STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CENTRAL CONSOLIDATED
EDUCATION ASSOCIATION,

Complainant,

v.

PELRB No. 102-15

CENTRAL CONSOLIDATED
SCHOOL DISTRICT,

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 merits. In this Prohibited Practice Complaint (PPC) the Complainant (union or CCEA) contends that in 2013 the Employer (District) engaged in bad faith bargaining over an extension of its 2013-2014 Collective Bargaining Agreement (CBA) by its conduct associated with presentation of the parties' tentative agreements for ratification and by concealing its refusal to ratify the negotiating teams' tentative agreement to extend the term of their CBA in violation of NMSA 1978 §§ 10-7E-19(F), (G) and 10-7E-17(A). The Union also contends that the District engaged in bad faith bargaining by refusing to reduce to writing and ratification the agreement negotiated by the parties and by refusing to abide by the negotiated terms in violation of NMSA 1978 §§ 10-7E-19(F) and 10-7E-22. The District denies any bad faith or failure to abide by contract terms contending that both bargaining teams understood that their agreement to extend the CBA's term required approval of the Superintendent as is clear by the plain language in Article 27 of the CBA. The District further claims that the PPC is barred by the doctrines of "unclean hands" and waiver because the Union had prior notice of the school board meeting wherein the

ratification vote was taken along with the form of the contract being presented, which did not contain the negotiated contract extension. In addition to the contract extension in Article 27 the school board also did not ratify some of the negotiated changes to Article 26 of the CBA. Despite the school board's failure to ratify terms of the negotiated agreement the union did not return to its members for another ratification vote, deciding instead to sign the CBA without the negotiated but unratified amendments at issue. The union President attended the school board meetings at which the collective bargaining agreement was presented and voted upon by the School Board but did not raise the issue until raised in a LMT meeting held in November of 2014. Therefore, because the union knew or should have known that the CBA term extension was not in the contract when it was signed by its President in August of 2013, did not raise the issue until shortly before this PPC was filed, did not negotiate the extension in subsequent intervening contract negotiations and for other reasons, the Employer claims the union has acquiesced in a CBA without the term extension to 2016, that the PPC is untimely and that it fails to state a claim for which relief can be granted. Furthermore, the District claims the alleged violation of §10-7E-19(G) is barred because it is based solely upon an alleged violation of §10-7E-19(F).

A hearing on the merits was held Wednesday, June 10, 2015. All parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. At the conclusion of the union's case in chief the District moved alternatively for dismissal or for a directed verdict. The Motion to Dismiss was premised on the PPC being untimely under 11.21.27 NMAC because the union knew or should have known as of the District's school board meeting on August 20, 2013 that the contract extension to June 10, 2016 had not been ratified. In support of dismissal the District pointed to evidence that the union's President signed the CBA without the contract extension on the same day that the school board met to vote on

ratification and that there were multiple junctures both before and after the ratification vote at which the union could have, and arguably should have, reviewed the contract for its specific term. The District pointed out that in an earlier case before this Board, *CCEA v. Central Consolidated School District,* PELRB No. 126-14 (filed October 10, 2014), the union had affirmatively pled that "The Union and CCSD have a collective bargaining agreement with an expiration date of June 30, 2015" referring specifically to the un-extended term of the CBA as it appeared prior to the 2013 negotiations at issue. See ¶2 of the Complaint in PELRB No. 126-14, of which I take administrative notice. The Employer also referenced evidence supporting its contention that the PPC's filing was untimely. Those references implicated issues of acquiescence, unclean hands and waiver doctrines, which I also considered.

The Union countered with reference to another earlier PPC, *CCEA v. Central Consolidated School District* PELRB No. 127-14 filed October 16, 2014, just six days after the case referenced by the District, in which the union asserted that the term of the CBA at issue ended in 2016, not 2015. The union also referenced evidence in the record suggesting that the District took action to prevent the union from discovering that that the school board had not ratified Article 27.

Accepting all well-pleaded factual allegations as true and resolving all doubts in favor of sufficiency of the complaint the Motion to Dismiss was denied. With regard to its Motion for a Directed Verdict the District avers that the alleged violation of §10-7E-19(G) (refusing or failing to comply with the PEBA or a board rule) is based entirely upon an alleged violation of § 10-7E-19(F) (refusal to bargain in good faith) and is therefore barred under PELRB precedent holding that § 19(G) is directed against claims arising under sections of PEBA other than §19. "To interpret §19(G) otherwise would result in the finding of repetitive and duplicative liability." *AFSCME v. Department of Corrections*, PELRB Case No. 150-07 Hearing Examiner's Report at 3 (Feb. 6, 2008). See, e.g. *AFT-*

NM v. Cuba Independent School District; PELRB No. 129-14 (Feb. 4, 2015). Accordingly, to the extent it alleges only violations of §19 the Complaint herein cannot establish a violation of §10-7E-19(G).

