STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 18,

Appellant,

v. **D-202-CV-2016-07671**

STATE OF NEW MEXICO, HUMAN SERVICES DEPARTMENT and NEW MEXICO PUBLIC EMPLOYEE LABOR RELATIONS BOARD,

Appellees.

MEMORANDUM OPINION AND ORDER

THIS MATTER is an appeal under Rule 1-074 NMRA of an Order of the Public Employee Labor Relations Board (Board) concluding that a petition for clarification is not the proper mechanism for resolving the dispute between the union and the employer in this case. The Court **AFFIRMS** the Board's Order.

I. BACKGROUND

This appeal presents a single narrow issue: Is the Board's conclusion that a petition for clarification is not the proper procedural mechanism to resolve the underlying dispute supported by substantial evidence, arbitrary or capricious, or contrary to law? The Court concludes the decision must be affirmed. The applicable regulation provides for unit clarification where the circumstances surrounding the creation of a bargaining unit have changed sufficiently to warrant a change in the scope and description of that unit. It was not arbitrary or capricious, or contrary to law for the Board to conclude Appellant did not allege or make a showing of changed circumstances.

The facts relevant to this appeal are as follows.[1] Employer is the New Mexico Human Services Department (HSD), a public employer subject to the Public Employee Bargaining Act (PEBA). NMSA 1978, § 10-7E-4(S) (2003). Prior to 1994, multiple separate bargaining units existed throughout state government. Appellant American Federation of State, County and Municipal Employees, Council 18 (AFSCME) was the exclusive representative for purposes of collective bargaining for all the units. In 1994, all bargaining units represented by AFSCME were consolidated (realigned) into a single bargaining unit. In 2003, following passage of the current version of PEBA, AFSCME, as the incumbent representative, sought recognition as the exclusive bargaining agent for the employees whom it represented at that time. The Board granted the request on August 7, 2003, certifying that AFSCME had demonstrated majority support among state employees in the realigned bargaining unit.

The parties agree the term "wall-to-wall" denotes an employer whose eligible employees are covered by a union. Eligible employees are employees who are not "management employees," "confidential employees," or "supervisors" as those terms are defined in PEBA. NMSA 1978, § 10-7E-4(G), (O), (S), (U). In 2008, all eligible HSD employees were accreted into the existing bargaining unit. Thus, as of 2008 HSD was "wall-to-wall."

HSD employs a number of attorneys[2] in its Child Support Enforcement Division (CSED). In 2015, after meeting with an AFSCME representative, several CSED attorneys filled out dues-deduction cards signifying their authorization to have union dues deducted from their paychecks.

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[1] These facts are taken from the Hearing Officer's Report and Recommended Decision. None of the factual findings are challenged on appeal. Furthermore, some exhibits admitted during the merits hearing appear to have been omitted from the record on appeal. Having reviewed the audio recordings in their entirety, the Court has determined the omitted exhibits would have no effect on the outcome of this appeal.

[2] The administrative proceedings included a dispute over whether "attorney" is synonymous with "lawyer." The Court expresses no opinion on this issue. The term "attorney" is used in this opinion simply for consistency.

HSD rejected the authorizations claiming that attorneys are not part of the wall-to-wall bargaining unit.

AFSCME filed a "Petition for Clarification" with the Board on October 22, 2015, followed by an "Amended Petition for Clarification" on October 23, 2015. The Amended Petition for Clarification was brought pursuant to 11.21.2.37 NMAC and "sought an order finding that the 'Wall to Wall' unit at the Human Services Department includes employees in the position of Attorney within the Child Support Enforcement Division." [RP 641.] The Amended Petition for Clarification further states: "The requested clarification is warranted because AFSCME recently turned in dues check-off authorizations for some of the CSED attorneys working for [HSD] and [HSD] returned them claiming that they were not a part of the 'Wall to Wall' bargaining unit. Upon information and belief, those attorney's [sic] used to be administratively located within the General Counsel's office, but have been administratively relocated to a separate division." [RP 642.]

A Hearing Officer held evidentiary hearings on February 18, 2016 and on May 20, 2016.[3] Points of contention included the 2003 and 2004 proceedings related to the Board's certification of AFSCME as the representative of the bargaining unit. Also disputed were the 2008 proceedings that resulted in HSD becoming wall-to-wall.

