

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO
HUMAN SERVICES DEPARTMENT,

Appellant,

v.

No. D-101-CV-2012-02176

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 18, AFL-CIO (AFSCME),

Appellee.

IN RE: PELRB No. 151-11

**ORDER AFFIRMING DECISION AND ORDER OF
THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

THIS MATTER came before the Court following a hearing on May 9, 2013, and upon the appeal taken by the State of New Mexico Human Services Department (“HSD”) pursuant to Rule 1-074 NMRA. The appeal challenges the decision and order of the Public Employee Labor Relations Board (“PELRB”) entered on July 13, 2012 in PELRB Case No. 151-11.

Having reviewed the record filed in this cause and the pleadings filed in this case and having heard argument of counsel for the parties hereto and being otherwise fully advised, the Court hereby denies the appeal and affirms the PELRB’s decision and order. The Court finds and concludes that the decision and order of the PELRB is not contrary to law, is supported by substantial evidence based upon the whole record on appeal, and is not arbitrary or capricious.

RATIONALE

Under Rule 1-074(R) NMRA, this Court evaluates the PELRB’s decision and order to determine: “(1) whether the agency acted fraudulently, arbitrarily or capriciously; (2) whether

based upon the whole record on appeal, the decision of the agency is not supported by substantial evidence; (3) whether the action of the agency was outside the scope of authority of the agency; or (4) whether the action of the agency was otherwise not in accordance with law.” In this case, there has been no allegation that the action of the PELRB was outside its scope of authority.

The PELRB found that HSD had committed a prohibited practice under NMSA 1978, § 10-7E-19(F) & (H) (2003), part of the Public Employees Bargaining Act (“PEBA”), when it unilaterally and without bargaining to impasse removed security guards from six of its field offices, primarily in rural areas. Section 10-7E-19(F) makes it a prohibited practice for a public employer, such as HSD, to “refuse to bargain collectively in good faith with the exclusive representative.” Section 10-7E-19(H) makes it a prohibited practice for a public employer to “refuse or fail to comply with a collective bargaining agreement.”

The PELRB found that the HSD had a past practice of providing security guards in those offices for the benefit of its employees, that the provision of security guards is a component of the employees’ terms and conditions of employment and a mandatory subject of bargaining under the PEBA, and that HSD violated PEBA when it unilaterally changed that term and condition of employment without first bargaining to impasse with AFSCME, the exclusive representative of certain of HSD’s employees. The PELRB rejected HSD’s argument that AFSCME had waived its right to bargain that issue by entering into the relevant Collective Bargaining Agreement.

Indeed, the PELRB found that HSD violated Article 18, Section 2 of that Collective Bargaining Agreement by refusing to bargain with AFSCME prior to unilaterally implementing changes to its employees terms and conditions of employment by removing security guards from six of its field offices. That section, part of the contract’s “Management Rights” Article provides

that “[p]rior to implementing any change in existing terms or conditions of employment relating to items 9, 10 or 11 of Section 1 above, the Employer shall provide the Union with reasonable notice under the circumstances of such contemplated action and, if requested to do so, shall bargain with the Union in good faith to impasse prior to implementing such changes.” The referenced items in Section 1 give management the right to: “(9) determine the location and operation of its organization; (10) provide reasonable rules and regulations governing the conduct of employees; and (11) provide reasonable standards and rules for employees’ safety.” Although these are management rights under Section 1 of this Article, under Section 2, the Employer must first bargain in good faith to impasse with AFSCME concerning changes in terms and conditions of employment relating to those items prior to implementing those changes.

The Court finds that the decision and order of the PELRB was not arbitrary and capricious by considering Section 17 of PEBA (NMSA 1978, § 10-7E-17 (2003)) as part of its decision. Subsection (A)(1) of that Section provides in part that public employers and exclusive representatives of their employees “shall bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties.” The Court finds that this section is implicitly referenced by Section 19(F), which AFSCME expressly pled as part of its Prohibited Practices Complaint. Under the notice pleading standard that exists in New Mexico, the PELRB properly referenced this section as part of its discussion of Section 19.

Moreover, the Court finds that the PELRB did not improperly consider AFSCME’s untimely-filed “Proposed Findings of Fact, Closing Argument, and Conclusions of Law.” The Hearing Officer’s Report and Recommended Decision expressly refused to consider that pleading as it was untimely filed. The PELRB adopted the Report and Recommended Decision *in toto*. Although the untimely-filed pleading was necessarily part of the Record Proper below,

the Court finds that the PELRB properly refused to consider it. The decision of the PELRB was not arbitrary or capricious in this regard.

The Court further finds that substantial evidence supports the decision of the PELRB. The Union's burden was to prove that there was a failure to bargain regarding the decision to stop using security guards at the six field offices. The Court finds that the presence of the security guards at the place of employment is a term and condition of employment and a mandatory subject of bargaining. Here, there was evidence of a unilateral change of a term or condition of employment as established by HSD's past practice of having these security guards at the field offices. The record establishes that there was no collective bargaining on this issue prior to the change. Thus, the record below clearly indicates that HSD failed to bargain on the elimination of the security guards prior to implementation, and substantial evidence supports the PELRB's determination that HSD violated the PEBA by failing to negotiate this issue to impasse prior to making the unilateral change.

Moreover, the Court finds that the PELRB's decision is in accordance with the law. The Court finds that the National Labor Relations Board's decision in *Northside Center for Child Development, Inc.*, 310 NLRB 105 (1993) applies, and that the PELRB's decision and order is in accordance with this decision and others cited by the PELRB and the Union.

Lastly, the Court finds, in accordance with the PELRB, that the Union did not waive the right to bargain the security guard issue. Under the relevant case law, HSD was required to show that the Union clearly and unmistakably waived the right to bargain by entering into the relevant Collective Bargaining Agreement. Here, Article 18, Section 2 of the Collective Bargaining Agreement expressly required HSD to negotiate in good faith prior to making any change in terms and conditions of employment related to "reasonable standards and rules for employees"

safety.” As such, the PELRB correctly determined that the Union did not clearly and unmistakably waive its right to bargain this issue by entering into the Collective Bargaining Agreement.

ACCORDINGLY, the decision and order of the PELRB is **AFFIRMED**.



RAYMOND Z. ORTIZ
District Judge

Respectfully submitted,

YOUTZ & VALDEZ, P.C.

/s/ Stephen Curtice
Shane Youtz
shane@youtzvaldez.com
Stephen Curtice
stephen@youtzvaldez.com
900 Gold Avenue S.W.
Albuquerque, NM 87102
(505) 244-1200 – Telephone
Counsel for Appellee

Approved as to form:

Approved via e-mail on 5/20/13 by Robert Lennon
Raymond W. Mensack
Raymond.Mensack@state.nm.us
Robert J Lennon
Robert.Lennon@state.nm.us
New Mexico Human Services Department
Office of General Counsel
P.O. Box 2348
Santa Fe, NM 87504-2348
Counsel for Appellant