# 5-PELRB-2016

**STATE OF NEW MEXICO**
**PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

**AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 18, AFL-CIO**

**Petitioner,**

**v.** **PELRB No. 309-15**

**STATE OF NEW MEXICO HUMAN SERVICES DEPARTMENT,**

**Respondent.**

## ORDER DENYING REQUEST FOR INTERLOCUTORY APPEAL

**THIS MATTER** came before the Public Employee Labor Relations Board ("Board") at a regular meeting on March 25, 2016 and a special meeting on April 1, 2016, to consider the State of New Mexico, Human Service Department's ("State") *Request to the PELRB for Interlocutory Appeal of Hearing Officer's Recommended Decision on Motion to Dismiss for Lack of Jurisdiction* ("Motion"), filed on March 21, 2016. Petitioner AFSCME submitted a response to the State's Motion on March 30, 2016. Counsel for both AFSCME and the State were present at the Board's March 25, 2016 meeting and presented oral arguments in support of their respective positions.

Having reviewed the pleadings and being sufficiently advised, and with a unanimous 3-0 vote in the affirmative, the Board finds that the Motion is not well taken and therefore should not be granted.

**IT IS HEREBY ORDERED** that the State's Request for Interlocutory Appeal is **DENIED**.

**PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

Date: 4-11-16

Duff Westbrook, Chair

**IN THE MATTER BEFORE THE**
**STATE OF NEW MEXICO**
**PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

**AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 18, AFL-CIO,**

**Petitioner,**

**v.**

**STATE OF NEW MEXICO, HUMAN SERVICES DEPARTMENT,**

**Respondent.**



**REQUEST TO THE PELRB FOR INTERLOCUTORY APPEAL OF HEARING OFFICER'S RECOMMENDED DECISION ON MOTION TO DISMISS FOR LACK OF JURISDICTION**

**NOW COMES** Respondent, the State of New Mexico Human Services Department, by and through its attorney of record, Dina E. Holcomb, Esq., and hereby submits its Request to the Public Employee Labor Relations Board (PELRB) for Interlocutory Appeal of the Hearing Officer's Recommended Decision denying Respondent's Motion to Dismiss for Lack of Jurisdiction.

## BACKGROUND

On or about October 23, 2015, Petitioner filed an Amended Petition for Clarification "pursuant to 11.21.2.37 NMAC…seeking an order finding that the 'Wall to Wall' unit at the Human Services Department includes employees in the position of Attorney within the Child Support Enforcement Division." (Amended Petition at p. 1). Petitioner stated in the Petition that

the existing bargaining unit, which includes many State of New Mexico Agencies and varying classifications, "was recognized on or about August, 2003, and in 2008 the unit was clarified to be 'Wall to Wall' in PELRB No. 357-04." ***Id.*** At the Status and Scheduling Conference held on November 20, 2015, the Executive Director determined the parties needed additional time to review the history regarding composition of the bargaining unit, which included at least one (1) prior accretion and/or unit clarification petition. (*See,* Scheduling Notice). Neither counsel for the parties were involved in the prior cases concerning the composition of the bargaining unit and, therefore, requested copies of the PELRB files since 2003 involving the composition of the bargaining unit. On or about November 25, 2015, counsel for the parties were provided copies of PELRB Nos. 336-04, 312-09, and 357-04 in their entirety via electronic mail from the PELRB.

With regard to the history and review of each of the PELRB cases concerning the composition of the bargaining unit, the following background information is relevant. With the exception of items 7, 9, and 10, these statements were established as Material Facts not in Dispute by the Executive Director in his letter decision denying Respondent's Motion to Dismiss or Motion for Summary Judgement:

1. In 2003, Joe Lang and Linda Vanzi were identified as Public Employee Labor Relations Board (PELRB) members.
2. Two (2) members would constitute a quorum of the PELRB.
3. A meeting of a quorum of the PELRB would require a duly noticed public meeting pursuant to the Open Meetings Act.
4. The first duly noticed public meeting of the PELRB was held on September 3, 2003.

5. The PELRB did not accept any Petitions, prohibited practice charges, requests for approval of local boards, or any other filings until the effective date of its rules on March 15, 2004. (*See,* January 6, 2004 minutes at ¶8; March 2, 2004 minutes at ¶7).
6. 11.21.2.37 NMAC does not allow for the filing of a petition for unit clarification for incumbent bargaining units under Section 10-7E-24(A) that were established prior to July 1, 1999.
7. The instant matter involves a bargaining unit that was initially formed prior to July 1, 1999.[1]
8. 11.21.2.37 NMAC provides for the filing of a petition for unit clarification in the following two (2) circumstances for non-grandfathered bargaining units:
    a. Circumstances surrounding the creation of an existing collective bargaining unit are alleged to have changed sufficiently to warrant a change in the scope and description of that unit; or
    b. A merger or realignment of previously existing bargaining units represented by the same labor organization.
9. Pursuant to 11.21.2.38 NMAC, non-grandfathered bargaining units may have positions accreted into the bargaining unit either by a unit clarification petition, if the group sought to be accreted is less than ten percent (10%) of the number of employees in the existing bargaining unit, or by representation petition for an election if the group sought to be accreted is greater than ten percent (10%) of the number of employees in the existing bargaining unit.

[1] The statement was not addressed by the parties or the Executive Director, but does not appear to be in dispute from the positions of the parties raised in pleadings in this matter and as set forth in decision of the PELRB in Case No. CP-71-93(S).

10. Pursuant to Section 10-7E-13(A), appropriate bargaining units are established on the basis of occupational groups, typically identified as blue collar, secretarial clerical, technical, professional, paraprofessional, police, fire, or corrections, or on clear and identifiable communities of interest. The law does not include reference to "wall-to-wall" bargaining units.

The following information was obtained from the review of the PELRB files in PELRB No. 336-04, upon which Petitioner relies as the Certification of Majority Support pursuant to §10-7E-24(B) to enable Petitioner to represent and bargain on behalf of the State-wide bargaining unit:

1. The file contains a single document entitled Certification of Majority Support signed by Joe Lang and Linda Vanzi with an issued date of August 7, 2003.
2. The file does not contain a Petition or accompanying showing of support for incumbent majority status as required by 11.21.2.36 NMAC.
3. The file does not contain any Notice of Filing of Petition to place the employees, other labor organizations, the employer, or the public on notice of the filing of a Petition as required by 11.21.2.15 NMAC.
4. The file does not contain any document acknowledged by the parties of an agreement to an alternate procedure for demonstration of majority support as permitted in Section 10-7E-14(C), NMSA 2003.
5. The file does not contain any Notice of Hearing or Notice of Meeting of the PELRB for August 7, 2003, in which Joe Lang and Linda Vanzi, members of the PELRB, purportedly met, constituting a quorum of the PELRB, and took action to "certify" the Petitioner as having demonstrated majority support.

6. The file does not contain a listing of eligible bargaining unit employees to which authorization cards could be compared to determine majority support.
7. The Certification is dated August 7, 2003, however, the case file has a 2004 date and, by case number, indicates it was the thirty-sixth ($36^{th}$) Petition accepted as filed in 2004.
8. The Certification's date occurs during the time period in which the PELRB was not accepting any filings until the effective date of its Rules.

The following information was obtained from the review of the PELRB files in PELRB No. 357-04, upon which Petitioner relies for accreting positions into the grandfathered bargaining unit and establishing the Human Services Department as being "wall-to-wall":

1. The file contains a Petition for Accretion filed on October 14, 2004, but lacks the referenced attachments of Exhibits A, B, and C.
2. A Motion to Dismiss filed by Respondent in the case contains reference to and a copy of the PELRB decision issued on August 31, 1994, in case number CP 71-93(S) in which the AFSCME bargaining units of various agencies of the State of New Mexico were realigned (consolidated) into a single bargaining unit, but lacks Exhibit A referenced in the decision.
3. The file contains contradictory documents that indicate an accretion of anywhere from 251 to 1900 employees.
4. The file contains notes and other documents that indicate cards were counted as applicable to individual agencies as opposed to the bargaining unit as a whole.
5. The file indicates the first card count was conducted with a few agencies on September 6, 2006, almost two (2) full years after the filing of the Petition and accompanying cards.

