STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

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

Complainant

v. **PELRB No. 109-23**

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 January 9, 2024 for review of the Hearing Officer's Report and Recommended Decision issued in this case on December 5, 2023. Having reviewed the file, hearing argument from the parties, and being otherwise sufficiently advised, the Board voted 3-0 to adopt the Hearing Officer's Report and Recommended Decision, issued in this case on December 5, 2023.

WHEREFORE the Hearing Officer's Report and Recommended Decision, issued in this case on December 5, 2023 is hereby adopted as the Order of this Board.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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Peggy Nelson
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PEGGY J. NELSON, BOARD CHAIR **DATE:** 2/8/2024

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

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

Complainant,

v. **PELRB No. 109-23**

UNM SANDOVAL REGIONAL MEDICAL CENTER, INC.,

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, for a Hearing on the Merits of a Prohibited Practices Complaint filed by United Health Professionals of New Mexico, AFT (Union or AFT) on May 5, 2023, against UNM Sandoval Regional Medical Center, Inc (SRMC). AFT alleges that on April 21, 2023 SRMC began a process of layoffs, affecting members of the bargaining unit AFT purports to represent, despite its request to bargain and that SRMC also unilaterally changed its layoff policy on April 10, 2023.

In addition, the Complaint alleges that UNM SRMC unilaterally assigned different duties to the Medical Center's Post-Anesthesia Care Unit (PACU) and Perioperative unit (Pre-Op) employees, and has required them to float to different units, performing duties not previously required. SRMC has ignored requests to bargain by the Union.

SRMC Answered the PPC on May 26, 2023, contending that in *UNM Sandoval Regional Medical Center, Inc. v. UHPNM, AFT, AFL-CIO,* Cause No. D-202-CV-2023-02118, District Court Judge Victor Lopez reversed the Board's Orders 26-PELRB-2022 (concluding that SRMC employees employed on a per diem or "PRN" basis are "regular" employees for the purposes of the PEBA and

remanding to me the issues of whether the PRNs share a community of interest with others in the petitioned-for unit), 8-PELRB-2023 (concluding that the PRNs share a community of interest with others in the petitioned-for unit so that it is appropriate to recognize a single bargaining unit that includes them and directing me to conduct a card-check) and 9-PELRB 2023 (ratifying and affirming the Card Check results issued January 19, 2023 and the resulting Certification of Representation). As a result, ratification of the card check subsequent certification of AFT as the exclusive bargaining unit representative was reversed so that the duty to bargain had not yet attached. SRMC also relies on the District Court's dismissal of AFT's Emergency Petition for Declaration of Obligation to Bargain filed as *United Health Professionals of New Mexico, AFT, AFL-CIO v. University of New Mexico Sandoval Regional Medical Center,* Cause No. D-202-CV-2023-01330 (J. Allison, Oct. 18, 2023), based on Judge Lopez's reversal of Orders 26-PELRB-2022, 8-PELRB-2023 and 9-PELRB 2023. Accordingly, Respondent did not have a duty to bargain during the time period alleged in the Prohibited Practices Complaint. In its Answer, SRMC further contends that its actions in or between April to May 2023 were consistent with SRMC's longstanding reduction-in-force ("RIF") policy and maintaining the *status quo*. The May 2023 RIF was not a unilateral change because SRMC employees "had a reasonable expectation that layoffs would occur". SRMC contends that the RIF was undertaken pursuant to "a substantively consistent policy in place since at least 2017". SRMC denies changing the terms and conditions of employees working in PACU between April 5, 2023 and May 5, 2023 and affirmatively posits that the Pre-Op/PACU Department is one-in-the-same so that nurses hired to work in that Department have provided perioperative care and services utilizing the same core competencies since at least 2021. The nurses within the Pre-Op/PACU Department work interchangeably and float between the Pre-Op and PACU units at SRMC, including covering PACU call. Accordingly, Respondent's longstanding practice of floating nurses

between the Pre-Op and PACU units within the Pre-Op/PACU Department is consistent with the *status quo*.

A hearing on the merits was held Monday, October 30, 2023. The record was held open to November 1, 2023 for the purpose of receiving into evidence a verified copy of a Competency Based Orientation document, Exhibit 5. All parties hereto were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Briefs in lieu of oral closing arguments were timely submitted by both parties on November 21, 2023. 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:

1. AFT is a "labor organization" as that term is defined in Section 4(K) of the PEBA. (Stipulated in the parties' SPHO).
2. Respondent is a "public employer" as that term is defined in Section 4(R) of PEBA (NMSA 1978, § 10-7E-4(R) (2020)), by virtue of Senate Bill 41, which became effective May 18, 2022, for the sole purpose of the application of PEBA as provided in URPEDA, NMSA 1978, § 21-28-7(A). (Stipulated in the parties' SPHO).
3. This Board has subject matter and personal jurisdiction over this dispute pursuant to NMSA 1978, § 10-7E-9(A)(3) (2020) recognizing that the Board's functions and duties include the "filing of, hearing on, and determination of complaints of prohibited practices." § 10-7E-9(F) provides that the PELRB "has the power to enforce provisions of the Public Employee Bargaining Act through the imposition of appropriate administrative remedies."

