25-PELRB-2022

STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 18, AFL-CIO, LOCAL 3022,

Complainant,

v. **PELRB No. 114-22**

ALBUQUERQUE-BERNALILLO COUNTY WATER UTILITY AUTHORITY,

Respondent.

ORDER

THIS MATTER came before the Public Employee Labor Relations Board (hereinafter the "Board") at its open meeting on December 6, 2022 upon the appeal of Albuquerque-Bernalillo County Water Utility Authority ("Respondent") from the Hearing Officer's Report and Recommended Decision dated November 3, 2022. The Board heard oral argument on the matter and carefully reviewed the Recommended Decision and the request for review. Pursuant to the Public Employee Bargaining Act (the "PEBA"), NMSA 1978, Sections 10-7E-1 to 25 (2003, as amended through 2020), and being otherwise sufficiently advised, the Board voted 3-0 to adopt the Recommended Decision and findings therein.

THEREFORE, the Hearing Officer's Report and Recommended Decision dated November 3, 2022 is hereby **ADOPTED**. Respondent is therefore ordered to return to the *status quo ante*, including by reinstating seniority rights, with regard to the O/M Supervisor-Drinking Plant and Groundwater System Operator Positions. The parties are directed to resume bargaining begun in December of 2021 until a written MOU is entered into on the issues or an arbitrator's decision is entered after impasse. If upon return to the *status quo ante* the Union can prove that those previously holding an O/M

Supervisor-Drinking Plant position suffered monetary damages in the form of back pay for lost time or overtime and/or standby pay, and the parties do not agree in their negotiations to the amount of damages, if any, to be paid, this Board shall reserve jurisdiction to determine damages, if any, upon proper application. ABCWUA is further ordered to post notice of its violation of PEBA as found herein and its assurances that it will comply with the law in the future in a form acceptable to the parties and this Board for a period of 30 days.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Nan A. Nash

HON. NAN NASH, BOARD CHAIR

9 December 2022

DATE

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEE, COUNCIL 18, AFL-CIO, LOCAL 3022,

Complainant,

v. **PELRB No. 114-22**

ALBUQUERQUE-BERNALILLO COUNTY WATER AUTHORITY,

Respondent.

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

STATEMENT OF THE CASE: This matter comes before Thomas Griego, designated as the Hearing Officer in this case, on the merits of a Prohibited Practices Complaint filed by the American Federation of State, County, and Municipal Employees, Council 18, Local 3022 ("AFSCME" or the "Union") against the Albuquerque-Bernalillo County Water Authority ("ABCWUA" or the "Water Authority"), in which the Union alleges that the Water Authority violated the parties' CBA, prohibited by Section 19(H) of PEBA and refused to bargain in good faith, thereby violating Section 19(F) of PEBA, when it split the O/M Supervisor-Drinking Plant position into a new Groundwater Control System Operator position and a revised O/M Supervisor-Drinking Plant position without bargaining to impasse.

The Water Authority denies violating either the parties' CBA or the PEBA because its actions with regard to the O/M Supervisor-Drinking Plant position constitute an authorized revision of two position descriptions in accordance with its reserved management rights under NMSA 1978 § 10-7E-6, and Article 19 of the CBA concerning classification of positions.

A hearing on the merits was held Tuesday, October 18, 2022. The Union had the burden of proof and of moving forward with the evidence. At the conclusion of the Union's case in chief the Water Authority moved for judgment in its favor, which motion was denied, with the result that the Water Authority was obliged to present testimony and other evidence on its behalf. All parties hereto were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Written briefs in lieu of oral argument were submitted by both parties on November 1, 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: The parties stipulated to the following facts as reflected in the Pre-Hearing Order filed herein:

1. Complainant AFSCME is the duly elected, exclusive bargaining representative for a bargaining unit of employees employed by the Respondent.
2. Complainant AFSCME is a "labor organization" as that term is defined in Section 4(L) of PEBA (NMSA 1978, § 10-7E-4(L) (2003)).
3. Respondent is a "public employer" as that term is defined in Section 4(S) of PEBA.
4. The PELRB has subject matter jurisdiction over this dispute, and personal jurisdiction over the parties.
5. Complainant AFSCME and Respondent entered into a CBA Respondent's Exhibit 1.

