STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, NEW MEXICO COUNCIL 18, AFL-CIO,

Petitioner,

v.

PELRB No. 128-15

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SANTA FE,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board ("Board") at a regular meeting on May 3, 2016, to consider the Executive Director's Letter Decision dated March 22, 2016, which granted summary judgment in favor of AFSCME and denied Santa Fe County's cross motion for summary judgment. Santa Fe County filed a *Notice of Appeal of Hearing Examiner's Decision Regarding Two Competing Motions for Summary Judgment* on April 6, 2016. On April 20, 2016, AFSCME filed *Petitioner's Response to Respondent's Notice of Appeal*. Counsel for both Santa Fe County and AFSCME were present at the meeting and presented oral arguments supporting their respective positions.

The Board, having reviewed the pleadings and being otherwise sufficiently advised, and by a unanimous 2–0 (Board Member Westbrook recusing) vote in the affirmative, finds that the Hearing Officer's March 22, 2016 Letter Decision should be affirmed.

IT IS HEREBY ORDERED that the Hearing Officer's March 22, 2016 Letter Decision is **AFFIRMED**.

IT IS FURTHER ORDERED that AFSCME's Motion for Summary Judgment is **GRANTED**.

IT IS FURTHER ORDERED that Santa Fe County's Cross Motion for Summary Judgment is **DENIED**.

IT IS FURTHER ORDERED that Santa Fe County shall immediately disclose the requested information to AFSCME. Notice of this violation shall be posted by Santa Fe County, in a form approved by the Executive Director, in a public place frequented by the employees affected for no fewer than sixty (60) days.

IT IS FURTHER ORDERED that an evidentiary hearing shall be held as soon as possible to evaluate any damages that may have resulted from Santa Fe County's prohibited act. An appeal of this matter may be filed once the Board has evaluated the damages, if any, after an evidentiary hearing.

PUBLIC EMPLOYEE
LABOR RELATIONS BOARD

Date: 5/11/2016

R. E. Bartosiewicz, Vice-Chair

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

SUSANA MARTINEZ
Governor

Duff Westbrook, Chair
Roger E. "Bart" Bartosiewicz, Vice-Chair
James Shaffner, Member

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THOMAS J. GRIEGO
Executive Director

March 22, 2016

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Attn: Shane Youtz

Santa Fe County Attorney's Office
102 Grant Avenue
Santa Fe, New Mexico 87501
Attn: Rachel Brown

Re: ***AFSCME, Council 18 v. Santa Fe County; PELRB 128-15***

Dear Counsel:

This letter constitutes my decision regarding two competing Motions for Summary Judgment filed herein on February 26, 2016. Both parties responded to the other's Motion on March 11, 2016.

STANDARD OF REVIEW:

When deciding a motion for summary judgment the PELRB has long followed New Mexico Rules of Civil Procedure, Rule 1-056. See *AFSCME Council 18 v. New Mexico Department of Labor*, 01-PELRB-2007 (Oct. 15, 2007). Applying that rule, the movant shall set out a concise statement of all material facts about which it is contended there is no genuine dispute. The facts set out shall be numbered and the motion shall refer with particularity to those portions of the record upon which the party relies. See N.M. Rul. Civ. Pro. Rule 1-056. 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.* 150 N.M. 123, 257 P.3d 943, (N.M. 2011); *Smith v. Durden*, 2012-NMSC-010, No. 32,594; *Blauwkamp v. Univ. of N.M. Hosp.*, 114 N.M. 228, 231, 836 P.2d 1249, 1252 (Ct. App. 1992). See also, *Bartlett v. Mirabal*, 2000-NMCA-36, 917, 128 N.M. 810, 999 P.2d 1062, quoting *Eoff v. Forest*, 109 N.M. 695, 701, 789 P.2d 1262 (1990); *Gardner-Zemeke*, 1990 NMSC 034, ¶ 11. The non-moving party "cannot stand idly by and rely solely on the allegations contained in its complaint or upon mere argument or contentions to defeat the Motion once a prima facie showing has been made:" *Ochswald v. Cristie*, 1980 NMSC 136, ¶ 6, 95 N.M. 251, 620 P.24:1 1276. As non-movant, Petitioner's response must contain specific facts showing that there is an actual issue to be tried. *Livingston v. Begay*, 1982 NMSC 121, 98 N.M. 712, 717 P.2d 734.

