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2929 Coors Blvd. N.W. Suite 303
Albuquerque, NM 87120
(505) 831-5422
(505) 831-8820 (Fax)

THOMAS J. GRIEGO
Executive Director

March 27, 2018

Jones, Snead, Wertheim & Clifford, PA
1800 Old Pecos Trail
Santa Fe, New Mexico 87504
Attn: Jiadai Lin

Walsh, Gallegos. Trevino,
Russo & Kyle, P.C.
500 Marquette, N.W. #1310,
Albuquerque, NM 87102
Attn: Rodney Gabaldon

Re: ***Teachers' Association of Lordsburg v. Lordsburg Municipal Schools; PELRB 102-18***

Dear Counsel:

On March 1, 2018 the Lordsburg Municipal Schools (hereinafter referred to as "District" or "Employer") filed a Motion to Dismiss the instant PPC. At a Status and Scheduling Conference held March 6, 2018 I gave the Teachers' Association of Lordsburg (hereinafter "Complainant " or "Union" until March 23, 2018 in which to file a written response to the Motion, which response may include supporting documentation or affidavits not then on file. The Employer was permitted to supplement its Motion with its own documentation and affidavits by the same March 23 deadline, in which event I would consider the Motion as an Alternative Motion to Dismiss or for Summary Judgment. If, after receiving the Union's response and any supplemental documentation and/or affidavits, I determined that oral argument would be helpful, argument would be heard Monday, April 2, 2018. The Union timely responded to the Motion as scheduled and the District submitted supplementation to its Motion in the form of an Affidavit by Randall Piper, Superintendent of the Lordsburg Municipal Schools, email messages between Bethany Walter and Superintendent Piper related to this case (Exhibit 2), and a series of teacher contracts (Exhibits 3,4 and 5).

In my judgment, oral argument is not required to decide the Employer's Motion, so the tentatively scheduled oral argument was vacated. What follows is my decision regarding the District's Alternative Motion to Dismiss or for Summary Judgment.

STANDARD OF REVIEW:

When deciding Motions to Dismiss the PELRB has historically applied the standard found in New Mexico Rule of Civil Procedure 1-012(B)(6), whereby the Hearing Officer accepts all well-pleaded factual allegations as true and resolves all doubts in favor of sufficiency of the complaint. See *Herrera v. Quality Pontiac*, 2003 NMSC 18, ¶ 2, 134 N.M. 43, 46. Dismissal on 12(B)(6) grounds is

appropriate only if the Complainant is not entitled to recover under any theory of the facts alleged in their complaint. *Callahan v. N.M. Fed'n of Teachers-TVI*, 139 N.M. 201, 131 P.3d 51 (2006). A motion to dismiss is predicated upon there being no question of law or fact. *Park Univ. Enter's., Inc. v. Am. Cas. Co.*, 442 F.3d 1239, 1244 (10th Cir. 2006). Granting a motion to dismiss is an extreme remedy that is infrequently used. *Town of Mesilla v. City of Las Cruces,* 120 N.M. 69, 898 P.2d 121, 1995-NMCA-058, ¶ 4. Here, I have relied on the parties' affidavits and other submissions so that it is appropriate to review it under the standard followed for Summary Judgment.

When deciding a motion for summary judgment the PELRB has long followed New Mexico Rules of Civil Procedure, Rule 1-056. See *AFSCME Council 18 v. New Mexico Department of Labor*, 01 PELRB-2007 (Oct. 15, 2007). Summary Judgment will be granted only when there are no issues of material fact with the facts viewed in the light most favorable to the non-moving party. The movant has the burden of producing "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." If that threshold burden is met by the Movant, the non-moving party then must "demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Summers v. Ardent Health Serv.* 150 N.M. 123, 257 P.3d 943, (N.M. 2011); *Smith v. Durden*, 2012-NMSC-010, No. 32,594; *Blauwkamp v. Univ. of N.M. Hosp.*, 114 N.M. 228, 231, 836 P.2d 1249, 1252 (Ct. App. 1992). See also, *Bartlett v. Mirabal*, 2000-NMCA-36, 917, 128 N.M. 810, 999 P.2d 1062, quoting *Eoff v. Forest*, 109 N.M. 695, 701, 789 P.2d 1262 (1990); *Gardner-Zemke*, 1990 NMSC 034, ¶ 11. The non-moving party "cannot stand idly by and rely solely on the allegations contained in its complaint or upon mere argument or contentions to defeat the Motion once a prima facie showing has been made." *Ochswald v. Cristie*, 1980 NMSC 136, ¶ 6, 95 N.M. 251, 620 P.2d 1276. As non-movant, Petitioner's response must contain specific facts showing that there is an actual issue to be tried. *Livingston v. Begay*, 1982 NMSC 121, 98 N.M. 712, 717 P.2d 734.

