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Leticia Cunningham

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

COUNTY OF SANTA FE,
NEW MEXICO,
Appellant-Respondent,

v.

Case No.: D-101-CV-2022-00913

NEW MEXICO COALITION
OF PUBLIC SAFETY OFFICERS
AND SANTA FE COUNTY
DEPUTY SHERIFF'S ASSOCIATION,
Appellees-Complainants.

ORDER REVERSING MAY 16, 2022 ORDER OF PUBLIC EMPLOYEE LABOR RELATIONS BOARD

THIS MATTER came before the Court on Appellant County of Santa Fe's appeal from a May 16, 2022 Order of the New Mexico Public Employee Labor Relations Board ("PELRB"). Having reviewed the pleadings, conducted a full record review and considered oral argument, THE COURT FINDS, CONCLUDES, AND ORDERS:

SUMMARY OF FACTS

a. Procedural Background.

This appeal has been made pursuant to Rule 1-074 NMRA and NMSA 1978, § 10-7E-23(B) (2003). On May 24, 2022, Appellant County of Santa Fe ("Appellant" or the "County") filed a Notice of Appeal in the above-captioned matter. Thereafter, Appellant filed its Statement of Appellate Issues ("Statement") on August 11, 2022. On September 14, 2022, Appellees New Mexico Coalition of Public Safety Officers and Santa Fe County Deputy Sheriff's Association ("Appellees" or the "Union") filed its Response to Statement of Appellate Issues ("Response"). In turn, on September 29, 2022, Appellant filed its Reply Brief ("Reply"). On April 11, 2023, this Court conducted a hearing to consider oral argument on the merits of the instant matter.

The record on review consists of four volumes: (1) Record from PELRB 133-21 ([1 RP 001-221]; (2) Record from PELRB 133-21 (County's Exhibits at Administrative Hearing) ([2 RP 001-326]); (3) Record from PELRB 133-21 (Union's Exhibits at Administrative Hearing) ([3 RP 001-082]); and, (4) Record from PELRB 133-21 (Joint Exhibits at Administrative Hearing) ([4 RP 001-064]). Additionally, the record contains a compact disc with eight audio files thereon.

b. Factual Background.

This appeal concerns the County's implementation of a COVID-19 vaccine mandate policy in late 2021. [1 RP 001-005] The factual circumstances giving rise to this appeal are largely undisputed. [1 RP 033-036]

At the outset of the COVID-19 pandemic, Governor Michelle Lujan Grisham declared the existence of a public health emergency via Executive Order 2020-004, dated March 11, 2020. [1 RP 033; 2 RP 025-029]. This public health emergency existed throughout the timeframe of the events giving rise to this appeal, *i.e.*, at least from March 11, 2020 until February 4, 2022. [2 RP 025-050] Likewise, on March 16, 2020, N.M. Department of Health Cabinet Secretary Kathyleen Kunkel "declared the current outbreak of COVID-19 to be a condition of public health importance ... [that] can reasonably be expected to lead to adverse health effects in the community, and that posed an imminent threat of substantial harm to the population of New Mexico." [1 RP 033-034] Similar to the action of the Governor, the Santa Fe County Board of County Commissioners declared Santa Fe County an "emergency/disaster area as a result of COVID-19" on March 24, 2020. [2 RP 017-020]

In response to the COVID-19 pandemic, drug manufacturers developed vaccines to aid in the prevention of COVID-19 caused by the SARS-CoV-2 virus. Following vaccine development, the U.S. Food and Drug Administration ("FDA") issued emergency use authorizations: (a) for a

vaccine developed by Pfizer-BioNTech on December 11, 2020; (b) for a vaccine developed by Moderna on December 18, 2020; and, (c) for a vaccine developed by Janssen on February 27, 2021. [1 RP 034] Thereafter, on August 23, 2021, the FDA "granted the biologics license application for the Pfizer/BioNTech mRNA COVID-19 vaccination ... which means that this vaccine has now received full FDA approval...." [*Id.*]