MATERIAL FACTS NOT IN DISPUTE:

1. AFSCME is the duly elected, exclusive bargaining representative for three bargaining units of eligible employees employed by the County of Santa Fe. See Stipulation (filed 2/5/16), ¶ 1.

2. Relevant to this dispute, AFSCME is the exclusive representative for the following County employees in the bargaining unit labeled Local 1413: all non-probationary Corrections Department employees in the positions of Detention Officer, Corporal, Sergeant, Teacher, Therapist, Case Manager, Booking Clerk, Senior Case Manager/Electronic Monitoring, Case Manager/Electronic Monitoring, Life Skills Worker I, Life Skills Worker II, and YDP Assistant Shift Supervisor. See Stipulation, ¶ 2, Ex. 1, at Art. I, § 1(A).

3. On or about September 30, 2015, Connie Derr, Executive Director of AFSCME Council 18, sent a letter to Justin Salazar, Payroll Department, notifying the County of the revised 2015 dues rate for AFSCME members in Local 1413. In that letter, she requested the "dues rosters" in electronic format, to include (among other things) the employees' full name, address, home phone number and cell phone number. See Stipulation, ¶ 7, Ex. 6.

4. On or about October 20, 2015, Bernadette Salazar, HR Director for Santa Fe County, sent a letter to Connie Derr denying the dues increase. In that letter, she pointed out that the Collective Bargaining Agreement required the Union to "provide written notification to the employer and all bargaining unit members" prior to the effective date of the increase. She instructed Ms. Derr to "provide me confirmation that all bargaining unit members have been notified in writing pursuant to the CBA by providing a copy of the dated letter sent to all bargaining unit employees." *Id.*

5. By email dated November 18, 2015, Connie Derr sent the following request to Bernadette Salazar: "In order to notify the bargaining unit of the dues increase, AFSCME needs the names and address of all the bargaining unit members. Please forward this information to me as soon as possible." See Stipulation, ¶ 5, Ex. 4.

6. Bernadette Salazar responded in relevant part: "It is not common that we release home addresses of County employees however, if you would like to post something on the locked bulletin board in accordance with the CBA, please let me know." *Id.*

7. The County does provide AFSCME with the home addresses of the bargaining unit members represented by Local 1782. See Stipulation, ¶ 9, Ex. 8.

8. On November 19, 2015, Bernadette Salazar provided Connie Derr with "the report you requested yesterday pursuant to the CBA." That report, however, did not include the employees' home addresses, which was the information Connie Derr had requested on the previous day. *Id.*

9. Connie Derr responded in relevant part: "Thank you for sending the bargaining unit list of names, classifications, etc. I am still requesting the home addresses in order for us to communicate with our represented unit. Will you be providing AFSCME with the home addresses for the bargaining unit?" *Id.*

10. Bernadette Salazar responded in relevant part: "Although we do not believe Santa Fe County is obligated to release the home addresses of employees who are part of Local 1413, in an effort to assist with your request, we are willing to reach out to those employees to seek their authorization to release their home addresses to AFSCME Council 18. Please let me know if you would like us to undertake that outreach." *Id.*

11. Connie Derr responded: "I appreciate your suggestion, but it does not satisfy our request. When AFSCME became the duly elected representative of the bargaining unit, it was not for partial representation. The union must be able to communicate directly to its bargaining unit and not with the employer as the intermediary. So again, please provide the information requested. Failure to do so continues to interfere with AFSCME's right to unfettered access to its bargaining unit." *Id.*

ISSUES PRESENTED:

The Union's Motion for Summary Judgment presents the issue whether under the uncontested facts of this case it is entitled to Judgment in its favor as a matter of law with respect to whether the County violated PEBA §19(F) (refusing to bargain collectively in good faith with the exclusive representative) by its refusal to provide the Union with requested home addresses of bargaining unit members.

The County's Motion asks that this PPC be dismissed upon one or more of the following grounds:

a. No legal grounds upon which to sustain a claim; *Excelsior* rights do not apply and the County's conduct does not constitute a refusal to bargain;
b. Waiver;
c. Employee privacy interests bar disclosure;
d. The Union has failed to exhaust administrative remedies.

