STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re: **33-PELRB-2012**

AFSCME, COUNCIL 18,

Petitioner,

v. **PELRB No. 144-09**

STATE OF NEW MEXICO,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board the State's request for interlocutory appeal of the Hearing Officer's Denial of its Motion to Dismiss the Prohibited Practices Complaint herein for failure of the Executive Director to follow statutory and regulatory requirements. 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 State's Motion to Dismiss, shall be and hereby is adopted by the Board for the reasons stated therein.

Date: 3-19-12

Duff Westbrook, Chairman
Public Employee Labor Relations Board

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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STATE OF NEW MEXICO,

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HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

THIS MATTER comes before the Hearing Officer on the State's Motion to Dismiss for Failure of the Board's Executive Director to abide by the Board's deadlines imposed by its own rules and statutory due process requirements regarding the Board's hearings. Following a hearing on the merits held September 22, 2011, the Hearing Officer Finds and Concludes as follows:

FINDINGS OF FACT:

1. On December 11, 2009, Petitioner filed a Prohibited Practices Complaint (PPC) and Motion for Summary Judgment with supporting Exhibits against the Respondent ("State") alleging violations of Sections 10-7E-17 by failing to bargain in good faith with regard to a state-imposed furlough plan.

2. On December 14, 2009, then Director Juan Montoya issued a letter to the parties indicating his receipt of the PPC and notifying the State that it had fifteen days to file an answer to the Complaint pursuant to NMAC 11.21.3.10(A)

3. On January 4, 2010 the State filed a Motion to have the Board adjudicate the PPC without the appointment of a Hearing Officer, a Motion to Dismiss on

jurisdictional grounds and for an extension of time in which to file an Answer. The basis for the State's Motion to have the Board decide pending issues was that the Executive Director was himself subject to the State's furlough at issue and therefore was disqualified from hearing the pending matter.

4. On January 19, 2010 the Petitioner filed its Response to the State's Motions.

5. On February 5, 2010 the Executive Director's Administrative Assistant issued notice to the parties of a hearing on the Motions scheduled for February 19, 2010.

6. On February 10, 2010 the State filed Replies to the Responses to the Motions to Dismiss on jurisdictional grounds and to have the Board adjudicate/decide the Union's PPC.

7. The Board's rules provide for the filing of motions and responses to motions but not Replies to Responses. There is nothing in the record to indicate that the State sought or received permission to file Replies in addition to the pleadings allowed under NMAC 11.21.1.23.

8. On February 19, 2010 the Board heard argument on the Motion to have the Board adjudicate AFSCME's PPC instead of the Hearing Officer, and voted to deny the Motion at that *en banc* meeting.

9. On February 26, 2010 Director issued a Notice of a Status and Scheduling Conference for March 23, 2010.

10. On March 2, 2010 the Board executed and issued its Order denying the State's Motion to Disqualify the Executive Director and hear the merits without a Hearing Officer.

11. A Status and Scheduling Conference was scheduled for March 23, 2010. The union withdrew its Summary Judgment motion at that conference in light of a position taken by the state that there was additional evidence to be heard and not yet on the record.

12. On March 23, 2010 the Executive Director issued Notice of a Hearing the State's pending Motion to Dismiss scheduled for April 15, 2010.

13. Following a hearing on the State's Motion to Dismiss on April 15, 2010, the Director issued a letter decision on April 20, 2010 denying the State's Motion to Dismiss on jurisdictional grounds. The letter decision incorporated herein by reference and attached as Appendix 1, referenced and incorporated the decisions rendered in PELRB No.'s 142-09 and 143-09 on the same jurisdictional arguments raised by the State in this case. See, letter decision of the Director par.1. The referenced and incorporated decisions in PELRB No.'s 142-09 and 143-09 each contain full and complete Findings of Fact and Conclusions of Law expressly incorporated into the decision of April 20, 2010 along with the rationale in each of those cases.

