STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AFSCME COUNCIL 18,
LOCAL 3999,

Petitioner,

v. **PELRB NO. 106-20**

CITY OF SANTA FE,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board ("Board") for review of the Hearing Officer's Report and Recommended Decision. After hearing oral argument, reviewing the Recommended Decision, the request for review and response thereto and being otherwise sufficiently advised the Board voted 3-0 to adopt Executive Director Thomas J. Griego's Recommended Decision and findings therein with the following amendments:

1. The City violated the Public Employee Bargaining Act and its rules when the City failed to give a 28-day advance notice before furloughing employees in violation of Article 19 Section 2 of the Parties' Collective Bargaining Agreement, thereby violating NMSA 1978, § 10-7E-19(H).
2. City employees were economically harmed by the failure of the City to give the 28-day notice before furloughing employees.

THEREFORE, THE BOARD adopts and affirms the hearing Officer's Report and Recommended Decision with the above amendment finding that the City violated the 28-day notice of furlough and **ORDERS** the parties to confer to determine damages. If the parties are unable to reach an agreement on damages, the matter is remanded to the Director

who will take additional evidence and submit his findings of fact and recommended decision on damages to the Board.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

1/15/2021
DATE

Marianne Bowers
MARIANNE BOWERS, BOARD CHAIR

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 18, AFL-CIO, LOCAL 3999,

Complainant,

v. **PELRB 106-20**

CITY OF SANTA FE,

Respondent

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

STATEMENT OF THE CASE: This matter comes before Thomas J. Griego, designated as the Hearing Officer in this case, on the merits of a Prohibited Practices Complaint (PPC) alleging that the City of Santa Fe violated the Public Employee Bargaining Act (PEBA) §§ 17(A)(1) and 19(F) when it breached its obligation to bargain in good faith by unilaterally implementing a furlough plan in response to a public health emergency declared after an outbreak of COVID-19 in New Mexico. The PPC also alleges the City violated §§ 17(A)(1) and 19(F) of the PEBA when it failed to provide requested information necessary for that bargaining. Finally, Complainant alleges the City's actions or inactions violated § 19(H) of the PEBA by refusing or failing to comply with Article 19 of the parties' Collective Bargaining Agreement (CBA) (Joint Exhibit 1), regarding Furlough, Layoff and Recall. Complainant bears the burden of proof on these claims.

Respondent claims that after a series of public health declarations that the virus posed an imminent threat of substantial harm to the population of New Mexico, on March 13, 2020, Alan Webber, the Mayor of Santa Fe, New Mexico declared a state of emergency pursuant to SFCC 1987, Section 20-1.2. (Exhibit 3). On the same day, the Santa Fe City Council adopted a Proclamation of Emergency. As a result of these various governmental declarations of a public health emergency, the City of

Santa Fe was required to shut-down all non-essential services and City related business. Because of the resulting loss of gross receipts tax revenues, the City was compelled to limit the effects of an estimated budget shortfall of over $100 million dollars. Among the actions taken to address the projected shortfall the City imposed temporary and partial employee furloughs in accordance with the CBA to the extent possible given the circumstances. The City's actions complied with the PEBA §§ 17(A)(1), 19(F), and 19(H). Furthermore, its actions were in accordance with Article 6 of the CBA concerning Management Rights. Any deviation from the requirements of the CBA were justified by the emergency making it necessary that the City take such action as may be necessary to carry out its mission and all other duties required by the Constitution, federal laws, state statutes, administrative regulations, and executive orders of the Governor, as well as City of Santa Fe Ordinances, and Rule and Regulations. The City bears the burden of proof on those defenses.

A hearing on the merits was held July 15 and 16 2020 at the PELRB offices in Albuquerque and via teleconference. All parties hereto were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Both parties submitted closing briefs on August 28, 2020. Both briefs were duly considered. On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

FINDINGS OF FACT: The following facts were stipulated by the parties in their Pre-Hearing Order as Facts Not in Dispute:

1. Complainant AFSCME is a "labor organization" as that term is defined in Section 4(L) of PEBA (NMSA 1978, § 10-7E-4(L) (2003)).
2. Complainant AFSCME is the duly elected, exclusive bargaining representative for a bargaining unit of employees employed by the City of Santa Fe.

3. Respondent City of Santa Fe is a "public employer" as that term is defined in Section 4(S) of PEBA.
4. Complainant AFSCME and Respondent have entered into a CBA entered into evidence as Exhibit J-1.
5. The PELRB has subject matter jurisdiction over this dispute, and personal jurisdiction over the parties.

In addition to the foregoing stipulated facts I find as follows:

6. On March 11, 2020, Governor Michelle Lujan Grisham, acting under the Public Health Emergency Act, declared in Executive Order 2020-004 that a Public Health Emergency exists in New Mexico. Exhibit 1.
7. On March 12, 2020, Kathyleen Kunkel, Cabinet Secretary of the New Mexico Department of Health, declared the current outbreak of COVID-19 to be a condition of public health importance and that the virus posed an imminent threat of substantial harm to the population of New Mexico. Exhibit 2.
8. On March 13, 2020, Alan Webber, Mayor of Santa Fe, New Mexico, declared a state of emergency pursuant to SFCC 1987, Section 20-1.2 in response to the Public Health Emergency. On the same day, Santa Fe's City Council adopted a Proclamation of Emergency due to the rapid spread of COVID-19. Exhibit 3.
9. Each of the above-referenced Orders and Proclamations have been extended and continue in force and effect through the Hearing on the Merits with some modifications regarding crowd size ("mass gatherings"), business closures or openings, schools, travel, and quarantine requirements. Special Notice of the Governor's Orders of extension at:

https://www.governor.state.nm.us/about-the-governor/executive-orders/; the Secretary's Orders of extension at: https://cv.nmhealth.org/public-health-orders-andexecutive-orders/and the Mayor's Resolution extensions at: https://www.santafenm.gov/2020_resolutions.

