STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AFSCME COUNCIL 18,

62 – PELRB - 2012

Complainant,

v.

PELRB No. 106-12

STATE OF NEW MEXICO,
Respondent.

ORDER AND DECISION

THIS MATTER comes before the Public Employee Labor Relations Board for ratification of the Hearing Officer's denial of the union's motion for Summary Judgment and partial Dismissal regarding "union security" provisions. Upon a 3-0 vote at the Board's August 28, 2012 meeting;

IT IS HEREBY ORDERED that the Hearing Officer's denial of the union's motion for Summary Judgment and partial Dismissal regarding "union security" provisions, shall be and hereby is ratified and adopted by the Board as its Order for the reasons stated in the Hearing Officer's recommended Decision.

Date: 9-9-12

Duff Westbrook, Chairman
Public Employee Labor Relations Board

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

SUSANA MARTINEZ
Governor

THOMAS J. GRIEGO
Executive Director

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August 2, 2012

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Re: ***AFSCME Council 18 and CWA, AFL-CIO, SEA v. State of New Mexico; PELRB No.106-12***

Dear Counsel:

This letter decision is to address the parties' competing Motions for Summary Judgment, and Dismissal; Complainants' joint Motion for Summary Judgment having been filed June15, 2012 and Respondent's alternative Motion for Summary Judgment or Dismissal on June 18, 2012. The two sets of motions are based on the same facts and so are all decided in this single recommended decision. The parties were unable to coordinate their calendars so that they could present oral argument at a mutually convenient time but both parties have adequately briefed the issues and the Motions are therefore decided without hearing oral argument. Based upon the pleadings, legal briefs and supporting documents of record I find, conclude and decide as follows:

FINDINGS OF FACT:

1. Complainants, American Federation of State County and Municipal Employees, (AFSCME, Council 18) and Communications Workers of America, AFL-CIO, SEA (CWA) jointly filed a Prohibited Practices Complaint (PPC) on April 12, 2012 the Complaint herein. (Complaint).
2. The State timely answered the PPC on May 4, 2012. (Answer).

3. Complainants are currently engaged in contract negotiations with the State of New Mexico on successor agreements which expired on December 31, 2011. These expired agreements are still in full force and effect as a consequence of NMSA 1978 §10-7E-18(D) and evergreen provisions in the parties' CBA's providing that the existing contract will continue in full force and effect until it is replaced by a subsequent written agreement. (Complaint, ¶3; Answer, ¶¶3&4; NMSA 1978 §10-7E-18(D)).
4. The parties' current CBA's contain what are known as "fair share" and dues deductions provisions. (Complaint ¶4; Answer ¶5).
5. Respondent is obligated to bargain dues deductions, a mandatory subject of bargaining. (Complaint ¶6; Answer ¶¶6 and 9; §10-7E-17(C) NMSA).
6. In the context of the negotiations referenced in Finding No. 3 above Respondent made proposals regarding dues deductions on August 8, 2011. (Complaint ¶6 and Exhibit 1 to PPC).
7. On June 15, 2012 Complainant filed a Motion for Summary Judgment requesting this Board find as a matter of law that the Respondent is refusing to bargain in good faith in the current negotiations over a mandatory subject of bargaining, i.e. "union security" provisions. In its Introduction to their Summary Judgment Motion the Complainants assert:

> "In contract negotiations for the current collective bargaining agreements between the State and the Unions CWA and AFSCME, the State has proposed deleting the agency shop provisions and refuses to bargain any other alternative, on the basis that the New Mexico Public Employees Bargaining Act (PEBA) explicitly identifies 'fair share' as a permissive subject of bargaining. However, because 'union security' is a mandatory subject of bargaining (as opposed to 'fair share') both petitioners have proposed union security provisions, which the employer refuses to bargain. By this motion, petitioners seek a finding that the employer is legally obligated to bargain in good faith on its union security proposals."

