

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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

Petitioner,

vs.

PELRB CASE NO. 309-15

STATE OF NEW MEXICO, HUMAN
SERVICES DEPARTMENT

Respondent.

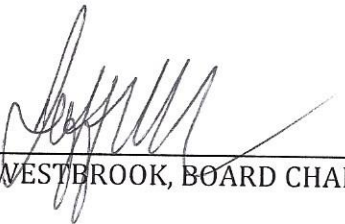
ORDER

THIS MATTER comes before the Public Employee Labor Relations Board on a Motion for Reconsideration by the American Federation of State, County and Municipal Employees, Council 18, AFL-CIO. Upon review of the parties' submissions and without hearing argument by counsel the Board finds, that the Board does not have jurisdiction to hear the Motion for Reconsideration in light of the Union's Appeal of the same case to the District Court.

THEREFORE THE BOARD ruled 3-0 at its meeting on January 10, 2017 that the Motion for Reconsideration **DISMISSED FOR LACK OF JURISDICTION.**

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

1-23-17
DATE



DUFF WESTBROOK, BOARD CHAIR

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

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MOTION FOR RECONSIDERATION

COMES NOW Petitioner, by and through its counsel, Youtz & Valdez, P.C. (Shane Youtz, Stephen Curtice, James A. Montalbano), and files this Motion for Reconsideration of the Board's Order of November 8, 2016.

I. INTRODUCTION

Petitioner AFSCME seeks review of the Board's Order of November 8, 2016, which found that the change to the bargaining unit was not due to a change in circumstances related to the formation of the bargaining unit. The Board found that the HSD's refusal to negotiate with Petitioner representing attorneys for HSD did not constitute a change in circumstances sufficient to warrant a unit clarification petition.

However, the Hearing Officer was correct in finding a sufficient change in circumstances for several reasons. First, the position of attorney/lawyer within HSD has never been historically excluded from the bargaining unit. In fact, the bargaining unit for HSD was established as "wall to wall" in 2008, as codified by the parties' collective bargaining agreement (CBA) in 2009.

Those positions can be excluded only if the employees perform functions that are supervisory, managerial or confidential, and the Hearing Officer found conclusively – as upheld by this Board – that none of those three categories apply to the position of attorney/lawyer.

Second, changed circumstances do exist sufficient to warrant consideration by the PELRB of a unit clarification petition that seeks to establish the position of attorney/lawyer as properly included in the “wall to wall” bargaining unit. For the reasons that follow, Petitioner AFSCME asks the Board to reconsider its Order and uphold the Decision of the Hearing Officer in its entirety.

II. LEGAL ARGUMENT

A. **The position of Attorney/Lawyer Has Not Been Historically Excluded From the Bargaining Unit, and as the Hearing Officer Found, a Change in Circumstances Exists Sufficient to Warrant a Petition for Clarification.**

The NLRB has ruled that a clarification petition is not appropriate when it would “upset[] ... an established practice of such parties concerning the unit placement of individuals.” *Union Electric Co.*, 217 NLRB 666, 667 (1975). “Thus, where a position or classification *has historically been excluded from or included in the unit*, and there have not been recent, substantial changes that would call into question the placement of the employees in the unit, the Board generally will not entertain a petition to clarify the status of that position or clarification, regardless of when in the bargaining cycle the petition is filed.” *Bethlehem Steel Corp.*, 329 NLRB 243, 244 (1999) (emphasis added). The NLRB’s “procedures for unit clarification” are intended to “provide a mechanism for ensuring that bargaining units continue to reflect the reality of the workplace.” *Banknote Corp. of Am.*, 315 NLRB 1041, 1044.

The NLRB has summed up its philosophy succinctly:

It is well established that, during the term of the contract, unit clarification is not appropriate for upsetting an agreement or established practice of a union and

employer with respect to the unit placement of employees. Rather, unit clarification is appropriate, *inter alia*, for resolving disputes concerning the unit placement of employees who, for example, come within newly established job classifications or whose duties and responsibilities have undergone recent substantial changes which create real doubt as to whether their positions continue to fall in the category – excluded or included – that they occupied in the past.

Mass. Teachers Assoc., 236 NLRB 1427, 1429 (1978).

In this case, three facts are crucial to the analysis: (1) Because the bargaining unit in question is “wall to wall,” attorneys/lawyers are to be considered members of the unit since its creation (unless their duties are supervisory, managerial or confidential, which has been found not to be the case); (2) declaring the attorneys/lawyers to be part of the bargaining unit would not upset the established practice of the parties regarding the unit placement of employees but rather would continue to reflect the reality of the workplace; and (3) as the Hearing Officer noted, there have been substantial changes to the bargaining unit in relation to attorneys/lawyers in recent years.

