

PELRB PRACTICE MANUAL

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Compiled by PELRB Staff

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I. PEBA Background

A. Introduction

Prior to enacting its first collective bargaining law in 1992, NMSA §§ 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 §§ 10-7E-1 *et seq.* (PEBA II), New Mexico rejoined the ranks of about 37 states¹, that have enacted a public employee collective bargaining statute. All such acts are based in large part 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 and a number of unique features as a consequence.

For example, in the interim between the two Acts a number of public employers continued to permit 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. As a consequence New Mexico’s collective bargaining law includes a number of provisions designed to protect pre-existing local boards, bargaining units and collective bargaining agreements (CBAs) and representatives. The State’s collective bargaining law also authorizes the creation of new local boards.

II. Basic Rights and Responsibilities Under PEBA

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 choice, without interference, restraint or coercion, *See* § 2 and § 5;
- public employees may refrain from forming, joining or assisting a union, *See* § 5;
- public employers and unions must negotiate in good faith over mandatory subjects of bargaining such as wages; hours; all other terms and conditions of employment except for retirement programs provided pursuant to the Public Employees Retirement Act or the Educational Retirement Act; payroll deduction of membership dues. They must also bargain over the impact of professional and instructional decisions made employees by the employer, in the case of public schools and educational employees in state agencies, *See* §§ 17(A), 17(A)(1)), 17(C), and § 10-7E-17(D);

¹ See Table A appended to this Practice Manual.

- local public employers may set up a new local board, with approval of the PELRB and provided that the local board follows the provisions and procedures of PEBA, *See* § 10(A);²
- local public employers may continue to operate under grandfathered local ordinances adopted prior to October 1, 1991, provided that no substantial change was made after January 1, 2003, and provided that the ordinance does not seek to except from coverage public employees who are covered under PEBA, *See* § 26(A), *Regents of UNM v. NM Federation of Teachers*, 125 NM 401 (1998) and *City of Deming v. Deming Firefighters Local 4521*, 2007-NMCA-069;³
- local public employers may continue to operate under grandfathered local ordinances adopted after October 1, 1991—or ordinances adopted prior to October 1, 1991 but substantially changed after January 1, 2003—provided that the ordinance meets certain enumerated substantive requirements, and does not seek to except from coverage public employees who are covered under PEBA, *See* § 26(B), *Regents* and *Deming*;
- public employers may insist on a secret ballot election, except as to incumbent unions. *See* § 14(C), and *NEA-Alamogordo and Alamogordo Public Schools*, 05-PELRB-2006 (June 1, 2006);
- incumbent unions may demonstrate majority support by card count over employer objection. *See* § 10-7E-24(B), NMAC 11.21.2.36 and *NEA-Alamogordo*, *supra*;
- bargaining units established prior to the effective date of PEBA shall continue to be recognized as appropriate, provided that any such unit established after July 1, 1999 is covered by a CBA on the date of the Act. *See* § 10-7E-24(A);
- labor organizations recognized as the exclusive representative of an appropriate bargaining unit on June 30, 1999 shall continue to be recognized as such, and the

² Of those states authorizing statewide collective bargaining under the supervision of a State Board seven, including New Mexico, also permit local entities to form their own boards. Notable provisions from among those statutes include Illinois where the statute provides for the State Labor Board to be divided into two “panels”; the State Panel and the Local Panel. A third panel, the Educational Labor Relations Board is established to deal with collective bargaining issues in the state’s school districts. Similarly, the Maryland statutes establish a “Public School Labor Relations Board” distinct from the State Labor Relations Board. Two of those states permitting a local option also impose a population requirement so that only the largest of the local entities may exercise the local option. 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 New York there once were as many as 20-30 local boards in existence. However, recently, all but New York City and one other locality have petitioned for and been granted dissolution by the state board.

³ Oregon is the only other state to provide for continued operation of grandfathered local labor boards. *See* Oregon Revised Statutes § 243.772.

employer must engage in negotiations with it, although the incumbent union must demonstrate majority support prior to reducing such negotiations to a CBA, *See* § 10-7E-24(B), § 4(I) and § 17(A)(1);

- CBAs and the status exclusive representatives in existence prior to the effective date of the PEBA shall not be annulled or modified, *See* § 25;
- adjudicatory hearings before the PELRB or a local board must meet all minimal due process requirements of the state and federal constitutions, *See* § 12(B);
- 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* NMAC 11.21.22.21, 11.21.22 (both regarding representation petitions generally), 11.21.2.30 (challenged ballots), 11.21.2.35 (amended certifications), 11.21.2.36 (incumbent certifications), 11.21.2.37(D) and 11.21.38(A) (unit clarifications, including accretions), 11.21.3.13 (dismissals of prohibited practice complaints—PPCs—without a hearing on the merits), 11.21.3.19 (recommendations on merits), 11.21.2.13(A) (showing of interest), and 11.21.3.22(E) (deferral), and;
- 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* § 23.

III. History and Overview of Public Bargaining in New Mexico

A. Pre-PEBA

Prior to the first enactment of PEBA, New Mexico and its political subdivisions had already 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*, 75 N.M. 393 (1965).

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 (Jan. 1991); Bernalillo County; the City of Alamogordo; the City of Farmington; the City of Raton.⁴ Additionally, the State Personnel Board promulgated rules pertaining to collective bargaining (1972). In 1989, the Court

⁴ The date of enactment or resolution is unknown as to the latter four entities, except that it occurred prior to October 1991.

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, *AFSCME v. Stratton*, 108 N.M. 163, 171 (1989).

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 PEBA’s conflicts provisions, § 3 and § 17(B),⁵ also accommodate New Mexico’s prior case law of collective bargaining, by implicitly incorporating the *Stratton* decision into PEBA.⁶ However, it may be significant that § 3 and § 17(B) expressly prohibit only “conflict[s].”

In contrast to § 3 and § 17(B), *Stratton* prohibited the enlarging upon or expanding of rights guaranteed under merit systems. Under New Mexico law a “conflict” exists between an ordinance and a state statute, for example, 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*, 139 N.M. 410, 133 P.3d 866 (Ct. App. 2006). 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.* Similarly, a number of other public bargaining jurisdictions have upheld the ability of the parties to negotiate to expand the rights available under the law, provided that the expansion of right is not in direct conflict with law or public policy.⁷

B. PEBA I

⁵ See § 3 and § 17(B) (respectively, “in the event of a conflict,” the provisions of PEBA shall be superceded by the provisions the State Personnel Act, the Bateman Act, the Group Benefits Act, the Per Diem and Mileage Act, the Retiree Health Care Act, other public employee retirement laws, and the Tort Claims Act; and state law shall prevail over provisions of CBAs).

⁶ See *e.g.*, *AFSCME v. State*, PELRB Case 164-06, State’s Response to Complainant’s Opening Brief on Summary Judgment at 7-10.

⁷ See *e.g.*, *Brown v. Bedford School Board*, 122 N.H. 627, 629 (N.H. 1982); *Schlosser v. Board of Education*, 62 A.D.2d 207, 212-14 (N.Y. App. Div. 1978); *City of Bethlehem v. Pennsylvania Labor Relations Board*, 153 Pa. Commw. 544, 549-50 (Pa. Commw. Ct. 1993).

As noted, both PEBA's 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 44, 123 NM 239 (emphasis added); see also *Regents of UNM v. NM Federation of Teachers*, 1998 NMSC 20, ¶18, 125 NM 401, 408 (citing and endorsing this language in *Fire Fighters*, in dicta, and *Santa Fe County & 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 instance, under PEBA the issue of payroll deduction of union dues is a mandatory subject of bargaining if either party chose to negotiate the issue, and the right to file a petition for decertification was limited to members of the certified union. See § 17(C) and § 16(A).¹ Public employers retained the right to continue to operate under grandfathered local boards, and the secured right to create new local boards. See § 26 and § 10(A). Finally, PEBA 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. See §§ 2, 21 and 20(F); See also JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at Chapters 21-24.

The drafting of the local board provisions under PEBA I in particular illustrates the compromise made between competing interests of labor and management. For example, 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 PEBA. The Coalition's bill also would not have permitted the creation of any new local boards.

The Legislature rejected the requirement for PELRB approval of grandfathered ordinances or resolutions and, over union protest, added a provision for the creation of new local boards. However, it did limit public employers' right to establish a new local board or operate a grandfathered one. Those limits are first, by requiring new local boards to be approved by the state board for conformance with basic rights and duties under the PEBA. Local ordinances or resolutions establishing such local boards would have to meet the requirements of PEBA unless the variance is approved by the state board for good reason shown. See § 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,"

¹ Cf. JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 2289 and citations therein (that under the NLRB dues check off is a creature of contract, rather than a mandatory subject of bargaining; although after passage of the Taft-Hartley Act the Board indicated a revised view: "Congress intended that the bargaining obligation contained in Section 8(a)(5) should apply to the check-off" citing *U.S. Gypsum Co.*, 94 NLRB 112, 28 LLRM 1015; amended 97 NLRB 889, 29 LLRM. Regarding decertification, Compare 9(e)(1) of NLRA, 29 USC § 159 (permitting any member of the bargaining unit to file a petition for decertification).

and had to have resulted in the designation of appropriate bargaining units, the certification of exclusive bargaining agents, and the negotiation of existing CBAs. *See* § 26(A) and § 10-7D-26(B).²

Under PEBA I, New Mexico district courts confirmed the Board's authority under § 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 93-197 (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 PEBA's supremacy over conflicting provisions in local ordinances created pursuant to PEBA I. *See Las Cruces Professional Firefighters v. City of Las Cruces (Firefighters I)*, 123 NM 239 (1996); and *Las Cruces Professional Firefighters v. City of Las Cruces (Firefighters II)* 123 NM 329 (1997). Finally, the New Mexico Supreme Court confirmed the supremacy of PEBA's definitions of "public employee" and "supervisor" over those of grandfathered provisions. *See Regents of UNM v. N.M. Federation of Teachers*, 125 N.M. 401 (1998).

Besides disputes regarding the Board's authority, and PEBA's supremacy, vis-à-vis local boards and ordinances, the bulk of the first Board's cases consisted of applying and explaining the terms of art arising in representation cases, such as "appropriate bargaining unit," and the statutory exclusions. *See infra*, Representation Section. None of these representation cases were reviewed by the courts, and all are binding precedent that shape and guide representation cases today under PEBA II.

A. PEBA II

After PEBA I expired on July 1, 1999, the New Mexico Legislature repeatedly passed legislation to reenact it. However, all attempts were vetoed until 2003 when the current public employee collective bargaining law was successfully reenacted.

PEBA II largely tracks the provisions of PEBA I and maintains most of the provisions previously discussed. Nonetheless, there are a number of significant changes:

- PEBA II expressly identified fair share payments as a permissive subject of bargaining, whereas PEBA I had interpreted it as a mandatory subject, *compare* § 10-7E-9(G) to § 10-7D-9(G).³

² The latter provision would be omitted from PEBA II, but the former provision would be retained and would be interpreted by the New Mexico Supreme Court to prohibit local ordinances from restricting the public employees to whom collective bargaining rights could be extended. *See infra*.

³ Although not expressly a mandatory subject of bargaining, under PEBA I the Board had interpreted language that fair share was "to be left to voluntary bargaining by the parties" to mean fair share was a mandatory subject of bargaining. *See AFSCME & Los Alamos County Firefighters v. County of Los Alamos*, 1 PELRB No. 3 (Dec. 20, 1994) and *Santa Fe County & AFSCME*, 1 PELRB No. 1 (Nov. 18, 1993).

- the required showing of interest for intervenors is increased from 10% to 30% under PEBA II, *compare* § 10-7D-14(A) and (B) to § 10-7E-14(A) and (B);
- the percentage of eligible employees required to vote for a valid election is decreased from 60% to 40%, *compare* § 10-7D-14(A) to § 10-7E-14(E);
- the parties are required to reduce agreements to a written CBA under PEBA II, which had been discretionary under PEBA I, *compare* § 10-7D-17(A)(2) to § 10-7E-17(A)(2);
- the impact of professional and instructional decisions is made a mandatory subject of bargaining as to public school employees and educational employees in state agencies, *See* § 10-7E-17(D);
- impasse resolution procedures are required to now culminate in binding arbitration rather than being left to the appropriations process, *compare* § 10-7D-18(A)(5) to § 10-7E-18(A)(8);
- in event of impasse, a CBA is to continue in full force and effect until replaced by another, except as to any identified level, step or grade increases in compensation, *See* § 10-7E-18(D);
- grandfathered collective bargaining units are now only required to be covered by a CBA on the date of PEBA II, rather than established through a representation election, *compare* § 10-7D-24 to § 10-7E-24(A);
- “incumbent” or grandfathered exclusive representatives are granted continued recognition, although they must demonstrate majority support prior to entering into a new CBA, *see* § 10-7E-24(B), and the PELRB rule implementing § 24 now provides for the certification of incumbent bargaining status upon a showing of majority support by card count, while the earlier rule did not require a demonstration of majority support, *compare* NMAC 11.21.2.36 (3-15-04) to NMAC 11.21.2.36 (3-18-93);
- PELRB rules enacted under PEBA II permit the clarification or accretion of grandfathered bargaining units only by election petition, *See* NMAC 11.21.2.37(A) and 11.21.38(B);
- labor organizations involved in strikes now only lose their certification as to the striking bargaining unit(s), not “any bargaining units,” but the one-year limitation on decertification was also eliminated, *compare* § 10-7D-21(C) to § 10-7E-21(C); and
- grandfathered ordinances or resolutions enacted prior to October 1, 1991 no longer have to result in the designation of appropriate bargaining units, the certification of

exclusive bargaining agents, and the negotiation of existing CBAs. *See* § 10-7E-26(B).

