STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME, COUNCIL 18,
Complainant,

v. **PELRB No. 104-24**

N.M. CORRECTIONS DEP'T.,
Respondent.

ORDER

THIS MATTER came before the Public Employee Labor Relations Board at its regularly scheduled meeting on February 7, 2025, for review of the Hearing Officer's Decision on Complainant's Motion to Enforce Settlement Agreement issued in this case on December 20, 2024. Having reviewed the file, hearing argument from the parties, and being otherwise sufficiently advised, the Board voted 3-0 to adopt the Hearing Officer's Decision, issued in this case on December 20, 2024.

WHEREFORE the Hearing Officer's Decision, issued in this case on December 20, 2024 is hereby AFFIRMED.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Signed by:
Mark Myers
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MARK MYERS, BOARD CHAIR

2/15/2025
DATE

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

MICHELLE LUJAN GRISHAM
Governor

THOMAS J. GRIEGO
Executive Director

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December 20, 2024

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Re: ***AFSCME, Council 18 and AFSCME Local 3422 v. New Mexico Corrections Dept.; PELRB No. 104-24***

Dear Counsel:

This letter constitutes my decision concerning the Complainant's Motion to Enforce Settlement Agreement argued on December 9, 2024.

PROCEDURAL BACKGROUND

On February 14, 2024 AFSCME, Council 18 and AFSCME Local 3422 filed a Prohibited Practices Complaint alleging that the parties agreed to a roster of all posts and post packages, by facility, available for selection by bidding and assignment. Each post package sets out the assigned post, shift and regular days off. Despite the agreement's provision that before altering the agreed-upon roster the Respondent must submit a proposed revision to the Union and bargain those changes in good faith to impasse, Respondent unilaterally reduced posts, changed posts from mandatory to nonmandatory, and refused to bargain the same upon request by the Union.

I found the Complaint to be "facially adequate" on February 15, 2024 and the Corrections Department Answered the Complaint on February 29, 2024. After a Status and Scheduling Conference on March 13, 2024, Complainant moved for, and I granted a Motion for Leave to Amend and to Vacate schedule issued April 16, 2024.

Complainant filed its Amended PPC on April 16, 2024 and after a second Status and Scheduling Conference on May 6, 2024, Complainant Petitioned this Board for a Temporary Restraining Order on May 31, 2024. After a hearing on June 14, 2024, I granted the requested Restraining Order on June 2024.

A Merits Hearing originally scheduled for July 18 and 19, 2024 was vacated at the request of the parties to accommodate settlement negotiations. The parties executed a Settlement Agreement on August 23, 2024, but Complainant wanted to monitor compliance with that agreement before withdrawing the PPC and voluntarily dismissing PELRB Case No. 104-24. On September 16, 2024, Complainant filed the instant Motion to Enforce the Settlement Agreement reached by the parties in August. After a second Status and Scheduling Conference on September 26, 2024 a Hearing on the Merits of the Motion to Enforce the Settlement Agreement was scheduled for October 25, 2024. Once again, I postponed that hearing to accommodate further settlement negotiations. After a third Status and Scheduling Conference held on November 20, 2024, a Hearing on the Merits of the Motion to Enforce Settlement Agreement was re-scheduled for December 9, 2024.

At the conclusion of the December 9, 2024 hearing, the Employer requested to file closing briefs in lieu of oral argument, and after further postponement at the Employer's request, both parties timely submitted their briefs on December 18, 2024 and both have been duly considered.

REASONING AND CONCLUSIONS OF LAW:

The essential issue to be determined is what constitutes the "last bargained for roster" in order to further determine the status quo for purposes of bargaining. At the outset there were four facilities at which the "last bargained for roster" was disputed[1]:

1. Central New Mexico Correctional Facility (Los Lunas);
2. Penitentiary of New Mexico (PNM North and South Facilities);
3. Springer Correctional Center; and
4. Roswell Correctional Center.

At the hearing, the parties agreed that the operative last bargained for roster at the Central New Mexico Correctional Facility was the facility matrix signed by Rob Trombley on August 5, 2021, Union Exhibit G. Consequently, that roster is no longer in dispute.