The Hearing Officer issued a Report and Recommended Decision on August 5, 2016. The report includes recommendations regarding resolution of numerous issues including HSD's attack on the legitimacy of the proceedings by which AFSCME was certified as the exclusive representative of the bargaining unit. Documentation from that era in the Board's history is partially lacking. As a result, the Hearing Officer was required to draw inferences and make

[3] Other proceedings, including an attempted interlocutory appeal to the Board, occurred between these two hearings. These other proceedings are not relevant to the disposition of this appeal.

findings gleaned from files that were admittedly incomplete. The Hearing Officer concluded, among other things, that the State had long since waived any objection to AFSCME as the exclusive bargaining representative and, in any event, the proceedings certifying AFSCME as the incumbent had been proper.

The Hearing Officer also found that more recently there had been changed circumstances sufficient to warrant a unit clarification petition. He went on to consider the merits of the dispute regarding whether CSED attorneys are within the bargaining unit. He concluded the CSED attorneys are not exempt under PEBA, *i.e.*, they are not management, supervisory, or confidential employees, and therefore are within the wall-to-wall bargaining unit at HSD.

The Board adopted the Hearing Officer's report and findings except for the finding that there had been a change in circumstances with respect to the bargaining unit. Due to the absence of changed circumstances, the Board concluded that a petition for clarification is not the proper mechanism for resolving a dispute as to whether CSED attorneys are included or excluded from the bargaining unit.

II. LEGAL STANDARDS

PEBA provides for judicial review of orders issued by the Board. NMSA 1978, § 10-7E-23(B). The Court must affirm the order unless it is: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record considered as a whole; or (3) otherwise not in accordance with law. *Id.*; *see also* Rule 1-074(R) NMRA.

III. DISCUSSION

A. Issue on appeal

At issue here is the Board's application of the regulation regarding unit clarification. The regulation states in pertinent part:

> [W]here the circumstances surrounding the creation of an existing collective bargaining unit are alleged to have changed sufficiently to warrant a change in the scope and description of that unit, or a merger or realignment of previously existing bargaining units represented by the same labor organization, either the exclusive representative or the employer may file with the director a petition for unit clarification.

11.21.2.37(A) NMAC (02/28/2005). The New Mexico Administrative Code thus provides for unit clarification in two situations: (1) where the circumstances surrounding the creation of an existing collective bargaining unit are alleged to have changed sufficiently to warrant a change in the scope and description of that unit or (2) when there has been a merger or realignment of previously existing bargaining units represented by the same labor organization. Only the first basis for unit clarification, changed circumstances, is alleged in this case. AFSCME does not rely on merger or realignment.

The Hearing Officer found changed circumstances arose from two situations: first, HSD's refusal to accept dues check-off requests from CSED attorneys; and second, the creation of two new attorney classifications within HSD. In addition, the Hearing Officer stated a change in supervision of CSED attorneys also might constitute changed circumstances.

The Board did not accept these as changed circumstances warranting a change in the scope and description of the collective bargaining unit for purposes of the unit clarification regulation. The Board's conclusion regarding the absence of changed circumstances is the only issue on appeal.

B. Analysis

What constitutes a change in circumstances for purposes of unit clarification appears to be a matter within the specialized realm of labor law, which is the Board's special expertise. Furthermore, it calls for interpretation and application of the Board's regulation. Thus, the Court begins the analysis by according some deference to the Board's determination on this matter.

Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n, 1995-NMSC-062, ¶ 11, 120 N.M. 579. 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." *Id.* (citation omitted).

AFSCME's claim on the merits of the dispute is that CSED attorneys have been part of the bargaining unit since HSD went wall-to-wall and they continue to be part of the bargaining unit to this day. HSD's position is that CSED attorneys have never been part of the bargaining unit because they are confidential employees exempt by statute and they continue to be exempt to this day.

AFSCME sought "clarification" in the sense that it sought a declaration of the status of CSED attorneys—are they in the bargaining unit or are they excluded by statute. However the New Mexico Administrative Code requires the circumstances surrounding the creation of the unit to have changed before a party may obtain such a declaration in a unit clarification proceeding. The premise of AFSCME's argument is precisely to the contrary—that circumstances have *not* changed since the unit was created. In other words, the circumstances surrounding the creation of the bargaining unit may be disputed, but they have not changed: CSED attorneys have either always been part of the bargaining unit or they have never been part of the bargaining unit.

Nevertheless, AFSCME asserts each of the circumstances discussed by the Hearing Officer as a change in circumstances sufficient to warrant a unit clarification. The Court addresses each in turn.

First, HSD's refusal of dues deduction authorizations from CSED attorneys is not a change in circumstances, it is the event that brought a latent dispute to light. This event did not

change the attorneys' status as included or excluded, it merely revealed a disagreement as to their status.

