November 1993 • Authority of PELRB • Local Ordinances

1 PELRB No. 1

STATE OF NEW MEXICO
BEFORE THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD

COUNTY OF SANTA FE

and

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, et al.

Case No. PPC 1-93(9)

DECISION AND ORDER

I. Proceedings

On April 1, 1993, the American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") filed with this Board the above prohibited practice complaint against Santa Fe County ("County"). AFSCME alleges that the County's Labor Management Relations Ordinance ("Ordinance") violates the New Mexico Public Employee Bargaining Act ("PEBA"), NMSA 1978, Sections 10-7D-1 through 10-7D-26.

More particularly, the complaint alleges that numerous provisions of the Ordinance, including its delineation of which employees have rights; its exclusion of certain subjects from collective bargaining; and its requirements for decertification of exclusive representatives, violate the requirements imposed upon such local collective bargaining ordinances by Section 26(C) of PEBA.[1]

[1] Sections of the Public Employee Bargaining Act, NMSA 1978 §§ 10-7D-1 through 26, ("PEBA") are designated herein by the section number.

The complaint alleges that by violating Section 26(C), the challenged provisions also violate PEBA Section 19(G), which makes it a prohibited practice for a public employer to violate "any provision" of PEBA.

On April 16,[2] the County filed a response to the complaint. The County asked the Board to dismiss the complaint on several grounds including the Board's asserted lack of jurisdiction and AFSCME's asserted lack of standing. The County also denied the substantive allegations of the complaint.

The Board originally set this matter (AFSCME and Santa Fe County) for a hearing to be held on June 8. On June 3, the County and other local public employers filed in the District Court for the Twelfth Judicial District a Complaint for Declaratory Judgment, Mandamus, Injunctive Relief and for a Temporary Restraining Order, Case No. CV-93-187, Board of County Commissioners of Otero County et al. v. State of New Mexico Public Employee Labor Relations Board et al. ("Otero"). On the same date, District Judge Robert M. Doughty II entered an ex parte temporary restraining order (TRO) prohibiting this Board from conducting the June 8 hearing and from taking any other action on this matter pending a hearing before the District Court.

Thereafter, this Board filed with the Court a motion to quash the TRO, and the Board, the County (with the other Petitioners), and intervening labor organizations filed briefs with the Court.

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[2] All dates referred to herein are 1993 unless otherwise noted.

Among other arguments that the County and the other Otero petitioners made in their brief and in oral argument to the Court were that the Board lacked jurisdiction over the present matter because the New Mexico Declaratory Judgment Act confers jurisdiction on the district court; that the Board lacked jurisdiction because of the doctrine of separation of powers; that AFSCME lacked standing; that the case was not ripe for adjudication; that the doctrine of exhaustion of remedies does not apply; that the Board had exhibited bias; and that the Board, in processing the present case, had violated its own rules.

On July 13, Judge Leslie C. Smith, sitting by designation, conducted a hearing in Otero and ruled from the bench that the Court lacked jurisdiction and granted the Board's motion to quash the TRO and thereafter issued a written order to that effect, on the Board's motion, dismissing the Petitioners' Complaint for Declaratory Judgment and other relief expressly on the ground that "the Court lack[s] subject matter jurisdiction." Neither the County nor any of the other Petitioners in Otero appealed or otherwise sought review of Judge Smith's orders quashing the TRO and dismissing the complaint for declaratory and other relief on the ground that Court lacked jurisdiction. Judge Smith's orders in Otero, therefore, are final.

Following the Court's quashing the TRO in Otero, on August 17, this Board, sitting en banc, conducted a hearing in this matter. At the hearing, the Board denied the County's motions to dismiss the complaint for lack of jurisdiction; to dismiss the complaint

due to the Board's asserted violation of its own rules; and to recuse a Board member.[3] The Board reserved ruling on the County's motion to dismiss based on AFSCME's asserted lack of standing. That issue (as well as the closely related issue of ripeness) we resolve in Part III below. The parties and three amici curiae, with the Board's permission, filed post-hearing briefs. Having considered the record, the arguments presented at the hearing, and the briefs, and being otherwise fully advised, the Board hereby issues its decision and order.

II. Facts

The facts are almost entirely documentary and are not in dispute. In its 1992 Session, the New Mexico Legislature enacted PEBA. The effective date of PEBA's substantive provisions was April 1, 1993.[4] PEBA's purposes, as declared by the Legislature, are "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 assuring, at all times, the orderly operation and functioning of the state and its political subdivisions." (Section 2.) Section 26 gives local public employers such as the County the option, if they meet certain conditions, of establishing, by ordinance, charter

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[3] We hereby affirm the rulings made at the hearing denying these motions. Because of the importance of the jurisdictional issues, we explain in Part III below our reasons for denying the motion to dismiss for asserted lack of jurisdiction.

[4] We take administrative notice of these legislative facts.

amendment or resolution, their own systems for the regulation of collective bargaining. Section 26(C) sets forth certain express conditions for the existence of any such system established after October 1, 1991. Section 26(C) reads as follows:

> Any public employer other than the state that subsequent to October 1, 1991, adopts by ordinance, resolution or charter amendment a system of provisions and procedures permitting employees to form, join or assist any labor organization for the purpose of bargaining collectively through exclusive representatives freely chosen by its employees may operate under those provisions and procedures rather than those set forth in the Public Employee Bargaining Act [10-7D-1 to 10-7D-26 NMSA 1978]; provided that the employer shall comply with the provisions of Sections 8, 9, 10, 11 and 12 [10-7D-8 to 10-7D-12 NMSA 1978] of that act and provided the following provisions and procedures are included in each ordinance, resolution or charter amendment:
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> (1) the right of public employees to form, join or assist employee organizations for the purpose of achieving collective bargaining;
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> (2) procedures for the identification of appropriate units, certification elections and decertification elections equivalent to those set forth in the Public Employee Bargaining Act;
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> (3) the right of a labor organization to be certified as an exclusive representative;
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> (4) 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;
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> (5) the obligation to incorporate agreements reached by the public employer and the exclusive representative into a collective bargaining agreement;

> (6) a requirement that grievance procedures culminating with binding arbitration be negotiated;
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> (7) a requirement that payroll deduction for the exclusive representative's membership dues be negotiated if requested by the exclusive representative;
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> (8) impasse resolution procedures equivalent to those set forth in Section 18 of the Public Employee Bargaining Act; and
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> (9) prohibited practices for the public employer, public employees and labor organizations that promote the principles established in Sections 19, 20 and 21 [10-7D-19 to 10-7D-21 NMSA 1978] of the Public Employee Bargaining Act.

Section 19(G), as noted, makes it a prohibited practice for a public employer to refuse or fail to comply with any PEBA provision.

On February 9, the County's Board of Commissioners enacted the Ordinance. The County's attorney approved the Ordinance as legally sufficient. The Ordinance was filed of record on February 15. All of AFSCME's allegations in the present case challenge provisions of the Ordinance as violative of PEBA Sections 19(G) and 26(C).[5]

III. Threshold Issues

A. Jurisdiction

The County, with the support of the public employer amici, makes before the Board precisely the same jurisdictional arguments that it made unsuccessfully before the Court in Otero, namely that

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[5] We take administrative notice of the facts that the County is a public employer within the meaning of Section 4(Q) and that AFSCME is a labor organization within the meaning of Section 4(J) of PEBA.

the Board lacks jurisdiction because the New Mexico Declaratory Judgment Act grants jurisdiction exclusively to the District Courts and that the Board's assertion of jurisdiction would violate the constitutional principle of separation of powers. A dispositive difficulty with these arguments is that the District Court in Otero found that the Court lacked subject matter jurisdiction and lifted the TRO that had prevented the Board from asserting jurisdiction, thereby finally and definitively resolving these issues against the County's position.

Settled principles of claim preclusion (res judicata) or issue preclusion (collateral estoppel) bar the County from litigating here issues previously litigated and resolved against it by a final court order. These related doctrines both have "the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979). The broader of the two doctrines, collateral estoppel, "precludes relitigation of issues actually litigated and necessary to the outcome of the first action," irrespective of whether or not the cause of action is the same. Id., n. 5. Accord: Silva v. State of New Mexico, 106 N.M. 472, 474, 745 P.2d 380 (1987).

Because the County litigated the issues of the Board's jurisdiction before the Court in Otero and the Court finally resolved those issues, we find that the doctrine of res judicata or the doctrine of collateral estoppel bars the County from re-

litigating them now.[6] However, because of the importance of these jurisdictional issues to labor relations in New Mexico under a new and untested statutory scheme, we proceed to address the merits of the County's claims.

The County maintains that the Board lacks jurisdiction because AFSCME's challenge to "[t]he validity of the ordinance is not a question of a prohibited practice," (County's Brief at 2), but a request for a declaratory judgment over which the District Courts have exclusive jurisdiction under New Mexico's Declaratory Judgment Act, NMSA 1978, 44-6-1 through 44-6-15. We find that the County's jurisdictional argument based on the Declaratory Judgment Act lacks merit for a number of reasons.

First, nowhere does that act state that the jurisdiction of the District Courts to resolve challenges to local ordinances is exclusive, and indeed it is clear that in various ways such jurisdiction is not exclusive.[7] Further, the County has cited no

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[6]We find it unnecessary to decide whether it is the doctrine of claim preclusion or the doctrine of issue preclusion which bars relitigation here of the issues decided by Judge Smith in Otero, a rather technical question that turns on the fine point of whether the "cause of action" is the same. It is sufficient, under the doctrine of issue preclusion (collateral estoppel), that the jurisdictional issues have been finally resolved against the County. That bars their re-litigation by the County here.

[7]Thus, the provision of the Declaratory Judgment Act upon which the County relies, NMSA 1978, Section 44-6-4, vests in the District Courts not only authority to determine rights under and validity of local ordinances, but also the authority to determine rights under and validity of deeds, wills, contracts, franchises, and statutes. Yet the District Courts clearly do not have exclusive jurisdiction in each of these areas. For example, the specialized probate courts have jurisdiction to determine rights under wills. Similarly, the New Mexico Human Rights Commission has authority to determine rights under the New Mexico Human Rights Act

case, nor are we aware of any, holding that such jurisdiction is exclusive.

Second, PEBA, fairly read, affirmatively grants to the Board express authority to resolve challenges to specific provisions of local collective bargaining ordinances when those provisions are alleged to constitute prohibited practices under PEBA. As earlier noted, Section 19(G) of PEBA makes it a prohibited practice for a public employer to "refuse or fail to comply with any provision of [PEBA]." (Emphasis added.) Section 9(A) authorizes the Board to hear and determine complaints of prohibited practices, while Section 9(F) empowers the Board to enforce PEBA's provisions "through the imposition of appropriate administrative remedies." Section 26(C) sets express requirements that a non-state public employer must incorporate in an ordinance, resolution or charter amendment in order to establish its own collective bargaining system. Reading these provisions together, it is clear that a local public employer's failure, in enacting its labor relations ordinance, to comply with the requirements of Section 26(C) constitutes a "fail[ure] to comply with [a] provision" of PEBA in violation of Section 19(G), a charge which this Board has express statutory authority to resolve. It is obvious, we think, that the Board could not carry out this statutory responsibility without reviewing the provisions of the ordinance alleged to constitute prohibited practices and determining whether or not it conforms to the requirements of Section 26(C).

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and the validity of contracts that may affect those rights.

Moreover, the County's argument that the Board lacks jurisdiction to determine whether provisions of local collective bargaining ordinances comply with PEBA requirements is clearly controverted by PEBA Section 10, which expressly empowers the Board to approve or disapprove local collective bargaining boards "created by ordinance, resolution or charter amendment," depending upon whether or not the ordinance, resolution or charter amendment meets specified criteria for structure, tenure, appointment, and payment of the local board. The County's Ordinance in Sections 8 and 9 would create such a board, which admittedly cannot function under PEBA without this Board first approving the local board.

Consistent with the point that the courts do not have exclusive jurisdiction, the doctrine of exhaustion of administrative remedies requires that the Board, rather than the district courts, initially resolve PEBA prohibited practice issues such as those presented to us in the present case, subject to the judicial review procedure established in PEBA Section 23. See, Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) (National Labor Relations Board ("NLRB"), rather than the federal courts, must initially resolve issues raised in unfair labor practice complaints under the National Labor Relations Act ("NLRA") subject to statutory judicial review, even where such issues include constitutional questions); State v. Zinn, 72 N.M. 29, 35-38, 380 P.2d 182 (1963) (applying Myers and holding that exhaustion of remedies requires New Mexico's district courts to defer to state administrative proceedings established by statute).

