BEFORE THE STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CITY OF DEMING,

Respondent/Appellant,

-v-

1-PELRB-2005
Case Nos. 102-04 & 309-04

DEMING FIREFIGHTERS LOCAL 4251,

Petitioner/Appellee.

DECISION AND ORDER

This request for Board review presents the issue of whether the Public Employee Labor Relations Board (hereinafter PELRB or the "Board") has jurisdiction to review "grandfathered" local ordinances for alleged violation of the Public Employee Bargaining Act (PEBA), §§ 10-7E-1 to 10-7E-26 NMSA 1978, and to invalidate portions of such local ordinances that are found to violate PEBA.

As explained in greater detail below, the Board hereby adopts the Executive Director's decision in part, and reverses it in part. The Board adopts the determination that it has jurisdiction to determine whether local ordinances meet the minimum requirements of PEBA, grandfathered or not. The Board also adopts the invalidation of (A) that part of the local ordinance in question that seeks to categorically withhold the right to collectively bargain from certain public employees by defining them as supervisors; and (B) that part of the local ordinance that fails to provide for final and binding arbitration, because both of these provisions violate the minimum requirements of PEBA. However, the Board reverses that part of the decision retaining jurisdiction over the matter to determine who are supervisors and what the appropriate bargaining units are.

FACTUAL AND PROCEDURAL BACKGROUND

The City of Deming (hereinafter the "City") has had in place since January 14, 1991 a local ordinance, Ordinance 1039, that establishes the Deming Labor Relations Board (hereinafter "Deming Board").

On July 1, 2003, the Deming Firefighters Local 4251 (hereinafter "Union") filed a Petition for Recognition with the City of Deming Board. On November 26, 2003, the Deming Board issued a decision concluding that the proposed bargaining unit was not an appropriate bargaining unit under Ordinance 1039 because it sought to include Lieutenants and Captains, personnel defined as "supervisors" under the local ordinance.

Thereafter, on March 15, 2004, the Union filed both a Petition for Representation and a Prohibited Practice Charge with the PELRB. The Petition for Representation simply sought recognition of the bargaining unit proposed to the Deming Board on July 1, 2003. The Prohibited Practice Charge alleges that Ordinance 1039 violates PEBA (a) by defining Lieutenants and Captains as "supervisors," and thus as categorically excluded from the right to collectively bargain that is guaranteed by PEBA to all public employees except management, supervisory and confidential employees; and (b) by failing to provide for final, binding arbitration between the parties in the event of an impasse in contract negotiations.

On March 16, 2004, the City filed identical motions to dismiss both Union filings for lack of jurisdiction, as well as a response to the Prohibited Practice Charge that raises essentially the same jurisdictional arguments. On May 17, 2004, the Union filed a response to the identical motions to dismiss that focused on the jurisdictional arguments as they pertained to the Prohibited Practice Complaint.[1]

On August 16, 2004, a hearing on the issue of jurisdiction was held before the Board's Executive Director, who acted as the hearing examiner. On October 4, 2004, on the basis of the parties' pleadings and the hearing record, the Director issued a written report concluding that: (a) the

[1] The Union response argued that "there is no need to address the motion to dismiss the Election Petition at this time." The City has argued on review before this Board that the Petition for Representation should have been dismissed as a result of the Union's failure to respond to the City's motion to dismiss. *See* Appeal of Director's Decision and Request for Board Review at 3 (Item No. 11). The Board rejects this argument as unpersuasive. First, because the two City motions to dismiss were identical, an answer to one necessarily answers the other. Second, as the Union observed in its Response to Motion to Dismiss, the issue of whether the State Board has jurisdiction to review the lawfulness of Ordinance 1039's "Supervisors" definition under PEBA is a predicate and controlling issue, and thus must be addressed first under the auspices of the motion to dismiss the prohibited practices. *See* Response to Motion to Dismiss at 2, 8-9.

Board does have jurisdiction to review a prohibited practice complaint alleging that a Local Resolution is in violation of PEBA; (b) Sections 3(I) "Supervisors" and Section 13 "Impasse Procedures" are invalid and not subject to the grandfather protection of 10-7E-26(A) NMSA 1978, because they do not conform to the purpose for which the Legislature created PEBA; and (c) the PELRB would, therefore, retain jurisdiction and make the determination as to who are supervisors and what constitutes an appropriate bargaining unit.

