STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

05-17-2012 FILE

NEA – NEW MEXICO
Complainant,

v.

PELRB No. 114-10

ESPAÑOLA PUBLIC SCHOOLS,
Respondent

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board for ratification of the Hearing Officer's Recommended Decision on the merits of the complaint herein. Upon a 3-0 vote at the Board's April 26, 2012 meeting;

IT IS HEREBY ORDERED that the Hearing Officer's Findings of Fact, Conclusions of Law, Rationale and ultimate recommended decision shall be and hereby is adopted by the Board as its own. To allow public employers to suspend negotiations without numerical proof of a union's actual loss of majority support even if its belief that the union had lost that support is in good faith undermines central policies of PEBA. It is destructive of the bargaining relationship. It deprives the employees of their chosen representative and disrupts the bargaining relationship until the union reestablishes its majority status to the employer's satisfaction. The employer in this case committed a Prohibited Labor Practice by suspending negotiations on March 30, 2009.

The employer had a basis on which to gather further evidence to establish its good faith belief that the union had lost majority support and therefore did not commit a PPC by undertaking a poll of bargaining unit members under the facts of

this case. Because the poll ultimately never took place, this Board does not decide the question whether the poll was free from taint or otherwise comported with principles established in ***Grenada Stamping,*** 351 NLRB No. 074 (2007). By this Order the Board establishes a preference for either a decertification election initiated by a bargaining unit member or a unit clarification proceeding initiated by the employer supervised by this Board in preference to employer sponsored polling as the means for determining majority support. This not to say that such polling would constitute a prohibited labor practice in every instance but that the employer undertaking to conduct one does so at great risk of being found to have violated § 10-7E-19(B) by interfering with an employee's right under PEBA or §10-7E-19(C) by interfering with the Union's rights. It is in the context of one of these two proceedings that the Respondent would be able to require the union to affirmatively produce contrary evidence to the employer's claim of loss of majority support, such as the as a signed petition, union records of dues paid through means other than payroll deductions, a poll, or an election that it asserts it was entitled to in this case. A Board-conducted secret ballot election has the advantages of ensuring that employees are informed of their rights and during the pendency of the election have an opportunity to gather facts, debate the merits of union representation with other bargaining unit members and ask questions of both the union and the employer. Furthermore, in a Board-conducted election the integrity of the selection process is preserved by the Board's policing of both the conduct of the parties and the campaign, thus greatly limiting the opportunity for threats and intimidation. The polling place is kept free from electioneering. Neutral Board agents ensure that the

election is free of taint or corruption. Ballot boxes are inspected and electioneering near the polls is prohibited. Observers selected by the employer and union verify the eligibility of voters. The secret ballot is the hallmark of employee free choice, insulating the voter from threats, coercion and peer pressure. The ballot boxes are inspected and sealed by Board agents. The Board agents tally the ballots in the presence of representatives of the employer and union. In the end, no one but the individual employee knows how he voted.

WHEREFORE, the Respondent School District shall be and is hereby **ORDERED** to post a notice that it has committed a Prohibited Labor Practice substantially in the form appended to the Hearing Officer's recommended decision within ten (10) days of this decision.

Date: 5-6-12

Duff Westbrook, Chairman
Public Employee Labor Relations Board

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

NEA – NEW MEXICO,

Complainant,

v. **PELRB No. 114-10**

ESPAÑOLA PUBLIC SCHOOLS,

Respondent

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

THIS MATTER comes before the Hearing Officer on the Merits of Complainant's Prohibited Practices Complaint. The Complaint alleges that Respondent failed to bargain in good faith when on March 30, 2010, it suspended negotiations over one of two Collective Bargaining Agreements being negotiated and refused to respond to proposals tendered at the bargaining table concerning said agreement for the unit at issue. The PPC further alleges that Respondent's research and a proposed poll to determine the Union's level of support by employees in the bargaining unit was done for the purpose of interfering with NEA's duty to bargain on behalf of those it represents.

The Respondent acknowledges suspending negotiations but only as to the one of the two bargaining units whose contracts were being negotiated; i.e. that representing Educational Support Personnel, and generally denies that its actions constitute a failure to bargain in good faith or interference with Española-NEA's duty to bargain on behalf of the employees it represents.

I. PROCEDURAL HISTORY.

A hearing on the merits of this case was previously held before a different Hearing Officer on January 13 and 14, 2011. However, that Hearing Officer was relieved of her

responsibilities before entering her recommended decision on the merits or on a then-pending Motion for a Directed Verdict. This Board on November 6, 2011 entered its Order Dismissing the Respondent's Motion for a Directed Verdict and the case was then ready for a decision on the merits of the PPC. At a status and scheduling conference the parties discussed submitting the case to the Hearing Officer on briefs. However, there was an insufficient record of the hearing on January 13 and 14, 2011 upon which this Hearing Officer could rely to render a recommended decision on the merits. The parties subsequently agreed to re-present the evidence and arguments so that this Hearing Officer would have enough evidence to render a recommended decision. A hearing was held for that purpose on February 13, 2012.

This constitutes the Hearing Officer's Recommended Findings, Conclusions and Recommended Decision in this case.