In addition to the foregoing, I make the following findings based on the Respondent's Answer to the PPC:

6. The Water Authority admits that in January 2022, the Union complained about splitting the position of Operation and Maintenance Supervisor, Drinking Plant into two positions. (Answer ¶ 2).

7. The Water Authority admits that a meeting occurred on November 4, 2021 attended by Union Vice-President Joseph Barrios, President Pete English, Daniel Trujillo, German Andrade, Lisa Zamora and Erica Jaramillo representing the Water Authority in part to discuss how to address filling approximately five vacancies, and how to ensure training for those filling the vacancies. (Answer ¶ 4).

8. The Water Authority admits that it created the position of Groundwater Control System Operator, in approximately January of 2022 and that the new position includes some duties that had been included in the position description for Operation and Maintenance Supervisor, Drinking Plant. (Answer ¶¶ 1 and 10).

Based on the documentary evidence and testimony I further find:

9. Article 3 of the parties' CBA material to this dispute (Exhibit 1), provides:

> "The Employer recognizes the Union as the sole exclusive representative in all matters establishing and pertaining to wages, hours and all other terms and conditions of employment for all full time and part time non-probationary classified M series employees as set forth in Appendix A and the stipulated bargaining unit, as pursuant to the Labor Management Relations Ordinance."

10. The "Appendix A" referred to by the parties in Article 3 of the CBA, is a list of Job Titles acknowledged to be in the covered bargaining unit dated July 8, 2010 and was introduced into evidence as Exhibit 11.

11. Neither the position of Groundwater Control System Operator nor Operation and Maintenance Supervisor - Drinking Plant appear on Exhibit 11 as positions within the bargaining unit because they did not exist at the time the July 8, 2010 version of

Appendix A to the CBA was created. (Exhibit 11; Testimony of Erica Jaramillo, Audio Record Part 1 at 00:30:00 – 00:35:17.)

12. The Job Description which the Water Authority purports to have "revived" as the Groundwater Control System Operator in January of 2022 was inactive since approximately 2015, meaning that no one held a position with that job title and no such position was funded since that time. Testimony of Erica Jaramillo, Audio Record Part 1 at 01:32:45 – 00:33:03.)
13. The parties amended Appendix A on June 13, 2018, which amendment is admitted into evidence as Exhibit L. The Job Title of Operation and Maintenance Supervisor - Drinking Plant appears on that Appendix as a position within the bargaining unit represented by the Union and that is the position at issue in this case. (Exhibit L; Testimony of Erica Jaramillo, Audio Record Part 1 at 00:35:47 – 00:37:09.)
14. The job description for the Operation and Maintenance Supervisor - Drinking Plant position existing in 2018 indicates that the position performed both "control room" and "field operations" duties. (Exhibit 2; Testimony of Erica Jaramillo, Audio Record Part 1 at 00:38:00 – 00:39:24).
15. In January of 2022, ABCWUA changed the duties of the Operation and Maintenance Supervisor - Drinking Plant position by removing any control center duties and changing the required knowledge, skills and abilities. (Exhibit 3; Testimony of Erica Jaramillo, Audio Record Part 1 at 00:40:00 – 00:41:21; 00:41:29 – 00:43:21; 00:54:00 – 00:55:19.)
16. The parties communicated by e-mail throughout January to July 2022 during which time the union objected to the Water Authority's unilateral change to the "terms and conditions" of bargaining unit positions inherent in changed the duties of the

Operation and Maintenance Supervisor - Drinking Plant position as described above, giving some of those duties related to the "control room" to a new "Groundwater Control System Operator" position. (Exhibit J; Exhibit 5; Testimony of Erica Jaramillo, Audio Record Part 1 at 00:43:21 - 00:43:51.)

17. Erica Jaramillo, the Human Resources Manager for ABCWUA, acknowledged Article 3 of the parties' CBA recognizing the Union as the "…sole exclusive representative in all matters establishing and pertaining to wages, hours and all other terms and conditions of employment for all full time and part time non-probationary classified M series employees as set forth in Appendix A and the stipulated bargaining unit…" and testified that Article 19(D) of the CBA pertaining to "Classification and Reorganization" only applies in instances when there is a dispute over whether a new position should be in the bargaining unit.

