BEFORE THE STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

NATIONAL UNION OF HOSPITAL
AND HEALTH CARE EMPLOYEES,
DISTRICT #1199.

Complainant/Petitioner,

v.

UNIVERSITY OF NEW MEXICO
HOSPITAL,

Respondent.

3-PELRB-2005
Case Nos. 106-04 & 315-04

DECISION AND ORDER

This request for review by the Public Employee Labor Relations Board (PELRB or the "Board") presents the legal issues of (1) whether University of New Mexico Hospital's (UNMH) Labor Relations Policy is "grandfathered" under the Public Employee Bargaining Act (PEBA), §§ 10-7E-1 to 10-7E-26 NMSA 1978, such that the PELRB lacks jurisdiction to hear this case; and (2) whether the Executive Director should have deferred his determination on the merits in favor of grievance arbitration pursuant to NMAC 11.21.3.22. Additionally, Respondent/Appellant challenges the Executive Director's findings and conclusions on the merits, including: (1) that UNMH committed a prohibited practice by failing to implement certain wage increases pursuant to contract; (2) that UNMH committed a prohibited practice by failing to provide certain requested information to the Union; (3) that UNMH committed a prohibited practice by unilaterally reclassifying Radiology Technologist positions; and (4) that dieticians and interpreters should be accreted into the existing bargaining unit.

As explained in greater detail below, the Board hereby affirms and adopts the findings, conclusions and recommendations of the Executive Director as stated herein. The Board shall retain jurisdiction to ensure implementation of this Order.

PROCEDURAL BACKGROUND

On September 24, 2003 Petitioner National Union of Hospital and Health Care Employees, District 1199 NM, AFSCME, AFL-CIO ("Union" or Petitioner) filed with the PELRB a Petition for Unit Clarification (Accretion), PELRB Case No. 315-04. In its Response of October 23, the Respondent moved for dismissal on the ground that it is a public employer governed by its own Labor Relations Policy pursuant to § 10-7E-26(A) of PEBA. Thereafter, on March 16, 2004, Petitioner filed with the PELRB a Prohibited Practice Complaint, PELRB Case No. 106-04, some of the allegations of which were withdrawn, dismissed or otherwise waived in the course of litigation. The remaining allegations litigated and ruled on included violations of PEBA Section 19(H) (requirement to comply with collective bargaining agreements), for failure to implement wage increases pursuant to contract, and Sections 17(A)(1)[1] (requirement to bargain in good faith) and 19(F) (requirement to bargain in good faith), for failure to provide certain requested information, and for the unilateral reclassification of Radiology Technologists. *See* Complaint ¶ 3 and Response to Notice of Appeal at 2.[2]

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[1] UNMH appears to argue that Section 17 of PEBA cannot support a prohibited practice complaint because actionable prohibited practices by an employer are stated only in Section 19. *See* Notice of Appeal at 19. However, Respondent's argument overlooks the fact that Section 19(G) expressly prohibits public employers from "refus[ing] or fail[ing] to comply with a provision of [PEBA]," thereby incorporating other provisions of PEBA into Section 19. *Id.*

[2] UNMH "takes exception with the Director's failure to provide conclusions of law that cite the provisions of PEBA that Respondent violated." *See* Notice of Appeal at 19. The PELRB does not see how Respondent has been prejudiced in these matters by any failure on the Executive Director's part to

At the May 4, 2004 status conference, the Executive Director consolidated the two cases, and bifurcated and requested briefing on the jurisdictional question. An evidentiary hearing on the jurisdictional question was held on May 25, 2004, and the Executive Director subsequently ruled by letter dated June 22, 2004 that the Respondent was not entitled to "grandfathered" status under PEBA.

Subsequently, on August 23-24, 2004, an evidentiary hearing was held on the merits of the consolidated cases and the Executive Director issued a preliminary ruling on the merits by letter dated November 19, 2004. However, concluding that it was "impossible to determine from the record" whether UNMH had committed an alleged prohibited practice in implementing the wage increase, the Executive Director required UNMH to produce certain wage information, which was done. Thereafter, by letter dated March 18, 2005, the Executive Director issued his "final order" on the merits of all claims in the consolidated cases, which included a spreadsheet of calculating the discrepancy of wages the Executive Director ruled were owed by the Respondent to the employees in the bargaining unit.

On April 11, 2005, the Respondent submitted its Notice of Appeal and on May 2, 2005 the Union filed its Response to Notice of Appeal. Thereafter, having been timely placed on the agenda and publicly noticed, these matters came before the full Board at the Board's regularly scheduled meeting on July 22, 2005. At the July hearing, the parties made oral arguments and were questioned by the Board. Based on the pleadings and oral argument, the Board unanimously affirmed and adopted the findings and conclusions of the Executive Director as stated herein, except that it remanded back to the Executive

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specifically state the PEBA provisions violated, as the record provides substantial support for the conclusion of the violations as pled in the Complaint and outlined here.

Director the issue of the calculation of the amount of the wage increase for the sole purpose of allowing the parties to present evidence regarding any mathematical errors in the calculation of the wage increase that may have occurred. Thereafter, a hearing was held, evidence presented, and the Executive Director issued an order affirming his first calculation of the wage increase in part, and modifying it in part.

ANALYSIS

I. THE PELRB HAS JURISDICTION TO ADDRESS THESE MATTERS BECAUSE UNMH'S LABOR RELATIONS POLICY IS NOT GRANDFATHERED UNDER § 10-7E-26 OF PEBA

UNMH enacted a Labor Relations Policy on February 18, 1981, prior to either the 1992 or the 2003 enactments of PEBA. Thereafter, UNMH enacted a Labor Relations Policy on February 2, 2001 effective July 1, 2001 and another Labor Relations Policy on June 1, 2001, to take effect July 1, 2001 before the February 2, 2001 policy could take effect. Both the February 2, 2001 and the June 1, 2001 Labor Relations Policies expressly state that they "supercede[]"earlier policies. *See* Executive Director's letter decision dated June 22, 2004, p. 2 (finding number 2), and Notice of Appeal at 14; *see also* February 2, 2001 and June 1, 2001 Policies, Section J. UNMH takes exception to the Executive's "findings of fact and conclusions of law that its Labor Relations Policy was adopted or altered in any manner such that Respondent is deprived of grandfathered status under Section 26(A)," and argues that the PELRB has no jurisdiction to hear these matters.

