1 PELRB No. 18

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In the Matter of

New Mexico Federation of Teachers
Complainant,
v.
University of New Mexico
Respondent,

and

American Association of University Professors, Gallup Campus
Complainant,
v.
University of New Mexico
Respondent.

DECISION AND ORDER

On March 6, 1996, an administrative law judge (ALJ) issued a decision and order pursuant to the Public Employee Bargaining Act of 1992, NMSA 1978, §§ 10-7D-1 to 10-7D-26 (Repl. Pamp. 1993), in *New Mexico Federation of Teachers v. University of New Mexico*, Case No. PPC 14-95(O) and *American Association of University Professors, Gallup Campus v. University of New Mexico*, Case No. PPC 17-95(O).

With respect to the matter involving complainant New Mexico Federation of Teachers (NMFT) in Case No. PPC 14-95(O), that administrative-level proceeding commenced on March 10, 1995, when NMFT filed a prohibited practice complaint (PPC or complaint) with the Public Employee Labor Relations Board (PELRB or Board). NMFT alleged violations of the Public Employee Bargaining Act (PEBA or Act) by respondent University of New Mexico (UNM).

Specifically, NMFT alleged that UNM's Policy on Labor Relations (policy) violates the Act's §§ 26(A), (B) and (C) and 19(G). In this regard, the policy identifies certain occupational groups and employees (faculty, professional, technical) to be excluded or prohibited from engaging in activities to join or assist any labor organization for the purpose of collective bargaining. NMFT seeks to represent non-teaching professional and technical positions but not faculty.

On April 26, 1995, complainant American Association of University Professors (AAUP) filed a complaint in Case No. PPC 17-95(O) with the Board after the UNM Board of Regents (regents), on March 23, 1995, declined to accept AAUP's petition for recognition of that labor organization as the bargaining representative for teaching faculty, librarians, and academic counselors at respondent's campus located in Gallup, New Mexico. AAUP's complaint alleges that the regents' denial violates PEBA §§ 26 and 19(G).

On the same date that respondent declined to accept AAUP's petition, UNM filed suit in Second Judicial District Court seeking declaratory relief and an order further defining its rights and obligations under PEBA. In September 1995 the court concluded that it "does not have jurisdiction over Plaintiff's declaratory judgment action until after the [Board] has rendered a decision on the [PPCs] brought by AAUP and NMFT now pending before it."[1]

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[1] *The Regents of the University of New Mexico v. The American Association of University Professors, Gallup Branch Chapter and The New Mexico Federation of Teachers*, Second Judicial District Cause No. CV 95-002376 (September 15, 1995). On November 20, 1995, an "Order of Voluntary Dismissal of [UNM's] Appeal" was entered into the record by the Second District Court and filed with the New Mexico Court of Appeals.

Case Nos. PPC 14-95(O) and PPC 17-95(O) were consolidated for the purposes of the hearing which occurred on October 10, November 12 and 13, 1995. During the course of the hearing 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 complaints.

After receipt of the evidence and testimony, the ALJ issued a decision and recommended order on March 6, 1996, wherein he concluded that (1) respondent's policy was invalid to the extent that it does not allow faculty, technical and professional employees to form, join, or assist any labor organization; (2) UNM's constitutional responsibility to manage and direct the university is not a bar or does not preclude the application of PEBA; (3) UNM committed a prohibited practice by refusing to accept AAUP's petition for recognition of a bargaining agent and appropriate unit of positions; (4) complainant NMFT has standing to bring this matter before the Board for adjudication; and (5) the complaints filed by NMFT and AAUP are not barred by the doctrine of laches or the 6-month period of limitations set forth in PELRB Rule 3.2.

Given these conclusions the recommended order by the ALJ was, one, for UNM to conduct an election at its Gallup campus to allow UNM employees to determine whether AAUP should be certified as an exclusive representative. The second part of the recommended order invalidated that portion of respondent's existing policy which prohibits UNM employees occupying faculty, professional, and technical positions from engaging in organizing activities.

EXCEPTIONS

On March 22, 1996, UNM filed a timely notice of appeal regarding the ALJ's recommended decision. Respondent exceptions follow.[2]

> 1. The hearing officer was incorrect in concluding that respondent is not entitled pursuant to section 26(A) and (B) of PEBA to continue to operate under its 1970 policy because the policy does not permit the same categories of employees to organize and bargain as permitted by the Act.
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> 2. The hearing officer was incorrect in concluding that the authority of the regents under the New Mexico Constitution is not impaired by failure to respect the policy determinations made in the regents 1970 policy.
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> 3. The complaints filed by NMFT and AAUP are not timely and NMFT does not have standing to bring its complaint.
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> 4. Neither the hearing officer nor the PELRB have authority to require that UNM conduct an election among employees at the UNM Gallup Branch because no determination has been made concerning an appropriate bargaining unit.