Finally, even if there were a conflict between the Declaratory Judgment Act and PEBA (which we believe there is not), the Board would still have jurisdiction over prohibited practice complaints such as the present matter because the Legislature has expressly provided in PEBA Section 3 that, with exceptions not relevant, "the provisions of [PEBA] shall supersede other previously enacted legislation." The Declaratory Judgment Act was enacted prior to PEBA's enactment.

In addition to arguing that the Board lacks jurisdiction because of the Declaratory Judgment Act, the County and the employer amici argue that the Board lacks jurisdiction because of the separation of powers doctrine embodied in Article III, Section 1 of the New Mexico Constitution.[8] They assert, in this regard that the Board, an executive branch agency, is attempting to infringe upon the legislative province of the county commission. We also find this argument without merit for the reasons that follow.

Since at least 1888, when Congress created the Interstate Commerce Commission, federal and state legislatures have established independent regulatory bodies with a combination of judicial, executive, and legislative functions. It is well settled that there is no inherent "separation of powers" problem in the existence of such boards and commissions, and their constitutionality repeatedly has been upheld.

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[8] The County unsuccessfully made this jurisdictional argument, as well as its jurisdictional argument based on the Declaratory Judgment Act, to the Court in Otero.

Professor Davis has succinctly stated the law on this point:

> 'Separation of powers' has never meant that legislative, executive, and judicial powers must be kept separate. . . . [A] typical agency has never been deemed to be in violation of the constitutional requirement of what is . . . miscalled 'separation of powers.' . . . . In planning and creating agencies, Congress has almost always preferred combination of legislative, executive and judicial powers in the same agencies.

1 K. Davis, Administrative Law Treatise, 1989 Supp., §2:2-2 at 21-22.

Accordingly, the existence of a state regulatory agency, such as a public employee labor relations board, with a combination of powers including the power to rule on the legality of local ordinances, does not violate separation of powers. Indeed, rejecting essentially the same argument the County makes here, a Florida appellate court stated:

> We note that the city's contention that [the state labor board's] interpretation of the statute would result in an unconstitutional infringement upon the power of the judicial branch of government by permitting [the state labor board], an administrative body, to pass upon the propriety of the city's legislative enactment. The delegation of the responsibility for determining whether local standards are equivalent to those enacted by the legislature does not appear to us as such an infringement, especially in light of the availability of judicial review of the... determination.

Public Employees Relations Commission v. City of Naples, 327 So.2d 41, 43 (Fla.Ct.App., 2d Dist. 1976).

The County's separation of powers argument is further undermined by its apparent acceptance of the portion of the statutory scheme, PEBA Sections 10(A) through 10(E), which requires the Board to pass on the portions of local ordinances that determine the structure, method of appointment, tenure, and pay of local boards. If the Legislature has chosen to delegate to the Board the duty to pass on the legality of local ordinances with respect to structural aspects of local boards and there is no constitutional problem with this, it is difficult to perceive how there could be a constitutional impediment to the delegation of power to the Board to rule on other aspects of the same ordinances. (Emphasis added.)

Further, various other New Mexico statutes permit state administrative bodies to pass on the legality of local ordinances, and this power has not been held to violate separation of powers principles. Indeed, the New Mexico Supreme Court in City of Albuquerque v. New Mexico Public Service Commission, __ N.M. __, __ P.2d __, Vol. 32 No. 23 SBB 463, 464 (June 10, 1993) noted with approval the state Public Service Commission's rulings on whether a city ordinance conformed to the requirements of the Public Utility Act. The Court also noted with approval the state commission's determination that it had jurisdiction to decide this matter. Id.

Finally, the County's contention that Board review of local ordinances violates separation of powers principles in that it involves an executive agency infringing upon the legislative domain

of the county commission ignores the facts that the state's ultimate legislative authority is the State Legislature and that the counties themselves are subject to the Legislature's control. See, City of Santa Fe v. Armijo, 96 N.M. 663, 634, 416 P.2d 685 (1966).[9] The Legislature, in PEBA, has delegated to the Board the authority to make certain determinations regarding local governments' labor relations ordinances. Repeatedly, the New Mexico courts have upheld, against separation of powers challenges, the Legislature's delegation of both quasi-judicial and quasi-legislative functions to administrative bodies, so long as the Legislature sets specific standards for the exercise of those functions. See, e.g., Montoya v. O'Toole, 94 N.M. 303, 610 P.2d 190 (1980); Fellows v. Schultz, 81 N.M. 496, 498, 469 P.2d 141 (1970) (quasi-judicial functions); City of Albuquerque v. Burrell, 64 N.M. 204, 210-211, 326 P.2d 1088 (1958)(quasi-legislative functions, labor matters). Here, as in the cases just cited, the Legislature has set specific procedures and standards for the agency's exercise of its delegated duties. Further, as Professor Davis has pointed out, there is nothing either unusual or unconstitutional about an executive agency making quasi-legislative, as well as quasi-judicial determinations, so long as

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[9] As the employer amici point out in their brief, NMSA 1978 Section 3-17-1 provides that "[t]he governing body of a municipality may adopt ordinances . . . not inconsistent with the law of New Mexico." [Emphasis added.] For the reasons set forth below, the ordinance before us eviscerates the law of New Mexico on collective bargaining as enacted by the Legislature. We have no doubt that the County would have acted within its constitutional and statutory authority had its ordinance conformed to the applicable state law, namely PEBA, but that is not the case.

aggrieved parties have the right to judicial review. The County has the right under PEBA to obtain judicial review of the Board's determinations regarding its Ordinance.

B. Standing

The County and employer amici assert that AFSCME lacks standing to bring the present case because AFSCME has not established that it represents any of the County's employees and has not established that it has suffered, or is imminently threatened with, actual injury. For the standard of actual injury or imminent threat thereof, the County cites DeVargas Savings & Loan Ass'n v. Campbell, 87 N.M. 469, 535 P.2d 1320 (1975). The County further asserts that "[u]ntil a labor organization is certified, there is no standing." (County's Brief at 5.)

AFSCME, also citing DeVargas, contends, on the other hand, that it has shown actual injury or imminent threat thereof and denies that certification to represent employees is a prerequisite for standing.

To begin with, we find that both the County and AFSCME, as well as amici, have misapprehended the appropriate standard to establish standing in an administrative proceeding. By citing DeVargas and similar cases, they have implicitly assumed that the standards applicable to judicial standing, governed as they are by constitutional provisions affecting the judicial branch,[10] also

[10] The doctrine of judicial standing is governed in large measure by Article III of the United States Constitution (judicial power), more particularly the case or controversy requirement of

apply to executive branch administrative proceedings. That is not the case, for "[j]udicial standing, affected by Article III of the Constitution, differs from administrative standing (i.e. standing to pursue a matter before an agency). . . . Administrative standing may be derived from . . . specific agency statutes." 5 Stein, Administrative Law, § 50.01, at 50-4, n. 2. Thus, standing to achieve party status before an administrative agency "is affected by agency rules and statutory provisions not affecting [judicial] standing . . ." and is "not governed by the same considerations." 1 K. Davis, Administrative Law Treatise § 8.11, at 568 (1958).[11]

Because administrative standing is a more flexible concept than judicial standing and is not governed by the constitutional considerations affecting the judiciary, we look to our own statute and regulations and the policies behind them to determine whether or not AFSCME has standing to pursue its complaint. Section 9(C) of PEBA gives the Board power to promulgate rules and regulations governing, among other things, "the filing of, hearing on and determination of complaints of prohibited practices." Section 12(A) gives the Board power to conduct hearings to adjudicate disputes and enforce PEBA and the Board's regulations. The statute

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that article. See, e.g., International Union, UAW, v. Brock, 477 U.S. 274, 281-82 (1986); Warth v. Seldin, 422 U.S. 490, 499-500 (1975); DeVargas Savings & Loan Ass'n v. Campbell, 87 N.M. 469, 472, 535 P.2d 1320 (1975).

[11] Accord: American Trucking Assoc's, Inc. v. I.C.C., 673 F.2d 82, 85, n. 4 (5th Cir. 1982) ("Nothing in this opinion is meant to equate administrative standing with judicial standing"); Koniag, Inc., Village of Uyak v. Andrus, 580 F.2d 601, 606 (D.C. Cir. 1978).

sets no restriction on who may file a prohibited practice complaint or appear as a party in a hearing, leaving the determination of these matters to the Board's rule-making and case-handling processes.

The Board's rules also place no restriction upon who may file or pursue a prohibited practice complaint, but refers generically to "the complainant" (PELRB Rules 3.1, 3.5, 3.6, 3.8, 3.9.) defined in PELRB Rule 1.3(e) as "...an individual, organization, or public employer[.]" This policy of refraining from setting specific qualifications for the filing or pursuit of a labor relations complaint is thoroughly consistent with the long-standing policy of the NLRB. Thus, the NLRB's Rules and Regulations provide that "any person" may file a complaint alleging a violation of the NLRA. (See 29 CFR 102.9).

In our view, the policy of not imposing strict qualifications for the filing or pursuit of a prohibited practice complaint comports with the purpose of PEBA, "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 assuring, at all times, the orderly operation and functioning of the state and its political subdivisions" (PEBA Section 2) and the Board's statutory duty to further this purpose by enforcing the statute. (PEBA Section 9(F).)

That is, the Board will better and more thoroughly be able to perform its duty to enforce PEBA if the Board is relatively open to accepting complaints from those who allege that the statute has been violated.

What has just been said does not mean that the Board will necessarily permit any person to pursue any type of complaint of a PEBA violation. Rather, the Board will determine, on a case-by-case basis, whether or not the complainant has a reasonable interest in the outcome of the proceeding and is potentially subject to harm. If so, the complainant will have administrative standing for the purpose of pursuing his or her complaint before this Board. If not, the complaint is subject to dismissal for lack of standing.

Turning to the issue of AFSCME's administrative standing to pursue the present case under the standard of reasonable interest in the outcome and the potential of being harmed, we reject the County's position that a labor organization must be certified as exclusive representative to have standing. This contention flies in the face of PEBA's "guarantee" to all public employees in New Mexico of the right to "organize," as well as to bargain collectively (Section 2); the right to "form" and "join" a labor organization, irrespective of whether or not the labor organization has been certified as exclusive representative (Section 5); a labor organization's right to organize employees so as to obtain their signatures in support of a representation election (Section 14) and its right to do other acts necessary to <u>become</u> certified (Section

26(C)(3)). If we adopted the County's position that certification is a pre-requisite to a labor organization's standing, consequences clearly abhorrent to the purposes of PEBA would necessarily follow. For example, a labor organization that had obtained sufficient employee signatures to warrant an election would be powerless to pursue a complaint against an employer that changed pro-union employees' work schedules so as to prevent them from voting in the election.[12] Surely, such a labor organization would have a sufficient interest to warrant standing.

As noted, the determinative question for our administrative standing purposes is whether AFSCME has a reasonable interest in the outcome and the potential to be harmed by the acts complained of. It is clear that AFSCME is an organization which exists, at least in part, for the purpose of representing public employees in collective bargaining and in otherwise dealing with employers on employment-related issues. As we have found above, AFSCME, therefore, is a labor organization within the meaning of PEBA Section 4(J). Because AFSCME is a labor organization within the statutory definition, it has certain rights of its own under PEBA, and it represents or exists to represent persons who have their own distinct PEBA rights. The statutory rights of a labor organization such as AFSCME include the right under Section 26(C)(3) to be

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[12] While this may be a somewhat extreme example, the same principle applies here, where AFSCME has alleged, for example, that the County's Ordinance completely divests some employees of their organizing and collective bargaining rights by altering the definitions of "employee," "supervisor," and "management employee."

certified as an exclusive representative and, if so certified, the right under Section 26(C)(4) "to negotiate all wages, hours and other terms and conditions of employment for public employees in the appropriate bargaining unit." The statutory rights of those whom AFSCME exists to represent -- public employees -- include "the right to organize and bargain collectively" (Section 2); the right to "form, join, or assist any labor organization for the purpose of collective bargaining through representatives freely chosen by [public] employees" (Section 26(C)); and the right to engage in such activities "without interference, restraint or coercion." (Section 5.)[13]

We believe that PEBA's grant of the above rights to labor organizations and to those whom labor organizations exist to represent means that a labor organization has a strong inherent interest in seeing that these same rights are not abridged by the actions of a public employer. AFSCME's complaint in the present case alleges that the County has abridged the statutory rights of employees and labor organizations. Therefore, AFSCME has a reasonable interest in the outcome of the proceeding as well as the potential to be harmed by the provisions of the Ordinance alleged to violate employee and labor organization rights and, accordingly, has administrative standing.