6. In two (2) letters from the Executive Director to the parties, the Director expresses concern about whether the process being used complies with PEBA and affords employees their rights.

7. A letter from Executive Director Montoya dated June 11, 2008, purports to be a Certification adding specific titles to the bargaining unit in the agencies of Department of Health Los Lunas and Public Education Department – Division of Vocational Rehabilitation, as well as making "agencies" "wall-to-wall" as listed: Human Services Department, EXPO, Public Defender's Department, Department of Cultural Services, and Department of Workforce Solutions.

8. Such letter identified as a Certification was issued almost four (4) years after the filing of the Petition for Accretion, based upon scant and contradictory file documentation, file documents with limited information on card counts conducted with only some of the agencies, and no information on the majority of the agencies listed.

9. The letter identified as a Certification of the Human Services Department as "wall to wall" is contradicted by notes in the file dated "9-6-06" showing the "original position & cards" pertained to thirty-five (35) positions and seventeen (17) cards, which fails to demonstrate majority support, followed by an entry for nineteen (19) positions and eleven (11) cards.

10. No documentation exists in the file with regard to what positions were included in the listing of thirty-five (35) positions nor the listing of nineteen (19) positions.

11. No documentation exists in the file to justify a "wall to wall" designation for any agency, particularly Human Services Department given the change in the number of positions being considered.

12. The lack of documentation of the HSD positions sought for inclusion, used for the card count, and determined as included in the "wall-to-wall" portion of the bargaining unit led to subsequent disagreement of the parties as demonstrated in a prohibited practice charge being filed in PELRB No. 117-09 and a Petition for Unit Clarification in PELRB No. 312-09.
13. A review of the file, the PELRB's decisional page, and PELRB agendas and minutes indicate the June 11, 2008 certification written by the Executive Director was not presented to the PELRB for approval.

The following information was obtained from the review of the PELRB files in PELRB No. 312-09, which presumably concerns a Petition for Unit Clarification pertaining to the Human Services Department:

1. The file presumably concerns a Petition for Unit Clarification concerning positions in the Human Services Department, but does not contain a copy of any complete Petition.
2. The file does not contain any Notice of Filing of Petition to place the employees, other labor organizations, or the public on notice of the filing of a Petition as required by 11.21.2.15 NMAC.
3. The file does not contain showing of interest or any indication that a showing of interest was ever filed as required by 11.21.2.38 NMAC.
4. The file does not contain an eligible employee listing for comparison to a showing of interest.
5. An Amended Report was issued in PELRB No. 312-09 dated August 4, 2009, by the PELRB's Deputy Director.

6. A review of the file, the PELRB's decisional page, and PELRB agendas and minutes indicate the August 4, 2009 Amended Report concerning unit clarification was not presented to the PELRB for approval.

Respondent filed a Motion to Dismiss for Lack of Jurisdiction or in the Alternative Motion for Reconsideration on February 16, 2016. Petitioner's filed a Response to the Motion on February 17, 2016. A hearing on the merits commenced on February 18, 2016, at which Respondent raised as a preliminary issue the Motion to Dismiss for Lack of Jurisdiction as well as the issue of whether Petitioner was alleging changed circumstances to accrete the position of attorney or alleging the position of attorney has been in the bargaining unit. Counsel for Petitioner stated the union was not seeking to accrete any positions and that the position of Petitioner was the attorneys have been included in the bargaining unit since it went "wall-to-wall" in 2008.

Respondent also raised the issue of the Petition being limited to the position of attorney and not including the position of lawyer inasmuch as the Petition only referenced attorney and Petitioner had not amended the Petition to include lawyer as directed by the Executive Director during the Status and Scheduling conference on November 20, 2015. This remained a contested issue between the parties in the Pre-Hearing Order. Respondent argued since Petitioner had not amended the petition to include "lawyer" as directed, the matter was limited to the position of "attorney". No ruling was issued on Respondent's assertion prior to commencement of the hearing. In addition, the Executive Director reserved ruling on the Motion to Dismiss for Lack of Jurisdiction, stating he wanted to review the two (2) PELRB cases cited in Respondent's Motion involving Silver Consolidated Schools and the City of Rio Rancho during a break in the

hearing. The hearing on the merits commenced after Respondent preserved its objections for the record.

At the conclusion of Petitioner's Brief in Chief, Respondent renewed its Motion to Dismiss for Lack of Jurisdiction or, in the alternative, made a Motion for a Directed Verdict. Following oral argument by counsel on the Motions, the Executive Director held under 11.21.2.37(B) that a question concerning representation exists, granted Respondent's Motion for a Directed Verdict, dismissed the Amended Petition for Unit Clarification, and determined the issue of the question concerning representation must be brought before the PELRB for determination. The following day, the Executive Director issued a written decision stating the dismissal was based upon administrative notice of the Board's records demonstrating the "absence of a Board meeting at which the current existing unit was established…[causing] a defect in approving majority support among those in that unit and, therefore, a question or representation existed that required [my] dismissal of the claim as stated." However, the Executive Director reversed his decision stating the decision failed to consider 11.21.2.37(D), which the Executive Director interpreted as only requiring PELRB review if an appeal is filed.

On February 29, 2016, Respondent filed a Motion for Reconsideration or Request for Permission to File an Interlocutory Appeal. Petitioner did not file a Response to the Motion, thereby indicating consensus therewith. By letter dated March 9, 2016, and received on March 14, 2016, the Executive Director denied both the Motion for Reconsideration and Request for Interlocutory Appeal incorporating by reference the legal analysis contained in the letter decision issued in PELRB No. 122-15 dated the same day. This Request for Interlocutory Appeal to the PELRB followed.

## ARGUMENT

### 1. A Motion to Dismiss for Lack of Jurisdiction May Be Filed at Any time, Cannot be Waived Pursuant to a Scheduling Order or Ruled Untimely; and, Must be Ruled Upon Prior to Proceeding on Merits.

On February 16, 2016, Respondent filed a Motion to Dismiss for Lack of personal and subject matter jurisdiction. On February 17, 2016, Petitioner filed a Response to the Motion claiming: 1) the Motion to Dismiss was untimely as filed after the dispositive motions deadline; 2) that regardless of the PELRB's files, the parties had entered into collective bargaining agreements; 3) a hearing would resolve the issue of whether a change in circumstances surrounding the creation of the bargaining unit had occurred; and 4) that Petitioner was not seeking to add a classification of employees, rather the issue involved whether the employees could assert their rights to dues deductions under the collective bargaining agreement.[2] (Response to Motion to Dismiss or for Reconsideration at ¶¶ 1, 5, 6, 7, and 9). At the outset of the hearing, Respondent addressed the Motion to Dismiss for Lack of Jurisdiction during the preliminary matters. The Executive Director took the matter under advisement and reserved ruling until later in the hearing. At the close of the Petitioner's case in chief, Respondent renewed its request for dismissal for lack of jurisdiction and further moved for a directed verdict. The Motion to Dismiss for Lack of Jurisdiction was denied as being untimely. Respondent requested the Executive Director reconsider this ruling in its Motion filed on February 26, 2016, inasmuch as a time limit cannot be imposed on a motion for lack of jurisdiction. Petitioner did not file a Response to the Motion for Reconsideration or Request for Interlocutory Appeal. In

[2] Issues 3 and 4 are conflicting arguments raised by Petitioner, which lead to Respondent requesting clarification as to whether Petitioner was alleging changed circumstances warranting accretion of positions not previously included in the bargaining unit or whether Petitioner was not seeking accretion and arguing the positions had already been included in the bargaining unit.

the letter Decision issued on March 9, 2016, it states "Respondent's counsel[3] filed a Motion for Reconsideration of my withdrawal of my grant of a directed verdict issued on February 19, 2016". The letter Decision does not directly address Respondent's request to reconsider the denial of the Motion to Dismiss for Lack of Jurisdiction as being untimely filed. However, the letter Decision incorporates by reference "the legal analysis contained in my letter decision denying Respondent's Motion to Dismiss issued March 9, 2016 in *AFSCME, Council 18 v. New Mexico Department of Health,* PELRB 122-15".

