



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

Minutes of Board Meeting held Tuesday, November 14, 2017 9:30 a.m. at the PELRB offices, 2929 Coors Blvd. NW, Albuquerque, New Mexico; Duff Westbrook, presiding.

1. **Call to Order.** Chair Westbrook being absent, the meeting was called to order at 9:30 a.m. by Vice-Chair R.E. Bartosiewicz. Member Jay Bledsoe was in attendance so that a proper quorum was present.
2. **Approval of Agenda.** Member Bledsoe moved to approve the agenda. Vice-Chair Bartosiewicz seconded the motion and the agenda was approved 2-0 after a roll call vote.
3. **Approval of September 12, 2017 meeting minutes.** Member Bledsoe moved to approve the minutes of the Board's April meeting. Vice-Chair Bartosiewicz seconded the motion and upon a 2-0 roll call vote the minutes were approved without modification.
4. **Public Comments.** There were no public comments.
5. **Voluntary Dismissals.** Three Voluntary Dismissals were reviewed:
 - a. *Taos Federation of United School Employees v. Taos Municipal Schools*; PELRB No. 115-17
 - b. *New Mexico Coalition of Public Safety Officers and City of Rio Rancho*; PELRB No. 306-17 and,
 - c. *AFSCME, Council 18 v. NM Div. of Vocational Rehabilitation*; PELRB 112-17.

Each dismissal was due to the parties resolving their issues and withdrawing the filed PPC or Petition. No Board action was necessary and none was taken.

6. **Dismissals by Director.** Two Summary Dismissals were reviewed:
 - a. *Cullison v. Santa Fe County*; PELRB No. 120-17; and,
 - b. *State of New Mexico v. AFSCME Council 18 and CWA, Local 7076*; PELRB 107-17.

In the matter of *Cullison v. Santa Fe County*, the PPC was inadequate as filed because it did not specify those provisions of the PEBA alleged to have been violated. Counsel for the Complainant did not cure the deficiency within the time allotted by the Director and so the case was dismissed. No parties were present to address the dismissal and no objection or request for review had been received. The Board voted 2-0 on a roll call vote to ratify the Director's dismissal of this case.

The issue before the Board in PELRB No. 306-17 involved the Director's Denial and Dismissal of the State's claim that the parties are at "statutory impasse" by operation of the time limits in NMSA 1978 § 10-7E-18 (A)(5). The Director explained that although this case is to be dismissed because the parties are not at impasse as a matter of law, the issue of whether the parties are in fact at impasse is still a live issue to be determined in two earlier filed PPCs. Action in those PPCs, *AFSCME, Council 18 v. State of New Mexico*; PELRB 125-15 and *CWA, Local 7076 v. State of New Mexico*; PELRB 127-15, were stayed by agreement of the parties until the decision in PELRB No. 306-17. No request for review of the Director's recommended decision was filed by the State. Shane Youtz, on behalf of CWA and AFSCMR confirmed the Director's procedural history. No Board action was taken and the case will be closed without prejudice to PELRB 125-15 and PELRB 127-15.

7. **Review of Letter Decision.** After an order was entered August 15, 2017 in *NEA-Deming v. Deming Public Schools*, 9-PELRB-2017, the Deming Public Schools filed a motion to stay further proceedings under the PEBA in PELRB No's 304-17 and 305-17. Director Griego informed the Board that he denied the Motion on the ground that the Board does not have jurisdiction to stay enforcement of its own orders. In denying the motion Director Griego opined that the District Court was the appropriate venue in which to file such a motion. Director Griego informed the Board that he has been informed that such a motion has been filed in the Second Judicial District Court. No objection to denial of the Motion has been filed and no party was present to address the denial. No action was taken by the Board.
8. **Appeals of Hearing Officer's Report and Recommended Decision.** Director Griego presented an appeal by the union from his decision denying an accretion petition in *AFSCME, Council 18 & New Mexico Department of Health*; PELRB No. 305-16. Shane Youtz was present on behalf of AFSCME and Dina Holcomb represented the New Mexico Department of Health. Mr. Youtz began by speaking generally about the employees at issue and the right of employees under the PEBA to organize and organized his argument along two lines: 1) procedural error in that Director Griego made a mistake in finding that the employees to be accreted don't share an "overwhelming community of interest; and 2) The Director erred in finding that they are supervisors and/or managers exempt from bargaining. With regard to the first line of argument, Mr. Youtz pointed out that the stated "primary" reason the Director relied upon was one of the nine oft cited *Kalamazoo* factors, i.e. "interchangeability". Mr. Youtz interpreted the "interchangeability" factor to refer exclusively to those employees with multiple work locations in a bargaining unit. Since there are not multiple work locations in this case, Mr. Youtz argued that the interchangeability factor was misapplied.

