UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

IN THE MATTER OF:

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Respondent,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 611, AFL-CIO,

Charging Party.

Case Nos.	**28-CA-22655**
	28-CA-22759
	28-CA-22997
	28-CA-23046

BRIEF IN SUPPORT OF RESPONDENT PUBLIC SERVICE COMPANY OF NEW MEXICO'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. STATEMENT OF THE CASE

Respondent Public Service Company of New Mexico ("PNM" or "Company") submits this brief in support of its exceptions to the Administrative Law Judge's February 17, 2012 Decision ("Decision") in the above-captioned case involving three unfair labor practice complaints issued on four charges filed by International Brotherhood of Electrical Workers, Local Union No. 611, AFL-CIO ("Union").

PNM is an electric utility serving communities throughout the State of New Mexico. The Union has represented bargaining units of the Company's employees for approximately sixty years, most recently under a collective bargaining agreement ("CBA") effective May 1, 2009 to April 30, 2012. The Administrative Law Judge ("ALJ") heard this consolidated proceeding over the course of eight days between August 31 and November 5, 2010. His decision found that PNM violated Section 8(a)(1) and (5) of the Act by failing to respond to four separate requests for information by the Union, and that PNM violated Section 8(a)(5) by unilaterally restricting Union representative Ed Tafoya's access to the Company's Electric Services Center. For the reasons discussed below, PNM takes exceptions to these findings by the ALJ and submits that they should not be adopted by the Board.

II. EXCEPTIONS, ARGUMENT AND AUTHORITY

A. Request for Information: Asbestos Investigations (¶¶ 6(a)-(c) of Amended Consolidated Complaint, Case Nos. 28-CA-22655 & 28-CA-22759)

PNM takes exception to the ALJ's finding that the Company violated Section 8(a)(5) by failing to provide the Union information it requested regarding asbestos investigations.

1. Facts

On March 31, 2009, Union Steward Kane Reeves requested the following information by e-mail to Ginger Lynch, HR Supervisor for PNM:

1. Any and all accident investigations involving bargaining unit employees since 2007 involving asbestos.
2. Any and all asbestos samples taken and lab reporting on these samples during the same time period.
3. Any and all internal memos by the safety department concerning these exposures during this same time frame. This would include e-mails.

(Joint Ex. 1 (emphasis added).) Reeves noted that the Union was requesting this information in connection with Grievance No. SJ-09-12 filed on behalf of bargaining unit employee Michael Patscheck. (Id.) The referenced grievance, dated March 19, 2009, alleged that PNM was not in compliance with an OSHA asbestos regulation due to "[n]umerous fiber release episodes, resulting in employee exposures above permissible limits." (Joint Ex. 77.) The grievance further alleged that "[t]he latest documented exposure happened during Unit 1's 2008 fall outage in the Unit 1 and 2 maintenance shop." (Id.) Union Assistant Business Manager Shannon Fitzgerald testified that this "latest documented exposure" was an incident involving Patscheck that occurred in September 2008, six months before the grievance was filed. (Tr. 1052.) Fitzgerald testified that all of the other alleged exposures referenced in the grievance occurred before the fall of 2008. (Id.)

Article 10(B) of the applicable collective bargaining agreement ("CBA") required that a written grievance be filed no later than fifteen days after occurrence of the event giving rise to the grievance. (GC Ex. 6 at 19.) The CBA did not address asbestos, occupational safety and health or compliance with OSHA regulations. (See generally GC Ex. 6.) The Patscheck grievance did not request any particular contractual remedy; instead it demanded that the Company "[b]ecome compliant with OSHA." (Joint Ex. 77.) As Fitzgerald admitted, however, only OSHA could determine whether PNM was in compliance with OSHA. (Tr. 1053.)

