

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

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

Appellant,

v.

No. D-202-CV-2023-09603

**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, and**

**NEW MEXICO PUBLIC EMPLOYEE
LABOR RELATIONS BOARD,**

Appellees.

FINAL MEMORANDUM OPINION AND ORDER

THIS MATTER is an appeal under Rule 1-074 NMRA of Order 60-PELRB-2023 issued by the State of New Mexico, Public Employee Labor Relations Board (“Board”). The matter concerns a prohibited labor practices complaint filed by the United Health Professionals of New Mexico, AFT, AFL-CIO (“Union”) against the University of New Mexico Sandoval Regional Medical Center (“Employer”) pursuant to the Public Employee Bargaining Act (“PEBA”), NMSA 1978, §§ 10-7E-1 to -26 (2003, as amended through 2020). The Board’s hearing officer held a merits hearing and thereafter recommended dismissal of the prohibited labor practices complaint. The Board accepted the recommendation of the hearing officer and issued the Order dismissing the Union’s complaint. The Union appealed to this Court.

The Court **AFFIRMS** the Board’s Order.

I. BACKGROUND

This case involves various issues related to the employment and termination of Paula Venegas. Ms. Venegas worked for the Employer as a Registered Nurse in the Pre-Operative (“Pre-

Op”)/Post Anesthesia Care Unit. On March 8, 2023, Ms. Venegas’ supervisor, Dustin Bierman (“Supervisor”), called her into a meeting and presented her with a written warning for a delay in patient care. Specifically, the warning stated that Ms. Venegas failed to timely administer standard pre-operative medication to a patient the previous day. **[RP 60–61.]**

On March 9, 2023, the Union filed a prohibited practices labor complaint against the Employer. The Union alleged that the Employer violated various sections of PEBA when it disciplined Ms. Venegas. Generally, the Union claims that Ms. Venegas was targeted and punished for her Union activity rather than her performance as an employee. **[RP 1–6.]**

The Employer terminated Ms. Venegas’ employment on April 21, 2023 due to continued unsatisfactory performance resulting in delays in patient care. The written termination notice chronicled two incidents. The notice stated that on April 3, 2023, Ms. Venegas initiated documentation and entered vitals for a patient, but another employee gave the pre-operative medication two hours late. Further, the notice detailed an incident on April 13, 2023, in which Ms. Venegas failed to administer medication to a patient resulting in a delay in care. **[RP 62–63.]**

The Union filed an amended prohibited practices complaint on June 1, 2023. The amended complaint addressed issues related to Ms. Venegas’ termination. **[RP 20–25.]** On July 21, 2023, the Employer filed a motion for summary judgment on various issues. After full briefing, the Board’s hearing officer granted summary judgment against the Union on two claims: (1) the Employer’s alleged failure to bargain prior to taking disciplinary action against Ms. Venegas; and (2) the Employer’s alleged failure to allow union representation during an investigatory interview (*i.e.*, a violation of rights as described in *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, (1975)). The hearing officer denied the summary judgment motion on the other claims. **[RP 97–100.]**

The remaining claims proceeded to a merits hearing. The Board’s hearing officer held a hearing on September 12, 2023. The parties called witnesses, introduced evidence, and presented

their respective cases. Afterward, the hearing officer issued a written report and recommendation. The hearing officer concluded that the Union failed to meet its burden of proof and recommended that the Board dismiss the Union's complaint.

The Board voted to accept the hearing officer's report and recommended decision and issued Order 60-PELRB-2023 on November 16, 2023. The Union appealed the Board's Order to this Court pursuant to NMSA 1978, Section 10-7E-23(B) (2003), and seeks reversal.

II. LEGAL STANDARDS

PEBA provides for judicial review of orders issued by the Board. § 10-7E-23(B). Such appeals "shall be based upon the record made at the board or local board hearing." *Id.* The Court must affirm the order 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.*

An agency decision is arbitrary and capricious if it provides no rational connection between the facts found and choices made or omits consideration of relevant factors or important aspects of the problem at hand. *See N.M. Indus. Energy Consumers v. N.M. Pub. Regul. Comm'n*, 2019-NMSC-015, ¶ 8.

