PELRB PRACTICE MANUAL

July 29, 2024

Compiled by PELRB Staff

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I. PEBA Background

A. Introduction

Prior to enacting its first collective bargaining law in 1992, NMSA 1978, §§ 10-7D-1 *et seq.* (PEBA I), New Mexico already had several decades of experience in public sector bargaining at local levels. After PEBA I expired in 1999 due to an internal "sunset clause," the Legislature enacted a second and very similar act in 2003. With the enactment of NMSA 1978, § 10-7E-1 (2005) *et seq.* (PEBA II), New Mexico rejoined the ranks of about 36 states[1], that have enacted a public employee collective bargaining statute. All such acts are based on the National Labor Relations Act (NLRA), 29 USC § 141, *et seq*. However, the New Mexico Public Employee Bargaining Act (PEBA) has a unique history resulting in some unique features.

For example, in the interim between PEBA I and PEBA II a few public employers continued collective bargaining under their own ordinances or resolutions, some of which predated PEBA I and some of which were created and approved under PEBA I. PEBA II protected pre-existing local boards, allowed bargaining to continue without interference and recognized existing bargaining units, their representatives and collective bargaining agreements (CBAs) executed under their auspices. On March 5, 2020, Governor Michelle Lujan Grisham signed into law modifications the Public Employee Bargaining Act to clarify remedies available to the Public Employee Labor Relations Board and imposing requirements on local labor boards continued operations among other changes. Perhaps the most significant change effected by the 2020 amendments appears in § 10-7E-10 concerning conditions placed on local labor boards' continued existence, the prohibition of new labor boards being created and the transfer of authority upon termination of local boards. Local boards that continued to exist after July 1, 2021, would cease to exist unless by December 31, 2021, they had submitted to the PELRB an affirmation that the public employer subject to the local board has affirmatively elected to continue to operate under the local board and each labor organization representing employees of the public employer subject to the local board submitted written notice to the board that it also elects to continue to operate under the local board. *See* § 10-7E-10(D). As a result of the amendments to § 10, 37 local boards ceased to exist, leaving only 15 local boards opting to continue operating.[2]

[1] *See* Appendix A appended to this Practice Manual.

[2] The local boards that ceased operating were those in Alamogordo, Albuquerque Bernalillo County Water Utility Authority, Aztec Municipal School District, Belen, Belen Consolidated School District, Bernalillo County, Chama Valley ISD, Chaves County, Clovis, Clovis Municipal Schools, Cuba ISD, Curry County, Dulce ISD, Eddy County, Farmington, Gadsden ISD, Gallup, Grants, Lake Arthur Schools, Las Vegas, Lea County, Lincoln County, Los Lunas, Los Lunas Public Schools, Luna County, McKinley County, NM Highlands University, Northern New Mexico College, Otero County, Portales, Raton, Rio Rancho Public Schools, Roosevelt County, Ruidoso Schools, Santa Fe Community College, Taos, UNM, and WNMU. Those that continued to operate are in Alamogordo Public Schools, Albuquerque, Albuquerque Public Schools, CNM, Deming, Doña Ana County, Hobbs, Las Cruces, Los Alamos County, NMSU, Roswell, San Juan College, Sandoval County, Silver City and Zuni Schools.

B. History and Overview of Public Bargaining in New Mexico

1. Pre-PEBA

Prior to the first enactment of the PEBA, New Mexico and its political subdivisions had several decades of experience in public sector collective bargaining and New Mexico courts consistently upheld the implied right of public entities to enter into CBAs under certain circumstances.
In 1959, the town of Farmington acquired a private electrical utility at which the workers were already organized and working under contract and the town renegotiated the CBA in 1962. In 1965, the Court upheld Farmington's authority to enter into a CBA where there was no applicable merit system in place. *IBEW v. Farmington*, 1965-NMSC-090, 75 N.M. 393.

In the following decades, prior to October 1991, a number of political subdivisions adopted public bargaining ordinances or resolutions, including the University of New Mexico (1970); Albuquerque Public Schools (1971); the City of Albuquerque (1977); University of New Mexico Hospital (1981); City of Deming (1991); Bernalillo County (1975); the City of Alamogordo (1990); the City of Farmington (1969); the City of Raton (1981). Additionally, the State Personnel Board promulgated rules pertaining to collective bargaining (1972). In 1989, the Court upheld the State Personnel Office's authority to enter into a CBA pursuant to agency rules, where the CBA did not "conflict with, contradict, expand or enlarge" rights provided under any existing or future state, county or municipal merit system. *See AFSCME v. Stratton,* 1989-NMSC-003, 108 N.M. 163, 769 P.2d 76.

Thus, over time a patchwork of collective bargaining practices and law developed. However, in the early 1990s, labor organizations in New Mexico sought unified legislation governing public bargaining throughout the state. By January of 1991, AFSCME, CWA, FOP, IAFF, NEA-NM, the N.M Federation of Teachers and the N.M. Federation of Labor had formed the New Mexico Coalition of Public Employee Unions and began drafting and circulating proposed public bargaining statutes. Bills were introduced to the Legislature unsuccessfully in 1991, and again, with success, in January 1992; and on April 1, 1993, PEBA I became effective until July 1, 1999.

To accommodate New Mexico's pre-existing public employee bargaining schema, PEBA I included the various grandfathering provisions discussed above. Some advocates argue that the PEBA's conflicts provisions, § 10-7E-3 and § 10-7E-17(B), were also intended to accommodate prior collective bargaining, by implicitly incorporating the *Stratton* decision into the PEBA. However, Sections 3 and 17(B) expressly prohibit only "conflict[s]". In contrast, *Stratton* prohibited enlarging upon or expanding rights guaranteed under merit systems. Under New Mexico law a "conflict" would exist only where the ordinance is actually "antagonistic" to or inconsistent with a state law of general applicability because it permits an act the general law prohibits or prohibits an act the general law expressly permits. *Cf. New Mexicans for Free Enterprise v. City of Santa Fe*, 2006-NMCA-007, ¶¶ 39-43, 138 N.M. 785, and cites therein; *Smith v. City of Santa Fe,* 2006-NMCA-048, 139 N.M. 410, 133 P.3d 866. Ordinances that are complimentary to the general law and/or that concern aspects of the issue on which general state law is silent, do *not* conflict with the state law. *Id.*

2. PEBA I

As noted, both PEBAs were generally modeled on the NLRA. Accordingly, "absent cogent reasons to the contrary," interpretations of the NLRA must generally be followed in interpreting substantially similar PEBA provisions, "particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the time the PEBA was enacted." *See Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, 123 N.M. 239; *see also Regents of UNM v. NM Federation of Teachers,* 1998-NMSC-020, ¶ 18, 125 N.M. 401, 408 (citing and endorsing this language in *Fire Fighters,* in dicta, and *Santa Fe County and AFSCME*, 1 PELRB No. 1 at 43 (Nov. 18, 1993) (that NLRB precedent should generally be followed when dealing with the "same or closely similar" language).

However, there are notable differences between the New Mexico PEBA and NLRA. For example, the first Public Employee Bargaining Act provided for payroll deduction of union dues as a mandatory subject of bargaining if either party chose to negotiate the issue and the right to file a petition for decertification being limited to members of the certified union. *See* § 10-7E-17(D) and § 10-7E-16(A). Because the NLRA is oriented toward the private employer-employee relationship, the PEBA included protections of the public interest and "orderly operation and functioning of government" by prohibiting strikes, slowdowns and lockouts, as well as the picketing of the homes and businesses of elected officials and public employees that do not exist in the NLRA. *See* §§ 10-7E-2, 10-7E-21 and 10-7E-20(F); *See also* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) at Chapters 19-22.

The ability of employers to "opt-out" of coverage under the PEBA by following grandfathered or their own locally adopted ordinance, resolution or charter amendment was a substantial departure from the NLRA and illustrated a compromise between competing interests of labor and management reached in order to get the law passed. The bill originally drafted by the Coalition of Public Employee Unions would have required the State Board to approve grandfathered ordinances and resolutions only if they provided "substantially equivalent" rights to employees as those provided by the PEBA. The Coalition's bill also would not have permitted the creation of any new local boards.[3]

The Legislature not only rejected the Coalition's proposed requirement of PELRB approval of grandfathered ordinances or resolutions but added an opt-out provision for newly created local boards over union protest. However, it did limit public employers' right to establish a new local board or operate a grandfathered one in two significant ways. First, new local boards would have to be approved by the state board and would have to meet the requirements of the PEBA unless otherwise approved by the state board. *See* § 10-7E-10(A). Second, grandfathered local ordinances had to "permit public employees to form, join or assist any labor organization for the purpose of bargaining collectively through exclusive representatives," and had to have resulted in the designation of appropriate

[3] A significant change to the law in 2020 no longer permits the creation of new local boards and those existing as of July 1, 2020, would have to be approved by the State Board and would have to meet the requirements of PEBA unless otherwise approved by the State Board. Previously grandfathered local ordinances must permit public employees to form, join or assist any labor organization for the purpose of bargaining collectively through exclusive representatives and had to have resulted in the designation of appropriate bargaining units, the certification of exclusive bargaining agents, and the negotiation of existing CBAs. Compare the 2020 amendments discussed in subparagraph 4 below essentially enacting the Labor Coalition's opt-out provisions previously rejected by the legislature in PEBA I.

bargaining units, the certification of exclusive bargaining agents, and the negotiation of existing CBAs. *Cf.* § 10-7E-26(A) and § 10-7D-26(B), since repealed. See NMSA 1978 § 10-7E-13 (2020) concerning the Board's power and duty to designate appropriate bargaining units.

Under PEBA I, New Mexico district courts confirmed the Board's authority under § 10-7E-10 to review the content of labor ordinances and resolutions, as part of the process of approving local boards. *See Board of County Commissioners of Otero County et al. v. State of New Mexico Public Employee Labor Relations Board,* Twelfth Judicial Dist. Case No. CV-93-187 (July 13, 1993, J. Leslie C. Smith); and *AFSCME v. Santa Fe County,* First Judicial Dist. Case No. SF 93-2174 (July 8, 1994, J. Herrera). The New Mexico Court of Appeals also confirmed the PEBA's supremacy over conflicting provisions in local ordinances created pursuant to PEBA I. *See Las Cruces Professional Firefighters,* 1997-NMCA-031, 123 N.M. 239; and *Las Cruces Professional Firefighters v. City of Las Cruces,* 1997-NMCA-044, 123 N.M. 329. Finally, the New Mexico Supreme Court confirmed the supremacy of the PEBA's definitions of "public employee" and "supervisor" over those of grandfathered provisions. *See Regents of UNM v. N.M. Federation of Teachers,* 1998-NMSC-020, ¶¶ 44-47, 125 N.M. 401.

The supremacy of the PEBA's definitions was addressed again in *AFSCME, Council 18, AFL— CIO, CLC, v. State of New Mexico, New Mexico State Personnel Board, and Sandra K. Perez, Director of New Mexico State Personnel Board*, 2013-NMCA-106, 314 P.3d 674 where the State Personnel Board adopted a regulation defining the phrase, "shift work schedule" differently than did Article 21, Section 5 of the State's Collective Bargaining Agreement with AFSCME. The Union prevailed at arbitration and sought enforcement of the arbitrator's decision asserting that the regulation violated the Contract Clauses of the United States and New Mexico Constitutions. The District Court dismissed the union's petition for injunctive and declaratory relief or failure to state a claim. However, the Court of Appeals reversed the district court because, having lost the arbitration, the State attempted to circumvent the arbitrator's decision and the State's obligations under the Agreement by adopting a definition that was the exact opposite of the definition adopted by the arbitrator. The Union adequately pled that the new regulation would substantially impair an existing contract right, to make the regulation unconstitutionally retroactive by impairing the Agreement in violation of the Contract Clauses of the United States and New Mexico Constitutions.

In the case of City of Las Cruces v. United Steel Local 9424, the City of Las Cruces, New Mexico, and the United Steelworkers Local 9424 (the union) were negotiating a contract set to expire in July 2023. While they had agreed on most terms for a successor CBA, they disagreed on Article 24, which pertained to pay increases. After declaring an impasse, the parties engaged in mediation sessions but failed to reach an agreement. An FMCS arbitrator issued an award, considering the parties' "Las Best Offers" (LBOs). The arbitrator noted that the PEBA required choosing one of the LBOs but lacked specific standards for doing so. The award also considered the availability of funds for any expenditure by the public employer. The union's LBO focused on wage increases and employee contributions, while the City's LBO included classification and compensation adjustments and proposed wage increases contingent on future appropriations.

3. PEBA II

After PEBA I expired on July 1, 1999, repeated attempts at replacement legislation were vetoed until 2003 when a revised public employee collective bargaining law was successfully re-enacted. Colloquially referred to as "PEBA II," the 2003 law largely maintained the provisions of PEBA I as outlined above, except for the following significant changes:

- The required showing of interest for intervenors was increased from 10% to 30%. *Cf.* § 10-7D-14(A) and (B); § 10-7E-14(A) and (B).

- The percentage of eligible employees required to vote for a valid election decreased from 60% to 40%. *Cf.* § 10-7D-14(A) to § 10-7E-14(E).

- Parties were required to reduce their agreements to a written CBA, whereas a written agreement was discretionary under PEBA I. *Cf.* § 10-7D-17(A)(2), § 10-7E-17(A)(2).

- The impact of professional and instructional decisions was made a mandatory subject of bargaining as to public school employees and educational employees in state agencies. Cf. § 10-7E-17(G).

- Impasse resolution procedures were required to culminate in binding arbitration. Cf. § 10-7D-18(A)(5), § 10-7E-18(A)(8).

- A CBA continues in full force and effect in event of impasse until replaced by another, except as to any identified level, step or grade increases in compensation, Cf. § 10-7E-18(D).

- Grandfathered collective bargaining units were required to be covered by a CBA on the date of PEBA II, rather than established through a representation election. Cf. § 10-7D-24, § 10-7E-24(A).

- Incumbent exclusive representatives continued to be recognized but must demonstrate majority support before an employer is required to enter into a new CBA. Cf. § 10-7E-24(B). PELRB rules enacted under PEBA II provided for the certification of incumbent bargaining status upon a showing of majority support by card count while the rules promulgated under PEBA I did not require a demonstration of majority support. Cf. 11.21.2.36 NMAC and 11.21.2.36 NMAC.

- PELRB rules enacted under PEBA II permit the clarification or accretion of grandfathered bargaining units only by election petition, *See* 11.21.2.37(A) NMAC and 11.21.38(B) NMAC.

- Labor organizations involved in prohibited strikes lose their certification only as to the

striking bargaining unit(s), not "any bargaining units," as under the former law. A one-year limitation on decertification was also eliminated. Cf. § 10-7D-21(C) and § 10-7E-21(C).

- Grandfathered ordinances or resolutions enacted prior to October 1, 1991 were not required to designate "appropriate bargaining units", certify exclusive bargaining agents or negotiate existing CBAs. *See* § 10-7E-26(B), repealed in the 2020 amendment.

- PEBA II also omitted "supervisors" in § 10-7E-5 as a class of employees excluded from the PEBA's coverage. However, the exclusion of supervisors from appropriate bargaining units was maintained in § 10-7E-13(A), with only minor grammatical variation. The PELRB has determined that the omission of "supervisors" from § 10-7E-5 of PEBA II was a clerical error. *See Santa Fe Police Officers' Association v. City of Santa Fe*, 02-PELRB-2007 (Oct. 14, 2007).

- PEBA II did not contain a sunset clause as did PEBA I.

4. 2020 Amendments

The PEBA was significantly amended effective July 1, 2020, as stated in the "Introduction" paragraph A above. In summary, the 2020 amendments to the Act effected minor changes to the "Conflicts" section, § 10-7E-3 substituting the word "rules" in place of "regulations" and striking the legal citation to the Personnel Act, "Sections 10-7-1 through 10-7- 19 NMSA 1978" in the listed laws that are not superseded by the Public Employee Bargaining Act.

Additionally, the "Definitions" section, § 10-7E-4 changed masculine pronouns used in the Act to gender neutral language; deleted a citation to "Section 7 of the Public Employee Bargaining Act" from the definition of "appropriate governing body"; deleted the definition of "fair share" as obsolete after the U.S. Supreme Court's decision in *Janus v. AFSCME,* 138 S. Ct. 2448, 2486 (2018). *See* ¶ 3B *infra.* § 10-7E-4 also modified the definition of a "local labor board" in light of changes to Section 9 and 10 discussed herein and further modified the definitions of "management employee" to exclude those "whose fiscal responsibilities are routine, incidental or clerical" and "public employee" to clarify that it includes those whose work is funded in whole or in part by grants.

- Section 10-7E-5 was amended in 2020 to add "concerted activities" to the protected rights of public employees, making express the Board's longstanding recognition of concerted activities as a protected category under § 5 of the Act before the 2020 amendment. *See AFSCME, Council 18 v. N.M. Children, Youth and Families Dep't.* 1-PELRB-2013 (PELRB 122-12, May 15, 2013) and the Hearing Officer's Recommended Decision therein citing *AFSCME, Council 18 v. N.M. Public Defender Dep't.* (In re: PELRB 121-05, July 14, 2006), in which Hearing Officer Juan Montoya equated the protections afforded employees to act in concert for mutual aid and protection by Section 7 of the NLRA[4] with protections afforded by the PEBA Section 10-7E-5 to form, join or assist a labor organization for the purpose of

collective bargaining. The PELRB adopted the same principle in *AFSCME, Council 18 v. N.M. Dep't of Health;* 06-PELRB-2007 December 3, 2007, (In Re; PELRB 168-06) and the Recommended Decision therein; *In re: AFSCME, Local 3422 v. N.M. Dep't of Corrections,* (PELRB 113-17).

- The Amendments materially altered §§ 10-7E-9 and 10-7E-10 so that local boards may continue to exist under certain circumstances described herein and clarified that the administrative remedies available to aggrieved parties before the state or local boards include "actual damages related to dues, back pay including benefits, reinstatement with the same seniority status that the employee would have had but for the violation, declaratory or injunctive relief or provisional remedies, including temporary restraining orders or preliminary injunctions and excluding punitive damages or attorney fees." Section 10-7E-9 was amended to make clear that, just as the NMPELRB is required to promulgate rules necessary to accomplish and perform its functions and duties, so are local boards, including procedures for the designation of appropriate bargaining units, the selection, certification and decertification of exclusive representatives and the filing of, hearing on, and determination of, complaints of prohibited practices. The PELRB is required to review rules promulgated by a local board to ensure that such rules conform with the PEBA, and that any deviation from PELRB administrative rules is warranted by the particular circumstances of the local employer. Every local board shall notify the PELRB of any revisions of its rules or changes in its membership within thirty days of any such revisions. The Board in turn is to maintain the current posting of that information. *See* § 10-7E-10(C).

- Perhaps the most significant change affected by the 2020 amendments appears in § 10-7E-10 concerning conditions placed on local labor boards' continued existence, the prohibition of new labor boards being created and the transfer of authority upon termination of local boards. Local boards that continued to exist after July 1, 2021, would cease to exist unless by December 31, 2021, they had submitted to the PELRB an affirmation that the public employer subject to the local board has affirmatively elected to continue to operate under the local board and each labor organization representing employees of the public employer subject to the local board submitted written notice to the board that it also elects to continue to operate under the local board. *See* § 10-7E-10(D).

- A local board that fails to timely submit the affirmation shall cease to exist as of January 1 of the next even-numbered year. *See* § 10-7E-10(E). A local board may also cease to exist if:

    - At any time after July 1, 2020, a local board has a membership vacancy exceeding sixty days in length (§ 10-7E-10(F)).

    - Upon repeal of the local ordinance, resolution or charter amendment authorizing continuation of the local board; or a vote of a local board, which vote is filed with the PELRB (§ 10-7E-10(G)).

- Once a local board ceases to exist for any reason, it may not be revived. *See* § 10-7E-10(H). Section 10-7E-10(I) provides that and all matters pending before such local board shall be transferred to the PELRB for resolution and a prohibition against creating any new local boards after June 30, 2020, appears in § 10-7E-10(J).

The 2020 amendments to 10-7E-17(D) require public employees who have authorized the payroll deduction of dues to a labor organization and wish to cease paying dues to provide written notice to their labor organization during a window period not to exceed ten days per year for each employee.

II. Basic Rights and Responsibilities Under the PEBA

The PEBA provides the following basic rights and responsibilities:

- Public employees may form, join or assist a union for the purpose of collective bargaining through representatives of their choice, or refrain from such activities without interference, restraint or coercion, *See* §§ 10-7E-2 and 5 of the PEBA.

- Public employees have the right to engage in other concerted activities for mutual aid or benefit. This right shall not be construed as modifying the prohibition against public employee strikes. *See* § 10-7E-5(B). The PELRB has historically followed the NLRA with regard to employees claiming protections for their activities either for union-related purposes aimed at collected bargaining or for other "mutual aid or protection" so that even before the 2020 amendment to the Act expressly protecting concerted activities for mutual aid or benefit such concerted activities enjoyed protected status. *See AFSCME, Council 18 v. N.M. Children, Youth and Families Dep't.* 1-PELRB-2013 (PELRB 122-12, May 15, 2013) and the Hearing Officer's Recommended Decision therein citing *AFSCME, Council 18 v. N.M. Public Defender Dep't.* (In re: PELRB 121-05, July 14, 2006), in which Hearing Officer Juan Montoya equated the protections afforded employees to act in concert for mutual aid and protection by Section 7 of the NLRA[4] with protections afforded by the PEBA Section 10-7E-5 to form, join or assist a labor organization for the purpose of collective bargaining. The PELRB adopted the same principle in *In re: AFSCME, Council 18 v. N.M. Dep't of Health;* 06-PELRB-2007 December 3, 2007, (PELRB 168-06) and the Recommended Decision therein; *In re: AFSCME, Local 3422 v. N.M. Dep't of Corrections,* (PELRB 113-17).

- Whenever a petition is filed by a labor organization containing the signatures of at least thirty percent of the public employees in an appropriate bargaining unit, the Board or local board shall conduct a secret ballot election to determine whether and by which labor organization the public employees shall be represented. Within ten days of accepting for filing such a petition, the Board or a local board shall require the public employer to provide the labor organization the names, job titles, work locations, home addresses, personal email addresses and home or cellular telephone numbers of any public employee in the proposed bargaining unit. This information shall be kept confidential by the labor organization and its employees or officers. *See* § 10-7E-14.

[4] *See* Sections 7 and 8 of the National Labor Relations Act; 29 U.S.C. §§ 151-169.

- Public employers and unions must negotiate in good faith over mandatory subjects of bargaining such as wages; hours and all other terms and conditions of employment except for retirement programs provided pursuant to the Public Employees Retirement Act or the Educational Retirement Act and payroll deduction of membership dues if a party request bargaining that subject. They must also bargain over the impact of professional and instructional decisions made by the employer, in the case of public schools and educational employees in state agencies. This duty to bargain in good faith is ongoing even after the parties have entered into a collective bargaining agreement and during its term, unless it can be demonstrated that the parties clearly and unmistakably waived the right to bargain regarding a particular subject. However, no party may be required to renegotiate the existing terms of collective bargaining agreements already in effect. *See* §§ 10-7E-17(A), (D) and (G).

- The PEBA imposes affirmative and reciprocal duties on exclusive representatives and public employers to "bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties." *See* § 17(A)(1). *See also* § 19(F) and § 20(C) prohibited the violation of that reciprocal duty by either party. A request by the exclusive representative to the State for the commencement of initial negotiations shall be filed in writing no later than June 1 of the year in which negotiations are to take place. Negotiations shall begin no later than July 1 of that year. In subsequent years, negotiations agreed to by the parties shall begin no later than August 1 following the submission of written notice to the State no later than July 1 of the year in which negotiations are to take place. *See* § 10-7E-18(A)(1).

- Effective July 1, 2020, no new local labor boards may be created as was previously permitted under PEBA II. However, local boards existing as of July 1, 2021, may continue operating after December 31, 2021, if they have submitted to the PELRB an affirmation that the public employer has elected to continue operating under the local board and each labor organization representing its employees has submitted written notice to the PELRB that it also elects to continue to operate under the local board. A local board that fails to timely submit the affirmation shall cease to exist. *See* § 10-7E-10.[5]

[5] Of those states authorizing statewide collective bargaining under the supervision of a State Board, six, including New Mexico, also permit local boards (California, Florida, Kansas, New Mexico, New York and Oregon). Only Florida and Kansas allow for the creation of new local boards. After the 2020 amendment to the PEBA, New Mexico joined California, New York and Oregon in allowing the continuation of certain existing local boards but not the creation of new ones. Other variations of statewide public bargaining also exist. For example, the Illinois statute establishing different panels: the State Panel, the Local Panel, and the Educational Labor Relations Board for collective bargaining issues in the state's school districts; Michigan's Employment Relations Commission is part of their Civil Service Commission which reviews and issues final decisions recommended by the ERC; the Maryland statutes establish a Public School Labor Relations Board distinct from the State Labor Relations Board; Maine, Nebraska, Washington and Wisconsin have one board, but different laws governing different types of state and local employees; Nevada does not permit statewide collective bargaining, but the State has established a Local Government Employee-Management Relations Board to supervise collective bargaining for those local entities that have opted to engage in collective bargaining; in Arizona, Georgia, Kentucky, Maryland and Utah, local boards have been established by local public employers in the absence of a statewide scheme covering their employees.

- A public employer withholding the names, job titles, work locations, home addresses, personal email addresses and home or cellular telephone numbers of any public employee in a proposed bargaining unit violates the right of public employees under § 10-7E-5 to form, join or assist a union for purposes of collective bargaining. *See American Federation of Teachers and International Association of Machinists and Aerospace Workers v. University of New Mexico Sandoval Regional Medical Center,* PELRB No. 112-22; 29-PELRB-2022 (11-28-22). *See also SSEA, Local #3878 v. Socorro Consolidated School District,* 05-PELRB-2007. objection. *See* § 10-7E-24(B), 11.21.2.36 NMAC and *NEA-Alamogordo, supra.*

- A labor organization that was recognized by a public employer as the exclusive representative of an appropriate bargaining unit on June 30, 2020, shall continue be recognized as the exclusive representative of the unit. Such recognition shall not be affected by a local labor board ceasing to exist pursuant to NMSA 1978, Section 10-7E-10 (2020). Such labor organization may petition for declaration of bargaining status under NMSA 1978, Section 10-7E-24(B) (2003).

- Adjudicatory hearings before the PELRB or a local board must meet all minimal due process requirements of the state and federal constitutions, *See* § 10-7E-12(B).

- Both the PELRB and any local board has the power to enforce the Public Employee Bargaining Act through the imposition of appropriate administrative remedies, which may include actual damages related to dues, back pay including benefits, reinstatement with the same seniority status that the employee would have had but for the violation, declaratory or injunctive relief or provisional remedies, including temporary restraining orders or preliminary injunctions. No punitive damages or attorney fees may be awarded. *See* § 10-7E-9.

- Local board rules shall conform to the rules adopted by the Board and shall not be effective until approved by an order of the Board. On good cause shown, the Board may approve rules proposed by a local board, which rules vary from rules of the Board. All rules promulgated by a local board shall comply with state law. A rule promulgated by the Board, or a local board shall not require, directly or indirectly, as a condition of continuous employment, a public employee covered by the Public Employee Bargaining Act to pay money to a labor organization that is certified as an exclusive representative. *See* § 10-7E-9.

- Any party may obtain Board review of final hearing examiner determinations, except those concerning the sufficiency of a showing of interest, and whether or not to defer to grievance-arbitration. *See* Representation - 11.21.2 NMAC, challenged ballots - 11.21.2.30 NMAC, amended certifications - 11.21.2.35 NMAC, incumbent certifications - 11.21.2.36 NMAC, unit clarifications, including accretions - 11.21.2.37(D) and 11.21.38(A), dismissals of prohibited practice complaints without a hearing on the merits - 11.21.3.13 NMAC, recommendations on merits - 11.21.3.19 NMAC, showing of interest - 11.21.2.13(A) NMAC, and deferral - 11.21.3.22(E) NMAC.

- Any public employee acting individually may present a grievance without the intervention of an exclusive representative. At a hearing on a grievance brought by a public employee individually, the exclusive representative shall be afforded the opportunity to be present and make its views known. *See* § 10-7E-15.

- A public employer is required to provide an exclusive representative of an appropriate bargaining unit reasonable access to employees within the bargaining unit, including the right to meet with new employees, without loss of employee compensation or leave benefits, within thirty days from the date of hire for a period of at least 30 minutes but not more than 120 minutes, during new employee orientation. If the public employer does not conduct new employee orientations such meetings may take place at individual or group meetings.

- Concerning employees who are not new employees, reasonable access includes the exclusive representative's right to meet with employees during the employees' regular work hours at the employees' regular work location to investigate and discuss grievances, workplace-related complaints and other matters relating to employment relations; and the right to conduct meetings at the employees' regular work location before or after the employees' regular work hours, during meal periods and during any other break periods. *See* § 10-7E-15.

- A public employer shall permit an exclusive representative to use the public employer's facilities or property for purposes of conducting meetings with the represented employees in the bargaining unit at a time and place set by the exclusive representative as provided the meetings do not interfere with the public employer's operations. *See* § 10-7E-15.

- Within ten days from the date of hire and every 120 days for employees in the bargaining unit who are not newly hired employees, a public employer is also required to permit an exclusive representative access to the employer's records containing bargaining unit the employees' names and dates of hire, cellular, home and work telephone numbers, work and personal electronic mail addresses, home addresses or personal mailing addresses and employment information, including job titles, salaries and work site locations. *See* § 10-7E-15(F) and (G).

- An exclusive representative shall have the right to use the electronic mail systems or other similar communication systems of a public employer to communicate with the employees in the bargaining unit regarding collective bargaining, including the administration of collective bargaining agreements, the investigation of grievances or other disputes relating to employment relations and matters involving the governance or business of the labor organization. *See* § 10-7E-15(H).

- Any person or party, including a union, affected by a final rule, order or decision of the PELRB or a local board may appeal to a district court, *See* § 10-7E-23.

III. PELRB Duties

The Public Employee Labor Relations Board has certain statutory duties regarding representation questions, including the designation of appropriate bargaining units (§ 10-7E-13); monitoring local boards' compliance with the Public Employee Bargaining Act; the selection, certification and decertification of exclusive representatives; investigation and adjudication of charges of prohibited labor practices; and rulemaking to effectuate the Act. (§ 10-7E-9).
Those duties are outlined as follows:

A. Representation Cases

Generally speaking, representation cases include any proceeding calling for the designation of appropriate bargaining units or for the selection, certification or decertification of exclusive representatives. For example, the Board's rules providing for petitioning the Board for amendment of certification to reflect changes such as a change in the name of the exclusive representative or of the employer, or a change in the affiliation of the labor organization, is included under the general rubric "Representation Case." (11.21.2.35 NMAC). The Board has also established procedures to clarify the composition of an existing bargaining unit (11.21.2.37 NMAC) and for the accretion of unit employees who do not belong to an existing bargaining unit but who share a community of interest with the employees in the existing unit. (11.21.2.38 NMAC). All of the foregoing are referred to as representation cases. The most common representation case is a petition for certification of an exclusive representative discussed more fully in the subsection below.

1. Petitions for Certification of Exclusive Representatives

Under the PEBA, employees may organize in units represented by labor organizations of their own choosing for the purpose of bargaining collectively with their employers concerning wages, hours and other terms and conditions of employment, and may engage in other concerted activities for mutual aid or benefit. NMSA 1978, § 10-7E-5 (2020). One of the Public Employee Labor Relations Board's major functions is to determine the appropriateness of these collective bargaining units based on guidelines established in the PEBA and relevant case law. *See* § 10-7E-13. The Board also determines whether the employees in an appropriate bargaining unit wish to be represented by a particular labor organization. This is principally done through secret ballot elections supervised by the Board. *See* § 10-7E-14. Certification of Exclusive Representatives begins with an employee representative filing a petition with the Board supported by at least 30 percent of the employees in the prospective unit. *Id.*

Units may be certified without conducting elections if an employer does not question either the appropriateness of the unit or the majority status of a petitioning labor organization and agrees with the petition to certify the proposed unit. *See* NMSA 1978, Section 10-7E-14(C) (2020).

Once certified, a labor organization is the exclusive bargaining agent for the employees in the bargaining unit. As exclusive representative, the union owes a duty to represent the interests of employees fairly and adequately in the bargaining unit members, whether they are members of the organizing union or not. A claim by a public employee that the exclusive representative has violated this duty of fair representation is barred if not brought within six months of the date on which the public employee

knew, or reasonably should have known, of the violation. *See* the PEBA § 10-7E-15(A) and Section V (B)(1)(a) herein, regarding "The Rights of Employees". A template for preparation of an Initial Petition for Certification may be found on the Board's website as Form #3.

2. Decertification Petitions

Just as employees may petition the Board for recognition of a collective bargaining representative, they may also seek decertification of a previously recognized representative. A member of a labor organization or the labor organization itself may initiate decertification of a labor organization as the exclusive representative if 30 percent of the public employees in the bargaining unit support a petition for a decertification election. *See* the PEBA § 10-7E-16. Decertification elections are held in a manner substantially the same as that for certification but when no collective bargaining agreement is in effect, the Board or local board shall not accept a request for decertification or for an election sought by a competing labor organization earlier than twelve months subsequent to a labor organization's certification as the exclusive representative. A template for preparation of a Decertification Petition may be found on the Board's website as Form #8.

3. Amendment of Certification

PELRB's rule 11.21.2.35 NMAC provides for petitioning the Board to amend a prior certification of Representation to reflect such changes as a change in the name of the exclusive representative or of the employer, or a change in the affiliation of the labor organization. Similarly, the Board has also established procedures to clarify the composition of an existing bargaining unit (11.21.2.37 NMAC) and for the accretion of unit employees who do not belong to an existing bargaining unit but who share a community of interest with the employees in the existing unit. (11.21.2.38 NMAC).

A Petition for Unit Clarification brought pursuant to NMAC 11.21.2.37 requires that a sufficient change in circumstances surrounding the creation of an existing collective bargaining unit be plead and proved. Either the exclusive representative or the employer may file a petition for Clarification of a bargaining unit. For example, throughout 2022 and 2023, the State of New Mexico together with the Unions representing employees in those agencies, jointly petitioned the Board to clarify the composition of all the state employee bargaining units originally certified in 2004. Cf. *CWA & NM Comm. for the Blind;* PELRB 311-22; *State Personnel Office/Early Childhood Education and Care Department & CWA Local 7606;* PELRB 316-22; *State Personnel Office/Public Education Dep't. & CWA, Local 7076*; PELRB 321-22.

Although parties may file either prohibited practice complaints or petitions for clarification to resolve disputes about whether certain positions are included in a unit or not, unit clarification was found not to be appropriate unless the classification has undergone recent, substantial changes. *See AFSCME, Council 18 v. NMHSD and NM PELRB*, D-202-CV-2016-07671, (In re: PELRB 309-15), 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, citing *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.

B. Prohibited Labor Practice Cases

The Public Employee Bargaining Act expressly prohibits certain acts or omissions in NMSA, §§ 10-7E-19 and 20 (2020). The following are delineated as prohibited acts by employers:

- Discrimination against a public employee with regard to terms and conditions of employment because of the employee's membership in a labor organization.
- Interference with, restraint or coercion of, a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act.
- Using public funds to influence the decision of its employees or the employees of its subcontractors regarding whether to support or oppose a labor organization that represents or seeks to represent those employees, or whether to become a member of any labor organization.
- Domination or interference in the formation, existence or administration of a labor organization.
- Discrimination in regard to hiring, tenure or a term or condition of employment in order to encourage or discourage membership in a labor organization.
- Discharge or Discrimination against a public employee because the employee has signed or filed an affidavit, petition, grievance or complaint or given information or testimony pursuant to the provisions of the Public Employee Bargaining Act or because a public employee is forming, joining or choosing to be represented by a labor organization.
- Refusal to bargain collectively in good faith with the exclusive representative.
- Refuse or failure to comply with a provision of the Public Employee Bargaining Act or board rule.
- Refusal or failure to comply with a collective bargaining agreement.

A Union or employees are expressly prohibited from:

- Discriminating against a public employee with regard to labor organization membership because of race, color, religion, creed, age, sex or national origin.
- Interfering with, restraining or coercing any public employee in the exercise of a right

guaranteed pursuant to the provisions of the Public Employee Bargaining Act.

- Refusing to bargain collectively in good faith with a public employer.

- Refuse or failing to comply with a collective bargaining or other agreement with the public employer. Refusing or failing to comply with a provision of the Public Employee Bargaining Act.

- Picketing homes or private businesses of elected officials or public employees.

The Board has the power to enforce the provisions of the Public Employee Bargaining Act through the imposition of appropriate administrative remedies. The phrase "appropriate administrative remedies" under the Act includes actual damages related to dues, back pay including benefits, reinstatement with the same seniority status that the employee would have had but for the violation, declaratory or injunctive relief or provisional remedies, including temporary restraining orders or preliminary injunctions. No punitive damages or attorney fees may be awarded by the Board or local board. *See* NMSA 1978, § 10-7E-9 (2020).

After initial screening and investigation of a PPC but before conducting a hearing on the merits of any claim the Board's Director will facilitate settlement discussions in order to further the Board's preference for peaceful resolution of disputes thereby promoting its statutory objective of "promoting harmonious and cooperative relationships between public employers and public employees."

If the complaint cannot be settled by the parties prior to the hearing, the matter shall proceed to hearing. The hearing examiner has the discretion to examine witnesses, call witnesses, or call for the introduction of documents (11.21.3.16 NMAC) after which the hearing examiner issues his or her report and recommended decision.

A party may obtain Board review of the report and recommended decision by filing a notice of appeal within 10 days following service of the hearing officer's report, whereupon the Board will either determine an appeal on the papers filed or, in its discretion, may also hear oral argument. The Board's Decision may adopt, modify, or reverse the hearing examiner's recommendations or take other action it may deem appropriate such as remanding the matter to the hearing examiner for further findings or conclusions. Even when no appeal to the Board is taken the hearing examiner's decision is transmitted to the Board which may *pro forma* adopt the hearing examiner's report and recommended decision as its own. In that event, the report and decision so adopted shall be final and binding upon the parties but shall not constitute binding board precedent. (11.21.3.19 NMAC). The Board's power to remedy PPCs through the imposition of appropriate administrative remedies including reinstatement of employees with or without back pay, and pre-adjudication injunctive relief. The Board has authority to petition the courts for enforcement of such orders. *See* NMSA 1978, § 10-7E-23 (2003).

C. Impasse Resolution Cases

The Board has limited powers related to bargaining impasses between employers and employees under the Act, acting primarily as a monitor and facilitator of mediation and arbitration performed by other entities. Typically, mediation and arbitration of bargaining impasse is done under the auspices of the

Federal Mediation and Conciliation Service although the parties may agree to another mediator and parties other than the state may agree to another arbitration procedure within a specific time frame:

A request to the state for the commencement of initial negotiations shall be filed in writing by the exclusive representative no later than June 1 of the year in which negotiations are to take place. Negotiations shall begin no later than July 1 of that year. In subsequent years, negotiations agreed to by the parties shall begin no later than August 1 following the submission of written notice to the state by the exclusive representative no later than July 1 of the year in which negotiations are to take place. *See* Section II *supra* re: Basic Rights under the PEBA and NMSA 1978, § 10-7E-18 (2020).

