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

February 28, 2018

Youtz & Valdez, P.C.
900 Gold Ave. SW
Albuquerque, New Mexico 87102
Attn: Shane Youtz, Steve Curtice and James Montalbano

Holcomb Law Office
3301-R Coors Road NW, Suite 301
Albuquerque, New Mexico 87120
Attn: Dina Holcomb

Re: *AFSCME, Council 18 & City of Las Vegas; PELRB No. 309-14*

Dear Mssrs. Youtz, Curtice, Montalbano and Ms. Holcomb:

This letter is my decision regarding the preliminary issue of jurisdiction. The issue arose in the context of a Petition filed by AFSCME, Council 18 (Union) seeking to accrete certain positions into an existing bargaining unit of blue and white collar employees of the City of Las Vegas (Employer). The Union alleges at ¶¶ 14 and 15 of its Petition that the PELRB has jurisdiction to process its petition and determine any related issues because "[the local board] is inactive and no board members have been appointed."

The Employer responded to the Accretion Petition by requesting dismissal on the ground that the City of Las Vegas Labor Management Relations Board has jurisdiction. At a status and scheduling conference the parties agreed to address the jurisdiction issue by briefing before resorting to an evidentiary hearing. Pursuant to a scheduling letter issued November 7, 2014, the parties timely submitted briefs in favor of their respective positions together with supporting documents and affidavits on November 21, 2014. Simultaneously submitted Response Briefs with counter-affidavits were timely exchanged and filed December 1, 2014.

Based on their submissions the parties' positions may be summarized as follows:

The Union argues that The PELRB has jurisdiction because the City of Las Vegas passed an ordinance superseding its grandfathered Labor Management Relations Ordinance on December 21, 2005. (Ordinance No. 05-47). The 2005 ordinance has not been submitted to the PELRB for review pursuant to §10-7E-10(A). Therefore, unless and until the City complies with the requirements of §10(A) there cannot be a duly constituted local board. Additionally, whether duly constituted or not the local board is not fully functioning.

The City argues that the Union's claim that the PELRB has jurisdiction in this case is barred by the doctrine of claim preclusion based on a prior PPC filed by AFSCME in 2005 having been remanded

to the Employer's Labor Management Relations Board on February 22, 2006 in PELRB No. 152-05. The Employer also argues that the City's LMRB "is one of the longest standing local labor management relations boards … formed in 1994… It has met to pass rules and meets whenever it has business to conduct. It stands ready to meet to consider the instant accretion petition." The City also argues that neither the PEBA nor PELRB's rules require approval of amendments to its ordinance.

STANDARD OF REVIEW:
In light of the reliance on affidavits and supporting documents the standard applied to the City's request for dismissal is that found in the New Mexico Rules of Civil Procedure, Rule 1-056 when deciding a motion for summary judgment. *See AFSCME Council 18 v. New Mexico Department of Labor,* 01-PELRB-2007 (Oct. 15, 2007). Summary Judgment will be granted 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, (N.M. 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).

Based on the parties' submissions it is my determination that the PELRB does not have jurisdiction over and it is, therefore, **DISMISSED** without prejudice. The City is directed to submit its Labor Management Relations Ordinance, City Ordinance No. 05-47 and any amendments thereto, to the PELRB for review of whether it comports with the provisions of the PEBA §10 pursuant to NMAC rule 11.21.5.13.

DISCUSSION AND FINDINGS:
The PELRB has historically deferred to local boards as long as they are "fully functional and operational," meaning all members of the local board have been appointed, and the local board has promulgated rules and is meeting for business. See, ***In the Matter of the Disqualification of Deputy Director Pilar Vaile, AFT v. Gadsden Independent School District***, PELRB No's. 132-05 and 309-05 (oral ruling, Minutes, PELRB Board Meeting, August 19, 2005). See also, Examiner's Decision of Respondent's Motion to Dismiss, ***Los Alamos Firefighters Ass'n, Local 3279 v. County of Los Alamos,*** PELRB No. 119-05. In ***American Federation of State, County and Municipal Employees International Union v. New Mexico State University,*** 2-PELRB-2005 (June 22, 2005) the Director dismissed a PPC and remanded a matter to a duly approved local board, but the PELRB reversed and remanded the matter back to the Director because the local board was not yet in fact functioning and the Complainant alleged that the employer was utilizing the process of establishing the local board to delay processing pending matters.

