STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

20-PELRB-2012

AFSCME COUNCIL 18

Petitioner,

v. **PELRB 107-11**

CITY OF ALBUQUERQUE,

Respondents

ORDER AND DECISION

THIS MATTER comes before the Public Employee Labor Relations Board on Interlocutory Appeal of the Hearing Officer's Recommended Decision denying Respondents' Motion to Dismiss or in the Alternative to Stay Proceedings. Upon a 3-0 vote at the Board's February 7, 2012 meeting the Board approves the Recommended Decision of the Hearing Officer issued December 29, 2011 and adopts it as the Board's Order for the reasons stated therein including the Findings of Fact, Conclusions of Law and the Rationale. **IT IS HEREBY ORDERED** that the recommended decision be and hereby is adopted by the Board and that the Respondent's Motion shall be and hereby is, **DENIED.**

Date: 2/22/12

Duff Westbrook, Chairman
Public Employee Labor Relations Board

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AFSCME COUNCIL 18

Petitioner,

v. **PELRB No. 107-11**

CITY OF ALBUQUERQUE,

Respondents

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

THIS MATTER comes before the Hearing Officer on Respondent's Motion to Dismiss or in the Alternative to Stay Proceedings. The issues raised in Respondent's Motion are also raised in several other cases pending before this Board involving the City of Albuquerque (e.g. PELRB No.'s 121-10, 128-10 A, B, C and D, 133-10, 106-11, 103-11, 104-11, 105-11 and 108-11). The dismissal issues in this and the companion cases regarding PELRB's jurisdiction were argued at a hearing on the Motion in PELRB 121-10 on September 7, 2011, in PELRB 133-10 on September 21, 2011 and discussed in Status and Scheduling Conferences in several of the other companion cases. The Motion was fully briefed on October 14, 2011.

FINDINGS OF FACT:

1. The Petitioner (AFSCME) is recognized by the City of Albuquerque (City) as the exclusive bargaining representative for its members, employees of the City of Albuquerque.
2. AFSCME and the City have entered into a series of Collective Bargaining Agreements (CBA's) beginning in the mid 1970's.

3. On January 25, 2011 AFSCME filed PELRB 107-11. The Charge alleges that the City had not empanelled a local board and so has not timely processed Complaints and so invokes the jurisdiction of this Board.

4. Respondent filed an Answer on February 9, 2011 raising as Affirmative Defenses that this Board lacks jurisdiction and that primary, if not exclusive jurisdiction resides with the City's local labor board.

5. On March 4, 2011 Respondent also filed a Motion to Dismiss or in the Alternative to Stay Proceedings asserting that jurisdiction resides with the City's local Labor-Management Relations Board over the issues in the Complaint.

6. The City enacted a Labor-Management Relations Ordinance (LMRO) in 1974 establishing a labor board empowered to hear prohibited practices complaints. R.O.A. §3-2-9(D).

7. The local board in this case is a creature of NMSA §10-7E-26(A) having been created prior to October 1, 1991.

CONCLUSIONS OF LAW:

A. This case does not present sufficient facts to compel this Board to exercise jurisdiction over the parties and the subject matter and therefore this Board should defer to the jurisdiction of the City's Labor-Management Relations Board.

B. The issues and facts in ***City of Albuquerque v. Montoya,*** 2010-NMCA-100 pending appeal are sufficiently different from those in the present case that determination of the Respondent's Motion need not await its outcome and its application is not expected to materially affect the outcome of the decision on this Motion.

C. To the extent PELRB 107-11 raises allegations that delays in obtaining a speedy hearing before the City's labor relations board has resulted in a denial of due process it does so in connection with the question of whether the individual at issue was suspended from employment without just cause. Just cause for discipline is more properly the province of a grievance proceeding pursuant to the parties' CBA and does not state a claim under PEBA. To the extent the complaint alleges a violation of PEBA it does so in the context of a CBA violation, a matter subject to discretionary deferral to arbitration.

RATIONALE:

It is not disputed that the City has adopted a labor-management relations ordinance and procedures permitting employees to form, join or assist any labor organization for the purpose of bargaining collectively through exclusive representatives prior to October 1, 1991 so as to be grandfathered under §26(A) of the Act. Neither is it disputed that all members of the local board have been appointed, are now meeting regularly and are now operating under rules and regulations promulgated to process pending matters notwithstanding AFSCME's assertion that for two years preceding the filing of this PPC such was not the case. AFSCME does not contend that the established system is being manipulated to thwart the intent of the local ordinance or the PEBA or that the local board has taken action not in compliance with prior PELRB decisions interpreting PEBA. As stated in the AFSCME's Response to the Respondent's Memorandum of Law in Support of its Motion the issue before the Hearing Officer is whether the City Labor Board's "significant back log" of prohibited practices complaints results in a delay in obtaining a hearing that is "unduly prejudicial" to AFSCME. If it does a further

question is whether that fact is sufficient under PEBA and cases construing it to permit this Board to assert jurisdiction over the AFSCME's Prohibited Practices Charge. It is my opinion that this case does not present sufficient facts to compel this Board to exercise jurisdiction over the Charge at issue in the presence of a grandfathered local ordinance under §26(A) of the Act.

