STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AMERICAN FEDERATION of STATE, COUNTY and MUNICIPAL EMPLOYEES, COUNCIL 18,

26-PELRB-2012

Complainant,

v.

PELRB No. 151-11

NEW MEXICO HUMAN SERVICES DEP'T.

Respondent

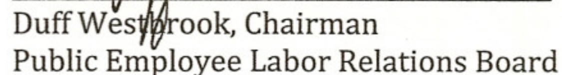
ORDER AND DECISION

THIS MATTER comes before the Public Employee Labor Relations Board for ratification of the Hearing Officer's Denial of the Respondent's Motion to Dismiss the Prohibited Practices Complaint herein.

Upon a 3-0 vote at the Board's March 14, 2012 meeting;

IT IS HEREBY ORDERED that the Hearing Officer's Denial of the Respondent's Motion to Dismiss herein, shall be and hereby is adopted by the Board.

Date: 3/19/12



Duff Westbrook, Chairman
Public Employee Labor Relations Board

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

SUSANA MARTINEZ
Governor

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Executive Director

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January 11, 2011

AFSCME Council 18
1202 Pennsylvania N.E.
Albuquerque, NM 87109
Attn: Joel Villarael

New Mexico Human Services Dept.
PO Box 2348
Santa Fe, NM 87504
Attn: Ray Mensak, General Counsel

Re: ***AFSCME Council 18 v. N.M. Human Services Dep't.; PELRB No.151-11***

Dear parties:

This letter decision is to address the Department's Motion to Dismiss 1 the Prohibited Practices Complaint herein filed December 16, 2011. Respondent has elected not to file a Response to the Motion as is allowed under NMAC 11.21.1.23. It is the Hearing Officer's opinion that oral argument is not required to develop either facts or issues raised in the Motion as the issues are familiar ones. With respect to the Motion I find and conclude as follows:

FINDINGS OF FACT:

1. Petitioner (AFSCME) and Respondent (HSD) have entered into a Collective Bargaining Agreement (CBA) that is in effect during the time material to the Prohibited Practices Complaint (PPC) herein, December 23, 2009 to December 31, 2011.
2. Article 14, Section 1 of the CBA provides that "[a]llegations of violation, misapplication, or misrepresentation of the Agreement except for Article 1 and 2 shall be subject to the negotiated grievance procedure.
3. Prior to filing its PPC plaintiff did not submit issues in the Complaint to grievance arbitration under the CBA.
4. Pursuant to Section 2(D) of Appendix H of the CBA "HSD agrees to provide for appropriate after hours security in its office when clients remain on the premises after 5:00 p.m."
5. On May 20, 2011 Respondent sent a letter to Petitioner regarding security guards on HSD premises, the contents of which are not known to the Hearing Officer.

6. On May 25, 2011 Petitioner sent a letter to the Respondent requesting additional information about the elimination of security guards at ISD offices.

7. The parties agreed to meet on June 27, 2011 to discuss the elimination of security guards at ISD offices but Respondent postponed that meeting. Subsequently, on June 30, 2011 Respondent notified Petitioner by e-mail that "...After further review of our proposed change it is not applicable with [sic] the provision under Appendix H Section 2D providing appropriate after hours security. Our action is not affecting security after 5pm. Therefore a meeting is not necessary."

CONCLUSIONS OF LAW:

A. This Board has jurisdiction over both the parties and the subject matter in this case.

B. Respondent has not established as a matter of law that it has not violated Appendix H of the CBA. Assuming *arguendo* that it has not violated the CBA Respondent's allegation because it has not violated Appendix H Petitioner's PPC fails to state a claim under PEBA, is without merit.

C. The Respondent's allegation that by negotiating Appendix H, Petitioner has waived any claim to have security provided during regular business hours, to wit: prior to 5:00 p.m. and therefore the PPC should be dismissed, is without merit.