Lynch responded to the request for information ("RFI") in a letter to Fitzgerald dated July 20, 2009. (Joint Ex. 2.) With respect to part 1 of the request, Lynch stated that there was no investigation document for the fall 2008 (Patscheck) incident – the specific subject of the grievance. (Id.) In response to parts 2 and 3 of the RFI, Lynch provided the lab reports and internal safety department e-mails related to the fall 2008 (Patscheck) incident. (Id.) She requested that the Union explain the relevance of the information it sought about incidents other than the fall 2008 incident specified in the grievance. (Id.) Fitzgerald responded by e-mail on July 24, 2009. (Joint Ex. 3.) He did not express any dissatisfaction with PNM's response as to the fall 2008 incident. (Id.) In response to the request for an explanation of the relevance of other incidents, Fitzgerald referred to the unspecified "numerous fiber release episodes" alleged in the grievance and stated that the Union wanted to show that the Company "did in fact disregard . . . the requirements of OSHA 1910.1001." (Id.)

On July 30, 2009, Carol Shay, PNM Corporate Counsel, e-mailed Fitzgerald a letter containing the Company's further response regarding the RFI. (Joint Ex. 5.) Shay noted that PNM was currently participating in an investigation by the New Mexico Occupational Health and Safety Bureau ("NMOSHB") regarding potential asbestos exposures and had provided a variety of asbestos-related documents to NMOSHB. (Id.) Shay asserted that Grievance No. SJ-09-12 was improper because it paralleled the NMOSHB investigation and did not meet the definition of a grievance under the CBA. (Id.; GC Ex. 5 at 10.) Shay also believed that the grievance was untimely because it was not filed within fifteen days of the underlying incident pursuant to Article 10(B) of the CBA. (Tr. 324.) Shay pointed out in her letter that, notwithstanding the Company's belief that the grievance was improper, it nevertheless had provided all requested documents relating to the fall 2008 incident. (Joint Ex. 5.) She further

noted that Fitzgerald had not explained how other incidents dating back to 2007 were relevant to the Union's responsibilities as bargaining agent. (Id.) At the end of the letter, Shay stated that PNM was willing to entertain the Union's input regarding asbestos safety and asked Fitzgerald to let her know if he wished to discuss this matter further. (Id.)

Fitzgerald replied to Shay by e-mail the same day, disagreeing with the statements in her letter and asserting that his previous e-mail had demonstrated the relevance of incidents before fall 2008. (Joint Ex. 6.) In response, Shay e-mailed Fitzgerald another letter on August 4, 2009. (Joint Ex. 7 at 2.) This letter briefly restated PNM's position on the RFI and noted that the Union's grievance specifically requested that the Company "become compliant with OSHA." (Id.) Again, Shay invited Fitzgerald to let her know if the Union wished to discuss asbestos safety generally with the Company. (Id.) Fitzgerald responded by e-mail the same day and reiterated the Union's disagreement with PNM's position. (Joint Ex. 7 at 1.) The Union never expressed any interest in discussing asbestos safety with the Company in response to Shay's repeated invitations. (Tr. 331, 1060.) Shay did not further respond to Fitzgerald because PNM's position on the RFI was unchanged and she was aware that the Union was involved in the ongoing NMOSHB asbestos investigation. (Tr. 314.)

Indeed, undisputed evidence at the hearing established that the Union was heavily involved in the NMOSHB investigation that paralleled this RFI. Fitzgerald instructed Reeves to call NMOSHB to initiate the investigation. (Tr. 924, 1056-57.) Fitzgerald informed the NMOSHB investigator about the RFI for asbestos information and told her that the Union had not received all of the requested information. (Tr. 1059.) Subsequently, on May 27, 2009, the NMOSHB investigator essentially repeated the Union's RFI, asking PNM to provide reports of "any asbestos exposures from the beginning of 2007 to the present time" and to indicate the

union status of affected employees. (Joint Ex. 79.) Fitzgerald represented several bargaining unit members when they were interviewed by NMOSHB during its investigation. (Tr. 924.) Ultimately, Fitzgerald directed Reeves to initiate a settlement of the NMOSHB investigation. (Tr. 1060.) The Union was directly involved in discussions regarding how the investigation would be resolved. (Tr. 1061.) Pursuant to a specific request by the Union, PNM agreed as part of the settlement that it would provide medical monitoring for the employees who had potentially been exposed to asbestos. (Tr. 1061-62; Joint Exs. 81-82.) The Union was given notice of the settlement agreement and did not file any objection to it. (Tr. 1061; Joint Ex. 83.)