MATERIAL FACTS NOT IN DISPUTE:

The following facts are admitted by the Schools in its Answer/Motion to Dismiss:

1. The Union is the exclusive representative for professional and classified employees of the District.
2. The parties currently have a Collective Bargaining Agreement ("CBA"), effective July 1, 2017 through June 30, 2018.
3. Under the CBA, employees who work at least 15 hours per week are eligible for medical insurance under the District's insurance plan.
4. Ms. Bethany Walter is an art teacher employed by the District and a professional employee represented by the Association as a member of the bargaining unit.
5. Prior to the spring semester of 2017, Ms. Walter was a full-time art teacher at Lordsburg High School. Beginning in the spring semester of 2017, Ms. Walter became a part-time art teacher and taught four classes per day, five days a week.
6. Around the spring of 2017, the District planned to change from a five-day workweek to a four-day workweek beginning with the upcoming 2017-2018 school year.

7. On August 7, 2017, Ms. Walter was notified by the District that she would be dropped from the District's health insurance plan because she worked fewer than fifteen hours per week and thus was ineligible for the District's insurance benefits. Ms. Walter was notified that her insurance coverage would terminate on August 31, 2017.
8. The District's full-time teachers are all calculated under a 1.0 FTE, which generally includes teaching six classes and one "prep period" amounting to a seven-period day.
9. On August 10, 2017, Mr. Piper notified Ms. Walter that the District was declining her request to be credited for prep time and that she would remain ineligible for the District's insurance plan. Ms. Walter and the Association discovered upon this news that the District's calculation of her working day was not an oversight.
10. Throughout the fall of 2017, Ms. Walter and the Association continued discussions with the District and requested that Ms. Walter, as a part-time employee, be provided paid prep time similar to other teachers, reasonable for her workload. The District denied these requests.

The following additional facts are established as a matter of the Board's records, submitted affidavits and other exhibits:

11. The effective date of filing the instant PPC is February 7, 2018.
12. During discussions and negotiations between the school district and the union regarding a proposed change from a five-day work week to a four-day work week the issue of preparatory time for part-time teachers was not raised. Affidavits of Bethany Walter, ¶ 8; Brian Culbertson ¶ 4.
13. On August 7, 2017 Ms. Walter first learned, via email from the district's bookkeeping manager, that she was dropped from the district's insurance plan effective August 31, 2017. Affidavit of Bethany Walter, ¶ 14. Sometime thereafter, she learned about the meaning of the "FTE" calculation on her contract and its meaning as it pertained to "prep" time.
14. The union had notice of Ms. Walter's issues "at the beginning of the 2017-18 school year, in August of 2017" according to the President of the Teachers' Association of Lordsburg. See, Affidavit of Raquel Montiel, ¶ 4.
15. The 2017-2018 school year began on August 2, 2017. Exhibit L.

REASONING AND CONCLUSIONS OF LAW:

The Complainant alleges two related but distinct theories as the basis for its PPC:

First, by failing to provide preparatory time as part of Ms. Walter's revised work schedule and by calculating her eligibility for insurance benefits in a way that did not include that preparatory time after her schedule was revised, the Employer made two unilateral changes in Ms. Walter's terms and conditions of employment. If proven, those changes would be a *per se* violation of the Employer's duty to bargain pursuant to NMSA 1978, Sections 10-7E-5 (establishing the right of eligible public employees to form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by them), 15(A)(setting forth a recognized Union's legal status as "exclusive representative") and 17(A) (setting forth the scope of bargaining), and, therefore,

violations of NMSA 1978, Sections 10-7E-19(B) (interference, restraint or coercion in the exercise of a PEBA right) and 19(F) (refusal to bargain collectively in good faith).

Second, the District's actions constitute "direct dealing" with Ms. Walter, which, if proven would also contravene rights found in NMSA 1978, Sections 10-7E-5, 15(A), 17(A), and therefore, would also violate NMSA 1978, Sections 10-7E-19(B), and 19(F).

