STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CWA LOCAL 7076,

Complainant,

v. **PELRB No. 134-11**

NEW MEXICO PUBLIC EDUCATION DEP'T.,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board on the State's request for review of the Hearing Officer's Recommended Decision denying the New Mexico Public Education Department's Alternative Motion to Dismiss for lack of jurisdiction and failure to be brought in the name of the real party in interest or for Summary Judgment.

Upon a 2-0 vote at the Board's May 8, 2012 meeting (the Board Chair, Duff Westbrook being absent);

IT IS HEREBY ORDERED that whether brought as a request for interlocutory appeal or on direct appeal as a matter of right, the Recommended Decision, including its Findings of Fact, Conclusions of Law and its Rationale shall be and hereby is adopted by the Board as its own.

WHEREFORE, Respondent's Motion for Dismissal or for Summary Judgment is **DENIED.**

Date: May 10, 2012

Wayne Bingham, Vice Chair,
Chairing by designation
Public Employee Labor Relations Board

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

CWA Local 7076,

Complainant,

v. **PELRB No. 134-11**

NM Public Education Department,

Respondent

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

THIS MATTER comes before the Hearing Officer on Respondent's Alternative Motion Dismiss for lack of jurisdiction and failure to be brought in the name of the real party in interest or for Summary Judgment.

A hearing on the motion was held November 29, 2011.

FINDINGS OF FACT:

1. The State entered into the collective bargaining agreement ("CBA") at issue in this case with the Communications Workers of America AFL-CIO, CLC State Employee Alliance on July 21, 2009 and that agreement was effective during all times material to this Complaint.
2. Administrative notice is taken of the Board's own records which include correspondence in the original certification file for the bargaining unit in this case, PELRB No. 358-04, suggesting that CLC- State Employee Alliance is the same entity as CWA Local 7076.
3. Additionally, administrative notice is taken of the CWA Constitution and bylaws posted on the website for CWA Local 7076 and referenced in the same correspondence referred to above in the case file for PELRB No. 358-04 which also

suggests that CLC- State Employee Alliance is another name for the entity also known as CWA Local 7076 (hereinafter "Union").

4. On April 29, 2011, the Respondent, New Mexico Public Education Department (Hereinafter, "NMPED" or "Employer") sent a letter to Petitioner, Communication Workers of America (hereinafter "CWA")providing notice pursuant to Article 14 of the parties' collective bargaining agreement ("CBA") that it was implementing a reduction in force ("RIF") effective July 1, 2011. (Exhibit A to Respondent's Motion.)

5. The letter of April 29, 2011, Exhibit A to Respondent's Memorandum in Support of its Motion to Dismiss, informs the Union that "The Department currently employs staff members covered under [the parties' CBA]" and "As part of a comprehensive reorganization of the Department ***many*** of these positions ***may*** be affected by the RIF." (Emphasis added). The letter further informs the Union that the Employer "...will notify the employees affected once they have been identified in order to work with the State Personnel Office (SPO) to locate potential employment opportunities for displaced staff based on their education, experience and skills prior to the effective date of the RIF."

6. On April 29, 2011 representatives of the Employer and the Union met to discuss the RIF. Based on the plain reading of the April 29, 2011 letter and the representations of counsel the Union did not receive details of the planned RIF such as the number of employees represented by the Union to be affected and in which job classifications as of the April 29, 2011 meeting.

7. Article 14 of the CBA provides that:

"In the event an agency contemplates a furlough or reduction in force, the Agency shall notify and meet with the Union to discuss the

furlough or reduction-in-force plan not less than thirty (30) days prior to submitting its furlough or reduction-in-force plans to the State Personnel Board."

CONCLUSIONS OF LAW:

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

B. CWA Local 7076 is an interested party and has standing as to bring this complaint.

C. NMPED's Motion to Dismiss or for Summary Judgment for lack of jurisdiction is without merit.

D. NMPED's Motion to Dismiss or for Summary Judgment for the Union's lack of Standing is without merit.

E. There is insufficient evidence to support NMPED's Motion to Dismiss or for Summary Judgment based on it affirmative defense that it met the bargaining obligation imposed by PEBA.

