STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

RATON FIRE FIGHTERS ASSOCIATION,
IAFF LOCAL 2378,

Complainant,

v. **PELRB No. 118-11**

CITY OF RATON, NEW MEXICO,

Respondent.

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

STATEMENT OF THE CASE: This matter comes before Thomas J. Griego designated as the Hearing Officer, on Complainant's challenge to Respondent's "grandfathered" status. The procedural facts are summarized as follows:

On April 13, 2011 Complainant filed with the State Public Employee Labor Relations Board a Petition for Accretion, Clarification, Election and/or Certification in which Petitioner seeks to accrete into an existing bargaining unit "Any and all City Fire Department Personnel assigned to 24-hour workshifts, including but not limited to, Captains, Lieutenants, Second Lieutenants, Medical Operations Officers, and FF/Paramedics, and excluding any personnel that are excluded from bargaining by law." (See, Petition in PELRB 302-11). The Petition challenges the "grandfathered" status of Raton's local public employee bargaining ordinance. On the same date, the Union also filed the instant Prohibited Practices Charge (PPC) alleging that the City violated PEBA, the Raton Ordinance and its collective bargaining agreement with the union in several respects. The City timely answered the Complaint on May 16, 2011 asserting that the local board has jurisdiction over the subject matter and parties, the State PELRB is without jurisdiction and therefore, the PPC should be dismissed. With approval of the PELRB the parties agreed to stay both matters until the New Mexico Supreme Court issued an opinion in *City of Albuquerque v. Montoya*, which decision was filed March 6, 2012 as Opinion Number 2012-NMSC-007. At a status and scheduling conference held May 7, 2012 the parties agreed to engage in discovery and briefing with regard to the threshold issue of whether the City's local ordinance was entitled to grandfathered status under PEBA §26. June 22, 2012 was established as the close of discovery. Complainant filed its brief in support of its position on July 6, 2012. The Respondent filed its Response brief July 20, 2012.

Complainant challenges the Raton collective bargaining ordinance on the following alleged grounds:

1) Under Raton's local bargaining ordinance the City's Personnel Board and City Commission, serve as the functional equivalent of the State's labor board which system does not comply with the requirements of PEBA §10 or the decision in *City of Albuquerque v. Juan Mont*oya.
2) Under the ordinance only the City may request District Court action to "'issue an order restraining or enjoining a violation of the unfair employee relations practices, §(8)(1) of the Ordinance.
3) The ordinance does not extend collective bargaining rights to employees guaranteed the right to bargain under PEBA because the ordinance applies expressly only to "classified" employees thereby excluding a class of "unclassified" employees, including "supervisors" and "professional" employees as the ordinance defines those terms.
4) The ordinance limits the subject matter over which the parties may bargain so that it does not satisfy the definition and scope of collective bargaining guaranteed by PEBA.
5) The local board is not "functional as a local labor board" because it does not have all its members appointed, does not meet regularly and has not adopted procedural rules. By reason of the foregoing, and because the commission meets in closed session to discuss labor matters they are controlled by management and are biased.

The Respondent asserts:

1) Raton's Ordinance provides for the right of employees to form, join, or assist a labor organization of their choosing, to bargain collectively over wages, hours and working conditions, through certified employee organizations of their own choosing or to refrain from any or all such activities and the City of Raton has a history of collective bargaining for almost 40 years under a local ordinance during which time labor organizations were certified as exclusive representatives, organized the City's employees and negotiated numerous collective bargaining agreements. Currently, the City negotiates with four different labor organizations: International Union of United Workers of America, Local 4194, Raton Police Officer's Association, American Federation of State, County and Municipal Employees, Council 18; and Raton Fire Fighters Association, IAFF.
2) Because the City adopted its current collective bargaining ordinance on January 22, 1991, and because no amendments were made after January 2003, it is properly grandfathered and is not required to comport with the provisions of §10-7E-26(B). In order for the grandfather provisions to be meaningful one must conclude that the Legislature intended for those grandfathered public employers to be able to continue under their existing policies notwithstanding PEBA's requirements for §26(C) local boards under the former PEBA I or the current §10-7E-26(B).
3) The history of the PELRB is to accord deference to the local boards that pre-dated the existence of PEBA.
4) Raton's exclusion of "unclassified" employees from collective bargaining is functionally no different than the exclusion under PEBA §§10-7E-5 and 10-

7E-13(C) of temporary, term, probationary employees and those employees defined in PEBA as "supervisors", "managers" and "confidential employees".

5) Citing the *City of Deming Firefighters* case, PELRB No. 102-04, Respondent asserts that to the extent Complainant alleges specific positions are excluded under the ordinance that would not otherwise be excluded under PEBA, the PELRB has recognized it is within the exclusive purview of the local board to make that determination.