The Employer moved to dismiss the above claims for three reasons:

First, based on the premise that the PELRB deemed the PPC to have been filed on February 14, 2018, dismissal is mandated by operation of Board Rule 11.21.3.9 NMAC, which requires dismissal of any claim filed with the PELRB more than six months following the conduct claimed to have violated the PEBA. According to the District's Motion, the operative date for calculating the six months limitations period is August 3, 2017 - the date Ms. Walter received her employment contract from the District. Counting from that date means that to be timely the PPC was required to be filed no later than February 3, 2018. As an alternative operative date, the District argues that knowledge of any actionable claim should be charged to the Complainant as early as the Spring of 2017, when Ms. Walter voluntarily changed from full-time to part-time employment. The District did not factor a preparation period into Ms. Walter's FTE calculation at this time either and the FTE calculation appeared on her contract.

Second, the District did not change its policy regarding FTE calculation and preparation periods when it gave Ms. Walter the new contract on August 3, 2017and part-time teachers have never been given credit for the preparation period for the purposes of FTE calculation. Consequently, because the Union has not plead that an existing policy was changed and because any claim of such change factually unsupportable, allegations that the District unilaterally altered Ms. Walter's terms and conditions of employment fail to state a claim for relief.

Third, because the rights alleged to have been violated are also present in the parties' CBA (see CBA, Section I, Subsections E, G and M) and the CBA contains a mandatory binding grievance resolution process covering violations of the CBA (see CBA, Section I, Subsection V the Complainant has failed to exhaust administrative remedies, depriving the PELRB of subject matter jurisdiction to hear the PPC.

A. THE COMPLAINT IS TIMELY FILED.

The PELRB records up to the point of this letter decision are ambiguous as to the filing date of the instant PPC. The agency's database summary recorded the date that the "hard copy" of the PPC was received, i.e. February 13, 2018 as the filing date, and that date was given by staff to the District's counsel in response to his telephonic inquiry. Like all databases, however, ours is only as reliable as the data being input. The receipt date of the hard copy is not necessarily the effective date of filing

when filing has been done by facsimile transmission. Rule 11.21.1.10 NMAC provides that documents to the Board via facsimile ("fax") transmission will be accepted for filing as of the date of transmission if an original is filed by personal delivery or deposited in the mail no later than the first work day after the facsimile is sent. The Board's case file contains a faxed copy of the Union's PPC dated February 7, 2018. That faxed version was inappropriately date-stamped by this office as having been received February 8, 2018. The Union submitted the Affidavit of Evelyn Sena affirming that she deposited the original of above-mentioned Complaint in the mail, postage prepaid, to the Public Employee Labor Relations Board's office in Albuquerque on February 7, 2018, the same day as its fax, thereby complying with the requirements of Rule 11.21.1.10 NMAC necessary to have the filing date established as the date of the fax transmission, i.e. February 7, 2018.

No negative inference may be drawn from the fact that the hard copy of the PPC did not arrive until six days after the fax (five work days excluding an intervening Sunday when there is no mail service), because historically, in many cases involving parties or counsel located in Santa Fe as is the case here, mail typically takes up to a week or longer to arrive. Pursuant to Rule 11.21.1.10 NMAC the operative date is not when the hard copy of the PPC is *received* by the PELRB, but when it was *deposited* in the mail. Accordingly, the effective date of filing the instant PPC is February 7, 2018 and the Board's database will be corrected to reflect that date.

If for the sake of argument the operative date from which our six months limitation period should be calculated is August 3, 2017 as argued by the Employer, the PPC would still be untimely even considering the adjusted filing date. However, the Employer's premise that August 3, 2017 is the operative date is incorrect. On this point it is critical to remember that the Complainant herein is the Teachers' Association of Lordsburg – not the individual employee, Bethany Walter. Neither the date Ms. Walter received her employment contract nor the date she voluntarily changed from full-time to part-time employment is dispositive, perhaps not even meaningful, on the question of when her union "either discovered or reasonably should have discovered each conduct [sic] claimed to violate the act." 11.21.3.9 NMAC.

We know from the submitted affidavits that during "discussions and negotiations between the school district and the union regarding the change from a five-day work week to a four-day work week" the issue of preparatory time for part-time teachers was not raised, neither did the union know at that time that Ms. Walter was not given preparatory time as part of her part-time schedule. See Affidavit of Bethany Walter, ¶ 8. Although the Union was involved with Ms. Walter's issues from an unspecified time August of 2017 according to Raquel Montiel, and the involvement of NEA representative Steve Sianez during the School Board's grievance process thereafter, the issues did not become "ripe" in terms of when the union reasonably should have known that a PEBA claim existed until her request for informal resolution was denied by Superintendent Piper at the earliest on August 10, 2017 (Affidavit of Bethany Walter, ¶ 16); or possibly on August 31, 2017 the effective date of the loss of insurance benefits and prep time. Either of those dates is more appropriate than August 3, 2017 as the operative date from which to calculate the six months limitations period and both result in a timely filing in light of the finding that the effective filing date was February 7, 2018.

