STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:
RUIDOSO EDUCATION ASSOCIATION and DANIEL M. KESSLER,
Complainants,

v. **PELRB No.'s 103-20 and 105-20 consolidated**

RUIDOSO MUNICIPAL SCHOOL DISTRICT and DR. GEORGE BICKERT,
Respondents.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board at its regularly scheduled meeting on October 6, 2020, the same date as the deadline for either party to request review of the Hearing Officer's Report and Recommended Decision issued September 22, 2020 ("Recommended Decision"). Although the deadline to seek Board review did not pass until close of business that day, the Executive Director informed the Board that neither party intended to appeal the Recommended Decision. Counsel for the Ruidoso Schools was present and confirmed that it did not intend to seek review. After reading the Recommended Decision and being otherwise sufficiently advised, the Board voted 3-0 to adopt the Hearing Officer's Recommended Decision as its Order.

THEREFORE. the Board adopts the Recommended Decision as its Order and the filed shall be closed after confirmation that Respondent has complied with this Order by the following:

1. Cease and desist its practice of referring matters deemed by site administrators to be non-grievable to a procedure outside the contract grievance procedure and to process all grievances in accord with the process outlined in the CBA;

2. Post a notice acknowledging that it violated PEBA Sections 10-7E-5, 17(F), 19(B),

19(G), and 19(H) by failing to follow the grievance procedure contained in the collective bargaining agreement and by violating its duty to bargain in good faith, in a form substantially conforming with that appended to the Hearing Officer's Report and Recommended Decision as Appendix A, for a period of no less than 60 days, in a place or places frequented by bargaining unit employees.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

10/16/2020
DATE

Marianne Bowers
MARIANNE BOWERS, BOARD CHAIR

STATE OF NEW MEXICO
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and DANIEL M. KESSLER,
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consolidated

RUIDOSO MUNICIPAL SCHOOL DISTRICT
and DR. GEORGE BICKERT,
Respondents.

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 Complainants' Amended Prohibited Practices Complaint filed March 19, 2020 alleging that the District failed to process grievances in violation of PEBA and otherwise interfered with, restrained, and coerced public employees in the exercise of their rights protected under PEBA in violation of Sections 10- 7E-5, 10-7E-17(F), and 10-7E-19(B), (G) and (H). Complainants have the burden of proof and the burden of going forward with the evidence. 11.21. l.22(8).

The District answered on April 10, 2020 to the effect that they acted within the scope of their authority and provided responses to Complainants grievances as required. Respondents' actions in no way prohibited Complainants from progressing grievances through the Levels of the grievance procedure. Respondents did not violate the collective bargaining agreement or the Public Employee Bargaining Act. A hearing on the merits was held on July 01, 2020 via teleconference from the N.M. Workforce Connection offices in Ruidoso and the PELRB offices in Albuquerque. After opening the hearing and taking testimony, the hearing was suspended to allow both parties to explore identity, relevance and veracity of the certain individuals mentioned in the testimony of one

of the Complainant's witnesses, Greg Maxie, and to prepare a proper cross-examination. (Audio Record of July 1, 2020 Hearing at 4:32:42 – 4:37:37). The hearing proceeded with testimony and documentary submissions from the remainder of the Complainants' witnesses and recessed without closing the record until the facts had been developed further as mentioned above. The Merits Hearing was scheduled to resume on August 25 and 26, 2020. Audio Record of July 1, 2020 Hearing at 4:38:50 – 4:43:25; 5:52:07 - 6:12:01. When they did not disclose the identity of the employees at issue by the deadline agreed to, Complainants moved to withdraw that portion of their claims to which Greg Maxie's testimony related and took the position that I may disregard Mr. Maxie's testimony altogether if permission to withdraw those claims is granted. See Letter Decision re: Motion to Compel and Motion to Partially Withdraw Claims, July 31, 2020. As a result, the Motion to Partially Withdraw Claims was granted and the testimony of Greg Maxie disregarded. Respondents' Motion to Compel Disclosure was denied and the Hearing on the Merits without claims alleged at ¶¶ 34 and 35 of the First Amended Complaint continued as scheduled on August 25, 2020.

