BEFORE THE PUBLIC EMPLOYEE
LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 18, AFL-CIO, and PAUL SANGALLI,

Petitioner,

01-PELRB-2009

vs.

PELRB Case No. 136-08

NEW MEXICO CORRECTIONS DEPARTMENT,

Respondent.

ORDER DENYING MOTION TO DISQUALIFY

THIS MATTER having come before the Public Employee Labor Relations Board upon the motion of Respondent to disqualify hearing examiner Pilar Vaile, and the Board, having heard argument on the motion by the parties and being otherwise fully advised;

IT IS HEREBY ORDERED that the motion to disqualify be and hereby is denied.

Martin V. Dominguez

MARTIN V. DOMINGUEZ
Chairman
Public Employee Labor Relations
Board

Date: April 6, 2009

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME COUNCIL 18,

Petitioner,

v. **PELRB Case No. 136-08**

NEW MEXICO CORRECTIONS DEPARTMENT,

Respondent.

HEARING EXAMINER'S DECISION ON MOTION TO DISQUALIFY

This matter comes before the undersigned on the Department's January 12, 2009 Motion to Disqualify the undersigned hearing examiner in this matter. The motion asks the undersigned to recuse herself or, in the alternative, for the PELRB to disqualify her.

To the extent the motion is directed to the undersigned, it is hereby DENIED as facially invalid because it is untimely under PELRB rules and unsupported by actions and statements related to the instant proceeding; additionally, or in the alternative, the motion is DENIED as being unfounded under the facts alleged.

To the extent the motion is directed to the PELRB, the undersigned forwards the motion although facially invalid, because the Respondent has timely asserted the same issue in three other cases, two of which had already been assigned to the undersigned and are therefore delayed pending a Board hearing on the motions to disqualify. *See* PELRB Case Nos. 147-08, 148-08, and 149-08. Therefore, administrative efficiency requires the PELRB to consider and finally resolve the novel question of whether allegations of bias in a prior, unrelated proceeding thereafter forever prohibit a PELRB hearing examiner from being assigned to any matter involving the same parties.

DISCUSSION

I. The motion is facially invalid.

To the extent the motion is directed to the undersigned it is DENIED as facially invalid because it is based on acts and statements previously known to the Respondent and unrelated to the instant proceedings.

As to the first point, NMAC 11.21.1.13 provides that "no board agent, … nor hearing examiner shall decide or otherwise participate in any case or proceeding in which …(d) for some … reason or prejudice, he or she cannot fairly or impartially consider the issues in the proceedings." *Id.* NMAC 11.21.1.14(A) requires that "[a] motion to disqualify a … hearing examiner in any matter, based upon the foregoing criteria, shall be filed with the board … prior to any hearing or the making of any material ruling involving the pending issues." *Id.* (emphasis added).

In the instant case, no material ruling has yet been made but an initial Status and Scheduling Conference was held before the undersigned on October 21, 2008. No motion to disqualify the undersigned—oral or written—was made at or prior to the October 21, 2008 hearing. Accordingly, the motion is untimely under NMAC 11.21.1.14(A).[1]

As to the second point, New Mexico case law at all times entitles parties to an administrative hearing an impartial and unbiased decision maker, notwithstanding the temporally limited provision for disqualification under PELRB rules. *See e.g., City of Albuquerque v. Chavez*, 197-NMCA-54, ¶123 NM 428 (concluding another agency's

[1] Although not dispositive under the plain language of the rule, it should be noted that one purpose of the October 2008 hearing was for the parties and the undersigned to raise and discuss any threshold legal or factual issues. Additionally, the evidentiary hearing scheduled without objection at the October 2008 hearing was thereafter reset two times with the Respondent's concurrence, prior to the Respondent's filing of the instant motion to disqualify the undersigned

similar guarantees of an impartial hearing examiner afford governmental respondents equivalent rights to a fair hearing as are provided to "persons" under the federal and state constitutional due process provisions). Thus, under New Mexico case law a party before the PELRB can generally raise issues concerning bias even after a hearing has been held, or a material ruling made, where the bias subsequently arises or becomes apparent. This could happen, for instance, if the movant did not know of preexisting facts suggesting bias or appearance thereof in the instant case. It could also occur if, after a hearing or material ruling, the hearing examiner subsequently engaged in conduct or made statements that could lead a reasonable person to question her continuing impartiality in the instant case.