The County also asks for Summary Judgment in its favor dismissing claims as to bargaining units Locals 1782 or 1413M because it provides the names and home addresses of bargaining unit members to the Union in one and there are no facts to support a claim regarding the other. That aspect of the case is discussed *infra.*

Also, the County argues that the Union has not complied with the requirement to notify employees of a dues increase, a prerequisite to the County raising the dues. This presents a perplexing circular argument. Of course the Union has not notified employees of the dues increase. The employer refuses to disclose the information necessary for it to do so. This is rather like the boy on trial for murdering his parents pleading for mercy because he's an orphan. The Union does not seek immediate implementation of the dues increase without the requisite notice. To the extent the

County, by this argument, wants to avoid liability for the consequences of any bad acts found herein or in a subsequent case, Summary Judgment on this point should be denied.

DISCUSSION AND RATIONALE:

The PELRB has jurisdiction to hear and decide this matter. Each party bears the burden of proof as to their respective motions and if based on the statement of material facts about which there is no genuine dispute, viewed in the light most favorable to the party opposing the motion. One issue is easily disposed of at the outset. In its response to the County's Motion the Union acknowledges its intent is to bring a claim only with regard to Local 1413. A plain reading of the PPC and the stipulations herein indicate that this PPC is about repeated requests for addresses and phone numbers of the Local 1413 bargaining unit members made in November of 2015. See also Stipulation, ¶ 5 & Ex. 4 thereto containing the November requests for information at issue in this case. The PPC has never concerned Locals 1782 or 1413M and the County's proposed facts and presentation of evidence about all three bargaining units are immaterial. All findings and conclusions in this recommended decision are limited to the only bargaining union at issue - Local 1413.

For the reasons discussed below I conclude that the Union has demonstrated sufficient undisputed material facts to support judgment as a matter of law in its favor while the County has not successfully rebutted them. The statement of undisputed material facts put forward by the County are not material, and so, are not adopted herein. Consequently, the County has not carried its burden with regard to its Motion.

I. THE UNDISPUTED MATERIAL FACTS REQUIRE SUMMARY JUDGMENT IN FAVOR OF THE UNION ON ITS CLAIM THAT THE COUNTY VIOLATED THE PEBA §§17(A)(1) and 19(F) BY REFUSING TO PROVIDE THE UNION WITH THE HOME ADDRESSES OF BARGAINING UNIT MEMBERS AS REQUESTED.

NMSA 1978 §10-7E-17(A) establishes a mutual obligation on the part of public employers and exclusive representatives to "...bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties." The duty to bargain includes the duty to provide, upon request, any relevant information necessary to negotiate, *administer* and police the CBA, *and to fairly and adequately represent all collective bargaining unit employees. See National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH,* 3-PELRB-2005 (Oct. 19, 2005) (NUHHCE). See also JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 976-1042, and *AFSCME Locals 624, 1888, 2962 and 3022 v. the City of Albuquerque,* Albuquerque Labor Management Relations Board, Case No. LB 06-033 (June 12, 2007).

Among the types of information found to be "presumptively" relevant and necessary to negotiating and administering the CBA listed in the Developing Labor Law Treatise are employee lists and other information pertaining to union members or supporters. See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 992-993, 1031-1036; see also *NUHHCA, supra.*

This dispute arose because the County declined to apply an increase in AFSCME dues deducted from bargaining unit members' paychecks based on the lack of written notice to the entire bargaining unit. See, Stipulations, Exhibits 4 and 6. The requested information fits squarely within the definition of relevant information "necessary to administer and police the CBA and to fairly and adequately represent all collective bargaining unit employees". Before AFSCME can discharge its statutory duty under NMSA 1978 § 10-7E-15 to fairly represent the entire unit, not just its members, AFSCME must have the information requested. Viewed in this way, it is clear that the County's obligation to provide the requested information arises under the substantive public sector bargaining laws. It is a separate, independent obligation apart from any other that may arise under the parties' CBA.

A. THE COUNTY'S DEFENSE BASED ON THE INSPECTION OF PUBLIC RECORDS ACT (IPRA), NMSA 1978 §§ 14-2-1 *ET SEQ.*, IS WITHOUT MERIT.