6) With regard to Complainant's claim that the Raton ordinance excludes from the scope of bargaining subject matter required to be bargained under PEBA the Respondent asserts that the City's Ordinance in this respect "is almost entirely equivalent" to PEBA. §33.28(B)(7)(a) of the City's ordinance secures the right to bargain wages and salaries, hours, working conditions, and other benefits compared with PEBA's provisions in §10-7E-17(A)(1) for bargaining over "wages, hours, and all other terms and conditions of employment and other issues agreed to by the parties".

7) Relying on *Board of Regents*, 121 N.M. 401, 962 P.2d 1236 (N.M. 1998) and *City of Deming v. Deming Firefighters*, 160 P.3d 595, 600 (Ct. App. 2007), the legislature did not intend for the PELRB or a court to ascertain the quality of collective bargaining provisions or procedures in order to apply the grandfather clause.

8) The existing management rights clause does not limit the scope of bargaining in such a way as to violate PEBA.

9) The "local board" in Raton is fully functional, has appointed all of its members and it is not required by PEBA or the local ordinance to meet regularly or pass procedural rules and is unbiased.

10) A union's right to appeal an adverse ruling under the local ordinance is preserved by § 30.28(B)(10)(g).

The merits of the claims in the underlying prohibited practice charge are reserved. For reasons of administrative and judicial economy the challenge to the local ordinance's grandfathered status should be determined before undertaking review of the Complainant's Prohibited Practices Charge.

FINDINGS OF FACT:

1. In 1974, the City of Raton enacted Ordinance No. 621, which gave City employees the right to form and join a labor organization and bargain collectively with the City. (See, Respondent's Brief, Background Statement.)
2. The City adopted Ordinance 823 on January 22, 1991 thereby amending its collective bargaining ordinance No. 621 prior to the October 1, 1991, the date set forth in NMSA §10-7E-26(A) for recognition of grandfathered status. (Exhibit 2 to Complainant's brief, Response pages 3-4).
3. The introductory language to Ordinance 823 indicates that it is amending a 15-years old ordinance and expressly references Ordinance 621 among the Ordinances being amended from which a reasonable inference may be drawn that the City of Raton has engaged in collective bargaining with its employees since at least 1976 and I so find.

4. There is no allegation that Ordinance No. 823 has been substantially changed after January 1, 2003 and no evidence to support such a contention. Therefore, the provision of PEBA whereby an ordinance amended after that date must comport with PEBA §10-7E-26(B) does not apply. Neither are the provisions of NMAC 11.21.5.13 and 12.21.5.14 implicated.
5. The collective bargaining section of Ordinance 823 was recompiled at some point as §33.28 *et seq*. without material alteration. (Exhibit 2 to Complainant's Brief).
6. City of Raton Ordinance 823 purports to provide for the right of recognized collective bargaining representatives to bargain wages and salaries, hours, working conditions, and other benefits. (§33.28(B)(7)(a)(Exhibit 2 to Complainant's Brief).
7. Ordinance 823 and §33.28 *et seq*. do not create a local labor board resembling that contemplated by PEBA §10 nor does it meet the fundamental requirement for a neutral Board without regard to §10 because it potentially allows for four management representatives. .
8. The City of Raton has not promulgated procedural rules governing collective bargaining matters.
9. The City has negotiated the following provisions with the International Union of United Mine Workers:
    a. Section 17. Employment Application - Drug Test & Physical Exam;
    b. Section 20. Promotional Policy:
    c. Section 22. Bidding of a Circularized Vacancy and;
    d. Section 23. Transfers.

    (Exhibit 4 to Complainant's Brief).

10. The City has negotiated the following provisions with the Raton Police Officer's Association:
    a. Section 6. Wages, with a career track for promotions;
    b. Section 18. Layoff and Recall;
    c. Section 25. State Certification of Officers; and
    d. Section 27. Vehicle Take Home.

    (Exhibit 8 to Respondent's Brief).

11. The City has negotiated the following provisions with AFSCME:
    a. Union Security - Fair Share,
    b. Section 20. Promotional Policies,
    c. Section 21. Working at a Higher Classification,
    d. Section 22. Bidding on a Circularized Vacancy;
    e. Section 23. Transfers; and
    f. Section 24. Layoff and Recall.

    (Exhibit 6 to Respondent's Brief).

10. The City has also negotiated with Complainant Raton Fire Fighters Association, IAFF Local 2378, the following provisions:
    a. Section 33. Promotional Policy;

b. Section 34. Personnel File:
c. Section 37. Layoff and Recall; and
d. Section 42. Personal Vehicles.
(Exhibit 7 to Complainant's Brief).

