2/13/97

1 PELRB No. 20

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In the Matter of

Classified School Employees Council-Las Cruces
Petitioner,

and

Las Cruces Public Schools,
Public Employer.

DECISION AND ORDER

On September 16, 1996, a hearing officer issued a Report and Recommended Decision in *Classified School Employees Council-Las Cruces and Las Cruces Public Schools,* Case No. CP 8-96(SD), pursuant to the Public Employee Bargaining Act, NMSA 1978, §§ 10-7D-1 to 10-7D-26 (Repl. Pamp. 1993).

On October 2, 1996, the public employer school district (hereinafter respondent) filed exceptions to the hearing officer's report and recommended decision. Petitioner, affiliated with the National Education Association and New Mexico Federation of Teachers, did not file a request for review but it did submit an answer or response to the respondent's exceptions.

The Public Employee Labor Relations Board (PELRB or Board) reviewed Case No. CP 8-96(SD) during open session at its December 3, 1996, and January 29, 1997, meetings in Santa Fe, New Mexico, following notice and publication of the meetings pursuant to the Open Meetings Act, NMSA 1978, §§ 10-15-1 to 10-15-4 (Repl. Pamp. 1992).

Hearing Officer's Report and Recommended Decision

On July 25, 1996, the hearing officer conducted a hearing on the issue of whether the position of head custodian or supervisory custodian is a "supervisor" as that term is defined in the Public

Employee Bargaining Act (PEBA).[1] If found to be a supervisor then it should be excluded from the bargaining unit composed of custodians (respondent's argument). If not a supervisor then the position is appropriate for inclusion in the unit (petitioner's argument). Although the dispute concerns a single job title or classification there are approximately 30 employees assigned to that position in numerous schools within the district.

Following receipt of pre-hearing and post-hearing briefs, the hearing officer issued a report and recommended decision finding that the contested position was not a "supervisor" because none of the employees designated as supervisor performed a "substantial" amount of work related to supervision. Rather these employees performed the same work as their subordinates--custodians--and functioned as a lead worker. Additionally, six of the employees designated "supervisory custodian" did not supervise at least two or more employees.

Since the statutory definition excludes from its coverage a position where (1) the superior's "duties are substantially similar to those of their subordinates," (2) the employee is a lead worker, and (3) the superior does not supervise at least two or more employees, the hearing officer found the contested position to fall outside the scope of the definition and, thus, not a "supervisor" under PEBA.

Given the evidence and argument submitted the hearing officer's recommended decision was to (1) deny the school district's "challenge to the inclusion of its supervisory custodians in the bargaining unit" and (2) request the PELRB to enter an order to include the position in the unit of custodians.

October Exceptions and Response Thereto

Pursuant to Rule 2, Paragraph 22.1, the respondent filed a request for review in October excepting to two matters. One, in the hearing officer's procedural findings of fact the school

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[1] 10-7D-4(S) states:

> "supervisor" means an employee who devotes a substantial amount of work time to supervisory duties, who customarily and regularly directs the work of two or more other employees and who has the authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively but does not include individuals who perform merely routine, incidental or clerical duties or who occasionally assume supervisory or directory roles or whose duties are substantially similar to those of their subordinates and does not include lead employees or employees who participate in peer review or occasional employee evaluation programs.

district noted that the letter identified in finding number three was not submitted by the respondent but by the petitioner. The second exception concerned the recommended decision wherein the hearing officer stated that an order should be entered to deny the respondent's challenge to the inclusion of the position in the unit. According to the school district it did not file any challenge because the position of supervisory custodian was excluded from the "very beginning."

The petitioner's response, filed under Rule 2, Paragraph 22.2, is that the hearing officer's misstatement in procedural finding of fact number three is a "harmless error" and, with respect to the second exception, the respondent acknowledged at the hearing the issue to be adjudicated since the parties were in dispute over the supervisory custodian position.

Board Review of October Exceptions

The Board reviewed the exceptions and response thereto at its December 3, 1996, meeting as required by Rule 2, Paragraph 22.3. In accordance with Rule 1, Paragraph 27, the review is "based on the evidence presented or offered at the earlier stages of the proceeding and shall not be de novo."