4. Eric Lehto was the National Director of Healthcare Organizing for AFT during the time relevant to this case and familiar with the relevant events as they occurred. (Testimony of Eric Lehto, Hearing Audio, Part 1 at 00:41:30 – 00:42:10; Exhibit A).
5. Michelle McPherson has been a Registered Nurse since 2012 and formerly worked at SRMC in its Pre-Op unit from May 2022 to May 2023. (Testimony of Michelle McPherson, Hrg. Audio Record Part 2 at 1:02:30 - 1:06:40).
6. Ms. McPherson chose to work in Pre-Op because that assignment had a set schedule from 5:30 a.m. to 2:00 p.m. that she wanted in order to care for her mother in hospice. (Testimony of Michelle McPherson, Hrg. Audio Record, Part 3 at 00:40:00).
7. Ms. McPherson denies that she was trained for work in PACU despite SRMC assertions that Post-Op and PACU nurses are cross-trained and that Competency forms such as Exhibit 5 suggest otherwise. (Testimony of Michelle McPherson, Hrg. Audio Record, Part 2 at 1:07:00 – 1:08:20).
8. On January 19, 2023, this Board recognized the Complainant, United Health Professionals of New Mexico, AFT AFL-CIO, as the exclusive representative for collective bargaining of a group of SRMC employees comprising:

   Case Managers, Clinic Techs, CT Techs, Dietitians, EEG Techs, Emergency Medical Techs, Interventional Radiology Techs, Licensed Clinical Social Workers, Medical Assistants, Mammography Techs, MRI Techs, Nuclear Medical Techs, Occupational Therapists, Paramedics, Patient Care Techs, Pharmacists, PSG Techs, Physical Therapists, Physical Therapy Assistants, Radiological Techs, Registered Nurses, Rehabilitation Techs, Respiratory Therapists, Respiratory Therapy Assistants, Sleep Lab Techs, Social Workers, Special Procedures Techs, Unit Based Educators, Urology Techs, Ortho/Casting Techs, Anesthesia Techs, Cardiology Techs, Speech Language Pathologists, Sterile Processing Techs, Surgical Techs, Techs, Ultrasound Techs, X-Ray Techs, including House Supervisors, Charge Nurses, Lead positions and per diem positions (PRNs) employed in any of the above positions.

   (Certification of Representation *In re: UHPNM & UNM Sandoval Regional Medical Center*; PELRB 304-22).

9. Certification of the Complainant, United Health Professionals of New Mexico, AFT AFL-CIO, as the exclusive representative for the above-referenced bargaining unit was affirmed and ratified by the PELRB on February 15, 2023. (PELRB Board Order 9-PELRB-2023).
10. SRMC informed AFT and the affected employees of SRMC's plan for a reduction in force on April 20, 2023. (Answer to PPC Paragraph 7; Exhibits A and J-4; Testimony of Eric Lehto and Wilson Wilson).
11. Among the changed working conditions foreseen in SRMC's planned RIF are reductions in the number of full-time employees and reductions in Shift Bonuses and Overtime. (Exhibits A and J-4).
12. In implementing the layoff, SRMC eliminated two clinical positions and made job offers within the organization to the employees affected by the layoffs at the same rate of pay and benefits. (Answer to PPC Paragraph 6).
13. After receiving notice of the planned layoff and the proposed reassignment of nurses in Pre-Op and PACU, AFT, by and through its Director of Healthcare Organizing, Eric Lehto, requested bargaining via email on April 21, 2023, not only over the planned layoff, but over any changes to bargaining unit employees' hours of work, work location, assignment or classification, method, manner and new work techniques. (Exhibits A and J-4; Testimony of Eric Lehto).
14. In connection with its request to bargain the planned layoff, AFT requested the following information:
    a. Names, job titles and "FTE" of all employees impacted;
    b. The changes [to] these employees' [working conditions] that the employer intends to implement;

c. The amount of money the employer seeks to save by "these actions;"

d. The amount of money the employer seeks to save "from the bargaining unit;"

e. The amount of money needed to address the employer's "current financial difficulties;"

f. Any reductions in pay, benefits or hours, etc. of non-bargaining unit employees anticipated.

(Exhibits A and J-4; Testimony of Eric Lehto).

15. SRMC has never responded to Mr. Lehto's April 20, 2023, demand to bargain and request for information. (Testimony of Wilson Wilson, Hrg. Audio Record Part 1 at 00:46:45; Part 2 at 00:46:30; Testimony of Correen Bales, Hrg. Audio Part 4 at 1:10:55).

16. The planned layoffs were carried out in May of 2023 during which SRMC dealt directly with employees individually, and not the Union. At least one bargaining unit employee, a physical therapy technician, was laid off. Testimony of Correen Bales, Hrg. Audio Part 4 at 1:02:30; 1:03:50-1:05:45).

17. Via email to Wilson Wilson, dated April 19, 2023, Adrienne Enghouse purported to demand bargaining over a proposal by Manager Dustin Bierman to assign "the Preop workgroup" to PACU on a rotating basis. However, the email does not designate Ms. Enghouse as a representative of AFT or United Health Professionals of New Mexico and originated from her personal email address. (Exhibit B; Testimony of Wilson Wilson and Adrienne Enghouse).

18. Eric Lehto testified that bargaining unit employees reported a sense of hopelessness about the future with SRMC because of its refusal to bargain and provide

information. As a result, bargaining-unit members quit or were terminated, leading to an erosion in the level of support for the Union. Employees have the impression based on the actions complained of, that the Union was not working on their behalf, and that engaging in concerted activity is pointless, thus damaging the credibility of the Union. (Testimony of Eric Lehto, Hrg. Audio Record Part 1 at 1:00:20 - 1:03:40).

