

**STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD**

**AMERICAN FEDERATION OF TEACHERS
And THE INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE
WORKERS (IAMAW), AFL-CIO,**

Complainant,

v.

PELRB No. 108-22

**UNIVERSITY OF NEW MEXICO SANDOVAL
REGIONAL MEDICAL CENTER,**

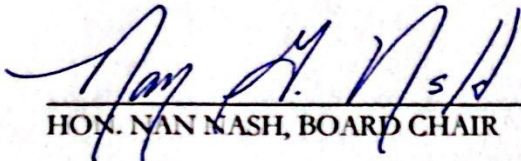
Respondent.

ORDER

THIS MATTER came before the Public Employee Labor Relations Board (hereinafter the “Board”) at its open meeting on November 19, 2022 upon the appeal of University of New Mexico Sandoval Regional Medical Center (“Respondent”) from the Hearing Officer’s Report and Recommended Decision dated September 22, 2022. The Board heard oral argument on the matter and carefully reviewed the Recommended Decision, the request for review, and the response thereto. Pursuant to the Public Employee Bargaining Act (the “PEBA”), NMSA 1978, Sections 10-7E-1 to 25 (2003, as amended through 2020), and being otherwise sufficiently advised, the Board voted 3-0 to reverse the Recommended Decision and findings therein concerning a violation of § 19(B) of the PEBA as not supported by the evidence and to dismiss the complaint.

THEREFORE, the Hearing Officer’s Report and Recommended Decision dated September 22, 2022 is hereby **REVERSED**. The prohibited practices complaint in the above-captioned matter is hereby **DISMISSED**.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD



HON. NAN NASH, BOARD CHAIR

12/1/2022

DATE

**STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

In re:

**AMERICAN FEDERATION OF TEACHERS
and THE INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE
WORKERS (IAMAW), AFL-CIO,**

Complainant,

v.

PELRB No. 108-22

**UNIVERSITY OF NEW MEXICO SANDOVAL
REGIONAL MEDICAL CENTER,**

Respondent.

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

STATEMENT OF THE CASE: This matter comes before Thomas J. Griego, designated as the Hearing Officer in this case, on a Prohibited Practices Complaint filed by the American Federation of Teachers (“AFT”) and the International Association of Machinists and Aerospace Workers, AFL-CIO (“IAMAW”) (collectively, “the Union”), in which the Union claims that the Respondent, University of New Mexico Sandoval Regional Medical Center (“SRMC” or “the Hospital”), violated Section 19 of PEBA by interfering with, restraining and/or coercing SRMC employees in the exercise of their rights guaranteed by PEBA; discouraging membership in the Union; and discriminating against its employees because they have signed or filed an affidavit, petition, grievance or complaint under PEBA; or by using public funds to influence the decision of its employees regarding whether to support or oppose a labor organization. In support of its claim, the Union alleges that after the Union filed certification petitions with the PELRB on May 18, 2022, on the morning of May 19, 2022, SRMC Manager, Kelly O’Mara, told employees working in the Fourth Floor Clinic during a morning meeting called a “safety huddle”, that SRMC’s Director, Paul Villani,

does not want the SRMC employees to unionize. During this huddle, O'Mara stated that if the SRMC employees join the union that they will have to pay union dues and that union dues are at least \$80 per pay period. Also on May 19, Security Guards Troy Baldonado and Jeff Chavez were ordered by management to escort IAMAW Representative Ryan Carrillo off of SRMC's leased property in order to stop him from handing out union fliers to the employees in the parking lot. The security guards stated that it is a standing directive from CEO Jamie Silva-Steele and Director of Human Resources Correen Bales that no union representatives or union fliers are allowed on SRMC property.

The Hospital Answered the Complaint on June 10, 2022 and responded to the Union's allegations by denying that Ms. O'Mara said that Paul Villani does not want SRMC employees to unionize and that Paul Villani himself ever said that he does not want SRMC employees to unionize. The Hospital admitted that two of its security guards compelled Union organizer Ryan Carrillo, who was handing out flyers in the SRMC parking lot, to leave SRMC property but denies that Security Guards told Mr. Carrillo that it was a standing directive from CEO Jamie Silva-Steele and Director of Human Resources Correen Bales that no union representatives or union fliers are allowed on SRMC property. SRMC does not dispute that its Security Guards escorted Mr. Carrillo off SRMC property, but it did so pursuant to a Solicitation, Distribution and Sales Policy that prohibits any non-employee, such as Mr. Carrillo, from soliciting or distributing materials or literature on SRMC premises.

