

STATE OF NEW MEXICO  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

SANTA FE POLICE OFFICERS ASS'N.,

Complainant

04-PELRB-2012

v.

PELRB No. 127-10

THE CITY OF SANTA FE, et al,

Respondents

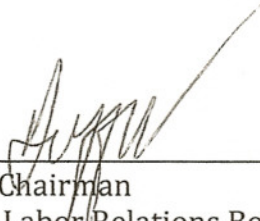
**ORDER**

THIS MATTER comes before the Public Employee Labor Relations Board for ratification of the Hearing Officer's Order dismissing the claims herein.

Upon a 3- 0 vote at the Board's January 10, 2012 meeting;

**IT IS HEREBY ORDERED** that the Hearing Officer's Findings, Conclusions and Rationale set forth in its Recommended Decision of October 31, 2011 shall be, and hereby are, adopted as the Order of the Board for the reasons set forth therein. Petitioner's Complaint is **DISMISSED.**

Date: 1-22-12

  
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Duff Westbrook, Chairman  
Public Employee Labor Relations Board

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Respondents**

**HEARING OFFICER'S REPORT AND RECOMMENDED DECISION**

THIS MATTER comes before the Hearing Officer on Respondents' Motion to Dismiss contained in Respondents' Answer to the Complaint. At a Status and Scheduling Conference held September 28, 2011, the parties were given an opportunity to research and brief the time bar issue and other issues raised in the City's Motion to Dismiss. Petitioner timely submitted its Brief in Response to the City's Motion to Dismiss and the Respondents filed a timely Reply Brief.

**FINDINGS OF FACT:**

1. Complaint (SFPOA) is the recognized collective bargaining representative for sworn certified officers employed by the Santa Fe Police Department holding the rank of Sergeant and below.
2. Respondent Aric Wheeler was at all times material the Chief of the Santa Fe Police Department and his acts complained of were performed in that capacity and as an agent of the public employer, City of Santa Fe.
3. SFPOA and the City, beginning in the 1980's have entered into a series of Collective Bargaining Agreements and there was at the time of the filing of the Complaint herein, a collective bargaining agreement (CBA) in effect.

4. On 01/28/2011 the union filed the Prohibited Practices Charge herein. Complainant does not specify the provisions of PEBA's Prohibited Practices section it alleges were violated and therefore the complaint is facially deficient in that NMAC 11.21.3.8 requires *inter alia* that a claim contain a statement of the specific section of PEBA claimed to have been violated as part of its minimum requirements. The complaint does assert in paragraph 12 that through the series of actions alleged in its complaint "...the Department, and Wheeler have failed to comply with the terms and conditions of the CBA in that the City, the Department, and Wheeler have violated Sections 33 and 35 of the CBA..." and PEBA §10-7E-19(H) NMSA 1978 provides that a public employer or his representative shall not "refuse or fail to comply with a collective bargaining agreement" but Petitioner has not clarified his pleading by referring to that section in its Brief or otherwise amending its complaint.
5. In its Answer to the Complaint Respondents moved for dismissal on the ground that the Complaint is time barred in that none of the acts alleged as the basis for the complaint occurred within the six month period preceding the filing of the complaint required under the Board's Rules NMAC 11.21.3.9; to wit:
  - a. The employee's termination at issue occurred 05/13/2010 almost 8 months prior to filing the PPC;
  - b. Notice by the City to the union that it was not proceeding to arbitration because the union had not timely requested arbitration was given 6 months and three weeks prior to the filing of the PPC;

- c. The union's complaint that the City did not timely complete the Internal Affairs investigation in violation of the contract was known to the union a year prior to the filing of the PPC;
  - d. Any union complaints alleging contract violations associated with the issuance of an Internal Affairs target letter issued July 19, 2009 occurred one year and 6 month prior to filing the PPC;
  - e. Allegations that the employer relied on old disciplinary information in violation of the contract occurred 10 months prior to filing the PPC.
6. The union does not contest this chronology but asserts that the operative date from which the 6 month rule should be calculated is 10/01/2011 which the union identifies as the earliest date it could have known the City would not arbitrate, based on conversations between the union and City officials. Those discussions took place in August and October 2010 beyond the CBA's deadline for requesting arbitration.

**CONCLUSIONS OF LAW:**

- A. This Board has jurisdiction over both the parties and the subject matter in this case except as noted below.
- B. This Board has no jurisdiction to adjudicate violations of the Peace Officers Employer/Employee Relations Act alleged by the Complainant
- C. Each of the acts alleged by Complainant that could arguably constitute a violation of the parties' contract and thus state a claim under §10-7E-19(H) NMSA 1978, occurred or reasonably should have discovered by Complainant

more than six (6) months prior to filing and thus must be dismissed pursuant to NMAC 11.21.3.9 and 11.21.3.12.