A reviewing court will uphold an agency decision if it is satisfied that there is "substantial evidence in the record as a whole to support the agency's decision and that the evidence in the record demonstrates that the decision is reasonable." *Skowronski v. N.M. Pub. Educ. Dep't*, 2013-NMCA-034, ¶ 47. Substantial evidence means "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Gallup Westside Dev., LLC v. City of Gallup*, 2004-NMCA-010, ¶ 11, 135 N.M. 30.

When conducting a substantial evidence review, courts view the evidence "in the light most favorable to the agency decision." *Nat'l Council on Comp. Ins. v. N.M. State Corp. Comm'n*,

1988-NMSC-036, ¶ 7, 107 N.M. 278. Although there may be conflicting evidence, courts consider “whether the record supports the result reached, not whether a different result could have been reached.” *Gallup Westside Dev., LLC*, 2004-NMCA-010, ¶ 11.

III. DISCUSSION

A. The Board’s findings of fact are supported by substantial evidence.

The Union contends that several of the Board’s findings of fact are not supported by substantial evidence. In particular, the Union challenges the following numbered findings in the hearing officer’s report: 8, 13, 15, 17, 18, 20, 21, and 23. The disputed findings of fact can be summarized as follows: (1) Ms. Venegas was assigned to care for certain patients and she failed to timely administer pre-operative medication to her patients on several occasions; (2) the Employer decided to terminate Ms. Venegas’ employment because of her unsatisfactory job performance; (3) Ms. Venegas was not terminated due to participation in protected Union activity; and (4) the Supervisor and the Employer’s labor relations director, Wilson Wilson (“Director Wilson”), were unaware of any protected concerted activity by Ms. Venegas on behalf of the Union or any Union members.

In support of its argument against the Board’s factual findings, the Union points to evidence in the record that it argues is contrary to the findings. The Union also cites additional evidence that it claims was not discussed in the hearing officer’s report.

The Employer responds that the Court must view the evidence in the light most favorable to the Board’s decision and that each of the Board’s findings of fact are supported by substantial

evidence. The Employer supports its argument by identifying the evidence in the administrative record that supports the Board's findings.

1. Findings concerning Ms. Venegas' work conduct

Substantial evidence in the administrative record supports the finding that Ms. Venegas was assigned certain patients and failed to timely provide them medication on three occasions. Supervisor testified that the first Pre-Op nurse to begin engaging with a patient is the "primary nurse" and that nurse is thereafter responsible for the patient until the beginning of surgery. Additionally, Supervisor testified that he discussed this expectation in staff meetings and that Ms. Venegas was aware of the expectation. **[5 Hr'g Audio, 10:30–12:00 (Supervisor Testimony).]** Documentation in the record indicates that on three separate occasions Ms. Venegas initiated contact with a patient and then subsequently failed to timely administer the patient medication. **[RP 139–142.]** Supervisor corroborated each incident during his testimony. **[Supervisor Test., 06:10–08:30; 22:30–23:40.]** Further, Director Wilson testified that Ms. Venegas' work performance was particularly unacceptable and she was not receptive to correction. **[6 Hr'g Audio, 08:40–10:00 (Director Testimony).]**

The Court will uphold the Board's finding when it is supported by substantial evidence. Other evidence may support a finding different than the one the Board reached. However, the Court's role in substantial evidence review is to assess whether the record supports the result reached, not to determine whether a different result is warranted.

2. Findings concerning the Employer's reason for terminating Ms. Venegas

Substantial evidence supports the Board's finding that Ms. Venegas was terminated for her unsatisfactory job performance. Ms. Venegas' poor job performance was the given reason for her termination. **[RP 139–142.]** As noted above, substantial evidence supports the finding that Ms. Venegas failed to timely administer patient care on several occasions.

