STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CWA LOCAL 7076,

Complainant,

v. **PELRB No. 134-11**

NEW MEXICO PUBLIC EDUCATION DEP'T.,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board on the Union's Appeal from the Hearing Officer's Report and Recommended Decision issued October 12, 2012, concluding that the union waived its right to bargain the issues in this case. An appeal filed by the Respondent on October 30, 2012 was not considered because it was not timely filed.

Upon a 2-1 vote at the Board's November 8, 2012 meeting the Hearing Officer's Report and Recommendation, including its Findings of Fact, Conclusions of Law and Rationale is adopted as the Order of this Board for the reasons stated therein. In summary, the Union has met its burden of proof with regard to its alleged violations of §10-7E-19(G) and §10-7E-19(F) of the Public Employee Bargaining Act based on the Respondent's intentional withholding of information requested by the Union necessary to administer the CBA and to fairly and adequately represent all collective bargaining unit employees. The issues in this case are not resolved by interpretation of the parties' CBA alone, and are therefore not subject to the grievance procedure. Even if they were subject to the grievance procedure, the PELRB has discretion to hear the matters herein in the first instance which discretion it has exercised.

Finally, the Respondent has not invoked the prerequisites to arbitration and submitted proof thereof. Therefore, its Counterclaim was properly dismissed.

Board Chair Westbrook dissents in part but joins in this Order insofar as it requires the Respondent to cease and desist from failing to provide relevant information, dismissal of the counterclaim, and insofar as it orders the Respondent to post a notice of its violation He does not join in the decision insofar as it may be construed to adopt the "contract coverage" standard nor insofar is it finds that the union waived its right to bargain the effects of the RIF.

IT IS THEREFORE ORDERED:

(1) The Respondent shall cease and desist from failing and refusing to provide relevant information upon request and to refrain from such similar conduct in the future; and,

(2) The Respondent shall post Notice of its violation in the form accompanying this Order as Appendix A; and,

(3) The Respondent's Counterclaim is **DISMISSED** in its entirety.

Date: 11-26-12

Duff Westbrook, Chair,
Public Employee Labor Relations Board

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 Public Education Department in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties.

It has been found that we violated NMSA §10-7E-19 (F), refusing to bargain collectively in good faith with the exclusive representative, and §10-7E-19 (G) refusing or failing to comply with a provision of the Public Employee Bargaining Act or board rule by intentionally withholding of information necessary to administer the CBA, and to fairly and adequately represent all collective bargaining unit employees during meetings held to discuss employee layoffs that took place July 1, 2011.

We acknowledge the above-described rights and responsibilities and will not in any like manner intentionally withhold information from CWA Local 7076 or fail to meet obligations under the parties' CBA.

_____ Date:_____

For the New Mexico
Public Education Department

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

CWA LOCAL 7076,

Complainant,

v. **PELRB No. 134-11**

NM PUBLIC EDUCATION DEPARTMENT,

Respondent.

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

THIS MATTER comes before Thomas J. Griego as the designated the Hearing Officer on the Merits of the Prohibited Practice Charge herein (PPC). The procedural history of this case may be summarized as follows:

- Complainant ("Union" or "CWA") filed its PPC on June 20, 2011 alleging that the Respondent failed to bargain a furlough and reduction in force in violation of every PPC provision available; PEBA §§ 19 (A), (B), (C), (D), (E), (F), (G) and (H). Respondent timely filed its Answer and a Counterclaim on July 11, 2012, alleging that in filing its PPC the Union failed to abide by contract terms requiring referral of the issues in dispute to grievance arbitration in violation of PEBA §20 (D).
- On October 7, 2011 NMPED filed a Motion to Dismiss for lack of jurisdiction and for failure of the PPC to be brought in the name of the real party in interest or, in the alternative, for Summary Judgment. The Union timely responded to the Motion on October 26, 2011. A hearing on NMPED's alternative motion was held November 29,

2011 and the Hearing Officer issued his Recommended Decision denying the Motion on December 26, 2011.

- On January 13, 2012 NMPED appealed the denial of its alternative motion to the PELRB. The Union responded to the Appeal January 24, 2012 and it was heard by the PELRB April 26, 2012. In the meantime NMPED also filed a Motion to Set Aside the Decision, to Disqualify the Executive Director and appoint a new Hearing Officer on January 13, 2012. The Hearing Officer denied the Motion to Set Aside the Decision and Appoint a new Hearing Officer on February 9, 2012. NMPED appealed that Decision on March 14, 2012. The appeal was scheduled to be heard by the PELRB on April 26, 2012; however, on April 17, 2012 Respondent requested that the Appeal be continued, which request was granted. The PELRB eventually heard the appeal and issued its Order upholding the Hearing Officer's denial of the NMPED's alternative motion on May 8, 2012. At the same time the Board upheld the Hearing Officer's Hearing Officer's Recommended Decision denying the State's Motion to Disqualify the Executive Director from hearing this case and a separate Order issued Denying the State's Motions.
- A Status and Scheduling Conference was held on June 25, 2012 and a Hearing on the Merits and on Respondent's Counterclaim was scheduled for and conducted on August 14, 2012. At the conclusion of Complainant's case-in-chief Respondent moved for a directed verdict on each count. The Hearing Officer granted the directed verdict as to the alleged violations of §10-7E-19 (A), (C), (D), and (E) and reserved judgment on whether a directed verdict should be granted with regard to the remaining allegations.

- A post-hearing briefing schedule was set at the conclusion of the presentation of evidence and both parties timely submitted their briefs.

SUMMARY OF CONCLUSIONS: The PEBA requires a public employer to bargain mandatory subjects during the term of a collective bargaining agreement that are not addressed in the basic agreement and which are not clearly and unmistakably waived by the union. This duty arises out of a comprehensive obligation to bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties found in NMSA §10-7E-17(1). §17(1) indicates that a comprehensive duty to "bargain collectively" exists whether or not such bargaining is part of the negotiation of an agreement. That this is so appears from the fact that the intention that the parties' negotiations result in a written contract is found in NMSA §10-7E-17(2), separate from the bargaining requirement in §17(1). Reading the duty to bargain in good faith as comprehensive and not ending once a collective bargaining has been negotiated, fosters the parties working together to find a collective solution to workplace problems that may appear before a contract reopener occurs. The public policy embodied in §NMSA §10-7E-2 guaranteeing public employees the right, to organize and bargain collectively, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring the orderly operation and functioning of the state and its political subdivisions, indicates that the legislature favors joint, not unilateral, solutions to such problems arising during the term of a CBA.

The Employer may be excused from its ongoing duty to bargain where it can be shown that the issue over which the union seeks to bargain is "covered by" the parties' CBA or where it can be shown that the union waived its right to bargain either by express language in the CBA or by conduct such as failure to timely demand bargaining. Here, the specific effects of the RIF identified by the union are all covered by the parties' CBA. To the extent the Union disagrees that all identified effects are covered by the contract or can identify other effects not covered by the CBA, the Employer is excused from further bargaining because the union waived bargaining by failing to make a timely demand.

However, the duty to bargain includes not only the duty to provide information necessary to further collective bargaining but also relevant information necessary administer and monitor compliance with 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). The Union is statutorily required by NMSA §10-7E-15(A) to act for *all* public employees in the appropriate bargaining unit and to represent the interests of *all* public employees in the appropriate bargaining unit without discrimination or regard to membership in the labor organization. For this reason the Employer committed a prohibited labor practice when it intentionally withheld from the union information relevant to enforcing or monitoring compliance with the CBA or otherwise impairing the Union and its President in fulfilling her statutory duty to represent all employees in the bargaining unit by refusing to provide information requested by the union after April 29, 2011.

