07- PELRB-2012

**BEFORE THE STATE OF NEW MEXICO**
**PUBLIC EMPLOYEES LABOR RELATIONS BOARD**

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

01-25-2012 RCVD

**Petitioner,**

**v.** **PELRB NO. 132-11**

**STATE OF NEW MEXICO,**
**HUMAN SERVICES DEPARTMENT,**

**Respondent.**

**ORDER AND DECISION**

THIS MATTER comes before the Public Employee Labor Relations Board for ratification of the Hearing Officer's Recommended Decision denying the Union's request for discovery and Dismissing of the Complaint.

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

**IT IS HEREBY ORDERED** that the Hearing Officer's Recommended Decision of November 15, 2011 shall be, and hereby is, adopted as the Order of the Board for the reasons set forth therein as the Hearing Officer's Rationale. Petitioner's Request for Discovery shall be and hereby is, **DENIED** and the Complaint herein is **DISMISSED.**

Date: 1-22-12

Duff Westbrook, Chairman
Public Employee Labor Relations Board

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**AMERICAN FEDERATION OF STATE,**
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**v.** **PELRB NO. 132-11**

**STATE OF NEW MEXICO,**
**HUMAN SERVICES DEPARTMENT,**

**Respondent.**

## RECOMMENDED DECISION

THIS MATTER comes before the Hearing Officer upon investigation of the Prohibited Practices Complaint filed herein.

On June 9, 2011 the union filed its Prohibited Labor Practices Complaint alleging a violation of NMSA 2003 §10-7E-19(B). In summary, the union alleges that by reclassifying a particular employee's position from one within the bargaining unit to one outside of it, the Human Services Department interfered with, restrained or coerced a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act; to wit, NMSA 2003 §10-7E-5, guaranteeing covered employees the right to "... form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion...".

In support of its Complaint the union relies upon Article 13 Section 1 of its Collective Bargaining Agreement with the State of New Mexico which requires "(1) Any newly created positions that replace bargaining unit positions shall remain in

the bargaining unit unless they are found to be supervisory/managerial/ confidential; (2) Disputes as to whether the new position should remain in the bargaining unit shall be determined in accordance with PEBA."

The Human Services Department timely filed its Answer pursuant to NMAC 11.21.3.10 alleging *inter alia* that the Complaint fails to state a claim because the referenced CBA provision related to the establishment of new job classifications, not the transfer of an employee into an already established position outside of the bargaining unit, and that position at issue was re-classified as "Executive Secretary Admin Asst – O" an already existing position agreed by the parties to be exempt from collective bargaining as a confidential position.

Upon receipt of a Prohibited Practices Complaint, the Director is obliged to screen it for facial adequacy. See, NMAC 11.21.3.8(A) and 11.21.3.12(A). It is my determination that the Complaint is facially adequate in that it states the minimum allegations for facial validity under the rule. However, the Complaint fails to state sufficient facts for the Director to make a determination as to the timeliness of the allegations required under NMAC 11.21.3.9 which states: "Any complaint filed more than six (6) months following the conduct claimed to violate the act, or more than six (6) months after the complainant either discovered or reasonably should have discovered each conduct, shall be dismissed." Further, the Director is obliged under NMAC 11.21.3.12(B) after screening a Complaint, to investigate the allegations and if in the opinion of the director the facts are insufficient 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. See, NMAC 11.21.3.12(C).

Upon review of the allegations of the Complaint and the Answer it is my opinion that the Complaint fails to state a claim under NMSA 2003 §10-7E-19(B). The section of the parties' CBA relied on by the union is inapplicable in that the position in question is not a "newly created position" contemplated by that section. There are no facts alleged by the union that the reclassification of the position in question was for any reason other the legitimate interests of the employer notwithstanding its unsupported statements in paragraph 6 that the State re-classified the position "solely to erode the employee's right to collective representation and bargaining."

In response to a Motion to Dismiss filed by the State, the union merely reiterated the allegations of its complaint without supplementation which response was not filed within the timeline established by the Director at a Status and Scheduling Conference. Along with its response the union requested discovery of the State's notification to the union of the reclassification; "The proposed Motion and Request to the PELRB and the union for removal of Tabitha Mondragon from the bargaining unit"; and the desk audit performed for the reclassification. The discovery request is telling because it demonstrates a misunderstanding of the nature of collective bargaining rights which appertain to positions, not to individuals except as they may enjoy such rights as a benefit of holding a position within a bargaining unit. Moreover the discovery request indicates that the union lacked sufficient facts to support the filing of the PPC and that the absence of well-plead facts is not a mere oversight or un-tutored pleading. It is ***not*** my opinion that re-classification of a covered position may never constitute a prohibited labor

practice. To the contrary, it very well may under properly plead facts supporting an anti-union animus. No such facts appear to be present in this case. If they exist, but have not yet been developed, then the union is to be reminded that the better practice is to develop supporting facts prior to filing a prohibited practices complaint rather than relying on unsupported assertions in the hope that subsequent discovery will bear them out.

Based on the foregoing the union request for discovery is **DENIED**. Request is hereby made that the complainant withdraw its complaint within five (5) days, leaving the union free to file any timely allegations arising out of the same occurrence that may state a claim supported by factual allegations if there are any. Absent such withdrawal, this Complaint shall be dismissed for the reasons set forth herein.

Issued this 15th day of November, 2011

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