

BEFORE THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CWA LOCAL 7911  
Complainant,

08-PELRB-09  
PELRB Case. No. 101-09

v.

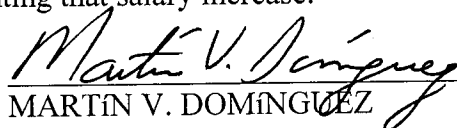
COUNTY OF SOCORRO  
Respondent.

DECISION AND ORDER

THIS MATTER came before the Public Employee Labor Relations Board upon Respondent's appeal of the hearing officer's recommended decision, and the Board, having heard argument and being otherwise fully advised:

IT IS HEREBY ORDERED that the hearing officer's recommended decision is upheld as the decision and order of this board, except as follows:

Although the employer Socorro County is bound by the existing collective bargaining contract, as reflected in the hearing officer's report dated April 24, 2009, the Board can not and does not require that a salary increase, as reflected in that report, be granted or maintained in the future by the employer to employees. The employer is free to increase the salary, as reflected that report, subject to any challenge in the nature of a prohibited practices complaint. Absent a challenge, and it appears there is none at this time, there is nothing wrong with the employer granting that salary increase.

  
MARTIN V. DOMÍNGUEZ  
Chairman  
Public Employee Labor Relations  
Board

Date: July 6, 2009



STATE OF NEW MEXICO  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

BILL RICHARDSON  
GOVERNOR

JUAN B. MONTOYA  
DIRECTOR

2929 Coors N.W., Suite #303  
Albuquerque, NM 87120  
Telephone: (505) 831-5422  
Fax: (505) 831-8820

MARTIN DOMINGUEZ, BOARD CHAIR  
DUFF H. WESTBROOK, VICE-CHAIR  
JOHN W. BOYD, MEMBER  
BOARD

April 24, 2009

Dina E. Holcomb  
Attorney at Law  
6709 Luella Anne NE  
Albuquerque, NM 87109

Thomas J. Griego  
Attorney at Law  
P.O. Box 994  
Cedar Crest, NM 87008

RE: Prohibited Practice Complaint, CWA Local 7911 vs. County of Socorro  
**PELRB Case # 101-09**

Dear Ms. Holcomb and Mr. Griego:

This case is a prohibited practice complaint filed by the Communication Workers of America, Local 7911 (Union) against the County of Socorro (County). The County of Socorro is a Public Employer as described in 10-7E-4 (S) NMSA 1978 Comp. The Union is a labor organization as described in 10-7E-4 (L) NMSA 1978 Comp. The Union represents public employees employed by the County of Socorro as Sheriff's Deputies. The complaint is timely filed, having been filed within six months of the alleged prohibited practice.

Thank you for your briefs stating your position on any and all issues in the above referenced case. Having read your briefs and considered the case law provided I conclude that the Public Employee Bargaining Act (PEBA) does not allow a public employer to unilaterally implement it's last, best, final offer upon impasse. The unilateral implementation of the last, best, final offer after impasse is therefore a violation of the prohibition against interfering in the existence of a labor organization, the duty to bargain in good faith and failing to comply with a collective bargaining agreement. The County of Socorro has by virtue of unilaterally implementing it's last, best, final offer after impasse violated 10-7E-19 ( C ), (F) and (H) NMSA 1979 Comp.

**FINDINGS OF FACT:**

CWA Local 7911 (Union) and the County of Socorro (County) are engaged in collective bargaining and had a contract (CBA) terminating on June 30, 2007.

Negotiations were held during July and August of 2007 and twenty-two (22) articles in the contract were tentatively agreed to.

Negotiation between the parties continued through 2007 and into 2008 with sessions scheduled for September, October, November of 2007 and April, May and June of 2008.

The parties reached impasse on August 8, 2008 when the County submitted its last, best, final offer after receiving the Union's last, best, final offer on July 10, 2008.

Mediation was held in September but was unsuccessful.

The County after giving the Union notice unilaterally implemented its last, best, final offer on November 3, 2008.