Accordingly, the union sustained its burden of proof with regard to a violation of §10-7E-19(B), by proving that NMPED interfered with or restrained Michelle Lewis' ability to represent her constituents as President of Local 7076 by withholding information regarding the classifications and number of employees to be RIF'd. The union also sustained its burden of proof with regard to a violation of §10-7E-19(F), refusing to bargain in good faith and §19(G) refusing or failing to comply with a provision of the Public Employee Bargaining Act insofar as NMPED's withholding information is a breach of a comprehensive duty to bargain in good faith. The union sustained its burden of proof with regard to a violation of §10-7E-19(H) by refusing or failing to comply Article 14's requirement that the parties meet to discuss layoff plans, again, by withholding requested relevant information during its meetings with the Union concerning the RIF. Because it appears that the effects of the RIF identified by the union in this case are covered by the parties' contract and the union waived bargaining a return to *status quo ante* requested by the union is not an appropriate remedy. NMPED's Counterclaim is without merit and should be dismissed. All parties hereto were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Both parties' closing 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 and conclusions:

FINDINGS OF FACT:

1. The State and CWA entered into the collective bargaining agreement ("CBA") at issue in this case on July 21, 2009 and that agreement was effective during all times material to this Complaint. (Finding No.1 in Hearing Officer's Report herein dated 12-26-11 and incorporated into Board Order of 5-10-12; CBA, Exhibit 1.)

2. On April 29, 2011, following a meeting regarding a new Code of Conduct, Gene Moser, Director of the State's Personnel Office, hand-delivered a letter (Union Exhibit A) to Michelle Lewis, President of CWA Local 7076. Also present at that time was Sandy Martinez, Labor Relations Specialist for the State Personnel Office. The purpose of the letter as stated therein was to give notice pursuant to Article 14 of the parties' collective bargaining agreement ("CBA") that the Employer was implementing a reduction in force ("RIF") effective July 1, 2011. (Letter of 4-29-11, Union Exhibit A; Testimony of Michelle Lewis, Testimony of Sandy Martinez).

3. Article 14 of the CBA provides that:

> "In the event an agency contemplates a furlough or reduction in force, the Agency shall notify and meet with the Union to discuss the furlough or reduction-in-force plan not less than thirty (30) days prior to submitting its furlough or reduction-in-force plans to the State Personnel Board." (CBA, Exhibit 1).

4. The parties' CBA contains a "zipper clause", or "Whole Agreement" clause which states "This Agreement shall be deemed the full and complete agreement between the parties and expresses the entire understanding of the Employer and the Union." (State Ex. I. Article 41).

5. As part of their CBA the parties negotiated the following relevant portions of Article 5, Management Rights:

"Section 1. Except to the extent specifically modified or limited by this Agreement or by applicable statutory or regulatory provisions, the sole and exclusive rights of management shall include the following:
...D. determine the size and composition of the work force;
...G. relieve an employee from duties because of lack of work or other legitimate reason;
H. determine methods, means, and personnel by which the Employer's operations are to be conducted."
(CBA, Exhibit 1).

6. Article 43 of the parties' CBA states in Section 2 that in addition to changes initiated pursuant to Article 5, management reserves the right to make other "reasonable" changes in terms and conditions of employment and "such changes are subject to negotiation in accordance with the PEBA..."

7. As part of statewide budget cuts in fiscal year 2011-2012 NMPED experienced a 23 per cent reduction in its operating budget for that year. (Exhibit A, Exhibits 3 and 4, Testimony of Paul Aguilar).

8. The letter of April 29, 2011, Exhibit A, informs the Union that "The Department currently employs staff members covered under [the parties' CBA]" and "As part of a comprehensive reorganization of the Department many of these positions may be affected by the RIF." (Emphasis added). The letter further informs the Union that the Respondent, (hereinafter "Employer" or "NMPED") "...will notify the employees affected once they have been identified in order to work with the State Personnel Office (SPO) to locate potential employment opportunities for displaced staff based on their education, experience and skills prior to the effective date of the RIF."

9. On April 29, 2011, after the letter giving notice of the RIF was delivered, representatives of the State, NMPED and the Union discussed the RIF. Based on the testimony of Michelle Lewis she asked about, but did not receive details of the planned RIF such as the number of employees represented by the Union to be affected by the RIF and the job classifications to be affected at that time. Mr. Moser told her she would have to contact NMPED to learn those details, which testimony is corroborated by plain reading of the April 29, 2011 letter which indicates that details such as those sought by Ms. Lewis were not known at that time. (Testimony of Michelle Lewis; Exhibit A).

10. Following the April 29, 2011 meeting Ms. Lewis called the contact number provided in the employer's notice letter but she did not receive answers that she considered to be adequate for her needs. (Testimony of Michelle Lewis; Testimony of Sandy Martinez).

11. After April 29, 2011 Ms. Lewis contacted Hipolito (Paul) Aguilar, NMPED Deputy Secretary for Finance and Operations by e-mail to schedule a meeting regarding the RIF. (Testimony of Michelle Lewis; Testimony of Hipolito (Paul) Aguilar).

12. After April 29, 2011 two more meetings took place among the Employer, representatives of the State and the Union to discuss the anticipated RIF. More specifically, on May 17, 2011 Michelle Lewis met with:

    a. Andrea Rivera-Smith, Executive Human Resources Manager for the State Personnel Office;
    b. Hipolito (Paul) Aguilar, NMPED Deputy Secretary for Finance and Operations;
    c. Sandy Martinez, a labor Relations Specialist for the State Personnel Office
    d. Patricia Hackney, NMPED Educational Administrator.

Ms. Lewis met again with the same persons plus Larry Behrens, the NMPED Public Information Officer on June 2, 2011 to discuss the RIF. (Testimony of Michelle Lewis; Testimony of Sandy Martinez).

13. During the May 17, 2011 meeting Ms. Lewis asked which units were being impacted by the RIF, how many employees were to be RIF'd and asked for any documents related to the planned RIF. The Employer's representatives responded to the effect that they were still working on details and had no additional information to provide. However, Mr. Aguilar told Michelle Lewis during that meeting that the Department had been able to save two of the positions planned to be RIF'd indicating that at that time the Employer had some idea of the persons or positions it planned to lay off. (Testimony of Michelle Lewis, Testimony of Hipolito (Paul) Aguilar).

14. During the June 2, 2011 Ms. Lewis again asked which units were being impacted by the RIF and how many employees were to be RIF'd to which NMPED repeated that it was still working on the details of the RIF and had no new information to share with the Union. (Testimony of Michelle Lewis; Testimony of Sandy Martinez).

15. Michelle Lewis on behalf of the Union verbally requested at both meetings and in subsequent e-mail communications, requested specific information relating to the RIF including the following:

a. Which units were being impacted;

b. The number of employees to be RIF'd;

(Testimony of Paul Aguilar; Testimony of Michelle Lewis; Exhibit K.)

16. The Employer provided some of the information requested by e-mail including responding to an inquiry regarding whether "DVR" was to be included in the RIF but did not provide requested information about the numbers of employees to be effected because of the possibility that by identifying the number of employees and their units the identity of employees to be impacted could be deduced: "We wanted to be very careful that when the employees were notified that we did it and did it in the right way." The Employer intentionally did not discuss the numbers of employees to be impacted out of concern that if secrecy could not be maintained and an employee learned he or she was scheduled to be laid off only to later find that the SPO Board did not accept the layoff plan or that NMPED changed its layoff plan at the last minute: "It just doesn't work; that just not the way to do things." Mr. Aguilar developed work sheets about the dollar impacts of the budget cuts but they were not specifically requested and he did not voluntarily provide them. (Testimony of Paul Aguilar).

17. Michelle Lewis' testified that she verbally requested to bargain the effects of the RIF and in an e-mail message. (Testimony of Michelle Lewis; Exhibit K).

