15-PELRB-2017

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

STATE OF NEW MEXICO,

Petitioner,

vs.

PELRB 107-17

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 18 and COMMUNICATION WORKERS OF AMERICA, LOCAL 7676,

Respondents.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board after Director Griego issued an October 20, 2017 letter decision dismissing the complaint on the ground that the parties are not at "statutory impasse" by operation of NMSA 1978, § 10-7E-18(A) (5). Whether the parties are at impasse is still a factual issue to be determined in two earlier filed PPCs - *AFSCME, Council 18 v. State of New Mexico*; PELRB 125-15 and *CWA, Local 7076 v. State of New Mexico;* PELRB 127-15, both of were stayed by agreement of the parties until the decision in this case. No objection or request for review has been received.

At its regularly scheduled meeting on November 14, 2017, by a 2-0 vote, (Chair Westbrook being absent) the Board being sufficiently advised finds that the parties are not at impasse as a matter of law.

THEREFORE THE BOARD ratifies Director Griego's decision dismissing the complaint and directs him to close this case without prejudice to the parties in PELRB 125-15 and PELRB 127-15.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

11-16-17
DATE

R.E. Bartosiewicz, Vice Chair
R.E. BARTOSIEWISCZ, BOARD VICE-CHAIR

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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Executive Director

October 20, 2017

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Re: ***State of New Mexico v. AFSCME Council 18 and CWA, Local 7076; PELRB 107-17***

Dear Counsel:

The issue before me for decision is whether, as a matter of law, the parties are at "statutory impasse" pursuant to NMSA 1978, § 10-7E-18(A) (5) and that the parties must therefore be ordered to arbitration. The issue was originally raised to this Board as a Declaratory Judgment Complaint. However, in a letter dated April 26, 2017 I indicated that I did not believe the PELRB may issue declaratory judgments, but was nevertheless accepting the State's Declaratory Judgment Complaint as a Prohibited Practice Complaint (PPC) stating a claim for alleged violations of NMSA 1978, Sections 10-7E-20(C) (refusal to bargain collectively in good faith) and (E) (failure or refusal to comply with the provisions of the PEBA). On August 24, 2017 the State moved to have the merits of this case decided on briefs rather than requiring the evidentiary hearing scheduled for Tuesday, October 17, 2017. A telephonic conference with representatives of the parties was held on August 30, 2017 in which the parties agreed that the issue presented by the State in this case, i.e. that whether the parties are at an impasse by operation of statute, is a legal conclusion that can be made by the Director and the PELRB through an interpretation of NMSA 1978 § 10-7E-18(A) (1)-(5) and applicable Board Rules.

Accordingly, the Hearing on the Merits scheduled for October 17, 2017 was vacated. Instead, the hearing date was used for oral argument on the parties' legal briefs. September 15, 2017 was established as the deadline for the State to file its legal brief in support of judgment in its favor as a matter of law and the Unions were to file a joint Response brief no later than October 2, 2017.

While Reply briefs are generally not permitted under the Board's rules, the parties agreed to allow a Reply from the State to be filed no later than Monday, October 9, 2017. All briefs were timely filed and duly considered. In its Brief the State clarified that its Motion for Judgment as a Matter of Law does not seek a finding that the Union violated Section 10 -7E-20(C) but is limited to Section 10-7E-20(E). Ultimately, the State asks the PELRB to determine, as a matter of law, that the parties are at impasse by operation of NMSA 1978, § 10-7E-18(A) (5) and that the parties must therefore be ordered to arbitration.

BACKGROUND:

The relationship between the State of New Mexico and the Unions representing State employees is governed by the Public Employee Bargaining Act, NMSA 1978 Sections 10-7E-1 *et seq.* (2003). The PEBA includes impasse resolution procedures in NMSA 1978, § 10-7E-18(A) that are uniquely applicable to the State in contrast to other public employers subject to § 10-7E-18 (B). § 10-7E-18(A) reads as follows:

> "A. The following negotiations and impasse procedures shall be followed by the state and exclusive representatives for state employees:
>
> (1) a request to the state for the commencement of initial negotiations shall be filed in writing by the exclusive representative no later than June 1 of the year in which negotiations are to take place. Negotiations shall begin no later than July 1 of that year;
>
> (2) in subsequent years, negotiations agreed to by the parties shall begin no later than August 1 following the submission of written notice to the state by the exclusive representative no later than July 1 of the year in which negotiations are to take place;
>
> (3) if an impasse occurs during negotiations between the parties, and if an agreement is not reached by the parties by October 1, either party may request mediation services from the board. A mediator from the federal mediation and conciliation service shall be assigned by the board to assist in negotiations unless the parties agree to another mediator;
>
> (4) the mediator shall provide services to the parties until the parties reach agreement or the mediator believes that mediation services are no longer helpful or until November 1, whichever occurs first; and
>
> (5) if the impasse continues after November 1, either party may request a list of seven arbitrators from the federal mediation and conciliation service. One arbitrator shall be chosen by the parties by alternately striking names from such list. Who strikes first shall be determined by coin toss. The arbitrator shall render a final, binding, written decision resolving unresolved issues pursuant to Subsection E of Section 17 [10-7E-17 NMSA 1978] of the Public

