DECEMBER 1994 • AUTHORITY OF PELRB • LOCAL ORDINANCES

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

American Federation of State, County and Municipal Employees, AFL-CIO and Los Alamos County Firefighters Association, International Association of Firefighters, AFL-CIO Complainants, vs. The Incorporated County of Los Alamos Respondent.	Case No. PPC 1-93(7)

DECISION AND ORDER OF THE NEW MEXICO PUBLIC EMPLOYEE LABOR RELATIONS BOARD

I. PROCEEDINGS

On April 1, 1993, Complainants American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") and Los Alamos County Firefighters Association, International Association of Firefighters ("Firefighters") (collectively, "Labor Organizations") filed their original prohibited practice complaint ("PPC") in this matter alleging that Respondent Incorporated County of Los Alamos ("County") violated the Public Employee Bargaining Act, NMSA 1978,

Sections 10-7D-1 through 10-7D-26, ("PEBA")[1] by including various provisions in its Collective Bargaining Ordinance, Ordinance No. 85-163 ("Ordinance"). On February 17, 1994, the Labor Organizations filed an amended PPC. The amended PPC alleged that approximately 47 provisions of the Ordinance violate the requirements for such local ordinances set forth in Section 26(C) of PEBA and therefore constitute prohibited practices within the meaning of Section 19(G), which makes it a prohibited practice for a public employer to violate any provision of P.E.B.A.

The County filed answers to the PPC and the amended PPC. In its answer to the amended PPC, the County denied that it had violated PEBA in any of the ways alleged and raised a number of threshold issues as affirmative defenses.

The Board's Hearing Officer, James J. Ashe, conducted a hearing in the matter commencing on March 2, 1994, during which the parties presented testimony, documentary evidence and argument. In addition, the parties filed both pre-hearing and post-hearing briefs with the Hearing Officer. On August 26, 1994, the Hearing Officer issued his report in this matter. On September 26, 1994, the County filed with the Board its notice of appeal and exceptions to the Hearing Officer's report. The Labor Organizations filed a response to the County's appeal and exceptions.

The Board gave preliminary consideration to this matter at its regular meeting on November 16, 1994, at which time it requested briefs from the parties, which thereafter were filed. The Board

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[1] Provisions of PEBA are referred to herein by section number.

heard oral argument, further deliberated on the matter, and decided the issues presented at its special meeting that commenced December 9, 1994, and was recessed and continued on December 13 and December 20, 1994. Having carefully considered the Hearing Officer's Report,[2] the parties' briefs, the arguments of counsel at the special meeting, as well as the record made before the Hearing Officer, the Board hereby issues its decision.

II. THRESHOLD ISSUES

A. Jurisdiction: Separation of Powers, Legislative Delegation, Declaratory Judgment Act, Exhaustion of Remedies, Primary Jurisdiction

The County has excepted to the Hearing Officer's rulings that the separation of powers doctrine; an alleged absence of legislative delegation to the Board; the Declaratory Judgment Act; and the doctrine of primary jurisdiction do not deprive the Board of jurisdiction in this matter. The County also excepts to the Hearing Officer's ruling that the doctrine of exhaustion of administrative remedies establishes Board jurisdiction at this stage in this matter. We discuss these related issues together.

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[2] The Hearing Officer stated at the hearing that he did not believe that he was bound by the Board's decision in AFSCME v. Santa Fe County, 1 PELRB No. 1, issued on November 18, 1993, ("Santa Fe County") the first decision that this Board issued following an adjudicatory hearing in a prohibited practices case. In addition, in his report, the Hearing Officer often failed to cite that decision as controlling authority even when dealing with an issue similar or identical to an issue that we decided there. We believe that the Board's hearing officers are bound by formal decisions of this Board. We have incorporated the findings, conclusions and reasoning of Santa Fe County into this decision and order where applicable. We affirm the Hearing Officer's findings, conclusions and reasoning only to the extent consistent with this Decision and Order.

1. Separation of Powers and Asserted Lack of Delegation of Authority to the Board

Although the County, in its Motion to Dismiss, strongly contended that the constitutional separation of powers doctrine barred the Board from passing on the merits of the County's Ordinance, the County later abandoned separation of powers as a separate argument.[3] Accordingly, we treat separation of powers only briefly.

As we pointed out in Santa Fe County (Slip Op. at 14), addressing the separation of powers argument the respondent had made there, our courts repeatedly have upheld, against separation of powers challenges, the Legislature's delegation of both quasi-legislative and quasi-judicial functions to administrative bodies, so long as it has set specific standards for the exercise of those functions. See, Montoya v. O'Toole, 94 N.M. 303, 610 P.2d 190 (1980) (quasi-judicial functions); Fellows v. Shultz, 81 N.M. 496, 498, 469 P.2d 141 (1970) (same); City of Albuquerque v. Burrell, 64 N.M. 204, 210-211, 326 P.2d 1088 (1958) (quasi-legislative functions in labor matters). In PEBA, the Legislature set specific

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[3] Specifically, in its Reply Memorandum on Motion to Dismiss (at 15) the County stated: "After further analysis, the County believes [the separation of powers] issue is adequately covered by the . . . arguments that (1) the Act does not grant the Board such authority; (2) that the Act therefore does not displace the district courts' authority to construe statutes to determine the validity of ordinances under the Declaratory Judgment Act . . . and (3) that the Act in any event does not grant the Board the authority to review a home rule county's . . . labor relations ordinance." Although the County excepted to the Hearing Officer's finding that separation of powers does not deprive the Board of jurisdiction, the County did not brief that issue to the Board.

standards for the Board to use in determining whether local collective bargaining ordinances are lawful. (See PEBA Sections 10(A) and 26(C) and our discussion of PEBA's delegation of authority to the Board, below.)

As we also pointed out in Santa Fe County (Slip Op. at 11-15), it is both common and lawful throughout the United States for administrative agencies to perform both quasi-legislative and quasi-judicial functions so long as aggrieved parties are afforded a right to judicial review. See, 1 K.Davis, Administrative Law Treatise, 1989 Supp., Sec. 2:2-2 at 21-22; Public Employees Relations Commission v. City of Naples, 327 So.2d 41, 43 (Fla.Ct.App. 2d Dist., 1976) (delegation to state labor board of authority to determine whether local collective bargaining ordinances meet state standards does not violate separation of powers principles given right to judicial review). PEBA (in Sec. 23) expressly grants affected persons a right to obtain judicial review of Board decisions.

The County contends that the Legislature, in PEBA, did not delegate to the Board the authority to determine whether local collective bargaining ordinances comply with PEBA's standards for such ordinances. The County notes correctly in this regard that PEBA Section 26(C) does not expressly state that the Board has authority to determine whether a local collective bargaining ordinance meets the requirements contained in that section. The County reads Section 26 of the statute in isolation from the rest. Contrary to this approach, it is settled that different

provisions of a single statute must be read in harmony so as to give meaning and effect to each. AA Oilfield Service, Inc. v. State Corporation Commission, ___ N.M. ___, 881 P.2d 18 (1994).

As we stated in Santa Fe County (Slip Op. at 9):

> PEBA . . . affirmatively grants to the board express authority to resolve challenges to specific provisions of local collective bargaining ordinances when [they] are alleged to constitute prohibited practices . . . . 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 certain express requirements that a non-state public employer must incorporate in its collective bargaining 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 specific requirements that Section 26(C) of PEBA places upon such ordinances, constitutes a "fail[ure] to comply with [a] provision" of PEBA within the meaning of Section 19(G), a charge which this Board has the express statutory authority to resolve. It is obvious, we think, that the Board could not carry out that statutory responsibility without reviewing the provisions of the ordinance alleged to constitute prohibited practices and determining whether or not [they] conform to the requirements of Section 26(C).

The same analysis applies here.

Moreover, the County's argument that the Legislature has not delegated to the Board the authority to rule on the validity of local collective bargaining ordinances is controverted by PEBA Section 10, one of the Sections of PEBA with which, under Section 26(C), a local collective bargaining ordinance "shall comply." Section 10 expressly empowers the Board to approve or disapprove

local collective bargaining boards "created by ordinance . . ." depending on whether the ordinance establishing the local board meets specified criteria for structure, tenure, appointment, and payment of local board members. The County's Ordinance would create such a board, which, however, cannot function under PEBA without this Board first approving the relevant provisions of the Ordinance. Finally, the Legislature's delegation of authority to the Board to determine whether the provisions of a local bargaining ordinance comply with the state statute is reflected in Section 10(A): "A local board shall follow all procedures and provisions of the Public Employee Bargaining Act . . . that apply to the [state] board unless approved by the [state] board."[4] (Emphasis added.)

We conclude, contrary to the County's contention, that the Legislature has clearly delegated to the Board the authority to determine whether provisions of a local public body's collective bargaining ordinance comply with the standards that PEBA establishes for such ordinances when a prohibited practice complaint filed with the Board challenges those provisions.[5]

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[4] Our insertion of the word "state" before "board" in this quote reflects the definition of the term "board" contained in Section 4(C) of PEBA: "the public employee labor relations board," that is, this Board.

[5] See Judge Herrera's Final Order affirming the Board's decision in Santa Fe County, American Federation of State, County and Municipal Employees (AFSCME) vs. County of Santa Fe, First Judicial District Case No. SF 93-2174, July 8 1994. "1. The PELRB was set up and designed specifically for purposes of determining compliance with the Public Employee Bargaining Act . . . 2. The PELRB has jurisdiction to review a local collective bargaining ordinance enacted under the authority of PEBA Section

2. Declaratory Judgment Act

The County contends that the Declaratory Judgment Act (NMSA 1978 Sections 44-6-1 through 44-6-15) grants the district courts exclusive authority to determine the validity of an ordinance. We rejected the same contention in Santa Fe County. As we said there:

> 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. Indeed, the . . . Declaratory Judgment Act . . . 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, with the District Courts, to determine rights under wills. Similarly, the Human Rights Commission has authority to determine rights under the New Mexico Human Rights Act and the validity of contracts that may affect those rights.

Santa Fe County, Slip Op. at 8 and n. 7.