Because I conclude that this PPC was timely filed based on the fax filing, I do not address the Union's claims of timeliness under the continuing violation theory.

B. THE PPC STATES A CLAIM FOR RELIEF UNDER THE PEBA.

In essence, the Employer's affirmative defense that the Complaint fails to state a claim is based on the premise that the District did not change its policy regarding FTE calculation and preparation periods when it gave Ms. Walter the new contract on August 3, 2017 because part-time teachers have never been given credit for the preparation period for the purposes of FTE calculation. Consequently, because the Union has not plead that an existing policy was changed and because any claim of such change factually unsupportable, allegations that the District unilaterally altered Ms. Walter's terms and conditions of employment. Although the PPC does speak in terms of the employer making "unilateral changes", that is not the whole of the complaint. The PPC alleges that the method used by the employer to calculate FTE and its decision not to provide preparatory time to teachers falling below certain FTE levels implicate mandatory subjects of collective bargaining, unilaterally imposed by the Employer without the benefit of bargaining, thereby violating Sections 10-7E-19(B) (interference, restraint or coercion in the exercise of a PEBA right) and 19(F) (refusal to bargain collectively in good faith). That allegation states a claim regardless of whether a change in policy is pled or proved. Without a doubt changes in terms and conditions of employment for Ms. Walter occurred to her detriment in that she lost valuable insurance coverage and preparatory time as a result of the District calculation formula, whether that formula represents a recent change or a longstanding practice. Reasonable minds can differ as to whether the District was privileged to follow that formula as a reserved management right, or whether a past practice may be established based on a single prior event involving a single part-time teacher (See Exhibit L) but that determination awaits further factual development and argument at a Hearing on the Merits.

Similarly, the evidence is too scant to conclude as a matter of law at this juncture that the employer did or did not engage in direct dealing in the course of acceding to Ms. Walters' request for a part-time schedule. Without more than the argument raised by the Employer's Motion I cannot conclude that there are no issues of material fact on this point with the facts viewed in the light most favorable to the Union. The District has not met its burden of producing "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted" such that Summary Judgment would be appropriate. The PPC states a claim for direct dealing in that it appears from the pleadings, affidavits and documentary exhibits that, with regard to Ms. Walter's 2017-2018 part-time contract, the District communicated directly with her for the purposes of changing wages, hours, and terms and conditions of employment without including a Union representative in those communications. The Association has adequately pled this claim. See *El Paso Elec. Co.*, 355 N.L.R.B. 95 (2010).

C. THE COMPLAINT IS NOT BARRED BY FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

The administrative remedy the Employer argues bars this PPC is the CBA's grievance procedure is

found at Section I, Subsection V of the CBA. (Attachment 1 to the Union's supplemental submissions). The CBA defines a "Grievance" as follows:

> "...an allegation *by an employee* that there has been a violation, a misinterpretation or an inequitable application of *one or more provisions of this collective bargaining agreement* that directly and adversely affects the grievant..."

Similarly, a "Grievant" subject to Section I, Subsection V of the CBA is defined as:

> "...an *employee* who is personally and directly affected by a condition for which he or she seeks a resolution."

(CBA p. 38, emphasis added).

On its face the grievance procedure does not apply to the union Complainant herein, who is not an employee, nor does the PPC allege a misinterpretation or an inequitable application of one or more provisions of this collective bargaining agreement. Merely because the PPC may implicate rights that are also "present in the parties' CBA" does not deprive the PELRB of its statutory grant of jurisdiction over the subject matter of this PPC. The District cites no authority for the proposition that its contractual mandatory binding grievance resolution process is the "exclusive remedy" for all violations of the CBA." A quick reference to the PEBA Section 10-7E-17 (F) requiring the bargaining of such a procedure makes no reference to its exclusivity.

Conspicuously absent from this PPC is an allegation that the Employer's conduct constituted a violation of the parties' CBA; nowhere is there a count claiming that the District's actions violated NMSA 1978, Sections 10-7E-19(H), stating a public employer or his representative shall not "refuse or fail to comply with a collective bargaining agreement." The apparent reason for that conspicuous omission is that the Union recognizes the difference between claims rooted in statutory rights, as opposed to claims rooted in contractual rights. The exhaustion of administrative remedies requirement does not apply to the latter. See *AFSCME Council 18 and Andrew Gilmore v. Luna County*, 17-PELRB-2016, No. 105-16, 2016 WL 8578780 ("This Board has long taken the position that exhaustion is not required as to any claim for which deferral to grievance or arbitration would be inappropriate in the first instance."); *AFSCME Council 18 and The Board Of County Commissioners of Santa Fe County*, 6-PELRB-2016, No. 128-15, 2016 WL 8578769, (exhaustion of grievance procedure not required for claim arising out of statutory obligation to bargain in good faith).

