BEFORE THE PUBLIC EMPLOYEE
LABOR RELATIONS BOARD

AMERICAN FEDERATION OF TEACHERS
LOCAL # 4212,

Petitioner,

03-PELRB-2006

PELRB Case No. 309-05

and

GADSDEN INDEPENDENT SCHOOL DISTRICT

Respondent.

DECISION AND ORDER

The appealing party, Gadsden Independent School District, having withdrawn its appeal as to the hearing examiner's report and having agreed to the bargaining order and order directing card count contained in said report;

IT IS HEREBY ORDERED that the Amended Hearing Examiner's Report dated May 3, 2006 is hereby adopted as the decision and order of the Public Employee Labor Relations Board. The grandfathered bargaining unit as reconciled is hereby found to be appropriate.

Martin V. Dominguez

MARTIN DOMINGUEZ
Chairman
Public Employee Labor Relations Board

05/31/06
DATE

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AMERICAN FEDERATION OF TEACHERS

LOCAL # 4212,

Petitioner,

and **PELRB Case No. 309-05**

GADSDEN INDEPENDENT SCHOOL DISTRICT,

Respondent.

AMENDED HEARING EXAMINER'S REPORT

On June 7, 2005, the American Federation of Teachers, Local No. 4212 (AFT) filed a Petition for Recognition as Incumbent exclusive representative for the Gadsden Independent School District (GISD), based on a 1997-1999 collective bargaining agreement (CBA). The petition was subsequently supplemented with a facially valid showing of 67.886% majority support within the approximately 1,722 member bargaining unit.[1] *See* PELRB Rules 2.13 and 2.36.

AFT had filed an earlier Petition for Recognition as Incumbent on June 8, 2004, which had also been supported by a purported showing of majority support. *See* PELRB Case No. 331-04. However, the 2004 Petition had been closed and remanded upon the PELRB's October 19, 2004 approval of the GISD Local Labor Board (LLB). *See* PELRB Case No. 216-04. Notwithstanding the earlier approval of a LLB and remand, GISD's motion to dismiss the 2005 Petition was denied. The denial was based on GISD's admissions that its LLB lacked three members and rules, and had not yet begun

[1] The total number of employees within the bargaining unit may now be changed due to the reconciliation discussed herein.

meeting regularly to conduct business, and based on AFT's allegations that GISD had failed or refused to timely constitute a functioning LLB with the intent of delaying the hearing of labor matters, including the Petition for Recognition as Incumbent.

The Petition for Recognition as Incumbent raises several issues. First, the Petition raises an issue under NMSA 1978§ 10-7E-24(A), Public Employee Bargaining Act (PEBA), of correct unit inclusion or exclusion. Specifically, reorganization of job positions and titles since 1999 has necessitated reconciliation between the positions described in the 1997-1999 CBA and the present-day positions. This issue is addressed in Section II.A below. Second, the Petition raises two issues under § 24(B): (a) whether GISD is required to enter collective bargaining with AFT, an incumbent exclusive representative, prior to a demonstration of majority support; and (b) the proper method of demonstrating to the employer the majority support of an incumbent exclusive representative. These issues are addressed in Sections II.B and II.C below.

Two separate hearings were held on December 14, 2005, one to address unit inclusion or exclusion under§ 24(A), and one to address the issues arising under§ 24(B). All parties were present at both hearings and given an opportunity to participate, to introduce relevant evidence, to examine witnesses, to argue orally and to file written briefs on all factual and legal issues. After full consideration of the parties' stipulations, evidence, arguments and briefs, and upon the entire record of the case, I make the following findings and conclusions.

I. STIPULATED FINDINGS

1. The parties stipulate, and I find, that AFT is a labor organization under § 4(L) of PEBA.

2. The parties stipulate, and I find, that GISD is a public employer under § 4(S) of PEBA.

3. The parties stipulate, and I find, that the bargaining unit identified in Article 2 of the 1997-1999 CBA is an incumbent or grandfathered bargaining unit under § 24(A) of PEBA.

4. The parties stipulate, and I find, that under § 24(B) of PEBA AFT is the incumbent exclusive representative for the bargaining unit identified in Stipulation No. 3.

II. FINDINGS OF FACT AND CONCLUSIONS

A. Unit Inclusion and Exclusion.

Section 24(A) of PEBA provides that "[b]argaining units established prior to July 1, 1999 shall continue to be recognized as appropriate bargaining units for the purposes of [PEBA]." Article 2 of the 1997-1999 CBA designates a bargaining unit of "all regular non-supervisory teachers and classified positions" identified in Article 2, with certain exceptions.

Most of the job titles on the July 5, 2005 employee list utilized at the December 14, 2005 hearing were obviously included in the bargaining unit described in the CBA, and thus did not raise a dispute between the parties. However, several job positions had been reorganized and/or re-titled since 1999. Additionally, the parties agreed that the CBA never intended to include managerial, supervisory or confidential positions.