Second, the creation of two new attorney positions at HSD, specifically, the "Lawyer B" and "Attorney IV" positions, is not a change in circumstances that warrants unit clarification. In some cases, the creation of new positions could constitute a change in circumstances sufficient to warrant clarification—as to the new positions. The creation of new positions could create uncertainty regarding whether the new positions belong in the bargaining unit. In this case, however, AFSCME does not seek clarification regarding just the two new positions. AFSCME seeks a declaration that all attorney positions in CSED are, and always have been, included in the bargaining unit regardless when the position was created.[4]

Third, in this case a change in supervision is not a change in circumstances surrounding the creation of the bargaining unit. It appears undisputed that when the bargaining unit went wall-to-wall in 2008, CSED attorneys were under the supervision of the Office of General Counsel. Subsequently, CSED attorneys were administratively reassigned such that they were supervised by the director. Currently, they are once again under the supervision of the Office of General Counsel.[5]

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[4] The record indicates the two new positions are at opposite ends of the qualifications continuum. Lawyer Bus are those who are just out of law school, have no practice experience, and have newly passed the bar exam, while Attorney IVs are required to have several years of practice experience and may exercise some supervisory or management authority. Between these two positions are the Lawyer O and the Lawyer A. [Disk 2, 02:08:00 (Iron testimony); Disk 5, 01:19:00 (Collins testimony).] Regardless where they fall on the qualifications continuum, AFSCME considers all attorneys in these job classifications to have been included in the bargaining unit since inception while HSD considers them all to be excluded.

[5] Although not entirely clear from the audio record, it appears there actually has been no change in direct supervision of the disputed CSED attorneys: they always have been directly supervised by managing or supervising attorneys. Rather, it is the managing or supervising attorneys whose direct supervisors have changed. The managing or supervising attorneys who supervise the CSED attorneys report to the director when the director is an attorney, and to the Office of General Counsel when the director is not an attorney. [Disk 2, 01:15:00 (Villanueva testimony); Disk 5, 00:43:00 (Padilla testimony).] Thus, the relationship between the disputed attorneys and the asserted change appears indirect.

A change of supervisors would not cause an employee to fall into a different labor category—excluded or included—than he or she occupied in the past. Placement inside or outside the bargaining unit is not determined by the identity of the supervisor; because the unit is wall-to-wall, it is determined by statutory exemption. A change in supervision therefore is not a change that requires clarification of an employee's status. Furthermore, the change in supervisors did not result in a change in job duties for the CSED attorneys. They continued to perform the same job functions before and after the changes in supervision. [Disk 5, 01:19:00 (Collins testimony).] If they were not confidential employees before the changes in supervision, they continued without any change to their status after the changes in supervision.

Relying on National Labor Relations Board authority, AFSCME argues that a unit clarification petition is proper because attorneys have not been historically excluded from the bargaining unit. This argument confuses the merits of the underlying dispute with the threshold requirement to demonstrate changed circumstances. *See In re Kaiser Found. Hosps.*, 337 NLRB 1061 (2002) (describing longstanding doctrine that NLRB will not entertain unit clarification petition seeking to accrete historically excluded classification into the unit unless the classification has undergone recent, substantial changes). Whether attorneys have been historically excluded is the substance of the dispute. Changed circumstances is the threshold requirement for resolving the dispute in a unit clarification proceeding.

In sum, AFSCME has failed to demonstrate the Board's conclusion is in error. Therefore, the decision must be affirmed.

The Court further notes the Board did not preclude AFSCME from presenting the dispute using an appropriate procedure. HSD's position is that the dispute must be raised through a petition for representation. This position is consistent with HSD's claim, rejected by the Board,

that AFSCME was not properly certified at the outset and therefore must undertake the process of demonstrating majority support before it can legitimately be recognized as the bargaining unit's representative. AFSCME, on the other hand, claims the CSED attorneys are and always have been part of the unit and HSD is violating the collective bargaining agreement by denying their requests to have union dues deducted. [RP 371, Agreement Between the State of New Mexico and AFSCME Council 18, Art. 10, Sec. 1 (requiring Employer to honor voluntary union membership dues deduction authorizations).] An employer who violates a collective bargaining agreement commits a prohibited practice. NMSA 1978, § 10-7E-19(H).

IV. CONCLUSION

The Board's conclusion that AFSCME failed to demonstrate that circumstances surrounding the creation of the collective bargaining unit have changed is supported by substantial evidence, is not arbitrary or capricious, and not contrary to law. Accordingly, the Board's conclusion that a petition for clarification is not the proper procedural vehicle to raise the dispute is affirmed.

IT IS SO ORDERED.

VALERIE HULLING
DISTRICT COURT JUDGE

This is to certify that a true and correct copy of the foregoing document was e-filed on July 19, 2017

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