I agree with the position taken by the union in its Response to the Motion to Dismiss that the rights and violations at issue in the instant case, e.g. the Association's right to act as the exclusive representative of the employees without interference, the District's duty to bargain in good faith, are central to PEBA and exist regardless of the language in any collective bargaining agreement.

In contrast, because the Union does not allege a violation of the CBA, nor do its claims "turn on" contract interpretation it is clear that those claims are not rooted in contract and thus, this case is distinguishable from those cited by the District in support of its motion: E.g. *Vaca v. Sipes*, 386

U.S. 171, 184 (1967) (employee's use of the grievance procedure applies where "an employee is discharged without cause in violation of such an agreement"); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 650-51 (1965) (respondent bringing suit solely for breach of collective bargaining agreement and entitlement to severance pay under agreement); *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962) (finding that a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively is a violation of the collective bargaining agreement).

Even if it could be legitimately argued (as it is not) that the instant PPC presents claims that would be appropriate for resolution by arbitration this Board recognizes that it will nevertheless retain its jurisdiction rather than defer to arbitration where arbitration would be futile; the employer has obstructed the grievance-arbitration process; there has been a break down of collective bargaining relationship; or the PPC alleges discrimination, interference with PEBA rights, or violation of another PEBA right that is independent of the contract. See *In re Dep't. of Health*, Case 168-06. See also JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 1599-1602, n. 141-142, and at 1608-1609, n. 181-185, and cites therein.

In the instant case, Ms. Walter utilized both the CBA's grievance procedure and a separate grievance process available under school board's procedures. See Affidavit of Bethany Walter, ¶¶ 17-22. The District declined to process these grievances for reasons that are dubious. *Id.* at ¶¶ 20, 25. Clearly, this case falls within that body of cases where arbitration was inappropriate due to futility; employer obstruction of the grievance-arbitration process or because of a break down in the collective bargaining relationship, if not because of its allegations of discrimination, interference with PEBA rights, or violation of another PEBA right that is independent of the contract.

To the extent some contract interpretation will be necessary to resolve our current issues, such construction is incidental to the statutory claims involved and does not require deferral to the grievance-arbitration procedure where the contract language at issue is not ambiguous and does not require an arbitrator's special expertise in contract interpretation. See *AFSCME v. State*, PELRB Case No. 143-07, Hearing Examiner's letter decision on Motion to Defer (Jan. 15, 2008); see also *Caritas Good Samaritan Medical Center*, 340 NLRB 61, 62-63 (2003) (where the terms of the CBA are "clear and ambiguous … the expertise of an arbitrator was not required to interpret the language to establish whether the Respondent violated the Act"); *Grane Health Care, Inc.*, 337 NLRB 432, 436 (2002) (where the terms of the CBA are "clear and unambiguous," the matter did not "turn on contract interpretation," and "therefore the special interpretation skills of an arbitrator would not be helpful"); and *Struthers Wells Corp.*, 245 NLRB 1170, 1171 n. 4 (1979) (that a claim should not be deferred where the CBA "provision is on its face clear and ambiguous," such that the issue "does not involve contract interpretation").

CONCLUSION.

There are significant material questions of fact in this case that preclude judgment as a matter of law as outlined above. For example it is a mixed question of law and fact whether application the

District's formula for calculating FTE status including its elimination of preparatory time violates the duty to bargain. Further, whether the District's application of its formula was justified either as a reserved management right under law or contract or was justified under a contract coverage theory all await further factual development. Summary Judgment will be granted only when there are no issues of material fact with the facts viewed in the light most favorable to the non-moving party. Where the facts are better developed is with regard to the issue of timeliness and there the facts are contrary to the District's position, though they were not fully developed until it was required to do so because of its motion. For the foregoing reasons the District has not met its burden of producing "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." Accordingly, the burden of proof has not shifted to the Union to "demonstrate the existence of specific evidentiary facts which would require trial on the merits" though I conclude that if called upon to do so, its Response was sufficient to that purpose. For these reasons the District's alternative Motion to Dismiss or for Summary Judgment is **DENIED** and the case shall proceed to a Hearing on the Merits of the claims as scheduled.

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Thomas J. Griego
Executive Director