19. He further testified that some of the employees that left SRMC employ told AFT representatives specifically that because of SRMC's refusal to bargain they felt they had no "agency" inside the facility, and so, were seeking employment with an employer that was more "inclusive." (Testimony of Eric Lehto, Hrg. Audio Record Part 2 at 00:52:00 – 00:54:25.
20. Michelle McPherson testified that Pre-Op skills and competencies are different than those required for work in PACU, because PACU involves postsurgical care and sedated patients, some intubated, creating more critical-care points, whereas Pre-Op does not, and a simple review of competencies on paper does not cure that. (Testimony of Michelle McPherson, Hrg. Audio, Part 2 at 00:01:10 – 00:01:18.
21. When Manager Dustin Bierman announced at a meeting on April 14, 2023, that nurses would rotate between Pre-Op and PACU, Ms. McPherson and at least three other nurses raised concerns about lack of training.(Testimony of Michelle McPherson, Hrg. Audio part 2 at 1:09:30 and 1:16:00 - 1:17:00.
22. Ms. McPherson and others had physical restrictions at the time, which would make it more difficult for them to treat PACU patients compared with Pre-Op patients. Tr. 2 1:20:45, 1:22:00. McPherson said Pre-Op nurses were able to help each other out to offset the restrictions, but that was not possible in PACU, because a nurse could not

as easily leave one patient to assist with another. (Testimony of Michelle McPherson, Hrg. Audio part 3 at 00:19:00 – 00:21:00; 00:30:30).

23. An unspecified number of employees beyond the two clinical positions SRMC admitted eliminating in its Answer to PPC Paragraph 6, were affected by the reduction in overtime hours implemented as part of the layoff plan. (Hrg. Audio Part 2 at 00:59:20).

24. The changes to Pre-Op and PACU scheduling in April of 2023 led to one nurse having a changed day off, one nurse changing to PRN status, and a change of hours for 8-12 nurses. (Cross-examination of Eric Lehto, Hrg. Audio Part 2 at 00:23:00 – 00:25:00).

25. Since the time of certification in January of 2023, the PACU went through what is, essentially, a complete employee turnover of the entire unit. (Cross-examination of Eric Lehto, Hrg. Audio Part 2 at 00:33:30).

26. After her Manager, Dustin Bierman, re-assigned her from Pre-Op duties to PACU duties, Michelle McPherson met with him to discuss her concerns about her ability to physically perform PACU duties, during which he told her that the Union was "not active" concerning its ability to affect management changing her duties, from which Ms. McPherson concluded that the Union could not be effective in fighting the unilateral change in assignments for nurses in Pre-Op and PACU. (Testimony of Michelle McPherson, Hrg. Audio Part 2 at 1:36:00 – 1:39:45.

27. Her conclusion that the Union could not be effective, based on Mr. Bierman's comment that it was "not active," was a factor in her decision to resign her employment the next day after her meeting with Mr. Bierman. (Testimony of Michelle McPherson, Hrg. Audio Part 2 at 1:40:00.

REASONING AND CONCLUSIONS OF LAW: On January 19, 2023, this Board recognized the Complainant, United Health Professionals of New Mexico, AFT AFL-CIO as the exclusive representative for collective bargaining of a group of SRMC employees as found herein. That Certification of the Complainant was affirmed and ratified on February 15, 2023. Therefore, SRMC was subject to a duty to bargain with the Complainant in good faith on wages, hours and all other terms and conditions of employment pursuant to NMSA 1978 § 10-7E-17(2020), *at least* during the period between January 19, 2023 and the District Court's Memorandum Opinion and Order in D-202-CV-2023-02118 issued on August 14, 2023. I make no judgment about the effect of that Memorandum Opinion and Order on the duty to bargain after it was issued, because all events at issue in this PPC occurred between April and May of 2023 when the duty to bargain indisputably existed.

The PELRB has not previously directly addressed the question of whether the duty to bargain attaches upon demonstrating majority support or upon certification of the bargaining unit and recognition of the exclusive representative. Because the date of certification and the date majority support was determined by card check is the same in this case, i.e. January 19, 2023, the distinctions between the two elucidated in *United Food & Com. Workers, AFL-CIO v. NLRB*, 519 F.3d 490, 496-97 (D.C. Cir. 2008) and *San Miguel Hosp. Corp.*, 357 NLRB 326, 326-27 (2011), are less important than they might otherwise be. I take this opportunity to construe the PEBA on this point.

While not "on all fours," I note that this Board has previously addressed when an employer's duty to bargain attaches in the context of an incumbent representative continuing to be recognized as the exclusive representative of the unit on the effective date of the Public Employee Bargaining Act, under NMSA 1978 § 10-7E-24(B). See *American Federation of*

Teachers Local #4212 and Gadsden Independent School District; PELRB Case No. 309-05. In that case the Board's Hearing Officer construed the Public Employee Bargaining Act as follows:

