

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

STATE OF NEW MEXICO,

Complainant,

v.

PELRB No. 145-11

COMMUNICATIONS WORKERS
OF AMERICA,

Respondent.

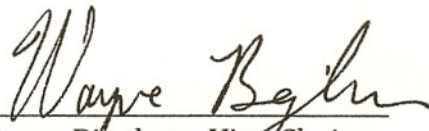
ORDER

THIS MATTER comes before the Public Employee Labor Relations Board for review of the Hearing Officer's Recommended Decision denying the State's Motion to Disqualify the Executive Director from hearing this case. 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 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, because none of the grounds for disqualification of the Executive Director specified in NMAC 11.21.1.13 exist in this case, this matter shall proceed with Director Griego as the Hearing Officer.

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:

STATE OF NEW MEXICO,

Complainant,

v.

PELRB No.'s 134-11 and 145-11

**COMMUNICATIONS WORKERS of
AMERICA,**

Respondent.

DENIAL OF MOTION TO DISQUALIFY EXECUTIVE DIRECTOR

THIS MATTER comes before the Executive Director on the State's Motion to Disqualify him from hearing the above-referenced cases. The Motions are consolidated for purposes of this decision as the same issues are raised in each case. The Motions are **DENIED** as without merit for the following reasons:

1. The fact that the Executive Director reached a decision adverse to the State's position in another case decision does not state grounds for disqualification in this case and the State's counsel cites no authority for that position.
2. The Motion misstates the Director's Decision in 134-11. The Recommended Decision did not find conclusively that Local 7076 was the same entity as the Communications Workers of America AFL-CIO, CLC State Employee Alliance; only that it appeared to be so, with the result that the State failed to meet the burden of proof necessary to grant its Alternative Motion Dismiss for lack of jurisdiction and failure to be brought in the name of the real party in interest or that a material question of fact remained so that Summary Judgment should be denied. See Recommended Decision in PELRB 134-11; Finding No.2 and Finding No.3 to the effect that the evidence "appears" to

be or "suggests" that the two are the same entity. The Rationale section of the Recommended Decision is consistent with those Findings:

"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... 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." (Emphasis added).

3. The Executive Director has no history of representing the Communication Workers of America AFL-CIO, CLC State Employee Alliance, the party to this these cases. See Petitioner's Response to Motion to Disqualify, par.1. The Executive Director has represented one Local Union affiliated with CWA within the preceding two years, i.e. CWA Local 7911. That Local is not a party to this or any other disputed proceeding pending before this Board. There is nothing in the decisions rendered by this Board thus far that could reasonably be interpreted as making every CWA Local in existence a party to any claim ever filed by another CWA Local or the parent organization CWA as implied by the State. Such an interpretation would not be legally supportable without some showing of interest as decided by this Board in upholding the Executive Director's recommended decision in *MTD and FOP v. State of New Mexico and NM Dep't of Public Safety, PELRB 144-11* (December 19, 2011). Movant does not allege that there is, and the Executive

Director affirmatively states that there is not, any expression of interest in the above-referenced cases by CWA Local 7911 nor does the State provide any facts to support an inference that any such interest exists.

4. Reliance on evidence of CWA's constitution or any other evidence "outside the record" as the State phrases it, in no way creates any conflict of interest of any kind. There is no present or future financial or personal interest at stake in this or any other pending case. The Executive Director receives no benefit of any kind from reliance on CWA's Constitution. Nor is it factually correct that the decision is based on evidence "outside the record". Under the procedures established in the Board's rules, the director performs a dual role as an investigator (See, NMAC 11.21.3.12(B) and (C)) in addition to serving in a quasi-judicial role adjudicating disputes. (NMAC 11.21.3.14-18 inclusive). The record in any case before this Board is what we (meaning both the parties and the Executive Director) make it to be. In this case that record includes the CWA Constitution and any other records discovered by the Executive Director without reliance on the submissions of counsel. Because the Director is empowered pursuant to NMAC 11.21.3.12(B) to investigate the allegations of a Prohibited Practices Complaint, he has discretion to independently investigate all aspects of the Complaint including allegations of lack of jurisdiction raised by a Respondent's Answer or by Motion or any other related matter on his or her own initiative. There is nothing in NMAC 11.21.3.12(B) that limits the Executive Director to submissions by the parties in the performance of his or her investigation and making the record. Clearly the rules contemplate otherwise because NMAC 11.21.3.12 (B) provides that "the director need not await the filing of an answer

before commencing the investigation." The independence of the Executive Director in conducting the investigation and making the record is consistent with the objective stated in NMAC 11.21.3.6 that the goal of the procedural rules governing PPC's "...to set forth an efficient and effective investigative process for collection and evaluating information to determine whether public employers, public employees or labor organizations have engaged in activities or conduct that constitutes a violation of the Public Employee Bargaining Act." (Citations omitted).

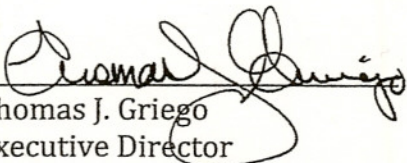
5. The Union has adequately addressed the deficiency in the State's assertion that "it [the union] speaks on behalf of all labor local labor organizations, which would include CWA Local 7911", not least of which is the fact that CWA Local 7911 is conspicuous by its *absence* from the list of CWA labor organizations covered by the letter referenced by the State. Beyond that, even if the assertion that in court proceedings referenced by the State in its Motions CWA has taken the position that it "speaks on behalf of all local labor organizations", doing so for the purpose of making labor's recommended appointment to this Board which is the subject matter of the referenced case, has no relevance to the question of whether the Executive Director has represented a party to this or any other pending action before the Board for purposes of disqualification. The grounds for disqualification of the Executive Director are specified in NMAC 11.21.1.13 and none of them exist here: he does not have a financial interest in the outcome and none is alleged; he is not indebted to any party and no such indebtedness is alleged; he is not related to any party or any agent or officer of a party by consanguinity within the third degree; and as set forth above he has not acted on behalf of any party within two years of the

commencement of the case or proceeding; and finally, there is no other reason or prejudice, he cannot fairly or impartially consider the issues in the proceeding.

For the foregoing reasons the State's Motion should be **DENIED**.

APPEAL: The State may appeal this decision by filing a notice of appeal with the PELRB staff at 2929 Coors Blvd. NW in Albuquerque NM 87120. Provisions for appeal are found at **NMAC 11.21.3.19**. Pursuant to **NMAC 11.21.1.27** appeal or request for review by the board shall be permitted only upon completion of proceedings before a hearing examiner or the director. An interlocutory appeal may be allowed with the permission of the board, director or the hearing examiner. As stated in the Board's February 6, 2012 meeting, this recommended decision does present issues appropriate for interlocutory appeal and will be heard at the Board's next regularly scheduled meeting.

Issued this 9th day of February 2012


Thomas J. Griego
Executive Director
Public Employee Labor Relations Board
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Albuquerque, NM 87120