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 January 9, 2024, for review of the Hearing Officer's Report and Recommended Decision issued in this case on December 8, 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 8, 2023.

WHEREFORE the Hearing Officer's Report and Recommended Decision, issued in this case on December 8, 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

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In re:

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

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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 January 31 and February 11, 2023; on February 22, 2023 and again on April 10, and 21, 2023, the Union requested from UNM SRMC documentation related to its representation of a group of SRMC employees and that as of the date of its PPC, the Employer has refused to provide that information.

SRMC Answered the PPC on May 26, 2023, contending that because of a District Court Memorandum Opinion and Order issued by Judge Victor Lopez in *UNM Sandoval Regional Medical Center, Inc. v. UHPNM, AFT, AFL-CIO,* Cause No. D-202-CV-2023-02118 reversing this 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), no 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. Since Judge Lopez entered his Order reversing ratification of the January 2023 card check performed by the PELRB, the District Court dismissed Complainant's Emergency Petition for Declaration of Obligation to Bargain. See *United Health Professionals of New Mexico, AFT, AFL-CIO v. University of New Mexico Sandoval Regional Medical Center,* Order, Cause No. D-202-CV-2023-01330 (J. Allison, Oct. 18, 2023). Judge Allison dismissed Complainant's Petition to enforce bargaining as moot in light of Judge Lopez's reversal of Orders 26-PELRB-2022, 8-PELRB-2023 and 9-PELRB 2023 in August 2023. Id. Accordingly, Respondent did not have a duty to bargain nor to respond to requests for information during the time period alleged in the Prohibited Practices Complaint.

Respondent denies that it refused to respond to valid requests for information. Moreover, Adrienne Enghouse was directed to information available to her and where she could easily obtain such information at the time she was an employee of SRMC. Ms. Enghouse failed to seek information available to her. Respondent is without sufficient knowledge or notice of

the financial information requests alleged in the Prohibited Practices Complaint, and Complainant failed to produce to the PELRB and Respondent the alleged requests for information in support of the allegations made in the PPC. Accordingly, such allegations and claims should be dismissed with prejudice. Respondent denies that, in light of Judge Lopez's Order, it had a duty to produce an updated *Excelsior* list. Nevertheless, Respondent timely produced an *Excelsior* list on or about July 26, 2022, and submitted an updated partial *Excelsior* list to AFT on or about June 16, 2023.

Respondent denies that its actions had the effect of undermining or eroding support for Complainant's authority granted to it under PEBA. Respondent denies that Complainant was a certified representative at times material hereto. Respondent denies that it committed a *per se* violation of the duty to bargain in good faith with the duly authorized representative. Respondent denies all claims that it violated Section 5 and/or Section 19 of the PEBA.

SRMC moved to Stay Hearing the Merits of this PPC and on July 11, 2023 the Board finding that it has jurisdiction over the subject matter and the parties directed me to determine the Respondent's Motion For Stay of Proceedings filed May 26, 2023 based on 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. My Letter Decision Denying SRMC's Motion to Stay Proceedings was issued on July 26, 2023. After a Status and Scheduling Conference on August 4, 2023 a Hearing on the Merits was scheduled for November 11, 2023. In the meantime, SRMC sought interlocutory review of my denial of its Motion to Stay Proceedings and filed a Motion to Dismiss. At its regularly scheduled meeting on September 5, 2023, The Board affirmed my denial of the Respondent's Motion for a Stay (41-PELRB-2023) and on September 14, 2023 I denied SRMC's Motion to Dismiss.

