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. 309-15**

STATE OF NEW MEXICO, HUMAN SERVICES DEPARTMENT,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board on Appeal by the State of New Mexico, Human Services Department ("HSD") of the Hearing Officer's Report and Recommended Decision entered August 5, 2016; Respondent's Motion to Strike Petitioner's Response to Appeal of Hearing Officer's Report and Recommended Decision received by the Board on October 24, 2016; and Petitioner's Response to Motion to Strike received by the Board on October 28, 2016. Upon review of the parties' submissions and after hearing argument by counsel the Board finds:

A. The Board has jurisdiction involving matters concerning the Petitioner's Petition for Unit Clarification;

B. The Board does not have jurisdiction to determine violations of the New Mexico Open Meetings Act, NMSA 1978, 10-15-1 *et seq.*;

C. That the change to the bargaining unit is not due to a change in circumstance when HSD refused to negotiate with the Petitioner

representing attorneys for HSD, therefore, the Petition for Clarification submitted to the PELRB is not the proper claim for resolving the current dispute between the parties; and

D. HSD is time-barred from objecting to the decisions made in PELRB cases: *In re: AFSCME & State of New Mexico*, PELRB No. 357-04; *In re: AFSCME and HSD*, PELRB No. 336-043; and *In re: AFSCME and HSD*, PELRB No. 312-09.

THEREFORE THE BOARD ruled 3-0 as follows:

E. That Respondent's Motion to Strike exhibits attached to the Petitioner's Response to the Appeal of Hearing Officer's Report and Recommended Decision is granted to the extent that only exhibits not included or referenced in the Hearing Officer's Report and Recommended Decision or relied upon by the hearing officer when making his decision are stricken;

F. The Board adopts the Hearing Officer's Report and findings except the Board does not find that there was a change in circumstance to the bargaining unit.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

11-8-16
DATE

DUFF WESTBROOK, BOARD CHAIR

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AFSCME, COUNCIL 18,

Complainant

v. **PELRB No. 309-15**

N.M. HUMAN SERVICES DEP'T,

Respondent

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

STATEMENT OF THE CASE: This matter comes before Thomas J. Griego, designated as the Hearing Officer in this case, on the merits of AFSCME's Petition for unit clarification. AFSCME filed the operative Amended Petition for Clarification herein on October 23, 2016 seeking to determine whether employees holding the position of Attorney in the Child Support Enforcement Division of the Human Services Department are included in the "Wall to Wall" unit recognized in 2003 or in 2008 when the unit was previously clarified. (See, PELRB No. 357-04.) The parties held a Status and Scheduling Conference on November 20, 2015 at which deadlines were set for the review of the parties' historical record and the filing of dispositive motions prior to a hearing on the merits.

HSD filed a Motion to Dismiss or for Summary Judgment on January 11, 2016 and AFSCME timely filed its Response on January 15, 2016. I denied that motion on January 21, 2016 and the case proceeded toward a hearing on the merits scheduled for February 18, 2016. However, two days before the merits hearing Respondent filed a Motion to Dismiss for Lack of Jurisdiction or in the Alternative Motion for Reconsideration on February 16, 2016. Petitioner filed a Response to the Motion on February 17, 2016 and at the merits

hearing I heard the Respondent's alternative motions as a preliminary issue along with the issue of whether Petitioner was alleging changed circumstances to accrete the position of attorney or alleging the position of attorney has been in the bargaining unit. I reserved ruling on the motions until I could review two cases cited in support of them by management and began hearing testimony and taking evidence as scheduled. At the close of the Union's case-in-chief, counsel for the HSD renewed its motion for dismissal and moved for a directed verdict. I granted the directed verdict dismissing the complaint on the mistaken premise that NMAC 11.21.2.37(B) and (C) required that outcome in light of there being no Board action on the record approving the scope of the bargaining unit.[1]

The following day, February 19, 2016, I withdrew my decision granting the directed verdict as having been improvidently granted because my decision granting the directed verdict overlooked subsection (D) of NMAC 11.21.2.35, 11.21.2.37 and 11.21.2.38 in which it is the director who certifies the unit and the Board reviews only upon the proper filing of an appeal. Accordingly, I requested that the parties confer to select a date time and place to resume the hearing on the merits. On February 29, 2016, Respondent filed a Motion for Reconsideration of my withdrawal of my grant of a directed verdict or in the alternative for permission to file an interlocutory appeal. I denied the Motion for Reconsideration. I also denied Respondent's Motion for interlocutory appeal for the reasons stated in that same

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[1] NMAC 11.21.2.37 (B) and (C) regarding Unit Clarification proceedings provide:

"B. Upon the filing of a petition for unit clarification, the director shall investigate the relevant facts, and shall either set the matter for hearing or shall issue a report recommending resolution of the issues within thirty (30) days of the filing of the petition. In the director's investigation or through the hearing, the director or hearing examiner shall determine whether a question concerning representation exists and, if so, shall dismiss the petition. In such a case, the petitioner may proceed otherwise under these rules.

C. If the director or hearing examiner determines that no question concerning representation exists and that the petitioned-for clarification is justified by the evidence presented, the director or hearing examiner shall issue a report clarifying the unit within thirty (30) days of the filing of the petition if no hearing is determined necessary, or within thirty (30) days of the hearing if a hearing is determined necessary. If the director determines that a question concerning representation exists, he or she shall dismiss the petition."

case. The PELRB reviewed my denial of those motions at its meeting on April 1, 2016 and upheld the denial of interlocutory appeal.

The parties resumed their hearing on the merits on Friday, May 20, 2016. Counsel for the Respondent restated her jurisdictional objections to make sure they were preserved for the record. She objected to AFSCME's decision not to amend its Petition to address "Lawyers" as well as "Attorneys" and contested whether AFSCME alleged that circumstances surrounding the creation of the bargaining unit changed sufficiently to warrant a change in the scope and description of the unit. I reserved all rulings on the motions until after the conclusion of the case.

By conducting the hearing on February 18, 2016 and May 20, 2016, I afforded all parties a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Both parties timely submitted Post-Hearing Briefs on June 7, 2016 and I duly considered both briefs. On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following findings and conclusions:

FINDINGS OF FACT: The following facts are established as set forth in the letter decision of January 21, 2016 regarding Respondent's Motion to Dismiss or for Summary Judgment and the Response thereto:

1. AFSCME is a labor organization as defined in § 10-7E-4(L) of the Public Employee Bargaining Act (PEBA), §§ 10-7E-1 *et seq*., and HSD is a public employer as defined in § 10-7E-4(S) of PEBA. (Prior Findings of Fact in Amended Report on Parties' Joint Petition for Unit Clarification in *AFSCME and HSD*, PELRB No. 312-09).

2. Petitioner filed a Petition for Clarification pursuant to 11.21.2.37 NMAC on October 22, 2015. (Stipulated in Pre-Hearing Order).

3. Except as provided in §24 (A) of the PEBA regarding bargaining units existing prior to 1999 and in the "gap period" between 1999 and the effective date of PEBA in 2003, Rule 11.21.2.37 NMAC provides for the filing of a petition for unit clarification in the following circumstances:

   a. Circumstances surrounding the creation of an existing collective bargaining unit are alleged to have changed sufficiently to warrant a change in the scope and description of that unit; or

   b. A merger or realignment of previously existing bargaining units represented by the same labor organization is appropriate.

   (Stipulated in Pre-Hearing Order).

4. The history regarding composition of the bargaining unit in this case includes at least one prior accretion and/or unit clarification: (Administrative Notice of PELRB files No's. 336-04, 357-04 and 312-09.)

5. A meeting of a quorum of the PELRB would require a duly noticed public meeting pursuant to the Open Meetings Act. (Stipulated in Pre-Hearing Order).

6. It is not unusual that the interest cards or an employee list documenting majority support are not in the file because by operation of NMAC 11.21.1.21 they are the property of the petitioning union and are returned to the Union upon closing the case. (Administrative Notice of PELRB files, records and rules.)

7. The legislative history on record with State Archives indicates that the Board's rules regarding Representation Proceedings, 11 NMAC 21.2 originally enacted on

June 24, 1996 was replaced by 11.21.2 NMAC, effective March 15, 2004 after the second version of the Act was re-enacted.

8. The first meeting of the PELRB under the second permutation of the PEBA for which the Board has a record was held on September 3, 2003. (Administrative Notice of PELRB files.)

9. The PELRB accepted Petitions, prohibited practice charges, requests for approval of local boards, and other filings prior effective date of its rules on March 15, 2004 but did not open files and maintain case records until after that date. (See, January 6, 2004 minutes at ¶8; March 2, 2004 minutes at ¶7). This reading of the referenced Board minutes is supported by the Certification of the bargaining unit in PELRB No. 336-04, dated August 7, 2003, having a 2004 filing date because, according to a footnote in the Hearing Officer's Amended Report on the parties' *Joint* Petition for Unit Clarification in *AFSCME & Human Services Dep't.* PELRB No. 312-09, "The case was given a 2004 case number because it was not until 2004 that the agency had an office or other facilities and equipment necessary to file management." (Administrative Notice of PELRB case file in *AFSCME & Human Services Dep't.* PELRB No. 312-09).