A union's right to information under the duty to bargain in good faith is not defined by IPRA because the public policy and purpose underlying IPRA is to ensure an informed electorate. *See National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH*, 3-PELRB-2005 (Oct. 19, 2005); see also *AFSCME Locals 624, 1888, 2962 and 3022 v. the City of Albuquerque, Albuquerque Labor Management Relations Board*, Case No. LB 06-033 (June 12, 2007) (concluding that while disclosure of such information cannot be compelled under IPRA, IPRA does not prevent its disclosure pursuant to established labor law). The public policy at issue here, the Union's right to information needed to fairly and adequately represent all collective bargaining unit employees is entirely distinct from that underlying the IPRA. I incorporate by reference those cases cited by the Union in its Motion for Summary Judgment on this point, particularly the decision of Judge Robles in *United Steelworkers of America, Local 9424 v. City of Las Cruces*, Third Judicial District Cause No. CV-2003-1599 (April 4, 2005). Although arising out of a local collective bargaining ordinance, on its face the decision also construed the PEBA §10-7E-19 in finding that the employer committed a prohibited practice when it refused to provide the United Steelworkers with home addresses of bargaining unit members. See also *Rio Rancho Public Schools v. Rio Rancho School Employees' Union*, Thirteenth Judicial District Cause No. D-1329-CV-2010-1987, where, in the context of conducting a representation election, the District Court upheld a decision by the Rio Rancho Public Schools Labor Relations Board requiring the School District to release home addresses of its employees. In so doing the District Court also determined that the New Mexico Inspection of Public Records Act is inapplicable and the release of home addresses "is not contrary to state law".

The County argues that cases construing a union's right to employee addresses during an organization drive, referred to as the "*Excelsior* doctrine" for the case articulating that right, do not apply here. That argument misses the point. The law requires the employer to provide that information to a union both when it seeks certification as well as when necessary to enforce the contract or represent the bargaining unit. If the *Excelsior* doctrine rationale requires the disclosure of such information *prior to* the union's certification as the exclusive representative, then the rationale is much stronger for requiring it *after* a union has been certified and has a statutory duty to fairly

represent *all* employees in the bargaining unit regardless of their membership in the union. The Union cannot properly discharge that duty if it cannot communicate with those members outside of the observation of the employer. See *Callahan v. N.M. Federation of Teachers-TVI*, 2006-NMSC-010, 139 N.M. 201, 131 P.3d 51. It is for this very reason that the bulk of authority, both in the public and private sector, recognizes the requirement of disclosure of this information upon request. *Prudential Ins. Co. of America v. NLRB*, 412 F.2d 77, 84 (2d Cir. 1969) ("It seems manifest beyond dispute that the Union cannot discharge its obligation unless it is able to communicate with those in whose behalf its [sic] acts."); see also *NLRB v. CJC Holdings, Inc.*, 97 F.3d 114 (1996); *Superior Protection, Inc.*, 341 NLRB 267, 269 (2004) ("Moreover, it is well established that information concerning unit employees' names, addresses, phone numbers, work assignments, and hours is presumptively relevant for purposes of collective bargaining and must be furnished on request."); *Stanford Hospital & Clinics*, 338 NLRB 1042 (2003); *MEMC Electronic Materials, Inc.*, 338 NLRB No. 142 (2003); *American Logistics, Inc.*, 328 NLRB 443 (1999), *enf'd.* 214 F.3d 935 (7th Cir. 2000); *Bozzuto's, Inc.*, 275 NLRB 353 (1985); *County of Morris v. Morris Council No. 6*, 852 A.2d 1126, 1135 (Super. Ct. N.J. 2004) ("Accordingly, the unions are entitled to the home addresses of their members and the employees within the negotiations unit."); *County of Los Angeles v. Los Angeles County Employee Relations Comm'n*, 301 P.3d 1102, 1105 (Cal. 2013) ("We conclude that, although the County's employees have a cognizable privacy interest in their home addresses and telephone numbers, the balance of interests strongly favors disclosure of this information to the union that represents them.").

For the above reasons and because the IPRA does not contain a prohibition against disclosing employee contact information for the legitimate purposes outlined herein the employees' privacy interests in that information are outweighed by the need for disclosure of that information to the union that represents them. For the same reasons the Driver's Privacy Protection Act of 1994, (Title 18 U.S.C. Section 2721 has no bearing on this case. Once again, I incorporate by reference those cases cited by the union in its Response to the County's Motion on this point. Because this case does not involve a request made pursuant to the IPRA arguments and cases cited by the County (including *New Mexico Federation of Teachers v. Governing Board of TVI*) denying disclosure on the basis that such information is not a "public record" are not applicable.

