13-PELRB-2022

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

N.M. COALITION OF PUBLIC SAFETY OFFICERS AND SANTA FE COUNTY DEPUTY SHERIFF'S ASS'N,

Complainants,

v. **PELRB No. 133-21**

SANTA FE COUNTY,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board ("Board") on Santa Fe County's request for review of the Hearing Officer's Report and Recommended Decision ("Recommended Decision"). After hearing oral argument at its regularly scheduled meeting on May 3, 2022, reviewing the Recommended Decision, request for review and Complainants' response and being otherwise sufficiently advised, the Board voted 3-0 to adopt the Hearing Officer's Report and Recommended Decision without modification.

THEREFORE, THE BOARD adopts the Hearing Officer's Recommended Decision as its own.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

May 16, 2022
DATE

Mark Myers Digitally signed by Mark Myers Date: 2022.05.16 11:36:10 -06'00'
MARK MYERS, BOARD CHAIR

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SANTA FE COUNTY,

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 of Complainants' claims that Santa Fe County failed to abide by NMSA 1978 § 10-7E-18(B) (2020) requiring the parties to engage in mediation and, if mediation is unsuccessful, to proceed to binding arbitration to resolve an impasse. By unilaterally implementing its Revised Mandatory Vaccination Policy, after reaching impasse in bargaining that policy, which included a provision requiring discipline "up to and including termination", the Complainants claim the County violated the following PEBA sections: 1. A public employer shall not ". . . refuse to bargain collectively in good faith with the exclusive representative" (§10-7E-19(F));

2. A public employer shall not ". . . refuse or fail to comply with a provision of the Public Employee Bargaining Act or board rule" (§10-7E-19(G)), specifically, the impasse resolution procedures contained in PEBA, Section 10-7E-18(B).

Pursuant to a Scheduling Order dated January 12, 2022, a hearing on the merits was held Thursday, February 10, 2022. Although neither party filed a pre-hearing dispositive motion, the parties agreed that it would be useful to determine prior to the presentation of evidence, the scope of bargaining

applicable in this case, i.e. whether the mandate at issue is within the County's authority and its obligation is limited to impact bargaining. As agreed, because the parties could not reach a stipulation in that regard to be included in their Stipulated Pre-Hearing Order, the parties submitted legal memoranda on January 28, 2022 arguing their respective positions and I decided the question as the first item of business at the merits hearing. After consideration of both memoranda and hearing argument of counsel, my decision may be summarized as follows:

1. The promulgation of a mandatory vaccine policy such as was done in the instant case is a mandatory subject of bargaining inasmuch as it vitally concerns bargaining unit employees' working conditions. See *NLRB v. Borg Warner Corp.* 356 U.S. 342 (1958); *Allied Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157 (1971); *NLRB v. American Nat'l. Can Co., Foster-Forbes Glass Div.,* 924 F.2d 518 (4th Cir. 1991), *enforcing* 293 NLRB 901 (1989) (Safety regulation of employees is not solely a management prerogative but instead is subject to mandatory negotiation). See also, *AFSCME Council 18 v. New Mexico Human Services Dep't,* PELRB 151-11; 59 PELRB 2012 (July 13, 2012), *aff'd* No. D-101-CV-2012-02176 (J. Ortiz 2013). [1]

2. According to Sections 2(B)(1), (2) and (3) of the parties' Collective Bargaining Agreement effective January 1, 2020 to December 31, 2023, Joint Exhibit 1:

> "B. The direction of the work force shall be controlled completely by the Sheriff or designee, except as specifically set forth in this Agreement. The County, through its BCC, the Sheriff, or County Manager shall have, but shall not be limited to the following rights:
>
> 1. To direct and supervise all operations, functions, and the work of bargaining unit employees;
>
> 2. To maintain the efficiency of the operations;
>
> 3. To take actions as necessary to carry out the services provided by the Sheriff's Office in emergency situations and to maintain the uninterrupted service to our citizens during such emergency situations;"

[1] The contention of some employers that health and safety regulation is a management function, not subject to mandatory negotiation, has been rejected by the NLRB and the courts. See Developing Labor Law treatise, Elkouri, 7th Ed. § 16-74 and cases cited therein.

Accordingly, the Union has agreed after bargaining that the County has the right to take actions as necessary to carry out the services provided by the Sheriff's Office in emergency situations and to maintain the uninterrupted service during such emergency situations. Imposing a vaccine mandate for public health purposes fits squarely within traditional powers exercised by County governments and is recognized as such by Section 2 of the parties' CBA. This conclusion is consistent with the recent U.S. Supreme Court decision in *National Fed'n. of Ind't. Business, et al. v. Dep't of Labor, OSHA, et al. and Ohio, et al. v. Dep't. of Labor, OSHA, et al.* 595 U.S. ___(2022) in which Justice Gorsuch in a concurring opinion wrote:

> " There is no question that state and local authorities possess considerable power to regulate public health. They enjoy the 'general power of governing,' including all sovereign powers envisioned by the Constitution and not specifically vested in the federal government. [internal citation omitted]. And in fact, States have pursued a variety of measures in response to the current pandemic. [citation omitted]."

In a manner consistent with the considerable power residing with local governments to regulate public health recognized by the U.S. Supreme Court, the State of New Mexico enacted the All Hazard Emergency Management Act, delegating to local governing bodies the responsibility and authority to address emergencies in their jurisdictions. See § 12-10-5 NMSA 1978 (2007). The Board of County Commissioners of Santa Fe County acted pursuant to the All Hazard Emergency Management Act by adopting a Resolution declaring Santa Fe County to be an emergency area and authorizing the adoption of the vaccine mandate Policy. (Exhibit 6).

Considering all of the above and the nature of vaccine mandates as a mandatory subject of bargaining along with the expressly reserved management right in Section 2 of the CBA, I concluded that the parties met their respective good faith bargaining obligations with regard to whether the County may impose such a mandate. This is not a conclusion that the Union has waived its right to bargain prior to employer's implementation of new policies affecting health and safety. Rather,

concerning the mandate without reference to its disciplinary consequences, the bargaining has occurred and is covered by Section 2 of the parties' contract.

That does not end the inquiry however, because as the Union argues, the County is still obliged to bargain over the "effects" or "impact" of its vaccine policy, such as its requirement that non-compliance with the vaccine requirement will result in discipline up to and including termination of employment. See *First National Maintenance Corporation v. National Labor Relations Board*, 452 U.S. 666, 101 S.Ct. 2573, 69 L.Ed.2d 318 (June 22, 1981). (While no per se rule could be formulated § 8(d) creates a presumption in favor of mandatory bargaining over a decision to close part of the employer's business, which presumption is rebuttable by showing that the purposes of the NLRA would not be furthered by imposing a duty to bargain). I note that at footnote 1 of its brief on the scope of bargaining, the union asserts that as of its writing, the County has cited three bargaining unit members for violation of the policy and proposed termination of all three. At least one of those members has now been formally terminated. The County does not deny that allegation.

The effects of the vaccine mandate are as much a mandatory subject of bargaining as is the mandate itself. "Many topics that fall within the phrase 'other terms and conditions of employment' are now so clearly recognized to be mandatory subjects of bargaining that no discussion is required. These include …discharge…".

See Developing Labor Law treatise, Elkouri, 7th Ed. § 16-54 and cases cited therein.

