STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 18, AFL-CIO, LOCAL 3999,

Complainant,

vs. **PELRB CASE NO. 101-20**

CITY OF SANTA FE,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board ("Board") by Matt Huchmala, Board Administrative Assistant, requesting the Board adopt the Hearing Officer's Report and Recommended Decision ("Recommended Decision"). Mr. Huchmala informed the Board that the time to request Board review had passed and that a request for review had not been received. The Board, after reviewing the Recommended Decision and being otherwise sufficiently advised, voted 2-0 to adopt Executive Director Thomas J. Griego's Recommended Decision.

THEREFORE, THE BOARD adopts Director Griego's Recommended Decision and the file shall be closed.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

9/21/2020
DATE

Marianne Bowers
Marianne Bowers, BOARD CHAIR

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CITY OF SANTA FE,

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 the merits of a Prohibited Practices Complaint alleging that the City violated the Public Employee Bargaining Act (PEBA) by failing to comply with Article 20, Section 3, and Article 26, Section 14 of the parties' Collective Bargaining Agreement (CBA) in violation of §§ 17(A)(1) and 19(F) of the PEBA and by failing to bargain in good faith regarding certain pay inequities resulting from the transfer or promotion of a non-bargaining unit employee into a bargaining unit position in violation of § 19(H) of the PEBA. Complainant bears the burden of proof on those claims. Respondent identified six affirmative defenses in its answer; it bears the burden of proof on those.

A hearing on the merits was held Monday, August 03, 2020. At the conclusion of the Union's case, the City moved for a directed verdict arguing that the union's evidence was insufficient to demonstrate that the personnel action precipitating the alleged pay inequity was a promotion as charged in the PPC and as defined in Article 20 Section 3 of the CBA. Rather, the City argued, the quantum of evidence proved the action was a transfer and so, the PEBA was not violated because

effecting a transfer is an exclusive management right under Article 6, Section 4 of the CBA and under the Act.

The Union countered that because the employee was moved from an FLSA exempt position into one in which she is now able to earn overtime, the move constitutes a "promotional increase" covered by Article 20 Section 3. The Union argues that the management rights clause is modified by Article 20 Section 5 of the CBA and that if the move was a transfer as claimed, the City violated the CBA by not notifying the Union in advance of the transfer or posting notice of a vacancy as required by Article 20 of the CBA. Further, the union's witnesses testified that a pay inequity was acknowledged by the City but promises to adjust the pay inequity pursuant to Article 26 Section 14 of the CBA were not fulfilled. The union argued that the agreement in that Article of the CBA to address pay equity issues on a case-by-case basis is part of an ongoing good faith bargaining obligation. The pay inequity at issue was described by the union as employees with more city seniority than Erminia Tapia receiving lower pay than she; a result of her move into a Project Specialist position at her former salary that is impliedly prohibited by the definition of seniority. (Argument of Counsel, Audio Record of Hearing Part 2 at 1:05:44 to 1:17:00.)

The PELRB follows New Mexico jurisprudence that a motion for directed verdict should not be granted unless it is clear that "the facts and inferences are so strongly and overwhelmingly in favor of the moving party that... reasonable people could not arrive at a contrary result." *Melnick v. State Farm Mut. Auto. Ins. Co.*, 1988-NMSC-012, ¶ 11, 106 N.M. 726, 749 P.2d 1105. "A directed verdict is appropriate only when there are no true issues of fact to be presented to a jury. The sufficiency of evidence presented to support a legal claim or defense is a question of law for the [district] court to decide." *Sunwest Bank of Clovis, N.A. v. Garrett*, 1992-NMSC-002, ¶ 9, 113 N.M. 112, 823 P.2d 912. With that legal standard in mind, I make the following findings of fact regarding the motion for a directed verdict:

1. Exhibit 2, a Memo dated December 11, 2019 to Jarel LaPan-Hill, City Manager and Bernadette Salazar, Human Resources Director from Gilbert Baca, AFSCME Union President, purports to be a grievance based on the same facts alleged in this PPC – Project Specialist Inequity. (Testimony of Chris Armijo, AFSCME, Council 18 Staff Representative, Audio Record of Hearing Part 1 at 0:24:45 to 0:26:01.)
2. In October, 2019 a union member complained to Michelle Gutierrez, then President of AFSCME Local 3999, that City employee Erminia Tapia had been transferred to a union position. (Testimony of Michelle Gutierrez, Audio Record of Hearing Part 1 at 0:45:00 to 0:45:24.)
3. Ms. Gutierrez met thereafter with the City's HR Director, Bernadette Salazar among others, and asked her "Did you transfer Erminia Tapia to a union position without advertising it? Without notifying myself [sic] or the Board so we could make a decision?" When Ms. Salazar affirmed that she had done so, Ms. Gutierrez said "We need to make some changes with this quickly because this has caused an inequity and it's in the contract that you have to inform myself [sic] and the Board when you transfer someone who is non-union into a [bargaining unit] position." (Testimony of Michelle Gutierrez, Audio Record of Hearing Part 1 at 0:45:24 to 0:46:15.)
4. Ms. Gutierrez relied on the transfer section of Article 20 of the parties' CBA as the basis for asserting that the contract requires the City to inform her and the Union's executive board whenever it transfers someone from a non-union position into a bargaining unit position. However, she also testified that section applies only to union members – not to anyone outside the union. Specifically, it did not apply to Ms. Tapia because she was not a "union

member". [1] (Testimony of Michelle Gutierrez, Audio Record of Hearing Part 1 at 0:46:45 to 0:47:03; 0:53:41 to 55:12.)

5. Ms. Gutierrez again raised Erminia Tapia's move into a bargaining unit position during a second meeting in November 2019 attended by City Manager Jarel Lapan Hill and HR Director Bernadette Salazar in which Ms. Salazar said there was no need for the Union to file a grievance over the alleged pay inequity because "we'd work on it.". (Testimony of Michelle Gutierrez, Audio Record of Hearing Part 1 at 0:47:50 to 0:49:00.)
6. As testified to above, Ms. Gutierrez addressed concerns about transferring a non-union employee into a bargaining unit position without prior notice to the union, without posting the vacancy so that others could compete for it, and the pay inequity question in October and November of 2019 before grievances were filed. (Testimony of Michelle Gutierrez, Audio Record of Hearing Part 1 at 0:57:08 to 0:58:42.)
7. Regarding lack of notice to the union, Ms. Gutierrez first said there was no contract requirement that notice be given; "it's just something we do." Thereafter she testified that there is a requirement in Article 20 of the CBA that notice of position vacancies be posted, but that provision applied only to bargaining unit members and Tapia was not in the bargaining unit. (Audio Record of Hearing Part 1 at 0:59:11 to 1:00:00.)
8. The Project Specialist position filled by Erminia Tapia was not advertised. (Testimony of Amanda Armijo, Audio Record of Hearing Part 2 at 0:54:30 – 0:55:17; Testimony of Monique Maes, Audio Record of Hearing Part 2 at 1:01:00 – 1:04:40.)

[1] AFSCME, Local 3999 has an obligation pursuant to NMSA 1978 § 10-7E-15 to represent the interests of all employees in the bargaining unit without discrimination or regard to membership in the labor organization, notwithstanding Ms. Gutierrez testified that the parties' CBA applies only to union members – specifically it did not apply to Ms. Tapia because she was not a "union member".

9. The personnel action at issue was a transfer from a non-union position to a union position, not a promotion. (Testimony of Michelle Gutierrez, Audio Record of Hearing Part 1 at 0:52:00 to 0:53:09.)

10. After the issues raised by Ms. Gutierrez were not resolved to the Union's satisfaction before she left office as the Union President, Jessie Esparza, Project Specialist at the Parks Division, created Exhibit 2 on behalf of the new Union President, Gilbert Baca. Exhibit 2 is a Memo to the City Manager and HR Director with attachments complaining about Erminia Tapia being moved into a Program Specialist position and resulting pay inequity. (Testimony of Jessie Esparza, Audio Record of Hearing Part 2 at 0:27:58 – 0:31:50.)