The hearing on the merits took place as scheduled on Wednesday, November 01, 2023. The parties stipulated to the use of Eric Lehto's testimony at a separate hearing between the parties on October 30, 2023, and apply it to the facts of this case. 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 were submitted by both parties in lieu of oral closing arguments on November 30, 2023. 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:

1. Complainant is a "labor organization" as that term is defined in Section 4(K) of PEBA. (Stipulated).
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).
3. 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, from Merits Hrg. In re: PELRB 109-23; Hearing Audio, Part 1 of that hearing at 00:41:30 – 00:42:10, incorporated by stipulation).
4. SRMC admits that it received an email from Eric Lehto, Director of AFT Healthcare Organizing, on or about April 21, 2023. (Answer to PPC Paragraph 9; Exhibit E).

5. This case involves UNM SRMC refusing to respond to requests for information tendered by AFT to SRMC between January and May 2023. (Exhibits A, B, C, D, E, F and G).

6. On January 20, 2023, Adrienne Enghouse submitted a letter to on behalf of "AFT New Mexico" to SRMC indicating its intent to begin bargaining a Collective Bargaining Agreement, requesting dates when SRMC's negotiating team would be available to meet, and informing SRMC that a request for information would follow under separate cover. (Exhibit A).

7. The exclusive representative certified by this Board on January 19, 2023 is the Complainant herein, "United Health Professionals of New Mexico, AFT, AFL-CIO". Therefore, an ambiguity exists as to Exhibit A in that by its letterhead it purports to be from "AFT New Mexico", a labor organization representing "Higher Education", "PSRP" and "Teachers", whereas the cover email to Exhibit A purports to be from American Federation of Teachers Nurses and Health Professionals", none of which are the certified exclusive representative authorized to bargain.

8. A subsequent list of requested documentation was introduced by AFT as Exhibit F. However, the exhibit does not include a cover letter or transmittal email that would identify from whom it originated, to whom it was sent and whether the sender was acting for United Health Professionals of New Mexico, AFT, AFL-CIO. To the extent AFT attempts to rectify this defect by testimony and argument to the effect that Exhibit F is actually a part of Exhibit A, and one must look to Exhibit A to provide context, I do not accept that testimony or argument because Exhibit A

plainly refers to an information request that will come "under separate cover." Exhibits A and F).

9. A further ambiguity exists as to whether Ms. Enghouse's request for OSHA records was made in the context of collective bargaining or as an individual employee for the reasons stated above concerning the absence of any indication that her requests were made on behalf of the union, but also because the initial email request dated February 1, 2023 states in part: "Per OSHA regulations this information will be posted from February to April *and employees have access to the records.* (Emphasis added) and her February 7, 2023 follow-up email to Mr. Wilson concerning those records states in part: "I continue to await the OSHA report I requested last week. OSHA policy states it will be provided *to any employee who requests the report.*" (Emphasis added). Those communications at least suggest that the request was being made in her individual employee capacity absent any indication otherwise, despite her testimony that it was made in an official union capacity, thereby resulting in the ambiguity.
10. On March 24, 2023 Eric Lehto, behalf of the Complainant, wrote to SRMC's Labor Relations point of contact, Wilson Wilson, "to make clear to the management of SRMC, [that] Adrienne Enghouse is the designated person to contact for all information pertaining to United Health Professionals of New Mexico. She has been appointed by the National Union as the Chief Negotiator for this first contract." Exhibit G.
11. On March 29 and March 30, 2023 Wilson Wilson on behalf of SRMC responded via email to two requests for information from Ms. Enghouse. The first was a request from Ms. Enghouse on February 22, 2023, for a copy of "town hall event" slide

presentation by SRMC's CEO, Jaime Silva on February 16, 2023. His response was "Hi Adrienne, I thought I had already communicated on this. It can be found in the 2/23/23 *SRMC Communications Daily Briefing* email sent to all employees." The second was her request for OSHA records made on February 1 and February 7, 2023, to which Mr. Wilson responded: "You can get a copy of the reports through the SRMC Occupational Health Office. The Office is open 7:00 a.m. – 4:00 p.m. M-F." (Exhibits 2 and 3).