II. FINDINGS OF FACT:

The following facts are established by stipulation of the parties entered herein February 8, 2012 and adopted by the Hearing Officer as modified:

1. Española-NEA was certified as the Exclusive Representative for two collective bargaining units in the Española Public Schools by the New Mexico Public Employee Labor Relations Board (PELRB) pursuant to an election conducted by the PELRB.

2. The two bargaining units are the "Certified Bargaining Unit" which includes all certified employees and the "Educational Support Personnel Bargaining Unit" which includes all other eligible employees within Española Public Schools.

3. Española-NEA and Española Public Schools negotiated an initial Collective Bargaining Agreement for the 2008-2009 school year.

4. Española-NEA and Española Public Schools (jointly referred to as the parties) subsequently negotiated a successor agreement for the 2009-2010 school year, which expired June 30, 2010.

5. All events relevant to this case occurred while the parties were negotiating a successor agreement for the 2010-2011 school year.

6. Although each bargaining unit had a separate written collective bargaining agreement, the parties had been negotiating both agreements jointly in some of the negotiating sessions for the 2010-2011 successor agreement.

7. On Tuesday, March 30, 2010, the parties met for the fourth bargaining session for the 2010-2011 successor agreement.

8. The Chief Negotiator for Española Public Schools was Mr. John Martinez.

9. The Chief Negotiator for Española-NEA was Laurel Fain.

10. At approximately 5:30 p.m. March 30, 2010, during a caucus called by the bargaining team for Española Public Schools, John Martinez delivered to Laurel Fain a letter dated March 26, 2010 addressed to Española -NEA President Brian Every.

11. The letter states Española Public Schools was suspending negotiations with Española -NEA over the Support Staff bargaining unit, also known as the Educational Support Personnel unit.

12. As a basis for suspending negotiations Española Public Schools relied upon the number of employees in the Educational Support Personnel unit who had union dues withheld from their paychecks.

13. An Española Public School payroll employee reviewed its payroll information to determine how many Educational Support Personnel Bargaining Unit employees had union dues deducted from their paychecks.

14. When the parties resumed negotiations, Española-NEA submitted new proposals for consideration by Española Public Schools.

15. Some of the new proposals applied to both the Certified Unit and the Educational Support Personnel Unit.

16. John Martinez responded to the new proposals by stating that Española Public Schools would not negotiate any proposals that applied to the Educational Support Personnel bargaining unit because negotiations for that unit had been suspended.

17. Española Public Schools responded in the same way to all proposals presented that evening that applied to the Educational Support Personnel bargaining unit.

18. Additionally, Española Public Schools refused to sign a Tentative Agreement as it applied to the Educational Support Personnel Bargaining Unit, but agreed to sign it as it applied to the Certified Personnel Unit.

19. Española Public Schools informed Española-NEA that it could conduct a poll to determine if the union had majority status.

20. On April 27, 2010, the parties had a bargaining session scheduled.

21. The Española Public Schools resumed negotiations over the Educational Support Personnel Unit on April 27, 2010.

22. An Española Public Schools payroll employee reviewed its payroll information again on or about April 27, 2010 and Española Public Schools determined the Union demonstrated through membership dues deductions taken through payroll deduction that it was within two (2) members of having majority support since the letter delivered on March 30, 2010.

23. A poll to determine whether the union had majority status never occurred.

In addition to the foregoing the Hearing Officer also finds as follows:

24. The letter of March 26, 2010 referred to in Findings of Fact 10 and 11 was admitted into evidence without objection as Exhibit 1 and states in pertinent part:

> "It has come to the District's attention based on Española -NEA dues deductions that Española-NEA does not currently enjoy majority status as an exclusive bargaining representative for the Support Staff bargaining unit...
>
> The Española Public School District hereby provides notice to the Española-NEA that due to its lack of majority status, negotiations between the Española -NEA Support Staff and the District are hereby suspended and the Española -NEA is given until April 30, 2010 to regain its majority status as the exclusive bargaining representative of the Española Public School District Support Employees..."

25. The union withdrew allegations that the Respondent's conduct violation PEBA §10-7E-19 (A) and (D) and those claims are not at issue in this case.

III. CONCLUSIONS OF LAW:

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

B. Resumption of suspended negotiations and ultimate agreement on a contract does not constitute an affirmative defense to a charge that a prohibited practice occurred by the suspension of negotiations.

C. Adoption by this Board of the rationale in ***Levitz Furniture Co. of the Pacific***, 333 N.L.R.B. No. 105 (2000-01) regarding the burden and quantum of proof required before an employer may withdraw recognition, so as to apply that rationale to public employers under PEBA when they suspend or cease negotiations on the ground that a collective bargaining representative has lost majority support, is consistent with the general purpose of PEBA as stated in §10-7E-2 NMSA, to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions.