PEBA II also omitted “supervisors” in § 5 as being a class of employees excluded from PEBA’s coverage. However, the exclusion of supervisors from appropriate bargaining units was maintained in § 13(A), with only minor grammatical variation. Moreover, the legislative history demonstrated that one proposed variant that would have expressly included supervisors under PEBA II’s coverage. Accordingly, the PELRB has determined that the omission of “supervisors” from § 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 does not contain a sunset clause as did PEBA I. In summary, the Board serves a critical adjudicatory function resolving allegations of prohibited labor practice charges as well as oversight of union elections and local board certifications.

1. Representation Cases

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. One of the Board’s major functions is to determine the appropriateness of these collective bargaining units based on guidelines established in PEBA and relevant case law. 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. Employee representatives seeking to represent a bargaining unit file a petition with the Board that must be supported by at least 30 percent of the employees in the unit.

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.

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 fairly and adequately represent the interests of employees in the bargaining unit members, whether or not they are members of the organizing union. *See* PEBA §15(A).

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 file a petition for a decertification election. *See* PEBA §19. Decertification elections are held in a manner substantially the same as that for certification.

The Board's rules provide a procedure for parties to petition 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. (NMAC 11.21.2.35). The Board has also established procedures to clarify the composition of an existing bargaining unit where the circumstances surrounding the creation of an existing collective bargaining unit are alleged to have changed sufficiently to warrant a change in the scope and description of that unit, or a merger or realignment of previously existing bargaining units represented by the same labor organization, (NMAC 11.21.2.37) 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. (NMAC 11.21.2.38) The accretion procedure is frequently used to allocate newly created positions to appropriate bargaining units or to merge two or more existing units.

2. Approval of Local Boards

Any public employer other than the state that wishes to create a local public employee labor relations board shall file an application for approval of such a local board with the PELRB. *See*, NMSA §10-7E-10. 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.

The PELRB has prepared and published templates for the creation of resolutions, ordinances or charter amendments (provided at www.state.nm.us/pelrb) designed to ensure compliance with the PEBA's requirements for approval of local boards. A public employer may propose variances from the templates pursuant to section 11.21.5.10 NMAC if the unique facts and circumstances of the relevant local public employer are deemed by the Board to be reasonable and necessary to effectuate the purposes of the Act. (NMAC 11.21.5.9)

Upon receipt of an application for approval seeking variance from the board approved templates, the director holds a status conference with the local public employer or its representative and any identified interested labor organizations, to determine the issues and set a hearing date. Upon setting a rule-making hearing, the director shall issue notice of the hearing and 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 these rules, it shall authorize the director to proceed with processing the application. (NMAC 11.21.5.10)

3. Prohibited Labor Practice Cases

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 board has the power to enforce provisions of the Public Employee Bargaining Act through the imposition of appropriate administrative remedies. (NMSA §10-7E-9)

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 discretion to examine witnesses, call witnesses, or call for the introduction of documents (NMAC 11.21.3.16) 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 ten (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.

(NMAC 11.21.3.19) The Board's power to remedy PPC's through the imposition of appropriate administrative remedies has been interpreted to include 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 §23.

4. 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. Similar but distinct procedures apply to the State and its employees and employees of other political subdivisions of the state or special districts under the PEBA. Although both procedures call for mediation of bargaining impasses under the auspices of the Federal Mediation and Conciliation Service impasse procedures followed by the state and exclusive representatives for state employees are employed within a specific time frame:

- 1) If an impasse occurs by October 1, during negotiations required to have begun in June of any particular bargaining year, either party may request mediation services from the Board. The Board does not provide those mediation services itself but a mediator from the Federal Mediation and Conciliation Service is assigned by the board unless the parties agree to another mediator;
- 2) The mediator provides services to the parties until the parties reach agreement or the mediator believes that mediation services are no longer helpful or until November 1, whichever occurs first;

- 3) If the impasse continues after November 1, the matter is referred to arbitration under the auspices of the FMCS. The arbitrator's decision shall be limited to a selection of one of the two parties' complete, last, best offers and is "final and binding" as that term is understood under Section 17 of the PEBA and the Uniform Arbitration Act [44-7A-1 NMSA 1978].

The impasse procedure followed by all other public employers and exclusive representatives is similar in that, if an impasse occurs, either party may request from the board or local board that a mediator be assigned to the negotiations and unless the parties agree on a mediator one from the FMCS is assigned. The specific time frame for requesting bargaining, declaring impasse and proceeding to arbitration applicable to the state as an employer are not applicable to public employers other than the state. If impasse continues after a thirty-day mediation period, either party may request arbitration from the FMCS. As under the process followed by the State as an employer the arbitrator's decision shall be limited to a selection of one of the two parties' complete, last, best offers and is "final and binding" as that term is understood under Section 17 of the PEBA and the Uniform Arbitration Act [44-7A-1 NMSA 1978].

5. Rulemaking Activity

The PELRB is empowered by NMSA §10-7E-9(A) 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.

D. The Rights of Employees

Section 2 Rights. The rights of public employees are set forth principally in Section 2 of the Act, 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."

Under PEBA § 4(R) a "public employee" entitled to the rights and protection afforded under the Act is defined as:

“‘public employee’ means a regular no probationary employee of a public employer; provided that, in the public schools, “public employee” shall also include a regular probationary employee.”

A “public employer” is defined in PEBA § 4(S) 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 state for collective bargaining purposes only”.

The term “public employer” also includes 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 & 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 §§ 22-8B-1 *et seq.* and the Public Schools Code NMSA § 22-8B-2(A), § 22-8B-4, and § 22-8B-16, 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.

A PELRB Order applying PEBA to judicial branch employees as a general matter with the proviso there may be some cases in which the particular application of PEBA would violate the separation of powers doctrine was reversed by the Seventh Judicial District as an abuse of discretion, largely without explanation. *See Laura Chamas-Ortega v. 2d Judicial District Court*, 7th Judicial Dist., Case No. CV-04-7883 (March 10, 2006, J. Kase). 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 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, 125 N.M. 401. This is because 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. The NLRB has held the State Bar of New Mexico to be a political subdivision exempt from NLRA coverage, because “it was directly created by the State as an administrative arm of the judicial branch of government.” *State Bar of New Mexico and Communications Workers of America Local 7011*, 346 NLRB 1 (2006).

In balancing public employees’ rights to organize and bargain collectively with their employers, while promoting cooperative labor-management relationships and ensuring “the orderly operation and functioning of the state and its political subdivisions” PEBA further defines the rights of public employees and their employers. PEBA §5 states that all public employees as defined above, other than management employees and confidential

employees, as those terms are further defined by 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. *See* § 4(G), (O), (Q) and (U) regarding the common employee exemptions from coverage of the Act.

In effectuating Section 2 rights, democratic selection of representatives is a fundamental premise under as PEBA, as it is under the NLRA. *Compare* PEBA § 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 [PEBA]), to the NLRA’s “a cardinal policy” of protecting “...the exercise by employees of full freedom to express their desires on union representation”).¹¹

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), *enfd.*, 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 at 905-906.

Duty of Fair Representation. As the exclusive representative the union owes a duty to fairly and adequately represent the interests of bargaining unit members, whether they members of the union or not. *See* PEBA § 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 particular 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

¹¹ JOHN E. HIGGINS, THE DEVELOPING LABOR LAW at 635

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*, 224 P.3d 1258, 2010 NMCA 4 (Ct. App. 2009) (Callahan II). Both Callahan I and Callahan II reiterated the holding in *Jones v. International Union of Operating Engineers*, 72 N.M. 322, 330-32, 383 P.2d 571, 576-78 (1963).

PELRB's and Local Boards' authority under § 11(E) 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*.

A claim for breach of the duty of fair representation was brought against the Albuquerque Police Officers Association 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 Granberry v. Albuquerque Police Officers Ass'n.*, 144 N.M. 595, 189 P.3d 1217 (Ct. App. 2008). *See also, Howse v. Roswell Independent School Dist.*, 188 P.3d 1253, 144 N.M. 502 (Ct. App. 2008).

In *Akins v. United Steel Workers of America*, 148 N.M. 442, 227 P.3d 744 (N.M. 2010) the New Mexico Supreme Court was asked to limit a union's liability for breach of a DFR by imposing a *per se* exclusion of punitive damages much as the U.S. Supreme Court has done for similar actions against federally regulated labor unions. The Supreme Court declined to do so and instead underscored the public policy served by punitive damages.

IV. Types of Representation Petitions

The following types of representation petitions are provided for under 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.

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 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 petition forms, interested parties are referred to the Board’s website at www.pelrb.state.nm.us. Under the “Forms” tab individuals will find a “Petition for Initial Certification of a New Bargaining Unit along with forms used in other Representation proceedings.

You may not proceed by “Accretion Petition” for grandfathered bargaining units, or where the number to be accreted is greater than 10% of the existing bargaining unit. Even though you are seeking to add bargaining unit members, you must in these cases proceed pursuant to a standard Representation Petition, and demonstrate majority support.

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* PEBA §§ 13 and 14; *See also* NMAC 11.21.2.8 through 11.21.2.35.

Certification Petitions are designated as “300 series” cases according to the Board’s case tracking system and assigned a case number accordingly. Upon receipt (refer to NMAC 11.21.1.10 for details concerning what constitutes filing with the PELRB and NMAC 11.21.2.9 for the Board’s requirements concerning service of a copy of the petition on all parties) the Petition will be date stamped, assigned a case number in chronological order, and logged into a case data base providing basic information from the petition. 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* NMAC 11.21.2.15

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

- a. Was the Petition filed on a form prescribed by the Director? (*See* PELRB website www.pelrb.state.nm.us for approved forms).
- b. Does the form include, at a minimum, the following information:
 - i. The petitioner's name, address, phone number, state or national affiliation, if any, and representative, if any;
 - ii. The name, address and phone number of the public employer or public employers whose employees are affected by the petition;
 - iii. A description of the proposed appropriate bargaining unit and any existing recognized or certified bargaining unit;
 - iv. The geographic work locations, occupational groups, and estimated numbers of employees in the proposed unit and any existing bargaining unit;
 - v. 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*, NMAC 11.21.2.8 Commencement of Case).
 - vi. 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. (NMAC 11.21.2.8).
- c. 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*, NMAC 11.21.2.10.
- d. Is the petition supported by a thirty percent showing of interest in the existing or proposed bargaining unit? NMAC 11.21.2.8. 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 5 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 additional showing of interest the Director may dismiss the petition. *See* NMAC 11.21.2.23.

B. Intervenors

As noted above, after receipt of a petition, the employer must post a notice of the filing of the petition. *See* NMAC 11.21.2.15. 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* § 14(C) and NMAC 11.21.2.16(A), (B). If the intervenor provides a sufficient showing of interest it will also appear on the ballot once an election is held. *See* § 14(C) and NMAC 11.21.2.16(C).

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.

C. Appropriate Bargaining Unit

Under § 13(A), the Board is charged with the statutory duty of designating appropriate bargaining units for collective bargaining. "Appropriate bargaining units" must meet the following statutory criteria:

They must be "established on the basis of occupational groups or clear and identifiable communities of interest in employment terms and conditions and related personnel matter among the public employees involved," *See* § 13(A). "Community of interest" factors include similarities or differences in (1) the method of wage or compensation, (2) the hours of work, (3) employment benefits, (4) separate supervision, (5) job qualifications, (6) job functions and amount of time spent away from employment situs, (7) regularity of contact with other employees, (8) level or lack of integration, and (9) the history of collective bargaining. *See NEA-Belen*, 1 PELRB No. 2, *citing Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962);

Occupational groups comprising an appropriate bargaining unit "shall generally be identified as blue-collar, secretarial, clerical, professional, paraprofessional, police, fire and corrections," *id.*, but these occupational groups are only advisory, not mandatory, *See NEA-Belen, Belen Federation of School Employees & Belen Consolidated Schools*, 1 PELRB 2 (May 13, 1994), and adopted and attached ALJ Report;

Supervisory, confidential or management employees are excluded, *See* § 13(C), § 4(G) and § 5.

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* § 13(A) and *NEA-Belen, supra* (adopting a general anti-fragmentation policy).

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* (6th Ed.) at 1451-1457.

D. Statutory Exclusions

As mentioned several classifications of employees are statutorily excluded from PEBA’s coverage:

1. Probationary Employees

PEBA excludes all probationary employees except those employed at a public school. See §§ 5 and 4(R); See *also* NMAC 11.21.1.7(B)(9). 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).