On his second point he pointed to evidence on the record that weighed against a finding the employees in question are supervisors, primarily that they spend a majority of their time working side-by-side with their subordinates in direct patient care. Neither are they managers for similar reasons based on the amount of time spent in direct patient care. They do not have budget authority and are not primarily involved in executive or management functions required to find that they are managers.

Member Bledsoe asked Mr. Youtz for clarification of his position on whether interchangeability was a relevant factor. Mr. Youtz answered that, while it was one of the recognized nine *Kalamazoo* factors, it was inapplicable in this case.

Ms. Holcomb responded by explaining the work performed by the employees in question and the clients that they serve. By focusing on one finding of fact regarding the amount of time spent in direct patient care, the union ignores all of the other findings in the recommended decision that support the conclusion that they may not be accreted. She disagreed with the union's interpretation of the term "lack of interchangeability". Although recent cases do look to cases in which there are multiple worksites, earlier NLRB cases construing the term, including the *Kalamazoo* case itself, also construed the term to mean lack of integration in the work function or interchangeability among workers. The Director's decision included a finding that there are duties performed by the supervisors that cannot be performed by the Home Health Aides and Psych Techs. Further there is a lack of community of interest based on the history of collective bargaining that excluded the positions and substantial differences in training skills and functions. Of the nine *Kalamazoo* factors, the Director found five weighed in favor of concluding that there was no community of interest: work hours, job qualifications, job functions, lack of integration and history of collective bargaining.

With regard to the question of whether they are supervisors or managers, Ms. Holcomb pointed out that by concentrating on the finding that a majority of their time is spent on direct patient care, the union ignores those findings that indicate that while engaged in direct patient care the employees at issues are also performing supervisory duties unlike their subordinate outlined in pages 14-25 of the decision. Those duties take up at least one-half of the employees' time. Another major difference is that the supervisors have authority over multiple homes and have authority to suspend employees or remove them from a home. The work is highly regulated at both the state and federal levels. The supervisors are the points of contact for the state auditor and other state and federal regulatory agency. The supervisors were found to exercise more independent judgment than is required of their subordinates, principally with regard to the individual clients' finances. She pointed out that the PEBA refers to whether an employee "effectuates management policy" in order to be a manager under the act. She argues that they do and are properly excluded.

Mr. Youtz responded by arguing the bright line test for supervisors in the PEBA and that because the Director found that they spend a majority of their work time on direct patient care, they cannot be engaged simultaneously in supervisory duties and reviewed facts that he argued were duties performed that are not supervisors and those that are similar to their subordinates.

Member Bledsoe asked who deals with allegations of client abuse or neglect. Mr. Youtz asserted that both the Home Health Aides as well as the supervisors are responsible for addressing such allegations. When asked by Member Bledsoe how a complaint against a Home Health Aide is investigated, the union asserts that the record is not fully developed on that question. The issue

is whether they spend a majority of their time in supervisory duties. Ms. Holcomb responded that the record is fully developed with regard to the supervisors making sure the Home Health Aides and Psych Techs are performing adequately and it reflects that supervisors may suspend or remove workers who do not perform adequately.

Member Bledsoe moved that the Board go into executive session pursuant to NMSA 10-15-1(H)3 of the Open Meetings Act, to discuss *AFSCME, Council 18 & New Mexico Department of Health*; PELRB No. 305-16. Vice-Chair Bartosiewicz seconded and the motion was approved 2-0 after a roll call vote. The Board went into executive session at 10:25 a.m.

At 10:36 a.m. Member Bledsoe moved that the Board go back into regular session pursuant to NMSA 10-15-(I)1 and 10-15(J) of the Open Meetings Act, and stated that the only matter discussed in the closed session was *AFSCME, Council 18 & New Mexico Department of Health*; PELRB No. 305-16. Vice-Chair Bartosiewicz seconded the motion and it was approved 2-0 after a roll call vote. The Vice-Chair congratulated the parties' representatives on their well-presented arguments and moved to adopt the Hearing Officer's Report and Recommended Decision in its entirety and to dismiss the Union's Petition for Accretion. Member Bledsoe seconded and the motion was approved 2-0 after a roll call vote.

9. **Director's Reports**

- a. FY19 Appropriations Request. Director Griego reported that he attended an LFC subcommittee meeting on October 25, 2017 and the LFC's budget analyst recommended adoption of the appropriation request.
- b. FY17 Audit Contract Report. Director Griego reported that the Agency timely submitted its audit report to the State Auditor's Office. Permission to release the report for publication is expected within a few weeks.

10. **Set Next Meeting Date and Adjournment.** The Board set Tuesday, January 9, 2018 at 9:30 a.m. for their next meeting. Vice-Chair Bartosiewicz moved to adjourn. Member Bledsoe seconded the motion and it was approved 3-0 after a roll call vote. The meeting was adjourned at 10:45 a.m.