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 the Declaratory Judgment Act. Indeed, the Supreme Court in City of Albuquerque v. New Mexico Public Service Commission, 115 N.M. 521, 854 P.2d 348, (1993) noted with approval the state Public Service Commission's rulings on whether a city ordinance conformed to the requirements

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26(C), by a public employer other than the state, in order to determine the compliance of the ordinance with the terms of PEBA."

of the Public Utility Act. The Court further noted with approval the state commission's determination that it had jurisdiction to decide that matter. Id.

. Finally, as we noted in Santa Fe County, 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 before PEBA was.

We conclude that the Declaratory Judgment Act does not deprive the Board of jurisdiction to decide whether provisions of a local public body's collective bargaining ordinance violate the requirements of PEBA Section 26(C) and therefore constitute prohibited practices under Section 19(G).

3. The Doctrines of Exhaustion and Primary Jurisdiction

The County maintains that the doctrine of exhaustion of administrative remedies does not establish the Board's authority in a case such as this to proceed with its administrative adjudication. In addition, the County contends that under the doctrine of primary jurisdiction, the Board should or must refrain from doing so.

The Board held in Santa Fe County that exhaustion of administrative remedies under PEBA is required, subject to later court review as provided of right in Section 23, citing State, ex

rel State Corporation Comm'n v. Zinn, 72 N.M. 29, 380 P.2d 182 (1963) and Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938). Both cases held that where the legislature has established an administrative structure for resolving a particular type of issue and judicial review is available following the administrative process, exhaustion of the administrative procedures is required. Importantly, both cases held that this was true of issues of law that arguably fall within the scope of the agency's jurisdiction. See Meyers 303 U.S. at 48-49 (even an issue of the agency's constitutional jurisdiction must be resolved initially by the agency, subject to judicial review of its decision); Zinn, 72 N.M. at 35-38 (under statutory scheme, administrative agency had jurisdiction in the first instance to determine the status of a party and its own jurisdiction, citing Meyers; because of the requirement that administrative remedies be exhausted, the district court was without jurisdiction).[6]

The County relies on Pan American Petroleum Corp. v. El Paso Natural Gas Co., 77 N.M. 481, 424 P.2d 397 (1966) for the proposition that the exhaustion requirement does not apply to

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[6] It also is worth noting that Meyers was one of the seminal decisions of the United States Supreme Court interpreting the National Labor Relations Act (NLRA), now at 29 U.S.C. 150 et seq., shortly after its passage. The frontal attack on the NLRA in Meyers was not unlike the attack on the PEBA here. As the Board noted in Santa Fe County (Slip Op. at 43 and n. 19), PEBA is patterned largely after the NLRA. Moreover, this Board has been given powers under PEBA, including the power to resolve complaints that employers have committed prohibited practices (termed "unfair labor practices" in the NLRA) borrowed directly from the powers of the National Labor Relations Board (NLRB) under the NLRA.

questions of law. We find that case completely inapposite because it deals with whether a federal administrative agency, or the state courts, had the authority to determine a question of state law that was outside the scope of the federal agency's expertise. The Court held, in that context, exhaustion was not required. Here, by contrast, we believe that the questions presented, though predominantly legal in nature, fall squarely within the expertise of this Board and squarely within the scope of issues expressly delegated to us by the Legislature. Moreover, an administrative agency has the authority to reasonably interpret the statute which it is charged with enforcing. State ex rel. Helman v. Gallegos, 117 N.M. 346, 871 P.2d 1352 (1994). See also, Beth Isreal Hospital v. NLRB, 437 U.S. 483 (1978) (NLRB has authority to interpret NLRA, and its interpretations are entitled to judicial deference.)

For the above reasons, we find that exhaustion of the Board's administrative procedures is required in this case.[7]

Our conclusion that exhaustion of administrative remedies is required here also resolves the primary jurisdiction issue. As the County acknowledged in its Motion to Dismiss (at 19), "'Exhaustion' applies when a claim is cognizable in the first instance by an administrative agency alone . . . . 'Primary jurisdiction,' on the other hand, applies when a claim is originally cognizable in the

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[7] See also, Grand Lodge of Masons v. Tax. & Rev. Dept., 106 N.M. 179, 183, 740 P.2d 1163, cert. denied, 106 N.M. 174, 740 P.2d 1158 (1987). ("the legislature, in enacting a comprehensive scheme for administrative and judicial review, has provided the exclusive remedy . . . [which] must be exhausted"); Smith v. Southern Union Gas Co., 58 N.M. 197, 269 P.2d 745 (1954).

courts . . . ." (Citations omitted.) The doctrine of primary jurisdiction comes into play only when a court and an administrative agency have concurrent initial jurisdiction and, in that event, permits the court to defer to the agency's expertise. See, New Mexico Association for Retarded Citizens v. State of New Mexico, 678 F.2d 847 (10th Cir. 1982); Mountain States Natural Gas Co. v. Petroleum Corporation of Texas, 693 F.2d 1015 (10th Cir. 1982); Gonzales v. Whitaker, 97 N.M. 710, 643 P.2d 274 (Ct. App. 1982). We find that under these principles, even if the doctrine of primary jurisdiction did apply, it would counsel in favor of initial Board jurisdiction to resolve questions concerning whether the County committed the alleged prohibited practices under PEBA.

4. District Courts' Declining Jurisdiction and Affirming Board Jurisdiction

Regarding the overall question of the Board's jurisdiction to hear and resolve questions presented by a prohibited practice complaint filed against a local government entity alleging that provisions of its collective bargaining ordinance violate Sections 26(C) and 19(G) of PEBA, it is important to point out that, to date, one New Mexico District Court has declined to assert jurisdiction over such a matter, while another has affirmatively approved the Board's jurisdiction. Specifically, in Board of County Commissioners of Otero County et al. v. State of New Mexico Public Employee Labor Relations Board et al., Case CV-93-187, Twelfth District Court, Judge Leslie C. Smith sitting by designation, the Court quashed a temporary restraining order that

had prohibited this Board from proceeding with the Santa Fe County case and thereafter issued an order dismissing the local government plaintiffs' complaint for declaratory and other relief on the ground the Court "lack[ed] subject matter jurisdiction."[8] Los Alamos County, Respondent here, was a party plaintiff in that case and did not appeal judge Smith's order.

In American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO vs. County of Santa Fe, Case SF-93-2172, First Judicial District, Judge Steve Herrera issued a Final Order July 8, 1994 (hereinafter "AFSCME") affirming the Board's decision and order in Santa Fe County. In his Order, Judge Herrera found, inter alia, that "The PELRB was set up and designed specifically for purposes of determining compliance with the Public Employee Bargaining Act;" "[t]he PELRB has jurisdiction to review a local collective bargaining ordinance enacted under the authority of PEBA Section 26(C), by a public employer other than the state, in order to determine compliance of the ordinance with the terms of PEBA;" "Santa Fe County must exhaust the administrative remedies of the PELRB before seeking judicial review of AFSCME's challenge to the validity of the provisions of its local collective bargaining ordinance." Although Santa Fe County filed an appeal of Judge'

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[8] As noted in Santa Fe County (at 3), the County and the other plaintiffs had asked the Court in Otero to assert jurisdiction based on their arguments, among others, that the Declaratory Judgment Act confers exclusive jurisdiction on the District Courts; separation of powers precludes Board jurisdiction; the complaining labor organization (AFSCME) lacked standing; the case was not ripe for adjudication; and that the Board had violated its own rules. The County did not appeal Judge Smith's order but raises the same arguments in this case.

Herrera's order in the Court of Appeals, it later voluntarily dismissed the appeal. Consequently, Judge Herrera's order, like Judge Smith's, is final. In these final orders by two New Mexico District Courts, we find strong support for our continued assertion of jurisdiction in matters such as the present case.

B. Ripeness and Standing

The Hearing Officer found that this case is ripe for determination by the Board and that the Labor Organizations have standing to bring it. The County excepts to these findings, re-asserting arguments it made to the Hearing Officer.

Regarding ripeness, the County contends essentially that in passing its Ordinance, it took no concrete action that has yet had any real effect, and that the Labor Organizations in challenging the Ordinance simply speculate about what possibly might happen in the future regarding the County's treatment of employees and labor organizations under the terms of the Ordinance. Accordingly, the County asserts, there is not, at this point in time, any actual controversy for the Board to decide.

With respect to the question of standing, the County contends that the Labor Organizations have insufficient interest to bring their complaint because neither organization has been certified to represent any employees of the County. Further, the County contends that neither Labor Organization has alleged sufficient injury to give it standing, citing DeVargas Savings & Loan Ass'n v. Campbell, 87 N.M. 469, 535 P.2d 1320 (1975). The County's ripeness

and standing arguments are essentially the same arguments that the County of Santa Fe made, and the Board rejected, in Santa Fe County.[9] The Board's Santa Fe County decision was affirmed in all respects, including, expressly, ripeness and standing, on appeal to the First Judicial District Court in AFSCME.[10]

With respect to ripeness, the Board stated in Santa Fe:

> 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. . . . The County has taken specific and concrete actions in deliberating on . . . 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 . . . . The Ordinance itself defines . . . collective bargaining-related rights . . . and sets forth the procedures for implementing those rights. 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 . . . to which the requirements of Section 26(C) expressly apply.

Santa Fe, Slip Opinion at 23-24. (Emphasis in the original.) Accordingly, and in view of the well settled principle that a legislative enactment may be unlawful on its face, the Board found in Santa Fe that the collective bargaining ordinance under

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[9] Los Alamos County, the Respondent here, participated in Santa Fe County as an amicus.

[10] The County of Santa Fe filed a timely appeal of Judge Herrera's order in AFSCME but thereafter dismissed its appeal.

challenge there was ripe for adjudication. For the same reasons, the same conclusion follows here.

With respect to standing, the Board in Santa Fe stated:

> The County and employer amici assert that AFSCME lacks standing . . . 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 . . . . [T]he County cites DeVargas Savings & Loan Ass'n v. Campbell, 87 N.M. 469, 535 P.2d 1320 (1975). . . . [W]e 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, also apply to executive branch administrative proceedings. That is not the case, for "judicial standing, affected by Article III of the Constitution, differs from administrative standing . . . Administrative standing may be derived from . . . specific agency statutes."

