69-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. 108-21**

ALBUQUERQUE-BERNALILLO COUNTY WATER UTILITY AUTHORITY,
Respondent

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board ("Board") on Complainant'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 2-1 to adopt the findings and conclusions of Executive Director Thomas J. Griego's Report and Recommended Decision dated July 27, 2021.

THEREFORE THE BOARD adopts the Recommended Decision as its own and the Complainant is **DISMISSED**.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

10/18/2021
DATE

MARK MYERS, BOARD CHAIR

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,
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v. **PELRB No. 108-21**

ALBUQUERQUE-BERNALILLO COUNTY
WATER UTILITY AUTHORITY,
Respondent

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 Prohibited Practices Complaint regarding the Union's allegation that the Respondent failed to bargain in good faith and violated the parties' CBA by unilaterally changing terms and conditions of employment of bargaining unit employees by making a change to the job description for the Supervisory Control and Data Acquisition (SCADA) Systems Specialist. The Union received notice of the proposed change, submitted input and asked to bargain but the Union complains that ABCWUA refused to bargain, as required by both Article 19 of the CBA and § 17 of the PEBA, thereby violating §§ 19(H) (which makes it a prohibited practice to "refuse or fail to comply with a collective bargaining agreement") and 19(F) (which makes it a prohibited practice to "refuse to bargain collectively in good faith with the exclusive representative.")

The Water Authority acknowledges that it revised the job description for SCADA Systems Specialists in 2019 at the request of the Union and with input from Electrical Engineer and SCADA specialist, John Ebia. The Water Authority contends it complied with the CBA in considering and adopting the revisions. The changes ultimately made to the job description did not affect the

position level or change its educational or licensure requirements. The Water Authority nonetheless provided the Union with a copy of the proposed changes and an opportunity to comment. The Water Authority considered the Union's input and offered to meet with the Union to discuss the proposed changes. The Water Authority argues that Article 19 of the CBA expressly recognizes that "the evaluation and classification of positions within the Authority are the responsibility of management" and that Article 7 of the CBA also recognizes that "Management shall have the rights as set forth in the Labor Management Relations Ordinance Section 10-2-5"[1] containing similar management rights. Thus, while the Water Authority valued the Union's input, it maintained discretion to revise the position description as it saw fit.

Based on the foregoing the issue to be determined is whether the Water Authority acted in accordance with the CBA, NMSA 1978 § 10-7E-6 and its management rights in revising the position description for SCADA Systems Specialist.

On July 7, 2021 the parties' filed a Joint Motion to Vacate the scheduled July 8, 2021 Merits Hearing in favor of briefing the issues on stipulated facts. The Hearing Officer granted the Joint Motion, vacated the hearing and scheduled July 16, 2021, as the deadline for the parties to submit stipulations. The parties were scheduled to submit briefs on July 23, 2021. The Hearing Officer reserved the possibility that in his discretion, argument on the Briefs may be scheduled. Briefs were timely submitted by both parties. After reviewing the briefs, the Hearing Officer determined that no further argument was necessary. On the entire record in this case and from the stipulated facts I make the following

[1] The parties' CBA at Article 7 refers the "Labor-Management Relations Ordinance" but the citation provided therein is from the Authority's "Merit Systems Ordinance", Exhibit J-2. Likewise, the Water Authority refers throughout is Closing Brief to the "Labor-Management Relations Ordinance" while citing a Section number from the Authority's "Merit Systems Ordinance". This is an important distinction in as much as its Labor-Management Relations Ordinance was rendered null and void by operation of NMSA 1978 §10-7E-10(B) January 1, 2021, after its local board did not submit a revised local ordinance, authorizing its continuation.

FINDINGS OF FACT:

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 is a "public employer" as that term is defined in Section 4(S) of PEBA.
4. The PELRB has subject matter jurisdiction over this dispute, and personal jurisdiction over the parties.
5. Complainant AFSCME and Respondent have entered into a Collective Bargaining Agreement (CBA) attached as Exhibit J-1 to the parties' stipulations.
6. A true and correct copy of the Water Authority's Merit System Ordinance is attached as Exhibit J-2 to the parties' stipulations.
7. In 2016, Joe Barrios requested a desk audit for the Supervisory Control and Data Acquisition (SCADA) position at issue in this case. See Email string beginning with a March 31, 2021 Email from Joe Barrios to Ronny Lovato, attached as Exhibit J-3 to the parties' stipulations.
8. Mr. Barrios and Water Authority management exchanged the emails attached as Exhibit J-3 to the parties' stipulations.
9. The Water Authority authorized a desk audit of the SCADA Specialists position in 2018.
10. Section 601 of the Water Authority's Personnel Rules and Regulations relates to position reviews. Pertinent provisions of the Personnel Rules is attached as Exhibit J-4 to the stipulations.

