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1       **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2       **GEORGE SEDILLO,**

3             Plaintiff-Appellant,

4       v.

**NO. 35,636**

5       **NEW MEXICO CHILDREN,**  
6       **YOUTH & FAMILIES DEPARTMENT,**

7             Defendant-Appellee.

8       **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

9       **Valerie A. Huling, District Judge**

10       Law Offices of E. Justin Pennington

11       E. Justin Pennington

12       Albuquerque, NM

13       for Appellant

14       Robles, Rael and Anaya, P.C.

15       Douglas E. Gardener

16       Christina E. Anaya

17       Albuquerque, NM

18       for Appellee

19                                       **MEMORANDUM OPINION**

20       **GARCIA, Judge.**

1 {1} Plaintiff is appealing from a district court order dismissing his motion to compel  
2 arbitration and alternative complaint for breach of employment contract. We issued  
3 a calendar notice proposing to reverse. CYFD has responded with a memorandum in  
4 opposition. Not persuaded, we reverse the district court. Plaintiff was a juvenile  
5 corrections officer employed by CYFD. He was a classified employee, and subject to  
6 a collective bargaining agreement (CBA). Under the State Personnel Act, a party to  
7 a CBA who is fired may either appeal the dismissal to the Personnel Board, or make  
8 an irrevocable election to arbitrate the matter pursuant to the CBA. NMSA 1978, § 10-  
9 9-18(H) (2009). Plaintiff chose to arbitrate, and under the terms of the CBA he is  
10 represented by the union, which, under the terms of the CBA, has seven days to  
11 request a panel of arbitrators from an approved list. [RP 36] The union failed to select  
12 arbitrators within the time set by the CBA, and CYFD subsequently refused to  
13 participate in arbitration proceedings. As a result, Plaintiff filed a motion in district  
14 court to compel arbitration, or alternatively to pursue a breach of the employment  
15 contract claim. [RP 1] CYFD filed a motion to dismiss. [RP 20] The district court  
16 granted the motion based on the straightforward rationale that the seven-day deadline  
17 was the equivalent of a jurisdictional requirement.

18 {2} As we observed in our calendar notice, CBA's are interpreted like any other  
19 contracts. *See Christmas v. Cimarron Realty Co.*, 1982-NMSC-079, ¶ 8, 98 N.M. 330,

1 648 P.2d 788. The district court’s bright-line rule on the seven-day deadline was in  
2 effect a determination that the CBA was not ambiguous, in that an employee will lose  
3 the right to challenge his dismissal if he elects arbitration and there is a failure to  
4 select arbitrators within the deadline. In the absence of language in the CBA  
5 specifically addressing the issue of what happens when the deadline is not met, the  
6 CBA is ambiguous. In addition, our calendar notice proposed to hold that the district  
7 court’s sanction (dismissal) for the failure to meet the seven-day deadline was too  
8 severe. *Cf. Marshall v. Providence Wash. Ins. Co.*, 1997-NMCA-121, ¶ 29, 124 N.M.  
9 381, 951 P.2d 76 (describing dismissal as a “severe” sanction to be used in “extreme”  
10 circumstances).

11 {3} In its memorandum in opposition, CYFD notes that this Court has held that,  
12 where a CBA calls for the union to represent an employee in these type of  
13 proceedings, and the union breaches its duty to effectuate the employee’s rights, the  
14 remedy is for the employee is to pursue a “hybrid suit.” *Howse v. Roswell Independent*  
15 *School Dist.*, 2008-NMCA-095, ¶ 16, 144 N.M. 502, 188 P.3d 1253. In a hybrid suit,  
16 the employee joins the union as a separate defendant, wherein the employee may  
17 prove that the union breached its duty, thereby allowing the suit against the employer  
18 to proceed. In *Howse*, the employee chose to pursue her grievance exclusively through  
19 the union. *Id.* ¶ 4. Here, Plaintiff’s private counsel made the irrevocable selection of

1 arbitration. [District Court Order, RP 90, ¶ 2] The CBA contemplates that an  
2 employee may assume the burden of representation. [RP 90-91, ¶ 8] As such, we  
3 believe that Plaintiff’s failure to pursue the “hybrid” approach does not prevent him  
4 from maintaining the arbitration action, but instead means that he has waived union  
5 representation. We are therefore left with his failure to satisfy the seven-day deadline,  
6 and we conclude that dismissal of the action was too extreme.

7 {4} For the reasons set forth above, we reverse and remand to permit the district  
8 court to fashion a remedy with respect to the selection of the arbitrators.

9 {5} **IT IS SO ORDERED.**

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**TIMOTHY L. GARCIA, Judge**

12 **WE CONCUR:**

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**JONATHAN B. SUTIN, Judge**

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**STEPHEN G. FRENCH, Judge**