Santa Fe, Slip Op. at 15-16 (citations omitted). There the Board, having found that "administrative standing is a more flexible concept than judicial standing" (Id. at 16), and looking for guidance to the policies of PEBA[11] and the procedures developed under the National Labor Relations Act went on to fashion its own rule of administrative standing before the Board:

> 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

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[11] "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 . . . '." (Santa Fe County, Slip Op. at 17, quoting Section 2 of PEBA.)

> subject to harm. If so, the complainant will have administrative standing.

Id., Slip Op. at 18. The Board then found that the complaining labor organization, AFSCME (which is also one of the complainants here), was a labor organization that was granted express rights under PEBA, including the right to take actions necessary to become the certified representative of county employees, and whose purposes included the protection of employee rights under PEBA. Therefore, the Board found, although AFSCME was not then certified to represent any of Santa Fe County's employees, it nevertheless met the Board's administrative standing test by demonstrating a reasonable interest in the outcome of the proceeding and the potential for harm as a result of the actions complained of (ie. Santa Fe County's enactment of its collective bargaining ordinance).[12] As noted, the Board's finding that AFSCME had standing was expressly affirmed in Judge Herrera's Final Order upholding the Board.

In the present case, the complaining Labor Organizations are in a significantly stronger position with respect to standing than was AFSCME in Santa Fe County. Undisputed record evidence here shows that one of the organizations in the present case, Firefighters, has filed a petition with the Board to be certified as the exclusive bargaining representative of the County's fire department employees. Therefore, Firefighters' interest in the

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[12] The Board in Santa Fe further found that even if the standards of judicial standing applied to its administrative proceedings, AFSCME had demonstrated sufficient injury or threat of injury to achieve such standing. Slip Op. at 21.

present proceeding, and the potential harm to it and its members if the County's Ordinance is approved are clearer and stronger than was AFSCME's in Santa Fe County. Further, the record here, unlike the record in Santa Fe County, contains undisputed evidence that AFSCME is actively organizing County employees. Therefore, AFSCME's stake in the outcome of the controversy is clearer and stronger here than it was there. Accordingly, we find that AFSCME and Firefighters have administrative standing to file and prosecute their complaint.[13]

Relevant to both ripeness and standing issues, the County has excepted to the Hearing Officer's conclusion that the case or controversy requirement in Article III of the U.S. Constitution is not applicable to the present administrative proceeding. We agree with the Hearing Officer's conclusion in this regard, but find that the issues presented to us here are sufficiently concrete and the parties sufficiently adverse to meet case-or-controversy requirements if they did apply.

C. Home Rule

Excepting to the Hearing Officer's contrary finding, the County contends that, because it is a home rule jurisdiction under the New Mexico Constitution (Article X, Sections 5 and 6) and implementing legislation, it has legislative powers that shield it from the Board's jurisdiction.

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[13] Further, for the same reasons stated in Santa Fe County at Slip Op. 21-22, we find that even if judicial standing requirements were applied to this administrative proceeding, AFSCME and Firefighters would have standing.

Article X, Section 6D of New Mexico's Constitution provides that a home rule jurisdiction "may exercise all legislative powers and perform all functions not expressly denied by general law or charter . . . ". The County correctly notes that the current legal standards for determining the authority of home rule jurisdictions in relation to state statutes were set down by the Supreme Court in State ex rel. Haynes v. Bonem, 114 N.M. 627, 845 P.2d 150 (1992). There, the Court held that whether a particular statute is a "general law" within the constitutional meaning, and therefore binding on home rule jurisdictions, depends on whether it "relate[s] to a matter of statewide concern" or, instead, "implicates matters . . . of purely local concern." Id. at 114 N.M. 632.

> [T]he test . . . is the effect of a legislative enactment -- whether it affects all, most, or many of the inhabitants of the state and is therefore of statewide concern, or whether it affects only the inhabitants of the municipality and is therefore of only local concern.

Id. at 114 N.M. 633. (Emphasis in the original.) Applying this test, the Court held that while a statute mandating single-member districts for municipalities "is a general law . . . [that] embodies the important state interest of protecting against the potential inequalities associated with . . . at-large voting schemes," a statute mandating five-member local governing bodies deals directly with matters primarily of local concern and, therefore, is not a general law. Id. 114 N.M. at 633 n. 9 and 634.

In order to constitute a general law with which home rule jurisdictions must comply, it is not necessary that a statute

expressly so state. Casuse v. City of Gallup, 106 N.M. 571, 573, 746 P.2d 1103 (1987). Rather, "any New Mexico law that clearly intends to preempt a governmental area should be sufficient," for "when two statutes that are governmental or regulatory in nature conflict, the law of the sovereign controls."

In enacting PEBA, the Legislature made clear its intent to bring home rule jurisdictions under the sweep of the statute in the same ways and to the same extent as other local public entities. Thus, Section 4(Q) expressly defines the term "public employer" as "the state or any political subdivision thereof including municipalities having adopted home rule charters . . . ." (Emphasis added.) In this way, PEBA is clearer with respect to the Legislature's intent regarding home rule than statutes examined in other cases. See, e.g., Casuse v. City of Gallup, 106 N.M. 571, 746 P.2d 1103 (1987) (statute held to be a general law applicable to home rule jurisdictions despite lack of such express language).

Further, the purposes section of PEBA (Section 2) shows that the organizing and collective bargaining rights of public employees which are "guarantee[d]" by PEBA belong to New Mexico public employees in general, with due regard for the interests of "the state and its political subdivisions," in general.[14] Clearly, the

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[14] In addition, PEBA is replete with references to local public employers (or public employers other than the state), and nowhere does it make any distinction between home rule jurisdictions and non-home rule jurisdictions. In particular, Section 26(C) of PEBA, under which the County admittedly enacted its Ordinance, grants limited, conditional local autonomy to certain non-state public employers without regard to home rule status.

rights, prohibitions and duties imposed by PEBA, including the right of public employees to bargain collectively, the duty of public employers to do so, and the prohibition against public employee strikes, are matters of important statewide concern. Accordingly, in our view, the Legislature intended PEBA to apply to home rule jurisdictions, just as to other non-state public employers.[15] We conclude that PEBA is a general law applicable to home rule jurisdictions such as the County and that the Board is not divested of jurisdiction because of the County's home rule status.

D. Asserted Violations of Board Rules

The County excepts to the Hearing Officer's findings that the Board did not violate its own rules in any of the ways the County alleged. Specifically, the County contends that the Board (or its staff) violated Board rules by (1) assertedly filing the original

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[15] Courts in other states have concluded that home rule provisions of their state constitutions do not shield home rule localities from state collective bargaining statutes. See, City of Roseburg v. Roseburg City Firefighters, Local No. 1489, 292 Or. 266, 622 P.2d 755 aff'd 639 P.2d 90 (1981); Cities of LaGrande and Astoria v. PERB, 281 Or. 137, 576 P.2d 1204, aff'd on rehearing, 284 Or. 173, 586 P.2d 765 (1978); Detroit Police Officers Assoc'n v. City of Detroit, 41 Mich App. 723, 200 NW2d 722 (1972) modified on other grounds, 214 N.W.2d 803 (1974); City of Cincinatti v. AFSCME, 61 Ohio St. 3d 658, 576 NE 2d 745 (1991).

complaint in this matter before the effective date of PEBA; (2) processing the present prohibited practices matter before processing the County's application for approval of its local board; (3) holding the hearing in this matter longer than 45 days after the filing of the complaint; and (4) assertedly accepting a complaint that did not sufficiently allege prohibited practices and was otherwise facially deficient. We affirm the Hearing Officer's findings that the Board did not violate its rules in any of the ways alleged.

1. The Board's records reflect that while the Board received the original complaint in this matter a few days before the effective date of the relevant provisions of PEBA, it held the complaint and officially filed it on the effective date (April 1, 1993). There is nothing in the Board's rules which prohibits that practice.

2. While Board Rules 5.2 and 5.3 indicate that applications for approval of local boards shall be given priority and that matters other than such applications "which would come within the cognizance of [a] local board" shall be abated for a period of 60 days, we find that these rules do not preclude the Board from hearing the present matter before acting on the County's petition for approval of its local board. This is, first, because the PPC, alleging a violation of PEBA, clearly comes within the cognizance of this Board and, in the absence of a provision in the Ordinance permitting the local board to hear complaints of violation of PEBA, clearly would not come within the cognizance of the local board.

Therefore, abatement and later referral of this matter to the local board would be inappropriate. Second, the principle of giving priority to local board applications is not contravened by first determining whether an ordinance that would create a local board is lawful when its legality has been challenged before this Board.[16]

3. Although Rule 3.7 states that the Board's Director shall schedule a hearing within 45 days of the filing of a PPC, Rule 5.3 modifies the effect of Rule 3.7 by providing that all limitations periods shall be tolled while an application for approval of a local board is pending. Also, at material times, Rule 1.27 expressly granted the Director authority to take an action such as the setting of a hearing at a reasonable time beyond the time otherwise required by the Board's rules. Accordingly, we find no violation of Rule 3.7 here. Further, we believe that Rule 3.7, even if it were applicable, and even if the Board had violated it, is directory rather than mandatory and, therefore, any such violation would not deprive the Board of jurisdiction. See Littlefield v. State of New Mexico ex rel. Taxation and Revenue Dpt., 114 N.M. 390, 393, 839 P.2d 134 cert. denied, 114 N.M. 123, 835 P.2d 839 (1992).

4. We find that the PPC and amended PPC filed by the Labor Organizations sufficiently alleged the violations asserted and

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[16] In addition, Rule 6.3 (promulgated during the pendency of this matter) by its terms supersedes Rules 5.2 and 5.3 to the extent of any conflict and affirmatively requires the Board to act on a PPC challenging the ordinance that would create a local board before ruling on approval of the local board.

otherwise substantially complied with all requirements for such complaints set forth in the Board's rules.