11. That portion of the Grievance Form calling for a description of the incident giving rise to the grievance, Page 00014 of Exhibit 2, describes the incident as a "transfer" but simultaneously alleges a violation of Article 20, Filling of Vacancies, Section 3, Promotions. (Testimony of Jessie Esparza, Audio Record of Hearing Part 2 at 0:37:41 – 0:40:31.)

12. Ms. Gutierrez testified that Article 20 of the CBA regarding transfers did not apply to Erminia Tapia. Rather, she was subject to the City's personnel rules and regulations and that transfers are a management right under Article 6 of the CBA. (Testimony of Michelle Gutierrez, Audio Record of Hearing Part 1 at 0:54:00 to 0:55:19.)

13. Article 6 Section 1 of the parties' CBA, Exhibit J-1, provides the following regarding "management rights":

    "It is agreed that, except as expressly modified by the terms of this Agreement, the Employer exclusively retains all rights, including but not limited to:

    1. Determine the mission, budget, organization and number of employees allocated by position to meet the minimum staffing levels of each department;

    2. Determine qualifications for employment; validate content of examinations; make requests for position audits and reclassifications;

and ensure that best practices exist for the recruitment, interviewing and selection of applicants;

3. Direct employees and evaluate their performance based on standards of work established by the Employer;

4. Make assignments, transfer, or retain employees in positions, and make determination of job duties;

5. Provide reasonable rules and regulations governing the conduct of employees;

6. Provide reasonable standards and rules for employees' safety;

7. Determine the location and operation of its facilities;

8. Determine standards for work, hiring, promotion, transfer, assignment and retention of employees in positions;

9. Initiate corrective and/or disciplinary action including, but not limited to, coaching and guidance, written reprimands, suspensions, demotions, alternate forms of discipline, transfers and terminations for just cause pursuant to Article 9 of this Agreement;

10. Determine scheduling and all other actions necessary to carry out the Employer's functions;

11. Relieve an employee from his/her duties because of lack of funds or other legitimate reason;

12. Maintain efficiency of government operations; determine methods, means, equipment and personnel by which the Employer's operations are to be conducted;

13. In cases of an emergency or declared disaster, take such actions as may be necessary to carry out the missions of the Employer that might not implicitly follow all articles in this Agreement; and

14. Act in furtherance of all other duties and responsibilities set forth in the Constitution, federal laws, state statutes, administrative regulations, and executive orders of the Governor, as well as City of Santa Fe Ordinances, and Rules and Regulations."

14. Exhibit 3 is a memo similar to Exhibit 2 but re-submitted December 27, 2019 after the HR Director requested that each effected employee file individual grievances, as represented by

page 00014 of that Exhibit. (Testimony of Jessie Esparza, Audio Record of Hearing Part 2 at 0:31:50 – 0:35:45.)

15. At the time the individual grievances were filed, Ms. Esparza believed the matter involved a "promotion" notwithstanding the fact that the grievances referred to it as a "transfer" because she believes the fact that a formerly exempt employee transfers into a position that is eligible for overtime constitutes a promotion. (Testimony of Jessie Esparza, Audio Record of Hearing Part 2 at 0:35:45 – 0:44:50.)

16. Similarly, Amanda Armijo, a Project Specialist in the Public Utilities Department, filed a grievance over the Erminia Tapia matter because she believed it was an improper transfer at the time. She now believes the action to be a "promotion" because Tapia moved from a non-union position to an overtime eligible position with union benefits. The mere fact that she is eligible to receive overtime pay is enough in her opinion – she "doesn't care" whether Tapia actually received any overtime pay. (Audio Record of Hearing Part 2 at 0:56:16 – 0:57:43.)

17. The definition of "promotion" in Article 20 Section 3 of Exhibit J-1, the parties' CBA, makes no reference to receiving union benefits or being overtime eligible as an element. (Testimony of Amanda Armijo, Audio Record of Hearing Part 2 at 0:57:43 – 0:58:35.)