The District also moved for a directed verdict with regard to claims under §§ 10-7E-17(A) and 10-7E-22 inasmuch as the PPC did not allege a violation of either section nor was leave requested to amend the PPC. Therefore, the District had insufficient time to prepare a defense to those claims. The Motion for a directed verdict was granted in part. §17(A) establishes the mutual mandate that both parties shall bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties and is necessarily implicated in an allegation under §19(F). While necessarily implicated, §17(A) does not state a cause of action apart from §19(F) and I do not understand the union's complaint to be alleging that it does. A directed verdict was denied in that respect.

A different result obtained with regard to the union's claims under §§10-7E-22 and 10-7E-19(G). §22 sets forth the parties' mutual obligation to abide by their collective bargaining agreements and other agreements "according to their terms when entered into in accordance with the provisions of the… Act". NMSA (1978) §10-7E-22.

As the Complainant, the union bears the burden of proof in establishing that a prohibited practice has occurred. The union did not meet its burden to establish a valid agreement enforceable under the Act that had been violated. Without more, the fact that bad faith may exist with regard to ratification of "consensus agreements" reached by the parties does not render those unwritten, unexecuted and unratified "agreements" enforceable under the Act either as a CBA or an "other agreement" as those terms are contemplated by §10-7E-22. Because the evidence established that both parties' understood their "consensus agreements" to be subject to ratification,[1] and at least one party, the District, did not ratify the extension I could not find that they constituted an enforceable

[1] NMSA (1978) §10-7E-17(E) appears to require ratification by the school district of only those provisions that require the expenditure of funds.

agreement. As a result, the union's claim under §22 is without merit. That conclusion meant that the only remaining basis for the union's alleged violation of §19(G) (refusal or failure to comply with the PEBA or a board rule) was its §19(F), refusal to bargain in good faith, claim. Therefore, pursuant to the doctrine espoused in *AFSCME v. Department of Corrections*, PELRB Case No. 150-07 and *AFT-NM v. Cuba Independent School District,* PELRB No. 129-14 I granted the District's Motion for a Directed Verdict as to §22 and §19(G). That left as the sole issue to be determined, whether the District violated NMSA §10-7E-19(F) by refusing to bargain in good faith.

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.

FINDINGS OF FACT:

1. Central Consolidated Education Association (CCEA) is the exclusive representative for certified, transportation and education support employees of Central Consolidated School District (the District). (PHO stipulation).
2. The Superintendent of the District is Don Levinski. (PHO stipulation).
3. The District and CCEA engaged in negotiations for a Collective Bargaining Agreement (CBA) in May of 2012 in an Interest Based Bargaining (IBB) format. (PHO stipulation).
4. Article 27(B) of the CBA had an expiration date of June 30, 2015. (PHO stipulation).
5. Article 27(D) states as follows: "The parties may, if in agreement before June 30 of each year of the Agreement, extend the Agreement an additional year. This process may continue extending the Agreement until June 30, 2017. The Association President and the Superintendent of Schools can authorize to agree on an extension.

Both representatives must be in agreement. The agreed upon extension is subject to Board approval." (PHO stipulation).

6. In 2013, the District and CCEA each appointed bargaining teams for negotiations. (PHO stipulation).
7. Pursuant to NMSA § 10-7E-17, the bargaining teams each had apparent authority to negotiate on behalf of the respective organizations subject to ratification. (PHO stipulation, modified by Testimony of Sharp, Moss and Levinsky).
8. George Schumpelt was the "lead" negotiator for the management team and had apparent authority to make an agreement subject only to ratification by the school board. No other limitation on Schumpelt's authority was disclosed to the other side before or during the negotiations. (Testimony of Mel Sharp; Exhibit J-2).
9. The CCEA President, Mel Sharp was a member of the negotiation team for the Union. (PHO stipulation, modified).
10. The District Superintendent, Don Levinsky, was a member of the negotiation team for the District, although he did not attend any of the bargaining sessions. (Testimony of Mel Sharp and Don Levinsky).
11. On May 30, 2013, during an IBB bargaining session, the parties' bargaining teams reached consensus to extend the CBA to June 30, 2016. (PHO stipulation).
12. Other provisions were also negotiated over multiple negotiation sessions. (PHO stipulation).
13. The bargaining session minutes reflecting the "consensus agreement" to extend the CBA term to 2016 indicate that the IBB facilitator, Rick Edwards, suggested that the parties reduce their consensus agreements to writing, check their agreements for grammatical errors, typos, etc. and that they then be signed by the two lead

negotiators before sending the draft agreement to the printers. No such signed and dated tentative agreements were introduced into evidence. (Exhibit J-2; Testimony of Mel Sharp under examination by the Hearing Officer.)