SRMC acknowledged that union activities were discussed during the May 19, 2022 department huddle attended by staff primarily by text messages called a "Tiger Text" and that the department's Manager, Kelly O'Mara, told those in attendance that union dues would be around \$80 a paycheck. She also said, however, during the same meeting that she did not want to steer anyone away from the union and encouraged employees to ask questions and to reach out to HR as well, if needed.

Respondent moved for Summary Judgment on June 24, 2022 arguing that the Complaint fails to state a claim; that SRMC has fully complied with all of its legal obligations and that the statement concerning union dues made during the May 19, 2022, huddle was innocent and not accurately alleged. The Union's Response to the Summary Judgment Motion was filed on July 5, 2022 and on July 7, 2022 I issued my Letter Decision denying the Motion because genuine issues of disputed material facts existed requiring resolution at a hearing on the merits before judgment either way could be entered.

The parties entered a Stipulated Pre-Hearing Order on August 1, 2022 for a Merits Hearing originally scheduled to take place on August 8, 2022. However, because many of the witnesses and some of the exhibits in this case would be the same as those in *AFT & LAMAW v. UNM Sandoval Regional Medical Center*; PELRB 109-22, in the interests of administrative economy, the scheduled hearing was postponed to August 11, when it could be heard together with PELRB 109-22.

All parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Both parties submitted their closing briefs on August 29, 2022, both of which were duly considered. On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following **FINDINGS OF FACT:**

The following two facts have been stipulated by the parties in the Stipulated Pre-Hearing Order filed herein:

1. Petitioners are "labor organizations" as that term is defined in Section 4(K) of PEBA.
2. Pursuant to Senate Bill 41, Respondent is a "public employer" for the limited purposes of the PEBA and as that term is defined in Section 4(R) of PEBA.

From the pleadings I further find:

3. AFT and IAMAW engaged in an organizing effort at SRMC. (Respondent's Answer at ¶ 1).
4. I take Special Notice of this Board's records containing a Petition filed by the IAMAW on May 18, 2022, PELRB No. 303-22, seeking to represent a group of workers employed by the University of New Mexico Sandoval Regional Medical Center at its acute care hospital.
5. The PERLB has subject matter jurisdiction over this dispute and personal jurisdiction over the parties. (Respondent's Answer at ¶ 4).
6. SRMC Security Officers Troy Baldonado and Jeff Chavez asked a Union Organizer Ryan Carrillo, who was handing out union flyers in the SRMC parking lot to leave, as it is private property and referred to SRMC's policy on antisolicitation. (Respondent's Answer at ¶ 4(b); Affirmative Defense No. 6).
7. SRMC's Supervisor of Patient Access, Kelly O'Mara, attended a department "huddle" on the morning of May 19, 2022 on the Fourth Floor at SRMC. (Respondent's Answer at ¶ 4(a)).
8. Ms. O'Mara told employees present during the department huddle that union dues would be about \$80 per paycheck. (Respondent's Answer at ¶ 4(a)). Ms. O'Mara admittedly said, "it's around \$80 a paycheck for dues FYI" (Pt. 2, 00:32:37-00:32:41),
9. Since the May 19, 2022 meeting, Ms. O'Mara has been informed that unions set the amount of dues, and that once formally recognized as the exclusive representative by the Public Employee Relations Board dues deductions from the employee paychecks is a matter to be negotiated between the employer and the union. (Affirmative Defense No. 3).

In addition to the foregoing, based on the testimony and exhibits on record, I further find:

10. The May 19, 2022 huddle, in part took place remotely, as a "chat" through the "Tiger Connect" secure communication messaging system used throughout SRMC. (Testimony of Jennifer Romero, Audio Record Pt. 1 at 00:23:00-00:25:05; testimony of Kelly O'Mara, Audio Record Part 2 at 21:10-21-40); Joint Exhibit 2.

