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February 27, 2015

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Attn: James Montalbano

Holcomb Law Office
3301-R Coors Road N.W., Ste. 301
Albuquerque, New Mexico 87120
Attn: Dina Holcomb

Re: *AFSCME, Council 18 v. Hidalgo County; PELRB No. 130-14*

Dear Ms. Holcomb and Mr. Montalbano:

This letter constitutes my decision regarding Respondent's Motion to Dismiss filed February 6, 2015. Complainant filed its Response to the Motion February 20, 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. 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.

## DISCUSSION AND CONCLUSIONS:

**A. Failure to State a claim by Complainant's references to NMAC 11.2.3.12(A) and NMSA §10-7E-18 (A)(5)**. Complainant's PPC alleges in one place that it was filed "pursuant to 11.2.3.12(A) NMAC", a rule apparently pertaining to the regular meeting schedule of the State Apprenticeship Council. According to Complainant's brief that reference was a typographical error and elsewhere in the PPC it correctly referred to Rule 11.21.3.8 and 11.21.3.12(A) NMAC as the basis for the PPC. Similarly, the Complainant misstated the section of the PEBA that public employers follow in negotiations and impasse procedures by reference to NMSA §10-7E-18 (A)(5).

The correct reference should have been to NMSA 1978, §10-7E-18(B) (2003).

The PELRB follows New Mexico's courts in utilizing the liberal "notice pleading" standard. See *AFSCME v. City of Rio Rancho,* PELRB Case No. 159-06, Hearing Examiner's letter decision on City's Motion to Dismiss (Nov. 17, 2006). Under the notice pleading standard, it is sufficient that the defendants be given only a fair idea of the nature of the claim asserted against them sufficient to apprise them of the general basis of the claim. See *Garcia v. Coffman*, 1997-NMCA-092, ¶ 11, 124 N.M. 12, 946 P.2d 216 and *Sanchez v. City of Belen*, 98 N.M. 57, 60, 644 P.2d 1046, 1049 (Ct. App. 1982) (the general policy under the notice pleading standard is to provide for "an adjudication on the merits" rather than allowing "technicalities of procedures and form" to "determine the rights of the litigants"). The PPC as plead, even with the referenced errors, suffice to give the Employer fair notice of the nature of the claim asserted against them sufficient to apprise them of the general basis of the claim. Under our rules of 'notice pleading,' it is sufficient that defendants be given only a fair idea of the nature of the claim asserted against them sufficient to apprise them of the general basis of the claim; specific evidentiary detail is not required at this stage[.]" *Petty v. Bank of NM Holding Co*., 109 N.M. 524, 787 P.2d 443, 1990-NMCA-021, ¶ 7. Furthermore, the Employer's Motion to Dismiss at ¶2 acknowledges that "The Prohibited Practice Charge (PPC) is based upon a single allegation, alleging the County 'began direct dealing with bargaining unit employees regarding work schedules.' (PPC at ¶2)". That paragraph supports a conclusion that the Employer is properly apprised of the charge against it.

**B. Failure to state a claim for injunctive relief.** This is not a case in which the Complainant seeks pre-adjudication temporary injunctive relief where it must show a likelihood of success on the merits and irreparable harm in the absence of immediate relief. The nature of the injunctive relief in this case involves enforcing compliance with the PEBA, which this Board has the authority to do. See, NMSA §10-7E-9(F). ("The board has the power to enforce provisions of the Public Employee Bargaining Act through the imposition of appropriate administrative remedies.") Historically, the Board also has also relied on NMSA 1978, § 10-7E-23(A) (2003), which states: "The board or local board may request the district court to enforce orders issued pursuant to the Public Employee Bargaining Act, including those for appropriate temporary relief and restraining orders" as a basis for its authority to issue injunctive relief. Cease-and-desist orders, which are injunctive in nature, are a common remedy under both the PEBA and the National Labor Relations Act. Under the facts of this case, the Complainant has pled a violation of the PEBA and has requested relief appropriate to the violation is proven.

**C. PELRB's authority to grant injunctive relief.** For the reasons stated above the Employer's Motion to Dismiss on the ground that the PELRB lacks authority to grant injunctive relief is without merit.

**D. Whether impasse exists.** The Employer correctly points out that the PELRB looks to National Labor Relations Board decisions interpreting the National Labor Relations Act for guidance in interpreting provisions in PEBA where they are substantially similar, "particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the time the

PEBA was enacted." See, *Las Cruces Prof. Fire Fighters v. City of Las Cruces*, 1997 NMCA 44, 123 N.M. 239. See also, *Regents of UNM v. N.M. Federation of Teachers*, 1998 NMSC 20, ¶18, 125 N.M. 401, 408. In accordance with that principle Employer cites to two cases interpreting the National Labor Relations Act: *Pillowtex Corp.,* 241 NLRB 40, 46 (1979) and *PRC Recording Co.,* 280 NLRB 615, 635 (1986), *enf'd.* 836 F.2d 289 (7th Cir. 1987). Those cases, and others cited therein, are clear that the determination of when an impasse exists is a question of fact. *PRC Recording Co.*, *citing Saunders House v. NLRB*, 719 F.2d at 687-88. The 7th Circuit in particular noted that a party's declaration that an impasse has occurred will not be dispositive in determining whether one does indeed exist--all of the circumstances of the case must be analyzed. *Id.* at ¶ 14, *citing to Huck Mfg.,* 693 F.2d at 1186-87and *Teamsters Local Union No. 175 v. NLRB*, 788 F.2d 27, 32 (D.C.Cir.1986). Ultimately, for purposes of deciding this motion, I must accept as true all well-pleaded factual allegations and resolve all doubts in favor of sufficiency of the complaint. Doing so results in a conclusion that the Complaint states a violation of the PEBA under the theories alleged in the complaint. Therefore, I must deny the Motion. *See, 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).

**RECOMMENDED DECISION:**

For the foregoing reasons, the motion to dismiss should be **DENIED.**

This recommended decision is not interlocutory and should await final disposition of the case before appeal.

Sincerely,

Thomas J. Griego
Executive Director