Here, however, the motion fails under this standard as well. The affidavit on which the motion is based is dated May 2, 2008 and was filed by the Department in a previous PELRB matter, now since settled and dismissed. *See* Affidavit, attached herein as Exhibit A; *see also AFSCME Council 18 v. Corrections*, Case 150-07. Thus, the facts and statements alleged therein to suggest bias were known to the Respondent prior to the October 2008 hearing, and are now stale. Although the Union Petitioner and Respondent Agency are the same, the movant here does not allege and the facts do not suggest a general predisposition against this Respondent Agency in all cases, or a general predisposition in favor of this Union Petitioner in all cases. Indeed, numerous claims against the movant were dismissed prior to the hearing in Case 150-07, and of the two claims ruled upon in the final decision, one was dismissed. Thus, the general drift of the disqualification motion appears to be that the undersigned was predisposed to find the movant liable for a particular claim, in the particular context of Case 150-07.

Under these facts, the instant motion fails to state a claim for disqualification because it is based on facts of a prior unrelated matter, and there are no facts alleged in support of a general—rather than case-specific—bias or prejudgment. Allegations in a motion to disqualify should be required to at least state a facially valid claim for disqualification, in order to warrant the extraordinary interim relief afforded under NMAC 11.21.1.14(A) of delaying proceedings (in this case and the related cases for up to four months) to enable to PELRB to first resolve the allegation of bias or appearance thereof.

II. The motion is unfounded on its merits.

Even assuming the motion is facially valid, the motion is DENIED upon consideration of its merits and relevant principles of law, to the extent it is addressed to the undersigned.[2]

Prohibited judicial bias is, by definition, a tendency to prejudge the facts of a matter. *See United Nuclear Corp. v. General Atomic Co.*, 96 NM 155, 247 (1980) (alleged bias must be personal not judicial, meaning it must "stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case"). In contrast, legal bias—that based on the judge's understanding of the law, or what the judge learned from his or her participation in a case—is allowed. Indeed, a decision maker is expected to have a preexisting knowledge and understanding of the law, and to make findings of fact based on evidence

[2] Besides the fact that the motion was directed in part to the undersigned, the undersigned would also arguably be authorized to consider the merits of the motion to the extent it fails to meet the timeliness criteria of NMAC 11.21.1.14(A). To the extent the criteria of the PELRB rule are not met and the motion is instead considered under case law, it should be subject to the general legal standard that adjudicators determine disqualification motions against them in the first instance, subject to review in the ordinary course of reviewing the adjudicator's final order. *See* NMAC 11.21.1.14(A) (requiring only that timely filed motions be filed with the board).

introduced at trial. *See, e.g.,* NMRA 1-015(B) (pleadings are deemed amended to conform with evidence received into the record when the issue is "tried by express or implied consent of the parties"), and *Wynne v. Pino*, 78 N.M. 520, 522 (1967) (when the issues is tried by express or implied consent, "the trial court is obliged to treat the issue in all respects as it had been raised in the pleadings") (emphasis added).

Equally prohibited as actual bias, of course, is the appearance of impropriety. *See Reid v. New Mexico Bd. of Examiners in Optometry*, 92 NM 414, 416 (1979) (the inquiry is not only whether a board member is "actually biased or prejudiced, but whether" there would be an appearance of impropriety because "there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him"). However, the appearance of impropriety issue or whether a decision maker "should" be disqualified, like the "actual prejudice" issue, still requires extrajudicial bias. *United Nuclear, supra* at 247.

For example, New Mexico courts have determined that an appearance of impropriety exists where a board member expresses an opinion regarding the outcome of the case prior to a hearing. *Reid, supra.* New Mexico courts have also determined that an appearance of impropriety exists where an administrative hearing examiner was being sued in court by a party before him; the party continually referenced the civil suit "every time that there was any kind of a real dispute" in the administrative proceeding; the hearing examiner "expressed concern" on the record "for the financial impact the suit would have on him;" and the hearing examiner admitted to being intimidated by the party suing him. *See City of Albuquerque, supra* at ¶ 4.

