STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

RHONDA GOODENOUGH,

Complainant/Appellant,

v. No. D-101-CV-2020-01743

STATE OF NEW MEXICO, CHILDREN YOUTH & FAMILIES DEPARTMENT,

and,

NEW MEXICO PUBLIC EMPLOYEE LABOR RELATIONS BOARD,

Respondents/Appellees.

ORDER AFFIRMING JULY 22, 2020 ORDER OF PUBLIC EMPLOYEE LABOR RELATIONS BOARD

THIS MATTER came before the Court on Appellant Ms. Rhonda Goodenough's appeal from a July 22, 2020 Order of the New Mexico Public Employee Labor Relations Board ("PELRB"). Having reviewed the pleadings, conducted a full record review and considered oral argument, THE COURT FINDS, CONCLUDES, AND ORDERS:

SUMMARY OF FACTS

a. Procedural Background.

This appeal has been made pursuant to Rule 1-074 NMRA and NMSA 1978, § 10-7E-23(B) (2003). On August 8, 2020, Appellant Ms. Rhonda Goodenough filed a Notice of Appeal in the above-captioned matter. On August 12, 2020, Appellant Goodenough filed an Amended Notice of Appeal. The Amended Notice of Appeal concerns an appeal from a July 22, 2020 Order of the New Mexico Public Employee Labor Relations Board ("PELRB").

On November 13, 2020, Appellant Goodenough filed her Statement of the Issues. On December 15, 2020, Appellee PELRB filed its Response to Statement of Issues. On January 4, 2021, Appellee New Mexico Children, Youth and Families Department ("CYFD") filed its Response to Statement of Issues. On January 23, 2021, Appellant Goodenough filed her Reply in Support of Statement of the Issues. On February 16, 2021, this Court conducted a hearing for oral argument on Appellant Goodenough's Statement of the Issues, Appellees' responses thereto, and Appellant's reply.

The record on review consists of: (a) four volumes of a record on appeal ([1 RP 1 to 4 RP 288]); (b) two volumes of a supplemental record on appeal ([1 SRP 1 to 2 SRP 348]); (c) a second supplemental record on appeal ([2SRP 1 to 2SRP 7]); and, (d) four transcripts concerning (i) a January 24, 2020 Merits Hearing, (ii) a May 18, 2020 Merits Hearing, (iii) a July 2, 2019 Status and Scheduling Conference, and (iv) a July 26, 2019 Emergency Motion Hearing. Additionally, the record contains two compact discs with eight audio files thereon. *See* Audio Index filed September 15, 2020, and Supplemental Audio Index filed October 5, 2020, in the above-captioned matter.

b. Factual Background.

General Employment History. Appellant Goodenough began her employment with CYFD in December 2003. [3 RP 190] Between May 9, 2005 and April 18, 2012, Appellant Goodenough was employed by CYFD Juvenile Justice as a Juvenile Probation Parole Officer ("JPPO") II in McKinley County, NM. [3 RP 191] Between April 19, 2012 and December 15, 2018, Appellant Goodenough was employed by the Gallup CYFD office as a JPPO II Supervisor. [*Id.*] However, on December 15, 2018, Appellant Goodenough was demoted to a JPPO II position. [*Id.*] On December 2, 2019, CYFD informed Appellant Goodenough via Notice of Final Action that CYFD

would dismiss Appellant Goodenough from her JPPO II position, effective December 17, 2019. [4 RP 259-63]

As a JPPO II employee between December 15, 2018 and December 17, 2019, Appellant Goodenough was covered by a collective bargaining agreement. [3 RP 193] As such, Appellant Goodenough was afforded certain protections under the Public Employee Bargaining Act ("PEBA"), NMSA 1978, Sections 10-7E-1 to -25 (2003, as amended through 2020).

PELRB 106-19 Appeal. This appeal arises from PELRB matter number 106-19. Matter 106-19 concerns additional preceding events that may be summarized as follows.

On May 31, 2019, Appellant Goodenough filed a Prohibited Practice Complaint in PELRB matter number 103-19. [1 SRP 1-25] Appellant Goodenough later amended the complaint through a June 6, 2019 First Amended Employee Prohibited Practices Complaint, [1 SRP 28-39], following a June 3, 2019 letter decision entered by PELRB Executive Director Thomas Griego indicating certain deficiencies in the initial complaint, [1 SRP 26-27]. In general, Appellant alleged in matter 103-19 that "as a JPPO II Supervisor, [Ms. Goodenough] was not performing supervisory work as defined by PEBA and that CYFD had failed to impose discipline within the allotted time." Appellant's Statement of the Issues, p. 6.

