PEBA KEYWORD AND PHRASE DIGEST

(Revised 6-7-24)

HOW TO USE THIS DOCUMENT

- Various subjects, keywords or phrases are cross-indexed in the Table of Contents of this Index, and the cross-references are not repeated in the index proper, for the most part. Accordingly, any search should begin with the Table of Contents.

- The primary emphasis of this Index is on statutory and regulation citations. Accordingly, many entries in the Table of Contents for popular words or phrases will, instead or additionally, refer the reader to entries for relevant statutory and regulation citations.

- **THIS DOCUMENT IS NOT A SOURCE OF LAW AND NOT TO BE CITED**. This document reflects the views of the individual Staff compilers and is to be used solely as a guide or aid to practitioners. The contents of this document have not been endorsed by the Board or local board.

Table of Contents

PEBA INDEX

§ 10-7E-2, [Purpose of Act]

- **Protect Public Interest**
  - Provisions of PEBA stating that arbitration awards are contingent on the appropriation and availability of funds prevail over provisions of PEBA stating arbitration awards shall be final and binding. The Union and the City reached an impasse during negotiations for a new collective bargaining agreement. They selected an arbitrator who issued an award based on the Union's final offer. The award covered a three-year period, including wage increases. However, the Court of Appeals held that the award was subject to the availability of funds, emphasizing the balance between finality in collective bargaining and prudent financial management within political subdivisions. *IAFF Local 1687 v. City of Carlsbad,* Court of Appeals, Case No. 28,189 (June 23, 2009).

§ 10-7E-3, [Conflicts]

- **Local ordinances' conflict provision.**
  - A § 10 local labor ordinance's conflicts provision violates PEBA by providing that the local labor ordinance shall not supersede previously enacted local legislation. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20. 1994).
  - Sandoval Regional Medical Center, a nonprofit "research park corporation", petitioned to be certified and was opposed by the Union who argued that SRMC was a nonprofit "research park corporation" created pursuant to the New Mexico URPEDA and the URPEDA expressly provides that for personnel matters, research park corporations shall not be deemed a "public employer". SRMC argued that it did not fall within the scope of PEBA and the PELRB does not have jurisdiction over it with respect to the Petition therein or other collective-bargaining and labor relations matters. The Hearing Officer concluded, "that both SRMC and its regular non-probationary employees are covered by the New Mexico Public Employee Bargaining Act is supported by PELRB precedent that the definition of "public employer" must be read in conjunction with the description of "appropriate governing body" in NMSA 1978, § 10-7E-7 (2003)." *See UHPNM-AFT and UNM Sandoval Reg. Med. Center, Inc.*, PELRB 306-21.

§ 10-7E-4(G), [Definitions]

- **Confidential employee.**
  - PEBA's exclusion of "confidential employees" from collective bargaining concerns those employees whose work duties are related to the formulation, determination and effectuation of a public employer's employment, collective bargaining, or labor relations activities. *CWA Local 7076 and Worker's Compensation Administration,* 5-PELRB-09 (April 6, 2009).
  - The exclusion of confidential employees is limited to those employees who assist and act in a confidential capacity to persons exercising managerial functions in the field of labor relations. *NEA and Jemez Valley Public Schools,* 1 PELRB No.10 (May 19, 1995).
  - PEBA's confidential employee definition requires an analysis of (1) the duties of the employee in question and (2) the duties of the person he or she allegedly assists. *NEA and Jemez Valley Public Schools,* 1 PELRB No.10 (May 19, 1995).
  - Where the employer has not engaged in collective bargaining in the past, the Board will utilize a reasonable expectation test for analyzing confidential status. Under such a test, analysis of the roles of the employer and his or her supervisor in collective bargaining will be based on their current duties and a reasonable expectation of whether the employee in question will be performing confidential duties within the meaning of the Act in the future. *NEA and Jemez Valley Public Schools.* 1 PELRB No. 10 (May 19, 1995).
  - In *Santa Fe Community College-AAUP and Santa Fe Community College*, 4-PELRB-2017 (PELRB No. 311-16) the Santa Fe Community College chapter of the American Association of University Professors filed a Petition for initial certification of a bargaining unit comprising all full-time faculty members including Department Chairs and Program Directors. The Community College objected to including Department Chairs and Program Directors because (1) they share no community of interest with faculty; (2) are supervisors, NMSA 1978, § 10-7E-4(U) (2020); and (3), are management employees. NMSA 1978, § 10-7E-4(N) (2020). A further dispute existed concerning whether employees who have not completed SFCC's multi-year probationary periods and temporary employees would be eligible to vote in a representation election. The Hearing Officer determined that the Chairs and Directors met the statutory definition of managers and are excluded from the bargaining unit pursuant to §§ 10-7E-4(N) and 10-7E-5. The union sought review of the Hearing Officer's determination regarding the excluded employees. The PELRB certified the bargaining unit for non-chair and non-director faculty and remanded back to the Hearing Officer the question of which chairs and directors fall within the PEBA's definitions of management and supervisory employees. As the parties were in the course of scheduling the hearing on

remand, the Community College restructured management functions modifying the job duties of those chairs and directors who were the subject of the Board's remand. The Union filed a PPC objecting to those modifications without bargaining. (PELRB No. 114-17.) While the PPC was pending the parties reached an agreement whereby Academic Directors will not be members of the bargaining unit but will be classified as "staff employees"; neither will Academic Directors be represented by AAUP for collective bargaining. Faculty Chairs will be included in the bargaining unit with duties to be negotiated between the parties. On August 14, 2017, AFSCME withdrew the PPC as part of the settlement and a Voluntary Dismissal was entered by the Director. *Cf. San Juan College v. San Juan College Labor Management Relations Board*, 2011-NMCA-117, 267 P.3d 101. (Substantial evidence was found to support the local labor board's determination that a bargaining unit of all full-time instructional professionals employed at 100% instruction, excluding those with additional administrative duties, was appropriate).

- **Application to particular job positions**
  - A School District's Administrative Interns, or ·principals-in-training are confidential employees because they could be on a bargaining team and, by training closely with principals and other administrators and attending the monthly administrator meetings. are privy to the formulation of the district's labor-management policies. *American Federation of Teachers Local 4212 and Gadsden Independent School District,* 03-PELRB-2006, PELRB Case No. 169-06 (May 31, 2006).
  - An employee that carries out her job functions almost entirely independent of anyone else, including her supervisors and whose duties do not involve handing confidential Information related to collective bargaining, does not "assist and act in a confidential capacity" as contemplated by PEBA. *NEA and Jemez Valley Public Schools,* 1 PELRB No. 10 (May 19, 1995).
  - A payroll employee is not confidential under PEBA where any financial information to which she has access is also available to others, *NEA and Jemez Valley Public* Schools, 1 PELRB No. 10 (May 19, 1995).
  - A payroll employee is not confidential under PEBA where the financial information she handles may be used by the employer for use in cost proposals, but without further input by the payroll employee in proposal formulation. *NEA and Jemez Valley Public Schools,* 1 PELRB No. 10 (May 19, 1995).
  - A school secretary who serves as the secretary to a school principal that is or will definitely be on the school district's negotiating team, and as such types and files documents related to labor relations matters and has access to the principals' offices, IS confidential even if she does not have substantive input in creating the documents typed or filed. *NEA* and *Jemez Valley Public* Schools, 1 PELRB No. 10 (May 19, 1995).

- **Local ordinances' definition, (§ 26 Repealed, 2020)**
  - A § 26(B) local ordinance's definition of "confidential employee" violates PEBA where it defines such employees as "a person who assist and acts in a confidential capacity with respect to a management employee" because such definition is overbroad, does not comport with the definition of PEBA as written or as subsequently interpreted by the Board in *CWA Local 7076 and Worker's Compensation Administration,* 5-PELRB-09 (April 6, 2009), and could exclude employees otherwise covered under PEBA. *IAFF Local* 2362 *v. City of Las Cruces,* 07-PELRB-2009 (July 6, 2009). *But See AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994) (holding that a legislative enactment is entitled to a presumption of validity, and the absence of a PEBA proviso from a local ordinance cannot deny by implication statutory rights guaranteed under PEBA to any class of employees covered thereunder). *See also, McKinley County Federation of United School Employees, AFT Local 3313 v. Gallup-McKinley County School District and Gallup-McKinley County School District Labor Management Relations Board,* 03-PELRB-2007 (undated). That case represents an instance in which the State PELRB Board imposed on local boards a requirement to follow PELRB interpretations of PEBA.
  - A § 10 local labor ordinance's definition of "confidential employee" violates PEBA where it identifies as confidential employees a broader class of employees than that defined in PEBA, such as secretaries to department heads and any person privy to confidential information concerning employee relations. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos.* 1 PELRB No.3 (Dec. 20, 1994).

§ 10-7E-4(K), [Definitions-Labor Organization.]

- **Local ordinances' definition**
  - A § 10 local ordinance's definition of a labor organization as an employee organization that represents employees in collective bargaining violates PEBA because it does not protect the rights guaranteed under PEBA concerning those labor organizations that are not yet exclusive representatives. *Santa Fe County* and *AFSCME,* 1 PELRB No.1 (Nov. 18, 1993). *See also*, *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).
  - Sandoval Regional Medical Center, a nonprofit "research park corporation", petitioned to be certified and

was opposed by the Union who argued that SRMC was a nonprofit "research park corporation" created pursuant to the New Mexico URPEDA and the URPEDA expressly provides that for personnel matters, research park corporations shall not be deemed a "public employer". SRMC argued that it did not fall within the scope of PEBA and the PELRB does not have jurisdiction over it with respect to the Petition therein or other collective-bargaining and labor relations matters. The Hearing Officer concluded, "that both SRMC and its regular non-probationary employees are covered by the New Mexico Public Employee Bargaining Act is supported by PELRB precedent that the definition of "public employer" must be read in conjunction with the description of "appropriate governing body" in NMSA 1978, § 10-7E-7 (2003)." *See UHPNM-AFT and UNM Sandoval Reg. Med. Center, Inc.*, PELRB 306-21.

- In the case of *State of New Mexico v. American Federation of State, County, and Municipal Employees Council 18 (AFSCME) and Communication Workers of America (CWA),* (2012-NMCA-114), labor organizations played a crucial role in advocating for classified employees. These organizations negotiated collective bargaining agreements with the State, which established terms like contractual salary increases. When disputes arose, the labor organizations utilized their rights under PEBA. They sought arbitration to enforce the agreements and protect employees' rights. This case highlighted labor organizations' active role in ensuring fair treatment and compliance with contractual obligations.

§ 10-7E-4(N), [Definitions-Management Employee.]

- PEBA's definition of manager can be broken down into a two-part test: (1) the employee is primarily engaging in executive and management functions; and (2) he or she has responsibility for developing administering, or effectuating management policies, which requires the employee to do more than merely participate in cooperative decision-making programs on an occasional basis. *NEA and Jemez Valley Public Schools,* 1 PELRB No. 10 (May 19, 1995).
- The first part of the Act's test-engagement in primarily executive or management functions-requires an individual to possess and exercise a level of authority and independent judgment sufficient to significantly affect the employer's purpose. The second part of the test-responsibility for developing, administering or effectuating management policies-requires an employee to either create, oversee or coordinate the means and methods for achieving policy objectives and to determine the extent to which policy objectives will be achieved. This requirement means more than mechanically directing others in the name of the employer but rather, requires an employee to have meaningful authority to carry out management policy, *NEA* and *Jemez Valley Public Schools,* 1 PELRB No. 10 (May 19, 1995).
- Consistent with NLRB case law, "manager" unlike "confidential employee", is read to encompass all management policies and not just those relating to labor relations, *NEA and Jemez Valley Public Schools,*1 PELRB No. 10 (May 19, 1995).
- The key inquiry is whether the duties and responsibilities of the alleged management employees are such that these individuals should not be placed in a position requiring them to divide their loyalty between the employer and the union. *NEA and Jemez Valley Public Schools,* 1 PELRB No. 10 (May 19, 1995).
- In *Santa Fe Community College-AAUP and Santa Fe Community College*, 4-PELRB-2017 (PELRB No. 311-16) the Santa Fe Community College chapter of the American Association of University Professors filed a Petition for initial certification of a bargaining unit comprising all full-time faculty members including Department Chairs and Program Directors.

- **Application to particular job positions**
  - Rio Rancho police lieutenants are not managers under PEBA because: (a) their abilities to recommend policy changes and to override staffing software do not significantly affect the employer's overall purpose of law enforcement, and (b) in creating quarterly "beat plans" they do not determine the extent to which the Department's policy objectives will be achieved *NMCPSO-CWA Local 7911 and City* of *Rio Rancho Police Department,* 04-PELRB-2009 (April 6, 2009).
  - Gadsden School day care managers meet the definition of "manager" under PEBA because they have a number of job functions unique from that of other day care workers that are related to executive and management functions, and/or developing, administering, or effectuating management policies. Additionally, it is not relevant under the PEBA definition of "manager" that they spend approximately 60% of their workdays engaged in the same work as other day care employees. *American Federation of Teachers, Local 4212 and Gadsden Independent School District,* 03-PELRB-2006, PELRB Case No. 169-06 (May 31, 2006).
  - A training sergeant at the County's Detention Center is not a manager under PEBA; she is not primarily engaged in executive and management functions because, although she drafts policies, that work largely consists of the routine or perfunctory task of pirating policies from other organizations and modifying them to the Detention Center's needs and her drafts are subject to numerous levels of review and revision. Additionally, she is not engaged in developing, administering or effectuating management policies because she largely just disseminates the policies, while the Administrator and the operations sergeant are responsible for determining which policies to follow. *In re Communications Workers of America, Local 7911 and Doña*

Ana County, 1 PELRB No. 16 (Jan. 2, 1996).

- A payroll manager that simply collects and maintains information pursuant to policy, plays no role in the development of management policy, and has no discretion in the way in which she carries out policies related to the payroll is not primarily engaged in executive and management functions. *NEA and Jemez Valley Public Schools,* 1 PELRB No. 10 (May 19, 1995).
- Although a payroll manager may carry out management polices related to payroll, she has no meaningful authority related to policy where she simply verifies financial information given to her by others: she must inform the director of finance if she makes any changes to pay as a result of an error. She lacks to authority to sign a purchase order to otherwise pledge the employer's credit; and she has no responsibilities associated with the budget. *NEA* and *Jemez Valley Public Schools,* 1 PELRB No.10 (May 19, 1995).
- A maintenance supervisor is not a management employee if he spends almost all of his time doing actual physical maintenance, and if he does not engage in independent decision-making that broadly affects the employer's purpose. *NEA and Jemez Valley Public Schools,* 1 PELRB No. 10 (May 19, 1995). A maintenance supervisor is not a management employee where the Superintendent created the District's Maintenance Plan based on information obtained from the maintenance supervisor, but the Maintenance Plan was never shown to the maintenance supervisor. *NEA and Jemez Valley Public Schools,* 1 PELRB No. 10 (May 19, 1995).

- **Local ordinances' definition**
  - A § 10 local ordinance's definition of management employee does not violate PEBA by substituting the word "effectuating" with the word "officiating" or by omitting PEBA's proviso that an employee shall not be deemed a management employee solely because the employee participates in cooperative decision-making programs on an occasional basis. These are *de minimis* and insignificant departures from the Act that are not likely to have the effect of sweeping any employee into the management category who would not be in that category under PEBA. Because a legislative enactment is entitled to a presumption of validity, the PELRB will presume that the absence of the proviso from the ordinance does not imply denying statutory rights guaranteed to any class of employees under PEBA. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).

§ 10-7E-4(Q), [Definitions-Public Employee.]

- **Court or judicial employees**
  - *See Laura Chamas-Ortega v. 2nd Judicial District Court,* 7th Judicial. Dist. Ct. Case No. CV-047883 (March 10, 2006, J. Kase) in which the District Court reversed as "arbitrary and an abuse of discretion" the Board's decision in *Chamas-Ortega v. Second Judicial District,* 01-PELRB-2004 (Nov. 9, 2004) holding that PEBA applies to employees of the New Mexico judiciary.

- **Local ordinances' limitations on scope**
  - A provision of a 26 (repealed in 2020) grandfathered labor ordinance or resolution shall be denied grandfathered effect where it denies the right to bargain collectively to any employees who are afforded this right under PEBA. *The Regents of the University of New Mexico v. New Mexico Federation of Teachers and American Assoc. of University Professors,* 1998-NMSC-020, 125 N.M. 401, 962 P.2d 1236. *See also City of Deming v. Deming Firefighters Local 4251*, 2007-NMCA-069, 141 N.M. 686, 160 P.3d 595. In *Deming Firefighters,* the New Mexico Court of Appeals relied on *Regents of the University of New Mexico v. New Mexico Federation of Teachers* to find that the grandfather clause did not apply to two provisions of Deming's local labor relations ordinance: the first excluding fire department officers and the second, concerning impasse procedures. The Court remanded to the PELRB the separate question of whether the City's fire department officers meet the definition of supervisors under the PEBA, essentially affirming the Board's decision in *City of Deming v. Deming Firefighters Local 4251*, 1 PELRB No. 2005 (March 31, 2005), but reversing the Board on an issue concerning the absence of binding arbitration. *See also IAFF Local 2362 v. City of Las Cruces,* 07-PELRB-2009 (July 6, 2009); *IAFF Local 4366 v. Santa Fe County,* 06-PELRB-2009 (May 7, 2009) (Battalion Commanders are supervisory and possibly managerial employees and therefore properly excluded from collective bargaining); *AFSCME v. N.M. Corrections Dep't.* 08-PELRB-2012 (July 13, 2012) (Lieutenants' inclusion would not render the bargaining unit an improper unit); *In re New Mexico Coalition of Public Safety Officers Ass'n and County of Santa Fe,* 78-PELRB-2012 (Dec. 5, 2012) (Sergeants accreted into existing bargaining unit); *AFSCME v. N.M. Corrections Dep't.* 02-PELRB-2013 (Jan. 23, 2013) (Lieutenants did not meet the statutory definition of supervisors under PEBA).
  - A local labor ordinance's definition of public employee violates PEBA where it excludes from its coverage part-lime regular, non-probationary employees who are covered under PEBA. *AFSCME and Los Alamos County Firefighters v. County of Los* Alamos, 1 PELRB No. 3 (Dec. 20, 1994). As a result of the 2020 amendments to the PEBA, all local boards are § 10 boards.

- **Graduate Students**
  - *See UE & UNM Board of Regents*, PELRB 307-20. The union sought recognition as the exclusive representative for graduate students working for the university. The Hearing Officer found, based on UNM's internal personnel policies, that the graduate students were not 'regular employees' as that term is defined in the PEBA. The Board reversed this finding and held the graduate students to be regular employees under the PEBA who are entitled to bargain collectively through an exclusive representative. This case has not been fully resolved and staff anticipate a lengthy appeals process.

- **University Research Park and Economic Development Act (URPEDA)**
  - *See United Health Professionals of New Mexico, AFT, AFL-CIO & UNM Sandoval Regional Medical Center,* PELRB Case No. 306-21. UNM Sandoval Regional Medical Center, Inc., a nonprofit "research park corporation", petitioned for certification. United Health Professionals of New Mexico, AFT, AFL-CIO moved to dismiss the petition claiming the URPEDA states that a research park facility is not a public agency and therefore cannot petition for certification. The Board ruled in favor of SRMC stating that, "The URPEDA was enacted prior to the PEBA authorizing state-wide public employee collective bargaining and its provisions at 21-28-7(A) that a research park corporation shall not be deemed an agency, public body or other political subdivision of New Mexico, presents a classic conflict question in consideration of NMSA 1978 §§ 10-7E-2; 10-7E-5; 10-7E-9 and 10-7E-13 (2020). Our legislature has provided for the eventuality of such conflicts by § 10-7E-3: "In the event of conflict with other laws, the provisions of the Public Employee Bargaining Act shall supersede other previously enacted legislation and rules; provided that the Public Employee Bargaining Act shall not supersede the provisions of the Bateman Act [6-6-11 NMSA 1978], the Personnel Act [Chapter 10, Article 9 NMSA 1978], the Group Benefits Act [Chapter 10, Article 7B NMSA 1978], the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978], the Retiree Health Care Act [10-7C-1 to 10-7C-16 NMSA 1978], public employee retirement laws or the Tort Claims Act [41-4- 1 to 41-4-27 NMSA 1978]." Conspicuously absent from the listed "previously enacted legislation" unaffected by the passage of the Public Employee Bargaining Act is the URPEDA NMSA 1978 §§ 21-28-1 to 25, inclusive. Therefore, [we] conclude that URPEDA, to the extent it would exclude SMRC as a Public Employer other than the state for collective bargaining purposes, has been superseded by the PEBA NMSA §§ 10-7E-1, et seq. enacted in 2003 and amended in 2020." To date, the case is currently on appeal.
  - On May 18, 2022, AFT filed a Petition seeking certification as the exclusive bargaining representative for a unit of specified full-time, part-time, and per diem public employees employed by the University of New Mexico – Sandoval Regional Medical Center (SRMC). See UHPNM & UNM Sandoval Regional Medical Center, PELRB 304-22. Because SRMC is a research park corporation organized under the University Research Park and Economic Development Act ("URPEDA"), NMSA 1978, §§ 21-28-1 et seq., it took the position that it was not a public employer and thus had no public employees subject to PEBA. After a hearing, the PELRB determined otherwise. Subsequently, Section 21-28-7(B)(2) of URPEDA was amended, effective May 18, 2022, to explicitly state that a URPEDA corporation that "owns, operates, or manages a health care facility or employs individuals who work at a health care facility" is a public employer for the purposes of PEBA. The Executive Director of the Board certified the unit as petitioned and SRMC appealed the inclusion of diem employees in the unit they are not "regular employees" under Section 10-7E-7(Q) of PEBA and because house supervisors and charge nurses are not excluded from coverage under PEBA and were appropriate for inclusion in the bargaining unit on Mary 17, 2023. On August 14, 2023, the District Court ambiguously "reversed" and "remanded" the Board's decision affirming the composition of the unit and the results of a card check certifying the union and the unit. Following the remand, on November 7, 2023, the Board concluded that the determination whether an employee is "regular: and therefore, covered by PEBA, depends on the contractual status of the employee, not on employer specific variables such as duties, tenure or schedule. Those employer specific variables may determine community of interest but have no bearing on the determination whether an employee is "regular".

§ 10-7E-4(R), [Definitions- Public Employer.]

- **Generally**
  - The definition of "public employer" must be read in conjunction with the provision of the Act regarding a public employer's governing body, which, according to 7, is the policy making body, or the body or person charged with management of the local public body. Therefore, the critical question is who is charged with management of the public body. Determining who IS charged with the management of the local public body requires addressing the factual question of who has the authority to hire, promote, evaluate, discipline, discharge and set work. rules for the employees in question. *USWA and Gila Regional Medical Center,* 1 PELRB No.14 (Nov. 17, 1995).
  - A joint employer status exists when two or more employers co-determine those matters governing essential terms and conditions of employment. *USWA* and *Gila Regional Medical Center,* 1 PELRB

No.14, (Nov. 17, 1995).
    - A management contract between a public hospital and a private managing firm does not change the public character of the hospital where the hospital retains all authority and control over the business, policies, operations and assets of the hospital. *USWA and Gila Regional Medical Center,* 1 PELRB No.14 (Nov. 17, 1995).

- **New Mexico University Research Park and Economic Development Act**
    - Sandoval Regional Medical Center, a nonprofit "research park corporation", petitioned to be certified and was opposed by the Union who argued that SRMC was a nonprofit "research park corporation" created pursuant to the New Mexico URPEDA and the URPEDA expressly provides that for personnel matters, research park corporations shall not be deemed a "public employer". SRMC argued that it did not fall within the scope of PEBA and the PELRB does not have jurisdiction over it with respect to the Petition therein or other collective-bargaining and labor relations matters. The Hearing Officer concluded, "that both SRMC and its regular non-probationary employees are covered by the New Mexico Public Employee Bargaining Act is supported by PELRB precedent that the definition of "public employer" must be read in conjunction with the description of "appropriate governing body" in NMSA 1978, § 10-7E-7 (2003)." *See UHPNM-AFT and UNM Sandoval Reg. Med. Center, Inc.*, PELRB 306-21. As of this revision the case is on appeal before the District Court.
    - In the case of *Maricar Castro v. Univ. of New Mexico, Medical Group,* Case No.: A-1-CA-39933, (J. Bogardus, December 7, 2023), Plaintiff filed a n Whistleblower Protection Act claim against the University of New Mexico Medical Group, alleging that Defendant retaliated against her for reporting misconduct and violations that she witnessed in the workplace. Defendant argued that it was a private, nonprofit corporation under the University Research Park and Economic Development Act, NMSA 1978 §§ 21-28-1 to -25 (1989, as amended through 2022). The district court granted summary judgment in favor of Defendant, finding that, as a matter of law, Defendant was not subject to the WPA due to its status as a private, nonprofit corporation under URPEDA. Plaintiff then appealed, asserting two main arguments. First, Plaintiff argued that a genuine issue of material fact exists regarding whether Defendant was a public employer subject to the WPA; and second, the district court's earlier denial of Defendant's motion to dismiss her WPA claim should be considered law of the case. After evaluation, the Court of Appeals upheld the district court's decision, stating that "… we perceived no error in the district court's later decision to grant Defendant's motion for summary judgment on the basis that URPEDA does preclude WPA claims against Defendant."

- **Courts or judiciary**
    - *See Laura Chamas-Ortega v. 2nd Judicial District Court,* 7th Judicial Dist. Ct. Case No. CV-047883 (March 10, 2006, J. Kase) in which the District Court reversed as "arbitrary and an abuse of discretion" the Board's decision in *Chamas-Ortega v. Second Judicial District,* 01-PELRB-2004 (Nov. 9, 2004) holding that PEBA applies to employees of the New Mexico judiciary.

- **Other constitutionally independent employers**
    - The constitutional independence of New Mexico universities is not impaired by application of PEBA to its and its employees, because PEBA only requires employers and unions to bargain in good faith. The purpose of constitutional independence is to assure that the entities' mission and function is free from the whims of political interference, notwithstanding its funding through legislative appropriations. PEBA, however, does not require a public employer to accept any specific proposal; the employer always have final say over the financial consequences of any collective bargaining agreement; and employers do not have to accept any union proposal that interferes with their organizational mission. *The Regents of the University of New Mexico v. New Mexico Federation of Teachers and American Assoc. of University Professors,* 125 N.M. 401, 1998-NMSC-020, 962 P.2d 1236.

§ 10-7E-4 (S), [Definitions-Strike.]

- **Local ordinances' definition**
    - A local ordinance's definition of "strike" violates PEBA where it fails to include a requirement that the employee's absence be directed to the purpose of inducing, influencing or coercing a change in the conditions, compensation, rights, privileges or obligations of public employment *AFSCME and LosAlamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).
    - A local ordinance's definition of strike violates PEBA where it prohibits certain forms of activity-slow downs, traffic ticket writing campaigns, mass resignations, and willful interference with the operations of the employer-that traditionally are not regarded as strike activity. *AFSCME* and *Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).

§ 10-7E-4(T), [Definitions-Supervisor.]

- **Generally**
  - Under PEBA I the Board established a three-part test for determining whether an employee is a "supervisor" and therefore excluded from coverage under the Act. Since PEBA II the Board has continued to apply the same three-part two stage analysis but modified the requirement that the employee must devote a "substantial amount" of his or her worktime to supervisory duties to a "majority" of work time to supervisory duties to reflect the change under PEBA II to 10-7E-4(T). As a result, the following three-part test for determining whether an employee is a supervisor is established: (1) the employee must devote a majority of work time to supervisory duties; (2) the employee must customarily and regularly direct the work of two or more other employees; and (3) the employee must have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively. If these requirements are met the analysis continues to determine whether the disputed employee (i) performs merely routine, incidental or clerical duties: or (ii) only occasionally assumes supervisory or directory roles: or (iii) performs duties which are substantially similar to those of his or her subordinates; or (iv) is a lead employee or an employee who participates in peer review or occasional employee evaluation programs. Even if the initial three-part test is met, if any of the subsequent questions found in the definition can be answered in the affirmative, or the employee is a lead worker, or he or she participates in peer review or occasional employee evaluation programs, then the employee is not a supervisor under PEBA. *See, NEA and Jemez Valley Public Schools,* 1 PELRB No. 10 (May 19, 1995). *See also New Mexico State University Police Officers Association and New Mexico State University.* 1 PELRB No. 13 (June 14, 1995); *In re: Communications Workers of America, Local 7911 and Doña Ana County,* 1 PELRB No. 16 (Jan. 2, 1996); *IAFF Local 2362 v. City of Las Cruces,* 07-PELRB-2009 (July 6, 2009); *IAFF Local 4366 v. Santa Fe County,* 06-PELRB-2009 (May 7, 2009) (Battalion Commanders are supervisory and possibly managerial employees and therefore properly excluded from collective bargaining); *AFSCME v. N.M. Corrections Dep't.* 08-PELRB-2012 (July 13, 2012) (Lieutenants' inclusion would not render the bargaining unit an improper unit); *In re New Mexico Coalition of Public Safety Officers Ass'n and County of Santa Fe,* 78-PELRB-2012 (Dec. 5, 2012) (Sergeants accreted into existing bargaining unit); *AFSCME v. N.M. Corrections Dep't.* 02-PELRB-2013 (Jan. 23, 2013) (Lieutenants did not meet the statutory definition of supervisors under PEBA).
  - Lieutenants in the Department of Corrections do not meet at least two of the three criteria required by PEBA §4(T); for supervisory status: (1) they do not devote a majority amount of work time to supervisory duties and they do not have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively. It is arguable whether they meet the third criterion as well, i.e., customarily and regularly directing the work of two or more other employees because of the absence of independent discretion in the direction of their subordinates except in rare circumstances. *AFSCME, Council 18 v. N.M. Dep't of Corrections,* 2-PELRB- 2013 (Jan. 23, 2013).
  - Whatever inferences may be drawn from the fact that "supervisors" are not expressly excluded from PEBA's coverage under 5 they are nevertheless excluded by §10-7E-13(C). Where two statutes deal with the same subject, one general and the other specific, the specific statute controls. §13(C) being the more specific controls and supervisors are therefore excluded from PEBA's coverage. *Santa Fe Police Officers' Association v. City of Santa Fe,* 02-PELRB-2007 (October 14, 2007).
  - It is not the rank nomenclature (corporal, sergeant, lieutenant, captain, etc.) that is determinative but rather the facts related to whether the individual functions as a supervisor as defined under the Act. *In re: New Mexico Coalition of Public Safety Officers, Local 7911, CWA, AFL-CIO and Town of Bernalillo.* 1 PELRB No. 21 (July 7, 1997).
  - Although it may appear awkward to find a person (operation sergeant) of a like rank to his or her actual subordinates (shift sergeants) to be their supervisor, that is not prohibited under PEBA and the determination of supervisor must ultimately be based on the facts and the law, regardless of job title or rank. *In re Local 7911, Communications Workers of America and Doña Ana County,* 1 PELRB No. 16 (Jan. 2, 1996).
  - Including eight of the Detention Center's nine sergeant positions in the bargaining unit does not result in lack of supervision at the facility because these positions do have supervisory duties and responsibilities, just not enough compared to their overall actual day-to-day duties to meet the statutory definition for exclusion under PEBA. *In re: Communications Workers of America, Local 7911 and Doña Ana County,* 1 PELRB-16 (Jan. 2, 1996). *See also AFSCME v. N.M. Dep't of Corrections*, 2 PELRB 2013 (July 13, 2012) (Lieutenants employed by the Department do not meet the statutory definition of supervisors under PEBA and are therefore not excluded from PEBA's coverage. The Lieutenants may be appropriately accreted into the existing bargaining unit.
  - The similarity of working conditions between a putative supervisor and his or her subordinates is not a criterion in the statutory definition of supervisor, and instead relates to community of interest. *In re:*

McKinley County Sheriffs Association Fraternal Order of Police and *McKinley County,* 1 PELRB No. 15 (Dec. 22, 1995).

