STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME, COUNCIL 18,

Petitioner,

v.

PELRB No. 113-12

NEW MEXICO REGULATION AND LICENSING DEP'T.,

Respondent.

ORDER

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

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

Date: 11-26-12

Duff Westbrook, Chair,
Public Employee Labor Relations Board

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NEW MEXICO REGULATION AND LICENSING DEP'T.,

Respondent.

AMENDED RECOMMENDED DECISION

THIS MATTER comes before Thomas J. Griego, designated as the Hearing Officer in this case on the Petitioner's Motion for Summary Judgment. On August 13, 2012 the Hearing Officer issued a decision partially dismissing Petitioner's claims, which Partial Dismissal was not appealed. As a result of that Partial Dismissal the New Mexico Regulation and Licensing Department was required to file an answer with regard to the Petitioner's allegations that the Department violated NMSA §10-7E-19(A), (B), (C) and (D).

The Respondent timely filed its Answer on August 16, 2012. A Status and Scheduling Conference was held August 24, 2012 wherein the parties set deadlines related to a Hearing on the Merits tentatively scheduled for October 17, 2012. Among the deadlines set was September 14, 2012 for the filing of dispositive motions and September 21, 2012 for responsive pleadings. Both parties submitted dispositive motions and responses[1].

This constitutes the Recommended Decision on Petitioner's Motion for Summary Judgment. I find that the operative facts in this case are these:

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[1] Respondent is reminded that the Board's rules do not provide for electronic submission to constitute "filing" a document.

1. Petitioner is the duly elected exclusive bargaining representative for all State of New Mexico employees subject to the collective bargaining agreement (CBA) between the State of New Mexico and AFSCME Council 18. (Department's Answer to PPC ¶1).

2. Pursuant to the parties' current CBA, the parties have executed a collateral Steward Agreement and a listing indicating that Petitioner is entitled to 1 Steward and 1 Alternate in Albuquerque, 2 Stewards in Santa Fe, and1 Steward and 1 Alternate in Las Cruces. (Respondent's Affirmative Defense No. 1, Attachment 1 to Respondent's Answer, AFSCME Steward Agreement, February 2, 2010; Exhibit A to Petitioner's Motion for Summary Judgment and Exhibit B to Respondent's Motion to Dismiss).

3. The locations listed in the agreement by which the number of stewards is determined corresponds with the Construction Industries Division of the RLD Regional Offices. (Affidavit of Jason Davis and website references appearing at p. 3 of the Union's Motion for Summary Judgment.)

4. In addition to the foregoing, other relevant portions of the parties' CBA include:

   a. Article 9 Union Rights

   Section 1. The Union shall have the right to select sufficient stewards to represent employees covered by this Agreement. The exact number and location of stewards shall be determined between the parties consistent with the principle set forth above.
   Section 2. The Union shall provide the Employer with the following information about stewards, and union representatives (union representative refers to the paid staff of AFSCME Council 18): a written list of the names, addresses, telephone numbers and the agency to which they are employed who are authorized to act on behalf of the Union and the extent of their authority. The list shall be updated every calendar quarter or when additions and/or deletions have occurred. Stewards shall have full power on behalf of the Union to resolve all disputes and disagreements through Step 3 of the grievance procedure in the administration of this agreement as set forth in Article 14 of this Agreement.

Section 3. The Employer shall allow employee union officials to attend on paid status (utilizing the union time code in the time and labor reporting system) meetings agreed to by the parties for purposes of administering this Agreement. Union officials, as defined in this section are: the Local Union Presidents, Local Vice-Presidents, and any other union official as designated by mutual agreement of the parties.

The Employer shall allow employee union stewards, for the purposes of representing employees only in their respective agency at grievance meetings, disciplinary appeals based on suspension, demotion, or dismissal and cases to the PELRB, paid union time (utilizing the union time code in the time and labor reporting system). Union stewards may request up to two (2) hours of paid union time to prepare and investigate each grievance; up to a total of four (4) hours to investigate and prepare each disciplinary appeal of a suspension, demotion or dismissal and up to a total of eight (8) hours to investigate and prepare and represent an employee in a matter before the PELRB...