14. Although he testified that reviewing and signing tentative agreements by the lead negotiators was "routine" and he "assumed" that routine was followed in this case, he had no direct recollection that such review was conducted or signatures obtained. (Testimony of Mel Sharp under examination by the Hearing Officer.)
15. The Union President acknowledged that the agreement reached by the negotiating teams for extension of the contract term was not the final step in reaching a "binding agreement" on that issue because ratification by both the union and the school board was required. (Testimony of Mel Sharp on cross examination; PHO stipulation).
16. Prior to a School Board work session on August 15, 2013, CCEA held a membership meeting for the purpose of explaining the changes to the CBA negotiated during the 2013 bargaining sessions to its membership, at which the negotiating team distributed "handouts" explaining why the agreement should ratified. (Exhibit J-3; Testimony of Mel Sharp under examination by counsel for the District after the Hearing Officer's examination).
17. The handouts distributed at the union's ratification meeting included language from the proposed new salary schedule (Article 26) but the actual language of the proposed Article 27 was not part of the handout. (Testimony of Mel Sharp under examination by counsel for the District after the Hearing Officer's examination).
18. Although the Minutes of the School Board meeting (Exhibit J-4), which Mel Sharp attended, reflect that some of the negotiated changes reached at the bargaining table were not ratified by the School Board he did not report that fact to his membership

and request whether they nevertheless wanted to re-ratify the contract without those changes. (Testimony of Mel Sharp on cross examination)

19. At the school board's work session meeting on August 15, 2013 the Union's President, Mel Sharp, "commented that the CCEA members ratified the CBA articles 26 and 27…" (Exhibit J-3, Work Session Minutes) but he did not present the school board with a copy of the revised Article 27 extending the contract term to June 30, 2016 and did not specifically address the extension of the contract term in Article 27. (Testimony of Mel Sharp on cross-examination).
20. No action to ratify the negotiated "consensus agreements" was taken by the School Board during the August 15, 2013 work session and agenda item IV for that meeting, indicated that "no items [were] requested" for the August 20, 2013 Regular School Board Meeting. (Exhibit J-3).
21. Some, though not all of the parties' "consensus agreements" were presented to the school board at a regular school Board Meeting held August 20, 2013. (Testimony of Don Levinsky; Exhibit J-4).
22. Prior to the August 20, 2013 Regular School Board Meeting CCEA had access to the agenda for that meeting along with applicable attachments including the version of Article 27 presented to the School Board at that meeting but did not avail itself of the opportunity to review the text of the contract before the Board for ratification (Testimony of Mel Sharp).
23. The District, through its Superintendent Don Levinski, took the contract to the School Board for ratification (PHO stipulation); however, Superintendent Levinski did not take the issue of the extension of the CBA to June 30, 2016, to the School

Board for ratification because he did not agree with the extension. (PHO stipulation).

24. The District, through its School Board President Matthew Tso and the CCEA through its President Melvin R. Sharp, signed the CBA on August 20, 2013. (PHO stipulation).

25. When the CBA was signed by Mr. Tso and Mr. Sharp and printed for the 2013-2014 school year, it listed June 30, 2015 as the expiration date. (PHO stipulation).

26. The parties negotiated other contract changes in 2014 (which negotiations are currently at impasse) but at no time during those negotiations did the parties propose changes to Article 27. (PHO stipulation, modified).

27. The CCEA raised the issue of the CBA expiration date not reflecting the consensus agreement in November 2014 in a LMT meeting. (PHO stipulation, modified by Testimony of Mel Sharp).

28. The testimony is inconsistent as to whether the union President signed the signature page of the CBA (Joint Exhibit 1) prior to or after the school board's ratification vote on August 20, 2013, but it is established that he signed without first reading the CBA to determine whether the negotiated changes were contained therein. (Testimony of Mel Sharp on cross-examination; Testimony of Don Levinsky on examination by the Hearing Officer).

29. The CCEA Union President acknowledged that by signing the CBA he agreed to abide by its terms as written. (Testimony of Mel Sharp on cross-examination).

30. Mel Sharp explained his decision to sign the CBA signature page without proofreading the CBA for accuracy as being made "in a hurry" so that the signed

document could go to the printer. (Testimony of Mel Sharp on examination by the Hearing Officer).

31. After the CBA was signed in August of 2013 copies were printed, posted on the District's email program and on the District's website; however, the union president did not review Article 27 until the absence of the consensus agreement to extend the term of the CBA was raised in a Labor-Management Team meeting in November of 2014. (Testimony of Mel Sharp on cross-examination).
32. Despite knowledge that some of the negotiated changes reached at the bargaining table were not ratified by the School Board Mel Sharp did not seek to rescind his signature approving the CBA, nor did he conduct a second meeting with union membership seeking ratification of the CBA as ratified by the School Board. (Testimony of Mel Sharp on cross-examination).
33. When the union re-opened contract negotiations in 2014, its President opened wages only as per Article 27 without reviewing it, *assuming* that the contract expired in 2016 and so there was not a full contract reopener. Further, he *assumed* that the employer would not be interested in extending the contract again and so did not offer to negotiate Article 27 in the current negotiations.
34. When Superintendent Levinsky presented his recommendations to the school board whether to ratify Articles 26 and 27 he did so in a closed executive session. (Testimony of Don Levinsky on direct examination.)
35. George Shumpelt was unaware that the contract extension had not been ratified until it was pointed out to him in an LMT meeting in November of 2014. (Testimony of Mel Sharp on direct examination; Amended PPC ¶10).

