

13-PELRB-2023

STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

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

Complainant,

v.

PELRB No. 102-23

NEW MEXICO HUMAN SERVICES DEPARTMENT,

Respondent.

ORDER

THIS MATTER came before the Public Employee Labor Relations Board (hereinafter the “Board”) at its open meeting on April 4, 2023 upon the Complainant’s appeal from the Executive Director’s February 28, 2023 Summary Dismissal. Upon the pleadings on file, and the Union not appearing to give argument why the case should not be dismissed, the Board voted 3-0 to affirm the Summary Dismissal and adopt the findings therein as its Order.

THEREFORE, the Executive Director’s February 28, 2023 Summary Dismissal shall be, and hereby is, affirmed and adopted as an Order of this Board.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

DocuSigned by:

Nan Nash

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NAN NASH, BOARD CHAIR

Date: 4/12/2023



STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

MICHELLE LUJAN GRISHAM
Governor

Nan Nash, Chair
Marianne Bowers, Vice-Chair
Mark Myers, Member

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THOMAS J. GRIEGO
Executive Director

February 28, 2023

New Mexico Human Services Department
P.O. Box 2348
Albuquerque, New Mexico 87504-2348
Attn: Dustin Acklin, Employee Relations Mgr.

AFSCME, Council 18
1202 Pennsylvania NE
Albuquerque, New Mexico 87110
Attn: Joel Villarreal, Staff Rep.

New Mexico State Personnel Office
2600 Cerrillos Rd.
Santa Fe, New Mexico 87505-3258
Attn: Lisa Garcia, Labor Relations Admin.

Re: *AFSCME, Council 18 v. N.M. SPO and N.M. HSD; PELRB 102-23*

Dear parties:


On February 21, 2023, I issued a Letter Decision concerning a Motion to Dismiss in this case, in which I requested AFSCME, Council 18 to withdraw the complaint within five days and, absent such withdrawal, the PPC shall be dismissed for the reasons set forth in that Letter Decision.

The PPC has not been withdrawn and by operation of our rules is deemed to be dismissed.

Pursuant to 11.21.3.13 NMAC, the director's decision to dismiss a complaint shall be subject to board review by the complainant filing with the board and serving upon the other parties a notice of appeal within 10 days following service of the dismissal decision. I have not received a notice of appeal to the Board of my Dismissal of this Complaint. Nevertheless, the matter is on the Board's agenda for March 7, 2023.

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD


Thomas J. Griego
Executive Director



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Re: ***AFSCME, Council 18 v. N.M. SPO and N.M. HSD; PELRB 102-23***

Dear parties:

This letter memorializes my decision announced today, granting New Mexico Human Services Department's Motion to Dismiss.

PROCEDURAL BACKGROUND

AFSCME, Council 18 filed a Prohibited Practices Complaint on January 23, 2023, alleging violations of § 19(F) of the Public Employee Bargaining Act (refuse to bargain collectively in good faith with the exclusive representative) and § 19(H) (refuse or fail to comply with a collective bargaining agreement) of the PEBA) after HSD issued a notice on December 30, 2022 that all HSD employees who are on telework or hybrid telework schedules will return to the office no later than February 2, 2023. On January 27, 2023 AFSCME filed a Motion for Temporary Relief asking that this Board enjoin implementation of HSD's return-to-work directive until a decision of the PPC is entered, which Motion was denied on February 2, 2023.

At that emergency hearing the parties set February 21, 2023 as the date to hear HSD's Motion to Dismiss filed on January 30, 2023. That Motion alleged, *inter alia*, that the parties engaged in negotiation beginning November 29, 2022 regarding the effects of a statewide termination of the State's Telework Policy effective January 1, 2023, which negotiations included staff schedule bids. An emergency Hearing on the Union's Motion for Temporary Injunctive Relief was held on February 1, 2023 resulting in a Letter Decision dated February 2, 2023, denying a Stay of the

“return-to-work” policy pending a determination of the PPC. On that same day, the Union submitted its supporting evidence as requested by the Executive Director pursuant to 11.21.3.12 NMAC as part of his investigation of the filed Complaint.

HSD filed its Answer on February 13, 2023. AFSCME filed an Amended PPC to name the New Mexico State Personnel Office as a party on February 15, 2023. I issued a letter declaring the Amended PPC to be facially adequate on February 20, 2023 in which I informed SPO of the hearing scheduled for the next day on HSD’s Motion to Dismiss.