The PELRB must determine whether it has jurisdiction over the parties and the subject matter based upon its authority granted in the Public Employee Bargaining Act (PEBA), and based upon whether the parties to the action meet the definition of a public employer, public employee, and/or labor organization. A claim for lack of jurisdiction can be raised at any time and cannot be considered untimely based upon a deadline for filing of dispositive motions. Subject matter jurisdiction cannot be waived and must be decided if raised at any time, even if raised for the first time on an appeal. ***Smith v. City of Santa Fe,*** 2007-NMSC-055, ¶10, 142 N.M. 786, 171 P.3d 500; ***Armijo v. Save 'N Gain,*** 1989-NMCA-014, ¶4, 108 N.M. 281, 282, 771 P.2d 989, 990. "The question of jurisdiction is a controlling consideration that must be resolved before going further in a proceeding." ***State v. Favela,*** 2013-NMCA-102, ¶6, 311 P.3d 1213. Subject matter jurisdiction involves the question of whether a court has the power to hear and decide a matter before it, and, therefore, "it is now well-settled that a lack of subject matter jurisdiction cannot be waived or cured by the consent of the parties." ***Residences v. Martinez,*** 2015-NMCA-41, ¶14; *citing,* ***Gonzales v. Surgidev Corp.,*** 1995-NMSC-036, ¶11, 120 N.M. 133, 899 P.2d 576. Accordingly, Respondent's Motion to Dismiss for Lack of Jurisdiction should

[3] The Motion for Consideration was filed by Respondent, State of New Mexico Human Services Department, by and through its attorney of record.

have been decided prior to proceeding with hearing Petitioner's case. In addition, the subsequent denial of the Motion for Lack of Jurisdiction as untimely was improper based on the case law cited herein and in the Motion itself.

The letter Decision issued on March 9, 2016, which incorporates by reference the letter Decision in PELRB 122-15, does not address the issue of timeliness other than at the outset of the letter in PELRB No. 122-15 regarding filing of the motion in that matter "well after the deadline of January 8, 2016 set for filing dispositive motions" and that the Department of Health "excuses this late filing on the ground that a jurisdictional challenge may be raised at any time." (Letter Decision in PELRB 122-15 at p. 1). Respondent contests referring to a "late filing" of the Motion inasmuch as the law is clear that jurisdiction may be raised at any time. Further, the letter Decision in PELRB 122-15 sets forth the standard of review of Motions to Dismiss as following the "standard 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." (Letter Decision in PELRB 122-15 at p. 1). Rule 1-012(B)(6) concerns a claim for relief in which a defense of failure to state a claim has been raised as opposed to Rules 1-012(B)(1) and (2) which concern jurisdiction. The New Mexico Court of Appeals has explained the reasoning for a different standard:

> We begin by explaining our standard of review and why we do not accept as true the facts alleged in the complaint. When considering motions to dismiss based on a failure to state a claim under Rule 1–012(B)(6) or lack of standing, we "accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party."
> But this standard does not always apply when reviewing the district court's ruling on a motion to dismiss for lack of subject matter jurisdiction under Rule 1–012(B)(1). The difference lies in the type of attack—facial or factual—mounted by the movant.
> In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true. [In contrast, in a

> factual attack,] a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations. This rule is based on the fundamental nature of jurisdictional questions: "Because at issue in a factual [1–012(B)(1) ] motion is the [district] court's jurisdiction—its very power to hear the case—there is substantial authority that the [district] court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case."

***Southern v. Lujan,*** 2014-NMCA-109, 336 P.3d 1000, ¶7-8 (internal citation omitted). Moreover, this instant matter does not concern a "claim for relief" as would be filed in a prohibited practice complaint alleging a violation of the Public Employee Bargaining Act. Rather, the matter involves a Petition for Unit Clarification concerning whether attorneys are included in the bargaining unit.[4] The letter Decision in PELRB No. 122-15 states the "instant case presents a complaint against a State employer alleging a unilateral change in a State employee's working conditions... [t]hat is plainly within the grant of both personal and subject matter jurisdiction bestowed on the Board." (Letter Decision in PELRB No. 122-15 at p. 2). Conversely, the instant matter does not involve a complaint or a claim of a unilateral change or other prohibited practice. Rather, it involved a Petition for Unit Clarification. Therefore, the application of the standard employed in Rule 1-012(B)(6) motions for dismissal of a complaint for failure to state a claim was misplaced in this matter.

The letter Decision incorporated by reference also states it considered the "doctrines of waiver, estoppel and laches" in reaching the conclusion to deny the Motion to Dismiss for Lack of Jurisdiction. (Letter Decision in PELRB No. 122-15 at p. 2). Applying waiver, estoppel, and

[4] One of Petitioner's contradictory claims in its Response Brief is attorneys are in the bargaining unit and have been denied the right to dues deductions under the contract. (Response Brief of 2/17/16 at ¶9). If Petitioner is alleging a claim of violation of the collective bargaining agreement, the Petition must be dismissed as Petitioner must file such claim as a grievance or prohibited practice complaint.

laches is in error inasmuch as a collateral attack premised upon jurisdiction can be raised in the same proceedings or in subsequent proceedings and even by a party different than the original party. The New Mexico Court of Appeals has held a collateral attack could render a judgment previously issued as void and, therefore, a party is not precluded by waiver, estoppel, or laches from raising the issue:

> Because a void judgment has no effect on the parties, or their respective interests, "[t]here is no time limitation on asserting that [a] judgment is void." This is true when a judgment is challenged under Rule 1-060(B) NMRA. It is also true when a judgment is challenged in a subsequent action. *Chavez v. Cnty. of Valencia,* 1974-NMSC-035, ¶ 15, 86 N.M. 205, 521 P.2d 1154 ("An attack on subject matter jurisdiction may be made at any time in the proceedings. It may be made for the first time upon appeal. Or it may be made by a collateral attack in the same or other proceedings long after the judgment has been entered.")
> The general rule is that judgments may be challenged directly or challenged collaterally in a subsequent action, where the challenge is based on an asserted lack of jurisdiction. This rule has been applied regardless of whether the challenge is based on an alleged lack of personal or subject matter jurisdiction. This rule also seems to apply regardless of whether the party making the attack was a party to the original action or a successor in interest.

***Phx. Funding, LLC v. Aurora Loan Servs., LLC***, 2016-NMCA-010, ¶10 (N.M. App., 2015)(internal citations omitted).

Furthermore, the Motion to Dismiss for Lack of Jurisdiction should be granted based on the issues raised in the Motion, all of which were undisputed by Petitioner in its response to the first Motion and Petitioner did not file a response to the Motion for Reconsideration. Specifically, the Petitioner has not denied that:

(1) The PELRB is a creature of statute and, therefore, only has the authority granted to it by statute. ***Southern Union Gas Co. v. New Mexico Public Utility Com'n,*** 1997-NMSC-56, ¶10, 124 N.M. 176, 947 P.2d 133 ("Statutes create administrative

agencies, and agencies are limited to the power and authority that is expressly granted and necessarily implied by statute"), *citing,* ***United Water N.M., Inc. v. New Mexico Pub. Util. Comm'n,*** 1996-NMSC-007, ¶8, 121 N.M. 272, 910 P.2d 906 (Where a question of agency jurisdiction is involved, courts "will accord 'little deference' to the agency's determination of its own jurisdiction."); ***Pub. Serv. Co. of New Mexico v. New Mexico Envtl. Imp. Bd.***, 1976-NMCA-039, ¶7, 89 N.M. 223, 226, 549 P.2d 638, 641 ("Administrative bodies are the creatures of statutes. As such they have no common law or inherent powers and can act only as to those matters which are within the scope of the authority delegated to them."); *see also,* ***El Dorado at Santa Fe, Inc. v. Board of County Comm'rs,*** 1976-NMSC-029, ¶6, 89 N.M. 313, 551 P.2d 1360 (1976)("A county is but a political subdivision of the State, and it possesses only such powers as are expressly granted to it by the Legislature…").