5. Finally, the County has failed to allege or prove prejudice to it resulting from any asserted violation of Board rules. Accordingly, even if there were a technical departure from Board rules, it would not affect the outcome of this case.

III. OTHER PRELIMINARY MATTERS

The County has excepted to the Hearing Officer's failure to address its contentions that National Labor Relations Act (NLRA) precedent should not apply and that the complaining Labor Organizations failed to carry their burden of proof. In its brief to the Board, the County also has asserted that the Hearing Officer failed to accord its Ordinance the presumption that legislative enactments including local ordinances are valid, and that some of the Hearing Officer's findings of violations contravene other actions previously taken by the Board. We now address these contentions.

A. Use of NLRA Precedent

The County, in its brief to the Board, argued that NLRA precedent should not guide us in our interpretations of PEBA because the two statutes, as well as the private sector versus public sector realms in which they operate, are fundamentally different. Interestingly, some of the provisions of PEBA which the

County cites as having no parallel in the NLRA are, to the contrary, borrowed directly from it.[17]

More importantly, as we made clear in Santa Fe County, we intend to give especial weight to interpretations of the NLRA by the NLRB and reviewing courts only "where provisions of PEBA are the same as or closely similar to those of the NLRA." Id. Slip Op. at 43. The reason for this is that there is a 60-year history of interpreting and applying some of the same statutory language that is found in PEBA, including many decisions by the United States Supreme Court, and we do not believe it would be wise to ignore that history where the New Mexico Legislature, through its choice of such language, has indicated in intent to follow the federal statute. Where the two statutes are dissimilar, however (for example with respect to PEBA's prohibition of strikes and lockouts and its provisions for the constitution of local boards), we surely do not feel compelled to give weight to NLRA precedent. As we noted in Santa Fe County, our practice of giving weight to NLRA precedent where PEBA provisions are similar is the same approach taken by state labor boards and courts in many other states.[18]

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[17] Specifically, the County asserts that an employee's right under Section 5 of PEBA to refuse to participate in protected activities and the provisio in Section 17(A)(1) that "neither the public employer nor the exclusive representative shall be required to agree to a proposal or to make a concession" find "no parallel" in federal law. However, these provisions, as well as numerous other provisions of PEBA, appear to be drawn directly from the NLRA. See 29 U.S.C. 157 and 158(d).

[18] See, e.g., State ex rel. Washington Federation of State Employees v. Bd. of Trustees, 605 P.2d 1252, 1256-57 (S.Ct. en banc, 1980); Teamsters Local No. 45 v. State of Montana Bd. of Personnel Appl's, 635 P.2d 1310, 1312 (S.Ct. 1981); Fire Fighters

B. Burden of Proof

The County contends that the Labor Organizations have not met the burden of proof imposed upon them as complainants before the Board. Board Rule 1.18(b) states that "[i]n a prohibited practices proceeding, the complaining party has the burden of proof and the burden of going forward with the evidence."

Complainants submitted as evidence Ordinance No. 85-163, the Los Alamos County personnel ordinance, and the rules and regulations for implementation and administration of the personnel ordinance. They also presented testimony of witnesses regarding such issues as AFSCME's and Firefighters' status as labor organizations and their interest in this proceeding, going to the question of standing. In a case such as this, where the relevant evidence is mainly documentary and the Board's determination of the issues primarily requires it to examine and determine the sufficiency under PEBA of documents introduced, we find that a complainant meets its burden of going forward by presenting the relevant documents and its burden of proof by offering argument as to how the documents violate the statute. Accordingly, we find that the Labor Organizations have met their burden here under the Board's rule.

C. Presumption of Legislative Validity

The County asserts correctly that legislative enactments, including local ordinances, are entitled to a presumption of

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Local 1186 v. City of Vallejo, 526 P.2d 971, 977-78 (S.Ct. en banc 1974).

validity. The County also contends that the Hearing Officer, in finding provisions of the County's Ordinance invalid, failed to recognize that principle.

We acknowledge the presumptive validity of legislative enactments including ordinances. In our examination of the merits of the objections raised against the County's Ordinance in the discussion that follows, we have been mindful of this presumption. The relevant inquiry is whether the presumption of validity has been overcome when we become convinced that a particular challenged provision of the Ordinance is inconsistent with the relevant requirements of PEBA.

D. Alleged Inconsistency With Other Board Actions

The County contends that some of the provisions of its Ordinance that the Hearing Officer found inconsistent with PEBA are the same as or similar to local collective bargaining ordinances that the Board has approved in other matters. The other matters in which the County contends that the Board has approved the same or similar provisions (the matters of Valencia County and San Juan Community College) were non-litigated administrative approvals of local collective bargaining ordinances in which the parties had fully settled and resolved between themselves the prohibited practice complaints previously filed against those ordinances. Because those matters were not litigated and Board approval of the ordinances followed the parties' settlement of their issues, we

hold that the approval of those ordinances does not create any precedent binding upon us in this fully litigated case.[19]

IV. FINDINGS OF FACT

We affirm the Hearing Officer's findings to which no exception was taken that AFSCME and Firefighters are labor organizations within the meaning of Section 4(J) of PEBA; that Firefighters has 89 members among the County's employees; that Firefighters has filed a petition with the Board to be certified as exclusive representative of certain County employees; and that AFSCME has members among the employees of various local governments in New Mexico and is in the process of attempting to organize employees of the County.

We also affirm the Hearing Officer's uncontested findings that the County is a public employer within the meaning of Section 4(Q) of PEBA; that the County enacted the Ordinance on December 21, 1992; and that the County entered into a five year contract with the U.S. Department of Energy (DOE) effective December 1, 1993 for the provision of fire department services to Los Alamos National Laboratories. We do not affirm, however, and find it unnecessary to pass on, the Hearing Officer's further finding (to which the County excepted) that there is no conflict between the

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[19] Accordingly, we do not find it necessary to supplement the record, as the County has requested in its brief to the Board, to include the Valencia County and San Juan Community College labor relations ordinances.

County's obligations under the DOE contract and its obligations under PEBA. We find that this issue is irrelevant to any question of whether the Ordinance violates PEBA as alleged in this matter.

We also do not affirm and find it unnecessary to pass on the Hearing Officer's finding that the County has impermissibly and discriminatorily restricted firefighters' union solicitation activities during non-working duty hours. In our view, it is not necessary to address this issue in order to determine whether any of the challenged provisions of the Ordinance violates the requirements of PEBA. We further do not affirm and find it unnecessary to pass on the Hearing Officer's finding that lieutenants and captains of the fire department are lead employees; that they perform routine, incidental or clerical duties; and that their duties are substantially similar to those of their subordinates. This finding goes directly to the supervisory status of lieutenants and captains under the criteria set forth in PEBA Section 4(S). It is not necessary in order to determine any of the issues presented in this case and instead would be an appropriate issue for resolution in a representation proceeding under PEBA or the Ordinance.

We affirm, over the County's exceptions, the Hearing Officer's Findings XI, XII, and XIII relating to ground rules and discuss this issue further below. We find it unnecessary to pass on the County's exception to the Hearing Officer's "Finding of Fact" XIV because it is not a factual finding.

We affirm, to the extent consistent with this decision and order, for the reasons explained below, the Hearing Officer's Conclusion of Law to that the Ordinance is inconsistent with PEBA.

V. THE PROVISIONS OF THE ORDINANCE IN DISPUTE

A. Ordinance Section 3, Conflicts

The Ordinance states:

> In the event of conflict with other laws or ordinances, the provisions of the Labor Management Relations Ordinance shall not supersede other previously enacted federal, state, or local legislation.

By comparison, PEBA Section 3, Conflicts, states in relevant part, "[i]n the event of conflict with other laws, the provisions of the Public Employee Bargaining Act. . . shall supersede other previously enacted legislation," with limited, specific exceptions.

The statutory scheme for collective bargaining in the State is embodied in PEBA. It calls for mandatory bargaining over wages, hours, and terms and conditions of employment by all public employers, including those which have enacted local collective bargaining ordinances under Section 26(C). (See, especially, Sections 17(A)(1), 19(F), 26(C)(4) and 26(C)(6) of PEBA.) Accordingly, topics heretofore unilaterally determined by a public employer, such as employee grievance or complaint procedures and other personnel procedures, are now subject to mandatory bargaining with an exclusive representative if and when one is certified.

We find the provision of the Ordinance that it "shall not supersede" previously enacted local legislation violates PEBA

Section 26(C)(4) and (6) because, by inverting the statutory precept that organizing and collective bargaining legislation supercedes earlier legislation, it allows or requires the County to exclude from its statutory duty to bargain over any topic covered by its personnel ordinance and rules and regulations, including, for example, the grievance procedure contained therein, and further excludes from the bargaining duty any other topic related to wages, hours and other terms and conditions of employees' employment which may be covered by any other ordinance enacted before December, 1992.

Consequently, we affirm the Hearing Officer's finding that Ordinance Section 3 constitutes a prohibited practice and violates PEBA §26(C)(4).

B. Section 4, Definitions

Ordinance Section 4(F) provides:

> F. "confidential employee" means a person who assists and acts in a confidential capacity with respect to a management employee; and includes, but is not limited to, employees who act in a confidential capacity with respect to management employees of the personnel department, County administrator's office, County attorney's office, secretaries to department heads, and any person privy to confidential information concerning employee relations.

PEBA Section 4(F) defines "confidential employee" as "a person who assists and acts in a confidential capacity with respect to a person who formulates, determines and effectuates management policies."

We held in Santa Fe County that altering the statutory definitions in such a way as to narrow the scope of those who under

PEBA are guaranteed such rights violates Section 26(C), which requires that a local collective bargaining ordinance assure those rights to all public employees. Further, we find that under the statutory scheme for resolving bargaining unit questions, which is applicable to local collective bargaining systems (see PEBA Sections 9, 11, 13, and 26(C)(1) and (2)), the determination of which particular classes of employees may appropriately be placed in a unit is a function of the Board or local board, and is not subject to unilateral determination by a party such as the County. Applying these principles here, we find that by unilaterally determining that certain classes of employees beyond those so defined in PEBA (such as secretaries to department heads and any person privy to confidential employee relations information) are "confidential employees" and therefore are denied rights, the County has violated Section 26(C) if PEBA.

