STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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

Complainant,

v. **PELRB No. 116-24**

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 came before the Public Employee Labor Relations Board at its regularly scheduled meeting on February 7, 2025, for review of the Hearing Officer's Report and Recommended Decision issued in this case on December 13, 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 Report and Recommended Decision, issued in this case on December 13, 2024.

WHEREFORE the Hearing Officer's Decision, issued in this case on December 13, 2024 is adopted as the Order of this Board.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Signed by:
Mark Myers
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MARK MYERS, BOARD CHAIR

2/15/2025
DATE

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In re:

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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 the merits of United Health Professionals of New Mexico, AFT's Complaint alleging that the Respondent Hospital made multiple unilateral changes affecting its constituent employees' terms and conditions of employment without bargaining to impasse. First, AFT alleges that the Hospital when current Charge Nurses (who are within the certified bargaining unit leave their positions, they are replaced with an "RN Supervisor", a job title that is not within the recognized bargaining unit. As the "RN Supervisor" job title is considered by the Hospital to be a "supervisor" as defined by the Public Employee Bargaining Act, creating schedules, evaluating other nurses, and issuing discipline, AFT alleges that through attrition, this will remove the Bargaining Unit's second-largest membership group.

AFT also alleges that the Hospital made unilateral changes to the employee schedules and/or hours in its Radiology and Physical Therapy departments. Further, the Hospital announced its intent to

reducing the facility to four anesthesiology rooms effective June 21, 2024 and would be shutting down one Operating Room (OR) resulting in a reduction of staff. UNM SRMC further announced it would census manage the employees.

Respondent appealed the Board's certification of the bargaining unit herein, (See, PELRB No. 304-22; PELRB Order No. 59-PELRB- 2023), which is currently pending before the Second Judicial District Court. Accordingly, the Hospital maintains that it owed no duty to bargain in good faith to AFT at any time alleged in the Prohibited Practices Complaint.

Without raising that objection, Respondent denies that it has implemented a change to the Charge Nurse position and states that it will exercise its management right to direct and control non-unit positions that are supervisory in nature, including but not limited to establishing an "RN Supervisor" position consistent with Respondent's organizational structure. Respondent further denies that it implemented a unilateral change when it reduced the number of available anesthesiology and/or operating rooms in June 2024, and that any such action was operational in nature and within management's reserved rights under PEBA. Respondent also denies that a reduction of relevant staff, or census management of relevant staff, occurred, denies that it changed the graveyard shift schedule for Radiology employees and denies that it changed the terms and conditions of employment for physical therapists at SRMC as physical therapists work in both inpatient and outpatient settings.

A hearing on the merits was held Tuesday, September 10, 2024. At the conclusion of the Union's case in chief, the Hospital moved for a directed verdict on the ground that the union failed to meet its burden of proof that changes to working conditions occurred. I denied that motion and proceeding with the hearing to take the Hospital's evidence in defense of the Union's claims. Closing briefs in lieu of oral argument were submitted by both parties on October 7, 2024. Both briefs were duly considered. 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. Complainant is a "labor organization" as that term is defined in Section 4(K) of the PEBA. (Stipulated).
2. Respondent is a "public employer" as that term is defined in Section 4(R) of the 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 Complaint in this matter was filed on June 24, 2024. Special Notice of PELRB's Records herein).
4. According to an email string beginning in late November of 2023, Radiology Department personnel and Hospital management began discussing Department employees' concerns with MRI Priority Guidelines Emergency Room/Inpatient allotted slots per day, among other concerns. (Exhibit F).
5. In connection with management's discussion with employee described above, Page 11 of Exhibit F, includes an email from Radiology Department employee Andy Isengard, dated December 4, 2023, proposing that a union representative – Adrienne Enghouse – be invited to attend a scheduled meeting between management and radiology department employees in which he opined that the meeting would include discussion regarding working conditions. (Exhibit F).
6. Mr. Isengard copied Union Representative Adrienne Enghouse on the above-mentioned email at her correct email address, with the result that AFT had notice of

issues in the Hospital's Radiology Department at lease as early as December 4, 2023. (Exhibit F; Audio Record Part 2 at 1:25:52 – 1:26:14).

7. Ms. Enghouse testified that the Union was aware of allegations of changing working conditions in the Hospital, specifically including the allegations concerning the Radiology Department, as early as December 2023. (Audio Record Part 2 at 1:25:52 – 1:26:14; 1:43:52 – 1:44:16. 1:43:52 – 1:44:16).
8. Ms. Enghouse testified that Gilbert Martinez reported to her on the status of those meetings with the Radiology Department mentioned in the emails. Audio Record Part 2 at 1:39:37 – 1:40:40).
9. AFT did not make a demand to bargain over any of the changes to working conditions alleged in its PPC. (Testimony of Adrienne Enghouse, Audio Record Part 2 at 1:40:58 – 1:41:22; Testimony of Wilson Wilson, Audio Record Part 5 at 1:06:44-52).
10. Shortly after Respondent's acquisition of SRMC, the Union's attorneys approached Ryan Randall, Executive Director of Employee and Labor Relations at UNM Hospital, about bargaining, proposing that it would put aside a disputed PRN issue that was pending litigation, to attend bargaining. Testimony of Wilson Wilson, Audio Record Part 5 at 00:55:58 – 00:56:55; 1:05:20-48).
11. In connection with its desire to engage in bargaining, the parties agreed to a framework, which stated:

> "… UNMH and AFT agree to immediately bargain, at dates/times/locations to be mutually-agreed upon, terms and conditions of employment for the non-PRN employees in the disputed collective bargaining unit at SRMC, with the parties agreeing to defer bargaining regarding PRN employees until at least a final District Court ruling regarding PRN's inclusion in the unit."

