

25-PELRB-2025

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

In re:

**COMMUNICATION WORKERS OF AMERICA
(CWA),**

Complainant,

v.

PELRB No. 115-25

**WORKERS' COMPENSATION ADMINISTRATION
(WCA),**

Respondent.

ORDER

THIS MATTER came before the Public Employee Labor Relations Board at its regularly scheduled meeting on September 2, 2025 upon a request by both parties for Board review of the hearing Officer's Recommended Decision on Motions for Summary Judgement filed by both parties. Upon review of the record, hearing from both parties' representatives, and deliberating the matter, the Board unanimously voted to affirm in part and overrule in part the Recommended Decision as follows:

1. The Board accepts the Hearing Officer's findings of fact;
2. That portion of the Recommended Decision finding that the WCA violated Section 19(F) of the PEBA by failing to offer the CWA and accommodation in the first instance is **AFFIRMED**;
3. That portion of the Recommended Decision finding that the "Thompson Report" is confidential and not subject to disclosure to the Union is **OVERRULED**. The Board finds that portions of the IPRA cited by the Hearing Officer are not controlling and the Employer is obligated by the PEBA to provide the "Thompson Report" to the union. Accordingly, the WCA is ordered to provide the Union with a copy of the report without requiring waivers.

It is so ORDERED

DocuSigned by:
Peggy Nelson
9E70ZCC2EDCE437

Date: 10/10/2025

Peggy J. Nelson, Board Vice-Chair

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**HEARING EXAMINER'S FINDINGS AND RECOMMENDED CONCLUSION ON THE
PARTIES' MOTIONS FOR SUMMARY JUDGMENT**

Background

This matter comes before the undersigned Hearing Examiner pursuant to the Parties' cross-filed Motions for Summary Judgment and their respective Responses thereto. The Prohibited Practice Complaint at issue, as amended on May 23, 2025, alleges the Workers' Compensation Administration (WCA, Agency or Respondent) has breached Section 19(F) (duty to bargain in good faith) of the Public Employee Bargaining Act (PEBA) by refusing to provide Communication Workers of America (CWA or Union) a copy upon request of a workplace investigation report (the "Thompson Report") that included interviews and interview summaries, and resulted in discipline for some bargaining unit members.

Both Parties assert there are no genuine issues of material fact and that they are entitled to judgment against the other as a matter of law. The Parties are largely in agreement as to the material facts, and their dispute is primarily one of law and contract interpretation. For the reasons explained below, the Motions and record establish that the PPC should be GRANTED in part, and DENIED in part.

Relevant Legal Standards

A. NMRA Rule 1-056

When deciding Motions for Summary Judgement, the PELRB has historically applied the standard found in New Mexico Rule of Civil Procedure 1-056: whether there are any genuine issues of material fact and whether the moving Party is entitled to summary judgment against the other as a matter of law. *See* NMRA Rule 1-056; *AFSCME Council 18 v. New Mexico Department of Labor*, 01-PELRB-2007 (Oct. 15, 2007) (the PELRB applies New Mexico Rules of Civil Procedure, Rule 1-056 when deciding a motion for summary judgment and such motions must be properly supported by affidavit and reference to the record); *see also AFSCME, Council 18 v. State of NM Dep't of Labor*, PELRB No. 149-06, and *Williams v. Cent. Consol. Sch. Dist.*, 1998-NMCA-006, ¶ 7, 124 NM 488, 490.

If a motion for summary judgment is made and properly supported, the opposing Party may not rely upon the mere allegations or denials of his pleadings or in the PPC. Rather, they must – by affidavit and reference to the record – set forth specific facts showing there is a genuine issue of material dispute for hearing. *See, e.g., Dep't of Labor*, Case No. 149-06, *supra* (denying a motion for summary judgment where the “procedures used in this case did not enable the PELRB to accurately assess whether the undisputed material facts entitle the DOL to summary judgment”).

As regularly noted elsewhere, dismissing a complaint without affording the Complainant a hearing on the merits “is an extreme remedy that is infrequently used”, but it is appropriate and necessary where properly supported under the record. *Compare Town of Mesilla v. City of Las Cruces*, 1995-NMCA-058, ¶ 4, 120 N.M. 69, 898 P.2d 121 (regarding motion to dismiss); *see also AFSCME Local 1529 v. Doña Ana County*, PELRB No. 112-25 (denying a motion to dismiss) (Vaile 7/10/25).

