BEFORE THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD

IAFF LOCAL 2362
Complainant,

v.

09-PELRB-09
PELRB Case No. 103-09

CITY OF LAS CRUCES
Respondent.

DECISION AND ORDER

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

IT IS HEREBY ORDERED that the hearing officer's decision embodied in his April 21, 2009 report is upheld and affirmed as the decision and order of this Board for the reasons stated in the hearing officer's report.

MARTíN V. DOMíNGUEZ
Chairman
Public Employee Labor Relations Board

Date: July 6, 2009

07-10-09A11:37 FILE

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April 21, 2009

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RE: IAFF Local 2362 vs. City of Las Cruces **PELRB Case # 103-09**

Dear Messieurs Leskey and Abrams:

This case is a prohibited practice complaint filed by the International Association of Fire Fighters, Local 2362 (Union) against the City of Las Cruces (City). The City of Las Cruces 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. and represents public employees employed by the City of Las Cruces as fire fighters. The City has a labor management relations policy dated January 7, 2000 recognized pursuant to 10-7E-26 (B) NMSA 1978 Comp. as an ordinance preexisting the present Public Employee Bargaining Act (PEBA) 10-7E-1 thru 10-7E-26 NMSA 1978 Comp.

After review of the pleadings and having heard a motion to dismiss and a hearing on the merits I hereby deny the motion to dismiss and find that the City of Las Cruces Ordinance number 1778 adopted February 7, 2000 being Chapter 15 Labor Management Relations Ordinance is in violation of PEBA Section 10-7E-26 (B) NMSA 1978 Comp. The sections of the City's ordinance that I find in violation of PEBA are the definitions of confidential employee and supervisor found in Section 15-3. Also in violation are Section 15-6 (a), Section 15-6 (e), Section15-10 (e) and Section 15-14 (b) (4).

MOTION TO DISMISS:

The City filed a motion to dismiss arguing that this Board did no have jurisdiction to hear the prohibited practice complaint brought by the Union. The motion raised the issue that by virtue of the City having an ordinance providing collective bargaining rights since February 7, 2000, this Board did not have jurisdiction. The City argues that exclusive jurisdiction rests with its labor board pursuant to 10-7E-26 (B) NMSA 1978 Comp.

FINDINGS OF FACT:

The City has a policy permitting collective bargaining dating back to February 7, 2000.

The City's definition of confidential employee is much broader than the definition in PEBA.

The City's definition of confidential employee deprives some employees of their rights under the PEBA.

The City's definition of supervisor is much broader than the definition in PEBA.

The City's definition of supervisor deprives some employees of their rights under the PEBA.

The City's provision for selection of board members allows the mayor and the city council to appoint three board members from a list submitted by the City's administration and a list submitted by the Union.

The board members can all be selected from management's list or labor's list or a combination thereof.

The City's labor relations policy requires the payment of costs by those involved in bringing matters before the City's labor board.

The requirement of charging a fee for filing of a complaint or petition creates a chilling effect upon individuals, representatives and management keeping them from the free exercise of their rights under PEBA.

The City requires that at least 60% of the bargaining unit vote in order to have a valid election.

10-7E-26 (B) (2) NMSA 1978 Comp. requires that election procedures be equivalent to those of PEBA.

PEBA require that at least 40% of the bargaining unit vote in order to have a valid election.

Pursuant to the City's ordinance the City Council makes the final and binding decision as to impasse in negotiating a contract.

Under PEBA the arbitrator shall render a final, binding, written decision.

Stipulated Exhibit #1 is Chapter 15 of the City of Las Cruces Ordinances and is entitled City of Las Cruces Labor Management Relations Ordinance (Chapter 15).

PROVISIONS FOUND TO BE ILLEGAL:

Definition of Confidential Employee:

Chapter 15 Section Three 3 defines confidential employees as, "Confidential employee means a person who assists and acts in a confidential capacity with respect to a management employee."

The PELRB has ruled "A confidential employee, as defined in the Public Employee Bargaining Act and in the Board's regulations, concerns employees whose work duties are related to the formulation, determination and effectuation of a public employer's employment, collective bargaining or labor relations activities." See CWA v. Workers' Compensation Administration and State Personnel Office, 05-PELRB-2009.

The City's definition of "confidential employee" is too restrictive and would exclude public employees from collective bargaining that the legislature and the courts have deemed to be employee rights under PEBA. See CWA, supra, and Regents of the University of New Mexico v. New Mexico Federation of Teachers, 125 N.M. 401.

10-7E-26 (B) (1) NMSA 1978 Comp. requires that "the following provisions and procedures are included in each ordinance---- (1) the right of public employees to form, join or assist employee organizations for the purpose of achieving collective bargaining;"

To exclude some employees from the "right to join" an employee organization violates the mandate of 26 (B) (1) and is contrary to the PELRB ruling on the issue and impermissibly limits public employee rights to organize. The City's definition of

confidential employee is overly broad in that it excludes those employees who assist and act in a confidential capacity with respect to a management employee regardless of whether or not the confidential capacity is labor related or not.