Therefore, the scope of bargaining in this case includes the effects of the County's vaccine policy including but not limited to discharge from employment for non-compliance and it remains for the scheduled hearing on the merits to determine whether the parties met their respective obligations to bargain those effects to impasse and whether the County committed a PPC by its unilateral implementation of those aspects of its policy after reaching impasse. The parties proceeded with the hearing on the merits with the scope of bargaining having been determined as stated above.

At the conclusion of the Union's case-in-chief the County moved for a directed verdict arguing that by the stipulations in the Pre-Hearing Order and testimony of the union's witnesses there could be no question but that the County bargained in good faith and so, it could not have committed a PPC as alleged. The County argued that while the County would not concede its right to implement the vaccine mandate after several offers and counteroffers, neither would the Union move on its opposition to terminating employees for non-compliance with the vaccine mandate. Both positions are justified inasmuch as the PEBA does not require either party to make a concession in order to be compliant with its good faith obligation. See, NMSA 1978 § 10-7E-17(A)(1) providing that public employers and exclusive representatives:

> "shall bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties. However, neither the public employer nor the exclusive representative shall be required to agree to a proposal or to make a concession;"

Additionally, the County argued that under the PEBA definition of "emergency", the public health emergency declared by the State and the County should be recognized as justifying unilateral imposition of the vaccine mandate in all respects because there was no refusal to bargain collectively in good faith with the exclusive representative" and consequently, no refusal or failure to comply with a provision of the Public Employee Bargaining Act or board rule required to sustain violations of §§ 10-7E-19(F) or (G) and no violation of PEBA's impasse resolution procedures contained in § 18(B) so that the PPC should be dismissed in its entirety.

The Union responded with three points:

First, that the emergency clause of the parties' CBA was not properly invoked because the term "emergency" does not get to be defined by the PEBA or a State or County declaration of an emergency but by the bargaining unit and what it understands the term to mean in the context of its CBA. In this case, the union urge construction of the term to mean something that is 1) immediate; 2) unforeseen; and 3) limited in duration. According to the Union the evidence supports a

conclusion that none of those three factors exist in this case because the County's vaccine mandate issued a year and a half after the State first declared a public health emergency due to the COVID 19 pandemic.

Second, the evidence supports a conclusion that the County was required to bargain the impact of its vaccine mandate, i.e. get vaccinated or be fired, to impasse and;

Third, the evidence supports a conclusion that the County was not justified in unilaterally implementing its last best offer prior to mediation/arbitration because no emergency required immediate implementation ahead of completing the impasse process one and a half years after the first public health emergency declaration. The impasse procedure set forth in § 18 of the Act exists for the purpose of rectifying the situation such as is found in this case where neither party agrees to the other's proposal or will not make a concession. That process is thwarted when the employer unilaterally implements its proposal.

Cognizant that under New Mexico case law, a motion for 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 judge believes that reasonable people could not arrive at a contrary result." *Melnick v. State Farm Mut. Auto. Ins. Co.*, 1988-NMSC-012, ¶ 11, 106 N.M. 726, 749 P.2d 1105 and that the sufficiency of evidence presented to support a legal claim or defense is a question of law for the court to decide" *Sunwest Bank of Clovis, N.A. v. Garrett*, 1992-NMSC-002, ¶ 9, 113 N.M. 112, 823 P.2d 912, after hearing the County's reply to the Union's response I decided to grant in part and deny in part the Motion for a Directed Verdict.

The Motion was granted insofar as the Union alleged a failure to bargain in good faith on the mandate itself up to the point impasse was declared. I concluded that the clear weight of the evidence demonstrated good faith bargaining by both parties after a series of offers and counteroffers in which the County made concessions, albeit not on issues that the County was

obliged to bargain (its reserved management right to mandate vaccines, in which case there could be no PPC for failure to bargain that which it was not required to bargain). There was no indicia of the County committing a per se violation such as refusal to provide information. (To the contrary it was the union that refused to reply to the County's request for information). See testimony of Steve Harvey in which he justified his non-response to the County's request for information on the ground that he considered its request to be retaliatory for a request the union made of the County). Other indicia of bad faith are absent as well, including any refusal to meet and confer at reasonable times, bargaining directly or indirectly with the employees or refusal to execute a written contract. There being no indicia of a per se violation I looked to whether there was evidence establishing a pattern of bad faith negotiation, in which an intent to frustrate bargaining could be inferred from conduct at the bargaining table. Further factual development was needed on that point. Accordingly, the Motion was denied as to whether the PEBA was violated by the County's refusal to make a concession on termination for failure to be vaccinated or its unilateral implementation of the County's last, best offer concerning the consequences of non-compliance with the vaccine mandate after the parties reached impasse on that issue.[2]

Therefore, I concluded that it remained for the County to present its case-in-chief before I could determine whether the parties met their respective obligations to bargain those effects to impasse and whether the County committed a PPC by its unilateral implementation of those aspects of its policy after reaching impasse.

[2] The District Court has upheld this Board's decision denying unilateral implementation of an employer's policy in the absence of any negotiation, which is not the case here. See, *AFSCME, Council 18 v. HSD*, D-101-CV-2012-02176 (1st Judicial Dist., J. Ortiz, 6-14-2013). (HSD unilaterally changed a term or condition of employment as established by its past practice of having security guards at the field offices. HSD failed to bargain the elimination of the security guards prior to implementation.)

All parties hereto were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Closing briefs in lieu of oral argument were submitted by the parties on March 10, 2022. Both briefs 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: I adopt and incorporate by reference the following stipulations from the parties' Stipulated Pre-Hearing Order herein:

1. The Union's current bargaining unit is comprised of public employees working for the County in the positions of non-probationary sworn Deputies, Corporals, and Sergeants of the County Sheriff's Office.
2. Since certification, the Union has negotiated and entered into successive collective bargaining agreements with the County.
3. The collective bargaining agreement currently in effect between the parties became effective on or about January 1, 2020 and is not set to expire until December 31, 2023.
4. On March 11, 2020, Governor Michelle Lujan Grisham, acting under the Public Health Emergency Act, declared in Executive Order 2020-004 that a Public Health Emergency exists in New Mexico.
5. On March 16, 2020, Kathyleen Kunkel, Cabinet Secretary of the New Mexico Department of Health, declared the current outbreak of COVID-19 to be a condition of public health importance as defined in the New Mexico Public Health Act, NMSA 1978, Section 24-1-2(A) as an infection, a disease, a syndrome, a symptom, an injury or other threat that is identifiable on an individual or community level and can reasonably be expected to lead to

adverse health effects in the community, and that posed an imminent threat of substantial harm to the population of New Mexico.