Similarly, the Parties agreed at the hearing that the last bargained for roster at PNM South is that signed by Rob Trombley on August 31, 2023, Union Exhibit K. While the Parties also agree that the last roster mutually agreed upon at PNM North is a 2022 matrix, Exhibit M, the Respondent takes the position that its negotiations with Complainant pursuant to the August 23, 2024 settlement agreement set forth more fully below, comport with its provision that "NMCD will bargain, in good faith, to impasse, any proposed changes" and that the agreement's provision that "these disputes will not go to impasse arbitration" means that it may unilaterally impose its last best offer for the PNM North facility.

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[1] NMCD initially argued that a matrix is not a roster. After much dispute and evidence regarding the difference or interchangeability of roster versus matrix, NMCD witness Gary Maciel confirmed that the last agreed upon roster for Central New Mexico Correctional Facility was the facility matrix, Exhibit G thereby establishing the practice of sometimes using a matrix as a roster under the settlement agreement.

With regard to both the Springer and Roswell facilities, I must decide whether what appears to be acknowledged to be the last written rosters agreed to by the parties at each location providing for five Lieutenants at these locations, was subsequently modified to include a sixth Lieutenant at each facility as the status quo.

I begin my analysis with acknowledgement of the following applicable provisions of the Public Employee Bargaining Act:

NMSA 1978 § 10-7E-22 (2020) provides in part:

> "Collective bargaining agreements and other agreements between public employers and exclusive representatives shall be valid and enforceable according to their terms when entered into in accordance with the provisions of the Public Employee Bargaining Act..."

NMSA 1978 § 10-7E-9(F) (2020) provides that:

> "The board...has the power to enforce provisions of the Public Employee Bargaining Act through the imposition of appropriate administrative remedies, actual damages related to dues, back pay including benefits, reinstatement with the same seniority status that the employee would have had but for the violation, declaratory or injunctive relief or provisional remedies, including temporary restraining orders or preliminary injunctions..."

NMSA 1978 § 10-7E-19(G) (2020) prohibits a public employer's refusal or failure to comply with any provision of the Public Employee Bargaining Act or board rule.

Complainant has shown by a preponderance of the evidence that the parties reached a settlement agreement of this case on July 16, 2024 calling for designated representatives of labor and management to meet, when the Corrections Department would present "the last bargained roster at all eight facilities". That last bargained for roster constitutes the "status quo" from which negotiations over changes to the rosters for each facility would proceed. I do not agree with the Respondent's argument that there was no meeting of the minds on the settlement agreement so that it may not now be enforced. A disagreement now as to what constitutes the last bargained roster at any of the facilities at issue or as to what the "status quo" from which negotiations over changes to the rosters for each facility would proceed may be, does not mean that there was no meeting of the minds as to the terms of the settlement agreement itself. Neither does a dispute now over the law pertaining to whether a public employer under the PEBA may unilaterally impose its last, best offer after bargaining to impasse, mean that there was not a meeting of the minds at the time the settlement agreement was entered into. To the contrary, this presents a rather straightforward case of contractual construction in which 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. Where, as here, the proffered evidence is in dispute, turns on witness credibility, or is susceptible of conflicting inferences, the ultimate factual issues must be resolved by the appropriate fact finder with the benefit of a full evidentiary hearing. To hold otherwise would be to relegate to judicial divination the determinative issues of many contract disputes. *C.R. Anthony Company v. Loretto Mall Partners,* 112 N.M. 504, 817 P.2d 238 1991 NMSC and *J.R. Hale Contracting Co., Inc. v. Union Pacific Railroad,* 179 P.3d 579, 2008 NMCA.
One particular ambiguous clause of the Settlement Agreement before me now states:

> "NMCD will bargain, in good faith, to impasse, any proposed changes. The Parties agree that these disputes will not go to impasse arbitration."

NMCD agreed not to mark any post as "no bid" unless the Union agreed. NMCD further agreed to:

> "...follow all provisions of the CBA in filling posts, including but not limited Article 10, Section 3, 'Off Site Volunteers' Subsection M ('Members of Management will not be selected for overtime in bargaining unit positions or to perform bargaining unit work until all qualified on-site and off-site volunteer Employees have been offered the overtime work.'").[2]