Definition of Supervisors:

Chapter 15 Section Three 3 defines Supervisors as:

"Supervisor means an employee who devotes a substantial amount of work time in supervisory duties, who customarily directs the work of two or more other employees and who has authority in the interest of the employer to effectively recommend the hiring, retaining, promoting, disciplining, or evaluating of other employees. Not included in this definition are employees who perform merely routine, incidental or clerical duties or employees who occasionally assume supervisory roles or employees whose duties re substantially similar as their subordinated or lead employees or employees who participate in occasional peer review or occasional employee evaluation programs.

PEBA, at 10-7E-4 (U) defines Supervisor as:

U. "supervisor" means an employee who devotes a majority of work time to supervisory duties, who customarily and regularly directs the work of two or more other employees and who has the authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively, but "supervisor" does not include an individual who performs merely routine, incidental or clerical duties or who occasionally assumes a supervisory or directory role or whose duties are substantially similar to those of his subordinates and does not include a lead employee or an employee who participates in peer review or occasional employee evaluation programs.

The primary difference is the "substantial" versus "majority" distinction in the ordinance as compared to the statute. The Legislature used "substantial" in PEBA I but changed to "majority" in PEBA II.

Section 26 (B) of PEBA requires, of public employers, procedures for the identification of appropriate bargaining units and creates the right of public employees to join an employee organization for the purpose of achieving collective bargaining. An appropriate bargaining unit is made up of public employees except appropriately excluded confidential, supervisor and management employees.

To properly exclude an employee from the collective bargaining process requires strict adherence to the statutory requirements for exclusion. In Regents, 43 supra, the New

Mexico Supreme Court said, "When PEBA describes those who may collectively bargain as "employees" it refers to all public employees, except confidential, managerial and supervisory employees," the Court goes on to state that UNM's policy, "does not qualify for grandfather status under PEBA, because it does not extend the right to bargain collectively to all employees who have been afforded this right under PEBA." Here the City has a definition of supervisor that would exclude from collective bargaining those who supervise 30% or 40% or some other substantial amount of their work time whereas PEBA includes them since they don't supervise a majority of the time. The City has therefore impermissibly excluded some employees from collective bargaining as guaranteed by PEBA.

Appointment of board members:

Chapter 15 Section Six (A) establishes a procedure whereby the mayor and city council appoint board members. Bargaining units and the city manager submit a list of up to three recommended individuals. The ordinance reads, "However, nothing contained herein shall mandate the mayor and city council to select from the nominations submitted by the bargaining units and the city manager."

PEBA's selection process is described by 10-7E-8 NMSA 1978 Comp.as:

A. The "public employee labor relations board" is created. The board consists of three members appointed by the governor. The governor shall appoint one member recommended by organized labor representatives actively involved in representing public employees, one member recommended by public employers actively involved in collective bargaining and one member jointly recommended by the other two appointees.

PEBA's Section 26 (B) requires the City's compliance with PEBA's Sections 8. Section 8 creates the possibility of a neutral tripartite board. One member selected upon the recommendation of management, one member selected upon the recommendation of labor and the third member selected by agreement of the first two members. The City's method of selecting board members could result in all three members being selected either from the City's list or the Unions list. In either event the board would most likely not be very impartial. While nothing can guarantee absolute impartiality, the State's method of selection of board members provides a much better chance for impartiality. PEBA wisely says the City shall comply with the provisions of Section 8 of PEBA. The Cities selection process of board members is in violation of this requirement.

The cost of hearings:

Chapter 15 Section Six (E) reads as follows:

The cost of any hearing, excluding any fixed additional compensation established by subsection (d) of this section, will be borne equally by the parties to the hearing or the board may, at its option, assess all costs of both parties to one party if the board determines that a party has asserted a frivolous complaint or claim or has pursued a grossly unreasonable position during any proceeding or hearing.

Subsection (d) referred to above is the authorization to pay Per Diem and Mileage.

PEBA doesn't have a corresponding provision in reference to costs but 10-7E-26 (B) (1), (2) and (9) require that employees have the right to form, join or assist towards collective bargaining, that they are afforded impartial elections with procedures equivalent to PEBA and make the interference with those rights a prohibited practice. The requirement of paying costs creates an impermissible chilling effect upon employees rights to participate in the collective bargaining process.

Elections:

Chapter 15 Section Ten (e) requires that at least 60% of the bargaining unit vote in order for the board to certify the labor organization as the exclusive bargaining representative.

The ordinance reads:

If a majority of the votes cast is in favor of representation by a labor organization and at least 60 percent of the members in the bargaining unit have cast a vote, the board shall certify that labor organization as the exclusive representative for all employees in that appropriate bargaining unit. No labor organization shall be certified as an exclusive representative unless a least 60 percent of the members of the bargaining unit vote in the election.