Exceptions to that general rules exist where it has been shown that a labor dispute is "trapped" in a non-productive local board's system – where the local board had been approved and appointed, but was not fully operational and functioning. *See* ***Gallup-McKinley County Schools v. PELRB and***

McKinley County Federation of United School Employees Local 3313, 2d Judic. Dist., Case No. CIV-2005-07443 (J. Campbell, oral ruling on Nov. 2, 2005); ***Regents of Univ. of N.M. v. N.M. Fed'n of Teachers***, 125 N.M. 401, 962 P.2d 1236 (1998). It is that precedent, analysis of the PEBA §§ 10 and 26(B), NMAC 11.21.5.13 and public policy considerations expressed in NMSA §10-7E-2 §that guide the decision in this case.

Claim Preclusion. The City's Brief asserts that the PELRB is barred from taking jurisdiction over the Union's Accretion Petition by the doctrine of claim preclusion, sometimes referred to in legal parlance as the doctrine of *res judicata*. Claim preclusion applies to give binding effect to a prior ruling. *See, e.g., City of Deming v. Deming Firefighters Local 4521,* 2007-NMCA-069, ¶ 17 (raising possibility of claim preclusion where one labor board hears a matter also pending before another labor board). For claim preclusion to bar a claim the two actions (1) must involve the same parties or their privies; (2) those parties or their privies must be acting in the same capacity or character, (3) the two actions must be regarding the same subject matter, and; (4) the two actions must involve the same claim. *See, State ex rel. Peterson v. Aramark Corr. Serv's., LLC* (Ct. App., 2014*)* ¶ 24, *citing Deflon v. Sawyers,* 2006-NMSC-025, ¶ 2, 139 N.M. 637, 137 P.3d 577. *(Claim Preclusion "bars re[-]litigation of the same claim between the same parties or their privies when the first litigation resulted in a final judgment on the merits.") See also Moffat v. Branch,* 2005-NMCA-103, ¶ 11, 138 NM 224. I cannot agree that the claims in this case are barred by the doctrine of claim preclusion for the following reasons:

The accretion petition now before us presents two questions concerning our jurisdiction: (1) whether the City of Las Vegas LMRB is acting and functioning at the time of its filing, October 16, 2014, and; (2) whether the City's LMRB is properly constituted inasmuch as it did not seek and receive PELRB approval of a 2005 ordinance superseding its earlier LMRA.

In its response to the accretion petition the City provides documentary evidence showing appointed members of the local board (although nothing to indicate re-appointment after their 2006 appointments as shown on Exhibit F) and that the local board has met to conduct business, most recently on April 18, 2008 regarding certification of a representation election for Professional Firefighters, Local 4625. (Exhibits 2, 3, 4 and J).

In addition, the City refers to this Board's 2006 dismissal and referral to the local labor board in PELRB No. 152-05 as the basis for invocation of the claim preclusion doctrine. The City's Motion to Dismiss PELRB No. 152-05 stated that the City was operating under a local ordinance pursuant to PEBA §26(B) that its local board "approved by the PELRB, is the proper board with jurisdiction." See Motion to Dismiss in PELRB No. 152-05, ¶¶ 3 and 4. The union failed to appear at a scheduled hearing to defend the City's Motion to Dismiss and consequently the PELRB's director dismissed in complaint. Very shortly thereafter, the director retracted the dismissal "instead transferring the case to the City of Las Vegas Labor Management Relations Board." After that, the union moved for reconsideration alleging that the Las Vegas LMRB had not met to conduct business in several years preceding the claim. See Motion to Reconsider in PELRB No. 152-05, ¶¶ 3 and 4. Again, the union failed to appear at a scheduled hearing to defend their motion for

reconsideration and consequently it was denied. See letter decision in PELRB No. 152-05 dated April 18, 2006.

Although this petition involves the same parties acting in the same capacity as in the complaint filed as PELRB 152-05 it is arguable whether the two actions are regarding the same subject matter, and it does not appear that the two actions involve the same claim.

The 2005 case involved a PPC by the Union alleged breach of a collective bargaining agreement with regard to a specific employee's discipline and grievance procedure. The present case is a petition seeking to accrete one group of employees into an existing bargaining unit. Thus, the cases do not involve the same subject matter. It may be argued that proper application of claim preclusion requires me to consider only the jurisdictional issue as being the same in both cases. While doing so might resolve the *subject matter* criterion, the *claim* remains different, not least because of the span of time between the two cases. Just because a local board is found to be active and functioning in 2006 does not mean that it is still active and functioning eight years later in 2014. The objection to the local board in this case includes an argument that the Las Vegas LMRB is inactive and no board members appointed because the enactment of its present LMRA in 2005 superseded all previously enacted ordinances with the result that it ought to be considered to be a new local board created under PEBA §10-7E-10(A) requiring PELRB approval. Since no such approval has been sought or obtained any board appointments or actions thereafter are ineffective. That argument was not raised in PELRB No. 152-05.