18. The term "classification" refers to the pay level of a particular job as contrasted with a "job description" which is a general description of the duties to be performed by those holding a particular position. It is ABCWUA's position in this case that because there was no revision to an existing classification or a new classification created, Article 19 of the CBA is not implicated. (Testimony of Erica Jaramillo, Audio Record Part 1 at 01:16:04 - 01:17:50.)

19. In all of its communications with ABCWUA concerning this matter, it never raised a concern that either of the two positions were not in the bargaining unit. (Testimony of Erica Jaramillo, Audio Record Part 3 at 01:04:00 - 01:04:43.) Therefore, Article 19 of the parties' CBA is not implicated.

20. Rather than reviewing the essential job functions of the Operation and Maintenance Supervisor - Drinking Plant position, for the purpose of determining its appropriate pay

level, the Water Authority went further, removing some of that position's essential functions, giving them to the "revived" position, Groundwater Control System Operator (Exhibits 2 and 4; Testimony of Lisa Zamora, Audio Record Part 3 at 00:25:00 – 00:27:00.)

21. On behalf of the Water Utility Authority, its Human Resources Analyst II, Lisa Zamora, communicated the changes set forth in Finding 20 above, directly to the employees assigned by the Water Authority to those positions. (Testimony of Lisa Zamora, Audio Record Part 3 at 00:27:00 – 00:28:00.)

22. The Water Authority did not engage in bargaining with the exclusive representative concerning its objection to changed terms and conditions of employment between December of 2021 and implementation of those changes on January 21, 2022. (Testimony of Erica Jaramillo, Audio Record Part 1 at 01:23:01 - 01:24:05.)

23. Among the changes to the terms and conditions of employment effected by the unilateral change on January 21, 2022, was that those employed as Operation and Maintenance Supervisors - Drinking Plant could no longer bid, based on seniority, for a position either in the field or in the control room pursuant to Article 18 of the CBA. (Testimony of Erica Jaramillo, Audio Record Part 1 at 01:25:18 - 01:25:52.)

24. Erica Jaramillo gave an example of the proper exercise of the Water Authority's management right of reclassification of a position; i.e. between 2018 and the current contract, ABCWUA changed the job title of a bargaining unit position, "Abstractor", to "Account Representative". The position with the new title and with the same people holding the position, remained in the M series unit represented by the Union. (Exhibits L and 10; Testimony of Erica Jaramillo, Audio Record Part 3 at 00:37:51 - 00:43:38.)

REASONING AND CONCLUSIONS OF LAW:

I. BOTH PARTIES ERR IN PROCEEDING UNDER ARTICLE 19 OF THEIR CBA CONCERNING "CLASSIFICATION AND REORGANIZATION".

The Union seeks to either restore the Operation and Maintenance Supervisor - Drinking Plant position description to pre-January 2022 language and do a shift bid for 10 positions by seniority, for 12-hour shifts and direct the parties to negotiate an MOU addressing training, hours, and other terms and conditions; or, to direct the parties to negotiate working conditions and hours, duties, etc. to split the O/M Supervisor - Drinking Plant position into the two positions proposed by the employer allowing affected employees to select where they want to go by seniority. To some degree the Union contends that the Employer's actions violated the parties' CBA Article 18, Shift Bidding; Article 19, Classification and Reorganization; Article 20, Seniority; Article 32, Temporary Upgrades; Article 33, Work Outside Classification; and Article 39, Labor-Management Committee.

For its part, the Water Authority defends this PPC by asserting that its revision of the two positions at issue were a proper exercise of management discretion under NMSA 1978 § 10-7E-6, and Article 19 of the CBA giving the Water Authority broad discretion with respect to the evaluation and classification of positions.