Section 5.

A. The Employer shall approve reasonable written request for annual leave, accrued comp time, and/or leave without pay [hereinafter referred to as "LWOP"] for up to fourteen (14) calendar days, if requested by steward/union officials, in order to participate in Union executive board meetings, Union conventions, and employment as Union staff.

B. The Employer shall approve reasonable written request for annual leave, accrued comp time, and/or LWOP in excess of fourteen (14) calendar days and less than twelve (12) months for the above purposes and shall ensure a right of return to a position of like status and pay ...

Section 8: Except as limited by law or" this Agreement, each employee shall have the right to join and assist the Union freely or to refrain from doing so, without fear of penalty or reprisal from the City or the Union, and the Employer and the Union shall assure that each employee shall be protected in the exercise of such right. Allegations concerning violations of these rights shall be filed with the PELRB...

Section 10. Union officials and/or stewards are authorized to make reasonable use of copiers, FAX machines, computers (including email) and other office equipment for purposes of investigating and processing grievances and communicating with the Employer and other union representatives regarding official labor/management business provided such use does not interfere with official State business...

(Exhibit A to Petitioner's Motion for Summary Judgment and Exhibit B to Respondent's Motion to Dismiss).

5. Jason Davis is employed as a Field Inspector in the Electrical Services Bureau of the Construction Industries Division of the Respondent Department. (Affidavit of Jason Davis par. 2).

6. Employee Jason Davis is assigned to the Moriarty work station. (Attachment 3 to Respondent's Answer) or to the "Moriarty/Torrance -2204" work location (Attachment 4 to Answer.)

7. On May 23, 2012 Rob Trombley sent an e-mail message to Tony Barajas, Malanie Otero, Mary Kay Root from Respondent RLD and to Sandy Martinez from the State Personnel Office and to Ken Long, President of AFSCME Local 1211, designating Jason Davis as a union steward "for RLD" and claiming for him "all protections, rights and privileges bargained in the CBA and [afforded under] PEBA". (Exhibit 2 to Jason Davis Affidavit.)

8. The Hearing Officer takes Administrative Notice of Rob Trombley's status as an AFSCME Council 18 Staff Representative for Locals 802, 1211, 1894, 2499, 3422, which area of responsibility includes the employees at issue in this dispute.

9. The day following the e-mail designating him as a union steward, Jason Davis submitted a request for leave to attend Union Steward training on June 1, 2012. The request for leave was denied by Mr. Davis' immediate supervisor, Kelly Hunt, Chief Electrical Inspector on May 30, 2012 and Mr. Davis was referred in the e-mailed denial to Leslie Garcia, RLD HR Administrator "for further clarification". Leslie Garcia sent an e-mail message on May 31, 2012 to Jason Davis re: Disapproved Leave request for union steward training, in

which is written: "The Regulation and Licensing Department will not recognize you as a union steward as the current steward agreement has been negotiated to reflect stewards in Albuquerque, Santa Fe and Las Cruces. Therefore you will NOT be recognized as a steward in the Moriarty area."(Emphasis in the original). The email string then indicates Mr. Davis submitted a second request for leave to attend steward training, this time requesting Compensatory time which leave was approved with the following message from James Hunt at RLD:

"I have approved your Comp Time leave request for tomorrow. How you use your personal time off is your business, but understand in no uncertain terms that I am not endorsing nor enabling any formal compensation for "Union Steward training". (Exhibit 2 to Jason Davis Affidavit.)

10. On July 3, 2012 the Respondent Department issued a letter of reprimand to Jason Davis (Exhibit 1 to Petitioner's Complaint) which states that the Department conducted an investigation "regarding alleged improper activities" and at paragraphs 3 and 4 of the reprimand, the Respondent Agency asserts:

"You have been told on numerous occasions that you are not recognized as nor are you to act in the capacity of a union representative [sic].

Based on the findings of this investigation, the evidence clearly shows that you violated the following RLD policies:
E/mail's [sic] dating May 24, 2012 and June 28, 2012 acting in a union capacity and requesting to be compensated as a representative of the union.