At the conclusion of the Complainants' case in chief, the employer moved for a directed verdict. 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 denied the Motion for a Directed Verdict because I found that significant factual and legal questions remained as to whether the CBA's grievance process was

complied with. The evidence at that point did not establish that all procedural requirements at each Level, such as a written response by the employer was complied with or otherwise waived. Further evidence was needed concerning the practical effect of an employee grievance having to move through the process "by default", so to speak, meaning moving to the next Level of the grievance procedure after the employee receives no written response at a lower Level and whether a practice of doing so constitutes a breach of the CBA. I concluded that it could not be said that as a matter of that there was no obligation to bargain what the union alleges to be a unilateral change in the grievance process by such a practice requiring grievances to be initiated at the Superintendent's level when it deals with an issue already addressed by the Superintendent. Under such circumstances it remains an whether the district is excused from following all Levels in a matter it either does not believe to be resolvable at a level below the Superintendent or that it does not believe to be grievable at all. To do so would, in effect, compel a grievant to abandon a venue it considers to be appropriate for resolution of its issues. Because the question of arbitrability belongs to the arbitrator, factual issues remained as to how a matter procedurally gets to an arbitrator for determination of grievability unless all grievance procedure Levels are followed.

Accordingly, the Employer proceeded with its case-in-chief, introducing additional testimony and documentary evidence.

All parties hereto were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Closing briefs in lieu of oral argument were submitted by Complainant and Respondent on September 11, 2020. Both briefs were duly considered. 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: In the Pre-Hearing Order herein, the parties stipulate that the following matters are not in dispute:

1. REA is the exclusive representative for all regular certified and classified employees of the District.

2. The District is a public employer as defined in the Public Employee Bargaining Act.

3. REA and the District are parties to a collective bargaining agreement ("CBA") effective July 1, 2018 through June 30, 2021.

Although originally stipulated, facts concerning District employee Amanda Owens having filed a grievance challenging a reassignment and being represented by NEA-NM UniServ Director Greg Maxie in grievance proceedings are no longer relevant as a result of certain claims and evidence being withdrawn by the Union. In addition to the foregoing, I make the following findings:

4. The Public Employee Bargaining Act (PEBA) requires that collective bargaining agreements between public employers and exclusive representatives include a grievance procedure to be used for the settlement of disputes pertaining to employment terms and conditions and related personnel matters. Special Notice of NMSA 1978 §10-7E-17(F) (2020).

5. The parties negotiated a CBA in which they agreed to a five-Level procedure, set forth as Article IX of that CBA, for filing and processing grievances as summarized below:

> Level 1: The "discussion level" at which within 10 days of an occurrence, a grievant meets with an immediate supervisor to discuss resolving the issue. If the supervisor does not meet with the grievant within five days, the grievant may proceed by filing a written grievance with the supervisor at Level 2.

Level 2: The "supervisor level" at which a written grievance is submitted to the grievant's immediate supervisor within five days of the meeting at Level 1. The supervisor is required to "communicate a decision in writing" within five days thereafter.

Level 3: The "superintendent level" which is invoked by appealing the immediate supervisor's decision to the superintendent within five days of receipt. The Superintendent under this Level is required to meet with the grievant to review the record and information presented at the preceding Levels and render a written decision within five days thereafter.

Level 4: The "mediation level." If the aggrieved party is not satisfied with the result of the Level 3 decision, then within 10 days thereafter, the aggrieved party may contact the Federal Mediation and Conciliation Service (FMCS) for appointment of a mediator.

Level 5: The "arbitration level". If mediation is not successful the aggrieved party may submit a request to FMCS for arbitration within 10 days after conclusion of the mediation process. Within five days thereafter, the Union is required to file with FMCS a request for a panel of available arbitrators and the parties are required to meet within 10 days after receipt of the panel to confer on selection of an arbitrator. (Joint Exhibit 1).

6. On August 30, 2019, the Complainant, Daniel M. Kessler, initiated a grievance at Level 1 of the CBA's grievance procedure. Exhibit A; Day 1 Rec. at 2:11:00-2:13:40.

