STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AMERICAN FEDERALTION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 18, AFL-CIO,

Petitioner,

vs. **PELRB CASE NO. 305-16**

STATE OF NEW MEXICO,
DEPARTMENT OF HEALTH

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board on a Motion by the State of New Mexico, Department of Health ("DOH") requesting leave to file for Interlocutory Appeal of the Hearing Officer's December 11, 2016 Decision denying DOH's Motion for Reconsideration of his August 12, 2016 Decision Denying the DOH's Alternative Motion to Dismiss or for Summary Judgment. Upon review of the parties' submissions and without hearing argument by counsel the Board finds:

A. The Board has jurisdiction over the parties and subject matter;

B. The movant has not established sufficient grounds to prompt the Board in the proper exercise of its discretion to permit interlocutory appeal as requested.

THEREFORE THE BOARD ruled 3-0 at its January 10, 2016 Board meeting that the Motion for Interlocutory Appeal should be, and is hereby **DENIED**

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

1/19/17
DATE

DUFF WESTBROOK, BOARD CHAIR

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 18, AFL-CIO,

Petitioner,

v.

STATE OF NEW MEXICO DEPARTMENT OF HEALTH,

Respondent.

REQUEST TO THE PELRB FOR INTERLOCUTORY APPEAL OF HEARING OFFICER'S RECOMMENDED DECISION ON MOTION FOR RECONSIDERATION

NOW COMES Respondent, the State of New Mexico Department of Health, by and through its attorney of record, Dina E. Holcomb, Esq., and hereby submits its Request to the Public Employee Labor Relations Board (PELRB) for Interlocutory Appeal of the Hearing Officer's Recommended Decision denying Respondent's Motion for Reconsideration.

BACKGROUND

On or about March 8, 2016, Petitioner filed a "Petition for Clarification (Accretion)" stating "Petitioner seeks to accrete" positions of "Home Health Aide Supervisor and Psychiatric Tech Supervisor, working for the Los Lunas Community Program of the Department of Health" into the existing bargaining unit. (Petition at pp. 1-2). Respondent filed a Motion to Dismiss or for Summary Judgment on June 11, 2016. On August 5, 2016, Respondent filed a Motion for Continuance of the hearing on the merits scheduled for August 17, 2016, stating a similar case

existed in AFSCME v. HSD, PELRB No. 309-15, in which the parties and the Executive Director has acknowledged the duplication of argument that would be made in both cases. AFSCME did not oppose the motion for continuance, the Executive Director found the motion to be well taken, and granted the motion thereby vacating all deadlines and holding the matter in abeyance. Subsequent to the Motion being granted, on August 11, 2016, a Recommended Decision was issued by the Executive Director denying Respondent's Motions to dismiss or for summary judgment.

On November 1, 2016, the PELRB dismissed AFSCME's Petition in PELRB No. 309-15 stating a unit clarification petition is not the proper mechanism to include attorneys in HSD into the existing grandfathered bargaining unit. On November 15, 2016, Respondent filed a Motion for Reconsideration of the Executive Director's decision with regard to Respondent's Motions to Dismiss or for Summary Judgment based upon the PELRB's ruling in PELRB No. 309-15. On December 7, 2016, the Executive Director issued a decision denying Respondent's Motion for Reconsideration and ordering the parties to a hearing on the merits.

ARGUMENT

1. The Cases Involve the Same Bargaining Unit.

The instant matter involves an attempt by the Union to accrete positions within one (1) division, the Los Lunas Community Health Program, and at one (1) agency, the Department of Health, into the existing state-wide bargaining unit. This is the same state-wide bargaining unit that was engaged in the matter of *AFSCME v. HSD*, PELRB No. 309-15, despite the matter involving a different agency. It is important to keep in mind the following factors:

A. On August 31, 1994, in case number CP 71-93(S), the AFSCME bargaining units of various agencies of the State of New Mexico were realigned (consolidated) into a single bargaining unit.

B. PELRB No. 336-04 is purportedly a Certification of Majority Support pursuant to §10-7E-24(B) of a grandfathered bargaining unit.

The Decision, however, claims "because of a prior accretion and showing of majority support in 2004 and 2008 the unit in question is *not* grandfathered." (Decision at p. 3). It is unclear exactly what is being relied upon to make this conclusion inasmuch as there was not an accretion or a showing of support in 2004 nor in 2008. As stated in B. above, PELRB No. 336-04 purportedly contains a Certification of Majority support of a grandfathered bargaining unit. In addition, the PELRB adopted the Finding of Fact in PELRB No. 309-15, that *as part of a settlement* the parties agreed to accretion of positions in PELRB No. 312-09. However, neither the Certification of Majority Support nor the agreed-to accretion constitute elimination of a grandfathered bargaining unit. There is nothing in PEBA nor the PELRB rules that a grandfathered bargaining unit becomes ***un***grandfathered due to demonstration of majority support, agreement of the parties, or any other action of the PELRB other than decertification. In fact, PEBA states quite the opposite: "Nor shall anything in the Public Employee Bargaining Act be construed to annul or modify the status of an existing or recognized exclusive representative." §10-7E-25, NMSA 1978 (2003). AFSCME is the grandfathered and incumbent exclusive representative of a bargaining unit that was formed prior to June 30, 1999, thereby constituting a grandfathered bargaining unit. The only way to change such a status is through a decertification.