Based on the evidence presented, I find and conclude that the reconciled bargaining unit includes all present-day positions or job titles on the July 5, 2005 list that are not excluded below.

1. Certificated Positions.

Ms. Browder, the Human Resources Director for GISD, testified that the term "teacher," as used in the CBA, was intended to include all certified personnel. Accordingly, all regular non-supervisory certified personnel are included in the reconciled bargaining unit.

2. Administrative Assistants, Human Resource Specialists and Specialists.

The CBA expressly excluded from the bargaining unit "all classified employees in the Superintendent's Office," the "Secretary to the Assistant Superintendent for

Finance," the "Secretary to the Deputy Superintendent," and "all classified employees of the Personnel Department."

Barbara Browder testified as follows: that these secretaries and the employees in the Superintendent's Office have been re-titled as Administrative Assistants; that the position of Deputy Superintendent has been reorganized into four (4) separate Associate Superintendents, [2] each with its own Administrative Assistant; and that classified employees of the Personnel Department are now titled Human Resource Specialists.

Ms. Browder additionally testified that certain employee's positions were mis-identified on the July 5, 2005 list. One person identified as being an Administrative Assistant, Irma I. Suarez, is now in an Administrative Support position, and thus within the bargaining unit. Additionally, two classified employees of the Personnel or Human Resources Department (Lupita Chavez and Betel M. Contreras) were listed as merely being Specialists rather than Human Resource Specialists.

Based on Ms. Browder's testimony I find and conclude as follows: that the Administrative Assistant positions are excluded from the bargaining unit; that Irma Suarez is now within the bargaining unit; that all Human Resource Specialists, including Ms. Chavez and Ms. Contreras, are excluded from the bargaining unit; and that all regular Specialists are included in the bargaining unit.

3. Administrative Intern

Ms. Browder testified that Administrative Interns are employees involved in a four-year principal-in-training program. She initially expressed her belief that they were excluded from the bargaining unit as supervisory personnel because they are principals-

[2] The four Associate Superintendents include that for (1) Support Services, (2) Curriculum and Instructional Services; (3) Human Resources; and (4) Finance.

in-training and have a level 3B license that permits them to evaluate teachers or other employees. (Exhibit C.) However, her further testimony and their job description (Exhibit B) revealed that they merely "assist" with some limited supervisory acts, and that the emphasis of their job description is on their learning the job duties of a principal to decide if they wish to become one. Based on this testimony and documentary evidence, I find and conclude that Administrative Interns are not supervisory personnel.

However, testimony was elicited to the effect that Administrative Interns are confidential employees. For instance, Ms. Browder testified that they could be on a bargaining team and that, by training closely with principals and other administrators and by attending the monthly Administrator Meetings, they are regularly exposed to GISD labor-management policy. At the monthly Administrator Meeting, the Superintendent meets with principals and other administrators to discuss policy matters, including matters related to labor-management policy. Although not every Administrator Meeting deals with labor-management policy, any such meeting could address labor-management policy. Based on this testimony, I find and conclude that an Administrative Intern "devotes a majority of his time to assisting and acting in a confidential capacity with respect to a person who formulates, determines and effectuates management policies," *see* § 4(G), and are thus excluded from the bargaining unit as confidential employees.

4. Custodian Heads.

GISD argued that present-day Custodian Heads were excluded from the reconciled bargaining unit as supervisors. AFT objected that Custodian Heads have no power to hire, fire or effectively recommend such action and are merely lead employees. Thereafter, Ms. Browder testified that these employees spend less than ten percent (10%)

of their time engaging in strictly supervisory tasks. On the basis of Ms. Browder's testimony I find and conclude that Custodian Heads do not meet the statutory definition of supervisor, *see* § 4(U), and thus are included in the bargaining unit. I further interpret the CBA to include all "head" employees whose positions are not in fact supervisory or managerial in nature.

5. Day Care Manager.

Ms. Browder testified that this position supervises the Day Care Facility, effectively recommends hiring and firing, gives evaluation input to the principal, reports to the principal, and effectuates state regulations and policies regarding child care. The AFT witness, Rethea Morris, National Administrator/Receiver for Local 4212, testified that the Day Care Manager spends approximately sixty percent (60%) of his or her work day engaged in the same work as an Instructional Assistant (IA) or other Day Care employee. Cross-examination of Ms. Morris revealed that this information was obtained by either hearsay or through very limited opportunities of personal observation.