(Exhibit 8, Testimony of Wilson Wilson, Audio Record Part 5 at 00:58:16-20).

12. The parties met for bargaining on February 1 and 2, 2024. However, bargaining was discontinued by the Union on the second day because Respondent denied Adrienne Enghouse access to the property. (Testimony of Wilson Wilson, Audio Record Part 5 at 00:54:50-45; 00:59:52 – 1:00:00).
13. Since February 2024, Respondent extended at least three invitations to Complainant to return to the bargaining table as may be seen from email messages dated May 16, 2024, July 25, 2024 and August 1, 2024. Complainant did not respond to any of the Respondent's offers to engage in bargaining. (Exhibit 6; Testimony of Wilson Wilson, Audio Record Part 5 at 1:00:22-48; 1:02:11-27; 1:02:53 – 1:03:06; 1:03:48-54).
14. The Hospital contracted with Main Street Anesthesia ("MSA") to provide SRMC with Certified Registered Nurse Anesthetists ("CRNAs") staffing seven Operating Rooms per day. (Testimony of Jason Perry, Audio Record Part 3 at 1:12:12-36).
15. In February of 2024, the Hospital's MSA, notified Jason Perry, Director of Surgical and Interventional Services for the Hospital, that it would not renew its contract for those services with the result that CRNA staffing of the Respondent's seven Operating Rooms ended. (Testimony of Jason Perry, Audio Record Part 3 at 1:09:57-1:10:14).
16. MSA's February 2024 notification to SRMC that it would not renew its contract was unexpected and surprised Mr. Perry. (Testimony of Jason Perry, Audio Record Part 3 at 1:10:38-49).
17. To keep its Operating Rooms functioning, the Hospital entered into an agreement with the University of New Mexico's School of Medicine ("SOM") to provide anesthesia services at six SRMC locations from Monday to Thursday and five

locations on Friday. (Testimony of Jason Perry, Audio Record Part 3 at 1:12:27-1:13:05; 1:10:18-33).

18. Once the Hospital knew what anesthesia services the SOM could provide, SRMC nursing staff were notified in March 2024 of operational changes to anesthetizing locations at SRMC as found in Finding 14 above reducing the number of operating rooms that could be staffed after expiration of the MSA contract. (Testimony of Jason Perry, Audio Record Part 3 at 1:15:40-1:16:18).

19. SRMC nursing staff schedules were not changed by the need to shut down anesthesia locations after non-renewal of the MAS contract and subsequent agreement with the SOM. (Testimony of Jason Perry, Audio Record Part 3 at 1:16:24-35).

20. SRMC nursing staff in the Surgical Services Department have not experienced mandatory overtime or an increase in "on-call" time as a result of the operational changes described in Findings 14 and 15 above. (Testimony of Jason Perry, Audio Record Part 3 at 1:27:46 – 1:28:04; 1:28:08-13).

21. Since switching anesthesia providers to the SOM, and despite a reduction in the number of available anesthetizing locations, the volume of patient operations at SRMC has not changed. (Testimony of Jason Perry, Audio Record Part 3 at 1:31:01-37).

22. The Surgical Services Department has used two processes of census management over the past seven years – one is a call for volunteers to go home, and the other is to assign additional staff to perform customary maintenance of the operating rooms and its equipment. (Testimony of Jason Perry, Audio Record Part 3 at 1:20:45 – 1:22:03).

23. AFT called one witness, Claudia Gonzalez, to testify about the Hospital's Surgical Services Department's census management process and she acknowledged that she has not been affected by the use of its census management process during the time at issue. (Testimony of Claudia Gonzalez, Audio Record Part 2 at 41:52-54; 44:43-47).

24. Although employees in the hospital's physical therapy department *typically* work either "inpatient" or "outpatient" modalities, therapists are cross-trained in both, and, in practice, provide services in both modalities. (Ex. C; Testimony of Katrina MacDonnell, Audio record Part 4 at 03:45-57; 04:19-29; 04:50-57; 05:55 – 06:15. Testimony of Regina McGinnis, Audio record Part 2 at 00:19:58 – 00:20:01; 26:11-24).

25. For example, the Union's witness, Regina McGinnis, testified that SRMC has always required its therapists to work with both inpatient and outpatient clients at SRMC and that she personally has worked with both outpatient and inpatient clients in 2024. Prior to that, she regularly worked inpatient shifts on Sundays in 2023, despite claiming now to be solely an outpatient therapist. Testimony of Regina McGinnis, Audio record Part 2 at 00:19:58 – 00:20:01; 00:26:11- 24; Audio record Part 4 at 00:10:45 – 00:11:03; 00:14:11- 48; 15:16-29.

26. Ms. McGinnis was able to serve both inpatient and outpatient clients without any changes to her job duties being required. (Testimony of Regina McGinnis, Audio record Part 2 at 00:10:39-46).

27. Receiving a license in physical therapy from the State, requires that one is trained to provide both inpatient and outpatient care. (Testimony of Katrina MacDonnell, Audio Record Part 4 at 07:27-44).

28. Because of a staffing shortage among inpatient therapists, on May 15, 2024, manager Katrina MacDonnell notified the three outpatient therapists under her management: "Since we are all of the therapists trained in inpatient, we will need to meet to discuss temporary inpatient coverage." That meeting occurred on May 21, 2024, at which Ms. MacDonnell indicated that inpatient patients were being neglected due to the shortage and that the four of them present at the meeting had to figure out how to address that problem. They discussed options on how to cover shifts and she asked which of the employees wanted to give up an outpatient day to take on inpatient patients. (Ex. C; McGinnis Test., Audio Pt. 2, at 22:18-23:48; 23:58-24:49).