11. Daily department huddles (meetings) are conducted as a way for employees to come together and keep the department manager informed “of what’s going on” (Testimony of Paul Villani, Audio Record Pt. 2 at 03:40-4:00, testimony of Kelly O’Mara Audio Record Part 2 at 19:00-20:00)
12. Joint Exhibit 2 is a series of text messages among SRMC employees concerning the Patient Access department “huddle” on the morning of May 19, 2022 referred to in Finding No. 7 above.
13. Kelly O’Mara, testified that “The policy of the Hospital is that you can’t talk about Union activities on the clock.” (Testimony of Kelly O’Mara, Audio Record Part 2 at 41:40-41:55)
14. Both before and after May 18, 2022, the Hospital interpreted its policy regarding solicitation, distribution and sales to prohibit non-employee union representatives from entering its “premises” including its parking lot, so that no non-employee union organizer, including IAMAW organizer Ryan Carrillo, has ever been allowed onto the Hospital premises. (Testimony of Coreen Bales, Audio Record, Part 6 at 33:25-33:40; Joint Exhibit 1.)
15. The Implementation Section of SRMC’s Solicitation, Distribution and Sales policy, Joint Exhibit 1 provides:
 - “1. Non-employees are prohibited from entering UNM Sandoval Regional Medical Center’s premises to solicit or distribute any materials or literature at any time.
 - 1.1. This policy does not apply to vendors or other representatives that are on the premises with UNM Sandoval Regional Medical Center’s permission.
 - 1.2. Employees are required to report nonemployee violations of this policy to Security or the Human Resources Department immediately.
 2. For purposes of this policy, “work time” means a period of scheduled and/or actual performance of job duties for UNM SRMC, but does not include meal or break periods, or the time before the commencement or after the completion of job-related performance for that day.
 3. “Work area” means all areas in UNM Sandoval Regional Medical Center facilities except break rooms.

4. UNM Sandoval Regional Medical Center does not permit employees to use UNM Sandoval Regional Medical Center equipment or supplies to copy, post, or distribute materials other than UNM Sandoval Regional Medical Center-sponsored activities for UNM Sandoval Regional Medical Center's business and then only after having obtained supervisor permission.
 - 4.1. UNM Sandoval Regional Medical Center equipment includes items such as bulletin boards, copy machines, telephones, and email system.
 5. This policy does not prohibit the UNM Sandoval Regional Medical Center from promoting or distributing literature about UNM Sandoval Regional Medical Center-sponsored charitable activities when approved by administration.
 - 5.1. Employee participation in such activities is entirely voluntary.
 6. UNM Sandoval Regional Medical Center will not interfere with, restrain, or coerce employees in the exercise of their rights under federal or state labor laws.”
15. The effective date of SRMC's Solicitation, Distribution and Sales policy, Joint Exhibit 1, is May 20, 2022 and the “Summary of Changes” section of the policy indicates that it was amended to add the administrative approval for distributing literature within UNM SRMC charitable activities. (Joint Exhibit 1 ¶¶ 5 and 5.1.
 16. Prior to the events material to this case, the SRMC Solicitation Distribution and Sales Policy has not been applied to the solicitation and sale of Girl Scout cookies or caramel apple sales to raise funds for a local cheerleading squad. (Testimony of Adrienne Enghouse, Audio Record, Part 2 at 2:1:01:40 - 2:1:01:41).
 17. Joint Exhibit 2 contains no reference to Ms. O'Mara saying that SRMC Director Paul Villani does not want SRMC employees to unionize.
 18. Mr. Villani testified that he never instructed Ms. O'Mara to tell employees not to unionize. (Testimony of Paul Villani, Audio Record Pt. 2, at 5:15-5:30 and 00:11:43-00:11:55; see also Pt. 6, 00:06:53-00:07:10 (Testimony of Correen Bales concerning her investigation of PPC 108-22)).
 19. Ms. O'Mara testified that she said the dues were \$80 a paycheck because she “had heard that.” (Testimony of Kelly O'Mara, Audio Record Pt. 2 at 00:32:34-00:32:54).
 20. Joint Exhibit 2 and the rest of the chat shows that during the “tiger connect” chat she followed up her statement the dues were \$80 a paycheck with by further stating “I don't want to steer anyone away from the union” and, “If any of you are interested, ask questions.”

21. A total of six employees attended the department huddle on May 19, 2020.
(Testimony of Kelly O'Mara, Audio Record Part 2 at 00:20:10 – 21:10.)

REASONING AND CONCLUSIONS OF LAW: According to the Union's PPC herein, the Union alleges violations of the following three subsections of NMSA 1978 § 10-7E-19 (2020):

1. Section 19(B), making it a prohibited practice for a public employer or its representative to "interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the [PEBA]"; or use public funds to influence the decision of its employees or the employees of its subcontractors regarding whether to support or oppose a labor organization, with certain exceptions;
2. Section 19(D), making it a prohibited practice for a public employer or its representative to "discriminate in regard to hiring, tenure or a term or condition of employment in order to encourage or discourage membership in a labor organization";
3. Section 19(E), making it a prohibited practice for a public employer or its representative to "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".