B. Duty to Disclose Necessary Information to the Union

Under Rule 1-056, the Movant must apply the Rule’s standard (that there is no question of fact and the Movant is entitled to judgment as a matter of law) to all of the elements of their case. As such, consideration of the legal standards associated with the duty to bargain in good faith and to provide information is also necessary.

PEBA imposes, and the PPC alleges a failure of, the duty to bargain over terms and conditions of employment in good faith. *See* PEBA Sec. 19(F). As the Union notes in its Motion and Response, “[t]he duty to bargain includes the duty to provide, upon request, any relevant information necessary to negotiate, administer, implement, and enforce or police the CBA, and to represent all collective bargaining unit employees fairly and adequately.” *See National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH*, 3-PELRB-2005 (Oct. 19, 2005). *See also AFSCME Locals 624, 1888, 2962 and 3022 v. the City of Albuquerque*, Albuquerque Labor Management Relations Board, Case No. LB 06-033 (June 12, 2007).

Moreover, analogous NLRB authority is highly persuasive and it has long held that “the Act requires an employer to provide a union representing some of its employees to provide that union with requested information that is necessary for processing grievances under a collective-bargaining agreement, including that necessary to decide whether to proceed with a grievance to arbitration or to prepare for arbitration.” *SEIU Local 790*, 1997 NLRB LEXIS 463 at *29-30 (1997); *Bohemia, Inc.*, 272 N.L.R.B. 1128 (1984); *Saginaw General Hospital*, 320 N.L.R.B. 748 (1996); *see also Las Cruces Prof’l Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, 123 N.M. 239, *Regents of UNM v. NM Federation of Teachers*, 1998- NMSC-020, ¶ 18, 125 N.M. 401, 408, and *Santa Fe County and AFSCME*, 1 PELRB No. 1 at 43 (Nov. 18, 1993) (collectively, that NLRB precedent should generally be followed when dealing with the “same or closely similar” language “absent cogent reasons to the contrary).

As the Union’s counsel Stephen Curtice observed to the WCA before the PPC was filed, there is a clear 50-year history of honoring a Union’s right to relevant and necessary information. This same tradition also makes clear that information concerning wages, hours, or terms and conditions of employment are generally deemed *per se* relevant and necessary. *See* Un. Ex. 3/Ag. Ex. E, letter dated 2/10/25 and legal citations therein. Nonetheless, “[a] union’s interest in information...will not always predominate over other legitimate interests.” *Penn. Power & Light Co.*, 301 N.L.R.B. 1104, 1105 (1991) (citing *Detroit Edison Co. v. NLRB*, 440 US 301 (1979)).

When a Union requests “relevant, but assertedly confidential information, the Board is required to balance a union’s need for the information against any ‘legitimate and substantial’ confidentiality interests established by the employer.” *Resorts Int’l Hotel Casino v. NLRB*, 996 F.2d 1553, 1556 (3d Cir. 1993) (quoting *Penn. Power & Light Co.*, 301 N.L.R.B. 1104, 1105 (1991)); *Penn. Power & Light Co.*, 301 NLRB 1104 (1991). Under this balancing test, the NLRB

and Courts have upheld the employer's right to withhold relevant material where legitimate countervailing interests were shown, and the Union did not agree to minimal conditions or burdens. *See, e.g., Columbus Prods. Co.*, 259 NLRB 220, 223 (1981) (upholding the employer's right to withhold witness employees' identities, out of concern that the Union may retaliate against and harass witness employees; affirming as reasonable accommodation the fact that the employer shared the substance of the witness statements; and concluding the information was not necessary since the Union admitted it had interviewed the employees and obtained its own information); and *Detroit Edison Co. v. NLRB*, 440 US 301 (1979) (upholding the employer's right to hold material psychological test scores/data subject to written employee consent because "any possible impairment of the function of the Union in processing the grievances of the employees is more than justified by the interests served in conditioning the disclosure of the test scores upon the consent of the very employees whose grievance is being processed" and the "burden on the Union in this instance is minimal").