7. On September 4, 2019, Lisa Vasquez, the former President of Complainant Ruidoso Education Association (REA), notified Mr. Kessler that a Level 1 meeting was scheduled

with his immediate supervisor, Dr. Melvina Torres, for the next day. Exhibit B; Day 1 Rec. at 2:13:40-2:15:00.

8. Later that evening, Ms. Vasquez notified Mr. Kessler that the meeting was cancelled with no explanation and no rescheduling of the meeting. Day 1 Rec. at 2:15:00-2:17:05; Exhibit C.

9. Upon learning of Mr. Kessler's grievance, the Superintendent of Ruidoso Municipal Schools, Dr. George Bickert, told Dr. Torres not to meet with Mr. Kessler. Day 2 Rec. at 0:15:10-0:16:50.

10. Dr. Bickert sent a letter dated September 6, 2019 to Mr. Kessler's grievance representative, Greg Maxie, explaining that in part:

> "The decisions which you seek to challenge have either been rejected by the local union representative or the local representatives have been left out of the discussions. In either event it is not productive for there to be non-grievable issues submitted and continually challenged.
>
> The decisions you have challenged are clearly within the purview of the superintendent of the school district and no one else in the District. It is therefore imperative that if you continue to raise these non-grievable issues that you refer them directly to my office."

Exhibit J2.

11. On September 9, 2019, REA and Mr. Maxie responded to Dr. Bickert's letter, Exhibit J-2, stating in part:

"REA formally requests that you process all grievances and follow all steps in the CBA."

Exhibit I.

12. On September 12, 2019 Dr. Bickert communicated via email to Greg Maxie, copied to Mr. Kessler among other interested parties, stating in part:

"I am in receipt of your most recent correspondence and once again will clarify that those items which are not grievable will be identified as such and will not be reviewed or commented upon…" Exhibit D

13. After no Level 1 meeting took place with his immediate supervisor within the time frame called for in the contract grievance procedure, Mr. Kessler submitted his written grievance at Level 2. Day 1 Rec. at 2:29:40-2:34:55; Exhibit E.

14. After Mr. Kessler received no response to his Level 2 grievance. he submitted his grievance to Dr. Bickert by email and by dropping off a hard copy at the school district's central office in conformance with Level 3 of the grievance procedure. Day 1 Rec. at -; Exhibit H. Day 1 Rec. at 2:33:20-2:39:20; Exhibit G.

15. Dr. Bickert did not respond to Mr. Kessler's grievance at Level 3, and did not meet with Mr. Kessler as required under CBA Art. IX.E.3.b. Day 1 Rec. at 2:40:00-2:43:25; Day 2 Rec. at 46:20-46:40.

16. Article IX.C.4 of the CBA provides:

> "[i]f a situation affects a group or class of employees, whether or not any employees have chosen to file a grievance, the Association may file the grievance . . . The Association has the right to initiate a grievance at the Superintendent's Level as appropriate."

Exhibit J1, Art. IX.C.4 (p. 29).

17. Dr. Bickert did not respond to REA President Ms. Ames Brown's October 18, 2019 request that he "let [them] know [his] preferences on scheduling mediation,". Exhibit J; Day 2 Rec. at 4:20:25-4:21:34.

18. Mr. Kessler acknowledges that he did not contact FMCS as required at Level 4 of the grievance procedure. Exhibit J1 Art. IX.E.4.c (p. 31); Day 1 Rec. at 2:44:40-2:45:35.

19. Dr. Bickert testified that the procedure to be followed by management after he directed initial screening for grievable issue to be substantially as follows:

A. School site administrators, the recipients of Level 1 and Level 2 grievances, would review the issues in the grievance to see if they were addressed in the CBA. If the administrator determined that the issues were within the CBA he or she would respond to the grievance. Day 2 Recording, at 25:00-38:30.

B. If the administrator determined that the issues were not within the CBA they would be deemed to be non-grievable and the administrator would direct the employee to the proceed under School Board policy and not provide any response under the CBA grievance process. Day 2 Recording at 25:10-27:25, 37:40 – 39:50.

REASONING AND CONCLUSIONS OF LAW:

I. BY FAILING OR REFUSING TO ABIDE BY THE PROCEDURAL STEPS AT EACH LEVEL OF THE CBA'S GRIEVANCE RESPONDENTS VIOLATED § 10-7E-5 OF THE PEBA.