14. On April 29, 2010 the State filed its Answer to the PPC and asserted Counterclaims.

15. On May 21, 2010 the Petitioner filed its Answer to the State's Counterclaims.

16. Executive Director Juan Montoya retired effective June 30, 2010 and the State Labor Board did not schedule hearings or process pleadings for a period of four months due in part to that retirement, in part to lack of space in which to conduct hearings and furniture and during which time a backlog of unheard motions and

merits hearings and uncompleted investigations as well and unprocessed petition for certification and decertification of bargaining units continued to build.

17. On September 28, 2010 notice was sent to the parties of a Status and Scheduling conference on October 20, 2010. The Scheduling Conference was postponed on October 13, 2010 on the Board's initiative due to difficulty in scheduling a location for the conference and re-scheduled on January 18, 2011 for January 27, 2011 before Mr. Montoya's replacement as Director, Pamela Gentry. However, Ms. Gentry was relieved of her duties as Executive Director in early January 2011 leaving the Board without an Executive Director to process or adjudicate claims.

18. On January 27, 2011 the State filed yet another Motion to Dismiss based on the time lapse between filing and adjudication. The Union Responded on February 10, 2011.

19. On February 28, 2011 the Union filed an Emergency Motion to Appoint an Executive Director for the purpose of processing and adjudicating pending claims. The State filed its Response on March 1, 2011 objecting to the filing of the Motion as violating the Board's rules.

20. The State filed a Reply to the Union's Emergency Motion on February 28, 2011.

21. Notice of a Hearing on the pending Motions was issued August 8, 2011 for September 22, 2011 and after the Board hired a new Director August 26, 2011 the hearing was held as scheduled.

22. The PPC herein has been screened in connection with the hearing on this motion and preceding motions and it is found to be facially adequate pursuant to

11.21.3.12(A). Further investigation of this case has taken place through consideration of the pleadings and hearing the various Motions filed herein pursuant to **11.21.3.12(B)**.

23. The State's counterclaim herein has been screened in connection with the hearing on this motion and is found to be facially adequate pursuant to **11.21.3.12(A**.) Further investigation of this case has taken place through consideration of the pleadings and hearing the various Motions filed herein pursuant to **11.21.3.12(B).**

24. The State has not demonstrated any prejudice to its rights or claims arising out of the acts complained of in its Motions for reasons that appear more fully in the Rationale below.

CONCLUSIONS OF LAW:

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

B. The referenced and incorporated decisions in PELRB No.'s 142-09 and 143-09 constitute full and complete Findings of Fact and Conclusions of Law which are expressly incorporated in the decision of April 20, 2010 along with the rationale in both those cases.

C. The employer has not demonstrated any prejudice caused by the delays of which it complains.

D. The time limits established in PELRB rules for the Board (or its agents) to investigate complaints and conduct hearings are directory rather than

mandatory and the Board's or its Agent's exceeding those limits do not support dismissal of the complaint under the facts of this case.

E. The State's Counterclaim fails to state a claim for relief and the Hearing Officer's Decision of April 20, 2010 effectively disposed of the underlying premise of the Counterclaim i.e. that the Union was obliged to pursue its claims by grievance arbitration so that it is appropriate to dismiss the Counterclaim pursuant to 11.21.3.12(B).

F. The delays complained of by the State do not rise to the level of a denial of minimal due process under the facts of this case.

RATIONALE:

A. Application of NMAC 10.21.1.29 does not result in a dismissal of the PPC.

Within approximately 15 workdays of the Executive Director sending notice of the filed charge and informing the State of its deadline to Answer, (December 14, 2009) the State challenged the Executive Director's ability to proceed in this case by a motion to disqualify the Executive Director for bias and because of an alleged personal interest in the outcome of the case. That matter was not resolved until denial of the motion by the Board on February 19, 2010. Thereafter, the Executive Director acted expeditiously to schedule status and scheduling conferences of the pending motions, which, because they raised jurisdictional issues, required disposition before proceeding further with investigation of the case and/or scheduling a hearing on the merits. The State filed a second Motion to Dismiss to which the union responded and which was denied on April 20, 2010 in a letter decision by Director Juan Montoya. That denial would have cleared the way for the Executive Director to proceed with evaluation of or adjudication of the merits of the complaint but for the State filing Counterclaims in its Answer to

the PPC on April 29, 2010. Those counterclaims are subject to the same investigatory and screening processes as the original complaint thereby delaying the process. The Union filed its Answer to the State's Counterclaims on May 21, 2010. Approximately a month later the Board found itself without an Executive Director until the appointment of Pamela Gentry approximately 4 months later. She scheduled Status and scheduling conferences in this case in the fall of 2010 in which the Union actively participated until she left in January 2011. Shortly after the Board once again found itself without a Director the State filed yet another Motion to Dismiss based on the time lapse between filing and adjudication. The Union Responded to that Motion on February 10, 2011.

