STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

ENDORSED
FILED IN MY OFFICE THIS
MAR 15 2017
LOURDES PEREZ

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Appellant/Cross-Appellee,

v.

D-202-CV-2015-03814

STATE OF NEW MEXICO,

Appellee/Cross-Appellant

and

NEW MEXICO PUBLIC EMPLOYEE LABOR RELATIONS BOARD,

Appellee.

**MEMORANDUM OPINION AND ORDER**

THIS MATTER comes to the Court's attention as a result of Appellant/Cross-Appellee Communications Workers of America, AFL-CIO's ("CWA") appeal and Appellee/Cross-Appellant State of New Mexico's ("State") cross-appeal of the April 15, 2015, Order of the New Mexico Public Employee Labor Relations Board ("PELRB"). PELRB has also filed an unopposed Motion to Dismiss itself from the proceedings. The Court has reviewed the record and the pleadings filed herein. The Court **GRANTS** PELRB's Motion to Dismiss. The Court **AFFFIRMS** PELRB's Order as to NMSA 1978, Section 10-7E-19(F) (2003) and **REVERSES** PELRB's Order as to Section 10-7E-19(B).

## I. FACTS AND BACKGROUND

Effective July 21, 2009, the applicable Collective Bargaining Agreement ("CBA") provided in Article 2, Section 3:

> The Employers shall allow Union Officers and stewards to attend on paid status (utilizing the union time code in the time and labor reporting system), meetings agreed to by the parties for purposes of administration of this Agreement including grievance meetings within the parameters set forth in this section's succeeding paragraphs.
>
> Each employee official shall be entitled to use union time to investigate and process grievances, which they are authorized to settle, within the agency to which they are assigned for reasonable periods of time without charge to pay or leave. Union time must be pre-approved and will not be disapproved except for operational reasons. However, the Employer retains the right to disapprove union time when the employee official is in an overtime status. If disapproval necessitates an extension of time for processing a grievance, the time shall be tolled for the duration of the denial until union time is afforded the employee official to investigate and process the grievance.
>
> Union time shall count as hours worked for the purpose of overtime computation but shall not qualify for payment of mileage or per diem unless an employee is otherwise assigned to a per diem status by the Employer.
>
> A union officer or steward shall use union time within assigned work hours to investigate and process grievances in the most efficient and effective manner possible so as to minimize the operational impairment.
>
> Time spent investigating and processing grievances outside of assigned work hours shall not be compensated. When a union officer or steward desires to consult with another employee concerning a grievance on work time, both employees shall request and obtain prior permission to do so.

[Record on Appeal ("ROA") 98]

On March 5, 2014, State Labor Relations Director Sandy Martinez sent a letter to CWA President Donald Alire stating:

> As you are aware, Article 2, § 3 of the CBA with regard to Union Rights provides:
>
> > "The Employer shall allow employee **Union Officers** and **stewards** to attend, on **paid status** (utilizing the union time code in the time and labor reporting system), meetings agreed to by the parties for purposes of administering this Agreement including grievance meetings within the parameters set forth in this section's succeeding paragraphs" (Emphasis added).

> "Each **union officer or steward** shall be entitled to use **union time** to investigate and process grievances, which they are authorized to settle, within the agency to which they are employed, for reasonable periods of time without charge to pay or to leave" (Emphasis added).
>
> "When a union officer or steward desires to consult with another employee concerning a grievance on work time, both employees shall request and obtain prior permission to do so".
>
> Please be advised that the State is taking action to ensure that state agencies comply with the above-referenced language. Accordingly, effective the pay period beginning March 29, 2014 paid union time will be applied appropriately for union stewards and officers only. Pursuant to Article 2, § 3, bargaining unit employees are not entitled to paid-time or union time. All past practices with regard to paid union time and paid state time that deviated from the above-referenced language of the CBA are ceased.

