

32-PELRB-2026

**STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD**

In Re:

**ALBUQUERQUE AREA FIRE FIGHTERS,
IAFF LOCAL 244, BERNALILLO COUNTY
CHAPTER**

Complainant,

PELRB Case No. 106-26

v.

COUNTY OF BERNALILLO, NEW MEXICO,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board at its regularly scheduled meeting on September 1, 2026, for *pro forma* adoption of the Hearing Officer's Report and Recommended Decision issued in this case pursuant to NMAC 11.21.3.19(D). The Hearing Examiner issued his report on July 10, 2026, and no request for Board review was filed by either party. Accordingly, the Board adopts the Hearing Officer's Recommended Decision and the decision is binding on the parties but does not constitute binding precedent.

DocuSigned by:

Peggy Nelson

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9/10/2026

Date: _____

Peggy J. Nelson, Board Chair

**BEFORE THE STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

In Re:

**ALBUQUERQUE AREA FIRE FIGHTERS,
IAFF LOCAL 244, BERNALILLO COUNTY
CHAPTER**

Complainant,

PELRB Case No. 106-26

v.

COUNTY OF BERNALILLO, NEW MEXICO,

Respondent.

**REPORT AND RECOMMENDED DECISION ON UNION'S
PRE-HEARING MOTION TO GRANT RELIEF REQUESTED IN THE PPC**

This matter comes before the undersigned Hearing Examiner pursuant to a scheduled motion filed by the Albuquerque Area Fire Fighters, IAFF Local 244, Bernalillo County Chapter (Union or IAFF) on May 29, 2026, to grant the relief requested in its Prohibited Practice Complaint (PPC) filed against County of Bernalillo (County or Employer) on March 20, 2026. Despite the title, the undersigned deems this to be a motion for summary judgment because the Union and the County aver a lack of genuine dispute of material facts.

Pursuant to the previously entered scheduling order, the County filed its Response on June 18, 2026; the Union filed a Reply on July 9, 2026; and the County did not exercise its right to file a Sur-reply on or by July 23, 2026. On that day, briefing closed and this decision is timely issued under PELRB rules.

The Union alleges that the County violated the Public Employee Bargaining Act (PEBA), §§ 10-7E-1 et seq., as follows:

1. § 19(B): by unilaterally implementing changes to staffing and overtime practices without bargaining with the Union, the County interfered with, restrained, and coerced public employees in the exercise of rights guaranteed by PEBA, including the right to act through their exclusive representative on mandatory subjects of bargaining.

2. § 19(F), and § 19(G) with § 17(A)(2): by unilaterally implementing four-person staffing on Engine 40 and changes to overtime distribution during the term of the CBA while the staffing policy remained under active negotiation and unresolved, and by refusing to bargain those changes to agreement or lawful conclusion, the County refused to bargain collectively in good faith with the Union as the exclusive representative.

Based upon the preponderance of the undisputed facts, and lack of genuine issue of material fact that rebuts the undisputed facts, the undersigned finds and concludes that a violation of § 19(B) was not shown; but the County violated the duty to bargain in good faith under §§ 17(A)(2), 19(F), and 19(G). Accordingly, she recommends that the PPC be SUSTAINED as to those claims and remedied as provided below.

APPEARANCES AND RECORD

For the Union

Justin Lesky, Esq.

Law Office of Justin Lesky

For the County:

Kate Furek, Esq.

Jackson Lewis, P.C.

Danny Jarret, Esq.

Jackson Lewis, P.C.

In support of its Motion, the Union submitted nine (9) Exhibits¹, including two Affidavits from the Local Vice President authenticating those documents; and the County submitted four (4) exhibits without authentication.² All evidence and argument have been considered whether or not specifically addressed herein.

