

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

In re:

**CENTRAL CONSOLIDATED
EDUCATION ASSOCIATION,
Complainant,**

v.

PELRB No. 126-14

**CENTRAL CONSOLIDATED
SCHOOL DISTRICT,
Respondent**

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

STATEMENT OF THE CASE: This matter comes before Thomas J. Griego, designated as the Hearing Officer in this case, for hearing on the merits in Farmington, New Mexico of the Union's PPC alleging violations of §§10-7E-19 (B), (C), (F) and (G). All preliminary motions have been filed and adjudicated. At the beginning of its case-in-chief, the Union elected to voluntarily withdraw that portion of its complaint alleging that the District's failure to follow Article 6 of the CBA caused the Union to be harmed by the inability to recruit members. The hearing on the merits was held March 30, 2015 after which the evidentiary record was closed.

All parties hereto were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following **FINDINGS OF FACT:**

1. CCEA is the exclusive representative for certified, transportation and education support employees of Central Consolidated School District (the District). (Stipulated in the Pre-Hearing Order).

2. At the beginning of each school year 2009 to 2015, the District has held two meetings relevant to this case: (1) an all-staff meeting for returning certified and classified employees referred to in the exhibits as the "District Back-to-School" meeting or agenda, and; (2) a new employee orientation for newly hired employees. (Exhibits A, B, F, 3 and 5).
3. Article Six, Paragraph (D) of the CBA applicable during all times material to this case states: "The Association will be provided space to set up an information table at the employee orientation meeting at the beginning of the school year and will be allotted time on the agenda". (Stipulated in the Pre-Hearing Order).
4. The Union has been allowed to set up a table and have time on the agenda for the New Certified Staff Orientation in each of the years about which its witnesses testified including that for the 2014-2015 school year on August 11, 2014. (Stipulated in the Pre-Hearing Order, amended by testimony of Ewa Krakowska).
5. In some years but not others, the District has allowed the Union to have both a table alongside other vendors and time on the agenda for the "District Back-to-School" meetings. More specifically, in 2011, the first year after the language of Article Six Paragraph (D) included a requirement for both an information table and time on the agenda, The Union was not on the District Back-to-School agenda, (Exhibit 5). Although not on the agenda in 2011, Union and Labor bargaining team representatives were introduced. Union representatives were on the agenda and made presentations at the District Back-to-School meetings held in 2012 and 2013. (Testimony of Sharpe and Krakowska).

6. For the 2014-2015 school year the "District Back-to-School" meeting with all employees was scheduled to occur on August 13, 2014. (Stipulated in the Pre-Hearing Order amended).
7. The Union was not allotted time on the agenda to speak to all employees at "District Back-to-School" meeting on August 13, 2014. (Stipulated in the Pre-Hearing Order amended).
8. Prior to 2011 Article Six, Paragraph (D) of the CBA provided that the Union was to be provided space to set up an information table at the employee orientation meeting at the beginning of the school year. Thereafter, Article Six, Paragraph (D) was amended to allow the Union "time on the agenda" as well as an information table at the employee orientation meeting at the beginning of the school year.
9. Article Eight of the parties' CBA creates a Labor – Management Team, the express purpose of which is to provide a place for:
 - a. An individual to voice issues or concerns where the typical systemic avenues have failed.
 - b. Support for the District mission and philosophy of maintaining healthy relationships among personnel.
 - c. A "safe haven" where frustration with the system can be discussed.
 - d. Resolving issues if the employee elects this avenue. (Exhibit J-1).
10. On August 6, 2014, the District's HR Director, George Schumpelt, sent an e-mail message to Union President Mel Sharpe inquiring whether Sharpe "was ready to schedule an LMT Tuesday, August 12th @ 4:00?" (Exhibit D).

11. Mr. Sharpe did not respond to the August 6, 2014 e-mail, nor did he confirm the date and time for the requested LMT meeting by other means. (Exhibit D, Testimony of Schumpelt and Krakowska).
12. On August 11, 2014 Union representative, Ewa Krakowska, gave Mr. Schumpelt a list of agenda items for the LMT meeting she believed was scheduled for August 12, 2014 at 4:00 pm. The first item on that agenda was the Union's request to be placed on the "District Back-to-School" agenda for August 13, 2014. (Testimony of Schumpelt and Krakowska).
13. At 11:35 a.m. August 12, 2014, Dr. Schumpelt sent an e-mail message to Union president Mel Sharpe acknowledging receipt of the agenda items given him by Ms. Krakowska the preceding day but informing Mr. Sharpe that since he had not received a response to his August 6th e-mail he had calendared another meeting and was now unavailable to meet at 4:00 p.m. that day suggesting instead a meeting on August 20, 2014. (Exhibit D).
14. On August 6, 2014 Mel Sharpe sent an e-mail request to Superintendent Don Levinski requesting that the Association be "allotted time on the agenda to address all elementary, secondary and ESP staff." He did not receive a response to his e-mail and could not verify that Mr. Levinsky received it. (Exhibit C, Testimony of Mel Sharpe.)
15. At 4:00 p.m. on August 12, 2014 Union officers, Mel Sharp, Mike Moss, Paula Magnuson, and Union representative, Ewa Krakowska, arrived at Mr. Schumpelt's office expecting to meet with him on the agenda items given him by Ms. Krakowska the preceding day. (Testimony of Schumpelt and Krakowska).