(2) The PELRB must ascertain whether it has "jurisdiction of parties, jurisdiction of the subject matter, and power or authority to decide the particular matters presented and the lack of either is fatal to the judgment[.]" ***Phx. Funding, LLC v. Aurora Loan Servs., LLC***, 2016-NMCA-010, ¶8 (N.M. App., 2015).

(3) The PELRB's powers and duties are set forth in § 10-7E-9(A), which requires the PELRB to promulgate rules to allow it to perform its functions of: 1) designating appropriate bargaining units; 2) selecting, certifying, and decertifying exclusive representatives; and, 3) hearing and determining prohibited practice charges.

(4) Petitioner failed to demonstrate majority support in accordance with PEBA, PELRB rules, and the Open Meetings Act, as set forth below, and as demonstrated by the PELRB's files.

(5) Positions cannot be accreted into a grandfathered bargaining unit, therefore, the positions Petitioner claims were accreted in PELRB 357-04, could not have been accreted. 11.21.2.37(A) NMAC.

(6) The purported accretion in PELRB No. 357-04 was not approved by the PELRB.[5] Rather, Petitioner asserted both in its Response Brief and in its case in chief that the State and AFSCME agreed to add positions to the bargaining unit, and agreed the portion of the bargaining unit under the Human Services Department was "wall-to-wall". (Response Brief of 2/17/16 at ¶9; testimony of Petitioner's witness, Rob Trombley, Hearing of 2/18/16, 44:04 – 44:14; 45:16 – 45:43).

(7) Inasmuch as positions cannot be accreted into a grandfathered bargaining unit, the instant Petition for Unit Clarification must be dismissed. 11.21.2.37(A).

Significantly, the failure to respond to contentions made in a brief constitutes a concession on the matter. ***Delta Automatic Sys., Inc. v. Bingham***, 1999-NMCA-029, ¶ 31, 126 N.M. 717, 974 P.2d 1174, 1181; ***Mexico v. New Mexico Env't Dep't.,*** 2015-NMCA-58, ¶26. In addition, Petitioner did not file a Response Brief to Respondent Motion for Reconsideration, thereby Petitioner conceded each of the arguments delineated by Respondent therein. ***State v. Templeton,*** 2007-NMCA-108, ¶22, 142 N.M. 369, 165 P.3d 1145 (failure to file a reply brief attacking or otherwise controverting the State's contentions constitutes concession). Also, Petitioner asserted that it was not alleging a change in circumstances, which is the necessary basis for a unit clarification petition, except when a merger or realignment is being sought. 11.21.2.37 NMAC. By its failure to refute these facts, Petitioner has already conceded the

[5] A review of the file in PELRB No. 357-04, the PELRB's decisional page, and PELRB agendas and minutes indicate the June 11, 2008, purported certification was not presented to the PELRB for approval.

PELRB lacks jurisdiction over Petitioner as a purported bargaining agent. The PELRB's lack of both personal and subject matter jurisdiction requires the Petition be dismissed.

2. **The PELRB Lacks Jurisdiction Over the Petition and Petitioner Because a Question Concerning Representation Does Exist inasmuch as Board Review is Required, Not Just on an Appeal, and the Open Meetings Act was Violated.**

The Reversed Decision issued by the Executive Director on February 19, 2016, states the following:

> Having taken administrative notice of the Board's own records regarding the absence of a Board meeting at which the current existing unit was established I held that there was a defect in approving majority support among those in that unit and therefore, a question of representation existed that required by [sic] dismissal of the claim as stated. My decision granting a directed verdict overlooked subsection (D) of NMAC 11.21.2.37:
> "D. A director or hearing examiner determination on a unit clarification petition shall be appealable to the board under the same procedures set forth in Section 22, above."
> Similarly, NMAC 11.21.2.35 providing for amendment of certification provides for Board review upon the filing of an appeal. NMAC 11.21.2.38 governing accretions, refers back to the procedures for a unit clarification cited above. In each of these instances it is the director who certifies the unit and the Board reviews only upon the proper filing of an appeal. Accordingly, my dismissal was based on the incorrect premise that the absence of Board meeting minutes approving the current existing unit was necessarily a defect in approving majority support. I am therefore withdrawing my decision granting a directed verdict in this case as having been improvidently granted…

The Reversed Decision is flawed in several respects, which will be addressed individually below:

A. **The Purported Certification Pre-Dates the Rules on Certification and Unit Clarification.**

The Reversed Decision appears to confuse the two cases of PELRB: (1) Case No. 336-04, which purportedly certified Petitioner as having demonstrated majority support in 2003, prior to the PELRB's first meeting in September 2003, and prior to implementation of the PELRB's

Rules in March 2004; and, (2) Case No. 357-04, in which a unit clarification petition was filed in 2004, and a purported certification accreting positions and declaring some agencies as "wall-to-wall" was issued in a letter in 2008 by the PELRB's Executive Director.

The purported "Certification of Majority Support" in PELRB No. 336-04 occurred on August 7, 2003, before the effective date of the PELRB's rules on March 15, 2004. Therefore, the Reversed Decision's requirement that the certification had to be appealed in accordance with NMAC 11.21.2.37, which did not exist at the time of the purported certification, is impossible. Additionally, the Reversed Decision's assertion that the demonstration of ***majority support*** required under PEBA II should have been governed by 11.21.2.37 NMAC is inaccurate because NMAC 11.21.2.37 only applies to ***unit clarification*** petitions. In other words, even if the PELRB's rules had been in effect in 2003, the ***unit clarification*** procedures are completely irrelevant to certification of majority support procedures, and issues regarding whether ***majority support*** was established.

**B. The purported Certification of Majority Support was Issued by Board Members, Not By a Director.**

The Reversed Decision refers to PELRB rules on unit clarification, amendment of certification, and accretions. 11.21.2.37, 11.21.2.35, and 11.21.2.38 NMAC. None of these rules apply to a demonstration of majority support, which is the issue raised by Respondent with regard to PELRB No. 336-04. Furthermore, the Reversed Decision states that in each of the situations of unit clarification, amendment of certification, and accretions, "it is the director who certifies the unit and the Board reviews only upon the proper filing of an appeal." Accordingly, the Reversed Decision states dismissal of the Petition was inappropriate because it presumed a defect in not having Board minutes of approving the certification of majority support. This logic is in error because it states the director can certify a unit and, then applies that argument to the

certification of majority support in 2003. The Reversed Decision fails to recognize the purported "Certification of Majority Support" was not issued by a director. Rather, the certification was issued by two (2) members of the PELRB: Joe Lang and Linda Vanzi. Therefore, finding that a director can issue a certification, which Respondent refutes, is irrelevant because a director did not issue the certification.

Also, this portion of the Reversed Decision attempts to apply provisions contained within the PELRB's rules on accretion, unit clarification, and amendment of certification. None of the PELRB's rules of accretion, unit clarification, or amendment of certification apply to a demonstration of majority support by an incumbent. The rule for demonstration of majority support by an incumbent is contained in 11.21.2.36. Further, the PELRB's rules were adopted on March 15, 2004 and cannot apply retroactively to the action of certifying majority support. The certification should not have occurred in 2003 inasmuch as PEBA only conveyed certification power upon the PELRB, and required the PELRB to adopt rules to carry out its duties. Therefore, the certification of majority support should have been held captive, just as all other filings with the PELRB were held captive, until the PELRB's rules became effective.

