

41-PELRB-2023

STATE OF NEW MEXICO PUBLIC EMPLOYEES LABOR RELATIONS BOARD

**UNITED HEALTH PROFESSIONALS
OF NEW MEXICO, AFT, AFL-CIO,**

Complainant

v.

PELRB No. 110-23

**UNIVERSITY OF NEW MEXICO
SANDOVAL REGIONAL MEDICAL CENTER,**

Respondent

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board at its regularly scheduled meeting on September 5, 2023 upon Respondent's request for Board review of the Hearing Officer's denial of the Respondent's Motion for a Stay of these proceedings in light of the District Court's ruling in case number D-202-CV-2023-02118 (Respondent's appeal of this Board's Decision in PELRB 304-22 recognizing the Complainant herein, as the exclusive representative for a bargaining unit comprising some of Respondent's employees).

The Board finds and concludes that Respondent's request is interlocutory in nature, and the requirements of NMAC 11.21.1.27 that review by the Board shall be permitted only after completion of proceedings by a hearing examiner, must be complied with.

WHEREFORE, by a vote of 3-0 the Board affirms the Hearing Officer's July 26, 2023 denial of Respondent's Request for Stay.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

DocuSigned by:

Peggy Nelson

9E707CC2FDCE437...

PEGGY J. NELSON, BOARD CHAIR

9/5/2023

DATE



STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

MICHELLE LUJAN GRISHAM
Governor

Nan Nash, Chair
Peggy Nelson, Vice-Chair
Mark Myers, Member

2929 Coors Blvd. N.W. Suite 303
Albuquerque, NM 87120
(505) 831-5422
(505) 831-8820 (Fax)

THOMAS J. GRIEGO
Executive Director

July 26, 2023

Youtz & Valdez, P.C.
900 Gold Avenue S.W.
Albuquerque, New Mexico 87102
Attn: James Montalbano

Office of University Counsel
The University of New Mexico
Scholes Hall Rm. 208, MSC05 3440
1 University of New Mexico
Albuquerque, New Mexico 87131-0001
Attn: Michael Calderon, Kevin Gick

Re: ***UHPNM, AFT v. UNM SRMC; PELRB 110-23***

Dear Counsel:

This constitutes my Letter Decision denying the Respondent's Motion For Stay of Proceedings.

PROCEDURAL BACKGROUND

On March 17, 2023, UNM Sandoval Regional Medical Center ("SRMC" or "Employer") appealed to the Second Judicial District Court of New Mexico this Board's Orders 8-PELRB-2023 and 9-PELRB-2023 (PELRB Case No. 304-22), concerning representation and certification of the Complainant herein ("UHPNM", "AFT" or "Union"). That appeal is now pending as Cause No. D-202-CV-2023-02118.

On May 5, 2023, Complainant filed the instant Prohibited Practice Complaint ("PPC") against SRMC alleging various violations of the Public Employee Bargaining Act arising out of financial information requests on January 31 and February 11, 2023, by the Union, which SRMC as declined to provide. On February 22, 2023, the Union requested from SRMC, documentation related to a presentation made by CEO Jamie Silva-Steele, which it declined to provide. Again, in late March of 2023, the Union made multiple requests to SRMC for documentation of OSHA injury reports and in April of 2023 the Union requested a current list of employees. To date, the Employer has refused to provide that information as well. On April 21, 2023, the Union requested from UNM SRMC six categories of information related to the Employer's plans to initiate layoffs at the hospital and the Employer has refused to provide that information.

Complainant alleges that all of the information and documents requested are presumptively relevant to the Union's duties as the certified representative, to enforce PEBA-protected rights and that UNM SRMC's refusal to provide the requested information is a per se violation of the Employer's

duty to bargain in good faith with the duly authorized representative.

SRMC filed its Answer to the PPC and a Motion For Stay of Proceedings on May 26, 2023. UHPNM responded to the Motion on July 7, 2023. I placed the Motion on the Board's agenda for consideration at its regularly scheduled meeting on July 11, 2023. The Board considered SRMC's objections to its consideration of the Motion and determined in its resulting Order 29-PELRB-2023, that it has jurisdiction over the subject matter and the parties herein, but that review by the Board shall be permitted only after completion of proceedings by a hearing examiner, pursuant to NMAC 11.21.1.27. Therefore, the Executive Director, as the designated Hearing Officer in this matter, was directed to decide the Motion For Stay of Proceedings. I consider the Motion to have been fully briefed by the citations and arguments in the Motion itself and the Response thereto filed June 12, 2023. A Hearing on the Motion was held on July 25, 2023 at which I heard testimony of one witness for the Employer and argument of counsel.

STANDARD OF REVIEW

I take my guidance as to the standard to be applied in deciding this Motion from Rule 1-074(Q)(c) NMRA applicable to this agency whenever an appeal is taken to the District Court from one of its Orders. A Request to Stay Proceedings must:

- “(c) state the reasons for granting a stay and the facts relied upon to show that:
 - (i) the appellant will suffer irreparable injury unless a stay is granted;
 - (ii) the appellant is likely to prevail on the merits of the appeal;
 - (iii) other interested persons will not suffer substantial harm if a stay is granted; and
 - (iv) the public interest will not be harmed by granting a stay.

