37-PELRB-2024

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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

Complainant,

v. **PELRB No. 121-23**

REGENTS OF THE UNIVERSITY OF NEW MEXICO, FOR ITS PUBLIC OPERATIONS KNOWN AS THE UNIVERSITY OF NEW MEXICO HOSPITAL, SPECIFICALLY INCLUDING THE UNM SANDOVAL REGIONAL MEDICAL CENTER,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board at its regularly scheduled meeting on September 5, 2024, upon the Respondent's request for Review of the Hearing Officer's July 18, 2024 Report and Recommended Decision finding and concluding that it did not comply with its obligations under NMSA 1978, § 10-7E-15(C) (2020) and therefore committed a practice prohibited by sections 19(C)(2) requiring Respondent to provide Complainant's non-employee representative reasonable access to employees within the bargaining unit, including (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

The Board by a vote of 2-0 (Vice-Chair Nash being absent) hereby upholds and affirms the Hearing Officer's Report and Recommended Decision and Orders the Respondent to:

(1) Cease and desist from the violations of the PEBA found by the Hearing Officer and provide AFT representatives access to Sandoval Regional Medical Center facilities in the same

manner as it provides to IAMAW representatives at Respondent's SRMC campus and the NUHHCE, District 1199NM representatives at its main campus in Albuquerque; and,

(2) Post notice of its violation of PEBA as found by the Hearing Officer in a form acceptable to the parties and this Board for a period of 30 days containing assurances that it will comply with the law in the future and the procedures established to comply with this Order.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Signed by:
Mark Myers
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9/10/2024

MARK MYERS, CHAIR **DATE**

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. 121-23**

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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 an Amended Complainant (PPC) filed by United Health Professionals of New Mexico, AFT, AFL-CIO (AFT), alleging that Respondent (UNM SRMC) has refused to allow reasonable access to employees, per NMSA 1978, § 10-7E-15(C).

Prior to filing its Answer, UNM SRMC filed a Motion seeking to Stay these proceedings, which Motion was denied on March 1, 2024. UNM SRMC Answered the Amended Complaint on March 1, 2024 generally denying all allegations that it took any action or engaged in any conduct that violated any provision of the Public Employee Bargaining Act. In addition, UNM SRMC raised five affirmative defenses:

1. Respondent owes no duty to the Union under law.
2. The Union fails to state claims for which the requested relief may be granted.
3. The Union's claims are barred by the doctrines of laches, estoppel, and unclean hands.

4. The Union manufactured this Complaint specifically to retaliate against Respondent for the directed verdict it moved for and was granted in PPC 111-23.

5. The Union has sought enforcement of its asserted rights under PELRB Order No. 59-PELRB-2023 in the District Court, thereby divesting the Board of its jurisdiction over this matter.

According to the Stipulated Pre-Hearing Order in this case, the sole issue to be determined after a Hearing on the Merits is whether Respondent denied the Petitioner's non-employee Union representatives reasonable access to its UNM Sandoval Regional Medical Center campus in violation of the following sections of PEBA: 5(A), 5(B), 19(A), 19(B), 19(C), 19(G) of the PEBA. Complainant bears the burden of proving that its non-employee Union representatives have been denied "reasonable access" to the SRMC campus. See NMAC 11.21.3.16, which provides that in the absence of an approved settlement agreement, the hearing examiner shall conduct a formal hearing, assigning the burden of proof and the burden of going forward with the evidence to the complainant.

A Hearing on the Merits was held on June 12, 2024 at which all parties hereto were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Closing Briefs in lieu oral closing arguments were filed on June 28, 2024. 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:

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)) because it is an educational institution created by the New Mexico Constitution and New Mexico Statute. (Stipulated).
3. The PELRB has jurisdiction over this matter. (Stipulated).
4. Immediately following the Hearing Officer's granting Respondent a directed verdict in PELRB No. PPC 111-23 on November 15, 2023, the Union's Representative Stephanie Li, announced within the hearing of all in attendance that that the Union would immediately go to UNM SRMC premises to seek access to areas of the Hospital. Tr1 01:16:37-01:18:30, 01:19:53-01:20:13, 01:21:02-01:22:02, 01:39:49-01:41:14; Amended PPC, ¶ 5 and Respondent's Answer thereto.
5. I incorporate herein my Report and Recommended Decision PELRB No. PPC 111-23 issued on November 17, 2023, noting in my written analysis that the issue in that case was not whether UNM SRMC was interfering with, restraining or coercing the public employee specifically involved in the case, its employees generally, or impairing the union itself, in the exercise of rights protected by the Public Employee Bargaining Act but whether Respondent violated PEBA when it suspended and reduced the pay of a specific employee in relation to her role in the events surrounding a Union representative's visit to UNM 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.
6. On November 15, 2023, Union representatives Stephanie Li and Gino Satriana went to UNM SRMC's facility in Sandoval County seeking access to break rooms and other non-work areas at the regular work location during regular work hours. Tr1

01:16:37-01:18:30, 01:19:53-01:20:13, 01:21:02-01:22:02, 01:39:49-01:41:14; Amended PPC, ¶ 5 and Respondent's Answer thereto.