11. The Raton Personnel Board has not promulgated rules necessary to accomplish and perform its functions and duties including the establishment of procedures for the designation of appropriate bargaining units, the selection, certification and decertification of exclusive representatives and the filing of, hearing on and determination of complaints of prohibited practices.

12. The Raton Personnel Board is not composed of three members; one appointed on the recommendation of individuals representing labor, one appointed on the recommendation of individuals representing management and one appointed on the recommendation of the first two appointees as contemplated by NMSA §10-7E-10(B).

REASONING AND CONCLUSIONS OF LAW:

The "grandfather" provision of PEBA provides that a public employer other than the state may operate under its own local collective bargaining provisions and procedures permitting employees to form, join or assist a labor organization for the purpose of bargaining collectively through exclusive representatives, if it enacted those provisions and procedures by ordinance, resolution or charter amendment prior to October 1, 1991. NMSA §10-7E-26(A). It further provides that any substantial change after January 1, 2003 to any such ordinance, shall subject the public employer to full compliance with the provisions of §26(B) of the Public Employee Bargaining Act. Because Respondent adopted Ordinance 823 (amending its prior collective bargaining ordinance) prior to the October 1, 1991 cut-off date set forth in §10-7E-26(A) and because there is no evidence that it was amended after January 2003, the ordinance is to be analyzed as a grandfathered ordinance under §10-7E-26(A), not under subsection (B).[1]

Where a provision of a grandfathered ordinance does not meet the requirements under § 26(A) for grandfathered status, the particular provision shall be denied grandfathered status, not the ordinance as a whole. *The Regents of the University of New Mexico v. New Mexico Federation of Teachers and American Assoc. of University Professors,* 125 N.M. 401 (1998).

[1] Respondent acknowledges that its 1991 collective bargaining ordinance was re-codified as Section 33.28. However, it does not appear that the re-codification constituted a substantial amendment of any provision of the Ordinance. Complainant asserts that it is still investigating whether any post 2003 amendments took place but as of this writing it does not appear that any amendments were made after January of 2003.

Among the express purposes of PEBA are promoting harmonious and cooperative relationships between public employers and their employees and protecting the public interest by ensuring the orderly operation and functioning of the state and its political subdivisions. NMSA §10-7E-2. Recognizing that maintaining long-standing established collective bargaining relationships is in furtherance of those objectives, the legislature carved out exceptions in PEBA for units, agreements and ordinances that pre-existed PEBA's enactment. The City of Raton has operated under an ordinance providing for collective bargaining for almost 40 years during which time labor organizations were certified as exclusive representatives and organized the City's employees. Throughout that time the City and its various recognized Unions have negotiated and executed numerous collective bargaining agreements. The history of the PELRB is to accord deference to the local boards that pre-dated the existence of PEBA. [2]

Balanced against this historic and legislative backdrop is the possibility of the State PELRB exercising jurisdiction to review a local ordinance, whether grandfathered or not, for compliance with PEBA. *See, City of Deming v. Deming Firefighters Local 4251, supra* (concluding that "the PELRB has the initial ability to determine its jurisdiction, and upholding the PELRB's determination that a certain provision of the local board was denied grandfathered effect). *See also*, this Board's decision in the consolidated Northern New Mexico Community College cases; PELRB No.'s 123-11, 124-11, 125-11, 130-11, 136-11 and 138-11. *See*, 60 PELRB 2012 and 61 PELRB 2012. Because these issues arise in the context of a Prohibited Labor Practice charge the Complainant bears the burden of proof by a preponderance of the evidence.

A. RATON'S ORDINANCE DOES NOT DEPRIVE EMPLOYEES OF RIGHTS GUARANTEED BY PEBA BY LIMITING RECOURSE TO THE COURTS TO RESTRAIN OR ENJOIN A VIOLATION OF THE UNFAIR EMPLOYEE RELATIONS PRACTICES §(8)(1).

Although §(8)(1) of Raton's Ordinance *i.e.,* the unfair employee relations practices section, makes reference only to the City requesting the District Court to "'issue an order restraining or enjoining its violation, elsewhere the Ordinance provides that if the Board's decision is that the City has engaged in an unfair employee relations practice and if compliance with the Board's decision is not obtained within the time

[2] New Mexico District Courts confirmed the Board's authority under PEBA I to review the content of labor ordinances and resolutions, as part of the process of approving local boards. However, under PEBA II grandfathered ordinances enacted prior to October 1, 1991 no longer have to result provide "substantially equivalent" rights as provided under PEBA I. Rather, deference is paid to the very oldest grandfathered ordinances provided they extend collective bargaining rights to the same classes of employees as enjoyed those rights under PEBA, *See Gallup McKinley Schools*, PELRB Case No. 103-07 at 10.

