STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY
And MUNICIPAL EMPLOYEES (AFSCME), COUNCIL
18, AFL-CIO,

Petitioner,

02-PELRB-2010

vs.

PELRB CASE NO. 111-09

DEPARTMENT OF CORRECTIONS

Respondent.

DECISION AND ORDER

THIS MATTER was earlier remanded by the Public Employee Labor Relations Board to the Director to engage in further fact-finding regarding the allegedly "mass" e-mail in question and Respondent's asserted practice of employer notification with respect thereto. The Director has engaged in such additional fact-finding, embodied within his February 17, 2009 correspondence to counsel for the parties. Having heard argument of counsel for the parties and being otherwise fully advised in the matter, the Board upholds the Director's recommended decision and finds and concludes that Respondent has engaged in a prohibited practice by issuing its reprimand to a bargaining unit member employee as a result of that bargaining unit member employee's sending an e-mail to 69 bargaining unit members employees.

Specifically, the Board finds that the e-mail, which contained a link to the AFSCME newsletter, did not itself contain political content. That e-mail simply disseminated the AFSCME newsletter, an activity that is proper union activity and is allowed under the collective bargaining agreement, which agreement trumps any otherwise contrary Department policies.

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MARTIN V. DOMINGUEZ
Chairman
Public Employee Labor Relations Board

Date: February 22, 2010

CONCURRENCE: Board member Boyd concurs in this Decision and Order and specially writes his concurring opinion to emphasize the importance of the First Amendment: When dealing with speech-related First Amendment activities, a collective bargaining agreement and employer policies must be very explicit with respect to any such activities that are implicated. Where a "mass" mailing is at issue, as here, that term must be carefully defined, which is not the case here. Certainly, such term cannot mean, as argued by Respondent here, "greater than three." Such argued description of the term "mass" is completely unacceptable. And if e-mails, which implicate speech-related First Amendment activities, are to require pre-clearance by management, such requirement must be cautiously and carefully written in order to make clear that government may not disallow the First Amendment activity on the basis of content.

CONCURRENCE: Chairman Domínguez concurs in the Board's Decision and Order and also specially writes to state that, in this case, the Respondent's practice respecting prior notification of e-mails was one of "non-enforcement." An employer must enforce its practice if it is to have a viable practice.

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