BEFORE THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD

McKINLEY COUNTY FEDERATION OF
UNITED SCHOOL EMPLOYEES, AFT
LOCAL 3313,

Complainant,

03-PELRB-2007

v.

PELRB Case No. 103-07

GALLUP-McKINLEY COUNTY SCHOOL
DISTRICT,

And

GALLUP-McKINLEY COUNTY SCHOOL DISTRICT
LABOR MANAGEMENT RELATIONS BOARD,

Respondents.

DECISION AND ORDER

THIS MATTER comes before the Public Employee Labor Relations Board upon the interlocutory appeal of Gallup-McKinley County School District Labor Management Relations Board (Local Board) pursuant to NMAC 11.21.1.27 from the hearing officer's denial of Local Board's motion to dismiss the prohibited practices complaint filed by McKinley County Federation of United School Employees, AFT Local 3313 (Union) against Local Board and the Gallup-McKinley County School District (District). We conclude that the Public Employee Labor Relations Board has jurisdiction of the prohibited practices complaint filed by the Union and uphold the denial of the Local Board's motion to dismiss and remand to the hearing officer for further proceedings consistent with this Decision and Order.

This case raises serious and significant issues affecting public sector collective bargaining statewide. This case raises issues that are the same or similar to issues that the Public Employee Labor Relations Board has addressed in the past. This case raises issues that are

important to the consistent and uniform administration of the Public Employee Bargaining Act (PEBA), NMSA 1978, Sections 10-7E-1 to -26 (2003, as amended), throughout the State of New Mexico. This case, and the issue raised herein, threatens uniformity in the proper administration of PEBA.

PEBA created the Public Employee Labor Relations Board (PELRB). Section 10-7E-8. The PELRB's "function is the administration of PEBA." Regents of University of New Mexico v. New Mexico Federation of Teachers, 1998-NMSC-020, ¶ 4, 125 N.M. 401, 962 P.2d 1236. "The PELRB's jurisdiction originates with the PEBA, which allows the PELRB to entertain petitions for representation and prohibited practice charges...." City of Deming v. Deming Firefighters Local 4521, 2007-NMCA-069, ¶ 16, 141 N.M. 686, 160 P.3d 595 (case involving PEBA's grandfather clause, which is not applicable to the case at bar).

The powers and duties of the PELRB include promulgating rules and regulations, § 10-7E-9(A), overseeing collective bargaining between public employees and their employers, § 10-7E-9(A)(1)and (2), and enforcing the provisions of PEBA through the imposition of appropriate administrative remedies, § 10-7E-9(F).[1] The PELRB must establish procedures for the filing of, hearing on and determination of complaints of prohibited practices, § 10-7E-9(A)(3).

In this case, the Union's prohibited practices complaint alleges a violation of Section 10-7E-19(G)(refusing or failing to comply with a provision of [PEBA] or board [PELRB] rule) and PELRB Rule 11.21.2.36 NMAC (allowing an incumbent union to show by petition majority support of its members within the bargaining unit for purposes of declaring bargaining status under Section 10-7E-24(B), which showing obliges the public employer to negotiate with the union for purposes of entering into a new collective bargaining agreement). In an appeal proceeding before the PELRB, the PELRB has ruled that under Section 10-7E-24(B) and Rule

[1] See Regents at ¶ 4.

11.21.2.36 NMAC, "majority support" of an incumbent union may be demonstrated by a card count, and that a public employer is not entitled, under Section 10-7E-14, to demand an election. See Re: Petition for Recognition as Incumbent Labor Organization NEA-Alamogordo and Alamogordo Public Schools, PELRB Case No. 303-06 (June 1, 2006).

The prohibited practices complaint at issue arises out of a rule adopted by the Local Board that is, on its face, at odds with the PELRB's decision in NEA-Alamogordo. That rule purportedly allows the public employer District to decide, for purposes of Section 10-7E-24(B), whether the required "majority support" of the incumbent Union will be demonstrated by card count or by an election, and if an election is selected by the District, then 50% + 1 of the total members of the bargaining unit must vote for continuing representation by the incumbent Union before the public employer District and the incumbent Union may enter into a new collective bargaining agreement; otherwise, the incumbent Union is decertified.