specified by the Board, it shall so notify the other party which may then resort to its legal remedies. §33.28(A)(10)(g). (Exhibit 2 to Complainant's Brief, p. 9). What those remedies may be depends on the nature of the underlying claim e.g., breach of contract or due process claims. Presumably, at a minimum, the Ordinance's requirement that the Board shall direct the City to take appropriate corrective action would be enforceable by writ of mandate. The Court of Appeals in *Deming Firefighters*[3] indicates that an aggrieved party may proceed in District Court to challenge a grandfathered local board's ruling pursuant to PEBA §10-7E-23(B). It is axiomatic that there can be no right without a remedy. That principle was key in the decision of *Marbury v. Madison*, wherein Chief Justice Marshall observed that the "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury" and warned that a government cannot be called a "government of laws, and not of men .... if the laws furnish no remedy for the violation of a vested legal right." Here, there is adequate provision in state law even if not clearly expressed in local ordinance or contract for an aggrieved union to pursue judicial review. Accordingly, the ordinance is not invalid for limiting recourse to the Courts.

B. THE ORDINANCE'S EXTENSION OF RIGHTS EXPRESSLY TO ONLY "CLASSIFIED" EMPLOYEES DOES NOT THEREBY NECESSARILY EXCLUDE A CLASS OF "UNCLASSIFIED" EMPLOYEES; HOWEVER, IT DOES BY ITS DEFINITIONS EXCLUDE EMPLOYEES WHO MIGHT OTHERWISE BE ENTITLED TO RIGHTS UNDER PEBA.

Complainant argues the ordinance extends collective bargaining rights only to "classified" employees. See, 33.28(B)(1). By excluding "unclassified" employees, supervisors and professional employees who might otherwise be entitled to bargain are prevented from exercising rights guaranteed by PEBA. Raton's Ordinance defines a "Professional Employee" as:

> "Any city employee or position engaged in work:
> (1) which is predominately intellectual and varied in character as opposed to routine manual, mechanical or physical work;
> (2) Which involves the consistent exercise of discretion and judgment in its performance;
> (3) Which is of a character that the output produced or the result accomplished cannot be standardized in relation to a given time period; and/or
> (4) Which requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or hospital, as distinguished from an apprenticeship

[3] See, *City of Deming v. Deming Firefighters Local 4251*, 141 N.M. 686, 160 P.3d 595 (Ct. App. 2007) at ¶33.

or from training in the performance or [sic] routine mental, manual, or physical processes."
§33.02. Definitions.

The term "Supervisor" is defined in the ordinance as:

> "Any nonelected individual having authority in the interest of the city as employer to hire, transfer, suspend, layoff, recall, promote discharge, assign, or discipline other employees or to adjust their grievances, or to effectively recommend any of the aforementioned action if in connection with the foregoing, the exercise of the authority is not of a merely routine, or clerical nature, but requires the use of independent judgment."
> §33.02. Definitions.

By comparison PEBA defines a professional employee as:

> "... an employee whose work is predominantly intellectual and varied in character and whose work involves the consistent exercise of discretion and judgment in its performance and requires knowledge of an advanced nature in a field of learning customarily requiring specialized study at an institution of higher education or its equivalent. The work of a professional employee is of such character that the output or result accomplished cannot be standardized in relation to a given period of time"

NMSA §10-7E-4 (Q) (2003).

The term "supervisor" is defined in PEBA as:

> "...an employee who devotes a majority of work time to supervisory duties, who customarily and regularly directs the work of two or more other employees and who has the authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively, but "supervisor" does not include an individual who performs merely routine, incidental or clerical duties or who occasionally assumes a supervisory or directory role or whose duties are substantially similar to those of his subordinates and does not include a lead employee or an employee who participates in peer review or occasional employee evaluation programs."

NMSA §10-7E-4 (U) (2003).

As previously stated, to remain grandfathered, provisions of a labor ordinance or resolution may not deny the right to bargain collectively to any public employees who have been afforded this right under PEBA and so, the Hearing Officer's task is to compare the respective definitions to determine whether Raton's ordinance

impermissibly excludes protected employees by defining them out of collective bargaining coverage. With regard to the definition of a professional employee I find that the ordinance does not exclude positions differently than does PEBA.

The City's definition of "Supervisor", however, represents the problem. While PEBA excludes those who have the authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively similarly to the ordinance, it also requires that such employees must devote a majority of work time to supervisory duties, customarily and regularly direct the work of two or more other employees, which the ordinance does not. Furthermore, while both the ordinance's and PEBA's definitions contain language distinguishing functions that are merely routine, or clerical nature, and requiring the use of independent judgment, PEBA does so with regard to the subject employee's performance of a majority of work time being devoted to his or her supervisory duties including customarily and regularly directing the work of two or more other employees. Because those supervisory functions are absent from the ordinance's definition its distinction of routine or clerical functions and its requirement of independent judgment pertains only to the exercise of authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, or discipline other employees or to adjust their grievances, not to the "supervisor's" spending a majority of his or her time supervising two or more other employees.