Following Appellant Goodenough's submission of the amended complaint in 103-19, Executive Director Griego issued a June 6, 2019 letter decision instructing Appellant Goodenough to "present to me all evidence now available to the complainant in support of the complaint, including documents . . . within 10 days of this letter." [1 SRP 68] In response, on June 14, 2019, Appellant Goodenough—through counsel—submitted several documents to the PELRB. [1 SRP 70-72; 2 SRP 234] Those documents included call logs setting forth the names of children. [2 SRP 238] Appellant Goodenough's attorney obtained some documents directly from Appellant

Goodenough. [7-26-19 Tr. 11:21 to 12:4] Upon review of the documents, CYFD filed an "Emergency Motion to Remove Confidential Documents from Complainant's Evidence" in which CYFD argued that the records provided by Appellant Goodenough to the PELRB constituted confidential records pursuant to NMSA 1978, Section 32A-2-32 (2009). [2 SRP 171] As such, CYFD posited that the records could only be released pursuant to a court order in which a District Court finds that there is a legitimate need for disclosure of the records. [2 SRP 175] In support, CYFD cited an Amended Order Finding a Legitimate Interest for Disclosure of Confidential Records entered on March 1, 2019 by District Court Judge Raymond Ortiz in which the District Court authorized the release of confidential CYFD records, with redactions, for use in a disciplinary appeal, *Rhonda Goodenough v. Children, Youth and Families Department*, State Personnel Board Docket No. 18-041. [*Id.*] *See* [2 SRP 229-31] (copy of order). PELRB Executive Director Griego heard CYFD's emergency motion concerning the documents on July 26, 2019. Following that hearing, Executive Director Griego stated he would remove the documents from the case file, and Appellant Goodenough would submit redacted versions in their stead for certain documents. [7-26-19 Tr. 32:2 to 36:22] With respect to the call logs, Appellant Goodenough agreed not to resubmit those to PELRB again. [2 SRP 238]

On August 13, 2019, PELRB Executive Director Griego dismissed Appellant Goodenough's Amended Prohibited Practice Complaint in PELRB matter number 103-19. The PELRB entered an Order on September 17, 2019 ratifying Director Griego's dismissal of Appellant Goodenough's complaint in 103-19. [2 SRP 346-47]

Following Appellant Goodenough's disclosure of the above-discussed records in PELRB 103-19, CYFD initiated an investigation. [2SRP 2-6] During the course of the investigation, CYFD Employee Relations Bureau investigator Mr. Drew Johnson interviewed Appellant

Goodenough on August 16, 2019. [2SRP 3] During the course of that interview, Appellant Goodenough indicated that she sought representation before she would answer questions relating to the release of the above-discussed records in PELRB matter number 103-19. [1-24-20 Tr. 224:1 to 226:13] Mr. Johnson continued to ask questions regarding the records, and Appellant Goodenough continued to state that she was not comfortable answering those questions without her attorney present. [*Id.*] Executive Director Griego later determined that Mr. Johnson's continuation of the interview after request for representation constituted a violation of Appellant Goodenough's *Weingarten* rights. [3 RP 202]; *see generally N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 256 (1975) (recognizing an employee's right to "to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline . . ."). Ultimately, the CYFD Employee Relations Bureau investigator, Mr. Drew Johnson, determined that the allegation that "Ms. Goodenough provided non-redacted, confidential client information to her attorney, Rosario Vega Lynn" was substantiated. [2SRP 2; 2SRP 4]

Following the investigation, CYFD placed Appellant Goodenough on administrative leave on August 19, 2019. [4 RP 240] Before Appellant Goodenough was placed on leave, CYFD Chief Juvenile Probation Officer Kimberly Mangan called Undersheriff James Mariano of McKinley County Sheriff's Department to arrange for escort of Appellant Goodenough off of CYFD premises. [1-24-20 Tr. 169:15 to 171:25] Appellant Goodenough was so escorted off of CYFD premises by two armed deputies. [*Id.*; 1-24-20 Tr. 125:11 to 126:4]

CYFD later issued a Notice of Contemplated Action on August 28, 2019 noticing Appellant Goodenough that it was "contemplating dismissing you from your position as a Juvenile Probation Officer II with the Juvenile Justice Services Division." [4 RP 241] On December 2, 2019, CYFD issued a Notice of Final Action to inform Appellant Goodenough that CYFD would

dismiss Appellant Goodenough from her position with CYFD effective December 17, 2019. [4 RP 259-60] As to cause, CYFD cited violations of CYFD's policies and procedures and Section 32A-2-32 (concerning the confidentiality of records maintained by CYFD). [4 RP 259]