7. Although the Union alleged in Par. 5 of its Amended PPC that Stephanie Li and Gino Satriana sought access to the Hospital break rooms and other non-work areas at the regular work location "in order to meet with bargaining-unit members regarding matters of employment relations and Union concerns and to distribute information to bargaining-unit members" there was no evidence adduced as to what matters regarding employment relations the Union sought to meet with employees about and why meeting with employee in the workplace was the preferred method for communicating that information. The information to be distributed to employees on that date was admitted into evidence as Exhibit A.
8. On November 22, 2023, Union representatives Stephanie Li and Gino Satriana sought access to break rooms and other non-work areas at the regular work location during regular work hours in order to meet with bargaining-unit members regarding matters of employment relations and Union concerns and to distribute information to bargaining-unit members. Tr part 1 at 1:15-1:21; Amended PPC ¶ 8 and Respondent's Answer thereto.
9. Respondent admitted that it denied the Union access to secured patient care areas and redirected the Union to its publicly accessible area i.e., the Hospital cafeteria. Tr1 01:16:37-01:18:30, 01:19:53-01:20:13, 01:21:02-01:22:02, 01:39:49-01:41:14; Amended PPC ¶ 9 and Respondent's; Answer thereto.
10. Respondent admits that, within the six months preceding the filing of the PPC and as recently as February 2, 2024, Respondent has barred Adrienne Enghouse from

accessing the UNM Sandoval Regional Medical Center. Tr1 02:35:29-02:37:23; Exhibit 12; Amended PPC ¶ 10 and Respondent's Answer thereto.

11. The reason given by Management's witnesses for barring Adrienne Enghouse from the UNM Sandoval Regional Medical Center was her past "unlawful incursions into its secured patient care areas – which access she gained through coercive means" and her "unauthorized disclosure of confidential patient health information in violation of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Amended PPC ¶ 10 and Respondent's Answer thereto.

12. Ms. Silva-Steele and Ms. Enghouse participated in an evidentiary hearing on November 16, 2023 regarding Ms. Silva-Steele's TRO Petition. During the hearing, Enghouse expressed her refusal to obey criminal trespass laws. Accordingly, the Court temporarily enjoined Enghouse from entering Ms. Silva-Steele's private property for any purpose. On February 23, 2024, the Court held another evidentiary hearing on the issue of whether a permanent injunction against Enghouse should be issued. Following the evidentiary hearing held on February 23, 2024, the Court found that Enghouse continued to refuse to acknowledge her legal duty to obey criminal trespass laws and stay off of Ms. Silva-Steele's property, and was intentionally harassing and attempting to intimidate Ms. Silva-Steele. Accordingly, the Court permanently enjoined Enghouse from entering on the private residential property of Ms. Silva-Steele. (Exhibits 6-9).

REASONING AND CONCLUSIONS OF LAW:

I. PETITIONER HAS NOT MET ITS BURDEN OF PROVING VIOLATIONS OF THE PEBA SECTIONS 5(A), 5(B), 19(A) and 19(B).

A. The Union's Closing Argument Relies Primarily on NMSA 1978, § 10-7E-15(C) and Does not Apply Facts Established by the

Evidence or Stipulation to its Alleged Violations of Sections 5(A), 5(B), 19(A) or 19(B) of the PEBA. Although the Burden of Proof Lies With AFT on its Allegations, UNM SRMC has Demonstrated That Limiting Access of Non-Employee Union Representatives Stephanie Li and Gino Satriana to Respondent's Public Areas, and Barring Former Employee Adrienne Enghouse From SRMC Altogether on May 26, 2023 Does not Constitute a Violation of Sections 5(A), 5(B), 19(A) or 19(B) of the PEBA.

According to the Stipulated Pre-Hearing Order in this case, the sole issue to be determined is whether Respondent denied the Petitioner's non-employee Union representatives reasonable access to its UNM Sandoval Regional Medical Center campus in violation of the following sections of PEBA: 5(A), 5(B), 19(A), 19(B), 19(C), 19(G) of the PEBA. That would include events occurring in November of 2023, which were pled in both the first PPC herein and the subsequent Amended PPC, as well as the parties' Stipulated Pre-Hearing Order entered on June 6, 2024. AFT has not waived or abandoned claims based on those events and they were filed within the applicable limitations period.

