UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PUBLIC SERVICE COMPANY OF NEW MEXICO

and **Cases 28-CA-22655**
28-CA-22759
28-CA-22997
28-CA-23046

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

CHARGING PARTY'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Charging Party, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 611, AFL-CIO (herein "Union"), by and through its undersigned counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, excepts to the decision of Administrative Law Judge William L. Schmidt, JD(SF)—08—12, issued under date of February 17, 2012, as follows:

1. Whether PNM[1] violated Section 8(a)(1) by Craft Supervisor Dale Smyth ripping the Union's *Weingarten* form from a bulletin board and throwing it a trash can in the presence of two employees. The Union excepts to lines 30-1, 34-38, page 4 and line 5, page 5 of the decision, reading as follows:

> Although two employees observed Smyth remove Tafoya's form, I find his conduct lacked any coercive character.
>
> This conclusion is reinforced by the inference suggested by Kinkaid's puzzlement at the need to describe the incident while testifying because he had other copies of the form in front of him on his desk at that very time. The more reasonable conclusion from the evidence amounts to little more

[1] Respondent Public Service Company of New Mexico is referenced herein, as at trial, as "PNM."

than the fact that Smyth carried out a superior's instruction to get a copy of the publicly posted form for review by management.

Accordingly, I recommend dismissal of this allegation.

The grounds for this exception are that two employees (Roger Kinkaid and Richard Reese) observed Supervisor Smyth rip the form from a bulletin board and throw it in the trash as found by ALJ Schmidt (Decision at lines 1-3, page 4). Accordingly, the conclusion that Smyth was carrying out a superior's instruction to get a copy of the form for review by management is unreasonable and contrary to the facts and the findings of ALJ Schmidt. Moreover, Judge Schmidt's reference to "puzzlement" of Kinkaid is not supported in the record. Kinkaid testified clearly and unhesitatingly that "Dale Smyth ripped it off the bulletin board" (TR 783, line 25, 784, line 1) and again: "He just walked in, ripped it off of the board, threw it in the trash can and walked out" (TR 784, lines 15-16). The coercive nature of conduct under Section 8(a)(1) does not turn upon whether employees were in fact coerced but rather "…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." *American Freightways Co.*, 124 NLRB 146, 147 (1959). Supervisor Smyth demonstrated his contempt for the Union and its form by ripping it off the bulletin board and throwing it in the trash in front of two employees. This was coercive.

2. Whether PNM violated Section 8(a)(3) when it removed Union Steward Eric Cox from a management-employee meeting and later subjected him to a disciplinary investigation of his conduct at that meeting. The Union excepts to lines 36-38, 44-46, page 9, lines 1-2, lines 11, 15-16, 40-45, and 52, page 10, and lines 7-11, lines 16-17, lines 22-25, and lines 34-39, page 11, reading:

That being so, under *Burnip & Sims* the burden shifted to the Acting General Counsel to show that, in fact, no unprotected conduct occurred. He failed to satisfy that burden.

Applying the *Atlantic Steel* tests here, I have concluded that Cox's conduct at the Telestaff meeting was not protected by the Act and, for that reason, the investigation by PNM's in-house labor and employment counsel was lawful.

1. The place of the discussion. This factor weighs against protection of the conduct by Cox and Tafoya in disrupting and constructively terminating the April 21 meeting.

2. The subject matter of the meeting. This factor weighs against protection of the Act. ***The conduct by Cox and Tafoya interfered with the progress of this ordinary work meeting and eventually caused its termination.

This confrontation initiated by Cox and continued by Tafoya occurred in a plant floor context, not a bargaining table context.

3. The nature of Cox's conduct. This factor weighs strongly against protection of the conduct by Cox and Tafoya in disrupting and effectively terminating the April 21 Telestaff meeting.

Cox admittedly sought to disrupt this meeting using this tactic.

I find Cox's insistent behavior on this subject, coupled with his menacing tone and gestures toward Brandon because of her reaction of dismay at his behavior, completely out of place in this particular situation. Cox's subsequent effort to bully and belittle Smyth when this supervisor sought to answer questions posed by other employees was likewise inappropriate and out of place in this setting.