On August 24, 2021, the County circulated a draft "Emergency Policy Requiring COVID-19 Vaccines, Providing Education for County Employees Who Are Not Fully Vaccinated; and Prohibiting Travel by County Employees Who Are Not Fully Vaccinated or Who Do Not Receive Authorized and Recommended Booster Doses of COVID-19 Vaccines" (the "Proposed Mandatory Vaccination Policy"). [*Id.*] Among other stakeholders, the Union received a copy of the Proposed Mandatory Vaccination Policy. [*Id.*] The Union's "current bargaining unit is comprised of public employees working for the County in the position of non-probationary sworn Deputies, Corporals, and Sergeants of the County Sheriff's Office." [1 RP 033] A collective bargaining agreement exists between the County and the Union with a contract term date between January 1, 2020 and December 31, 2023 (the "Collective Bargaining Agreement"). [4 RP 011-064]

On August 30, 2021, the Union sent the County a demand to bargain concerning the Proposed Mandatory Vaccination Policy. [3 RP 001] While the County initially considered the input of the Union in revising the Proposed Mandatory Vaccination Policy, the County's preliminary position was that it was "not required to bargain with the Union concerning [the policy] and would refuse to bargain." [1 RP 034] Nonetheless, the County eventually engaged in bargaining related to the Proposed Mandatory Vaccination Policy between September 2021 and early November 2021. [*Id.*] Following impasse with the Union, the County implemented a final mandatory vaccination policy, effective on November 11, 2021 (the "Policy"). [*Id.*; 4 RP 001-

010]. Among other requirements, the Policy mandated full vaccination of all County employees (subject to certain exceptions) and prohibited unvaccinated County employees from traveling outside the state for work. [1 RP 035] Further, the Policy provided that a violation of the Policy may result in disciplinary action, up to and including termination. [*Id.*]

In response to the County's action, the Union filed a Prohibited Practices Complaint on December 9, 2021 with the PELRB. [1 RP 001-005] Among other allegations, the Union alleged: (a) "[the Policy] is a mandatory subject of bargaining given that it affects wages, hours, and other terms and conditions of employment for bargaining unit members, and the fact that the failure to follow the policy can result in disciplinary action"; and, (b) "[b]y unilaterally implementing its own proposal regarding [the Policy], the County has bargained in bad faith." [1 RP 003]

A hearing on the merits was held before Hearing Officer, and PELRB Executive Director, Thomas J. Griego on February 10, 2022. The Union called three witnesses: Union President Sergeant Eddie Webb, Union Lead Negotiator David Bency, and Union Executive Director Steve Harvey. The County called four witnesses: Expert Witness Epidemiologist Dr. James Marx, County Human Resources Director Ms. Sonya Quintana, County Attorney Mr. Gregory Shaffer, and Deputy County Attorney Ms. Rachel Brown. [1 RP 036-039]

Following the hearing, the Hearing Officer entered his Hearing Officer's Report and Recommended Decision on March 22, 2022 (the "Recommended Decision"). [1 RP 140-172] In summary, the Recommended Decision concluded that the County's implementation of the Policy fell within the County's management rights reserved under the Collective Bargaining Agreement. However, the Recommended Decision concluded that the County was required to bargain to impasse the impact or effects of the Policy. Further, the Recommended Decision concluded that the County's unilateral implementation of its last, best, and final offer vis-à-vis the disciplinary

component of the Policy violated the County's duty to bargain in good faith over the impact or effects of the Policy. As a result, the Recommended Decision proposed that the PELRB: (a) enjoin the County's enforcement of the Policy; (b) order the County to rescind all discipline of Union bargaining unit members until binding arbitration may take place; (c) reinstate any disciplined Union bargaining unit members to their previous positions with back pay and benefits until binding arbitration may take place; and, (d) order the County to post notice of the violation of the duty to bargain in good faith. [1 RP 140-172]

Following entry of the Recommended Decision, the County requested PELRB review of said decision, making several exceptions thereto. [1 RP 173-183] Ultimately, the PELRB entered its May 16, 2022 Order (the "May 16, 2022 Order" or the "Order"), which rejected the County's exceptions and adopted the "Hearing Officer's Report and Recommended Decision without modification." [1 RP 221] The appeal of concern in this matter followed.