"Impasse" is defined by the PEBA as the "failure of a public employer and an exclusive representative, after good faith bargaining, to reach agreement in the course of negotiating a collective bargaining agreement. *See* NMSA 1978, § 10-7E-4(J) (2020). This relatively straightforward definition becomes more complicated in practice when questions of management rights clauses or issues surrounding waiver of the right to bargain are raised. *See infra* re: Prohibited Practices.

If an impasse occurs, either party may request mediation services from the PELRB or local board. The PELRB typically refers parties to the Federal Mediation and Conciliation Service, and it is common that Collective Bargaining Agreements call for the parties to directly request a panel of arbitrators from the FMCS. In either case, the PEBA requires that a mediator from the FMCS shall be assigned by the Board or local board to assist in negotiations unless the parties agree to another mediator. An existing contract continues in full force and effect until it is replaced by a subsequent written agreement. However, the public employer is not required to increase employees' levels, steps or grades of compensation contained in the existing contract.

The mediator shall provide services to the parties until the parties reach agreement or the mediator believes that mediation services are no longer helpful or until 30 days after the mediator was requested, whichever occurs first.

If the impasse continues beyond the 30 days after the mediator was requested, either party may request a list of seven arbitrators from the FMCS. The parties alternately strike names from the list of arbitrators until one remains who shall hear the case. Who strikes first is determined by coin toss. The arbitrator is required to render a final, binding, written decision no later than 30 days. The arbitrator's decision shall be limited to a selection of one of the two parties' complete, last, best offer. The costs of an arbitrator and the arbitrator's related costs conducted pursuant to this subsection shall be shared equally by the parties. Each party shall be responsible for bearing the cost of presenting its case. The decision shall be subject to judicial review pursuant to the standard set forth in the Uniform Arbitration Act.

In the case of City of Las Cruces v. United Steel Local 9424, the City of Las Cruces, New Mexico, and the United Steelworkers Local 9424 (the union) were negotiating a contract set to expire in July 2023. While they had agreed on most terms for a successor CBA, they disagreed on Article 24, which pertained to pay increases. After declaring an impasse, the parties engaged in mediation sessions but failed to reach an agreement. An FMCS arbitrator issued an award, considering the parties' "Las Best Offers" (LBOs). The arbitrator noted that the PEBA required choosing one of the LBOs but lacked

specific standards for doing so. The award also considered the availability of funds for any expenditure by the public employer. The union's LBO focused on wage increases and employee contributions, while the City's LBO included classification and compensation adjustments and proposed wage increases contingent on future appropriations.

A public employer other than the state may enter into a written agreement with the exclusive representative setting forth an alternative impasse resolution procedure. *See* NMSA 1978, § 10-7E-18(C) (2020).

Any arbitration award is subject to the appropriation and availability of funds, leaving to governmental entities the ability to manage and appropriate their public funds. *See* NMSA 1978, § 10-7E-17(H) (2020); *Int'l. Assoc. of Firefighters, Local 1687 v. City of Carlsbad*, 2009-NMCA-97, 147 N.M. 6, 216 P.3d 256. *See also*, *State v. AFSCME*, 2012-NMCA-114, 291 P.3d 600. The New Mexico Court of Appeals held that arbitrators did not exceed their powers in two related cases after they mandated monetary relief that would require the Legislature to appropriate funds to pay wages increases previously bargained. The Court reasoned that the Legislature already appropriated sufficient funds in the current fiscal year for the State to meet its contractual obligations but failed to meet its 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. S*tate of New Mexico v. AFSCME Council 18 and CWA,* 2012-NMCA-114, 291 P.3d 600.

In *Albuquerque Police Officers' Association et al. v. City of Albuquerque et al.* 2013-NMCA-110, 314 P.3d 667; the New Mexico Court of Appeals found that at the time it adopted its CBA with the police union, the City of Albuquerque had appropriated funds for negotiated annual salary increases. After the City, for economic reasons, declined to implement the scheduled salary increase in the third year of the three-year contract, the Court held that those economic factors did not relieve the City of its obligations under the CBA or their duty to re-open negotiations should budget shortfalls require reforming the contract.

In *AFSCME, Council 18 v. State of New Mexico, New Mexico State Personnel Board, and Sandra K. Perez, Director of the State of New Mexico Personnel Board,* 314 P.3d 674 (Ct. App. 2013) 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.

D. Approval of Local Boards

After June 30, 2020, no new local labor boards may be created as was previously permitted under PEBA II. However, local boards existing as of July 1, 2021, may continue operating if prior to December 31, 2021, they have submitted to the PELRB an affirmation that the public employer has elected to continue operating under the local board and each labor organization representing its employees has submitted written notice to the PELRB that it also elects to continue to operate under the local board. A local board that fails to timely submit the affirmation shall cease to exist. Once created by ordinance, resolution or charter, and once approved by the PELRB, a local board assumes the duties and responsibilities of the PELRB and shall follow all procedures and provisions of the Public Employee Bargaining Act unless otherwise approved by the Board. *See* § 10-7E-10.

Local board rules shall conform to the rules adopted by the Board and shall not be effective until approved by an order of the Board. On good cause shown, the Board may approve rules proposed by a local board, which rules vary from rules of the Board. All rules promulgated by a local board shall comply with state law. A rule promulgated by the Board, or a local board shall not require, directly or indirectly, as a condition of continuous employment, a public employee covered by the Public Employee Bargaining Act to pay money to a labor organization that is certified as an exclusive representative. *See* § 10-7E-9.

The PELRB has enacted rules governing public employers' seeking to maintain an operating local board. A public employer other than the state that intends to maintain a local labor relations board after January 1, 2021, is required to file an application for approval to do so with the PELRB within the time limits specified in NMSA 1978, § 10-7E-10 (2020):

- No later than December 31, 2020, each local board shall submit to the Board copies of a revised local ordinance, resolution or charter amendment authorizing continuation of the local board. A local board that fails to meet the submission deadline set forth in this subsection shall cease to exist on January 1, 2021.

- No later than February 15, 2021, the Board shall determine whether the local ordinance, resolution or charter amendment authorizing continuation of a local board provides the same or greater rights to public employees and labor organizations as the Public Employee Bargaining Act, allows for the determination of, and remedies for, an action that would constitute a prohibited practice under the Public Employee Bargaining Act and contains impasse resolution procedures equivalent to those set forth in NMSA 1978, § 10-7E-18 (2020).

- If the Board determines that a local ordinance, resolution or charter amendment authorizing continuation of a local board does not satisfy the requirements of this subsection, defects may be cured by June 30, 2021, or the local board will cease to exist. The Board shall certify by written order whether the requirements of this subsection have been met.

- No later than April 30, 2021, each local board shall submit to the Board copies of its rules. A local board that fails to meet the submission deadline set forth in this subsection shall cease to exist on July 1, 2021.

- No later than May 30, 2021, the Board shall determine whether the rules of a local board conform to the rules of the Board, or for good cause shown, any variances meet the requirements of the Public Employee Bargaining Act.

- If the Board determines that the rules of a local board do not meet the requirements of this subsection, the local board may cure any defects by June 30, 2021, or it will cease to exist. The Board shall certify by written order whether the requirements of this subsection have been met by a local board.

- A local board existing as of July 1, 2021, shall continue to exist after December 31, 2021, only if it has submitted to the Board an affirmation that 1) the public employer subject to the local board has affirmatively elected to continue to operate under the local board and; 2) each labor organization representing employees of the public employer subject to the local board has submitted a written notice to the Board that it affirmatively elects to continue to operate under the local board.

- Once approved, the local board is required to re-affirm its intent as required by § 10-7E-10 and submit that re-affirmation to the PELRB between November 1, and December 31 of each odd numbered year. A local board that fails to timely submit the affirmation required by this subsection shall cease to exist as of January 1 of the next even-numbered year.

As of May 1, 2024, the following public employers continue to operate under their own local boards

- City of Albuquerque
- Albuquerque Public Schools
- City of Deming
- City of Hobbs
- Town of Silver City
- Zuni Public Schools

Contact information for these local boards can be found on the Local Boards page_of the PELRB website.

All local board resolutions, ordinances or charter amendments shall follow the Board approved templates provided on the Board's website provided, however, that the public employer may propose variances to the templates where appropriate, pursuant to 11.21.5.10 NMAC.

Upon receipt of an application for approval seeking variance from the Board approved templates, the Director shall review the application for conformance with NMSA 1978, Sections 10-7E-9 and 10-7E-10 (2020) and submit a recommendation to the PELRB for approval. If in the Director's discretion it

is desirable to hold a hearing or confer with the local public employer and any identified interested labor organizations before making a recommendation to the Board a status and scheduling conference may be held. *See* PELRB Form 18.

11.21.5.9 NMAC.

In certain instances, variances from the Board approved templates may be required by the unique facts and circumstances of the relevant local public employer. In such instances, the application for approval shall additionally specify the particular facts and circumstances requiring such variance and inform the Board of any incumbent exclusive representative under Subsection B of § 10-7E-24 of the Act NMSA 1978, and 11.21.2.36 NMAC and any other labor organizations believed by the public employer to be involved in attempting to organize any local public employees.

In the event that the Board determines that such variance is warranted, and the resolution, ordinance or charter amendment otherwise conforms to the requirements of the Act and the Board's rules, the director will process the application accordingly.

11.21.5.10 NMAC.

Each local board applying pursuant to 11.21.5.8 NMAC, shall submit a verified copy of the procedural rules enacted by the applying local board necessary to accomplish its functions and duties under the Act no later than April 30, 2021. Any proposed changes to the procedural rules of a local board must be approved by the PELRB prior to being enacted by the local board.

11.21.5.11 NMAC.

After PELRB approval of a local board, any amendments to the ordinance, resolution, or charter amendment creating the local board, and any amendments to procedural rules, shall be filed with the PELRB. Upon a finding by the Board that the local board no longer meets the requirements of Section 10 of the Act, the local board shall be so notified and be given a period of 30 days to come into compliance or prior approval shall be revoked and all matters pending before the local board shall be removed to the PELRB. 11.21.5.13 and 11.21.5.14 NMAC.

E. Rulemaking

The PELRB is empowered by NMSA 1978, § 10-7E-9(A) (2020) to promulgate rules necessary to accomplish and perform its functions and duties as established in the Public Employee Bargaining Act, including the establishment of procedures for the designation of appropriate bargaining units, the selection, certification and decertification of exclusive representatives and for the filing of, hearing on and determination of complaints of prohibited practices. The Board has enacted such rules and over time the need to amend those rules may arise either to correct apparent errors or simply to adjust procedures to better serve the Board's mission or to comport with changes in the substantive law.

F. Pre-filing Assistance

The PELRB's agents provide pre-filing assistance to the public and are available daily in the Board's Albuquerque office to answer inquiries and to assist members of the public who visit, telephone, or submit written inquiries regarding the filing of representation case petitions. Board agents will answer public inquiries regarding the Act and the Agency as accurately, completely, and as concisely as possible but they may not give legal advice and should explain that advice cannot be given particularly during an organizational campaign or a labor dispute. Thus, the Board's agents will not offer an opinion as to whether any specific conduct violates the Act but may describe the types of conduct which, depending on all the surrounding circumstances, may constitute a violation of the Act and refer inquiries to applicable provisions of the PEBA or the Board's rules. Furthermore, statements of the agent cannot be considered as an official pronouncement of law binding on the Agency. In circumstances where an individual is essentially seeking legal advice, the Board agent may suggest that the individual seek private counsel. Although under no circumstances should a specific attorney be recommended, the Board agent may direct an individual to the State Bar Association referral service. For additional information concerning the Act and the Board, including petition forms, interested parties are referred to the Board's website. Under the "Forms" tab.

IV. Specific Types of Representation Petitions

Certification Petitions are designated as "300 series" cases according to the Board's case tracking system and assigned a case number accordingly. Upon receipt a Petition will be date stamped, assigned a case number in chronological order, and logged into a case database providing basic information from the petition. Refer to 11.21.1.10 NMAC for details concerning what constitutes filing with the PELRB and 11.21.2.9 NMAC for the Board's requirements concerning service of a copy of the petition on all parties. If the case is accepted after review by the Director, the parties have 30 days in which to post notice that the petition was filed. *See* 11.21.2.15 NMAC.

The following types of representation petitions are provided for under the PEBA or PELRB rules:

- Basic representation petition, *e.g.*, the initial petition for recognition and certification as exclusive bargaining agent
- Petition for certification as incumbent
- Clarification petition
- Accretion petition
- Severance petition
- Decertification petition
- Petition for amendment of certification

A. Basic Petition for Recognition – General

The basic petition for recognition is filed by a union desiring to be designated as the exclusive bargaining agent of the described bargaining unit and must include a "showing of interest" from at least 30% of

the employees in the petitioned for bargaining unit. *See* the PEBA §§ 107E-13 and 14; *See also* 11.21.2.8 through 11.21.2.35 NMAC.

After receipt of a Petition, the Director performs a preliminary review for facial adequacy based on the following:

- Was the Petition filed on a form prescribed by the Director? (*See* PELRB Form 3 -Petition for Initial Certification).

- Does the form include, at a minimum, the following information?
    - The petitioner's name, address, phone number, state or national affiliation, if any, and representative, if any
    - The name, address and phone number of the public employer or public employers whose employees are affected by the petition
    - A description of the proposed appropriate bargaining unit and any existing recognized or certified bargaining unit
    - The geographic work locations, occupational groups, and estimated numbers of employees in the proposed unit and any existing bargaining unit
    - A statement of whether or not there is a collective bargaining agreement in effect covering any of the employees in the proposed or any existing bargaining unit and, if so, the name, address and phone number of the labor organization that is party to such agreement
    - A statement of what action the petition is requesting

    See 11.21.2.8 NMAC.

- A petition shall contain a signed declaration by the person filing the petition that its contents are true and correct to the best of his or her knowledge. *See* 11.21.2.8 NMAC.

- Did the petitioner file with a copy of any collective bargaining agreement in effect or recently expired, covering any of the employees in the petitioned-for unit? *See* 11.21.2.10 NMAC.

- Is the petition supported by a thirty percent showing of interest in the existing or proposed bargaining unit? *See* 11.21.2.8 NMAC. The showing of interest must state that each employee signing wishes to be represented for the purposes of collective bargaining by the petitioning labor organization. Each signature shall be separately dated. If the petitioner or an intervenor has submitted an insufficient showing of interest, they have the opportunity to submit an additional showing of interest within five days. The director then reviews the additional showing of interest to determine whether the total showing of interest submitted by the party is sufficient to sustain its petition or intervention. If the party does not provide an additional showing of interest in the reasonable amount of time given by the Director, the Director may then dismiss the petition. *See* 11.21.2.23 NMAC.

- Pursuant to the New Mexico Uniform Electronic Signatures Act (UETA), NMSA 1978, §§ 14-16-1 to 14-16-21 (2001, amended 2013), electronic signatures may be used to support a showing of interest. If electronic signatures are used as support, the petition must include the following to ensure the authenticity of the signatures.

    - Each electronic interest card must have the following required information:
        - the signer's name
        - the signer's email address or other known contact information (e.g., social media account)
        - the signer's telephone number
        - the language to which the signer has agreed (e.g., that the signer wishes to be represented by ABC Union for purposes of collective bargaining or no longer wishes to be represented by ABC Union for purposes of collective bargaining)
        - the date the electronic signature was submitted and
        - the name of the employer
    - A Declaration explaining how the procedures for collecting the electronic interest cards ensure:
        - that the electronic or digital signature is that of the signatory employee and
        - that the employee herself signed the document and
        - that the electronically transmitted information regarding what and when the employees signed is the same information seen and signed by the employees

- As is now the case with handwritten signatures, an electronic signature submitted in support of a showing of interest that meets the requirements set forth above is presumed to be valid absent sufficient probative evidence warranting an investigation of possible fraud. Mere speculation or assertions of fraud are not sufficient to cause the Agency to investigate.

- By regulation, a union's showing of interest is confidential and always remains the property of the union. "Evidence of a showing of interest submitted to the director in support of a representation petition shall remain the property of the party submitting such evidence; shall not become property of the director or the Board, shall be kept confidential by the director and the Board; and shall be returned to the party that submitted the same upon the close of the case." *See* 11.21.1.21 NMAC. The confidentiality of a union's showing of interest under this regulation has been upheld, even against demands for production made pursuant to the Inspection of Public Records Act (IPRA), NMSA 1978, §§ 142-1 *et seq*. *See City of Las Cruces v. PELRB*, 1996-NMSC-24, 121 N.M. 688 and *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't* 2012-NMSC-26, 283 P.3d 853.

1. Intervenors

As noted above, after receipt of a petition, the employer must post a notice of the filing of the petition. *See* 11.21.2.15 NMAC. This notice alerts other unions engaged in organizing the same employees to file a petition to intervene and how to do so. *Id.* An intervenor has 10 days from the posting of the notice of filing of petition to file its own petition in intervention and its petition must also be accompanied by a 30% showing of interest. *See* § 10-7E-14(B) and 11.21.2.16(A) and (B) NMAC. If the intervenor provides a sufficient showing of interest it will also appear on the ballot once an election is held. *See* § 10-7E-14(B) and 11.21.2.16(C) NMAC.

An intervenor's showing of interest must be among the appropriate bargaining unit as designated in the original petition rather than an alternate appropriate bargaining unit as is allowed under the NLRA. *See* NLRB Case Handling Manual ¶ 11023.2 (an intervenor may petition for a substantially different bargaining unit, and its thirty percent showing of interest will be of their petitioned for unit, not the original unit). Compare *AFSCME and County of Santa Fe Detention Center*, PELRB No. 316-06 and *CWA and County of Santa Fe Detention Center,* PELRB No. 308-16 regarding the requirement that an intervenor's petition must be supported by an adequate showing of interest among the employees of the bargaining unit identified in the original petition.

2. Appropriate Bargaining Unit

Under § 10-7E-13(A), 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. *See*, *San Juan College v. San Juan College Labor Management Relations Board*, 2011-NMCA-117, 267 P.3d 101. To be deemed "appropriate," proposed bargaining units" must meet the following statutory criteria:

- a proper "community of interest" or "occupational group"
- principles of efficient administration of government
- the history of collective bargaining
- the assurance to public employees of the fullest freedom in exercising rights guaranteed by the Public Employee Bargaining Act

Occupational groups generally are identified as blue-collar, secretarial clerical, technical, professional, paraprofessional, police, fire and corrections are only advisory, not mandatory. *See NEA-Belen, Belen Federation of School Employees and Belen Consolidated Schools*, 1 PELRB 2 (May 13, 1994), and adopted and attached ALJ Report. Accordingly, when determining whether a proposed unit is appropriate, the Board does not limit its inquiry to whether the jobs in a particular unit fall within one of the identifiable occupational groups but also examines whether clear and identifiable communities of interest in employment terms and conditions and related personnel matters exist.

"Community of interest" factors include similarities or differences in:

- the method of wage or compensation
- the hours of work
- employment benefits
- separate supervision
- job qualifications
- job functions and amount of time spent away from employment situs,
- regularity of contact with other employees
- level or lack of integration
- the history of collective bargaining

See NEA-Belen, 1 PELRB No. 2, citing *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962); *Santa Fe Community College-AAUP and Santa Fe Community College*, 4-PELRB-2017 (PELRB No. 311-16).

Section 13 also refers to the efficient administration of government, collective bargaining history and assurance of the fullest freedom in exercising rights guaranteed by the Public Employee Bargaining Act as "essential" factors to be considered.

Supervisory, confidential or management employees, as those terms are defined in § 10-7E-4 of the Act, are excluded from collective so that their inclusion in a bargaining unit would render it "inappropriate". *See* § 10-7E-13(C). The Board has construed the definition of "supervisor" under the Act several times[6] but has also examined the criteria for excluding management employees.

For example, after 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 College objected to Department Chairs and Program Directors being in the unit because they shared no community of interest with faculty and were either supervisors, or management employees as defined by Section 4 of the Act. The hearing examiner determined that some of the Chairs and Directors showed indicia of being management employees and excluded them from the bargaining unit. The Board certified the bargaining unit for non-chair and non-director faculty but remanded back to the Hearing Officer the question of which specific Chairs and Directors fell within the PEBA's definitions of management and supervisory employees and why. Pending 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 scheduling was pending, the parties reached an agreement whereby

[6] For example, *See 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*; City of Deming v. Deming Firefighters Local 4251*, 2007-NMCA-069, 141 N.M. 686, 160 P.3d 595. 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). *AFSCME v. N.M. Corrections Dep't.* 08-PELRB-2012 (July 13, 2012); *In re New Mexico Coalition of Public Safety Officers Ass'n and County of Santa Fe*, 78-PELRB-2012 (Dec. 5, 2012); *AFSCME v. N.M. Corrections Dep't.* 02-PELRB-2013 (Jan. 23, 2013).

Academic Directors are not members of the bargaining unit but are classified as "staff employees;" not represented by AAUP. Faculty Chairs are 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 entered by the Director.[7]

The 2020 Amendment to the Act modified the definition of "management" employee so that an employee shall not be deemed a management employee solely because the employee participates in cooperative decision-making programs or whose fiscal responsibilities are routine, incidental or clerical.

Under the principle of "efficient administration of government" the unit should not promote unnecessary and needless proliferation of bargaining units or fragmentation of the work force. *See* § 10-7E-13(A) and *NEA-Belen*, *supra* (adopting a general anti-fragmentation policy). Toward that end, the unit need only be "an appropriate bargaining unit," not necessarily the "most" appropriate bargaining unit. *See NEA-Belen*, *supra*; *See also American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 610 (1991). Additionally, only the petitioned-for bargaining unit will be considered and certified, unless it is truly inappropriate, and an appropriate unit is identified by the PELRB from within the petitioned-for grouping. *See NEA-Belen*, *supra*; *See also, American Hosp. Ass'n*, *supra* at 610 ("the initiative in selecting an appropriate unit resides with the employees") and *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008) (in challenging a petitioned-for unit "the employer must do more than show there is another appropriate unit," and instead must show that unit is "truly inappropriate") (citations omitted). However, under NLRB decisions, a bargaining unit consensually agreed to by the parties will generally be accepted as lawful unless wholly inappropriate. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 11(I) and (II). *See also*, *San Juan Coll. v. San Juan Coll. Labor Mgmt. Relations Bd.*, 192 L.R.R.M. (BNA) 2119, 267 P.3d 101, 275 Ed. Law Rep. 409, 2011 - NMCA - 117 (Ct. App., 2011) (The Board is entitled to determine an appropriate bargaining unit without being hamstrung by having to declare "the most appropriate [bargaining] unit." *Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1084 (D.C. Cir. 2003) (emphasis omitted) (internal quotation marks and citation omitted); *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008).

The difference between *an* appropriate unit and *the most* appropriate unit rests in the fact that sharing a community of interest does no more than establish a unit that is prima facie appropriate, and "more than one appropriate collective bargaining unit logically can be defined in any particular factual setting." *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000). That a unit with "different contours" might exist is immaterial. *Id.* There is no absolute rule of law as to what constitutes an appropriate bargaining unit. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, at 491, (1947). Because it is the Board's task is to choose among bargaining units that are perhaps equally appropriate and because it does not substitute its own judgment it is limited to striking down only those determinations that are "truly inappropriate." *Country Ford Trucks, supra* at 1189. *San Juan Coll. v. San Juan Coll. Labor Mgmt.*

[7] Other PELRB cases construing the definitions of "confidential" and "management" employees include *American Federation of Teachers Local 4212 and Gadsden Independent School District*, 03-PELRB-2006 (May 31, 2006); *NEA & Jemez Valley Public Schools,* 1 PELRB No. 10 (May 19, 1995).

Relations Bd., supra.

V. The Rights of Employees

A. Section 2 Rights

The rights of public employees are set forth principally in NMSA 1978, § 10-7E-2 (2003), which provides as follows:

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

The "public employees" referred to in Section 2 to whom its coverage extends is defined elsewhere in the Act. The PEBA § 10-7E-4(Q) defines a "public employee" as:

> "'public employee' means a regular non-probationary employee of a public employer; provided that, in the public schools, 'public employee' shall also include a regular probationary employee and includes those employees whose work is funded in whole or in part by grants or other third-party sources."

Likewise, a "public employer" is defined in the PEBA § 10-7E-4(R) as:

> "... the state or a political subdivision thereof, including a municipality that has adopted a home rule charter, and does not include a government of an Indian nation, tribe or pueblo, provided that state educational institutions as provided in Article 12, Section 11 of the constitution of New Mexico shall be considered public employers other than the state for collective bargaining purposes only".

The term "public employer" has also been found to include public facilities run by private contractors if the public governing body retains authority and control over the business, policies, operations and assets of the facility. *See In re: United Steelworkers of America and Gila Regional Medical Center and Grant County Board of County Commissioners*, 1 PELRB No. 14 (Nov. 17, 1995). The PELRB has held New Mexico Charter Schools to be "public schools" pursuant to both the Charter Schools Act NMSA 1978, § 22-8B-1 (2006) *et seq*. and the Public Schools Code NMSA 1978, § 22-8B-2(A), § 22-8B-4 (2015), and § 22-8B-16 (2007), and therefore public employers subject to the PEBA. *See NEA and Alma d'Arte Charter High School*, PELRB No. 313-08; *NEA-NM and Monte del Sol Charter School*. PELRB No. 309-10.

In two cases involving the State's Universities, graduate assistants were found to be within the PEBA's definition of a public employee: *In re: United Electrical, Radio and Machine Workers of America v. University of New Mexico Board of Regents,* 66-PELRB-2021 (August 17, 2021) and *In re: United Electrical, Radio and Machine Workers of America* and University of New Mexico Board of Regents, 73-PELRB-2021 (11-9-

2021).

The Act's coverage does not extend to employees of the judicial branch. Largely without explanation, but presumably relying on the separation of powers doctrine, New Mexico's Seventh Judicial District reversed a PELRB Order applying the PEBA to judicial branch employees. *See Laura Chamas-Ortega v. 2d Judicial District Court*, 7th Judicial Dist., Case No. CV-04-7883 (March 10, 2006) (J. Kase).

Employees of the State's universities are covered. However, the New Mexico Supreme Court has concluded in another context that the constitutional independence of New Mexico's State universities is not impaired by application of the PEBA to its employees. *See The Regents of the University of New Mexico v. New Mexico Federation of Teachers and American Assoc. of University Professors,* 1998-NMSC-20, ¶ 50, 125 N.M. 401. This is because the PEBA does not require a public employer to accept any specific proposal, the employer always has 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. *Id.* at ¶¶ 57-59.

Employees of a "research park corporation" created under and in accordance with the University Research Park and Economic Development Act, NMSA 1978, §§ 21-28-1 to 25 ("URPEDA") that "owns, operates or manages a health care facility or employs individuals who work at a health care facility", shall be deemed a "public employer" for purposes of the Public Employee Bargaining Act, as defined in PEBA Section 4(R). S*ee AFT and IAMAW Local 794 v. UNM Sandoval Reg'l. Med. Center;* PELRB 108-22; 30-PELRB-2022.

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."

B. Section 5 Rights

In balancing public employees' rights to organize and bargain collectively with their employers with promoting cooperative labor-management relationships and ensuring "the orderly operation and functioning of the state and its political subdivisions." The PEBA further defines the rights of public employees and their employers. The PEBA § 10-7E-5 states that all public employees as defined in §

10-7E-4(Q), other than management employees and confidential employees as those terms are further defined by the PEBA, may form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion and shall have the right to refuse any such activities. Additionally, public employees have the right to engage in other concerted activities for mutual aid or benefit, without it being construed as modifying the prohibition on strikes set forth in § 10-7E-21. *See* §§ 10-7E-4(G), (O), (Q) and (U) regarding the common employee exemptions from coverage of the Act.

There is now a considerable body of PELRB and Court Decisions construing the statutory exemptions under a variety of facts to which interested parties may refer. Please refer to the Board's Key Word Digest and index as well as Article IV Section D of this Practice Manual, pp. 32 - 36.

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 PEBA. *See State v. Am. Fed'n. of State, Cnty., and Municipal Emps., Council 18,* Case No.: 33, 792 (N.M. 2013).

It is fundamental to effectuating public employees' rights under Sections 2 and 5 of the Act that selection of their representatives be done democratically. *Cf.* the PEBA § 10-7E-13(A) providing that an essential factor in designating an appropriate bargaining unit is "assurance to public employees of the fullest freedom in exercising the rights guaranteed by the Public Employee Bargaining Act".[8] *See* Sections X and XI below for discussion of the standard of proof for showing a violation of Section 5 rights.

[8] A "cardinal policy" of the National Labor Relations Act is to protect "...the exercise by employees of full freedom to express their desires on union representation". *See,* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW 7th Ed. at 10-59-60.

C. Exclusive Representative

Once certified, the union is the exclusive bargaining agent for all of the bargaining unit employees. The employer may not in any way interfere in the relationship between the union and bargaining unit members, such as by dealing or negotiating directly with those employees regarding wages, hours or any other term and condition. *See General Elec. Co*., 150 NLRB 192, 194 (1964), *enf'd,* 418 F.2d 736 (2d Cir. 1969), cert den., 397 US 965 (1970) (An employer must recognize that once a union is certified as exclusive representative, it is the one with whom the employer must deal in conducting bargaining negotiations and the employer can no longer bargain directly or indirectly with the employees), *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW, 7th Edition Ch. 13.II.B. *See also*, *Americare Pine Lodge Nursing,* 325 NLRB 98 (1997); *AFSCME Council 18 v. New Mexico Department of Corrections*, 04-PELRB-2007; *AFSCME Council 18 v. New Mexico Regulation and Licensing Department*, 06-PELRB-2010.

1. Duty of Fair Representation

As the exclusive representative the union owes a duty to represent the interests of bargaining unit members fairly and adequately, whether they are members of the union or not. *See* PEBA § 10-7E-15(A). This "duty of fair representation" arises out of the common law of labor and is a necessary corollary to the statutory right of a union to be recognized as the exclusive representative of employees in a given bargaining unit. As stated in the landmark case *Vaca v. Sipes,* 375 U.S. 335, 55 LLRM 1584 (1964):

> "[T]he exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct...It is obvious that [plaintiff's]...complaint alleged a breach by the Union of a duty grounded in federal statutes..."

Id. at 342.

Under New Mexico law a union member states a claim for breach of the duty of fair representation when he or she pleads that the union acted arbitrarily, in bad faith, and in violation of its trust. Mere negligence will not state a claim for breach of the duty of fair representation. *See Callahan v. N.M. Federation of Teachers-TVI,* 2006-NMSC-010, 139 N.M. 201, 131 P.3d, (Callahan I) and *Callahan v. N.M. Federation of Teachers-TVI*, 2010-NMCA-004, 147 N.M. 453, 224 P.3d 1258, (Callahan II). 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.

PELRB's and Local Boards' authority under § 10-7E-9 to enforce the PEBA or a local collective bargaining ordinance, resolution or charter through the imposition of appropriate administrative remedies has not been interpreted to permit either an award of monetary damages to an aggrieved union member for a union's breach of its duty of fair representation or an order 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. *See Callahan v. New Mexico Federation of Teachers-TVI, supra.*

In *Johnny M. Trujillo v. AFSCME, Local 3973*, No. D-0608-CV-2015-00250 (J. Robinson; March 13, 2017) the district court granted AFSCME's Motion for Summary Judgment dismissing all claims, 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. At worst, 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 Officers Assoc.*, 2008-NMCA-094, 144 N.M. 595, 598 189 P.3d 1217, 1220. *Granberry* involved a claim for breach of the duty of fair representation against the Albuquerque Police Officers Association brought after it settled a prohibited practices complaint on behalf of four police sergeants and did not include non-dues paying members of the bargaining unit in the settlement. Summary Judgment granted by the District Court in favor of the Union was reversed on appeal because 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 also*, *Howse v. Roswell Independent School Dist.*, 2008-NMCA-095, 144 N.M. 502, 188 P.3d 1253, *see also*, *Mario Alderete, et al. v. City of Albuquerque, et al.* NMCA Nos. 33,151; 33,380; 33,714 (consolidated) February 23, 2015 (unpublished memorandum opinion) finding that no breach of DFR occurred when union refused to file grievance if City was compliant with CBA); *Sanchez v. Jimenez et al. District of New Mexico*, CV 121122 KG/WPL (D.N.M. Oct. 21, 2013) finding no breach of DFR when union negligently failed to file for arbitration within the appropriate time period.

The New Mexico Supreme Court declined 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. *See Akins v. United Steel Workers of America*, 2010-NMSC-031, 148 N.M. 442, 227 P.3d 744. The unanimous opinion underscored the public policy served by punitive damages and held that "punitive damages should be available in DFR suits where the union's conduct is malicious, willful, reckless, wanton, fraudulent or in bad faith." *Id.* at ¶1.

D. Statutory Exclusions

As mentioned, several classifications of employees are statutorily excluded from the PEBA's coverage:

1. Probationary Employees

The PEBA excludes all probationary employees except those employed at a public school. *See* §§ 10-7E-5 and 4(Q); *see also* 11.21.1.7(B)(12) NMAC. That the employer has designated an employee "probationary" will not necessarily be dispositive, and the hearing examiner may look to the background facts and the policy underlying the regulatory definition of "probationary" in making the determination of unit inclusion or exclusion. For example, in one case, 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).

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.

2. Confidential Employees

The PEBA also excludes confidential employees. *See* § 10-7E-4(G), § 10-7E-5 and § 10-7E-13(C). The exclusion of confidential employees is limited to those who assist and act in a confidential capacity to persons who exercise managerial functions in the field of labor relations. *NEA and Jemez Valley Public Schools,* 1 PELRB No. 10 (May 19, 1995). Thus, the PEBA's confidential employee definition requires an analysis of both the duties of the employee in question and the duties of the person he or she allegedly assists. *Id.*

Criteria considered in the past are whether the employee:

- is or could likely be on the employer's bargaining team
- is privy to the employer's District's labor-management policy or bargaining strategy
- has access to confidential financial or other data used in bargaining; or has input or involvement in the employer's contract proposal formulation.

See American Federation of Teachers Local 4212 and Gadsden Independent School District, 03-PELRB-2006 (May 31, 2006); *NEA and Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995).

Under these criteria a school district's administrative interns, or "principals-in-training," were found to be confidential employees because they could be on a bargaining team and are regularly exposed to the District's labor-management policy. *See American Federation of Teachers Local 4212 and Gadsden Independent School District*, 03-PELRB-2006 (May 31, 2006).

In another case 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).

3. Supervisors

PEBA II excludes supervisors even though not expressly excluded under § 10-7E-5, because they are expressly excluded under § 10-7E-13(C). *See Santa Fe Police Officers' Association v. City of Santa Fe*, 02-PELRB-2007 (Oct. 14, 2007).

The PEBA definition of "supervisor" is very strict so that while a position may be designated by the employer as supervisory and may in fact constitute a supervisory position under law other than the PEBA, "[i]t 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).

A three-pronged approach under § 10-7E-4(T) is undertaken to determine whether an employee is a "supervisor" for purposes of applying the PEBA.[9] First, the employee must:

- devote a majority of work time to supervisory duties
- customarily and regularly direct the work of two or more other employees; and
- 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, then the second prong of the analysis is undertaken to determine whether the duties supposed to be supervisory in nature are such that the disputed employee:

- performs merely routine, incidental or clerical duties; or
- only occasionally assumes supervisory or directory roles; or
- performs duties which are substantially similar to those of his or her subordinates.

If the duties performed meet the above criteria the employee is not a "supervisor" as defined by the Act.

Finally, even if the employee meets the foregoing criteria, he or she will not be a supervisor if he or she is:

- a lead employee; or
- an employee who participates in peer review or occasional employee evaluation programs.

See NEA and Jemez Valley Public Schools, 1 PELRB No. 10 (May 19, 1995), *See also NEA and Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995) adopting the Hearing Officer's Report and Recommended Decision identifying the three-part test embedded in the definition.

[9] The 2020 Amendment to the Act renumbered the definitions section so that the definition of "supervisor" formerly found at § 10-7E-4(U) is now found at § 10-7E-4(T)

In applying these criteria, the Board relies on actual job duties performed, rather than employer designations, definitions, expectations, job descriptions or standard operating procedure manuals. *See New Mexico State University Police Officers Association and New Mexico State University,* 1 PELRB No. 13 (June 14, 1995) (discounting testimony that police sergeants are expected to supervise 100% of the time, where that expectation only results in the occasional performance or assumption of supervisory or directory roles); *In re: McKinley County Sheriff's Association Fraternal Order of Police and McKinley County,* 1 PELRB No. 15 (Dec. 22, 1995) (considering actual duties performed rather than written job descriptions or Standard Operating Procedures manuals); *In re: Communications Workers of America, Local 7911 and Doña Ana County,* 1 PELRB No. 16 (Jan. 2, 1996) (considering actual duties performed rather than written job descriptions and the employer's expectation that a position would engage in supervision while performing the work of subordinates); *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) (rejecting the significance of employer's designation of position as supervisor) *NEA v. Bernalillo Public Schools,* 1 PELRB No. 17 (May 31, 1996) (rejecting a local ordinance's conflicting definition of supervisor; *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) (It is not the rank nomenclature that is determinative but rather the facts related to whether the individual functions as a supervisor as defined under the Act.)

Applying the three-pronged analysis outlined above, the following results have obtained:

- Lieutenants in the Town of Bernalillo's Fire Department do not devote a majority of work time to supervisory duties. As a result, they do not meet the first prong of the initial three-pronged test for a supervisor under § 4(T). Neither do they have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively. With regard to discipline, Lieutenants merely report instances of subordinates' deviation from standards of conduct without a recommendation of any specific discipline. Any discretion that exists in the imposition of discipline resides entirely with the Chief and Director of the Town's Human Resources office. Similarly, the Lieutenants play no role in the promotional process. Lieutenants in this case spend a significant amount of their time performing duties substantially similar to those of their subordinates. The Lieutenants do perform some supervisory duties as noted herein such as when they assume the incident commander role where they oversee the operation of the entire scene or operation and ensure adequate direction of all firefighters on the scene, but such duties do not constitute a majority of their majority of work time. Lieutenants in the Town of Bernalillo's Fire Department do not meet at least two of the three criteria required by PEBA § 4(T); i.e., 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 allocation of human resources between the Town's two Fire Stations. *Town of Bernalillo Professional*

Firefighters Ass'n – IAFF and Town of Bernalillo, PELRB No. 307-22.

- Lieutenants in the Town of Bernalillo's Fire Department are "lead workers" as contrasted with true supervisors. That does not mean that they perform no supervisory functions at all or that they may not be considered to be supervisors for other purposes under other laws or regulations. *Id.*

- Lieutenants in the New Mexico Department of Corrections do not meet at least two of the three criteria required by the PEBA § 10-7E-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).

- 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 the 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 the PEBA. However, the Detention Center's Operations Sergeant is a supervisor under the 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-16 (Jan. 2, 1996). *See also AFSCME v. N.M. Dep't of Corrections,* 2 PELRB-2013 (July 13, 2012).

- 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 the 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 could be accreted because they did not meet the statutory definition of supervisors under the 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 (May 31, 2006).

- Head Custodians are not supervisors because they spend less than ten percent (10%) of their time engaged in strictly supervisory tasks. However, 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 the 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).

- 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: NMCPSO & County of Santa Fe,* 78-PELRB-2012 (Dec. 5, 2012).