18. Paul Aguilar testified that none of the Union representatives requested bargaining during the meetings of May 17, 2011 and June 2, 2011. "Not in those terms...No offers or any alternatives, any of those sorts of things." (Testimony of Paul Aguilar).

19. Approximately, one week after its last meeting with the union to discuss the RIF, on June 10, 2011, Respondent presented its plan for implementing

the RIF to the State Personnel Board for approval, which plan may be summarized as follows:

a. 33 Department employees were laid off; 17 of whom were bargaining unit employees.

b. The laid off employees were placed on administrative leave with pay from June 10, 2011, through June 30, 2011.

c. Of the 17 bargaining unit employees laid off, 13 were placed into other positions within the State and two chose not to return to State employment. (Spreadsheet of RIF'd Employees, Exhibit C; Testimony of Michelle Lewis).

20. The RIF plan presented to the State Personnel Board on June 10, 2011 had not been previously presented to the Union for discussion. The State Personnel Board approved the reduction in force plan proposed by the Department and it was subsequently implemented as approved. (Spreadsheet of RIF'd Employees, Exhibit C; Testimony of Michelle Lewis).

21. None of the information submitted to the State Personnel Board for approval including the total number of Department Employees to be laid off, the number of bargaining unit employees to be laid off, and the time period during which employees would be placed on administrative leave, was shared with the Union prior to NMPED presenting that information to the State Personnel Board. (Spreadsheet of RIF'd Employees, Exhibit C; Testimony of Michelle Lewis).

22. The Employer was in possession of information responsive to the Union's requests prior to its presentation of the RIF plan to the SPO Board on June 10, 2011, at a minimum the list of impacted employees and the written plan

submitted to the Board but made a calculated decision to withhold that information from the Union because of the need for discretion prior to approval of the plan and because he had "more important" matters to deal with. (Testimony of Paul Aguilar).

23. The parties have negotiated Article 9 of their CBA, a grievance procedure culminating in binding arbitration as required by NMSA §10-7E-17(F). Article 9 Section 1 regarding the scope of the grievance and arbitration procedure provides in subsection A:

> "Allegations of violation, misapplication, or misinterpretation of this Agreement, except for Preamble and Agreement, shall be subject to this negotiated grievance procedure. For purposes of this Article, "day" means calendar day unless otherwise specified. In the event an action or response is due is a Saturday, Sunday, or legal Holiday (as defined by the State Personnel Board – SPB), the action or response shall be due the following workday."

Subsection D of Article 9 Section 1 provides:

> "The parties agree that this Section shall not be used by either party as a waiver, or concession of position, as to the interpretation of the PEBA."

24. The Union filed a grievance pursuant to Article 9 over the RIF and on September 30, 2011 submitted the dispute to arbitration. However, the parties did not proceed through the arbitration process, the Union deciding instead to adjudicate the matter as a PPC brought under PEBA. (Testimony of Michelle Lewis; Appeal to Arbitration, Exhibit J).

RATIONALE AND CONCLUSIONS OF LAW:

This Board has jurisdiction over both the parties and the subject matter in this case.

At the conclusion of the Union's case-in-chief the Hearing Officer granted a directed verdict in favor of the Employer on several of the Union's allegations - there was no evidence provided that would support a judgment in favor of the Union on its claim that the Employer's actions discriminated against a particular public employee or public employees generally with regard to terms and conditions of employment because of the employee's membership in a labor organization. To the contrary, the evidence is that both bargaining and non-bargaining unit employees were affected by the RIF. Similarly, because both bargaining and non-bargaining unit employees were affected by the RIF without reference to their union affiliation there was no evidence that the Employer's actions discriminated in regard to hiring, tenure or a term or condition of employment in order to encourage or discourage membership in a labor organization. There was no evidence produced to support a claim that the RIF or the activities leading up to it in any way dominated or interfered in the formation, existence or administration of a labor organization. There being no representation or prohibited practices proceeding involved in any way during the pendency of the RIF, the evidence could not support a conclusion that the Employer's activities resulted in the discharge or other discrimination against a public employee because of signing or filing an affidavit, petition, grievance or complaint or given information or testimony pursuant to the provisions of the Public Employee Bargaining Act or because a public employee is forming, joining or choosing to be represented by a labor organization. Accordingly, the NMPED's motion for a directed verdict was granted as to the Union's allegations that the Employer's actions violated NMSA §§10-7E-19 (A), (C), (D), and (E). The Hearing

Officer reserved judgment on whether a directed verdict should be granted as to the Union's alleged violations of §10-7E-19 (B), (F), (G), and (H). A directed verdict is granted if, after reviewing all of the evidence in a light most favorable to the nonmoving party, the evidence as a matter of law is insufficient to justify judgment in favor of the nonmoving party.[1] See, J. Walden, Civil Procedure in New Mexico Sec. 9c (2) (a) at 225 (1973) and 5A J. Moore, Moore's Federal Practice ¶ 50.02 (2d ed. 1987). In this case the Union established that while notice of the planned RIF was given by the Employer on April 29, 2010 no details of the RIF plan were presented until it was presented to the SPO Board for approval. Although specific information was requested no detailed information was presented by the Employer at any of its meetings with the Union concerning the RIF prior to presentation of the Plan to the State's Personnel Board; to the contrary at each meeting the Employer told the Union that it could not produce the requested information because the RIF plan had not yet been developed. The Union's witness testified that its representative requested specific information relating to the RIF and requested bargaining over the effects of the RIF. It is apparent that at some point at least as early as the time between its last meeting with the Union on June 2, 2011 and its presentation of a RIF plan to the State Personnel Board a little more than a week later, on June 10, 2011, NMPED had a fully developed plan for implementing the RIF complete with specific proposals as to the number of bargaining unit and non-bargaining unit employees to be RIF'd, a procedure for the laid-off employees to be placed on

[1] A directed verdict is only granted when no reasonable jury could find for the nonmoving party. See *Fortner Enterprises, Inc. v. United States Steel Corp.*, 452 F.2d 1095, 1097-98 n.3 (6th Cir. 1971) (noting distinction), cert. denied, 406 U.S. 919, 92 S.Ct. 1773, 32 L.Ed.2d 119 (1972).

administrative leave for a period of time and a procedure for placement of laid-off employees into other positions within the State system, which information was not shared with the Union prior to it being presented to the SPO Board. Additionally, the evidence showed that NMPED representatives meeting with the Union as early as the May 17, 2011 meeting knew the identity of at least some of those employees to be RIF'd (subject to change)but purposely did not disclose that information to the Union because of the Employer's desire to maintain secrecy. It is not disputed that NMPED did not negotiate the effects of the RIF with the Union after providing notice on April 29, 2011 for what the Employer asserts are good and legitimate reasons. This Board has already determined in this case that the employee layoff at issue is a mandatory subject of bargaining under PEBA. *See,* Conclusion of Law F, Hearing Officer's Report herein, dated 12-26-11 and incorporated into the Board's Order of 5-10-12. This Board also concluded previously that the Employer's decision to layoff Union-represented employees because of economic reasons entitles the Union to a significant opportunity to bargain in a meaningful manner and at a meaningful time over the effects of the Employer's decision to terminate its Union-represented employees, citing to *First National Maintenance Corp v. NLRB,* 452 U.S. 666, 681 (1981). I reiterate those Conclusions here. The prior findings and conclusions left open for determination in this proceeding whether NMPED met the duty to bargain found to exist, whether that duty applied to either the RIF itself or the effects of the RIF plan[2] or whether the Union waived its right to bargain either

[2] The Hearing Officer acknowledges that NMPED does not recognize a duty to bargain the effects of the layoff and defends against the union's allegations that it failed to engage in good faith bargaining over the effects by denying that it has a duty to do so under PEBA or the contract.

the RIF, its effects or both, and finally whether the Employers' actions violated any other provisions of PEBA or its CBA with the Union.