PEBA § 10-7E-5 provides:

> "Public employees, other than management employees and confidential employees, may form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion and shall have the right to refuse any such activities."

Respondent argues that because § 5 specifically refers to the right to form, join, or assist a labor organization for the purpose of collective bargaining and Complainants make no reference to being unable to form, join, or assist REA for the purpose of collective bargaining, § 5 is irrelevant and claims for its violation should be dismissed. I do not agree with Respondents' view of how § 5 operates to protect employee rights.

PEBA § 10-7E-5 has a corollary in section 8(a)(1) of the National Labor Relations Act so that cases decided under the federal law are instructive. Like Section 5 of the PEBA, Section 8(a)(1) of the NLRA makes it an unfair labor practice to promulgate, maintain, or enforce

work rules that reasonably tend to inhibit employees from exercising their rights under the Act. Under NLRB precedent the test for a violation Section 8(a)(1) is whether the employer engaged in conduct which, it may reasonably be said, *tends to interfere* with the free exercise of employee rights under the Act. See *American Freightways Co.*, 124 NLRB 146, 147 (1959). See also *Joseph Chevrolet,* 343 NLRB 7, 12 (2004). ("the test … is whether, from the standpoint of the employees, *it has a reasonable tendency* to interfere with, restrain or coerce the employees in the exercise of protected rights.") (emphasis added); and *Double D Construction Group, Inc.*, 339 NLRB 303, 303 ("[t]he test … is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction").

The PEBA requires that collective bargaining agreements include a grievance procedure to be used for the settlement of disputes pertaining to employment terms and conditions and related personnel matters. As the grievance procedure is integral to the collective bargaining process, public employees have a "basic and fundamental" right to utilize and participate in negotiated grievance procedures. *See AFSCME v. State of N.M., Regulation & Licensing Dep't*, 2013 WL 12205593, (citing *Consumers Power Co. & Local 103, Utility Workers of Am., AFL-CIO*, 245 NLRB 183 (1979) and *Limbach Co.*, 337 NLRB 573, 589 (2002)). "Without this right, protection of any preceding and supportive concerted activity becomes useless and a sham." *Id.*

Dr. Bickert, as Superintendent, created a procedure to be followed by school site administrators, to whom grievances at the initial stages are most commonly submitted, directing them to screen grievances for whether (in their subjective opinions) the issues were addressed in the CBA. Only if the site administrator determined that the grievance issues were within the CBA would a response be issued under Levels 1 and 2 of the grievance procedures. Otherwise, the grievance was to be deemed non-grievable and the site

administrator would direct the employee to the proceed under School Board policy. Regarding Complainant Kessler's grievance at issue in this case, Dr. Bickert, told his immediate supervisor, Dr. Torres, not to meet with him regarding his grievance. In a letter dated September 6, 2019 to Mr. Kessler's grievance representative, Greg Maxie, Dr. Bickert wrote:

> "The decisions which you seek to challenge have either been rejected by the local union representative or the local representatives have been left out of the discussions. In either event it is not productive for there to be non-grievable issues submitted and continually challenged.
>
> The decisions you have challenged are clearly within the purview of the superintendent of the school district and no one else in the District. It is therefore imperative that if you continue to raise these non-grievable issues that you refer them directly to my office."

Again, on September 12, 2019, Dr. Bickert communicated via email to Greg Maxie and others, stating in part:

> "I am in receipt of your most recent correspondence and once again will clarify that those items which are not grievable will be identified as such and will not be reviewed or commented upon…"

While I see no problem with initial screening for grievability, a problem exists when the Superintendent-directed response to a subjective determination that a matter is non-grievable is to disregard the CBA's response requirements at Levels 1 and 2 and to steer the grievant away from the negotiated contract procedure to the Employer's procedure under its own policies. There is no reason that the employer having determined a matter to be non-grievable simply states that in its responses at levels 1 and 2. Or if the District so confident in non-grievability wanted to, it could offer to waive all steps in the grievance since, as Dr. Bickert testified the decision had already been made at his level, and proceed directly to mediation and arbitration. Those possibilities were not considered because as Dr. Bickert testified not only that he wanted that no response given those matters deemed non-grievable

but that he wanted any such matters moved out of the grievance process entirely and into the School Board's personnel process.

