STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AMERICAN FEDERATION OF
STATE, COUNTY AND MUNICIPAL
EMPLOYEES, COUNCIL 18, AFL-CIO,

Petitioner,

vs.

PELRB CASE NO. 102-17

NEW MEXICO DEPARTMENT OF
WORKFORCE SOLUTIONS,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board on a Petition by the American Federation of State, County and Municipal Employees, Council 18, AFL-CIO (AFSCME) and the New Mexico Department of Workforce Solutions (NMDWS) appealing the decision of the hearing officer, Executive Director Thomas J. Griego. After hearing oral argument by both parties, and the Board being otherwise sufficiently advised, finds by a vote of 3-0 the following:

A. There is sufficient evidence supporting the hearing officer's July 25, 2017 decision that NMDWS violated Sections 19(F) and Article 42 of the parties' Collective Bargaining Agreement in violation of Section 19(H) of the Public Employee Bargaining Act.

THEREFORE THE BOARD affirms Director Griego's July 25, 2017 Decision in PELRB Case No. 102-17.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

10/3/14
DATE

R.E. BARTOSIEWISCZ, BOARD VICE-CHAIR

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AFSCME, COUNCIL 18,
Complainant,

v.

PELRB No. 102-17

NM DEP'T OF WORKFORCE SOLUTIONS,
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 a Prohibited Labor Practice Charge filed by Complainant on January 26, 2017. The Respondent, New Mexico Department of Workforce Solutions (NMDWS or "Department") timely answered the Complaint on February 23, 2017 in which it moved for dismissal of as a party and dismissal for lack of jurisdiction. Oral argument on the agency's motion for dismissal as requested in its answer was heard on March 17, 2017. I issued my Letter Decision denying the Department's Motion to Dismiss on March 21, 2017. A Status and Scheduling Conference was held on April 03, 2017 at which the parties agreed that that, with one exception, all pre-trial motions have been heard and decided. The single exception was that the Department announced at the Scheduling Conference that it wanted to depose the union's witnesses and compel discovery of documents and a deadline of April 10, 2017 was set for both parties to submit any good cause it may have for discovery pursuant to NMAC 11.21.1.20. Additionally, a hearing on the merits was scheduled for June 28, 2017. The Department timely filed its Motion requesting Discovery. No response to the motion from the union was received before I denied the Motion the following day, April 11, 2017. On June 12, 2017, sixteen days before the scheduled hearing on the merits, the Department moved for reconsideration of my denial of both its Motion to Dismiss and its Motion

for Discovery. AFSCME, Council 18 did not respond to the Motion for Reconsideration before issuing my letter decision denying both Motions on June 22, 2017.

The hearing on the merits was held on June 28, 2017 as scheduled. Before taking evidence the Department renewed its motions for reconsideration of my denial of its Motion to Dismiss and Motion for Discovery and further orally moved that I recuse myself from hearing the Complaint for bias. I orally denied the renewed motion for reconsideration for the reasons originally stated. I further orally denied the motion that I recuse myself, both because the motion was wholly without merit and because it was untimely in light of the deadlines established in the parties' Stipulated Pre-Hearing Order. The Department then moved a second time for recusal based on my decision denying its prior motion for recusal, which motion was also denied as being without merit.

Upon conclusion of the Complainant's case-in-chief the Department moved for a directed verdict. I granted the Motion for Directed Verdict as to the claim that the Department violated §19(F), (refusal to bargain collectively in good faith with the exclusive representative; and §19(H) (refusal or failure to comply with a collective bargaining agreement) with respect to the classification study at issue. The Motion for Directed Verdict was denied with regard to the Union claim that the Department unilaterally altered performance measures.