4. Management Employees

The PEBA's definition of a "manager" exempt from coverage of the Act 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. *See* § 10-7E-4(N).

The first prong of the Act's test requires that an individual possess and exercise a level of authority and independent judgment sufficient to significantly affect the employer's purpose. The second prong requires that an employee creates, oversees or coordinates the means and methods for achieving policy objectives and determines 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, the term "manager," unlike "confidential employee," is read to encompass all management policies and not just those relating to labor relations. 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). The 2020 Amendment emphasized that an employee shall not be deemed a management employee solely because the employee participates in cooperative decision-making programs or whose fiscal responsibilities are routine, incidental or clerical.

E. Organizing Rights and Limitations

1. Adequacy of Showing of Interest or Authorization Cards

The showing of interest or authorization cards may be a regular union membership card, an application for membership, or a petition signed and dated by eligible bargaining unit members. The PELRB has held that, without more, a dues deduction card is not sufficient because it does not contain an unambiguous statement that the signer is authorizing the putative representative as the exclusive representative for collective bargaining purposes. Generally, authorization cards "must have been signed during the union's current organizing campaign," and "cards signed more than a year prior to the union's demand for recognition may be considered 'stale' and thus not count toward the union's majority." *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Ch. 12. III A. 1-A. 3.

However, there are cases in which cards over one year in age have been recognized. *See Grand Union Co.,* 122 NLRB 589 (1958), *citing NLRB v. Piqua Munising Wood Products Co.*, 109 F.2d 552, 554 (6th Cir. 1940) (rejecting the argument that designation cards dated two years before the union's demand for

collective bargaining could not be counted, under the "well-established rule of evidence that when the existence of a personal relationship or state of things is once established by proof, the law presumes its continuance until the contrary is shown or until a different presumption arises from the nature of the subject matter"), *Safeway Stores, Inc.,* 99 NLRB 48, 49, and 56 (1952) (counting as proof of majority status cards that were over one year old and had not been repudiated by the employees); *Knickerbocker Plastic Co., Inc.,* 104 NLRB 514, 529 (1953), *enf'd.* 218 F.2d 917 (9th Cir. 1955).

Additionally, the employer's unfair labor practices interrupting an organizing campaign in effect toll the running of the clock on card signing. *See Blue Grass Industries, Inc.,* 287 NLRB 274, 290 (1987); *See also Northern Trust Co.,* 69 NLRB 652 (1946) (cards that were only ten and eleven months old when the petition was filed remained valid for demonstrating majority support when the processing of the petition was delayed several years through no fault of the union).

The PELRB recognizes electronic showing of interest/authorization cards as acceptable subject to the New Mexico Uniform Electronic Transaction Act (UETA). *See* NMSA 1978, §§ 14-16-2 and 18. The UETA was enacted in 2001 and applies to electronic records and electronic signatures relating to a transaction unless otherwise excluded by law. *See* NMSA 1978, §§ 14-16-3. The UETA states that if the law requires a signature, an electronic signature satisfies the law. NMSA 1978, § 14-16-7(D). However, the electronic signature must be attributable to a person. Refer to the PELRB Guidelines For Utilizing Electronic Signatures For A Showing Of Interest on the PELRB website for detailed information.

2. Confidentiality of Showing of Interest

The showing of interest is confidential and always remains the property of the union. *See* 11.21.1.21 NMAC. The reasonableness of this regulation has been upheld, even as against demands for production made pursuant to the Inspection of Public Records Act (IPRA), NMSA 1978, §§ 14-2-1 et seq. *See City of Las Cruces v. PELRB*, 1996-NMSC-24, 121 N.M. 688.

3. Laboratory Conditions

The employer is required to maintain "laboratory conditions" between the filing of a petition and the holding of an election, also referred to as the campaign or election period. *General Shoe Corporation*, 77 NLRB 124, 126 (1948). The term "laboratory conditions" refers to maintaining the *status quo* as to existing terms and conditions of employment and to the prohibition on coercive speech or misrepresentations that could impair the election. The goal of the "laboratory conditions" requirement is to ensure employees' freedom of choice. Threats are absolutely prohibited and the determination whether a threat was made will depend on the reasonable listener standard. The prohibition of coercive speech concerns threats and is discussed in the Prohibited Practices Section, Interference, Restraint or Coercion, *infra.*

Under the NLRA an employer is prohibited from making misrepresentations that prevent employees from recognizing or evaluating election propaganda for what it is, such as forgery or other deceptive statements. *See Midland National Life Insurance Co. and Local 304A, UFCW*, 263 NLRB 127, 133 (1982). In the absence of such deceptive acts, employees can be taken to have expressed their true convictions

in the secrecy of the polling booth. *See General Shoe Corp.*, 77 NLRB 124, 21 LRRM 1337 (1948); *See also The Liberal Market, Inc.,* 108 NLRB 1481, 1482 (1954) (elections do not in fact occur in the controlled conditions of a laboratory and the goal is therefore "to establish ideal conditions insofar as possible," and to assess "the actual facts in the light of realistic standards of human conduct"). General misrepresentations made as part of election propaganda are not per se objectionable and do not require invalidation of the election. *See Midland National Life Insurance Co.,* 263 NLRB 127, 129 (1982); *United Steel Service, Inc.*, 340 NLRB 1999 (2003); *Maywood Hosiery Mills, Inc.,* 64 NLRB 146, 150 (1945) (it is not the Board's function to "censor the information, misinformation, argument, gossip, and opinion which accompany all controversies of any importance") and *Corn Products Refining Company*, 58 NLRB 1441, 1442 (1944) (that employees "undoubtedly recognize campaign propaganda for what it is, and discount it").

4. Maintenance of the Status Quo

The prohibition against unilateral changes to terms and conditions of employment during the campaign period ensures that bargaining unit members are not threatened or lured away from seeking union representation. *See Pearson Education, Inc.*, 336 NLRB No. 92 (2001*); NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964); *B&D Plastics, Inc.*, 302 NLRB 245, 245 (1991). After certification changes to the *status quo* must be made pursuant to negotiations, after negotiation to impasse, or upon notice and opportunity to bargain over the changes.[10] *See NLRB v. Katz,* 369 U.S. 736 (1962); *Koenig Iron Works, Inc.,* 276 NLRB 811 (1985). At this point, the purpose of maintaining the *status quo* is to preserve the integrity of negotiations and protect the Union's status as exclusive bargaining representative. *See, e.g., NLRB v. McClatchy Newspapers*, 964 F.2d 1153, 1162 (D.C. Cir. 1992). *See* PPC presentation materials *infra*, "Duty to Bargain in Good Faith," for an explanation of these terms of art and principles.

5. Prohibition Against Coercive Interrogations, Surveillance and Threats

The PELRB has adopted the test set forth in *J.P. Stevens & Co., Inc. v. NLRB*, 638 F.2d 676, 683 (4th Cir. 1980) to determine interference, restraint or coercion on the part of the employer when questioning employees. An employer violates the prohibition if its question create in the mind of an employee an impression that the employer is closely observing union organizational activity, and whether by that impression the question reasonably tends to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by the Act. Applying this test in *AFSCME, Council 18 v. NM Children Youth and Families Dept.;* PELRB 120-20, the Hearing Officer found that CYFD violated Section 19(B) of the PEBA by its questioning of JCO Supervisors about their union views or activities in relation to a petition for accretion.

In *McKinley County Federation of United School Employees Local 3313, AFT-NM v. Gallup-McKinley County Public Schools*, PELRB 122-20, the Board adopted NLRB case law on the subject of an employer's surveillance of its employees, holding that "monitoring employee action by camera is "plainly germane

[10] The PEBA's impasse resolution procedures differ from the NLRA in that whenever an impasse continues after the expiration of a contract, the existing contract continues in full force and effect until it is replaced. NMSA 1978, § 10-7E-18(D). However, this shall not require the public employer to increase any employees' levels, steps or grades of compensation contained in the existing contract.

to the 'working environment' and is not among those 'managerial decisions', which lie at the core of entrepreneurial control". In the parlance of the instant case, the terms of its employee monitoring effort is not a management right – it is deemed to be "terms and conditions of employment" and therefore are mandatory subjects of bargaining." Citing *Anheuser-Busch*, 342 NLRB 560 (2004) In that case, the school district had mandated the installation of surveillance software on remote instructor's home computers without bargaining. The Board held that "the installation and use of hidden surveillance cameras in the workplace constitutes a mandatory subject of bargaining, especially in light of the cameras' effects on the employees' job security."

6. Limitations on Electioneering

During the election, no electioneering is permitted within 50 feet of any room in which balloting is taking place. *See* 11.21.2.28 NMAC. Additionally, neither the union nor the employer may make "captive audience" speeches during the 24 hours preceding an election. *See Peerless Plywood Co.,* 107 NLRB 427 (1953), and *San Diego Gas & Elec.,* 325 NLRB 1143, 1146 (1998) (clarifying that the *Peerless* prohibition on mass "captive audience" speeches on company time does not prevent either the employer or the union from campaigning in that 24-hour period through mailings, or from conducting mass meetings on the employees' own time if attendance is not mandatory).

7. Excelsior Lists

The union is entitled to a list of all employees within the petitioned for bargaining unit, as well as their mailing addresses and home phone numbers. *See Excelsior Underwear, Inc.,* 156 NLRB 1236 (1996); *See also SSEA, Local 3878 v. Socorro Consolidated School District,* 05-PELRB-2007 (December 13, 2007); *Rio Rancho Public Schools v. Rio Rancho School Employees' Union,* 13th Judicial Dist. No. D-1329-CV-2010-1987 (J. Eichwald 11/5/2013.) (School District's policy adopted pursuant to the PEBA requires the District to release employee names and home addresses to ensure "that certification elections or decertification elections are fair and public employees have the best opportunity to listen to all arguments and decide for themselves whether they desire to be represented by a labor organization.") *See* Section IX(B) *infra* concerning the failure to provide requested information in other contexts.

8. Right of Reasonable Access to Employees Being Organized

A public employer shall provide an exclusive representative of an appropriate bargaining unit reasonable access to employees within the bargaining unit. This includes the right to meet and conduct meetings during business hours and at the employees' regular work location as long as it doesn't interfere with the public employer's regular operations. *See* NMSA 1978, § 10-7E-15 (2020).

In general, employees can engage in oral communications regarding union interests in work areas while on break although oral communications, wearing, posting or distribution of written materials may be reasonably restricted to non-public or non-work areas, or off-site, due to the disruption such communications can cause if communications regarding non-union matters are similarly restricted and there are alternative channels of communication available to the union.

Unions must be allowed use of mailboxes, electronic or otherwise, to distribute materials if other organizations are provided such access. However, no other organization—including unions—may be allowed to place materials into the employer's mail distribution system free of charge. *See* PPC Section, Interference, Restraint or Coercion, *infra. See* NMSA 1978, § 10-7E-15(H) (2020).

F. Consent Election Agreements

Where there are no disputes regarding unit inclusion or exclusion, the parties shall enter into a consent election agreement detailing the time, place and manner of election. *See* 11.21.2.17 NMAC. Under this rule, the election is held pursuant to the agreement only if the "agreement is not set aside at the Board's next regular meeting or the following regular meeting." *Id.* To avoid a two-month or longer delay, the agreement is typically put on the next Board agenda for formal Board approval, and the election is scheduled for as soon as possible after that meeting.

G. Questions Concerning Representation or "QCR"

A question of representation or "QCR" arises whenever an election and/or hearing is required "to determine whether the union ... represents a majority of the employees in an appropriate bargaining unit." *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters 31(B) and (C). Thus, QCRs may concern either (I) majority status, or (ii) the appropriateness of the petitioned for unit. Where a QCR is presented as to unit inclusion or exclusion, the parties cannot proceed by way of consent election agreement, and there must instead be a hearing on unit inclusion and exclusion. *See* 11.21.2.17 NMAC.

H. Withholding Recognition Until Successful Election

Under the PEBA, as under the NLRA, an employer may generally refuse to negotiate with a non-incumbent union unless it demonstrates majority support, either through a secret ballot election or by card check. *See Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974). *See also* the PEBA § 10-7E-14(C) and discussion *infra* regarding incumbent labor organizations. However, where the employer commits unfair or prohibited labor practices that impair an election, the Board may issue a remedial bargaining order based on a card count demonstration of majority support. *See NLRB v. Gissel Packing Co*., 395 U.S. 575 (1967). Additionally, an employer cannot disavow a demonstration of majority support that the employer itself solicited, such as through interrogations or other employee polling, in response to a union's demand for recognition. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 32 II(B) and citations therein.

I. Mail-in and Electronic Ballot Elections

Electronic and mail-in ballot options have come into increasing use since the COVID 19 pandemic, in the discretion of the Executive Director acting as Election Supervisor. Consequently, the preference expressed in the PELRB's rules for on-site balloting is considered to be less persuasive than it may have been in prior years. *See* 11.21.2.25 NMAC. When conducting an election by mail, electronic balloting

or a combination of those methods this Board generally follows NLRB guidelines in the exercise of that discretion. *See San Diego Gas & Electric,* 325 NLRB 1143 (1998). *San Diego Gas & Electric* suggests that the existence of the following circumstances may make use of mail ballots appropriate:

- Eligible employees are scattered over a wide geographic area, and
- Eligible employees' work schedules vary significantly, and they are not present at a common location at common times.

Moreover, when these circumstances are present, the NLRB has directed the Regional Director to consider "the desires of all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and finally, what constitutes the efficient use of Board resources, because efficient and economic use of Board agents is reasonably a concern." *Id.* However, the decision to conduct a mail-ballot election should not be based on budgetary considerations alone *Id.*

Because the New Mexico Public Employee Labor Relations Board is subject to the New Mexico Uniform Electronic Transaction Act (UETA)[11] electronic balloting will follow its requirements *See* NMSA 1978, §§ 14-16-3. The UETA states that if the law requires a signature, an electronic signature satisfies the law. NMSA 1978, § 14-16-7(D). However, the electronic signature must be attributable to a person. NMSA 1978, § 14-16-9. The UETA mandates that:

(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under Subsection (a) is determined from the context and surrounding circumstances at the time of its creation, execution or adoption, including the parties' agreement, if any, and otherwise as provided by law. NMSA 1978, § 14-16-9. The UETA provides that government agencies who accept electronic signatures on electronic records may define the format for the signature. NMSA 1978, § 14-16-18. *See*:
https://www.pelrb.state.nm.us/pdf/GUIDELINES%20FOR%20UTILIZING%20ELECTRONIC%20SIGNATURES%20FOR%20A%20SHOWING%20OF%20INTEREST.pdf

In accord with the UETA, the Board amended its election rules in 2020 to permit electronic balloting in several sections. For example, 11.21.2.25 NMAC concerning the parties' pre-election conference with the Director provides:

> "At a reasonable time at least 15 days before the election, the director shall conduct a pre-election conference with all parties to resolve such details as the polling location(s), the use of manual, *electronic, or mail ballots* the hours of voting, the number of observers permitted, and the time and place for counting the ballots...

[11] NMSA 1978, §§ 14-16-2 and 18

> In deciding the polling location(s) and the use of manual, mail or *electronic* participation in the election by employees in the bargaining unit there shall be a strong preference for onsite balloting..."

Similarly, 11.21.2.27 NMAC amended the Board's voting procedure to provide that "...all elections shall be conducted by the director, *whether electronically, by mail in ballots* or onsite elections, subject to the provisions of 11.21.1.28 NMAC regarding the director's authority to delegate duties."

J. Card Counts

PEBA authorizes card counts as an alternative to an election where the authorization cards submitted evidence majority support the representation by the union submitting them. The PEBA § 10-7E-14(C) provides:

> "As an alternative to the provisions of Subsection A of this section, a labor organization with a reasonable basis for claiming to represent a majority of the employees in an appropriate bargaining unit may submit authorization cards from a majority of the employees in an appropriate bargaining unit to the board or local board, which shall, upon verification that a majority of the employees in the appropriate bargaining unit have signed valid authorization cards, certify the labor organization as the exclusive representative of all public employees in the appropriate bargaining unit. The employer may challenge the verification of the board or local board; the board or local board shall hold a fact-finding hearing on the challenge to confirm that a majority of the employees in the appropriate bargaining unit have signed valid authorization cards."

The Director will examine original cards submitted to ensure that they a "signed, dated statement" the card reflects the signor's "desire to be represented for the purposes of collective bargaining by the petitioning labor organization." Cards have been rejected where some information appeared to be in different handwriting and/or ink than other information, because the validity of the signature and date was thus made questionable. *See* Section 5 below for a discussion of card counts in the context of the recognition of an incumbent bargaining representative.

The PELRB addressed an employer's objections to the conduct of a Board-sponsored card check in *United Electrical, Radio and Machine Workers of America and New Mexico State University Board of Regents*, 12-PELRB-2022 (In re: PELRB No. 313-21). The Board decided that PEBA does not require the Board to use an updated bargaining unit list when conducting a card check proceeding - the purpose of a card check is to test majority support as of the time a petition is submitted. Section 10-7E-14(C) allows labor organization to submit authorization cards from a majority of employees in the proposed bargaining unit with its representation petition. The Board then verifies "that a majority of the employees in the bargaining unit have signed valid authorization cards," and, if so, certifies the labor organization as the exclusive representative. The Board's verification is based on the authorization cards submitted with the petition, which means the Board necessarily relies on the list of employees in the bargaining unit at the time the petition is filed.

Misspelled printed names on the authorization cards do not, by themselves, indicate fraud. The cards

were challenged based on the misspellings and properly removed from the count. No showing was made that the challenged cards affected the validity of the remaining cards included in the count.

NMSU's objections related to alleged violations of the Card Check Agreement were without merit. The Agreement did not preclude the Executive Director from having a staff member under his supervision assist in conducting the card check . The Agreement's provisions governing observers is based on the Board's rules for observers during ballot counts, which specify that "observers shall not be ... labor organization employees" and allow "representatives of the parties in addition to the observers to observe the counting of ballots." 11.21.2.29 NMAC. Under these rules, the Union had only one eligible observer physically present at the card check and signed the card check results. NMSU did not show what effect, if any, the alleged violations of the Card Check Agreement had on the validity of the authorization cards or the card check process.

NMSU's objection related to whether the authorization cards are "sufficiently current" is premised on the submission of the cards ten months before the card check was conducted. However, as with the list of eligible employees discussed above, the time for determining whether an authorization card is "sufficiently current" is when the representation petition is filed, not at the time of the card check proceedings. See 11.21.2.13(A) NMAC (requiring the Director to investigate the petition within 30 days of filing, including whether the signatures on the showing of interest (in the form of cards or a petition) "are sufficiently current"). NMSU does not claim that the authorization cards were insufficiently current when the Union submitted the Petition to the NMSU Labor Management Relations Board. Because the cards presumably were "sufficiently current" when the NMSU Labor Management Relations Board reviewed the Petition, there are no grounds for the objection.

NMSU's contention that the title of the Board's form used to record the results of the card check and references in the form to "election returns" are misleading has no merit. No evidence was presented that parties and other persons participating in the card check were confused or misled by the challenged language on the form or that it affected the validity of the authorization cards or card check proceedings.

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).

However, if no persuasive evidence is presented challenging the showing of support for the petitioning employee organization, PERB and the director will not sustain a challenge to a certification without election. *See Mohawk Valley Gen. Hosp.*, 19 N.Y. P.E.R.B. ¶ 3020 (1986); *North Greece Fire Dist.*, 31 N.Y. P.E.R.B. ¶ 4022, 31 N.Y. P.E.R.B. ¶ 3000.13 (1998); *Addison Cent. Sch. Dist.,* 28 N.Y. P.E.R.B. ¶ 4024 (1995); *Town of N. Salem,* 23 N.Y. P.E.R.B. ¶ 4009, 23 N.Y. P.E.R.B. ¶ 3000.18 (1990). For example, in *Mohawk Valley General Hospital,* the employer submitted six employee affidavits, and a letter signed by three other employees stating that they singed designation cards based upon misrepresentations. PERB found the submission to be an insufficient basis for ordering an election. In reaching its conclusion, PERB reasoned that the number of unchallenged designation cards alone was sufficient to support a certification without an election. Furthermore, PERB stated:

> [W]e find that the probative value of the affidavits and letters is relatively weak given the wording of the designation cards. These cards are unusually explicit in their statement that the signatories seek to be represented by CWA. While we might be persuaded by the affidavits of individuals who say that they themselves did not read the cards before they signed them, we are unwilling to give any cred to the hearsay statements that other unit employees were unaware of the content of the designation cards which they signed. Similarly, we find that the statements regarding "strong persuasion" are not sufficient to raise an issue of duress.

In Addison Central School District, the Director rejected an employer's request for the scheduling of an election premised on allegations in its response to the representation petition, that several employees had informed the employer that they regretted signing the dues authorization cards and were unaware of the representation procedures. During the course for the representation investigation, however, the employer was unable to substantiate its conclusory assertions resulting in the issuance of a certification without election. *See* Herbert, William A., *Card Check Labor Certification: Lessons from New York*, 74 Alb. L.Rev. 93 (2010).

Tierra Encantada Charter School – NEA alleged that the School violated § 10-7E-5, 19(B), and 19(C) of PEBA by misrepresenting the effects of unionization and by modifying a past practice in retaliation for the formation of a labor organization at the School. Complainant stated that by suspending "certain courtesies" previously extended to employees, TECS disrupted the status quo ante as the parties begin their contract negotiations, constituting a violation of employee rights under the PEBA. A TRO and Preliminary injunction were put in place requiring that the School (1) cease and desist from no longer extending "courtesies" such as early dismissal and early release days, (2) restore the status quo ante with regard to terms and conditions of employment at the School, and (3) shall decease and desist from any further communication with bargaining unit members. The matter was then resolved after the parties chose to voluntarily dismiss the action after a settlement agreement. The agreement stated that Tierra Encantada Charter School gave notice that email communication from the director disrupted the status quo with regard to early dismissal and was a violation of § 10-7E-5, 19(B), and

19(C) of PEBA. It then outlined the rights of employees under the aforementioned sections. *See In Tierra Encantada Charter School-NEA v. Tierra Encantada Charter School*, PELRB Case No. 101-22.

In *Village of Webster,* 21 N.Y. P.E.R.B ¶ 3002 (1988), PERB ruled that the six-month time restriction, contained in Section 201.9(g)(1) of the Rules, is applicable to the date of the proposed certification rather than the date when the Director determines that a certification without an election is appropriate. In 1992 the amendment to section 201.9(g)(1) of the Rules added a specific procedure with respect to a challenge to the Director's determination: a) the Director must inform all the parties in writing if the director determines that there is sufficient support for a certification without an election; and b) the Director's determination is reviewable by the Board within five working days after its receipt of the determination. The objection must set for the grounds and supporting facts for challenging the certification without an election and the other parties are entitled to respond. *See* Herbert, William A., *Card Check Labor Certification: Lessons from New York*, 74 Alb. L.Rev. 93 (2010).

K. Voluntary Recognition

An employer and a union representing a majority of employees in a bargaining unit may enter into a voluntary recognition agreement. *See* 11.21.2.39 NMAC. There are requirements that must be met before such an agreement will be approved, however. First, the union must file a petition for certification along with a showing of majority support, which shall be verified by card count. *See* 11.21.2.39(A) NMAC. Second, a notice of filing of petition must be filed and other unions given an opportunity to intervene; if any union intervenes there shall instead be an election. *See* 11.21.2.39(B), (C) and (E) NMAC. Third, the union must file a petition for Board approval of the voluntary recognition. If there were no intervenors and majority support is demonstrated the Board will approve the voluntary recognition agreement unless it determines the bargaining unit to be inappropriate. *See* 11.21.2.39(D) NMAC.

L. Election Bar

An election may not be conducted if an election or runoff election has been conducted in the twelve-month period immediately preceding the filing of the proposed representation petition. *See* § 10-7E-14(E).

M. Contract Bar and Window for Filing a Petition

An election may not generally be held during the term of an existing contract and a petition for election must be filed within a specific window of time. *See* § 10-7E-14(E) incorporating § 107E-16 by reference. If the term of the current CBA is three years or less in duration the petition for election must be filed no earlier than 90 days and no later than 60 days before the expiration of the CBA. *See* § 10-7E-16(B). If the CBA is more than three years in duration, the petition may be filed at any time after the expiration of the third year. *Id.* The 90/60 thirty-day window is calculated based on calendar days NOT business days. This is because 11.21.1.8 NMAC concerns "days in which some action must or may be taken after a given event," while here the window occurs before the given event. Additionally, this interpretation follows the NLRA.

N. Petition for Certification as Incumbent

1. General

A labor organization that was recognized by a public employer as the exclusive representative of an appropriate bargaining unit on June 30, 2020, shall be recognized as the exclusive representative of the unit. Such recognition shall not be affected by a local labor board ceasing to exist pursuant to NMSA 1978, Section 10-7E-10 (2020). Such a labor organization may petition for declaration of bargaining status under NMSA 1978, Section 10-7E-24(B) (2003). Whenever a union seeks to establish that it was recognized on June 30, 2020, and to demonstrate current majority support for the purpose of entering into a new collective bargaining agreement, it files a Petition for Certification as an Incumbent. *See* § 10-7E-24(B) and 11.21.2.36 NMAC and 11.21.1.7(B)(3) NMAC. The procedure for filing a petition for incumbent certification is the same as that for a basic Petition for Recognition under subparagraph IV A above. *See* PELRB Form #5, Petition for Recognition as an Incumbent Labor Organization.

2. Question Concerning Representation (QCR) and the Incumbent's Requirement to Demonstrate Majority Support

Whenever an incumbent labor organization files a Petition for Recognition as an Incumbent, a QCR is presumed to exist as to majority support before the employer is obliged to execute a new CBA with the union. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 10.I(B).2.b and citations therein. *See* § 10-7E-24(B) and 11.21.2.36 NMAC. Obviously, an employer may voluntarily recognize an incumbent labor organization just as it may voluntarily recognize a labor organization after an initial certification for a new bargaining unit.

A petition for certification as incumbent, by definition, does not present a QCR as to unit inclusion or exclusion, because § 10-7E-24(A) deems the bargaining unit to still be appropriate. *See NEA-Alamogordo and Alamogordo Public Schools*, 05-PELRB-2006 (June 1, 2006).

3. Duty to Bargain Prior to Demonstration of Majority Support

The PEBA expressly states that an incumbent union shall be recognized as the exclusive representative unless and until it tries and fails to demonstrate majority support. Thus, there is apparently still a duty to bargain with the incumbent union prior to the demonstration of majority support, even though the result of the negotiations cannot be reduced to a CBA until majority support is demonstrated. *See, e.g., American Federation of Teachers Local 4212 and Gadsden Independent School District,* 03-PELRB-2006 (May 31, 2006).

Under 11.21.2.36 NMAC, a labor organization recognized on June 30, 1999, shall continue to be recognized as the exclusive representative of the unit and may petition for a "declaration of bargaining status" pursuant to NMSA 1978 § 10-7E-24(B) (2020). This Board has long held, even before the 2020 amendment to the Act favoring card counts as an alternative to an election, that a reasonable interpretation of § 10-7E-24(B) of the PEBA include card counts based on the following analysis:

- Section 10-7E-24(B) provides majority support and shall be demonstrated "pursuant to § 10-7E-14."
- Section 10-7E-14(A) is inapplicable because it concerns an "election to determine whether and by which labor organization the public employees...shall be represented."
- Section 10-7E-24(B) has already determined the incumbent "shall be recognized as the exclusive representative." *See In re: Petition for Recognition as Incumbent Labor Organization, NEA-Alamogordo and Alamogordo Public Schools,* 05-PELRB-2006 (June 1, 2006).

See supra for electronic showing of interest cards.

O. Accretion Into an Incumbent Unit by Clarification Petition

A clarification petition filed by either the exclusive representative or the public employer when the circumstances surrounding the creation of an existing bargaining unit have changed sufficiently to warrant a change in the scope and description of that unit, or a merger or realignment has occurred. A clarification petition must not raise a question concerning representation or the petition must be dismissed. 11.21.2.37 NMAC, 11.21.1.7(B)(17) However, one cannot proceed by an Accretion Petition where the number to be accreted is greater than 10% of the existing bargaining unit. Instead, in such instances, a labor organization seeking to add or clarify positions is required to proceed pursuant to a standard Representation Petition and demonstrate majority support. *See IAFF Local 2378 v. City of Raton*, PELRB No. 118-11 and in *In re: IAFF Local 2378 v. City of Raton,* PELRB No. 302-11. Although the 2020 Amendments eliminated the distinction of "grandfathered" bargaining units, Although under the former law grandfathered bargaining units may not be the subject of a clarification petition, (11.21.2.37(A) allowing for unit clarification as warranted, in recognition that pre-existing bargaining units frequently face reorganization and renaming of positions over time, the PELRB nevertheless allowed grandfathered bargaining units to be "reconciled" by evidentiary hearing, to determine which present-day job titles the parties would have intended to be included under the grandfathered bargaining unit and CBA. *See American Federation of Teachers Local 4212 and Gadsden Independent School District,* 03-PELRB-2006 (May 31, 2006). Additionally, where circumstances surrounding the original creation of the bargaining unit have substantially changed positions (Section 10-7E-24(A)) could be added to a grandfathered bargaining unit by a regular election petition. *See International Association of Firefighters Local 2430 v. Town of Silver City,* PELRB Case No. 308-07 (March 7, 2008, Hearing Examiner Report) (allowing the petition because the change in the definition of "supervisor" under PEBA II).

The 2020 Amendment eliminated the unique status enjoyed grandfathered entities but, so far, has maintained the requirement that a petition for accretion where the number to be accreted is greater than 10% of the existing bargaining unit must be dismissed and proceed by a Petition for Recognition as the elimination of grandfathered status did not affect that requirement. The Board's Director has continued to apply this "10% rule" after the 2020 amendments. *See Sandoval County Professional Fire Fighters & Sandoval County;* PELRB 325-22 (November 29, 2022) in which the Director dismissed a Petition to accrete Lieutenants into an existing firefighters' bargaining unit with leave for the Petitioner to file a Petition for Representation, pursuant to NMAC 11.21.2.38(C), because the number of employees in the group sought to be accreted was greater than 10% of the number of employees in

the existing unit.

1. Change in Circumstances

The PELRB's clarification rule follows NLRA precedent in requiring that there has been a sufficient change in circumstances surrounding the creation of the original bargaining unit to warrant a change in the scope and description of the bargaining unit, absent an election. *See* 11.21.2.37(A) and (B) NMAC (requiring the dismissal of the petition absent a demonstration of change of circumstances but permitting the petitioner to "proceed otherwise under these rules"); *Compare Laconia Shoe*, 215 NLRB 573 (1974) (that "[w]hen a group has in fact been excluded for a significant period of time from an existing ... unit, the Board will not permit their accretion without an election or a showing of majority [support] among them"). The change must be to the circumstances surrounding the creation of the bargaining unit, not just the circumstances of the unit members. *See AFSCME v. State of New Mexico, Human Services Department and New Mexico Public Employee Labor Relations Board*, No. D-202-CV-2016-07671 (J. Huling; July 19, 2017; in re: PELRB 309-15) where 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.

In *In re: Rio Rancho Police and Dispatchers Ass'n and City of Rio Rancho;* 11-PELRB-2018; PELRB 309-17 (October 4, 2018) the parties agreed to change the unit description to reflect current job titles and to add five additional positions to the unit: (1) Crime Analyst; (2) Property and Evidence Tech; (3) Lead Property and Evidence Tech; (4) Public Safety Aid and (5) Communications Shift Supervisor. The Board amended certification of representation to reflect the name change and to add the positions. *See also*, *International Ass'n of Firefighters, Local 1687 and City of Carlsbad;* PELRB 308-17, in which the union filed a petition seeking to add the EMS Division Chief, the Fire Marshal and the Training Officer/Staff Development Officer positions to the existing Firefighter bargaining unit. The Board's Hearing Officer concluded the positions met the statutory definition of managers and were therefore excluded from the bargaining unit pursuant to §§ 10-7E-4(N) and 10-7E-5. No appeal to the Board was taken.

2. Merger Doctrine

Where smaller bargaining units have been merged into a single bargaining unit by contract a showing of interest required is 30% of the larger unit as merged, rather than 30% of the group of employees first certified. *See* § 10-7E-16(A). *See also NLRB v. 1115 Nursing Home and Serv. Employees Union*, 44 F.3d 136, 138 (2nd Cir. 1995); *Miron Building Prods. Co.*, 116 NLRB 1406, 1407-08 (1956) (both imposing the merger doctrine to multi-employer units, except where there has been no, or very limited, actual bargaining on a multi-employer basis, in contrast to an earlier long history of bargaining on an individual basis) and *Wisconsin Bell, Inc.*, 283 NLRB 1165, 1165 (1987). *See also Gibbs & Cox, Inc.,* 280 NLRB 953 (1986) and *The Greenwood Cemetery*, 280 NLRB 1359 (1986) (all applying the merger doctrine where the employer and union have agreed to merge separately certified or recognized units into one overall unit" by way of a single collective bargaining agreement that covers the merged units). A 30% showing of interest is required from the entire bargaining unit.

P. Accretion Petition

An Accretion Petition is a type of Clarification Petition filed by the exclusive representative to add employees to an existing bargaining unit. *See* 11.21.2.38(B) NMAC.

1. Timing

11.21.2.38 NMAC does not contain an express time limit on filing an Accretion Petition. However, where there has not been a substantial change in circumstances, a petition for accretion should be filed shortly after the contract is executed if the parties could not reach an agreement but desired not to hold up the agreement on the contract. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 10-43. Alternatively, the accretion petition may be filed during the certification year if the status of the employees was left unresolved by the Board's certification and parties were unable to resolve the issue through negotiations. *Id.* Thus, in either case, the inclusion would have been contemplated at the time of the initial election petition, but the parties could not reach an agreement.

2. Showing of Interest

A thirty percent (30%) showing of interest is required for a petition for accretion, unlike with other clarification petitions. *Compare* 11.21.2.38(B) to 11.21.2.37 NMAC. *See* Adequacy of Showing of Interest or Authorization Cards *supra*.

3. Change In Circumstances

As with any clarification petition, the petition for accretion should not be utilized to add a sizable group that has been historically excluded from the existing bargaining unit absent a demonstration of majority support among those new employees. *See supra.* However, the PELRB will typically allow such accretions if the employer does not raise an objection. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 10-43, *citing Radio Corp. of America*, 135 NLRB 980 (1962) (under NLRB precedent, a bargaining unit consensually agreed to by the parties will generally be accepted as lawful unless wholly inappropriate).

4. Community Of Interest

There must be a community of interest between the existing bargaining unit and employees to be accreted. *See* 11.21.2.38(A) NMAC.

Under PEBA I, at least one hearing examiner held that there was insufficient community of interest to support the accretion of certain Department of Public Education employees into a statewide horizontal bargaining unit of similar paraprofessional or technical employees because although such employees were initially hired under the same job classification, they went on to become part of a distinct work unit where the work was governed by the particular needs of the Department irrespective of the job classification. Additionally, wages were calculated differently, they had the option to use a different retirement system (the teachers system, rather than PERA), there was no interaction between these and existing bargaining unit members, they were subject to separate discipline authority, and there was no history of bargaining between CWA and the Department as

to the employees to be accreted, all of which pointed to a lack of economic relatedness between the subject employees and their bargaining unit member counterparts. *Communication Workers of America and State of New Mexico Department of Public Education,* PELRB Case Nos. CP 29-95(S) and CP 30-95(S), Hearing Examiner Decision (Jan. 3, 1996) (denying the accretion of financial specialists and procurement specialists into a statewide paraprofessional unit, and the accretion of print shop employees into a statewide technical unit).

5. Effect of Questions Concerning Representation (QCRs)

As with other clarification petitions, the existence of a Question Concerning Representation (QCR) requires dismissal of an accretion petition, and the petitioner must instead proceed via election. *See* 11.21.2.38(B) and 11.21.2.37(B) NMAC.

Absence of QCR is presumed if the group to be accreted is less than 10% of the existing bargaining unit. Accordingly, the petitioner will be able to proceed with the accretion solely upon demonstrating a 30% showing of interest through signed authorization cards. *See* 11.21.2.38(B) NMAC.

If the group to be added is greater than 10% of the existing bargaining unit, a QCR is presumed and the petition for accretion must be dismissed and a petition for an election filed instead. Accordingly, the petitioner will have to demonstrate majority support, and through a secret ballot election or card check. *See* 11.21.2.38(C) NMAC; *See also* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 10 concerning QCRs generally.

Q. Severance Petition

This is a petition filed by a labor organization to sever a group of employees comprising an occupational group listed in § 10-7E-13 of the PEBA, from an existing bargaining unit. The procedure for filing a severance petition is the same as that for a basic Petition for Recognition under subparagraph IV A above, including the requisite 30% showing of interest among the group of employees to be severed. *See* 11.21.2.41 NMAC. 11.21.2.41 NMAC; *NMCPSO and Rio Rancho Police and Dispatch Ass'n;* 2-PELRB-2018*, In re:* PELRB No. 307-17. (Petition for Severance barred and dismissed by operation of 11.21.2.41 NMAC because severance of employees is limited to those in the occupational groups specifically delineated in the PEBA § 10-7E-13.

1. Timing

A severance petition for must be filed during the 90/60 thirty-day window. *See* 11.21.2.41 NMAC.

2. Occupational Group Analysis

The group to be severed must be one of the occupational groups listed in NMSA 1978, § 10-7E-13 (2020), e.g., blue-collar, secretarial, clerical, technical, professional, paraprofessional, police, fire or corrections. *See* 11.21.41 NMAC and the PEBA § 10-7E-13(A). *See also*, *NMCPSO and Rio Rancho Police and Dispatch Ass'n*, *supra.*

3. Distinct Community of Interest

Under the NLRA, a petitioner for severance must demonstrate that the group to be severed has a community of interest that is separate distinct form that of the rest of the bargaining unit. *See, e.g.*, *In re: Mallinckrodt Chemical Works, Uranium Div.,* 162 NLRB 387 (1966). However, since 11.21.2.41 NMAC only seems to require that the group to be severed fall in a specific occupational category, inclusion in such a category may create a presumption of distinctiveness.

R. Decertification Petition

A decertification petition is filed by either a member of a labor organization certified as exclusive representative or by the exclusive representative itself seeking decertification of that union as the exclusive bargaining representative. The procedure for filing a decertification petition is the same as that for a basic Petition for Recognition under subparagraph IV(A) above, including the requisite 30% showing of interest among the group of employees to be severed except for the identity of the filer. *See* § 10-7E-16 and 11.21.2.8 through 11.21.2.35 NMAC. As to the identity of the filer, the PEBA differs from the NLRA. Under the NLRA, a decertification petition need only be filed by a member of the bargaining unit, rather than a member of the union or union itself. *Compare* the PEBA § 10-7E-16(A) and NLRA § 9(e)(1). Concerning a Union's Disclaimer of Interest and its effect on a pending Petition for Decertification, please refer to the Section on Disclaimer of Interest below.

1. Timing

A decertification petition must also be filed during the 90/60 thirty-day window. *See* § 10-7E16.

2. No Carve-Outs Allowed

Under the NLRA, a decertification petition must address the overall existing bargaining unit and may not seek to carve out portions of an existing bargaining unit for decertification. *See, e.g. Ma's West,* 283 NLRB 130 (1987) (concerning a decertification petition filed on behalf of a single employer of a multi-employer bargaining unit); *American Consolidating Co.,* 226 NLRB 923 (1976) (same); and *Great Falls Employers Council, Inc.,* 114 NLRB 370, 371 (1950) (concerning a decertification petition filed on behalf of certain professional pharmacists within a multi-employer clerical bargaining unit).