I will address each of the enumerated claims in turn applying the facts as found above.

I. THE PREPONDERANCE OF THE EVIDENCE ESTABLISHED THAT SRMC VIOLATED NMSA 1978 § 10-7E-19(B) (2020) DURING A DEPARTMENT MEETING ON MAY 19, 2022.

Section 19(B) of the Act provides that a public employer or the public employer's representative shall not:

“interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act or use public funds to influence the decision of its employees or the employees of its subcontractors regarding whether to support or oppose a labor organization that represents or seeks to represent those employees, or whether to become a member of any labor organization; provided, however, that this subsection does not apply to activities

performed or expenses incurred:

- (1) addressing a grievance or negotiating or administering a collective bargaining agreement;
- (2) allowing a labor organization or its representatives access to the public employer’s facilities or properties;
- (3) performing an activity required by federal or state law or by a collective bargaining agreement;
- (4) negotiating, entering into or carrying out an agreement with a labor organization;
- (5) paying wages to a represented employee while the employee is performing duties if the payment is permitted under a collective bargaining agreement; or
- (6) representing the public employer in a proceeding before the board or a local board or in a judicial review of that proceeding;”.

(Emphasis added).

In 2020 the New Mexico Legislature amended § 19(B) of the PEBA to add the provision regarding the use of public funds highlighted in the citation above. Therefore, in order to prevail on its claim under § 19(B) in this case, the Union has the burden of proving either that SRMC’s Supervisor of Patient Access, Kelly O’Mara, interfered with, restrained or coerced a public employee in the exercise of a right protected by the Act by her comments during a department “huddle” on May 19, 2022, or that the huddle represents SRMC’s use of public funds to influence the decision of its employees regarding whether to support or oppose IAMAW as it seeks to represent a group of SRMC employees, or to influence their decisions whether to become a member of IAMAW.

The Union might also prevail on its claim under § 19(B) if it meets its burden of proving that SRMC’s Director of Security, Rudy Reyes, and/or Post Anesthesia Care Unit (PACU) Manager, Dustin Beirman, interfered with, restrained or coerced a public employee in the

exercise of the same § 5 right and prohibitions by preventing a Union organizer, Ryan Carrillo, from handing out union flyers to public employees, after one or both of them caused SRMC Security Guards, Troy Baldonado and Jeff Chavez, to remove Mr. Carrillo from the hospital's property, preventing him from distributing union flyers; or that preventing Mr. Carrillo from distributing union flyers on May 19, 2022 also represents SRMC's use of public funds to influence the decision of its employees regarding whether to support or oppose a IAMAW.

This case represents a case of first impression insofar as it is the first time this Board is construing the clause prohibiting a public employer's use public funds to influence the decision of its employees concerning support of a labor organization made a part of § 19(B) by the 2020 amendment.

I begin by noting that the protected right at issue here is that in NMSA 1978 § 10-7E-5 (2020), whereby public employees, other than management and confidential employees¹, may form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion as well as the right to refuse those activities. Additionally, Section 5 protects public employees' right to engage in "other concerted activities for mutual aid or benefit".

Section 19(B)'s prohibition against interference, restraint or coercion regarding the exercise of § 5 rights or the use public funds to influence the labor relations decisions of employees is consistent with the obligation to maintain "laboratory conditions" during the period between the filing of a petition for recognition as an exclusive bargaining representative and

¹ Although "supervisors" are omitted from the class of employees excluded from the PEBA's coverage in § 10-7E-5, their exclusion appears in § 10-7E-13(A). The PELRB has determined their absence from § 5 is a clerical error. See *Santa Fe Police Officers' Association v. City of Santa Fe*, 02-PELRB-2007 (Oct. 14, 2007).

certification of the bargaining unit, sometimes referred to as the “campaign” or “election period”². See *General Shoe Corporation*, 77 NLRB 124, 126 (1948).