Section 10-7E-26 of PEBA provides certain protections to "public employer[s] other than the state" that "adopted by ordinance, resolution or charter amendment a system of provisions and procedures permitting employees to form, join or assist a labor

organization for the purpose of bargaining collectively through exclusive representatives" prior to the re-enactment of PEBA in 2003. *See* §10-7E-26(A) and (B). Subsection (A) provides that where the labor resolution was adopted prior to October 1, 1991, the public employer "may continue to operate under those provisions and procedures," although "[a]ny substantial change after January 1, 2003 to any ordinance, resolution or charter amendment shall subject the public employer to full compliance with the provisions of Subsection (B)." *Id.* Subsection (B), in turn, provides more limited protections to public employers adopting such a resolution after October 1, 1991. Specifically, Subsection (B) employers may continue to operate under their pre-existing labor resolutions, "provided that the employer shall comply with the provisions of Sections 8 through 12 and Subsection D of Section 17" of PEBA "and provided" that nine separately enumerated provisions and procedures provided for in PEBA "are included in each ordinance, resolution or charter amendment." *Id.*

UNMH argues that the changes made to the UNMH Labor Relations Policy in 2001 do not remove UNMH's Policy from the purview of Subsection (A) and into Subsection (B). However, it is inescapable that UNMH, in adopting the 2001 Policies, expressly stated that the new Policies "supersede[] and replace[] in its entirety" the previously enacted policy or policies. *See, e.g.*, June 1, 2001 Policy (hereinafter "2001 Policy" or "Policy") (*quoted in* Notice of Appeal at 14). This is strong language having a distinct legal meaning and effect and is not merely a question of semantics. Accordingly, the 2001 Policy cannot under any reasonable understanding of the words "supercedes and replaces in its entirety" be said to a mere amendment to the 1981 Policy that thus

continues to be grandfathered under Subsection (A). Having chosen to make changes to its Policy in this way, UNMH must be held to that choice.

This conclusion is bolstered by the fact that the changes made in 2001 included a grant of rights. In particular, the Union points out in its brief and Mr. Tinnin for UNMH admitted in oral argument before the PELRB that in the process of changing the Policy in 2001, arbitration procedures were added for the hearing of grievances,[3] and this change "grants another right under the Act." *See* Response to Notice of Appeal at 5 and tape of July 22, 2005 proceedings (Side A at 168-173). Moreover, the Union points out that the Labor Relations Policy was modified to apply the new arbitration procedures to the resolution of prohibited practice complaints. *See* Response to Notice of Appeal at 5; *compare* 1991 Policy, Sections F and G and 2001 Policy, Sections F(5) & G(7). The new arbitration procedures provide specific rights to the parties in the event of a grievance or an alleged prohibited practice. A grant of right, however, is a substantive change, and a substantive change is by definition a "substantial" change.[4]

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[3] Both the Union and Mr. Tinnin refer to this arbitration procedure as being added in the new Impasse Resolution procedures, *see id.*, but reference to the policies in question demonstrate that the parties misspoke in that regard.

[4] In the alternative, the PELRB affirms and adopts the Director's findings and conclusions that the issuance of UNMH Policy 100 – Bargaining Unit Determination on April 29, 2004 amounted to a substantial change to a pre- October 1, 1991 Policy such that it would, for that reason, also remove the Policy from the purview of § 10-7E-26(A). Prior to the 2004 rule change, the UNMH Policy provided for a case-by-case determination of appropriate bargaining units, while under the 2004 rule change, the UNMH Policy now provides for a static, frozen scheme including only five bargaining units, into which all new employees must fit. *See* Response to Notice of Appeal at 6-7; *see also* UNMH Policy 100. Although Mr. Jim Pendergast, UNMH's Human Resource Administrator, testified that "the policy document does not modify or amend the provisions of the Labor Relations Policy" but rather "merely provides details for implementing the guiding principles contained in the Labor Relations Policy," *see* Notice of Appeal at 17, the PELRB is not persuaded by this testimony in light of the plain text of the two documents.

Nor is the UNMH Policy grandfathered under Subsection 26(B).[5] As noted above, to be grandfathered under this subsection, a Policy adopted after October 1, 1991 must meet a number of strict requirements. Here, the policy in question does not meet many of those requirements. For example, as noted by the Executive Director, the Policy violates Subsection 10-7E-10(B) by failing to provide for a tripartite Board representing both management and labor, as well as including a jointly selected third and neutral member. Rather, the Clinical Operations Board, a seventeen-ember board, is stacked with representatives of hospital management such that it is in reality a management controlled or dominated board. *See* Executive Director's letter decision of June 22, 2004 at 3.

Similarly, the Policy does not include "a requirement that grievance procedures culminating in binding arbitration be negotiated. *See* § 26(B)(6). Rather, the Policy provides for grievance arbitration that can be appealed to the management dominated Clinical Operations Board "on grounds that the Arbitrator's decision violates this policy or exceeds the powers of the Arbitrator," and the Clinical Operations Board is then authorized to remand the decision back to the Arbitrator. *See* 2001 Policy, Section G(7).

Nor, as noted by the Executive Director, does the policy in question provide "procedures for the identification of appropriate bargaining units ... equivalent to those set forth in [PEBA]," which provides for the identification of appropriate bargaining unit by a neutral party through a hearing process and based on community of interest. *See* §

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[5] This opinion performs a full jurisdictional analysis to ensure the sufficiency of the Executive Director's findings and conclusions because the PELRB's review of prohibited practice decisions is not limited to issues raised by the parties, *see* NMAC 11.21.3.19(C), and because a full analysis is warranted to support the PELRB's assertion of jurisdiction. However, it worth noting that UNMH appears to concede that its Labor Relations Policy does not meet the requirements of NMSA § 10-7E-26(B). *See* Notice of Appeal at 8, n. 6.

26(B)(2). Rather, the UNMH Policy provides that "UNMH will be solely responsible for determining ... whether a unit is appropriate," *see* 2001 Policy, Section D, and subsequent implementing rules designate five bargaining units, into which UNMH will fit any additional employee units. *See* Response to Notice of Appeal at 7; *see also* UNMH Policy 100, Bargaining Unit Determinations, Sections 3.2 and 4.1. At the same time, the Policy does not provide a mechanism to hear disagreements between the Union and UNMH regarding unit determination. Indeed, as determined by the Executive Director on the basis of both Union and Management testimony,[6] the 2001 Policy and its implementing rules fail to establish and provide procedures for hearing any kind of dispute, including prohibited practices complaints, in contravention of § 10-7E-12.