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[13]Section 5 of PEBA also grants public employees the right to refuse to engage in activities related to forming, joining and assisting labor organizations.

Even if we were to apply judicial standing requirements to our determination of administrative standing, we would find that AFSCME has standing. Actual injury or imminent threat of injury is required to establish judicial standing, but the injury need not be economic and "the extent of injury can be very slight." DeVargas Savings & Loan Ass'n v. Campbell, 87 N.M. 469, 472, 535 P.2d 1320 (1975). Such injury may consist of the creation of an administrative impediment to the legitimate interests or goals of the party. Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, __ U.S. ___, 111 S.Ct. 2298, 2306 (1991). Further, "[t]he actual or threatened injury required . . . may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." Warth v. Seldin, 422 U.S. 490, 500 (1975). An association or organization, even if not itself injured or threatened with injury, may establish standing on the ground that those whom it represents are injured or threatened with injury, so long as such members would themselves have standing; the interests that the organization is pursuing are germane to its purposes; and the participation of individual members is not required for relief. Hunt v. Washington State Apple Advertising Com'n, 432 U.S. 333, 343 (1977).

Here, we believe that the complaint's allegations to the effect that various provisions of the Ordinance violate AFSCME's PEBA rights, including its right under Section 26(C)(3) to become certified as the exclusive representative of County employees, is alone sufficient to show actual or threatened injury to AFSCME

under the standard of Washington Metropolitan Airports Authority, 111 S.Ct. at 2306, supra. There, the United States Supreme Court found that the creation of an administrative agency which would make attainment of the goals of a citizen's group more difficult constituted injury to the citizen's group so as to confer standing. Here, as there, an organization has alleged that a new administrative structure makes it more difficult for the organization to attain its goals. Hence, the organization has standing. Further, even in the absence of injury to AFSCME itself, the complaint alleges concrete harm to those whom AFSCME would represent, including the complete denial of the statutory rights of certain public employees to form, join and assist labor organizations such as AFSCME and to bargain collectively. Consequently, we find, as the United States Supreme Court did in UAW v. Brock, 477 U.S. 274, 281-85 (1986), that the union here has met the standards required for an organization to establish judicial standing based on injury to its members.[14]

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[14] The first associational standing requirement under UAW v. Brock and Hunt, supra, 432 U.S. at 343, is that members (or those whom the organization represents) themselves have standing. We have no doubt that an employee of the County whose status, as AFSCME's complaint alleges, has been changed by the Ordinance from that of one who enjoys organizing and bargaining rights to that of one who has no such rights, would have standing, even under judicial standing requirements. The same is true of County employees in general whose rights to bargain collectively allegedly have been curtailed by the Ordinance. Second, the interests which the organization seeks to protect must be germane to its purposes. AFSCME's efforts to further employees' organizing and bargaining rights clearly are germane to AFSCME's purposes. The final requirement is that the presence as parties of individual members is not necessary to the prosecution of the case or the granting of relief. We see no reason why the case cannot go forward, or why the Board cannot order an appropriate remedy, simply because

C. Ripeness

The County and employer amici have argued that the present case does not present sufficiently concrete issues for adjudication because the County has taken no specific action under its Ordinance.[15] In essence, the County asserts that AFSCME complains here only of what the County might do, and not of what it has done because, so far, the County has done nothing concrete. It remains to be seen, the County argues, how the local labor relations board that the Ordinance calls for will interpret and apply the Ordinance, and only after it has done so will there be a case sufficiently concrete for adjudication.

While the logic of the County's position on the ripeness question is intriguing, it fails under scrutiny. The County has taken specific and concrete actions in deliberating on, gaining legal counsel's approval of, and enacting its Ordinance. The primary PEBA section under which the present case is brought, Section 26(C), sets forth particular requirements that are expressly applicable to the provisions of local collective bargaining ordinances such as the County's Ordinance.[16]

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individual employees are not formal parties.

[15] The County and employer amici have variously framed essentially this same argument as a question of jurisdiction, a question of standing, and a question of ripeness. We have chosen to treat it under the single heading "ripeness."

[16] For example, Section 26(C) requires a local collective bargaining ordinance to contain election procedures and impasse resolution procedures "equivalent to" those of PEBA and requires the ordinance to assure public employees the right to form, join or assist employee organizations for the purpose of collective bargaining.

Where the meanings of the words of the Ordinance are clear and plain on their face, we need not await their application by the local board in order to determine whether or not they comply with the requirements of Section 26(C). The Ordinance itself defines the collective bargaining-related rights of public employees, the County, and labor organizations and sets forth the procedures for implementing those rights. (Emphasis added.) AFSCME has alleged that some of those provisions actually deny rights that PEBA requires the County to guarantee. It is such provisions of the Ordinance itself, rather than whatever future actions may be taken under the Ordinance, to which the requirements of Section 26(C) expressly apply.

Moreover, contrary to the County's apparent belief, it is well settled that a statute or ordinance may be found unlawful on its face, without waiting to see how it is applied, so long as its meaning is sufficiently clear. See, e.g., ILC Data Device Corp. v. Suffolk County, 588 NY Supp.2d 845 (App. Div. 1992) (County ordinance facially invalid due to conflict with scheme of state labor law).

For the above reasons, we find that the action of the County in enacting the challenged provisions of its Ordinance is sufficiently concrete and specific to present a "live" or ripe case for our adjudication under Sections 26(C) and 19(G) of PEBA.

IV. OVERVIEW OF RELEVANT PEBA PROVISIONS

The starting point for our overview of PEBA is the Legislature's intent in establishing the state's policy for public employee collective bargaining as expressed in the statute. The Legislature's intent must be determined primarily from the language of the statute itself. U.S. Brewers Ass'n v. New Mexico Department of Alcoholic Beverage Control, 100 N.M. 216, 219, 668 P.2d 1093 (1983), appeal diss'd, 465 U.S. 1093. Where the words of a statute are clear and unambiguous, the Legislature's intent is clear, and there is no room for further interpretation. State v. Jonathan M., 109 N.M. 789, 790, 791 P.2d 64 (1990).

To assist us with discerning its intent, the Legislature provided in Section 4 of PEBA definitions of certain terms. We note that many of these terms are found in various sections of PEBA (including Section 26) and must be interpreted and applied in a manner consistent with the Section 4 definitions regardless of where in the statute they appear.

Where a term has not been defined in PEBA, the plain and ordinary meaning of the term should be used. As the New Mexico Supreme Court stated in State ex rel. Bingaman v. Valley Savings & Loan Association, 97 N.M. 8, 636 P. 2d 279, 281 (1981): "In construing a statutory provision to determine the intent of the Legislature, the statute is to be read as a whole, giving the words their ordinary and usual meaning unless a different intent is made clear."

Where statutory terms are not entirely clear on their face, we may properly rely on other indicia of legislative intent that appear in the statute itself. State of New Mexico ex rel. Helman v. Gallegos, ___ N.M.___, 839 P.2d 624, 628 (Ct.App. 1992). In interpreting PEBA, therefore, we may rely inter alia upon the purpose of the law as expressed by the Legislature in Section 2 as well as the specific wrongs proscribed in Sections 19, 20, 21. In interpreting a statute "we must . . . look to the provisions of the whole law, and to its object and policy." United States v. Boisdore's Heirs, 8 How. 113, 121 (U.S.S.Ct. 1850). Moreover, "we...give effect to legislative intent by adopting a construction which will not render a statute's application absurd or unreasonable and will not lead to injustice or contradiction." Gutierrez v. City of Albuquerque, 96 N.M. 398, 400, 631 P.2d 304 (1981).

The purpose of PEBA stated in Section 2 is a compelling expression of the Legislature's intent. Not only did the Legislature set forth certain statutory rights, it guaranteed them. This means, for example, that the rights of all public employees in New Mexico to "organize"--a word used in Section 2 but not defined in the PEBA--and "bargain collectively" are statutory rights, guaranteed by the State. A local ordinance which intrudes upon, trammels, or interferes with those rights undermines the Legislature's intent as expressed in PEBA.

The Legislature, in Section 2, has proclaimed its determination that the procedures and provisions found elsewhere in PEBA are necessary to promote harmony and cooperation in the workplace. Moreover, the Legislature has determined that the public interest is served and protected by these provisions, and that this system results in the orderly operation of the state and its political subdivisions. Similar wording is found in Santa Fe County's Ordinance, indicating its intent to be consistent with the Legislature's policy.

Section 5 furthers the public policy stated in Section 2 by providing that "employees may form, join or assist <u>any</u> labor organization for the purpose of collective bargaining." [Emphasis added.] In other words, employees may define and shape the organization for they are free to form, join or assist it. Of equal importance and clarity is an employee's right to refuse to participate in activities to form, join, or assist a labor organization. This right encompasses, for example, an employee's decision not to organize or not to vote in a representation election.

The Board's powers and duties are enumerated in Section 9. It may enforce PEBA by imposing appropriate administrative remedies. (Section 9(F).) In doing so, however, the Board must act in accordance with Section 2 and other provisions of PEBA, for the statute must be read as a whole. For example, Section 26(C)(7) mandates a provision in a local ordinance requiring negotiation of payroll deduction of dues if requested.

Section 11 sets forth the powers and duties of the local board; it requires compliance with all provisions of PEBA. That is, Section 11(A) states that the local board shall issue regulations "necessary to accomplish and perform its functions and duties as established in [PEBA]. The Legislature did not sanction an exemption for a local board to delete any of PEBA's applicable duties and functions. This comports with Section 11(E) where the "local board has the power to enforce provisions of the PEBA or [its] local ordinance" and with Section 10(A) which requires a local board "to follow all procedures and provisions of [PEBA] that apply to the [state] board unless otherwise approved by the [State] board."

With particular reference to the introductory paragraph in Section 26(C) of PEBA, the Legislature stated that an employer other than the state "shall comply with the provisions of Sections 8, 9, 10, 11, and 12." In this regard, Section 8 concerns creation of state labor board; Section 9 is the Board's powers and duties; Section 10 is the creation of a local board; Section 11 is the local board's powers and duties; and Section 12 concerns hearing procedures. In unambiguous terms, the Legislature mandated political subdivisions to accept the terms and conditions specified in those sections.

Section 26(C) also states that the ordinance must provide a "system of provisions and procedures permitting employees to form, join or assist any labor organization for the purpose of bargaining collectively through exclusive representatives freely chosen by its

employees." Where the Legislature guaranteed rights to organize and bargain collectively to all public employees in Section 2, we do not believe that it intended to allow those same rights to be diminished or negated in Section 26(C) by a local public employer precluding access to the administrative machinery established in Sections 8, 9, 10, 11, and 12.

In view of the above, we interpret the words "shall comply" to mean that a local ordinance may not eviscerate or negate PEBA Sections 8, 9, 10, 11, 12, for the Legislature mandated that certain rights be guaranteed to public employees.

To carry out this mandate, the Legislature authorized the Board and local boards to implement and administer PEBA--making no provision for the payment of fees or costs--to take advantage of the administrative machinery on parties in political subdivisions that do not elect to adopt a local ordinance and operate a local board. In those situations where a political subdivision elects to establish a local board, the same obligation to ensure the protection of employee rights to organize and bargain collectively, as assured by the administrative machinery of Sections 8, 9, 10, 11, and 12 exists.

This obligation, which political subdivisions are free to choose, is reinforced in Sections 26(C)(1), "the right of public employees to form, join or assist employee organizations for the purpose of achieving collective bargaining;" in Section 26(C)(3), "the right of a labor organization to be certified as the exclusive representative;" and Section 26(C)(4), "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." [Emphasis added.]

Interpreting this organic statute as a whole, the sections cited above constitute a reaffirmation of Section 2. By enumerating them, again, under Section 26(C) as "provisions and procedures" to be included in each ordinance, the Legislature's intent was to guarantee that Section 2 permeates labor-management relationships in all political subdivisions, rather than restricting it to state agencies.

In Sections 26(C)(2)--representation matters--and 26(C)(8)--impasse procedures--the word "equivalent" appears. In the absence of a statutory definition, we give the word its plain and ordinary meaning. Webster's Ninth New Collegiate Dictionary (1985) defines "equivalent" as "equal in force, amount or value...like in signification or import...having logical equivalence... corresponding or virtually identical esp. in effect or function...equal in might or authority...capable of being placed in one-to-one correspondence."

We do not conclude that representation (Section 26(C)(2)) and impasse procedures (Section 26(C)(8)) must be identical to those found in PEBA Sections 14 and 18; however, they must be the same in intent and effect, "equal in might and authority." For example, a local board may establish an alternative appropriate procedure for determining the bargaining representative as permitted by Section 14(C). This alternative procedure, however, may not interfere with

the right of public employees to form, join, or assist employee organizations for collective bargaining in Section 26(C)(1); the right of a labor organization to be certified as the exclusive representative in Section 26(C)(3); and the right of an exclusive representative to negotiate all wages, hours and other terms and conditions of employment as stated in Section 26(C)(4).