### C. The Purported Certification Action Violated the OMA, PEBA, and PELRB Rules.

The Reversed Decision fails to recognize the violation of the Open Meetings Act, PEBA, and PELRB Rules codified in the NMAC that occurred in the issuance of the "Certification of Majority Support" in 2003. The action taken by two (2) members of the PELRB was within the scope of their authority as PELRB members to certify a bargaining unit and exclusive representative. §10-7E-9(A). However, that same section of PEBA required the PELRB promulgate rules of procedure to effectuate the Board's duties. ***Id.*** The PELRB appeared to recognize the requirement to adopt rules before accepting and acting upon any filings based upon

its minutes. *See*, January 6, 2004 PELRB minutes at ¶8. The PELRB did not promulgate its rules until March 15, 2004, and did not accept filings with the PELRB until that date. *See*, March 2, 2004 PELRB minutes at ¶7. Based on the sole and single document contained in PELRB No. 336-04, the action to certify majority support in 2003 was taken by two (2) members of the PELRB on August 7, 2003, prior to the effective date of the PELRB's Rules, and prior to the first meeting of the PELRB on September 3, 2003. Two members of the PELRB constitute a quorum and those two members were "taking action within the authority" of the board granted under PEBA, which pursuant to the Open Meetings Act (OMA), must occur in an open and publicly noticed meeting. §10-15-1(B). An action of a board not taken in a public and properly noticed meeting is invalid. §10-15-3(A). There are no exceptions in the OMA that would allow for the PELRB to meet and take action in private, even if the parties agreed to such. §10-15-3(H). This is likely because any agreement by the parties would deny the employees of the opportunity to be informed of a meeting and the action to be taken, which is contrary to the purpose of the OMA. §10-15-1(A). Ignoring the legal requirements of the OMA negatively affects the employees because it deprived them of being an "informed electorate", and deprived them of the "greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." ***Id.***

The letter Decision in PELRB No. 122-15 asserts the contentions raised in the Motion to Dismiss for Lack of Jurisdiction and assertions regarding violation of the Open Meetings Act are "based on alleged defects in the Board's recordkeeping from 2004". (Letter Decision in PELRB No. 122-15 at p. 2). The allegations are not that the PELRB failed to keep adequate records, but that the PELRB did not take action in a publicly-noticed meeting in PELRB No. 336-04, as required by the Open Meetings Act, thereby rendering the certification of majority support

invalid. §10-15-3(A)(an action of a board not taken in a public and properly noticed meeting is invalid). The letter Decision asserts an action of a board is "presumed to have been taken or made at a meeting held in accordance with the Open Meetings Act", because Respondent is arguing "based on the absence of evidence". (Letter Decision in PELRB No. 122-15 at p. 2; Letter Decision of 1/21/16 at p. 5). It is unreasonable to conclude Respondent must present greater evidence that a meeting did not occur than what Respondent has provided: 1) the purported Certification of Majority Support in PELRB No. 336-04 is dated August 7, 2003; 2) the first publicly-noticed meeting of the PELRB did not occur until September 3, 2003; 3) the PELRB determined it would not accept any filings for action until after its rules were adopted (*See,* January 6, 2004 minutes at ¶8; March 2, 2004 minutes at ¶7).; and the PELRB rules became effective on March 15, 2004.

Pursuant to the Records Retention Act, the PELRB is responsible for the "creation, maintenance, safekeeping, and preservation of public records", for annually appointing a chief records officer responsible for the establishment and maintenance of a centralized tracking system, for developing policies and procedures pertaining to records management, and for properly retaining records in accordance with law. 11.21.1.30 NMAC (requiring the director to reproduce multiple copies of Board decision, classify and index the decision, make tables and indices of the decisions available to the public); 1.21.2.452 NMAC (permanent retention of records of meetings of statutory and policy making bodies); 1.21.2.490 NMAC (permanent retention of administrative rules); 1.21.2.615 NMAC (permanent retention of case files); 1.13.12.8 NMAC (designation of chief records officer); 1.13.12.9 NMAC (chief records officer's duties). In citing to these provisions of the Records Retention Act, Respondent is not asserting defects in the PELRB's recordkeeping but, rather, that the official records of the PELRB's

actions and cases are those maintained by the PELRB. A review of the file in PELRB No. 336-04, the PELRB's decisional page, and PELRB agendas and minutes indicate the certification of majority support was not acted upon or approved by the PELRB during an official, publicly-noticed meeting of the Board. Because a quorum of the PELRB took action to certify majority support, but the PELRB records indicate that it was not done in an open meeting of the Board, the action is in contravention of the Open Meetings Act and, therefore, is invalid.

Even assuming, despite lack of any documented written agreement, the State of New Mexico and the Union had agreed to an alternate process for the demonstration of majority support, the outcome of such process still requires certification to be issued by the PELRB. The Legislature granted sole authority to the PELRB to certify exclusive representatives based on the results of a card count or an election. §10-7E-9(A) and 10-7E-15. PEBA does not provide for the delegation of this authority. Such lack of delegation is supported by the case law developed under the NLRA. The NLRB has held that while it will recognize procedures for selecting an exclusive representative of a bargaining unit that differ from the NLRB's procedures, it must still ensure such procedures provide for due process before the NLRB issues a certification:

> Where the parties have voluntarily submitted the issue, the Board will respect the tribunal's decision even if rendered under standards in variance from the Board's subject only to fundamental considerations of due process.
> Since a union's majority status may be established by means other than a Board election, the Board's policy of crediting the results of state-conducted elections that satisfy the requirements of due process does not violate or offend the governing statute.
>
> Thus the statute requires the Board to exercise its discretion as to an appropriate unit in each and every case. This responsibility can neither be delegated to nor discharged by a state agency where Congress has sought to create a national labor policy by vesting this discretion in a national board. Here, however, the Board abdicated its required duty by accepting the PLRB determination

> without exercising its own mandated discretion. In so doing the Board "overstep(ped) the law."
> In this connection we observe that the Board in discussing the challenged election in its September 17, 1975 decision, said only that it had found "no basis in due-process standards and the policies embedded in the Act to warrant a refusal by this Board to recognize the authority of the certification of the PLRB in this proceeding." App. at 312. Such a conclusory statement unsupported by factual findings and without articulation of its reasons is insufficient to satisfy us that the state election was consistent with due process standards and otherwise complied with the requirements of the NLRA.

***Memorial Hosp. of Roxborough v. N.L.R.B.,*** 545 F.2d 351, 359 - 362 (C.A. 3rd , 1976). The NLRB recognized Congress only granted authority to the NLRB to issue certifications in the private sector, limiting this power to one body to ensure due process was afforded to all affected parties. The Court found the NLRB, in accepting a state agency's process, violated the law by failing to ensure due process standards and compliance with the NLRA before issuing a certification. The PELRB would similarly be violating the law if it ignored due process requirements to ensure the employees were informed, ignored the violations of PEBA and the OMA, and accepted a certification not properly issued by the PELRB in PELRB No. 336-04. Certifications are exceptionally important actions taken by the PELRB that affect the employment terms of employees for an indefinite number of years. The NLRB has recognized the importance of certifications and the weight they hold:

> Certification is the "final and effective action" and the "conclusive act of decision" in the Board's determination of the parties for collective bargaining. The statutory purpose of the proceedings "is to provide a hearing in which interested parties shall have full and adequate opportunity to present their objections before the Board concludes its investigation and makes its effective determination by the order of certification." The Board's certification procedures are generally binding on both employers and employees.
> ...Courts accord considerable deference to the Board's certification decisions. This deference imposes upon the Board a duty to consider certifications carefully.

> ...In American Air, the Board refused to accord weight to the certification proceedings because they "are intended principally to determine the interests of employees...." We believe the proceedings affect important employer interests as well, and for that reason the certification should be binding on all parties: Board, union, employee, and employer.