Because the 2001 Policy fails to meet the requirements of either Subsection 26(A) or Subsection 26(B), it is not grandfathered under PEBA and must therefore meet the requirements of § 10-7E-10 and implementing regulations, and be approved by the PELRB. However, the 2001 Policy clearly does not follow the template used by the PELRB, which is modeled on PEBA, and UNMH has not sought approval for its nonconforming Policy. *See* NMAC 11.21.5.8, 11.21.5.9(B) and 11.21.5.10. Specifically, as noted by the Executive Director, the 2001 Policy violates §10-7E-10(B) by failing to provide for a neutral tripartite board; violates § 10-7E-14(D) by improperly combining "no union" votes with nonvoters for a union defeating majority; and violates § 10-7E-17(F) by failing to provide for the negotiation of a grievance procedure including final and binding arbitration. Because the UNMH Policy does not meet the requirements of

[6] Mr. Jim Pendergast, the UNMH Human Resources Administrator and Ms. Eleanor Chavez, the Union President.

either § 10-7E-10 or § 10-7E-26, it is not entitled to any effect and the provisions of PEBA continue to govern relations between UNMH and its employees.

Based on the foregoing, the PELRB hereby concludes that, as stated herein, the Executive Director's findings and conclusions are supported by the record and are in accordance with the requirements of PEBA and its implementing rules. For this reason, as stated herein, the PELRB hereby adopts the Executive Director's findings, conclusions and recommendations that UNMH's Labor Relations Policy is not entitled to grandfathered status. The PELRB further concludes that UNMH's Labor Relations Policy violates the requirements of PEBA that a new local labor relations policy must meet to be approved by the PELRB. For these reasons, the PELRB additionally adopts the Director's findings, conclusions and recommendations, as stated herein, that the PELRB has jurisdiction to hear these matters.

II. THE EXECUTIVE DIRECTOR DID NOT ABUSE HIS DISCRETION IN DECLINING TO DEFER TO ARBITRATION

The collective bargaining agreement between the Union and UNMH includes a procedure for resolving grievances related to alleged breaches of the collective bargaining agreement. *See* Collective Bargaining Agreement, Article VII. UNMH takes exception that the Executive Director did not defer his ruling on the merits to permit the parties to proceed through grievance arbitration under the collective bargaining agreement. *See* Notice of Appeal at 20.

PEBA expressly provides that refusal to comply with a bargaining agreement constitutes a Public employer prohibited practice. *See* § 10-7E-19(H). Moreover, PEBA implementing rules provide that the decision to defer to grievance arbitration shall be left to the Executive Director's sound discretion. *See* NMAC 11.21.3.22(A) (that "[i]f the

subject matter of a prohibited practices complaint requires the interpretation of a collective bargaining agreement ... and the director determines that the resolution of the contractual dispute likely will resolve the issues raised in the prohibited practices complaint, then the director may, on the motion of any party, defer further processing of the complaint until the grievance procedure has been exhausted") (emphasis added).

Although UNMH presents a good public policy argument in favor of deferral, it does not allege or establish abuse of discretion in the Executive Director's decision to not defer to arbitration. Moreover, the PELRB expressly concludes here that it could not be abuse of discretion to refuse to defer to arbitration under the circumstances presented here. As noted above, UNMH's Policy provides that the management dominated Clinical Operations Board, rather than an independent and neutral body such as a district court, is to initially review the arbitration award. The Clinical Operations Board can then determine that an arbitration award violates UNMH's Policy, and remand that award back to the arbitrator with instructions to reverse or modify the award. *See* 2001 Policy, Section G(7). On the basis of this fact alone, it was not an abuse of discretion for the Executive Director to decline to defer to arbitration.

In the first place, this is not a narrow review, but rather very broad one. Under both the New Mexico Uniform Arbitration Act, NMSA § 44-7A-1 *et seq.* and the Federal Arbitration Act, 9 USCS §§ 1-16, for instance, an arbitration award can only be reviewed under very limited grounds. First, it can only be vacated in the event of partiality or corruption, fraud, arbitrator's misconduct such as refusal to consider pertinent and material evidence or manifest disregard of the law or, under federal law, when the arbitrator's decision violates "some explicit public policy" that is "well-defined and

dominant." *See* NMSA § 44-71-24(A), 9 USCS § 10 (and annotations therein) and *United Paperworkers Int'l Union v. Misco, Inc.*, 484 US 29, 43 (1987) (regarding public policy exceptions). Second, an award can be modified "[w]here there was an evident material miscalculation," "[w]here the arbitrators have awarded upon a matter not submitted to them," or "[w]here the award is imperfect in matter of form not affecting the merits of the controversy." *See* NMSA § 44-7A-25, 9 USCS § 11. Certainly, in either instance, the reviewing court may not substitute its judgment for that of the arbitrator. *See, e.g., Stroh Container Co. v. Delphi Indus.*, 783 F.2d 743, 751 (8th Cir. 1986) (that a reviewing courts will not set aside an arbitration award "simply because [it] might have interpreted the agreement differently or because the arbitrators erred in interpreting the law or in determining the facts"); *see also Town of Silver City v. Silver City Police Officers Ass'n*, 115 NM 628 (1993) (district court has no authority to review the merits on appeal of an arbitration award). Here, in contrast, under the language of the Policy UNMH can ask the management dominated Clinical Operations Board to remand a decision back to an arbitrator with instructions to reverse or modify the award simply because UNMH and/or the Clinical Operations Board disagrees that the arbitrator's conclusions or substantive judgment are consistent with UNMH Policy. *See, e.g.*, Response to Notice of Appeal at 10 (*citing* Transcript of merits hearing testimony)

In the second place, there is no adequate remedy in the grievant's right to appeal the arbitration award to district court, as modified or reversed upon instruction by the Clinical Operation Board. Specifically, on appeal the court would give deference to the modified arbitration award, which would now include or embody the substituted judgment of the Clinical Operation Board.

Accordingly, the PELRB hereby affirms the Executive Director's exercise of discretion in declining to defer consideration of these matters in favor of grievance arbitration.

III. UNMH COMMITTED A PROHIBITED PRACTICE BY FAILING TO IMPLEMENT CERTAIN WAGE INCREASES PURSUANT TO CONTRACT

UNMH takes exception with the Executive Director's finding and conclusion that "the entire bargaining unit was to get both a 2.5% increase to the base [wage] at the time the contract was signed and a 2.7% increase on the employee['s] anniversary if the employee received a 'meets expectation' performance." *See* Notice of Appeal at 20-21 and Executive Directors letter decision dated March 18, 2005 at 2. Additionally, UNMH takes exception to the fact that the Executive Director applied the 2.5% wage increase to all employees, and not simply to those receiving bonuses in lieu of a pay increase, arguing that the alleged failure to accurately implement the wage increase was only raised in the prohibited practices complaint as to the twenty-three (23) employees who were to receive lump sum payments in lieu of a base rate increase, not as to the failure to accurately increase all other employees' base rates pursuant to contract. These arguments, however, are not well taken.

