STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 18, AFL-CIO,
Appellee,
v. **D-202-CV-2017-07924**

NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS,
Appellant.

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) that determined Appellant (Employer) committed a prohibited practice in violation of the Public Employee Bargaining Act (PEBA), NMSA 1978, §§ 10-7E-1 through -26 (2003, as amended through 2005), by unilaterally increasing the number of inspections Labor Law Administrators are required to perform. The Court **AFFIRMS** the Board's Order.

I. BACKGROUND

Employer is a state agency charged with, among other things, administering the Public Works Minimum Wage Act. Employer employs a number of Labor Law Administrators (LLAs) whose duties include performing inspections of public works projects to ensure contractors are complying with the Public Works Minimum Wage Act. Employer requires the LLAs to perform twenty inspections per month.

In October 2016, Employer informed the LLAs that the performance measures for fiscal year 2017 had increased and as a result each LLA would be required to perform an additional five inspections per month, for a total of twenty-five per month. Appellee (Union) filed a prohibited practices complaint alleging that Employer had not notified the Union of the increase in the number of required inspections nor had it provided the Union an opportunity to negotiate

the change.[1] [Record Proper (RP) Pt. 7, pp. 630–33.] Employer answered that it had merely adjusted production standards for the position because of a shortage of employees, that it was not required to negotiate the standard, and the issue was "void" because Employer since had become fully-staffed and the number of inspections required for each LLA per month had reverted to twenty. [RP Pt. 7, p. 601.]

A Hearing Officer held an evidentiary hearing on June 28, 2017. One former and one current LLA, a Union representative, and the Director of the Labor Relations Division testified.

The Hearing Officer issued a Report and Recommended Decision on July 25, 2017. The Hearing Officer found in favor of Employer on all the prohibited practices alleged in the Union's complaint except one: the Hearing Officer found Employer had violated PEBA by increasing the quota from twenty inspections per month to twenty-five inspections per month without bargaining. The Hearing Officer recommended Employer be ordered to publicly post for a period of 180 days in all its buildings where there are bargaining unit employees a notice of the violation found. He further recommended that Employer be ordered to bargain with the Union over any future changes to covered employees' terms and conditions of employment in a manner consistent with PEBA and the parties' collective bargaining agreement.

The Board affirmed the Hearing Officer's decision. Employer appealed the Board's Order to this Court pursuant to NMSA 1978, § 10-7E-23(B) (2003).

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.*

[1] The prohibited practices complaint contains numerous other alleged violations which are not at issue on this appeal.

III. DISCUSSION

A. The Board's order is not arbitrary or capricious and is supported by substantial evidence.

PEBA requires public employers and the designated labor representative to "bargain in good faith on wages, hours, and all other terms and conditions of employment and all other issues agreed to by the parties." NMSA 1978, § 10-7E-17(A)(1) (2003). The failure or refusal to bargain is a prohibited practice. *Id.* § 10-7E-19(F).

The question this appeal presents is whether the increase from twenty inspections per month to twenty-five inspections per month is a term or condition of the LLAs' employment and, as such, a subject of mandatory bargaining. It is undisputed Employer implemented this change unilaterally, *i.e.*, without bargaining.

There is no definition in PEBA of the phrase "wages, hours, and other terms and conditions of employment" so as to delineate what constitutes a subject of mandatory bargaining. *County of Los Alamos v. Martinez*, 2011-NMCA-027, ¶ 12, 150 N.M. 326 (stating this issue is one of first impression in New Mexico). However, it is appropriate to look for guidance to federal cases interpreting similar language in the National Labor Relations Act (NLRA). *Las Cruces Prof'l Firefighters v. City of Las Cruces*, 1997-NMCA-031, ¶ 15, 123 N.M. 239.

The NLRA uses terminology identical to the language in PEBA to define the topics of mandatory bargaining. 29 U.S.C. § 158(d) (imposing mutual obligation on employer and employees' representative to bargain collectively "with respect to wages, hours, and other terms and conditions of employment"). Under the NLRA, subjects that are plainly germane to the working environment and are not among those managerial decisions which lie at the core of entrepreneurial control are deemed "terms and conditions of employment" and therefore are subjects of mandatory bargaining. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498, 99 S. Ct. 1842 (1979).

The approach to the question of what constitutes a term or condition of employment is "quite deferential"—the determination of the labor board is upheld so long as it is "reasonably defensible." *Minteq Int'l, Inc. v. NLRB*, 855 F.3d 329, 332 (D.C. Cir. 2017) (citing *Ford Motor Co.*, 441 U.S. at 497, 99 S. Ct. 1842). New Mexico similarly affords deference to questions that fall within an agency's special expertise. *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶¶ 11, 12, 120 N.M. 579.

The Court concludes it was not arbitrary or capricious for the Board to find that the number of inspections LLAs are required to perform is a term or condition of their employment. Conducting inspections of public works construction sites is one purpose of the LLA position and a required job duty. [RP Pt. 5, p. 439 (Job Bulletin).] The number of inspections performed is a direct and objective measure of the LLA's productivity.

Furthermore, the Hearing Officer found that whether an employee meets the inspection quota has the potential to affect the employee's success or failure in meeting job requirements. Substantial evidence in the record supports the finding that the failure to meet productivity measures can affect an employee's evaluations. [RP Pt. 2, p. 151 (Granado testimony; RP Pt. 3, pp. 238–39 (Dean testimony).] Productivity expectations that can affect an employee's performance reviews are plainly germane to the work environment. The Board's determination is reasonably defensible and fully supported upon review of the whole record.