18. Article 20 Section 3 of the parties' CBA, Exhibit J-1, provides the following regarding "promotions":

> "A promotion shall be defined as movement of an employee from his/her position to a position of a higher pay grade within the bargaining unit. Promotions may result in a salary increase from five to twenty percent (5% - 20%), or the minimum of the new grade, whichever is greater. However, a promotion shall not result in an hourly pay rate that exceeds the top of the pay grade for the job classification into which the employee is being promoted. This allows the flexibility to maintain consistency of pay with other employees in the same job classification and to address budgetary limitations. Promotional increases shall not create pay inequities based upon City seniority

with other bargaining unit employees whose City seniority is higher than the person being promoted in the same classification."

19. The basis for the "pay inequity" alleged in this case is that after assuming her assignment as a Program Specialist, Erminia Tapia, with less city seniority than other Program Specialists is paid a higher hourly wage than those with greater seniority. (Testimony of Michelle Gutierrez, Audio Record of Hearing Part 1 at 0:51:13 to 0:51:51; Exhibit A.)

20. Before becoming a Project Specialist Erminia Tapia was in Pay Range 9. After becoming a Project Specialist, she went to a lower Pay Grade 8 at the same salary as before. (Testimony of Jessie Esparza, Audio Record of Hearing Part 2 at 0:44:50 – 0:45:50.)

21. All Project Specialists employed by the City are in Pay Range 8 except two who are in Pay Range "A-20". Exhibit 2, COSF 00006 – 00011. No evidence was submitted regarding the meaning of Pay Range A-20.

22. Not all Project Specialists employed by the City perform the same duties. The specific duties performed depends upon which department the Project Specialist is assigned. (Testimony of Amanda Armijo, Audio Record of Hearing Part 2 at 0:56:00 – 0:56:16.)

23. Article 20 Section 1 of the parties' CBA, Exhibit J-1, provides the following regarding posting vacancies:

> "A. All vacant classified Union positions shall be advertised for a minimum of ten (10) calendar days. All advertisements will be posted on designated City bulletin boards by the office manager or designee. The Union and the Employer may mutually agree in writing to lower the recruitment period on a case-by-case basis. Applications will be accepted concurrently from applicants not currently employed by the City of Santa Fe.
>
> B. The position vacancy posting shall contain the classification of the position, the testing requirement for applicants, the minimum qualifications for the position, the FLSA and Union status; the work location of the vacancy; a description of working conditions; a general description of the position; examples of work; the pay range of the position; the location where applications are to be filed; the opening and closing dates; and the time frames for accepting applications."

REASONING AND CONCLUSIONS REGARDING DIRECTED VERDICT: I do not agree with the City that at the close of the union's case it was clear "the facts and inferences are so strongly and overwhelmingly" in its favor "that... reasonable people could not arrive at a contrary result" with regard to whether the City failed to bargain in good faith in violation of § 19(H) of the PEBA.

It is axiomatic that public employers and unions must negotiate in good faith over mandatory subjects of bargaining such as wages; hours; all other terms and conditions of employment with certain limited exceptions that are not applicable here. This duty to bargain in good faith is ongoing even after the parties have entered into a collective bargaining agreement and during its term, unless it can be demonstrated that the parties clearly and unmistakably waived the right to bargain regarding a particular subject. See §§ 10-7E-17(A), (C) and (D). (However, no party may be required to renegotiate the existing terms of collective bargaining agreements already in effect. See § 10-7E-17(A)(2)).

It is not disputed that Program Specialist wages are not equal, (See Exhibit A for example). But equality is neither required nor wise given that not all Project Specialists perform the same duties depending on which department the Project Specialist is assigned. The CBA itself requires some measure of inequality based on City Seniority. See Exhibit J-1 Article 34, Section 5.

Putting aside Erminia Tapia's pay issue, there is no equality among Project Specialists pay as shown on Exhibit E. Ernestina Baca makes $0.98 per hour more than Erminia Tapia and $7.48 more than Nicholas Baca who found Tapia's pay rate so concerning that he complained to his supervisor about it. All of the other Project Specialists make more per hour than he does. The differences in pay cannot be established as being based on City Seniority because according to Exhibit A, Michelle Gutierrez hired in 1998 makes $6.68 per hour less than Dora Marquez hired in 2000. There are no hire dates for several of the employees on Exhibit A making it impossible for the Union to rely on it to establish the pre-eminence of City Seniority in setting wage rates.