STANDARD OF REVIEW

The PELRB’s rules provide that after screening a Prohibited Practices Complaint for facial adequacy, the director shall investigate the allegations, dismissing any complaint is not sufficiently supported by evidence then available to the complainant. See 11.21.3.12(B) and (C) NMAC (2004):

“B. After screening a complaint, the director shall investigate the allegations. The director need not await the filing of an answer before commencing the investigation. At the director’s request, the complainant shall immediately present to the director all evidence available to the complainant in support of the complaint, including documents and the testimony of witnesses.

C. If a complainant fails to timely produce evidence in support of its complaint pursuant to the director’s request, or fails to produce evidence that in the director’s opinion is sufficient to support the allegations of the complaint, the director shall request the complainant withdraw the complaint within five days and, absent such withdrawal, shall dismiss the complaint stating the director’s reasons in writing and serving the dismissal on all parties.”

The PELRB follows New Mexico courts in utilizing the liberal “notice pleading” standard. See *AFSCME v. City of Rio Rancho*, PELRB Case No. 159-06, testing the legal sufficiency of the complaint”). See also *Garcia v. Coffman*, 1997-NMCA-092, ¶ 11, 124 N.M. 12, 946 P.2d 216 (under the notice pleading standard, “it is sufficient that [the] defendants be given only a fair idea of the nature of the claim asserted against them sufficient to apprise them of the general basis of the claim”) (internal quotations and citation omitted), and *Sanchez v. City of Belen*, 1982-NMCA-070, 98 N.M. 57, 60, 644 P.2d 1046, 1049 (the general policy under the notice pleading standard is to provide for “an adjudication on the merits” rather than allowing “technicalities of procedures and form” to “determine the rights of the litigants”).

Although chronologically, this dismissal follows a hearing on HSD’s Motion to Dismiss, it is based primarily on the Executive Director’s screening and investigation of the PPC and Amended PPC pursuant to 1.21.3.12 NMAC (2004), rather than the Motion to Dismiss itself. In this regard the hearing on the Motion served the purpose of providing additional information pertinent to my investigation.

ANALYSIS AND CONCLUSIONS

- I. **The Evidence Available to the Complainant in Support of the Complaint as Provided Pursuant to 11.21.3.12 NMAC (2004) is not Sufficient to Support the Allegations of the Complaint, That HSD’s Failure to Make an Exception for Bargaining Unit Employees Currently on a Telework or Hybrid Schedule, Violated The CBA; That HSD Rescinded “Telework and Hybrid Schedules” Thereby Unilaterally Changing Agreed-Upon Terms and Conditions of Employment; and That any of HSD’s or SPO’S Acts or Omissions as Alleged Violated the PEBA § 19(F) (Refuse To Bargain Collectively in Good Faith With the Exclusive Representative) or § 19(H) (Refuse or Fail to Comply With a Collective Bargaining Agreement).**

In connection with the initial screening and investigation of the PPC required of the Executive Director the Complainant provided the following documentation relevant to this Letter Decision:

1. Agreement Between The American Federation of State, County and Municipal Employees and The State of New Mexico, including Appendix 9, Section 4, regarding Schedule Bidding – ISD and CSED Field Offices. Exhibit A.
2. Exhibit C-1, an October 6, 2022 letter from Dustin Acklin, Employee and Labor Relations Manager for HSD to Joel Villareal, AFSCME Counsel 18, Staff Representative, concerning a schedule bid on Friday October 21, 2022, effective November 12, 2022.
3. November 29, 2022 letter from L. Teresa Padilla, Director of State Personnel, to State employees regarding “discussions” with “union leadership to rescind the statewide Non-Mandatory Telework policy effective Jan. 1, 2023”. Exhibits D and E.
4. Email from Frederick Garcia to Connie Derr and Joel Villarreal, et al, concerning an email from Karmela Martinez of HSD dated December 29, 2022 concerning teleworkers return to their offices, retaining all existing policies regarding flex time and alternative work schedules, e.g. employees may request alternative work schedules in accordance with existing policy, and approval must be based on operational and customer need. Exhibit E.
5. Exhibit F, a Memorandum to “All HSD Employees” from “HSD Leadership Team” dated December 30, 2022, concerning Updated Timeframes for Return to HSD Offices; e.g. “Negotiations on the effects of the rescission of the statewide Non-Mandatory Telework Policy have concluded with both Unions. The important changes in implementation are as follows:

