BEFORE THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 18,

Complainant,

01-PELRB-2008

vs.

PELRB Case No. 168-06

DEPARTMENT OF HEALTH,

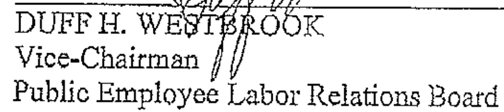
Respondent.

ORDER DENYING MOTION FOR RECONSIDERATION

THIS MATTER having come before the Public Employee Labor Relations Board (PELRB) upon the recommendation of the hearing officer to deny Respondent's motion for reconsideration, and the PELRB having heard the argument of the parties and being otherwise fully advised;

IT IS HEREBY ORDERED that Respondent's motion for reconsideration be and hereby is denied.

Vice-Chairman Westbrook and Member Boyd join in issuing this Order. Chairman Domínguez has recused himself from all participation in this case.



DUFF H. WESTBROOK
Vice-Chairman
Public Employee Labor Relations Board

Date: 1-3-08

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 18,

Complainant,

v. **PELRB Case No. 168-06**

DEPARTMENT OF HEALTH,

Respondent.

HEARING EXAMINER'S DECISION AND RECOMMENDATION[1]
ON RESPONDENT'S MOTION FOR RECONSIDERATION

At the December 3, 2007 PELRB meeting, the Department of Health (Department or Respondent) appealed the Report and Recommendation (hereinafter "Report") issued by the undersigned, which found and concluded that the Department had violated the Public Employee Bargaining Act (PEBA), NMSA 10-7E-1 *et seq.*, by seeking to hold a mandatory meeting concerning terms and conditions of employment without first notifying the Area Representative (Maria Sanchez) of the exclusive bargaining representative, the American Federation of State, County and Municipal Employees, Council 18 (Union).

The Department challenged numerous findings and conclusions, and also asserted that it was surprised and prejudiced by the undersigned Hearing Examiner having

[1] It is unclear whether the Motion is for the undersigned to reconsider the Report, or for the PELRB to reconsider its affirmation of the Report. *See* Motion at 4 (moving the PELRB "for ... [a] hearing to reconsider the Hearing Officer's decision"). The initial decision-maker of any report, ruling or order is, obviously, the proper party to reconsideration that report, ruling or order. Otherwise, it is not a reconsideration but instead an appeal, which the Respondent has already been afforded in this case. However, the Board's Order itself is unclear as to which decision is to be reconsidered—the Hearing Examiner's or its own. *See* Report at 1. Accordingly, the Motion is treated dually here.

amended the PPC *sua sponte* to correspond to record evidence admitted without objection from the Department. The Public Employee Labor Relations Board (PELRB) affirmed the Hearing Examiner Report with the proviso that the Department would be "permitted to move for reconsideration of that decision, upon a good faith showing that it would have presented additional evidence with respect to the charge of interference had it not been surprised by the addition of that charge made by the Hearing Examiner during the course of the proceedings below." *See* 6-PELRB-2007 at 1 (hereinafter "Order").

On January 2, 2008 the Department filed a Motion for Reconsideration, and on January 18, 2008 the Union filed its Response. Having reviewed the filings, I conclude the Motion does not meet the Board's requirements because it does not identify how or in what manner it was surprised by the claim that it interfered with the Union's rights and responsibilities as the exclusive bargaining agent. Moreover, reviewing the prior record, I conclude that it cannot do so because the claim was not raised *sua sponte*, having been sufficiently stated in the PPC to meet the liberal notice pleading standard; because it had ample opportunity to object to, cross-examine and/or rebut evidence going to the claim; and because it had ample opportunity to argue a contrary legal interpretation of the evidence. Finally, however, even assuming the Department was surprised, the record does not support the asserted grounds for reaching a different conclusion.