Therefore, the question for the union in the first instance, and for this Board when called upon to render a decision in this dispute, begins with whether the wage at issue is "equitable"; that is to say, whether it is unjust or unfair. The concept of "equitable" pay as opposed to "equal" pay, is reflected in the parties' CBA (Exhibit J-1) at Article 26, Section 1(A), Classification and Pay Plan:

> "The Classification and Pay Plan is intended to be employee-based as well as provide for *equitable* employee compensation and career growth. The plan shall also establish competitive salaries to allow the City to recruit and retain qualified employees. The expressed objectives for the Classification and Pay Plan for the City of Santa Fe are:
>
> 1. To assign appropriate range assignments based on internal *equity*…"
>
> (Emphasis added).

The evidence at the close of the union's case established that in October and November of 2019 the union communicated to the employer its concerns about the City transferring Erminia Tapia, a non-union employee, into a bargaining unit position without prior notice to the union, without posting the vacancy so that others could compete for it, and that a "pay inequity" resulted. The City met at least twice with union representatives about those concerns before grievances were filed in December of 2019. After multiple grievances were filed the issues were again raised with the City's HR Director and the various steps in the contract grievance procedure followed.

Accordingly, reasonable minds could differ over whether the City fulfilled its ongoing obligation to bargain the alleged pay inequity or whether that right has been waived. A directed verdict is not appropriate on the union's claim that the good faith bargaining obligation in § 17 of the Act was not met and that therefore, the City violated §§ 19(F) or (H).

A different result obtains, however, with regard to the union's claims that the City failed to comply with Article 20, Section 3 concerning promotions and Article 26, Section 14 of the parties' CBA concerning equity adjustments in the contract Classification and Pay Plan.

Although a great deal of evidence and argument in this case surrounded the question whether the personnel action at issue was a promotion as defined in the contract, it is not necessary to spend a great deal of effort analyzing Article 20, Section 3 of the CBA because the union's witnesses are self-contradictory with regard to whether the contract applies at all.

Review of the Grievance Forms, Exhibits 2 and 3, simultaneously describe the incident as a "transfer" while alleging a violation of Article 20 regarding promotions. Former union President Michelle Gutierrez testified that Article 20 of the CBA did not apply to Erminia Tapia. Rather she was subject to the City's personnel rules and regulations and that transfers are a management right under Article 6 of the CBA. I agree that Article 20 of the CBA did not apply to Erminia Tapia's personnel action in this case. A plain reading of the contract's promotion definition results in a conclusion the action does not meet the definition. As the move was from a non-bargaining unit position to one within a bargaining unit it cannot be a movement from one position to another "within the bargaining unit". Furthermore, because upon becoming a Project Specialist, Erminia Tapia was placed in a lower pay grade, albeit at the same salary as before, she cannot be said to have moved "from his/her position to a position of a higher pay grade within the bargaining unit." When coupled with the evidence that the CBA does not apply to the employee or the issue at all, a directed verdict is appropriate on that issue.

With regard to whether the City violated Article 26, Section 14 of the parties' CBA regarding equity in pay plans, the union's claim fails on three points. First, it is apparent that the City met and discussed Project Specialist pay inequity at least twice before the filing of grievances and continued to meet on the issue thereafter. Second, that the issue was not resolved to the union's satisfaction does not in and of itself constitute a failure to bargain both because the City is not required to agree to a proposal or to make a concession, nor is it required to renegotiate the existing terms of a collective bargaining agreement already in effect. See §§ 10-7E-17(A)(1) and (2). Because Erminia

