

STATE OF NEW MEXICO  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

10-PELRB-2011

SANTA FE COUNTY FIREFIGHTERS  
ASSOCIATION, IAFF LOCAL 4366,

Complainant,

v.

PELRB No. 128-11

COUNTY OF SANTA FE,  
Respondent

ORDER AND DECISION

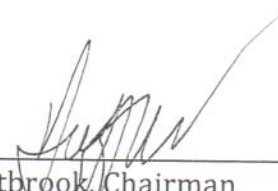
THIS MATTER comes before the Public Employee Labor Relations Board for ratification of the Hearing Officer's Recommended Decision on threshold issues identified during a scheduling and status conference September 13, 2011. The issues identified by the parties and the Hearing Officer are:

1. Whether by contract the union waived the right to bring this Prohibited Practices Complaint (PPC).
2. If the union did not waive its right to bring this PPC, whether the issues raised by Petitioner in its PPC are more properly brought as a grievance under the parties' Collective Bargaining Agreement (CBA) and whether doing so should result in dismissal of the PPC.

Upon a 2-1 vote at the Board's December 19, 2011 meeting;

**IT IS HEREBY ORDERED** that the Hearing Officer's Recommended Findings of Fact, Conclusions of Law and Rationale shall be, and hereby are, adopted as the Order of the Board. Respondent's Motion that Petitioner's Prohibited Practices Complaint fails to state a claim shall be and hereby is, **DISMISSED**.

Date: 1-2-12

  
\_\_\_\_\_  
Duff Westbrook, Chairman  
Public Employee Labor Relations Board

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

**In re:**

**SANTA FE COUNTY FIREFIGHTERS  
ASSOCIATION, IAFF LOCAL 4366,**

**Complainant,**

**v.**

**PELRB No. 128-11**

**COUNTY OF SANTA FE,**

**Respondent**

**HEARING OFFICER'S REPORT AND RECOMMENDED DECISION**

THIS MATTER comes before the Hearing Officer in the context of threshold issues identified during a scheduling and status conference September 13, 2011.

The issues identified by the parties and the Hearing Officer are:

1. Whether by contract the union waived the right to bring this Prohibited Practices Complaint (PPC).
2. If the union did not waive its right to bring this PPC, whether the issues raised by Petitioner in its PPC are more properly brought as a grievance under the parties' Collective Bargaining Agreement (CBA) and whether doing so should result in dismissal of the PPC.

The Hearing Officer established a briefing schedule and both parties timely submitted their briefs as scheduled. The matters submitted are decided on the briefs.

**FINDINGS OF FACT:**

1. Petitioner herein is the recognized collective Bargaining Representative for the following full-time non-probationary personnel employed by Respondent Santa Fe County:
  - a. Firefighters/EMT Basic;
  - b. EMT Intermediate;
  - c. Paramedics;

- d. Lieutenants;
- e. Fire Protection Specialists I and II.

CBA , Art. 1

2. The parties have bargained a CBA a copy of which was provided to the Hearing Officer in connection with this proceeding. The term of that Agreement is from the date of ratification to June 30, 2011. (CBA Article 31) Article 31 of the parties' contract also provides that either party may request negotiation of a successor agreement by filing a written request with the other party no later than March 15, 2011.
3. On March 9, 2011 the Union requested collective bargaining for a successor Collective Bargaining Agreement. (Exhibit A to Petitioner's Brief).
4. On March 10, 2011 the union received a memo from the County of Santa Fe stating in relevant part:

"We will eliminate the less than 24 hour leave (annual and personal) except for emergencies.