Except to the extent the Water Authority's reliance on Article 19 of the CBA explains its failure or refusal to bargain those revisions, it is otherwise irrelevant to this claim because the employer's actions in this case were not limited to classification or re-classification of the positions, which is the subject matter of Article 19. Erica Jaramillo testified that Article 19(D) of the CBA pertaining to "Classification and Reorganization" only applies in instances when there is a dispute over whether a new position should be in the bargaining unit. The term "classification" refers to the pay level of a particular job as contrasted with a "job description" which is a general description of the duties to be performed by those holding a

particular position. It is ABCWUA's position in this case that as there was no revision to an existing classification or a new classification created pursuant to Article 19 of the CBA. Therefore, Article 19 is not implicated. That would explain why in all of its communications with ABCWUA concerning this matter, the Union never raised a concern that either of the two positions were not in the bargaining unit; a dispute that is a prerequisite to application of Article 19. Perhaps most importantly, the example given by Erica Jaramillo of a previous appropriate re-classification under Article 19, is completely different compared to what occurred in this case. According to Ms. Jaramillo's example, ABCWUA changed the job title of a bargaining unit position, "Abstractor", to "Account Representative". That represents a title change of a single position where nothing else of substance was altered. The position with the new title and with the same people holding the position, remained in the M series unit represented by the Union performing essentially the same duties they previously performed under a different title.

Here, without bargaining to impasse, ABCWUA unilaterally altered the duties of the bargaining unit position Operation and Maintenance Supervisor - Drinking Plant in January of 2022, by removing any control center duties and changing the required knowledge, skills and abilities of that position to reflect that removal. It then unilaterally assigned those control center duties and the required knowledge, skills and abilities to a new position - Groundwater Control System Operator. HR Analyst Lisa Zamora acknowledged that sometime between 2010 and 2018 the position of Control System Operator – Drinking Operator was eliminated from the bargaining unit and no one was in that position by 2018 and at any other time prior to its "revival" in 2022. Ms. Zamora communicated those changes directly to the employees assigned by the Water Authority to those positions, thereby effecting a unilateral change to the working conditions of the Operation and

Maintenance Supervisors - Drinking Plant (employees in that position could no longer bid, based on seniority for a position either in the field or in the control room pursuant to Article 18 of the CBA) and creating a new position, added to the unit, effectively dictating to the Union the positions it shall represent.

The Water Authority denies that its "revival" of the Groundwater Control System Operator position was creating a new position, because it based the position's duties, required knowledge skills etc. on a prior description defunct for many years prior. ABCWUA would have this Board accept without objection, that it could reach back to its musty, dusty archives of job descriptions for a position that long ago ceased to exist, alter its title and duties to reflect its current needs by reassigning it bargaining unit work from a different position and call it appropriate as a re-classification under Article 19. It would take a grain of salt too large for me to contemplate to accept that rationale - especially in consideration of Erica Jaramillo's reference in Exhibit J to the Groundwater Control System Operator position as a "new" position:

> "We do not have a dispute that would be taken to the Labor Board, because we are both in agreement that all positions, *both new and revised*, shall be included in the bargaining unit."

Exhibit J, January 19 email from Jaramillo to Barrios. (emphasis added.)

For the reasons above, this Board's decision in *AFSCME, Local 3022 v. ABCWUA*; PELRB 108-21 (69-PELRB-21) is inapposite and does not support the Water Authority's argument that the Union's claims in this case are barred. In 69-PELRB-21 the parties agreed to conduct a desk audit of the SCADA Specialists position in 2018 at the request of AFSCME, Local 3022 for the apparent purpose (as I concluded) of seeking a change in the SCADA Specialists classification to a higher one so that those in that position would receive more pay, without the necessity of further mid-term bargaining to alter the existing negotiated

wage scale. Following the desk audit, the Water Authority adopted the resulting revised job description for the SCADA Specialists but the revision did not result in a higher classification for them and consequently did not result in higher pay. This Board affirmed my conclusion in that case that the Water Authority did not refuse to bargain the reclassification of the SCADA Specialists position in violation of the Act because it had already bargained for such desk audits and revisions to position descriptions to be performed and approved in management's discretion by Article 19 of the CBA. *AFSCME, Local 3022 v. ABCWUA*; PELRB 108-21 (69-PELRB-21) is a notable illustration of the example concerning the Abstractor position given by Erica Jaramillo of a proper reclassification under Article 19 of the parties' CBA. In both instances the employer took a single existing position already within the bargaining unit, gave it a new title, and adjusted the duties to reflect reality, after which the same people holding the position before the changes to the title and duties remained in the M series unit represented by the Union. As I pointed out in analyzing the Abstractor example, that is not what occurred in this case. At the risk of needlessly repeating myself, what the employer did in this case was to alter the duties of the bargaining unit position Operation and Maintenance Supervisor - Drinking Plant by removing any control center duties and changing the required knowledge, skills and abilities of that position to reflect that removal. It then unilaterally assigned those control center duties and the required knowledge, skills and abilities to a new position - Groundwater Control System Operator.