F. An employee layoff is a mandatory subject of bargaining under PEBA. NMPED's implementation of a RIF triggered its statutory duty to bargain over the effects of that plan and the union's allegation that the Employer failed to meet that obligation raises a dispute which is within this Board's jurisdictional purview.

G. The Employer's decision to layoff union-represented employees because of economic reasons entitles the union to a significant opportunity to bargain in a meaningful manner and at a meaningful time over the effects of the employer's decision to terminate its union-represented employees. On this issue the Board follows the rationale in ***First National Maintenance Corp v. NLRB***, 452 U.S. 666, 681 (1981).

H. The terms of the CBA at issue are clear and unambiguous. The expertise of an arbitrator is not required to interpret the language to establish whether the Respondent violated the PEBA.

I. NMPED has not established that Deferral to Arbitration is appropriate in this case because the circumstances contemplated by Board Rule 11.21.3.22(A), are not present; i.e. the dispute does not arise over the application or interpretation of an existing collective bargaining agreement. Rather, it arises out of allegations that NMPED violated the PEBA by failing to negotiate in good faith with the Union. The Hearing Officer follows the rationale in ***Collyer Insulated Wire,*** 192 N.L.R.B. 837 (1971). However, neither party has argued or briefed the impact on the deferral question, if any, of Exhibits I and J to NMPED's Memorandum in Support of its Motion to Dismiss and/or for Summary Judgment. Further development of their impact is desirable before scheduling a Hearing on the Merits.

STANDARD OF REVIEW:

With regard to the Motion to Dismiss the standard to be applied is that found in New Mexico Rule of Civil Procedure Rule 1-012(B)(6) wherein the Hearing Officer accepts all well-pleaded factual allegations as true and resolve all doubts in favor of sufficiency of the complaint. Dismissal on 12(B) (6) grounds is appropriate only if the complainant not entitled to recover under any theory of the facts alleged in their complaint. ***Callahan v. N.M. Fed'n of Teachers-TVI,*** 139 N.M. 201, 131 P.3d 51 (2006). When the Hearing Officer relies on matters outside the pleadings the Motion to Dismiss will be treated as a Motion for Summary Judgment and in this case the Movant did file an alternative Motion for Dismissal or Summary Judgment with a supporting affidavit and the Hearing Officer took administrative notice of its own file and a union website outside of the pleadings. With regard to the Motion for

Summary Judgment this Board will apply the standard of review for cases decided under Rule 1-056 NMRA. Summary Judgment will be granted only when there are no issues of material fact, with the facts viewed in the light most favorable to the non-moving party. The movant has the burden of producing "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." If that threshold burden is met by the Movant, the non-moving party then must "demonstrate the existence of specific evidentiary facts which would require trial on the merits." ***Summers v. Ardent Health Serv.*** (N.M., 2011) Docket No. 32,202, April 12; ***Smith v. Durden (N.M. App., 2010)*** No. 28, 896, August 23, 2010; ***Blauwkamp v. Univ. of N.M. Hosp.,*** 114 N.M. 228, 231, 836 P.2d 1249, 1252 (Ct. App. 1992).

National Labor Relations Board and Federal Court precedent are appropriate sources of law for interpretation of the New Mexico Public Employee Bargaining Act (PEBA). ***Las Cruces Professional Fire Fighters and International Association of Fire Fighters, Local No. 2362 v. City of Las Cruces,*** 123 N.M. 239 (1997); ***The Regents of the University of New Mexico v. New Mexico Federation of Teachers,*** 125 N.M. 401, 408 (1998).