Therefore, to the extent the Department moves for the undersigned to reconsider her initial Report and Recommendation and to determine that the hearing should be re-opened to obtain additional evidence, the Report is hereby reconsidered in light of the Motion, and the original Report is RE-AFFIRMED. To the extent the motion is instead a

motion for the PELRB to reconsider its affirmation of the Report and to re-open or direct the undersigned to re-open the hearing, I RECOMMEND the PELRB deny the motion.

ANAYLIS

I. The claim not raised *sua sponte.*

At the most fundamental level, the Motion for Reconsideration must be denied because it is premised on the undersigned having raised a claim *sua sponte* when, in fact, the claim was stated in the PPC.

Specifically, the PPC gave adequate notice (a) that the factual allegations included failure to give the Union advance notice of a meeting at the New Mexico Behavior Health Institute at Las Vegas (NMBHI), and (b) that the legal claims included interference with the Union's rights and responsibilities as exclusive bargaining representative. For instance, the PPC alleged that "[i]n … requesting notice and involvement, the Union was exercising its rights and responsibilities as the exclusive agent for bargaining unit employees." *See* PPC ¶ 17. It also alleged that "[i]n refusing to notify and involve the Union regarding changes in working conditions and mandatory meeting(s) that involved and included employees covered under the Agreement between AFSCME and the State of New Mexico, the Employer violated NMSA 1978, 10-7E-19 (A, B, G and H) (2003)." *See* PPC ¶ 19. These allegations are sufficient under New Mexico's liberal notice-pleading standard. *See Garcia v. Coffman*, 1997-NMCA-092, ¶ 11, 124 N.M. 12, 946 P.2d 216 (that "[u]nder our rules of notice pleading, it is sufficient that [the] defendants be given only a fair idea of the nature of the claim asserted against them sufficient to apprise them of the general basis of the claim") (internal quotations and citation omitted); *Sanchez v. City of Belen*, 98 N.M. 57, 60, 644 P.2d 1046, 1049 (Ct.

App. 1982) (that New Mexico construes pleadings liberally and the general policy is to provide for "an adjudication on the merits" rather than allowing "technicalities of procedures and form" to "determine the rights of the litigants.").[2]

Section 19(B) of PEBA prohibits "interference with, [or] restrain ... a public employee in the exercise of a right guaranteed to [PEBA]," and §19(G) prohibits violations of PEBA. Additionally, reading these sections together with the facts alleged implicated §5 and §15(A) of PEBA, which together required the employer to conduct any discussions regarding terms and conditions of employment through the PT's elected bargaining representative. *See* §5 (that "public employees ... may form, join or assist a labor organization for the purpose of collective bargaining <u>through representatives chosen by public employees without interference</u>, restraint or coercion"; and §15(A) (that "[a] labor organization that has been certified by the board ... as representing the public employees in the appropriate bargaining unit <u>shall</u> be the exclusive representative of all public employees in the appropriate bargaining unit," and "<u>shall</u> act for all public employees in the appropriate bargaining unit"). Finally, this reading is consistent with case law interpreting the National Labor Relations Act (NLRA). *See, e.g., Americare Pine Lodge Nursing and Rehab Center v. NLRB*, 164 F.3d 867 (4th Cir. 1999) (that communicating with represented employees concerning terms and conditions of employment—or "direct dealing"—is prohibited by §8(a)(1) and §8(a)(5) of the NRLA,

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[2] This point is particularly compelling before the PELRB, where almost all PPCs are filed by and many are initially answered by a pro-se party, who often only obtain licensed counsel, if at all, immediately prior to the merits hearing. Thus, PPCs frequently cite the wrong PEBA subsection or otherwise have technical defects, and the parties—and/or late-hired counsel prosecuting or defending the PPC at the merits hearing—are frequently unaware of the technical deficiencies. Finally, rightly or wrongly, counsel tend to rely on the expectation that an informal administrative tribunal will not summarily dismiss or grant a PPC based on technical defects of any pleadings.

which respectively prohibit interference in the right to bargain collectively, and require employers to bargain in good faith with the exclusive representative).