On September 13, 2019, Appellant Goodenough filed her Employee Prohibited Practice Complaint in PELRB matter number 106-19. [1 RP 3] PELRB Executive Director Thomas Griego was designated as the hearing officer in the matter. The merits hearing took place over two days: January 24, 2020 and May 18, 2020. The parties, Appellant Goodenough and CYFD, submitted closing briefs in lieu of oral argument. [3 RP 187-88]

Executive Director Griego issued a Hearing Officer's Report and Recommended Decision on June 15, 2020. [3 RP 187-216] Executive Director Griego's 30 page report and recommended decision included twenty-two findings of fact and separate conclusions of law. [*Id.*] Ultimately, Executive Director Griego concluded that Appellant Goodenough "did not establish that disparate treatment occurred, nor did she prove by a preponderance of the evidence that CYFD acted in a retaliation or restrained her right to conduct any protected activity in violation of the Public Employee Bargaining Act. Evidence of a *Weingarten* violation is not sufficient basis because Complainant has not demonstrated the materiality of that violation to the decision to terminate." [3 RP 215] Executive Director Griego recommended dismissal of Appellant Goodenough's complaint and denial of her requested remedies. [3 RP 215-16] Following Appellant Goodenough's appeal to the PELRB from Executive Director Griego's recommended decision, the PELRB entered an Order on July 22, 2020 adopting the findings and conclusions of Executive Director Griego's report and recommended decision by a 3-0 vote and dismissed Appellant Goodenough's complaint. [4 RP 288] The appeal of concern in this matter followed.

STANDARD OF REVIEW AND BURDEN OF PROOF

This appeal was brought pursuant to Rule 1-074 NMRA, which authorizes appeals from

administrative decisions. *See also* § 10-7E-23(B) (2003) ("Actions taken by the board or local board shall be affirmed unless the court concludes that the action is: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence on the record considered as a whole; or (3) otherwise not in accordance with law."). Under the Rule, the District Court functions as an appellate court, not as a fact finder. *Mata v. Montoya,* 1977-NMSC-078, ¶ 3, 91 N.M. 20, 569 P.2d 946; *Zamora v. Vill. of Ruidoso Downs,* 1995-NMSC-072, ¶¶ 20-21, 120 N.M. 778, 907 P.2d 182. In exercising its appellate authority, the Court is to limit its scope of review to the whole record to determine:

> (1) whether the agency acted fraudulently, arbitrarily, or capriciously;
> (2) whether based upon the whole record on review, the decision of the agency is not supported by substantial evidence;
> (3) whether the action of the agency was outside the scope of authority of the agency; or
> (4) whether the action of the agency was otherwise not in accordance with law.

Rule l-074(R) NMRA; *see also Gallup Westside Development, LLC v. City of Gallup,* 2004-NMCA-010, ¶ 10, 135 N.M. 30, 84 P.3d 78.

As the appealing party, Petitioners bear the burden of showing "'that agency action falls within one of the oft-mentioned grounds for reversal . . . .'" *Fitzhugh v. N.M. Dep't of Labor, Emp't Sec. Div.,* 1996-NMSC-044, ¶ 25, 122 N.M. 173, 922 P.2d 555 (internal citation omitted).

"A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record." *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n,* 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806. The burden is on the party challenging the decision to make this showing. *Attorney General v. N.M. Pub. Regulation Comm'n,* 2011-NMSC-034, ¶ 9, 150 N.M. 174, 258 P.3d 453. "Where there is room for two opinions, the action is not arbitrary or capricious if exercised

honestly and upon due consideration, even though another conclusion might have been reached." *Perkins v. Dep't of Human Services,* 1987-NMCA-148, ¶ 20, 106 N.M. 651, 748 P.2d 24. Also, deference is given to any agency's interpretation of its regulations so long as the interpretation is reasonable. *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm'n,* 2006-NMCA-115, ¶ 25, 140 N.M. 464, 143 P.3d 502.

"Findings of fact supported by substantial evidence will not be overturned on appeal . . . . 'Substantial evidence' means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and if there is such evidence in the record to support a finding, it will not be disturbed . . . . Moreover, in examining such evidence an appellate court will view the evidence in a light most favorable to the prevailing party below and will not disturb findings, weigh evidence, resolve conflicts, or substitute its judgment as to the credibility of witnesses where evidence substantially supports the findings of the trial court." *Den-Gar Enterprises v. Romero,* 1980-NMCA-021, ¶ 11, 94 N.M. 425, 611 P.2d 1119 (internal citations and quotations omitted).

"When an agency that is governed by a particular statute construes or applies that statute, the court will begin by according some deference to the agency's interpretation . . . . The court will confer a heightened degree of deference to legal questions that 'implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function.' . . . However, the court is not bound by the agency's interpretation and may substitute its own independent judgment for that of the agency because it is the function of the courts to interpret the law . . . . The court should reverse if the agency's interpretation of a law is unreasonable or unlawful." *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 11, 120 N.M. 579, 904 P.2d 28 (internal citations and quotations omitted).