Beyond responding to the State's attempts to dismiss its claims, on February 28, 2011 the Union filed an Emergency Motion to Appoint an Executive Director for the purpose of processing and adjudicating pending claims. The State objected to the Union's Motion on March 1, 2011as violating the Board's rules. Thereafter, within one month after appointment of a new Executive Director a Status and Scheduling Conference and hearing on this Motion to Dismiss was held September 22, 2011.

There is nothing in this chronology to suggest that the union was dilatory in bringing this matter to a hearing on the merits, nor is there any reasonable action it could have taken in light of the state's challenges to the Director's power to act and motions to dismiss. Actively responding to motions to dismiss its claims in order to keep those claims alive is consistent with the doctrine that a petitioner must be diligent in bringing its claims to a hearing on the merits.

The employer relies on ***Emmco Ins. Co. v. Walker***, 57 N.M. 525, 260 P.2d 712 (N.M. 1953) for the proposition that this Board ought to dismiss the union's claims for delay in bringing them to trial. ***Emmco*** was raised in a Reply brief and there is no provision under

the board's rules for the filing of a Reply after a Response.[1] The state did not seek and was not given permission to file a Reply. It is not necessary to consider striking the Reply, however, because ***Emmco*** and its progeny can be distinguished from the instant case on the absence of a directive from the trier of fact and because the claims were not ready for adjudication until the State's multiple motions were decided. In ***Emmco*** the trial judge advised the plaintiff's counsel that the case would be set for trial in the "none too distant future", and that plaintiff should take whatever depositions it desired to take immediately, and get ready for trial. ***Id.*** at 714. About two months later, the trial court set the case to be tried on February 27, 1952, but a continuance was granted plaintiff's counsel because he had not up to that time taken the depositions desired to be used at the trial. On March 3, 1952, the case was called upon the docket and the court announced the case would be set for trial. On May 24, 1952, the court mailed a notice to appellant's counsel notifying him that the case had been set for trial as of June 10, 1952. Again, plaintiff's counsel advised the court that he would not be ready for trial on the day set, because of his failure to take depositions. The Court denied a motion for a continuance at trial. Counsel then moved to dismiss his cause of action without prejudice, which motion was likewise denied. Defendant in ***Emmco*** announced she was ready for trial, and plaintiff having failed to introduce any evidence in support of its complaint, the court dismissed its complaint with prejudice.

Unlike the ***Emmco*** case, there is no evidence of delay by petitioner after claims were declared "ready for trial" and unlike ***Emmco,*** not only has the moving party not announced

[1] NMAC 11.21.1.23 contemplates the filing of Motions and Responses but says nothing about the filing of a Reply. There is no provision in the rules governing prohibited practices complaints, NMAC 11.21.3.1 *et seq.* separately permitting the filing of a Reply brief.

ready for trial, it has file multiple motions to avoid trial. The ***Emmco*** court found there to have been "no diligence whatsoever in the preparation and presentment of [plaintiff's] cause notwithstanding the repeated warnings and admonitions of the Court to get ready for trial." No such admonitions, promptings or warnings are present in this case and in fact could not be issued until all of the pending preliminary motions filed by the Employer have been decided. There is no indication in the record that as a result of the many status and scheduling conferences held in this matter that the was ever agreement or direction that the matter was ready for a merits hearing only disposition of the state's preliminary motions. No fault for the delays in this case can be laid at the union's doorstep and to dismiss their claims on the basis of delay would result in an unwarranted windfall to the employer.

B. Dismissal of the Petitioner's claims because the Executive Director failed to abide by deadlines set in Board Rules is not mandated and would result in an unwarranted windfall to the Employer.

