BEFORE THE PUBLIC EMPLOYEE
LABOR RELATIONS BOARD

COMMUNICATIONS WORKERS
OF AMERICA, LOCAL 7076,

Petitioner,

vs.

05-PELRB-2009
PELRB Case No. 301-09

WORKERS' COMPENSATION
ADMINISTRATION,

Respondent,

and

STATE PERSONNEL OFFICE,

Intervenor.

ORDER ANSWERING CERTIFIED QUESTION

THIS MATTER having come before the Public Employee Labor Relations Board upon the question certified by the hearing examiner to the Board for answer by it in this cause, and the Board, having heard argument of the parties with respect to that question and being otherwise fully advised;

IT IS HEREBY ORDERED that the Board answers the question certified to it as follows: A "confidential" employee, as defined in the Public Employee Bargaining Act and in the Board's regulations, concerns employees whose work duties are related to the formulation, determination and effectuation of a public employer's employment, collective bargaining or labor relations activities.

Martin V. Dominguez

MARTIN V. DOMINGUEZ
Chairman, PELRB
Date: 04/06/09

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 7076,

Petitioner

and

PERLB Case No. 301-09

WORKERS' COMPENSATION ADMINISTRATION,

Respondent,

and

STATE PERSONNEL OFFICE,

Intervenor.

DECISION OF HEARING EXAMINER AND CERTIFICATION OF QUESTION TO THE PELRB

This matter comes before the undersigned on a Petition for Clarification filed on January 15, 2009 by the Communication Workers of America Local 7076 (CWA or Union), concerning a Workers' Compensation Administration (WCA) Economist-A position, held by Scott Goold. The State Personnel Office (SPO) has intervened in its capacity of Contract Administrator for the State.

The parties and SPO dispute whether or not the position is excluded from the existing bargaining unit as "confidential" under PEBA, and what the correct interpretation of "confidential employee" is under PEBA. By agreement of the parties, the second question is being addressed first, so the appropriate scope of any evidentiary hearing or stipulations of fact will be known in advance. The parties have filed legal

briefs concerning the correct interpretation of "confidential employee," and those briefs are attached herein as Ex. A and Ex. B.

For the reasons stated below, the undersigned hereby concludes she is compelled under existing PELRB precedent—issued under both enactments of the Public Employee Bargaining Act, NMSA §§ 10-7E-1 *et seq.* (PEBA II) and NMSA §§ 10-7D-1 *et seq.* (PEBA I) (repealed)—to apply the PEBA definition of "confidential employee" consistent with that of the NLRB, as having a "labor nexus." However, for the reasons state below, the undersigned is, on her own motion, also simultaneously certifying the following question to the Board concerning the correct application of "confidential employee" under PEBA:

> **Question:** In amending NMAC 11.21.1(B)(6) effective 2004, and deleting a PEBA I- era limitation on the definition of "confidential employees" to concern only those work duties related to the formulation, determination and effectuation of "a public employer's employment, collective bargaining or labor relations activities," did the Board[1] intend to disavow prior PELRB precedent, *NEA-Jemez Valley & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995), or is that precedent still the governing interpretation of § 10-7E-4(G) and NMAC 11.21.1.7(B)(6), which are now identical?[2]

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[1] At the time the Board's members were Chair Joe Lang, Vice-Chair Linda Vanzi, and Member Lew Harris.

[2] *See* NMSA §§ 10-7D-1, *et seq.* (repealed) and NMAC Title 11, Chapter 21, Parts 1 through 6 (3-18-93) (repealed); *compare* NMSA §§ 10-7E-1, *et seq.* and NMAC Title 11, Chapter 21, Parts 1 through 6 (3-15-04).

DISCUSSION

I. The Parties' Positions

The Union argues that, notwithstanding differences in language between PEBA and the National Labor Relations Board (NLRB) precedent, the PELRB should continue to follow the NLRB's definition of "confidential employee," as adopted in *Jemez Valley*, which excludes certain employees on the basis of work duties related to "'managerial' functions in the field of labor relations." *See Jemez Valley*, ALJ Report at 20, *citing Ford Motor Co.*, 66 NLRB 137 (1946)

The WCA and SPO argue that the PEBA definition of confidential employee should be literally and broadly applied in all cases where the relevant work duties relate to the formulation, determination and effectuation of any "management policies." They further argue that *Jemez Valley* was wrongly decided and the 2004 amendment of NMAC 11.21.1.7(B)(6) confirms the PELRB intends to now apply the PEBA exception according to its plain language, without a "labor nexus."