16. Because the Union refused to leave without speaking with Dr. Schumpelt, he interrupted his meeting to explain that the Association would not be allotted time on the agenda as requested. (Testimony of Schumpelt and Krakowska).

17. The clear and unambiguous meaning of the phrase “employee orientation meeting” found in Article Six, Paragraph (D) of the parties’ CBA refers to the annual new employee orientation conducted by the District.

ISSUES: Complainant contends the District failed to comply with the parties’ CBA, thereby violating NMSA 1978 §10-7E-19(G) and (H), when it did not provide time on the District Back-to-School meeting with all employees on August 13, 2014. On August 11, 2014, the Union was allowed to speak at the new employee orientation but claims that a “long-standing past practice” exists whereby Union officers are allotted time on the agenda as well as an information table at both the new employee orientation as well as the all staff meeting at the beginning of each school year. The Union further contends that the District failed to comply with Article Eight of the CBA which establishes a Labor Management Team (LMT) to deal with issues arising during the term of the CBA in violation of NMSA 1978 § 10-7E-19 (B), (C) and (H) after an anticipated LMT meeting on August 12, 2014 did not take place.

The District denies that the CBA requires it to allow Union officers time on the agenda to speak at both the new employee orientation, as well as the "District Back-to-School" meeting and denies that there exists a long-standing past practice of doing so. The District also denies that it refused to meet with the Union for a previously scheduled LMT meeting.

REASONING AND CONCLUSIONS OF LAW: This Board has subject matter and personal jurisdiction over the parties. As the Complainant, the Union has the burden of proof and the burden of going forward with the evidence pursuant Board rule NMAC

11.21.1.22(B). In its pursuit of meeting that burden the Union is obliged to present reasonable substantiation of statements or records tendered, the accuracy or truth of which is in reasonable doubt. While the technical rules of evidence do not apply, the hearing officer may exclude or disregard any proffered evidence that is irrelevant, immaterial, unreliable, unduly repetitious or cumulative, and shall exclude any evidence protected by the rules of privilege upon timely objection. See, NMAC 11.21.1.17. I construe the relevant provisions of the parties' CBA as a question of fact. The question of the meaning to be given the words of the contract is a question of fact where that meaning depends on reasonable but conflicting inferences to be drawn from events occurring or circumstances existing before, during, or after negotiation of the contract. See, 3 Corbin on Contracts Sec. 554, at 219. See, e.g., *Hill v. Hart*, 23 N.M. 226, 232, 167 P. 710, 711 (1917) ("The principle that parol evidence is not admissible to vary the terms of a written instrument is not infringed when the evidence is used for the purpose of ascertaining the meaning of doubtful expressions in the instrument."). As Professor Corbin observes, "No parol evidence that is offered can be said to vary or contradict a writing until by process of interpretation the meaning of the writing is determined." Corbin, *The Parol Evidence Rule*, 53 Yale L.J. 603, 622 (1944). New Mexico rejected the "four corners" standard for contractual construction in *C.R. Anthony Company v. Loretto Mall Partners and J.R. Hale Contracting Co., Inc. v. Union Pacific Railroad*, 179 P.3d 579, 2008 NMCA 37, 143 N.M. 574 (Ct. App. 2007) adopting instead the "contextual approach" to contract interpretation; a standard under which, even if the language of the contract appears to be clear and unambiguous, a court may hear evidence of the circumstances surrounding the making of the contract and of any relevant usage of trade, course of dealing, and course of performance, in order to decide whether the meaning of a term or expression

contained in the agreement is actually unclear. The operative question then becomes whether the evidence is offered to contradict the writing or to aid in its interpretation. This case requires two analyses: (1) application of the evidence to Article Eight of the parties' CBA establishing a Labor-Management Team with the express purpose of engaging "in meaningful discussion regarding issues and concerns" in order to determine whether the District failed to abide by its terms, and (2) construction of Article Six, Paragraph (D) of the parties' CBA. In particular I must construe whether its provisions that the Union will be provided space to set up an information table and will be allotted time on the agenda "at the employee orientation meeting", includes the District Back-to-School meeting with all employees, new and returning. With those standards in mind my conclusions and the reasoning behind them are as follows:

A. VIOLATION OF §10-7E-19(G); REFUSAL OR FAILURE TO COMPLY WITH A PROVISION OF THE PUBLIC EMPLOYEE BARGAINING ACT OR BOARD RULE.