Note, however, that an employer asserting confidentiality "must offer to accommodate both its concern and its bargaining obligations." *Norris v. NLRB*, 417 F.3d 1161, 1169 (10th Cir. 2005) (quoting *United States Testing Co. v. NLRB*, 160 F.3d 14, 20 (D.C. Cir. 1998)). This means that "[t]he onus [of accommodation] is on the employer because it is in the better position to propose how best it can respond to a union request for information. The union need not propose the precise alternative to providing the information unedited." *United States Testing*, 160 F.3d at 20-21 (citing *OCAW v. NLRB*, 711 F.2d 348, 362 (D.C. Cir. 1983)) ("[i]t has long been established that the employer has the burden of seeking to accommodate the union's request for relevant information consistent with other interests rightfully to be protected"); *Tritac Corp.*, 286 N.L.R.B. 522, 522 (1987); *United States Testing*, 160 F.3d at 20-21 (citing *East Tennessee Baptist Hosp. v. NLRB*, 6 F.3d 1139, 1144 (6th Cir. 1993)) ("[a]n employer is not relieved of its obligation to turn over relevant information simply by invoking concerns about confidentiality, but must offer to accommodate both its concern and its bargaining obligations, as is often done by making an offer to release information conditionally or by placing restrictions on the use of that information"); *E.W. Buschman Co. v. NLRB*, 820 F.2d 206, 208-09 (6th Cir. 1987); *Safeway Stores, Inc. v. NLRB*, 691 F.2d 953, 958 (10th Cir. 1982); and *Rieth-Riley Constr. Co. v. NLRB*, 114 F.4th 519 (6th Cir. 2024) ("substantial evidence supports the conclusion the Rieth-Riley failed to meet its burden in asserting this defense [of confidentiality] and that the NLRA compelled disclosure of this

information” where the employer “never proposed” redaction “as a reasonable accommodation”, “[n]or did it ask the Union to keep the information confidential”).

Note also that information concerning non-bargaining unit members is not presumed to be relevant and “must be demonstrated by the union”. See *Penn. Power & Light Co.*, 301 NLRB 1104 (1991). Accordingly, to obtain information on non-bargaining unit members, the Union would need to assert its need and relevance more particularly.

Lastly, “the duty to provide information may be modified by agreement between employer and union.” See *Am. Med. Response of Conn., Inc. v. NLRB*, 464 US App. DC 253, 258; 93 F.4th 491 (2024). In such cases, ordinary contract interpretation principles must be used to determine what each Party’s rights and duties are. *Id.* at 255, 259 (“abiding by the terms of a bargained-for contract is a defense to a charge that a company failed to bargain”); *NLRB v USPS*, 8 F.3d 832, 836 (DC Cir. 1993) (that when a matter is “covered by the [CBA]”, the Parties have bargained over the issue and “the question of waiver is irrelevant”); and *CR Anthony Co. v. Loretto Mall Partners*, 1991-NMS-070, ¶ 17; 112 NM 504-509-10 (where the language of a contract and its surrounding conduct are unambiguous, the plain meaning of the contract controls).

Undisputed Facts

1. Petitioner is the exclusive representative of bargaining unit employees working at the Farmington Workers’ Compensation Administration (WCA) Office. (Amended PPC and Answer.)
2. In November 2024, WCA conducted an investigation of the workplace environment at the Farmington Field Office (FFO), after approximately five (5) years of receiving complaints from bargaining-unit and non-bargaining unit FFO employees, and after an October 2, 2024 meeting with FFO employees where management “observed that the atmosphere in FFO was uncomfortable”. WCA contracted with Jonathan Thompson to conduct a workplace investigation after the tense October meeting. Advance notice of the investigation was sent to all FFO employees, and interviews were conducted in November 2024 of at least seven employees. The investigation culminated in a written report referred to by the Parties as the “Thompson Report”, which included the Investigator’s summaries of the recorded interviews. The investigation and/or Thompson Report also led to the

discipline of one Union member and one non-Union member; and to incoming Executive Director Jordan issuing a letter on January 7, 2025 to all FFO employees that outlined [her] expectations regarding performance and behavior in the workplace.” (Un. Ex. 1, PPC; Ag. Ex. A, Jordan Affidavit at ¶¶ 2-3, 5, 8, 10-12; Ag. Ex. A1, 1/7/25 Jordan letter; Ag. Ex. B, Farrell Aff. at ¶¶ 2-5, 7; Ag. Ex. B1, 10/17/24 email regarding “a fact-finding interview...based upon the work environment at the [FFO]”, and that “the outcome of this fact-finding process may result in discipline, up to and including dismissal”).

