9-PELRB-2020

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

RHONDA GOODENOUGH,

Complainant,

v. **PELRB 106-19**

N.M. CHILDREN, YOUTH AND FAMILIES DEP'T,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board ("Board") on Rhonda Goodenough's request for Board review of Executive Director Thomas J. Griego's Report and Recommended Decision regarding the Prohibited Practices Complaint ("PPC") filed against New Mexico Children, Youth and Families Department ("CYFD"). The Board, after reviewing the pleadings, hearing oral argument and being sufficiently advised, voted 3-0 to adopt the findings and conclusions of Executive Director Thomas J. Griego's Report and Recommended Decision dated June 15, 2020.

THEREFORE the complaint is **DISMISSED** and the file shall be closed.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

7/22/20
DATE

DUFF WESTBROOK, BOARD CHAIR

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

RHONDA GOODENOUGH,
Complainant,

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N.M. CHILDREN,
YOUTH AND FAMILIES DEP'T,
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HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

This matter comes before Thomas J. Griego, designated as the Hearing Officer in this case, on the Merits of this PPC.

STATEMENT OF THE CASE

Complainant claims that by investigating her, placing her on administrative leave and then terminating her employment, the Respondent retaliated against her for having filed a prior prohibited practice complaint, PELRB No. 103-19. If proven, Respondent's actions violate §§ 10-7E-19(B) and (E).

Respondent denies that Complainant's termination was improper and that the filing of PELRB No. 103-19 was not a motivating factor in the decision to terminate her employment. That decision was based on her release of confidential material contrary to Department regulations and State statute (albeit in PELRB No. 103-19).

A hearing on the merits was held Friday, January 24, 2020. At the conclusion of the union's case-in-chief the CYFD moved for a "directed verdict" - a summary dismissal - for failure to make a *prima facie* case. That oral motion was denied. Because Complainant's case-in chief took the entire time scheduled for hearing the parties agreed to re-convene the hearing on February 20, 2020 to allow CYFD to present its defense. Before resuming the merits

hearing, Department of Health restrictions in response to the COVID 19 pandemic prevented witnesses travelling or gatherings of more than five persons such that resumption of the hearing was not immediately practicable. The hearing resumed by videoconference on May 18, 2020 after which the case was submitted to the Hearing Officer for decision. Closing briefs in lieu of oral argument were submitted by Complainant on June 3, 2020 and Respondent on June 4, 2020. Both were duly considered.[1] Based on the foregoing, both parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue their points and authorities. On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand both live and via video conference, I make the following

FINDINGS OF FACT

1. The Children Youth and Families Department (CYFD) is a public employer as defined by the Public Employee Bargaining Act (PEBA) NMSA (1978) § 10-7E-4(S) (2003). (Stipulated in the parties Pre-Hearing Order).
2. Rhonda Goodenough is a public employee, employed by the Children, Youth and Families Department as a Juvenile Probation Parole Officer at various levels since December 6, 2003. (Stipulated in the parties Pre-Hearing Order).
3. Complainant is a public employee and is therefore protected by Section 19(B) of the Public Employee Bargaining Act. (Stipulated in the parties Pre-Hearing Order).
4. The parties stipulate that the following statute and administrative regulation are relevant to this case:
    a. Section 32A-2-32(A) of the Children's Code concerning Confidentiality of

[1] Respondent requested to extend the deadline for closing briefs from June 2 to June 4. In granting the request I erroneously granted the extension only one day. Because I intended to grant the extension as requested and Complainant did not object to the original request I accepted both briefs as timely.

records:

All records pertaining to the child, including all related social records, behavioral health screenings, diagnostic evaluations, psychiatric reports, medical reports, social studies reports, records from local detention facilities, client-identifying records from facilities for the care and rehabilitation of delinquent children, pre-parole or supervised release reports 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.

b. NMAC 8.14.23.8 concerning Departmental Client Records:

Records held by the department that concern juvenile justice services clients may be disclosed to employees within the department pursuant to the informed consent of the client who is the subject of the records and according to federal or state laws, rules, and regulations. Departmental employees shall maintain the confidentiality of the information disclosed, shall adhere to all state and federal laws, rules and regulations and the departmental code of conduct, and shall not release the information outside CYFD operations and their responsibilities for the identification, placement or management of youth involved in the juvenile justice system. Anyone who intentionally or otherwise unlawfully releases confidential information is subject to disciplinary action and/or criminal prosecution.

c. NMAC 8.14.23.9 concerning Delinquency Records Requests states:

Juvenile justice services client records are confidential and can only be disclosed pursuant to a valid court order, except to those entities specifically entitled to access under the New Mexico Children's Code Delinquency Act. Any time a request for juvenile justice services client records is received by a facility, JPO field office, or any other departmental entity, the request is immediately forwarded to the OGC records custodian.

A. Once received by the OGC records custodian, the request is forwarded to an assistant general counsel in the office of general counsel for review. If the assistant general counsel approves the request, the OGC records custodian corresponds with the requester and asks them to complete and return a juvenile justice services request for disclosure of confidential information form and any required HIPAA or other release forms, as below.

B. If the forms are returned, the OGC records custodian requests copies of the client records from the appropriate facility for

review by the OGC assistant general counsel. The OGC assistant general counsel is responsible for ensuring that records are released only as allowed by the Children's Code Delinquency Act, including types of records, the manner of release, and the person(s) released to.

C. When allowing access to an authorized entity, all attorney-client privileged information and all internal records of the department found within client records, including case narrative notes, email correspondence, and other internal correspondence, shall be stricken or otherwise not included in the disclosure.