Based on foregoing, the claim of interference with the Union's rights and responsibilities as exclusive bargaining representative was not raised "*sua sponte*." This is true notwithstanding the Department's unsupported assertion, as part of its motion for directed verdict, that "the question before us today it is not the substantive issues raised in the petition but whether or not the Department had engaged in retaliation claim." *See* August 20, 2007 proceedings, Tape 3, Side A.[3] This is also true notwithstanding the undersigned's determination (itself proper, *see infra*), in denying the motion for directed verdict, that the PPC was "deemed amended" because "evidence presented without objection on relevancy grounds also included interference with PEBA rights … , that the Department was going around the Union." *Id.* Finally, it was for this reason that the undersigned instead concluded in her written Report (which was necessarily based on a more careful examination of the pleadings than a ruling from the bench on the motion for directed verdict), that the claim was adequately and separately raised in ¶ 19 of the PPC. *See* Report at 10.

II. Evidence was admitted without objection and the Department had ample opportunity to cross-examine and/or rebut evidence going to the claim.

In any event, even assuming the claim was not stated in the PPC, the Respondent waived any objections it might have had by permitting extensive evidence to be admitted without objection concerning the Respondent's attempts at circumnavigating the exclusive bargaining relationship between the PTs and AFSCME area representative

[3] Of course, this statement was itself an unequivocal admission by the Department that the claim had been raised in the PPC, and no explanation was given at the time the statement was made as to why the terms of the PPC would not structure the merits hearing and subsequent rulings.

Maria Sanchez. *See* Rule 1-015(B) NMRA) (providing, essentially, that pleadings are deemed amended to conform with evidence received into the record when the issue is "tried by express or implied consent of the parties," even if a party does not move to amend the pleadings)[4]; *see also Foundation Reserve Insurance Co. v. Mullenix*, 97 N.M. 618 (1982) (recognizing that "[u]nder notice pleading, the evidence in a case may establish liability ... different from that alleged in the pleadings or otherwise anticipated by the parties").

Moreover, even if the Respondent was initially surprised by Ms. Sanchez' testimony regarding interference, it had ample opportunity to cross-examine and/or rebut evidence going to that claim. First, it had the opportunity to and did cross-examine Ms. Sanchez on Friday, August 17, 2007 regarding her testimony that she had previously objected to Department management about the failure to notify area representatives of meetings concerning terms and conditions of employment. Second, the Department had the opportunity to present rebuttal testimony as to notice or prior objection from its own witnesses—in particular Jeff Gallegos, the undisputed Human Resources point of contact for the Union—when it presented its case on Monday, August 20, 2007, and did not do so. Indeed, Mr. Gallegos testified that he tried to contact Ms. Sanchez to notify her about the meeting, but was unable to reach her. *See* August 20, 2007 hearing, Tape 4, Side A.

[4] Specifically, Rule 1-015(B) provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." It further provides that while "[s]uch amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment ... failure so to amend does not affect the result of the trial of these issues." In applying this language, the New Mexico Court has concluded that "if the issue was tried by express or implied consent of the parties, then the trial court was obliged to treat the issue in all respects as it had been raised in the pleadings, <u>even had the complaint not been amended</u>." *Wynne v. Pino*, 78 N.M. 520, 522 (1967) (emphasis added). Finally, the Rule provides that amendments may even be made in the face of objections when "the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits," although "[t]he court may grant a continuance to enable the objecting party to meet such evidence."

Although the undersigned rejected the credibility of Mr. Gallegos' testimony in this regard, *see* Report at 15, the testimony nonetheless demonstrates knowledge or notice on the part of the Department that it was required to give the Union area representative advance notice of the meeting.