4. Provocation by Respondent. This final factor also weighs against the protection or, at best, it is neutral.

In my judgment, the out-of-control conduct by Cox and Tafoya that prevented the PNM officials from conducting an orderly, legitimate business meeting with its employees substantially exceeds the disruptive employee actions the Board found unprotected in *Carrier Corp.*, 331 NLRB 126 fn. 1 (2000).

When Cox abused the negotiated accommodation to perform representational duties on work time by becoming disruptive and abusive,

> Smyth had a lawful right to eject him [from] the ordinary workplace meeting that took place.
>
> As I have concluded that PNM did not violate the Act by its investigation of Cox's conduct at the April 21 Telestaff meeting, I recommend dismissal of this allegation.

The grounds for these exceptions are that Judge Schmidt's conclusions are unwarranted, and held Cox, an admitted Union Steward acting in that capacity, to a higher standard than required by the Board. Judge Schmidt misapplied the *Atlantic Steel* factors. To hold Cox's conduct unprotected, Judge Schmidt conflated his conduct with that of Tafoya.

The place of the discussion was that of a conference room where PNM was presenting a new automated call-out system. It obviously was not a place where the attending linemen were engaged in any line work. It was not in any way a "plant floor" where any production work was occurring. At the direction of Line Department Manager Jeff Nawman, Craft Supervisor Mark Martinez specifically directed Eric Cox to that place and that meeting because he was a union steward (TR 798; Decision lines 5-7, page 6). According to Cox, he was told to "poke holes in this" (TR 814). PNM thus chose the place and chose to have Cox there as a union steward.

The subject matter of the meeting weighs in favor of Cox's conduct being protected. The subject matter of the meeting was the proposed implementation of the automated call-out program called Telestaff. As Judge Schmidt notes (Decision, lines 37-41), the Union had filed a charge nine days before the April 21 meeting claiming unilateral action in changing call-in requirements. Cox's conduct, questions, and comments related to the new Telestaff program and changing call-in requirements and whether dispatchers would be laid off. The question that Cox insisted Smyth answer and

that Smyth kept trying to avoid answering was whether the Telestaff program changed the call-in requirements (TR 810).

The nature of Cox's conduct weighs in favor of protection. He asked questions and insisted on answers directly related to the Telestaff program and the Union's claim that it changed call-in requirements. He was not subservient. When Brandon rolled her eyes at him, he protested this because he thought it condescending (TR 842). As stated, he insisted that Smyth answer his question about the change in call-in requirements. When Smyth cursed, telling Cox to go ahead and ask his "damn question", Cox responded that his own "mama" did not speak to him like that and neither was Smyth (TR 800-13). As far as leaving the meeting, Cox invited Smyth to call his [Cox's] supervisor to change his job assignment (TR 814).

Provocation by PNM weighs in favor of protection. PNM knew that the Union had filed its charge of unilateral changes. According to Ray Mathes (Jt. Exh. 73), PNM had previously given the Union notice of "Mr. Cox's unnecessarily antagonistic, unprofessional, and disruptive behavior during meetings." Yet PNM intentionally sent Cox into the Telestaff meeting to poke holes in that program as a steward. Once there, he was treated to condescending behavior by Brandon and to rude behavior by Smyth. He was set up.

His conduct, comments, and questions were appropriate to his acting as a steward. Based upon what scanty allegations Smyth and Brandon came up with at trial, no reasonable basis existed to even investigate Cox, particularly when Cox told Smyth that he was there as a steward (TR 813). *Family healthcare Inc.*, 354 NLRB No. 29 (2009) (speaking loudly or raising voice while discussing terms and conditions of employment);

Compare *DKS Tool & Engineering*, 332 NLRB 1578 (2000) (loud profane language at employee meeting), with *Media General Operations, Inc. v. NLRB*, 394 F.3d 207 (4th Cir. 2005), *denying enforcement*, 341 NLRB 124 (2004) (loud, offensive and derogatory comments at group meeting). As the Board found in *Media*, 341 NLRB at 126:

> The third factor, the nature of the conduct, weighs in favor of protection of Mankins' conduct as well. Although Mankins interrupted Leonard and called him a racist, this conduct was not so inflammatory as to lose the protection of the Act. Indeed, the Act allows a certain degree of latitude to employees when engaged in otherwise protected conduct, even when employees express themselves intemperately. See *CKS Tool & Engineering, 332 NLRB 1578, 1586 (2000)* (finding protected "accusatory language [that] is stinging and harsh"). Accordingly, although the accusation of racism is serious, the statement is not so outrageous as to weigh in favor of losing the protection of the Act.