The County's last, best, final offer eliminated a variety of benefits enjoyed by the Union under the last CBA. Those are:

- Paid time for the Union President to adjust grievances
- Paid time to negotiate the CBA
- Two hours paid per week to attend meetings and process complaints, disputes, etc.
- Union right to perform Union business during workday if not interfering with work
- Union president to meet and confer with Sheriff during workday
- President could use 10 hours weekly for Union business during workweek
- Union members could attend Union meetings up to one hour while on duty
- No more opportunity for Union members to associate during workday
- No more opportunity to explain Union benefits to newly hired employees
- No more Union use of County equipment, phones, computers, etc.
- Limited information to that accessible through public information requests
- Eliminated fair share
- Eliminated all promotional testing procedures
- Eliminated all shift bidding procedures
- Altered the provisions for replacement of uniforms and equipment
- Eliminated paid time for voting
- Eliminated the policy review committee
- Eliminated from grievance any action not having and adverse economic impact
- Eliminated the employees right to bring prohibited practice complaints

Eliminated paid Court Time  
Eliminated the designated holidays  
Eliminated premium pay for work on holidays  
Altered overtime pay provisions  
Eliminated premium pay for working extra duty  
Eliminated having the County pay for required drug tests

Arbitration was scheduled for January 2009 but the arbitration never took place.

New Mexico has an "evergreen" statute, 10-7E-18 (D), the NLRA does not.

The CBA which terminated on June 30, 2007 contains an "evergreen clause" namely:

Article 33 ( C ) Term of Agreement:

This agreement shall be effective \_\_\_\_\_, and remain in full force and effect until \_\_\_\_\_, except that if the parties are at impasse on the last day, then the parties shall abide by the New Mexico Public Employee Bargaining Act, Section 18, subsection D. regarding the extension of the existing contract under impasse resolution.

The New Mexico Public Employee Bargaining Act, Section 18 (D) reads:

In the event that an impasse continues after the expiration of a contract, the existing contract will continue in full force and effect until it is replaced by a subsequent written agreement. However, this shall not require the public employer to increase any employees' levels, steps or grades of compensation contained in the existing contract.

#### **DISCUSSION:**

The County raised several arguments in support of its position. Let me discuss the arguments raised by the County one by one.

First, the County argues that since the language in the National Labor Relations Act (NLRA) and the language in the PEBA are so similar that the PELRB should find in similar fashion as the National Labor Relations Board (NLRB) has in reference to unilateral implementation of an employer's last, best final offer after impasse.

The NLRA at Section 8 (d) reads:

**(d) [Obligation to bargain collectively]** For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with

respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising there under, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

- (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
- (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
- (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
- (4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

**10-7E-17. Scope of bargaining. (2003)**

A. Except for retirement programs provided pursuant to the Public Employees Retirement Act [Chapter 10, Article 11 NMSA 1978] or the Educational Retirement Act [Chapter 22, Article 11 NMSA 1978], public employers and exclusive representatives:

- (1) shall bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties. However, neither the public employer nor the exclusive representative shall be required to agree to a proposal or to make a concession; and
- (2) shall enter into written collective bargaining agreements covering employment relations.

While the statutes are similar in their language, neither alludes to nor specifically requires that after impasse the employer may implement its last, best, final offer. The NLRB has, through case law, developed the principle that after impasse an employer may implement its final offer, as a tool, to move the negotiations to some settlement.

There are limits to what can be unilaterally implemented (only mandatory subjects of bargaining). The reasons for the unilateral implementation are always considered in determining whether bad faith bargaining was a motive in reaching impasse.

The New Mexico Supreme Court has told us that if the language in the PEBA and the NLBA are similar, in the absence of New Mexico case law, we are to apply the NLRB holdings. Regents of the University of New Mexico v. New Mexico Federation of Teachers, 1125 N.M. 401, 962 P.2d 1236 (1998). In this case the language of the statutes is similar as to what they require in mandatory bargaining but the PEBA also contains a statute specifically addressing the “evergreen” clause.

The language of the New Mexico statute is quite clear. 10-7E-18 (D) reads, “In the event that an impasse continues after the expiration of a contract, the existing contract will continue in full force and effect until it is replaced by a subsequent written agreement.” While there may be exceptions to this rule because public employee collective bargaining is subject to legislatively mandated teacher or other public employee wage increase or other mandated benefits. Absent a legislative mandate, a public employer may not unilaterally implement changes in the CBA upon impasse and must continue the existing contract in full force and effect until replaced with another CBA.