11. The Water Authority reviewed the existing job description with the input of Jon Ebia, an Electrical Engineer employed by the Water Authority and SCADA specialist.

12. The Water Authority did not specifically seek input from Joe Barrios or Dean Brush, other SCADA specialists employed at the time, after it began the audit in 2018.

13. On April 24, 2019, the Water Authority's Human Resources Manager, Judy Bentley, sent the proposed changes to the SCADA Systems Specialist job description to Pete English, President of AFSCME Local 3022. See Email and Letter from Judy Bentley to Pete English (April 24, 2019), attached as Exhibit J-5 to the stipulations.

14. Ms. Bentley and Pete English exchanged the emails attached as Exhibit J-6 to the parties' stipulations regarding the job description at issue.

15. Mr. English submitted a grievance on behalf of AFSCME Local 3022 on May 19, 2019. See May 19, 2019 Grievance package attached to the parties' stipulations as Exhibit J-7.

16. The revised job description was adopted by the Water Authority and is attached as Exhibit J-8 to the parties' stipulations.

REASONING AND CONCLUSIONS OF LAW:

I. ARTICLE 19 OF THE PARTIES' CBA CONCERNING CLASSIFICATION AND REORGANIZATION CONTROLS THE OUTCOME OF AFSCME, LOCAL 3022'S CLAIMS THAT THE WATER AUTHORITY REFUSED TO BARGAIN IN VIOLATION OF SECTIONS 17(A)(1), 19(F) AND 19(H).

A. The parties' CBA contains a clear and unmistakable waiver of the obligation to bargain further over the job description changes and reclassification desired by the Union at issue in this case.

Section 17(A)(1) of the PEBA (NMSA 1978, § 10-7E-17(A)(1) (2020)) provides that the employer and the Union must bargain in good faith over changes to an employee's wages, hours, and other terms and conditions of work that are mandatory subjects of bargaining. However, that general statement of the law upon which Complainant's failure to bargain claim relies is true *unless the requirement to bargain has been waived.* See generally JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 13.II. Any such waiver must be a clear and unmistakable waiver of the union's right to bargain those issues. See *County of Los Alamos v. Martinez,* 2011-NMCA-027, 150 N.M. 326, 258 P.3d 1118; wherein our Court of Appeals noted "We recognize that a union can contractually waive its right to mandatory bargaining if the waiver is expressed clearly and unmistakably. … However, courts will not infer a waiver unless it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them." See also, *AFSCME, Council 18 v. HSD*, No. D-101-CV-2012-02176 (J. Ortiz) issued 6-14-2013.

The parties have stipulated that the Water Authority authorized a desk audit of the SCADA Specialists position in 2018 at the request of AFSCME, Local 3022's President, Joe Barrios. The Water Authority reviewed the existing job description with the input of Jon Ebia, an Electrical Engineer employed by the Water Authority and SCADA specialist, but did not specifically seek input from Joe Barrios or Dean Brush, other SCADA specialists employed until after it began the audit in 2018. After the Water Authority's Human Resources Manager sent the proposed changes to the SCADA Systems Specialist job description to the President of AFSCME Local 3022, there followed an email exchange between them debating the proposed the job description changes. By that exchange and the allegations of the original Complaint, it is apparent that Local 3022's purpose in requesting the desk audit and debating the changes to the job description was to seek a change in the SCADA classification to a

higher one with the result that they would receive more pay, without the necessity of further mid-term bargaining to alter the existing negotiated wage scale.