The definition of "supervisor" in the Raton ordinance leaves out most of the criteria established by PEBA for testing whether a particular position is supervisory or not, including the rather basic criterion that a supervisor actually supervises someone. It does not call for analysis of whether an employee alleged to be a supervisor devotes a substantial (majority) amount of work time to supervisory duties. It so broadly defines the term that it encompasses those who only occasionally assume supervisory or directory roles; or perform duties which are substantially similar to those of his or her subordinates, are "lead employees" and arguably includes those who merely participate in peer review or occasional employee evaluation programs.[4]

In *Regents* the New Mexico Supreme Court addressed a challenge to UNM's labor-management relations policy's grandfathered status based on its exclusion of

[4] The analysis for determining whether an employee is a "supervisor" first requires satisfying a three-part test, i.e. first, the employee must: (a) devote a substantial amount of work time to supervisory duties; (b) customarily and regularly direct the work of two or more other employees; and (c) have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively. If these requirements are met, the analysis continues to determine whether the disputed employee: (a) performs merely routine, incidental or clerical duties; or (b) only occasionally assumes supervisory or directory roles; or (c) performs duties which are substantially similar to those of his or her subordinates. Finally, even if the employee meets the foregoing criteria, he or she will not be a supervisor if he or she is a lead employee; or an employee who merely participates in peer review or occasional employee evaluation programs. See § 4(U).

faculty, professional and technical employees from the rights guaranteed under PEBA to join or assist, or refuse to join or assist labor organizations for the purpose of bargaining collectively over working conditions. [5] Our Supreme Court held that despite UNM's grandfathered status, it could be compelled under PEBA to recognize categories of employees that are excluded by its policy, and that such compulsion did not conflict with the Regents' constitutionally mandated authority to govern and control the university. [6]

Any provision of a grandfathered local ordinance that defines "supervisor," "confidential employee" or "management employee" so broadly that it effectively excludes employees who would otherwise be entitled to bargain under PEBA will not be given grandfathered effect under PEBA §26. In the present case Complainant asserts, and the Respondent does not deny, that by application of Raton's definition of professional and supervisory employees, the bargaining unit in question consisted of only two persons at the time of filing its petition and that it seeks to add seven employees to the bargaining unit. Thus, if the union is correct, approximately 62% of employees who would be in this bargaining unit have been deprived of bargaining rights.

This decision invalidating the definition of "supervisor" under the ordinance is consistent with New Mexico's Supreme Court decision in the *Regents* [7] case that no class of public employee covered under PEBA could be excluded from coverage of a grandfathered local ordinance:

> "...the very function [of PEBA] is to extend the right to organize and bargain collectively to all 'public employees,' as they are defined by PEBA. It is entirely within the constitutional police power of the Legislature to require a public employer— even one that has a long-standing well established employment policy—to expand the scope of employees to whom it must extend the right to bargain collectively". 962 P.2d 1236 at 1249.

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[5] In May 1970, the UNM Board of Regents adopted a labor-management relations policy which was revised April 16, 1979 and again in 1980. The Policy expressly excluded certain categories of employees from bargaining including "administrative, faculty and supervisory personnel" and "professional and technical personnel." Twenty-two years after UNM first adopted its collective-bargaining policy, the New Mexico Legislature enacted the Public Employee Bargaining Act (PEBA I). By time of the first hearing in this matter, UNM had recognized and negotiated collective-bargaining agreements with four bargaining units representing approximately 1800 employees.

[6] Although the *Regents* case was construing PEBA I, there is no material difference between PEBA I and PEBA II with regard to categories of employees are excluded by PEBA from the right to bargain collectively. Also, Regents included analysis of sec 26(B) along with 26(A). No different result obtains from concentrating on that portion of *Regents* construing Sec 26(A).

[7] *The Regents of the University of New Mexico v. New Mexico Federation of Teachers and American Assoc. of University Professors*, 125 NM 401, 962 P.2d 1236 (1998)