6. On August 24, 2021, the County circulated a draft policy titled "Emergency Policy Requiring COVID-19 Vaccines, Providing Education for County Employees Who Are Not Fully Vaccinated; and Prohibiting Travel by County Employees Who Are Not Fully Vaccinated or Who Do Not Receive Authorized and Recommended Booster Doses of COVID-19 Vaccines" ("Mandatory Vaccination Policy").
7. The County sought and received "input" regarding the Mandatory Vaccination Policy from various parties, including the Complainant Union.
8. On December 11, 2020, the U.S. Food and Drug Administration (FDA) issued the first emergency use authorization (EUA) for a vaccine for the prevention of coronavirus disease 2019 (COVID-19) caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) in individuals 16 years of age and older. The EUA allowed the Pfizer-BioNTech COVID-19 Vaccine to be distributed in the U.S.
9. On December 18, 2020, the FDA issued an EUA for the second vaccine for the prevention of COVID-19 caused by SARS-CoV-2. The EUA allowed the Moderna COVID-19 Vaccine to be distributed in the U.S. for use in individuals 18 years of age and older.
10. On February 27, 2021, the FDA issued an EUA for the third vaccine for the prevention of COVID-19 caused by SARS-CoV-2. The EUA allowed the Johnson COVID-19 Vaccine to be distributed in the U.S for use in individuals 18 years of age and older.
11. On August 23, 2021, the FDA granted the biologics license application for the Pfizer/BioNTech mRNA COVID-19 vaccination known as Comimaty, which means that this vaccine has now received full FDA approval and is no longer being distributed under its emergency use authorization for those 16 and older.

12. On August 30, 2021, the Union submitted a demand to bargain the Mandatory Vaccination Policy.
13. The County submitted another version of the Mandatory Vaccination Policy and proposed to make it effective on September 3, 2021.
14. While initially the County indicated that it was not required to bargain with the Union concerning the Mandatory Vaccination Policy and would refuse to bargain, eventually bargaining concerning the Mandatory Vaccination Policy took place between the parties in September, October, and early November 2021. The parties exchanged proposals and discussed them.
15. On November 9, 2021, the County informed the Union that it would be unilaterally implementing its last, best offer, which was the Revised Mandatory Vaccination Policy.
16. Among other things, the Revised Mandatory Vaccination Policy provides the following:
    A. By December 10, 2021 all employees, including Union bargaining unit members, must be fully vaccinated for COVID-19 and submit proof of their vaccination status to the County, subject to certain exemptions and exceptions;
    B. All employees who are not fully vaccinated, including Union bargaining unit members, must take a COVID-19 Vaccine Education course;
    C. The only exemptions to the vaccination requirement are due to disability, a permanent or temporary medical condition recognized by the FDA or CDC as a contra-indication to all vaccines licensed by the FDA, or an employee's sincerely held religious belief;
    D. Any Union bargaining unit members who are not fully vaccinated are prohibited from traveling outside of the state for work; and

E. Violations of the Revised Mandatory Vaccination Policy "may result in disciplinary action, up to and including termination."

17. After receiving the County's November 9, 2021 correspondence indicating that it had submitted its last, best offer regarding the Revised Mandatory Vaccination Policy, the Union informed the County that it desired to proceed to mediation pursuant to PEBA impasse resolution procedures, Section 10-7E-18(B)(1).

18. On November 11, 2021 the County informed the Union that it would be unilaterally implementing its last, best offer regarding the Revised Mandatory Vaccination Policy.

19. The Revised Mandatory Vaccination Policy went into effect on November 11, 2021, and the Union's bargaining unit members were required to comply with its vaccine mandate by December 10, 2021 or request an exemption.

20. The County is in the process of terminating three bargaining unit members as a result of non-compliance with the Revised Mandatory Vaccination Policy.

21. On January 21, 2022, the parties conducted mediation pursuant to PEBA, Section 10-7E-18(B)(1) regarding the Revised Mandatory Vaccination Policy. The mediation did not result in an agreement.

22. From March 2020 through today, the State of New Mexico has been in a statewide public health emergency due to COVID-19.

23. From March 2020 through today, Santa Fe County has been declared to be an emergency/disaster area as a result of COVID-19.

24. The parties hereto stipulate and agree that the following issues are not in dispute:

A. The New Mexico Coalition of Public Safety Officers and Santa Fe County Deputy Sheriff's Association, a Chapter of the New Mexico Coalition of Public Safety Officers, are

and were at all times material hereto a "labor organization" as defined by the Public Employee Bargaining Act ("PEBA"), §10-7E-4(K).

B. Santa Fe County is and was at all times material hereto a "public employer" as defined by the PEBA, §10-7E-4(R).

C. The Union is and was at all material times hereto an "exclusive representative" under PEBA, §10-7E-4(I).

I adopt and incorporate by reference the facts found by the 10th Circuit Court of Appeals in *Valdez, et al v. Lujan Grisham, et al.*, --- F. Supp. 3d ---, 2021 WL 4145746 (10th Cir., September 15, 2021), consistent with the testimony of the County's expert witness, James Marx, PhD, as background applicable to this case:

25. Since its emergence in 2019, the virus that causes COVID-19 has spread exponentially through the world and New Mexico has been no exception.
26. The ease and rapidity with which COVID-19 spread and its potentially severe symptoms created a potential for mass deaths and an overloaded healthcare system.
27. During the winter of 2020-21, the United States averaged nearly 200,000 new cases and 4,000 COVID-19-related deaths every day.
28. One in five New Mexicans who were hospitalized for COVID-19 during that time frame passed away.
29. In February 2020, the United States Department of Health and Human Services ("HHS") declared a public emergency and instructed the United States Food and Drug Administration ("FDA") to grant emergency use authorizations ("EUA") for "medical devices and interventions" to combat the pandemic, including vaccines. The FDA issued detailed guidance to vaccine manufacturers, requiring a determination that the vaccine's benefits

outweigh its risks based on data from at least one well-designed Phase 3 clinical trial that demonstrates the vaccine's safety and efficacy in a clear and compelling manner.

30. Three vaccine candidates emerged as frontrunners: Pfizer/BioNTech and Moderna's two-dose mRNA vaccines, and Johnson & Johnson's ("J&J") single-dose viral vector vaccine.

31. By the time Pfizer, Moderna, and J&J applied for EUA status (which, for Pfizer and Moderna, was in November 2020, and for J&J, was in February 2021), each vaccine had undergone significant testing.

32. After a team of representatives from across the FDA reviewed the data submitted by each manufacturer and independently assessed the risks and benefits of the vaccines, the FDA granted EUA, for individuals 16 and older, to Pfizer and Moderna's vaccines in December 2020 and to J&J's vaccine in February 2021, noting that each had met the expectations set out in the FDA's comprehensive guidance. Pfizer's vaccine later received EUA for individuals 12 and older, and on August 23, 2021, received full FDA approval for individuals 16 and older.

33. Since the three vaccines received EUA status, over 368 million doses have been administered and over 173 million Americans have been fully vaccinated.

34. Comprehensive data collected since the three vaccines received EUA status demonstrates that they are safe and highly effective in preventing infection and severe illness, and that serious adverse side effects from the vaccines are exceedingly rare. Further, the immunity provided by the vaccines is significantly more robust than natural immunity gained following infection. [3]

[3] Centers for Disease Control and Prevention ("CDC") Morbidity and Mortality Weekly Report November 5, 2021;1539–1544. The report memorializes a CDC study that looked at more than 7,000 people hospitalized with *Covid-like* illnesses and found that those who were unvaccinated, but had a previous case of the illness, were five times more likely to have a confirmed case of Covid than people who were fully vaccinated and had not had Covid before. The

35. By mid-June of 2021, the Centers for Disease Control and Prevention ("CDC") had labeled the Delta variant a "variant of concern." The Delta variant now accounts for virtually all new infections in the United States – including in New Mexico – and is believed to be twice as contagious as previous variants.[4]

36. Studies indicate that individuals infected with the Delta variant are more likely to be hospitalized than those infected with other strains. While the Delta variant is more likely to cause "breakthrough" infections than other variants, the vaccines still provide strong protection against serious illness and death in individuals who contract the Delta variant.