First, although the Director's reasoning as to why all employees should get 2.5% increase "to the base at the time the contract was signed" was not elaborate, the PELRB concludes that further elaboration was not necessary as the Executive Director based his conclusions squarely on the unambiguous language of the contract.

In particular, the contract provides,

A. The wage rates for the bargaining unit classifications will be increased by two-

point-five percent (2.5%) effective upon ratification and signature of the agreement. ...

...

F. ...

Employees with at least a "meets expectations" performance evaluation shall receive a performance increase of two-point-seven percent (2.7%) on their anniversary date. Employees who are topped out shall, based upon a "meets expectations" performance evaluation, receive a lump sum bonus of two-point-seven percent (2.7%) on their anniversary date.

...

See Collective Bargaining Agreement, Article XIII, Wages; *compare* March 18, 2005 Letter decision at 2-3.

It appears from the Notice of Appeal that UNMH has argued a different interpretation for the quoted contract language based on witness testimony regarding intent. *See* Notice of Appeal at 20-21. Specifically, UNMH applied "the 2.5% increase to 'wage rates' by increasing each employee's base hourly rate to the maximum rate allowed for his or her step in the wage classification structure, with the remainder of the increase granted in the form of a one-time bonus." *See* Notice of Appeal at 20-21. Thus, UNMH applied the 2.5% wage rate increase of Paragraph XIII(A) of the collective bargaining agreement as if it was limited to the maximum rate allowed, as is the 2.7% 'meets expectations' performance-based wage increase set out in Paragraph XIII(F).

The PELRB concurs with the Executive Director in rejecting this argument.

Because the quoted contract language is clear and unambiguous and was accurately read and applied by the Executive Director, it is unnecessary and improper to consider UNMH witness testimony supporting an alternate interpretation of the contract language. As previously stated by the New Mexico Supreme Court,

> Whether an ambiguity exists is a question of law to be decided by the court. This Court has held that a contract is deemed ambiguous only if it is reasonably and fairly susceptible of different constructions. The mere fact that the parties are in disagreement on construction to be given to the contract does not necessarily establish an ambiguity. ... Moreover, where the terms of an agreement are plainly stated, the intention of the parties must be ascertained from the language used. Absent a finding of ambiguity, provisions of a contract need only be applied, rather than construed or interpreted.

See Levenson v. Mobley, 106 NM 399, 401-02 (1987) (internal citations omitted).

Second, the PELRB rejects UNMH's argument that the Union only pled a violation of PEBA as to those twenty-three employees who received lump sums in lieu of a base rate increase, not as to the remainder of the employees who received only an improperly calculated rate increase. The complaint alleges that,

> Shortly after the wages were implemented the Union discovered that the employer had not implemented wages in accordance with the newly negotiated agreement. Some employees received a bonus in lieu of a pay increase.

See Complaint, ¶ 3(a). Based on review of the Complaint, the PELRB concludes that the Complaint is not limited on its face to those employees who "received a bonus in lieu of a pay increase," because this sentence is merely illustrative rather than limiting. That the

Complaint gives sufficient notice to UNMH that the Union's claim is directed more generally to all instances of improper implementation of wage increases is made especially clear by the request for relief, which is broadly stated:

> For relief the Union requests that the wage increase be implemented according to the agreed upon Collective Bargaining Agreement back to the date of the tentative agreement.

Id. Finally, it is clear from the record that the Executive Director received evidence in the course of litigation, and without objection from UNMH, that the failure to implement wage increases was widespread and applied to all employees not just those receiving a bonus in lieu of pay increase. Accordingly, it is entirely appropriate that the complaint be amended to conform to the evidence. *Cf.* Federal Rule of Civil Procedure 15(b), and New Mexico Rule of Civil Procedure 1-015(B). This is particularly true where, as here, it would be wasteful of the Board's resources to re-conduct a hearing as to the majority of the employees when evidence as to all employees has already been received, and where the Union had previously sought the information necessary to allege and support a claim of wide-spread miscalculation but was only able to receive the information during the course of litigation. *See* Response to Notice of Appeal at 14.

Accordingly, the PELRB hereby adopts the Executive Director's findings, conclusions and recommendations that UNMH committed a prohibited practice by failing to implement the wage increases as required under the collective bargaining agreement, and that UNMH be required to "multiply the number of hours worked by the discrepancy amount and award those employees back pay in an amount equal to that computation." *See* Executive Director's letter decision dated March 18, 2005, p. 3.

IV. UNMH COMMITTED A PROHIBITED PRACTICE BY FAILING TO PROVIDE CERTAIN REQUESTED INFORMATION TO THE UNION

UNMH takes exception to the Executive Director's determination that PEBA, like NLRA, imposes a duty to provide information to exclusive representatives, and the Director's failure to address arguments made in Respondent's Post-Hearing Brief regarding waiver and mootness. *See* Notice of Appeal at 23-24.

As correctly noted by the Executive Director, under PEBA "[t]he Union has a duty to adequately represent its members and the Hospital has a duty to cooperate in the process." *See* Executive Director's letter decision dated March 18, 2005, p. 4. The duty to adequately represent its members stems from the Union's role as exclusive representative, *see* NMSA § 10-7E-15, and the Executive Director was correct in concluding that it is well established under the National Labor Relations Act (NLRA) that the duty of adequate representation requires that the Union "seek and obtain the information needed to adequately represent the bargaining unit members." *See* March 18, 2005 letter decision at 4; *see also* The Developing Labor Law (4th Ed.) at 890 (that the union has "not only the duty to negotiate collective bargaining agreements, but also the statutory obligation to police and administer existing agreements"). Additionally, the reciprocal duty of the parties to exchange information derives from their duty to collectively bargain in good faith. *See* NMSA § 10-7E-17(A)(1); *compare* The Developing Labor Law at 861.