Also, that rule of the Local Board is, on its face, at odds with the voter turn-out and affirmative vote requirements of Section 10-7E-14(A) and (D), because that rule requires an affirmative vote of 50% + 1 of the total members of the unit. Under Section 10-7E-14 (A), which applies to proceedings initiated by unions seeking to represent a bargaining unit, the minimum voter turn-out is 40% of the members of the unit, and, under Section 10-7E-14 (D), a majority vote of those voting is all that is necessary in order for the union to be certified as the exclusive representative of the unit.

The Local Board must comply with PEBA. It may not depart from PEBA's requirements unless approved by the PELRB. Section 10-7E-10(A) provides:

> With the approval of the board [PELRB], a public employer ... may, by ordinance, resolution or charter amendment, create a local board similar to the public employee labor relations board. Once created and approved, the local board shall assume the duties and responsibilities of the public employee labor

> relations board. <u>A local board shall follow all procedures and provisions of the Public Employee Bargaining Act unless otherwise approved by the board [PELRB]</u>.

(Emphasis added.) The PELRB has not approved the apparent departures from PEBA reflected in this Decision and Order.

ACCORDINGLY, IT IS HEREBY ORDERED by the Public Employee Labor Relations Board that the hearing officer's denial of the Local Board's motion to dismiss is upheld and we remand to the hearing officer for further proceedings consistent with this Decision and Order.

MARTÍN V. DOMÍNGUEZ
Chairman
Public Employee Labor Relations Board
Date: [signature]

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

MCKINLEY COUNTY FEDERATION OF UNITED SCHOOL EMPLOYEES, AFT LOCAL 3313,

Complainant,

v. **PELRB Case No. 103-07**

GALLUP-MCKINLEY COUNTY SCHOOL DISTRICT

and

GALLUP-MCKINLEY COUNTY SCHOOL DISTRICT LABOR MANAGEMENT RELATIONS BOARD,

Respondents.

HEARING EXAMINER DECISION ON MOTION TO DISMISS

This matter comes before the undersigned on a Prohibited Practice Complaint (PPC) filed with the Public Employee Labor Relations Board (PELRB) on January 8, 2007 by McKinley County Federation of United School Employees, AFT Local 3313 (Union), against the Gallup-McKinley County School District (District) and the Gallup-McKinley County School District Labor Management Relations Board (Local Board). The PPC alleges that the School and the Local Board have violated § 19(G) of the Public Employee Bargaining Act (PEBA) by the Local Board's promulgation of a rule that violates PEBA and/or PELRB Rule 11.21.2.36.[1] In response, the School and the Local

[1] The PPC also alleged that one or more sections of the Resolution varied from the PELRB-approved template and violated PEBA by failing to extend organization rights to probationary employees. However, that claim was dismissed by the undersigned by letter decision dated March 28, 2007, upon receipt from the District of a copy of an enacted Resolution that conformed to the template.

Board filed a joint motion to dismiss for lack of jurisdiction. A hearing on the motion to dismiss was held on May 21, 2007, at which time the parties were granted a full and fair opportunity to present their arguments. Based on the written pleadings and oral arguments, and for the reasons given below, I hereby conclude that the motion to dismiss is well taken in part and not well taken in part, and it is hereby granted as to the District and denied as to the Local Board, although the PPC against the Local Board is hereby recast as an Application for Re-approval of a Local Board.

UNDISPUTED BACKGROUND FACTS

On November 1, 2004, pursuant to § 10(A) of PEBA and PELRB Rule 11.21.5.9(B), the District adopted a resolution for collective bargaining (Local Resolution) that created a local labor management relations board (Local Board) based on the PELRB-approved template. The PELRB approved the Local Board on January 25, 2005 pursuant to § 10(A) of PEBA and PELRB Rule 11.21.5.12. Thereafter, on December 5, 2005, the duly created and approved Local Board adopted local rules and regulations for its operation.