D. Juvenile justice services records or information shall not be released pursuant to a subpoena, because subpoenas do not reflect a determination by a children's court judge that the requesting party has a legitimate interest in the case or the work of the court, as required by the New Mexico Children's Code Delinquency Act."

5. In addition to the foregoing I take Special Notice of the following:

a. NMSA 1978 § 32A-2-32 (E), which makes it a petty misdemeanor to:

…intentionally and unlawfully release[s] any information or records closed to the public pursuant to this section or releases or makes unlawful use of records in violation of this section…

b. NMSA 1978 § 10-7E-19(B) providing 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;

c. NMSA 1978 § 10-7E-19(E) providing a public employer shall not:

…discharge or otherwise discriminate 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 or because a public employee is forming, joining or choosing to be represented by a labor organization;

6. From December 6, 2003 to May 8, 2005, Complainant, Ms. Goodenough, worked for CYFD as a Protective Service Investigator in McKinley County. (Stipulated in the parties Pre-Hearing Order).

7. From May 9, 2005 to April 18, 2012, CYFD Juvenile Justice (JJS) employed Ms. Goodenough as a JPPO II (juvenile probation parole officer) in McKinley County. (Stipulated in the parties Pre-Hearing Order).
8. From April 19, 2012 to December 15, 2018, Ms. Goodenough was employed by the Gallup CYFD office with the assigned title of JPPO II Supervisor. (Stipulated in the parties Pre-Hearing Order).
9. On December 15, 2018 CYFD demoted Ms. Goodenough to JPPO II and imposed a 10% reduction in pay. (Stipulated in the parties Pre-Hearing Order).
10. Based on events surrounding investigation of Ms. Goodenough leading to a demotion in 2018, Ms. Goodenough filed PPC No. 103-19 on May 31, 2019 alleging violations of the disciplinary procedure in a collective bargaining agreement between AFSCME and the State. That PPC was summarily dismissed because as a JPPO II Supervisor Ms. Goodenough was not subject to the CBA at issue. (Special Notice of PELRB Records in *In re: Rhonda Goodenough v. the N.M. Children, Youth and Families, Dep't.;* PELRB 103-19).
11. CYFD was defended in PELRB 103-19 by its counsel, Kathryn Grusauskas. (Special Notice of PELRB Records in *In re: Rhonda Goodenough v. the N.M. Children, Youth and Families, Dep't.*, PELRB 103-19; Testimony of Kathryn Grusauskas; Day 1 Merits Hearing Audio at 039:37 – 043:38.)
12. While representing Ms. Goodenough in PELRB 103-19, Complainant's counsel obtained certain documents and produced those documents to the PELRB Executive Director in response to his request for all documents in her possession supporting her claims. (Special Notice of PELRB Records in *In re: Rhonda Goodenough*

v. the N.M. Children, Youth and Families, Dep't.; PELRB 103-19; Testimony of Kathryn Grusauskas; Day 1 Merits Hearing Audio at 039:37 – 043:38.)

13. The same documents described in Finding 14 above were the subject of 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, in which the Court found that a legitimate interest existed for disclosure in connection with a then-pending disciplinary action before the State Personnel Board of the following CYFD records deemed to be confidential under NMSA 1978, § 32A-3-32(A):

    a. Information in the Family Automated Client Tracking System (FACTS) concerning referrals to CYFD for adjudicated youths found to be in need of probation and/or parole supervision, and the chronological information related to those referrals and supervision, specifically Rhonda Goodenough's actions or inactions in regard to those supervisions, during the time period of June 1, 2018 to August 1, 2018. Unredacted documents *will be provided to the parties but shall not be disclosed to the public.* (Emphasis added).

    b. Foundational information about the scope of the referrals to CYFD may be disclosed. *The underlying factual details of the cases shall remain confidential and shall be withheld except for those facts that reflect actions taken or not taken by CYFD employees. All identifying information for individuals who were not employed by CYFD at the time of the FACTS cases and actions disclosed pursuant to this Order shall be withheld in their entirety without exception."*

    In relevant part the Order further orders that:

c. "…*the parties*, witnesses, State Personnel Board and Administrative Law Judge *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…"* (Emphasis added). (Special Notice of PELRB Records in *In re: Rhonda Goodenough v. the N.M. Children, Youth and Families, Dep't.,* PELRB 103-19, i.e. Amended Order Finding a Legitimate Interest For Disclosure of Confidential Records in First Judicial District Case No. D-101-CV-2019-00370 (J. Ortiz, 3-1-2019); Testimony of Kathryn Grusauskas; Day 1 Merits Hearing Audio at 032:23 – 039:00.)

14. Ms. Goodenough was demoted on December 15, 2018, to JPPO II and CYFD imposed a 10% reduction in pay, whereupon she became a bargaining unit employee covered by the parties' CBA (PHO Joint Exhibit G; Exhibit A(i)(7); Testimony of Rhonda Goodenough; Day 1 Merits Hearing Audio at 4:29:50 – 4:30:04.
15. From December 25, 2018 to December 17, 2019, Ms. Goodenough was employed as a JPPO II in the Gallup CYFD office. (Stipulated in the parties Pre-Hearing Order).
16. By reviewing the case file in PELRB 103-19 on or about July 15, 2019 Ms. Grusauskas obtained copies of the documents submitted by Ms. Goodenough's counsel in support of PELRB 103-19 referred to in Finding 14 above (Testimony of Kathryn Grusauskas; Day 1 Merits Hearing Audio at 040:20 – 043:11.)
17. After obtaining copies of the documents referred to in the foregoing paragraph Ms. Grusauskas spoke with Ms. Goodenough's Deputy Director of Field Services, Nick Costales, on the morning of July 19, 2019 about the disclosure to the public of documents containing confidential information in PELRB 103-19, contrary to

CYFD policy and the Children's Code. (Testimony of Kathryn Grusauskas; Day 1 Merits Hearing Audio at 044:35 – 044:39; Special Notice of PELRB Records *In re: Rhonda Goodenough v. the N.M. Children, Youth and Families, Dep't.*; PELRB 103-19.)

