STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME, LOCAL 3022,

Complainant,

v. **PELRB 106-22**

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY,

Respondent.

ORDER

THIS MATTER came before the Public Employee Labor Relations Board ("Board") at its regularly scheduled meeting on August 2, 2022 upon the request of the Albuquerque Bernalillo County Water Utility Authority (ABCWUA) for review of Executive Director Griego's Letter Decisions dated June 27, 2022 and July 14, 2022. The June 27 Letter Decision considered the parties' cross motions for summary judgment related to AFSCME's Prohibited Practices Complaint filed on May 18, 2022, and granted AFSCME summary judgment on its claim that ABCWUA committed a prohibited labor practice under Section 10-7E-19(F) of the Public Employee Labor Relations Act by refusing or failing comply with its obligation to bargain collectively in good faith with AFSCME. The Executive Director's July 14 Letter Decision denied ABCWUA's Motion for Reconsideration of the June 27 Letter Decision granting AFSCME's motion for summary judgment.

After hearing the parties' oral arguments, reviewing the pleadings, and being otherwise sufficiently advised, the Board voted 3-0 to affirm Executive Director Griego's Letter Decisions dated June 27, 2022 and July 14, 2022.

THEREFORE, the Executive Director's decisions granting AFSCME summary judgment, as set forth in the Letter Decision dated June 27, 2022, and denying ABCWUA's Motion for Reconsideration, as set forth in the Letter Decision dated July 14, 2022, are **AFFIRMED**.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Mark Myers Digitally signed by Mark Myers Date: 2022.08.10 18:04:20 -06'00'

MARK MYERS, BOARD CHAIR

Aug 10, 2022

DATE

June 27, 2022

AFSCME, Local 3022
1202 Pennsylvania St. NE
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Attn: Rocky E. Gutierrez

Holcomb Law Office
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Attn: Dina Holcomb

Re: *AFSCME, Local 3022 v. ABCWUA; PELRB 106-22*

Dear Mr. Gutierrez and Ms. Holcomb:

This letter constitutes my decision granting Complainant's Motion for Summary Judgement and granting in part and denying in part, Respondent's Motion for Summary Judgement.

PROCEDURAL BACKGROUND

AFSCME Local 3022 filed the instant Prohibited Practices Complaint on May 18, 2022 alleging various violations of the Public Employee Bargaining Act after the Albuquerque Bernalillo County Water Utility Authority (ABCWUA) refused to negotiate with the Union over a successor contract, after the Union failed to request bargaining within a 30-day window called for in Article 61 of the parties' CBA. Specifically, the Union alleges that the Water Authority's refusal to bargain violates Sections: 10-7E-2 (Purpose of Act); 10-7E-15 (Exclusive Representation); 10-7E-17 (Scope of Bargaining); 10-7E-19(F) (Prohibiting an Employer refusing to bargain collectively in good faith with the exclusive representative); 10-7E-22 (Agreements Valid; Enforcement); 10-7E-24 (Existing Collective Bargaining Units); 10-7E-25 (Existing Bargaining Agreements); and 10-7E-26 (Existing Ordinances providing for Public Employee Bargaining). PELRB's Executive Director found the Complaint to be facially adequate the same date.

ABCWUA timely Answered the PPC on June 8, 2022 denying any violation of the PEBA because Complainant's request to negotiate was untimely under Article 61 of the applicable collective bargaining agreement and accordingly, ABCWUA's refusal to bargain/negotiate with the Union is appropriate.

The Executive Director, serving as the designated Hearing Officer in this case, conducted a Status and Scheduling Conference on June 8, 2022, at which, June 15, 2022 was established as the deadline for either party to file a Dispositive Motion such as the timely Motion for Summary Judgment before me now. June 23, 2022 was set as the deadline for parties to respond to any such filed motion.