Accordingly, I conclude that the Water Authority exceeded the scope of its rights under Article 19 of the CBA so that the preponderance of the evidence supports a conclusion that the Water Authority did not act in accordance with the applicable CBA and its management rights when it revised the O/M Supervisor and Control Systems Operator positions. The

Decision in 69-PELRB-21 does not bar or limit Complainant's prohibited practices complaint. Furthermore, there is no evidence of a clear and unmistakable waiver by the Union of its right to bargain with respect to the issues raised in its prohibited practices complaint. To the contrary, reference to Exhibit J demonstrates the Union's ongoing objections to the changes until they were unilaterally implemented by the Water Authority as a *fait accompli*[1].

To the extent the Water Authority relies upon Article 60 of the CBA, such "zipper clauses" providing that the collective-bargaining agreement is the complete agreement between the parties and purports to relieve them from bargaining during the term of the agreement have routinely been held to be insufficient to constitute the required "clear and unmistakable waiver" where, as here, it is couched in general terms that do not make any specific reference to the particular subject at issue. See, *Johnson Bateman Co.,* 295 NLRB 180 (1989).

In *County of Los Alamos v. John Paul Martinez and Michael Dickman, Robbie Stibbard, as President of the Los Alamos Firefighters Association Local #3279,* 2011-NMCA-027, 150 N.M. 326, 250 P.3d 1118, our Court of Appeals affirmed the decision of the District Court (J. Sanchez) denying the County's motion for summary judgment and granting the Intervenor, Los Alamos Firefighters Association Local #3279's, cross-motion for summary judgment. As part of its ruling the Appellate Court rejected the County's argument that the CBA's "zipper clause" constituted a waiver of any right to bargain over the paramedic training contracts at issue. The Appellate Court rejected both the Union's argument that a strict "clear and

[1] A "fait accompli" pronounced "fate uh-COM-plee," is a French term that literally means "an accomplished fact". The term has been adopted into the English lexicon to describe a change or decision made by some authority on behalf of the people who will actually be affected. For example, if workers strike after a change in their working conditions has taken effect, they're protesting a fait accompli.

unmistakable" standard should be applied and the County's argument that broad waiver clauses satisfy the clear and unmistakable requirement language stating:

> "…the answer does not call for a rigid rule, formulated without regard for the bargaining postures, past practices, and agreements of the parties for two reasons. First, notwithstanding the split in the circuits, the NLRB has continued to adhere to the broader position taken in Radioear. Moreover, given our Supreme Court's direction in this area, we believe that application of the reformulated standard described by the NLRB in Radioear is the more reasoned approach to deciding the question of whether the language of the CBA expressly waived the right to negotiate [the terms and conditions in question]" [2]

County of Los Alamos v. John Paul Martinez and Michael Dickman, Robbie Stibbard, as President of the Los Alamos Firefighters Association Local #3279; 2011-NMCA-27, at ¶ 25; internal citations omitted.

Accordingly, I conclude that under the facts of this case, and in consideration of *County of Los Alamos v. John Paul Martinez and Michael Dickman, Robbie Stibbard, as President of the Los Alamos Firefighters Association Local #3279,* the Union did not waive its right to bargain based on the zipper clause.