¹ Un. Ex. A, Affidavit of Local President Theodore Ygbuhay; Un. Ex. A(1), 9/25/25 – 10/25/25 emails between/among union and management representatives regarding policy change; Un. Ex. A(2), 12/21/26 - 1/1/26 emails regarding the policy change; Un. Ex. A(3), Arbitration Award, FMCS No. 250603-06785, IAFF Local 244 and Bernalillo County (Arbitrator Lynn E. Rubinett, 1/30/26); Un. Ex. A(4), 1/1/26 email from Local V.P. to Chief Lardy; Un. Ex. B, second Affidavit of V.P. Ygbuhay; Un. Ex. B(1), Union proposal submitted on or about 11/14/25; Un. Ex. B(2), Union proposal submitted on or about 2/19/26; and Un. Ex. B(3), CBA, effective from 2024 through present.

² Cty. Ex. A, 9/25/26 email notice from Fire Chief to Union of “201-004 Staffing Management” policy changes; Cty. Ex. B, 12/7/25 – 1/28/26 emails between Union and Fire Chief regarding bargaining proposals; Cty. Ex. C, County’s redlined proposal for Staffing Management Policy change, Policy 201-004 (see Note 4, *infra*); Cty. Ex. D, 12/31/26 – 1/1/26 email responses to policy change.

STATEMENT OF UNDISPUTED MATERIAL FACTS³

1. The Union is and was at all times material hereto a “labor organization” as defined by the § 4(K), and an “exclusive representative” under § 4(I). (PPC/Answer ¶ 1, ¶ 3; County Stmt. of Facts, ¶ 1.) The Union’s current bargaining unit in the County is comprised of public employees working for the Fire Department in the positions of Battalion Commander, Captain, Lieutenant, Paramedic/Firefighter, Apparatus Engineer, and Firefighter. (PPC/ Answer ¶ 4.)
2. Bernalillo County is and was at all times material hereto a “public employer” as defined § 4(R). (PPC/ Answer ¶ 2.) It is the most populous county in New Mexico. (County Stmt. of Facts, ¶ 1.)
3. Since certification, the Union has negotiated and entered into successive collective bargaining agreements with the County. (PPC/ Answer ¶ 5.) The collective bargaining agreement (CBA) currently in effect between the parties became effective on or about July 1, 2024 and was, at the time of the PPC’s filing, set to expire on June 30, 2026. (PPC/Answer ¶ 6; and Un. Ex. B(3), CBA.) Among other things, the CBA and related County policies address staffing levels, scheduling, and overtime (“additional time”) distribution for bargaining unit members. (PPC/ Answer ¶ 7.)
4. On or about September 25, 2025, Fire Chief Zachary Lardy transmitted to the Union a proposed “Staffing Management” policy (201-004) for a ten-day review period, stating that the policy would be posted after that period absent further input. The proposed Staffing Management policy contained provisions addressing, among other things, minimum staffing levels on specific apparatus (including Engine 40), leave quotas, daily staffing levels, and how overtime assignments would be distributed. (PPC/Answer ¶¶ 8-9; Un. Ex. A(1), emails 9/29/25; County Stmt. of Facts, ¶¶ 1-2, 4; Un. Resp. to Couty Stmt. of Facts, ¶¶1, 3; Cty. Ex. 3, County’s proposal (*see* Note 4, *infra*)).
5. On September 29, 2025, the Union formally invoked its right to bargain under PEBA with respect to the Department’s operational expansion and proposed staffing policy changes,

³ These facts are taken primarily from the Union’s Motion as confirmed by the undersigned against the documentary evidence, because the County only provided seven (7) statements of fact and did not dispute the Union’s statement of facts in either ¶¶11-12, 14-27 of the Union’s opening Motion, or ¶¶1-7 of the Union’s Reply.

specifically identifying effects on terms and conditions of employment including leave quotas, daily staffing, and scheduling practices. (Un. Ex. A, ¶¶ 4-5; Un. Ex. A(1), 9/29/25 emails; County Stmt. of Facts, ¶ 3.)

