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10-PELRB-2024

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

UNITED HEALTH PROFESSIONALS
OF NEW MEXICO, AFT, AFL-CIO,

Complainant,

v. **PELRB No. 111-23**

UNIVERSITY OF NEW MEXICO
SANDOVAL REGIONAL MEDICAL
CENTER,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board at its regularly scheduled meeting on January 9, 2024 for review of the Hearing Officer's Report and Recommended Decision issued in this case on November 17, 2023. Having reviewed the file, hearing argument from the parties, and being otherwise sufficiently advised, the Board, voted 3-to adopt the Hearing Officer's Report and Recommended Decision, issued in this case on November 17, 2023.

WHEREFORE the Hearing Officer's Report and Recommended Decision, issued in this case on November 17, 2023 is hereby adopted as the Order of this Board.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

DocuSigned by:
Peggy Nelson
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PEGGY J. NELSON, BOARD CHAIR **DATE:** 2/8/2024

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

UNITED HEALTH PROFESSIONALS OF NEW MEXICO, AFT, AFL-CIO,

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v. **PELRB No. 111-23**

UNIVERSITY OF NEW MEXICO SANDOVAL REGIONAL MEDICAL CENTER,

Respondent.

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

THIS MATTER comes before the Hearing Officer for hearing on the merits of United Health Professionals of New Mexico, AFT (Union) claim that University of New Mexico Sandoval Regional Medical Center (SRMC) violated the New Mexico Public Employee Bargaining Act, Sections 5(A) (giving public employees the right 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"); 5(B) (giving public employees the right to engage in concerted activities for mutual aid or benefit); 19(A) (making it a prohibited practice for a public employer to "discriminate against a public employee with regard to terms and conditions of employment because of the employee's membership in a labor organization"); 19(B) (making it a prohibited practice for a public employer to "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"); 19(D) (making it a prohibited practice for a public

employer 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"); 19(E) (making it a prohibited practice for a public employer to "discharge or otherwise discriminate against a public employee because the employee has signed or filed an affidavit, petition, grievance or complaint or given information or testimony pursuant to the provisions of the Public Employee Bargaining Act or because a public employee is forming, joining or choosing to be represented by a labor organization"); and 19(G) (making it a prohibited practice for a public employer to "refuse or fail to comply with a provision of the Public Employee Bargaining Act or board rule"). The Union's claims arise out of SRMC's three-day suspension of one of its employees, Regina McGinnis, because she used her key card badge to allow the Union's non-employee representative, Adrienne Enghouse, access to various restricted areas of the Hospital on May 21, 2023. Previously, on September 19, 2023, I dismissed the Union's claim that SRMC violated the PEBA by failing to bargain the disciplinary action at issue. See Letter Decision re: Motion for Partial Dismissal, PELRB Case No. 111-23, p. 2.

According to the parties' Stipulated Pre-Hearing Order, the only issue to be determined at the Hearing on the Merits was whether SRMC violated the PEBA when it suspended Ms. McGinnis and reduced her pay in relation to her role in the events of the Union's visit to SRMC on May 21, 2023. A hearing on the merits was held on November 15, 2023 and at the close of the Union's case-in-chief, SRMC moved for judgment in its favor (directed verdict). I granted that Motion with the result that the Prohibited Practices Complaint was dismissed in its entirety.

Applicable Legal Standard. A directed verdict is granted if, after reviewing all of the evidence in a light most favorable to the nonmoving party, the evidence as a matter of law is insufficient to justify judgment in favor of the moving party. See, J. Walden, Civil Procedure in New Mexico Sec. 9c (2) (a) at 225 (1973) and 5A J. Moore, Moore's Federal Practice ¶ 50.02 (2d ed. 1987). Under New

Mexico case law, a motion for directed verdict should not be granted unless it is clear that "the facts and inferences are so strongly and overwhelmingly in favor of the moving party that the judge believes that reasonable people could not arrive at a contrary result." *Melnick v. State Farm Mut. Auto. Ins. Co.*, 1988-NMSC-012, ¶ 11, 106 N.M. 726, 749 P.2d 1105. The sufficiency of evidence presented to support a legal claim or defense is a question of law for the [district] court to decide." *Vought v. San Juan Cnty. New Mex.*, A-1-CA-39390 (N.M. App. Jan 19, 2023); *Collado v. Fiesta Park Healthcare, LLC*, 525 P.3d 378 (N.M. App. 2022); *Sunwest Bank of Clovis, N.A. v. Garrett,* 1992-NMSC-002, ¶ 9, 113 N.M. 112, 823 P.2d 912.