Finally, the Department also had sufficient opportunity to arrange for the testimony of NMBHI Deputy Administrator Troy Jones, who it now alleges "had frequent communication with Maria Sanchez" during which "Maria Sanchez did not inform the Deputy Administrator of her concerns regarding interference with exclusive representation."[5] *See* Motion at ¶¶ 18-19. Assuming Mr. Jones could have credibly rebutted Ms. Sanchez' testimony (notwithstanding Mr. Gallegos' apparent inability to truthfully deny Ms. Sanchez' assertions), the Motion for Consideration does not make any showing that Mr. Jones could not have been called as a late-identified rebuttal witness as a result of undue surprise. While Mr. Jones was not on its original witness list, the Department reserved the right to call "[a]ny necessary rebuttal Witnesses that cannot be anticipated at this time." *See* Respondent's Final Witness List. Additionally, the Department had from Friday, when the Union rested, to Monday, when the Department put on its case, to contact Mr. Jones. Finally, the Department was expressly assured by the undersigned on Monday—after the undersigned's ruling on the motion for directed verdict that the matter included a claim for interference—that the hearing could be continued beyond Monday if needed.

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[5] While the Union argues that the Department has failed in its Motion for Reconsideration to raise any new evidence it would have raised but for the undue surprise, *see* Union Response at 3-4, I find that the Department has done so, albeit obliquely, in pointing to the testimony of Mr. Jones and, *see infra*, a new legal theory based on the management rights provision of the CBA. However, for the reasons stated here, the Department still has not demonstrated that it was precluded by virtue of "surprise" from presenting either Mr. Jones' testimony or the management rights theory at the merits hearing, or how the new fact and new legal theory would or could have warranted a different conclusion under the existing record and case law.

III. The Department had ample opportunity to—and did—argue the contrary legal interpretation of the evidence it now puts forward and, in any event, its arguments are not well founded.

Besides suggesting that it was somehow prevented from presenting crucial and dispositive testimony of Mr. Jones, the Department argues—as it did at the merits hearing—that the meeting did not concern "union business." Specifically, the Department asserts, as it did at the merits hearing, that it did not believe it was required to give the Union advance notice of the meeting because it was merely a "staffing" or "personnel" meeting to "clarify communications," and no employee had alerted the Department at prior, similar meetings that they desired Union representation. *Compare* Report at Finding 13 and pages 9, 14-15 to Motion at ¶¶ 14, 16-17.

The only difference in the Department's position is that it now asserts that the meeting did not concern the "negotiation" or establishment of terms and conditions of employment or other mandatory subjects of bargaining, and that the meeting instead fell within an area of interest exclusively reserved to the Department through the "management rights" clause of the collective bargaining agreement. *See* Motion at ¶¶ 12-13, 15; *compare* Article 18, Sections 1(8), 1(10), 1(11) and 2 of the CBA (that management reserves exclusive rights in certain areas, including determining the methods, means and personnel by which operations are to be conducted; and that management need only provide the Union an *opportunity* to bargain over changes in three of the eleven enumerated areas, including changes to rules and regulations regarding conduct, or standards and rules regarding safety).

However, this difference is insufficient to support the Motion to Reconsider. As discussed above, the District had ample prior notice of the interference claim to present

this new "management rights" legal argument during the merits hearing. Moreover, even assuming surprise, the new legal argument does not support a different conclusion because it is not supported by either the existing record, or relevant case law.

First, it was undisputed at the hearing that: (a) the meeting concerned Admission Physical Therapists' (PTs) concerns about leave, mandatory overtime and safety; (b) the Area Representative had notified the Department that the Department must notify it of meetings concerning these and similar issues; and (c) the Department failed to notify the Area Representative of the meeting. *See* Report, Findings 10-11, 17-19. Second, it is clear under basic principles of labor law that leave, mandatory overtime and safety are mandatory subjects of bargaining. *See, e.g.,* Developing Labor Law (5th Ed.) at 1264-1265, 1294-1295, 1299, 1318-13-19; *Alamo Cement Co.*, 281 NLRB 737, 738 (1986). Third, as mandatory subjects of bargaining, an employer may only address its employees about such subject through or in the presence of the exclusive bargaining representative, even when the communication is not a "negotiation" per se.