REASONING AND CONCLUSIONS OF LAW: This Board has both subject matter and personal jurisdiction over the issues and the parties. In order to prevail on its claim that the District breached its obligation to bargain in good faith under §19(F) CCEA bears the burden of proof and persuasion with regard to the following four components identified in the PPC, Pre-Hearing Order and the evidence produced at the Merits Hearing:

a. The District engaged in bad faith bargaining because its representatives at the bargaining table were not given full bargaining authority;

b. The District engaged in bad faith bargaining by unilaterally refusing to ratify the negotiated extension of the CBA's term;

c. The District engaged in bad faith bargaining by concealing its refusal to agree to or to ratify the extension of the CBA's term;

d. the District engaged in bad faith bargaining by refusing to reduce to writing the terms of its negotiated agreement and to abide by the negotiated extension of the CBA's term;

I first address the last of those four components, refusal to reduce to writing the terms of its negotiated agreement, because it implicates a *per se* violation of the duty to bargain in good faith.

A. EXECUTION OF A WRITTEN CONTRACT IS EXPRESSLY REQUIRED UNDER THE PEBA § 17(A)(2) AND THE REFUSAL TO EXECUTE A WRITTEN CONTRACT CONSTITUTES A *PER SE* VIOLATION OF THE DUTY TO BARGAIN IN GOOD FAITH. CCEA HAS NOT MET ITS BURDEN OF PROOF REGARDING ITS ALLEGATION THAT THE DISTRICT ENGAGED IN BAD FAITH BARGAINING BY REFUSING TO REDUCE THE TERMS OF ITS NEGOTIATED AGREEMENT TO WRITING AND ABIDE BY THOSE TERMS FOR THE REASONS SET FORTH BELOW.

The Board may apply by analogy NLRB precedent that regards the refusal to execute a written agreement as constituting a *per se* violation of the duty to bargain in good faith. See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 908-910 and NLRB cases

cited therein. When considering *per se* violations, intent is not relevant. The party could even have intended to enter into a contract as a general matter. *See NLRB v. Katz*, 369 U.S. 736 (1962). As the Developing Labor Law treatise describes it, instead of a refusal to bargain, *per se* violations of the duty to bargain typically constitute, a "failure to negotiate" as to a particular issue, or under certain conditions, "rather than an absence of good faith."

At the outset I note that the testimony of CCEA's principal witness, Mel Sharp, was too confusing and unreliable, filled with speculation and erroneous assumptions to establish that the District failed to negotiate as to a particular issue, or under certain conditions that is, i.e. by refusing to reduce to writing the terms of Article 26 or 27. Michael Moss' testimony, while informative on the history of the negotiations surrounding both Articles and the events taking place after CCEA discovered that the consensus agreements reached at the bargaining table were not reflected in the parties' CBA, lent nothing to the issue of the failure to reduce the agreement to writing.

The somewhat unusual facts that have been established are that the consensus agreements reached at the bargaining table were never reduced to writing by either party; even though reviewing and signing such tentative agreements was "routine" and Mel Sharp "assumed" that routine was followed, he had no direct recollection that such review was conducted and signatures obtained. If the District is to be faulted for not reducing the consensus agreements to wring CCEA is equally culpable because, as bargaining session minutes show IBB facilitator, Rick Edwards, suggested that the parties reduce their consensus agreements to writing, check their agreements for grammatical errors, typos, etc. and that they then be signed by the two lead negotiators before sending the draft agreement to the printers. No such signed and dated tentative agreements were introduced into evidence. (Exhibit J-2; Testimony of Mel Sharp under examination by the Hearing Officer.)

There was eventually a contract, ratified by the school board but not by the union, that was reduced to writing. CCEA's President signed the signature page of that agreement (Joint Exhibit 1) on the date of the School Board meeting, August 20, 2013, without first reading the CBA to determine whether the negotiated consensus agreements were contained therein. Mel Sharp acknowledged that by signing that CBA he bound CCEA to its terms as written and that despite eventually discovering that some of the changes negotiated at the bargaining table were not ratified by the School Board, he did not seek to rescind his signature. His explanation for signing the CBA signature page without proofreading was that the parties were "in a hurry".

Under these facts, especially in light of the complicity of CCEA in the failure to reduce to the terms of its negotiated agreement to writing, I cannot conclude that the District committed a *per se* violation of the duty to bargain in good faith by failure to reduce the consensus agreements to writing.

That conclusion does not dispose of the case entirely, however, because I must still consider the remaining components of CCEA's claims to determine whether there is sufficient evidence to establish a pattern of conduct from which intent to frustrate bargaining can be inferred.

The statutory obligation to bargain in good faith PEBA §17(A)(1) may be said to be

> "an 'obligation… to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement… This implies both 'an open mind and a sincere desire to reach an agreement' as well as 'a sincere effort…to reach common ground.' The presence of absence of intent 'must be discerned from the record."

JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 914-915. (Internal citations omitted, emphasis in original).

B. UNDER THE FACTS ESTABLISHED IN THIS CASE CCEA HAS NOT MET ITS BURDEN OF PROOF AS TO ITS ALLEGATION THAT THE DISTRICT ENGAGED IN BAD FAITH

BARGAINING BY UNILATERALLY REFUSING TO RATIFY THE NEGOTIATED EXTENSION OF THE CBA's TERM.

As previously stated in connection with the discussion of the directed verdict the evidence established that both parties understood their "consensus agreements" to be subject to ratification. The NLRB has held that while the parties to an agreement may make final agreement contingent upon the ratification of their principals without violating the Act, an employer lacking good cause to refuse to ratify a collective bargaining agreement acts in bad faith . *See Valley Cent. Emergency Veterinary Hospital* 349 NLRB 1126, 182 LRRM 1121 (2007). One of the cases submitted by the union to support this claim, *Alaska Community Colleges' Federation of Teachers, Local. No. 2404*,669 P.2d 1299 (1983), supports the proposition that it is permissible for an employer to refuse to ratify a tentative agreement in accordance with an agreed upon ground rule so long as its failure to ratify does not result from the employer's intent to string out negotiations and avoid reaching agreement.

While there is evidence of misconduct in connection with the negotiation and ratification of the agreement herein the School Board's refusal to ratify the consensus agreements in this case is not without justification under the facts presented to it for consideration. It may fairly be said that its decision was made in ignorance – Superintendent Levinsky acknowledged that he withdrew the agreed extension of the CBA from consideration by the Board because he did not agree with it. Superintendent Levinsky is not a party respondent and under the totality of circumstances it would not be just to hold the District responsible for failing to ratify a contract term of which it had no knowledge. CCEA shares in the blame for the District operating in the dark. The school board held a "work session" meeting on August 15, 2013 where CCEA's President, Mel Sharp, commented that the CCEA members ratified the CBA Articles 26 and 27 but he did not present the school board with a copy of the

revised Article 27 extending the contract term to June 30, 2016 and did not specifically address the extension of the contract term in Article 27. Agenda item IV for that meeting was discussion of agenda items for the upcoming August 20, 2013 Regular School Board Meeting. The Work Session Minutes indicated that "no items [were] requested" with the result that CCEA missed two opportunities to inform the school board of the specifics of its consensus agreements. For the foregoing reasons I cannot conclude that the District violated the duty to bargain in good faith by failure or refuse to ratify the consensus agreements reached at the bargaining table. The NLRB has held that while parties to an agreement may make a final agreement contingent upon ratification by their principals without violating the Act, an employer may not refuse to ratify a collective bargaining agreement without good cause. *See Valley Central Emergency Veterinary Hospital,* 349 NLRB 1126, 182 LRRM 1121 (2007).

> "Certainly, the Board has held that parties negotiating a collective-bargaining agreement may make the final agreement contingent upon the ratification of their principals. However, the principals may not refuse to ratify for an improper reason. Here, the board of directors lacked good cause to refuse to ratify the tentative agreement. Thus, there is ample evidence that the refusal was in bad faith and the culmination of an unlawful course of conduct. Consequently, we reject the Respondent's contention that its board of directors' refusal to ratify the contract privileged the Respondent's refusal to implement the contract's terms."

Id. (internal citations omitted).

Here, there is no evidence of improper motive for the school board's failure to ratify. Mere ignorance does not suffice. Accordingly, CCEA has not met its burden of proof with regard to this claim.

C. CCEA HAS NOT MET ITS BURDEN OF PROOF AS TO ITS ALLEGATION THAT THE DISTRICT ENGAGED IN BAD FAITH BARGAINING BY CONCEALING ITS REFUSAL TO RATIFY EXTENSION OF THE CBAs TERM.

As discussed under the preceding heading, there is some evidence that Superintendent Levinsky may not have been as transparent as he might have been in connection with ratification of the CBA. However, there is also contrary evidence and reasonable limits on the employer's duty to provide information to the union must be considered. Under the totality of circumstances of this case it would not be just to hold the District responsible for concealing its refusal to ratify extension of the CBA's term, especially when it is not clear that it was aware that its ratification of Article 27 before it was in any way controversial. For example, Superintendent Levinski presented his own versions of Articles 26 and 27 for ratification that did not include the consensus agreement reached on Article 27 because he did not agree with the extension. He did so in a closed executive session. Arguably, the result of that process was that no one other than Superintendent Levinsky was aware that the version of Article 27 presented did not include the parties' consensus agreement. He apparently told no one on either bargaining team of his decision to withhold presentation of the consensus agreement because management negotiating team spokesperson George Shumpelt was unaware that there was an issue with the contract extension until CCEA pointed it out to him in a Labor Management Team meeting three months after ratification. He then had to investigate before he could provide an explanation for why the consensus agreement was not ratified. When requested to sign the CBA the CCEA President was presented with only the signature page, not the entire contract reducing the odds that removal of the extended Article 27 would be discovered before the ratification vote.
On the other hand, prior to the August 20, 2013 Regular School Board Meeting CCEA had access to the agenda for that meeting along with applicable attachments including the version of Article 27 presented to the School Board but did not avail itself of the opportunity to review the text of the contract before the Board for ratification. The Union

President signed the signature page of the CBA without first reading the CBA to determine whether the negotiated changes were contained therein. After the CBA was signed and copies were printed and posted on the District's email program and on the District's website the union president did not review Article 27 until more than a year later.