FINDINGS OF FACT:

1. Complainant is a "labor organization" as that term is defined in Section 4(K) of PEBA. (Stipulated).
2. Respondent is a "public employer" as that term is defined in Section 4(R) of PEBA (NMSA 1978, § 10-7E-4(R)) (2020)), by virtue of Senate Bill 41, which became effective May 18, 2022, for the sole purpose of the application of PEBA as provided in URPEDA, NMSA 1978, § 21-28-7(A). (Stipulated).
3. Regina McGinnis is an employee in the Rehab Department of UNM SRMC. (Testimony of McGinnis).
4. On May 26, 2023, Ms. McGinnis was issued a three-day suspension based on the allegation that:

   "On May 21, 2023, [she] used [her] badge to willfully allow an unauthorized person access to patient care and work areas. [Her] actions violated patient and staff safety practices, were an abuse of badge access privileges, and interrupted the work of employees on duty. [She] continued to accompany the unauthorized visitor even after a security officer engaged with [her] and questioned why [she] was in patient and work areas."

   (Testimony of McGinnis; Exhibit J-1, Suspension Notice).

5. The alleged "unauthorized person" who Ms. McGinnis allowed access on May 21, 2023, was Adrienne Enghouse, an employee of United Health Professionals of New Mexico, AFT. (Testimony of Ms. McGinnis and Adrienne Enghouse).
6. The purpose of Ms. Enghouse's presence on May 21, 2023 was to post Union flyers or notices of some unspecified sort, in various locations around the hospital. (Testimony of Ms. McGinnis and Adrienne Enghouse).
7. Ms. McGinnis assisted Union Representative Adrienne Enghouse in posting those union materials by providing her access to secured areas of the hospital normally limited by use of a badge/key card authorization system. (Testimony of Ms. McGinnis and Adrienne Enghouse).
8. As a condition of her employment, Ms. McGinnis entered into a "Workforce Member Confidentiality Agreement", part of which provides that she agrees "… not to share or release any authentication code or device, password, key card, or identification badge to any other person…". She further agrees "…that, in the event I breach any provision of this Agreement, SRMC has the right to reprimand me or to suspend or terminate my employment…" (Testimony of Ms. McGinnis; Exhibit 4).
9. Ms. McGinnis testified that she was aware of SRMC's Access Control policy, Exhibit J-3, effective 5/20/2022, which provides in pertinent part:
    a. "Access to facilities, grounds, and information systems will be controlled to help assure a secure environment for all patients, partners in care, staff, physicians, and assets. UNM Sandoval Regional Medical Center (UNM SRMC) must appropriately limit physical access to the information systems contained within its facilities while ensuring that properly authorized workforce members can physically access such systems. UNM SRMC will prevent unauthorized physical access to its facility and to all information systems containing Electronic Protected Health Information (EPHI). UNM SRMC utilizes a combination of electronic card access and restricted key locking systems to secure all facilities."

b. Although there is unrestricted access to the Emergency Department's lobby area on a 24-hour basis, access into the emergency department treatment areas is secured and requires card access for staff and controlled monitored access for patients and "partners in care". (Ms. Enghouse does not purport to be a patient or partner in care at SRMC).

c. There are no restrictions to the public areas of the Medical Office Building (MOB) during "operational hours" of Monday through Friday between the hours of 6:00 AM and 9:00 PM; however, on weekends, as was the period at issue here, the MOB has "restricted access".

d. Paragraph 7.2 of the Access Control policy provides: "Staff members will not open any door within the Facility for the purpose of allowing access to any non-staff member or other unidentified persons.

10. Neither Ms. McGinnis nor Ms. Enghouse sought permission for, or notified SRMC of, their intent to visit the Intensive Care Unit (ICU) or the Respiratory Therapy Department for the purpose of posting Union flyers prior to doing their accessing those areas on May 21, 2023 and consequently were without permission to do so. (Testimony of Ms. McGinnis and Adrienne Enghouse).