3. Whether PNM violated Section 8(a)(5) by failing and refusing to furnish the Larkin Contract. The Union excepts to lines 23-26, 43-51, page 17, reading:

> Therefore, the Acting General Counsel or Local 611 had the burden of establishing the relevance of the Larking [*sic*] contract to the procession of the Powell grievance, the specific incident that gave rise to the request. I have concluded that they failed to meet that burden.
>
> In this context, and in the complete absence of an on-going pattern of similar conduct in connection with the use of supplemental employees that would provide a basis for a reasonable person to suspect that the pattern resulted from collusion between PNM and Larkin seeking to undermine the employment of union represented workers, I cannot conclude that a "logical foundation or factual basis" exists for requiring the production of the Larkin contract in order to process the Powell grievance, a relatively routine dispute in the context of almost any collective-bargaining relationship. Accordingly, I find PNM did not violate Section 8(a)(5) by failing and refusing to furnish Local 611 with a copy of the Larkin contract in order to process the Powell grievance so I will recommend the dismissal of this allegation.

The grounds for this exception are that Union agent Fitzgerald explained the relevance of the Larkin contract in his August 7 email (Jt. Exh. 12) to Lynch. Judge Schmidt's reference to "the complete absence of an on-going pattern of similar conduct

in connection with the use of supplemental employees" ignores the following allegation that PNM refused to furnish information regarding a grievance charging that PNM used two supplemental workers in place of a regular employee on the coal pile at the San Juan Station (Decision, pages 18-20). Judge Schmidt did find a violation on this allegation. No question of "collusion" is involved; the question is whether PNM intended to violate the contract. The information requested, i.e., the Larkin contract, may not have been required to process the grievance, but it clearly would be helpful to show there was a contract violation, and even an intentional one. For matters outside the bargaining unit the requesting party must demonstrate the relevance of the requested information. *Shoppers Food Warehouse Corp.* 315 NLRB 258, 259 (1994); *Ohio Power Co.,*, 216 NLRB 987, 991 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976). As stated in *Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003), however:

> Although that burden "is not an exceptionally heavy one," it does require a showing of 'probability that the desired information is relevant and …would be of use to the union in carrying out its statutory duties and responsibilities.'"

See *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006). Only a reasonable objective basis for making the request is required to be shown. *Earthgrains Co.*, 349 NLRB 389 (2007), *enforced in part and denied in part sub nom. Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422 (5th Cir. 2008); *Certco Distribution Centers*, 346 NLRB 1214, 1215 (2006); *Shoppers Food Warehouse*, supra.

4. Whether PNM violated Section 8(a)(5) by failing and refusing to furnish an answer as to the current duties of James Martinez. The Union excepts to lines 10, 15-16, 18-20, 22-27, page 21 of the decision reading:

   I agree with Respondent's argument.

> There followed from that situation Fitzgerald's email which failed to resolve the ambiguous use of the word "answer" and Tafoya's June 18 email bitterly complaining about the lack of an "answer" …" *** I find these various communications after May 26 failed to convey any sense that the process had been frustrated by a lack of information requested by Local 611.
>
> In view of these circumstances, I find that the obviously ambiguous requests for an "answer" contained in emails from Fitzgerald and Tafoya did not refer to a pending information request but rather referred to Local 611's demand that PNM answer their proposal to reclassify Martinez and the others. Accordingly, I find the Acting General Counsel failed to prove the allegations made in complaint paragraph 6(m) – (o) by a preponderance of the evidence. Therefore, I will recommend the dismissal of these allegations.

Fitzgerald's May 26 email (Jt. Exh. 31) is unambiguous regarding what answer PNM was to provide after the May 20 meeting. It reads in pertinent part:

> When we met on the 20th Ed Tafoya and I had brought up the subject of Linda Hall and James Martinez. The Company was to provide an answer as to their current duties.

