36-PELRB-2024

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

UNITED HEALTH PROFESSIONALS OF NEW MEXICO, AFT, AFL-CIO,

Complainant,

v. **PELRB No. 117-23**

REGENTS OF THE UNIVERSITY OF NEW MEXICO, FOR ITS PUBLIC OPERATIONS KNOWN AS THE UNIVERSITY OF NEW MEXICO HOSPITAL, SPECIFICALLY INCLUDING THE UNM SANDOVAL REGIONAL MEDICAL CENTER,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board at its regularly scheduled meeting on September 5, 2024, upon the Complainant's request for Review of the Hearing Officer's July 18, 2024 Report and Recommended Decision dismissing it's Complaint. The Board by a vote of 2-0 (Vice-Chair Nash being absent) hereby upholds and affirms the Hearing Officer's Report and Recommended Decision dismissing the Prohibited Practices Complaint. However, in so doing the Board acknowledges that its decision is limited to these facts and the response to the union's request for information, provided by the employer in this case is not to be cited as an adequate response in any future case before this Board.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Signed by:
Mark Myers
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MARK MYERS, CHAIR

9/10/2024

DATE

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

UNITED HEALTH PROFESSIONALS OF NEW MEXICO, AFT, AFL-CIO,

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v. **PELRB No. 117-23**

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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, on a Prohibited Practices Complaint (PPC) and Petition for TRO and Preliminary Injunctive Relief filed by United Health Professionals of New Mexico, AFT, AFL-CIO (AFT) on October 10, 2023. The PPC alleges that the Respondent (UNMH) violated Sections 17(A)(1) and 19(F) of the Public Employee Bargaining Act (PEBA) by engaging in direct dealing with AFT's bargaining unit employees when it communicated with them directly regarding "merger plans" (asset acquisition) of UNM Sandoval Regional Medical Center and its direct impact on terms and conditions of employment. The PPC further alleges that despite demand, UNMH refused to bargain the proposed changes to terms and conditions of employment and refused to respond to the Union's request information related to its bargaining demand.

The Employer Answered the Complaint on October 31, 2024 generally denying all allegations that it took any action or engaged in any conduct that violated any provision of the Public Employee Bargaining Act, NMSA 1978, §§ 10-7E-1 et seq. SRMC further asserted

that the Complaint should be dismissed in its entirety for failing to state a claim for which relief may be granted or summary judgment should be issued because there is no issue material fact requiring a hearing on the matter.

I scheduled a Hearing on that portion of AFT's PPC Petitioning for a Temporary Restraining Order and Preliminary Injunctive Relief on November 7, 2023 and denied the TRO request on November 9, 2023. I then denied the Respondent's Motion to Dismiss on December 21, 2023. Respondent then filed a Motion to Stay this proceedings, which motion was denied on March 1, 2024. Respondent sought interlocutory review of that decision, which review was denied on April 3, 2024 in 22-PELRB-2024. A subsequent Alternative Motion to Dismiss or For a More Definite Statement filed on March 22, 2024 was denied on April 17, 2024.

A hearing on the merits was held on May 30, 2024. As stated in the parties Stipulated Pre-Hearing Order, the issues presented for decision are:

> 1) whether Respondent made unilateral changes in terms and conditions of employment in violation of the Public Employee Bargaining Act ("PEBA"), NMSA 1978, §§ 10-7E-17(A)(l) and/or 19(F);
>
> 2) if so, whether Respondent refused to bargain over such changes; and
>
> 3) whether Respondent refused to respond to the Union's information request in violation of those provisions of the PEBA.

All parties hereto were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Closing brief in lieu of oral closing arguments were submitted on July 12, 2024. Both briefs were duly considered. 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. Complainant is a "labor organization" as that term is defined in Section 4(K) of PEBA. (Stipulated)

2. Respondent is a "public employer" as that term is defined in Section 4(R) of PEBA (NMSA 1978, § 10-7E-4(R) (2020)) because it is an educational institution created by the New Mexico Constitution and New Mexico Statute. (Stipulated).

3. The PELRB has jurisdiction over this matter. (Stipulated).

4. SRMC at the time material to this case was a New Mexico Nonprofit Corporation incorporated pursuant to the New Mexico Nonprofit Corporations Act, NMSA 1978, § 53-8-1 et seq., University Research Park and Economic Development Act (URPEDA), NMSA 1978, §§ 21-28-1 et seq. (PPC ¶ 2 and Respondent's Answer thereto).

5. SRMC ceased to be an employer of any employees at issue in this case as of January 1, 2024, (PPC ¶ 7 and Respondent's Answer thereto).

