6/5/96

1 PELRB No. 17

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In the Matter of

National Education Association-New Mexico/Bernalillo
Complainant,

v.

Bernalillo Public Schools
Respondent.

DECISION AND ORDER

On December 7, 1995, an administrative law judge (ALJ) issued a decision and recommended order pursuant to the Public Employee Bargaining Act of 1992, NMSA 1978, §§ 10-7D-1 to 10-7D-26, (Repl. Pamp. 1992) in *National Education Association-New Mexico/Bernalillo versus Bernalillo Public Schools*, Case No. PPC 19-95(SD).

This administrative-level proceeding commenced on May 19, 1995, when the complainant National Education Association-New Mexico (NEA-NM), on behalf of its affiliate NEA-Bernalillo, filed a prohibited practice complaint with the Public Employee Labor Relations Board (PELRB or Board) alleging violations by the respondent Bernalillo Public Schools (BPS) of the Public Employee Bargaining Act (PEBA or Act). Specifically, NEA-NM alleges that BPS violated the Act by (1) not bargaining over a binding grievance arbitration provision for inclusion in the parties' collective bargaining agreement and (2) denying certain statutory rights of representation to the head cook designated by respondent to be a supervisor.

During the course of a 3-day hearing conducted by an ALJ in August and September 1995 all parties were afforded an opportunity to participate, adduce relevant evidence, examine and cross-examine witnesses, present oral argument, and file post-hearing briefs. Additionally, the parties filed prehearing briefs on jurisdictional or threshold issues and affirmative defenses raised by respondent in its answer to the prohibited practices complaint (complaint or PPC).

After receipt of the evidence and testimony, the ALJ issued a decision and recommended order on December 7, 1995, wherein he concluded that (1) complainant NEA-NM had standing to bring the complaint on behalf of its affiliate NEA-Bernalillo and (2) the PPC was timely filed under the PELRB's rules and regulations.

Moreover, the ALJ concluded that respondent "lost" its "grandfather" status--PEBA § 26(A) and (B)--when it violated a duty to bargain, allegedly contained in § 26(A), by not bargaining over a binding grievance arbitration procedure. The ALJ determined, however, that complainant waived by contract (or accord and satisfaction) its contention that BPS unlawfully refused to bargain over the inclusion of a binding grievance arbitration provision in the parties' collective bargaining agreement (CBA) when it signed that contract. Consequently, the ALJ recommended that the complaint be dismissed with respect to the allegation concerning refusal to bargain.

As for the allegation concerning the denial of representational rights to the head cook, the ALJ found that position not to be a "supervisor" as defined in the Act's § 4(S). Since the head

cook is not a supervisor, the ALJ concluded that BPS violated PEBA §§ 5, 19(F) and (G) when it admonished and disciplined her for seeking representation.[1]

EXCEPTIONS

On December 22, 1995, BPS filed a timely notice of appeal regarding the ALJ's report and recommended decision.[2] Respondent BPS excepts to the ALJ's finding that (1) complainant NEA-NM has standing to bring this matter before the Board and (2) the PPC is timely under the Board's rules. Rather, respondent maintains NEA-NM does not have standing and the PPC is untimely.

BPS excepts to other ALJ conclusions: one, that respondent is not a "grandfather" entity under § 26(A) and (B) of the Act; and two, that the head cook is not a "supervisor" as that term is

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[1]PEBA § 5, Rights of public employees, essentially states that a public employee may form, join, or assist any labor organization without interference, restraint or coercion or refuse to engage in such activities; PEBA § 19, public employers, prohibited practices, states that a public employer will not "B. interfere with, restrain or coerce any public employee in the exercise of any right guaranteed under the [Act]" and "G. refuse or fail to comply with any provision of the [Act] or board regulation[.]"