Complainants' NMFT and AAUP filed timely answers to the respondent's exceptions; they urge the Board to dismiss the exceptions and affirm the ALJ's findings, conclusions, 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

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[2]Unless respondent excepted to an issue in its notice of appeal, we find that UNM has abandoned all other affirmative defenses and threshold, jurisdictional issues raised in its answers to the prohibited practice complaints and pre-hearing and post-hearing memoranda of points and authorities.

review is based on evidence and argument presented to the ALJ. Furthermore, 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 these proceedings, the Board exercised its discretion to entertain oral presentations from counsel for respondent and complainants.[3] Rule 3.12(c) also 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." Based on this provision, the Board adopts the ALJ's findings of fact and determinations on certain issues but reverses the presiding official's conclusion that UNM committed a PPC by violating PEBA §§ 5 and 19(G).[4]

FINDINGS OF FACT

Unless modified herein, we adopt the ALJ's findings of fact appearing at pp. 2-5 in the recommended order. In summary fashion the facts are that respondent is a public employer as

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[3]The Board also received, without objection from respondent or complainants, argument from counsel representing the Attorney General and its position set forth in N.M. Att'y Gen. Op. 93-05 (1994). That is, respondent UNM is not a "public employer *other than the state*" under the statutory definition of "public employer" (PEBA § 4(Q)). [Emphasis added.] Rather, the statutory definition reflects the legislature's intent that state educational institutions confirmed by Article XII, Section 11 of the New Mexico Constitution be included within the term "state" appearing at PEBA § 4(Q). In view of the Attorney General's position, counsel to the PELRB recused herself from advising the Board during its closed session deliberations. We have taken the Attorney General's position under advisement; we recognize the autonomy of that office to pursue whatever action it deems appropriate in this matter.

[4]PEBA § 5, Rights of public employees, states that "[p]ublic employees, other than management employees, supervisors, and confidential employees, may form, join or assist any labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion and shall have the right to refuse any or all such activities." Pursuant to PEBA § 19(G), no public employer "shall...refuse or fail to comply with any provision of the [Act] or board regulation."

defined in the Act's § 4(Q)[5] and PELRB Rule 1.3r.[6] and complainant NMFT and complainant AAUP are each a "labor organization" as defined at PEBA § 4(J).[7] In this regard, UNM acknowledged in its answer to AAUP's complaint that AAUP is a "labor organization" and it never contested NMFT's status as a "labor organization." In 1970 UNM adopted its policy, revised in 1979 and 1980; it states, in relevant part, the following:

> B. MEMBERSHIP AND REPRESENTATION
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> 1) Any permanent, full-time or part-time, staff employee of the University is free to join and assist any labor organization of his own choosing or to participate in the formation of a new labor organization, or to refrain from any such activities, except however, administrative, faculty and supervisor personnel, professional and technical personnel, security officers and guards, confidential employees and employees engaged in personnel work, temporary part-time employees and temporary full-time employees shall not be represented by any labor organization for the purposes of bargaining collectively with the University on wages, hours, or other working conditions.

We find that UNM employs approximately 10,000 persons of which 1,800 of them are currently represented by exclusive, certified bargaining agents. NMFT seeks to represent technical and professional employees at the main campus (Albuquerque) whereas AAUP seeks representation of teaching faculty, librarians and academic counselors at a branch campus in Gallup. UNM's Gallup campus is part of the statewide UNM system; its focus is extensive

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[5]PEBA § 4(Q) defines "public employer" as "the state or any political subdivision thereof including municipalities having adopted home rule charters and does not include any government of a tribe or pueblo[.]"

[6]PELRB Rule 1.3r. defines "public employer" as "the state, educational institutions confirmed by Article XII, Section 11 of the Constitution of the State of New Mexico, or any political subdivision of the State, including municipalities having adopted home rule charters and does not include any government of a tribe or pueblo."

[7]PEBA § 4(J) defines "labor organization" as "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."

vocational programs and course offerings and faculty at the Gallup campus teach only the initial two years of the traditional, college academic courses. They are not engaged in the depth or level of research activities performed at the flagship campus in Albuquerque where bachelor, master, doctoral, juris doctor, and medical degrees are conferred. In short, the Gallup facility serves a different clientele and community purpose with faculty and staff not subject to the degree of a "publish or perish" environment commonly found at larger, national research institutions offering more comprehensive courses and academic programs as found at UNM's main campus in Albuquerque.