29. Physical therapists volunteered to cover shifts left vacant due to the inpatient therapist staffing shortage – no physical therapist has been directed to cover a vacant shift. (Testimony of Regina McGinnis, Audio record Part 2 at 00:10:39-46; Audio record Part 4 at 00:11:03-56; 00:12:29-54; 00:12:55 – 00:13:05).

30. At all times material to this PPC the parties had not negotiated a Collective Bargaining Agreement limiting the Employer's rights under NMSA 1978 § 10-7E-6 (2020) to direct the work of, assign, transfer, or otherwise take actions as may be necessary to carry out the mission of the public employer in emergencies. (Testimony of Jason Perry, Audio Record Part 3 at 1:20:45 – 1:22:03; 1:31:01-37).

31. The parties dispute whether the Respondent was required to give notice to, and/or negotiate with the Union prior to discussing the impact of the foregoing staffing issues with putative bargaining unit members, but it is not disputed that Ms. MacDonnell did not contact the Union prior to discussing staffing issues with putative bargaining unit employees. (Testimony of Katrina MacDonnell, Audio

Record Part 4 at 00:17:35 – 00:18:30; Testimony of Adrienne Enghouse, Audio Record Part 2 at 1:04:06-1:04:49.

32. In November and December of 2023, employees in the Respondent's radiology department sought a meeting with management to discuss several workplace issues. As part of the email chain trying to coordinate such a meeting and who should attend, on December 4, 2023, radiology technologist, Andy Isengard, wrote: "We want our Union Reps to be present during the meeting since it involves working conditions." Exhibit F.

33. The union's designated representative, Adrienne Enghouse, was copied on Mr. Isengard's email requesting "Union Reps" to be present at the meeting concerning scheduling. Exhibit F.

34. On December 5, 2023, Hospital Chief Operating Officer Adrian Larson responded: "The individuals who are acting as your union representation are not allowed at our meeting. The meeting is an internal department meeting to address operational concerns." Id. at 9-10.

35. The meeting referred to in Exhibit F took place on December 14, 2023. At that meeting, Mr. Larson directed the managers to work with the lead technologist to develop proposed schedule changes that would meet the operational needs of the Hospital. (Testimony of Gilbert Martinez, Audio Record Part 1 at 00:36:29-00:37:05; 00:37:37-00:38:35; 00:59:27-1:01:01).

36. Those proposed changed schedules were presented to Respondent's Radiology Department staff at a staff meeting on January 15, 2024. (Id. at 00:35:06-00:37:05; Union Exhibits B1 and B2).

37. Respondent held subsequent meetings with bargaining unit employees to talk

directly with them about who was willing to change their schedules as previously proposed. Two such meetings were held on March 8 and April 10, 2024. (Testimony of Gilbert Martinez, Audio Record Part 1 at 1:91:33-1:02:37).

38. Radiology Technician, Gilbert Martinez, testified that his schedule never changed contrary to the allegation that he had been unilaterally moved from night shift to day shift, and that he did not know of any other employees in the Radiology Department that had their schedule changed. (Testimony of Gilbert Martinez, Audio Record Part 1 at 1:03:07 – 1:03:11).

39. At the Merits Hearing, Ms. Enghouse confirmed her email address appearing on Exhibit F, and testified that Gilbert Martinez reported to her on the status of those meetings with the Radiology Department mentioned in the emails, from which I find that the Union was aware of allegations of changes made, specifically including allegations concerning the Radiology Department as early as December 2023. (Exhibit F; Testimony of Adrienne Enghouse, Audio Record Part 2 at 01:43:52 – 01:44:16; 01:25:52 – 01:26:14).

40. The Union did not make a demand to bargain over the alleged changes in "working conditions" in the Radiology Department as pled in the instant PPC. (Testimony of Adrienne Enghouse, Audio Record Part 2 at 01:40:58 – 01:41:22).

41. Wilson Wilson, Director of Employee Relations for the UNM Sandoval Regional Medical Center Campus of UNM Hospital, testified that the Union did not request to bargain staff schedules for radiology personnel in 2023 or in 2024. (Testimony of Wilson Wilson, Audio Record Part 5 at 1:06:44-52).

42. The Union representative, Adrienne Enghouse, testified that the schedules of two radiology department employees – Stephanie Montoya and Louise Garcia – were

changed by management in connection with the Department's staff meetings as alleged. However, neither of them had been identified by Complainant as having had their schedules changed in either the Complaint or the SPHO, neither had been identified as a witness who may testify regarding their alleged schedule changes when the Union submitted information in support of its Complaint to the PELRB or when requesting subpoenas for testimony at the Merits Hearing. Neither of them was called to testify at the merits hearing, nor was any exhibit entered by the Union, to substantiate Ms. Enghouse's allegations. Accordingly, Ms. Enghouse's testimony on that point is not credible. (Testimony of Adrienne Enghouse, Audio Record Part 2 at 01:04:49-01:05:10; 01:08:25-27).

43. The position of RN Supervisor is one utilized at the UNM Hospital – Lomas Campus. In the UNM Hospital organization chart, the RN Supervisor position is situated below the executive director. (Exhibit 2; Testimony of Coreen Bales Audio Record Part 3 at 00:34:09-23; 00:36:00-09; 00:34:58-00:35:58; 00:37:31-35).

44. I take special notice of the fact that nurses at UNM Hospital – Lomas Campus are represented by National Union-Hospital & Health Care Employees District 1199 NM, a different union, that the Complainant here, which represents nurses at UNM Hospital's Sandoval Regional Medical Center Campus.

45. The RN Supervisor position was first used by SRMC when it restructured its clinics in May to June 2024, changing leadership positions from one director and two managers, to an executive director and two RN Supervisors. (Testimony of Coreen Bales Audio Record Part 3 at 00:35:25-58; 00:38:40 – 00:39:22; 00:39:21-38.

