68-PELRB-2021

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 18, AFL-CIO, LOCAL 3022,
Complainant,

v. **PELRB No. 107-21**

ALBUQUERQUE-BERNALILLO COUNTY WATER UTILITY AUTHORITY,
Respondent

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board ("Board") on Respondent's request for Board review of Executive Director Thomas J. Griego's Report and Recommended Decision regarding the Prohibited Practices Complaint ("PPC") filed against Respondent by the American Federation of State, County, and Municipal Employees ("AFSCME"). The Board, after reviewing the pleadings, hearing oral argument and being sufficiently advised, voted 3-0 to adopt the findings and conclusions of Executive Director Thomas J. Griego's Report and Recommended Decision dated August 31, 2021.

THEREFORE THE BOARD adopts the Recommended Decision as its own and the Respondent is ordered to provide the Complainant the remedies described therein.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

10/18/2021
DATE

MARK MYERS, BOARD CHAIR

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HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

STATEMENT OF THE CASE: This matter comes before Thomas J. Griego, designated as the Hearing Officer in this case, on the Merits of Complainant's Prohibited Practices Complaint alleging that the Water Authority violated the parties' CBA as it relates to the continuation of longevity pay when an employee is promoted from the B-Series (represented by AFSCME Local 624) to the M-Series (represented by AFSCME Local 3022). In 2012, the Union took the issue to final and binding arbitration on behalf of two affected employees and received an award in its favor construing Article 9 of the parties' CBA concerning wages to mean that employees maintain longevity pay upon promotion to the M-Series. That award was affirmed by the Second Judicial District Court in case number CV-2012-5866 (June 26, 2013). The District Court's Memorandum Opinion and Order has not been vacated despite the parties' settlement of the amounts owed the two employees affected at that time. The Union contends that since that time, the Water Authority continued to deny the continuation of longevity pay upon promotion despite the District Court affirming the arbitrator's construction of the parties' CBA resulting in the Union filing two Grievances/PPCs with the Water Authority's former Labor Management Relations Board, i.e. PPC 281 filed March 27, 2019 and grievance 290 filed July 26, 2019.

After the Water Authority's Labor Board ceased to exist by operation of the Public Employee Bargaining Act Section 10, December 31, 2020, this Board assumed jurisdiction and assigned PELRB Case Nos. 107-21 and 109-21 to the disputes. On May 21, 2021 the parties agreed to consolidate the two cases under PELRB Case No. 107-21 as the earlier filed of the two cases.

The Water Authority contends that a settlement signed in December of 2013 and a Memorandum of Understanding (MOU) signed on June 5, 2014 established that only seven blue collar (B-series) employees promoted into the AFSCME Local 3022 bargaining unit after 2010 but before May 25, 2012 would continue to receive longevity pay. As for employees who were promoted into the M-series bargaining unit after May 25, 2012, the Union waived and settled their claims to B-series longevity pay in the 2014 MOU and as an explicit term of the 2018 CBA. Additionally, the Water Authority claims that the PPCs are time barred because they were not timely filed after receipt of the first paycheck by a bargaining unit member after promotion into AFSCME Local 3022 bargaining unit if that paycheck did not include a B-series Longevity amount.

A hearing on the merits was held Friday, August 06, 2021. Because I considered the question of timeliness to be jurisdictional, I addressed it as the first matter following convening the merits hearing and before taking any testimony.

A. Limitations Issues. This Board's rules require that a complaint shall be dismissed unless it is brought within six months "…following the conduct claimed to violate the act, or more than six months after the complainant either discovered or reasonably should have discovered such conduct." See NMAC 11.21.3.9. The Employer argued that as in *Tull v. City of Albuquerque*, 1995-NMCA-123, 120 N.M. 829, 907 P.2d 1010, (Ct. App. 1995), this case ought to be decided under a "single-wrong with continuing effects" theory, which maintains that there is only one breach of contract and although that breach has continuing consequences in the form of lower paychecks, those continuing effects do not extend the life of Plaintiffs' breach of contract cause of action. See

also, *Beggs v. City of Hamner* (N.M. App. 2013 at ¶ 25). (Although the wrong has continuing consequences in the form of lower paychecks, the continuing effects do not extend the life of the plaintiffs' breach of contract cause of action, *which is based solely on that initial refusal*.) (Emphasis added.)

The union argues that this case is better decided under the "continuing violation" theory, whereby each paycheck that does not contain the contested longevity pay constitutes a new cause of action. The continuing violation theory is discussed in *Tull* (though not adopted under the specific facts of that case) and a line of cases adopting the theory are cited in *Tull,* beginning with *Hart v. International Tel. & Tel. Corp.*, 546 S.W.2d 660 (Tex. Ct. App. 1977).

