1A-PELRB-2006

BEFORE THE STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In the Matter of

HENRIETTA ROMERO, et al.,

Petitioners,

and **Case No. 315-05**

STATE EMPLOYEE ALLIANCE-COMMUNICATION WORKERS OF AMERICA, LOCAL 7076,

Respondent.

In the Matter of

BRUCE WALKER and LORETTA GONZALES,

Petitioners,

and **Case No. 316-05**

STATE EMPLOYEE ALLIANCE-COMMUNICATION WORKERS OF AMERICA, LOCAL 7076,

Respondent.

DECISION AND ORDER

These cases, consolidated herein for review, come to us on the Petitioners' request for PELRB review in the wake of the Director's dismissal of their Petitions for Decertification for lack of adequate showing of interest.

On October 3, 2005, employees of the Miners' Colfax Medical Center of the State of New Mexico ("Miners'," Case No. 315-05), and the General Services Department of the State of New Mexico ("GSD," Case No. 316-05) filed separate Petitions for Decertification pursuant to Section 16 of the Public Employee Bargaining Act (PEBA), NMSA 1978, §§ 10-7E-1 through 10-7E-26.[1] The petitions were signed by a member of the union representing the agency, the State Employee Alliance-Communication Workers of America (SEA-CWA or Union), and were accompanied by a thirty percent or greater showing of interest.[2]

The Union moved to dismiss the petitions under the "merger doctrine." Between 2003 and 2004, the Union organized ten separate agencies or departments on an individual basis, including the agencies referenced herein, and the Union obtained recognition as the agencies' and departments' exclusive representative under PEBA pursuant to card count.[3] Thereafter, on September 9, 2004, the Union and the State entered into a single collective bargaining agreement that merged all ten of the individual agencies and departments represented by the Union into a single statewide bargaining unit. Accordingly, the Union maintained that under the merger doctrine Petitioners were

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[1] A third Petition for Decertification of SEA-CWA was filed by an employee of the Workers' Compensation Administration, Case No. 317-05, and dismissed for the same reason, but the decision in that case was not appealed.

[2] The Miners' Petition was supported by signatures from 79 Miners' employees, while the eligible employee list provided by the employer indicates that there are 141 Miners' employees included within the bargaining unit represented by SEA-CWA. Signatures from 97 GSD employees supported the GSD Petition, while the eligible employee list provided by the employer indicates that there are 255 GSD employees included within the bargaining unit represented by SEA-CWA.

[3] The other seven agencies organized by SEA-CWA and merged into the single collective bargaining agreement with the Stare are Commission for the Blind; Commission on Status of Women; Department of Cultural Affairs; Department of Environment; Department of Health; Organic Commodities Commission; and the State Treasurers' Department *See* Appendix A, "Positions Included in the Bargaining Unit," 2004-2005 Agreement between the State of New Mexico and State Employee Alliance—The Communications Workers of America, AFL-CIO, CLC at 60-63.

required to produce a thirty percent (30%) showing of interest of the total state personnel covered by the SEA-CWA collective bargaining agreement, rather than merely a showing of interest within their own agencies or departments.

On November 21, 2005, Director Juan Montoya of the New Mexico Public Employee Labor Relations Board (PELRB or Board), acting as a Hearing Examiner, conducted separate hearings in these matters, during which the parties were given the opportunity to present testimony, documentary evidence and argument. At the conclusion of each of the hearings, the Hearing Examiner issued an oral ruling dismissing the relevant petition under the merger doctrine, and the oral rulings were followed up on November 22, 2005 with written letter decisions. At the conclusion of the GSD hearing, the Hearing Examiner also issued an oral ruling denying GSD Petitioners' oral motion to file an amended petition that would include an expanded showing of interest from employees of the other nine agencies and departments. This oral ruling was not memorialized in the November 22, 2005 written letter decision issued in the GSD matter.