46. SRMC never employed Charge Nurses in its clinics. (Testimony of Coreen Bales Audio Record Part 3 at 00:51:08-14.

47. In each instance where SRMC hired an RN Supervisor, it did not replace a Charge Nurse. For example, an RN Supervisor position was created for the Staffing Office that did not previously have a charge nurse position; and an RN Supervisor position was added in the Interventional Radiology lab in anticipation of transitioning the lab to the radiology department at UNM Hospital – Lomas Campus. (Testimony of Coreen Bales Audio Record Part 3 at 00:44:28 – 00:45:04).

48. Respondent has not changed the job duties of the charge nurse position, nor has SRMC discontinued or ceased use of the charge nurse position. To the contrary, time of the merits hearing, SRMC had active job postings recruiting for the charge nurse position. (Testimony of Coreen Bales Audio Record Part 3 at 00:43:04-12; 00:52:25-32).

49. The job duties of Nursing Supervisors and Charge Nurses overlap somewhat but Nurse Supervisors perform job functions that were not being performed by charge nurses. (Compare Exhibits 1 and 2; Testimony of Coreen Bales Audio Record Part 3 at 00:40:20 – 00:41:10; 00:41:56 – 00:42:14).

REASONING AND CONCLUSIONS OF LAW: This Board has personal and subject matter jurisdiction over the parties and the dispute herein pursuant to NMSA 1978, § 10-7E-9(A)(3) (2020) recognizing that the Board's functions and duties include the "filing of, hearing on, and determination of complaints of prohibited practices." § 10-7E-9(F) provides that the PELRB "has the power to enforce provisions of the Public Employee Bargaining Act through the imposition of appropriate administrative remedies." Concerning the Hospital's objection to our exercising that jurisdiction to hear prohibited practice complaints arising out of its duty to bargain because of the District Court's Memorandum Opinion and Order in D-202-CV-2023-02118 issued on August 14, 2023, this Board decided more than once that

the state of the law was, at the time material to this Complaint, that the recognition of the Complainant, United Health Professionals of New Mexico, AFT AFL-CIO as the exclusive representative for collective bargaining of a group of SRMC employees at issue herein on January 19, 2023, was affirmed and ratified. Therefore, Respondent was subject to a duty to bargain with the Complainant in good faith on wages, hours and all other terms and conditions of employment pursuant to NMSA 1978 § 10-7E-17(2020). E.g. *United Health Professionals of New Mexico, AFT, AFL-CIO v. University of New Mexico Sandoval Regional Medical Center*, 8-PELRB-2024 (In re: PELRB No. 109-23); *United Health Professionals of New Mexico, AFT, AFL-CIO v. University of New Mexico Sandoval Regional Medical Center*, 9-PELRB-2024 (In re: PELRB No. 110-23); *United Health Professionals of New Mexico, AFT, AFL-CIO v. 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*, 36-PELRB-2024 (In re: PELRB No. 117-23).

Subsequently, the Second Judicial District Court, in Cause No. D-202-CV-2023-09660, concluded that a PRN employee is not "regular" and is thus not a "'public employee'" under Section 10-7E-4(Q). Accordingly, the Court denied Appellee's Emergency Motion for Declaration of Obligation to Meet and Bargain as moot and reversed the decision of the Board finding the unit including PRNs to be appropriate.

In this Board's Order 47-PELRB-2024, we recognized that the "practical result of the Court's November 1, 2024 Opinion and Order is that an unresolved Petition for Recognition remained before this Board in PELRB Case No. 304-22, requiring a determination whether the petitioned-for unit, without the PRNs, is 'appropriate' as required by NMSA 1978 § 10-7E-13(A), and , if so, whether majority support without reference to

the PRNs existed at the time the Petition for Recognition was originally filed for Certification of the bargaining unit and its representative should issue."[1]

Because a public employer is required to maintain the status quo ante unless and until desired changes are negotiated, whether the Respondent's actions complained of are consistent with its management rights status quo ante is the deciding factor in this case. [2]

Considering the Court's Order in Cause No. D-202-CV-2023-09660, this Board issued its Order 47-PELRB-2024, directing its staff to determine the appropriateness of the petitioned-for unit excluding PRN employees and, following that determination, conduct a card check excluding PRNs, either issuing a Certification of Representation or scheduling an election as may be appropriate under the Act. Certification of Representation post Board Order 47-PELRB-2024 has been done.

According to the parties' Stipulated Pre-Hearing Order filed August 28, 2024, the issues before me for decision are:

(1) Whether the Respondent implemented unilateral changes to mandatory subjects without bargaining the issues to impasse in violation of Sections 5(A), 5(B), 19(A), 19(B), 19(C), 19(D), 19(F), and 19(G) of the Public Employee Bargaining Act; and,

(2) Respondent's Affirmative Defenses that the allegations of this Complaint concerning the Radiology Department are time-barred under the PELRB's statute of limitations and that Complainant and waived by failing to seek bargaining over a proposed

[1] After the events giving rise to this PPC, staff has determined that the petitioned-for unit without PRNs is appropriate and re-issued certification of that unit, to be reviewed by the Board at its meeting on January 7, 2025.

[2] The prohibition against unilateral changes to terms and conditions of employment during the campaign period ensures that bargaining unit members are not threatened or lured away from seeking union representation. See *Pearson Education, Inc.*, 336 NLRB No. 92 (2001); *NLRB v. Exchange Parts Co.,* 375 U.S. 405, 409 (1964); *B&D Plastics, Inc.,* 302 NLRB 245, 245 (1991). 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. See *NLRB v. Katz*, 369 U.S. 736 (1962); *Koenig Iron Works, Inc.*, 276 NLRB 811 (1985).

change of which it had notice. Further Respondent states that its actions are consistent with the *status quo*.