STANDARD OF REVIEW AND BURDEN OF PROOF

This appeal was brought pursuant to Rule 1-074 NMRA, which authorizes appeals from administrative decisions. *See also* § 10-7E-23(B) (2003) ("Actions taken by the board or local board shall be affirmed unless the court concludes that the action is: (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."). Under the Rule, the District Court functions as an appellate court, not as a fact finder. *Mata v. Montoya,* 1977-NMSC-078, ¶ 3, 91 N.M. 20; *Zamora v. Vill. of Ruidoso Downs,* 1995-NMSC-072, ¶¶ 20-21, 120 N.M. 778. In exercising its appellate authority, the Court is to limit its scope of review to the whole record to determine:

> (1) whether the agency acted fraudulently, arbitrarily, or capriciously;
> (2) whether based upon the whole record on review, the decision of the agency is not supported by substantial evidence;
> (3) whether the action of the agency was outside the scope of authority of the agency; or

(4) whether the action of the agency was otherwise not in accordance with law.

Rule 1-074(R) NMRA; *see also Gallup Westside Development, LLC v. City of Gallup*, 2004-NMCA-010, ¶ 10, 135 N.M. 30.

As the appealing party, Appellant bears the burden of showing "'that agency action falls within one of the oft-mentioned grounds for reversal....'" *Fitzhugh v. N.M. Dep't of Labor, Emp't Sec. Div.*, 1996-NMSC-044, ¶ 25, 122 N.M. 173 (internal citation omitted).

"A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record." *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 17, 133 N.M. 97. "The burden is on the part[y] challenging the decision to make this showing." *Attorney General v. N.M. Pub. Regulation Comm'n*, 2011-NMSC-034, ¶ 9, 150 N.M. 174. "Where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though another conclusion might have been reached." *Perkins v. Dep't of Human Services*, 1987-NMCA-148, ¶ 20, 106 N.M. 651. Also, deference is given to any agency's interpretation of its regulations so long as the interpretation is reasonable. *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm'n*, 2006-NMCA-115, ¶ 25, 140 N.M. 464.

"Findings of fact supported by substantial evidence will not be overturned on appeal.... 'Substantial evidence' means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and if there is such evidence in the record to support a finding, it will not be disturbed.... Moreover, in examining such evidence an appellate court will view the evidence in a light most favorable to the prevailing party below and will not disturb findings, weigh evidence, resolve conflicts, or substitute its judgment as to the credibility of witnesses where

evidence substantially supports the findings of the trial court." *Den-Gar Enterprises v. Romero,* 1980-NMCA-021, ¶ 11, 94 N.M. 425 (internal citations and quotations omitted).

"When an agency that is governed by a particular statute construes or applies that statute, the court will begin by according some deference to the agency's interpretation.... The court will confer a heightened degree of deference to legal questions that 'implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function.' ... However, the court is not bound by the agency's interpretation and may substitute its own independent judgment for that of the agency because it is the function of the courts to interpret the law.... The court should reverse if the agency's interpretation of a law is unreasonable or unlawful." *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 11, 120 N.M. 579 (internal citations and quotations omitted).

"Administrative decisions are not in accordance with the law 'if the agency unreasonably or unlawfully misinterprets or misapplies the law.'" *Princeton Place v. N.M. Human Serv. Dep't, Med. Assistance Div.*, 2018-NMCA-036, ¶ 27, 419 P.3d 194 (citation omitted).

DISCUSSION

The Court conducted the whole record review as mandated by the rule and case law, and examined each section of the standard of review. Citing the standards of review, the County asserts the May 16, 2022 Order erred in finding that: (a) "the County was required to negotiate and proceed through impasse arbitration regarding its vaccine mandate policy"; (b) "the County was prohibited in implementing its last, best offer and, thereby, violated its duty to bargain in good faith in violation of § 10-7E-19(F) and (G)"; and, (c) "the County violated § 10-7E-18(H), a non-existent provision of the statute." Statement, p. 1. The Court addresses the first issue raised by the County.

Because the Court finds the first issue dispositive, the Court does not address further the additional issues raised by Appellant.

a. The Court Has Subject-Matter Jurisdiction over the Instant Appeal.

Although not raised by the parties, a "jurisdictional defect may not be waived and may be raised at any stage of the proceedings, even *sua sponte* by the appellate court." *Armijo v. Save 'N Gain*, 1989-NMCA-014, ¶ 4, 108 N.M. 281 (citation omitted). Here, the Court notes that the PELRB is not a party to the action, despite the PELRB issuing the decision on review.