6. Complainant's Exhibits K and L, these documents establish only that a demand for information was made and rejected, a restatements of the parties' respective positions in this case, but one that negates the Union's claim that Respondent did not respond to its information request. It clearly did respond – its response was a refusal to provide the requested information for the reasons stated in Exhibit L.

7. Prior to the acquisition, Respondent sent multiple communications to SRMC's employees. These include a notice to those employees describing the process for employment with Respondent's UNM Hospital ("UNMH"), which would assume

operational control of the SRMC campus following Respondent's acquisition thereof. Exhibit 18; Audio Record 3 at 01:18:00-01:21:15, 01:41:45-01:44:00, 02:11:20-02:11:35.

8. UNMH drafted the communication with no input from SRMC. Audio Record 3 at 01:43:30-01:44:00.

9. The purpose of that notice was to provide as much detail as possible regarding employment with UNMH in order to convince SRMC's employees to choose to become employed by UNMH at its SRMC campus. Exhibit 18. This information included a process by which SRMC employees could apply for employment with UNMH, links to information about the terms and conditions of employment at UNMH, and information about how to participate in UNMH's Benefits Open Enrollment process should SRMC employees elect to be employed by UNMH. Id.

10. Another communication was sent to SRMC's employees by Kate Becker, Chief Executive Officer of UNMH, describing the purposes of Respondent's acquisition of SRMC, and inviting SRMC employees to affirm their interest in employment with UNMH post-acquisition. Exhibit 20; Audio Record 3 at 00:49:45-00:51:16. Again, the purpose of this communication was to convince SRMC's employees to choose to become employed at UNMH following Respondent's acquisition of SRMC. Id.; Audio Record 3 at 00:51:05-00:51:16.

11. At no point in either of these communications were changes to the terms and conditions of SRMC employment discussed. Id.

12. Respondent provided SRMC's employees with comprehensive information about the process for employment at UNMH. This included information about how SRMC employees could obtain more information about employment at UNMH; potential differences between their existing employment with SRMC and future employment with UNMH if employees

elected to become employed there; and information regarding policies and benefits associated with UNMH employment. Exhibit 17; Audio Record 2 at 00:43:10-00:43:26; Audio Record 3 at 01:12:05-01:17:45, 02:14:05-02:14:10.

13. Respondent also provided information about Benefits Open Enrollment at UNMH for those SRMC employees seeking to become UNMH employees. Exhibit 19; Audio Record 3 at 01:44:00-01:48:30. Furthermore, those SRMC employees who elected to become employed with UNMH were provided with new employee orientation materials describing the culture and structure at UNMH. Exhibit 16; Audio Record 3 at 01:07:35-01:10:45. All such information pertained to employment with UNMH, not SRMC, and was drafted by and emanated from Respondent, not SRMC. Audio Record 3 at 01:17:45-01:40:10.

14. At the hearing, all of the testimony supports that SRMC's employees received these communications and information from Respondent, followed the instructions to accept employment with UNMH, and were thereafter hired as employees thereof. Audio Record 2 at 00:08:00-00:09:15; Audio Record 3 at 00:22:52-00:24:05, 00:49:10-00:50:00, 01:00:00-01:02:30, 01:12:05-01:17:45.

15. Those employees who elected to apply for employment with UNMH and were subsequently hired, suffered no loss in pay or benefits. Audio Record 2 at 00:33:40-00:35:35. SRMC employees were referred to Respondent's human resources representatives with questions about employment with UNMH. Audio Record 2 at 00:32:00-00:32:35; Audio Record 3 at 02:13:00-02:13:30, 02:39:00-02:41:25.

16. Respondent further communicated to SRMC's employees that those employees who elected not to become employed by Respondent following the acquisition would no longer be employed by either entity. Audio Record 3 at 00:22:30-00:22:52, 01:02:30-01:03:15, 02:12:00-02:12:35.

17. This process applied to all of SRMC's employees – including those in management. Audio Record 3 at 01:38:00-01:39:10, 02:10:35-02:15:35.

18. Not all of SRMC's employees applied for and obtained employment with Respondent following the acquisition. Audio Record 3 at 00:44:30-00:40:40, 01:38:45-01:39:10.

19. Respondent's acquisition of all of SRMC's assets and liabilities was an acquisition, not a merger. Audio Record 2 at 00:47:15-00:49:45.

REASONING AND CONCLUSIONS OF LAW:

I. STANDING ISSUE:

A. Respondent's Argument That the Union is not Entitled to the Relief it Seeks Because it Was Not the Certified Bargaining Representative as a Matter of Law at the Time it Filed the Complaint, Begs the Question Because it Ignores or Overlooks Respondent's obligation to Maintain the Status Quo Regardless of AFT's Status as a Certified Exclusive Representative.