2. PNM's Argument and ALJ's Findings

In its post-hearing brief, PNM argued that it had no obligation to provide further information regarding asbestos incidents because: (1) the RFI was not relevant to any timely and potentially viable grievance, given that even the latest incident occurred far more than fifteen days before the filing of the Patscheck grievance; and (2) the RFI was improperly propounded in furtherance of a safety complaint before a regulatory agency. See S. Cal. Gas Co., 342 NLRB 613, 616 (2004).

The ALJ found that the Union's broad request for asbestos information was relevant on its face insofar as the grievance alleged a "continuing pattern" of violations of which the Patscheck incident was only one. (Decision at 13: 40-50.) He distinguished Southern California Gas on the basis that the union there specifically requested information in order to pursue a regulatory complaint while no grievance connected to the request was pending, so that the request found improper by the Board related "solely to an action outside the collective-bargaining context." (Id. at 13:52-14:14.) Accordingly, the ALJ found that PNM violated

Section 8(a)(5) by failing to furnish all of the asbestos information initially requested by Reeves. (Id. at 14:16-18.)

3. Argument and Authority Supporting PNM's Exceptions

The ALJ initially erred in ignoring the timeliness issue and finding that the Union's request for asbestos information dating back to 2007 was relevant to the Patscheck grievance filed in March 2009. The grievance may well have attempted to allege a "continuing pattern" of asbestos incidents, but Fitzgerald admitted that the last alleged exposure in the "pattern" was the Patscheck incident in September 2008. Thus, the grievance filed six months later was untimely as to Patscheck and even more untimely to the extent it was based on previous occurrences. Although the RFI therefore could not have been relevant to any potentially valid grievance, PNM fully responded with respect to the Patscheck incident and thereby did more than was required. The Company had no obligation to provide additional information about incidents before the fall of 2008 that could not have formed the basis for a viable grievance due to the contractual time bar. See Schaeff Namco, 280 NLRB 1317, 1319 (1986) (employer not obligated to provide union with financial information ostensibly relevant to wage negotiations where time for such negotiations had expired under CBA.) The ALJ inexplicably failed to address this issue altogether, and therefore his finding that the RFI was relevant was erroneous.

The ALJ also erred in distinguishing the present case from Southern California Gas. He correctly noted that the Board in that case found the union's request improper because it related "solely to an action outside the collective-bargaining context." 342 NLRB at 615. But this is no basis for distinction because the same is true here. The Union filed a grievance with no available contractual remedy, demanding that PNM "become compliant with OSHA" when only OSHA could make this determination. After requesting information from PNM ostensibly related to the

grievance, the Union filed a complaint with NMOSHB, fed its RFI to the NMOSHB investigator, and participated extensively in the investigation and settlement of the complaint. Meanwhile, Fitzgerald ignored Shay's repeated invitations to discuss asbestos safety with the Company. The inescapable conclusion is that the Union used the grievance and the RFI merely as vehicles for the collection of information to support its NMOSHB complaint against PNM. In reality, therefore, the RFI did relate "solely to an action outside the collective bargaining context" and was improper under the holding of Southern California Gas. The ALJ's conclusion to the contrary was erroneous.

B. Request for Information: Contract Employee Archuleta (¶¶ 6(j)-(l) of Amended Consolidated Complaint, Case Nos. 28-CA-22655 & 28-CA-22759)

PNM takes exception to the ALJ's finding that the Company violated Section 8(a)(1) and (5) by failing to provide the Union information it requested regarding contract employee Tom Archuleta.

