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July 5, 2016

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Albuquerque, New Mexico 87103
Attn: Frederick Mowrer

Adren Robert Nance
Nance, Pato & Stout, LLC
P.O. Box 772
Los Lunas, New Mexico 87031

Re: ***Valencia County Sheriff's Officers' Association v. Valencia County and Valencia County Sheriff's Dep't; PELRB 109-16***

Dear Messrs. Mowrer and Nance:

On May 20, 2016 Valencia County and the Valencia County Sheriff's Department filed a Motion to Dismiss the PPC herein for lack of jurisdiction as well for an untimely filing and that it fails to comport with minimum filing requirements. Following a scheduling conference on June 6, 2016, a Response to the County's Motion was timely filed on June 30, 2016. After consideration of pleadings herein the following is my decision regarding the County's Motion to Dismiss.

STANDARD OF REVIEW:

When deciding Motions to Dismiss the PELRB has historically applied the standard found in New Mexico Rule of Civil Procedure 1-012(B)(6), whereby the Hearing Officer accepts all well-pleaded factual allegations as true and resolves all doubts in favor of sufficiency of the complaint. See *Herrera v. Quality Pontiac*, 2003 NMSC 18, ¶ 2, 134 N.M. 43, 46. Dismissal on 12(B)(6) grounds is appropriate only if the Complainant is not entitled to recover under any theory of the facts alleged in their complaint. *Callahan v. N.M. Fed'n of Teachers-TVI*, 139 N.M. 201, 131 P.3d 51 (2006). A motion to dismiss is predicated upon there being no question of law or fact. *Park Univ. Enter's., Inc. v. Am. Cas. Co.*, 442 F.3d 1239, 1244 (10th Cir. 2006). Granting a motion to dismiss is an extreme remedy that is infrequently used. *Town of Mesilla v. City of Las Cruces*, 120 N.M. 69, 898 P.2d 121, 1995-NMCA-058, ¶ 4.

ANALYSIS AND CONCLUSIONS:

Pursuant to NMSA 1978 §10-7E-9(A) (2003) the Board has jurisdiction to:

(1) designate appropriate bargaining units;
(2) select, certify and decertify exclusive representatives; and,
(3) accept the filing of, conduct hearing on and determination of complaints of prohibited practices.

In furtherance of that statutory grant of jurisdiction the board shall:

(1) hold hearings and make inquiries necessary to carry out its functions and duties;
(2) conduct studies on problems pertaining to employee-employer relations; and
(3) request from public employers and labor organizations the information and data necessary to carry out the board's functions and responsibilities.

NMSA 1978 §10-7E-9(B) (2003).

The PELRB has the power to enforce provisions of the Public Employee Bargaining Act through the imposition of appropriate administrative remedies.

NMSA 1978 §10-7E-9(F) (2003).

Finally, a public employer or its representative shall not refuse to bargain collectively in good faith with the exclusive representative; or refuse or fail to comply with a provision of the Public Employee Bargaining Act or board rule; or refuse or fail to comply with a collective bargaining agreement.

NMSA 1978 §10-7E-19(F), (G) and (H) (2003).

WHETHER THE COMPLAINT IS UNTIMELY

The Board's rules require that any Prohibited Practices Complaint (PPC) must be filed within six months following the conduct claimed to have violates the PEBA, or within six months after the complainant either discovered or reasonably should have discovered such conduct. Any complaint filed more than six months after that time shall be dismissed. NMAC 11.21.3.9 (2004). The County moves for dismissal on the ground that Complainant knew or should have known of the state-mandated PERA employee contribution rate increase either at the time the state mandating the increase was passed in 2013 or because of a PERA publication distributed to participants in the retirement association's County retirement plan in June or July, 2013 (which would include the Valencia County employees in the bargaining unit herein) and because each employee's paycheck voucher reflects the rate increase beginning in 2013.

It is undisputed that the parties negotiated a Collective Bargaining Agreement (CBA) effective January 14, 2015, which is currently in effect and that Section 22 of the CBA, provides for a contribution payment by the employee of 7%. (See ¶ 4 of the PPC and Answer thereto; Exhibit 1 to Union's Response.) It is also undisputed that neither the County nor the State gave actual notice to the collective bargaining representative Valencia County Sheriff's Officers' Association of the rate increase or a request to bargain a change in the rate of the employee contribution set by contract that it the county may have wanted The dates of purported "constructive notice" through pay vouchers or PERA publications is immaterial because they postdate the date of the contractual obligation setting the employee contribution rate at 7%. If one accepts the County's constructive notice theory, one must also accept the premise that it would apply equally to both parties to this

action. Both are under an equal obligation to bargain in good faith if either of them wishes to change the *status quo*. Therefore, a material question precluding dismissal exists as to whether the parties have bargained the effect of the state-mandated increase and agreed to cap the employees' contributions for members off the VCSOA at 7%.