The question whether any specific positions are excluded under the ordinance that would not otherwise be excluded under PEBA is not exclusively within the purview of the local board as Respondent asserts. Respondent errs in its assertion that the PELRB has "recognized it is the local board's responsibility to determine whether a position excluded by Ordinance would also be excluded under PEBA" based on its decision in *City of Deming v. Deming Firefighters,* 1 PELRB 2005. In that case after a journey through the Courts on appeal [8] the determination of whether certain positions met the definition of "supervisor" was remanded to a local board. However, Respondent overlooks the fact that what was remanded to the local board was a contemporaneously filed representation petition, not the challenge to the local ordinance. The PELRB remanded the representation petition to the local board only because, doing otherwise would imply that invalidating a portion of the grandfathered ordinance necessarily results in a complete loss of grandfathered status – a message the Board did not wish to send. 1 PELRB 2005 at p. 13, Sec. III. Therefore the remand in *Deming Firefighters* (referred to as PELRB 102-04 in Respondent's Brief) is not a prior determination by this Board that it will not exercise jurisdiction in the first instance to construe challenges to a grandfathered entity's definition of supervisor in the context of a challenge to grandfathered status. To the contrary, the *Deming Firefighters* case supports the proposition that the State PELRB will exercise jurisdiction to review a local ordinance, whether grandfathered or not, for compliance with PEBA. *See, City of Deming v. Deming Firefighters Local 4251*, 141 N.M. 686, 160 P.3d 595 (Ct. App. 2007) (concluding that the PELRB has the initial ability to determine its jurisdiction, and upholding the PELRB's determination that a certain provision of the local board was denied grandfathered effect). See also, this Board's decision in the consolidated Northern New Mexico Community College cases; PELRB No.'s 123-11, 124-11, 125-11, 130-11, 136-11 and 138-11; 60 PELRB 2012 (July 13, 2012) and 61 PELRB 2012 (July 2, 2012).

C. THE ORDINANCE DOES NOT LIMIT THE SUBJECT MATTER OVER WHICH THE PARTIES MAY BARGAIN TO SUCH AN EXTENT THAT IT DOES NOT SATISFY THE DEFINITION AND SCOPE OF COLLECTIVE BARGAINING GUARANTEED BY PEBA.

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." NMSA Section 10-7E-4(F). This definition sets forth both the form and the scope of required bargaining.

The ordinance does contain a rather expansive management rights reservation but that reservation of management rights is expressly subject to other "restrictions contained in this section and the collective bargaining agreement and any provision

[8] *See, City of Deming v. Deming Firefighters Local 4251*, 141 N.M. 686, 160 P.3d 595 (Ct. App. 2007).

of this Chapter".[9] See, §33.28 (B)(2), Exhibit 2 to Complainant's Brief. General reservations of management rights as is seen in Raton's ordinance are common and such general reservations do not typically operate to defeat the obligation to bargain collectively over wages, hours and working conditions, established by contract or under a collective bargaining law, to the extent those subjects constitute mandatory subjects of bargaining. *See, How Arbitration Works,* Elkouri and Elkouri, 6th ed. Pp. 642- 648. Historically, the ordinance does not seem to have resulted in disputes over the scope of bargaining based on Raton's reservation of management rights; or if it has, Complainant has not made the Hearing Officer aware of any such dispute. Respondent's brief contains multiple references to subjects bargained in the several contracts under the ordinance that might be considered to be reserved management rights but for the bargaining history and the overriding effect of the duty to bargain in good faith over mandatory subjects imposed by law. A sampling of such subjects includes layoff and recall provisions, promotional policies, provisions for employees working at a higher classification and for bidding on a circularized vacancy, transfers and promotional policy. Additionally, although not raised by either party, under the doctrine of "effects bargaining", even though a subject may fall under a reserved management right, the employer may nevertheless be required to bargain the effects of its exercise of that right. In light of the foregoing it is my opinion that the City's Ordinance adequately provides for the right to bargain wages and salaries, hours, working conditions, and other benefits. §33.28(B)(7)(a)(Exhibit 2 to Complainant's Brief) so as to preserve its grandfathered status.

D. RATON'S ORDINANCE HAS NOT RESULTED IN THE CREATION OF A LOCAL BOARD CAPABLE OF ASSUMING THE DUTIES AND RESPONSIBILITIES OF THE STATE'S PUBLIC EMPLOYEE LABOR RELATIONS BOARD.

Raton's collective bargaining ordinance appears to be unique in that it does not establish a dedicated labor board but instead utilizes the City's Personnel Board and City Commission for the purpose of enforcing its collective bargaining ordinance. The Complainant alleges that Raton's local board is not "functional as a local labor board" because it does not have all its members appointed, does not meet regularly and has not adopted procedural rules. Complainant also alleges that because the

[9] The specific reservation of rights at issue include, "without limitation because of enumerations", the right to 1) Direct the work of its employees; 2) Hire, promote, assign, transfer, and retain employees' positions in the service; 3) Demote, suspend, or discharge employees for proper cause; 4) Promote and maintain the efficiency of city operations; 5) Relieve Employees from employment or duties because of lack of work or for other legitimate reason; 6) Take the actions as may be necessary to carry out the missions of the city in emergencies; 7) Determine the methods, means, and personnel by which city operations are to be carried on; 8) Adopt and enforce a merit system to govern the hiring, promotion, demotion, suspension, or discharge of city employees; 9) Determine the purposes, objectives, and policies of each of its offices and departments; 10) Set the standard of services to be offered to the public and/or carry out normal management function.

commission meets in closed session to discuss labor matters and for other reasons related to their past and present management associations they are controlled by management and are biased. See, Complainant's Brief, pp. 6-9. In support of these claims Complainant relies on the decision in *City of Albuquerque v. Juan Montoya*, 274 P.3d 108 (N.M. 2012).