Thereafter, GISD produced a job description (Exhibit D) to assist in resolving the dispute. Ms. Morris testified that many of the job functions listed on the job description could be or were performed by an IA. However, she testified that IAs did not perform at least five enumerated tasks: 5. supervise staff; 6. prepare receipts and deposits for parents according to strict guidelines; 7. work closely with the finance department to assure the day care center has adequate funds to support payroll; 12. assure all day care staff participate in workshops and staff meetings; 14. assure developmental screenings and assessments are performed on each child in order to determine program planning

using the DDST II and Humanics Assessment instruments, and for reporting progress to the CYFD Office of Child Development.[3]

Notably, all of the job functions that are admittedly unique to Day Care Managers are related to "executive and management functions," and/or "developing, administering or effectuating management policies." *See* § 4(O). Accordingly, based on the foregoing, I find and conclude that Day Care Managers are managers under PEBA. I do not find it significant that a Day Care Manager may spend approximately sixty percent (60%) of his or her workday engaged in the same work as other Day Care employees. Under PEBA, performing "substantially similar" duties as one's subordinates does not detract from one's status as manager, as it would from one's status as supervisor. *Cf.* § 4(O) and § 4(U).

6. Student Nutritional Program (SNP) or Food Service Manager.

Ms. Browder testified that Food Service Managers supervise cooks, "4 or 7 hour workers" and assistant managers. Accordingly, GISD argued that Food Service or SNP Managers were excluded from the bargaining unit.

However, the bargaining unit described in the 1997-1999 CBA included "First Cooks," and Ms Morris testified that an employee had told her that he had always been a First Cook but was recently informed that he was now a "Food Service Manager," although there was no change in his job duties.

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[3] Contradictory evidence was presented as to whether IAs as well as Day Care Managers perform enrollment activities, and whether Day Care Managers are certified to develop Individual Family Support Plans and implement family training sessions utilizing the ADVANCE curriculum. (Exhibit D, Item Nos. 8, 15, 16.) I do not resolve these issues here, however, because these job functions are not dispositive to my ultimate finding and conclusion regarding unit inclusion or exclusion.

To resolve this potential dispute, GISD researched the personnel files of these employees, to find a First Cook job description to compare to that of Food Service Manager. The search revealed only one First Cook, an employee who had retired in 2001. This employee's job description read that the position "performs the duty of cafeteria manager when she is absent." Based on this job description (which was read into the record but not formally admitted), I find and conclude that the First Cook position was a lead employee position distinct from the position of SNP or Food Service Manager. I reject the hearsay testimony presented by Ms. Morris because it is contradicted by all other admissible evidence and is not subject to cross-examination. I also find and conclude based on the foregoing evidence that the SNP or Food Service Manager position is properly excluded from the reconciled bargaining unit as a legitimate managerial or supervisor position.

There was also a question regarding three employees listed simply as "managers." Ms. Browder had their positions investigated and testified that they are Food Service Managers. I find and conclude that, as such, they are similarly excluded from the bargaining unit.

7. Grounds Shop Foreman, Motor Vehicle Supervisor and SNP Warehouse Supervisor.

GISD argued that the positions of Grounds Shop Foreman, Motor Vehicle Supervisor and SNP Warehouse Supervisor were excluded from the bargaining unit as being supervisory in nature. AFT concurred with or did not object to the exclusions. Accordingly, I find and conclude that these positions are excluded from the bargaining unit.

8. Temp Clerical

GISD testified that Temp positions are excluded from the bargaining unit, because the 1997-1999 bargaining unit only included regular employees. AFT agreed in principle but did raise a concern that some people might be listed as "temp" employees for an indefinite or excessive period of time.

Although GISD argued that the length of time spent in a temp position is irrelevant, GISD agreed to investigate the status of the listed Temp Clerical employee, Minerva Menchaca. GISD's investigation revealed that she had filled this position during the maternity leave of another employee from November 18, 2002 to March 3, 2003. Ms. Browder testified that normally Ms. Menchaca is employed as either a parti-time or a substitute clerk. Ms. Browder further testified, without objection from counsel for GISD, that Ms. Menchaca should be allowed to vote or have her card counted.

Based on the foregoing, I find and conclude that the Temp Clerical position is excluded from the bargaining unit. However, I find and conclude that Ms. Menchaca is not a temp employee. I also conclude, pursuant to the parties' agreement, that Ms. Menchaca shall be allowed to vote or have her card counted.

B. Rights and Duties Prior to a Demonstration of Majority Support.

As noted above, the parties have stipulated that AFT is an incumbent exclusive representative under § 24(B). One issue presented under § 24(B) is whether a public employer is required to collectively bargain with an incumbent exclusive representative prior to a demonstration of majority support.

Section 24(B) provides that,

> A labor organization that was recognized by a public employer as the exclusive representative of an appropriate bargaining unit on June 30, 1999 shall be

> recognized as the exclusive representative of the unit on the effective date of [PEBA]; provided, however, that the public employer shall not enter into a new collective bargaining agreement pursuant to this subsection unless the labor organization demonstrates majority support to the public employer pursuant to Section 14 of [PEBA]. A labor organization which attempts and fails to show majority support shall no longer be recognized as the exclusive bargaining representative of that unit.

Id. (emphasis added).