18. Ms. Grusauskas filed an Emergency Motion to Remove Confidential Documents from Complainant's Evidence in PELRB 103-19 on July 22, 2019. *Id.*

19. Ms. Grusauskas was subsequently interviewed by CYFD's Employee Relations Bureau Investigator, Drew Johnson, in connection with contemplated disciplinary action against Ms. Goodenough arising out of the document disclosures in PELRB 103-19. (Testimony of Kathryn Grusauskas; Day 1 Merits Hearing Audio at 031:30 – 031:40; Testimony of Drew Johnson; Day 1 Merits Hearing Audio at 3:55:56 – 3:55:60; Testimony of Rhonda Goodenough; Day 1 Merits Hearing Audio at 04:29:50 – 04:30:04.)

20. Complainant's Deputy Director of Field Services, Nick Costales, testified that Complainant's violation of the Children's Code and CYFD regulations governing the release and disclosure of confidential information including NMAC 8.14.23.9 constituted a valid ground for dismissal. (Testimony of Nick Costales; Day 2 Merits Hearing Audio at 047:36 – 051:28.)

21. Ms. Goodenough's employment was terminated effective December 17, 2019 for violating the Children's Code and CYFD regulations concerning confidentiality of records by her disclosures of CYFD records to support her claim in PELRB 103-19. (See Notice of Contemplated Action and the Notice of Final Action, Exhibit 9.)

22. As a result of her termination and the investigation precipitating it, Ms. Goodenough filed this PPC, PELRB 106-19, alleging CYFD retaliated against her for having filed PELRB No. 103-19 in violation of §§ 10-7E-19(B) and (E) of the Act. (Special

Notice of PELRB Records in *In re: Rhonda Goodenough v. the N.M. Children, Youth and Families, Dep't.;* PELRB 106-19).

REASONING AND CONCLUSIONS OF LAW

Complainant filed this prohibited practices claim on September 13, 2019 claiming that the Respondent retaliated against her in violation of NMSA 1978, §§ 10-7E-19(B) and (E) (2003) by placing her on administrative leave and then terminating her employment for filing a previous prohibited practice complaint, No. 103-19. At paragraphs 35-37 of her Complaint, Ms. Goodenough states:

> "35. CYFD violated NMSA 1978, § 10-7E-19(E) of the PEBA which prohibits employers from 'discharg[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 governmental activity (including but not limited to, action that is in violation of any state or federal law or regulation…)'".

Complainant has the burden of proof by the preponderance of evidence as to each alleged violation and the burden of going forward with the evidence as provided in NMAC 11.21.3.16. To prevail under § 19(B), proof of illegal animus is required. The standard to be applied in determining whether retaliation has occurred under the PEBA is whether retaliation constitutes a motivating factor in the adverse employment action that is the subject matter of the complaint as discussed in the § 19(B) analysis below.

A. Section 19(B) Analysis

Section 19(B) of the PEBA prohibits interference with, restraint or coercion of a public employee in the exercise of a right guaranteed by the Act. The protected rights at issue in this case appear to be Ms. Goodenough's right under NMSA 1978 § 10-7E-5 (2003) to enjoy the benefits of a collective bargaining agreement or other agreement between her exclusive bargaining representative and her employer found in NMSA 1978 § 10-7E-22. [2]

Ms. Goodenough has produced evidence of activity protected under § 19(B). The record reflects that prior to filing the instant PPC, Ms. Goodenough filed PPC No. 103-19 against the same Respondent. That filing is protected activity. Ordinarily, the submission of documentary evidence to support that prior PPC would also be protected by § 19(B). However, § 19(B) cannot be read as granting *carte blanche* to disclose with impunity the employer's records when those records are otherwise protected from disclosure by statute or the Administrative Code, without first obtaining an appropriate court order.

To the extent possible, I must read the provisions of one statute (the Public Employee Bargaining Act) together with other statutes (such as the Children's Code) in *pari materia* under the presumption that the Legislature acted with full knowledge of relevant statutory and common law. *See State ex rel. Quintana v Schneder*; 1993-NMSC-033, ¶4; 115 NM 573, 575; *Co. of Los Alamos v Johnson*, 1989-NMSC-045, ¶4; 108 NM 633, 634. Doing so forecloses the argument that the fact of Ms. Goodenough's disclosure of documents in PELRB 103-19 under the circumstances of this case is enough to prove interference with, restraint or coercion of a public employee in the exercise of a right guaranteed by the Act.

[2] NMSA (1978) § 10-7E-22 provides that 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. Included among protection that appear to be at issue are representation rights. Ms. Goodenough argues in her closing brief that she was denied the right to a union representative during a disciplinary interview (colloquially known as a *Weingarten* right) which right is founded upon Section 5 of the Act. Because evidence was introduced relating to the invocation of that right without objection, I will discuss its application as part of this Section 19(B) analysis although it was not plead with specificity and does not appear as an issue in the parties' stipulated Prehearing Order.