Under these facts, applying the legal standard for granting a directed verdict and in light of the duty to bargain a change in a mandatory subject of bargaining unless waived, it cannot be said that as a matter of law the Union could not prevail on its charges that NMPED actions as alleged interfered with, restrained or coerced a public employee in the exercise of a right guaranteed pursuant to PEBA. Nor may it be said that it could not as a matter of law prevail on its claim that NMPED's refuse to bargain collectively was not in good faith and that its failure or refusal to do so was not a refusal or failure to comply with a provision of PEBA or the applicable CBA. Accordingly, with regard to the Union's alleged violations of §10-7E-19 (B), (F), (G), and (H) the Employer's Motion for a Directed Verdict is **DENIED**.

Having denied the Motion for Directed Verdict, I turn my attention to whether the Union has sustained its burden to prove by a preponderance of the evidence its alleged violations of NMSA §§10-7E-19 (B), (F), (G), and (H).

A. The Duty To Bargain The Effects Of The Layoffs Identified In This Case Had Been Discharged Prior To Implementation Of The RIF Plan July 1, 2011.

I begin my analysis with a review of Article 14 of the parties' CBA (Exhibit 1). Article 14 provides for notice to, and meeting with, the Union in the event of a contemplated a furlough or reduction in force.

In its earlier Order denying the NMPED'S Motion to Dismiss this Board determined that the RIF at issue here is a mandatory subject of bargaining and that the decision to layoff Union-represented employees for economic reasons entitled the Union to a significant opportunity to bargain in a meaningful manner and at a meaningful time

over the effects of the Employer's decision to terminate its Union-represented employees. *See,* Hearing Officer's Report herein dated 12-26-11 and incorporated into this Board's Order of 5-10-12.[3] Those Conclusions do not end all matters at issue however, because if the parties have negotiated regarding the particular matters at issue here, the Employer is not obligated to negotiate further on such matters during the term of the contract. The Employer cites to *NLRB v. USPS,* 8 F.3d 832. 303 Ct. App DC 428 (Ct. App. D.C. 1993) for that proposition. Furthermore, while *NLRB* v. *Jacobs Manufacturing Co.,* 196 F.2d 680 (2d Cir. 1952), stands for the long held proposition that the duty to bargain mandatory subjects continues during the term of a collective bargaining agreement, it also recognizes that proposition to be true only if the duty to bargain has not been discharged or waived.[4]

Here, NMPED admits that it did not bargain the effects of the layoff at issue based on the principle that it was under no legal obligation to do so having already bargained a CBA. As part of their CBA the parties negotiated a reservation of management rights found in Article 5 of the CBA, Exhibit 1.

NMPED argues that the above relevant sections of the CBA's Management Rights clause set forth in the findings herein, reserve to management the right to determine the size and composition of the work force, to relieve an employee from duties for any legitimate reason, and to determine which employees to layoff under its right to

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[3] In its previous Order denying dismissal, the Board relied on the rationale in *First National Maintenance Corp v. NLRB,* 452 U.S. 666, 681 (1981). PEBA, like the NLRA, imposes a duty to bargain in good faith over "wages, hours and all other terms and conditions of employment." *Compare,* PEBA §17(A)(1) and §19(F) to NLRA §8(a)(5).

[4] It has become axiomatic that the PELRB will interpret language in PEBA in the same manner as the NLRA has been interpreted to the extent that the language at issue is the same. *Las Cruces Prof'l Firefighters v. City of Las Cruces,* 123 NM 239, 938 P.2d 1384 (Ct. App. 1997).

determine which employees will conduct the Employer's operations. NMPED argues that it has met the only limitation on those management rights; Article 14's requirement that the Employer notify the Union, meet, and discuss its intent to lay off employees.

Article 14 does not stand alone. To the extent possible Article 14 must be read in conjunction with Articles 5, 41 and 43. Read together it is my conclusion that all of the effects of the layoff identified on the record in this case have been reserved by the parties to management's discretion. Therefore, under the facts of this case there is no duty to bargain during the term of the parties' CBA because all matters over which the Union wanted to bargain are covered by the contract. *See, NLRB v. U.S. Postal Service,* 8 F.3d 832, 836 (D.C. Cir. 1993). The "contract coverage" doctrine explicitly presupposes that the parties have exercised, rather than waived, their statutory right to bargain. *Local Union No. 47, IBEW v. NLRB*, 927 F.2d 635, 641 (D.C. Cir. 1991); *Postal Service*, 8 F.3d at 836, 838.

This conclusion should not be read to mean that "effects bargaining" is forever foreclosed, even as to RIF's and layoffs, for although both the Management Rights Clause and Article 14 afford NMPED wide latitude to implement a reduction in force, there is no indication that this flexibility reserved to management to change the workforce automatically included a corresponding right to evade all bargaining over the impact of those changes, or that the parties fully discussed at the time they entered into their CBA the specifics of any such plan. *See, Regal Cinemas*, 317 F.3d at 313-14 (There was no waiver of bargaining rights where the employer failed to present "affirmative evidence" that parties' bargaining history included any

discussion that the management rights clause included specific right to make the change at issue). The obligation in Article 14 to meet and discuss after notice runs counter to the idea that the Union conceded changes in the workforce due to such a RIF or Layoff as a *fait accompli* and this decision is consistent with NLRB precedent beginning with *Jacobs Manufacturing Co.* that the duty to bargain exists unless waived or discharged as I have found to have been done here.

I therefore must disagree with the Employer's argument that without an express authorization in PEBA for effects bargaining, public employers have no such obligation. NMPED contrasts the absence of an express authorization in PEBA requiring the Employer to engage in bargaining the effects of a layoff with an express obligation to bargain the impact of professional and instructional decisions in school districts found in NMSA §10-7E-17(D) (Employer's closing argument pp. 6-7.)[5] NMPED argues that imposing such a duty would require this Board to impermissibly interject into PEBA language which is not there. To the contrary, the requirement in NMSA §10-7E-15 (A) that a certified labor organization shall act for all public employees in the appropriate bargaining unit, is not limited to the period of time that the parties are at the negotiating table and consequently does not end once an agreement on a CBA has been reached. [6] Similarly, the obligation of public employers and exclusive representatives in NMSA §10-7E -17(A)(1) to

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[5] *NLRB* v. *Jacobs Manufacturing Co.* is not distinguished from the present case by virtue of the differing facts referenced by the Employer in its closing argument because the principle for which it is cited here remains the same, differing facts notwithstanding.

[6] NMSA §10-7E-15 (A) provides that a recognized bargaining representative "shall act for all public employees in the appropriate bargaining unit *and* negotiate a collective bargaining agreement covering all public employees in the appropriate bargaining unit. The requirements to act for represented employees and to negotiate a CBA on behalf of the represented employees are two separate and distinct albeit linked obligations

bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties is distinct from the obligation to "enter into written collective bargaining agreements covering employment relations" found in NMSA §10-7E -17(A)(2). I am required as a matter of statutory construction to read the provisions of §17(A) together with §17(D) and to read both of those sections consistently with the stated purposes of the Act to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions. PEBA obligates the Employer to bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties. *See,* 10-7E-17. NMPED's RIF plan unquestionably affects wages, hours and other terms and conditions of employment, and the statutory duty to bargain attaches. The duty to bargain layoffs is a settled area of labor law. *Hilton Mobile Homes,* 155 NLRB 873 (1965), *Advertiser's Mfg. Co.,* 280 NLRB 1185 (1986). This decision is therefore consistent with NLRB precedent. The Employer urges the Board to adopt the view that any intent of the parties to treat management's right to implement its layoff decision as different and distinct from the effects of that decision must be reflected in contract language or bargaining history before this board holds the Employer to a mandatory duty to bargain those effects. NMPED asserts that there is no such contract language or bargaining history giving rise to a duty to negotiate the effects of the layoff. I disagree both with regard to the standard

