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Attn: Shane Youtz

Re: ***AFSCME, Council 18 v. New Mexico Department of Health; PELRB 122-15***

Dear Ms. Holcomb and Mr. Youtz:

On February 23, 2016 the Agency filed a Motion to Dismiss for Lack of Jurisdiction well after the deadline of January 8, 2016 set for filing dispositive motions in the Scheduling Notice dated November 20, 2015. The agency excuses this late filing on the ground that a jurisdictional challenge may be raised at any time. Following a telephone conference on February 25, 2016, the scheduled Merits Hearing on February 25, 2016 was postponed to March 11, 2016 in and a deadline of March 2, 2016 was set for the Union to respond to the Motion and to file its own Motion to Strike. The Union's Response arrived too late for me to consider it. I received a letter request from the Union's counsel on March 7, 2016 requesting that the deadline be extended for excusable neglect. Counsel's request is denied. What follows is my decision regarding the Agency's Motion to Dismiss.

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.

ANALYSIS AND CONCLUSIONS:

Pursuant to NMSA 1978 §10-7E-9(A) (2003) the Board has jurisdiction to:

(1) designate appropriate bargaining units;

(2) select, certify and decertify exclusive representatives; and
(3) accept the filing of, conduct hearing on and determination of complaints of prohibited practices.

In furtherance of that statutory grant of jurisdiction the board shall:
(1) hold hearings and make inquiries necessary to carry out its functions and duties;
(2) conduct studies on problems pertaining to employee-employer relations; and
(3) request from public employers and labor organizations the information and data necessary to carry out the board's functions and responsibilities.
NMSA 1978 §10-7E-9(B) (2003).

Finally, the PELRB has the power to enforce provisions of the Public Employee Bargaining Act through the imposition of appropriate administrative remedies.
NMSA 1978 §10-7E-9(F) (2003).

The instant case presents as a complaint against a State employer alleging a unilateral change in a State employee's working conditions in violation of the PEBA §§19 (F) and (G). That is plainly within the grant of both personal and subject matter jurisdiction bestowed on the Board.

The agency raises a collateral attack based on alleged defects in the Board's recordkeeping from 2004 outside of the record in this PPC. See *Hanratty v. Middle Rio Grande Conservancy Dist.*, 1970-NMSC-157, ¶¶ 4-5, 82 N.M. 275, 480 P.2d 165 (defining a "collateral attack" as an attempt in a separate action to impeach "a judgment by matters dehors the record" (internal quotation marks and citation omitted)). However, the alleged record insufficiencies in matters do not support an inference that PELRB rules were violated or that an Open Meetings Act violation occurred for the same reasons stated in my January 21, 2016 letter decision in re: *AFSCME, Council 18 & New Mexico Human Services Dep't*; PELRB No. 309-15:

> "If the agency's objective in referencing PELRB record deficiencies is to establish that there is no wall-to-wall-unit existing at HSD (which would require that I overlook evidence to the contrary in the parties' CBA) one cannot logically reach that conclusion because it argues from silence – where the conclusion is based on the absence of evidence, rather than the existence of evidence."

NMSA 1978 §10-15-3 provides that every "resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body" shall be presumed to have been taken or made at a meeting held in accordance with the Open Meetings Act. For the reasons stated above the agency's proffers are insufficient to overcome that presumption.

I also consider doctrines of waiver, estoppel and laches in considering whether to set aside a collective bargaining relationship that has been in place for so many years. In a pre-PEBA era case *Local 2238 of the American Federation of State, County and Municipal Employees, AFL-CIO v. Stratton,* 769 P.2d 76, 108 N.M. 163 (N.M. 1989) our Supreme Court adopted the view held by a minority of

jurisdictions that a general grant of power to contract by a municipality implies authority to engage in collective bargaining even in the absence of express statutory authority to bargain collectively:

> "Turning to the dispositive question in the instant case, we are aware that collective bargaining in the public sector has been in existence in New Mexico for approximately seventeen years without an express grant of legislative authority. Thus, the challenge by the attorney general to its existence was not inappropriate. But we are also compelled to look at this issue realistically, and are mindful that *we cannot, without grave injustice and harm, turn back the hands of time.* Therefore for us to conclude that the existence of collective bargaining in the public sector is legal in New Mexico, we must find support for our position in the minority viewpoint."
> 769 P.2d at 81. (Emphasis added).

