STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AMERICAN FEDERATION of
STATE, COUNTY and MUNICIPAL
EMPLOYEES, COUNCIL 18,

Complainant,

v.

PELRB No. 151-11

NEW MEXICO HUMAN SERVICES DEP'T.

Respondent

ORDER

THIS MATTER comes before the Board on Appeal of the Hearing Officer's Recommended Decision of May 22, 2012. On a roll call vote of 3-0 during the Board's regularly scheduled July meeting the Board voted to adopt the Hearing Officer's Findings, Conclusions and Rationale as its own and ratify the Decision that the New Mexico Human Services Department committed a prohibited labor practice by its unilateral change in the practice of providing guards for the six locations identified in the hearing on the merits.

WHEREFORE, IT IS HEREBY ORDERED:

(a) The New Mexico Human Services Department shall rescind the unilateral change in the practice of providing guards for the six locations identified in the hearing on the merits.

(b) The New Mexico Human Services Department shall post at its main facility and at the six facilities where security guards were removed copies of the attached notice marked "Appendix A", after being signed by the Department's authorized representative. The notice shall be posted by the Department immediately upon

receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Department to ensure that the notices are not altered, defaced, or covered by any other material.

(c) The Department shall notify the Executive Director in writing within 20 days from the date of the Board's Order what steps it has taken to comply with this Order.

Dated: 7-13-12

Duff Westbrook, Chair

STATE OF NEW MEXICO
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Respondent

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

THIS MATTER comes before the Hearing Officer on the Merits April 24, 2012. As preliminary matters, the Hearing Officer considered argument on Respondent's Motion for Summary Judgment and Motion in Limine. Those Motions were denied at the Hearing and my letter decision containing findings, conclusions and my rationale for the decisions issued April 25, 2012. At the conclusion of Complainant's case in chief Respondent moved for Judgment in its favor. (Directed Verdict). A directed verdict is granted only if, after reviewing all of the evidence in a light most favorable to the nonmoving party, the evidence as a matter of law is insufficient to justify judgment in favor of the moving party. See, J. Walden, Civil Procedure in New Mexico Sec. 9c (2) (a) at 225 (1973) and 5A J. Moore, Moore's Federal Practice ¶ 50.02 (2d ed. 1987). The Motion was denied on the basis that a contract between the parties was established and that certain sections and articles of that contract implicate employee health and safety. That same evidence also established that without bargaining, a change occurred in the existing bargaining unit's working conditions by the removal of security staff from six of the employer's locations. A

reasonable inference may be drawn in favor of the Petitioner that the unilateral change affected the safety of its constituents. Accordingly, a *prima facie* case had been made both for a claim of failure to bargain in good faith and for a contract violation sufficient to deny Respondent's Motion.

Following completion of the case, May 15, 2012 was set as the deadline for submission of written closing arguments and requested findings of fact and conclusions of law. The parties were granted leave to submit their closing documents by e-mail as long as a hard copy followed by the next business day pursuant to the Board's rules. Respondent timely submitted its argument and requested findings and conclusions, first by e-mail on the 15th then by mail. Petitioner neither faxed nor e-mailed its closing documents on the 15th but mailed its closing documents on May 16, 2012. The Director received them on May 17, 2012. NMAC 11.21.1.10 provides that a filed document be either hand-delivered or mailed to the board's office in Albuquerque and a document is deemed filed "when it is received by the director". The rule also provides that documents submitted via fax transmission will be accepted for filing as of the date of transmission if an original is filed by personal delivery or deposited in the mail no later than the first work day after the facsimile is sent. No e-mailed or faxed filing of the Petitioner's closing documents was received by the Director on the 15th so the rule regarding mailing the next business day is inapplicable. Because of the late submission, Petitioner's closing argument and requested findings and conclusions were not reviewed or considered by the Hearing Officer. With regard to the Merits of this case the Hearing Officer Finds and Concludes as follows:

FINDINGS OF FACT:

Exhibit 1, Exhibit A and Exhibit B as well as the testimony of Connie Derr and Rob Trombley concerning those exhibits, support findings of fact in an earlier Decision entered herein on January 11, 2012 denying the Respondent's Motion to Dismiss. Some of those prior findings are applicable to the Merits and are restated and incorporated here:

1. Petitioner (AFSCME) and Respondent (HSD) have entered into a Collective Bargaining Agreement (CBA) that is in effect during the time material to the Prohibited Practices Complaint (PPC) herein, December 23, 2009 to December 31, 2011. (Prior finding No. 1).