In late 2006, the Union requested that the Local Board revise Local Rule 2.27, which provides as follows:

> **Majority Status Showing.**
>
> Pursuant to Section 10-7E-24 NMSA, of the Public Employee Bargaining Act, an incumbent labor organization must demonstrate that it holds majority support (50% + 1) of the bargaining unit prior to entering into collective bargaining with the employer. The public employer shall decide whether majority support will be demonstrated by a card count or a secret ballot election upon the filing of a Petition for Recognition and Demonstration of Majority Support by the incumbent labor organization. If the employer chooses a secret ballot election, the election will be conducted in accordance with Section 11 of the Gallup McKinley County School's Labor Relations Resolution, however, a majority (50% + 1) of the appropriate bargaining unit must vote in favor of continuing representation by the

> incumbent labor organization for representation rights. Failure to obtain majority status shall constitute decertification of the incumbent labor organization.

Id. (emphasis added).

In contrast to Local Rule 2.27, § 14(A) of PEBA and § 11(R) of the Local Resolution require only a forty percent (40%) voter turnout in order for an election to be valid, and only a majority (50% + 1) of voting employees need vote in favor of representation. Additionally, in *NEA-Alamogordo v. AlamogordoPublic School*, 05-PELRB-2006 (June 1, 2006), the Board concluded that under § 24(B) and § 14 of PEBA (and PELRB Rule 11.21.2.36, which the Board concluded reasonably interprets § 24(B)), an incumbent union may demonstrate its continuing majority support by a card count, even over the employer's demand or request for a secret ballot election.

On January 3, 2007, the Local Board held a public hearing on the Union's request to amend Local Rule 2.27 and on January 12, 2007 it issued a written decision reflecting its majority vote to not change the Local Rule as requested. That decision was not appealed to District Court within thirty (30) days, as authorized under § 23(B) of PEBA and § 20(B) of the Resolution. Thereafter, the instant PPC was filed, followed by the instant motion to dismiss for lack of jurisdiction.

LEGAL STANDARDS

Subject matter jurisdiction is the authority of the decision maker to hear and determine "the general class of cases" that the action falls within, while "personal jurisdiction is the authority of the court to obligate parties to comply with its orders." *Marchman v. NCNM Tex. Nat'l Bank*, 120 N.M. 74, 84 (1995). As a duly created adjudicatory agency, "the PELRB has the initial ability to determine its jurisdiction…, subject of course, to review by the courts." *City of Deming v. Deming Firefighters Local*

4521, No. 26,508 consolidated with No. 26,509, unpublished op. at 8 (Ct. of App., April 19, 2007), citing *Cibas v. N.M. Energy, Minerals & Natural Res. Dep't.*, 120 N.M. 127, 132 (Ct. App. 1995).

The Respondents here challenge the jurisdiction of the PELRB to hear this case in light of the existence of a duly created and approved Local Board that is operating under a Local Resolution rather than under PEBA. They also challenge the PELRB's jurisdiction in light of the fact that the action alleged to have violated PEBA—the promulgation of Local Rule 2.27—was committed by the Local Board, while § 19 of PEBA only prohibits certain actions by public employers, not by local boards. Thus, both subject matter and personal jurisdiction issues are implicated in the motion to dismiss.

DISCUSSION

A. <u>The PELRB has continuing oversight of Local Resolutions for compliance with PEBA.</u>

First, I begin with the observation that the PELRB has the authority, under the § 10 local board approval process, to review local ordinances and resolutions for compliance with PEBA. From this initial observation, I further conclude that this review or oversight authority continues even after the PELRB has approved the ordinance or resolution.