Contrary to the Hearing Officer's finding and the view of our dissenting colleague, we do not find that the definition of "confidential employee" found in the Ordinance violates PEBA in any other way.

Ordinance Section 4 (H)

The Ordinance defines "employee" as a "regular full-time nonprobationary employee of the County of Los Alamos."

PEBA Section 4(P), by comparison, defines the parallel term "public employee" in pertinent part as a "regular, non-probationary, employee of a public employer."

Under the Ordinance, an employee who is a regular, part-time employee is automatically excluded from coverage and protections with respect to rights guaranteed by the Ordinance and by PEBA -- for example, the right to organize and bargain collectively with their employer. (See PEBA Section 2; Ordinance Section 2.) In his oral argument to the Board, counsel for the County admitted that the Ordinance should omit the reference to "full-time" in order to comply with PEBA. We hold that Ordinance Section 4(H) is a prohibited practice because it denies rights that Section 26(C) requires a local collective bargaining ordinance to assure to all public employees by excluding regular employees who are other than full-time.

Ordinance Section 4(M)

The Ordinance defines "labor organization" as "any employee organization which represents employees in collective bargaining."

PEBA Section 4(J) defines "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." (Emphasis added.)

In Santa Fe County (at 60-61), we found that the same definition of "labor organization" which the County has used here violates PEBA. With respect to the definition of "labor organization," PEBA requires an ordinance 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." [PEBA §26(C) and (C)(3)]. Since 26(C) expressly requires a local ordinance to provide certain rights to a "labor organization," the Act's statutory definition of that term determines the public employer's obligations to abide by that requirement. That is, the statutory definition of the term "labor organization" determines its meaning in §26 and elsewhere in the Act.

The Ordinance defines an "employee" as a person employed by Los Alamos County. Therefore, the Ordinance on its face denies labor organization status to any organization that does not already represent employees of the County in collective bargaining. This means that a union which does not already represent County employees (such as AFSCME) does not have a right under the Ordinance to be certified to do so and that an employee who belongs to such a union is not protected under the ordinance from discrimination based on membership.

By narrowing the statutory definition, the County denies employees and labor organizations rights that PEBA Section 26 requires the County to guarantee. This constitutes a prohibited practice by violating PEBA §§26(C) and 19(G).

Ordinance Section 4(O)

The Ordinance defines the term "management employee" as "an employee who is engaged primarily in executive and management functions and is charged with the responsibility of developing, administering or officiating management policies." (Emphasis

added.) The only differences between the Ordinance and PEBA's definition of the same term are (1) the substitution in the Ordinance of the word "officiating" for the word "effectuating" in PEBA and (2) the Ordinance's omission of the statutory proviso, "[a]n employee shall not be deemed a management employee solely because the employee participates in cooperative decision making programs on an occasional basis."

We find, contrary to the Hearing Officer, that the definition of "management employee" in the Ordinance is not a prohibited practice because the use of the word "officiating"-- rather than "effectuating" --and the absence of PEBA's proviso are de minimis and insignificant departures from the Act which are not likely to have the effect of sweeping any employee into the management category who would not be in that category under PEBA. Because, as we have noted, a legislative enactment is entitled to a presumption of validity, we will presume that the absence of the proviso from the Ordinance does not imply denying statutory rights to any class of employees who are guaranteed them under PEBA. Ordinance Section 4(O), therefore, is not a prohibited practice.

Ordinance Section 4(R), "strike"

The Ordinance defines "strike" as:

> an employee's refusal, in concerted action with other employees, to report for duty or his/her willful absence in whole or in part from he full, faithful, and proper performance of the duties of employment. The definition of strike includes, but is not limited to such actions as, the blue flu, sick outs, slow downs, traffic ticket writing campaigns, mass resignations, sympathy strikes, or willful interference with the operations of the employer.

PEBA Section 4(R), by contrast, defines "strike" as "a public employee's refusal, in concerted action with other public employees, to report for duty or his willful absence in whole or in part from the full, faithful and proper performance of the duties of employment for the purpose of inducing, influencing or coercing a change in the conditions, compensation, rights, privileges or obligations of public employment."

Section 26(C)(9) requires a local collective bargaining ordinance to promote the principles of, among other sections of PEBA, Section 21, which prohibits public employee strikes. The definition of the term "strike" is an essential element in determining whether such equivalency exists. We find that the term "strike" as defined in the Ordinance is significantly broader than the same term in PEBA in that it fails to include a statement of the purpose to which an employee's absence must be directed in order for his or her absence to constitute a strike. Consequently, under a plain reading of the Ordinance, any unexcused concerted absence from work of two or more employees, whether or not it has any purpose related to changing conditions, compensation, rights, privileges or obligations of employment, would constitute a "strike" which, pursuant to another provision of the Ordinance would trigger decertification of the exclusive bargaining representative. In this way, the Ordinance fails to promote the applicable principles of PEBA and therefore violates Sections 26(C) and 19(G).

In addition, although we have no objection to a local public employer setting forth in its ordinance specific examples of activity that constitutes strike activity, we find that some of the specific examples of strike activity listed in the Ordinance, namely, slow downs, traffic ticket writing campaigns, mass resignations, and willful interference with the operations of the employer are impermissible in that they significantly expand the definition, thereby prohibiting various forms of activity that traditionally are not regarded as strike activity. In this additional way, the definition of "strike" in the Ordinance fails to promote the relevant principles of PEBA and contravenes Sections 26(C) and 19(G).

Ordinance Section 4(S)

The Ordinance contains the following definition:

> "supervisor" means 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 **retention**, promotion, discipline **or evaluation** of other employees. **In the police and fire departments sergeants, lieutenants, captains and higher ranks are classified as supervisors.**

(Emphasis added.)

PEBA Section 4(S) defines "supervisor" as:

> an employee who devotes a substantial amount of work time in 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."

(Emphasis added.)

We find that the definition of "supervisor" in the Ordinance, by including police and fire department sergeants, lieutenants, captains, and higher ranks, expands the PEBA definition and thereby denies organizing and bargaining rights to classes of employees who may be guaranteed such rights under PEBA. The County's unilateral designation of these job categories as supervisory also usurps the function of the Board or a local board, in a representation proceeding, to determine bargaining unit composition. See PEBA Sections 9, 11, 13 and 26(C)(2). In that way, we find that the definition of "supervisor" in the Ordinance is a prohibited practice.

Further, in agreement with the Hearing Officer, we find the absence from the Ordinance of the statutory proviso is significant and is a prohibited practice for the same reasons that we found its absence violations in Santa Fe County. We believe that the absence of the proviso is likely to sweep some employees into the category of "supervisor" who wouldn't be supervisors under PEBA. In this additional way, the definition of "supervisor" in the Ordinance is a prohibited practice.

C. Ordinance Sections 5

Ordinance Section 5, Rights of Employees, states:

> Employees other than management employees, supervisors and confidential employees, may form,

> join or assist any labor organization for the purpose of collective bargaining through representatives chosen by employees **through representation elections** without interference, restraint or coercion. Such employees also have the right to refuse, to form, join or assist any labor organization. **Employees shall not be required to pay "fair-share" contributions.**

(Emphasis added.)

Section 5 of PEBA, Rights of Employees, is substantively the same as Section 5 of the Ordinance except that the PEBA provision does not contain the words that appear above in bold.

In disagreement with the Hearing Officer and our dissenting colleague, we find that the requirement of the Ordinance that collective bargaining representatives be chosen "through representation elections" does not offend PEBA. This is because PEBA itself grants any public employer, including the County, the absolute right to insist on a representation election before the Board or a local board certifies a labor organization as exclusive representative of any of the public employer's employees. PEBA Section 14(C). To hold that the County has violated PEBA by inserting in its collective bargaining ordinance a provision that the County clearly would be permitted to promulgate in some other form in our opinion would exalt form over substance.

In Santa Fe County, we addressed the same issue as is presented by the provision of the Ordinance forbidding any requirement that employees make "fair share" payments. As we stated there:

> 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) . . . 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 also violates Section 26(C). It follows that Section 6 of the Ordinance violates Section 19(G) of PEBA.

Santa Fe County at 54-55.

The County here argues that the requirement in PEBA Section 9(G) that fair share "shall be left to voluntary bargaining by the parties" means that the County need not bargain about it and, therefore, can unilaterally decide that there will be no requirement of fair share contributions in any collective bargaining agreement. We believe that the County misconstrues the meaning of the statute. In context, the word "voluntary" in Section 9(G) means that the parties must be left free to bargain over "fair share," as distinguished from the Board or a local board, in its rules, imposing a requirement that employees make

such contributions. Thus, the last sentence of Section 5 in the Ordinance, removes from the scope of bargaining a mandatory subject of bargaining under PEBA Section 9(G). Because §26(C) requires an employer to "comply with the provisions of Sections 8, 9, 10, 11 and 12" of PEBA, we find that the County has violated a §26(C) requirement and, therefore, committed a prohibited practice.

D. Ordinance Sections 6 and 14(C), Management Rights

Section 6 of the Ordinance provides as follows:

> 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 shall be rendered to the citizens;
>
> E. To determine staffing requirements, create, abolish positions or 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 County of Los Alamos Labor Management Relations Ordinance.

Section 14(C) of the Ordinance provides:

> The obligation to bargain collectively imposed by the Labor Management Relations Ordinance shall not be construed as authorizing the employer and exclusive representatives to enter into any agreement that is in conflict with the provisions of any other statute or local ordinance of the County, state, federal government, or the "Management Rights" section of this Ordinance. Issues covered by the Personnel Rules & Regulations are subject only to voluntary negotiations, not mandatory negotiations, and are not appropriate subjects for consideration in the impasse procedure. Failure to reach agreement on such issues shall constitute a deletion of the issue. Should agreement be reached on any such issue and such agreement conflicts with the Personnel Rules & Regulations, the executed collective bargaining agreement shall control.