Both parties hereto were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Written closing arguments were simultaneously submitted by complainant and respondent on July 21, 2017. Both closing arguments were duly considered. 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. Complainant is the exclusive bargaining representative for bargaining unit employees in the Department of Workforce Solutions (NMDWS) for the State of New Mexico. (Complaint ¶ 1 and Answer thereto.)
2. Complainant and Respondent have entered into a collective bargaining agreement (CBA) that went into effect on December 23, 2009 and is now in effect. (Complaint ¶ 2 and Answer thereto. See also, NMSA 1978 § 10-7E- 18(D) ("In the event that an impasse continues after the expiration of a contract, the existing contract will continue in full force and effect until it is replaced by a subsequent agreement.").
3. This Board has both subject matter and personal jurisdiction over the issues and parties hereto. In actions before the PELRB, the State's agencies may be proper parties in PPC's involving State employees employed by those agencies; the State's Personnel Office is not the exclusive representative of the State for all purposes in all cases before the PELRB. (Letter decision denying Respondent's Motion to Dismiss, 3-21-17; NMSA 1978 §10-7E-9 re: Board; powers and duties).
4. Prior to the classification study at issue herein, the Classification Description for the Labor Law Administrator positions (LLAs) employed by DWS was "Private Detectives and Investigators – Advanced" (Exhibits B, D, E, F, 1, 5 and 7).
5. A major role of the LLAs is to perform work site inspections to check for compliance with both State and Federal labor laws. (Complaint ¶ 12 and Answer thereto; Testimony of Gina Naranjo.)
6. DWS played a role in the reclassification at issue in this case along with the State Personnel Office, which, at a minimum consisted of appointing a DWS employee to the class study committee, being requested to comment on the classification, and in conjunction with SPO ensuring "...that each position in the classified service is

assigned to the classification that best represents the duties assigned by the employer and performed by the employee.". (State Personnel Rule 1.7.3.10 NMAC; Exhibits 4, 5, 6, 7 and 8).

7. The parties' CBA requires that Respondent provide the Union with reasonable notice when contemplating changes to employee classifications. (Exhibit A, Article 13).

8. There is no evidence on the record that would support a conclusion that the Union waived bargaining over any of the subjects of bargaining alleged herein. (Exhibit A, Article 42.)

9. The Department met its obligation under Article 13 of the parties' CBA to provide AFSCME with reasonable notice of the reclassification based on the following:

   a. On June 21, 2016 Sandy Martinez, Labor Relations Director for the State Personnel Office (SPO) notified Connie Derr, Executive Director of AFSCME, Council 18, the Complainant herein, the State Personnel Office was conducting a classification study of the Criminal Investigator and State Investigator classifications, in which she specifically referenced the notice obligation under Article 13, Section 2 of the parties' CBA. (Exhibit 1; Testimony of Testimony of Dianne Granado).

   b. On June 21, 2016 Ms. Derr notified the SPO Director that Complainant was appointing Tirzio Lopez to serve as their Subject Matter Expert for the Criminal Investigator Classification study. No mention was made of a separate subject matter expert being appointed for State Investigator classification. (Exhibit 2; Testimony of Dianne Granado).

c. Ms. Derr was again notified by SPO Labor Relations Director, Ms. Martinez, that a second classification study was needed specifically for a position at the Public Regulation Commission and Ms. Derr again appointed Mr. Lopez as the Complainant's subject matter expert. (Exhibits 12 and 13).

d. On August 1, 2016, Labor Law Administrators (LLAs) employed by DWS were notified of their reclassification pay band 60 to a pay band 65 effective August 13, 2016. That notice informed them that they would not receive a pay increase attendant to the pay band change. (Complaint ¶¶ 3 and 4 and Answer to ¶ 4.)

10. Gina Naranjo, a LLA working for DWS, requested an increase in pay to the midpoint of the new Pay Band 65. (Complaint ¶ 5 and Answer thereto; Testimony of Gina Naranjo.)

11. On or about November 15, 2016, DWS responded to Ms. Naranjo's request acknowledging that her work duties fell within the scope of the pay band 65 but stated "At this time, there is no budget set aside for any wage adjustments so your request for a pay adjustment cannot be approved." (Complaint ¶ 6 and Answer thereto; Testimony of Gina Naranjo; Exhibit F.)

12. NMAC 1.7.4.11 regarding Salary Schedules, provides:

> "A. Based on the pay plan, the director shall develop and maintain salary schedules for the classified service that shall consist of pay bands.
> B. No employee in the classified service shall be paid a salary less than the minimum nor greater than the maximum of their designated pay band unless otherwise authorized by the director, or provided for in these rules, or the employee has been transferred into the classified service by statute, executive order, or order of a court of competent jurisdiction.
> C. The director, pursuant to the direction of the board, shall adjust the salary schedules to address the external competitiveness of the service and/or other concerns. Employees whose pay band is

adjusted upward or downward shall retain their current salary. Such salary schedule adjustments may result in employees temporarily falling below the minimum or above the maximum of their pay band upon implementation.