The Parties' settlement agreement, Exhibit 2, constitutes an agreement within the meaning of NMSA 1978 § 10-7E-22 (2020) that is subject to enforcement by this Board through an appropriate administrative remedy pursuant to NMSA 1978 § 10-7E-9(F) (2020). I further conclude that the agreement makes clear that both parties understood that the status quo from which negotiations would proceed would be reset at each facility according to the last (most recent) roster *agreed to by both parties,* not one that was the subject of negotiation or bargained to impasse. I reject the Respondent's argument that having *negotiated,* it has *bargained* a new roster that it may unilaterally impose without the parties having agreed to a roster. That provision of the settlement agreement was drafted by the Respondent according to Deputy Cabinet Secretary, Gary Marcial's testimony. It is axiomatic that ambiguities in contract language are to be construed strictly against drafter. See, *Schultz & Lindsay Constr. Co. v. State,* 83 N.M. 534, 536, 494 P.2d 612, 614 (1972); *Id.* at 535, 494 P.2d at 613; *J.R. Hale Construction, Inc. v. Union Pacific Railroad,* 179 P.3d 579, 2008 NMCA.

Not only does New Mexico's Public Employee Bargaining Act make no provision for unilaterally implementing last, best offers after reaching impasse in negotiations, this Board has previously taken the position that doing so violates the PEBA. In *New Mexico Coalition of Public Safety Officers Association v. Santa Fe County,* 13-PELRB-2022, (In re: PELRB 133-21) (reversed on other grounds in D-101-CV-2022-00913) I decided that by unilaterally implementing its Revised Mandatory Vaccination Policy, after reaching impasse in bargaining that policy, the County violated the PEBA, Sections 19(F) and 19(G) and the impasse resolution procedures contained in Sections 18(B) and (H).

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[2] The Corrections Department further agreed to post notice in all facilities for a period of 60 days that the Parties have resolved the Prohibited Practices Complaint No. 104-24 by agreeing to the negotiations as described in the agreement.

As I noted in that decision "The impasse procedure set forth in § 18 of the Act exists for the purpose of rectifying the situation such as is found in this case where neither party agrees to the other's proposal or will not make a concession. That process is thwarted when the employer unilaterally implements its proposal." In the instant case, I would add that process is thwarted when the parties bargain away the impasse procedure required by law.
I took the opportunity in PELRB 133-21 "to re-iterate this Board's long-standing policy that a public employer under New Mexico's Public Employee Bargaining Act may not unilaterally impose its LBO." That it did so in that case was found to be a breach of the County's duty to bargain in good faith. See also, *NEA v. West Las Vegas School District*, 21 PELRB 13 (August 19, 2013); injunction dissolved without explanation in D-412-CV-2013-00347. (While at impasse in their contract negotiations, the PELRB issued injunction requested by NEA to stop the West Las Vegas School District's unilateral imposition of a schedule change not agreed to by the union).
In consideration of the foregoing, I conclude as follows:

1. The last bargained for roster at PNM South is that shown on Union Exhibit K.
2. The last bargained for Roster at PNM North, is Exhibit M, negotiated in December 2023 when it was operational, before being temporarily closed for renovation and all employees assigned there, moved to PNM South as shown on Union Exhibit K.
3. Language at the end of Exhibit K that:

   "#6 added only for temp as North facility is closed. This will be removed as it is reopened.
   Relief Sgt's are added only as temp 2 for days 2 for nights while North facility is closed.
   (2) for days (2) for nights and (1) 5 day post[.]
   These will be removed as it is reopened.
   These posts are on the bid sheets for reference[.]"

does not mean that parties agreed upon "zero staffing" at the North facility; that is, that they agreed not to bargain staffing at the North because it was closed for renovation. Such construction is inconsistent with the parties' settlement agreement, which calls for negotiation of a present roster, beginning with the last roster agreed upon. I can find nothing in the quoted language on Exhibit K to indicate that the parties agreed upon zero staffing at the North facility. Bargaining from an empty roster cannot reasonably be construed as compliance with the settlement agreement's call for negotiations to be based on a "the last bargained for roster." Therefore, to the extent NMCD imposes a "zeroed out roster", it does so unilaterally, without bargaining an agreement to do so and contrary to its settlement agreement, which is the subject of this Motion. The last bargained for roster for the North facility is the one shown on Exhibit M. This conclusion in supported by the email exchange contained in Exhibit A.

As concerns the rosters at the Springer and Roswell facilities, I agree with NMCD that the last written roster agreed to by the parties at each location provides for five, not six Lieutenants at those locations. That the parties verbally agreed to a sixth Lieutenant slot to prevent the harsh result of

firing or transferring the extra Lieutenant is an accommodation by the employer to the Union and the employees affected. It does not alter the status quo for purposes of enforcing the settlement agreement. Both Lieutenants Maldanado and Gallegos explained that the parties verbally agreed to sixth Lieutenant despite never agreeing to modify the roster to reflect that agreement. Mr. Maciel testified that the agreement allowed the Lieutenant roster at both facilities to be reduced at his discretion. I accept Mr. Maciel's interpretation of the parties' agreement as more compliant with both the law of the State and the parties' settlement agreement.

