STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AFSCME Local 3277,

Petitioner,

vs. **PELRB CASE NO. 113-18**

CITY OF RIO RANCHO,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board ("Board") on a stipulated agreement between AFSCME Local 3277 and the City of Rio Rancho, ("City") for entry of a Permanent Injunction.

After hearing oral argument from both parties, the Board being sufficiently advised finds by a vote of 3-0 the following:

A. On November 5, 2018, the Board voted to affirm its hearing officer's issuance of a preliminary injunction pending a hearing on the merits of this Prohibited Practices Complaint, and adopted his findings supporting the preliminary injunction.

B. At the hearing on the merits, held December 17, 2018, the parties reached an agreement that the Board enter a final order making the temporary injunction a permanent injunction allowing the parties an immediate appeal to the district court.

C. During the Board meeting, both parties affirmed the agreement for the issuance of a permanent injunction.

THEREFORE THE BOARD issues a permanent injunction prohibiting the City from withholding union dues from existing union members prior to the June 27, 2018 *Janus* decision based on the findings of fact found by the hearing officer in his preliminary injunction.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

1-18-19
DATE

DUFF WESTBROOK, BOARD CHAIR

STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 18, LOCAL 3277, AFL-CIO,

Petitioner,

v. **PELRB No. 113-18**

CITY OF RIO RANCHO,

Respondent.

TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

THIS MATTER comes before the Public Employee Labor Relations Board (Thomas J, Griego, Hearing Officer) on the Petitioner's Motion for a Temporary Restraining Order and Preliminary Injunction. After hearing oral argument on August 17, 2018 and having considered those arguments, the pleadings and being otherwise fully informed in the premises, the Hearing Officer FINDS that the Motion is well taken and will be GRANTED. Specifically, the Hearing Officer FINDS:

1. The Public Employee Labor Relations Board (PELRB) has asserted its jurisdiction to grant pre-hearing injunctive relief pursuant to NMSA 1978, § 10-7E-23(A) (2003). See, *AFSCME Council 18, NMCPSO & Santa Fe County*, PELRB Case No. 303-14, (May 7, 2014) (The County of Santa Fe and the NMCPSO were enjoined from executing a planned CBA pending the results of a representation petition.); *NEA-NM v. West Las Vegas School District,* 21-PELRB-13 (Aug. 19, 2013) (Board voted 2-1 to grant a pre-adjudication injunction because of a School District's announced intent to unilaterally impose a schedule change not agreed to by the union.) Pre-adjudication injunction is an

extraordinary remedy that 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).

2. The parties have been afforded an opportunity to present all factual information to the Hearing Officer, and have made all legal argument that they believe is relevant. I do not take into consideration testimony of witnesses under oath at the hearing on August 17, 2018.

3. The Petitioner and Respondent are parties to a collective bargaining agreement ("CBA") that remains in effect through June 30, 2020. See Affidavit of Joel Villarreal, Exhibit 1 to Motion and Exhibit A thereto, at Art. 1.2 (recognition clause).

4. The Petitioner ("Union") is the exclusive bargaining representative for the bargaining unit of blue and white collar employees employed by the City of Rio Rancho ("Employer" or "Respondent"). *Id.*

5. For the reasons outlined below, Plaintiffs have satisfied all elements necessary for a preliminary injunction. See *National Trust for Historic Preservation v. City of Albuquerque,* 117 N.M. 590, 595, 874 P.2d 798, 803 (Ct. App. 1994) ("To obtain a preliminary injunction, 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.")

6. The U.S. Supreme Court recently held that "States and public-sector unions may no longer extract *agency fees from nonconsenting employees*" and that "[n]either an agency fee nor any other payment to the union may be deducted from a *nonmember's* wages, nor may any

other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." *Janus v. American Federation of State, County, and Municipal Employees, Council 31, et al.* Decided June 27, 2018, slip op. at 48.

7. The *Janus* Decision is narrowly written with its effects limited to payments by non-members of an "agency fee" or "fair share" fee; it has no application to the payment of dues by members of the union or the use of payroll deduction of those dues and the First Amendment rights of union members having previously authorized dues deductions payable to the union are unaffected because the First Amendment is implicated only by a non-member authorizing agency fees to be deducted automatically from wages. See *Janus* slip op. at 48*("*Neither an *agency fee nor any other payment to the union* may be deducted from a *non-member's* wages, nor may any attempt be made to collect *such a payment,* unless the [non-member] employee affirmatively consents to pay. By agreeing to pay, *non-members are waiving their First Amendment rights,* and such a waiver cannot be presumed." (Emphasis added, bracketed language added, internal citations omitted. See *also, Id.* at 1 ("We conclude that this arrangement violates the free speech rights of *nonmembers* by compelling them to subsidize private speech on matters of substantial public concern." (emphasis added)). See also, *Id.* at 48.