The applicant has the burden of demonstrating that a stay is warranted. The standard articulated above is consistent with that espoused in *Associated Securities Corp. v. Securities & Exchange Commission*, 283 F.2d 773 (10th Cir.1960) adopted in *Tenneco Oil Co. v. New Mexico Water Quality Control Com'n*, 736 P.2d 986, 105 N.M. 708, 1986 NMCA 33 (N.M. App. 1986).¹

DISCUSSION

¹ In *Associated Securities Corp.*, the appellate court recognized four conditions which they determined should guide an appellate court in determining whether its discretion should be exercised in the granting of a stay from an order or regulation adopted by an administrative agency. These conditions involve consideration of whether there has been a showing of: (1) a likelihood that applicant will prevail on the merits of the appeal; (2) a showing of irreparable harm to applicant unless the stay is granted; (3) evidence that no substantial harm will result to other interested persons; and (4) a showing that no harm will ensue to the public interest.

I have carefully considered the Motion for a Stay of Proceedings in light of these four criteria. As discussed below, I find that the SRMC is not likely to prevail on the merits of the appeal, nor has it demonstrated that the other three factors favor the interim relief requested.

A. SRMC Has Not Demonstrated a Substantial Likelihood of Success on the Merits of its Appeal

To show that it is “likely to prevail on the merits of the appeal” SRMC will have to demonstrate that the Board’s certification order in PELRB Case No. 304-22 was “(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence on the record considered as a whole; or (3) otherwise not in accordance with law.” NMSA 1978, § 10-7E-23(B) (2003). In considering the Motion, I have reviewed once again, the Board Orders 26-PELRB-2022, 8-PELRB-2023, 9-PELRB-2023 and the Recommended Decisions underlying them. They are well-reasoned and supported by substantial evidence, so that they cannot reasonably be considered to be arbitrary, capricious or an abuse of discretion. There was no clear argument made in the hearing on the Stay Motion that the New Mexico Legislature’s 2022 amendment to URPEDA expressly recognizing the SRMC as a public employer subject the PEBA, violates the New Mexico Constitution and Constitution of the United States of America. I can only conclude that those novel claims that without more on this record, stand a remote chance of success. The likelihood that that the District Court will find that AFT is not the exclusive representative of the bargaining unit as found by this Board, and that AFT had no standing to bring this PPC, is small.

B. SRMC Has Not Demonstrated Irreparable Injury if the PPCs Are Not Stayed.

In order to obtain a stay, SRMC must also demonstrate that it will suffer irreparable injury absent a stay of these proceedings. Irreparable harm is the “single most important prerequisite for the issuance of a preliminary injunction.” *First W. Cap. Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1141 (10th Cir. 2017). It requires a showing of “significant risk” of “harm that cannot be compensated after the fact by money damages.” *Fish v. Kobach*, 840 F.3d 710, 751 (10th Cir. 2016). The testimony of Wilson Wilson, upon which SRMC relies indicates that its claimed harm is largely monetary or retrospective in nature. See also, Motion for Stay of Proceedings, page 4 ¶1. (“Given that the PELRB’s discretion in awarding relief is broad, including matters involving economic impact on a non-profit regional hospital, a stay pending appeal is proper. Moreover, no mechanism exists to undo relief issued by the PELRB should the parties be required to return to the certification process. Accordingly, a stay is proper.”)

The fact that an applicant may suffer financial detriment does not rise to the level of irreparable injury warranting issuance of a stay. Any such harm attributable to the Union may be remedied by damages, and as the Union argues, claimed potential monetary losses may be avoided by SRMC honoring and obeying the Order of this Board recognizing Complainant as the exclusive representative of the employees in question and engaging in the good faith bargaining required by NMSA 1978 § 10-7E-17 and 19(F) (2020). That good faith bargaining obligation has long been

recognized as including an employer's duty to provide information such as that requested by the Union as necessary to accomplish its representational role. As stated in *National Health Union of Hospital and Health Care Employees, District 1199NM v. University of New Mexico Hospital*, 3-PELRB-2005, pp. 17-18 (In re: PELRB case No.'s 106-04 and 315-04):

“As correctly noted by the Executive Director, under PEBA ‘[t]he Union has a duty to adequately represent its members and the Hospital has a duty to cooperate in the process.’ See Executive Director’s letter decision dated March 18, 2005, p. 4. The duty to adequately represent its members stems from the Union’s role as exclusive representative, see NMSA § 10-7E-15, and the Executive Director was correct in concluding that it is well established under the National Labor Relations Act (NLRA) that the duty of adequate representation requires that the Union ‘seek and obtain the information needed to adequately represent the bargaining unit members.’ See March 18, 2005 letter decision at 4; see also *The Developing Labor Law* (4th Ed.) at 890 (that the union has ‘not only the duty to negotiate collective bargaining agreements, but also the statutory obligation to police and administer existing agreements’). Additionally, the reciprocal duty of the parties to exchange information derives from their duty to collectively bargain in good faith. See NMSA § 10-7E-17(A)(1); compare *The Developing Labor Law* at 861.

