

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME, COUNCIL 18,

Complainant,

9 - PELRB - 2014

-v-

PELRB No. 310-13

HIDALGO COUNTY,

Respondent.


ORDER

THIS MATTER comes before the Public Employee Labor Relations Board on May 28, 2014 for review of the Hearing Officer's decision that a sergeant's position in the County's Sheriff's Department was not included in the bargaining unit because the position did not exist at the time of the original petition. By a vote of 3-0 the Board adopts his recommended decision, including its findings, conclusions and rationale, as its own without modification.

IT IS THEREFORE ORDERED that the Petition in this case shall be, and is hereby, **DISMISSED**.

Date: _____

6-3-14



Duff Westbrook, Chair,
Public Employee Labor Relations Board

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AFSCME COUNCIL 18,
Petitioner

v.

PELRB No. 310-13

HIDALGO COUNTY,
Respondent

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

STATEMENT OF THE CASE: This matter comes before Thomas J. Griego, designated as the Hearing Officer in this case, on a Motion for Clarification of a Bargaining Unit. As appears from the Pre-Hearing Order entered herein, three issues are before the Hearing Officer for determination:

1. Whether the Union (AFSCME Council 18, Petitioner herein) petitioned for representation of Sergeants in the petition that resulted in designation of the unit at issue;
2. If the Union did so petition for representation of Sergeants, then the Hearing Officer is to determine whether David Arredondo was a Sergeant at the time of the representation election; and,
3. Whether the bargaining unit certified by the PELRB at issue in this case included Sergeants.

A hearing on the merits was held on Monday, March 31, 2014 during which, at the conclusion of the Union's case-in-chief, the County moved for a directed verdict. The County's Motion was denied, there being further factual development required after the union established its prima facie case in light of NMAC 11.21.2.37 and 11.21.1.22 regarding the burden of proof in a unit clarification proceeding. The record was held open until April 4, 2014 for the limited purpose of receiving a copy of David Arredondo's Commission card. Copies of two cards were received from Mr. Arredondo via e-mail on April 1, 2013. The cards (and only the cards) were added to the record as Joint Exhibit 8 and routed to counsel

of record via e-mail on April 3, 2014. All parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

FINDINGS OF FACT:

1. On October 5, 2010 David Arredondo was promoted from Sergeant to Lieutenant in the Hidalgo County Sheriff's Department without a change in his rate of pay according to a Status/Payroll Change Report, Hidalgo County Form 3840. [County Exhibit 4].
2. In 2011, the Sheriff at that time, Saturnino Madero, "did do away with rank within the Department, leaving the Under Sheriff as a buffer between [himself] and the deputies in the chain of command." [County Exhibit 1; Testimony of Salazar at 1:46:00].
3. Effective January 11, 2011 David Arredondo was reduced in rank from Lieutenant to Deputy without a change in his rate of pay due to "restructuring" of the Sheriff's Department according to a Status/Payroll Change Report, Hidalgo County Form 3840. [County Exhibit 5].
4. In approximately November of 2011 Sheriff Madero appointed David Arredondo as patrol Sergeant, without a change in his pay rate, without following any of the County's procedures for posting a vacancy notice, permitting competition for the position or changing his classification status or his pay rate or benefits. [Testimony of Arredondo at 43:25:00].

5. Arredondo's appointment as Sergeant was announced by text messages to other deputies [Testimony of Arredondo 1:10:10] and at a department meeting. [Testimony of Tavazon at 27:20:00 and 25:50:00].
6. Shortly after the appointment by Sheriff Madero, Arredondo resumed wearing the same distinct badge designating him as a Sergeant, chevrons on his uniform shirt sleeves and collar tabs displaying rank as a Sergeant that he had worn prior to the Department's "restructuring" in January 2011. [Testimony of Arredondo at 1:24:17].
7. David Arredondo held himself out to be a Sergeant with the Hidalgo County Sheriff's Department and the Department included him as such in its chain of command between 2011 and the filing of the Petitioner's Petition for Initial Certification of a New Bargaining Unit on January 29, 2013. [Union Exhibits 4 and 5; Testimony of Arredondo at 56:20; Testimony of Tavason at 28:00.]
8. A Peace Officer Commission card valid from January 1, 2007 to December 31, 2010 reflects that David Arredondo held the rank of "Deputy" under Sheriff Madero, while another Commission card valid for the same time period reflects that he held the rank of Sergeant under Sheriff Hall. [Joint Exhibit 8]. There is no Peace Officer Commission card for him in evidence that purports to be valid after December 31, 2010.
9. On January 29, 2013 the Petitioner herein filed a Petition for Initial Certification of a New Bargaining unit seeking to be certified as the exclusive collective bargaining representative for the following Hidalgo County Employees:

"Deputies, Dispatcher, Telecommunication employees, and
Detention Center Employees."