2. Confidential Employees

PEBA also excludes confidential employees. See § 4(G), § 5 and § 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 & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995). Thus, PEBA’s confidential employee definition requires an analysis of (1) the duties of the employee in question and (2) the duties of the person he or she allegedly assists. *Id.*

Criteria considered in the past are whether the employee:

- (a) is or could likely be on the employer’s bargaining team;
- (b) is privy to the employer’s District’s labor-management policy or bargaining strategy;
- (c) 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 & 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 & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995).

3. Supervisors

PEBA II continues to exclude supervisors even though not expressly excluded under § 5, because they are expressly excluded under § 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 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 & Town of Bernalillo*, 1 PELRB No. 21 (July 7, 1997).

A three-pronged approach under § 4(U) is undertaken to determine whether an employee is a "supervisor" for purposes of applying the PEBA. First, the employee must:

- (a) devote a substantial amount of work time to supervisory duties;
- (b) customarily and regularly direct the work of two or more other employees; and
- (c) 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 continue to determine whether the duties supposed to be supervisory in nature are such that the disputed employee:

- (a) performs merely routine, incidental or clerical duties; or

- (b) only occasionally assumes supervisory or directory roles; or
- (c) 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) a lead employee; or
- (b) an employee who participates in peer review or occasional employee evaluation programs.

See § 4(U); *See also NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995), attached and adopted ALJ’s Decision and Order (emphasis in original ALJ opinion) (identifying the three part test embedded in the definition).

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 & 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 & 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 & 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 & 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 New Mexico Department of Corrections do not meet at least two of the three criteria required by PEBA §4(U) 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 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 & Doña Ana County*, 1 PELRB No. 16 (Jan. 2, 1996).

Including eight of the Detention Center's nine sergeant positions in the bargaining unit does not result in lack of supervision at the facility because these positions do have supervisory duties and responsibilities, just not enough compared to their overall actual day-to-day duties to meet the statutory definition for exclusion under PEBA. However, Detention Center's Operations Sergeant is a supervisor under PEBA. While all the other sergeant positions are largely interchangeable, her job duties are very different from those of other sergeants and all the other sergeants. In addition, the booking officer and maintenance worker report to her. In contrast to the other Detention Centers sergeants, her work time is devoted almost entirely to supervisory duties such as directing her subordinates' work by reviewing their paperwork for accuracy and completeness, overseeing their work and evaluating their performance; disciplining and recommending discipline; conducting monthly sergeant meetings; and insuring that the facility's policies and procedures are communicated to and carried out by staff. Her job duties is also different from that of her subordinates, since unlike other sergeants she works in the administrative part of building and has little contact with detainees, and since she has additional responsibilities regarding facility maintenance and repair. *In re: Communications Workers of America, Local 7911 & 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 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.

NMCP SO-CWA Local 7911 and City of Rio Rancho Police Department, 04-PELRB-2009 (April 6, 2009). *But see In re: New Mexico Coalition of Public Safety Officers Ass'n and County of Santa Fe*, 78-PELRB-2012 (Dec. 5, 2012) wherein Sergeants were accreted into existing bargaining unit and *AFSCME v. N.M. Corrections Dep't.* 02-PELRB-2013 (Jan. 23, 2013) wherein Lieutenants were allowed to be accreted because they did not meet the statutory definition of supervisors under PEBA.

Administrative Interns, or “principals-in-training” are not supervisors because they merely assist with some limited supervisory acts and the purpose and emphasis of their job is to learn the job duties of a principal, to decide if they wish to become one. *American Federation of Teachers Local 4212 and Gadsden Independent School District*, 03-PELRB-2006 (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 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 & 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: New Mexico Coalition of Public Safety Officers Ass'n and County of Santa Fe*, 78-PELRB-2012 (Dec. 5, 2012).

4. Management Employee

PEBA's definition of a “manager” exempt from coverage of the Act can be broken down into a two-part test:

- a. the employee is primarily engaging in executive and management functions; and
- b. 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.

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 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 & 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 & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995).

E. Organizing Rights and Limitations

1. Age of Showing of Interest or Authorization Cards

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* (6th Ed.) at 783.

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), (same).

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).

2. Confidentiality of Showing of Interest

The showing of interest is confidential and remains at all times the property of the union. See NMAC 11.21.1.21. 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 NM 688 (1996).

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 also 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 on coercive speech concerns threats, and is discussed in the PPC 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 changes¹². *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.

¹² 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.

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

See PPC Section, Interference, Restraint or Coercion, *infra*.

6. Limitations on Electioneering

During the election, no electioneering is permitted within 50 feet of any room in which balloting is taking place. See NMAC 11.21.2.28.

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 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.”)

8. Right of Reasonable Access to Employees Being Organized

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 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*.

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* NMAC 11.21.2.17. 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 (6th Ed.) at 580. 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* NMAC 11.21.2.17.

H. Withholding Recognition Until Successful Election

Under PEBA, as under the NLRA, an employer may generally refuse to negotiate with a non-incumbent union unless it demonstrates majority support through a secret ballot election. *See Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974). *See also* PEBA §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 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 (6th Ed.) at 795-800 and citations therein.

I. Mail-in Ballot Elections

Mail-in ballot elections have been allowed under PEBA with the consent of the employer. However, PELRB rules specify that “[i]n deciding the polling location(s) and the use of manual or mail participation in the election by employees in the bargaining unit there shall be a strong preference for on-site balloting.” *See* NMAC 11.21.2.25.

On-site elections are preferred under the NLRA too, although the decision to conduct an election by mail is within the Regional Director’s discretion. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 658-59, the NLRB has announced fairly narrow guidelines in support of the exercise of that discretion. *See San Diego Gas & Electric*, 325

NLRB 1143 (1998). Relevant to PEBA, *San Diego Gas & Electric* suggests that the existence of the following circumstances may make use of mail ballots appropriate:

- if eligible employees are scattered over a wide geographic area; and
- if eligible employees' work schedules vary significantly, and they are not present at a common location at common times. *Id.* at 1145. 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.* at 1145 n. 8.

J. Card Counts

PEBA authorizes "an alternative appropriate procedure" to secret ballot elections, for determining majority status, provided the employer does not object. *See* PEBA §14(C). *But see* subparagraph N below regarding incumbent labor organizations. Typically the "alternate procedure" is a card count, but it may also be based on a petition. Following NMAC 11.21.2.11 (concerning the showing of interest) by way of analogy, the card or petition must be 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." *Id.* 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.

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* NMAC 11.21.2.39. There are a number of 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* NMAC 11.21.2.39 (A). 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* NMAC 11.21.2.39 (B), (C) and (E). 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* NMAC 11.21.2.39 (D).

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* § 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 particular window of time. *See* §14(E) incorporating §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* §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 NMAC 11.21.1.8 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

Whenever a union seeks to establish that it was recognized on June 30, 1999 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* § 24(B) and NMAC 11.21.2.36 and NMAC 11.21.1.7(B)(3). 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.

a. Requirement to Demonstrate Majority Support

The Act expressly states that majority support must be demonstrated to the employer before the employer can enter into a new CBA with the putative incumbent union. There is nothing in the language of the current PEBA or its rules to suggest this requirement does not apply if the employer and the union have had a continuous and ongoing bargaining relationship, and NLRA precedent supports this conclusion.

This need for eventual election relates back to the fundamental purposes of democratic selection of representatives, and protection of employees’ freedom of choice concerning representation. *See e.g. International Ladies Garment Workers Union v. NLRB*, 280 F.2d 616, 619-620 (D.C. Cir. 1960) (that “[t]he intent of the ... Act ... is that the decision whether or not to be represented by a bargaining representative and also the choice of that representative shall be the uncoerced decision of a majority of the employees in an appropriate unit;” that “[o]bstruction of that freedom of choice, by either the employer or the union, deprives some of the employees of this guaranteed right;” and that “[i]t is difficult to conceive of a clearer restraint on the employees’ right of self-organization than for their employer to enter into a collective-bargaining agreement with a minority of the employees,” because “[i]f upheld, that action would foreclose any other choice of a bargaining representative by a majority of the workers in the unit” during the contract bar period).

Petitions for Certification as Incumbent must be distinguished from the NLRA line of cases alleging failure or refusal to bargain with a union and/or exclusive previously known to have majority support, because the PEBA incumbent provision has no parallel provision in the NLRA.

b. 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).

c. QCR

A petition for certification as incumbent, by definition, does not present a QCR as to unit inclusion or exclusion, because § 24(A) deems the grandfathered bargaining unit to still be appropriate. *See NEA-Alamogordo and Alamogordo Public Schools, 05-PELRB-2006* (June 1, 2006). However, a QCR is presumed to exist as to majority support, as both § 24(B) and NMAC 11.21.2.36 require a demonstration of continuing majority support before the parties can enter into a CBA. The existence of any dispute concerning unit inclusion or exclusion requires dismissal of a clarification petition, and the petitioner must instead proceed via election. *See NMAC 11.21.2.37(B)*.

d. Card Count

Under NMAC 11.21.2.36, the § 24(B) demonstration of majority support is done through a card count even over the employer's objection, unlike in normal representation cases. *See In re: Petition for Recognition as Incumbent Labor Organization, NEA-Alamogordo and Alamogordo Public Schools, 05-PELRB-2006* (June 1, 2006). The Board has upheld this rule as a reasonable interpretation of § 24(B) of PEBA, based on the following analysis:

- § 24(B) provides majority support shall be demonstrated “pursuant to §14;”
- §14(A) is inapplicable because it concerns an “election to determine whether and by which labor organization the public employees ... shall be represented,” while § 24(B) has already determined the incumbent “shall be recognized as the exclusive representative;”
- §14(C), in contrast, discusses “an alternative appropriate procedure for determining majority status,” which is what is being done under § 24(B); and
- the proviso in §14(C) that the alternative mechanism may not be used “if the public employer objects to the certification without an election” concerns certification of “an appropriate bargaining unit,” not certification of the union, while § 24(A) has deemed that the grandfathered bargaining unit “shall continue to be recognized as appropriate,” without requiring further certification.

O. Clarification Petition

1. General

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. NMAC 11.21.2.37, 11.21.1.7(B)(17). 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 except that there is no requirement that the Petitioner file a showing of interest unless the clarification petition is also an “accretion petition.” *Compare* NMAC 11.21.2.37 to 11.21.2.38 (B).

a. Change in Circumstances

The PELRB’s clarification rule follows NLRA precedent in requiring that there have 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* NMAC 11.21.2.37(A) and (B) (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”).

b. Grandfathered Bargaining Units

Grandfathered bargaining units may not be the subject of a clarification petition before the PELRB. *See* NMAC 11.21.2.37(A) (allowing for unit clarification as warranted, “[e]xcept as provided in Section 24(A)”).

However, in recognition that pre-existing bargaining units frequently face reorganization and renaming of positions over time, the PELRB has 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 may 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).

P. Accretion Petition

1. General

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

a. Timing

NMAC 11.21.2.38 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* (6th Ed.) at 630. 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.* at 630-631. 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.

b. Showing of Interest

A thirty percent (30%) showing of interest is required for a petition for accretion, unlike with other clarification petitions. *Compare* NMAC 11.21.2.38(B) to 11.21.2.37.

c. 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* (6th Ed.) at 1451, *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).

d. Community of Interest

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

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).

e. QCRs Prohibited

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

Lack 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* NMAC 11.21.2.38(B).

If 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 if the employer so desires. *See* NMAC 11.21.2.38(C); *see also* *See* JOHN E. HIGGINS, *THE DEVELOPING LABOR LAW* (6th Ed.) at 621 and 635 (that “[a] cardinal policy of the Act is to protect the exercise by employees of full freedom to express their desires on union representation” and that, therefore, “[t]he Board has consistently indicated a somewhat restrictive attitude toward accretions in deference to the important statutory policy of employee free choice”).

f. Grandfathered Bargaining Units

The accretion rule, by its incorporation of the clarification rule, excludes grandfathered bargaining units from its application. *See* NMAC 11.21.2.38(B) and 11.21.2.7(A).

However, this limitation has been interpreted by a PELRB hearing examiner to mean only that the accretion must be performed by election among the employees to be added, not that a grandfathered bargaining unit may never be subject to change. *See Silver City, supra*.

Q. Severance Petition

1. General

This is a petition filed by a labor organization to sever a group of employees comprising an occupational group listed in § 13 of 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* NMAC 11.21.2.41. NMAC 11.21.2.41.

a. Timing

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

b. Occupational Group Analysis

The group to be severed must be one of the occupational groups listed in §10-7E-13 NMSA, e.g. blue-collar, secretarial, clerical, technical, professional, paraprofessional, police, fire or corrections. *See* NMAC 11.21.41 and PEBA §13(A).

c. 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 NMAC 11.21.2.41 only seems to require that the group to be severed fall in a particular occupational category, inclusion in such a category may create a presumption of distinctiveness.

R. Decertification Petition

1. General

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* § 16 and NMAC 11.21.2.8 through 11.21.2.35. As to the identity of the filer, 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* PEBA § 16(A) and NLRA § 9(e)(1).

a. Timing

A decertification petition must also be filed during the 90/60 thirty-day window. *See* § 16.

b. 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. Mo'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).

c. 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* § 16(A). *See also NLRB v. 1115 Nursing Home & 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.

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).