HEARING OFFICER'S CONCLUSIONS OF LAW

Having reviewed the record in these proceedings, we adopt the hearing officer's conclusions of law on the issues identified below.

1. That portion of the UNM labor policy at issue is invalid because it denies the right to form, join or assist a labor organization to the faculty, professional, and technical occupational groups and also denies the right for such occupational groups to refuse to engage in such organizing activities.[8]

[8]Section 26(C) of the Act applies only to those public employers other than the state that, after April 1, 1993, elect to seek approval from the PELRB to establish and operate a labor board, commonly referred to as a "local board." See *NEA-NM/Bernalillo v. Bernalillo Public Schools*, 1 PELRB No. 17, 12-13 (May 31, 1996). Section 26(A) and (B) of the Act pertain to a public employer other than the state that seeks confirmation of its "grandfather" rank. The PELRB's statutory responsibility is to interpret and apply PEBA or, more specifically, to determine whether respondent UNM has attained elderly status under PEBA § 26(A) and (B). In this regard the definition of "public employer" (PEBA § 4(Q)) encompasses UNM and PELRB Rule 1.3r. defines UNM as a public employer "other than the state"; respondent's policy was enacted prior to October 1, 1991; collective bargaining agreements covering all employees represented by labor organizations were in effect as of October 1, 1991; the policy permits some occupations and UNM employees to form, join, or assist a labor organization for

2. The constitutional argument does not foreclose the application of PEBA to UNM. The Act does not infringe on the regents' constitutional responsibility to manage or control the university.[9]

3. Complainant NMFT has standing to bring this action.[10]

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purposes of collective bargaining; facial or surface wording in the policy excludes other occupational groups and UNM employees but respondent has allowed excluded groups and employees to petition, or currently has under consideration a petition, that allows them to form, join, or assist a labor organization of their choosing. Based on these findings, we believe respondent is acting in accordance with the statutory requirements to obtain the PELRB's imprimatur of grandfather rank as well as the maintenance or retention of it. Additionally, we are not persuaded by UNM's argument that the word "employee" in PEBA § 26(A) means anything other than "public employee" (PEBA § 4(P)). Finally, we do not address any constitutional concerns associated with the policy's proscriptions against employees forming, joining, or participating in a labor organization. (See generally *Morfin v. Albuquerque Public Schools*, 906 F.2d 1434, 1438-39 (10th Cir. 1990)(First Amendment protects the right of a public employee to join and participate in a labor union)).

[9]The sphere or core of managerial functions asserted by UNM in its constitutional argument, although not identified, appears to be a variation on the argument of management rights found in the traditional model of industrial labor-management relations. There is no reason why the systems of collegiality and collective negotiations may not function harmoniously. Neither system need impose upon the other. Respondent is free to continue to delegate to collegial entities whatever managerial functions it chooses subject, of course, to applicable law. Collective negotiations would mandate a change in the collegial system only if that system operates to alter the university's obligation to deal exclusively with a labor organization with regard to the grievances and terms and conditions of employment for bargaining unit employees. Beyond that, however, both systems are free to operate without interfering with one another. We observe that since the inception of its policy in 1970 UNM has been dealing with grievances and terms and conditions of employment for employees represented by exclusive bargaining agents and labor organizations. By comparison and example in *Regents of the University of Michigan v. Michigan Employment Relations Commission and University of Michigan Interns-Residents Association*, 389 Mich. 96, 204 N.W.2d 218, 82 LRRM 2909 (1973), the Supreme Court of Michigan recognized that the Michigan Public Employment Relations Act could be applied to grant medical residents at a state university the right to organize; however, there was a recognition, also, that some subjects of bargaining would be off-limits because they fall into the "educational sphere" entrusted by a state's constitution to the university's board of regents. Although the case involved university hospital and its public employees, and the UNM Hospital and its policy are not contested in this proceeding, the interface of collective negotiations and constitutional duties shows how the two systems interface and work together. A private-sector model of collective negotiations in a system of collegiality or shared governance is Harvard University and the Harvard Union of Clerical and Technical Employees noted in RESTORING THE PROMISE OF AMERICAN LABOR LAW (Sheldon Friedman et al. eds., 1994) and Thomas A. Kochan's and Paul Osterman's THE MUTUAL GAINS ENTERPRISE (1994). Attorney General Opinion No. 93-05 (1994) at 11-13 provides further discussion and references as to a university's constitutional responsibility to manage and direct its operations not being unlawfully interfered with in an environment of collective negotiations.

