

**STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT**

**UNM SANDOVAL REGIONAL
MEDICAL CENTER, INC.,**

Appellant,

v.

D-202-CV-2022-07805

**UNITED HEALTH PROFESSIONALS OF
NEW MEXICO,**

Appellee.

FINAL MEMORANDUM OPINION AND ORDER

Before the Court is an appeal, under Rule 1-074 NMRA, of an Order of the Public Employees Labor Relations Board (Board) that determined Appellant UNM Sandoval Regional Medical Center, Inc. (SRMC or Employer) violated Sections 10-7E-19(D), (E), and (G) of the Public Employee Bargaining Act (PEBA).¹ NMSA 1978, § 10-7E-19 (2020). This Court **REVERSES** the Board's Order that concluded Employer violated Section 10-7E-19(D), (E), and (G) of the PEBA.²

I. BACKGROUND

A. Procedural Background

Employer is a healthcare facility created by the University of New Mexico pursuant to the University Research Park and Economic Development Act, NMSA 1978, §§ 21-28-1 to -25 (1989,

¹ Public Employee Bargaining Act (PEBA), NMSA 1978, §§ 10-7E-1 to -26 (2003, amended 2020).

² The Court notes Employer/SRMC filed a *Motion to Stay Pending Outcome of Related Matter* on Feb. 10, 2023. The Motion, however, was not submitted to this Court per the motion-packet rule, and thus not considered, and the Motion is now moot upon entry of this Opinion and Order.

as amended through 2022). Though Employer is a private corporation, it was made subject to PEBA on May 18, 2022. NMSA 1978, § 21-28-7(B)(2) (2022).

Appellee (Union) filed a Prohibited Practices Complaint against Employer on June 3, 2022. [1 RP 1–6] A First Amended Prohibited Practices Complaint was filed June 9, 2022. [1 RP 9–15] Employer filed a motion for summary judgment which the Hearing Officer denied. [2 RP 101–13] The matter proceeded to an evidentiary hearing on the merits on September 1, 2022.

The First Amended Prohibited Practices Complaint contained numerous allegations. However, only three issues remained to be determined by the time of the merits hearing.

One issue was whether allegedly misleading anti-union statements made at a Patient Care Technician (PTC) meeting, held May 31, 2022, violated PEBA. A second issue was whether Employer violated PEBA by putting employee Adrienne Enghouse “on notice” for engaging in union behavior. A third issue was whether Employer’s social media policy violates PEBA. [Tr. 11–12.]³ [3 RP 190 (Hrg. Ofc. Report p. 15) (stating the three issues “to be determined” by the Hearing Officer)]

B. Hearing Officer’s Report

The Hearing Officer issued a Report and Recommended Decision on September 28, 2022. [3 RP 176-203 (Hrg. Ofc. Report)] The Hearing Officer determined all three issues in the Union’s favor.

First, the Hearing Officer determined that anti-union comments had been made at a meeting on May 31, 2022, and a management-level employee of Employer, Nancy Santiesteban, violated PEBA by failing to interrupt or correct the comments, and by telling employees at the meeting that

³ Citations are to the Transcript of Proceedings filed May 10, 2023 as a supplement to the record, rather than to the audio recording filed January 19, 2023 with the Record on Review.

they could not speak about unions during work hours. Specifically, the Hearing Officer found this conduct violated two clauses of Section 10-7E-19(B): One that states a public employer shall not “interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to [PEBA]”; and another that prohibits public employers from “us[ing] public funds to influence the decision of its employee . . . 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[.]” § 10-7E-19(B). [3 RP 190-95 (Hrg. Ofc. Report pp. 15-20)]

The meeting at issue, conducted on May 31, 2022, occurred during a time when the Union was conducting an organizing campaign. According to the Union, a management-level employee, Nancy Santiesteban, made, permitted, encouraged, or did not stop others from making anti-union remarks during the meeting. [3 RP 192-95] The Union claimed the intention of the remarks was to discourage employees from signing union authorization cards. The meeting was a regular quarterly meeting for PTCs and union issues were not on the agenda. [Tr. 168-69] [3 RP 261 (Ex. J-3, Agenda for May 31, 2022 Meeting)] Once the agenda items had been covered, Nancy Santiesteban initiated a “round robin” and opened the floor for questions. [Tr. 18 (Rocha testimony), 133-35 (Segura-Miller testimony), 169-70 (Santiesteban testimony).] It was during this “round robin” that the alleged PEBA violations occurred.