10. The General Fund budget for the municipality of the City of Santa Fe is largely based on Gross-Receipt Taxes or GRT (67%). Salaries and benefits comprise 65% of the City's General Fund expenses. The City's budget was, and continues to be, negatively impacted by the precipitous, unforeseen, and estimated long-lasting effects on budget shortfalls as a result of the business effects of the public health emergency. Exhibits 4 and 22.
11. As a result, Respondent was forced to take actions to limit estimated budget shortfalls for Fiscal Year (FY) 20 of over $46 million dollars. Exhibit 4 and Exhibit 22.
12. In order to balance estimated budget losses, the City implemented spending freezes for non-essential purchases, a hiring freeze, restricted non-essential overtime, and separated nonessential temporary employees. Exhibit 4.
13. The City introduced a Resolution seeking direct federal aid, used a portion of its "Rainy-Day Fund" to bridge the gap and bring the General Fund reserve down to 10%, considered generating additional revenue by reducing the City's real estate portfolio, and looked to access a portion of the $1.25 billion provided to the State through the CARES Act. Exhibit 4 at 0029-0033.
14. Employees who were eligible to work from home began to telework to comply with Governor Lujan-Grisham's Executive Order, the New Mexico Department of

Health Order, and the City of Santa Fe Proclamation of Emergency. Exhibits 1, 2, and 13.

15. New Mexico Public Schools were ordered closed, "mass gatherings" (which were later defined as more than five people) were prohibited, and non-essential travel was to be avoided. Id.

16. As a result of these measures, certain departments and services provided by the City ceased or were severely cut. These cost-cutting measures were not enough to address the City's estimated budget shortfall. Exhibit 22.

17. In considering the City's options, members of the City's "management team", which included the City Manager, Human Resource Director, Finance Director, and City Attorney examined portions of the Collective Bargaining Agreement (CBA), more specifically including, Article 19 concerning Furlough, Layoff and Recall, and Article 6 concerning Management Rights. Exhibits 16, 17 and 18.

18. Article 19 of the CBA (Joint Exhibit 1), in summary, contains the following provisions directly relevant to this case:

> "Section 1 General
>
> A. Upon determination by the Employer that a furlough or layoff of bargaining unit employees is deemed necessary, the Employer shall prepare and submit to the Union a detailed plan justifying the need for the furlough or layoff including all pertinent documents, including budgets, reports and any other materials used in its determination.
> B. A furlough is a temporary reduction of an employee's work hours within a workweek due to lack of funds. In the event of a furlough, full-time bargaining unit employees' hours shall not be reduced below twenty-four (24) hours. A furlough shall not exceed six (6) months.
> C. A layoff, or reduction in force, is the elimination of a position or positions on a temporary or permanent basis because of a shortage of work or funds.
> D. Management positions shall also be considered when devising such a plan for a furlough or layoff.

E. Prior to any furlough or layoff, the City Manager will meet with the Union to review and consider any cost-cutting measures within the bargaining unit represented by the Union that may reduce the need for, or extent of, the furlough or layoff.

F. Within seven (7) working days of receipt of a notice of furlough or layoff, the Union will develop a list of bargaining unit employees who wish to voluntarily participate in the furlough or layoff. That list will be presented to the City Manager for consideration.

Section 2 Notice

If a furlough or layoff is implemented, affected employees shall receive a minimum of twenty-eight (28) calendar days advance written notice. However, the Employer will attempt to provide as much advance notice as possible.

Section 3 Wages and Benefits

Upon layoff, laid-off employees shall be paid in full all due wages, accrued annual leave, longevity administrative leave, accrued personal holiday and compensatory time.

Section 4 Order of Furlough/Layoff

Employees affected by furlough or layoff will be furloughed/laid-off in inverse order of city seniority by type of appointment in the following order:

1. Emergency
2. Temporary/Seasonal
3. Probationary
4. Term/Grant funded
5. Classified part-time
6. Classified full-time

Section 5 Recall Rights

A. Furloughed/laid-off employees shall be recalled to work in the reverse order in which they were furloughed/laid-off."

19. The City's management team invited members and officers of Local 3999 to attend meetings via Zoom to discuss cost-cutting measures. Exhibits 8, 9 and 10.

20. Santa Fe's Mayor, Alan Webber, indicated that the purpose of the meetings was to brainstorm on cost-savings ideas and come to an agreement with the Union on how

they would be implemented. Testimony of Alan Webber, Audio Record Part 9 at 17:58-18:08.

21. During these meetings, the Mayor brought up the idea that neither party should publicly discuss what they were discussing at the table. They entered into a "gentleman's agreement" to do so. Id. at 20:00-21:32.

22. The Union considered that "gentleman's agreement" to have been breached on April 20, 2020 when the Mayor released details of the City's furlough plan in a regularly scheduled weekly press briefing without having reached an agreement with the Union. Exhibits 28 and 29.

23. On April 14, 2020, the City estimated its COVID-19 related administrative leave payments for the preceding two pay periods to be $350,000.00. Exhibit 7.

24. Zoom meetings, each lasting more than an hour were held on April 15, 16, and 17, 2020, were attended by Local 3999's President, Vice-President, Treasurer, Union Attorney, and Council 18 Representative, the Mayor and the City "Management Team". Testimony of Therese Martinez, Audio Record Part 2 at 06:30-31:50.

25. During the first meeting on April 15, 2020, the Union proposed, and the City agreed, to extend the current CBA and postpone negotiations until August "to take the pressure off both parties." Exhibit 8; Testimony of Therese Martinez, Audio Record Part 2 at 7:43 – 10:13.

26. The Finance Director also gave a presentation during that first meeting regarding City finances in general saying that they wanted to make sure that essential services continued to be provided during the crisis and to "do no harm." They also indicated that actual GRT revenues would not be known until June. Id. at 12:32-13:15; 13:16-14:05.

27. During that first meeting AFSCME Local 3999 was invited to suggest cost-cutting measures to address the City's fiscal crisis. Id. at 14:15-14:45; Exhibit 12.