S. Petition for Amendment of Certification

This is a petition filed by either the exclusive representative or the employer to reflect a change such as in the name of either, or a change in the affiliation of the union. The procedure for filing a decertification petition is the same as that for a basic Petition for Recognition under subparagraph IV A above, except that there is no requisite 30% showing of interest. *See* NMAC 11.21.2.35.

V. 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* NMAC 11.21.12.

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* NMAC 11.21.2.23. 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* NMAC 11.21.2.13. 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. *Id.*

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* NMAC 11.21.2.15. 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 § 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* NMAC 11.21.2.15.

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. 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, meaning whether the proposed members share a community of interest and/or whether they are excluded confidential, supervisory or management employees.

During this hearing (except in the case of unit clarification proceedings where the moving party bears the burden of proving requisite changed conditions) neither party shall have the burden of proof. Instead it is the duty of the hearing examiner to fully develop a record sufficient to make a determination of the matter. In the case of representation hearings, the burden of proof is on the party seeking any change in an existing appropriate unit or in the description of the unit. *See* NMAC 11.21.1.22(A).

F. 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 ten (10) business days of service of the notice of appeal. *See* NMAC 11.21.2.22(A) and (B). 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* NMAC 11.21.2.22(A). 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 & Doña Ana County*, 1 PELRB No. 16 (Jan. 2, 1996).

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

G. 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. *See* NMAC 11.21.2.25. However, these logistical details can be arranged beforehand by way of a Consent Election Agreement, in which case a pre-election conference is not necessary.

H. Notice of Election

At least ten (10) business days prior to the election, the employer shall post a Notice of Election provided by the hearing examiner. 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* NMAC 11.21.2.26. 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.

I. Election Procedures

1. Manner of Election

Except in the case of incumbents, *see supra*, elections shall be conducted by secret ballot if so requested by the employer. *See* § 14(C) and NMAC 11.21.2.36. Additionally, the parties may agree to either on-site or mail balloting but there is a strong regulatory preference in favor of on-site balloting if there is a dispute. *See* NMAC 11.21.2.25.

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* § 4(R)) 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* NMAC 11.21.2.24(A). *See also* *NEA-Carrizozo & 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 NMAC 11.21.2.24(A)). The employer shall provide the list of eligible voters at least 10 business days before the start of the election. *See* NMAC 11.21.2.27(C). 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 “no representation.” *See* NMAC 11.21.2.27(A).

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* NMAC 11.21.2.27(D).

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* NMAC 11.21.2.27(B).

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* NMAC 11.21.2.29.

7. Electioneering

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

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*, NMAC 11.21.2.30.

9. Tally of Ballots

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* NMAC 11.21.2.34. Objections concerning bargaining unit composition are not appropriate under this rule. *See Local 7911, Communications Workers of America & 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 hearing examiner will serve the certification of election results within 10 business days of service of final tally, if no objections filed. The certification states the name of the labor organization selected and sets forth the bargaining unit, or gives a certification of results showing that no labor organization was selected as the bargaining representative. *See* NMAC 11.21.2.33.

VI. Local Labor Boards

A. Introduction

Under § 10(A) of PEBA, public employers other than the State have a substantive right to create a new local labor board that shall have the same duties and responsibilities as the PELRB, provided that: the local board is approved by the PELRB; and it follows all procedures and provisions of PEBA unless otherwise approved by the PELRB. *Id.*

Under § 26 of PEBA, public employers other than the State also have a substantive right to continue to operate under a preexisting local law instead of PEBA under certain conditions.

These local laws, be they ordinance, resolution or charter amendment (hereinafter “ordinances,” collectively), typically create and empower a local labor board to enforce the local labor law. There are two types of “grandfathered” local boards; § 26(A) and § 26(B) boards, each with their own particular requirements.

There is active and ongoing debate among practitioners as to the ability of the PELRB to exercise jurisdiction where a local board exists, pursuant to either § 10 or § 26. The weight of judicial and PELRB decisions over the years support the conclusion that the PELRB retains some jurisdiction but should use considerable discretion in exercising its concurrent jurisdiction, particularly in the case of the oldest grandfathered boards.

B. Section 10 Boards

In the case of § 10 or newly created local boards, the PELRB requires applicants to use a pre-approved template, or to show good cause why a variance should be allowed. See NMAC 11.21.5.9 and 11.21.5.10. Only one variance has been requested to date, and it was granted. See *In re: Application of the University of New Mexico for Approval of Local Board*, 04-PELRB-2006 (May 31, 2006), *aff’d National Union of Hospital and Health Care Employees, District 1199 NM v. UNM*, 2nd Judicial Dist. Case No. CV 2006-04505 (May 14, 2007).

Since the re-establishment of the PELRB in March 2003, it has approved fifty-seven (57) local boards created by ordinance or resolution, and has revoked the approval of one such local board. See *McKinley County Federation of United School Employees v. Gallup-McKinley County School District Labor Management Relations Board*, PELRB Case No. 103-07. A current list of § 10 local boards follows:

1. Alamogordo Public Schools
2. Albuquerque-Bernalillo County Water Utility Authority
3. Artesia, City of
4. Aztec Municipal School District
5. Carlsbad Municipal Schools
6. Belen, City of
7. Belen Consolidated School District
8. Carlsbad Municipal Schools
9. Central Consolidated Schools
10. Chama Valley Schools
11. Chavez County
12. Clovis, City of
13. Clovis Community College
14. Clovis Municipal Schools
15. CCNM (TVI)
16. Cuba Independent Schools
17. Curry County
18. Doña Ana County
19. Dulce Independent Schools
20. Eddy County
21. Española Municipal Schools
22. Gadsden Independent Schools
23. Gallup, City of
24. Grants, City of
25. Hidalgo County
26. Hobbs, City of
27. Lake Arthur Municipal School District
28. Lea County
29. Lincoln County

30. Los Alamos County
31. Los Lunas, Village of
32. Los Lunas Public School
33. Loving Schools
34. McKinley County
35. NM Highlands University
36. NM State University
37. Northern NM College
38. Otero County
39. Portales, City of
40. Rio Rancho Public Schools
41. Roosevelt County
42. Roswell, City of
43. Roswell Independent School District
44. Ruidoso Municipal School District
45. San Juan College
46. Santa Fe County
47. Santa Fe Community College
48. Sierra County
49. Socorro, City of
50. Silver City
51. Socorro, City of
52. Socorro Schools
53. Taos, Town of
54. Truth or Consequences Municipal School District
55. Tucumcari, City of
56. University of New Mexico
57. Western NM University
58. Zuni Schools

NMAC 11.21.5.13 requires local boards approved by the PELRB to thereafter file with the PELRB any amendments to their ordinance or resolution. “Upon a finding by the board that the local board no longer meets the requirements of § 10, the local board shall be so notified and given thirty (3) days to come into compliance or prior approval shall be revoked.” *Id.*

In the *Gallup McKinley* case, the local board was found to have effectively amended its resolution through rule-making, and the resultant amendment was determined to conflict with both § 14(A) and (D) of PEBA and the Board’s decision in *NEA-Alamogordo and Alamogordo Public Schools*, 05-PELRB-2006 (June 1, 2006). *See Gallup McKinley*, 03-PELRB-2007 (undated Board Decision). When the local board failed to timely rescind or amend the local rule, its prior PELRB approval was revoked. *See Gallup McKinley*, Case 103-07, Hearing Examiner’s Notice of Revocation (Feb. 26, 2007).

In a similar case, a PELRB hearing examiner found that an employer effectively amended its resolution by refusing at least one union recommendation for appointment to the local board on grounds that the recommendation was not “local” to the area. *See American Federation of Teachers Local 4212 v. Gadsden Independent School District*, PELRB Case No. 169-06, letter decision (Nov. 2, 2007). In that case, which was not appealed to the PELRB, the hearing examiner ordered the District to cease and desist from imposing such a requirement on appointees unless and until it was approved by the PELRB pursuant to NMAC 11.21.5.13.

In *Gadsden*, the hearing examiner also concluded that the District violated § 19(B) of PEBA (interference with, restraint or coercion of public employees in the exercise of a PEBA right) by removing a board member duly recommended by the union and appointed

by the school district prior to the expiration of the one year term established under the local ordinance, without a hearing and without cause under the ordinance. *Id.*

In *Northern Federation of Education Employees v. Northern New Mexico Community College*, 61-PELRB-2012, the College had been bargaining with its employees under an approved labor/management resolution since 2006. The three appointees to the local labor commission had been annually re-appointed since 2006. However, in 2011 the labor-recommended appointee did not agree to the annual reappointment of the neutral, nor could she agree with management's appointee on the appointment of a different neutral member. The Union filed six PPC's and a Petition for revocation of approval of the local ordinance with the State Board which were consolidated for hearing. The Board held that in cases involving local boards created under §10 of PEBA the PELRB will exercise jurisdiction only if it can be shown that the local board has taken some generally applicable action that is both in violation of PEBA and threatens the uniform interpretation and application of PEBA statewide. The Board found insufficient evidence of either of those elements stating "PEBA does not allow a union to apply to the PERLB because it does not like the procedures and process of the local board." The Board decision was affirmed by the First Judicial District Court (J. Singleton) in D-101-CV-2012-02100, issued 4/18/2013.

C. Section 26 Boards

PEBA also includes provision for two types of "grandfathered" boards that pre-date PEBA; local boards grandfathered under § 26(A) and local boards grandfathered under § 26(B).

1. § 26(A) Local Boards

Section 26(A) governs the oldest local labor boards, and provides that:

"[a] public employer other than the state that prior to October 1, 1991 adopted by ordinance, resolution or charter amendment a system of provisions and procedures permitting employees to form, join or assist a labor organization for the purpose of bargaining collectively through exclusive representatives may continue to operate under those provisions and procedures. Any substantial change after January 1, 2003 to any ordinance, resolution or charter amendment shall subject the public employer to full compliance with the provisions of Subsection B of Section 26 of the Public Employee Bargaining Act."

Id. Thus, a § 26(A) local board will be grandfathered if its enabling ordinance meets the following three elements:

- it was in effect prior to October 1, 1991;
- it constitutes "a system of provisions and procedures permitting employees to form, join or assist a labor organization for the purpose of bargaining collectively through exclusive representatives;" and,

- it was not substantially changed after January 1, 2003.

New Mexico courts have interpreted “employees” in § 26(A) as being consistent with the use of the term “public employees” under § 4(R) and § 5 of PEBA. This interpretation has resulted in the invalidation of grandfathered ordinance provisions that seek to exclude more public employees from its coverage than would be excluded under PEBA. *See infra*.

However, the New Mexico Court of Appeals has rejected a PELRB analysis that concluded the right to final and binding arbitration was so fundamental to “collective bargaining,” as to be similarly incorporated by implication. *City of Deming v. Deming Firefighters Local 4251*, 2007-NMCA-069 (April 19, 2007, overruling in part *City of Deming v. Deming Firefighters Local 4251*, 1 PELRB No. 2005 (Mar. 31, 2005)). In doing so, the Court of Appeals specifically observed that the definition of “collective bargaining,” in the PEBA §4(F), “does not contain any qualitative requirement or measure of effectiveness.” *Id.* at ¶ 21. The PELRB has asserted jurisdiction since *Deming* where the complainant alleged the local board was not fully functioning.

There are presently six¹³ local boards recognized as grandfathered under § 26(A) and presumed to be functioning:

1. City of Alamogordo,
2. City of Albuquerque
3. Albuquerque Public Schools
4. County of Bernalillo
5. City of Farmington
6. City of Raton (*But see IAFF Local 2378 and City of Raton*, PELRB No. 302-11 (June 20, 2013) regarding lost grandfathered status as to certain provisions).

The Town of Silver City also has a local ordinance and board dating back to 1975, but as of 2008 it was not functioning. *See IAFF Local 2430 and Town of Silver City*, PELRB Case No. 308-07, Hearing Examiner Report at 1-2 (March 7, 2008). It eventually was grandfathered under §26(B).

In 2007 AFSCME filed a PPC with Albuquerque’s grandfathered local board alleging discrimination against one of its members because of his union activities. *See, City of Albuquerque v. Montoya*, 2012-NMSC-007, N.M. , 247 P.3d 108. Following the prohibited practices complaint hearing, the “neutral” member of the local board recused himself from the matter. A deadlock resulted. The union then filed the same complaint with the PELRB and the City moved to dismiss for lack of jurisdiction. The PELRB determined that it had jurisdiction and revoked grandfathered status finding that the ordinance’s provision permitting the City Council President to make an emergency appointment to the

¹³ Although the City of Deming originally had a §26(A) grandfathered ordinance, it made substantial changes to that ordinance after January 1, 2003 and by operation of the “substantial changes” clause of §26(A) is now regarded as having an ordinance grandfathered under §26(B).

board was not sufficiently neutral. On review the Supreme Court disagreed and reversed a Court of Appeals' holding that PELRB had jurisdiction. The Supreme Court held that City Council President does not serve in either a "management" or a "labor" capacity, and therefore the City Ordinance provision that provides a procedure by which the City Council President appoints a member to the local board during the absence of a member does not violate the § 26(A) grandfather clause.