12. Ms. Enghouse testified that the email link provided by Mr. Wilson did not work in her employee email. (Testimony of Adrienne Enghouse, Merits Hrg. Audio, Part 1 at 1:00:00 - 1:00:15). However, she did not communicate the failed link to Mr. Wilson and made no other attempt to access the link.
13. On April 10, 2023, Ms. Enghouse requested an updated list of employees in the bargaining unit, referred to as an "Excelsior List", to which SRMC did not respond until May 22, 2023, after this PPC was filed, and which response specifically referred to this PPC in the subject line of Mr. Wilson's response email, stating "We will get to work on it." (Exhibit D).
14. On April 20, 2023, Mr. Lehto repeated the request for SRMC's negotiating team's availability to conduct negotiations, such as was made by Ms. Enghouse on January 20, 2023 in Exhibit A. (Exhibit E).
15. On June 16, 2023, SRMC provided AFT with a partial list of bargaining unit employees, excluding the PRN employees who had been part of the certification. (Exhibit 4; Testimony of Adrienne Enghouse, Merits Hrg. Audio, Part 1 at 1:15:00 – 1:15:30).

16. After receiving notice of a planned layoff, AFT, by and through its Director of Healthcare Organizing, Eric Lehto, requested specific information relevant to a demand to bargain the planned layoff via email on April 21, 2023. (Testimony of Eric Lehto, from Merits Hrg. In re: PELRB 109-23; Hearing Audio, Part 1 of that hearing, incorporated by stipulation).
17. Mr. Lehto testified that UNM SRMC's failure to respond to demands to bargain, including the requests for information, had a negative impact on the Union, rendering it "irrelevant" in the eyes of bargaining-unit members, leaving them with the impression that efforts to organize were "futile." (Testimony of Eric Lehto, from Merits Hrg. In re: PELRB 109-23; Hearing Audio, Part 1 of that hearing at 1:00:00 - 1:00:20, incorporated by stipulation).
18. SRMC's delays in bargaining, which includes a duty to provide the requested information relevant to bargaining signaled to the bargaining unit that there was no use in engaging in concerted activity. (Testimony of Eric Lehto, from Merits Hrg. In re: PELRB 109-23; Hearing Audio, Part 1 of that hearing at 1:00:20 - 1:01:00).
19. SRMC's delays in negotiations, including its failure or refusal to provide requested information relevant to negotiations, gave bargaining unit employees a sense of hopelessness about their future with SRMC. (Testimony of Eric Lehto, from Merits Hrg. In re: PELRB 109-23; Hearing Audio, Part 1 of that hearing at 1:01:00 - 1:01:30 - 1:02:33.
20. Bargaining-unit members quit or were terminated during this period, leading to an erosion in the level of support for the Union. (Testimony of Eric Lehto, from Merits Hrg. In re: PELRB 109-23; Hearing Audio, Part 1 of that hearing at 1:02:33 - 1:03:40.

21. Bargaining unit employees were left with the impression that the Union was not working on their behalf and that engaging in collective activity is pointless, thus damaging the credibility of the Union. (Testimony of Eric Lehto, from Merits Hrg. In re: PELRB 109-23; Hearing Audio, Part 1 of that hearing at 1:04:35 – 1:06:00.
22. SRMC did not respond to any part of the Union's request for information regarding the layoffs, thus damaging the credibility of the Union, which was unable to fully understand the dynamics of the workplace, leaving bargaining unit employees with the impression that the Employer could do whatever they wanted when they wanted, hurting the standing of the Union. (Testimony of Eric Lehto, from Merits Hrg. In re: PELRB 109-23; Hearing Audio, Part 2 of that hearing at 00:47:00 – 00:54:25).
23. The reason given by SRMC for refusing to provide information relevant to bargaining was because SRMC had filed an appeal of the PELRB certification of the Union. (Testimony of Wilson Wilson, Hearing Audio, Part 3 at 00:32:00 - 00:32:15.
24. Mr. Lehto testified to a nearly complete turnover of employees in the PreOp unit and PACU and that bargaining unit employees reported to him that they felt they no longer had "agency" inside the facility. And thus they were "seeking an employment situation that was more inclusive." (Testimony of Eric Lehto, from Merits Hrg. In re: PELRB 109-23; Hearing Audio, Part 2 of that hearing at 00:52:00 – 00:54:25.