"Administrative decisions are not in accordance with the law 'if the agency unreasonably or unlawfully misinterprets or misapplies the law.'" *Princeton Place v. N.M. Human Serv. Dep't, Med. Assistance Div.*, 2018-NMCA-036, ¶ 27, 419 P.3d 194 (citation omitted).

DISCUSSION

The Court conducted the whole record review as mandated by the rule and case law and examined each section of the standard of review. Appellant Goodenough states that the issues before the Court are (a) whether PELRB "acted arbitrarily, capriciously, or otherwise not in accordance with state law when it determined that CYFD did not discriminate or retaliate against Ms. Goodenough in violation of the PEBA," and (b) whether "based upon the whole record on appeal, the decision of the PELRB is not supported by substantial evidence." Appellant's Statement of the Issues, pp. 5-6. Appellant develops these issues by claiming six points of error in the PELRB's decision: (1) that PELRB failed to apply state law to determine Appellant Goodenough's discrimination and retaliation claims; (2) that PELRB misapprehended Appellant Goodenough's claims; (3) that PELRB did not require CYFD to prove its affirmative defenses; (4) that PELRB improperly relied upon a District Court proceeding in determining that the records were confidential; (5) that PELRB improperly rejected Appellant Goodenough's bench memoranda; and, (6) that the PELRB decision was not supported by substantial evidence. *See* Appellant's Statement of the Issues. Each of these topics are addressed below.

a. PELRB Applied the Correct Standard when Evaluating Appellant Goodenough's Claims, Properly Apprehended Appellant Goodenough's Claims, and Appropriately Evaluated CYFD's Defense.

Appellant Goodenough filed her Prohibited Practice Complaint 106-19 with PELRB on September 13, 2019, pursuant to Regulation 11.21.3 NMAC ("Prohibited Practices Proceeding"). *See* [1 RP 3]. In her complaint, Appellant Goodenough alleged, *inter alia*:

> 35. CYFD violated NMSA 1978, § 10-7E-19 (E) of the PEBA which prohibits employers from "discharge[ing] or otherwise discriminate[ing] [*sic*] against a public employee because he has signed or filed an affidavit, petition, grievance or complaint or given information or testimony pursuant to the provisions of the Public Employee Bargaining Act . . . ."
> 36. CYFD violated CBA Article 6, Section 1 which states, "no employee shall be discriminated against by reason of union membership or non-membership or activities on behalf or in opposition to the Union."
> 37. CYFD violated CBA Article 39 which states, "Employees shall have the right, without interference or fear of penalty or reprisal, to disclose in good faith to . . . appropriate governmental authorities information that may evidence improper government activity (including but not limited to, action that is in violation of any state or federal law or regulation . . .) . . . ."

[1 RP 8]

PELRB Executive Director Griego analyzed Appellant Goodenough's claims under NMSA 1978, Sections 10-7E-19(B) and -19(E) (2020). [3 RP 195] Section 10-7E-19(B) provides, in part, that a public employer shall not "interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act . . ." *See also* NMSA 1978, § 10-7E-5 (2020) (establishing the right to a collective bargaining agreement); NMSA 1978, § 10-7E-22 (2003) ("Collective bargaining agreements and other agreements between public employers and exclusive representatives shall be valid and enforceable according to their terms when entered into in accordance with the provisions of the Public Employee Bargaining Act.") Section 10-7E-19(E) provides, in part, that a public employer shall not "discharge or otherwise discriminate against a public employee because the employee has signed or filed an affidavit, petition, grievance or complaint or given information or testimony pursuant to the provisions of the Public Employee Bargaining Act . . ."

"In the absence of guidance from our own courts, the New Mexico Supreme Court has directed that we should interpret language in the PEBA 'in the manner that the same language of the [National Labor Relations Act] has been interpreted.'" *County of Los Alamos v. Martinez*, 2011-NMCA-027, ¶ 21, 150 N.M. 326 (quoting *Regents of Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶ 18, 125 N.M. 401); *see also Las Cruces Prof. Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, ¶ 15, 123 N.M. 239 ("Our legislature's selection of language that so closely tracks the NLRA indicates general approval of the operation of that statute . . . Absent cogent reasons to the contrary, we should interpret language of the PEBA in the manner that the same language of the NLRA has been interpreted, particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the time the PEBA was enacted.").