Both parties timely filed competing Motions for Summary Judgement. The Union moved for judgement in its favor on the ground that the Employer's admitted refusal to bargain is a per se prohibited practice under NMSA 1978, § 10-7E-19(F) notwithstanding its admitted failure to demand bargaining within the time called for in Article 61 of the parties' CBA.

The Employer's Motion seeks dismissal of all the Union's claims on the ground that its request to open negotiations was untimely pursuant to the express terms of their collective bargaining agreement. Therefore, Respondent is under no obligation to engage in negotiations for a successor agreement. Furthermore, their motion alleges the Complaint fails to state claims for violations of Sections 2, 15, 17, 19, 22, 24, 25 and 26.

The parties timely filed their Responses to each other's Motions on June 23, 2022. In its Response to the Union's Motion ABCWUA argues that the Union's Motion concentrates on cases construing prohibitions against unilateral implementation of changes to wages, hours, or terms and conditions of employment, when such cases are irrelevant inasmuch as Respondent has not made, nor has Complainant alleged, any such unilateral changes. Instead, ABCWUA argues, this is a straightforward contract enforcement case and the Union should suffer the consequences of its failure to timely request to open negotiations as called for in Article 61 of the CBA. To do otherwise would be tantamount to allowing AFSCME, Local 3022 to violate the negotiated terms of its collective bargaining agreement contrary to § 10-7E-20(D) of the PEBA, (which prohibits a labor organization from refusing or failing to comply with a collective bargaining agreement or other agreement with a public employer) and § 10-7E-22 of PEBA (which sets forth the validity and enforceability of collective bargaining agreements).

In its Response to the Employer's Motion AFSCME, Local 3022 argues that ABCWUA's construction of Article 61 of the CBA is contrary to PEBA's purpose of guaranteeing public employees the right to bargain collectively with their employers and of promoting harmonious and cooperative relationships between public employers and public employees espoused by § 10-7E-2 of the PEBA. Furthermore, it argues that the mutual obligation of the parties to bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties, guaranteed by § 10-7E-17(A)(1) may not be conditioned upon timely notification of intent to bargain pursuant to the parties' CBA. The Union argues that ABCWUA's construction of Article 61 of the CBA renders the guarantees in § 17 moot, resulting in an absurdity, i.e. that ABCWUA is relieved of any obligation to bargain a successor contract unless and until the employer (and the employer alone) wants to make a change in terms and conditions of employment. Such a result would allow the parties' CBA to expire on June 30, 2022 without requiring one party to negotiate in good faith when the other party has requested such negotiations. The Union further relies on § 10-7E-17(C)to the effect that where there is a conflict between the PEBA and a CBA agreement, the

PEBA shall govern. Finally, AFSCME repeats its argument concerning prohibitions against a public employer's unilateral alteration of wages, hours or other terms and conditions of employment constituting a per se violation of the PEBA.

STANDARD OF REVIEW

When deciding a motion for summary judgment, the PELRB follows the New Mexico Rules of Civil Procedure, Rule 1-056. See *AFSCME Council 18 v. New Mexico Dep't. of Labor*, 01-PELRB-2007 (October 15, 2007). "Summary judgment is appropriate in the absence of any genuine issues of material fact and where the movant is entitled to judgment as a matter of law." *Montgomery v. Lomos Altos, Inc.,* 2007–NMSC–002, ¶ 16, 141 N.M. 21, 150 P.3d 971. *AFSCME v. State of N.M., Regulation & Licensing Dep't*, 5-PELRB-2013, PELRB No. 124-12, 2013 (Feb. 21, 2013). "The movant has the burden of producing 'such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted.'" *Id.* "If that threshold burden is met by the Movant, the non-moving party then must 'demonstrate the existence of specific evidentiary facts which would require trial on the merits.'" *Id.* Once the movant meets its burden, the non-moving party then must "demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Summers v. Ardent Health Serv.,* 2011 -NMSC- 017 ¶ 10, 150 N.M. 123. "Summary Judgment will be granted only when there are no issues of material fact, with the facts viewed in the light most favorable to the non-moving party."