Developing a practice of initiating individual grievances at Level 3 should not be encouraged as that is a procedure limited by the parties' CBA to multiple party grievances filed by the REA. CBA Article IX.C.4 states:

> "[i]f a situation affects a group or class of employees, whether or not any employees have chosen to file a grievance, the Association may file the grievance . . . The Association has the right to initiate a grievance at the Superintendent's Level as appropriate."

Exhibit J1, Art. IX.C.4 (p. 29).

Under such circumstances it cannot reasonably be disputed that the Respondents' unilateral change in the contract grievance procedure at least *tends to*, if not actually impairs the basic and fundamental right to participate in the negotiated grievance procedure because the a clear response obligation at each step of the grievance procedure was disregarded without authority.

It is no defense to point out that Mr. Kessler moved his grievance forward despite receiving no replies at Levels 1 or 2, because his doing so illustrates the problem. Because the CBA does not provide for a grievance to move to the next level automatically upon expiration of management's deadline for a meeting or written response, a grievant is a risk of either missing a chance to move a grievance forward while waiting for a response that's never going to come or being found not to have completed all administrative procedures if and when grievant ever gets to an arbitrator because the grievant followed a process other than as agreed in the CBA. Thus, Respondents' unilateral change to the process becomes a trap for the unwary and an opportunity for the unscrupulous.

Dr. Bickert testified that when Mr. Kessler filed his grievance, he had already decided he issue. See, e.g., Day 2 Rec. at 44:27-47:15; Exhibit K ("The [grievance] ha[s] not received a

response not because the District has no response, but because the reasons have already been provided by the persons granted the authority to make such decisions.").

Based on the foregoing both Respondents failed or refused to abide by the procedural steps at each level of the CBA's grievance respondents and thereby violated § 10-7E-5 of the PEBA. That violation constitutes a prohibited labor practice under § 10-7E-19(G) which prohibits refusal or failure to comply with a provision of the Public Employee Bargaining Act.

II. BY FAILING OR REFUSING TO ABIDE BY THE PROCEDURAL STEPS RESPONDENTS VIOLATED NMSA 1978 § 10-7E-19(H) PROHIBITING AN EMPLOYER'S FAILURE OR REFUSAL TO ABIDE BY THE NEGOTIATED TERMS OF ITS CBA WITH THE UNION.

As Dr. Bickert acknowledged in his testimony, whether an employee's grievance presents a grievable issue a determination reserved for an arbitrator. He testified at the merits hearing that he was prepared to go forward to mediation with Mr. Kessler's grievance Level 4 of the CBA's grievance procedure. (Kessler did not advance the grievance to arbitration). His professed willingness to engage in mediation at Level 4 of the procedure does not excuse failure to abide by the contract at Levels 1, 2 or 3. Dr. Bickert testified that he had already made the decision regarding Mr. Kessler's coursework prior to the grievance being filed. See, e.g., Day 2 Rec. at 44:27-47:15; Exhibit K ("The [grievance] ha[s] not received a response not because the District has no response, but because the reasons have already been provided by the persons granted the authority to make such decisions."). Mr. Kessler acknowledges that he did not contact FMCS as required at Level 4 of the grievance procedure. Exhibit J1 Art. IX.E.4.c (p. 31); Day 1 Rec. at 2:44:40-2:45:35. By this time, however, Respondents had already committed multiple infractions of the grievance