PTC Araceli Segura-Miller testified that when the opportunity to ask questions was presented, she asked whether a decision about the union had been made. [Tr. 134-40] She testified that she stated she was neither for nor against unions, but did not want to pay dues and believed that if there was a union, then employees would be required to pay dues. [Tr. 136-37] According to Ms. Segura-Miller, Nancy Santiesteban told a story about an employee who had signed a union card without understanding what it entailed. [Tr. 138-39] Ms. Santiesteban cautioned the PTCs

attending the meeting to be careful about what they signed and not to divulge their social security numbers or birth dates on union cards. [Tr. 134-40, 146-50]

Ms. Santiesteban testified that in response to Ms. Segura-Miller's question she stated she was unfamiliar with unions and did not know if there was a cost associated with joining. [Tr. 175-76] She stated she shared a story about an employee from a different floor who also had asked questions about the fee because he had signed a union card without understanding the consequences. [Tr. 177-83] Ms. Santiesteban stated she advised this other employee to always read before you sign, especially if personal information is requested. [Tr. 177-83] She testified she gave the same information to the group of PTCs attending the May 31, 2022 meeting, and that her comments were not directed specifically to union cards but to general matters of personal responsibility. [Tr. 177-83] She testified that Ms. Segura-Miller asked a second question, which was whether she was permitted to talk to staff about the union. [Tr. 184-85] Ms. Santiesteban testified her response was that speaking about unions was permitted but should occur in the staff lounge, not at the nurses' station, and should be limited to "off hours." [Tr. 173-85.]

PTC Nina Rocha testified that in response to Ms. Segura-Miller's question, Ms. Santiesteban told the PTCs they were not required to sign union cards and told a story about an employee who had been "bombarded," repeatedly asked to sign a union card, signed a union card, and then regretted it. [Tr. 18-21] Ms. Rocha testified that Ms. Santiesteban told the PTCs union dues were high and they would not be able to afford to pay them. [Tr. 22] Ms. Rocha further testified that Ms. Segura-Miller stated she had had a bad experience with unions and advised the other PTCs at the meeting not to join the union. [Tr. 22] According to Ms. Rocha, Ms. Santiesteban allowed Ms. Segura-Miller to speak against unions at length and without interruption

before the meeting abruptly ended.⁴ [Tr. 18-25]

The Hearing Officer determined that Ms. Santiesteban's warnings to employees at the May 31, 2022 meeting not to sign things they had not read and not to put their date of birth or Social Security number on documents violated Section 10-7E-19(B) because they occurred at a time when the Union was conducting organizing activities and reasonably could be interpreted as a warning against signing a union authorization card. The Hearing Officer determined Ms. Santiesteban further violated Section 10-7E-19(B) by permitting Ms. Segura-Miller to speak uninterrupted about her past negative experiences with unions. The Hearing Officer concluded this conduct violated Section 10-7E-19(B) because it could have the effect of discouraging union membership. Furthermore, because the employees attending the meeting were on paid time and using employer computer equipment to attend the meeting, the Hearing Officer found the conduct also violated the provision of Section 10-7E-19(B) that prohibits the use of public funds to influence the decision of employees whether to support or oppose a labor organization. [3 RP 190-95 (Hrg. Ofc. Report pp. 17-20)]

Second, the Hearing Officer determined that Employer violated PEBA by threatening to discipline Ms. Adrienne Enghouse, a nurse, for being active in the Union organizing effort. [3 RP 195-98 (Hrg. Ofc. Report pp. 20-23)] Specifically, the Hearing Officer found this conduct violated Section 10-7E-19(D), which makes it a prohibited practice to "discriminate in regard to hiring, tenure or a term or a condition of employment in order to encourage or discourage membership in a labor organization," and violated Section 10-7E-19(E), which makes it a prohibited practice to "discharge or otherwise discriminate against a public employee because the employee has signed

⁴ The meeting was scheduled to last one hour but lasted only 30 to 45 minutes and ended abruptly because the Zoom session expired unexpectedly. [Tr. 22, 167-68, 205]

or filed an affidavit, petition, grievance or complaint or given information or testimony pursuant to the provisions of [PEBA] or because a public employee is forming, joining or choosing to be represented by a labor organization[.]”