- **Application to particular job positions**
  - Lieutenants in the Department of Corrections do not meet at least two of the three criteria required by PEBA §4(T); for supervisory status: (1) they do not devote a majority amount of work time to supervisory duties, and they do not have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively. It is arguable whether they meet the third criterion as well, i.e., customarily and regularly directing the work of two or more other employees because of the absence of independent discretion in the direction of their subordinates except in rare circumstances. *AFSCME, Council 18 v. N.M. Dep't of Corrections,* 2-PELRB- 2013 (Jan. 23, 2013).
  - The Hearing Officer relying on *NLRB v. Kentucky River Community Care,* 532 U.S. 706, 167 LRRM 2164 (2001) concluded that decisions made through ordinary technical or professional judgment do not constitute the exercise of independent judgment that the Board has discretion to determine the degree of independent judgment that an employee must utilize in order to be deemed a supervisor and that the existence of employer-specified standards, rules and regulations may constrain an employee's judgment to such a degree that the direction of others does not rise to the level of supervisory authority. By application of that analysis Lieutenants in the Department of Corrections do not spend a majority of their time performing supervisory duties. *AFSCME, Council 18 v. N.M. Dep't of Corrections,* 2-PELRB- 2013 (Jan. 23, 2013).
  - The Board reversed a hearing examiner's conclusion that Battalion Captains did not spend a majority of their time engaged in work requiring the exercise of independent judgment with the result that Santa Fe County Fire Department Battalion Captains may not be accreted into the existing bargaining unit because they are supervisory and possibly managerial employees. *IAFF Local 4366 v. Santa Fe County,* 06-PELRB-2009, PELRB Case No. 321-08 (May 7, 2009).
  - Rio Rancho Police Department lieutenants are supervisors under PEBA because they effectively recommend discipline by issuing written and oral warnings: they effectively recommend promotion by evaluating their subordinates, since such evaluations are weighed in awarding promotions in pay grade under Department policies; they customarily and regularly direct the work of both their subordinate by instructing and guiding them in the proper interpretation of Department policies for them, by acting as incident commander at large operations and by regularly delegating and directing beat activities sergeants and the lower ranked patrol officers, and they spend a majority of their work time devoted to various supervisory duties, including but not limited to the direction of subordinates that require independent judgment and that are distinct from the work of their subordinates. *NMCPSO-CWA Local 7911 and City of Rio Rancho Police Department,* 04-PELRB-2009 (April 6, 2009). *But See In re New Mexico Coalition of Public Safety Officers Ass'n and County of Santa Fe,* 78-PELRB-2012 (Dec. 5, 2012) wherein Sergeants were accreted into existing bargaining unit and *AFSCME v. N.M. Corrections Dep't.* 02-PELRB-2013 (Jan. 23, 2013) wherein Lieutenants were allowed to be accreted because they did not meet the statutory definition of supervisors under PEBA.
  - Administrative Interns, or "principals-in-training," are not supervisors because they merely assist with some limited Supervisory acts, and the purpose and emphasis of their job is to learn the job duties of a principal, to decide if they wish to become one. *American Federation of Teachers Local 4212 and Gadsden Independent School District,* 03-PELRB-2006, PELRB Case No. 169-06 (May 31, 2006).
  - Custodian Heads are not supervisors because they spend less than ten percent (10%) of their time engaged in strictly supervisory tasks. *American Federation* of *Teachers Local 4212 and Gadsden Independent School District,* 03-PELRB-2006 (May 31, 2006).
  - Food Service Managers are supervisors because they regularly supervise cooks and assistant managers. *American Federation* of *Teachers Local 4212 and Gadsden Independent School District,* 03-PELRB-2006 (May 31, 2006).
  - Head custodians and supervisory custodians at Las Cruces Public Schools are *not* supervisors under PEBA because they performed the same work as their subordinates and functioned as a lead employee. Additionally, some did not supervise at least two or more employees. *In re: Classified School Employees Council-Las Cruces and Las Cruces Schools,* 1 PELRB No. 20 (Feb. 13, 1997).
  - The Doña Ana County Detention Center's Operations Sergeant is a supervisor under PEBA. While all the other sergeant positions are largely interchangeable, her job duties are very different from those of other sergeants and all the other sergeants. In addition, the booking officer and maintenance worker report to her. In contrast to the other Detention Centers sergeants, her work time is devoted almost entirely to supervisory duties such as directing her subordinates' work by reviewing their paperwork for accuracy and completeness, overseeing their work, and evaluating their performance; disciplining and recommending discipline; conducting monthly sergeant meetings; and ensuring that the facility's policies and procedures are communicated to and carried out by staff. Her job duties are also different from that of her subordinates, since unlike other sergeants she works in the administrative part of building and has little contract with detainees, and since she has additional responsibilities regarding facility maintenance

and repair. *In* re *Communications Workers of America, Local 7911 and Doña Ana County,* 1 PELRB No. 16 (Jan. 2, 1996).

- The positions of shift sergeant, classification sergeant, juvenile sergeant and transport sergeant at the Doña Ana County Detention Center are not supervisors under PEBA. The amount of supervisory direction undertaken by the sergeants varies from sergeant to sergeant, and the amount of time a sergeant spends directing subordinates is limited to 25-30% of their workday or may even be eliminated entirely depending on how busy and short-handed a shift may be. The bulk of these sergeants' workday is spent in the performance of non-supervisory duties which are substantially similar to that of their subordinates, such as (1) walking the floor of the jail, (2) checking for contraband , (3) handing out or delivering meals, (4) answering the telephone, (5) cleaning the facility, (6) removing detainees from the cellblocks for court appearances or release, (7) performing intake interviews, (8) escorting detainees to showers, (9) conducting visual searches, and (10) escorting visitors to and from the jail. Thus, these sergeants are mere lead workers, not supervisors, because they perform most, if not all, of the duties as those of their subordinates: they explain tasks to them and expedite the work of a shift that is small in number of personnel; their supervisory functions are incidental and occasional; and, for the most part, their exercise of independent judgment and discretion is limited by reliance on such things as decision trees and the standard operating procedures manual. *In re: Communications Workers* of *America, Local 7911 and Doña Ana County,* 1 PELRB No. 16 (Jan. 2, 1996).
- A maintenance supervisor is not a supervisory employee where he spends most if not all of his time doing maintenance work; he does not have to directly tell the custodians what to do as they know what needs to be done and complete their work without instruction from him; and it is the principal, not the maintenance supervisor, that has the authority to hire, promote, discipline or discharge the custodians, or effectively recommend any of these actions. *NEA and Jemez Valley Public Schools,* 1 PELRB No.10 (May 19, 1995).
- Sergeants were accreted into an existing bargaining unit because their actual duties as performed did not meet the three-part test established by the Board to determine whether an employee is a "supervisor" as that term is defined by the Act. *In re: New Mexico Coalition of Public Safety Officers Ass'n and County of Santa Fe,* 78-PELRB-2012 (Dec. 5, 2012).
- Lieutenants did not meet the statutory definition of supervisors under PEBA and their inclusion would not render the bargaining unit an improper unit. *AFSCME v. N.M. Corrections Dep't.* 02-PELRB-2013 (Jan. 23, 2013).

- **Directing the work of subordinates**
  - This element of the PEBA definition of supervisor is distinct from "supervisory duties". Thus, an employee need not spend a majority of his or her work time directing the work of subordinates but need only do so "customarily and regularly". The phrase "customarily and regularly" means that the conduct is commonly or frequently practiced or observed, at fixed or normal intervals. *NMCPSO/CWA Local 7911 and City of Rio Rancho Police Department,* 04-PELRB-2009, PELRB Case No. 319-08 (April 6, 2009).
  - "Directing" the work of subordinates does not require the supervisor to literally instruct his or her subordinates in how to perform every aspect of their jobs. Thus, an employee may be a "supervisor" under PEBA even though his or her subordinates are largely capable of executing their job duties without direction. It is sufficient in these cases that the disputed employee regulates or determines the activities or course of performance of his or her subordinates, organizes or energizes their work, or trains and leads the performance of their duties. *NMCPSO-CWA Local 7911 and City* of *Rio Rancho Police Department,* 04-PELRB-2009, PELRB Case No 319-08 (April 6, 2009).
  - "Post orders" exist for every duty assignment at the Employer's facilities setting forth how each assignment is to be performed. Lieutenants' reliance upon post orders issued by the Warden of each institution is significant in that they are an indicium of the limitation on, if not the total absence of, the lieutenant's ability to exercise independent judgment. *AFSCME, Council 18 v. N.M. Dep't of Corrections,* 2-PELRB- 2013 (Jan. 23, 2013). No set of standardized rules and procedures can anticipate every contingency and the testimony supports a conclusion that from time to time a lieutenant may be called upon to exercise independent judgment and discretion whenever a situation arises that is not covered under a post order. However, the witnesses testified that such instances rarely occur. When asked, one witness could not think of a single instance arising in his multiple year career that was not covered by a post order. *AFSCME, Council 18 v. N.M. Dep't of Corrections,* 2-PELRB- 2013 (Jan. 23, 2013).
  - The weight of the evidence supported a conclusion that the direction given by lieutenants to their subordinates is almost completely constrained by the post orders issued by the Warden of each facility and therefore, time spent enforcing compliance with those orders does not involve the exercise of independent judgment sufficient to constitute supervision as contemplated under PEBA – any independent judgment exercised was found to be "occasional" or in the performance of non-supervisory duties. *AFSCME, Council 18 v. N.M. Dep't of Corrections,* 2-PELRB-2013 (Jan. 23, 2013).

- **Effectively recommend hiring, promotion or discipline**
  - The “hiring, promotion or discipline” prong is written in the disjunctive, so only one criterion need be met. *NMCPSO-CWA Local 7911 and City* of *Rio Rancho Police Department,* 04-PELRB-2009, PELRB Case No. 319-08 (April 6, 2009).
  - Under the “hiring, promotion or discipline" prong, it is sufficient that the employee have the authority to issue written or oral discipline, even if some of that employee's subordinates-who are lead employees or are otherwise in the bargaining unit-also have similar authority. *NMCPSO-CWA Local 7911 and City of Rio Rancho Police Department,* 04-PELRB-2009, PELRB Case No. 319-08 (April 6, 2009). Lieutenants in the Department of Corrections do not have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively when they merely report instances of a subordinate’s deviation from policies or post orders without a recommendation of any specific level of discipline deemed to be appropriate and all discretion in the imposition of discipline resides entirely with the Warden and the Department’s Human Resources office. Similarly, the lieutenants play no role in the hiring or promotional process; that function resides solely with the Warden and Human Resources staff. The lieutenants’ role in the promotion process is limited to annual performance evaluation of their subordinates. These evaluations are performed on a standardized form prepared by Human Resources staff and are completed based on instructions and training provided by Human Resources staff. Accordingly, they are the sort of occasional peer review or evaluation program contemplated by PEBA as not being an indication of supervisory status. *AFSCME, Council 18 v. N.M. Dep’t of Corrections,* 2-PELRB-2013 (Jan. 23, 2013).

- **Employer designations as supervisor**
  - Duties performed by a sergeant are not supervisory merely because the County has designated the sergeant position to be supervisory. Otherwise, an employer could, merely by labeling positions as supervisory, exclude whole classes or groups of employees from the Act's coverage, without regard to statutory definitions and the Board's role in adjudicating unit determination issues. *In re: Local 7911, Communications Workers of America and Doña Ana Deputy Sheriffs ' Association, Fraternal Order of Police and Doña Ana County,* 1 PELRB No. 19 (Aug. 1, 1996).
  - The public employer retains the right to designate a position as supervisory in nature, but PEBA provides the definition for supervisor for purposes of collective bargaining and unit composition, even over a conflicting definition of a local ordinance. *NEA v. Bernalillo Public Schools,* 1 PELRB No. 17 (May 31, 1996).

- **Employer expectations, job descriptions, and/or SOP manuals**
  - An employer's expectation that an employee shall supervise subordinates even when they are performing the same work as those subordinates is not relative under the PEBA definition. Rather, the PEBA definition requires consideration of duties actually performed, while expectations may not surface or materialize. *In re Communications Workers* of *America,* Local 7911 and *Doña Ana County,* 1 PELRB No. 16 (Jan. 2, 1996).
  - In determining whether or not an employee is an excluded supervisor, a hearing examiner properly relies on witness testimony regarding actual job duties, rather than basing the determination on written job descriptions. *In re: Communications Workers* of *America, Local 7911 and Doña Ana County,* 1 PELRB No. 16 (Jan. 2, 1996).
  - Unit inclusion and exclusion determinations must be based on actual duties performed, rather than on written Job descriptions or Standard Operating Procedures manuals, which merely reflect expectations that may not materialize or surface, especially when juxtaposed against actual duties herein. *In re: McKinley County Sheriff's Association Fraternal Order of Police and McKinley County,* 1 PELRB No. 15 (Dec. 22, 1995).
  - Basing unit determinations on expectations without regard to the actual duties performed could result in the denial of statutory rights to classes of employees. *In re: McKinley County Sheriff's Association Fraternal Order of Police and McKinley County,* 1 PELRB No. 15 (Dec. 22, 1995).
  - Testimony that police sergeants are expected to supervise 100% of the time only reflects the expectation that they will perform supervisory duties whenever called upon to do so. Where, in fact, the expectation only results in the occasional performance or assumption of supervisory or directory roles, the position meets the proviso in the definition for excluding a position from supervisory status. *New Mexico State University Police Officers Association and* New *Mexico State University,* 1 PELRB No. 13 (June 14, 1995). The weight of the evidence supported a conclusion that the direction given by lieutenants to their subordinates is almost completely constrained by the post orders issued by the Warden of each facility and therefore, time spent enforcing compliance with those orders does not involve the exercise of independent judgment sufficient to constitute supervision as contemplated under PEBA – any independent judgment exercised was found to be “occasional” or in the performance of non-supervisory duties. *AFSCME, Council 18 v. N.M. Dep’t of Corrections,* 2-PELRB- 2013 (Jan. 23, 2013).

- **Independent judgment**
  - An important factor in determining supervisory status is whether the employee is exercising independent judgment. or routinely ensuring that procedures and policies are followed. Where an employee is merely relaying instruction from a supervisor or ensuring that subordinates adhere to an established procedure, that individual is not a supervisor under the Act. *In re: McKinley County Sheriff's Association Fraternal Order of Police and McKinley County,* 1 PELRB No. 15 (Dec. 22, 1995).
  - A police lieutenant is appropriately excluded as a supervisor where his or her duties go beyond simply ensuring established procedures and policies are followed, and instead require the use of independent judgment in directing employees. For example, the lieutenant is responsible for the supervision of the patrol division through the planning, controlling and direction of work, i.e., through planning work schedules, determining types and numbers of employees to assign to each shift, and reassigning calls issued by telecommunications. Furthermore, the lieutenant is involved with the applicant review board, whereas the sergeant's rote in that process is minimal or nonexistent. *In re: McKinley County Sheriff's Association Fraternal Order of Police* and *McKinley County,* 1 PELRB No. 15 (Dec. 22, 1995).
  - A telecommunicator supervisor is excluded from a bargaining unit where he is responsible for the overall supervision of the communications personnel; has sole scheduling responsibility: disciplines and evaluates subordinate telecommunicators or effectively recommends such action; is responsible for other telecommunicators' proficiency training; and there is no evidence presented demonstrating that he does not devote a substantial amount of work time to supervisory duties, or that he performs substantially the same duties as his Subordinates. *New Mexico State University Police Officers Association and New Mexico State University,* 1 PELRB No. 13 (June 14, 1995).
  - The Hearing Officer relying on *NLRB v. Kentucky River Community Care,* 532 U.S. 706, 167 LRRM 2164 (2001) concluded that decisions made through ordinary technical or professional judgment do not constitute the exercise of independent judgment that the Board has discretion to determine the degree of independent judgment that an employee must utilize in order to be deemed a supervisor and that the existence of employer-specified standards, rules and regulations may constrain an employee's judgment to such a degree that the direction of others does not rise to the level of supervisory authority. By application of that analysis Lieutenants in the Department of Corrections do not spend a majority of their time performing supervisory duties. *AFSCME, Council 18 v. N.M. Dep't of Corrections,* 2-PELRB- 2013 (Jan. 23, 2013).

- **Lead employees**
  - A "lead employee" is one who performs the same work as his or her subordinates and who does not engage in distinct and separate supervisory duties that require the exercise of independent judgment. *NMCPSO-CWA Local 7911 and City of Rio Rancho Police Department,* 04- PELRB-2009, PELRB Case No. 319-08 (April 6, 2009). *But See IAFF Local 4366 v. Santa Fe County,* 06-PELRB-2009, PELRB Case No. 321-08 (May 7, 2009) (reversing the hearing examiner's findings and conclusions that Fire Department Battalion Captains are essentially lead employees, even though their duties were substantially different, because a majority of their work time was nonetheless spent on routine or clerical duties that did not call for the exercise of independent judgment).
  - Head custodians and supervisory custodians at Las Cruces Public Schools are not supervisors under PEBA because they performed the same work as their subordinates and functioned as a lead employee. Additionally, some did not supervise at least two or more employees. *In re Classified School Employees Council-Las Cruces and Las Cruces Schools,* 1 PELRB No. 20 (Feb. 13, 1997).
  - The positions of shift sergeant, classification sergeant, juvenile sergeant and transport sergeant at the Doña Ana County Detention Center are lead workers, not supervisors, because they perform most, if not all, of the duties as those of their subordinates: they explain tasks to them and expedite the work of a shift that is small in number of personnel; their supervisory functions are incidental and occasional; and, for the most part, their exercise of independent judgment and discretion is limited by reliance on such things as decision trees and the standard operating procedures manual. *In re: Communications Workers of America, Local 7911 and Doña Ana County,* 1 PELRB No. 16 (Jan. 2, 1996).
  - A sergeant's actual duties are of a routine, ministerial nature and fall within the role and function of a lead employee, where the leader (sergeant) performs the duties of the workers (deputies), expedites or facilitates the performance or completion of those duties, and explains tasks to new workers, and supervisory functions "are incidental to the duties performed as a member of the work shift, *In re: McKinley County Sheriffs Association Fraternal Order of Police and McKinley County,* 1 PELRB No. 15 (Dec. 22, 1995).
  - Notwithstanding their job descriptions or the paramilitary structure of the Santa Fe Fire Department, captains are not supervisors under PEBA, but rather are lead employees with limited authority, whose duties are substantially similar to those of their subordinates including firefighting, and who exercise no independent judgment in directing other employees *Firefighters and City of Santa* Fe, 1 PELRB No. 6 (Jan. 19, 1995).

- **Effect of NLRA precedent**
  - The definition of “supervisor” in PEBA is not the same as, or closely similar to, the definition contained in the NLRA because PEBA's definition is delimited by provisos that do not exist in the NLRA definition. Consequently, positions that *may* be supervisory under the NLRA and excluded from the bargaining unit under that act may not be supervisory under PEBA given the difference in definitions *New Mexico State University Police Officers Association and New Mexico State University,* 1 PELRB No. 13 (June 14, 1995).
  - The Hearing Officer relying on *NLRB v. Kentucky River Community Care,* 532 U.S. 706, 167 LRRM 2164 (2001) concluded that decisions made through ordinary technical or professional judgment do not constitute the exercise of independent judgment that the Board has discretion to determine the degree of independent judgment that an employee must utilize in order to be deemed a supervisor and that the existence of employer-specified standards, rules and regulations may constrain an employee’s judgment to such a degree that the direction of others does not rise to the level of supervisory authority. By application of that analysis Lieutenants in the Department of Corrections do not spend a majority of their time performing supervisory duties. *AFSCME, Council 18 v. N.M.* Dep’t of Corrections, 2-PELRB- 2013 (Jan. 23, 2013).

- **Local ordinances' definition**
  - A § 26(B) (Repealed in 2020, see requirements under § 10-7E-10) local ordinance's definition of “supervisor” violated PEBA where it required the employee to "devote a substantial amount of work time in supervisory duties," rather than a "majority of work time" as under PEBA, *IAFF Local 2362 v. City of Las Cruces*, 07-PELRB-2009 (July 6, 2009).

  Note: The hearing examiner, whose report was adopted as the board's own, read ·substantial" in this case to mean as little as 30% or 40%, and the hearing examiner believed this definition would operate to exclude more persons that would be covered under PEBA, However, in fact, the prior PELRB under PEBA I interpreted "substantial' to mean "'being largely but not wholly that which is specified,'" *See New Mexico State University Police Officers Association and New Mexico State University,* 1 PELRB No. 13 (June 14, 1995), and is not as little as either 25-40%. *Id.; In re: Communications Workers of America, Local 7911 and Doña Ana County,* 1 PELRB No. 16 (Jan, 2, 1996); and *In re: Local 7911*, *Communications* Workers *of America and Doña Ana Deputy Sheriffs' Association, Fraternal Order of Police and Doña Ana County,* 1 PELRB No. 19 (Aug. 1, 1996). Moreover, in a prior recent case, the Board adopted a hearing examiner report that based its alternative reasoning on the old meaning of "substantial" as interpreted by the first PELRB under PEBA I. *Compare NMCPSO-CWA Local 7911 and City of Rio Rancho Police Department,* 04-PELRB-2009, PELRB Case No. 319-08 (April 6, 2009).
  - A provision of a grandfathered local ordinance that defines certain classes of employees as supervisors, and thus excluded them from the ordinances or resolution's coverage, shall be denied grandfathered effect under PEBA, *City of Deming v. Deming Firefighters Local 4251,* 2007-NMCA-686, 141 N.M. 686, 160 P.3d 595.
  - Local boards approved by the PELRB under § 10 are required to follow all procedures and provisions of the Act, and therefore must follow PEBA's definition of “supervisor”. *Las Cruces Professional Fire Fighters and IAFF, Local No. 2362 v. City of Las Cruces,* 1997-NMCA-044, 123 N.M. 329, 940 P.2d 177.
  - A § 10 local ordinance's definition of supervisor violates PEBA by expressly including police and fire department sergeants, lieutenants, captains and higher ranks, because it thereby expands the PEBA definition and denies organizing and bargaining rights to classes of employees who may be guaranteed rights under PEBA. *AFSCME* and *Los Alamos County Firefighters v.* County *of Los* Alamos, 1 PELRB No. 3 (Dec. 20, 1994).
  - Unilateral designation of certain job positions as supervisory usurps the function of the Board or local board, in a representation proceeding, to determine bargaining unit composition. *AFSCME* and *Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).
  - The absence from a local ordinance's definition of supervisor of the statutory proviso is significant because its absence, unlike in the case of the proviso for management employees, is likely to sweep some employees into the category of supervisor who would not be supervisors under PEBA. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).

- **Majority of work time**
  - The 2020 amendment codified that the PEBA requires a “majority of work time be devoted to supervisor duties. PELRB jurisprudence concerning § 26(B) local ordinances requiring a "substantial amount of time "being declared void because the local ordinance would exclude more employees than does the PEBA, by excluding those employees who supervise only 30% or 40% or some other substantial amount of their work time (*IAFF Local* 2362 *v. City of Las Cruces,* 07-PELRB-2009 (July 6, 2009). See also *NMCPSO-CWA Local 7911 and City of* Rio *Rancho Police Department,* 04-PELRB-2009, PELRB Case No. 319-08 (April 6, 2009); *Santa Fe Police Officers ' Association v. City of Santa Fe*, 02-PELRB-2007 (Oct. 14, 2007) while not not overruled are certainly “old law” rendered unnecessary by the 2020 amendment eliminating Section 26(B) boards.).

- **Routine, ministerial duties**
  - "Routine, clerical or ministerial duties" are duties that do not require the exercise of independent judgment and such duties therefore cannot be supervisory in nature. *NMCPSO-CWA Local 7911 and City of Rio Rancho Police Department,* 04-PELRB-2009, PELRB Case No. 319-08 (April 6, 2009). *But see IAFF Local 4366 v. Santa Fe County,* 06-PELRB-2009, PELRB Case No. 321-08 (May 7, 2009) (reversing the hearing examiner's findings and conclusion that Fire Department Battalion Captains are not supervisors because, although they do have supervisory duties, a majority of their work time is spent on routine, ministerial duties).
  - Sergeants are appropriately included in the bargaining unit where the majority of their work time is consumed by duties of a routine nature, which are also closely aligned with the duties performed by subordinate patrol officers *and* deputies. *In re: McKinley County Sheriffs Association Fraternal Order of Police* and *McKinley County,* 1 PELRB No. 15 (Dec. 22, 1995).
  - A sergeant's actual duties are of a routine and ministerial nature, and fa11 within the role and function of a lead employee, where the sergeant performs the duties of the deputies; expedites or facilitates the performance or completion of those duties; explains tasks to new workers; and any supervisory functions "are incidental to the duties performed as a member of the work shift. *In re: McKinley County Sheriffs Association Fraternal Order of Police* and *McKinley County,* 1 PELRB No. 15 (Dec. 22, 1995).

- **Substantial amount of work time**
  - Under the PEBA I definition of supervisor, 40% of work time was held to be insufficient to constitute "substantial amount of work time: *In re: Local 7911*, *Communications Workers of America and Doña Ana Deputy Sheriffs' Association, Fraternal Order of Police and Doña Ana County,* 1 PELRB No. 19 (Aug. 1, 1996).
  - Under the PEBA I definition of supervisor, 25-30% of work time was held to be insufficient to constitute "substantial amount of work time." *In re: Communications Workers* of *America, Local 7911 and Doña Ana County, 1* PELRB No. 16 (Jan. 2, 1996)
  - Under the PEBA I definition of supervisor, "substantial" was interpreted "according to its plain and ordinary meaning found in Webster's New Collegiate Dictionary' to mean ·' ... considerable in quantity, significantly large.... being largely but not wholly that which is specified," and 25% of work time was held to be insufficient to meet this standard. *New Mexico State University Police Officers Association and New Mexico State University,* 1 PELRB No. 13 (June 14, 1995).
  - Much of the administrative work lieutenants engage in "is of a routine or clerical nature, such as recording attendance, or creating shift rosters rather than engaging in actually scheduling. Administrative duties such as completing serious incident reports in which the lieutenants merely compile the reports of others, or processing attendance records are not supervisory in nature. Based on witness testimony and being generous to the employer in the estimation of time spent in duties that could arguably be described as "supervisory" as contrasted with ministerial or administrative functions, the Hearing Officer calculated approximately 4.25 hours out of a possible 12-hour shift that may be considered to be supervisory. It cannot be said based on that testimony that the lieutenants at issue devote a majority amount of work time to supervisory duties. *AFSCME, Council 18 v. N.M. Dep't of Corrections,* 2-PELRB- 2013 (Jan. 23, 2013).

- **Substantially same duties**
  - It is not sufficient to perform substantially different duties, if the majority of the different duties are routine, clerical or ministerial in nature because they do not involve the exercise of independent judgment. *NMCPSO-CWA Local 7911 and City of Rio Rancho Police Department,* 04-PELRB-2009, PELRB Case No. 319-08 (April 6, 2009), and attached. adopted hearing examiner report. *But see IAFF Local 4366 v. Santa* Fe *County,* 06-PELRB-2009, PELRB Case No. 321-08 (May 7, 2009) (reversing the hearing examiner's findings and conclusion that Fire Department Battalion Captains could be accreted into the existing bargaining unit because, although their duties were substantially different, a majority of their work time was nonetheless spent on routine or clerical duties that did not call for the exercise of independent judgment).
  - Police sergeants are not excluded as supervisors where they spend 75% of their work engaged in the same patrol duties as their subordinates, such as patrolling the university, issuing citations, appearing in court, and providing support or backup to other officers. *New Mexico State University Police Officers Association and New Mexico State University,* 1 PELRB No. 13 (June 14, 1995).
  - Notwithstanding their job descriptions or the paramilitary structure of the Santa Fe Fire Department, captains are not supervisors under PEBA, but rather are lead employees with limited authority, whose duties are substantially similar to those of their subordinates including firefighting, and who exercises no independent judgment in directing other employees. *Firefighters and City of Santa Fe,* 1 PELRB No.6 (Jan. 19, 1995).

- **Supervisory duties**
  - Supervisory duties are marked by the use of independent judgment, and supervisors are distinguished from lead employees who typically do substantially the same job as their subordinates except for occasional routine or clerical duties that do not require independent judgment. *NMCPSO-CWA Local 7911 and City of Rio Rancho Police Department,* 04-PELRB-2009, PELRB Case No. 319-08 (April 6, 2009), and attached, adopted hearing examiner report. *But see IAFF Local 4366 v. Santa Fe County,* 06-PELRB-2009, PELRB Case No. 321-08 (May 7, 2009) (reversing the hearing examiner's findings and conclusion that Fire Department Battalion Captains could be accreted into the existing bargaining unit because, although their duties were substantially different, a majority of their work time was nonetheless spent on routine or clerical duties that did not call for the exercise of independent judgment).
  - Supervisory duties are not limited to directing the work of others, and can instead include any administrative or liaison duties that involve the use of independent judgment in effectuating the employer's purposes, goals and objectives. *NMCPSO-CWA Local 7911 and City of Rio Rancho Police Department,* 04-PELRB-2009, PELRB Case No. 319-08 (April 6, 2009).

§ 10-7E-5 [Rights of public employees.]

- **Right to *Excelsior* list of names and address**
  - The failure to provide a union with the names and home addresses of proposed bargaining unit employees interferes with, restrains or coerces the public employees in their right to form, join or assist a union for purposes of collective bargaining. *SSEA, Local* 3878 *v. Socorro Consolidated School District,* 05-PELRB-2007. (Dec. 13, 2007), citing *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1996).
    Note: By citing with approval to *Excelsior* the Board implicitly rejected arguments of counsel that *Excelsior* should not apply to the public sector, and that the PELRB should follow precedent under the Federal Labor Management and Employees Relations Act, 29 USC §§ 7101 *et seq*. rather than the NLRA.

- **Supervisors excluded**
  - The failure to expressly exclude supervisors from those public employees protected under § 5 was a clerical or typographical error, and the omission does not mean that supervisors are covered under PEBA provided that they are represented in a separate bargaining unit under § 13(A). The continued exclusion of supervisors under PEBA II was balanced by the legislature against the narrowing of the definition of supervisor (or expansion of the employees covered under PEBA) by use of the phrase "majority of work time" rather than "substantial amount of work time." *Santa Fe Police Officers' Association v. City of Santa Fe,* 02-PELRB-2007 (Oct. 14, 2007).
    Note: This decision characterizes “substantial amount of work time" differently than did the prior PELRB under PEBA I.

- **Union Representation during disciplinary interviews**
  - In a split ruling the Board held that *Weingarten*-type rights exist under PEBA. *See AFSCME, Council 18 v. New Mexico Children, Youth and Families Department,* 10-PELRB-2013 (May 15, 2013). There are several prior cases discussing the issue, some of which resulted in Hearing Officers’ decisions not appealed to the full Board and therefore, under PELRB’s rules, not binding precedent. Others were appealed to the Board and may be cited as precedence including one case involving the same Respondent as in 10-PELRB-2013: In *Pita S. Roybal v. CYFD*, 02-PELRB-2006, the employee appealed a Hearing Officer’s dismissal of her PPC on the ground that *Weingarten* rights did not apply to her case. The Board affirmed the Hearing Officer’s dismissal on the ground that the meeting at issue was not investigatory. In so doing the Board did not question that *Weingarten* rights exist under PEBA; rather, it enumerated them.
  - In *AFSCME, Council 18 v. N.M. Dep’t of Health*, 06-PELRB-2007 the Board adopted the principle that: “...PEBA protects peaceful concerted activity for mutual aid and support to the same extent as does the NLRA... Comparing PEBA to the NLRA...the protections provided by PEBA are
    sufficiently similar to those provided by the NLRA to warrant the inference that the New Mexico Legislature intended to protect public employees engaged in more general concerted activities, not only those activities performed to assist a labor organization.” (Citation omitted). The Board relied on Section 5 of PEBA finding that it provides “basically the same rights” as Section 7 of the NLRA. The differences in text “appear to be directed to streamlining the language utilized in the NLRA, rather than limiting or narrowing the enunciated rights." *Also see, AFSCME, Council 18 v. N.M. Children, Youth and Families Dep’t.* 1-PELRB-2013 (PELRB 122-12, May 15, 2013).
  - In *AFSCME Council 18, on Behalf of Daniel Nogales v. City of Albuquerque Parks and Recreation Department and the City of Albuquerque Personnel Board*; 2nd Judicial District Court No. CV 2022012-02239 Parks and Recreation Department worker Daniel Nogales appeal to the District Court from a decision of the Albuquerque Personnel Board upholding termination of his employment. AFSCME raised

two issues on appeal on behalf of Nogales: (1) Nogales' termination is contrary to law because he was denied his right to union representation during the investigative process, contrary to *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975) and (2), The Personnel Board's decision as not supported by substantial evidence. The City argued that *Weingarten*'s application is limited to private sector employees and that the Personnel Board was without jurisdiction to hear the issue. The Court stated that although it is "unquestionable that *Weingarten* specifically addressed a private sector employee who was covered under the National Labor Relations Act ("NLRA") ... the City has not explained why the PEBA should not be interpreted in the same way as the NLRA was interpreted in *Weingarten* or otherwise substantiated its argument. Overall, the Court is not convinced that the PEBA does not encompass *Weingarten* rights." Neither was the Court convinced that the Personnel Board did not have jurisdiction to address the *Weingarten* dispute. While acknowledging that such disputes would typically be heard as a PPC by the City's Labor-Management Relations Board, a *Weingarten* violation can affect imposed discipline as was, therefore, "highly relevant to the Personnel Board." As to the merits of the *Weingarten* violation the Court ruled that a violation of the employee's rights occurred when the Assistant Superintendent denied his request for union representation at the initial meeting but that *Weingarten* rights did not apply to law enforcement investigation of potential crimes. Therefore, no violation occurred when he was denied union representation when APD sought to interview him.