6. On October 24, 2025, the Union sent a written “Demand to Bargain & Clarification of Outstanding Policy Obligations” reiterating that policies containing mandatory subjects of bargaining, including the Staffing Management Policy, remained outstanding and must be bargained, and requesting formal written proposals and a schedule for further bargaining sessions. (PPC/Answer ¶ 11; Un. Ex. A(1) at 10.)
7. On November 12, 2025, Chief Lardy responded, acknowledging that various policies containing mandatory subjects of bargaining were outstanding and that the Union had requested to bargain them, including the staffing policy, and indicating that management would be consulting County legal counsel regarding its obligations. (PPC/Answer ¶ 12.)
8. On or about November 14, 2025, the Union made a counter proposal to the County that included, among other things, that Engine 40’s minimum staffing be set at four personnel. (Un. Ex. B(1), Union Proposal; and Un. Ex. B, Second Ygbuhay Aff., ¶ 4.) On December 7, 2025, after not receiving a response, the Union followed up and reminded the County that the Union’s counter proposal “was submitted under the 10-day review process as part of formal bargaining.” (Cty. Ex. B; *compare* Cty. Stmt. of Facts ¶¶ 5, 7.)⁴
9. On December 31, 2025, Division Chief Eric Wasson issued a written “Staffing Issues” email to all BCFR Commanders, with Chief Lardy copied, “to ensure consistent application of our Staffing Management Policy moving forward,” directing that a 24-hour vacancy “should not be split into 10-hour and 14-hour segments as a standard practice,” and that, where an employee is signed up for Additional Time and can fulfill an entire 24-hour vacancy, that member “shall be assigned the full 24-hour vacancy” and “the shift will not be split.” (PPC/Answer ¶ 13; County Stmt. of Facts, ¶ 6; Un. Resp. to Couty Stmt. of Facts, ¶ 6.)

⁴ The County offered County Exhibit C, averring without supporting Affidavit that it was the Union’s redlined changes/proposal offered “in or about December 2025”. The Union disputes that Cty. Ex. C is the Union’s proposal and provides its actual November 14, 2025 counter proposal, which is authenticated by Affidavit, and to which the County did not sur-reply. As such, the undersigned infers that Cty. Ex. C, which is printed on Bernalillo County Fire Rescue letterhead, is in fact a County proposal, although the County proposal provided in September was evidently not in redline format (*see* Un. Ex. A(1) at 10).

10. In the same December 31 email chain, Battalion Commander Steven Lopez stated that the practices addressed in Wasson's email had "become past practice" and that the written direction represented a "change," and suggested that a department-wide memo be issued so personnel would understand the change and not have to ask why it was occurring. (Un. Ex. A, ¶ 6.)
11. Also in that email chain, Captain Justin Tolliver explained that, during upgrade shifts in 2024 and thereafter, he had been ordered by prior command staff to split 24-hour vacancies into 10- and 14-hour segments and that this had become a common and open practice discussed in Commander/Chiefs meetings, which was never changed. (Un. Ex. A, ¶ 7.)
12. Chief Lardy had previously stated on December 31st that "it has never been authorized to distribute shifts at less than 24 hours," and Division Chief Wasson also stated on December 31st and January 1st that it was "never authorized" to split shifts into sections of 10 hours and 14 hours, while nevertheless announcing the new direction that 24-hour vacancies would not be split and that qualifying employees signed up for Additional Time would be assigned the entire 24-hour vacancy. (Un. Ex. A, ¶ 8.) These claims would later be contradicted by the findings and conclusions of Arbitrator Rubinett, in her award issued on January 30, 2026, although that matter dealt with a slightly different aspect of implementing shift splits for purposes of the assignment of overtime. (Un. Ex. A(4).)
13. On January 1, 2026, the Union notified Chief Lardy in writing that certain aspects of the staffing policy "currently under bargaining between the parties have been directed for implementation," expressly identifying: (a) "the assignment of a fourth firefighter on the pumper at Station 40;" and (b) "the practice of giving preference to 24 hour overtime signups over 10 and 14 hour signups regardless of opportunity hours." (PPC/Answer ¶ 17.)
14. In that January 1st email, the Union stated that these items had been raised previously in proposals and discussions, remained part of the unresolved staffing policy, and that the Union did not consider the implementation of any such provisions to constitute agreement on the staffing policy or a waiver of the union's bargaining rights, and that it expected bargaining over the staffing policy and its impacts to continue to completion. (Un. Ex. A, ¶ 9.)
15. The Union further noted in its January 1, 2026 email that its November counterproposal on the staffing policy remained outstanding and that meaningful progress toward agreement