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Complainant and Respondent entered into a collective bargaining agreement which expires on June 30, 2022. (Complaint at first sentence; Answer at ¶ 1).
2. I take Special Notice of Articles 59 (Savings Clause), 60 (Integration Clause) and 61 (Term of Agreement) of the parties' collective bargaining agreement Exhibit A to the Water Authority's Motion for Summary Judgement.

    a. Article 59 provides:

    > "If any portion of this Agreement is invalidated by the passage of legislation or a decision of a court of competent jurisdiction, such invalidation shall apply only to those portions thus invalidated and the remaining portions of this Agreement not invalidated shall remain in full force and effect. If any provision or provisions are declared to be in conflict with a law, both parties shall meet immediately, if requested in writing by either party, for the purpose of renegotiating an agreement on provisions invalidated."

    b. Article 60 provides:

    > "A. This Agreement specifically describes the entire agreement between the Authority and the Union. There are no other agreements, memoranda of

understanding or any other express or implied agreements between the parties and the parties have had the opportunity to negotiate on all items. Labor Board cases pending at the time of execution of this Agreement as signed in a Memorandum of Understanding are incorporated herein and are considered resolved. Any matters not addressed in this Agreement are subject to the Authority's policies, procedures, rules, and regulations. Should there exist any conflict between the terms of this Agreement and the Authority's policies, procedures, rules, or regulations, this Agreement shall control. All amendments to or modifications of this Agreement must be by written mutual agreement and shall be of no force or effect until ratified and approved by the Authority's Executive Director and the Union.

B. Therefore, the Authority and the Union for the duration of this Agreement each voluntarily and unqualifiedly agree to waive the right to oblige the other party to bargain with respect to wages, hours, or any other terms and conditions of employment unless mutually agreed in writing otherwise, even though the specific subject or matter may not have been within the knowledge or contemplation of either or both parties at the time they negotiated or executed this Agreement."

c. Article 61 provides:

"This Agreement is effective upon ratification by the parties and signature of the Union President and Executive Director. The Agreement will remain in full force and effect through midnight, June 30, 2022. The parties may reopen negotiations for wages only if the Water Authority Governing Board fails to appropriate sufficient funding for the agreement in fiscal years 2020, 2021, and 2022. Either party may request negotiations for a successor agreement by submitting such request in writing to the other party no later than ninety (90) days and no earlier than one hundred twenty (120) days prior to the expiration date of this Agreement."

3. On May 11, 2022, the Union submitted a negotiations request to Erica Jaramillo (Human Resource Mgr.) via email. (Answer at ¶ 2).
4. Mrs. Jaramillo, on behalf of the Employer, responded to the Union's request for bargaining that the request was untimely under Article 61 of the CBA. Subsequent requests by the union to schedule negotiations on May 13, 2022, May 16, 2022, and May 17, 2022 have gone unanswered. (Affidavit of Joe Barrios)
5. Respondent admits ABCWUA is refusing to bargain/negotiate with the Union inasmuch as Complainant's request to negotiate was untimely by 40 days.

ANALYSIS AND CONCLUSIONS:

Respondent's Motion for Summary Judgement. I agree with the Employer that the Complaint contains no factual allegations that would support a claim for violation of NMSA 1978 §§ 10-7E-15; 10-7E-22; 10-7E-24; 10-7E-25 and 10-7E-26. Likewise, there is nothing in the Union's Response to the Employer's Motion for Summary Judgement that demonstrates the existence of specific evidentiary facts which would require trial on the merits on those claims.

More specifically, § 26 was repealed on July 1, 2020. Therefore, Summary Judgement dismissing that claim is appropriate. § 25 addresses collective bargaining agreements that existed prior to the enactment of PEBA on July 1, 2003 and is inapplicable to the collective bargaining agreement material to this case. Similarly, § 24 provides that bargaining units established prior to July 1, 1999 and exclusive representatives recognized on June 30, 1999 shall continue to be recognized after the effective date of the 2003 version of the PEBA. No facts are alleged that would suggest that the Respondent does not recognize either the bargaining unit or exclusive representative as they have always existed. Therefore, Summary Judgement dismissing those claims is appropriate.