§ 10-7E-7, [Appropriate governing body; public employer.]

- Instrumentalities, agencies and institutions of local government are included as separate appropriate governing bodies under PEBA by virtue of use of the phrase "local public body" in § 7. *USWA and Gila Regional Medical Center,* 1 PELRB No. 14 (Nov. 17, 1995)
- As an instrumentality, agency or institution of Grant County that is solely responsible for managing the hospital and for performing all tasks and assuming all responsibilities associated with the hospital's employees, the Gila Regional Medical Center is a public employer under the Act and is the appropriate governing body. *USWA and Gila Regional* Medical *Center and Grant County Board of County Commissioners,* 1 PELRB No. 14 (Nov. 17, 1995).
- A County is not an appropriate governing body where its instrumentality, agent or institution routinely acts independently of the County and disregards County Commissioner recommendations, and where the County has historically denied legal liability related to the operation of the instrumentality, agent or institution. *USWA and Gila Regional Medical Center and Grant County Board of County Commissioners*, 1 PELRB No. 14 (Nov. 17, 1995).
- The definition of "public employer" must be read in conjunction with the provision of the Act regarding a public employer's "governing body which, according to § 7, is the policy making body, or the body or person charged with management of the local public body. Therefore, the critical question is who is charged with management of the public body. Determining who is charged with the management of the local public body requires addressing the factual question of who has the authority to hire, promote, evaluate, discipline, discharge and set work rules for the employees in question. *In re: United Steelworkers Associations and Gila Regional Medical Center and Grant County Board of County Commissioners*, 1 PELRB No. 14 (Nov. 17, 1995).

§ 10-7E-8, [PELRB; created; terms; qualifications.]

- The union sought a writ of mandamus from the Supreme Court to prohibit the Governor from removing two members of the Public Employee Labor Relations Board. The Supreme Court granted the writ, holding that none of the PELRB members served at the pleasure of the Governor, though the Public Employee Bargaining Act obligates the Governor to appoint them. Based on Article XX, Section 2 of the New Mexico Constitution, the Court found that the third neutral board member whose appointment had expired continued to serve until his successor is duly qualified "unless he is lawfully removed." Because constitutional due process required a "neutral tribunal with members who were free to deliberate without fear of removal by a frequent litigant such as the Governor. the Governor was enjoined from removing the PELRB members. *AFSCME v. Martinez and the State of New Mexico,* 2011-NMSC-018, No. 32,905.
- The New Mexico Supreme Court addressed whether the Governor could use the broad removal authority granted by Article V, Section 5 of the New Mexico Constitution to remove members of the Public Employee Labor Relations Board (PELRB) who were responsible for adjudicating disputes involving the Governor. The court ruled in the negative, citing three key reasons. First, none of the PELRB members served at the pleasure of the Governor. The Public Employee Bargaining Act (PEBA) obligated the Governor to appoint one member recommended by organized labor, one member recommended by public employers, and one neutral member jointly recommended by those two appointees. Second, the Governor's duty to "take care that the laws be faithfully executed," as outlined in Article V, Section 4 of the New Mexico Constitution, required respecting the PEBA's provisions for continuity and balance. Attempting to remove appointed

PELRB members would undermine this balance. And finally, The court emphasized the importance of constitutional due process. A neutral tribunal, free from fear of removal by a frequent litigant (such as the Governor), was necessary for fair deliberation. *See AFSCME v. Martinez,* 2011-NMSC-018, 150 N.M. 132, 257 P.3d 952.

§ 10-7E-9(A), [PELRB; powers and duties-issue regulations.]

- **PELRB regulations as force of law**
  - PELRB regulations have the force of law if promulgated in accordance with the statutory mandate to carry out and effectuate the purpose of PEBA. *City of Las Cruces v. Public Employee Labor Relations Bd.,* 1996-NMSC-024, 121 N.M. 688, 917 P.2d 451.

§ 10-7E-9(B), [PELRB; powers and duties-conduct hearings.]

- **Authority to conduct adjudicatory hearings**
  - The separation of powers doctrine does not prevent the PELRB, an executive agency, from acting as an adjudicatory body by passing on the merits of a complaint alleging that a local labor ordinance's provisions violate PEBA. *Santa Fe County* and *AFSCME,* 1 PELRB No.1 (Nov. 18, 1993). *See also AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).

§ 10-7E-9(F), [PELRB; powers and duties-administrative remedies.]

- **Attorney fees**
  - The imposition of attorney fees is not an appropriate administrative remedy under PEBA. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No.3 (Dec. 20, 1994).

- **Denial of local board approval**
  - Where a local labor ordinance violates PEBA, the PELRB may deny approval of the application for a local board and may declare the ordinance to be of no effect unless and until the governing body revises the offending provisions consistent with the Board's determination. *AFSCME* and *Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).

- **Duty of fair representation (DFR) claims**
  - The PELRB lacks authority under § 9(F) to either award monetary damages to an aggrieved union member for a union's breach of its duty of fair representation, or to order the Union to reinstate an employee allegedly improperly terminated as a result of the Union's breach. Therefore, claims for breach of the duty to fairly represent bargaining unit members cannot be brought before a Labor Relations Board and must instead be filed in District Court. *Callahan v. New Mexico Federation of Teachers-TVI,* 2006-NMSC-010, 139 N.M. 201, 131 P.3d 51.
  - A union member stated a claim for relief for breach of the duty of fair representation when he pleaded that the union had acted arbitrarily, in bad faith, and in violation of its trust when it refused to press the member's grievance to arbitration. *Callahan,* 2006-NMSC-010, (reiterating the holding in *Jones v. International Union of Operating Engineers,* 1963-NMSC-118, 72 N.M. 322, 330-32, 383 P.2d 571, 576-78. "[T]he breach of duty of fair representation requires a showing of arbitrary, fraudulent, or bad faith conduct[.]" *Id.* ¶¶ 13-15; *See also Vaca v. Sipes,* 386 U.S. 171, 190, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) ("A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary,
    discriminatory, or in bad faith."). The claim for breach of the duty of fair representation cannot be premised upon mere negligence. *See Callahan, Id*; *See also United Steelworkers of Am. v. Rawson,* 495 U.S. 362, 372-73, 110 S. Ct. 1904, 109 L.Ed.2d 362 (1990) (stating that mere negligence will not state a claim for breach of the duty of fair representation); *Webb v. ABF Freight Sys., Inc.,* 155 F.3d 1230, 1240 (10th Cir.1998) (stating that a union does not "violate[ ] its duty of fair representation by mere negligent conduct; carelessness or honest mistakes are not sufficient to impose liability on a union").
  - AFSCME's Motion for Summary Judgment dismissing all claims was granted, both because the complaint was not timely filed, and because there was no evidence of arbitrary or discriminatory action, nor was there evidence of bad faith. Even if, arguendo, Trujillo was not timely notified of the final State Personnel Board decision by the Union representatives, AFSCME's actions were negligent and therefore not sufficient to state a claim for breach of a duty of fair representation under the standard set forth in Granberry v. Albuquerque Police Officer's Assoc., 2008-NMCA-094, 144 N.M. 595, 598 189 P.3d 1217, 1220). Finally. AFSCME had no obligation to assist Trujillo in his private appeal to the court. See Johnny M. Trujillo v. AFSCME, Local 3973, No. D-0608-CV-00250 (J. Robinson, March 13, 2017).

- In United Health Professionals of New Mexico, v. University of New Mexico Sandoval Regional Medical Center, Case No.; D-202-CV-2023-01330, an emergency motion was filed by the respondent, University of New Mexico, seeking a stay of enforcement for a specific administrative order, 59-PELRB-2023. The motion's objective was to halt all proceedings related to that order, including an ongoing declaratory judgment action. However, the court denied the motion, citing several critical points. First, there was confusion regarding the timing of the motion. The First Rule 1-074 Appeal had already been closed for four months, rendering the stay motion irrelevant. Second, Hon. Victor Lopez had previously reversed orders issued by the Public Employee Labor Relations Board (PELRB), which undermined the basis for relief sought by the respondent. Third, the motion sought a stay of enforcement for 59-PELRB-2023 and related proceedings. Respondent argued that without a stay, they would be forced to negotiate with an entity before the appeal's merits were heard. The court clarified that it lacked authority to stay related administrative proceedings before the PELRB. Rule 1-074(Q), cited by the respondent, did not apply to this case; it only governed the Second Rule 1-074 Appeal. Additionally, the respondent's request to stay enforcement of 59-PELRB-2023 should have been made in the Second Rule 1-074 Appeal as well. Finally, since 59-PELRB-2023 was an enforceable order issued by the PELRB, the court found no grounds for a stay in the declaratory judgment action. Furthermore, there are other related cases, such as 60-PELRB-2023, where the Public Employee Labor Relations Board affirmed the Hearing Officer's report and dismissed a complaint filed by United Health Professionals of New Mexico against UNM Sandoval Regional Medical Center. The complaint alleged prohibited labor practices related to retaliation for union activity and disciplinary actions. See United Health Professionals of New Mexico v. University of New Mexico Sandoval Regional Medical Center, Case No.: D-202-CV-2023-01330, (J. Allison, May 15, 2024).

- **Punitive damages**
  - The imposition of punitive damages is not an appropriate administrative remedy under PEBA. *AFSCME and Los Alamos County Firefighters v. County of Los* Alamos, 1 PELRB No. 3 (Dec. 20, 1994).

§ 10-7E-9(G), (Amended in 2020), [PELRB; powers and duties-fair share.]

- **Fair share as a subject of bargaining under PEBA I and II no longer enforceable**
  - PEBA II expressly identified fair share payments as a permissive subject of bargaining, whereas PEBA I had interpreted it as a mandatory subject. *Cf*. § 10-7E-9(G) and § 10-7D-9(G). This provision has since been rendered moot after the U.S. Supreme Court's decision in *Janus v. AFSCME,* 138 S. Ct. 2448, 2486 (2018), which held that union dues deduction agreements for agency fees (fair share payments) are no longer enforceable.
  - Under PEBA I, the PELRB held that fair share was a mandatory subject of bargaining as under NLRA precedent. The language of § 9(G) was subsequently amended under PEBA II to expressly state that "[t]h issue of fair shall be left a permissive subject of bargaining ..."
  - PEBA §9(G) provides that "fair share" shall be a permissive subject of bargaining. In contrast the State is obligated to bargain "dues deductions", as a mandatory subject of bargaining. *See* §17(C). The Board found factual issues exist so as to preclude Summary Judgment with regard to whether proposed "union security" clauses may fairly be said to be squarely within the provisions of PEBA §17(C) or of some other recognized mandatory subject of bargaining, or if they include language that may be said to be within §9(G)'s permissive subject matter. If the union includes fair share language in its dues deductions proposals, then it calls into question whether a provision that would otherwise be a mandatory subject of bargaining remains so. *AFSCME Council 18 v. State of New Mexico,* 62-PELRB-2012.
  - As part of an interest arbitration award, the Arbitrator rejected a proposed indemnification clause wherein management sought to add to a Fair Share Article, changes to sick leave and vacation leave accrual rates, sick leave conversion payouts and other changes to the *status quo*. *Doña Ana County (Sheriff) and CWA, Local 7911*; FMCS Case #13-51332-1, Aug. 27, 2013.
  - Under the former law (pre-*Janus*) unions seeking to preserve or add to fair share provisions included in their contracts, they must do so with the understanding that such provisions are a permissive subject of bargaining pursuant to PEBA § 9(G). *AFSCME Council 18 and CWA, AFL-CIO, SEA v. State of New Mexico*; PELRB No.106-12.
  - Following the *Janus* decision, a separate suit was brought where the plaintiff sought retrospective relief for dues paid while a member of a trade union. Over the course of his employment, the plaintiff had signed three union membership agreements and due's deduction authorizations. The court found in favor of the defendants stating that the signed agreements were binding documents that the plaintiff freely entered into on multiple occasions and the *Janus* case did not permit the plaintiff to renege on his contractual obligations. *See, Hendrickson v. AFSCME Council 18,* 992 F. 3d 950 - Court of Appeals, 10th Circuit 2021.

§ 10-7E-10(A), [Local Board; created upon approval by the PELRB.]

- **Approval of content of local ordinances - Generally**
  - The PELRB has jurisdiction to review a local ordinance, "whether grandfathered or not: for compliance with PEBA. *City of Deming v. Deming Firefighters Local 4251*, 1 PELRB No. 2005 (March 31, 2005), aff'd *City of Deming v. Deming Firefighters Local 4251,* 2007-NMCA-069, 141 N.M. 686, 160 P.3d 595. (Overruled on other grounds).
  - Because a legislative enactment is entitled to a presumption of validity, the PELRB will presume that the absence of a proviso from the local ordinance does not imply denying statutory rights to any class of employees who are guaranteed them under PEBA. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos*, 1 PELRB No.3 (Dec. 20, 1994).
  - The PELRB does not have the authority to pass on the constitutionality of local ordinances. *Santa Fe County and AFSCME,* 1 PELRB No.1 (Nov. 18, 1993).
  - So long as a lawful interpretation is reasonable, the Board will not read an unlawful interpretation into the words of an ordinance. *Santa Fe County and AFSCME,* 1 PELRB No.1 (Nov. 18, 1993).
  - The Declaratory Judgment Act, NMSA 1978, §§ 44-6-1 to-15 (1975), does not grant the district courts exclusive authority to determine the validity of a local labor ordinance. *Santa Fe County & AFSCME,* 1 PELRB No.1 *(*Nov. 18, 1993). *See also AFSCME and Los Alamos County Firefighters v. County of Los Alamos*, 1 PELRB No.3 (Dec. 20, 1994).
  - Being a home rule jurisdiction under Article X, Sections 5 and 6 of the New Mexico Constitution does not shield that employer from PELRB review of its local ordinance. *Santa Fe County and AFSCME,* 1 PELRB No.1 (Nov. 18, 1993).

- **§ 10 Boards**
  - Section 10(A) expressly empowers the Board to approve or disapprove local collective bargaining boards "created by ordinance," depending on whether the ordinance meets specified criteria for structure, tenure, appointment and payment of the board members. Section 10(A) also reflects the legislature's delegation of authority to the Board to determine whether the other provisions of a local bargaining ordinance comply with the state statute by stating that '[a] local board shall follow all procedures and provisions of the [PEBA] that apply to the [state] board unless approved by the state board.' (Emphasis added in Decision.) Thus, the Legislature has dear1y delegated to the Board the authority to determine whether provisions of a local public body's collective bargaining ordinance comply with the standards PEBA establishes for such ordinances, when a PPC filed with the Board challenges those provisions. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No.3 (Dec. 20, 1994).
  - The PELRB has jurisdiction and authority to review the content of § 10 local ordinances for compliance with PEBA. *Santa Fe County and AFSCME,* 1 PELRB No.1 (Nov. 18, 1993). *See* also *Board of County Commissioners of Otero County et al. v. State of New Mexico Public Employee Labor Relations Board,* Case No. CV-93-187 (J. Leslie C. Smith) (Jul. 13, 1993) (dismissing mandamus action against Board to enjoin it from hearing such cases) and *AFSCME v. County of Santa Fe,* Case No. SF 93-2174 (J. Herrera) (Jul. 8, 1994) (upholding the Board's decision in 1 PELRB No. 1).

- **§ 26 Boards (Repealed, 2020)**
  - Petitions for writ of prohibition against the PELRB, related to its hearing a PPC that a §26(B) labor ordinance fails to meet the requirements of that section, will not be heard by the Supreme Court. *See City of Las Cruces v. Juan B. Montoya and PELRB,* Supreme Court of New Mexico, Case No. 31,629 (March 24, 2009).
    Note: Although no reasoning or analysis was provided, the underlying briefing addressed the fact that both New Mexico Courts and the PELRB have routinely upheld the PELRB's authority to review local ordinances' compliance with PEBA, even where grandfathered; and that local boards grand fathered under §26(B) are subject to many more substantive requirements than §26(A) boards, and thus permit greater grounds for the PELRB's exercise of jurisdiction to review such ordinances. In the context of the 2020 amendments, this case and those that follow may stand for the proposition that the Board has ongoing authority to review local board rules and decision for conformance with the PEBA.
  - The PELRB *may* review and invalidate portions of § 26(A) grandfathered ordinances that violate PEBA. *NEA v. Bernalillo,* 1 PELRB No. 17 (May 31, 1996).
  - After the neutral member of the City's LMRB recused himself in a PPC the Mayor made an interim appointment with the result that management effectively controlled two of the three local board appointments. *See* Albuquerque Ordinance § 3-2-15(A) – (D). A union representing City employees filed a challenge to the City of Albuquerque's § 26(A) grandfathered status with the PELRB on the ground that the local ordinance did not meet PEBA's requirement for appointment of a neutral board. The PELRB denied the City's motion to dismiss for lack of jurisdiction. The City won a writ of prohibition staying PELRB proceedings pending appeal. The Court of Appeals reversed the grant of the writ and denial of the motion

to dismiss and the matter was remanded for further proceedings. *City of Albuquerque v. Juan B. Montoya and PELRB*, 2010-NMCA-100, 148 N.M. 930, 242 P.3d 497. In *City of Albuquerque v. Juan B. Montoya*, et al., 2012-NMSC-007, New Mexico's Supreme Court construed PEBA §26(A) as it pertained to Albuquerque's process for the appointment of interim members to its Labor-Management Relations Board. Citing to *City of Deming v. Deming Firefighters Local 4521*, 2007-NMCA-069, 141 N.M. 686, 160 P.3d 595 and to *The Regents of the University of New Mexico v. New Mexico Federation of Teachers and American Assoc. of University Professors*, 1998-NMSC-020, 125 N.M. 401, 962 P.2d 1236, *Montoya* reiterates the basic proposition that PEBA §26(A) allows a public employer to preserve an existing collective bargaining system created prior to October 1, 1991, as long as the "system of provisions and procedures permits employees to form, join or assist a labor organization for the purpose of bargaining collectively through exclusive representatives". With regard to the application of PEBA §10 to entities grandfathered under §26(A), the Supreme Court disagreed with the Court of Appeals' holding that the Albuquerque Local Board's process for selecting an interim board member ignored §10(B) but did not take issue with the application of §10(B) generally, even in the presence of a §26(A) grandfathered entity. The Montoya Court said quite plainly that NMSA §107E-10(A) requires that the local board be balanced in membership and therefore a neutral body and specifically references §10-7E-10(B) which requires a local board shall be composed of three members appointed by the public employer; one appointed on the recommendation of individuals representing labor, one appointed on the recommendation of individuals representing management and one appointed on the recommendation of the first two appointees. Following that analysis the Board concluded that where a local ordinance uses its Personnel Board together with the City council as the functional equivalent of State's Labor Board, that ordinance does not meet the requirements of PEBA §10(B), does not meet the fundamental requirement of PEBA for ensuring balance and neutrality because representatives of labor have no recommendation for appointment to the board in any real sense and there exists the real possibility that management controls at least four of the five positions. See In re: *Raton Fire Fighters Association, IAFF Local 2378 v. City of Raton*, 3 PELRB 2013 (June 20, 2013).

- **Continuing PELRB jurisdiction**
  - The PELRB does not infringe on a clear legal right of a public employer, and does not exceed its authority under PEBA, when it exercises jurisdiction to hear a matter after a local board had been approved but where the local board lacked board members and was not meeting for business. *Gallup-McKinley County Schools* v. *PELRB* and *McKinley County Federation of United School Employees Local 3313*, 2d Judicial Dist. Case No. CIV-2005-07443 (Nov. 23, 2005, J. Campbell) (denying School's Petition for Writ of Mandamus and Stay of Proceedings).
    Note: In this case, it was undisputed that the local board lacked board members and was not meeting for business when the PPC was filed, but the Order does not reference these facts.
  - If the local board is not fully functional and operational, the PELRB *may* exercise jurisdiction over a matter. *In the Matter of the Disqualification of Deputy Director Pilar Vaile, AFT v, Gadsden Independent School District (Gadsden),* Case No's. 132-05 and 309-05 (oral ruling, Minutes, PELRB Board Meeting, August 19, 2005).
  - The Board will order the reinstatement and continued processing of a PELRB matter where the local board to which it was transferred was not yet in fact created or appointed and where the complainant alleges that the public employer has used the process of setting up a local board to delay the processing of pending matters. *AFSCME v. New Mexico State University,* 02-PELRB-2005 (June 22, 2005).

- **Local board 's assumption of PELRB duties**
  - The PELRB shall transfer a matter to a local board when the local board is "fully functional and operational. A local board is "fully functional and operational" where all members of the local board have been appointed, it has promulgated rules and it is meeting and conducting business. *In the Matter of the Disqualification of Deputy Director Pilar Vaile, AFT v. Gadsden Independent School District (Gadsden).* Case No's. 132-05 and 309-05 (oral ruling, Minutes, PELRB Board Meeting, August 19, 2005).
  - The Board found Respondent's local Labor-Management Commission to be duly constituted and fully functional, citing to the New Mexico Supreme Court's decision in *AFSCME v. Martinez and the State of New Mexico,* 2011-NMSC-018, No. 32,905 (2011) *supra.* Therefore, the Board did not have jurisdiction over the parties and the subject matter in three of the consolidated PPC's alleging violations that would come under the jurisdiction of the local board. The Board found that it did have jurisdiction over three other consolidated PPC's alleging violations of PEBA §19(G). With regard to those claims the Board held that the union did not meet its burden of proof needed to establish grounds for revocation of its approval of the local Board. *Northern Federation of Education Employees v. Northern New Mexico Community College, et al.* (July 2, 2012), upheld on appeal in First Judicial District Court Case No. D-101-CV-2012-02100.

§ 10-7E-10(B), [Local board created]

- **Method of appointment**
  - New Mexico District Courts confirmed the Board's authority under PEBA I to review the content of labor ordinances and resolutions, as part of the process of approving local boards. However, under PEBA II grandfathered ordinances enacted prior to October 1, 1991, no longer have to result provide "substantially equivalent" rights as provided under PEBA I. Rather, deference is paid to the very oldest grandfathered ordinances provided they extend collective bargaining rights to the same classes of employees as enjoyed those rights under PEBA, *See Gallup McKinley Schools*, PELRB Case No. 103-07 at 10.
  - In *City of Albuquerque v. Juan B. Montoya, et al.*, 2012-NMSC-007, New Mexico's Supreme Court construed PEBA §26(A) (Repealed in 2020), as it pertained to Albuquerque's process for the appointment of interim members to its Labor-Management Relations Board. Citing to *City of Deming v. Deming Firefighters Local 4521,* 2007-NMCA-069, 141 N.M. 686, 160 P.3d 595 and to *The Regents of the University of New Mexico v. New Mexico Federation of Teachers and American Assoc. of University Professors,* 125 N.M. 401, 962 P.2d 1236 (1998), *Montoya* re-iterates the basic proposition that PEBA §26(A) (Repealed in 2020), allows a public employer to preserve an existing collective bargaining system created prior to October 1, 1991, as long as the "system of provisions and procedures permits employees to form, join or assist a labor organization for the purpose of bargaining collectively through exclusive representatives". With regard to the application of PEBA §10 to entities grandfathered under §26(A) (Repealed in 2020), the Supreme Court disagreed with the Court of Appeals' holding that the Albuquerque Local Board's process for selecting an interim board member ignored §10(B) but did not take issue with the application of §10(B) generally, even in the presence of a §26(A) (Repealed in 2020), grandfathered entity. The *Montoya* Court said quite plainly that NMSA §10-7E-10(A) requires that the local board be balanced in membership and therefore a neutral body and specifically references §10-7E-10(B) which requires a local board shall be composed of three members appointed by the public employer; one appointed on the recommendation of individuals representing labor, one appointed on the recommendation of individuals representing management and one appointed on the recommendation of the first two appointees. Following that analysis the Board concluded that where a local ordinance uses its Personnel Board together with the City council as the functional equivalent of State's Labor Board, that ordinance does not meet the requirements of PEBA §10(B), does not meet the fundamental requirement of PEBA for ensuring balance and neutrality because representatives of labor have no recommendation for appointment to the board in any real sense and there exists the real possibility that management controls at least four of the five positions. *See In re: Raton Fire Fighters Association, IAFF Local 2378 v. City of Raton*, 3 PELRB 2013 (June 20, 2013).
  - A §26(B) (Repealed in 2020), local boards' member selection process must comply with the selection procedures stated in §10(B). A local ordinance does not comply with §10(B) where it provides that bargaining units and the city manager shall submit a list of up to three recommended individuals, but further provides "[h)owever, nothing contained herein shall mandate the mayor and city council to select from the nominations submitted by the bargaining units and the city manager." *IAFF Local 2362 v. City of Las Cruces,* 07-PELRB-2009 (July 6, 2009).
  - A § 10 local ordinance violates PEBA where it permits the County Council chairman to appoint an interim member of the local board. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994),
  - A § 10 local ordinance violates PEBA where it requires that the union recommendation be from a certified union actively involved in representing employees In the County. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).
  - A § 10 local ordinance violates PEBA where it permits the City Council to appoint the third member if the labor and management representatives cannot agree within 30 days. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No.3 (Dec. 20, 1994).
  - Following the decision in *The Regents of the University of New Mexico v. New Mexico Federation of Teachers and American Assoc. of University Professors,* 98-NMSC-020, 125 N.M. 401 the Board held that where provisions of the City of Raton's grandfathered ordinance do not meet the requirements of § 26(A) (Repealed in 2020), for grandfathered status, the particular provision shall be denied grandfathered status, not the ordinance as a whole. *In re: Raton Fire Fighters Association, IAFF Local 2378 v. City of Raton*, 3 PELRB 2013 (June 20, 2013).
  - *See also*, this Board's decision in the consolidated *Northern New Mexico Community College* cases; PELRB No.'s 123-11, 124-11, 125-11, 130-11, 136-11 and 138-11, 61 PELRB 2012. July 2, 2012
  - Where the local ordinances' definition of "supervisor" leaves out most of the criteria established by PEBA for testing whether a particular position is supervisory or not, including the rather basic criterion that a supervisor actually supervises someone it so broadly defines the term that it encompasses those who only occasionally assume supervisory or directory roles; or perform duties which are substantially similar to those of his or her subordinates, are "lead employees" and arguably includes those who merely

participate in peer review or occasional employee evaluation programs. Therefore, it impermissibly excludes a class of employees entitled to bargaining rights under the PEBA. *In re: Raton Fire Fighters Association, IAFF Local 2378 v. City of Raton*, 3 PELRB 2013 (June 20, 2013).

- Any provision of a grandfathered local ordinance that defines "supervisor," "confidential employee" or "management employee" so broadly that it effectively excludes employees who would otherwise be entitled to bargain under PEBA will not be given grandfathered effect under PEBA §26. *In re: Raton Fire Fighters Association, IAFF Local 2378 v. City of Raton*, 3 PELRB 2013 (June 20, 2013).
- Although the local ordinance contains a more expansive management rights reservation than the usual that reservation of management rights is expressly subject to other "restrictions contained in this section and the collective bargaining agreement and any provision of this Chapter". Therefore, it is merely a general reservation of management rights and such general reservations do not operate to defeat the obligation to bargain collectively over wages, hours and working conditions established by contract or under a collective bargaining law to the extent those subjects constitute mandatory subjects of bargaining. Consequently, the management rights clause in question did not violate Section 10-7E-4(F) of the Act. *See In re: Raton Fire Fighters Association, IAFF Local 2378 v. City of Raton*, 3-PELRB-2013 (June 20, 2013).
- *Northern Federation of Education Employees v. Northern New Mexico Community College, et al.* (July 2, 2012). Upheld on appeal in First Judicial District Court Case No, D-101-CV-2012-02100. The Board found Respondent's local Labor-Management Commission to be duly constituted and fully functional, citing to the New Mexico Supreme Court's decision in *AFSCME v. Martinez and the State of New Mexico,* 2011-NMSC-018, No. 32,905 (2011) *supra.* Therefore, the Board did not have jurisdiction over the parties and the subject matter in three of the consolidated PPC's alleging violations that would come under the jurisdiction of the local board. The Board found that it did have jurisdiction over three other consolidated PPC's alleging a violations of PEBA §19(G). With regard to those claims the Board held that the union did not meet its burden of proof needed to establish grounds for revocation of its approval of the local Board.
- In *City of Albuquerque v. Montoya,* 2012-NMSC-007 (March 6, 2012), the dispute centered around the process for appointing interim members to the City's Labor-Management Relations Board. Section 3-2-15(D) of the City Ordinance allowed the City Council President to make such appointments during a Local Board member's absence. On appeal, the court characterized the City Council president as "managerial personnel" and raised concerns about the neutral composition of the Local Board due to the appointment of a third member. The Supreme Court disagreed with the Court of Appeals' characterization and held that the City Council President did not serve in either a "management" or "labor" capacity. Consequently, the provision allowing the City Council President to appoint a third member to the Board did not violate PEBA's grandfather clause. The Court's decision clarified that administrative appointments during temporary absences did not contravene PEBA's core principles.

- **Duty of Fair Representation (DFR) claims**
  - Local Boards lack authority under § 11(E) to either award monetary damages to an aggrieved union member for a union's breach of its duty of fair representation, or to order the Union to reinstate an employee allegedly improperly terminated as a result of the Union's breach. Therefore, claims for breach of the duty to fairly represent bargaining unit members cannot be brought before a Labor Relations Board and must instead be filed in District Court. *Callahan v. New Mexico Federation of Teachers-TVI,* 2006-NMSC-010, 139 N.M. 201, 131 P.3d 51.
  - Following the Supreme Court decision in *Callahan v. N.M. Fed'n of Teachers-TVI*, 2006-NMSC-010,the matter came before the Court of Appeals a second time in *Callahan v. NM Federation of Teachers-TVI,* 2010-NMCA-004, 147 N.M. 453, 224 P.3d 1258. The Court of Appeals reversed the Summary Judgment in favor of the Union and remanded for trial on Plaintiffs' claims against the Union; however, summary judgment in favor of the International Union was held to be appropriate.
  - Both Callahan I and Callahan II reiterated the holding in *Jones v. International Union of Operating Engineers,* 1963-NMSC-118, 72 N.M. 322, 330-32, 383 P.2d 571, 576-78, that a union member stated a claim for relief for breach of the duty of fair representation when he pleaded that the union had acted arbitrarily, in bad faith, and in violation of its trust when it refused to press the member's grievance to arbitration and that that mere negligence will not state a claim for breach of the duty of fair representation.
  - In *Akins v. United Steel Workers of America,* 2010-NMSC-031, 148 N.M. 442, 227 P.3d 744 the New Mexico Supreme Court was asked to limit a union's liability for breach of a DFR by imposing a *per se* exclusion of punitive damages much as the U.S. Supreme Court has done for similar actions against federally regulated labor unions. The Supreme Court declined to do so and instead underscored the public policy served by punitive damages.

- When the Albuquerque Police Officers Association settled a prohibited practices complaint with the City of Albuquerque on behalf of four police sergeants, it did not include non-dues paying members of the bargaining unit in the settlement and was sued for breach of its duty of fair representation to Appellants. Summary Judgment was granted by the District Court in favor of the Union which was reversed on appeal. It is for a jury to resolve the question of whether Appellants were precluded from recovery by a particular APOA bylaw and whether APOA's actions breached its duty of fair representation, whether Appellants suffered damages, and whether APOA's actions were the proximate cause of those damages. *See Granberry v. Albuquerque Police Officers Ass'n*., 2008-NMCA-094, 144 N.M. 595, 189 P.3d 1217. See *also Howse v. Roswell Independent School Dist.,* , 2008-NMCA-095, 144 N.M. 502, 188 P.3d 1253.

§ 10-7E-13(A), [Appropriate bargaining units-designation of.]