2. § 26(B) Local Boards Grandfathered

Section 26(B) is directed to grandfathered boards created after October 1, 1999, and grandfathered boards created before October 1, 1999 but substantially amended after January 1, 2003. In contrast to § 26(A), it imposes many more requirements. First, such ordinances must comply with the following sections of PEBA:

- Section 8 (creation, terms and qualifications of the PELRB);
- Section 9 (powers and duties of the PELRB);
- Section 10 (creation of local boards, and the selection, qualification and terms of local board members);
- Section 11 (powers and duties of the PELRB);
- Section 12 (hearing procedures); and
- Section 17(D) (that the scope of bargaining for representatives of public school employees or educational employees in state agencies shall include, as a mandatory subject of bargaining, the impact of professional and instructional decisions made by the employer).

Additionally, such ordinances must provide for:

- the right of public employees to form, join or assist employee organizations or the purpose of collective bargaining;
- procedures for the identification of appropriate bargaining units, certification elections and decertification elections equivalent to those set forth PEBA;
- the right of a labor organization to be certified as an exclusive representative;
- the right of an exclusive representative to negotiate all wages, hours and other terms and conditions of employment for public employees in the appropriate bargaining unit;
- the obligation to incorporate agreements reached by the public employer and the exclusive representative into a collective bargaining agreement;
- negotiation of grievance procedures culminating with binding arbitration;
- negotiation of payroll deductions for the exclusive representative's membership dues if requested by the exclusive representative;
- impasse resolution procedures equivalent to those set forth in Section 18 of PEBA; and
- prohibited practices for the public employer, public employees and labor organizations that promote the principles established in Sections 19 through 21 of PEBA.

There are presently four local boards grandfathered under § 26(B); those for the Cities of Las Cruces, Las Vegas, Deming and Silver City.

PEBA's § 26(B) covers the same class of employees as does §26(A). As noted above, New Mexico courts have interpreted the word "employees" in § 26(A) to mean "public employees" as used under § 4(R) and § 5 of PEBA and shortly before PEBA I expired the New Mexico Supreme Court concluded that no class of public employee covered under PEBA could be excluded from coverage of a grandfathered local ordinance. *See The Regents of the University of New Mexico v. New Mexico Federation of Teachers and American Assoc. of University Professors*, 1998 NMSC 20, ¶¶ 43 and 48, 125 NM 401 (the "very function" of PEBA "is to extend the right to organize and bargain collectively to all 'public employees,'" and "[i]t is entirely within the constitutional police power of the Legislature to require a public employer—even one that has a long-standing well established employment policy—to expand the scope of employees to whom it must extend the right to bargain collectively"). Additionally, the New Mexico Court of Appeals has held under PEBA II that neither can classes of public employees be statutorily defined as an excluded supervisory employee. *See City of Deming v. Deming Firefighters Local 4251*, 2007-NMCA-069 (April 19, 2007).

Accordingly, any provision of a grandfathered local ordinance that somehow narrows the definition of "public employee" or broadens the definition of "supervisor," "confidential employee" or "management employee will not be given grandfathered effect under § 26.

The *Regents* and *Deming* holdings should apply with equal force to § 26(B) ordinances, because § 26(B) is also directed to existing "system(s) of provisions and procedures permitting employees to form, join or assist a labor organization for the purpose of bargaining collectively through exclusive representatives..." *Id.* (emphasis added).

NOTE, however, that under *Regents* only those portions of a local ordinance that violate the requirements of § 26(A) or § 26(B) will be denied grandfathered effect.

Under PEBA I the PELRB and reviewing courts typically assumed that § 26(B) (§ 26(C) under PEBA I) concerned newly created local boards approved by the PELRB under § 10. *See, e.g., Santa Fe County & AFSCME*, 1 PELRB No. 1 (Nov. 18, 1993); *AFSCME & Los Alamos County Firefighters v. County of Los Alamos*, 1 PELRB No. 3 (Dec. 20, 1994); *In re: New Mexico Federation of Teachers & American Association of University Professors, Gallup Campus v. UNM*, 1 PELRB No. 18 (June 25, 1995) at n. 8; and *The Regents of the University of New Mexico v. New Mexico Federation of Teachers and American Assoc. of University Professors*, 1998 NMSC 20, ¶¶ 34, 38, 125 NM 401.

Accordingly, since PEBA's reenactment, the PELRB has interpreted § 26(B) as governing only those local boards created between October 1, 1991 and the enactment of PEBA II, and it has interpreted § 10 as exclusively governing boards newly created under PEBA II. *See, e.g., National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH*, 3-PELRB-2005 (Oct. 19, 2005). *See also McKinley County Federation of United School Employees, AFT Local 3313 v. Gallup-McKinley County School District and*

Gallup-McKinley County School District Labor Management Relations Board, PELRB Case No. 103-07, Hearing Examiner Report at 5-7 (May 29, 2007), *aff'd* PELRB Case No. 103-07.

As noted, § 26(C), a provision identical to § 26(B), existed in PEBA I. The purpose of § 26(C) was apparently to protect those ordinances and resolutions passed as a prophylactic measure just prior to the enactment of PEBA I. Under PEBA II, the purpose of § 26(B) is to protect both those ordinances preserved under § 26(C) as well as ordinances and resolutions passed in the “gap period” between PEBA I and PEBA II.

The distinct treatment afforded established local boards compared with those newer local boards enacted either prior to or while PEBA I was in effect, during the “gap period” between PEBA I and II or after PEBA II went into effect, reflects a legislative accommodation of competing interests. As noted in the historical background section of this manual *supra*. Labor interests had initially proposed to the Legislature that grandfathered ordinances provide “substantially equivalent” rights as provided under PEBA I, and that no new local boards be created. The Legislature rejected that proposal and instead elected to preserve the oldest grandfathered ordinances (provided that they extend collective bargaining rights to the same classes of employees as does the PEBA) and to permit the continuing creation of new local boards. It did, however, impose a “substantiality equivalent” standard, but only on those local ordinances created under and just prior to enactment of PEBA I.

D. Section 10 Boards

Pursuant to § 10 of PEBA a public employer other than the state may, with the approval of the PELRB, create by ordinance, resolution or charter amendment, a local board that is similar to the PELRB. Once created and approved, the local board shall assume the duties and responsibilities of the PELRB. A local board created under § 10 shall follow all procedures and provision of PEBA unless otherwise approved by the PELRB.

Unless a variance is specifically requested and approved pursuant to NMAC 11.21.5.11, public employers should use one of the Board’s model templates posted on its website at <http://www.pelrb.state.nm.us/localboards.php> to create a local board.

Based on a survey conducted by the Board in May of 2005 and updated on February 18, 2009, there are 31 local boards created and approved by the PELRB pursuant to § 10 of PEBA. However, not all of those local boards have all three of their members appointed nor have they all met to conduct business or pass rules.¹⁴

¹⁴ At the time of the 2009 update 13 local boards had all three board members appointed: 1) City of Roswell; (2) City of Hobbs; (3) Dona Ana County; (4) San Juan College; (5) NM Highlands; (6) City of Clovis; (7) Sandoval County; (8) Chama Valley Schools; (9) Rio Rancho Public Schools; (10) NMSU; (11) Otero County; (12) Western NM University; and (13) City of Artesia. Of those 7 had at least one meeting: 1) Dulce Independent Schools; (2) Dona Ana County; (3) San Juan College; (4) Sandoval County; (5) Rio Rancho Public Schools; and (6) NMSU. Two of those promulgated rules (Dona Ana County and NMSU) and two were in the process of adopting rules. (Gadsden Independent School District and Gallup McKinley Schools.)

Of the local boards that have appointed members and met the average time between PELRB approval and the local board's first meeting has been approximately four months, but sometimes as high as seven (7) or eight (8) months. For those local boards known not to have had an initial meeting yet, several years have passed without appointment of members, passing rules or holding meetings.

E. Jurisdictional Issues

As noted, there is still considerable debate as to the extent of the PELRB's jurisdiction in the face of a local board.

As to newly created boards, § 10(A) states that local board "shall assume the duties and responsibilities" of the PELRB, and § 11(E) provides the local boards shall have the power to enforce both PEBA and the local ordinance. As to grandfathered boards, as noted above, §26(B) states that public employers with grandfathered ordinances "may operate under those provisions and procedures rather than those set forth in [PEBA]."

Employers with a local board typically argue this language signifies that upon PELRB approval of a local board, the PELRB is divested of all jurisdiction in favor of that local board. Unions desiring to stay before the PELRB tend to argue that the PELRB continues to have concurrent jurisdiction. The weight of judicial and PELRB decisions over the years, as noted, supports the conclusion that the PELRB retains some jurisdiction, but should use considerable discretion in exercising its concurrent jurisdiction, particularly in the case of the oldest grandfathered boards.

The prior PELRB and several New Mexico District Courts have ruled unequivocally that the PELRB has jurisdiction and authority to review the content of ordinances or resolutions creating a local board, attendant to approving the local board pursuant to § 10 of PEBA. *See Santa Fe County & AFSCME*, 1 PELRB No. 1 (Nov. 18, 1993); *AFSCME & Los Alamos County Firefighters v. County of Los Alamos*, 1 PELRB No. 3 (Dec. 20, 1994), *Board of County Commissioners of Otero County et al. v. State of New Mexico Public Employee Labor Relations Board*, Case No. CV-93-187 (J. Leslie C. Smith, Jul. 13, 1993) (dismissing mandamus action against Board to enjoin it from hearing such cases), and *AFSCME v. County of Santa Fe*, Case No. SF 93-2174 (J. Herrera, Jul. 8, 1994) (upholding Board's decision in *Santa Fe County & AFSCME*, 1 PELRB No.1).

The present day Board has also ruled that it has jurisdiction to review a local ordinance, "whether grandfathered or not," for compliance with PEBA, and its exercise of such jurisdiction has been upheld by the New Mexico Court of Appeals. *See City of Deming v. Deming Firefighters Local 4251*, 1 PELRB No. 2005 (March 31, 2005), *aff'd City of Deming v. Deming Firefighters Local 4251*, 2007-NMCA-069 (April 19, 2007) (concluding that "the PELRB has the initial ability to determine its jurisdiction, and upholding the PELRB's determination that a certain provision of the local board was denied grandfathered effect). *See also* discussion *infra* concerning the New Mexico Supreme Court decision in *The Regents of the University of New Mexico v. New Mexico*

Federation of Teachers and American Assoc. of University Professors, 1998 NMSC 20, ¶¶ 43 and 48, 125 NM 401.

A distinction may be drawn between earlier Board and District Court decisions indicated that the PELRB has concurrent jurisdiction to enforce PEBA after the approval and creation of a local board (a doctrine modified in later decisions) and those based on a determination that a local board is not functional and operational. For example, in 2004, the Director dismissed and remanded a matter to a duly approved local board but the PELRB reversed and remanded the matter back to the Director because the local board was not yet in fact functioning and the Complainant alleged that the employer was utilizing the process of establishing the local board to delay processing pending matters. *See American Federation of State, County and Municipal Employees International Union v. New Mexico State University*, 2-PELRB-2005 (June 22, 2005). Similarly, the Second Judicial District Court denied a local employer's petition for mandamus to prevent the PELRB from exercising jurisdiction where a local board had been approved and appointed, but was not fully operational and functioning when the PELRB PPC was filed. The court orally reasoned that the PELRB and a local board have concurrent jurisdiction to enforce PEBA, pursuant to § 9(F) and § 11(E). *See Gallup-McKinley County Schools v. PELRB and McKinley County Federation of United School Employees Local 3313*, 2d Judicial Dist., Case No. CIV-2005-07443 (J. Campbell, oral ruling on Nov. 2, 2005).

In contrast, whereas the PELRB's earlier decisions concluded that it has concurrent jurisdiction to review a local board's rules for compliance with PEBA and for compliance with prior PELRB decisions interpreting PEBA,¹⁵ subsequent Court decisions compel modification of that view of concurrent jurisdiction. For example, in *City of Albuquerque v. Montoya*, 2012-NMSC-007, _N.M. _, 247 P.3d 108, AFSCME filed a PPC with Albuquerque's Local Board alleging discrimination against one of its members because of his union activities. Following the prohibited practices complaint hearing, the "neutral" member of the Local Board recused himself from deciding the matter. As a result of the deadlock the two remaining members of the local board could not adjudicate AFSCME's complaint. The union then filed the same complaint with the PELRB and the City moved to dismiss for lack of jurisdiction. The PELRB Director determined that the PELRB had jurisdiction because the ordinance was not grandfathered. On review the Supreme Court disagreed and concluded that the City Ordinance did not violate the grandfather clause requirement and thus reversed the Court of Appeals' holding that PELRB had jurisdiction.

The Court of Appeals had characterized the City Council President as "managerial personnel" and held that the President's appointment of a third member defeated the neutral makeup of the Local Board's membership. The Supreme Court disagreed and held that the City Council President does not serve in either a "management" or a "labor" capacity, and therefore the City Ordinance provision that provides a procedure by which the City Council President appoints a member to the Local Board during the absence of a member does not

¹⁵ See *Gallup-McKinley Schools*, supra, 03-PELRB-2007 (undated), and attached Hearing Examiner Report, reasoning that to rule otherwise would undermine "the consistent and uniform administration of [PEBA] ... throughout the State of New Mexico," and thus would "threaten [] uniformity in the proper administration of PEBA." *Id.* at 2.

violate the Act's grandfather clause requirement that a local ordinance create a system of collective bargaining.