NMSA 1978 § 10-7E-5 (2020), guarantees *public employees* covered by the Act the right to form, join or assist a labor organization for the purpose of collective bargaining through representatives of their choice "without interference, restraint or coercion and shall have the right to refuse those activities." Subparagraph B of Section 5 further guarantees *public employees* under the Act the right to engage in concerted activities for mutual aid or benefit. AFT does not argue any facts applied to Section 5(A) and (B) to support that UNM SRMC violated those sections of the PEBA by violating *employees'* rights as contrasted with the rights of their exclusive representative *qua* representative.

There is frequently significant overlap among claims for discrimination under § 10-7E-19(A), (B) and (C) and those under § 10-7E-5 for interference, as we see in the instant case. See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters 6.I.C, 7.I., II.8 and III,

concerning the NLRB's corollary to Section 5 of the PEBA; ("[t]he Board has noted since its earliest days that a violation by an employer of any of the ... subdivisions of Section 8," the NLRA prohibited practice section, "is also a violation of subdivision one," the NLRA's prohibition on interfering, restraining or coercing employees). Merely being difficult or unpleasant to employees and/or union representatives, even when the latter is engaged in conducting union business, does not violate PEBA unless coupled with or rising to the level of some prohibited conduct. Arguably, a violation of NMSA 1978, § 10-7E-15(C) would constitute the pre-requisite prohibited conduct. However, Sections 5(A), 5(B), 19(A) and 19(B) all address the rights of individual public employees protected by the Act. While AFT has more or less credibly argued the exclusive representative's perceived rights or preferences being infringed upon[1], it has not demonstrated or argued persuasively that any such infringement implicates the rights of individual employees required as an element of a claim for violation of Sections 5(A), 5(B), 19(A) and 19(B).

The same analysis pertains to the alleged events occurring in February of 2024 concerning the Employer barring the non-employee Union representative Enghouse from its premises.

II. PETITIONER HAS NOT MET ITS BURDEN OF PROVING VIOLATIONS OF THE PEBA SECTION 19(C).

NMSA 1978 § 10-7E-19(C) (2020) makes it a Prohibited Practice for a Public Employer to "dominate or interfere in the formation, existence or administration of a labor organization". This Board has had occasion in the past to construe Section 19(C). In *AFSCME Council 18 v. Department of Health,* 06-PELRB-2007 (December 3, 2007), we held that failure to give a union representative notice of a mandatory employee meeting concerning the terms and

[1] AFT points to the testimony of Kyle Arnone that typically Unions have access to the work areas and breakrooms in hospitals and that of Yolanda Ulmer, who testified that at UNM's main hospital campus, the Union has access to the cafeteria, nurse's stations, and breakrooms, the only condition being that the Union provide advance notice before visiting the facility.

conditions of employment, after the representative requested such notice, constitutes interference with the union's status as exclusive representative and interference in the collective bargaining relationship, contrary to § 19(C). Changing the duties of, and extending benefits to, three bargaining unit members without bargaining, was found to have violated § 19(C). *Central Consolidated School Association v Central Consolidated School District,* 27-PELRB-2013 (October 11, 2013).

This Board found no violation to § 19(C) in a dispute concerning an employee's reprimand for using state phones to conduct union business. Despite establishing the employee's union affiliation and activities, the union failed to demonstrate a clear connection between union-related calls and the reprimand. The evidence showed that restricting union-related calls to the last 15 minutes of the day did not significantly interfere with union business. Overall, there was insufficient evidence to support the alleged violations related to limiting organizational activities. *AFSCME Council 18 v. N.M. Taxation & Revenue Dep't*, PELRB Case No. 104-12, 55-PELRB-2012 (July 13, 2012).

In *In re: New Mexico Coalition of Public Safety Officers v. Santa Fe County,* 3-PELRB-2018 (January 17, 2018), the PELRB upheld the Summary Dismissal of the Union's claimed violation of the PEBA § 19(C). My Letter Decision dismissing the claim in that case noted that a similar provision in the NLRA has been construed to address a very narrow type and limited number of activities, such as establishment of a 'company union; infiltration of unions by lower-level supervisors; or failing to maintain neutrality between competing unions:

> "Unions frequently cite this PEBA section incorrectly, claiming violations of § 19(C) when an employer limits a union's access to employees, disciplines union stewards for union activity, engages in direct dealing or for other claims involving interference with employees' PEBA rights as contrasted with the rights of the union itself."

Letter Decision re: PELRB 118-17, November 29, 2017 at page 5.