The Court considers whether the PELRB is an indispensable party. The Court concludes that PELRB is not an indispensable party for two reasons. First, neither Rule 1-074 NMRA nor NMSA 1978, § 10-7E-23(B) (2003) expressly require the PELRB to be joined as a party. Second, similar to the State Personnel Board in *Montoya v. Department of Finance and Administration*, the PELRB acted in its quasi-judicial capacity in rendering the decision on review. *See Montoya v. Dep't of Fin. & Admin.*, 1982-NMCA-051, ¶ 24, 98 N.M. 408 ("In its function of hearing appeals by state employees from agency actions affecting their employment, the New Mexico Personnel Board sits in a quasi-judicial capacity involving the taking of evidence and testimony and the rendering of a decision including findings of fact and conclusions of law."). The Court of Appeals concluded in *Montoya* that the State Personnel Board was not an indispensable party in an appeal from a decision made by the State Personnel Board acting in its quasi-judicial capacity. *Id.* ¶¶ 28-29. Similarly, the Court concludes that the PELRB is not an indispensable party and the Court has subject-matter jurisdiction over the instant appeal.

b. The PELRB Erred by Concluding that the County Had to Bargain the Disciplinary Component of the Policy.

The Legislature enacted the Public Employee Bargaining Act ("PEBA"), NMSA 1978, Sections 10-7E-1 to -25, to achieve multiple purposes: "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." NMSA 1978, § 10-7E-2 (2003).

Regarding PEBA's guarantee of bargaining, NMSA 1978, Section 10-7E-17(A)(2) (2020) provides, in pertinent part, "[e]ntering into a collective bargaining agreement shall not obviate the duty to bargain in good faith during the term of the collective bargaining agreement regarding changes to wages, hours and all other terms and conditions of employment, unless it can be demonstrated that the parties clearly and unmistakably waived the right to bargain regarding those subjects." Further, numerous courts recognize a distinction between decision bargaining and effects bargaining. *See, e.g.*, *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981); *Enloe Med. Ctr. v. NLRB*, 433 F.3d 834, 838 (D.C. Cir. 2005) ("In *First National Maintenance Corp. v. NLRB*, [], the Supreme Court held that when an employer is authorized by the National Labor Relations Act to make a certain decision without bargaining with its union, it still may be obligated to bargain over the effects of that decision." (citation omitted)). Stated differently, "even if a collective bargaining agreement gives an employer the right to make a decision on a particular issue, if the agreement is silent as to the effects of that decision, the employer must agree to bargain with its union over those effects." *Enloe Med. Ctr.*, 433 F.3d at 838. However, both decision bargaining and effects bargaining may be waived through a collective bargaining agreement. *See generally Overview of Bargaining Subjects*, Fed. Labor Law: NLRB Practice § 9:10 (Feb. 2023 Update).

Although reaching its decision before the legislature amended Section 10-7E-17(A)(2) to expressly include a clear and unmistakable waiver standard,[1] the New Mexico Court of Appeals similarly "recognize[d] that a union can contractually waive its right to mandatory bargaining if the waiver is expressed clearly and unmistakably." *Cnty. of Los Alamos v. Martinez*, 2011-NMCA-027, ¶ 19, 150 N.M. 326; *see also NLRB v. New York Tel. Co.*,[2] 930 F.2d 1009, 1011 (2d Cir. 1991) ("A clear and unmistakable waiver may be found in the express language of the collective bargaining agreement; or it may even be implied from the structure of the agreement and the parties' course of conduct.... No waiver will be implied, however, unless it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them." (citations omitted)).

As developed in greater detail below, the Court concludes that the PELRB erred in two ways. First, the PELRB erred by failing to apply the proper standard to assess whether adoption of the Policy, including its inseparable disciplinary component, was a necessary action in light of the COVID-19 public health emergency. Second, assuming *arguendo* that the disciplinary component of the Policy constitutes an effect of the decision, the PELRB erred by concluding that the Union had not clearly and unmistakably waived any effects bargaining over the Policy through the Collective Bargaining Agreement. Resultantly, the Court reverses the May 16, 2022 Order of the PELRB.