The principle that the PELRB has authority to review ordinances and resolutions for compliance with PEBA, at least as part of the process of approving a local ordinance or resolution, has been tested and reaffirmed several times before both the first PELRB and several district courts. *See County of Santa Fe & American Federation of State,*

County and Municipal Employees, 1 PELRB 1 at 9 (Nov. 18, 1993) ("...PEBA, fairly read, affirmatively grants to the Board express authority to resolve challenges to specific provisions of local collective bargaining ordinances when those provisions are alleged to constitute prohibited practices under PEBA") and *AFSCME & Los Alamos County Firefighters v. County of Los Alamos*, 1 PELRB 3. (Dec. 20, 1994) (where a local labor ordinance violates PEBA, under Section 9(F) the PELRB may deny approval of the application for a local board, and may declare the ordinance to be of no effect unless and until the governing body revises the offending provisions consistent with the Board's determination); *see also Board of County Commissioners of Otero County et al. v. State of New Mexico Public Employee Labor Relations Board*, Case No. CV-93-187 (J. Leslie C. Smith) (2nd Judic. Dist., July 13, 1993) (dismissing mandamus action against Board to enjoin it from hearing the *Santa Fe* case) and *AFSCME v. County of Santa Fe*, Case No. SF 93-2174 (J. Herrera) (1st Judic. Dist., July 8, 1994) (upholding Board's decision in the *Santa Fe* case, issued subsequent to dismissal of the mandamus action).

In contrast to this well-established authority, the Respondents argue that they are permitted under § 26(B) to follow the terms of the Local Resolution and the Local Board's rules, instead of PEBA, where the two systems vary. *Id.* at 4. For authority, the Respondents points to language in § 26(B) providing that

> a public employer other than the state that subsequent to October 1, 1991 adopts 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 freely chosen by its employees may operate under those provisions and procedures rather than those set forth in the [PEBA] ...

Id. (emphasis added).

Admittedly, there is an ambiguity as to whether the phrase "subsequent to October 1, 1991" means all ordinances and resolutions enacted subsequent to October 1, 1991, or just those ordinances and resolutions enacted subsequent to October 1, 1991 and prior to PEBA II. However, I ultimately conclude by reading § 10 and § 26 together, that § 26(B) applies only to grandfathered local ordinances created between October 1, 1991 and the effective date of PEBA II, March 2003. I so conclude because § 10(A), regarding newly created local boards approved by the PELRB, requires compliance with "all procedures and provisions of the [PEBA] unless otherwise approved by the [PEBA]," *id.* (emphasis added), while § 26(B) requires compliance with only certain enumerated provisions of PEBA. The Union argues that the "all" language of § 10(A) also applies to § 26(B) local boards, by virtue of the proviso in § 26(B) requiring such local boards to "comply with the provisions of Sections 8 through 12 and Subsection D of Section 17...," as well contain nine other specifically enumerated provisions. However, this proviso must refer to the more specific, substantive requirements of § 10, such as a having a tripartite board whose members shall be appointed in a specific fashion and shall serve one year terms. *See, e.g.*, § 10(B) and (C). Otherwise, imposing the general requirement to comply with all provisions of PEBA would render superfluous those parts of § 26(B) requiring only a more limited or selective compliance with PEBA. *See, e.g.*, *Deming* at 11 (that construing the grandfather clause "to apply only to ordinances that adopt the same system of provisions and procedures as those currently in the PEBA would render [the grandfather clause] meaningless").

Finally, my interpretation is further supported by the heading of § 26, which states that it concerns "[e]xisting ordinances providing for public employee bargaining,"

meaning existing at the time PEBA was enacted, and then reenacted.[2] *See State of New Mexico v. Ellenberger*, 96 N.M. 287, 288 (1981) (that statutory headings can be useful in interpreting ambiguities in the body of the act); *State v. Chavez*, 34 N.M. 258, 272 (1929) (that "[t]he heading to a section of a statute is proper to be considered in interpreting the statute when an ambiguity exists"), citing *Knowlton v. Moore*, 178 U.S. 41.