Respondent's argument that AFT lacks standing to bring this PPC rests on the August 14, 2023 Final Memorandum Opinion and Order by the Second Judicial District Court (J. Lopez) in Case No. D-202-CV-202302118 and its remand of Board Order 26-PELRB-2022. As the argument goes, the Union must be certified as the exclusive representative before any duty to bargain with it or provide it information attaches. See NMSA 1978, § 10-7E-15(F) ("[T]he public employer shall provide *to the exclusive representative*…the following information for each employee *in an appropriate bargaining unit*…") (emphasis added); see also NMSA 1978, § 10-7E-15(G) ("The public employer shall provide the information described in Section F of this section *to the exclusive representative*…") (emphasis added); and § 10-7E-17(A)(1) (providing that "public employers *and exclusive representatives* … shall bargain in good faith on wages, hours and all other terms and conditions of employment") (emphasis added).

As of August 14, 2023, the date of Judge Lopez's Memorandum Opinion and Order, the only authority upon which Complainant could rely to make its claim that it was certified as the exclusive bargaining representative of any group of Respondent's employees had been explicitly reversed by the District Court. With that reversal, the District Court also nullified any legal obligation SRMC or Respondent may have had to bargain with or provide information to Complainant.

The Union's Closing Brief reminds us that the question of the effect of Judge Lopez's Decision on the Union's standing to bring its claims was argued previously in Respondent's Motion to Dismiss filed herein on October 31, 2023 in the context of a Rule 12(B)(6) type of motion. In my letter Decision denying the Motion to Dismiss I wrote:

> "The duty to bargain that is the basis of the Complaint attaches as of the date of determination of majority status. Until that point, the employer is required to maintain the *status quo* and may not make unilateral changes to terms and conditions of employment during the campaign period. (Citations omitted).
>
> After certification changes to the status quo must be made pursuant to negotiations, after negotiation to impasse, or upon notice and opportunity to bargain over the changes. (Citations omitted)…Here, majority status was determined on January 19, 2023, when I conducted the card count that determined that majority status, an act recently affirmed by the PELRB in 59-PELRB-2023 (November 20, 2023), notwithstanding the complex, convoluted path travelled by the parties following SRMC's appeal from the Boards Orders 26-PELRB-2022, 8-PELRB-2023 and 9-PELRB-2023."

In the intervening period between the Motion and my Letter Decision the Board met on November 20, 2023 concerning the Court's remand and issued its Order 59-PELRB-2023, restoring the status quo ante as of February 15, 2023 concerning the PRNs sharing a community of interest with others in the petitioned-for unit so that it is appropriate to recognize a single bargaining unit that includes them (See 8-PELRB-2023) as well as the *status quo ante* of the card check and resulting certification of the Union as the exclusive representative of the unit in question. (See 9-PELRB-2023).

I adopt the rationale from my Letter Decision of November 22, 2023, Denying Respondent's Motion to Dismiss as part of my decision here that this Board's restoration of the *status quo ante* by operation of its Order 59-PELRB-2023 renders moot the lack of exclusive representative status. Beyond that, even if the Respondent had no legal obligation under § 10-7E-15 to provide information, or to bargain in good faith on wages, hours and all other terms and conditions of employment under § 10-7E-17(A)(1) because of the asserted dubious status of AFT as an exclusive representative under the Act, it is still obliged to maintain the *status quo* concerning those same wages, hours and all other terms and conditions of employment as of the filing of the Petition for recognition, placing the Respondent in a bit of a "Catch 22"[1] in that although an employer may not yet have been required to provide information or engage in bargaining for some period of time, it could not make unilateral changes to those terms and conditions of employment until Complainant's representative status is determined and it engages in collective bargaining. For those reasons, Complainant has and has had standing to bring this complaint.

B. AFT DID NOT MEET ITS BURDEN OF PROOF TO ESTABLISH THAT RESPONDENT REFUSED TO BARGAIN OVER CHANGES IN TERMS AND CONDITIONS OF EMPLOYMENT AND REFUSED TO RESPOND TO THE UNION'S INFORMATION REQUEST IN VIOLATION OF NMSA 1978, §§ 10-7E-17(A)(L) AND/OR 19(F).