Tapia's pay was within the negotiated pay band established by the negotiated Classification and Pay Plan, her wage had already been negotiated and the City was under no obligation to renegotiate those terms except insofar as it might constitute a pay inequity calling for adjustment under Section 14 of Article 26 as the union claims. The evidence, however, does not support a conclusion that Article 26 was violated because Tapia's hourly rate was within the negotiated pay band and so, cannot be construed as inequitable in relation to other Project Specialist without calling into question the equity of the entire pay band. It is important to note that Section 14's call to address "equity issues…on a case-by-case basis" does not stand alone as an invitation to address any and all claimed pay inequities. Rather, as a section under the Classification and Pay Plan, Article 26, it has its meaning within the context of that Plan and relates to inequities within or resulting from the pay plan itself. More importantly, the call to address such issues by the Human Resources Department and the Union was plainly complied with. The Union met at least twice with HR before filing grievances and presumably thereafter. The requirement to address such issues does not presume that an agreement on resolution must be reached. The union makes much of the fact that the City Manager agreed with the union that a pay inequity existed and directed the HR Director to "fix it" or to "take care of" the pay issue, but whether that could reasonably be done is left in question and the absence of a resolution to the union's satisfaction, while understandably frustrating, does not rise to the level of a contract violation. As the union has the burden of proof on these issues I construe the absence of evidence against the non-moving party.

Finally, as with Article 20 not applying to Ms. Tapia as a non-union member, neither does Article 26 apply. Accordingly, a directed verdict is appropriate on this issue as well.

Because Ms. Tapia's move to a Project Specialist position was not covered by either Article 20 or Article 26, I conclude that it was a transfer effected as a reserved management right pursuant to Article 6, Section 1 of the parties' CBA. Among the reserved rights under Article 6 Section 1 of the

parties' CBA, is the City's right to "[m]ake assignments, transfer, or retain employees in positions, and make determination of job duties" and to "[d]etermine standards for work, hiring, promotion, transfer, assignment and retention of employees in positions".

Therefore, the Motion for a Directed Verdict was granted as to the Union's claim that the City violated §§ 17(A)(1) and 19(F) of the PEBA by failing to comply with Article 20, Section 3, regarding promotions and Article 26, Section 14 of the parties' CBA regarding equity in pay plans dismissing both, while reserving for further evidence on the union's claim that the good faith bargaining obligation in § 17 of the Act was not met and therefore the City violated §§ 19(F) or (H).

REASONING AND CONCLUSIONS REGARDING GOOD FAITH BARGAINING: After announcing my decision granting the motion for directed verdict in part, the City continued with its case in chief. I make the following additional findings concerning the City's case in chief:

24. Prior to becoming a Project Specialist assigned to the Arts and Culture Department, Erminia Tapia was the Executive Assistant to then Mayor Javier Gonzales. Once a new administration took office, the new Mayor, Alan Webber, hired his own Executive Assistant resulting in the position being "double filled". Rather than simply firing Ms. Tapia, the HR Director allowed the position to be double filled until a suitable vacancy existed into which Ms. Tapia could be placed, because she was considered to be a valuable employee performing her duties at a high level of competence. (Testimony of Bernadette Salazar, Human Resources Director, Audio Record of Hearing Part 4 at 0:04:03 – 0:05:56.)

25. Ms. Salazar evaluated Ms. Tapia's qualifications for the job and found them to be adequate. (Testimony of Bernadette Salazar, Audio Record of Hearing Part 4 at 0:06:19 – 0:06:37.)

26. Regarding the alleged pay inequity, Ms. Salazar learned of the issue during weekly meetings with union representatives held to address any ongoing labor issues. She looked

into what other Project Specialists were making and found a wide range of hourly wages within the established pay scale. (Testimony of Bernadette Salazar, Audio Record of Hearing Part 4 at 0:07:03 – 0:09:01.)

27. After researching the salary range she found that some Project Specialists with an earlier hire date than Ms. Tapia were earning less than Ms. Tapia. She discussed that finding with union representatives and talked about what the CBA required and particularly the Promotion section but she disagreed with them that section applied. (Testimony of Bernadette Salazar, Audio Record of Hearing Part 4 at 0:09:03 – 11:30.)

28. She also discussed "equity adjustments" in Article 26 Section 14 with the union during the weekly meetings. This section means union and HR will talk on a case-by-case basis if one believes there is an equity issue. She does not believe this section applied because the term "pay inequities" referred to in Article 26 though not defined does not involve questions of seniority. (Testimony of Bernadette Salazar, Audio Record of Hearing Part 4 at 0:11:30 – 0:12:17.)