It is of particular interest to note that Exhibit I, a series of email messages among Union officials and management personnel, including Erica Jaramillo, on December 20 – 21, 2021, indicates that the parties were in the midst of negotiating a Memorandum of Understanding (MOU) at that time but the negotiations were suspended because, as Charles Kolberg wrote to Joe Barrios:

> "1. At the last meeting, we didn't have the shift/payroll info needed to decide how to divide among the various supervisors the weeks when B-series were on upgrade. In the absence of the relevant info, we can hammer out a general MOU concept so we are ready when we get the particulars. I will take a stab at a rough draft of an MOU soon and get it to you. Hopefully, the payroll situation will simmer down soon.

[2] *Radioear Corp.*, 214 NLRB 362 (1974), held that general management rights clauses, which typically reserve to the employer the right to act unilaterally with respect to specified subjects, may also be construed as a waiver see also *Allison Corp.*, 330 NLRB 1363, 1365 (2000), but the NLRB has refused to find that such management rights clauses constitute a clear and unmistakable waiver where it was couched in very general terms but failed to make any specific reference to the particular subject at issue.

> 2. I was not at the meeting where German explained his MOU proposal concerning the shift bid/training but I understood that the Union rejected that proposal because of training pay and the proposed shifts. We have not developed anything else to propose at this time.
>
> 3. As you know, there is a desk audit in progress. We cannot discuss the outcome until there is an outcome."

A reasonable inference may be drawn that at the conclusion of the desk audit, the parties did not resume negotiations for an MOU. Rather, the Water Authority unilaterally imposed its revision of the two positions at issue, thereby implicating both timing and intent in a way that weighs against the ABCWUA as it relates to whether the Union tendered a demand to bargain as discussed under Section II below.

Just as the Water Authority erred by presuming it was appropriate to proceed under Article 19 as though it was merely performing a re-classification, to some extent the Union also erred, when throughout its objections communicated to Erica Jaramillo, it engaged the Water Authority under Article 19, effectively and needlessly ceding the playing field to the employer on that issue. According to Exhibit J ABCWUA sought resolution of its objections by reference to the Public Employee Labor Relations Board pursuant to Article 19(D). But Exhibit J also shows that the Union did not limit its objections to application of Article 19. In Exhibit J we see that Union Vice-President Joe Barrios objected in an email to Erica Jaramillo dated January 14, 2022 that:

> "By splitting the original SPDP position into 2 new positions (a new GCSO and a revised SPDP) the Authority has changed the terms and conditions of these positions."

In its PPC the Union alleges *inter alia* the employer's failure to bargain the position changes in good faith:

> "ABCWUA created a new Groundwater Control System Operator by removing duties from an existing Drinking Water Supervisor position, refused

> to negotiate the terms and conditions of these 2 positions via an MOU, and is not acting in good faith. This violates sections: 10-7E-2 Purpose of Act; 10-7E-13 Appropriate Bargaining Units B.; [sic] 10-7E-15 Exclusive Representation; 10-7E-17 Scope of Bargaining; 10-7E-19 Public Employers; Prohibited Practices specifically [sic] F and H; 10-7E-22 Agreements valid; Enforcement; 10-7E-24 Existing Collective Bargaining Units; 10-7E-25 Existing CBAs."

In the Stipulated Pre-Hearing Order setting forth the contested issues to be determined by the Hearing on September 14, 2022 to be *inter alia*:

1. Whether ABCWUA violated the CBA and PEBA when it unilaterally split the SPDP position into a revised SPDP position and a new Groundwater Control System Operator.

2. Whether ABCWUA can assign employees to a bargaining [sic] (the new Groundwater Control System Operator) that does not exist in Appendix A without bargaining with the Union.

3. Whether ABCWUA can arbitrarily place the 5 current SPDP employees as revised SPDP employees or as new Groundwater Control System Operator, without allowing the 5 current SPDP employees to choose for themselves or to negotiate with them (Union).

Having determined that the Water Authority did not act in accordance with the CBA and its management rights when it revised the O/M Supervisor and Control Systems Operator positions, that the Complainant has not waived the right to bargain with respect to the issues raised in its prohibited practices complaint and that this Board's Decision in 69-PELRB-21 does not bar or limit Complainant's prohibited practices complaint, I turn my attention now to the Union's claims pertaining to ABCWUA's failure to bargain in good faith.