- **Generally**
  - The Board is charged with the statutory duty of designating appropriate bargaining units for collective bargaining. There is no absolute rule of law as to what constitutes an appropriate bargaining unit and courts will defer to the Board's decision on what constitutes an appropriate bargaining unit if that determination is supported by substantial evidence and otherwise in accordance with the law. *San Juan College v. San Juan College Labor Management Relations Board*, 2011-NMCA-117, 267 P.3d 101.
  - Community of interest is determined on a case-by-case basis. *Public Safety Officers and Town of Bernalillo,* 1 PELRB No. 21 (June 3, 1997).
  - Unit determinations, such as statutory exclusions, must be based on actual duties performed rather than on written job descriptions or Standard Operating Procedures manuals, which merely reflect expectations that may not materialize or surface. *In re: McKinley County Sheriff's Association Fraternal Order of Police and McKinley County,* 1 PELRB No. 15 (Dec. 22, 1995).
  - Basing unit determinations on expectations without regard to the actual duties performed could result in the denial of statutory rights to classes of employees, in violation of *County of Santa Fe,* 1 PELRB No. 1 (1993). *In re: McKinley County Sheriff's Association Fraternal Order* of *Police* and *McKinley County,* 1 PELRB No. 15 (Dec. 22, 1995).
  - Decisions from other jurisdictions cannot substitute for performing the community of interest analysis under § 13(A). *Firefighters and City of Santa* Fe, 1 PELRB No. 6 (Jan. 19, 1995).
  - Unit determinations are fact specific and must be made on a case-by-case basis. *NEA-Belen and Belen Federation* of *School Employees and Belen Consolidated Schools,* 1 PELRB No. 2 (May 13, 1994).
  - The occupational groups listed in § 13(A) are advisory as opposed to mandatory directives for configuring appropriate units. *NEA-Belen and Belen Federation of School Employees and Belen Consolidated Schools,* 1 PELRB No. 2 (May 13, 1994).
  - A hearing examiner does not err by failing to consider whether a disputed position is an excluded confidential employee if the employer did not raise that defense at the representation hearing. *In re: Communications Workers of America, Local 7911 and Doña Ana County,* 1 PELRB No. 16 (Jan. 2, 1996).
  - It is the Board's responsibility to designate *an* appropriate unit, not necessarily the most comprehensive or most appropriate unit. *NEA-Belen and Belen Federation of School Employees* and *Belen Consolidated Schools,* 1 PELRB No. 2 (May 13, 1994).
  - If the Board were to determine the most appropriate bargaining unit, it would result in an untenable situation where the Board unduly interfered in the affairs of public employers and labor organizations. Therefore, the Board should maintain a posture of noninterference, except where a proposed bargaining unit is clearly inappropriate. *NEA-Belen and Belen Federation of School Employees and Belen Consolidated Schools,* 1 PELRB No.2 (May 13, 1994).
  - A local ordinance that unilaterally designates certain positions as being statutorily excluded from its coverage usurps the function of the Board and/or local board to determine appropriate unit composition. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).
  - In *DEA & Deming Public Schools,* PELRB No's. 304-17 and 305-17, the labor board concluded that the "[c]ontinued recognition of the existing wall-to-wall bargaining unit is mandated by NMSA 1978, Section 10-7E-24(A) which allows bargaining units established prior to July 1, 1999 to continue to be recognized as appropriate bargaining units" and "[t]he Board's rule 11.21.2.37 NMAC expressly exempts bargaining units under Section [10-7E-24(A)] ... from being subject to unit clarification except in limited circumstances not applicable here."
  - In *AFSCME, Council 18 v. NM Department of Workforce Solutions*, PELRB No. 102-17, 11-PELRB-2017. Hearing examiner granted the Department's Motion for a directed verdict as to the § 10-7E-19(F) and § 10-7E-19(H) claims. Additionally, the Union did not meet its burden of proof regarding whether denial of pay increases in connection with the pay band adjustment constituted a failure to bargain or a breach of the contract. Directed verdict was denied, however, as to whether NMDWS increased performance measures without bargaining. AFSCME appealed the Board's Order affirming the Directed Verdict to the

District Court and NMDWS appealed the Board's Order concluding that it violated § 10-7E-19(F) and § 10-7E-19(H) when the Employer increased performance measures without bargaining. The District Court affirmed the Board's conclusion that the number of inspections employees were required to perform each month was a term or condition of employment and a mandatory subject of bargaining under the PEBA and that NMDWS violated § 10-7E-19(F) when it unilaterally changed the required number of inspections.

- The International Association of Machinists and Aerospace Workers (IAMAW) filed a petition with PELRB on May 18, 2022, seeking certification to represent various employee groups at the University of New Mexico – Sandoval Regional Medical Center (SRMC). These groups included full-time, regular part-time, and per diem employees in roles such as security guards, cooks, food service workers, registration representatives, and housekeepers. *See IAMAW & UNM Sandoval Regional Medical Center,* PELRB 303-22. SRMC opposed the inclusion of certain positions (such as per diem employees, security leads, and housekeeper leads) in the bargaining unit, arguing that some employees were supervisors exempt from coverage under PEBA and that others were in probationary status. The PELRB's Executive Director conducted a hearing on unit composition on July 27, 2022, during which it was determined that six employees were indeed in a probationary status. The Director equated SRMC's orientation period to a probationary period. On September 14, 2022, the PELRB adopted the Director's Report and Recommendation Decision in its entirety. Subsequently, on September 15, 2022, the Executive Director conducted a card count under PEBA, NMSA 1978, Section 10-7E-14(C), and found that IAMAW had majority support to represent the bargaining unit. The Board upheld the Executive Director's decision on December 9, 2022. However, the dispute was appealed to the District Court as Case No.: D-202-CV-2023-00132 in 2023 and remains pending on appeal.
- It was not the legislature's intent in drafting § 13(A) that only the listed occupational groups would constitute appropriate units. *NEA-Belen and Belen Federation of School Employees and Belen Consolidated Schools,* 1 PELRB No. 2 (May 13, 1994).
- Where a labor organization's petitioned-for unit is appropriate, an alternative proposal or configuration proffered by an employer will not be substituted. *NEA-Belen and Belen Federation of School Employees and Belen Consolidated Schools,* 1 PELRB No. 2 (May 13, 1994).

- **Board's duty to make unit determinations**

- **Community of interest standards**
  - There is sufficient community of interest to support the accretion of Interpreters and Dieticians into an existing unit of nurses and professional employees where they work under the same discipline rules, supervision and holiday schedules, work at the same location, get paid the same day, participate equally in the process of patient care, interact and work closely with the members of the existing unit to carry out the hospital's core function of patient care, and their positions require a certain amount of medical related training. *National Union of Hospital and Health Care Employees, District No.* 1199 *v. UNMH,* 03-PELRB-2005 (Oct. 19, 2005).
  - Similarities between employees regarding their hourly compensation, work hours, benefits, lack of history of collective bargaining and, to some degree, supervision, are not sufficient by themselves to create a community of interest, where such commonalities are shared by all of the employees and are not unique to the petitioned-for group. *USWA and* Gila *Regional Medical Center and Grant County Board of County Commissioners,* 1 PELRB No. 14 (Nov. 17, 1995).
  - Operating Room Technicians lack a community of interest with service, maintenance, and clerical employees because they carry pagers; remain on call for emergency surgeries; have different training and skills; actually assist the surgeons during the operations and are expected to anticipate what to do; are ultimately responsible to the OR Director; have limited daily contact with other proposed bargaining unit personnel; and there is no integration of work functions between OR Techs and other petitioned-for employees. *USWA and Gila Regional Medical Center and Grant County Board* of *County Commissioners,* 1 PELRB No. 14 (Nov. 17, 1995).
  - Inclusion of Operating Room Technicians in a service, maintenance and clerical bargaining unit is not appropriate, even though some members of petitioned-for unit share a title of "technician: without facts suggesting more parallels regarding their qualifications, training and actual job functions. *USWA and Gila Regional Medical Center and Grant County Board* of *County Commissioners.* 1 PELRB No. 14 (Nov. 17, 1995).
  - The fact that Operating Room Technicians are not licensed or certified is not a sufficient justification for their inclusion into a service, maintenance and clerical bargaining unit, where the OR Techs' job requires a greater degree of skill and use of independent judgment and the position is a technical one. *USWA and Gila Regional Medical Center and Grant County Board of County Commissioners,* 1 PELRB No. 14 (Nov. 17, 1995).
  - An appropriate bargaining unit of police officers, investigators and telecommunicators does not include administrative secretaries, because there is no clear and identifiable community of interest between the

two types of positions to justify varying from the normal designations under PEBA, or the NLRB precedent of treating safety officer and clerical employees separately. Specifically, clerical employees are not certified in law enforcement; they do not wear a uniform; they perform clerical duties; they do not work the same shifts as officers and telecommunicators and are not engaged in the same or even similar skills; the record does not show a great deal of contact between these employees and other members of the proposed bargaining unit; and the clerical employees' impact upon the primary function of the department is tangential. *New Mexico State University Police Officers Association and New Mexico State University,* 1 PELRB No. 13 (June 14, 1995).

- Community of interest shall be analyzed under the nine factors listed in *Kalamazoo Paper Box Corp*., 136 NLRB 134, 49 LRRM 1715 (1962). These include: (1) differences in method of wages or compensation; (2) differences in work hours; (3) differences in employment benefits; (4) separate supervision; (5) degree of dissimilar qualifications, training and skills; (6) differences in job functions and amount of working time spent away from the employment or plant *situs*; (7) the infrequency or lack of contact with other employees; (8) the lack of integration with the work. functions of other employees, or interchange with them; and (9) the history of collective bargaining. No single factor will be conclusive. *NEA-Belen and Belen Federation of School Employees and Belen Consolidated Schools,* 1 PELRB No. 2 (May 13, 1994).
- No single community of interest factor is conclusive, and the test cannot be mechanically applied as some elements may support one outcome, and others may indicate another outcome. Rather, the factors are a means of sifting through relevant facts to reach well-reasoned community of interest determinations. *NEA-Belen and Belen Federation of School Employees* and *Belen Consolidated Schools,* 1 PELRB No. 2 (May 13, 1994).
- The statutory phrase 'related personnel matters· is part and parcel of community of interest rather than a separate factor to be considered. *NEA-Belen and Belen Federation of School Employees and Belen Consolidated Schools,* 1 PELRB No. 2 (May 13, 1994).

- **Efficient administration of government**
  - The principle of efficient administration of government, which must be considered when determining an appropriate bargaining unit, requires consideration of stability in government operations. *NEA-Belen and Belen Federation of School Employees and Belen Consolidated Schools,* 1 PELRB No. 2 (May 13, 1994).
  - The maintenance of stability in government operations may outweigh a group of employees· desire to be placed in a separate unit where the creation of such a unit would lead to fragmentation. *NEA-Belen and Belen Federation of School Employees and Belen Consolidated Schools,* 1 PELRB No. 2 (May 13, 1994).
  - Based on the principle of efficient administration of government, the PELRB adopts an anti-fragmentation policy to avoid unnecessary and needless proliferation of bargaining units, and resultant instability in government operations. *NEA-Belen and Belen Federation of School Employees and Belen Consolidated Schools,* 1 PELRB No. 2 (May 13, 1994). *See also United Steel Workers Association and New Mexico State University,* Case No. 55-93(O) (No separate PELRB No. assigned) (Aug. 1994).
  - The Board's anti-fragmentation policy is not violated where employers and labor organizations have mutually agreed upon multiple units without invocation of the Board. Such decisions reflect self-determination and efficient administration of government as appropriately determined by those at the operational level of the labor-management relationship. *NEA-Belen and Belen Federation* of *School Employees and Belen Consolidated Schools,* 1 PELRB No. 2 (May 13. 1994).

- **Local ordinances, equivalent unit determination procedures**
  - A local ordinance that unilaterally consolidates the three presumptively appropriate groups of secretarial clericals, technical and paraprofessionals into a single "white collar" occupational group usurps the unit determination duty and function of the Board or local board, and therefore is not equivalent to the unit determination procedures of PEBA. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No.3 (Dec. 20, 1994). *But See NEA-Belen and Belen Federation of School Employees and Belen Consolidated Schools,* 1 PELRB No. 2 (May 13, 1994) (the occupational groups listed in § 13(A) are advisory and it was not the drafter's intent that only the listed occupational groups would constitute appropriate units).

- **Realignment; consolidation**
  - The realignment of previously certified bargaining units represented by the same union into a single horizontal unit organized by occupational groups effectuates the legislative intent in PEBA § 13(A), constitutes an appropriate bargaining unit under PEBA and facilitates both collective bargaining and the principles of efficient administration of government. *CWA and State,* Case No. 28-95(S), PELRB Order of Realignment (March 13, 1996) (No PELRB report number assigned).

§ 10-7E-13(C), [Appropriate bargaining units; supervisors, managers and confidential employees excluded.]

- Unit determinations regarding statutory exclusions must be based on actual duties performed, rather than

on written job descriptions or Standard Operating Procedures manuals that merely reflect expectations that may not materialize. Basing unit determinations onexpectations without regard to the actual duties performed could result in the denial of statutory rights to classes of employees under PEBA. *In re: McKinley County Sheriff's Association Fraternal Order of Police and McKinley County,* 1 PELRB No. 15 (Dec. 22, 1995).

- An appropriate bargaining unit of firefighter personnel includes the position of fire captain but not the position of battalion chief, which is a supervisory position. *Firefighters and City of Santa Fe,* 1 PELRB No. 6 (Jan. 19, 1995).
- The secretary to a school principal who is or will definitely be on the school district's negotiating team is confidential where she types and files documents related to labor relations matters and has access to the principals' offices, even if she does not have substantive input in creating the documents typed or filed. On the other hand, the District's payroll manager is not a confidential employee where she carries out her job functions almost entirely independent of anyone else, any financial information to which she has access is also available to others and while the financial information she handles may be used by the employer for cost proposals in collective bargaining that use Supervisors does not require further input by the payroll manager. See *NEA and Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995).

§ 10-7E-14(A), [Elections; when and how conducted]

- **Certification of incumbent labor organizations**
  - A Hearing Examiner may directly certify an incumbent based on a majority card count, without first allowing an appeal to the Board, in reliance on the Board's decision in *NEA-Alamogordo and Alamogordo Public* Schools, 5-PELRB-2006 (Jun 1, 2006). *In re: Petition for Recognition, Federation of Teachers and Pecos Independent Schools,* 07-PELRB-2006 (Sept. 10, 2006).
  - A Hearing examiner may permit incumbent labor organization to demonstrate majority support by card count, even over employer's objection and demand for an election. Elections, which attend initial representation proceedings and are extensively regulated, are not required under the language of either § 24(B) or 11.21.2.36 NMAC. The right of an employer to demand an election under § 14(C) relates only to the certification of an appropriate bargaining unit. while § 24(A) has already recognized the incumbent unit as appropriate. Finally, 11.21.2.36 NMAC authorizes a card count and is a reasonable implementation of § 24(B). *NEA-Alamogordo and Alamogordo Public Schools,* 5-PELRB-2006 (Jun 1, 2006).
  - Sections 14(A) and 24 read together and in conjunction with 11.21.3.36 NMAC authorize incumbent labor organizations to demonstrate majority support by way of card count even over objection of the employer. This is so because § 14(A), which details requirements for elections, concerns the initial identification of an exclusive representative, if any, while § 24(B) has already specified that the incumbent shall be the exclusive representative. *American Federation of Teachers Local 4212 and Gadsden Independent School District,* 03-PELRB-2006 *(*May 31, 2006).

- **Local ordinances or rules, alternate procedures**
  - A § 26(B) (Repealed, 2020), local ordinance's election procedure is not equivalent to PEBA's where it requires a 60% rather than 40% turnout for a valid election. *IAFF Local* 2362 *v. City of Las Cruces, 07-*PELRB-2009 (July 6, 2009).
  - A local board may not promulgate a rule that violates § 14(A) and § 14(D), and the PELRB' S decision in *NEA-Alamogordo and Alamogordo Public Schools,* 05-PELRB-2006, by permitting an employer to demand a secret ballot election for an incumbent union and by requiring a voter turnout of at least 50% + 1 of bargaining unit. *McKinley County Federation of United School Employees, AFT Local 3313 v. Gallup-McKinley County School District and Gallup-McKinley County School District Labor Management Relations* Board. 03-PELRB-2007 (undated).
    Note: The initial action was filed as a PPC but the Hearing Examiner concluded that neither § 19 nor § 20 provided for PPC's to be filed against local boards. The Hearing Examiner then recast the PPC as a request for re-approval of the local board and found jurisdiction under its general power of approval under § 10, and under the post approval reporting requirements established under 11.21.5.13 NMAC. The Board upheld the Hearing Examiner's subsequent denial of the local board's motion to dismiss for lack of jurisdiction, but in doing so stated that the PELRB has jurisdiction of the prohibited practices complaint filed by the Union.
  - A local ordinance's provision for a 24-month election bar violates PEBA because it is not "equivalent" to PEBA's election procedures. *AFSCME and* Los *Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).
  - A local ordinance's provision that "no representation" option be included in all run-off elections, even when it was not a top choice in the original election, violates PEBA because this is not "equivalent" to PEBA's

election procedures. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).
- A requirement of in-person balloting does not violate PEBA because PEBA does not state or imply that other forms of balloting must be permitted. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).
- Where alternative procedures to secret ballot election are authorized for employers other than the state, they must be equivalent to and protect PEBA rights to the same extent. *Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993).

§ 10-7E-14(C), [Elections; alternate procedures with consent of employer.]

- **Generally**
  - Section 14(C) grants public employers the general right to insist on a representation election before the Board or a local board certifies a labor organization as exclusive representative. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994). *But See* American *Federation of Teachers Local 4212 and Gadsden Independent School District,* 03-PELRB-2006 (May 31, 2006) and *NEA-Alamogordo and Alamogordo Public Schools,* 05-PELRB-2006 (June 1, 2006) (both holding that incumbent labor organizations are excepted from this general rule by operation of § 24(B) and § 14(A).

§ 10-7E-15(A) [Exclusive Representation; rights and responsibilities.]

- **Breach of the duty of fair and adequate representation**
  - A claim against a union for breach of its statutory duty, as exclusive representative, to fairly and adequately represent a bargaining unit member does not state a prohibited practice under PEBA. Therefore, such claims cannot be brought before a Labor Relations Board and must instead be filed in District Court. *Callahan v. New Mexico Federation of Teachers-TVI*, 2006-NMSC-010, 139 N.M. 201, 131 P.3d 51.

- **Direct dealing prohibited**
  - Failure to the certified representative notice of a mandatory employee meeting concerning the terms and conditions of employment interferes with the Union's status as exclusive representative, and interferes in the collective bargaining relationship, contrary to § 15(A), § 19(C) and § 19(G). *AFSCME Council 18 v. Department of Health,* 06-PELRB-2007 (Dec. 3, 2007).

- **Right to obtain necessary information**
  - The employer's duty to provide information to the union is not met when the employer does the bare minimum of providing notice to, and meeting with, the Union while purposely withholding information relevant to a layoff. *See also*, 2nd Judicial District Case No. D-202-CV-2012-11595 (Oct. 2013).
  - A labor organization that has been certified as the exclusive representative has a duty to adequately represent its members, and the duty to represent members requires the exclusive representative to seek and obtain the information necessary to adequately represent those bargaining unit members. "Necessary information" includes that relevant to the negotiation, policing and administration of the collective bargaining agreements, such as information that would assist the Union in determining the extent and number of employees affected by an erroneous wage implementation; work schedules; a list of casual pool employees; and copies of contracts between the employer and staffing agencies. *National Union of Hospital and Health* Care *Employees, District No. 1199 v. UNMH,* 3-PELRB-2005 (Oct. 19, 2005).
    Note: The Labor Management Relations Board for the City of Albuquerque has also upheld a similarly broad duty to provide contact and other information to certified unions under the City's grandfathered local ordinance, in light of the union's status as exclusive representative and its duty to fairly and adequately represent bargaining unit members. Necessary information under the Albuquerque ordinance includes the full name, Social Security number, date of birth,
    department work address, work phone, email address, home address, home telephone
    number, date of hire, full or part time status, and salary of each bargaining unit employee. *See AFSMCE Locals 624, 1888, 2962 and 3022 v. City of Albuquerque, City of Albuquerque Labor Management Relations Board,* Case No. LB 06-033, Decision and Order (June 12, 2007).

§ 10-7E-16 [Decertification.]

- Under the merger doctrine, when several individually certified bargaining units are merged into a single bargaining unit by subsequent collective bargaining agreement, any Petition for Decertification must be addressed to the decertification of, and supported by a showing of interest for, the entire bargaining unit

as merged, rather than as originally certified. *In the matter of Romero, et al., and CWA Local 7076,* 1A PELRB-2006 (Nov. 21, 2008).

§ 10-7E-17(A)(1), [Scope of bargaining; duty to bargain in good faith.]

- **Generally**
  - Because ground rules for negotiation are permissive subjects of bargaining, it is a violation of the duty to bargain in good faith to impose them as a precondition to bargaining. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994)
  - Payroll deduction of dues is a mandatory, not permissive, subject of bargaining. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).
  - Subjects that lie at or near the core of the County's public service mission are not mandatory subjects of bargaining. However, the effect, consequence, or impact and the implementation of core managerial decisions with respect to bargaining unit employees are mandatory bargaining subjects. *Santa Fe County and AFSCME,* 1 PELRB No.1 (Nov. 18, 1993).
  - "Terms and conditions of employment" is a broad term that includes workloads and work assignments; definition of bargaining unit work; transfer of employees; promotion; discipline and work rules; changes in operations that have a significant impact on bargaining unit employees; certain subcontracting bargaining unit work or other removal of work from the bargaining unit; and procedures regarding the discharge of employees. *Santa Fe County and AFSCME,* 1 PELRB No.1 (Nov. 18, 1993).
  - Parties must bargain over the terms and conditions of employment which are mandatory subjects of bargaining *Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993).
  - The duty of an employer and an exclusive representative to bargain in good faith over wages, hours and other terms and conditions of employment is fundamental to the entire scheme of PEBA, and without the mutual duty to bargain over terms and conditions of employment, PEBA would be useless and pointless. *Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993).
  - The presence of security guards at the workplace is a term and condition of employment and a mandatory subject of bargaining. HSD relied upon the management rights and scheduling clauses in its CBA as a waiver of the union's right to bargain but the Court referring to another section of the same CBA that required HSD to negotiate in good faith prior to making any changes in terms and conditions of employment related to "reasonable standards and rules for employees' safety" found that HSD did not meet its burden of showing a clear and unmistakable waiver of the union's right to bargain those issues. PELRB Case No. 151-11, 59-PELRB-2012, *AFSCME, Council 18 v. HSD*, No. D-101-CV-2012-02176 (J. Ortiz) issued 6-14-2013.
  - The union was found to have waived bargaining by failing to make a timely demand. The District Court reversed the Board on the waiver issue and remanded the matter for further findings on which RIF effects are covered under the contract. *CWA Local 7076 v. New Mexico Public Education Department,* 76-PELRB-2012.
  - *AFSCME, Council 18 v. State of New Mexico,* 1-PELRB-2013 (Jan. 23, 2013). The Union alleged that the State violated the PEBA's § 17 by failing to bargain in good faith about a state-wide furlough plan. The PELRB held that furloughs are an exercise of management's reserved rights under Article 18 Section 1(7) of the parties' CBA, which reserves to management the right to relieve an employee from duties because of lack of work or other legitimate reason,
  - The school district was found to have violated § 17(A)(1) by assigning extra work to employees and paying them a "foreman stipend" without bargaining. *Central Consolidated School Association v Central Consolidated School District,* 27-PELRB-2013.
  - *Communications Workers of America, AFL-CIO v. State of New Mexico and New Mexico Public Employee Labor Relations Board*, 2019-NMCA-031, No. D-202-CV-2015-03814 (J. Butkus, March 15, 2017) (In re: PELRB No. 122-14), CWA filed a PPC over unilateral changes made by the State to its policy regarding paid time for employee union representative for their time spent filing and investigating grievances. The Hearing Officer found, and PELRB rejected, that a letter the State sent CWA presented a "fait accompli" by which the State relieved CWA from any duty to request bargaining and concurrently breached § 10-7E-19(F). The Court upheld the PELRB's rejection of the findings related to CWA being relieved of the duty to demand bargaining after waiting six months to file the PPC. According to the District Court the PELRB had evidence before it to support the conclusion that the State's letter was not a fait accompli. The Court concluded, therefore, that it was not unreasonable for the PELRB to reject the HO's finding that CWA did not have the opportunity to request bargaining. (Citations omitted). Regarding the State's cross-appeal the Court determined that PELRB's Order sustaining a violation of Section 10-7E-19(B) was inconsistent with its conclusion rejecting a finding of bad faith. Accordingly, the Order was reversed as arbitrary and capricious. The union sought and obtained a writ of certiorari and the Court reversed and remanded to the Board to determine whether the CBA's zipper clause eliminated the past practice of paying bargaining unit employees for time spent preparing for and participating in grievance meetings.

- **Duty to provide information**
  - The employer's duty to provide information to the union is not met when the employer does the bare minimum of providing notice to, and meeting with, the Union while purposely withholding information relevant to a layoff. *CWA Local 7076 v. New Mexico Public Education Department,* 76-PELRB-2012. *See also,* 2nd Judicial Dist. Case No. D-202-CV-2012-11595.
  - An employer is required to provide upon request such information as the following: information that would assist the Union in determining the extent and number of employees affected by an erroneous wage implementation; work schedules, a list of casual pool employees; and copies of contracts between the employer and staffing agencies. This information is all of a type routinely required and requested in implementing a contract, because it concerns wage information, information related to hours and other terms and conditions of employment, employee lists, and information pertaining to possible loss of work. *National Union of Hospital and Health* Care *Employees, District No. 1199 v. UNMH,* 03-PELRB-2005 (Oct. 19, 2005).
  - The duty under PEBA to bargain in good faith requires the parties to provide that information necessary to negotiate collective bargaining agreements and to police and administer existing agreements. *National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH,* 03-PELRB-2005 (Oct. 19, 2005).
  - A union's right to information from a public employer is not defined by the Inspection of Public Records Act, but rather is defined by the duty to bargain in good faith. Because the public policy and purpose underlying IPRA is to ensure an informed electorate, it cannot define a public employer's obligations under PEBA to provide information. *National Union of Hospital and Health Care Employees, District No. 119*9 *v. UNMH,* 03-PELRB-2005 (Oct. 19, 2005).
  - The City of Las Cruces' refusal to provide the Union with bargaining unit members' home addresses constitutes a refusal to bargain in good faith, and City Resolution 00-136 is void to the extent it prohibits disclosure of the home addresses of bargaining unit employees to the Union. *United Steel Workers of America, Local 9424 v. City of Las Cruces*, 3d Judicial Dist., Case No. CV-2003-1599 (April 1, 2005, J. Robles).

- **Local ordinances**
  - A local ordinance violates PEBA by subjecting the duty to bargain in good faith to other County ordinances. *AFSCME and Los Alamos* County *Firefighters* v. *County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).
  - A local ordinance violates PEBA by substituting the duty to bargain over "terms and conditions of employment" with a duty to bargain over "working conditions," which implies only physical or
  - environmental conditions. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994). An employer or a labor organization violates its duty to bargain in good faith with the other by placing unreasonable conditions on bargaining, including by insisting upon agreement to subjects that are considered "permissive," such as ground rules. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).
  - A local ordinance cannot limit the subjects over which a public employer must negotiate through an improperly broad reservation of exclusive management rights. *Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993). *See also AFSCME and Los Alamos County Firefighters v.* County *of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).

§ 10-7E-17(C) [Scope of bargaining; conflict of CBA with other laws prohibited.]

- A collective bargaining agreement provision that limits the scope of the required grievance *and/or* arbitration procedures to apply only to disputes concerning the interpretation, application and/or violation of the collective bargaining agreement, comports with § 17(8). *AFSCME Council 18 v. State of New Mexico,* 07-PELRB-2007 (Dec. 13, 2007).

§ 10-7E-17(E) [Scope of bargaining; Fair share dues and fees actions.]

- Provisions of PEBA stating that arbitration awards are contingent on the appropriation and availability of funds prevail over provisions of PEBA stating arbitration awards shall be final and binding. The Union and the City reached an impasse during negotiations for a new collective bargaining agreement. They selected an arbitrator who issued an award based on the Union's final, best offer. The award covered a three-year period, including wage increases. However, the Court of Appeals held that impasse resolutions involving expenditures be contingent upon specific legislative appropriations, and the award was subject to the availability of funds, emphasizing the balance between finality in collective bargaining and prudent financial management within political subdivisions. *IAFF Local 1687 v. City of Carlsbad,* Court of Appeals, Case No. 28,189 (June 23, 2009).
- In accordance with the Public Employee Bargaining Act (PEBA) § 10-7E-1-26, the New Mexico Legislature granted authorization to the State, acting through representatives of its Executive Branch, to engage in

negotiations and establish binding contracts with organized labor. These contracts pertained to state employees who chose to become union members, obligating the State to pay wages at negotiated levels. In 2005, the State entered into contracts with organized labor, committing to future wages for covered state employees. These contracts created enforceable rights and obligations, contingent upon legislative appropriation. In 2008, the New Mexico Legislature allocated sufficient funds to honor these contracts for Fiscal Year 2009 (covering the period from July 1, 2008, to June 30, 2009). However, following the 2008 legislative session, the State Personnel Board diverted a portion of these appropriated funds away from fulfilling contractual obligations. As a result, state employees covered by contract were left without adequate funds to honor their agreements. The State chose to allocate increased wages to employees not covered by contracts, even though they lacked contractual rights. This action by the 2008 State Personnel Board, acting on behalf of the Executive branch, constituted a breach of the State's contractual obligations and ran counter to legislative appropriation and PEBA itself. *See State v. Am,Fed'n of State, Cnty., and Municipal Emps., Council 18,* Case No.: 33,792 (N.M. 2013).

§ 10-7E-17(F) [Scope of bargaining; Employee rights and benefits.]

- The PELRB decided that the HSD's practice of providing security guards at several locations was a mandatory subject of collective bargaining, as it implicated employee safety. By altering this mandatory subject without bargaining, the HSD committed a per se breach of its duty to bargain. Despite this breach, there was insufficient evidence to prove that Article 34 of the CBA was violated either by failing to provide a safe work environment or by requiring security to be provided. Article 34 allowed employees to refuse work in situations where they were exposed to the risk of harm. Additionally, AFSCME failed to establish a violation of Appendix H of the CBA, which pertained to after-hours work requirements. There was insufficient evidence that bargaining unit members were required to remain with clients on the premises past 5:00 p.m. Importantly, the decision to remove security was not a reserved management substantive right Article 18, Section 2 of the CBA obligated the HSD to bargain in good faith whenever contemplating changes to existing terms or conditions of employment related to the location and operation of its organizations (Article 18(9)) and standards related to employee safety (Article 18(11).
- Having enacted PEBA § 10-7E-1-26, the New Mexico Legislature authorized the State, acting by and through representatives of its Executive Branch, to negotiate and enter into binding contracts with representatives of organized labor, acting on behalf of those state employees choosing to become union members, and thereby to obligate the State, subject to legislative appropriation, to pay wages at the negotiated level to those state employees covered by contract. In 2005, the State entered into contracts with organized labor, pursuant to PEBA and thereby committed to future wages at specified levels for those state employees covered by those contracts. The contracts created binding obligations on the State and enforceable rights in those state employees covered by contract, conditioned on legislative appropriation. In 2008, the New Mexico Legislature appropriated sufficient funds to honor those contracts for Fiscal Year 2009, covering the period July 1, 2008 – June 30, 2009. Following the 2008 legislative session, and notwithstanding that appropriation, the State Personnel Board took actions to allocate a portion of those appropriated funds to purposes other than fulfillment of the State's contractual obligations. The effect of this action was to deprive those state employees covered by contract of sufficient funds to honor these contracts. Instead, the State chose to provide increased wages to those employees not covered by contract who had no contractual rights at the expense of those state employees who had enforceable contractual rights. In doing so, the 2008 State Personnel Board, acting on behalf of the Executive branch, breached the State's contractual obligations, and acted contrary to legislative appropriation and to the Act. *See State v. AFSCME., Council 18,* Case No.: 33,792 (N.M. 2013).

§ 10-7E-17(H) [Scope of bargaining; Impasse resolutions.]