The instant case does not present facts that would bring it within the narrow category of cases described in *In re: New Mexico Coalition of Public Safety Officers v. Santa Fe County*. Here, AFT refers to the testimony of Ms. Li and Mr. Satriana concerning events on November 15, 2023, and November 22, 2023, when they sought access to breakrooms and other non-work areas at UNM SRMC during regular work hours, in an attempt to meet with bargaining-unit members "regarding matters of employment relations" and "Union concerns", as well as to distribute information to bargaining-unit members. Their testimony did not specify what employment relations matters or Union concerns required meeting with employees. The information they sought to distribute is a flyer entitled "We're Your Union. "We've Got Your Back," conveying only the most general union promotional advocacy. Ms. Li's testimony about why it is so important for the Union to have access to breakrooms and not just the cafeteria because the cafeteria does not allow for confidential conversations, stressing the importance of employees being able to express their concerns about their bosses and the workplace with confidentiality and without the fear of observation, does not explain how a meeting in a breakroom, also open to management, would be any more amenable to a confidential conversation than the cafeteria would. She further testified that "These nurses and health care professionals have been expressing *for years* about the diminished care that has been happening in the hospital, and they are scared every single day." (Emphasis added). "They are scared for their license. They are scared." Taking as true her testimony that employees have been scared for years and that AFT has been recognized by this Board as an exclusive representative since November 20, 2023, it is difficult to understand how restricting union access to breakrooms constitutes domination or interference in the formation, existence or administration of AFT as a labor organization so that a claim under § 19(C) would lie. For the same reason, I give little weight to the self-

serving testimony of Gilbert Martinez and Alexis Roos that restrictions on AFT non-employee representative access to breakrooms has significantly impaired the ability of the Union to represent its members and be effective in the workplace. Martinez and Roos have not provided facts that would demonstrate the accuracy of their broad conclusory statements that "the restrictions placed on the Union have made it nearly impossible to support the employees with their valid concerns."

AFT argues that their attempts to gain access to the Hospital's break rooms were attempts to conduct "essential conversations…with its members…" and that "it is necessary for Union representatives to have these conversations freely with its members without the risk of the employer's listening ears." AFT does not provide evidence to demonstrate the essential character of the information it sought to convey. The self-promoting flyer introduced as Exhibit A communicated nothing of that character, especially in consideration of the fact that the Union had already been recognized and the unit certified by this Board. Rather, the facts indicate that this is another instance of a union incorrectly claiming a violation of § 19(C) based on the employer limiting a union's access to employees, viewed with disfavor by this Board in *In re: New Mexico Coalition of Public Safety Officers v. Santa Fe County.*

III. NMSA 1978, § 10-7E-15(C) (2020) ESTABLISHED A RIGHT FOR UNIONS TO ACCESS THE REGULAR WORK LOCATION DURING REGULAR WORK HOURS AT THE EMPLOYEES' REGULAR WORK LOCATION. THE PREPONDERANCE OF THE EVIDENCE SUPPORTS A CONCLUSION THAT UNM SRMC DID NOT COMPLY WITH ITS OBLIGATIONS UNDER SECTION 15(C) AND THEREFORE COMMITTED A PRACTICE PROHIBITED BY SECTIONS 19(C) AND 19(G) OF THE ACT.

NMSA 1978, § 10-7E-15(C) is not set forth in the parties' Stipulated Pre-Hearing Order as one of the listed sections of the PEBA before me for consideration. However, because the Union pled a violation of Section 15(C) in its PPC, and that matter had not been withdrawn or otherwise disposed of by motion prior to the Hearing on the merits, I regard it as being

properly before me and actually litigated at the merits hearing on June 12, 2024. AFT did not plead violations of Sections 15(D) or (E) nor are those sections among the listed contested issues in the parties' SPHO and so, are not properly before me and were not actually litigated at the merits hearing.

Section 15(C) of the PEBA provides:

> "A public employer shall provide an exclusive representative of an appropriate bargaining unit reasonable access to employees within the bargaining unit, including the following:
>
> (1) for purposes of newly hired employees in the bargaining unit, reasonable access includes:
>
> (a) the right to meet with new employees, without loss of employee compensation or leave benefits; and
>
> (b) the right to meet with new employees within thirty days from the date of hire for a period of at least thirty minutes but not more than one hundred twenty minutes, during new employee orientation or, if the public employer does not conduct new employee orientations, at individual or group meetings; and
>
> (2) for purposes of employees in the bargaining unit who are not new employees, 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."

The Union correctly states in its argument that the question of whether Section 15(C) was violated is a matter of first impression in New Mexico, inasmuch as we are called upon for the first time to construe the terms "work location", "work hours", "exclusive representative" in the context of non-employee union representatives, and "reasonable access". The term "reasonable access" is statutorily defined in Section 15(C) as meaning at a minimum that an employer is required to give an exclusive representative access to employees' regular work location during regular work hours for the specific purposes of investigating and discussing grievances, workplace-related complaints and other matters

relating to employment relations and to conduct meetings before or after the employees' regular work hours, during meal periods and during any other break periods. Section 15(C) draws no distinction between access allowed employee union representatives and non-employee union representatives.