***Central Transport, Inc. v. N.L.R.B.,*** 997 F.2d 1180, 1184-1187 (C.A. 7th Cir., 1993)(internal citations omitted). Therefore, in PELRB Nos. 336-04, 357-04, and 312-09, the lack of procedures which would accord employees a "full and adequate opportunity" to be informed and present their views is contrary to the intent and plain language of PEBA and the required promulgation of rules of procedure. In addition, the failure to have the PELRB take action on certification in these cases is contrary to the Legislature's delegation of such authority only to the PELRB itself.

3. **The Potential Impact of the Instant Matter Does not Excuse Violations of the Law.**

To Respondent's knowledge, the issues in this case are a matter of first impression before the PELRB. No case law exists in New Mexico with regard to certifications of incumbent exclusive representatives and incumbent bargaining units that failed to follow PEBA, PELRB Rules, and the Open Meetings Act. Respondent recognizes the potential impact based upon possible action of the PELRB to correct the violations that have occurred. As stated in the letter Decision in PELRB No. 122-15, incorporated by reference, the Executive Director noted "I must be mindful of the injustice and harm that could result if I were to attempt to 'turn back the hands of time' in this case by invalidating a bargaining relationship that has existed between these parties for a number of years." (Letter Decision in PELRB No. 122-15 at p. 3) *citing,* ***AFSCME v. Stratton,*** 769 P.2d 76, 108 N.M. 163 (N.M. S. Ct. 1989). The case of ***AFSCME v. Stratton*** involved the determination of whether collective bargaining in the public sector was legal absent specific statutory authorization. The Court determined collective bargaining was legal, provided

the collective bargaining agreements did not conflict with the State Personnel Act, the State Personnel Board's Rules for Labor-Management Relations, the Mileage and Per Diem Act, an in-place merit system, the legislature's appropriation power, or other governmental entity's rules regarding labor relations. ***Id.*** The Supreme Court, in being mindful of the existence of collective bargaining in the public sector in New Mexico for a number of years, concluded that while the act of collectively bargaining was not illegal, the agreement produced could not conflict with laws or rules applicable to the parties. Therefore, while correcting the violations that occurred in prior cases may impact the parties, the PELRB and the parties cannot knowingly disregard the violations or continue to violate the law.

The fact that the parties entered into collective bargaining agreements over the years by relying upon faulty actions is not excusable neglect relieving the parties of the due process required and appropriate action necessary to comply with the law. The NLRB has addressed this issue in regard to an employer that recognized a union and engaged in bargaining on the mistaken belief that the union had a majority support of the employees in the bargaining unit. ***Intl. Ladies' Garment Workers' Union,*** 366 U,S. 731 (1961). The NLRB held the employer violated Sec. 8(A)(1), interfering with, restraining, or coercing employees in the exercise of their rights under the NLRA, and Sec. 8(A)(2), giving unlawful support to a labor organization. ***Id.*** The NLRB also found the union in violation of Sec. 8(B)(1)(A), by the union accepting exclusive bargaining authority which thereby interfered with, restrained, or coerced employees in the exercise of their rights. ***Id.*** Therefore, while the employer and union may have been mistaken and negligent, rather than intentional, in violating the law, it did not excuse the violation or alter the process that had to be followed. Similarly, while the State of New Mexico, AFSCME, and the PELRB may have executed the process with good intentions followed by

negotiations, such facts would not counteract the requirements set forth in PEBA, the NMAC, and/or the OMA.

4. **If the PELRB Determines it has Jurisdiction, the Petition Must be Denied because Unit Clarification Cannot be Applied to Grandfathered Bargaining Units; and, Even if it was Determined that a Unit Clarification Petition Could be Filed Contrary to PEBA, Petitioner was Adamant its Petition does not Allege Changed Circumstances.**

**A. Accretion into Grandfathered bargaining units is not allowed.**

As previously stated, the PELRB only has the authority granted to it by PEBA, and the PELRB was required to promulgate rules pursuant to that authority. §10-7E-9(A). The PELRB's rules prohibit grandfathered bargaining units from being subject to a petition for unit clarification. 11.21.2.37(A) NMAC. Rule 11.21.2.37(A) specifically states a petition for unit clarification may be filed "[e]xcept as provided in Section 24(A) of the Act", which is the section providing for grandfathered bargaining units. It is undisputed by the parties that the bargaining unit was "established prior to July 1, 1999" and "must continue to be recognized as an appropriate unit". *See*, PHO at Stipulation contained in ¶ j, concerning PELRB Case No. CP 71-93(S). Under both PEBA I and PEBA II, grandfathered bargaining units could continue to be recognized pursuant to certain requirements. §§10-7D-24, NMSA 1992 and 10-7E-24, NMSA 2003. Under PEBA I a unit clarification petition could be filed even with a grandfathered bargaining unit. 11.21.2.30(A) NMAC (repealed). Conversely, under PEBA II, the language in the PELRB rules was amended to specifically prohibit unit clarification petitions from being filed concerning a grandfathered bargaining unit. 11.21.2.37(A) NMAC. An accretion or unit clarification petition is prohibited for grandfathered bargaining units and, therefore, the purported petition in PELRB No. 357-04 should have been dismissed and the instant Petition

must also be dismissed.[6] The only available avenue for grandfathered bargaining units is a Representation Petition. ***Silver City Professional Firefighters, IAFF Local 2430 v. Town of Silver City,*** 2-PELRB-2008 (Hearing Examiner's Report in PELRB 308-07 at p.30); ***NMCPSO v. Rio Rancho Police Department,*** 4-PELRB-2009.

The letter Decision in PELRB No. 122-15, incorporated by reference, asserts Respondent has misread the PELRB's decisions in ***Silver City Professional Firefighters, IAFF Local 2430 v. Town of Silver City,*** 2-PELRB-2008 (Hearing Examiner's Report in PELRB 308-07) and ***NMCPSO v. Rio Rancho Police Department,*** 4-PELRB-2009. Respondent contests this finding. The PELRB in ***Silver City*** dismissed the Petition for Unit Clarification inasmuch as the petitioner was seeking to accrete greater than ten percent (10%) of the existing bargaining unit, which requires the filing of a representation petition pursuant to 11.21.2.37(C). However, the Hearing Examiner concluded the PELRB's rules prohibit a unit clarification petition for grandfathered bargaining units, leaving only the option of filing a representation petition. Specifically, the Hearing Officer concluded:

> As noted, the Instant Petition was filed as a Petition for Clarification. PEBA's clarification rule requires a sufficient change in circumstances surrounding the creation of the original bargaining unit to warrant a change in the scope and description of the bargaining unit. *See* PELRB Rule 11.21.2.37(A). It also excludes grandfathered bargaining units from its application. *Id.* (allowing for unit clarification as warranted, "[e]xcept as provided in Section 24(A)"); *see also Santa Fe Police Officers Association and City of Santa Fe,* PELRB Case No. 325-07 (May 30, 2007 Hearing Examiner Decision at 3-4.
> ...The second issue was whether the grandfathered Firefighter bargaining unit could be clarified as requested under PELRB Rule 11.21.2.37(A), assuming the required change in circumstances. Notwithstanding the language of the rule, it is difficult to imagine

[6] The file in PELRB No. 357-04 lacks a complete Petition with attached exhibits, Notice of Filing of the Petition, showing of interest, and clear records of actions taken by the Executive Director. In addition, the file contains information that would indicate greater than ten (10%) of the grandfathered bargaining unit was being sought for accretion, which would require an election and dismissal of the petition pursuant to 11.21.2.38(C) NMAC.