Which theory applies depends upon the specific facts of an individual case. *Tull* did not eliminate the continuing violation theory altogether but instructs a trier of fact to examine the contract breach alleged to distinguish between those where the promisor made but a single promise, as in *Tull*, and those where the contract is for ongoing payments on a future schedule. Therefore, the question whether the continuing violation theory applies under the facts of *this* case remained open for me to determine.

In *Tull*, City of Albuquerque employees were reclassified from Commercial Building Inspectors to Building Inspector Supervisors, on a specific date, and began to perform new and expanded job duties from that date certain. While the City's Merit Systems Ordinance arguably constituted a contract requiring a pay raise due to the reclassification and new job duties, the affected employees did not file their lawsuit until seven years after the reclassification. Id. ¶¶ 1-3.

On those facts, the Court of Appeals determined that the failure to give a pay raise after the reclassification was a single breach of contract that occurred outside of the statute of limitations.

The Water Authority argued that because longevity pay is a fixed amount paid in the same manner in each paycheck (if the CBA allows for that pay) the alleged breach of the CBA occurred when the Water Authority first announced that it would not continue B-Series Longevity pay for all employees newly promoted to the M-Series sometime in 2010 and was accepted by the Union no later than 2014 when a MOU was signed settling longevity pay claims. Pursuant to NMSA 1978 § 37-1-23 a claim against governmental entities on a contract must be brought within two years from the time of accrual and that limitations period runs from the date the contract is breached. See *Karim Salehpoor v. N.M. Institute of Mining and Technology, et al.* 2019-NMCA-046 (June 6, 2019); citing *Nashan v. Nashan,* 1995-NMCA-021, ¶ 29, 119 N.M. 625, 894 P.2d 402. Accordingly, the Water Authority argues, whether one applies the 10-day limitations period in the Water Authority's Merit Systems Ordinance, the PELRB's six-month limitations period or the limitations under New Mexico law governing breaches of contract, the Union's claims are long since time barred if limitations began to run when the cause of action accrues and it began to accrue in 2010 or 2014 at the latest.

AFSCME argued that because the CBA section dealing with longevity, Article 9(E), specifies that the various rates contracted for shall be paid to eligible employees "each pay period", they are more analogous to the wage claims considered but disregarded by the Court in *Tull*; not the fixed amount that ultimately led the *Tull* Court not to apply the continuing violation theory. In other words; because the parties' CBA specifically calls for the payment of longevity premiums "Each Pay Period," each new pay period that passes without longevity bonuses included in eligible employees' pay constitutes a new violation of the CBA. Exhibit J-3, at Bates No. 36. Consequently, while the Board's six-month limitations period may cut off recovery for claims accruing before the limitations period it does not operate to bar the claims altogether. The cause of action cannot be said to have accrued in 2010 or 2014. Rather, because we are dealing with a series of violations on which a cause

of action accrues anew as to each new violation, only those claims accruing in pay periods prior to the applicable limitations period would be barred.

After hearing argument of counsel and reviewing the cases cited, I concluded at the hearing that The CBA section dealing with longevity, Article 9(E), did not call for a one-time increase to base pay as in *Tull*, but rather calls for a $50 premium payment for eligible employees apart from hourly wages in future installments each pay period. Because our case does not concern a pay raise on a date certain but concerns a contract for payment of an additional amount each pay period, the instant case is more like both the *Hart* case distinguished by *Tull*, as well as those wage cases cited by the Union wherein the FLSA was held to have been violated each time the City issued a plaintiff a paycheck that failed to include payment for overtime hours actually worked.". Cf. *Knight v. Columbus*, 19 F.3d 579 (11th Cir. 1994); See also *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1050 (5th Cir. 1973) ("It is well settled that [a] separate cause of action for overtime compensation accrues at each regular payday immediately following the work period during which the services were rendered and for which the overtime compensation is claimed." (Internal quotation marks omitted)).

Therefore, I concluded that the Union's claims in this case were not time-barred except by application of NMAC 11.21.3.9 – this Board's six-month limitations period applied to any claims not otherwise settled.