RATIONALE:

A. The existence of the parties' grievance arbitration procedure does not mandate dismissal of the instant PPC.

The State has moved this Board for dismissal of the above-referenced matter on the basis that the prohibited practices alleged are covered in the Collective Bargaining Agreement (CBA) and subject to the grievance and arbitration provisions of that agreement. This is not an issue of first impression. This Board has ruled many times on this issue. Prior rulings are summarized as follows:

While on the one hand the contract arbitration procedure upon which Respondent's argument rests is a requirement of the Public Employee Bargaining Act (PEBA). §10--7E-17 NMSA (2003) requires:

> F. An agreement shall include a grievance procedure to be used for the settlement of disputes pertaining to employment terms and conditions and related personnel matters. The grievance procedure shall provide for a final and binding determination. The final determination shall constitute an arbitration award within the meaning of the Uniform Arbitration Act [44-7A-1 to 44-7A-32 NMSA 1978]; such award shall be subject to judicial review pursuant to the standard set forth in the Uniform Arbitration Act. The costs of an arbitration proceeding conducted pursuant to this subsection shall be shared equally by the parties.

On the other hand, we have the provisions of §10-7E-19 NMSA (2003) providing in pertinent part that a public employer or his representative shall not refuse to bargain collectively in good faith with the exclusive representative, refuse or fail to comply with a provision of the Public Employee Bargaining Act or board rule; or

refuse or fail to comply with a collective bargaining agreement. §10-7E-19 (F), (G) and (H) NMSA (2003).

PEBA authorizes and in fact mandates the PELRB to hear claims alleging violations of §§10-7E-19, 10-7E-20, and 10-7E-21 NMSA 1978. It is axiomatic that the parties may not by contract render the statutory mandates of PEBA ineffective. Because it is the PEBA that enables the parties to enter into collective bargaining agreements in the first instance, the contract is obviously subordinate to PEBA. Therefore, the contract provisions cannot be interpreted to divest the PELRB of jurisdiction to hear alleged prohibited practice violations. Nor can it be construed as mandating dismissal of a PPC in deference to arbitration especially when such deferral is discretionary with the director or the board. The PELRB will continue to accept and adjudicate prohibited practice complaints that allege a violation of the contract as the basis for the complaint. Beyond that, the allegation in this case is that the State has made a unilateral change in the terms and conditions of employment in violation of the duty to bargain in good faith, §10-17-19(F) 1978 Comp. That allegation is not subject to the arbitration clause of the parties' CBA and therefore precludes dismissal of the PPC.

As has been decided several times, this Board will evaluate alleged contract violations brought as prohibited practices on a case-by-case basis with regard to the applicability of contract arbitration provisions and whether deferral would be appropriate. Matters that allege violations of Sections 10-7E-19 (A) through 10-7E-19 (G), Sections 10-7E-20 (A) through 10-7E-20 (C) or 10-7E-20 (E) through 10-7E-20 (F), or Section 10-7E-21 of PEBA will continue to be heard by the PELRB. Matters that allege a violation of PEBA solely under Sections 10-7E-19(H) or 10-7E-20(D), refusal or failure to comply with a collective bargaining agreement, will be deferred to the grievance and arbitration process pursuant to NMAC 11.12.3.22. The above approach has been embraced by this Board as effectively protecting the PEBA guarantees of public employees' right to organize and bargain collectively with their employers, while promoting harmonious and cooperative labor-management relations and efficiency in government. For the same reasons set forth above, Petitioner has not violated Article 14 of the CBA and §10-7E-20(D) by filing its complaint.