should occur “through the exchange of proposals during bargaining, rather than through unilateral implementation of unresolved provisions,” and characterized the County's actions as part of “a continuing pattern of implementing mandatory subjects of bargaining without initiation and or completion of bargaining.” ([PPC/Answer ¶ 19.]

16. Later on January 1, 2026, Chief Lardy responded that “labor has not agreed to policy updates related to the staffing of the fire department” and claimed the department “continues to operate” under “the current version of the staffing management policy.” He defended the directions given to commanders, and acknowledged that the issues raised are “a mandatory subject of bargaining”, but he asserted that they “must be addressed in the next negotiation cycle if the IAFF so-wishes.” (PPC/Answer ¶ 20.)
17. On January 28, 2026, after implementing the changes without bargaining, Chief Lardy wrote that the County “accept[ed]” the Engine 40 four-person staffing proposal”, along with several other items among the Union’s counter proposal. (Cty. Ex. B, Lardy email to Local VP). The assignment of a fourth firefighter to Engine 40 has effects on overtime opportunities and daily staffing allocations elsewhere in the system, including reallocation of hours that would otherwise have been offered as additional time, changes in staffing needs at other apparatus and stations, and changes in leave coverage and deployment patterns, all of which are mandatory subjects of bargaining. (Un. Ex. A, ¶ 12.)
18. The distribution of additional time and overtime opportunities, including the use or non-use of 10-hour and 14-hour segments within a 24-hour workday and the prioritization of opportunities under Article 21.4.1 of the CBA, also directly affects wages, hours, and working conditions for bargaining unit members and is a mandatory subject of bargaining. (Un. Ex. A, ¶ 13.)
19. The Union supports four-person engine staffing at Engine 40 from a safety and operational perspective and is not seeking removal of the fourth firefighter. The Union’s objection is to the County’s unilateral implementation of that change and the related overtime distribution changes while the underlying mandatory subjects remain under bargaining and unresolved. (Un. Ex. A, ¶ 14.)
20. On January 30, 2026, FMCS Arbitrator Lynn Rubinett issued a final award in a grievance arbitration between the Union and the County involving the application of Article 21.4.1 to an April 27, 2025 additional-time assignment, sustaining the grievance and finding that additional time opportunities are to be prioritized by “total hours within the work status,” that a 24-hour

vacancy is typically comprised of a 10-hour day shift and a 14-hour night shift pursuant to the parties' past practice, and that the County's restrictive interpretation of additional-time assignments in disregard of shift splitting practices was not supported by the CBA or a clear past practice. (Un. Ex. A, ¶ 15; Un. Ex. A(3).)

21. An absent employee's "entire shift" for purposes of additional time opportunities is normally 24 hours. (Un. Ex. B(3), CBA, p. 44, Article 22.2.4.1 (providing example of an "entire shift" being 24 hours); p. 34, Article 19.1 (for purposes of leave requests, a "full-scheduled shift" is 24 hours; Article 4.7.7 (for purposes of the Union Business Pool of Hours, a "full scheduled shift" is 24 hours). However, the County then normally subdivides an employee's full 24-hour shift into portions known as day and night shifts. (*Id.*, p. 7, Article 4.7.7 (day shift consists of a 10-hour work period and night shift is 14 hours); p. 34, Article 19.1 (same).) The day shift portion of an employee's normal 24-hour entire shift is 0900-1900, and the night shift portion is 1900-0900. (*Id.*, Article 19.1.) Thus, "shift splitting" 24-hour shifts into ten and fourteen hour increments, as had been the practice for additional time opportunities prior to the County's unilateral change, is not inconsistent with the CBA. (CBA, and Un. Ex. A(3), Arb. Rubinet Award dated 1/30/26.)
22. On February 19, 2026, the Union submitted a second counter proposal, to which the County had not responded by July 8, 2026. (Un. Ex. B(2); and Un. Ex. B, Aff. at ¶ 5.)

