

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME, COUNCIL 18,

Complainant,

10 - PELRB - 2014

-v-

PELRB No. 110-13

HIDALGO COUNTY,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board on May 28, 2014 for review of a Directed Verdict granted by the Executive Director and review of the parties' settlement agreement concerning those issues remaining after the Directed Verdict. The Board adopts the Hearing Officer's Findings and Fact and Conclusions of Law that form the basis for his Directed Verdict and ratifies the conclusion that the 2013 changes to the Personnel Policies identified in this case are not substantial, material or significant because they made no change in the actual practices followed in those policies. Therefore, the changes in the Personnel Policy are *de minimus* and insufficient to sustain this Prohibited Practices Complaint.

IT IS THEREFORE ORDERED that the PPC insofar as it alleges that the County's unilateral adoption of a new Personnel Policy violated §§ 17(A)(1) and 19(F) of the PEBA is **DISMISSED**.

IT IS FURTHER ORDERED that issues remaining after the Hearing Officer's Directed Verdict, including the Union's charge that the County made an impermissible change to its past practice of shift bidding, have been resolved by the parties' settlement agreement.

Pursuant to that Agreement those claims are deemed withdrawn with prejudice and

DISMISSED. The Director shall close this case conditioned on performance by all parties of the terms of the settlement agreement.

Date: 6-3-14



Duff Westbrook, Chair,
Public Employee Labor Relations Board

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

In re:

**AFSCME COUNCIL 18,
Complainant**

v.

PELRB No. 110-13

**BOARD OF COUNTY COMMISSIONERS
OF HIDALGO COUNTY,
Respondent**

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

STATEMENT OF THE CASE: This matter comes before Thomas J. Griego, designated as the Hearing Officer in this case, on the Union's Prohibited Practices Complaint and Request for Declaratory Relief filed September 10, 2013 by which Petitioner seeks to prohibit the County from making alleged unilateral changes to the terms and conditions of employment without notice to the union and an opportunity to bargain such changes to impasse. Specifically, the Union alleges that the County made unilateral changes to its Personnel Policy in 2013 and terminated its past practice of shift bidding by seniority.

Respondent filed a Motion to Dismiss for Lack of Jurisdiction on February 4, 2014 based on the premises that having approved a local board for Hidalgo County, that board, not PELRB has jurisdiction over this matter and because the Board of County Commissioners was not a "public employer" as defined in the PEBA. That Motion was denied on February 17, 2014. After a continuance requested by the County a hearing on the merits was held March 31, 2014. At the conclusion of the Union's case in chief the County moved for a directed verdict which was granted in part. With regard to that portion of the Union's Complaint that was not disposed of by the directed verdict, i.e. its past practice of shift bidding by seniority, the parties reached a settlement agreement, which settlement was read into the record. The purpose of this Report and

Recommended Decision primarily is to address the issues disposed of by the directed verdict. With respect to those issues all parties hereto were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following **FINDINGS OF FACT**:

1. A hearing was held before this Hearing Officer on March 5, 2013 for the purpose of the County and the Union entering into a Consent Election Agreement. [Pre-Hearing Order Section 2, Stipulation a (modified).]
2. The representation election resulting from the Consent Election Agreement entered into as a result of the above-referenced hearing was held on March 21, 2013. [Pre-Hearing Order Section 2, Stipulation b (modified).]
3. On April 16, 2013 the PEELRB certified the election results in which there were 15 votes out of 18 eligible voters in favor of the union and none against. [Pre-Hearing Order Section 2, Stipulation c.]
4. The Personnel Policy in effect at the time of the formation of the bargaining unit and its certification by the PEELRB was the one dated November 10, 2011. [Pre-Hearing Order Section 2, Stipulation d; Joint Exhibit 1.]
5. The County Board of Commissioners adopted a new Policy on August 14, 2013 effective the next day. [Pre-Hearing Order Section 2, Stipulation e; Joint Exhibit 2.]
6. The following sections of the “new” Personnel Policy, Joint Exhibit 2, appear to be different from the corresponding sections of the “old” Policy, Joint Exhibit 1:
 - a. 5.1 Promotional Process
 - b. 6.1 Evaluation Process

- c. 6.2 Award Recognition Process
- d. 9.3 Holidays
- e. 10.1 Safety
- f. 11.10 Electronic Mail, Computer, On-Line Services Usage and Social Networking
- g. 11.4 Inventory and Disposal Process

[County Exhibits 2 through 9 inclusive; testimony of Wolfe at 13:47 to 23:00.]