The Union argues that two distinct areas of the Employer’s conduct support its § 19(B) claim. First, SRMC employee, Cenovia Vigil, reported to Mr. Carrillo that during a regularly held daily meeting between employees and management on May 19, 2022, SRMC’s Supervisor of Patient Access, Kelly O’Mara, made improper statements regarding the Union. Mr. Carrillo’s hearsay testimony was that employees attending the meeting, either in person or remotely, as a chat through the “Tiger Connect” secure communication messaging system used throughout SRMC, were told by Kelly O’Mara that SRMC Director Paul Villani does not want SRMC employees to unionize. Joint Exhibit 2 confirmed that Kelly O’Mara provided misleading information to employees regarding the union wherein she wrote “if you tell them (union organizers) you are interested, then that is a YES vote. It’s around \$80 a paycheck for dues FYI.”

Second, both before and after May 18, 2022, the Hospital has interpreted its solicitation, distribution and sales policy to prohibit non-employee union representatives from entering its “premises” including its parking lot, so that no non-employee union organizer, including IMAW organizer Ryan Carrillo, has ever been allowed onto the Hospital premises. As a result, SRMC Security Officers stopped Ryan Carrillo from distributing union literature in the SRMC employee parking lot on May 19, 2022.

With regard to the comments Kelly O’Mara made during the May 19, 2022 meeting, much of what was reported to Mr. Carrillo as having been said during the meeting turned out not

² The term “laboratory conditions” refers not only to maintaining the *status quo* as to existing terms and conditions of employment, but also to the prohibition of coercive speech or misrepresentations that could impair the employees’ freedom of choice regarding joining, assisting or otherwise supporting a petitioning union.

to have been said or the substance of those statements is disputed and not supported by a preponderance of the evidence. In particular, I consider Jennifer Romero's credibility to be weak and give her testimony little weight. Ms. Romero's relevant credible testimony is limited to that concerning her statement in the May 19, 2022 Tiger Connect chat. Therefore, I limit my § 19(B) analysis as it pertains to the May 19, 2022 meeting to Ms. O'Mara's reference to union dues as reflected in Exhibit J-2 and to her testimony explaining those statements and their aftermath.³

The chat reflected on Exhibit J-2 refers to a prior meeting of some kind wherein some aspect of the union's organizing effort was discussed⁴. The opening text by Krystal Bogdan asks "What did I miss during the call in (sic) meeting we had?" In reply to Ms. Bogdan's query, her fellow employee Cenovia Vigil responded "Nothing. The union will be *calling and calling you*. HR was obligated to give them our phone numbers but *if you don't want to be contacted let them know*" followed less than a minute later by the additional comment "*Or don't even interact with them*". (Emphasis added).

A plain reading of that exchange convinces me that Ms. Vigil came away from the prior meeting with the impression that after management was obligated to give IAMAW employee phone numbers, those employees should prepare themselves to be pestered by repeated annoying phone calls from the union and that employees were advised to tell the union not to contact them or to simply not interact with the union. Advice that one should tell the union not to contact you or to not interact with the union *if you don't want to be contacted*, does not render the advice neutral because to tender the advice is to presume the need for it. It

³ Because Joint Exhibit 2 does not contain any reference to Mr. Villani or any alleged statements by him, his testimony is not relevant to the union's allegations in PPC 108-22 and were not considered in this decision.

⁴ We know very few specifics about what was said during that prior meeting except what was summarized in the Tiger Connect texts, Exhibit J-2.

casts contact by the union in a negative light and pre-supposes the need to avoid it. Whether Ms. Vigil's perception of what was said during the call-in meeting is accurate is not as important as the impression itself and that her impression was subsequently communicated to all of her fellow Patient Access Department employees via the Tiger Connect texts represented in Exhibit J-2.

Ms. Bogdan then sought clarification of what the purpose of the call-in meeting was:

"oh ok... it was about SRMC becoming Union?" followed by her question two minutes later: "oohhhh ok so they want to know if I want to join?"

In response, Ms. O'Mara texted "YES if you tell them you are interested then that is a YES vote." (Capitalization in the original). Less than a minute later she added: "It's around \$80 a paycheck for dues FYI".

As the Union points out in its Closing Brief, both of those assertions are false. Telling a union you are interested in learning more about its organizing campaign is not the equivalent of a "yes" vote in favor of union representation, which can only be conveyed by a signed and dated interest card or by secret ballot and Ms. O'Mara had no factual basis for her belief that union dues would be \$80.00 per paycheck – it was just something she heard somewhere. Because SRMC is a public employer, no employee will ever be obligated to pay dues without their voluntary consent. See *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018) (declaring that public-sector unions may no longer collect fair-share fees but only voluntary membership contributions). Ms. O'Mara's text did not state that she heard or believed the dues would be \$80.00 per paycheck – the statement was offered as an assertion of fact. That Ms. O'Mara's texts up to that point in the Tiger Connect exchange had the effect of discouraging support for, or membership in, the Union is apparent from the text response by Ms. Bogdan that followed them:

“we have to pay 80\$ a paycheck?” “oh wow”.