we are urged to apply and as to whether there would be found such contract language or bargaining history giving rise to a duty to negotiate the effects of the layoff. First, with regard to the standard, the Employer's view constitutes a departure from the majority view. I am unable to find any New Mexico labor cases adopting that view, NMPED cites none and it is an approach at odds with NLRB precedent. While it is true as a general proposition that parties to a CBA may negotiate terms and conditions which would excuse further mandatory bargaining those same cases allow that in order to be construed as resolving issues *pro tanto* the CBA provisions in question must specifically address the full range of impact and implementation issues involved. *See also* Hearing Officer's Report herein dated 12-26-11 and incorporated into Board Order of 5-10-12, citing to *Department of the Navy, Marine Corps Logistics Base, Albany, Georgia v. Federal Labor Relations Authority, American Federation of Government Employees, AFL-CIO, Intervenor, v. Federal Labor Relations Authority*, 140 L.R.R.M. (BNA) 2206, 295 U.S. App. D.C. 239 (1992). (A determination whether any particular issue is "covered by" a collective bargaining agreement so as to preclude further bargaining depends on whether the contract provision in question "specifically address[es] the full range of impact and implementation issues." Taken alone, all that was required by Article 14 of the CBA was a minimum 30 days' notice, meeting and discussing layoff plans before presenting them to the State Personnel Board for approval. Article 14 alone and read together with Articles 5, 41 and 43 in no way address the full range of impact and implementation issues surrounding a RIF. Indeed, it would be counter to the public policy expressed in PEBA to promote harmonious and cooperative

relationships between public employers and public employees and to ensure the orderly operation and functioning of the state and its political subdivisions to attempt to address all effects of layoff or RIF, known or unknown, in a single contract since one cannot know years in advance what the specific implementation and impact issues may be with regard to a RIF implemented years later. So, while I have concluded that all aspects of the RIF that I can identify as issues in this case are covered by the parties' CBA I do not conclude that the Employer is relieved of its obligation to bargain the impact and implementation of a reserved management rights in another case.

There is long-standing NLRB precedent that although an agency is not required to bargain with respect to its management rights *per se*, it is required to negotiate about the "impact and implementation" of those rights--that is, the "procedures which management officials of the agency will observe in exercising" management rights and "appropriate arrangements for employees adversely affected by the exercise" of such rights. Therefore, an agency commits an unfair labor practice when it refuses to bargain over "impact and implementation" issues or fails to consult with the employees' representative over proposed changes in conditions of employment. *Freeport-McMoRan Oil & Gas Company and KN Energy, Inc., v. Federal Energy Regulatory Commission*, 962 F.2d 45, 295 U.S. App. D.C. 239 at 241, *citing* USC § 7106(b) (2) (3) and *United States Dep't of the Air Force v. FLRA*, 949 F.2d 475, 477 & n. 2 (D.C.Cir.1991).

Engaging in effects bargaining requires only an exploration of whether NMPED had feasible alternatives that it could have explored with the Union, without

reconsidering its underlying management decision and is not the kind of "perpetual bargaining" over its right to implement its layoff plans to which the Employer objects. It may be that bargaining over issues so circumscribed is brief and unproductive, but that possibility does not excuse NMPED from participating in the process.

I do however agree with NMPED that if the CBA authorizes an employer to act unilaterally with respect to certain conditions of employment, then changing those conditions is not a change in the *status quo*. *See, Enloe Medical Center v. NLRB,* 433 F.3d 834 (D.C. Cir. 2005) (Refusal to bargain over changes allowed by the collective bargaining agreement is not a basis for an unfair labor practice claim over refusal to bargain). In part, for that reason I conclude that the Employer's failure to bargain over changes allowed by the collective bargaining agreement in this case cannot be a prohibited labor practice.

I next turn my attention to whether NMPED is excused from its obligation to engage in effects bargaining as to any effects of the layoff *not* covered under the parties' contract by waiver of that obligation.

B. Articles 14, 5 And 43 Of The Parties' CBA, Read Separately Or Together, Do Not Constitute A Waiver Of The Union's Right To Bargain The Effects Of A Changed Working Condition Reserved To Management Rights.

The issue of whether the Employer satisfied its bargaining requirement with regard to the specific matters at issue in this case by having bargained Article 14, 5, 41 and 43 is a separate question from whether by those same articles constitute a waiver of the right to bargain the effects of reserved management right generally. A finding that the CBA does not cover all possible effects of a change in working conditions is

not in conflict with my conclusion that under the "covered by" doctrine the specific class of management decisions on which bargaining is sought have already been bargained over by the parties. This is so because under the ongoing good faith obligation under PEBA employers are not permitted to refuse bargaining based on their own prejudgment as to what those effects will be or whether bargaining will be successful.

The courts and the NLRB will not assume waiver by a Union of its statutory right to bargain over changes in terms and conditions of employment. *Suffolk Child Dev Ctr.* 277 N. L.R B. 1345, 1985 WL 46157 (1985). National labor policy disfavors waivers of statutory rights by a Union and thus a Union's intent to waive a right must be clear before a waiver will be enforced. *Id.* It is my conclusion that Article 14 whether read separately or together with Articles 5, 41 and 43 is not sufficiently specific to constitute a waiver of the right to bargain the effects of a layoff or reduction in force. A reasonable mind can conceive of any number of effects not contemplated by those sections such as whether and how alternatives to a layoff may be considered, the manner and method of providing notice to the laid off employees, the manner and method of their departure from the workplace, what benefits shall be accorded to those RIF'd employees in terms of leave usage and accruals, preservation of seniority rights and how the RIF effects other provisions of the collective bargaining agreement or any other effects of a RIF or a layoff. The necessary explicit waiver language is not contained in any of those clauses. Furthermore, the management rights in Article 5 are expressly reserved only to "the extent [they are] specifically modified or limited by [the CBA] or by applicable statutory or regulatory

provisions..." Also, reserved management rights to determine the location and operation of its organization, to impose rules governing employee conduct or rules concerning employee safety and to determine scheduling are expressly subject in Section 2 to a notice and bargaining provision.

Article 41 of the CBA, which the Employer regards as a "zipper clause", similarly is subject to "written supplemental and any other written agreements reached by the parties" as well as conflicting controlling regulations, rules or laws "in accordance with the PEBA". The normal function of zipper clauses is to maintain the *status quo,* not to facilitate unilateral changes. Use of the clause to impose unilateral changes without first bargaining is not favored. *Pennsylvania Labor Relations Board.* 459 A. 2d at 457. A zipper clause must meet the standard of any other alleged waiver; it must contain a clear and unequivocal relinquishment of the right involved. Where a zipper clause is couched in broad terms, it must appear from an evaluation of the negotiations that the particular matter at issue was fully discussed or consciously explored and the Union consciously yielded or clearly and unmistakably waived its interest in the matter. *Suffolk Child Dev. Ctr.* 277 N.L.R.B. 1345, 1350-51, 1985 WL 46157 (1985) *quoting Angelus Block Co,* 250 NLRB 868, 877 (1980). It is my conclusion that based on the express language of Article 41 and based on the case law cited, the zipper clause in this case is not so clear and unmistakable in its term so as to constitute a waiver of the Union's right to bargain the effects of NMPED's layoff.

For similar reasons, Article 43 does not constitute a waiver of effects bargaining. Section 1 of Article 43 applies to changes initiated by the Union, which are not at

issue here. In Section 2 the parties agreed that in addition to those rights reserved to management under Article 5 the Employer may make "other reasonable changes in the terms and conditions of employees to meet legitimate public service and operating needs" but such changes are expressly subject to collective bargaining. Such language is contrary to an expression of waiver.