[Id. 179-80]

The CWA filed a Prohibited Practices Complaint ("PPC") in September 2014 alleging violations of NMSA 1978, Section 10-7E-19(A)-(B), (D), (F), (G) (2003). [Id. 520] The PPC essentially asserted that the March 5, 2014 letter "unilaterally revoke[ed] an employee's ability to use state-paid time to meet with his/her Union representative in the filing/investigation of a grievance." [Id.]

> State employees have used state-paid time whether they are union eligible or not for filing complaints since before 2004 and since the [CBA] has been in place. Article 2, Section 3, paragraph 5 of the CBA speaks to the usage of work time for employees filing or consulting with their union representative.

[Id. 521]

A Hearing Officer ("HO") considered the matter on briefs and evidentiary materials submitted in lieu of a merits hearing. [Id. 95] At issue in these appeals are Sections 10-7E-19(B) and (F), which provide: "A public employer or his representative shall not: . . . (B) interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act; . . . (F) refuse to bargain collectively in good faith with

the exclusive representative." As to Section B, the HO found that CWA had established a "past practice" whereby a grievant's supervisor had discretion to determine whether time spent addressing his or her grievances was "time worked" or "union time" and that "those supervisors routinely granted requested leave for that purpose without requiring the grievant to take annual leave or compensatory time" and that the March 5, 2014, letter interfered with that "past practice." [Id. 112] The HO noted that the State defended itself as to this alleged violation by arguing that CWA had failed to timely request bargaining after receiving notice of the change via the March 5, 2014 letter. [Id.] The HO rejected this defense and found that the letter and the State's decision was a "fait accompli" thereby relieving CWA of its duty to request bargaining. [Id. 113, 117-19] This conclusion also was the basis for the HO's determination that CWA had established the State's violation of Section 10-7E-19(F). [Id. 119]

> The State's conduct in issuing the March 5, 2014 letter with its announcement that the State was unilaterally ending its past practice of allowing supervisors, in the exercise of the exercise of their discretion, to pay employees preparing for and attending their own grievance meetings as time worked or as union time constitutes violation [sic] violated [sic] PEBA §10-7E-19(B) because it unilaterally altered a mandatory subject of bargaining and a longstanding past practice thereby unlawfully restraining and interfering with employees' rights under PEBA. The same conduct also violated § 10-7E-19(F) by failing to bargain in good faith with regard to its change in employees' working conditions. As to those claims the PPC is **SUSTAINED**.

[Id. 120] The State appealed to PELRB. [Id. 59-79]

After hearing on April 7, 2015, PELRB entered its Order adopting the HO's Report and Recommendation, including its Findings of Fact, Conclusions of Law and Rationale

> with the exception of those relating to finding a violation of PEBA § 10-7E-19(F). With regard to that finding the Hearing Officer's Report and Recommended Decision that the State failed to bargain in good faith is reversed on the ground that the Union did not adequately explain why it took no action in a six-month period to request bargaining.

[Id. 2] The Board ordered in pertinent part:

(2) The State shall reinstate its prior practice of allowing a grievant's supervisor, in the proper exercise of his or her discretion, to authorize paid time for grievances without requiring use of accrued leave or leave without pay to the extent the union can subsequently show that their supervisors' decisions not to code their time as union time or time worked was prompted by the policy change expressed in the March 5, 2014 letter.

(3) The State is ordered to cease and desist from similar conduct in the future unless and until it either successfully negotiates the policy change embodied in the March 5, 2014 letter in a successor agreement or Memorandum of Understanding.

[Id. 3] These appeals followed.

## II. STANDARD OF REVIEW

Rule 1-074(A) NMRA "governs appeals from administrative agencies to the district courts when there is a statutory right of review to the district court." Rule 1-074(R) provides that the district court shall apply the following standards of review:

(1) whether the agency acted fraudulently, arbitrarily or capriciously;

(2) whether based upon the whole record on appeal, the decision of the agency is not supported by substantial evidence;

(3) whether the action of the agency was outside the scope of authority of the agency; or

(4) whether the action of the agency was otherwise not in accordance with law.