B. Employer has not demonstrated grounds to reverse.

Employer argues the Board's decision is not supported by substantial evidence. However, the evidence supporting the decision is, for the most part, undisputed: the previous number of required inspections was twenty per month; Employer increased the number to twenty-five without bargaining the change. The Board's determination of the question these undisputed facts raise—whether the inspection quota constitutes a term or condition of

employment—is reviewed with deference on appeal. *Minteq Int'l, Inc.*, 855 F.3d at 332 ("The classification of bargaining subjects as 'terms or conditions of employment' is a matter concerning which the [National Labor Relations] Board has special expertise." (citation and quotation marks omitted)).

Employer points to a potential discrepancy in the testimony regarding how much of the LLAs' entire workload is comprised of public works inspections. One LLA testified that public works comprise about half of her entire workload. [RP Pt. 2, unnumbered page between 147 and 148 (Granado testimony).] The Director testified that public works inspections comprise roughly 20% of all LLA job duties. [RP Pt. 3, pp. 234–35.] The Hearing Officer concluded the LLA's testimony better reflected the impact of the change than did the Director's testimony.

A purported conflict in the evidence is not grounds for reversal in this case. The Hearing Officer's assessment of the testimony is a matter of credibility that will not be disturbed on appeal so long as there is substantial evidence to support the finding. Though Employer argues the Director supervises and works most closely with LLAs, the Director testified to the contrary, that he no longer closely supervises them. [RP Pt. 3, p. 240.] Therefore, it was not unreasonable for the Hearing Officer to prefer the testimony of the LLA who is responsible for meeting the quota the Director set.

Employer argues that increasing the inspection quota is a right reserved to management under PEBA and the CBA. The Director testified that increasing the number of required inspections constitutes "directing work," is a well-established management right, and therefore not a subject of mandatory bargaining. [RP 246–47.]

The Hearing Officer was not required to accept the Director's testimony as conclusive on the question of what constitutes a topic of mandatory bargaining. PEBA reserves to public employers the right to "direct the work of, hire, promote, assign, transfer, demote, suspend,

discharge or terminate public employees[.]" NMSA 1978, § 10-7E-6(A). The CBA reserves similar management rights and in addition, the right to "determine methods, means, and personnel by which the Employer's operations are to be conducted[.]" [RP Pt. 3, p. 300 (CBA, Art. 18, § 1, ¶ 8).] However, neither PEBA nor the CBA authorizes Employer to unilaterally change a term or condition of employment. Employer may propose such changes, but they are subject to bargaining. [RP Pt. 4, p. 347 (CBA Art. 42, § 2 ("[T]he Employer reserves the right to propose other reasonable changes in the terms and conditions of employment of employees to meet legitimate public service and operating needs, and such changes are subject to negotiation in accordance with the PEBA or any other expedited impasse resolution procedures mutually agreed upon by the parties at the time of such negotiations.")).] The Hearing Officer reasonably found that changing the inspection quota falls outside management's exclusive right to determine the means and methods by which its mission is accomplished because it can affect whether the LLAs succeed or fail at job expectations.

Employer argues it was not required to bargain the increase because it was temporary,[2] easily attainable or already being accomplished by most LLAs, and was not used as a basis to discipline any LLA. The duration, difficulty, and disciplinary effect of the increase are factors that could have been raised during bargaining. These factors do not relieve Employer of the duty to bargain and they do not alter the conclusion that the number of inspections LLAs are expected to perform is a term or condition of employment.

Employer argues the change was so minor that the Union did not request negotiation. However, it is undisputed Employer imposed the change unilaterally, giving the Union no opportunity to negotiate.

[2] The temporary nature of the increase was not communicated to the LLAs at the time it was imposed. [RP, Pt. 3, p. 243 (Dean testimony).]

To the extent Employer argues bargaining was not required because the increase was *de minimis*, the Hearing Officer found to the contrary that a 25% increase in the number of acceptable public works inspections per month is material. The finding that the increase is material is subject to deference. *El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 657–58 (5th Cir. 2012). The materiality of a 25% increase in the inspection quota is supported by the testimony of Ms. Granado. She testified that a 25% increase in the number of inspections required per month could be difficult to meet if there are not a sufficient number of ongoing public works projects in the region to inspect. She further testified that hours of travel time could be expended to make a site visit that ultimately does not count toward the inspection quota because there are no workers or contractors on site. She stated that five additional inspections could require an additional day of work. [RP Pt. 2, pp. 145–49 (Granado testimony).] Given this testimony, the Court defers to the Board's determination that the change was material.

Employer argues it was not required to bargain because the increase was a matter of economic exigency. The Court notes an absence of evidence regarding the economic necessity of the increase in the inspection quota. Rather, the evidence was that Employer's performance measures were increased, and Employer in turn increased its demand upon LLAs. Argument of counsel that Employer's funding was in jeopardy [Statement of Appellate Issues, p. 20], is not evidence of an economic emergency.

IV. CONCLUSION

The Court affirms the Board's order.

IT IS SO ORDERED.

CLAY CAMPBELL
DISTRICT COURT JUDGE

This is to certify that a true and correct copy of the foregoing document was mailed and/or otherwise delivered to the following on July 26, 2018

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