II. THE UNION HAS PROVEN BY A PREPONDERANCE OF THE EVIDENCE THAT ABCWUA FAILED TO BARGAIN IN GOOD FAITH WITH THE EXCLUSIVE REPRESENTATIVE IN VIOLATION OF ITS CBA AND THE PEBA WHEN IT UNILATERALLY ASSIGNED DUTIES OF THE OPERATION AND MAINTENANCE SUPERVISOR - DRINKING PLANT POSITION TO A NEW GROUNDWATER CONTROL SYSTEM OPERATOR, AND ASSIGNED THE NEW POSITION TO THE BARGAINING UNIT WITHOUT THE AGREEMENT OF THE EXCLUSIVE REPRESENTATIVE.

Public employers and unions must negotiate in good faith over mandatory subjects of bargaining such as wages; hours and *all other terms and conditions of employment* except for retirement programs provided pursuant to the Public Employees Retirement Act or the Educational Retirement Act. This duty to bargain in good faith is ongoing even after the parties have entered into a collective bargaining agreement and during its term, unless it can be demonstrated that the parties clearly and unmistakably waived the right to bargain regarding a particular subject. See §§ 10-7E-17(A), (D) and (G).

Under the facts of this case we see that by email on January 11, 2022, ABCWUA, Human Resources Manager, Erica L. Jaramillo, informed Union President Augustine Romero and Vice-President Joe Barrios, that the ABCWUA had "preformed a classification review and has made changes to the 2 job descriptions attached." (Union Exhibit X). The first attached document was a revised "O/M Supervisor–Drinking Plant" job description (Exhibit 3) and the second attached document was a new "Groundwater Control System Operator" job description (Exhibit 5). By comparing the original O/M Supervisor–Drinking Plant job description (Exhibit 2) with the revised job description, we see that the ABCWUA removed the Control Room functions from the original O/M Supervisor–Drinking Plant job description. If that was all that the Water Authority did, it would have a colorable argument that such action was an appropriate exercise of management authority pursuant to Article 19 of the parties' CBA. But as we see from the analysis above, that is not all that the Water

Authority did. ABCWUA reinserted those same Control Room functions from the original O/M Supervisor–Drinking Plant job description into a new Groundwater Control System Operator job description. (Exhibit 5). By doing so, ABCWUA unilaterally impacted employees' wages, hours and working conditions, mandatory subjects of collective bargaining. On January 14, 2022, Mr. Barrios replied to Ms. Jaramillo's January 11, 2022, email informing her that "By splitting the original SPDP position into 2 new positions (a new GCSO and a revised SPDP) the Authority has changed the terms and conditions of these positions." In the same email, Mr. Barrios requested to meet and discuss the changes with the ABCWUA in a Union-Employer Committee created pursuant to Article 19(D) of the parties' CBA. (Exhibit 9, p. 3). Ms. Jaramillo replied, stating in part, "We will be proceeding with the reclassification and posting of positions." (Id. pp. 2-3). Shortly after that, Human Resources Analyst II, Lisa Zamora, communicated the changes directly to the employees assigned by the Water Authority to those positions.

Reasonable minds can differ over whether the Union made a proper demand to bargain the changes to the two positions after January 11, 2022 by asking to present its dispute to the Union-Employer Committee pursuant to Article 19(D), a pre-requisite to finding that ABCWUA breached a duty to bargain in good faith. However, a union can be relieved of its duty to request bargaining over an issue if it is presented as a "fait accompli" by the employer.

The Court of Appeals has held that there are two methods of establishing a fait accompli: timing or intent. *CWA v. State of NM*, 2019-NMCA-31, at ¶20; citing *Haddon Craftsmen, Inc.*, 300 NLRB 789, 790(1990), and *Gratiot Cmty. Hosp. v. NLRB*, 51 F.3d 1255, 1260 (6th Cir. 1995). A preponderance of the evidence establishes a fait accompli under either theory. The

Employer suspended negotiations pending the outcome of its desk audit of the O/M Supervisor–Drinking Plant job description, then unilaterally implemented its changes without resuming bargaining within a few days after completing the audit, giving the Union insufficient time to bargain. Although the Water Authority previously engaged in negotiations over these issues, by January 11, 2022 the Water Authority implemented, or was in the process of implementing, its desired change to the bargaining unit so as to warrant a finding that the Water Authority had no intention of changing its mind or engaging in bargaining. Therefore, I conclude that to whatever extent the Union did not make a timely bargaining demand (even though the parties were previously bargaining and bargaining was suspended) the Union was relieved of its obligation to demand bargaining as the matter was presented as a fait accompli.