The party appealing bears the burden to show that the agency action falls within one of the oft-mentioned grounds for reversal set out above. See Morningstar Water Users Ass'n v. N.M. Pub. Utility Comm'n, 1995-NMSC-062, ¶ 9, 120 N.M. 579, 904 P.2d 28.

"Substantial evidence supporting administrative agency action is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." Gallup Westside Dev., LLC v. City of Gallup, 2004-NMCA-010, ¶ 11, 135 N.M. 30, 84 P.3d 78. "A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis,

when viewed in light of the whole record." Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n, 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806; see also Las Cruces Prof'l Fire Fighters v. City of Las Cruces, 1997-NMCA-044, ¶ 7, 123 N.M. 329, 940 P.2d 177. Whether PELRB's actions were contrary to law is a question reviewed de novo. See Smyers v. City of Albuquerque, 2006-NMCA-095, ¶ 5, 140 N.M. 198, 141 P.3d 542.

## III. DISCUSSION

PELRB'S Motion to Dismiss

On July 22, 2015, PELRB filed a Motion to Dismiss itself as a party pursuant to Rules 1-019, 1-021, 1-074(P)(7) NMRA. Neither the State nor CWA has filed any opposition to the Motion, and the Court has no authority before it compelling the joinder of PELRB in this appeal. See, e.g., NMSA 1978, § 10-7E-23(B) (2003) ("B. A person or party, including a labor organization affected by a final rule, order or decision of the board or local board, may appeal to the district court for further relief. All such appeals shall be based upon the record made at the board or local board hearing."). Accordingly, the Court **GRANTS** PELRB's Motion.

CWA'S APPEAL

CWA asks this Court to reverse PELRB's decision rejecting the HO's recommendation that the State violated Section 10-7E-19(F) by not bargaining in good faith the changes to past policy. The HO determined that the March 5, 2014, letter constituted a "fait accompli," and, as such, CWA had no duty to request bargaining in response to the letter. PELRB rejected the HO's reasoning, associated findings, and conclusions and determined instead that CWA had not "adequately explain[ed] why it took no action in a six-month period to request bargaining." [Id. 2] CWA asserts that substantial evidence does not support PELRB's decision and that it is contrary to law. The Court is unpersuaded.

The law provides that unilateral action by an employer regarding a subject of mandatory bargaining will not amount to a refusal to bargain if the employer provides notice of the proposed change and a reasonable opportunity for the union to request bargaining over the proposed change. See Pinkston-Hollar Constr. Servs., 312 NLRB 1004, 1004-05 (1993); Nat'l Labor Relations Bd. ("NLRB") v. Okla. Fixture Co., 79 F.3d 1030, 1035 (10th Cir. 1996); Haddon Craftsmen, Inc., 300 NLRB 789, 790 (1990). A party is obligated to request bargaining before a claim for breach of the duty to bargain may be sustained. Ciba-Geigy Pharms. Div., 264 NLRB 1013, 1017 (1982). However, a union has no duty to request bargaining if employer's proposed change is presented as a "fait accompli." See id.

> The [NLRB] has long recognized that, where a union receives timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a fait accompli.

Id.; see also NLRB v. Crystal Springs Shirt Corp., 637 F.2d 399, 402 (5th Cir. 1981). "An employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals." NLRB v. Citizens Hotel Co., 326 F.2d 501, 505 (5th Cir. 1964); see also Int'l Ladies' Garment Workers Union, AFL-CIO v. NLRB, 463 F.2d 907, 919 (D.C. Cir. 1972) ("Notice of a fait accompli is simply not the sort of timely notice upon which the waiver defense is predicated.").