1. Facts

Article 41 of the CBA permits temporary agency employees, also known as supplemental employees, to work in certain positions for limited time periods in any given year. (GC Ex. 5 at 56.) Supplemental employees are employed by outside contractors and are not members of the bargaining unit. (Tr. 122, 1068.) According to Fitzgerald's testimony, there is an important distinction between "contractor employees" and "supplemental employees." (Tr. 937.) Contractor employees are supervised by the contracting agency, while supplemental workers are directed by PNM employees. (Id.) There is no contractual time limitation on PNM's use of contractor employees. (Id.)

In March 2008, a Union steward filed a grievance, SJ-08-15, alleging that the Company was using supplemental employees to displace permanent employees at PNM's San Juan

Generating Station ("SJGS"). (Joint Exs. 65, 88.) On May 1, 2008, Fitzgerald e-mailed to PNM Benefits Analyst Crista Belt a nine-part RFI related to Tom Archuleta, an employee of an outside contractor working at SJGS. (Joint Ex. 13.) Fitzgerald stated that he was requesting the information in connection with grievance SJ-08-15. (Id.) Fitzgerald testified that the Union believed Archuleta was a supplemental employee and was concerned that the Company was "alluding that he was a contractor." (Tr. 937.)

On June 29, 2009, Sonia Otero, Lead HR Consultant for PNM, sent Fitzgerald a letter requesting clarification and explanation of the relevance of certain items in the RFI. (Joint Ex. 89 at 1.) Fitzgerald replied by e-mail on June 30, 2009. (Id. at 2.) Otero ultimately provided the Company's response to the RFI in a letter e-mailed to Fitzgerald on August 14, 2009. (Joint Ex. 14.) In response to six of the nine items in the RFI, PNM either provided the requested information or stated that no responsive information existed. (Id.) The information provided included a report of Archuleta's time card swipes showing the dates and hours he had worked. (Id.)

Item 4 requested "[a] list of all safety instruction that PNM has given this worker." (Joint Ex. 13.) The Company objected that this information was not relevant to the pending grievance. (Joint Ex. 14 at 2.) In his June 30 e-mail, Fitzgerald asserted that this item was relevant because the Union believed a unit employee was not properly paid for training Archuleta. (Joint Ex. 89 at 2.)

Item 5 requested a copy of PNM's contract with EESI, the agency that employed Archuleta. (Joint Ex. 13.) This contract followed the Company's standard template for such agreements and included a detailed confidentiality provision. (Tr. 1116-17.) These contracts are considered confidential because they contain sensitive and competitively valuable pricing

information from the Company's suppliers. (Tr. 1117-18.) PNM declined to produce the agency contract because it was confidential and not relevant to the underlying grievance, which alleged that the use of Archuleta resulted in the layoff of regular employees. (Joint Ex. 14 at 2.) Fitzgerald's argument regarding the relevance of the agency contract was that it might show "the Companies [sic] intent as to who would coordinate his work, supervise this worker and insure that his safety was considered as well as requirements for training." (Joint Ex. 89 at 2.) Fitzgerald admitted at the hearing that this was speculation on his part. (Tr. 1064.)

Item 7 requested "[a]mount per hour to include any fringe or roll up costs for this employee." (Joint Ex. 13.) Again, the Company objected that this information was not relevant to the grievance. (Joint Ex. 14 at 2.) Fitzgerald made no attempt to explain the relevance of this item in his June 30 e-mail. (Joint Ex. 89 at 2.)