3. On or about January 22, 2025, CWA 7076 sent WCA a records request seeking the Employer’s investigation report and interviews concerning alleged workplace safety issues at the WCA Farmington office, which resulted in discipline (*e.g.*, the Thompson Report). (Un. Ex. 1/Ag. Ex. C.)
4. On or about January 29, 2025, WCA sent a letter to CWA 7076 denying the Union access to the Thompson Report, as a confidential document including opinions and related to discipline. WCA asserted that the information was confidential under the collective bargaining agreement (CBA), IPRA, WCA policy, and State Personnel Board rules. It provided citations to four (4) New Mexico court decisions regarding IPRA; and requested legal authorities in support of the Union’s position that it was entitled to the records sought. (Un. Ex. 2/Ag. Ex. D; *see also* Ag. Ex. B, Farrell Aff. at ¶ 8 (that the Agency “held” the Thompson Report “confidential pursuant to the CBA, State Personnel Board rules, and WCA Policy No. 3.)
5. The CBA provides as follows (emphases added):
 - Article 6, Sec. D: “**In all cases, the confidentiality of the disciplinary process shall be maintained by the Employer and its representatives, the Employee’s representative, and any and all Stewards shadowing, as required by law, SPB Rules, and this Agreement.**”
 - Article 15, Sec. 2: “**In accordance with applicable SPB Rules, the following documents shall be regarded as confidential:...D. Any documents containing statements of opinion about an Employee; [and] E. Documents concerning alleged or proven infractions or disciplinary actions**”; and “**[t]he Employer will make such confidential documents available to the Union, with prior written consent of the Employee, if necessary, for and relevant to a grievance[.]...The Employer shall not provide references or disclose any information from confidential documents or the documents themselves, by any means of communication, to any person or organization, except with the prior written consent of the Employee to whom the employment reference and document disclosure pertains.**”

6. The Inspection of Public Records Act (IPRA) provides that “[e]very person has a right to inspect public records of this state except:...C. letters or memoranda that are matters of opinion in personnel files or students' cumulative files...” (NMSA 14-2-1, emphases added.)
7. SPB Rule 1.7.1.12 (Employment Records) provides as follows (emphases added):
- A. Agencies shall maintain a record of each employee’s employment history in accordance with operational necessity and applicable state and federal law requirements. Employees shall have access to review their own file. ...
 - B. Employment records, except confidential records, are subject to inspection by the general public. **Confidential records may be inspected with the written permission of the employee...**
 - C. For the purpose of inspection of public records under Subsection B of 1.7.1.12 NMAC, **the following material shall be regarded as confidential and exempted from public inspection:...records and documentation containing matters of opinion; interview notes; [and] documents concerning infractions and disciplinary actions...**
8. WCA Policy No. 3 provides as follows (emphases added):

Procedure:

...

- (C)(2) All employees, whether the complainant, witness, or respondent, are required to cooperate during investigations. During the investigation process, witnesses or potential witnesses who are interviewed have the responsibility to maintain confidentiality about their interviews.

...

- E.** While the confidentiality of the information received, the privacy of the individuals involved, and the wishes of the complaining person cannot be guaranteed, **each will be protected to as great a degree as legally possible. Information will only be disclosed on a need-to-know basis.**
- F.** The Director or his/her designee will have **sole discretion to determine what information or findings are appropriate for disclosure and to whom.**
9. On or about February 10, 2025, Attorney Stephen Curtice of the Youtz & Valdez, PC firm responded to WCA on CWA 7076’s behalf with a letter providing an explanation of the legal basis of the Union’s request, including citations, quotes and references to/from 17 cases, 15 of which addressed the broad duty to provide information necessary for a Union to negotiate, implement and enforce the contract, which arises under the duty to bargaining in good faith, and from the Union’s responsibilities as an exclusive representative. The Union also reiterated its offer to consider a confidentiality agreement if proposed by the Agency. (Un. Ex. 3/Ag. Ex. E)