Further, substantial evidence in the record supports the findings that (1) Ms. Venegas was not terminated because of her involvement with the Union and (2) the Supervisor and Director Wilson were unaware that Ms. Venegas engaged in any protected Union activity. The Supervisor and Director Wilson denied that any Union activity affected the decision to terminate Ms. Venegas. **[Supervisor Test., 46:40–47:05; Director Test., 10:55–11:45.]** Supervisor testified that he had no solid evidence whether Ms. Venegas was a Union member and he denied knowledge of Ms. Venegas’ Union activities. **[Supervisor Test., 30:00–30:09; 33:20–33:32.]** Director Wilson also denied knowledge of Ms. Venegas’ Union activity or membership. **[Director Test., 5:28–6:53.]**

The Court will uphold the Board’s findings regarding Employer’s reason for terminating Ms. Venegas because substantial evidence supports the findings. The Union points to evidence that Ms. Venegas openly supported the Union in the workplace. **[RP 82–83.]** However, the Court’s role here is not to reweigh evidence or determine the credibility of conflicting testimony. *See N.M. Indus. Energy Consumers*, 2019-NMSC-015, ¶ 13.

B. The Board’s conclusions are not arbitrary or capricious.

The Union challenges the Board’s conclusions and contends that the evidence in favor of the Union position is overwhelming or demands a different result. Although the Union characterizes the Board’s conclusions as contrary to law, the Court is interpreting these arguments as challenging the conclusions as arbitrary and capricious in light of the evidence presented.

1. The Board’s conclusions concerning Ms. Venegas’ termination

The Union contends that the “vast majority of the evidence presented by the Union’s witnesses” establish that Ms. Venegas was punitively singled out and the discipline was unwarranted. **[Union’s Statement of Appellant Issues, filed February 19, 2024 (“SAI”), 17].** Further, the Union argues that the “overwhelming weight of testimony” supports the conclusion that the Employer was aware of Ms. Venegas’ support for the Union. **[SAI, 23.]** Essentially, the

Union argues that it was arbitrary and capricious for the Board to credit Employer's evidence given the weight of the evidence contrary to the Board's conclusion that no prohibited practice occurred.

The Union's arguments present no basis to conclude that the Board erred. The Board's findings regarding Ms. Venegas' termination are supported by substantial evidence and the conclusions logically follow from the factual findings. The record reflects that the Board considered evidence contrary to its findings but for various reasons assigned a lesser weight to the evidence. [RP 218–223.] The Board's conclusions are reasonable and supported by substantial evidence. Accordingly, the Union's arguments are unpersuasive.

2. The Board's dismissal of the Union's *Weingarten* claim

The Union contends that the Employer violated Ms. Venegas' *Weingarten* rights. The concept of *Weingarten* rights originates in jurisprudence interpreting the National Labor Relations Act ("NLRA"). *See Weingarten*, 420 U.S. at 252–53. New Mexico courts may look to interpretations of the NLRA by the National Labor Relations Board ("NLRB") as a guide in interpreting similar provisions of PEBA. *Las Cruces Pro. Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, ¶ 15, 123 N.M. 239.

Courts have interpreted the NLRA to provide for a right to union representation in an investigatory interview that an employee reasonably fears may result in discipline. *See Weingarten*, 420 U.S. at 256–260. The right to representation "arises only in situations where the employee requests representation." *Id.* at 257. Improper denial of such representation may interfere with an employee's right to engage in concerted activities for mutual aid and protection. *See id.* at 260. However, an employee is not entitled to the presence of a union representative "at a meeting with his employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision." *Baton Rouge Water Works Co.*, 246 N.L.R.B. 995, 997 (1979).

The alleged deprivation of *Weingarten* rights occurred during the March 8, 2023 meeting in which Supervisor disciplined Ms. Venegas. The Board found that the meeting was not investigatory and relied on an inference from documentary evidence to support the finding. **[RP 60–61, 99.]** Accordingly, the Board concluded that there was no right to Union representation and no *Weingarten* violation. On appeal to this Court, the Union challenges the Board’s conclusion and contends that a recording of the meeting establishes a *Weingarten* violation.