Also, because the union's complaint in PELRB No. 152-05 was dismissed and transferred after it twice failed to appear at hearings to defend its positions it appears that the jurisdictional issue therein was never actually litigated on its merits. I am reluctant to apply the doctrine of claim preclusion under those circumstances. Because claim preclusion does not bar this Accretion Petition, I now turn my attention to whether there is a functioning board in Las Vegas and, if there is, whether the fact that Ordinance No. 05-47 was never submitted to the PELRB for review results in this Board having jurisdiction.

Whether a Duly Appointed and Active Board Exists. The PELRB has routinely remanded matters that originated with the PELRB to local boards upon a showing that the local board is functioning and operational. *See, e.g., Zuni FUSE v. Zuni Public School District*, PELRB Case No. 152-07 (Nov. 30, 2007); *National Federation of Educational Employees v. Northern New Mexico College,* PELRB Case Nos. 136-07 and 137-07 (Oct. 19, 2007); *IAFF, Los Lunas Local and Village of Los Lunas*, PELRB Case No. 312-07 (Oct. 18, 2007); *NMCPSO-CWA Local 7911 and Doña Ana County Sheriff's Department*, PELRB Case No. 321-06 (Nov. 1, 2006); *Alamogordo Firefighters Associations, IAFF Local 4348 and City of Alamogordo and Alamogordo Public Safety Officers Associations,* PELRB Case No. 312-06 (July 13, 2006); *AFSCME v. Doña Ana County,* PELRB Case No. 128-06 (July 12, 2006); *Los Alamos Firefighters Association Local 3279 v. County of Los Alamos*, PELRB Case No. 119-05 (July 11, 2006). As mentioned before, the PELRB has previously deferred to the local board under the same ordinance at issue here, City Ordinance 05-47, *Las Vegas Firefighters and City of Las Vegas*, PELRB No. 301-08 (Feb. 18, 2008), although the legitimacy of the ordinance and the board created thereunder was presumed and the jurisdictional challenge based on PEBA §10 present here was not raised there so

that, for reasons discussed under the claim preclusion heading above, PELRB No. 301-08 is not dispositive.

The Union's submissions argue that there is no functioning local board first, because City Ordinance No. 05-47 is subject to the requirement in NMSA §10-7E-10(A) that a local board may "assume the duties and responsibilities of the public employee labor relations board" only "[w]ith the approval of the [PELRB]. It is undisputed that the City has not sought or received such approval, the City's position being that it is not required to do so. Consequently, without PELRB approval there can be no duly constituted local board empowered to hear its accretion petition. Second, the union argues the Las Vegas LMRB is not "fully functional and operational," as contemplated by the case precedent cited above, meaning that all members of the local board have been appointed, and the local board has promulgated rules and is meeting for business.

This Board has previously ruled that the fact that a local board has not met for a period of years, without more, is insufficient to challenge its legitimacy because that criterion presumes that there is some business to conduct. The PEBA does not require a local board to meet solely for the sake of meeting. *See, e.g.* Hearing Officer's Letter Decision re: Jurisdiction, Sept. 19, 2014 in *Los Lunas Firefighters v. Village of Los Lunas*; PELRB No. 118-14. So, while it appears to be undisputed that the local board has not met since 2008 there is nothing in the record to indicate that it has failed to meet when there was business to conduct or that it has engaged in conduct that could reasonably be construed as utilizing the process to delay processing pending matters. The PELRB has raised a question in another recent case whether Section 10-15-1(D) of the Open Meetings Act requires a local board to meet at least annually to pass a resolution setting forth what constitutes reasonable notice of its public meetings, but the union has not alleged that here. Consequently a decision on that ground remains for another day.