10. The file in PELRB No. 357-04 contains a Petition for Accretion filed on October 14, 2004, that refers to Exhibit A (a list of positions then in the unit); Exhibit B (a list of positions to be accreted into the unit); and Exhibit C (a copy of the existing collective bargaining agreement). Although not marked as Exhibits A or B there are two lists of positions stapled to the Petition that I find to be the referenced Exhibits and the position title "Lawyer" is included on the

second list titled "Accretion Targets by Job Title". (Administrative Notice of Case file *in re: AFSCME & State of New Mexico*, PELRB No. 357-04).

11. On June 2, 2006, the State filed a Motion to Dismiss the Accretion Petition in *AFSCME & State of New Mexico*, PELRB No. 357-04 alleging there were no changed circumstances and no shared community of interest to justify an accretion. (Administrative Notice of Case file in *AFSCME & State of New Mexico*, PELRB No. 357-04).

12. An affidavit in support of the State's June 2, 2006 Motion to Dismiss, filed by Gary L. J. Giron, former Deputy Director for Labor Relations for the State, contains a concise statement of the history of the bargaining unit to that point, which I adopt as a finding in this case:

    a. Between 1984 and 1994 the American Federation of State, County and Municipal Employees, Council 18, AFL-CIO (hereinafter "AFSCME") was certified as the exclusive representative for purposes of collective bargaining of separate units of employees in fifteen state agencies or governmental subdivisions, including three separate facilities operated by the Department of Health of the State of New Mexico (hereinafter "State"). With one exception, each of the separate units was composed of "all employees who are not confidential, managerial, supervisory or temporary." The single exception was the Department of Transportation, in which AFSCME represented only blue-collar employees.

    b. Following the filing of a petition for certification and unit realignment by AFSCME, the Public Employee Labor Relations Board entered an Order on August 31, 1994 in Case No. CP 71-93(S) realigning the existing bargaining

units represented by AFSCME into a single bargaining unit consisting of those job classifications, which, at the time the Order was entered, were subject to existing AFSCME collective bargaining agreements and/or certifications issued by the State Personnel Board under its Rules for Labor Management Relations.

c. Following passage of the current Public Employee Bargaining Act, effective July 1, 2003, AFSCME sought recognition as the exclusive bargaining agent of the employees formerly represented by it as certified in PELRB Case No. CP 71-93(S).

d. On August 7, 2003 a certification was issued by Joe Lang and Linda Vanzi, two of the three members of the Public Employee Labor Relations Board, certifying that AFSCME had demonstrated majority support among the State of New Mexico employees in a reconstituted unit of the realigned bargaining unit certified by the former PELRB in Case No. CP 71-93(S).

(Administrative Notice of Case file in *AFSCME & State of New Mexico,* PELRB No. 357-04).

13. Two members constitute a quorum of the PELRB. (Stipulated in Pre-Hearing Order).

14. PELRB Case file 357-04 contains a reference to, and a copy of, the PELRB decision issued on August 31, 1994 in case number CP 71-93(S), in which the AFSCME bargaining units of various agencies of the State of New Mexico were realigned (consolidated) into a single bargaining unit. The description of the consolidated unit referenced in the decision as Exhibit A is not attached to the copy on file. (Stipulated in Pre-Hearing Order (modified)).

15. When realigned into a single unit by decision of the PELRB in Case No. CP-71-93(S) AFSCME was required to demonstrate majority support in that single bargaining unit. (Stipulated in Pre-Hearing Order).

16. Pursuant to NMSA 1978 §10-7E-24, AFSCME was the incumbent exclusive representative of the State of New Mexico bargaining unit realigned by operation of the decision in PELRB No. 357-04. (Stipulated in Pre-Hearing Order, modified).

17. HSD's past Human Resources Manager, Corinne Jameson, authored an email message dated July 17, 2008 in which she acknowledged that on June 11, 2008 the PELRB issued an order that Accretion Petition Case No. 357-04 was in compliance with PELRB [sic] and that all employees affected by the certification were to begin union dues or fair share fees within 90 days from the date of the order. (Exhibit A).

18. An email dated March 24, 2008 from the State Personnel Office acknowledges that on September 6, 2006 the HSD "went wall to wall." (Exhibit B).

19. In December 2009 the parties entered into a collective bargaining agreement (CBA) that continues in effect under the evergreen provisions of the PEBA and that includes an Appendix listing positions covered, by agency, throughout the State bargaining unit. (NMSA 1978, § 10-7E-18(D) (2003). (Testimony of Rob Trombley, Exhibit D.)

20. Appendix R of that CBA states that the Human Services Department "is now 'wall to wall'". (Testimony of Rob Trombley, Exhibit D.)

21. Sometime around September 10, 2015, supervision of legal services, including the lawyers and attorneys who are the subject of this Petition for Clarification,

was re-assigned from the Child Support Enforcement Division (CSED) to the General Counsel's office pending a vacancy in the CSED Director position because a non-attorney could not supervise attorneys. (Testimony of Johnna Padilla).

22. The PEBA, § 10-7E-14(C), allows for "an alternative appropriate procedure" to the card-check method for determining majority status and the State entered into joint stipulations agreeing to the method of certifying the bargaining unit.

23. On September 9, 2008, the State provided AFSCME with a list of employees covered pursuant to the June 2008 certification of accretion but thereafter, on or about October 14, 2008, a disagreement arose as to whether the following positions identified in the September 9, 2008 list should be removed as managerial and/or confidential:

   a. IT Systems Manager 2, 3 and 4;

   b. IT Network Specialist 2 and 3;

   c. IT Business Analyst;

   d. Engineer.

(Administrative Notice of Case file in *AFSCME v. HSD*; PELRB 117-09).

24. After the union filed a PPC over exclusion of the above-referenced positions (PELRB No. 117-09) the parties settled that dispute to their mutual satisfaction. (Administrative Notice of Case file in *AFSCME v. HSD*; PELRB 117-09; prior Findings of Fact in Amended Report on Parties' Joint Petition For Unit Clarification in re: *AFSCME and HSD*, *in re: AFSCME & NM Human Services Department*, PELRB Case No. 312-09).

25. As part of the settlement in *AFSCME v. HSD;* PELRB 117-09 the parties agreed accretion of the positions at issue in PELRB 357-04 and in PELRB 312-09 was appropriate and that the PELRB found there to be no question concerning representation. (Prior Findings of Fact in Amended Report on Parties' Joint Petition for Unit Clarification in *AFSCME & NM Human Services Department*, PELRB Case No. 312-09).

26. In *AFSCME & NM Human Services Department*, PELRB Case No. 312-09) the Board concluded as a matter of law that AFSCME and the State agreed to a card-check procedure on August 7, 2003. (Administrative Notice of Recommended Decision and Order in *AFSCME & NM Human Services Department*, PELRB Case No. 312-09).

27. On August 7, 2003, AFSCME was certified as the exclusive bargaining representative of certain Department employee positions. (Administrative notice of case file in *AFSCME and HSD*, PELRB No. 336-04; prior Findings of Fact in Amended Report on Parties' Joint Petition For Unit Clarification in re: *AFSCME and HSD*, PELRB No. 312-09).

28. Thereafter, on June 11, 2008, the remaining eligible HSD employee positions were accreted into the existing AFSCME bargaining unit. (Administrative notice of case file *In re: AFSCME and State*, PELRB No. 357-04 and prior Findings of Fact in Amended Report on Parties' Joint Petition For Unit Clarification in re: *AFSCME and HSD*, PELRB Case No. 312-09).

29. In approximately May of 2015, the Employer rejected Union dues check-off authorizations submitted by AFSCME for some CSED lawyers employed by

HSD claiming they are not part of the unit. (Testimony of Rob Trombley, Exhibit F).

30. The parties' dispute over use of the term "Lawyer" in contrast to "Attorney" is not material because the Attorney IV position has only existed a few months before filing the Petition herein and the terms "Lawyer" and "Attorney" are used interchangeably by the HSD. (Testimony of Donna Lopez, HSD HR Operations Manager; Testimony of Johnna Padilla, HSD HR Manager; Testimony of Chris Collins, General Counsel; Exhibits 1, A and B).

31. New Mexico's Statewide Human Resource, Accounting and Management Reporting (SHARE) system entries beginning in July of 2008 indicate that HSD Lawyers are "non-covered" that is, not covered under a collective bargaining agreement. Those entries further indicate that the positions are "AFSCME – Confidential" meaning that AFSCME is the recognized collective bargaining representative in the workplace but that the Lawyer positions are considered to be exempt from the bargaining unit as "confidential" employees as that term is used in the PEBA. (Testimony of Johnna Padilla and Donna Lopez).

32. Employees holding the lawyer and Attorney positions at issue do not participate in labor negotiations or advise management with regard to labor-management relations. (Testimony of Johnna Padilla Exhibit B).