Therefore, while as a general proposition, supporting her PPC with documentary evidence is protected activity, if the disclosed documents are confidential by another regulation or statute, their disclosure absent a court order permitting it falls outside of protected activity under § 19(B). Under the circumstances of this case I conclude that the Judge Ortiz's Amended Order Finding a Legitimate Interest For Disclosure of Confidential Records issued March 1, 2019 in 1st Judicial District Court Case No. D-101- 2019-00370, is dispositive on the question of whether documents submitted to the PELRB by Complainant's counsel in PELRB 103-19 contained confidential records under the Children's Code and CYFD regulation:

A. Information in the Family Automated Client Tracking System (FACTS) concerning referrals to CYFD for adjudicated youths found to be in need of probation and/or parole supervision, and the chronological information related to those referrals and supervision, specifically Rhonda Goodenough's actions or in actions in regard to those supervisions, during the time period of June 1, 2018 to August 1, 2018;

B. Foundational information about the scope of referrals to CYFD including those facts that reflect actions taken or not taken by CYFD employees. The latter, though confidential were ordered to be disclosed in the underlying grievance but the former were ordered to remain undisclosed;

C. All identifying information for individuals who were not employed by CYFD at the time of the FACTS cases and actions disclosed pursuant to Judge Ortiz's Order were ordered to be withheld in their entirety without exception;

D. Documents relevant to Rhonda Goodenough's substantiated misconduct.

The fact that the basis for terminating Ms. Goodenough's employment included the submission of documents to support her claim in PPC 103-19 is not enough in and of itself,

to prevail under § 19(B). Proof of illegal animus is required by § 19(B) in contrast with Ms. Goodenough's claim of anti-union discrimination under § 19(E) or the violation of *Weingarten* rights that underlies the claim.

This Board follows a two-part test for any claim alleging a violation of § 19(B). 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, once 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.

Although the evidentiary burdens shift back and forth under this framework the ultimate burden of persuading the trier of fact remains at all times with the Complainant. *See CWA v. Dept. of Health,* PELRB Case No. 108-08, Hearing Examiner's Report (July 15, 2008) applying the *Wright Line* test and concluding that, although the union established a *prima facie* case of retaliation, it failed meet its ultimate burden refute the Department's business justifications by a preponderance of the evidence.

In *Wright Line* the Court explicitly differentiates "pretextual" and "dual motive" cases. The employer may put forth "what it asserts to be a legitimate business reason for its action. Examination of the evidence may reveal, however, that the asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not,

in fact, relied upon. When this occurs, the reason advanced by the employer may be termed pretextual. Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive." *Wright Line* at 1087.

The instant case presents a clear example as a case calling for application of the *Wright Line* test. Here, we have a facially legitimate discipline for violation of a statute and regulation concerning confidential records. Accordingly, a legitimate business justification for the discipline exists. Therefore, I do not accept the Complainant's argument that the termination of her employment was a mere pretext for anti-union discrimination and inasmuch as the PPC herein did not allege discrimination under § 19(A) of the Act and the Prehearing Order did not include such a claim I cannot accept Ms. Goodenough arguments at the close of this case that such discrimination was proven. Her case citations and argument on that point are considered but rejected as not properly before me in this case.

Therefore, I begin this analysis by reviewing the record for evidence of antiunion animus needed to substantiate a claim under § 19(B). I do consider evidence of other conduct, including prior PPCs as part of the "background" evidence for a § 19(B) claim as indicia of illegal animus but only to the extent such background conduct occurred within the six-month statute of limitations for a PPC. Almost all of Complainant's proffered evidence of past performance evaluation and workplace disputes upon which both parties relied in their closing arguments, is immaterial for that reason.

As evidence of illegal animus Ms. Goodenough relies primarily on an alleged violation of her *Weingarten* rights in connection with the disciplinary interview in connection with this case by Investigator Drew Johnson (Exhibit A(i)-7). The PELRB has regularly concluded that *Weingarten* -type rights exist under the PEBA. Our conclusion that denying an employee's request for union representation during an investigatory meeting may interfere with an

employee's rights under Section 5 of the PEBA finds support in a Memorandum Opinion and Order issued October 11, 2013 by the 2nd Judicial District in *AFSCME Council 18 v. City of Albuquerque Parks and Recreation Dep't. and The City of Albuquerque Personnel Board*, Case No. CV-2013-2891, issued March 1, 2019.

Consequently, it is appropriate to examine whether Ms. Goodenough states a claim for violation of her *Weingarten* rights before deciding whether any such violation states a claim under § 19(B). To do so, she must prove three elements:

1. She requested the assistance of her bargaining representative for an "investigatory interview";
2. CYFD denied the request and instead compelled her to appear unassisted; and
3. Ms. Goodenough reasonably believed the interview would result in disciplinary action.

See Weingarten at 256-257.

CYFD makes no argument that Ms. Goodenough did not reasonably believe the interview of August 16, 2019 could result in disciplinary action, since the email notice of the interview (Exhibit A at page 069) informs her "You have been identified in allegations of employee misconduct and scheduled for an interview…". Nor does CYFD argue that she did not request the assistance of a union representative, albeit *after* the investigation began. See The testimony of Investigator Johnson, Complainant Goodenough, and the Investigator's report, Exhibit A(i)-7. Interestingly, it is *Complainant* who claims she did not know the interview was disciplinary in nature. Notwithstanding that, I conclude that from the outset it was clear that the scheduled interview could result in disciplinary action so that *Weingarten* rights apply even if Ms. Goodenough was late in coming that realization.

