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



**In re:**

**AFSCME, COUNCIL 18,**

**Petitioner,**

**v.**

**STATE OF NEW MEXICO,**

**Respondent.**

**PELRB No. 144-09**

**ORDER**

THIS MATTER comes before the Public Employee Labor Relations Board for review of the Hearing Officer's Recommended Decision issued October 24, 2012 on the merits of the complaint herein. Upon a 2-0 vote at the Board's January 15, 2013 meeting, (Chair Westbrook being absent) the Board adopted the Hearing Officer's findings of fact and conclusions of law as their own for the reasons stated in the Hearing Officer's Report and Recommended Decision.

**IT IS HEREBY ORDERED** that the Union's PPC shall be and is hereby **DISMISSED**.

**IT IS FURTHER ORDERED** that the Recommended Decision of the Hearing Officer issued January11, 2012 finding that the State's Counterclaim fails to state a claim for relief and the Hearing Officer's Decision of April 20, 2010 effectively disposing of the underlying premise of the Counterclaim, is **AFFIRMED** so that the Counterclaim shall be and is hereby **DISMISSED**.

Date: Jan. 23, 2013

Wayne Bingham, Vice-Chairman
Public Employee Labor Relations Board

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## HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

THIS MATTER comes before Thomas J. Griego as the designated Hearing Officer on the Merits of the Prohibited Practice Charge herein (PPC). The procedural history of this case may be summarized as follows:

- Petitioner ("Union" or "AFSCME"), filed its PPC and a Motion for Summary Judgment with supporting Exhibits on December 11, 2009, alleging that the Respondent ("State" or "Employer") violated NMSA 1978 §10-7E-17 by failing to bargain in good faith with regard to a state-wide furlough plan.
- The State did not immediately answer the PPC but on January 4, 2010, filed a Motion to have the Board adjudicate the PPC without the appointment of a Hearing Officer, a Motion to Dismiss on jurisdictional grounds and a request for an extension of time in which to file an Answer.
- Petitioner Responded to the State's Motions on January 19, 2010 and a hearing on the Motions was scheduled for February 19, 2010.

- On February 10, 2010 the State filed Replies to the Responses.[1]
- On February 19, 2010 the Board denied the Motion to have the Board adjudicate the PPC and on March 2, 2010 the Board issued an Order denying the State's Motion to Disqualify the Executive Director and hear the merits without a Hearing Officer.
- At a Status and Scheduling Conference March 23, 2010. The Union withdrew its Summary Judgment motion at that conference in light of a position taken by the State that there was additional evidence to be heard that was not yet on the record.
- On March 23, 2010 the Executive Director scheduled a Hearing for April 15, 2010 on the State's pending Motion to Dismiss. Following the hearing the Executive Director issued a letter decision on April 20, 2010 denying the State's Motion.
- The State filed its Answer to the PPC and asserted Counterclaims on April 29, 2010. Petitioner Answered the State's Counterclaims on May 21, 2010.
- On September 28, 2010 notice was sent to the parties of a Status and Scheduling Conference on October 20, 2010. The Scheduling Conference was postponed on October 13, 2010 on the Board's initiative due to difficulty in scheduling a location for the conference and re-scheduled on January 18, 2011 for January 27, 2011 before Mr. Montoya's replacement as Director, Pamela Gentry. However, Ms. Gentry was relieved of her duties as Executive Director in early January 2011 leaving the Board without an Executive Director to process or adjudicate claims.
- On January 27, 2011 the State filed yet another Motion to Dismiss based on the time lapse between filing and adjudication. The Union Responded on February 10, 2011.

[1] The Board's rules provide for the filing of motions and responses to motions but not Replies to Responses. There is nothing in the record to indicate that the State sought or received permission to file Replies in addition to the pleadings allowed under NMAC 11.21.1.23.