The Board’s dismissal of the *Weingarten* claim was based on substantial evidence and was not arbitrary or capricious. The evidence cited by the Board supports the findings that the discipline was determined prior to the meeting and that the purpose of the meeting was merely to communicate the decision to Ms. Venegas. The Board reasonably concluded that the meeting had no investigatory purpose and no *Weingarten* violation occurred.

The Board addressed the recording in its written decision. The Board noted that the Supervisor asked only two questions, in tandem, at the beginning of the recording: “Did you miss meds? Do you remember?” Further, the Board explained that Ms. Venegas did not attempt to invoke a right to Union representation until long after the Supervisor asked the two questions. **[RP 99–100.]** The Board reasonably concluded, based on the documentary evidence, that the Supervisor had already prepared the written discipline and the questions served no investigatory purpose. The Board also reasonably concluded that no *Weingarten* violation occurred because Ms. Venegas failed to timely invoke her right to representation. Accordingly, the Court concludes that the Board’s dismissal of the *Weingarten* claim was not arbitrary or capricious.

C. The Board applied the *Wright Line* standard in accordance with law.

The Union contends that the Board acted contrary to law and improperly applied the *Wright Line* burden shifting analysis. In order to determine whether an adverse employment action violates the NLRA, the NLRB applies the so-called *Wright Line* analysis. *See Matsu Corp. d/b/a*

Matsu Sushi Rest. & Flushing Workers Ctr., 368 N.L.R.B. No. 16 (June 28, 2019). Under this analysis, a showing of discriminatory motivation for the employment action may occur by proving “the employee’s protected concerted activity, employer knowledge of that activity, and animus against the employee’s protected conduct.” *Id.* If a complainant makes such a showing by the preponderance of the evidence, the burden shifts to the respondent to demonstrate that adverse employment action would have taken place even in the absence of protected conduct. *Id.*

In this case, the Board applied the *Wright Line* analysis in the context of PEBA and concluded that the Union had failed to make the requisite showing. On appeal, the Union contends that the Board incorrectly applied the standard and that the Union’s evidence was sufficient to shift the burden to the Employer to demonstrate that the reasons for disciplining Ms. Venegas were not pretextual. In response, the Employer argues that the Board properly applied the standard and that the Union failed to meet its burden with respect to all three elements of the claim.

The Court discerns no error in the Board’s conclusion. The Board found that the Union failed to establish the Employer’s knowledge of Ms. Venegas’ protected activity. As noted earlier, substantial evidence supports the finding that Supervisor and Director Wilson were unaware of Ms. Venegas’ Union activities. **[RP 221; Supervisor Test., 30:00–30:09; Director Test., 5:28–5:50.]** Absent a finding that the Employer was aware of Ms. Venegas’ protected activity, the burden did not shift to the Employer. The Board correctly applied the law and concluded that the Union failed to meet its burden under *Wright Line*.

The Union provided some evidence that that Ms. Venegas engaged in activities supporting the Union. For example, the Union argues that Ms. Venegas vocally supported the Union and questioned management in meetings about policy changes. **[1 Hr’g Audio, 56:00–1:03:00 (Nurse Mauro Testimony).]** The Court expresses no opinion on whether these activities qualify as

“protected concerted activities” within the meaning of the law. The status of the activities does not change the result of the *Wright Line* analysis.

IV. CONCLUSION

For the reasons explained above, the Court affirms the Board’s Order.

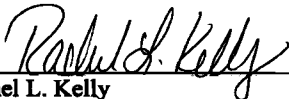
IT IS SO ORDERED.


VICTOR S. LOPEZ, JUDGE
Second Judicial District, Div. XXVII

This is to certify that a true and correct copy of the foregoing document was mailed and/or otherwise delivered to the following on June 28, 2024.

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