Under the totality of the circumstances, if there was any misconduct by concealing the "non-ratification" of the consensus agreement reached on Article 27, I cannot attribute that misconduct to the District since, assuming there was concealment, it was due to the acts of one of its bargaining team members alone, one not named as an individual party respondent. Therefore, I do not conclude that the District violated the duty to bargain in good faith by concealing its failure or refusal to ratify the consensus agreements reached at the bargaining table.

D. THE DISTRICT ENGAGED IN BAD FAITH BARGAINING BECAUSE ITS REPRESENTATIVES AT THE BARGAINING TABLE WERE NOT GIVEN FULL BARGAINING AUTHORITY.

As previously stated the parties share a mutual obligation to bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties. NMSA (1978) § 10-7E-17(A). Breach of that obligation constitutes a prohibited labor practice pursuant to PEBA §19(F). While necessarily implicated, §17(A) does not state a cause of action apart from §19(F).

The Developing Labor Law Treatise describes the duty to bargain collectively as:

> "...contemplating "a *bilateral* procedure through which the employer and the bargaining representative *jointly* attempt to set wages and working conditions for the employees."

JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 919-920. (Internal citations omitted, emphasis in original).

It is axiomatic that the parties must vest their collective bargaining negotiators with sufficient authority to carry on meaningful bargaining. Thus, an employer violates PEBA §19(F) when it sends representatives to the bargaining table who have no authority to enter into a contract or to advance binding contract proposals. *See, S-B Manufacturing Co., Ltd. and Local 659, Allied Industrial Workers of America, AFL-CIO*, 270 NLRB 485, 116 LRRM 1065 (1995), *enf'd in relevant part,* 118 F.3d 795, 116 LRRM 1334 (1984). In *S-B Manufacturing* the NLRB held that management's negotiating committee had no authority to agree to anything meaningful without first seeking the approval of the company President. The NLRB noted that while Respondent was not required to be represented by an individual possessing final authority to enter into an agreement, its negotiating committee merely acted as a conduit, relaying the Union's proposals to the company President and the other partners and then, in turn, relaying the partners' answers to the union committee. That method of bargaining prevented any give-and-take negotiating at the bargaining table, which is essential.

In the case before me, although the District's Superintendent, Don Levinsky, was a member of the management negotiation team he did not attend any of the bargaining sessions. He testified that he was named as a member of the team so that he could communicate confidentially with the other team members as negotiations proceeded. It does not appear that whatever communication took place during negotiations was sufficient to prevent the management team from proposing and agreeing to a contract term extension. The District's bargaining method prevented the essential give-and-take negotiating at the bargaining table, in the same manner as was condemned in *S-B Manufacturing.*

Further support for a conclusion that the District engaged in bad faith bargaining may be found in *Bedford Farmers Cooperative and United Textile Workers of America, AFL-CIO*, 259 NLRB 1226 at 1237 (1982) wherein the Co-op was found to have violated the requirements

of good-faith bargaining by sending to the bargaining table representatives with insufficient authority to engage in meaningful negotiations. After a member of the Co-op's negotiating committee, drew up tentative agreements between his committee and the Union's, the Co-op's board of directors rejected them *in toto*. The NLRB referred to the tentative agreements as "little more than trial balloons which [the Co-op's board of directors] could seemingly shoot down or reject at will. Such conduct does not constitute good-faith bargaining." quoting from *Manor Mining and Contracting Corporation*, 197 NLRB 1057, 1059 (1972).

The District justifies Superintendent Levinski's conduct in withholding the Article 27 consensus agreement from his presentation to the school board on the ground that he was privileged to do so since the terms of Article 27 expressly requires his consent. Article 27(D) reads as follows:

> "The parties may, if in agreement before June 30 of each year of the Agreement, extend the Agreement an additional year. This process may continue extending the Agreement until June 30, 2017. The Association President and the Superintendent of Schools can authorize to agree on an extension. Both representatives must be in agreement. The agreed upon extension is subject to Board approval."