RELEVANT LEGAL STANDARDS

The PELRB has long looked to N.M. Rules of Civil Procedure, specifically Rule 1-056 NMRA, for guidance in resolving a motion for summary judgment, and the response thereto. *AFSCME Council 18 v. Dep't of Labor*, 1-PELRB-2007 (Oct. 15, 2007; in re: Case No. 149-06). Accordingly, the burden is on the Union as Complainant and movant to establish lack of genuine dispute of material fact and, if it presents a prima facie case of such, the non-moving party must then "demonstrate the existence of specific evidentiary facts which would require trial on the merits." The non-moving party "cannot stand idly by and rely solely on the allegations...or upon mere argument or contentions to defeat the Motion once a prima facie showing has been made." *N.M. Coalition of Public Safety Officers v. Santa Fe County*, 3-PELRB-2018 (Jan. 17, 2018; in re: Case No. 118-17), citing *AFSCME Council 18 v. Dep't of Labor*, 1-PELRB-2007 (Oct. 15, 2007;

in re: Case No. 149-06); *see also* *Thuman v. Public Defender Dep't*, 54-PELRB-2012 (Jul. 13, 2012, in re: Case No. 103-12).

In this case, it is violation of the duty to “bargain in good faith on wages, hours, and all other terms and conditions of employment” that the Union must establish by a preponderance of the evidence. *See* § 17(A)(1), 19(F), and 19(G). Notably, despite the name, the duty to bargain in good faith includes *per se* violations such as substantial and material unilateral changes of or affecting terms and conditions of employment, without first giving the Union notice and opportunity to bargain.

In such *per se* cases, the Employer’s subjective good faith or intent, or legitimate business reasons or rationale are irrelevant. *See Las Cruces Prof’l Fire Fighters v. City of Las Cruces*, 1997-NMCA-31, ¶ 15, 123 NM 239, 938 P.2d 1384 (“[a]bsent cogent reasons to the contrary, we should interpret language of the PEBA in the manner that the same language of the NLRA has been interpreted, particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the time the PEBA was enacted”); *NLRB v. Katz*, 369 U.S. 736 (1962) (that “the duty ... may be violated without a general failure of subjective good faith” and “an employer’s unilateral change in conditions of employment under negotiation is similarly a violation of § 8(a)(5)”); *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (that “[t]he Board has determined, with our acceptance, that an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment.”); *Alamo Cement Co.*, 281 NLRB 737, 738 (1986) (to violate the duty to bargain in good faith, the change to the mandatory subject must be “substantial, material and significant”).

Moreover, the duty to bargain over changes to terms and conditions of employment prior to unilateral imposition continues during the life of a collective bargaining agreement, and also after its expiration under the PEBA’s evergreen clause. *See* § 18(D) (evergreen provision); *IBEW v. NLRB*, 795 F.2d 150, 153 (D.C. Cir. 1986) (“making unilateral changes in the terms and conditions of employment during the pendency of an existing collective bargaining agreement ... violates [the] duty to bargain.”); *County of Los Alamos v. Martinez*, 2011-NMCA-027; *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 137-38 (D.C. Cir. 1999); *Duffy Tool & Stamping, LLC v. NLRB*, 233 F.3d 995, 996-97 (7th Cir. 2000), citing *Litton, supra* (“if there is no deadlock, no foot-dragging by the union, and no exigency requiring an immediate change in the terms or conditions of employment to stave off disaster, the employer may not make such a change unilaterally”).