37. Although case rates in New Mexico had begun to drop dramatically, the numbers rose rapidly with the rise of the Delta variant. For example, in June of 2021, there were approximately 60 new cases a day but by mid-August, there were nearly 900 new cases a day – a fifteenfold increase. As a result, hospitals were again operating over their capacity to accommodate the surge of infected New Mexicans, the majority of whom were not vaccinated.

I incorporate the following Findings from my Denial of Preliminary Injunctive relief issued February 8, 2022:

38. The Mandatory Vaccination Policy affects wages, hours, and other terms and conditions of employment for bargaining unit members, not least of which is that the failure to abide by the policy will result in disciplinary action up to and including termination of employment and is, therefore, a mandatory subject of bargaining.

Report acknowledges that a previous infection does provide some degree of immunity and protection against reinfection, but the findings suggest that the protection conferred by vaccination is stronger.

[4] No comparative data was presented in *Valdez, et al v. Lujan Grisham, et al* since the emergence of the omicron variant November 24, 2021. I consider the absence of such data to be immaterial as background relevant to the negotiations that took place in his case in September, October and November of 2021.

39. On August 30, 2021 NMCPSO sent to the County a demand to bargain the Mandatory Vaccination Policy.

In addition to the foregoing I make the following additional findings based on the testimony and documentary evidence adduced during the hearing on the merits or that I take Special Notice:

40. Exhibit J-2, the parties CBA applicable to this case in the Preamble thereto, in pertinent part provides:

    A. "The Sheriff's Office Standard Operating Procedures, the Santa Fe County Human Resources Handbook or other policies and procedures promulgated through the authority of the Sheriff, shall govern any issues not agreed to herein. Management shall meet with the NMCPSO/SFCDSA regarding changes in County policies, procedures or regulations that affect wages, hours, or terms and conditions of employment. The NMCPSO/SFCDSA may also identify alternative solutions and provide suggestions not governed by this Agreement. Meetings regarding changes to this Agreement should be held at times mutually agreed to by the parties"; and,

    B. "It is understood and agreed that none of the foregoing rights and responsibilities will be exercised in a manner that is inconsistent with the provisions of this Agreement".

41. I take Special Notice of Santa Fe County Resolution No. 2012 – 164 adopting the 2012 Santa Fe County Human Resources Handbook to replace the 2008 Santa Fe County Human Resources Handbook.

42. I take Special Notice of Santa Fe County Human Resources Handbook Section 7 concerning Discipline, providing in pertinent part:

    A. "7.1 AUTHORITY TO TAKE DISCIPLINARY ACTION. Supervisory and managerial personnel have the responsibility and obligation to take disciplinary action deemed necessary, in the best interests of the County.

    B. 7.2 PROGRESSIVE DISCIPLINE The primary purpose of discipline is to correct

    C. performance or behavior that is below acceptable standards, or contrary to the County's legitimate interests, in a constructive manner that promotes employee responsibility. It is the County's policy that, as a general rule, discipline is progressive in nature, beginning with less severe action necessary to correct the undesirable conduct or behavior, and

increasing in severity if the conduct or behavior is not corrected. There are instances when a disciplinary action, including dismissal, is appropriate without first having imposed a less severe form of discipline. The circumstances surrounding an offense, such as the severity of the misconduct, the number of times it has occurred, as well as any previous counseling, and the employees disciplinary history, will be factors considered in determining the action to be taken. The conduct at issue in a prior discipline need not be similar to the conduct involved in a subsequent discipline to serve as the basis for progressive discipline.

D. 7.3 FORMS OF DISCIPLINARY ACTION

E. 7.3.1 ORAL REPRIMAND An oral reprimand is generally used for minor offenses or to correct minor faults in an employee's performance. An oral reprimand is not grievable and not subject to the notice and hearing requirements of this section.

F. 7.3.2 WRITTEN REPRIMAND A written reprimand may be issued by a supervisor for an offense of a more serious nature which requires more formal action than an oral reprimand. The written reprimand shall become a part of the employee's Human Resources file. A written reprimand is not grievable and not subject to the notice and hearing requirements of the applicable section of this handbook.

G. 7.3.3 SUSPENSION A suspension may be ordered for an offense of a more serious nature or for repeat of a minor offense. An employee may be suspended for a period not to exceed thirty (30) working days. During a suspension, an employee will not be paid or accrue leave. Each suspension shall be recorded and filed in the employee's Human Resources file.

H. 7.3.4 DEMOTION An employee may be demoted for an offense of a more serious nature or for repeat of a minor offense. The employee may be demoted to a lesser position for which the employee is otherwise qualified. When demoted, the employee will receive a decrease in compensation commensurate with the new position. Each demotion will be recorded and filed in the employees Human Resources file.

54. I take Special Notice of Santa Fe County Sheriff's Department Standard Operating Procedures (currently under revision) as follows:

A. S.O.P Number 1-7, General Rules of Conduct ¶¶ (B)(1) and (2):

"B. Obedience to laws, ordinances, rules, and regulations.

DEFINITION - Employees of the Office will obey all federal and state laws. They will also obey all laws and ordinances of Santa Fe County or

other municipalities in which the employee may be present. Employees will obey all rules, regulations, and orders as may be issued by the Office. The term "employees" includes both sworn and non-sworn personnel.

AUTHORITY - Employees of the Office will obey all lawful orders issued to them by competent authority."

REASONING AND CONCLUSIONS OF LAW:

I. GENERALLY SPEAKING, WITHOUT REFERENCE TO ITS DISCIPLINARY CONSEQUENCES, THE COUNTY MET ITS OBLIGATION TO BARGAIN IN GOOD FAITH CONCERNING IMPOSITION OF THE VACCINE MANDATE IN QUESTION BY NEGOTIATING SECTION 2 OF THE PARTIES' CONTRACT.

A. A plain reading of the parties' contract is determinative, establishing that except for the imposition of discipline, the County's unilateral action in implementing its Vaccine Mandate fell within the coverage of the County's contractual rights as well as management rights reserved under the PEBA.

MV Transportation, Inc. and Amalgamated Transit Union Local #1637, AFL–CIO, CLC, Case 28–CA–173726, September 10, 2019 is correctly cited by the County for the proposition that "Under contract coverage, the Board will examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally." The PELRB recognizes the contract coverage doctrine, allowing employers to rely on broad management rights clauses to justify unilateral changes the employer seeks to implement. Under this doctrine the PELRB will look to the plain language of the contract to determine if the unilateral action fell within the coverage of the employers' contractual rights. See, *AFSCME, Council 18 v. State of New Mexico,* 1-PELRB-2013. (Imposition of furloughs were an exercise of management's reserved rights under an article of the parties' CBA reserving to management the right to relieve an employee from duties because of lack of work or other legitimate reason, or under sections reserving to management the right to determine the size and composition of the work force, or to determine methods, means, and

personnel by which the employer's operations are to be conducted. Therefore, the State was not obligated to bargain further over the furloughs). See also *CWA Local 7076 v. New Mexico Public Education Department and New Mexico Public Employee Labor Relations Board*, 2nd Judicial District, CV-2012-11595 (August 8, 2013, J. Bacon) (Upholding the Board's Order 28-PELRB-2013 in re: PELRB No. 134-11, affirming Hearing Officer's Report and Recommended Decision of October 12, 2012); *AFSCME, Council 18 v. N.M. Human Services Dep't.*, D-101-CV-2012-02176 (1st Judicial Dist., J. Ortiz, June14, 2013).