This case requires that we balance requirements of Section 15(C) to allow access for certain purposes at certain times, with longstanding restrictions that *employee* union representatives (as contrasted with the non-employee representatives such as Enghouse, Li and Satarain in the instant case) while on break can discuss union business with fellow workers at any work location on the employer's work-site as long as such meetings do not take place in "immediate patient care areas". Additionally, the distribution of written materials may be prohibited both while an employee is on duty and in working areas. That is because in the case of distribution of written material, the potential for disruption of operations is greater. See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters 6.II.B and 19.III.B.3.

It remains the case that Respondent does not owe non-employee union organizers the same duties as it may owe employee organizers with regard to access to its SRMC campus. See *National Labor Relations Bd. v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956) ("No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline… But no such obligation is owed to nonemployee organizers") (internal citations omitted). Rather, "So long as nonemployee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place." *Lechmere v. NLRB*, 502 U.S. 527, 538 (1992). "It is only where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level,

balancing the employees' and employer's rights as described in the *Hudgens*[2] dictum." Id. (emphasis in original). The Regents have resolved those conflicts with the procedures negotiated with its other unions, thereby establishing what constitutes "reasonable access" going forward.

I do not construe Section 15(C) as altering the general rule that an employer has the right to bar non-employee union organizers from its property unless a union meets its "burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation." *Sears, Roebuck & Co. v. San Diego Co. Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978); *United Health Professionals of New Mexico, AFT, AFL-CIO v. University of New Mexico Sandoval Regional Medical Center*, 10-PELRB-2024, in re: PELRB No. 111-23 (Hearing Officer's decision at pp. 6-10). However, the Regents argument in this case seems to equate the term "reasonable access" as meaning the bare minimum access it can allow without running afoul of the law. I take a different approach in this Report and Recommended Decision.

It is UNM SRMC itself that has set the parameters of what is "reasonable access" in this case, including construction of the terms "work location," "work hours" and "exclusive representative" in the context of non-employee union representatives: UNM SRMC's policies do not preclude a patient's guests and family members, vendors, or other the non-employee union representatives employed by the International Association of Machinists and Aerospace Workers (IAMAW) and the National Union of Hospital and Healthcare Employees ("NUHHCE"), District 1199NM, from accessing the "work location" (including break rooms) through its patient care areas to meet with the employees they represent during the employees' work hours. To some extent therefore, the reasons given AFT in this case for

[2] See *Hudgens v. NLRB*, 424 U.S. 507 (1976).

limiting its access (e.g. lack of inoculation records, maintaining patient safety, the security of patient information and that UNM SRMC has *no* way of enforcing its employment policies or policies intended to protect Personal Health Information against AFT's non-employee representatives) is a bit of a pretense, in that Respondent has overcome all those obstacles for others while protesting that it cannot do so for AFT.

Both employee union representatives and non-employee union representatives perform a legitimate healthcare function when they are able to investigate and discuss hospital employee grievances, workplace-related complaints and other matters relating to employment relations, and conduct meetings at the employees' regular work location before or after the employees' regular work hours in furtherance of the stated goal of the PEBA to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions. See NMSA 1978 § 10-7E-2 (2020). Just as Respondent has apparently resolved that NUHHCE's and IAMAW's non-employee union representatives serve a legitimate healthcare function by their presence on hospital grounds, including breakrooms, for the purposes and at the times set forth in Section 15(C) so should this Board adopt the parameters of their access rights as the definition of reasonable access in this case. This decision is therefore consistent with prior decisions of this Board recognizing UNM SRMC's legitimate interest in meeting its legal obligations to maintain the security of its patients' Personal Healthcare Information and to mitigate harm to its patients. The Hospital remains able to limit the hours and location of any non-employee union representative visits that disrupt operations. That aspect is not affected by Section 15(C) and the definition of "reasonable access" established by this

Report and Recommended Decision. Further, the Respondent has recourse to this Board and its panoply of relief including injunctive relief to redress any breach of the parameters set forth by the Respondent for other non-employee visitors to its facilities. While I do not agree with the Union's argument that refusing to allow Union representatives into breakrooms "removes all opportunity for employees to conduct private work-related business in regular work location during regular work hours" it is accurate to say that doing so impairs the Union's rights protected by Section 15(C). It cannot reasonably be said, as the Union argues, that the restriction "forces employees to utilize their only personal time on work related business and causes them to engage with the Union at the cost of neglecting their personal needs" or that even if true that restricting meetings to break time violates the PEBA, because Section 15(C)(2)(b) expressly provides that the Union has "…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*." (Emphasis added). It is enough to say that restricting access to the cafeteria has the effect of impairing the opportunity for employees to conduct private work-related business in regular work location during regular work hours.

I reiterate to the extent that it may not be clear that the meetings and dissemination of information at issue does not take place in patient care areas themselves, but Respondent's employee break rooms at its SRMC campus where such meetings and dissemination of information would take place are only accessible by passing through secured patient care areas.