The Board expressed a preference for a Board supervised decertification election in preference to employer sponsored polling as the means for determining majority support in *NEA - New Mexico v. Española Public Schools*, 17 PELRB 2013 (June 19, 2013).

VI. PELRB and Employer Action Following the Filing of a Petition

After the filing of any of the Representation Petitions outlined above the PELRB notifies the employer of the filing and requests a list of employees in the petitioned for bargaining unit (or in the case of accretion a list of employees within the group to be accreted and a list of employees within the existing bargaining unit) to be produced within 10 days. The list is of employees that would be eligible to vote if the Petition were found to be appropriate, based on the payroll period that ended immediately preceding the filing of the Petition. *See* 11.21.12 NMAC.

A. Verification of Showing of Interest

Once the employee list is received, the showing of interest is compared against the employee list. If there is an insufficient showing of interest, the union may be granted a "reasonable amount of time" to file additional showing of interest. *See* 11.21.2.23 NMAC. If there are allegations of fraud, forgery or coercion related to the showing of interest, the hearing examiner shall investigate the matter while still maintaining the confidentiality of the showing of interest. *See* 11.21.2.13 NMAC. The showing of interest is presumed valid, however, unless there is clear and convincing proof of fraud, forgery or coercion. *Id.* Any rulings concerning the adequacy of the showing of interest are made in the complete discretion of the hearing examiner and are not subject to review. *See* Adequacy Of Showing Of Interest or Authorization Cards on electronic submissions *supra.*

B. Notice of Filing of Petition

After the hearing examiner determines the Petition is facially adequate and supported by the required showing of interest, he or she serves the employer with a Notice of Filing of Petition, to be posted for at least five consecutive business days where notices to employees are typically posted. The Notice shall identify the union filing the Petition, describe the petitioned-for bargaining unit, and inform any would be intervening unions of the procedure for filing a Petition for Intervention. *See* 11.21.2.15 NMAC. The Notice should be issued within thirty (30) business days from the date of the filing. *Id.* As a practical matter, it will usually be issued either by mail along with the first notice of hearing, or by hand delivery at the first status conference. This Notice is required for all petitions except a Petition for Recognition as Incumbent. It is not required in those cases because the incumbent is already the exclusive representative pursuant to § 10-7E-24(B) so no intervenors are allowed.

C. Petitions for Intervention Filed

A Petition for Intervention must be filed, along with the required 30% showing of interest, within ten (10) business days of the posting of the Notice. *See* 11.21.2.15 NMAC.

D. Initial Status Conference

Once it is determined that the Petition is facially adequate and supported by the required showing of interest, the matter is typically set for an initial Status and Scheduling Conference. At this hearing, the parties will discuss any factual or legal issues they perceive, and the hearing examiner will determine if there is a QCR requiring a representation petition and/or election.

If there is no QCR raised concerning unit inclusion or exclusion, but the employer still desires a secret ballot election, the parties may at this time draft a Consent Election Agreement for the conduct of the election. *See infra.*

If there is no QCR and the employer does not desire a secret ballot election, the hearing examiner and parties should discuss voluntary recognition. *See infra.*

In the case of incumbents, if no QCR is raised concerning unit inclusion or exclusion, the hearing examiner may conduct the formal demonstration of majority support by card count at this hearing,

assuming proper notice has been given to the parties.

E. Disclaimer of Interest and Dismissal of Petition

The relationship between a recognized exclusive representative and the members of the bargaining unit is sometimes a fluid one. Fervor for union activities that accompanies an initial organizing effort ebbs and flows as workplace relationships change over time. Occasionally the relationship degrades to the point that one or the other party seeks to end the relationship altogether. Typically the representative relationship severed by means of a decertification proceeding but occasionally it is the union that seeks to end the relationship whether for financial reasons or due to lack of support generally. For example, in *Teamsters 492 v. Curry County*; PELRB 308-14, the Union sought to disclaim its interest in representing the existing bargaining unit after having negotiated its first Collective Bargaining Agreement for the unit when only one member of the unit showed up for the ratification vote. Similarly, in a case involving McKinley County Corrections Officers, after successfully negotiating a CBA, the Union members failed to ratify the CBA. Thereafter, the AFSCME Local disclaimed its interest. The parties in that case opined that high turnover in the corrections field is the largest factor in union disclaimer of interest cases.

Disclaimer offers unions in an untenable financial position a way out, even if years remain on the stated term of the collective bargaining agreement (CBA). A disclaimer of interest is an initiative by the union and it differs from a decertification: a petition for decertification is where the employees seek to leave the union, whereas a disclaimer of interest is the union walking away from the group of employees. On the other hand a petition for decertification takes more time especially as it requires a vote of over 50% to ultimately detach the union from the membership. A disclaimer of interest, like a successful petition for decertification, frees the membership to take independent legal action against an employer - no longer obliged to go through the representative body (the union) or subject to the often-plodding and frequently-political grievance process.

In 2020 the Board amended its rules to add provisions governing a union's disclaimer of its interest in representing a unit for which it has been recognized as the exclusive representative pursuant to NMSA 1978 § 10-7E-9 (2020) and NMAC 11.21.2.33 or NMAC 11.21.2.39. NMAC 11.21.2.42 concerning Disclaimer of Interest provides:

> "Any labor organization holding exclusive recognition for a unit of employees may disclaim its representational interest in those employees at any time by submitting a letter to the PELRB and the employer disclaiming any representational interest in a unit for which it is the exclusive representative. Upon receipt of a letter disclaiming an interest under this rule, the board shall cause to be posted in a place or places frequented by employees in the affected bargaining unit, a notice that the union has chosen to relinquish representation of the employees and direct staff to dismiss any petitions to decertify the exclusive representative of the disclaimed unit."

A union seeking to disclaim any present interest in a group of employees does so by filing a disclaimer of interest in writing. There is no special form for a disclaimer. In general, it should state that the disclaiming union waives and disclaims any right to represent (described) employees (or "employees

involved in Case . . ."). On request, conformed copies of a disclaimer may be furnished other parties in the case.

To be effective, the disclaimer must be clear and unequivocal and made in good faith. *Retail Associates*, 120 NLRB 388, 391–392 (1958); *Rochelle's Restaurant*, 152 NLRB 1401 (1965); and *Gazette Printing Co.,* 175 NLRB 1103 (1969). In *International Paper,* 325 NLRB 689 (1998), the Board characterized the request as being one of "sincere of abandonment with relative permanency." Thus, a union's bare statement is not sufficient to establish that it has abandoned its claim to representation if the surrounding circumstances justify an inference to the contrary. *Beall Bros.* 3, 110 NLRB 685, 687 (1954). Its conduct, judged in its entirety, must not be inconsistent with its alleged disclaimer *H. A. Rider & Sons*, 117 NLRB 517, 518 (1957), *McClintock Market*, 244 NLRB 555 (1979), *Ogden Enterprises*, 248 *Windee's Metal Industries*, 309 NLRB 1074 (1992).

In N.L.R.B. v. Circle A & W Products Co., 647 F.2d 924, 927 (9th Cir., 1981) (Pregerson, J., dissenting), the majority enforced the Board's order requiring the employer to bargain with the newly elected union, rejecting the contract-bar rule as a defense to an 8(a)(5) charge in these circumstances. petitions for an election. The Board will carefully scrutinize the "good faith" element of petitions for an election. The Board will carefully scrutinize the "good faith" element of disclaimer in this interest, and will refuse to lift the contract bar if there is evidence of collusion between the two unions to merely shift representation of the unit from one to the other. When there is no evidence of collusion, however, employers have been unsuccessful in raising the contract bar doctrine as an obstacle to a representation petition.

In addition to collusive agreements to shift representation from one union to another, unions also face potential pitfalls in attempting to use disclaimer unilaterally to expand or contract the scope of the bargaining unit. In Skilbeck, P.L.C., Inc., 345 NLRB No. 46 (2005) the Steelworkers had entered into a jurisdictional agreement with the Operating Engineers on heavy and highway construction jobs. Skilbeck, whose employees were represented by the Steelworkers, bid on a contract involving work in Ohio, which was the Operating Engineers' jurisdiction. An arbitrator ruled that the Steelworkers had to disclaim its interest in the employees working on the Ohio project, which the Steelworkers promptly did. While finding that the disclaimer was clear, unequivocal and in good faith, the Board nonetheless refused to give it effect. the Board held that any disclaimer that unilaterally changes the scope of the bargaining unit will be ineffective. See also *Mack Trucks, Inc.*, 209 NLRB 1003 (1974) (The scope of the bargaining unit has long been recognized as a matter that may not be unilaterally altered by either party.)

In any inquiry into the effectiveness of a disclaimer, the union's contemporaneous and subsequent conduct receives particular attention. *Miratti's, Inc.,* 132 NLRB 699 (1961); *Holiday Inn of Providence-Downtown,* 179 NLRB 337 (1969); and *Denny's Restaurant*, 186 NLRB 48 (1970). In the latter, the Board rejected a contention that the withdrawal or dismissal by the General Counsel of charges filed by the employer, alleging violations of Section 8(b)(7)(c) based on the picketing involved in the case, precluded a finding of conduct inconsistent with the union's asserted disclaimer. A disclaimer must not be accompanied by action that is inconsistent with the disclaimer, such as simultaneously seeking to process grievances, except where such grievance processing involves pre-disclaimer matters. *See also* Electrical Workers Local 58 (Steinmetz Electrical), 234 NLRB 633 (1978), an unfair labor practice case. In *VFL Technology Corp.*, 329 NLRB 458 (1999), a union's disclaimer issued pursuant to a "no raid" decision was considered ineffective where the union continued to represent the employees outside of that decision.

F. Effect of Disclaimer Upon a Pending Decertification Petition.

Occasionally, a Union will decide to disclaim its interest in representing the bargaining unit following receipt of a decertification petition filed by one of its constituents. NMAC 11.21.2.42 provides that upon the filing of a Union's Disclaimer of Interest, staff shall dismiss any petition to decertify the exclusive representative of the disclaimed unit that may be pending.

There is little PELRB jurisprudence on this topic but cases decided under the National Labor Relations Act are consistent with this practice, holding that a disclaimer may be made by a representative sought to be decertified as long as such disclaimer is clear and unequivocal and made in good faith. See, *Retail Associates*, 120 NLRB 388, 391–392 (1958); *Rochelle's Restaurant*, 152 NLRB 1401 (1965); and *Gazette Printing Co.,* 175 NLRB 1103 (1969). In *International Paper*, 325 NLRB 689 (1998), the Board characterized the request as being one of "sincere of abandonment with relative permanency." Thus, a union's bare statement is not sufficient to establish that it has abandoned its claim to representation if the surrounding circumstances justify an inference to the contrary. *Beall Bros.* 3, 110 NLRB 685, 687 (1954). Its conduct, judged in its entirety, must not be inconsistent with its alleged disclaimer. *H. A. Rider & Sons*, 117 NLRB 517, 518 (1957); *McClintock Market,* 244 NLRB 555 (1979); *Ogden Enterprises*, 248 NLRB 290 (1980); *Windee's Metal Industries,* 309 NLRB 1074 (1992).

Any form or letter from PELRB staff recognizing a union's disclaimer of interest as well as the dismissal of a Decertification Petition pursuant to NMAC 11.21.2.42, should contain a revocation of the prior certification.

G. Representation Hearing

A hearing regarding unit inclusion and exclusion will be necessary if there is any dispute as to whether the petitioned for bargaining unit is "appropriate". The PEBA defines an appropriate unit as one which is established on the basis of occupational groups or clear and identifiable communities of interest in employment terms and conditions and related personnel. Occupational groups shall generally be identified as blue-collar, secretarial clerical, technical, professional, paraprofessional, police, fire and corrections. The parties, by mutual agreement, may further consolidate occupational groups. Essential factors in determining appropriate bargaining units shall include the principles of efficient administration of government, the history of collective bargaining and the assurance to public employees of the fullest freedom in exercising the rights guaranteed by the Public Employee Bargaining Act. An appropriate bargaining unit will not include supervisors, managers or confidential employees. See § 13(B) of the Act.

Except in the case of unit clarification hearings, where the burden of proof is on the party seeking any change in an existing appropriate unit or in the description of the unit, neither party shall have the burden of proof. Instead, it is the duty of the hearing examiner to fully develop a record sufficient to decide the matter. *See* 11.21.1.22(A) NMAC. *See also AFSCME v. State of New Mexico, Human Services Department and New Mexico Public Employee Labor Relations Board*, No. D-202-CV-2016-07671 (J. Huling; July 19, 2017; *in re*: PELRB 309-15), in which AFSCME filed a Petition for Unit Clarification seeking an order finding that the "Wall to Wall" unit at the Human Services Department includes employees in the position of Attorney within the Child Support Enforcement Division. The district court upheld

the PELRB conclusion that the CSED attorneys are not exempt under the PEBA, i.e., they are not management, supervisory, or confidential employees, and therefore are within the wall-to-wall bargaining unit at HSD. However, it further concluded that there had not been a change in circumstances so that a petition for clarification is not the proper mechanism for resolving a dispute as to whether CSED attorneys are included or excluded from the bargaining unit.

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 *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 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, § 107E-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 multiyear 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 §§ 107E-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 the Director entered a Voluntary Dismissal. *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).

H. Board Review of Hearing Examiner's Recommended Decision

A request for review of a hearing examiner's dismissal or recommended decision must be filed within 10 business days following service of the decision. Thereafter, any other party may file a response within 10 business days of service of the notice of appeal. *See* 11.21.2.22(A) and (B) NMAC. The

request for review or notice of appeal shall state the specific portion of the Report to which exception is taken and the factual and legal basis for such exception. *See* 11.21.2.22(A) NMAC. However, even if a request for review has not been filed, the PELRB shall review the recommended disposition regarding the scope of the bargaining unit, and any decision shall have precedential effect. *Id. See also In re: Communications Workers of America, Local 7911 and Doña Ana County*, 1 PELRB No. 16 (Jan. 2, 1996).

The Board's review shall be conducted based on the existing record. *See* 11.21.2.22(C) NMAC.

I. Pre-election Conference

At least 15 business days before the election, the hearing examiner shall conduct a pre-election conference to resolve the details of polling locations, the use of manual or mail ballots or both, the hours of voting, the number of observers permitted for each side, and the time and place for counting the ballots. The director shall notify all parties by mail (and email if available) of the time and place of the pre-election conference, at least five days in advance of the conference. The conference may proceed in the absence of any party. The director will attempt to achieve agreement of all parties on the election details, but in the absence of agreement, shall determine the details. *See* 11.21.2.25 NMAC. Logistics can be arranged beforehand by way of a Consent Election Agreement; in which case, a pre-election conference is not necessary. Attempts at expanding the ballot options to include electronic participation in the election have been rejected by the PELRB but are being re-addressed at the time of this writing in the wake of the State's response in 2020 to the COVID 19 pandemic.

J. Notice of Election

At least 10 business days prior to the election, the employer shall post a Notice of Election provided by the director. The Notice shall identify the union(s) and employer, describe the petitioned-for bargaining unit, and state the polling date(s), time(s) and location(s). *See* 11.21.2.26 NMAC. It is the PELRB's practice to also include a Sample Ballot for posting along with the Notice of Election.

The Notice of Election and Sample Ballot are to remain posted consecutively for at least 10 business days, "in all lounges or common areas frequented by unit employees and in all places where notices to employees are commonly posted." *Id.* Some Consent Election Agreements also require posting at all doors leading into and out of the building(s) at which the relevant employees work.

K. Election Procedures

1. Manner of Election

Except in the case of incumbents, *supra*, elections shall be conducted by secret ballot. *See* § 10-7E-14(C) and 11.21.2.36 NMAC. Additionally, the parties may agree to either on-site, electronic balloting or mail balloting in the Director's discretion. The Rules expressly state a preference in favor of on-site balloting although in response to the COVID-19 pandemic, electronic balloting and mail balloting has become more frequent. *See* 11.21.2.25 NMAC. Attempts at expanding the ballot options to include electronic participation in the election. have been rejected by the PELRB but are being re-addressed

at the time of this writing in the wake of the State's response in 2020 to the COVID 19 pandemic.

2. Voter Eligibility

Employees in the bargaining unit shall be eligible to vote in the election if they were employed (and on non-probationary status, except for public school employees, *see* § 10-7E-4(Q)) during the last payroll period preceding the date of the consent election agreement or the Direction of Election issued by the hearing examiner or the Board, and are still employees in the unit on the date of the election. *See* 11.21.2.24(A) NMAC. *See also NEA- Carrizozo and Carrizozo Municipal Schools*, 1 PELRB No. 11 (May 19, 1995) (the list of employees eligible to vote must also 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). The employer shall provide the list of eligible voters at least 10 business days before the start of the election. *See* 11.21.2.27(C) NMAC. Employees who are not on the list of eligible voters may nonetheless file a ballot by using the challenged ballot procedures, *infra*.

3. Ballots

Each ballot shall provide a place to elect between the petitioning union, any intervenors that have provided a 30% showing of interest and shall include an option to select "no representation" except in the case of a run-off election where "no representation" was not one of the top two choices (*see* section 10 *infra*). Voting shall be by secret ballot prepared by the director and the position on the ballot shall be determined randomly. *See* 11.21.2.27(A) NMAC. Additionally, electronic ballots are now allowed in accordance with the New Mexico Uniform Electronic Transaction Act (UETA). *See* Adequacy of Showing of Interest or Authorization Cards on electronic submissions *supra*.

4. Employee Accommodation

Public employers shall allow eligible employees sufficient time away from their duties to cast their ballots and shall allow their employees who have been selected as election observers sufficient time away from their duties to serve as observers, although employers are not required to change the work schedules of employees to accommodate voting hours. *See* 11.21.2.27 (D) NMAC.

5. Absentee Ballots

Eligible employees may request an absentee ballot if they will be absent on the day of voting because of hospitalization, temporary assignment away from normal post of duty, leave of absence, vacation at a location more than 50 miles away from the polling place, or other legitimate reason. This is a departure from the practice under the NLRA, which does not allow absentee ballots. *See NLRB v. Cedar Tree Press*, 169 F.3d 794 (3d Cir. 1999), and NLRB Case Handling Manual ¶ 11302.4. An absentee ballot must be requested at least 10 business days prior to the commencement of the election, except for good cause shown. *See* 11.21.2.24 NMAC.

6. Observers

Each party is entitled to an equal number of observers to observe and assist in each polling area, and to witness the counting of the ballots. The number is in the discretion of the hearing examiner, but typically only one per polling location, per side, is allowed. Observers shall not be supervisory or

managerial employees, or labor organization employees, although party representatives may observe the counting of the ballots. *See* 11.21.2.29 NMAC.

7. Electioneering

No electioneering is permitted within 50 feet of any room in which balloting is taking place. *See* 11.21.2.28 NMAC.

"Whoever intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner, at any election held solely or in part for the purpose of electing such candidate, shall be fined under this title or imprisoned not more than one year, or both." 18 U.S.C. § 594 (2020)

C. Whoever commits electioneering too close to the polling place is guilty of a petty misdemeanor.

8. Challenged Ballots

Any observer or the PELRB election supervisor may challenge the eligibility of any person who seeks to vote. The Election Supervisor shall challenge anyone who is not on the previously provided list of eligible voters. Challenged ballots are placed in a separate envelope and will only be resolved and/or counted if they are or could be dispositive to the election results. If they could be dispositive, an investigation and/or hearing will be held on the voter's eligibility as soon as possible. *See*, 11.21.2.30 NMAC.

9. Tally of Ballots

It is the general practice to count the ballots immediately following the close of the polling, but the count can be conducted at a later time at the discretion of the election supervisor, if warranted by the circumstances. Immediately following the counting of the ballots, the Election Supervisor will serve a tally of ballots upon a representative of each party. The tally shall state:

- the total number of votes cast
- the number of votes cast for each labor organization listed
- the number of votes cast for no representation
- the percentage of employees in the unit who cast ballots
- the number of challenged ballots
- whether the 40% participation threshold was met and
- if the threshold was met, what the conclusive vote was.

10. Run-off Election

A run-off election is required if there are three or more choices on the ballot, at least 40% of eligible voters vote, yet no ballot choice receives a majority of the valid votes cast. Where necessary a run-off

election will be held within 15 business days of the initial election, and between the two choices receiving the highest number of votes.

11. Objections to Election

Either party may file objections to conduct affecting the result of the election, within five (5) business days of the service of the election tally results. *See* 11.21.2.34 NMAC. Objections concerning bargaining unit composition are not appropriate under this rule. *See Local 7911, Communications Workers of America and Doña Ana County*, Case No. CP 19-95(C), Supplemental Report of the Director in 1 PELRB No. 16 (March 4, 1996).

12. Certification

The director will serve the certification of election results within 10 business days of service of final tally if no objections are filed. If the election results in the selection of a bargaining representative, the certification will state the name of the labor organization selected and sets forth the positions in the bargaining unit. If a majority of the employees choose "no representation" the certification will show that no labor organization was selected as the bargaining representative. *See* 11.21.2.33 NMAC.

VII. Local Labor Boards

A. Introduction

As early as 2007, the PELRB has expressed its preference for "consistent and uniform administration of [PEBA] ... throughout the State of New Mexico," and implicitly opposed local board actions that might "threaten...uniformity in the proper administration of PEBA." *Gallup-McKinley Schools, supra,* 03-PELRB-2007 (undated), and attached Hearing Examiner Report. That expressed preference was stated despite exception to the uniform applicable of the PEBA associated with "grandfathered" boards that pre-dated the PEBA under NMSA 1978, § 10-7E-26(A) (2019).[12]

On March 5, 2020, Governor Michelle Lujan Grisham signed into law modifications the Public Employee Bargaining Act to clarify remedies available to the Public Employee Labor Relations Board and imposing requirements on local labor boards continued operations among other changes. Perhaps the most significant change effected by the 2020 amendments appears in NMSA 1978, § 10-7E-10 (2020) concerning conditions placed on local labor boards' continued existence, the prohibition of new labors being created and the transfer of authority upon termination of local boards. Local boards existing as of July 1, 2021, will cease to exist unless by December 31, 2021, they have submitted to the PELRB an affirmation that the public employer subject to the local board has affirmatively elected to

[12] Section 10-7E-26(A) of the former Act governed the oldest local labor boards and provided for the continued operation of local boards created by public employers other than the state prior to October 1, 1991. Section 107E-26(B) of the former Act was directed to grandfathered boards created after October 1, 1999, or before October 1, 1999, but substantially amended after January 1, 2003. In contrast to § 10-7E-26(A), § 10-7E-26(B) imposed many more the PEBA compliance requirements than did § 26(A). Finally, local boards created after January 1, 2003, pursuant to § 10 of the PEBA were required to follow all procedures and provisions of the PEBA with limited exceptions. The distinctions among those three distinct types of local boards with regard to how closely they must comport with the PEBA, have been eliminated by the 2020 amendment to the Act.

continue to operate under the local board and each labor organization representing employees of the public employer subject to the local board submits written notice to the Board that it also elects to continue to operate under the local board. *See* § 10-7E-10(D).

The amendments materially altered §§ 10-7E-9 and 10-7E-10 so that local boards may continue to exist under certain circumstances described herein and clarified that the administrative remedies available to aggrieved parties before the state or local boards include "actual damages related to dues, back pay including benefits, reinstatement with the same seniority status that the employee would have had but for the violation, declaratory or injunctive relief or provisional remedies, including temporary restraining orders or preliminary injunctions and excluding punitive damages or attorney fees." Section 10-7E-9 was amended to make clear that, just as the PELRB is required to promulgate rules necessary to accomplish and perform its functions and duties, so are local boards, including procedures for the designation of appropriate bargaining units, the selection, certification and decertification of exclusive representatives and the filing of, hearing on, and determination of, complaints of prohibited practices. The PELRB is required to review rules promulgated by a local board to ensure that such rules conform with the PEBA, and that any deviation from PELRB administrative rules is warranted by the particular circumstances of the local employer. Every local board shall notify the PELRB of any revisions of its rules or changes in its membership within thirty days of any such revisions. The Board in turn is to maintain current posting of that information. *See* § 10-7E-10(C).

Perhaps the most significant change effected by the 2020 amendments appears in § 10-7E-10 concerning conditions placed on local labor boards' continued existence, the prohibition of new labor boards being created and the transfer of authority upon termination of local boards. Local boards existing as of July 1, 2021, will cease to exist unless by December 31, 2021, they have submitted to the PELRB an affirmation that the public employer subject to the local board has affirmatively elected to continue to operate under the local board and each labor organization representing employees of the public employer subject to the local board submits written notice to the Board that it also elects to continue to operate under the local board. *See* § 10-7E-10(D).

A local board that fails to timely submit the affirmation shall cease to exist as of January 1 of the next even-numbered year. *See* § 10-7E-10(E). A local board may also cease to exist if:

1. At any time after July 1, 2020, a local board has a membership vacancy exceeding sixty days in length (§ 10-7E-10(F)).
2. Upon repeal of the local ordinance, resolution or charter amendment authorizing continuation of the local board; or a vote of a local board, which vote is filed with the PELRB (§ 10-7E-10(G).

Once a local board ceases to exist for any reason, it may not be revived. *See* § 10-7E-10(H). Section 10-7E-10(I) provides that and all matters pending before such local board shall be transferred to the PELRB for resolution and a prohibition against creating any new local boards after June 30, 2020, appears in § 10-7E-10(J).

Effective July 1, 2020, no new local labor boards may be created as was previously permitted under PEBA II. However, local boards existing as of July 1, 2021, may continue operating after December

31, 2021, if they have submitted to the PELRB an affirmation that the public employer has elected to continue operating under the local board and each labor organization representing its employees has submitted written notice to the PELRB that it also elects to continue to operate under the local board. A local board that fails to timely submit the affirmation shall cease to exist. *See* § 10-7E-10(E).

A labor organization that was recognized by a public employer as the exclusive representative of an appropriate bargaining unit on June 30, 2020, shall continue be recognized as the exclusive representative of the unit. Such recognition shall not be affected by a local labor board ceasing to exist pursuant to NMSA 1978, Section 10-7E-10 (2020). Such labor organization may petition for declaration of bargaining status under NMSA 1978, Section 107E-24(B) (2003).

Adjudicatory hearings before the PELRB or a local board must meet all minimal due process requirements of the state and federal constitutions, *See* § 10-7E-12(B).

Both the PELRB and any local board has the power to enforce the Public Employee Bargaining Act through the imposition of appropriate administrative remedies, which may include actual damages related to dues, back pay including benefits, reinstatement with the same seniority status that the employee would have had but for the violation, declaratory or injunctive relief or provisional remedies, including temporary restraining orders or preliminary injunctions. No punitive damages or attorney fees may be awarded. *See* § 10-7E-9.

Local board rules shall conform to the rules adopted by the Board and shall not be effective until approved by an order of the Board. On good cause shown, the Board may approve rules proposed by a local board, which rules vary from rules of the Board. All rules promulgated by a local board shall comply with state law. A rule promulgated by the Board, or a local board shall not require, directly or indirectly, as a condition of continuous employment, a public employee covered by the Public Employee Bargaining Act to pay money to a labor organization that is certified as an exclusive representative. *See* § 10-7E-9.

B. Approval of Local Boards

After June 30, 2020, no new local labor boards may be created as was previously permitted under PEBA II. However, local boards existing as of July 1, 2021, may continue operating if prior to December 31, 2021, they have submitted to the PELRB an affirmation that the public employer has elected to continue operating under the local board and each labor organization representing its employees has submitted written notice to the PELRB that it also elects to continue to operate under the local board. A local board that fails to timely submit the affirmation shall cease to exist. Once created by ordinance, resolution or charter, and once approved by the PELRB, a local board assumes the duties and responsibilities of the PELRB and shall follow all procedures and provisions of the Public Employee Bargaining Act unless otherwise approved by the Board. *See* § 10-7E-10.

Local board rules shall conform to the rules adopted by the Board and shall not be effective until

approved by an order of the Board. On good cause shown, the Board may approve rules proposed by a local board, which rules vary from rules of the Board. All rules promulgated by a local board shall comply with state law. A rule promulgated by the Board, or a local board shall not require, directly or indirectly, as a condition of continuous employment, a public employee covered by the Public Employee Bargaining Act to pay money to a labor organization that is certified as an exclusive representative. *See* § 10-7E-9.

The PELRB has enacted rules governing public employers' seeking to maintain an operating local board. A public employer other than the state that intends to maintain a local labor relations board after January 1, 2021, is required to file an application for approval to do so with the PELRB within the time limits specified in NMSA 1978, § 10-7E-10 (2020):

- No later than December 31, 2020, each local board shall submit to the Board copies of a revised local ordinance, resolution or charter amendment authorizing continuation of the local board. A local board that fails to meet the submission deadline set forth in this subsection shall cease to exist on January 1, 2021.

- No later than February 15, 2021, the Board shall determine whether the local ordinance, resolution or charter amendment authorizing continuation of a local board provides the same or greater rights to public employees and labor organizations as the Public Employee Bargaining Act, allows for the determination of, and remedies for, an action that would constitute a prohibited practice under the Public Employee Bargaining Act and contains impasse resolution procedures equivalent to those set forth in NMSA 1978, Section 10-7E-18 (2020).

- If the Board determines that a local ordinance, resolution or charter amendment authorizing continuation of a local board does not satisfy the requirements of this subsection, defects may be cured by June 30, 2021, or the local board will cease to exist. The Board shall certify by written order whether the requirements of this subsection have been met.

- No later than April 30, 2021, each local board shall submit to the board copies of its rules. A local board that fails to meet the submission deadline set forth in this subsection shall cease to exist on July 1, 2021.

- No later than May 30, 2021, the Board shall determine whether the rules of a local board conform to the rules of the Board, or for good cause shown, any variances meet the requirements of the Public Employee Bargaining Act.

- If the Board determines that the rules of a local board do not meet the requirements of this subsection, the local board may cure any defects by June 30, 2021, or it will cease to exist. The Board shall certify by written order whether the requirements of this subsection have been met by a local board.

- A local board existing as of July 1, 2021, shall continue to exist after December 31, 2021, only if it has submitted to the Board an affirmation that:
  - the public employer subject to the local board has affirmatively elected to continue to operate under the local board and
  - each labor organization representing employees of the public employer subject to the local board has submitted a written notice to the Board that it affirmatively elects to continue to operate under the local board.

- Once approved, the local board is required to re-affirm its intent as required by §10-7E-10 and submit that re-affirmation to the PELRB between November 1, and December 31 of each odd numbered year. A local board that fails to timely submit the affirmation required by this subsection shall cease to exist as of January 1 of the next even-numbered year.

11.21.5.8 NMAC.

An application to maintain a local board shall include an affirmation of the public employer that it intends to maintain a local public employee labor relations board and that such board existed, and its enabling legislation was approved by the Public Employee Labor Relations Board prior to July 1, 2021. In addition, the application includes:

- Written notice from each labor organization representing employees of the local government special district or school district submitting an affirmation

- The name of the local public employer; the name, address and phone number of the local governing body

- A complete and fully integrated copy of the local board resolution, ordinance or charter amendment creating the local board, along with an electronic document or compact disk containing the same information; and the evidence that the proposed resolution, ordinance or charter amendment has either been approved by the local governing body or submitted for approval pursuant to local procedures conforming with NMSA 1978, Sections 10-7E-9 and 10-7E-10 (2020).

- A verified copy of the procedural rules enacted by the applying local board necessary to accomplish its functions and duties, such as procedures for the designation of appropriate bargaining units, the selection, certification and decertification of exclusive representatives and the filing of, hearing on, and determination of, complaints of prohibited practices.

As a result of the amendments to § 10, 37 local boards ceased to exist, leaving only 15 local boards opting to continue operating. *See* footnote 2 in Section B, History and Overview of Public Bargaining in New Mexico, *supra* for list of those local boards that went out of existence by operation of § 10-7E-10.

All resolutions, ordinances or charter amendments under Subsection A above shall follow the Board

approved templates provided at www.state.nm.us/pelrb; provided, however, that the public employer may propose variances to the templates where appropriate, pursuant to 11.21.5.10 NMAC.

Upon receipt of an application for approval seeking variance from the Board approved templates, the Director shall review the application for conformance with NMSA 1978, Sections 10-7E-9 and 10-7E-10 (2020) and submit a recommendation to the PELRB for approval. If in the Director's discretion it is desirable to hold a hearing or confer with the local public employer and any identified interested labor organizations before making a recommendation to the Board a status and scheduling conference may be held.

11.21.5.9 NMAC

In certain instances, variances from the Board approved templates may be required by the unique facts and circumstances of the relevant local public employer. In such instances, the application for approval shall additionally specify the particular facts and circumstances requiring such variance and inform the Board of any incumbent exclusive representative under Subsection B of NMSA 1978, Section 10-7E-24 (2003)and 11.21.2.36 NMAC and any other labor organizations believed by the public employer to be involved in attempting to organize any local public employees.

In the event that the Board determines that such variance is warranted, and the resolution, ordinance or charter amendment otherwise conforms to the requirements of the Act and the Board's rules, the director will process the application accordingly.

11.21.5.10 NMAC.

Public employers that wished to maintain a local public employee labor relations board after January 1, 2021 pursuant to 11.21.5.8 NMAC, submitted a verified copy of the procedural rules enacted by the applying local board necessary to accomplish its functions and duties under the Act no later than April 30, 2021. Any proposed changes to the procedural rules of a local board would then be approved by the PELRB prior to being enacted by the local board.

11.21.5.11 NMAC.

After PELRB approval of a local board, any amendments to the ordinance, resolution, or charter amendment creating the local board, and any amendments to procedural rules, shall be filed with the PELRB. Upon a finding by the Board that the local board no longer meets the requirements of Section 10 of the Act, the local board shall be so notified and be given a period of 30 days to come into compliance or prior approval shall be revoked and all matters pending before the local board shall be removed to the PELRB.

11.21.5.13 and 11.21.5.14 NMAC.

VIII. Prohibited Practices

The Board enforces and protects the rights guaranteed both public employers and employees under PEBA through the investigation and adjudication of charges of prohibited labor practice charges (PPC). The PELRB has the power to enforce provisions of the Public Employee Bargaining Act through the imposition of appropriate administrative remedies. (NMSA 1978, § 10-7E-9 (2020)) *See* "Remedies" section, *infra.* A "Prohibited Practice" is defined in the Board's rules as a violation of §§ 10-7E-19, 10-7E-20 or 10-7E-21(A) of the Act. *See* 11.21.1.7(B)(10) NMAC.

NMSA 1978, Section 10-7E-19 (2020), provides that "a public employer or his representative" shall not:

"A. discriminate against a public employee with regard to terms and conditions of employment because of the employee's membership in a labor organization
B. interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act
C. dominate or interfere in the formation, existence or administration of a labor organization
D. discriminate in regard to hiring, tenure or a term or condition of employment in order to encourage or discourage membership in a labor organization
E. discharge or otherwise discriminate against a public employee because he has signed or filed an affidavit, petition, grievance or complaint or given information or testimony pursuant to the provisions of the Public Employee Bargaining Act or because a public employee is forming, joining or choosing to be represented by a labor organization
F. refuse to bargain collectively in good faith with the exclusive representative
G. refuse or fail to comply with a provision of the Public Employee Bargaining Act or Board rule; or
H. refuse or fail to comply with a collective bargaining agreement."

Just as PEBA prohibits certain conduct by employers and their agents, activities of employees and their representatives are similarly circumscribed. NMSA 1978, Section 10-7E-20 (2003) provides that a public employee or labor organization or its representative shall not:

"A. discriminate against a public employee with regard to labor organization membership because of race, color, religion, creed, age, sex or national origin
B. interfere with, restrain or coerce any public employee in the exercise of a right guaranteed pursuant to the provisions of the Public Employee Bargaining Act
C. refuse to bargain collectively in good faith with a public employer
D. refuse or fail to comply with a collective bargaining or other agreement with the public employer
E. refuse or fail to comply with a provision of the Public Employee Bargaining Act; or

F. picket homes or private businesses of elected officials or public employees."

Sections 10-7E-19(G) and 10-7E-20(E) are referred to as "catch-all provisions" for violations of any substantive PEBA rights other than those specifically enumerated in §§ 10-7E-19 to 22 rather than an opportunity for a Complainant to establish multiple violations for the same offense. As stated by the Hearing Examiner in *AFSCME v. Department of Corrections*, PELRB Case No. 150-07 Hearing Examiner's Report at 3 (Feb. 6, 2008) to interpret § 10-7E-19(G) otherwise "would result in duplicative liability, and it is unlikely the Legislature intended every violation of a subsection of §19 to result in two separate counts of liability".

Section 10-7E-21(A) prohibits public employees or labor organizations from engaging in a strike and when read in conjunction with § 10-7E-20(F) protects the public and ensures the orderly operation and functioning of government by prohibiting strikes, slowdowns and lockouts, as well as the picketing of the homes and businesses of elected officials and public employees.

A. Pre-filing Assistance

The PELRB's agents provide pre-filing assistance to the public and are available daily in the Board's Albuquerque office to answer inquiries and to assist members of the public who visit, telephone, or submit written inquiries regarding the filing of representation case petitions. Board agents will answer public inquiries regarding the Act and the agency as accurately, completely, and as concisely as possible but they may not give legal advice and should explain that advice cannot be given particularly while a prohibited labor practice charge is pending. Thus, the Board's agents will not offer an opinion as to whether any specific conduct violates the Act but may describe the types of conduct which, depending on all of the surrounding circumstances, may constitute a violation of the Act and refer inquiries to applicable provisions of the PEBA or the Board's rules. Furthermore, statements of the agent cannot be considered as an official pronouncement of law binding on the agency. In circumstances where an individual is essentially seeking legal advice, the Board agent may suggest that the individual seek private counsel. Although under no circumstances should a specific attorney be recommended, the Board agent may direct an individual to the State Bar Association referral service. For additional information concerning the Act and the Board, including forms, interested parties are referred to the Board's website. Under the "Forms" tab individuals will find a "Prohibited Practices Complaint" and an "Answer to PPC" along with forms used in other proceedings.

B. Initiation of Prohibited Practices Complaints (PPC)

A Prohibited Practices Complaint is filed by a public employee or his representative alleging one or more violations of the subparagraphs of § 10-7E-19 or by a public employer or his representative alleging violations of § 10-7E-20 or 21(A).

Prohibited Practices Complaints (PPCs) are designated as "100 series" cases according to the Board's case tracking system and assigned a case number accordingly. Upon receipt (refer to 11.21.1.10 NMAC for details concerning what constitutes filing with the PELRB and 11.21.2.9 NMAC for the Board's

requirements concerning service of a copy of the petition on all parties) the PPC will be date stamped, assigned a case number in chronological order, and logged into a case data base providing basic information from the complaint. If the case involves the State of New Mexico or a State Agency as a party a courtesy copy of the documents to the Director of Labor Relations at the State Personnel Office.

After receipt of a Petition the Director performs a preliminary review for facial adequacy based on the following:

- Is the Complaint on a form furnished by the director and does it set forth, at a minimum, the name, address and phone number of the public employer, labor organization, or employee against whom the complaint is filed and of its representative if known, the specific section of PEBA claimed to have been violated; the name, address, and phone number of the complainant; a concise description of the facts constituting the asserted violation; and a declaration that the information provided is true and correct to the knowledge of the complaining party?