Section 2 of the parties' CBA, Exhibit J-2, provides:

> "A. Policy Making - Santa Fe County and the Sheriff's Office policy making officials reserve the rights prescribed by the County, State, and Federal Constitutions, Statutes, and Ordinances in effect during the term of this Agreement.
>
> B. The direction of the work force shall be controlled completely by the Sheriff or designee, except as specifically set forth in this Agreement. The County, through its BCC, the Sheriff, or County Manager shall have, but shall not be limited to the following rights:
>
> 1. To direct and supervise all operations, functions, and the work of bargaining unit employees;
>
> 2. To maintain the efficiency of the operations;
>
> 3. To take actions as necessary to carry out the services provided by the Sheriff's Office in emergency situations and to maintain the uninterrupted service to our citizens during such emergency situations;
>
> 4. To determine what, by whom, and when, services will be provided to the citizens and determine the performance standards applicable to the provision of those services;
>
> 5. The Sheriff may hire, promote, assign, transfer, retain, demote, discharge, suspend or take other disciplinary action. The Sheriff may relieve bargaining unit employees for just cause, and legitimate documented reasons only; and
>
> 6. To determine and implement all policies, methods, standards, and direction of bargaining unit employees that does not conflict with the terms of this Agreement, and to determine the resources to be allocated to accomplish the mission and goals of the Sheriff's Office as a unit of County Government."

Section 2 of the CBA conforms with the PEBA NMSA 1978, § 10-7E-6(C) (2020) whereby an employer, unless limited by a CBA or other statutory provision, may ("take actions as may be necessary to carry out the mission of the public employer in emergencies"). The PEBA further defines the term "emergency" in NMSA 1978, § 10-7E-4(H):

> "emergency" means a one-time crisis that was unforeseen and unavoidable;"

The parties must be presumed to have been aware of, and their CBA held to be in conformity with, the definitions of the statute under which authority it engages in bargaining. It is that definition that controls the outcome of this case and I reject any alternative definitions the parties may propose.

The substantial weight of the evidence compels a conclusion that this has never really been a case in which the County's right to promulgate its vaccine policy should be at issue. First, because of Section 2 of the parties' CBA, but second, and perhaps most importantly, because the County's right to impose the vaccine mandate as an emergency public health measure was not disputed throughout the parties' negotiations. Then as now, only termination of employment for non-compliance was an issue.[5] Because of this, the Union's argument now that the emergency clause of the parties' CBA was not properly invoked is a red herring. I note that in Exhibit 5, an NMCPSO bargaining proposal dated October 30, 2021, the Union's Chief Negotiator, David Bency, wrote:

> "NMCPSO-Sheriff does not deny the County has the right, as established by several court cases, to mandate health standards. NMCPSO understands Santa Fe County's position that COVID -19 is a life threatening virus which has killed numerous persons worldwide and poses a significant threat to our Deputies' lives. They interact with the public daily and are placed in life endangering situations when doing so. NMCPSO also understands that breakthrough cases are surging and create a meaningful danger to our deputies' health even after vaccination, as vaccinated persons continue to die after being infected with COVID-19. NMCPSO maintains the right in how the policy can and will be instituted. Implementation must be negotiated."

[5] Termination remains an issue in this case in part because firing a non-conforming employee is not an emergency justified by Section 2 of the CBA.

We can also read in ¶Exhibit G, an email from Assistant County Attorney Rachel Brown to Mr. Bency dated November 11, 2021 responding to the Union's statement that the parties were at impasse, that her restatement of the Union's position during negotiations was:

> "…NMCPSO/SFCDSA recognized the County's right, as an employer, to mandate health standards, such as mandating that employees receive a COVID-19 vaccine…"

In summary, the public policy embodied in §NMSA §10-7E-2 guaranteeing public employees the right, to organize and bargain collectively, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring the orderly operation and functioning of the state and its political subdivisions, includes the duty to bargain in good faith as ongoing and does not end once a collective bargaining has been negotiated, but an employer may be excused from its ongoing duty to bargain where it can be shown that the issue over which the union seeks to bargain is "covered by" the parties' CBA. Here, the union has bargained a CBA that reserves to management the discretion to take such actions as are necessary to carry out the services provided by the Sheriff's Office in emergency situations and to maintain the uninterrupted service during such emergency situations. It avails the Union nothing to argue as it does here, that that the COVID-19 pandemic had no effect on the Department's operations so that the policy "was necessary for the Department to carry out its services and maintain uninterrupted services to citizens". The decision as to what is necessary is an integral part of the right that has been reserved to management in Section 2 of the CBA and § 10-7E-6(C) of the Act. It was not necessary to hear testimony of Sheriff's Department and County management related to necessity and it should be remembered that as the proponent of prohibited practice charges, it is the union that has the burden of proof that the emergency clause was improperly invoked but a preponderance of the evidence is otherwise.

Apparently, at the time the effects of the County's vaccine policy were being negotiated, the union believed, as I do now, that discretion for implementing such a public health related policy, which

necessarily includes discretion to decide that an emergency exists, resides with the County government. Apparently, they believed then, as I do now, that such decisions are political decisions that can only be made by those responsible to the constituents who elected or appointed them to make such decisions. Sections 2(B)(1), (2) and (3) of the parties' Collective Bargaining Agreement reflects that realization. To the extent the union disagrees with the sufficiency of factual support for implementing the vaccine policy in this case, that disagreement should be addressed through the political process holding elected and appointed officials accountable for their decisions through the democratic process. It is not for this Board in this case to second guess the elected officials exercise of discretion acknowledged in the parties' CBA either to declare that an emergency exists or what the proper response to it should be.

There may come a time when an employer abuses its discretion under an emergency clause of a CBA to implement emergency measures without sufficient basis, weighing in favor of this Board deciding that the particular emergency clause was not properly invoked. This is not that case.

At the time the County's policy was implemented the New Mexico was under a state-wide declared public health emergency. Exhibits 7-16. New Mexico was experiencing a high transmission rate and a 20% positivity rate, which was higher than any other time during the pandemic. (Dr. Marx Testimony, Hearing Audio Part 4 at 43:00 — 43:12; 52:00 — 52:58). The 10th Circuit Court of Appeals considered such information in *Valdez, et al v. Lujan Grisham, et al.*, --- F. Supp. 3d ---, 2021 WL 4145746 (10th Cir., September 15, 2021), upholding the Governor's vaccination mandate for healthcare workers resulting in the findings adopted herein.

II. ALTHOUGH SANTA FE COUNTY'S IMPLEMENTATION OF ITS VACCINE MANDATE FELL WITHIN THE COVERAGE OF ITS CONTRACTUAL RIGHTS AND MANAGEMENT RIGHTS RESERVED UNDER THE PEBA, IT WAS NEVERTHELESS REQUIRED TO BARGAIN TO IMPASSE THE IMPACT OF ITS VACCINE MANDATE, i.e. TO GET VACCINATED OR RISK BEING FIRED.

A. A preponderance of the evidence establishes that the County bargained in good faith to impasse over the impact of its vaccine mandate.