[2]At the PELRB meeting held on March 13, 1996, the Board reviewed the respondent's exceptions dated December 22, 1995. The PELRB found the format and content of the respondent's exceptions falling short of the requirements set forth in Rule 3.12(a). The rule requires that exceptions "specify which findings, conclusions, or recommendations to which exception is taken and shall identify the specific evidence presented or offered at the hearing that supports each exception." Rather than dismiss the exceptions, as urged by complainant in its response filed pursuant to Rule 3.12(b), the Board elected to afford respondent an opportunity to file a brief identifying the particular findings, conclusions, or recommendations to which it objected to and, thereafter, providing complainant with an option to respond to respondent's brief. Thereafter, briefs were filed by the parties in accordance with the Board's guidance. PELRB Rule 2 (representation proceedings) and Rule 3 (complaint proceedings) both provide for the filing of exceptions to a hearing officer's report and recommended decision. Although we recognize the difference between the content of a Rule 2 and Rule 3 proceeding, our statement in a Rule 2 matter is equally applicable in this Rule 3 adjudication: "A party requesting a review [of a hearing officer's report] must cull from the record and affirmatively present to the Board the particular facts applicable to its exception. A party that fails to do so...acts at its own peril." *Belen Consolidated Schools*, 1 PELRB No. 2, fn. 2 (May 13, 1994). In the circumstances of this proceeding, the Board accorded another opportunity for exceptions given the nature and scope of issues presented.

defined at PEBA § 4(S) and, therefore, may exercise representation rights accorded under the PEBA. Finally, BPS "appeals and seeks PELRB review" of the Board's Director's denial of respondent's motion to disqualify the ALJ.

Complainant did not file exceptions to the ALJ's findings and conclusions; however, it filed an answer to the respondent's exceptions wherein it requests the Board to dismiss them and affirm the ALJ's decision and recommended order.

REVIEW OF REPORT AND RECOMMENDED DECISION

PELRB Rule 1.23 states that "[r]eview by the Board shall be based on the evidence presented or offered at the earlier stages of the proceeding, and shall not be de novo." Our review is based on evidence and argument presented to the ALJ. Also, PELRB Rule 3.12(c) states that the "Board may determine an appeal on the papers filed or, in its discretion, may also hear oral argument." In the circumstances of this case, the Board exercised its discretion to entertain oral argument from counsel for respondent and complainant. Additionally, Rule 3.12(c) states that the Board "may issue a decision, adopting, modifying, or reversing the hearing officer's recommendations or taking other appropriate action. The Board may incorporate all or part of the hearing officer's report in its decision." For the reasons set forth below, the Board adopts the ALJ's findings of fact and determinations on certain issues such as standing and timeliness of the complaint but reverses the ALJ on the conclusion that respondent is not covered by PEBA § 26(A) and (B).

FINDINGS OF FACT

Unless modified herein we adopt the findings of fact appearing at pages 4-13 in the ALJ's decision and recommended order. In summary fashion the facts are that respondent and complainant NEA-Bernalillo have engaged in collective bargaining since 1985 or 1986. This time period pre-dates the Act's effective date of April 1, 1993, as well as the BPS' Board of Education's enactment of "Collective Bargaining and Negotiations Policy" (policy) in 1989 . The parties consummated collective bargaining agreements in 1986, 1991, 1992, 1993 and 1995. Each agreement addressed wages, hours and other terms and conditions of employment. In this regard, the 1986 CBA contained a grievance procedure culminating in arbitration although whether it is of an advisory or binding nature is not clear. Negotiations in 1994 centered on the "win-win" bargaining format--an alternative to the traditional approach--wherein the parties focus on a consensus oriented, collaborative approach to problem solving. Despite the absence of a binding grievance arbitration provision or article resulting from the 1994 negotiations, the labor organization's leadership recommended that the contract be ratified, which it was. and the CBA became effective April 27, 1995, following approval by respondent's board of education.

With respect to the policy on collective bargaining it "allows employees to organize and bargain collectively with the [BPS Board of Education] in matters pertaining to salary, benefits, and working conditions"; it contains the right for BPS' employees "to form, join, and otherwise participate in the activities of employee organizations for the purpose of negotiating with the Board [of Education]"; it sets forth a procedure whereby any employee organization may be certified as the exclusive representative for a unit of BPS' employees; and it provides that "an

employee organization which has been certified by the Board [of Education] pursuant to the provisions herein as the exclusive negotiating agent for a determined negotiating unit of employees may negotiate for all employees in the unit concerning terms and conditions of employment." In 1992 the policy was amended in some respects.