SRMC is a public employer for the purposes of the PEBA as that term is defined in Section 4(R) of PEBA and at the time the Tiger Texts, Exhibit J-2, were generated, the Union that is the subject of the text messages, Complainant herein, was involved in an organizing campaign seeking to represent a group of workers employed by SRMC. Because those texts were part of Patient Access Department “huddle” in which all attending were SRMC employees on paid time using the employer’s “Tiger Connect” secure communication messaging system used throughout SRMC exclusively, for the purpose of employees to come together and keep the department manager informed of what’s going on, I conclude that SRMC used public funds to influence the decision of its employees regarding whether to support or oppose a labor organization seeking to represent those employees, or whether to become a member of IAMAW in violation of § 19(B). None of the six enumerated exceptions to application of § 19(B) exist under the facts of this case.

This conclusion is bolstered by the texts that continued afterward. Approximately seven minutes later, at 9:04 a.m. Ms. O’Mara texted “I don’t want to steer anyone AWAY from the union. If any of you are interested, ask questions. You can reach out to HR as well too if needed”. (Capitalization in the original). That text is interesting in two ways: First, it strikes me as insufficient to “un-ring the bell” once rung by misrepresenting union dues and what constitutes a “yes” vote in support of representation. Second, it compels the rhetorical question “Why would one stress that they didn’t want to steer anyone away from the union unless they realized that their texts did exactly that?” To ask the question is to answer it, and the answer supports the conclusion I have reached here. The texts in Exhibit J-2 continue with an exchange between Jennifer Romero and Ms. O’Mara in which Ms. Romero expressed her dissatisfaction with SRMC’s Human Resources Department’s responses to her

questions about the union's organizing campaign, but because I find Ms. Romero's credibility to be weak I do not address her comments in Exhibit J-2. Ms. O'Mara's final text message appearing on Exhibit J-2 states: "True Jen – that's why I say..if you ARE interested then ask them questions. They can't just take money from you so even if you say YES it doesn't mean it will happen for sure and they would take dues from you".

If I was deciding this case under the first clause of § 19(B) requiring that a preponderance of the evidence sustain allegations of interference with, restraint or coercion of employees in the exercise of their rights under § 5, that text might arguably be material. However, because this case is decided under the second clause of § 19(B) requiring that a preponderance of the evidence establish the SRMC's use public funds to influence the decision of its employees regarding support of a labor organization seeking to represent them, I do not consider that particular text message to be significant.

Because there is no corollary provision in the NLRA such as that found in the 2020 amendment to § 19(B) concerning the employer's use of public funds, and because this decision is based on that amendment, the cases decided under the NLRA cited by the parties are of little relevance and I do not rely upon them for this decision.

II. THE PREPONDERANCE OF THE EVIDENCE ESTABLISHED THAT SRMC VIOLATED NMSA 1978 § 10-7E-19(B) (2020) BY PREVENTING A NON-EMPLOYEE UNION REPRESENTATIVE, RYAN CARRILLO, FROM DISTRIBUTING UNION LITERATURE TO SRMC EMPLOYEES IN ITS PARKING LOT ON MAY 19, 2022.

For reasons similar to those outlined above, the Union has established by a preponderance of the evidence that SRMC used public funds to influence the decision of its employees regarding whether to support or oppose a IAMAW when it prevented a Union organizer, Ryan Carrillo, from handing out union flyers to public employees. Troy Baldonado and Jeff

Chavez were employed by SRMC as Security Officers and were acting in the course of their duties, when they asked Mr. Carrillo, to cease distributing union flyers and leave Hospital premises because the Hospital's parking lot is private property, referring to SRMC's policy on antisolicitation. Both before and after the May 18, 2022, date when SRMC came under the PEBA, the Hospital interpreted its Solicitation, Distribution and Sales policy to prohibit non-employee union representatives from entering its premises including its parking lot, so that no non-employee union organizer, including IAMAW organizer Ryan Carrillo, has ever been allowed onto the Hospital premises.

