

BEFORE THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME COUNCIL 18

Petitioner,

04-PELRB-2007

vs.

PELRB Case No. 106-07

NEW MEXICO DEPARTMENT OF CORRECTIONS,

Respondent.

DECISION AND ORDER

THIS MATTER having come before the Public Employee Labor Relations Board (PELRB) upon the appeal of Respondent from the Hearing Examiner's recommended decision and report dated August 29, 2007, arising out of a prohibited practice complaint filed by AFSCME Council 18 (Union) against the Respondent New Mexico Department of Corrections. That recommended decision and report of the Hearing Examiner found in favor of the AFSCME Council 18, concluding that the Department of Corrections violated Section 10-7E-19 (F) of the Public Employee Bargaining Act (PEBA), NMSA 1978, §§ 10-7E-1 to -26 (2003, as amended), because the warden met with corrections officer Fenley, member of the bargaining unit, outside the presence of the Union, to adjust a grievance filed by the Union on officer Fenley's behalf.

The PELRB, having heard argument of counsel and being otherwise fully advised, hereby adopts in whole the recommended decision and report of the Hearing Examiner dated August 29, 2007, and it is hereby ORDERED, as recommended by the Hearing Examiner:

The New Mexico Department of Corrections is hereby ordered to honor its contractual obligation to deal exclusively with the recognized union (AFSCME) and stop dealing directly with union represented employees. This opinion [of the Hearing Examiner] is to be posted at all places where the Department displays information for the employees. The posting is to occur for no less than fifteen (15) days.

*Martin V. Dominguez*  
MARTIN V. DOMINGUEZ  
Chairman  
Public Employee Labor Relations Board

Date: 12/13/07



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PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

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BOARD

August 29, 2007

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Shane Youtz  
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900 Gold Ave. SW  
Albuquerque, New Mexico 87102

RE: Prohibited Practice Complaint, American Federation of State, County and Municipal Employees (Union) vs. the New Mexico Department of Corrections (Department), Public Employee Labor Relations Board (PELRB) Case Number 106-07

Dear Messieurs Brewster and Youtz:

The above referenced case was filed by the Union with the PELRB in late January of this year. After a variety of hearings, stipulated facts and post hearing briefs this matter is finally ready to be decided.

The issue in this case is one of negotiating in good faith. It's about the relationship between the Department and the Union more so than the relationship between the Department and the employees.

In this case the Union filed a grievance on behalf of an employee, Corrections Officer Greg Fenley. The grievance was filed with the Department alleging a violation of the Collective Bargaining Agreement (CBA) in reference to over-time scheduling by seniority. Warden Robert Ulibarri scheduled a meeting with Officer Fenley without advising the Union of the meeting. Warden Robert Ulibarri and Officer Fenley reached an agreement, settling the grievance, and reduced the settlement to writing. The meeting

between Warden Robert Ulibarri and Officer Fenley to negotiate settlement of a grievance is in violation of 10-7E-19 (F) NMSA 1978 that requires bargaining in good faith by the employer. I therefore find that the New Mexico Department of Corrections has violated the Public Employee Bargaining Act as alleged in the complaint.

**FINDINGS OF FACT:**

The facts were not disputed in this case and I find that:

A step one grievance was filed on November 23, 2006.

Richard Smith an AFSCME representative filed the grievance.

The grievance was filed with the Department alleging a violation of the CBA in reference to over-time scheduling by seniority.

Said grievance was filed on behalf of Officer Greg Fenley and against the Department of Corrections Central New Mexico Facility.

A step two grievance was also filed on November 23, 2006.

On December 28, 2006 Warden Robert Ulibarri asked Officer Fenley to come to his office to adjust the grievance.

The Union, AFSCME, was not invited to or advised of the meeting between Officer Fenley and Warden Robert Ulibarri.

Warden Robert Ulibarri and Officer Fenley met on December 28, 2006 and settled the grievance filed by the Union.

The agreement entered into by Warden Robert Ulibarri and Officer Fenley was reduced to writing and has been admitted as Respondent's exhibit 4 in this proceeding.

**LAW RELIED UPON IN THIS CASE:**

The law of the case is 10-7E-19 (F) NMSA 1978, which makes it a prohibited practice to "refuse to bargain collectively in good faith with the exclusive representative". The National Labor Relations Act has a similar provision, Section 8, (a) (5).

#### UNFAIR LABOR PRACTICES

Section 8 (a) (5) states, "to refuse to bargain collectively with the representatives of the employees, subject to the provisions of section 9 (a)".

Section 8, (a) (5) refers us to Section 9 (a).

