STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

CITY OF ALBUQUERQUE,

Respondent-Appellant,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL I888,

Petitioner-Appellee.

D-202-CV-2012-02239
(consolidated)

MEMORANDUM OPINION AND ORDER[1]

THIS MATTER comes to the Court's attention as a result of Appellant's appeals in these consolidated cases from the Orders and Decisions of the Public Employee Labor Relations Board ("PELRB"), dated February 8, 2012, and February 22, 2012, adopting the Hearing Officer's Report and Recommended Decision, dismissing Appellees' Prohibited Practices Complaints ("PPC") and remanding them to the City of Albuquerque Labor-Management Relations Board ("City Labor Board") for further proceedings. Having reviewed the pleadings and the record, the Court concludes, given that the PELRB lacked jurisdiction to hear the PPCs, the Board's Order remanding the PPCs to the City Labor Board is **REVERSED**.

I. FACTS AND BACKGROUND

This appeal involves nine consolidated cases that pose the same preliminary question regarding the jurisdiction of the PELRB: whether the PELRB has jurisdiction, concurrent or otherwise, that would allow it to remand the PPCs back to the City Labor Board, a Board

[1] The following cases are consolidated into this matter: D-202-CV-201201856 (PELRB 133-11); D-202-CV-201201857 (PELRB 121-10); D-202-CV-201201862 (PELRB 128-10 (A, C, D)); D-202-CV-201202239 (PELRB 103-11); D-202-CV-201202240 (PELRB 104-11); D-202-CV-201202242 (PELRB 105-11); D-202-CV-201202246 (PELRB 106-11); D-202-CV-201202247 (PELRB 107-11); D-202-CV-201202254 (PELRB 108-11).

grandfathered under the Public Employee Bargaining Act ("PEBA"). See NMSA 1978, §§ 10-7E-1 to -26 (2003, as amended through 2005). The underlying procedural facts are generally undisputed.

According to the City, between September 28, 2010 and June 15 2011, four bargaining units representing employees of the City filed PPCs with the PELRB. [Statement of Appellate Issues ("SAI") 2] At that time, the City Labor Board had a backlog. [RP 60-68 D-202-CV-2012-2239 (PELRB 103-11); Response 2] Appellees stated at the hearing that the City Labor Board had not operated for two years; the City stated that it was one year. [Response 2; Tr. 2/7/12 31:22, 32:30-35] The City asserted in response to the PPCs that under Section 10-7E-26(A) of PEBA the PELRB lacked jurisdiction to hear the PPC, which should be heard by the City's properly-grandfathered Labor Board. [SAI 3] Appellees argued that PEBA allowed the PELRB to take jurisdiction when the local board was failing to act. [Response 2]

On December 29, 2011, the Hearing Officer issued his Hearing Officer's Report and Recommended Decision in all the PPCs involving the City.[2] The Hearing Officer determined, inter alia, that the City Labor Board was "fully functional" at the time these matters were being considered by the PELRB, stating that all board members had been appointed, rules and regulations that did not conflict with PEBA had been promulgated, and the local board was meeting for business.[3] The Hearing Officer concluded: "This case does not present sufficient

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[2] [RP 2 D-202-CV-201201856 (PELRB 133-11); RP 7 D-202-CV-201201857 (PELRB 121-10); RP 27 D-202-CV-201201862 (PELRB 128-10 (A, C, D)); RP 16 D-202-CV-201202239 (PELRB 103-11); RP 16 D-202-CV-201202240 (PELRB 104-11); RP 16 D-202-CV-201202242 (PELRB 105-11); RP 16 D-202-CV-201202246 (PELRB 106-11); RP 16 D-202-CV-201202247 (PELRB 107-11); RP 16 D-202-CV-201202254 (PELRB 108-11)]