Thereafter, having been timely placed on the agenda and publicly noticed, this matter came before the full Board at the Board's regularly scheduled meeting on March 4, 2005 by interlocutory appeal, leave for which was previously granted by the Director on oral motion of the City. Prior to the March hearing, the parties briefed the issues upon the Board's request. At the March hearing, the parties, as well as several representatives who had filed briefs as *amicus curiae* in the matter, made oral arguments and were questioned by the Board. Based on the pleadings and oral argument, the Board has unanimously concluded as follows.

ANALYSIS

I. THE PELRB HAS JURISDICTION TO ADDRESS THIS MATTER

First, the Board concludes that it has jurisdiction to determine whether a local ordinance, grandfathered or not, meets the minimum requirements of PEBA and to invalidate those portions of the local ordinance not in compliance with PEBA.

In coming to this conclusion, the Board looked primarily to the plain language of PEBA, to determine legislative intent. *State v. Ogden*, 118 N.M. 234, 242 (that "[t]he principal command of statutory construction is to … effectuate the intent of the legislature"); *Whitely v. New Mexico State Personnel Board*, 115 N.M. 308, 311 (1993) (in determining legislative intent, "the plain language of the statute [is] the primary indicator of legislative intent")

Section 10-7E-10(A) of PEBA provides that,

> [w]ith the approval of the [State] board, a public employer other than the state may, by ordinance, resolution or charter amendment, create a local board similar to the public employee labor relations board. Once created and approved, the local board shall assume the duties and responsibilities of the public employee labor relations board. A local board shall follow the procedures and provisions of

the Public Employee Bargaining Act [10-7E-1 to 10-7E-26 NMSA 1978] unless otherwise approved by the board.

Id.

The Union asserts, and it is undisputed that, Deming Ordinance 1039 varies from the provisions of PEBA, in that it categorically defines Lieutenants and Captains as supervisory personal excluded from the statutory right to collectively bargain, and in that it fails to provide for final and binding arbitration between the parties in the event of impasse in contract negotiation. *See* Prohibited Practice Complaint at 2, Item 8.[2] The Union also asserts, and it is undisputed, that Ordinance 1039 has never been approved by the State Board, as it predates the existence of both this Board and the Board operating under the original 1992 enactment of PEBA. *See* Prohibited Practice Complaint at 2, Item 5; Response to Prohibited Practice Complaint at 7.

Nonetheless, the City asserts that such unapproved variances are authorized under § 10-7E-26(A), also known as the "grandfather clause," and that the PELRB does not have jurisdiction to determine whether variances in a grandfathered ordinance violate PEBA. *See* Respondent's Brief in Support of Interlocutory Appeal at 2-3. Indeed, the City argues that "the PELRB lacks the jurisdiction to review any ordinance," and that "a pre-1991 ordinance need not comply with PEBA" at all. *See* Respondent's Reply Brief at 3 (emphasis added). Section 26(A) provides that,:

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

Id. (internal citations omitted).

The City further asserts that its interpretation is

[2] Although the City freely admits in its pleadings that the provisions at issue vary from those set out in PEBA, it denies that such variances violate PEBA. *See* Response to Prohibited Practice Complaint at 8.

supported by § 10-7E-26(B), which provides that ordinances, resolutions or charter amendments adopted subsequent to October 1, 1991 must comply with certain enumerated provisions of PEBA, which are not relevant here, as well as contain a laundry list of particular provisions and procedures, including "(8) impasse procedures equivalent to those set forth in Section 18 of the [PEBA]," such as a provision for final and binding arbitration. *Id.* (internal citations omitted); *see also* § 10-7E-18(B)(2). The City and the *amici* argue that the practical result of allowing the PELRB to review grandfathered ordinances that have not been substantially amended, and imposing any requirements that such ordinances follow the procedures or provisions of PEBA, would be to "eviscerate" any distinction between a § 26(A) ordinance and a § 26(B) ordinance. *See, e.g.*, UNMH *Amicus Curiae* in Support of Appellant at 2.

Reviewing the relevant sections of PEBA, however, several things become immediately clear. First, a local ordinance must be approved by the PELRB for the local board to assume the duties and responsibilities of the PELRB, and any variance from the procedures and provisions of PEBA must be approved by state Board. *See* § 10-7E-10(A) ("Once created and approved, the local board shall assume the duties and responsibilities of the public employee labor relations board. A local board shall follow the procedures and provisions of [PEBA] unless otherwise approved by the board.") (emphasis added and internal citations omitted). Thus, at the least, the Board retains jurisdiction to review unapproved ordinances for compliance with PEBA.

