BEFORE THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD

COMMUNICATIONS WORKERS OF AMERICA,
Complainant,

v.

NEW MEXICO ENVIRONMENT DEPARTMENT,
Respondent.

07-PELRB-09

PELRB Case No. 140-07

DECISION AND ORDER

THIS MATTER came before the Public Employee Labor Relations Board upon the appeals of the Complainant and Respondent of the hearing examiner's recommended decision, and the Board, having heard argument and being otherwise fully advised;

IT IS HEREBY ORDERED that the hearing examiner's decision is reversed based on collateral estoppel. The Board is collaterally estopped regarding the issue whether there was any violation of the collective bargaining agreement as alleged in the instant prohibited practices complaint. The State Personnel Board has ruled that there was no violation of that agreement and has upheld the disciplinary action involved in the instant prohibited practices complaint, and this Board is bound by that ruling in this case. Because the State Personnel Board's decision necessarily applies only to this specific case, the Board's decision here does not preclude the Board, in a case involving similar facts, from reaching a different conclusion than the State Personnel Board reached here. Our decision here is required because the complainant and the employee chose to litigate the alleged breach of contract, in the first instance, before the State Personnel Board and it is our judgment that the complainant and the employee cannot litigate that issue twice.

Complainant's appeal concerning the hearing officer's proposed remedy is necessarily denied, because the Board has reversed the hearing examiner's decision.

MARTIN V. DOMINGUEZ
Chairman
Public Employee Labor Relations
Board

Date: July 6, 2009

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

SEA-CWA,

Complainant,

v. **PELRB Case No. 140-07**

ENVIRONMENT DEPARTMENT,

Respondent.

DECISION AND ORDER

This matter initially came before the undersigned on a Prohibited Practice Complaint (PPC), filed by the SEA-CWA on July 27, 2007 and subsequently amended on September 25, 2007. The Amended PPC (hereinafter "PPC") alleges the Environment Department (Department or Agency) breached the collective bargaining agreement (CBA) and therefore the Public Employee Bargaining Act (PEBA), NMSA §§ 10-7-E-1 *et seq.*, by failing to impose disciplinary action on or issue a Notice of Contemplated Action (NCA) to Robert Atencio "forty-five (45) days after it acquires knowledge of the misconduct ... for which the disciplinary action is imposed." *See* CBA, Art. 8, Sec. 3.

The undersigned issued an interlocutory legal ruling on November 19, 2007 applying the disputed contract language. The State Personnel Board (SPB) issued a Final Decision on March 17, 2008 that contradicted the undersigned's November 19, 2007 legal ruling. For the reasons stated below, the undersigned hereby finds and concludes: (a) collateral estoppel does not bar PELRB review of the SPB decision, and (b) the Department did violate the forty-five daytime limit of the CBA in this case; however, (c) the appropriate remedy in the instant case is a cease and desist order rather than back pay and/or expungement of the three-day suspension from Mr. Atencio's personnel file.

BACKGROUND

The complete CBA language, which is identical to language in the AFSCME and State contract as well, is as follows:

> [e]xcept for disciplinary actions related to performance which are governed by Article 25 and/or cases where outside agencies or divisions are involved in the investigation, the Employer may impose any disciplinary action or issue a notice of contemplated action no later than 45 days after it acquires knowledge of the employee's misconduct for which the disciplinary action is imposed, unless facts and circumstances exist which require a longer period of time.

See CWA CBA Art. 8, Sec. 3; *see also* AFSCME CBA, Art. 24, Sec. 4.

At the November 9, 2007 status Conference, arguments were heard concerning the meaning of this language. The Union argued, as it did before the SPB, that the phrase "acquires knowledge of the employee's misconduct for which the disciplinary action is imposed" requires discipline be imposed or noticed within forty-five (45) days of learning of the incident or conduct alleged to support the discipline. The Department argued, as it did before the SPB, that discipline must be imposed or noticed within forty-five (45) days of confirming by investigation that the incident or conduct constituted just cause for discipline. The Department also asserted before both tribunals that, in the alternative, facts and circumstances warranted an exception to the forty-five (45) day limit because the Department required confirmation from the Motor Vehicle Division of the Taxation and Revenue Department (hereinafter "MVD") that Atencio's license had been suspended, and because Atencio was away from his assigned place of duty on during the two weeks prior to the date the 45 day time limit would have expired under the Union's interpretation of the CBA.

On November 19, 2007 the undersigned issued a letter decision that deferred to findings of fact to be issued by the SPB Administrative Law Judge (SPB ALJ) in the

related SPB matter, concerning the alleged misconduct and investigation of the discipline. However, the undersigned went on to declare the meaning of the disputed CBA provision.[1] Specifically, the undersigned applied the plain language of the contract to conclude "the 45 day period is the investigatory period unless facts and circumstances warrant a greater period of time, and that the language therefore requires initiation of discipline within 45 days of acquiring knowledge of, concerning or related to the act(s) or conduct for which an employee is being disciplined." *Id.* The undersigned also concluded the CBA language requires actual "involvement" by the outside agency in the investigation, such as a joint investigation, rather than one agency merely providing information it is charged with maintaining, and routinely provides upon proper request. *Id* at note 2.

Thereafter, the SPB ALJ found Atencio was disciplined for cause; interpreted the same disputed contract provision to require the issuance of disciplinary action or NCA within forty-five days of the conclusion of the investigation finding just cause to issue such discipline; and in the alternative found the involvement of the Department of Motor Vehicles in the investigation warranted an extension of the forty-five day period. The record and pleadings before the SPB and the PELRB do not reflect that the Union submitted the undersigned's legal ruling to the SPB ALJ or the SPB.