D. Adoption by this Board of the rationale in ***Levitz Furniture Co. of the Pacific***, 333 N.L.R.B. No. 105 (2000-01) regarding the burden and quantum of proof required before an employer may withdraw recognition, so as to apply that rationale to public employers under PEBA when they suspend or cease negotiations on the ground that a collective bargaining representative has lost majority support, is consistent with

the definition of an exclusive representative in §10-7E-4(I) as an organization once recognized having the right to represent all public employees in an appropriate bargaining unit for the purposes of collective bargaining; the principles embodied in §10-7E-5 as well as §10-7E-15 regarding a certified labor organization' s status as the exclusive representative for negotiating a collective bargaining agreement covering all public employees in the appropriate bargaining unit without reference to whether or not they pay union dues.

E. Evidence of a decline in the number of bargaining unit employees authorizing dues deductions was not sufficient to establish an actual loss of majority support.

F. A decline in the number of bargaining unit employees authorizing dues deductions was sufficient basis for the Respondent to undertake additional research to establish a good faith doubt whether the Union had the support of a majority of employees in the bargaining unit. The union did meet its burden of proof to show that any such additional research taken by the employer in this case, such as research preparatory to conducting a poll, was undertaken for the purpose of interfering with NEA's duty to bargain on behalf of those it represents.

G. At the conclusion of its case in chief the union did not present sufficient evidence that the offers and counteroffers exchanged during the negotiation at issue the sort of mandatory subjects of bargaining contemplated under §10-7E-17(D). so as to substantiate its claim that respondent violated that Section. Accordingly the

directed verdict granted by the Hearing Officer dismissing that claim was appropriate.

H. The evidence and stipulated facts established that the threatened poll to determine majority status never took place and the union was able not only to ignore the Respondent's request for membership figures but to use the Respondent's action to its benefit as a recruiting tool. Diversion of time and resources from negotiating to recruitment was *de minimus*. Therefore, at the conclusion of the union's case in chief it had not presented sufficient evidence to support its allegations that the Respondent's conduct dominated or interfered in the formation, existence or administration of a labor organization. Accordingly a directed verdict granted by the Hearing Officer dismissing the union's claim under §10-7E-19(C) was appropriate.

I. At the conclusion of the union's case in chief there was sufficient evidence, principally, findings of fact 11, 12, 13, 14, 15, 16 and 17and the letter, Exhibit 2 , to substantiate its claim that Respondent violated §10-7E-19(B). Accordingly a directed verdict dismissing those claims was properly denied by the Hearing Officer.

J. Complainant bears the burden of proof in establishing a prohibited practice has occurred. See, NMAC 11.21.1.22(B). § 10-7E-17(A) (1) which requires the parties to bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties. By its suspension of negotiations Respondent has refused or failed to abide by that provision of the PEBA. Therefore, Complainant has

met its burden of proof with regard to §10-7E-19(G) which declares that it is a prohibited labor practice for an employer to refuse or fail to comply with a provision of the Public Employee Bargaining Act. Likewise, Complainant has met its burden of proof with regard to §10-7E-19(F) which declares that it is a prohibited labor practice for an employer to refuse to bargain collectively in good faith with the exclusive representative.

IV. RATIONALE:

This is a case of first impression for this Board. Prior Board cases dealing with a question of majority did so in the context of a necessary demonstration of majority support upon a petition for initial certification of a representative for a new bargaining unit, (***McKinley County Federation of United School Employees, AFT Local 3313 v. Gallup-McKinley County School District and Gallup-McKinley County School District Labor Management Relations Board,*** 03-PELRB-2007) and a demonstration of majority support needed for recognition of an incumbent labor organization. **(*In re Petition for Recognition as Incumbent Labor Organization, NEA-Alamogordo and Alamogordo Public Schools,*** 05-PELRB-2006.) ***American Federation of Teachers Local 4212 and Gadsden Independent School District,*** 03-PELRB-2006 reminds us that PEBA expressly states that an incumbent union shall be recognized as the exclusive representative unless and until it tries and fails to demonstrate majority support. Thus, there is a duty to bargain with an incumbent union prior to the demonstration of majority support, even though

the result of the negotiations cannot be reduced to a CBA until majority support is demonstrated.

The limited applicability of this Board's prior decisions does not leave us entirely "at sea". Guidance may be found in National Labor Relations Board precedence. This Board has previously applied decisions under the National Labor Relations Act to PEBA where the specific provisions at issue are sufficiently similar. ***See, Regents of the Univ. of NM v. New Mexico Federation of Teachers***, 125 N.M. 401, 408 (1998). Where the PEBA and the NLRA contain similar provisions, interpretations of the NLRA may guide this Board in interpreting similar provisions of PEBA. ***Las Cruces Professional Fire Fighters v. City of Las Cruces,*** 123 N.M. 239, 243, P.2d 1384, 1388 (Ct. App. 1997). Under PEBA, New Mexico's public employees have the right to bargain collectively over their "wages, hours, and terms and conditions of employment." NMSA 1978 § 10-7E-1 through § 10-7E-26. The PEBA at § I 0-7E-17 (A) requires the parties to bargain in good faith. § 10-7E-19(F) states: "An employer ... shall not (F) refuse to bargain in good faith with the exclusive representative" and § 10-7E-19(G) requires that "An employer ... shall not (G) refuse or fail to comply with a provision of [PEBA] ... " These provisions are substantially similar to like provisions in the NLRA on which PEBA was modeled so that NLRB cases construing the withdrawal of recognition are instructive. See 29 U.S.C. § 158(a) (5). [1]