> Employee Bargaining Act and the Uniform Arbitration Act [44-7A-1 NMSA 1978] no later than thirty days after the arbitrator has been notified of his or her selection by the parties. The arbitrator's decision shall be limited to a selection of one of the two parties' complete, last, best offer. The costs of an arbitrator and the arbitrator's related costs conducted pursuant to this subsection shall be shared equally by the parties. Each party shall be responsible for bearing the cost of presenting its case. The decision shall be subject to judicial review pursuant to the standard set forth in the Uniform Arbitration Act."

Additionally, § 10-7E-18 (D) contains an "Evergreen" provision providing:

> "D. In the event that an impasse continues after the expiration of a contract, the existing contract will continue in full force and effect until it is replaced by a subsequent 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."

The State of New Mexico and the two Unions herein are parties to Collective Bargaining Agreements ("CBAs") that expired on December 31, 2011. Pursuant to NMSA 1978, § 10-7E-18(A)(1), the State and those Unions requested opening of negotiations for successor CBAs in June 2011. The State and Respondents commenced negotiations on the successor bargaining agreements on July 26, 2011. Since that time the parties have been unable to reach an agreement on successor CBAs. The Unions do not acknowledge that parties are at impasse and so, refuse to apply the impasse procedure referenced above. Rather, they seek to return to the bargaining table and either reach an agreement or to exhaust bargaining before resorting to statutory impasse procedures.

Both parties refer to and rely to some degree upon an Order dismissing without prejudice, a Declaratory Judgment action brought by the State in the Fifth Judicial District Court. In *State of New Mexico v. AFSCME and CWA, Local 7076*, Case No. D-504-CV-2016-00153, J. Freddie Romero found on March 6, 2017referring to this Board "...that the Plaintiff has not exhausted its administrative remedies because there are administrative remedies in place to determine whether an impasse has occurred between the parties. The Determination of whether an impasse has occurred between the parties involves questions of fact which should be resolved in the administrative context."

ANALYSIS AND CONCLUSIONS:

Whether the parties are at impasse as a matter of law, by operation of NMSA 1978, § 10-7E-18(A)(5) is an issue of statutory construction and a matter of first impression for this Board. "In construing a statute, our charge is to determine and give effect to the Legislature's intent." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135. In the quest to give effect to the Legislature's intent "We will construe the entire statute as a whole so that all the provisions will be considered in relation to one another." *Regents of Univ. of N.M. v. N.M.*

Fed'n of Teachers, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 962 P.2d 1236. Statutes must also be construed so that "no part of the statute is rendered surplusage or superfluous," *In re Rehab. of W. Investors Life Ins. Co.,* 100 N.M. 370, 373, 671 P.2d 31, 34 (1983), and we will not "read into a statute . . . language which is not there." *Burroughs v. Bd. of Cnty. Comm'rs,* 88 N.M. 303, 306, 540 P.2d 233, 236 (1975). Finally, the PELRB has the power to enforce provisions of the Public Employee Bargaining Act through the imposition of appropriate administrative remedies. NMSA 1978 § 10-7E-9(F) (2003).

The State takes the position that NMSA 1978, §§ 10-7E-18(A) (3) through (5) inclusive should be read to mean that if the State and a Union do not reach an agreement by November 1 of the contract year, they are necessarily at an impasse that requires review by an arbitrator whose function is "...limited to a selection of one of the two parties' complete, last, best offer" within 30 days of being notified of being chosen. See NMSA 1978, § 10-7E-18(A) (5).

In support of its position the State asserts that the two Unions' reliance on the "Evergreen Clause" of the PEBA to maintain their expired contracts in full force and effect is a tacit admission that the parties are at impasse. See, §10-7E-18(D).