RLD-100 (II) (A) Insubordination: Intentional refusal to follow a supervisor's instruction, or directive, [sic] insubordination does not include an employee(s) [sic] refusal to follow the supervisor's instruction and/or directive when the employee(s) [sic] welfare may be placed in imminent danger and/or the employee(s) believe that the instruction or directive may be illegal in nature.

RLD-3000 (Exhibit A) (9) Prohibited Internet Use: Staff shall not use any state IT resources for anything other than official state business unless otherwise specifically allowed by their supervisor or another authority designated by their Agency Director or Secretary."

11. In support of its Affirmative Defenses Respondent proffers a document purporting to be an "Official Union Steward List (revised 7/29/12)" and Jason Davis is not designated as a union steward on that list. (Attachment 2 to Respondent's Answer).

Discussion:

This Board has historically followed the standard found in the New Mexico Rules of Civil Procedure for the District Courts in weighing whether a Motion for Summary Judgment should be granted. Granting a Motion for Summary Judgment is predicated on there being no material questions of law or fact that would preclude judgment in favor of the movant. See, ***Cain v. Champion Window Co. of Albuquerque, LLC,*** 142 N.M. 209, 164 P.3d 90 (Ct. App. 2007). Once the moving party has made a prima facie showing of the absence of a genuine issue of material fact, the burden shifts to the non-moving party to show a reasonable doubt as to a genuine issue for trial on the merits. ***Hansler v. Bass,*** 106 N.M. 382, 743 P.2d 1031 (Ct. App. 1987). Complainant union has the burden of proof in a Prohibited Practices proceeding. NMAC 11.21.1.22 and likewise, the initial burden on its Motion for Summary Judgment. In light of the undisputed facts based on the pleadings including the and respective parties' supporting affidavits there are no material issues of fact so as to preclude a finding that as a matter of law the Department committed a prohibited labor practice (PPC) by violating the requirements of §§10-7E-19(B) and (C).

the principle set forth above." By the parties' agreement the number and locations of the stewards is subordinate to the union's right to select what is in it discretion is "sufficient" including its appointment of a steward for the Albuquerque area whose primary workstation is in Moriarty or anywhere else for that matter.

Respondent misconstrues the Steward listing document and the parties' CBA to require the union to appoint its union stewards allocated to a slot on the list, to mean that the steward must be assigned to that work area. This misconstruction then leads to the subsequent argument whether Jason Davis is assigned to the Albuquerque work area and consequently whether the Department may refuse to honor his selection by the union as a steward. The employer does not have discretion to veto the union's appointment of its stewards in this manner and the argument is ultimately a "red herring". Appointment of stewards is an internal union business matter and unless modified by contract the union is free to appoint whomever it will to serve in that capacity. The parties' CBA is unambiguous on this question and a plain reading of the document reveals that the union reserved the right to appoint it stewards without reference to any correlation between a steward's assigned workstation and the slots designated in the parties' steward agreement. The parties' CBA is similarly unambiguous in its contemplation that from time to time the agreed-upon list of the names, addresses, telephone numbers and the agency in which they are employed ***who are authorized to act on behalf of the Union*** must be updated at least every calendar quarter or when additions and/or deletions have occurred. (CBA Section 2). In section 2 it is clear that it is not the list which controls who may be a steward but rather, it is an informational compilation of those who are already authorized by the union to act on its behalf. The Department may have a legitimate complaint that the union is not as

scrupulous as it ought to be in maintaining a current list of union officers, but there is no factual or legal basis for asserting that the failure to do so enables the employer to reject the union's appointment of its stewards and officers. This conclusion does render the list meaningless. If, for example, this was a case in which the Employer was asserting a good faith basis for overlooking notice to an appropriate officer, or refusal of a right under contract because the employer was unaware of an employee's union officer status, the list might be relevant evidence of good faith. But such is not the case here. Here, the employer refuses recognition despite acknowledged notice of Davis' appointment as a steward. The stated basis for the Department's refusal to recognize Jason Davis as a steward is because "...the current steward agreement has been negotiated to reflect stewards in Albuquerque, Santa Fe and Las Cruces. Therefore you will NOT be recognized as a steward in the Moriarty area." (E-mail message from Leslie Garcia, RLD sent 5/31/12). Jason Davis did not seek to be recognized as a steward "in the Moriarty area" but was designated as a steward for RLD to fill the vacant Albuquerque slot. It is irrelevant whether he is stationed in Albuquerque or has Albuquerque as his primary work station or post. Consequently the Employer's argument "...that the Board cannot designate the RLD employee Jason Davis as a shop steward, without violating the ... Collective Bargaining Agreement..." is without merit.