The email goes on to demand that PNM reclassify Hall and Martinez. This does not make the request for "an answer as to their current duties" ambiguous. Other requests for information regarding employees believed to be includible in bargaining units have been held relevant. *Otay River Constructors*, 351 NLRB 1105 (2007). Here, the information as to the job duties of Hall and Martinez is obviously relevant to the basic issue of whether they should be in the unit and if so, in what classification.

5. Whether PNM violated Section 8(a)(5) by failing and refusing to furnish information regarding, and unilaterally changing to a mandatory fit-testing and clean-shaven policy. The Union excepts to lines 48-52, page 27, and lines 1-6, 10-11, 23-25, page 28 of the Decision reading:

> After careful consideration of the foregoing, I find that McNicol's inarticulate statement on July 30 amounted to nothing more than an

> announcement the respiratory protection program would become mandatory. There is no allegation that this action violated the Act. The preponderance of the evidence clearly establishes that PNM never, at any time, established a so-called "clean-shaven" policy as alleged in complaint paragraph 6(v). Hence, I find that despite Fitzgerald's repeated insistence that it do so, PNM had no legal duty to furnish information about a nonexistent "clean shaven" policy.
>
> I further find that PNM provided Local 611 with the information sought on August 26 to the extent that it was legally obliged to do. ***Having concluded that Respondent provided all of the information it was legally obliged to provide, I recommend dismissal of these allegations.
>
> The closely related allegation by the Acting General Counsel in **complaint paragraphs 7(b), (h), and (g)** that PNM violated the Act by unilaterally implementing a mandatory pulmonary and fit testing program requiring that employees be clean-shaven also lacks merit. At [*sic*] previously found, PNM never instituted a clean-shaven requirement. ***Accordingly, I find the Acting General Counsel failed to prove any unlawful unilateral action as alleged in complaint paragraphs 7(b), (h) and (g). For this reason, I also recommend dismissal of those allegations.

The grounds for these exceptions are that on July 30, 2009, San Juan Plant Manager Jim McNicol did announce an end to voluntary compliance with the fit-testing program; that it would become mandatory; and that the employees must be clean-shaven, all as found by Judge Schmidt (lines 1-11, page 25). The Amended Consolidated Complaint in Cases 28-CA-22655 and 28-CA-22759 issued March 24, 2010, does allege in paragraph 7(b) that:

> On or about July 30, 2009, the Respondent implemented a new policy requiring employees to undergo mandatory pulmonary and fit testing and that employees be clean shaven when undergoing such testing.

Judge Schmidt erred when he ruled that there was no allegation that PNM violated the Act by McNicol announcing on July 30, 2009, that the respiratory protection program would become mandatory.

On August 18, 2009, Fitzgerald e-mailed (Jt. Exh. 36 at 1) Lynch noting that he had received no response regarding the clean-shaven policy and that the furnished policy/program as well as OSHA regulations does not require employees to be clean-shaven. He asked specifically: "Does the Company as Jim states have a mandatory 'clean Shaven' policy or not?"

By e-mail (Jt. Exh. 39) dated August 26, 2009, to Lynch, Fitzgerald demanded rescission, and asked for answers to the following questions:

> What will happen if an employee is unsuccessful in passing his/her fit test? Will being fit test be a new requirement of a job or jobs? Does the Company intend to use being fit tested as a reason to bypass employees for overtime on certain jobs? Will all employees be required to fit test even though they may or may not wear respirators in their current duties? Since the Company has chosen to start this on August 31, 2009 is this the implementation date? Has each of these employees been evaluated in accordance with OSHA requirements? Will employees be advised as to how they will comply while in equipment such as ARC flash hoods?

Fitzgerald renewed his requests for information and demand for rescission in his e-mail (Jt. Exh. 38) of September 4, 2009, to Lynch. He also noted that management required two employees to be clean shaven in order to be fit tested.