- **Funding contingent on appropriation.**
  - Provisions of PEBA stating that arbitration awards are contingent on the appropriation and availability of funds prevail over provisions of PEBA stating arbitration awards shall be final and binding. The Union and the City reached an impasse during negotiations for a new collective bargaining agreement. They selected an arbitrator who issued an award based on the Union's final offer. The award covered a three-year period, including wage increases. However, the Court of Appeals held that the award was subject to the availability of funds, emphasizing the balance between finality in collective bargaining and prudent financial management within political subdivisions. *IAFF Local 1687 v. City of Carlsbad,* Court of Appeals, Case No. 28,189 (June 23, 2009).
  - The requirements and obligations of the parties regarding the funding of a public employee collective bargaining agreement are statutorily controlled by the PEBA, the Labor Management Relations Ordinance

and the specific terms of the CBA. The City's expenditures of funds to comply with the CBA was subject to both "the specific appropriation of funds" and the "availability of funds" under PEBA § 10-7E-17(H) and LMRO § 3-2-18. LMRO § 3-2-18, referenced in Section 2.1.1.5 of the parties' CBA, required the City Council to "adopt a resolution" appropriating funds to cover the economic components of the contract when the CBA was approved by the City in 2008. As such, the City adopted the appropriate resolution in 2008 to cover the economic obligation for the new three-year CBA. Multi-year collective bargaining agreements are beneficial to both sides and provide stability and continuity for both management and public employees.

- The City bypassed necessary resolution procedure when deciding that city police officers would not receive their agreed upon annual, rank-based raise due to a projected budget shortfall. The previously executed CBA required that the CBA re-open the CBA to address "economic items" should an unexpected budgetary shortfall arise during subsequent years of a mutli-year collective bargaining contract. The Court of Appeals noted, "The evidence indicated that the Mayor chose to breach the CBA contractual obligation in order to 'share the burden' so that no single class of employee shoulders an unfair share of the [City budgetary shortfall] or otherwise increase the City's unemployment rate through layoffs. These reasons and goals do not legally justify a departure from the City's contractual obligation to reopen the CBA to address unexpected economic items." *See Abq Police Officer's Assoc., Joey Sigala, Felipe Garcia, Tom Novicki, and Matt Fisher v. City of Abq, Abq Police Department, and Mayor Richard Berry;* Case No.: 2013-NMCA-110, Docket No. 31,606
- In the case of AFSCME, Council 18 v. State of New Mexico, the New Mexico State Personnel Board and Sandra K. Perez, Director of New Mexico State Personnel Board, the central issue revolved around the Board's adoption of a regulation that defined the term "shift work schedule" as outlined in Article 21, Section 5 of the collective bargaining agreement (CBA) between AFSCME (American Federation of State, County, and Municipal Employees) and the State of New Mexico. The Union contended that this regulation directly contravened the mandatory subjects of bargaining within the CBA. Specifically, the Board's action was seen as an attempt to circumvent a prior arbitration decision that had removed the benefit associated with "shift work schedule" from certain job positions (except those requiring twenty-four-hour coverage). By adopting a definition that contradicted the arbitrator's ruling, the Board allegedly breached its obligations under the Agreement. The Court of Appeals agreed with the Union, finding that the new regulation substantially impaired an existing contract right. Consequently, they held that the regulation was unconstitutionally retroactive and violated the Contract Clauses of both the United States and New Mexico constitutions. *See AFSCME, Council 18, v. State of New Mexico, the New Mexico State Personnel Board, and Sandra K. Perez, Director of New Mexico State Personnel Board*, 312 P.3d 674 (Ct. App. 2013).
- Under PEBA, a majority of employees who vote in favor of representation are considered represented, irrespective of their membership status or agreement with organizational policies. In the case *of Luginbuhl v. City of Gallup*, Opinion No: 2013-NMCA-053, the petitioner, David Luginbuhl, served as a full-time police officer with the Gallup Police Department (GPD) from October 27, 2007, until his termination on June 8, 2011. Despite choosing not to join the Union, pay dues, or seek the Union's assistance, Luginbuhl acknowledged that he was a regular full-time, non-probationary, sworn police officer covered by the Collective Bargaining Agreement (CBA) between the Union and the City. The CBA outlined terms related to disciplinary procedures, grievances, and appeals. Under the CBA, the grievance procedure begins when an employee files a written grievance within seven days of becoming aware of the issue that led to disciplinary action. Luginbuhl initiated a grievance challenging his termination, but he claimed it was based on the City's personnel rules and regulations for non-union employees, not pursuant to the CBA. The key distinction between the two processes lies in arbitration: the CBA requires arbitration, while the City Personnel procedure does not. Luginbuhl followed the first three steps of the grievance process but did not proceed to the fourth step—arbitration—under the CBA. Instead, he filed a petition in district court seeking injunctive relief, arguing that his non-union status exempted him from CBA-bound arbitration. The district court denied his petition, prompting an appeal. The City contended that the district court lacked jurisdiction to grant a writ of prohibition, but the Court of Appeals ruled on other grounds. It held that no injunctive relief—whether a writ of prohibition, temporary restraining order, or preliminary injunction—was appropriate because arbitration was the proper forum for Luginbuhl's grievance. The Court of Appeals also addressed the question of whether a writ of prohibition could be issued from a district court to a municipality or its arm. The court reasoned that Luginbuhl's argument, as a non-union member, that he was not bound by the agreement to arbitrate disputes was refuted by the plain language of the Public Employees Bargaining Act (PEBA) and case law. The PEBA establishes that a majority of employees voting in favor of representation are all represented, regardless of their membership status or agreement with organizational policies. Even the City's Labor Management Relations Ordinance confirms that the CBA covers all employees in the bargaining unit. *See Luginbuhl v. City of Gallup & Gallup Police Department,* Opinion No.: 2013-NMCA-053 (March 11, 2013).

- **Funding contingent on allocation of funds.**
  - Under 11.21.5.10 NMAC there is good cause to grant UNM a variance from the PELRB template

resolution creating a local board, to add language regarding the ' allocation" or "reallocation" of funds following the template's references to "Appropriation" or "re-appropriation" of funds the former terminology is more appropriate to UNM's situation, since the UNM Board of Regents ·allocates· funds appropriated to it by the Legislature, rather than "appropriating" Its own funds. The variance, therefore, promotes statutory clarity, avoids disharmony with § 17(H), is consistent with legislative intent, and places UNM on an equal footing with other governmental entities under PEBA. *In re: Application of the University of New Mexico for Approval of Local Board,* 04-PELRB-2006 (May 31, 2006).

- Arbitrators did not exceed their powers in two related cases by mandating monetary relief that will require the Legislature to appropriate funds to pay wages increases previously bargained because the Legislature already appropriated sufficient funds in FY 2009 for the State to meet its contractual obligations under the Agreements and that the State failed to meet its contractual obligation to distribute the funds according to the terms of the Agreements. The State's representation that it has already used the funds appropriated should not affect the arbitrators' decisions and awards in favor of the Unions. There is no difference between this case and other cases where adverse judgments are rendered against the State; as in those cases, the State cannot avoid its obligation to comply with the judgment by maintaining that compliance would require it to seek further appropriations from the Legislature. *State of New Mexico v. AFSCME Council 18 and CWA*, 2012-NMCA-114, 291 P.3d 600.

§ 10-7E-17(I) (Scope of bargaining; negotiation of grievance and arbitration procedures.]

- **Negotiated procedures need not apply to all disputes**
  - The grievance and arbitration procedures that § 17(F) requires in all collective bargaining agreements are not required to apply to all disputes pertaining to terms and conditions and related personnel matters. Parties to a collective bargaining agreement can limit the scope of the required grievance and arbitration procedures to apply only to disputes concerning the interpretation, application and/or violation of the collective bargaining agreement. *AFSCME Council 18 v. State of New Mexico,* 07-PELRB-2007 (Dec. 13, 2007).
  - In the case of *AFSCME, Council 18 v. State of New Mexico*, *New Mexico State Personnel Board, and Sandra K. Perez, Director of New Mexico State Personnel Board,* 314 P.3d 674 the dispute centered around the New Mexico State Personnel Board's adoption of a regulation that defined the term "shift work schedule" found in Article 21, Section 5 of the CBA between AFSCME and the State of New Mexico. The Union contended that this regulation violated their contractual rights and, consequently, the Contract Clauses of both the United States and New Mexico Constitutions. Initially, the district court dismissed the case, ruling that AFSCME failed to state a claim. However, the Court of Appeals took a different view. They reasoned that the Board's adoption of a definition opposing the one previously determined by an arbitrator was an attempt to circumvent the arbitrator's decision and the State's obligations under the Agreement. The Union's allegation that the new regulation would substantially impair an existing contract right was deemed sufficient to make the regulation unconstitutionally retroactive, thus violating the Contract Clauses of the United States and New Mexico constitutions.
  - The Court of Appeals reasoned that Step 4 of the grievance process negotiated as part of the parties' CBA, provides that the school board, as the policy maker who negotiated and agreed to the CBA, simply determines whether its own policy (i.e., a specific provision in the CBA) has been violated, misinterpreted, or misapplied. Making such a determination is not "interfering: in personnel matters, nor does it constitute "overruling" a personnel decision of the superintendent. Instead, because the CBA applies to all employees, the school board is not involved in making a personnel decision on a personal basis, but under the contractual structure of the CBA through which all individual personnel matters are administered. *See Adrian Alarcon v, APS Board of Education and Brad Winter, Ph.D., Superintendent of APS,* Case No.: A-1-CA-34843, consolidated with *Central Consolidated School District No. 22 v. Central Consolidated Education Association,* Case No.: A-1-CA-34424.

- **Majority in favor of representation are considered represented**
  - Under PEBA, a majority of employees who vote in favor of representation are considered represented, irrespective of their membership status or agreement with organizational policies. In the case *of Luginbuhl v. City of Gallup*, Opinion No: 2013-NMCA-053, the petitioner, David Luginbuhl, served as a full-time police officer with the Gallup Police Department (GPD) from October 27, 2007, until his termination on June 8, 2011. Despite choosing not to join the Union, pay dues, or seek the Union's assistance, Luginbuhl acknowledged that he was a regular full-time, non-probationary, sworn police officer covered by the Collective Bargaining Agreement (CBA) between the Union and the City. The CBA outlined terms related to disciplinary procedures, grievances, and appeals. Under the CBA, the grievance procedure begins when an employee files a written grievance within seven days of becoming aware of the issue that led to disciplinary action. Luginbuhl initiated a grievance challenging his termination, but he claimed it was based on the City's personnel rules and regulations for non-union employees, not pursuant to the CBA. The key

distinction between the two processes lies in arbitration: the CBA requires arbitration, while the City Personnel procedure does not. Luginbuhl followed the first three steps of the grievance process but did not proceed to the fourth step—arbitration—under the CBA. Instead, he filed a petition in district court seeking injunctive relief, arguing that his non-union status exempted him from CBA-bound arbitration. The district court denied his petition, prompting an appeal. The City contended that the district court lacked jurisdiction to grant a writ of prohibition, but the Court of Appeals ruled on other grounds. It held that no injunctive relief—whether a writ of prohibition, temporary restraining order, or preliminary injunction—was appropriate because arbitration was the proper forum for Luginbuhl's grievance. The Court of Appeals also addressed the question of whether a writ of prohibition could be issued from a district court to a municipality or its arm. The court reasoned that Luginbuhl's argument, as a non-union member, that he was not bound by the agreement to arbitrate disputes was refuted by the plain language of the Public Employees Bargaining Act (PEBA) and case law. The PEBA establishes that a majority of employees voting in favor of representation are all represented, regardless of their membership status or agreement with organizational policies. Even the City's Labor Management Relations Ordinance confirms that the CBA covers all employees in the bargaining unit. *See Luginbuhl v. City of Gallup & Gallup Police Department,* Opinion No.: 2013-NMCA-053 (March 11, 2013).

- In *Town of Islip*, 8 N.Y. P.E.R.B. ¶ 3049, 3085 (1975), the employer challenged a Director's decision that an employee organization was entitled to a certification without an election based upon the submission of a petition signed by the employees demonstrating majority support. The employer argued that the lack of a secret ballot election was undemocratic because it deprived employees of freedom of choice, and that the Director's acceptance of a signed petition to establish majority status for a certification without an election was inconsistent with PERB's Rules. Finally, the employer argued that it was improperly denied an opportunity to examine the signed petition.
- In denying the employer's exception seeking a secret ballot election in Town of Islip, PERB held that the language in the Taylor Law "not only countenances reliance by PERB on evidences other than a secret ballot [sic] election, but indicates a preference for such an alternative procedure unless PERB finds that an election is necessary." Id. at 3086. See Herbert, William A., Card Check Labor Certification: Lessons from New York, 74 Alb. L.Rev. 93 (2010).

§ 10-7E-18 [Impasse procedures]

- **Final and binding arbitration**
  - Provisions of PEBA stating that arbitration awards are contingent on the appropriation and availability of funds prevail over provisions of PEBA stating arbitration awards shall be final and binding. *IAFF Local 1687 v. City of Carlsbad,* Court of Appeals, Case No. 28,189 (June 23, 2009).
  - Final and binding arbitration is not a fundamental requirement of an effective collective bargaining system. *City of Deming v. Deming Firefighters Local 4251,* 2007-NMCA-069, 141 N.M. 686, 160 P.3d 595.

§ 10-7E-18(B) [Impasse Resolution, public employers other than the state.]

- **§ 26(A) (Repealed, 2020), Ordinances**
  - Local labor ordinances grandfathered under § 26(A) are not required to have a provision for final and binding arbitration. *City of Deming v. Deming Firefighters Local 4251,* 141 N.M. 686, 160 P.3d 595 (Ct. App. 2007). **Note:** This case reverses in part *City of Deming v. Deming Firefighters* in which the PELRB determined that a grandfathered labor ordinance's impasse arbitration provision violated the minimum or core requirements of PEBA, and was therefore not entitled to grandfathered status, because it provided for advisory arbitration only rather than final and binding arbitration.
  - During negotiations over successor CBA's the Unions brought suit asking the district court to declare that the City's LMRO violates the PEBA because the LMRO does not contain impasse arbitration and evergreen provisions required by the PEBA. On June 30, 2010, the Unions filed a motion for a temporary restraining order and preliminary injunction to continue the expiring collective bargaining agreements until new agreements were reached. The district court granted partial injunctive relief, continuing the agreements with certain exceptions until a full evidentiary hearing before the court. The parties then filed cross-motions for summary judgment. The New Mexico Court of Appeals reversed the District Court holding that the City's collective bargaining procedures are exempt from compliance with PEBA's "evergreen provision", PEBA §18(D). The absence of an evergreen provision in the LMRO does not fundamentally violate the PEBA. The LMRO does not permit the City to unilaterally impose conditions of employment once a CBA has expired. Instead, the LMRO includes provisions for impasse resolution through mediation and voluntary binding arbitration. These provisions ensure that the Unions are participants in the determination of employment conditions even after a CBA has expired. *AFSCME Council 18, AFSCME Local 1888, AFSCME Local 3022, AFSCME Local 624, and AFSCME Local 2962 v. The City of Albuquerque*, Court of Appeals No. 31,631, April 17, 2013

- **§ 26(B) (Repealed, 2020), Ordinances, equivalent alternative procedures**
  - A local ordinance that permits the governing body to "accept, reject, or modify the fact finder's recommendations as they See fit is not equivalent to the impasse procedure of PEBA; final and binding arbitration is the tradeoff for public employees giving up their right to strike. *IAFF Local 2362 v. City of Las Cruces,* 07-PELRB-2009 (July. 6, 2009).
  - A local ordinance that permits the governing body to "accept, reject, or modify the fact finder's recommendations as they *See* fit- is not equivalent to the impasse procedure of PEBA; is inimical to the concept of collective bargaining; and could deter the duty to bargain in good faith. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20. 1994).
  - A local ordinance that permits the governing body to make a final and binding settlement of impasse if the parties cannot agree as to the fact finder's report is not equivalent to the impasse procedure of PEBA; is inimical to the concept of collective bargaining; and could deter the duty to bargain in good faith. *Santa Fe County and AFSCME,* 1 PELRB NO. 1 (Nov. 18, 1993). **Note:** Both *Los Alamos County* and *Santa Fe County* dealt with § 10 PELRB-approved boards, but at that time the PELRB treated them as being subject only to the requirements of § 26(B) rather than all provisions of PEBA, as required under § 10.
  - While at impasse in their contract negotiations, the Union filed a PPC alleging bad faith bargaining and requested a pre-adjudication injunction because of the District's announced intent to unilaterally impose a schedule change not agreed to by the union. After an emergency meeting the board 2-1 granted the injunction. PELRB has jurisdiction to grant pre-adjudication injunctive relief based on §23(A). Because PEBA §18(D) requires an existing contract to remain in effect, unless injunction is granted the union will suffer irreparable harm. The injunction was appealed to District Court as case No. D-412-CV-2013-00347. 4th Judicial District dissolved the injunction referred the matter to the pending arbitration as part of the impasse proceeding. Settled. *NEA v. West Las Vegas School District,* 21 PELRB 13 (August 19, 2013)

§ 10-7E-18(C) [Impasse resolution; alternate procedures by agreement]

- Where alternative impasse procedures are authorized for employers other than the stale, they must still be equivalent to PEBA's procedures. *Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993).

§ 10-7E-18(D) [Impasse resolution; expired CBA continues until replaced.]

- PEBA's "evergreen clause", which states that expired contracts continue in full force and effect in the event of impasse until replaced by a subsequent written agreement, prevents an employer from implementing its last, best and final offer after impasse as may be done under case law interpreting the National Labor Relations Act (NLRA). *CWA Local 7911 v. County of Socorro,* 08-PELRB-2009 (July 6, 2009).
- The Section 18(D) language, "[i]n the event impasse continues after the expiration of a contract: does not require that impasse be declared prior to the contract's expiration, for the contract to continue in effect, *CWA Local 7911 v. County of* Socorro, 08-PELRB-2009 (July 6, 2009). Under Section 18(D), the Board cannot and does not require that a salary increase be granted or maintained by the employer after impasse. *CWA Local 7911 v. County of Socorro,* 08·PELRB·2009 (July 6, 2009).

§ 10-7E-19(A) [Prohibited practices by employers; discrimination because of union membership.]

- **Retaliation for union association and other concerted activities**
  - Union employees claimed the School District had committed prohibited practices violating §§ 107E-19(A), (B), (D) or (E) (2020), by discriminating against several of the School's Union employees, some of whom were also Union Officers, after the Union members discussed the removal of the School's Superintendent at a few public-school board meetings while wearing Union insignia. Shortly following these events the Union member's contracts were not renewed for various School Board policy violations. Additionally, Union members had email correspondence circulated encouraging teachers to not participate in the District's voluntary grant survey. The District's Superintendent cited this action as insubordinate while the Union claimed it to be concerted activities, protected under section 5 of PEBA. After reviewing the evidence and utilizing the Wright Line analysis, the Hearing Officer found in favor of some Union members. Upon appeal, the Court affirmed the Hearing Officer's decision with exception to the concerted activities (due to the action having occurred prior to the 2020 PEBA amendments which added protection for concerted activities). *Peñasco Federation of United School Employees v. Peñasco Independent School District,* PELRB No. 108-20 (2021).
  - An employee, who was also a union member, received a reprimand for allegedly using state phones to conduct union business. The union filed a prohibited practice complaint (PPC) claiming violations of specific sections of the Public Employee Bargaining Act (PEBA). Despite establishing the employee's union affiliation and activities, the union failed to demonstrate a clear nexus between union-related calls and the reprimand. The evidence showed that while there were 40 hours of personal phone use for which

the employee was disciplined, only two hours were related to union calls. Consequently, the restriction of union-related calls to the last 15 minutes of the day did not interfere with union business. Overall, there was insufficient evidence to support the alleged violations. *AFSCME Council 18 v. NM Tax & Rev, Dep't,* PELRB Case No.: 104-12, 55-PELRB-2012

- **Gender discrimination**
  - The PELRB is not the proper forum to address claims of gender discrimination, even where Union asserts that the Doña Ana County withheld proper rank of lieutenant from a Detention Center training sergeant on the basis of her gender, and that such action interfered with the designation of an appropriate bargaining unit. *In re: Communications Workers of America, Local 7911 and Doña Ana County,* 1 PELRB No. 16 (Jan. 2, 1996).

- **Probationary employees**
  - Probationary employees' rights to form, join or assist a union are not protected under § 19(A). *Health Care Local 2166. National Union of Hospital and Health Care Employees District 1199 v. University of New Mexico Health Science Center,* 2d Judicial. Dist. No. CV 2007-8161 (Feb. 20, 2008, J. Nash).
  - Once an employee's status has changed from probationary to non-probationary, an employer cannot revert the employee to probationary status. *See City of Albuquerque v. AFSCME Council 18*, 2011-NMCA-21, 149 N.M. 379, 249 P.3d 510.

- **Stewards**
  - In *AFSCME, Council 18 v. N.M. Regulation and Licensing Dep't,* 5 PELRB-2013 (Feb. 22, 2013), the Department was determined to have violated several provisions of PEBA. These violations consisted of refusing to recognize an employee's appointment as union steward, denying employee leave to conduct union business, and preventing him from representing an employee in his steward role. The employee was then issued a letter of reprimand for engaging in union activities without the Department's approval. These actions were deemed to have interfered with, restrained, or coerced a public employee in the exercise of a right guaranteed pursuant to PEBA and by dominating or interfering in the administration of a labor organization.

§ 10-7E-19(B) [Prohibited practices by employers; interference with PEBA rights.]

- **Limitations on organizational activities**
  - A fire department's no-solicitation rule that encompasses rest breaks, lunch time, and residential or after-duty hours presumptively violate Section 19(B) of PEBA. Thus, such rule constitutes a prohibited employer practice unless the city makes a showing that its firefighting efforts would be hampered if employees were permitted to engage in union organizational activities during times when fire fighters were not needed for emergency services. *Las Cruces Prof'l Fire Fighters v. City of Las Cruces (Fire Fighters II),* 1997-NMCA-031, 123 N.M. 239.
  - In *Bernalillo County Court Deputies Association v. Bernalillo County Sheriff's Office and Bernalillo County,* PELRB No. 121-20 (2021), the Complainant filed a PPC alleging the Respondent breached a duty to bargain before changing shift hours and transferring bargaining unit work to non-bargaining unit employees. The opposing parties are in separate bargaining units, covered by separate CBAs, and represented by different unions. However, NMSA 1978, § 10-7E-6 allows the transfer of public employees unless limited by the provisions of the CBA. In this case, the CBA's Management Rights Clause stated that management could transfer unit employees and change shift hours in order to maintain the governmental operations entrusted to it by law. In the absence of any explicit restriction within the CBA, the complaint was dismissed.
  - An employee, who was also a union member, received a reprimand for allegedly using state phones to conduct union business. The union filed a prohibited practice complaint (PPC) claiming violations of specific sections of the Public Employee Bargaining Act (PEBA). Despite establishing the employee's union affiliation and activities, the union failed to demonstrate a clear nexus between union-related calls and the reprimand. The evidence showed that while there were 40 hours of personal phone use for which the employee was disciplined, only two hours were related to union calls. Consequently, the restriction of union-related calls to the last 15 minutes of the day did not interfere with union business. Overall, there was insufficient evidence to support the alleged violations. *AFSCME Council 18 v. NM Tax & Rev, Dep't,* PELRB Case No.: 104-12, 55-PELRB-2012
  - In *AFSCME, Council 18 v. N.M. Regulation and Licensing Dep't,* 5 PELRB-2013 (Feb. 22, 2013), the Department was determined to have violated several provisions of PEBA. These violations consisted of refusing to recognize an employee's appointment as union steward, denying employee leave to conduct union business, and preventing him from representing an employee in his steward role. The employee

was then issued a letter of reprimand for engaging in union activities without the Department's approval. These actions were deemed to have interfered with, restrained, or coerced a public employee in the exercise of a right guaranteed pursuant to PEBA and by dominating or interfering in the administration of a labor organization.

- In *AFSCME, Council 18 v. State of New Mexico, New Mexico State Personnel Board, and Sandra K. Perez, Director of New Mexico State Personnel Board.* 312 P.3d 674 (Ct. App. 2013), AFSCME sought declaratory and injunctive relief against the New Mexico State Personnel Board and Sanda Perez, the Board Director, following the Board's adoption of a regulation defining the phrase, "shift work schedule" found in Article 21, Section 5 of the parties CBA in such a way that the Union asserted the regulation violated the Contract Clauses of the United States and New Mexico Constitutions. The district court dismissed for failure to state a claim. The Court of Appeals reversed and remanded for further proceedings. The Court of Appeals reasoned that because, having lost an arbitration after removing the benefit from persons in jobs except those requiring twenty-four-hour coverage, the Board attempted circumvent the arbitrator's decisionand the State's obligations under the Agreement by adopting a definition that was the exact opposing of the definition adopted by the arbitrator. The Union adequately pled that the new regulation would substantially impair an existing contract right, so as to make the regulation unconstitutionally retractive by impairing the Agreement in violation of the Contract Clauses of the United States and New Mexico constitutions.
- In the case of *AFSCME, Council 18, v. State of New Mexico, New Mexico State Personnel Board, and Sandra K. Perez, Director of New Mexico State Personnel Board,* the dispute centered around the New Mexico State Personnel Board's adoption of a regulation that defined the term "shift work schedule" found in Article 21, Section 5 of the CBA between AFSCME and the State of New Mexico. The Union contended that this regulation violated their contractual rights and, consequently, the Contract Clauses of both the United States and New Mexico Constitutions. Initially, the district court dismissed the case, ruling that AFSCME failed to state a claim. However, the Court of Appeals took a different view. They reasoned that the Board's adoption of a definition opposing the one previously determined by an arbitrator was an attempt to circumvent the arbitrator's decision and the State's obligations under the Agreement. The Union's allegation that the new regulation would substantially impair an existing contract right was deemed sufficient to make the regulation unconstitutionally retroactive, thus violating the Contract Clauses of the United States and New Mexico constitutions.
- In Communication Workers of America, AFL-CIO v. State of New Mexico, Case No.: (Ct. App. 2019), the Union filed a prohibited practice complaint against the State of New Mexico. The Union contended that the State violated PEBA by denying an employee paid time for preparing and attending her grievance proceedings. The State's argument was that since the employee was not a union officer or steward, and that she was not entitled to paid time for participating in the proceedings. During the proceedings, it was discovered State agencies were granting paid time to bargaining unit employees for grievance meetings. The Hearing Officer found that the State violated §10-7E-19(B) (2003), which prohibits public employers from refusing to bargain collectively and in good faith with the exclusive representative. Additionally, the State was found to have unilaterally altered a mandatory bargaining subject under §10-7E-19(F). The State appealed the Hearing Officer's decision to the Board, which largely upheld the findings but disagreed with the violation of §10-7E-19(F), citing the Union's failure to request bargaining within a six-month period. The district court affirmed the Board's decision on § 10-7E-19(F) but reversed it regarding §10-7E-19(B), deeming it inconsistent. The case reached the Court of Appeals, where the Union argued that the State violated both §10-7E-19(B) and (F) by unilaterally changing a binding past practice related to compensating bargaining unit employees for grievance meeting time. The Court was tasked with determining whether a binding past practice existed as a mandatory bargaining subject and whether the State's notice constituted fait accompli, excusing the Union from requesting bargaining. Ultimately, the Court of Appeals reversed the district court's decision, instructing a remand to the Board. The Board was to assess whether the collective bargaining agreement's zipper clause eliminated the past practice of paying employees for grievance meeting preparation time. If not, the Court would then consider whether the State's actions constituted fait accompli, thus waiving the Union's right to bargain.

- **Right to *Excelsior* list of names and address**
  - The failure to provide a Union with the names and home addresses of proposed bargaining unit employees interfere with, restrains or coerces the public employees in their right to form, join or assist a union for purposes of collective bargaining *SSEA, Local* 3878 *v, Socorro Consolidated School District,* 05-PELRB-2007. (December 13, 2007), citing *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1996).
    Note: The Board implicitly rejected arguments of counsel that *Excelsior* should not apply to the public sector, and that in this regard the PELRB should follow precedent under the federal labor Management and Employees Relations Act. 29 USC §§ 7101, et *seq.,* rather than the NLRA.

- **Right to *Weingarten* representative**
  - An employee is not denied *"Weingarten* rights"- the rights of employees to union representation during investigatory meetings- in violation of PEBA where the purpose of a meeting is not to investigate or gather information, but rather to deliver a reprimand for previous conduct. *Pita* S. *Roybal* v. *Children, Youth and Families Department,* 02-PELRB-2006 (May 12, 2006).
  - By a vote of vote of 2-1 (Vice-Chair Bingham dissenting) the Board adopted the Hearing Officer's Findings, Conclusions and Rationale Board recognizing an established history of finding *Weingarten*-type rights arising under the PEBA. The Board declined to depart from that history both for reasons of *stare decisis*, as well as because the Board's prior decisions on this issue constitute a well-reasoned interpretation of PEBA. The New Mexico Supreme Court has recognized that "much of the language in PEBA was derived from the National Labor Relations Act." *Regents of the Univ. of N.M. v. N.M. Fed. of Teachers,* 1998-NMSC-020, 125 N.M. 401, 962 P.2d 1236. For that reason, "[a]bsent cogent reasons to the contrary, [courts] should interpret language of the PEBA in the manner that the same language of the NLRA has been interpreted, particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the time the PEBA was enacted." *Id*. (quoting *Las Cruces Prof'l Fire Fighters v. City of Las Cruces,* 1997-NMCA-031, 123 N.M. 239. 938 P.2d 1384. *AFSCME, Council 18 v. N.M. Children, Youth and Families Dep't.* 10-PELRB-2013 (May 15, 2013).
  - The rights guaranteed by PEBA at NMSA 1978, §10-7E-5 (2020), to form, join or assist a labor organization for the purpose of collective bargaining are substantially the same as the protections afforded employees by Section 7 of the NLRA to act in concert for mutual aid and protection and the protections provided by PEBA are sufficiently similar to those provided by the NLRA to warrant the inference that the New Mexico Legislature intended to protect public employees to the same extent as does the decision in *Weingarten v. NLRB. AFSCME, Council 18 v. N.M. Children, Youth and Families Dep't.* 10-PELRB-2013 (May 15, 2013).
  - Refusal to process grievances because the employer has refused to recognize the union's choice of steward is a violation of § 19(B). *AFSCME, Council 18 v. N.M. Regulation and Licensing Dep't,* 5 PELRB-2013 (Feb. 22, 2013)
  - In *AFSCME Council 18, on Behalf of Daniel Nogales v. City of Albuquerque Parks and Recreation Department and the City of Albuquerque Personnel Board*; 2nd Judicial District Court cause No. CV 202-2012-02239 Parks and Recreation Department worker Daniel Nogales appeal to the District Court from a decision of the Albuquerque Personnel Board upholding termination of his employment. AFSCME raised two issues on appeal on behalf of Nogales: (1) Nogales' termination is contrary to law because he was denied his right to union representation during the investigative process, contrary to *NLRB v. Weingarten, Inc*., 420 U.S. 251 (1975) and (2) The Personnel Board's decision as not supported by substantial evidence.
  - The City argued that *Weingarten*'s application is limited to private sector employees and that the Personnel Board was without jurisdiction to hear the issue. The Court stated that although it is "unquestionable that *Weingarten* specifically addressed a private sector employee who was covered under the National Labor Relations Act ("NLRA") ... the City has not explained why the PEBA should not be interpreted in the same way as the NLRA was interpreted in *Weingarten* or otherwise substantiated its argument. Overall, the Court is not convinced that the PEBA does not encompass Weingarten rights." Neither was the Court convinced that the Personnel Board did not have jurisdiction to address the *Weingarten* dispute. While acknowledging that such disputes would typically be heard as a PPC by the City's Labor-Management Relations Board, a *Weingarten* violation can affect imposed discipline as was, therefore, "highly relevant to the Personnel Board."
  - As to the merits of the *Weingarten* violation the Court ruled that a violation of the employee's rights occurred when the Assistant Superintendent denied his request for union representation at the initial meeting but that Weingarten rights did not apply to law enforcement investigation of potential crimes. Therefore, no violation occurred when he was denied union representation when APD sought to interview him.

§ 10-7E-19(C) [Prohibited practices by employers; domination of or interference with union.]

- **Direct dealing**
  - Failure to give a union representative notice of a mandatory employee meeting concerning the terms and conditions of employment after the representative requested such notice constitutes interference with the union's status as exclusive representative and interference in the collective bargaining relationship, contrary to § 19(C). *AFSCME Council* 18 *v. Department* of *Health,* 06-PELRB-2007 (December 3, 2007).
  - By changing the duties of and extending benefits to three bargaining unit members without bargaining, the District violated § 19(C). *Central Consolidated School Association v Central Consolidated School District,* 27-PELRB-2013.
  - The dispute revolved around an employee's reprimand for using state phones to conduct union business.