Therefore, I consider the fact that the local board has not met since 2008 to be insufficient under the test espoused by *In the Matter of the Disqualification of Deputy Director Pilar Vaile, AFT v. Gadsden Independent School District*, PELRB No's. 132- 05 and 309-05 (August 19, 2005); *Los Alamos Firefighters Ass'n, Local 3279 v. County of Los Alamos,* PELRB No. 119-05; and *In re: AFSCME v. New Mexico State University,* 2-PELRB-2005 (June 22, 2005) to demonstrate that it is other than "fully functional and operational". Neither does that fact without more establish that the board is other than "productive" within the meaning of that term as used in *Regents of Univ. of N.M. v. N.M. Fed'n of Teachers*, 125 N.M. 401, 962 P.2d 1236 (1998) and *Gallup-McKinley County Schools v. PELRB and McKinley County Federation of United School Employees Local 3313,* 2d Judic. Dist., Case No. CIV-2005-07443 (J. Campbell, oral ruling on Nov. 2, 2005).

Prior PELRB Approval of City Ordinance No. 05-47. With regard to whether the absence of PELRB approval of City Ordinance 05-47means that the local board created thereunder has no power to act on this accretion petition, I analyze the question is two phases: First, whether the City is required to obtain PELRB approval under NMSA §10-7E- 10(A) or some other provision of PEBA or rules promulgated thereunder, and; second, if PELRB approval of City Ordinance 05-47 is required, whether the absence of such approval results in the PELRB retaining its general jurisdictional grant under NMSA §10-7E-9.

The PELRB has interpreted PEBA §26(B) as governing only those local boards created between October 1, 1991 and the enactment of PEBA II. It has interpreted §10 as exclusively governing boards newly created under PEBA II in 2003,. *See, e.g., National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH,* 3-PELRB-2005 (Oct. 19, 2005). *See also McKinley County Federation of United School Employees, AFT Local 3313 v. Gallup-McKinley County School District and Gallup-McKinley County School District Labor Management Relations Board,* PELRB No. 103-07.

Until this case, there has never been a question but that City Ordinance 05-47 constitutes a local bargaining ordinance created under §10-7E-26(B). It has been so regarded in all of this Board's records at least since December of 2009 when information on all local boards then in existence was compiled. In its January 2006 Motion to Dismiss a PPC in *AFSCME, Council 18 v. City of Las Vegas*, PELRB 152-05, Counsel for the City in that case (who is also counsel for the City in this case) represented at ¶3 of the Motion that "Under PEBA Section 26(B), Respondent may operate under its local Ordinance's provisions and procedures rather than PEBA" referring to the same ordinance, City Ordinance 05-47, at issue here. My own analysis of the history of collective bargaining in the City of Las Vegas beginning with its 1994 ordinance as related by the parties in their briefs leads me to conclude that City Ordinance 05-47 is subject to §10-7E-26(B). Therefore, the provisions of Section 10 (A) that requires a local board created thereunder to operate "with approval of" the PELRB is inapplicable here.

The union makes much of the fact that City Ordinance 05-47 purports to have "superseded" rather than "amended" the City's 1991 LMRA(City Ordinance 81-14) amended by City Ordinance 82-26, enacted in 1994. (Union Exhibits A, B and C). I conclude that use of the term "superseded" rather than amended is a distinction without a difference. Any amendment contemplated by Section 26(B) effectively supersedes the ordinance existing before the amendment.

Viewing the City's LMRA as an amendment suggests that PELRB rule 11.21.5.13 regarding post approval reporting requirements should be considered. That rule provides:

> "Following board approval of a local board, the local board or the public employer that created it shall file with the board and 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 prior approval shall be revoked."

At its December 2, 2014 meeting concerning *In re: Central Consolidated School District*, the Board discussed whether a finding of non-conformance with §10 of PEBA would be appropriate after the School Board failed to enact a labor management relations resolution that had been approved by the PELRB. During that discussion the PELRB opined that the two clauses of rule 11.21.5.13 – the first, requiring filing amendments; the second, prompting notice to the employer after a finding of non-compliance with §10 - as independent clauses. Viewed as independent clauses the rule requires post-amendment reporting in order to ensure compliance with §10. The PELRB may learn of an issue of non-compliance in ways other than through the reportage required in the first clause, such

as by a PPC alleging that the local board amendment offends §10 or through an independent investigation undertaken by the PELRB pursuant to NMSA §10-7E-9 (B),[1] but regardless of how an amendment to a §26(B) ordinance comes to the attention of the PELRB it is to be examined for conformance with §10 pursuant to the second independent clause of rule 11.21.5.13.