Third, the Hearing Officer determined that Employer’s social media policy violated PEBA. [3 RP 198-201 (Hrg. Ofc. Report pp. 23-26)] Specifically, he found the social media policy violated Section 10-7E-19(G), which states it is a prohibited practice to “refuse or fail to comply with a provision of [PEBA] or [a] board rule[.]” § 10-7E-19(G).

C. The Board’s Order

Employer appealed the Hearing Officer’s decision to the Board. The Board issued an Order on December 1, 2022. [3 RP 253-54] In that Order, the Board rejected the Hearing Officer’s conclusion that Employer had violated Section 10-7E-19(B), and otherwise “affirm[ed] the remainder of the Recommended Decision” by the Hearing Officer. [3 RP 253-54] The Board therefore adopted the Hearing Officer’s Report finding Employer violated Sections 10-7E-19(D), (E), and (G). *Id.* The Board ordered Employer to cease and desist from all violations of PEBA as found, including Employer enforcing the terms of its social media policy. *Id.* Employer appealed the Board’s Order to this Court pursuant to NMSA 1978, Section 10-7E-23(B) (2003). The Union did not appeal the Board’s Order concluding there was no PEBA violation under Section 10-7E-19(B).

II. LEGAL STANDARDS

PEBA provides for judicial review of orders issued by the Board. § 10-7E-23(B). This Court must affirm the Board’s action unless it is: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record considered as a whole; or (3) otherwise not in accordance with law. *Id.*; *see also* Rule 1-074(R) NMRA.

III. DISCUSSION

A. The record does not support a conclusion Employer, through a representative, violated PEBA at a meeting conducted on May 31, 2022.

As to the first issue before the Hearing Officer, the Hearing Officer determined Employer, through the conduct of Nancy Santiesteban, Employer's Medical Services Director, violated PEBA during a Zoom meeting for Patient Care Technicians (PTCs) on May 31, 2022. The Hearing Officer's Report concluded a Zoom meeting, conducted on May 31, 2022, violated Sections 10-7E-19(B), 19(D), 19(E) and 19(G). [3 RP 190] However, the Hearing Officer's Report did not explain how or why the evidence demonstrated the May 31, 2022 meeting violated Sections 10-7E-19(D), 19(E) and 19(G). While the *heading* of the Hearing Officer's discussion section, i.e., Section I,⁵ [3 RP 190] stated that the "evidence established" that the May 31, 2022 meeting violated Sections 10-7E-19(B), 19(D), 19(E) and 19(G), the only discussion or analysis of the evidence regarding the May 31, 2022 meeting is in the context of finding a violation under Section 10-7E-19(B). [3 RP 190-95] And the Board rejected, in its entirety and without limitation, the Hearing Officer's determination that the Union had established a violation of Section 10-7E-19(B). [3 RP 253-54] The Board adopted the "remaining conclusions [of the Report of the Hearing Officer] finding that [Employer] violated Sections 10-7E-19(D), 19(E) and 19(G) of the PEBA."

⁵ The heading at Section I of the Hearing Officer Report states:

- I. THE PREPONDERANCE OF THE EVIDENCE ESTABLISHED THAT NANCY SANTIESTEBAN'S COMMENTS DURING A MANDATORY MEETING WITH STAFF ON MAY 31, 2022, HER FAILURE TO INTERRUPT OR CORRECT ANTI-UNION COMMENTS BY ANOTHER EMPLOYEE AT THAT MEETING AND TELLING EMPLOYEES THAT THEY COULD NOT SPEAK ABOUT UNIONS DURING WORK HOURS, CONSTITUTES A PROHIBITED LABOR PRACTICE PURSUANT TO SECTIONS 19(B), 19(D), 19(E) AND 19(G).**

[3 RP 190 (Hrg. Ofc. Report p. 15)]

[3 RP 253] The Union did not appeal the Board's Order concluding there was no violation under Section 10-7E-19(B).