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[1] *Compare* § 10-7E-17(A)(2) (2003), *with* § 10-7E-17(A)(2) (2020). *But see MV Transportation, Inc.*, 368 NLRB No. 66, at *2 (2019) ("After careful consideration, we decide today to abandon the 'clear and unmistakable waiver' standard and to adopt the 'contract coverage' standard."); *id.* at *1 ("[T]he [National Labor Relations] Board . . . applie[d] the 'clear and unmistakable waiver' standard, under which the employer will be found to have violated the Act unless a provision of the collective-bargaining agreement 'specifically refers to the type of employer decision' at issue 'or mentions the kind of factual situation' the case presents." (footnote omitted)).

[2] "Rather than litigating every matter from scratch, interested parties can largely rely on the body of law developed under the [National Labor Relations Act ("NLRA")] to expedite the resolution of disputes under the PEBA. We approve of the position of the state PELRB that interpretations of the NLRA by the National Labor Relations Board (NLRB) and reviewing courts should act as a guide in interpreting similar provisions of the PEBA." *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, ¶ 15, 123 N.M. 239 (citation omitted).

i. <u>The Emergency Provisions of PEBA and the Collective Bargaining Agreement Authorized Implementation of the Policy without Bargaining.</u>

The rights of public employers are expressly stated in PEBA. Specifically, the act provides:

> Unless limited by the provisions of a collective bargaining agreement or by other statutory provision, a public employer may:
> A. direct the work of, hire, promote, assign, transfer, demote, suspend, discharge or terminate public employees;
> B. determine qualifications for employment and the nature and content of personnel examinations;
> C. take actions as may be necessary to carry out the mission of the public employer in emergencies; and
> D. retain all rights not specifically limited by a collective bargaining agreement or by the Public Employee Bargaining Act.

NMSA 1978, § 10-7E-6 (2003); *see also* NMSA 1978, § 10-7E-4(H) (2020) (defining an emergency as "a one-time crisis that was unforeseen and unavoidable"). Further, the parties' Collective Bargaining Agreement states, "[t]he County, through its BCC, the Sheriff, or County shall have, but shall not be limited to the following rights: ... 3. To take actions as necessary to carry out the services provided by the Sheriff's Office in emergency situations and to maintain the uninterrupted service to our citizens during such emergency situations[.]" [4 RP 015]

Here, the Recommended Decision correctly acknowledges that the Union "has bargained a CBA that reserves to management the discretion to take such actions as are necessary to carry out the services provided by the Sheriff's Office in emergency situations and to maintain the uninterrupted service during such emergency situations.... The decision as to what is necessary is an integral part of the right that has been reserved to management in Section 2 of the CBA and § 10-7E-6(C) of the Act." [1 RP 159]

However, and critically, the Recommended Decision further concludes, "[t]hen as now, only termination of employment for non-compliance was an issue. [Footnote 5:] Termination

remains an issue in this case in part because firing a non-conforming employee is not an emergency justified by Section 2 of the CBA. Because of this, the Union's argument now that the emergency clause of the parties' CBA was not properly invoked is a red herring." [1 RP 158] The Recommended Decision (a) frames the Policy's discipline component as "an aspect of a new work rule that could be grounds for discipline and consequently is a mandatory subject of bargaining"; and, (b) asserts that "emergency responses need not necessarily carry with them a disciplinary component, but when they do, that component is a mandatory subject of bargaining." [1 RP 163-64] In this regard, the Recommended Decision and adopting May 16, 2022 Order are not in accordance with law and are unsupported by substantial evidence in the record.

The Recommended Decision is not in accordance with law because the Hearing Officer's above analysis ignores the emergency provision of the Collective Bargaining Agreement and Section 10-7E-6, which entitles public employers to "take actions as may be necessary to carry out the mission of the public employer in emergencies." § 10-7E-6(C). Thus, the law dictates that the Hearing Officer and PELRB assess whether adoption of a policy mandating vaccination, with a corresponding disciplinary component, was an action necessary to carry out the mission of the public employer amidst an emergency. *See id.* In other words, the law does not call for an analysis as to whether "firing a non-conforming employee is [] an emergency justified by Section 2 of the CBA." Rather, the Collective Bargaining Agreement and Section 10-7E-6 require the PELRB to assess whether the Policy and inseparable disciplinary component thereof are actions necessary for the County to take in response to the emergency. *See* NMSA 1978, § 10-7E-6 ("a public employer may: ... (C) take actions as may be necessary to carry out the mission of the public employer in emergencies"). Thus, the Recommended Decision and Order are contrary to law because they analyzed the disciplinary component as a new work rule in and of itself without

regard to the County's rights to "take actions as may be necessary" in an emergency as afforded by PEBA and expressly retained by the County in the Collective Bargaining Agreement.