10. On or about February 18, 2025, General Counsel Michael Holt of the WCA issued a letter to CWA 7076 continuing to dispute that it must provide the Thompson Report under the basis of the CBA. It also asserted that CWA representative “Dan Secrist reviewed and negotiated language within the WCA employee policies currently in place”, and that those policies create privacy rights and expectations. Mr. Holt chided the Union for not offering “any...suggestion short of the WCA providing the complete, unredacted Thompson Report.” He added that, “[h]owever, in the spirit of collective bargaining, and without waiving any management rights, the WCA is willing to provide to the four CBA members who were interviewed the actual recording of their interview as conducted by Mr. Thompson” although “[i]t will be up to the union member to provide those items to the union”. (Un. Ex. 4/Ag. Ex. F; Un. Motion at p. 2, ¶ 5.) The Union describes this as a suggestion of direct dealing by the WCA.
11. On March 6, 2025, CWA sent the WCA a statement of no confidence to Executive Director Jordan, HR Manager Catherin Farrell, and the Agency’s General Legal Counsel (Michael Holt, Esq., who is representing the Agency before the undersigned in this matter). The letter was signed by three of the four bargaining unit members at the FFO. It “express[ed] deep concerns regarding the leadership and management practices within the State of New Mexico Workers’ Compensation Administration”, and “formally convey[ed] a vote of no confidence in Charlene Roberts...and for Trey Flynt.” The letter alleged that Ms. Bryant “created a toxic and unsafe work environment” and that Mr. Flynt “allowe[ed] Charlene Robert’s behavior to continue after [the Union] had brought [their] concerns to Trey Flynt.” (Ag. Ex. A, Jordan Affidavit at ¶¶ 13-15; Ag. Ex. A2, 3/6/25 CWA Letter of No Confidence to Jordan.)
12. On or about April 9, 2025, CWA 7076 issued another letter to WCA. The Union again requested records relevant to the Employer’s investigation of workplace safety concerns and offered to enter into any appropriate confidentiality agreement, while also noting the Employer’s duty to propose an accommodation to allow the Union to access relevant but confidential information. (Un. Ex. 5/Ag. Ex. G.)
13. On April 15, 2025, bargaining unit member Tanya Lane requested and received a copy of the written summary of her interview, from the Thompson Report, and the audio recording of her interview. (Ag. Ex. H, 4/15/25 enclosure to 5/7/25 letter.)

14. On or about May 7, 2025, General Counsel Holt issued a letter to CWA reiterating the Agency's February 18, 2025 offer of accommodation, or, in the alternative, that the Union could provide a signed release from the member to the WCA. In support of its position, Mr. Holt pointed to one of the cases Mr. Curtice shared on behalf of the Union on February 10, 2025: *Penn. Power & Light Co.*, 301 NLRB 1104 (1991) (upholding employer's action in withholding the identities of confidential informants reporting alleged drug policy violations – although relevant to the Union's role as exclusive representative – because "lack of strict confidentiality in the employer's drug program would deter informants from coming forward in the future and possibly subject those informants to harassment"). Mr. Holt asserted that the Union failed to demonstrate relevancy of the records for non-union members. He also asserted that the March 6, 2025 letter of no confidence, and the refusal of one bargaining unit member to sign the letter, showed that "[p]ersonal animosity runs deep in the Farmington office, including amongst CWA members". He further stated that "[o]n a reasonable basis, WCA believes that a Farmington office bargaining unit member may not want CWA to have access to their individual interview or associated summary". He added that the accommodations suggested by the WCA presented a low burden when weighed against the employers and the individual employees' legitimate and substantial rights and interests. (Ag. Ex. H.)
15. Throughout this period, the Agency was aware that the Union's purpose in seeking this information was to investigate unresolved complaints of a hostile or unsafe workplace. (Ag. Ex. H, observing that one bargaining unit member "has...been resistant to CWA efforts to portray the Farmington office as an unsafe work environment.") However, no PPC or grievance about a hostile or unsafe work environment is pending.
16. On May 16, 2025, the Union filed the instant PPC regarding the Agency's refusal to produce the Thompson Report and interviews, and it amended the PPC on May 23, 2025. (Un. Ex. 1/Ag. Ex. C.)

Summary of the Parties' Positions

The *Union* argues that "[t]he duty to bargain includes the duty to provide, upon request, any relevant information necessary to negotiate, administer and police the CBA, and to represent

all collective bargaining unit employees fairly and adequately.” See *National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH*, 3-PELRB-2005 (Oct. 19, 2005); see also *AFSCME Locals 624, 1888, 2962 and 3022 v. the City of Albuquerque*, Albuquerque Labor Management Relations Board, Case No. LB 06-033 (June 12, 2007).

Here, the Union argues, implementation of the contract requires its access to the Thompson Report. The Thompson Report is allegedly a summary of the investigative meetings conducted with the WCA-Farmington Field Office (FFO) employees, and several employees (one union member and two non-union members) have been disciplined in reliance upon the Thompson Report. However, the Union asserts, the Agency erroneously concluded there is no reason to believe the workplace is unsafe; and the Union knows from personal knowledge of its representatives and/or members that the Thompson Report inaccurately reflected certain interview testimony.