With respect to Appellant Goodenough's claim under Section 10-7E-19(B), PELRB Executive Director Griego applied the two-part *Wright Line* test to determine whether Appellant Goodenough had satisfied her burden of proof for the Section 19(B) claim. [3 RP 198] The *Wright Line* test required:

> First, the employee must make a *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision to take adverse employment action. As part of the prima facie case evidence of animus is relevant to show a nexus or connection between the adverse action and the allegedly impermissible considerations. *See Carpenters Health & Welfare Fund*, 327 NLRB 262, 265 (1998). Animus can be inferred from circumstantial evidence. *Id.*
>
> Second, one a *prima facie* case is established, the burden shifts to the employer to establish that the same action would have taken place even in the absence of the protected conduct. *See NRLB v. Transportation Management Corp.*, 462 US 393 (1983), *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1319 (7th Cir. 1989); *Carpenters, supra*, at 265-266.

[*Id.*]

Executive Director Griego additionally explained that in employing the *Wright Line* test, the PELRB distinguishes between pretextual and dual-motive cases. [3 RP 198-99] Here, Executive Director Griego found "a legitimate business justification for the discipline exists. Therefore, [Executive Director Griego does] not accept [Appellant Goodenough's] argument that the termination of her employment was a mere pretext for anti-union discrimination . . ." [3 RP 199] Thereafter, Executive Director Griego considered whether Appellant Goodenough had established "evidence of antiunion animus needed to substantiate a claim under § 19(B)." [*Id.*] Executive Director Griego considered whether CYFD's violation of Appellant Griego's *Weingarten* rights presented evidence of antiunion animus, but concluded that "[t]he discipline here does not arise out of the assertion of *Weingarten* rights and there is ample evidence outside of [Appellant Goodenough's] interview to support the discipline." [3 RP 203] Executive Director Griego additionally considered other evidence that could constitute antiunion animus, [3 RP 203-09], but ultimately concluded that, as to the Section 10-7E-19(B) claim, Appellant Goodenough "bears the burden of proof on animus as a substantial or motivating factor and I conclude that burden has not been met." [3 RP 209]

This Court concludes that Executive Director Griego's application of the *Wright Line* test to Appellant Goodenough's Section 10-7E-19(B) claim was not an improper application of the law. As stated by the Court of Appeals, language in PEBA that mirrors that of the National Labor Relations Act may be interpreted "in the manner that the same language of the [National Labor Relations Act] has been interpreted." *Martinez*, 2011-NMCA-027, ¶ 21 (citation omitted); *see also Communication Workers of America, AFL-CIO v. State*, 2019-NMCA-031, ¶¶ 18-20, 446 P.3d 1183 (adopting the National Labor Relation Board's *fait accompli* analysis after identifying similar provisions of NLRA and PEBA).

This Court notes that the language set forth in 29 U.S.C. § 158(a)(1) mirrors that of Section 10-7E-19(B). Further, in reviewing 29 U.S.C. 158(a)(1) claims, "[t]he so called *Wright Line* analysis is applied when an employer articulates a facially legitimate reason for its termination decision, but that motive is disputed." *Tschiggfrie Properties, Ltd. v. N.L.R.B.*, 896 F.3d 880, 885 (8th Cir. 2018) (quoting *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 780 (8th Cir. 2013) (citing *Wright Line*, 251 NLRB 1083 (1980))); *see also Ready Mixed Concrete Co. v. N.L.R.B.*, 81 F.3d 1546, 1550 (10th Cir. 1996) ("The [U.S.] Supreme Court and this circuit have both approved the *Wright Line* test." (citations omitted)); *N.L.R.B. v. Interstate Builders, Inc.*, 351 F.3d 1020, 1027 (10th Cir. 2003) ("In general, for both refusal-to-hire and wrongful-termination cases, the critical question is the company's motivation for the challenged conduct; specifically, we focus on whether 'anti-union animus' motivated that conduct." (citation omitted)).

As to Appellant Goodenough's Section 10-7E-19(E) claim, Executive Director Griego similarly applied the two-part *Wright Line* test. [3 RP 210-11] However, Executive Director Griego also explained that "[a] principal distinguishing characteristic of Complainant's § 19(E) claim is that, unlike her §19(B) claim, no proof of animus is required." [3 RP 212]; *see generally Vokas Provision Co. v. N.L.R.B.*, 796 F.2d 864, 871 n.10 (6th Cir. 1986) ("Unlike section 8(a)(3), the Board has held that a section 8(a)(4) violation does not require a finding of anti-union animus.").