Lynch purported to respond to Fitzgerald's e-mail quoted above in her letter of September 8, 2009, attached to her e-mail (Jt. Exh. 40) of the same date. Note that Lynch states in her letter: "If an employee fails the fit test solely because he refuses to shave, the employee may be subject to the disciplinary process incorporated into the collective bargaining agreement." Fitzgerald responded by his e-mail (Jt. Exh. 40) the same day. He noted all his questions were not answered and listed them:

> Will all employees be required to fit test even though they may not wear respirators in their current job?
> Will being fit test be a new requirement of a job or jobs?

> Does the Company intend to use fit testing as a reason to bypass employees for overtime?
>
> Fitzgerald made the following new request:
>
> The Union also requests all site monitoring that has been done to show what areas and locations have exposure levels greater than allowed by OSHA and the dates this testing was performed.

The information was not provided (TR 953). Nothing has been published to the unit employees that they do not have to be clean shaven to be fit tested (TR 1039, 1088-90). Fitzgerald testified (TR 1074) that a "ton of them shaved" but he was "sure there's some that do have facial hair." He later specified that 40 to 50 out of 300 employees shaved to be fit-tested (TR 1095). If PNM did not have a clean-shaven policy contrary to McNicol's announcement on July 30, then it should have so advised Fitzgerald in answer to his requests for information. PNM did not answer his other requests for information.

6. Whether PNM violated Section 8(a)(5) by failing and refusing to furnish requested information regarding its implementation of its Cyber Security policy.

   The Union excepts to lines 37-48, page 35, and lines 1-2, 20, 23-31, page 36, reading:

   > I find, however, that the Company had no duty to provide this information in the peculiar circumstance of this case.
   >
   > In my judgment, the arguments advanced in the briefs submitted by the Acting General Counsel and the Union fail to give sufficient deference to the careful determinations made by Arbitrator Snider. Instead, their analysis effectively treats the arbitrator's decision as though it did not exist, cites standard cases concerning the duty to furnish information, and argues that a violation plainly occurred. I profoundly disagree with their approach and refuse to adopt it.
   >
   > The parties agreed to abide by Arbitrator Snider's decision as final and binding. Enforcing Fitzgerald's demands that the Company provide the Union with a declaration of each factor it relied on in determining that each employee would be subject to the requirements of the cyber security

> policy drafted by the arbitrator would simply eviscerate the arbitrator's decision and the parties' agreement to abide by it.
>
> The requests here occurred in the absence of any adverse action. *** As I have concluded that the nature of the discretion vested in the Company by the arbitrator's cyber security policy essentially gave PNM the unilateral right to decide who would be subject to the policy's requirements. I find that it had no obligation to provide the type of detailed information Fitzgerald sought at the time that he sought it. In that respect, I essentially agree with the assertion Oldham made in his February 16 email (Jt. Exh. 61, p.2) that the Union's information requests were designed to require the Company to justify the coverage selections it made. Arbitrator Snider's decision obviates any need for the Company to provide such justifications. Accordingly, as I find PNM had no legal duty to honor the Union's requests, I recommend dismissal of this allegation.

Merely being subject to the policy and the personnel risk assessment now and in the future is an adverse action, in that they are subjected to a personnel risk assessment now and every subsequent seven years (GC Exh. 4, at 17-18). The policy (GC Exh. 4, at 16-21) does not give PNM the unfettered discretion to determine who will be covered employees. That policy (*id.* at 16) requires PNM to "consider, at a minimum, the following factors" and lists in subparagraph A, "only those employees whose jobs have a reasonable connection to cyber security" and lists in subparagraph B, "those employees whose job duties reasonably require more than isolated instances of access cyber assets or to cyber physical security perimeter areas." Before Fitzgerald could grieve in good faith PNM's determination that any employee or employees were subject to the policy contrary to the listed mandated factors, he needed the information that he requested, and that PNM refused to provide. Oldham's answers amounted to nothing more than that PNM followed its interpretation of the policy. Judge Schmidt found (Decision, lines 9-11, page 35): "Concededly, the Company never furnished the Union with the reasons it had for selecting each individual employee it ultimately determined to be covered by the cyber

security policy." [Footnote omitted.] The Policy (GC Exh. 4 at 20) specifically provides for the submission to arbitration of any grievances "about the interpretation or application of this cyber security policy." If given the requested information, the Union can determine whether to grieve and arbitrate the determination that any particular employee or employees are covered employees in accordance with the policy. Without the information, the Union is left to speculation.