Second, the Act is quite specific in stating only that a municipality that, prior to October 1, 1991, has adopted an ordinance providing for collective bargaining of the municipality's public employees "may continue to operate under those provisions and procedures," notwithstanding the fact that the local ordinance was not approved by the PELRB. *See* § 10-7E-26(A) (emphasis added). However, it is clear in reading § 10 and § 26 together that the Legislature did not, therefore, intend to give municipalities blanket immunity as to ordinances that violated fundamental purposes or provisions of PEBA. Rather, the Legislature was providing no more and no less than what the Act states: (a) that ordinances enacted post-1991, or substantially amended post-2003 must include the explicitly recited provisions, as well as comply with other procedures and provisions of PEBA unless otherwise approved

by the Board; and (b) that ordinances enacted pre-1991 and not substantially amended post-2003 may continue to operate unless and until the provisions therein are found to violate PEBA. *Cf. Regents, supra* at ¶ 27 (that "in resolving statutory ambiguities, courts will favor a general provision over an exception," such as a grandfather clause, and "a grandfather clause will be construed to include no case not clearly within the purpose, letter, or express terms, of the clause").

Certainly nowhere in the Act does it state that the PELRB shall not have authority to review local ordinances, whether grandfathered or not, for compliance with PEBA, which the PELRB is after all given the power and duty "to enforce." *See* § 10-7E-9(F).[3] It is equally certain that nowhere does the Act state, as one *amicus* suggests, that all provisions of a grandfathered ordinance "supercede" the PEBA "in the event of conflict." *See* City of Albuquerque *Amicus Curiae* Brief at 2. At best, § 26(A) and (B) merely provide that a pre-1991 ordinance will not be held to the same rigorous standards as a post-1991 ordinance, not that it will be held to no standards whatsoever.

From the conclusion that the Board has jurisdiction to review local ordinances, it logically follows that the Board also has jurisdiction to invalidate those portions of a local ordinance not in compliance with PEBA. Otherwise, the Board's determination would not be enforceable, and there would be no remedy to aggrieved employees or unions for a found violation of PEBA.

Finally, these conclusions are reinforced by the New Mexico Supreme Court's reasoning in *Regents of the Univ. of New Mexico v. N.M. Federation of Teachers*, 1998-NMSC-020, 125 N.M. 401, in which the Supreme Court upheld the PELRB's invalidation of a provision of UNM's grandfathered labor resolution as violating PEBA.

The City asserts that the issue of the PELRB's jurisdiction was not addressed in *Regents, see* Respondent's Reply Brief at 4, and at oral argument it was alternately asserted that the issue of jurisdiction had been stipulated to and waived by the parties. However, subject matter jurisdiction cannot be either stipulated to or waived. Moreover, the

[3] Indeed, the Act assumes Board review to the extent that it requires Board approval prior to the local board's assumption of the duties and responsibilities of the PELRB. *See* § 10-7E-10(A).

Board concludes that the Supreme Court did indeed address the issue of PELRB's jurisdiction to review and invalidate portions of a grandfathered ordinance or resolution, as evident in several parts of the opinion:

- where it began by noting that the "function" of the PELRB "is the administration of PEBA," and that PELRB's powers and duties include "enforcing the provisions of PEBA," and "hearing and determining 'complaints of prohibited practices' under the Act" (*Id.* at ¶ 4);
- where it affirmed the PELRB's determination that UNM's resolution did not qualify for grandfather status under PEBA because "it did not extend the right to bargain collectively to all employees who have been afforded this right under PEBA" (*Id.* at ¶ 43);
- where it ruled that the Legislature, in enacting PEBA, could impose greater requirements on a public employer than did the employer's "long standing well-established employment policy" (*Id.* at ¶ 48); and
- where it concluded by holding that "the decision of the PELRB was neither arbitrary nor capricious, nor did the Board abuse its discretion in any way" (*Id.* at ¶ 49).