The Complainant alleges four events constituting the basis for its allegations of failure to bargain and anti-union discrimination: First, the Union alleges that as Charge Nurses (who are in the putative bargaining unit) leave their positions, they are replaced with "Nurse Supervisors, who are not in the bargaining unit. Second, it alleges that management in the Radiology Department is "attempting" to do away with a graveyard shift in that department and toward that end changed the number of hours per day and the number of days per week that the employees in that department are scheduled to work. Third, management in the Physical Therapy Department has "requested" that Physical Therapists assigned to outpatient clinics, also perform inpatient clinic physical therapy to cover a temporary inpatient therapy staffing shortage. Finally, effective June 21, 2024, Respondent shut down one of its seven operating rooms (OR), resulting in a reduction of staff and is "census managing" the remaining OR staff.

Because the PPC and the SPHO characterize the four above-described actions as violating the full panoply of PEBA Sections as alleged, I begin my analysis by looking at each Section alleged to have been violated to determine whether any of the four specific actions alleged, occurred as alleged, and if so, whether they violated one or more of the stated PEBA sections.

I. COMPLAINANT FAILED TO MEET ITS BURDEN OF PROOF SHOWING THAT RESPONDENT VIOLATED SECTIONS 5(A) AND 5(B) OF THE PUBLIC EMPLOYEE BARGAINING ACT.

NMSA 1978 § 10-7E-5 provides:

> "A. Public employees, other than management employees and confidential employees, may form, join or assist a labor organization for the purpose of

> collective bargaining through representatives chosen by public employees without interference, restraint or coercion and shall have the right to refuse those activities.
> B. Public employees have the right to engage in other concerted activities for mutual aid or benefit. This right shall not be construed as modifying the prohibition on strikes set forth in Section 10-7E-21 NMSA 1978."

Complainant has the burden of establishing by a preponderance of the evidence each element of its claims. I conclude that Complainant failed to establish violations of Sections 5(A) or 5(B) of the PEBA.

This Board must balance public employees' rights to organize and bargain collectively with their employers as stated in Section 5 of the Act, with promoting cooperative labor-management relationships and ensuring "the orderly operation and functioning of the state and its political subdivisions" as set forth in NMSA 1978 § 10-7E-2:

> "The purpose of the Public Employee Bargaining Act is to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions.

As noted, there are four factual scenarios presented in this case on which the Complainant relies. The first, concerning Charge Nurses being replaced with Nurse Supervisors, has not been proven. Rather, the preponderance of the evidence established that the position of RN Supervisor is one utilized at the UNM Hospital – Lomas Campus prior to the events alleged in the PPC. Nurses at UNM Hospital – Lomas Campus are represented by National Union-Hospital & Health Care Employees District 1199 NM, a different union than the Complainant here, and there is no indication that it has objected to the creation of the Nurse Supervisor position as one that is exempt from bargaining. Neither has the Union in the instant case contested the Nurse Supervisors exempt status. To the contrary, it relies on that

exempt status to support its claims that the Respondent has interfered with employee rights under Section 5. The RN Supervisor position was first used at the SRMC Campus when it restructured its clinics in May to June 2024, changing leadership positions from one director and two managers notice to an executive director and two RN Supervisors. SRMC never employed Charge Nurses at any of its clinics so assigning exempt RN Supervisors to the clinics does not affect Charge Nurse positions. In each instance where Respondent hired an RN Supervisor, it did not replace a Charge Nurse. For example, an RN Supervisor position was created for the Staffing Office that did not previously have a charge nurse position; and an RN Supervisor position was added in the Interventional Radiology lab in anticipation of transitioning the lab to the radiology department at UNM Hospital – Lomas Campus. Respondent has not changed the job duties of the charge nurse position, nor has Respondent discontinued or ceased use of the charge nurse position. To the contrary, at the time of the merits hearing, SRMC had active job postings recruiting for the charge nurse position. The job duties of Nursing Supervisors and Charge Nurses overlap somewhat but Nurse Supervisors perform job functions that were not being performed by Charge Nurses. If the Union wanted to contest the creation of the Nurse Supervisor position and assigning bargaining unit work to that exempt position, it should have done so. Rather, the instant PPC alleges that as current Charge Nurses leave their positions, they are replaced with an RN Supervisor. As postured, there is no evidence to support that allegations. In general, the testimony of Adrienne Enghouse concerning the duties performed by and assignments given Nurse Supervisors is too vague and uninformed to be relied upon. That two Charge Nurses told her that they had been offered Nurse Supervisor positions says nothing about whether those Charge Nurses' positions were being *replaced* by a Nurse Supervisor. The two positions

apparently exist side by side. Whether under the PEBA they *should* exist side by side is not before the Board in this case.

The second stated basis for the Union's allegation that management in the Radiology Department is "attempting" to do away with a graveyard shift in that department and toward that end changed the number of hours per day and the number of days per week that the employees in that department are scheduled to work. It begs the question to say that the PEBA does not provide relief for attempted violations of the Act. Here, the gravamen of this claim is that Respondent changed the number of hours per day and the number of days per week that the employees in the Radiology Department are scheduled to work without bargaining. While the assignment of shifts and work hours is typically a reserved management right in the absence of a Collective Bargaining Agreement modifying that right, I take notice of the provisions of NMSA 1978 § 10-7E-6 providing that:

> "Unless limited by the provisions of a collective bargaining agreement or by other statutory provision, a public employer may:
> A. direct the work of, hire, promote, assign, transfer, demote, suspend, discharge or terminate public employees;
> B. determine qualifications for employment and the nature and content of personnel examinations;
> C. take actions as may be necessary to carry out the mission of the public employer in emergencies; and
> D. retain all rights not specifically limited by a collective bargaining agreement or by the Public Employee Bargaining Act."