2. Pursuant to Section 2(D) of Appendix H of the CBA "HSD agrees to provide for appropriate after hours security in its office when clients remain on the premises after 5:00 p.m." (Prior finding No. 4).

3. On May 20, 2011 Respondent sent a letter to Petitioner regarding security guards on HSD premises. (Prior finding No. 5).

4. On May 25, 2011 Petitioner sent a letter to the Respondent requesting additional information about the elimination of security guards at ISD offices. (Prior Finding No. 6).

5. The parties agreed to meet on June 27, 2011 to discuss the elimination of security guards at ISD offices but Respondent postponed that meeting. Subsequently, on June 30, 2011 Respondent notified Petitioner by e-mail that "...After further review of our proposed change it is not applicable with [sic] the provision under Appendix H Section 2D providing appropriate after

hours security. Our action is not affecting security after 5pm. Therefore a meeting is not necessary." (Prior Finding No. 7).

I further find:

6. Petitioner is the exclusive bargaining representative for the employees at issue in this case and with regard to the CBA Exhibit 1. See Respondent's Answer to the Complaint ¶ 1 and 2; Findings of Fact entered herein on January 11, 2012 in the letter decision denying Respondent's Motion to Dismiss.

7. AFSCME's PPC charges that the above-referenced acts violated the PEBA in two ways, first; by failing to bargain in good faith in violation of §19 (F) of the Act and second; by failing or refusing to comply with a collective bargaining agreement in violation of PEBA §19 (H). See PPC ¶8.

8. The parties do not dispute that the Respondent, without prior bargaining, implemented its plan to eliminate security guards at certain ISD offices, reducing the number of its offices with guards from 24 to 18.

9. HSD resumed bargaining with AFSCME over the removal of security guards on April 3, 2012. See Respondent's Motion ¶5.

10. HSD does not contend that it has returned to the *status quo ante* in connection with resuming bargaining April 3, 2012 and it did not refute the representations by the union that the unilateral change alleged in paragraphs 3 and 7 of the complaint are still in place even while the parties are now bargaining.

11. I find the following sections of New Mexico law applicable to the issues in this case: NMSA §10-7E-17 (A) requires the parties to bargain in good faith. §10-7E-17 (F) states: "An employer ... shall not refuse to bargain in good faith with the exclusive representative" and § 10-7E-19(H) requires that "An employer ... shall not "refuse or fail to comply with a collective bargaining agreement."

Based on the foregoing the Hearing Officer concludes as follows:

CONCLUSIONS OF LAW:

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

B. Resumption of negotiations does not render the PPC moot nor does it state a defense to the charge that Respondent refused to bargain or breached a contract term on June 30, 2011.

C. Respondent's practice of providing security guards at several of its locations implicates a safety issue which is a mandatory subject of collective bargaining.

D. The Respondent committed a *per se* breach of the duty to bargain by unilaterally altering a mandatory subject of bargaining without bargaining to impasse. The Respondent has the burden of proof as to any of its affirmative defenses and it did not establish a waiver of the Petitioner's right to bargain removal of security personnel.

E. There was insufficient evidence to prove that Article 34 Section 1 was breached by failure to provide a safe work environment. Neither did AFSCME

establish a breach of Article 34 Section 3 because that section does not require that security be provided – only that employees may refuse to work where they are exposed to risk of harm. The Petitioner did not establish a violation of Appendix H of CBA because there was insufficient evidence of any bargaining unit members being required to remain with clients on the premises after 5:00 p.m.

F. There was a fair amount of testimony elicited both in direct and cross examination of the witnesses concerning Respondent's reservation of management rights, Article 18 of the CBA from which the Hearing Officer concludes that Article 18 Section 2 requires HSD to bargain in good faith with the union whenever it contemplates changes to existing terms or conditions of employment relating to Article 18(9) (location and operation of its organization) and 18(11) (standards related to employees' safety).

G. HSD failed or refused to abide by Article 18 Section 2 of the parties' CBA when it removed security personnel at six of its worksites without bargaining to impasse.

H. Respondent's obligation to bargain in good faith with the Petitioner arises by operation of the PEBA, not only under terms of the CBA that may express a duty to bargain and removal of security guards at six of HSD's worksites constitutes a change in public employees' terms and conditions of employment over which those employees have the right to bargain collectively under PEBA.