Secondly, the County argues that it has the right to control its own finances. That the wage raise does not violate the requirement to bargain in good faith because it had to raise the probationary entrance pay scale to attract new hires. The entrance pay scale necessary to attract new hires would have been more than the existing employee’s pay rate therefore necessitating the pay scale increase.

A legislatively expressed purpose of PEBA is, “to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions.” 10-7E-2 NMSA 1978 Comp. In private sector collective bargaining the parties may avail themselves of the strike or the lockout in an attempt to force a concession from the other party. In the public sector neither strikes nor lockouts are allowed. In private sector collective bargaining, in some cases, unilateral changes after impasse are allowed. In New Mexico public sector collective bargaining does not, pursuant to its evergreen clause. However the test for unilateral changes in a CBA, as a prohibited practice, is not whether changes were made but rather what was the employers motive for making the changes.

The change in the pay scale, in this case, was not motivated by some union animus or an attempt to undermine the Union by direct dealing or some other impermissible activity. The County was motivated by the need to attract new hires and to maintain the existing work force. The County has the right to control its own finances and the rate change is properly executed as required by the, “orderly operation and functioning of the state and its political subdivisions.” 10-7E-2 NMSA 1978 Comp.

Thirdly, the County urges me to read 10-7E-18 (D) NMSA 1978 to only be applicable when impasse occurs prior to the expiration of the contract then "continues" after the contract expires. The County argues that something cannot continue after some time or event if it didn't exist prior to that time or event. Namely, can impasse continue after expiration of the contract if it did not exist before expiration? The County would add to the statute the word "declared" before impasse. PEBA does not require that impasse be declared before the CBA terminates for 10-7E-18 (D) to have effect. PEBA defines impasse as being a lack of agreement. Certainly there was a lack of agreement before and after the termination date of the contract. Therefore impasse continued after the expiration of the contract.

Finally, the County argues that pursuant to NLRB case law an employer may implement its last, best, final offer after impasse. Impasse is defined by a long list of cases decided by the NLRB. Many of which turn on good faith bargaining. Here the County appears to have entered into negotiations with the intent of altering the existing contract by rescinding much of what had been agreed to before. The problem with starting negotiations from a change in the status quo is that the parties come into negotiations thinking they have some basis from which they can go forward. Instead their expectations are dashed and the need to renegotiate every aspect of the CBA makes impasse more of a probability.

#### **CONCLUSIONS OF LAW:**

The specific language of 10-7E-18 (D) NMSA 1978 Comp. that reads, "In the event that an impasse continues after the expiration of a contract, the existing contract will continue in full force and effect until it is replaced by a subsequent written agreement.", is controlling and prohibits the implementation of unilateral changes in the wages, hours and all other terms and conditions of employment.

Impasse is the inability of the parties to agree as to a CBA.

#### **ORDER:**

The County of Socorro is hereby ordered to cease and desist from the unilateral implementation of its last, best, final offer made to the CWA Local 7911. The County is further ordered to return to all of the term and conditions of employment as found in the last CBA entered into by the parties, except the increased pay rate which is necessary to attract new hires and retain existing employees. The County is to post this letter order fifteen (15) days after the date of this order unless one or both of the parties properly appeals this matter to the Public Employee Labor Relation Board (PELRB). This Order is to remain posted for an uninterrupted period of forty-five (45) days.

CWA Local 7911 vs. County of Socorro, **PELRB Case # 101-09**

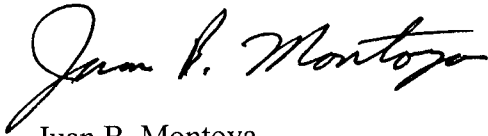
April 24, 2009

Page seven

**APPEAL:**

Either party may appeal this decision to the Public Employee Labor Relations Board by filing a notice of appeal with the PELRB staff at 2929 Coors Blvd. NW in Albuquerque New Mexico 87120. The provisions for appeal are found at NMAC 11.21.3.19. An appeal must be filed within 10 days and otherwise comply with NMAC 11.21.3.19. Thank you.

Sincerely yours,

A handwritten signature in black ink that reads "Juan B. Montoya". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Juan B. Montoya