It is by now practically axiomatic that public employers and unions must not only negotiate in good faith over mandatory subjects of bargaining such as wages, hours, and almost all other terms and conditions of employment, but an employer must also bargain over the impact of its decisions made pursuant to a reserved management right unless bargaining is waived. Among those terms and conditions of employment subject to "effects" or "impact" bargaining are such things as attendance policies; safety and health regulation and discharges. See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters 13.I.B.3; 13.II.F; 16.III and 16.IV.

Even where a union has clearly and unmistakably waived its right to bargain over an initial decision, management may still have a duty to bargain over the effects or impact of that management decision because effects or impact bargaining is required when the decision "significantly and adversely affects a bargaining unit's wages, hours, or working conditions" and the impact is not "extremely indirect and uncertain." See *Fibreboard Paper Products Corp. v. NLRB*, 379 US 203, 223 (Stewart, J., concurring); *Claremont Police Officers Association v. City of Claremont,* 139 P.3d 532 (Cal. 2006); *First National Maintenance Corp. v. NLRB*, 452 US 666 (1981).

In *Kennametal, Inc. and United Steelworkers, Local 5518, affiliated with United Steelworkers of America, AFL–CIO, CLC.* Cases 01–CA–046293 and 01–CA–046294; June 26, 2012 a three-member NLRB panel decided, contrary to its administrative law judge, that the parties' collective-bargaining agreement was a waiver of the Union's right to bargain over the decision to implement a safety checklist requirement. However, the NLRB decided differently concerning the discipline to be imposed for violation of the safety checklist requirement. The panel agreed with the ALJ that the Respondent

violated Section 8(a)(5) and (1) by unilaterally eliminating progressive discipline for safety violations and that the CBA did not constitute waiver of bargaining as to the discipline to be imposed:

> "Board law is clear that disciplinary policies and procedures constitute mandatory subjects of bargaining. Further, work rules that could be grounds for discipline are mandatory subjects of bargaining, *Southern Mail, Inc.*, 345 NLRB 644, 646 (2005); *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 330 NLRB 900, 904 (2000), enf'd. in relevant part 24 Fed. Appx. 104 (4th Cir. 2001); *Frontier Hotel & Casino*, 309 NLRB 761, 766 (1992), enf'd. 71 F.3d 1434 (9th Cir. 1995).

The PELRB has also recognized the long-established doctrine that work rules that could be grounds for discipline are mandatory subjects of bargaining. Cf. *In re: AFSCME, Council 18 v. N.M. Department of Workforce Solutions*, 2nd Judicial District Court Case No. D-202-CV-2017-07924, (J. Campbell, 11-19-2018), in which the District Court affirmed this Board's decision in PELRB No. 102-17, 11-PELRB-2017, that the Department committed a PPC by increasing performance measures without bargaining. The Court agreed with this Board's conclusion that the number of inspections required to be performed per month is a term or condition of employment and while acknowledging the employer's right under the collective bargaining agreement to direct employees' work and to determine the methods, means, and personnel by which an employer's operations are to be conducted, those reserved management rights do not include the right to unilaterally change the terms and conditions of employment. See also, *Santa Fe County and AFSCME,* 1 PELRB No.1 (Nov. 18, 1993). ("Terms and conditions of employment" is a broad term that includes not only workloads and work assignments; definition of bargaining unit work, etc. but discipline and work rules and procedures regarding the discharge of employees. Even where the Employer makes core managerial decisions with respect to bargaining unit employees that are within its reserved management rights, the effect, consequence, or impact and the implementation of such decisions remain as mandatory bargaining subjects).

In the instant case the parties have agreed at paragraphs 6 and 7 of the Preamble to their CBA:

> "This Agreement specifically describes the entire agreement between the County and the NMCPSO/SFCDSA. The Sheriff's Office Standard Operating Procedures, the Santa Fe County Human Resources Handbook or other policies and procedures promulgated through the authority of the Sheriff, shall govern any issues not agreed to herein. Management shall meet with the NMCPSO/SFCDSA regarding changes in County policies, procedures or regulations that affect wages, hours, or terms and conditions of employment. The NMCPSO/SFCDSA may also identify alternative solutions and provide suggestions not governed by this Agreement. Meetings regarding changes to this Agreement should be held at times mutually agreed to by the parties.
>
> All amendments to or modifications of the subject matter of this Agreement must be by mutual agreement and shall be of no force or effect until ratified and approved by the BCC and the NMCPSO/SFCDSA membership. It is understood and agreed that none of the foregoing rights and responsibilities will be exercised in a manner that is inconsistent with the provisions of this Agreement."

What the foregoing means in the context of the instant case is that while the County's right to implement a policy requiring COVID vaccination without further bargaining is covered by the parties' contract, the imposition of discipline "up to and including termination" is not. It is an aspect of a new work rule that could be grounds for discipline and consequently is a mandatory subject of bargaining.

I have considered Section 28 of the same CBA upon which I relied to conclude that the County's right to impose a vaccine mandate was covered by the contract, which acknowledges the County Sheriff's wide discretion to impose discipline:

> "A. The County reserves the right to investigate all allegations of a Bargaining Unit Employee's misconduct and poor performance, and to discipline the bargaining unit employee as it determines to be necessary."

and,

> "F. Nothing in this section shall prevent the County from disciplining a bargaining unit employee for just cause."

I conclude that the discipline is not covered by Section 28 of the CBA in the same way as is Section 2, because it is impossible that the new work rule could have been contemplated by the parties at the time the CBA was bargained. By its very nature and by definition the emergency that justified

imposition of the mandate means that it was "a one-time crisis that was unforeseen." In that way it differs from Section 2 in which management's ability to make executive decisions swiftly in response to an emergency is expressly preserved. Such emergency responses need not necessarily carry with them a disciplinary component, but when they do, that component is a mandatory subject of bargaining.

MV Transportation, Inc., infra holds that:

> "…if the agreement does not cover the employer's disputed act, and that act has materially, substantially and significantly changed a term or condition of employment constituting a mandatory subject of bargaining, the employer will have violated Section 8(a)(5) and (1) unless it demonstrates that the union clearly and unmistakably waived its right to bargain over the change or that its unilateral action was privileged for some other reason."

I disagree with the County's position that an individual employee's contract grievance over his or her termination constitutes a sufficient remedy for a failure to bargain in good faith over this mandatory subject. This Board has ruled many times in the context of deferral that arbitration is appropriate only when (a) the dispute arises within the confines of a collective bargaining relationship, (b) the employer has indicated its willingness to resolve the issue through the grievance-arbitration process, and (c) the contract and its meaning lie at the center of the dispute). See *AFSCME, Local 3999 v. City of Santa Fe,* PELRB No. 111-14. See also *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971). Deferral is not appropriate in cases where, as here, there is a break down in the collective bargaining relationship and where the PPC alleges discrimination, interference with PEBA rights, or violation of another PEBA right that is independent of the contract. See *AFSCME, Council 18 v. N.M. Dep't of Health*; 06-PELRB-2007 (December 3, 2007) (In re: PELRB 168-06); JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters 17 V, 18 III, IV and V, and cites therein. Additionally, the argument for deferral will be "far less compelling" as a matter of administrative efficiency" when the PPC raises both contract claims and other claims that the PEBA has been violated. In *Windstream Corporation and International Brotherhood of Electrical Workers, AFL–CIO, CLC on*

behalf of its affiliated Local Unions 463, 1189, 1507, 1929, 2089, and 2374, Case 6–CA–35290 352 NLRB 44 the NLRB wrote:

> "We agree with the judge that the allegation that the Respondent unilaterally implemented a "zero tolerance" ethics policy in violation of Sec. 8(a)(5) is not appropriate for deferral pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971), and its progeny. In declining to defer under *Collyer*, we rely in particular on *Arvinmeritor, Inc.*, 340 NLRB 1035 fn. 1 (2003), where the Board quoted from *American Commercial Lines*, 291 NLRB 1066, 1069 (1988), which held, in pertinent part:
> '[W]hen, as here, an allegation for which deferral is sought is inextricably related to other complaint allegations that are either inappropriate for deferral or for which deferral is not sought, a party's request for deferral must be denied.'"

