

**NEW MEXICO MOTOR TRANSPORTATION
EMPLOYEE'S ASSOCIATION (MTD),
and THE FRATERNAL ORDER OF POLICE (FOP),**

13 -PELRB-2011

Complainants,

v.

PELRB No. 144-11

**THE STATE OF NEW MEXICO, and
THE DEPARTMENT OF PUBLIC SAFETY,**

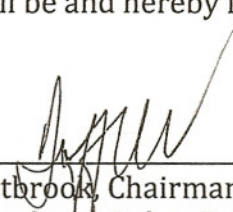
Respondents.

ORDER AND DECISION

THIS MATTER comes before the Public Employee Labor Relations Board on Interlocutory Appeal of the Hearing Officer's Recommended Decision denying Respondents' Motion to Dismiss The Fraternal Order of Police as a party for lack of standing. Upon a 3-0 vote at the Board's December 19, 2011 meeting the Board approves the Recommended Decision of the Hearing Officer and adopts it as the Board's Order for the reasons stated therein including the Findings of Fact, Conclusions of Law and the Rationale.

IT IS HEREBY ORDERED that the recommended decision be and hereby is adopted by the Board and that the Respondent's Motion shall be and hereby is, **DENIED.**

Date: 1-2-12



Duff Westbrook, Chairman
Public Employee Labor Relations Board

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

In re:

**NEW MEXICO MOTOR TRANSPORTATION
EMPLOYEE'S ASSOCIATION (MTD),
And THE FRATERNAL ORDER OF POLICE (FOP),**
Complainants,

v.

PELRB No. 144-11

**THE STATE OF NEW MEXICO, and
THE DEPARTMENT OF PUBLIC SAFETY,**
Respondents

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

THIS MATTER comes before the Hearing Officer on Respondents' Motion to Dismiss The Fraternal Order of Police as a party for lack of standing. At a Status and Scheduling Conference held September 13, 2011, the Respondents' representative addressed the issue of FOP's standing which may be summarized as reliance upon MTD's status as the exclusive collective bargaining representative certified by this Board meaning that only MTD may file and advance this Prohibited Practices Charge (PPC). Said another way, because FOP is not the certified exclusive collective bargaining representative, it lacks standing to act as a petitioner in this case. FOP's representative claimed standing as an interested party due to recognition in the parties' collective bargaining agreement as such and a history of past dealings among the parties which include the Respondents' past acceptance of FOP acting on behalf of MTD. The issue of whether FOP has standing was identified by this Hearing Officer as a threshold issue and requested briefs be simultaneously submitted on the issue. After the briefing and hearing schedule set at the Scheduling Conference was continued due to the unexpected illness of one of the Representatives simultaneous briefs were submitted October 21, 2011 and a hearing on the

standing issue held on October 25, 2011. The parties also agreed to Hearing on the Merits November 28, 2011 regardless of the outcome of the standing issue since that outcome would affect only FOP and not the other Petitioner, MTD.

After reviewing the parties' briefs, hearing argument of counsel and otherwise being fully advised the Hearing Officer finds and decides as follows:

FINDINGS OF FACT:

1. Petitioners filed the Prohibited Practices Complaint herein on August 12, 2011 naming as petitioners both MTD and FOP.
2. Respondents filed their Answer to that Complaint on August 22, 2011, which Answer raises as an affirmative defense that the Fraternal Order of Police (FOP) lacks standing.
3. Review of the file in PELRB No 301-04 and the parties' briefs indicate that a Petition for Certification Election for the unit at issue in this case was filed February 24, 2004 by Petitioner herein New Mexico Motor Transportation Employees Association (MTD). That same Petition indicates that MTD is affiliated with FOP.
4. Upon the filing of the Petition for Certification Election the State contested the composition of the bargaining and after a previously scheduled hearing was continued, a hearing on composition of the unit was scheduled for October 14, 2004. Prior to the scheduled hearing the parties reached an agreement reduced to writing whereby two separate bargaining units were established and in paragraph 4 The Fraternal Order of Police, pending demonstrations of majority support by card counts of the employees in each unit, "shall be the exclusive bargaining agent for the

two bargaining units as identified above." Exhibit A to Petitioners' Brief and Exhibit B to Respondents' Brief.