Despite establishing the employee's union affiliation and activities, the union failed to demonstrate a clear connection between union-related calls and the reprimand. The evidence showed that restricting union-related calls to the last 15 minutes of the day did not significantly interfere with union business. Overall, there was insufficient evidence to support the alleged violations related to limiting organizational activities. *AFSCME Council 18 v. NM Tax & Rev, Dep't,* PELRB Case No.: 104-12, 55-PELRB-2012.

- **Appointment of stewards**
  - An agreement recognizing the union's right to designate 1 steward and 1 alternate in Albuquerque, 2 stewards in Santa Fe and 1 steward and 1 alternate in Las Cruces, did not require that employees serving as stewards must have an office in or work primarily out of those designated locations. The union was not required by that agreement to obtain concurrence of the Employer as to whom it will appoint as its stewards. Concurrence was required only as to the number of stewards and their areas of geographical responsibility. *See AFSCME, Council 18 v. N.M. Regulation and Licensing Dep't,* 5 PELRB-2013 (Feb. 22, 2013)

§ 10-7E-19(D) [Prohibited practices by employers; discrimination in hiring or term or condition, to encourage or discourage union membership.]

- **Probationary employees**
  - Although probationary employees are specifically excluded from the category of individuals whose rights are acknowledged in § 2, § 19(D) prohibits all discrimination for the purpose of encouraging or discouraging membership in a union, regardless of whether the discrimination is directed toward a probationary employee. Section 19(D), unlike § 2, omits any reference to "employees' and is broadly worded. Additionally, to conclude otherwise would render meaningless § 19{D)'s prohibition against discrimination "in hiring." *Health* Care *Local* 2166. *National Union* of *Hospital and Health* Care *Employees District 1199 v. University* of *New Mexico Health Science Center,* 2d Judicial Dist. No. CV 2007-8161 (Feb. 20, 2008. J. Nash).An employee was held not to be probationary under UNM personnel regulations where she had worked in the same position doing the same job for almost a year, for six months as a temporary employee and five months as a regular employee; and where the stated purpose of probationary status was to "give the University the opportunity to evaluate" a new employee's performance and to allow the new employee "the opportunity to understand the mission and goals of the University and ... department and to demonstrate satisfactory performance." *See United Staff-UNM Employees Local No. 6155 v. UNM,* PELRB Case No. 101-05, Hearing Examiner Report at 11-13, 32-34 (Aug. 17, 2005).

§ 10-7E-19(F) [Prohibited practices by employers, refusal to bargain in good faith.]

- **Private adjustment of grievances/direct dealing**
  - An employer violates § 19(F) by meeting with an employee outside of the presence of the union, to privately adjust a grievance filed by the union on that employee's behalf. *AFSCME Council* 18 *v. New Mexico Department* of *Corrections,* 04-PELRB-2007. (December 13, 2007). The discipline imposed by the Department in this and a related case (PELRB 113-12; 4-PELRB-2012, Feb. 21, 2013) was taken for an employee acting as a union steward against the wishes of the Employer, which acted improperly in refusing to recognize his appointment by the union as a steward, by denying him leave for union-related activities and by imposing discipline for attempting to act as a union steward. *AFSCME, Council 18 v. N.M. Regulation and Licensing Dep't,* 5 PELRB-2012(Feb. 22, 2013)The Employer committed a PPC when it continued to act in a manner found by the Board's Hearing Officer in an earlier case involving the same parties to have violated the law. That sort of "in your face" approach to labor relations is not consistent with the stated purpose of the PEBA to "...promote harmonious and cooperative relationships between public employers and public employees..." NMSA 1978 §10-7E-3 (2003). *AFSCME, Council 18 v. N.M. Regulation and Licensing Dep't,* 5 PELRB-2012 (Feb. 22, 2013).
  - The school district was found to have violated § 19(F) by assigning extra work to employees and paying them a "foreman stipend" without bargaining. *Central Consolidated School Association v Central Consolidated School District,* 27-PELRB-2013.
  - An employer does not violate § 19(F) by changing work shifts and schedules when those changes are consistent with the CBA. *Bernalillo County Court Deputies Association v. Bernalillo County Sheriff's Office and Bernalillo County,* PELRB No. 121-20 (2021).
  - Despite establishing the employee's union affiliation and activities, the union failed to demonstrate a clear connection between union-related calls and the reprimand. The evidence showed that restricting union-related calls to the last 15 minutes of the day did not significantly interfere with union business. Overall, there was insufficient evidence to support the alleged violations related to limiting organizational activities. *AFSCME Council 18 v. NM Tax & Rev, Dep't,* PELRB Case No.: 104-12, 55-PELRB-2012.
  - In *Communication Workers of America, AFL-CIO v. State of New Mexico*, Case No.: A-1-CA-36331 (Ct.

App. 2019), the Union filed a prohibited practice complaint against the State of New Mexico. The Union contended that the State violated PEBA by denying an employee paid time for preparing and attending her grievance proceedings. The State's argument was that since the employee was not a union officer or steward, and that she was not entitled to paid time for participating in the proceedings. During the proceedings, it was discovered State agencies were granting paid time to bargaining unit employees for grievance meetings. The Hearing Officer found that the State violated §10-7E-19(B) (2003), which prohibits public employers from refusing to bargain collectively and in good faith with the exclusive representative. Additionally, the State was found to have unilaterally altered a mandatory bargaining subject under §10-7E-19(F). The State appealed the Hearing Officer's decision to the Board, which largely upheld the findings but disagreed with the violation of §10-7E-19(F), citing the Union's failure to request bargaining within a six-month period. The district court affirmed the Board's decision on § 10-7E-19(F) but reversed it regarding §10-7E-19(B), deeming it inconsistent. The case reached the Court of Appeals, where the Union argued that the State violated both §10-7E-19(B) and (F) by unilaterally changing a binding past practice related to compensating bargaining unit employees for grievance meeting time. The Court was tasked with determining whether a binding past practice existed as a mandatory bargaining subject and whether the State's notice constituted fait accompli, excusing the Union from requesting bargaining. Ultimately, the Court of Appeals reversed the district court's decision, instructing a remand to the Board. The Board was to assess whether the collective bargaining agreement's zipper clause eliminated the past practice of paying employees for grievance meeting preparation time. If not, the Court would then consider whether the State's actions constituted fait accompli, thus waiving the Union's right to bargain.

- **Past Practice**
  - In *CWA v. State of NM*, 2019-NMCA-31, the State sent a letter to the union stating that it was discontinuing a past practice of allowing bargaining unit employees to use paid time (union time) to prepare for and participate in grievance meetings, subject to supervisor approval. The union filed a Prohibited Practice Complaint six months later alleging (inter alia) that the State had refused to bargain in good faith about the subject of union time in the grievance process. The Hearing Officer considered the Union's unchallenged evidence of the parties' past practice of paying bargaining unit employees for preparing for and participating in grievance meetings. Indeed, the State's own witness, Labor Relations Administrator Ronald Herrera, stated that he was "aware of at least five (5) instances occurring in 2012 and 2013 in which employees of one (1) agency, the Department of Cultural Affairs, who were not union officers or union stewards, were coded as utilizing union time in the payroll system." Relying on the State's March 5, 2014, letter acknowledgement of a past practice, the affidavit statements of Gould and Alire that the State has engaged in this practice, and six bargaining unit employees' statements and exhibits establishing they were paid either "union time" or "paid time" for time they spent in grievance meetings, the Hearing Officer determined "the past practice of paying employees for preparing and attending their own grievance meetings as either union time or regular work time [was] clearly established." As a result, the Hearing Officer concluded that "the State violated PEBA § 10-7E-19(B) when it unilaterally altered a mandatory subject of bargaining and a longstanding past practice thereby unlawfully restraining and interfering with employees' rights under PEBA. The Hearing Officer's decision held that the letter presented the union with a fait accompli which relieved them of the duty to request bargaining over the subject of union time and found that the State had violated§ 10-7E-19(F). The Board reversed the Hearing Officer's determination of a violation of § 10-7E-19(F) citing the union's inadequate explanation of why it took no action in a six-month period to request bargaining. The District Court affirmed the PELRB's finding that no violation of § 10-7E-19(F) occurred because the union was not relieved of its duty to request bargaining because the State provided them sufficient time to do so and had not implemented the change before notifying the union. Having determined that the union had waived any claim about the timeliness of the States notice, the Court of Appeals reversed the District Court and held the Board's conclusion that no violation of § 10-7E-19(F) occurred was arbitrary and capricious because it had not considered the State's intent when deciding the issue. The Board's decision "contains no indication that it considered the possibility that the State had already implemented, or was in the process of implementing, its stated shift in policy, so as to warrant a finding that the State had no intention of changing its mind." *Id.* at ¶23. The case was remanded to the PELRB to consider, in light of the Court of Appeal's decision, whether the State's actions constituted a fait accompli.
  - A past practice will not be binding if there is insufficient evidence to establish it. *See AFSCME, Council 18, AFL-CIO, Local 3022 vs. ABCWUA*, PELRB No. 106-21.

§ 10-7E-19(G) [Prohibited practices by employers; refusal to comply with PEBA.]

- **Direct dealing**
  - *Northern Federation of Education Employees v. Northern New Mexico Community College, et al.* (July 2, 2012), upheld on appeal in First Judicial District Court Case No, D-101-CV-2012-02100. The Board found

Respondent's local Labor-Management Commission to be duly constituted and fully functional, citing to the New Mexico Supreme Court's decision in *AFSCME v. Martinez and the State of New Mexico,* 2011-NMSC-018, No. 32,905 (2011) *supra.* Therefore, the Board did not have jurisdiction over the parties and the subject matter in three of the consolidated PPC's alleging violations that would come under the jurisdiction of the local board. The Board found that it did have jurisdiction over three other consolidated PPC's alleging a violations of PEBA §19(G). With regard to those claims the Board held that the union did not meet its burden of proof needed to establish grounds for revocation of its approval of the local Board.

- The failure to give a Union representative notice of a mandatory employee meeting concerning the terms and conditions of employment-after the Union representative had requested she be granted such notice-constitutes interference with the Union's status as exclusive representative and interference in the collective bargaining relationship, contrary to § 15(A) and thus § 19(G). *AFSCME Council 18 v. Department* of *Health,* 06-PELRB-2007 (Dec. 3, 2007).
- The Employer committed a PPC when it continued to act in a manner found by the Board's Hearing Officer in an earlier case involving the same parties to have violated the law. That sort of "in your face" approach to labor relations is not consistent with the stated purpose of the PEBA to "...promote harmonious and cooperative relationships between public employers and public employees..." NMSA 1978, §10-7E-3 (2020). *See AFSCME, Council 18 v. N.M. Regulation and Licensing Dep't,* 5 PELRB-2012 (Feb. 22, 2013).
- The school district was found to have violated § 19(G) by assigning extra work to employees and paying them a "foreman stipend" without bargaining. *Central Consolidated School Association v. Central Consolidated School District*, 27-PELRB-2013.
- Despite establishing the employee's union affiliation and activities, the union failed to demonstrate a clear connection between union-related calls and the reprimand. The evidence showed that restricting union-related calls to the last 15 minutes of the day did not significantly interfere with union business. Overall, there was insufficient evidence to support the alleged violations related to limiting organizational activities. *AFSCME Council 18 v. NM Tax & Rev, Dep't,* PELRB Case No.: 104-12, 55-PELRB-2012.
- In *AFSCME, Council 18, v. New Mexico Human Services Dep't,* PELRB Case No.: 151-11, 59-PELRB-2012 (July 13, 2012), the parties' CBA contains sections that implicate employee health and safety. More specifically, in Section 2(D) of the CBA, "HSD agrees to provide for appropriate after hours security in its office when clients remain on the premises after 5:00 p.m." Without bargaining, for budgetary reasons the HSD removed security staff from six of its Income Support Division offices. The Board concluded that the Employer's practice of providing security guards at several of its locations implicates a safety issue which is a mandatory subject of collective bargaining. The Human Services Department committed a per se breach of the duty to bargain by unilaterally altering a mandatory subject of bargaining. However, there was insufficient evidence to prove that Article 34 of the CBA was breached by failure to provide a safe work environment or because it required that security must be provided. The only provision stated that employees may refuse to work where they are exposed to risk of harm. AFSCME failed to establish a violation of Appendix H of the CBA because there was insufficient evidence of any bargaining unit members being required to remain with clients on the premises past 5:00 p.m. The decision to remove security was not a reserved management substantive right because Article 18, Section 2 requires HSD to bargain in good faith whenever it contemplates changes to existing terms or conditions of employment relating to Article 18(9) (location and operation of its organizations) and 18(11) (standards related to employee's safety).

- **Duty to provide information**
  - An employer violates § 15(A) and § 17(A)(1) by refusing to provide, upon request, information necessary for a certified exclusive representative to police and administer a contract. A labor organization that has been certified as the exclusive representative has a duty to adequately represent its members. "Necessary information- includes such information as would assist the union in determining the extent and number of employees affected by an erroneous wage implementation; work schedules; a list of casual pool employees and copies of contracts between the employer and staffing agencies. *See National Union* of *Hospital and Health Care Employees, District No.* 1199 *v. UNMH,* 3-PELRB-2005 (Oct. 19, 2005).
  - There is nothing in the CBA's requirement that the union provide the Employer a written list of the names, address, telephone numbers of those authorized to act on behalf of the Union and the extent of their authority that gives the Employer the right to veto the Union's designation of a steward because the steward's name is absent from the required quarterly listing, especially in light of the fact that the Employer would have refused to recognize the union's appointment of its steward regardless of whether the steward's name had been added to the list because the Employer's stated justification for its actions was that the parties' agreement "does not permit, authorize or contemplate an RLD Steward outside of Albuquerque, Santa Fe or Las Cruces work location areas." Thus, whether or not the name appears on

a list is irrelevant to the reason given for refusing to honor his appointment. The steward's "post of duty" is irrelevant to the question whether he may serve as the designated union Steward. *See AFSCME, Council 18 v. N.M. Regulation and Licensing Dep't,* 4-PELRB-2012 (Feb. 21, 2013)

- The Employer did not commit a PPC by refusing to allow a contested union steward to attend on paid status, meetings agreed to by the parties for purposes of administering their CBA because the CBA's definition of the term "Union officials" entitled to such leave listed the Local Union Presidents, Local Vice-Presidents, and "any other union official as designated by mutual agreement of the parties." The CBA does not include union stewards as an official for whom leave must be approved and it is plain from the context of the PPC and the parties' respective dispositive motions that the contested union steward is not mutually agreed to be entitled to such paid status. A different result obtains, however, with regard to the Employer's obligation under the CBA to grant leave for the investigation and processing of grievances, which was also denied the contested steward where the parties' CBA requires the Employer to allow union stewards paid leave "for the purposes of representing employees only within their respective agency at grievance meetings, disciplinary appeals based on suspension, demotion, or dismissal and cases to the PELRB". *AFSCME, Council 18 v. N.M. Regulation and Licensing Dep't,* 4-PELRB-2012 (Feb. 21, 2013)

§ 10-7E-19(H) [PPCs for Violation of §§ 10-7E-19(H) or 20(D) Alleging Violation of the CBA or "Other Agreements"]

- In the case of *AFSCME, Council 18 v. New Mexico Human Services Department*, PELRB Case No.: 151-11, 59-PELRB-2012 (July 13, 2012), the CBA between the parties included provisions related to employee health and safety. Specifically, Section 2(D) of the CBA stipulated that the Human Services Department (HSD) would provide appropriate after-hours security in its office when clients remained on the premises after 5:00 p.m. However, without engaging in collective bargaining, the HSD unilaterally removed security staff from six of its Income Support Division offices due to budgetary reasons. The PELRB concluded that the HSD's practice of providing security guards at several locations was a mandatory subject of collective bargaining, as it implicated employee safety. By altering this mandatory subject without bargaining, the HSD committed a per se breach of its duty to bargain. Despite this breach, there was insufficient evidence to prove that Article 34 of the CBA was violated either by failing to provide a safe work environment or by requiring security to be provided. Article 34 allowed employees to refuse work in situations where they were exposed to a risk of harm. Additionally, AFSCME failed to establish a violation of Appendix H of the CBA, which pertained to after-hours work requirements. There was insufficient evidence that bargaining unit members were required to remain with clients on the premises past 5:00 p.m. Importantly, the decision to remove security was not a reserved management substantive right Article 18, Section 2 of the CBA obligated the HSD to bargain in good faith whenever contemplating changes to existing terms or conditions of employment related to the location and operation of its organizations (Article 18(9)) and standards related to employee safety (Article 18(11).

- In the case of *AFSCME, Council 18 v. State of New Mexico, the New Mexico State Personnel Board and Sandra K. Perez, Director of New Mexico State Personnel Board*, 314 P.3d 674 (Ct. App. 2013), the crux of the matter was the Board's adoption of a regulation that defined the term "shift work schedule" as outlined in Article 21, Section 5 of the CBA between AFSCME and the State of New Mexico. The Union contended that this regulation directly contravened the terms of the CBA, thereby violating the contractual rights established therein. Specifically, the Board's action was seen as an attempt to circumvent a prior arbitration decision that had removed the benefit associated with "shift work schedule" from certain job positions (except those requiring twenty-four-hour coverage). By adopting a definition that contradicted the arbitrator's ruling, the Board allegedly breached its obligations under the Agreement. The Court of Appeals agreed with the Union, finding that the new regulation substantially impaired an existing contract right. Consequently, they held that the regulation was unconstitutionally retroactive and violated the Contract Clauses of both the United States and New Mexico constitutions.

- **Majority in favor of representation are considered represented**
  - Under PEBA, a majority of employees who vote in favor of representation are considered represented, irrespective of their membership status or agreement with organizational policies. In the case *of Luginbuhl v. City of Gallup*, Opinion No: 2013-NMCA-053, the petitioner, David Luginbuhl, served as a full-time police officer with the Gallup Police Department (GPD) from October 27, 2007, until his termination on June 8, 2011. Despite choosing not to join the Union, pay dues, or seek the Union's assistance, Luginbuhl acknowledged that he was a regular full-time, non-probationary, sworn police officer covered by the Collective Bargaining Agreement (CBA) between the Union and the City. The CBA outlined terms related to disciplinary procedures, grievances, and appeals. Under the CBA, the grievance procedure begins when an employee files a written grievance within seven days of becoming aware of the issue that led to

disciplinary action. Luginbuhl initiated a grievance challenging his termination, but he claimed it was based on the City's personnel rules and regulations for non-union employees, not pursuant to the CBA. The key distinction between the two processes lies in arbitration: the CBA requires arbitration, while the City Personnel procedure does not. Luginbuhl followed the first three steps of the grievance process but did not proceed to the fourth step—arbitration—under the CBA. Instead, he filed a petition in district court seeking injunctive relief, arguing that his non-union status exempted him from CBA-bound arbitration. The district court denied his petition, prompting an appeal. The City contended that the district court lacked jurisdiction to grant a writ of prohibition, but the Court of Appeals ruled on other grounds. It held that no injunctive relief—whether a writ of prohibition, temporary restraining order, or preliminary injunction—was appropriate because arbitration was the proper forum for Luginbuhl's grievance. The Court of Appeals also addressed the question of whether a writ of prohibition could be issued from a district court to a municipality or its arm. The court reasoned that Luginbuhl's argument, as a non-union member, that he was not bound by the agreement to arbitrate disputes was refuted by the plain language of the Public Employees Bargaining Act (PEBA) and case law. The PEBA establishes that a majority of employees voting in favor of representation are all represented, regardless of their membership status or agreement with organizational policies. Even the City's Labor Management Relations Ordinance confirms that the CBA covers all employees in the bargaining unit. *See Luginbuhl v. City of Gallup & Gallup Police Department,* Opinion No.: 2013-NMCA-053 (March 11, 2013).

§ 10-7E-21, [Strikes and lockouts prohibited.]

- **Limitations on penalties**
  - A union that has been decertified for strike activity cannot be barred from collecting dues. *AFSCME and Los Alamos County Firefighters v. County of* Los *Alamos,* 1 PELRB No.3 (Dec. 20, 1994).
  - Section 10-7D-21(C) of PEBA I (Section 10-7E-21(C) of PEBA II) expressly provided for decertification "for a period of not more than one year." Where a union has engaged in illegal strike activity. Therefore, under PEBA I, a three-year bar on recertification could not be imposed. *AFSCME* and *Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).
    Note: PEBA II, in contrast, provides for an indefinite period of decertification, although the board could still conclude that three years would be excessive under the particular facts of the case.
  - The Board or local board must examine or investigate on a case-by-case basis to determine whether an exclusive representative caused, instigated, encouraged or supported a strike, before the sanction of decertification can be imposed. *Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993).
  - An existing CBA cannot be automatically voided as a penalty for strike of voiding, without a case-by-case determination of whether the exclusive representative caused, instigated, encouraged or supported a strike. *Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993).

- **Local ordinances**
  - A local ordinance's provision that mandates automatic decertification and/or contract nullifications in the event of strike, even if the union had no knowledge or involvement, fails to promote the principles of §21. *Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993).
  - A local ordinance may not provide greater or additional penalties for strike than that provided for under PEBA, because such provisions would not "promote the principles established in Sections 19 through 21 of the [PEBA]". *Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993). *See* also *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).
  - A local ordinance's strike provision violates PEBA where it permits the County Council chairman to appoint an interim member of the local board in the event of a strike emergency, without adhering to the appointment criteria of § 10. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No.3 (Dec. 20, 1994).

§ 10-7E-22, [Agreements Valid; Enforcement]

- In the case of *AFSCME, Council 18 v. State of New Mexico, the New Mexico State Personnel Board and Sandra K. Perez, Director of New Mexico State Personnel Board*, 314 P.3d 674, (Ct. App. 2013), the central issue revolved around the Board's adoption of a regulation that defined the term "shift work schedule" as outlined in Article 21, Section 5 of the CBA between AFSCME and the State of New Mexico. The Union contended that this regulation directly contravened the terms of the CBA, rendering it unenforceable. Specifically, the Board's action was seen as an attempt to circumvent a prior arbitration decision that had removed the benefit associated with "shift work schedule" from certain job positions (except those requiring twenty-four-hour coverage). By adopting a definition that contradicted the arbitrator's ruling, the Board allegedly breached its obligations under the Agreement. The Court of Appeals agreed with the Union, finding that the new regulation substantially impaired an existing contract

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- In Town of Islip, 8 N.Y. P.E.R.B. ¶ 3049, 3085 (1975), the employer challenged a Director's decision that an employee organization was entitled to a certification without an election based upon the submission of a petition signed by the employees demonstrating majority support. The employer argued that the lack of a secret ballot election was undemocratic because it deprived employees of freedom of choice, and that the Director's acceptance of a signed petition to establish majority status for a certification without an election was inconsistent with PERB's Rules. Finally, the employer argued that it was improperly denied an opportunity to examine the signed petition. In denying the employer's exception seeking a secret ballot election in Town of Islip, PERB held that the language in the Taylor Law "not only countenances reliance by PERB on evidences other than a secret ballot [sic] election, but indicates a preference for such an alternative procedure unless PERB finds that an election is necessary." Id. at 3086. *See* Herbert, William A., *Card Check Labor Certification: Lessons from New York*, 74 Alb. L.Rev. 93 (2010).
- In contrast, in *Board of Cooperative Educational Services of Sullivan County*, 14 N.Y. P.E.R.B. ¶ 3101 (1981), PERB denied an employer's effort to vacate a certification without an election premised on a letter signed by employees stating they wished to withdraw their support for the petitioning employee organization. In denying the exceptions, PERB stated that the letter had not been submitted to the Director and was not part of the administrative record. In addition, PERB found the letter to be immaterial because the dates of the designation cards, signed by the employees and relied upon by the Director, were signed many months after the date of the purported withdrawals. See Herbert, William A*., Card Check Labor Certification: Lessons from New York*, 74 Alb. L.Rev. 93 (2010).

§ 10-7E-24(A), [Existing collective bargaining units; grandfathered bargaining unit.]

- A bargaining unit recognized as appropriate prior to January 1, 1992, under State Personnel Board Rules for Labor Management Relations continues to be recognized as appropriate pursuant to § 24, notwithstanding the inclusion of certain positions with the title of "manager" being included. *CWA and State of* New *Mexico,* 1 PELRB No.8 (March 17, 1995).

§ 10-7E-24(B) [Existing collective bargaining units; incumbent labor organizations.]

- **Generally**
  - Under § 24(B), a petition to represent certain employees will be dismissed where another union was the grandfathered exclusive representative of those employees. The new union argued that the grandfathered union had not acted timely to renew collective bargaining for this group of employees. The Board held

that § 24(B) does not impose a time limit for an incumbent union to exercise its grandfathered status. *In the Matter of Petition for Recognition filed by Teamsters Local No.* 492, 01-PELRB-2006 (April 13, 2006).

- **Duty to bargain with**
  - Under § 24(B), an employer is required to negotiate in good faith with an incumbent labor organization prior to its demonstration of majority support, even though it is barred from reducing that agreement to writing prior to a demonstration of majority support. Otherwise, the incumbent labor organization could not meet the duties imposed on it under § 15 and § 17, as the unit's exclusive representative. *American Federation of Teachers Local 4212 and Gadsden Independent School District,* 03-PELRB-2006, PELRB Case No. 169-06 (May 31, 2006).

  Note: This decision was issued as part of a representation case, PELRB Case No. 309-05, and was adopted without further review by the Board after the School District withdrew its appeal.

- **Stay of negotiations or execution of contract pending judicial review**
  - Stay of negotiations pending any appeal to the District Court is not warranted under the Act but stay of the obligation to reduce any agreement into a contract is appropriate. Stay of negotiations is denied because the School is not likely to prevail on merits and neither public policy nor the equities favor such a stay. *In re: Petition for Recognition, Federation of Teachers and Pecos Independent Schools,* 07-PELRB-2006 (Sept. 10, 2006).
  - By using the term 'labor organization: this section incorporates a requirement that local ordinances follow the § 4 PEBA definition of 'labor organization.' *Santa Fe County and AFSCME,* 1 PELRB No. 1(Nov. 18, 1993).

- **Public employees**
  - A local ordinance's definition of confidential employee is void under PEBA where it does not follow the PELRB's interpretation of that definition, to mean employees whose duties relate to the formulation, determination and effectuation of a public employer's employment, collective bargaining or labor relations activities. *IAFF Local 2362 v. City of Las Cruces*, 07-PELRB-2009 (July 6, 2009).

    Note: The *Las Cruces* decision imposes on grandfathered boards an obligation to follow PELRB precedent in interpreting the local ordinance. Previously, the PELRB had only imposed such an obligation on a PELRB approved local board. *See McKinley County Federation of United School Employees, AFT Local 3313 v. Gallup-McKinley County School District and Gallup-McKinley County School District Labor Management Relations Board,* 03-PELRB-2007 (undated).
  - A local ordinance's definition of "supervisor" is void under PEBA where it still utilizes the PEBA I-based "substantial amount of work time" element. *IAFF Local 2362 v. City of Las Cruces,* 07-PELRB-2009 (July 6, 2009).

    Note: The *Las Cruces* decision appears to stand for the principle that a local ordinance may not provide greater rights than that afforded under PEBA. Specifically, the *Las Cruces* decision prohibits utilization of the old "substantial amount of work time" standard, but that PEBA I standard resulted in the exclusion of fewer employees as "supervisors." *See Las Cruces, supra.*
  - A local ordinance's provision that defines certain job positions as being supervisory, and thus automatically excluded from collective bargaining, is denied grandfathered status under the reasoning of *Regents. City of Deming v. Deming Firefighters Local 4251,* 2007-NMCA-069, 141 N.M. 686, 160 P.3d 595.
  - By using the term "employee" this section incorporates the definition of "public employee" under PEBA and requires the extension of rights under the ordinance to all "public employees" that would be covered under PEBA. *The Regents of the University of New Mexico v. New* Mexico *Federation of Teachers and American Assoc. of University Professors,* 1998-NMSC-20, 125 N.M. 401.
  - To remain grandfathered, provisions of a labor ordinance or resolution may not deny the right to bargain collectively to any employees who are afforded this right under PEBA. *The Regents* of *the University of New Mexico v. New Mexico Federation of Teachers and American Assoc.* of *University Professors,* 1998-NMSC-20, 125 N.M. 401.

- **System of provisions and procedures for collective bargaining**
  - Final and binding arbitration is not a fundamental requirement of an effective collective bargaining system. *City* of *Deming v. Deming Firefighters Local* 4251, 2007-NMCA-069, 141 N.M. 686,160 P. 3d 595.
  - To be grandfathered under § 26(A) (Repealed, 2020), a local ordinance or resolution must constitute a system of provisions and procedures permitting public employees to form, join or assist any labor organization and it must have been enacted before October 1, 1991. *The Regents of the University of New Mexico v. New Mexico Federation of Teachers and American* Assoc. *of University Professors,* 1998-NMSC-20, 125 N.M. 401.

- An ordinance that merely authorizes the City Administrator to represent the City in collective bargaining negotiations does not 'establish a system of provisions and procedures for labor relations' under § 10-7E-26 (Repealed, 2020), *Firefighters and City of Carlsbad,* 1 PELRB No. 9 (May 2, 1995).

§ 10-7E-26(A) (Repealed in a 2020 Amendment), [Existing ordinances---enacted prior to October 1, 1991.]

- **Substantial changes after January 1, 2003**
  - A grandfathered local labor resolution loses its § 26(A) grandfathered status where, after January 1, 2003, it issues labor policies pursuant to its labor ordinance that amount to a substantial change to the pre-October 1, 1991, policy, by instituting fixed, static bargaining units. *National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH,* 03-PELRB-2005 (Oct. 19, 2005).
  - A change to a grandfathered ordinance that adds a grant of right-such as arbitration procedures for The hearing of grievances-is a substantive and therefore substantial change. *National Union* of *Hospital and Health Care Employees, District No. 1199 v. UNMH.* 03-PELRB-2005 (Oct. 19, 2005).

- **Superseding and replacing ordinances after October 1, 1991**
  - A grandfathered local labor resolution loses its § 26(A) grandfathered status where it is replaced after October 1,1991 by an ordinance that expressly slates that it supersedes in its entirety any earlier policy. *National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH,* 03-PELRB-2005 (Oct. 19, 2005).

- **Variances from PEBA allowed**
  - Impasse procedures are not required to be final and binding to be afforded continuing grandfathered status under § 26(A). *City of Deming v. Deming Firefighters Local 4251*, 2007-NMCA-069, _ N.M. _ 160 P.3d 595.
  - Section 26(A) does not impose on grandfathered collective bargaining ordinances or resolutions any minimal requirements with respect to their quality or effectiveness. *City of Deming v. Deming Firefighters Local 4251*, 2007-NMCA-069, _ N.M. _, 160 P.3d 595.
  - Construing § 26(A) to apply only to ordinances that adopt the same system of provisions and procedures currently stated in PEBA would render § 26(A) meaningless. *City of Deming v. Deming Firefighters Local 4251,* 2007-NMCA·069, _ N.M. _, 160 P.3d 595.
  - The very existence of the grandfather provisions for public employers that enacted and implemented collective bargaining policies before October 1, 1991, *a priori* means they are accorded a different status from those public employers coming before the Board under § 26(B), and to attach all of the PEBA's proscriptions In § 26(B) and elsewhere to an elderly entity would render meaningless § 26(A)'s permission for a public employer to continue to operate under those provisions and procedures enacted prior to October 1, 1991. *NEA v. Bernalillo Public Schools,* 1 PELRB No. 17 (May 31, 1996).