- On February 28, 2011 the Union filed an Emergency Motion to Appoint an Executive Director for the purpose of processing and adjudicating pending claims. The State filed its Response on March 1, 2011 objecting to the filing of the Motion as violating the Board's rules. The State filed a Reply to the Union's Emergency Motion on February 28, 2011. Notice of a Hearing on the pending Motions was issued August 8, 2011 for September 22, 2011 and after the Board hired a new Director August 26, 2011 the hearing was held as scheduled.
- On January 11, 2012, the Executive Director issued a Recommended Decision dismissing the State's Counterclaim for failure to state a claim for relief and denied the State's Motion to Dismiss for failure to abide by time deadlines.
- The State filed a request for interlocutory appeal of the Hearing Officer's Denial of its Motion to Dismiss the Prohibited Practices Complaint and on March 14, 2012 the Board upheld the Denial of the State's Motion to Dismiss but due to an oversight the Board Order did not reflect its affirmance of the Hearing Officer's Dismissal of the Counterclaims.
- Following a Status and Scheduling Conference on April 23, 2012, a Hearing on the Merits was scheduled for June 20, 2012 with attendant pre-hearing deadlines. The Hearing took place as scheduled. Following the Hearing, a briefing schedule was set and both parties timely submitted their post-hearing briefs.
- In the course of preparing briefs the parties discovered that, due to technical difficulties, a portion of the audio record of the Merits Hearing was not preserved. Consequently the post-hearing briefing deadlines were postponed while the parties reconstructed the missing testimony and a stipulated Order regarding the missing

testimony was filed August 18, 2012. After a Conference held August 14, 2012 to re-establish a post-hearing briefing schedule the parties timely submitted their closing briefs September 4, 2012.

All parties hereto were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to submit written arguments. Both parties' closing 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 and conclusions:

## FINDINGS OF FACT:

1. The parties negotiated a collective bargaining agreement (CBA) effective September 13, 2005 to December 31, 2008. (Joint Exhibit 1). A successor agreement was negotiated between the parties effective December 23, 2009 through December 31, 2011. (Joint Exhibit 2). Among the articles negotiated by the parties as part of their CBA are the following relevant provisions:

    a. Sections 1 and 2 of Article 31, Furlough and Reduction in Force:

    "**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."

b. Article 18, Management Rights:

"**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."

c. Article 19, Mid-Contract Bargaining:

"**Section 1.** Changes in Statutes and Regulations. The parties recognize that from time to time the U.S. Congress, federal agencies, and the State Legislature may enact changes that affect terms and conditions of employment and that the State Personnel Board (SPB) may adopt, repeal, and/or modify its rules and regulations and that these legislative or regulatory actions may alter established terms and conditions of employment or conflict with or nullify terms of this Agreement. Accordingly, within thirty (30) calendar days following the

enactment of such legislative or regulatory action, if requested by a party hereto, the parties shall negotiate over the matter to the extent consistent with law."

2. During Fiscal Year 2010 Governor Richardson issued Executive Order 2009-044 requiring the furlough of state employees in order to address a "budget shortfall". (Joint Exhibit 4 p. 3, 7-8.)

3. Governor Richardson ordered his Chief of Staff to notify the unions representing state employees of the need for furloughs, to discuss the furloughs and develop a plan, to seek approval of the plan from the State Personnel Board in accordance with Regulation 1.7.10.8(A) NMAC, and to oversee implementation of the plan. (Joint Exhibit 4 p. 7).

4. In a memorandum to Chief of Staff Brian Condit dated "November 2009", the Union acknowledges having received notice of the furloughs and meeting with representatives of the State in compliance with Article 31 of the CBA. That memorandum refers to a meeting having taken place on November 13, 2009 to discuss the State's furlough "proposal". It also requests additional information pertinent to the furloughs (referred to in the letter as "layoffs"), suggests alternatives and requests bargaining over the effects of the "layoff". (Joint Exhibit 5; Testimony of Rob Trombley).

5. By letter dated December 1, 2009, Respondent acknowledged receipt of the request for bargaining the effects of the furloughs but disagreed that it had any obligation to bargain. Notwithstanding its position regarding the bargaining request the letter states that a follow up meeting is being scheduled for December 4, 2009, which meeting, in the words of Mr. Condit's letter "should not, however, be construed as

bargaining". The December 1st letter also states that the furlough plan "is now being finalized and will soon be implemented" and also that the Union's "comments and suggestions were taken into earnest consideration and, in some instances, are reflected in the plan." (Joint Exhibit 6).

6. At the meeting on December 4, 2009 the State met with several representatives of AFSCME and discussed the furloughs in detail. A final draft of the furlough plan that had not yet been presented to the Governor was discussed with the Union. AFSCME suggested alternate furlough days but those suggestions were not agreed to. (Joint Exhibit 3B).