[Joint Exhibit 1].

10. The PELRB issued a form Notice of the Union's filed Petition for Recognition to be posted by the County, which notice informed interested parties, principally competing unions that may desire to intervene, that:

“On January 29th, 2013, AFSCME Council 18 Petitioned for Recognition as the exclusive bargaining agent for deputies, dispatchers, telecommunications employees and detention center employees employed by Hidalgo County, except, confidential employees)10-7E-4(G) NMSA 1978, Management employees (10-7E-4 (O) NMSA 1978) and supervisor employees (10-7E-4 (U) NMSA 1978).”

[Joint Exhibit 2]

11. A hearing before a PELRB Hearing Officer was held March 5, 2013 for the purpose of the County and the Union stipulating to a Consent Election Agreement. [Pre-Hearing Order Section 2, Stipulation b (modified)].
12. The Hearing Officer takes Administrative Notice of the audio record of the March 5, 2014 hearing during which the County's representative, J.J. Salazar, was asked by the Hearing Officer whether the County saw any issues regarding composition of the bargaining unit such as whether any of the workers in the proposed unit were exempt from bargaining as supervisors or managers. Mr. Salazar said that there were no such issues except for a potential issue involving the Detention Center depending on whether or not it is privatized. [Audio record of hearing in PELRB 303-13 held 3-5-13 2:54 to 4:37].
13. The parties raised and discussed a representation issue concerning a Sergeant in the Detention Center [Audio record of hearing in PELRB 303-13 held 3-5-13 24:14 to 33:10] but did not raise any question of a Sergeant in the Sheriff's Department posing a representational issue. Eventually the parties agreed to exclude from the

bargaining unit the Sergeant in the detention center [Audio record of hearing in PELRB 303-13 held 3-5-13 35:20 to 35:50].

14. The parties agreed to a Consent Election Agreement approved by the Director on March 19, 2013. [Pre-Hearing Order Section 2, Stipulation c (modified)].

15. Paragraph 3 of the Consent Election Agreement defined the unit as follows:

“INCLUDES: County employed Sheriff’s Deputies, Dispatchers, Detention Officers and Corporal Detention Officers.
EXCLUDES: All PROBATIONARY, MANAGERIAL, CONFIDENTIAL OR SUPERVISORY EMPLOYEES.”

[Joint Exhibit 4].

16. Pursuant to paragraph 4(B) of the approved Consent Election Agreement and NMAC 11.21.2.12 and 11.21.2.13 the County provided the Union and the PELRB a list of eligible voters. [Joint Exhibit 4].

17. David Arredondo was included in the County’s list of eighteen eligible voters. [Pre-Hearing Order Section 2, Stipulation d] and appeared on the list as “Deputy David Arredondo”. [Joint Exhibit 3].

18. The Notice of Election designated the voting unit as:

“All County employed Sheriff’s Deputies, Dispatchers, Detention Officers and Corporal Detention Officers except those holding positions excluded below.
EXCLUDES: All probationary, managerial, confidential, or supervisory employees and specifically the following positions:”

The Notice did not list any additional specifically excluded positions.

[Joint Exhibit 5].

19. The ballot used in the election for the purpose of determining whether the unit desired exclusive representation by the Union designates the voting unit as:

“...all Sheriff’s Deputies, Dispatchers, Detention Officers and Corporal Detention Officers except, management, (10-7E-4 (O),

NMSA 1978) confidential (10-7E-4(G) NMSA 1978) or supervisory employees (10-7E-4 (U) NMSA 1978 of HIDALGO COUNTY.”

[Joint Exhibit 6].