I conclude that Complainant has not met its burden of proving its allegation that Respondent violated Section 5 of the PEBA by unilaterally changing schedules in the Radiology Department.

The Union relied primarily on the testimony of Gilbert Martinez to establish those alleged unilateral changes. Mr. Martinez testified that his schedule had not been changed and that he was unaware of any others in the Radiology Department having their schedule changed by Respondent. The Union representative, Adrienne Enghouse, testified that she heard of two

radiology department employees, Stephanie Montoya and Louise Garcia, whose schedules were changed by management. However, neither of those employees had been identified by Complainant as having had their schedules changed in either the Complaint or the SPHO, neither had been identified as a witness who may testify regarding their alleged schedule changes when the Union submitted information in support of its Complaint to the PELRB or when requesting subpoenas for testimony at the Merits Hearing. Neither of them was called to testify at the merits hearing, nor was any exhibit entered by the Union, to substantiate Ms. Enghouse's allegations. Accordingly, Ms. Enghouse's hearsay testimony on that point is not credible.

I also take note of Ms. Enghouse's testimony that the Union was aware of allegations of changing working conditions in the Hospital, specifically including the allegations concerning the Radiology Department, as early as December 2023. Gilbert Martinez reported to her on the status of meetings with the Radiology Department and AFT did not make a demand to bargain over any of the changes to working conditions alleged in its PPC. Eventually, the parties did engage in bargaining "terms and conditions of employment for the non-PRN employees in the disputed collective bargaining unit at SRMC..."(Respondent's Exhibit 8). Those facts persuade me that Respondent did not violate Sections 5(A) or 5(B) of the PEBA by unilaterally changing work schedules in the Radiology Department.

The third basis for the Union's Complaint under Section 5 is that management in the Physical Therapy Department has "requested" Physical Therapists assigned to outpatient clinics, to also perform inpatient clinic physical therapy to cover a temporary inpatient therapy staffing shortage.

Katrina MacDonnell, Director of Rehabilitative Services at SRMC, testified that SRMC does not divide therapists into inpatient or outpatient and are hired simply as physical therapists.

They are cross-trained to provide both inpatient and outpatient care, including coverage for each modality, as needed. In practice, regardless of assignment, physical therapists serve both inpatient and outpatient clients. For instance, the Union's witness, Regina McGinnis, testified that she had served both outpatient and inpatient clients in 2023 and 2024, despite claiming to be solely an outpatient physical therapist. She acknowledged that SRMC requires its therapists to work with inpatient and outpatient clients.

After a physical therapist resigned from her employment with SRMC in or around May 2024, Ms. MacDonnell saw that inpatient clinic clients were not being well served. To address that problem she utilized an established process for seeking coverage in the Rehabilitation Services Department that she manages. Ms. MacDonnell first sought to find coverage by utilizing the PRN pool. Next, Ms. MacDonnell consulted with the regular full-time and part-time physical therapists to determine whether anyone would volunteer to provide coverage. Some did volunteer so Ms. Mac Donnell never found it necessary to mandate that physical therapists switch shifts or work extra hours. Because a physical therapist's job duties are not delineated as inpatient and outpatient duties, because they are cross-trained in both modalities, and provide services in both, the Complainant failed to establish that any actual change occurred. To the extent the Union claims that Respondent may not speak to its employees about such operational matters with a Union Representative being present, under the limited circumstances of this case I conclude that such an interpretation of the PEBA is contrary to the express purpose of PEBA as stated in NMSA 1978 § 10-7E-2 to "…to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions."

Finally, the Complainant alleges a violation of Section 5 arising out of Respondent closing one of its seven operating rooms (OR), after a third party contractor, Main Street Anesthesia, did not renew its contract for Certified Registered Nurse Anesthetist staffing. I agree with Respondent that the change in operations, necessitated by a contractor's non-renewal, under the circumstances of this case did not implicate a mandatory subject to bargaining. Bargaining unit employee's schedules were not changed, nor were their hours, including mandatory overtime and on-call requirements, changed following the change in anesthesia providers.

Concerning Census Management, I conclude that the established practice in the Surgical Services Department has been to engage in census management as a reserved management right for scheduling employees by either calling for volunteers to go home when not needed or by assigning additional staff to perform customary maintenance of the operating rooms and its equipment. That was the procedure followed in this case. Complainant's witness, Claudia Gonzalez, testified that the Union have never been involved when the Census Management process is in effect and that she, personally, was not affected by the Surgical Service Department's well-established use of its census management process alleged in this Complaint.

Additionally, concerning all of Complainant's Section 5 claims, I agree with the Respondent's argument that it is highly doubtful "UNM SRMC's actions have the potential effect of undermining the authority of the Union and eroding support for the Union as the certified representative" (Complaint, ¶18), given its failure to bargain after being invited to do so. I refer to the testimony of Wilson Wilson regarding the status of bargaining as it relates to Complainant's allegations as found herein.

II. COMPLAINANT FAILED TO MEET ITS BURDEN OF PROOF SHOWING THAT RESPONDENT VIOLATED SECTIONS 19(A), 19(B) OR 19(D) OF THE PUBLIC EMPLOYEE BARGAINING ACT.