(1) The pay of employees who would be above the maximum of the pay band shall not be reduced.

(2) The pay of employees who fall below the minimum of their pay band shall be raised to the minimum unless the director confirms that the agency does not have budget availability. In these instances, agencies shall raise the pay of employees to the minimum of their pay band within six months of the effective date of the salary schedule adjustment. The director may grant an extension to the six month time period upon submission and approval of a plan by the agency to raise the pay of employees to the minimum of their pay band.

D. An employee's placement in the pay band will be identified by a compa-ratio value."

13. As a result of the classification study at issue herein, no employee at DWS was paid a salary less than the minimum nor greater than the maximum of their designated pay band. (Testimony of Jason Dean).

14. As a result of the classification study at issue herein, all employee at DWS whose pay band was adjusted upward retained their current salaries, as required by NMAC 1.7.4.11 (C). (Testimony of Dianna Granado; Joel Villarael; Jason Dean).

15. As a result of the classification study at issue herein, no change was made to salary rates assigned to job classifications. (Exhibit 11; Testimony of Dianna Granado; Joel Villarael; Jason Dean).

16. On October 12, 2017, LLAs were notified that their performance measures changed from 20 to 25 Public Works Inspections per month; a 25% increase. (Testimony of Dianna Granado; Joel Villarael; Jason Dean; Exhibit I).

17. Although LLAs were notified that their performance measures had changed as stated in Finding 15 above, the Complainant Union was not notified through one of the representatives identified under Article 9 Section 2 of the CBA. (Testimony of Dianna Granado; Joel Villarael; Jason Dean; Exhibit I.)

18. Performance measures directly affect employee performance evaluations. (Testimony of Jason Dean).

19. Dianna Granado testified that Public Works Inspections constitute about one-half of the duties she performed as a LLA. (Testimony of Dianna Granado).

20. Dianna Granado testified that the 25% increase in the number of Public Works Inspections that must be conducted monthly under the unilateral change required an additional workday being devoted to such inspections instead of other job duties in order to reach enough job sites. (Testimony of Dianna Granado; Gina Naranjo).

21. LLAs may meet an increase in the *annual* quota of Public Works Inspections without difficulty. For example, Dianna Granado averaged 30 inspections per month when averaged over the course of a year. However, she would have fallen short of the 25 inspections requirement during one or more months during that same year, resulting in an adverse performance evaluation for that month. (Testimony of Dianna Granado).

22. LLAs are assigned to different geographical areas on a rotating basis with the result that in a month during which an LLA is assigned to a less populated area, with fewer Public Works projects underway, meeting the increased monthly quota is difficult. (Testimony of Dianna Granado).

REASONING AND CONCLUSIONS OF LAW:

The parties are subject to a mutual statutory obligation to bargain in good faith, not only over wages and hours, but over "...all other terms and conditions of employment..." NMSA 1978 § 10-7E-17 (A)(1) (2003). NMSA 1978 § 10-7E-4 (F) (2003) defines that obligation to mean "the act of negotiating between a public employer and an exclusive representative for the purpose of entering into a written agreement regarding wages, hours

and other terms and conditions of employment." (Emphasis added). The scope of this collective bargaining obligation has a corollary in the National Labor Relations Act, upon which New Mexico's Public Employee Bargaining Act is based. *See*, 29 U.S.C. § 158(a)(5). For example, the U.S. Supreme Court recognized that an employee's work duties are mandatory subjects of bargaining about which the parties must bargain in addition to the employee's pay rates. *See, NLRB v. Wooster Div. of Borg–Warner Corp.*, 356 U.S. 342, 78 S.Ct. 718, 2 L.Ed.2d 823 (1958). *The Developing Labor Law* treatise includes among its listed examples of *per se* violations "...work assignments; work duties; workloads; minimum production standards [and] work rules..." *See*, JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 893, n. 63 and 1378-1384, 1396-1431, 1442-1445.

Any contractual waiver by the union of its right to mandatory bargaining must be expressed clearly and unmistakably, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705, 708, 103 S. Ct. 1467, 75 L.Ed.2d 387 (1983), and Courts will not infer a waiver "unless it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them." *NLRB v. New York Tel. Co.*, 930 F.2d 1009, 1011(2d Cir.1991).