  - a. You will no longer be able to schedule less than 24 hour leave in TeleStaff.
  - b. Regular leave will only be approved for a minimum of 24 hours.
  - c. Less than 24 hours leave may be granted by the on-duty BC for emergency circumstances only.
  - d. The BC, Assistant Chief or the Fire Chief will make the final determination.
  - e. If an employee wants to take less than 24 hours (i.e. attend a class they will need to do a trade."
5. On June 1, 2011 Petitioner filed a Prohibited Practices Complaint herein as PELRB No. 128-11 alleging that by implementing the changes set forth above from the aforementioned memo Respondent unilaterally implemented changes to a

mandatory subject of bargaining, i.e. use of annual and personal leave, thereby violating Section 10-7E-19(C), (F) and (H).

6. Although Respondent did not list the doctrine of waiver among its enumerated affirmative defenses, in paragraphs 4 and 5 of its Answer the Respondent asserts facts pertaining to negotiated sections of the parties' CBA reserving as a management right the designation of the minimum hours that may be taken with each leave request that are in the nature of a waiver defense and the defense of waiver was identified at a Status and Scheduling Conference as a threshold issue to be resolved before proceeding further with the complaint. Again, although not specifically stated in its enumerated affirmative defenses, the Respondent alleges in its second affirmative defense that Petitioners failed to comply with the grievance process set forth in Article 3 of the CBA which is in the nature of a claim that this matter is properly to be deferred to arbitration.
7. Neither party has asserted that a grievance arbitration proceeding is pending on the facts at issue in this case nor has the County asserted yet that it is willing to waive timelines so that the matter, if deferred could be arbitrated.
8. The parties CBA contains a provision regarding the accrual and use of personal leave, i.e. Article 31, which provides for accrual of one personal leave day per calendar year which must be before the end of the last pay period in December or it will be forfeited. Article 31 also provides: "Personal leave cannot be divided and taken on separate days."
9. The parties CBA contains a provision regarding the accrual and use of annual leave, i.e. Article 27, which provides for accrual of annual leave based on years of service

according to a schedule set forth in the CBA. Article 27 also provides that "Annual leave shall not be granted in advance of accrual".

10. Article 23 (B) of the CBA provides in part:

"The County and the Union for the life of this agreement, each voluntarily and without reservation, waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject matter not specifically referred to or covered in this Agreement, even though such subject matter may not have been within the knowledge or contemplation of either or both parties at the time they negotiated or signed this Agreement."

11. The parties' CBA also contains a Management Rights Cause, Article 8. The contested change to leave increments does not appear amid the enumerated reserved management rights but in addition to the expressly reserved rights Article 8 provides that the County may make "such reasonable rules and regulations as it may from time to time deem best for the purpose of ...efficient operations." Also, Article 8 provides that any "Items" not covered in the Agreement are to be handled under the most recent Personnel Manual and if not covered there are left to management discretion.

12. The parties' CBA also contains a Union Rights Cause, Article 2 which provides at paragraph D that "If this Agreement is silent regarding a particular issue, it shall be considered a retained management right to exercise discretion on such issue."

#### **CONCLUSIONS OF LAW:**

A. This Board has jurisdiction over both the parties and the subject matter in this case.

B. The County has no obligation to bargain the changes complained of because the union either waived its bargaining rights by bargaining terms in its CBA that

gave management discretion over such matters or the County discharged its obligation to bargain by negotiating those terms.

- C. In light of the conclusion that the County has no obligation to bargain over the changes set forth in Exhibit A to Respondent's Answer, there is no need to decide, and the Hearing Officer does not decide, the issue of deferral to arbitration.

**RATIONALE:**

Reading the contract as a whole, the union clearly and unmistakably waived its right to bargain over changes to the County's elimination of the practice of allowing less than 24 hour annual and personal leave except for emergencies by permitting the County to reserve the sole and exclusive right to make such changes as long as they are not expressly negotiated in the parties' Agreement. The union permitted the County to reserve that right is at least three places:

- a. In Article 23 (B) of the CBA wherein each party "voluntarily and without reservation" waived the right to bargain collectively with respect to "any subject matter not specifically referred to or covered in this Agreement, even though such subject matter may not have been within the knowledge or contemplation of either or both parties at the time they negotiated or signed this Agreement."
- b. In Article 8 where the union permitted the County to make "such reasonable rules and regulations as it may from time to time deem best for the purpose of ...efficient operations" and by deferring to

the County's personnel manual and in the absence of coverage there, to "management discretion" any "Items" not covered in the Agreement.