29. The union's requested relief was that all Project Specialists' salaries be raised to what Erminia Tapia is making. That proposal was considered by management. However, because the City had already committed to approximately $1,000,000.00 toward adjusting AFSCME represented employees' pay bands to conform with its most recent class and compensation study that went into effect in June of 2019 and because sufficient money did not exist in the City's budget to fund the union's requested salary increases in excess of $100,000.00, the proposal was dismissed. (Testimony of Bernadette Salazar, Audio Record of Hearing Part 4 at 0:13:00 – 0:15:00; 0:24:10 – 0:25:26; 0:31:00 – 0:38:00; 0:44:00 – 0:44:45.)

30. Ms. Salazar acknowledges that the vacant position into which Ms. Tapia was transferred was not advertised but denies that the CBA requires her to advertise the open

position. (Testimony of Bernadette Salazar, Audio Record of Hearing Part 4 at 0:15:00 – 0:21:00.)

31. The mere fact that someone in a position earns less with more seniority than another employee in the same position does not mean there is a pay inequity because experience in other areas outside the position, certifications, licensure and the person's prior salary must be taken into account. (Testimony of Bernadette Salazar, Audio Record of Hearing Part 4 at 0:22:47 – 0:24:10.)

32. She denies that in a November meeting with the union concerning the pay issues that the City Manager told her "We need to fix this". (Testimony of Bernadette Salazar, Audio Record of Hearing Part 4 at 0:29:00 - 0:29:19.)

33. Article 20 of the CBA regarding transfers does not apply to this situation because as a non-union employee Ms. Tapia's transfer is governed by City Personnel rules. (Testimony of Bernadette Salazar, Audio Record of Hearing Part 4 at 0:30:00 - 0:31:00.)

34. As long as all Project Specialists are being paid salaries within the designated pay band for that position, there is no issue of pay inequity regardless of seniority. (Testimony of Bernadette Salazar, Audio Record of Hearing Part 4 at 0:42:00 – 0:43:16.)

35. The City could have reduced Ms. Tapia's salary but typically does not reduce pay without giving the employee due process and she considered that such a reduction would have been inequitable. (Testimony of Bernadette Salazar, Audio Record of Hearing Part 4 at 0:44:00 – 0:44:45.)

A significant part of the reason the Complainant perceives a pay inequity exists is because it construes the job action at issue to be a promotion in violation of the CBA. For the reasons set forth in my partial grant of the City's Motion for a Directed Verdict, I do not share either the union's construction of the job action as a promotion, nor do I share its perception that pay inequity

resulted from the move. I note that there are employees on Exhibit A with more seniority earning less than others without regard to Ms. Tapia's move into the bargaining unit. There are simply too many variables that go into analysis of an appropriate salary for a particular Project Specialist, not least of which is the department to which the particular Project Specialist is assigned and what its particular duties are, to conclude that Exhibit A demonstrates a pay inequity. I agree with Ms. Salazar's analysis that as long as an employee's wage is within the authorized pay band for that position, there is no inequity. There may be *inequality,* but that inequality has a logical basis and is not what the Board is called upon to remedy.

That the City Manager may have acknowledged that a pay inequity existed and told the HR Director to remedy it (which is disputed) does not support a conclusion that the union met its burden of proof on failure to bargain. That is so because an inequity may exist in the moral sense yet not be a violation of the CBA or the PEBA. Furthermore, though the will to remedy a perceived inequity may exist, the means to do so may not, or may prove to be so costly as to be impossible as a practical matter. The PELRB does not exist to remedy any inequality brought to its attention, but to remedy violations of the PEBA found to exist and the Act does not require an employer to expend funds it has not appropriated.

The transfer of employees is the City's right under Article 6, paragraphs 1, 4, 8, and 12 of the CBA as well as under the Act itself, NMSA 1978 § 10-7E-6. Nowhere do I see a contract limitation or modification on the employer's right to assign or transfer Ms. Tapia as it did with one possible exception - the vacant position into which Ms. Tapia was transferred was not advertised. To the extent there is evidence that the vacant position into which she was transferred was not posted or otherwise advertised in violation of Article 20 Section 1 of the CBA, that claim was not brought and is not a part of this PPC. Hence, I do not consider that evidence.