The Union denies that either the Inspection of Public Records Act, SPB or WCA policies, or certain sections of the Parties’ CBA prohibit the Respondent from producing the Thompson Report. It argues that IPRA and SPB policies do not limit or control the duty to provide necessary information that arises under PEBA, and it denies that it is a member of the “general public” to which those alleged bars would apply. It also argues that, rather than barring Union’s access to the Thompson Report, Article 6 of the CBA clearly contemplates that the Union would get copies of such materials as the exclusive bargaining representative. Moreover, the burden was on the Agency to offer an appropriate accommodation if it believed the information was confidential. In this case, the Union offered to enter into a protected order regarding confidentiality of the Thompson Report (although not necessary under Article 6, which subjects the Union to confidentiality), and the Agency was in the wrong to reject that accommodation.

In contrast, the *Workers’ Compensation Administration* argues that the duty to provide information that arises under PEBA is limited by Articles 6 and 12 of the CBA, State Personnel Board Rule 1.7.1.12, WCA Policy No. 3, and IPRA.

The WCA argues that Articles 6 and 12 of the CBA clearly and expressly require the Agency to maintain the confidentiality of the Thompson Report and interviews, because they contain statements of opinion about employees and concerns infractions or discipline; both Article 6 and 12 also clearly and expressly incorporate SPB Rules; SPB Rule 1.7.1.12, like Article 12, clearly and expressly defines as confidential “[a]ny documents containing statements of opinion

about an Employee” and “[d]ocuments concerning alleged or proven infractions or disciplinary actions”; IPRA similarly defines statements of opinion as confidential; and WCA Policy No. 3 clearly and expressly makes confidentiality assurances sufficient to give rise to the individual employee’s reasonable expectation of privacy of those documents.

Under ordinary rules of construction, these documents must be read together, and they should be understood according to their plain language and ordinary meanings. Doing so, it is clear that the Union has agreed with Management to make these documents confidential. Moreover, since the requested Thompson Report and interviews clearly contain statements of opinion, and relate to discipline, they are protected as confidential notwithstanding the general duty to bargain and to provide relevant information.

WCA also argues that the Union fails to establish the relevance of the requested documents for non-bargaining unit members. Relatedly, it argues that even if the relevance for non-bargaining unit members was established, FFO employees’ interests would outweigh those of the Union, due to the “potential for harassment of informants, with a concomitant chilling effect on future informants.” (Ag. Motion at 12, citing *Penn. Power* at 1107; *see also* Ag. Motion at 13-15, citing *Columbus* at 223-224; and *Detroit Edison* at 349-50). In this regard, it highlights the workplace tensions or “deep personal animosity” that are evident in the record.

Lastly, WCA argues that it has attempted to reasonably accommodate the Union and their bargained-for responsibilities. Initially, the Agency offered that the Union could obtain a copy of the individual employee interviews by requesting the recordings through members; but it refused to provide the Thompson Report’s summaries of the interviews. Thereafter, during the course of negotiations, the Agency reiterated its offer to the Union to obtain a copy of the Thompson Report by requesting it through union or non-union members, and also offered for the Union to obtain a written release from the employees to the WCA. WCA maintains that these were reasonable and appropriate accommodations to protect the employees’ legitimate and weighty privacy interests in maintaining the documents’ confidentiality, and the employers’ legitimate and weighty interests in chilling disclosures in investigations and discouraging harassment or retaliation of informants.

Discussion and Analysis

As a preliminary matter, the undersigned notes that the Union's submission failed to meet the technical requirements of Rule 1-056 because it lacked a sworn affidavit or other record evidence in support of its fact claims. The Union also largely copied and pasted its own Motion for Summary Judgment into its Response to the Agency's Motion. These practices or this presentation have compromised its case somewhat.

For instance, in its Reply to the Agency's Motion, the Union modified the original content of its Motion to add a few new factual claims, but it failed to provide any sworn statement attesting to these facts. Without such an affidavit, the following are not admissible as fact because wholly unsubstantiated, even assuming they were relevant:

- the Union claims in the Summary of the Case section that "[t]he Cabinet Secretary at the time put the supervision out on administrative leave" (Un. Resp. at 1); and
- the Union also claims in that section that "[o]nce the new Cabinet Secretary was in place, the Employer advised the work group and the Union that there was no clear evidence of an unsafe work place, brought to supervisor back to work back to work, and issued a 'get along with each other' memo to all employees" (Un. Resp. at 1).