The union alleges that because the District violated §§ 19(B), (C) and (H), the District also committed a violation of §10-7E-19(G) by failing to comply with those provisions of the PEBA. This Board has previously taken the position that §19(G) is directed against claims arising under sections of the PEBA other than §19. To interpret §19(G) otherwise would result in the finding of repetitive and duplicative liability. There is no reason to believe the New Mexico Legislature intended every violation of a subsection of §19 to result in two separate counts of liability. Accordingly, the Union cannot establish a violation of §10-7E-19(G) since it alleges no violation of PEBA except other subparts of §19.

B. VIOLATION OF §19(H), REFUSAL OR FAILURE TO COMPLY WITH A COLLECTIVE BARGAINING AGREEMENT.

The Union claims entitlement to have an information table and make a presentation at two separate meetings: the new employee orientation and the District Back-to-School meeting

for both returning and new employees. So, in order to prevail on its claim that the District violated Article Six, Paragraph (D) of the CBA it must prove that the phrase “employee orientation meeting” includes the District Back-to-School meeting with all employees. I conclude that it does not. I construe that phrase in Article Six paragraph (D) to refer to the new employee orientation only.

The pertinent language of the CBA addresses only a single “employee orientation meeting”, not “meetings” in the plural. The Union argues that if forced to choose between the new employee orientation and the District Back-to-School meeting with all employees, it is the latter that is intended as the “orientation” contemplated by Article Six Paragraph (D). The evidence is insufficient to support that conclusion. Although the Union’s witnesses all testified that in common parlance the annual District Back-to-School meetings are referred to by employees as “orientation” the District does not agree that it is so. None of the Agendas for the Back-to-School meetings introduced into evidence refer to the meetings as “orientations”; whereas all of the agendas for the new employee orientations specifically use that term.

The Union has not established a long-standing past practice of a Union information table and presentation occurring at both meetings. Under the “past practice” doctrine, prior conduct and representations may become or create binding term and conditions of employment when the following conditions are met: (a) the practice has been consistently followed in the past; (b) both parties to the contract are aware of the consistent practice; and (c) the past practice does not undermine, negate or amend provisions of the CBA. See, *AFSCME, Council 18 v. N.M. Dep’t of Corrections*, PELRB Case No. 150-07 Hearing Officer Decision (February 6, 2008) *citing to BP Amoco Chemical-Chocolate Bayou*, 2001 NLRB Lexis 8, at 36-40; *Kurdziel Iron of Wauseon, Inc.*, 327 NLRB 155 (1998), *enfd* 208 F.3d 214 (2000);

LaSalle Ambulance, d/b/a/ Rural/Metro Medical Services, 327 NLRB 49 (1998) and *Developing Labor Law* (5th Ed.) at 836-837. Because PELRB Case No. 150-07 was not appealed to the Board, it is not cited as precedent here but is referenced for NLRB cases referenced therein. *See also, Metal Specialties Co.*, 39 Lab. Arb. Rep. (BNA) 1265, 1269 (1962) (For a “past practice” to be binding on both parties it must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties); *Celanese Corp. of America*, 24 Lab. Arb. Rep. (BNA) 168, 172 (1954).

The evidence shows that after 2011, the first school year Article Six, Paragraph (D) would effectively entitle the Union to both an information table and time on the agenda, the District Back-to School agenda did not include the Union. (Exhibit 5). The record does not reflect that any objection by the Union was raised at that time. Mel Sharpe, on behalf of the Union testified that he did not recall a Union presentation being made at the 2011, when he was the Union’s Vice-President, and did not recall that the Union made an issue of not being on the 2011 agenda at that time. He also testified that his predecessor as President of the Union, Dave Fierke, made a presentation at the District Back-to School meeting in 2012 and that the Union had both a table and time on the agenda in 2013, although he did not request time on that agenda. (Testimony of Mel Sharpe). Mr. Sharpe testified that whether or not on the agenda, the Union was allowed to have an information table at all of the returning employee meetings since 2009. Other witness testimony was uncertain as to whether there was an information table at the 2012 District Back-to School meeting. In 2011 Ms. Krakowska acknowledged that the Union was not on the agenda but testified that the meeting that year was “a little bit different”, designed more for uplifting morale with entertainers and music. Although not on the agenda she testified that she was introduced

along with the District's chief negotiator. She did not make a presentation other than to greet employees and explain that the parties were engaged in interest based bargaining. I do not agree with the union that this brief, impromptu introduction constitutes "time on the agenda" such as is contemplated by Article Six the CBA. Accordingly, I find that the evidence establishes that in two of the four years the CBA required both time on the agenda and an information table at the "employee orientation", i.e. 2012 and 2013, the Union had both a table alongside other vendors and time on the agenda for the "District Back-to-School" meetings. In the other two years, 2011 and the year at issue, 2014, it did not. More specifically, in 2011, the first year after the language of Article Six, Paragraph (D) required both an information table and time on the agenda, the Union was not on the District Back-to-School agenda.