B. A CLAIM FOR REFUSAL TO PROVIDE INFORMATION IS NOT SUBJECT TO ARBITRATION.

As noted above the Union's PPC arises out of the mutual statutory obligation bargain in good faith found in NMSA 1978 §10-7E-17(A). Therefore, the Union is not required to exhaust the contract arbitration remedy because the subject matter is not one for which grievance-arbitration is appropriate. NMSA 1978 §10-7E-17(B) prohibits a public employer and representatives from entering into a CBA that conflicts with the provisions of any other statute and provides that in the event of a conflict the statute shall prevail over the CBA. See, *AFSCME v. Public Regulation Commission*, 07-PELRB-2007 affirming in part Hearing Examiner's Decision on Motion to Dismiss in PELRB Case No. 154-06. Because this claim is based on a statutory right, not one arising out of the parties' contract, it is not subject to arbitration. See also, JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 979-980 and citations therein for the proposition that although it is common for collective bargaining agreements to have provisions requiring disclosure of relevant information

during the contract term, the duty to furnish information is a statutory obligation that exists independent of any agreement between the parties.

C. WAIVER ANALYSIS.

The Developing Labor Law Treatise continues at the above citation stating "However, the union's right to disclosure of relevant and necessary data can be waived by the union in a collective bargaining agreement." *Id.* The County has asserted just such a waiver exists here.

Article 3, Section 1(B) of the parties' CBA (Stipulations, Exhibit 1) requires the County to provide AFSCME an annual list of the bargaining unit "to include the employee's name, classification, hourly rate and date of hire." Article 5, Section G of the CBA requires the maintenance of lists classifying employees on the bases of Department Seniority and Classification Seniority. Comparison of those two contract Articles with the example of lists actually produced lends credence to the Union's assertion in its response to the County's Motion that those lists allow AFSCME to ensure that the seniority list the County is obligated to provide is complete and accurate as personnel change during the course of the contract year. Nothing in Article 3, Section 1(B) suggests that this annual provision of information is intended to be the only information AFSCME is entitled to receive during the life of the CBA, especially in light of Article 8, Section 1, which requires the Union to "provide written notification to the employer and all bargaining unit members" prior to the effective date of any dues increase. To hold otherwise would require reaching the absurd conclusion that the Union has contracted to provide the entire bargaining unit with written notification of a dues increase, while simultaneously waiving its right to request the addresses of the bargaining unit in order to perform that task.

My reading of the parties' contract comports with the general understanding of "waiver" in the collective bargaining context. A waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter. Such a waiver will only be found in a CBA if the waiver is "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) ("Thus, we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable."); see also *County of Los Alamos v. Martinez*, 2011-NMCA-027, ¶ 19, 150 N.M. 326, 258 P.3d 1118 ("We recognize that a union can contractually waive its right to mandatory bargaining if the waiver is expressed clearly and unmistakably.") I incorporate by reference the cases on this point cited by the Union in its response to the County's Motion.

Nothing in the parties' CBA, even with reference to its bargaining history and "zipper clause", approaches the standard of a clear and unmistakable waiver of the union's statutory right to receive the requested information. Generally, broadly-worded zipper clauses do not meet the "clear and unmistakable waiver" standard. See *Angelus Block Co.*, 250 NLRB 868, 877 (1980); *County of Los Alamos*, 2011-NMCA-027, ¶ 20-26.

CONCLUSION:

AFSCME has demonstrated that there are no issues of material fact precluding judgment in its favor that, as a matter of law, the failure to provide the names, addresses and phone numbers of the Local 1413 bargaining unit is a violation of Sections 17(a)(1) and 19(F) of PEBA. The County has not rebutted its evidence or otherwise demonstrated the existence of specific evidentiary facts which would require a hearing on the merits. Therefore, I conclude that the Union's Motion for Summary Judgment should be **GRANTED.**

The same facts established and conclusions reached above require a decision against the County's Cross Motion for Summary Judgment. The County's Motion should be **DENIED** because the County has a statutory duty to provide the information upon request. Disclosure as requested is not precluded by other state laws or by contract and the employees' privacy rights in the requested information is outweighed by the Union's right to obtain that information. Of the requested facts or arguments made but not addressed herein, none are material to any issue in the case.

As a remedy the County should immediately disclose the requested information to the Union and Notice of this violation should be posted by the Employer, in a form approved by the Executive Director, in a public place frequented by the employees affected by this Recommended Decision for a period of no fewer than 60 days. An evidentiary hearing should be held as soon as possible to evaluate any damages that may have resulted from the prohibited act found.

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Thomas J. Griego
Executive Director