B. Negotiation of Appendix H of the parties' CBA does not constitute a waiver of the instant PPC.

The HSD premises its waiver argument on New Mexico cases generally construing the doctrine of waiver e.g. ***Young v. Seven Bar Flying Services, Inc.***, ***Nearburg v. Yates Petroleum Corp.*** and ***Rubalicava v. Garst.*** (Citations omitted). (Defining "waiver" as the intentional relinquishment or abandonment of a known right.) The United States Supreme Court has found that in the context of collective bargaining rights that a waiver will be found only in clear and unmistakable conduct. ***Metropolitan Edison Co.*** v. NLRB, 460 U.S. 693, 708 n. 12 (1983). HSD relies exclusively on Appendix H of the parties' CBA for the proposition that "by specifically negotiating with HSD the level of security that is to be provided after 5:00 p.m., Petitioner has waived its ability to negotiate any changes to the security provided by HSD before 5:00 p.m." (HSD Motion to Dismiss p. 3 par. 3.) As noted above PEBA requires HSD to bargain in good faith regarding wages, hours and all other working terms and conditions. A change in the *status quo* regarding the level of security

provided by the employer is a working condition subject to bargaining at least as to the impact of the change. The record does not support a conclusion that the Union waived the right to bargain all aspects of the particular subject at issue. The plain reading of Appendix H of the parties' CBA establishes that all that was negotiated by the parties with regard to security was a provision for providing security when client's remain after 5:00 p.m. It is silent with regard to removal of existing security during the rest of the day. That single contract provision cannot be construed as resolving *pro tanto* the issues surrounding the impact of management changes in the levels of security to be provided.

By analogy, in ***Department of the Navy, Marine Corps Logistics Base, Albany, Georgia v. Federal Labor Relations Authority, American Federation of Government Employees, AFL-CIO, Intervenor, v. Federal Labor Relations Authority***, 140 L.R.R.M. (BNA) 2206, 295 U.S. App. D.C. 239 (1992), the Federal Labor Relations Authority and the D. C. Court on appeal recognized the doctrine that there is no duty to bargain over matters "covered by" a collective bargaining agreement, but the case also elaborated on what criterion is applied to determine whether any particular issue is "covered by" a collective bargaining agreement so as to preclude further bargaining. The D.C. Appellate Court held that the collective bargaining obligation at issue was *not* removed from bargaining because the contract provision is question did not "specifically address the full range of impact and implementation issues." The D.C. Court's holding also recognized two long-standing principles: 1) that although an agency is not required to bargain with respect to its management rights *per se*, it is required to negotiate about the "impact and implementation" of those rights--that is, the "procedures which management officials of the agency will observe in exercising" management rights and "appropriate arrangements for employees adversely affected by the exercise" of such rights; and, 2) An agency commits an unfair labor practice if it refuses to bargain over "impact and implementation" issues or fails to consult with the employees' representative over proposed changes in conditions of employment. 295 U.S. App. D.C. 239 at 241, citing USC § 7106(b) (2) (3) and ***United States Dep't of the Air Force v. FLRA,*** 949 F.2d 475, 477 & n. 2 (D.C.Cir.1991).
Applying the criterion that a contract provision must specifically address the full range of impact and implementation issues in order to be considered as being "covered by a CBA" it is clear to the Hearing Officer that Appendix H of the CBA does not remove the subject of reduction existing levels of security from the range of bargaining.

In accordance with this analysis the Motion to Dismiss should be denied.

Recommended Order:

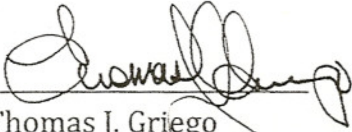
Respondent's Motion for Dismissal is **DENIED.**

APPEAL:

Appeal or request for review by the board shall be permitted only upon completion of proceedings. An interlocutory appeal may be allowed only with the permission of the board, director or the hearing examiner. With respect to the dismissal of Respondent's Counterclaim, the Director's decision to dismiss that claim is subject to board review by filing with the board and serving upon the other parties a notice of appeal within ten (10)

days following service of the dismissal decision. Notice of Appeal or requests for interlocutory appeal are to be filed with the PELRB staff at 2929 Coors Blvd. NW in Albuquerque New Mexico 87120. Provisions for appeal are found at NMAC 11.21.3.19. An appeal must be filed within 10 work days of this opinion and otherwise comply with NMAC 11.21.3.19.

Issued this 11th day of January, 2012



Thomas J. Griego
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Public Employee Labor Relations Board
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Cc: Sandy Martinez, SPO Labor Relations Director