B. Prior Settlement of Claims. For reasons of administrative economy, I also addressed as a preliminary matter the Water Authority's defense that the instant PPC was previously settled by a signed agreement in December of 2013 and/or by a Memorandum of Understanding (MOU) signed on June 5, 2014. In so doing, I reviewed Exhibits J-1 the 2018-2022 CBA, particularly Article 60 concerning longevity pay; J-7 arbitration award; J-8, District Court Memorandum Opinion and Order (June 26, 2013); J-12, an AFSCME Grievance letter dated April 20, 2018 concerning employee claims for unpaid longevity premiums; J-15, Notice of Withdrawal of Union Grievances;

J-17 the 2019 longevity PPC, Step 3 and J-19 the 2019 longevity pay PPC, Step 1. The Water Authority argued that the grievances/PPCs filed in 2018 and 2019 are based upon identical allegations and were "resolved" by bargaining Article 60 of the 2018 CBA. Even in the absence of the 2018 CBA, the Water Authority argued that the 2014 MOU bars the current claims. According to the Water Authority the MOU was written to eliminate any future complaints about longevity pay. It allowed only those who were promoted into the M-series between 2010 and May 25, 2012 to receive longevity pay and was entered into in the knowledge that the Grievant and all similarly situated employees who were promoted into the M-series after May 25, 2012 would not receive longevity pay. The 2014 MOU was negotiated on behalf of the entire bargaining unit and while it may have referred to only those employees who received compensation under its terms, it also settled claims by similarly situated employees promoted after May 25, 2012, ratifying the Water Authority's practice of cutting off longevity pay upon promotion of an employee from the B-series to the M-series.

I declined to adopt the Water Authority's construction of the 2018 and 2019 grievances/PPCs, Article 60 of the 2018 CBA and the 2014 MOU. Its argument overlooks (or disregards) the fact that the dispute over whether longevity pay would continue for two B-Series employees upon their promotion to the M-Series was submitted for final, binding arbitration after the 2018-2021 CBA went into effect.

The arbitrator's construction of Article 60 concerning longevity pay rejected the Water Authority's argument that longevity should be stopped upon promotion:

> "I credit Montoya's testimony that the issue of promotion in the context of the freeze was discussed along the lines advanced by the Authority. However, one would expect that if the discussion led to agreement, there would have been some language passed across the table memorializing that agreement; or at least some negotiator's notes in support of that agreement; or some definitive language in the Authority's summary of the deal, either directed to management personnel who would have to implement the deal, or to employees who would or had voted on the deal. We have none of these. What

> we have is Executive Director Sanchez's very general language quoted above [promising that employees would not lose their longevity] that does deal with promotions at all - ditto the contract language. Id. at 65-66. Thus, while the Water Authority may well have wanted Longevity to cease upon promotion (despite contemporaneous communications to the three bargaining units that it would be frozen for all employees), it never achieved an agreement from the Union on that position. Rather, the agreement reached by the parties simply stated "Longevity pay shall be frozen at current rates and eligibilities paid only to eligible employees receiving longevity as of July 1, 2010."

Exhibit J-7 at pp. 10-11.

As the arbitrator noted, to the extent that any ambiguity as to what the parties meant by the term "employees" when freezing the longevity benefit as of July 1, 2010 that ambiguity would be construed against the Water Authority.

The Water Authority sought review of the arbitrator's decision before the Second Judicial District Court. The District Court agreed with the arbitrator that the use of the term "employee" created an ambiguity: "Upon the Court's review of the Longevity provision, it appears to be reasonably susceptible to two different constructions and therefore ambiguous." Ex. J-8, at Bates No. 74. The Court noted that the arbitrator made specific factual findings in resolving the ambiguity in favor of the Union's argument and contrary to the Water Authority, and further declined to "interfere with the Arbitrator's resolution of the facts." Id. at Bates No. 75.

Upon the District Court confirming the arbitration award it became a judgment of the Court pursuant to the New Mexico Uniform Arbitration Act. See NMSA 1978, § 44-7A-24(C) (2001). This Board is therefore compelled to follow the arbitrator's interpretation of the CBA's longevity clause by the doctrines of res judicata and collateral estoppel. The language of that clause has not changed from 2010 to the present. Consequently, I found and concluded that longevity pay paid workers in the B-series bargaining unit at a rate "frozen" at the rate paid on July 1, 2010, and for a number of employees "frozen" at the number of B-series bargaining unit employees who were eligible to receive longevity pay as of that date, continues to be paid to those employees in the event they are

promoted to a position within the M-series bargaining unit. In other words, Article 60 of the parties' CBA does not cut off a B-series employee's longevity pay upon his or her promotion to a position within the M-series bargaining unit.

In light of that now-established fact, the Water Authority was not able to demonstrate that the settlement of *grievances* (as distinguished from Prohibited Labor Practice Charges) to redress individual employees' rights brought in 2018 and 2019 or the settlement PPCs brought during that timeframe, including the 2018 MOU, providing relief to individual employees denied their longevity pay, but which did nothing to alter the language of Article 9 requiring longevity pay to continue upon promotion, can in any way be deemed a waiver of the union's right to enforce Article 9 in a manner consistent with the District Court's Order. A plain reading of the documents themselves reveals that they settled claims of individual employees for longevity pay but effected no change to the language of Article 9 on which their right to longevity pay is based. If the Water Authority intended to change the meaning Article 9 and the construction given it by the arbitrator and the District Court, it failed to do so.