Accordingly, based on the foregoing authority and analysis, I conclude that a § 10 local ordinance or resolution is required to comply with the provisions of PEBA, and its compliance with PEBA is subject to review by the PELRB. In so concluding, I acknowledge that the Respondents have distinguished this case from the earlier *Santa Fe* and *Los Alamos cases*, in which the PELRB was reviewing the relevant ordinances at the time of PELRB approval. However, I do not find this distinction persuasive or even relevant because I conclude that the PELRB has continuing authority to review ordinances and resolutions for compliance with PEBA, even after the ordinance or resolution is approved.

As provided under PELRB Rule 11.21.5.13,

> [f]ollowing board approval of a local board, the local board or the public employer that created it shall file with the board [any] amendments to the ordinance, resolution or charter amendment, creating the local board. Upon a finding by the board that the local board no longer meets the requirements of Section 10 of the act (10-7E-10), the local board shall be so notified and be given a period of thirty (30) days to come into compliance or pr prior approval shall be revoked."

[2] The same provision exists in PEBA I and PEBA II, although in the case of PEBA I, which became effective in April 1993, the purpose was to protect those ordinances and resolutions prophylactically passed just prior to the enactment of PEBA, while in the case of PEBA II, the purpose is to protect both those ordinances and resolutions just mentioned, and ordinances and resolutions enacted under or subsequent to PEBA I.

Id.;[3] *see also* PEBA § 9(A) (granting the PELRB the authority to adopt "rules necessary to accomplish and perform its functions and duties"). Although the Respondents asserted at the hearing that this rule exceeds the PELRB's authority and is therefore invalid, I conclude that PELRB Rule 11.21.5.13 is a reasonable and therefore valid interpretation of PEBA in this regard.

If the PELRB has authority to approve local boards upon a determination that their enabling ordinance or resolution either complies with PEBA or represents a justified variance from PEBA, it stands to reason that the PELRB would also need to have the authority to revoke such prior approval. Otherwise, it would be too easy for local employers or boards, after obtaining PELRB approval, to amend their ordinance or resolution so as to render it non-compliant with PEBA and thus defeat the PELRB's jurisdiction in the approval process. Thus, post-approval oversight authority is the only effective way to enforce the clear legislative intent to vest the PELRB with the authority to ensure that local enabling resolutions comply with the terms of PEBA, unless a variance is required under special circumstances confronting the particular local public employer.

B. The PELRB is not preempted from hearing the matter, and should not defer to the Local Board under these circumstances.

Next, I consider whether the PELRB is nonetheless divested of jurisdiction to resolve this matter, given the fact that a duly created and approved local board exists to

[3] An identical rule implemented § 10 of PEBA I, but it was then numbered as 11.21.5.16. Although the District asserted at the hearing that the rule exceeds the PELRB's authority and as such is invalid, it is notable that the rule has never been challenged either within thirty (30) days of either promulgation, as authorized under § 23(B), or thereafter during the combined ten-year history of the two PEBAs.

hear the PPC, or whether the PELRB should defer to the Local Board if there is concurrent jurisdiction.

The Union has argued that because the PPC alleges that the Local Resolution violates the requirements of PEBA, the PELRB has jurisdiction and the inquiry should stop there. *See* Union's Response Memorandum at 4-5, citing PEBA § 9(A)(3) and 9(F)) (that the PERLB has jurisdiction under PEBA to adjudicate PPCs alleging a violation of PEBA, and to enforce the provisions of PEBA through the imposition of appropriate administrative remedies). However, the Respondents argue that the Union's argument is insufficient in this case because there is a local board in place.

PEBA provides that "once created and approved" by the PELRB, "the local board <u>shall assume the duties and responsibilities of the [PELRB]</u>." *See* § 10(A) (emphasis added). Based on the "shall assume" language, and the lack of any language in PEBA granting the PELRB concurrent jurisdiction with, or superintending control over duly created and approved local boards, the Respondents argue that the result of § 10(A) is that the local board assumes exclusive jurisdiction over all labor relations matters arising under either PEBA or the Resolution, and the PELRB's jurisdiction is thereby relinquished to the local board. *See* Respondents' Memorandum Brief at 3-5.