While it is true that under the NLRA, non-employee union organizers have fewer access rights than employees and may be lawfully prohibited from accessing and distributing union literature on company property, that is only true if "reasonable efforts ... through other available channels of communication will enable those organizers to reach the employees," and the employer does not discriminate against the union by allowing distribution of items by other non-employees. See *NLRB v. Babcock & Wilcox Co.*, 351 US 105, 112-113 (1956) (regarding union access to private property), and *Lechmere, Inc. v. NLRB*, 502 US 527, 533-534 (1992) (regarding access to public property or quasi-public property, meaning private property that is open to the public). However, I do not decide this case on whether reasonable efforts through other available channels of communication will enable those organizers to reach the employees and whether the employer's policy discriminates against the union by allowing distribution of items by other non-employees. Rather, the prohibited practice is substantiated by SRMC's use of public funds to prevent a non-employee union organizer communicating with its employees by distributing leaflets.

The purpose of the Public Employee Bargaining Act, as stated in § 10-7E-2, is, in part to guarantee public employees the right to organize and bargain collectively with their

employers.⁵ NMSA 1978 § 10-7E-5 (2020) promotes advancement of those rights by further protecting the right of eligible employees to form, join or assist *a labor organization* for the purpose of collective bargaining through representatives chosen by public employees *without interference, restraint or coercion...*”

Because, the 2020 amendment of the Act § 19(B) prohibits the use public funds to influence the decision of its employees or the employees of its subcontractors regarding whether to support or oppose a labor organization that represents or seeks to represent those employees, or whether to become a member of any labor organization, I can think of few clearer violations of that prohibition than that occurring under the facts of this case.

While I recognize a legitimate business interest in securing the employer’s premises, security does not require using public funds to prevent a union organizer setting foot on the employer’s property altogether, particularly when less restrictive measures are available such as limiting time place and manner of the organizer’s presence by requiring checking in with hospital security, badging or perhaps even escorting the non-employee representative to non-work areas. In summary, while under the NLRA an employer may not (as a rule) be compelled to permit nonemployee organizers onto its property, under the PEBA, public funds may not be expended to prevent nonemployee organizers coming onto its property for legitimate union organizing activities consistent with §§ 2 and 5 of the Act. Here, Mr. Carrillo’s quietly distributing pamphlets in a parking lot posed no security threat and did not in any way interfere with patient care. He was stopped in that peaceful pursuit by Security Officers “on the clock” paid with public funds and acting pursuant to a public employer’s

⁵ As employees of a “public employer” under the Act, those employees are necessarily public employees entitled to the rights and protections of the Act, regardless of their current employment-at-will status. See discussion of at-will employment status in *United Health Professionals of New Mexico, AFT & UNM Sandoval Regional Medical Center*; PELRB 304-22 (August 23, 2022), currently under Board review.

policy. Accordingly, the preponderance of the evidence established that SRMC violated NMSA 1978 § 10-7E-19(B) (2020) by preventing Ryan Carrillo's distribution of union literature to employees in the SRMC parking lot on May 19, 2022.

I decline to consider evidence of other work rules or employer actions that the Union argues may interfere with employees' rights under PEBA because application of those other rules and actions have not been plead as part of the Union's Section 19(B) claim in this case.

Similarly, because the union has filed multiple PPCs against SRMC, one of which were heard on the merits together with this case at the August 11, 2022 hearing, I do not consider any evidence relevant to one of those other prohibited practices to support any finding against SRMC as to this PPC.

III. THE UNION DID NOT MEET ITS BURDEN OF PROOF THAT SRMC VIOLATED NMSA 1978 § 10-7E-19(D) (2020) PROHIBITING DISCRIMINATION IN REGARD TO HIRING, TENURE OR A TERM OR CONDITION OF EMPLOYMENT IN ORDER TO ENCOURAGE OR DISCOURAGE MEMBERSHIP IN A LABOR ORGANIZATION.

Because of the distinction between a *nonemployee* union organizer and an *employee* union activist, drawing a direct comparison between Mr. Carrillo being prevented from distributing union literature on hospital premises and employees selling Girl Scout cookies and cheerleader team caramel apples is not possible. As that is the only comparison in evidence upon which I could conclude that SRMC violated § 19(D) I conclude that the Union has not proven by a preponderance of the evidence that SRMC committed a violation of NMSA 1978 § 10-7E-19(D) (2020).