The Union also fails to respond to the following averments in support of WCA's Motion for Summary Judgment, although these statements are supported by sworn Affidavit, or other facts in record:

- the averment by Heather Jordan, the WCA Executive Director, that Dan Secrist of CWA was involved in negotiating the WCA Policy No. 3, on harassment (Ag. Ex. B, Farrell Aff. at ¶ 9);
- Director Jordan's averment that "[t]he statement of no confidence in FFO management...demonstrate[d] that there continues to be disagreement between CWA members and union animosity towards WCA and FFO management (Ag. Ex. A, Jordan Aff. at ¶ 15); and
- Agency arguments through counsel, leading up to the PPC's filing, that no relevancy was demonstrated as to non-bargaining unit members; and that there is a reasonable basis to believe that at least one bargaining unit member would not want the Union to access their interview or interview summary based on their not supporting the Union's independent investigation of workplace safety at the WCA FFO (Ag. Ex. H).

Indeed, the Union arguably adopted or assented to all of the Agency's factual averments in the WCA Motion for Summary Judgment, since the Union did not address them but wrote in the opening sentence of its Response thereto that "there is no dispute of facts in this case". (CWA Response at 1.)

Lastly, although the Union added legal citations to its mostly copied and pasted Response to the Agency's Motion for Summary Judgment, the Union largely failed to address any of the specific Agency arguments related to Articles 6 and 12 of the CBA, SPB Rules and WCA Policy No. 3. Because the undersigned found those arguments to be very well-founded and compelling, this also compromises the Union's position. *See, e.g., Dep't of Labor*, Case No. 149-06, *supra* (denying a motion for summary judgment where the "procedures used in this case did not enable the PELRB to accurately assess whether the undisputed material facts entitle the [movant] to summary judgment").

Nonetheless, upon review of the Motions and Responses and their attached materials and citations, where any, it is evident that there is no material fact in dispute about the relevance and confidentiality of the materials under the CBA and SPB rules. It is also evident that the accommodation(s) ultimately offered the WCA were of a type supported by the CBA, but that it was too narrowly drawn to exclude the interview summaries. Specifically, the Agency incurred a technical violation of Section 19(F) of PEBA by failing to offer an accommodation at the very outset; and it violated PEBA by refusing to offer an accommodation for the summaries of the interviews, as provided for in Article 12, Sec. 2.

As such, this dispute can be resolved as a matter of law, without need for an evidentiary hearing. The record makes clear that the Union has agreed to limit the otherwise broad duty to share certain confidential information in Articles 6 and 12 of the CBA, by its express terms and by its express adoption and incorporation of the SPB Rules and law such as IPRA, on which SPB's definition of confidential documents is based in part. As noted above, "the duty to provide information may be modified by agreement between employer and union", and in such cases, ordinary contract interpretation principles must be used to determine what each Party's rights and duties are. *See Am. Med. Response of Conn.* 464 US App. DC at 255, 258-59. Applying normal contract principles requires that these provisions be read together, and together they support both Parties' positions in part, and refute both Parties' positions in part.

First, the record establishes the relevancy of the requested documents as to bargaining unit members for whom the Union is the exclusive bargaining agent, but not as to non-Union members.¹

¹ The undersigned can easily imagine a scenario where the type of information sought here would also be relevant as to non-bargaining unit members, particularly where the Union alleges a course of practice that

In its initial request of January 22, 2025, CWA made clear that it was looking into the matter because it had “been notified of worker safety concerns at the WA Farmington Office that have not been addressed by WWCA Management despite the conclusion of the recent investigation” of 2024. (Un. Ex. 1/Ag. Ex. C.) As the bargaining unit employees’ exclusive representative, the Union is required by the duty of fair representation to investigate and guard against contract violations and unsafe working conditions. It is also evident from the pleadings that the Union is specifically challenging the accuracy of the summarizations upon which Management relied in issuing discipline against Union and non-Union members. (Un. Motion at 2 and Un. Response at 2.) Obviously, in that case, the interviews alone would not be sufficient for the Union’s efforts in enforcing the contract and investigating potential grievances or PPCs. However, the Union makes no legal or factual claim as to the relevance of the same information for non-bargaining unit members, so the record does not establish relevance as to non-bargaining unit members.²

Second, the record establishes that the documents sought (the interviews and the summarizations thereof) are confidential under the CBA, SPB rules, WCA Policy No. 3 and/or IPRA, because they include statements related to infractions or discipline, and statements of opinion about FFO employees. See CBA Art. 12, Sec. 2 (“[i]n accordance with applicable SPB Rules, the following documents” are “confidential:...D. Any documents containing statements of opinion about an Employee; [and] E. Documents concerning alleged or proven infractions or disciplinary actions”); see also SPB Rule 1.7.1.12 (defining the same two types of confidential documents) and IPRA, NMSA 14-2-1(C) (that there is no right to inspect “C. letters or memoranda that are matters of opinion in personnel files or students’ cumulative files...”).