The introductory language in Section 6 and the first sentence of Section 14(C) of the Ordinance negate any duty to bargain over various subjects relating to employees' terms and conditions of employment. In Santa Fe County, essentially the same wording was found to constitute a prohibited practice. As we stated there (at 42-47):

> The duty of an employer and the exclusive representative to bargain in good faith over wages, hours and other terms and conditions of employment 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), emphasis added.) . . . .

The Ordinance . . . 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.)

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)). The NLRB and reviewing courts have interpreted that phrase in decisions spanning a period of nearly sixty years. Where provisions of PEBA are identical 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.

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, 341 F.2d 1020 (8th Cir. 1965); work rules (NLRB v. Southern Transportation, 343 F.2d 558 (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 (Electri-Flex Co., 228 NLRB 847 (1977), enf'd as modified, 570 F.2d 1327 (7th Cir.), cert. denied, 439 U.S. 911 (1978); certain changes in operations which have a significant impact on bargaining unit employees (Newspaper Printing Corp. v. NLRB, 625 F.2d 926 (10th Cir. 1980), cert. denied, 450 U.S. 911 (1981)); certain types of 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 No. 66 (1991); layoffs (Advertisers Mfg. Co., 280 NLRB 1185 (1986), enf'd 823 F.2d 1086 (7th Cir. 1987)); and discharge of employees (National Licorice Co. v. NLRB, 309 U.S. 350 (1940). The NLRB and the 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 schedules of work; 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 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 . . . 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.

We find that the other subjects listed in . . . 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; 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 effects, consequences, or impact and implementation upon bargaining unit employees of even its core managerial decisions.
>
> 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. . . . 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, and taking necessary actions in emergencies, the County has precluded bargaining not only over its decisions in these areas, but also over the impact and implementation of such decisions on unit employees. Consequently, we find that by forbidding bargaining over the mandatory subject of the impact on bargaining unit employees of managerial decisions, the County has further violated Section 26(C)(4) and 19(G) of PEBA.

There are no circumstances or facts in this case to warrant a different conclusion. Therefore, Ordinance Sections 6 and 14(C) violate Sections 26(C) and 19(G) of PEBA. In addition, we agree with the Hearing Officer's finding that Section 14(C) of the

Ordinance further violates PEBA by subjugating the duty to bargain to County ordinances in general.

E. Section 14(A), Scope of Bargaining

In pertinent Part, the Ordinance provides:

> A. The parties shall bargain in good faith on wages, hours and working conditions . . . .

PEBA Section 17, Scope of bargaining, provides in part:

> A. Except for retirement programs provided under the Public Employees Bargaining Act [Chapter 10, Article 11 NMSA 1978] or the Educational Retirement Act [Chapter 22, Article 11 NMSA 1978], public employers and exclusive representatives:
>
> (1) shall bargain in good faith on wages, hours and other terms and conditions of employment and other issues agreed to by the parties. However, neither the public employer nor the exclusive representative shall be required to agree to a proposal or to make a concession.

Section 26(C)(4) requires each local collective bargaining ordinance 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." Ordinance Section 14(A) substitutes for the statutory duty to bargain over "terms and conditions of employment" a duty to bargain over "working conditions." We find this difference to be a significant departure from PEBA which for two reasons portends a narrowing of the duty to bargain. First, we believe that a common-sense reading of the words "working conditions," as well as its common usage in labor relations parlance, implies physical or environmental conditions of work, such as safety conditions, temperature, etc., while "terms and conditions of employment" is a

much broader term, which connotes not only physical or environmental conditions of employment, but also such matters as seniority, fringe benefits, and grievance procedure. The sixty year history of delineating the scope of the words "terms and conditions of employment" in the NLRA (29 U.S.C. Section 158(d)) should not be ignored where the Legislature has used exactly the same term of art. Therefore, we find that by limiting the duty to bargain to "wages, hours and working conditions" rather than "wages, hours and other terms and conditions of employment," the County has violated PEBA Sections 26(C) and 19(G).

Cost Provisions of the Ordinance

Section 7 of the Ordinance states in part:

> D. Each Board member shall be paid $200.00 dollars per day or portion thereof for prohibited practices hearings.
>
> E. The cost of any hearing shall be borne equally by the parties to the hearing . . . .

Section 11 of the Ordinance provides in part:

> H. The cost of elections shall be borne equally by the parties.

Similar cost provisions were addressed in Santa Fe County, (at 64-65) where we said:

> 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. We also are mindful of the fact that neither PEBA, nor the statutes and rules governing access to the New Mexico courts, 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) and small, unaffiliated labor organizations to effectively assert the rights that PEBA and the Ordinance ostensibly guarantee them, as well as to be able effectively to defend themselves if they are charged with prohibited practice violations.

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 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.

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.

For the same reasons stated in Santa Fe County we find Ordinance §§7(D) and (E) and 11(H) to constitute prohibited practices here.[20] In our view, requiring private parties (labor organizations) to pay even half of the cost of elections that are

[20]We do not conclude that any fee is, *per se*, illegal under the Act. Rather, when evaluating a fee we will examine whether the public employer assesses a comparable amount for invoking the administrative procedures before other boards and commissions. Also, is the fee assessed representative of the fees charged by other boards or by the courts? We note that the county established a personnel board but does not assess a fee when the procedures of that board are used.

governmental functions under PEBA and the Ordinance is as inconsistent with the statutory scheme as the provision, in the Santa Fe ordinance, requiring labor organizations to pay the full costs of such elections.

F. Ordinance Section 15, Impasse Resolution

Section 15 of the Ordinance provides in part:

> The following impasse procedure shall be followed by the employer and exclusive representatives:
>
> (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/she may select the employer's total and complete last best offer. The fact finder may not create his\her own settlement or compromise package . . . .
>
> (4) The governing body may accept, reject, 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.

The Labor Organizations allege, and the Hearing Officer found, that the above impasse resolution procedures violate PEBA. Again, we addressed the same issue in Santa Fe County, where we stated (at 48-54):

> Section 18 of PEBA ("Impasse Resolution") includes Subsection A, procedures to be followed in negotiations between the state and exclusive representatives of state employees 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:
> >
> > (1) If an impasse occurs, either party may request from the board or local board that a

mediator be assigned to the negotiations unless the parties can agree on a mediator. A mediator with the federal mediation and conciliation service will be assigned by the board or local board to assist negotiations unless the parties agree to another mediator.

(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.

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.

* * * *

In order for the Ordinance to comply with Section 26(C)(8) it must include impasse resolution procedures "equivalent to" PEBA's. . . . To be equivalent to statutory provisions, provisions of a local ordinance need not be stated in identical language, but must be the same in all essential respects. Moreover, the County's procedures, in order to conform to PEBA's requirements, may not contravene PEBA's fundamental purposes.

We find that the provision . . . of the Ordinance prohibiting the factfinder from making any recommendation for the resolution of an impasse other than adoption of the County last, best offer or adoption of the union's last, best offer is not the same, in essential respects, as PEBA's procedure. This is because PEBA Section 18 contains no similar limitation on the scope of the factfinder's discretion in making recommendations for impasse resolution. Thus, under the state procedures, 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 and, consequently, also violates Section 19(G).

The position that the County takes . . . that 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 in state-level

collective bargaining, while Section 18(B) applies to impasse resolution in 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. 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 [the] Ordinance [by] providing that the County's governing body may impose terms of a collective bargaining agreement if the parties have not reached accord . . . [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, 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 clearly is not equivalent to the scheme for resolving local bargaining impasses found in PEBA. 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). 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 an 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. It is as inimical to the principle of good faith collective bargaining to permit an employer to unilaterally impose terms of a bargaining agreement on a union as to permit a union to unilaterally impose such terms on an employer. 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 also with the spirit and the fundamental collective bargaining purpose of the entire statute.

For the same reasons, the impasse resolution provisions of the County's Ordinance violate PEBA.

G. Ordinance Section 17, Employee and Labor Oganization Prohibited Practices

Section 17 of the Ordinance provides in part:

> An employee, labor organization or its representative shall not:
>
> B. solicit membership for an employee or labor organization during the employee's duty hours.
>
> D. interfere with, restrain or coerce any elected official, employee or representative of the employer for the purpose of gaining a concession;
>
> J. interfere with the normal process of negotiations between the duly authorized negotiating teams of the employer and the exclusive representative.
>
> L. use County time, property or equipment for union business without advance approval of the County Administrator.

We find that each of the provisions of Section 17 of the Ordinance set forth above violates Sections 26(C) and 19(G) by failing to promote the principles of the prohibited practices sections of PEBA in contravention of Section 26(C)(9). Regarding

the prohibition in 17(B) against solicitation during duty hours and the prohibition in 17(L) against the use of County time, property or equipment for union business without county administrator approval, we note that the prohibited practices sections of PEBA contain no such prohibitions. Further, in our view the question of the propriety of employees' soliciting for labor organizations during paid time and using company property (which from the broad language of the Ordinance apparently would include parking lots and lunch rooms as well as work areas) is a proper subject for an employer's rules and disciplinary procedure -- subject to the rights guaranteed by PEBA -- and is not a proper subject for a prohibited practice complaint against employees or sponsoring labor organizations.

Regarding the prohibition against interference with officials, employees, etc., for the purpose of obtaining a concession in Sections 17(D) and the prohibition against interference with the "normal" process of negotiations found in 17(J), we believe that these prohibitions are so vague and so broad as to chill employee rights guaranteed by PEBA and the Ordinance, including the right to organize and the right to assist a labor organization. Accordingly, they are inconsistent with the principles of the prohibited practices sections of PEBA.

H. Ordinance Section 18, Additional Prohibited Practices

Section 18 of the Ordinance provides in part:

> B. Neither party shall issue public announcements or make disclosures to any persons not directly involved with the negotiations, concerning negotiations during the pendency of negotiations or of impasse procedures.