The second element of a *Weingarten* violation claim – that CYFD denied the request for union representation and instead compelled her to appear unassisted, is more difficult to decide. As the testimony of Drew Johnson and Exhibit A(i)-7 show, after some preliminary questions about Ms. Goodenough's work experience with CYFD client confidential records, Mr. Johnson turned to the specifics of the allegations against Ms. Goodenough for breach of confidentiality. It was at that point that she said she felt "uncomfortable" continuing the interview without a representative, effectively though not unequivocally, asserting *Weingarten* rights, because stating you're "uncomfortable" with continuing without a representative is not as clear as claiming the right to representation before the questioning may continue. In response, Mr. Johnson pointed out that Ms. Goodenough had a week advance notice (or three days' notice depending on which witness one believes) before the interview to arrange for representation and that the interview presented her only opportunity to address the allegations against her. Based on the notice (Exhibit A at page 069) that the interview was scheduled because she had been identified in allegations of employee misconduct and because of her prior experience with the disciplinary interview process I conclude her statement that she was unaware of the nature of the interview and whether she would need representation is incredible. I do not find either of the investigator's statements about having sufficient prior notice to arrange for representation and that the interview presented her only opportunity to address the allegations against her to be problematic. They are both true and of benefit to the employee in making an informed decision whether or not to proceed with the interview in the absence of a union representative. The employer is under no obligation to postpone an interview to allow the employee additional time to find a union representative. Neither does *Weingarten* require a delay so that the employee may secure a specific representative. The employer may elect to proceed with investigation of charges in

the absence of an employee's statement and take disciplinary action if the evidence justifies it.

As stated by the Hearing Officer's expert union attorney Shane Youtz:

> "The employer can stop the interview at any time it wants under any circumstances or conditions it wants. It's my experience it is usually the employer who wants to continue the interview without representation but, at any time, the employer is free to terminate the interview … It's the employer's choice to interview or not interview an employee in any investigatory situation."

Testimony of Shane Youtz, Audio record Day 2 at 1:48:50.

Therefore, Mr. Johnson's several attempts to get Ms. Goodenough to participate in the interview are not a violation of her *Weingarten* rights. The point of the protection *Weingarten* provides is to prevent any examination that "involves questioning to secure information." *See National Treasury Employees Union v. Federal Labor Relations Authority*, 835 F.2d 1446, 1450 (D.C. Cir. 1987). Consequently, it gives me pause that he asked at least twice whether Ms. Goodenough gave confidential records to her attorney in a PELRB proceeding after she said she felt "uncomfortable" answering such questions without her attorney being present. (Testimony of Drew Johnson Audio, Day 1 at 4:10:33 – 4:11:38.) Although as previously written, saying one is "uncomfortable" answering such questions is ambiguous. But in the context of being asked to answer questions several times and being given that response I conclude that the ambiguity is best resolved in favor of the Complainant. Under the circumstances continued questioning about the specifics of the charges against her violated *Weingarten*-type protections recognized as arising from Section 5 of the Act.

Having determined that a *Weingarten* violation occurred I next consider whether that violation serves in this case as evidence of the employer's animus necessary for Complainant to prevail on her § 19(B) claim.

Although because of her refusal to answer questions Mr. Johnson wrote in his investigative report that Ms. Goodenough was "uncooperative", Complainant presents no evidence that her lack of cooperation was a factor in Mr. Costales' decision to terminate her employment. No negative inference may be drawn from Mr. Johnson's observation that Ms. Goodenough did not cooperate with being interviewed on the scheduled date. While it is undoubtedly true, as Ms. Goodenough argues, that Mr. Costales as the final decision maker relied on Mr. Johnson's report in his decision to terminate her employment, there is no evidence that he relied in any way on the observation within it that she was "uncooperative". (Testimony of Nick Costales, Audio record Day 2 at 55:05). Ms. Goodenough was not terminated for being uncooperative, but for violating the law and regulations governing confidentiality of CYFD records. Ms. Goodenough presents no evidence that her discipline was enhanced due to her not cooperating with the scheduled interview. Consequently, I see no evidence of illegal animus in Mr. Johnson describing Ms. Goodenough in his report as uncooperative. The discipline here does not arise out of the assertion of *Weingarten* rights and there is ample evidence outside of the Complainant's interview to support the discipline. Accordingly, the *Weingarten* rights violation is given little weight on the question of illegal animus.

The closing brief is not clear upon what other evidence Ms. Goodenough relies to prove the animus necessary to prevail under § 19(B). Consequently, I searched out every complaint of procedural error or intentional conduct by the employer appearing in the brief to weigh whether it is intended as proof of illegal animus.

Ms. Goodenough at various points complains that CYFD did not adequately train its employees on how to handle information it contends is confidential. Such argument might be more effective in a grievance arbitration proceeding upon a challenge to just cause but it avails nothing in the context of a claim under § 19(B) providing 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. Beyond that, the lack of proper training, even if proved, pales to insignificance in view of the same counsel and parties in this PPC having actually litigated not only the issue but the same documents in *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.) The Order issued by Judge Ortiz, states in part:

> "The underlying factual details of the cases shall remain confidential and shall be withheld except for those facts that reflect actions taken or not taken by CYFD employees. All identifying information for individuals who were not employed by CYFD at the time of the FACTS cases and actions disclosed pursuant to this Order shall be withheld in their entirety without exception."

Judge Ortiz permitted limited disclosure of confidential information but only within the disciplinary appeal before the State Personnel Board:

> "IT IS FURTHER ORDERED that the redacted documents at issue relevant to Rhonda Goodenough's substantiated misconduct may be offered in evidence, and admitted, if relevant, in the disciplinary appeal, *Rhonda Goodenough v. Children, Youth and Families Department*, State Personnel Board Docket No. 18-041, and may be disclosed during pre-hearing discovery.

Although limited disclosure was permitted within the limited context of Ms. Goodenough's grievance appeal before the State Personnel Board, Judge Ortiz further cautioned the parties and the Administrative Law Judge hearing the appeal to maintain strict confidentiality outside of the grievance hearing itself:

> "IT IS FURTHER ORDERED that the parties, witnesses, State Personnel Board and Administrative Law Judge 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. The record of the disciplinary appeal shall include the relevant records in possession of the New Mexico Children, Youth and Families Department, which shall be placed in a sealed envelope by the Administrative Law Judge."