It is also notable that the Union failed to refute the Agency’s affidavit evidence that the Union and Agency negotiated over WCA Policy No. 3. This policy is qualified, so does not amount to the absolute barrier to disclosure that the Agency argues. Nonetheless, it is sufficient to give rise to a reasonable employee expectation of privacy. *Id.* (providing qualified protections

affects Union-members and non-Union members alike. However, because the Union fails to articulate its claim of relevance as to non-Union members, it must be rejected under this record.

² The Agency argues that the CBA only provides for the provision of confidential information when relevant to a grievance, and that there is no pending grievance. The undersigned rejects that argument because it is axiomatic that a Union needs information before it files a grievance or PPC, to investigate whether a filing is warranted or appropriate in the first instance. *See generally* The Developing Labor Law at Ch. 13.

that “confidentiality...cannot be guaranteed” but “will be protected to as great a degree as legally possible”).

Third, the record establishes that the Parties have already agreed to the accommodation ultimately offered, at least as to the actual interviews: that access to matters of opinion or concerning discipline shall be allowed with the subject employee’s permission. *See* CBA Art. 6 (“[i]n all cases, the confidentiality of the disciplinary process shall be maintained...as required by law, SPB Rules, and this Agreement”); CBA Art. 12, Sec. 2 (“[t]he Employer will make such confidential documents available to the Union, with prior written consent of the Employee, if necessary, for and relevant to a grievance”); SPB Rule 1.7.1.12 (B. Confidential records may be inspected with the written permission of the employee...”) (emphases added).

Although the general duty to bargain may be as broad as the Union urges, the Parties in this case have expressly limited that broad duty. As such, the Union may not engage in a fishing expedition among confidential documents where the record shows, as it does here, that the disclosure without permission and/or confidentiality agreements could result in harassment, retaliation, or an increase in the “deep animosity” or discord observed at FFO over the past five years.

However, neither Party’s Motion survives in its entirety. Under the plain language of Articles 6 and 12 of the CBA, and SPB rule 1.7.1.12(C), the Agency was correct to limit Union access to the requested confidential information without employee permission. That said, the Agency was in violation of the CBA by not also making the Thompson summarization available on the same conditions established under the CBA. *See* CBA, Art. 12(2).

WCA also violated the general duty to bargain in good faith by failing to provide an accommodation in the first instance. *See Norris, supra* (that an employer asserting confidentiality “must offer to accommodate both its concern and its bargaining obligations”); *United States Testing, supra* (“[i]t has long been established that the employer has the burden of seeking to accommodate the union’s request for relevant information consistent with other interests rightfully to be protected”). However, this latter error was only a technical violation as to the interviews, since the Union had the same access to the plain text of the CBA, and it does not dispute that it knows all FFO employees, so it would be able to obtain the contractually required permissions with little burden.

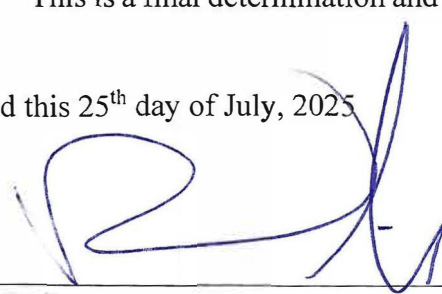
Accordingly, based on the foregoing, the undersigned determines and recommends the Board conclude that: there is no material fact in dispute; the Employer is entitled to judgment as a matter of law as to the confidentiality of the Thompson Report summarizations and interviews, lack of relevancy as to non-bargaining unit, and the adequacy of the accommodations it offered as to the interviews; and the Union is entitled to judgment as a matter of law as to the insufficiency of the Agency's initial response to the Union's request, in failing to offer an accommodation first but instead seeking an initial accommodation from the Union, and in failing or refusing to offer the summarizations on the same basis as the interviews (*e.g.*, with employee permission).

RECOMMENDED CONCLUSIONS/ORDER

For the foregoing reasons, the Party's Motions for Summary Judgment are GRANTED IN PART AND DENIED IN PART; and the PPC is AFFIRMED IN PART based upon the undersigned's determination that the WCA violated Section 19(F) of PEBA as described above. As remedy, the Agency is hereby ORDERED to comply with PEBA going forward, consistent with this Order; and to promptly supply bargaining unit members' interviews and interview summaries to the Union if the Union presents a signed release from the member to the WCA.

This is a final determination and is subject to Board review pursuant to NMAC 11.21.3.19.

Issued this 25th day of July, 2025



Pilar Vaile
Executive Director