The relevant portions of PEBA, Section 10-7E-19, at issue in this case are as follows:

A public employer or the public employer's representative shall not:

A. discriminate against a public employee with regard to terms and conditions of employment because of the employee's membership in a labor organization;

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

(1) addressing a grievance or negotiating or administering a collective bargaining agreement;

(2) allowing a labor organization or its representatives access to the public employer's facilities or properties;

(3) performing an activity required by federal or state law or by a collective bargaining agreement;

(4) negotiating, entering into or carrying out an agreement with a labor organization;

(5) paying wages to a represented employee while the employee is performing duties if the payment is permitted under a collective bargaining agreement; or

(6) representing the public employer in a proceeding before the board or a local board or in a judicial review of that proceeding;

D. discriminate in regard to hiring, tenure or a term or condition of employment in order to encourage or discourage membership in a labor organization;

E. 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;

G. refuse or fail to comply with a provision of the Public Employee Bargaining Act or board rule; or

Regarding Section 10-7E-19(B): The Board's Order determining there was no Employer violation of Section 10-7E-19(B) at the May 31, 2022 meeting was not appealed by the Union, and is therefore not before this Court on appeal.

Regarding Sections 10-7E-19(D), 19(E) and 19(G), this Court concludes: The Board's Order affirming the Hearing Officer Report finding Employer, at the meeting on May 31, 2022, violated Sections 10-7E-19(D), 19(E) and 19(G) of the PEBA is **REVERSED**.

The Union asserts the issue of whether Ms. Santiesteban violated PEBA is properly before the Court on appeal because the Hearing Officer determined her conduct also violated Sections 10-7E-19(D), (E), and (G). The Court disagrees. The discussion and analysis of the May 31, 2022 meeting in the Hearing Officer Report is only with respect to Section 10-7E-19(B). Because the Union did not appeal the Board's Order finding no violation under Section 10-7E-19(B), the issue of whether Ms. Santiesteban's alleged statements and failures to act during the May 31, 2022 meeting violated Section 10-7E-19(B) is not before the Court.

Nothing in the Hearing Officer's Report discussed, explained, or analyzed how the meeting on May 31, 2021, *i.e.*, conduct of Ms. Santiesteban at that meeting, violated Sections 10-7E-19(D), 19(E) and 19(G). The Report only examined the May 31, 2022 meeting evidence in examining whether a violation occurred under Section 10-7E-19(B). [3 RP 190-95] And the Board rejected

the Hearing Officer finding a violation under Section 10-7E-19(B), which the Union did not appeal. [3 RP 253]

And while not necessary to the Court's decision, the Court notes that Sections 19(D) and 19(E) both prohibit discrimination against an employee with respect to certain aspects of their employment, and the alleged meeting conduct at issue related to the making or failing to correct misleading statements.⁶ Thus, a finding of any alleged violations under Sections 19(D) and 19(E) is not supported by substantial evidence, is arbitrary and capricious, and is contrary to law because the alleged meeting conduct cannot reasonably be considered discrimination falling within the purview of Sections 19(D) or 19(E).

Finally, the Court also rejects the Union's position that the Hearing Officer found Employer's conduct at the May 31, 2022 meeting violated Section 10-7E-19(G). Again, while unnecessary to the Court's decision, the Court notes this argument is inconsistent with the Hearing Officer's statement that Section 10-7E-19(G) is a "catch-all provision" that is generally inapplicable when another paragraph applies and that it should not be used to establish multiple violations for the same offense. [3 RP 198 (Hrg. Ofc. Report p. 23)] Having expressly found a violation of 19(B), the Hearing Officer presumably would not have proceeded to find the same conduct also violated 19(G).

The Board's Order affirming Employer, through a representative at the meeting on May 31, 2022, violated Sections 10-7E-19(D), 19(E) and 19(G) of the PEBA is **REVERSED**.

⁶ See § 10-7E-19(D) (prohibiting discrimination "in regard to hiring, tenure or a term or condition of employment in order to encourage or discourage membership in a labor organization"); § 10-7E-19(E) (prohibiting a public employer from "discharg[ing] or otherwise discriminat[ing] 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 [PEBA] or because a public employee is forming, joining or choosing to be represented by a labor organization").

B. The Board’s conclusion that Employer violated PEBA by placing Ms. Enghouse “on notice” is arbitrary and capricious, contrary to law, and not supported by substantial evidence.