AFT maintains that under § 24(B) GISD is required to negotiate wages, hours and other terms and conditions of employment with AFT even prior to a demonstration of majority support, because the section merely prohibits the public employer from entering into a CBA without such a demonstration. GISD responds that it would be "ludicrous" and wasteful of "public resources, time and money" for GISD to enter into negotiations with AFT if AFT does not in fact represent a majority of employees within the bargaining unit. *See* Respondent's Post Hearing Brief at 10. Although GISD's argument has a certain amount of common-sense appeal, the language of PEBA directly contradicts it.

First, the term "exclusive representative" is a legal term of art under PEBA, and the mandate under § 24(B) that incumbent exclusive representatives "shall be recognized as the exclusive representative of the unit on the effective date of [PEBA]" (emphasis added) has special significance. "Exclusive representative" is defined as "a labor organization that, as a result of certification, has the right to represent all public employees in an appropriate bargaining unit for the purposes of collective bargaining." *See* § 4(I). "Certification," in turn "means the designation by the board or local board of a labor organization as the exclusive representative for all public employees in an appropriate bargaining unit." *See* § 4(E). Finally, "collective bargaining" is "the act of negotiating between a public employer and an exclusive representative for the purpose of

entering into a written agreement regarding wages, hours and other terms and conditions of employment." *See* § 4(F). Reading § 24(B) and these definitions together reveals that an incumbent exclusive representative is statutorily deemed to remain certified to negotiate wages, hours and other terms and conditions of employment until the incumbent attempts and fails to demonstrate majority support.

Second, it is significant that § 24(B) expressly requires a demonstration of majority support only to enter into a CBA, not to be recognized as the exclusive representative. To prevent this proviso from being superfluous, the whole subsection must be read as providing for some action by a public employer and exclusive representative that falls short of entering into a CBA. *See Katz v. N.M. Dep't of Human Servs.*, 95 N.M. 530, 534 (1981) (that "[a] statute must be construed so that no part of the statute is rendered surplusage or superfluous"). As discussed, the definition of exclusive representative is tied to representing public employees "for the purposes of collective bargaining," and the definition of collective bargaining is tied, in turn, to "negotiating ... for the purpose of entering into a written agreement regarding wages, hours and other terms and conditions of employment." *See* §§ 4(I) and 4(F). Accordingly, the statutorily required action that falls short of entering into a CBA is the negotiation of wages, hours and other terms and conditions of employment.

Finally, § 15 and § 17 impose affirmative duties on both labor organizations and public employers to negotiate wages, hours and other terms and conditions of employment based on a labor organization's status as exclusive representative.[4] It is

[4] Section 15(A) provides that "[t]he exclusive representative shall ... negotiate a collective bargaining agreement covering all public employees in the appropriate bargaining unit." Section 17(A)(1) provides that "public employers and exclusive representatives ... shall bargain in good faith on wages, hours and all other terms and conditions of employment..."

inconceivable that PEBA would impose a duty to negotiate without also imposing a corresponding right to engage in such required negotiation.[5] *See Santa Fe and AFSCME*, 1 PELRB 1 at 26 (1993) (that construction must not render a statute's application absurd or unreasonable, or lead to injustice or contradiction).

Based on the forgoing, I conclude that GISD is required to bargain with AFT as the incumbent exclusive representative even prior to AFT demonstrating its majority support to GISD. Moreover, I conclude that GISD can be ordered to bargain with AFT pursuant to § 9(F). *Id.* (that the Board has the authority to impose appropriate administrative remedies for purposes of enforcing the provisions of PEBA).

C. Method of Demonstrating Majority Support.

The second issue presented under § 24(B) is the proper method of demonstrating the majority support of an incumbent exclusive representative. AFT argues that, as an incumbent exclusive representative, it is entitled to demonstrate majority support through a card count rather than a secret ballot election. GISD counters that AFT's incumbent status does not entitle it to receive a card count over GISD's objection.[6]

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[5] The fact that § 15 and § 17(A)(2) contemplate that the parties shall eventually reduce any agreement reached in negotiations into a CBA, does not alter the above analysis. It is the purpose of PEBA "to guarantee public employees the right to organize and bargain collectively," *see* § 2, and to that end it mandates good faith in negotiations. *See* § 19(A)(1). However, the act does not require either the public employer or the exclusive representative to "agree to a proposal or make a concession." *Id.* § 19(A)(1). In other words, the Legislature sought to promote the act of negotiating over wages, hours and terms and conditions of employment, whether or not the parties ultimately reach an agreement that can be reduced to writing. *See Santa Fe and AFSCME*, 1 PELRB 1 at 26 (that the Board may rely on the express purposes of PEBA and the specific wrongs prohibited, as indicia of legislative intent).