The SPB ALJ's findings and conclusions were affirmed by the SPB except for a single typographical error. The Union did not appeal the SPB decision. Instead—many

[1] The undersigned did so after considering the Department's post-hearing brief submitted to the SPB ALJ, and after having concluded that, as a matter of law and public policy, the PELRB rather than the SPB was the agency best suited for interpreting CBA language having such a "far reaching legal effect on collective bargaining throughout the State." *See* Nov. 19, 2007 Letter Decision. From its oral arguments at the November 24, 2008 hearing, it appears the Agency has withdrawn its procedural objections regarding the November 19, 2008 letter ruling. In the event these arguments are reasserted in any appeal to the PELRB, additional procedural background is provided in the following Appendix.

months later, it should be noted—the Union filed the instant request for this office to review the SPB ALJ and SPB decisions for compliance with PEBA, pursuant to NMAC 11.21.3.21, and the parties filed briefs and oral arguments were held on November 24, 2008 concerning the request.

POSITIONS

The Union argues the PELRB should continue to process its PPC in this matter based on the undersigned's November 19, 2008 legal ruling regarding the meaning of the disputed contract language, because the PELRB is the State agency "most appropriately suited to and charged with" determining the meaning of disputed CBA language. *See* Union Request ¶ 10, citing Nov. 19, 2007 PELRB Hearing Examiner's Letter Decision.

The Department's position is, notwithstanding the undersigned's contrary ruling and the provisions of NMAC 11.21.3.21, the undersigned is bound by principles of collateral estoppel and must dismiss the instant PPC because the ultimate issue presented herein—whether the issuance of notice of discipline violated Article 3, Section 8 of the CBA and PEBA—was fully and fairly adjudicated before the SPB and found against the Union.

ISSUES

1. Is the undersigned collaterally estopped from reviewing the SPB decision(s) for compliance with PEBA, as authorized under NMAC 11.21.3.21?
2. If not, does the SPB decision comply with PEBA?
3. If not, was the NCA was issued later than allowed under the CBA?
4. If the CBA was violated, what is the proper remedy?

DISCUSSION

I. PELRB is not collaterally estopped from reviewing the SPB decision(s) as authorized under NMAC 11.21.3.21.

Under collateral estoppel principles, a party is precluded from re-litigating an issue when the two cases involved the same parties, or a party in privity with a party in the original suit, and "the two cases [] concerned the same ultimate issue of fact which was (a) actually litigated, and (b) necessarily determined in the first suit." *See DeLisle v. Avallone*, 117 NM 602 (1994); *see also Shovelin v. Central New Mexico Electric Cooperative, Inc.*, 115 NM 293 (1993) (generally affording preclusive effect to the decision of administrative agencies acting in an adjudicative capacity).

Here, it is undisputed that the parties were the same and/or in privity, that the ultimate factual issue of contract interpretation was actually and fairly litigated and necessarily determined. Nonetheless, under the authority of NMAC 11.21.3.21, the undersigned declines to apply collateral estoppel principles here. NMAC 11.21.3.21 provides that, [w]here the board becomes aware that a complainant has initiated another administrative or legal proceeding based on essentially the same facts and raising essentially the same issues as those raised in the [PPC], the board may," in its discretion, hold the PEBA proceedings "in abeyance pending the outcome of the other proceeding," or "go forward with its own processing." *See* NMAC 11.21.3.21. In the event that the PELRB defers to the other administrative or legal proceeding and subsequently determines the resolution of the other forum was "contrary to the act, or all issues raised before the board are not resolved, the board may proceed" under its own rules for hearing PPCs. *Id.*

On its face, NMAC 11.21.3.21 necessarily contemplates cases in which the PELRB may rule on a PPC that concerns the same parties and facts, and essentially the same issues as previously decided before another administrative agency. The Agency argues NMAC 11.21.3.21 "implicitly" suggests the PELRB will review the other agency's decision for compliance with PEBA only after the PELRB determines it is not collaterally estopped from doing so. However, there is no language in the rule to support this implication. Instead, by use of the conjunctive "or" this rule affirmatively preserves the PELRB's right to review the decisions of other agencies for compliance with PEBA when PEBA rights are at stake, even if all issues raised by the PPC were resolved in the other forum.

Thus, NMAC 11.21.3.21 essentially disavows the binding effect of collateral estoppel principles where another agency—which lacks the PELRB's statutory authority and specialized knowledge and expertise to interpret PEBA—has necessarily but erroneously decided whether a PEBA right was or was not violated. Moreover, NMAC 11.21.3.21 is a reasonable interpretation of PEBA, because it is consistent with the general drift of labor law precedent. *See NEA-Alamogordo and Alamogordo Public Schools*, 5 PELRB 2006 at 7 (Jun. 1, 2006) (affirming the PELRB's authority to promulgate a regulation that "is a reasonable construction" of the Act, "and a reasonable application of the agency's special expertise and policy determinations under the … Act").

It is "quite clear that as a matter of law" the NLRB "is not bound by [an] arbitration award," *see Spielberg Manufacturing Co.*, 112 NLRB 1080, (1955), or agency decisions or private agreements that are contrary to the Act. *See Intl'l Union,*

United Automobile, Aircraft and Agricultural Implement Workers, 194 F.2d 698, 702 (7th Cir. 1952) ("the act confers upon the Board exclusive jurisdiction to prevent unfair labor practices within the meaning of the statute," and "[t]he Board's exclusive function in this field may not be displaced by action before State agencies or by arbitration") (emphasis added), *NLRB v. Walt Disney Productions*, 146 F.2d 44, 48 (9th Cir. 1944) ("[c]learly, agreements between private parties cannot restrict the jurisdiction of the Board," and "the Board may exercise jurisdiction in any case of an unfair labor practice when in its discretion its interference is necessary to protect the public rights defined in the Act"); *see also Monsanto Chemical Co.*, 97 NLRB 517, 520 (1951) ("[t]here can be no justification for deeming ourselves bound, as a policy matter, by an arbitration award which is at odds with the statute") and *Wertheimer Stores Corp.*, 107 NLRB 1434, 1435 (1954) ("[i]t is clear as a matter of law that the Board is not bound by an arbitration award").