A complainant bears the burden of proving its claims and the burden of going forward with the evidence. Rule 11.21.1.22 NMAC. A complainant must prove its claims with substantial evidence based on the record as a whole. *Regents of Univ. of N.M. v. N.M. Fed'n. of Teachers,* 1998-NMSC-020, ¶ 17; NMSA 1978, § 10-7E-23. "'Substantial evidence' is evidence that a reasonable mind would regard as adequate to support a conclusion." *Id.* Although hearsay is

[1] A catch-22 is a paradoxical situation from which an individual cannot escape because of contradictory rules or limitations. The term was coined by Joseph Heller, who used it in his 1961 novel *Catch-22*.

commonly allowed in administrative hearings, including those before the PELRB, and may even provide "substantial evidence" to support a finding of fact or conclusion of law, the "legal residuum rule", recognized in case law, requires a finding or conclusion of liability to be based on some modicum of legally admissible evidence in cases such as this where a "substantial right" is at stake. See *Trujillo v. Employment Sec. Comm'n*, 1980-NMSC-054, 94 N.M. 343, 344.

That said, I give little to no weight to AFT's Exhibits A-L. Most of these documents lack the indicia of reliability required to give any of them weight. For example, Exhibits A-I are all photographs, apparently taken of web pages, with no indication of the source of the images. As I pointed out during the merits hearing, Exhibits A through I simply do not stand for the proposition that SRMC made any changes to any of its employees' terms and conditions of employment. Audio Record 1 at 00:48:40-00:48:55. Adrienne Enghouse was the sponsoring witness for Exhibits A-J. None of her testimony regarding those exhibits was based on personal knowledge. She admitted on cross-examination that she could not say for certain where any of those documents came from because she did not receive them directly. Audio Record 1 at 00:28:00 - 01:05:00; 01:17:15-01:17:45.

Exhibit J is similarly problematic. It appears to be a screenshot from a cell phone of a document entitled "Sunsetting UNM Sandoval Regional Medical Center's Benefits". As with Exhibits A-I, it facially lacks any indicia of reliability necessary to give it any evidentiary weight. As with Exhibits A-I, Complainant did not adequately correct all of that evidentiary deficiencies. Moreover, even assuming that Exhibit J is given evidentiary weight, all that it would prove is that SRMC announced ahead of time the different employee benefits at UNM Hospitals once SRMC ceased to be their employer. The significance of any changes reflected on J has not been clearly established. For example, Gilbert Martinez testified that,

while he participated in the CAP program described in Exhibit J, Audio Record 2 at 00:11:50-00:13:00, he did not suffer any loss of pay associated with the program's demise, Audio Record 2 at 00:35:00-00:36:00. He also confirmed that, even if he were to apply for the CAP program, he was not guaranteed to benefit from it. Audio Record 2 at 00:36:00-00:36:15.

As to Complainant's Exhibits K and L, these documents establish only that a demand for information was made and rejected, which negates the Union's claim that Respondent did not respond to its information request. It clearly did respond – its response was a refusal to provide the requested information for the reasons stated in Exhibit L.

The preponderance of the evidence shows that all communications sent to SRMC's employees regarding Respondent's acquisition of SRMC were drafted by and sent by Respondent, not SRMC and that all such communications are information provided to SRMC employees from UNM Hospitals describing the terms and conditions of employment with Respondent. The evidence demonstrates that the reason Respondent sent these communications and information was to convince SRMC's employees to accept employment with Respondent following its acquisition of SRMC. The evidence therefore does not support Complainant's assertions that SRMC was communicating to its employees regarding changes to the terms and conditions of employment with SRMC. AFT had no bargaining relationship with Respondent and it had not sought to represent any group of employees at UNMH. Accordingly, the Complainant also finds itself in a "Catch 22" whereby the alleged changes to wages, hours and terms and conditions of employment are not made by the entity with whom it claims a bargaining relationship. That entity is essentially "going out of business" and its assets and liabilities were being acquired by Respondent, with whom AFT had no relationship. The so-called changes are not changes at all from the Respondent's

perspective (and mine). It was merely informing SRMC employees what the wages and benefits would be at UNM Hospitals if they decided to come work for them.

Complainant's allegations in this case are similar to those brought against the successor employer in *NLRB v. Burns Intern. Sec. Services, Inc.*, 406 U.S. 272 (1972). In *Burns*, the National Labor Relations Board ("NLRB") held that the successor employer, the successor to a prior security company whose employees had recently been certified as the bargaining representative for a group of security guards, violated the National Labor Relations Act ("NLRA") when, among other things, it allegedly unilaterally changed the terms and conditions of employment of the prior security company's employees when it set the baseline terms and conditions of employment for those employees upon acquiring them. Id. at 292-93. On appeal at the U.S. Supreme Court, the NLRB argued that "'the obligation to bargain imposed on a successor-employer includes the negative injunction to refrain from unilaterally changing wages and other benefits established by a prior collective bargaining agreement even though that agreement had expired.'" Id. at 293. The NLRB further argued, "In this respect, the successor-employer's obligations are the same as those imposed upon employers generally during the period between collective-bargaining agreements." Id.