[6] AFT additionally argues that GISD failed to timely and properly object to a card count and/or that GISD has previously acquiesced in a card count. I reject most of AFT's arguments on the grounds stated in Respondent's Post Hearing Brief. *Id.* at 8-10. However, I decline to rule whether the GISD School Board has violated the Open Meetings Act by failing to object in a public meeting, or whether the School Board rather than the Superintendent was required to make the decision to object, because the PELRB is not constituted to resolve legal issues arising under statutes other than PEBA. *Cf.* Santa Fe County & AFSCME, 1 PELRB 1 at 68 (1993) (that it is the PELRB's "function ... to interpret and apply PEBA," not to determine the constitutionality of local ordinances).

In resolving this issue, I look primarily to the language of PEBA. However, because legislative intent is not clear when Sections 24 and 14 are read together, this analysis also makes recourse to canons of construction, and amendments made to preexisting law in enacting PEBA II.[7]

1. Statutory Language.

Section 24(B) merely provides in general fashion that the demonstration of majority support shall be made "pursuant to Section 14 of [PEBA]." As an initial matter, it is clear that neither § 14(B), § 14(D) nor § 14(E) is applicable. Section 14(B) addresses intervention, or when a competing labor organization seeks to get onto the ballot after another labor organization has already filed a representation petition accompanied by a thirty percent (30%) showing of interest. Intervention, however, is not applicable in the context of an incumbent exclusive representative because the incumbent is already declared by statute to be recognized as "the exclusive representative." *See* § 24(B). Clearly, a representative would not be "exclusive" if competing unions are allowed to intervene into that bargaining relationship. Similarly, § 14(D) concerns run-off elections, which will only be applicable in the case of intervention. Finally, § 14(E) concerns the election and contract bars to representation petitions, which are not applicable here. Accordingly, this issue must be resolved pursuant to § 14(A) and/or §14(C).

Subsection 14(A) addresses the general requirement, upon the filing of a Representation Petition containing a showing of interest, of conducting a secret ballot

[7] The analysis does not rely on the factual testimony presented that certain local jurisdictions proceeded with secret ballot elections in the case of an incumbent exclusive representative because the employer objected to a card count. The issue presented is a question of law rather than one of fact, and testimony probative of someone's subjective belief as to the content or meaning of law is not relevant. The same is true of AFT's assertions regarding the Belen Schools incumbent card counts performed in PELRB Case Nos. 330-04 and 309-05.

election "to determine whether and by which labor organization the public employees ... shall be represented." *Id.* However, the issue of whether and by which labor organization the public employees shall be represented has already been answered as to incumbent exclusive representatives by § 24(B), when that subsection declares that an incumbent exclusive representative "shall be recognized as the exclusive representative of the unit on the effective date of [PEBA]."

"Which" labor organization shall represent the bargaining unit is already determined under § 24(B) because a grant of exclusive right assumes that competitors shall not have access to the same right. Moreover, "whether" the incumbent shall represent the bargaining unit is also already determined under § 24(B) by that subsection's use of mandatory recognition language in connection with the term "exclusive representative."

Because § 14(A) is not applicable to incumbents on its face, it would be unreasonable to interpret § 24(B)'s requirement that an incumbent's majority support be demonstrated "pursuant to Section 14" as referencing § 14(A). *See Santa Fe and AFSCME, supra* (that construction must not render a statute's application absurd or unreasonable, or lead to injustice or contradiction). It is true, as GISD argues, that "there is no definition in PEBA to distinguish an 'initial' representation election" from an incumbent representation proceeding. *See* Respondent's Post Hearing Brief at 3. However, PEBA does not, itself, define *any* representation procedure. *See* § 4. Rather, "representation cases" and procedures related to incumbent exclusive representatives are defined in the Board rules implementing PEBA and, conspicuously, these rules do

distinguish between normal "representation cases" and procedures related to incumbent exclusive representatives.[8]

In contrast to § 14(A), § 14(C) provides for an alternative method for demonstrating majority support, such as by a card count. Section 14(C), unlike all other subsections of § 14, is the only subsection that is not clearly inapplicable on its face to incumbent proceedings. Section 14(C) is also the only subsection that refers to a "procedure for determining majority status," which compares to the language of § 24(B) requiring an incumbent exclusive representative to "demonstrate[] majority support" prior to entering into a CBA. Accordingly, by process of elimination, § 14(C) appears to be the subsection by which the majority support of an incumbent exclusive representative shall be demonstrated.

Admittedly, § 14(C) normally requires employer agreement to proceed by card count. Specifically, § 14(C) provides that,

> As an alternative to the provisions of Subsection A of this section, a public employer and a labor organization with a reasonable basis for claiming to represent a majority of the employees in an appropriate bargaining unit may establish an alternative appropriate procedure for determining majority status ... The board or local board shall not certify an appropriate bargaining unit if the public employer objects to the certification without an election.