- Does the Complaint allege a violation of NMSA 1978, §§ 10-7E-19, 20 or 21(A) (2003, as amended through 2020)? *See* 11.21.1.7(10) NMAC.

- Was the PPC timely filed? Any complaint filed more than six months following the conduct claimed to violate the act or more than six months after the complainant was either discovered or reasonably should have discovered such conduct shall be dismissed. *See* 11.21.3.9 NMAC.

- Was the PPC properly filed in the correct format? All papers required or permitted to be filed with the director, a hearing examiner or the Board shall be on an official form prepared by the director, if available, or on 8 $^{1}/_{2}$ by 11 white paper, double spaced. All papers shall show at or near the top of the first page the case name and, if available, the case number, and shall be signed by the filer. *See* 11.21.1.26 NMAC. The PPC may be either hand-delivered to the Board's office in Albuquerque during its regular business hours or sent to that office by United States mail, postage prepaid or by the New Mexico state government interagency mail. A document will be deemed filed when the director receives it. Documents sent to the Board via fax will be accepted for filing as of the date of transmission only if an original is filed by personal delivery or deposited in the mail no later than the first workday after the fax is sent. *See* 11.21.1.10 NMAC.

- A representative of a party who is not an employee of the party shall file a signed notice of appearance, stating the name of the party, the title and official number (if available) of the case in which the representative is representing the party, and the name, address, and telephone number of the representative. The filing of a pleading containing the above information is sufficient to fulfill this requirement. *See* 11.21.1.11 NMAC.

The PELRB follows New Mexico courts in utilizing the liberal "notice pleading" standard. *See AFSCME v. City of Rio Rancho*, PELRB Case No. 159-06, Hearing Examiner's letter decision on City's Motion to Dismiss (Nov. 17, 2006) ("[b]ased on the similarity between PELRB and New Mexico Rule of Civil Procedure 1-008(A), it is apparent that PELRB rules, like New Mexico Rules of Civil Procedure, call for a notice pleading standard in testing the legal sufficiency of the complaint"). *See also Garcia v. Coffman*, 1997-NMCA-092, ¶ 11, 124 N.M. 12, 946 P.2d 216 (under the notice pleading standard, "it is sufficient that [the] defendants be given only a fair idea of the nature of the claim asserted against them sufficient to apprise them of the general basis of the claim") (internal quotations and citation omitted), and *Sanchez v. City of Belen*, 1982-NMCA-070, 98 N.M. 57, 60, 644 P.2d 1046, 1049 (the general policy under the notice pleading standard is to provide for "an adjudication on the merits" rather than allowing "technicalities of procedures and form" to "determine the rights of the litigants").

If, after initial review, the PPC is determined to be inadequate, notice of any defect is given only to the complainant with leave to correct any deficiencies within five business days. If the complainant fails to cure the identified deficiencies within the time allotted, written notice of dismissal is served on all parties. *See,* 11.21.3.12(A) NMAC and 11.21.1.8 NMAC.

Only the PELRB has authority to investigate and adjudicate claims of prohibited labor practices under its jurisdiction. It does so under an administrative format that relies logistically on an Executive Director for processing and adjudicating in the first instance such claims subject to its review. The director has authority to delegate to other board employees or outside contractors any of the authority delegated to the director by the Board's rules and may appoint himself or a board member as the hearing examiner. It has been suggested that whenever the Director investigates a hearing officer other than the director must be designated under 11.21.3.14 NMAC. The Board has rejected that reading because the Director is required by 11.21.3.12 NMAC to investigate in every case and as a consequence, the Board would be required to delegate either the investigative or the hearing officer responsibilities to an outside contractor or a Board member in every case. The contractor option poses a fiscal impossibility. The Board appointee option presents a potentially precarious procedural posture if a quorum could not be maintained, or the remaining two voting members deadlocked on review of their peer's recommended decision. The Board rejected the option of not conducting the initial investigation at all as an impermissible abrogation of the Director's duty to investigate established by 11.21.3.12 NMAC.[13]

The Board relied principally on *Winthrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712, (1975) for the proposition that before the combination of the investigative and adjudicative functions necessarily creates an unconstitutional risk of bias, one must first overcome a presumption of honesty and integrity in those serving as adjudicators and it must convince that, under a "realistic appraisal of psychological tendencies and human weakness", conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented. *Id.* at 48, citing *In re: FTC v. Cement*

[13] "...recusal is reserved for compelling constitutional, statutory, or ethical reasons because a judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified." *State v. Hernandez,* 1993-NMSC-007, 115 N.M. 6, 20, 846 P.2d 312, 326

Institute 333 U.S. 683 (1948); *Kennecott Copper Corp., v. FTC,* 467 F.2d 67, 79 (10th Cir. 1972) (Congress designed the FTC to combine the functions of investigator, prosecutor and judge and that "the courts have uniformly held that this feature does not make out an infringement of the due process clause of the Fifth Amendment".) The Board also relied on the "doctrine of necessity" followed in *Seidenberg v. New Mexico Bd. of Medical Examiners*, 1969-NMSC-028, 80 N.M. 135, 452 P.2d 469:

> "From the very necessity of the case has grown the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises. If the law provides for a substitution of personnel on a board or court, or if another tribunal exists to which resort may be had, a disqualified member may not act. But where no such provision is made, the law cannot be nullified or the doors to justice barred because of prejudice or disqualification of a member of a court or an administrative tribunal."
>
> *Brinkley v. Hassig,* 83 F.2d 351 (10th Cir. 1936).

In administrative proceedings such as those before the PELRB due process is "flexible in nature and may adhere to such requisite procedural protections as the particular situation demands" *State ex rel. Battershell v. City of Albuquerque*, 1989-NMCA-045, 108 N.M. 658, 662, 777 P.2d 386, 390 *citing Morrisey v. Brewer*, 408 U.S. 471, 481 (1972).

C. Service

Any motions, pleadings or papers filed subsequent to the PPC must be served on the respondent. Requests for continuances must be made in writing pursuant to 11.21.1.16(C) NMAC. In all cases of request for extension or continuance, whether expressly required by the rules or not, the best practice is to:

(a) seek concurrence or indicate why concurrence was not sought or obtained,
(b) state the specific reasons for the request, rather than vaguely citing "schedule conflict" or "unavailability;" and
(c) in the case of continuances, propose alternate dates for which either all parties or the requesting party shall be available (the former in the case of unopposed motions, the latter in the case of opposed motions). *See* 11.21.1.23 NMAC.

However, because the PELRB must first conduct an initial screening of all PPCs, the complainant may wish to delay service of the PPC until after this review has been conducted, typically within one business day of filing. *See* 11.21.3.12(A) NMAC.

D. Answer

An answer must be filed within 15 business days after service of the PPC. 11.21.3.10(A) NMAC. Failure to do so may result in entry of a default judgment. 11.21.3.11 NMAC. Typically, if an answer is not timely filed, PELRB staff issues an Order to Show Cause and sets the matter for a hearing to

show why default judgment should not be entered. If the answer is filed before that hearing, the show cause hearing will be deemed converted into a Status and Scheduling Conference.

E. Status Conference

Upon receipt of the Employer's response, the matter is set for a Status and Scheduling Conference. *See* 11.21.1.16(A) NMAC.

At this conference, the parties may be asked to summarize their respective pleadings. Alternately, the hearing examiner may summarize the pleadings, to assist the parties in framing and narrowing the issues raised.

At this conference, the parties will frequently recognize opportunities for possible settlement, and discussions concerning settlement are often held off the record and outside of the presence of the hearing examiner.
If settlement does not appear likely, the hearing examiner and parties will go back on the record and resume scheduling the matter for hearing. Scheduling may include, if requested and appropriate, discovery, pre-trial motions, and the issuance of subpoenas. *Id.*

F. Deferral to Grievance-Arbitration Procedures

The hearing examiner may, on motion of any party, defer hearing a PPC that alleges a contract violation in favor of having the parties first proceed through the negotiated grievance-arbitration procedures. *See* 11.21.3.22 NMAC.

Deferral is allowed where the subject matter of the PPC requires interpretation of the CBA, the parties waive in writing any objections to timeliness or other procedural impediments to the processing of the grievance-arbitration, and the resolution of the contract dispute will likely resolve the issues raised in the PPC. *Id. See also Collyer Insulated Wire,* 192 NLRB 837, 842 (1971) (deferral is appropriate when (a) the dispute arises within the confines of a collective bargaining relationship, (b) the employer has indicated its willingness to resolve the issue through the grievance-arbitration process, and (c) the contract and its meaning lie at the center of the dispute). *See AFSCME, Local 3999 v. City of Santa Fe*, PELRB No. 111-14.

Although a court generally determines whether "a controversy is subject to an agreement to arbitrate" (NMSA 1978, Section 44-7A-7(b) (2001).) when the parties have "clearly and unmistakably" reserved an issue to the arbitrator, then the arbitrator shall proceed to decide it. *See AT&T Techs., Inc. v. CWA*, 475 U.S. 643, 649 (1986); *see also Clay v. N.M. Title Loans, Inc.*, 2012-NMCA-102, ¶ 10, 288 P.3d 888, 893 ("The Court uses ordinary state-law principles that govern the formation of contracts to determine whether the parties clearly and unmistakably agreed to arbitrate an issue, including arbitrability." (internal quotation marks and citation omitted).

In contrast, the New Mexico Court of Appeals in *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) found that a union "manifested an intent to forgo what it considered an inadequate remedy in favor of swifter justice before the district court" when it sought an injunction and temporary restraining order to prevent the City of Albuquerque from closing a drug treatment program and laying off bargaining unit employees. The Court of Appeals held that the union waived its right to arbitration by invoking the court's discretionary powers.

In another case, the Court of Appeals ruled that PEBA requires that the provisions of a CBA apply to all employees within the bargaining unit and an employee cannot opt-out of arbitration provisions because he is not a member of the union. *See Luginbuhl v. City of Gallup,* 2013-NMCA-053.

G. Deferral to Other Administrative Proceedings

The hearing examiner may also defer hearing a PPC when "essentially the same facts and ... essentially the same issues" have been raised in an administrative proceeding before another agency." *See* 11.21.3.21 NMAC. Alternatively, the hearing examiner may request the other agency to hold its proceedings in abeyance; or the hearing examiner may continue processing the matter while the other agency does as well.

Under this rule, the PELRB may be able to coordinate its processing of related matters with the SPB and/or other boards charged with reviewing disciplinary action taken against public employees. Although the subject has not been tested, the decision of one agency to defer to the other will likely depend in large measure on the nature of the allegations raised by each side. For instance, deferral by the PELRB may be warranted where the defense of the discipline depends on complicated issues removed from PEBA, such as professional licensing, other bodies of law, egregious moral turpitude and/or criminal conduct, while the allegations of discrimination, retaliation, interference, or coercion under PEBA are comparatively straightforward. In contrast, deferral by the other agency may be warranted where the PPC and the appeal of the discipline allege a complicated fact pattern and/or history of PEBA violations, while the defense of the discipline consists of an instance or pattern of misconduct that does not pose unusual problems in evaluation and analysis.

In the event that both agencies do continue processing the matter, *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) principles may apply to give binding effect to the first ruling. *See, e.g., City of Deming v. Deming Firefighters Local 4521*, 2007-NMCA-069, ¶ 17, 141 N.M. 686, 160 P.3d 595 (raising possibility of preclusion where one labor board hears a matter also pending before another labor board); *see also Moffat v. Branch,* 2005-NMCA-103, ¶ 11, 138 NM 224 (for claim preclusion to bar a claim, "[t]he two actions (1) must involve the same parties or their privies, (2) who are acting in the same capacity or character, (3) regarding the same subject matter, and (4) must involve the same claim"), and *Hyden v. Law Firm of McCormick, Forbes, Caraway & Tabor,* 1993-NMCA-008, 115 N.M. 159, 164 ("[t]o invoke collateral estoppel ..., the moving party must show that (1) the subject matter or causes of action in the two suits are different; (2) the ultimate fact or issue was actually litigated; (3) the ultimate fact or issue was necessarily determined; and (4) the party to be bound by collateral estoppel had a full and fair opportunity to litigate the issue in the prior suit').

Practitioners should also be aware that in one case, the Court of Appeals held that a non-union member

covered under a collective bargaining agreement who declined to pursue the CBA's grievance procedure in favor of the City's grievance process under its Personnel rules, would be denied a district court writ of prohibition because the CBA's arbitration clause applied. The Petitioner in *Luginbuhl v. City of Gallup,* 2013-NMCA-053, was a full-time police officer for the Gallup Police Department from October 27, 2007, until his termination on June 8, 2011. During his employment, he chose not to join the Union, did not pay dues, and never sought the assistance of the Union. Despite his decision to decline union membership, Luginbuhl acknowledged that he was a regular full-time, non-probationary, sworn police officer employed by the GPD and a member of the bargaining unit covered by the CBA. The CBA contained negotiated terms establishing a disciplinary, grievance and appeal process. Luginbuhl initiated a grievance to challenge his termination, according to the City's personnel rules and regulations for non-union employees, and not a grievance pursuant to the CBA. The primary difference between the two processes is that the CBA requires arbitration, whereas the City Personnel procedure does not. He followed the first three steps of the grievance process. However, he elected not to follow through with the fourth and final step under the CBA: arbitration. Instead, claiming he was not bound by the CBA because of his non-union status, he filed his petition in district court seeking injunctive relief. A hearing was held on December 20, 2011, at the end of which the petition was denied.

The Court of Appeals reasoned that Petitioner's contention that, as a non-union member of the bargaining unit, he is not bound by the agreement to arbitrate disputes is refuted by the plain language of the PEBA and case law including United States Supreme Court precedent standing for the proposition that a majority of the employees having voted in favor of representation, all are represented whether they are members of the employee organization or not, and whether or not they agree with all of the policies, acts, and contracts of the employee organization. The City's Labor Management Relations Ordinance also states that "a CBA cover[s] all employees in the bargaining unit." City of Gallup Labor Management Relations Ordinance Ch. 12, § 1-12-12 (2008).

H. Motion to Dismiss

Motions to Dismiss are typically based on either jurisdictional grounds, or failure to state a claim but other procedural grounds have also been asserted as discussed below.

1. Jurisdiction

Lack of jurisdiction may be alleged for a variety of reasons, such as the existence of local board; failure to exhaust administrative or contract remedies such as grievance arbitration; or the subject matter is preempted by the State Personnel Act or SPO rules or regulations. The PELRB and its staff have generally maintained that the PELRB retains jurisdiction even if there is an existing local board, but it will also decline to exercise that jurisdiction if the local board is fully operational and functioning. *See* Local Board Section.

Failure to exhaust the contract remedy of grievance arbitration may constitute a jurisdictional bar requiring dismissal of the PPC if:

a) the subject matter is one for which grievance arbitration would have been appropriate; and

b) the employer has not challenged the appropriateness or jurisdiction of grievance arbitration.

See supra (regarding contract violations). *See also AFSCME v. Department of Health,* PELRB Case No. 168-06; Hearing Examiner's Decision on Motion to Dismiss, and *AFSCME v. Public Regulation Commission*, PELRB Case No. 154-06, Hearing Examiner's Decision on Motion to Dismiss, and *United Health Professionals of New Mexico, AFT, AFL-CIO v. UNM Sandoval Regional Medical Center*, PELRB Case No. 306-21, Hearing Examiner's Denial of Motion to Dismiss.

2. Failure to Exhaust Grievance Arbitration

Under the doctrine of exhaustion of administrative remedies, failure to timely exhaust contract remedies may result in a jurisdictional bar to hearing a claim turning on contract interpretation. Accordingly, generally a complainant should always plan to first exhaust negotiated grievance-arbitration procedures provided for in the CBA. However, there are exceptions to the doctrine of exhaustion. First, exhaustion will not be required as to any claim for which deferral to grievance arbitration would be inappropriate. Second, the PELRB will not require exhaustion where the State Personnel Office (SPO) has indicated that it would oppose grievance and arbitration on grounds that challenged action was consistent with SPO rules and could therefore only be appealed to the SPO Director under Article 14, Section 1(B) of the CBA. *See AFSCME Local 477 New Mexico Public Regulation Commission*, PELRB Case No. 154-07, Hearing Examiner's letter decision on a motion to dismiss (Oct. 23, 2007).

3. Deferral

Related to, but conceptually distinct from, the issue of exhaustion is the issue of deferral. 11.21.3.22 NMAC provides for deferral to grievance arbitration, if the PPC requires contract interpretation, involves the same issues as the grievance, and the parties will waive any procedural impediments in writing. *Id. See also Collyer Insulated Wire*, 192 NLRB 837 (1971).

When a PPC "turns on" contract interpretation, deferral is the well-settled norm under the NLRA, and one PELRB hearing examiner has concluded that PEBA and NLRA are not sufficiently different to warrant a divergence from NLRA precedent in this regard. *See Department of Health*, Case No. 168-06, *supra* (although the NLRA does not designate violation of a CBA as an unfair labor practice, it nonetheless prohibits such conduct by providing a right of private action for it in federal court).

Deferral is not appropriate in the following cases:

- futility[14]
- employer obstruction of the grievance arbitration process
- breakdown of collective bargaining relationship
- the PPCs allege discrimination, interference with PEBA rights, or violation of another

[14] Note however, that the futility claim may not rest solely on alleged "bias at the lower echelons of the grievance process." *See Douglas v. American Information Technologies Corp.*, 877 F.2d 565, 574 (7th Cir. 1989).

PEBA right that is independent of the contract

See Dept. of Health, Case 168-06, *supra*; *see also* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters 17 V, 18 III, IV and V, and cites therein.

Additionally, the argument for deferral will be "far less compelling" as a matter of administrative efficiency" when the PPC raises both contract claims and other claims that are not appropriate for deferral. *Sheet Metal Workers Local 17*, 199 N.L.R.B. 166 (1972); *but see Dubo Manufacturing*, 142 N.L.R.B. 431 (1963) (deferring some claims and not others).

Finally, in one case the hearing examiner declined to defer the matter to grievance arbitration because the contract language at issue was not ambiguous and did not, therefore, require an arbitrator's special expertise in contract interpretation. *See AFSCME v. State*, PELRB Case No. 143-07, Hearing Examiner's letter decision on Motion to Defer (Jan. 15, 2008); *see also Caritas Good Samaritan Medical Center*, 340 NLRB 61, 62-63 (2003) (where the terms of the CBA are "clear and unambiguous ... the expertise of an arbitrator was not required to interpret the language to establish whether the Respondent violated the Act"); *Grane Health Care, Inc.*, 337 NLRB 432, 436 (2002) (where the terms of the CBA are "clear and unambiguous," the matter did not "turn on contract interpretation," and "therefore the special interpretation skills of an arbitrator would not be helpful"); and *Struthers Wells Corp.*, 245 NLRB 1170, 1171 n. 4 (1979) (that a claim should not be deferred where the CBA "provision is on its face clear and ambiguous," such that the issue "does not involve contract interpretation").

However, in Case 143-07 the threshold question of deferral required analysis of the exact same contract language under a legal standard essentially equivalent to that governing the pending motion to dismiss if the matter had not been deferred. Accordingly, in this case administrative efficiency argued strongly in favor of the PELRB hearing examiner continuing to process the matter.

4. Failure to State a Claim

The PELRB follows New Mexico jurisprudence regarding dismissal motions. A motion to dismiss for failure to state a claim tests the legal sufficiency of a complaint, and all facts alleged in a complaint and reasonable inferences therein are taken as true. *See Herrera v. Quality Pontiac*, 2003-NMSC-18, ¶ 2, 134

N.M. 43, 46; *Southern Union Gas Co. v. New Mexico PUC*, 1997-NMSC-56, ¶ 27, 124 N.M. 176, 184. Because New Mexico follows liberal notice pleading rules, technical deficiencies in the form of allegations will not generally support a dismissal for failure to state a claim. *See supra.*

5. Preemption

Preemption of remedy or subject matter by the State Personnel Act or its regulations, or other law has been occasionally raised but has not yet been fully adjudicated and/or reviewed. *See* Remedies, *infra*. *See also United Health Professionals of New Mexico, AFT, AFL-CIO v. UNM Sandoval Regional Medical Center*, PELRB Case No. 306-21, where the PEBA superseded a previously enacted legislation.

6. Failure to Abide by Time Limits

The jurisdiction of the Board has been challenged because of its failure to abide by the time limitations set forth in its own rules. *See* 11.21.2.18 NMAC, 11.21.2.21 NMAC, 11.21.3.14 NMAC and 11.21.3.18 NMAC. The challenge by the State Personnel Office arose after extensive pre-hearing motion practice including two separate motions to Dismiss filed by the State, a Summary Judgment motion, a Motion to have the merits heard by the Board *en banc* without a Hearing Officer, a Motion to Disqualify the Hearing Officer, all of which needed to be briefed and argued before they could be decided and which necessarily delayed holding a hearing on the merits of the Union's claims, coupled with a period when the Board was without an Executive Director to schedule and hold hearings, the State moved to dismiss the Union's claims for failure of the Board to hold a merits hearing within the deadlines set in the Board's rules. *See AFSCME, Council 18 v. State of New Mexico*, 33-PELRB-2012. The PELRB held that the limits established for the Board to investigate complaints and conduct hearings are directory rather than mandatory. Exceeding those limits does not require dismissal of the complaint. That decision is in accord with *N.M. Dep't of Health v. Compton,* 2000-NMCA-078, ¶¶ 12-13, 129 N.M. 474. (Although some mandatory statutory time limitations are jurisdictional, others are only intended to promote expeditious review. Under New Mexico case law, "mandatory statutory requirements...raise a bar to jurisdiction when the requirement [is] essential to the proper operation of the statute.") *Compare, Robert Narvaez v. New Mexico Department of Workforce Solution and Southwest Tyre LTD.,* 2013-NMCA-079, Docket No. 32,149 (consolidated with 32,256) (filed April 23, 2013), *cert. denied*, June 19, 2013, No. 34,169. (An administrative agency is bound by its own regulations. An administrative error does not alter the failure to follow the regulations that require the Department to act promptly on claims. It certainly does not extend the time limits of the regulations.)

The Board had previously taken a general position that exceptions based on technical violations of the rules for the Board or its agents to conduct a hearing are directory rather than mandatory, so their violation does not deprive the Board of jurisdiction. *See AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994). *See also Local 7911, Communications Workers of America and Doña Ana County,* 1 PELRB No. 19 (Aug. 1, 1996), *citing Littlefield v. State of New Mexico,* 114 N.M. 390 (1992).

I. Summary Judgment

The PELRB has long followed New Mexico Rules of Civil Procedure, Rule 1-056 when deciding a motion for summary judgment. *See AFSCME Council 18 v. New Mexico Department of Labor,* 01-PELRB-2007 (Oct. 15, 2007). Applying that rule the movant shall set out a concise statement of all material 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. *See* Rule 1-056 NMRA.

The respondent shall file a response that includes a concise statement of all material facts as 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. *Id.* Both sides may include supporting affidavits, based on personal knowledge and setting forth evidence that would be

admissible at trial. *Id.*
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."

J. Withdrawal/Dismissal of Complaint

Withdrawal of a PPC occurs under a variety of circumstances including settlement of the underlying charge or upon the request of the director after initial screening resulted in a preliminary decision that the complaint is inadequate as discussed *supra*. While both the PELRB and the NLRB provide for the withdrawal of charges, whether voluntarily ("unsolicited" in the NLRB parlance) or upon request, the PELRB's rules differ considerably from those followed by the NLRB.

For example, under both the PELRB rules and the NLRB rules a charging party may request to withdraw an unfair labor practice charge or any portion thereof at any time, the NLRB's Regional Director has discretion whether to approve the withdrawal request.

Whenever a charging party requests an unsolicited withdrawal of the entire charge or any portion of it, the NLRB Board agent is directed to ascertain the reasons for withdrawal, included that reason in a recommendation to the Regional Director who has discretion to decline to approve a withdrawal based on whether the settlement was intended to resolve the unfair labor practice charge and whether it complies with the NLRA.

In contrast, the PELRB rules separate to some degree the settlement of issues from the withdrawal of the charge so that the director or the Board have a different level of discretion depending on whether the request for withdrawal involves an adjustment of a claim and whether it is made before or after commencement of a hearing. Pursuant to 11.21.3.15(A) NMAC before commencement of a hearing on the merits of a charge the director is obligated to attempt to settle the complaint with the parties. If the parties achieve a settlement, they shall reduce it to writing and submit it to the director for approval. 11.21.3.15(B) NMAC states that the complaint may be settled by the parties at any time prior to hearing and under subparagraph 15(C) the director or hearing examiner may submit a proposed settlement agreement to the Board for its approval before the settlement becomes final.

11.21.3.15(D) NMAC provides that a complainant may *withdraw* a PPC at any time prior to hearing, without approval by the director or the Board as contrasted with the *settlement* of a PPC that may be the proximate event precipitating the withdrawal and perhaps conditioned on the withdrawal, which agreement is to be reviewed by the director and in his or her discretion presented to the Board before it becomes final. *See* 11.21.3.15(A) and (C) NMAC.

Furthermore, after commencement of the merits hearing, the complaint shall not be withdrawn or settled without the approval of the hearing examiner and if it is settled after a hearing examiner's report

has been issued, a complaint may not be withdrawn without Board approval. *See* 11.21.3.15(D) NMAC. The Board has interpreted this rule not to require Board review of a settlement achieved under Court annexed settlement facilitation after appeal from the Board's Order upholding its Hearing Examiner's Recommended Decision.

IX. Evidentiary Hearings

If the matter has not been settled or dismissed, the hearing examiner will conduct an evidentiary hearing, on the merits. Due process in administrative hearings such as this are conducted in such a way as to meet the requirements of the state and federal constitutions. *See* NMSA 1978, 10-7E-12(B). The basic elements of a fair hearing are listed in an article published in 1975 by Second Circuit Judge Henry J. Friendly entitled, "Some Kind of Hearing":

- An Unbiased Tribunal
- Notice of the Proposed Action and the Grounds Asserted for It
- An Opportunity to Present Reasons Why the Proposed Action Should Not Be Taken
- The Right To Call Witnesses
- The Right To Know the Evidence Against One
- The Right To Have the Decision Based Only on the Evidence Presented
- Counsel
- The Making of a Record
- A Statement of Reasons for the Decision
- Public Attendance
- Judicial Review

Additionally, 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.

The Supreme Court of New Mexico maintains that "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). "[I]t 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 (emphasis omitted) (internal quotation marks and citation omitted).

In accordance with these elements, the evidentiary hearing conducted by the PELRB will include the following:

A. Discovery

The only discovery expressly addressed under PELRB rules is the production of documents pursuant to a subpoena issued by the PELRB, which the rules state shall be requested according to a scheduling order agreed to by the parties. *See* 11.21.19(A) NMAC. In practice neither discovery nor complicated scheduling orders are typically required in PELRB cases.
However, the parties can always raise the subject of discovery at the initial status conference. Additionally, they may raise it afterwards, by filing and serving requests for productions and/or interrogatories, or by requesting the production of documents by subpoena. New Mexico Rules of Civil Procedure for the District Courts governing discovery will generally be followed as a guide.

B. Admissible Evidence

The evidentiary hearing will not be strictly bound by formal rules of evidence. *See* 11.21.1.17(A) NMAC. Nonetheless, rules of evidence will guide the matter, in particular as to relevancy, reliability, materiality, privilege, and repetitious or cumulative evidence. *See Id.* at (B) and (C).

Notably, hearsay will be allowed and may even provide "substantial evidence" to support a finding of fact or conclusion of law. *See Trujillo v. Employment Sec. Comm'n,* 1980-NMSC-054, 94 N.M. 343, 344 (the legal residuum rule, which prohibits a finding or conclusion of liability based solely on inadmissible evidence, only applies in New Mexico administrative hearings in which "substantial right, such as one's ability to earn a livelihood, is at stake").

Nonetheless, there are standards for the admission of testimony. All witnesses must be sworn in and competent to testify, meaning they have personal knowledge of the subject matter, and their testimony is not privileged. PELRB hearing examiners also typically discourage the testimony of witness who are also presenting legal arguments, to avoid confusion as to whether a particular statement is sworn testimony and therefore admissible evidence, or merely legal argument. Additionally, all documentary evidence must be admitted through a witness capable of laying the "foundation," meaning attesting to its veracity and reliability, and that it is what it purports to be.

C. Subpoenas

Subpoenas are issued by the hearing examiner, either upon a proffer of general relevance when issued on a party's motion, or without any showing of relevance required when issued on the hearing examiner's own motion. *See* 11.21.1.19(A) and (B) NMAC. A subpoena may be quashed upon motion. *See* 11.21.1.19(C) NMAC.

Duly subpoenaed State employees are eligible for paid administrative time pursuant to State Personnel Board rules. *See* 1.7.7.14 NMAC. However, at this time PELRB rules also provide that the subpoenaing party shall be responsible for "any applicable witness and travel fees." *See* 11.21.1.19(D) NMAC.

D. Order of Case Presentment

The parties may elect to begin with opening statements or proceed directly to witness testimony. Opening statements should address only what evidence is expected to be elicited; they are not argumentative in nature. Thereafter, the complaining party will put on its case-in-chief, by callings witness it desires to put under direct examination. All witnesses will be subject to cross examination and the hearing examiner may also question the witnesses.

At the close of the Complainant's case and prior to initiating its own case, the Respondent may move for a directed verdict dismissing the PPC on grounds that there was no evidence admitted as to an element of the alleged violation. Under New Mexico case law, a motion for directed verdict should not be granted unless it is clear that "the facts and inferences are so strongly and overwhelmingly in favor of the moving party that the judge believes that reasonable people could not arrive at a contrary result." *Melnick v. State Farm Mut. Auto. Ins. Co.,* 1988-NMSC-012, ¶ 11, 106 N.M. 726, 749 P.2d 1105. "A directed verdict is appropriate only when there are no true issues of fact to be presented to a jury. The sufficiency of evidence presented to support a legal claim or defense is a question of law for the [district] court to decide." *Sunwest Bank of Clovis, N.A. v. Garrett,* 1992-NMSC-002, ¶ 9, 113 N.M. 112, 823 P.2d 912 (citations omitted).

If there is no motion for a directed verdict, or the motion is denied, the respondent shall put on its case-in-chief.

At the close of the respondent's case-in-chief, the parties may make closing arguments. They may also request to file written post-hearing briefs, which shall be granted. 11.21.3.17 and 11.1.2.20 NMAC.

X. Section 5 Violations - Legal Standards

NMSA 1978, Section 10-7E-5 (2020), prohibits violations of an employee's right to form, join or assist a labor organization for the purpose of collective bargaining or to refuse such activities.

There is frequently significant overlap among claims for discrimination under § 10-7E-19(A), (D) and (E) and those under § 10-7E-5 for interference. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters 6.I.C, 7.I., II.8 and III; ("[t]he Board has noted since its earliest days that a violation by an employer of any of the ... subdivisions of Section 8," the NLRA prohibited practice section, "is also a violation of subdivision one," the NLRA's prohibition on interfering, restraining or coercing employees).

However, the Sixth Circuit has held that employer knowledge of the protected nature of the conduct being interfered with is, nonetheless, an essential and requisite element of this type of claim. *See Meijer, Inc. v. NLRB,* 463 F.3d 534 (6th Cir. 2005).

Generally, making disparaging or belittling comments about bargaining unit employees, the union or union representatives will not "reasonably ... tend to interfere with the free exercise of employee rights" under PEBA, unless such statements are coupled with or evidence some prohibited conduct. Similarly,

merely being difficult or unpleasant to employees and/or union representatives, even when the latter is engaged in conducting union business, does not violate PEBA unless coupled with or rising to the level of some prohibited conduct.

A. Solicitation and Distribution by Employees

No-solicitation and no-distribution rules are facially invalid if phrased so broadly that they can be interpreted to prohibit protected solicitation. Additionally, even if valid on their face, they will violate labor law if discriminatorily or punitively enforced as regards to union related solicitation. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters 6.II.B and 19.III.B.3.

Generally, employees on break can orally solicit fellow workers at any location on-site. However, such break-time oral solicitations may be prohibited in retail locations and "immediate patient care areas" in health care facilities. Additionally, the distribution of written materials may be prohibited both while an employee is on duty and in working areas. That is because in the case of distributions of written material, the potential for disruption of operations is greater. However, the solicitation to sign an authorization card is treated as a solicitation, rather than distribution of written material. *Id.*

Work time is for work, but the time outside working hours (such as rest and lunch breaks, and residential hours for employees working twenty-four (24) hour shifts, such as firefighters) is an employee's time to use as he wishes without unreasonable restraint, although the employee is rightfully on company property. *See Republic Aviation*, 324 US 793 (1945), and *Our Way*, 268 NLRB 394 (1983); *see also Las Cruces Professional Fire Fighters v. City of Las Cruces,* 1997-NMCA-31, 123 N.M. 239.

The right of an employee to enter or remain on the premises before or after his or her shift may also be restricted by work-rule or policy provided:

- access is limited solely with respect to the interior of the facility and other work areas
- the policy is clearly disseminated to all employees, and
- the policy applies to off-duty employees seeking access to the plant for any purpose, including those not related to union activities.

See Tri-County Medical Center, 222 NLRB 1089 (1976) (stating the rule), and *Central Valley Meat Co.,* 346 NLRB No. 94 (2006).

B. Buttons, T-Shirts, Etc.

Labor law also strikes a balance concerning employees' right to wear union buttons or T-shirts or post pro-union stickers while at work. Although this is generally protected activity, an employer nonetheless has a right to maintain an orderly work environment. Accordingly, an employer may promulgate and enforce a rule restricting such activity "only where the prohibition is necessary because of 'special circumstances,' such as maintaining production and discipline, ensuring safety, preventing alienation of customers, adverse effects on patients in a health care institution, or where the message is inflammatory and offensive." Additionally, such a rule must apply to and be enforced equally against

other non-union related communications. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters 6.I.B.1; 6.I.B.3; 6.III.A.3; 6.II.A.4 and cites therein.

C. Rights of Non-employee Union Organizers

Under the NLRA, non-employee union organizers have fewer access rights than employees. Accordingly, they can be lawfully prohibited from accessing and distributing union literature on company property, provided:

- "reasonable efforts ... through other available channels of communication will enable it to reach the employees; and

- the employer does not discriminate against the union by allowing distribution of items by other non-employees.

See NLRB v. Babcock & Wilcox Co., 351 US 105, 112-113 (1956) (regarding union access to private property), and *Lechmere, Inc. v. NLRB,* 502 US 527, 533-534 (1992) (regarding access to public property or quasi-public property, meaning private property that is open to the public).

Under *Babcock and Lechmere*, if the employee does not live on the employer's property, "they are presumptively not 'beyond the reach'" of the union, and access to the employer's property may therefore be restricted. *Babcock, supra* at 113; and *Lechmere, supra* at 540, *citing Babcock*. At the PELRB access has been an issue at secured facilities such as public schools, medical or rehabilitation facilities, and corrections or detention facilities. However, no such cases have been fully adjudicated and reviewed, so it is unknown at this time whether these NLRA precedents will be applied under PEBA.

D. Access to Mail Distribution Systems and Employee Mailboxes

Under federal postal monopoly laws and regulations, employers may not distribute materials for anyone through their mail distribution systems free of charge, and this proscription applies to exclusive representatives and other unions as well. *See Regents of the University of California v. Public Employment Relations Board,* 485 U.S. 589 (1988) and *Fort Wayne Community Schools v. Fort Wayne Education Assoc., Inc.,* 977 F.2d 358 (7th Cir. 1992). *See also AFT v. Las Cruces Public Schools,* 130-06, Hearing Examiner Report at 14-16 (Feb. 28, 2007).

However, union officers or union employees may distribute such materials by hand into bargaining unit members' mailboxes, through electronic mail systems (or other similar systems) free of charge and may not be prohibited from doing so if other groups are allowed to distribute materials in the same manner. *See 18 USCS* § 1694 and 39 CFR § 310.3(b)(1) (concerning the "letters of the carrier" exception to the postal monopoly), *Fairfax Hospital,* 310 NLRB 299, 305-306 (1993) (that a union may be granted direct access to mailboxes under this exception); *AFT v. Las Cruces Public Schools,* 130-06, Hearing Examiner Report at 16-17 (Feb. 28, 2007); NMSA 1978, § 10-7E-15(H) (2020).

E. Interference with Concerted Activity

As discussed above, PELRB hearing examiners and the PELRB have regularly concluded that *Weingarten* rights of concerted action for mutual aid and support has existed under the PEBA prior to the amendment of § 10-7E-5 of the PEBA. *See AFSCME v. Department of Health,* PELRB Case No. 168-06, Hearing Examiner Report (Aug. 30, 2007); *Michaels v. Anglo Am. Auto Auctions,* 1994-NMSC-015, 117 N.M. 91, 94.

F. Work Rules That Interfere with Employees' PEBA Rights

It violates the PEBA to promulgate work rules or restrictions with the intent to interfere with employees' rights under the PEBA, rather than for legitimate business purposes. For example, an employer may impose limits on general fraternization during work time, but it may not forbid or prevent union organizational activities at all, even during non-working periods. *See Las Cruces Professional Fire Fighters v. City of Las Cruces,* 1997-NMCA-31, 123 N.M. 239 (Ct. App. 1996) (Firefighters II). Additionally, even otherwise legitimate restrictions violate the PEBA when promulgated for the purpose of interfering with organizations rights, "rather than to maintain production and discipline." *See Horton Automatics,* 289 NLRB 405, 409 (1988); *see also Capitol EMI Music, Inc.,* 311 NLRB 997, 997 n.4 and 1006 (1993); *New Mexico Corrections Department v. American Federation of State, County, and Municipal Employees, Council 18, AFL-CIO*, No. A-1-CA-34737 (J. Hanisee, September 5, 2017) (In re: PELRB 105-09; 11 PELRB 2009). The New Mexico Corrections Department committed a prohibited practice in violation Section 19(A) by discriminating against two of the Department's employees, both of whom were also Union Officers, after the Department denied their requested use of a state vehicle to travel to and from a policy review meeting with Department management. Other Department employees attending the same meeting on behalf of management could use a state vehicle to travel to and from the meeting. The Court of Appeals rejected the Department's argument that union representatives who attend a meeting on behalf of the union are not on state business in the same sense as Department employees who attend the meeting on behalf of management. The Court found that position to be at odds with § 10-7E-2 of the PEBA, which expressly contemplates and encourages the promotion of "cooperative relationships between public employers and public employees".

G. Disciplining Union Stewards for Concerted Activity

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 the 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." *See also, International Union of*

Operating Engineers, Local 953 v. Central Consolidated School District No. 22, PELRB Case No. 137-06, Hearing Examiner Order of Dismissal (Oct. 5, 2006); and *AFSCME v. The Public Defender's Office,* PELRB Case No. 121-05, Hearing Examiner Report (May 24, 2006); AFSCME v. Department of Health, PELRB Case No. 168-06, (Aug. 30, 2007) (The PEBA protects the right to circulate a non-union related petition without retaliation, and the difference between § 7 of the NLRA and § 10-7E-5 of the PEBA reflects a streamlining of language, not a limitation of rights afforded under NLRA).