II. INVALIDATION OF THE PROVISIONS IN QUESTION WAS APPROPRIATE

Next, the Board concludes that invalidation of the "Supervisors" and "Impasse Procedures" provisions of Ordinance 1039 was proper, as those portions violate minimum requirements of PEBA and do not conform to the purpose for which the Legislature created PEBA.[4]

In coming to this conclusion, the Board relied primarily on its power and authority under § 10-7E-9(F) "to enforce provisions of the Public Employee Bargaining Act" in keeping with legislative intent and the purposes of PEBA. Additionally, the Board's understanding of its power and authority is informed by the New Mexico Supreme Court's reasoning in *Regents*, a case directly on point as to the

[4] Although the present case deals with a grandfathered ordinance, the same reasoning underpinning the affirmance of both jurisdiction and invalidation applies as well to non-grandfathered ordinances that violate PEBA. However, as a practical matter, the issue will seldom arise outside of the grandfather context because post-1991 ordinances, resolutions and charter amendments must either follow the procedures and provisions of PEBA or, prior to Board approval, be found by the Board to nonetheless not violate the purposes of PEBA. *See* § 10-7E-10(A); *see also* NMAC 11.21.5.10(A).

issue of the legality of the "Supervisors" provision of Ordinance 1039 under PEBA, and which can also be analogized to the issue of the "Impasse Procedures" provision.

A. "Supervisors" provision.

In *Regents*, the Supreme Court upheld the PELRB's invalidation of a provision of UNM's grandfathered labor resolution for failure to meet minimum requirements of PEBA. PEBA merely excludes management, supervisory and confidential employees from the statutory right to collectively bargain. *See* § 10-7D-5 (1992 Act); *see also* § 10-7E-5 (2003 Act). In contrast, the UNM policy excluded "administrative, faculty and supervisory personnel, professional and technical personnel, security officers and guards, confidential employees and employees engaged in personnel work, temporary part-time employees and temporary full-time employees." *Regents* at ¶ 20.

In conducting its analysis of the UNM provision under PEBA, the Court began by noting that grandfather clauses are exceptions to new general rules carved out to prevent harm, but that they are very narrowly construed so as to exclude any case not clearly within its "purpose, letter, or express term" and are construed "strictly against the party who seeks to come within its exception." *Id.* at ¶¶ 24, 26-27. The Court then identified a two-part test for determining whether specific portions of a public employers policy may fail to attain grandfather status: (a) that the provision constitute part of "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;" and (b) that it "be in effect 'prior to October 1, 191.'" *Id.* at ¶¶ 34-35.

Based purely on the plain language and legislative intent of PEBA, the Court concluded as follows:

> When PEBA describes those who may collectively bargain as "employees," it refers to all public employees except confidential, managerial, and supervisory employees, who work for a public employer other than the state. *See* § 10-7D-5; § 10-7D-26. Furthermore, this is the meaning that the Legislature intended when it used the word "employees" in the grandfather clause, Section 10-7D-26(A). Paragraph B of UNM's *Policy* ... does not qualify for grandfather status under PEBA because it does not extend the right to bargain collectively to all employees who have been afforded this right under PEBA. Thus, this portion of UNM's

> *Policy* fails to meet the first requirement, mentioned above, that a public employer must satisfy in order to obtain grandfather status.

Id. at ¶ 43 (emphasis added).

The Court then went on to examine the public policy and purpose behind the PEBA. After noting that UNM had "offered no convincing evidence of any hardship or injustice it will suffer from opening the collective-bargaining process to an expanded number of employees," *id.* at ¶ 47, and reciting the purpose section of § 10-7D-2,[5] *id.* at ¶ 48, it reiterated and elaborated on its original conclusion, reasoning that:

> Once again the Act makes clear that its very function is to extend the right to organize and bargain collectively to all 'public employees' as they are defined by PEBA. It is entirely within the constitutional police power of the Legislature to require a public employer—even one that has a long-standing well-established employment policy—to expand the scope of employees to whom it must extend the right to bargain collectively.

Id. at ¶ 48 (emphasis added).

The present case comes squarely within the ruling of *Regents*. Here, Ordinance 1039 categorically withholds the right to collectively bargain from certain public employees, Lieutenants and Captains, by statutorily defining them as supervisors. The City and *amici* argue that *Regents* is distinguishable because it sought to directly exclude numerous and broad categories of employees from the statutory right to bargain, while here Ordinance 1039 merely defines two discrete categories of employees as supervisors, and thus indirectly excluded from the statutory right to bargain. The Board concludes that this is a distinction without merit, as the result is the same in either case: the categorical exclusion of one or more groups of employees that may not be managerial, supervisory

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[5] "The purpose of the Public Employee Bargaining Act is to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions." *Id.* (internal citations omitted); *see also* § 10-7E-2.

or confidential employees from the right to bargain collectively. Accordingly, under the reasoning of *Regents*, this provision of Ordinance 1039 "does not qualify for grandfather status under PEBA because it does not extend the right to bargain collectively to all employees who have been afforded this right under PEBA."