RATIONALE:

Prior to removing the security officers at issue in this case, HSD recognized an obligation to give notice of their proposed removal to the union, gave that notice and invited discussions with the union over its proposed plan. The union requested bargaining and a session was scheduled. See, Exhibit 1 and testimony of Connie Derr and Rob Trombley. HSD cancelled that session because, based solely on the terms of the CBA, it decided that it had no bargaining obligation:

> "...After further review of our proposed change it is not applicable with [sic] the provision under Appendix H Section 2D providing appropriate after hours security. Our action is not affecting security after 5pm. Therefore a meeting is not necessary."

See e-mail to Ms. Derr June 30, 2011, Exhibit 1.

A public employer is certainly obligated to bargain those subjects it agrees to bargain under a CBA - those subjects constitute "other issues agreed to by the parties" as described in PEBA §17(A)(1). But that is not the only source of the obligation to bargain in good faith. NMSA 1978 §10-7E-17(A)(1) provides that a public employer and the exclusive bargaining representative "shall bargain in good faith on wages, hours and all other terms and conditions of employment" as well as "other issues agreed to by the parties." "Other terms and conditions of employment" include safety and health regulation. *See* The Developing Labor Law, Fifth Edition at 1318-1320. Respondent followed a practice of providing security guards at several of its locations, which practice pre-dated the negotiation of the parties' current contract. *See,* Exhibit A and witness testimony from Mr. Trombley regarding negotiation of Appendix H Section 2D of the current CBA. Respondent's decision to eliminate security guards at certain ISD offices implicates a safety issue which, as a term and condition of employment, is a mandatory subject of collective bargaining

under PEBA. Recognizing that the elimination of security guards in this case is a mandatory subject of collective bargaining does not end the analysis, however. Respondent asserts that eliminating the security guards as alleged is not a substantial, material and significant change and therefore did not violate a duty to bargain. *See,* ***Alamo Cement Co.,*** 281 NLRB 737, 738 (1986). (To violate the duty to bargain, the change to the mandatory subject must be "substantial, material and significant," rather than *de minimus.*) Respondent argues that it should prevail on the question of whether "Reducing the number of offices with guards from 24 to 18 is not substantial, material or significant... [because] The union has presented no evidence that the change has caused any substantial, material or significant hardship to its members." I am not persuaded that it is part of the union's burden to prove that a substantial hardship to its members must result before a change to a mandatory subject may be found to be substantial, material or significant. Nor is HSD's comparison of the number of locations retaining security guards with those where they are eliminated helpful to the analysis because the comparative number of worksites affected is not an important measure of significant substantial or material change in this case because of the safety aspect of the subject. HSD in its closing argument compared cases finding a substantial, material and significant change with some that did not. If there is one overriding principal to be gleaned from the cases finding a change to have been *de minimus*, it is that there was no change in the essential nature of benefit or contract term itself, only the manner and method of delivering the benefit was altered. For example, in ***Alamo Cement Co.,*** 277 NLRB 1031 (1985) the change at issue involved employees' classification titles

only without significant change in the duties performed. In ***UNM Nuclear Indus.,*** 268 NLRB 841 (1984) a new requirement that employees to take a short oral test on lectures and written materials given every year was *de minimus* because the employees' job position or security was not affected or impaired by the results. Similarly, in ***Dynatron/Bondo Corp.,*** 176 F.3d 1310 (11th Cir. 1999) (unilaterally assigning parking spaces when parking was previously allowed on a first-come, first-served basis) and ***Berkshire Nursing Home, LLC,*** 345 NLRB No. 14 (2005) (changing parking policy, with the result that a one-minute walk from the parking facility to the employer's entrance became a three-to five-minute walk) the essential character of the benefit, i.e. employer-provided parking did not change.

In contrast, the NLRB in ***Northside Center for Child Development, Inc. and Brotherhood of Security Personnel Officers and Guards,*** Case 2–CA–24030 (January 14, 1993) determined that the Respondent in that case failed to meet its bargaining obligation when it changed, without bargaining, the past practice of providing guns to its guards and requiring the guards to carry the guns while on duty. The employer defended the unfair labor practice change by asserting that its unilateral decision to remove the guns from the guards' possession did not result in a material, substantial, and significant change and that it did not involve a mandatory subject of bargaining. The NLRB found that the question of whether a security guard will carry a weapon is a mandatory subject of bargaining because the subject is "plainly germane to the 'working environment'". The Board also found the issue to be "a very substantial and significant one" not because the union showed a substantial harm to the unit members but because the employer's change "***can***

affect the safety, and indeed the life, of the guards involved". (Emphasis added). Thus, it appears that when it comes to employee safety questions the possibility of unit employees' safety being affected is sufficient; it is not necessary that the union show actual harm. In so ruling, the NLRB noted that "Questions concerning the safety and the lives of unit employees are not insignificant matters."

