

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

03-PELRB-2012

COMMUNICATIONS WORKERS OF AMERICA,

Complainant,

v.

PELRB No. 142-11

STATE OF NEW MEXICO
OFFICE OF THE STATE ENGINEER,

Respondent

ORDER AND DECISION

THIS MATTER comes before the Public Employee Labor Relations Board for ratification of the Executive Director's Dismissal of this matter based upon Petitioner's withdrawal of the Charge. Upon a 3-0 vote at the Board's December 19, 2011 meeting the Board approves the Executive Director's Dismissal

IT IS HEREBY ORDERED that this matter shall be, and hereby is, **DISMISSED**.

Date: 1-22-12



Duff Westbrook, Chairman
Public Employee Labor Relations Board

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

In re:

**COMMUNICATIONS WORKERS OF AMERICA,
Complainant,**

v. PELRB No. 142-11

**STATE OF NEW MEXICO
OFFICE OF THE STATE ENGINEER,
Respondent**

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

THIS MATTER comes before the Hearing Officer on the State's Motion to Dismiss the Prohibited Practices Complaint herein. The parties briefed their arguments and submitted simultaneous briefs on October 3, 2011. Based on the pleadings and the briefs the Hearing Officer decides as follows:

FINDINGS OF FACT:

1. On June 15, 2011, Mark Esrig, on behalf of *Communications Workers of America, Local 7076*, filed a Petition for Initial Certification of a New Bargaining Unit with this Board ("PELRB" or "Board") seeking certification as the exclusive representative for purposes of collective bargaining of a "wall to wall" unit of public employees of the New Mexico Office of the State Engineer ("State Engineer" or "OSE") which Petition excluded supervisors, managers, or confidential employees. (Petition for Initial Certification of a New Bargaining Unit, filed with this Board as PELRB No. 306-11; Respondent's Brief in Support of Its Motion to Dismiss Prohibited Practices Complaint, ¶ 1.)

2. No incumbent collecting bargaining representative or unit for OSE employees existed or had been certified at the time of the filing of the June 15, 2011 Petition by Petitioner. (Petition for Initial Certification of a New Bargaining Unit, filed with this Board as PELRB No. 306-11, ¶ 2; Respondent's Brief in Support of Its Motion to Dismiss Prohibited Practices Complaint, ¶ 2.)
3. On August 11, 2011, Mark Esrig on behalf of *Communications Workers of America* filed a Complaint, PELRB No. 142-11, alleging that OSE committed a prohibited labor practice by unilaterally altering certain terms and conditions of employment of OSE employees during the period of time after the filing of the above-referenced Petition for Initial Certification of a New Bargaining Unit, PELRB No. 306-11 in violation of PEBA §§10-7E-19 (A), (B) and (G). (Prohibited Practices Complaint, PELRB No. 142-11.)
4. In support of its Prohibited Practices Complaint, Complainant incorporated a Memorandum from an OSE Human Resources Support staff employee, dated August 3, 2011 to "OSE-All Employees Dist List" which Memorandum states in pertinent part:

"We have received directive [sic] from the current administration that Educational Leave will no longer be authorized for employees. In the case that employees are enrolled or will enroll in classes, it is up to their supervisor to allow them to flex their time or allow them to work an alternative work schedule to meet the demands of their classes..."

The remainder of the Memorandum then makes reference to and reprints an Alternative Work Schedules policy. (Prohibited Practices Complaint, PELRB No. 142-11.)

5. On September 6, 2011 Respondent filed an Answer to the Union's Prohibited Practices Complaint accompanied by a Motion to Dismiss. Both the Answer and the Motion to Dismiss request dismissal on the ground that Complainant is not a labor organization representing employees of the OSE and therefore the provisions of PEBA §§10-7E-19 (A), (B) and (G) are inapplicable.

CONCLUSIONS OF LAW:

- A. This Board has jurisdiction over both the parties and the subject matter in this case. The Complaint is facially adequate pursuant to NMAC 11.21.3.12. (A).
- B. Certification of the Communication Workers of America or the Communication Workers of America, Local 7076 as an exclusive bargaining representative for a designated and certified bargaining unit covering OSE employees is not determinative of its status as a labor organization as that term is defined by PEBA and for purposes of being a proper party to a Prohibited Practices Complaint filed pursuant to PEBA §10-7E-19 NMSA (1978). Consequently, the stated primary ground for Respondent's Answer and Motion to Dismiss is without merit.
- C. There is no evidence to support the allegation that OSE discriminated against a public employee with regard to terms and conditions of employment because of that employee's membership in a labor organization but for reasons other than asserted by Respondent in its Motion and Answer.

RATIONALE:

- I. New Mexico PEBA §10-7E-4(L) defines the term “labor organization” as:

“...an employee organization one of whose purposes is the representation of public employees in collective bargaining and in otherwise meeting, consulting, and conferring with employers on matters pertaining to employment relations.”