A plain reading of the Children's Code directive to maintain confidentiality of records pertaining to the child applies the confidentiality requirement to *all* records pertaining to the

child, in possession of the department. See NMSA 1978 § 32A-2-32(A). Subsection (E) of § 32A-2-32 makes it a petty misdemeanor to intentionally and unlawfully release[s] any information or records closed to the public pursuant to this section. 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 claimed 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 105-113 of those submitted documents should be withdrawn as confidential.
I also considered alleged gaps and inconsistencies in the employer's records regarding Ms. Goodenough's evaluations and discipline argued by the Complainant. While such argument may be effective in the grievance arbitration context, as it may relate to a just cause determination, it is of less utility in the context of a § 19(B) claim because Ms. Goodenough was terminated solely for the unauthorized release of confidential materials, not for poor work performance. *See* Notice of Contemplated and the Notice of Final Action, Exhibit 9; Testimony of Costales Day 2 Audio at 52:18 – 53:00 (to the effect that she would have been

terminated for the confidentiality breach alone, without regard to any prior discipline). That she did not hold a position in the bargaining unit from April 19, 2012 to December 15, 2018, aside from being time-barred, renders such records immaterial to the question of antiunion animus. To the extent she argues such insufficiencies are evidence of animus she produces no evidence of intentionality and fails to show any nexus between those deficiencies and her protected union rights at issue.

Complainant further argues that when she was given final notice of her termination, her employer took the unusual step of having her escorted from the workplace by law enforcement officers. I tend to agree with Complainant that a police escort of a terminated employee is unusual but it is not unheard of and while I have doubts that it was necessary in this case, I will not second-guess management's decision that extra security was needed. Her supervisor, Ms. Mangan, testified she thought Ms. Goodenough might act precipitously. She testified to a long history of animosity between the Administrative Secretary at the Gallup office and Ms. Goodenough. (Mangan testimony Audio record Day 1 at 3:25:15 - 3:26:50). There is some basis to that fear because as Ms. Goodenough testified, on an earlier occasion, an Administrative Secretary, Ursula Saucedo, attacked her in the workplace and Ms. Goodenough filed a police report, an internal grievance against the Administrative Secretary and notified Ms. Mangan when the incident occurred. (Goodenough testimony Audio record Day 1 at 5:19:17). Accordingly, while I might not have called the police to escort Ms. Goodenough off of the premises, I cannot say Ms. Mangan had no reason to do so other than antiunion animus.

I fail to see the significance of Ms. Mangan knowing at the time of her call to Undersheriff Mariano that one of his Deputies is the former husband of Ms. Saucedo. While arguably an interesting fact, Complainant does not explain its significance and offers no evidence

connecting that fact to Ms. Goodenough's protected activities. If she is arguing now that it is evidence of retaliation for the protected activity of having filed a complaint against Saucedo, that offense was never plead and does not appear as a contested issue in the PHO controlling this litigation.

Ms. Goodenough, argues that Ms. Mangan filing serial ERB complaints against her constitutes evidence of animus. I can draw no adverse conclusion from the filing of ERB complaints by a supervisor concerning an employee with an apparent checkered work history. I refer to Complainant's closing brief, page 2, in which counsel argues:

> "Kim Mangan, requesting the Employee Relations Bureau (ERB) investigate multiple allegations against Ms. Goodenough."

Again, at page 10 of her closing brief we read:

> "Ms. Mangan testified she had dealt with *many disciplinary problems with Ms. Goodenough* and that Ms. Goodenough was a very capable employee when she was being directly supervised. (Mangan-May 18, 2020 at 1:09) Ms. Mangan testified that, "[T]here had been growth and she was open and honest and, without looking at everything I had documented in the interim, my assumption is that she was acknowledging during our check-ins there was improvement and there was enough improvement that she had risen back to the level of 'achieves performance standards.' And I noted that we were going to, I'm sorry it was on the overall accomplishments, we will continue to work together." (Mangan-Jan. 24, 2020 at 3:34:37)… Ms. Mangan's testimony is not credible because, while she claimed to have been working to improve Ms. Goodenough's performance, *she was given a "directive" by her supervisor, Tommy Rodriguez, "to make sure [Ms. Goodenough's work issues] got fixed*." (Mangan-Jan. 24, 2020 at 3:39:44)".

What Complainant's counsel calls "soliciting employee complaints against Ms. Goodenough" is nothing more than her supervisor fulfilling a duty to inform a subordinate how to pursue his rights to file a complaint against Ms. Goodenough. Former CYFD employee, Gabriel Claw, wanted to file an internal complaint alleging Ms. Goodenough was mistreating Native Americans. Ms. Mangan then assured Mr. Claw she would send his complaint to ERB. (Mangan Testimony -May 18, 2020 at 1:18:17).

I do not accept Ms. Mangan's filing ERB investigation requests or assisting subordinates with filing their own complaints to constitute evidence of antiunion animus.

Complainant's best evidence is the list of comparable discipline for violation of confidentiality rules (Exhibit 8) requested by the Hearing Officer. Complainant simultaneously relies upon and disparages Exhibit 8. At page 11 of her closing brief counsel argues:

> "CYFD treated Ms. Goodenough in a disparate manner. No other CYFD permanent employee was disciplined or discharged for the same allegations. CYFD failed to provide any actual comparables to Ms. Goodenough's employment situation."