Having determined that the parties were obliged to bargain in good faith concerning the disciplinary impact of its vaccine mandate, I further conclude that a preponderance of the evidence establishes that the County did, in fact, bargain the impact in good faith to impasse. [6]

For this conclusion I rely on Union Exhibits B, C, D and F in which it appears that at least one offer and counteroffer were exchanged and the resulting proposed policy was rejected by the union's membership, resulting is a declaration of impasse. While the County did not change its position concerning its "right" to impose discipline up to and including termination, it must be remembered that a party is not required to make a concession in order to be compliant with its good faith obligation pursuant to NMSA 1978 § 10-7E-17(A)(1).

Whenever, as is the case here, neither party agrees to the other's proposal or will not make a concession, the legislature provided for an impasse procedure set forth in § 18 of the Act for the purpose of rectifying those situations. That is where we find ourselves as of this decision – with the parties awaiting arbitration pursuant to § 18 of the Act. Accordingly, the last issue before this Board

[6] The County's immediate response on September 1st to the Union's demand to bargain was "[a]lthough you submitted a demand to bargain, the County does not have to, nor does it intend to, bargain over the Policy" and the Policy "is anticipated to be signed and distributed to County employees tomorrow." Exhibit B, pp. 4-5. At some point, however, the County's refusal to bargain changed because it did thereafter engage in formal bargaining with the Union for over two months until the parties reached impasse in early November. See Exhibits D, E and F.

for determination is whether Santa Fe County committed a PPC by unilaterally imposing the disciplinary provisions in its vaccine mandate once the parties reached impasse in their bargaining.

III. SANTA FE COUNTY'S UNILATERAL IMPLEMENTATION OF ITS LAST, BEST, FINAL OFFER AS IT PERTAINS TO THE IMPOSITION OF DISCIPLINE FOR NON-COMPLIANCE WITH ITS VACCINE MANDATE POLICY, VIOLATES ITS DUTY TO BARGAIN IN GOOD FAITH.

As re-stated herein, the County was obliged to bargain in good faith regarding its vaccine policy's imposition of discipline up to and including termination and met that obligation by bargaining to impasse over that issue.

The County's November 11, 2021 response to the Union's declaration of impasse was to declare that the policy would be immediately implemented. See Exhibit G. The County admits in its closing brief that there is no dispute that a valid impasse was declared and existing and that it implemented its last, best offer which was presented to Complainants during negotiation of the policy. (During the pendency of this PPC the Union argues that several Sheriff's Deputies have been terminated under the vaccine mandate for non-compliance or have termination proceedings pending.)

The County takes the position that under NLRA precedent it had the right to implement its last, best offer following declaration of an impasse and cites to numerous NLRB cases for that proposition. However, this Board has historically departed from NLRB precedent on this point, declaring that it is the public policy of New Mexico under its Public Employee Bargaining Act that a public employer *may not* unilaterally implement its last, best offer following declaration of an impasse.

For example, the original version of the New Mexico Public Employee Bargaining Act, NMSA 1978 § 10-7D-1, *et seq.* was construed as prohibiting an employer's unilaterally implementation of its last, best offer upon bargaining to impasse. In *Santa Fe County and AFSCME*, 1 PELRB No. 1 (Nov. 18, 1993) (Case No. PPC 1-93(9)), the PELRB invalidated the County's labor-management ordinance

insofar as it permitted the governing body to make a final and binding settlement of impasse if the parties could not agree as to a fact finder's report as not equivalent to the impasse procedure of PEBA, inimical to the concept of collective bargaining and that it could deter the duty to bargain in good faith. See also, *AFSCME and Los Alamos County Firefighters v. County of Los Alamos*, 1 PELRB No. 3 (Dec. 20. 1994), the PELRB struck down a local ordinance that permitted the governing body to accept, reject, or modify the fact finder's recommendations as they see fit as not equivalent to the impasse procedure of PEBA. The Board found such unilateral implementation by the governing body to be "…inimical to the concept of collective bargaining" and a possible deterrence to fulfilling the duty to bargain in good faith.

Unlike the NLRA, the PEBA requires mediation and binding arbitration following an impasse in negotiations, a requirement legislatively imposed as trade-off for prohibiting public employees from engaging in strikes in NMSA 1978 § 10-7E-21 (2020). For example, in *IAFF Local 2362 v. City of Las Cruces*, 09-PELRB-2009 (July 6, 2009) (In re: PELRB 103-09) in the course of striking down a local labor ordinance impasse resolution procedures as contrary to the PEBA, this Board's Hearing Officer found:

> "An underlying basis for collective bargaining is that the disparity between the enormous power of capital, private or public, and labor, can only be brought into balance by organized labor. In the private sector when an inability to agree on a contract occurs there is an option of a strike or a lockout. In the public sector neither of these options is allowed. The tradeoff is final and binding arbitration."

As a consequence the Las Cruces policy allowing its City Council to make a final and binding decision after an impasse in contract negotiations was declared to be illegal under Section 26(B) of the Act providing for binding arbitration by a neutral arbitrator if mediation is unsuccessful.

In a similar case, the National Education Association and the West Las Vegas School District were at impasse in their contract negotiations when the School District announced its intent to unilaterally impose a schedule change not agreed to by the union. NEA filed a PPC alleging bad faith bargaining

and requested a pre-adjudication injunction. This Board granted the injunction on the ground that §18(D) of the PEBA requires an existing contract to remain in effect, unless injunction is granted the union will suffer irreparable harm.[7] *NEA v. West Las Vegas School District*, 21 PELRB 13 (August 19, 2013).

Furthermore, the State law contains an "evergreen" provision, whereas the NLRA does not. NMSA 1978 § 10-7E-18(D)[8] provides:

> "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 written agreement. However, this shall not require the public employer to increase any employees' levels, steps or grades of compensation contained in the existing contract."

In *CWA Local 7911 v. County of Socorro*, 08-PELRB-2009 (July 6, 2009), the parties reached impasse in their negotiations for a successor agreement approximately two years after their CBA expired. After mediation, Socorro County unilaterally implemented its last, best, final offer, which contained a number of mandatory subjects of bargaining to which the Union had not agreed. CWA filed a PPC against the County of Socorro complaining that by unilaterally implementing its last, best, final offer after impasse the County violated NMSA 1978 § 10-7E-19(C), (F) and (H). The PELRB affirmed its hearing officer's conclusion that:

> "The specific language of 10-7E-18(D) NMSA 1978 Comp. that reads, '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 written

[7] The School District appealed and requested a stay of the Board's injunction with the 4th Jud. Dist. Ct. (J. Aragon) as case No. D-412-CV-2013-00347 and NEA sought a Writ of Mandamus as case No. D-412-CV-2013-00349. The District Court granted the Stay on October 15, 2013 "as it pertains to Appellant's implementation of the 5 x 5 schedule" without discussion of the grounds upon which it was granted "…until the Court rules on whether the Alternative Writ of Mandamus is made peremptory in cause No. D-412-CV-2013-00349, this Court rules on the appeal in the instant matter, or until further order of this Court." Two weeks later, the same Court granted NEA's Peremptory Writ finding that the School District violated this Board's injunction by implementing unilateral changes to the working conditions contrary to the Order, breached it non-discretionary duty to adhere to the Order issued by the PELRB while at the same time inexplicably ruled that the District's obligation to comply with the injunction continued to be stayed, thus shedding more heat than light on the subject of whether a public employer in New Mexico may unilaterally implement its last, best offer after impasse. The parties reached a settlement before hearing on the merits or further Court action.