**RATIONALE:**

The standard to be followed in reviewing the briefs submitted is that set forth in NMAC 11.21.3.12 concerning the Executive Director's screening complaints for adequacy:

"A. Upon receipt of a complaint, the director shall screen the complaint for facial adequacy. If the complaint is facially deficient, the director shall advise the complainant of the deficiency and give the complainant an opportunity to amend the complaint within five (5) days. Absent an amendment curing a facially deficient complaint, the director shall dismiss the complaint, stating the reasons in writing and serving the dismissal on the parties. A complaint that is facially untimely pursuant to Section 9 shall be dismissed.

B. After screening a complaint, the director shall investigate the allegations. The director need not await the filing of an answer before commencing the investigation. At the director's request, the complainant shall immediately present to the director all evidence available to the complainant in support of the complaint, including documents and the testimony of witnesses.

D. If a complainant fails to timely produce evidence in support of its complaint pursuant to the director's request, or fails to produce evidence that in the director's opinion is sufficient to support the allegations of the complaint, the director shall request the complainant withdraw the complaint within five (5) days and, absent such withdrawal, shall dismiss the complaint stating the director's reasons in writing and serving the dismissal on all parties."

The union's PPC is facially untimely and should therefore be dismissed. All of the material occurrences that form the basis of its complaint occurred outside of the 6 month time bar set forth in NMAC 11.21.3.9. The point from which the time bar applies is not 10/01/2011 which the union identifies as the earliest date it could have known the City would not arbitrate. The conversations among union

representatives and City officials upon which the unions rely for their claim of the City's waiver of the arbitration deadline all occurred after the expiration of that deadline and notice by the City to the union that it would not proceed to arbitration because of the missed deadline. The union did not lack knowledge of any of its alleged violations of the CBA at least 8 months prior to the filing of the PPC, at the latest, the time of the employee's termination, assuming that the termination could be construed as a contract violation, which is not at all clear. Allegations of acts by City officials constituting a waiver of arbitration deadlines cannot be deemed a contract violation giving rise to a PPC because they are all external to the contract and it is the enforcement of the arbitration deadline by the City that would be consistent with the parties' CBA.

Even if the Hearing Officer were to consider the union's claim of waiver, the evidence is insufficient to establish a clear and unmistakable waiver of the express terms of the CBA regarding the time in which a request for arbitration must be filed. PEBA's prohibited practices procedures should not be applied to affect an "end run" around a missed opportunity to arbitrate a claim that the union acknowledges was properly arbitrable without at least making a prima facie case under §10-7E-19 NMSA 1978.

**RECOMMENDED ORDER:**

The PPC herein is hereby **DISMISSED**.

**APPEAL:**

Complainant 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 **11.21.3.13**. An appeal must be filed within 10 work days of this opinion and otherwise comply with NMAC **11.21.3.13**.

Issued this 31<sup>st</sup> day of October 2011

A handwritten signature in black ink, appearing to read 'Thomas J. Griego', written over a horizontal line.

Thomas J. Griego  
Executive Director  
Public Employee Labor Relations Board  
2929 Coors N.W., Suite 303  
Albuquerque, NM 87120

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PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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**ORDER**

THIS MATTER comes before the Board on a Status and Scheduling Conference and on Respondent's Motion to Dismiss held September 28, 2011. The following deadlines were established as a result of that Conference and notice is hereby given of the following:

- A. Before rendering a decision on the facial adequacy of the Complaint and on the Motion to Dismiss the parties will be given further opportunity to research and brief the time bar issue and other issues raised in the City's Motion to Dismiss. Complaint shall have until **October 21, 2011** in which to file a **Response** to the City's Motion to Dismiss. If it decides to do so, the City may elect to submit a **Reply** and if it elects to do so shall submit it no later than **October 28, 2011**.
- B. The briefs may be submitted personally, by mail received within the time established or by electronic and faxed transmission to [Tom.Griego@state.nm.us](mailto:Tom.Griego@state.nm.us) and (505) 831-8820 as long as a hard copy follows.
- C. All other issues in the case are reserved until after the decision on the Motion to Dismiss. In the event the matter is not dismissed in whole, a subsequent



scheduling conference will be held to set a hearing on the merits of any issues remaining.

Issued this 11<sup>st</sup> day of October 2011

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Thomas J. Griego  
Executive Director  
Public Employee Labor Relations Board  
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**RECOMMENDED ORDER:**

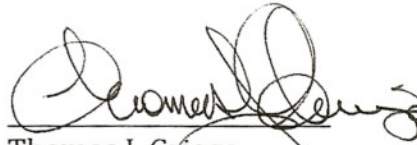
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