Putting aside that it is patently untrue that "No other CYFD permanent employee was disciplined…"as appears from Exhibit 8, if I cannot rely on Exhibit 8 because the discipline reflected thereon are not "actual comparables", then on what basis may I reach the conclusion Complainant wishes - that CYFD treated Ms. Goodenough in a disparate manner? The closing brief does not say. Notwithstanding her attempt at impeachment of Exhibit 8, Complainant refers to my questioning of Mr. Costales about Exhibit 8 as though it *is* an actual comparable to establish the point that once probationary employee dismissals are taken out of consideration from Exhibit 8, the most serious discipline meted out for breach of confidentiality is a letter of reprimand. (Testimony of Nick Costales Audio, Day 2 at 26:35 – 27:00).

Mr. Costales distinguished Ms. Goodenough's breach of confidentiality from others on the list by its particularly "egregious" nature - that it was released into the record of the PELRB open and available to the public and therefore not a limited disclosure as others on the list. (Testimony of Nick Costales Audio, Day 2 at 22:39 – 23:14; 52:18.)

Though Complainant relies on Mr. Costales's testimony on the point that only probationary employees were dismissed as appears on Exhibit 8, she does not take the next step to

establish whether the employees have similar disciplinary records, similar records of union affiliation and activities, etc. so that I might conclude that the employees on Exhibit 8 are similarly situated but treated differently. Neither does she connect the apparent disparate treatment to her engaging in a protected right other than the mere assertion that it is so. Based on Mr. Costales' testimony I conclude they are not so similarly situated that different treatment supports a reasonable inference of discrimination or retaliation.

Complainant bears the burden of proof on animus as a substantial or motivating factor and I conclude that burden has not been met.[3] See, *AFSCME Council 18 v. NM Tax & Rev. Dep't.*, PELRB Case No. 104-12, 55-PELRB-2012. (Directed verdict granted when union did not meet its burden of proof with regard to alleged violation of § 19(B). Employee established protected activities and that correction and disciplinary action was taken but not a sufficient nexus between the two). Where the evidence is insufficient to establish that union animus was a substantial or motivating factor in the disciplinary decision a decision in favor of the employer is indicated. *See New Mexico Corrections Department v. American Federation of State, County, and Municipal Employees, Council 18, AFL-CIO,* No. A-1-CA-34737 (J. Hanisee, September 5, 2017) (In re: PELRB 105-09; 11 PELRB 2009). 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. Therefore, protected activity was not a "motivating factor" in the employer's decision to take adverse employment action. Further, the evidence is insufficient to establish a connection between the adverse action and the alleged union activities. As a *prima facie* case has not been made

[3] In her closing brief, Ms. Goodenough reverses the burden of proof arguing "CYFD was unable to prove that Ms. Goodenough's protected activities were not "a motivating factor" in her termination of employment."

The 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. I note, however, that under the shifting burden I would find that the same action would have taken place even in the absence of the protected conduct.

B. Section E Analysis

NMSA 1978, § 10-7E-19(E) prohibits employers from "discharg[ing] or otherwise discriminat[ing] against a public employee because he [or she] 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 *Wright Line*, 251 NLRB 1083 (1980), *enf'd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), applied by analogy here, the Court differentiates "pretextual" and "dual motive" cases. The employer may put forth "what it asserts to be a legitimate business reason for its action. Examination of the evidence may reveal, however, that the asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon. When this occurs, the reason advanced by the employer may be termed pretextual. Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive." *Wright Line* at 1087.

The NLRB established the following two-part test to determine whether an employee has been disciplined or otherwise discriminated against for union activity, rather than for a legitimate business reason. 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 certain adverse employment action. *Id.* at 1089. A *prima facie* case is established by showing there was (a) union activity, (b) knowledge of such union activity, and (c) animus against the union. *See Carpenters Health & Welfare Fund*, 327 NLRB 262, 265

(1998). The necessary animus element is relevant to show a nexus or connection between the adverse action and the allegedly impermissible considerations and may be inferred from circumstantial evidence. *See Carpenters, supra.*

Second, once a *prima facie* case is established, the burden will shift to the employer to establish that the same action would have taken place even in the absence of the protected conduct. *Wright Line* at 1089; *See also NRLB v. Transportation Management Corp.,* 462 US 393 (1983), *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1319 (7th Cir. 1989) and *Carpenters, supra,* at 265-266.

Although the evidentiary burdens shift back and forth under this framework the ultimate burden of persuading the trier of fact remains at all times with the Complainant. *See CWA v. Dept. of Health,* PELRB Case No. 108-08, Hearing Examiner's Report (July 15, 2008) applying the *Wright Line* test and concluding that, although the union established a *prima facie* case of retaliation, it failed meet its ultimate burden refute the Department's business justifications by a preponderance of the evidence. See also *Gonzales v. New Mexico Dep't of Health, Las Vegas Med. Ctr.*, 2000-NMSC-029, ¶21, quoting *Reeves v. Sanderson Plumbing Prods., Inc.,* 120 S. Ct. 2097, 2106 (2000), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (all discussing a federal employment discrimination claim, which utilizes a similar burden shifting framework under *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-05 (1973)).

Goodenough conflates discrimination claims under NMSA 1978, § 10-7E-19(A) with those brought NMSA 1978, § 10-7E-19(E). Because Complainant did not bring a § 19(A) claim 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).

I pause in writing this Report and Recommended Decision to comment on Complainant's submission of Bench Memoranda. Our rules make no provision for filing Bench Memoranda in advance of a Merits Hearing. They were not discussed or provided for in the parties' Pre-Hearing Order. I suppose, under appropriate circumstances, a Hearing Examiner may request or require Bench Memoranda on a particular issue of law, but that is not the case here. The two filed Memoranda – one on available administrative remedies and a second on the standard of proof for retaliation – were unsolicited, gratuitous filings. Because the filing of such memoranda were not called for in the parties' PHO no provision was made for Respondent to present opposing views and none were submitted. Some might consider such filings to be an attempt to unduly influence the mind of a trier of fact ahead of the merits hearing. In addition, Complainant filed hundreds of pages of documents in support of her PPC, most of which were not introduced as exhibits in the merits hearing. Of the hundreds of pages of documents and audio recordings that *were* introduced as evidence, (Exhibit A alone, for example, comprises 95 pages of mostly separate documents) most were not used in direct or cross-examination of any witness nor were they referred to in closing briefs. Such serious overburdening of the administrative record is a practice to be discouraged and will not likely be appreciated by an appellate court having to wade through the record on appeal should either party choose to appeal.