Pursuant to this policy, the school district employees' elected NEA-Bernalillo in 1989 as its bargaining agent and the BPS' Board of Education recognized and certified complainant as the bargaining agent for a "wall-to-wall" unit of public employees. In other words, the only positions not represented by the certified, exclusive agent are those of a supervisory, confidential, and managerial nature.

The facts pertaining to the denial of representational rights for the head cook are that, on April 1995 the superintendent informed that individual and the complainant's representatives that the head cook did not have a right to representation because she occupies a supervisory position. There had been at least one meeting with the head cook wherein the superintendent and the food services director discussed her conduct in seeking union representation involving the transfer of one or more cooks between schools. According to respondent, discussions of that topic should be with her superiors and not the labor organization. As a result of the head cook seeking the complainant's assistance rather than pursuing the transfer issue with the administration, the superintendent directed the food services director to issue a letter of reprimand to the head cook.

ISSUES

1. Standing

We agree with the ALJ that complainant NEA-NM has standing to invoke the administrative processes to adjudicate this matter before the Board on behalf of its affiliate NEA-Bernalillo. In reaching this conclusion, we reaffirm the widely acknowledged standards for standing in administrative proceedings identified in *Santa Fe County*, 1 PELRB No. 1, otherwise known as the "test case."[3] That is, to achieve standing before the PELRB, an administrative agency, is not governed by the same considerations present for finding judicial standing.[4] The Board determines on a case-by-case basis whether a complainant has a reasonable interest in the outcome of the proceeding and is potentially subject to harm.

In the circumstances of this complaint, there is no evidence to rebut the organizational affiliation and comity of interests between the parent NEA-NM and its sibling, NEA-Bernalillo. Each is a "labor organization" as that term is defined at PEBA's § 4(J): "any employee organization one of whose purposes is the representation of public employees in collective bargaining and in otherwise meeting, consulting, and conferring with employers on matters pertaining to employment relations." NEA-NM advises and supports its Bernalillo labor organization through, among other matters, the services of a chief negotiator to engage BPS in collective bargaining. NEA-NM has an interest in the outcome of the disposition of collective

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[3] *Santa Fe County* at 15-22.

[4] See 1 K. Davis, *Administrative Law Treatise* § 8.11 (1958); 5 Stein, *Administrative Law* § 50.01, at 50-4, n. 2; and Kenneth C. Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* § 16.11 (3d ed. 1994).

bargaining issues, such as grievance arbitration and representation rights, between NEA-Bernalillo and BPS as well as by the Board because of the potential impact on its organizing efforts, other NEA-affiliates' collective bargaining agreements, and members' individual rights.

Certain employment-related matters may fall outside the traditional, mandatory scope of bargaining yet, nevertheless, be of interest to complainant for NEA-NM has organizational rights it seeks to protect separate and apart from individual public employee rights that it supports and promotes. For example, it seeks to (1) negate or lessen a potential loss of members and dues and (2) eliminate or at least minimize the potential harm flowing from an abridgement or denial of statutory rights. Equally significant is NEA-NM\Bernalillo seeks to influence, as does the respondent BPS, the Board's interpretation of the Act. Given the absence of evidence from respondent to sustain its exception on standing, we find the exception as without merit and dismiss it.