In his August 14, 2009 reply to Otero's letter, Fitzgerald stated the Union's dissatisfaction with certain of PNM's responses but did not pursue item 4 or item 7 any further. (Joint Ex. 15.) Instead, he wrote that "I am restating our request for information in regards to #3 and #6 as well as #5 and #9." (Id. (emphasis added).) The Complaint in these cases alleged only that the Company failed and refused to answer items 4, 5 and 7 of this RFI. (Am. Consol. Compl., 28-CA-22655 & 28-CA-22759, ¶ 6(l).) After Fitzgerald's reply on August 14, Otero reasonably concluded that the Union had withdrawn its request for the information sought in items 4 and 7. (Tr. 387.)

2. PNM's Argument and ALJ's Findings

In its post-hearing brief, PNM contended that it was not required to respond any further to the Archuleta RFI because: (1) the requests pertained to a non-unit employee and therefore were presumptively irrelevant; (2) the Union failed to demonstrate the relevance of the

outstanding requests; (3) the EESI contract contained confidential information; and (4) the Union effectively withdrew items 4 and 7 of the RFI.

The ALJ found that the information sought in items 4, 5 and 7 of the RFI was relevant to the pending grievance "[g]iven the existence of the parties' dispute about Archuleta's status." (Decision at 19:38-40.) He further found that PNM did not establish a confidentiality interest in the EESI contract or offer to accommodate that concern with the Union's interest in obtaining information. (Id. at 19:40-20:4.) Based on these conclusions, the ALJ found that PNM violated Section 8(a)(1) and (5) by failing to provide the information requested in items 4, 5 and 7 of the RFI. (Id. at 20:6-8.)

3. Argument and Authority Supporting PNM's Exceptions

The ALJ erred in concluding that items 4, 5 and 7 of the Archuleta RFI were relevant to the pending grievance. As the General Counsel acknowledged at the hearing, Archuleta was employed by an outside contractor and therefore was outside the bargaining unit regardless of whether he was a "supplemental employee" or a "contract employee." (Tr. 122.) Where information requested by a union concerns matters outside the bargaining unit, there is no presumption of relevance and the union bears the burden of demonstrating a reasonable belief, supported by objective evidence, that the information is relevant. Disneyland Park, 350 NLRB 1256, 1257-58 (2007). Indeed, the ALJ observed on the record that this grievance dealt with "work that was being performed by a non-unit employee," so that information regarding that employee would not be presumptively relevant. (Tr. 122-23.) Earlier in his decision, while discussing an RFI pertaining to another supplemental employee, the ALJ observed that the union's burden in this circumstance is to show that "a logical foundation and a factual basis exist

for such an information request." (Decision at 17:28-29 (citing Postal Service, 310 NLRB 391 (1993).)

Despite recognizing at the hearing that Archuleta was a non-unit employee and that information pertaining to him was presumptively irrelevant, the ALJ in his decision disregarded the law he cited elsewhere and neglected to hold the Union to its burden of demonstrating the relevance of its requests here. The ALJ agreed with the General Counsel and the Union that "a genuine issue existed between the parties about Archuleta's status as a contract worker or a supplemental employee." (Decision at 19: 22-36.) However, the ALJ never explained how the unanswered portions of the RFI were relevant to this dispute or how the Union met its burden of showing such relevance.

Item 4 requested a list of safety instructions given to Archuleta, and Item 7 sought information regarding how much the Company paid for his services. Neither of these items was relevant to resolving the "genuine issue" regarding whether Archuleta was a contractor employee or a supplemental employee. According to Fitzgerald's testimony accepted by the ALJ, the key factor in this determination would be the extent to which PNM employees were supervising Archuleta. Nothing in the record suggests that safety instructions or rate of pay would inform this inquiry or otherwise help define Archuleta's status. To the extent that the Union was contending that PNM had exceeded the time limit for using Archuleta as a supplemental employee, safety instructions and pay rate would not be relevant to this either. Notably, Fitzgerald never even attempted to explain the relevance of the compensation information in response to Otero's request that he do so. Certainly the grievance did not allege that Archuleta was not being paid properly as a supplemental employee.