5. Although the Stipulated Agreement is titled and purports to be a "Stipulated Order", in fact it does not include a signature line for the Executive Director or for the Board and is not signed by the Executive Director or the Board.
6. Following the filing of the stipulated agreement a card count was held December 6, 2004 after which a Certification of Majority Support was issued certifying "New Mexico Motor Transportation Employee Association" as the exclusive Bargaining Representative for each of the bargaining units referenced in the stipulated agreement referred to above. Exhibits C and D to Respondents' brief.
7. The parties have a collective bargaining history since 2004 and the current Collective Bargaining Agreement among the parties at page 1 states:

"This Agreement is made and entered into this August 12, 2009 between the State of New Mexico, hereinafter "Employer" or "the State" and the New Mexico Motor Transportation Employee's Association (hereinafter referred to as the NMMTEA or the "Association") of the Fraternal Order of Police and is applicable to all eligible employees in the collective bargaining unit of the Employer described in the Recognition Article of this agreement."

Exhibit C of Petitioners' Brief.

At page 77 of the current CBA the contract is signed by David Tarango on behalf of "NMMTEA-FOP".

Exhibit D of Petitioners' Brief.

8. As used in the Public Employee Bargaining Act "exclusive representative" means a labor organization that, as a result of certification, has the right to represent all public

employees in an appropriate bargaining unit for the purposes of collective bargaining.

§10-7E-4 (I) NMSA 1978.

9. As used in the Public Employee Bargaining Act "collective bargaining" means 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. §10-7E-4 (F) NMSA 1978.
10. The Hearing Officer finds that the MTD and the FOP are separate legal entities and as stated by Petitioners at page 3 of their Brief, The FOP is a parent organization of MTD and MTD operates as a FOP affiliate.

CONCLUSIONS OF LAW:

- A. This Board has jurisdiction over both the parties and the subject matter in this case.
- B. FOP's status as the exclusive bargaining representative in this case is not dispositive of the question whether it has standing to prosecute a prohibited labor practice charge as a party in interest.
- C. FOP has standing as an interested party in this PPC and the Respondents' affirmative defense of lack of standing is properly stricken.
- D. By executing the "Stipulated Order", Exhibit A to Petitioners' Brief and Exhibit B to Respondents' Brief, and by their bargaining history since 2004 Respondents have waived their objection to FOP having standing on the basis that it is not the exclusive bargaining representative or are otherwise equitably estopped from objecting to their standing on that basis.

RATIONALE:

An apparent ambiguity has been interjected into the record with regard to the status of FOP as an exclusive bargaining representative in that the "Stipulated Order" Exhibit A to Petitioners' Brief and Exhibit B to Respondents' Brief, purports to recognize FOP as the exclusive bargaining representative whereas the subsequently issued Certifications of Majority Support certify that it is the MTD that has demonstrated majority support. That apparent ambiguity is resolved somewhat by the bargaining conduct of the parties since 2004 as expressed in the language of the CBA which is made and entered into between the State of New Mexico and the "New Mexico Motor Transportation Employee's Association *of the Fraternal Order of Police*" (Emphasis added) and signed by the exclusive bargaining representative as being "NMMTEA-FOP". This Board need not reach that issue at this time however, because regardless of what legal affect the "Stipulated Order" may or may not have *vis a vis* the Board it constitutes an agreement among the parties themselves to regard FOP as at least jointly with MTD the exclusive bargaining representative. The "Stipulated Order is therefore evidence of a voluntary waiver any objections to FOP's standing because it is not the recognized exclusive bargaining representative. New Mexico cases have defined "waiver" as the intentional relinquishment or abandonment of a known right. *Young v. Seven Bar Flying Serv., Inc.*, 101 N.M. 545, 685 P.2d 953 (1984). Here, we have an express contractual obligation recognizing FOP as the bargaining representative for the units in question which while arguably ineffective as to the Board and its recognition process is binding among the signators to it. Moreover, waiver may be implied from a party's representations that fall short of an express declaration of waiver, or from his conduct. See *Elephant*

Butte Resort Marina, Inc. v. Wooldridge, 102 N.M. 286, 289, 694 P.2d 1351, 1354 (1985); *Cooper v. Albuquerque City Comm'n*, 85 N.M. 786, 790, 518 P.2d 275, 279 (1974); see also *C & H Constr. & Paving Co. v. Citizens Bank*, 93 N.M. 150, 161, 597 P.2d 1190, 1201 (Ct.App.1979). While not express, these types of "implied in fact" waivers still represent a voluntary act whose effect is intended. A number of cases our opinions discussed a waiver "implied" from a course of conduct in terms of estoppel. *Easterling v. Peterson*, 107 N.M. 123, 753 P.2d 902 (1988); *Green v. General Accident Ins. Co. of Am.*, 106 N.M. 523, 746 P.2d 152 (1987); *Shaeffer v. Kelton*, 95 N.M. 182, 619 P.2d 1226 (1980). Unlike a case of a voluntary waiver, either express or implied in fact, a waiver of the contractual obligation or condition and the effect of the conduct upon the opposite party may have been unintentional.