Executive Director Griego found that "[t]he preponderance of the evidence supports the employer's argument that it was not Complainant's exercising her rights under the Public Employees Labor Relations [*sic*] Act that resulted in termination of her employment but the confidentiality violation." [3 RP 213] Further, Executive Director Griego gave substantial weight to CYFD's deeming the confidentiality violation to be particularly egregious given that Appellant

Goodenough's "disclosure was into a public record widely available to anyone interested enough to take a look." [3 RP 214] Additionally, Executive Director Griego found that Appellant Goodenough had not been discharged because she asserted her *Weingarten* rights during the course of the investigation. [3 RP 213-15] Ultimately, Executive Director Griego concluded that Appellant Goodenough did not establish that she was "discharge[d] or otherwise discriminate[d] against . . . because the employee has signed or filed an affidavit, petition, grievance or complaint or given information or testimony pursuant to the provisions of the Public Employee Bargaining Act . . .," Section 10-7-19(E). *See* [3 RP 215].

With respect to the Section 10-7E-19(E) claim, the Court similarly concludes that the application of the *Wright Line* test was not in error. This Court notes that the language set forth in 29 U.S.C. § 158(a)(4) mirrors that of Section 10-7E-19(E), although Section 10-7E-19(E) does include additional protected activities within its scope beyond those recited in 29 U.S.C. § 158(a)(4). *See Martinez*, 2011-NMCA-027, ¶ 21 (indicating support for interpreting the PEBA in the same manner as the NLRA when similar language is found in the two statutes). In applying the *Wright Line* test, Executive Director Griego weighed the evidence to assess whether Appellant Goodenough had established by a preponderance of the evidence that she was discriminated against or discharged because of the filing of PELRB 103-19 or the assertion of *Weingarten* rights. Executive Director Griego concluded that Appellant Goodenough had failed to do so. [3 RP 215]

Appellant Goodenough contends that the Executive Director erred when applying the *Wright Line* test, and cites to UJI 13-2304 NMRA as the proper standard for application in PELRB 106-19. Appellant's Statement of the Issues, p. 7. The Court is not persuaded that UJI 13-2304 establishes the applicable burden of proof in a prohibited practice complaint with claims brought pursuant to Sections 10-7E-19(B) and -19(E) of the PEBA. *See* UJI 13-2304 Committee

Commentary ("A cause of action in tort for retaliatory or abusive discharge in violation of public policy . . ."). PELRB did not err when evaluating Appellant Goodenough's claims under the standards set forth above. *See Martinez*, 2011-NMCA-027, ¶ 21.

Additionally, PELRB did not err by failing to assess Appellant Goodenough's claims under a Section 10-7E-19(A) standard as Appellant Goodenough did not claim that CYFD "discriminate[d] against [Appellant Goodenough] with regard to terms and conditions of employment because of the employee's membership in a labor organization," NMSA 1978, § 10-7E-19(A). *See generally N.M. Corr. Dept. v. Am. Fed'n of State, Cnty., & Mun. Employees*, 2018-NMCA-007, ¶ 12, 409 P.3d 983 (rejecting an interpretation of Section 10-7E-19(A) in accordance with federal cases interpreting "similar—but not identical—provision of the National Labor Relations Act"). Nonetheless, the Court notes that Executive Director Griego considered Appellant Goodenough's Section 10-7E-19(E) claim without requiring proof of anti-union animus similar to how Section 10-7E-19(A) claims are evaluated. [3 RP 212-13]

Appellant Goodenough additionally argues that PELRB acted in an arbitrary and capricious manner by failing to require CYFD to prove its affirmative defenses. Appellant's Statement of the Issues, pp. 22-23. Appellant Goodenough cites to the Stipulated Prehearing Order wherein the order reads, "Respondent contends that there was not retaliation against Complainant for filing a PPC. CYFD will present evidence of other employees who were disciplined solely upon an employee's unauthorized disclosure of confidential information. These are documented in comparative discipline records." [2 RP 113] Appellant Goodenough interprets this provision as an affirmative defense of CYFD. *But see* Respondent's Answer to Prohibited Practices Complaint, p. 3 (listing no such affirmative defense), at [1 RP 28].

Under the *Wright Line* standard discussed above, it is Appellant Goodenough's burden to establish a *prima facie* case that the employee's "protected conduct was a motivating factor in the employer's decision to take adverse employment action." [3 RP 198]; *see also* 11.21.1.22(B) NMAC ("In a prohibited practices proceeding, the complaining party has the burden of proof and the burden of going forward with the evidence."). Executive Director Griego concluded that Appellant Goodenough, for both claims under Section 10-7E-19(B) and Section 10-7E-19(E), failed to establish her burden of proof. *See* [3 RP 209] ("Complainant has not made a *prima facie* case for violation of § 19(B) because the disclosures, being contrary to law and policy that prompted Complainant's termination, were not protected conduct. . . . As a *prima facie* case has not been made [t]he burden does not shift to the employer to establish that the same action would have taken place even in the absence of the protected conduct."); [3 RP 214]; *see also Duke City Lumber Co. v. N.M. Envtl. Improvement Bd.*, 1980-NMCA-160, ¶ 7, 95 N.M. 401 ("Once the party who bears the burden of proof has made a prima facie showing the burden of going forward with the evidence shifts to the opposing party." (citation omitted)).