> "First, the term 'exclusive representative' is a legal term of art under PEBA, and the mandate under § 24(B) that incumbent exclusive representatives 'shall be recognized as the exclusive representative of the unit on the effective date of [PEBA]' (emphasis added) has special significance. 'Exclusive representative' is defined as 'a labor organization that, as a result of certification, has the right to represent all public employees in an appropriate bargaining unit for the purposes of collective bargaining.' See § 4(I). 'Certification,' in turn 'means the designation by the board or local board of a labor organization as the exclusive representative for all public employees in an appropriate bargaining unit.' See § 4(E). Finally, 'collective bargaining' is 'the act of negotiating between a public employer and an exclusive representative for the purpose of entering into a written agreement regarding wages, hours and other terms and conditions of employment.' See § 4(F). Reading § 24(B) and these definitions together reveals that an incumbent exclusive representative is statutorily deemed to remain certified to negotiate wages, hours and other terms and conditions of employment until the incumbent attempts and fails to demonstrate majority support.
>
> Second, it is significant that § 24(B) expressly requires a demonstration of majority support only to enter into a CBA, not to be recognized as the exclusive representative. To prevent this proviso from being superfluous, *the whole subsection must be read as providing for some action by a public employer and exclusive representative that falls short of entering into a CBA.* (Emphasis added). See *Katz v. N.M. Dep't of Human Servs.*, 95 N.M. 530, 534 (1981) (that '[a] statute must be construed so that no part of the statute is rendered surplusage or superfluous'). As discussed, the definition of exclusive representative is tied to representing public employees 'for the purposes of collective bargaining,' and the definition of collective bargaining is tied, in turn, to 'negotiating … for the purpose of entering into a written agreement regarding wages, hours and other terms and conditions of employment.' See §§ 4(I) and 4(F). *Accordingly, the statutorily required action that falls short of entering into a CBA is the negotiation of wages, hours and other terms and conditions of employment.*
> (Emphasis added).
>
> Finally, § 15 and § 17 impose affirmative duties on both labor organizations and public employers to negotiate wages, hours and other terms and conditions of employment *based on a labor organization's status as exclusive representative.* (Emphasis added). It is inconceivable that PEBA would impose a duty to negotiate without also imposing a corresponding right to engage in such required negotiation. See *Santa Fe and AFSCME*, 1 PELRB 1 at 26 (1993) (that construction must not render a statute's application absurd or unreasonable, or lead to injustice or contradiction).

> Based on the forgoing, I conclude that GISD is required to bargain with AFT as the incumbent exclusive representative even prior to AFT demonstrating its majority support to GISD. Moreover, I conclude that GISD can be ordered to bargain with AFT pursuant to § 9(F). *Id.* (that the Board has the authority to impose appropriate administrative remedies for purposes of enforcing the provisions of PEBA)."

I adopt Hearing Officer Vaile's statutory construction as it construes the definitions of "exclusive representative," "certification" and "collective bargaining" as well as her construction of § 15 and § 17 of the PEBA imposing an affirmative duty on both labor organizations and public employers to negotiate wages, hours and other terms and conditions of employment based on a labor organization's status as exclusive representative. Based on that analysis I conclude that an obligation to bargain attached in this case on January 19, 2023, the date of certification. This conclusion is consistent with NLRB cases other than those cases cited by AFT on this point in its closing brief. Those "other cases" speak in terms of changes to the *status quo* being made only pursuant to negotiations, after negotiation to impasse, or upon notice and opportunity to bargain over the changes *after* certification of the exclusive representative and designation of an appropriate unit. See *NLRB v. Katz,* 369 U.S. 736 (1962); *Koenig Iron Works, Inc.*, 276 NLRB 811 (1985); *NLRB v. McClatchy Newspapers,* 964 F.2d 1153, 1162 (D.C. Cir. 1992). To the extent our jurisprudence departs from the NLRB on this point, it must be so in order to correctly construe the PEBA. The question whether an employer can commit a prohibited labor practice under the PEBA by ignoring lawful bargaining demands during the period between a union's demonstration of majority support and its certification awaits a different case under different facts than are before us here. For the reasons stated above I reaffirm my decision denying SRMC's oral Motion to Dismiss at the Merits Hearing for lack of jurisdiction over the parties related to the alleged absence of certification being applied on a retroactive basis.

I. SRMC BREACHED A STATUTORY DUTY TO BARGAIN WITH AFT OVER LAYOFFS ANNOUNCED IN APRIL, 2023 AND CARRIED OUT IN MAY OF 2023.

A. SRMC's Failure or Refusal to Bargain the Layoff After Demand is a *Per Se* Violation of the Act and a Prohibited Labor Practice.

It is practically axiomatic that layoffs and reductions in force or "RIFs" are mandatory subjects of bargaining. Layoffs are among the enumerated topics requiring bargaining, along with work schedules and days off; changing from fixed to rotating shifts; changes in overtime policies and curtailing work hours due to a decline in business needs, work assignments; work duties; workloads and work rules. See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters 13.I.B.3; 13.II.F; 16.III and 16.IV.

This Board has recognized that the layoff of State employees is a mandatory subject of bargaining entitling the Union to a significant opportunity to bargain in a meaningful manner and at a meaningful time, at a minimum, over the effects of the Employer's layoff or RIF decision. See *CWA Local 7076 v. New Mexico Public Education Department*, 76-PELRB-2012; *CWA Local 7076 v. New Mexico Public Education Department and New Mexico Public Employee Labor Relations Board,* CV-2012-11595 (J. Bacon, Memorandum Opinion and Order, August 9, 2013). (The District Court agreed with the PELRB that the withholding of information relevant to bargaining was a violation of the PEBA but remanded the case to the Board for further findings concerning which RIF effects were covered under the CBA).