RATIONALE:

A. Deferral to Arbitration. While NMPED did not make a deferral request *per se* in its Motion, deferral was argued in the Employer's Memorandum of Law supporting its Motion and in connection with its deferral argument NMPED argues that because a grievance arbitration process was negotiated by the parties this Board is "divested" of jurisdiction over the subject matter of this complaint. This is not an

issue of first impression. It has been previously determined by the Public Employee Labor Relations Board that alleged violations of Sections 10-7E-19 (A) through 10-7E-19 (G), will continue to be heard by the Board. Matters that allege a violation of PEBA solely under Sections 10-7E-19(H), 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 and the hearing officer shall determine whether a particular case will be deferred or not. For example see, ***AFSCME Council 18 v. State of New Mexico Regulation and Licensing Dep't***, PELRB No.'s 142-09 and 143-09, (March 9, 2010). In another case the Hearing Officer declined to defer a matter to grievance-arbitration because the contract language at issue was not ambiguous and did not, therefore, require an arbitrator's special expertise in contract interpretation. *See* ***AFSCME v. State,*** PELRB Case No. 143-07, Hearing Examiner's letter decision on Motion to Defer (Jan. 15, 2008); *see also* ***Caritas Good Samaritan Medical Center***, 340 NLRB 61, 62-63 (2003) (where the terms of the CBA are "clear and ambiguous ... the expertise of an arbitrator was not required to interpret the language to establish whether the Respondent violated the Act"); ***Grane Health Care, Inc.***, 337 NLRB 432, 436 (2002) (where the terms of the CBA are "clear and unambiguous," the matter did not "turn on contract interpretation," and "therefore the special interpretation skills of an arbitrator would not be helpful"); and ***Struthers Wells Corp.***, 245 NLRB 1170, 1171 n. 4 (1979).

This Board is not "divested" of jurisdiction unless and until it exercises its discretion to defer a matter to arbitration and then, only as to those aspects of the dispute within the scope of arbitration while the arbitration is pending. The

allegation in this case is that the Employer has instituted a RIF in violation of the duty to bargain in good faith in violation of § 10-17-19(F). That claim is within the class of cases typically decided by the Board under PEBA in preference to deferral. The Board does not lose its jurisdiction merely by virtue of parties having negotiated a grievance procedure culminating in arbitration. Because it is the PEBA that enables the parties to enter into collective bargaining agreements in the first instance, the contract is subordinate to PEBA. Therefore, the contract provisions cannot be interpreted to divest the PELRB of jurisdiction to hear alleged prohibited practice violations. [1]As a matter of proper statutory construction this Board is to read the constituent provisions of the PEBA together and in a manner that construes them harmoniously. While on the one hand PEBA §10-7E-17(F) requires collective bargaining agreements to include a grievance procedure to be used for the settlement of disputes pertaining to employment terms and conditions and related personnel matters, the Board also continues to operate under an affirmative statutory duty to adjudicate claims alleging a failure to bargain (See §10-7E-9) and complaints of prohibited practices (See §10-7E-19-(F).

Among the rules promulgated by the Board in furtherance of its statutory mandate to adjudicate prohibited practices claims are those regarding Administrative Agency Deferral, NMAC 11.21.3.21, and NMAC 11.21.3.22, regarding Arbitration Deferral. Both rules allow for deferral at the Director's discretion or by

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[1] In ***AFSCME v. State Personnel Office***, PELRB Case No. 143-07, the Hearing Officer construed the "management rights" clause in the AFSCME/State CBA. The Hearing Examiner concluded that, reading the contract as a whole, the union had clearly and unmistakably waived its right to bargain over amendments to the State's employee evaluation form, by permitting the State to reserve "the sole and exclusive right[]" to "evaluate ... employees." *See* AFSCME/State CBA, Article 18, Section 1(1). Hearing Examiner's letter decision on Motion to Defer (Mar. 20, 2008).

order of the Board. It is axiomatic that this agency should strive to construe all provisions of the PEBA consistently with each other and to construe the rules consistently with the PEBA. Therefore, the resolution to the question addressed herein is that the PELRB will continue to exercise jurisdiction over prohibited practice complaints that allege a failure to bargain in good faith as the basis for the complaint and will defer to arbitration only when appropriate under the ***Colyer***.