The City and *amici* also argue that this case is more like an earlier PELRB decision, *National Education Association v. Bernalillo Public Schools* ("*NEA*"), 1 PELRB No. 17 (1996), than *Regents*. For the reasons already discussed, the Board is of the opinion that this case falls squarely within the ruling of *Regents*. Moreover, it finds that the *NM Federation of Teachers* case is clearly distinguishable. In that case, the employer denied that a particular employee, a head cook, could be included in the bargaining unit because he was designated a supervisor, and the Board concluded that it did not have jurisdiction to hear the case because there was a local ordinance in place.

At least one *amicus* has argued that "Lieutenants and captains are like head cooks," and that, therefore, this case should be dismissed and returned to the local board for disposition as was done in the *NEA* case. *See* City of Farmington *Amicus Curiae* Brief at 6. The Board is not persuaded by this analogy. As observed by both the PELRB and the ALJ in the *NEA* case, "the head cook's supervisory status 'is a garden variety dispute over the unit inclusion or exclusion of a particular employee,'" and the Legislature did not intend "that a public employer could lose grandfathered status whenever a dispute arose as to the unit status of a particular employee." *Id.* at 10, n. 8 (emphasis added). In contrast, the present case deals with a wholesale, categorical and statutory exclusion of certain groups of employees who may or may not, in fact, be supervisory personnel as that term is defined under PEBA.[6]

Finally, the City and *amici* argue that *Regents* is distinguishable because it was based on the previously enacted PEBA, which contained a now deleted section

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[6] *See* § 10-7E-4(U): "'supervisor' means an employee who devotes a majority 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 'supervisor' does not include an individual who performs merely routine, incidental or clerical duties or who occasionally assumes a supervisory or directory role or whose duties are substantially similar to those of his subordinates and does not include a lead employee or an employee who participates in peer review or occasional employee evaluation programs."

providing that a grandfathered ordinance must, in fact, result in appropriate bargaining units, among other conditions. *See* § 10-7D-26(B) of 1992 Act. The Board concludes that this is also a distinction without merit. As ¶ 43 of *Regents*, quoted above, makes clear, the Court's reasoning in that case was based independently on § 26(A) of PEBA, not on the now-deleted § 26(B). That this is true is again made clear when the Court cited § 26(B) as merely "bolstering" its original conclusion.

For the foregoing reasons, the Board concludes that invalidation of the "Supervisors" provision of Ordinance 1039 was proper, as that portion of Ordinance 1039 violates the minimum requirement of PEBA that an ordinance, grandfathered or not, must "extend the right to organize and bargain collectively to all 'public employees' as they are defined by PEBA." *Regents* at ¶ 48.

B. "Impasse Procedures" provision.

The lessons of *Regents* are that the Legislature, by enacting PEBA, has granted certain core rights pertaining to collective bargaining, and that the Legislature's grant of the core rights embodied in PEBA will trump a municipality's "long standing well-established employment policy," notwithstanding the grant of grandfather status as to non-essential rights. *Id.* at ¶ 48. The determination that PEBA establishes certain minimum rights pertaining to collective bargaining is inherent in the first prong of the test set out in *Regents* for grandfather status under § 26(A): that the provision constitute part of "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." *Id.* at ¶ 34.

Recognizing this, the question then becomes which provisions of PEBA are so essential as to constitute "core" or "minimum" requirements that cannot be bartered away under the guise of a grandfather status. The *Regents* test itself provides the answer, although it must obviously be applied on a case-by-case basis: that the provision in question have a significant and substantial nexus to "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." *See Regents* at ¶ 34.

The Board concludes that impasse procedures, like the definition of "public employees," have exactly such a significant and substantial nexus to the system of collective bargaining rights established in PEBA. As reasoned by the Union in its Brief in Opposition

> Because the Act deprives public employees of the right to strike, they are deprived of what federal law recognizes and legitimizes as the "coercive power" of private-sector employees to break impasse and drive bargaining to resolution. The Legislature has substituted binding arbitration as the mechanism to resolve impasse and bring bargaining to resolution.

Id. at 9. Certainly it was "within the constitutional police power of the Legislature," *Regents* at ¶ 48, to determine that strikes by public employees are inimical to "orderly operation and functioning of the state and its political subdivisions," *see* § 10-7E-2, and to thus require final and binding arbitration under PEBA—even by non-state public employers that have "a long-standing well-established employment policy," *Regents* at ¶ 48—to break impasses in contract negotiation, in lieu of the coercive power to strike.