28. The prospect of furloughs was not discussed during the first meeting. Testimony of Therese Martinez, Tr. Part 2 at 13:16-14:05.

29. The evening after the first meeting concluded, the City provided four pages of charts to the Union, Exhibit 8; Id. at 14:45-15:57.

30. During the second Zoom meeting on April 16, 2020, AFSCME Local 3999 presented its proposed cost-cutting measures, emailed at 3:45 pm that day, which concluded with "furloughs and layoffs are a last resort". Exhibit 13; Exhibit A; Testimony of Therese Martinez, Audio Record Part 2 at 16:22-17:58.

31. During this second meeting, the City made no proposal regarding furloughs or layoffs, but the Mayor suggested that they were a possibility. Id. at 23:13-23:35. Id. at 19:31-20:00.

32. After the second meeting, on April 16 the Human Resource Director prepared and shared with the Union a spreadsheet wherein she outlined the cost cutting measures suggested by the Union that were already being implemented, those already active, those that the City would further consider and those that could not or would not be implemented. Exhibit 14.

33. On April 17, 2020, Complainant sent an email to the Mayor and Staff acknowledging consideration of the Union's proposals for cost-cutting measures, the Mayor's agreement to "several of these points" and requesting greater detail regarding the potential furloughs. Exhibit 18.

34. At the same time the Zoom meetings were taking place the City began to create the detailed plan for the employee furloughs as required by Article 19, Section 1A of the CBA. City Exhibits 5, 11, 12, 16, 19, and 20.

35. At the April 17 meeting the City orally presented its projected budget shortfall - $46 million overall (out of a $400 million budget), of which $16 million was from the general fund (out of a $100 million general fund budget) but did not provide documentation showing how they came up with those figures. Testimony of Therese Martinez, Testimony of Therese Martinez, Audio Record Part 2 at 21:32-23:13.

36. Following this meeting, the Union sent an information request based on the topics that were discussed at the meeting. Exhibit B.

37. The Union's request for information in Finding 37 asked specific questions, such as the anticipated savings from the three categories of cost-cutting mentioned by the City (spending freeze, hiring freeze, and "people part"), a list of the 70 different funds Mary McCoy mentioned during the meeting, a line item breakdown of the shortfalls for those funds, and the regular/typical losses for each fund, a copy of the budget placeholder Mary McCoy mentioned they were allowed to submit to DFA during the pandemic in lieu of an actual budget, and an amount in the reserve fund and an amount they were required to maintain in that fund. Id.

38. The City did not provide the requested information. Testimony of Therese Martinez, Testimony of Therese Martinez, Audio Record Part 2 at 23:35 – 29:37.

39. In accordance with Article 19, Section 1F of the CBA, the City Manager requested the Union to provide a list of bargaining unit employees who wish to voluntarily participate in the furlough or layoff, within seven days of receipt of the notice of furlough plan. Exhibits 5 and 22.

40. There is no evidence that the Union prepared and submitted the requested list of bargaining unit employees who wish to voluntarily participate in the furlough and so one may reasonably infer that it was not done.
41. The City Manager acknowledged that the City would not provide the 28-day notice required in Article 19, Section 2 of the CBA rapid reduction in revenues which the City depends on to provide salaries. Exhibit 22.
42. In support of the furlough plan the City's Finance Director, Mary McCoy, provided the union with a budget update and report on April 20, 2020. Exhibit 24.
43. In response, the Union sent an email, with an attached proposal to minimize the impact on the bargaining unit on April 20, 2020, at 2:05 p.m. Exhibits 25 and 26.
44. The Union's April 20 proposal was not adopted. Exhibit 27.
45. On April 21, 2020, affected employees received a notice of furlough of either four hours or 16 hours per week. The notice indicated that the furlough would be effective beginning May 6, 2020, contingent upon approval by the Governing Body. This notice provided all effected City of Santa Fe employees with a 14-day notice in accordance with City Rule 7.41 (Furlough Rule). See Exhibit H and Exhibit 38.
46. On April 23, 2020, the City Manager provided the Union with supplemental documentation (AFSCME Furlough Listing by Name) to the detailed furlough plan provided to the Union on April 19, 2020. The City Manager also responded to a number of concerns and misconceptions regarding the furlough plan. Exhibits 35, 36, and 37.
47. On April 29, 2020, Resolution No. 2020-17 entitled "A Resolution Approving

Furloughs of Up to Four and Sixteen Hours for Certain City Employees, Due to the Fiscal Impacts of the COVID-19 Public Health Emergency" was approved by City of Santa Fe City Council. Exhibit 38.

REASONING AND CONCLUSIONS OF LAW:

I. EXCEPT AS NOTED IN POINTS II AND III BELOW, THE CITY DID NOT VIOLATE §§ 17(A)(1) AND 19(F) OF THE PEBA, BY REFUSING TO BARGAIN IN GOOD FAITH WITH THE UNION REGARDING THE IMPLEMENTATION OF THE CITY'S FURLOUGH PLAN.

While I agree with the City that it did not violate §§ 17(A)(1) and 19(F) of the PEBA by refusing to bargain in good faith during the several meetings about the City's COVID-19 response, I cannot agree that AFSCME's failure to bargain in good faith claims should be dismissed because the decision to furlough employees is an exclusive management right. As AFSCME points out, the management rights clause negotiated as part of the parties' CBA acknowledges that management rights may be modified:

> "It is agreed that, *except as expressly modified by the terms of this Agreement*, the Employer exclusively retains all rights, including but not limited to: … Relieve an employee from his/her position because of lack of funds or other legitimate reason… [and to] Maintain efficiency of government operations; determine methods, means, equipment and personnel by which the Employer's operations are to be conducted."

CBA Article 6, paragraphs 11 and 12, Exhibit J-1 (emphasis added).