Similarly, it is well established that the NLRB is not bound by decisions rendered in civil suits under § 301 procedures[2] concerning contract violations. *See Field Bridge Associates*, 306 NLRB 322 (1992) ("the Board, as a public agency asserting public rights should not be collaterally estopped by the resolution of private claims asserted by private parties"); *see also Huttig Sash & Door Co.*, 377 F.2d 964, 970 (8th Cir. 1967). Further, "the Board's primary and exclusive jurisdiction to determine unfair labor practices renders Board decisions dispositive where they conflict with determinations in other forums. *Field Bridge*, citing *Pennsylvania Shipbuilders' Assn. v. NLRB*, 663 F.2d 488, 492 (4th Cir. 1981); *see also New Orleans Typographical Union No. 17 v. NLRB*, 368

[2] *See* NLRA § 185(a), 29 U.S.C. § 301(a). This is the NLRA's counterpart to PEBA's § 10-7E-19(H) and 20(D), except that under the NLRA such suits are brought as civil actions in federal district court, rather than to the NLRB.

F.2d 755, 767 (5th Cir. 1966) (giving precedence to an NLRB determination of violation, over a conflicting determination by a district court).

This principle is appropriate, because the labor board alone is charged with enforcing its jurisdiction's collective bargaining laws. *See, e.g., Ross v. Cummuns. Satellite Corp.*, 759 F.2d 355, 361-62 (4th Cir. 1985) (a judicial determination by one administrative agency may not be binding on another adjudicator operating under a different statute). For this reason, the principle has also been followed in at least one other public bargaining jurisdiction. *See, e.g., California Correctional Peace Officers Association v. State of California, Dept. of Corrections*, California Public Employment Relations Board (PERB) Decision No. 1104-S, Case No. S-CE-551-S (May 18, 1995) ("[c]ollateral estoppel in this case is inappropriate because the issues litigated before the SPB, discipline of state civil service employees, are not identical to the issues litigated before PERB, that is, whether [the Agency] interfered in [the Union's] right to represent its members").[3]

The principle, and NMAC 11.21.3.21 itself, is likewise appropriately applied here to determine whether the SPB decision is contrary to PEBA. First, both the SPB and the PELRB matters had to be filed to protect the employee's rights under each statute, while the SPB scheme provides a shorter filing period yet greater likelihood of misinterpreting PEBA rights. Thus, this is not necessarily a case of improper forum shopping. *See, e.g., Timken Roller Bearing Co.*, 70 NLRB 500 (1946) (the NLRB should not exercise its discretion to hear a matter where the Union has elected to "concurrently utilize[] two

[3] *But see Kansas University Police Officers Association v. University of Kansas Police Dept.*, Kansas Public Employee Relations Board (PERB), Case No. 75-CAE-13-1989 (dismissing a complaint before the PERB when a related claim was decided by the Kansas Civil Service Board and upheld by the District Court).

forums for the purpose of litigating the matter … in dispute" to its advantage). Second, the instant case presents an issue of far-reaching and significant impact under PEBA, while the SPB ALJ lacks authority to determine PEBA violations and lacks specialized knowledge in interpreting collective bargaining agreements.

In so concluding, the undersigned notes the New Mexico Court of Appeals has suggested in dicta that "[p]reclusion principles may apply" in PERLRB proceedings. *City of Deming v. Deming Firefighters Local, 4521*, 2007-NMCA-069, ¶ 17, 141 NM 686 (emphasis added). However, the *Deming* case does not automatically demand preclusion. First, the *Deming* court merely stated such principles may apply. The Agency argues the Court used the word "may" because it would depend on whether the elements were met. However, if that had been the court's intended meaning it would have simply stated, "preclusion principles will apply if the elements of preclusion are met." Further, if the only limitation is that the elements be met, then the principles themselves apply in all cases and the only debate is whether are not the application of preclusion principles preclude subsequent suit in the particular case.[4]

II. The SPB Decision does not comply with PEBA.

Having concluded that principles of collateral estoppel do not prevent the PELRB from reviewing another agency's determination of whether a violation of PEBA has occurred, the undersigned now considers whether the instant SPB decision complies with PEBA. For the reasons discussed below, the undersigned concludes the SPB's decision violates PEBA not only because it (1) violates the plain meaning of the CBA as properly

[4] It may also be significant that the *Deming* Court's case citation for its argument concerned only *res judicata* claims, rather than collateral estoppel or issue preclusion. *Id.*¶ 17, citing *Moffat v. Branch*, 2005-NMCA-103, ¶ 11, 138 NM 224. By referencing only res judicata, the Court may have intended to signal its familiarity with the foregoing body of labor law.

applied, *see* § 10-7E-19(H), but also because it (2) unilaterally alters the terms and conditions of employment of all State employees represented under a contract containing this provision, and (3) violates these State employees' due process rights negotiated in good faith and reduced to writing under the authority of PEBA. *See* § 10-7E-19(H) and 10-7E-20(D) (prohibiting public employers and employees from violating CBAs); and § 10-7E-5, § 10-7E-17(a)(1) and (a)(2), and § 10-7E-19(B) (prohibiting interference with the PEBA rights of public employees, including the right to be represented by an exclusive representative for purposes of collective bargaining, and the right that all agreements on terms and conditions of employment shall be negotiated in good faith and reduced to written CBAs).