By whatever angle the duty to furnish information is examined, however, it is clear that it would be "equally a prohibited practice under [PEBA] as it is under the [NLRA]" for UNMH "not to provide the Union with the information needed" by the Union for the Union to exercise its duty. *See* March 18, 2005 letter decision at 4; *see also*

NLRB v. ACME Indus. Co., 385 US 432, 435-36 (1967) (that "[t]here can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the performance of its duties," and that failure to provide such information is a breach of the statutory duty to collectively bargain in good faith) and *The Regents of the University of New Mexico v. New Mexico Federation of Teachers*, 1998 NMSC 20, ¶ 18, 125 N.M. 401 (that "absent cogent reasons to the contrary, we should interpret language of the PEBA in the manner that the same language of the NLRA has been interpreted, particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the time the PEBA was enacted") (citing *Las Cruces Prof'l Fire Fighters v. city of Las Cruces*, 1997 NMCA 31,¶ 15, 123 NM 239)

Here, the Union requested the following information from UNMH, most of which UNMH has failed to provide: "information that would assist the Union in determine the extent and number of employees affected by the erroneous wage implementation," including "copies of the letters sent by the Hospital to the bargaining unit members advising them of their pay raises;" "Children Psychiatric Center Employee work schedules;" "a list of casual pool employees;" and copies of contracts between UNMH and nursing staffing agencies. *See* Complaint 3(b), (c); *see also* March 18, 2005 letter decision at 2. All of this information is standard information, of a type routinely required and requested by unions in their capacity as exclusive representative. *See* The Developing Labor Law at 901-06 (that unions have a right to obtain "wage information," "information related to hours, and other terms and conditions of employment," employee lists, and "information pertaining to possible loss of work").

Because the duties to request and provide such information are so well-

established under the NLRA, on which PEBA is modeled, the PELRB concurs with the Executive Director's summary rejection of UNMH's argument "that PEBA does not incorporate within an employer's duty to bargain in good faith any inherent duty to provide information." *See* Notice of appeal at 23 The PELRB also concurs with the Executive Director's implicit rejection of UNMH's claim that "[i]nstead, a union's right to information from a public employer is defined by the Inspection of Public Records Act, NMSA 1978, § 14-2-1 *et seq.*..." *Id.* It is unclear that all information available under NLRA or PEBA would be available under the Inspection of Public Records Act (IPRA) and, in any event, the public policy and purpose underlying IPRA is to ensure an "informed electorate" so it cannot be said to define a public entity's obligations as an employer, under labor law. *See* NMSA § 41-2-5.

Finally, the PELRB is unable to address UNMH's exceptions regarding waiver and mootness. The PELRB notes that in numerous places throughout its Notice of Appeal, UNMH does not fully restate arguments made previously to the Executive Director, but rather refers the PELRB to its Post-Hearing Brief, which it claims is "incorporated by reference herein." The problem with this tactic is particularly apparent as to UNMH's waiver and mootness arguments, which lack any detail whatsoever such that it is impossible for the PELRB to determine what UNMH's claims are. *See* Notice of Appeal at 23-24. The very purpose of filing Notices of Appeal and Responses to Notices of Appeal is to apprise the PELRB of exceptions and arguments, so that it does not need to sift through past pleadings. *See* NMAC 11.21.3.19(A) (that "[t]he notice of appeal shall specify which findings, conclusions or recommendations to which exception is taken and shall identify the specific evidence presented or offered at the hearing that

supports each exception") (emphasis added).

Accordingly, for the foregoing reasons, the PELRB hereby adopts the Executive Director's findings, conclusions and recommendations that UNMH committed a prohibited practice by failing to provide the information requested by the Union, and that UNMH produce that information forthwith. Furthermore, the PELRB directs UNMH to produce any information listed here that the Director did not expressly order UNMH to produce in his March 18, 2005 letter decision. *See* Notice of Appeal at 23.

V. UNMH COMMITTED A PROHIBITED PRACTICE BY UNILATERALY RECLASSIFYING RADIOLOGY TECHNOLOGIST POSITIONS

UNMH takes exception to the Director's failure to expressly rule whether or not UNMH committed a prohibited practice by unilaterally reclassifying Radiology Technologist positions, and to the fact that the Director merely orders UNMH to engage in salary negotiations as to these positions. *See* Notice of Appeal at 25. The Union responds by continuing to contend that UNMH committed a prohibited practice by the unilateral reclassification but also points out that during the merits hearing Mr. Jim Pendergast, the UNMH Human Resources Administrator, "obviated the need for this contention by agreeing to bargain over the wage rates for the new classifications." *See* Response to Notice of Appeal at 17 (emphasis in original).

As correctly noted by the Executive Director, Mr. Pendergast "agreed that the salaries for the Radiology Technologists is something that should be negotiated." *See* Executive Director's letter decision dated March 18, 2005, p. 3; *see also* Response to Notice of Appeal at 17 (citing Transcript testimony). The Executive Director, therefore, did not rule on the question of whether the unilateral reclassification amounted to a

prohibited practice and instead merely ordered UNMH "to enter into negotiations as to the salaries of Radiology Technicians." *See* March 18, 2005 letter decision at 3.

Because there does not seem to be a genuine dispute between the parties on this issue, and because the Executive Director's order was supported by uncontested facts in the record, the PELRB hereby adopts the Director's order that UNMH enter into negotiations as to the salaries of Radiology Technologists.

VI. DIETICIANS AND INTERPRETERS SHOULD BE ACCRETED INTO THE EXISTING BARGAINING UNIT

Finally, UNMH raises exceptions to the Executive Director's findings and conclusions related to the accretion of Interpreters and Dieticians into the existing bargaining unit for nurses and professional employees.

Under the rules implementing PEBA, "[t]he exclusive representative of an existing collective bargaining agreement, [sic] may petition the board to include in the unit employees who do not belong, at the time the petition is filed, to any existing bargaining unit, who share a community of interest with the employees in the existing unit, and whose inclusion in the existing unit would not render that unit inappropriate." *See* NMAC 11.21.2.38(A) and 11.21.1.7(B)(16). Moreover, "[i]f the number of the employees in the group sought to be accreted is less than ten percent (10%) of the number of employees in the existing unit, the board shall presume that their inclusion does not raise a question concerning representation requiring an election, and the petition may proceed by filing a unit clarification petition under these rules." *See* NMAC 11.21.2.38(B).

Here, the Executive Director found that "[t]he Interpreters and Dieticians make up about 1% of the existing bargaining unit." *See* Executive Director's letter decision dated

March 18, 2005, p. 4. Indeed, the Interpreter and Dietician positions "currently represent approximately 11 people," while the bargaining unit into which they seek to accrete presently includes approximately 1054 members. *See* Response to Notice of Appeal at 18 (citing transcript testimony). The Executive Director also that the Interpreters and Dieticians "do share a sufficient community of interst with the bargaining unit to be included as a part of the existing bargaining unit," because they work under the same discipline rules, supervision and holiday schedules, work at the same location, get paid the same day, and "participate equally in the process of patient care as the rest of the bargaining unit." *Id.* In particular, the Interpreters and Dieticians interact and work closely with the nurses and other professionals within the bargaining unit, to carry out the Hospital's core function of patient care, and their positions require a certain amount of medical related training. *See* Response to Notice of Appeal at 19-21 (citing transcript testimony).