A plain reading of Article 27(D) supports a conclusion that it provides a mechanism for extending the entire contract without re-opening the contract on a year to year basis up to 2017. That conclusion is consistent with the union's witnesses' testimony regard Article 27. The necessary implication of the District's on the other hand, would be to remove the term of the CBA from the bargaining table, at least through 2017, a result that would in and of itself likely be bad faith bargaining because the expiration date of the contract, like its substantive provisions, is a bargainable matter. *See, Insulating Fabricators, Inc., Southern Division and International Union of Electrical, Radio and Machine Workers, AFL-CIO,* 144 NLRB No. 125 (1963). Accordingly, I cannot conclude that the District's interpretation of Article 27 is a reasonable one.

In the context of an implied covenant of good faith under New Mexico contract law *Allsup's Convenience Stores, Inc. v. North River Ins. Co.,* 976 P.2d 1, 127 N.M. 1(1991) at 14 considered the question whether both parties' interpretation of an ambiguous contract must be deemed to be reasonable and since the respondent behaved according to its presumptively reasonable interpretation of the contract, it was acting in good faith with respect to the contract as a whole and cannot be held responsible for breaching the duty of good faith and fair dealing. The New Mexico Supreme Court held that an ambiguous contract term may be said to be:

> "susceptible to reasonable but conflicting meanings," *C.R. Anthony,* 112 N.M. at 509, 817 P.2d at 243, did not mean that North River's interpretation was reasonable. The reasonableness or unreasonableness of a party's interpretation of a contract is never established until the trier of fact resolves the ambiguity by deciding what the parties reasonably intended. This too is the standard for good faith. The breaching party is held to objective knowledge of the meaning of the contract from its inception, and held to the requirement of proceeding in good faith thereunder. See generally, 2 Farnsworth §§ 7.8-7.9."

CCEA also submitted for consideration the NLRB case *Long Island Day Care Services,* 303 NLRB 13 (1991). The allegations of the *Long Island Day Care* complaint included charges that the Respondent withdrew the authority of its negotiator, refused to submit the contract for approval to its board of directors and reneged on certain portions of that agreement. Respondent hired attorney Ann Coates to be its "chief negotiator." As such, Coates would represent the Company at the bargaining table and its President, Phyliss Simmons, would not directly participate at the negotiations. Simmons did not attend any negotiation sessions but was active behind the scenes.

Both Renee Mayne, Chief negotiator for the Union and Simmons testified that it was understood by both that any agreement they reached at the bargaining table would be subject

to ratification by their respective principals. For the Union, this meant ratification by the employees. In the case of the Respondent, approval by its board of directors was intended. After negotiations the parties eventually reached a memorandum agreement but when Simmons refused a request by Coates to meet with the Respondent's board of directors to explain the agreement or to recommend its approval as she had agreed to do, Coates resigned as the Chief Negotiator. Afterward, Mayne met with Simmons where Simmons stated her objections to certain portions of the memorandum of agreement and asserted that she would not recommend it to the board of directors. After further discussions to resolve Simmons objections to the memorandum agreement meeting minutes of the Respondent's board of directors read in part:

> "Policy Council voted favorably on Board suggestion to hold single-item agenda meeting to review draft of union contract....
>
> President states that after review, clause by clause, of draft contract, ratification process would be set up in each center where staff covered by contract would have opportunity to vote. Implementation procedures and schedule dates will have to be set.
>
> President advises board that labor attorney has resigned; response regarding impact of binding arbitration on 70.2 received from Phipps; meeting with President and union staff representative last Friday, where President outlined controversy..."

Much as the District did in this case, the Respondent in *Long Island Day Care* contended that Coates only had authority to negotiate with the Union, not enter into an agreement unless specifically approved by Respondent's president (Simmons) and both the Parent Policy Council and the board of directors. The NLRB disagreed pointing to evidence that Coates was designated by the Respondent as its chief spokesman and that on several occasions, in the presence of the managerial employees assigned to assist her, she told the Union that she had authority to make an agreement subject only to ratification by the board of directors. As Coates was placed at the head of the bargaining table by the Respondent she was vested with

apparent authority subject to whatever limitations she disclosed to the other side. Accordingly, the evidence established that each of the parties' chief negotiators had the authority to make an agreement that would be subject to ratification by their respective principals.

In the context of collective bargaining, the NLRB has long held that "when an agent is appointed to negotiate a collective bargaining agreement that agent is deemed to have apparent authority to bind his principal in the absence of clear notice to the contrary." *Id.* at 29 *citing University of Bridgeport*, 229 NLRB 1074 and *Aptos Seascape Corporation*, 194 NLRB 540 (1971), *Medical Towers Limited*, 289 NLRB 123 (1987), enf. granted without opinion, *Medical Towers Ltd. v. NLRB*, 862 F.2d 309 (3rd Cir. 1988).

The result in *Long Island Day Care* was a conclusion that management's chief negotiator Coates fulfilled her function concerning the negotiation of a contract; the only impediment to a binding agreement was ratification. The agreement was subject neither to approval by Simmons nor by the Parent Policy Council. It was therefore incumbent on Simmons to promptly submit the agreement to the board of directors for approval or rejection. The same result should obtain here.

CCEA also submitted *United Steelworkers of America, Local #7807*, 224 NLRB 27 (1976) for consideration. However, that case is distinguished because it involved a permissive subject of bargaining that the employer had no obligation to bargain and which it had not agreed to bargain.