Additionally, the Recommended Decision and Order are not supported by substantial evidence based upon the whole record on review. During the February 10, 2022 administrative hearing, several County witnesses provided testimony to establish the necessity of the Policy mandating vaccination, with failure to adhere resulting in disciplinary action. Expert witness epidemiologist Dr. James Marx testified that: (a) "2,000 people a day are dying from COVID in the United States," [RP-CD, File Name: "133-21 Hrg 2-10-22 Pt. 4," 42:38-43:47]; (b) approximately 10% of individuals who contract COVID-19 suffer from deleterious long-term health effects, [*id.*, at 43:15-43:40]; (c) unvaccinated individuals occupy far more hospital beds than vaccinated individuals, [*id.*, at 43:40-43:50]; (d) in terms of a ratio, about fifteen unvaccinated individuals die from COVID-19 for every one vaccinated person who dies from COVID-19, [*id.*, at 43:50-44:10]; (e) the mRNA COVID-19 vaccines are safe and effective, [*id.*, at 51:00-51:50]; and, (f) COVID-19 vaccines effectively reduce transmission of the virus, [*id.*, at 54:30-54:46].

County Human Resources Director Ms. Sonya Quintana offered testimony establishing that: (a) both bargaining unit members and non-bargaining unit members employed by the Santa Fe County Sheriff's Office had contracted COVID-19, [RP-CD, File Name: "133-21 Hrg 2-10-22 Pt. 5," 06:50-07:09]; and, (b) one County employee had died from COVID-19, two County employees were hospitalized long-term due to COVID-19 contraction, and one County employee suffers from long-term effects of COVID-19 infection, [*id.*, at 07:10-08:20]. Deputy County Attorney Rachel Brown testified that the County sought to adopt a vaccine mandate policy once the FDA fully licensed the Pfizer-BioNTech COVID-19 vaccine, [*id.*, at 51:30-52:30]. Further, County Attorney Gregory Shaffer testified that the County self-insures its group health insurance

fund up to $225,000 of a claim, and that a 20-day long-term hospitalization of an individual with need of a ventilator would cost $436,000. [RP-CD, File Name: "133-21 Hrg 2-10-22 Pt. 6," 36:07-39:40]

Beyond testimony, documentation in the record establishes the existence of an emergency and reasoning for a vaccination mandate. Numerous public health related orders, declarations of emergencies, and statistics demonstrating incidence of disease locally appear throughout the record. [2 RP 017-050]; [2 RP 071-326]. The record proper includes a report establishing, "[o]f the [nation-wide] 458 confirmed law enforcement line-of-duty deaths from January 1, 2021 – December 31, 2021, Covid-19-related fatalities are the leading cause of law enforcement deaths." [2 RP 064] (identifying 301 reported Covid-19-related fatalities). Additionally, the record shows increasing cases of COVID-19 within Santa Fe County during the pertinent timeframe. [2 RP 071] The County also provided justification for a vaccine mandate, citing numerous economic and noneconomic costs associated with illness due to unvaccination, such as an "[i]ncreased burden on employees required to work overtime to cover absences due to avoidable COVID-19 infections and serious illness among the unvaccinated." [2 RP 007-008]

On the other hand, the Union's testimonial and documentary evidence generally focused on whether an emergency even existed, and the Union's continued insistence that the County bargain implementation of the vaccine mandate. *See generally* [3 RP 001-038]; [RP-CD, File Name: "133-21 Hrg 2-10-22 Pt. 2," 0:14:00-1:23:00]; [RP-CD, File Name: "133-21 Hrg 2-10-22 Pt. 3," 00:00-14:05].