Given that the hearing officer concluded Appellant Goodenough failed to make her *prima facie* case, PELRB did not act arbitrarily or capriciously in failing to require CYFD to prove up the defense to the extent Appellant Goodenough seeks. *See* [3 RP 209] ("Based on Mr. Costales' testimony I conclude [other employees disciplined for breaches of confidentiality] are not so similarly situated that different treatment supports a reasonable inference of discrimination or retaliation."); *see also Beyale v. Arizona Pub. Serv. Co.*, 1986-NMCA-071, ¶ 13, 105 N.M. 112 ("An affirmative defense ordinarily refers to a state of facts provable by defendant that will bar plaintiff's recovery *once a right to recover is established*" (emphasis added) (citation omitted)).

b. PELRB Appropriately Evaluated the Records CYFD Deemed Confidential.

Appellant Goodenough submits that the PELRB erred when Executive Director Griego rejected her arguments that the records submitted in PELRB matter number 103-19 may not be confidential, that CYFD did not sufficiently train its employees to appreciate what records CYFD considered to be confidential, and that requiring employees to obtain a court order before submitting certain documents to the PELRB in support of a prohibited practice complaint would pose an impediment to filing a prohibited practice complaint. *See* Appellant Statement of the Issues, pp. 9-14.

Executive Director Griego found that certain records submitted in PELRB matter number 103-19 were confidential pursuant to an "Order entered on March 1, 2019 by District Court Judge, Raymond Z. Ortiz, *In the Matter of the Application by New Mexico Children, Youth and Families Department for Release of Confidential Records*, Case No. D-101-CV-2019-00370." [3 RP 192] The March 1, 2019 Order further stated that ". . . the parties . . . shall deem the documents as confidential, and they shall not disclose the contents of those documents, in whole or in part, directly or indirectly, to the public or to persons not legitimately associated with the proceeding before the State Personnel Board . . ." [3 RP 193; 1 RP 42-44] Executive Director Griego concluded:

> Under any circumstance it would strain credulity to accept Complainant's argument that her disclosure of confidential records is mitigated by lack of training after a 15-year career working with the Children's Code on a daily basis. But in view of Judge Ortiz's Order following Complainant's actual litigation over the confidentiality requirements of NMSA 1978 § 32A-2-32 that claim will not stand. Quibbling over whether FACTS numbers themselves are confidential gets us nowhere. That the supporting documents submitted in PELRB 103-19 included documents covered by Judge Ortiz's Order is not reasonably disputed. The statute at issue in the First Judicial District, NMSA 1978 Section 32A-2-32 defining "confidential records", is the same as that at issue here. The definition covers all CYFD records pertaining to a case including names, DOB, addresses, etc. In her statement to ERB investigator Johnson, Ms. Grusauskas identified 32 of the submitted documents in

> PELRB 103-19 she claim contained confidential information under that definition and, as a result of the hearing on CYFD's Motion to remove confidential documents in PELRB 103-19, Complainant's counsel agreed that pages 103-113 of those submitted documents should be withdrawn as confidential.

[3 RP 205]

The Court does not find that PELRB erred when relying upon the March 1, 2019 Order in D-101-CV-2019-00370 to conclude that the records were confidential. *Den-Gar Enterprises v. Romero*, 1980-NMCA-021, ¶ 11, 94 N.M. 425 ("Findings of fact supported by substantial evidence will not be overturned on appeal." (citation omitted)). Additionally, this Court does not find that PELRB erred when evaluating Appellant Goodenough's contention that she was not properly trained to assess when records are confidential under the Children's Code. *Id.* ("Moreover, in examining such evidence an appellate court will view the evidence in a light most favorable to the prevailing party below and will not disturb findings, weigh evidence, resolve conflicts, or substitute its judgment as to the credibility of witnesses where evidence substantially supports the findings of the trial court.")

NMSA 1978, Section 32A-2-32(A) (2009) comprehensively provides, "All records pertaining to the child, including all related social records . . . and supervision histories obtained by the juvenile probation office, parole officers and the juvenile public safety advisory board or in possession of the department, are confidential and shall not be disclosed directly or indirectly to the public." To the extent necessary, if an individual seeks records deemed confidential under Section 32A-2-32(A) for use in an ancillary matter such as a prohibited practice complaint, then that individual may obtain a court order for the limited release of the records. *See* § 32A-2-32(C)(16).

c. The Court Does Not Consider Appellant Goodenough's Argument Concerning Her Submission of Bench Memoranda.