To resolve this issue, I first look to the plain meaning of the word "assume." Relevant to the instant matter, the verb "assume" is subject to two different meanings:

- to take to or upon oneself, as in "to undertake," or "to assume responsibility;" or
- to take over as one's own, as in "to assume the debts of another"

See Merriam-Webster Dictionary. Interestingly, the first definition is that which is popularly understood to include "assuming responsibility," as PEBA provides, while it is only the second definition that clearly connotes exclusivity of control over the thing assumed. Accordingly, I find there is an ambiguity in PEBA's use of the words "shall assume" in § 10(A) and I therefore look to other language in PEBA to ascertain the legislature's intention in using the word "assume."

In doing so, I find it significant that § 26 of PEBA provides that a local employer "may continue to operate under" the "provisions and procedures" of a grandfathered local ordinance or resolution, "rather than those set forth in the [PEBA]."[4] From this, I conclude that the Legislature was able, in the case of § 26, to specify exclusivity of the applicable law. Moreover, that it knew how to do so in the case of choice-of-law preemption under § 26, indicates that it simply chose not to specify exclusivity as to choice-of-forum under § 10(A). *See, e.g., Gonzales v. Surgidev Corp.*, 120 N.M. 133 (App. Ct. 1995) (distinguishing between choice-of-law or choice-of-forum preemption). The end result of this and the previous analysis is that while § 26 constitutes a choice-of-law preemption clause,[5] § 10 preempts neither PEBA as the choice-of-law, nor the PELRB as choice-of-forum, and instead merely provides for concurrent jurisdiction between a local board and the PELRB as to enforcement of PEBA. *Compare* PEBA § 9(F) (that the PELRB has the power to enforce provisions of the PEBA) and § 11(E) (that local boards have the power to enforce the provisions of PEBA and the local ordinance or resolution).

---

[4] Subsections 26(A) and 26(B) use slightly different language from each other, while I quote from both here. However, I do not find the differences significant in this context because the end result of implying exclusivity is evident in the language of both sections.

[5] Provided, of course, that the conditions for grandfathering are met. *See Deming, supra.*

That said, however, it must be nonetheless emphasized that the Legislature still clearly did not intend that the PELRB routinely usurp the jurisdiction of local boards. Otherwise, what would be the point in having granted public employers other than the state the right to form local boards? Thus, the PELRB itself has indicated a general policy preference that cases be remanded to the relevant local board when those local boards are "functional and actually operational." *See In the Matter of the Disqualification of Deputy Director Pilar Vaile, AFT v. Gadsden Independent School District (Gadsden)*, Case Nos. 132-05 and 309-05 (oral ruling, Minutes, PELRB Board Meeting, August 19, 2005).[6] This policy of deferral is a sound one, and comports with the deferral jurisprudence articulated between the New Mexico Supreme Court and lower courts. *See State ex re. Bird v. Apodaca,* 91 N.M. 279, 286-287 (1977) (J. Sosa, dissent) (that where there is concurrent jurisdiction between the State Supreme Court and district courts, the former shall generally defer in favor of the jurisdiction of the latter unless a legal question of significant "public importance" is raised).

Here, there is no allegation that the Local Board is not functional and actually operational. However, there is a serious allegation that, in effect, the Local Board has, via its rule-making authority, improperly amended its Local Resolution in violation of PEBA. I conclude that such an allegation is as serious, and raises as significant an issue of public importance as the allegation that a local board is not operational and thus cannot process pending PPCs or representation petitions. Also, the matter presents a pure legal

[6] The Board did not specify exactly what is a "functional and actually operational board." The only guidelines it gave were by distinguishing such an operational local board from the Gadsden local board, which (1) lacked the third member and (2) rules, and (3) was not meeting for business. Therefore, it is not clear whether all three or only certain of the three criteria must be met in order for a local board to be deemed operational.

question regarding interpretation of PEBA, a type of question that the PELRB was expressly created to resolve. *Cf. Apodaca*. Finally, as discussed above, § 10(A) evidences a clear legislative intent that the PELRB, not local boards or district courts, be charged in the first instance with determining whether a local resolution complies with PEBA. Accordingly, I believe this case presents a compelling basis for the PELRB to exercise its jurisdiction, assuming that there are no other impediments to its exercising its jurisdiction, as discussed below.