For purposes of ruling on NMPED's motion to dismiss the Board must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. Applying that standard, the State's Motion to Dismiss for want of jurisdiction based on the deferral doctrine is denied. Neither is there anything in the affidavit upon which the State relies for its Summary Judgment motion that disposes of all material issues of fact with respect to the deferral question. With the facts viewed in the light most favorable to the non-moving party, the State has not met its threshold burden of producing "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted". Therefore its Motion for Summary Judgment for want of jurisdiction based on the deferral doctrine is likewise denied.

B. Standing. The second ground on which the State's Motion relies is that CWA 7076 is not a proper party to this action and therefore lacks standing to advance the Prohibited Practices Charge. Once again, this is not an issue of first impression. A similar claim of lack of standing was present most recently in PELRB 144-11, ***New Mexico Motor Transportation Employee's Association and The Fraternal Order of Police v. The State of New Mexico and The Department of Public Safety.***

(Recommended Decision and Order entered October 26, 2011 and ratified after appeal to the Public Employee Labor Relations Board on December 19, 2011.) In that case the State filed a Motion to Dismiss The Fraternal Order of Police (FOP) as a party to a PPC for lack of standing. The State argued that because FOP was not the certified exclusive collective bargaining representative it was not an interested party and therefore lacked standing. The Hearing Officer found the FOP to be the parent organization of New Mexico Motor Transportation Employee's Association (MTD) and that MTD operated as a FOP affiliate. On those facts and applying the standard set forth in the New Mexico Rules of Civil Procedure Rule 1-020 (NMRA 1-020) the Hearing Officer concluded that FOP had standing as an interested party and denied the State's Motion. (Separate grounds for denial of the Motion on the basis of waiver and equitable estoppel are not discussed here.)

In the present case as in PELRB 144-11 guidance for the proper joinder of parties in prohibited practice proceedings before this Board may be found in the New Mexico State Court Rules of Civil Procedure. In the present case the Hearing Officer looks to Rule 1-017(A) which states:

> "Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the state so provides, an action for the use or benefit of another shall be brought in the name of the state. Where it appears that an action, by reason of honest mistake, is not prosecuted in the name of the real party in interest, the court may allow a reasonable time for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

Review of the Board's file for the certification of Communications Workers of America AFL-CIO, CLC State Employee Alliance as the exclusive bargaining representative for the employees at issue in this case seems to indicate that CWA Local 7076 is the same entity as, and operates under the name of "Communications Workers of America AFL-CIO, CLC State Employee Alliance". Both names appear on its letterhead and charter and on its website. Reference is made in correspondence in the initial certification file to the unity of their identification. As stated in PELRB 144-11 the real party in interest is the "...one [who] is the owner of the right being enforced and is in a position to discharge the defendant from the liability being asserted in the suit." Citing ***Edwards v. Mesch***, 107 N.M. 704, 706, 763 P.2d 1169, 1171 (1988) (quoting ***Jesko v. Stauffer Chem. Co.,*** 89 N.M. 786, 790, 558 P.2d 55, 59 (Ct.App.1976)). In the present case the dispute over who "owns" the rights being adjudicated is a mirage; Communications Workers of America AFL-CIO, CLC State Employee Alliance with whom the State admits it has a bargaining relationship appears to be just another name for CWA Local 7076. The intervening years of bargaining without the issue having been raised is perhaps testament to the fact that what was an accepted fact initially only becomes an issue 8 years later when memories have faded regarding the unity of identity. To the extent ambiguity exists as to the use of the name "CWA Local 7076" that ambiguity is easily resolved by permitting the Union to amend the Complaint to use a name more palatable to the State. That remedy is consistent with the solution contemplated by Civil Procedure Rule 1-017(A). Leave to amend for that purpose should be granted if the union chooses to do so.