Ultimately, substantial evidence does not support the Hearing Officer and PELRB's decision that the disciplinary component of the Policy may be decoupled from the emergency

Policy itself, and viewed alone as a "new work rule that could be grounds for discipline and consequently is a mandatory subject of bargaining." [1 RP 163]

ii. <u>The Union Clearly and Unmistakably Waived Both Decision and Effects Bargaining over the Policy.</u>

In this matter and pertinent to the instant issue, the Hearing Officer concluded that "while the County's right to implement a policy requiring COVID vaccination without further bargaining is covered by the parties' contract, the imposition of discipline 'up to and including termination' is not." [1 RP 163]; *see also* [1 RP 161-166] (framing the imposition of discipline as an impact or effect of a decision "made pursuant to a reserved management right"). This conclusion, adopted by the PELRB in its May 16, 2022 Order, is not supported by substantial evidence based upon the whole record on review, and is arbitrary and capricious. *See Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 17, 133 N.M. 97 ("A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record." (citation omitted)). This conclusion ignores pertinent provisions of the parties' Collective Bargaining Agreement, which demonstrate that the Union clearly and unmistakably waived its right to bargain over both the decision of the County to adopt the emergency Policy and any attendant effects of the Policy.

Pertinent provisions of the parties' Collective Bargaining Agreement read as follows:

> **<u>Section 1: Preamble</u>**
>
> [. . .]
>
> This Agreement specifically describes the entire agreement between the County and the NMCPSO/SFCDSA. The Sheriff's Office Standard Operating Procedures, the Santa Fe County Human Resources Handbook or other policies and procedures promulgated through the authority of the Sheriff, shall govern any issues not agreed to herein. Management shall meet with the NMCPSO/SFCDSA regarding changes in County policies, procedures or regulations that affect wages, hours, or terms and conditions of employment. The NMCPSO/SFCDSA may also identify alternative solutions and provide suggestions not governed by this Agreement. Meetings

regarding changes to this Agreement should be held at times mutually agreed to by the parties.

All amendments to or modifications of the subject matter of this Agreement must be by mutual agreement and shall be of no force or effect until ratified and approved by the BCC and the NMCPSO/SFCDSA membership. It is understood and agreed that none of the foregoing rights and responsibilities will be exercised in a manner that is inconsistent with the provisions of this Agreement.

Section 2: Management and Association Rights

A. Policy Making – Santa Fe County and the Sheriff's Office policy making officials reserve the rights prescribed by the County, State, and Federal Constitutions, Statutes, and Ordinances in effect during the term of this Agreement.

B. The direction of the work force shall be controlled completely by the Sheriff or designee, except as specifically set forth in this Agreement. The County, through its BCC, the Sheriff, or County Management shall have, but not be limited to the following rights:

1. To direct and supervise all operations, functions, and the work of the bargaining unit employees;
2. To maintain the efficiency of the operations;
3. To take actions as necessary to carry out the services provided by the Sheriff's Office in emergency situations and to maintain the uninterrupted service to our citizens during such emergency situations;
4. To determine what, by whom, and when, services will be provided to the citizens and determine the performance standards applicable to the provision of those services;
5. The Sheriff may hire, promote, assign, transfer, retain, demote, discharge, suspend or take other disciplinary action. The Sheriff may relieve bargaining unit employees for just cause, and legitimate documented reasons only; and
6. To determine and implement all policies, methods, standards, and direction of bargaining unit employees that does not conflict with the terms of this Agreement, and to determine the resources to be allocated to accomplish the mission and goals of the Sheriff's Office as a unit of County Government.

C. NMCPSO/SFCDSA Rights

[. . .]

3. The NMCPSO/SFCDSA may provide input regarding changes in the Sheriff's Office's policies, procedures, rules and regulations. Concerns regarding such changes may be addressed through the management representative responsible for implementation. If not resolved at the

lower level, concerns of the NMCPSO/SFCDSA may be expressed in writing to the County Sheriff.

[. . .]

Section 54: Complete and Entire Agreement

A. This Agreement is the complete and only agreement between the parties and replaces any and all previous agreements. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make proposals with respect to all proper subjects of collective bargaining and that all such subjects have been discussed and negotiated upon and agreements contained in this Agreement were arrived at after the free exercise of such rights and opportunities. Therefore, except as otherwise required by law, the County and the Union, for the life of this Agreement, each voluntarily and without qualification waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

[. . .]