33. Lawyers and Attorneys employed at HSD spend the majority of their work time managing a caseload and representing the agency's constituents before state courts on behalf of CSED. (Testimony of Blas Villanueva; Exhibits 1 and 2).

I decline to accept proposed findings of fact proposed conclusions to be drawn from the presence or absence of documents in PELRB files, from the PELRB's decisional page or

from available PELRB agendas and minutes to the extent they are inconsistent with prior findings by this Board in *In re: AFSCME & NM Human Services Department*, PELRB Case No. 312-09 and *In re: AFSCME and State*, PELRB No. 357-04. I also take administrative notice of the following cases in which the State or the Human Services Department either admitted or affirmatively stated that AFSCME is the exclusive bargaining representative for bargaining unit employees in the Human Services Department:

a) *AFSCME v. New Mexico Human Services Department*, PELRB No. 151-11;

b) The PELRB's conclusions in *AFSCME v. New Mexico Human Services Department*, PELRB No. 151-11 that it had both subject matter and personal jurisdiction and that the HSD had an obligation to bargain in good faith. The District Court upheld our jurisdiction in *State of New Mexico Human Services Department v. AFSCME, Council 18*, No. D-101-CV-2012-02176;

c) *AFSCME v. State of New Mexico*, PELRB No. 144-09 (which case included a counterclaim asserting the State's obligation to bargain and asserting the enforceability of the same contract at issue in this case);

d) *AFSCME v. New Mexico Regulation and Licensing Department*, PELRB No.'s 142-09 and 143-09 consolidated.

REASONING AND CONCLUSIONS OF LAW:

I cannot agree with the union that the issue here is as simple as deciding whether the evidence shows that the HSD portion of the bargaining unit is wall-to-wall, that the attorneys and lawyers in CSED do not perform supervisory, managerial or confidential duties. The reason the issue is not so simple is that the Union is not seeking to accrete the attorneys and lawyers as new positions previously excluded from the bargaining unit (which would pose its own set of problems inasmuch as we are dealing with a grandfathered unit).

Rather, AFSCME seeks a determination that they were in the unit ever since it went wall-to-wall when there is evidence to the contrary. Resolving that issue requires consideration of related issues. As HSD points out, if attorneys have been in the bargaining unit since accretion and therefore denied their right to dues deductions under the contract, then as a contract claim AFSCME should file a grievance or prohibited practice complaint rather than this unit clarification petition. However, HSD denies that Attorneys were ever in the unit and are not covered by the contract, so if I were to dismiss this petition in favor of a PPC or grievance HSD would surely seek dismissal of any filed PPC or grievance for failure to state a claim.

Escaping that conundrum requires deciding as quickly as possible "Whether the 'wall to wall' bargaining unit in the Human Services Department includes the positions of attorney/lawyer in the Child Support Enforcement Division or whether they are excluded by reason of any status as managerial, supervisory or confidential duties." (Stipulated Pre-Hearing Order). This unit clarification proceeding serves to answer that question as long as a necessary condition precedent to filing such a petition is met, i.e. that circumstances have changed sufficiently to satisfy our rule governing the filing of such petitions. HSD asserts that AFSCME has neither been pled nor proven changed circumstances, among other affirmative defenses including various challenges to this Board's jurisdiction. Therefore, before I can turn my attention to main issue as stated above, I must first address the State's affirmative defenses and AFSCME's responses thereto.

A. JURISDICTION. The State reprises the arguments raised in its February 18, 2016 Motion to Dismiss, Motion for Reconsideration and Motion for Interlocutory Appeal, that the PELRB lacks subject matter and personal jurisdiction. That the Union was late in filing its Response the State's Motion does not result in "a concession on the matter" as it might in

the Appellate Court cases cited by the State. That is because there is no corollary in the Board's rules to Rules 12-210 or 12-213 of the New Mexico Rules of Appellate Procedure, which speak in terms of mandatory briefing deadlines. To the contrary, NMAC 11.21.1.23 governing Motions and responses to Motions, the Board's rules provide that "*If a party decides to file a written response* to a written motion, the response shall be filed and simultaneously served pursuant to the scheduling order." (Emphasis added). Because under our rules a written response to a filed motion is discretionary, to file one late or not at all cannot constitute a concession. The State premises its so-called jurisdictional challenge on the argument that grandfathered bargaining units are not eligible for unit clarification and that the proper procedure for the Union to have followed is by filing a Representation Petition. Whether that premise is true or false, for the reasons stated above, this Board clearly has jurisdiction to adjudicate that question. As an affirmative defense the Motion is untimely because it was filed a mere two days before the scheduled hearing on the merits and long after the January 8, 2016 deadline set in the Scheduling Order for filing dispositive motions. Because the State's motions to dismiss are not jurisdictional, the argument that it could file them at any time is not valid. Even if accepted as a proper jurisdictional challenge the cited by the State for the proposition that a jurisdictional challenge may be raised at any time, do not stand for the proposition that a litigant may delay filing a jurisdictional challenge until the last minute as a tactical maneuver. The Rules of Procedure for the District Courts SCRA 1-012(B) (1) provide that a motion making a jurisdictional challenge "shall be made before pleading if a further pleading is permitted." Thus, the Supreme Court's rules require that the State's jurisdictional challenges must be filed sooner rather than later, notwithstanding a court's ability to raise jurisdiction *sua sponte* or a parties' ability to raise it for the first time on appeal. Accordingly, and because the so-called jurisdictional challenge was filed long after

the deadline stipulated by the parties for the filing of dispositive motions, about 48 hours before the scheduled hearing on the merits, it was properly dismissed.

In addition to the foregoing, analysis of the substantive law justifies our exercise of jurisdiction over the parties and subject matter.

1. **Subject Matter Jurisdiction.** HSD's challenge to subject matter jurisdiction may been summarized as follows:

a) Under the PEBA, positions may not be accreted into grandfathered bargaining units;[2]

b) Even if the positions at issue in this case were allowed to be accreted into a grandfathered bargaining contrary to PEBA, the Petition does not allege sufficient changed circumstances to warrant a unit clarification; and,

c) The Petitioner's alleged wall-to-wall bargaining unit does not exist because of improprieties in the recognition process and the collective bargaining agreement for that unit is therefore, invalid.

See HSD's Alternative Motion to Dismiss for Lack of Jurisdiction or for Reconsideration, filed February 18, 2016 and Closing Brief herein.

Calling the State's last minute Motion to Dismiss, a "jurisdictional challenge" does not make it one. For the reasons that follow, HSD's various motions do not state a challenge to this Board's authority to hear a particular case or issue.

a) The PELRB's jurisdiction extends to all claims brought under the Public Employee

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[2] The term "grandfathered bargaining unit" refers to bargaining units established prior to July 1, 1999 (or those established between July 1, 1999 and the effective date of the PEBA if the unit is covered by a collective bargaining agreement) which shall continue to be recognized as appropriate bargaining units for the purposes of the Act. See §10-7E-24 (A) NMSA 1978.

Bargaining Act. See § 10-7E-9 (A), providing that the Board has jurisdiction over the designation of appropriate bargaining units, the selection, certification and decertification of exclusive representatives and the filing of, hearing on and determination of complaints of prohibited practices. See also, § 10-7E-9(F) noting that the PELRB "has the power to enforce provisions of the [PEBA]"); *Regents of Univ. of N.M. v. N.M. Fed'n of Teachers*, 125 N.M. 401, 962 P.2d 1236 (recognizing that the "PEBA created the PELRB, whose function is the administration of [the] PEBA"); *Deming Firefighters Local 4521*, 141 N.M. 686, 160 P.3d 595. Under Section 4 of the PEBA, AFSCME is a "labor organization," and the State is a "public employer." The Union here has filed a Petition that implicates the designation of appropriate bargaining units and the selection and certification of an exclusive representative, which the Board has power to adjudicate under Section 9(A) of the Act regardless of, or perhaps *because of*, the State disputing recognition of AFSCME as the exclusive representative for the bargaining unit at issue.

b) The State has admitted in another case, *AFSCME, Council 18 v. State of New Mexico*, PELRB No. 125-15, now pending before the Board, that the parties entered into a collective bargaining agreement in effect through 2011, and which remains in full force and effect pursuant to the PEBA. It also admitted that it has a statutory duty to bargain with AFSCME, that the parties have conducted bargaining since 2011, that the parties engaged in bargaining in September and October 2015 and that the Act applies to bargaining between the State and AFSCME. See Answer and Counter-Claim in *AFSCME, Council 18 v. State of New Mexico*, PELRB No. 125-15. While the State may argue that those admissions should not operate as waiver or estoppel against the State taking an opposite stance in this case, such admissions suggest that the challenge to jurisdiction here is not a jurisdictional objection at after all or else they would be consistently plead in all cases involving the State and AFSCME. Rather,

the Motions assert what is better described as an affirmative defense - a new matter - that, assuming the complaint true, constitutes a defense to it. The party alleging an affirmative defense has the burden of proof. See *Ortiz v. Overland Express*, 148 N.M. 405, 237 P.3d 707 (2010); See also *Tafoya v. Seay Bros. Corp.*, 119 N.M. 350, 352, 890 P.2d 803, 805 (1995) ("The party alleging an affirmative defense has the burden of persuasion."); *J.A. Silversmith, Inc. v. Marchiondo*, 75 N.M. 290, 294, 404 P.2d 122, 124 (1965) (noting that "it is well settled that the party" asserting an affirmative defense has the burden of proof). In the face of the broad legislative grant of subject matter jurisdiction as outlined above and the State's tacit admission of the Board's jurisdiction in such areas HSD fails to establish lack of subject matter jurisdiction and the Petition should not be dismissed for lack of it.