There is ample evidence that the City met its bargaining obligation, first, generally, by negotiating adjustments to its Pay Plan to coincide with a Compensation and Classification study in June of 2019 resulting in a $1,000,000.00 adjustment to bargaining unit members' wages. Second, with regard to Ms. Tapia's pay specifically, Ms. Salazar reviewed Project Specialists' wages, noted a wide range of hourly wages within the established pay scale and discussed those findings with union representatives at more than one weekly meeting and at least two during which the City Manager was also in attendance in October and November of 2019. Although the parties disagree whether Article 26 Section 14 of the CBA concerning "equity adjustments" applies, there is no dispute that the union's requested relief that all Project Specialists' salaries be raised was considered but having already committed approximately $1,000,000.00 toward adjusting AFSCME represented employees' pay to conform with its most recent class and compensation study, an additional increase in excess of $100,000.00 to Project Specialist wages was not in the operating budget. The Union produced no evidence to the contrary.

Several recent PELRB and State Court decisions illustrate the mutual *per se* duty to meet and confer about mandatory subjects of bargaining, upon any party's request. For example, in A*FSCME, Council 18 v. State of New Mexico*, 1-PELRB-2013 the PELRB held that furloughs are an exercise of management's reserved rights under an article of the parties' CBA reserving to management the right to relieve an employee from duties because of lack of work or other legitimate reason, or under sections reserving to management the right to determine the size and composition of the work force, or to determine methods, means, and personnel by which the employer's operations are to be conducted. Therefore, the State was not obligated to bargain further over the furloughs. See *CWA v. PED*, PELRB Case No 131-11, Hearing Officer's Report and Recommended Decision (October 12, 2012) re: contract coverage theory. See also, *AFSCME, Council 18 v. HSD*, D-101-CV-2012-02176 (1st Judicial Dist., J. Ortiz, 6-14-2013).

Thus, while I conclude the transfer of Erminia Tapia was a legitimate exercise of a reserved management right, I also conclude that the City was obliged to meet and confer with the union over the effect of that transfer as a part of its ongoing duty to bargain in good faith over mandatory subjects of bargaining. I conclude that the City met that obligation by the meetings described above and by negotiating the Pay Plan in the parties' CBA.

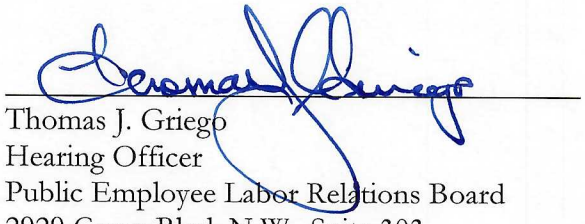
Bad faith in bargaining is inferred from the totality of circumstances, or the entire course of conduct, both at and away from the bargaining table. See *NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 466 (2d Cir. 1973). The test for subjective bad faith has been recognized to be a "fluctuating one, dependent in part upon how a reasonable person might be expected to react to the bargaining attitude displayed by those across the table. None of the traditional indicia of bad faith have been shown to exist here. There is no evidence of a desire not to reach an agreement; lack of sincere effort to reach common ground or a basis of agreement or lack of serious intent to adjust differences and to reach an acceptable common ground. See e.g., *Times Publishing Co.*, 72 NLRB 676, 682-83 (1947); *Advanced Business Forms Corp.*, 474 F.2d at 466; *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960); *NLRB v. Montgomery Ward,* 133 F.2d 676, 686 (9th Cir. 1943) and *White Cap, Inc.*, 325 NLRB 1166, 1169-117 (1998).

Under the totality of the circumstances I conclude the parties' conduct reflect mutual good faith bargaining over the alleged pay discrepancy and the Union has not met its burden of proving a failure to bargain in good faith.

DECISION: For the reasons stated herein, including my findings in connection with the Motion for a Directed Verdict, my recommended decision is that the Complainant's claim be **DISMISSED** and that its requested relief be **DENIED**.

Issued, Thursday, August 13, 2020.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD



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