As in *AFSCME v. Stratton* I must be mindful of the injustice and harm that could result if I were to attempt to "turn back the hands of time" in this case by invalidating a bargaining relationship that has existed between these parties for a number of years. Additionally, the Board's minutes of June 30, 2011 show that the same argument as posited here was brought before the Board and argued with current counsel for the State participating in that argument. The Board at that time declined to invalidate prior Board actions by application of the Open Meetings Act and the State did not pursue litigation at that time. I do not believe it would be appropriate for me to reverse the course set by the Board in 2011 by granting the State's requested dismissal in this case. If that is ever to be done it is better done by the Board itself after a proper appeal following a Hearing on the Merits.

Interlocutory appeals are only allowed with the hearing examiner's, director's or PELRB's permission. See NMAC 11.21.1.27. Because denial of this Motion to Dismiss is not a final order disposing of the merits of the case but instead permits the case to move forward it is not appropriate for interlocutory appeal. See *City of Sunland Park v. Paseo Del Norte Limited Partnership*, 128 N.M. 163, 990 P.2d 1286 (Ct. App. 1999), construing N.M. Rul. App. Pro. 12-203. See also, *In re Doe*, 85 N.M. 691, 516 P.2d 201 (Ct. App. 1973). (Denial of a Motion to Dismiss filed by the Department of Corrections was not immediately appealable because the order was (1) interlocutory, (2) did not practically dispose of the merits of the action, (3) was not a final judgment in a special statutory proceeding).

To support its claim that accretion of positions that occurred in 2004 is suspect, the Agency refers to two cases – *IAFF v. Silver City*, 2-PELRB-08 and *NMCPSO v. Rio Rancho Police Department*, 4-PELRB-09, for the proposition that an accretion petition may not be brought with regard to grandfathered bargaining units. That is a misreading of those cases. In the former case the Union could not proceed by accretion because a separate question of representation existed, not because of a blanket prohibition against such petitions. As stated by the Hearing Officer in her decision upheld by the Board without modification:

> "PELRB Rule 11.21.2.37(A) does not stand for the proposition that a grandfathered bargaining unit must remain forever static. Rather, it reflects and implements the

> general policy, as does PELRB Rule 11.21.2.38(C), that significantly modifying an existing bargaining unit should normally be done through the election process (including card counts) and a demonstration of majority support, rather than upon a mere showing of thirty percent (30%) interest."

Hearing Officer's Recommended Decision; PELRB Case No. 308-07, page 34.

Likewise, in the latter case the Board asserted its jurisdiction to determine whether clarification of the existing bargaining unit in Rio Rancho was appropriate. The Board, in accepting the Hearing Officer's Recommended Decision without modification accepted her rationale at pages 50-51 that while she had previously concluded that NMAC 11.21.2.38(B) and 11.21.2.37(A) "Absolutely prohibit accretion in the case of grandfathered bargaining units, she had since changed her mind concerning the "implications of such a harsh policy":

> "...grandfathered units may be clarified *provided* the clarification is otherwise appropriate under PRBA standards and any accretion is done so by election rather than merely upon a showing of thirty percent (30%) showing of interest as ordinarily contemplated under NMAC 11.21.2.38(B)."(Emphasis in the original).

Accordingly, reference to that Board precedent does not support the State's position.

Accepting all factual allegations in the Union's PPC as true and resolving all doubts in favor of sufficiency of that complaint, I conclude that the PELRB has both personal and subject matter jurisdiction in this case and the Agency's Motion to Dismiss is **DENIED**. I do not rely on any of the late submissions by the Union in rendering this decision.

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Thomas J. Griego
Executive Director