A violation of the duty to bargain in good faith can be either a "*per se* violation", in which actual intent or subjective good faith is irrelevant or a pattern of bad faith negotiation, in which an intent to frustrate bargaining can be inferred from conduct. *See, NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 465 (2d Cir. 1973); *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *Visiting Nurse Services of W. Mass., Inc.* v. NLRB, 177 F.3d 52, 57-59 (1st Cir. 1999).

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 E. HIGGINS, THE

DEVELOPING LABOR LAW (6th Ed.) at 892-905. Furthermore, to violate the duty to bargain the unilateral change complained of must be "substantial, material and significant," rather than *de minimus*. *See Alamo Cement Co.*, 281 NLRB 737, 738 (1986).

The instant Complaint alleges that two employer actions or omissions violated the PEBA: First, that Labor Law Administrators (LLAs) were reclassified without notice to the union and denied pay raises in violation of Section 10-7E-19(F) (refuse to bargain collectively in good faith with the exclusive representative) and in violation of Section 10-7E-19(H), the employer's duty to comply with a collective bargaining agreement. Second, the DWS improperly increased performance measures for LLAs from 20 to 25 without bargaining in violation of Sections 19(F) and (H).

A. LLAs WERE NOT RECLASSIFIED WITHOUT NOTICE TO THE UNION AND WERE NOT DENIED PAY INCREASES TO WHICH THEY WERE ENTITLED IN VIOLATION OF SECTIONS 10-7E-19(F) AND (H) OF THE PEBA.

Upon completion of the Union's case in Chief NMDWS moved for a Directed Verdict on all claims. I adopt the rationale espoused in *Melnick v. State Farm Mut. Auto. Ins. Co.*, 106 N.M. 726, 729, 749 P.2d 1105, 1108 (1988) to the effect that a Motion for a directed verdict should not be granted unless it is clear that the facts and inferences are so strongly and overwhelmingly in favor of the moving party that the trier of fact believes that reasonable people could not arrive at a contrary result. Here, the Motion was granted in part, for the union's failure to meet its burden of proof by a preponderance of evidence as to the alleged violations surrounding the classification study only, including the pay raise issue. To the contrary, the preponderance of the evidence supports a conclusion that NMDWS met its obligation under Article 13 of the parties' CBA to provide AFSCME with reasonable notice of the reclassification for the reasons set forth in Finding 9 above. Many of the facts found

concerning notice to the Union were not known by the Union's representative at the time he filed the PPC. Neither did the Union meet its burden with regard to whether denial of pay increases in connection with the classification change violated the PEBA. There was no budget set aside for any wage adjustments connected with the LLAs re-classification. As a result of the classification study at issue herein, all employee at DWS whose pay band was adjusted upward retained their current salaries, as required by NMAC 1.7.4.11 (C). The Union produced no evidence that a pay increase under these circumstances was required either by the PEBA or the parties' CBA. Accordingly, the facts and inferences in this case so strongly and overwhelmingly favor NMDWS on those limited points that dismissal of those claims was appropriate.

However, at the close of its evidence the Union satisfactorily established a prima facie case that NMDWS improperly increased performance measures for LLAs from 20 to 25 without bargaining in violation of Sections 19(F) and (H) as discussed below, and as to that issue the Department's Motion for a directed verdict was denied.

B. NMDWS VIOLATED OF SECTIONS 19(F) AND (H) OF THE PEBA WHEN IT IMPROPERLY INCREASED PERFORMANCE MEASURES FOR LLAs FROM 20 TO 25 WITHOUT BARGAINING.

Here, it is not disputed that the DWS unilaterally implemented a change in bargaining unit employees' performance measures without providing notice to the Union or allowing the Union the opportunity to bargain. For that reason the Employer's closing argument to the effect that the Union never demanded bargaining falls on deaf ears. The union's duty to request bargaining is relieved if the change is presented as a *fait accompli. NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030 (10th Cir. 1996); *Gratiot Community Hospital v. NLRB*, 51 F.3d 1255 (6th Cir. 1995); *Pinkston-Hollar Construction Services, Inc.*, 312 NLRB 1004 (1993); *Haddon Craftsmen, Inc.*, 300 NLRB 789, 790 (1990). Exhibit I establishes beyond reasonable dispute

that the only notice of the increased performance measures was directly to LLAs and then, only after the increase was in place and effective.