The Supreme Court rejected this argument. In doing so, it stated, "It is difficult to understand how [the successor employer] could be said to have changed unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and … no outstanding terms and conditions of employment from which a change could be inferred." Id. at 294. "The terms on which [the successor employer] hired employees for service … may have differed from the terms extended by [the prior employer] and required by the collective-bargaining contract, but it

does not follow that [the successor employer] changed its terms and conditions of employment when it specified the initial basis on which employees were hired." Id.

The same result should obtain here. Such a result would be consistent with the PEBA. See NMSA 1978, § 10-7E-17(A)(1) ("neither the public employer nor the exclusive representative shall be required to agree to a proposal or to make a concession"). The exception to this presumption is only when "it is perfectly clear that the new employer plans to retain all of the employees in the unit." *Burns*, 406 U.S. Id. at 295. However, no bargaining obligation, if any, exists between a successor employer and a predecessor union until the successor employer hires a "full complement of employees… since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit." Id.

Under this legal framework, Complainant cannot establish that Respondent violated any provision of PEBA as alleged. Like the NLRB in *Burns*, Complainant alleges that, by communicating the terms and conditions of employment with UNMH, Respondent unilaterally changed the terms and conditions of SRMC employees' employment. However, as with the NLRB's argument, these allegations are without merit. The evidence demonstrates that Respondent and SRMC were separate entities prior to the acquisition. SRMC and Respondent had entirely different employment policies governing the terms and conditions of employment for their respective employees. Compare Exhibit 14, Exhibit 15; Audio Record 3 at 01:04:00-01:07:00, 02:15:35-02:37:45. SRMC and Respondent had different Federal Employer Tax ID Numbers. Compare Exhibit 1, Exhibit 2; Audio Record 3 at 00:07:20-00:07:46, 00:12:30-00:13:35. Respondent and SRMC had entirely different governing boards. Audio Record 3 at 00:45:50-00:48:40. At no point did Respondent have any control over the terms and conditions of SRMC employees' employment or its

operations prior to the acquisition. Audio Record 3 at 00:05:00-00:05:19, 00:35:30-00:40:20, 00:55:45-00:56:00. Respondent had no role in SRMC's labor relations prior to the acquisition. Audio Record 3 at 01:58:55-02:01:05.

The terms of the acquisition were iterated in an "Asset Purchase Agreement." Exhibit 6. Those terms, and the steps Respondent engaged in to acquire SRMC, make it clear that the transaction in which Respondent purchased SRMC was at arms' length and comported with the industry standards for one healthcare facility's acquisition of another. See Id.; Audio Record 3 at 00:04:30-00:35:30. In fact, in order to effectuate the acquisition, Respondent was required to engage with multiple state and federal agencies in order to acquire SRMC to ensure that healthcare operations could continue without interruption. This includes notifying the New Mexico Health Facility Licensing and Certification Bureau of its intent to acquire SRMC (Exhibit 3); applying for approval from the Centers for Medicare and Medicaid Services ("CMS") to own and operate SRMC clinics under its licenses, (Exhibit 4, Exhibit 8, Exhibit 12, Exhibit 13; see also Exhibit 10 (terminating SRMC's CMS billing authorization)); applying for a license to operate those clinics with the New Mexico Department of Health ("NMDOH") (Exhibit 5, Exhibit 7 (identifying new ownership of SRMC clinics as UNMH), Exhibit 9); and applying for approval for the acquisition from the U.S. Department of Housing and Urban Development ("HUD") to assume SRMC's outstanding loans (Exhibit 11). Audio Record 3 at 05:20-00:07:20, 00:14:45-00:34:00.

The evidence therefore shows that Respondent, a successor employer, had no obligation to bargain or provide any information to Complainant regarding the terms and conditions of employment at UNMH, nor did the dissemination of information from Respondent to SRMC employee affect any unilateral change to the employees' status quo.

DECISION: For the reasons set forth above, AFT's Complaint that Respondent made unilateral changes in terms and conditions of employment and refused to provide information in violation of the Public Employee Bargaining Act, NMSA 1978, §§ 10-7E-17(A)(l) and/or 19(F) should be **DISMISSED** as being without merit.

Issued, Thursday, July 18, 2024.

Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board
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Albuquerque, New Mexico 87120