An employer may not discipline or otherwise penalize a union steward for statements, demeanor and/or certain conduct while engaged in union business. *See, Union Fork and Hoe Company,* 241 NLRB 907, 908 (1979) ("a steward is protected ... when fulfilling his role in processing a grievance" under substantially identical provisions of the NLRA); *United States Postal Service and San Angelo Local (San Angelo),* 251 NLRB 252, 258 (1980) (stewards "are essentially insulated from discipline for statements made to management representatives which, if made in another context, would constitute insubordination"). However, a steward does not have unlimited immunity, or a *carte blanche,* when acting as a steward.

Specifically, a steward may be disciplined for excessive or "opprobrious" conduct that is not part of the processing of a grievance, or for disobeying a direct order given while processing a grievance. *See, AFSCME v. Dept of Corrections,* Case No. 150-07, Hearing Examiner Report (Feb. 6, 2008); *see also Clara Barton Terrace Convalescent Center,* 225 NLRB 1028, 1034 (1976) (a steward may nonetheless be disciplined for excessive or "opprobrious" conduct in processing a grievance, if "the excess is extraordinary, obnoxious, wholly unjustified, and departs from the *res gestae* of the grievance procedure"); *San Angelo,* 251 NLRB at 259, citing *Atlantic Steel Company,* 245 NRLB No. 107 (1979) (a steward loses protection for "opprobrious conduct," meaning conduct that is extreme, occurs outside the context of grievance processing, occurs in a location where grievances are not usually processed, and/or is not provoked by any unfair labor practices on the employer's part). *See also, United States Postal Service and National Assoc. of Letter Carriers, Sunshine Branch* 504 (Sunshine Branch), 350 NLRB 3, 5 (2007) (a steward may be disciplined for "clearly insubordinate conduct," such as disobeying a direct order, provided that the employer takes the same action "that it would have taken toward any other employee committing similar insubordinate acts").

After the Regulation and Licensing Department refused to recognize the union's appointed steward and disciplined him for acting in the capacity of, and claiming the rights of, a union steward despite the Employer's lack of recognition the PELRB granted Summary Judgment in favor of the union stating that the appointment of stewards is an internal union business matter and unless modified by contract, the union is free to appoint whomever it will, to serve in that capacity. The parties' CBA was unambiguous that the union reserved the right to appoint it stewards without reference to any correlation between a steward's assigned workstation and the slots designated in the parties' steward agreement and that the list of the names, addresses, telephone numbers and the agency in which those listed are authorized to act must be updated at least every calendar quarter. However, it is equally clear that it is not the list that controls who may be a steward. Rather, it is an informational compilation of those who are already authorized by the union to act on its behalf. *See AFSCME, Council 18 v. New Mexico Regulation and Licensing Department,* 4-PELRB-2013. *See also, AFSCME, Council 18 v. New Mexico Regulation and Licensing Department,* 5-PELRB-2013.

While the recommended decision by the Hearing Officer in 4-PELRB-2013 was awaiting review by the PELRB. RLD again disciplined the same union steward for representing an employee in a grievance, imposing a one-day suspension without pay. The Department acknowledged receiving the decision finding that it had committed PPCs but justified its disregard of the recommended decision with the argument that because the PELRB had not yet adopted the recommendation it is not binding on RLD.

Summary Judgment was granted in favor of the Union on a second PPC (5-PELRB-2013). The PELRB held in the second case that the RLD's "unreasonable persistence" in punishing union officials who disagree with its construction of the CBA, constitutes "inherently destructive conduct" because it has caused and is likely to continue to cause confusion as to who is the proper steward to contact to administer the CBA in the Albuquerque area.

Both this case and 4-PELRB-2013 were appealed to District Court and a settlement was mediated under the auspices of the Court's settlement facilitation program. The terms of that settlement were not disclosed to the PELRB.

H. Refusal to Provide an Excelsior List

Once a union has petitioned for recognition, it is entitled to a list of all employees within the proposed bargaining unit, and their telephone numbers and home numbers. *See SSEA, Local 3878 v. Socorro Consolidated School District,* 05-PELRB-2007. (December 13, 2007), *citing Excelsior Underwear, Inc.,* 156 NLRB 1236 (1996); *see also United Steel Workers of America Local 9424 v. City of Las Cruces,* 3rd Judicial Dist., Case No. CV 2003-1599 (J. Robles) (invalidating Las Cruces City Resolution 00-136 as inconsistent with State law as far as it forbids the disclosure of such information).

NOTE that the right to names and addresses continues after certification, but thereafter its violation is typically cited under the duty to bargain in good faith. *See* Section III (F)(6) *infra.*

At least one New Mexico Court has held that a public employer's release of employee names and home addresses ensures that certification or decertification elections are fair and public employees have the best opportunity to listen to all the arguments and decide for themselves whether they desire to be represented by a labor organization. *Rio Rancho Public Schools v. Rio Rancho School Employees' Union*, 13th Jud. Dist. No. D-1329-CV-2010-1987 (Nov. 5, 2013; J. Eichwald).

I. Refusal to Permit Union Representation During Discipline

Denying an employee's request for union representation during an investigatory meeting may interfere with an employee's rights under Section 5 of the PEBA that guarantees covered public employees the right to "form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion." The question whether the bundle of union-represented employee rights, known in legal shorthand as "Weingarten rights," may be found in the PEBA has been answered in the affirmative. This is so despite the fact that prior to the 2020 amendment to § 10-7E-5 of the PEBA, did not contain the same language as §

7 of the NLRA concerning employee rights "to engage in concerted activities for mutual aid and protection," that was relied on in *Weingarten* and its progeny. *See, AFSCME, Council 18 v. N.M. Dep't of Health,* PELRB 168-06 (affirmed, 06-PELRB-2007).

In a split ruling the Board held that *Weingarten*-type rights exist under the PEBA.[15] *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, instead, it enumerated them.

The application of *Weingarten* rights in the public employment context was upheld by the 2nd Judicial District Court in a Memorandum Opinion and Order in *AFSCME Council 18 v. City of Albuquerque Parks and Recreation Dep't and The City of Albuquerque Personnel Board,* Case No. CV-2013-2891, issued October 11, 2013.

To state a claim for violation of *Weingarten* rights, the Complainant must allege three elements:

(i) the employee requested the assistance of his or her bargaining representative for an "investigatory interview"

(ii) the employer denied the request and instead compelled the employee to appear unassisted

(iii) the employee reasonably believed the meeting or interview would result in disciplinary action.

See Weingarten at 256-257.

The investigatory interview is not "literally limited to a formal interrogation," but rather is any examination that "involves questioning to secure information." *See National Treasury Employees Union v. Federal Labor Relations Authority,* 835 F.2d 1446, 1450 (D.C. Cir. 1987). Additionally, the employer is not required to bargain with the union representative attending the investigatory interview. *Id.* at 259.

In contrast to a *Weingarten* claim, to state a claim for discrimination or retaliation for exercise of *Weingarten* rights, the Complainant need not allege facts in support of the conclusion that a *Weingarten*

[15] In his dissenting opinion, Board member Wayne Bingham wrote that he would reverse the prior Board decisions recognizing *Weingarten* rights for 3 reasons: (1) There is no express grant of *Weingarten* rights in the PEBA; (2) The PEBA's language is different than the NLRA's as it pertains to concerted activities for mutual aid and benefits – the language upon which the *Weingarten* decision was based; and (3) The NLRA applies only to the private sector. At the time of this writing the case is on appeal in the 2nd Judicial District as D-202-CV-201305070.

right existed. Instead, the Complaint must only allege:

(i) the employee claimed and/or asserted a *Weingarten* right; and

( ) thereafter the employee faced some discriminatory or retaliatory action as a result.

Since the 2020 amendment the PEBA expressly Section 7 of the NLRA guarantees covered protects employees' the right to "form join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Thus, it appears that the jurisprudence favoring the application of *Weingarten* protections under the PEBA is strengthened.

J. Interrogating Employees About Union Views or Activities

Questioning employees about their union sympathies or activities is not per se unlawful. Rather, the test is "whether, under all of the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by the Act." *See, Rossmore House*, 269 NLRB 1176, 1177-1178 and n. 20 (1984), *enf'd. sub nom. Hotel Employees and Restaurant Employees Union Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). Factors to consider include:

- whether the interrogated employee is an open and active union supporter
- the background of the interrogation
- the nature of the information sought
- the identity of the questioner
- the place and method of the interrogation
- the truthfulness of the reply
    - whether a valid purpose for the interrogation was communicated to the employee and
- whether the employee was given assurances against reprisals

Id. See also NLRB v. Nueva Engineering, Inc., 761 F.2d 961 (1985) (interrogation was coercive because it took place in the foreman's office, the foreman had authority to hire and fire as he saw fit and he gave no assurances against retaliation); and *Millard Refrigerated Services,* 345 NLRB 1143, 1146-1147 (2005) (questioning objectionable where it occurred along with card solicitations and threats, it was made by supervisors with broad authority over their crews, and there was no evidence that the interrogated employees were open and active union supporters). *See AFSCME, Council 18 v. State of NM CYFD*, PELRB No. 120-21.

K. Threatening Employees Regarding Union Representation

An employer violates the right to form, join or assist a union without interference when it threatens employees with economic reprisals such as layoffs or termination, if employees select union representation. *NLRB v. Gissell Packing Co.,* 395 US 575, 616-618 (1969); *Nueva Engineering, supra.*

An employer also violates this section when it threatens employees that voting in the union will result in a loss of existing benefits while the parties' bargain. *See, e.g., NLRB v. General Fabrications Corp.,* 222 F.3d 218, 231 (6th Cir. 2000) ("[a]n employer's statement that after unionization bargaining will begin 'from scratch' can be coercive depending on the context").

However, statements about the employer's economic situation that are based on objective fact are not prohibited. *Gissell* at 618.

Similarly, "[i]n evaluating comments concerning 'bargaining from scratch,' the Board cases draw a distinction between (1) a lawful statement that benefits could be lost through the bargaining process and (2) an unlawful threat that benefits will be taken away and the union will have to bargain to get them back." *See So-Lo Foods, Inc.,* 303 NLRB 749, 750 (1991).

L. Surveillance or Recording of Protected Activity

Surveillance of employees engaged in protected union-related activity will generally tend to interfere with, restrain and/or coerce those employees in the exercise of their PEBA rights. The following acts of surveillance have been found to violate the NLRA:

- photographing employees engaged in protected activity, in the absence of a valid explanation conveyed to the employees in a timely manner, *See Randell Warehouse of Arizona, Inc.,* 247 NLR No. 56 (2006) (Randall II).
- following employees believed to be *en route* to a union meeting, *See NLRB v. Nueva Engineering Inc.,* 761 F.2d 961 (1985).
- creating in the mind of an employee an impression that the employer is closely observing union organizational activity, *See J.P. Stevens & Co., Inc. v. NLRB,* 638 F.2d 676, 683 (4th Cir. 1980).

As both a pleading and evidentiary issue a complainant should be aware of the need to plead and prove facts sufficient to infer knowledge that protected union activity was occurring when the claim consists of someone observing or following co-worker stewards at the work site. *See AFSCME, Council 18 v. NM Children, Youth and Families Dep't*, PELRB No. 110-20. *See also AFSCME Council 18 v. Board of County Commissioners for Bernalillo County*, PELRB No. 101-21.

M. Denial of Reasonable Access Between the Union and Employees

Employees have a right to be accessible to union organizers, to engage in organizing efforts, and to express their views in support of the union. The right of access typically involves both the right of employees to wear or post union insignia or advertisements and to distribute union materials during non-working periods, and union access to employees at the workplace. *See generally* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW 7th Ed.) Chapters 6.I.B.1; 6.I.B.3; 6.III.A.3; 6.II.A.4 and cites therein This is a complex area of law that has been shaped by balancing employees' first amendment considerations against the employer's right to orderly business environment and operations, and the following legal standards have evolved under the NLRA.

N. Improper Removal of Appointees to the PELRB or a Local Board

An employer may not remove an appointee from a local board prior to the expiration of his or her term of service under the ordinance or resolution, without a hearing and a determination of just cause under the ordinance, such as by disqualification as a result of being an employee of a labor organization or a public employer. *See American Federation of Teachers Local 4212 v. Gadsden Independent School District,* PELRB Case No. 169-06, Hearing Examiner's letter decision (Nov. 2, 2007) (regarding removal of the union-recommended appointee without a hearing, based on the unsupported belief that he was employed by a union).

In *AFSCME v. Martinez*, 2011-NMSC-018, 150 N.M. 132, 257 P.3d 952, the New Mexico Supreme Court addressed the question: May the Governor use the broad removal authority under Article V, Section 5 of the New Mexico Constitution to remove members of the Board who have the responsibility to adjudicate the merits of disputes involving the Governor? The Supreme Court answered that question in the negative for three reasons:

- First, none of the PELRB members serve at the pleasure of the Governor because the Public Employee Bargaining Act obligates 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 responsibility under the Act and Article V, Section 4 of the New Mexico Constitution to "take care that the laws be faithfully executed" requires that the Governor respect the Act's requirement for continuity and balance by not attempting to remove appointed members of the PELRB.

- Third, 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.

Additionally, the City of Albuquerque had enacted the Labor Management Relations Ordinance (LMRO), which was considered grandfathered under the Public Employee Bargaining Act (PEBA). This ordinance governed labor relations within the City and outlined procedures for appointing members to Labor-Management Relations Board. The specific provision in question was Section 3-2-15(D) of the City Ordinance. According to this provision, during a Local Board member's absence, the City Council President had the authority to appoint an interim member "with due regard to the representative character of the [Local] Board." The intent behind this provision was to ensure continuity and representation on the Board even when regular members were unavailable. However, a dispute arose over the interpretation of the PEBA's grandfather clause. The Court of Appeals characterized the City Council President as "managerial personnel" and argued that the appointment of a third member by the President disrupted the neutral composition of the Local Board. The Court of Appeals believed that this appointment violated § 10-7E-10 regarding the spirit of collective bargaining by potentially favoring one side over the other. Upon review, the Supreme Court took a different stance. It held that the City Council President did not serve in either a "management" or

"labor" capacity. Instead, the President's role was administrative and procedural. Therefore, the provision allowing the City Council President to appoint members during absences did not contravene the PEBA's grandfather clause requirement for establishing a collective bargaining system. The Court emphasized that the PEBA's intent was to ensure fair representation and a balanced approach to labor relations. While the appointment process needed to be transparent and impartial, it did not preclude administrative appointments during temporary absences. The Court's decision clarified that the City Council President's actions did not violate the PEBA's core principles as outlined in §10-7E-2. As a result, the Court reversed the Court of Appeals' decision, affirming the validity of the City's appointment process. However, the case was remanded for consideration of other unaddressed issues related to the LMRO and its impact on labor-management relations within the City of Albuquerque. *See City of Albuquerque, v. Montoya,* 2012-NMSC-007 (March 6, 2012).

XI. Claims for Violation of §§ 10-7E-19(A), (B), (D) or (E) (2020), or § 10-7E-20(A) or (B) (2003)

An employer or union violates the PEBA where their opposition to a protected activity or status is a substantial or motivating factor in their decision to take adverse action against an employee. In *Wright Line,* 251 NLRB 1083 (1980), the NLRB established the following two-part test to determine whether an employee has been disciplined or otherwise discriminated against for union activity, rather than for a legitimate business reason. This same type of analysis would presumably apply when the discrimination claim is raised against the union.

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

Second, once a *prima facie* case is established, the burden will shift to the employer to establish that the same action would have taken place even in the absence of the protected conduct. *Wright Line* at 1089; *See also NRLB v. Transportation Management Corp.,* 462 US 393 (1983), *Northern Wire Corp. v. NLRB,* 887 F.2d 1313, 1319 (7th Cir. 1989) and *Carpenters, supra,* at 265266.

Although the evidentiary burdens shift back and forth under this framework the ultimate burden of

persuading the trier of fact always remains with the Complainant. *See CWA v. Dept. of Health,* PELRB Case No. 108-08, Hearing Examiner's Report (July 15, 2008) applying the *Wright Line* test and concluding that, although the union established a *prima facie* case of retaliation, it failed meet its ultimate burden refute the Department's business justifications by a preponderance of the evidence. With regard to all prohibited discrimination claims but particularly with regard to § 20's prohibition against discrimination by a labor organization or its representative with regard to labor organization membership because of race, color, religion, creed, age, sex or national origin, *See also Gonzales v. New Mexico Dep't of Health, Las Vegas Med. Ctr.,* 2000-NMSC-029, ¶21, 129 N.M. 586, quoting *Reeves v. Sanderson Plumbing Prods., Inc.,* 120 S. Ct. 2097, 2106 (2000), and *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981) (all discussing a federal employment discrimination claim, which utilizes a similar burden shifting framework under *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-05 (1973)).

The "*Wright Line*" test was established for dual motive cases and is not applicable outside of that context. In *Wright Line* the Court explicitly differentiates "pretextual" and "dual motive" cases. The employer may put forth "what it asserts to be a legitimate business reason for its action. Examination of the evidence may reveal, however, that the asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon. When this occurs, the reason advanced by the employer may be termed pretextual. Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive." *Wright Line* at 1087.

The *Wright Line* test is applied when an employer expresses a valid reason for its termination decision, but that motive is disputed. In *Rhonda Goodenough v. State of New Mexico, CYFD, and New Mexico PELRB*, No. D-101-CV-2020-01743 (B. Biedscheid; April 30, 2021), Goodenough claimed CYFD had terminated her for exercising her rights under the Public Employee Labor Relations Act. After application of the Wright Line test, it was determined that Goodenough's termination was actually a result of a confidentiality violation. Goodenough was unable to establish a *prima facie* case.

A. Violations of NMSA 1978, §§ 10-7E-19(A), (B), (D) or (E) or by § 10-7E-20(A) or (B) - Legal Standards

1. Discrimination/Retaliation for Union Involvement

- Includes, discrimination in hiring, tenure or term and condition of employment, or discharge of an employee:
- because of union involvement
- to encourage or discourage membership
- because employee is forming, joining, assisting a union or
- choosing to be represented by a union

Overt adverse action, such as discipline or discharge is easy to ascertain. Other examples of action covered could include threats of and/or loss of benefits; assigning employees more difficult work tasks; changing their schedule; changing their work assignments; or reviewing their requests for a

particular schedule or their requests for time off more critically, because they are engaged in union or other protected concerted activity. *See*, *AFSCME Council 18 v. NM Tax & Rev. Dep't.*, PELRB Case No. 104-12, 55-PELRB-2012. (Directed verdict granted when union did not meet its burden of proof with regard to alleged violation of §§ 10-7E-19(A), (B)); *New Mexico Corrections Department v. American Federation of State, County, and Municipal Employees, Council 18, AFL-CIO,* 2018-NMCA-007 (J. Hanisee, September 5, 2017) (In re: PELRB 105-09; 11 PELRB 2009). The New Mexico Corrections Department appealed the District Court's affirmance and adoption of the Public Employee Labor Relations Board's September 2009 order, which found the Department to have committed a prohibited practice in violation of NMSA 1978, Section 10-7E-19(A) (2020), by discriminating against two of the Department's employees, both of whom were also Union Officers, after the Department denied their requested use of a state vehicle to travel to and from a policy review meeting with Department management. Other Department employees attending the same meeting on behalf of management were allowed to use a state vehicle to travel to and from the meeting. The Department argued that they were prohibited by the Transportation Services Act from allowing union officials to use state vehicles because they were not on "official state business" when representing the union. The court, citing the PEBA's stated purpose of promoting cooperative relationships between public employers and public employees, held that because the meeting involved mandatory subjects of bargaining and the Department could not implement policy changes without meeting with union officers who were also employees, employee union officers were on "official state business" while attending the policy review meeting, even if they were there to represent the union's interests. Therefore, the Department had discriminated against the union officials when denying them access to state vehicles to travel to the meeting in violation of § 10-7E-19(A). The Department appealed the PELRB's decision to the district court which upheld the Board *See, NM Corrections Dep't v. AFSCME & NM PELRB,* Case No.: D-101-CV-2009-03457 (J. Thompson). The Department's petition for a *writ of certiorari* was granted and on September 5, 2017, the Court of Appeals affirmed the district court's affirmance of the PELRB's order, concluding, "By its plain language, Section 10-7E-1(A) requires only that the discriminatory treatment be 'because of the employee's membership in a labor organization' in order for such treatment to constitute a prohibited practice. We decline to read into the statute a requirement that there be evidence that anti-union animus was the underlying motivation for a public employer's discriminatory treatment of a public employee in order to constitute a violation of Section 10-7E-19(A) …The simple fact that the decision discriminates against an employee because of his or her union status is sufficient to constitute discrimination – and a prohibited practice – under Section 10-7E-19(A)." *See, NM Corrections Dep't v. AFSCME Council 18,* Case No.: A-1-CA-34737 ¶ 13 (J. Miles Hanisee). The Court of Appeals rejected the Department's argument that union representatives who attend a meeting on behalf of the union are not on state business in the same sense as Department employees who attend the meeting on behalf of management. The Court found that position to be at odds with §10-7E-2 of the PEBA, which expressly contemplates and encourages the promotion of "cooperative relationships between public employers and public employees."

In another case, *Peñasco Federation of United School Employees v. Peñasco Independent School District,* PELRB No. 108-20, Union employees claimed the School District had committed prohibited practices violating §§ 10-7E-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 the 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).

Some circumstances may exist where the employer's actions are deemed appropriate, despite the perception by a union that it has an adverse effect on its members. 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 (2003) 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.

In the case of *AFSCME Council 18 v. NM Tax & Rev, Dep't,* PELRB Case No.: 104-12, 55-PELRB-2012, an employee, who was also a union member, received a reprimand by her supervisor for allegedly using state phones to conduct union business. The union filed a prohibited practice complaint (PPC) alleging that the reprimand violated § 10-7E-19(A), (B), (C), (F), and (H) of the PEBA. At a hearing on the merits on May 16, 2012, the Hearing Officer granted the State's motion for a directed verdict, dismissing all claims. The PELRB affirmed the Hearing Officer's recommended decision, finding substantial reasons for taking disciplinary action apart from the employee's union activities and affiliation. Despite establishing the employee's union affiliation and activities, and also establishing that correction and disciplinary action had been taken, 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. The union did not show that restricting union-related calls to the last 15 minutes of the day interfered with union business so that PEBA § 10-7E-19(B) would be implicated. Neither was there sufficient evidence of a violation of PEBA § 10-7E-19(A) because a good overall evaluation does not preclude an employer from taking corrective or disciplinary action for isolated infractions of its work rules. Absent evidence suggesting that the union business was compromised, there can be no conclusion that the employer dominated or interfered in the administration of the union. Therefore there was no basis for Complainant's allegation that PEBA § 10-7E-19(C) was violated. No evidence was present as to any other specific provisions of PEBA violated. Accordingly, there was no evidence to support a claim that PEBA § 10-7E-19(G) was violated.

2. Discrimination/Retaliation for Union Support; NMSA 1978, § 10-7E-19(E) (2020)

Includes the discharge or other discrimination against an employee because he or she did the following, pursuant to the provisions of the PEBA:

- signed or filed an affidavit
- signed or filed a petition
- signed or filed a grievance or
- gave information or testimony

3. Race, Sex, Etc. Discrimination, by a Union

A union violates the PEBA by discriminating against a public employee regarding union membership because of race, color, religion, creed, age, sex or national origin. *See* § 10-7E-20(A).

4. Discrimination/Retaliation or Interference and Coercion for Not Joining or Assisting the Union

A union violates the PEBA by discriminating against a public employee because of the employee's non-membership in, or opposition to the union. *See* §§ 10-7E-5, 10-7E-15(A), 107E-20(B), 10-7E-20(E). Illegal conduct includes discrimination in the processing of grievances, and discrimination in the negotiation or administration of the CBA. It also includes influencing or encouraging an employer to take adverse employment action against a non-member "or a member who has incurred the disfavor of the union's leadership," such as layoff, transfer, demotion, changing work schedule, removal of overtime opportunities, or discharge for reason other than failure to pay any required dues or contract administration fees. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters 3.II.C; 7.III.A; 25.II.B.1.

However, a prohibited practice complaint (PPC) filed by a public employee against a union must distinguish itself from a claim for breach of the duty to represent bargaining unit members fairly and adequately. *See* C*allahan v. NM Federation of Teachers-TVI*, 2006-NMSC-010, 139 N.M. 201 (that such a claim does not constitute a PPC under the PEBA and must instead be filed as a civil action with the district court); *see also Pita Roybal v. AFSCME Council 18*, PELRB Case No. 102-06, Hearing Examiner's Order of Dismissal (May 5, 2006) (looking beyond the formal claims of interference with the PEBA rights and refusal to comply with the PEBA, and concluding that the essence of the PPC was nonetheless for breach of the duty to fairly represent a bargaining unit member).

Much of the PELRB jurisprudence related to fair share or agency fee payments, was rendered moot by the U.S. Supreme Court's decision in *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 3*1, 138 S. Ct. 2448, 201 L.Ed.2d 924 (2018). *Janus* reversed the longstanding rule announced in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) that allowed employers to deduct "fair share" or agency fees from non-union members' pay and transfer those fees to the union. Abood justified agency fees on two grounds: the fees promoted "labor peace" and minimized the risk of "free riders" who would benefit from the union's contract without having to support the union in bargaining. *Janus* rejected that reasoning holding that "Neither an agency fee nor any other payment to the union may be

deducted from a nonmembers wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." 138 S. Ct. at 2473.

Since the U.S. Supreme Court issued its decision in *Janus v. AFSCME*, many unions have received correspondence from bargaining unit members demanding reimbursement for all union dues paid New Mexico unions are no exceptions. For example, in *McCutcheon v. CWA Local 7076 et al.*, in the United States District Court for the State of New Mexico as case 1:18-cv-01202-CG-JHR, IT technician David McCutcheon represented by the National Right to Work Legal Defense Foundation filed a lawsuit against CWA Local 7076 alleging that the union violated federal law by restricting non-union members' chance to opt out of paying "agency fees," to a certain window period in the collective bargaining agreement. The matter was settled out of court and McCutcheon dismissed the suit voluntarily.

Additionally, a separate suit was brought where the plaintiff sought retrospective relief for dues paid while a member of a trade union following the Supreme Court decision in *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31,* 138 S. Ct. 2448, 201 L.Ed.2d 924 (2018). The Plaintiff contended that, under *Janus*, the Union cannot retain dues that had been deducted from his paychecks or serve as his exclusive bargaining representative. In *Janus*, the Court said the First Amendment right against compelled speech protects non-members of public sector unions from having to pay "agency" or "fair share" fees—fees that compensate the union for collective bargaining but not for partisan activity. Over the course of his employment, the plaintiff 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. The Plaintiff included the Governor and Attorney General of New Mexico in his suit and sought a declaration stating that "the Union and [the Governor] cannot force public employees to wait for an opt-out window to resign their union membership and to stop the deduction of dues from their paychecks." Additionally, he sought a declaration that the New Mexico statute providing for exclusive representation "constitute[s] an unconstitutional violation of his First Amendment rights to free speech and freedom of association." These claims were dismissed because these officeholders do not enforce the exclusive representation statute. Rather, members of the Public Employee Labor Relations Board ("PELRB") do. The Public Employee Bargaining Act ("PEBA") provides for a union to serve as the exclusive representative for the employees in a bargaining unit. *See* N.M. Stat. § 10-7E-14. The PELRB "has the power to enforce provisions of the [PEBA]." The Governor and Attorney General therefore do not fall within the Ex parte Young exception and thus have Eleventh Amendment immunity to this suit. *See Hendrickson v. AFSCME Council 18*, 992 F. 3d 950 - Court of Appeals, 10th Circuit 2021.

5. Interference, Restraint or Coercion by Employer Under NMSA 1978, § 10-7E-19(B) (2020) or by Union Under § 10-7E-20(B) (2003)

Interference claims may overlap with and those for discrimination and/or retaliation. *See* Discussion above regard § 5 claims and JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters

6.I.C; 25.II.B.1.

Domination or Interference with the Union prohibited by the PEBA § 10-7E-19(C); *See also* § 10-7E-15(A) and § 10-7E-19(G). Refer to the discussion of the denial of or retaliation for exercising *Weingarten* rights, interference with appointment of stewards, etc. *supra.*

Under the NLRA, an essentially identical provision is directed against a very narrow type and limited number of activities, such as:

- establishment of a "company union"
- infiltration of unions by lower-level supervisors
- failing to maintain neutrality between competing unions.

See generally JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters 8.I; 8.VII; 12.III.C.2; 13.VIII.A and B. However, unions frequently cite this PEBA section incorrectly, such as for claims concerning limiting a union's access to employees; disciplining union stewards for union activity; direct dealing; and other claims involving interference with *employees'* PEBA rights.

Unlike discrimination or retaliation cases motive is not a critical element of interference claims. Under NLRB precedent it is well settled that "interference, restrain, and coercion ... does not turn on the employer's motive or whether the coercion succeeded or failed." Rather, "[t]he test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *See American Freightways Co.,* 124 NLRB 146, 147 (1959). A violation of § 10-7E-5 can be found based on ambiguous language or conduct. *See Joseph Chevrolet,* 343 NLRB 7, 12 (2004).

"the test ... is not whether the statement is unambiguous; it is whether, from the standpoint of the employees, it has a reasonable tendency to interfere with, restrain or coerce the employees in the exercise of protected rights."); and *Double D Construction Group, Inc.,* 339 NLRB 303, 303 ("[t]he test ... is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction").

Although it may intuitively seem like § 10-7E-19(C) *should,* at the least, cover claims of retaliation for or interference with a steward's actions in conducting union business, such is not the case under NLRA precedent. Instead, under the NLRA such claims are asserted under § 8(a)(1) and § 8(a)(3) of the NLRA, which correspond almost word-for-word with § 10-7E-19(B) and § 10-7E-19(D) of the PEBA. *See Union Fork and Hoe Company,* 241 NLRB 907, 908 (1979) and *United States Postal Service and San Angelo Local,* 251 NLRB 252, 258 (1980). Accordingly, one hearing examiner has declined to extend § 10-7E-19(C) to such claims and concluded that these claims should instead be asserted under § 10-7E-19(B) and § 10-7E-19(D) of the PEBA. *See AFSCME v. Department of Corrections,* Hearing Examiner's Report at 23, 16 (Feb. 6, 2008).

The one situation in which the PELRB has extended the application of this provision is for an employer's failure to give the union notice of a mandatory employee meeting concerning the terms and conditions of employment, when the union had previously alerted the employer that such notice was required and expected. In this case, the hearing examiner and the PELRB concluded that the

refusal to give notice to the employees' union interfered with the union's status as exclusive representative, contrary to § 10-7E-19(C) of the PEBA. *See AFSCME Council 18 v. Department of Health,* 06-PELRB-2007 (Dec. 3, 2007). *Cf. AFSCME Council 18 v. NM Tax & Rev. Dep't.,* PELRB Case No. 104-12, 55-PELRB-2012. (Directed verdict granted when union did not meet its burden of proof regarding alleged violation of § 10-7E-19(B).)

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, (Ct. App. 2013) 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 by impairing the Agreement in violation of 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.: 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.

6. Violation of the Duty to Bargain in Good Faith Under NMSA 1978, 55 10-7E-17(A)(1) (2020), 10-7E-19(F) (2020), or 10-7E-20(C) (2003)

The PEBA imposes affirmative and reciprocal duties on exclusive representatives and public employers to "bargain in good faith on wages, hours and all other terms and conditions of employment

and other issues agreed to by the parties." *See* § 10-7E-17(A)(1). *See also* § 10-7E-19(F) and § 10-7E-20(C). This duty has been described as "the most unruly of the obligations" imposed under labor law, because "what constitutes 'good faith' ... is not readily ascertainable, although thousands of cases and exhaustive commentaries have undertaken the task." *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters 13.I.A; 13.I.B.2; 13.III. The issue is further complicated by the fact that there are in fact two standards, depending on what type of violation is alleged. Specifically, a violation of the duty to bargain in good faith can be either:

(i) A per se violation, in which actual intent or subjective good faith is irrelevant, but the conduct must be clear and unambiguous

(ii) a pattern of bad faith negotiation, in which an intent to frustrate bargaining can be inferred from conduct.

See, NLRB v. Advanced Business Forms Corp., 474 F.2d 457, 465 (2d Cir. 1973). *Cf. AFSCME Council 18 v. N.M. Taxation & Rev. Dep't.,* PELRB Case No. 104-12, 55-PELRB-2012. (Directed verdict granted when union did not meet its burden of proof with regard to alleged violation of § 10-7E-19(F)); *AFSCME, Council 18 v. N.M. 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.

A union can be relieved of its duty to request bargaining over an issue if it is presented with a *fait accompli*[16] by the employer. The Court of Appeals has held that there are "two methods of establishing a fait accompli: timing or intent." *CWA v. State of NM*, 2019-NMCA-31, at ¶20, italics in original; citing Haddon Craftsmen, Inc., 300 NLRB 789, 790(1990), and *Gratiot Cmty. Hosp. v. NLRB*, 51 F.3d 1255, 1260 (6th Cir. 1995). 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'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

[16] [17] A "fait accompli" pronounced "fate uh-COM-plee," is a French term that literally means "an accomplished fact". The term has been adopted into the English lexicon to describe a change or decision made by some authority on behalf of the people who will actually be affected. For example, if workers continue to strike after a change in their working conditions has taken effect, they're protesting a fait accompli.

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.

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.

B. Per Se Violations

For per se violations, intent is not relevant, and the party could even have intended to enter into a contract as a general matter. *See NLRB v. Katz,* 369 U.S. 736 (1962) (that certain acts per se violate the duty to bargain in good faith "though the [party] had every desire to reach agreement ... upon an overall collective agreement and earnestly and in all good faith bargains to that end"). As the Developing Labor Law treatise describes it, per se violations of the duty to bargain typically constitute, instead of

a refusal to bargain, a "*failure to negotiate*" as to a particular issue, or under certain conditions, "rather than an absence of good faith."

A "vague or ambiguous statement" is insufficient evidence to support a determination that an employer has committed a per se violation of the duty to bargain in good faith. *See NLRB v. Advanced Business Forms Corp.,* 82 LRRM 2161, 2166-2167 (2d Cir. 1973). This is particularly true where "events which occur before and after" the statement indicates an alternate "reasonable interpretation." Id. For this reason, one PELRB hearing examiner has concluded that, in duty to bargain cases, the NLRB has implicitly rejected the "reasonable listener" standard that it utilizes in coercion cases. *See NEA-Santa Fe v. Santa Fe Public Schools,* Case No. 123-06, Hearing Examiner Report (Sept. 26, 2006).

Per se violations include the following:

1. Refusal to Provide Information

The duty to bargain includes the duty to provide, upon request, any relevant information necessary to negotiate, administer and police the CBA, and to represent all collective bargaining unit employees fairly and adequately. *See National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH,* 3-PELRB-2005 (Oct. 19, 2005). *See also AFSCME Locals 624, 1888, 2962 and 3022 v. the City of Albuquerque,* Albuquerque Labor Management Relations Board, Case No. LB 06-033 (June 12, 2007). A claim for refusal to provide information is not subject to arbitration. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 13.IV and cites therein.

The following types of information have been found to be "presumptively" relevant and necessary to negotiating and administering the CBA:

- employee lists
- financial information if the employer asserts inability to meet a wage or benefit demand
- wage rate and wage calculation information (increasingly even as to non-bargaining unit members)
- time-study material and other information used in setting wage rates or incentives
- information on employee job classifications and how they are determined
- information related to hours
- insurance plan cost information and employee benefits under the plan
- worker's compensation policies
- information regarding COBRA coverage, and
- information regarding any other benefit or term and condition of employment.

See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 13.IV and cites therein; *see also National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH*, *supra.* Additionally, other information may be relevant and necessary to investigate and/or process grievances or PPCs, as part of the union's duties in administering or policing the contract and adequately representing bargaining unit members. Other common requests for information concern:

- information pertaining to possible loss of bargaining unit work
- information pertaining to claims of disparate treatment of bargaining unit
- members and or union representatives or supporters

As a practical matter, relevant and necessary information is usually in the possession of the employer and sought by the union, so as a PPC it is usually directed against the employer. Such PPCs may be filed prematurely where the union "adamantly insist[s] on its right to have the information in the precise form demanded," or does not adequately inform the employer of the information's relevancy in those cases where relevancy is not presumed. *See Emeryville Research Center, Shell Development Co. v. NLRB*, 441 F.2d 880, 884 (9th Cir. 1971). When a PPC for refusal to provide information is filed prematurely, it "preclude[s] in effect, a test of the [employer's] willingness to give the Union access to the ... information involved on mutually satisfactory terms." *See American Cyanimid Co.*, 129 NLRB 683 (1960).

The employer may timely raise an affirmative defense that the information is confidential or privileged based on either the employer's interests (such as trade secrets, standardized tests used to evaluate applicants, or non-union employees' wages) or employees' interests (such as drug test results, or medical reports). In either case, both sides will need to argue their particularized needs. If the employer raises a legitimate privacy interest, the union may be denied to the information or, if possible, the two competing interests may be balanced, such as by use of a protective order, submissions under seal to an intermediary, redaction of personal identifying information, or the production of aggregate rather than personal data. *See, e.g.*, *Detroit Edison Co. v. NLRB*, 440 US 301 (1979).

In contrast, a defense based on the Inspection of Public Records Act (IPRA), NMSA 1978, §§ 14-2-1 (1979, as amended through 2019) *et seq*., will be rejected. A union's right to information under the duty to bargain in good faith is not defined by the IPRA because the public policy and purpose underlying the IPRA is to ensure an informed electorate. *See National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH*, 3-PELRB-2005 (Oct. 19, 2005); *see also AFSCME Locals 624, 1888, 2962 and 3022 v. the City of Albuquerque*, Albuquerque Labor Management Relations Board, Case No. LB 06-033 (June 12, 2007) (concluding that while disclosure of such information cannot be compelled under IPRA, IPRA does not prevent its disclosure pursuant to established labor law).[17]

Even though the CBA's "management rights" clause reserved to management the right to determine the size and composition of the work force, to relieve an employee from duties for any legitimate reason, and to determine which employees will conduct the Employer's operations, the layoff of State employees is a mandatory subject of bargaining entitling the Union to a significant opportunity to bargain in a meaningful manner and at a meaningful time over the *effects* of the Employer's decision. The PELRB held, however, that the effects of the layoff at issue were already covered by the CBA and no further bargaining was required. So, while the Board found no PPC arising out of the failure to bargain, it did find a separate PPC to have been committed arising out of the employer's duty to

[17] *See* section IV(A) of this document for additional information on IPRA and confidentiality of collective bargaining materials.

provide information to the union. That duty 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 the layoff and so, the PED committed a PPC by withholding relevant information. *CWA Local 7076 v. New Mexico Public Education Department*, 76-PELRB-2012. On appeal, the District Court agreed that the withholding of information was in violation of the PEBA and remanded to the PELRB for further findings. The Board adopted the Hearing Officer's findings, and recommended decision, and ordered the PED to cease and desist from withholding relevant information and to post a notice of the violation where employees could view it. *See* Order 76-PELRB-12.

It is possible for a CBA to place additional information requirements as in *AFSCME Council 18, Local 3999 v. City of Santa Fe*, PELRB No. 106-20, where the City failed to give a 28-day notice prior to furloughing employees. The Union contended that, "the relief available is broader and should include damages for not complying with the "detailed plan" requirement of the applicable CBA." The Hearing Officer sided with the Union.

