

BEFORE THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME Council 18,
Complainant,

10-PELRB-2009

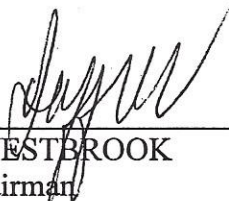
PELRB case No. 147-08

New Mexico Department
of Corrections,
Respondent.

DECISION AND ORDER

THIS MATTER having come before the Public Employee Labor Relations Board ("Board") upon the Respondent's appeal of the hearing officer's recommended decision, and the Board, having heard argument and being otherwise fully advised:

IT IS HEREBY ORDERED that the hearing officer's decision dated June 12, 2009 is upheld and affirmed as the decision and order of this Board for the reasons stated in the hearing officer's report.



DUFF WESTBROOK
Vice Chairman
Public Employee Labor Relations Board

Date: 9-16-09



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

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June 12, 2009

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RE: Prohibited Practice Complaint, AFSCME Council 18
vs. Dept. of Corrections

PELRB Case # 147-08

Dear Ms. Haught and Mr. Trombley:

This is a prohibited practice complaint filed by the American Federation of State, County and Municipal Employees, Council 18 (Union) against the New Mexico Department of Corrections (Department). The Department is a Public Employer as described in 10-7E-4 (S) NMSA 1978 Comp. The Union is a labor organization as described in 10-7E-4 (L) NMSA 1978 Comp. The Collective Bargaining Agreement (CBA) between the parties is dated and effective from September 13, 2005 to December 31, 2008. The incident complained of occurred on October 3, 2008.

The complaint is timely filed, having been filed within six months of the alleged prohibited practice. The Letter of Reprimand was issued on November 18, 2008 and the Prohibited Practice Complaint was filed on December 9, 2008.

Thank you for your briefs stating your position on the issues in the above referenced case. Having read your briefs, I conclude that the Public Employee Bargaining Act (PEBA)

does not allow a public employer to reprimand a bargaining unit employee for distributing union flyers to union members, while off duty, by placing the flyers in the employee mail slots. The employee discipline for placing flyers in employee mail slots while off duty is a violation of the prohibition against interfering in the existence of a labor organization, the duty to bargain in good faith and failing to comply with a collective bargaining agreement. The Department has by virtue of said discipline violated 10-7E-19 (C), (F) and (H) NMSA 1978 Comp.

The Union filed a PPC alleging a violation of the Public Employee Bargaining Act (PEBA). The Department filed an answer and a status and scheduling conference was held. At the status conference the parties agreed that there were no facts in dispute, that the complaint and answer contained all of the information in this case and that an evidentiary hearing would not bring forth any additional information upon which a decision could be made. The parties filed briefs with exhibits and agreed that a decision would be made based on the information contained in the Public Employee Labor Relations Board (PELRB) file.

The information used in arriving at this decision is the following:

The complaint filed in PELRB case # 147-08

The answer filed in PELRB case # 147-08

The Department's Motion for Judgment on the Pleadings with exhibits

The Union's response to the Department's motion

The Department's Code of Conduct, CD-032201 (H)-(2) and (2-f)

The CBA between the parties effective September 13, 2005 to December 31, 2008

NMAC 1.7.6.10 and 1.7.8.7 (I)

FINDINGS OF FACTS:

1. Jack Brodeur, a Department employee, was on break on October 3, 2008 when he distributed the flyers.
2. The flyers were union flyers.
3. The flyers were distributed to union members.
4. The flyers contained some partisan political content.
5. On November 18, 2008, Ms. Elsie Duran a Department region manager, reprimanded Mr. Brodeur for distributing the union flyers.

6. On December 9, 2008 the Union filed this PPC.
7. This situation does not create a conflict between the CBA and SPO regulations or the Department's Code of Conduct. SPO regulations and the Department's Code of Conduct prohibit partisan political activity while on duty only.

DISCUSSION:

The complaint, in paragraph 2 alleges that the employee reprimanded, Jack Brodeur, while off duty distributed union flyers to union member employees by placing the flyers in employee mail slots. The Department fully admitted paragraph 2 of the complaint in its answer. There is no question that the flyers distributed to union members were union flyers of a partisan political nature.

The State Personnel Office (SPO) regulation at NMAC 1.7.6.10 (D) reads, "Employees are prohibited from engaging in a political activity while on duty;" The only "on duty" definition provided by the parties is found at NMAC 1.7.8.7 (I) "On duty" means any time during an employee's regular workday or other period during which the employee is required to work by the employer, including authorized lunch and other breaks and anytime while operating or riding in a state vehicle. This definition is in the New Mexico Administrative Code entitled "Drug and Alcohol Abuse". The necessity of including lunch and other breaks and while driving or riding in a state vehicle in the "on duty" definition under Drug and Alcohol Abuse is obvious. Lunch and other breaks are not included in "on duty" in any other context than Drug and Alcohol Abuse.

The Code of Conduct for the Department addressed political activities in CD-032201 (H) "Political activities prohibited to Corrections Department employees include ----- distribution of campaign literature -----while on duty with the State."

The CBA at Article 28, Section 4 provides for "a reasonable number of rest periods during the work day" and Article 5 of the CBA contains the following language, "nothing contained herein shall bar parties or their members from -----fully and actively participating in the political process".

Article 9, Section 6 of the CBA states, "---employee officials who are on non-work time, or Union staff, may distribute Union literature on Employer facility grounds in public areas, in non-public non-work areas, and in work areas where the distribution does not interfere with Employer operations or present a security or confidentiality breach."

Article 9, Section 6 goes on to state, "Postings on union bulletin boards shall be confined to internal union business, including notices and announcements of meetings, news item, labor-management news but shall not include materials of a partisan, political, defamatory or obscene nature or personal criticism of any individual. Distribution of Union literature at worksites shall not include materials of a defamatory or obscene nature or personal criticism of any individual." Postings on union bulletin boards cannot be of a partisan political nature but distribution of Union literature does not have the same restriction.

Finally, the CBA at Article 40 states, "In the event of a conflict between this Agreement and any other rule, law, regulation, or policy, the terms of this Agreement shall prevail unless the conflicting rule, law, regulation, or policy is considered as controlling authority in accordance with the PEBA.

CONCLUTIONS OF LAW:

A state employee is on non-work time or not on duty during lunch and break times.

The Code of Conduct for the Department does not prohibit partisan political activity during lunch or other breaks throughout the workday.

Pursuant to the CBA bargaining unit employees may fully and actively participating in the political process.

Posting of partisan political information on the union bulletin boards is not allowed by the CBA.

Distributing union literature to union members, including literature having some partisan political content is not prohibited while not on duty or while on non-work time.

ORDER:


The Department is to rescind the Letter of Reprimand issued to Mr. Jack Brodeur and his personnel file reflect that the Letter of Reprimand was erroneously issued. This letter opinion is to be posted for sixty (60) consecutive days on all Department bulletin boards at all Corrections facilities throughout the State of New Mexico.

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. The

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provisions for appeal are found at NMAC 11.21.3.19. An appeal must be filed within 10 work days and otherwise comply with NMAC 11.21.3.19.

Sincerely yours,



Juan B. Montoya