8. On June 18, 2012 Respondent filed an alternative Motion for Summary Judgment or Dismissal asserting that "The allegations [of bad faith bargaining] raised by the Petitioners [in their Summary Judgment Motion] cannot be supported inasmuch as the parties have continued to bargain and exchange proposals on all mandatory subjects of collective bargaining.
9. The State did not support its Answer or its Motions and any assertions of fact therein with affidavits or exhibits outside of the initial pleadings.
10. On June 29, 2012 AFSCME and CWA filed their joint Response to the State's Motion for Summary Judgment or for Dismissal.
11. On July 2, 2012 the State filed its Response to the unions' joint Motion for Summary Judgment. Assertions of fact in the State's Response are not supported by affidavit or documents outside of the initial pleadings.

STANDARD OF REVIEW:

With regard to the State's 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 resolves all doubts in favor of sufficiency of the complaint. Dismissal on 12(B) (6) grounds is appropriate 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). In this case the State filed an alternative Motion for Dismissal or Summary Judgment and the Unions filed a Summary Judgment Motion. With regard to the competing Motions 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).

REASONING AND CONCLUSIONS OF LAW:

This Board has jurisdiction over both the parties and the subject matter present in the competing Motions. The Motions present 2 questions for determination:

A. Is there a sufficient undisputed factual basis to find that the "union security" proposals at issue in this case are mandatory subjects of bargaining as a matter of law?
B. Is there a sufficient undisputed factual basis to find that the State failed to bargain in good faith over the "union security" proposals at issue in this case by engaging in regressive bargaining or retaliatory bargaining as alleged in paragraph 6 of the Unions' Motion?

Analysis of the questions presented begins and ends with examination of the actual language of the Public Employee Bargaining Act. The unions' reference to *Borg-Warner* is of limited utility. Since NLRA §14(b) permits union security agreements to be limited by state law even in the private sector, how state law defines

permissive and mandatory subjects of bargaining controls the outcome of the instant motions. The NLRA anticipates the possibility that states might be governed by right-to-work laws enacted by sovereign governments and so embraces diversity of legal regimes respecting union security agreements at the level of 'major policy-making units.'" *New Mexico Fed'n of Labor v. City of Clovis*, 735 F. Supp. 999 at 1003(D.NM 1990). PEBA §10-7E-9(G) provides that the issue of fair share shall be left a permissive subject of bargaining. In contrast Respondent is obligated to bargain dues deductions, as a mandatory subject of bargaining. (Complaint ¶6; Answer ¶¶6 and 9; §10-7E-17(C) NMSA). The State does not dispute that it is obligated to bargain dues deductions and so one must conclude that the unions mean something other than that by their use of the term "union security". What that "something else" is, is apparent from the introductory language of Complainant's joint Summary Judgment Motion wherein they reference the "agency shop" and the State's proposal to eliminate "fair share" provisions in the same breath as their reference to the unions having tendered their union security proposals. [1]

To the extent the Unions seek to preserve or add to fair share provisions included in their contracts, they must do so with the understanding that such provisions are a permissive subject of bargaining pursuant to PEBA §9(G). If the proposed "union security" clauses at issue in this case may fairly be said to be squarely within the provisions of PEBA §17(C) or of some other recognized mandatory subject of bargaining, and if at the same time they do not include language that may fairly be said to be within §9(G)'s defined permissive subject matter, then the proposals would be mandatory subjects of bargaining. Conversely, if the union security proposal includes language that might fairly be said to be a permissive under §9(G), then it calls into question whether a provision that was formerly a mandatory subject of bargaining remains so. [2]

I decline to parse the proposals and render what amounts to a declaratory judgment as to the mandatory or permissive characteristics of the proposals. The reason I

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[1] The "agency shop" has been described as "...a hybrid form of union security...[which] provide[s] that employees, as a condition of continued employment, must either become members of the union, with the attendant dues obligation, or pay the union a service fee. Although its legal nature is essentially the same as the statutory union shop...the agency shop is perceived and treated distinctly by the collective bargaining parties. Its very name emphasizes payment-for-service, rather than organizational membership; it thus represents a lesser form of union security. See, *The Developing Labor Law,* 5th Ed., Ch.26.IIIA, pp. 2143-2144.