Respondent errs when it compares the Raton Personnel Board and the PELRB on the basis that they both meet only "when an issue is filed for the Board to hear." PELRB is required to and does meet regularly to conduct its business as a result of the Board's Open Meetings Resolution. In contrast, I can find no rule or law requiring the Raton Board to meet except as suggested by Respondent. Consequently, the fact is there have been no filings in the last five years (Complainant's Brief p. 9) means that there has been no need for the Board to convene. Similarly, Complainant does not assert there are filed matters pending before the Board which are not being heard and so, without anything having been filed for board to hear, there is little reason up until now to be concerned about allegations that not all appointments to the board have been made.

Again, Respondent errs when it argues that its local board operating without all members having been appointed is comparable to the operation of the PELRB: "If all members of a board being appointed were a requirement, the PELRB would have been non-functional when it had a vacancy on the Board, met with only two (2) members, and ruled in the absence of the third member". The PELRB is able to operate with one of its members being absent because two members constitute a quorum. See, PELRB Open Meetings Act Resolution; See also, NMSA §10-7E-9(D) requiring the PELRB to decide issues by majority vote. There was never a time when there was more than one vacancy on the PELRB and never a time when it met and took action without a legal quorum being present. Taken to its logical conclusion, Respondent's argument that a board may legally function without all of its members having been appointed, without regard for what constitutes a legal quorum would mean that a board could function with a single appointment having been made – an obviously absurd result.

In *City of Albuquerque, v. Juan B. Montoya, et al.*, 2012-NMSC-007, New Mexico's Supreme Court construed PEBA §26(A) as it pertained to Albuquerque's process for the appointment of interim members to its Labor-Management Relations Board holding that the City Council President does not serve in either a "management" or a "labor" capacity, and therefore the City Ordinance provision by which the City Council President appoints a member to the Local Board during the absence of a member does not violate the grandfather clause. Citing to *City of Deming v. Deming Firefighters Local 4521,* 141 N.M. 686, 160 P.3d 595 (quoting *Regents*) *Montoya* re-iterates the basic proposition that PEBA §26(A) allows a public employer to preserve an existing collective bargaining system created prior to October 1, 1991, as long as the "system of provisions and procedures permits employees to form, join or assist a labor organization for the purpose of bargaining collectively through exclusive representatives".

Other than its analysis of whether the Council President may be considered to be "management" the importance of the *Montoya* case lies in the Supreme Court's application of PEBA §10 so as to seemingly end once and for all any debate over whether §10 applies to entities grandfathered under §26(A). While the Supreme Court disagreed in *Montoya* with the Court of Appeals' holding that the Albuquerque Local Board's process for selecting an interim board member essentially ignored §10-7E-10(B) of PEBA, it did not take issue with the application of §10(B) generally, even in the presence of a §26(A) grandfathered entity. The *Montoya* Court said quite plainly that NMSA §10-7E-10(A) requires that the local board be balanced in membership and therefore a neutral body and specifically references §10-7E-10(B) which requires a local board shall be composed of three members appointed by the public employer; one appointed on the recommendation of individuals representing labor, one appointed on the recommendation of individuals representing management and one appointed on the recommendation of the first two appointees. Here, I am not so concerned as was *Montoya* with how vacancies are filled under the local ordinance as I am concerned with *Montoya's* obvious application of §10 alongside its §26(A) analysis. Following that example I am compelled to conclude that by using its Personnel Board together with the City council as the functional equivalent of State's Labor Board, Raton's ordinance does not meet the requirements of PEBA §10(B).

The provisions for appointment of members of Raton's Personnel Board may be found at Section 4(A) of Ordinance 823:

> "A Personnel Board (the "Board") consisting of five (5) members is created. The membership of the Board shall be composed as follows:
> (1) One member shall be an employee covered under the provisions of this article. The employee and one alternate shall, by July 1st be elected for four-year terms by the employees covered under the provisions of this article. The alternate employee member shall be elected from a department other than that of the primary elected employee, and shall serve on the Board in the primary member's absence or when possible conflicts of interest prohibit the primary employee from serving on the Board.
> (2) One member shall be a department head, and this member and one alternate shall be elected. By July 1st, for four-year terms by the heads of the departments of the municipal government. The alternate department head member shall be elected from a department other than that of the primary member, and shall serve on the Board in the primary member's absence or when possible conflicts of interest prohibit the primary employee from serving on the Board.
> (3) Three (3) members shall be members of the general public and shall be appointed by the Mayor for staggered three-year terms with approval of the City Commission, such terms to commence July 1st. A

vacancy on the board shall be filled for the remainder of the unexpired term...."