§ 22 provides that written agreements between public employers and exclusive representatives shall be valid and enforceable according to their terms when entered into in accordance with the provisions of the Public Employee Bargaining Act and § 15 pertains to an exclusive representative's duty to act for all public employees in the appropriate bargaining unit and negotiate a collective bargaining agreement covering those employees. There is no dispute that the parties *have* negotiated a collective bargaining agreement and the instant dispute concerns an acknowledged refusal to bargain based on a specific provision of that agreement. In this regard the Complaint is somewhat schizophrenic insofar as it simultaneously seeks to enforce its contract and avoid the consequences of its terms. There are no allegations in the Complaint pertaining to exclusive representative status, an employee individually presenting a grievance, access to employees, use of facilities or property, meetings interfering with operations, bargaining unit information, or use of electronic mail systems. Therefore, Complainant has not alleged any facts that would support an alleged violation of §§ 22 or 15 and Summary Judgement dismissing those claims is appropriate.

To the extent that the Complaint is based on the acknowledged refusal to bargain after the Union's May 11, 2022 demand, such claims are best addressed under Complainant's claims for violation of Sections 10-7E-2, 10-7E-17; 10-7E-19(F)[1], for which Summary Judgment is denied.

NMSA 1978 § 10-7E-2 (2020) sets forth the purpose of PEBA as being:

> "…to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public

[1] Although the alleged violations of §§ 10-7E-2 and 10-7E-17 arguably would constitute a prohibited practice, if proven, pursuant to § 10-7E-19(G) (prohibiting a public employer's refusal or failure to comply with a provision of the Public Employee Bargaining Act), the Union has not specifically pled a violation of § 19(G). Nevertheless, violations of §§ 2 and 17 are relevant to the "good faith" element in § 10-7E-19(F), which has been specifically plead.

> employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions."

The premise of ABCWUA's Motion with regard to the § 2 claim is that the preference for harmonious and cooperative relationship is best promoted by strict compliance with Article 61 of the CBA by both parties. That premise is not indisputable as a matter of law for the reasons that appear below and so, Summary Judgement in favor of the Employer is denied as to the Union's claim that § 2 has been violated.

Similarly, Summary Judgement in favor of the Employer is denied as to Plaintiff's § 17 claim. NMSA 1978 § 10-7E-17 (2020) in pertinent part provides:

> "A. Except for retirement programs provided pursuant to the Public Employees Retirement Act [Chapter 10, Article 11 NMSA 1978] or the Educational Retirement Act [Chapter 22, Article 11 NMSA 1978], public employers and exclusive representatives:
> (1) 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; and
> (2) shall enter into written collective bargaining agreements covering employment relations. Entering into a collective bargaining agreement shall not obviate the duty to bargain in good faith during the term of the collective bargaining agreement regarding changes to wages, hours and all other terms and conditions of employment, unless it can be demonstrated that the parties clearly and unmistakably waived the right to bargain regarding those subjects. However, no party may be required, by this provision, to renegotiate the existing terms of collective bargaining agreements already in place.
> B. In regard to the Public Employees Retirement Act and the Educational Retirement Act, a public employer in a written collective bargaining agreement may agree to assume any portion of a public employee's contribution obligation to retirement programs provided pursuant to the Public Employees Retirement Act or the Educational Retirement Act. Such agreements are subject to the limitations set forth in this section.
> C. The obligation to bargain collectively imposed by the Public Employee Bargaining Act shall not be construed as authorizing a public employer and an exclusive representative to enter into an agreement that is in conflict with the provisions of any other statute of this state; provided, however, that a collective bargaining agreement that provides greater rights, remedies and procedures to public employees than contained in a state statute shall not be considered to be in conflict with that state statute. In the event of an actual conflict between the provisions of any other statute of this state and an agreement entered into by the public employer and the exclusive representative in collective bargaining, the statutes of this state shall prevail."