Id. (emphasis added). Accordingly, the PELRB has previously ruled that § 14(C) "grants any public employer ... the absolute right to insist on a representation election before the Board or a local board certifies a labor organization as exclusive representative ..." *AFSCME v. Los Alamos County* at 39 (emphasis added). However, neither the

[8] *Compare* Rule 1.7(B)(13) (that representation cases only include matters "requesting a certification or decertification election, or an amendment of certification, or unit clarification"); and Rules 1.7 (B)(3) and 2.36 (providing for a separate procedure, "certification of incumbent bargaining status," whereby an incumbent exclusive representative may petition the Board for a "declaration of bargaining status under Section 24(B)" by "submitting a petition accompanied by a showing of majority support").

underscored language of § 14(C) nor *Los Alamos* is relevant to the special situation of an incumbent exclusive representative.

First, the bargaining unit is already identified pursuant to § 24(A), so it is not what is being certified as a result of the § 24(B) demonstration of majority support. Similarly, § 24(B) provides that an incumbent exclusive representative is already an exclusive representative, so its status as exclusive representative is not being certified but rather its successful demonstration of majority support and/or its right to thus enter into a CBA. Finally, GISD does not have a right to refuse to recognize an incumbent exclusive representative without a secret ballot election because § 24(B) mandates that an incumbent exclusive representative "shall be recognized as the exclusive representative of the unit on the effective date of [PEBA]" unless and until the incumbent "attempts and fails to show majority support."

Accordingly, based solely on the language of PEBA it appears that incumbent exclusive representatives may demonstrate majority support by some method other than secret ballot election, even over the employer's objection. The conclusion that a card count rather than secret ballot election applies in the case of an incumbent exclusive representative is, moreover, supported by the Board rule implementing § 24(B). *See* Rule 2.36 (that an incumbent exclusive representative "may petition for declaration of bargaining status under Section 24(B) of the act by submitting a petition accompanied by a showing of majority support within that unit," and that such a petition "shall not raise an issue of representation").

2. Canons of Construction.

The interpretation that § 14(C) rather than § 14(A) applies in the case of an incumbent exclusive representative is also supported by canons of construction.

First, it is axiomatic that specific provisions control over general provisions where there is an inconsistency or conflict between the two. *See City of Albuquerque v. Redding*, 93 N.M. 757, 759 (1980) (that "as between two conflicting statutory provisions, the specific shall govern over the general"). Here, § 24(B) applies to a more specific representation situation than § 14. In such a situation, "[i]t is the intent of the Legislature, as found in this very specific provision, which necessarily decides the issue[]," and the specific intent expressed in § 24(B) must "take[] precedence over the general declarations" or intentions embodied in § 14 of the statute. *See In re Rehabilitation of W. Investors Life Ins. Co.*, 100 N.M. 370, 372-73 (1983). Accordingly, the intent of § 24(B) that an incumbent exclusive representative "shall be recognized" to represent the bargaining unit and shall only have to "demonstrate[] majority support" to enter into a CBA takes precedence over the general declarations in § 14 that mandate a secret ballot election, unless the employer agrees otherwise, to determine whether a labor organization shall represent a bargaining unit.

Second, a statute must be read so that no provision is superfluous. *See State v. Rivera*, 134 N.M. 769, 773 (2003) (construction of one provision of a statute should not render other provisions "null or superfluous"). Reading a requirement of secret ballot election into § 24(B) would strip it of much of its significance. The very enactment of a special provision for incumbent exclusive representative indicates a legislative intent to afford them special right, privilege or consideration under PEBA, as had been previously

done for grandfathered local labor ordinances. *Cf.* § 26. Because every labor organization seeking to represent employees must establish majority support by way of election unless the employer agrees otherwise, an incumbent exclusive representative would not be afforded any special right, privilege or consideration under § 24(B) if it were required to establish its majority status by secret ballot election all over again to enter into a CBA.

3. History of PEBA.

Finally, amendments made to the law in re-enacting PEBA in 2003 ("PEBA II") support the interpretation that § 14(C) rather than § 14(A) applies in the case of an incumbent exclusive representative.

The original PEBA ("PEBA I") only included the text from Subsection (A) regarding incumbent or grandfathered bargaining units. *See* § 10-7D-24 NMSA 1978. However, because bargaining units and exclusive representatives necessarily go hand in hand,[9] PEBA I's implementing rules provided for certification of an incumbent labor organization as an exclusive representative and the PELRB regularly certified incumbent exclusive representatives under PEBA I without either a card count or an election. *See* Rules 1.7(B)(3) (3-18-93) and 2.36 (3-18-93); *see also* 1 PELRB No. 7, *Carpenters and Joiners & Fort Bayard Medical Center* (3/16/95), and 1 PELRB No. 8, *CWA & State of New Mexico* (3/17/95).

