STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

04-**PELRB-2011**

NEA – NEW MEXICO

Complainant,

v. **PELRB No. 114-10**

ESPAÑOLA PUBLIC SCHOOLS,

Respondent

ORDER AND DECISION

THIS MATTER comes before the Public Employee Labor Relations Board for ratification of the Hearing Officer's Recommended Decision denying Respondent's Motion for a Directed Verdict, concluding that resumption of suspended negotiations and ultimate agreement on a contract does not end a controversy over whether the facts surrounding the suspension of the negotiations constituted a prohibited labor practice as a matter of law. Neither does Respondent's assertion that a purported survey of union dues being paid did not actually take place end a controversy surrounding the justification for suspension of negotiations as a matter of law. Upon a 3-0 vote at the Board's November 6, 2011 meeting;

IT IS HEREBY ORDERED that the recommended decision be and hereby is adopted by the Board and that the Respondent's Motion be **DENIED.**

Duff Westbrook, Chairman
Public Employee Labor Relations Board

Date: 11-14-11

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

NEA – NEW MEXICO

Complainant,

v. **PELRB No. 114-10**

ESPAÑOLA PUBLIC SCHOOLS,

Respondent

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

THIS MATTER comes before the Hearing Officer on the Respondent's Motion for a Directed Verdict. Petitioner filed a Prohibited Practices Complaint on April 5, 2010 alleging that Respondent failed to bargain in good faith when on March 30, 2010 Respondent suspended negotiations over one of two Collective Bargaining Agreements being negotiated and refused to respond to proposals tendered at the bargaining table concerning said agreement. It further alleges that research purportedly undertaken by the Respondent into which employees were paying union dues was done for the purpose of interfering with NEA's duty to bargain on behalf of those it represents.

The Respondent acknowledges suspending negotiations but only as to the one of the two bargaining units whose contracts were being negotiated. That representing Educational Support Personnel, and generally denies that its actions constitute a failure to bargain in good faith or interference with Española-NEA's duty to bargain on behalf of the employees it represents. In a position statement submitted by Respondent September 27, 2010, it asserted that Complainant no longer has a justiciable claim because the polling complained of did not occur and because since the filing of the complaint, the parties have

reached an agreement through collective bargaining for both bargaining units and therefore Complainant's allegations of bad faith bargaining are moot.

A hearing on the merits was held January 13 and 14, 2011 and at the close of the Española-NEA's case in chief, Respondent moved for a "directed verdict" which is being regarded for purposes of this recommended decision as a Motion for Judgment on the Law. Then-Executive Director Pamela Gentry was to rule on the motion by January 28, 2011 and if such motion was denied, the parties were to file post-hearing briefs by February 18, 2011. By letter dated January 31, 2011, Director Gentry extended the deadlines by two weeks. However, on February 5, 2011 Director Gentry was terminated and therefore, no rulings have been made in this matter.

At a Status and Scheduling Conference held September 15, 2011 the parties stated their preference for a ruling on the pending Motion on the Law reserving the right to proceed with a briefing schedule until after a decision on that Motion is entered. This Hearing Officer agreed to render a decision on the Motion as soon as possible and this report and recommended decision constitutes that decision.

FINDINGS OF FACT:

1. Complainant is the Exclusive Bargaining Representative for both of the two Bargaining Units at issue in this case; Certified Personnel and Educational Support Personnel.
2. The parties have engaged in collective bargaining culminating in contracts for each unit for the year 2008-2009, and renewed those contracts for the year 2009-2010. The terms of those contracts expired June 30, 2010.

3. The parties were engaged in negotiations over successor contracts for both bargaining units when, on March 30, 2010, during a caucus, the Chief Negotiator for the Respondent delivered a letter to Española-NEA's Chief Negotiator which letter stated that Respondent was suspending negotiations with regard to the Educational Support Personnel bargaining unit.

4. The letter states in pertinent part:

> "It has come to the District's attention based on Espanola-NEA dues deductions that Espanola-NEA does not currently enjoy majority status as an exclusive bargaining representative for the Support Staff bargaining unit...
>
> The Espanola Public School District hereby provides notice to the Espanola-NEA that due to its lack of majority status, negotiations between the Espanola-NEA Support Staff and the District are hereby suspended and the Espanola-NEA is given until April 30, 2010 to regain its majority status as the exclusive bargaining representative of the Espanola Public School District Support Employees..."