REASONING AND CONCLUSIONS OF LAW:

I. THE ISSUE OF WHETHER SRMC BREACHED A STATUTORY DUTY TO BARGAIN WITH AFT OVER LAYOFFS ANNOUNCED IN APRIL, 2023 AND CARRIED OUT IN MAY OF 2023 AS HAS ALREADY BEEN ESTABLISHED AS A MATTER OF RES JUDICATA AND NO DOUBLE RECOVERY SHOULD BE PERMITTED BY A SEPARATE IDENTICAL CONCLUSION IN THIS CASE.

I incorporate herein my findings and conclusions *In re: United Health Professionals of New Mexico, AFT, AFL-CIO v. UNM Sandoval Regional Medical Center, Inc.*, PELRB No. 109-23, as they relate to the duty to bargain including the duty to provide relevant information when requested. 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).

In *In re: United Health Professionals of New Mexico, AFT, AFL-CIO v. UNM Sandoval Regional Medical Center, Inc.*, PELRB No. 109-23, I determined on December 5, 2023 that SRMC breached a statutory duty to bargain with AFT over layoffs announced in April, 2023, carried out in May of 2023 and that its failure or refusal to bargain the layoff was a *per se* violation of the Act and a Prohibited Labor Practice. I incorporate my findings and conclusions applicable to that point herein but further conclude that the claim in the instant case that SRMC breached its statutory duty to bargain over its latest layoff is duplicative of that brought and decided in PELRB 109-23 and no additional recovery will be granted for that claim here. Relief in the form of a bargaining order and the tolling of any statutory deadlines for challenging majority status would not constitute duplicate relief.

II. AFT FAILED TO MEET ITS BURDEN OF PROOF THAT SRMC BREACHED A STATUTORY DUTY TO BARGAIN WITH AFT BY ITS FAILURE OR REFUSAL TO PROVIDE REQUESTED INFORMATION BY ADRIENNE ENGHOUSE ON AND ABOUT JANUARY 20, 2023; FEBRUARY 1, 7 AND 22, 2023, AND MARCH 30, 2023.

As best I can discern from the Parties' Closing Briefs and the evidence produced at the Hearing on the Merits, there are six relevant requests for information at issue in the instant case that are not addressed by my Report and Recommended Decision in *In re: United Health*

Professionals of New Mexico, AFT, AFL-CIO v. UNM Sandoval Regional Medical Center, Inc., PELRB No. 109-23:

1. A January 20, 2023 request by Ms. Enghouse to SRMC's Human Resources Director Correen Bales to provide SRMC's negotiating team's availability to conduct negotiations, Exhibit A.
2. The undated, 11-page comprehensive list ostensibly from Ms. Enghouse to Ms. Bales preparatory to entering into collective bargaining negotiations, submitted sometime around January 20, 2023, Exhibit F.
3. Requests by Ms. Enghouse to Wilson Wilson on February 1, 7, 2023, repeated on February 22 and March 30, 2023, for OSHA injury reports as shown in Exhibits 2 and 3.
4. The request from Ms. Enghouse on February 22, 2023, for a copy of a "town hall event" slide presentation by SRMC CFO Jaime Silva.
5. The April 10, 2023 request by Ms. Enghouse for an updated list of bargaining unit employees (referred to as an "Excelsior" list, and a similar request by Mr. Lehto made on April 20, 2023.
6. On April 20, 2023, Mr. Lehto repeated the request for SRMC's negotiating team's availability to conduct negotiations, such as was made by Ms. Enghouse on January 20, 2023, Exhibit E.