[4 RP 014-016]; [4 RP 062].

Through these provisions, the Union clearly and unmistakably waived its right to bargain over the decision and effects of a policy implemented in an emergency. *See generally Mueller v. Sample*, 2004-NMCA-075, ¶ 8, 135 N.M. 748 (noting that contract interpretation is an issue of law that appellate courts review *de novo*). As described in greater detail above, the management rights clause authorizes the County to "take actions as necessary to carry out the services provided by the Sheriff's Office in emergency situations and to maintain the uninterrupted service to our citizens during such emergency situations." [4 RP 015] Such actions include other management rights such as promulgating policy and imposing discipline. [*Id.*]

Assuming *arguendo* that the disciplinary component of the Policy is properly characterized as an effect of the Policy, the Collective Bargaining Agreement includes an express, clear, and unmistakable waiver of effects bargaining. The County retains the right to "determine and implement all policies, methods, standards, and direction of bargaining unit employees that

does not conflict with the terms of this Agreement...." [4 RP 015] In turn, "[m]anagement shall meet with the NMCPSO/SFCDSA regarding changes in County policies, procedures or regulations that affect wages, hours, or terms and conditions of employment. The NMCPSO/SFCDSA may also identify alternative solutions and provide suggestions not governed by this Agreement." [4 RP 014] Further, the association rights clause authorizes the NMCPSO/SFCDSA to provide mere "input regarding changes in the Sheriff's Office's policies, procedures, rules and regulations." [4 RP 016]

Thus, while the County is required to meet with the Union regarding policies that affect wages, hours, or terms and conditions of employment, the Union may only "identify alternative solutions and provide suggestions not governed by this Agreement" and "provide input regarding changes in the Sheriff's Office's policies, procedures, rules and regulations." [4 RP 014; 4 RP 016]. This is a clear and unmistakable waiver of the Union's right to engage in bargaining over certain policy decisions and such decisions' corollary effects.

In this respect, the Recommended Decision and May 16, 2022 Order are unsupported by substantial evidence in the record, and unreasonable when viewed in light of the whole record.

CONCLUSION

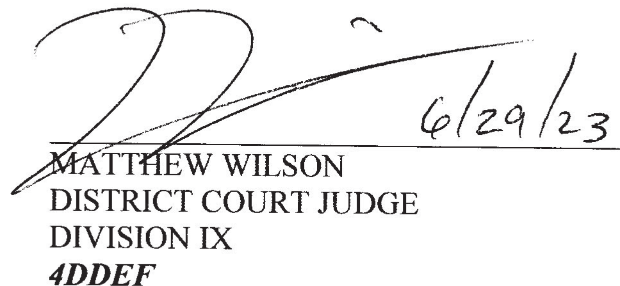
Based upon the pleadings and all matters of record, this Court finds:

1. This Court has jurisdiction over the parties hereto and the subject matter hereof;
2. This review is governed by Rule 1-074 NMRA;
3. In material part, the action of the PELRB was arbitrary and capricious;
4. In material part, the decision of the PELRB is not supported by substantial evidence based upon the whole record on appeal;
5. In material part, the action of the PELRB was not in accordance with law; and,

6. Therefore, reversal of the decision of the PELRB is justified and permitted by Rule 1-074(T)(2) NMRA.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED BY THE COURT that the May 16, 2022 Order in PELRB matter number 133-21 by the Public Employee Labor Relations Board—adopting the Hearing Officer's Report and Recommended Decision, dated March 22, 2022—is hereby **REVERSED**.

IT IS HEREBY ORDERED.



MATTHEW WILSON
DISTRICT COURT JUDGE
DIVISION IX
4DDEF

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the date of acceptance for e-filing a true and correct copy of the foregoing was e-served on counsel registered for e-service in these matters as listed below.

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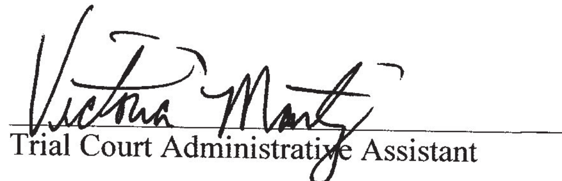

Trial Court Administrative Assistant