The obligation to bargain in good faith imposed by NMSA 1978, § 10-7E-17(A)(1) is mandatory and NMSA 1978, § 10-7E-4(F), in turn, defines "collective bargaining" to mean "the act of negotiating between a public employer and an exclusive representative for the purpose of entering into a written agreement regarding wages, hours and other terms and conditions of employment." NMSA 1978, § 10-7E-19(F) makes it a prohibited practice for the public employer to "refuse to bargain collectively in good faith with the exclusive representative." It is a "per se" breach of the duty to bargain[3] to unilaterally alter a mandatory subject of bargaining without first providing notice and opportunity to bargain to

[3] For per se violations, intent is not relevant, and the party could even have intended to enter into a contract as a general matter. See *NLRB v. Katz*, 369 U.S. 736 (1962) (that certain acts per se violate the duty to bargain in good faith "though the [party] had every desire to reach agreement ... upon an over-all collective agreement and earnestly and in all good faith bargains to that end"). As the Developing Labor Law treatise describes it, per se violations of the duty to bargain typically constitute, instead of a refusal to bargain, a "failure to negotiate" as to a particular issue, or under certain conditions, "rather than an absence of good faith."

impasse unless the requirement to bargain has been waived. See generally JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 13.II.

The PELRB found that the Human Services Department committed a prohibited labor practice when it removed security guards from six of its field offices without bargaining that change to impasse. HSD appealed that decision to the District Court on the grounds that the change was a reserved management right and the union had waived bargaining through its CBA. The First Judicial District upheld the PELRB. The Court found that the presence of security guards at the workplace is a term and condition of employment and a mandatory subject of bargaining. Referring to a section of the parties' CBA related to management's discretion in setting "reasonable standards and rules for employees' safety", the Court held that HSD did not meet its burden of showing a clear and unmistakable waiver of the union's right to bargain. See, *AFSCME, Council 18 v. HSD,* D-101-CV-2012¬02176 (1st Judicial Dist., J. Ortiz, 6-14-2013).

I conclude that the outcome of this case should be the same as that reached in *AFSCME, Council 18 v. HSD*. The creation of a new bargaining unit position, taking duties from another bargaining unit position and assigning them to that new position necessarily implicates terms and conditions of employment for employees in either position that are mandatory subjects of bargaining. Referring to Articles 19 and 60 of the parties' CBA related to management's discretion in classifying positions and controlling job descriptions does not meet the employer's burden of showing a clear and unmistakable waiver of the union's right to bargain these mandatory subjects.

DECISION: On January 21, 2022, the ABCWUA unilaterally imposed changes to the original O/M Supervisor–Drinking Plant job description, refusing to negotiate and enter a written agreement with the Union regarding such changes to employees' hours, and terms and conditions of employment, thereby committing a prohibited practice under NMSA § 10-7E-19(F). Any other alleged violations of the PEBA not addressed here are rejected. As a remedy I direct a return to the *status quo ante,* including reinstating seniority rights, with regard to the O/M Supervisor-Drinking Plant and Groundwater Control System Operator positions. I further direct the parties to resume the bargaining begun in December of 2021 until a written MOU is entered into on the issues or an arbitrator's decision is entered after impasse. If upon return to the *status quo ante* the Union can prove that those previously holding an O/M Supervisor–Drinking Plant position suffered monetary damages in the form of back pay for lost time or overtime and/or standby pay, and the parties do not agree in their negotiations to the amount of damages, if any, to be paid, this Board shall reserve jurisdiction to determine damages, if any, upon proper application. ABCWUA shall post notice of its violation of PEBA as found herein and its assurances that it will comply with the law in the future in a form acceptable to the parties and this Board for a period of 30 days. Any other relief requested by the Complainant in its PPC filed June 21, 2022 is denied.

Issued, Thursday, November 03, 2022.

Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board
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