Moreover, allowing a public body to unilaterally determine impasse and impose a contract is not equivalent to the impasse procedure of Section 18, for it undercuts the basic principle of labor relations, i.e., all dealings are undertaken in good faith as required by PEBA Sections 19(F) and 20(C), and negates PEBA's definition of collective bargaining which "means the act of negotiating between a public employer and an exclusive representative for the purpose of entering into a written agreement." (Emphasis added.)

Allowing one party to unilaterally impose contract terms or dictate terms of negotiations mocks the statutory definition of collective bargaining, is a waste of taxpayer monies, and is inconsistent with the promotion of harmony and cooperation in the workplace which is a purpose of PEBA.

Section 26(C)(5) concerns the obligation to incorporate agreements into a collective bargaining agreement, and Sections 26(C)(6) and (7) deal with grievance procedures culminating in binding arbitration and payroll deduction. The Legislature determined in Section 17(F) that "[e]very agreement shall include a grievance procedure" and it "shall provide for a final and

binding determination." This requirement has been placed on political subdivisions under 26(C)(6).

Although labor and management may disagree over the grievance procedure processes--number of steps, selection of arbitrator, discovery, post-hearing briefs--the obligation to incorporate in a bargaining agreement a grievance procedure culminating in binding arbitration is foregone conclusion. "Binding arbitration of grievances that arise during the term of a labor agreement, once the exception in the public sector, is now the norm." [Public Sector Bargaining, p. 229 (Benjamin Aaron et al. eds., 2d ed. 1990) and Basic Patterns in Union Contracts (BNA eds., 13th ed. 1992)].

A similar requirement found in Section 17(C) to negotiate payroll deduction reappears in 26(C)(7). As with grievance procedures culminating in binding arbitration, the topic is to be negotiated. Once agreements are reached, the parties must place them into a collective bargaining agreement as required under 26(C)(5).

Finally, Section 26(C)(9) states that procedures and provisions of a local ordinance must include "prohibited practices for the public employer, public employees, and labor organizations that promote the principles established in Sections 19, 20, and 21" of PEBA.

The nature of the principles to be promoted is preventive and remedial without being punitive. They generally sustain the relationship notwithstanding the wrongdoing giving rise to the prohibited practice. As a result, neither party should be

disadvantaged to such an extent that the purpose of the principle does not promote harmony and cooperation in the workplace as well as maintain the orderly business operations of the political subdivision.

Sections 2 and 26(C)(9) promote the same principles. The former does it with an affirmative declaration guaranteeing rights and protecting the public interest, while the latter does it by ensuring that certain, fundamental labor relations principles of fair play are fostered between the parties in such a manner that a breach of the rules does not automatically impose terminal penalties.

Certainly a political subdivision may enumerate the prohibited practices found in Sections 19, 20 and 21 of PEBA. We note that the enumerated prohibited practices in Section 19 (eight) are approximately equal in number to those found in Sections 20 and 21 combined (nine). The Legislative intent, in this respect, as well as elsewhere in PEBA, was to maintain a level playing field between the parties. Consequently, a local ordinance that is replete with prohibited practices against public employees and labor organizations tilts the playing field and does not promote the labor relations principles mandated by the Legislature.

In sum, where a local employer chooses to create its own machinery for the regulation of collective bargaining, it must do so consistent with the statutory parameters, i.e., "the employer shall comply with the provisions of Sections 8, 9, 10, 11, and 12" and must incorporate in its ordinance all of the provisions and

procedures set forth in Sections 26(C)(1) through (9). If it fails to do this in any respect, it commits a prohibited practice under Section 19(G).

V. SPECIFIC ALLEGATIONS OF PROHIBITED PRACTICES[17]

A. Denying Statutory Rights to Classes of Employees

AFSCME alleges that by incorporating in its Ordinance definitions of the terms "employee," "management employee," and "supervisor" that differ from the definitions in Section 4 of PEBA, the County has denied certain classes of public employees the rights and protections that PEBA guarantees them. The County maintains that Section 4 is not one of the sections of PEBA that Section 26(C) requires the County to follow.

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[17]Some of AFSCME's allegations we do not address, and express no opinion on, in this Decision. These are (1) allegations which AFSCME has abandoned in its post-hearing brief; and (2) an allegation that AFSCME raised for the first time in its post-hearing brief. AFSCME has abandoned its allegations that: Ordinance Section 5(Q), defining "strike," violates PEBA Section 26(C); Ordinance Section 15(C), dealing with payroll deduction, violates PEBA Section 26(C)(7); Ordinance Sections 12(C) and 12(D), dealing with runoff elections, violate PEBA Section 26(C)(2); Ordinance Section 12(F), dealing with the period of an election bar, violates PEBA Sections 26(C)(2) and (4); Ordinance Section 10(C), setting a limitations period, violates PEBA; Ordinance Section 18(B), restricting employees' right to solicit union membership, violates PEBA Section 26(C); and Section 21 dealing with judicial enforcement, violates PEBA. We are persuaded that AFSCME has abandoned the above allegations by the absence of any reference to them in AFSCME's brief and the statement in the brief (at 2) that "[t]his brief will focus on six specific ... violations of [PEBA]. In reliance on assurances of the County at the Board hearing..., Complainant [AFSCME] has significantly narrowed the issues for decision by the Board." The issue that AFSCME has raised for the first time in its brief is the allegation that Sections 8(A) and 8(C) of the Ordinance, dealing with the local board, violate PEBA Section 26(C). We do not consider this allegation because the County had no notice of, or opportunity to respond to, it.

To begin with, Section 26(C), by using the term "public employee" in stating to whom rights and protections must be provided in a local ordinance, effectively requires the ordinance to define the same (or a substitute) term in the same way the PEBA Section 4 defines "public employee." This is because, as we noted in Part IV above, a term that appears in Section 26 must have the same meaning there as it has elsewhere in the statute. Consequently, when Section 26(C)(1) says that a local ordinance must include "the right of public employees to form, join or assist employee organizations" (emphasis added), this means that the ordinance must afford such rights to the same class of people that PEBA defines as "public employees." By the same token, in order to comply with its obligations under Section 26(C) to afford rights and protections to members of the protected class, a local public employer may not narrow that class by, for example, defining the terms "supervisor" and "management employee" in such a way as to remove persons from the protected class.

The importance of the terms in question is shown by their use in various PEBA provisions. Thus, the purpose 2 of PEBA is "to guarantee public employees the right to organize and bargain collectively with their employers." (Section 2) Section 5 extends to "all public employees other than management employees, supervisors, and confidential employees" the rights to form, join and assist labor organizations and the right to refrain from doing so. Similarly, Section 26(C)(1) requires that local collective bargaining ordinance guarantee to "public employees" the rights to

form, join and assist labor organizations. It is clear from these provisions that the definitions of the terms "public employee" (or "employee," if that term is substituted), "management employee," and "supervisor" determine who enjoys the rights and protections of PEBA and who does not.

PEBA defines the term "public employee" (except in schools) as "a regular, non-probationary employee of a public employer." (Section 4(P).) The Ordinance, on the other hand, defines the parallel term "employee" as "a regular nonprobationary public employee filling a classified position for the County of Santa Fe." (Section 5(F), emphasis added.) PEBA's definition of the term "management employee" is:

> an employee who is engaged primarily in executive and management functions and is charged with the responsibility of developing, administering or effectuating management policies. An employee shall not be deemed a management employee solely because the employee participates in cooperative decision making programs on an occasional basis.

The Ordinance defines the same term as "an employee who is engaged primarily in executive or administrative management functions and is charged with the responsibility of developing, administering or effectuating management policies." (Section 5(N), emphasis added.)

The term "supervisor" is defined in PEBA as:

> an employee who devotes a substantial amount of work time to supervisory duties, who customarily and regularly directs the work of two or more other employees and who has the authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively but does not include individuals who perform merely routine, incidental or clerical duties or who

> occasionally assume supervisory or directory roles or whose duties are substantially similar to those of their subordinates and does not include lead employees or employees who participate in peer review or occasional employee evaluation programs.

(Section 4(S).)

The same term is defined in the Ordinance as:

> an employee who devotes a substantial amount of work time in supervisory duties, who customarily directs the work of two or more other employees and who has the authority in the interest of the employer to effectively recommend the hiring, promoting or disciplining of other employees.

(Section 5(R).)

The Ordinance, like PEBA, grants the rights to "form, join or assist" a labor organization for the purpose of collective bargaining to "[e]mployees other than management employees, supervisors and confidential employees." (Ordinance Section 6; PEBA Section 5.) Thus the terms have an import under the Ordinance similar to their import under PEBA. That is, the rights and protections of the Ordinance do not apply to anyone who does not fall within the definition of "employee" and at least some such rights and protections are also denied to anyone who comes within the definition of "management employee" or "supervisor." Therefore, if the County has either narrowed the definition of "employee" or expanded the definition of "management employee" or "supervisor," it has, thereby, denied organizing and bargaining rights to classes of employees to whom PEBA guarantees those rights.

We find that the County's definition of the term "employee", by excluding any employee who does not hold a classified position with the County, significantly narrows the meaning of the parallel statutory term "public employee," thereby disenfranchising the class of public employees who are non-classified. In this regard, non-classified employees, so long as they are regular and non-probationary, are to be protected by any local collective bargaining ordinance under the terms of Section 26(C)(1), for the definition of "public employee" in that section of PEBA must be the same as the definition of the same term elsewhere in the statute. Therefore, the County has violated Section 26(C)(1) by narrowing the mandatory statutory definition of "public employee."

With regard to the terms "management employee" and "supervisor," we find that, by expanding the definitions, the County also has disenfranchised classes of public employees who according to PEBA Section 26(C) must be guaranteed rights.

Specifically, the Ordinance omits the statutory requirement that to be a supervisor, one must "regularly" direct the work of other employees. The Ordinance also omits the statutory provision that the term supervisor does not include those who assume supervisory roles only occasionally; whose duties are similar to those of subordinates; lead employees; and those who participate in peer review or occasional employee evaluation.

These departures from the statutory definition are substantial, not merely semantic, and they have the effect of broadening the class of persons included in the definition of

"supervisor," thereby denying to some the rights that must, under PEBA be afforded to all employees who are not supervisory, managerial, or confidential.

As with the definition of "supervisor" the Ordinance has defined "management employee" more broadly than PEBA defines that term, thereby denying statutorily guaranteed rights to those who are "management employees" under the Ordinance but who are not "management employees" under PEBA. Specifically, while the statute defines as a management employee one who is engaged primarily in executive and management functions, the Ordinance includes one engaged primarily in executive or administrative management functions. In addition, the Ordinance omits the statutory provisos excluding from the definition persons who participate occasionally in cooperative decisionmaking. Again, the County's departure from the statutory definition is substantial and has the effect of denying rights to some persons who, according to PEBA, are entitled to those rights.

In sum, we find that the County, by defining the term "employee" more narrowly than PEBA defines the parallel term "public employee" and by defining the terms "supervisor" and "management employee" more broadly than PEBA defines those terms, has violated the requirement of Section 26(C) that the County assure certain rights and protections to all public employees. By violating Section 26(C), the County has also violated Section 19(G) of PEBA, making it a prohibited practice to violate any PEBA provision.

B. Removal of Subjects From the Duty to Bargain

AFSCME alleges that the County, in its Ordinance, has violated Section 26(C)(4) and related PEBA provisions by removing various subjects from the scope of the statutory duty to bargain. The County maintains, on the contrary, that the Ordinance complies with the requirements of Section 26(C)(4).

Section 26(C)(4) requires local collective bargaining ordinances to include "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."

Section 7 of the Ordinance ("Management Rights") provides, in full:

> Without limitation, but by way of illustration, the exclusive prerogatives, functions and rights of the employer shall include the following:
>
> A. To direct and supervise all operations, functions and the work of the employees;
>
> B. To determine the place to report for work, to determine methods, processes and manner of performing work;
>
> C. To hire, lay off, promote, demote, assign, transfer, discipline, discharge or terminate employees;
>
> D. To determine what and by whom services will be rendered to the citizens;
>
> E. To determine staffing requirements, to create or abolish positions, to eliminate or reorganize work units;
>
> F. To determine and revise schedules of work;

G. To establish, revise and implement standards for hiring and promoting employees;

H. To assign shifts, work days, hours of work and work locations;

I. To designate, assign and reassign all work duties;

J. To determine the need for and the qualifications of new employees, and to determine the qualifications for and qualifications of employees considered for transfer and promotion;

K. To take actions as necessary to carry out the mission of the employer in emergencies; and

L. To retain all rights not specifically prohibited by a collective bargaining agreement or the Santa Fe County Labor Management Relations Ordinance.