At least one *amicus* has argued, in essence, that to conclude that final and binding arbitration, which is required under § 26(B), is a core requirement for local ordinances grandfathered under § 26(A) of PEBA, is the same thing as requiring grandfathered ordinances to meet all of the requirements of § 26(B). *See* Brief of *Amicus Curiae* Albuquerque Public Schools at 2. However, section 26(B) mandates a whole host of requirements not implicated in the Board's determination that a § 26(A) ordinance's impasse provision must provide for final and binding arbitration. Thus, to say that final and binding arbitration is a core requirement of PEBA that a grandfathered ordinance must comply with is not to say that the other fourteen separate and express requirements of § 26(B) are, *a priori*, also core requirements of PEBA with which a grandfathered ordinance must comply.

Moreover, the case that the APS *amicus* cites in support of its argument, the *NEA* case, is distinguishable on several grounds. In that case the PELRB reversed the ALJ's conclusion that UNM "'lost' its grandfather status" for "violating its duty to bargain" by "not bargaining over a binding grievance arbitration procedure." *Id.* at 2, 11, 16. However, *NEA* involved an allegation of breach of the

duty to bargain over grievance arbitration[7] and not, as discussed above, violation of the Legislature's determination that final and binding arbitration must replace the right to strike in the context of impasse in contract negotiation in the public sector. Second, the ALJ in *NEA* ultimately dismissed the complaint with respect to the allegation concerning refusal to bargain because it determined that the Union had waived the complaint by entering into a contract; here there has been no waiver. Finally, here the Director has only determined that the portion of Ordinance 1039 which violates PEBA is invalid, not that the entire ordinance has "'lost' its grandfather status," as the ALJ concluded in *NEA*.

For the foregoing reasons, the Board concludes that invalidation of the "Impasse Procedures" provision of Ordinance 1039 was proper, as it violated the minimum requirements of PEBA. The "Impasse Procedures" of Ordinance 1039 fail to constitute part of "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," *Regents* at ¶ 34, because final and binding arbitration is a necessary component of collective bargaining where the employees do not have a right to strike.

III. FURTHER RETENTION OF JURISDICTION NOT WARRANTED

Although the Board adopts the Director's rulings as to jurisdiction and invalidation, it reverses the Director's conclusion that "[t]herefore the PELRB will make the determination as to who are supervisors and what the appropriate bargaining unit/s are." *See* Director's Report at 3.

Upon invalidating any portion of a grandfathered ordinance, the PELRB does not therefore have jurisdiction to hear a Petition for Representation filed contemporaneously with the complaint. To conclude otherwise would imply that failure of a part of a grandfathered ordinance necessarily results in complete loss of grandfather status, in violation of the rule of *Regents*. *Id.* at ¶ 35.

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[7] "Grievance arbitration procedure" refers to an arbitration procedure for handling individual employment-related complaints and/or individual complaints arising under a collective bargaining agreement. Such an individual-oriented procedure typically exists in private-sector bargaining along with the institutional right of employees to collectively strike over bargaining impasse in contract negotiations.

ORDER

THIS MATTER having come before the Public Employee Labor Relations Board ("Board") on Respondent/Appellant City of Deming's Appeal of Director's Decision and Request for Board Review, the Board having reviewed the pleadings, heard oral argument by the parties and *amici curiae*, and being otherwise advised, **ORDERS AS FOLLOWS:**

1. The Decision of the Executive Director, rendered by letter ruling on October 4, 2004 ("Decision"), is adopted in part and reversed in part.

2. That part of the Decision stating that the Board has jurisdiction to determine whether a local ordinance complies with the requirements of the Public Employee Bargaining Act, NMSA 1978, §§ 10-7E-1 to 10-7E-26 (2003) ("PEBA"), sufficiently to be protected by the "grandfather" provision, § 10-7E-26, is adopted.

3. That part of the Decision stating that Deming City Ordinance No. 1039, §§ 3(I) (categorically withholding the right to collectively bargain from certain public employees by defining them as supervisors) and 13 (failing to provide for final and binding arbitration) fail to conform with PEBA sufficiently to be protected by § 10-7E-26 and are, thus, invalid is adopted.

4. That part of the Decision retaining jurisdiction in the Board to determine who are supervisors and what is the appropriate bargaining unit is reversed. These two issues are remanded to the Deming local board to be decided in accordance with this Order.

Decided by the PELRB on the 4th day of March during open session at its regular meeting

held in Santa Fe, New Mexico.

For the Board.

Martin V. Dominguez
Chairman

Date of Issuance: March 31, 2005