2. Timeliness

We affirm the ALJ's finding and conclusion that the complaint is timely filed as it relates to the refusal to bargain allegation lodged by complainant.[5] The time for filing the complaint on this issue commenced on November 19, 1994, when counsel for BPS issued the definitive letter to complainant containing the conclusionary statement that respondent would not bargain over

[5]The timeliness issue is not raised by respondent for the issue of representational rights for the head cook. We note that respondent's arguments or affirmative defenses of estoppel and laches were abandoned in its exceptions-in-brief. Other affirmative defenses abandoned by respondent before the ALJ were (1) failure to join necessary parties; (2) lack of jurisdiction; (3) failure to comply with PELRB Rule 3.1; (4) ripeness; and (5) impermissible request for advisory opinion.

the binding grievance arbitration procedure notwithstanding PEBA § 17(F).[6] Prior comments or correspondence during the course of collective bargaining negotiations are stump rhetoric, part and parcel of bargaining collectively. We also note the "win-win" approach to collective bargaining endured by the parties at the table. As noted by the ALJ, the "'win-win' approach...was designed to discourage the taking of fixed, adverse positions in collective bargaining." To commence the time period for filing the complaint whenever the respondent's negotiator voiced any statement not in harmony with the labor organization's bargaining position would undercut the consensus building and mutual problem solving sought by the parties. This exception, as with the prior one, is without merit and dismissed.

3. PEBA § 26(A) and (B): "Grandfather" Provisions

The principal issue before us is whether BPS is protected or covered by PEBA § 26, "Existing ordinances providing for public employee bargaining," specifically, subsections (A) and (B):

> A. Any public employer other than the state that prior to October 1, 1991, adopted by ordinance, resolution or charter amendment a system of provisions and procedures permitting employees to form, join or assist any labor organization for the purpose of bargaining collectively through exclusive representatives may continue to operate under those provisions and procedures.

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[6]PEBA § 17(F) states, in part, that "[e]very agreement shall include a grievance procedure to be used for the settlement of disputes pertaining to employment terms and conditions and related personnel matters. The grievance procedure shall provide for a final and binding determination[.]"

B. Only a public employer other than the state or a municipality whose ordinance, resolution or charter amendment has resulted in the designation of appropriate bargaining units, the certification of exclusive bargaining agents and the negotiation of existing collective bargaining agreements may avail itself of the provisions set forth in Subsection A of this section.

To attain "grandfather" status or to continue to operate under previously established collective bargaining provisions and procedures, the Act requires the following:

(1) the entity must be a *public employer other than the state*[7]; and

(2) the entity *prior to October 1, 1991, [must have] enacted a system of provisions and procedures permitting employees to form, join or assist any labor organization for the purpose of bargaining collectively through exclusive representatives*;

and

(3) [the system] *must result in*

(a) the designation of appropriate bargaining units;[8]
(b) the certification of exclusive bargaining agents; and
(c) the negotiation of existing collective bargaining agreements.

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[7]Section 26(B)'s reference to "...a municipality..." is a statutory mystery. Section 26(A) begins with the words "*Any public employer* other than the state..." (Emphasis added.) Section 26(B)'s inclusion of the word "municipality" is not interpreted or applied by the Board to include only municipalities or to exclude municipalities. We find the inclusion of the word "municipality" in § 26(B) to be the result of awkward drafting rather than accord its presence a special meaning. In sum we interpret § 26(A) and (B) as applying to any public employer other than the state including, but not limited to, municipalities.

[8]We agree with the ALJ's view that the head cook's supervisory status "is a garden variety dispute over the unit inclusion or exclusion of a particular employee" and such an issue "can arise under any collective bargaining system and has nothing to do with...the appropriateness of unit, itself[.]" Furthermore, we adopt the ALJ's conclusion that "[i]t would be unreasonable to believe that, in enacting Section 26(A) and (B), the Legislature intended that a public employer could lose grandfathered status whenever a dispute arose as to the unit status of a particular employee." Administrative Law Judge's Decision and Recommended Order at 21, n. 7. In this case the parties collectively bargain over the substance of the definition for "supervisor" that is contained in their CBA; however, the respondent retains the right to designate a position as supervisory in nature.

In applying the facts to § 26(A) and (B), we find that BPS satisfies the first prong of the statutory test for grandfather status. That is, the parties' stipulated, and we find, that BPS is a "public employer" other than the state within the meaning of PEBA and the Board's rules and regulations.

