STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

CWA LOCAL 7076,

Appellant,

v.

CV-2012-11595

NEW MEXICO PUBLIC EDUCATION DEPARTMENT and NEW MEXICO PUBLIC EMPLOYEE LABOR RELATIONS BOARD,

Appellees.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes to the Court's attention as a result of Appellant, CWA Local 7076's appeal of the November 26, 2012 Order of the State of New Mexico Public Employee Labor Relations Board (the "Board'). The Board adopted the Hearing Officer's Report and Recommendation concluding, in relevant part, that the Union waived its right to bargain with the New Mexico Public Education Department concerning a reduction in force. The Court has reviewed the record and the pleadings and **REVERSES** the Order of the Board for the reasons that follow and **REMANDS** the case to the Board for appropriate action.

I. FACTS AND BACKGROUND

The New Mexico Public Education Department (the "Department") and CWA Local 7076 (the "Union") are parties to a Collective Bargaining Agreement ("CBA").[1] [Record on Appeal ("ROA"), 149] Pursuant to the CBA, the Union filed a Prohibited Practices Complaint with the Board on June 17, 2011, alleging that the Department failed to bargain a reduction in

[1] To be precise, the State of New Mexico is the party to the CBA, and the Department, as an agency of the State, is covered thereunder.

force in violation of several provisions of the Public Employee Bargaining Act (the "Act"), NMSA 1978, Sections 10-7E-1 through 10-7E-26 (2003, as amended through 2005). [*Id.* at 459-463] The underlying facts, as found by the Hearing Officer and adopted by the Board[2], are generally not in dispute.

On April 29, 2011, the Department delivered a letter to the Union pursuant to Article 14 of the CBA, notifying it "of an impending Reduction in Force (RIF)" and that employees covered under the CBA "may be affected by the RIF." [*Id.* at 118-119] The letter also provided that the effective date of the RIF was July 1, 2011. [*Id.*] Article 14 of the CBA provides that

> [i]n the event an Agency contemplates a furlough or reduction in force, the Agency shall notify and meet with the Union to discuss the furlough or reduction-in-force plan not less than thirty (30) days prior to submitting its furlough or reduction in force plans to the State Personnel Board.

[*Id.* at 179]

After delivering the letter, the Union and the Department met to discuss the RIF. [*Id.* at 50] At that meeting, the Union asked for but did not receive details concerning the RIF such as the number of union-represented employees that would be affected by it. [*Id.*] The parties met two more times to discuss the RIF, on May 17, 2011 and June 2, 2011. [*Id.* at 50-52] At these meetings the Union again inquired into the details of the RIF but did not receive further information. [*Id.*] At both meetings and in subsequent email correspondence, the Union specifically inquired into which bargaining units were being impacted and the number of employees who were to be laid off pursuant to the RIF. [*Id.*] The Department did not provide the Union any further specific information until June 10, 2011, the day it presented its RIF plan to the State Personnel Board ("SPB"). [*Id.* at 52-53] SPB approved the RIF, and thirty-three

[2] As the Board adopted the Hearing Officer's Findings of Fact and Conclusions of Law, the Court will hereafter refer to the "Board's" findings and conclusions, rather than to the Hearing Officer's.

Department employees were laid off, seventeen of whom were bargaining unit employees. [*Id.* at 53] The Board found that the Department knew the details of the RIF prior to submitting it to SPB but made a calculated decision to withhold the information from the Union. [*Id.* at 53-54]

The Union filed its Prohibited Practices Complaint on June 17, 2011, alleging that the Department willfully refused to provide the Union with an opportunity to bargain and demanding that it be permitted to bargain the effects of the RIF. [*Id.* at 459-463] The Board concluded that the employee layoffs at issue are a mandatory subject of bargaining and that the decision to layoff union-represented employees entitled the Union to a significant opportunity to bargain about the *effects* of the layoffs. [*Id.* at 57] However, relying on what is known as the "contract coverage" doctrine, the Board also concluded that the Union was excused from bargaining in this instance, because the effects of the RIF were already covered in the CBA. [*Id.* at 60] The rationale is that the CBA provides that the RIF and its effects are within management's sole discretion and thus, the parties already bargained over these issues and memorialized their agreement in the CBA.[3] *See NLRB v. United States Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993) ("[T]he duty to bargain . . . does not prevent parties from negotiating contract terms that make it unnecessary to bargain over subsequent changes in terms or conditions of employment.").