We find that this prohibition also is inconsistent with the principles of the prohibited practice sections of PEBA and that it further violates Section 26(C) by infringing on employee rights to assist labor organizations and to bargain collectively, rights that Section 26(C) requires local ordinances to guarantee. Specifically, by flatly forbidding communications to <u>any person</u> not <u>directly</u> involved in negotiations concerning negotiations, the Ordinance makes it a prohibited practice for union negotiators to communicate with their membership (that is their principals) concerning the progress of negotiations. Such a prohibition is inconsistent with the right of employees to bargain and to assist labor organizations. In addition, we note that such a prohibition is entirely out of line with the general practice in labor-management negotiations.

I. <u>Ordinance Section 19, Strikes and Lockouts</u>

Section 19 of the Ordinance provides:

> C. Any bargaining unit whose employees participate in, cause, instigate, encourage or support 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 Los Alamos County employees for a period of not less than three years.

The comparable provision in PEBA §21 states:

> C. 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 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.

Section 26(C)(9) of PEBA requires that the prohibited practice provisions of an ordinance "promote the principles established in Sections 19, 20 and 21 of PEBA." As we stated in Santa Fe County:

> It appears from the face of the Ordinance . . . 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 . . . [any] 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 showing] that the union caused, instigated, encouraged, or supported a strike before the sanction of decertification may be imposed. Consequently, . . . 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 . . . the Ordinance are inconsistent with PEBA Section 26(C) in other respects. Specifically, . . . Section 26(C)(4) requires that a local collective bargaining ordinance include the right of an exclusive representative to negotiate over 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 agreements. By automatically decertifying an exclusive representative and automatically voiding the existing collective bargaining agreement in the event of an employee strike, irrespective of any union knowledge or involvement, the Ordinance contravenes the bargaining and contract obligations that Section 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.

The same reasoning and the same conclusion apply here. In addition, we find that the Ordinance here fails to promote the

relevant principles of PEBA by flatly forbidding a labor organization that has been decertified under Section 19 from collecting dues and by imposing a three year bar on its re-certification. Neither of these provisions appears in or is sanctioned by PEBA, and they are inconsistent with the organizing and certification rights that PEBA guarantees. In all of the above ways, we find that Ordinance Section 19(C) violates Sections 26(C) and 19(G) of PEBA.

Section 19(B) of the Ordinance allows the County Council chairman to appoint an interim member of the local board in the event of a strike emergency, without adhering to the criteria in PEBA Section 10 for the appointment of board members. In this way, Section 19(B) violates Sections 10, 26(C) and 19(G) of PEBA.

J. Ordinance Sections 10(A) and 4(A) -- Appropriate Bargaining Units

Section 4(A) of the Ordinance defines "appropriate bargaining unit" in relevant part as:

> a group of employees designated by the board for the purpose of collective bargaining. Appropriate units shall be formed by occupational group, such as blue collar (unskilled, semi-skilled, and skilled), white collar (clerical, secretarial, administrative, technical and para-professional), professional, fire and police.

Section 10(A) of the Ordinance provides in part:

> A. The Board shall, upon receipt of a petition for a representation election filed by a labor organization, designate the appropriate bargaining units for collective bargaining. Appropriate bargaining units shall be established on the basis of occupational groups, a clear and identifiable community of interest in employment terms

and conditions and related personnel matters among the employees involved. Occupational groups shall generally be identified as blue collar, white collar, professional, police and fire.

Section 26(C)(2) of PEBA requires a local ordinance to include "procedures for the identification of appropriate units . . . equivalent to those set forth in [PEBA]." PEBA Section 13, "Appropriate bargaining units," subsection (A) states that "occupational groups shall generally be identified as blue collar, secretarial clerical, technical, professional, paraprofessional, police, fire and corrections." Thus, under PEBA, there are separate presumptively appropriate occupational groups (one of the criteria for determining appropriate bargaining units) for secretarial clerical employees; technical employees, and paraprofessional employees. The Ordinance telescopes these separate presumptively appropriate groups into one broad "white collar" group. While such a unit may indeed be appropriate, depending upon community of interest and other factors, we find that this unilateral consolidation by the County of separate presumptively appropriate groups into a single group, usurps the unit determination function of the Board or local board and is not equivalent to the unit determination procedures of PEBA and, therefore violates Sections 26(C) and 19(G) of PEBA.

K. Section 7 of the Ordinance, Local Board

The Ordinance provides in Section 7:

> A. The "labor management relations board" is hereby created. The board shall consist of three members appointed by the Council. The Council shall appoint one member recommended by certified organized labor representatives actively involved in representing employees

in the County, one member recommended by management and one member jointly recommended by the two other appointees. In the event that the labor and management appointees cannot agree on a recommendation for the third appointee within thirty (30) days of their appointment, the Council may appoint without their recommendation.

C. During the term for which he/she is appointed, no Board member shall hold or seek any other political office or be an employee of a union, an individual representing the employer in collective bargaining or an employee of the County.

PEBA Section 10 provides:

B. The local board shall be composed of three members appointed by the public employer. One member shall be appointed on the recommendation of individuals representing labor, one member shall be appointed on the recommendation of individuals representing management and one member shall be appointed on the recommendation of the first two appointees.

D. During the term for which he is appointed, no local board member shall hold or seek any other political office or public employment or be an employee of a union or an organization representing public employees or public employers.

Section 26(C) of PEBA expressly requires that a local collective bargaining ordinance "shall comply" with PEBA Section 10. In agreement with the Hearing Officer, we find that Section 7(A) of the Ordinance fails to comply with Section 10 of the statute in two respects. First, it plainly restricts the labor representative on the local board to a person recommended by a "certified" labor representatives "actively involved in representing employees in the County." This restriction does not appear in PEBA, infringes on the province reserved to labor by PEBA and, if applied, could preclude the formation of a local board because currently it appears that there are no certified exclusive representatives in the County. Second, Section 7(A) contravenes PEBA by permitting

the County Council to appoint the third member if the labor and management appointees cannot agree in 30 days. This provision is as inconsistent with the balanced local board structure required by Section 10 of PEBA as a provision that unions would be allowed to appoint the third board member if there were no agreement within 30 days. In these two ways, we find that Ordinance Section 7(A) violates Sections 10, 26(C) and 19(G) of PEBA. Section 7(B) also violates the same provisions of PEBA by failing to exclude from service on a local board of a person who is an employee of an organization representing public employees or public employers, directly contrary to the express requirement of PEBA Section 10(D).

L. Ordinance Section 8, Board Powers and Duties

Section 8 of the Ordinance provides, in pertinent part:

> D. The decisions of the Board on interpretation and application of the ordinance and collective bargaining agreements are final and binding on the parties. This section does not apply to negotiations impasse issues.
>
> H. The Board shall have no power to award punitive damages or to assess attorney's fees.
>
> I. Should the Board be required to act during the absence of or prior to recommendation and appointment of a Board member the Council Chairman shall appoint an interim member with due regard to the representative nature of the Board.

Under Section 26(C)(6) of PEBA, a local ordinance must include a requirement that a grievance procedure culminating in binding arbitration be negotiated. Also under 26(C) a local ordinance must comply with PEBA Section 10, dealing with local board appointment and Section 11, setting forth powers and duties of local boards.

We find that the provision in Section 8(D) of the Ordinance establishing the local board as the final decision-maker with respect to the interpretation and application of collective bargaining agreements substitutes the local board for the final arbitration that PEBA Section 26(C) explicitly requires the parties be permitted to negotiate under a local ordinance. It thereby violates Sections 26(C) and 19(G).

Contrary to the Hearing Officer, however, we do not find that Section 8(D) of the Ordinance violates PEBA by precluding appeal rights. We believe that Section 8(D) can be read in conjunction with Section 20 of the Ordinance so as to permit appeals consistently with Section 23 of PEBA. For the same reason, we do not find that Section 20 of the Ordinance violates PEBA. In light of the presumption of validity accorded to ordinances, we will not presume that the Ordinance will be applied in such a way as to deny statutory appeal rights.

Under PEBA Section 11(E), a local board has the power to enforce provisions of the Public Employee Bargaining Act or a local collective bargaining ordinance, resolution or charter amendment through the imposition of "appropriate administrative remedies." We find, contrary to the Hearing Officer, that the prohibition in the Ordinance against the imposition of attorney fees and punitive damages does not contravene PEBA because we believe that, consistent with the practice of the NLRB and the present state of the law in New Mexico, the imposition of such fees and damages is

not, and should not be, an appropriate administrative remedy under PEBA.

We find that Section 8(I) of the Ordinance, by permitting the Council Chairman to appoint an interim member of the board, without adhering to the express requirements for the appointment of all local board members set forth in Section 10 of PEBA violates Sections 10, 26(C) and 19(G).

Ordinance Section 12, Exclusive Representation

Section 12(B) of the Ordinance provides:

> B. The existence of an exclusive bargaining representative shall not prevent employees in or out of a bargaining unit from taking their grievances or prohibited practices to their supervisor or the Personnel Department or the County Administrator or for public utilities employees, to the Utilities Manager, provided, however, that no employee may pursue both the grievance procedure provided for in the Personnel Rules and Regulations and a prohibited practices charge with the Board arising out of the same or substantially the same set of facts and circumstances or subject matter.

We find that by providing for the resolution of prohibited practice matters by County officials, rather than the local board, the Ordinance contravenes the requirements of Section 11 of PEBA with which Section 26(C) expressly requires it to abide. Further, this provision of the ordinance would permit an interested party (the County) to resolve a prohibited practice complaint against itself or against a labor organization that may be its adversary. It is the local board that must perform the neutral role envisioned by the statutory scheme. Consequently, this section of the Ordinance violates Sections 26(C) and 19(G) of PEBA.

However, we do not find any inconsistency with PEBA in the election of remedies that the same section of the Ordinance imposes on employees, for employees still may avail themselves of the local board's prohibited practice procedure if they prefer it to the grievance procedure under the County's personnel rules.

M. Ordinance Section 9, Hearing Procedures

Section 9 of the Ordinance provides in part:

> C. Charges of prohibited labor practices that are filed within thirty (30) days of the commission or omission of the act that generated the charges shall be heard by the Board.

