In the Matter of the Arbitration Between AMERICAN FEDERATION OF STATE, COUNTY, and MUNICIPAL EMPLOYEES, COUNCIL 18, Union, and STATE OF NEW MEXICO, Employer.	)	GRIEVANT: Michelle Archuleta

DECISION ON STATE'S MOTION TO APPLY
PROCEDURAL REQUIREMENTS OF STATE PERSONNEL ACT

The State asserts that NMSA 10-9-18(H) provides that the arbitration is governed by the pre-hearing procedural requirements of the State Personnel Board, NMAC 1.7.1.1 et. seq. The Union disagrees, arguing that the arbitration is governed by the terms of the governing collective bargaining agreement (CBA).

The arbitrator finds that the State did not establish that the Grievant's NMSA Section 10-9-18 right to have her dismissal heard by an arbitrator was limited to merely selecting the arbitrator through the method established by the governing collective bargaining agreement. Nor did the State establish that the State Personnel Rules of procedure (NMAC 1.7.1.1 et. seq.) otherwise apply to the arbitration.

NMSA 10-9-18(H) provides:

> Where the public employer has entered into a collective bargaining agreement pursuant to the Public Employee Bargaining Act [10-7E-1 NMSA 1978] covering the employee, such an employee who is dismissed, demoted or suspended may, within thirty days after the dismissal, demotion or suspension, irrevocably elect to appeal the action through arbitration. An appeal under this subsection shall be conducted

> in accordance with the procedures and requirements of Subsection A, C, and D of this section. The arbitrator shall have all of the powers of the board set forth in Subsection G of this section. The selection of an arbitrator shall be conducted in accordance with the selection procedures set forth in the collective bargaining agreement that covers the employee.

Here, it is not disputed that the State has entered into a collective bargaining agreement (CBA) with the Union, and that Michelle Archuleta is a member of the bargaining unit represented by the Union. Nor is there any dispute that Ms. Archuleta made an irrevocable election for arbitration.

NMSA 10-9-18 does provide that arbitrators are selected pursuant to the method set forth in the collective bargaining agreement. NMSA 10-9-18 does not, however, explicitly provide that the resulting arbitration is governed by New Mexico Personnel Board regulations. The State surmises this is the case because: (1) the statute applies the procedural requirements of Subsections A, C and D; and (2) the statute mandates that the arbitrator have the same powers as the Board in the appeal. The arbitrator does not agree with the State's analysis.

Subsections A, C, and D of NMSA 10-9-18 do not specifically state that the State Personnel Board procedural requirements apply where an employee has irrevocably elected arbitration. This would have been easy enough to do, yet it was not. Subsection A imposes a thirty-day period to make the election, and confirms the employee's right to be heard on appeal. Subsection C confirms that the technical rules of evidence do not apply to arbitrations. It would be a highly unusual case where a collective bargaining agreement required technical application of the rules of evidence. Finally, Subsection D confirms that the hearing will be transcribed. Alone or in combination, the arbitrator fails to see how application of these few, general rules evidence the wholesale displacement of the bargained for arbitration procedures and substitution with the State Personnel Board pre-hearing and hearing procedures. Again, had the legislature wanted this result it could have easily included language in the statute for it. It did not. Indeed, NMSA 10-9-18(E) would appear to be a more appropriate reference had the Legislature meant to apply the State Personnel Board rules to arbitration.

Expressio unius est exclusion alterius is an oft quoted rule of contract interpretation. It means that the expression of one thing is the exclusion of another. For

example, contracts that expressly include some guarantees imply that no other guarantees apply. Here, the fact that NMSA 10-9-18 identified only subjections A, C, and D (Subsection F is addressed below) suggests that no other provisions, including the State Personnel Board regulations, apply.

NMSA 10-9-18(F) does not, as the State sweepingly claims, provide the arbitrator with the same powers of the Board in the appeal. Subsection F addresses the *remedial powers* of the Board (modify the discipline, reinstatement, back pay) after it has determined the absence of just cause. The limitation of Subsection F to the remedial powers of the Board does not, the arbitrator finds, establish that the regulatory pre-hearing procedural requirements of the Board supplant the Article 14 arbitration procedures. Rather, Subsection F merely identifies the range of arbitrator remedial authority, nothing more or less. Similarly, the right to appeal the decision of an arbitrator to the district court does not imply that the regulations of the State Personnel Board govern the arbitration process.

The position advanced by the State is contradicted by the State Personnel Board's notice to employees. Both the June 19, 2009 State Personnel Board memorandum to all Agency Human Resource Managers and the Notice of Appeal Form to the Grievant specifically inform employees that appeals to the Board proceed in accordance with SPB regulations whereas an irrevocable election to arbitration proceeds in accordance with the CBA. Such language is consistent with Article 14.C of the CBA, as amplified by the bargaining history provided by the Union. The State's contrary position in this case calls into question that validity of all similar employee appeal notices that have been issued statewide since NMSA 10-9-18(H) went into effect. The arbitrator believes that the referenced language in the June 19, 2009 State Personnel Board memorandum and the Notice of Appeal Form in this case accurately reflect the meaning of NMSA 10-9-18.

The State argues that NMSA 10-9-13.H authorizes the State Personnel Board to issue rules governing dismissal or demotion procedures, including where an employee elects to file his or her appeal with an arbitrator. The arbitrator notes that NMSA 10-9-13.H does not specifically state that the SPB may issue regulations where an employee has selected arbitration. Even assuming, arguendo, legislative authority, the State failed

to reference anything in the SPB rules it provided indicating that the State Personnel Board has, in fact, exercised such authority and either: (1) specifically applied SPB pre-hearing regulatory procedures where arbitration has been elected; or (2) issued separate rules governing the arbitration process. A review of the SPB rules fails to reveal anything suggesting that they apply where arbitration, as opposed to a Board appeal, has been elected.

The State argues that the an employee's rights under the State Personnel Act cannot be waived or abrogated by removing the action from the administration process under the Act and allowing adjudication under a collective bargaining agreement, citing *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974). The argument appears to suggest that NMSA 10-9-13(H) is unconstitutional. Such a determination is beyond this arbitrator's jurisdiction. With that said, the arbitrator suggests the State read the April 1, 2009 decision of the U.S. Supreme Court in *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (April 1, 2009). Moreover, the applicability of *Alexander* appears dubious where, as here, the two-track adjudication system of NMSA 10-9-13(H) was enacted by the New Mexico Legislature. The arbitrator further notes the absence, in the limited record before him, of any evidence that the Grievant is asserting violation of statutory anti-discrimination rights.

The State argues constitutional equal protection requires application of the State Personnel Board pre-hearing procedural rules. Application of different procedural rules to the dismissal of bargaining and non-bargaining employees would, the State argues, violate the equal protection clause of the United States and New Mexico. The State did not offer any evidence or support for its summary assertion. As such, the arbitrator finds that the State failed to establish the processing of a dismissal appeal through the CBA arbitration process, as permitted by NMSA 10-9-18(H), violates constitutional equal protection.

For all of the above reasons, the State's motion to confirm application of the State Personnel Board pre-hearing procedural regulations (NMAC 1.7.1.1 et. seq.) in lieu of the Article 14 arbitration procedures is denied. Where, as here, arbitration is elected the hearing process is governed by the CBA arbitration provisions, subject to the requirements of Subsections A, C, D, F, and G. NMSA 10-9-18(H).

Carl C. Bosland

Dated: 11/17/09

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Carl C. Bosland, Esq.
Arbitrator