The contracts' silence as to such effects of layoff hardly demands the conclusion that the Union clearly and unmistakably waived its right to bargain the effects of a layoff or a RIF. *See, Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 354 n.8 (D.C. Cir. 1983) (Silence in the bargaining agreement is insufficient to constitute clear and unmistakable waiver.). *See also, George Banta Co. v. NLRB*, 686 F.2d 10, 20 (D.C. Cir. 1982). NLRB precedent has held that an agreement to "discuss" a specific topic such as we have here with Article 14 does constitute a waiver of the Employer's statutory bargaining obligations. *See, Roytype Division, Pertee Computer Corporation,* 284 NLRB No. 88 (1987). (A contract provision requiring the Employer to 'notify and discuss with the Union' does not waive the Respondent's statutory obligation for bargaining over those subjects under the circumstances.)

Notwithstanding the foregoing, while I conclude that the CBA did not serve as an effective waiver of the Union's right to bargain regarding the effects of the layoff, I also conclude that the Union by its inaction waived its right to bargain the effects of the layoff at issue as appears more fully below.

C. The Union Waived Bargaining The Effects Of The Layoff At Issue In This Case By Failing To Make A Timely Demand For Bargaining.

On April 29, 2011 the Union was given notice of the Employer's intent to implement a layoff effective July 1, 2011. It did not tender a bargaining demand at that time. The Union has an obligation to be proactive. *See, In re: AT&T Corp.,* 337 NLRB 105 (2002). When an employer notifies a union of proposed changes in terms and conditions of employment it is incumbent on the union to act with due diligence in requesting bargaining. While the effects of the implemented layoff may properly be descried as "working conditions" and thus a mandatory subject of collective bargaining, to the extent that bargaining obligation was not satisfied by negotiating Articles 14, 5 and 41, the Union must initiate bargaining or risk waiving its right to bargain by inaction. *See, Pinkston-Hollar Const. Services, Inc.,* 312 NLRB 148 (1993). (Union had notice of specific changes and had the opportunity to act but failed to do so.) The Union argues that by failing to provide it with requested information it was denied a reasonable opportunity to bargain because it was not provided the details of the plan until its presentation to the State Personnel Board June 10, 2011. In this regard I note that the Employer gave the Union 3 months advance notice of the layoff Instead of immediately demand bargaining of the effects of the layoff the Union met twice with the Employer and requested information related to the work units to be effected by the layoff but did not demand to bargain any aspect of the layoff.

It is well settled law that a union can waive the duty to bargain by inaction, by failing to seek to bargain over a proposed change of which it has actual notice, and which was not presented as a "*fait accompli.*" *NLRB v. Oklahoma Fixture Co.,* 79 F.3d 1030 (10th Cir. 1996); *Gratiot Community Hospital v. NLRB,* 51 F.3d 1255 (6th Cir. 1995);

Pinkston-Hollar Construction Services, Inc., 312 NLRB 1004 (1993); *Haddon Craftsmen, Inc.*, 300 NLRB 789, 790 (1990). Once the employer provides appropriate notice to the union, "the onus" is then "on the union to request bargaining over subjects of concern." *NLRB v. Oklahoma Fixture Co., supra.* If the Union fails to do so it "will have waived its right to bargain over the matter in question." *Id.* I am aware of that line of cases holding that a union's duty to request bargaining is relieved if the change is presented as a *fait accompli.* Clearly the plans presented by the Employer on April 29 were not presented as a *fait accompli* since it expressly referred to development of the plan needing to take place. At each meeting between the Union and the Employer concerning the RIF it is clear that the plans were developing. Even in cases where a fully developed plan is presented, that fact alone is not enough to find that the proposal was presented as a *fait accompli. See, Haddon Craftsmen, Inc.*, 300 NLRB at 790 (A "*fait accompli*" will not be found based solely on the fact that the notice presents the proposed change as a fully developed plan or uses positive language to describe the change.) In such a case, the union must still "act with due diligence in requesting bargaining," or "risk a finding that it has lost its right to bargain through inaction and, as a consequence, risk the dismissal of ... allegations because no objective basis exists to find or infer bad faith on the part if the employer." *Id.* at 790-791.

Here, the Union received notice of the intended layoff on April 29, 2011 to be implemented almost three months later in July. The Union's representative contacted the Deputy Secretary for Finance and Operations and scheduled a meeting regarding the RIF for May 17, 2011. The parties met again with the Employer's

representatives on June 2, 2011 to discuss the RIF. There was nothing indefinite about the Employer's intention to conduct a RIF in the initial notice to the Union, and the Union's meetings following that notice did nothing to make it less definite that employees were to be laid off and there was a substantial likelihood if not certainty that some of those to be laid would be bargaining unit employees. Although details such as the specific work units and number of employees to be RIF'd were indefinite and were still being developed as the parties met there can be no doubt that the intended RIF was a certainty and the missing specifics were reserved to management's discretion by the CBA.

Under these circumstances the April 29 notice amounted to clear and unequivocal notice of the layoff of bargaining unit members. Thus, the Union was required to request bargaining reasonably expeditiously after April 29, 2011. The Union argues that Michelle Lewis verbally requested bargaining at one or several of its meetings with NMPED about the RIF and requested bargaining in an e-mail message, Exhibit K. Whenever asked about these verbal requests for bargaining Ms. Lewis' testimony was always in the context of her requests for information. To paraphrase the witness, when asked directly whether she requested bargaining her response typically was "Yes, we requested additional information." Similarly, while Exhibit K is put forward by the Union as evidence of an e-mail request for bargaining, it is clearly a demand for additional information and I find nothing therein that may be construed as a bargaining demand. Reliance by the Union on Exhibit K underscores its lack of appreciation for the distinction between requesting bargaining and requesting information. It is more plausible to me that Ms. Lewis as an experienced

union officer would have reduced a demand to writing rather than continuing with information requests which by her own testimony went largely unanswered. While I credit Ms. Lewis' testimony of the events surrounding her receipt of the layoff notice her testimony regarding verbal demands for bargaining are denied by the Employer and I discredit her testimony concerning verbal and e-mail demands for bargaining. Although a demand to bargain need take no special form, so long as there is a clear communication of meaning, the evidence in this case, while proving numerous requests for information, did not establish a demand for bargaining or memorialized the Union's claimed verbal requests for bargaining. There is no clear communication of a desire for bargaining and the weight of the evidence therefore supports a conclusion that the Union never made a timely demand to bargain. *See, Armour and Co.*, 280 NLRB 824, 828 (1986) (quoting *Scobell Chemical Co. v. NLRB*, 267 F.2d 922, 925 (2d Cir. 1959).

I acknowledge that the NLRB has construed the waiver doctrine narrowly and has been reluctant to infer a waiver in the absence of clear and unmistakable language. *See, e.g., Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 n.12 (1983); *United Techs. Corp.*, 274 N.L.R.B. 504, 507 (1985). The NLRB decisions have been consistent with New Mexico law on the doctrine of waiver generally. For example, *Young v. Seven Bar Flying Serv., Inc.*, 101 N.M. 545, 685 P.2d 953 (1984) defined "waiver" as the intentional relinquishment or abandonment of a known right. But the NLRB cases also support a finding of waiver if the evidence shows that the Union received sufficient notice of the proposed change, and yet failed to protest or demand bargaining on the issue. *International Ladies Garment Workers' Union v. NLRB,* 463

F.2d 907, 918 (D.C. Cir. 1972). However, with regard to any effects of the layoff not covered by the parties' CBA the preponderance of the evidence persuades me that the Union waived effects bargaining by failing to make a bargaining demand. The Union's claim that it demanded bargaining is relevant to another issue in this case, notwithstanding the conclusion that no such demand was made. To the extent the Union argues that it was not given a fair opportunity to bargain because its information requests were not met, that position is negated by Ms. Lewis' testimony that she verbally requested bargaining during the May 7, 2011 and June 2, 2011 meetings. The Union cannot be heard to complain that it was not afforded "a significant opportunity to bargain ...in a meaningful manner and at a meaningful time"[7] because it lacked sufficient information from the Employer to determine whether or not to demand bargaining while simultaneously arguing that it demanded bargaining.