Between September 28, 2010 and June 15, 2011 four bargaining units representing City employees filed nine PPC's with the PELRB because at that time the City's labor board had not operated creating a backlog of unheard cases. The unions argued that PEBA allowed the PELRB to take jurisdiction when the local board was failing to act. *See American Federation of State, County and Municipal Employees, Local 1888 v. City of Albuquerque*, Case No. D-202-CV-2012-02239. The City responded that under § 10-7E-26(A) of PEBA the PELRB lacked the jurisdiction. The nine cases were consolidated by the PELRB and the Board's Hearing Officer determined, *inter alia*, that despite its prior inability to function, the City Labor Board was "fully functional" by the time the consolidated cases were being considered by the PELRB. The Board adopted the Hearing Officer's recommendation that "The Prohibited Practice Complaint should be DISMISSED and remanded to the Albuquerque Labor-Management Relations Board for further proceedings."

The City appealed to the District Court concerning the issue of remand raising the issue that if the PELRB is without jurisdiction to hear the PPC's (because the local board was found to be fully functional and operational)¹⁶ then it had no power to remand the PPC's back to the City Labor Board. The unions argued, consistent with the implications in the prior cases discussed above, that PELRB has concurrent jurisdiction with the City Labor Board and when the City Board is not functioning PPC's may be filed in both the local and state boards. Therefore, remand is appropriate.

The Court agreed with the City, relying on the principle set forth in *Deming Firefighters* and re-affirmed in *City of Albuquerque v. Montoya*, that where the grandfather clause applies PEBA does not apply and the PELRB does not have jurisdiction. Consequently, the PPC's were properly dismissed but the PELRB was without jurisdiction remand to the local board for further proceedings – they did not originate at the local board and make their way via appeal or removal to the State Board.

The Board has historically exercised great discretion in exercising what it considered to be its concurrent jurisdiction, generally deferring to local boards as long as they are "fully functional and operational," meaning all members of the local board have been appointed, and the local board has promulgated rules and is meeting and conducting business so at least with regarding to functioning boards the recent decision do not reflect a significant change in the Board's former practice. *See In the Matter of the Disqualification of Deputy Director Pilar Vaile, AFT v. Gadsden Independent School District (Gadsden)*, Case Nos. 132-05 and 309-05 (oral ruling, Minutes, PELRB Board Meeting, August 19, 2005). Second, its ruling in the *Gallup-McKinley County School District* Case, *supra*, indicated that the exercise of jurisdiction in that case—which had a functional and operational board

¹⁶ Referring to the two part test set forth in *Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, 125 N.M. 401, 962 P.2d 1236: First, a local board must have in place "a system of provisions and procedures permitting employees to form, join or assist in any labor organization for the purpose of collective bargaining through exclusive representatives." Second, the system must be in place prior to 1991.

when the PPC was filed—was warranted only because of the unusual circumstances of that case. In particular, the local board local had promulgated a rule that violated PEBA on its face, as well as a prior PELRB ruling interpreting another provision of PEBA. *Id.* at 3; citing *In re: Petition for Recognition as Incumbent Labor Organization NEA-Alamogordo and Alamogordo Public Schools*, PELRB Case No. 303-006 (June 1, 2006). The Board reasoned that the case therefore “raise[d] serious and significant issues affecting public sector collective bargaining statewide,” and “issues that are important to the consistent and uniform administration of the PEBA, throughout the State of New Mexico.” *Id.* at 1-2.

As always, where there is a functioning board the decision to exercise jurisdiction will be strongly affected by whether the matter concerns a § 10 or a § 26(A) board. For instance, where a § 10 local board has taken some generally applicable action that is both in violation of PEBA and threatens the uniform interpretation and application of PEBA statewide the Board is more likely to assume jurisdiction than it might in the face of a § 26(A) grandfathered entity such as was involved in the City of Albuquerque cases referenced above.

PELRB hearing examiners routinely have remanded matters that originated with the PELRB to newly formed local boards upon a showing that the local board is functioning and operational as contrasted with the remand at issue in the City of Albuquerque cases referenced above. *See, e.g., Las Vegas Firefighters and City of Las Vegas*, PELRB Case No. 301-08 (Feb. 18, 2008); *Zuni FUSE v. Zuni Public School District*, PELRB Case No. 152-07 (Nov. 30, 2007); *National Federation of Educational Employees v. Northern New Mexico College*, PELRB Case Nos. 136-07 and 137-07 (Oct. 19, 2007); *IAFF, Los Lunas Local and Village of Los Lunas*, PELRB Case No. 312-07 (Oct. 18, 2007); *NMCP SO-CWA Local 7911 and Doña Ana County Sheriff’s Department*, PELRB Case No. 321-06 (Nov. 1, 2006); *Alamogordo Firefighters Associations, IAFF Local 4348 and City of Alamogordo and Alamogordo Public Safety Officers Associations*, PELRB Case No. 312-06 (July 13, 2006); *AFSCME v. Doña Ana County*, PELRB Case No. 128-06 (July 12, 2006); *Los Alamos Firefighters Association Local 3279 v. County of Los Alamos*, PELRB Case No. 119-05 (July 11, 2006).

As noted *infra*, the District Courts, not the PELRB have jurisdiction over claimed violation of a union’s Duty of Fair Representation. Local Boards lack authority under § 11(E) to either award monetary damages to an aggrieved union member for a union's breach of its duty of fair representation, or to order the Union to reinstate an employee allegedly improperly terminated as a result of the Union's breach. Therefore, claims for breach of the duty to fairly represent bargaining unit members cannot be brought before a Labor Relations Board and must instead be filed in District Court. *Callahan v. New Mexico Federation of Teachers-TVI*, 139 N.M. 201, 131 P.3d 51 (2006).

Following the Supreme Court decision in *Callahan I* the matter came before the Court of Appeals a second time in *Callahan v. NM Federation of Teachers-TVI*, 224 P.3d 1258, 2010 NMCA 4 (Ct. App. 2009) (*Callahan II*). The primary issue in the district court on remand from *Callahan I* was whether the handling of Plaintiffs' grievances was perfunctory and therefore arbitrary, or was in bad faith. The district court entered summary judgments

in favor of the Union and the International Union. The district court determined that Plaintiffs did not show that the Union engaged in the arbitrary, fraudulent, or bad faith conduct required to support their claim. As to the International Union, the court also determined that Plaintiffs did not provide any evidence to show that it was party to the collective bargaining agreement or that it consulted with or advised the Union with regard to Plaintiffs' grievances. The Court of Appeals reversed the Summary Judgment in favor of the Union and remanded for trial on Plaintiffs' claims against the Union; however, summary judgment in favor of the International Union was held to be appropriate.

Both *Callahan I* and *Callahan II* reiterated the holding in *Jones v. International Union of Operating Engineers*, 72 N.M. 322, 330-32, 383 P.2d 571, 576-78 (1963), that a union member stated a claim for relief for breach of the duty of fair representation when he pleaded that the union had acted arbitrarily, in bad faith, and in violation of its trust when it refused to press the member's grievance to arbitration and that that mere negligence will not state a claim for breach of the duty of fair representation. Relying on the "tripartite" duty from *Vaca v. Sipes*, 386 U.S. at 191, 87 S. Ct. 903 that a union's actions may not be arbitrary, discriminatory, or in bad faith the Court reiterated that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion. *Callahan II* makes clear that the general policy of deference to a union's discretion on whether to represent a member's complaint is not unlimited. In *Callahan II* it remained for the jury to evaluate whether Union had and breached a duty to investigate, to pursue, obtain, and evaluate the reasons for the termination, and then to evaluate the merits of the grievances relating to the employees' termination, before settling the grievances as it did.

In *Akins v. United Steel Workers of America*, 148 N.M. 442, 227 P.3d 744 (N.M. 2010) the New Mexico Supreme Court was asked to limit a union's liability for breach of a DFR by imposing a per se exclusion of punitive damages much as the U.S. Supreme Court has done for similar actions against federally regulated labor unions. The Supreme Court declined to do so and instead underscored the public policy served by punitive damages. Punitive damages should be available in DFR suits where the union's conduct is malicious, willful, reckless, wanton, fraudulent or in bad faith. This decision is based in no small part on the particularly egregious conduct involved. In response to serious allegations of a racially hostile work environment, the Union's response to *Akins* was that he was the wrong color and needed to learn to speak Spanish. The compensatory award against the Union of a mere \$1,661 was insufficient to deter similar outrageous conduct against other Union members in the future. *Akins*, 2009-NMCA-051, ¶ 24.

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

595 (Ct. App. 2008). *See also, Howse v. Roswell Independent School Dist.*, 188 P.3d 1253, 144 N.M. 502 (Ct. App. 2008).

VII. Prohibited Practices

A. Generally

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 §10-7E-9) *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* NMAC 11.21.1.7(B)(10).

Section 10-7E-19 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. Section 10-7E-20 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.”

§ 19(G) and § 20(E) are referred to as “catch-all provisions” for violations of any substantive PEBA rights other than those specifically enumerated in §§ 19 through 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 § 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 21(A) prohibits public employees or labor organizations from engaging in a strike and when read in conjunction with § 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. *See also* JOHN E. HIGGINS, *THE DEVELOPING LABOR LAW* (6th Ed.) at Chapters 21-24.

B. 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 at www.pelrb.state.nm.us. Under the “Forms” tab individuals will find a “Prohibited Practices Complaint” and an “Answer to PPC” along with forms used in other proceedings.

C. Initiation of Prohibited Practices Complaints

A Prohibited Practices Complaint is filed by a public employee or his representative alleging one or more violations of the subparagraphs of §19 or by a public employer or his representative alleging violations of §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 NMAC 11.21.1.10 for details concerning what constitutes filing with the PELRB and NMAC 11.21.2.9 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 §§ 19, 20 or 21(A) of PEBA. *See* NMAC 11.21.1.7(10).
- 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* NMAC 11.21.3.9.
- 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 ½ 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* NMAC 11.21.1.26. 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 it is received by the director. 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 work day after the fax is sent. *See* NMAC 11.21.1.10.

- 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* NMAC 11.21.1.11.

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*, 98 N.M. 57, 60, 644 P.2d 1046, 1049 (Ct. App. 1982) (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*, NMAC 11.21.3.12(A) and NMAC 11.21.1.8.

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 conducts an investigation a hearing officer other than the director must be designated under NMAC 11.21.3.14. The Board has rejected that reading because the Director is required by NMAC 11.21.3.12 to conduct an investigation 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 potential 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 conduct an investigation established by NMAC 11.21.3.12.¹⁷

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 prejudice 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 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*, 80 N.M. 135, 452 P.2d 469 (N.M. 1969):

"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*, 108 N.M. 658, 662, 777 P.2d 386, 390 (Ct. App. 1989) citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

1. 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 NMAC 11.21.1.16(C). 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

¹⁷ "...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*, 115 N.M. 6, 20, 846 P.2d 312, 326 (1993).

(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* NMAC 11.21.1.23.

However, the complainant should not serve the PPC, because the PELRB must first conduct an initial screening of all PPCs. *See* NMAC 11.21.3.12(A). Thereafter, the PELRB shall either serve the PPC, or give the complainant notice of and opportunity to cure any defects.

2. Answer

An answer must be filed within 15 business days after service of the PPC. NMAC 11.21.3.10(A). Failure to do so may result in entry of a default judgment. NMAC 11.21.3.11. 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, it will be deemed converted into a Status and Scheduling Conference.

3. Status Conference

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

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.*

4. 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* NMAC 11.21.3.22.

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).

Although a court generally determines whether "a controversy is subject to an agreement to arbitrate", (Section 44-7A-7(b)) 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)).

5. 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* NMAC 11.21.3.21. 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 (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*, 115 N.M. 159, 164 (Ct. App. 1993) ("[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’).

6. 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.

a. 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.

b. Jurisdictional Requirement 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. *See AFSCME v. Department of Health*, PELRB Case 168-06, Hearing Examiner’s Decision on Motion to Dismiss at 16-19 (July 16, 2007), and cites therein. Accordingly, as a general rule 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. *See infra*; *see also* Case 168-06 at 4-5, 16 (if the matter is not appropriately deferred to grievance-arbitration in the first instance, a motion to dismiss for failure to exhaust the grievance-arbitration procedure will be moot). 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).

c. Deferral

Related to, but conceptually distinct from, the issue of exhaustion is the issue of deferral. NMAC 11.21.3.22 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;¹⁸
- employer obstruction of the grievance-arbitration process;
- break down of collective bargaining relationship; or
- the PPCs alleges discrimination, interference with PEBA rights, or violation of another 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 (6th Ed.) at 1599-1602, n. 141-142, and at 1608-1609, n. 181-185, 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)

¹⁸ 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).

(where the terms of the CBA are “clear and ambiguous ... 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 which would govern the pending motion to dismiss, if the matter was not deferred. Accordingly, in this case administrative efficiency argued strongly in favor of the PELRB hearing examiner continuing to process the matter.

d. Failure to State a Claim

The PELRB follows New Mexico jurisprudence with regard to 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*.

e. 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*.

f. Failure to Abide by Time Limits

The jurisdiction of the Board has been challenged on the basis of its failure to abide by the time limitations set forth in its own rules. 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. *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. *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.