[8] Reference to § 18(D) is not intended to imply that it is applicable to this case, only as further illustration why the State has departed from NLRA precedent on the issue of unilateral implementation upon reaching impasse.

> agreement.', is controlling and prohibits the implementation of unilateral changes in the wages, hours and all other terms and conditions of employment."

Counsel for Santa Fe County in the instant case, Dina Holcomb, then representing Socorro County, made the same argument then as she does now – that because the language in the National Labor Relations Act (NLRA) and the language in the PEBA are so similar that the PELRB should find as the National Labor Relations Board (NLRB) has concerning unilateral implementation of an employer's last, best final offer after impasse. This Board declined to do so adopting its hearing officer's rationale that while the language of the NLRA at Section 8(d) and Section 10-7E-17 of our PEBA concerning the scope of bargaining are similar, neither expressly permits an employer to implement its last, best, final offer after impasse. Rather, the NLRB has developed the principle of unilateral implementation of an employer's last, best offer through case law, as a tool to move the negotiations to some settlement, thus rejecting the argument that as regard unilateral implementation the language in the PEBA and the NLBA are not so similar as to apply NLRB precedent.

In the context of an expired contract this Board adopted its hearing officer's construction that the "evergreen" provision of Section 10-7E-18 (D) a public employer may not unilaterally implement changes in the CBA upon impasse and must continue the existing contract in full force and effect until replaced with another CBA.[9] As a remedy the PELRB ordered Socorro County to cease and desist from the unilateral implementation of its last, best, final offer and return all of the terms and conditions of employment back to the *status quo*.

[9] The PELRB's Hearing Officer recognized certain specific exceptions to this rule such as Section 10-7E-17(H) of the PEBA which provides that an impasse resolution by a public employer other than the state or the public schools and an exclusive representative that requires the expenditure of funds shall be contingent upon the specific appropriation of funds by the appropriate governing body and the availability of funds. An agreement provision by a local school board and an exclusive representative that requires the expenditure of funds shall be contingent upon ratification by the appropriate governing body and an arbitration decision shall not require the reappropriation of funds. None of these exception apply in the present case.

If a New Mexico public employer may not unilaterally implement its last, best, final offer at impasse after a CBA has expired, the argument is that much stronger that it may not do while that CBA is still in full force and effect.

Accordingly, I conclude that Santa Fe County's unilateral implementation of its last, best, final offer as it pertains to the imposition of discipline for non-compliance with its vaccine mandate policy, violates its duty to bargain in good faith in violation of NMSA 1978 § 10-7E-19 (F),(G) namely the impasse resolution procedures contained in PEBA, Section 10-7E-18(B)) and (H).

Even though the County has wide discretion over employee discipline, Effects of the termination cannot reasonably be construed as having also been waived because the COVID emergency prompting the new work rule did not exist at the time the CBA was bargained. As stated above, neither can they reasonably be construed as a reserved management right under contract coverage theory.

CONCLUSION: Reduced to its essence this case is about one thing: Whether Santa Fe County may unilaterally impose the last, best and final offer referred to in its November 11, 2021 response to the Union's declaration of impasse. I take this opportunity to re-iterate this Board's long-standing policy that a public employer under New Mexico's Public Employee Bargaining Act may not do so. Therefore, the County breached a duty to bargain in good faith by its unilateral imposition of discipline "up to and including termination" because that is an aspect of a new work rule that is grounds for discipline and consequently is a mandatory subject of bargaining not covered by the contract.

Therefore, for the foregoing reasons it is my recommended decision that the PELRB:

1. Enjoin the effectiveness and enforcement of the discipline up to and including termination of employment for non-compliance with the County's Revised Mandatory Vaccination Policy called for in that policy until binding arbitration pursuant to the PEBA, Section 10-7E-18(B) is completed;

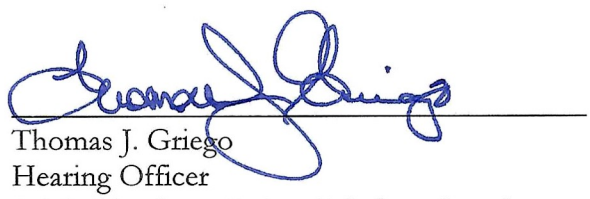
2. Order Santa Fe County to rescind any and all discipline issued to the Union's bargaining unit members pursuant to the Revised Mandatory Vaccination Policy at least until binding arbitration pursuant to the PEBA, Section 10-7E-18(B) is completed;

3. Reinstate any bargaining unit members terminated or suspended from duty pursuant to the Revised Mandatory Vaccination Policy and order any and all backpay including benefits and to any bargaining unit members that were disciplined under the Revised Mandatory Vaccination Policy until binding arbitration pursuant to the PEBA, Section 10-7E-18(B) is completed;

5. Order Santa Fe County to post notice of its violation of its duty to bargain in good faith by the unilateral implementation of its last, best, final offer as it pertains to the imposition of discipline for non-compliance with its vaccine mandate policy, in violation of NMSA 1978 § 10-7E-19 (F),(G) namely the impasse resolution procedures contained in PEBA, Section 10-7E-18(B)) and (H), in a form substantially conforming with that in Appendix A hereto.

No further bargaining should be ordered, as doing so would be inconsistent with the County's right to impose a vaccine mandate being covered by the parties' CBA and the status of the parties being at impasse concerning the effects of that mandate on terms and conditions of employment e.g. discipline and discharge from employment.

Issued, Tuesday, March 22, 2022.



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 Santa Fe County in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties and to require that the County abide by the Public Employee Bargaining Act, PELRB board rules and with the collective bargaining agreement entered into between N.M. Coalition of Public Safety Officers, Santa Fe County Deputy Sheriff's Ass'n. and Santa Fe County.

Although we were entitled to promulgate our Revised Mandatory Vaccination Policy on or about November 11, 2021, the County was nevertheless still obliged to bargain over the "effects" or "impact" of that policy, such as its requirement that non-compliance with the vaccine requirement would result in discipline up to and including termination of employment. As was found by the PELRB, we breached our obligation to bargaining in good faith when we unilaterally imposed our last, best and final offer after negotiations with your union ended in an impasse.

We acknowledge the above-described rights and responsibilities and will not in any like manner unilaterally impose mandatory subjects of bargaining or refuse to bargain in good faith and we agree to honor our commitments under the County policies, your CBA and the Public Employee Bargaining Act, including compliance with requiring just cause for imposing progressive discipline and following the provisions of NMSA 1978 § 10-7E-18 pertaining to Impasse resolution.

_____ Date:_____
Katherine Miller, County Manager