Here, however, nothing in the movant's Affidavit suggests either "an opinion on the merits on some basis other than what the judge learned from his participation in the case," *see United Nuclear*, *supra* at247 (concerning the test for "actual bias"), or "a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him." *See Reid*, *supra* at 414 (the test for the appearance of bias or impropriety). In particular, the motion is unfounded for the following reasons.

The facts alleged in ¶ 3 of the movant's supporting Affidavit cannot establish bias against it because the claim about which the undersigned questioned the Union at the December 4, 2007 proceedings was dismissed, and therefore decided in the movant's favor. The facts alleged in ¶¶ 4-6 of the movant's supporting Affidavit cannot establish bias against it because black letter rules of civil procedure require decisions be rendered based on the evidence received without objection at trail.[3]

Nor do the facts alleged in ¶¶ 7-9 of the movant's supporting Affidavit establish bias when viewed in context. At the April 25, 2008 Board meeting, the undersigned was repeatedly urging the Board to review the actual record below if it had factual questions, rather than posing such questions to the parties, because the Department was making factual assertions to the Board contrary to the parties' express stipulations at the hearing. *See* Case 150-07, Stipulations, Exhibit 7, ¶¶ 7-8, 10, and 17-18.[4]

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[3] *See* NMRA 1-015(B) (pleadings are deemed amended to conform with evidence received into the record when the issue is "tried by express or implied consent of the parties") and *Wynne v. Pino*, 78 N.M. 520, 522 (1967) (when the issues is tried by express or implied consent, "the trial court is obliged to treat the issue in all respects as it had been raised in the pleadings") (emphasis added); *see also National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH*, 03-PELRB-2005 (Oct. 19, 2005) (applying the principle to PELRB proceedings).

[4] Specifically, the Department sought to argue the aborted meeting between Sgt. Fernandez and the Warden concerned a discipline rather than a grievance (such that the Governor's face-to-face directive concerning grievances would not apply), solely because the Union used the term "oral response meeting," which as a legal term of art relates to pre-disciplinary meetings. However, the terms is also a factual description of

Similarly, the facts alleged in ¶ 11 of the movant's supporting Affidavit do not establish bias against it, when the referenced occurence is considered in its entirety. The undersigned advised *both* parties seriatim on April 25, 2008 that she would be seeking to schedule the remand hearing as soon as possible after reviewing transcripts the Department had just agreed to provide, and after Department counsel's calendar cleared up. In any event, *ex parte* communications concerning procedure are not improper, provided one side is not likely to obtain an advantage, and the opposing side (in this case the Union) is promptly notified of the substance of the conversation. *See* Notice of Withdrawal at 2, attached herein as Exhibit B.[5]

Finally, the facts alleged in ¶¶ 12-15 of the movant's supporting Affidavit do not establish bias against it, because the issuance of subpoenas was authorized and proper under both PELRB rules and the circumstances. Under NMAC 11.21.1.19(B), PELRB hearing examiners have full authority to issue subpoenas on their own initiative. *Id.* Moreover, this rule is a reasonable interpretation of hearing examiner's powers under the Public Employee Bargaining Act, since it is a general and well-established principle that administrative hearing officers have a duty to fully develop the record before them, in

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both discipline- and grievance-related meetings and it was at all times clear from the context that the Union used the term in its lay or descriptive sense to describe a grievance meeting, as evidenced by the parties' stipulations.