[1] Sec. 158 (a) (5) of the NLRA provides: "...It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees..." Sec. 158(d) provides: "...to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any

Both parties urge this Board to follow ***Levitz Furniture Co. of the Pacific***, 333 N.L.R.B. No. 105 (2000-01) with regard to the standard therein for withdrawing recognition from a bargaining representative when it no longer enjoys the support of a majority of the employees in the unit it represents. In ***Levitz,*** the employer withdrew recognition of the union because of what it believed was evidence of its good-faith doubt of the union's majority status: a petition from a majority of the employees stating the employees no longer wanted to be represented by the union. The NLRB took this opportunity to create a more stringent standard to which employers must adhere before unilaterally withdrawing union recognition and suspending negotiations. ***Levitz*** held that an employer may unilaterally withdraw recognition, only on a showing that the union has in fact lost the support of a majority of the employees in the bargaining unit, overruling its prior standard that an employer may lawfully withdraw recognition on the basis of a good faith doubt (uncertainty or disbelief) as to the union's continued majority status.

Because the loss of majority support is the basis alleged by the employer in this case for unilaterally suspending the negotiations, it is appropriate to do as both parties urge and look to the ***Levitz*** case for guidance in the present case. Applying the rationale in ***Levitz*** does not require this Board to determine whether the District's suspension of negotiations is the functional equivalent of a withdrawal of recognition under the NLRA. Under the NLRA, when an employer unilaterally

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agreement reached if requested by either party...where there is in effect a collective-bargaining contract..."

withdraws recognition and so also stops bargaining with an incumbent union, the frustration of those negotiations, if done without sufficient legal ground for the withdrawal of recognition pursuant to the ***Levitz*** standard, would violate § 8(a) of the NLRA just as a failure or refusal to bargain in good faith would be a violation of § 19(F) of PEBA regardless of whether the employer has withdrawn recognition in any formal sense. Discussion of whether the District actually withdrew recognition as that term is understood by the NLRB is therefore somewhat academic - the focus may remain on the District's good faith in suspending bargaining.

As stated both sides in this dispute argue for adoption of the rationale set forth in ***Levitz,*** but they do so with very different expectations as to the result that would follow. While arguing for adoption of the ***Levitz*** standard the District's brief seems to simultaneously argue for application of the ***Celanese*** "good faith standard" rejected by ***Levitz.***[2]

In ***Celanese Corp. of America***, 95 N.L.R.B. 664, 672 (1951), the NLRB decided the employer needed only a good-faith belief that a majority of the employees no longer supported the union to withdraw recognition from union. However, ***Levitz*** ended the good-faith doubt test as applied to the unilateral withdrawal of recognition and instead limited application of that standard to employers who wished to obtain an RM election:

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[2] At p. 3 of its brief, Respondent, relying on its interpretation of ***Levitz***, writes: "Under the NLRA case law, an employer may withdraw recognition of a union unilaterally if the union has lost a majority support of the bargaining unit. Such withdrawal of recognition can occur either on a showing of actual loss of majority support or upon a good faith doubt, based on objective considerations, of the union's majority status. [citation omitted]. Once good faith doubt is established, the burden shifts to the union to prove, by preponderance of the evidence that an unfair labor practice occurred." Citing to ***NLRB v. Oil Capital Electric***, 5 F.3d 459, 464 (Ct App. 10th Cir. 1993); a case preceding ***Levitz*** by 8 years.

> "An employer who withdraws recognition from a majority union, even in good faith, invades his employer's section 7 rights every bit as much as an employer who unwittingly extends recognition to a nonmajority union. Consequently, an employer who *withdraws* recognition from an incumbent union in the honest but mistaken belief that the union has lost majority support, should be found to violate Section 8(a)(5). The employer's good faith should no more be a defense in the 8(a)(5) context than in the 8(a)(2) setting.
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> For all these reasons we hold that an employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition, only on a showing that the union has in fact lost the support of a majority of the employees in the bargaining unit. We overrule Celanese and its progeny insofar as they hold that an employer may lawfully withdraw recognition on the basis of a good faith doubt (uncertainty or disbelief) as to the union's continued majority status."
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> ***Levitz*** at 725.

The result is that after ***Levitz*** an employer should not withdraw recognition of a union, or by logical extension cease bargaining, on the ground that the union has lost the support of a majority of its covered employees without having established by objective evidence the union's ***actual loss*** of that support.[3]

The NLRB made clear in ***Levitz*** that to establish "actual loss" of majority support an employer may rely only on "objective evidence," offering as an example a petition signed by a majority of the employees in the bargaining unit but even then, the NLRB in ***Levitz*** wrote

> "We emphasize that an employer with objective evidence that a union has lost majority support, for example a petition signed by a majority of the employees in the bargaining unit ***withdraws recognition at its peril.***"

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[3] The NLRB stated: "In our view, there is no basis in either law or policy for allowing an employer to withdraw recognition from an incumbent union that retains the support of a majority of the unit employees, even on a good-faith belief that majority support has been lost." *See* ***Levitz Furniture***, 333 N.L.R.B. No. 105 at 2.