As to contract violation, the undersigned has previously declared the disputed contract language as meaning the contract that the 45-day period is period of time allowed for investigation unless facts and circumstances warrant a greater period of time for that investigation. This conclusion, which is reaffirmed herein, was based on the following points of reason. First, at the very start of the section, the CBA provision speaks plainly of "investigation" in the context of explaining and delimiting the 45-day time limit, by stating "[e]xcept for ... cases where outside agencies or divisions are involved in the investigation," discipline may not be noticed or imposed more "than 45 days after it acquires knowledge of the ... misconduct for which the disciplinary action is imposed..." *Id.* Article 24, Section 4. Second, the 45-day limit would be of questionable value unless it was for the purpose of conducting an investigation to determine whether or not there was "just cause" for discipline. Third, the existence of a final "facts and circumstances" exception, in addition to that provided when outside agencies are

involved, ensures the State's interests will not be prejudiced where a greater delay is properly mandated by due process requirements for investigating and issuing discipline. Thus, the disputed contract language is properly applied as a kind of "statute of limitations," under which the time to take action begins to run from the moment the act or conduct complained of either occurs, or was or could reasonably have been discovered with due diligence.

Because a violation of the contract is a violation of PEBA, *see* § 10-7E-19(H) and 20(D), any contrary ruling by another administrative agency necessarily violates PEBA. Nor is the contract provision at issue here a "mere trifling" as suggested by the Department. The disputed contract language is in both the CWA and the AFSCME contracts with the State, so impacts approximately ten thousand State employees.[5]

As to the unilateral change of terms and conditions of employment and interference with State employees' PEBA rights, the following facts are significant. First, the disputed CBA provision provides due process rights for covered State employees that were negotiated in good faith and reduced to writing by the State and the Union, as required under PEBA. Second, the SPB ALJ here did not merely misapply the contract, but rather improperly accepted parole evidence (and, indeed, relied on the weakest parole evidence imaginable—one party's personal belief as to what the contract "should" mean) to vary the negotiated terms of the contract.

[5] *See* Case Statistics, Petitions Concerning Representation as of Aug. 15, 2008, www.pelrb.state.nm.us. Moreover, the issue presented here is a recurring one although it has evaded full review until now. *See AFSCME v. Taxation and Revenue Dept.*, PELRB Case No. 107-06 (settled and withdrawn); *AFSCME v. Dept. of Health*, PELRB Case No. 108-06 (withdrawn pending settlement); *AFSCME v. Dept. of Health*, PELRB Case No. 109-06 (withdrawn pending settlement); and *AFSCME v. CYFD*, PELRB Case No. 141-07 (settled and withdrawn).

Under New Mexico law, the meaning of a contract is traditionally derived from its plain language in the first instance, and parole evidence is generally only be resorted to where the contract is subject to two or more equally likely interpretations. *See Brown v. American Bank of Commerce*, 79 NM 223, 226 (1968) (internal citations omitted); and *Kirkpatrick v. Introspect Healthcare Corp.*, 114 NM 706, 711 (1992). New Mexico courts have tended in more recent years to allow extrinsic evidence to ascertain whether or not a contract term is ambiguous. *See C.R. Anthony Co. v. Loretto Mall Partners*, 112 N.M. 504, 508-509 (1991) ("a court *may* hear" parole evidence in certain circumstances) (emphasis added). In that situation, however, the trier of fact still may take evidence only as to "the circumstances surrounding the making of the contract and of any relevant usage of trade, course of dealing, and course or performance." *Id.* Here, the SPB ALJ's Report does not suggest any evidence that the bargaining history or the subsequent conduct of *both* parties reveal a meaning other than what is suggested by the plain language.

Although the undersigned noted in the November 19, 2007 ruling that the provision is "somewhat ambiguous," she meant only that an alternative meaning could be posited, which is what the Department did. However, it is axiomatic that the mere assertion of a competing interpretation does not itself create ambiguity necessitating parole evidence. *See Kirkpatrick, supra* (ambiguity is not established simply because parties differ on contract's proper construction). It is also axiomatic that ambiguity does not exist "where one party strain[s] the contract language beyond its reasonable and ordinary meaning." *Seiden Associates, Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 429 (2d Cir. 1992). Here, reasonable application of language, logic, and general principles of discovery and estoppel inexorably lead to the conclusion that the forty-five day period is

the investigatory period. Thus, "knowledge of the misconduct" is properly understood to mean "knowledge of the []conduct," or "knowledge of the incident."

The Department and the SPB ALJ, in contrast, would essentially add a whole new proviso to the present CBA section. To quote the SPB ALJ, it would add that the 45 days to serve the NCA begins to run "from the date of the completed investigative report, which establishe[s] the just cause basis for formal discipline," *see* ALJ Report, Discussion at 47, or that the 45 day limit "is triggered by agency knowledge of just cause basis to initiate disciplinary action through issuance of an NCA which necessarily involves a thorough investigation leading to a meaningful oral response opportunity for an affected employee." *Id.* at 54, Conclusion of Law No. 6.

The SPB ALJ also asserts that failure to add these additional lines of text to the CBA, and to instead read "misconduct" as "[]conduct" or "incident," amounts to "arbitrary imposition of the 45 day rule." *Id.* at 48. His sole justification for this assertion is that public employer must afford public employees due process rights in investigating and issuing discipline. *Id.* Under his construction, however, there would be nothing to prohibit a State agency from taking years to investigate a matter, and then taking an additional 45 days to issue the NCA.

The SPB ALJ fails to explain a legitimate nexus between affording due process rights and indefinitely lengthening the time available under contract to investigate and issue discipline for misconduct. This is not surprising as there can be no such nexus: lengthening the time available under contract for investigating and issuing discipline, except as warranted under facts and circumstances, is inherently destructive to the affected employee's due process rights. In contrast, the undersigned's interpretation

would provide a safe harbor for those cases in which facts and circumstances do truly require a longer investigation period to meet due process standards for discipline.