Article 6 of the CBA is consistent with § 10-7E-6 of the PEBA concerning rights of public employers and which provides:

> "*Unless limited by the provisions of a collective bargaining agreement* or by other statutory provision, a public employer may:
> A. direct the work of, hire, promote, assign, transfer, demote, suspend, discharge or terminate public employees;
> B. determine qualifications for employment and the nature and content of personnel examinations;
> C. take actions as may be necessary to carry out the mission of the public employer in emergencies; and

> D. retain all rights not specifically limited by a collective bargaining agreement or by the Public Employee Bargaining Act."

NMSA 1978 § 10-7E-6 (2003) (Emphasis added).

The parties have bargained limitations on what might otherwise be management's right to effectuate furloughs as appears in Article 19 of their CBA concerning "Furlough, Layoff and Recall." As the Union points out in its closing brief, Article 19 defines a furlough as "a temporary reduction of an employee's work hours within a work week due to a lack of funds." Id. at § 1(B) (emphasis added). The temporary nature of furloughs is underscored by Article 19's requirement that "In the event of a furlough, full-time bargaining unit employees' hours shall not be reduced below twenty-four (24) hours. A furlough shall not exceed six (6) months." Id.

Once the City determined that a furlough was necessary it was obliged to submit a detailed plan justifying the need for the furlough together with all pertinent documents, including budgets, reports and any other materials used in its determination. Id. at § 1(A).

When formulating its furlough plan the City was further obligated to "consider" management positions Id. at § 1(D). Prior to implementing its furlough plan the City was required by Article 19 to meet and confer with the union concerning alternative cost-cutting measures. Finally, the City was required to give no less 28 days advance written notice before implementing any furlough plan.

Therefore, I conclude that the City bargained away any unfettered management right to effectuate furloughs and layoffs that may have existed and the PPC cannot be dismissed on the ground that the City was exercising such a right. The City is bound by the limitations and obligations imposed by Article 19 of the CBA and must act in accord with those limitations and obligations; a concept discussed further in the enumerated points below.

I do agree with the City that having negotiated Article 19 of the CBA, the terms of the City's right to implement furloughs has already been bargained and therefore, the City had no duty to bargain further on that issue until negotiations were scheduled to resume in August 2020. This is a closer question that might first appear because there is evidence on both sides of the question of whether the parties were actively engaged in negotiations for a successor contract at the time the furloughs were enacted. Based on the fact that during the first meeting concerning the COVID 19 response on April 15, 2020, the Union offered and the City agreed to extend the current CBA, I determine that negotiations on a successor contract had concluded and the existing layoff and furlough Article 19 was binding on the parties.

As the City observed in its closing brief, the facts of this case and the contract language at issue are substantially similar to those in *AFSCME Council 18 v. State of New Mexico*, 01-PELRB-2013 (January 23, 2013), (In re: PELRB No. 144-09), wherein this Board decided that the furloughs in that case was a proper exercise of management's right, reserved under the applicable CBA, to relieve an employee from duties for lack of work or other legitimate reason, to determine the size and composition of the work force, or to determine methods, means, and personnel by which the Employer's operations are to be conducted. *AFSCME v. State* drew a distinction between management exercising various rights specifically reserved to it in a CBA and the general obligation to bargain to impasse over changes in existing terms or conditions of employment.

The relevant portions of the CBA at issue in *AFSCME Council 18 v. State of New Mexico* are Sections 1 and 2 of Article 31, concerning Furlough and Reduction in Force and Article 18, Management Rights. Article 31 provided:

> "Section 1. In the event an agency contemplates a furlough or reduction in force (RIF), prior to submitting its furlough or reduction in force plan to the

SPB the agency shall notify and meet with the Union to discuss the furlough or reduction in force plan and consider alternatives.

Section 2. Furlough. In the event of a furlough, other than a furlough implemented because of a temporary loss of federal funds, the Employer may not furlough an employee in a manner that results in the loss of more than 80 hours of pay during a twelve month period or more than 53 hours of pay in any pay period, unless agreed to by the Union and there are no other alternatives available."

The Management Rights Clause, Article 18 of that CBA provided:

"Section 1. Except to the extent specifically modified or limited by this Agreement or by applicable statutory or regulatory provisions, the sale and exclusive rights of management shall include the following:

1. direct the work of, hire, promote, assign, evaluate, transfer, demote, suspend, dismiss, or otherwise discipline employees;
2. determine qualifications for employment and the nature and content of personnel examinations;
3. take actions as may be necessary to carry out the mission of the State in emergencies;
4. determine the size and composition of the work force;
5. formulate financial and accounting procedures;
6. make technological or service improvements and change production methods;
7. relieve an employee from duties because of lack of work or other legitimate reason;
8. determine methods, means, and personnel by which the Employer's operations are to be conducted;
9. determine the location and operation of its organization;
10. provide reasonable rules and regulations governing the conduct of employees; and
11. provide reasonable standards and rules for employees' safety.

Section 2. Prior to implementing any change in existing terms or conditions of employment relating to items 9, 10 or 11 of Section 1 above, the Employer shall provide the Union with reasonable notice under the circumstances of such contemplated action and, if requested to do so, shall bargain with the Union in good faith to impasse prior to implementing such changes."

Comparing the foregoing contract language with the contract language in the instant case shows that the furlough and management rights provisions of each are substantially the same. Article 6 of the CBA before us concerning management rights, provides:

"It is agreed that, except as expressly modified by the terms of this Agreement, the Employer exclusively retains all rights, including but not limited to:

1. Determine the mission, budget, organization and number of employees allocated by position to meet the minimum staffing levels of each department;
2. Determine qualifications for employment; validate content of examinations; make requests for position audits and reclassifications; and ensure that best practices exist for the recruitment, interviewing and selection of applicants;
3. Direct employees and evaluate their performance based on standards of work established by the Employer;
4. Make assignments, transfer, or retain employees in positions, and make determination of job duties;
5. Provide reasonable rules and regulations governing the conduct of employees;
6. Provide reasonable standards and rules for employees' safety;
7. Determine the location and operation of its facilities;
8. Determine standards for work, hiring, promotion, transfer, assignment and retention of employees in positions;
9. Initiate corrective and/or disciplinary action including, but not limited to, coaching and guidance, written reprimands, suspensions, demotions, alternate forms of discipline, transfers and terminations for just cause pursuant to Article 9 of this Agreement;
10. Determine scheduling and all other actions necessary to carry out the Employer's functions;
11. Relieve an employee from his/her duties because of lack of funds or other legitimate reason;
12. Maintain efficiency of government operations; determine methods, means, equipment and personnel by which the Employer's operations are to be conducted;
13. In cases of an emergency or declared disaster, take such actions as may be necessary to carry out the missions of the Employer that might not implicitly follow all articles in this Agreement; and

14. Act in furtherance of all other duties and responsibilities set forth in the Constitution, federal laws, state statutes, administrative regulations, and executive orders of the Governor, as well as City of Santa Fe Ordinances, and Rules and Regulations."