2. **Personal Jurisdiction.** The State next argues that the PELRB has no personal jurisdiction over the *Union* because when the bargaining unit at issue was recognized in 2003 the PEBA, PELRB Rules, and the Open Meetings Act were not followed. Consequently, the bargaining unit was not properly recognized for lack of majority support. To address adequately the personal jurisdiction issue requires analysis of the State's somewhat unusual stance that the PELRB has no personal jurisdiction over its opponent. HSD contends that it has standing to defend the third party rights of the employees in the bargaining unit and brings it challenge to the Board's personal jurisdiction over AFSCME in furtherance of its defense of those rights. AFSCME disputes that the State has standing to challenge the Board's jurisdiction over the Union.

A. Standing. As stated, AFSCME challenges HSD's standing to assert putative rights of the same employees it purports to represent as the exclusive collective bargaining representative. I cannot dismiss out-of-hand the State's argument that it may bring third party claims on behalf of employees in the bargaining unit solely because AFSCME

represents those same employees purposes of collective bargaining. New Mexico jurisprudence on the issue of standing includes the possibility that an organization may bring third party claims on behalf of its constituent members under appropriate circumstances. The question of standing warrants a more detailed assessment. I begin by considering the statutory rights HSD alleges its positions advance.

The PELRB is empowered to enforce a mutual obligation under NMSA 1978 §10-7E-2 shared by the State and AFSCME to:

> "...guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions."

Additionally, both parties are obligated to respect the rights of public employees (other than management and confidential employees) to "...form, join or assist a labor organization for the purpose of collective bargaining *through representatives chosen by public employees without interference, restraint or coercion* and shall have the right to *refuse any such activities*. NMSA 1978 §10-7E-5. (Emphasis added). It is conceivable that in an appropriate case it may be employer rather than a labor organization that is the appropriate party to protect public employee rights if it otherwise has "standing" to do so, because the obligations under Section 5 are the mutual obligations of public employers, public employees and labor organizations. It may not always be in a labor organization's best interests to protect or advance an employee's rights, to refuse union activities or to choose a representative other than itself.

In *ACLU of New Mexico v. City of Albuquerque*, 188 P.3d 1222, 144 N.M. 471 (N.M. 2008) the New Mexico Supreme Court declined to alter long-established jurisprudence and reiterated that, generally, to establish standing litigants must establish three elements:

(1) They are directly injured as a result of the action they seek to challenge;

(2) There is a causal relationship between the injury and the challenged conduct; and,

(3) The injury is likely to be redressed by a favorable decision.

These requirements are known in short form as "injury in fact", "causation", and "redressability" and are derived from federal standing jurisprudence. In *De Vargas Sav. & Loan Ass'n v. Campbell*, 87 N.M. 469, 471, 535 P.2d 1320, 1323 (1975), the New Mexico Supreme Court established the contours of the modern "injury in fact" standard:

> "New Mexico has always required allegations of direct injury to the complainant to confer standing... once the party seeking review alleges he himself is among the injured, the extent of injury can be very slight."

Id. at 472, 535 P.2d at 1323.

A litigant need not suffer the actual effects of the challenged action or statute to meet the injury in fact requirement, only that he is "imminently threatened with injury". See *ACLU v. City of Albuquerque* (ACLU I), 128 N.M. 315, 992 P.2d 866 (1999).

Organizations may have standing to sue if their individual members would have standing in their own right, (See, e.g., *Nat'l Trust for Historic Preservation v. City of Albuquerque*, 117 N.M. 590, 594, 874 P.2d 798, 802 (Ct. App. 1994)) and a litigant may bring an action on behalf of a third party if the litigant demonstrates the following three criteria:

(1) The litigant has suffered an injury in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute;

(2) The litigant has a close relation to the third party; and,

(3) There exists some hindrance to the third party's ability to protect his or her interests. See, *N.M. Right to Choose/NARAL*, 126 N.M. 788, 975 P.2d 841 (1998).

Finally, New Mexico courts have "conferred" standing and reached the merits of a case regardless of whether a plaintiff meets the traditional standing requirements, where the questions raised involve matters of "great public importance" based on their original

jurisdiction in mandamus actions. Those cases that have been deemed to raise issues of great public importance typically have involved "clear threats to the essential nature of state government guaranteed to New Mexico citizens under their Constitution-a government in which the three distinct departments, ... legislative, executive, and judicial, remain within the bounds of their constitutional powers." *State ex rel. Coll v. Johnson*, 128 N.M. 154, 990 P.2d 1277 (1999); *Gunaji v. Macias*, 130 N.M. 734, 31 P.3d 1008 (2001).

In *ACLU of New Mexico v. City of Albuquerque* the plaintiff was found *not* to have standing because the alleged injury was too speculative to meet the "injury in fact" standard. Such a "hypothetical possibility" of injury will not suffice to establish the threat of direct injury required for standing and because there was no indication that any person against whom the City enforces the challenged Ordinance will be hindered from challenging the Ordinance individually. Neither did the case raise a question deemed to be of great public importance such that the Supreme Court would elect to confer standing when it is not otherwise present. The question of whether the Ordinance violates due process by allowing forfeiture of a vehicle based only on an arrest did not rise to the level of a clear threat to the "essential nature of government." *Id.* citing *Baca v. New Mexico Dep't. of Public Safety,* 132 N.M. 282, 47 P.3d 441(2002) which in turn quoted *Jolley v. State Loan & Inv. Bd.*, 38 P.3d 1073, 1078 (Wyo. 2002), for proposition that "[t]he doctrine of great public interest or importance should be applied cautiously"; and *State ex rel. Overton*, 81 N.M. at 33, 462 P.2d at 618 (1969) "As desirable as it may be to have our opinion on questions of public importance as soon as possible, it is always dangerous to function in the abstract. We must avoid ill-defined controversies over constitutional issues." (quoted authority omitted)).

As in *ACLU of New Mexico v. City of Albuquerque* and following the caution counselled by the courts in *Baca, Jolley* and *State ex rel. Overton*, I conclude that the evidence of any injury in fact

too deficient to support a conclusion that the State has standing to challenge personal jurisdiction.

B. MAJORITY SUPPORT UNDER THE PEBA AND PELRB RULES.

This case begins with the union's Amended Petition for Unit Clarification seeking to determine whether employees holding the position of Attorney in the Child Support Enforcement Division of the Human Services Department are included in the bargaining unit recognized in 2003 or in 2008 when the unit was previously clarified to be wall to wall. Although no showing of interest need be filed in support of a petition for unit clarification, (See, NMAC 11.21.2.11) HSD claims that support was not demonstrated when the union sought and obtained recognition as an incumbent representative in 2003-2004 and again in 2008 when the unit was clarified as being wall-to-wall.

Whenever a union that was recognized before June 30, 1999 wishes to be recognized as an incumbent representative under the PEBA it files a Petition for Certification as an Incumbent pursuant to the PEBA § 24(B), NMAC 11.21.2.36 and NMAC 11.21.1.7(B)(3). The procedure for filing a petition for incumbent certification is generally the same as that for a basic Petition for Recognition and usually majority support is demonstrated through a secret ballot election. See PEBA §14(A).[3] See also *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974). However, PEBA also authorizes "an alternative appropriate procedure" to secret ballot elections, for determining majority status, provided the employer does not object. See PEBA §14(C). Typically, the "alternate procedure" is a card count, but it may also be based on a petition. An employer and a union representing a majority of employees in a bargaining

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[3] PEBA §14(A) provides: in pertinent part: "Whenever, in accordance with rules prescribed by the board or local board, a petition is filed by a labor organization containing the signatures of at least thirty percent of the public employees in an appropriate bargaining unit, the board or local board shall conduct a secret ballot representation election to determine whether and by which labor organization the public employees in the appropriate bargaining unit shall be represented..."

unit may also enter into a voluntary recognition agreement, (See NMAC 11.21.2.39) but such an agreement must still be based on a filed petition for certification supported by a showing of majority support, verified by card count. See NMAC 11.21.2.39 (A). This case involves not one but several card counts resulting in the recognition of AFSCME as the representative for the employees in question.

By challenging whether the union ever demonstrated support of a majority of the employees in the bargaining unit and whether the bargaining unit was ever appropriately certified the State argues that a question concerning representation (QCR) exists and if a QCR exists, a unit clarification petition must be dismissed. See, NMAC 11.21.2.37(B).