UNMH argues, in contrast, that the Executive Director's ruling was based "on the generic employee conditions applicable to all Hospital employees offered into evidence by the Union," and that "the Union failed in its burden to prove a community of interest." *See* Notice of Appeal at 26. These arguments may or may not be true. However, UNMH merely points to contrary evidence previously identified in its Post-Hearing Brief, which it again claims is "incorporated by reference herein." *Id.* For the reasons previously given, the PELRB cannot rule on arguments supported by reference to the parties' Post-Hearing Briefs, while the PELRB concludes that the evidence cited by the Union is sufficient to support the Executive Director's findings, conclusions and recommendations as to community of interest.

Accordingly, the PELRB hereby adopts the Executive Director's findings, conclusions and recommendations that dieticians and interpreters be accreted into the existing bargaining unit.

ORDER

THESE MATTERS having come before the Board on Respondent/Appellant UNMH's Appeal of Director's Decision and Request for Board Review, the Board having reviewed the pleadings, heard oral argument by the parties, and being otherwise advised, **ORDERS AND DECLARES AS FOLLOWS:**

1. The Decision of the Executive Director in these matters, rendered by letter rulings issued on June 22, 2004 and March 18, 2005 (collectively referred to herein as "Decision"), is hereby adopted and affirmed, as stated herein

2. UNMH's Labor Relations Policy is not entitled to grandfathered status under § 10-7E-26 of PEBA.

3. The Board shall retain jurisdiction to ensure implementation of this Order and any other Order issued in these matters.

Decided by the PELRB on the 22nd day of July during open session at its regular meeting held in Albuquerque, New Mexico.

For the Board.

Martín V. Dominguez
Chairman

Date of Issuance: October 19, 2005

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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March 18, 2005

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Shane C. Youtz
Youngdahl, Youtz & Youngdahl, P.C.
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Albuquerque, New Mexico 87102

RE: National Union of Hospital and Health Care Employees District 1199NM, AFSCME, AFL-CIO (Union) and University of New Mexico Health Sciences Center (Hospital), Prohibited Practice Complaint PELRB Case # 106-04 and Accretion Petition Case # 315-04

Dear Messieurs Tinnin and Youtz:

I have completed the computations on the 2.5% raise negotiated effective August 17, 2003. Please allow me to reiterate some of my findings as stated in my November 18, 2004 letter to both of you. This is a final order from which either or both of you may appeal.

I have reviewed the transcript, read the District 1199's Post Hearing Brief, Respondent's Post Hearing Brief and the Reply Brief. The Union's Accretion Petition seeks to include the dieticians and the interpreters in the bargaining unit. The Prohibited Practice Complaint alleges a variety of violations of either the contract, the statute (10-7E-1 through 26 NMSA 1978) or the rules (11.21.1.1

through 11.21.6.12 NMAC). The Complaint asks that the bargaining unit employees be paid the agreed to increases in pay of 2.5% upon the signing of the contract. An additional 2.7% on the employee's anniversary date conditioned upon a "meets expectations" performance evaluation. The 2.7% bonus is to be paid either as an increase to the employees base hourly rate or as a one time lump sum amount for topped out employees. The Union further alleges a prohibited practice by the Hospital for refusing to provide information needed by the union to perform its duty to the employees it represents; in particular refusing to send copies of the letters sent by the Hospital to the bargaining unit members advising them of their pay raises and the work schedules and casual pool employees information in the Child Psychology Department. Finally, the Union alleges a prohibited practice on the part of the Hospital by unilaterally re-classifying the radiology technician positions.

The Hospital countered by challenging this Board's jurisdiction to hear these matters. If this Board does have jurisdiction then, the Hospital alleges, there is no community of interest between the existing bargaining unit and dietitians and interpreters. Finally, the Hospital maintains that the bargaining unit members were paid according to the contract and therefore no prohibited practice was committed.

As to the Public Employee Labor Relations Board's jurisdiction, please see the June 22, 2004 decision in PELRB case number 106-04 finding that this Board does have jurisdiction over labor-management relations matters between the National Union of Hospital and Health Care Employees District 1199NM, AFSCME, AFL-CIO and University of New Mexico Health Sciences Center. Therefore, I'm finding that the Hospital's position as to jurisdiction is not well taken.

The pay raise negotiated in the contract seems clear to me, that is, that the entire bargaining unit was to get both a 2.5% increase to the base at the time the contract was signed and a 2.7% increase on the employees anniversary if the employee received a "meets expectation" performance

evaluation. An employee, whose base pay rate is less than the top rate for that classification, gets a 2.7% increase to the base on the anniversary date. An employee, whose base pay rate is less than the top rate for that classification but whose wage raise would exceed the top rate with the 2.7% increase, gets an increase to the base pay rate up to the top rate and the balance of the 2.7% raise is received in a one time lump sum amount. An employee, whose base rate is already at the top rate for that classification, gets the 2.7% increase as a one-time lump sum amount. I have computed the 2.5% increase for the bargaining unit employees and find that the Hospital has committed a prohibited practice by not implementing the raise as negotiated. The negotiated raise was in the amount of 2.5% and the Hospital failed to raise the bargaining unit member's hourly rate by that amount. I am therefore ordering that the Hospital increase the hourly rate for the employees listed on the roster attached to this order. The amount by which the hourly rate is to be increased is listed in the "discrepancy" column of the roster. That number represents the amount to be increased in cents. The hospital is then to compute the number of hours worked by each of those employees since August 17, 2003 and multiply the number of hours worked by the discrepancy amount and award those employees back pay in an amount equal to that computation.

At the hearing on August 24, 2004, see pages 275 through 279 of the transcript, Mr. Pendergast agreed that the salaries for the Radiology Technicians is something that should be negotiated. Therefore I am ordering that the Union and the Hospital enter into negotiation as to the salaries of the Radiology Technicians.

To determine if the information requested by the Union as to work schedules and casual pool employees in the Child Psychology Department must be produced by the Hospital one has to look to the purpose of the information and the relationship between the Union and its members and the Union and the Hospital. The Union has, inter alia, a statutory obligation to bargain collectively in good faith with the employer, to not discriminate in its representation of employees and to comply with the

provisions of the contract. The Union would be remiss in its duty not to seek and obtain the information needed to adequately represent the bargaining unit members. The relationship between the Union and the Hospital is one of mutual responsibility. The Union has a duty to adequately represent its members and the Hospital has a duty to cooperate in the process. For the Hospital not to provide the Union with the information needed for it to exercise its duty is equally a prohibited practice under the Public Employee Bargaining Act as it is under the National Labor Relations Act. The Hospital has to provide the work schedules and casual pool employee's information in the Child Psychology Department.