The Movant did not produce sufficient evidence to persuade me that either party intended to alter the status quo by allowing a sixth Lieutenant position as contrasted with an agreement to avoid a harsh result by strict compliance with the roster. An agreement not to enforce compliance is not an agreement to alter the agreement itself. Even if there was evidence to suggest such intent, the sixth Lieutenant position is not of sufficient duration to have established an enforceable past practice that could be construed as modifying the status quo. Because Section 22 of the PEBA provides the basis for enforcement of the parties' settlement agreement, I conclude in this case that to be enforceable, the addition of the sixth Lieutenant positions must have been in writing executed with the same formality as the settlement agreement or the parties' CBA. As it is not, I decline to conclude that the operative agreed upon roster at Springer and at Roswell contains six Lieutenants.

To the extent NMCD argues, without evidence, that it has not appropriated funding for the agreed upon rosters, such an argument implicitly relies on Sections 17(H) and (I) of PEBA. I agree with the Union's argument that PEBA, Sections 17 (H) and (I) do not preclude enforcement of the settlement agreement as I have construed it concerning PNM. I conclude that the Union's reliance on *State of New Mexico v. AFSCME Council 18,* 2012-NMCA-114, 291 P.3d 600, and *Bernalillo County in AFSCME Local 2499 v. Board of County Commissioners of Bernalillo County*, A-1-CA-37036, mem. Op. (N.M. Ct. App. November 2, 2021) (unpublished), is correct. The State cannot avoid its obligation to comply with the settlement agreement by maintaining that compliance would require it to seek further appropriations from the legislature. As in those cases I conclude that enforcement of the parties' settlement agreement is not contingent on an additional appropriation. Whether any supplemental appropriation is needed awaits the outcome of negotiations that have not yet been completed due to the Respondent's mistaken belief that it may unilaterally implement its LBO.

CONCLUSION: Argument that AFSCME did not attempt to resolve this dispute informally before filing the Motion to Enforce is immaterial. There is no issue of the Union's failure to bargain in good faith before me. No such claim would serve as a defense to enforcement of the agreement. There is no condition precedent to its enforcement. The assertion that the Motion is premature because the Parties have not executed the Agreement and announced their formal negotiation designees, runs counter to the evidence before me. Exhibit 2 is a fully executed settlement agreement. The parties have, in fact met and negotiated new rosters for all locations but those that are the subject of this Motion – no witness on either side has disputed that. That no change has yest been made to the existing work schedules is also immaterial to this Motion. That argument may be material to the underlying Prohibited Practices Complaint, but it is not material to whether a Motion to enforce this settlement agreement as it pertains to the negotiation of any such schedule change

should be granted. As stated, NMCD errs by interpreting the phrase "last bargained roster" to mean "the roster with respect to which the Parties last engaged in bargaining". The Employer further errs in its belief that ambiguities in a contract (and this settlement agreement specifically) render it unenforceable rather than subject to construction by a trier of fact, as I have done here.

I do not agree with the argument that enforcement of the Settlement Agreement would require NMCD "to completely restructure its workforce at a given facility to return to staffing levels consistent with rosters in effect in 2021". Any return to staffing levels consistent with rosters in effect in 2021 is done only for the purpose of establishing a baseline from which negotiations will proceed. Those negotiations are hindered by the errors by NMCD concerning imposition of its LBO and its position on a "zeroed out" North facility roster at PNM. Those negotiations are also hindered by the Union's error surrounding the sixth Lieutenant controversy.

Putting aside whether the parties' waiver of impasse arbitration is legal and enforceable, that waiver does not mean that the employer's LBO may be imposed. It simply means that the parties have abandoned the most common tool used for resolution of bargaining impasse, with the result that a bargaining impasse would be resolved in some other forum such as a court of competent jurisdiction or before this Board

WHEREFORE, Complainant's Motion is **GRANTED** in that by this Decision, I have determined and identified the "last bargained for roster" at the disputed facilities. The Parties are ordered to "bargain, in good faith, to impasse, any proposed changes" in a manner consistent with this decision.

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Thomas J. Griego
Executive Director