The HO found, and PELRB rejected, that the letter the State sent CWA on March 5, 2014, presented a "fait accompli" by which the State relieved CWA from any duty to request bargaining and concurrently breached Section 10-7E-19(F). [Id. 119] The HO reasoned:

> Here, the March 5, 2014 letter presented the Union with a fait accompli that did not necessitate a demand to bargain. It announced a change to a past practice of

> many years' duration to take effect within a few weeks. The letter clearly communicated that the State had made up its mind to end the past practice. Any request to bargain would have been fruitless and therefore, was not required.
>
> It is not disputed that no bargaining over this issue took place. Therefore, I conclude that under the facts of this case the Union was not required to demand bargaining and as a result, the Union has established a violation of § 10-7E-19(F).

[Id.]

The Court cannot agree with CWA that PELRB erred in its determination that the HO's findings were insufficient to demonstrate a "fait accompli" such that CWA was relieved from its duty to request bargaining. The HO found that the notice given by the State was too short and that the letter "clearly" communicated that the State had made up its mind to end the "past practice" the HO found of paying employees when meeting with their union representatives. PELRB rejected these findings and concluded that CWA never requested bargaining and waited six months to file the PPC. PELRB found this dispositive of CWA's complaint pursuant to Section 10-7E-19(F). See, e.g., Okla. Fixture Co., 79 F.3d at 1037 ("Further, the filing of an unfair labor practice charge does not relieve the Union of its obligation to request bargaining."); Haddon Craftsmen, Inc., 300 NLRB at 790 ("When an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining." (Internal quotation marks, quoted authority, and alterations omitted.)).

PELRB had evidence before it supporting the conclusion that the State's letter was not a fait accompli. The letter was sent to CWA's President, and the letter gave CWA notice that as set forth in the CBA only union stewards and officials could code their time as "union time" with the pay period beginning in twenty-four days. Assuming a pay period was fourteen days, this totaled at least thirty days prior to implementation for CWA to request bargaining. CWA did

not. No one disputes that CWA had notice of the State's proposal and any potential effects it had on "past practices." The Court cannot conclude that it was unreasonable for the PELRB to reject the HO's finding that CWA did not have the opportunity to request bargaining. See, e.g., Okla. Fixture Co., 79 F.3d at 1035-36 (finding four days sufficient for union to request bargaining); Haddon Craftsmen, Inc., 300 NLRB at 790 (finding notice of approximately five weeks sufficient to provide meaningful opportunity to bargain). This is not a case of an employer implementing the change and then informing the union. See Pontiac Ostepathic Hosp., 336 NLRB No. 101, at * 5 (2001).

"Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration." McDaniel v. N.M. Bd. of Med. Exam'rs, 1974-NMSC-062, ¶ 11, 86 N.M. 447, 525 P.2d 374 (internal quotation marks and quoted authority omitted). Substantial evidence supports PELRB's decision, and "[t]his Court will not reweigh the evidence nor substitute [its] judgment for that of the fact finder." Wilcox v. N.M. Bd. of Acupuncture & Oriental Med., 2012-NMCA-106, ¶ 7, 288 P.3d 902 (internal quotation marks and quoted authority omitted). PELRB's dismissal of CWA's Section 10-7E-19(F) complaint that the State refused to bargain collectively in good faith is **AFFIRMED**.

THE STATE'S CROSS-APPEAL

The State cross-appeals PELRB's adoption in its Order of the HO's Report and Recommendation concluding that the State violated Section 10-7E-19(B). Section 10-7E-19(B) provides: "The public employer . . . shall not . . . (B) interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act." The State argues in its Statement that reversal of PELRB is proper because: 1) PELRB's Order expands the scope of the PPC with regard to the allegations; 2) the Order expands the scope of

the PPC by relying on NMSA 1978, Sections 10-7E-5 (2003) and 10-7E-17 (2003) to establish the statutory rights for a violation of Section 10-7E-19(B); 3) the Order adds language to the March 5, 2014 and the CBA; and 4) the Order ignores evidence in the record. [State's SAI 3-10] The Court agrees that reversal is proper but for somewhat different reasons. The Court determines that PELRB's Order sustaining a violation of Section 10-7E-19(B) appears inconsistent with its conclusion regarding Section 10-7E-19(F) and, accordingly, the Order is arbitrary and capricious. The Court believes this determination is dispositive of the State's cross-appeal, and it need not reach the State's other arguments.