Accordingly, I concluded that the Union's PPC stated a claim requiring adjudication and that this Board had personal and subject matter jurisdiction to adjudicate the claims in the first instance and the parties proceeded with the presentation of their respective cases. Both parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Closing Briefs in lieu of oral argument were submitted by Complainant and Respondent on August 20, 2021. Both briefs were duly considered. On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

FINDINGS OF FACT: The following facts are stipulated by the parties as part of the Pre-Hearing Order herein:

1. Complainant AFSCME is the duly elected, exclusive bargaining representative for a bargaining unit of employees employed by the Respondent.

2. Complainant AFSCME is a "labor organization" as that term is defined in Section 4(L) of PEBA, NMSA 1978, § 10-7E-4(L) (2003).

3. Respondent Water Authority is a "public employer" as that term is defined in Section 4(S) of PEBA, NMSA 1978, § 10-7E-4(S) (2003).

4. The PELRB has subject matter jurisdiction over this dispute, and personal jurisdiction over the parties.

5. Complainant AFSCME and Respondent Water Authority have entered into a CBA, Exhibit J-1.

6. Three different AFSCME Locals represent employees at the Water Authority: Local 624 (B-Series), Local 3022 (M-Series), and Local 2962 (Clerical). Gutierrez Testimony, Hearing Audio Part 2 at 0:30:50 – 0:31:12.

7. In 2010, the parties negotiated Article 9, Section E of their CBA providing:

> "Longevity pay shall be frozen at current rates and eligibilities paid only to eligible employees receiving longevity as of July 1, 2010. No future movement in longevity steps nor additions of employees to the longevity will occur.
>
> 1. Each employee with five (5) continuous years service with the Employer shall receive fifty dollars ($50.00) each pay period.
> 2. Each employee with ten (10) continuous years service with the Employer shall receive fifty dollars ($75.00) each pay period.
> 3. Each employee with fifteen (15) continuous years service with the Employer shall receive one hundred dollars ($100.00) each pay period.
> 4. Each employee with twenty (20) or more continuous years service with the Employer shall receive one hundred twenty-five dollars ($125.00) each pay period."

Successor contracts contained identical language in Article 9(F).

Ex. J-2, at Bates No. 36; Gutierrez Testimony, Hearing Audio Part 2 at 0:31:30 - 0:31:53; 0:31:54 - 0:32:02; Exhibits J-1 and J-3.

8. Toward the end of the 2010 negotiations, then-Executive Director of the Water Authority, Mark Sanchez, explained to representatives of the various unions his understanding of Article 9(E) as being that if you were receiving longevity pay as of July 1, 2010, you would continue to receive it throughout your employment. Based on that understanding, the unions agreed to the language at issue. Gutierrez Testimony, Hearing Audio Part 2 at 0:33:14 - 0:34:49. See also Exhibit A at 1 reflecting that at the time the Water Authority governing body ratified the CBA it was told: "Longevity - employees receiving longevity will continue at their current rates - no loss or increase of longevity will occur."

9. All CBAs are required to include a grievance procedure providing for a final and binding determination, which determination shall constitute an arbitration award within the meaning of the Uniform Arbitration Act; such award shall be subject to judicial review pursuant to the standard set forth in the Uniform Arbitration Act. NMSA 1978, § 10-7E-17(I) (2003).

10. After the 2010 agreement went into effect a dispute arose over whether longevity pay would continue for two B-Series employees after their promotion to the M-Series. The issue was grieved and proceeded to binding arbitration. Gutierrez Testimony, Audio Part 2 at 0:36:54 – 0:38:20; Exhibit J-7 (arbitration award).

11. Pursuant to NMSA 1978, § 10-7E-17(I) (2003) all CBAs negotiated under the the provisions of the New Mexico Public Employee Bargaining Act are required to include a grievance procedure providing for a final and binding determination. The

final determination shall constitute an arbitration award within the meaning of the Uniform Arbitration Act; such award shall be subject to judicial review pursuant to the standard set forth in the Uniform Arbitration Act and I take Special Notice of these statutory provisions.

12. The issue arbitrated was: "Did the Employer violate its collective bargaining agreement when it discontinued the Longevity pay that Messrs. Pino and Brown had been receiving upon their promotion to M-series Employment in 2011?" Exhibit J-7, at Bates No. 56.

13. The arbitrator found the use of the word "employee" rather than "bargaining unit employee" or "M-Series" employee in Article 9 coupled with the promises Mark Sanchez made to all union employees that they would not lose longevity pay, meant that the CBA required employees to keep longevity pay at the rate the parties agreed would be frozen as of July 2010, upon promotion to the M-Series. Id. at 64 - 67.