- **Selection of board members**
  - A local boards' member selection process must comply with the selection procedures stated in § 10(B) of the Act. A local ordinance does not comply with §10(B) where it provides that bargaining units and the city manager shall submit a list of up to three recommended individuals, but further provides "nothing contained herein shall mandate the mayor and city council to select from the nominations submitted by the bargaining units and the city manager." *IAFF Local* 2362 *v. City of Las Cruces,* 07-PELRB-2009 (July 6, 2009).
  - In *City of Albuquerque v. Juan B. Montoya, et al.*, 2012-NMSC-007, New Mexico's Supreme Court construed PEBA §26(A) as it pertained to Albuquerque's process for the appointment of interim members to its Labor-Management Relations Board. Citing to *City of Deming v. Deming Firefighters Local 4521,* 141 N.M. 686, 160 P.3d 595 and to *The Regents of the University of New Mexico v. New Mexico Federation of Teachers and American Assoc. of University Professors,* 125 N.M. 401, 962 P.2d 1236 (1998), *Montoya* re-iterates the basic proposition that PEBA §26(A) allows a public employer to preserve an existing collective bargaining system created prior to October 1, 1991, as long as the "system of provisions and procedures permits employees to form, join or assist a labor organization for the purpose of bargaining collectively through exclusive representatives". With regard to the application of PEBA §10 to entities grandfathered under §26(A), the Supreme Court disagreed with the Court of Appeals' holding that the Albuquerque Local Board's process for selecting an interim board member ignored §10(B) but did not take issue with the application of §10(B) generally, even in the presence of a §26(A) grandfathered entity. The *Montoya* Court said quite plainly that NMSA §10-7E-10(A) requires that the local board be balanced in membership and therefore a neutral body and specifically references §10-7E-10(B) which requires a local board shall be composed of three members appointed by the public employer; one appointed on the recommendation of individuals representing labor, one appointed on the recommendation of individuals representing management and one appointed on the recommendation of

the first two appointees. Following that analysis the Board concluded that where a local ordinance uses its Personnel Board together with the City council as the functional equivalent of State's Labor Board, that ordinance does not meet the requirements of PEBA §10(B), does not meet the fundamental requirement of PEBA for ensuring balance and neutrality because representatives of labor have no recommendation for appointment to the board in any real sense and there exists the real possibility that management controls at least four of the five positions. *See In re: Raton Fire Fighters Association, IAFF Local 2378 v. City of Raton*, 3 PELRB 2013 (June 20, 2013).

- In *City of Albuquerque v. Montoya,* 2012-NMSC-007 (March 6, 2012), the dispute centered around the process for appointing interim members to the City's Labor-Management Relations Board. Section 3-2-15(D) of the City Ordinance allowed the City Council President to make such appointments during a Local Board member's absence. On appeal, the court characterized the City Council president as "managerial personnel" and raised concerns about the neutral composition of the Local Board due to the appointment of a third member. The Supreme Court disagreed with the Court of Appeals' characterization and held that the City Council President did not serve in either a "management" or "labor" capacity. Consequently, the provision allowing the City Council President to appoint a third member to the Board did not violate PEBA's grandfather clause. The Court's decision clarified that administrative appointments during temporary absences did not contravene PEBA's core principles.

BOARD RULES INDEX

11.21.1.13 NMAC [Disqualification.]

- Motions to disqualify a hearing examiner are denied where based on statements or conduct in a previous unrelated case between the same parties. *AFSCME Council* 18 *v. New* Mexico *Corrections Department,* 03-PELRB-2009, PELRB Case No. 136-08 (April 6, 2009). *See* also *AFSCME Council* 18 *v. New Mexico Corrections Department,* 03-PELRB-2009; *AFSCME Council 18 v. New Mexico Corrections Department,* 02-PELRB-2009, PELRB Case No. 148-08 (Apr. 6, 2009).

11.21.1.21 NMAC [Ownership and confidentiality of showing of interest]

- 11.21.1.21 NMAC, providing for the confidentiality of a showing of interest in support of a petition for representation, is an authorized exception "as otherwise provided by law" to the Inspection of Public Records Act (IPRA), under § 14-2-1 (F) of IPRA, because 11 21.1.21 NMAC is a properly promulgated regulation that effects the legislative intent behind PEBA. Exclusion of the showing of interest from IPRA's coverage is appropriate as a matter of public policy because any benefit to the public from inspecting the cards would be significantly outweighed by the employees' privacy interest. *City of Las Cruces v. PELRB,* 1996-NMSC-24, 121 N.M. 688. *See Republican Party of N.M. v. N.M. Taxation and Revenue Dep't*, 2012-NMSC-26, 283 P. 3d 853.

11.21.1.24 NMAC [Service of pleadings.]

- A document is deemed "served" the date it is placed into the mail, as evidenced by the postmark. *In re: Communications Workers of America, Local 7911 and Doña Ana County,* 1 PELRB No. 16 (Jan. 2, 1996).

11.21.2.18 NMAC [Representation Petitions; Investigation, report, notice of hearing.]

- **Time limits**
  - The time limit established in PELRB rules for the Board (or its agents) to conduct a hearing are directory rather than mandatory, so its violation does not deprive the Board of jurisdiction. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994), citing *Littlefield v. State of New Mexico,* 1992-NMCA-083, 114 N.M. 390.
  - The Board will reject exceptions based on technical violations of rules by Board agents that are not alleged or proven to cause prejudice, and do not affect the outcome *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).

11.21.2.20 NMAC [Representation Petitions; Briefs.]

- **Right to file**
  - There is no right to file post-hearing briefs. Rather, the matter lies in the discretion of the hearing examiner. *In re: Local 7911, Communications Workers of America and Doña Ana Deputy Sheriffs' Association, Fraternal Order of Police and Doña Ana County,* 1 PELRB No. 19 (Aug. 1, 1996). **Note:** This rule, which is also relevant to 11.21.3.17 NMAC, provides that when any party requests permission to file a post hearing brief and that request is granted, then the hearing examiner shall permit all parties to file briefs. By this decision the Board has interpreted its rule to mean that if one party's request for submission of a written brief is granted, then all parties shall likewise submit briefs. Permission to submit written briefs in lieu of oral argument remains in the discretion of the Hearing Examiner and the rule should not be read to make the submission of written briefs mandatory upon request of any party.

11.21.2.21 NMAC [Representation Petitions; Hearing Examiner reports.]

- **Time limits**
  - The Board will reject exceptions based on technical violations of rules by Board agents that are not alleged or proven to cause prejudice, and do not affect the outcome. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).
  - The time limit established in PELRB rules for the issuance of a Hearing Examiner's report are directory rather than mandatory, so its violation does not require Board rejection of the report unless there is a demonstration of prejudice to the appellant by the Hearing Examiner's delay in the issuance of the report. *Local 7911, Communications Workers of America and Doña Ana Deputy Sheriffs' Association Fraternal Order of Police and Doña Ana County,* 1 PELRB No. 19 (Aug. 1, 1996), citing *Littlefield v. State of New Mexico.* 114 N.M 390 (1992).
  - The time limits established in PELRB rules for the Board (or its agents) to investigate complaints and conduct hearings are directory rather than mandatory and exceeding those limits does not support dismissal of the complaint under the facts of this case. *In re: AFSCME, Council 18 v. State of New Mexico,* 33-PELRB-2012.

11.21.2.22(A) NMAC [Representation Petitions; Board review-requirements for notices of appeal.]

- **Contents**
  - A party requesting review must cull from the record and affirmatively present to the Board the particular facts applicable to its exception. Merely referring the Board to the page numbers without particulars does not satisfy Rule 2.22(A). *NEA-Belen and Belen Federation of School Employees and Belen Consolidated Schools.* 1 PELRB No. 2 (May 13, 1994). *See also* 11.21.3.19(A) NMAC regarding PPCs.

- **Preservation requirements**
  - Objections to hearing procedures must be raised first with the hearing examiner, and then with the Board by exception, to be preserved and timely raised for review by the PELRB. *In re: Classified School Employees Council-Las* Cruces and *Las Cruces Public Schools.* 1 PELRB No. 20 (Feb. 13. 1997).
  - Request for review may not rely on any evidence or argument not presented to the hearing examiner. *In re: Local* 7911, *Communications Workers of America* and *Doña Ana Deputy Sheriffs' Association, Fraternal Order of Police and Doña Ana County,* 1 PELRB No. 19 (Aug. 1, 1996).
  - Notwithstanding the hearing examiner's duty to determine an appropriate bargaining unit. he or she does not err by failing to consider whether a disputed position is an excluded confidential employee. If the employer did not raise that defense at the representation hearing. *In re: Communications Workers of America. Local 7911 and Doña Ana County,* 1 PELRB No. 16 (Jan. 2. 1996).

- **Timeliness**
  - The ten-day time limit to seek review in a representation matter begins to run on day after receipt of a report and the request for review is timely filed if deposited into the mail on the tenth day. as evidenced by the postmark. *In re: Communications Workers of America, Local 7911 and Doña Ana County,* 1 PELRB No. 16 (Jan. 2. 1996).

11.21.2.22(C) NMAC [Representation Petitions; Board review-scope of review.]

- **Independent review of unit determination**
  - 11.21.2.22(C) NMAC requires the Board to independently review any recommended decision by a hearing examiner regarding the scope of the bargaining unit. *In re: Communications Workers of America,*

Local 7911 and Doña Ana County, 1 PELRB No. 16 (Jan. 2, 1996).

- **Limitations on oral argument**
  - A five-minute time limitation on oral presentations to the Board as part of a request for Board review of a hearing examiner's decision does not violate due process. Such a time limit is reasonable under the circumstances because the decision to permit oral arguments at this stage of the proceedings resides solely in the Board's discretion, and the parties are afforded an opportunity to fully develop their cases prior to that stage of the proceedings. *In re: Local 7911*, *Communications Workers of America and Doña Ana Deputy Sheriffs' Association Fraternal Order of Police* and *Doña Ana County,* 1 PELRB No. 19 (Aug. 1, 1996).

11.21.2.22(D) NMAC [Representation Petitions; Board review-Board decisions.]

- **Precedential effect of**
  - Under 11.21.2.22(D) NMAC, an un-appealed recommended decision adopted by the Board in a representation matter can constitute binding precedent unlike an un-appealed recommended decision concerning a PPC that is *pro forma* adopted by the Board under 11.21.3.19(D) NMAC. Reliance on Board-adopted recommended decisions regarding the scope of a bargaining is also warranted under 11.21.2.22(C) NMAC, which requires the Board to independently review any recommended decision by a hearing examiner regarding the scope of the bargaining unit. *In re: Communications Workers of America, Local 7911 and Doña Ana County,* 1 PELRB No. 16 (Jan. 2, 1996).

  Note: In contrast *NMSU Police Officers Association and NMSU,* 1 PELRB No. 13 (June 14, 1995) held that the Board may, upon review of the whole record, summarily adopt a Recommended Decision regarding unit inclusion or exclusion in the absence of exception, but that part of the Board's Decision will not have precedential effect. *New Mexico State University Police Officers Association and New Mexico State University,* 1 PELRB No. 13 (June 14, 1995).

11.21.2.24(A) NMAC (Representation Petitions; Eligibility to vote.]

- The list of employees eligible to vote in an election must include those individuals who have resigned, retired or whose contract has not been renewed for the next school year, if those individuals are eligible to vote pursuant to 11.21.2.24(A) NMAC. *NEA-Carrizozo and Carrizozo Municipal Schools,* 1 PELRB No. 11 (May 19, 1995).

11.21.2.36 NMAC [Representation Petitions; Certification of incumbent unions.]

- **Certification under PEBA I**
  - *In re: Local 1687 International Association of Firefighters and City of Carlsbad,* 1 PELRB No. 9 (May 2, 1995).
  - *In re: Communications Workers* of *America and State of New Mexico,* 1 PELRB No. 8 (Mar 17, 1995).
  - *In re: Western Council of Industrial Workers, United Brotherhood of Carpenters and Joiners* of *America and Fort Bayard Medical Center,* 1 PELRB No. 7 (March 16, 1995).
  - *In re: United Steelworkers of America and City of Carlsbad,* 1 PELRB No. 5 (Jan. 12, 1995).
  - *In re: Local 1193 American Federation of State, County and Municipal Employees and Taos County,* PELRB No. 4 (Jan 12, 1995).

    Note: Under PEBA I, there was no explicit provision for incumbent unions as for incumbent bargaining units. However, the rules promulgated under PEBA I provided for the certification of incumbent unions as the exclusive representative of an incumbent bargaining unit for which the union had previously been recognized as the exclusive representative. Such certification was done without any requirement for a showing of majority support, unlike under current rules, so these cases are of questionable precedential value under PEBA II.

11.21.2.37 NMAC [Unit Clarification]

- AFSCME v filed a Petition for Clarification pursuant to 11.21.2.37 NMCA on October 22, 2015. Rule 11.21.2.37 provides for the filing of a petition for unit clarification when circumstances surrounding the creation of an existing collective bargaining unit are alleged to have changed sufficiently to warrant a change in the scope and description of that unit; or a merger or realignment of previously existing bargaining units represented by the same labor organization is appropriate. *See AFSCME, Council 18 v. State of New Mexico Human Resources Services Department and New Mexico Public Employee Labor Relations Board,* Case No.: D-202-CV-2016-07671 (J. Huling, July 19, 2017)

11.21.2.38 NMAC [Representation Petitions; Accretion.]

- **Accretions greater than 10%**
  - A Petition for Accretion in which the group to be accreted is greater than ten percent (10%) of the existing bargaining unit will be dismissed in such a case, 12.21.2.38(C) NMAC requires the petitioner to proceed by way of Petition for Election. *Silver City Professional Fire Fighters, IAFF Local 2430 and Town of Silver City,* 02-PELRB-2008 (May 2, 2008).

- **Community of interest**
  - There is sufficient community of interest to support the accretion of Interpreters and Dieticians into an existing unit of nurses and professional employees where they work under the same discipline rules, supervision and holiday schedules, work at the same location, get paid the same day, participate equally in the process of patient care, interact and work. closely with the members of the existing unit to carry out the hospital's core function of patient care, and their positions require a certain amount of medical related training. *National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH,* 03-PELRB-2005 (Oct. 19, 2005).

11.21.3.15(D) NMAC [PPC's; Settlement efforts-when approval is required to withdraw the PPC.]

- Board approval is required to withdraw a matter after a hearing examiner's report has been issued in the matter. *See* In *re: Motion to Withdraw all Cases, UNMH and NUHHCE District 1199,* 06-PELRB-2006 (June 16, 2006).

11.21.3.19(A) NMAC [PPCs; Appeal to Board-procedural requirements for notice of appeal.]

- A party must cite to specific record evidence in its Notice of Appeal of a PPC to the Board, rather than simply "incorporating by reference" record citations in its post hearing brief. *National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH,* 03-PELRB-2005 (Oct. 19, 2005). *See also* 11.21.2.22(A) NMAC, regarding representation matters.

11.21.3.19(D) NMAC [PPCs; Appeal to Board--effect of review in absence of request.]

- An un-appealed recommended decision concerning a PPC that is pro forma adopted by the Board, for purposes of making the recommended decision binding on the parties, cannot constitute binding precedent. *In re: Communications Workers Local 7911 and Doña Ana County,* 1 PELRB No. 16 (Jan. 2, 1996). *Compare* 11.21.2.22(D) NMAC regarding un-appealed decisions regarding representation petitions.

11.21.3.21 NMAC [PPCs; Administrative agency deferral]

- A PELRB hearing examiner is collaterally estopped from reviewing for compliance with PEBA another agency's decision when the elements of collateral estoppel are met. *CWA Local v. New Mexico Environment Department,* 09-PELRB-2009 (July 6, 2009).

11.21.3.22{A) NMAC [PPCs; Arbitration deferral--discretionary, if conditions met.]

- **Abuse of discretion**
  - A hearing examiner does not abuse his or her discretion when he or she declines to defer to arbitration, particularly where the applicable § 26(B) local labor resolution would permit a public employer dominated local labor board to review and reverse or modify any arbitration award *National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH,* 03-PELRB-2005 (Oct. 19, 2005). *See also AFSCME, Local 3999 v. City of Santa Fe*, PELRB No. 111-14.

11.21.5.10 NMAC [Local Board approval; application for variance from templates.]

- There is good cause to grant institutions of higher education a variance from the PELRB template resolution creating a local board, to add language regarding the "allocation" or "reallocation" of funds following the template's references to "appropriation" or "re-appropriation" of funds. The former terminology is more appropriate to these institutions' situation, since they "allocate" funds appropriated to them by the Legislature, rather than "appropriating" their own funds. The variance, therefore, promotes statutory clarity, avoids disharmony avoids disharmony with § 17(H), is consistent with legislative intent and places institutions of higher education on an equal footing with other governmental entities under PEBA. *In re: Application of the University of New Mexico for Approval of Local Board,* 04-PELRB-2006 (May 31, 2006).
- Arbitrators did not exceed their powers in two related cases by mandating monetary relief that will require the Legislature to appropriate funds to pay wages increases previously bargained because the Legislature

already appropriated sufficient funds in FY 2009 for the State to meet its contractual obligations under the Agreements and that the State failed to meet its contractual obligation to distribute the funds according to the terms of the Agreements. The State's representation that it has already used the funds appropriated should not affect the arbitrators' decisions and awards in favor of the Unions. There is no difference between this case and other cases where adverse judgments are rendered against the State; as in those cases, the State cannot avoid its obligation to comply with the judgment by maintaining that compliance would require it to seek further appropriations from the Legislature. *State of New Mexico v. AFSCME Council 18 and CWA*, 2012-NMCA-114, 291 P.3d 600.

11.21.5.13 NMAC [Local Board approval; post approval reporting requirements.]

- The PELRB has jurisdiction to review and remedy rule-making actions by a local board that amend the local ordinance, raise serious and significant issues affecting public sector collective bargaining statewide, and threaten the consistent and uniform administration of PEBA. *McKinley County Federation of United School Employees, AFT Local* 3313 *v. Gallup-McKinley County School District and Gallup-McKinley County School District Labor Management Relations Board,* 03-PELRB-2007 (undated).
- The PELRB has jurisdiction to review and remedy a rule promulgated by a local board that violates § 14(A), § 14(D) and the PELRB's decision in *NEA-Alamogordo and Alamogordo Public Schools,* 05-PELRB-2006, by permitting an employer to determine whether an incumbent union could demonstrate majority support by election or card count and, in the event of election, by requiring that at least 50% of the total members of the bargaining unit vote for continuing representation. *McKinley County Federation of United School Employees, AFT Local 3313 v. Gallup-McKinley County School District and Gallup-McKinley County School District Labor Management Relations Board,* 03-PELRB-2007 (undated).

Note: The initial action was filed as a PPC, but the Hearing Examiner concluded that neither §19 nor § 20 provided for PPCs to be filed against local boards. The Hearing Examiner then recast the PPC as a request for re-approval of the local board and found jurisdiction under its general power of approval under § 10, and under the post-approval reporting requirements established under 11.21.5.13 NMAC. The Board upheld the Hearing Examiner's subsequent denial of the local Board's motion to dismiss for lack of jurisdiction but in doing so it stated that the "[PELRB] has jurisdiction of the prohibited practices complaint filed by the Union." After due notice and failure of the local board to rescind the offending rule, the prior PELRB approval of the local board was revoked.

KEYWORD AND PHRASE INDEX

ADMINISTRATIVE REMEDIES

- **Duty to exhaust**
  - Writ of Mandamus against the PELRB to prevent it from asserting jurisdiction over matters arising in locations with a local board is inappropriate if the Petitioner has not exhausted the administrative procedures available to it before the PELRB for further review. *Gallup-McKinley County Schools v. PELRB and McKinley County Federation* of *United School Employees Local 3313*, Court of Appeals Case No. 26,376 (June 8, 2006).
  - The courts lack jurisdiction to hear a suit for declaratory relief regarding the PELRB's jurisdiction in matters arising in locations with a local board, until after the PELRB has rendered a decision on the PPC's pending before it *The Regents* of *the University* of *New Mexico v. The American Association* of *University Professors, Gallup Branch Chapter and the New Mexico Federation of Teachers,* 2nd Judicial Dist. No. CV-95-002376 (Sept. 15, 1995).

AGENCY RELATIONSHIP

- There is no legal agency relationship between a County and its instrumentality or institution such as would make the alleged principal the public employer and appropriate governing body under PEBA where the institution routinely acts independently of the County, disregards County Commission recommendations and where the County has historically denied legal liability related to the operation of the institution. *In re: United Steelworkers of America, Gila Regional Medical Center and Grant County Board of County Commissioners,* 1 PELRB No. 14 (Nov. 17, 1995).

AMENDMENT OF A PPC

- **To conform to evidence admitted without objection**
  - A motion for reconsideration based on the Hearing Examiner having made findings and conclusions based on evidence introduced without objection at the trial will be denied if not supported by information

demonstrating unfair surprise or undue prejudice. *AFSCME v. Department of Health,* 01-PELRB-2008 (Jan. 31, 2008).

- Where evidence has been received in the course of litigation without objection, a prohibited practice complaint may be amended to conform to the evidence. *National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH,* 03-PELRB-2005 (Oct. 19, 2005).

AUTHORIZATION CARDS

- **Evidence of desires concerning representation**
  - Signed authorization cards evidence employees' desire for union representation, and the Director's determination of sufficiency of the showing of interest is not subject to question or review. If a group of employees were not interested in representation by a particular union, they could have chosen not to sign the cards, they could have sought representation by a different union, or they could have organized their own independent union. They pursued none of these alternatives, and therefore the only evidence of their desire to be represented by a union is expressed in the showing of interest presented by the particular union seeking to represent them. *NEA-Belen* and *Belen Federation* of *School Employees and Belen Consolidated Schools,* 1 PELRB No. 2 (May 13, 1994).

CLEAR AND UNMISTAKABLE

- The court determined that paramedic training contracts are subjects of mandatory bargaining and that the County may not unilaterally enter into such contracts with Union members without including the Union in its negotiations. As part of its ruling the Appellate Court rejected the County's argument that the CBA's "zipper clause" constituted a waiver of any right to bargain over the paramedic training contracts at issue. The Appellate Court rejected both the Union's argument that a strict "clear and unmistakable" standard should be applied and the County's argument that broad waiver clauses satisfy the clear and unmistakable requirement language stating that "...the answer does not call for a rigid rule, formulated without regard for the bargaining postures, past practices, and agreements of the parties for two reasons. First, notwithstanding the split in the circuits, the NLRB has continued to adhere to the broader position taken in *Radioear.* (citations omitted) Moreover, given our Supreme Court's direction in this area, we believe that application of the reformulated standard described by the NLRB in *Radioear* is the more reasoned approach to deciding the question of whether the language of the CBA expressly waived the right to negotiate the paramedic training contracts." (Citations omitted). Accordingly, the district court did not err in determining in the summary judgment proceeding that, as a matter of law, the Union did not waive its right to bargain based on the zipper clause. *See County of Los Alamos v. John Paul Martinez and Michael Dickman, Robbie Stibbard, as President of the Los Alamos Firefighters Association Local #3279*, 2011-NMCA-027, 150 N.M. 326, 250 P.3d 1118.

COLLATERAL ESTOPPEL

- When a PELRB litigant is collaterally estopped from pursuing his or her PPC due to a previously rendered State Personnel Board (SPB) decision, that SPB decision shall only apply to that specific case, and shall not preclude the PELRB from reaching a different conclusion in a subsequent case involving similar facts *CWA Local v. New Mexico Environment Department,* 09-PELRB-2009 (July 6, 2009).
- A PELRB hearing examiner is collaterally estopped from reviewing for compliance with PEBA another agency's decision, in a matter based on essentially the same facts and issues, when the elements of collateral estoppel are met. *CWA Local v. New Mexico Environment Department,* 09-PELRB-2009 (July 6, 2009).
- The PELRB is collaterally estopped from reviewing another agencies' decision for compliance with PEBA when the PELRB matter and the other agency's matters concern the same parties, or parties in privity, and the two cases concern the same ultimate issue of fact which was actually litigated and necessarily determined in the other forum. *CWA Local v. New Mexico Environment Department,* 09-PELRB-2009 (July 6, 2009).
- In AFSCME, Council 18, Local 3022 v. ABCWUA, PELRB Case No. 107-21, the Complainant alleged the Respondent violated the parties' CBA in relation to longevity pay when the employees are promoted from one unit with longevity pay to another without. The issue had previously been through final and binding arbitration years prior in a separate instance which held that longevity pay be maintained upon promotion. In that instance, which was settled by a signed agreement in December of 2013 and/or by a Memorandum of Understanding (MOU) signed on June 5, 2014, the Arbitrator noted that the Respondent may have wanted longevity to cease upon promotion but an agreement was never achieved from the Complainant on that position. What was agreed upon was too ambiguous to sway a decision in the favor of the Respondent. As

the arbitrator noted, to the extent that any ambiguity as to what the parties meant by the term "employees" when freezing the longevity benefit as of July 1, 2010, that ambiguity would be construed against the Water Authority. That decision was affirmed by District Court the following year at which point it became a judgment of the Court pursuant to the New Mexico Uniform Arbitration Act, NMSA 1978, § 44-7A-24 (A) and (C) (2001). The Hearing Officer found the decision binding in favor of the Complainant stating, "New Mexico Courts have applied both res judicata and collateral estoppel to arbitration awards. *See Rex, Inc. v. Manufactured Hous. Comm. of State of N.M., Manufactured Hous. Div.*, 1995-NMSC-023, 119 N.M. 500, 892 P.2d 947, where the particular circumstances of the arbitration proceeding justify their application and a court has confirmed the arbitration award. In Fogelson v. Wallace, 2017- NMCA-089, ¶¶ 15-17, 406 P.3d 1012, our Court of Appeals concluded that res judicata also applies to arbitration awards." He added, " Upon the District Court confirming the arbitration award it became a judgment of the Court pursuant to the New Mexico Uniform
Arbitration Act. See NMSA 1978, § 44-7A-24(C) (2001). This Board is therefore compelled to follow the arbitrator's interpretation of the CBA's longevity clause by the doctrines of res judicata and collateral estoppel." "Even were this Board to disagree with the arbitrator and the District Court on the meaning of the language in the parties' CBA, PEBA requires that the parties submit these types of disputes to final and binding arbitration, and the parties are bound by the results of that arbitration. In the instant case we have uniformity of parties, contract being construed and the issue determined. This case presents an appropriate case for applicable of either or both res judicata and collateral estoppel."

CONTRACT INTERPRETATION

- Where the terms of a collective bargaining agreement are plainly stated, the intention of the parties must be ascertained from the language of the contract. Absent a finding of ambiguity, provisions of a contract need only be applied, rather than construed or interpreted, and in that case, it is unnecessary and improper to consider witness testimony supporting an alternate interpretation of the contract language. The mere fact that the parties disagree on construction to be given to the contract does not necessarily establish an ambiguity. *National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH,* 03-PELRB-2005 (Oct. 19, 2005).
- In *AFSCME, Council 18, Local 3022 v. ABCWUA*, PELRB Case No. 107-21, the Complainant alleged the Respondent violated the parties' CBA in relation to longevity pay when the employees are promoted from one unit to another. The issue had previously been through final and binding arbitration years prior in a separate case which held that longevity pay be maintained upon promotion. The Arbitrator noted that the Respondent may have wanted longevity to cease upon promotion but an agreement was never achieved from the Complainant on that position. What was agreed upon was too ambiguous to sway a decision in the favor of the Respondent. That decision was affirmed by District Court the following year at which point it became a judgment of the Court pursuant to the New Mexico Uniform Arbitration Act, NMSA 1978, § 44-7A-24 (A) and (C) (2001). The Hearing Officer found the decision binding in favor of the Complainant stating, " Upon the District Court confirming the arbitration award it became a judgment of the Court pursuant to the New Mexico Uniform Arbitration Act. See NMSA 1978, § 44-7A-24(C) (2001). This Board is therefore compelled to follow the arbitrator's interpretation of the CBA's longevity clause by the doctrines of res judicata and collateral estoppel."

COSTS

- **Assessment of costs of proceedings**
  - A § 26(B) (Repealed, 2020), local ordinance violates PEBA where it imposes any costs for hearings, even when those costs are equally apportioned between parties, because this creates an impermissible chilling effect
    upon employees' rights to participate in the collective bargaining process. *IAFF Local 2362 v. City of Las Cruces,* 07-PELRB-2009 (July 6, 2009).
  - A § 10 local ordinance provision that imposes the cost of any hearing, and the cost of election on the parties equally, violates PEBA, unless the public employer assesses a comparable amount for invoking the administrative procedures before other boards and commissions and/or such assessments are comparable to the fees assessed by other boards or by the courts. *AFSCME* and *Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).
  - A § 10 local ordinance requiring a party to pay fees in the range of $300 per day for PPC hearings is a substantial barrier to the realization of PEBA rights and violates PEBA. *Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993).
  - A § 10 local ordinance violates PEBA by assessing against the union the costs of a board election. which

constitutes a substantial barrier to the rights of a labor organization to gain certification as an exclusive representative and is not equivalent to the PEBA election procedure. *Santa* Fe *County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993).

DUE PROCESS

- **Administrative proceedings**
  - Administrative proceedings must conform to fundamental principles of justice and the requirements of due process of law. A litigant must be given a full opportunity to be heard with all rights related thereto. The essence of justice is largely procedural. *Uhden v. The N.M. Oil Conservation Comm'n*, 1991-NMSC-089, 112 N.M. 528, 817 P.2d 721 (S. Ct. 1991).
  - It is well settled that the fundamental requirements of due process in an administrative context are reasonable notice and opportunity to be heard and present any claim or defense. *TW Telecom of N.M., L.L.C. v. N.M. Pub. Regulation Comm'n*, 2011-NMSC-029, ¶ 17, 150 N.M. 12, 256 P.3d 24.
  - New Mexico Courts have found the "Mathews test" from *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), provides useful framework for determining the appropriate amount of process to protect liberty. "Under the Mathews test, identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *City of Albuquerque v. Chavez*, 1998-NMSC-033, 125 N.M. 809, 965 P.2d 928.

- **Entitlement of counties to due process**
  - Counties are not "persons" entitled to due process and equal protection under state and federal constitutions. *In re: McKinley County Sheriffs Association Fraternal Order of Police and McKinley County,* 1 PELRB No. 15 (Dec. 22, 1995), citing *Williams v. Mayor,* and 289 US 36, 40 (1933): *City* of *Newark v. City* of *New Jersey,* 262 US 192, 196 (1923); *Avon Lake City School District v. Limbach,* 518 N.E.2d 1190 (Oh. 1988): *Penny v. Bowden,* 199 So.2d 345 (La. App. 1967): and *Village of Blaine v. Indep. School District,* 138 NW.2d 32 (Minn. 1965). See also *In re: Local 7911, Communications Workers of America and Doña Ana Deputy Sheriffs' Association, Fraternal Order of Police and Doña Ana County,* 1 PELRB No. 19 (Aug. 1, 1996).

- **Right to impartial decision-maker**
  - Motions to disqualify a hearing examiner are denied where based on statements or conduct in a previous unrelated case between the same parties. *AFSCME Council* 18 *v. New Mexico Corrections Department,* 03-PELRB-2009, PELRB Case No. 149-08 (April 6, 2009). *See also AFSCME Council 18 v. New Mexico Corrections Department,* 03-PELRB-2009.
    PELRB Case No. 149-08 (Apr. 6, 2009); and *AFSCME Council* 18 *v. New Mexico Corrections Department,* 02-PELRB-2009, PELRB Case No. 148-08 (April 6, 2009).
  - Questions asked by a local board member at an administrative hearing concerning the possibility of compromise does not indicate prejudgment or bias where the board member directed the questions to both the employer and the union representatives, and he did not indicate what he thought the compromise should be. *Las Cruces Prof'l Fire Fighters v. City of Las Cruces (Fire Fighters* II), 1997-NMCA-031, 123 N.M. 239.
  - A board member is not disqualified for bias simply because he was nominated by union interests, or because he had expressed support for aggressive unionization of the public sector prior to being appointed to the Board. *Las Cruces Prof'l Fire Fighters v. City of Las Cruces (Fire Fighters II),* 1997-NMCA-031, 123 N.M. 239.
  - Any suggestion of improper conduct on the part of a hearing officer is highly inappropriate absent evidence of bias or a showing of some impermissible motive which might lead to an inference of bias and without such evidence the Board will not entertain mere allegations of impropriety. *In re: Local 7911, Communications Workers of America and Doña Ana Deputy Sheriffs ' Association Fraternal Order of Police and Doña Ana County,* 1 PELRB No. 19 (Aug. 1, 1996).
  - Vague and unspecific comments of a Board member are insufficient to preserve objection of bias particularly when record shows appellant otherwise granted due process regarding pleadings and oral arguments allowed and considered. *In re: McKinley County Sheriffs Association, Fraternal Order of Police* and *McKinley County.* 1 PELRB No. 15 (Dec. 22, 1995).
  - The Governor's responsibilities under Article V, Section 4 of the New Mexico Constitution to "take care that the laws be faithfully executed" requires that the Governor respect the PEBA's requirement for

continuity and balance by not attempting to remove appointed members of the PELRB. Constitutional due process requires a neutral tribunal whose members are free to deliberate without fear of removal by a frequent litigant in that forum, such as the Governor. *AFSCME v. Martinez,* 2011-NMSC-018, 150 N.M. 132, 257 P.3d 952.

ELECTION OF REMEDIES

- A local ordinance does not violate PEBA by requiring a party to elect between proceeding with a grievance and bringing a PPC regarding the same or substantially the same set of facts and circumstances or subject matter. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20. 1994).