C. <u>That the alleged non-complying amendments were enacted via rule-making by the Local Board does not divest the PELRB of personal jurisdiction or otherwise prevent the PELRB from awarding an adequate remedy</u>.

Next, I consider whether the PELRB in this instance nonetheless lacks either personal jurisdiction over the parties or the functional ability to order an adequate remedy, given the fact that the alleged amendment to PEBA and the Local Resolution was made by the Local Board through its rule-making authority, rather than by the District itself via direct amendment of the Local Resolution.

As noted above, the promulgation of Local Rule 2.27 is alleged to have the functional effect of amending § 11(E) of the Local Resolution, in violation of § 14(A) of PEBA, by requiring incumbent labor organizations to have a greater than forty percent (40% turnout) in order to have a valid election.[7] Although the PPC did not cite PELRB Rule 11.21.5.13, it does use the language of that rule when it requests that approval of the

[7] The promulgation of Local Rule 2.27 is also alleged to have the functional effect of interpreting PEBA differently from how the PELRB interpreted it in *Alamogordo*. However, I am not prepared to rule today that a local board must interpret PEBA consistent with the PELRB's interpretations of PEBA. Besides the fact that such a ruling would risk intruding impermissibly on the autonomous decision-making function of the local board, such a ruling is not necessary here because an amendment in direct conflict with the facial requirements of PEBA has been alleged, and I conclude this allegation is sufficient to establish jurisdiction.

Local Board be revoked as a remedy, and the Union cites PELRB Rule 11.21.5.13 in its response to the motion to dismiss. *See* Union's Response Memorandum at 6. Thus, although the Respondents claim they understood the Union to be asserting PELRB Rule 11.21.5.14, which requires a finding by a court of competent jurisdiction that the local board is not in compliance with PEBA (*see* Respondents' Memorandum Brief at 7, erroneously citing PELRB Rule 11.21.5.16), I conclude that the Union has properly and sufficiently invoked PELRB Rule 11.21.5.13.

Additionally, although the Respondents asserted at the hearing that PELRB Rule 11.21.5.13 requires an amendment of a Resolution and no amendment is asserted or in fact occurred, I reject this argument as being hyper-technical. PELRB Rule 11.21.5.13 does not define or limit "amendments" to those passed by the original enacting body. However, as alleged, the promulgation of Local Rule 2.27 clearly operates as the functional equivalent of an amendment of the Local Resolution in violation of PEBA. Accordingly, I conclude that the promulgation of Local Rule 2.27 raises sufficient issue under PELRB Rule 11.21.5.13 to fall within the PELRB's continuing jurisdiction to review ordinances and resolutions for compliance with PEBA, and thereby survives a motion to dismiss for lack of jurisdiction.

Finally, the Respondents argued at the hearing that the Local Board cannot be a proper party of a PPC under § 19 of PEBA, because it is not a "public employer," while PEBA lacks a PPC provision that could be directed to the Local Board. Conversely, the Respondents argued that as an autonomous board, the Local Board's actions cannot be imputed to the District for purposes of establishing jurisdiction over one or the other parties under § 19 of PEBA. The Union responded to these arguments by urging that the

rule-making actions of the Local Board can and should be imputed to the District in this case because the Local Boards' local rules implement the District's Resolution, and it would be absurd if the Local Board could do through rule-making what the District cannot do by resolution.