[3] [Response 2; RP 9 D-202-CV-201201856 (PELRB 133-11); RP 13-14 D-202-CV-201201857 (PELRB 121-10); RP 33-34 D-202-CV-201201862 (PELRB 128-10 (A, C, D)); RP 23-24 D-202-CV-201202239 (PELRB 103-11); RP 23-24 D-202-CV-201202240 (PELRB 104-11); RP 23-24 D-202-CV-201202242 (PELRB 105-11); RP 23-24 D-202-CV-201202246 (PELRB 106-11); RP 23-24 D-202-CV-201202247 (PELRB 107-11); RP 23-24 D-202-CV-201202254 (PELRB 108-11)]

facts to compel this Board to exercise jurisdiction over the parties and the subject matter and therefore this Board should defer to the jurisdiction of the City's Labor-Management Relations Board."[4] The Recommended Order stated: "The Prohibited Practices Complaint should be **DISMISSED** and remanded to the Albuquerque Labor-Management Relations Board for further proceedings."[5]

The City appealed to the PELRB, arguing that the Recommended Decisions assumed that the PELRB had jurisdiction because the recommendation was to remand the PPCs. [SAI 4] After hearing oral argument on February 7, 2012, the Board approved and adopted the Recommended Decision of the Hearing Officer.[6] The appeals to this Court followed.

II. STANDARD OF REVIEW

Rule 1-074(A) NMRA "governs appeals from administrative agencies to the district courts when there is a statutory right of review to the district court." Rule 1-074(R) provides that the district court shall apply the following standards of review:

> (1) whether the agency acted fraudulently, arbitrarily or capriciously;
>
> (2) whether based upon the whole record on appeal, the decision of the agency is not supported by substantial evidence;

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[4] [RP 3 D-202-CV-201201856 (PELRB 133-11); RP 8 D-202-CV-201201857 (PELRB 121-10); RP 28 D-202-CV-201201862 (PELRB 128-10 (A, C, D)); RP 17 D-202-CV-201202239 (PELRB 103-11); RP 17 D-202-CV-201202240 (PELRB 104-11); RP 17 D-202-CV-201202242 (PELRB 105-11); RP 17 D-202-CV-201202246 (PELRB 106-11); RP 17 D-202-CV-201202247 (PELRB 107-11); RP 17 D-202-CV-201202254 (PELRB 108-11)]

[5] [RP 10 D-202-CV-201201856 (PELRB 133-11); RP 14 D-202-CV-201201857 (PELRB 121-10); RP 34 D-202-CV-201201862 (PELRB 128-10 (A, C, D)); RP 24 D-202-CV-201202239 (PELRB 103-11); RP 24 D-202-CV-201202240 (PELRB 104-11); RP 24 D-202-CV-201202242 (PELRB 105-11); RP 24 D-202-CV-201202246 (PELRB 106-11); RP 24 D-202-CV-201202247 (PELRB 107-11); RP 24 D-202-CV-201202254 (PELRB 108-11)]

[6] [RP 1 D-202-CV-201201856 (PELRB 133-11); RP 1 D-202-CV-201201857 (PELRB 121-10); RP 1 D-202-CV-201201862 (PELRB 128-10 (A, C, D)); RP 1 D-202-CV-201202239 (PELRB 103-11); RP 1 D-202-CV-201202240 (PELRB 104-11); RP 1 D-202-CV-201202242 (PELRB 105-11); RP 1 D-202-CV-201202246 (PELRB 106-11); RP 1 D-202-CV-201202247 (PELRB 107-11); RP 1 D-202-CV-201202254 (PELRB 108-11); Transcript 2/7/12]

(3) whether the action of the agency was outside the scope of authority of the agency; or

(4) whether the action of the agency was otherwise not in accordance with law.

See also Miss. Potash, Inc. v. Lemon, 2003-NMCA-014, ¶ 8, 133 N.M. 128, 61 P.3d 837. The City asserts that the PELRB's final orders were arbitrary and/or capricious, outside the scope of authority of the agency, or otherwise not in accordance with law. [SAI 6]

> An administrative ruling is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record, and [the Court] must avoid substituting [its] own judgment for that of the agency. Whether the Board's actions were contrary to law is a question reviewed de novo. The party challenging the ruling has the burden to demonstrate grounds for reversal.