Besides straining the language of the contract and adding terms about which the contract is completely silent, the Department and SPB ALJ's interpretation is flawed in several other respects. First, it fails to consider the contract provision's reference to "investigation," and it fails to explain the purpose of that 45-day period if not to determine whether just cause exists to issue discipline. In doing so, the SPB ALJ's interpretation essentially renders the reference to investigation and the entire time-period meaningless. *See Brown, supra* (in construing the contract, "every word, phrase or part of a contract should be given meaning and significance," meaning contract interpretation shall not render any contract provision superfluous).

Second, the SPB ALJ reached its erroneous interpretation by disregarding the only competent evidence in the record—that of CWA President Robin Gould—that the parties did not discuss the purpose or meaning of this provision at all. Ms. Gould testified that she was present for the contract negotiations, and her testimony as to lack of discussion concerning the provision's meaning was not refuted. Nonetheless, the SPB ALJ apparently chose to rely on the personal belief statements of the Department Human Resources Director, Judy Bentley who was not present at negotiations, as to what the contract provision "should" mean. *See* ALJ Report at 34, 36-37. The SPB ALJ may also have weighed heavily the fact that the parties had not negotiated a penalty for violation of the 45-day limit. *See* ALJ Report at 50, Finding 15. However, such fact does not logically support one interpretation or another and, in any event, collective bargaining agreements typically do not include penalties, as crafting a proper remedy or penalty is a

function left to the arbitrator or other decision maker (the PELRB in the case of PEBA, and federal district courts in the case of the NLRA).

For the forgoing reasons, the SPB's interpretation is not supported "by a preponderance of the evidence," as it pro forma declared. *See* ALJ Report at 53, Conclusion of Law No. 6. Moreover, the SPB's interpretation also violates the cardinal rule that it is not the province of courts or agencies "to amend or alter the contract by construction," and that contract language must instead be interpreted to "enforce the contract which the parties made for themselves." *Brown, supra.* Here, there being no evidence presented as to a contrary meaning understood by both parties, the CBA is read in its entirety and according to its plain language, which does not support the Department's or SPB's interpretation.

III. The CBA, as properly applied, was violated.

Having concluded that the SPB decision violated PEBA in a number of respects, the undersigned now turns to examine whether the contract as properly applied was violated, meaning whether the NCA was issued within 45 days of discovering the misconduct, or whether facts and circumstances warranted a longer period of time to investigate the matter and issue the NCA.

Generally deferring to the evidence before and the specific findings of the SPB ALJ, but consistent with the forgoing discussion, the following facts are established by a preponderance of the evidence:

1. Robert Atencio is employed by the New Mexico Environment Department as an Environmental Scientist and Specialist in the Hazardous Waste Bureau (HWB),

and he works as part of a Compliance and Technical Assistance Team. (ALJ Report at 31 and 48, Finding No. 1.)

2. The first incidence of misconduct on which discipline was based was a work place altercation (or "tense face-to-face verbal exchange") that occurred on December 5 or 6, 2006.[6] The investigator, Art Vollmer, concluded his witness interviews and issued an Investigation Memorandum to management regarding this incident on December 21, 2006. (PPC ¶¶ 14-16; Answer ¶¶ 14-16; and ALJ Report at 15-17.)

3. The second incidence of misconduct on which discipline was based was Mr. Atencio's having driven a State vehicle on August 11, 2007, while his license was suspended for his having failed to pay a traffic citation. On November 21, 2006 the General Services Department notified the Environment Department that a "Robert Atencio" had a suspended license. On December 11, 2006 the Environment Department received more detailed and credible notice from the Motor Vehicle Division of Department of Taxation and Revenue, which confirmed this was the Robert Atencio employed at the Department and provided the start date of the suspension. (PPC ¶¶ 5-6; Answer ¶¶ 5-6; and SPB ALJ Recommended Decision at 21-23.)

4. The Department elected to issue a single NCA for a three-day suspension based on both incidences of misconduct, on January 29, 2007. (ALJ Report at 1-2, 7.)

5. Using the date of December 6, 2006 as plead in the PPC, the 45th day after the work place altercation—the oldest instance of misconduct—would have been

[6] Although the Notice of Final Action states the altercation occurred on December 5, 2006, the Amended PPC, the Answer to the Amended PPC and most parts of the SPB ALJ's Recommended Decision refer to the incident as occurring and being reported on December 6, 2006.

January 20, 2007, a Saturday. Accordingly, the latest day to timely issue the NCA would have been January 22, 2007.

6. The investigator, Art Vollmer, concluded his witness interviews and issued an Investigation Memorandum to the Director of the Human Resources Bureau regarding this incident on December 21, 2006. (PPC ¶¶ 14-16; Answer ¶¶ 14-16; and ALJ Report at 15-17.) This left almost a month after conclusion of the investigation in which to draft, finalize and timely issue a NCA concerning the work place altercation.

7. The 45th day after December 11, 2006—the date on which the Department obtained credible and verified information from the MVD of Atencio's license suspension—would have been January 25, 2007.

8. Vollmer issued a final Investigation Memorandum to the Director of the Human Resources Bureau concerning the license suspension on December 19, 2006. Based on the investigator's review of the Environment Department's vehicle logs, the memorandum concluded Atencio was the sole user and thus the driver of HWB's 2001 Ford Taurus, license number G-47060 for an inspection in Albuquerque on August 31, 2006. (ALJ Report at 21-23, 33.) The Department had more than five weeks in which to draft, finalize and timely issue a NCA concerning the incident of driving on a suspended license.