Aside from the obvious numerical inconsistency with §10(B) there is nothing that would lead one to believe that the personnel ordinance covers only bargaining unit employees and in any case an election among covered employees at large would not satisfy the requirement that one member shall be appointed on the recommendation of individuals representing labor. Assuming for the sake of argument that at least one of the remaining appointments is made on the recommendation of management, the ordinance nevertheless makes no provision for an appointment of one member based on the recommendation of the first two. For the above reasons it doesn't matter much whether this or that public official in Raton is "management" or whether it is proper for Raton's City Commissioners to meet in closed session or whether the existing process results in a biased local board, because the structure and process is overall foreign to PEBA §10 regardless of those issues and is contrary to PELRA on that ground.

With regard to the absence of procedural rules, again by application of PEBA §10 I cannot conclude other than that their absence prevents the Raton Board from being fully grandfathered. NMSA §10-7E-10(A) requires a local board to "Assume the duties and responsibilities of the public employee labor relations board" and to follow all of PEBA's requirements "unless otherwise approved by the board." NMSA §10-7E-9(A) requires the PELRB to promulgate rules necessary to accomplish and perform its functions and duties including the establishment of procedures for the designation of appropriate bargaining units, the selection, certification and decertification of exclusive representatives and the filing of, hearing on and determination of complaints of prohibited practices. Raton Ordinance 873 contemplates that such rules should exist though it is undisputed that they do not: The unfair employee relations practice section of the Raton Ordinance 873 makes a specific reference to such rules in Section 33.28(B)(10)(f): " ...The charges shall be filed in writing with the Board. Each charge so filed shall be processed in accordance with the rules and regulations of the Board."

But in any event, whether the number of members of the local may be five or must be three, or whether procedural rules are a necessity, Raton's existing mechanism for appointment and serving on its board does not meet the fundamental requirement of PEBA for ensuring balance and neutrality because representatives of labor have no recommendation for appointment to the board in any real sense and there exists in the present schema the real possibility that management controls at least four of the five positions.

DECISION: Raton's ordinance does not comply with the requirements of PEBA §26(A) in all it provisions, because it does not extend the right to bargain collectively to all employees who have been afforded this right under PEBA. The ordinance has a definition of supervisor that would exclude from collective bargaining those who effectively recommend an employee's hire, transfer,

suspension, layoff, recall, promotion discharge, assignment, or discipline, without regard to whether they actually spend a substantial (majority) amount of their work time supervising the work of any subordinate employees. The City has therefore impermissibly excluded some employees from collective bargaining as guaranteed by PEBA.

As an additional separate ground, Raton's ordinance does not comply with the requirements of PEBA §26(A) in all it provisions, because it has not resulted in the creation of a local board capable of assuming the duties and responsibilities of the State's public employee labor relations board and because it has not promulgated rules necessary to accomplish and perform its functions and duties including the establishment of procedures for the designation of appropriate bargaining units, the selection, certification and decertification of exclusive representatives and the filing of, hearing on and determination of complaints of prohibited practices.

Wherefore, the City of Raton should cease and desist from following or enforcing the provisions in its ordinance which do not comport with PEBA as set forth herein. The City should further post this recommended decision or any resulting Board Order along with an acknowledgment that it will not enforce the provisions of the City of Raton Ordinance 823 referenced above. The posting should take place within fifteen (15) days after the date of this decision unless one or both of the parties timely appeals this matter to the Public Employee Labor Relation Board (PELRB). Both documents are to remain posted for an uninterrupted period of forty-five (45) days.

The City of Raton should take remedial action to rescind or amend Ordinance 823 §33.28 *et seq*. in order to comply with this Decision. Unless and until the deficiencies are corrected PELRB shall exercise jurisdiction over any properly filed matters brought under PEBA concerning the parties. In the event the City of Raton is able to show the PELRB that it has started rescission, amendment or repeal of its Ordinance within 30 days in order to comport with this decision then enforcement of any Order resulting from this decision should be stayed for a period of up to 3 months while working any amendment, rescission or repeal.

Either party may appeal this recommended decision by filing a notice of appeal with the PELRB staff at 2929 Coors Blvd. NW in Albuquerque, New Mexico 87120. The provisions for appeal are found at NMAC 11.21.3.19. An appeal must be filed within 10 days and otherwise comply with NMAC 11.21.3.19.

Issued this 30th day of August 2012

Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board