7. 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 about 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.*

8. 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 NMAC 11.21.3.15 (A) 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. NMAC 11.21.3.15 (B) 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.

NMAC 11.21.3.15(D) 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* NMAC 11.21.3.15(A) and (C).

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* NMAC 11.21.3.15(D). 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.

9. 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* NMAC 11.21.19(A).

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.

D. Evidentiary Hearing

If the matter has not been settled or dismissed, the hearing examiner will conduct an evidentiary hearing, on the merits.

1. Admissible Evidence

The evidentiary hearing will not be strictly bound by formal rules of evidence. *See* NMAC 11.21.1.17(A). 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*, 94 N.M. 343, 344 (1980) (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.

2. 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* NMAC 11.21.1.19(A) and (B). A subpoena may be quashed upon motion. *See* NMAC 11.21.1.19(C).

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

3. 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 calling 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 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. NMAC 11.21.3.17 and 11.1.2.20.

E. §5 Violations Legal Standards

§5 violations of the 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 §19(A) (D) and (E) and those under § 5 for interference. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 88 (“[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).

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 § 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”).

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.

1. 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 (6th Ed.) at 110-119.

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. See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 109 - 111 and cites therein. However, the solicitation to sign an authorization card is treated as a solicitation, rather than distribution of written material. *Id.* at 110.

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 NM 239 (Ct. App. 1996) (Firefighters II).

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).

2. 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 (6th Ed.) at 121-123 and cites therein.

3. 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.

4. 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 free of charge, and may not be prohibited from doing so if other groups are allowed to distribute materials via employee mailboxes. *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); *see AFT v. Las Cruces Public Schools*, 130-06, Hearing Examiner Report at 16-17 (Feb. 28, 2007).

5. Interference with Concerted Action

As discussed above, PELRB hearing examiners and the PELRB have regularly concluded that Weingarten rights of concerted action for mutual aid and support exists under PEBA despite the difference in language between § 7 of the NLRA and § 5 of PEBA.

Additionally, one hearing examiner has held that § 5 of PEBA also protects the circulation of a petition directed to improving the terms and conditions of employment, that is signed by employees and circulated without union involvement. *See AFSCME v. Department of Health*, PELRB Case No. 168-06, Hearing Examiner Report (Aug. 30, 2007). There, the hearing examiner determined that circulation of a petition concerning leave usage, overtime, and safety was protected concerted activity for mutual aid and protection, because it was peaceful and concerned improvement of employees' conditions of employment. *Id.* *See also Michaels v. Anglo Am. Auto Auctions*, 117 NM 91, 94 (1994) (remedial statutes are to be given a liberal construction to affect their purpose), and JOHN E. HIGGINS, *THE DEVELOPING LABOR LAW* (6th Ed.) at 209-211, 220-221, 252 (regarding standards for protected concerted activity).

Under NLRA case law interference with other concerted activity, such as concerted action directed against sexual or racial discrimination, may also state a valid complaint. *See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW* (6th Ed.) at 255-256. However, concerted activity for the benefit of the employer's clients does not state a claim under the NLRA, and must instead be raised under relevant whistleblower statutes. *Id.* at 258.

6. Work Rules That Interfere With Employees' PEBA Rights

It violates PEBA to promulgate work rules or restrictions with the intent to interfere with employees' rights under 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 NM 239 (Ct. App. 1996) (Firefighters II). Additionally, even otherwise legitimate restrictions violate 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).

7. Disciplining Union Stewards for Union Activity

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 NLRB 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 employers part); and See, *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 its 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 PPC's 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.

8. 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 insofar 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 infra*.

9. 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 PEBA has been answered in the affirmative. This is so despite the fact that § 5 of PEBA, unlike § 7 of the NLRA, does not contain the same language, "to engage in concerted activities for mutual aid and protection," that was relied on in Weingarten and its progeny.

Section 7 of the NLRA guarantees covered 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." The PELRB has held that Section 5 of the PEBA provides for basically

the same rights and any differences in text are directed to streamlining the language rather than limiting or narrowing the enunciated rights. *See, AFSCME, Council 18 v. N.M. Dep't of Health*, PELRB 168-06 (affirmed, 06-PELRB-2007). The federal decisional law characterizes this right as the *Weingarten* rule or doctrine, a shorthand label commonly used even when referring to rights arising under PEBA.

In a split ruling the Board held that *Weingarten*-type rights exist under PEBA.¹⁹ *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.

In an earlier case, *AFSCME, Council 18 v. N.M. Dep't of Health*, 06-PELRB-2007 the Board adopted the principle that:

“...PEBA protects peaceful concerted activity for mutual aid and support to the same extent as does the NLRA... Comparing PEBA to the NLRA...the protections provided by PEBA are sufficiently similar to those provided by the NLRA to warrant the inference that the New Mexico Legislature intended to protect public employees engaged in more general concerted activities, not only those activities performed to assist a labor organization.” (Citation omitted).

The Board relied on Section 5 of PEBA finding that it provides “basically the same rights” as section 7 of the NLRA. The differences in text “appear to be directed to streamlining the language utilized in the NLRA, rather than limiting or narrowing the enunciated rights.” *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) (PEBA protects the right to circulate a non-union related petition without retaliation, and the difference between § 7 of the NLRA and § 5 of PEBA reflects a streamlining of language, not a limitation of rights afforded under NLRA).

¹⁹ 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 PEBA; (2) 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-2013-05070.

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; and
- (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* right existed. Instead, the Complaint must only allege:

- (i) the employee claimed and/or asserted a *Weingarten* right; and
- (ii) thereafter the employee faced some discriminatory or retaliatory action as a result.

10. 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:

- (i) whether the interrogated employee is an open and active union supporter;
- (ii) the background of the interrogation;
- (iii) the nature of the information sought;
- (iv) the identity of the questioner;
- (v) the place and method of the interrogation;
- (vi) the truthfulness of the reply;

- (vii) whether a valid purpose for the interrogation was communicated to the employee; and
- (viii) whether the employee was given assurances against reprisals.

Id. See also *NLRB v. Nueva Engineering, Inc.*, 761 F.2d 961 (1985) (interrogation coercive because it took place in the office of a 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).

11. 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).

12. 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); and

- 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).

Occasionally, however, there will be a pleading and evidentiary issue for the complainant, to state and establish facts sufficient to infer knowledge that protected union activity was occurring when the claim consists of someone observing or following two co-worker stewards when the stewards are discussing union business at the work site.

13. 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 work place. *See generally* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 107-142. 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:

14. 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*, 150 N.M. 132, 257 P.3d 952 (2011) 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.

Claims by a union or employee against a public employer or its representative under § 19(A), (B), (D) or (E), or by a public employer or its representative under § 20(A) or (B)

An employer or union violates 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*.

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 *NLRB 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 265-266.

Although the evidentiary burdens shift back and forth under this framework the ultimate burden of persuading the trier of fact remains at all times 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 to meet its ultimate burden to 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, 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.

F. Violations of § 19(A), (B), (D) or (E), or by § 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 fairly 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.

2. Discrimination/retaliation for Affidavit, Complaint, Etc. See § 19(E)

- Includes the discharge or other discrimination against an employee because he or she did the following, pursuant to the provisions of 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 PEBA by discriminating against a public employee with regard to union membership because of: race, color, religion, creed, age, sex or national origin. See § 20(A).

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

A union violates PEBA by discriminating against a public employee because of the employee's non-membership in, or opposition to the union. *See* §§ 5, 15(A), 20(B), 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* (6th Ed.) at 411-415.

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 fairly and adequately represent bargaining unit members. *See Callahan v. NM Federation of Teachers-TVI*, 2006-NMSC-010 (that such a claim does not constitute a PPC under 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 PEBA rights and refusal to comply with PEBA, and concluding that the essence of the PPC was nonetheless for breach of the duty to fairly represent a bargaining unit member).

Several PPCs have challenged conduct related to fair share payments, under a variety of theories including discrimination, interference with the right to refrain from joining a union, and violation of the contract. *See Thomas Baker v. CWA*, PELRB Case No. 105-07 (alleged refusal to cancel dues deduction and change employee to fair share payments after he canceled his union membership); *Elena Velasco v. AFSCME*, PELRB Case No. 105-08 (alleged interference with right not to join the union, by sending fair share debt to a collections agency without first giving employee notice and justification of the debt); and *Ortiz v. AFSCME*, PELRB No. 115-08 (alleged improper calculation and assessment of fair share payments and sending matter to collections agency without notice to the employee). *Fleming v. AFSCME, Council 18, AFL-CIO*; PELRB No. 110-12. (Alleged improper calculation and assessment of fair share payments and sending matter to collections agency without notice to the employee). These PPCs have all settled and/or been withdrawn without a dispositive ruling.

Another potential issue is the termination of bargaining unit employees who refuse to make required fair share payments. The New Mexico Attorney General has opined that a classified employee may be terminated for refusing to make a fair share contribution as required by a collective bargaining agreement, if the State Personnel Board determines the termination is supported by just cause under the State Personnel Act, because compliance with a negotiated fair share provision may become a condition of continued employment. *See*, Aug. 17, 2007 Advisory Letter to the Honorable Luciano "Lucky" Varela. Accordingly, such an issue will not generally be a PELRB matter unless discrimination

under PEBA is alleged, such as that the union encourages the termination of non-members for fair share delinquency, but not the termination of union members for dues delinquency.

5. Interference, Restraint or Coercion by Employer Under §19(B) or by Union Under §20(B)

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 (6th Ed.) at 88 (“[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).

Domination or Interference with the Union prohibited by PEBA § 19(C); *See also* § 15(A) and § 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; or
- failing to maintain neutrality between competing unions.

See generally JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 448-449. 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.

Although it may intuitively seem like § 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 § 19(B) and § 19(D) of 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 § 19(C) to such claims, and concluded that these claims should instead be asserted under § 19(B) and § 19(D) of PEBA. *See AFSCME v. Department of Corrections*, Hearing Examiner’s Report at 2-3, 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 § 19(C) of PEBA. See *AFSCME Council 18 v. Department of Health*, 06-PELRB-2007 (Dec. 3, 2007).

6. Violation of the Duty to Bargain in Good Faith under §§ 17(A)(1), 19(F) or 20(C)

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). 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* (6th Ed.) at 882. 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; OR
- (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).

a. *Per se* Violations

For *per se* violations, intent is not relevant, and the party could even have actually 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 over-all 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 indicate 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 fairly and adequately represent all collective bargaining unit employees. *See National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH*, 3-PELRB-2005 (Oct. 19, 2005) (NUHHCE). *See also* JOHN E. HIGGINS, *THE DEVELOPING LABOR LAW* (6th Ed.) at 976-1042, and *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* (6th Ed.) at 979-980 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* (6th Ed.) at 992-993, 1031-1036; *see also NUHHCA, 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; and
- 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 PPC’s 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 two 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); *See also* JOHN E. HIGGINS, *THE DEVELOPING LABOR LAW* (6th Ed.) at 1001-1012.

In contrast, a defense based on the Inspection of Public Records Act (IPRA), NMSA 1978 §§ 14-2-1 *et seq.*, will be rejected. A union’s right to information under the duty to bargain in good faith is not defined by IPRA because the public policy and purpose underlying 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).

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 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 . As of this writing the decision is on appeal. *See*, 2nd Judicial Dist. Case No. D-202-CV-2012-11595. (Oct. 2013).

2) Refusal to Meet and Confer

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).

The duty to meet and confer in fact is also 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* (6th Ed.) at 911 n. 167 and cites therein (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 Respondent's assertion that a purported survey of union dues being paid did not actually take place end 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, 6-14-2013), *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,²⁰ 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 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* (6th Ed.) at 905-908 and cites therein.

5) Refusal to Execute a Written Contract

Execution of a written contract is expressly required under PEBA, as under the NLRA. Compare PEBA § 17(A)(2), to NLRA § 8(d).²¹ 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. *See* JOHN E. HIGGINS, *THE DEVELOPING LABOR LAW* (6th Ed.) at 908-910.

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

²⁰ 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*.

²¹ The only difference being that PEBA requires it without qualification, while the NLRA requires it “if requested by either party.”

all material terms.” See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 909 and cites therein.

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 (6th Ed.) at 892-905. 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-2012-02176 (1st Judicial Dist., J. Ortiz, 6-14-2013).

7) Mandatory Subjects of Bargaining

Mandatory subjects of bargaining include wages, hours or other terms and conditions of employment. See §15(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 (6th Ed.) at 1342-1343, 1347, 1352, 1362-1363. 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(E) 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”. The New Mexico Court of Appeals addressed the controversy surrounding §17(E) and a similarly worded local ordinance provision in a case involving the City of Albuquerque’s effort to avoid layoffs and balance its budget in the face of a projected budget shortfall. In *Albuquerque Police Officers Ass’n. et al., v. City of Albuquerque, et al.*, 2013- NMCA-110; *cert. denied*, Nov. 20, 2013, No. 34,373 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* (6th Ed.) at 1374-1378.

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* (6th Ed.) at 893, n. 63 and 1378-1384, 1396-1431, 1442-1445.