Lastly, new terms and conditions of employment that are not in conflict with the CBA can be created by clear and mutually acceptable past practices of long standing. *See Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581-82 (1960) (that “...the practices of the industry and shop is equally a part of the collective bargaining agreement although not expressed in it”). To become an “established past practice”, meaning a legally binding one, it must be shown to be clear and unequivocal (“clarity”) and consistently applied over a long period of time (“consistency” and “longevity”) such as to demonstrate “mutuality”. *See, e.g.*, Ed. Ray Schoonhoven, *Fairweather’s Practice and Procedure in Arbitration* (4th ed. BNA, 1999) at 255-56; *see also* PELRB Case 150-07, *AFSCME v. Department of Corrections*, Hearing Examiner’s Report (Feb. 6, 2008); and Ruben Miles, *Elkouri and Elkouri: How Arbitration Works* (6th ed. ABA, 2003) at 606-612.

PARTIES’ POSITIONS

The Union argues that the County’s December 31, 2025 directive and subsequent implementation of “24-hour only” additional-time assignments and non-splitting of 24-hour vacancies, and its implementation of four-person staffing at Engine 40, were undertaken unilaterally during ongoing staffing-policy bargaining and are inconsistent with the Union’s rights under PEBA and the CBA as interpreted in the recent arbitration award. It points to a sworn statement of the Local Vice President and email communications from management and staff, including those offered by the County, which it says show that shift splitting was an established practice, as recently recognized by Arbitrator Rubinett. (Un. Ex. A(3).)

The County denies that shift splitting was a past practice, pointing to recent email statements by management that split shifting had never been authorized. (Un. Ex. A(3).) It also argues that it is within its management rights under § 6 of the PEBA to “mak[e] a minor alteration to the schedule and staffing.” (Cty. Resp. at 3.) It further argues that in implementing four-person staffing on Engine 40 on or about December 31, 2025 or January 1, 2026, it was simply carrying out what the Union offered “in or about December”⁵ and what the County formally accepted on January 28, 2025. (Cty Resp. at ¶¶ 5, 7; Cty. Ex. B.)

⁵ As found above, the Union issued its counterproposal in November 2025, and again in February 2026.

ANALYSIS

The questions presented are whether there is any genuine dispute of material fact as to whether the County violated the duty to bargain in good faith by implementing the four-person staffing complement for Engine 40, without bargaining the effects thereof; and by terminating a past practice of shift splitting for purposes of overtime or additional time assignment.

First, as discussed above, the PEBA unequivocally requires parties to a CBA to negotiate in good faith at all times, and obligates them to give notice and opportunity to bargain before effectuating significant unilateral changes to terms and conditions of employment, including past practices. *See* PEBA, Secs. 19(F) and 20(C); *see also Communication Workers of America (CWA), AFL-CIO v. State of New Mexico*, 2019-NMCA-031, No. D-202-CV-2015-03814 (Mar. 15, 2017; in re: PELRB No. 122-14); *Katz, supra*; *Litton, supra*; *Visiting Nurse Services of W. Mass., Inc. v. NLRB*, 177 F.3d 52, 57-59 (1st Cir. 1999); *IBEW v. NLRB*, 795 F.2d 150, 153 (D.C. Cir. 1986) (that “making unilateral changes in the terms and conditions of employment during the pendency of an existing collective bargaining agreement ... violates [the] duty to bargain.”).