7. The changed policies referenced above were not submitted to the Union as proposals during the parties' current and ongoing collective bargaining negotiations. [Testimony of Wolfe at 28:52 to 30:05; testimony of Tavazon at 1:01:32.]
8. Each of the Personnel Policy differences between Joint Exhibit 1 and Joint Exhibit 2, identified by the union as constituting a unilateral change without bargaining, was the subject of a corresponding Directive from the County Manager to all Department Officials and County Employees. Each of those Directives pre-date the filing of the Union's Petition for recognition as the exclusive representative of the employees whose rights are at issue herein, the most recent one having been issued in October of 2012. [County Exhibits 1 through 9 inclusive.]
9. The Union's employee witness acknowledged having received and followed each of the above-referenced Directives in 2012 and that the changes identified in the Directives all occurred prior to the Union filing its Petition to be recognized as the exclusive bargaining representative for the employees herein. [Testimony of Wolfe 30:51 to 43:08 and 44:08 to 45:11.]

10. The Hearing Officer takes Administrative Notice of its own files to establish the date of the union filing its petition for Recognition as the Exclusive Representative to be January 29, 2013.
11. The Hidalgo County Sheriff's Department followed a practice beginning in 2011 whereby Sheriff's Deputies bid for shift assignments based on seniority. In addition to the changes made to the Personnel Policies referenced above, after September of 2013 the Department changed that practice and began making shift assignments on a rotational basis without bargaining that change. [Testimony of Tavazon at 1:04:35 to 1:07:50.]

REASONING AND CONCLUSIONS OF LAW: It is axiomatic that an employer may not make unilateral changes to terms and conditions of employment except pursuant to negotiations, after negotiation to impasse or upon notice and opportunity to bargain over the changes. See *NLRB v. Katz*, 369 U.S. 736 (1962); *Koenig Iron Works, Inc.*, 276 NLRB 811 (1985). Neither may the employer make such unilateral changes to the *status quo* during a union's organization campaign period. See *Pearson Education, Inc.*, 336 NLRB No. 92 (2001); *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964); *B & D Plastics, Inc.*, 302 NLRB 245, 245 (1991); *NLRB v. McClatchy Newspapers*, 964 F.2d 1153, 1162 (D.C. Cir. 1992). It is a *per se* breach of the duty to bargain to "unilaterally" alter a "mandatory subject of bargaining" without first providing notice and opportunity to bargain to impasse unless the requirement to bargain has been waived. See generally JOHN F. HIGGINS, *THE DEVELOPING LABOR LAW* (6th Ed.) at 892-905.

Not every change to the *status quo* by the employer without bargaining will result in a successful PPC however. In order to state a claim for violation of the duty to bargain the change to the mandatory subject must be "substantial, material and significant," rather than

de minimus. (*Alamo Cement Co.*, 281 NLRB 737, 738 (1986)). Examples of changes found to have been substantial, material and significant include changing a shift schedule (*Millard Processing Services, Inc.*, 310 NLRB 421 (1993)); advancing the usual shift start time from 8:00 a.m. to 7:30 a.m. (*Quality Engineered Prod's. Co.*, 267 NLRB 593, 597 (1983)).

Examples of changes found not be substantial, material and significant include extending a rest break by five minutes (*La Mouse*, 259 NLRB 37 (1981)); changing an employee's classification title where working conditions are only changed minimally, (*Alamo Cement Co.*, 277 NLRB 1031 (1985)); requiring employees to take a short oral test on lectures and written materials given every year when job position or security is not affected or impaired by the results, (*UNM Nuclear Indus.*, 268 NLRB 841 (1984)); unilaterally assigning parking spaces when parking was previously allowed on a first-come, first-served basis, (*Dynatron/Bondo Corp.*, 176 F.3d 1310 (11th Cir. 1999)); and changing parking policy with the result that a one-minute walk from the parking facility to the employer's entrance became a three-to-five-minute walk. (*Berkshire Nursing Home, LLC*, 345 NLRB No. 14 (2005)). See generally JOHN E. HIGGINS, *THE DEVELOPING LABOR LAW* (6th Ed.) at 905, 1369-1372, 137 and cites therein.