Based on that evidence I conclude that the evidence is insufficient to establish that any of the criteria to establish a binding past practice entitling the Union to both an information table and time on the agenda at the District Back-to-School meeting. The alleged past practice is not unequivocal; clearly enunciated and acted upon; and readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties.

With regard to the question whether the District breached Article Eight of the CBA establishing a LMT, thereby interfering in employee rights and the Union's existence and administration in violation of NMSA 1978 §10-7E-19 (B), (C) and (H), I conclude that the evidence is insufficient to substantiate the union's claim.

The scheduling of LMT meetings is addressed in two paragraphs of Article Eight. Paragraph D provides:

"The LMT will schedule monthly meetings. Additional meetings will be scheduled when an issue or concern requires a more immediate response. The Association President and the District Superintendent will schedule these meetings."

Paragraph H reads as follows:

“The Association and the District are responsible for requesting an additional meeting of the LMT, if either party determines it is necessary due to a time-related issue.”

These paragraphs address the frequency of meetings and responsibility for ensuring LMT meetings occur but are otherwise silent as to the logistics of the actual scheduling. Dr. Schumpelt, on behalf of the District, testified that immediately following completion of one LMT meeting a tentative date for the next LMT meeting is set, subject to later confirmation via e-mail. In this case Dr. Schumpelt, sent an e-mail message to Union President Mel Sharpe on August 6, 2014, a week prior to the scheduled District Back-to-School meeting, inquiring whether Sharpe “was ready to schedule an LMT Tuesday, August 12th @ 4:00?” (Exhibit D). Mr. Sharpe did not respond to the e-mail, nor did he confirm the date and time for the requested LMT meeting by other means. (Exhibit D, Testimony of Schumpelt and Krakowska). Without confirmation of the proffered date and time, Dr. Schumpelt was justified in scheduling another meeting on that date and at that time, which he had done prior to receipt of the note from Ms. Krakowska suggesting an agenda. It would not be reasonable to conclude that the District breached Article Eight of the CBA by this conduct when the CBA is not specific as to the logistics of scheduling the LMT meetings and the District appears to have followed the parties’ past custom and practice regarding scheduling. Neither would it be reasonable to hold the District liable for unlawfully restraining and interfering with employees’ rights under PEBA or for interfering with the existence or administration of a labor organization when the District followed the custom and practice for scheduling but received no confirmation of the meeting from the Union. Although Ms. Krakowska gave Dr. Schumpelt a proposed agenda she did so only the day prior to the expected LMT meeting. Even if I were to accept that the hand-delivered note suggesting an

agenda constitutes confirmation of a meeting on August 12, 2014, it came too late to reasonably form the basis of a PPC for failure to accommodate the request under Article Eight (D) of the CBA. Presuming that the absence from the District meeting agenda for August 13, 2014 constitutes the sort of time sensitive matter requiring the District to meet under Article Eight (H), I note that Dr. Schumpelt interrupted his conflicting meeting to address the union's issue, notwithstanding the fact that the outcome was not resolved to the Union's satisfaction. Therefore, the evidence does not establish a violation of Article Eight.

C. VIOLATIONS OF §§19(B), UNLAWFULLY RESTRAINING AND INTERFERING WITH EMPLOYEES' RIGHTS UNDER PEBA AND §19(C), INTERFERING WITH THE EXISTENCE OR ADMINISTRATION OF A LABOR ORGANIZATION.

Without having established either a contract right or a binding past practice to provide both space for an information table and time on the District Back-to-School meeting on August 13, 2014, the Union cannot prevail on its claim that the District's failure to do so unlawfully restrained or interfered with employees' rights under PEBA in violation of §19(B) or that it interfered with the existence or administration of the Union in violation of §19(C).

DECISION: It is my recommended Decision that the Union's Complaint be **DISMISSED** with prejudice, that its claim for Relief be **DENIED**.

REQUEST FOR REVIEW: Pursuant to PELRB Rule 11.21.3.19, any party may file a request for Board review within 10 business days after service of this Report. The request for review shall state the specific portion of the Report to which exception is taken and the factual and legal basis for such exception. The request may not rely on any arguments not previously raised before the undersigned. The request must be served on all other parties. Within ten business days after service of a request for review, any other party may file and serve on all parties a response to the request for review.

Issued, Friday, April 03, 2015.

Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board
2929 Coors Blvd. N.W., Suite 303
Albuquerque, New Mexico 87120