More specifically, HSD argues:

1) Petitioner never demonstrated majority support back in 2004 when it obtained recognition of its incumbent exclusive representative status as required by NMAC 11.21.2.36;

2) The PELRB did not properly process the Union's Petition for recognition of its incumbent exclusive representative back in 2003-2004 for the following reasons:

a) There was no valid Petition filed, no proof of posting a Notice of the Petition and the interest cards and/or the employee list supporting the Petitions required by NMAC 11.21.2.39 (A) and (B) were invalid;

b) There was no public notice of a meeting of the PELRB approving the unit as required by NMAC 11.21.2.22(C);

3) Two Accretion and/or Clarification Petitions (*AFSCME and State of New Mexico-Accretion Petition*, PELRB, Case Number 357-04 and (*AFSCME and NM Human Services Department*, PELRB Case No. 312-09) should not have been processed by the

PELRB because, when the bargaining unit at issue is a grandfathered unit, such petitions are barred by NMAC 11.21.2.37(A);

4) If processing of the Accretion or Clarification Petition is deemed to be appropriate for a grandfathered bargaining unit, then a question regarding representation nevertheless exists because:

a) There were no Notices of the Petitions posted as required by NMAC 11.21.2.39 (B);

b) The interest cards and/or the employee list used were invalid (See NMAC 11.21.2.39 (A);

c) There was no public notice of a meeting of the PELRB approving the unit as required by NMAC 11.21.2.22(C)and consequently no valid Board approval of the Accretion/Clarification obtained;

d) The two Accretion and/or Clarification Petitions were not timely processed.

Under NMAC 11.21.2.36, the § 24(B) demonstration of majority support is done through a card count even over the employer's objection, unlike in normal representation cases. See *In re: Petition for Recognition as Incumbent Labor Organization, NEA-Alamogordo and Alamogordo Public Schools,* 05-PELRB-2006 (June 1, 2006). The Board has upheld this rule as a reasonable interpretation of § 24(B) of PEBA, based on the following analysis:

- § 24(B) provides majority support shall be demonstrated "pursuant to §14;"
- §14(A) is inapplicable because it concerns an "election to determine whether and by which labor organization the public employees … shall be represented," while § 24(B) has already determined the incumbent "shall be recognized as the exclusive representative;"

- §14(C), in contrast, discusses "an alternative appropriate procedure for determining majority status," which is what is being done under § 24(B); and
- the proviso in §14(C) that the alternative mechanism may not be used "if the public employer objects to the certification without an election" concerns certification of "an appropriate bargaining unit," not certification of the union, while § 24(A) has deemed that the grandfathered bargaining unit "shall continue to be recognized as appropriate," without requiring further certification.

The State argues that the Board was in violation of its regulations. However, no regulations existed in the immediate months after the 2003 renewal of the PEBA, and therefore actions by the Board were not subject to regulations before March 2004. Even without regulations in place, the PELRB is obliged to follow the dictates of the statute. A public body need not wait for the promulgation of rules and regulations in order to carry out the mandate of a statute. See *Illinois Federation of Teachers v. Board of Trustees, Teachers' Retirement System*, 548 N.E.2d 64, 66-67 (Ill. App. 1989); *Morgan v. Committee on Benefits*, 894 P.2d 378, 384 (Nev. 1995) (concluding that there is "no reason to require the formalities of rulemaking whenever an agency undertakes to enforce or implement the necessary requirements of an existing statute"); *Stuart v. State, Div. for Children and Youth Services*, 597 A.2d 1076, 1078 (N.H. 1991) (asserting that even when an agency "is required by the statute to adopt rules," such language does not "require an initial rule to carry out what the statute demands on its face"); *Nevins v. New Hampshire Dept. of Resources and Economic Development*, 792 A.2d 388, 391 (N.H. 2002). The existence of any dispute concerning unit inclusion or exclusion requires dismissal of a clarification petition, and the petitioner must instead proceed via election. See NMAC 11.21.2.37(B). A petition for certification as incumbent, by definition, does not present a QCR as to unit inclusion or exclusion, because § 24(A) deems the grandfathered bargaining

unit to still be appropriate. See *NEA-Alamogordo and Alamogordo Public Schools*, 05-PELRB-2006 (June 1, 2006). However, a QCR is presumed to exist as to majority support, as both § 24(B) and NMAC 11.21.2.36 require a demonstration of continuing majority support before the parties can enter into a CBA. However, in the case of the bargaining unit comprising employee of the HSD AFSCME and the State agreed to a card-check procedure on August 7, 2003. By that agreement AFSCME was required to provide membership/authorization cards on an agency-by-agency basis. *Id.* The card-check procedure was supervised by two PELRB Board members, Joe Lang and Linda Vanzi, who then certified the results. *Id.* Exhibit 4. Therefore, any QCR was resolved by agreement as found by this Board in PELRB No.'s In re: *AFSCME & NM Human Services Department*, PELRB Case No. 312-09 and *In re: AFSCME and State*, PELRB No. 357-04. Once having been recognized as an incumbent organization by card check the election requirement no longer applies.

Union Exhibit H confirmed that a card count conducted by the parties resulted in an agreement on the scope of representation. The testimony of Rob Trombley that HSD and the State Personnel Office acknowledged the Union's status back in 2008 and the parties codified that agreement in their collective bargaining agreement (CBA) the following year. An email message SPO's labor-relations director issued to agency directors the day before the hearing advises agency heads about the logistics of attending the card-count meeting. files of Case No. 357-04 showing the results of card counts across the various agencies, in dates ranging from September 2006 to December 2007, (Administrative notice of case file I*n re: AFSCME and State*, PELRB No. 357-04.Subsequent to those events the parties negotiated a CBA which includes acknowledgement of the wall-to-wall unit at issue (Exhibit D).

The preponderance of the evidence substantiates that any question of majority support and any QCR was resolved by the State and AFSCME by an agreed- upon card count. The union

sustained its burden of showing majority support to the employer's satisfaction at that time and that it representational status was affirmed under a stipulated procedure in the absence of controlling regulations delineating a different process.

C. ALLEGED OMA VIOLATIONS AND MAJORITY SUPPORT.

The State alleges a violation of the Open Meetings Act (OMA) that occurred in 2003. The State relies primarily on an incomplete PELRB case file from 12 years ago. Jurisdiction to hear alleged violations of the OMA rests exclusively with the district courts. NMSA 1978, § 10-15-3(B), (C); *Chavez v. City of Albuquerque*, 1998-NMCA-004, ¶ 9, 124 N.M. 479, 952 P.2d 474 ("The OMA vests exclusive jurisdiction in the district court over OMA enforcement actions."). Anyone alleging a violation of the Act must provide "written notice of the claimed violation to the public body," allowing the entity 15 days to deny or act on the claim. § 10-15-3(B). The State has not provided such notice prior to its motion practice in this case. It is not reasonable to expect an agency to remedy an OMA violation a dozen years after the event occurred. Even if the State argues that notice today is appropriate for an alleged violation that occurred 12 years ago any OMA violation claim is barred by the applicable statute of limitations. The OMA does not designate its own limitations period and so, the OMA falls under the general statute of limitations of four years. See NMSA 1978, 37-1-4 (1953); *Galef v. Buena Vista Dairy*, 1994-NMCA-068, ¶ 8, 117 N.M. 701, 875 P.2d 1132. According to the OMA every action by the PELRB shall be presumed to have been taken at a meeting held in accordance with the §1 of the Open Meetings Act. For the reasons stated above the HSD had not rebutted the presumption in favor of PELRB's compliance with the OMA.

D. WAIVER AND ESTOPPEL. Whether as originally constituted or as constituted

after accretion in 2008, the evidence establishes a long-standing acceptance of the bargaining unit represented by AFSCME. The Union argues that an objection now to the legitimacy of that unit and the union's status as its exclusive representative, is barred by the doctrines of waiver and estoppel after the parties entered into agreements over the years. I address each doctrine separately.

1. **Waiver.** Article 10 of the parties' CBA (Exhibit D) requires the State to deduct dues upon proper request by an employee. Article 3 and the bargaining that preceded its inclusion in the CBA constitutes an implicit acceptance of AFSCME's majority support by recognizing AFSCME as the bargaining representative for the wall-to-wall unit at HSD. Section 2 of the CBA provides that "Disagreements over the inclusion or exclusion from the bargaining unit of a specific employee(s) based on supervisory, management, or confidential employee status will be resolved by the PELRB unless otherwise agreed by the parties." Because of the foregoing and because of its active participation in the recognition procedures about which it now complains, I conclude that the State has waived objection to Board jurisdiction, to the Union's majority support and to the validity of the parties' contract.

In the collective bargaining context, a waiver occurs when a party knowingly and voluntarily relinquishes its right to bargain about a matter. Such a waiver must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). See *County of Los Alamos v. Martinez*, 150 N.M. 326, 258 P.3d 1118 (2011); *AFSCME, Council 18 v. HSD*, D-101-CV-2012-02176 (1st Judicial Dist., J. Ortiz, 6-14-2013). The PELRB and NLRB decisions are consistent with New Mexico law on the doctrine of waiver generally. For example, *Young v. Seven Bar Flying Serv., Inc.*, 101 N.M. 545, 685 P.2d 953 (1984) defined "waiver" as the intentional relinquishment or abandonment of a known right.