[5] The undersigned recused herself in Case 150-07 because an agent of a significant witness provided the movant with an affidavit suggesting the witness's agent perceived a bias in the undersigned after observing only the second communication, that with the Union representatives. *See* Notice at 3-4. Had no question been raised concerning a significant witness's perception of bias, the undersigned could not properly have recused herself from Case 150-08 under the facts alleged. *See* New Mexico Code of Judicial Conduct, NMRA 21-400(A) and 21-300(B)(1), and Model Code of Judicial Conduct, Canon 3E(1) and 3B(1) ("a judge is disqualified and shall recuse himself [or herself] in any proceeding in which his [or her] impartiality might reasonably be questioned," but a judge nonetheless "shall hear and decide matters assigned ... except those in which disqualification is required") (emphasis added); *see also City of Albuquerque, supra*, at ¶ (recognizing that *Reid* and other cases concerning the duties and responsibilities of hearing examiners represent a paraphrasing of state and federal codes of judicial conduct).

light of the limited nature of subsequent review. *See* Charles H. Koch, Jr., Administrative Law and Practice § 5.25 (2d ed. 1997) ("the presiding official is pivotal to the factfinding function of an evidentiary hearing and hence, unlike the trial judge, an administrative judge has a well established affirmative duty to develop the record"); *see also New Mexico State Board of Psychologist Examiners v. Land*, 2003 NMCA 34, ¶ 12, 133 NM 362, 366 (the hearing examiner below determined that a full evidentiary hearing was required in spite of party stipulations as to many issues including the lack of need for further hearing, because the hearing examiner determined that other issues had to be considered to enable a "fair judgment" about sanctions). In the instant case, the undersigned believed the Board's oral order of remand was effective as of April 25, 2008. Additionally, the subpoenas were served through counsel for, or the counsel who had previously called, the subpoenaed witnesses.

Accordingly, the movant's Affidavit does not "unabashedly demonstrate[] a cumulative bias in favor of the Complainant" in Case 150-07, and much less does it demonstrate a general bias against the Department and in favor of the Union which would influence all future cases between these two parties.

III. The motion is forwarded because it presents a novel question of law.

The undersigned hereby forwards the instant disqualification motion to the PELRB, despite having concluded in Section I and Note 2, *supra*, that timely filing and a facially valid claim should be preconditions for delaying the proceedings on the merits while the PELRB conducts an inquiry under NMAC 11.21.1.14(A). The undersigned does so because it is a novel question whether a party can permissibly delay proceedings by seeking disqualification of a hearing examiner based on actions in a prior case, when

the facts of the prior case are not raised in the instant case although the Union Petitioner and Respondent Agency are the same. Additionally, as previously noted, this is a recurrent issue raised by this agency.

Moreover, it is also a novel question as to whether, by what standards, and by whom shall motions inconsistent with the strict language of NMAC 11.21.1.14(A) be considered. *See* Section 1, *supra*, and Note 5, *supra*. Therefore, in forwarding the instant motion the undersigned respectfully requests the Board to also give some guidance as to when motions for disqualification should be forwarded under NMAC 11.21.12.14(A) and/or New Mexico case law, and when—if ever—a hearing examiner may refuse to forward such a motion based on untimeliness and/or facial invalidity.

Issued in Albuquerque, New Mexico this 20th day of January 2009.

Pilar Vaile
Deputy Director

STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR REALTIONS BOARD
2929 Coors NW, Suite #303
Albuquerque NM 87120
(505) 831-5422 Telephone
(505) 831-8820 Facsimile

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 18, AFL-CIO, and PAUL SANGALLI
1202 Pennsylvania Street NE
Albuquerque NM 87110
(505) 266-2505 Telephone
(505) 266-2404 Facsimile

Petitioner,

vs. PELRB Case Number 136-08

NEW MEXICO CORRECTIONS DEPARTMENT,
Office of General Counsel
PO Box 27116
Santa Fe, NM 87502-0116
(505) 827-8560 Telephone
(505) 827-8685 Facsimile

01-12-09A08:12 FILE

Respondent.

MOTION TO DISQUALIFY HEARING EXAMINER

COMES NOW the New Mexico Corrections Department (Respondent), through its counsel of record, Carlos Elizondo, pursuant to NMAC 11.21.1.14 (2004) and states the following as the Respondent's Motion to Disqualify Hearing Examiner:

1. This matter was heard at a scheduling hearing on October 21, 2008.

2. Previously, in PELRB Case Number 150-07, the Hearing Examiner, Pilar Vaile, engaged in behavior that "a reasonable person would perceive as bias." See *City of Albuquerque v. Chavez*, ¶15, 123 N.M. 428, 941 P.2d 509 (holding that public entity has a right to a hearing examiner who meets an "objective appearance of fairness" test). In *City of Albuquerque v.*

Chavez, ¶15, 123 N.M. 428, 941 P.2d 509 (Ct. App. 1997) the New Mexico Court of Appeals "clarified when a [] hearing officer should disqualify himself or herself." See also *Motion to Disqualify Hearing Examiner* in PELRB Case Number 150-07 attached hereto as Exhibit A and incorporated herein (setting out facts showing objective appearance of bias against NMCD in that case).