- c. In Article 2 (D) which provides that "If this Agreement is silent regarding a particular issue, it shall be considered a retained management right to exercise discretion on such issue."

13. The Hearing Officer has searched the parties' contract for any indication that the modification of annual and personnel leave use as presented by the union in its complaint was negotiated into the contract by the parties. The parties' CBA contains a provision regarding the accrual and use of personal leave, i.e. Article 31, which provides for accrual of one personal leave day per calendar year which must be before the end of the last pay period in December or it will be forfeited. Article 31 also provides: "Personal leave cannot be divided and taken on separate days" but says nothing more about the incremental use of such leave. Similarly, where Article 27, provides for accrual of annual leave based on years of service according to a schedule set forth in the CBA it is equally silent on its incremental use. While it might be argued that the general topics of leave in the Agreement and the mandatory nature of the topic itself might require bargaining in the face of a general reservation of management rights, it strains credulity to do so when confronting three separate provisions of the parties' Agreement where the union relinquished to management discretion any issue not specifically written down in their contract. No help for the union may be found by relying on the provisions of the PEBA requiring

bargaining in good faith over mandatory subjects coupled with the Act's provisions prohibiting agreements in violation of the Act because the parties have negotiated the issues of annual and personal leave and in so doing specifically rendered to management, discretion to act as it deems fit with regard to such leave unless it violates a contract term the union had the foresight to anticipate. The union did not anticipate the present dispute over incremental use and thus did not bargain specific language concerning its use with the result that it is left to management's discretion, **not** by operation of a general reservation of management rights but by three express grants of that discretion.

PEBA, like the National Labor Relations Act (NLRA), 29 USC §1 *et seq.*, imposes a duty to bargain in good faith over "wages, hours and all other terms and conditions of employment." *Compare*, PEBA §17(A)(1) and §19(F) to NLRA §8(a)(5). Under the NLRA it is a *per se* violation of the duty to bargain to unilaterally alter wages, hours or other terms and conditions of employment *unless that duty has been discharged, suspended or waived, such as by contract, bargaining history or inaction. NLRB v. Katz*, 369 US 736, 743 (1962). See generally, *Developing Labor Law* (5<sup>th</sup> Ed.) at 988-1030. The facts of this case indicate that the duty to bargain the unilateral change complained of was discharged or waived when the union granted the right to management to exercise its discretion over such changes. *See also, AFSCME v. State Personnel Office*, PELRB Case No. 143-07, addressing the "management rights" clause in the AFSCME/State CBA.

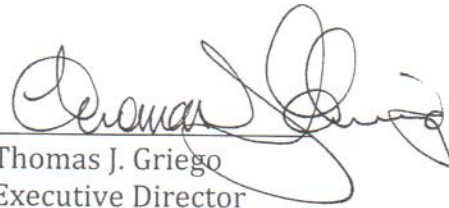
**Recommended Order:**



The County has no obligation to bargain the changes complained of because the union either waived its bargaining rights by bargaining terms in its CBA that gave management discretion over such matters or the County discharged its obligation to bargain by negotiating those terms. Accordingly, Petitioner's Prohibited Practices Complaint fails to state a claim and is hereby **DISMISSED**.

**APPEAL:** Either party may appeal this hearing officer's decision by filing a notice of appeal with the PELRB staff at 2929 Coors Blvd. NW in Albuquerque New Mexico 87120. Provisions for appeal are found at NMAC 11.21.3.19. An appeal must be filed within 10 work days of this opinion and otherwise comply with NMAC 11.21.3.19.

Issued this 28th day of October 2011



Thomas J. Griego  
Executive Director  
Public Employee Labor Relations Board  
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Albuquerque, NM 87120