7. At a scheduled meeting of the State Personnel Board on December 16, 2009, State Personnel Director Sandra Perez informed the State Personnel Board that the Governor's Chief of Staff met with all unions upon issuance of the Executive Order, including the Petitioner and met again with AFSCME on December 4, 2009. Several representatives of AFSCME addressed the Board during that meeting raising objections to the furloughs including that the Union had not been given an opportunity to bargain the effects of the layoff making a specific reference to the instant PPC having been filed. Director Perez requested and received approval of the furlough plan by the State Personnel Board. (Joint Exhibit 3b, Testimony of Sandra Perez, Testimony of Rob Trombley.)

8. All Findings and Conclusions contained in the Recommended Decision of the Hearing Officer issued January 11, 2012 are incorporated herein by reference.

## CONCLUSIONS OF LAW AND RATIONALE:

In a prohibited practices proceeding, the complaining party has the burden of proof by a preponderance of the evidence and the burden of going forward with the evidence. *See,* NMAC 11.21.1.22 (B). In brief, the union's primary position is that although the State met its obligation under Article 31 of the contract to meet with the union and to discuss alternatives to the furlough plan prior to presenting it to the State Personnel Board, the State was required by Article 18 Section 2 to bargain the furloughs to impasse before implementing them. More specifically, the union argues at the furloughs are a change in the "operation of the Employer's organization" (Article 18 Section 2 (9)) and are therefore subject to bargaining by application of Article 18 Section 2. [2]

The operations of the various and several agencies were not altered by the furloughs. Operations, in terms of the mission and principal functions of each agency, continued as they always had, interrupted, if at all, only by the number of employees performing the tasks during specific and limited period of the furloughs. It is true that the furloughs affected the employees' workweeks and might arguably be a change in the employer's operations. However, the Board need not reach that question, because whatever else they might be, the furloughs are clearly an exercise of management's reserved rights under Article 18 Section 1(7) to relieve an employee from duties because of lack of work or other legitimate reason, or under Section 1(4) to determine the size and composition of the work force, or under Section 1 (8) to determine methods, means, and personnel by which the Employer's operations are to be conducted. These subsections reserve to management the various rights enumerated thereunder and are not subject to the bargaining requirement in

[2] Article 18 Section 2 states that "Prior to implementing any change in existing terms or conditions of employment relating to items 9, 10 or 11 of Section1 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."

Article 18 Section 2 relied on by the Union. [3] Read together, the State was not obligated to bargain the furloughs as requested pursuant to Article 18 Section 2 (9) of the CBA or otherwise under PEBA.

As acknowledged by the union in its letter of "November 2009" requesting bargaining, a furlough is in most respects synonymous with the term "lay off". A recent Report Recommended Decision had much to say about the State agencies' duty to bargain the effects of a layoff. In re: *CWA Local 7076 v. New Mexico Public Education Department,* PELRB No. 134-11, Decided October 12, 2012, I determined that NMPED did not bargain the effects of the layoff at issue in that case based on the principle that it was under no legal obligation to do so having already bargained a CBA reserving as a management prerogative the right 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 under its right to determine which employees will conduct the Employer's operations. Here, as in the *NMPED* case, the effects of the layoff identified on the record have been reserved by the parties to management's discretion. Therefore, under the facts of this case there is no duty to bargain the effects of the furloughs at issue even under a general re-opener during the term of the parties' CBA because all matters over which the Union wanted to bargain are covered by the contract. *See, NLRB v. U.S. Postal Service,* 8 F.3d 832, 836 (D.C. Cir. 1993). In addition to its argument that the furlough constituted a change in the agencies' operations requiring bargaining it also elicited testimony

[3] Rob Trombley testified for the Union that the furlough effected the work week and identified that as the effect he wished to bargain but that is a reserved management right.