9. The MVD's role in the matter of Atencio's discipline was limited to merely providing information it is charged with maintaining, and routinely provides upon proper request. Based on the absence of any contrary evidence in the record before the SPB, the MVD was not involved in the investigation of the

Environment Department's driving logs, and did not otherwise jointly participate in the Environment Department's investigation of whether Atencio drove a State vehicle while his license was suspended.

10. Although there were some delays in the respective investigations, as detailed in both the ALJ Report and the Department's Memorandum on the Preclusive Effect that Must be Accorded to the Decision of the SPB, those delays are not relevant to the question of whether facts and circumstances prevented the Department from issuing one or more NCAs in the time remaining (almost a month or over five weeks, depending on the incident, *see* Findings 6 and 8).

11. The Division Director is the only person authorized to initiate formal disciplinary action, after consultation with management, Human Resources and General Counsel Representatives. The Department H.R. Director received and reviewed Vollmer's investigative reports and forwarded them to the Department Deputy Cabinet Secretary Cindy Padilla. After Padilla made a decision to initiate formal discipline, the H.R. Director was asked to and did propose a range of disciplinary actions for consideration and subsequently drafted the NCA letter and coordinated a date for the letter to be served on Atencio. The dates for all of these actions of H.R. and the Division Director are unknown, but the record does not reflect any facts and circumstances causing an undue delay in the members of upper management receiving, reviewing and considering the investigative report, drafting the proposed NCA or approving its final form. (ALJ Report at 35-36.)

12. Atencio works nine-hour days with every other Friday off. He also works out of the office frequently conducting site inspections as part of a team. During the

period after which the Department had concluded its investigation of the incidents in question and was to analyze, write up and issue either a NCA or discipline itself, Mr. Atencio was out of the office the following days: December 20-21, 2006 (Wednesday and Thursday, on annual leave); December 22, 2006 (Friday, "flex" day off) the following week of December 25-29, 2006 (annual leave); January 1, 2007 (New Years holiday, Monday); January 5, 2007 (Friday, "flex" day off); January 10, 2007 (Wednesday, leave); January 15, 2007 (Monday, leave) January 16-18, 2007 (Tuesday through Thursday, sick leave); January 19, 2007 (Friday, "flex" day off); and January 22-25, 2007 (on inspection at Los Alamos National Lab. (ALJ Report at 31, 34 and 41.)

13. Among the dates during which Atencio was at his duty station, this would have left only January 2-4, January 8-9, or January 11-12, 2007 in which to timely issue an NCA concerning both incidents. There is no indication in the SPB ALJ's Recommended Decision that the Department was unable to issue the NCA in these remaining days. There is also no evidence in the record as recited by the SPB ALJ that the Department was unable to call Atencio into work on a day he was out on leave or inspection. *Compare* ALJ Report at 37 (Bentley stating her belief that an exception to the time limit "would apply to periods when Atencio was not available" for these reasons), and at 38 (Padilla opining that an exception "could be" warranted by "unavailability of the employee).

14. It was only after receipt of the NCA is when Atencio's time and opportunity to present an oral response arise. (NMAC 1.7.11.13.) Because the CBA's 45-day deadline is to issue either a NCA or final discipline, the opportunity to present an

oral response has no relevance to the question of whether the 45-day deadline to issue a NCA begins from the date of the incident or from the date an investigation establishing just cause for discipline is concluded. *Compare* Department Counsel's oral arguments on November 24, 2008.

15. Other arguments related to the need to provide constitutional due process in investigating and confirming just cause are adequately accommodated for by the "outside agency" and "facts and circumstances" exceptions to the 45-day deadline.

Based on the foregoing facts, the undersigned concludes the facts and circumstances of the instant case did not warrant an exception to the negotiated 45-day time limit in which to issue either an NCA or discipline itself.[7] First, the undersigned rejects the claim that the MVD's confirmation of Atencio's license suspension requires waiver or even extension of the 45-day deadline. As stated in the November 19, 2007 ruling, the CBA requires actual "involvement" by the outside agency in the investigation, such as a joint investigation, rather than one agency merely providing information it is charged with maintaining, and routinely provides upon proper request. In any event, the "facts and circumstances" of the MVD's having confirmed the suspension of Atencio's license in this case are adequately accommodated for by treating the 45-day period as beginning from the date of confirmation by the MVD.

Second, the undersigned rejects the claim that Atencio's "unavailability" requires extension of the 45-day deadline, for several reasons. Although the Department argued at

[7] The Union's Reply Brief concerning NMAC 11.21.3.21 review emphasized that there was an even greater period of time when counting backwards from the date the discipline itself was issued. However, under the plain language of the contract, the employer is only required to issue one or the other—a Notice of Contemplated Action or discipline itself—within the 45-day period.

the November 24, 2008 hearing that Atencio was out of the office the entire two weeks prior to the issuance of the NCA, that argument overlooks the fundamental fact that the issuance was belated to begin with. As found above, Atencio was in the office seven of the ten business days immediately preceding the January 22, 2007 deadline for issuing an NCA concerning the workplace altercation. Counsel for the Department also argued at the November 24, 2008 hearing that site inspections were cumbersome affairs scheduled months in advance such that it is not practicable to call employees out of such an inspection. However, besides this being merely a lawyer's argument rather than evidence, it still lacks persuasion as a logical matter. Specifically, this argument does not address whether or not the employer may or should at least make an attempt to call an employee in on from other kinds of leave. Nor does this argument address the fact that inspections are done by teams, and the possibility that on any given day a team member could call in sick without necessarily requiring the cancellation of the scheduled inspection.