This is because the right to collectively bargain through the chosen exclusive representative is much broader than merely a right to have the Union and management sit down together at the actual negotiating table. Rather, the right also encompasses union representation at informational labor-management meetings that discuss terms and conditions of employment. *See Dayton Newspapers, Inc. v. NLRB*, Case No. 04-1981/2110, www.versuslaw.com (6th Cir. 2005) (that an employer violates the NLRA when, in the midst of known labor-management unrest, an employer has meetings with employees about terms and conditions of employment without informing the Union of the meetings or discussing the relevant issues with the Union first"), and *Harris-Teeter Super*

Markets, Inc., 293 NLRB v. 743, 747 (1989) (that an employer violated the NLRA by bypassing the union and engaging in direct dealing with employees by asking them their opinions of a four-day work week); *see also Medo Photo Supply Corp. v. NLRB*, 321 US 678, 684 (1944) (that "it is a violation of the essential principle of collective bargaining and an infringement of the [NLRA] for the employer to disregard the bargaining representative"), and *Americare Pine Lodge*, *supra* (that it is improper direct dealing to take "actions that persuade employees to believe they can achieve their objective directly through the employer and thus erode the union's position as the exclusive bargaining representative"), and.

The Department also misses the point to the extent that it argues that the burden was on the bargaining unit employees to request union representation. That is part of the standard for union representation during investigational interviews under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), but that standard is irrelevant here. Rather, the onus is always on the employer to go through the exclusive representative when addressing employees about disputed terms and conditions of employment or other mandatory subjects of bargaining. Notably, that is true even when the employer merely seeks to "clarify" the employees' concerns. *See, e.g., Obie Pacific, Inc.*, 196 NLRB 458, 460 (1972) (that an employee may not use a survey to ascertain employee sentiment and position, and undermine the Union about matters that may soon be subject to negotiation); and *NLRB v. M.A. Harrison Mfg. Co.*, 682 F.2d 580, 582 (6th Cir. 1982) (that bypassing the Union by directly soliciting employee views on a term and condition of employment is prohibited direct dealing).

Finally, the Department's motion is not well founded to the extent that it seeks to assert that the Union waived the right to be present at the meeting by virtue of the management rights clause. As discussed above, the meeting was to concern labor-management disputes regarding leave, overtime and safety. As to safety, the Union expressly reserves the right to negotiate changes to "standards and rules for employee safety." *See* CBA Article 18, Section 2. As to leave and mandatory overtime, the reservation of management's right to affect without negotiation changes to the "methods, means, and personnel by which the [NMBHI's] operations are to be conducted" does not constitute a "clear and unmistakable" waiver of the Union's right to bargain over leave and mandatory overtime. *See, e.g.*, Developing Labor Law (5th Ed.) at 1007-1011, 1014-1017. "Methods, means and personnel" are all vague terms, while "leave" and "overtime" are quite specific. In any event, even if "methods, means and personnel" could be understood to clearly and unmistakably include "leave" and "overtime," any waiver of the right to negotiate an issue does not address or limit the Union's right to exclusively represent bargaining unit employees away from the negotiating table, which—as discussed above—is considerably broader than the right to negotiate at the table.

CONCLUSION

For all the foregoing reasons, in reconsidering the initial Report and Recommendation in light of the Motion for Reconsideration, the Report is hereby RE-AFFIRMED to the extent the Motion for Reconsideration is directed to the undersigned. To the extent the Motion is directed to the PELRB, the undersigned RECOMMENDS to the PELRB that the it deny the Motion. This report and the parties' briefings on the

Respondent's Motion to Reconsider shall be forwarded forthwith to the PELRB for further review and consideration at its next regularly scheduled board meeting.

Issued in Albuquerque, New Mexico this 22nd day of January, 2008.

Pilar Vaile, Deputy Director
Public Employee Labor Relations Board