I begin my analysis with the Unions' reliance on the "Evergreen Clause" as an admission. The State relies on the unions' answers to paragraph 10 of its PPC in which it asserted:

> "The Respondents refuse to acknowledge that the parties are at impasse. However, Respondents have relied on the 'Evergreen Clause' of the PEBA so that Union members can continue to be covered by the CBA that expired on December 31, 2011. See NMSA 1978, § 10-7E-18(D) ('In the event that an impasse continues after the expiration of a contract, the existing contract will continue in full force and effect until it is replaced by a subsequent written agreement.')."

In response, AFSCME Answered:

> "With respect to paragraph 10 of the Complaint, AFSCME admits that it and Petitioner are not at impasse and thus admits that it refuses to acknowledge that the parties are at impasse. AFSCME states that the 'evergreen clause' speaks for itself and any allegations regarding it are legal conclusions to which no response is required. In all other respects, AFSCME denies paragraph 10 of the Complaint."

CWA answered the allegations of paragraph 10 this way:

> "Respondent CWA Local 7076 admits that the parties - Petitioner and CWA are not at impasse and thus CWA has not acknowledged that the parties are at impasse in negotiations; Respondent CWA Local 7076 admits that pursuant to the 'Evergreen Clause' in the prior CBA between the parties provides that the existing contract remains in effect; and otherwise deny the allegations in paragraph 10 of the Complaint."

I see nothing in either union's Answer to paragraph 10 that would constitute an admission that the Unions are relying on the "Evergreen Clause" of the PEBA for continuation of their CBAs beyond their terms. To the contrary, CWA's Answer expressly refers not to PEBA's "evergreen" provision but to "...the 'Evergreen Clause' in the prior CBA..."

As the unions made clear in their oral arguments on August 17, 2017, they rely not on the statutory "Evergreen" Clause, PEBA §18 (D), but on a similar but distinctly different "evergreen" clause in the parties' expired CBAs – found at Article 43 of the AFSCME CBA and at Article 42 of the CWA CBA. The relevant portions of AFSCME's and CWA's CBAs read:

> "If either party provides notice to reopen for negotiations, this Agreement will continue in full force and effect until it is replaced by a subsequent written Agreement in accordance with PEBA."

The critical distinction is the absence of the phrase in PEBA Section 18 (D) "In the event *that an impasse continues* after the expiration of a contract..." (Emphasis added) from the CBAs "evergreen" clauses. Under the CBA clauses a state of impasse is not required, only that a successor contract has not been agreed upon. Accordingly, reliance upon the parties' CBAs "evergreen" clauses cannot be construed as an admission that the parties are at impasse.

With regard to whether the parties are at impasse as a matter of law by operation of NMSA 1978 § 10-7E-18(A)(5), I do not agree with the unions' position that Judge Romero disposed of that issue in their favor by his decision dismissing the State's Declaratory Judgment action. In brief the unions argue that because Judge Romero found that "The Determination of whether an impasse has occurred between the parties involves questions of fact which should be resolved in the administrative context" he was foreclosing the possibility of finding that the parties are at impasse as a matter of law – the existence of questions of fact being contrary to judgment as a matter of law. That the District Court recognizes proceedings before this Board as a proper venue for determining whether the parties are at impasse require factual findings includes those predicate facts necessary to determine whether the State is entitled to judgment on this issue as a matter of law. For example, to prevail on its PPC as a matter of law the State has the burden of establishing the predicate facts under NMSA 1978, §10-7E-18(A) e.g. that the parties are the state and exclusive representatives for state employees; that a request to the state for the commencement of initial negotiations was timely filed in writing; and that negotiations timely began; that an impasse exists and an agreement has not reached by the parties by October 1. Finally, predicate facts would include that either mediation failed or no agreement was reached by November 1, whichever occurs first. I am aided in my construction of the District Court's Order by reference to the Transcript of the Hearing before Judge Romero. At pages 38 and 39 Judge Romero discussed the basis for his Order:

> "Well, Counsel, the Court -- certainly the Court recognizes two sorts of issues that exist or two sorts of circumstances that exist in this case. Number one, this process has been going on for quite a bit of time. Secondly, the Court does not disagree that

> it can be a costly process and may very well be a costly process. The Court feels, however, that there is an administrative authority that exists to make the determinations that underlying the -- underlie the issues presented to this Court, specifically the issue of whether an impasse occurs -- has occurred. That determination can be made by the board, and then a -- if an impasse has occurred, that determination is made, then there is a procedure by which the case goes forward.
>
> If an impasse -- a determination is made that an impasse has not occurred, there may be other procedures administratively that exist. Or if they don't, then at that point, perhaps the case might be ripe for a district court determination.
>
> So the Court will find that there are administrative procedures in place to make the determinations that are sought in this particular case, namely a declaration as to whether an impasse has occurred, and then secondly, the issue of either way, what the proceedings are going forward."