Assuming for the sake of this Recommended Decision that each of the changes to the Personnel Policies identified in this case implicates a mandatory subject of bargaining I conclude that those changes are not substantial, material and significant because, while they may be a change in the wording of the Personnel Policies existing prior to 2013, they made no change in the actual practices followed in those policies. That is so because of the effect of the Management Directives promulgated in 2012, before the union appeared on the scene. The changes complained of are nothing more than the Directives making their way into the actual Policies and thereby being adopted by the County Commission. There was no

substantial change to the *status quo* by that action. Therefore, the change in the Personnel Policy language is *de minimus* and insufficient to sustain a Prohibited Practices Complaint. For that reason the County's Motion for a Directed Verdict was **GRANTED**, but only as to the allegations regarding changes to the County's Personnel Policy in 2013, not as to the charge that the County made a unilateral change to its past practice of shift bidding without providing an opportunity for the union to bargain that issue. With regard to that issue, the parties have reached a settlement and that settlement, read into the record herein is incorporated into and made a part of this Report and Recommended Decision.

DECISION: The PPC should be **DISMISSED** insofar as it alleges that the County's unilateral adoption of a new Personnel Policy violated §§ 17(A)(1) and 19(F) of the PEBA and as a result of my granting the County's Motion for a Directed Verdict at the close of the Union's case in chief for the reasons stated herein. With regard to the allegations of the Complaint that the County committed a PPC by unilaterally changing an established past practice of shift bidding without notice to the Union and an opportunity to bargain, that claim is withdrawn and therefore, **DISMISSED** with prejudice, pursuant to a settlement agreement reached by the parties at the close of the Union's case in chief, which settlement is incorporated into this report and Recommended Decision.

The Union's Request for Declaratory Relief is deemed to have been voluntarily withdrawn prior to the Hearing on March 31, 2014 in light of the Hearing Officer's letter decision denying the County's Motion to Dismiss issued February 17, 2014 and inasmuch as it appears to have been dropped as an issue in the Pre-Hearing Order. (See PHO ¶1 in which the only contested issue before the Hearing Officer was stipulated to be whether the County

made unilateral changes to terms and conditions of employment). Therefore no evidence was adduced at the hearing on that issue.

Issued April 9, 2014

A handwritten signature in black ink, appearing to read "Thomas J. Griego", written over a horizontal line.

Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board
2929 Coors Blvd. N.W., Suite 303
Albuquerque, New Mexico 87120

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PELRB No. 110-13

Settlement Agreement

The parties agree the three (3) non-probationary deputies, Tavizon, Peru, and Esquivel, will be permitted to bid for shifts to take effect the beginning of the second pay period in April 2014. The bid will be by seniority for the following three (3) options:

- 1) 6:00 AM - 2:00 PM shift with Saturday and Sunday off
- 2) 2:00 PM - 10:00 PM shift with Monday and Tuesday off
- 3) 10:00 PM - 6:00 AM shift with Monday and Tuesday off

Each shift above will only be available to one (1) employee. Once the shift is chosen by the employee with the most seniority, that shift will be removed from selection, leaving two (2) options for the second most senior employee and one (1) option for the third most senior employee.

The shift bid will occur again in July 2014, to take effect the second pay

period in July. Shift bidding will cease October 1, 2014, at which time shift assignments will be the sole discretion of the Sheriff, including, but not limited to, days off or rotation of shifts unless a collective bargaining agreement has been reached, ratified, and signed by the parties containing a shift bid provision. If a collective bargaining agreement is executed, its terms shall prevail.

Upon signature of this settlement agreement below, the Union, AFSCME, hereby withdraws the prohibited practices claim in this matter with prejudice.

Agreed:
Dina C. Holloway

Date: 3/31/14

Agreed:
James A. Mantall
for AFSCME

Date:
3/31/14