2. **Accretion is not Appropriate for Grandfathered Bargaining Units.**

It is undisputed by the parties that the bargaining unit was "established prior to July 1, 1999" and "must continue to be recognized as an appropriate unit". *See*, PHO in PELRB No. 309-15 at Stipulation contained in ¶ j, concerning PELRB Case No. CP 71-93(S). Under both PEBA I and PEBA II, grandfathered bargaining units could continue to be recognized pursuant to certain requirements. §§10-7D-24, NMSA 1992 and 10-7E-24, NMSA 2003. Under PEBA I a unit clarification petition could be filed even with a grandfathered bargaining unit. 11.21.2.30(A) NMAC (repealed). Conversely, under PEBA II, the language in the PELRB rules was amended to specifically prohibit unit clarification petitions from being filed concerning a grandfathered bargaining unit. 11.21.2.37(A) NMAC. Petitioner's claims that this case is an accretion as opposed to a unit clarification is a distinction without a difference. In ***NMCPSO v. Rio Rancho Police Department,*** 4-PELRB-2009, the Hearing Officer and PELRB reviewed an attempt by the union to accrete lieutenants into the existing grandfathered bargaining unit. As part of the review, the Hearing Officer specifically found "***accretion*** raises three issues under PELRB rules: (1) whether there was sufficient change of circumstances from the creation of the original unit to now warrant a change to that unit; (2) ***whether a grandfathered bargaining unit may be accreted or clarified at all***; and (3) whether accretion is otherwise appropriate." ***Id.*** at pp. 48-49 (emphasis added). The only available avenue for grandfathered bargaining units is a Representation Petition. ***Silver City Professional Firefighters, IAFF Local 2430 v. Town of Silver City,*** 2-PELRB-2008 (Hearing Examiner's Report in PELRB 308-07 at p. 30); ***NMCPSO v. Rio Rancho Police Department,*** 4-PELRB-2009. The Hearing Examiner in ***NMCPSO v. Rio Rancho*** had previously concluded in a third case, ***Santa Fe Police Officer's Association and City of Santa Fe***, that accretion to grandfathered bargaining units could not occur through any means in order to "protect

the parties' expectancy interests, and also prevents grandfathered unit from becoming even more potentially inappropriate." ***NMCPSO v. Rio Rancho Police Department,*** 4-PELRB-2009 (Hearing Examiner's Report at pp. 50-51). Rather than changing her conclusion reached in ***Silver City***, the Hearing Examiner stated she "reaffirms that view today, and concludes that grandfathered units may be clarified *provided* the clarification is otherwise appropriate under PEBA standards, and ***any accretion*** is done so ***by election*** rather than merely a showing of thirty percent (30%) showing of interest as ordinarily contemplated under NMAC 11.21.2.38(B)." ***Id.*** at p. 51 (emphasis added). The PELRB's holdings support Respondent's position that the Petition must be dismissed and the only available avenue to Petitioner is a representation petition involving the entire bargaining unit.

3. **The Ruling in PELRB No. 309-15 is Applicable.**

The Executive Director's Decision states, "I find and conclude that the Board's decision in PELRB 309-15 does not bear on this case because the 'changed circumstances' element of a Unit Clarification proceeding pursuant to Rule 11.21.2.37 NMAC at issue in PELRB 309-15 is not is not [sic] an element required for an accretion petition brought pursuant to Rule 11.21.2.38 NMAC." (Decision at p. 2). However, petitions for accretion are a type of unit clarification petition. ***Desert Palace, Inc.,*** 209 NLRB 950 (1974)(NLRB dismissal of a unit clarification petition seeking to accrete positions into an existing bargaining unit). The National Labor Relations Board has explained the interplay between unit clarifications and accretions as a single action:

> Unit clarification procedures permit the NLRB to add employees to a particular bargaining unit. The addition is accomplished without an election. The added employees are considered covered by the existing collective bargaining agreement. The theory of unit clarification, insofar as adding positions to the collective bargaining unit, is that the added employees functionally are within the existing

> bargaining unit but had not formally been included due to changed circumstances (for example, evolving or newly created jobs). See NLRB v. Magna Corp., 734 F.2d 1057, 1061 (5th Cir.1984); Consolidated Papers, Inc. v. NLRB, 670 F.2d 754, 756-57 (7th Cir.1982); Boston Cutting Die Co., 258 NLRB 771 (1981); Massachusetts Teachers Ass'n, 236 NLRB 1427 (1978); Arthur C. Logan Memorial Hospital, 231 NLRB 778 (1977); Copperweld Speciality Steel Co., 204 NLRB 46 (1973).
>
> Limits on unit clarification result from its rationale. Employees may be added by unit clarification where, as in the creation of new job, their existence was unforeseen and they are functionally identical to employee classifications included within the existing unit. Employees cannot be added by unit clarification, however, where they intentionally and historically were excluded from the existing bargaining unit. The NLRB first announced this limitation on unit clarification in Wallace-Murray Corp., 192 NLRB 1090 (1971), and has adhered to the rule since. See Massachusetts Teachers Ass'n, 236 NLRB 1427 (1978).