Although I recognize that this situation may very well test the very outer limits of permissible exercise of personal jurisdiction, I am ultimately forced to agree with the Union at least as to exercise of jurisdiction over the Local Board. Specifically, I find authority for the PELRB's exercise of control over the Local Board under PELRB Rule 11.21.5.13, which expressly makes both public employers and local boards responsible for notifying the PELRB of amendments, and expressly makes the local board responsible for coming back into compliance. *See* PELRB Rule 11.21.5.13.[8]

Notably, the grounds for reviewing the promulgation of Local Rule 2.27 here is not as a PPC, but essentially as an Application for Re-approval of Local Board. Moreover, as implied in Rule 11.21.5.13, the Application is reopened by the PELRB on its own motion, upon the receipt of information—in this instance as a result of the PPC filed by the Union—indicating that the Local Board has amended the Local Resolution such that it may no longer be in compliance with PEBA.

However, I cannot imply the actions to the Local Board to the District for purposes of establishing personal jurisdiction over the District under § 19(G) (refusal or failure to comply with a provision of the PEBA). Although the District may have

[8] That "the local board or the public employer that created it shall file with the [PELRB] [any] amendments to the ordinance, resolution or charter amendment, creating the local board," and that "[u]pon a finding by the [PELRB] that the local board no longer meets the requirements of Section 10 of the act (10-yE-10), the local board shall be so notified and be given a period of thirty (30) days to come into compliance or prior approval shall be revoked." *Id.*

advocated for and been benefited by the alleged amendment to the Local Resolution, there has been no allegation that the Local Board is somehow impermissibly dominated by the District such that it acted as an agent of the District in this matter.

D. The availability of alternate remedies does not divest the PELRB of jurisdiction.

Finally, I consider the Respondents' argument that the proper procedure was to file an appeal with state district court against the Local Board's decision to refrain from amending Local Rule 2.27. *See* Respondents' Memorandum Brief at 5-6. Both PEBA § 23(B) and Local Resolution § 20(B) permit a party affected by a final rule, order or decision of the PELRB or a local board to appeal to district court within thirty days of the date of the final rule, order or decision.

Although that may arguably have been "the best practice," failing to utilize one available remedy does not foreclose all other legally available remedies unless laches or estoppel has somehow occurred. The Respondents, who had the burden of persuasion as the movants, did not raise any claim of prejudice to support laches or estoppel. In any event, in light of the previous conclusion that the Legislature intended to grant the PELRB the first opportunity to determine whether a resolution or ordinance complies with PEBA, it is not clear that appealing immediately to district court would have been the best practice.

Certainly, it cannot be that because a local rule was not appealed to district court within thirty days of its promulgation, it is now deemed beyond review, as the strict language of the act and resolution suggest. However, as a practical matter the only other opportunity for review besides one before the PELRB, would be upon dismissal of a

‚sentation petition filed with the Local Board, after an election in which the Union ‚iled to obtain a sufficiently large voter turnout under Local Rule 2.27. It cannot promote administrative efficiency in this case to only allow review of law after such a huge delay, as well as waste of time, manpower and other resources, has occurred.

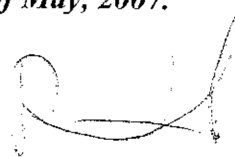
CONCLUSION

For the foregoing reasons, I hereby conclude that the motion to dismiss is well taken in part, and not well taken in part. The motion to dismiss is therefore hereby granted as to the District and denied as to the Local Board, although the PPC against the Local Board is hereby recast as an Application for Re-approval of a Local Board.

INTERLOCUTORY REVIEW

Pursuant to PELRB Rule 11.21.1.27, an appeal or request for review by the Board is generally permitted only upon completion of the proceedings before the undersigned, and the issuance of a final Order or Recommended Decision. However, pursuant to PELRB Rule 11.21.1.27, an interlocutory appeal may be allowed with the permission of the Board, Director or Hearing Examiner. Because this Decision presents a jurisdictional issue, and one of first impression under PEBA, I hereby grant the parties permission to file an interlocutory appeal to the PELRB, within ten (10) business days.

Issued in Albuquerque, New Mexico this 29th day of May, 2007.



Pilar Vaile
Deputy Director
Public Employee Labor Relations Board