As an affirmative defense the Department bore the burden of proof to demonstrate by a preponderance of the evidence that an exception to the 45-day limit was warranted. That burden is not met simply by the fact that Mr. Atencio was out of the office for approximately half of the days between the conclusion of the investigation and the running of the 45-day deadline, particularly where his absences were front loaded at the beginning of that period of time. Nor is this burden met by pointing to the bare facts that an outside agency was briefly consulted, or that the investigation report had to be forwarded to and considered by several members of upper management.

IV. Remedy.

Finally, having concluded that the Department violated the CBA and PEBA in issuing the instant NCA, the undersigned now turns to the appropriate remedy for the PEBA violation.

Under the analogy of *Weingarten* violations, *see NLRB v. J. Weingarten, Inc.*, 420 US 251 (1975), discipline issued for just cause would not be overturned solely because the 45-day time period was violated. *See Taracorp Industries*, 273 NLRB 221 (1984). In such cases, the NLRB and a host of Circuit Courts have reasoned that a make whole remedy violates public policy and the only appropriate remedy is the issuance of a Cease and Desist Order. *Id.* and cites therein.

The Federal Labor Relations Authority (FLRA), the federal counterpart to the PELRB, and the United States Supreme Court also follow this tact as to *Weingarten* or notice violations under the Federal Service Labor-Management Relations Statute, 5 USCS § 7101 *et seq.* ("Federal Service Statute"). *See Charleston Naval Shipyard*, 32 FLRA 222 (1988), *U.S. Dept. of Justice, Bureau of Prisons*, 35 FLRA 431 (1990) and *Cornelius v. Nutt*, 472 U.S. 648 (1985). Similarly, at least two other public sector jurisdictions follow NLRA precedent in this regard, leaving it to the state personnel or merit systems protection board—or subsequent court review—to modify the discipline if contractual discipline procedures were violated. *See, e.g,, City of Phoenix v. Phoenix Employment Relations Board*, 207 Ariz. 337, ¶¶ 15 and 26, 86 P.3d 917 (Ct. of App. 2004) (expressly rejecting a make-whole remedy); and *Dubuque Policemen's Protective Association and City of Dubuque*, Iowa Public Employment Relations Board, Case No. 3316 (Jun. 17, 1988) (issuing a cease and desist order without further explanation).

The undersigned is mindful of the objection that such a remedy may not be effective to prevent or deter future, similar misconduct. It is for this reason that at least one other public sector jurisdiction and at least one arbitrator have declined to follow *Taracorp*. *See e.g.*, *Town of Cheshire and Local 1303-202 of Council #4, AFSCME*, Connecticut State Board of Labor Relations, Decision No. 2447 (Dec. 9, 1985) (rejecting *Taracorp* because the state law has not equivalent to Section 10(c), which specifically provides that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause"); and *Appleton Papers Inc.*, 109 Lab. Arb. 414, 416 (1997).[8]

In New Mexico, the higher courts have ruled that "absent cogent reasons to the contrary," interpretations of the NLRA must generally be followed in interpreting substantially similar PEBA provisions, "particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the time the PEBA was enacted." *See Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997 NMCA 44, 123 NM 239; *see also Regents of UNM v. NM Federation of Teachers*, 1998 NMSC 20, ¶18, 125 NM 401, 408 (citing and endorsing this language in *Fire Fighters*). Here, the *Taracorp* decision was well established when PEBA was enacted, and it is difficult to see cogent factual or legal reasons to vary from it.

[8] The Union cites *Appleton Papers* in support of its position that a make whole remedy is necessary and appropriate. *Id.* at 2. However, it does not escape the undersigned that the Union is essentially urging that the PELRB, like the NLRB, cannot be bound by an arbitrator's awards in one matter, *see supra*, but should nonetheless follow an arbitrator's determination over that of the NLRB as to this issue.

First, the unique language of the NLRA alone does not support the PELRB's variance from *Taracorp*. Although *Taracorp* was based in the first instance on Section 10(c) of NLRA, of which PEBA has no counterpart, the court went on to say that a make whole remedy where there was just cause for discipline violated "the general remedial framework of the Act, and independent of those restrictions, constitutes bad policy." *Id.* at 221-222. The Board also observed that the make-whole remedy violated the proscription against punitive remedies and remedies that serve as a windfall to employees or employers." *Id.* at 223, *citing Carpenters Local 60 v. NLRB*, 365 US 651, 655 (1961) (proscribing punitive remedies), and *Service Roofing Co.*, 200 NLRB 1015, 1017 (1972) (proscribing windfall remedies). It is for these reasons that the FLRA and the U.S. Supreme Court follow *Taracorp* in interpreting the Federal Service Statute, which also lacks language similar to that of Section 10(c) of NLRA. *See Charleston Naval Shipyard, U.S. Dept. of Justice*, and *Cornelius*. They do so because "one of the major purpose" of the Federal Service Statute is, as with PEBA, "to preserve the ability of federal managers to maintain 'an effective and efficient Government.'" *Cornelius*, 472 U.S. at 662 (internal citations and quotations omitted); *compare also* 5 USCS § 7101(b) *to* § 10-7E-3 of PEBA.

Second, *Taracorp* does not represent a completely new and random "Reagonite" policy, as the Union suggested in oral arguments. Although the *Taracorp* decision was only issued as recently as 1984, it overruled a line of cases not much older. *See Kraft Foods*, 251 NLRB 598 (1980) and its progeny. Additionally, as already noted, the NLRB has previously disavowed "windfalls" to petitioners, while prior to *Taracorp*, "the courts

of appeals ha[d] repeatedly refused to endorse the Board's previous efforts to impose a make-whole remedy for a Weingarten violation." *Id.*, at 222 n. 11, and citations therein.