that the *possible* effects of the furloughs subject to bargaining included changes in the health insurance premium rates paid by employees and PERA retirement eligibility dates for furloughed employees. (Cross-examination of Sandra Perez). Putting aside concerns over whether the evidence is too speculative to support a conclusion in favor of the Union it appears that the extension of retirement eligibility dates is beyond the scope of bargaining as superseded by the public employee retirement laws. *See,* NMSA 1978 §10-7E-3. The potential effect of insurance rates is covered by the contract. Article 16 of the CBA provides for a sliding scale of the State's contributions to the costs on an annual percentage basis. If by operation of the furlough an employee's earnings are reduced to the extent he or she slips below the annual rates set forth in the bargained-for scale, the State picks up a commensurate increased percentage of the cost of contributions. The effect of the furloughs on insurance premiums is therefore covered by the contract. I incorporate and adopt the rationale and the case authorities set forth in *CWA v. NMPED* issued October 12, 2012, in this decision with respect to the "contract coverage" doctrine. Even under a general re-opener the parties' CBA remains in effect until the parties either negotiate a successor contract or resolve impasse through arbitration. I do not believe that the Union is attempting to argue that the State is obligated to bargain over benefits being extended to employees for periods they are no longer on the payroll and so I do not address that point.

As in the *NMPED* case, this conclusion should not be read to mean that "effects bargaining" is forever foreclosed, even as to furloughs if the union in a future case can identify an effect not already covered by the CBA, for although both the

Management Rights Clause and Article 31 afford the Employer wide latitude to implement a furlough, there is no indication that this flexibility reserved to management to change the workforce automatically included a corresponding right to evade all bargaining over the impact of those changes, or that the parties fully discussed at the time they entered into their CBA the specifics of any such plan. *See, Regal Cinemas*, 317 F.3d at 313-14. (There was no waiver of bargaining rights where the employer failed to present "affirmative evidence" that parties' bargaining history included any discussion that the management rights clause included specific right to make the change at issue). In the NMPED case as here, the obligation in to meet and discuss furloughs after notice runs counter to the idea that the Union conceded changes in the workforce due to such a furlough plan as a *fait accompli* and this decision is consistent with NLRB precedent beginning with *Jacobs Manufacturing Co.* that the duty to bargain exists unless waived or discharged as I have found to have been done here. I therefore incorporate into this decision the rationale and case authority in *CWA v. NMPED* issued October 12, 2012 with regard to the requirement in NMSA §10-7E-15 (A) that a certified labor organization shall act for all public employees in the appropriate bargaining unit does not end once an agreement on a CBA has been reached. [4] Similarly, the obligation of public employers and exclusive representatives in NMSA §10-7E -17(A)(1) to bargain in good faith on wages, hours and all other terms and conditions of employment and

[4] NMSA §10-7E-15 (A) provides that a recognized bargaining representative "shall act for all public employees in the appropriate bargaining unit *and* negotiate a collective bargaining agreement covering all public employees in the appropriate bargaining unit. The requirements to act for represented employees and to negotiate a CBA on behalf of the represented employees are two separate and distinct albeit linked obligations

other issues agreed to by the parties is distinct from the obligation to "enter into written collective bargaining agreements covering employment relations" found in NMSA §10-7E -17(A)(2). I am guided in rendering this Report and Recommended Decision by the principle espoused in PEBA §10-7E-2 to protect the public interest by ensuring the orderly operation and functioning of the state.

With regard to application of Article 19 of the CBA regarding mid-contract bargaining, evidence of the Governor's Executive Order was insufficient to establish a change instituted by the legislature, U.S. Congress, federal agencies or the State Personnel Board required as a prerequisite to application of Article 19. Enactment of the furlough plan in this case did not involve the adoption, repeal or modification its rules and regulations, as furloughs are contemplated by the SPO rules. *See,* NMAC 1.7.10.8.

**RECOMMENDED ORDER:** An Order of this Board should issue: (1) **DISMISSING** the Union's PPC for the reasons set forth in this Report and Recommended Decision; and, (2) affirming the Recommended Decision of the Hearing Officer issued January11, 2012 finding that the State's Counterclaim fails to state a claim for relief and the Hearing Officer's Decision of April 20, 2010 effectively disposed of the underlying premise of the Counterclaim, i.e., that the Union was obliged to pursue its claims by grievance arbitration so that it is appropriate to **DISMISS** the Counterclaim pursuant to 11.21.3.12(B).

**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 22nd day of October, 2012

Thomas J. Griego
Executive Director
Public Employee Labor Relations Board
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Albuquerque, NM 87120