20. The representation election was held March 21, 2013. [Pre-Hearing Order Section 2, Stipulation e].
21. On April 16, 2013, the PELRB certified the election results in which there were 15 votes in favor of the Union and none against. [Pre-Hearing Order Section 2, Stipulation f].
22. The County does not acknowledge that the certified unit includes the Sergeant position [Answer to Petition ¶¶ 7-9]
23. On April 11, 2013 the County posted Notice that it was accepting letters of interest for the position of Sergeant through April 18, 2013. [County Exhibit 2].
24. In response to the Notice referred to in Finding 23 above David Arredondo submitted his resume. [Testimony of Arredondo at 104:15:00].
25. David Arredondo was the only one to submit his resume for consideration and was selected for the position of Sergeant. [Testimony of Arredondo at 104:20:00; Testimony of Salazar at 1:48:30].
26. According to a Hidalgo County Personnel Action Request Form David Arredondo was reclassified from Deputy to Sergeant with an attendant pay raise effective April 27, 2013. [County Exhibit 3].

REASONING AND CONCLUSIONS OF LAW:

- A. Under the facts and circumstances of this case the question whether the Union petitioned for representation of Sergeants in PELRB 303-13 is answered in the negative. On its face the petition does not mention Sergeant(s) as being within the petitioned-for unit. The Union makes the well-reasoned argument that the term “deputy” used in its Petition for

Recognition and related documents encompasses all deputies commissioned or appointed by the Sheriff regardless of rank and so, would include any Sergeants in the proposed bargaining unit here. That proposition finds support in both the law and the testimony of witnesses in this proceeding. Both Deputy Tavazon and Sergeant Arredondo testified that the term “deputy” is understood to mean Sheriff’s deputies of any rank except the Undersheriff. Article 41 of the New Mexico Statutes concerning the powers and duties of County Sheriffs §§ 4-41-1 through 4-41-22 NMSA (2013 Edition) speaks in terms of the Sheriffs’ power to delegate authority to various deputies without regard to their rank nomenclature, the reasonable inference being that the term incorporates all of the Sheriffs’ deputies regardless of rank. To understand the term otherwise would render the absurd result that once a deputy receives any kind of promotion he or she is no longer within the statutory grant of delegated authority in §§ 4-41-1, *et seq.* But to agree that in common parlance the term “deputy” encompasses those of all ranks is not to say that the common parlance suffices to establish that the sergeant was within the unit the union petitioned for because it does not establish that the County also understood it to be so, nor that this Board intended such a result when it approved a bargaining unit that included only “deputies”. The issue was simply never presented to either the County or this Board in connection with either approval of the Consent Election Agreement or approval of the election results. The question of whether the Sergeant is included in the unit petitioned for and approved by this Board arose only after the creation of the Sergeant rank after approval of the unit and after the election. This is established by the fact that although the parties discussed Sergeants in the Detention Center during the pre-election conference, no similar discussion took place with regard to a Sergeant in the Sheriff’s Department. Nor did the union make an issue of the fact that the Sergeant at issue here appeared on the eligible voter list as “Deputy David

Arredondo” not as a “Sergeant”. Therefore, it cannot be said that there was a meeting of the minds among the union, the County and this Board as to whether the Petition for Recognition included a Sergeant before the dispute came up during the parties’ contract negotiations and this Motion for Clarification of a Bargaining Unit. Absent a meeting of the minds on that issue prior to designation of the unit, it cannot be said that the County had a full and fair opportunity to dispute the Sergeant’s inclusion in the unit on the basis of one or more of the statutory exemptions available. Accordingly, I take the position that ultimately it is less important what unit the union intended to petition for than what unit the Board approved. For the reasons stated herein, not least of which is the fact that there was no Sergeant rank in the Department at the time of the Petition for Recognition as discussed more fully below, there is insufficient evidence to establish that the unit approved included the Sergeant.