Because of the ambiguities related to Ms. Enghouse's status as a representative of AFT, as noted in the Findings herein, I concur with SRMC's closing argument that the Union failed to meet its burden of proof that it made a request for information on January 20, 2023 (Ms. Enghouse's request for SRMC's negotiating team's availability to negotiate a CBA), failed to meet its burden of proof that it made a request for comprehensive information preparatory

to entering into collective bargaining negotiations sometime around January 20, 2023 (Exhibit F). AFT could not demonstrate when its putative request for comprehensive information preparatory to entering into collective bargaining negotiations entered into evidence as Exhibit F was transmitted to SRMC. Ms. Enghouse was unable to find the separate cover showing that it was actually sent to SRMC. (Testimony of Adrienne Enghouse, Merits Hrg. Audio, Part 1 at 43:28-38; 44:37- 44; 45:12-20; Part 2 at 00:31:10-17). Neither had Mr. Wilson seen Exhibit F prior to the date of the merits hearing (Testimony of Wilson Wilson, Merits Hrg. Audio, Part 3 at 00:37:00 – 00:37:08. Accordingly, I conclude that AFT failed to meet its burden of presenting substantial evidence showing that it properly submitted legitimate information request requiring a response from SRMC relating to the January 20, 2023 request by Ms. Enghouse for SRMC's negotiating team's availability to conduct negotiations, or for its 11-page comprehensive list for information requested preparatory to entering into collective bargaining negotiations, so that AFT's claims based on those two requests should be dismissed but without prejudice because, although due to ambiguities set forth SRMC escaped liability for its failure to bargain *at the time material to the complaint,* those ambiguities have been resolved by the hearing on the merits and further refusal to provide the requested information would not bar a subsequent PPC for failing to provide the same information.

Likewise, because of the ambiguity that exists as to whether Ms. Enghouse submitted her February 1, 2023 request for OSHA injury reports, (repeated on February 7, 2023) in her capacity of a union representative as outlined in the Findings herein, I conclude with SRMC that the Union failed to meet its burden of proof that it made a request for information on January 20, 2023 (Ms. Enghouse's request for SRMC's negotiating team's availability to negotiate a CBA), failed to meet its burden of proof that it made a request for OSHA injury

reports as contrasted with Ms. Enghouse making such requests in her individual capacity as an employee. It may well be that, as Ms. Enghouse testified, her status as a union organizer is well known to management so that she should not have to state that status in her communications with management, but where, as here, such absence of clarity adversely affects AFT's ability to prove a *prima facie* case, the adverse impact should be borne by the Union and the claims based on February 1, and February 7, 2023 requests for OSHA injury reports should be dismissed but without prejudice because, although due to ambiguities set forth SRMC escaped liability for its failure to bargain *at the time material to the complaint*, those ambiguities have been resolved by the hearing on the merits and further refusal to provide the requested information would not bar a subsequent PPC for failing to provide the same information. I also conclude that AFT failed to meet its burden of proof both as to the element that it (as contrasted with Ms. Enghouse personally) on February 22, 2023, for a copy of a "town hall event" slide presentation by SRMC CFO Jaime Silva, and that SRMC did not properly respond to it. Her follow up to that request on March 29, 2023 indicates to me that it was a request made in her capacity as an employee, not as a Union representative. It was generated from her personal email account and signed by her as "Adrienne M. Enghouse RN," without indicating any Union role, title or position. I understand that at her level of responsibility union business is often conducted using a personal email account, but that is all the more reason that care must be taken to otherwise communicate in the body of the correspondence itself that such requests are being made in one's capacity as a Union representative and/or under the Public Employee Bargaining Act.

