STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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December 7, 2016

Youtz & Valdez, P.C.
900 Gold Ave. SW
Albuquerque, New Mexico 87102
Attn: Shane Youtz

Holcomb Law Office
3301-R Coors Blvd. NW
Albuquerque, New Mexico 87120
Attn: Dina Holcomb

Re: ***AFSCME, Local 3103 & San Miguel County; PELRB 308-16***

Dear Ms. Holcomb and Mr. Youtz:

On October 19, 2016 the County filed its Response to the Union's Accretion Petition and a Motion to Dismiss the Petition on the grounds that the parties previously agreed by a Consent Election Agreement entered in PELRB 306-10 to exclude Lieutenants from the bargaining unit; that the result of the Election held pursuant to that agreement was never presented to the Board as required by Rule 11.21.2.17 nor was certification of representation issued as required by Rule 11.21.2.33. The County further alleges that there are no changed circumstances justifying the accretion and that the number of employees sought to be accreted exceeds 10 percent of the bargaining unit requiring dismissal under Rule 11.21.2.38 (C).

The Union responded to the Motion to Dismiss on November 9, 2016 and a Hearing on the Motion was held November 15, 2016. This letter constitutes my decision regarding the Motion to Dismiss.

STANDARD OF REVIEW:

When deciding Motions to Dismiss the PELRB has historically applied the standard found in New Mexico Rule of Civil Procedure 1-012(B)(6), whereby the Hearing Officer accepts all well-pleaded factual allegations as true and resolves all doubts in favor of sufficiency of the complaint. See *Herrera v. Quality Pontiac*, 2003 NMSC 18, ¶ 2, 134 N.M. 43, 46. Dismissal on 12(B)(6) grounds is appropriate only if the Complainant is not entitled to recover under any theory of the facts alleged in their complaint. *Callahan v. N.M. Fed'n of Teachers-TVI*, 139 N.M. 201, 131 P.3d 51 (2006). A motion to dismiss is predicated upon there being no question of law or fact. *Park Univ. Enter's., Inc. v. Am. Cas. Co.*, 442 F.3d 1239, 1244 (10th Cir. 2006). Granting a motion to dismiss is an extreme remedy that is infrequently used. *Town of Mesilla v. City of Las Cruces*, 120 N.M. 69, 898 P.2d 121, 1995-NMCA-058, ¶ 4.

Under Mexico Rule of Civil Procedure 1-012 (C) a motion to dismiss is analyzed as a motion for summary judgment when evidence outside the pleadings is considered. See *Sabella v. Manor Care, Inc.*, 121 N.M. 596, 915 P.2d 901 (1996); *Vigil v. Martinez*, 113 N.M. 714, 832 P.2d 405 (Ct. App. 1992). Here, I take administrative notice of the file in PELRB 306-10 so that it is appropriate to analyze the Motion as one for summary judgment. When deciding a motion for summary judgment the PELRB has long followed New Mexico Rules of Civil Procedure, Rule 1-056. See *AFSCME Council 18 v. New Mexico Department of Labor,* 01-PELRB-2007 (Oct. 15, 2007). Applying that rule, the movant shall set out a concise statement of all material facts about which it is contended there is no genuine dispute. The facts set out shall be numbered and the motion shall refer with particularity to those portions of the record upon which the party relies. See N.M. Rul. Civ. Pro. Rule 1-056. Summary Judgment will be granted only when there are no issues of material fact with the facts viewed in the light most favorable to the non-moving party. The movant has the burden of producing "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." If that threshold burden is met by the Movant, the non-moving party then must "demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Summers v. Ardent Health Serv.* 150 N.M. 123, 257 P.3d 943, (2011); *Smith v. Durden*, 2012-NMSC-010, No. 32,594; *Blauwkamp v. Univ. of N.M. Hosp.*, 114 N.M. 228, 231, 836 P.2d 1249, 1252 (Ct. App. 1992). See also, *Bartlett v. Mirabal*, 2000-NMCA-36, 917, 128 N.M. 810, 999 P.2d 1062, quoting *Eoff v. Forest*, 109 N.M. 695, 701, 789 P.2d 1262 (1990); *Gardner-Zemeke*, 1990 NMSC 034, ¶ 11. The non-moving party "cannot stand idly by and rely solely on the allegations contained in its complaint or upon mere argument or contentions to defeat the Motion once a prima facie showing has been made:" *Ochswald v. Cristie*, 1980 NMSC 136, ¶ 6, 95 N.M. 251, 620 P.24:1 1276. As non-movant, Petitioner's response must contain specific facts showing that there is an actual issue to be tried. *Livingston v. Begay*, 1982 NMSC 121, 98 N.M. 712, 717 P.2d 734.

ANALYSIS AND CONCLUSIONS:

Prior Agreement. The purpose of the Public Employee Bargaining Act is to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions. NMSA 1978 §10-7E-2 (2003). A corollary right of public employees, other than management employees and confidential employees, to form, join a labor organization for the purpose of collective bargaining or to refuse any such activities exists by virtue of NMSA 1978 §10-7E-5 (2003).
Consistent with the above-stated general principles we read in NMSA 1978 §10-7E-22 (2003) that collective bargaining agreements *and other agreements* between public employers and exclusive representatives shall be valid and enforceable according to their terms when entered into *in accordance with the provisions of the Public Employee Bargaining Act.* (Emphasis added).