Notwithstanding the provision made for certifying labor organizations as exclusive representatives under PEBA I, the Legislature felt it necessary to amend PEBA

[9] *Compare* § 4(A) (that an appropriate bargaining unit is a group of public employees designated by the board for the purpose of collective bargaining) and § 4(F) (that collective bargaining is the act of negotiating between a public employer and an exclusive representative).

to add a subsection specifically stating that incumbent exclusive representatives "shall be recognized as exclusive representatives" and shall only be required to "demonstrate[] majority support" prior to entering into a CBA. *See* § 24(B). The Legislature is presumed to know how PEBA I was being implemented and interpreted. *See Childers v. Lahann*, 18 N.M. 487, 492 (1914) (that the legislature will be presumed to know the effect that re-enacted statutes originally had). Accordingly, this amendment is significant in several ways.

First, the amendment represents a rejection by the Legislature of any interpretation of PEBA that incumbent labor organizations are not already recognized as exclusive representatives, or that an incumbent labor organization must be re-certified as an exclusive representative to represent unit members. Second, the amendment also reflects a legislative intent that the statutory recognition of an incumbent exclusive representatives need only be supplemented by a demonstration of majority support for the parties to enter into a CBA.

Thus, the addition of § 24(B) amounts to a significant increase in the right, privilege or consideration than was accorded to incumbent exclusive representatives under PEBA I. This significant increase in right weighs against an interpretation that would make the gain illusory. However, the gain would be illusory if an incumbent exclusive representative was required to go through the same election process all over again to become re-certified to represent the incumbent bargaining unit, just to be able to reduce agreements reached in negotiations into a CBA.

The Board in promulgating implementing rules was apparently of the same mind. Present-day rules recognize that the Board now certifies or declares the incumbency of

bargaining status, rather than certifying the recognition as an incumbent labor organization. *Compare* Rules 1.1.7(B)(3) (3-18-93) and 1.7(B)(3) (3-15-04); and Rules 2.36 (3-18-93) and 2.36 (3-15-04).[10] This is because an incumbent exclusive representative is now already recognized by statute. Accordingly, the rule under PEBA II merely requires the petitioning incumbent exclusive representative to submit a "showing of majority support," not to undergo a secret ballot election. *See* Rule 2.36 (3-15-04). This rule does not, as GISD argues, contradict PEBA, but rather merely implements and clarifies what is not immediately clear under the statute, *e.g.*, how to demonstrate majority support.

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[10] Rule 1.1.7(B)(3) (3-18-93): "'Certification of Incumbent Labor Organization' shall mean a procedure whereby a labor organization recognized by the New Mexico State Personnel Board pursuant to the Rules of Labor Management Relations [RLMR] of the State Personnel Board or recognized by another public employer pursuant to ordinance, resolution or charter amendment, petitions the Board to be recognized as the exclusive representative in an existing bargaining unit in the Board's jurisdiction." (Emphasis added).

Rule 1.7(B)(3) (3-15-04): "'Certification of Incumbent Labor Organization' shall mean a procedure whereby a labor organization recognized by a public employer as the exclusive representative of an appropriate bargaining unit on June 30, 1999 petitions the board for a declaration of bargaining status under Section 24(B) of the act ..." (Emphasis added).

Rule 2.36 (3-18-93): "A labor organization may file a petition for certification to have itself or its local or state affiliate certified as an exclusive representative for an existing bargaining unit when, on and before March 31, 1992, such labor organization or its local or state affiliate had been recognized by the New Mexico State Personnel Board pursuant to the Rules of Labor Management Relations ("RLMR") of the State Personnel Board or by another public employer under a local ordinance, resolution or charter amendment as the exclusive representative for that bargaining unit. Such a petition for certification of incumbent based on prior recognitions shall not raise an issue of representation. The Director shall investigate the petition and, within thirty (30) days of the filing of the petition, shall issue a report and certification, a report and dismissal, or a notice of hearing. A determination by the Director certifying the petitioner or dismissing the petition shall be appealable to the Board under the procedures set forth in Section 22, above." (Emphasis added).

Rule 2.36 (3-15-04): "A labor organization that was recognized by a public employer as the exclusive representative of an appropriate bargaining unit on June 30, 19999 shall be recognized as the exclusive representative of the unit. Such labor organization may petition for declaration of bargaining status under Section 24(B) of the act by submitting a petition accompanied by a showing of majority support within that unit[. S]uch a petition for certification of incumbent based on prior recognition shall not raise an issue of representation. The director shall investigate the petition and, within thirty (30) days of the filing of the petition, shall issue a report and certification, a report and dismissal, or a notice of hearing. A determination by the Director certifying the petitioner or dismissing the petition shall be appealable to the Board under the procedures set forth in Section 22, above." (Emphasis added).

4. Conclusion.

Based on the foregoing, I conclude that under PEBA an incumbent exclusive representative may demonstrate its majority support by way of card count or other alternative to a secret ballot election, even over an employer's objection. In so concluding, I also conclude that the present day Rule 2.36 is not in violation of PEBA.