Moreover, the parties' stipulated, and we find, that prior to October 1, 1991, BPS enacted its "Collective Bargaining and Negotiations Policy." Although the policy was amended in 1992 it remains equivalent in all essential respects to the initial, original 1989 policy and, therefore, does not impact § 26(A)'s requirement that the enabling legislation be in existence prior to the statutory deadline of October 1, 1991. Furthermore, the policy permits BPS' employees to form, join or assist any labor organization for the purposes of bargaining collectively through exclusive representatives. As a result, the second prong of the test is satisfied.

The third prong of the test is also met based on our review of the record. We find, as did the ALJ, that the BPS' policy resulted in the designation of an appropriate bargaining unit--a comprehensive "wall-to-wall" unit encompassing all eligible public employees. In other words, the only public employees or occupational groups not included in the unit are supervisors, confidential, and managerial positions. The complainant's affiliate, NEA-Bernalillo, is recognized by BPS as the certified exclusive bargaining agent and has negotiated, with NEA-NM's assistance, a number of collective bargaining agreements including one in effect at the time of PEBA's enactment. Despite these findings the ALJ found that respondent BPS "lost" its grandfather status by "violating its duty to bargain" under § 26(A). Although that section does

not explicitly create a duty to bargain, the ALJ concluded that the Board's decision in its test case, *Santa Fe County*, results in a bargaining obligation.

The test case concerned the interpretation and application of PEBA § 26(C) which details the requirements for attaining approval of a "local board" for those public employers other than the state who, *after* April 1, 1993, enacted a system of provisions and procedures for collective bargaining. In that decision the Board held that the "...Legislature has clearly expressed...its intention to extend PEBA's fundamental guarantee of collective bargaining rights to employees of local public employers that choose to adopt their own collective bargaining ordinances."[9] As a result, although a public employer other than the state could establish a local board through enactment of an ordinance, resolution, or charter amendment, such legislation under § 26(C) could not accord public employees less in the way of statutory rights than those guaranteed by PEBA. The ALJ analogies his interpretation of the test case to conclude that the Legislature intended to extend to all public employees PEBA's fundamental rights. We disagree with this analogy for the following reasons.

The very existence of the grandfather provisions for public employers that enacted and implemented collective bargaining policies before October 1, 1991, *a priori* means they are accorded a different status from those public employers coming before the Board under § 26(C). To analogize the grandfather provisions--§ 26(A) and (B)--to the local board provision of §

[9] *Santa Fe County* at 42.

26(C) assumes that the Legislature intended to attach all of the PEBA's proscriptions in § 26(C) and elsewhere to a elderly entity. This would, in our view, render meaningless § 26(A)'s permission for a public employer to "continue to operate under those provisions and procedures enacted prior to October 1, 1991," concerning collective bargaining. For the grandfather provisions to have any statutory significance or meaning, we believe the Legislature intended for those public employers other than the state whose collective bargaining system satisfies the statutory requirements of § 26(A) and (B) to be able to continue under those existing policies notwithstanding PEBA's requirements for § 26(C) local boards. In view of our interpretation of the Act, we do not find a duty to bargain in § 26(A) similar to the duty to bargain in § 26(C).

The ALJ finds that § 26(B) "contemplate[s] the possibility that a grandfathered public employer could lose its grandfathered status."[10] Section 26(B) does not specifically state that grandfather status may be lost but the ALJ finds it possible to do so because § 26(B) includes the requirement concerning negotiation of "existing" collective bargaining agreements. Our reading of the Act interprets the word "existing" to mean in existence prior to October 1, 1991. This interpretation would preclude a public employer who met the conditions in § 26(A) but only some conditions in § 26(B)--such as never negotiating a collective bargaining agreement with an exclusive bargaining agent prior to October 1, 1991--from masquerading under grandfather status for the three conditions in § 26(B) are prerequisites for grandfather rank: (1) the designation of appropriate bargaining unit(s); (2) the certification of exclusive bargaining agent(s); and (3) the

[10]This is not to say that "losing" grandfather status may not occur; however. this proceeding does not present that scenario.

negotiation of existing collective bargaining agreements. Only those public employers who meet these three requirements prior to October 1, 1991 are grandfathered.