> that PELRB Rules would forbid the subsequent accretion of non-supervisory firefighters to a grandfathered unit if they shared a community of interest with the rest of the firefighters and were only excluded by operation of a "supervisor" definition that is no longer effective. However, not that the representation hearing has concluded, it has become clear that there is a third issue, analysis of which is dispositive to this Petition and also sheds further light on the second issue.
>
> ...When the issue is analyzed from this perspective, the true meaning of PELRB Rule 11.21.2.37(A) and the apparent prohibition against clarifying the scope or description of grandfathered bargaining units becomes clear. PELRB Rule 11.21.2.37(A) does not stand for the proposition that a grandfathered bargaining unit must remain forever static. Rather is reflects and implements the general policy, as does PELRB Rule 11.21.2.38(C), that significantly modifying an existing bargaining unit should normally be done ***through the election process*** (including card counts) and upon a demonstration of majority support, rather than upon a mere showing of thirty percent (30%) interest.
>
> The only different is that the PELRB has determined in Rule 11.21.2.37(A) that any modification to the scope or description of a grandfathered bargaining unit must always be done upon a hearing to establish continued appropriateness, and upon demonstration of majority support. The difference, moreover, is entirely reasonable, because under § 24 of PEBA, grandfathered bargaining units are legislatively deemed to be appropriate and the grandfathered exclusive bargaining agent is legislatively deemed to continue to be recognized as such, within limits. Accordingly, it is reasonable to limit the grandfathered status of bargaining units and exclusive bargaining agents to comport with other provisions of PEBA, such as §13 (requiring appropriate bargaining units) and §14 (requiring some kind of demonstration of majority support as the norm).

***Silver City,*** 2-PELRB-2008 (Hearing Examiner's Report in PELRB No. 308-07 at pp. 30-31 and 34-35)(emphasis added)(internal citation omitted). The Hearing Examiner held the PELRB's rules prohibiting a unit clarification petition in grandfathered bargaining units was understood inasmuch as a representation petition for an election was the appropriate procedure. The letter Decision recognized and cited the decisions in both ***Silver City*** and ***Rio Rancho*** as requiring the

election process rather the unit clarification process. (Letter Decision in PELRB No. 122-15 at p. 4).

The letter Decision appears to infer the Hearing Examiner "changed her mind" with regard to her holding in ***Silver City***, which does not comport with the Hearing Examiner's conclusions. (Letter Decision in PELRB No. 122-15 at p. 4). Rather, the Hearing Examiner had previously concluded in a third case, ***Santa Fe Police Officer's Association and City of Santa Fe***, that accretion to grandfathered bargaining units could not occur through any means in order to "protect the parties' expectancy interests, and also prevents grandfathered unit from becoming even more potentially inappropriate." ***NMCPSO v. Rio Rancho Police Department,*** 4-PELRB-2009 (Hearing Examiner's Report at pp. 50-51). Rather than changing her conclusion reached in ***Silver City***, the Hearing Examiner stated she "reaffirms that view today, and concludes that grandfathered units may be clarified *provided* the clarification is otherwise appropriate under PEBA standards, and any accretion is done so ***by election*** rather than merely a showing of thirty percent (30%) showing of interest as ordinarily contemplated under NMAC 11.21.2.38(B)." ***Id.*** at p. 51. The PELRB's holdings support Respondent's position that the Petition must be dismissed and the only available avenue to Petitioner is a representation petition.

**B. No Changed Circumstances.**

In addition, Petitioner's insistence that it is not alleging changed circumstances results in Petitioner failing to meet the requirements for a unit clarification petition. Rule 11.21.2.37 NMAC provides for the filing of a petition for unit clarification in the following circumstances:

1) Circumstances surrounding the creation of an existing collective bargaining unit are alleged to have changed sufficiently to warrant a change in the scope and description of that unit; or

2) A merger or realignment of previously existing bargaining units represented by the same labor organization is appropriate.

It is undisputed Petitioner is not seeking a merger or realignment. More importantly, Petitioner clearly stated in its Response Brief, at the outset of the hearing when Respondent's counsel requested clarification of whether changed circumstances was being alleged, in Petitioner's case in chief, and in Petitioner's response to the Motion for Directed Verdict, that Petitioner is not alleging changed circumstances. Therefore, if neither of the bases for a Petition for unit clarification exist under Rule 11.21.2.37, then the PELRB lacks jurisdiction. ***Union Electric Co.,*** 217 NLRB No. 124, 666-667 (1975)(unit clarification is appropriate for a newly established displaced classification or recent, substantial changes); ***Bethlehem Steel,*** 329 NLRB No. 32, 243 (1999)(NLRB refuses to entertain petition that seeks to include positions historically excluded and that have not seen substantial changes); *see also,* ***Batesville Casket Co.,*** 283 NLRB No. 118 (1987)(dismissing a unit clarification petition where petitioner failed to show a substantial change in operations and holding a unit clarification process is not appropriate to upset established practice of excluding classifications).

Petitioner's insistence that changed circumstances do not exist and are not applicable is reiterated multiple times in its pleadings and statements to the Executive Director. The Amended Petition for Clarification states it seeks an order "finding that the 'Wall to Wall' unit at the Human Services Department includes employees in the position of Attorney within the Child Support Enforcement Division." (Amended Petition at p. 1). The Amended Petition further states "Petitioner seeks to clarify that the existing 'Wall to Wall' unit includes employees in the position of Attorney". (Amended Petition at ¶2). Petitioner asserts the bargaining unit is covered by a collective bargaining agreement. (Amended Petition at p. 1 and at ¶8). The

Amended Petition alleges the "requested clarification is warranted because AFSCME recently turned in dues check-off authorizations for some of the CSED attorneys working for Respondent, and Respondent returned them claiming that they were not a part of the 'Wall to Wall' bargaining unit." (Amended Petition at ¶4). Petitioner stated "the question is not whether Petitioner is seeking to add a classification of employees... but rather whether members of a 'wall to wall' portion of the bargaining unit in HSD may assert their rights under the contract and submit requests for dues deductions." (Petitioner's Response Brief at ¶9). In addition to these assertions in the Petition, Petitioner further clarified during the preliminary matters at the outset of the hearing that Petitioner was "not trying to bring anyone into the bargaining unit so those unit clarification arguments and case law don't apply." (Audio of Hearing on 2/18/16 at 7:52 – 7:59). For Petitioner to claim it thought attorneys have been included in the bargaining unit since the accretion in 2008 is incredulous.[7] Since 2008, the State of New Mexico has provided Petitioner a listing of all bargaining unit employees and their classifications at least four (4) times per year, pursuant to the requirements contained in Article 8 of the collective bargaining agreement. (Exhibit A hereto). In addition, every pay period, which would equate to twenty-six (26) times per year, each year since 2008, the State of New Mexico has provided Petitioner a listing of every bargaining unit employee itemizing either their membership dues deduction or fair share fees deduction taken in the pay period and transmitted in payment to the Union in accordance with Article 10 of the collective bargaining agreement. (Exhibit B hereto). Therefore, between 2008 and the date of filing of the Amended Petition, Petitioner had over two hundred (200) reports that would indicate attorneys in Human Services Department have not been included in the bargaining unit.

[7] Respondent maintains the "accretion" through a unit clarification petition in 2008 should have been dismissed under 11.21.2.37(A). In addition, any action taken in said petition was invalid as having failed to comply with PEBA and PELRB Rules.

Petitioner vehemently asserted during the hearing that its unit clarification petition was not the "typical" petition and, therefore, Petitioner did not have to present changed circumstances since it was alleging the attorneys have been in the bargaining unit since 2008. Respondent refutes this position as contrary to the PELRB's rules requiring a unit clarification only under the auspices of changed circumstances or merger/realignment. 11.21.2.37 NMAC. Petitioner also asserted, though, that circumstances had changed because the attorneys "were once stationed in the General Counsel's Office but were moved to Child Support Enforcement Division, although they have recently been temporarily relocated to the General Counsel's Office after the resignation of the CSED Director." (Pre-Hearing Order at p. 2, Petitioner's Contested Facts). Regardless, Petitioner's witnesses both testified contrary to Petitioner's assertion in its Pre-Hearing Order. Petitioner's witness Mr. Blas Villanueva, when asked on direct examination whether his duties have changed in the two and one half (2 ½) years that he has been as CSED responded stating, no, the duties have stayed the same. When asked if his job location ever changed, Mr. Villanueva also answered that it has not. Similarly, Petitioner's witness Becky Jiron also testified that she has always reported to a managing or supervising attorney in her office and her office location has not changed.