(Emphasis added). (See also, ***Highlands Regional Medical Center***, 347 NLRB 1404, 1406 (2006), enf'd . 508 F.3d 28 (D.C. Cir. 2007) (A decertification petition supported by 15 of the 30 unit employees); ***Renal Care of Buffalo, Inc.,*** 347 NLRB 1284, 1286 (2006) (A decertification petition, supported by 114 out of 220 unit employees); ***KFMB Stations***, 349 NLRB 373 , 377 (2007) (decertification petition signed by a majority); In every post-***Levitz*** case in which an employer successfully established actual loss, the employer presented some kind of evidence that a numerical majority no longer wanted the incumbent union as its collective bargaining representative. The NLRB's emphasis on actual loss, as opposed to good faith doubt, supports the view that numerical evidence of a loss of support is required.

In the present case the District presented no such numerical evidence of an actual loss of support. The District's witness Fidel Trujillo did offer testimony that approximately 18 to 20 ESP Unit employees over an unspecified period of time corresponding with the length of time he has held his post with the District, complained about dues and the efficacy of the Union representation (Testimony of Fidel Trujillo); Witness John Martinez testified that he heard of 24 employees who complained about the dues provisions (Testimony of John Martinez). On March 30, 2010, the District presented the Union with a letter in which it suspended negotiations over the ESP/Staff unit based on the number of bargaining unit employees who were members of the Union. (Stip. No's. 7-13, Union Ex. 2, (Testimony of Charles Goodmacher, Testimony of John Martinez). The letter states:

"The Support Staff membership is at 46. Majority status would require 65 members." (Union Ex. 2).

The District examined dues deduction statistics from its central payroll records and determined that there was a decrease in authorized payroll deductions for union dues. It was that decline in deductions that prompted the District to suspend negotiations with the ESP unit. (See stipulated facts No.'s 11 and 12.) A decrease is dues deductions is not acceptable as the sort of numerical objective evidence required under ***Levitz*** to prove an actual loss of majority support because it becomes speculative how many workers are supportive of the union in principle but simply do not want to pay for the benefits derived from that support. The District offered no evidence concerning whether and to what extent the decrease in dues deduction may have been attributable to terminations, layoffs, retirements or resignations in positions soon to be filled with dues paying members or whether or how it controlled its sampling to account for those contingencies. The District had no way of knowing whether bargaining unit employees were paying their dues by means other than payroll dues deductions. For these reasons the NLRB has long held that a failure to pay union dues does not reflect a lack of support for union representation, because employees often are content to support the union and enjoy the benefits of union representation without joining the union or giving it financial support. See, ***Trans-Lux Midwest Corp.***, 335 NLRB 230, 232 (2001); ***R.J.B. Knits,*** 309 NLRB 201, n.2, 205 (1992); ***Odd Fellows Rebekah Home***, 233 NLRB 143, 143 (1977). See also, ***Calatrello v. Carriage Inn of Cadiz***, 2006 WL 3230778, (S.D. Ohio).

(A lower number of dues-check authorizations does not establish a reasonable basis for believing that a union has lost majority support.)

In this respect, Respondent misapplies the holding in ***McDonald Partners, Inc. v. NLRB,*** 331 F.3d 1002 (D.C. Cir. 2003). Respondent's brief argues that the NLRB has held membership and dues check off data can be used to support a good faith doubt of majority status. That is a true statement insofar as it goes. But as a post-***Levitz*** case ***McDonald Partners*** follows the distinction established in ***Levitz*** between a reasonable good faith belief that a union has lost majority support as the necessary predicate to a RM election supervised by the Board and the "actual loss" of majority support based on "objective evidence," necessary before an employer may unilaterally withdraw recognition or suspend negotiations. ***McDonald Partners*** and related cases cited in Respondent's brief are irrelevant to the question whether the District committed a prohibited labor practice by suspending negotiations. They are relevant to whether a good faith basis existed for taking a poll or other measures to determine whether the union still had majority support as will be explained further in this decision. [4]

An employer that withdraws recognition bears the initial burden of proving that the incumbent union suffered a valid, untainted numerical loss of its majority status. ***NLRB v. B.A. Mullican Lumber & Mfg. Co.***, 535 F.3d at 282 - 283. 12 333 NLRB at 725. In the same way an employer under PEBA bears the initial burden of

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[4] ***McDonald Partners*** reiterates the holding in ***Levitz*** that union may enjoy majority support despite less than a majority authorizing dues deductions. However, a decline in dues deductions may indicate "an erosion of support and may therefore be probative of an employer's good faith reasonable doubt". 331 F.3d at 1005-1006. McDonald goes on to state however that such evidence alone is insufficient to establish good faith and after consideration of such evidence the NLRB still found that the employer committed a ULP.

proving that the incumbent union suffered a valid, untainted numerical loss of its majority status before it may be excused from its obligation to continue bargaining with that unit representative in good faith. This result is accord with this Board's prior holding in ***American Federation of Teachers Local 4212 and Gadsden Independent School District***, 03-PELRB-2006.