[2] The Hearing Officer notes that the term "union security" is foreign to PEBA. As generally understood the term encompasses that portion of labor law governed by the NLRA §§8(a)(3) and 8(b)(2). See, *The Developing Labor Law, supra.* A contract clause negotiated pursuant to PEBA §17(C) which designates payroll deduction of union membership dues as a mandatory subject of bargaining, provides that the amount of dues shall be certified in writing, may not include special assessments, penalties or fines, requires a public employer to honor payroll deductions until the authorization is revoked in writing by the public employee in accordance with the negotiated agreement so long as the labor organization is certified as the exclusive representative and prohibits a public employer deducting dues for any other labor organization may be considered by some to be a sort of union security clause.

decline to do so is because the issue is not ripe for determination by this Board. The Complainants are currently engaged in contract negotiations with the Respondents and the existing contract will continue in full force and effect until it is replaced by a subsequent written agreement. Respondent made proposals regarding dues deductions on August 8, 2011. According to the PPC the State has proposed deleting the agency shop provisions and though it allegedly refuses to bargain any other alternative, on the basis that PEBA explicitly identifies 'fair share' as a permissive subject of bargaining, by proposing the change, the Respondent is engaged in bargaining. Whether it continues in its alleged recalcitrant attitude toward its proposal remains to be seen – the parties are still in negotiations and the prospect of a possible impasse in negotiations will often change negotiation positions on permissive subjects of bargaining.

"Collective bargaining" is defined as the "act of negotiating between a public employer and an exclusive representative for the purpose of entering into a written agreement regarding wages, hours and other terms and conditions of employment." NMSA 1978, §10-7E-4 (F) (2003). The public employer and the exclusive representative are obliged to bargain in good faith on wages, hours and all other terms and conditions of employment and other agreed issues, but neither party is required to agree to a proposal or make a concession. §10-7E-17 (A). Unless and until the parties' negotiations are concluded or end in impasse this Board is not in a position to adjudicate whether the Respondent has ultimately bargained in good faith over a mandatory subject of bargaining. Until then the specifics of the pending negotiations remain closed and confidential. See, §10-7E-17(G) which requires collective bargaining sessions, which by implication would include the offers and counteroffers therein, as well as consultations and impasse resolution procedures, to be closed. Accordingly, accepting all well-pleaded factual allegations as true and resolving all doubts in favor of sufficiency of the complaint it is my opinion that dismissal on 12(B)(6) grounds is appropriate because the complainant is not entitled to recover under any theory of the facts alleged in their complaint because it is premature.

While one might be tempted to "help" the parties progress toward agreement in their negotiations by deciding today "yes" or "no" on the broad (perhaps overly-broad) question of whether the Unions' union security proposals are mandatory subjects of bargaining I can't help but see the specter of unintended consequences hovering in the background if we do so prematurely. The kind of help one is instinctively prompted to give is more properly delivered through PEBA's mediation and arbitration procedures if the parties reach an impasse in the negotiations. NMSA 1978, §10-7E-18 (2003).

It is for these reasons that the Unions' PPC should be dismissed without prejudice as having been brought prematurely and their joint Summary Judgment Motion denied. Consequently, the State's Motion to Dismiss should be granted except insofar as it requests that the Dismissal is with prejudice. As the Motion to Dismiss is granted there is no need to adjudicate the State's Motion for Summary Judgment. It is my

opinion that by so deciding this Board best effectuates the guaranteed right given public employees to organize and bargain collectively with their employers and best promotes the desire for harmonious and cooperative relationships between public employers and public employees espoused in NMSA 1978, §10-7E-2(2003).

RECOMMENDED ORDER:

A. Respondent's Motion to Dismiss should be **GRANTED** without prejudice because the PPC is premature.
B. For the same reasons Complainants' joint Motion for Summary Judgment should be **DENIED**.
C. As the Motion to Dismiss is granted there is no need to adjudicate the State's Motion for Summary Judgment and it should be **DISMISSED** as moot.

APPEAL:

The Executive Director's decision may be appealed to the Board under the procedure set forth in pursuant to NMAC 11.21.3.19 NMAC.

Issued this 2nd day of August, 2012

Thomas J. Griego
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Cc: Sandy Martinez, SPO Labor Relations Director