In summary, I conclude that Section 15(C) in this particular case is properly construed to mean that "work location", "work hours", "exclusive representative" in the context of non-employee union representatives, and "reasonable access" means ascribing the same meaning

of those terms and the same access to AFT as the UNM Board of Regents provides to the International Association of Machinists and Aerospace Workers ("IAMAW") at Respondent's SRMC campus and the National Union of Hospital and Healthcare Employees ("NUHHCE"), District 1199NM at its main campus in Albuquerque.

If the Complainant refuses or subsequently fails to abide by the conditions required by the Respondent that allows access to employee break rooms to its other unions for the reasons herein, in the mistaken belief that it has access to those areas without limitation or upon its own terms, it condemns itself to the status quo that it now complains of because it will be insisting on access that is not "reasonable".

Concerning the parameters of Union Representatives' access to the Respondent's facilities, I refer to Exhibit D, Section 5 of a Collective Bargaining Agreement between Respondent and IAMAW, which provides as follows:

> "Article 5 UNION ACTIVITY, VISITATION, AND BULLETIN BOARDS
>
> A. No employee shall engage in any Union activity, including the distribution of literature, that interferes with the performance of work during work time or in work areas of the Hospital. Solicitation of memberships or dues, campaigning for internal Union office, or other internal Union business shall be conducted only during the non-duty hours of the employees concerned and meetings with members shall only be held in the breakrooms designated as the employee's department breakroom or the cafeteria.
>
> B. The President of the Union or designee shall notify the Chief Human Resources Officer (CHRO) or designee in writing of the Union representatives or designees authorized to visit the Hospital on behalf of the Union. When a representative is away from work for a week or longer, the Union may notify the CHRO or designee of a replacement.
>
> C. Representatives of the Union shall have reasonable access to the Hospital in public areas for the purpose of monitoring the administration of this Agreement and shall not interfere with patient care or Hospital operations. Visits shall be to investigate and discuss grievances, workplace-related complaints and other matters relating to employment relations. When warranted by special or unusual circumstances arrangements may be made

with the CHRO or designee for employees who work in confidential areas where there is care being performed on patients or when additional visits are needed. Other Union staff and/or officers may visit the Hospital on occasion when notification is given to the CHRO or designee.

Where a Union representative finds it necessary to enter a department or unit of the Hospital for purposes of investigating or addressing grievances, the representative during normal business hours (8am-5pm) shall first advise the CHRO or designee in advance. For any visit outside normal business hours, the representative shall follow the same procedure by reporting to the Hospital's RN On-Duty House Administrator and in his/her absence the Administrator on Call. The RN On-Duty House Administrator may be contacted through the Hospital operator 505-994-7000. Under no circumstance is the representative to enter any work area of the Hospital without reporting as provided herein and identifying self with IAMAW ID badge.

Upon entering any work area of the Hospital, the representative shall first notify the Director of Employee Labor Relations and work together to inform the supervisor of the purpose of the visit. Any discussion with employees shall be conducted in a non-patient care area. Visits with employees shall be of limited duration and will not be permitted when employees are engaged in the delivery of patient care or during their work time (breaks and lunch hours excluded). Any problem in this regard shall be brought to the attention of the CHRO or designee for resolution. Any non-employee union representative activities in the Hospital shall be limited to those provided herein.

With the exception described in subsection (1) below, under no circumstances shall the representative enter nursing stations, medication rooms, patient rooms or wards, patient treatment areas or other areas where patient care is delivered. While in any work area, the representative's contacts shall be restricted to members of the bargaining unit except as may otherwise be provided. arrangements may be made with the CHRO or designee for employees who work in confidential areas where there is care being performed on patients or when additional visits are needed. Other Union staff and/or officers may visit the Hospital on occasion when notification is given to the CHRO or designee.

Where a Union representative finds it necessary to enter a department or unit of the Hospital for purposes of investigating or addressing grievances, the representative during normal business hours (8am-5pm} shall first advise the CHRO or designee in advance. For any visit outside normal business hours, the representative shall follow the same procedure by reporting to the Hospital's RN On-Duty House Administrator and in his/her absence the Administrator on Call. The RN On-Duty House Administrator may be contacted through the Hospital operator 505-994-7000. Under no circumstance is the representative to enter any work area of the Hospital

without reporting as provided herein and identifying self with IAMAW ID badge.

Upon entering any work area of the Hospital, the representative shall first notify the Director of Employee Labor Relations and work together to inform the supervisor of the purpose of the visit. Any discussion with employees shall be conducted in a non-patient care area. Visits with employees shall be of limited duration and will not be permitted when employees are engaged in the delivery of patient care or during their work time (breaks and lunch hours excluded}. Any problem in this regard shall be brought to the attention of the CHRO or designee for resolution. Any non-employee union representative activities in the Hospital shall be limited to those provided herein.