The County claims that there was an agreement between the parties to exclude lieutenants from the bargaining unit arising out of a Consent Election Agreement in PELRB 306-10, in which the Union sought recognition as the exclusive representative for the unit at issue that did not include

Lieutenants at that time.

This Board has jurisdiction to determine what positions shall be included in or excluded from any bargaining unit. NMSA 1978 §10-7E-9 (2003). An agreement of the parties cannot deprive the Board of its jurisdiction to make that determination. Neither would such an "agreement" be valid or enforceable if, in fact, it deprived lieutenants of collective bargaining rights they might otherwise be entitled because any agreements are only enforceable in accordance with the provisions of the Public Employee Bargaining Act. See Section 22 of the Act, *supra.* To determine whether the alleged "agreement" is valid and enforceable would require the very same evaluation of lieutenant's duties compared to others in the bargaining unit that is required as part of the Union's Accretion Petition herein.

Furthermore, it does not follow that because the parties agreed for purposes of the initial petition for recognition to exclude lieutenants from collective bargaining they could be accreted at a later date. Board Rule 11.21.2.38 NMAC explicitly provides for the accretion of unit employees who do not belong, at the time the initial petition is filed, to any existing bargaining unit, but who share a community of interest with the employees in that unit. Consequently, the County's argument that the instant petition is barred by a prior agreement is without merit.

Changed Circumstances. The County argues that no changed circumstances as required by NMAC 11.21.2.37(A) exist or have been alleged sufficient to warrant a change in the scope and description of the unit. As appears from the Amended Petition herein, this case is brought pursuant to Rule 11.21.2.38 NMAC accompanied by the necessary showing of interest. The "changed circumstances" element of a Unit Clarification proceeding pursuant to Rule 11.21.2.37 NMAC at issue is not is not an element required for an accretion petition brought pursuant to Rule 11.21.2.38 NMAC.

This Board decided in *AFSCME v. Santa Fe County Board of Commissioners*, PELRB 305-15; 5-PELRB-2015, that the "changed circumstances" requirement for a Unit Clarification proceeding brought pursuant to Rule 11.21.2.37 cannot be imported into Rule 11.21.2.38(A) specifically pertaining to accretions. Rather, the following elements apply to an Accretion Petition brought pursuant to Rule 11.21.2.38:
(1) The employees to be accreted must not yet belong to a bargaining unit;
(2) The employees must show a community of interest with those in the existing bargaining unit;
(3) Their inclusion in the unit must not render it inappropriate;
(4) The petition must be accompanied by a showing of interest; and
(5) A petition for election must be filed if the number of employees to be accreted exceeds 10 percent of the bargaining unit. *Id.*

These criteria are to be applied in this case, not the changed circumstances element of Rule 11.21.2.37.

Application of Rule 11.21.2.38(C) NMAC. AFSCME acknowledges that the 10% threshold is exceeded in this case. Rule 11.21.2.38(C) NMAC requires that if the number of employees in the group sought to be accreted is greater than 10% 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 under these rules. However, 11.21.2.38(C) require dismissal of the case. Rather, it requires that the case may only move forward by filing a "petition for an election under these rules". I can find no reason why such a petition for election may not be filed in the existing case without dismissal. The rule appears to contemplate that such a petition would be filed within a pending accretion petition because such an accretion petition must be accompanied by a showing of interest. Thus, an initial petition in such an accretion situation, as distinguished from a unit clarification brought under Rule 1.21.2.37 NMAC, requires the sort of showing of interest that would permit us to segue into an election in the event we find that the 10% threshold is exceeded. To require dismissal followed by a refiling of a petition for an election elevates form over substance and would frustrate the speedy resolution of representation petitions. The better course is to permit or require the Union to file a "Petition for Election" within this case setting forth the same allegations as in its accretion petition but acknowledging the presumption that a question of representation exists, setting forth the fact of its already tendered showing of interest and requesting an election scheduling conference to set dates and procedures for the posting of notice and conducting balloting.

Alleged Defects in the Board's Recordkeeping. The Board has rejected collateral attacks based on alleged defects in the Board's recordkeeping. E.g. See *AFSCME, Council 18 v. New Mexico Department of Health*; PELRB 122-15. The alleged record insufficiencies in matters do not support an inference that PELRB rules were violated or that an Open Meetings Act violation occurred for the same reasons stated in my January 21, 2016 letter decision *in re: AFSCME, Council 18 & New Mexico Human Services Dep't;* PELRB No. 309-15.

CONCLUSION:

Accepting all factual allegations in the Union's Petition as true and resolving all doubts in favor of sufficiency of the Union's Petition, I conclude that the County's Motion to Dismiss should be and is hereby **DENIED.** The Union shall file a "Petition for Election" within this case as described above within ten days of receiving this letter decision.

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Thomas J. Griego
Executive Director