With respect to item 5, the Union demanded to see all the terms of the EESI contract but never demonstrated, either contemporaneously or at the hearing, how any provision of the contract would be relevant to the pending grievance. Fitzgerald admitted that his theory about what the contracts might show was speculation. Thus, the Union had no objective evidence supporting a reasonable belief that the contract was relevant. The ALJ dismissed the other allegation in this case regarding PNM's refusal to produce an agency contract (the "Larkin contract") governing a supplemental employee (Powell). In that part of his decision, the ALJ properly found that in the absence of evidence that would provide a basis for a reasonable person to suspect "collusion between PNM and Larkin seeking to undermine the employment of union represented workers," he could not conclude that a "logical foundation or factual basis" existed for requiring the production of the contract in order to process the grievance. (Decision at 17:43-49.) The Union did not articulate a logical or factually supported basis for production of the EESI contract any more than it did for production of the Larkin contract. The ALJ's unexplained conclusion that the EESI contract was relevant was erroneous and directly contradicted his finding regarding the Larkin contract. Given that the Union demonstrated no legitimate need for the EESI contract, the Company's legitimate concerns regarding confidentiality justified its withholding the document.

The ALJ also erred in ignoring the Union's effective withdrawal of items 4 and 7 of the RFI. After Otero raised objections as to the relevance of items 4, 5 and 7, Fitzgerald continued to pursue the EESI contract (item 5) but gave no indication that the Union was still seeking information responsive to items 4 and 7. His August 14 reply did not disagree with Otero's objections regarding items 4 and 7 or attempt to explain their relevance. Instead, he restated the Union's requests for items 3, 6 and 9, which were not part of the Complaint in this case. As a

result, Otero reasonably concluded that items 4 and 7 were no longer at issue. Where an employer responds to an information request and the union does not subsequently renew the request or otherwise indicate that it expects more information, the employer's duty is satisfied. Whitesell Corp., 352 NLRB 1196, 1197 (2008). Here, Fitzgerald's failure to renew or otherwise pursue items 4 and 7 amounted to an abandonment of those requests such that PNM had no further duty to respond.

C. Request for Information: Silas/Claw Terminations (¶¶ 6(aa)-(cc) of Amended Consolidated Complaint, Case Nos. 28-CA-22655 & 28-CA-22759)

PNM takes exception to the ALJ's finding that the Company violated Section 8(a)(1) and (5) by failing to provide the Union information it requested regarding the terminations of employees Everard Silas and Guy Claw.

1. Facts

On October 1, 2009, Fitzgerald e-mailed to Lynch an RFI for "any and all documentation that was used or considered" and "any and all notes or statements taken that were used in determining the termination[s]" of Everard Silas and Guy Claw, bargaining unit employees at SJGS. (Joint Ex. 19 at 1.) Silas and Claw were terminated for fighting in the workplace. (Tr. 987.) The Union had filed grievances over these discharges and was following up on oral requests made at the grievance hearings. (Joint Ex. 19 at 1.) As Fitzgerald testified, the Union wanted to know "what did the decision-makers have in front of them when they decided to terminate those two individuals?" (Tr. 1079.) In Lynch's response dated October 27, 2009, PNM declined to provide management's notes on the basis that "a Union steward was present during the fact-finding interviews and took notes from individuals involved in the altercation as well as the employee witness." (Joint Ex. 19 at 2.)

Maintenance Manager Mathew Zersen made the decision to terminate Silas and Claw. (Tr. 986-87.) He attended their investigatory interviews along with Lynch, Supervisor Jimmy Cash and a Union steward. (Tr. 988, 1000.) Zersen testified that he did not review or rely on any documents in deciding to discharge Silas and Claw. (Tr. 987-89.) He did not take notes or rely on anyone else's notes in making his decision. (Tr. 988-89.) Zersen decided to terminate Silas and Claw after participating in a conference call with Cash, Lynch and PNM's legal group in which the grounds for discharge were discussed. (Tr. 996-98.) After Zersen made the decision that Silas and Claw would be terminated, he informed Lynch of his decision and she prepared "termination recommendation" memos addressed to Anna Ortiz, Director of HR Services. (Tr. 990; CP Exs. 12, 13.) However, the approval of Human Resources was not required to carry out the terminations. (Tr. 992.) Zersen testified that he did not remember reading Lynch's memos. (Tr. 995.)