The Petitioners herein filed timely requests for review under Rule 2.22. Although no written briefs were filed in support of the requests, the Petitioners (who are filing *pro se*) appear from oral argument to except to the Hearing Examiner's conclusion that the PELRB shall, in the absence of contrary authority, follow the interpretations of the National Labor Relations Act regarding the merger doctrine. Additionally, the GSD Petitioners appear from oral argument to except to the Hearing Examiner's denial of their motion to amend their decertification petition.

Based on review of the whole record of the case, we adopt the Hearing Examiner's findings of fact and conclusions of law. By attaching the Hearing

Examiner's Report to this DECISION AND ORDER we incorporate it as a final action of the Board. Nonetheless, because this is a case of first impression, we wish to add several comments for the benefit of and guidance to other public employers, employees and labor organizations.

As Director Montoya noted, New Mexico courts have made clear that "absent cogent reasons to the contrary, we should interpret language of the PEBA in the manner that the same language of the NLRA has been interpreted, particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the time the PEBA was enacted." *Regents of the University of New Mexico v. New Mexico Federation of Teachers*, 125 N.M. 401, 408 (1998) (quoting *Las Cruces Professional Fire Fighters v. City of Las Cruces*, 123 N.M. 239, 243 (Ct. App. 1997) ("*Firefighters II*")). PEBA and the NLRA utilize essentially the same criteria for determining a "bargaining unit" and an "appropriate bargaining unit." *Compare* § 10-7E-4(B) and § 10-7E-13(A) to 29 U.S.C. § 159(a) and (b); *see also* Developing Labor Law at 589-91 (4th Ed.). Moreover, as the Hearing Examiner noted, PEBA case law is silent on the instant issue of merger of bargaining units, while the relevant standards are well-settled under NLRA jurisprudence. Accordingly, no reason being demonstrated by Petitioners to the contrary, it behooves the PELRB to follow the long-standing interpretations of the NLRA in this case. Here, two related NLRA principles or doctrines are relevant.

First, it is undisputed under the NLRA that a decertification petition must address the overall existing bargaining unit, and may not seek to carve out portions of an existing bargaining unit for decertification. *See, e.g., Mo's West*, 283 NLRB 130 (1987) (concerning a decertification petition filed on behalf of a single employer of a multi-

employer bargaining unit); *American Consolidating Co.*, 226 NLRB 923 (1976) (same); and *Great Falls Employers Council, Inc.*, 114 NLRB 370, 371 (1950) (concerning a decertification petition filed on behalf of certain professional pharmacists within a multi-employer clerical bargaining unit). When dealing with multi-employer units, to which the present situation compares by analogy, the NLRB and reviewing courts have only declined to follow this rule where there has been no, or very limited, actual bargaining on a multi-employer basis, in contrast to an earlier long history of bargaining on an individual basis. *See NLRB v. 1115 Nursing Home & Serv. Employees Union*, 44 F.3d 136, 138 (2d Cir. 1995); *Miron Building Prods. Co.*, 116 NLRB 1406, 1407-08 (1956). Here, however, the Union has only ever bargained for the relevant agencies or departments on an aggregate multi-agency and departmental basis.

Second, the NLRB "has long recognized the 'merger doctrine' under which an employer and union can agree to merge separately certified or recognized units into one overall unit" by way of a single collective bargaining agreement that covers the merged units. *See, e.g., Wisconsin Bell, Inc.*, 283 NLRB 1165, 1165 (1987). Under the merger doctrine, the NLRB has regularly required that decertification petitions be based on the larger overall merged unit, as reflected in the collective bargaining agreement. *Id.*; *see also Gibbs & Cox, Inc.*, 280 NLRB 953 (1986) and *The Greenwood Cemetery*, 280 NLRB 1359 (1986). The only NLRB and reviewing court decisions to come to a contrary conclusion were distinguishable because of the relatively brief period of bargaining as a merged unit compared to a long history of single-employer bargaining, or concerned an NLRA provision that does not exist under PEBA, and are thus not

applicable in the instant case. *See 1115 Nursing Home & Serv. Employees Union, supra*; *West Lawrence Care Center*, 305 NLRB 212, 217 n. 27 (1991) (same).