A comparison of Article 19 of the instant CBA set forth in Finding 18 above with Article 31 of the CBA in *AFSCME Council 18 v. State of New Mexico* concerning furlough, layoff and recall, demonstrates the same substantial similarity.

Considering the similarity of the applicable contract provisions and underlying facts, between the instant case and *AFSCME Council 18 v. State of New Mexico,* a similar outcome

should result. Here, as in *AFSCME Council 18 v. State of New Mexico,* the Union's comments and alternatives to the furloughs were taken into consideration and, in some instances, were reflected in the furlough plan eventually implemented. Meetings between labor and management via teleconference to discuss furlough avoidance cost-cutting measures, each lasting more than an hour, were held on April 15, 16, and 17, 2020. During the first meeting the City's Finance Director gave a presentation regarding City finances indicating that more precise numbers reflecting the adverse impact of the COVID-19 response on gross receipts tax revenues would not be known until June, but there was no reasonable doubt that the City was faced with a financial crisis as a result.

During the second meeting on April 16, 2020, AFSCME Local 3999 presented its proposed cost-cutting measures, which concluded with "furloughs and layoffs are a last resort" and Mayor Webber conceded that furloughs were a possibility. After that meeting the City's Human Resource Director shared with the Union a spreadsheet outlining the cost-cutting measures suggested by the Union that were already active or being implemented, those that the City would further consider and those that could not or would not be implemented. The Union acknowledged the City's consideration of its proposals and that the Mayor agreed to several of them.

At its last meeting, the City reported a projected budget shortfall of $46 million, but without documenting how it arrived at that figure. Accordingly, the Union sent an information request asking for the anticipated savings from the adopted cost-cutting measured, a list of the different funds comprising the City's budget, a line item breakdown of the shortfalls for those funds, typical losses for each of those funds, a copy of the "placeholder" budget submitted to the New Mexico Department of Finance and Administration in lieu of an actual budget, allowed because of the pandemic, and an amount in the City's reserve fund.

Reasonable minds may differ on the question of whether the meetings outlined herein satisfies the City's contractual obligation to confer with the union prior to implementing the furlough plan, but that is a different question than whether the City was obliged to bargain the furlough plan to impasse before implementing it. The parties' CBA reserved to management the prerogative to determine the size and composition of the work force, to relieve an employee from duties for any legitimate reason, and to determine which employees to layoff or furlough under its right to determine which employees will conduct the Employer's operations. See *National Labor Relations Board v. United States Postal Service*, 8 F.3d 832 (D.C. Cir. 1993). (Where a collective bargaining agreement gave the Employer the exclusive right to transfer and assign employees and determine methods, means, and personnel by which its operations were to be conducted, the Employer was not required to bargain before implementing service reductions which was a unilateral rearrangement of the employee's work schedules.) See also, *In Re: AFSCME Council 18 v. New Mexico Human Services Department*, 12-PELRB-2018 (PELRB 123-17, October 4, 2018). (The rights at issue had been bargained by the Union as the exclusive rights of management that may be exercised without further bargaining. These reserved management rights find a corollary in the PEBA itself at NMSA 1978, Section 10-7E-6 (2020) such that unless limited by the provisions of a collective bargaining agreement or by other statutory provision, the employer may direct the work of its employees. "The employer's actions in this case are not limited by the parties' CBA or PEBA but are in furtherance of them.").

While I agree that the fact that the parties entered into a CBA does not obviate the duty to bargain in good faith during the term of the collective bargaining agreement, I do not agree with the Union's argument that § 10-7E-17(A)(2) required the City to re-bargain furloughs reserved to management discretion by Article 19. Perpetual bargaining over terms and

conditions employment clearly reserved to management's discretion is not a desirable practical result for either party. Nor can the furlough plan in this case be deemed to constitute a *change* in wages, hours or working conditions when its possibility was contemplated by Article 19 and provided for in the parties' negotiated CBA. Additionally, the Union proposed that the CBA at issue here be extended until August 2020 - a proposal to which the City agreed, thus constituting a waiver of the Union's "right" to re-bargain a previously reserved management right. A contrary conclusion would not permit employer's the level of dexterity required under emergency circumstances such as those faced by the City in this case and contemplated by Article 19 of its agreement with the Union.

For the reasons stated above, I conclude that the City did not refuse or fail to bargain in good faith with the union regarding implementation of its furlough plan and therefore, it did not violate §§ 17(A)(1) and 19(F) of the PEBA by its enactment of a furlough plan without bargaining to impasse.

That determination does not entirely dispose of the question of good faith bargaining, however. The Union relies on evidence suggesting that the City did not provide it with sufficiently detailed information to meet the requirements of Article 19 or the ongoing statutory obligation to bargain in good faith – an obligation that extends beyond the term of the parties' CBA. Analysis of that aspect of the good faith obligation is undertaken in the two points that follow.