procedure. See Section 1.A, supra. When Ms. Ames Brown contacted Dr. Bickert on October 18, 2019 asking for him to "let us know your preferences on scheduling mediation," Dr. Bickert did not respond. Exhibit J; Day 2 Rec. at 4:20:25-4:21:34. Furthermore, the District's letter dated September 6, 2019, its multiple refusals to respond to Mr. Kessler's grievance, and then its October 25, 2019 letter sent through counsel stating that Mr. Kessler's grievance has "not received a response . . . because the reasons have already been provided by the person granted the authority to make such decisions" made clear to Complainants that the District would not be cooperating in good faith to resolve Mr. Kessler's grievance at any subsequent level. Exhibit K. See also Exhibit J2; Day 1 Rec. at 45:05-47:01. Dr. Bickert testified at the hearing on August 25, 2020 that he was prepared to go forward to mediation with Mr. Kessler's grievance, but all of his stances and statements regarding the grievance indicate otherwise – that he was not willing to engage in any way in the grievance procedure and in fact resented that Mr. Kessler had filed a grievance challenging a decision that Dr. Bickert believed was not subject to challenge for which he, and only he, had the final say in making. Day 2 Rec. at 4:07:15-4:07:35; 4:09:40-4:10:30; 4:11:55-4:28:15; Section 1.A, *supra*. See also generally Day 2 Rec., Dr. Bickert testimony.

III. RESPONDENTS UNILATERALLY ALTERED THE GRIEVANCE PROCEDURE IN VIOLATION OF THE DUTY TO BARGAIN IN GOOD FAITH AND PEBA SECTIONS 10-7E-15(A), 10-7E-19(F).

The PEBA imposes affirmative and reciprocal duties on exclusive representatives and public employers to "bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties." See § 17(A)(1). See also § 19(F) and § 20(C) making it a prohibited labor practice to fail or refuse to bargain in good faith. There are two standards applicable, depending on what type of violation is alleged. Specifically, a

violation of the duty to bargain in good faith can be either a per se violation in which actual intent or subjective good faith is irrelevant; or a pattern of bad faith negotiation. In the latter type of case, an intent to frustrate bargaining may be inferred from conduct. The former type pf case, a per se failure to bargain, applies when the offending conduct is clear and unambiguous. See, *NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 465 (2d Cir. 1973). *Cf. AFSCME Council 18 v. NM Tax & Rev. Dep't.*, PELRB Case No. 104-12, 55-PELRB-2012. *AFSCME, Council 18 v. NM Department of Workforce Solutions*, PELRB No. 102-17, 11-PELRB-2017. The District Court affirmed the Board's conclusion that NMDWS violated §19(F) when it unilaterally changed the required number of inspections. No. D-202-CV-2017-07924 (November 19, 2018).

An employer commits a per se violation of this duty to bargain if it makes a unilateral change to a matter that is a mandatory subject of bargaining. See *Cty. of Los Alamos v. Martinez,* 2011-NMCA-027, ¶11, 150 N.M. 326; *Transportation Services of St. John, Inc.*, 369 N.L.R.B. No. 15 (2020). A per se violation is based on an employer's failure to negotiate and requires no analysis of its subjective good or bad faith. *Cf. CWA Local 7076 v. State of New Mexico*, 1-PELRB-2015, PELRB No. 122-14, Hearing Officer's Report at 23 ("For per se violations, intent is not relevant.").

In this case, the grievance procedure provides that an employee must start at Level 1 and advance a grievance sequentially through five levels. The District must take certain affirmative actions in response at all subsequent levels. For example, at Level 1 a grievant's immediate supervisor is required to meet with the grievant to discuss the issues prior to filing a grievance. At Level 2 the immediate supervisor will communicate a decision, in writing, within five days after receiving the grievance and at Level 3, the superintendent is required to meet with the aggrieved and/or representative(s) within five days of the a request for review,

or at another agreed upon date. The CBA does not allow that the District may do nothing in response to a grievance. The preponderance of the evidence establishes, however, that in September 2019, Dr. Bickert unilaterally implemented a grievance screening process that had the practical effect of allowing the District to do just that, if in its sole discretion, the District deemed the issue to be non-grievable. Furthermore, Dr. Bickert directed that if a site administrator determined that a disputed issue was not a proper grievance then the administrator would direct the employee to the grievance process under Board policy and not provide any response under the CBA grievance process.

Because the PEBA requires that every CBA contain a negotiated grievance process and because of the nature of a grievance procedures effecting working conditions, there can be little dispute that the grievance process is a mandatory subject of bargaining. It is a per se breach of the duty to bargain to unilaterally alter a mandatory subject of bargaining, that is, without first providing notice to the union and opportunity to bargain to impasse.