For future reference the FOP may want to refer to NMAC 11.21.2.35 regarding amendment of certification for resolving any ambiguities remaining after this decision with regard to who is the exclusive bargaining representative.

Regardless of what ambiguities may exist with regard to who is the exclusive bargaining representative in the present case or questions of waiver or estoppel, FOP's status as an exclusive bargaining representative is not dispositive of the question whether it may act as a party petitioner in this case. A party's status as an exclusive representative is primarily concerned with who is empowered to advocate the represented employees' interests at the bargaining table. §10-7E-4 (I) and (F) NMSA 1978. There is nothing in the definition of the term "exclusive representative" or in the Board's rules or elsewhere in PEBA that exclusivity for collective bargaining applies equally to prosecuting prohibited practices complaints.

The Board's rules clearly contemplate parties other than an exclusive bargaining representative or employer being proper parties to a PPC. NMAC 11.21.3.8(B) provides for an individual employee being able to file a prohibited practices complaint apart from its exclusive bargaining representative and perhaps even contrary to the wishes of the exclusive bargaining representative since the rule further provides that when filing a prohibited practices charge an individual employee alleging a violation of Section 19(F), 19(H), 20(C), or 20 (D) of the act, is bound by a presumption that an interpretation given to the collective bargaining agreement by the employer and the exclusive representative is correct.

Guidance for the proper joinder of parties in prohibited practice proceedings before this Board may be found in the New Mexico State District Court Rules of Civil Procedure which would regard the FOP as properly joined in that it seek relief jointly with MTD and because it alleges a series of transactions or occurrences which share common questions of law or fact as to whether the Respondents have breached contract terms or failed to bargain in good faith. Where any substantive distinctions exist as to the relief requested NMRA 1-020 provides that where such differences exist judgment may be given for one or more of the plaintiffs according to their respective rights to relief. The same rationale should apply here and the interpretation of PEBA and the Board's rules should be liberally construed to include affiliates of recognized collective bargaining representatives as proper parties to a Prohibited Practices Complaint under proper circumstances and should not be read as being preventing affiliates from presenting complaints for adjudication solely on the grounds that they are not the certified collective

bargaining representative as long as there exists some other indicia of legitimate interest in the outcome of such claims.

Such a construction is consistent with the law of New Mexico regarding the real party in interest in a lawsuit as being the " 'one [who] is the owner of the right being enforced and is in a position to discharge the defendant from the liability being asserted in the suit.' " *Edwards v. Mesch*, 107 N.M. 704, 706, 763 P.2d 1169, 1171 (1988) (quoting *Jesko v. Stauffer Chem. Co.*, 89 N.M. 786, 790, 558 P.2d 55, 59 (Ct.App.1976)). An affiliated labor organization may meet both criteria and as a result should not be precluded as a party solely on the basis of its lack of status as an exclusive bargaining representative. In the present case the matter of who "owns" the rights being adjudicated is a matter of agreement between the parties Petitioner. Petitioners assert that FOP is at least half owner of the rights being asserted and is in a position to discharge Respondents by right of MTD's affiliation with it. Respondents have not shown anything to the contrary other than argument that the owner of rights being enforced belong solely to the exclusive bargaining representative and at the Hearing on the briefs acknowledged that it has no reason to believe that MTD asserts a position in opposition to FOP in this case.

RECOMMENDED ORDER: Respondent's Affirmative Defense that FOP lacks standing in this case is without merit and should be stricken.

APPEAL: Either party may appeal this hearing officer's decision by filing a notice of appeal with the PELRB staff at 2929 Coors Blvd. NW in Albuquerque New Mexico 87120. Provisions for appeal are found at NMAC 11.21.3.19. An appeal must be filed within 10 work days of this opinion and otherwise comply with NMAC

11.21.3.19. Please also note that this recommended Decision is being forwarded to the Board and will be taken up at the next scheduled Board meeting **November 8, 2011 at 9:00 a.m.** for ratification.

Issued this 26th day of October 2011

A handwritten signature in black ink, appearing to read 'Thomas J. Griego', written over a horizontal line.

Thomas J. Griego
Executive Director
Public Employee Labor Relations Board
2929 Coors N.W., Suite 303
Albuquerque, NM 87120