The parties do not dispute that the Union's request for bargaining includes mandatory subjects of bargaining e.g. wages, hours or other terms and conditions of employment. An employer commits a a per se violation of its duty to bargain in good faith under Section 17 and thus, commits a prohibited labor practice pursuant to NMSA 1978 § 10-7E-19(F) and (G) (2020) when it refuses to bargain collectively in good faith with the exclusive representative or refuse or fails to comply with a its bargaining duty.[2] Neither does the Employer dispute that it refuses to bargain despite demand on the premise that it is justified in its refusal by operation of Article 61 of the CBA and by application of NMSA 1978 § 10-7E-22 (2020), which provides:

> "Collective bargaining agreements and other agreements between public employers and exclusive representatives shall be valid and enforceable according to their terms when entered into in accordance with the provisions of the Public Employee Bargaining Act."

To grant the ABCWUA's Motion as it concerns the Union's Section 17 claim, requires a conclusion that Article 61 of the parties' CBA was entered into "in accordance with the provisions of the Public Employee Bargaining Act" before one may further conclude that it is enforceable to foreclose all bargaining as the Employer posits. For reasons that are discussed more fully in the analysis of the Union's Motion for Summary Judgement below, the undisputed facts do not support such a conclusion. Therefore, Summary Judgement in favor of the Employer is denied as to the Union's claim that § 17 has been violated resulting in a prohibited labor practice under NMSA 1978 § 10-7E-19(F) (2020).

Complainant's Motion for Summary Judgement. I agree with ABCWUA that cases and argument by the Union referring to the unilateral implementation of changes to wages, hours, or terms and conditions of employment are not germane. ABCWUA has not made, nor has Complainant alleged, any unilateral changes to wages, hours, or terms and conditions of employment. To the contrary, by insisting on enforcement of its interpretation of Article 61, ABCWUA is foreclosing any and all changes to wages, hours, or terms and conditions of employment in perpetuity, unless there are changes that ABCWUA wants to make. Then, and only then, must bargaining take place.

I further agree with ABCWUA that this is a straightforward case of contractual construction and I conclude that a plain reading of Article 61 reveals that it is unenforceable to excuse a refusal to negotiate for an untimely request to open negotiations. Article 61 of the parties' CBA is clear and unambiguous on its face. Therefore, I do not rely on evidence extrinsic to the contract. To the extent that I rely on rules of contractual construction or by traditional rules of grammar and punctuation, to reach a reasonable interpretation of the contract, then that issue may be considered

[2] By analogy, there is a long line of cases beginning with *NLRB v. Borg-Warner Corp., Wooster Division*, 356 U.S. 342 (1958) to the effect that insisting to impasse on an illegal subject is prohibited. See also, *Honolulu Star-Bulletin,* 123 NLRB 395, enforcement denied on other grounds, 274 F.2d 567 (D.C. Cir. 1959) (inclusion of an illegal subject in a CBA is prohibited).

as one of law. See, *Smith v. Tinley*, 100 N.M. 663, 665, 674 P.2d 1123, 1125 (1984); *Schultz & Lindsay Constr. Co. v. State*, 83 N.M. 534, 536, 494 P.2d 612, 614 P.2d 1123, 1125 (1984).

I begin my analysis with the language of Article 61 essential to this case:

> "Either party *may* request negotiations for a successor agreement by submitting such request in writing to the other party no later than ninety (90) days and no earlier than one hundred twenty (120) days prior to the expiration date of this Agreement."

(Emphasis added).

By using the permissive term "may" rather than the mandatory terms "will" or "shall" the time frame negotiated therein is properly read as being aspirational, rather than mandatory.