Section 15 of the Ordinance provides in relevant part:

A. Except for retirement programs provided under the Public Employees Retirement Act, employers and exclusive representatives shall bargain in good faith on wages, hours and other terms and conditions of employment. However, neither the employer nor the exclusive representative shall be required to agree to a proposal or to make a concession. All agreements between the parties shall be reduced to writing and included in the Collective Bargaining Agreement.

B. The obligation to bargain collectively imposed by [this] Ordinance shall not be construed as authorizing employers and exclusive representatives to negotiate or enter into any agreement that is in conflict with the provisions of any other State or federal statute or County ordinance including the "Management Rights" section of this Ordinance.

The duty of an employer and an exclusive representative to bargain in good faith over wages, hours and other terms and conditions of employment expressly set forth in PEBA Section 17(A)(1) is fundamental to the entire scheme of PEBA, as it is to that of the National Labor Relations Act, from which PEBA has taken this bargaining obligation. Without the mutual duty to bargain over terms and conditions of employment, PEBA would be useless and pointless, for its first stated purpose is "to guarantee public employees the right to organize and bargain collectively with their employers." (PEBA Section 2.)

The Legislature has unmistakably expressed its intention to extend PEBA's fundamental guarantee of collective bargaining rights to employees of local public employers that choose to adopt their own collective bargaining ordinances by requiring each such ordinance to include "the right of an exclusive representative to negotiate all wages, hours and other terms and conditions of employment." (Section 26(C)(4).) Further, in the introductory language to Section 26(C), the Legislature has clearly expressed the same intention by delineating the nature of permissible local collective bargaining systems as those which "permit[] employees to form, join or assist any labor organization for the purpose of bargaining collectively through exclusive representatives freely chosen by . . . employees."

The Ordinance, in Section 7, provides that numerous employment-related subjects, including hours of work, hiring, work assignments, schedules, shifts, job duties, methods of performing

work, place to report for work, standards for promotion, employee discipline, transfer, layoff, termination, elimination of positions, by whom work will be performed, and organization of work units "are the exclusive prerogatives, functions and rights of the employer . . ." (Emphasis added.)

Section 15(B) of the Ordinance underscores the exclusiveness of the County's control in these areas by prohibiting the County and an exclusive representative from bargaining over any of the subjects listed in Section 7.

PEBA's mandate that the bargaining duty apply to "all wages, hours and other terms and conditions of employment" is broad and sweeping. The phrase "wages, hours and other terms and conditions of employment" is taken, word for word, from Section 8(d) of the National Labor Relations Act (29 U.S.C. § 158(d)).[18] The NLRB and reviewing courts have interpreted that phrase in decisions spanning a period of nearly sixty years. Where provisions of PEBA are the same as or closely similar to those of the NLRA, we will give great weight to interpretations of such provisions made by the NLRB and reviewing courts.[19]

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[18]The proviso in PEBA Section 17(A)(1) to the effect that the duty to bargain in good faith over wages, hours and other terms and conditions of employment does not compel either party "to agree to a proposal or to make a concession" is also borrowed from Section 8(d) of the NLRA.

[19]Public employee labor relations boards and courts in other states have taken the same approach in interpreting provisions of their states' labor relations statutes that track the NLRA. See, eg., Fire Fighters Union, Local 1186 v. City of Vallejo, 526 P.2d 971, 977-978, 116 Cal. Rptr. 507, 513 (S.Ct. en banc 1974); Lamphere School Dist. v. Lamphere Fed. of Teachers, 67 Mich. App. 485, 241 N.W.2d 257 (1976); Palm Beach Junior College Board of

While the meaning of the word "wages" and the meaning of the word "hours" are relatively self-evident, the meaning of the words "other terms and conditions of employment" is not. The NLRB and reviewing courts have interpreted "other terms and conditions of employment" to include, among other things, workloads and work assignments (Beacon Piece Dyeing & Finishing Co., 121 NLRB 953 (1958); Little Rock Downtowner, 145 NLRB 1286 (1964), enf'd as modified, 341 F.2d 1020 (8th Cir. 1965)); definition of bargaining unit work (Almeida Bus Lines, 142 NLRB 445 (1963)); transfer of employees (United Technologies Corp., 296 NLRB No. 79, 132 LRRM 1240 (1989)); promotion (Transit Union v. Donovan, 767 F.2d 939 (D.C. Cir. 1985)), cert. denied, 475 U.S. 1046 (1986)); discipline and work rules (Electri-Flex Co. v. NLRB, 570 F.2d 1327 (7th Cir.)), cert. denied, 439 U.S. 911 (1978)); changes in operations that have a significant impact on bargaining unit employees (Newspaper Printing Corp. v. NLRB, 625 F.2d 956 (10th Cir. 1980), cert. denied, 450 U.S. 911 (1981)); certain subcontracting bargaining unit work (Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964)) or other removal of work from the bargaining unit (Dubuque Packing Co., 303 NLRB 386 (1991)); layoffs (Advertisers Mfg. Co., 280 NLRB 1185, 1197 (1986), enf'd 823 F.2d 1086 (7th Cir. 1987)); and procedures regarding discharge of employees (National Licorice Co. v. NLRB, 309 U.S. 350 (1940)). The NLRB and the

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Trustees v. United Faculty of Palm Beach Junior College, 475 So.2d 1221, 1225-27 (Fla. 1985); State ex rel. Washington Federation of State Employees v. Board of Trustees, 605 P.2d 1252, 1256-57 (S.Ct. en banc, 1980); Teamsters Local No. 45 v. State of Montana Board of Personnel Appeals, 635 P.2d 1310, 1312 (S.Ct. 1981).

federal courts have found that these subjects (as well as others) constitute "mandatory subjects of bargaining," that is, subjects over which neither party to a bargaining relationship can refuse to negotiate without violating its bargaining duty under the NLRA.

We find that the County, by unilaterally reserving exclusively to itself the right to determine the place to report for work; to hire, lay off, promote, demote, assign, transfer, discipline, discharge and terminate employees; to determine by whom work will be performed; to abolish positions; to eliminate or reorganize work units; to direct the work of employees; to determine and revise work schedules; to establish, revise and implement standards for promoting employees; to assign shifts, work days, hours of work and work location; to designate, assign and reassign work duties; to determine staffing requirements; to determine the methods, processes and manner of performing work; and to determine the qualifications for transfer and promotion, has removed each of these mandatory subjects from the realm of collective bargaining (Ordinance Section 7) and thereby has violated the requirement of Section 26(C)(4) that every local collective bargaining ordinance include the right of an exclusive representative to bargain over all wages, hours and other terms and conditions of employment.

Further, by unilaterally prohibiting bargaining over these subjects in Section 15(B) of the Ordinance, the County has committed an additional violation of Section 26(C)(4). By violating Section 26(C)(4) in each of these ways, the County also

has violated Section 19(G) of PEBA.[20]

We find that the other subjects listed in Section 7 of the Ordinance over which the County has reserved to itself exclusive control -- namely, the rights to determine what services will be rendered to citizens; to direct and supervise the County's operations and functions; to establish, revise and implement standards for hiring employees and to determine who shall be hired; to determine the need for and qualifications of new employees; and to take actions necessary to carry out the mission of the County in emergencies, are areas in which both private and public sector management traditionally assume control and, therefore, are not generally considered mandatory subjects of bargaining. Accordingly, we find that these subjects, which lie at or near the core of the County's public service mission, are not mandatory subjects of collective bargaining.

Therefore, PEBA Section 26(C)(4)'s requirement that every local collective bargaining ordinance assure the right of an exclusive representative to bargain over terms and conditions of employment does not require the County to assure a right to bargain over the decisions it makes in such core public service areas. Consistent with both NLRA and public sector labor relations precedent, however, an employer generally must bargain over the

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[20]The County's defense that by incorporating in Ordinance Section 15(A) the general words that the parties "shall bargain in good faith on wages, hours and other terms and conditions of employment" is unpersuasive because that obligation is effectively vitiated by the much more specific removal of numerous topics from the duty to bargain in Ordinance Sections 7 and 15(B).

effects, consequences, or impact and implementation upon bargaining unit employees of even its core managerial decisions.[21]

Accordingly, we hold that the effects, consequences, or impact and implementation of core managerial decisions with respect to bargaining unit employees is a mandatory bargaining subject covered by the requirement of PEBA Section 26(C)(4) that every local ordinance guarantee the right to bargain over conditions of employment.

A plain reading of Sections 7 and 15(B) of the Ordinance shows that, by vesting exclusive control in the County and flatly prohibiting bargaining over any aspect of such subjects as determining services to be rendered to citizens, directing County operations, establishing hiring criteria and taking necessary actions in emergencies, the County has precluded bargaining not only over its decisions in these areas, but also over the effects, consequences, impact and implementation of such decisions on unit employees.

Consequently, we find that by forbidding bargaining over the mandatory subject of the effect, consequences, impact and implementation of core managerial decisions on bargaining unit employees, the County has further violated Section 26(C)(4) and 19(G) of PEBA.

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[21]See, e.g., Walter Pape, Inc., 205 NLRB 719 (1973); Howruit Corp., 197 NLRB 471 (1972), enf'd., 495 F.2d 1375 (7th Cir. 1974); Civil Service Reform Act, 5 U.S.C. 7106(b)(2) and (b)(3) (federal government agencies' duty to bargain over "impact and implementation" of decisions).

C. Impasse Resolution Procedures

AFSCME alleges that the County has violated Sections 26(C)(8), 19(G) and related PEBA provisions by incorporating in its Ordinance impasse resolution procedures that are not equivalent to PEBA's procedures. The County maintains that the impasse procedures in its Ordinance are equivalent to PEBA's.

Section 26(C)(8) of PEBA requires that a local collective bargaining ordinance incorporate "impasse resolution procedures equivalent to those set forth in Section 18 of the Public Employee Bargaining Act." PEBA defines the term "impasse" as "failure of a public employer and an exclusive representative, after good-faith bargaining, to reach agreement in the course of negotiating a collective bargaining agreement." (Sec. 4(I).)

Section 18 of PEBA ("Impasse Resolution") includes Subsection A, procedures to be followed in state negotiations and Subsections B and C, procedures applicable to non-state collective bargaining. Subsections B and C provide in pertinent part:

> B. The following impasse procedure shall be followed by all public employers and exclusive representatives, except the state and the state's exclusive representatives:
>
> (2) If the impasse continues after a sixty-day mediation period, either party may request from the board or local board that a factfinder be assigned to the negotiations.
>
> (3) The factfinder shall conduct hearings and submit written findings and recommendations to the parties and the board or local board. If the parties have not reached agreement within ten days after receipt of the factfinder's report, the board or local board shall publish the report.

C. A public employer other than the state may enter into a written agreement with the exclusive representative setting forth an alternative impasse resolution procedure.

The Ordinance, Section 16(B), provides in pertinent part:

> The following impasse procedure shall be followed by the employer and exclusive representatives:
>
> (2) If the impasse continues after a sixty (60) day mediation period, either party may request from the Board that a fact-finder be assigned to the negotiations. A fact-finder will be selected by the parties from a list of individuals requested from the Federal Mediation and Conciliation Service.
>
> (3) The fact-finder shall conduct hearings and submit written findings and recommendations to the parties and the Board. The fact-finder shall select either the exclusive representative's total and complete last best offer or he may select the employer's total and complete last best offer. The fact-finder may not create his own settlement. If the parties have not reached agreement within fifteen (15) days after receipt of the fact-finder's report, the Board shall publish the fact-finder's recommendation.
>
> (4) If no agreement has been reached within thirty (30) days of the issuance of the fact-finder's recommendation, the recommendation of the fact-finder will be forwarded to the governing body and the governing body may accept or modify the fact-finder's recommendation as they see fit. The decision of the governing body is final and binding on both parties and shall be incorporated into a contract along with those items that had been tentatively agreed to by the parties.
>
> (5) The cost of any impasse proceeding that requires a third party shall be borne equally by the parties to the impasse.