In support of its position Respondent offers a document called an "Official Union Steward List (revised 7/29/12)" pointing out that Jason Davis is not designated as a union steward on that list. (Attachment 2 to Respondent's Answer). The document does not indicate who prepared it or whether union agrees that it is an accurate listing of its designated stewards, but in any event it appears on the face of the

document that the effective date is outside of the relevant time period. All actions relevant to the PPC occurred between May 23, 2012 when Davis was designated by Rob Trombley as a union steward and July 3, 2012, when the Department issued a letter of reprimand to Jason Davis. The list is therefore irrelevant to the question whether Davis was acting in the role of a union steward during the time that formed the basis of his discipline and the facts giving rise to the PPC. Furthermore, the basis for the Department's refusal to recognize Mr. Davis as a union steward during the relevant time period is not because he did not appear on a list designating him as such but because "...the current steward agreement has been negotiated to reflect stewards in Albuquerque, Santa Fe and Las Cruces. Therefore you will NOT be recognized as a steward in the Moriarty area."

For similar reasons, the Employer's argument that the union is being inconsistent when it filed a grievance on behalf of Jason Davis and other Field Inspectors is not only without merit, but irrelevant to the issues in this case. The grievance, objecting to the Department's unilateral expansion of territory to be covered by Field Inspectors in what the union alleges is in violation of the CBA's provisions regarding transfers has nothing to do with the issues in this case because Mr. Davis' "post of duty" is irrelevant to the question whether he may serve as the designated union Steward for the Albuquerque area.

Having determined that there was no legal impediment to Jason Davis' appointment as a union steward I am compelled to conclude that the Employer acted improperly in refusing to recognize his appointment, by denying him leave for union-related activities and by imposing discipline for fulfilling his role as a union steward. This does not necessarily result in a finding that the employer breached its contract when it refused leave to attend

steward training, however. I reach this conclusion by analysis of Article 9 Section 3 which requires the Employer to allow employee union officials to attend on paid status meetings agreed to by the parties for purposes of administering this Agreement. Section 3 defines the term "Union officials" as the Local Union Presidents, Local Vice-Presidents, and any ***other union official as designated by mutual agreement of the parties.*** The parties' CBA does not contain a designation of union steward as an official agreed to by the parties for whom leave must be approved. The parties could have expressly included "stewards" as it did Local Presidents and Vice-Presidents among those for whom leave must be approved, but they did not. Instead the agreement is that if leave for union business is to be extended to employees other than Local Presidents and Vice-Presidents, it must be by mutual agreement of the parties. It is plain from the context of the PPC and the parties' respective dispositive motions that Jason Davis is not mutually agreed to be a union official. Therefore, the employer was not contractually obligated to extend paid leave to him to under the terms of the CBA. That does not end the inquiry however for the contractual obligation to grant leave for union business is distinct from the requirement to provide leave for the investigation and processing of grievances (which was also denied Davis) and because while the denial of leave to attend steward training may not violate the CBA, it can nevertheless constitute harassment, coercion and intimidation of a union official because of his status as a union official. When the same facts as stated in the Article 9 Section 3 analysis above are analyzed under PEBA a different result obtains than that following a strictly contractual analysis. NMSA 1978 §10-7E-5 (2003) guarantees public employees the right to "form, join or assist a labor organization...without interference, restraint or coercion." NMSA 1978 §10-7E-19(B) (2003) prohibits a public employer from interfering