To the extent that the Union disagreed that all of the effects of the RIF were covered by the CBA, the Board also concluded that the Union waived its right to bargain by failing to make a timely bargaining demand. [*Id.* at 46] While the Board concluded that the Department was

[3] The Board's determination that the RIF and its effects were within management's sole discretion is based on the following provisions of the CBA: (1) Article 14 (quoted above); (2) Article 5 (referred to as the "management rights" clause and which provides, in relevant part, that management has the sole and exclusive right to "determine the size and composition of the work force" and "relieve an employee from duties because of lack of work or other legitimate reason"); (3) Article 43 (which provides that in addition to the changes permitted by Article 5, management may propose other reasonable changes in the terms and conditions of employment and such changes are subject to negotiation); and (3) Article 41 (which provides that the CBA is the final and complete agreement between the parties).

excused from bargaining, it found that its failure to provide the Union with specific information concerning the RIF, was a violation of the CBA. [*Id.*] As a remedy, the Board ordered that the Department cease and desist from failing to provide relevant information in the future and required the Department post a notice advising employees that the Department violated the Act by withholding information from the Union. [*Id.* at 1-3]

II. STANDARD OF REVIEW

The Board will be affirmed unless the Court concludes that the Board's action is:

(1) arbitrary, capricious or an abuse of discretion;
(2) not supported by substantial evidence on the record considered as a whole; or
(3) otherwise not in accordance with law.

§ 10-7E-23(B).

III. DISCUSSION

It is not disputed that the Department is required to bargain the effects of a RIF. The Board concluded that the "employee layoff at issue is a mandatory subject of bargaining under [the Act]," and neither party challenges this conclusion. [*See* ROA, 57] The issues on appeal are whether the Union waived its right to bargain the effects of the RIF by failing to timely request bargaining and whether the Department was excused from bargaining, because the issue is covered by the CBA, and thus the duty to bargain was already discharged as memorialized in the CBA.

Timeliness of Bargaining Demand

The Union challenges the Board's conclusion that it waived its right to bargain the effects of the RIF by failing to timely demand bargaining. The Union concedes that it has an affirmative duty to seek bargaining and that if it does not, it waives its right to bargain. *See NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030, 1037 (10th Cir. 1996) ("If the Union fails to request

bargaining, the Union will have waived its right to bargain over the matter in question."). However, in order to trigger a union's duty to affirmatively seek bargaining, it must first have received adequate notice from the employer. *See id.* at 1035-1036. Thus, if an employer is required to bargain about a subject matter, such as the effects of a RIF as in this case, it must provide "timely notice to the union of [its] decision . . . so that good faith bargaining does not become impossible." *See id.* at 1035.

The Board found that the Department adequately notified the Union of the RIF by providing the letter dated April 29, 2011, which informed the Union of the Department's intent to implement a RIF effective July 1, 2011. The Union, on the other hand, argues that the letter was inadequate because it lacked enough specificity to allow for meaningful bargaining. As the Union points out, while the letter provided that the Department was indeed seeking a RIF, it did not confirm whether the RIF would include unionized employees, instead providing that employees covered by the CBA "may be affected by the RIF." And, although the Union continually sought more specific information concerning the RIF, the Department never provided further information until it submitted the RIF to SPB for approval.

The Court finds the Union's argument persuasive. Interestingly, the Board found that the Department knew the details of the RIF prior to submitting it to SPB but made a calculated decision to withhold the information from the Union. Yet, the Board still found that the Department provided adequate notice of the RIF to the Union. While the Union was notified that the Department was seeking a RIF, it was never informed whether the RIF would definitively affect employees covered by the CBA. The April 29, 2011 letter informs the Union of a RIF that "may" affect employees under the CBA. The Board's determination that the "April 29 notice amounted to clear and unequivocal notice of the layoff of bargaining unit members" is simply

not supported by the language in the letter itself or any other evidence in the record. *See id.* ("Whether an employer has provided meaningful and timely notice is essentially a question of fact, and the Board's findings in this area are to be accepted if supported by substantial evidence.").

Whether unionized employees would be affected by the RIF is fundamental information. Without such fundamental information, the Union could not engage in meaningful bargaining. The Union was not aware of any specifics of the RIF until June 10, 2011, the day the RIF was presented to SPB. Seven days later, on June 17, 2011, the Union filed its Prohibited Practices Complaint, demanding bargaining over the effects of the RIF. Thus, once the Union received notice that unionized employees were indeed included in the RIF and laid off, it timely requested bargaining and therefore did not waive its right to bargain over the effects of the layoff. While the RIF was already approved at that point, it was not yet effective until July 1, 2011. Thus, there still was opportunity to bargain about the effects of the RIF. *See id.* at 1036 ("[M]eaningful effects bargaining can occur even after the termination decision has been completely implemented."). The Court therefore reverses the Board's conclusion that the Union waived its right to bargain by failing to make a timely demand for bargaining.