NLRB v. Mississippi Power & Light Co., 769 F.2d 276 (5th Cir. 1985). A unit clarification petition cannot be used to upset the stability created in the bargaining relationship, particularly a grandfathered bargaining unit. Similarly, an accretion is also prohibited to undo an appropriate grandfathered bargaining unit. The PELRB has recognized this prohibition and requirement for a representation election in the ***Silver City***, ***Santa Fe***, and ***Rio Rancho*** cases cited herein. Furthermore, the PELRB appeared to support this finding by making the following motion in the AFSCME v. HSD case: "[m]otion and second to uphold the findings except with regard to [the Executive Director's] findings regarding changed circumstances and to declare unit clarification is not the proper mechanism for ***including*** these attorneys in the unit." (Audio of November 1, 2016 PELRB meeting). Inasmuch as an accretion is a type of unit clarification petition and the PELRB determined unit clarifications are not appropriate to "include" positions in a bargaining unit, then it follows the accretion petition is also inappropriate and must be dismissed.

4. **Allowing Accretions to Existing Bargaining Units Violates PEBA.**

The PEBA allows employees to freely choose to be represented by a labor organization of their choice, without interference, restraint, or coercion. §10-7E-5. This provision also allows employees to refuse such activities. ***Id.*** However, an accretion petition, without an election, interferes with the employee's freedom of choice and, instead, forces the representation upon the employee. The NLRB has recognized the coercive nature of accretions and significantly limits the application of accretions. The NLRB has repeatedly held the following:

> The Board has followed a restrictive policy in finding accretion because it forecloses the employees' basic right to select their bargaining representative. We stated in *Melbet Jewelry Co.*, 180 NLRB 107, 110 (1969), that the Board "will not, under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election."

Towne Ford Sales, 270 NLRB 311 (1984); *see also,* ***Safeway Stores,*** 276 NLRB 944 (1985). The Courts have supported the NLRB's limitations on accretions:

> In this case, however, the Board declined to apply the community of interest test, holding that "the fact of [the clerks'] historical exclusion [from the bargaining unit] ... is determinative" that they could not be accreted to the unit except by a showing of majority sentiment among them. In other words, if neither the Company nor the Union insisted upon including a particular group of employees in a bargaining unit at its formation, then the excluded employees are thereafter conclusively presumed to lack a community of interest with those in the bargaining unit.
>
> ...The Board based its holding in this case on its prior decision in Laconia Shoe, 215 N.L.R.B. 573 (1974), in which it stated: "When a group has in fact been excluded for a significant period of time from an existing production and maintenance unit, the Board will not permit their accretion without an election or a showing of majority among them even if no other union could obtain representative status for them." That decision fully supports the Board's formulation in this case - that the clerks' "historical

> exclusion ... is determinative" against their later accretion absent evidence of the majority's preference.
>
> ...Both the Board and the courts recognize that the Laconia Shoe doctrine is critical to the protection of employees' Section 7 right to choose whether to belong to a union and if so to which one. As the Second Circuit perceptively stated the matter in NLRB v. Stevens Ford, Inc.: "If groups of employees may be permissibly accreted to a bargaining unit after they have been earlier excluded from an election in that unit, strategic selection of one group for election purposes followed by accretion will lead to a larger bargaining unit in which the bargaining representative does not have majority status. Such bootstrapping violates the Act's policies favoring the free choice of employees."

Teamsters v. NLRB, 17 F.3d 1518 (Ct. App. D.C. 1994), *citing,* ***NLRB v. Stevens Ford, Inc.,*** 773 F.2d 468 (1985); ***International Union of Petroleum & Industrial Workers v. NLRB,*** 980 F.2d 774, 778 (D.C.Cir.1992); ***Laconia Shoe,*** 215 N.L.R.B. 573 (1974). The instant matter as well as AFSCME v. HSD is a prime example of what the Courts have specifically denied the Union the ability to do: force employees into union representation without an election, without a choice, contrary to the exclusion when the bargaining unit was formed, and either into or creating a minority union. Allowing the accretion petition to proceed would essentially allow labor organizations to form small bargaining units and, over time and through a process in which the employees have no choice, create a much larger bargaining unit that is subject to existing collective bargaining agreements in which the employees had no participation and no voice. In addition, it would force employers to apply negotiated provisions to groups of employees it had no idea would be subject to the language at the time it was negotiated into a collective bargaining agreement.

CONCLUSION

For the reasons stated herein, and in Respondent's previously filed Motions, Respondent respectfully requests the matter proceed to the PELRB on an interlocutory appeal, the Executive Director's Decision be reversed, and the Petition dismissed in its entirety with prejudice.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Request for Interlocutory Appeal was faxed and mailed, postage prepaid, this 21st day of December, 2016, to:

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