For purposes of ruling on NMPED's motion to dismiss the Board must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. Applying that standard the State's Motion to Dismiss for lack of standing is denied. Neither is there anything in the affidavit upon which the State relies for its Summary Judgment motion that disposes of all material issues of fact with respect to the standing question. In some respects the affidavit of Sandy Martinez would support a conclusion contrary to NMPED's argument:

> "In my capacity as the SPO Labor Relations Director, I have worked with Ms. Lewis in her capacity as CWA Local 7076 President on numerous occasions on various management-labor issues involving not only NMPED, but with other state agencies covered by the CBA..."

Affidavit of Sandy Martinez, paragraph 7, Exhibit B to Respondent's Memorandum.

Viewing the facts in the light most favorable to the non-moving party, the State has not met its threshold burden of producing "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted" and its Motion for Summary Judgment for lack of standing is likewise denied.

C. **Authority under statute and administrative rule to perform the RIF.**

Respondent's Memorandum in support of its Motion also argued that because the NMPED was authorized by statute and administrative rule to conduct a RIF the Union's claims should be dismissed. In support the Employer refers to the State's 2011 appropriation in which the Legislature appropriated nearly $3 million less to the NMPED in FY12 than in FY11 for employee salaries. Shortage of funds is a criterion for authorizing a RIF in l.7.10 NMAC. There is no question that New Mexico's Administrative Code permits state agencies to engage in RIF's or that Article 14 of the CBA does not prevent them. Neither of these facts is dispositive of

any disputed issue. The State's authority to conduct a RIF is not at issue in this case. Establishing the legal authority to conduct a RIF says nothing about the obligation to bargain the impact of the decision to conduct the particular RIF at issue; such authority is presumed when the Union seeks bargaining over the impact of the RIF. For purposes of ruling on NMPED's motion to dismiss the Board must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. Applying that standard, the State's Motion to Dismiss on the basis that the Employer was otherwise authorized by statute or administrative rule is denied. Neither is there anything in the affidavit upon which the State relies for its Summary Judgment motion that disposes of all material issues of fact with respect to the question whether the Employer was otherwise authorized by statute or administrative rule. Viewing the facts in the light most favorable to the non-moving party, the State has not met its threshold burden of producing "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted" and its Motion for Summary Judgment on the basis that the Employer was otherwise authorized by statute or administrative rule is likewise denied.

D. **The Employer's obligation to bargain the RIF at issue.** The next point raised by NMPED in its Memorandum is that that this PPC must be dismissed because, having negotiated Article 14 of the CBA, the parties already negotiated RIF. In a permutation of that argument, the Employer also argues that its meetings with Michelle Lewis, President of CWA Local 7076, on April 29, 2011, May 17, 2011 and

June 2, 2011, satisfied NMPED's obligation to bargain. (Exhibit B).[2] Both arguments are in the nature of an affirmative defense, and are not jurisdictional. For the reasons stated above this Board is not divested of jurisdiction over claims brought pursuant to NMSA §10-17-19(F) alleging a violation of the duty to bargain in good faith. Setting aside any consideration of whether such defense was properly raised procedurally, (Affirmative Defense No. 6 raises the first permutation but not the second) the record does not support a conclusion that NMPED bargained the impact of the RIF at issue. The plain reading of the parties' CBA establishes that all that was negotiated by the parties with regard to RIF's was a provision in Article 14 for notice of an intended RIF plan prior to submission of the plan to the State Personnel Board. Neither those notice provisions or the requirement to meet with the union over an intended RIF can be construed as resolving *pro tanto* the issues surrounding an actual RIF once noticed. Guidance on this issue may be found in a case cited by NMPED in its Memorandum of Law; ***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). In that case the Federal Labor Relations Authority and the D. C. Court on appeal did recognize the doctrine posited by NMPED in this case 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

[2] It is notable that on one hand the Employer argues that CWA Local 7076 is not a proper party in interest because it is not the certified exclusive collective bargaining representative while simultaneously arguing on the other hand that it met its obligation to bargain by meeting with the President of CWA Local 7076.