AFSCME alleges that the County's impasse resolution procedure are not equivalent to those of PEBA, first, in requiring the fact-finder to choose between the parties' respective last, best offers; second, in providing that if the parties do not reach agreement within thirty days after issuance of the factfinder's recommendations, the County's governing body may accept or modify the recommendations, thereby establishing final and binding contract provisions between the County and the exclusive representative; third, in requiring the parties to share the costs of impasse resolution procedures.[22]

In order for the Ordinance to comply with Section 26(C)(8), it must include impasse resolution procedures "equivalent to" PEBA's. As we stated in Part IV, above, to be equivalent to statutory provisions, provisions of a local ordinance, need not be stated in identical language, but must be the same in value or effect. Moreover, the County's procedures, in order to conform to PEBA's requirements, may not contravene any of PEBA's basic purposes.

We find that the provision in Section 16(B)(3) of the Ordinance prohibiting the factfinder from making any recommendation for the resolution of an impasse other than adoption of one party's last, best offer is not the same, in value or effect, as PEBA's procedure. This is because PEBA Section 18 contains no similar limitation on the scope of the factfinder's discretion in making

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[22]We discuss AFSCME's contention regarding the cost-sharing provision of Ordinance Section 16(B) in Part V,G, below, where we discuss other provisions of the Ordinance related to the imposition of costs on parties.

recommendations for impasse resolution. Thus, under the statutory procedure, a factfinder could propose contract language that included some elements of the employer's offer and other elements of the union's offer. Alternatively, the factfinder could propose compromise language that neither party has placed on the table. The Ordinance flatly prohibits any such recommendation. By so doing, it violates the requirement of Section 26(C)(8) that local collective bargaining ordinances contain impasse resolution procedures equivalent to those of PEBA Section 18 and, consequently, also violates Section 19(G).[23]

The County's position reflected in its brief, i.e., its impasse resolution procedure is equivalent to PEBA Section 18(A) rather than Section 18(B), is unpersuasive for two reasons.

First, Section 18(A) applies exclusively to impasse resolution for state-level collective bargaining whereas Section 18(B) applies to local bargaining. Therefore, the procedures of Section 18(B), rather than those of 18(A), constitute the appropriate frame of reference for determining whether the impasse procedures of ordinance are "equivalent to" PEBA's.

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[23]Restrictions on the scope of a factfinder's discretion to make recommendations, such as those contained in the Ordinance, might well be permissible as an "alternative impasse resolution procedure" under PEBA Section 18(C). However, that section permits such alternative procedures only when set forth in "a written agreement with the exclusive representative." The requirement of mutual assent to alternative impasse procedures underscores the unlawfulness of the County's unilaterally imposing such procedures.

Second, even if Section 18(A) applied, the restriction in the Ordinance on the factfinder's ability to recommend solutions still would fail the equivalency test because Section 18(A), like Section 18(B), admits of no such restriction.

We also find that Ordinance Section 16(B)(4), providing that the County's governing body may impose terms of a collective bargaining agreement if the parties have not reached accord within thirty days after issuance of a factfinder's report, is not equivalent to PEBA's impasse resolution procedures. Section 18(B) of PEBA makes publication of the factfinder's report the last step in impasse procedures applicable to local collective bargaining. Under the PEBA procedure, if publication of the report does not induce the parties to reconcile their differences, there simply is no collective bargaining agreement. Under the procedure set forth in the Ordinance, on the other hand, if the County and the union are unable to reach agreement following factfinding, the County's governing body is empowered to dictate all disputed terms of a collective bargaining agreement, which then becomes binding upon the union. This procedure manifestly is not equivalent to the scheme for resolving local bargaining impasses found in PEBA Section 18. For that reason, it violates PEBA Sections 26(C)(8) and 19(G).

In addition, we find that the County's ability to impose the terms of a collective bargaining agreement upon an exclusive representative is inimical to the concept of collective bargaining found in the first stated purpose of PEBA (Section 2) as well as in

Section 26(C) and elsewhere in the statute. PEBA defines collective bargaining as "the act of negotiating between a public employer and an exclusive representative for the purpose of entering into a written agreement regarding wages, hours and other terms and conditions of employment." (Section 4(E).) PEBA further clarifies the nature of collective bargaining by requiring a public employer and exclusive representative to "bargain in good faith" with one another and making the refusal to do so a prohibited practice. (Sections 19(F), 20(C).)

The principle found in PEBA that collective bargaining requires good faith negotiations by both the employer and the union, with the aim of reaching an agreement covering wages, hours and other terms and conditions of employment, is derived from the National Labor Relations Act and is fundamental to American Labor law.[24] It is inimical to the principle of good faith collective bargaining to permit an employer or a union to unilaterally impose terms of a bargaining agreement upon the other. Moreover, we believe that if one party to a collective bargaining relationship knew that in the event of impasse it could impose its own contract terms on the other party, this would seriously deter good faith efforts to reach agreement, contrary to the basic purposes of PEBA. In these ways, we find Section 16(B)(4) of the Ordinance inconsistent not only with the letter of PEBA Section 26(C) but

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[24]See NLRA Sections 8(a)(5), (b)(3), (d) (29 U.S.C. 158(a)(5), (b)(3), (d)). See generally, Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401 (1958); Summers, Collective Agreements and the Law of Contracts, 78 Yale L.J. 525 (1969).

also with the spirit and the fundamental collective bargaining purpose of the entire statute.

D. "Fair Share"

AFSCME contends that Section 6 of the Ordinance violates Section 26(C) of PEBA by prohibiting any requirement that employees pay "fair share" contributions to a labor organization. Section 6 of the Ordinance states, in pertinent part, "Employees may not be required to pay 'fair share' contributions." The County explains that in this provision, "the Board of County Commissioners has made a clear policy decision that no collective bargaining agreement will require employees to pay money to a labor organization." (County Brief at 13).

The introductory language in PEBA Section 26(C) provides that a local public employer, in order to establish its own system for the regulation of collective bargaining, "shall comply with the provisions of Sections 8, 9, 10, 11 and 12" of PEBA. Thus the requirements of Section 9 are mandatory upon the County. Section 9(G) provides:

> No rule or regulation promulgated by the board or a local board shall require, directly or indirectly, as a condition of continuous employment, any public employee covered by [PEBA] to pay money to any labor organization that is certified as an exclusive representative. This issue shall be left to voluntary bargaining by the parties.

(Emphasis added.)

Section 26(C)(4), as earlier noted, requires that a local collective bargaining ordinance include the right of an exclusive representative to negotiate all wages, hours and other terms and conditions of employment.

By admittedly removing the subject of "fair share" from the scope of collective bargaining, the County has acted inconsistently with the clear mandate of PEBA Section 9(G) that this issue be left to bargaining between the parties. Because Section 26(C) of PEBA expressly requires the County to abide by Section 9, the County's prohibition against a collective bargaining agreement requiring "fair share" contributions violates Section 26(C). It follows that Section 6 of the Ordinance violates Section 19(G) of PEBA.

In addition, we find that by removing the subject of "fair share" from collective bargaining, the County has violated the requirement of PEBA Section 26(C)(4) that a local bargaining ordinance assure the right of an exclusive representative to negotiate all wages, hours and other terms and conditions of employment. The NLRB and reviewing courts have long interpreted the duty to bargain over "terms and conditions of employment" under the NLRA to include a duty to bargain over the issue of requiring employees to make payments to their exclusive representative as a condition of continued employment. See, e.g., NLRB v. General Motors, Corp., 373 U.S. 734 (1963). We find no reason to depart from this precedent in defining the bargaining duty under our own statute. Moreover, it can hardly be disputed that the statutory term "conditions of employment," on its face, includes any payments

an employee must make in order to keep his or her job, for such payments are, quite literally, conditions of that person's employment. For this additional reason, the subject of "fair share" contributions is a mandatory subject of bargaining, and by removing this subject from the duty to bargain, the County has violated Section 26(C)(4) and 19(G) of PEBA.

E. Automatic Decertification

Also challenged as violative of Section 26(C) of PEBA is Section 19(C) of the Ordinance, which states:

> Any bargaining unit whose employees participate in, causes, instigates, encourages, or supports a public employee strike, walkout or slow-down shall be automatically decertified. In such a case, the collective bargaining agreement shall be null and void, the exclusive representative for that appropriate bargaining unit may not collect dues, negotiate or represent employees in any fashion, and shall be barred from serving as the exclusive representative of any bargaining unit of Santa Fe County employees for a period of not more than one (1) year.

The above provision of the Ordinance, AFSCME alleges, violates PEBA Section 26(C)(9), which requires a local bargaining ordinance to include prohibited practice provisions "that promote the principles established in Sections 19, 20 and 21 of PEBA." Section 21(A) of PEBA prohibits public employee strikes and provides that "no labor organization shall cause, instigate, encourage or support a public employee strike." Section 21(C) states:

> Any labor organization that causes, instigates, encourages or supports a public employee strike, walkout or slowdown may be decertified as the exclusive representative

> for that appropriate bargaining unit by either the board or local board and shall be barred from serving as the exclusive representative of any bargaining unit of public employees for a period of not more than one year.

Both PEBA and the Ordinance define the term "strike" broadly as the concerted refusal of public employees to report for duty or "willful absence, in whole or in part from the full, faithful and proper performance of the duties of employment" for the purpose of bringing about a change in rights, compensation or other attributes of public employment. (PEBA Sec. 4(R); Ordinance Sec. 5(Q).) The Ordinance adds that this definition includes such activities as "blue flu," sick outs, slow downs, traffic ticket writing campaigns and sympathy strikes. (Sec. 5(Q).)

In essence, AFSCME's contention is that by requiring decertification of an exclusive representative whenever bargaining unit employees engage in a strike, whether or not the union has any involvement in or knowledge of the strike, the Ordinance fails to promote the principles of PEBA Section 21(C) that permit (but do not require decertification in the event of a strike and limit such decertification to cases in which the union is actively involved in the strike.

The County, in its defense, asserts that by providing stronger sanctions for strike activity than are found in PEBA, the Ordinance promotes the no-strike principle of PEBA Section 21.

It appears from the face of the Ordinance provision in question that decertification of an exclusive representative would be mandatory if any two or more employees in the bargaining unit

that it represents were to engage in a ticket-writing campaign, slow-down, sick-out or other concerted absence from the full performance of their duties. Further, the Ordinance, by its clear terms, would impose mandatory decertification even if the union had no knowledge of the employees' activity or had knowledge of it and attempted in good faith to prevent the employees from striking. We find that the Ordinance, by requiring automatic decertification of an exclusive representative whenever employees it represents engage in a strike, fails to promote the principle of PEBA Section 21, which requires a governing body to examine or investigate on a case-by-case basis to determine whether there was involvement as contemplated by the law, that the union caused, instigated, encouraged, or supported a strike before the sanction of decertification may be imposed. Consequently, Section 19(C) of the Ordinance violates Section 26(9)(C) and 19(G) of PEBA.

We are also of the view that the automatic decertification and contract nullification provisions of Section 19(C) of the Ordinance are inconsistent with PEBA Section 26(C) in other ways. Specifically, as we have noted earlier, Section 26(C)(4) requires that a local collective bargaining ordinance include the right of an exclusive representative to negotiate all wages, hours and other terms and conditions of employment. Section 26(C)(5) requires ordinances to include the obligation to incorporate agreements reached by a public employer and an exclusive representative in a collective bargaining agreement.

By automatically decertifying an exclusive representative and automatically voiding the existing collective bargaining agreement in the event of an employee strike, the Ordinance contravenes the bargaining and contract obligations that Sections 26(C)(4) and (5) require local ordinances to include. For this additional reason, Section 19(C) of the Ordinance violates Sections 26(C) and 19(G) of PEBA.

F. Labor Organization Status

AFSCME alleges that the County has deprived employees and labor organizations of rights that PEBA Section 26(C) guarantees them by narrowing the definition of the statutory term "labor organization" found in Section 4 of PEBA. The County contends that Section 26(C) does not require it to abide by the definitions set out in PEBA Section 4.

PEBA requires local bargaining ordinances to permit "employees to form, join or assist any labor organization for the purpose of bargaining collectively . . . " and to provide for "the right of a labor organization to be certified as an exclusive representative." (Sec. 26(C), Introduction, and 26(C)(3) emphasis added.) Because Section 26(C) expressly requires local ordinances to provide certain rights related to a "labor organization," PEBA's definition of that statutory term determines the local employer's obligations in abiding by those requirements. That is, the statutory definition of the term "labor organization" determines its meaning in Section 26, just as it does wherever the term is found in PEBA.

PEBA defines the term "labor organization" as:

> any employee organization one of whose purposes is the representation of public employees in collective bargaining and in otherwise meeting, consulting and conferring with employers on matters pertaining to employment relations.

(Sec. 4(J).)

The Ordinance defines the same term as:

> any employee organization which represents employees in collective bargaining.

(Sec. 5(L).)

"Employees" under the Ordinance comprise persons employed by Santa Fe County only. (Sec. 5(F).) Hence, the Ordinance denies labor organization status to any organization that does not represent employees of the County in collective bargaining.