Because the referenced Articles in the parties' CBA, meet the standard of a clear and unmistakable waiver, I do not address those cases in which waiver has been found where a party, with knowledge of its rights, "sleeps" on those rights by failing to assert them in a timely manner. I will discuss timeliness as part of the analysis of the doctrine of estoppel below.

2. **Estoppel.** Estoppel may be applied against a state governmental entity if There is a "shocking degree of aggravated and overreaching conduct or where right and justice demand it". *Kilmer v. Goodwin*, 136 N.M. 440, 99 P.3d 690 (2004), quoting *Wisznia v. State, Human Servs. Dep't*, 125 N.M. 140, 958 P.2d 98 (1998). In this case, "right and justice" demand estoppel be invoked to promote the harmonious and cooperative relationship between the State and its employees, and ensure the orderly operation and function of the State sought by the PEBA § 10-7E-2.

Under New Mexico law, estoppel is established by showing the following elements:

(1) the party to be estopped made a misleading representation by conduct;

(2) the party claiming estoppel had an honest and reasonable belief based on the conduct that the party to be estopped would not assert a certain right under the contract; and,

(3) The party claiming estoppel acted in reliance on the conduct to its detriment or prejudice. *Brown v. Taylor,* 120 N.M. 302, 901 P.2d 720 (1995).

The PELRB has adopted a six-month statute of limitations for instituting prohibited practice proceedings. See NMAC Rule 11.21.3.9. The NLRB has applied its similar six-month statute of limitations to hold that employers are estopped from challenging the recognition of a bargaining unit beyond that limitations period. See, *North Bros. Ford, Inc.*, 220 NLRB 1021, 1021-22 (1975) (employer could not refuse to execute a contract on the ground that the union was not the lawful representative of its employees when it recognized that local more

than six months earlier); *Lehigh Portland Cement Co.*, 286 NLRB 1366, 1382 (1987) (Employer is estopped from contesting merger procedures because it continued to bargain with the union for a year after the merger took place); *Knapp-Sherrill Co.*, 263 NLRB 396, 398 (1982). The NLRB has also applied estoppel to an employer's challenge to the appropriateness of bargaining units it agreed to when it extended voluntary recognition. *Red Coats, Inc.,* 328 NLRB 205, 206 (1999). The reason for prohibiting an employer from reneging on a voluntary recognition of a bargaining unit is that the employer has gained a benefit of avoiding an organizing campaign and enjoying the rewards of stable labor relations:

> "To permit the [employer] to change its mind and withdraw recognition because it did not like the way bargaining was proceeding would undermine the Board's commitment to voluntary recognition agreements, and would encourage the parties to manipulate the process to their unfair advantage."

Id. at 207.

The United States Supreme Court has warned against allowing either party to go far back in time "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused," to disavow collective bargaining responsibilities or challenging the status of a bargaining unit. To permit either party to do so more than six months after extending recognition to that unit would be doing a "disservice to stability of bargaining relationships". *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 425-28 (1960). While acknowledging the "interest in employee freedom of choice" inherent in labor law, *Local Lodge No. 1424* held that the "disservice to stability of bargaining relationships" resulting from retroactive challenges to the appropriateness of a bargaining unit was paramount. *Id.* at 425.

New Mexico's public employee labor relations jurisprudence comports with the federal law on the doctrine of estoppel. As I previously noted in denying HSD's prior motions to dismiss this petition, in *Local 2238 of AFSCME v. Stratton*, 108 N.M. 163, 769 P.2d 76 (1989)

the New Mexico Supreme Court looked at a 17-year bargaining history "realistically" and was "mindful that we cannot, without grave injustice and harm, turn back the hands of time." *Id.* ¶ 17. Applying that reasoning here, I decline to undo more than a dozen years of collective bargaining between the Union and the State. Even if the State was correct about its allegations of PEBA, OMA and Board rules violations (and I have concluded otherwise) it was an active participant in those violations. It may be worth observing that the PELRB is not alone in its responsibility for record keeping; the State Personnel Office that actively participated in recognition of the bargaining units at issue herein, reports to the State Personnel Board that must agree and authorize the actions taken. HSD did not offer into evidence the Personnel Board's contemporaneous minutes, which might have shined some light on the murky issues before us. Taking the State's allegation at face value for purposes of analyzing the estoppel doctrine, I conclude that the elements of detrimental reliance exist so that "right and justice" demand that estoppel be invoked to promote the harmonious and cooperative relationship between the State and its employees, and ensure the orderly operation and function of the State sought by the PEBA § 10-7E-2. The State is therefore, estopped from denying that AFSCME is the legitimate certified bargaining representative or that the CBA has no force or effect. Thus, any claim that this Board lacks jurisdictions over either the subject matter or the parties based on the claim that AFSCME is not the legitimate certified bargaining representative, fails.

E. **CHANGED CIRCUMSTANCES.** NMAC 11.21.2.37 provides for the filing of a petition for unit clarification in the following two circumstances:

a. Circumstances surrounding the creation of an existing collective bargaining unit are alleged to have changed sufficiently to warrant a change in the scope and description of that unit; or

b. There is a merger or realignment of previously existing bargaining units represented by the same labor organization.

AFSCME is proceeding under the first of the two circumstances by this Petition and must both allege and prove sufficient changed circumstances to justify its requested clarification. I agree with that portion of the State's argument, relying on *Union Electric Co.*, 217 NLRB No. 124, that unit clarification is not appropriate for upsetting an agreement or an established practice of a union and employer concerning the unit placement of various individuals even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent. To the extent the State uses *Union Electric, Co.,* to argue that a unit clarification proceeding is appropriate *only* for resolving ambiguities concerning the unit placement of individuals who have undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within or without that classification, I am compelled to disagree because it is too narrow a statement of the purpose of unit clarification under the PEBA, which allows that *any* sufficiently changed circumstances surrounding the creation of an existing collective bargaining unit will support a petition.

It is fruitless to argue, as the parties do, over whether the Petitioner ever stated that it did not need to show changed circumstances because changed circumstances have been both plead and proven. In its Amended Petition the Union alleged at paragraph 3 that the bargaining unit was clarified in 2008 to be "Wall-to-Wall" and at paragraph 4 that the employer refused to accept dues check-off authorizations submitted by several Child Support Enforcement Division attorneys claiming that they were not included in the wall-to-wall unit thereby prompting the instant Petition. The employer has historically honored dues

check-off requests from members of the wall-to-wall unit and if the Lawyer positions at issue were always included in that unit the its refusal to accept those authorizations now would be a changed circumstance. I do not rely on the argument that responsibility for supervision of CSED lawyers changed to the General Counsel's office during an interim Director's tenure because they could not be supervised by a non-attorney. That may or may not be a material changed circumstance, but refusal to accept dues check-off authorizations from bargaining unit members years after designation of a wall-to-wall unit certainly is. In addition, since the creation of the wall-to-wall unit the Lawyer B and Attorney IV positions have come into existence and the assumption of their duties compared with other Lawyer positions in the unit constitutes a significant change surrounding the creation of an existing collective bargaining unit that will support a unit clarification petition.

That Petitioner is found to have both plead and proved changed circumstances is not contrary to its repeated position that it is not seeking an accretion since an accretion is not the only form of unit clarification. Neither is it inconsistent with its repeated position that Lawyers/Attorneys have always been in the bargaining unit.

E. Application of Unit Clarification to a Grandfathered Unit. AFSCME does not seek to accrete positions that have been historically barred from the bargaining unit. Rather, Petitioner seeks to clarify that lawyers/attorneys have always been part of the wall-to-wall unit at HSD. For this reason HSD's argument and case citations that that unit-clarification petitions may not be applied to grandfathered bargaining units is misdirected and so, does not persuade. For example, *IAFF Local 2430 v. Silver City,* 2-PELRB-08, and *NMCPSO v. Rio Rancho Police Dep't,* 4-PELRB-09 do not support an outright prohibition against filing a unit clarification petition in a case involving a grandfathered bargaining unit since they plainly permit clarification by accretion into the grandfathered units as long as the

more stringent requirements for a Representation Petition are followed. Concerns about the need to protect the existing parties' expectancy interests" and to prevent grandfathered units from becoming inappropriate required that grandfathered units may be clarified through a representation election if the union is seeking to accrete new positions. Those concerns are inapplicable here because AFSCME does not seek to accrete any positions.

F. UNIT CLARIFICATION MERITS.

Having determined that there are no procedural or jurisdictional impediments to AFSCME's petition I now turn my attention toward the merits of the petition. I approach that analysis as a three-step process:

First, determine whether any of the State's affirmative defenses prevent this Board from entering an Order clarifying the unit as having always included the positions. For the reasons outlined above State's affirmative defenses are dismissed.