II. THE CITY FAILED TO COMPLY WITH ARTICLE 19 SECTION 2 OF THE PARTIES' CBA, REGARDING ADVANCE NOTICE OF A FURLOUGH. HOWEVER, THE VIOLATION IS EXCUSED BY OPERATION OF ARTICLE 6, PARAGRAPHS 13 AND 14 SO THAT THE SHORTENED NOTICE DID NOT CONSTITUTE A PROHIBITED LABOR PRACTICE UNDER § 19(H) OF THE PEBA

NMSA 1978 § 10-7E-19(H) provides that a public employer shall not refuse or fail to comply with a collective bargaining agreement. Article 19 Section 2 of the parties' CBA in this case provides that "If a furlough or layoff is implemented, affected employees shall receive a minimum of twenty-eight (28) calendar days advance written notice. However, the Employer will attempt to provide as much advance notice as possible." The City does not dispute that it gave only 14 days advance written notice before implementing its furlough plan but argues that shortening the notification period was necessary to avoid paying out approximately $175,000.00 in COVID-19 administrative leave for people to stay at home and not work.[1]

NMSA 1978 § 10-7E-2 provides that one of the purposes of the Public Employee Bargaining Act is to "…protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions. In times like these, when public employers are struggling to balance public safety and fiscal responsibility against their ongoing obligations to bargain with collective bargaining representative over wages, hours and working conditions, conflicts among various sections of a CBA are more likely to occur. The parties in this case have contemplated such conflicts and negotiated specific provisions of their CBA to address them. The parties' management rights clause, Article 6, paragraphs 13 and 14 provide that the City may:

> "In cases of emergency or declared disaster, take such actions as may be necessary to carry out the mission of the Employer that might not implicitly follow all articles in the Agreement"

and,

> "Act in furtherance of all other duties and responsibilities set forth in the Constitution, federal laws, state statutes, administrative regulations, and

[1] The City's HR Director, Bernadette Salazar testified in accord with Exhibit 7 that for two periods (approximately 28 days) in April 2020, the City paid $350,000.00 to employees on COVID-19 related administrative for which the City received no work. For one pay period, ½ of that amount is a reasonable estimated savings.

> executive order of the Governor, as well as City of Santa Fe Ordinances, and Rule and Regulations."

The City faced an emergency budget shortfall resulting from shutting off a major part of it tax revenue in order to comply with Public Health Emergency Act declarations. If the City had a duty to be fiscally conservative under such emergency circumstances (as I believe it did), then a conflict between its statutory obligation to ensure the orderly operation and functioning of the state and its political subdivisions and the 28-day notice provision of Article 19, Section 2, was almost inevitable.

It is axiomatic that when construing the terms of a contract a judge is to give effect to the intention of the parties as shown by the language of the whole instrument, considered with the surrounding circumstances. For example, in *Agua Fria Save the Open Space Ass'n v. Rowe*, 149 N.M. 812, 255 P.3d 390, 2011 -NMCA- 54, 2011 NMCA 54 (N.M. App. 2011) our Court of Appeal observed in the context of construing restrictive covenants that "…a court is to give effect to the intention of the parties as shown by the language of the whole instrument, considered with the circumstances surrounding the transaction, and the object of the parties in making the restrictions", citing *Hines Corp. v. City of Albuquerque,* 95 N.M. 311, 313, 621 P.2d 1116, 1118 (1980).

In considering whether the City committed a prohibited labor practice by its admitted failure to give the required 28 days advance written notice of it furlough plan in Article 19, Section 2 of the CBA, I am obliged to take into account Article 6, paragraphs 13 and 14 of the CBA so that the intention of the parties as shown by the language of the whole instrument is given effect. Construing the CBA as a whole I conclude that under appropriate limited circumstance such as are present here, the City may depart from the required 28 days advance written notice of its furlough plan given such notice as is appropriate under the circumstances. In this case Santa Fe was required to cease all non-essential City services and

restrict local business and travel because of various governmental declarations of a public health emergency. The resulting loss of gross receipts tax revenues compelled it to take immediate action to limit the effects of an estimated budget shortfall of over $100 million dollars. The projected budget shortfall (whether considered to be a "crisis" or not) justified the City deeming the subject furloughs a fiscal necessity in a proper exercise of its discretion to do so and only after exhausting other remedial measures. Time was of the essence in dealing with the fiscal emergency as was acknowledged by the Union in Exhibits 12 and 18. As the City's Finance Director testified and as shown by Exhibit 7, for a two-pay period timeframe, the City paid $350,000.00 in COVID-19 administrative leave. Shortening the furlough notice period from 28 to 14 days saved an estimated $175,000.00 in personnel costs, which arguably inures to the benefit of bargaining unit employees by lessening the duration and amount of furlough hours necessary to offset the projected shortfall.

I have considered the cases cited in the City's closing brief concerning the obligation to bargain following various natural disasters, acts of God, terrorism and war but do not find most of them particularly helpful as they construe the parties' obligations under a force majeure clause not present here. Even if the CBA at issue here contained a force majeure clause, I doubt that policy decisions by government officials even though made in response to a pandemic qualify as an "act of God", particularly when those policy decisions are made by the employer itself rather than imposed by a superior entity. Finally, I do not believe force majeure applies because the effects of the pandemic did not prevent compliance with Article 19's notice provisions, only the cost of doing so.

Those cases decided under sequestration and resulting temporary failure to fund the federal government are only somewhat more applicable to the extent they involve collective bargaining and not an agency's regulatory powers or application of other statutory schemes

such as the Worker Adjustment and Retraining Notification Act (WARN) which requires employers to give employees 60-days advanced notice of plant closing or layoff. Although *National Federation of Federal Employees, Local 1442 v. Department of Army*, 810 F.3d 1272 (Ct. App. Fed. Cir. 2015), has some possible application to whether a decision to furlough is justified by the circumstances faced by the employer when the furlough decisions were made and whether promoting the "efficiency of the service" standard is satisfied by demonstrating that the furlough was a reasonable management solution to the prevailing financial restrictions and whether the employer applied the furlough in a fair manner, the City's right to impose the furlough in its discretion is not an element of the Union's claim that it did not comply with Article 19 section 2 of the parties' CBA, regarding advance notice of the furlough plan. Therefore, this recommended decision is based not on those cases but on my construction of Articles 19 and 6 of the CBA and New Mexico jurisprudence on contractual construction.