The second issue the Hearing Officer considered was whether Employer violated PEBA by placing employee Adrienne Enghouse “on notice” that her activities on behalf of the Union were violating Employer’s anti-solicitation policy. The Hearing Officer concluded, and the Board affirmed, that Employer violated Sections 10-7E-19(D) and (E) of PEBA with regard to Ms. Enghouse. [3 RP 195-98 (Hrg. Ofc. Report pp. 20-23); 3 RP 253-54] The Board’s Order affirming Employer violations under Sections 10-7E-19(D) and (E), as it pertains to Ms. Enghouse, is **REVERSED**, this Court determining the decision was arbitrary and capricious, contrary to law, and not supported by substantial evidence.

The record indicates that Ms. Enghouse, a nurse, was actively engaged in the Union organizing effort. The basis of the Union’s claim on Ms. Enghouse’s behalf is an email Employer’s Human Resources director sent to her on May 26, 2022. The email states:

Adrienne:

You have been informed on several occasions that SRMC is private property and UNM Sandoval has an antisolicitation policy. Sandoval Regional Medical Center allows employees to solicit co-workers during meal and rest breaks and during any other period of non-working time so long as the employees being solicited are also on non-working time and such solicitation does not disrupt or interfere with patient care or ongoing Sandoval Regional Medical Center operations.

Coming in on your day off to hand out flyers during other employees['] work time goes against our policy. Distribution of literature is prohibited during working time and in working areas. In addition when you interfere with other employees who are working, it disrupts the work that is being done. When you are not working on the clock as an RN, and you come into the building as a union representative during your non-working hours utilizing your hospital badge to access areas that are restricted to the public and to other employees, you are soliciting on private property and in violation of our policy.

You may engage with the staff during your scheduled shifts as an RN at meal or break time or the time before or after the completion of job-related performances in break rooms. SRMC will not interfere with your rights under federal or state law.

In addition, a complaint has been brought forth regarding coercion from you toward other employees to sign a union card. We are still considering the matter.

[3 RP 260 (Ex. J-2)] Ms. Enghouse testified she viewed this email as a threat that could lead to termination. [Tr. 77-80] However, she did not deny handing out flyers to colleagues who were working, in violation of Employer’s anti-solicitation policy, and she also testified that she handed out flyers to her colleagues while she herself was on the clock. [Tr. 82]

The Union’s position is that placing Ms. Enghouse “on notice” in the May 26, 2022 email constituted harassment of an employee for engaging in union behavior, and is a violation of PEBA. Employer argued that the law permits employers to prohibit union solicitation during work hours in work areas, the email was not threatening, and Ms. Enghouse has never been disciplined for her organizing activities.

The Hearing Officer determined that Employer’s conduct with regard to Ms. Enghouse violated Sections 10-7E-19(D) and (E). [3 RP 195-98 (Hrg. Ofc. Report pp. 20-23)] The Board affirmed these violations.

The Board’s conclusion that Employer violated PEBA by placing Ms. Enghouse “on notice” that her conduct was contrary to its anti-solicitation policy must be reversed because it is arbitrary and capricious, contrary to law, and not supported by substantial evidence. A rule that prohibits employees from engaging in union activity during work time and on work premises is presumptively not a PEBA violation. *See Las Cruces Prof’l Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, ¶ 16, 123 N.M. 239 (seeking guidance from federal decisions that interpret similar provision of the National Labor Relations Act). An anti-solicitation policy is “presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose.” *Id.* (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803-04 n.10 (1945)); *see Essendant Co.*, 365 NLRB No. 46, 47 (2017)⁷ (“The [National Labor Relations] Board has long recognized the

⁷ This decision can be found at the following website: <https://www.nlr.gov/cases-decisions/weekly-summaries-decisions/summary-of-nlr-decisions-for-week-of-march-13-17-2017>

principle that working time is for work and has permitted employers to adopt and enforce rules prohibiting solicitation during working time, absent evidence that the rule was adopted for a discriminatory purpose[.]” (citing *Peyton Packing, Co., Inc.*, 49 NLRB 828, 843 (1943)). “However, an employer cannot generally prohibit solicitation by employees in nonwork areas during nonworking time.” *Id.*; see *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 617 and n.4 (1962) (recognizing law allows an employer to make and enforce a rule forbidding employees to engage in such union solicitation during working time; while a broad rule banning such activity during nonworking time is presumptively invalid, “employee solicitation can be forbidden even during non-working time where the nature of the employer’s business requires such a broad limitation”); *Las Cruces Prof’l Fire Fighters*, 1997-NMCA-031, ¶ 16 (“Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours.”) (quoting *Republic Aviation Corp.*, 324 U.S. at 803-04 n.10); see also *Beth Israel Hosp. v. N.L.R.B.*, 437 U.S. 483, 499-500, 505-06 (1978) (recognizing hospitals have an important interest in protecting patients and may lawfully prohibit union-organizing activity in areas that might disrupt patient care).