The HO considered whether the State had committed a prohibited labor practice pursuant to Section 10-7E-19(B) "by unilaterally ending a past practice of paying employees for attending grievance meetings on 'union time' or regularly scheduled work time such that the State unlawfully restrained and interfered with those employees[']' rights under PEBA." [ROA 104] The HO disagreed with the State's argument that PPC did not identify any specific rights and concluded that the PPC's allegation that "the March 5, 2014 letter [in which] the employer announced its intent to unilaterally alter terms and conditions for bargaining unit members without bargaining over that change" and cease "past practices" implied a violation of both Sections 10-7E-17(A) and 10-7E-5. [ROA 108-09] Section 10-7E-17(A) requires an employer to negotiate over changes in terms and conditions of employment, and Section 10-7E-5 establishes the right of public employees to form, join or assist a labor organization for the purpose of collective bargaining without restraint.

Finding that statutory rights were implicated by the State's position, the HO then considered the State's defenses and rejected them. [Id. 110]

> The State defends the PPC in part by asserting that it did not revoke the bargaining unit members' ability to use "state-paid time" because requiring them

> to use annual leave satisfies any alleged requirement that the employee is on time paid by the State. Additionally, the State defends the PPC by reference to that portion of Article 2, Section 3 of the parties' CBA requiring that whenever a union officer or steward desires to consult with another employee concerning a grievance on work time, "both employees shall request and obtain prior permission to do so." As the State argues, requiring an employee to request permission to meet on work time is not a guarantee that such request will be granted. Rather, it is a "retained management right of the supervisor to decide whether the employees will be allowed to meet on work time.

[Id.] The HO concluded that the State had established a "past practice" of paying employees for meeting regarding grievances, a "past practice" which was now a binding term and condition of employment. [Id.] The HO stated:

> [I]t is a past practice whereby a grievant's immediate supervisor has discretion to consider time spent by the grievant addressing his or her grievances to be time worked or "union time" and that those supervisors routinely granted requested leave for that purpose without requiring the grievant to take annual leave or compensatory time.

[Id. 112] According to the HO, in the March 5, 2014 letter the State unilaterally changed this practice and "removed discretion to consider time spent in grievances as time worked that previously resided in a grievant's supervisor in favor of a centralized mandate from the State Personnel Office that it shall not be so." [Id. 111-12]

The State also defended the alleged abrogation of the past practice by arguing that CWA did not timely request to bargain the change when it received notice. [Id. 112] The HO rejected this defense because the HO concluded that the March 5 letter presented a "fait accompli," thus excusing CWA from requesting to bargain and concluding the "State may not unilaterally end [the past practice] without bargaining with the Union." [Id. 112-14] As discussed above, PELRB did not adopt the findings regarding "fait accompli" and declined to find that the State refused to bargain and violated Section 10-7E-19(F) because CWA did not file a PPC until six months after the fact.

Thus, while CWA may have established a "past practice," which the Court need not determine, the PELRB essentially determined that the State had no duty to bargain because CWA never requested it thereby establishing the State's defense to the allegations it violated Section 10-7E-19(B). The Court finds that the PELRB's Order is inconsistent and cannot sustain PELRB's adoption of the HO's reasoning that a violation of Section 10-7E-19(B) occurred. Accordingly, PELRB's Order as to Section 10-7E-19(B) is **REVERSED**.

## IV. CONCLUSION

Accordingly, for the above-stated reasons, the Court **AFFIRMS** the Order in part and **REVERSES** it in part. This matter is remanded to PELRB for proceedings consistent with this opinion.

**IT IS SO ORDERED.**

CARL J. BUTKUS
DISTRICT COURT JUDGE

This is to certify that a true and correct copy of the foregoing document was _____ to the following on this ___ day of _____, 2016:

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