The plain meaning of the Ordinance in this regard is that its provisions establishing the right of employees to form, join and assist labor organizations, prohibiting discrimination against employees based on labor organization membership, permitting labor organizations to file petitions for representation elections, permitting labor organizations to become exclusive representatives, and so forth, do not apply to any organization that does not already represent County employees in collective bargaining. This means, for example, that a union which does not already represent County employees (such as AFSCME) has no right under the Ordinance to become certified to do so, and that an employee who belongs to such a union is not protected under the Ordinance from discrimination based on that membership.

In view of the above, we find that by substantially narrowing the definition of the statutory term "labor organization," a term made expressly applicable to local collective bargaining ordinances by Section 26(C) of PEBA, the County has effectively denied employees and labor organizations rights that PEBA requires the County to guarantee.

Therefore, the definition of the term "labor organization" in the Ordinance violates Section 26(C) and 19(G) of PEBA.

G. Requiring Parties to Pay Costs of Proceedings

The Ordinance contains various provisions that require parties to pay for services to be provided by, through, or in connection with the local collective bargaining board that the Ordinance would create. AFSCME argues that the cost assessment provisions erect a barrier to the ability of public employees and labor organizations to exercise the rights that PEBA guarantees them and that Section 26(C) requires the County to ensure.

The County asserts that PEBA does not prohibit the County from assessing such costs; cost assessment is a matter of procedure not substance; cost assessment is an inherent right of the County which PEBA permits it to retain; and equal allocation of costs between the County and other parties does not deprive the other parties of their PEBA rights.

The cost provisions of the Ordinance in issue include, first, Sections 8(D) and (E) which together require the parties to any hearing held by the local board to bear equally the costs of the

hearing, including a fee of $200 per day or portion of a day for each local board member participating in the hearing. The Ordinance calls for a three-member local board. This means that in a hearing involving two parties and the three board members, each party would be required to pay $300 for each day or part day of hearing.

To determine what types of hearings the parties will be required to pay for under Section 8 of the Ordinance, we look to Sections 10 and 11 of the Ordinance and other sections to which they refer. Section 10(C) of the Ordinance calls for hearings by the local board whenever a complaint of a prohibited practice has been filed. Prohibited practices defined by the Ordinance include, among others, discrimination by the County against an employee because of labor organization membership; discrimination by a labor organization against an employee because of race, color, religion, creed, age, sex or national origin; and interference, restraint or coercion of an employee by the County, by a labor organization, or by an employee with an employee's exercise of any right assured by the Ordinance, including the right to refrain from union activities. (Ordinance Secs. 6, 17, 18.) Section 11(B) of the Ordinance calls for the local board to hold a hearing whenever the parties to a representation case cannot agree on the composition of bargaining units.

It appears from the above that Section 8(D) and (E) of the Ordinance would ordinarily require each party to a prohibited practice hearing to pay $300 per day, even where one party is an

In analyzing the above cost-assessment provisions, we are mindful of the basic organizing and collective bargaining rights guaranteed to all public employees in New Mexico by PEBA Sections 2 and 5, as well as the requirement of Section 26(C) that any local public employer that wishes to establish its own system for the regulation of collective bargaining must assure those same essential rights to its employees. In addition, any such employer must afford to exclusive representatives bargaining and impasse resolution rights and procedures equivalent to those set out in PEBA. We also are mindful of the fact that neither PEBA, nor the statutes and rules governing access to the New Mexico courts,[25] nor the regulations of the National Labor Relations Board, require the parties to pay the costs of operating the governmental machinery that has been established to vindicate their rights. We are particularly concerned, in this regard, with the ability of individual employees (who may be part-time and may be paid little more than minimum wage) to effectively assert the rights that PEBA and the Ordinance ostensibly guarantee them, and to be able effectively to defend themselves if they are charged with prohibited practices.

We find that the assessment of a fee in the range of $300 per day or portion thereof against a party to a prohibited practice hearing is more than a procedural device that the County has the

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[25] A flat filing fee of $72.00 is required by the district courts of New Mexico for nonjury trials, irrespective of the number of days of hearing. The filing fee may be waived by the judge where a party establishes his or her inability to pay.

prerogative to implement in its discretion. Rather, such a fee is a substantial barrier to the realization of the rights that PEBA guarantees and that Section 26(C) expressly requires the County to provide to public employees and labor organizations.[26]

We find that the provision of the Ordinance requiring the labor organizations involved to pay the costs of a local board election constitutes a substantial barrier to the right of a labor organization to gain certification as exclusive representatives under PEBA Section 26(C)(3) and a significant departure from the requirement of Section 26(C)(2) that a local ordinance include "procedures for . . . certification elections and decertification elections equivalent to those set forth in [PEBA]." Because PEBA contains no provision requiring a labor organization to pay election costs, the provision of the Ordinance which does so is not equivalent to the PEBA election procedure.

The same rationale, however, does not apply to Section 16(B)(5) of the Ordinance requiring an exclusive representative to pay half the costs of third party impasse procedures. Section 26(C)(8) requires a local ordinance to have impasse procedures "equivalent to" those of PEBA Section 18. Although PEBA Section 18 contains no reference to exclusive representatives paying mediation and factfinding costs, we unequivocally and firmly believe that the sharing of such costs is the standard, commonplace practice in

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[26] We are not called upon to decide, and we express no opinion on, whether the statutory scheme would countenance the assessment of less substantial fees in connection with the processing of cases.

labor relations whether it be in the public or private sectors. Indeed, the Board sanctions this practice in PELRB Rule 4.6, "Mediation and Factfinding Fees: All fees of mediation and/or factfinding shall be shared equally by the parties." (Emphasis supplied.) The sharing of such costs is a feature for maintaining the neutrality of those individuals selected by the parties to provide mediation and factfinding services. It also enhances the pressure on the parties to settle their disputes without undue reliance on a third party. The Ordinance, by requiring such payments, merely restates the longstanding, ingrained practice in labor-management relations. For these reasons, 16(B)(5) is equivalent to Section 18 of PEBA and consistent with Section 26(C)(8).

In sum, we find that Sections 8(D) and (E), 12(H) and that portion of 16(B) dealing with representation elections and prohibited practice hearings violate Sections 26(C) and 19(G) of PEBA whereas Section 16(B)(5) does not constitute a violation.

AFSCME also complains that Section 10(F) of the Ordinance, requiring each party to a prohibited practice proceeding to pay its witnesses "any lost wages for time spent at hearings" constitutes an impermissible barrier to the realization of rights that the County is required by PEBA Section 26(C) to provide. We do not agree for two reasons. First, requirements for payment of witness fees by the party calling the witness is common in courts of law and hence is not out of line with other adjudicatory proceedings in New Mexico. Second, it seems likely that witnesses

usually will not actually be forced to forego wages in order to testify at local board hearings and, therefore, will not have to be paid under this provision of the Ordinance.

H. Prohibited Practice Provisions

The Ordinance defines prohibited practices to include certain types of conduct by employees, labor organizations and the County's elected officials which have no parallel in the prohibited practice sections of PEBA. Three such provisions that AFSCME has challenged are Sections 17(I), 18(H), and 18(I) which read as follows:

> Section 17(I): [D]uring the negotiating process, including the impasse procedure, elected officials are prohibited from discussing any issue, which is a subject of negotiations, with employees of the bargaining unit involved in negotiations or employees of the exclusive representative.
>
> Section 18(H): [D]uring the negotiating process, including the impasse procedure, [employees, labor organizations and representatives of labor organizations shall not] discuss any issue with elected officials which is a subject of negotiations.
>
> Section 18(I): Unions or employee groups who represent Santa Fe County employees may not endorse or publicly support any candidates for County commissioner.

AFSCME contends that these three prohibited practices are inconsistent with the County's duty under PEBA Section (C)(9) to include prohibited practices that "promote the principles" of the sections of PEBA dealing with prohibited practices--Sections 19, 20, and 21. Specifically, AFSCME contends that the quoted provisions of the Ordinance violate the principle embodied in

Sections 19(A), (D) and (E) where a public employer is prohibited from discriminating against an employee because of membership in or activity on behalf of a labor organization. In this connection, AFSCME argues that the prohibitions against employees communicating with elected officials and supporting candidates do not apply to employees who have not exercised or attempted to exercise collective-bargaining related rights. AFSCME further argues that these prohibitions infringe on the employees' rights under the First Amendment to the United States Constitution and under the New Mexico Constitution to freely associate, to petition their government and to speak freely.

The County argues that there is no inconsistency between any of the restrictions at issue and the requirements of PEBA; that the limited restrictions placed on public employees' speech are constitutional, and that, in any event, it is not this Board's duty to pass on the constitutionality of the Ordinance.

We agree with the County that it is not the function of this Board to determine the constitutionality of the challenged provisions of the Ordinance. PEBA does not grant us that authority; the state and federal courts are the proper forums for resolving constitutional issues. Accordingly, we offer no opinion on the constitutionality of the challenged provisions of the Ordinance.

Our function, as the County suggests, is to interpret and apply PEBA. Section 26(C)(9) of PEBA requires that the prohibited practice provisions of a local collective bargaining ordinance

"promote the principles established in" the prohibited practice sections of PEBA (Sections 19, 20, and 21).

This clearly implies, as the County has argued, that the prohibited practice provisions of the Ordinance need not be identical to those of PEBA. They may not, however, subvert or contravene the principles embodied in PEBA's prohibited practice sections.

We find nothing in the challenged sections of the Ordinance that is at odds with the principles embodied in Sections 19, 20 and 21 of PEBA. Section 19, for example, makes it unlawful for a public employer to discriminate against employees for their union activities or membership; to interfere with employees' exercise of their rights to form, join or assist labor organizations for the purpose of collective bargaining; and to refuse to bargain in good faith with an exclusive representative. The Ordinance prohibitions against employees or their representatives discussing collective bargaining issues with elected officials during the course of negotiations or impasse proceedings, and prohibiting labor organizations from supporting County commission candidates do not, in our view, interfere in any significant or substantial way with employees' organizing and collective bargaining rights under PEBA. Employees and their exclusive representatives remain free to organize and bargain with the County, including their right to strongly advocate their positions at the bargaining table and in impasse resolution proceedings.

The County has done nothing more in the challenged sections of the Ordinance than to place certain limited restrictions on communications and political activities that are, at most, peripheral to collective bargaining. We note that during the hearing, counsel for the County stated that employees are free to express their views at public meetings. (Tr. 116). Accordingly, we find that Sections 17(I), 18(H) and 18(I) of the Ordinance do not violate Section 26(C) or 19(G) of PEBA.

I. Limiting the Size of Negotiating Teams

Section 16(A)(2) of the Ordinance limits the size of the negotiating teams for the County and the exclusive representative to five members each. AFSCME alleges that the County's limitation on the size of a union's negotiating team violates PEBA Section 26(C)(4), requiring that local ordinances assure "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."[27]

The County argues that a limit on the size of negotiating teams is not a term or condition of employment; therefore Section 26(C)(4) does not require the Ordinance to guarantee the right to bargain over such a topic. We agree with the County that the size

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[27] Prior to filing its brief, AFSCME had also alleged that various other negotiations ground rules provisions of the Ordinance violated Section 26(C). Because AFSCME apparently has abandoned those claims, we do not address them and make no finding as to the lawfulness or unlawfulness of any other "ground rules" provision of the Ordinance.

of the parties' bargaining committees does not fall within the scope of "wages, hours and other terms and conditions of employment," and, therefore, is not subject to the requirement of Section 26(C)(4) that a local collective bargaining ordinance assure the right to bargain over such subjects.

We note, however, that the NLRB and the federal courts have long held that an employer's refusal to bargain with a negotiating committee designated by the exclusive representative, or the employer's attempt, by bargaining to impasse, to dictate the composition of the exclusive representative's negotiating committee, constitutes a per se refusal to bargain in good faith in violation of the National Labor Relations Act. See, e.g., General Electric Co. v. NLRB, 412 F.2d 512 (2d Cir. 1969); Standard Oil Co. of Ohio, 137 NLRB 690 (1962), enf'd 322 F.2d 40 (6th Cir. 1963); Cabinet Mfg. Co., 140 NLRB 576 (1963). Compare, Mine Workers Local 1854 (Amax Coal Co.), 238 NLRB 1583, enf'd in pert. part, 614 F.2d 872 (3d Cir. 1980) (union's attempt to coerce employer regarding employer's bargaining representatives unlawful). Therefore, although we find that the provision in question does not violate Section 26(C)(4) as AFSCME has alleged, we do not mean to suggest that the County would be acting in compliance with its duty to bargain in good faith if, in negotiations, it attempted to enforce the Ordinance's limitation on the size of a union's bargaining committee. Because we are not now presented with that question, however, we do not decide it.