- a. All exempt employees, Managers, supervisors and directors will return to the office full-time on January 3, 2023.
 - b. Non-manager and non-supervisor employees on a 100% telework or hybrid telework schedule will return to the office full-time on or before February 2, 2023.
 - c. HSD referred employees to the Early Childhood Education and Care Department for resources to assist employees with locating childcare, if needed.
6. Exhibit G-1. Memorandum of Understanding between the State of New Mexico and the American Federation of State, County and Municipal Employees, New Mexico Council 18 regarding the effects of the rescission of the statewide Non-Mandatory Telework Policy issued by SPO on June 11, 2021, and effective January 17, 2021. The MOU provides in pertinent part:
- a. AFSCME bargaining unit Employees who have already returned to in-person work in the office will continue to report to the office.
 - b. Employees on 100% telework or hybrid telework will return to the office full-time on or before Thursday, February 2, 2023.
 - c. The rescission of the statewide Non-Mandatory Telework Policy will have no impact on an Employee's eligibility for an ADA Reasonable Accommodation.
 - d. This MOU does not change or alter the terms of the Parties' existing collective bargaining agreement.
 - e. The MOU shall not be altered, changed, or amended, except by instrument of writing executed by both Parties.
7. Email from Connie Derr dated June 8, 2021 to Joel Villarreal, Rob Trombley, Chris Armijo, Sam Chavez and Rocky Gutierrez transmitting a copy of the final draft of the negotiated non-mandatory telework policy and informing them that "there is no mandatory telework policy. Should the State decide to go that avenue, they must negotiate with us."

I conclude from my review of the foregoing documents that the parties CBA does not address either the state's telework policy issued in response to the COVID-19 pandemic, nor does it address rescission of that policy. After giving notice on November 29, 2022 that the emergency telework policy was coming to an end, the state and the various unions representing its employees, including the Complainant herein, bargained over the effects of terminating the State's Telework policy that in itself was terminable at any time in the Judgment of the Employer. I refer to Union exhibits D, D1, E and F. The parties, in fact, as a result of those negotiations entered into an MOU in which AFSCME not only agreed to employees returning to on-site work by the February 2nd deadline, but also acknowledged that the parties' CBA (which necessarily includes the schedule bid provision that the PPC alleges were violated) is unaffected by the return to on-site work.

AFSCME errs by considering its employees' schedule bid to be a bid to a telework schedule. There is nothing in Appendix 9, Section 4 of the CBA, regarding Schedule Bidding shows exactly that – the

bid is for hours of work – not for the work situs. While I have sympathy for those employees who bid for a schedule influenced by the then-existing fact that telework was available, those bidding on that basis assumed the risk that the state’s telework policy, terminable at the discretion of the state, may change before the next scheduled bid. My sympathy does not extend so far as to write into the parties’ CBA a provision that the employees bid not only for the hours to be worked, but the location where such work is to be performed, when they have not done so themselves.

As stated, the State and the Union bargained over the effects of terminating the State’s Telework policy culminating in an MOU in which AFSCME not only agreed to employees returning to on-site work by the February 2nd deadline, but also acknowledged that the parties’ CBA (which necessarily includes the schedule bid provision that the PPC alleges were violated) is unaffected by the return to on-site work. On those facts, the Union cannot demonstrate that either HSD or SPO failed to make an exception for bargaining unit employees currently on a telework or hybrid schedule violated the CBA in any way. Neither is it possible to show that HSD or SPO unilaterally changed agreed-upon terms and conditions of employment by rescinding the “Telework and Hybrid Schedules”. To the contrary, the effects of the change were fully bargained resulting in an MOU called for a return to the workplace by February 2, 2023. Should AFSCME believe that exceptions to that MOU are needed, it has already recognized its obligation to bargain a non-mandatory telework policy with the state at some future point if it should decide to go in that direction. It would be an abuse of this Board’s discretion to impose such an exception to the parties’ MOU by circumventing the parties’ bargaining.

Therefore, none of HSD’s or SPO’s acts or omissions as alleged may reasonably be said to have violated the PEBA § 19(F) (Refuse To Bargain Collectively in Good Faith With the Exclusive Representative) or § 19(H) (Refuse or Fail to Comply With a Collective Bargaining Agreement).

CONCLUSION

For the reasons stated herein, pursuant to 11.21.3.12(C) NMAC (2004), AFSCME, Council 18, is requested to withdraw the complaint within five days of this letter and, absent such withdrawal, the PPC shall be dismissed for the reasons set forth herein. Pursuant to 1.21.3.13 NMAC (2004) The director’s decision to dismiss this PPC has been placed on the Board’s March 7, 2023 agenda for review in the event the Union files a timely notice of appeal.

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD


Thomas J. Griego
Executive Director