Accordingly, it falls to this Board to determine if impasse exists whether by operation of law or under a more traditional analysis of the many factors used to determine whether a state of impasse exists. Therefore, I turn next to the question of whether the parties are at impasse as a matter of law.

The State reads §18 (A) of the PEBA as a mandate that if the State and a Union do not reach an agreement by November 1 of the contract year, they are per force at an impasse requiring arbitration. See §§ 10-7E-18(A) (4), (5). But that is not the only fair reading of §18 (A) nor is it the best reading in light of its relation to other provisions of the PEBA. As I read §18 (A) it operates, not as deadline by which the parties must reach agreement or be automatically deemed to be at impasse, but as a deadline before which the parties must remain at the table bargaining in good faith without declaring impasse. Understanding the statute this way gives maximum effect to the purpose of the Act espoused in NMSA 1978 §10-7E-2 of guaranteeing public employees the right to organize and bargain collectively with their employers and that found in NMSA 1978 §10-7E-17(A) requiring public employers and exclusive representatives to bargain in good faith by setting a date certain upon which negotiations are to begin and requiring the parties to remain at the bargaining for at least three months before declaring impasse and resorting to mediation or four months before resorting to arbitration. Most of all, it conforms with and gives effect to how PEBA itself defines "impasse" – as the "failure of a public employer and an exclusive representative, after good faith bargaining, to reach agreement in the course of negotiating a collective bargaining agreement." NMSA 1978 §10-7E-4 (K).

To read the statute as does the State, would require reading into the statutory definition of "impasse" the phrase "…or for the state and its unions, failure to reach an agreement by November 1 of the contract year pursuant to NMSA 1978, §10-7E-18(A)." That, we may not do. The rules of statutory construction do not allow us to "read into a statute . . . language which is not there." *Burroughs v. Bd. of Cnty. Comm'rs*, 88 N.M. 303, 306, 540 P.2d 233, 236 (1975).

The plain language of NMSA 1978, §10-7E-18(A) indicates that the October 1 mediation, and November 1 arbitration time deadlines uniquely applicable to the State under NMSA 1978, §10-7E-18(A) (3), (4) and (5), are only invoked "...*if* an impasse occurs during negotiations between the parties, *and if* an agreement is not reached by the parties by October 1..." and "*if* the impasse continues after November 1". (Emphasis added). The presence of impasse, which is a question of fact as that term is defined in NMSA 1978 §10-7E-4(K), is a predicate to application of the statutory deadlines, not a statutorily imposed bargaining status without reference to the good faith bargaining requirement that is in both the public policy statement underlying the PEBA as well as in the statutory definition of "impasse" itself.

By comparison, the State's reading of the statute would have a deleterious effect on the good faith bargaining requirement underlying the PEBA. If impasse is purely a function of time without regard to whether the parties have exchanged last, best offers, without regard to their bargaining positions or behavior at or away from the table, or indeed, without regard to whether they have been at the table at all, then the good faith bargaining duty is effectively written out of the law when the State or a State employees union is a party. The State's view of the statute would require us to take what is ordinarily a fact-intensive inquiry into whether parties have reached a good-faith impasse, and reduce it to an automatic process based on no fact other than November 1of the contract year passed without an agreement. I also note that the State asserts its position that § 18(A) operates as a "statutory impasse" provision, not after November 1 of the contract term in question, but six years after the parties' contract expired and bargaining on a successor contract began on July 26, 2011. In light of the foregoing I conclude that NMSA 1978, §10-7E-18(A) does not operate as a "statutory impasse" provision requiring that the parties be ordered to arbitration as a matter of law after that date.

Based on the foregoing the Respondents cannot reasonably be found to have committed a Prohibited Labor Practice by violating NMSA 1978 §10 -7E-20(E) (failure or refusal to comply with the provisions of the PEBA). Therefore, the State's Motion for Judgment as a Matter of Law is **DENIED** and this PPC shall be, and hereby is **DISMISSED**. There are currently pending before this Board, two cases involving the parties to this action: *AFSCME, Council 18 v. State of New Mexico*; PELRB 125-15; and, *CWA, Local 7076 v. State of New Mexico*; PELRB No. 127-15. Determining whether the parties are at impasse after "good faith bargaining" may be determined in those cases in a manner consistent with Judge Romero's Order in *State of New Mexico v. AFSCME and CWA, Local 7076*, Case No. D-504-CV-2016-00153. If necessary, leave to amend pleadings may be granted or the parties may stipulated to trying the issue of impasse to ensure that it is properly litigated in those cases.

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Thomas J. Griego
Executive Director