14. The Water Authority appealed the arbitrator's decision to the District Court, which affirmed the ruling of the arbitrator that the language in the CBA requires continuation of the frozen longevity pay upon promotion from the B-Series to the M-Series. Exhibit J-8.

15. The Water Authority appealed that decision to the Court of Appeals, but ultimately entered into a settlement agreement with Mr. Brown and Mr. Pino, individually, agreeing to dismiss its appeal, leaving the District Court decision as the last word on the issue on appeal. Id. at Bates No. 77.

16. The relevant language, given a final and binding interpretation by the arbitrator, which interpretation was affirmed by the judgment of the District Court, did not change in the 2013 CBA (Exhibit J-3 at Bates No. 43-44), or the 2016 CBA (Exhibit

J-4 at Bates No. 49). The operative language for the current CBA is likewise identical, although the parties agreed to delete the amounts listed in the subparagraphs because it was "frozen" and thus not needed. Exhibit J-1, at Bates No. 9; Gutierrez Testimony, Hearing Audio Part 2 at 0:41:20 - 0:42:09.

17. After losing the arbitration case the Water Authority modified its Rules and Regulations on November 1, 2013 to cease longevity pay when an employee moves in any way (transfers, promotes, reclassifies, etc.) to a different bargaining unit or out of a bargaining unit position to a non-bargaining unit position or vice versa.

18. The parties' agreed at Article 2 of their CBA, Scope of Agreement, that:

> "This Agreement has been negotiated in accordance and compliance with the Employer's Labor Relations Ordinance and the laws of the State of New Mexico. This Agreement shall control in the event of any conflict between this Agreement and the Employer's standard operating procedures, policies or Personnel Rules and Regulations, or Merit System Ordinance, except as provided by Section 10-1-24."

Exhibit J-1 at Bates No. 4; Exhibit J-2 at Bates No. 34; Exhibit J-3 at Bates No. 42.

19. I take Special Notice that Section 10-1-24 of the Water Authority's Merits System Ordinance incorporated by reference into Article 2 of the parties' CBA provides:

> "(A) The provisions of this ordinance shall apply to all Authority employees; provided, however, that where a collective bargaining agreement, which has been ratified and approved by the Executive Director in accordance with the Authority's Labor Management Relations Ordinance, conflicts with a provision of this ordinance, the collective bargaining agreement shall, with respect to those employees covered by the agreement, govern over such provision of this ordinance unless it is one establishing:
>
> (1) Classified and unclassified service;
> (2) Methods of service rating of unclassified employees; or
> (3) Methods of initial employment, promotion recognizing efficiency and ability as the applicable standards, and discharge of employees.
>
> (B) In the case of a conflict between a collective bargaining agreement and a provision establishing any of the above, this ordinance shall govern."

20. The longevity pay issues before me do not implicate the establishment of classified and unclassified service; methods of service rating of unclassified employees; or methods of initial employment, promotion recognizing efficiency and ability as the applicable standards, and discharge of employees.

21. In 2014, the Union again grieved other employees not receiving longevity pay upon their promotion and ultimately settled that dispute on terms reflected in the parties MOU dated June 5, 2014. Exhibits J-10 and J-11.

22. The June 5, 2014 MOU does not purport to change any language in the CBA: "This Agreement only pertains to the matters set forth above and does not apply to other matters or grievances." Exhibit J-11.

23. The parties also agreed at Article 60 of their CBA that:

> "This Agreement specifically describes the entire agreement between the Authority and the Union. There are no other agreements, memoranda of understanding or any other express or implied agreements between the parties and the parties have had the opportunity to negotiate on all items. Labor Board cases pending at the time of execution of this Agreement assigned in a Memorandum of Understanding are incorporated herein and are considered resolved. Any matters not addressed in this Agreement are subject to the Authority's policies, procedures, rules, and regulations. Should there exist any conflict between the terms of this Agreement and the Authority's policies, procedures, rules, or regulations, this Agreement shall control. All amendments to or modifications of this Agreement must be by written mutual agreement and shall be of no force or effect until ratified and approved by the Authority's Executive Director and the Union
>
> Therefore, the Authority and the Union for the duration of this Agreement each voluntarily and unqualifiedly agree to waive the right to oblige the other party to a bargain with respect to wages, hours, or any other terms and conditions of employment unless mutually agreed in writing otherwise, even though the specific subject or matter may not have been within the knowledge or contemplation of either or both parties at the time they negotiated or executed this Agreement."

Ex. J-1, at Bates No. 29-30.