A principal distinguishing characteristic of Complainant's § 19(E) claim is that, unlike her § 19(B) claim, no proof of animus is required. For example, where the New Mexico Corrections Department treated state employees who were members of a union differently than a state employee who was not by allowing the non-union employee to use a state vehicle to attend the same department-called policy review meeting, the district court did not err in affirming this Board's decision that the department had committed a prohibited

practice in violation § 19(A)[4]. The plain language of this section required only that the discriminatory treatment be because of the employee's membership in a labor organization and does not require proof that the action was retaliatory or motivated by anti-union animus. *N.M. Corrections Dep't v. AFSCME,* 2018-NMCA-007, *cert. denied*. See also *Northern N.M. Fed. of Educ. Emps. v. Northern N.M. College,* 2016-NMCA-036, ¶ 18, 369 P.3d 22 (The appellate court concluded the union was not required to prove that the Department's action was retaliatory or motivated by anti-union animus in order for the hearing examiner to conclude that the Department had engaged in a prohibited practice).

Complainant argues it is undisputed that Ms. Goodenough engaged in protected activity by filing PPC 103-19 and that Ms. Grusauskas relied on the proceedings in 103-19 when she reported her concerns about the disclosure of those confidential documents to Ms. Goodenough's Deputy Director of Field Services, Mr. Costales. That is true insofar as it goes, but as discussed herein the submission of confidential documents into the public records falls outside of the definition of protected activity. She further argues that Ms. Goodenough engaged in protected activity by requesting representation during the ERB interview. Again, that is true insofar as it goes, but as discussed above the *Weingarten* violation herein is *de minimus* and given little weight on the question of animus.

The preponderance of the evidence supports the employer's argument that it was not Complainant's exercising her rights under the Public Employees Labor Relations Act that resulted in termination of her employment but the confidentiality violation. The evidence further supports the employer's argument that the confidentiality violation here was particularly egregious because the confidentiality question was actually litigated in First

[4] I reiterate that there is no § 19(A) claim present in this case. However, I apply to a claim under § 19(E) the standard for finding discrimination enunciated in cases construing § 19(A).

Judicial District Court Case No. D-101-CV-2019-00370 wherein the presiding judge entered an order cautioning the parties in this case to maintain strict confidentiality outside of the SPO grievance hearing. Mr. Costales compared the various confidentiality violations appearing in Exhibit 8 that did not result in termination with Ms. Goodenough's disclosure. (Testimony of Nick Costales Audio, Day 2 at 36:35 – 27:00; 49:13 to 50:42; 51:36 – 51:52; 52:18 to 53:08.) The former comprised such acts as an employee speaking about a case with a friend at a barbecue, sending one email to an outside party containing confidential information, reading and forwarding Human Resource documents to parties who would not otherwise have been privy to the matter, disclosing confidential information verbally to CYFD clients and accessing the FACTS system for personal reasons. In contrast, Ms. Goodenough's disclosure was into a public record widely available to anyone interested enough to take a look. The potential for unfettered public exposure of details concerning juvenile delinquents was what concerned Mr. Costales. (Testimony of Nick Costales Audio, Day 2 at 22:39 – 23:14.)

Because this is a mixed motive case and CYFD has discretion to discipline an employee for a violation of the Children's Code, Complainant's termination cannot be deemed to be based on mere pretext. Argument and evidence that Complainant's seniority, work record, prior good conduct and expertise should be taken into account is more appropriate to a grievance arbitration proceeding where it may be taken into account as part of the just cause analysis. Here, her task is to produce such evidence as will support a reasonable conclusion that CYFD discharged her or discriminated against her *because of* her complaint in PELRB 103-19 or her request to be represented by a labor organization.

It is an axiom of logic that correlation does not imply causation. Complainant has submitted evidence of correlation, such as the undisputed connection between documents filed in

PELRB 103-19 and the termination of employment that is the basis for this PPC. There is evidence of failed attempts at corrective action and Complainant's being noted as "uncooperative" in the ERB interview in the investigatory file on which Mr. Costales relied to terminate employment. That evidence 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. *See Juneau v. Intel Corp.,* 2006-NMSC-002, ¶ 11, 139 N.M. 12, 127 P.3d 548 (stating that a *prima facie* case of retaliation requires the plaintiff to show: (1) he [or she] engaged in protected activity, (2) he [or she] was subject to adverse employment action subsequent to, or contemporaneous with the protected activity, and (3) a causal connection exists between the protected activity and the adverse employment action.).

DECISION: Complainant did not meet her burden in showing that CYFD engaged in a prohibited practice under NMSA § 10-7E-19(B) or (E). Complainant 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. Furthermore, the discipline here was not taken as a direct result of having asserted *Weingarten* rights. Rather, she was disciplined for other cause. See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) at Chapter 6.III.B.4 and citations therein.

WHEREFORE, The *Weingarten* violation found in this Report and Recommended Decision should be noted and the employer enjoined from future violations. The Complaint for

violation of NMSA 1978 § 10-7E-19(B) and NMSA 1978 § 10-7E-19(E) should be **DISMISSED** and the Complainant denied her requested remedies.

Issued, Monday, June 15, 2020.

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