7. Whether PNM violated Section 8(a)(5) by failing and refusing to furnish requested information regarding its investigation of Eric Cox. The Union excepts to lines 44-53, page 37, and lines 1-7, page 38, reading:

> Accordingly, I find the materials prepared during the Company's investigation under the direction of Shay constituted protected work product within the meaning of *Central Telephone*, 343 NLRB 987 (2004) and, for this reason, the Company had no obligation to provide the Union with the materials prepared by Company representatives during the investigation Shay supervised.
>
> Moreover, based on the nature of the misconduct engaged in by Cox (with Tafoya's eventual full support and endorsement) at the Telestaff meeting itself together with the fact that the initial demand for information occurred in the middle stages of Shay's inquiry, I have concluded that the potential for harassment or retaliation that might result from the disclosure of the identity of any complaining employee or other witness sufficiently outweighs the Union's need for those names to a degree that would privilege the Company's refusal to provide such information on confidentiality grounds. *Northern Indiana Public Service Co.*, 347 NLRB 210, 211 (2006). This timing renders the Union's claim that it sought the requested information to evaluate a possible grievance challenging the Company's treatment of Cox highly suspect. Accordingly, I recommend dismissal of this allegation.

Tafoya needed to know the names of the persons interviewed, the list of the allegations on which the investigation was based, and the names of who made those allegations in order to represent Cox during the investigation and afterwards in order to decide whether to grieve the investigation of Cox as a union steward. See Jt. Exh. 70. These information

requests do not implicate any mental impressions of Shay or Otero who conducted the investigations. They were not work product. While Castro and Mathes claimed on May 18 (Jt. Exhs. 17 and 72) that the requested information was confidential, they made no proposal for any accommodation. A party asserting confidentiality of information for business reasons has the burden of proof. See, e.g., *Pertec Computer Corp.*, 284 NLRB 810 (1987); *Washington Gas Light Co.*, 273 NLRB 116 (1984). The parties must bargain, however, in good faith to attempt to accommodate the interests of both parties. *Pacific Bell Tel. Co. dba SBC Cal.*, 344 NLRB 243 (2005); *International Protective Servs., Inc.*, 339 NLRB 701 (2003). Judge Schmidt's conclusion of a "potential for harassment or retaliation" is his speculation, and was not even claimed by PNM.

8. Whether PNM violated Section 8(a)(5) by failing and refusing to consider and recognize employees who perform electrical meter reader and collector work as being in the electrical unit and by refusing to process grievances in behalf of James Martinez and similarly-situated employees. The Union excepts to lines 14-19, 21-23, 29-30, 36-39, page 47, lines 26, 32-33, page 48, and lines 5-9, page 49, reading:

> I find merit in Respondent's argument. In my judgment, it would be inappropriate at this late date and in the context of a refusal to bargain unfair labor practice case to determine on the basis of a *Caesar's Tahoe* analysis that Martinez has always been in the MRC unit. In my judgment, finding PNM's current refusal to treat him as a part of the MRC unit as tantamount to a unilateral change in the unit scope would not be appropriate.
>
> The evidence in this record merits the inference and conclusion that Martinez and a few others were originally excluded from the MRC unit at the time of the NLRB election largely by mistake.
>
> Here, parties have resolved this problem as to all affected employees other than Martinez.

> I find no merit to the Acting General Counsel's argument regarding complaint allegation 7(e) that Respondent violated Section 8(a)(5) by its failure to include operations representatives in the MRC unit at Local 6111's request if an employee so classified engaged in any meter reading. *** As that situation existed at the time of the election, any effort to now sweep the operations representatives into the merged unit because of the meter reading responsibilities of this group, whatever and however much they are, would appear to raise a question concerning representation. For these reasons, I recommend dismissal of complaint paragraph 7(e).
>
> But that does not appear to end the matter. *** Here, Respondent has refused to process only a single grievance, i.e., that involving the Martinez situation.
>
> I find the *Velan Valve* rule controls complaint paragraph 7(f). Although I have found other violations in this consolidated proceeding, the evidence shows that the Martinez matter is sufficiently discrete and isolated as to preclude a finding that PNM's failure to process this single grievance amounts to a "unilateral modification or wholesale repudiation of the collective bargaining agreement." Therefore, I recommend dismissal of complaint paragraph 7(f).