Moreover, even if Petitioner could have shown the attorneys' offices were relocated, such would not amount to a changed circumstance sufficient to support a unit clarification petition. The National Labor Relations Board (NLRB) has long addressed the requirements for a unit clarification petition, and case law developed under the National Labor Relations Act (NLRA) and decided by the NLRB, should be used for guidance. ***Las Cruces Prof'l Fire Fighters v. City of Las Cruces***, 1997-NMCA-044, 123 NM 239 (emphasis added); see also, ***Regents of UNM v. NM Federation of Teachers***, 1998-NMSC-020, ¶18, 125 NM 401, 408. The NLRB has set

similar requirements as those under PEBA and the PELRB Rules, including a showing of substantial changes in the employer's operations, or in the jobs themselves, to process a petition for unit clarification. The NLRB has repeatedly held in accordance with the following:

> Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category – excluded or included – that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.

***Union Electric Co.***, 217 NLRB No. 124, 666-667 (1975).

Similar to the instant matter involving HSD and AFSCME, the positions being sought for accretion into the bargaining unit in ***Union Electric*** had existed for years and had never been in the bargaining unit. The NLRB explained:

> Here, most of the classifications or jobs sought by the Petitioners have been excluded from their units for substantial periods of time – in some instances for as long as 20 years. And with respect to Local 1455 those it seeks to add to its unit include not only historically excluded individuals but, as it concedes, also a "substantial number of classifications" specifically excluded by certain clauses of its past and present agreements with the Employer. Consequently, we are faced for the most part with claims by the Petitioners that cannot appropriately be resolved in a unit clarification proceeding.

***Id.*** "[B]ecause the petition deals with positions that have historically been excluded from the bargaining unit, and have not been shown to have undergone recent substantial changes, it is a petition that the Board would refuse to entertain even if the existing collective-bargaining

agreement were about to expire." ***Bethlehem Steel***, 329 NLRB No. 32, 243 (1999) (NLRB refuses to entertain petition that seeks to include positions historically excluded and that have not seen substantial changes); *see also*, ***Batesville Casket Co.***, 283 NLRB No. 118 (1987) (dismissing a unit clarification petition where petitioner failed to show a substantial change in operations, and holding a unit clarification process is not appropriate to upset established practice of excluding classifications). Therefore, in addition to the arguments set forth above regarding grandfathered bargaining units, a directed verdict should also be granted for Petitioner's failure to establish changed circumstances necessary for a unit clarification.

3. **The Determination that Board Review Takes Place Only on Appeal is in Contravention of Established Case Law.**

The Reversed Decision, dated February 19, 2016, refers to PELRB rules for unit clarification, accretions, and amendment of certifications, which is wholly irrelevant to the issue of demonstration of ***majority support*** in PELRB No. 336-04; and, as mentioned above, the action taken by the two (2) PELRB members took place *prior* to enactment of the cited PELRB rules. Also, the Reversed Decision is contrary to OMA's requirements that the PELRB, in taking action within its authority, such as certifying majority support of an exclusive representative, must occur in a publicly-noticed open meeting. The Reversed Decision does not address these impediments to processing the instant Petition. Instead, the Reversed Decision is only premised upon a finding that a director can certify a unit, and the Board only reviews the certification upon the filing of an appeal, which finding is not supported by the PELRB's rules or established case law under PEBA. As cited in the Reversed Decision, the PELRB Rule regarding "Unit Clarification" states a determination on a unit clarification is appealable to the Board members

"under the same procedures set forth in Section 22".[8] 11.21.2.37(D) NMAC. The Unit Clarification Rule refers to the entirety of Section 22, not just a portion of Section 22.

Section 22 first provides a party has ten (10) days to request Board review of Hearing Examiner Reports and Director Decisions, and sets forth the required contents of the request. 11.21.2.22(A) NMAC. Next, Section 22 allows any other party to file a response to the request for review. 11.21.2.22(B) NMAC. Third, Section 22 states "[w]hether or not a party has filed a request for review, the board, within sixty (60) days, ***shall*** review any recommended disposition regarding the scope of a bargaining unit made by the director or a hearing examiner." 11.21.2.22(C) NMAC (emphasis added). The PELRB has consistently held this provision of its rules ***requires*** the PELRB to review the Director's decisions on all certifications, even if neither party has appealed. ***Local 1193, AFSCME and Taos County,*** 1-PELRB-4 (certification of incumbent)[9]; ***Local 187, United Steelworkers of America and City of Carlsbad,*** 1-PELRB-5 (certification of incumbent); ***CWA and State of New Mexico,*** 1-PELRB-8; ***CWA and Dona Ana County,*** 1-PELRB-16; *See also,* ***NEA-NM and Lake Arthur Municipal Schools,*** 08-PELRB-2011 (certification of representative); ***NEA-NM and IUOE Local 953 and Central Consol. School District,*** 10-PELRB-2012 (certification of representative); ***McFadden and CWA Local 7911,*** 11-PELRB-2012 (decertification); ***NEA-NM and Silver Consolidated Schools,*** 21-PELRB-2012 (certification of incumbent bargaining status); ***NMCPSO/CWA Local 7911 and Town of Bernalillo,*** 23-PELRB-2012 (failure to attain 40% voter turnout in a representation election); ***AFSCME and Grant County Regional Dispatch Authority,*** 24-PELRB-2012 (certification of voluntary recognition); ***NEA-NM and Alamogordo Mun. School Dist.,*** 40-PELRB-2012 (stipulated accretion); ***Intl. Brotherhood of Teamsters and N. Central Reg.***

[8] This same language exists in 11.21.2.35 and 11.21.2.36.

[9] Cases decided under PEBA I refer to PELRB Rule 2.15(C), which was 11.21.2.15(C), and was recodified with identical language under PEBA II as 11.21.2.22(C).

***Transit Auth.,*** 50-PELRB-2012 (certification of new bargaining unit and majority support); ***AFT NM and Cibola County Board of Educ.,*** 51-PELRB-2012 (certification of bargaining unit and voluntary recognition); ***NMCPSO and Cibola County,*** 2-PELRB-2014 and 3-PELRB-2014 (amendment of certifications). Therefore, as shown by the cases above, the Director's decisions involving representation are required to be reviewed and ruled upon by the Board. The Director's initial determination in accordance with the above-listed precedent was correct, and must be reinstated.

## CONCLUSION

While this case was initiated as a petition for unit clarification, it has undoubtedly grown into much more complex issues never anticipated by Respondent. The complexity of the issues makes it susceptible to confusion in reviewing all of the facts and legal requirements associated with the case, and the peripheral cases impacting the instant matter. The Reversed Decision incorrectly relies upon irrelevant PELRB Rules that did not exist at the time of the purported "Certification of Majority Support" in 2003, and cites to Rules inapplicable to ***majority support*** proceedings.

The Reversed Decision fails to consider the PELRB's lack of compliance with PEBA, PELRB Rules and OMA, caused by the claimed action of demonstrating majority support by two (2) PELRB members, prior to promulgating rules, in contravention to PEBA's requirements, and outside of a publicly noticed meeting. The Reversed Decision also fails to acknowledge Petitioner's insistence that it is not alleging changed circumstances, which is a requirement to proceed as a petition for unit clarification.

For the reasons stated herein, in Respondent's previously filed Motions, and in Respondent's Motions made at the hearing on February 18, 2016, Respondent respectfully requests the Executive Director rescind the Reversed Decision issued on February 19, 2016, reinstate the dismissal of the Petition entered on February 18, 2016, reverse the denial of the Motion to Dismiss for Lack of Jurisdiction as untimely, and present the issue of the question concerning representation to the PELRB at its next regularly scheduled meeting. If such request is denied, Respondent respectfully requests the Executive Director allow Respondent to proceed to the PELRB on an interlocutory appeal.

Respectfully submitted,

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**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing Motion for Reconsideration/Interlocutory Appeal was faxed and mailed, postage prepaid, this 26th day of February, 2016, to:

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Rebekah Gros

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