Following the rationale that, because questions concerning the safety of unit employees are not insignificant matters and that the possibility of an employer's change in a matter concerning employees' safety might affect employee safety is sufficient to find such questions to be mandatory subjects of bargaining, it is not part of the Petitioner's burden in this case to prove a resulting hardship. The Complainant has met its burden of proof that HSD committed a Prohibited Labor Practice by failing to bargain in good faith in violation of §19 (F) of the Act and by failing or refusing to comply with a collective bargaining agreement in violation of PEBA §19 (H), specifically, Article 18 Section 2 of the CBA which requires HSD to bargain in good faith with the union whenever it contemplates changes to existing terms or conditions of employment in what otherwise would be reserved management rights under Article 18(9) (location and operation of its organization) and 18(11) (standards related to employees' safety).

The Respondent requested findings of fact to the effect that its witness, Mr. Roth, analyzed caseloads and reported security concerns at the various ISD offices before deciding which offices would not have guards and there were no incidents at offices losing guards and they have low traffic flow compared with offices that retained security guards. He testified (and the Respondent requested findings) that

there have been no security incidents since the security guard change; the last incident at an ISD office was in 1996. The Respondent introduced evidence concerning the savings resulting from hiring fewer guards required to meet its reduced budget, the preference for reducing the number of contract workers over losing full-time regular employees, as well as facts establishing the majority of location where security guards remain. To rely on that evidence is to miss the point. In cases alleging a failure to bargain in good faith, the Public Employee Labor Relations Board does not make an assessment as to whether a given change would make the workplace "safer" or "better" or whether the decision was otherwise a "good" or necessary one. The issue in such cases is whether the change is of legitimate concern to the union as the representative of employees, such that the union would be entitled to bargain about the matter on behalf of the employees. For the reasons indicated I conclude that the subject of whether security guards will continue to be provided at bargaining unit members' work sites is such a matter of legitimate concern. All that would have been required of the Respondent to avoid this charge would be to have continued down the path it started on when it gave notice of the proposed change to the union and scheduled a meeting to discuss its proposal; the path it is once again walking, having resumed negotiations on this subject. By making its unilateral change and by its e-mail of June 30, 2011 that "a meeting is not necessary" the Respondent was essentially telling the union that it didn't matter when it came to this particular mandatory subject of bargaining. Bargaining now over the elimination of guards cannot be deemed to be proceeding in good faith where the Respondent has unilaterally changed the respective

positions of the parties. Because bargaining has resumed it is unnecessary to order the Respondent back to the bargaining table as that relief is already in place. However, there is other relief necessary in order to remedy the violations of §10-7E-17 (A) and (F), §10-7E-19(G) and (H) found here. The time-honored remedy for this sort of imposed change of positions is to order the parties returned to the *status quo ante*. Accordingly, my recommended decision is as stated below:

RECOMMENDED DECISION:

The Hearing Officer recommends that the Public Employee Labor Relations Board order the Respondent, New Mexico Human Services Department, to take the following affirmative action necessary to effectuate the policies of the Act:

(a) Rescind the unilateral change in the practice of providing guards for the six locations identified in the hearing on the merits.

(b) Post at its main facility and at the six facilities where security guards were removed copies of the attached notice marked "Appendix A", after being signed by the Respondent's authorized representative. The notice shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Executive Director in writing within 20 days from the date of the Board's Order what steps the Respondent has taken to comply.

Issued this 22nd day of May, 2012

Thomas J. Griego
Executive Director
Public Employee Labor Relations Board
2929 Coors Blvd 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 Bargaining Act and has ordered us to post and obey this notice.

You have the right under the Public Employee Bargaining Act §10-7E-17(A)(1), to bargain collectively with the Human Services Department 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 Bargaining Act, §10-7E-4(I) the American Federation of State, County and Municipal Employees, Council 18, having been recognized as an exclusive representative, has the right to represent employees of the Department covered under the parties' Collective Bargaining Agreement now in effect.

By failing to negotiate with the American Federation of State, County and Municipal Employees, Council 18 prior to the elimination of security guards in ISD offices in Belen, Grants, Moriarty, Ruidoso, T or C and Silver City 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 (H).

We acknowledge the above-described rights and responsibilities and will not in any like manner refuse to bargain with the American Federation of State, County and Municipal Employees, Council 18 and will return to our former practice of providing security guards at the above-referenced locations while engaged in negotiations with the American Federation of State, County and Municipal Employees, Council 18 over whether we may proceed with their planned elimination.

_____ Date: _____

For the New Mexico
Human Services Department