Finally, it is not relevant that, as orally argued on appeal, the Petitioners were not advised at the outset by the PELRB Director that they would need to file a decertification petition based on the larger overall SEA-CWA bargaining unit. The Director correctly advised the Petitioners that they would need a 30% showing of interest from within the "bargaining unit," although at the time the Director believed based on the Petitioner's representations that the bargaining unit was only comprised of GSD employees. *See, e.g.*, Petitioner Bruce Walker's June 28, 2005 e-mail to Director Montoya and Director Montoya's July 1, 2005 e-mail response. In any event, even as *pro se* litigants the Petitioners were ultimately responsible for their own filings and PELRB staff can only provide general guidance as to established law or prior Board decisions. This having been a case of first impression with the PELRB, the Director could not know how the statute would be interpreted before the matter was fully briefed and decided.

Moreover, the Hearing Officer properly denied the GSD Petitioners' motion for leave to file an amended Petition including signatures from the other agencies and departments. At the time of the Petitioner's motion, the statutory window in which to file a Decertification Petition had already expired as to the 2004-2005 contract. *See* § 10-7E-16(B) (requiring that such a petition be filed "no earlier than ninety days and no later than sixty days before the expiration of the collective bargaining agreement"). Additionally, SEA-CWA and the State have now entered into a new contract and permitting the filing of an amended Petition would violate the statutory window of that new contract. Although amended complaints typically relate back when they concern the

same parties, here new employee parties-in-interest would be affected as a result of the expanded showing of interest, so the principle of relation back cannot apply.

The Board reviewed Case Nos. 315-05 and 316-05 during open and closed sessions at its January 20, 2006 meeting in Santa Fe, New Mexico, following notice and publication of the meetings pursuant to the Open Meetings Act, NMSA 1978, §§ 10-15-1 through 10-15-4.

ORDER

The Petitioner's exceptions are hereby denied and dismissed.

For the Board.

Martín V. Domínguez
Chair, PELRB

Issued: ~~January ___, 2006~~ November 21, 2006
Los Alamos, New Mexico

DW (vice chair)

STATE OF NEW MEXICO
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November 22, 2005

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200 Hospital Dr.
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State Employees Alliance-CWA
Attn: Ms. Robin Gould
901 West Alameda, Suite 25-B
Santa Fe, New Mexico 87501

Miners' Colfax Medical Center
Attn: Mr. Donald R. Holl, CEO
200 Hospital Dr.
Raton, New Mexico 87740

RE: Petition for Decertification, Miners' Colfax Medical Center and CWA Local 7076, PELRB Case # 315-05

Dear Ms. Romero and Mr. Holl and Ms. Gould:

A hearing was held on November 21, 2005 to hear the Motion to Dismiss filed by the Communications Workers of America Local 7076 (CWA). The petitioners stipulated to the facts as contained in the motion to dismiss entitled Undisputed Facts. I therefore make these findings of fact:

1. CWA organized various state agencies and departments.
2. Miners Colfax Medical Center is one of those agencies.
3. A contract was entered into between the State of new Mexico and CWA whereby the agencies and departments organized by CWA were consolidated into one bargaining unit.

4. The ratification of the contract occurred by vote of the employees from all the agencies and departments consolidated into the bargaining unit.
5. Appendix A of the contract lists all of the state units included in the bargaining unit.
6. Miners Colfax Medical Center is included in Appendix A.

In Regents of the University of New Mexico vs. New Mexico Federation of Teachers, 125 N.M. 401(1998), the New Mexico Supreme Court recognized the we did not have much law in reference to the Public Employee Bargaining Act. In view of that fact we should use the National Labor Relations Board (NLRB) decisions in areas where the NLRB has extensive experience with a long history of decisions in a given area. The decertification of CWA as the exclusive bargaining agent for one state department where CWA represents many state departments and has entered into one contract for all it's departments is a matter of first impression for this agency. This is an area of extensive experience for the NLRB.