with, restraining or coercing a public employee in the exercise of rights guaranteed under PEBA including Section 5's right to assist the union without restraint or coercion. It is well settled law that this Board will interpret language in PEBA in the same manner as the NLRA has been interpreted to the extent that the language at issue is the same. *Las Cruces Prof'l. Firefighters v. City of Las Cruces,* 123 NM 239, 938 P.2d 1384 (Ct. App. 1997). Here, the language in PEBA guaranteeing public employees the right to "form, join or assist a labor organization...without interference, restraint or coercion and § 19(B)'s prohibition against a public employer interfering with, restraining or coercing a public employee in the exercise of their rights are identical to the NLRA, 29 U.S.C. §§ 157 and 158(a)(1). It is therefore appropriate to apply the rationale in the cases decided under the NLRA cited by the union in its Motion, notably *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983). (Holding union office is protected by NLRA §7 and the imposition of discipline on union officials inhibits qualified employees from holding office.)

CONCLUSION:

The Department's refusal to recognize Jason Davis as AFSCME's designated steward and refusal to grant his request for leave to attend union training and to represent an employee constitute a violation of Sections 5 and 19 (B) and (C) by interfering with, restraining or coercing a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act; to wit, Mr. Davis' right under NMSA 1978 §10-7E-5 (2003) to assist a labor organization without interference, restraint or coercion, and by dominating or interfering in the administration of a labor organization because its actions necessarily restricted the union's ability to provide essential services to its membership.

I also conclude that strictly under the facts of this case the evidence was insufficient to demonstrate that as a matter of law the employer violated NMSA 1978 §10-7E-19(A) or (D) by discriminating against Davis in regard to hiring, tenure or a term or condition of employment in order to encourage or discourage membership in a labor organization. It is my decision that in this case we should not follow the NLRB line of cases urged by the union holding that prohibited discrimination by an employer to discourage union membership includes discrimination for participation in union activities. To do so in this case unnecessarily blurs the distinction in PEBA between violations of PEBA §19 (B) which more directly deals with union activities and §§19 (A) (D) which are premised on mere membership in a union organization. This aspect of my recommended decision is limited to the facts of this case only.

Recommended Decision:

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

The uncontested facts are insufficient in my opinion to demonstrate that as a matter of law the Department has violated NMSA 1978 §10-7E-19(A) and (D) and with regard those two sections of PEBA the union's Motion for Summary Judgment should be **DENIED.**

To remedy the violations this Board should:

(1) Order the Department to cease and desist from the above violations of PEBA, which Order requires the Department to recognize Jason Davis as the union's designated steward in Albuquerque;

(2) Require the Department to post for sixty (60) days and mail notice of the violations in the form attached to this decision as Appendix A;

(3) Reimburse Jason Davis for compensatory time used for his union steward activities, and;

(4) Remove the written reprimand from Jason Davis' file.

Issued this 25th day of September, 2012.

Thomas J. Griego
Executive Director
Public Employee Labor Relations Board

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD

An Agency of the State of New Mexico

The Public Employee Labor Relations Board has found that the New Mexico Regulation and Licensing Department violated the Public Employee Labor Relations Act and has ordered us to post and obey this notice.

You have the right under Public Employee Labor Relations Act NMSA 1978 §10-7E-5 (2003) to form, join or assist a labor organization without interference, restraint or coercion. Furthermore, NMSA 1978 §10-7E-19(B) (2003) prohibits a public employer from interfering with, restraining or coercing a public employee in the exercise of rights guaranteed under PEBA including your right to assist the union without restraint or coercion. On May 31, 2012 the Department refused to recognize Jason Davis' appointment as a union steward for your recognized collective bargaining representative AFSCME Council 18 and denied him leave to conduct union business and to represent an employee in his role as union steward. On July 3, 2012 the Respondent Department issued a letter of reprimand to Jason Davis for engaging in union activities without its approval.

The Department's refusal to recognize Jason Davis as AFSCME's designated steward, its refusal to grant his request for leave to attend union training and to represent an employee constitute and issuing a letter of reprimand violated Sections 5 and 19 (B) and (C) by interfering with, restraining or coercing a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act and by dominating or interfering in the administration of a labor organization.

We acknowledge the above-described rights and responsibilities and will not in any like manner interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act, nor will we in any like manner dominate or interfere in the administration of a labor organization.

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For the New Mexico Regulation and Licensing Department — Date