As noted, Section 26(C)(9) requires a local bargaining ordinance to incorporate provisions that promote the principles of the prohibited practice sections of PEBA. Those sections of PEBA contain no limitations period for the filing of PPCs. In line with the NLRA, the Board has adopted by rule a six month limitations period. While we do not believe that imposing a reasonable limitations period would violate the principles of PEBA, we find the 30 day period provided in the Ordinance, at least where there is no provision for tolling until the complainant knew or should have known of the act complained of, is unreasonably restrictive of the rights of public employees, public employers and labor organizations embodied in the prohibited practices sections of PEBA. Therefore, it violates Sections 26(C) and 19(G).

N. Ordinance Section 11, Elections

Section 11 of the Ordinance provides in part:

> C. All representation elections shall include the option for no representation.

D. In the event of an election with two or more organizations on the ballot where neither of the choices received a majority of the votes cast, and sixty percent (60%) of the bargaining unit eligible employees have cast votes, then and in such an event a run-off election shall be held within thirty (30) days. The choices on the run-off election shall consist of the employee organization which received the greatest number of votes in the original election and the choice of "no" representation.

F. No election shall be conducted if an election or run-off election has been conducted in the 24 month period immediately preceding the proposed representation election.

I. Balloting for elections shall be done in person at the election site during the time period for the election specified by the Board.

Section 14 (D) of PEBA states:

Within fifteen days of an election in which no labor organization receives a majority of the votes cast, a runoff election between the two choices receiving the largest number of votes cast shall be conducted.

Section 14(F) of PEBA states that "no election shall be conducted if an election or a runoff election has been conducted in the twelve-month period immediately preceding the proposed representation election."

PEBA Section 26(C)(2) requires that election procedures in a local ordinance be equivalent to those in PEBA. Section 11 of the Ordinance is blatantly inconsistent with Section 14 of the statute in so far as it requires a choice of no representation in any runoff election. This contravenes the statutory mandate that the choice in a runoff election must between the top two choices in the original election. The Ordinance thus violates Sections 26(C) and 19(G). The Ordinance also violates these sections of PEBA by providing a 24-month rather than a 12-month election bar following

an election or runoff election. It is obvious that a bar twice as long as the one in the statute is not "equivalent" to it.

We find, however, that Section 11(I) of the Ordinance requiring in-person balloting, does not violate PEBA because PEBA does not state or imply that other forms of balloting must be permitted. Ordinance Section 14(D), Payroll Deduction

Section 14(D) of the Ordinance provides that "payroll deduction of the exclusive representative's membership dues is a negotiable item by either party. The amount of dues, if such a provision is agreed to by the parties, shall be certified . . . ." PEBA Section 26(C)(7) states that an ordinance must include "a requirement that payroll deduction for the exclusive representative's membership dues be negotiated if requested by the exclusive representative." Thus PEBA makes deduction of union dues a mandatory subject of bargaining and expressly imposes that requirement on local ordinances. The Ordinance violates that requirement by implying that payroll deduction is only subject to negotiations permissively and by failing to include the mandatory language. The same provision of the Ordinance also violates PEBA by providing that the County must agree on the amount of union dues to be deducted, a matter squarely within the province of the labor organization involved. In these ways, Section 14(D) of the Ordinance violates Sections 26(C) and 19(G) of PEBA.

O. Ordinance Section 15, Ground Rules for Negotiations

Section 15(A) of the Ordinance provides:

A. The following negotiation procedures shall apply to the employer and exclusive representatives:

(1) Negotiations shall be opened upon written notice by either party to the other requesting that negotiating sessions be scheduled. Such request shall be post marked no earlier than one hundred twenty (120) days nor later than sixty (60) days prior to the contract ending date. The parties may open negotiations at any time by mutual agreement.

(2) Negotiating teams for each negotiating session shall consist of a maximum of five (5) persons designated by the exclusive representative and a maximum of five (5) persons designated by the County Administrator.

(3) All negotiations shall be conducted in closed sessions. Negotiations shall be held at the facilities and at a time mutually agreed upon by the negotiating teams. Negotiations shall begin with the party that requested the negotiations presenting their complete proposal and changes, section by section, in writing.

(4) Following the complete presentation of both proposals the parties shall identify the economic and non-economic issues. All non-economic issues must be resolved prior to negotiating economic issues.

(5) Recesses and study sessions may be called by either team. Prior to these recesses or study sessions the reconvening time shall be agreed upon. Caucuses may be taken as needed.

(6) Employees who are members of the exclusive representative negotiating team shall be released from their normal duties without pay to participate in negotiations.

(7) Tentative agreements reached during negotiations shall be reduced to writing, dated and initialed by each team spokesperson. Such tentative agreements are conditional and may be withdrawn should later discussion change either team's understanding of the language as it relates to another part of the agreement.

(8) Agreement on contract negotiations is accomplished when the County Council approves the collective bargaining agreement and the union president

> sign the agreement. Multi-year agreements, which include economic increases in subsequent years shall be considered ratified if and when the governing body appropriates the funds necessary to fund the increase for the subsequent year or years. Should the governing body not appropriate sufficient funds to fund the agreed upon increase for subsequent years either party may reopen negotiations.

Section 26(C)(9) requires a local ordinance to promote the principles of Section 19 of PEBA. Section 19(F) makes it a prohibited practice for a public employer such as the County to "refuse to bargain collectively in good faith with the exclusive representative" of its employees. This provision is taken from the NLRA, 29 U.S.C. 158(a)(5)and 158(d). Under NLRA precedent, an employer or a labor organization violates its duty to bargain in good faith with the other by placing unreasonable conditions on bargaining, including by insisting upon agreement to subjects that are considered "permissive," such as ground rules. See NLRB v. Borg-Warner Corp., Wooser Div., 356 U.S. 342 (1958); NLRB v. Superior Fireproof Door & Sash Co., 289 F.2d 713 (2d Cir. 1961); Boise Cascade Corp. v. NLRB, 860 F.2d 471 (D.C. Cir. 1988).

We find that by imposing each of the provisions set forth in Section 15(A) as a pre-condition to bargaining, the County has committed a violation of Section 26(C) by failing to abide by the principles set forth in Section 19(F). It thereby also has violated Section 19(G).[21] In addition, we find that the condition imposed by Section 15(A)(8) of the Ordinance violates Section 26(C)(4) and 19(G) of PEBA by conditioning the effectiveness of any

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[21] To the extent of any inconsistency between this finding and Santa Fe County, our decision there is hereby modified.

multi-year collective bargaining agreement that includes economic terms on appropriations for future years.

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; complainants AFSCME and Los Alamos County Firefighters have standing; the matter is ripe for administrative adjudication; all applicable rules and procedures have been complied with; and respondent Los Alamos County has committed prohibited practices in violation of §§19(G) and 26(C) of the Public Employee Bargaining Act by enacting the following provisions of its Ordinance No. 85-163: 3, 4(A), 4(F), 4(H), 4(M), 4(R), 4(S), 5, 6, 7(A), 7(C), 7(D), 7(E), 8(D), 8(I), 9(C), 10(A), 11(C), 11(D), 11(F), 11(H), 12(B), 14(C), 14(D), 15(A), 15(B)(3), 15(B)(4), 17 (B), 17(D), 17(J), 17(L), 19(A), 19(B), 19(C).

We further find and conclude that the above prohibited practices warrant the imposition of an administrative remedy as authorized by PEBA §9(F). The remedy is set forth in the **ORDER** below.

The Board finds that the County has not committed prohibited practices by including in Ordinance No. 85-163 any of the provisions that the Labor Organizations have challenged other than those set forth in the first paragraph of this conclusions section, above.

ORDER

Based on the Board's findings and conclusions as set forth above, the Board hereby enters the following ORDER:

The County's Ordinance No. 85-163 is not effective and the Board will not approve the respondent Los Alamos County's application for a local labor board until the County's Ordinance No. 85-163 is revised to conform to the Public Employee Bargaining Act.

Specifically, the Board orders that Ordinance No. 85-163 shall not be effective unless and until the County revises the sections referred to in our Conclusions in a manner consistent with this decision.

DECIDED AND ENTERED by the New Mexico Public Employee Labor Relations Board this 20th day of December 1994.

Belarmino Giron
Chairman

Member Loy, Concurring in Part and Dissenting in Part:

I concur with the majority of the Board in all respects except as follows. First, I would find that Section 4(F) of the Ordinance defining the term "confidential employee" by including in the definition any employee who "assists and acts in a confidential capacity with respect to a management employee" violates PERA. PEBA states, instead, that a confidential employee is one who assists and acts in a confidential capacity to a person who "formulates, determines and effectuates management policies." This

difference in wording means that the statutory definition of confidential employee is narrower than the Ordinance definition. Therefore, the Ordinance denies organizing and collective bargaining rights to some persons who are guaranteed them by PEBA.

Second, I dissent from the majority's finding that Section 5 of the Ordinance does not violate PEBA by requiring elections for certification of representatives. Under PEBA Section 14(C) a local board is specifically empowered to create alternative procedures for determining majority status and certification. The Ordinance thus infringes on the local board's authority under the statute.

Dick Loy, Member

Member Keaton, Concurring in Part and Dissenting in Part:

I concur with the majority in all respects except that, first, I would find that Section 15(A)(6) of the Ordinance, providing that employee members of a union negotiating team shall participate in negotiations on unpaid time, is not a prohibited practice. The employer has the unqualified right to determine what work it will pay an employee to perform, and there is nothing inconsistent with PEBA in the County, through its Ordinance, exercising that right.

Second, I dissent from the majority's finding that Section 4(S) of the Ordinance violates PEBA by its failure to include the proviso found in Section 4(S) of PEBA. I believe that the absence of the proviso is insignificant because the language of Section

4(S) of the ordinance, limiting the definition of "supervisor" to those who devote substantial time to supervisor duties, who customarily direct the work of two or more other employees, and who have the authority to effectively recommend various personnel actions implies that persons such as lead employees and those who perform supervisory duties only occasionally, and the other categories set forth in the proviso of Section 4(S) of PEBA, are not included within the Ordinance's definition of supervisor. To the extent that my position here differs from the position I took in Santa Fe County with respect to the definition of supervisor in the Santa Fe County ordinance, I acknowledge having possibly erred there.

James T. Keaton

James T. Keaton, Member