[10]Administrative standing is a minimal or low level threshold to cross and attain; it is the appropriate standard to be applied in an administrative level proceeding. The term "complainant" is broadly defined at PELRB Rule 1.3e. as "an individual, organization, or public employer, that has filed a prohibited practices complaint." This

4. The complaints are timely filed and not barred by the doctrine of laches.[11]

Having reviewed the record in these proceedings, we reverse the hearing officer's conclusion of law that respondent committed a prohibited practice by declining to accept the petition for recognition of a bargaining unit of teaching faculty, librarians, and academic counselors at the Gallup campus and to designate AAUP as the exclusive representative. We agree with UNM that, before an election occurs, an appropriate bargaining unit must be determined for the petitioned-for unit at that campus. Moreover, the petition as presented to the regents appears to contemplate recognition of AAUP as the exclusive representative for these positions without an election.[12] The Act does not require any public employer, whether that

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spacious definition is intended to further the Act's purposes of providing an administrative forum, with decisions subject to judicial review, for redress of any complaints. See *NEA-NM/Bernalillo v. Bernalillo Public Schools*, 1 PELRB No. 17, 7-8 (May 31, 1996). We also find and conclude that complainants have satisfied the requirements for judicial standing given their active representation of public employees at UNM, complainants' interests in protecting those individual rights as well as the purposes for which each organization exists and seeks to further in terms of collective bargaining under the Act and policy. Cf. *Director, Office of Workers' Compensation Programs v. Newport News Shipyard and Drydock Co.*, 115 S.Ct. 1278, 1283 (1995)(Federal Administrative Procedures Act threshold is relatively low and plaintiffs' interests need be only "arguably" within the zone of interests of a statute in order to establish standing) and *Clarke v. Securities Industries Association*, 479 U.S. 388, 399-400 (1987)(federal-level administrative standing test is not "especially demanding").

[11]We agree with the hearing officer's statement that "PEBA does not require that employees race to join or race to refuse to join unions" and find, therefore, that the 6-month period of time for filing these complaints did not commence with the effective date (April 1, 1993) of the Act. The doctrine of laches does not bar these complaints because respondent has not demonstrated any sufferance of inequities incurred by the adjudication of legal rights and obligations under the Act § 26 and policy. The Second District Court decision is a compelling statement that the rights and obligations under the Act and policy, to which UNM sought clarification in its suit for declaratory judgement, must be adjudicated before the PELRB.

[12]The policy does not define the occupational positions of technical, professional, and faculty. UNM reserved its right, before the hearing officer, to assert that the petitioned-for unit is inappropriate because the positions are managerial in nature. Its policy does not define a "management employee" but the respondent relies upon the National Labor Relations Board's case law determination and application of that term. See *Yeshiva University*, 221 NLRB 1053, 91 LRRM 1017 (1975), *enforcement denied*, 582 F.2d 686, 98 LRRM 3245 (CA 2,

public employer is subject to the jurisdiction of the PELRB, a local board or a grandfather institution, to voluntarily recognize a petitioner. Although the particular group of employees involved in this proceeding are prohibited from engaging in organizing activities under the policy, the respondent, notwithstanding the facial appearance of its policy, allows employees to form, join, or assist any labor organization for the purpose of collective bargaining as witnessed by the determination of an appropriate unit, election, and certification of security or campus police and current consideration of NMFT's petition for representation of museum curators.

Should the regents elect not to accept AAUP's petition once properly placed before it and, therefore, not proceed with the determination of an appropriate unit and election, then the petitioning party should seek redress in the appropriate judicial forum. In view of this finding and conclusion, as well as noting that the policy on its face is invalid but in actual operation the regents allow and permit organizing activities by its employees in these excluded occupations, we do not affirm the hearing officer's decision and order to (1) direct and election and (2) invalidate the policy because it disregards the current state of affairs that permits organizing activities.

1978), *aff'd*, 444 U.S. 672, 103 LRRM 2526 (1980).

ORDER

The PELRB hereby enters the following ORDER:

(1) NMFT has standing; (2) NMFT's and AAUP's complaints are timely; (3) the hearing officer is reversed, UNM did not commit a prohibited practice by not accepting the AAUP petition; and (4) adopt the hearing officer's conclusion that the policy on its face is invalid for excluding or prohibiting faculty, professional, and technical occupational groups and those public employees from engaging in activities to form, join, or assist a labor organization for the purpose of collective bargaining.

Decided by the PELRB on the 1st day of May 1996 during open session at its regular meeting held in Santa Fe, New Mexico.

For the Board.

Martín V. Domínguez
Chairman

Date of Issuance: June 25, 1996