CONCLUSIONS AND ANALYSIS. This Board has jurisdiction over the parties and subject matter. To the extent the Union argues that SRMC is interfering with, restraining or coercing its public employee McGinnis specifically, its public employees generally, or impairing the union itself, in the exercise of organizational and representational rights guaranteed by the Public Employee Bargaining Act because it seeks to keep AFT's representative, Adrienne Enghouse, away from the facility, I remind them that is not the case before me for decision. As stated in the Pre-Hearing Order, there is a single, fairly

straightforward issue to be decided: "Whether Respondent violated PEBA when it suspended Regina Hite McGinnis and reduced her pay in relation to her role in the events of the Union's visit to SRMC on May 21, 2023." The Union did not make a *prima facie* case that any violation of the Act occurred as the issue was framed for me to decide.

It is not disputed that Ms. McGinnis provided Union Representative Adrienne Enghouse access to secured areas of the hospital by use of her badge/key card and that by doing so Ms. McGinnis violated a "Workforce Member Confidentiality Agreement" not to share her key card or identification badge. By that same agreement she acknowledged that in the event she breached any provision of the agreement, SRMC has the right to reprimand, suspend or terminate her employment. It is also undisputed that Ms. McGinnis was aware of SRMC's Access Control policy, which restricts access to the Emergency Department and Medical Office Building during the dates and times at issue, thereby prohibiting her providing access to those areas by non-staff member such as Adrienne Enghouse, which she acknowledges doing. Neither Ms. McGinnis nor Ms. Enghouse sought permission for, or notified SRMC of, their intent to visit the Intensive Care Unit (ICU) or the Respiratory Therapy Department for the purpose of posting Union flyers prior to doing their accessing those areas on May 21, 2023 and consequently were without permission to do so that that Ms. Enghouse cannot be deemed to be "authorized" to be in those areas thereby excusing Ms. McGinnis' providing her access.

Based on Ms. Enghouse's testimony, I conclude that the Union is under the misapprehension that the restrictions on access to the facility by a non-employee union representation in evidence here, *per se* violate the PEBA. That is not the law. The PEBA provides at NMSA 1978 § 10-7E-15(C) that "A public employer shall provide an exclusive representative of an appropriate bargaining unit *reasonable* access to employees within the

bargaining unit..." Assuming for the sake of argument that AFT is an "exclusive representative of an appropriate bargaining unit", its access to employees at the employer's facility is not unfettered but is subject to a "reasonable" standard.[1] The National Labor Relations Act, like the PEBA Section 19(B) prohibits covered employers interfering with, restraining or coercing covered employees in the exercise of a guaranteed organizational or representational rights so cases construing a non-employee union representative right to access an employer's premises under the NLRA are instructive. In *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956), the NLRB observed that while the NLRA required an employer to refrain from interfering, restraining or coercing employees' exercise of their statutory rights, the Act does not require that an employer permit the use of its facilities by nonemployees for promotional or organizing purposes. Even in areas open to the public, an employer has a right to promulgate and enforce rules and practices regulating conduct to be carried out in that public space *as long as they are facially neutral and enforced in an even-handed and consistent fashion.* Thus, absent disparate treatment, where by a rule or practice, a property owner bars access by nonemployee union representatives seeking to engage in certain activities, while permitting similar activity in similar relevant circumstances by other nonemployees, an employer may decide what types of activities, if any, it will allow by nonemployees on its property and exclude those nonemployees who elect to engage in such proscribed conduct, even though they are affiliated with a union and on premises to engage in organizational activities. In a later opinion, the Supreme Court deemed the burden to be

[1] § 10-7E-15(C)(2) provides that "reasonable access" includes: (a) the right to meet with employees during the employees' regular work hours at the employees' regular work location to investigate and discuss grievances, workplace-related complaints and other matters relating to employment relations; and (b) the right to conduct meetings at the employees' regular work location before or after the employees' regular work hours, during meal periods and during any other break periods. None of the enumerated reasons for access are at issue in this case.