#### REPRESENTATIVES AND ELECTIONS

Section 9 (a) states, "[Exclusive Representatives; employees' adjustment of grievances directly with employer] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposed of collective bargaining in respect of rates of pay, wage, hours of employment, or other conditions of employment; Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract of agreement then in effect; Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

The relationship between the New Mexico Department of Corrections, its employees and the Union is regulated by the Public Employee Bargaining Act (PEBA) not the National Labor Relation Act (NLRA). Although, the Public Employee Labor Relations Board has been directed by the New Mexico Court of Appeals and the New Mexico Supreme Court to use as a guide National Labor Relations Board (NLRB) interpretation of similar language between the NLRA and the PEBA, Las Cruces Professional Fire Fighters and International Association of Fire Fighters, Local No. 2362, vs. City of Las Cruces and Louis Roman, Las Cruces Fire Department Fire Chief, 123 N.M. 239, 1997 NMCA 31, and, The Regents of the University of New Mexico, vs. New Mexico Federation of Teachers and American Association of University Professors, Gallup Campus, 125 N.M. 401, 1998 NMSC 20, respectively.

The NLRB has a substantial history of interpreting the provisions of Section 8 (a) (5) and Section 9 (a) of the NLRA. The following cases span a fifty-seven (57) year time period of consistent Board rulings.

In the NLRB case of, In the Matter of Bethlehem Steel Company, Shipbuilding Division, and Bethlehem Sparrows Point Shipyard, Inc. and Industrial Union of Marine & Shipbuilding Workers of America, CIO, 89 N.L.R.B. 341, 1950, the Board interpreted Section 9 (a) stating, "Thus, in explicit language, the second proviso to Section 9 (a) guarantees to the bargaining representative an opportunity to be present at the adjustment

of grievances. Clearly, the Act does not limit this right to the adjustment of grievance by any particular managerial representative; nor is there any evidence in legislative history that any such limitation was contemplated." The issue in Bethlehem Steel, supra, was whether the Union had a right to attend adjustment of grievances meetings attended by the foreman and the aggrieved employee.

In, United States Postal Service and Columbus Area Local, American Postal Workers Union, AFL-CIO, 281 N.L.R.B. 1031, 1986, the Union complained that it had a right to be present when the Postal Service adjusts or attempts to adjust an Equal Opportunity complaint with individual bargaining unit employees when the same incidents or course of conduct comprising those complaints are concurrently the subject of contractual grievances. The Board found a violation of Section 8 (a) (5) stating, "we find the allegations of the complainant sufficiently broad to support our finding that the violation occurred at the time of the grievance adjustment, rather than at the time the settlement was asserted as a contract grievance defense".

The 2007 case of Georgia Power Company and International Brotherhood of Electrical Workers, Local Union No. 84, 342 N.L.R.B. 192, defines 'direct dealing' as communicating directly with union-represented employees to the exclusion of the union, for the purpose of establishing or changing terms and conditions of employment.

#### **CONCLUSION OF LAW:**

Based on the above I conclude that as a matter of law the New Mexico corrections Department violated 10-7E-19 (F) NMSA 1978 by meeting with Officer Greg Fenley, outside of the presence of the Union, to adjust a grievance filed by that Union.

#### **PERIPHERAL ISSUES:**

The Department has raised several other issues that, in my opinion, were not dispositive in this case but that should be addressed. First, the Department raised the issue of its acts being so de minimis that, even if unlawful, no remedy is required. I disagree with the Department because these are acts that are likely to be repeated by the Department in the future. Secondly, the Department contends that, "A failure to respond to a motion constitutes consent to the granting of the motion. See, NMRA 1-007.1 (D)." Our rule, NMAC 11.21.1.23 make a response to a written motion optional. That is, "If a party decides to file a response to a written motion, the response shall be filed and simultaneously served pursuant to the scheduling order." Finally, the issue of union representation seems to be somewhat elusive to the Department. 10-7E-4 (I) NMSA 1978 defines exclusive representative as, "exclusive representative" means a labor organization that, as a result of certification, has the right to represent all public employees in an

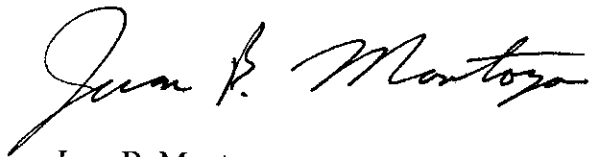
AFSCME v. Corrections, PELRB case # 106-07  
August 23, 2007  
Page five

appropriate bargaining unit for the purposes of collective bargaining;" The grievance procedure is established through a collective bargaining agreement, therefore, the exclusive representative has a right to participate in the collective bargaining process.

**ORDER:**

The New Mexico Corrections Department is hereby ordered to honor its contractual obligation to deal exclusively with the recognized union (AFSCME) and stop dealing directly with union represented employees. This opinion is to be posted at all places where the Department displays information for the employees. The posting is to occur for no less than fifteen (15) days.

Issued in Albuquerque, New Mexico on this the 29<sup>th</sup> day of August 2007.

A handwritten signature in cursive script that reads "Juan B. Montoya". The signature is written in black ink and is positioned above the printed name and title.

Juan B. Montoya  
Director, Public Employee Labor Relations Board