The Board in *CWA Local 7076*, *supra,* affirmed my recommended decision that NMPED did not satisfy its obligation to bargain in good faith because it did not provide requested information concerning a planned layoff or "RIF". As part of my Report and Recommended Decision in that case Denying the Employer's Motion to Dismiss or for Summary Judgment, I noted the following points pertinent to the instant case:

> "PEBA obligates Respondent to "bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties." 10-7E-17. Respondent's RIF plan unquestionably affects wages, hours and other terms and conditions of employment, and the statutory duty to bargain attaches. The duty to bargain layoffs is a settled area of labor law. *Hilton Mobile Homes*, 155 NLRB 873 (1965); *Advertiser's Mfg. Co.,* 280 NLRB 1185 (1986)… NMPED also shows that it sent notice to the CWA [on] April 29, 2011 of the agency's intent to conduct a RIF (Exhibit A). But notice of the possibility of or the intent to conduct a RIF is not all that is required of NMPED to satisfy the obligation to bargain in good faith. For example, the April 29, 2011 letter promised to provide RIF plan details at some unspecified future date, stating it would '…notify the employees affected once they have been identified in order to work with the State Personnel Office (SPO) to locate potential employment opportunities for displaced staff based on their education, education and skills prior to the effective date of the RIF.' There is no evidence submitted by NMPED demonstrating that prior to submission of its RIF plan to the State Personnel Board on June 10, 2011 on which date it was approved, that it notified the Union of employees identified as being affected by the RIF. (Exhibits B, D and E). Meetings that took place between NMPED and CWA prior to that approval, namely those on April 29, 2011, May 17, 2011 and June 2, 2011, to discuss the RIF (Exhibit B) never included any discussion of any details of the reduction plan or identification of the employees to be affected by it. Denigrating the union representative's pursuit of details during these meetings, lends nothing to resolution of the issues because the State was obliged to inform the union not only of its intent to conduct a RIF but its plan to do so as well. Consequently, the union could not have known whether a bargaining demand was necessary until approval of the plan by the Personnel Board by which time the RIF was a fait accompli. This result is not consistent with PEBA's duty to bargain mandatory subjects in good faith... It is a long-established principle that a union is entitled to "a significant opportunity to bargain... in a meaningful manner and at a meaningful time" over the effects of an employer's decision to terminate its union-represented employees because of economic reasons. *First National Maintenance Corp v. NLRB,* 452 U.S. 666, 681 (1981)…"

Following a course similar to that followed by Public Education Department in the *CWA, Local 7076* case, *supra*, SRMC here, dealt directly with its bargaining unit employees concerning the layoff rather than respond to the Union's bargaining demand and request for information.

For the reasons outlined above, once AFT was certified as the exclusive representative, it was the one with whom SRMC must deal and SRMC could "… no longer bargain directly or indirectly with the employees." See *General Elec. Co.*, 150 NLRB 192, 194 (1964), *enf'd,* 418

F.2d 736 (2d Cir. 1969), cert denied, 397 US 965 (1970). Such direct dealing with employees constitutes a *per se* violation of the duty to bargain in good faith because "direct dealing, by its very nature, improperly affects the bargaining relationship." *Americare Pine Lodge Nursing & Rehab. Ctr.*, 325 NLRB 98, 99 (1997).

All employees, including those in the bargaining unit represented by AFT were affected by the change in overtime policy and at least one bargaining-unit member was laid off as a result of the downsizing. SRMC acknowledges that in implementing the layoff, it eliminated two clinical positions and made offers to move employees into other jobs with different duties at SRMC. The effects of the layoff on bargaining unit employees is not disputed. Whether the number of those bargaining unit employees is great or small is less important than the *per se* violation of the PEBA that occurred by SRMC's failure to bargain. (The number of employees affected may be relevant to the appropriate remedy). Regardless of the number of employees concerned, the harm done to the Union *qua* union by SRMC's delay in bargaining calls for remedial action under the PEBA.

As found herein, based on Eric Lehto's testimony, SRMC's failure to respond to demands to bargain had a negative impact on the Union, rendering it "irrelevant" in bargaining-unit members eyes, who came to view their efforts to organize as "futile." Bargaining unit members quit or were terminated during this period, leading to an erosion in the level of support for the Union and as the Union has previously argued in response to SRMC's motion to stay these proceedings, an employer's delay in recognizing the union and bargain with it causes a cognizable harm to the union, for which this Board has remedial powers. See NMSA 1978, § 10-7E-9(F) (2020) granting the PELRB the power to enforce the Public Employee Bargaining Act through the imposition of appropriate administrative remedies including awarding actual damages related to dues, reinstatement of employees with the

same seniority status that the employee would have had but for the violation, back pay including benefits, declaratory or injunctive relief or provisional remedies, e.g. temporary restraining orders or preliminary injunctions.

The United States Supreme Court has long recognized the damage done to the collective bargaining process by such delay as AFT has experienced in this case, In *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944) the Court noted:

> "Out of its wide experience, the Board many times has expressed the view that the unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions. The Board's study of this problem has led it to conclude that, for these reasons, a requirement that union membership be kept intact during delays incident to hearings would result in permitting employers to profit from their own wrongful refusal to bargain."