The Interpreters and Dieticians make up about 1% of the existing bargaining unit. They work side by side with other bargaining unit members, like nurses, pharmacists, case managers, dispatchers, radiologists and many other professionals. The Interpreters and Dieticians have the same rules in reference to discipline, they get paid on the same day, enjoy the same holiday schedule, work in the same building with the same supervision and participate equally in the process of patient care as the rest of the bargaining unit. I find that the Interpreters and Dieticians do share a sufficient community of interests with the bargaining unit to be included as a part of the existing bargaining unit.

Sincerely yours,

Juan B. Montoya

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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November 19, 2004

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RE: National Union of Hospital and Health Care Employees District 1199NM, AFSCME, AFL-CIO (Union) and University of New Mexico Health Sciences Center (Hospital), Prohibited Practice Complaint PELRB Case # 106-04 and Accretion Petition Case # 315-04

Dear Mr. Tinnin and Mr. Youtz:

I have reviewed the transcript, read the District 1199's Post Hearing Brief, Respondent's Post Hearing Brief and the Reply Brief. The Union's Accretion Petition seeks to include the dieticians and the interpreters in the bargaining unit. The Prohibited Practice Complaint alleges a variety of violations of either the contract, the statute (10-7E-1 through 26 NMSA 1978) or the rules (11.21.1.1 through 11.21.6.12 NMAC). The Complaint asks that the bargaining unit employees be paid the agreed to increases in pay of 2.5% upon the signing of the contract. An additional 2.7% on the employee's anniversary date conditioned upon a "meets expectations" performance evaluation. The 2.7% bonus is to be paid either as an increase to the employees base hourly rate or as a one time lump sum amount for topped out employees. The Union further alleges a prohibited practice by the Hospital for refusing to provide information needed by the union to perform its' duty to the employees it represents. In particular copies of the letters sent by the Hospital to the bargaining unit members advising them of their pay raises and the work schedules and casual pool employees information in the Child Psychology Department. Finally, the Union alleges a prohibited practice on the part of the Hospital by unilaterally re-classifying the radiology technician positions.

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interest between the existing bargaining unit and dietitians and interpreters. Finally, the Hospital maintains that the bargaining unit members were paid according to the contract and therefore no prohibited practice was committed.

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The pay raise negotiated in the contract seems clear to me, that is, that the entire bargaining unit was to get both a 2.5% increase to the base at the time the contract was signed and a 2.7% increase on the employees anniversary if the employee received a "meets expectation" performance evaluation. An employee, whose base pay rate is less than the top rate for that classification, gets a 2.7% increase to the base on the anniversary date. An employee, whose base pay rate is less than the top rate for that classification but whose wage raise would exceed the top rate with the 2.7% increase, gets an increase to the base pay rate up to the top rate and the balance of the 2.7% raise is received in a one time lump sum amount. An employee, whose base rate is already at the top rate for that classification, gets the 2.7% increase as a one-time lump sum amount. It is impossible to determine from the record whether the bargaining unit employees received the increases that were negotiated. I am therefore requiring the Hospital to provide both the Board and the Union with information. The information needed is an alphabetical list of all bargaining unit members, the base pay for each of them, on the payday prior to August 17th, 2004. Together with how the pay increase was put into effect for both the 2.5% increase and the 2.7% increase on the employee's anniversary. Please provide this information by December 21, 2004.

At the hearing on August 24, 2004, see pages 275 through 279 of the transcript, Mr. Pendergast agreed that the salaries for the Radiology Technicians is something that should be negotiated. Therefore I am ordering that the Union and the Hospital enter into negotiation as to the salaries of the Radiology Technicians.

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it's representation of employees and to comply with the provisions of the contract. The Union would be remiss in its duty not to seek and obtain the information needed to adequately represent the bargaining unit members. The relationship between the Union and the Hospital is one of mutual responsibility. The Union has a duty to adequately represent its members and the Hospital has a duty to cooperate in the process. For the Hospital not to provide the Union with the information needed for it to exercise its duty is equally a prohibited practice under PEBA as it is under NLRA. The Hospital is to provide the work schedules and casual pool employee's information in the Child Psychology Department by December 21, 2004.

The Interpreters and Dieticians make up about 1% of the existing bargaining unit. They work side by side with other bargaining unit members, like nurses, pharmacists, case managers, dispatchers, radiologists and many other professionals. The Interpreters and Dieticians have the same rules in reference to discipline, they get paid on the same day, enjoy the same holiday schedule and work in the same building with the same supervision. I find that the Interpreters and Dieticians do share a sufficient community of interests with the bargaining unit to be included as a part of the existing bargaining unit.

ISSUED in Albuquerque, New Mexico on this 19th day of November, 2004 by:

Juan B. Montoya, Executive Director

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

BILL RICHARDSON
GOVERNOR

EDMUND J. "JOE" LANG, CHAIR
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LEW HARRIS, MEMBER
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JUAN B. MONTOYA
DIRECTOR

June 22, 2004,

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RE: National Union of Hospital and Health Care Employees District 1199 Petition for Unit Clarification (Accretion) PELRB Case # 315-04 and Prohibited Practice Complaint PELRB Case # 106-04

Dear Mr. Tinnin and Mr. Youtz:

The National Union of Hospital and Health Care Employees District 1199 (Union) filed a petition and a complaint in reference to the University of New Mexico Hospital (Hospital). The petition seeks to accrete certain employees into the existing collective bargaining unit. The complaint alleges that the Hospital has refused to bargain in good faith and has failed to comply with the collective bargaining agreement by refusing to recognize the Union as the exclusive bargaining agent. The Hospital responded by challenging the Public Employee Labor Relations Board's (Board) jurisdiction to hear these matters. The Hospital has had a Labor Relations Policy since February 18, 1981 and therefore claims grandfather status pursuant to 10-7E-26 (A) NMSA 1978.

A hearing was held on May 25, 2004. The Hospital called three witnesses and the Union called one witness. The only issue heard was whether the Board has jurisdiction to hear the Hospital's labor-management relations matters or if that jurisdiction rests exclusively in the hands of the Hospital's Clinical Operations Board.

The Director of the Public Employee Labor Relations Board, Juan B. Montoya, served as the hearing examiner. A status conference was conducted on May 4, 2004 establishing a schedule for submission of briefs, oral arguments, exchange of witness lists and hearing on the merits.

Based on the testimony of the witness' at the May 25, 2004 hearing the hearing examiner finds:

1. A Labor Relations Policy was enacted by the Hospital dated February 18, 1981. Exhibit "A".

2. A Labor Relations Policy superseding the February 18, 1981 policy was enacted by the Hospital on February 2, 2001 to take effect on July 1, 2001. Exhibit "B".