2. Refusal to Meet and Confer

The PEBA requires the public employer and exclusive representative to bargain collectively in good faith. *See* § 17(A)(1), § 19(F), and § 20(C), and under the NLRA similar language has been interpreted to impose a per se duty to meet and confer in fact about mandatory subjects of bargaining, upon any party's request. *See* NLRA § 8(d) (defining the term "to bargain collectively" as a duty "to meet at reasonable times and confer in good faith") and *NLRB v. Katz,* 396 U.S. 736, 743 (1962). That obligation to meet and confer relates to collective bargaining defined in NMSA 1978 § 10-7E-4(F) (2020) as: "...the act of negotiating between a public employer and an exclusive representative for the purpose of entering into a written agreement regarding wages, hours and other terms and conditions of employment".

The duty to meet and confer in fact is violated when a party unreasonably and without good faith justification insists upon bargaining by mail or that the other party submit all its proposals in writing, despite the other party's request for personal meetings. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters 12 and 13 and cites therein. Concerning the duty to meet face to face upon request); *compare CWA v. Sierra County,* PELRB Case No. 123-07, Hearing Examiners letter decision of dismissal (July 28, 2008) (PPC dismissed where employer refused to meet face to face and demanded a written counter proposal, but employer's bargaining representatives were allegedly intimidated by the union's bargaining representatives, both parties were responsible for delays in bargaining, and the hearing examiner had previously order the parties to first exchange written proposals).

A school district breached its obligation to bargain in good faith when it suspended negotiations due to its belief that the union lack majority support because of a decline in payroll deductions for dues. Declining payroll dues deductions is not evidence of a lack of majority support and so, suspending negotiations on that basis deprived employees of their chosen representative and disrupted the bargaining relationship. *NEA-NM v. Española Public Schools* 4-PELRB-2011. Resumption of suspended negotiations and ultimate agreement on a contract does not end a controversy over whether the facts

surrounding the suspension of the negotiations constituted a prohibited labor practice as a matter of law. Neither does the Respondent's assertion that a purported survey of union dues being paid did not actually take place and as a matter of law a controversy surrounding the justification for suspension of negotiations. *See also,* 34-PELRB-2012 on the merits of this case.

Several recent PELRB and State Court decisions illustrate the mutual per se duty to meet and confer about mandatory subjects of bargaining, upon any party's request. For example, in *AFSCME, Council 18 v. State of New Mexico,* 1-PELRB-2013 the PELRB held that furloughs are an exercise of management's reserved rights under an article of the parties' CBA reserving to management the right to relieve an employee from duties because of lack of work or other legitimate reason, or under sections reserving to management the right to determine the size and composition of the work force, or to determine methods, means, and personnel by which the employer's operations are to be conducted. Therefore, the State was not obligated to bargain further over the furloughs. *See CWA v. PED,* PELRB Case No 131-11, Hearing Officer's Report and Recommended Decision (October 12, 2012) re: contract coverage theory. *See also, AFSCME, Council 18 v. HSD,* D-101-CV-2012-02176 (1st Judicial Dist., J. Ortiz, 6-142013), *infra.*

3. Refusal to Meet Pending Resolution of a PPC

It is a per se violation of the duty to bargain in good faith to refuse to meet and confer pending the resolution of a PPC. *See RBE Electronics of S.D., Inc.,* 320 NLRB 80, 88 (1995). However, a finding of liability may not be based on ambiguous statements. *See NLRB v. Advanced Business Forms Corp.,* 82 LRRM 2161, 2166-2167 (2nd Cir. 1973); *see also NEA-Santa Fe v. Santa Fe Public Schools,* Case No. 123-06, Hearing Examiner Report (Sept. 26, 2006).

4. Bargaining Directly with Employees

As the NLRB has observed, once a union is certified as exclusive representative,[18] it "is the one with whom [the employer] must deal in conducting bargaining negotiations," and the employer "can no longer bargain directly or indirectly with the employees." *See General Elec. Co.,* 150 NLRB 192, 194 (1964), *enf'd,* 418 F.2d 736 (2d Cir. 1969), *cert denied,* 397 US 965 (1970). Direct dealing constitutes a per se violation of the duty to bargain in good faith because "direct dealing, by its very nature, improperly affects the bargaining relationship." *Americare Pine Lodge Nursing & Rehab. Ctr.,* 325 NLRB 98, 99 (1997).

The prohibition against direct dealing also extends to direct dealing concerning the discussion or settlement of grievances. *See AFSCME Council 18 v. New Mexico Department of Corrections,* 04-PELRB-2007 (Dec.13, 2007), and attached and adopted hearing examiner report.

Direct dealing violations have also been found in such conduct as: promising benefits directly to employees to encourage decertification or changing of the union's bargaining agent; meeting with

[18] Prior to certification but after the filing of a petition, direct dealing is also prohibited, but under the duty to maintain laboratory conditions, to avoid interfering with the right to form, join or assist a Union. *See* Representation Section, *infra.*

employees to actively discuss matters that are subjects of ongoing negotiations, or alterations of existing contract terms; and conducting attitude surveys while refusing to bargain. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters 12.III.C.2; 13.II.B; 13.III.A; 13.3.B.7; 18.II.C.3.

5. Refusal to Execute a Written Contract

Execution of a written contract is expressly required under the PEBA. Compare the PEBA § 17(A)(2), to NLRA § 8(d).[19] Under the NLRA, refusal to execute a written contract has long and widely been held to constitute a per se violation of the duty to bargain in good faith. Nor may an employer insist on union member ratification of the contract prior to execution, unless that is a condition mutually agreed to by the parties prior to bargaining. *See Sierra Publishing Co.,* 296 NLRB 477 (1989). However, "refusal to execute the contract will be lawful if there has been a failure to gain requisite approval of a principal, or a misunderstanding as to terms, or failure to agree on all material terms." *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 13.II.

6. Unilateral Change of Terms and Conditions of Employment

It is a per se breach of the duty to bargain to "unilaterally" alter a "mandatory subject of bargaining" without first providing notice and opportunity to bargain to impasse unless the requirement to bargain has been waived. *See generally* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 13.II. The PELRB found that the Human Services Department committed a prohibited labor practice when it removed security guards from six of its field offices without bargaining that change to impasse. HSD appealed that decision to the District Court on the grounds that the change was a reserved management right and the union had waived bargaining through its CBA. The First Judicial District upheld the PELRB. The Court found that the presence of security guards at the workplace is a term and condition of employment and a mandatory subject of bargaining. Referring to a section of the parties' CBA related to management's discretion in setting "reasonable standards and rules for employees' safety," the Court held that HSD did not meet its burden of showing a clear and unmistakable waiver of the union's right to bargain. *See, AFSCME, Council 18 v. HSD,* D-101-CV-201202176 (1st Judicial Dist., J. Ortiz, 6-14-2013). The decision to remove security was not a reserved management 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 organization) and 18(11) (standards relating to employees' safety). Finally, the Board determined that resumption of negotiations after the PPC was filed does not render the PPC moot nor does it state a defense to the charge that Respondent refused to bargain or breached a contract term on June 30, 2011, when the unilateral changed occurred.

A "zipper" clause and a management rights clause are frequently relied on to show waiver by express agreement. A so called "zipper" clause provides that the collective-bargaining agreement is the complete agreement between the parties and purports to relieve them from bargaining during the term of the agreement. *See*, *Radioear Corp.,* 214 NLRB 362 (1974). Likewise, management rights clauses, which

[19] The only difference being that the PEBA requires it without qualification, while the NLRA requires it "if requested by either party."

typically reserve to the employer the right to act unilaterally with respect to specified subjects, may also be construed as a waiver. *See Allison Corp.,* 330 NLRB 1363, 1365 (2000), but the NLRB has refused to find that a management rights clause constituted a clear and unmistakable waiver where it was couched in very general terms but failed to make any specific reference to the particular subject at issue, *Johnson Bateman Co.,* 295 NLRB 180 (1989).

In *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 Court of Appeals affirmed the decision of the District Court (J. Sanchez) denying the County's motion for summary judgment and granting Intervenor's, Los Alamos Firefighters Association Local #3279, cross-motion for summary judgment. 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.

The State had a longstanding practice whereby a bargaining unit employee who files a grievance may use state-paid time to prepare for and participate in grievance meetings, subject to the discretion of the employee's supervisor. In 2014 the State Labor Relations Director informed agencies that state-paid "union time" only applied to union officers and stewards without bargaining the matter. The Board upheld the Hearing Officer's conclusion that a change in past practice occurred violating Section 10-7E-19(B) but reversed on whether the change constituted failure to bargain in good faith violating Section 19(F). The District Court held that it was inconsistent to find no violation of Section 19(F) while simultaneously finding a violation of 19(B) and remanded for further action including finding regarding whether the CBA's zipper clause precluded a finding of a binding past practice. *Communications Workers of America, AFL-CIO v. State of New Mexico,* No. A-1-CA-36331.

7. Mandatory Subjects of Bargaining

Mandatory subjects of bargaining include wages, hours or other terms and conditions of employment. *See* § 17(A)(1).

Wages includes any type of compensation, benefit or emolument for services performed, such as: piece rates, incentive wage plans, overtime pay, shift differentials, discretionary merit wage increases; holiday pay rate; the holidays to be paid, paid vacations, commissions, severance pay, pensions, and health insurance plans. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters 13.I.B.3; 13.II.F; 16.III and 16.IV. One hearing examiner has determined that the duty to bargain is violated when an employer unilaterally re-designates a scheduled workday as an unpaid holiday, and requires the employees to use annual leave, make up the hours or take leave without pay. *See*, *AFT v. Las Cruces Public Schools,* PELRB 130-06 (Feb. 28, 2007).

The requirements and obligations regarding the funding of a public employee collective bargaining agreement has been the subject of much controversy. Under Section 10-7E-17(H) a public employer's expenditure of funds to comply with bargained-for wage increases is subject to both "the specific appropriation of funds" and "the availability of funds". Two New Mexico appellate court cases, *State v. AFSCME, Council 18,* 2012-NMCA-114, 291 P. 3d 600, affirmed, No. 33,792 (N.M. 2013) and *Albuquerque Ass'n. et al., v. City of Albuquerque, et al.*, 2013-NMCA-110, 314 P. 3d 667; cert. denied, Nov. 20, 2013, No. 34,373 have addressed whether the PEBA § 17(H) allows an employer to escape its contractual obligations under multi-year collective bargaining agreements to provide scheduled wage increases in order to balance its budget or avoid layoffs and resolved the issue in favor of the unions. *State v. AFSCME, Council 18* involved State contracts with organized labor entered into in 2005 committing to future wages at specified levels for state employees covered by those contracts. In 2008 the New Mexico Legislature appropriated funds sufficient to honor those contracts for Fiscal Year 2009, covering the period July 1, 2008, through 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 funds sufficient to honor those 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. The rulings of both the District Court and the Court of Appeals correctly enforce the rights of those state employees covered by contract.

In *Albuquerque Police Officers Ass'n. et al., v. City of Albuquerque, et al*., the City did not implement the final phase of a salary increase negotiated as part of a multi-year agreement, instead implementing a sliding scale wage reduction plan for all City employees. The Court of Appeals reversed Summary Judgment in favor of the City and remanded the matter on the basis that APOA presented evidence that sufficient funds were available to fund all three years of the annual wage increases in its CBA and that the City Council adopted the required resolution to appropriate those funds in 2008 when it adopted and approved the CBA. The City also presented evidence that the funds were available to pay the 2011 increase but the Mayor chose not to make the required allocation of those funds in his 2011 budget proposal for "other policy reasons". *Id.* at ¶ 14. The Court also noted that multi-year collective bargaining agreements are beneficial to both sides, providing "stability and continuity for both

management and public employees." *Id.* at ¶ 11.

Hours include the number of hours worked in a day or shift; number of days worked in a week; work schedules and days off; implementation of swing shift; changing from fixed to rotating shifts; changes in overtime policies; curtailing work hours due to a decline in business needs; changing break times; adding an "on-call" day to a regular schedule; and policies providing pay for certain non-work activities. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters 7.II.1.b; 13.I.B.3; 16.II;16.IV; 29.I.B.

Other terms and conditions of employment include such things as: existing hiring practices reasonably believed to be discriminatory; layoffs and recalls; discharges; seniority, promotions and transfers; changes in operations having a significant impact, unless the right to make operational changes is reserved under the CBA; the effects of economically motivated partial closure of the business; probationary periods; attendance policies; safety and health regulation; dress codes; uniform policies; policies regarding carrying a gun and/or badge; applicant and employee examination requirements; employee drug and alcohol testing; vacation request or scheduling policies; policies concerning the time and place for union discussion with employees; time-keeping methods; work assignments; work duties; workloads; minimum production standards; work rules; subcontracting; elimination of bargaining unit positions; transfer of bargaining unit work outside of the unit, including by promoting unit employees into supervisory positions; grievance and arbitration procedures; past practices concerning providing and/or laundering uniforms; use of bulletin boards by unions; past practices concerning use of an employer's car; and past and future arrangements and conditions for negotiations, such as scheduling, agendas, locations, per diem and compensated leave allowances *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters 13.I.B.3; 13.II.F; 16.III and 16.IV.

An agreement to provide after-hours security was held to implicate employee health and safety, which is a mandatory subject of bargaining. *AFSCME, Council 18 v. New Mexico Human Services Department*, PELRB No. 151-11; 59 PELRB 2012 (July 13, 2012). Payroll deduction of dues is a mandatory subject under the PEBA if either party chooses to negotiate the issue. *See* § 10-7E-17(D). However, the PEBA's provision that "fair share" is a permissive subject of bargaining (§ 9(G) of the Act) has been rendered unenforceable by the U.S. Supreme Court's decision in *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31,* 138 S. Ct. 2448, 201 L.Ed.2d 924 (2018). *See* Section 4 *supra* regarding Discrimination/Retaliation or Interference and Coercion for Not Joining or Assisting the Union and the discussion of the *Janus* decision therein.[20] 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 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.

[20] Under the PEBA I 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 ...".

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).

8. Substantial, Material and Significant Change

To violate the duty to bargain, the change to the mandatory subject must be "substantial, material and significant," rather than *de minimus*. *See Alamo Cement Co.,* 281 NLRB 737, 738 (1986). The following changes have been found to be substantial, material and significant:

- changing a shift schedule. *See Millard Processing Services, Inc.,* 310 NLRB 421 (1993).
- advancing the usual shift start time from 8:00 a.m. to 7:30 a.m. *See Quality Engineered Prods. Co.,* 267 NLRB 593, 597 (1983).
- shortening or extending the length of a lunch break by half an hour, *See Litton Systems*, 300 NLRB 324 (1990), and *Fresno Bee*, 339 NLRB 1214 (2003).
- shortening or extending the length of a lunch break by fifteen minutes, *See Rangair Acquisition Corp.,* 309 NLRB 1043 (1992), and *Sertafilm*, *Atlas Microfilming Div.,* 267 NLRB 682.
- changing the lunch break location to a non-centralized location that prevents employees from communicating during their lunch hour, *See AFT v. Las Cruces Public Schools,* 130-06, Hearing Examiner Report at 28 (Feb. 28, 2007).

These changes have been found to not be substantial, material and significant:

- extending a rest break by five minutes, *See La Mouse*, 259 NLRB 37 (1981).
- changing an employee's classification title where working conditions are only changed minimally, *See Alamo Cement Co.,* 277 NLRB 1031 (1985).
- newly requiring employees to take a short oral test on lectures and written materials given every year, when job position or security is not affected or impaired by the results, *see UNM Nuclear Indus.,* 268 NLRB 841 (1984).
- unilaterally assigning parking spaces when parking was previously allowed on a first-come,

first-served bases, *See Dynatron/Bondo Corp.,* 176 F.3d 1310 (11th Cir. 1999).

- changing parking policy, with the result that a one-minute walk from the parking facility to the employer's entrance became a three-to-five-minute walk. *See Berkshire Nursing Home, LLC,* 345 NLRB No. 14 (2005).
- the transfer of duties between bargaining units, and/or changes to schedules or shifts when the reorganization of a workforce is necessary for legitimate business reasons. *See Bernalillo County Court Deputies Association v. Bernalillo County Sheriff's Office and Bernalillo County*, PELRB No. 121-20 (2021).

See generally JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 16.IV.A.

9. Waiver

As noted, the duty to bargain must not have been previously waived. Waiver can occur either by inaction or by express contractual waiver. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 13.IV.A. *See also AFSCME Council 18, Local 3022 v. ABCWUA*, PELRB No. 108-21.

a. Waiver by Inaction

First, the union can waive the duty to bargain by inaction, by failing to seek to bargain over a proposed change of which it has actual notice, and which was not presented as a "*fait accompli*." *NLRB v. Oklahoma Fixture Co.,* 79 F.3d 1030 (10th Cir. 1996); *Gratiot Community Hospital v. NLRB,* 51 F.3d 1255 (6th Cir. 1995); *Pinkston-Hollar Construction Services, Inc.,* 312 NLRB 1004 (1993); *Haddon Craftsmen, Inc.,* 300 NLRB 789, 790 (1990).[21]The union's duty to request bargaining is relieved if the change is presented as a *fait accompli*. Nonetheless, a "*fait accompli*" will not be found based solely on the fact that the notice presents the "proposed change ... as a fully developed plan or ... use[s] positive language to describe" the change. *Haddon Craftsmen, Inc.,* 300 NLRB at 790. In such a case, the union must still "act with due diligence in requesting bargaining," or "risk a finding that it has lost its right to bargain through inaction and, as a consequence, risk the dismissal of ... allegations because no objective basis exists to find or infer bad faith on the part if the employer." *Id.* at 790-791.

Once the employer provides appropriate notice to the union, "the onus" is then "on the union to request bargaining over subjects of concern." *NLRB v. Oklahoma*, 79 F.3d at 1036-1037 (internal citations and quotations omitted). If the union fails to do so it "will have waived its right to bargain over the matter in question" and "the filing of an unfair labor practice charge does not relieve the union of its obligation to request bargaining." *Id.*

The union was found to have waived bargaining by failing to make a timely demand in *CWA Local 7076 v. New Mexico Public Education Department*, 76-PELRB-2012. 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. Similarly in *Communications Workers of America, AFL-CIO v. State of New Mexico and*

[21] But see NLRB v. Pepsi Bottling Co. of Fayetteville, Inc., 24 Fed. Appx. 104, 114-115 (4th Cir. 2001) citing *Roll and Hold Warehouse Distribution Corp. and United Steelworkers of America Subdistrict 1, AFL-CIO*, Case No.: 13-CA-33306, (October 8, 1997) (all requiring formal notice rather than actual notice, based on the view that a union's role in the collective bargaining process is fatally undermined when it learns of the change incidentally upon notification to all employees).

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 reasonable 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.

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 (white collar) for extracurricular activities such as sponsoring student clubs outside working hours and paying stipends to hourly paid maintenance and transportation employees (blue collar) for bargaining unit work that would otherwise require overtime. *See Adrain 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.

b. Express Waiver

The union may expressly waive the right to bargain over any given subject. Express waiver is typically supported by reference to the substantive content of the CBA, such as to a management rights clause. When an employer relies on a claim of waiver of the duty to bargain, it bears the burden of demonstrating such waiver "clearly and unmistakably," reading the contract "as a whole." *See Provena Hospitals,* 350 NLRB 1 (2007) (regarding NLRB's clear and unmistakable waiver standard); and *Mastro Plastics Corp. v. NLRB,* 350 U.S. 270 (in determining whether a right was waived, a CBA, "[l]ike other contracts, ... must be read as a whole and in the light of the law relating to it when made").

The New Mexico Court of Appeals rejected the argument that a CBA's "zipper clause" constituted a waiver of any right to bargain over the paramedic training contracts at issue. The Court adopted the reformulated standard described by the NLRB in *Radioear* as "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."

Even where the union has clearly and unmistakably waived its right to bargain over an initial decision, however, management may still have a duty to bargain over the effects or impact of that management decision. Unless also waived, effects or impact bargaining is required when the decision "significantly and adversely affects a bargaining unit's wages, hours, or working conditions," *see Claremont Police Officers*

Association v. City of Claremont, 139 P.3d 532 (Cal. 2006), and the impact is not "extremely indirect and uncertain." *See Fibreboard Paper Products Corp. v. NLRB*, 379 US 203, 223 (Stewart, J., concurring) (that such an "extremely indirect and uncertain" impact may alone "be sufficient to conclude that such decisions" do not concern "conditions of employment"); *see also First National Maintenance Corp. v. NLRB*, 452 US 666 (1981). Waiver of the duty to engage in "effects bargaining" must also be clear and unmistakable. *See Allison Corporation*, 330 NLRB 1363 (2000).[22] *See Communications Workers of America, AFL-CIO v. State of New Mexico,* No. A-1-CA-36331. Wherein the New Mexico Court of Appeals remanded to the PELRB for findings regarding whether the CBA's zipper clause precluded a finding by the Board of a binding past practice.

In *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 central issue revolved around whether had waived its right to arbitration. 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.

c. Coverage Analysis

Related to, but analytically distinct from waiver, is the inquiry into whether the parties have already bargained over a subject. As discussed above, a waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter; but where the parties' CBA covers the matter the union has *exercised* its bargaining right. *See AFSCME v. Santa Fe,* PELRB Case No. 101-20. The PELRB thus far has engaged in a two-step analysis when confronted with a waiver issue:

First, the Board determines whether there has already been bargaining on the disputed issue. If the parties' agreement is germane to the issue and there is no indication to the contrary, it is reasonable to conclude that the parties' bargaining encompassed that issue and Board should then determine the agreement's effect on the parties' rights.

Second, if the agreement is not applicable to the disputed topic or not dispositive of the issue then the Board will determine whether the union waived its rights to bargain over the issue. This is not to say

[22] *But see Enloe Medical Center v. NLR*B, 433 F.3d 834 (D.C. Cir. 2005) (advocating the "contract coverage" analysis for effects bargaining as well, reasoning that any intent of the parties to treat a decision and its effects differently should be reflected in some contract language or in the bargaining history); *see also* n. 17, *infra.*

that a broad management rights clause satisfies the contract coverage analysis because the Board will still determine the meaning of the clause and therefore whether the employer's action is a breach of the parties' agreement. A PPC over unilateral changes should be reserved for situations where the contract does not speak to those issues and there was no bargaining or where a clear term of the contract was modified in violation of the duty to bargain in good faith.

10. Maintenance of Status Quo and Doctrine of Past Practice

Related to the issue of "unilateral changes," is the requirement to "maintain the *status quo*" regarding existing mandatory subjects of bargaining, after a petition for election is filed and/or during the course of bargaining. Besides preventing direct dealing and unilateral changes to terms and conditions, this requirement also prevents an employer from suspending all existing benefits and requiring the union to therefore "bargain from scratch," or from "zero." *See infra.*

The *status quo* may be based on an existing or just expired contract. Sometimes, however, it may arise under the doctrine of "past practices." Under this doctrine, if an employer had a past practice that required the use of no discretion on its part, for instance providing a 15-minute break, a predetermined and automatic annual raise, or a turkey lunch on Thanksgiving, it may not discontinue that practice during negotiations. As the U.S. Supreme Court declared in *Steelworkers v. Warrior & Gulf Nav. Co*, 363 U.S. 574, 581-82 (1960): "...the practices of the industry and shop – is equally a part of the collective bargaining agreement although not expressed in it."

For a past practice to be binding, three elements must be met. It must be 1) clear and consistent, 2) repeated over a period of time, and 3) have mutuality. Parties that go along with the practice are giving their mutual acceptance, or mutuality, of the practice. A past practice does not have mutuality if there were objections or expressions of dissatisfaction made at the outset of the practice. A key distinction of past practices that are binding are those that involve working conditions or other benefits of peculiar personal value to employees and do not implicate such management rights as basic methods of operation or direction of the workforce. Strong, clear and unequivocal language in a contract may negate the effect of a past practice. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) at § 12.7, p. 12-18. 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.

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.

The presence of employer discretion in the exercise of a supposed past practice can complicate the analysis. For example, "[a]n employer with a past history of a merit increase program neither may discontinue that program ... nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected. What is required is maintenance of pre-existing practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted." *Oneida Knitting Mills,* 205 NLRB 500, 500 n.1 (1973) (citation omitted); *see also NLRB v. Blevins Popcorn Co.,* 659 F.2d 1173, 1189 (D.C. Cir. 1981) (that the company could not discontinue annual reviews, but also "could not unilaterally determine the size of the increase that each employee would receive" and instead "it would be required to bargain over this discretionary element").

Additionally, in some situations, the doctrines of maintenance of *status quo* and past practice doctrines may have limited direct applicability to the public sector. For instance, in one case, the hearing examiner determined that the doctrines had limited applicability as to legislatively mandated pay increases and budgeting processes, which do not exist in the private sector. *See Int'l Union of Operating Engineers v. Central Consolidated Schools,* Case No. 130-06, Hearing Examiner Report (May 9, 2007) (school does not breach *status quo* by issuing a legislatively mandated pay increase, and school's dissemination of budgeting documents and salary projections do not create a binding promise or *status*

quo prior to formal approval of the school's budget by the Public Education Dept.).

In a Letter Decision for *AFSCME, Local 3022 v. ABCWUA*, the Hearing Officer stated, "Local 3022 filed a grievance on behalf of Joseph Barrios on September 16, 2019, alleging *inter alia*, violations of Article 1 Preamble B, C, D; Article 8 Discrimination; Article 21(A) Vacancies; and Article 27(C) Certification and Training Programs. I do not consider the alleged violations of personal rules also alleged. The alleged "past practice" of hearing grievances before the now-defunct labor board is immaterial, as that board and its operational rules no longer exist. The alternative motion will be decided under *this* Board's precedence and in accordance with *this* Board's procedural rules. I do not read the parties' CBA to require this Board's to hear disputes other than violations of the PEBA pursuant to NMSA 1978 § 10-7E-9(A)(3) (2020), relegating violations of the Personal Rules to its proper place in the grievance arbitration process provided for in the parties' CBA. In any event, the parties' past practice or CBA cannot expand this Board's jurisdiction beyond that set forth in Section 9 of the Act." *See AFSCME, Local 3022 v. ABCWUA* Letter Decision re: Alternative Motion, June 15, 2021, and *AFSCME, Council 18, AFL-CIO, Local 3022 v. ABCWUA*, PELRB No. 108-21.
One question that has been raised in several PPCs but not yet reviewed by the Board is whether an employer's directive implementing a contract can constitute binding past practice. For example, the Office of the Governor has issued a memorandum mandating there be a face-to-face meeting between management and union representatives at each stage of the grievance process. One hearing examiner has concluded the memorandum constituted binding past practice and was therefore incorporated into the CBA, because it was widely disseminated and known to the parties; spoke to an issue not directly covered by the contract; and did not contradict the contract. *See AFSCME v. Department of Corrections*, Hearing Examiner's Report (Feb. 6, 2008).

In *AFSCME, Council 18 v. HSD,* No. D-101-CV-2012-02176 (J. Ortiz) issued 6-14-2013. the District Court upheld the PELRB's holding that a decision to remove after-hours security guards was not a reserved management right because the parties' CBA required HSD to bargain in good faith whenever it contemplates changes to existing terms or conditions of employment relating to employee health and safety.

11. Bargaining From Scratch

An employer impermissibly "bargains from scratch" (also called "zero-based bargaining) when it begins negotiations from the legally required minimum wage, and with no benefits. Thus, bargaining from scratch is essentially a unilateral elimination of existing wage structures and benefits. It is also typically a prohibited retaliatory action, because done in response to the employees' decision to engage in collective bargaining. However, contrary to popular belief, existing wages, hours and other terms and conditions are not an absolute floor or minimum from which future negotiations may only move upward. *See e.g., NLRB v. United Steel Serv.,* 159 Fed. Appx. 611, 612-613 (6th Cir. 2005) (the union made a misleading campaign statement by telling prospective bargaining unit members that the employer "was required by law to start negotiations on wages and benefits at the levels then in effect, from which point wages and benefits would only go up").

To the contrary, "there is no guarantee that the bargaining process will result in maintenance or

improvement of existing benefits." *LaSalle Ambulance, d/b/a/ Rural/Metro Medical Services,* 327 NLRB 49, 51 n. 3 (1998). Even existing "benefits can be lost through the bargaining process," and "the normal give and take of negotiations," once different or additional benefits are sought. *Mediplex of Connecticut*, 319 NLRB 281, 289 (1995) (internal citation and quotations omitted); *see also Checker Motors Corporation,* 232 NLRB 1007, (1977); *Computer Peripherals, Inc.,* 215 NLRB 293, 294 (1974). That is because in such a situation the employer is not acting unilaterally, but rather in response to the union's decision to negotiate other benefits. Accordingly, without more there is no basis for concluding the employer is bargaining in bad faith or acting in retaliation for having to bargain with the Union. *See e.g., Checker Motors* at 18; *Computer Peripherals* at 294.

12. Bargaining over Non-mandatory Subjects

Finally, a per se violation occurs when a party conditions bargaining about mandatory subjects on the negotiation or agreement as to a permissive subject of bargaining or insists to impasse as to permissive or prohibited subjects. *See e.g., NLRB v. Borg-Warner Corp., Wooster Division,* 356 U.S. 342 (1958) (insisting to impasse on a permissive subject is prohibited) and *Benson Produce Co.,* 71 NLRB 888 (1946) (conditioning bargaining on a permissive subject is prohibited); *Sheet Metal Workers Local 91,* 294 NLRB 766 (1989) (insisting to impasse on an illegal subject is prohibited, but mere proposal is not); *Honolulu Star-Bulletin,* 123 NLRB 395, *enforcement denied on other grounds,* 274 F.2d 567 (D.C. Cir. 1959) (inclusion of an illegal subject in a CBA is prohibited); and JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 16.IV. (A permissive subject, in contrast to a mandatory subject, "may by mutual approval of the parties be incorporated into the agreement").

However, it cannot by definition be a violation of the duty to bargain in good faith to refuse to bargain over a permissive or illegal subject of bargaining. *See e.g., International Union of Operating Engineers, Local 953 v. Central Consolidated School District No. 22,* PELRB Case No. 135-06 (Oct. 5, 2006) (concluding it is not a violation of the duty to bargain in good faith to refuse to bargain over "fair share," then a permissive subject of bargaining under § 9(G) of the PEBA, and now, after the decision in *Janus v. AFSCME, supra*, an illegal subject of bargaining, the PELRB would violate the PEBA by entering a bargaining order, as was requested, concerning fair share).

Examples of permissive subject of bargaining include the following:

- those portions of management rights and waiver clauses that do not concern terms and conditions of employment
- interest arbitration upon impasse
- internal union affairs, such as that non-union members be allowed to vote at union meetings
- that employees ratify contracts; or that a contract would become void if the percentage of employee paying their dues by automatic deduction dropped below 50 percent
- whether employees are allowed to use union labels
- the settlement of pending PPCs, *See KBE Electronics of S.D., Inc.,* 320 NLRB 80, 88 (1995)

(that it is a per se violation of the duty to bargain in good faith to refuse to meet and confer pending the resolution of a PPC)

- use of a stenographer or recording device in negotiations, *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters 13.II.F and 16.V.

Some examples of prohibited subject of bargaining include:

- Fair Share or Agency Fee provisions permissible under the PEBA § 9(G) but declared unconstitutional by the U.S. Supreme Court in *Janus v. AFSCME, supra*
- "hold harmless" clauses regarding sex discrimination
- modification of court approved settlements
- preference for union members
- clause making the CBA terminable at will

C. Intent-based Violation

Bad faith in bargaining is inferred from the totality of circumstances, or the entire course of conduct, both at and away from the bargaining table. *NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 466 (2d Cir. 1973) *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 13.III.B (anti-union conduct away from the bargaining table, to be considered, should be accompanied by conduct at the table that evidences bad faith bargaining).

Analysis also considers the actions of both parties, and responses thereto. *See e.g.*, *Komo Paper Prods. Corp.*, 208 NLRB 644 (1974) (an employer's take- it-or-leave-it position did not constitute bad faith bargaining where the union also refused to compromise on any of its demands); *White Cap, Inc.*, 325 NLRB 1166, 1170 (1998) (it is "appropriate to look at the Respondent's actions in light of the Union's bargaining conduct); and *Optica Lee Borinquen, Inc.*, 307 NLRB 705, 720-721 (1992) (no bad faith where "[n]egotiations opened on an antagonistic note," "[e]gos were on a collision course," and the resulting "struggle for control led to an exercise in bashing, and ultimate collapse of the negotiations, for which the Employer, could not alone be faulted").
Thus, the test for subjective bad faith has been recognized to be a "fluctuating one, 'dependent in part upon how a reasonable [person] might be expected to react to the bargaining attitude displayed by those across the table.'"

Bad faith has been inferred and described in a variety of ways over the years:

- a desire not to reach an agreement at all
- lack of sincere effort to reach common ground or a basis of agreement
- lack of serious intent to adjust differences and to reach an acceptable common ground; a take-it-or-leave-it attitude
- lack of an open mind or sincerity in negotiations
- an intent to simply frustrate bargaining; either completely or as it is going at that moment
- a desire to enter into a contract only on the party's own terms

See e.g., *Times Publishing Co.,* 72 NLRB 676, 682-83 (1947); *Advanced Business Forms Corp.*, 474 F.2d at 466; *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960); *NLRB v. Montgomery Ward*, 133 F.2d 676, 686 (9th Cir. 1943) and *White Cap, Inc.*, 325 NLRB 1166, 1169117 (1998).

Notably, the desire to enter into a contract alone does not satisfy the duty to bargain in good faith, and it is the totality of circumstances and conduct that must be weighed. *See NLRB v. General Elec. Co.,* 418 F.2d 736, 761-62 (2d Cir. 1969) ("'[d]esire to reach agreement' may mean different things to different people" and under NLRA § 8(a)(5) "it must mean more than a willingness to sign a piece of paper," because "[t]he statute does not say that any 'agreement' reached will validate whatever tactics have been employed to exact it"); *see also Horsehead Resource Developing Co.*, 154 F.3d 328, 343 (6th Cir. 1998) (C.J. Martin, dissent) (that the mere desire to enter into a contract is not dispositive because any party would obviously desire to enter into a contract on its own terms).

Additionally, bad faith must be distinguished from mere "hard bargaining," which is permissible and "an inevitable aspect of labor-management relations." *See Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 758 (6th Cir. 2003); *see also Coastal Electric Cooperative*, 311 NLRB 1126 (1993) (hard bargaining permissible). It must also be distinguished from mere stubbornness. *See NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 154-155 (1956) (the duty of good faith "is not necessarily incompatible with stubbornness or even with what to an outsider may seem unreasonableness").

PEBA, much like the NLRA, specifically provides that the parties are not "required to agree to a proposal or make a concession." *Compare* the PEBA § 17(A)(2) and NRLA § 8(d) (the bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession"). Under § 8(d) of the NLRA, the U.S. Supreme Court has concluded in its so-called "freedom of contract" trilogy, that this language permits "the parties [to] 'take their gloves off' and to exert whatever economic pressure is at their disposal." *See* WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 105 (3rd Ed. 1993), citing *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952); *NLRB v. Insurance Agents' Union*, 361 U.S. 477 (1960); and *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965). Accordingly, "an employer's bargaining tactics are permissible as long as they are not designed or serve to affect the union's role in the collective-bargaining process or "used . . . as a means . . . to evade his duty to bargain collectively." *See White Cap, Inc.*, 325 NLRB at 1170-71 (1998), *citing American Ship Building v. NLRB*, 380 U.S. 300, 308 (1965).

Finally, because it is the entire course of conduct that is considered, a violation of the duty to bargain in good faith cannot be based solely on "stray statements indicating inflexibility," or isolated misconduct such as the withdrawal of a tentative agreement. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) *supra.* Moreover, because stray statements and isolated misconduct are insufficient to support a conclusion of subjective bad faith, these claims will generally be premature if the parties have not expended a certain amount of time and effort on negotiations. *But see NLRB v. Wright Motors, Inc.,* 603 F.2d 604, 608-609 (7th Cir. 1979) (claim not premature when filed after only three bargain sessions, when the employer insisted on unreasonable provisions; in such a case "the Union should not be compelled to continue the charade for more sessions before asserting its statutorily protected right").

Some examples of subjective bad faith and indicia thereof, under the totality of the circumstances test, include the following:

1. Surface Bargaining

A party violates the duty to bargain in good faith where it engages in surface bargaining, meaning it goes through the motions of bargaining but has no actual intent of entering into a contract. Factors of surface bargaining include:

- delaying tactics
- the nature of the bargaining demands
- unilateral changes in mandatory subjects of bargaining
- efforts to bypass the union as the exclusive representative of the bargaining unit employees
- failure to designate an agent with sufficient bargaining authority
- withdrawal of already agreed upon provisions without good cause, also called "regressive bargaining;" and
- the arbitrary scheduling of meetings.

See Atlanta Hilton and Tower, 271 NLRB 1600 (1984) (factors); and *Driftwood Convalescent Hospital,* 312 NLRB 247, 252 (1993) ("good cause" caveat).

2. Regressive Bargaining

Regressive bargaining is the withdrawal of previous proposals and may be an indicator of bad faith bargaining. However, it is "settled" that regressive bargaining "does not per se establish the absence of good faith, but rather represents one factor in the totality of circumstances test." *Aero Alloys,* 289 NLRB 497 (1988); *NLRB v. Randle-Eastern Ambulance Service,* 584 F.2d 720, 725 (5th Cir. 1978).

Thus, the NLRB "examines the respondent's explanation for its change in position to determine whether it was undertaken in bad faith and designed to impede agreement." *White Cap, Inc.,* 325 NLRB 1166, 1169 (1998), *citing Merrell M. Williams,* 279 NLRB 82, 83 (1986) and *O'Malley Lumber Co.,* 234 NLRB 1171, 1179 (1978).
The NLRB has upheld regressive bargaining where: the employer advised the union it wanted timely ratification and implementation; granted additional benefits to ensure that goal; did not secure that goal because the contract was not timely ratified upon the union representatives' recommendation; and thereafter withdrew those additional benefits. *See White Cap, Inc.,* 325 NLRB at 1169.

3. Breach of Ground Rules

A breach of ground rules may also constitute a breach of the duty to bargain in good faith. *See Detroit Newspaper*, 326 NLRB 700, 703 (1998) (the NLRB should enforce ground rules where it finds "that the party's breach of ground rules was inconsistent with the general statutory obligation to bargain in good faith"); *see also Intl. Brotherhood of Police Officers, Local 320 v. Town of Merrimack,* Case No. P-0723-8,

Decision No. 2004-182 (N.H. PELRB) ("[a]dherence to ... mutual ground rules reflects ... the statutory obligation the parties have to negotiate in good faith"), and *United Electrical, Radio and Machine Workers of America, Local 267 v. University of Vermont*, 21 NLRB 1206 (1998) (ground rules are "integral to the process of negotiating over substantive issues" and "integral to the dynamics of how negotiations over substantive issues will proceed").

Where the breach of ground rule does not, by itself, arise to the level of a breach of the duty to bargain in good faith, it may nonetheless be further indicia of bad faith. *See Inland Counties Legal Services and Workers Unidos*, 317 NLRB 941, 947 (1995) and *The Electric Materials Company (Temco)*, 2002 NLRB Lexis 540 at 156-159.