8. Following the *Janus* decision, Petitioner sent notice to the Respondent on July 2, 2018 requesting that the City stop all fair share fees deductions and further requested that any fair share fees deducted after the date of the Supreme Court Decision be reimbursed to nonmembers. The Petitioner also requested that the Employer continue the deduction of dues for union members, with any questions to be directed to the Petitioner. See Affidavit of Joel Villarreal ¶ 4 & Exhibit B thereto.

9. On July 5, 2018, the Employer sent notice to "All City Staff" informing them that it

would no longer deduct fair share payments from non-members. However, the Employer also informed staff that it would stop deducting membership dues from union members unless they affirmatively re-authorized dues deductions.

10. Prior to the Respondent sending out this July 5, 2018, letter, Sheila Allen, President of AFSCME Local 3277 memorialized a conversation she had with Deputy City Manager John C. Craig and HR Director Ty Ryburn, concerning their planned notice regarding *Janus,* by an email in which she quoted CBA Article 7.4 and its process for terminating membership. Allen Affidavit, Exhibit 2, & Exhibit A thereto.

11. On July 10, 2018, Sheila Allen, sent an email to the bargaining unit encouraging employees to either stay in or to join the union and listed a number of items the local union had bargained in the past. *Id.* ¶ 6 & Exhibit B thereto.

12. In light of the foregoing the preponderance of the evidence does not support a conclusion that the Petitioner agreed with Respondent as to the form and method of dues re-authorization in the City's July 5, 2018 letter.

13. On July 17, 2018, the Employer reaffirmed its decision to unilaterally stop member dues deductions as well as fair share deductions by an email to employees reminding them to contact HR "to inform them of your decision regarding union membership" attaching a copy of the July 5, 2018 letter. See Villarreal Affidavit, Exhibit 1 at 5 & Exhibit C thereto.

14. Article 27.1 of the CBA provides that when any part or provision of the agreement is declared invalid the "validity of the remaining portions shall not be affected." *Id* & Exhibit A thereto.

15. Article 7 of the CBA entitled "Union Security" contains separate provisions relating to fair share deductions (Article 7.2) and for membership dues (Articles 7.1 and 7.4). *Id.*

16. Article 7.1 provides, in part: "During the life of this Agreement and upon receipt of a voluntary authorization for dues deduction card, the City will deduct each pay period, from the pay of each employee who has executed an authorization card, membership dues levied by the Union."

17. Article 7.4, regarding termination of deduction, provides in part: "Only a letter submitted by the employee and acknowledged by Union President's signature will allow termination of Union membership dues ...." *Id.*

18. The City's July 5, 2018, memo requiring all employees, members and non-members alike to make a new election regarding the deduction of their dues "regardless of their respective status and previous payroll deductions" and turn in a new form does not accord with Article 7.4 of the CBA. *Id.* ¶ 5 & Exhibit C thereto; see also Affidavit of Sheila Allen, attached hereto as Exhibit 2, at ¶¶ 3-4 & Exhibit A thereto.

19. The City also ceased collecting any dues for the paychecks delivered July 13, 2018, and, for those employees who resubmitted dues authorization, "doubled up" on their dues on the following paycheck. Villarael Affidavit, Exhibit 1, at ¶ 6 & Exhibit C thereto; see also Allen Affidavit, Exhibit 2, at ¶ 4 & Exhibit A thereto.

20. The City's actions resulted in the cessation of union dues for sixty of the Union's 158 members thereby causing irreparable harm to the local union. During which time, no employee has contacted the Union President to cease membership in the Union, as is required by Article 7.4 of the CBA. See Allen Affidavit Exhibit 2, ¶ 8.

21. The City's interpretation of *Janus* is an outlier contrary the post-*Janus* guidelines issued by of Attorneys General in New Mexico, Connecticut, Illinois, Maryland, Oregon and Pennsylvania. Exhibit 3 and Attorney General of New Mexico general guidelines letter introduced at the hearing. The City introduced no competent legal authority in at any

jurisdiction that extends *Janus* beyond its plain meaning rendering agency fees assessed against non-members unconstitutional, to challenge on the same basis dues deduction previously authorized by union members. I decline to follow the City's entreaty to ignore the Attorneys General letters because they do address the specific contract provisions at issue here. That argument does not persuade because the City's action was not premised on contractual construction so much as it was premised on the First Amendment rights of its employees – the very issue decided by the *Janus* Court and common to all of the Attorneys General letters.

22. The injury described above is ongoing and unless the parties return to the *status quo ante* each new pay period will repeat a new harm thus this TRO and Preliminary injunction intends to prevent future harm. Because this is a case in which the imminent harm or conduct is of a continuous nature, the constant recurrence of which renders a remedy at law inadequate, except by a multiplicity of suits, the injury is irreparable at law and relief by injunction is therefore appropriate. See, *City of Sunland Park*, 2000-NMCA-044, ¶ 19; *Winrock Enterprises, Inc. v. House of Fabrics of New Mexico, Inc.*, 1978-NMSC-038, ¶ 6, 91 N.M. 661 579 P.2d 787.