J. Grievance Procedure

Section 15(E) of the Ordinance provides:

> The parties shall negotiate a grievance procedure that culminates with a binding decision for grievances which will apply only to alleged violations of the Collective Bargaining Agreement.

AFSCME alleges in its brief that the above provision of the Ordinance, when read in conjunction with another provision, Section 9(E),[28] violates the requirement of Section 26(C)(6) that each ordinance include "a requirement that grievance procedures culminating with binding arbitration be negotiated." In essence, AFSCME argues that the Ordinance substitutes the local board for the arbitrator as the authority for resolving grievances, and thereby fails to comply with the statutory requirement of a grievance procedure that results in binding arbitration. (Emphasis added.) The County argues that Section 15(E) of the Ordinance complies with the requirements of Section 26(C)(6) of PEBA and asserts that PEBA does not require that the Ordinance be identical, word-for-word, to PEBA. We are unpersuaded by AFSCME's contention because unlike the various other provisions of the Ordinance discussed above, the meanings of the words in Sections 9(E) and 15(E) are far from clear on their face. Thus, contrary to AFSCME's position, the wording of Section 15(E) of the Ordinance is susceptible to the interpretation that it requires a bargaining

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[28] Section 9(E) of the Ordinance provides that the local board "has the power to enforce provisions of the . . . Ordinance and labor-management agreements through the imposition of appropriate administrative orders."

agreement to contain a grievance procedure culminating in binding arbitration, in compliance with Section 26(C)(6) of the statute. So long as a lawful interpretation is reasonable, we will not read an unlawful interpretation into the words of the Ordinance. Nor does Section 9(E) of the Ordinance convince us that the County intends to substitute the local board for an arbitrator as the final and binding step of contractual grievance procedures. Rather, that section may mean nothing more than that the local board has the authority to remedy violations of a collective bargaining agreement that have been asserted as prohibited practice complaints. PEBA itself, in Sections 19(H), 20(D), 9(F) and 11(E), gives this Board and local boards that authority. Accordingly, we find without merit AFSCME's allegations that Sections 15(E) and 9(E) of the Ordinance, on their face, violate the statute.[29]

VI. CONCLUSIONS OF LAW

Based on the above analysis and findings, we conclude that the State of New Mexico's Public Employee Labor Relations Board has jurisdiction over this case; AFSCME has standing; the matter is ripe for administrative adjudication; all applicable procedures have been complied with; and the County has committed prohibited practices in violation of Sections 19(G) and 26(C) of PEBA by

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[29]Earlier in the processing of the case, AFSCME had taken the position that Section 15(E) of the Ordinance violated Section 26(C)(6) because the Ordinance restricted the scope of the grievance procedures to alleged violations of a collective bargaining agreement whereas PEBA contemplated a broader scope grievance procedure. AFSCME appears to have abandoned that argument in its brief, therefore, we do not address it.

enacting the following sections of its Labor Management Relations Ordinance: 5(F), 5(L), 5(N), 5(R), 6, 7, 8(D), 8(E), 12(H), 15(B), 16(B)(3), 16(B)(4) and 19(C).

We further find and conclude that the above prohibited practices warrant the imposition of an administrative remedy, as authorized by Section 11(F) of PEBA. That remedy is set forth in the ORDER below.

The Board finds that the County has not committed a prohibited practice by enacting the following sections in its Labor Management Relations Ordinance: 10(F), 15(E), 16(A)(2), 16(B)(5), 17(I), 18(H), 18(I).

AFSCME's other allegations have been abandoned or have been untimely asserted and therefore the Board does not reach the merits of those allegations.

ORDER

Based on the Board's findings and conclusions, above, the Board hereby enters the following Order:

The County's Labor Management Relations Ordinance is not effective and the Board will not approve the County's application for approval of a local board until the County revises the Ordinance to conform to the PEBA.

Specifically, the Board orders that the Ordinance shall not become effective unless and until the County revises Sections 5(F), 5(L), 5(N), 5(R), 6, 7, 8(D), 8(E), 12(H), 15(B), 16(B)(3), 16(B)(4) and 19(C) in a manner consistent with this Decision and Order.

THE BOARD FURTHER ORDERS that AFSCME's remaining allegations which it has abandoned are hereby dismissed with prejudice and that the allegation raised untimely is dismissed without prejudice.

DECIDED AND ENTERED by the New Mexico Public Employee Labor Relations Board this **18th** day of **November**, **1993**.

Bill Giron, Chairman

DISSENT BY MEMBER KEATON

I agree with the findings and conclusions set forth in the ORDER above except as noted in the paragraph below.

Ordinance Section 5(N)

With respect to the County's definition of "management employee" in Section 5(N) of its ordinance, I conclude that the use of the disjunctive word "or," compared to the conjunctive word "and" in PEBA's definition, is a difference without a distinction. Consequently, I disagree with Chairman Giron and Member Ellis and conclude that the County's definition of "management employee" is not a violation of PEBA.

James T. Keaton, Member

DISSENT BY MEMBER ELLIS

I agree with the findings and conclusions set forth in the ORDER above except as noted in the paragraphs below.

Ordinance Sections 17(I), 18(H) and 18(I)

The central issue, in determining whether Sections 17(I), 18(H) and 18(I) of the Ordinance violate PEBA is whether they "promote the principles established in" the prohibited practice sections of PEBA, as Section 26(C)(9) requires or whether, on the other hand, they run counter to those principles. To decide this issue one must first determine what relevant principles are established by PEBA's prohibited practice sections.

Section 19 of PEBA (employer prohibited practices) not only makes it unlawful for a public employer to discriminate against any public employee because of membership in or activity on behalf of a labor organization, but also makes it unlawful to "interfere with, restrain or coerce any public employee in the exercise of any right guaranteed" by PEBA. (Section 19(B).) To determine what principles are established by this provision, one must ask what rights PEBA guarantees. PEBA guarantees public employees "the right to organize and bargain collectively with their employers" (Section 2); the right to "form, join or assist any labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion;" and "the right to refuse any or all such activities" (Section 5).

From the above analysis, it is clear that an essential principle established by Section 19 of PEBA is the principle that a public employer may not interfere with, restrain or coerce any public employee in the exercise of his or her right to form, join or assist a labor organization for the purpose of collective bargaining, or in the exercise of the right to refrain from such activities. It follows that, in order to conform to the requirements of Section 26(C)(9), the prohibited practice provisions of a local collective bargaining ordinance must promote, and may not detract from, the fundamental principle that public employees are free to engage, or not to engage, in a wide range of labor organization activities related to collective bargaining.

Do the provisions of the Ordinance at issue here interfere, in any way, with the fundamental organizing and collective bargaining rights of public employees and the right to refrain from such activities guaranteed by PEBA? I believe they do.

Ordinance Section 18(H) makes it illegal for employees of the County, or their bargaining representatives, to discuss with an elected official, during the collective bargaining or impasse resolution process, any issue that is a subject of negotiations. The plain meaning of this language makes it illegal, for example, for an employee who is a member of a union's bargaining committee, or a paid union official, to discuss with a county commissioner a refusal by the County to accept the recommendation of a factfinder during impasse proceedings. The same provision would make it illegal for an employee who is dissatisfied with a position that

his or her union has taken in collective bargaining to discuss that matter with a County commissioner.

Absent the prohibition contained in Section 18(H) of the Ordinance, employees and their representatives would be free to advance their collective bargaining aims by discussing them with elected officials, unless, by mutual agreement, the parties had limited such rights.[30]

The ability of employees and union representatives to communicate with elected officials regarding subjects over which the parties are at impasse, in a system where there is no right to strike and no binding impasse resolution procedure, may be the only way for employees and their representatives to attempt to resolve the impasse once a factfinder has issued recommendations. Accordingly, I find that the broad prohibition contained in Section 18(H) of the Ordinance against employees and union representatives discussing bargaining topics with elected officials does not promote, and indeed runs counter to, the basic principle embodied in PEBA Section 19 that employees must be free to engage in a wide range of union organizing and collective bargaining activities

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[30] I recognize that there are strong arguments in favor of an agreement between an exclusive representative and an employer to the effect that the parties will not discuss subjects of collective bargaining outside of negotiating sessions. The question of the lawfulness of such a ground rule, if agreed to by the parties, is not before us and I do not address it. Under National Labor Relations Act precedent, however, ground rules are subjects of collective bargaining and cannot be dictated by one party to the other. See, eg., Co-Jo d/b/a Clinton Food 4 Less, 288 NLRB 597 (1988); General Electric Co., 173 NLRB 253, enf'd 412 F.2d 512 (2d Cir. 1969).

without interference, restraint or coercion. Therefore, Section 18(H) of the Ordinance violates Sections 26(C)(9) and 19(G) of PEBA. Because Section 17(I) of the Ordinance is a "mirror image" of Section 18(H) -- prohibiting the same discussions from the other end -- I also find that section unlawful.

Section 18(I) of the Ordinance prohibits labor organizations and employee groups that represent County employees from endorsing or publicly supporting candidates for County commission office. Again, the critical question in determining whether this provision violates Section 26(C)(9) of PEBA is whether it promotes or detracts from the fundamental organizing and collective bargaining rights, as well as the right to refrain from union activities, established in Section 19 and derived from Sections 2 and 5 of PEBA and the parallel provisions of the NLRA.

In Eastex, Inc. v. NLRB, 437 U.S. 556 (1978), the United States Supreme Court upheld a finding of the NLRB that an employer had violated Section 8(a)(1) of the National Labor Relations Act (29 U.S.C. § 158(a)(1)) by prohibiting employees from distributing, in non-work areas of the plant during non-work time, a union newsletter that (1) urged employees to write their state legislators opposing an effort to incorporate a "right-to-work" provision in the state's constitution and (2) noted a recent presidential veto of an increase in the federal minimum wage and urged employees to support more friendly politicians.

Section 8(a)(1) of the NLRA, which the Supreme Court in Eastex found the employer had violated, makes it an unfair labor practice

for an employer to "interfere with, restrain or coerce employees in the exercise of rights guaranteed in" Section 7 of the NLRA. PEBA Section 19(B) clearly is patterned after Section 8(a)(1) of the NLRA. Section 7 of the NLRA (29 U.S.C. 157) guarantees private sector employees "the right to self-organize, to form, join, or assist labor organizations, to bargain collectively . . . , and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ." Although Section 5 of PEBA does not include all of the language of Section 7 of the NLRA, it is clear that PEBA's assurance of the basic rights of employees to "form, join or assist any labor organization for the purpose of collective bargaining" and to "refuse any or all such activities" are derived from Section 7 of the NLRA.

In upholding the NLRB's finding that the employer had violated Section 8(a)(1) of the NLRA by prohibiting employee distribution of a newsletter urging political action related to wage and union security laws, the Court in Eastex reasoned:

> To hold that activity of this nature is entirely unprotected . . . would leave employees open to retaliation for much legitimate activity that could improve their lot as employees. As this could 'frustrate the policy of the Act to protect the right of workers to better their working conditions,' . . . we do not think that Congress could have intended the protection of Section 7 to be as narrow as [the employer] insists.

Id. at 566-567. [Citation omitted.]

Although the Court in Eastex based its reasoning on the language of NLRA Section 7 that protects employees' right to engage in concerted activities for "other mutual aid or protection" (Id.) --language that does not appear in PEBA--I find the Court's reasoning helpful to our analysis of Section 18(H) of the Ordinance under PEBA standards. As I have noted, PEBA Sections 5 and 19 protect the right of all public employees in New Mexico not only to form and join labor organizations, but also to "assist" them in activities related to collective bargaining, as well as to conduct collective bargaining "through representatives chosen by" the public employees. Section 18(H) of the Ordinance, on its face, would forbid employees, through their chosen representatives, to endorse or publicly support any candidate for County commission office, including, for example, a candidate who had promised to work for higher wages or safer working conditions for County employees in harmony with the exclusive representative's position in collective bargaining. Such a prohibition infringes on the right of employees under Sections 5 and 19 of PEBA to assist labor organizations in collective bargaining and to bargain through them. Like the Court in Eastex, I do not believe that the legislature could have intended the protections of the labor relations statute to be so narrow as to permit such an infringement on the "right of workers to better their working conditions."

Accordingly, I find that Section 18(H) of the Ordinance contravenes one of the essential principles that Section 26(C)(9) of PEBA requires the Ordinance to promote. That section of the Ordinance therefore violates Sections 26(C) and 19(G) of PEBA.

James J. Ellis, Member