On March 29 and March 30, 2023 Wilson Wilson on behalf of SRMC responded via email to her follow up request by "Hi Adrienne, I thought I had already communicated on this. It can be found in the 2/23/23 SRMC Communications Daily Briefing email sent to all

employees." I conclude that but for the link not working properly, that would have been a sufficient response. The Employer is not required to make special arrangements to copy and deliver documents that are easily obtainable by the Union otherwise – a reference to where and how they may be retrieved suffices to comply with the Act. The Union cites no case authority otherwise. However, in this case Mr. Wilson's referral to the SRMC Communications Daily Briefing email may not have sufficed, as it appears that Ms. Enghouse could not access that email. That another bargaining unit employee might have been able to retrieve that information for her was not discussed. There was evidence that Ms. Enghouse did not communicate the failed link to Mr. Wilson and made no other attempt to access the link, apparently preferring to have the claim for failing to provide the information rather than actually obtaining the information requested. Under those circumstances, AFT has not made a *prima facie* case, that SRMC violated Sections 5(A), 5(B), 19(B), 19(C), 19(F) or 19(G) of the Act, so its claim against SRMC for failing to provide a copy of a "town hall event" slide presentation by SRMC CFO Jaime Silva, should be dismissed as premature but without prejudice because, although due to ambiguities set forth SRMC escaped liability for its failure to bargain *at the time material to the complaint*, those ambiguities have been resolved by the hearing on the merits and further refusal to provide the requested information would not bar a subsequent PPC for failing to provide the same information, once the link has been restored or other arrangements made to provide the information to the union if it does not have access to the referenced SRMC Communications Daily Briefing email.

These dismissals do not end the inquiry, however, because the preponderance of the evidence substantiates other instances where SRMC failed or refused to respond to other legitimate requests for information from AFT.

III. SRMC BREACHED A STATUTORY DUTY TO BARGAIN WITH AFT BY ITS FAILURE OR REFUSAL TO PROVIDE REQUESTED INFORMATION BY THE UNION ON APRIL 20, 2023 FOR BARGAINING DATES, BY ITS FAILURE OR REFUSAL TO RESPOND TO THE APRIL 10, 2023 REQUEST BY MS. ENGHOUSE FOR AN UPDATED LIST OF BARGAINING UNIT EMPLOYEES AND BY ITS FAILURE OR REFUSAL TO RESPOND TO A SIMILAR REQUEST BY MR. LEHTO MADE ON APRIL 20, 2023.

As I concluded in *In re: United Health Professionals of New Mexico, AFT, AFL-CIO v. UNM Sandoval Regional Medical Center, Inc.*, PELRB No. 109-23 (December 5, 2023) Certification of the Complainant herein as the exclusive representative for the group of SRMC employees at issue 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. All events at issue in this PPC occurred between April and May of 2023 when the duty to bargain indisputably existed. For example, on April 20, 2023, Mr. Lehto repeated the request for SRMC's negotiating team's availability to conduct negotiations, such as was made by Ms. Enghouse on January 20, 2023 in an email, Exhibit E. That request does not suffer from the same infirmities as does Ms. Enghouse's January 20, 2023 request for meeting dates and the fact that SRMC never responded to that email with dates to meet and confer with the union implicates the duty to bargain in two ways: First, it is *prima facie* evidence that SRMC had no intention of bargaining in good faith with the union during a period when the duty to do so existed, contrary to NMSA1978 § 10-7E-17(A)(1) and prohibited by § 10-7E-19(F). Second, it constitutes a *per se* violation of the duty to bargain by refusing to provide, upon request, any relevant information necessary to negotiate the CBA, and to represent all collective bargaining unit employees fairly and adequately. See *National Union of Hospital and Health Care*

Employees, District No. 1199 v. UNMH, 3-PELRB-2005 (Oct. 19, 2005). In cases involving a per se violation, 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) (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).

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).