This Board has a long history of applying the two-part test established in *Wright Line*, 251 NLRB 1083 (1980) whenever, as here, an employer's alleged opposition to protected activity or status is a substantial or motivating factor in their decision to take adverse action against an employee. The *Wright Line* two-part test to determine whether an employee has been disciplined or otherwise discriminated against for union activity, rather than for a legitimate business reason, may be summarized as follows:

First, the employee must "make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision to take certain adverse employment action." Id. at 1089. A prima facie case is established by showing there was (a) union activity, (b) knowledge of such union activity, and (c) animus against the union. *See Carpenters Health & Welfare Fund*, 327 NLRB 262, 265 (1998). Animus can be inferred from circumstantial evidence. Id. Mere animus alone, without adverse action, is not prohibited. See, e.g., *AFSCME v. Dept. of Health*, PELRB Case No. 168-06, Hearing Examiner's Report (Aug. 30, 2007) (employer did not violate the act by merely calling a "mandatory" meeting in response to the circulation of a petition, when no penalty was threatened or in fact levied for failure to attend the meetings). Instead, animus is relevant to show a nexus or connection between the adverse action and the allegedly impermissible considerations. See *Carpenters, supra*. This was clarified in *Tschiggfrie Properties, Ltd.,* Case 25-CA-161304, Clarification was necessary to make clear that there must be some evidence, direct or circumstantial demonstrating that anti-union animus was a motivating factor in the

adverse action at issue before the burden shifts to the employer to demonstrate the same action would have been taken in the absence of the unlawful motive.

Second, once a prima facie case is established, the burden will shift to the employer to establish that the same action would have taken place even in the absence of the protected conduct. *Wright Line* at 1089; See also *NRLB v. Transportation Management Corp.*, 462 US 393 (1983), *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1319 (7th Cir. 1989) and *Carpenters, supra*, at 265 - 266.

Although the evidentiary burdens shift back and forth under this framework the ultimate burden of persuading the trier of fact always remains with the Complainant. See *CWA v. Dept. of Health,* PELRB Case No. 108-08, Hearing Examiner's Report (July 15, 2008) applying the *Wright Line* test and concluding that, although the union established a prima facie case of retaliation, it failed meet its ultimate burden refute the Department's business justifications by a preponderance of the evidence.

In the instant case, the Union appears to have abandoned its claimed violations of Sections 19(A), 19(B) and 19(D), as it makes no reference to those sections in its Closing Brief. Aside from that I conclude that the evidence is insufficient to support the inference that protected conduct was a motivating factor in the Respondent's actions.

The Union's witnesses, including Mr. Martinez, Ms. Gonzalez and Ms. McGinnis, each testified that they had not been affected personally by Respondent's actions. As such, Complainant did not establish a causal connection between Respondent's actions and the impact on the individuals who testified, so that it failed to meet its burden of establishing a prima facie showing that union animus was a motivating factor and its claimed violations of Sections 19(A), 19(B) and 19(D) of the Public Employee Bargaining Act should be dismissed.

III. COMPLAINANT FAILED TO MEET ITS BURDEN OF PROOF SHOWING THAT RESPONDENT VIOLATED SECTION 19(C) OF THE PUBLIC EMPLOYEE BARGAINING ACT.

NMSA 1978 § 10-7E-19(C) (2020) prohibits an employer's domination or interference with the Union. Under the National Labor Relations Act, an essentially identical provision is directed against a very narrow type and limited number of activities, such as establishment of a "company union", infiltration of unions by lower-level supervisors or failing to maintain neutrality between competing unions. See generally JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters 8.I; 8.VII; 12.III.C.2; 13.VIII.A and B. However, unions frequently cite this PEBA section incorrectly, such as for claims concerning limiting a union's access to employees; disciplining union stewards for union activity; direct dealing; and other claims involving interference with employees' PEBA rights.

Unlike discrimination or retaliation cases motive is not a critical element of interference claims. Under NLRB precedent it is well settled that "interference, restrain, and coercion... does not turn on the employer's motive or whether the coercion succeeded or failed." Rather, "[t]he test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." See *American Freightways Co.*, 124 NLRB 146, 147 (1959). The test is whether, from the standpoint of the employees, the employer's action has a reasonable tendency to interfere with, restrain or coerce the employees in the exercise of protected rights. See *Double D Construction Group, Inc.*, 339 NLRB 303, 303.

The preponderance of the evidence in this case does not support a conclusion that Respondent committed the very narrow and limited kind of activities that comprise a violation of Section 19(C). I take note of the Respondent's argument that the Union had knowledge of at least *some* of proposed changes at SRMC and failed to demand bargaining

over those changes and the fact that the parties engaged in bargaining during February through June of 2024, wherein the Union had the opportunity to bargain over the matters now before me.

Accordingly, Complainant did not meet its burden of establishing a prima facie case for violation of Sections 19(C), and that claim should be dismissed.

IV. COMPLAINANT DID NOT MEET ITS BURDEN OF PROVING THAT RESPONDENT VIOLATED SECTION 19(F).

Section 19(F) of the PEBA prohibits a public employer from refusing to bargain collectively in good faith with the exclusive representative. See NMSA 1978, § 10-7E-19(F). The alleged violations of the duty to bargain in this case center around the alleged changed work schedules in the Radiology Department and Physical Therapy Department, shutting down one Operating Room after the contractor providing anesthesia staff declined to renew its contract and the Surgical Services Department employees being "census managed" all of which are discussed *supra*.

I address each in turn.

A. The Preponderance of the Evidence Demonstrates That AFT Waived its Right to Bargain Over *Potential* Changes, Including Effects Bargaining, in its Radiology Department.

It is not disputed that a bargaining unit employee in the Hospital's Radiology Department, Andy Isengard, copied AFT Representative Adrienne Enghouse, on a December 4, 2023 email in which he asserted that she should be present at the meetings that are the subject of AFT's Complaint concerning *potential* schedule changes in the Radiology Department. Ms. Enghouse acknowledged that AFT was aware of the PPC's alleged contemplated changes concerning the Radiology Department, as early as December 2023. Despite being

informed of the proposed schedule changes, AFT did not demand to bargain over any of the changes to working conditions alleged in its PPC.