The mere fact that the City has enacted a local labor-management ordinance does not dispose of the jurisdictional issue presented for consideration. Both the PELRB and the Second Judicial District Court have indicated that the PELRB has concurrent jurisdiction to enforce PEBA ***after*** the approval and creation of a local board under appropriate limited circumstances. In ***American Federation of State, County and Municipal Employees International Union v. New Mexico State University***, 2-PELRB-2005 (Jun. 22, 2005) the Director dismissed and remanded a matter to a duly approved local board, but the PELRB reversed and remanded the matter back to the Director because the local board was not yet in fact functioning and the Complainant alleged that the employer was utilizing the process of establishing the local board to delay processing pending matters. The Second Judicial District Court denied a local employer's petition for mandamus to prevent the PELRB from exercising jurisdiction where a local board had been approved and appointed, but was not fully operational and functioning when the PELRB PPC was filed. The court orally reasoned that the PELRB and a local board have concurrent jurisdiction to enforce PEBA, pursuant to §9(F) and §11(E). *See* ***Gallup-McKinley County Schools v. PELRB and McKinley County Federation of United School Employees Local 3313***, 2d Judic. Dist., Case No. CIV-2005-07443 (J. Campbell, oral

ruling on Nov. 2, 2005). The PELRB has also concluded that it has concurrent jurisdiction to review a local board's rules for compliance with PEBA, and for compliance with prior PELRB decisions interpreting PEBA. *See* ***Gallup-McKinley Schools***, *supra*, 03-PELRB-2007 (undated), and attached Hearing Examiner Report. To rule otherwise would undermine "the consistent and uniform administration of [PEBA] ... throughout the State of New Mexico," and thus would "threaten uniformity in the proper administration of PEBA." ***Id.*** at 2.

In ***City of Deming v. Deming Firefighters Local 4521***, 141 N.M. 686, 160 P.3d 595 (Ct. App. 2007) New Mexico's Court of Appeals ruled that, in order for a local labor-management policy to be exempt from some of the requirements of the PEBA, "(1) the public employer must have adopted a system of provisions and procedures permitting employees to form, join or assist any labor organization for the purpose of bargaining collectively through exclusive representatives and (2) the public employer must have taken such action prior to October 1, 1991." ***Id.*** ¶ 9 (emphasis, internal quotation marks, and citation omitted); *see also* ***Regents of Univ. of N.M. v. N.M. Fed'n of Teachers,*** 125 N.M. 401, 962 P.2d 1236 (1998) (discussing the grandfather clause of the PEBA and stating that the "system must be productive" to be grandfathered). The PELRB has also previously ruled that the criteria for what constitutes a fully functional board include: (1) whether all "three members have been appointed," (2) whether rules and regulations have been promulgated, and (3) whether the local board is "meeting for business." *See* ***In the Matter of the Disqualification of Deputy Director Pilar Vaile, AFT v. Gadsden Independent School District,*** Case Nos. 132-05 and 309-05 (oral ruling, Minutes,

PELRB Board Meeting, August 19, 2005). The Board's ruling ***in Gallup-McKinley County School District***, *supra*, indicated that the exercise of jurisdiction in that case—which had a functional and operational board when the PPC was filed—was warranted because the local board local had promulgated a rule that violated PEBA on its face, as well as a prior PELRB ruling interpreting another provision of PEBA. ***Id.*** at 3; *citing* ***In Re: Petition for Recognition as Incumbent Labor Organization NEA-Alamogordo and Alamogordo Public Schools,*** PELRB Case No. 303-006 (June. 1, 2006). The Board reasoned that the case therefore "raise[d] serious and significant issues affecting public sector collective bargaining statewide," and "issues that are important to the consistent and uniform administration of the .... PEBA, throughout the State of New Mexico." ***Id.*** at 1-2.

If the grandfather clause applies to the City's Ordinance in this case, the PELRB does not have jurisdiction to rule on the merits of any claims that the City has not complied with the PEBA." *See* ***Deming,*** ¶¶ 11-12, 16. If, on the other hand, despite having adopted a system of provisions and procedures so as to be grandfathered under §26(A) of the PEBA, the system is not "productive" as required under ***Regents,*** or if the local board is not in fact functioning and there is evidence that the employer is utilizing the process of establishing the local board to delay processing pending matters as in ***AFSCME v. NMSU,*** or it is issuing decisions or taking actions not in compliance with prior PELRB decisions interpreting PEBA as in ***Gallup-McKinley Schools*** and ***Alamogordo Public Schools,*** or if all members of the local board have not been appointed, it is not meeting regularly or it has not promulgated rules and regulations, as under ***Gadsden***, then under those

circumstances it is not eligible for continuing grandfather status and, therefore, the PELRB would have jurisdiction.