There is nothing in this definition requiring that a labor organization have completed PEBA’s unit certification processes with regard to the petitioned-for bargaining unit in order to attain status as a “labor organization”. An organization does not derive its status as a “labor organization” from successfully petitioning for certification. Rather, that status is wholly independent of and pre-exists the filing of a petition for certification of a bargaining unit and exists whether the labor organization represents millions of workers or none at all. All that is statutorily required for an entity to be a “labor organization” is that it be an organization one of whose purposes is that of representing public employees in collective bargaining and in otherwise meeting, consulting, and conferring with employers on matters pertaining to employment relations. This understanding of the term is apparent from its use elsewhere in PEBA and throughout the Board’s rules regarding the certification process. For example, §10-7E-13 NMSA (A) (1978), regarding the designation of appropriate bargaining units provides in part:

“The board or local board shall, *upon receipt of a petition for a representation election filed by a labor organization*, designate the appropriate bargaining units for collective bargaining...”

It would hardly be possible for a “labor organization” to file a petition for a representation election under PEBA if first it had to win the right to the

representation sought before it becomes a "labor organization" as the State's Motion suggests. Similarly, NMAC 11.21.2.11 regarding the requisite showing of interest in a certification or decertification proceeding provides for filed petitions for certification to be accompanied by at least thirty (30) percent of the employees in the proposed unit stating that each such employee wishes to be represented for the purposes of collective bargaining by the petitioning "labor organization". See, also NMAC 11.21.2.16 pertaining to procedures to be followed by intervening "labor organizations" to be considered along with the petitioner as "a party to the proceeding" and NMAC 11.21.2.33 regarding the failure of a "labor organization to be certified, all of which reference activities prior to or in the total absence of certification of the petitioned-for unit and recognition of the petitioner or intervener as the exclusive representative. Conversely, there is nothing in §10-7E-15 NMSA (A) (1978), to suggest that the exclusive representation rights and duties set forth therein determine whether an entity is a "labor organization". It seems clear that it contemplates instead a distinction between labor organizations that have won representation rights and those that have yet to do so.

In conformance with the foregoing Petitioner has demonstrated its status as a labor organization by the filing of the petition herein in which it expresses its intended purpose of representing public employees employed at OSE in collective bargaining. The State has presented nothing to indicate that its purpose is anything other than that. The Hearing Officer takes notice of the fact that a New Jersey court has described CWA as "an international labor organization" representing over 700,000 workers in both the private and public sectors. ***Communication Workers of***

America v. State of New Jersey, 22 A.3d 170, 174 (2011). Closer to home, CWA represents workers in the New Mexico Department of Health, Environment Department, Workers Compensation Administration and several other State Agencies, thereby underscoring the purpose of the organization implicit in its filing of the petition herein.

The Respondent briefed numerous issues other than the limited issue which is the subject of this decision some of which are wholly new issues and some of which are related to this issue but more properly the subject matter of the dispute over composition of the petitioned-for unit to be determined in PELRB 306-11. Issues surrounding the relationship between Communication Workers of America, the Complainant herein and Communication Workers of America, Local 7076 the Petitioner in the certification Petition PELRB 306-11 may be raised in that proceeding and perhaps cured by amendment in that case or this. In any case, that issue was not raised in the State's Motion and Answer. The Hearing Officer declines to consider issues not raised in the Answer and Motion to Dismiss filed September 6, 2011. Notwithstanding the foregoing, the Hearing Officer is empowered and has a duty to under NMAC 11.21.3.12 (C) to investigate the allegations of a Complaint and to dismiss or seek withdrawal of insufficient complaints. In the present case there is no evidence to support the allegation that OSE discriminated against a public employee with regard to terms and conditions of employment because of that employee's membership in a labor organization. The memorandum upon which the union's Complaint rests is directed to "OSE-All Employees Dist list". The change in working condition is directed to all OSE employees, not only those in the petitioned-

for bargaining unit". Issues surrounding whether the change though not discriminating against employees on the basis of union activities nevertheless constitute a prohibited practice on other grounds are not before us at this time and therefore are not decided.


II. Recommended Decision and Order:

- A. Respondent's Motion to Dismiss is **DENIED**.

- B. Complainant shall have five (5) days from receipt of this decision to withdraw allegations that Respondent's acts or omissions violated NMSA §10-7E-19(A). In the event the allegations are not so withdrawn those claims and those claims only shall be dismissed.

APPEAL: Either party may appeal this hearing officer's decision by filing a notice of appeal with the PELRB staff at 2929 Coors Blvd. NW in Albuquerque New Mexico 87120. Provisions for appeal are found at NMAC 11.21.3.19. An appeal must be filed within 10 work days of this opinion and otherwise comply with NMAC 11.21.3.19.

Issued this 7th day of October, 2011


Thomas J. Griego
Executive Director
Public Employee Labor Relations Board
2929 Coors N.W., Suite 303
Albuquerque, NM 87120
(505) 831-5422