I draw two conclusions from those facts: First, that the changes about which the Union complains never actually occurred; and second, that AFT waived bargaining over those proposed changes by its inaction after notice.

It is axiomatic that waiver can occur either by inaction or by express contractual waiver. See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 13.IV.A. See also *AFSCME Council 18, Local 3022 v. ABCWUA*, PELRB No. 108-21. A union can waive the duty to bargain by inaction, that is, by failing to seek bargaining over a proposed change of which it has actual notice, and which was not presented as a "fait accompli." *NLRB v. Oklahoma Fixture Co.,* 79 F.3d 1030 (10th Cir. 1996); *Gratiot Community Hospital v. NLRB*, 51 F.3d 1255 (6th Cir. 1995); *Pinkston-Hollar Construction Services, Inc.*, 312 NLRB 1004 (1993); *Haddon Craftsmen, Inc.*, 300 NLRB 789, 790 (1990). Once the union has notice, the onus is then on the union to request bargaining over subjects of concern. *NLRB v. Oklahoma*, 79 F.3d at 1036-1037. If the union fails to do so, it "will have waived its right to bargain over the matter in question". Id.

The union may be excused from its duty to request bargaining if the change is presented as a "fait accompli". Such is not the case here. A "fait accompli" will not be found based solely on the fact that the notice presents the "proposed change ... as a fully developed plan or ... use[s] positive language to describe" the change. *Haddon Craftsmen, Inc.,* 300 NLRB at 790. In such a case, the union must still "act with due diligence in requesting bargaining," or "risk a finding that it has lost its right to bargain through inaction and, as a consequence, risk the dismissal of ... allegations because no objective basis exists to find or infer bad faith on the

part if the employer." Id. at 790-791. That the proposed changes were never made, negates any argument that they were presented a "fait accompli".

The "express waiver" standard, requiring clear and unmistakable language constituting a waiver cannot reasonably be applied where, as here, there is no Collective Bargaining Agreement in effect; hence, no contract term by which an express waiver may be deduced. That conclusion is consistent with a plain reading of NMSA 1978 § 10-7E-17(A) (2020) in which the express waiver standard is adopted, specifically in reference to an existing collective bargaining agreement:

> "… public employers and exclusive representatives:
>
> (1) shall bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties. However, neither the public employer nor the exclusive representative shall be required to agree to a proposal or to make a concession; and
>
> (2) shall enter into written collective bargaining agreements covering employment relations. Entering into a collective bargaining agreement shall not obviate the duty to bargain in good faith during the term of the collective bargaining agreement regarding changes to wages, hours and all other terms and conditions of employment, unless it can be demonstrated that the parties clearly and unmistakably waived the right to bargain regarding those subjects. However, no party may be required, by this provision, to renegotiate the existing terms of collective bargaining agreements already in place."

To the extent the Union did not waive bargaining, any failure to bargain is due to the Complainant's own recalcitrance in leaving the bargaining table in February of 2024. Accordingly, AFT failed to meet its burden of proving a violation of Section 19(F) regarding alleged changes to the employee schedules in the Radiology Department, because those changes never took place, AFT waived bargaining over the prospect of any such changes and the preponderance of the evidence established that while Respondent was willing to bargain, it was AFT that refused to engage.

B. AFT Failed to Meet its Burden of Proving a Violation of Section 19(F) With Regard to Changes to the Employee Schedules in the Physical Therapy Department by "Moving" Employees From Outpatient Physical Therapy to Inpatient Physical Therapy to Cover a Temporary Shortage of Inpatient Physical Therapy Staff.

In addition to the management right to make such changes as are alleged pursuant to Section 6 of the PEBA, I further conclude that the Complainant failed to prove that Respondent implemented any unilateral change by "moving" employees from Outpatient Physical Therapy to Inpatient Physical Therapy. Again, Ms. McGinnis testified that she has not been required to work with inpatient clients since May 2024. Therefore, no change has occurred with respect to Ms. McGinnis. Ms. MacDonnell testified that she utilized a consistent past practice in seeking coverage for a vacant shift. The two individuals identified by Ms. McGinnis – Lahiri and Ash – volunteered to alter their schedules. Accordingly, Respondent has not implemented a unilateral change. Complainant fails to meet its burden of proof proving a violation of Section 19(F) and that claim should be dismissed.

Notably, the overwhelming evidence shows that the Union had knowledge of proposed changes at SRMC and failed to demand to bargain those changes. Additionally, when it was at bargaining in February 2024, Complainant walked away from the table over an issue that concerned one non-employee individual Adrienne Enghouse. The Union had the opportunity to bargain with Respondent over alleged proposed changes from February 2024 through June 2024 and failed to do so.

Like the situation concerning the Radiology Department above, the evidence presented at the merits hearing shows that Complainant had actual knowledge of potential and actual

operational changes in the Surgical Services Department as early as December 2023. However, Complainant first waived its right to bargain over such potential and actual changes, eventually bargaining those same issues.

Accordingly, all claims concerning the Surgical Services Department should be dismissed as the Union is not permitted to ignore its responsibility to initiate bargaining over subjects of concern and thereafter accuse the employer of violating its statutory duty to bargain.

CONCLUSION: For the foregoing reasons, I recommend that the Complainant's Prohibited Practices Complaint be **DISMISSED** with prejudice and its requested relief shall be and hereby is, denied.

Issued, Friday, December 13, 2024.

Thomas J. Griego
Hearing Officer
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