Upon application of the ***Levitz*** standard as well as general application of the parties' obligation to bargain in good faith found in PEBA the District failed to meet its initial burden of proving by objective numerical evidence that the Complainant has lost the support of a majority of it constituents prior to suspending negotiations when it suspended negotiations over one of two Collective Bargaining Agreements being negotiated and refused to respond to proposals tendered at the bargaining table concerning said agreement for the unit at issue. Española Public Schools committed a prohibited practice by suspending bargaining with Española-NEA on March 30, 2010 and by demanding NEA regain its majority status as the exclusive bargaining representative of the Española Public School District Support Employees by April 30, 2010.

A. The Employer's belief that unless it suspended negotiations until such time as the union demonstrated majority support it risked committing a prohibited labor practice was without a reasonable good faith basis.

At the hearing the District's Chief Negotiator, John Martinez, testified that his decision to suspend negotiations was done at least in part to avoid committing a prohibited practice by negotiating with a union that did not have majority support. At pages 2-3 of its brief Respondent reiterates from a public policy standpoint the problems associated with being compelled to negotiate with a union that has that has lost majority support, such as "bargaining with a representative that is not

advocating for a position supported by a majority of the employees" or depriving employees "of association rights" or "of having a voice in their employment relationship, and most egregiously, the right to work in this state by negotiating a union shop provision."

The preceding paragraph illustrates the "catch-22" in which employers sometimes found themselves prior to ***Levitz***: by withdrawing recognition they could possibly face charges for refusing to bargain with employee representatives under sections 8(a)(5) and (1);[5] however, by bargaining with a non-majority union, employers could face charges under section 8(a)(2). [6] ***Levitz***, curtailed this fear by pointing out that if an employer has not proven a union has actually lost majority support, it cannot be charged with bargaining with a non-majority union because of the presumption that the union continues to enjoy majority support. In ***Levitz*** at 726 we read:

> "An employer with evidence of an actual loss of majority status can petition for an RM election rather than withdraw recognition immediately; we would not find the employer violated 8(a)(2) by failing to withdraw recognition while the representation proceeding was pending. With such a safe harbor available, an employer who withdraws recognition anyway can hardly claim that it was forced to do so for fear of committing an 8(a)(2) violation."

Thus, after ***Levitz,*** the District cannot justify a cessation of bargaining based on fear of committing a prohibited practice by negotiating with a union that did not

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[5] Section 8(a)(5) makes it an unfair labor practice to refuse to bargain with employee representatives.

[6] *See* 29 U.S.C. §§ 158(a)(1), (2), (5) (2000). Section 8(a)(2) makes it an unfair labor practice for a company to dominate or control a labor union, and this has been extended to showing support by bargaining with a minority union.

have majority support when it has not by objective evidence proven an actual loss of majority support.

B. The Union had no duty to provide information regarding majority support is this case.

As outlined above the District had the burden of proof to show actual loss of majority support before suspending negotiations. The District may not shift the burden of proof by asking the Union to provide the District with its membership numbers on the premise that it is necessary to bargaining before resuming bargaining. Suspending negotiations and requiring the union to prove ongoing majority status would contradict the Union's presumption of majority status. [7]Under the circumstances of this case and particularly in the absence of a decertification petition filed by an employee or a unit clarification petition filed by the employer the union was under no obligation to respond to the March 26, 2010 letter. Since there was no obligation there was no reasonable basis to infer that the Union had actually lost majority support.

C. The Hearing Officer acknowledges Respondent's brief citing to *Midwest Television, Inc., d/b/a KFMB Stations and American Federation of Television and Radio Artists San Diego Local,* 349 NLRB No. 038 (2007), *and Challenge-Cook Bros.,* 288 NLRB 387 (1988) for the proposition that it is well settled law that, the totality of the conduct of the alleged offender is to be reviewed in deciding a claim of bad faith bargaining.

Applying totality of the Respondent's conduct, the March 26, 2010 letter alleging a loss of majority support and suspending bargaining is not mitigated by

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[7] The suspension of negotiations in this case occurred March 30, 2010, three months prior to expiration of the parties' annual contract. The NLRB has long held that once employees have elected a union to represent them that union enjoys a presumption of majority support during the term of an agreement that is three years or less in duration. The presumption becomes rebuttable after expiration of the contract. See, *Levitz* at 720 and ***Auciello Iron Works, Inc. v. NLRB***, 517 US 781, 786 (1996).

Respondent's actions at or away from the bargaining table. Respondent argues that by "receiving" proposals with regard to the Support Staff bargaining unit after it had announced that it was suspending negotiations with that unit somehow negates a claim of bad faith bargaining. Merely "receiving offers" without rescinding its announced position that it would not bargain with regard to the unit whose offers were being "received" avails the Respondent nothing. After all it is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is delaying or preventing agreement.

Neither is there any saving grace in the fact that Respondent continued to bargain with Complainant concerning a completely different bargaining unit and offered a tentative agreement with regard to the Certified Bargaining unit. Complainant's refusal to sign a tentative agreement which Respondent proposed and Complainant's subsequent ending of negotiations are immaterial to whether the Respondent's actions indicate good faith.