In 1997 the D.C. Circuit in *Lee Lumber and Building Material Corp. v. NLRB* (Lee Lumber I), 117 F.3d 1454 (D.C. Cir. 1997), held that an employer's delays in bargaining violated sections 8(a)(1) and (5) of the National Labor Relations Act (NLRA), 29 U.S.C. As a result, the employer was ordered to bargain with Carpenter Local No. 1027 affirming the NLRB's presumption that a loss in majority status is caused by an employer's refusal to bargain with the Union based findings that lengthy delays in bargaining deprive the union of the ability to demonstrate to employees the tangible benefits to be derived from union representation and 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.

The D.C. Circuit noted that the NLRB's *presumption of taint* "supports employee free choice because it prevents an employer from pointing to an intervening loss of employee support for the union when such loss of support is a foreseeable consequence of the employer's unfair labor practice." 117 F.3d at 1459 (quoting *Fall River Dyeing Finishing Corp. v. NLRB,* 482 U.S. 27, 51 n. 18, 107 S.Ct. 2225, 2240 n. 18, 96 L.Ed.2d 22 (1987)).[1]

I adopt the rationale in *Franks Bros. Co.,* and *Lee Lumber and Building Material Corp.* to conclude that the delays in bargaining in this case require remedial action and that this Board has authority to grant it.

It is not relevant to this failure to bargain claim that SRMC conducted four previous layoffs. All of those prior layoffs occurred before AFT was certified in January of 2023 and the duty to bargain the effects of that layoff was not present.

SRMC's refusal to bargain either the layoff itself or its effects constitutes a *per se* violation of the PEBA. It interfered with the rights to engage in collective activity under Section 5, and it interfered with and restrained the Union's ability to rights guaranteed the Union and the bargaining unit under Section 19. The Employer's acts also interfered with the administration of the Union; sought to discourage membership in the Union; and showed that the Employer refused to bargain in good faith and comply with the provisions of the Act, all considered violations under Section 19. By those acts or omissions SRMC violated Respondent violated Sections 5(A), 5(B), 19(B), 19(C), 19(F) and 19(G) of the PEBA when it implemented a reduction in force in May 2023 without bargaining.

[1] In *Lee Lumber and Bldg. Material v. N.L.R.B.*, 310 F.3d 209 (D.C. Cir. 2002) (Lee Lumber II) The D.C. Circuit dismissed the Employer's challenges to the NLRB's presumption of taint and its determination that employers must bargain for "a reasonable period of time" to remove that taint. The Court also rejected the challenges to the Board's determination that the company committed unfair labor practices by refusing to bargain in April 1990 and by refusing to provide the union with requested information.

B. By Ignoring AFT's Request For Bargaining-Related Information, SRMC Committed a Second Set of Separate Prohibited Practices Related to Its Failure to Bargain.

As acknowledged in *CWA Local 7076 v. New Mexico Public Education Department*, *supra,* the duty to bargain imposed on public employees and labor organizations includes a duty to provide relevant information when requested. SRMC does not dispute that it has never responded to AFT's April 20, 2023 request for information and I conclude that SRMC's failures to respond to demands to bargain and for related information had a negative impact on the Union, rendering it "irrelevant" in the minds of employees, tending to leave them with the impression that AFT's efforts to organize were "futile." I cannot say that there is a direct causal relationship between the erosion of union confidence and the high turnover rate in the PACU testified to by Eric Lehto, but I can say that the high turnover rate is consistent with AFT's argument that SRMC's acts in this case have eroded employee confidence in their union. I stress that an action would lie for an employer's delays in recognition and bargaining that *tend to* undermine employees' confidence in the union. Here, the preponderance of the evidence leads me to conclude that SRMC's conduct in this case not only tended to undermine employee confidence in the union, but actually did so.

For *per se* violations, intent is not relevant, and the party could even have actually intended to enter into a contract as a general matter. See *NLRB v. Katz*, 369 U.S. 736 (1962) (that certain acts *per se* violate the duty to bargain in good faith "though the [party] had every desire to reach agreement … upon an over-all collective agreement and earnestly and in all good faith bargains to that end"). As the Developing Labor Law treatise describes it, *per se* violations of the duty to bargain typically constitute, instead of a refusal to bargain, a "failure to negotiate" as to a particular issue, or under certain conditions, "rather than an

absence of good faith." See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) at Chap. 13.II (13-13) and *AFSCME Locals 624, 1888, 2962 and 3022 v. the City of Albuquerque*, Albuquerque Labor Management Relations Board, Case No. LB 06-033 (June 12, 2007). This Board has recognized that the duty to bargain includes the duty to provide, upon request, any relevant information necessary not only to negotiate or administer a Collective Bargaining Agreement, but to otherwise fairly and adequately represent all collective bargaining unit employees. An employer's failure to provide information is a *per se* violation of the PEBA. See *National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH*, 3-PELRB-2005 (Oct. 19, 2005).

The financial information, information related to hours of work and any other benefit or term and condition of employment, information pertaining to possible loss of bargaining unit work, such as that sought by AFT in this case, is recognized as being presumptively relevant. See, *National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH, supra.* See also, JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) at Chap.13.IV.B.2 (13-97).

As such, I conclude that SRMC's refusal to provide the information requested in this case, necessary for addressing the proposal to lay off employees in April and May 2023 violated Sections 5(A), 5(B), 19(B), 19(C), 19(F) and 19(G).

II. SRMC DID NOT BREACH A STATUTORY DUTY TO BARGAIN WITH AFT PRIOR TO CHANGING ITS LAYOFF POLICY IN APRIL 2023.

SRMC acknowledged unilaterally changing its layoff policy on April 10, 2023 but I conclude that changes were not substantial. They are incidental title and date changes that ultimately do not warrant attention.