Third, the PELRB and its hearing examiners have regularly applied NLRB precedent and principles even where the language of PEBA differed from that of the NLRA, where the precedent and principles were well established and sound as a matter of public policy. *See Pita S. Roybal v. Children, Youth and Families Department*, 02-PELRB-2006 (May 12, 2006) (interpreting PEBA to include the same *Weingarten* protections as arise under the NLRA, 29 USC §§ 1 *et seq.* despite PEBA's lack of similar protection for "concerted activities for mutual aid and protection"); and *See AFSCME v. Department of Health*, PELRB Case No. 168-06, Hearing Examiner Report (Aug. 30, 2007) (PEBA protects the right to circulate a non-union related petition without retaliation, and the difference between § 7 of the NLRA and § 5 of PEBA reflects a streamlining of language, not a limitation of rights afforded under NLRA).

In light of the foregoing, variance from NLRB precedent in the instant case would seem to be a matter of public policy best left to the determination of the full and duly appointed Public Employee Labor Relations Board. However, the undersigned is not compelled to reach that question today because she declines to exercise any discretion she may have to award back pay or expungement of the suspension.

Throughout, the Union has followed questionable procedures in both the PELRB and the SPB matters. The PPC was filed just barely within the six-month statute of limitations under PEBA, but more than a month *after* the conclusion of the SPB hearing. The undersigned's November 19, 2007 ruling was not provided to the SPB ALJ for his timely consideration, although the SPB ALJ would not issue a written decision for more

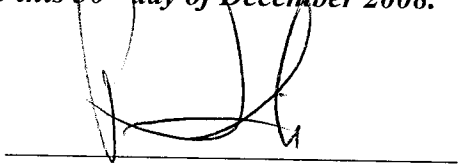
than three months thereafter. The SPB decision itself was not appealed to District Court. Finally, the instant request for review was filed almost six months after the Final SPB decision was issued.

The undersigned concluded above that the Union's utilization of two separate remedies did not warrant a dismissal of the PPC under collateral estoppel principles, since the Union and/or Atencio were required to timely exhaust all administrative remedies. Nonetheless, the foregoing procedural circumstances are still questionable enough to affect the undersigned's exercise of discretion in fashioning a proper remedy. Accordingly, the undersigned concludes that the appropriate remedy in this case is a declaration that the Department violated PEBA, and the posting of a cease and desist order for thirty calendar days.

REQUEST FOR REVIEW

Pursuant to PELRB Rule 11.21.3.19, any party may file a request for Board review within 10 business days after service of this Report. 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 raised before the undersigned. The request must be served on all other parties. Within ten business days after service of a request for review, any other party may file and serve on all parties a response to the request for review.

Issued in Albuquerque, New Mexico this 30th day of December 2008.



Pilar Vaile
Deputy Director, PELRB

APPENDIX

ADDITIONAL PROCEDURAL BACKGROUND CONCERNING THE UNDERSIGNED'S NOVEMBER 19, 2008 RULING

The original PPC, which omitted many details and only generally alleged discipline was issued in violation of the CBA, was filed on July 27, 2007, after a full evidentiary hearing had already been completed before a SPB ALJ on June 14, 2007. By the time the first and second PELRB status conferences were held, on September 11, 2007 and November 9, 2007, the SPB ALJ had still not issued a decision.

At the November hearing, the Department orally moved that further processing by the PELRB be deferred pending the issuance of the SPB and/or SPB ALJ's decision(s). Both parties also argued extensively about the meaning of the disputed contract, the same arguments which had been previously made to the SPB ALJ orally and in their post-hearing briefs.

At the close of the November PELRB hearing, the undersigned took the deferral motion under advisement. Nonetheless, she advised the parties she may likely issue a legal ruling as to the meaning of the disputed CBA language to avoid being bound by an erroneous interpretation by the SPB, particularly in light of the PELRB's greater institutional experience in addressing labor law issues and statutory authority in applying and interpreting CBAs, as compared to the SPB. (Tapes, Nov. 9, 2007 hearing.)

The Department earlier had agreed that interpretation of the disputed CBA language presented a question of law. Similarly, the undersigned described the language as appearing relatively "straightforward" and referenced, by way of analogy, the line of National Labor Relations Board cases holding that grievance-arbitration deferral not being necessary or appropriate where the CBA language is "clear on its face." (*Id.*)

Prior to closing the hearing, the undersigned also invited the parties to submit copies of their briefs submitted to the SPB ALJ on the same issue, to avoid duplication of their effort. (*Id.*) This proffer was made in response to the Department's request for the opportunity to brief the meaning of the language before the undersigned issued any legal ruling. (*Id.*) After asking further questions, including the scope and nature of matters briefed to the SPB ALJ, the undersigned indicted she did not require further argument of the parties. (*Id.*) Both parties submitted the legal briefs they had previously submitted to the SPB ALJ without objection, although the Union's was not filed until after the undersigned's issuance of the November 19, 2007 declaration and deferral.

Upon further consideration of the parties' oral arguments and the Department's legal brief to the SPB ALJ, the undersigned agreed that "administrative efficiency support[ed] deferral as to the taking of evidence and the determination of any factual issues." *See* Letter Decision dated Nov. 19, 2008 ("Letter Decision"). However, the undersigned simultaneously concluded that as a matter of law and public policy, the PELRB rather than the SPB was the agency best suited to declare the meaning of the disputed CBA language, which "has far reaching legal effect on collective bargaining throughout the State, as it binds all public employees represented in a bargaining unit." *Id.*

Accordingly, the undersigned granted the motion to defer as to the SPB's factual determinations, but denied the motion as to the legal issue of what the disputed contract language means. The undersigned then went on to declare the contract provision's meaning "to prevent the PELRB from being potentially precluded from examining the matter" in the event the SPB issued a decision that violated PEBA. *Id.*