With the exception described in subsection (1) below, under no circumstances shall the representative enter nursing stations, medication rooms, patient rooms or wards, patient treatment areas or other areas where patient care is delivered. While in any work area, the representative's contacts shall be restricted to members of the bargaining unit except as may otherwise be provided.

1. In the event the union determines it is necessary to enter nursing stations, medication rooms, patient rooms, or wards, patient treatment areas or other areas where patient care is delivered for the purposes of conducting an investigation, the union will contact the Director of Employee Labor Relations or designee to coordinate the date and time of such visit. The union representative(s) will be accompanied by a management official while visiting an area identified in this subsection.

G. While in the Hospital, the representative shall abide by Hospital policies, rules and regulations which will be provided to the Union. Representatives shall not engage in discourteous, disrespectful, threatening, or intimidating behavior. In the event a union employee is in violation of this provision of the agreement, the union employee may be subject to penalties under the SRMC Campus visitor policy…"

This construction of Section 15(C) is consistent with cases decided under the National Labor Relations Act wherein access policies must be non-discriminatory. An employer can limit solicitations on its property "so long as it applies the practice in a nondiscriminatory manner by prohibiting other nonemployees from engaging in similar activity." *UPMC Presbyterian Shadyside and SEIU Healthcare Pennsylvania,* 368 NLRB No. 2 (June 14, 2019).

A. UNDER AN APPROPRIATE SET OF CIRCUMSTANCES, RESPONDENT MAY OUTRIGHT BAR A NON-EMPLOYEE UNION REPRESENTATIVE FROM ITS PREMISES. ON BALANCE, THIS CASE DOES NOT PRESENT SUFFICIENT REASON FOR SUCH A BAN OF ADRIENNE ENGHOUSE.

It is undisputed that on May 26, 2023 the Respondent's Director of Employee Relations barred Complaint's representative, Adrienne Enghouse, from the SRMC premises. See Exhibit 12. I agree with the UNM Board of Regents that to the extent AFT asserts that Enghouse, a non-employee union organizer, is legally entitled to access to the SRMC campus by virtue of her being a Union representative without restriction, and that by denying her access, Respondent is in violation of PEBA, such assertion is "legally untenable" and ignores Respondent's right to control access to its property for non-employee union organizers. I refer the reader to this Board's Order No. 10-PELRB-2024 (PELRB No. 111-23, February 8, 2024) In that case I concluded 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…"

As stated above, the construction given Section 15(C) herein both recognizes and conforms with Respondent's right to control access to its property for non-employee union organizers. From the Employer's perspective, there is ample reason to bar Ms. Enghouse from the SRMC premises:

- Enghouse's employment at SRMC was terminated effective April 6, 2023 as a result of allegations that she disclosed a patient's Personal Health Information at a publicly broadcasted political meeting. Exhibits 5; Audio Record 1 at 02:36:39-02:38:08; Audio Record 3 at 00:08:21-00:09:18.

- Even though she knew that her access to patient care areas was terminated along with her employment, Enghouse continually violated Respondent's access control policies, breaching security protocol to enter Respondent's secured patient care areas without authorization. See Exhibits 10-12; Audio Record 1 at 02:40:27-02:41:43; Audio Record 3 at 00:09:22-00:14:54. Examples of such conduct includes two documented instances, one on April 9, 2023, when Enghouse, wearing hospital "scrubs", gained unauthorized access to secured patient care areas with the assistance of an unknown staff member, and again on May 21, 2023, when Enghouse gained unauthorized access with the assistance of SRMC employee Regina McGinnis. Exhibits 10-12. Ms. McGinnis was disciplined for her part in granting Enghouse unauthorized access to secured patient care areas. This discipline was the subject of this Board's Order No. 10-PELRB-2024. In that Order, the PELRB confirmed that Enghouse was in secured patient care areas without authorization in violation of Respondent's Access Control policies. See also PELRB No. 111-23, Hearing Officer's Report and Recommended Decision, "Findings of Fact" ⁋⁋ 4-7 (McGinnis was suspended for allowing unauthorized access to Enghouse so that Enghouse could post Union flyers or notices in secured areas of the hospital normally limited by use of a badge/key card authorization system"); Id., pp. 5-6.
- Enghouse admitted that "every Sunday" after her employment was terminated, she gained access to SRMC patient care areas without notice to SRMC and without obtaining prior authorization.
- Ms. Enghouse was permanently enjoined by the Second Judicial District Court from

appearing at SRMC President Jaime Silva Steele's home after the Court noted her refusal to obey criminal trespass laws and stay off of Jaime Silva Steele's property. Exhibits 6-10.

There is much in this conduct that may be condemnable, but that must be weighed against the right of employees to select their own representatives set forth in Section 15(A) and the prohibition in Section 19(C) of the Act against an employer dominating or interfering in the formation, existence or *administration* of a labor organization. For the following reasons I conclude that the employee's representational rights prevail. In this respect, I see that AFT has altered any prior argument it may have made to the effect that the restrictions on access to the facility by a non-employee union representation *per se* violate the PEBA. As stated on page 17 of its Closing Brief, "[t]he legal question to resolve here is whether, and under what conditions, is such a deprivation justified." I undertake answering that question for the instant case now.