10-7E-14. Elections. (2003)
A. Whenever, in accordance with rules prescribed by the board or local board, a petition is filed by a labor organization containing the signatures of at least thirty percent of the public employees in an appropriate bargaining unit, the board or local board shall conduct a secret ballot representation election to determine whether and by which labor organization the public employees in the appropriate bargaining unit shall be represented. The ballot shall contain the name of any labor organization submitting a petition containing signatures of at least thirty percent of the public employees in the appropriate

bargaining unit. The ballot shall also contain a provision allowing public employees to indicate whether they do not desire to be represented by a labor organization. An election shall only be valid if forty percent of the eligible employees in the bargaining unit vote in the election.

10-7E-26 (2) NMSA 1978 Comp. requires that the City have provisions equivalent to the PEBA. The City's requirement of 60% versus 40% of bargaining unit members voting to have a valid election is not equivalent and therefore not permissible.

Binding arbitration:

Chapter 15 Section Fourteen calls for the selection of a factfinder to conduct hearings and submit written findings and recommendations. 15-14-4 reads as follows:

If no agreement has been reached within 30 days of the issuance of the factfinder's recommendation, the recommendation of the factfinder will be forwarded to the city council, and the city council may accept or modify the factfinder's recommendation as it sees fit. The decision of the city council shall be final and binding on both parties and shall be incorporated into a contract along with those items that had been tentatively agreed to by the parties.

The PEBA at 10-7E-26 (B) (8) requires the City to enact procedures equivalent to PEBA's Section 18. Section 18 (B) reads as follows:

B. The following impasse procedures shall be followed by all public employers and exclusive representatives, except the state and the state's exclusive representatives:

(1) if an impasse occurs, either party may request from the board or local board that a mediator be assigned to the negotiations unless the parties can agree on a mediator. A mediator with the federal mediation and conciliation service shall be assigned by the board or local board to assist negotiations unless the parties agree to another mediator; and

(2) if the impasse continues after a thirty-day mediation period, either party may request a list of seven arbitrators from the federal mediation and conciliation service. One arbitrator shall be chosen by the parties by alternately striking names from such list. Who strikes first shall be determined by coin toss. The arbitrator shall render a final, binding, written decision resolving unresolved issues pursuant to Subsection E of Section 17 [10-7E-17 NMSA 1978] of the Public Employee Bargaining Act and the Uniform Arbitration Act [44-7A-1 to 44-7A-32 NMSA 1978] no later than thirty days after the arbitrator has been notified of his or her selection by the parties. The arbitrator's decision shall be

limited to a selection of one of the two parties' complete, last, best offer. The costs of an arbitrator and the arbitrator's related costs conducted pursuant to this subsection shall be shared equally by the parties. Each party shall be responsible for bearing the cost of presenting its case. The decision shall be subject to judicial review pursuant to the standard set forth in the Uniform Arbitration Act.

An underlying basis for collective bargaining is that the disparity between the enormous power of capital, private or public, and labor, can only be brought into balance by organized labor. In the private sector when an inability to agree on a contract occurs there is an option of a strike or a lockout. In the public sector neither of these options is allowed. The tradeoff is final and binding arbitration.

CONCLUSIONS OF LAW:

The City enjoys a 10-7E-26 (B) ordinance permitting collective bargaining.

The City's collective bargaining policy is not grandfathered pursuant to 10-7E-26 (B) NMSA 1978 Comp. as to its definition of confidential employee, supervisor and its provisions as to selection of board members, the cost of hearing, elections and binding arbitration.

The City's definition of confidential employee and supervisor excludes employees from the collective bargaining process that PEBA specifically includes in said process contrary to 10-7E-26 (B) (1) and (2) NMSA 1978 Comp.

The City's policy fails to create the neutral tripartite board with membership to be one member appointed upon the recommendation of management, one appointed upon the recommendation of labor and the third appointed upon the recommendation of the first two appointees as required by 10-7E-8 (A) and 10-7E-10 (B) NMSA 1978 Comp.

The City's policy requiring some expenditure for the purpose of Section 15 filing of Prohibited practice complaints, petitions for election for certification, unit clarifications, accretions or decertification violates the provisions of 10-7E-26 (B) NMSA 1978 Comp.

The City's policy allowing the City council to make the final and binding decision in an impasse in contract negotiation situation is contrary to 10-7E-26 (B) (8).

The Public Employee Labor Relations Board has the power to enforce provisions of the PEBA pursuant to 10-7E-9 (F) NMSA 1978 Comp.

ORDER:

Therefore I order the City of Las Cruces to cease and desist from following or enforcing the illegal provisions in its ordinance. The City is further ordered to post this letter order. And post an acknowledgment that it will not enforce the illegal provisions of the City of Las Cruces Labor Management Relations Ordinance number 1778. Namely, the definitions of confidential employee and supervisor found in Section 15-3 along with Section 15-6 (a), Section 15-6 (e), Section15-10 (e) and Section 15-14 (b) (4).

The posting of both this letter order and the acknowledgement is to occur 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). Both documents are to remain posted for an uninterrupted period of forty-five (45) days.

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. 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.

Sincerely yours,

Juan B. Montoya