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2929 Coors Blvd. N.W. Suite 303
Albuquerque, NM 87120
(505) 831-5422
(505) 831-8820 (Fax)

THOMAS J. GRIEGO
Executive Director

August 18, 2015

Youtz & Valdez, P.C.
900 Gold Avenue SW
Albuquerque, New Mexico 87102
Attn: Shane Youtz and Stephen Curtice

Santa Fe County Attorney's Office
102 Grant Avenue
Santa Fe, New Mexico 87501
Attn: Rachel Brown

Re: ***AFSCME & Santa Fe County; PELRB 305-15***

Dear parties:

By letter dated July 6, 2015 the Employer objected to the petition herein on the basis that the positions the union seeks to accrete are statutorily excepted from collectively bargaining as either "confidential" employees as defined by NMSA 1978,§10-7E-4(G), as "supervisors" as that term is defined by NMSA 1978, §107E-4(U) and/or " managers" as that term is defined in NMSA 1978, §10-7E-4(0). At a Status and Scheduling Conference held July 21, 2015, a briefing schedule was set to address the Employer's Motion to establish the burden of proof. Briefing was completed on August 17, 2015. This constitutes my letter decision establishing the burden of proof.

I note that the term "burden of proof" has been used to describe two distinct concepts: (1) the burden of persuasion, i.e., the burden to persuade the factfinder; and (2) the burden of production, i.e., the burden to produce evidence. *Strausberg v. Laurel Healthcare Providers, LLC*, 304 P.3d 409 (N.M., 2013)*citing Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005) and *Duke City Lumber Co. v. N.M. Envtl. Improv. Bd.,* 95 N.M. 401, 402–03, 622 P.2d 709, 710–11 (Ct.App.1980). As in *Strausberg* I use the terms "burden of persuasion" and "burden of proof" interchangeably; both referring to the party who must persuade the factfinder in order to prevail.

As stated in the July 6, 2015 referenced above, this case involves an Accretion Petition filed pursuant to NMAC 11.21.2.38(A), as distinguished from a Unit Clarification proceeding brought pursuant to NMAC 11.21.2.37. (A unit clarification proceeding is an exception to the rule that neither party has a burden of proof in a representation proceeding). In a unit clarification proceeding, the party seeking to change an appropriate unit or description of such unit shall have the burden of proof and the burden of going forward with the evidence. The Union does not dispute that it bears the burden of proof on its accretion petition by a preponderance of the evidence. However, issues remain concerning the elements to be proven by Union under its burden and the County's burden of proof with regard to its affirmative defenses. The Employer has not disputed that the positions sought to be accreted constitute less that ten present of the employees in the existing bargaining unit, meaning

that the board may presume that the petition does not raise an issue of representation. NMAC 11.21.38(B) directs that a petition for accretion be processed as would a unit clarification petition when, as here, the employees sought to be accreted does not raise a question of representation.

Although NMAC 11.21.38(B) directs that a petition for accretion be *processed* as a unit clarification petition, it is not, strictly speaking, the same thing as a unit clarification petition. While a unit clarification proceeding under NMAC 11.21.37(A) requires a petitioner to show that the circumstances surrounding the creation of an existing collective bargaining unit have changed sufficiently to warrant a change in the scope and description of that unit, or a merger or realignment of previously existing bargaining units represented by the same labor organization, NMAC 11.21.38(A) governing accretions does not require a petitioner to show changed circumstances. Rather, the elements to be proven in an accretion petition are:

1. The employees to be accreted must not yet belong to any existing bargaining unit;
2. The employees to be accreted must share a community of interest with the employees in the existing unit;
3. Their inclusion in the existing unit must not render that unit inappropriate;
4. If the accretion petition is accompanied by a showing of interest by no less than 30% of the employees in the group sought to be accreted and if the number of employees in the group sought to be accreted is less than 10% of the number of employees in the existing unit, then the board shall presume that their inclusion does not raise a question concerning representation requiring an election and the petitioner may proceed under the rule governing a unit clarification petition.
5. If the number of employees in the group sought to be accreted is greater than ten percent of the number of employees in the existing unit, the board shall presume that their inclusion raises a question concerning representation and the petitioner may proceed only by filing a petition for an election.

The Union bears the burden of proof with regard to the elements listed above. This distinction between the respective elements to be proven in a unit clarification proceeding and an accretion has previously been recognized by this Board in *AFSCM E, Council 18 v. New Mexico Corrections Department,* PELRB No. 311-11 (Jan. 23, 2013); *aff'd, AFSCM E, Council 18 v. New Mexico Corrections Department, D-202-CV-2013-01920* (J. Mallott, May 15, 2014).

With regard to who bears the burden of proof on the question of whether the employees sought to be accreted are excepted from collective under one or several of the enumerated exceptions in the PEBA §4, that burden is best allocated to the Employer. Under the PEBA public employees other than management employees and confidential employees, may form, join or assist a labor organization for the purpose of collective bargaining or to refuse such activities. See §10-7E-5 NMSA 1978(2003). §13(C) provides for certain exceptions to those employees covered under the Act:

> "C. The board or local board shall not include in an appropriate bargaining unit supervisors, managers or confidential employees."

§10-7E-5 NMSA 1978(2003).

The Employer's claim that the employees are excluded from collective bargaining under one or more of the enumerated statutory exemptions, if established, is a matter which constitutes a complete defense to the petition herein. It is therefore in the nature of an affirmative defense. As a general rule, the party alleging an affirmative defense has the burden of proof. *See Ortiz v. Overland Express*, 2010–NMSC–021, ¶ 30, 148 N.M. 405, 237 P.3d 707; *see also Tafoya v. Seay Bros. Corp.*, 119 N.M. 350, 352, 890 P.2d 803, 805 (1995); *J.A. Silversmith, Inc. v. Marchiondo,* 75 N.M. 290, 294, 404 P.2d 122, 124 (1965). Accordingly, the Employer bears the burden of proof with regard to the statutory exemptions alleged.

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Thomas J. Griego
Executive Director