24. A third grievance relating to longevity pay was filed in 2018 by the newly-elected Union Vice President, Pete English in which he requested:

> "The remedy for this grievance is to compensate all 3022 bargaining unit M series employees with compensation equal to that which has been paid to those individuals for the amount of time they have been receiving their Longevity pay since their transfer, and to reinstate Longevity for all Local 3022 bargaining unit M series employees in accordance with Local 3022 CBA Article 9 Wages sub-section F, 1., 2., 3., and 4."

Ex. J-12; English Testimony, Hearing Audio Part 2 at 0:05:55 – 0:06:20.

25. Because payment of longevity pay for all employees this was not an appropriate remedy and was not consistent with the 2012 arbitration award, Mr. English agreed to withdraw it along with other then-pending grievances at the time the current CBA was signed. English Testimony, Hearing Audio Part 2 at 0:06:24 - 0:06:51; Exhibit J-15; Gutierrez Testimony, Hearing Audio Part 2 at 0:42:31 – 0:43:40.

26. Mr. English filed a fourth grievance on March 27, 2019, relating to longevity, seeking to compensate only the employees affected by the termination of their longevity pay, not to give longevity pay to all M-series employees as was requested in the 2018 grievance. English Testimony, Hearing Audio Part 2 at 0:07:15 – 0:07:35; 0:08:32 – 0:08:40; Exhibit J-19.

27. On July 26, 2019, Mr. English filed a fifth grievance after the Water Authority terminated another employee's longevity pay and requiring him to pay it back. Exhibit J-18.

28. The two grievances identified in Findings 23 and 24 were submitted to the Water Authority's Labor Board for resolution prior to its going out of existence, whereupon they were transferred to the PELRB for decision. The parties jointly moved to consolidate the two separate PELRB cases into this single PPC, PELRB cause number 107-21, in which the Union alleges that the Water Authority violated

Section 19(H) of PEBA, refusing or failing to comply with a collective bargaining agreement by discontinuing longevity pay for employees otherwise entitled to it. See Stipulated Pre-Hearing Order.

REASONING AND CONCLUSIONS OF LAW:

I. CONSISTENT WITH THE FINAL AND BINDING ARBITRATION DECISION, AFFIRMED BY THE DISTRICT COURT UNDER THE UNIFORM ARBITRATION ACT CONSTRUING THE PARTIES' CBA TO REQUIRE THE WATER AUTHORITY TO CONTINUE PAYMENT OF LONGEVITY PAY TO ANY EMPLOYEE RECEIVING IT AS OF JULY 1, 2010 REGARDLESS OF ANY SUBSEQUENT PROMOTION, I CONCLUDE THAT THE EMPLOYER FAILED OR REFUSED TO ABIDE BY THE PARTIES' CBA WHEN IT CEASED THOSE PAYMENT AS ALLEGED IN THE ABCWUA GRIEVANCE FILED ON MARCH 27, 2019 AND JULY 26, 2019. SUCH FAILURE OR REFUSAL IS PROHIBITED BY SECTION 19(H) OF THE ACT.

A. Doctrines of Res Judicata or Collateral Estoppel Apply to The Arbitration Award and The District Court Judgment, Giving a "Final and Binding" Interpretation to Article 9 Concerning the Payment of Longevity Pay Following Promotion to a Position Within The M-Series Bargaining Unit.

New Mexico Courts have applied both res judicata and collateral estoppel to arbitration awards. See *Rex, Inc. v. Manufactured Hous. Comm. of State of N.M., Manufactured Hous. Div.*, 1995-NMSC-023, 119 N.M. 500, 892 P.2d 947, where the particular circumstances of the arbitration proceeding justify their application and a court has confirmed the arbitration award. In *Fogelson v. Wallace*, 2017-NMCA-089, ¶¶ 15-17, 406 P.3d 1012, our Court of Appeals concluded that res judicata also applies to arbitration awards, noting: "We believe that the principles of res judicata apply regardless of whether the parties have previously resolved their claims through a judgment in a litigated or arbitrated proceeding, but we emphasize that each arbitration case is to be scrutinized against these principles on a case-by-case basis and that res judicata is to be applied, or not, based on the

particular circumstances of the arbitration proceeding and any court confirmation of an arbitration award." Id. ¶ 16. Both collateral estoppel and res judicata can, therefore, bar re-litigation of claims resolved through final and binding arbitration. Even were this Board to disagree with the arbitrator and the District Court on the meaning of the language in the parties' CBA, PEBA requires that the parties submit these types of disputes to final and binding arbitration, and the parties are bound by the results of that arbitration. In the instant case we have uniformity of parties, contract being construed and the issue determined. This case presents an appropriate case for applicable of either or both res judicata and collateral estoppel.

