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THOMAS J. GRIEGO  
Executive Director

January 19, 2016

National Education Association  
New Mexico Southwest Region Office  
225 East Idaho Avenue, Suite 34  
Las Cruces, New Mexico 88005  
Attn: Leslie A. Fritz, UniServ Director

Cuddy and McCarthy, LLP  
7770 Jefferson St. NE Suite 102  
Albuquerque, New Mexico 87109  
Attn: Andrew M. Sanchez, Esq.

Re: ***SCEA v. Silver Consolidated School District; PELRB No. 126-15***

Dear Ms. Fritz and Mr. Sanchez:

This letter constitutes my decision regarding Respondent's Motion to Dismiss filed December 23, 2015. Complainant filed its Response to the Motion January 13, 2016. Based on the record and arguments contained in the parties' pleadings it is my decision that the Motion should be **DENIED** for the reasons that follow:

**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 (10<sup>th</sup> 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.

**DISCUSSION AND CONCLUSIONS:**

A. **The Amended PPC is Not Time-Barred.**

The District argues that this PPC is time-barred because the conduct alleged to have occurred all took place more than six months prior to its filing.<sup>1</sup> That argument rests upon its belief that the limitations period set forth in NMAC 11.21.3.9 began to run on May 23, 2015. That belief is incorrect for two reasons: First, the amended pleading relates back to the original filing and; second, the original filing date is three days earlier than supposed by the District.

According to the Union's Response to the District's Motion to Dismiss, allegations of acts occurring prior to May 21, 2015 that appear in both the Prohibited Practices Complaint and the Amended PPC are alleged to provide context and are not intended to provide a basis for a claimed PPC. I disregard them for purposes of this Motion and concentrate on the alleged acts occurring on May 21, 2015 and thereafter. The acts alleged to have occurred in paragraphs 33-50 of the original PPC are substantially repeated with additions in paragraphs 33-54 of the amended PPC filed December 2, 2015. If timely, state a claim for violation of the PEBA. Board Rule 3.12 (NMAC 11.21.3.12) requires the director to screen all complaints for "facial adequacy" and, if a complaint is facially deficient, the director shall give the complainant an opportunity to amend the complaint within five days. Therefore, it is appropriate to deem the allegations made in a PPC amended pursuant to that rule to "relate back" to the original filing. By analogy, SCRA 1-015(c) provides:

"Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

The District also argues that the limitations period set forth in NMAC 11.21.3.9 began to run on May 23, 2015 because the "hard copy" of the PPC was filed on November 23, 2015. By so arguing, the District overlooks the operation of two other Board rules: NMAC 11.21.1.8 regarding the computation of time and that portion of NMAC 11.21.1.10 concerning the manner of filing documents with the director or the board that provides for filing by "fax".

NMAC 11.21.1.8 provides:

"When these rules state a specific number of days in which some action must or may be taken after a given event, the date of the given event is not counted in computing the time, and the last day of the period is deemed to end at close of business on that day. Saturdays, Sundays and state recognized legal holidays observed in New Mexico shall not be counted when computing the time. When the last day of the period falls on a Saturday, Sunday or legal holiday observed in New Mexico, then the last day for taking the action shall be the following business day."

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<sup>1</sup> NMAC 11.21.3.9 provides "Any complaint filed more than six (6) months following the conduct claimed to violate the act, or more than six (6) months after the complainant either discovered or reasonably should have discovered such conduct, shall be dismissed."



NMAC 11.21.1.10 provides:

“To file a document with the director or the board, the document may be either hand-delivered to the board’s office in Albuquerque during its regular business hours, or sent to that office by United States mail, postage prepaid, or by the New Mexico state government interagency mail. The director will be responsible for recording the filing of documents to be filed with the board, as well as documents to be filed with the director. A document will be deemed filed when it is received by the director. Documents sent to the board via facsimile (“fax”) transmission will be accepted for filing as of the date of transmission only 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.”

Here, the Union filed its original complaint by facsimile transmission on Friday, November 20, 2015. The “hard” copy was received the following Monday, November 23, 2015 as required by NMAC 11.21.1.10 with the result instead of the pertinent allegations being filed two days late as the District argues, they were in fact filed a day prior to being time barred. For this reason the Motion to dismiss as time barred is **DENIED**.

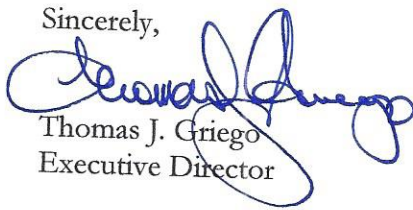
**B. The Amended PPC Was Not Resolved by the CBA’s Grievance Procedure.**

Paragraphs 20 through 23 of the Amended Prohibited Practices Complaint refer to a grievance brought by SCEA on behalf of Ms. Weeks. The District argues that that because the allegations therein were resolved in the contract grievance procedure the claims thereunder should be dismissed and the allegations themselves should be viewed as indicia of the bad faith plead by the School District in its Counter-Claim. Neither party submitted a copy of relevant portions of the CBA’s grievance procedure in support of their positions on this Motion although the file does coincidentally contain a portion of the contract’s grievance procedure as part of an earlier Union submission responsive to my initial request for supporting documents. There is no allegation that the parties entered into a settlement agreement whereby they waived their respective rights to bring claims under the PEBA. There is no allegation that the parties clearly and unmistakably agreed to arbitrate any of the issues in this PPC so that deferral to an arbitrator might be appropriate. Rather the Motion to Dismiss is premised on the notion that because a grievance was initiated involving the same parties and facts, that resolution of that grievance bars this PPC. That notion is not in accordance with the law.

As appears from ¶ 38 of the PPC the grievance was premised on violations of school board policies, not violations of the PEBA. Furthermore, the PPC paragraphs referenced by the District are not limited to violations of the PPC that might be the subject of a contract grievance. To the contrary, the acts occurring between May 21 and 26, 2015 are alleged in paragraphs 55-63 of the Amended PPC to have:

1. Discriminated against a public employee because of the employee's membership in a labor organization in violation of § 19(A) of PEBA;

Sincerely,

A handwritten signature in blue ink, appearing to read "Thomas J. Griego". The signature is stylized with large, flowing loops and is positioned over the printed name and title.

Thomas J. Griego  
Executive Director