I can think of few things more essential to negotiating the parties' first contract by which AFT most obviously may be seen to fairly and adequately represent all collective bargaining unit employees than establishing dates to meet for negotiations. Without a response to AFT's request for availability, negotiations go nowhere, effectively staying the negotiations until SRMC's appeals could run their course, without the benefit of receiving a legal stay of proceedings from either this Board of a Court of Competent jurisdiction. Although I conclude that this particular failure to respond was intentionally calculated to delay any negotiations, AFT need not have proven intent in order to prevail on this *per se*

violation. As such, I conclude that SRMC's refusal to provide a response to Mr. Lehto's April 20, 2023 request for the management team's availability for bargaining violated Sections 5(A), 5(B), 19(B), 19(C), 19(F) and 19(G) of the Act.

By the time Ms. Enghouse tendered her April 10, 2023 request for an updated list of bargaining unit employees, any doubt about her status as a representative of the Union were dispelled by Mr. Lehto's March 24, 2023 letter to Wilson Wilson designating her as the person to contact for all information pertaining to United Health Professionals of New Mexico and informing SRMC that she has been "appointed by the National Union as the Chief Negotiator for this first contract." When SRMC did not respond to her request, even to acknowledge its receipt, Eric Lehto submitted a second request for the same list of employees on April 20, 2023. SRMC did not respond to that second request either. SRMC does not appear to have even tried to provide the information requested until After this PPC was filed on May 26, 2023 indicating that its response with a partial list in June 2023 was tendered in response to this PPC, not in a good faith effort to comply with its obligation to bargain. SRMC did not comply with AFT's request for an updated employee list until July 2023. Again, I am persuaded that the July list was tendered only to better its position in this PPC, not in a good faith effort to comply with its obligation to bargain, which it continues to insist did not exist because SRMC had filed an appeal of the PELRB certification of the Union.

I wrote above that I can think of few things more essential to negotiating the parties' first contract by which AFT most obviously may be seen to fairly and adequately represent all collective bargaining unit employees than establishing dates to meet for negotiations. One of those "few things" that is as important, is knowing which employees are currently in the covered bargaining unit. As with the Employer's failure or refusal to provide negotiation

meeting dates, I conclude that the long delay in providing an "*Excelsior*" list without explanation, was intentionally calculated to delay any negotiations. SRMC did not begin to compile the information much less present it, until months after the request. However, AFT need not have proven intent in order to prevail on this *per se* violation. In summary, the Union asked for information, and the Employer refused to provide it for a period of months. That is a *per se* violation of the duty to bargain in good faith.

As above, this refusal to respond to a straightforward request for information had deleterious effects on the Union. It interfered with the administration of the Union. It eroded support for the Union and affected the credibility of the Union in the eyes of its members. As such, I conclude that SRMC's delay in providing an updated list of bargaining unit employees in response to the April 10, 2023 request by Ms. Enghouse and the similar request by Mr. Lehto made on April 20, 2023 was effectively a refusal to provide the requested, necessary relevant information that violated Sections 5(A), 5(B), 19(B), 19(C), 19(F) and 19(G) of the Act.

DECISION: That SRMC breached a statutory duty to bargain with AFT over layoffs announced in April, 2023 and carried out in May of 2023, has already been established as a matter of *res judicata* by my Report and Recommended Decision issued in *United Health Professionals of New Mexico, AFT* v. *UNM Sandoval Regional Medical Center, Inc.*; PELRB 109-23 (December 5, 2023). No double recovery should be permitted by a separate identical conclusion in this case; however, relief in the form of a bargaining order and the tolling of any statutory deadlines for challenging majority status would not constitute duplicate relief. SRMC also breached its statutory duty to bargain with AFT by its failure or refusal to provide requested information by the union on April 20, 2023 for bargaining dates, by its failure or refusal to respond to the April 10, 2023 request by Ms. Enghouse for an updated

list of bargaining unit employees and by its failure or refusal to respond to a similar request by Mr. Lehto made on April 20, 2023.