Here, the Union indicated agreement to the four-person staffing model for Engine 40, but that was only one of its proposals and bargaining on the effects of the Engine 40 staffing change had not yet occurred, despite the Union’s multiple and repeated requests for such bargaining. As explained by V.P. Ygbuhay in his affidavit, “[t]he assignment of a fourth firefighter to Engine 40 has effects on overtime opportunities and daily staffing allocations elsewhere in the system, including reallocation of hours that would otherwise have been offered as additional time, changes in staffing needs at other apparatus and stations, and changes in leave coverage and deployment patterns, all of which are mandatory subjects of bargaining.” (Un. Ex. A, Ygbuhay Aff., ¶ 12.) Furthermore, the distribution of additional time and overtime opportunities, including the use or non-use of 10-hour and 14-hour segments within a 24-hour workday and the prioritization of opportunities under Article 21.4.1 of the CBA, “directly affects wages, hours, and working conditions for bargaining unit members. Hence, many issues existed for the parties to bargain over prior to implementation of the County’s proposed changes to these mandatory subjects of bargaining.” (*Id.* at ¶ 13, footnote omitted.)

Notably, the Union did not waive bargaining, and instead repeatedly sought to bargaining and the County failed or refused to engage in actual or effects bargaining before making these unilateral changes. (It is also logically inapposite to argue, as the County does, that the Chief

merely accepted what had been offered, months after the Union's alleged offer and weeks after the County's implementation thereof.)

Second, it is axiomatic in labor law that a policy or practice that does not conflict with the terms of a CBA can become a binding or established past practice that has the same weight and effect of a right guaranteed by the CBA. *See Steelworkers, supra* (that "...the practices of the industry and shop is equally a part of the collective bargaining agreement although not expressed in it"); *see also CWA, supra* (recognizing the doctrine of past practice under the PEBA). Similarly, a final and binding arbitration award between the Parties becomes a part of the CBA unless or until amended through bargaining. *See Fairweather's, supra*, at 529-30.⁶

If a past practice is established, it is very significant. Thereafter, it can only be amended with notice and opportunity to bargain over the change. In other words, it can only be terminated "at the bargaining table", like any other contractual right. *See Fairweather's* at 266; Elkouri at 617-20. There is no magic number to establish longevity, but the standard is that it endured "over such a period of time that the employees may rely on and reasonably expect such practice to continue." *See Fairweather's* at 256; *see also* Elkouri at 608.

In this case, the undisputed evidence (aside from command staff's conclusory email pronouncements that gave rise to the PPC and were swiftly and repeatedly contradicted by staff) is that the practice of shift splitting for purposes of the assignment of overtime has ripened into a binding "past practice" that it is enforceable under labor law and PEBA. The evidence of this is that it has endured for years; at least one BCFR staff member has been trained on it by command staff, according to the County's own proffered evidence; and a mutually selected FMCS arbitrator has confirmed the existence of the shift splitting practice. *See, e.g., Steelworkers* (that "...the practices of the industry and shop is equally a part of the collective bargaining agreement although not expressed in it"); and Un. Ex. A(3), Rubinett Award at 6-9. Needless to say, management's bare denials of a practice in an email purporting to rescind, overrule or void the past practice do not constitute adequate rebuttal of the existence of this past practice.

Because this is found to be a binding past practice that is consistent with the CBA, management was required to first provide the Union notice and opportunity to bargain before

⁶ Although not specifically alleged, the undisputed facts put before the undersigned for her consideration strongly suggest that the County's conduct here regarding shift splitting is contrary to and/or intended to evade the determinations of the Rubinett Award.

amending it – much like it was required to continue to bargain over the effects of the change of staffing on Engine 40, despite the Union’s acceptance of that and some other items in the County’s September proposal package.