As HSD noted in its appeal, *Union Electric Co.* involved a bargaining unit in which the jobs sought to be recognized by the petitioners had been explicitly excluded from the bargaining unit for 20 years. 217 NLRB 666, 666-667. The petition in that case also involved “historically excluded individuals” and “a ‘substantial number of classifications’ specifically excluded by certain clauses of its past and presents agreements with the Employer.” *Id.* Here, by contrast, the individuals sought to be recognized have been historically *included* in the bargaining unit, and the parties’ CBA explicitly includes *all* employees in the HSD portion of the bargaining unit unless they perform supervisory, managerial or confidential functions, which has been found not to be the case, as concluded by the Hearing Officer and ratified by this Board in its Order of November 8, 2016.

HSD repeatedly has contended that the Union did not put forth allegations of changed circumstances as well as failing to show such changed circumstances. However, the Petition that launched this case did allege a change of circumstances:

4. The requested clarification is warranted because AFSCME recently turned in dues check-off authorizations for some of the CSED attorneys working for Respondent, and Respondent returned them claiming that they were not a part of the "Wall to Wall" bargaining unit. Upon information and belief, those attorney[s] used to be administratively located within the General Counsel's office, but have been administratively relocated to a separate division.

Petitioner put on evidence showing that change of circumstances. While work stations were not physically moved, testimony revealed that back in 2008, when the "wall to wall" designation was established, HSD attorneys worked under the supervision of the Office of General Counsel; they later were removed to supervision outside the General Counsel's office. Hearing Officer's Finding of Fact No. 21.

Further, the Hearing Officer noted other evidence of a change in circumstances: (1) the implementation of the Lawyer-B and Attorney IV positions within the past year or so, and (2) the refusal to acknowledge dues deduction of lawyers/attorneys in the bargaining unit. Evidence brought forth by the Union showed that HSD, in 2015, significantly altered the positions of attorneys and lawyers. Within months of this litigation, HSD reorganized the classifications of its CSED lawyers/attorneys. Whereas previously those employees had been considered "lawyers," HSD created a more complicated hierarchy that established the following positions: Lawyer-A, Lawyer-B, Lawyer-O and Attorney-IV. Two of those positions were newly created. Hearing Officer Finding of Fact No. 30 (citing testimony and exhibits). HSD conceded in its Appeal that the addition of new classifications of positions – specifically the addition of the Lawyer-B and Attorney-IV posts – would constitute changed circumstances if the lawyers had historically been included in the bargaining unit. Appeal at 59. As noted above, the lawyers

have not been historically excluded from the bargaining unit, but rather have been included with all other non-supervisory, non-managerial and non-confidential employees at HSD.

Further, the failure to honor a request for dues-deduction is a significant change from the establishment of the “wall to wall” unit in 2008, as codified by the CBA in 2009. Evidence brought forth by the Union showed that HSD, in May 2015, rejected the dues-checkoff authorizations submitted by the Union for some of the CSED lawyers working for HSD, making the claim that those lawyers were not a part of the “wall to wall” bargaining unit. Hearing Officer’s Finding of Fact No. 29. As the Hearing Officer elaborated, HSD has historically honored requests for dues checkoffs from members in the “wall to wall” unit; thus, a refusal to honor such requests in the case of the attorney/lawyer position constitutes a change in circumstances from the status quo. Hearing Officer’s Decision at 31-32.

In sum, the position of attorney/lawyer has been historically included in the bargaining unit, and several changes in circumstances – including HSD’s refusal to honor a dues-checkoff request – have necessitated a unit clarification in this instance. Recognition of the position of attorney/lawyer through a unit clarification petition would not “be disruptive of a bargaining relationship voluntarily continued by the Employer when it executed the existing contract with the Union.” *Wallace-Murray Corp.*, 192 NLRB 1090, 1090 (1971).

III. CONCLUSION

WHEREFORE, for the foregoing reasons Petitioner respectfully requests that this Board **REVERSE** Paragraph C of its order and affirm the Director’s Decision in its entirety.

Dated: November 23, 2016

Respectfully Submitted,

YOUTZ & VALDEZ, P.C.



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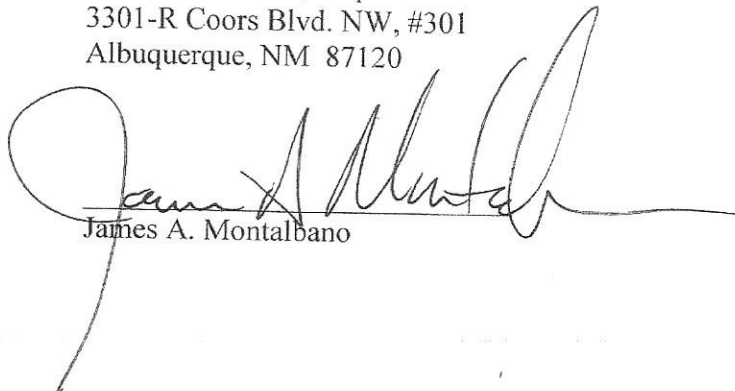
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Counsel for AFSCME

I HEREBY CERTIFY that a true
and correct copy of the foregoing
pleading was served on all parties
to this action pursuant to 11.21.3.8
NMAC this 23rd day of November, 2016.

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