My determination that the shortened notice did not constitute a prohibited labor practice does not end the inquiry however, because the Union also alleges failure to comply with the detailed information requirements found in Article 19.

III. THE CITY VIOLATED §§ 17(A)(1), 19(F) AND 19(H) OF THE PEBA, BY REFUSING OR FAILING TO PROVIDE THE UNION WITH REQUESTED INFORMATION NECESSARY FOR THE BARGAINING REGARDING A FURLOUGH PLAN

a. There exists an ongoing duty to bargain in good faith, which includes a duty to provide requested relevant information necessary to negotiate, administer and police the CBA and to represent all collective bargaining unit employees fairly and adequately. By refusing or failing to provide the union-requested information in this case the City violated §§ 17(A)(1), 19(F) of the PEBA

b. The City failed to comply with Article 19 Section 2 of the parties' CBA, requiring a detailed plan justifying the need for the furlough including all pertinent documents, including budgets, reports and any other materials used by the city in its determination that the furlough was deemed necessary. That failure constituted a prohibited labor practice under § 19(H) of the PEBA

On more than one occasion the Union requested information relating to the City's finances, the cost-savings proposals under consideration, and what furlough plans was contemplated as part of the required disclosures under Article 19 of the CBA. For example, on April 17, 2020 during the second of the three meetings to discuss cost cutting measures, the Union requested "other data" regarding the potential furloughs. See Exhibit 18. See also specific information requested on April 17 and 23, 2020 in Exhibits B, C and D including the anticipated savings from the three categories of cost-cutting measures discussed at the meeting on April 17, a list of the 70 different funds mentioned during the meeting, a line item breakdown of the shortfalls for those funds, and the regular/typical losses for each fund, a copy of the "budget placeholder" submitted to DFA in lieu of an actual budget and the City's reserve fund balance. The City did not provide much of the requested information. Testimony of Therese Martinez, Audio Record Part 2 at 23:35 – 29:37.
I note that estimated cost savings ahead of furloughs was provided to the union on April 16, 2020 (Exhibit 11) and a detailed list of the status of cost cutting proposals (without estimated savings for each) was submitted to the union on April 17. See Exhibit 14. Also, on April 17, 2020, the City submitted what it purported to be a "Detailed Budget Cut Plan", which plan is devoid of any supporting data. See Exhibit 16. To the contrary, the section of the plan calling for the estimated cost savings is left blank on the document. On April 20, 2020, the City shared budget update to be presented to the City's Finance Committee later that evening. Exhibit 24. That presentation does not specify how the revenue projection was

made. Testimony of Mary McCoy, Audio Record Part 10 at 1:06:30-1:07:51. This level of information disclosure falls short of the "detailed plan" requirements of Article 19. The disclosures did not inform the Union of such basic information as which bargaining unit employees would be furloughed and for how long until the City provided that information on April 23, 2020, several days after it implemented its furlough plan. I infer that such information was available to be shared with the Union earlier because Bernadette Salazar testified that the City maintains a spreadsheet that allows it to calculate the kind of data sought by the Union. Testimony of Bernadette Salazar, Audio Record Part 11, at 00:11:15 et seq.

Mary McCoy testified that in retrospect, her projection that GRT revenue would fall by 40-50% did not come to pass. In April 2020 it fell by only 19%. (Testimony of Mary McCoy, Audio Record Part 10 at 1:02:24-1:03:58.) The union seizes on that inaccuracy to argue that the furlough was not justified by a lack of funds as required by Article 19. I consider the same information to have another meaning. I conclude that it is not reasonable to hold the City to a budget figures acquired after-the-fact for determining whether the furloughs were fiscally justified. An employer can act only upon information available to it at the time. There is no evidence that the budget projections were fraudulent; only that they turned out to be inaccurate in hindsight. There was an actual revenue shortfall though, thankfully, less than anticipated. Therefore, I draw no negative inference from the fact that the City's projections turned out to be inaccurate to challenge the basis for the furloughs being "due to lack of funds". However, I agree with the Union that the purpose of Article 19's requirement that the City must submit a detailed plan justifying the need for the furlough together with all pertinent documents, including budgets, reports and any other materials used in its determination, is to avoid such inaccurate projections and making poor policy decisions in

reliance on them. That the actual revenue shortfall was significantly less than projected highlights the wisdom of the parties in negotiating Article 19's disclosure requirements. Had the Union been given the source information requested, it is possible that the Union could have challenged the projections that eventually turned out to be inaccurate. Avoiding inadequately supported policy decisions also underscores the solid reasoning behind the proposition that the employer's ongoing duty to bargain in good faith includes a duty to provide, upon request, any relevant information necessary to negotiate, administer and police the CBA, and to fairly and adequately represent all collective bargaining unit employees. 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).

Given the express requirements of Article 19 for disclosure of information, it cannot reasonably be disputed that the information requested by the Union but not provided, was necessary to fulfill its representational role. In that respect I view the failure to provide information differently than I do the 28-days advance notice requirement so that the management rights clause, Article 6, paragraphs 13 and 14 do not constitute actions "necessary to carry out the mission of the Employer that might not implicitly follow all articles in the Agreement" or an "Act in furtherance of all other duties and responsibilities set forth in the Constitution, federal laws, state statutes, administrative regulations, and executive order of the Governor, as well as City of Santa Fe Ordinances, and Rule and Regulations." Under the facts and circumstances of this case the preponderance of the evidence supports a conclusion that the City failed to provide the Union with requested information relevant to the Union's administration of the contract constituting a breach of

an ongoing duty to bargain in good faith regarding the furlough at issue in violation of §§ 17(A)(1) and 19(F) and (H) of the PEBA.