PEBA also makes payroll deduction of dues a mandatory subject if either party chooses to negotiate the issue. *See* § 17(C). “Fair share”, in contrast, is a permissive subject of bargaining. *See*, § 9(G). Under PEBA I, the PELRB held that fair share was a mandatory subject of bargaining as under NLRA precedent. The language of § 9(G) was subsequently amended under PEBA II to expressly state that “[t]h issue of fair shall be left a permissive subject of bargaining ...” In *AFSCME, Council 18 v. State of New Mexico*, 62-PELRB-2012, the Board found that factual issues exist so as to preclude Summary Judgment with regard to whether proposed “union security” clauses may fairly be said to be squarely within the provisions of PEBA §17(C) or of some other recognized mandatory subject of bargaining, or if they include language that may be said to be within §9(G)'s permissive subject matter. If the union includes fair share language in its dues deductions proposals,

then it calls into question whether a provision that would otherwise be a mandatory subject of bargaining remains so. In the context of an interest arbitration award, an Arbitrator rejected a proposed indemnification clause wherein management sought to add to a Fair Share Article, changes to sick leave and vacation leave accrual rates, sick leave conversion payouts and other changes to the *status quo*. *Doña Ana County (Sheriff) and CWA, Local 7911*; FMCS Case #13-51332-1, Aug. 27, 2013.

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; and
- 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 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); and
- 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).

See generally JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 905, 1369-1372, 1377 and cites therein.

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 (6th Ed.) at 1067-1068, 1086-1091.

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).²² 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. The District Court reversed the Board on the waiver issue and remanded the matter for further findings on which RIF effects are covered under the contract. *CWA Local 7076 v. New Mexico Public Education Department*, 76-PELRB-2012

b) Express Waiver

The union may expressly waive the right to bargain over a particular 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*,

²² But see *NLRB v. Pepsi Bottling Co. of Fayetteville, Inc.*, 24 Fed. Appx. 104, 114-115 (4th Cir. 2001) citing *Roll & Hold Warehouse & Distr. Corp.*, 325 N.L.R.B. 41, 42 (1997), and *Roll & Hold Warehouse & Distr. Corp.*, 162 F.3d 513, 519 (7th Cir. 1998) (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).

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”).²³

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).²⁴

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 matter is covered by the parties’ CBA the union has *exercised* its bargaining right. 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.

²³ Since 1993, at least three Circuit courts have abandoned use of the “clear and unmistakable” standard under the NLRA in favor of a “contract coverage” analysis. *See NLRB v. U.S. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992); *Bath Marine Draftsmen’s Ass’n v. NLRB*, 475 F.3d 14 (1st Cir. 2007) (in dicta, as the case was ultimately decided under a different NLRA section). Under this analysis, the contract is read as a whole to determine whether the general subject matter is “covered” by the contract, rather than requiring that the contract “specifically address[]” the exact “type of employer decision’ at issue.” *US Postal Service, supra*. If the contract addresses the general subject matter, then “the parties *have bargained* about the subject and have reached some accord,” *see Provena Hospitals, supra* at 10 (Dissent), and that accord should be honored. However, despite the apparent mutual antipathy between the proponents of each theory, *compare U.S. Postal and Provena*, it could be argued that the two standards are not really so different in practical application, when the contract is “read as a whole” as the courts generally do. *See, e.g., Masro Plastics, supra; NLRB v. United Technologies Corp.*, 884 F.2d 1569, 1575 (2nd Cir. 1989) (considering whether “[t]aken together,” the reservation of rights “plainly grants” the employer “broad authority” to amend a term and condition of employment); and *International Brotherhood of Electrical Workers, Local 803, AFL-CIO v. NLRB*, 826 F.2d 1283, 1296 (3rd Cir. 1987) (finding “a fair reading of the collective bargaining agreement as a whole establishes an intention to waive the employees’ right to engage in” a type of strike not specifically addressed in the contract).

²⁴ *But see Enloe Medical Center v. NLRB*, 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*.

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 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.

However, the "past practice" doctrine is frequently misunderstood, because the requirement for no exercise of discretion is typically overlooked. For example, under the doctrine of past practice, "[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.).

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).

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 for 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* (6th Ed.) at 1480 (a permissive subject, in contrast, “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,” a permissive subject of bargaining under § 9(G) of PEBA, and that the PELRB would violate PEBA to enter a bargaining order, as requested, concerning fair share).

Examples of permissive subject of bargaining include the following:

- fair share, *see* § 9(G);
- those portions of management rights and waiver clauses that do not concern
- terms and conditions of employment, *See* JOHN E. HIGGINS, *THE DEVELOPING LABOR LAW* (6th Ed.) at 1388-1390;
- interest arbitration upon impasse, *See* JOHN E. HIGGINS, *THE DEVELOPING LABOR LAW* (6th Ed.) at 1464;
- 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, *See* JOHN E. HIGGINS, *THE DEVELOPING LABOR LAW* (6th Ed.) at 1468-1470;
- that employees be allowed to use union labels, *See* JOHN E. HIGGINS, *THE DEVELOPING LABOR LAW* (6th Ed.) at 1470-1471;
- the settlement of pending PPCs, *See* JOHN E. HIGGINS, *THE DEVELOPING LABOR LAW* (6th Ed.) at 1474 and n. 801, and cites therein; see also *RBE 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); and
- use of a stenographer or recording device in negotiations, *See* JOHN E. HIGGINS, *THE DEVELOPING LABOR LAW* (6th Ed.) at 1445, 1475-1476.

Some examples of prohibited subject of bargaining include:

- “hold harmless” clauses regarding sex discrimination;
- modification of court approved settlements;
- preference for union members;
- clause making the CBA terminable at will;
- higher hourly rate to stewards; and
- superseniority for stewards beyond layoff and recall.

b. 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) *but See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 917-918 n. 196 and 197 (that 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.*, *Romo 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.'" *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 883, *citing Times Publishing Co.*, 72 NLRB 676, 682-83 (1947).

- Bad faith has been inferred and described in a variety of ways over the years:
- a desire not to reach an agreement at all;
- 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;
- lack
- an intent to simply frustrate bargaining; either completely or as it is going at that moment; or
- a desire to enter into a contract only on the party's own terms.

See e.g., *See 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, 1169-117 (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* PEBA § 17(A)(2) and NLRA § 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 (6th Ed.) at 916 and cites therein. 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 indicia 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.

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):

- a. refusal to make concessions, proposals or counterproposals, unless “patently meaningless” or “patently unreasonable;”
- b. intransigent insistence on unreasonable or overly broad management rights and waiver clauses;
- c. 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;
- d. 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;
- e. sending a representative with inadequate authority to bargain;
- f. 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;
- g. making unilateral changes while bargaining is underway;
- h. bypassing the union to negotiate directly with individual employees;
- i. commission of prohibited practices while bargaining is underway; or
- j. premature declaration of impasse and/or implementation of contract proposals.

See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 922-977, 1388-1390; *see also Master Window Cleaning, Inc.*, 302 NLRB 373, 375 (1991) (premature implementation of contract proposal).

Although not yet fully adjudicated and reviewed under 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* (6th Ed.) at 974-975.

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 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 PEBA. First, 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 NLRB 1206 (1998).

Based on the foregoing, one hearing examiner has concluded that such conduct violates PEBA. *See Santa Fe Public Schools v. NEA-Santa Fe*, PELRB Case No. 122-02. 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 enter into ground rules that clearly and unambiguously impose confidentiality requirements on the negotiations.

G. PPC’s Pursuant to § 19(G) or § 20(E) for Violation of PEBA or PELRB Rules

Although as yet untested, the standard for a claim will most likely be whether the section of PEBA alleged to have been violated awards a specific substantive right; or whether the section is merely advisory, aspirational or precatory.

For example, § 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.

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 NMAC 11.21.5.13, 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 § 15(A)

An employer violates § 19(G), in addition to § 19(C), where it interferes with the union’s status as exclusive representative under § 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. Violation of Incumbent’s Rights Under § 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 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*.

H. PPC's for Violation of §§ 19(H) or 20(D) Alleging Violation of the CBA or "Other Agreements"

PEBA, like the NLRA, prohibits violation of a CBA. *Compare* 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 PEBA requires all CBA's to include a grievance procedure culminating in final and binding arbitration. On one hand, the Respondent may file a motion to dismiss based on the complainant's complete failure to exhaust administrative remedies. On the other hand, the Respondent may seek and obtain a deferral from the hearing examiner pending resolution of grievance or arbitration procedures.

If the PELRB 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*, 79 NM 223, 226 (1968) (internal citations omitted). A contract is ambiguous if, considered as a whole, it "is reasonably susceptible to different constructions." *Kirkpatrick v. Introspect Healthcare Corp.*, 114 NM 706, 711 (1992). 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 or not 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*, 112 N.M. 504, 508-509 (1991) ("[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).²⁵

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 the parties made for themselves." *Id.*

I. Contract Violation Cases Before the PELRB

²⁵ Indeed, this construction seems almost necessary to prevent the exception from swallowing the rule, with the resultant evidentiary free-for-all.

A number of PPCs have asserted violation of the contract. Please refer to the PELRB's most recent Annual Report posted on its website: www.pelrb.state.nm.us for the statistics concerning the number of PPC's 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).²⁶

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).

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 with regard to 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

²⁶ 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 NMAC 11.21.3.21 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 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 NMAC 11.21.3.21 to enforce PEBA rights in the face of contrary decisions by other agencies. *Id.* at 2-3.

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 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 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), the Union alleged that the School District violated NMSA §10-7E-19(F), (G) and (H) 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 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 PEBA §19(C), (F) and (G) but found there to be insufficient evidence to support a conclusion that the District’s conduct violated 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.

This Order has been appealed by the School District to the Second Judicial District Court as case No. D-202-CV-2013-08758 and is now pending.

J. "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. 122-02 (Sep. 27, 2006); *see also Intl. Brotherhood of Police Officers, 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)

K. Post-hearing Procedures

The hearing examiner may leave the record open for a period of time 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* NMAC 11.21.3.18 and 11.21.2.21. 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 & Doña Ana Deputy Sheriffs' Association Fraternal Order of Police & Doña Ana County*, 1 PELRB No. 19. (Aug. 1, 1996), citing *Littlefield v. State of New Mexico*, 114 N.M. 390 (1992) (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).

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* NMRA 1-015(B) (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*, 78 N.M. 520, 522 (1967) (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*, 97 N.M. 618 (1982) ("[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* NMAC 11.21.3.19(D). A PPC decision so adopted will not constitute binding precedent. *Id.*

1. 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* NMAC 11.21.3.13 (regarding dismissal without a hearing on the merits) and 11.21.3.19 (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* NMAC 11.21.1.27.

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* NMAC 11.21.3.22(E).

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

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 resolutions 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)).

2. 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 sua sponte the issue for which it was found liable. *See AFSCME Council 18 v. Dept. of Health*, 06-PELRB-07 (Dec. 3, 2007).

3. Enforcement of PELRB Orders

If a party disregards or violates a PELRB order, the proper recourse is to seek judicial enforcement pursuant to §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; or
- (c) otherwise not in accordance with law.

Id.

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

4. Judicial Review

PEBA also provides the right to appeal to District Court. *See* §23(B). The appeal to district court must be filed within thirty (30) days of the issuance of the decision. *See* NMRA 1-074 and NMSA § 39-3-1.1. 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* NMRA 12-505.

L. 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).

M. Remedies

PEBA gives the PELRB “the power to enforce provisions of [PEBA] through the imposition of appropriate administrative remedies.” *See* § 9(F). It similarly gives local boards “the power to enforce provisions of [PEBA] or a local collective bargaining ordinance, resolution or charter amendment through the imposition of appropriate administrative remedies.” *See* § 11(E).

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* (6th Ed.) at 394-395. 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:

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* § 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”). 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 adverse to the public’s interest; and (4) there is a substantial likelihood plaintiff will prevail on the merits.” *Id.*, quoting *LaBalbo v. Hymes*, 115 N.M. 314, 318 (Ct App. 1993).

2. Posting

A common remedy is to order the posting of a notice that certain actions of a respondent have violated 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* (6th Ed.) at 2927.

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 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 of their PEBA rights. *See* JOHN E. HIGGINS, *THE DEVELOPING LABOR LAW* (6th Ed.) at 2926.

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 PEBA “in any other manner.” *See* JOHN E. HIGGINS, *THE DEVELOPING LABOR LAW* (6th Ed.) at 2926.

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).

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 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 PEBA. *See* JOHN E. HIGGINS, *THE DEVELOPING LABOR LAW* (6th Ed.) at 2930-2931.

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).

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 §§ 22-10A-1 *et seq.* 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*, Ct. App. No. 30,847; 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 PPC's 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 CBA's 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* (6th Ed.) at 251-252 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*

Return to the *status quo ante* is probably the broadest type of remedy, and will depend on the conduct found to violate PEBA. It could include, for example: rescinding work rules

passed in violation of the duty to bargain; reinstating 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, work load 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 (6th Ed.) at 825-826. 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 PEBA where a union has caused or instigated a strike. See § 21(C).

9. Punitive Damages and Attorneys’ Fees

Punitive damages and attorneys’ fees are not an appropriate administrative remedy. See *AFSCME & 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* 10-18-13, 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).