- B.** Between the restructuring of the Hidalgo County Sheriff’s Department in January of 2011 and the Representation Election in PELRB No. 303-13 on March 21, 2013 there were no Sergeants in the Hidalgo County Sheriff’s Department. That conclusion is compelled by the fact that in 2011 the Sheriff at that time, Saturnino Madero, eliminated all ranks in the Department except the Undersheriff and as a result, David Arredondo was reduced in rank from Lieutenant to Deputy. Notwithstanding the foregoing, the union claims that sometime around December of 2011 Deputy Arredondo was “appointed” by Sheriff Madero to serve in the role of Sergeant after which he displayed the various accoutrement of that rank. There is nothing to suggest that by doing so the Department reversed the restructuring that eliminated all rank eleven months prior. There was no indication that the County was officially resuming the use of the Sergeant rank until the Sergeant vacancy was

posted on April 11, 2013 and no change in Arredondo's classification until he successfully competed for that vacant position in April of 2013. The best that can be said from this evidence is that the Sheriff abused the use of an "acting appointment" as defined in Section 2.1 of the Hidalgo County Personnel Policy, Resolution 2011-51 effective November 10, 2011 and amended by Resolution 2013 effective August 14, 2013, referenced below.

That Arredondo was required to undergo the County's usual promotion process in April of 2013 supports the County's argument based on its personnel records that prior to that time Arredondo did not hold the rank of Sergeant despite appearances. To hold otherwise would require a conclusion that the Sheriff may make such promotions by executive fiat; a notion totally at odds with merit system principles. I take administrative Notice of the Hidalgo County Personnel Policy, Resolution 2011-51 effective November 10, 2011 and amended by Resolution 2013 effective August 14, 2013 establishing a personnel classification system including merit-based promotion processes and NMSA §§ 4-41-6¹ and 4-41-7² authorizing counties to establish merit systems for deputies in county sheriffs' offices and providing that the

¹ §4-41-6 provides: "Each county is authorized and empowered to establish by ordinance a merit system for the hiring, promotion, discharge and general regulation of the deputies and the employees of the county sheriff's office. The ordinance may, in the discretion of the board of county commissioners, provide for the classification of deputies and other employees and their probationary periods, service ratings, pay scales and ranges, the number of hours of work per week and the methods of employment, promotion, demotion and discharge of such deputies and employees within the limits provided by law."

² §4-41-7 provides: "In all cases of employment by county sheriffs of deputies, clerks and other personnel to positions covered by the merit system subsequent to the passage of an ordinance establishing a merit system, the contract of employment between the deputy or employee and the sheriff shall be considered to contain the provisions of the ordinance and all regulations issued pursuant thereto. The provisions of an ordinance and all regulations issued pursuant thereto shall become part of the contract of employment between the sheriff and all employees of the sheriff's office in positions covered by the merit system when the employment relationship exists at the time of the passage of the ordinance, unless the employee files with the county clerk, within ten days of the passage of the ordinance, a declaration stating that the employee does not desire to have the provisions of the ordinance, together with the regulations issued pursuant thereto, included as a part of his contract of employment."

passage of a merit system ordinance constitutes part of the contract of employment between the deputy or employee and the sheriff.

Accordingly, Arredondo's "appointment" by Sheriff Medrano to serve in the role of Sergeant does not compel me to reach a conclusion other than there were no Sergeants in the Sheriff's Department during the period in which the Union petitioned for recognition and a representation election was held. It is also reasonable to conclude that County Manager Salazar was in earnest when he asserted at the pre-election conference March 5, 2013 that there was no representation issue involving the Sergeant position in the Sheriff's Department because he correctly concluded that there was no Sergeant rank in the Department that would give rise to any such concern.

- C. Based on the rationale and conclusions outlined above the answer to the question whether the bargaining unit certified by the PELRB at issue in this case included Sergeants, is "no".

DECISION: A variety of possible solutions to the problem posed by the Motion herein come to mind, the least disruptive of which seems to be to find, as I have here, that the Sergeant was not included in the unit approved by this Board. If the union desires to represent the Sergeant at this time and believes that inclusion of that position would not render the unit invalid it is free to seek accretion of that position on the basis that its discovery that the new rank created on April 27, 2013 was not included in the recognized unit constitutes sufficient grounds to seek its inclusion now. Therefore, the Union's Motion for Clarification of the Bargaining unit herein should be **DENIED**.

Issued, April 8, 2014

A handwritten signature in black ink, appearing to read "Thomas J. Griego", written over a horizontal line.

Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board
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Albuquerque, New Mexico 87120