Smyers v. City of Albuquerque, 2006-NMCA-095, ¶ 5, 140 N.M. 198, 141 P.3d 542 (internal quotation marks, quoted authority, and citations omitted).

III. DISCUSSION

The City asks this Court to conclude that the PELRB lacked jurisdiction to hear the PPCs belonging to the City Labor Board, grandfathered by Section 10-7E-26(A) of PEBA, and, that without such jurisdiction, it had no power to remand the PPCs back to the City Labor Board. Appellees assert that PELRB has concurrent jurisdiction with the City Labor Board, specifically when the City Labor Board is arguably not functioning, such that PPCs can be filed in both and remand is appropriate. The Court agrees with the City.

The City's Labor-Management Relations Ordinance, established in 1974, created the City Labor Board, which is empowered to hear complaints of prohibited practices. LMRO § 3-2-9(D).[7] PEBA grants the City Labor Board continuing authority through its grandfathering provision. Section 10-7E-26(A) provides:

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[7] The Court relies on the Hearing Officer's Findings of Fact as they are not contested. [RP 3 D-202-CV-201201856 (PELRB 133-11); RP 8 D-202-CV-201201857 (PELRB 121-10); RP 28 D-202-CV-201201862 (PELRB 128-10 (A, C, D)); RP 17 D-202-CV-201202239 (PELRB 103-11); RP 17 D-202-CV-201202240 (PELRB 104-11); RP 17 D-

> A. 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.

No one appears to dispute that the City Labor Board is a properly-grandfathered Board within the purview of this statute. See City of Albuquerque v. Montoya, 2012-NMSC-007, ¶ 10, ____ N.M. ____, 274 P.3d 108; City of Deming v. Deming Firefighters Local 4521, 2007-NMCA-069, ¶ 9, 141 N.M. 686, 160 P.3d 595; Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers, 1998-NMSC-020, ¶ 34, 125 N.M. 401, 962 P.2d 1236. [Tr. 9/8/11 11:53-12:00] LMRO Section 3-2-9(D) states that "[a]ny controversy concerning prohibited practices will be submitted to the [City Labor] Board."

Where the grandfather clause applies, "the City may operate under the ordinance and, because the PEBA does not apply, the PELRB does not have jurisdiction." City of Deming, 2007-NMCA-069, ¶¶ 6, 11-12. The Supreme Court recently reaffirmed this general precept in Montoya in which it determined that the PELRB did not have jurisdiction over a PPC where the City ordinance at issue had grandfather status. 2012-NMSC-007, ¶ 22. In Montoya, a union filed a PPC with the City Labor Board. See id. ¶ 3. After the complaint was heard, the neutral member of the Board recused himself, and the other two members could not agree on a resolution. See id. The union then filed the same complaint with the PELRB, and the City moved to dismiss it for lack of jurisdiction. See id. ¶¶ 4-5. The PELRB Director determined that the PELRB had jurisdiction over the complaint because the ordinance at issue was not

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202-CV-201202242 (PELRB 105-11); RP 17 D-202-CV-201202246 (PELRB 106-11); RP 17 D-202-CV-201202247 (PELRB 107-11); RP 17 D-202-CV-201202254 (PELRB 108-11)]

grandfathered under PEBA. See id. ¶ 5. On review, the Supreme Court disagreed and concluded that the City Ordinance at issue did not violate the grandfather clause requirement and thus reversed the Court of Appeals' holding that PELRB had jurisdiction. See id. ¶ 22.