JUDICIAL REVIEW

- **Deference to Board**
  - When reviewing administrative agency decisions, the courts begin by looking at two interconnected factors: (a) is the question one of law, fact or both; and (b) is the matter is within the agency's specialized field of expertise. If the agency decision is based upon its interpretation of its statute, the court will accord some deference, especially if the legal question implicates agency expertise. However, the court may always substitute its interpretation of the taw for that of the agency because it is the function of the court to interpret the law. If the court is addressing a question of fact, the court will accord greater deference to the agency's determination, especially if the factual issues concern matters in which the agency has specialized expertise. *The Regents of the University of New Mexico v. New Mexico Federation of Teachers and American Assoc. of University Professors,* 1998-NMSC-20, 125 N.M. 401.

- **Capricious, arbitrary**
  - The party appealing the agency decision has the burden of showing that the agency action is (a) arbitrary and capricious, (b) not supported by substantial evidence, and/or (c) represents an abuse of the agency's discretion by being outside the scope of the agency's authority, clear error, or a violation of due process. *The Regents of the University of New Mexico v. New Mexico Federation of Teachers and American Assoc. of University Professors,* 1998-NMSC-20, 125 N.M. 401.

- **Substantial evidence**
  - "Substantial evidence" is evidence that a reasonable mind would regard as adequate to support a conclusion. If the agency's factual findings are not supported by substantial evidence, the court *may* adopt its own findings and conclusions based upon the information in the agency's record. *The Regents of the University of New Mexico v. New Mexico Federation of Teachers and American Assoc. of University Professors.* 1998-NMSC-20. 125 N.M. 401.
  - When reviewing an administrative agency's findings of fact. courts apply the whole record standard of review, meaning the reviewing court looks at both favorable and unfavorable evidence. The reviewing court may not exclusively rely upon a selected portion of the evidence and disregard other convincing evidence if it would be unreasonable to do so. The decision of the agency will be affirmed if it is supported by substantial evidence in the record as a whole. *The Regents of the University of New Mexico v. New Mexico Federation of Teachers and American Assoc. of University Professors,1998*-NMSC-20, 125 N.M. 401.
  - In reviewing a labor board's decision on a claim of insufficiency of the evidence, the appellate court resolves all disputes of facts in favor of the prevailing party and indulges all reasonable inferences in support of the prevailing party. The courts do not reweigh the evidence or substitute their own judgment for that of the board. *Las Cruces Professional Fire Fighters v. City of Las* Cruces *("Fire Fighters I,* 1997-NMCA-44. 123 N.M. 329 (1996), citing *Clovis Nat'l Bank v. Harmon,* 1984-NMSC-119, 102 N.M. 166, 168-69, *Sanchez v. Homestake Mining Co.,* 1985-NMCA-022, 102 N.M. 473, 476, and *Hernandez v. Mead Foods, Inc.,* 1986-NMCA-020, 104 N.M. 67, 71, and *National Council on Compensation Ins. v. New Mexico State Corp. Comm'n.* 1988-NMSC-036, 107 N.M. 278. 282.
  - The question is not whether substantial evidence exists to support the opposite result but rather whether substantial evidence supports the result reached. To conclude substantial evidence exists to support an administrative decision, the court need only find there is credible evidence for a reasonable mind to accept as adequate the result reached by the agency. *Las Cruces Professional Fire Fighters v. City of Las Cruces* (*Fire Fighters I)* 1997-NMCA-44, 123 N.M. 329, citing *Clovis Nat'l Bank v. Harmon*, 1984-NMSC-119, 102 N.M. 166, 168-69, *Sanchez v. Homestake Mining Co.,* 1985-NMCA-022, 102 N.M. 473, 476, *and Hernandez v. Mead Foods, Inc.,* 1986-NMCA-020, 104 N.M. 67, 71, *and National Council on Compensation Ins. v. New Mexico State Corp. Comm'n.,* 1988-NMSC-036, 107 N.M. 278, 282.

JURISDICTION

- **Divestment of Board's jurisdiction over PPC's**
  - A local ordinance's provision allowing employees to take their grievances to their supervisor or other County officials rather than to the board violates PEBA by depriving the local board of its power to resolve the matter, and by permitting interested parties to resolve PPC against itself or against a union that may be its adversary. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).

- **Gender discrimination and other claims of**
  - The PELRB is not the proper forum to address claims of gender discrimination even where union asserts the County withheld proper rank from an employee on the basis of her gender and that such action interfered with the designation of an appropriate bargaining unit. *In re: Communications Workers of America, Local 7911 and Doña Ana County,* 1 PELRB No. 16 (Jan. 2. 1996).

- **Home rule jurisdictions**
  - Being a home rule jurisdiction under Article X, Sections 5 and 6 of the New Mexico Constitution does not shield a public employer other than the state from the PELRB's jurisdiction. *Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993).

- **PELRB's violation of its regulations, Jurisdictional effect of**
  - The time limits established in PELRB rules for the Board (or its agents) to investigate complaints and conduct hearings are directory rather than mandatory and exceeding those limits does not support dismissal of the complaint under the facts of this case. *In re: AFSCME, Council 18 v. State of New Mexico,* 33-PELRB-2012.
  - The time limit established in PELRB rules for the Board (or its agents) to conduct a hearing are directory rather than mandatory, so its violation does not deprive the Board of jurisdiction. *AFSCME and Los Alamos County Firefighters v. County of Los* Alamos, 1 PELRB No. 3 (Dec. 20, 1994), citing *Littlefield v. State of New Mexico,* 1992-NMCA-083, 114 N.M. 390.
  - The Board will reject exceptions based on technical violations of rules that are not alleged or proven to cause prejudice and that do not affect the outcome, such as holding a hearing more than 45 days after the filing of the case. *AFSCME* and *Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).

- **PPC's raised in petitions.**
  - PPCs may not be raised as part of a representation petition, even where the claims (discrimination and interference with the bargaining unit) are closely related to the Petition because they derive from the employer's opposition to the proposed bargaining unit. (Employer had opposed the inclusion of sergeants, and the local president was a sergeant.) Instead, a separate PPC must be filed. *In re: Communications Workers of America, Local 7911 and Doña Ana County,* 1 PELRB No. 16 (Jan. 2, 1996), attached and affirmed ALJ Decision and Order.

- **Reconsideration authority**
  - An administrative body such as the PELRB does not have the authority to reverse or reconsider its final action unless the legislature expressly granted the Board the power to do so, and the legislature did not do so. *New Mexico State University Police Officers Association and New* Mexico *State University,* 1 PELRB No. 13 (June 14, 1995). *But See* AFSCME *Council 18 v. Department of Health,* 06-PELRB-2007 (December 3, 2007) (permitting reconsideration where the Hearing Examiner considered evidence introduced at trial to find violation of a PEBA provision not alleged in the PPC, provided the Department could demonstrate undue prejudice) (subsequent motion for reconsideration *denied* for failure to demonstrate prejudice, *See AFSCME Council 18 v. Department of Health,* 01-PELRB-2008 (April 6, 2009.)

- **Legislative intent**
  - It is the policy of New Mexico courts to determine legislative intent primarily from the legislation itself because New Mexico has no state-sponsored system for recording the legislative history of particular enactments. Thus, New Mexico courts do not attempt to divine what legislators read, heard and thought at the time they enacted a particular item of legislation. If the intentions of the legislature cannot be determined from the actual language of the statue, then New Mexico courts resort to rules of statutory construction, not legislative history. *The Regents of the University of New Mexico v. New Mexico Federation of Teachers and American Assoc. of University Professors,* 1998-NMSC-20, 125 N.M. 401.

But See Santa Fe Police Officers' Association v. City of Santa Fe, 02-PELRB-2007 (Oct. 14, 2007) (basing ruling in part on legislative history concerning a proposed and rejected amendment from PEBA I to PEBA II).

LIMITATIONS PERIOD

- **Local ordinances**
  - A 3-day time limit to file PPC's is unreasonably restrictive of the rights of public employees, public employers and labor organizations and therefore violates PEBA. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).

LOCAL ORDINANCES OR RESOLUTIONS, COMPLIANCE WITH PEBA

- **Promotion of principles established in PEBA's PPC Sections**
  - The prohibited practices of a local ordinance must be approximately equal in number as between public employers on one hand and unions or public employees on the other. A local ordinance that is replete with prohibited practices against public employees and labor organizations tilts the playing field and does not promote the labor relations principles mandated by PEBA. *Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993).
  - There is no violation of PEBA where a local ordinance has only three additional employee or labor organization prohibited practices, all of which are, at most, only peripherally related to collective bargaining. *Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993).

- **Limitations on speech or use of political pressure in bargaining**
  - Prohibitions against interference with officials to obtain concessions, and against interference with "normal" negotiation processes are so vague and so broad as to chill employee rights guaranteed by PEBA and the Ordinance, including the right to organize and assist a labor organization. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos*, 1 PELRB No. 3 (Dec. 20, 1994).
  - Prohibitions on communications regarding negotiations to any persons not directly involved in such negotiations infringes on the right to assist labor organizations by prohibiting unions from communicating with their membership regarding the progress of negotiations. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No.3 (Dec. 20, 1994).
    A prohibition on elected officials and employees or labor organization representatives from discussing any issue that is a subject of negotiations does not violate PEBA. *Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993).
  - A prohibition on unions or employee groups who represent Santa Fe County employees from endorsing or publicly supporting any candidates for County Commissioner does not violate PEBA. *Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993).

- **Limitations on the solicitation of union membership**
  - Prohibitions in a local ordinance on soliciting union membership during duty hours, and on using county time, property, or equipment for union business without advance approval of the County Administrator, do not promote the principles of the prohibited practice sections of PEBA. Such prohibitions do not exist in PEBA and are best addressed by employer rules and disciplinary procedures that are subject to the rights guaranteed by PEBA and are therefore not a proper subject for a PPC. *AFSCME* and *Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).

- **Providing greater rights than afforded under PEBA**
  - A local ordinance may not expand the pool of employees covered from that covered under PEBA, by providing for a narrower definition of "supervisor". *IAFF Local* 2362 *v. City of Las Cruces,* 07-PELRB-2009 (July 6, 2009).

MANAGEMENT RIGHT

- **Core management decisions**
  - Subjects that lie at or near the core of the County's public service mission are not mandatory subjects of bargaining. However, the effect, consequence or impact and implementation of core managerial decisions with respect to bargaining unit employees are mandatory bargaining subjects. *Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993)

- **Reservation of management rights**
  - A local ordinance cannot limit the subjects over which a public employer must negotiate through an improperly broad reservation of exclusive management rights. Such a reservation of right violates PEBA.

Santa Fe County and AFSCME, 1 PELRB No. 1 (Nov. 18, 1993). *See also AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).

MANDAMUS

- Where an appeal process is available to a litigant, mandamus is not an appropriate vehicle for challenging an administrative decision and the extraordinary remedy of mandamus is not proper where the only consequences alleged are the usual delay and expense inherent in all litigation. *Gallup-McKinley County Schools v. PELRB and McKinley County Federation of United School Employees Local* 3313, Court of Appeal Case No. 26,376 (June 8, 2006), citing *State ex rel. Hyde Park Co., LLC v. Planning Comm'n of the City of Santa Fe,* 1998-NMCA-146, 125 N.M. 832, footnotes 11 and 13.
- The PELRB, by exercising concurrent jurisdiction after a local board had been approved, does not infringe on a clear legal right of the School and does not exceed its authority under PEBA, such as to support a mandamus action *Gallup-McKinley County Schools v. PELRB and McKinley County Federation* of *United School Employees Local* 3313, 2d Judicial Dist. Case No. CIV-2005-07443 (Nov. 23, 2005, J. Campbell).

MOOTNESS DOCTRINE

- The PELRB will hear a matter in which the issues have become moot if the matter involves issues of substantial public interest or issues capable of repetition yet evading review. *Chamas-Ortega v. Second Judicial District,* 01-PELRB-2004 (Nov. 9, 2004).

PARAMILITARY STRUCTURE

- That the Santa Fe Fire Department is organized into a paramilitary structure does not create a conflict of interest in having fire captains represented in a bargaining unit with subordinates or destroy the community of interest among these employees. *Firefighters and City of Santa Fe,* 1 PELRB No. 6 (Jan. 19, 1995).

PAYROLL DEDUCTION OF DUES

- Payroll deduction of dues is a mandatory, not permissive, subject of bargaining. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).
- The amount of dues to be deducted is a matter squarely within the province of the labor organization involved *AFSCME and Los Alamos County Firefighters v County of Los Alamos,* 1 PELRB NO. 3 (Dec. 20, 1994).

PERMISSIVE SUBJECTS OF BARGAINING

- **Generally**
  - An employer or a labor organization Violates its duty to bargain in good faith by placing unreasonable conditions on bargaining, such as by insisting upon agreement concerning "permissive" subjects of bargaining. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).

- **Ground rules**
  - Because ground rules for negotiation are permissive subjects of bargaining, it is a violation of the duty to bargain in good faith to impose them through a local ordinance as a precondition to bargaining. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).

PRECEDENT

- **Effect of PELRB precedent on local boards**
  - A § 26(B) (Repealed 2020) local ordinance's definition of confidential employee violates PEBA where it does not comport with the definition under PEBA as interpreted by the Board. *IAFF Local 2362 v. City of Las Cruces,* 07- PELRB-2009 (July 6, 2009).
  - A §10 local board's certification procedures for incumbent labor organizations violate PEBA where they permit an election upon the employer's request, contrary to 11.21.2.36 NMAC and the PELRB's interpretations of § 24(B) (Repealed 2020) and § 14(A) and (e) in *NEA-Alamogordo and Alamogordo Public Schools,* 05-PELRB-2006 (June 1, 2006). *McKinley County Federation of United School Employees, AFT*

Local 3313 v. Gallup-McKinley County School District and Gallup-McKinley County School District Labor Management Relations Board, 03-PELRB-2007. **Note:** These cases both represent instances in which the Board has imposed on local boards the requirement to follow PELRB interpretations of PEBA, and even PELRB rules in the case of *Gallup-McKinley. Las Cruces* is also noteworthy because it was a grandfathered local board rather than a PELRB approved local board.

- **Effect of PELRB precedent before the PELRB**
  - Under 11.21.22(D) NMAC, an un-appealed recommended decision adopted by the Board in a representation matter can constitute binding precedent, unlike an un-appealed recommended decision concerning a PPC that is pro forma adopted by the Board, which is governed by NMAC 11.21.3.19(D).
  - Reliance on Board-adopted recommended decisions regarding representation petitions is also authorized under 11.21.2.22(C) NMAC, which requires the Board to independently review any recommended decision by a hearing examiner regarding the scope of the bargaining unit. *In re: Communications Workers of America, Local 7911 and Doña Ana County,* 1 PELRB No. 16 (Jan. 2, 1996).
  - The Board may, upon review of the whole record, summarily adopt a Recommended Decision regarding unit inclusion or exclusion in the absence of exception, but that part of the Board's Decision will not have precedential effect. *New Mexico State University Police Officers' Association and New Mexico State University,* 1 PELRB No. 13 (June 14, 1995).
  - The Board's hearing officers are bound by the formal decisions of the Board. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20. 1994).

- **Effect of NLRB precedent before the PELRB**
  - Absent cogent reasons to the contrary, we should interpret language of the PEBA in the manner that the same language of the NLRA has been interpreted, particularly when that interpretation was a well settled, long-standing interpretation of the NLRA at the time the PEBA was enacted. NLRA precedent should generally be followed when it concerns a PELRB provision that is identical or substantially similar and there is no cogent reason for varying from the NLRA precedent. *The Regents of the University of New Mexico v. New Mexico Federation of Teachers and American Assoc. of University Professors.* 1998-NMSC-20, 125 N.M. 401, citing *Firefighters v. City of Las* Cruces *(Fire Fighters II),* 1997-NMCA-031, 123 N.M. 239.
  - The definition of "supervisor" in PEBA is not the same as or closely similar to the definition contained in the NLRA, because PEBA's definition is narrower than the one found in the NLRA. Consequently, positions that may be supervisory under the NLRA and excluded from the
    bargaining unit under that act may not be supervisory under PEBA given the provisos contained in § 4(T). *New Mexico State University Police Officers Association and New Mexico State University,* 1 PELRB No. 13 (June 14, 1995).
  - Although the NLRA precludes the inclusion of security guard positions with other positions in the same bargaining unit, NLRA precedent is *not* persuasive here because PEBA and the NLRA are not the same as or closely similar in this matter: (1) PEBA does not contain a security guard provision; (2) § 13 of PEBA permits the consolidation of occupational groups by the parties and the Board may. in fashioning an appropriate unit, consolidate them; and (3) § 21(A) of PEBA, unlike the NLRA, unequivocally prohibits strikes and lockouts on which the NLRA prohibition is based. *New Mexico State University Police Officers Association and New Mexico State University,* 1 PELRB No. 13 (June 14, 1995).
  - As noted in *Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993) the PELRB will give special weight to interpretations of similar NLRA provisions based on the 60-year history of interpreting and applying that act. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos.* 1 PELRB No. 3 (Dec. 20, 1994).
  - The Board will give great weight to interpretations of the NLRA by the NLRB and reviewing courts where the relevant provisions are the same or closely similar to those of PEBA. *Santa Fe County* and *AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993).

- **Effect of other labor boards' decisions before the PELRB**
  - Where the parties present decisions from other labor boards in representation proceedings, the fact specific nature of representation proceedings requires that each party's reliance upon suchopinions be buttressed with (1) the specific wording from the labor law of the jurisdiction from which the decision issued; (2) how the wording is similar or dissimilar to comparable wording in the New Mexico PEBA; and (3) justification why the PELRB should find such decisions persuasive in the circumstances of the instant proceeding. Additionally, decisions from other jurisdictions cannot substitute for performing the community of interest analysis under § 13(A). *Santa Fe Firefighters and City of Santa Fe,* 1 PELRB No. 6 (Jan. 19, 1995).

PRELIMINARY INJUNCTION

- The NLRB sought an injunction against Starbucks Corp. alleging that it interfered with an employee's right to engage in protected concerted activities. The injunction was appealed to the Supreme Court where it remains pending as of this writing. The specific question before the Supreme Court is whether courts should apply the traditional, four-factor test for preliminary injections (i.e., the likelihood of success on the meris, irreparable harm, balance of equities, and public interest) or a more lenient standard when considering the NLRB's injunction requests. See, *Starbucks Corporation v. M. Kathleen McKinney, Regional Director of Region 15 of the Nation Labor Relations Board,* Docket No.: 23-367 (pending).

PROHIBITED SUBJECTS OF BARGAINING

- **Amount of dues to be deducted**
  - The amount of dues to be deducted is a matter squarely within the province of the labor organization involved, and therefore is not subject to bargaining. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No.3 (Dec. 20, 1994).

RIPENESS

- A claim that a local ordinance violates PEBA on its face is ripe even before the ordinance is applied. *Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993). *See also AFSCME* and *Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).

SECURITY GUARD OR LAW ENFORCEMENT POSITIONS

- **Inclusion with other positions**
  - Although the NLRA precludes the inclusion of security guard positions with other positions in the same bargaining unit, NLRA precedent is not persuasive here because PEBA and the NLRA are not the same as or closely similar in this matter: (1) PEBA does not contain a security guard provision; (2) § 13 of PEBA permits the consolidation of occupational groups by the parties and the Board may, in fashioning an appropriate unit, consolidate them; and (3) § 21(A) of PEBA, unlike the NLRA, unequivocally prohibits strikes and lockouts on which the NLRA prohibition is based. *New Mexico State University Police Officers Association and New Mexico State University,* 1 PELRB No. 13 (June 14, 1995).

STANDING

- A statewide parent union has standing to bring claims on behalf of a local union. *NEA-New Mexico/Bernalillo and Bernalillo Public Schools,* 1 PELRB No. 17 (May 31, 1996).
- There is an affiliation and comity of interest between 'parent' NEA-NM and 'sibling' NEA-Bernalillo, including (1) negating or lessening a potential loss of members and dues; (2) eliminating or minimizing the potential harm flowing from an abridgement or denial of statutory rights; and (3) *See*king to influence the PELRB's interpretation of PEBA. *NEA v. Bernalillo Public Schools*, 1 PELRB No. 17 (May 31, 1996).
- The Article III case or controversy requirement is not applicable to matters pending before administrative agencies. The PELRB standard is whether the complainant has a reasonable Interest in the outcome and is potentially subject to harm. *Santa Fe County* and *AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993). *See also AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).
- An uncertified union has administrative and juridical standing to bring a claim that a local ordinance violates PEBA. *Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993).
  An uncertified union's administrative and juridical standing to bring a claim that a local ordinance violates PEBA is even stronger where the union has filed a petition for certification as exclusive representative or where the union is actively organizing the county employees. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).
- Whether a union is the certified exclusive bargaining representative for a group of employees is not dispositive of the question whether a union has standing to prosecute a PPC. Exclusive representative status concerns who is empowered to advocate the employees' interests at the bargaining table. §10-7E-4 (I) and (F). There is nothing in the definition of the term "exclusive representative" to support a claim that only the exclusive representative may prosecute PPC's. *Motor Transportation Employee's Association and FOP v. NM Dep't of Public Safety,* 13-PELRB-2011.
- While a Petition seeking certification as the exclusive representative for a "wall to wall" unit in the State Engineer's Office was pending, the employer unilaterally altered employees work schedules sought summary dismissal on the ground that, because they have not yet been certified, CWA is not a "labor organization" representing employees of the OSE and therefore the PPC provisions of PEBA do not apply. The PELRB held that certification as an exclusive bargaining representative for a designated bargaining unit is not what defines a "labor organization". That status is independent of and pre-exists the filing of a petition for certification of a bargaining unit. Pursuant to §10-7E-4(L) all that is required is that the organization be one whose purposes is that of representing public employees in collective bargaining and in otherwise meeting, consulting, and conferring with employers on matters pertaining to employment

relations. *Communications Workers of America v. NM Office of the State Engineer*, 3-PELRB-2012

STATUTORY CONSTRUCTION

- Where there is a conflict between general and specific statutory provisions, the specific provision shall control over the general provision. *Santa Fe Police Officers ' Association* v. *City of Santa Fe,* 02-PELRB-2007 (October 14, 2007), citing *Crutchfield v. New Mexico Dept. of Taxation and Revenue,* 2005-NMCA-022, 137 N.M. 26, and *Stinbrink v. Farmers Inc. Co.,* 1990-NMSC-108, 111 N.M. 179, 182.
- It is the policy of New Mexico courts to determine legislative intent primarily from the legislation itself, because New Mexico has no state-sponsored system or recording the legislative history of particular enactments. Thus, New Mexico courts do not attempt to divine what legislators read and heard and thought at the time they enacted a particular item of legislation. If the intentions of the legislature cannot be determined from the actual language of the statue, then New Mexico courts resort to rules of statutory construction, not legislative history. *The Regents of the University of New Mexico* v. *New Mexico Federation of Teachers and American Assoc. of University Professors,* 1998-NMSC-20, 125 N.M. 401. *But See Santa Fe Police Officers' Association v. City of Santa Fe,* 02-PELRB-2007 (October 14, 2007) (considering legislative history in support of its construction of § 5).
- A word is properly interpreted out of the statute and its presence is not accorded a special meaning, where it was not used elsewhere and the Board finds its inclusion to be the result of awkward drafting *NEA-New Mexico/Bernalillo* v. *Bernalillo Public Schools,* 1 PELRB No. 17 (May 31, 1996).
- The Board may rely on the express purposes of PEBA and the specific wrongs prohibited, as indicia of legislative intent. Construction must not render a statute's application absurd or unreasonable or lead to injustice or contradiction. *Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993).
- As long as a lawful interpretation is reasonable, the Board will not read an unlawful interpretation into the words of an ordinance. *Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993).

SUMMARIES OF EVIDENCE

- It is not reasonable to produce, on the day of the hearing, fifteen (15) boxes of original documents on which a summary is based *In re: Local* 7911, *Communications Workers of America and* Doña *Ana Deputy Sheriffs' Association, Fraternal Order of Police and Doña Ana County,* 1 PELRB No. 19 (Aug. 1, 1996).
- Summaries of evidence may be properly excluded in the hearing examiner's discretion when the opposing party and/or hearing examiner raise issues with the summaries' reliability, accuracy and relevancy and the proponent fail to produce the original documents on which the summaries are based at a "reasonable time and place" prior to the hearing. *In re: Local 7911, Communications Workers of America and Doña Ana Deputy Sheriffs' Association, Fraternal Order of Police and Doña Ana County,* 1 PELRB No. 19 (Aug. 1, 1996).

SUMMARY JUDGMENT

- A motion for summary judgment. and the response thereto, shall follow New Mexico Rules of Civil Procedure, specifically Rule 1-056 NMRA, for guidance. *AFSCME Council 18 v. New Mexico Department of Labor,* 01-PELRB-2007 (Oct. 15, 2007).
- In a motion for summary judgment, the movant shall set out a concise statement of all malarial facts to which it is contended there is no genuine dispute, the facts set out shall be numbered, and the motion shall refer with particularity to those portions of the record upon which the party relies. The respondent shall file a response that includes a concise statement of all material facts to which it is contended there is a genuine dispute, the facts set out shall be numbered, and the response shall refer with particularity to those portions of the record upon which the party relies. Both sides may include supporting affidavits, based on personal knowledge and setting forth evidence that would be admissible at trial. *AFSCME Council 18 v. New Mexico Department of Labor,* 01-PELRB-2007 (Oct.15, 2007).
- If a motion for summary judgment is made and properly supported, the opposing party may not rely upon the mere allegations or denials of his pleadings on in the PPC, but rather must by affidavit and reference to the record, set forth specific facts showing there is a genuine issue of material dispute for trial. *AFSCME Council* 18 *v. New Mexico Department of Labor,* 01-PELRB-2007 (Oct. 15, 2007).
- If a motion for summary judgment is made and properly supported, the opposing party may not rely upon the mere allegations or denials of his pleadings or in the PPC, but rather must by affidavit and reference to the record, set forth specific facts showing there is a genuine issue of material dispute for trial*. Id. See AFSCME, Council 18 v. State of NM Dep't of Labor*, PELRB No. 149-06 where 'the summary judgement procedures used in this case did not enable the PELRB to accurately assess whether the undisputed material facts entitle the DOL to summary judgment."

UNIT CLARIFICATION

- **Changed Circumstances**
  - In *AFSCME, Council 18 v. NMHSD and NM PELRB*, D-202-CV-2016-07671, (In re: PELRB 30915), AFSCME argued that a unit clarification petition was proper. The Board disagreed stating that the

argument made, "confuses the merits of the underlying dispute with the threshold requirement to demonstrate changed circumstances. Neither the refusal to deduct dues, the creation of new positions, nor a change in supervision were changes sufficient to justify a petition for clarification. The court noted that prohibited practice complaints or petitions for representation or accretion were alternatives when the dispute is about whether certain positions are included in a unit or not. *See In re Kaiser Found. Hosps*., 337 NLRB 1061 (2002), describing longstanding doctrine that NLRB will not entertain unit clarification petition seeking to accrete historically excluded classification into the unit unless the classification has undergone recent, substantial changes. Changed circumstances is the threshold requirement for resolving the dispute in a unit clarification proceeding.

WAIVER

- AFSCME sought an injunction and temporary restraining order in district court to prevent the City of Albuquerque from closing a drug treatment program and laying off bargaining unit employees. While the district court granted an injunction regarding the facility's closure and contracting out of work, it refused to grant equitable relief concerning the layoff procedures. Subsequently, AFSCME sought to compel arbitration specifically on the issue of layoffs. The court granted AFSCME's motion to compel arbitration. However, the City appealed, arguing that AFSCME had waived its right to arbitration by invoking the Court's discretionary powers. The Court of Appeals evaluated the waiver based on three principles set forth in *Bd. Of Educ., Taos Mun. Sch. v. the Architects*. First, mere delay or dilatory conduct does not automatically constitute waiver. Second, the court considers whether the party urging arbitration previously invoked the judicial system. If so, this could indicate an intent to waive arbitration. And finally, the extent to which the other party relied on the manifested intent to waive arbitration during court proceedings is also relevant. Ultimately, the Court of Appeals held that AFSCME failed to invoke its right to arbitration. Instead, AFSCME manifested an intent to forgo what it considered an inadequate remedy in favor of swifter justice before the district court. Consequently, the court reversed the district court's order compelling arbitration and remanded the case for further proceedings consistent with this opinion. *See AFSCME Local 3022 v. City of Albuquerque, Richard J. Berry, Mayor of City of Albuquerque*, 2013-NMCA-049, (December 28, 2012) (Cert. Granted, April 5, 2013, No. 34,007).
- The court determined that paramedic training contracts are subjects of mandatory bargaining and that the County may not unilaterally enter into such contracts with Union members without including the Union in its negotiations. As part of its ruling the Appellate Court rejected the County's argument that the CBA's "zipper clause" constituted a waiver of any right to bargain over the paramedic training contracts at issue. The Appellate Court rejected both the Union's argument that a strict "clear and unmistakable" standard should be applied and the County's argument that broad waiver clauses satisfy the clear and unmistakable requirement language stating that "...the answer does not call for a rigid rule, formulated without regard for the bargaining postures, past practices, and agreements of the parties for two reasons. First, notwithstanding the split in the circuits, the NLRB has continued to adhere to the broader position taken in *Radioear.* (citations omitted) Moreover, given our Supreme Court's direction in this area, we believe that application of the reformulated standard described by the NLRB in *Radioear* is the more reasoned approach to deciding the question of whether the language of the CBA expressly waived the right to negotiate the paramedic training contracts." (Citations omitted). Accordingly, the district court did not err in determining in the summary judgment proceeding that, as a matter of law, the Union did not waive its right to bargain based on the zipper clause. *See County of Los Alamos v. John Paul Martinez and Michael Dickman, Robbie Stibbard, as President of the Los Alamos Firefighters Association Local #3279*, 2011-NMCA-027, 150 N.M. 326, 250 P.3d 1118
- The union alleged that the school district violated New Mexico law by refusing to review grievances appealed to the School Board. These grievances were part of a negotiated grievance procedure. Additionally, the district was accused of giving three bargaining unit employees extra work and paying them an additional "foreman" stipend without bargaining those changes with the union. Furthermore, the union claimed that the district intentionally discriminated against internal candidates based on their union activities during a competition for a vacant Maintenance Foreman position. The Public Employee Labor Relations Board (PELRB) found that the district committed prohibited labor practices by refusing to review grievances and by providing additional work and stipends without proper negotiation. However, there was insufficient evidence to support other alleged violations. On appeal, with regard to the stipend issue, the Court of Appeals concluded that the Union did not waive its right to bargain over changes in duties and pay for the transportation employees affected and it was not arbitrary or capricious for the PELRB to consider differences between paying salaried certified academic employees for extracurricular activities such as sponsoring student clubs outside of working hours and paying stipends to hourly paid maintenance and transportation employees for bargaining unit work that would otherwise require overtime. *See Adrian Alarcon v, Albuquerque Public Schools Board of Education and Brad Winter, Ph.D., Superintendent of Albuquerque Public Schools,* Case No.: A-1-CA-34843, consolidated with *Central Consolidated School District No. 22 v. Central Consolidated Education Association,* Case No.: A-1-CA-

34424.

ZIPPER CLAUSE

- The court determined that paramedic training contracts are subjects of mandatory bargaining and that the County may not unilaterally enter into such contracts with Union members without including the Union in its negotiations. As part of its ruling the Appellate Court rejected the County's argument that the CBA's "zipper clause" constituted a waiver of any right to bargain over the paramedic training contracts at issue. The Appellate Court rejected both the Union's argument that a strict "clear and unmistakable" standard should be applied and the County's argument that broad waiver clauses satisfy the clear and unmistakable requirement language stating that "...the answer does not call for a rigid rule, formulated without regard for the bargaining postures, past practices, and agreements of the parties for two reasons. First, notwithstanding the split in the circuits, the NLRB has continued to adhere to the broader position taken in *Radioear.* (citations omitted) Moreover, given our Supreme Court's direction in this area, we believe that application of the reformulated standard described by the NLRB in *Radioear* is the more reasoned approach to deciding the question of whether the language of the CBA expressly waived the right to negotiate the paramedic training contracts." (Citations omitted). Accordingly, the district court did not err in determining in the summary judgment proceeding that, as a matter of law, the Union did not waive its right to bargain based on the zipper clause. *See County of Los Alamos v. John Paul Martinez and Michael Dickman, Robbie Stibbard, as President of the Los Alamos Firefighters Association Local #3279*, 2011-NMCA-027, 150 N.M. 326, 250 P.3d 1118.