By whatever angle the duty to furnish information is examined, however, it is clear that it would be ‘equally a prohibited practice under [PEBA] as it is under the [NLRA]’ for UNMH ‘not to provide the Union with the information needed’ by the Union for the Union to exercise its duty. See March 18, 2005 letter decision at 4; see also *NLRB v. ACME Indus. Co.*, 385 US 432, 435-36 (1967) (that ‘[t]here can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the performance of its duties,’ and that failure to provide such information is a breach of the statutory duty to collectively bargain in good faith) and *The Regents of the University of New Mexico v. New Mexico Federation of Teachers*, 1998 NMSC 20, ¶ 18, 125 N.M. 401 (that ‘absent cogent reasons to the contrary, we should interpret language of the PEBA in the manner that the same language of the NLRA has been interpreted, particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the time the PEBA was enacted’) (citing *Las Cruces Prof'l. Fire Fighters v. City of Las Cruces*, 1997 NMCA 31, ¶ 15, 123 NM 239).”

Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with a stay of proceedings as an extraordinary remedy that should only be awarded upon a clear showing that the applicant is entitled to such relief. SRMC has not made such a showing. I am persuaded by the Union’s argument that Mr. Wilson’s testimony established that there is no extra cost associated with defending these PPCs as all involved in doing so are salaried employees, and no harm to patient care has been demonstrated. I agree with the Union that at least as of May 20, 2022 SRMC is a public employer subject to the Public Employee Bargaining Act. Unless and until that fact is negated by a court of competent jurisdiction, or amended by the legislature, that is the law of the case.

I further agree that SRMC's argument in favor of the stay is tantamount to saying that it shouldn't have to spend time defending its actions alleged to have violated the PEBA before the PELRB, effectively giving it the ability to act with impunity. Accordingly, other than the possibility of a decision on the PPCs adverse to its interest, in which event SRMC may seek to stay enforcement, I find that there are no injuries demonstrated that would result from the absence of a stay at this juncture.

C. Substantial Harm to Other Parties and the Public Interest Will Result if the Requested Stay is Issued.

The third factor to be considered in granting a stay is the harm, if any, that could result to other parties if a stay is granted, and the fourth factor is the public interest.

As noted above, the PEBA imposes a duty to bargain in good faith upon both a public employer, and a union recognized by the PELRB as an exclusive representative of an appropriate group of employees. See NMSA 1978, § 10-7E-17(A)(1) (2020). If the NLRB's interpretation of the obligation to bargain as commencing with the election of an exclusive representative, or in this case, a card check pursuant to NMSA 1978, § 10-7E-14(C) (2020), SRMC was under a statutory obligation to bargain in good faith with the union since January 19, 2023. In any case it was so obliged as of the certification of results by the board, February 15, 2023. It is the declared public policy of the State of New Mexico that the purpose of the PEBA is to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions. See NMSA 1978 § 10-7E-2. To the extent the union is impeded in fulfilling its role as exclusive representative its rights under the PEBA are impaired, its constituent members' rights under the PEBA are impaired and the public interest expressed in § 2 of the Act, is impaired.

It has long been recognized that an employer's refusal to bargain with its employees' chosen representatives adversely impacts employee morale, their organizational activities and discourages their membership in unions. See *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944). Similarly, the D.C. Circuit in *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1459 (D.C. Cir. 1997) has affirmed the NLRB's presumption that a loss in majority status is caused by an employer's refusal to bargain with the Union, finding:

“[I]lengthy delays in bargaining deprive the union of the ability to demonstrate to employees the tangible benefits to be derived from union representation. Such delays consequently tend to undermine employees' confidence in the union by suggesting that any such benefits will be a long time coming, if indeed they ever arrive. Thus, delays in bargaining caused by an employer's unlawful refusal to recognize and bargain with an incumbent union foreseeably result in loss of employee support for the union, whether or not the employees know about the delay.”

Letter Decision re: Motion for Stay
July 26, 2023
Page 6

The apparent delay in SRMC recognizing its good faith bargaining obligation demonstrated in this case and by its request for a Stay of this PPC, constitutes the kind of lengthy delay in bargaining that deprives the union of its ability to demonstrate to its represented employees the tangible benefits to be derived from union representation. Further delay that would result from granting the requested Stay would cause the kind of substantial harm to the Union and SRMC employees recognized in *Franks Bros. Co.* and *Lee Lumber & Bldg. Material Corp.* Encouraging that delay by granting the requested Stay is not in the public interest.

CONCLUSION

For the reasons discussed above, I am compelled to conclude that SRMC's Motion For Stay of Proceedings filed May 26, 2023, should be, and hereby is, **DENIED**.

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

A handwritten signature in blue ink that reads "Thomas J. Griego". The signature is written in a cursive style with a large, stylized "G" at the end.

Thomas J. Griego
Executive Director