Arbitrator Berman reviewed the CBA's longevity provision and determined that the use of the word "employee" rather than "M-Series employee" or "bargaining unit employee" created an ambiguity as to whether the Longevity freeze applied upon promotion from the B-Series to the M-Series. He resolved that ambiguity in favor of the Union by looking first to other uses of the terms in the CBA, noting that when the parties wanted to limit a provision to bargaining unit employees, they did so explicitly. Ex. J-7 at Bates No. 64-65. That award was affirmed by the District Court at which point it became a judgment of the Court pursuant to the New Mexico Uniform Arbitration Act, NMSA 1978, § 44-7A-24 (a) and (c) (2008). I follow Arbitrator Berman's rationale and conclusions and those of the District Court in this Report and Recommended Decision.

I agree with the Union's argument that while the Water Authority may well have wanted longevity pay to cease upon promotion, it never achieved an agreement with Union to do so. The parties' agreement that longevity pay rates will be frozen at July 1, 2010 rates and paid only to those employees receiving longevity as of that date does not go so far as to justify cessation of those payments upon promotion. Unless and until the Water Authority secures such an agreement at the bargaining table it cannot be said to be in compliance with Article 9 of the CBA and thus, commits a

prohibited labor practice pursuant to Section 19(H) by ceasing longevity payments upon promotion and requiring repayment of any such premiums it believes were improvidently made.

B. The Water Authority's Unilateral Changes to its Rules and Regulations Concerning the Payment of Longevity Premiums Does Not Alter the Effect of the Arbitrator's Decision or the Outcome of this Recommended Decision.

It would be unjust to permit the Water Authority to accomplish by unilateral amendment to its rules and regulations that which it could not accomplish by negotiation or by prevailing at arbitration. Contrary to Water Authority witness Judy Bentley's testimony, the CBA was not *silent* on the question of longevity pay; it was *ambiguous*. Therefore, the CBA is not subordinated to the Rules and Regulations as per Article 60 of the CBA, which states in part "Any matters not addressed in this Agreement are subject to the Authority's policies, procedures, rules, and regulations." (Exhibit J-1, page 30). To the contrary, the continuing payment of the longevity premium following promotion to a position in the M-series *is* addressed in the CBA, albeit ambiguously. Consequently, it would be more accurate to resort to that provision in Article 60 stating that in the event of a conflict between the CBA and the Rules and Regulations, the CBA governs, and would have even before the arbitrator's decision. That the Water Authority made changes to its rules in order to evade the arbitrator's ruling makes their prohibited practice all the more egregious. As the Union points out, in *AFSCME Council 18 v. State,* 2013-NMCA-106, the Union and the State - like the Union and the Water Authority here – an ambiguous term in a CBA was construed by an arbitrator in favor of the Union, after which the State modified its Rules and Regulations to undo the arbitration award. This was found to state a claim for impairment of contract. Such a result may be avoided by a decision in favor of the Union in this PPC and providing a remedy that gives effect to the District Court's judgment upholding Arbitrator Berman.

Similarly, it strains credulity to assert that the Union acquiesced in a past practice of stopping longevity payments upon promotion when it filed and settled for payment of monetary damages, several grievances taking one of them all the way through arbitration and particularly after it won the arbitration and was upheld on appeal. Under the facts of this case, it cannot reasonably be said that the Union acquiesced in the Employers refusal to pay longevity upon promotion. Although that practice indeed seems to be long-standing over a period of years is any long-standing, it is highly doubtful that the practice was either frequent or accepted and known about both by the union and management. I give little weight to the Water Authority's argument that the Union's witnesses could not explain why only five of the six grievants originally named in the grievance Exhibit J-10, promoted into the M-Series before the arbitrator's decision, received B-Series longevity pay and why at least six other M-Series employees who had been promoted between May 25, 2012 and the 2014 MOU did not receive Longevity pay. Remembering that one must have been receiving longevity pay as of July 1, 2010 before laying claim to it upon promotion offers one possible explanation. That the employer settled with several of its employees on such claims offers a second. Ultimately, however, the Union is not obliged to foreclose all possibilities only that the Employer has failed to abide by its contractual obligation to pay a longevity premium within six months preceding the filing of this PPC. This, the Union has done, for the reasons stated herein.

Neither am I persuaded by the argument that Article 60's reference to the two PPCs being "resolved" means that the Employer prevailed on the question of whether longevity pay continues upon promotion. The only thing resolved was the monetary claim by the employees directly involved in those PPCs. Likewise, I disagree with the Employer's so-called "fact" that the 2014 MOU "ratified" the Water Authority's practice of refusing to pay longevity upon promotion. A plain reading of the MOU reveals nothing to suggest the Union's agreement with that practice. The MOU reflected settlement of a *grievance* brought by the Union on behalf of certain specific employees and

explicitly stated: "This Agreement only pertains to the matters set forth above and does not apply to other matters or grievances." The MOU does not purport to change any language in the CBA which by that time had been construed to require continuing longevity following promotion.