5. When the parties resumed the negotiations session after the caucus, Española-NEA submitted proposals for consideration by the Respondent, several of which pertained to both the Certified Personnel and Educational Support Personnel Agreements. The Respondent's Chief Negotiator declared that he would not respond to them because they applied to the Educational Support Personnel Collective Bargaining Agreement and the Respondent had suspended bargaining as to that contract.

6. At times material throughout the negotiations, the Complainant entered into Tentative Agreements with Respondent but only as to the Certified Personnel Collective Bargaining Agreement.

CONCLUSIONS OF LAW:

This case presents two actual controversies warranting consideration by the Hearing Officer; the first, arising out of the union's allegations that the Respondent's conduct at the bargaining table and during a caucus on March 30, 2010 constituted bad faith bargaining and the second, arising out of the union's allegations that research (or "polling" as the Respondent puts it) into employees union dues illegally interfered with Española-NEA's duty to bargain on behalf of those it represents. Neither of those controversies is resolved by the subsequent resumption of negotiations and eventual agreement on a contract. The subsequent resumption of negotiations and eventual agreement on a contract may affect the remedy available or the willingness to continue pursuing the claim but it is not dispositive of the controversy over whether a prohibited labor practice was committed by the suspension of bargaining on March 30, 2011 or by the research into dues payments that preceded it.

The controversy over dues research is not avoided as the Respondent seeks to do by alleging that the "polling" never actually took place because the status of dues payments to the union was the stated basis for believing that Complainant lacked of majority support justifying the suspension of negotiations and if no research was actually conducted then the good faith basis for suspending negotiations is even more questionable.

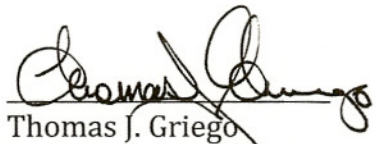
Additionally, even if the facts no longer supported the existence of an actual controversy, applying the ***Mowrer*** criteria, it appears that there is both a likelihood of recurrence of the same issue as well as a public interest exception present. The gravamen of Respondent's Motion for Judgment on the Law is that it matters less whether an actual prohibited labor practice occurred than it does that it eventually retreated from the practice. (This not to say that a violation is found to have occurred in this case but, as stated

previously, resumption of negotiations and ultimate agreement on a contract does not end the controversy as a matter of law.) The Chief Negotiator for the Respondent or his business entity appear in dozens of this Board's files over several years and he is well-known in the public employee labor/management community as being an influential and active participant in either direct bargaining public employee collective bargaining contracts subject to the Public Employee Bargaining Act or advising others who are. As the Chief Negotiator in the present case it is reasonable to presume that the suspension of negotiations if not the surveying of union dues payments was done with his knowledge and consent. It follows that given the breadth of his involvement in either directly or indirectly negotiating public employee contracts that the rationale justifying the acts complained of bears a substantial likelihood of being repeated. An Order in this case on the controversies presented would likely have a preclusive effect on parties faced with similar situations arising in negotiating future public employee collective bargaining contracts.

Additionally, these controversies present issues of substantial public interest. At the risk of stating the obvious, the contracts involved were being negotiated pursuant to the state's Public Employee Collective Bargaining Act, §10-7E-17 (2008). Jurisdiction over the controversies is invoked pursuant to the Act, §10-7E-19 (2008). While these references alone may not rise to the level of "substantial" public interest an authoritative determination in this case will likely provide future guidance of public officers in their contract negotiations under the Act . If the Respondent in this case is allowed to arguably commit a prohibited labor practice with impunity as long as it eventually "sees the light" and repents, then the Respondent and other governmental entities similarly situated could effectively

briefs to the Executive Director for a recommended decision on the merits. However, upon preparing the record for transmission to the parties it became apparent that the record was not complete and transmittal would serve no purpose. It remains therefore to determine whether the parties nevertheless wish to submit the issue to the Executive Director for decision on briefs or re-try the matter with a new evidentiary hearing. A scheduling conference is directed to be held to set a time either for submission of briefs or for re-trying the matter on the merits after which a Hearing Officer's report and recommended Decision on the merits will issue.

Issued this 27th day of September 2011



Thomas J. Griego
Executive Director
Public Employee Labor Relations Board
2929 Coors N.W., Suite 303
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September 29, 2011

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RE: ***Prohibited Practice Complaint, NEA-NM v. Espanola Public Schools PELRB Case # 114-10***

Dear Ms. De Santiago and Ms. Holcomb:

Please take notice that with regard to the recommended decision issued in this case on September 27, 2011 with regard to the issue of mootness that either party may appeal that 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 the opinion and otherwise comply with NMAC 11.21.3.19.

Sincerely,

/s/

Thomas J. Griego
Executive Director, PELRB