As reflected in the case law, Employer’s anti-solicitation policy may be enforced absent evidence it was adopted for a discriminatory purpose. In this case, no evidence was presented that Employer’s anti-solicitation policy was adopted for a discriminatory purpose. Employer’s anti-solicitation policy is thus presumed valid. While the Court agrees blanket bans on solicitation that include work breaks are presumptively invalid, *Las Cruces Prof’l Fire Fighters*, 1997-NMCA-031, ¶ 16, Employer in this case did not impose a blanket ban on Ms. Enghouse. Employer expressly stated Ms. Enghouse would be permitted to solicit in breakrooms during meal or break

times or before or after completing job related duties—a restriction that is presumptively valid under both state and federal law.

The Hearing Officer’s Report makes no mention of the presumptive validity of a rule that restricts solicitation to nonworking time. Rather, the Hearing Officer appeared to have presumed, contrary to law, that the rule is invalid because it interfered with Ms. Enghouse’s union advocacy. The failure to consider the presumptive validity of the restriction imposed on Ms. Enghouse is arbitrary and capricious. *See Colonias Dev. Council v. Rhino Env’tl. Servs.*, 2005-NMSC-024, ¶ 41, 138 N.M. 133 (stating agency “cannot ignore relevant factors or omit important aspects of the problem”) (citation omitted); *Bernalillo Cty. Health Care Corp. v. N.M. Pub. Regulation Comm’n*, 2014-NMSC-008, ¶ 9, 319 P.3d 1284 (“An agency’s ruling is arbitrary and capricious if the agency failed to consider an important aspect of the problem[.]”) (internal quotation marks and citation omitted).

The Hearing Officer also found, in the section of the Report analyzing 19(D), that Employer “has generally sought to chill any discussions of the Union in the workplace during work hours by singling out any discussion of the union as being uniquely prohibited.” [3 RP 196 (Hrg. Ofc. Report pp. 21)] The Court, however, declines to review this additional finding because it goes beyond the three issues the parties presented for resolution at the merits hearing, as reflected in the Hearing Officer’s Report. [3 RP 190 (articulating the three specific matters “to be determined” by the Hearing Officer as alleged by the Union)] “Evidence without a supporting allegation cannot serve as the basis of a determination of an unfair labor practice.” *N.L.R.B. v. I.W.G., Inc.*, 144 F.3d 685, 688 (10th Cir. 1998) (quoting *Montgomery Ward & Co. v. NLRB*, 385 F.2d 760, 763 (8th Cir. 1967)); *id.* at 688-89 (holding labor-board findings “neither charged in the complaint nor litigated at the hearing” violate due process). The Hearing Officer Report stated the

second issue to be determined was: “2. Whether SRMC’s Human Resources Director’s email to Ms. Enghouse, Joint Exhibit 2, constitutes a threat of discipline up to and including termination and whether the email directing her to cease communicating with employees regarding the union during work time violated the PEBA.” [3 RP 190] The issue presented by the Union was therefore whether Employer violated PEBA with respect to its conduct toward Ms. Enghouse specifically, by threatening her with discipline or termination for engaging in union advocacy. [Tr. 12-13, 90]

The Board’s Order affirming Employer violations under Sections 10-7E-19(D) and (E) with respect to Ms. Enghouse is **REVERSED**.

C. The Board’s conclusion that Employer’s social media policy violates PEBA is not supported by substantial evidence and is arbitrary and capricious.

The third issue the Hearing Officer considered is whether Employer’s social media policy violates PEBA. The Hearing Officer determined the social media policy violated Section 10-7E-19(G). [3 RP 198-202] The Board adopted this conclusion. The Board’s Order determining Employer’s social media policy violates PEBA is **REVERSED**, this Court concluding the decision is not supported by substantial evidence and is arbitrary and capricious.