AFT failed to meet its burden of proof that SRMC breached a statutory duty to bargain with AFT by its failure or refusal to provide requested information by Adrienne Enghouse on and about January 20, 2023; February 1, 7 and 22, 2023, and March 30, 2023. Those claims should be dismissed as premature but without prejudice because, although due to ambiguities set forth SRMC escaped liability for its failure to bargain *at the time material to the complaint*, those ambiguities have been resolved by the hearing on the merits and further refusal to provide the requested information would not bar a subsequent PPC for failing to provide the same information once the link has been re-established or otherwise provided.

Having found that the Respondent violated Sections 5(A), 5(B), 19(B), 19(C), 19(F) and 19(G) of the Public Employee Bargaining Act by failing and refusing to bargain with the Union in good faith during first contract negotiations, an affirmative bargaining order would be appropriate in this case. The National Labor Relations Board has consistently held that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Caterair International*, 322 NLRB 64 at 68 (1996).

I Find and Conclude that an affirmative bargaining order in this case is consistent with the purpose of the PEBA espoused in NMSA 1978 § 10-7E-2 and vindicates the rights of the unit employees, guaranteed by NMSA 1978 § 10-7E-5 to form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion, to engage in other concerted activities for mutual aid or benefit. Those employees were denied the benefits of collective bargaining by SRMC's refusal to bargain in good faith with the Union. By refusing to bargain

in good faith and thereby frustrating the possibility of securing a first contract, SRMC unlawfully deprived unit employees of the opportunity to obtain the stability and predictability such an agreement would provide. Traditional remedies of posting notice of the violation and enjoining further violations of the Act are inadequate to remedy the violations sustained because they would permit a challenge to the Union's majority status before the taint of the Respondent's unlawful conduct has dissipated, and before the employees have had a reasonable time to regroup and bargain through their representative in an effort to reach a first contract. Such a result would be particularly unjust in the circumstances presented here, where the Respondent's unlawful conduct frustrated any real progress toward achieving a collective-bargaining agreement for which unit employees, not privy to the Respondent's conduct, would probably fault their bargaining representative, at least in part, further tending to undermine the unit employees' support for the Union. Thus, the Respondent's failure to bargain in good faith would likely have a continuing effect, tainting any employee disaffection from the Union for a period of time after the issuance of this decision and order. Moreover, the imposition of a bargaining order would signal to employees that their rights guaranteed under the Act will be protected. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of the Employer who opposes union representation.

An affirmative bargaining order also serves the purpose of the Act by fostering meaningful collective bargaining and labor peace by removing the Employer's incentive to delay bargaining in the hope of further discouraging support for the Union.

Additionally, under these circumstances, a reasonable period during which the Union's majority status cannot be challenged as prayed for by the Union, will foster meaningful collective bargaining.

Wherefore, it is my recommended decision that:

A. The 12 months period in NMSA 1978 § 10-7E-16(D) within which this Board may accept a request for a decertification election or an election sought by a competing labor organization shall be tolled until such time as the Employer begins to bargain collectively with the Union on a first contract.

B. SRMC is Ordered to: (1) cease and desist from all violations of the PEBA and found herein, (2) post notice of its violations of PEBA and assurances that it will comply with the law, in all areas where notices to employees are commonly posted including electronic postings, (3) immediately respond to the following requests for information and documentation:

i. Requests by Ms. Enghouse and Mr. Lehto for SRMC's negotiating team's availability to conduct negotiations, which at a minimum will include at least one meeting per week for the next thirty days or other dates agreed to by the parties.

ii. The 11-page comprehensive list of requested information, Exhibit F.

iii. OSHA injury reports as referred to in Exhibits 2 and 3.

iv. The requested copy of a "town hall event" slide presentation by SRMC CFO Jaime Silva.

The request for an updated list of bargaining unit employees appears to have been complied with, albeit late.

C. Immediately bargain with the Union regarding a collective bargaining agreement and all other terms and conditions of employment, including wages and discipline, consistent with the ordered schedule of negotiation sessions.

Issued, Friday, December 08, 2023.

Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board
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Albuquerque, New Mexico 87120