2. PNM's Argument and ALJ's Findings

PNM argued in its post-hearing brief that it had no documents responsive to the RFI because the Union requested documents on which the decision-maker relied, but Zersen relied on no documents in deciding to discharge Silas and Claw.

The ALJ credited Zersen's testimony that he reviewed no notes before making his decision and had no recollection of reading Lynch's termination recommendation memos. (Decision at 28:51-53.) The ALJ also recognized that Lynch generated her memos after Zersen made his decision. (Id. at 29:2-3.) Despite concluding that it was true that Zersen did not rely on Lynch's memos in making his decision, the ALJ found that the memos were relevant and responsive to the RFI because they amounted to "a summary of the considerations that Zersen, Lynch, and Cash discussed jointly and with some unidentified person or persons in PNM's legal

department following the interviews of the two employees and the witness." (Id. at 29:48-30:6.) He therefore found that PNM violated Section 8(a)(1) and (5) by failing to provide the Union with unredacted copies of the memos. (Id. at 30:9-11.) The ALJ went on to find that PNM was not required to produce Lynch's notes from the witness interviews because: (1) the Union had equal access to the same raw information, due to a steward's attendance at the interviews; and (2) Lynch's notes constituted privileged work product because they likely contained her mental impressions that she later discussed with the legal department. (Id. at 30:13-27.)

3. Argument and Authority Supporting PNM's Exceptions

The ALJ erred in finding that Lynch's termination recommendation memos were relevant and responsive to the RFI. The Union requested "any and all documentation that was used or considered" and "any and all notes or statements taken that were used in determining the termination[s]." Consistent with the written request, Fitzgerald testified that the Union's intent was to discover "what did the decision-makers have in front of them when they decided to terminate those two individuals?" Thus, both the letter and the intent of the request encompassed only documents that the decision-maker reviewed and relied on in making his decision. The ALJ accepted Zersen's undisputed testimony that he relied on no documents in making his decision and did not recall seeing Lynch's memos. The only possible conclusion based on that factual finding is that the memos were not responsive to the RFI as phrased and intended by the Union. Those documents may well have contained a summary of the considerations discussed in connection with the terminations, but this is not what the Union requested. The Company could not be required to respond to a request that was never made.

The ALJ also erred in failing to find that Lynch's memos were privileged work product after finding that her underlying notes were work product. He ruled that the notes constituted

work product because they contained Lynch's mental impressions from the interviews that were later discussed in the conference call with the legal department. Lynch's memos contained not only a summary of her notes and mental impressions from the interviews, but also a summary of the grounds for termination discussed with the legal department in anticipation of a potential grievance. If Lynch's notes were work product, then her memos summarizing the same notes and the ensuing discussion with the Company's attorneys must have been work product as well, under the case law cited by the ALJ. See Central Tel. Co., 343 NLRB 987 (2004). The ALJ therefore erred in finding that PNM was required to produce the memos.

D. Request for Information: "Other Duties" (¶¶ 6(a), (d) & (e) of Amended Complaint, Case No. 28-CA-22997)

PNM takes exception to the ALJ's finding that the Company violated Section 8(a)(1) and (5) by failing to provide the Union information it requested regarding "other duties" performed by certain Coordinators.