An additional ground upon which the employer relies for dismissal of the PPC is the Board's failure to abide by its own time deadlines set by its own rules. The time limits established in the Board's rules upon which the State relies are plainly intended to require the director move cases through the adjudication process expeditiously, not to punish a complainant when the agency is unable to or otherwise fails to abide by those deadlines. In the context of a jurisdictional challenge, this Board has previously ruled that the time limits established in PELRB rules for the Board (or its agents) to conduct a hearing are directory rather than mandatory. See, ***AFSCME & Los Alamos County Firefighters v. County of Los Alamos,*** 1 PELRB No. 3 (Dec. 20, 1994), citing ***Littlefield v. State of New Mexico,***

114 N.M. 390 (1992). (The Board will reject exceptions based on technical violations of rules by Board agents that are not alleged or proven to cause prejudice, and do not affect the outcome.) See also, ***Local 7911, Communications Workers of America & Doña Ana Deputy Sheriffs' Association Fraternal Order of Police & Doña Ana County***, 1 PELRB No. 19. (Aug. 1, 1996) (The time limit established in PELRB rules for the issuance of a Hearing Examiner's report are directory rather than mandatory, so their violation does not require Board rejection of the report unless there is a demonstration of prejudice to the appellant by the Hearing Examiner's delay in the issuance of the report.) Based on the foregoing dismissal on the ground of failure to abide by deadlines for review, screening and rendering decisions should be denied.

C. The delays experienced in this case do not rise to the level of a denial of due process.

§10-7E-12 (A) (3) and (B) NMSA 1978[2] are cited by the State for the proposition that the Board is required to conduct adjudicatory hearings in a manner as to "meet all minimal due process requirements of the state and federal constitutions." (Respondent's Motion to Dismiss p. 4, par. 4). This begs the questions "Whose due process rights are implicated by the failure to meet deadline or conduct timely initial review and screening?" and "How much or what kind of process is due?" The state does not identify an interest at stake that is constitutionally protected and leaves unanswered the question whether the state is a "person" or an "individual"

[2] §10-7E-12 (A)(3) provides "The board or local board may hold hearings for the purposes of... adjudicating disputes and enforcing the provisions of the Public Employee Bargaining Act [10-7E-1 to 10-7E-26 NMSA 1978] and rules adopted pursuant to that Act. §10-7E-12 (B) regarding the rules adopted provides "...The procedures adopted for conducting adjudicatory hearings shall meet all minimal due process requirements of the state and federal constitutions."

entitled to due process under either the state or federal constitutions which it invokes. This Board need not reach those questions in order to dispose of the State's due process concerns. Presumably, the State invokes the principle of procedural due process as distinguished from substantive due process which requires the government to give notice and an opportunity to be heard before depriving an individual of liberty or property. Assuming without deciding that the State is an individual entitled to the due process protections it asserts, before the State can assert a procedural due process violation it must establish that it was deprived of a legitimate liberty or property interest and that it was not afforded adequate procedural protections in connection with the deprivation. *See*, ***Bd. of Educ. v. Harrell,*** 118 N.M. 470, 477, 882 P.2d 511, 518 (1994). That, it has not done.

For example, the State speculates that "Had Director Montoya actually done a proper screening of the complaint as required under the Board Rules it would be reasonable to presume that he would find the complaint was facially invalid and deficient due to contradictory and unclear statements and allegations made by the Petitioner." See, Respondent's Motion to Dismiss, p. 7 par. 2). This Hearing Officer does not find it reasonable to presume the complaint would have been found to be facially invalid. The opposite conclusion is more reasonable – the complaint is facially valid in that it sets forth the name, address and phone number of the public employer, labor organization, or employee against whom the complaint is filed (the respondent) and of its representative, the specific sections of the act claimed to have been violated; the name, address, and phone number of the complainant; a concise description of the facts constituting the asserted violation; and a declaration that the

information provided is true and correct to the knowledge of the complaining party. The complaint is signed and dated and served upon the respondent. (See, NMAC 11.21.3.8) and is filed within the six-month limitations period established in NMAC 11.21.3.9.