23. The threatened injury outweighs any damage the injunction might cause the defendant; Fair share fees charged to non-union members is to be distinguished from dues paid by full members of the union. Indeed, PEBA provides that dues deduction for members is a mandatory subject of bargaining, whereas fair share was a permissive subject. Section 10-7E-17(C) (emphasis added). The public employer shall honor payroll deductions until the authorization is revoked in writing by the public employee *in accordance with the negotiated agreement and* for so long as the labor organization is certified as the exclusive representative. Therefore, I find that the harm to the union's status as exclusive

representative and abrogation of the contract strike at the heart of the PEBA Section 10-7E-2 : The purposes of the PEBA stated therein being 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. There is no certain threat of harm to the public or to the City if the injunction issues. Perceived prospective violation of the rights of employees who opted to discontinue dues is too speculative to outweigh the harm to the Petitioner if the injunction does not issue. Any employee who wishes to discontinue dues deductions may take immediate steps called for in the parties' CBA to cease those deductions. Furthermore, it would be inequitable to permit the City to take unilateral action, contrary to the parties' CBA that has the effect of weakening the union both financially and, perhaps more importantly, in terms of its numerical support among those it is presumed to represent, based on nothing more than an expansive reading of *Janus* that is not warranted by a plain reading of the holding in the case itself. In contrast, there is no harm to the City in issuing the injunction, as their actions were not required by *Janus'* clear holding that it applies only to non-members and the injunction would merely return the City to the position it would be in had it not embarked on a course based on a peculiar extension of *Janus* to bargaining unit member that cannot be justified by the plain holding of the case. Indeed, an injunction may save the City money, as an unlawful refusal to collect dues is typically remedied by an order requiring the employer to pay the lost dues to the union with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), and without recouping the money owed for past

dues from employees. *Id.* at 5; *Space Needle LLC*, 362 NLRB No. 11 (Jan. 30, 2015).

24. Because of the foregoing, and because the net effect of the injunction is to require the City to follow the CBA and PEBA, issuing the TRO and Preliminary Injunction as prayed for is not contrary to the public interest. Both require the City to honor payroll deduction provisions in the collective bargaining agreement. Nothing in *Janus* in any way alters that. Because both parties are bound by their agreement, any ambiguity the local union President may arguably have interjected into this dispute does not provide a persuasive reason for allowing the City to ignore it and unilaterally create its collateral procedure for cancelling dues. Neither am I persuaded by the City's argument that because employees did not have the same choice of paying no fees at all or union dues as now exists after *Janus* for two reasons. First, circumstances often change after contracts are executed. That's why contracts exist at all; to bind parties to certain courses despite changing circumstances, except where legal impossibility exists. Here, it is not legally impossible to perform Article 7.4 because the Fair Share payment provision may be ignored without affecting the union dues deductions part of that article. Second, because Fair Share is a permissible subject of bargaining under the PEBA, the choice to pay no fees in fact *did* exist at the time the contract was entered into See, § 10-7E-9(G) of the PEBA:

> "A rule promulgated by the board or a local board shall not require, directly or indirectly, as a condition of continuous employment, a public employee covered by the Public Employee Bargaining Act to pay money to a labor organization that is certified as an exclusive representative. The issue of fair share shall be left a permissive subject of bargaining by the public employer and the exclusive representative of each bargaining unit."

25. Petitioner has a substantial likelihood of success on the merits, because the City does not credibly dispute that it violated Articles 7.1 and 7.4 of the CBA, essentially arguing instead that it had a good reason for doing so. Pursuant to Article 7.1, "During the life of

this Agreement and upon receipt of a voluntary authorization for dues deduction card, the City will deduct each pay period, from the pay of each employee who has executed an authorization card, membership dues levied by the Union." Pursuant to Article 7.4, "Only a letter submitted by the employee and acknowledged by Union President's signature will allow termination of Union membership dues ...." Contrary to those provisions, during the life of the CBA, the City has unilaterally and without bargaining ceased dues deductions for members for whom it had already received dues deduction authorizations and required those employees to resubmit authorizations in violation of the CBA.

26. In light of the foregoing, I conclude that other remedies at law will be inadequate to address the immediate harm here, the character of the interest to be protected, (both individual union members right to association without interference or coercion by the employer as well as the Union's protected rights as the exclusive representative) the apparent misconduct by the employer and the interests of third parties all weigh in favor of granting immediate injunctive relief. Returning the parties to *status quo ante* is a practical solution in light of the minimal hardship likely to result to the City if an injunction is granted.

IT IS THEREFORE ORDERED that the Motion for Preliminary Injunction is GRANTED as follows:

1. Defendant City of Rio Rancho shall continue to honor the parties' collective bargaining agreement, in particular the provisions requiring withholding authorized union dues deductions from its employees' wages and shall reimburse the union for the difference in dues lost to the union as a result of the City's July 5, 2018 and July 17, 2018 letters.

2. The City shall honor only those requests to cease dues deductions from those employees

complying with the provisions of Section 7.4 of the parties CBA except for the words in the first paragraph that "fair share fees will be deducted instead", which was rendered invalid by operation of the *Janus* decision.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Thomas J. Griego
Executive Director

Dated: August 21, 2018