III. SRMC BREACHED A STATUTORY DUTY TO BARGAIN WITH AFT OVER CHANGES IN PACU AND PREOP UNIT SCHEDULES IN MAY OF 2023.

Giving the benefit of the doubt to SRMC it may well be that its expectation is that nurses in its Pre-Op and PACU units work interchangeably, effortlessly floating between the two units at will. But the preponderance of the evidence, including the testimony of Ms. McPherson that she was not prepared to perform PACU duties, supports a conclusion that while that may be the Employer's expectation, the actual practice is otherwise. Nurses assigned to duties in each unit clearly do not float back and forth as the Employer posits, else it would not have been necessary for Mr. Bierman to announce and implement a change in scheduling to accomplish it. He would not have had to re-assign Ms. McPherson, resulting in her eventual resignation. The preponderance of the evidence convinces me that the duties performed by nurses in PACU are substantially different from those performed by nurses in Pre-Op. Ms. McPherson gives an example when she testified that her physical limitations, easily accommodated in Pre-Op, were not so easily accommodated in PACU. Viewed from this perspective, it is less important whether the precise plan for rotating PACU and Pre-Op schedules proposed by Mr. Bierman in April was carried out, than it is that schedule and duty changes were made unilaterally, a fact that SRMC does not dispute.

Included among the laundry list of commonly recognized mandatory subjects of bargaining are work schedules; changing from fixed to rotating shifts; work assignments; work duties; workloads and work rules. See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chap. 13.I.B.3; 13.II.F; 16.III and 16.IV. Each of those mandatory subjects of bargaining are implicated in changes in PACU and Pre-Op Department schedules in May of 2023.

In the period following certification, no change may be made to the *status quo* absent negotiations or upon notice and opportunity to bargain over the changes. *NLRB v. Katz,* 369 U.S. 736 (1962). The NLRB has defined "terms and conditions" of employment as (1)

wages, benefits, and other compensation; (2) hours of work and scheduling; (3) the assignment of duties to be performed; (4) the supervision of the performance of duties; (5) work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline; (6) the tenure of employment, including hiring and discharge; and (7) working conditions related to the safety and health of employees. CFR 103.40 and 88 FR 73946 (II-B). This Board follows NLRB case law as it concerns the duty to bargain over terms and conditions of employment and its construction of what may constitute a term and condition of employment *AFSCME, Council 18 v. HSD*, D-101-CV-201202176 (1st Judicial Dist., J. Ortiz, 6-14-2013), wherein the PELRB found a prohibited practice when a public employer removed security guards from some of its field offices without bargaining that change to impasse.

According to Eric Lehto, changes to Pre-Op and PACU led to one nurse having a changed day off, one nurse forced to go to PRN status, and a change of hours for other nurses. UNM SRMC did not rebut those assertions. In addition, the change from Pre-Op to PACU, announced on April 14, 2023, raised substantial issues for the Pre-Op nurses, who immediately raised concerns about the change in schedule and the lack of training regarding PACU duties.

Registered Nurse Michelle McPherson testified that the move from Pre-Op to PACU involved fundamental changes to her terms and conditions of employment – requiring tasks for which she had not been properly trained and altering her hours of work. She testified that skills and competencies were different between Pre-Op and PACU, because PACU involves postsurgical care and sedated patients, some intubated, creating more critical-care points, whereas Pre-Op does not, and a simple review of competencies on paper does not cure that. Moving to post-surgery would also mean a change in hours and shift in schedule at

a time when McPherson had specifically locked into a 5:30 a.m. start in order to be free in the afternoon to care for her mother who was in hospice in April and May.

Ms. McPherson was ordered to work in PACU on May 1, 2023, and when she showed up for duty, she asked who would train her and was told that no one would. She invoked her rights to a Safe Harbor under New Mexico law, and she quit the next day. When McPherson raised the issue of the Union, Dustin Bierman told her that the Union was "not active," which was echoed by others, suggesting to McPherson that the Union would not be effective in fighting the unilateral change in assignments for nurses in Pre-Op and PACU. That was a factor in her decision to quit.

Whether or not Exhibit 5 establishes that a nurse like Ms. McPherson, previously assigned to Pre-Op were qualified to work in PACU, is an ancillary point. The main point is that SRMC unilaterally altered those nurses' job duties by their re-assignment from one unit to another. Testimony that Mr. Bierman's planned rotation schedule was never implemented is beside the point. The undisputed fact is that some nurses' previously assigned to Pre-Op duties were mandatorily assigned to PACU and vice versa. I conclude that the dispute between SRMC and AFT over the importance of Exhibit 5 and the dispute over whether McPherson or others were given hands-on training or were observed first-hand exhibiting the competencies asserted in the document represented by Exhibit 5 is not very important. The actual change in work duties is.