With regard to the question whether there is sufficient evidence to support the allegations of the complaint. Such a determination awaits a hearing on the merits. The screening process is not intended to supplant development of facts upon notice and a hearing. That would risk a denial of petitioner's due process. Neither has the State been harmed in any respect with regard to appeal rights because NMAC 11.21.3.19 contemplates appeal after a decision following a hearing on the merits, which hearing has not yet taken place and which the State has sought to avoid by motion practice. See also, NMAC 11.21.1.27 regarding interlocutory appeals.

Beyond the absence of an identifiable liberty or property interest, "Due process requires that the proceedings looking toward a deprivation be essentially fair." ***Harrell,*** 118 N.M. at 478, 882 P.2d at 519. In general, the right to due process in administrative proceedings contemplates only notice of the opposing party's claims and a reasonable opportunity to meet them. ***United States v. Florida East Coast Ry. Co.,*** 410 U.S. 224, 242-43, 93 S. Ct. 810, 819-20. (1973). Whether analyzed under the state or the federal constitution the essential elements of due process embodied in the board's procedural rules are:

(1) adequate notice of the charges or basis for government action;

(2) a neutral decision-maker;

(3) an opportunity to make an oral presentation to the decision-maker;

(4) an opportunity to present evidence or witnesses to the decision-maker;

(5) a chance to confront and cross-examine witnesses or evidence to be used against the individual;

(6) the right to have an attorney or other representative present the individual's case to the decision-maker;

(7) a decision based on the record with a statement of reasons for the decision.

See ***Harrell,*** 118 N.M. at 478, 882 P.2d at 519. The Board's procedural rules provide all of the essential elements of due process outlined above notwithstanding the delays in effecting them. Due process considerations are flexible; the circumstances of the case determine the requirements. *See,* ***New Mexico Indus. Energy Consumers v. New Mexico Pub. Serv. Comm'n***, 104 N.M. 565, 568, 725 P.2d 244, 247 (1986). In the instant case special circumstances exist in the form of extensive and complex motions practice as well as periods of time when the Board was without an Executive Director or hearing facilities. Because due process is a flexible concept whose essence is the right to be heard at a meaningful time and in a meaningful manner, it is at least as important to give consideration to the Union's due process right to have its claim decided on its merits as it is to give consideration to the State's alleged concern over delays in screening complaints and rendering decisions. In balancing the two competing interests, the Hearing Officer is persuaded that the proceedings in this case, despite delays beyond limits set in the Board's rules, are essentially fair and have provided the State with minimal due process guarantees of notice of the opposing party's claims and a reasonable

opportunity to meet them. For the foregoing reasons the Hearing Officer rejects the State's contention that procedural due process rights under Article II, Section 18 of the New Mexico Constitution or under the Federal Constitution have been violated or that due process requires dismissal of the Union's claims.

RECOMMENDATION:

A. Respondent's Motion to Dismiss for Failure to Comply with Statutory and Procedural Rules shall be and hereby is **DENIED.**

B. The decisions in PELRB No.'s 142-09 and 143-09 referenced and incorporated by Juan Montoya in his letter decision of April 20, 2010 along with the rationale in both those cases, denying the State's Motion to Dismiss for lack of jurisdiction, constitute full and complete Findings of Fact and Conclusions of Law which are expressly incorporated in the decision of April 20, 2010. The decision of April 20, 2010 should be and hereby is ratified and adopted by this Board and the State's Motion to Dismiss for lack of jurisdiction shall be and hereby is **DENIED.**

C. The State's Counterclaim fails to state a claim for relief and the Hearing Officer's Decision of April 20, 2010 effectively disposed of the underlying premise of the Counterclaim, i.e. that the Union was obliged to pursue its claims by grievance arbitration so that it is appropriate to dismiss the Counterclaim pursuant to 11.21.3.12(B). The State's Counterclaim shall be and is hereby, **DISMISSED.**

D. The parties are directed to meet and confer on a mutually convenient date and time for a hearing on the merits and inform the Director of at least three options within 10 days of this decision. In the absence of acceptable options, the Director

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
Executive Director
Public Employee Labor Relations Board
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