D. While *Levitz* limited an employer's ability to withdraw recognition to cases in which the employer has actual proof the union has lost majority status, it also preserved the good faith standard for proceeding with the RM petition or polling choosing to "leave to a later case whether the current good-faith doubt (uncertainty) standard for polling should be changed."

I have already noted that ***McDonald Partners*** is relevant to whether a good faith basis existed for taking a poll or other measures to determine whether the union still had majority support. A decline in dues deductions was held in that case to be a possible indicator of "an erosion of support and may therefore be probative of an employer's good faith reasonable doubt" 331 F.3d at 1005-1006. But ***McDonald*** also held that such evidence alone is insufficient to avoid a finding that it committed a

ULP. There was some additional evidence of the loss of majority support in this case. In addition to the testimony of witnesses Martinez and Trujillo referenced above:

1. The Respondent's witness, Fidel Trujillo, testified that he became aware that dues deductions were being remitted on behalf of bargaining unit employees to another labor organization that was not the recognized exclusive representative. He ordered the deductions ceased as they were contrary to the law and notified the employees that dues to that organization were no longer being deducted. Mr. Trujillo testified the employees were upset the dues deductions would cease and expressed their support for the other labor organization and their disfavor with Complainant. (The propriety of ceasing those dues deductions is not at issue in this case.)

2. Mr. Trujillo testified he had received two (2) dozen calls from unidentified employees stating they wanted out of paying membership dues and that they felt the union was not representing them. It was then Mr. Trujillo testified that a person in payroll reported to him the number of employees authorizing automatic dues deductions payable to the Complainant had decreased, which information then resulted in the more formal review of payroll records at issue in this case.

This testimony cuts both ways – while on the one hand the complaints described by the witness may be an indication of an erosion of support for the Complainant, they may also be seen as the result of confusion over which of two competing unions was actually representing them, which was responsible for the benefits of their current and past contracts and which one was bargaining for them at the moment.

This situation illustrates why dues deductions is not a reliable measure of support for the union *per se.* Employees may react to political infighting by withholding their dues while still supporting the recognized union in principal. Furthermore, it remains an unanswered question to what extent the employer's unilateral cessation of authorized deductions may have prompted the disaffection Mr. Trujillo noted in the calls he received.

IV. Recommended Decision:

Respondent argues that it "did nothing more than to encourage a positive collective bargaining relationship between the employee and employees by bringing its concerns of minority status to the Union." The District did more than that.; it suspended negotiations and gave the union a deadline for proving its majority status. Therein lays the problem for the Respondent. Without numerical proof of an actual loss of majority support Respondent's suspending negotiations was not justified by its belief that the union had lost that support even if that belief was in good faith for the reasons set forth above.

This case comes at a time where clarity is needed regarding challenging majority support in general, polling and suspension of negotiations pending the outcome of challenges to majority support, specifically. This Hearing Officer is aware of at least four (4) cases brought to this Board within the past year involving polling to test majority support, three of which involved the same management representative as in this case and two of which involved a suspension of

negotiations while majority support challenges were dealt with. [8]. It is hoped that adopting the ***Levitz*** rationale and underscoring the already existing irrebutable presumption of majority status while a contract is in effect will serve as a strong disincentive for employers to engage in such activity as was present here. To its credit the Respondent resumed negotiations quickly; no scheduled bargaining sessions were postponed and the parties eventually succeeded in bargaining a contract. These facts are in contrast with cases before the NLRB where there may have been long-term disruption of the bargaining relationship and the relationship between the union and its constituents. The harm in this case to the union was *de minimus* and the remedy should reflect that finding, Otherwise this Board should establish as a matter of policy under PEBA that, following the holding in ***Levitz***, allowing employers to suspend negotiations without numerical proof of an actual loss of majority support even if its belief that the union had lost that support is in good faith undermines central policies of PEBA. It destroys the bargaining relationship and as a result frustrates the exercise of employee free choice. It deprives the employees of their chosen representative and disrupts the bargaining relationship until the union reestablishes its majority status to the employer's satisfaction.

Having determined that the employer committed a PPC by suspending negotiations March 30, 2009 we turn our attention to the remainder of

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[8] In addition to the present case, see ***NEA & Silver Consolidated Schools***, PELRB 301-12, ***NEA-NM & Alamogordo Public Schools,*** PELRB No. 315-09; ***AFT-NM v. Dulce Independent School District***, PELRB 121-11 and ***AFT-NM v. Dulce Independent School District***, PELRB 122-11.

Complainant's PPC especially the acts surrounding the Respondent attempting a poll.