The County's constructive notice theory is immaterial in another sense as well. Knowledge of the statutory rate increase is not the same thing as knowledge that the CBA was violated, which is the material fact in this case and the date from which the six-month limitation rule should apply. In other words, knowledge of a PERA rate increase, whether actual or constructive, is immaterial to the question whether the County breached its CBA by passing along that increase in excess of the amount agreed to in the CBA without bargaining that change. It is not disputed that the Association, as the recognized collective bargaining representative and as contrasted with its constituent members, was never notified of the County's unilateral action. At a minimum, a material question of fact exists as to whether such notice was legally or contractually required.

WHETHER STATE LAW SUPERSEDES PERA IN THIS MATTER

This case does not present subject matter is that superseded by the legislated increase in PERA contribution rates. The legitimacy and validity of the legislated increase is undisputed and is immaterial to the questions as to whether the County is bound by the parties' CBA to assume payment of the employees' contribution rate in excess of 7%, whether it was obligated to give notice and demand bargaining prior to unilaterally imposing a different rate and ultimately whether the PEBA was violated by the undisputed fact that it did not do so. Those questions are within the exclusive jurisdiction of the PELRB as outlined above.

WHETHER THE COMPLAINT IS FACIALLY DEFICIENT

Here, the County raises a valid point – the PPC does not specify that the provisions at issue. NMAC 11.21.3.8 setting forth the requirements of commencement of case provides that a prohibited practices case shall set forth, among other things, "...the specific section of the act claimed to have been violated..." The apparent purpose of the requirement for a statement of the specific purpose of the Act claimed to have been violated is two-fold: First, to benefit the Director in conducting his initial review for facial adequacy and; Second, to aid the Respondent in fashioning its response to the PPC.

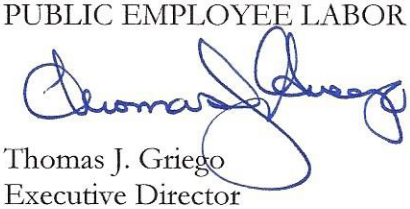
At the initial review stage I had no difficulty in discerning that the PPC involved §§ 10-7E-15 regarding exclusive representation, 10-7E-17 regarding the scope of bargaining and 10-7E-19 (F) (G) and (H) making it a prohibited labor practice to refuse to bargain collectively in good faith with the exclusive representative; refuse or fail to comply with a provision of the Public Employee Bargaining Act or board rule; or refuse or fail to comply with a collective bargaining agreement based on the allegations of paragraphs 8-14. By reference to its Answer herein it does not appear that the County had difficulty understanding that those sections were at issue or in formulating responses thereto.

The PELRB follows New Mexico courts in utilizing the liberal "notice pleading" standard. See *AFSCME v. City of Rio Rancho*, PELRB Case No. 159-06, Hearing Examiner's letter decision on City's Motion to Dismiss (Nov. 17, 2006) ("[b]ased on the similarity between PELRB and New Mexico Rule of Civil Procedure 1-008(A), it is apparent that PELRB rules, like New Mexico Rules of Civil Procedure, call for a notice pleading standard in testing the legal sufficiency of the complaint"). See also *Garcia v. Coffman*, 1997-NMCA-092, ¶ 11, 124 N.M. 12, 946 P.2d 216 (under the notice pleading standard, "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), and *Sanchez v. City of Belen*, 98 N.M. 57, 60, 644 P.2d 1046, 1049 (Ct. App. 1982) (the general policy under the notice pleading standard is to provide for "an adjudication on the merits" rather than allowing "technicalities of procedures and form" to "determine the rights of the litigants"). In the case of *N.M. Human Services Department v. AFSCME*, Council 18, No. D-101-CV-2012-02176 (J. Ortiz, June 14, 2013) the First Judicial District affirmed the PELRB on its application of the notice pleading standard. In the present case the union plead that it learned of the contract breach October 26, 2015 meaning that if the complaint were to be dismissed on the technicality that a specific statutory reference is missing, the complaint would be time barred and could not be re-filed. Therefore, because the law favors resolution of disputes on the merits and in light of the notice pleading standards, the circumstances of this case weigh in favor of denying the Motion to Dismiss. Any doubts about the applicable sections of the PEBA may be resolved by the entry of a Pre-Hearing Order after a scheduling conference prior to the Hearing on the Merits.

For the foregoing reasons, and accepting all factual allegations in the Union's PPC as true and resolving all doubts in favor of sufficiency of that complaint, I conclude that the County's Motion to Dismiss is **DENIED**.

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD



Thomas J. Griego
Executive Director