3. NMCD alleges that this is a situation "where a reasonable person would have serious doubts about whether the hearing officer could be fair" and therefore "it is inappropriate for the Hearing Examiner to hear"[1] this case.

WHEREFORE, Respondent respectfully requests that the Hearing Examiner disqualify herself or be removed from this case by the board.

Respectfully submitted,

OFFICE OF GENERAL COUNSEL
NEW MEXICO CORRECTIONS DEPT.

Carlos Elizondo
Deputy General Counsel
PO Box 27116
Santa Fe, NM 87502-0116
(505) 827-8560

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy foregoing pleading was faxed/mailed to opposing counsel, Shane Youtz, Esq./Brandt Milstein, Esq., 900 Gold Ave. SW, Albuquerque NM 87110, on January 7, 2009:

Carlos Elizondo

[1] *City of Albuquerque v. Chavez*, ¶15, 123 N.M. 428, 941 P.2d 509 (Ct. App. 1997).

STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR REALTIONS BOARD

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

05-06-08A11:01 FILE

Complainant,

vs.

PELRB Case Number 150-07

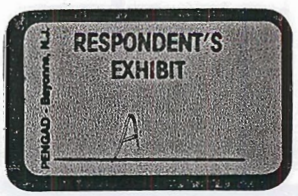
NEW MEXICO CORRECTIONS DEPARTMENT,

Respondent.

MOTION TO DISQUALIFY HEARING EXAMINER

COMES NOW the New Mexico Corrections Department (Respondent), through its counsel of record, K. Janelle Haught, pursuant to NMAC 11.21.1.14 (2004) and states the following as the Respondent's Motion to Disqualify Hearing Examiner:

1. This matter was originally heard on the merits on December 3rd and 4th, 2007.
2. Per the Hearing Examiner, the issue to be decided was whether "Mr. Fernandez [acted] in his capacity of a union steward or not." (Transcript of Proceedings 6:24 –25, December 3, 2007).
3. During the Complainant's oral closing argument at the hearing on the merits, the Hearing Examiner stopped Complainant's counsel and asked him questions. She noted: "I know it's not normal to – I know that normally I only ask questions of counsel during something like a motion to dismiss and when we're dealing with legal issues. But I want to hear your – how you would argue this." (Transcript of Proceedings 257:13 – 18, December 4, 2007).



Through asking questions during the Complainant's oral closing arguments, the Hearing Examiner assisted Complainant's counsel in crafting his arguments.

4. The Hearing Examiner issued a Report on the matter on February 6, 2008. In her Report the Hearing Examiner determined two issues: 1. whether Mr. Fernandez acted in his capacity of a union steward or not.; and, 2. whether the "Department violated the CBA/interfered with Sergeant Fernandez' performance of union business by failing or refusing to provide or allow a face-to-face meeting between Warden Moya and Sergeant Fernandez, attendant to directing an employee to pick up the Warden's response on a Step 2 grievance concerning that employee."

5. The Complainant failed to allege the second issue in the complaint it filed in the PPC. Per the Petitioner's Complaint, Enrique Fernandez alleges he was to attend an oral response regarding a contemplated action (as opposed to a face to face meeting regarding a grievance).

6. Nonetheless, the Hearing Examiner made a determination regarding an issue, which was not presented to the Board and in which there is no testimony or evidence to substantiate.

7. On April 25, 2008, the Respondent's Notice of Appeal and request for oral arguments were heard by the PERLB.

8. During the Respondent's oral arguments before the PELRB, the Hearing Examiner interrupted counsel for the Respondent, although the Hearing Examiner was not a party to the proceeding. The Hearing Examiner did not

interrupt counsel for the Complainant. See Affidavit of Sandy Martinez, attached hereto and marked as Exhibit 1.