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 in ***Department of the Navy, et al. v. FLRA et al.,*** 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 Article 14 does not remove the RIF from the range of bargaining and the cases cited by the State for that proposition under the NLRA are either inapplicable or inapposite. PEBA obligates Respondent to "bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties." 10-7E-17. Respondent's RIF plan unquestionably affects wages, hours and other terms and

conditions of employment, and the statutory duty to bargain attaches. The duty to bargain layoffs is a settled area of labor law. ***Hilton Mobile Homes,*** 155 NLRB 873 (1965), ***Advertiser's Mfg. Co.,*** 280 NLRB 1185 (1986). When analyzed under the Rule 1-012(B) (6) standard dismissal for absence of a case and controversy is not warranted. Similarly, applying the standard for Summary Judgment under Rule 1-056 the Employer has not established the absence of a material fact, with the facts viewed in the light most favorable to the non-moving party regarding whether the RIF was removed from the obligation to bargain.

NMPED also shows that it sent notice to the CWA April 29, 2011 of the agency's intent to conduct a RIF (Exhibit A). But notice of the possibility of or the intent to conduct a RIF is not all that is required of NMPED to satisfy the obligation to bargain in good faith. For example, the April 29, 2011 letter promised to provide RIF plan details at some unspecified future date, stating it would "...notify the employees affected once they have been identified in order to work with the State Personnel Office (SPO) to locate potential employment opportunities for displaced staff based on their education, education and skills prior to the effective date of the RIF." There is no evidence submitted by NMPED demonstrating that prior to submission of its RIF plan to the State Personnel Board on June 10, 2011 on which date it was approved, that it notified the Union of employees identified as being affected by the RIF. (Exhibits B, D and E). Meetings that took place between NMPED and CWA prior to that approval, namely those on April 29, 2011, May 17, 2011 and June 2, 2011, to discuss the RIF (Exhibit B) never included any discussion of any details of the reduction plan or identification of the employees to be affected by it.

Denigrating the union representative's pursuit of details during these meetings, lends nothing to resolution of the issues because the State was obliged to inform the union not only of its intent to conduct a RIF but its plan to do so as well. Consequently the union could not have known whether a bargaining demand was necessary until approval of the plan by the Personnel Board by which time the RIF was a *fait accompli.* This result is not consistent with PEBA's duty to bargain mandatory subjects in good faith. Article 14's requirement to provide notice not only of the employer's intent to conduct a RIF but of its plan to do so is consistent with the duty to bargain in good faith established in PEBA. However, one need not construe that Article of the CBA to find an absence of evidence of good faith bargaining regarding the RIF and the Hearing Officer does not rely on or construe Article 14 on this point. Aside from any consideration of Article 14 it remains a material question of fact as to whether the State has fulfilled its obligation to bargain in good faith under the facts of this case. It is a long-established principle that a union is entitled to "a significant opportunity to bargain ...in a meaningful manner and at a meaningful time" over the effects of an employer's decision to terminate its union-represented employees because of economic reasons. ***First National Maintenance Corp v. NLRB,*** 452 U.S. 666, 681 (1981).

For purposes of ruling on NMPED's motion to dismiss the Board must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. Applying that standard the State's Motion to Dismiss on the basis that there is no case or controversy because the parties have bargained the RIF is denied. Neither is there anything in the affidavit upon which the State

relies for its Summary Judgment motion that disposes of all material issues of fact with respect to that question. With the facts viewed in the light most favorable to the non-moving party, the State has not met its threshold burden of producing "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted" and its Motion for Summary Judgment for want of jurisdiction based on the basis that there is no case or controversy because the parties have bargained the RIF is likewise denied.

Recommended Order:

A. Respondent's Motion for Dismissal or for Summary Judgment is **DENIED.**

APPEAL:

Either party may appeal this hearing officer's decision by filing a notice of appeal 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 26th day of December, 2011

12-26-11

Thomas J. Griego
Executive Director
Public Employee Labor Relations Board
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