The Union does not contend that "operations representatives" are included in the unit. The Union contends that the MRC unit scope is defined not by classification, but rather by job duties, namely, meter readers and collectors generically. Even office employees are excluded only if they "do not regularly work in the field" (Jt. Exh. 29). The job description for an "operations representative" applies to PNM's former gas operations and not its electrical operations (TR 253-7). James Martinez has always worked in Las Vegas, New Mexico, where PNM has never had any gas operations (TR 350). He has been and is performing electrical meter reading and collector work, and no gas operations work (350, 365). He clearly is within the unit scope. On July 13, 2009, the Union grieved PNM's failure to classify Martinez as either a senior meter reader or collector (Jt. Exh. 30), and thus include him in the unit. PNM refused to recognize the grievance and has failed and refused to include him in the unit, merely because of his erroneous

classification (Jt. Exh. 32, TR 286-7). Other than his erroneous misclassification as an operations representative, PNM has no basis to exclude him from the unit and contract coverage. Judge Schmidt found (Decision, lines 30-31, page 47): "There is little indication that they have any serious disagreement about his eventual inclusion in the represented unit." PNM, however, has insisted upon keeping Martinez excluded from the unit unless the Union gives up its claim that his proper classification is that of a senior meter reader, and has refused to process the grievance protesting his misclassification (Jt. Exh. 32; TR 765). Any further bargaining is futile.

On February 16, 2010, the Union filed another grievance (Jt. Exh. 49) claiming that PNM failed to properly classify Martinez and seven others, including six coordinators (see decision at 31). "PNM denied the grievance on February 22 on the ground that the named employees could not avail themselves to the grievance procedure. (Jt. Exh. 49)" (Decision at 31, lines 34-35.) Again, any further bargaining is futile.

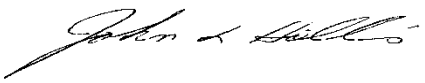
Thus, PNM has refused to recognize and process two grievances involving multiple employees on the ground that the employees are not in the unit because of their classifications. By doing so, PNM has insisted upon modifying the unit scope to one based upon classifications, a permissive subject. Charging Party cited to Judge Schmidt the cases of *Public Service Company of New Mexico*, 337 NLRB 193 (2001) and *Grosvenor Resort*, 336 NLRB 613 (2001). See Decision, Lines 6-10, page 47. According to Judge Schmidt (Decision, lines 25-27): "Those cases implicate the principle that a party may not press a unit scope issue to the point of impasse because it is a permissive, rather than a mandatory, subject of bargaining." That is the exact principle that applies here.

Charging Party recognizes the rulings of *Velan Valve*, 316 NLRB 1273 (1995) and *ACS, LLC*, 345 NLRB 1080, 1081 (2005). See Decision, lines 35-53, page 48 and lines 1-2, page 49. Where an employer, as here, however, declares that employees are not in the bargaining unit solely because of their misclassification, and then refuses to process and arbitrate grievances protesting such misclassifications, the employer is unilaterally modifying the Certification of Representative and resulting collective-bargaining agreement. Any further bargaining is futile and the parties are at impasse because the employer has chopped off the continuation of the negotiated grievance/arbitration process.

9. Conclusion No. 5. The Union excepts to the conclusion of law numbered 5 at lines 37-38, page 49, reading: "Respondent did not engage in any other of the unfair labor practices alleged in this consolidated proceeding."

For the above reasons, and as more fully set forth in Charging Party's Brief in Support of Exceptions to Administrative Law Judge's Decision, the Union files its exceptions to the Decision of Administrative Law Judge William L. Schmidt, dated February 17, 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2012, I e-filed the above with the NLRB, Office of the Executive Secretary and caused a true and correct copy of the foregoing to be served upon the following by email as indicated:

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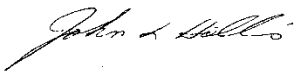

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