If the ground rules for collective bargaining negotiations reflect an understanding of tentative agreements, then an employer's withdrawal of tentative agreements does not, standing alone, constitute bad faith bargaining. *See AFSCME Council 18, Local 2499 v. Bernalillo County*, PELRB Case No. 120-20, where the parties' agreed upon ground rules stated that neither party was bound by a tentative agreement until a full CBA was signed.

4. Other Indicia of Bad Faith Bargaining

Under the broad totality of the circumstances test, a party may be bargaining in bad faith even if it is not engaged in surface bargaining, engaged in regressive bargaining, or breached significant ground rules, provided it seeks to frustrate bargaining, at least as it is going at that moment in time. Subjective bad faith in bargaining can be demonstrated by the following additional conduct or indicia (some of which overlap with the surface bargaining factors):

- refusal to make concessions, proposals or counterproposals, unless "patently meaningless" or "patently unreasonable"
- intransigent insistence on unreasonable or overly broad management rights and waiver clauses
- engaging in dilatory tactics, such as procrastinating in executing or ratifying a contract; delaying the scheduling of meetings; canceling meetings without proposing any additional sessions; scheduling only brief bargaining sessions and taking numerous and long breaks during those meetings; and delaying the provision of information necessary to make and evaluate proposals
- seeking to coerce a party regarding the selection of its bargaining, and/or refusing to meet with a particular chosen representative in the absence of a "clear and present danger" or such severe ill will as to make bargaining impossible or futile
- sending a representative with inadequate authority to bargain
- imposing unreasonable conditions upon either bargaining or the execution of a contract, such as requiring the opposite party to withdraw pending grievances, or negotiate non-mandatory subjects of bargaining
- making unilateral changes while bargaining is underway

- bypassing the union to negotiate directly with individual employees
- commission of prohibited practices while bargaining is underway; or
- premature declaration of impasse and/or implementation of contract proposals

See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 13.III.B. *See also Master Window Cleaning, Inc.,* 302 NLRB 373, 375 (1991) (premature implementation of contract proposal).

Although not yet fully adjudicated and reviewed under the PEBA, there are two other types of conduct that arguably could provide indicia of or constitute bad faith:

5. Prior PPCs and/or Other Matters Already Settled

Under the NLRA, evidence of other conduct, including prior PPCs and/or matters settled, may also be heard and considered as part of the "background" evidence for a subjective bad faith claim. Used in that manner, it would be further indicia of bad faith. However, any such background conduct must have occurred within the six-month statute of limitations, and a settlement agreement itself cannot be used as evidence of union animus absent a specific provision in the agreement to permit reliance therein as a litigated case. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 13.III.B. *See also AFSCME, Council 18, Local 3022 v. ABCWUA*, PELRB Case No. 107-21, where the Complainant's PPC was previously decided in final and binding arbitration and affirmed in District Court.

In *AFSCME, Counsel 18 v. New Mexico Human Services Dep't,* PELRB Case No.: 151-11, 59-PELRB-2012 (July 13, 2012), regarding the decision to remove security and the requirement of HSD to bargain in good faith whenever it contemplates changes to existing terms or conditions of employment, the Board determined that resumption of negotiations after the PPC was filed does not render the PPC moot nor does it state a defense to the charge that Respondent refused to bargain or breached a contract term on June 20, 2011, when the unilateral change occurred.

6. Disclosing Matters Discussed in Closed Bargaining Sessions

Another recurring and unresolved issue is whether a party violates the duty to bargain in good faith by publicly disclosing matters discussed in closed bargaining session pursuant to § 17(G)(2) of the PEBA. This practice is also referred to as bargaining around or behind the designated bargaining team.

There is some support for the proposition that such disclosure violates the PEBA. First, the PEBA requires these sessions be closed and, since the bargaining team itself is not a public body subject to the Open Meetings Act, "closed" would seem to mean confidential in this context. Second, the Board approved Template Ordinance and Template Resolution expressly prohibit public employers and labor organizations alike from "negotiating issues which are the subject of negotiations" with or through anyone other than "the appointed ... negotiating team." Moreover, the Templates state that "[it] is the intent of this language that the integrity of the negotiating process be maintained." *Id.* §§ 16(B) and 17(B). This interpretation, moreover, is consistent with the "accepted practice" in some states, which require that public sector "negotiations be conducted in private and unilateral public releases about

negotiations sessions be prohibited prior to impasse," because "unilateral, one-sided public release of information about negotiations" is damaging to "the free exchange of views and compromise inherent in collective bargaining." *See e.g.*, *United Electrical, Radio and Machine Workers of America, Local 267 v. University of Vermont*, 21 VLRB 106 (1998).

Based on the foregoing, one hearing examiner has concluded that such conduct violates the PEBA. *See Santa Fe Public Schools v. NEA-Santa Fe*, PELRB Case No. 122-06. However, the Board's questions and comments during oral arguments, prior to the matter being dismissed as moot, indicated uneasiness with the constitutional implications of such a ruling. As an alternative, the parties may be able to avoid these first amendment concerns if they agree to ground rules that clearly and unambiguously impose confidentiality requirements on the negotiations.

D. PPCs Pursuant to § 10-7E-19(G) or § 10-7E-20(E) for Violation of the PEBA or PELRB Rules

The standard for a claim will most likely be whether the section of the PEBA alleged to have been violated awards a specific substantive right; or whether the section is merely advisory, aspirational or precatory. For example, § 10-7E-2 (the "Purpose" section), is frequently cited as having been violated by an employer or union for "failing to promote harmonious relations." However, § 2 does not provide any substantive rights and it is unlikely that the Legislature intended, by § 19(G) and § 20(E), to create substantive rights in a provision that does not itself provide a substantive right. Moreover, purpose sections of legislation are typically only intended as an aid to statutory interpretation, such as in analyzing whether a particular action violates or comports with the act in question.

For instance, 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 the 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).

1. Violation of PELRB Rules in Amending a Local Ordinance

An employer violates § 19(G) where it effectively amends a resolution without prior PELRB approval, contrary to 11.21.5.13 NMAC, by instituting a policy requirement that board appointees be "local" to the area. *See American Federation of Teachers Local 4212 v. Gadsden Independent School District,* PELRB Case No. 169-06, Hearing Examiner's letter decision (Nov. 2, 2007).

2. Interference with the Collective Bargaining Relationship in Violation of § 10-7E-15(A)

An employer violates § 10-7E-19(G), in addition to § 10-7E-19(C), where it interferes with the union's status as exclusive representative under § 10-7E-15(A) and interferes in the resultant collective bargaining relationship, by failing to give notice of a mandatory employee meeting concerning the terms and conditions of employment to the employee's union. *AFSCME Council 18 v. Department of Health,* 06-PELRB-2007 (Dec. 3, 2007).

3. Agreements Valid; Enforceable Under § 10-7E-22

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 right. Consequently, they held that the regulation was unconstitutionally retroactive and violated the Contract Clauses of both the United States and New Mexico constitutions.

4. Violation of Incumbent's Rights Under § 10-7E-24(B)

An employer violates § 19(G) where it refuses to recognize a grandfathered bargaining unit, and/or refuses to bargain with incumbent exclusive representatives prior to a demonstration of majority support. *See American Federation of Teachers Local 4212 v. Gadsden Independent School District,* PELRB Case No. 309-05, Hearing Examiner's report at 10-13 (Jan. 4, 2006).

Section 24(B) provides that an incumbent union "recognized as the exclusive representative ... on June 30, 1999, shall be recognized as the exclusive representative on the effective date of [PEBA II]." Section 10-7E-4(I) in turn defines "exclusive representative" as "a labor organization that ... has the right to represent all public employees in an appropriate bargaining unit for the purposes of collective bargaining." Thus, it necessarily follows that an immediate duty to bargain arises when § 24(B) expressly requires a demonstration of majority support only to enter into a CBA and not to be recognized as the exclusive representative. *See Gadsden,* Case 309-05, *supra.*

5. Picketing, Lockouts, Strikes and Slowdowns

Unions and public employees are prohibited from picketing the homes or private businesses of elected officials or public employees. *See*, § 20(F). Additionally, lockouts, strikes and slowdowns—and their instigation or encouragement—are also prohibited. *See*, §§ 21(A) (strike); 21(B) (lockout).

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

The PEBA, like the NLRA, prohibits violation of a CBA. *Cf.* NLRA § 185(a), 29 U.S.C. § 301(a). However, in certain cases the PELRB may not hear a contract claim, immediately or at all.

Section 17(F) of the PEBA requires all CBAs to include a grievance procedure culminating in final and binding arbitration.

If the PELRB does not defer the contract violation but hears the contract violation claim, New Mexico law will govern contract interpretation. Traditionally, under New Mexico law the intent of the parties in the event of a contract dispute is to be ascertained from the language of contract in the first instance, and recourse to extrinsic evidence (*e.g.*, testimony or documentary evidence going to what one party, or another thought or intended the contract to mean) is generally only allowed if the terms of the contract are unclear or ambiguous. *Brown v. American Bank of Commerce*, 1968-NMSC-096, 79 N.M. 222, 226 (internal citations omitted). A contract is ambiguous if, considered as a whole, it "is reasonably susceptible to different constructions." *Kirkpatrick v. Introspect Healthcare Corp.*, 1992-NMSC-070, 114 NM 706, 711. Ambiguity is not established simply because parties differ on contract's proper construction. *Id.*

More recently New Mexico courts have tended to allow extrinsic evidence at the outset, as to surrounding circumstances, to ascertain whether a contract term is ambiguous. However, the decision to do so appears to be within the sound discretion of the trier of fact, such as if a prima facie case of ambiguity is presented, the disputed language is a term of art in the industry, and/or the record requires additional evidence. *See C.R. Anthony Co. v. Loretto Mall Partners*, 1991-NMSC-070, 112 N.M. 504, 508-509 ("[w]e hold today that in determining whether a term or expression to which the parties have agreed is unclear, a court may hear evidence of the circumstances surrounding the making of the contract and of any relevant usage of trade, course of dealing, and course or performance") (emphasis added).[23]

Additionally, it apparently still holds true that in construing the contract, it "should be interpreted as a harmonious whole to effectuate the intentions of the parties, and every word, phrase or part of a contract should be given meaning and significance according to its importance in context of the contract." *Brown*, *supra*. It is not the province of courts or agencies "to amend or alter the contract by construction," and the contract language must instead be interpreted to "enforce the contract which

[23] Indeed, this construction seems almost necessary to prevent the exception from swallowing the rule, with the resultant evidentiary free-for-all.

the parties made for themselves." *Id.*

The PELRB dismissed a PPC alleging that a CBA between AFSCME and the State violates Section 10-7E-17(F) of the PEBA because it submits to the negotiated grievance and arbitration procedures only those disputes related to the application and interpretation of the collective bargaining agreement, not disputes related to discipline or to the violation, misinterpretation or misapplication of State Personnel Board rules. The district court upheld the dismissal in *AFSCME Council 18 v. The State of New Mexico and the New Mexico Public Employee Labor Relations Board*, No. D101-CV-200703130 (J. Sanchez) (In re: PELRB 164-06), reasoning that § 17(F) does not define what is a "grievance." It was appropriate, therefore, for the parties to limit the scope of the binding arbitration provisions in their collective bargaining agreement.

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 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.

1. Contract Violation Cases Before the PELRB

Several PPCs have asserted violation of the contract. Please refer to the PELRB's most recent Annual Report posted on its website for the statistics concerning the number of PPCs filed alleging contract violations. Of the contract violation cases filed most settle or are withdrawn, a smaller number are deferred to grievance arbitration. Of contract cases heard by the PELRB, most have involved the simple application of relatively clear contract language. Several cases, however, have been noteworthy.

CWA v. Environment Dept., PELRB Case No. 140-07, addressed the provision in State CBA's that imposes on the employer a 45-day limit for taking disciplinary action "after it acquires knowledge of the employee's misconduct for which the disciplinary action is imposed, unless facts and circumstances warrant a greater period of time." *See* CWA/State CBA, Article 8, Section 3; *see also* AFSCME/State CBA, Article 24, Section 4. The hearing examiner concluded "acquires knowledge of the ... misconduct" means knowledge of the conduct on which discipline is based, rather than knowledge that the act or conduct constitutes "misconduct." Thus, "the 45-day period is the investigatory period unless "facts and circumstances warrant a greater period of time." *Id.* at 3, Hearing Examiner's letter decision granting respondent's Motion to Defer in favor of State Personnel Board proceedings (Nov. 19, 2006) (emphasis in original).[24]

AFSCME v. State Personnel Office, PELRB Case No. 143-07, addressed the "management rights" clause in the AFSCME/State CBA. The Hearing Examiner concluded that, reading the contract as a whole, the union had clearly and unmistakably waived its right to bargain over amendments to the State's employee evaluation form, by permitting the State to reserve "the sole and exclusive right [ ]" to "evaluate ... employees." *See* AFSCME/State CBA, Article 18, Section 1(1). *Id.* Hearing Examiner's letter decision on Motion to Defer (March 20, 2008).

In *AFSCME, Council 18 v. HSD,* No. D-101-CV-2012-02176 (R. Ortiz) (6-14-2013) the District Court affirmed the PELRB's holding that a decision to remove after-hours security guards was not a reserved management right because the parties' CBA required HSD to bargain in good faith whenever it contemplates changes to existing terms or conditions of employment relating to employee health and safety.

In the PELRB case *AFSCME Council 18 v. NM Tax & Rev. Dep't.*, PELRB Case No. 104-12, 55-

[24] The State Personnel Board (SPB) matter concerned the just cause of discipline in light of the fact that it was allegedly issued after the contractual time limit for doing so. The matter was deferred to the SPB pursuant to 11.21.3.21 NMAC for purposes of determining whether "facts and circumstances exist[ed] which require[d] a longer period of time" in which to investigate the matter and issue discipline. However, the hearing examiner concluded the PELRB, rather than the SPB, was more appropriately charged by statute with interpreting the meaning of the disputed CBA language. *See* the PEBA § 9(A)(3), § 9(F) and § 19(H). The hearing examiner also concluded PELRB interpretation prior to SPB deferral was necessary because the issue was a recurrent one with state-wide implications, and the PELRB could be potentially precluded from reviewing any SPB interpretation under *City of Deming v. Deming Firefighters Local 4251*, 2007-NMCA-069, ¶17, notwithstanding the PELRB's authority under 11.21.3.21 NMAC to enforce the PEBA rights in the face of contrary decisions by other agencies. *Id.* at 2-3.

PELRB-2012, an employee - union member was reprimanded by her supervisor allegedly for using state phones to conduct union business. The Union filed a PPC alleging that the reprimand violated §§ 19(A), (B), (C), (F), (G) and (H) of the PEBA. At a hearing on the merits May 16, 2012, the Hearing Officer granted the State's motion for directed verdict dismissing all claims. The PELRB affirmed the Hearing Officer's recommended decision concluding that there were substantial reasons for taking disciplinary action apart from the employee's union activities and affiliation. While the union established the employee's union affiliation and activities and established that correction and disciplinary action has been taken, it did not establish a nexus between the two. Relegating union-related calls to the last 15 minutes of the day, without more, was not enough when the evidence showed that there were 40 hours of personal phone use for which the employee was disciplined but only 2 hours of which were union related calls. The Union did not show that restricting union-related calls to the last 15 minutes of the day interfered with union business so that PEBA § 19(B) would be implicated. No evidence was presented as to any other specific provisions of the PEBA or the parties' violated. Accordingly, there was no evidence to support a claim that the PEBA § 19(G) or (H) was violated.

In the PELRB case *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, or under Section 1(4) to determine the size and composition of the work force, or under Section 1(8) to determine methods, means, and personnel by which the Employer's operations are to be conducted. Therefore, the State was not obligated to bargain further over the furloughs as requested pursuant to Article 18 Section 2(9) of the CBA or otherwise under the PEBA. The Board emphasized that its conclusion should not be read to mean that "effects bargaining" is forever foreclosed, even as to furloughs if the union in a future case can identify an effect not already covered by the CBA, for although both the Management Rights Clause and Article 31 afford the Employer wide latitude to implement a furlough, there is no indication that this flexibility reserved to management to change the workforce automatically included a corresponding right to evade all bargaining over the impact of those changes, or that the parties fully discussed at the time they entered into their CBA the specifics of any such plan.

In *NEA-NM v. West Las Vegas School District* 21-PELRB-13 (Aug. 19, 2013) while the parties were 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. In a split decision the Board voted 2-1 (Member Shaffner dissenting) to grant the injunction. In so doing, the PELRB affirmed that it has jurisdiction to grant pre-adjudication injunctive relief based on the PEBA's § 23(A) and § 18(D) (evergreen provision) requires existing contracts to remain in effect until a successor contract is negotiated. The injunction was appealed to District Court as case No. D-412-CV-2013-00347 and eventually a universal settlement was achieved at the scheduled merits hearing.

In *Central Consolidated School Association v. Central Consolidated School District*, 27-PELRB-13 (October 11, 2013), upheld on appeal as *Adrian Alarcon v. Albuquerque Public Schools Board of Education and Brad Winter*

Ph.D., Superintendent of Albuquerque Public Schools, No, A-I-CA-34843 consolidated with *Central Consolidated School District No. 22 v. Central Consolidated Education Association*, No. A-I-CA-34424. (J. Vigil) (November 30, 2017), the Union alleged that the School District violated NMSA 1978, § 10-7E-19 (B), (F), (G) and (H) (2020) by refusing to review grievances appealed to the School Board pursuant to Step 4 of their negotiated grievance procedure. The union additionally alleged further violations arising out of the District having given three bargaining unit employees additional work and paid them an additional "foreman" stipend without bargaining those changes, by intentionally discriminating against three internal candidates on the basis of union activities or association during their competition with an outside candidate for a vacant Maintenance Foreman position in January of 2013, by the conduct of the District's agent during a Labor-Management Team meeting and by the School Board President having posted negative comments about the union and its leadership on his Facebook page.

The PELRB held that the District committed prohibited labor practices pursuant to the PEBA § 19 (G) and (H) by refusing to review grievances appealed to the School Board pursuant to Step 4 of their negotiated grievance procedure found in Article 14 of the CBA. The PELRB also found that the District violated § 17(A)(1) when the District gave three bargaining unit employees additional work and paid them an additional "foreman" stipend without bargaining those changes with the union and therefore committed a prohibited labor practice pursuant to the PEBA § 19(C), (F) and (G) but found there to be insufficient evidence to support a conclusion that the District's conduct violated the PEBA § 19(B) prohibiting interference with, restraint or coercion of a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act. Similarly, the Board found there to be insufficient evidence to show that the employer intentionally discriminated against three internal candidates on the basis of union activities or association in connection with their competition with an outside candidate for a vacant Maintenance Foreman position or that the conduct of its agent during a Labor-Management Team meeting and the School Board President's Facebook postings rose to the level of a PPC.

On appeal the school district argued that the union had waived its right to bargain over stipends by not objecting to previous stipends paid to salaried teachers. The District Court affirmed the PELRB decision and the NMCA found that the Board did not err when finding the school district had engaged in prohibited practices, nor did the District Court in affirming the Board's decision. The NMCA noted a clear distinction between providing a stipend to salaried workers and providing a stipend to hourly wage workers who would otherwise have to be paid overtime.

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 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. District Court affirmed that decision 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."

2. "Other Agreements"

Section 20(D) also prohibits *unions* from violating "other agreement[s]" between the union and employer. *Id.* The failure to apply this same prohibition to employers in § 19 was likely a clerical or drafting error, and the prohibition will probably be applied even handedly to both employers and unions.

"Other agreements" has been interpreted to include ground rules. *See Santa Fe Public Schools v. NEA-Santa Fe*, PELRB Case No. 122-06 (Sep. 27, 2006); *see also Intl. Brotherhood of , Local 320 v. Town of Merrimack*, Case No. P-0723-8, Decision No. 2004-182 (N.H. Public Employee Labor Relations Board) (concluding that ground rules "constitut[e] a valid contract between the parties," and "constitute an agreement, in and of itself, between the parties," because "[i]n form it is dated and executed and its content expresses, in part, standards of conduct or obligations of the parties related to their negotiations").

However, under the duty to bargain, it may sometimes be appropriate and lawful to "retreat from" or "depart from" ground rules where they hinder bargaining. *See Detroit Newspaper Agency*, 326 NLRB 700, 703-704 (1998).

"Other agreements" should logically also include Memorandums of Understanding, and settlement agreements concerning grievances and PPCs. *AFSCME, Council 18 v. New Mexico Regulation and Licensing Department* 5-PELRB-2013 (Feb. 21, 2013).

XII. Post-hearing Procedures

The hearing examiner may leave the record open for a period to supplement the record. Upon closing of the record and receipt of post-hearing briefs, if any, the examiner shall write and issue a report of his or her findings of fact, conclusions of law, and recommended disposition. *See* 11.21.3.18 and 11.21.2.21 NMAC. The hearing examiner should generally issue such reports within 15 business days following the close of the hearing or the submission of post hearing briefs, whichever is later. *Id. But see 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,* 1992-NMCA-083, 114 N.M. 390, (that these time limits are directory rather than mandatory, and their violation does not require Board rejection of the report unless there is a demonstration of prejudice by delay). *See* Section III (B) *et seq. supra* re: effect of the Board's failure to abide by its own time limits.

Once the hearing is closed, the hearing examiner's decision will be rendered based on all relevant evidence admitted without objection. *See AFSCME v. Dept. of Health,* PELRB Case No. 168-06, Hearing Examiner's Decision and Recommendation on Respondent's Motion to Reconsider (Jan. 22, 2007); *see also* Rule 1-015(B) NMRA (pleadings are deemed amended to conform with evidence received into the record when the issue is "tried by express or implied consent of the parties"), *Wynne v. Pino,* 1967-NMSC-254, 78 N.M. 520, 522 (when the issues is tried by express or implied consent, "the trial court is obliged to treat the issue in all respects as it had been raised in the pleadings") (emphasis added), and *Foundation Reserve Insurance Co. v. Mullenix,* 1982-NMSC-038, 97 N.M. 618 ("[u]nder notice pleading, the evidence in a case may establish liability ... different from that alleged in the pleadings or otherwise anticipated by the parties"). However, where an issue is not raised in the complaint or fully litigated at the merits hearing, the record may be inadequate to support findings or conclusions as to that issue. *Trident Seafoods, Inc. v. NLRB,* 101 F.3d 111, 116 (D.C. Cir. 1996).

If there is no appeal to the PELRB, the PELRB may *pro forma* adopt the report to ensure that any required remedial action is taken. *See* 11.21.3.19(D) NMAC. A PPC decision adopted will not constitute binding precedent. *Id.*

A. Request for Board Review of Hearing Examiner's Decision

Any party may request Board review of a hearing examiner's dismissal or report on the merits hearing, within 10 business days of the service of the dismissal or report. *See* 11.21.3.13 NMAC (regarding dismissal without a hearing on the merits) and 11.21.3.19 NMAC (regarding the final decision on the merits). The party requesting review must state the specific portion of the report to which exception is taken, and the factual and legal basis for the exception. *Id.* After a request is filed, the other party will have 10 business days in which to file a response. *Id.* at subparagraph (B).

Interlocutory appeals are only allowed with the hearing examiner's, director's or PELRB's permission. *See* 11.21.1.27 NMAC. *See also United Health Professionals of New Mexico, AFT, AFL-CIO & UNM Sandoval Regional Medical Center,* PELRB Case No. 306-21 and *UE & UNM Board of Regents*, PELRB 307-20 where parties sought clarification on whether decisions were interim decisions or final orders of the Board subject to appeal to the District Court under Rule 10-74 NMRA.

Not subject to review is a hearing examiner's initial decision to defer or not defer processing of a PPC pending arbitration, although the subsequent decision after completion of arbitration to dismiss the PPC or further process it is subject to review. *See* 11.21.3.22(E) NMAC.

PELRB review is based on the record and/or on evidence presented or offered at earlier stages and shall not be de novo. *See* 11.21.1.27 NMAC.

Under the NLRA, which also utilizes the whole record standard of review, the NLRB's "established policy is not to overrule an administrative law judge's credibility resolution unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." *See Blue Grass Industries, Inc. and United Food and Commercial Workers, International Union, Local 68,* 287 NLRB 274, 274 n.2 (1987) (*citing Standard Dry Wall Products,* 91 NLRB 544 (1950), *enf'd.* 188 F.2d 362 (3d Cir, 1951)).

B. Motions to Reconsider

The first PELRB held it lacked jurisdictional authority to reverse or reconsider its final actions or decisions, because the legislature did not specifically grant it that authority. *See New Mexico State University Police Officers Assoc. and New Mexico State University,* 1 PELRB 13 (June 14, 1995). However, the present day PELRB has in one final Decision and Order provided that the appellant could file a Motion for Reconsideration showing prejudice, where the appellant had argued on appeal that the hearing examiner improperly raised, on his own, the issue for which it was found liable. *See AFSCME Council 18 v. Dept. of Health,* 06-PELRB-07 (Dec. 3, 2007).

C. Enforcement of PELRB Orders

If a party disregards or violates a PELRB order, the proper recourse is to seek judicial enforcement pursuant to § 10-7E-23(A). Actions taken by the Board, or a local board, shall be affirmed unless the court concludes the action is:

(a) arbitrary, capricious or an abuse of discretion
(b) not supported by substantial evidence on the record considered as a whole
(c) otherwise not in accordance with law

Additionally, the disregard or violation may form the basis of another PPC under § 19(G) or § 20(E) (violations of the PEBA), and §§ 9(B)(1) and (E) (granting the PELRB authority to hold hearings and enforce the PEBA through the imposition of appropriate administrative remedies).

D. Judicial Review

The PEBA also provides the right to appeal to District Court. *See* § 23(B). The appeal to district court must be filed within 30 days of the issuance of the decision. *See* Rule 1-074 NMRA and NMSA 1978, § 39-3-1.1 (1999). Thereafter, further appeal may be had only upon the granting of a writ of certiorari, which must be filed within 20 days of the decision appealed. *See* Rule 12-505 NMRA.

The Public Employee Bargaining Act, NMSA 1978, § 10–7E–23(B) (2003), instructs reviewing courts

that "[a]ctions taken by the Board or local board shall be affirmed unless the court concludes that the action is (1) arbitrary, capricious [,] or an abuse of discretion; (2) not supported by substantial evidence on the record considered as a whole; or (3) otherwise not in accordance with law." The court views the evidence in a light most favorable to the Board's decision and employs a deferential standard to the decision concerning areas within the agency's expertise. While we do not substitute our judgment for that of the Board, we examine the record to determine whether it supports the result. *San Juan College v. San Juan College Labor Management. Relations Board*, 192 L.R.R.M. (BNA) 2119, 267 P.3d 101, 275 Ed. Law Rep. 409, 2011-NMCA- 117 citing *N.M. State Bd. of Psychologist Exam'rs v. Land*, 2003–NMCA–034, ¶ 5, 133 N.M. 362, 62 P.3d 1244. If the findings do not support the result, the reviewing court may adopt facts from the record before it. *Sanchez v. N.M. Dep't of Labor,* 1990-NMSC-016, 109 N.M. 447, 449, 786 P.2d 674, 676. The District Court employs a *de novo* standard of review. *Selmeczki v. N.M. Dep't of Corr.,* 2006–NMCA–024, ¶ 13, 139 N.M. 122, 129 P.3d 158.

E. Remedies

Both the PELRB and any local board has the power to enforce the Public Employee Bargaining Act through the imposition of appropriate administrative remedies, which may include actual damages related to dues, back pay including benefits, reinstatement with the same seniority status that the employee would have had but for the violation, declaratory or injunctive relief or provisional remedies, including temporary restraining orders or preliminary injunctions. No punitive damages or attorney fees may be awarded. *See* § 10-7E-9 and § 10-7E-11(E). Backpay has been awarded by the PELRB where an improper unilateral change of a term and condition of employment resulted in a loss of pay to bargaining unit employees. *See, e.g.*, *Classified School Employees Council of Las Cruces (Physical Plant Dept. Bargaining Unit) v. Las Cruces Public Schools*, PELRB Case No. 130-06 (Feb. 28, 2007, Hearing Examiner's Report). Since the 2020 amendment to the PEBA, both the PELRB and any local board has the power to enforce the Public Employee Bargaining Act through the imposition of appropriate administrative remedies, which may include actual damages related to dues, back pay including benefits, reinstatement with the same seniority status that the employee would have had but for the violation, declaratory or injunctive relief or provisional remedies, including temporary restraining orders or preliminary injunctions. No punitive damages or attorney fees may be awarded. *See* § 10-7E-9(F).

Under the NLRA, a similar grant of power has been interpreted to authorize only prohibitory orders, such as cease-and-desist orders, and remedial action orders designed to cure the prohibited practice. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW 7th Ed.) Chapters 31.III.B.10; 32.III.B.2. The U.S. Supreme Court has noted that the NLRB's authority to order affirmative action "does not ... confer a punitive jurisdiction enabling the Board to inflict ... any penalty it may choose ... even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." *Consolidated Edison Co. of New York v. NLRB,* 305 U.S. 197 (1938).

Remedies should be tailored to cure the harm caused, so it is impossible to identify every possible remedy in advance. However, the following remedies have been or are likely to be raised before the PELRB:

The still undecided *Starbucks Corporation v. M. Kathleen McKinney, Regional Director of Region 15 of the Nation Labor Relations Board*, Docket No.: 23-367 (pending), revolves around the evaluation of the National Labor Relations Board's requests for injunctions under Section 10(J) of the National Labor Relations Act, which allows the NLRB to request court-ordered injunctions when it believes that unfair labor practices are occurring during the pendency of a complaint proceeding. The NLRB sought an injunction against Starbucks Corp., alleging that Starbucks had engaged in unfair labor practices, including interfering with an employee's right to engage in protected concerted activities. The specific question before the Supreme Court is whether courts should apply the traditional, stringent four-factor test for preliminary injections or a more lenient standard when considering the NLRB's injunction requests. Stringent four factors include the likelihood of success on the meris, irreparable harm, balance of equities, and public interest. (Pending).

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).

1. Pre-adjudication Injunctions

The legislature has granted the PELRB authority to issue temporary injunctions prior to the adjudication of a case on the merits. *See* § 10-7E-23(A) ("[t]he board ... may request the district court to enforce orders issued pursuant to the [PEBA], including those for appropriate temporary relief and restraining orders"). In *City of Rio Rancho v. AFSCME Council 18, Local 3277, AFL-CIO,* CV-2019-1398, the 2nd Judicial District Court (J. Franchini) affirmed the Board's statutory authority under section 23 of the PEBA to issue injunctive relief including preliminary injunctions.

However, this is an extraordinary remedy and must be justified under the circumstances. *See CWA Local 7911 v. Sierra County,* PELRB Case No. 133-08, Hearing Examiner's letter decision on Motion for Immediate Injunction (Aug. 19, 2008). Under New Mexico law, to obtain an injunction prior to a hearing on the merits, "a plaintiff must show that (1) the plaintiff will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause the defendant; (3) issuance of the injunction will not be averse to the public's interest; and (4) there is a substantial likelihood plaintiff will prevail on the merits." *Id.* quoting *LaBalbo v. Hymes,* 1993-NMCA-010, 115 N.M. 314, 318, 850 P.2d 1017.

2. Posting

A common remedy is to order the posting of a notice that certain actions of a respondent have violated the PEBA. Such postings are generally for sixty (60) days beginning as soon as the notice is issued to the employer. However, the posting time may be adjusted "to coincide with the actual operation of a seasonal business," such as schools. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 32.III.

3. Cease-and-Desist orders

A prohibitory cease-and-desist order is another common remedy. It orders the respondent to discontinue the specific action determined to violate the PEBA, as well as "any similar or related" conduct, and is typically issued in tandem with a Notice for posting.

The cease-and-desist order and posting order will be the basic remedy for interference with, restraint of, or coercion of employees in the exercise if their PEBA rights. *Id.*

Where the employer has engaged in a pattern or practice of unlawful conduct, the cease-and-desist order may direct it to cease and desist from violating the PEBA "in any other manner." *Id.*

4. Removal of Documents from Personnel File

Where the PPC alleges discipline was issued for discriminatory or retaliatory motives, an appropriate remedy may be removal of any improper discipline. *See Wal-Mart Stores, Inc. v. NLRB,* 400 F.3d 1093, 1100 (8th Cir. 2005) (ordering the expungement of a personnel file as to all activities found to be protected activity). *See AFSCME, Council 18, AFL-CIO v. Board of County Commissioners for Bernalillo County*, PELRB Case No. 101-21.

Removal of documents from the personnel file may avoid a dispute as to whether the PELRB or the SPB has jurisdiction to review disciplinary action taken in violation of the PEBA. *See e.g., CWA v. GSD,* PELRB Case 125-05. If the offending document is removed by PELRB order, there will then be insufficient evidence in the file for a SPB ALJ to subsequently conclude the challenged disciplinary action was supported by just cause and/or principles of progressive discipline.

This remedy will be less attractive where the discipline was supported by employee misconduct but

issued in violation of contractual or other protections such as the right to receive notice of an investigation, the right to be represented by a union steward in any investigatory interview, and the right to have discipline initiated within forty-five (45) days of the conduct at issue. *See, e.g., infra* (regarding backpay, reinstatement and *Weingarten* violations). That is because where there was actual employee misconduct, the employer will be motivated to keep a record in the file for purposes of establishing progressive discipline in the event of future misconduct.

5. Backpay and Reinstatement

Backpay and reinstatement, along with a cease-and-desist-order, are the most common remedies under the NLRA for cases where an employee was demoted or terminated in violation of the NLRA and may be expected to be equally common remedies under the PEBA. *Id.*

Backpay has also been awarded by the PELRB where an improper unilateral change of a term and condition of employment resulted in a loss of pay to bargaining unit employees. *See*, e.g., *Classified School Employees Council of Las Cruces (Physical Plant Dept. Bargaining Unit) v. Las Cruces Public Schools*, PELRB Case No. 130-06 (Feb. 28, 2007, Hearing Examiner's Report). Since the 2020 amendment to the PEBA, both the PELRB and any local board has the power to enforce the Public Employee Bargaining Act through the imposition of appropriate administrative remedies, which may include actual damages related to dues, back pay including benefits, reinstatement with the same seniority status that the employee would have had but for the violation, declaratory or injunctive relief or provisional remedies, including temporary restraining orders or preliminary injunctions. No punitive damages or attorney fees may be awarded. *See* §§ 10-7E-9.

Note, however, that both SPO and one public school have challenged whether the PELRB has jurisdiction or authority to award backpay or reinstatement, under theories that these remedies may only be awarded pursuant to SPO rules or to the School Personnel Act, NMSA 1978, §§ 22-10A-1 (2003) *et seq*. This issue was resolved by the legislature in the 2020 amendments to the PEBA, which granted the Board the expressed authority to award these types of damages. These issues have not been fully litigated or reviewed yet. *See, e.g., AFSCME v. State,* PELRB Case 164-06, Hearing Examiner Report at 17 (Apr. 4, 2007) (rejecting the argument, as to state employees, *in dicta*); and *Taos Federation of United School Employees v. Taos Municipal Schools,* PELRB Case 119-08, School's Motion to Dismiss.

In *State of New Mexico v. AFSCME Council 18 and CWA,* 2012-NMCA-114, 291 P.3d 600. ; issued August 8, 2012, the State implemented salary increases for its classified employees that differed from those required by collective bargaining agreements previously executed by the State and the Unions. Each Union filed PPCs with the PELRB that were deferred to arbitration. Arbitrators Goldman and Epstein determined that the State's pay package for FY 2009 violated the terms of the CBAs and issued back pay awards in favor of the Unions. The State appealed from the District Court's confirmation of the arbitration awards. The State raised four issues on appeal, two of which were that the arbitrators exceeded their powers by mandating remedies that violate the PEBA, and that they mandated remedies that violated Article IV, Section 27 of the New Mexico Constitution prohibiting "extra compensation" for public employees. The Court of Appeals rejected the State's argument that the district court should

have conducted an independent review of the arbitration records prior to determining whether the arbitrators exceeded their powers and held that the arbitrators did not exceed their powers in finding that the legislature appropriated sufficient funds to cover the salary increases. Review of the facts is not *de novo* and so long as the award is made fairly and honestly and is restricted to the scope of the submission, it must be confirmed. Neither did the arbitrators exceed their powers by issuing awards that require retroactive salary increases for the Unions' employees The remedies mandated by the arbitrators were not "extra compensation" for services performed in FY 2009, as that term is used in the New Mexico Constitution but compensation that the Unions' employees were entitled to and would have received were it not for the State's violation of their contracts.

Backpay and reinstatement may not be appropriate remedies for *Weingarten* violations under the NLRA if the employee was otherwise disciplined for just cause. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 6.III.B.4 and cites therein. These remedies are only authorized in the *Weingarten* context if the employee was disciplined as a direct result of having asserted *Weingarten* rights. *Id.*

6. Returning Employee to the Status Quo Ante

Returning the parties to the *status quo ante* is probably the broadest type of remedy and will depend on the conduct found to violate the PEBA. It could include, for example: rescinding work rules passed in violation of the duty to bargain; reinstituting past policies or practices that constituted terms and conditions of employment and were amended in violation of the duty to bargain; returning to prior work schedules, workloads or work assignments when those were changed in violation of the duty to bargain or returning an employee to a prior work schedule, workload or work assignment when those were changed for discriminatory or retaliatory motives.

7. Gissel Bargaining Orders

A *Gissel* bargaining order is an order for a respondent to engage in bargaining, and it is issued upon a determination that the respondent seriously impeded an organizational effort, and/or refused to bargain without a good faith belief that the union lacked majority support. *See NLRB v. Gissel Packing Co., Inc.,* 395 U.S. 575 (1969).

The "main concern in granting bargaining orders has been, and is, to correct and give redress for an employer's misconduct and to protect the employees from the effects thereof." *See Trading Port,* 219 NLRB 298 (1975). Accordingly, such orders are retroactive, and effective as of the date the employer "embarked on a clear course of unlawful conduct ... sufficient ... to undermine the union's majority status." *Id.* at 301.

However, a bargaining order is "an extraordinary remedy." *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 31.III.B.9. As such it is typically only issued when the employer's practices "have the tendency to undermine majority strength and impede the election processes." *Gissell,* 395 U.S. at 614.

8. Decertification

Decertification is the remedy required under the PEBA where a union has caused or instigated a strike. *See* § 10-7E-21(C).

9. Punitive Damages and Attorneys' Fees

Punitive damages and attorneys' fees are not an appropriate administrative remedy. NMSA 1978, Section 10-7E-9(F) (2020) concerning Board and local board powers and duties. *See AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).

A different result may obtain if an administrative decision is appealed to the District Court under the Courts' inherent power to impose sanctions, even against a public entity. The New Mexico Court of Appeals addressed that question in *Traci and Kenneth Harrison v. Bd. of Regents of UNM and Lovelace Health System, Inc., et al.*, 2013-NMCA-105 (Sept. 5, 2013), *cert. granted* 10-1813, No. 34,349, in the Court (J. Garcia dissenting) affirmed the District Court's imposition of a $100,000 non-compensatory monetary sanction against a public entity.

10. Setting Aside Election Results

Setting aside an election, like issuance of a bargaining order, is an extraordinary remedy because it could contravene the principle of democratic selection—or rejection—of a representative. Accordingly, an election may only be set aside where the "record reveals conduct so glaring that it is almost certain to have impaired employees' freedom of choice." *General Shoe,* 77 NLRB at 126 (emphasis added).