D. NMPED Complied With the Notice Requirement Set Forth In Article 14 of the Collective Bargaining Agreement, But Did Not Comply With the Requirement to Meet and Discuss Its Plan 30 Days Prior To its Presentation to the State Personnel Board.

Article 14 of the collective bargaining agreement required NMPED to notify and meet with the Union to discuss its furlough or reduction in force plan not less than thirty (30) days prior to submitting its plans to the State Personnel Board. It is not disputed that the Employer gave notice on April 29, 2011 of its intent to conduct a RIF of employees effective July 1, 2011, some of whom would possibly be bargaining unit employees. It is also undisputed that the layoff "plan" eventually presented by NMPED to the State Personnel Board on June 10, 2011 contained details of the layoff

[7] *First National Maintenance Corp v. NLRB*, 452 U.S. 666, 681 (1981).

not previously disclosed to the Union. As vague and ambiguous as the notice provided April 29, 2011 may have been in comparison to the plan presented to the Personnel Board on June 10, 2011, it is my opinion that the notice of April 29, 2011 was sufficient to meet the requirement of Article 14 that the Employer provide notice of the impending layoff to the Union at least 30 days prior to presentation to the State Personnel Board. In this instance, doing the bare minimum meets the requirement for notice.

I reach this conclusion based on the CBA's use of the words "plan" and "plans" in Article 14. Within the same sentence the CBA calls for the Employer to give notice of a furlough or reduction-in-force *plan* not less than thirty days prior to submitting its furlough or reduction-in-force *plans* to the State Personnel Board. This verbiage convinces me that Article 14 does not require that a final written plan such as that eventually presented to the State Personnel Board on June 10, 2011 is to be disclosed 30 days prior to being presented to the State Personnel Board. Rather, to paraphrase the Employer's witness, Sandy Martinez, the management decision to implement a RIF alone constitutes the sort of "plan" or "plans" contemplated by Article 14. This reading of Article 14 is consistent with the plain meaning of the word "plan", which Webster's 21st Century Dictionary defines as "an intended scheme or method". Webster's Pocket Dictionary and Thesaurus adds that "plan" means "To have in mind as an intention or purpose". The fact that Article 14 uses both the plural and singular forms of the word indicates that a variety of methods; shifting and changing schemes are contemplated by Article 14.

Nevertheless, there is a second element to Article 14. In addition to providing notice, the Employer is obligated to meet with the Union to discuss the furlough or reduction in force plan. With respect to the notice requirement I draw no negative conclusions from the lack of specificity in the Employer's layoff plans provided to the Union during its meetings on April 29, May 7 and June 2, 2011 because Article 14's requirement that the parties meet and discuss layoff "plans" would have no practical meaning if the "plans" to be presented to the Union 30 days ahead of its presentation to the State Personnel Board was the one and only plan presented as a *fait accompli* or if any subsequent changes to the plan that the Union was able to persuade the Employer to make would require a new 30 days notice period. I am guided in this respect by the principle embodied in PEBA §10-7E-2 that one of the purposes of the Act is to protect the public interest by ensuring the orderly operation and functioning of the state and its political subdivisions.

The evidence in this case is convincing that the RIF was not presented as a *fait accompli,* but was shifting, changing "up to the 11th hour" to paraphrase the testimony of Paul Aguilar and the Union was aware of those changes. (Exhibit K). The Union apparently also drew no negative inferences at the time of the meetings because the meetings were not taking place 30 days ahead of layoff plans being presented to the State Personnel Board. I reach this conclusion based on Exhibit K sent by Ms. Lewis to Deputy Secretary Aguilar to provide alternative dates for a follow-up meeting after the May 17, 2011 meeting "should the plan be ready for review by CWA". Exhibit K also shows that Ms. Lewis was aware that the plan was to be presented to the State Personnel Board on either June 10 or June 15 of 2011 but

had proposed a meeting date as late as June 2, 2011, apparently unconcerned that none of the meetings being conducted were scheduled to take place 30 days prior to presentation of the RIF plan to the Board.

While I have concluded that the timing of the notice and meetings does not violate PEBA the duty to bargain in good faith includes the duty to provide information upon request that may be necessary to enforce or monitor the CBA and to provide service to the Union members apart from actual bargaining of the CBA.[8] It is evident that the Employer did not discuss all of its layoff plans with the Union, prior to their submission to the State Personnel Board. Mr. Aguilar testified that the specific positions scheduled to be RIF'd at any given point in time during the parties' meetings April 29, 2011 was intentionally withheld from the Union because of management's desire for, and lack of trust in the Union's ability to maintain confidentiality. Withholding that information is contrary to the language in Exhibit A that employees to be RIF's would be contacted by the Employer "once they have been identified" not "once the plan has been presented to the State Personnel Board". It cannot be said that under these circumstances the Employer fulfilled its obligation under Article 14 Union to discuss the reduction in force plan not less than thirty days prior to submitting its plans to the State Personnel Board. One cannot simultaneously discuss plans and hold them secret. Accordingly, it is my decision that the Employer by the above actions violated NMSA §10-7E-19 (H) by refusing or failing to comply with a collective bargaining agreement, particularly, the requirement under Article 14 to meet and discuss plans 30 days in advance.

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[8] *See National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH*, 3-PELRB-2005 (Oct. 19, 2005) (NUHHCE); *see also The Developing Labor Law* at 920-982.

E. NMPED breached a duty to bargain in good faith arising out of its refusal to provide requested information about the layoff.

Beyond the question whether intentionally withholding information from the Union in the manner described above constituted a violation of Article 14 is the question whether it also constitutes a violation of the duty to bargain in good faith. 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).

Complainant bears the burden of proof in establishing a prohibited practice has occurred. *See*, NMAC 11.21.1.22(B). NMSA §10-7E-17(A) (1) requires the parties to bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties. By intentionally withholding requested information from the Union, necessary to administer the CBA, and to fairly and adequately represent all collective bargaining unit employees, The Employer has refused or failed to abide by §17(A). Therefore, the Union has met its burden of proof with regard to §10-7E-19(G) which states that it is a prohibited labor practice for an employer to refuse or fail to comply with a provision of the Public Employee Bargaining Act. Likewise, the Union has met its burden of proof with regard to §10-7E-19(F) which states that it is a prohibited labor practice for an employer to refuse to bargain collectively in good faith with the exclusive representative.

F. NMPED's Counterclaim is Without Merit and Should Be Dismissed.

For its Counterclaim the Employer asserts that the parties' CBA contains a grievance and arbitration provision mandated by PEBA and that because the dispute raised in the PPC is nothing more than an interpretation of Article 14 of the CBA, the Union committed a PPC by failing to abide by the contract terms with regard to filing a grievance. In any given case the same facts may support both a PPC and a grievance and while there are elements of contractual construction necessarily implicated in rendering this decision I do not agree, for the reasons set forth above, that this case could have been decided by solely construing Article 14 of the CBA. Neither do I conclude that the CBA's grievance arbitration provision controls a party's decision whether or not to file a PPC where the elements of both a PPC and a contract interpretation are present for the reasons set forth below.

The question of whether this Board may hear as prohibited practices issues that could also have been brought as a grievance has been addressed in the past and a summary of the law bears repeating here.

NMSA §10-7E-17(F), Scope of Bargaining (2003) provides:

> "An agreement shall include a grievance procedure to be used for the settlement of disputes pertaining to employment terms and conditions and related personnel matters. The grievance procedure shall provide for a final and binding determination. The final determination shall constitute an arbitration award within the meaning of the Uniform Arbitration Act [44-7A-1 to 44-7A-32 NMSA 1978]; such award shall be subject to judicial review pursuant to the standard set forth in the Uniform Arbitration Act. The costs of an arbitration proceeding conducted pursuant to this subsection shall be shared equally by the parties."