Appellees do not argue that any specific provision, or lack thereof, of the LMRO violates PEBA and gives the PELRB jurisdiction. Rather, Appellees argue that PELRB jurisdiction is appropriate because the City Labor Board was dark for a period and no longer provided a meaningful system. [Response 5] Such argument neither changes the analysis nor compels a different result in this matter. In their Response, Appellees assert that the City Labor Board failed the two-part test set forth in Regents of the University of New Mexico to obtain grandfather status "because it had ceased to operate or was operating under an extreme backlog of cases," and, thus, the PPCs were subject to PELRB jurisdiction. [Id.] In Regents of the University of New Mexico, the Supreme Court stated:

> PEBA sets forth two requirements a public employer must satisfy in order to obtain grandfather status. First, it must already have in place "a system of provisions and procedures permitting employees to form, join or assist in any labor organization for the purpose of bargaining collectively through exclusive representatives." Section 10-7D-26(A) (emphasis added). PEBA makes it clear that this system must be productive, actually resulting "in the designation of appropriate bargaining units, the certification of exclusive bargaining agents and the negotiation of existing collective bargaining agreements." Section 10-7D-26(B). Second, in order to be grandfathered, this system must be in effect "prior to October 1, 1991." Section 10-7D-26(A).

1998-NMSC-020, ¶ 34 (emphasis in original). However, Appellees do not direct this Court to anything in PEBA addressing jurisdiction when an otherwise properly-grandfathered local board has a back log or other procedural issues. The Court notes that the language regarding a system being "productive" as characterized in Regents of the University of New Mexico is no longer part of the statute. See NMSA 1978, § 10-7D-26(B) (1992) ("Only a public employer other than the state or a municipality whose ordinance, resolution or charter amendment has resulted in the

designation of appropriate bargaining units, the certification of exclusive bargaining agents and the negotiation of existing collective bargaining agreements may avail itself of the provisions set forth in Subsection A of this section."). The Court of Appeals has stated: "We glean from the removal of this language and the absence of any language concerning quality or effectiveness in the current PEBA that the Legislature intended that a public employer's system of provisions and procedures permitting collective bargaining would not be subject to that type of scrutiny to achieve grandfather status." AFSCME Council 18 v. City of Albuquerque, 2013-NMCA-012, ¶¶ 14-15, ____ N.M. ____, ____ P.3d ____, cert. granted, No. 30,927 (Jan. 7, 2013); see also City of Deming, 2007-NMCA-069, ¶¶ 20-21.

Nor do Appellees direct this Court to any part of PEBA that addresses jurisdiction at all. Appellees' citation to several regulations regarding the creation and approval of local boards under PEBA is equally unpersuasive. See, e.g., 11.21.5.12 NMAC; 11.21.513 NMAC; 11.21.5.14 NMAC. The PELRB did not create the City Labor Board; rather the City Labor Board has grandfather status under Section 10-7E-26(A).

Moreover, and as Appellees recognize in their Response, the Hearing Officer found and concluded that "however imperfectly, the City's labor board is complying with these requirements and is therefore fully functional."[8] [Response 2, 5-6] The Hearing Officer continued that he was "not persuaded that, in this case, the specific provisions of the City's Ordinance fail[] to comply with the overall intent of the PEBA." [Id.] Appellees did not appeal or otherwise challenge these findings.

The PPCs before the Board were properly dismissed. See, e.g., City of Deming, 2007-NMCA-069, ¶ 14 ("If the evidence establishes that the PELRB does not have jurisdiction, it must dismiss, leaving any further proceedings under the ordinance to the City Board."). However,

[8] See FN 3.

without jurisdiction to adjudicate or otherwise act regarding the PPCs, the Board had no power to remand the PPCs to the City Labor Board for further proceedings. The PPCs at issue did not originate at the City Labor Board and make their way via appeal or removal to the PELRB. See Black's Law Dictionary (9th ed. 2009) ("The act or an instance of sending something (such as a case, claim, or person) back for further action."). Rather, it is the Court's understanding that Appellees filed them at the PELRB as new matters for that Board.

IV. CONCLUSION

For the above-stated reasons, this Court **REVERSES** the remand of the PPCs to the City Labor Board.

TED BACA
DISTRICT COURT JUDGE

This is to certify that a true and correct copy of the foregoing document was mailed to the following on this 1st day of May, 2013:

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