3. A Labor Relations Policy was enacted by the Hospital on June 1, 2001 to take effect on July 1, 2001 before the February 2, 2001 policy could take effect on July 1, 2001. Exhibit "C".

4. A new Appropriate Bargaining Unit Policy was issued by the Hospital on April 29, 2004. Exhibit "F".

5. Mr. Jim Pendergast, one of the Hospital's witnesses, testified that the Hospital did not have a policy for determining appropriate bargaining units prior to April 29, 2004. He testified that one has to look at both exhibits "C", the Labor Relations Policy, and Exhibit "F", the Bargaining Unit Determination Policy, to determine what an appropriate bargaining unit is.

6. On July 1, 1999 the Board of Regents created the Clinical Operations Board.

7. The Hospital intends it's Clinical Operations Board to operate as a Labor Relations Board.

8. Exhibit F, the document entitled "100 Bargaining Unit Determination", modifies the Labor Relations Policy and the Clinical Operations Board Policy as to appropriate bargaining units.

9. Mr. Jim Pendergast further testified that the Clinical Operations Board does not have a procedure for determination of appropriate bargaining units, nor does it have a procedure for bringing or hearing prohibited practices complaints.

10. The new policy as to how appropriate bargaining units are determined modifies the Hospital's labor relation policy.

11. Exhibit "F" changes the way appropriate bargaining units are determined.

12. Exhibit "E" lists the membership of the Clinical Operations Board.

In 10-7E-10 (A) NMSA 1978 the Legislature allowed for local boards to be created, with the approval of the Board, on condition that those local boards "follow all procedures and provisions of the Public Employee Bargaining Act". The Hospital's Labor Relations Policy and it's Clinical Operations Board do not follow all procedures and provisions required by the Act. In Las Cruces Professional Fire Fighters and International Association of Fire Fighters, Local No. 2362, v. City of Las Cruces and Louis Roman, Las Cruces Fire Department Fire Chief, 123 N.M. 329 (1996), the New Mexico Court of Appeals said, "[**9] The Board was created pursuant to Section 10-7D-10 (A) which provides that a public employer other than the state with approval of the board may create a local board. The local board assumes the duties and responsibilities of the public employees labor relations board, but must follow all procedures and provisions of the Act. Additional provisions of Section 10-7D-10 provide for the composition, term length of members, compensation, and other limitations on the local board."

10-7E-10 (B) NMSA 1978 requires that a three member board be created and mandates the board's make up. The Clinical Operations Board has ten members with an additional seven ex-officio members. The labor management balance sought by the Act is nonexistent in the Clinical Operations Board.

10-7E-12 NMSA 1978 requires that a local board establish a hearing procedure for information gathering and inquiry, adopting rules and adjudicating disputes. Mr. Pendergast, the Human Resources Administrator testified that the Hospital does not have a procedure for determining appropriate bargaining units nor for hearing prohibited practice complaints. Ms. Eleanor Chavez testified that the Hospital does not have a procedure for the Union to redress objections to the Hospital's unilateral actions nor for the filing of complaints or for determination of appropriate bargaining units.

Exhibit "C", the Labor Relations Policy and Exhibit "F", the 100-Bargaining Unit Determination policy do not contain a provision for hearing disagreements between the Union and the Hospital for the determination of appropriate bargaining units.

While arbitration is in place in the Hospital's labor relations policy the arbitration is not consistent with 10-7E-17 (F) NMSA 1978 requiring arbitration that is final and binding.

The Hospital's election procedure, Labor Relations Policy, Exhibit "C" at E (1) combines the "no union" vote with the nonvoters for a majority in contravention of 10-7E-14 (D) NMSA 1978 .

In, The Regents of the University of New Mexico v. New Mexico Federation of Teachers and American Association of University Professors, Gallup Campus, 125 N.M. 401 (1998), the New Mexico State Supreme Court said, "{34} PEBA sets forth two

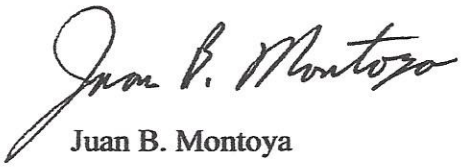
requirements a public employer must satisfy in order to obtain grandfather status. First, it must already have in place ' a system of provisions and procedures permitting employees to form, join or assist any labor organization for the purpose of bargaining collectively through exclusive representatives. "Section 10-7D-26 (A) (emphasis added). PEBA makes it clear that this system must be productive, actually resulting "in the designation of appropriate bargaining units, the certification of exclusive bargaining agents and the negotiation of existing collective bargaining agreements.' Section 10-7D-26 (B). Second, in order to be grandfathered, this system must be in effect "prior to October 1, 1991." Section 10-7D-26 (A)."

The Hospital's system is not productive in that it does not provide a process for employees to file prohibited practice complaints, petitions for representation, unit clarifications nor does it have a process for hearing these matters. Therefore the Hospital policy does not actually result in providing the rights and privileges guaranteed to public employees in the Public Employee Bargaining Act. In addition the Hospital policy has been substantially changed in February, 2001, June, 2001 and in April, 2004 requiring the Hospital to comply with the provisions of 10-7E-26 (B).

Based on all of the above I conclude that the existing labor policy at the Hospital does not satisfy the requirements of the Public Employee Bargaining Act resulting in denying their employees the right to form, join or assist a labor organization for the purpose of collecting bargaining through representatives chosen by public employees without interference, restraint or coercion pursuant to (10-7E-5 NMSA 1978).

I want to thank both you Mr. Tinnin and Mr. Youtz for the polite, informative and professional representation of your clients interests.

Sincerely yours,



Juan B. Montoya

National Union of Hospital and Health Care Employees District 1199 Petition for Unit Clarification (Accretion) PELRB Case # 315-04 and Prohibited Practice Complaint PELRB Case # 106-04

EXHIBIT LIST

Exhibit A Labor Relations Policy dated February 18, 1981

Exhibit B Labor Relations Policy dated February 2, 2001

Exhibit C Labor Relations Policy dated June 1, 2001

Exhibit D Labor Relations Policy dated June 1, 2001 (redline comparison)

Exhibit E Clinical Operations Board June 1, 201 (Minutes)

Exhibit F Bargaining Unit Determination Policy dated April 29, 2004

Exhibit G James Pendergast letter to Eleanor Chavez dated May 13, 2003

Exhibit H Iris Cowles letter to Eleanor Chavez dated August 4, 2004

Exhibit I Eleanor Chavez letter to James Pendergast dated May 23, 2003

Exhibit J Robert P. Tinnin, Jr. letter to Shane C. Youtz dated March 18, 2004