In *Central Consolidated School Association v. Central Consolidated School District*, 27-PELRB-13 (October 11, 2013), upheld on appeal as *Adrian Alarcon v. Albuquerque Public Schools Board of Education and Brad Winter Ph.D., Superintendent of Albuquerque Public Schools,* No, A-I-CA-34843 consolidated with *Central Consolidated School District No. 22 v. Central Consolidated Education Association*, No. A-I-CA-34424. (J. Vigil) (November 30, 2017), the New Mexico Court of Appeals upheld a decision of this Board and a decision of the Albuquerque Public Schools Board *inter alia* that the School Districts violated NMSA § 10-7E-19(F), (G) and (H) by refusing to review grievances appealed to the school board pursuant to Step 4 of their negotiated grievance procedure.

Therefore, it is reasonable to conclude that Dr. Bickert and the School District violated NMSA 1978 §§ 10-7E-15(A) and 10-7E-19(F) when they unilaterally altered the grievance procedure without first providing notice to the union and opportunity to bargain.

CONCLUSION

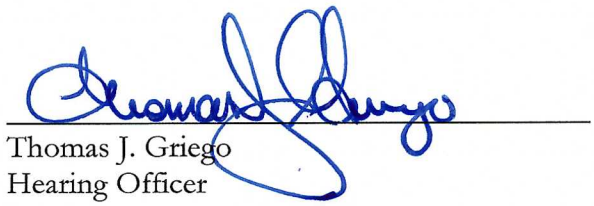
By failing or refusing to abide by the procedural steps at each level of the CBA's grievance, Respondents violated § 10-7E-5 of the PEBA, which constitutes a Prohibited Labor Practice pursuant to § 10-7E-19(G). By the same conduct both Respondents also violated NMSA 1978 § 10-7E19(H) prohibiting an employer's failure or refusal to abide by the negotiated terms of its CBA with the union. Both Respondents, by unilaterally altered the grievance procedure in violation of the duty to bargain in good faith further breach a duty under sections 10-7E-15(A) of the Act and thus committed a prohibited Labor Practice pursuant to section 10-7E-19(F) of the Act. It is my recommendation therefore that the Board enter its Order finding the violations of the Public Employee Bargaining Act as set forth herein and requiring Dr. Bickert and the School District to:

1. Cease and desist its practice of referring matters deemed by site administrators to be non-grievable to a procedure outside the contract grievance procedure and to process all grievances in accord with the process outlined in the CBA;

2. Post a notice acknowledging that it violated PEBA Sections 10-7E-5, 17(F), 19(B), 19(G), and 19(H) by failing to follow the grievance procedure contained in the collective bargaining agreement and by violating its duty to bargain in good faith, in a form substantially conforming with that appended hereto as Appendix A, for a period of no less than 60 days, in a place or places frequented by bargaining unit employees.

Because the parties have already engaged in FMCS assisted mediation and Mr. Kessler did not timely request arbitration additional relief requested by the Complainants will be denied.

Issued, Tuesday, September 22, 2020.



Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board
2929 Coors Blvd. N.W., Suite 303
Albuquerque, New Mexico 87120

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD
An Agency of the State of New Mexico

The Public Employee Labor Relations Board has found that we (Dr. George Bickert and the Ruidoso Municipal School District) violated the Public Employee Bargaining Act and has ordered us to post and obey this notice.

You have the right under the Public Employee Bargaining Act §10-7E-17(A)(1), to bargain collectively with the Ruidoso Municipal School District in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties.

As defined by the Public Employee Bargaining Act, §10-7E-4(I) The Ruidoso Education Association, having been recognized as an exclusive representative, has the right to represent certain District employees covered under the parties' Collective Bargaining Agreement (CBA) now in effect.

That CBA includes procedures to be undertaken when an employee files a grievance. By failing to follow those procedures, and unilaterally altering the grievance procedure, we did not comply with the CBA and violated NMSA §§ 10-7E-5; 10-7E-15(A); 10-7E-17(F); and 10-7E-19(B), (F), (G), and (H).

We acknowledge the above-described rights and responsibilities and will not in any like manner violate the PEBA, and we agree to honor our commitments under the CBA, including following the grievance procedures.

_____ Date:_____
Dr. George Bickert, Superintendent