on the nonemployee union organizer to show such circumstances exist meeting one of the narrow exceptions to an employer's right to control access to its facility. See *Sears Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 205 (1978). More recently, in *In re: University of Pittsburgh Medical Center*, 368 NLRB No. 2 (June 14, 2019) the NLRB affirmed an employer's right to enforce rules and practices that regulate the employer's property, so long as the practices do not violate the Act nor fall within the *Babcock* exceptions. The Union's argument that SRMC *does* discriminate against Ms. McGinnis falls flat because its witnesses testifying that vendors have sometimes accessed those areas could not say whether those vendors were otherwise authorized by the employee for a legitimate business purpose or conversely whether the employer was aware that vendors had been allowed access to secured areas. Ms. Enghouse also testified that on one occasion an outside medical care provider was allowed into a secured patient care area where he treated an SRMC patient and the staff member permitting such access was not disciplined. She did not explain to my satisfaction the basis for the assertion that the outside care provider's treatment should not have been allowed, did not explain whether she knew it was or was not authorized, and if it was not authorized, whether SRMC was aware of the security breach so that appropriate disciplinary action could be taken. That particular incident was significant to me, not because it demonstrated disparate treatment as the Union intended, but because it underscored the necessity of SRMC's Access Control policy and how serious the consequences for breach of that policy may be.

Any reasonable person would acknowledge the wisdom of limiting access to areas of a hospital were sick or injured people are present both because of the risk of exposure to bacteria or viruses from without as well as the potential risk of exposure to the outsider.

That common-sense notion is reflected in the Access Control policy itself, which states in part:

> "*Access to facilities*, grounds, and information systems *will be controlled to help assure a secure environment for all patients, partners in care, staff, physicians, and assets.* UNM Sandoval Regional Medical Center (UNM SRMC) must appropriately limit physical access to the information systems contained within its facilities while ensuring that properly authorized workforce members can physically access such systems. *UNM SRMC will prevent unauthorized physical access to its facility* and to all information systems containing Electronic Protected Health Information (EPHI). *UNM SRMC utilizes a combination of electronic card access and restricted key locking systems to secure all facilities.*"

See Exhibit J-3 (Emphasis added).

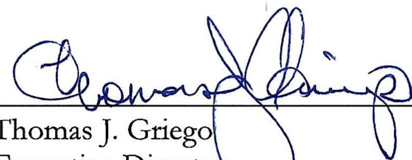
Because the mere fact that SRMC's policies and agreements restrict an employee's use of a key card to provide access to restricted areas by a non-employee union representative is not *per se* unlawful or legally sufficient to establish a violation of the PEBA it is incumbent upon the Union to provide proof by a preponderance of the evidence that the employer has permitted similar conduct by other non-employees before a *prima facie* case for discrimination by the discipline at issue may be established. Based on the evidence presented, I cannot conclude that the employer's discipline of Ms. McGinnis in this case was "disparate treatment" so that the burden would shift to SRMC to show a bona fide non-discriminatory reason for its application of its rules and agreement. Neither do I conclude that AFT is entitled to the rebuttable presumption of discrimination that may arise when the employer does not provide the reason for the disciplinary action. AFT presumes that citation to the exact chapter and verse of the policies alleged to have been violated must be given to the employee. While that exactitude may be required by a Collective Bargaining Agreement, it is not required by the PEBA. Rather, the level of notice required by law may be compared to the notice pleading requirements under the New Mexico Rules of Civil Procedure. I take guidance on this point from JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) at

Chapter 7.II.C.1.d and the cases cited therein. I conclude that by informing Ms. McGinnis that her discipline was being taken because her actions on May 21, 2023 "violated patient and staff safety practices, were an abuse of badge access privileges, and interrupted the work of employees on duty. You continued to accompany the unauthorized visitor even after a security officer engaged with you and questioned why you were in patient and work areas" was sufficient notice of the SRMC policies violated, so that a presumption of discrimination did not arise. See Exhibit J-3.

Complainant did not establish a connection between the discipline of Ms. McGinnis in this case for her admitted use of her key card to allow access to the unauthorized non-employee Union representative, and any prior Prohibited Practice Complaints for anti-union retaliation. There was a substantial, non-discriminatory reason for taking the disciplinary action at issue apart from her union activities and affiliation that were not distinguished by the union's evidence. Accordingly, no violation of Sections 5(A) or (B); 19(A), (B), (D) and (E) occurred. Without a violation of those provisions there can be no violation of Section 19(G) making it a prohibited practice for a public employer to "refuse or fail to comply with a provision of the Public Employee Bargaining Act or board rule" can be established.

For these reasons, judgment in favor of SRMC is appropriate. It's Motion for a Directed Verdict is **GRANTED** and Complainants PPC is **DISMISSED.**

Issued this 17th day of November, 2023.



Thomas J. Griego
Executive Director
Public Employee Labor Relations Board
2929 Coors Blvd N.W., Suite 303
Albuquerque, NM 87120