This is a case of first impression in that the AFSCME seeks a definition of board that is not "fully functioning" "operational" and "productive" as including a local labor board suffering the strain and delay of dealing with a substantial backlog of cases. AFSCME seeks an extension of the of the rationale in ***Regents of Univ. of N.M. v. N.M. Fed'n of Teachers, AFSCME v. NMSU*** and related decisions so that the delay in scheduling hearings due to a backlog of cases is the functional equivalent of a non-functioning board. Under the facts of this case the Hearing Officer declines to extend the existing case decisions as the AFSCME position would require. The ***Regents*** case requires that the grandfather clause be narrowly construed. ***Regents,*** ¶ 35, 125 N.M. 401, 962 P.2d 1236. The grandfather clause is part of the PEBA, and must be construed with reference to the purpose and other provisions of the PEBA. ***Regents,*** ¶ 28, 125 N.M. 401, 962 P.2d 1236. PEBA §10-7E-12(B) requires the procedures adopted for conducting adjudicatory hearings shall meet all minimal due process requirements of the state and federal constitutions. The allegations of the AFSCME's PPC and Response to the Motion to Dismiss do not provide sufficient facts to support a decision that the City's procedures fail to meet minimal due process. The mere delay in effecting the local board's rule concerning appointment of a board member is not necessarily an indictment of the sufficiency of the rule itself. The union offers no facts other than the delay in obtaining a hearing. The ASCME does suggest that due process violation has occurred but does so in connection with an allegation that employees affected in PELRB 103-11 and 104-11

were terminated from employment without just cause. That is a matter more properly subject to grievance arbitration and the AFSCME offers no reason whether grievance arbitration was pursued, if not, why not and so, leaves the Hearing Officer somewhat in the dark as to whether there is a due process violation in connection with something over which the Board has jurisdiction under PEBA. Neither do the issues in the Charges raise serious and significant issues affecting public sector collective bargaining statewide, or issues that are important to the consistent and uniform administration of the PEBA, throughout the State of New Mexico such as would prompt this Board to exercise its jurisdiction in preference to that of the local board.

I do not discern anything in the ***Regents*** use of the term "productive" as a requirement of a local labor ordinance or the activities of a local board to provide any basis for extension the current law. In Regent's the Court expressly meant the term to mean "actually resulting 'in the designation of appropriate bargaining units, the certification of exclusive bargaining agents and the negotiation of existing collective bargaining agreements'". ***Regents of Univ. of N.M. v. N.M. Fed'n of Teachers***, 125 N.M. at 1247. ***Regents*** does not appear to be intending anything by the use of the term "productive" beyond the commonly understood meaning of the term "fully functional" as construed in the existing case law on this subject, meaning that all board members have been appointed, rules and regulations that do not conflict with PEBA have been promulgated, and the local board is "meeting for business."

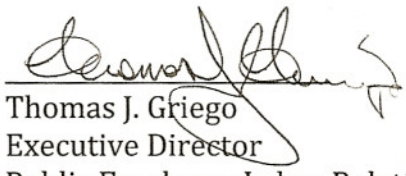
Under the facts of this case it appears that, however imperfectly, the City's labor board is complying with these requirements and is therefore fully functional. While I do not disagree with AFSCME's general propositions that "the longer a violation goes unaddressed the greater the impact and prejudice it causes to unions and union members", I am not persuaded that, in this case, the specific provisions of the City's Ordinance, fails to comply with the overall intent of the PEBA or that its Board is not now fully functional, notwithstanding that it may not have been at the time the PPC's were filed. According to the decisions in ***Regents*** and ***Deming*** I must find a violation of the PEBA as contrasted with a violation of the local ordinance or CBA in order to assert PELRB jurisdiction. While it may be arguable that upon a finding that the City's procedures fail to provide minimal due process in violation of PEBA, there are insufficient facts to support a conclusion that the allegations AFSCME has presented rise to that level.

Recommended Order: The Prohibited Practices Complaint should be **DISMISSED** and remanded to the Albuquerque Labor-Management Relations Board for further proceedings. In light of this decision the Alternative Motion to Stay Proceedings is moot and should be **DENIED.**

APPEAL:

Either party may appeal this hearing officer's decision by filing a notice of appeal with the PELRB staff at 2929 Coors Blvd. NW in Albuquerque New Mexico 87120. Provisions for appeal are found at NMAC 11.21.3.19. An appeal must be filed within 10 work days of this opinion and otherwise comply with NMAC 11.21.3.19.

Issued this 29th day of December 2011



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