At the December meeting the Board exercised its discretion in Rule 2, Paragraph 22.3, and permitted oral argument by the school district's representative. In this regard, respondent stated that it disagreed with the hearing officer's conclusion about the supervisory status of the disputed custodian position but was not challenging it.

Given the respondent's two exceptions and its decision not to challenge the hearing officer's substantive conclusions, the Board returned the report and recommended decision to the hearing officer to correct the errors in the procedural finding of fact number three and the recommended decision.

December Letter and Response Thereto

Following issuance of the corrected report in accordance with the Board's directive, the school district submitted a letter dated December 24, 1996, wherein it states that "[respondent] is appreciative of the PELRB's direction to the Hearing Officer to reexamine his findings and make corrections to the errors submitted in his initial Decision and Recommended Order"; however, "the [r]espondent will show that this issue [supervisory status] never should have been heard by the Hearing Officer and that the Director exceeded his authority by violating the PELRB's own rules in the consent of election." Respondent acknowledges raising these matters "following the discussion before the PELRB on December 3, 1996."

Petitioner filed a response to the letter maintaining that the allegations are in the form of a motion--which is untimely--and Rule 1, Paragraph 27, does not permit the Board to conduct a de novo review as respondent now seeks. In addition to the letter and response thereto, the Board received extensive comment from each party's representative at its January 29, 1997 meeting.

Board Review of December Letter

For the reasons set forth below the Board adopts the hearing officer's corrected report and recommended decision and denies the respondent's issues identified in its December 24 letter because they are untimely.

With respect to the adoption of the corrected report and recommended decision, we note that the respondent maintained at the December 3 PELRB meeting it was not challenging the substantive conclusions of the hearing officer. Our review of the record reveals that the findings of fact, conclusions of law, and recommended decision are supported by the evidentiary record. Consistent with Rule 2, Paragraph 22.4, we adopt the corrected report and recommended decision and incorporate it as the Board's decision and order in this matter.[2]

Turning to the alleged Rule 2 violations presented to the Board for the first time in the December 24 letter, we find the allegations are untimely for the following reasons. In response to the hearing officer's inquiry at the July 1996 hearing the respondent stated unequivocally that there were no other matters to report other than the supervisory status of the custodian position. The inquiry comports with Paragraph 19.3 for a hearing officer to compile a "full and complete record on all unresolved unit issues *and any other issues necessary to process the petition.*" [Emphasis added.]

The respondent's answer before the hearing officer reflects only one issue in dispute between the parties--supervisory status--and no allegations of Rule 2 violations. The alleged violations in processing the petition, then, were not presented to the hearing officer or identified by the respondent in its two exceptions filed in October. As we have previously stated, "the proffer of new argument or evidence at this late stage of Board proceedings is not in accordance with the unambiguous wording of [Paragraph 22.1]--'The request [for review] may not rely on any evidence not

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[2]Paragraph 22.4 states that "[t]he Board may adopt or incorporate in and attach to its decision all or any portion of the hearing officer's report or Director's decision."

presented to the hearing officer.'"[3] In *DAC* the Board stated that its rules on the review of reports and recommended decisions "are designed to expedite the adjudication of disputes by having the parties not delay the presentation of evidence or raise previously unidentified issues for the first time before the Board in their exceptions."[4]

Based on the presentation of new issues for the first time in the December letter, and given respondent's prior representation to the hearing officer that the only issue to report was supervisory status in conjunction with its affirmation before the Board not to challenge the hearing officer's conclusions, we find the issues or allegations presented in the December 24 letter to be untimely and not properly raised in a request for review.[5] Our conclusions are reflected in the Order below.

ORDER

The Public Employee Labor Relations Board hereby enters the following ORDER:

1. The PELRB adopts the hearing officer's corrected report and recommended decision.

2. The PELRB denies the issues set forth in the respondent's letter dated December 24, 1996, because they are untimely.

For the Board.

Sherman McCorkle
Chairman

Issued: February 13, 1997

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[3] *Doña Ana County*, 1 PELRB No. 19 at 9 (August 1, 1996) (hereinafter *DAC*).

[4] *DAC* at 12.

[5] See *Santa Fe County*, 1 PELRB No. 3 (1993) at n. 17 where the Board concluded that it would not address allegations or issues raised or presented for the first time by the complainant labor organization in its post-hearing brief.