1. Facts

On December 30, 2009, Union Assistant Business Manager Ed Tafoya requested extensive information regarding the names, classifications, duties and pay rates of PNM employees outside the bargaining unit whose work included reading meters, field collections, disconnects for non-payment and delivery of two day notices. (Joint Ex. 93.) This request related to the Union's ongoing contention that employees with the job title Coordinator performed the work of a Senior Meter Reader or Collector and should be classified as such within the bargaining unit. (Joint Exs. 49, 50.) The Union filed a grievance to this effect on February 15, 2010. (Id.) Without waiving the Company's objections to the irrelevance of information requests explicitly pertaining to non-bargaining unit employees, PNM Labor Relations Manager Ray Mathes provided a complete written response to Tafoya's request on

January 22, 2010. (Joint Ex. 48.) In answering the questions about meter reading and collection duties performed by the non-unit employees, Mathes's letter referred to the fact that the listed employees performed these duties "among other duties." (Id. at 3-4.) The information requested and provided included the amount of time that each employee spent performing meter reading and collection duties. (Id. at 3-5.)

On March 26, 2010, Tafoya sent PNM Labor Relations Consultant Cindy Castro a follow-up letter requesting lists of "the other duties referred to by the Company" for six named Customer Service Coordinators and Meter Reader Coordinators – positions outside the bargaining unit that had been listed in PNM's January 22 response. (Joint Ex. 51.) This letter also requested copies of the Company's job descriptions for Meter Reader Coordinator and Customer Service Coordinator. (Id.) On April 2, 2010, Mathes responded with a letter attaching copies of the requested job descriptions. (Joint Exs. 53-55.) In the same letter, Mathes asked Tafoya to explain why the Union considered the "other duties" information relevant and stated that PNM would consider providing it if relevance were established. (Joint Ex. 53.) The Union provided no explanation other than Tafoya's April 7, 2010 response that "[t]he Union must be provided those 'other duties' to determine if those duties also fall under the MRC [Meter Reader and Collector] Job Descriptions." (Joint Ex. 56.)

2. PNM's Argument and ALJ's Findings

PNM argued to the ALJ that this RFI was presumptively irrelevant because it explicitly pertained to employees outside the bargaining unit, and the Union failed to demonstrate the relevance of its request concerning job duties unrelated to the grievance.

The ALJ ruled, citing Piggly Wiggly Midwest, LLC, 357 NLRB No. 191, 2012 WL 36858 (2012), that the Union was not required to explain the relevance of its request where the

factual basis for it was "obvious from all the surrounding circumstances." (Decision at 32:20-26.) Thus, despite recognizing that the Union "failed to articulate the relevance of its request," the ALJ decided that the request was obviously "essential to assessing whether the meter reading or collection work performed by the disputed individuals amounted to an incidental or predominate part of their work." (Id. at 32:26-32.) He therefore found that PNM violated Section 8(a)(1) and (5) by failing to provide the information. (Id. at 32:32-34.)

3. Argument and Authority Supporting PNM's Exceptions

The ALJ erred in finding this request relevant. The Union's RFI about "other duties" (i.e., duties other than meter reading and collection duties) performed by non-bargaining unit employees obviously concerned matters outside the bargaining unit and therefore was presumptively irrelevant. Notwithstanding its objections, PNM provided information regarding the non-unit Coordinators to the extent the Union's requests related to its specific contention that meter reading and collection duties performed by those employees constituted "unit work." However, the "other duties" request expressly extended to duties other than the duties that the Union specifically claimed constituted "unit work." Applying the standard cited elsewhere by the ALJ, the Union did not satisfy its burden of showing that "a logical foundation and a factual basis existed" for its request. The ALJ expressly recognized that the Union failed to demonstrate relevance.

The ALJ essentially excused the Union from its burden of showing relevance because he found that the factual basis for its request was "obvious from all the surrounding circumstances." This finding and his analogy to the Piggly Wiggly case were erroneous. In Piggly Wiggly, the Union informed the employer at the time of its request that it wanted information to determine whether the employer and other entities were alter egos, and the employer was "well aware of