Application of Contract Coverage Doctrine

In its Response, the Department argues that the Board should have never reached the question of whether the Union failed to timely request bargaining, because of its application of the contract coverage doctrine and conclusion that the RIF and its effects were covered by the CBA. The Department concedes that it did not itself appeal this portion of the Board's Order. However, in light of the Court's conclusion that the Union did not waive its right to bargain, whether the Board's decision still stands because of the determination that the Department was

excused from bargaining in the first place, is the ensuing part of analysis. The Department's argument is that once the Board concluded that the Union was excused from further bargaining because the RIF and its effects were already covered in the CBA, it was unnecessary to then determine whether the Union had waived bargaining by failing to timely request it.

The parties dedicate significant portions of their briefing to the applicability of the "contract coverage" doctrine versus the "waiver" doctrine, both of which were addressed by the Board. The "waiver" doctrine "requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 540 F.3d 1072, 1079-80 (9th Cir. 2008) (internal quotation marks and citation omitted). The waiver doctrine has been identified as the "competing standard" to the contract coverage doctrine and has been adopted by the DC, Seventh, and First Circuits. *Id.* at 1080, n.11. The Board concluded that the Union did not "waive" the right to bargain the effects of a layoff within the CBA itself. [ROA, 66] Neither party has challenged the Board's conclusion under the waiver doctrine.

The Board's application of both the contract coverage doctrine and waiver (in the context of waiving bargaining by failing to act and also in the context of waiving bargaining by specifically expressing an intention to waive bargaining – the "waiver doctrine"), highlights the Boards equivocal conclusion concerning the contract coverage doctrine. After reading several provisions of the CBA at issue together, the Board concluded that "the effects of the layoff identified on the record in this case have been reserved by the parties to management's discretion." [ROA, 60] The Board goes on to state that

> [t]his conclusion should not be read to mean that "effects bargaining" is forever foreclosed, even as to RIF's and layoffs, for

> although both the Management Rights Clause and Article 14 afford [the Department] wide latitude to implement a reduction in force, there is no indication that this flexibility reserved to management to change [sic] the workforce automatically included a corresponding right to evade all bargaining over the impact of those changes, or that the parties fully discussed at the time they entered into their CBA the specifics of any such plan.

[*Id.*]

A fair reading of the Board's conclusions concerning the CBA's coverage of a RIF and its effects is that the CBA generally does not foreclose all bargaining with respect to RIFs but that the specific RIF effects in this case are covered by the CBA. Indeed, the Board goes on to state that "while . . . all aspects of the RIF . . . identif[ied] as issues in this case are covered by the parties' CBA . . . the [Department] is [not] relieved of its obligation to bargain the impact and implementation of a reserved management rights in another case. [*Id.* at 64] Aside from the issue of whether the contract coverage doctrine is applicable or not, the foundational problem with the Board's analysis is that it never identifies the specific effects in this case that make the CBA dispositive of bargaining. The Board references the "effects of the layoff identified on the record" as being reserved to management's discretion but does not include any findings of those specific effects. Without findings on the specific effects of the layoff and the subsequent analysis of how those effects are provided for in the CBA, the Court is unable to effectively review the Board's determination that the specific effects in this case are covered by the CBA.

It is also noteworthy that the Board provided that "[t]o the extent the Union disagrees that all identified effects are covered by contract or can identify other effects not covered by the CBA, the [Department] is excused from further bargaining because the union waived bargaining by failing to make a timely demand." [*Id.* at 46] Thus, it appears that the Board considered its decision concerning the Union's timeliness in demanding bargaining as dispositive of all other

issues. In light of the Court's reversal of the Board's conclusion with respect to the Union's timeliness in demanding bargaining, the contract coverage issue is now more pertinent to the final resolution of this case. As such, the case is remanded to the Board for reconsideration and appropriate action consistent with this Opinion and Order.

IV. CONCLUSION

Based on the foregoing, the Order of the State of New Mexico Public Employee Labor Relations Board is **REVERSED** and **REMANDED**.

IT IS SO ORDERED.

C. SHANNON BACON
DISTRICT COURT JUDGE

I swear or affirm that the foregoing document was submitted for e-filing the 9 day of August, 2013