In the case before me, the parties have bargained the issue of position re-classification in Article 19 of their CBA:

> "A. The official job descriptions will be maintained by Human Resources and placed on the Authority's website. It is recognized that job descriptions generally describe the duties performed but does not precisely define each specific task an employee may be required to perform. In the event an employee or the Union has concerns about job specifications, the employee or Union shall put such concerns in writing to the Human Resources Manager.
>
> B. *It is recognized that the* evaluation and *classification of positions within the Authority are the responsibility of management. The authority to request a restructuring and/or reevaluation of a position lies with the Division Manager.*
>
> C. The Authority will provide the Union President with a copy of any changes to the job description which has the potential to affect the position's level or is a change to the educational or licensure requirements. The Union President will be given the opportunity to provide written input within five (5) days of receipt of the changes prior to implementation through the Human Resources Manager regarding such changes.
>
> D. Prior to revising existing classifications or establishing new classifications, the Employer will notify the Union of its anticipated action and offer the Union the opportunity to provide input and recommendations related to whether or not the affected positions shall be included in the Union's bargaining unit. Either party may bring this issue for discussion in the Union-Employer Committee (UEC) if it deems necessary. In the event of a dispute, either party may take the issue to the Labor Board for resolution.
>
> E. *An employee may request a position reclassification through the employee's Division Manager and in accordance with the Employer's Rules and Regulations.*

(Emphasis added).

The Employer's Rules and Regulations incorporated by reference in Article 19 Section E of the Contract, includes Section 601 concerning Position Reviews which provides in pertinent part:

> "With the approval of the Executive Director, through the chain of command, a request may be submitted to the Human Resources Manager for review of the position classification…
>
> The Human Resources Manager will submit a finalized and approved recommendation to the Executive Director on any reclassification action. There will be no reorganizations or additional permanent duties assigned to an employee, that would result in an upgrade, until the position review has been finalized and approved by the Executive Director. The above procedure also applies to vacant positions."

By negotiating Article 19 and incorporating into it the discretion of the Human Resources Manager and the Executive Director on reclassification of any position found in its Personnel Rule 601, the Union agreed that all authority for review and setting job description rests with the Executive Director particularly when such reclassification would result in an upgrade as desired by the Union. See also, Article 9 of the CBA, Section C concerning wages, and providing that "The Union may request the Authority perform desk audits in accord with Personnel Rules and Regulations."

Article 19 is not a general reservation of management rights that may be over-ridden by the ongoing duty to bargain over mandatory subjects but expressly reflects a negotiated agreement that the classification of positions is within management's discretion subject to the procedural and notice rights in that Article. I construe it as such in consideration of Article 60, Section B of the CBA, which states:

> " 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 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."

The kind of general management right provisions that the case law suggests may be contrary to PEBA Section 17, appears instead at Article 7 of the CBA stating "Management shall

have the rights as set forth in the Labor Management Relations Ordinance (sic) Section 10-2-5" and in Article 60, Section A, stating in part that "Any matters not addressed in this Agreement are subject to the Authority's policies, procedures, rules, and regulations" Accordingly, the instant case is distinguished from *ABB, Inc. and Local 2379, United Automobile, Aerospace & Agricultural Implement Workers of America*, 355 NLRB No. 2 (January 22, 2010) on the ground that drafting job descriptions was never formally bargained prior to the issue arising in that case. Similarly, *Central Cartage*, 236 NLRB 1232, 1258 (1977), enf'd. 607 F.2d 216 (7th Cir. 1978) is distinguishable because the employer's change to the functions of jobs occurred during the representation process so that no prior bargaining, and hence no express waiver such as exists in the instant case, could possibly have taken place. The Union's reliance on *MV Transportation, Inc. and Amalgamated Transit Union Local #1637*, *AFL–CIO, CLC* does not support its case because it rejects the "clear and unmistakable waiver" standard in favor of the "contract coverage" standard. *Remington Lodging & Hospitality, LLC d/b/a The Sheraton Anchorage and Unite-Here! Local 878,* 363 NLRB No. 6 (September 15, 2015) is inapposite dealing as it does not with changes to job descriptions in accord with a CBA and at the request of the Union, but with an employer changing its scheduling procedures and no longer scheduling hours and shifts according to employees' seniority without notifying the Union or giving the Union the opportunity to bargain.

DECISION:

I conclude that the Water Authority did not refuse to bargain, as required by both Article 19 of the CBA and § 17 of the PEBA, because it already bargained for such job descriptions to be performed and approved in management's discretion and was not required to bargain the specific issue further, midterm. Therefore it did not violate §§ 19(F) 19(H) by its actions in this case. As there is no argument that the Water Authority failed or refused to comply with

the parties' collective bargaining agreement in any other respect, it is my Recommended Decision that the Complaint herein be **DISMISSED** and the Complainant should take nothing in the way of relief.

Issued, Tuesday, July 27, 2021.

Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board
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