III. Conclusions of Law

1. Pursuant to the September 27, 2005 Decision on the Respondent's motion to dismiss for lack of jurisdiction, the PELRB has jurisdiction to hear this matter.
2. AFT is a labor organization under § 4(L) of PEBA.
3. GISD is a public employer under § 4(S) of PEBA.
4. The bargaining unit described in the 1997-1999 collective bargaining agreement is grandfathered under § 24(A) and continues to be recognized as appropriate today.
5. The appropriate bargaining unit, as grandfathered under § 24(A), includes all regular, non-supervisory, non-managerial and non-confidential certified and classified employees consistent with this Report.
6. AFT is a grandfathered exclusive representative under § 24(B).
7. GSID is required under § 24(B) to enter into collective bargaining with AFT prior to AFT's demonstration of majority status.
8. An exclusive representative grandfathered under § 24(B), AFT is not required to demonstrate majority status by secret ballot election, even over an employer's objection to a card count or other alternative method.

Bargaining Order and Order Directing Card Count

GISD shall immediately enter into collective bargaining with AFT, and shall only discontinue such negotiations (1) if this Report is rejected or modified in relevant part by the Board, or (2) if AFT fails to demonstrate majority support by card count.

A count of AFT authorization cards shall be conducted at the PELRB office, 2929 Coors Blvd., Albuquerque, New Mexico, 87120, beginning on January 13, 2006 at 9:30 a.m. and continuing until concluded. To facilitate the card count, the Respondent shall immediately (and no later than January 10, 2006) provide the PELRB and Petitioner with an alphabetized version of the July 5, 2005 employee list, as modified consistent with rulings made at the December 14, 2005 hearing and this written Report. The card count shall be conducted pursuant to the accompanying Order Establishing Ground Rules for Showing for Majority Support Card Count.

The appropriate bargaining unit for which cards shall be counted is Gadsden Independent School District, and is comprised as follows:

> All regular non-supervisory certified employees and all regular non-supervisory classified positions as stated below:
>
> Accounts Payable Specialist
> Administrative Support
> Attendance Clerk
> Bookkeeper
> Building Mechanic
> Child Find/Family Educ.
> Clerk
> Clerk/Cook
> Community Liaison Instructional Assistant (CLIA)
> Coach
> Comm. Supt. System. Tech
> Compliance Officer
> Computer Assistant
> Computer Technician
> Cook

COTA (Special Educ. Position)
Counselor
Crossing Guard
Custodial Equipment Repairman
Cust. Srvs. Warehouse Person
Custodial Services Specialist
Custodian
Custodian Head
Custodian/Building Mechanic
Data Processing Clerk
Day Care Assistant
Diagnostician
Dist. Instructional Specialist
Dist. Data Entry Clerk
Educ. Resource Specialist
Electrician
Federal Programs Specialist
Fixed Assets Bookkeeper
Grounds Shop Technician
Groundskeeper
Health Assistant
HVAC & R Technician
Instructional Assistant (IA)
Instructional Assistant Kinder
Instructional Assistant SPED
Instructional Specialist
Interpreter
Job Coach
Liaison
Librarian
Library Assistant
Library Technician
Locksmith
Mail Clerk
Maintenance
Maintenance Service Specialist
Maintenance Warehouse Person
Math Process Trainer
Media Secretary
Motor Vehicle Helper
Motor Vehicle Technician
NJROTC Assistant
NJROTC Instructor
Nurse
Occupational Therapist
Parent Fac/Even Start

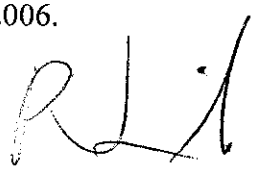
Payroll Bookkeeper
PE Assistant
Physical Therapist
Physical Therapist Assistant
Plumber
PPD Bookkeeper
Psychologist
Reading Process Trainer
Receptionist/Clerk
Registrar
Rehabilitation Counselor
Roads/Ground Equipment Operator
Secretary
Security Guard
Security Officer
Server
SNP/Food Service Assistant Manager
SNP/Food Service Bookkeeper
SNP/Food Service Clerk/Cook
SNP/Food Service Cook
SNP/Food Service Equipment Tech
SNP/Food Service Manager
SNP/Food Service Server
SNP/Food Service Warehouse Person
Social Worker
Special Education Driver
Specialist
Speech/Language Apprentice
Speech/Language Pathologist
Sports
Teacher
Telecommunications Tech
Testing Specialist
Transportation Oper. Assistant
Transportation Specialist
Tutor
Warehouse Person
Water Wastewater Tech

Excluded are the following:
All classified employees in the Superintendent's Office
Secretary to the Assistant Superintendent for Finance
Secretaries to any Associate Superintendent
All classified employees of the Personnel Department

V. Request for Review

Pursuant to Rule 2.22, within 10 business days after service of this Report any party may file a request for Board review. 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 evidence not presented at the hearing. 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 in Albuquerque, New Mexico, May 3, 2006.



Pilar Vaile
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Public Employee Labor Relations Board