IV. RESPONDENT HAS NOT MET ITS BURDEN OF PROOF REGARDING OTHER AFFIRMATIVE DEFENSES

Respondent's brief argued defenses not otherwise addressed in this Report and Recommended Decision. Although they do not appear in either the City's Answer or in the Stipulated Pre-Hearing Order herein, I have considered each and address them here. Affirmative defenses such as the doctrines of frustration and unclean hands are not appropriately applied in a statutory claim such as this PPC. Both are defenses only against claims in equity and do not protect a party against a claim at law. Furthermore, it is debatable that the City's COVID-19 response made it physically or commercially impossible to fulfill the contract or transformed the obligation to perform into a radically different obligation from that undertaken initially so that the defenses would fail on their merits.

CONCLUSION: An emergency such as that faced by the City of Santa Fe reflected by the series of Public Health Declarations described herein, does not excuse an obligation to bargain in good faith imposed by NMSA 1978 §10-7E-17(A)(1). That bargaining obligation however, is subject to limited exceptions where an Employer must take such emergency actions necessary to carry out its mission that might deviate from a Collective Bargaining requirement or take limited emergency action in furtherance of other duties and responsibilities set forth in the Constitution, federal laws, state statutes, Ordinances, administrative regulations and Executive Orders of the Governor. The parties to this PPC contemplated such emergency exceptions in the CBA's management rights clause, Article 6, paragraphs 13 and 14.

Although I have determined that the City of Santa Fe was not required to bargain to impasse over the furloughs at issue, I did not reach that determination because the decision to furlough employees is an exclusive management right. Such management rights to initiate a furlough as may have existed in the absence of a Collective Bargaining Agreement have been modified by Article 19 of the CBA. Rather, having negotiated Article 19 of the CBA, the terms under which City could implement furloughs has already been bargained and therefore, the City had no duty to bargain further on that issue until negotiations were scheduled to resume in August of 2020. That determination did not entirely dispose of the question of good faith bargaining because the City did not provide the Union with sufficiently detailed information to meet the ongoing statutory obligation to bargain in good faith. That failure constitutes a breach of an ongoing duty to bargain in good faith in violation of §§ 17(A)(1) and 19(F) of the PEBA. Similarly, the failure to provide more detailed information constituted a violation of Article 19 of the parties PPC and therefore a prohibited labor practice under § 19(H). There is not sufficient evidence on the record to determine that had the requested documentation been provided that the furloughs would not have taken place, that the furloughs would not have still been necessary considering the actual GRT shortfall or that bargaining unit members have otherwise been economically harmed.

Based on the foregoing it is my Recommended Decision that the Board adopt my findings, legal analysis and conclusions, sufficient to establish that the City of Santa Fe committed Prohibited Labor Practices and the union's Complaint should be **SUSTAINED** as to the following:

1) Violation of §§ 17(A)(1) and 19(F) of the PEBA for failure to provide detailed information as requested as a failure to abide by the ongoing duty to bargain in good faith.

2) Violation of NMSA § 19(H) of the PEBA, by refusing or failing to provide the union with requested information necessary for the bargaining regarding a furlough plan failed to comply with Article 19 Section 2 of the parties' CBA.

Any other allegations of the Complaint not part of the above violations should be dismissed.

As a remedy for the above prohibited practices, the City should be ordered to:

a) Cease and desist from the above-found prohibited practices now and in the future.

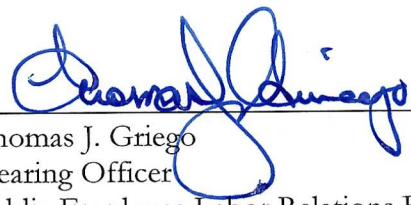
b) Bargain in good faith with the Union regarding furloughs, as required by PEBA during any negotiations scheduled to have begun in August 2020 or thereafter.

c) Post at its City Hall and at any of the facilities where bargaining unit members are assigned, copies of the attached notice marked "Appendix A", after being signed by the Mayor of Santa Fe. The notice shall be posted immediately after exhaustion of all appeal rights and maintained for 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the District to ensure that the notices are not altered, defaced, or covered by any other material.

d) Notify the Executive Director in writing within 20 days from the date of the Board's Order what steps the District has taken to comply with the Board's Order and post notice of the violations.

Because there is not sufficient evidence on the record to determine that had the requested documentation been provided that the furloughs would not have taken place, that the furloughs would not have still been necessary considering the actual GRT shortfall or that bargaining unit members have otherwise been economically harmed, no economic damages as requested by the Union should be awarded.

Issued, Friday, September 18, 2020.



Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board
2929 Coors Blvd. N.W., Suite 303
Albuquerque, New Mexico 87120

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD
An Agency of the State of New Mexico

The Public Employee Labor Relations Board has found that we violated the Public Employee Bargaining Act and has ordered us to post and obey this notice.

You have the right under the Public Employee Bargaining Act §10-7E-17(A)(1), to bargain collectively with the City of Santa Fe in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties.

As defined by the Public Employee Bargaining Act, §10-7E-4(I) American Federation of State, County and Municipal Employees, Council 18, AFL-CIO, Local 3999, having been recognized as an exclusive representative, has the right to represent certain City employees covered under the parties' Collective Bargaining Agreement (CBA) now in effect.

That CBA includes procedures to be undertaken prior to implementing employee furloughs. By failing to provide the Union with sufficient detailed information prior to enacting Resolution No. 2020-17 entitled "A Resolution Approving Furloughs of Up to Four and Sixteen Hours for Certain City Employees, Due to the Fiscal Impacts of the COVID-19 Public Health Emergency" on April 29, 2020, we did not comply with Article 19 of the CBA in violation of NMSA §10-7E-19(G) and (H).

We acknowledge the above-described rights and responsibilities and will not in any like manner refuse to bargain in good faith with the American Federation of State, County and Municipal Employees, Council 18, AFL-CIO, Local 3999, and we agree to honor our commitments under the CBA, including the preparation and submission to the Union of a detailed plan justifying the need for the furlough or layoff including all pertinent documents, including budgets, reports and any other materials used in its determination prior to implementing layoffs and responding to union requests for information necessary to fulfill its role as your exclusive representative.

_____ Date:_____
Alan Webber, Mayor, City of Santa Fe