In Great Falls Employers Council, Inc., Ronald Mauer, and Retail Clerks International Association, Local 57, 114 NLRB 370 (1955), the NLRB ruled that the existing bargaining unit alone, is the appropriate bargaining unit for decertification. The case has been subsequently followed by the NLRB on numerous occasions. The facts in Wisconsin Bell, Inc., Deborah Hollis and Local 4603, Communications Workers of America, AFL-CIO, 283 NLRB 1165 (1987) are almost identical to the instant case. Different groups of employees were organized and certified independently of one another. The union and the employer agreed that all existing units be combined into one unit. The NLRB ruled that by virtue of that agreement there is only one collective bargaining unit and that the petition for decertification of a small part of the bargaining unit is not appropriate and therefore dismissed the petition.

This case is very similar to Wisconsin Bell, supra, in that multiple departments were combined by agreement

between the State and the Union, one contract was entered into for all state employees covered by the CWA contract. The "Merger Doctrine" whereby separately certified units are combined occurred here resulting in one large bargaining unit which is the only appropriate unit for a representation election or in this case a decertification election.

Based on all of the above I conclude that the appropriate bargaining unit is the unit as included in the contract between the State of New Mexico and the Communications Workers of America Local 7076. The petition filed in this case addressed only the Miners Colfax Medical Center and not all of the State employees covered. Therefore the petition is deficient on its face, without the requisite signatures and therefore dismissed.

This is a final order and may be appealed to the Public Employee Labor Relations Board by filing a notice of appeal with this office. Appeals to the PELRB are governed by NMAC 11.21.2.22 (A). Thank you.

Sincerely yours,

S/

Juan B. Montoya

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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November 22, 2005

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Santa Fe, New Mexico 87507

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Santa Fe, New Mexico 87501

General Services Department
Attn: Secretary Edward Lopez
715 Alta Vista
Santa Fe, New Mexico 87502-0110

RE: Petition for Decertification, General Services Department and CWA Local 7076, PELRB Case # 316-05

Dear Mr. Walker, Secretary Lopez and Ms. Gould:

A hearing was held on November 21, 2005 to hear the Motion to Dismiss filed by the Communications Workers of America Local 7076 (CWA). CWA produced one witness and introduced three exhibits into evidence. The petitioners produced neither witnesses nor exhibits. Based on the pleadings, the witness's testimony and the exhibits I make these findings of fact:

1. CWA organized various state agencies and departments.
2. General Services Department is one of those departments.
3. A contract was entered into between the State of New Mexico and CWA whereby the agencies and departments

organized by CWA were consolidated into one bargaining unit.

4. The ratification of the contract occurred by vote of the employees from all the agencies and departments consolidated into the bargaining unit.
5. Appendix A of the contract lists all of the state units included in the bargaining unit.
6. General Services Department is included in Appendix A.

In Regents of the University of New Mexico vs. New Mexico Federation of Teachers, 125 N.M. 401(1998), the New Mexico Supreme Court recognized the we did not have much law in reference to the Public Employee Bargaining Act. In view of that fact we should use the National Labor Relations Board (NLRB) decisions in areas where the NLRB has extensive experience with a long history of decisions in a given area. The decertification of CWA as the exclusive bargaining agent for one state department where CWA represents many state departments and has entered into one contract for all it's departments is a matter of first impression for this agency. This is an area of extensive experience for the NLRB.

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The "Merger Doctrine" whereby separately certified units are combined occurred here resulting in one large bargaining unit which is the only appropriate unit for a representation election or in this case a decertification election.

Based on all of the above I conclude that the appropriate bargaining unit is the unit as included in the contract between the State of New Mexico and the Communications Workers of America Local 7076. The petition filed in this case addressed only the General Services Department and not all of the State employees covered under the contract. Therefore the petition is deficient on its face, without the requisite signatures and therefore dismissed.

This is a final order and may be appealed to the Public Employee Labor Relations Board by filing a notice of appeal with this office. Appeals to the PELRB are governed by NMAC 11.21.2.22 (A). Thank you.

Sincerely yours,

S/

Juan B. Montoya