The specific change at issue, is a 25% increase in the acceptable number of targeted public works inspections from 20 to 25 per month. The Union cites *So. Calif. Edison Co.*, 284 NLRB 1205 (1987), wherein a temporary work assignment practice was found to be a mandatory subject of bargaining that could not be unilaterally implemented. The hearing officer in that case found the unilateral change to be "material, substantial, and significant" based on a resulting 25% decrease in lost-time accidents. *Id.* at 1211. I therefore conclude that the unilateral increase in the inspection quota was not *de minimus* but was a material change. There is no express reservation of a management right to unilaterally alter performance measures affecting employee discipline, pay raises and retention rights under Article 18 of the CBA. The reserved management right to direct work, assign and evaluate employees is exceeded by the Employer's action in unilaterally altering the measure by which those rights are accomplished. Similarly, altering the quota at issue here does not fall within management's reserved right to determine means, methods and personnel by which its mission is accomplished because none of those criteria are affected. Rather what is changed is the measure by which management determines an employee's success or failure in utilizing the employer's established means and methods. Emphasis belongs instead on Article 42, Section 2 of the parties' CBA, which, while reserving management's right to propose "reasonable changes in the terms and conditions of employment", also makes clear that any such changes are "subject to negotiation in accordance with the PEBA…" Under the doctrine espoused in *NLRB v. Katz* and its progeny, *supra*, NMDWS' acts and omission in unilaterally increasing the performance standard constitutes a *per se* violation of the duty to bargain in violation of Sections 19(F) and failure to comply with Article 42 of the parties'

CBA in violation of Section 19(H) of the PEBA. As a *per se* violation, the Department's argument that the increase in performance measures lasted only three month is not material. In any event, the reversion back to the former measure took place only after the filing of this PPC and the Department never communicated intent to make the increase temporary at the time it was instituted. I have also considered the Department's alternative method of calculating the overall percentage increase on performance measures on an annual basis, but prefer the calculation provided by the Union as better reflecting the impact of the change.

DECISION: As outlined above it is my report and recommended decision that NMDWS has committed a PPC by violating Sections 19(F) and Article 42 of the parties' CBA in violation of Section 19(H) of the PEBA by the conduct and omissions described herein. I am informed both by testimony and the parties' closing arguments that the increase in inspection quotas was rescinded after January of 2017 when more LLAs were hired. While this did not have an effect on my conclusions as to whether a per se violation occurred, it does impact the remedy to be afforded the Union – ordering the Employer to cease and desists from using the increased measure is apparently no longer necessary. It is my recommendation therefore, that the Board find the violations outlined herein to have been committed by the Department and Order NMDWS to bargain with AFSCME over any future changes to covered employees' terms and conditions of employment in a manner consistent with its obligations under Section 17 of the PEBA and/or Articles 13 and 18 of the parties' CBA. Additionally, the NMDWS should be ordered to publicly post for a period of 180 days in all NMDWS buildings where there are bargaining unit employees a Notice of the violations found in a form substantially conforming to that attached hereto as Appendix A.

Issued, Tuesday, July 25, 2017.

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

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD
An Agency of the State of New Mexico

The Public Employee Labor Relations Board has found that we violated the Public Employee Bargaining Act and has ordered us to post and obey this notice.
You have the right under the Public Employee Bargaining Act §10-7E-17(A)(1), to bargain collectively with the Department of Workforce Solutions in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties.

As defined by the Public Employee Bargaining Act, §10-7E-4(I) AFSCME, Council 18, having been recognized as an exclusive representative, has the right to represent employees of the District covered under the parties' Collective Bargaining Agreement (CBA) now in effect. That CBA includes a requirement that changes to working conditions must be bargained, Article Thirteen.

By unilaterally increasing the number of Public Works Inspections required of Labor Law Administrators in October of 2016, we committed a *per se* violation of the duty to bargain in violation of NMSA §10-7E-19(G) and failed to comply with Article 13 of the parties' CBA in violation of Section NMSA §10-7E-19(H).

We acknowledge the above-described rights and responsibilities and will not in any like manner refuse to bargain with AFSCME, Council 18, and honor our commitments under the CBA including the requirement that changes to working conditions must be bargained

_____

Douglas Calderon, HR Director
NM Dep't of Workforce Solutions