Looking at the rule in that way is consistent with the PELRB's mandate under NMSA §10-7E-9(A) To promulgate rules necessary to accomplish and perform its functions and duties as established in the PEBA, including the establishment of procedures for (1) the designation of appropriate bargaining units; (2) the selection, certification and decertification of exclusive representatives; and (3) the filing of, hearing on and determination of complaints of prohibited practices. Rule 11.21.5.13 is distinguished from Rule 11.21.5.12 regarding review of local boards, which contemplates the filing of a new ordinance creating a local labor board where none had existed before.

Based on the foregoing I read the Board's rules to mean that the City was required to submit its LMRA City Ordinance 05-47 for review by the PELRB under the clear mandate of NMAC 11.21.5.13. What then, should be the appropriate remedy for the City's failure to abide by the rule's mandate? Here, I believe that a blanket rule assuming jurisdiction over all pending issues in all instances in which a public employer has not submitted its amended ordinance, resolution or charter amendment for review would be ill-advised. I believe the more reasoned approach requires that the problem created when an employer does not comply with rule 11.21.5.13's reporting requirement is best handled on a case-by-case approach.

Under the facts now before me it appears that the Petitioner has not raised an objection that City Ordinance 05-47 does not comport with §10. It takes no position with respect to whether the PELRB would or should approve the ordinance after review. In the closing paragraph of its brief filed herein on November 21, 2014, the union writes:

> "AFSCME need not – and does not- take a position on whether the PELRB would grant such approval. However, unless and until it approves both the ordinance and the local board, the PELRB's plenary jurisdiction to adjudicate this petition remains intact."

I also have before me a record that indicates that this Board referred a pending PPC to the City's local board under the same ordinance at issue today, City Ordinance 05-47. *See*, *AFSCME, Council 18 v. City of Las Vegas,* PELRB No. 152-05. The PELRB deferred to the local board a second time, that time regarding designation of an appropriate bargaining unit in Las Vegas Firefighters and City of Las Vegas, PELRB No. 301-08. Notwithstanding the procedural intricacies of those cases, discussed above, that render them ineligible for application of claim preclusion, there was apparently nothing in City Ordinance 05-47 that caused the Hearing Officer to be concerned about referring

[1] NMSA §10-7E-9(B) provides that the PELRB shall (1) hold hearings and make inquiries necessary to carry out its functions and duties; (2) conduct studies on problems pertaining to employee-employer relations; and (3) request from public employers and labor organizations the information and data necessary to carry out the board's functions and responsibilities.

those matters to the Las Vegas LMRB. It does not appear that the union attempted to file its PPC with the local board, thereby testing whether a hearing there could be obtained, preferring instead to raise this jurisdictional issue. I am guided by the provisions of NMSA §10-7E-2 providing that one of the purposes of the PEBA is to promote harmonious and cooperative relationships between public employers and their employees and to protect the public interest by ensuring the orderly operation and functioning of government, in light of the legislative intent expressed in §§ 10(A), and 26(B) of PEBA that public employers other than the State have a substantive right to opt out of PEBA's coverage as long as the local board follows all procedures and provisions of PEBA unless otherwise approved by the PELRB.

Having determined, as discussed above, that there is a fully functioning local board that stands ready, willing and able to determine this PPC upon a proper filing, I believe that the wiser course is to dismiss this petition in deference to the jurisdiction of the Las Vegas LMRB. This decision is limited to the specific facts in this case; a different result might obtain from the same analysis under different facts, such as the local board's failure to appoint members, pass rules or meet regularly to attend to business.

CONCLUSION:

The City's board meets the criteria recognized by the PELRB for finding a fully functional and productive board. Despite the employer's failure to comply with the requirements of rule 11.21.5.13, balancing competing interests militates in favor of declining to find that the PELRB has jurisdiction.

This decision is rendered on the specific facts of this case indicating that the City has a fully functioning and productive board and that the PELRB has previously deferred to that board alone - not for any of the other reasons put forward by the Respondent. The PPC is not barred by the doctrine of claim preclusion.

In light of the analysis of the PEBA §26(B) and PELRB rule 11.21.5.13 herein, the City is directed to comply with its provisions regarding submission of the ordinance to the Board for review.

Pursuant to NMAC 11.21.2.22 this decision shall be subject to Board review by filing a request for review within 10 days after service of the dismissal A request for review shall state the specific portion of the disposition to which exception is taken and the factual and legal basis for such exception. The request must be served on all other parties and a response to the request for review may be filed and served within 10 days thereafter.

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Thomas J. Griego
Executive Director