Appellant Goodenough submitted two bench memoranda during the course of PELRB matter number 106-19. On appeal, Appellant Goodenough argues that Executive Director Griego "did not consider Complainant's arguments/analysis as presented in her bench memos at all dismissing them outright as improper." Appellant's Statement of the Issues, p. 24. However, Executive Director Griego appears to have considered Appellant Goodenough's Bench Memorandum. *See* [3 RP 211] ("I consider case authorities under § 19(A) cited in her Bench Memorandum only insofar as they share the same explanation of the term 'discrimination' against a public employee as do cases considered under § 19(E)").

Nonetheless, as to the standards of review set forth in Rule 1-074(R), Appellant Goodenough fails to inform the Court as to the significance of Executive Director Griego's failing to consider her Bench Memoranda to the extent she claims. Thus, the Court does not consider Appellant Goodenough's argument concerning the bench memoranda. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339 ("We will not review unclear arguments, or guess at what his arguments might be." (citation omitted)).

d. The PELRB Decision Is Supported by Substantial Evidence.

Appellant Goodenough states that PELRB's decision is not supported by substantial evidence as it ignores that but for Appellant Goodenough's filing the prohibited practice complaint in PELRB matter number 103-19 and Executive Director Griego's instruction to provide all relevant documents to the complaint, then she would not have been dismissed. Appellant's Statement of Issues, p. 19. Appellant Goodenough further develops this argument by reciting the events that preceded Appellant Goodenough's termination from CYFD and the *Weingarten*

violation that occurred during the course of the investigatory process. *Id.* at pp. 19-22. While those events did take place, Executive Director Griego concluded that the evidence developed by Appellant Goodenough during the course of PELRB matter number 106-19, "does not bridge the gap between association and causation so that I might say, based on all the other facts and circumstances, that Complainant has proven by a preponderance of the evidence that she was discharged or discriminated against because of her complaint in PELRB 103-19 or her request to be represented by a labor organization." [3 RP 215] After conducting a full record review, the Court concludes that there is substantial evidence to support the decision of the PELRB, which concluded that Appellant Goodenough was not dismissed because of the prohibited practice complaint in PELRB 103-19 or the assertion of her *Weingarten* rights.

CONCLUSION

Based upon the pleadings and all matters of record, this Court finds:

1. This Court has jurisdiction over the parties hereto and the subject matter hereof;
2. This review is governed by Rule 1-074 NMRA and NMSA 1978, Section 10-7E-23(B) (2003);
3. The decision of the PELRB was not fraudulent, arbitrary, or capricious;
4. The decision of the PELRB was not an abuse of discretion;
5. The decision of the PELRB was supported by substantial evidence based upon the whole record on appeal;
6. The PELRB had the authority to consider the prohibited practice complaint; and,
7. The decision of the PELRB to dismiss Appellant Goodenough's prohibited practice complaint was in accordance with law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the July 22, 2020 Order in PELRB matter number 106-19 by the Public Employee Labor Relations Board dismissing Appellant Goodenough's prohibited practice complaint and adopting the findings and conclusions of Executive Director Thomas J. Griego's Report and Recommended Decision dated June 15, 2020, is hereby **AFFIRMED**.

IT IS HEREBY ORDERED.

BRYAN BIEDSCHEID
DISTRICT COURT JUDGE
DIVISION VI

Closing: 4ddef

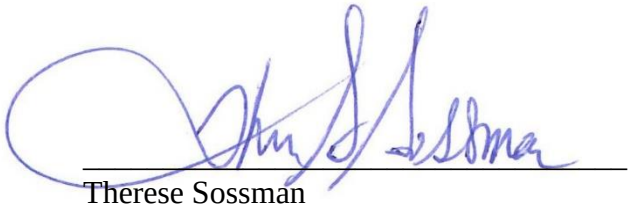
CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the date of acceptance for e-filing a true and correct copy of the foregoing was e-served on counsel registered for eservice in these matters as listed below.

Counsel for Appellant
Ms. Rhonda Goodenough
Rosario D. Vega Lynn
Vega Lynn Law Offices LLC
P.O. Box 65513
Albuquerque, NM 87193

Counsel for Public Employee
Labor Relations Board
Lori Chavez
Assistant Attorney General
Officer of the New Mexico Attorney General
201 3rd Street NW, Suite 300
Albuquerque, NM 87102-3366

Counsel for Children, Youth and Families Department
James E. Cowan
NM CYFD
Office of General Counsel
PO Box 5160
Santa Fe, NM 87502-5160



Therese Sossman
TCAA