Adopting ABCWUA's interpretation of Article 61 as argued in its Motion for Summary Judgement, would have the result of compelling AFSCME, Local 3022's members to work from this day forward forever under its present contract, foreclosing forever collective bargaining between the parties except on issues ABCWUA and the Union might agree to bargain someday. That day might never come. Such an interpretation is utterly inconsistent with the mutual obligation to bargain in good faith set forth in NMSA 1978 § 10-7E-17 (2020). I further conclude that the legislature did not intend the provisions of § 10-7E-17 to the effect that "…neither the public employer nor the exclusive representative shall be required to agree to a proposal or to make a concession" or that "…no party may be required, by this provision, to renegotiate the existing terms of collective bargaining agreements already in place" to forever foreclose future bargaining by operation of the PEBA's "evergreen provision".[3] When one party refuses to negotiate at all, there have been no offers and counteroffers so that it cannot be said that the parties continue to be at impasse after expiration of their contract. The PEBA's "evergreen provision", intended as a shield to protect the status quo while the parties proceed through mediation and arbitration under the PEBA's impasse process, cannot be wielded as a sword, to cut down any attempt by a union to negotiate a successor contract until such time (if ever) that it pleases the employer to do so. That outcome is inconsistent with the purpose of the PEBA set forth in NMSA 1978 § 10-7E-2 (2020) "…to guarantee public employees the right to …bargain collectively with their employers, [and] to promote harmonious and cooperative relationships between public employers and public employees…".

Therefore, I conclude that Article 61 is unenforceable, as ABCWUA construes it, pursuant to NMSA 1978 § 10-7E-22 (2020), which provides:

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[3] NMSA 1978 § 10-7E-17(D) (2020), commonly referred to as PEBA's "evergreen provision" provides that "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."

> "Collective bargaining agreements and other agreements between public employers and exclusive representatives shall be valid and enforceable according to their terms *when entered into in accordance with the provisions of the Public Employee Bargaining Act.*"

The undisputed facts support a conclusion that Article 61, as construed by ABCWUA, is not entered into in accordance with the provisions of the Public Employee Bargaining Act because it violates Section 17 and 2 of the Act for the reasons set forth above.

The interpretation of Article 61 as aspirational rather than mandatory, as I conclude should be done in this decision, avoids a conflict with the PEBA requiring a declaration that the PEBA must prevail over the collective bargaining. See, NMSA 1978 § 10-7E-17(C) (2020) which states:

> "The obligation to bargain collectively imposed by the Public Employee Bargaining Act shall not be construed as authorizing a public employer and an exclusive representative to enter into an agreement that is in conflict with the provisions of any other statute of this state; provided, however, that a collective bargaining agreement that provides greater rights, remedies and procedures to public employees than contained in a state statute shall not be considered to be in conflict with that state statute. In the event of an actual conflict between the provisions of any other statute of this state and an agreement entered into by the public employer and the exclusive representative in collective bargaining, the statutes of this state shall prevail."

Additionally, construing Article 61 to be aspirational rather than mandatory, as I conclude should be done in this decision, avoids further analysis of what would need to be done in the face of an illegal contract term. It is axiomatic that neither party may be required to follow an illegal contract term. As we read in the Developing Labor Law treatise, Chapter 16 VI.A: "Insistence upon an illegal provision thus violates the duty to bargain."

Therefore, AFSCME, Local 3022 has met its burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law as to its claim that ABCWUA has violated §§ 2 and 17 of the Act thereby committing a prohibited labor practice in violation of § 10-7E-19(F). ABCWUA's Response to the Motion raises no issue of material fact that would foreclose this entry of Summary Judgment.

CONCLUSION. There is no genuine issue of material fact and the ABCWUA is entitled to judgement as a matter of law with regard to Complainant's claims brought under NMSA 1978 §§ 10-7E-15; 10-7E-22; 10-7E-24; 10-7E-25 and 10-7E-26. Summary Judgement in favor of ABCWUA is denied in all other respects.