CONCLUSIONS OF LAW

1. The PELRB has jurisdiction over the Parties and subject matter.
2. At the time of these actions, the Parties had not reached a final agreement on the staffing policy, no lawful conclusion of negotiations had been reached or processed under applicable procedures, and the Union had not clearly and unmistakably waived its right to bargain over staffing levels or overtime distribution. (Un. Ex. A, ¶ 10.)
3. When the Union accepted some items from the County’s proposal, including four-person staffing on Engine 40, it did not waive and it continued to seek effects bargaining on those items.
4. At the time of these actions, there was an established and mutually acceptable past practice to permit shift splitting for purposes of assigning overtime or additional time under the CBA, and this practice is consistent with the CBA and therefore enforceable under the law as a term and condition of employment subject to mandatory bargaining.
5. Notwithstanding the Union’s known and ongoing demands to bargain, and the absence of agreement or waiver, the County implemented: (a) a four-person staffing model on Engine 40 by assigning an additional firefighter to that apparatus while the staffing policy containing that provision remained under negotiation; and (b) changes to overtime practices, including preferring 24-hour overtime assignments over 10- and 14-hour overtime opportunities and directing that 24-hour vacancies “shall not be split” into 10- and 14-hour segments except for limited administrative exceptions, in violation of the Rubinett Arbitration Award. (Un. Ex. A, ¶ 11; Un. Ex. A(3).)
6. By these actions, the County “substantial[ly], material[ly] and significant[ly]” altered terms and conditions that are mandatory subjects of bargaining, and it therefore engaged in *per se* violations of its affirmative duty to bargain in good faith pursuant to §§ 17(A)(2), 19(F), and § 19(G)) of the PEBA.
7. However, these actions were not shown to violate § 19(B), interference with the exercise of PEBA rights. That is a separate type of claim and no argument was proffered that it was

the intent of the New Mexico legislature to make duty to bargain claims overlap with interference claims, rendering one or more as mere surplusage.

RECOMMENDED DECISION

Based upon the foregoing undisputed facts, legal standards, reasoning, and conclusions, the Hearing Examiner recommends as follows:

- that the claim for violation §19(B) be DISMISSED for failure to state a claim;
- that the remaining claims for violation of the duty to bargain in good faith (§§ 17(A)(2), 19(F), and § 19(G)) be SUSTAINED; and
- that the violations be remedied by:
 - (a) a declaration of violation of the duty to bargain in good faith under §§ 17(A)(2), 19(F), and § 19(G));
 - (b) an order directing the County to cease and desist such violations;
 - (c) an order directing the County to return to the prior *status quo* regarding the Staffing Management Policy;
 - (d) an order directing the County to return to the bargaining table and bargain in good faith with the Union regarding the changes the County desires to make to the Staffing Management Policy; and
 - (e) an order directing the County to post notice of this decision and the Board's order where information regarding terms and conditions of employment is ordinarily posted.⁷

This is a final disposition, and an aggrieved Party may obtain Board Review of this Recommendation pursuant to NMAC 11.21.3.19

ISSUED this 5th day of August, 2026



Pilar Vaile,
Exec. Dir. and Hearing Examiner

⁷ A proposed Notice is provided at Appendix A for the Parties' review. They shall confer and notify the undersigned within 10 business days of the issuance of this report, if there are changes to request.

APPENDIX A
[PROPOSED] NOTICE FOR POSTING

**THE NEW MEXICO PUBLIC EMPLOYEE LABOR RELATIONS BOARD
CONDUCTED A LEGAL PROCEEDING AND RULED THAT BERNALILLO COUNTY
COMMITTED A PROHIBITED PRACTICE AND ORDERED THE COUNTY TO POST
THIS NOTICE TO EMPLOYEES:**

We UNLAWFULLY suspended an established past practice of “shift splitting” for the purposes of assigning additional time without first giving the Union notice and opportunity to bargain over the proposed change; and

We UNLAWFULLY implemented four-person staffing on Engine 40 without first bargaining the effects of such change, despite the Union giving notice of its desire to bargain the effects, and its provision of bargaining proposals.

TO REMEDY OUR PROHIBITED PRACTICE:

WE WILL immediately reinstate the shift splitting past practice for purpose of assigning additional time; and pause the four-person staffing plan for Engine 40 until the effects are bargained.

WE WILL give notice to and negotiate in good faith with IAFF Local 244, Bernalillo County Chapter, before making the foregoing changes to the take-home vehicle policy for bargaining unit members.

**TO BE POSTED FOR 30 DAYS WHEREEVER SIMILAR NOTICES TO BARGAINING
UNIT EMPLOYEES ARE POSTED**