For instance, a public employer who enacted an ordinance on September 30, 1991, detailing a system or provisions and procedures for collective bargaining but had not designated any appropriate bargaining units, nor certified any exclusive bargaining agents, nor negotiated any existing collective bargaining agreements does not satisfy the statutory requirements. Section 26(B)'s prerequisites reflect legislative intent not to permit a public employer from courting the appearance of engaging in collective bargaining while never concluding the penultimate rite in labor relations, i.e., a negotiated collective bargaining agreement.

In sum, the Act presents a dichotomy of change (§ 26(C)) and, at the same time, stability in labor-management relations (§ 26(A) and (B)). This dichotomy is not limited to § 26 but permeates other PEBA provisions. For example, § 2, Purposes, provides a compelling expression for change through its Legislative guarantee to public employees to organize and bargain collectively with public employers. At the same time, however, there is a countervailing expression of Legislative intent to change and that is stability in labor-management relationships, as expressed in § 24 where bargaining units established prior to January 1, 1992, continue to be recognized as appropriate under the Act despite the peculiar configuration of positions in a unit. Without the mandate and promotion of stability embodied in § 24, a bargaining unit may not

survive the strict scrutiny under PEBA § 13 for determining appropriateness.[11] Other units established between January 1, 1992, and the effective date of the Act (April 1, 1993) also fall within the umbrella of § 24 as long as the unit resulted from a representation election. Further Legislative indicia promoting stability in collective bargaining is found in § 25 where collective bargaining agreements entered into before the Act's effective date remained in place.

This interpretation of the whole statute (PEBA) is consistent with our duty to look at the objectives the Legislature sought to accomplish and thereby interpret the statute to achieve these purposes. Our finding and conclusion that BPS is covered by PEBA § 26(A) and (B) is consistent with the Legislature's intent to preserve the stability and integrity of full-fledged collective bargaining relationships in existence prior to October 1, 1991. Accordingly, the complaint is dismissed.[12]

CONCLUSIONS OF LAW

Based on the analyses and findings set forth above, the PELRB concludes that complainant NEA-New Mexico has standing to file and adjudicate the prohibited practice complaint in Case No. PPC 19-95(SD) on behalf of its affiliate NEA-Bernalillo; the prohibited

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[11] See *Local 1193, American Federation of State, County and Municipal Employees, AFL-CIO, and Taos County*, 1 PELRB No. 4 (January 12, 1995) where a conglomeration of positions retain their appropriate stature under the Act because of § 24.

[12] We agree with the recommendation directed by the ALJ at p. 30 that respondent "remove from the personnel file of [the head cook] the reprimand issued to her...and refrain from using that reprimand, or any reference to it, in...future personnel action or evaluation [of her]."

practice complaint is timely filed under the Board's rules and regulations; respondent BPS is a "grandfather" entity pursuant to PEBA § 26(A) and (B); and, because of respondent's status under the Act, the complaint is dismissed.[13]

ORDER

Based on the findings of fact and conclusions as determined by the Board, the PELRB hereby enters the following ORDER:

(1) The ALJ's findings and conclusions that NEA-NM has standing and the PPC is timely are affirmed; (2) the ALJ's finding and conclusion that respondent "lost" its grandfather status is reversed; (3) the Board finds and concludes that respondent is covered by the grandfather provisions set forth in PEBA § 26(A) and (B); and (4) the Board dismisses the complaint in Case No. PPC 19-95(SD) in all other respects.

Decided by the New Mexico Public Employee Labor Relations Board on the 1st day May 1996 during open session at its regular meeting.

[13]In view of our findings and conclusions, the respondent's appeal to the PELRB of the Director's denial of respondent's motion to disqualify the ALJ is moot.

For the Board.[14]

Martín V. Domínguez
Chairman

Date of Issuance: May 31, 1996

[14]Member Loy finds respondent not to be covered by § 26(A) and (B) because of its decision not to include a binding grievance arbitration procedure in the collective bargaining agreement which, in his view, PEBA § 17(F) requires. Therefore he votes "No" with respect to the issue of grandfather status for respondent.