Under the totality of circumstances it is my conclusion that each parties' negotiating team in this case was vested with apparent authority to make an agreement that would be subject only to ratification by their respective principals. The parties reached "consensus agreements" in May of 2013 and the only impediment to a binding agreement was

ratification by each parties' principals. The consensus agreements were not subject to approval by Superintendent Levinski. It was therefore incumbent on Levinski to promptly submit the consensus agreements to the school board for approval or rejection.

That conclusion does not necessitate a recommended decision in favor of CCEA however. The District claims that the PPC is untimely, is barred by the doctrines of "unclean hands" and waiver and that the union has acquiesced in the CBA without the term extension to 2016.

i. Whether The PPC Was Untimely.

In order for a complaint to be timely filed it must be received no later than six months following the conduct claimed to violate the Act, or no more than six months after the complainant either discovered or reasonably should have discovered such conduct. NMAC 11.21.3.9. Having determined that the District engaged in bad faith bargaining because its representatives at the bargaining table were not given full bargaining authority, evidence exists for arguing three alternative points in time other than the LMT meeting in November of 2014 at which CCEA may be deemed to have either discovered or reasonably should have discovered the conduct establishing the prohibited conduct:

a. At some unspecified point during the multiple negotiation sessions in May of 2013 but no later than May 30, 2013, when the parties' bargaining teams reached consensus to extend the CBA to June 30, 2016 in the absence from all of the bargaining sessions of management team member Don Levinsky.

b. When CCEA through its President Melvin R. Sharp, signed the CBA on August 20, 2013 without first reading it;

c. At a point undetermined after the CBA was signed in August of 2013 and copies were printed, distributed, posted on the District's email program and on the District's website.

This PPC was filed March 9, 2015 and amended March 30, 2015. The only one of the alternative dates that results in a timely filing November of 2014 when the absence of the contract extension was noticed in connection with preparation for negotiating the 2014-2015 CBA and the issue was raised in a Labor-Management Team meeting. To select that date as the operative one requires that I either ignore that portion of NMAC 11.21.3.9 that connects the filing deadline to when a complainant "reasonably should have discovered the conduct establishing the prohibited practice" or else decide that CCEA should not be deemed to have reasonably discovered the bad faith bargaining herein at any of the earlier junctures identified.

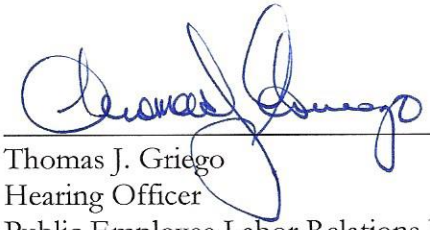
One reason that the PELRB imposes a relatively short six-month limitations period on the filing of PPCs is that there is merit to the concept that to be effective, a sanction must be as closely related to the offense as possible. When, as here, there has been a significant passage of time between the conduct constituting bad faith bargaining and the sanction imposed for that conduct, the parties are often on to the next round of bargaining on a successor contract and they run the risk of impairing their current bargaining relationship because of the need to deal with a tainted contract that is soon to be replaced anyway. Here, the evidence is that CCEA elected not to bargain Article 27 in the negotiations for the successor contract, which negotiations are now at impasse. I fear that fashioning a remedy for the bad faith bargaining that occurred so long ago might do more harm than good. I believe that is the sort of dilemma that the six-month limitations period was designed to avoid. Therefore,

it is my conclusion that the PPC was untimely filed and is barred by the limitations period found in NMAC 11.21.3.9.

Having concluded that the PPC is time barred, there is no need to address the District's renaming affirmative defenses of waiver, acquiescence and "unclean hands.

RECOMMENDED DECISION: There is an old saying that seems custom designed for this case: "Act in Haste, Repent at Leisure". It means that one should not be in too great a rush to make important decisions because if you're wrong, you will suffer the consequences of that poor decision and wonder for a long time afterward why you didn't take your time to achieve a better outcome. The overriding sense left with me after the merits hearing was that the union was in a hurry to complete its negotiations, in a hurry for its members to ratify the contract before the summer break, in a hurry for the District to ratify and in a hurry to execute the agreement so that the contract could go to the printer. In its rush to conclude the contract negotiations the union made numerous erroneous assumptions and exercised insufficient diligence to ensure that its hard work at the bargaining table was reflected in a final agreement. Accordingly, it is my report and recommended decision that CCEA has not met its burden of proof regarding its allegations that the district engaged in bad faith bargaining by refusing to reduce the terms of its negotiated agreement to writing, by refusing to ratify the negotiated extension of the CBA's term or by concealing its refusal to ratify extension of the CBA's term. Although the evidence supports a finding that the District engaged in bad faith bargaining by failing to vest its negotiating team with sufficient authority, the complaint is untimely filed and should therefore be DISMISSED.

Issued, Monday, June 29, 2015.



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