Additionally, NMSA §10-7E-19(H), Public employers; prohibited practices (2003) provides:

> "A public employer or his representative shall not:

refuse or fail to comply with a collective bargaining agreement."

NMAC 11.21.3.22, Arbitration Deferral, allows for deferral at the director's discretion or by order of the Board:

> "A. If the subject matter of a prohibited practices complaint requires the interpretation of a collective bargaining agreement; and the parties waive in writing any objections to timeliness or other procedural impediments to the processing of a grievance, and the director determines that the resolution of the contractual dispute likely will resolve the issues raised in the prohibited practices complaint, then the director may, on the motion of any party, defer further processing of the complaint until the grievance procedure has been exhausted and an arbitrator's award has been issued.
>
> B. Upon its receipt of the arbitrator's award, the complaining party shall file a copy of the award with the director, and shall advise the director in writing that it wishes either to proceed with the prohibited practice complaint or to withdraw it. The complaining party shall simultaneously serve a copy of the request to proceed or withdraw upon all other parties.
>
> C. If the complaining party advises the director that it wishes to proceed with the prohibited practices complaint, or if the board on its own motion so determines, then the director shall review the arbitrator's award. If in the opinion of the director, the issues raised by the prohibited practices complaint were fairly presented to and fairly considered by the arbitrator, and the award is both consistent with the act and sufficient to remedy any violation found, then the director shall dismiss the complaint. If the director finds that the prohibited practice issues were not fairly presented to, or were not fairly considered by, the arbitrator, or that the award is inconsistent with the act, or that the remedy is inadequate, then the director shall take such other action as he or she deems appropriate. Among such other actions, the director may accept the arbitrator's factual findings while substituting his or her own legal conclusions and/or remedial requirements.
>
> D. In the event that no arbitrator's award has been issued within one year following deferral under this rule, then the director may, after notice and in the absence of good cause shown to the contrary, dismiss the complaint.
>
> E. The director's decision either to dismiss or further process a complaint pursuant to this rule may be appealed to the board under the procedure set forth in 11.21.3.13 NMAC. Interim decisions of the

> director under this rule, including the initial decision to defer or not to defer further processing of a complaint pending arbitration, shall not be appealable to the board."

Based on the foregoing statutory citations we have, on the one hand, a mandatory requirement in §17 (F), that a grievance procedure is to be negotiated culminating in final and binding arbitration while on the other hand, refusal or failure to comply with a collective bargaining agreement is an enumerated prohibited practice, 10-7E-19 (H) NMSA 1978. This board has previously balanced the above seemingly competing requirements of PEBA, while implementing the purpose of the statute:

> "...to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions."

NMSA (2003) §10-7E-2.

Because PEBA not only authorizes but mandates the PELRB to hear claims involving violations of NMSA 1978 §§10-7E-19, 10-7E-20 and 10-7E-21, this Board has always maintained that the parties' contract may not have the practical effect of making the statutory provision of §19 (H) ineffective. In other words, the parties by their contract grievance procedure, even though mandated, may not prevent the PELRB from adjudicating what PEBA has enumerated as a prohibited practice. Because it is the PEBA that enables the parties to enter into collective bargaining agreements in the first instance, the contract is subordinate to PEBA. Therefore, the contract provisions cannot be interpreted to supersede alleged prohibited practice violations. Historically, the PELRB has evaluated alleged contract violations brought as prohibited practices on a case-by-case basis. Matters that allege violations of

Sections 10-7E-19 (A) through 10-7E-19 (G), Sections 10-7E-20 (A) through 10-7E-20 (C) or 10-7E-20 (E) through 10-7E-20 (F), or Section 10-7E-21 of PEBA will continue to be heard by the PELRB. Matters that allege a violation of PEBA solely under Sections 10-7E-19(H) or 10-7E-20(D), refusal or failure to comply with a collective bargaining agreement, will be deferred to the grievance and arbitration process pursuant to NMAC 11.12.3.22. But ultimately it remains within the Director's discretion to hear a matter as a PPC rather than deferring a matter to grievance arbitration as he has done here. Even if the matter had been deferred to the CBA's grievance arbitration procedures the PELRB may still proceed with the prohibited practices complaint, review the arbitrator's award and if in the opinion of the director, the prohibited practice issues were not fairly presented to, or were not fairly considered by, the arbitrator, or that the award is inconsistent with the act, or that the remedy is inadequate, then the director shall take such other action as he or she deems appropriate. NMAC 11.21.3.22, B and C. Under this regulatory and statutory scheme there is no reason why the parties' CBA should be read to prevent the PELRB from determining a PPC in the first instance.

Furthermore, the Employer has not shown evidence that the necessary prerequisites of deferral to arbitration exist in this case and it could not have been determined simply by interpretation of the CBA itself without reference to the substantive law with regard to notice, a reasonable opportunity to bargain and effects bargaining among other legal issues not within the contract. Finally, the Employer's allegation that the PPC is nothing more than a breach of contract claim subject to grievance arbitration would itself be nothing more than a breach of

contract claim subject to the parties' grievance procedure if we were accept its logic. Extending that logic to its conclusion would result in a finding that the Employer committed the same PPC that it accuses the Union of having committed – foregoing the contract grievance procedure by bringing its Counterclaim. This kind of circular reasoning eventually gets us nowhere and risks having a chilling effect on the right to bring prohibited practice charges. Fortunately, the Board need not step through the looking glass because for the reasons set forth above, the issues in this case are not resolved by interpretation of the parties' CBA alone, and are therefore not subject to the grievance procedure. Even if they were subject to the grievance procedure, the PELRB has discretion to hear the matters herein in the first instance which discretion it has exercised. Finally, the Employer has not invoked the prerequisites to arbitration and submitted proof thereof.

RECOMMENDED ORDER: An Order of this Board should issue (1) directing the Employer to cease and desist from failing and refusing to provide relevant information upon request and to refrain from such similar conduct in the future, and directing the Employer to (2) post Notice of its violation in the form accompanying this Decision as Appendix A; and, (3) dismissing the Employer's Counterclaim in its entirety.

APPEAL:

Either party may appeal this hearing officer's decision by filing a notice of appeal with the PELRB staff at 2929 Coors Blvd. NW in Albuquerque New Mexico 87120. Provisions for appeal are found at NMAC 11.21.3.19. An appeal must be filed within 10 work days of this opinion and otherwise comply with NMAC 11.21.3.19.

Issued this 12th day of October, 2012

Thomas J. Griego
Executive Director
Public Employee Labor Relations Board
2929 Coors N.W., Suite 303
Albuquerque, NM 87120

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD
An Agency of the State of New Mexico

The Public Employee Labor Relations Board has found that we violated the Public Employee Bargaining Act and has ordered us to post and obey this notice.

You have the right under the Public Employee Bargaining Act §10-7E-17(A)(1), to bargain collectively with the Human Services Department in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties.

It has been found that we violated NMSA §10-7E-19 (B), interfering with, restraining or coercing a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act; §10-7E-19 (F), refusing to bargain collectively in good faith with the exclusive representative, and §10-7E-19 (G) refusing or failing to comply with a provision of the Public Employee Bargaining Act or board rule, and §10-7E-19 (H) refusing or failing to comply with a collective bargaining agreement by intentionally withholding of information from CWA Local 7076 President Michelle Lewis during meetings held to discuss employee layoffs that took place July 10, 2011.

We acknowledge the above-described rights and responsibilities and will not in any like manner refuse to bargain with CWA Local 7076 or fail to meet obligations under the parties' CBA.

_____ Date:_____

For the New Mexico
Public Education Department