III. THE UNION DID NOT MEET ITS BURDEN OF PROOF THAT SRMC VIOLATED NMSA 1978 § 10-7E-19(E) (2020) PROHIBITING DISCHARGE OR OTHER DISCRIMINATION 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.

A Section 19(E) claim by the union presumably looks to unequal treatment of employees by SRMC's application of its solicitation policy. It's hard to tell because the Union did not clearly address the claim in its closing brief. There is no evidence that we are dealing with a situation in which an employee gave "information or testimony given pursuant to the provisions of the Public Employee Bargaining Act", but rather, I deduce that we are dealing with the clause prohibiting discrimination against a public employee that is forming, joining or choosing to be represented by a labor organization. I am somewhat in the dark about which SRMC employee the Union alleges has been discharged or otherwise discriminated against and what form the discrimination took. The Union's brief does not dispel that darkness. If I have to guess which employee or employees are at issue and what the acts constituting discrimination may be, that is a strong signal that the union did not meet its burden of proof that SRMC violated NMSA 1978 § 10-7E-19(E) (2020).

DECISION: Respondent SRMC does not dispute that it is a public employer subject to the Act for purposes of this PPC. As was discussed in *United Health Professionals of New Mexico, AFT v UNM Sandoval Regional Medical Center*, PELRB 304-22, (August 23, 2022), currently under Board review, the Respondent's employees are "public employees" covered by the Public Employee Bargaining Act unless they are otherwise within one of the classes of employees expressly excepted from its coverage, i.e. management, supervisory or confidential employees. I reiterate my conclusion in that case that while a property interest in employment is indicia of regular employee status, it does not follow that it is the single defining criteria so that no one who serves at-will may be considered a regular employee

under the Act. Therefore, the Respondent SRMC is subject to the prohibitions of NMSA 1978 § 10-7E-19(B) (2020), making it a prohibited practice for a “public employer or his representative” to “interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the [PEBA]”; or use public funds to influence the decision of its employees or the employees of its subcontractors regarding whether to support or oppose a labor organization, with certain exceptions that do not apply here. While the facts as found herein may, arguably, support the union’s claim that SRMC interfered, restrained or coerced its employees in the exercise of their right to engage in concerted activities for mutual aid or benefit, I do not decide this case based on whether the employer exhibited anti-union animus or whether statements by Kelly O’Mara on May 19, 2022, constituted interference, restraint or coercion. Likewise, I do not base this Report and Recommended Decision on whether the employer’s Solicitation, Distribution and Sales Policy was applied in a non-discriminatory manner when union organizer Ryan Carrillo was asked to leave the employer’s premises on May 19, 2022. Rather, this Report and Recommended Decision is based on that clause of § 19(B) prohibiting the SRMC’s use of public funds to influence the decision of its employees regarding support of a labor organization seeking to represent them. I conclude for the reasons stated above, that SRMC used public funds to influence the decision of its employees regarding whether to support or oppose a labor organization seeking to represent those employees, or whether to become a member of IAMAW to discourage support for or membership in the Union in violation of § 19(B).

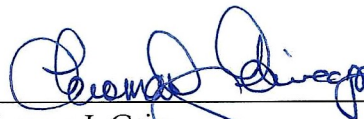
I further conclude that the Union did not prove by a preponderance of the evidence that SRMC violated NMSA 1978 § 10-7E-19(D) (2020) prohibiting discrimination in regard to hiring, tenure or a term or condition of employment in order to encourage or discourage

membership in a labor organization, nor did it meet that burden with regard to its claim that SRMC violated NMSA 1978 § 10-7E-19(E) (2020) prohibiting discharge or other discrimination 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.

Any implications that the Union's solicitation of interest cards from SRMC employees constituted fraud or coercion are without merit. I can find no evidence that any of the Union's actions rose to that level.⁶

WHEREFORE, Respondent should be Ordered to: (1) cease and desist from all violations of the PEBA as found, (2) post notice of its violation of PEBA as found herein in a form acceptable to the parties and this Board for a period of 30 days and assurances that it will comply with the law in the future.

Issued, Thursday, September 22, 2022.



Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board
2929 Coors Blvd. N.W., Suite 303
Albuquerque, New Mexico 87120

⁶ See *Owens-Corning Fiberglas Corporation and Glass Bottle Blowers Association of the United States and Canada*, AFL-CIO 179 NLRB 219, and *American Wholesalers, Inc. and Textile Workers Union of America*, AFL-CIO, 218 NLRB 292