Although the exclusion of Ms. Enghouse from SRMC premises is not in the context of bargaining a contract, the rationale expressed in the line of cases concerning removal of a union representative from bargaining apply as well in the context of servicing a contract, gathering information in preparation for negotiations and addressing employee grievances or workplace issues. According to the NLRB cases cited by AFT in its Closing Brief, the party seeking to exclude a selected representative from bargaining has a heavy burden of proving the individual poses a "clear and present danger" to the collective bargaining process. See *General Electric v. NLRB*, 412 F.2d at 519-520; *Milwhite Co., Inc.,* 290 NLRB 1150 (1998).

I agree with AFT's argument that UNM SRMC has not established that Ms. Enghouse poses a clear and present danger to the collective bargaining process, to UNM SRMC as an employer, or to patient safety, nor is there any evidence in the record that she has ever

disrupted the business operations of UNM SRMC. Merely claiming that she disrupted operations, without showing how and when such disruption occurred, doesn't make it so. The evidence establishes that Ms. Enghouse did not access restricted patient care areas for its own sake, but to pass through them on her way to employee breakrooms with the intent to conduct Union business and engage with bargaining members there. Despite the breaches of the employer's access policies, there is no evidence that AFT representatives including Ms. Enghouse have been disruptive in any way, maliciously accessed any restricted or patient care areas, and with the possible exception of the visits to SRMC on November 15, 2023 immediately following my granting Respondent a directed verdict in PELRB No. PPC 111-23 (when the request to access SRMC patient care areas may have been to create a claim) that AFT representatives engaged in any behavior that was not related to Union business. There is no evidence that Ms. Enghouse ever prevented a patient from receiving care or prevented an employee from engaging in her work. In fact, even if one allows that Ms. Enghouse gained access to certain SRMC areas by duplicitous means, Ms. Enghouse visited the facility weekly without issue or complaint from patients, employees, or management. (Audio Record part 1 at 2:45).

The allegation that, while an employee, Ms. Enghouse violated HIPPA is not sufficient to establish a threat to patient care or safety. We do not know what patient information was alleged to have been compromised, when and how this information was compromised, or that Ms. Enghouse was the source of this compromised information. (Audio Record part 3 At 1:27-1:31). UNM SRMC's allegation was based upon the testimony of Mr. Wilson Wilson who relied upon a written report by an unknown author, which is undated, unauthenticated, unidentified, and not subject to scrutiny by the Union or the Board.

As such, UNM SRMC has no reason to continue to ban Ms. Enghouse from the facility, and it should be ordered to allow her and other employee and non-employee union representatives access to its employees in the same time place and manner as it allows other unions.

DECISION: For the reasons stated above, I conclude that AFT has not met its burden of proving violations of the PEBA Sections 5(A), 5(B), 19(A) and 19(B), principally because it does not apply facts established by the evidence or stipulation to its alleged violations of sections 5(A), 5(B), 19(A) or 19(B) of the PEBA and those sections implicate the rights of individual employees, not the Union as the exclusive representative or non-employee representatives. Those claims are therefore **DISMISSED.**

AFT has not met its burden of proving violations of the PEBA Section 19(C) because it has not demonstrated that the acts complained of fall within the very narrow type and limited number of activities PEBA Section 19(C) is intended to address, such as establishment of a company union; infiltration of unions by lower level supervisors; or failing to maintain neutrality between competing unions. AFT's claims for violation of Section 19(C) are therefore, **DISMISSED.**

The preponderance of the evidence supports a conclusion that the Respondent did not comply with its obligations under NMSA 1978, § 10-7E-15(C) (2020) and therefore committed a practice prohibited by sections 19(C)(2) (a public employer shall provide an exclusive representative of an appropriate bargaining unit reasonable access to employees within the bargaining unit, including (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) and 19(G) of the Act (prohibiting refusal or failure to comply with a provision of the Public Employee Bargaining Act or board rule).

WHEREFORE, Respondent should be ordered to:

(1) Cease and desist from the violation of the PEBA found herein and provide AFT representatives access to SRMC facilities in the same manner as it provides to IAMAW representatives at Respondent's SRMC campus and the NUHHCE, District 1199NM representatives at its main campus in Albuquerque;

(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 containing assurances that it will comply with the law in the future and the procedures established to comply with this decision.

AFT's Requests for Extended Remedies that the Board toll the one-year Certification Bar are **DENIED**. Neither were mentioned in the parties Stipulated Pre-Hearing Order and their propriety were not actually litigated.

Issued, Thursday, July 18, 2024.

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