The second step is to determine whether the preponderance of the evidence establishes that the lawyer and attorney positions are statutorily exempt as management, supervisory or confidential employees. The Union has the burden of proving the absence of the statutory exemptions according to the Board's decision in *AFSCME, Council 18 v. Santa Fe County*, PELRB No. 305-15. If I determine that one or more of the statutory exemptions apply my analysis stops and I will dismiss the Petition. If I find they are not exempt, I then proceed to the third step: determining whether they are to be excluded from the bargaining unit for other legitimate reasons such as lack of a shared community of interest or their inclusion renders that unit inappropriate. Analysis of their current duties should suffice to answer this question since HSD denies any changed circumstances such as a significant alteration of job duties or function between designation of the wall-to-wall unit and the present.

1. **Supervisory Status.** Under the PEBA §10-7E-4(U), a supervisor must all of the three following criteria: (1) devote a majority of work time to supervisory duties; (2) customarily and regularly direct the work of two or more other employees, and; (3) possess authority to hire, promote or discipline other employees or to recommend such actions effectively. If any one of these required elements is absent, the employee is not a "supervisor" as that term is used by the Act. Furthermore, an employee that meets these three criteria is still not a supervisor if: (1) he or she performs merely routine, incidental or clerical duties or; (2) he or she only occasionally assumes a supervisory or directory role, or; (3) his or her duties are substantially similar to those of his subordinates, or; (4) he or she is a "lead employee", or; (5) he or she is an employee who merely participates in peer review or occasional employee evaluation programs.

The unrebutted testimony of CSED attorneys Blas Villanueva and Becky Jiron established that they do not direct the work of any subordinates. Their testimony is supported by reference to Exhibit 2 outlining the Attorneys' duties. Although they may occasionally give direction to clerical staff or paralegals, they do not devote the majority of their time to doing so, and they have no authority to hire, fire, promote, or discipline other employees. The occasional assumption of a supervisory or directorial role is statutorily excluded as an indicator of supervisory status. Accordingly, CSED attorneys do not meet the first half of the criteria to establish that they are supervisors and thus, there is no need to examine the evidence for consideration of whether they perform merely routine, incidental or clerical duties, perform duties that are substantially similar to subordinates, act as a lead employee or participate in peer review or occasional employee evaluation.

2. **Managerial Status.** The definition of a "management" employee is found at §10-7E-4(O). In order to qualify as a manager, an employee must be primarily engaging in

executive and management functions, and he or she must have responsibility for developing, administering, or effectuating management policies. *NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995). §4(O) requires that the employee do more than merely participate in cooperative decision making programs on an occasional basis. *Id.* In *Jemez Valley*, the PELRB quoted with favor the NLRB, which noted that management employees must be "making operative decisions of their employer" and "have discretion in the performance of their jobs independent of the employer's established policy." *Bell Aerospace Co.*, 219 NLRB 384. Such status is not conferred on workers who perform such tasks routinely "but rather it is reserved for those who are closely aligned with management as true representatives of management." *Id.* as quoted in *Jemez Valley* at 31. To be a "manager" an employee must "possess and exercise a level of authority and independent judgment sufficient to significantly affect the employer's purpose." *Jemez Valley* at 32. They must "establish policies and procedures" or "prepare budgets" among their duties. *Id.* They must represent management interests "by taking or recommending discretionary actions that effectively control or implement employer policy." *Id.* Any exercise of independent judgment must occur more often than "occasionally." See, *Dep't. of Corrections*, 2-PELRB-2013 at 10. An employee is not a manager if his or her suggested changes to policy are extensively reviewed and revised by others. See *In re: Local 7911, CWA and Dona Aña County,* 1-PERLB-16 at 15 (September 14, 1995).

In this case, evidence and testimony shows that none of the attorney/lawyer positions perform duties that would qualify them as management employees under the Act. Again, the unrebutted testimony of CSED attorneys Blas Villanueva and Becky Jiron established that they do not develop, administer or effectuate management policies. They do not participate in cooperative decision making on more than an occasional basis. They do not have

discretion independent of HSD's stated policies, and no discretionary authority that would allow them to significantly affect the employer's purposes. They do not establish policies and procedures, and they do not prepare budgets. Their testimony is supported by reference to Exhibit 2 outlining the Attorneys' duties.

Therefore, I conclude that Lawyers/attorneys working for CSED are not managers and not exempt from coverage under the parties' CBA on that basis.

3. **Confidential Status.** The exclusion of confidential employees under the PEBA § 4(G), § 5 and § 13(C) is limited to those who assist and act in a confidential capacity to persons who exercise managerial functions in the field of labor relations. See, *NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995). Thus, PEBA's confidential employee definition requires an analysis of both the duties of the employee in question and the duties of the person he or she allegedly assists. *Id.*

Criteria to be considered in establishing confidential status are whether the employee (1) is or could likely be on the employer's bargaining team; (2) is privy to the employer's labor-management policy or bargaining strategy; (3) has access to confidential financial or other data used in bargaining; or has input or involvement in the employer's contract proposal formulation. See *American Federation of Teachers Local 4212 and Gadsden Independent School District*, 03-PELRB-2006 (May 31, 2006); *NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995).

Those criteria are consistent with the "labor nexus" test propounded by the NLRB and upheld by the United States Supreme Court. Under the labor nexus test, the term "confidential employee" encompasses only those employees who assist and act in a confidential capacity to those who exercise managerial functions specifically in the field of labor relations. That includes only "those employees who assist and act in a confidential

capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 189 (1981). The verbs formulate, determine and effectuate are to be read conjunctively; that is, all three conditions must be present. See *Greyhound Lines, Inc.*, 257 NLRB 477, 480 (1981); *Bd. of Educ., Dist. No. 230 v. Illinois Educational Labor Relations Bd.*, 518 N.E.2d 713, 723 (Ill. App. 1987).

Yet again, the unrebutted testimony of CSED attorneys Blas Villanueva and Becky Jiron established that they do not assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. Their testimony is supported by reference to Exhibit 2 outlining the Attorneys' duties. HSD Director Christopher Collins acknowledged that the scope of their legal duties "is very narrow." That testimony is also supported by reference to Exhibit 2 outlining their job duties and which indicates no duties related to creating labor policy or enforcing it. Mr. Collins testified that CSED lawyers have "no choice" but to take certain actions consistent with those duties outlined in Exhibit 2 and that their "hands are tied" when performing their functions. That CSED attorneys are privy to some confidential information regarding parents or children, testimony from the Union's witnesses showed that the attorneys are privy to less information than are paralegals in the office whose inclusion in the bargaining unit as part of the wall-to-wall designation is not challenged by HSD. In addition, Ms. Padilla found that in conjunction with a query run by the State Personnel Office pursuant to Petitioner's Exhibit A, the positions of Lawyer A, O, and B were subsequently changed to be noted as "confidential" and, therefore, excluded from the bargaining unit and the "wall-to-wall" designation. Mr. Collins further testified the position of Attorney IV may require management or oversight of other employees. I conclude that Lawyers/attorneys working

for CSED are not confidential employees and not exempt from coverage under the parties' CBA on that basis.

G. Shared Community of Interest and Unit "Appropriateness". The preponderance of the evidence based on Exhibits 1 and 2 along with the testimony of Blas Villanueva and Becky Jiron supports a conclusion that the Attorneys and Lawyers share a community of interest with the other employees in the wall-to-wall unit and that there is no other reason that their inclusion would render the unit inappropriate.

H. Positions of "Attorney" and "Lawyer". I conclude that there is no appreciable difference between "attorneys" and "lawyers" in this case. Witness testimony established that the two terms are used interchangeably. The exhibits entered by the State refer to the "lawyers" at issue in some instances as "attorneys". Though the State Personnel Office (SPO) may categorizes HSD Lawyers as "Attorney" in specific instances that distinction is not material to the Petition here because it seeks clarification that the position of CSED attorney or lawyer however classified by SPO was included in the bargaining unit's wall-to-wall coverage in HSD.

For the reasons that follow I conclude that the Lawyers employed in the CSED are, and have always been, included in the wall-to-wall unit designated in 2008. Furthermore, within the past two years, HSD created sub-categories within the realm of attorneys and lawyers. Testimony and exhibits showed that since the creation of the wall-to-wall unit the lawyer classifications were expanded from "Lawyer-A" (advanced) and "Lawyer-O" (operational), to add "Lawyer-B" (Basic) and "Attorney-IV". That changed circumstance together with the State's more recent refusal to accept dues check-off authorization cards submitted by lawyers in the CSED requires unit clarification to determine whether those new classifications are properly included in the bargaining unit.