The testimony is ambiguous about whether PACU and Pre-Op nurses are cross-trained. Dustin Bierman says they are. Michelle McPherson says they are not. Whether they are cross-trained and the degree of that training is less important to this analysis than the change in work duties that necessarily occurred once a nurse previously assigned only to PACU

duties is assigned to Pre-Op duties and vice versa.[2] I am persuaded that the reason she quit was not, as she testified, out of fear for her license. Rather, I am convinced that the reason she quit was the change in her schedule that left her unable to care for her hospice-bound mother. Her resorting to the Safe Harbor provisions under New Mexico law negates her proffered reason that she resigned out of fear that her license was in jeopardy. However, to the extent she quit because of the change in her schedule, that reason sufficiently demonstrates why the Pre-Op/PACU rotation schedule impacts working conditions so that PEBA would require bargaining before affecting that change. Whatever the reason for her quitting, it is the impact of SRMC's unilateral change in schedules on bargaining unit employees that illustrates why such changes are a mandatory subject of bargaining. Regardless of the unreliability of her testimony concerning the completion of SRMC's competencies form, Ms. McPherson's testimony provided an example of at least one employee who found herself inadequately trained after assuming the actual duties of her re-assigned schedule, despite that completed competency form.

Mr. Bierman testified that prior to the rotating assignments in April 2023, a group of nurses, included Ms. McPherson, had been assigned to work only in Pre-Op, even if being subject to being on call for PACU. That testimony does not contradict Ms. McPherson's testimony that she was never called for PACU duties prior to April of 2023 or that she was not cross trained as claimed.

[2] I believe Ms. McPherson's testimony that when she reviewed the checklist of her competencies with her supervisor that she did not fill out the form – her supervisor Ms. Richards did. That testimony is consistent with standard office practice. I also believe that competencies shown on the form were not verified by direct observations of a Preceptor. But I do not credit her testimony that she did not fill out or agree to any of the categories related to PACU, and those sections were blank when she signed the document. To the extent the Competencies form is deceptive, Ms. McPherson is complicit in that deception. A remedy for the alleged lack of training existed and was exercised: McPherson invoked her rights to a Safe Harbor under New Mexico law, NMSA 1978 61-3A-1 to -3 (2019), which allows a medical professional to refuse an assignment in good faith for fear of lack of training or competency and fear of retaliation. She quit the next day, before any additional training could be provided.

Because PACU is considered acute critical care involving post-operative patients who are under sedation, whereas Pre-Op involves patients who are awake and alert, I am persuaded by AFT's argument that merely because nurses share the same job title and have the same basic set of core competencies does not mean that they are able to perform the different tasks of each respective unit, interchangeably, without significant additional effort, adjustments and possibly mentoring or training.

The preponderance of the evidence convinces me that SRMC's re-assignment of nurses between Pre-Op and PACU constituted a substantive change in terms and conditions of employment – a mandatory subject of bargaining, not only work tasks but schedules requiring bargaining, for which bargaining was demanded but refused. Such a change in duty assignments necessarily implicates terms and conditions of employment that SRMC was obliged to bargain before implementing.

Similarly, the dispute over whether Adrienne Enghouse submitted a proper demand to bargain these schedule changes on April 19, 2023 is an ancillary issue because of another bargaining demand over the same subjects of bargaining tendered by Eric Lehto on April 21, 2023. I do not rely on Ms. Enghouse's putative demand. Rather, Eric Lehto's bargaining demand dated April 21, 2023 included any changes to bargaining unit employees' hours of work, work location, assignment or classification, method of work, manner of work and any new work techniques, which would include the changes in PACU and Pre-Op unit schedules at issue here.

For the reasons set forth herein I conclude that SRMC failed to maintain the *status quo* and breached its duty to bargain with AFT over changes in the PACU and Pre-Op schedules and duty assignments in May of 2023, thereby violating Sections 5(A), 5(B), 19(B), 19(C), 19(F) and 19(G).

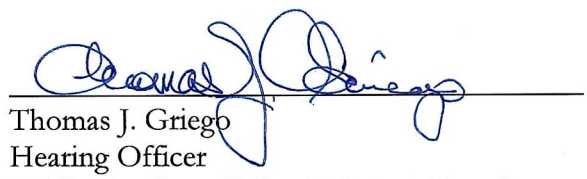
DECISION: SRMC was under a duty to bargain with AFT in good faith on wages, hours and all other terms and conditions of employment pursuant to NMSA 1978 § 10-7E-17(2020), at least during the period between January 19, 2023 and the District Court's Memorandum Opinion and Order in D-202-CV-2023-02118 issued on August 14, 2023. During that time SRMC breached a statutory duty to bargain with AFT over layoffs announced in April, 2023 and carried out in May of 2023, thereby committing a *per se* Prohibited Labor Practice pursuant to 19(B), 19(C), 19(F), or 19(G) of the PEBA. By ignoring AFT's request for bargaining-related information, SRMC committed a second separate Prohibited Practice, thereby committing a *per se* Prohibited Labor Practice pursuant to 19(B), 19(C), 19(F), and 19(G) of the PEBA.

The evidence was insufficient to prove discrimination in violation of 19(A) or 19(D), with regard to any of the violations found so those claims are properly DISMISSED. SRMC did not breach a statutory duty to bargain with AFT by changing its layoff policy in April 2023. Any claim to the contrary is DISMISSED.

Because this case presents exceptional circumstances that tend to undermine majority strength and impede the election processes, I recommend that SRMC be ordered to:

1. Recognize and bargain in good faith with the union immediately on wages, hours and all terms and conditions of employment under the PEBA;
2. Cease and desist from all violations of the PEBA as found;
3. Post notice of its violation of PEBA as found herein in a form acceptable to the parties and this Board for a period of 30 days containing assurances that it will comply with the law in the future.

Issued, Tuesday, December 05, 2023.



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