The Hearing Officer’s Report notes several provisions of the social media policy that could implicate rights protected by PEBA. The social media policy prohibits employees from, among other things: being disrespectful when presenting themselves as SRMC employees; giving a negative impression of SRMC; engaging in impolite online dialogue; and making inappropriate posts. The social media policy requires employees to limit their social media activity during work time, to direct news media inquiries to management, and it reserves to Employer the right to determine if the policy has been violated. [3 RP 200 (Hrg. Ofc. Report p. 25)]

The Hearing Officer concluded the social media policy is unenforceable against the Union, its members and officers, and members of the putative bargaining agreement because it might chill

or inhibit rights that PEBA protects such as maintaining a bargaining unit, negotiating, and monitoring and enforcing a collective bargaining agreement. [3 RP 200] He found that even mild, mundane, or routine social media posts regarding workplace concerns risked violating the social media policy and could subject an employee to termination. [3 RP 200]

The Court concludes the decision cannot be upheld in the absence of evidence that any employee has been disciplined for exercising PEBA-protected rights that violate the social media policy, or any evidence that it has a chilling effect on such rights. The Union presented no evidence that the social media policy has a chilling effect or that it has actually been used to punish or deter union activity. The only evidence of a PEBA violation presented was the social media policy itself.

The Court notes the existence of nonbinding authority, cited by the Hearing Officer, that a facially-neutral policy may violate the National Labor Relations Act even absent enforcement. *The Boeing Co. & Soc’y of Prof’l Eng’g Emps. in Aerospace, IFPTE Local 2001*, 365 NLRB No. 154, 2017 WL 6403495, at *4 (Dec. 14, 2017). The *Boeing* test created three categories of rules: those that are *per se* lawful; those that warrant individualized scrutiny; and those that generally are unlawful. *Id.*; see *Lowes Home Ctrs., LLC v. N.L.R.B.*, 850 F. App’x 886, 889-90 (5th Cir. 2021) (discussing application of the rule created by the National Labor Relations Board in the *Boeing* case).

The issue of whether the mere existence of a facially-neutral workplace policy could violate PEBA is one of first impression in New Mexico. However, assuming the *Boeing* test created by the National Labor Relations Board could apply, the Hearing Officer and Board did not apply it here.

As an initial matter, the social media policy encompasses a wide variety of conduct that

would not implicate PEBA. The Court therefore cannot assume it is *per se* unlawful.

The Hearing Officer appears to have made a finding that the social media policy reasonably could be construed to interfere with rights that PEBA protects. [3 RP 199, 201-02] However, under the *Boeing* test, a workplace policy will not be held unlawful based on this single inquiry alone. *The Boeing Co.*, 365 NLRB No. 154, 2017 WL 6403495, at *2 (“The Board will no longer find unlawful the mere maintenance of facially neutral employment policies, work rules and handbook provisions based on a single inquiry, which made legality turn on whether an employee ‘would reasonably construe’ a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future.” (footnote omitted)).

When assessing a facially-neutral policy or rule that, when reasonably interpreted, could potentially interfere with the exercise of protected rights, two things must be evaluated: (1) the rule’s potential impact on protected concerted activity and (2) the employer’s legitimate business justifications for maintaining the rule. *The Boeing Co.*, 365 NLRB No. 154, 2017 WL 6403495, at *4. To determine if a challenged policy is lawful, its justifications must be painstakingly examined, based on evidence, and weighed against its impact on protected concerted activity. *Id.* at *19-22.

In this case, the Hearing Officer considered only the potential chilling effects of the social media policy and considered none of its justifications. Thus, even if the *Boeing* test were to apply—a determination this Court does not make—the Board’s decision would be arbitrary and capricious because it failed to consider important aspects of the problem. Further, the Board’s decision that Employer’s social media policy violates Section 10-7E-19(G) is not supported by substantial evidence where the only evidence is the policy itself.

The Board’s Order determining Employer’s social media policy violates PEBA is

REVERSED.

IV. CONCLUSION

The Board's determination that Employer violated Section 10-7E-19(D), (E), and (G) of the PEBA is **REVERSED.**

SO ORDERED.



ERIN B. O'CONNELL
DISTRICT COURT JUDGE

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