9. After the oral arguments when the Board stated it was remanding the case, the Hearing Examiner again interrupted counsel for the Respondent when she was speaking to the Board. See Exhibit 1.

10. The Board remanded the case back to the Hearing Examiner to hear evidence on six issues. As of the date of this filing, the Board had not issued a written Order regarding the Remand.

11. Following the PERLB's oral order remanding the case to the Hearing Examiner, Sandy J. Martinez, a member of the audience, overheard the Hearing Examiner assure to counsel for the Complainant and Sam Chavez, AFSCME Council 18 Staff, that she would "get this case done quickly" or words to that effect. Counsel for Respondent was not included in the conversation. See Exhibit 1.

12. Nonetheless, on April 29, 2008, the Hearing Examiner issued subpoenas. The Hearing Examiner also set this matter for a Hearing on the remand on May 21, 2008.

13. The subpoenas issued by the Hearing Examiner on the remand were clearly not properly served and there was apparently no attempt to do so, giving the appearance the subpoenas were issued to harass Respondent.

14. The subpoenas issued by the Hearing Examiner were issued prior to the Board issuing a written Order regarding the remand.

15. Additionally, it appears the Hearing Examiner is attempting to try this PPC herself by issuing subpoenas, when it is the role of the Complainant and Respondent to determine whom they will call as witness and what evidence to present.

16. The Hearing Examiner has unabashedly demonstrated a cumulative bias in favor of the Complainant, based on paragraphs 2 through 15, above. As a result, the Hearing Examiner cannot fairly or impartially consider the issues in the remand.

WHEREFORE, Respondent respectfully requests that the Hearing Examiner be removed from this case.

Respectfully submitted,

OFFICE OF GENERAL COUNSEL
NEW MEXICO CORRECTIONS DEPT.

K Janelle Haught
Deputy General Counsel
NMCD
PO Box 27116
Santa Fe, NM 87502-0116
(505) 827-8560

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy foregoing pleading was faxed/mailed to opposing counsel:

Shane Youtz, Esq. /Brandt Milstein, Esq., 900 Gold Ave. SW, Albuquerque NM 87110

And

Robert P. Tinnin, Jr., 500 Marquette NW, Albuquerque NM 87102, on this 2nd day of May, 2008

K. Janelle Haught

STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR REALTIONS BOARD

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

Petitioner,

vs. PELRB Case Number 150-07

NEW MEXICO CORRECTIONS DEPARTMENT,

Respondent.

AFFIDAVIT OF SANDY MARTINEZ

STATE OF NEW MEXICO)
)ss.
COUNTY OF SANTA FE)

I, Sandy Martinez, being first duly sworn under oath, states the following:

1. My name is Sandy J. Martinez.
2. I am the Labor Relations Manager with the State Personnel Office.
3. I have served in this capacity since September 2006.
4. I attended the aforementioned PPC, which was heard on December 3rd and 4th, 2007.
5. On April 25th, 2008, I attended the Public Employer Labor Relations Board, in which the Notice of Appeal and request for Oral arguments were to be heard.
6. During the Respondent's oral arguments, the Hearing Examiner interrupted counsel for the Respondent. The Hearing Examiner did not interrupt counsel for the Petitioner.

STATE'S EXHIBIT
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7. After the oral arguments when the Board stated it was remanding the case, the Hearing Examiner interrupted counsel for the Respondent when she was speaking to the Board.
8. Immediately after the case was remanded by the Board, I overheard something to the effect that Ms. Vail informed both Mr. Youtz, Council for AFSCME Council 18 and Mr. Chavez, AFSCME Council 18 Staff, that she would "get this case done quickly" or words to that effect. Counsel for Respondent was not included in the conversation.
9. FURTHER AFFIANT SAYETH NAUGHT.

Sandy Martinez
Labor Relations Manager, SPO

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this 1 day of May, 2008, by Sandy Martinez.

S.A. Zamora
Notary Public

My commission expires:
Oct 17, 2011