There is no genuine issue of material fact and the Union is entitled to judgement as a matter of law with regard to its claims that Article 61 as applied by ABCWUA in this case violates §§ 2 and 17 of the Act, with facts viewed in the light most favorable to the Respondent and drawing all inferences

in favor of ABCWUA. Accordingly, ABCWUA has committed a prohibited labor practice in violation of § 10-7E-19(F) by its refusal to engage in negotiations as established by the undisputed facts in this case so that Summary Judgement on that issue is granted in favor of AFSCME, Local 3022.

WHEREFORE, Respondent is ordered to:

(1) Cease and desist from all violations of the PEBA as set forth in this Decision and immediately begin good faith negotiations with AFSCME, Local 3022 with the objective of reaching a successor collective bargaining agreement before the current contract's expiration on June 30, 2022;
(2) Post notice of the foregoing violations of the PEBA together with its assurances that it will comply with the law in a form acceptable to the Union in all places where notice to employees is commonly posted.

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Thomas J. Griego
Executive Director

July 14, 2022

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Holcomb Law Office
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Albuquerque New Mexico 87120
Attn: Dina Holcomb

Re: ***AFSCME, Local 3022 v. ABCWUA; PELRB 106-22***

Dear Mr. Gutierrez and Ms. Holcomb:

This matter came before me on July 12, 2022 on the Water Authority's Motion for Reconsideration. This letter constitutes my decision regarding that Motion.

The Water Authority asserts two points to support its Motion for Reconsideration: The gravamen of Respondent's first point is that because neither party knew Article 61 of their CBA would be deemed unenforceable at the time it was negotiated, my subsequent decision that it is so, necessarily means that both parties are "guilty" of negotiating an illegal term in the collective bargaining agreement. Consequently, because each party is equally at fault in that respect, it would be unjust to find that the Water Authority alone committed a prohibited practice by merely trying to enforce a contract provision that up until that point it did not know was unenforceable.

Respondent's second point is that had no intent of violating PEBA by its refusal to bargain but "… instead, was ensuring it was promoting efficient operations and harmonious relationships by applying the express and agreed-upon terms of the negotiated agreement in compliance with §§ 10-7E-22 and 10-7E-19(H)."

The first argument misinterprets the ground upon which I found that ABCWUA committed a prohibited practice. ABCWUA committed a PPC, not because it negotiated an illegal term, but because of its refusal to bargain mandatory subjects despite demand in violation of 19(F). It is circular reasoning to argue that no PPC for refusal to bargain can lie unless the contract term upon which a party relies for its refusal is first found to be unenforceable. When a party refuses to bargain

mandatory subjects despite demand, based on its interpretation of a contract term, it does so at the risk that its interpretation may subsequently be found to be incorrect. That this Board finds a PPC to have been committed by that refusal to bargain serves as a necessary disincentive for parties to interpret their contractual obligations as limiting public employees' rights to engage in collective bargaining through exclusive representatives of their choice guaranteed by Section 10-7E-5 of the Act.

The Water Authority's first point also misinterprets the legal analysis underlying my finding that the Water Authority violated Section 19(F) by its failure to bargain. I remind the Water Authority that by using the permissive term "may" rather than the mandatory terms "will" or "shall" in Article 61 of the parties' CBA, the time frame negotiated therein is properly read as being aspirational, rather than mandatory. Accordingly, Article 61 is not an illegal term that does not absolve the Water Authority of its bargaining obligation when properly understood.

It is ABCWUA's interpretation of Article 61 as argued in its Motion for Summary Judgement, that would result in an illegal contract term, which interpretation I rejected as being inconsistent with the mutual obligation to bargain in good faith set forth in Section 17 of the Act. I concluded therefore, that Article 61 is unenforceable, "*…as ABCWUA construes it*". Perhaps it would have been clearer to have written that Article 61 *would be unenforceable, as ABCWUA construes it*, but the meaning of both phrases is the same.

Accordingly, having considered the Water Authority's Motion for Reconsideration I conclude that the Motion is without merit and is, therefore, DENIED.

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Thomas J. Griego
Executive Director