DECISION: AFSCME, Council 18, Local 3022, has proven by a preponderance of the evidence that the Albuquerque-Bernalillo County Water Authority violated the parties' CBA concerning the continuation of longevity pay when an employee is promoted from the B-Series to the M-Series. The Water Authority is required to pay the longevity premium to qualifying employee "each pay period" at the amounts that employee was receiving on July 1, 2010, the date on which longevity was frozen, regardless of any subsequent promotion. Any ambiguity in the operative language was resolved in the manner required by PEBA, through a final and binding determination of the meaning of the language by an arbitrator. See NMSA 1978, § 10-7E-17(I). The District Court upheld the arbitrator and declined to "interfere with the Arbitrator's resolution of the facts." B-Series to the M-Series in Exhibits 1-4, as well as the amounts that they were receiving prior to their promotion.

As a remedy for the above prohibited practice, the Water Authority should be ordered to:

a) Cease and desist from the above-found prohibited practices now and in the future.

b) Bargain in good faith with the Union before any changes to continuation of longevity pay when an employee is promoted from the B-Series to the M-Series, as required by PEBA during negotiations for its next successor contract or sooner if the parties so agree.

c) Post at its administrative offices and at any of the facilities where bargaining unit members are assigned, copies of a notice substantially conforming with that appended as "Appendix A", after being signed by the Water Authority's Executive Director. The notice shall be posted immediately after exhaustion of all appeal rights and maintained for 60 consecutive days thereafter in conspicuous places including all

places where notices to employees are customarily posted. Reasonable steps shall be taken by the Water Authority to ensure that the notices are not altered, defaced, or covered by any other material.

d) Notify the PELRB's Executive Director in writing within 20 days from the date of the Board's Order in this matter what steps the District has taken to comply with the Board's Order.

e) Reinstate longevity payments for those employees eligible for such payments as found by Arbitrator Berman's Award and this Recommended Decision.

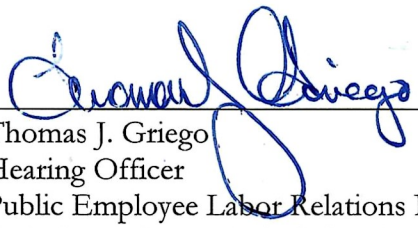
f) Compensate those employees eligible for longevity payments as found by Arbitrator Berman's Award and this Recommended Decision for back pay from September 27, 2018, to the present (or until such time as the employee separated from employment or was promoted to a non-bargaining unit position), in the amounts they were receiving prior to their promotion, as identified in the Water Authority's Exhibits 1-4.

g) Enjoin the Water Authority from compelling any employee to pay back longevity payment made to them arising out of its misinterpretation of Article 9(E) of the CBA that longevity pay ceases upon promotion and to reimburse Henry Ortega and any other employee compelled to pay back longevity payments following their promotion to an M-Series position.

h) The amounts to be paid each affected employee shall be calculated by reference to the Water Authority's Exhibits 1-4 setting forth the amounts they were receiving prior to their promotion. This Board should order the parties to confer in an attempt to reach agreement on the precise amounts to be paid each employee. In the event the parties do not reach such an agreement within one week of the Board entering its

Order in this case, the parties shall submit their calculations to the Hearing Officer with an explanation of why one calculation is preferable to the other and this Board should retain jurisdiction to have its Hearing Officer determine the amounts to be paid.

Issued, Tuesday, August 31, 2021.



Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board
2929 Coors Blvd. N.W., Suite 303
Albuquerque, New Mexico 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 Albuquerque-Bernalillo County Water Utility Authority 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) American Federation of State, County and Municipal Employees, Council 18, AFL-CIO, Local 3022, having been recognized as an exclusive representative, has the right to represent certain Water Authority employees covered under the parties' Collective Bargaining Agreement (CBA) now in effect.

That CBA includes Article 9(E) requiring that if you were receiving longevity pay as of July 1, 2010, you would continue to receive it throughout your employment. By ceasing longevity payments upon promotion from a B-series position to a M-series position we did not comply with Article 9(E) of the CBA in violation of NMSA § 10-7E-19(H).

We acknowledge the above-described rights and responsibilities and will not in any like manner refuse to bargain in good faith with the American Federation of State, County and Municipal Employees, Council 18, AFL-CIO, Local 3022, and we agree to honor our commitments under the CBA, including the payment of longevity pay to those employees entitled to receive it.

_____ Date:_____

Albuquerque-Bernalillo County Water Utility Authority
Mark Sanchez, Executive Director