It is my opinion that based on the above information, however deficient the evidence may have been to justify suspension of negotiations it nevertheless the showed that the employer had a basis on which to inquire further; to gather further evidence to establish its good faith belief that the union had lost majority support. Respondent did, in fact, inquire further. It contacted former PELRB Deputy Director and Board Member, Pilar Vaile, about conducting a secret ballot poll to determine whether the Union had majority status. Ms. Vaile testified that after reviewing the case law under the NLRA, she would be willing to be the polling supervisor and she prepared a notice to the Union and bargaining unit concerning the poll. (District Ex. B). (The propriety or advisability of Ms. Vaile undertaking to supervise polling is not at issue here). Because the poll ultimately never took place, this Board need not decide the question whether the poll was free from taint or otherwise meant the requirements of ***Grenada Stamping,*** 351 NLRB No. 074 (2007). Respondent acted discreetly, informing Complainant only at the bargaining table of its claim that the union had lost majority status, while Complainant publicized the claim and used the claimed loss of majority status to launch an apparently successful recruitment campaign.

Based on all of the foregoing it is the recommended decision of this Hearing Officer that the Board follow the example set in ***Levitz*** and establish a preference for polling in the form of either a decertification election initiated by a bargaining unit member or a unit clarification proceeding initiated by the employer supervised by

this Board in preference to employer sponsored polling. This not to say that such polling would constitute a prohibited labor practice in every instance but that the employer undertaking to conduct one does so at great risk of being found to have violated § 10-7E-19(B) by interfering with an employee's right under PEBA or §10-7E-19(C) by interfering with the Union's rights. It is in the context of one of these two proceedings that the Respondent would be able to require the union to affirmatively produce contrary evidence to the employer's claim of loss of majority support, such as the as a signed petition, union records of dues paid through means other than payroll deductions, a poll, or an election that it asserts it was entitled to in this case. A Board-conducted secret ballot election has the advantages of ensuring that employees are informed of their rights and during the pendency of the election have an opportunity to gather facts, debate the merits of union representation with other bargaining unit members and ask questions of both the union and the employer. Furthermore, in a Board-conducted election the integrity of the selection process is preserved by the Board's policing of both the conduct of the parties and the campaign, thus greatly limiting the opportunity for threats and intimidation. The polling place is kept free from electioneering. Neutral Board agents ensure that the election is free of taint or corruption. Ballot boxes are inspected and electioneering near the polls is prohibited. Observers selected by the employer and union verify the eligibility of voters. The secret ballot is the hallmark of employee free choice, insulating the voter from threats, coercion and peer pressure. The ballot boxes are inspected and sealed by Board agents. The Board agents tally the ballots in the presence of representatives of the employer and union.

In the end, no one but the individual employee knows how he voted. The United States Supreme Court, federal courts of appeal, and the NLRB have consistently recognized the Board-conducted secret ballot election as the preferred and most reliable means of determining majority support. See, e.g., ***NLRB v. Gissel Packing Co.,*** 395 U.S. 575 (1969); ***Ray Brooks v. NLRB***, 348 U.S. 96 (1954). See also, ***Levitz Furniture Co. of the Pacific, Inc.,*** 333 NLRB 717 (2001); ***Underground Services Alert of Southern California***, 315 NLRB 958 (1994).

Because the disputed polling never took place and because the negotiations resumed and resulted in a negotiated contract, no bargaining order or injunctive relief would be appropriate or effective. It is the intent of this recommended decision that the effects of adopting the ***Levitz*** standard be largely prospective. Therefore, the Hearing Officer recommends as a remedy, adoption of this decision by the Board as an acknowledgement that a prohibited labor practice has occurred and that the District be ordered to post a notice substantially in the form appended t to this recommended decision.

Any other motions whether made orally at a hearing or conference before the Hearing Officer or made in writing not specifically addressed in this recommended decision is deemed denied to the extent it may be inconsistent with any holding herein. This includes, but is not limited to the Motion to Strike submitted after the briefing schedule set in this matter by the union and which was not considered in this recommended decision.

Issued this 22nd day of March, 2012

Thomas J. Griego, Executive Director
Public Employee Labor Relations Board
2929 Coors N.W., Suite 303
Albuquerque, NM 87120

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD

An Agency of the State of New Mexico

The Public Employee Labor Relations Board has found that we violated the Public Employee Labor Relations Act and has ordered us to post and obey this notice.

You have the right under Public Employee Labor Relations Act NMSA §10-7E-2 and §10-7E-17(A)(1), to organize and bargain collectively with the District in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties.

As defined by the Public Employee Labor Relations Act, §10-7E-4(I) NEA- Española, having been recognized as an exclusive representative, has the right to represent two bargaining units in the District: the "Certified Bargaining Unit" which includes all certified employees and the "Educational Support Personnel Bargaining Unit" which includes all other eligible employees within Española Public Schools.

For the purposes of collective bargaining NEA- Española was at all times during the recent negotiations of a successor collective bargaining agreement for the 2010-2011 school year entitled to recognition as the exclusive representative for negotiating that agreement. By briefly suspending negotiations with NEA- Española over the Educational Support Personnel Bargaining Unit during the recent contract negotiations it is the decision of the Public Employee Labor Relations Board that we committed a Prohibited Labor Practice by failing in our obligation to bargain in good faith in violation of NMSA §10-7E-19(G) and (F).

We acknowledge the above-described rights and responsibilities and will not in any like manner refuse to bargain with NEA- Española.

_____ Date:_____

For the Española Public Schools