HSD asserts that the "Lawyer" and "Attorney" positions at HSD have been historically excluded from the bargaining unit and a unit clarification process is not the appropriate mechanism to upset established practice of excluding classifications relying on *Bethlehem Steel,* 329 NLRB No. 32, 243 (1999) and *Batesville Casket Co.*, 283 NLRB No. 118 (1987). There is some evidence to support that assertion. For example, former Human Resources Director, Johnna Padilla, testified to her belief that at the time of the accretion, the position of Lawyer was discussed as being a "confidential" employee and SHARE data entries after 2008 indicate that for personnel record purposes, Lawyers at CSED are carried on the books as "confidential" employees exempt from bargaining. Regular reports of "Fair Share" payers, that is employees in the bargaining unit but not paying dues, were sent to the union without AFSCME questioning the lawyers' absence from among them. Donna Lopez, Human Resource Operations Manager, testified that she oversees compensation and classification of existing and new positions within the Human Services Department. Ms. Lopez testified the positions of Lawyer-A, Lawyer-O and Lawyer-B, have always been identified in the SHARE system as non-bargaining unit employees. In addition, Ms. Lopez testified that with the creation of the Attorney-IV position in 2015, it was also identified as non-bargaining unit position. However, the preponderance of the evidence does not support a conclusion that the positions of "Lawyer" or "Attorney" have historically been excluded from the bargaining unit. SHARE entries are not dispositive because the employer unilaterally controls those entries. I note that when HSD created the positions of Attorney B and Attorney IV, there was no bargaining or discussion concerning their inclusion or exclusion from the unit. The State presumed that they were excluded and unilaterally made the data entry it thought was appropriate. There is nothing in the PELRB files that constitutes an express exclusion of Lawyer positions or a clear statement that they were to be excluded from the designation of

a wall-to-wall unit. The "Certification of Majority Support" in PELRB No. 336-04, issued August 7, 2003 contains no express exclusion of lawyers or attorneys. Thereafter, on June 11, 2008, the remaining eligible HSD employee positions were accreted into the existing AFSCME bargaining unit creating the much-referenced wall-to-wall unit designation at issue here. (Administrative notice of case file in *AFSCME and State,* PELRB No. 357-04 and prior Findings of Fact in Amended Report on Parties' Joint Petition for Unit Clarification *in re: AFSCME and HSD,* PELRB Case No. 312-09). At that time, Lawyers inclusion in the unit was not an issue. On September 9, 2008, the State provided AFSCME with a list of employees covered by the June 2008 accretion but a dispute arose over whether positions should be added to that list or removed as managerial and/or confidential. The dispute over excluding positions did not involve Lawyers or Attorneys, but technical positions. After the union filed a PPC over the dispute the parties met, conferred and resolved that dispute to their mutual satisfaction in *AFSCME v. HSD,* PELRB No. 117-09. (Prior Findings of Fact in Amended Report on Parties' Joint Petition for Unit Clarification in AFSCME and HSD, PELRB Case No. 312-09; Findings of Fact 28 and 29 *supra.*) At no point in any of the unit's history is there any indication that the positions Lawyer or Attorney were intentionally excluded when debate and agreement ensued over which positions would be excluded at the point the unit went "wall-to-wall". Accordingly, the only legal basis for asserting that the positions could have been historically excluded is that they must have been so excluded based on one or more of the statutory exclusions in the PEBA for management, supervisor or confidential employees. See, NMSA 1978 §10-7E-5 and §10-7E-13 (2003). I agree with that part of the State's argument that the parties may not by agreement, impair the organizational rights of the State's employees guaranteed by NMSA 1978 §10-7E-5. Just as the parties may not impair those rights now, they could not do so back in 2008 when HSD

employees were accreted into the existing AFSCME bargaining unit. For that reason, I conclude that parties followed the law with respect to whether Lawyers were in or out of the union at the time it went wall-to-wall. According to the Board's ruling in *AFSCME, Council 18 v. Santa Fe County*, PELRB No. 305-15 it is the Union's burden to prove the absence of the statutory exemption:

"The Board reverses the Executive Director's Letter Decision of August 18, 2015, with regard to the question of who bears the burden of proof on the question of whether the employees sought to be accreted are excepted from collective under one or several of the enumerated exceptions in the PEBA §4. That burden is best allocated to the Petitioner as part of the third element outlined above, which requires that the Petitioner show that inclusion of the position(s) sought to be accreted must not render that unit inappropriate." Board Order 5-PELRB-3015 (September 21, 2015).

The State in its closing brief, asserts that since 2008, the State of New Mexico has provided Petitioner a listing of all bargaining unit employees and their classifications at least four times per year, pursuant to the requirements contained in Article 8 of the collective bargaining agreement. Article 8 of the CBA calls for the State to provide such a report only "If requested by the Union". I can locate no evidence establishing how often or whether AFSCME requested such reports. Given the genesis of this Petition - the State declining to accept dues deduction authorizations from Lawyers - they would not have appeared on any such report anyway. Their absence from that report would indicate nothing about whether they were in the bargaining unit since AFSCME is obliged to represent bargaining unit members regardless of whether or not they pay dues.

The State points out that it is also required to submit regular reports on "fair share" fees deductions taken in any pay period and transmitted to the Union in accordance with Article

11 of the CBA without the requirement of a Union request. Therefore, between 2008 and the date of filing of the Amended Petition, Petitioner had a report each pay period that provides the means for deducing that attorneys in Human Services Department have not been included in the bargaining unit. I cannot conclude from the evidence that anyone at the union actually connected the dots necessary to deduce that management considered lawyers at CSED to be excluded from bargaining. To prove the lawyers have been historically excluded requires proof of actually knowledge agreement or at lease t a knowing acquiescence in their exclusion. As the state points out in its reliance on *Union Electric Co.*, 217 NLRB No. 124, that unit clarification is not appropriate for upsetting an *agreement or an established practice of a union and employer* concerning the unit placement of various individuals even if the *agreement* was entered into by one of the parties for what it claims to be *mistaken* reasons *or the practice has become established by acquiescence and not express consent.* Accordingly, I give little weight to the fact that the referenced reports were submitted to the union and conclude that the Lawyers have not been historically excluded from the bargaining unit. HSD acknowledges the concern I expressed in my letter Decision in PELRB No. 122-15, incorporated by reference, wherein I noted "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." (Letter Decision in PELRB No. 122-15 at p. 3) citing, *AFSCME v. Stratton*, 769 P.2d 76, 108 N.M. 163 (N.M. S. Ct. 1989). However, in addressing that concern, the State speaks as though it is a detached observer having played no role in the events of the past. In accusing the union and the PELRB of failing to abide by statute and procedural requirements is to accuse itself of being complicit it the very conduct of which it now complains. I require more evidence than I have here to overturn the *status quo* existing for more than 12 years.

RECOMMENDED DECISION:

Sometimes literature may provide insight into a legal problem such as that faced here. From the Rubaiyat of Omar Khayyam we read:

> "The Moving Finger writes and having writ,
> Moves on; nor all your piety nor wit
> Shall lure it back to cancel half a line,
> Nor all your tears blot out a word of it."

What the "moving finger" has written in this case is a unit clarification in 2008 creating a wall-to-wall unit from which the evidence is insufficient to exclude HSD Lawyers and/or Attorneys doing work in its Child Support Enforcement Division. No matter how much we might wish otherwise, there is no "WABAC machine"[4] that we can access to transport us back to the accretion and recognition of the bargaining unit in question. We cannot correct any deficiencies that occurred "way back then" nor observe what the parties said and did so that today we might have a fuller truth. In reality our ability to look into the past in this case is limited by the recollections and records presented at the Hearing on the Merits or those of which I am able to take Administrative Notice. I will not belabor the point so often made throughout this proceeding that both are not as complete as we might prefer. Therefore, mindful of the principle laid out by the New Mexico Supreme Court in *AFSCME v. Stratton* and by the NLRB in *Local Lodge No. 1424*, against invalidating a bargaining relationship that has existed between these parties for a number of years and in furtherance of the purpose of the Public Employee Bargaining Act NMSA 1978 §10-7E-2 (2003) to "guarantee public employees the right to organize and bargain collectively with their employers" while simultaneously promoting "harmonious and cooperative relationships between public

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[4] The WABAC (or "Wayback") machine was a central element of the "Peabody's Improbable History" cartoon segment. At the request of Mr. Peabody ("Sherman, set the Wayback machine to ..."), Sherman would set the WABAC controls to a time and place of historical importance, and by walking through a door in the WABAC machine, they would be instantly transported there.

employers and public employees and [protecting] the public interest by ensuring…the orderly operation and functioning of the state…" I recommend that the Board issue its Order affirming its subject matter and personal jurisdiction and affirming the Board's prior findings of AFSCME's Majority Support in the unit in question.

I further recommend that the Board find the Lawyers and Attorneys at issue are not supervisory, managerial or confidential employees as defined by the PEBA, that it clarify the unit by affirming that it always included those positions.

REQUEST FOR REVIEW:

Pursuant to PELRB Rule 11.21.3.19, any party may file a request for Board review within 10 business days after service of this Report. The request for review shall state the specific portion of the Report to which exception is taken and the factual and legal basis for such exception. The request may not rely on any arguments not previously raised before the undersigned. The request must be served on all other parties. Within ten business days after service of a request for review, any other party may file and serve on all parties a response to the request for review.

Issued, Friday, August 05, 2016.

Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board
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Albuquerque, New Mexico 87120