II. The Comparative History of the NLRB and PEBA Exceptions

In contrast to PEBA, the National Labor Relations Act itself, 29 USC §§ 1 *et seq.*, does not include an exception for confidential employees. The exception, which dates back to 1946, was created by NLRB decisional law based on the potential conflict of interest of including in a bargaining unit an employee with access to certain confidential information. Because the exception would deprive affected employees of rights in derogation of the statute, the NLRB has narrowly applied it to only those employees who "assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations." *Ford Motor Co.*, *supra*, or who "formulate, determine,

and effectuate management policies in the field of labor relations." *See B.F. Goodrich Co.*, 115 NLRB 722 (1956) (emphasis added); *see also NLRB v. Hendricks Co. Rural Elec. Membership Corp.*, 454 U.S. 170, 190-191 (1981) and *Swift and Co.*, 129 NLRB 1391 (1961).

PEBA, first enacted effective 1993, does and has always expressly excluded "confidential employees" from its coverage. *See* § 10-7E-5 and § 10-7D-5. The exception derives, at least in part, from NLRB precedent just described. However, "confidential employee" is, and has always been, defined under PEBA as a person who "assist[s] and act[s] in a confidential capacity with respect to a person who formulates, determines and effectuates management policies." *See* § 10-7E-4(G) and § 10-7D-4(F) (emphasis added). The only difference between PEBA I and PEBA II is that the latter act now limits the exception to employees who "devote[] a majority of his [or her] time" to assisting and acting in the confidential capacity. *See* § 10-7E-4(G); *compare* § 10-7D-4(F).[3] Under both acts, however, the NLRB's "labor nexus," *Hendricks*, is conspicuously absent.

Notwithstanding the lack of an express labor nexus, the PELRB under the first PEBA promulgated rules implementing PEBA's statutory definition of "confidential employee" in a manner more consistent with the NLRB definition. Specifically, old PELRB rules defined "confidential employee" as

> an individual who assists and acts in a confidential capacity with respect to a person who formulates, determines or effectuates a public employer's employment, collective bargaining or labor relations activities, including grievance processing."

[3] This also distinguishes PEBA II from the NLRB precedent. *See Raymond Baking Co.*, 249 NLRB 1100 (1980) (under the NLRA, employees may be excluded as confidential even if a "relatively small percentage" of their time is spent on confidential duties).

See 11.21.1.7(B)(6) (3-18-93, 2-25-94) (emphasis added).

Thereafter, in 1995, the first PELRB also adopted an Administrative Law Judge (ALJ) Report that interpreted the PEBA exception to follow the NLRB definition of "confidential employee." *NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995). The ALJ had based her decision primarily on NLRB precedent, after reasoning that (a) "an employee's exposure to confidential information, other than labor relations or bargaining strategy, would not give a union the unfair advantage in collective bargaining that the confidential exclusion is designed to protect against;" and (b) without a "labor nexus," the exception would broadly exclude too many employees, contrary to public policy and logic, such as all such employees exposed to personnel, disciplinary, student, academic, patient and medical records or information. *Id.*, ALJ Report at 20-22. In the alternative, the *Jemez Valley* ALJ based her decision on the language of the 1993/1994 PELRB rule. *Id.*, ALJ Report, n. 24 and n. 26 (but citing the same rule as "Rule 1.3(f)").

The Board adopted the ALJ Report upon independent review but it did not clarify on which grounds it had adopted the Report as to confidential employees.[4] Since that time, under both PEBA I and PEBA II, criteria considered to determine whether an employee is "confidential" under PEBA have been whether the employee: is or could likely be on the employer's bargaining team; is privy to the employer's labor-management policy or bargaining strategy; has access to confidential financial or other

[4] The ALJ Report was not appealed but PELRB rules, then as now, require the Board to conduct an independent review of hearing examiner decisions concerning unit inclusion or exclusion. *Compare* NMAC 11.21.2.22(C) (3-18-93) to NMAC 11.21.22(C) (3-15-04). After adoption upon such review, the hearing examiner decision becomes binding precedent, unlike in the case of an unappealed decision on a Prohibited Practice Complaint. *See In re Communications Workers of America, Local 7911 & Dona Ana County*, 1 PELRB No. 16 (Jan. 2, 1996).

data used in bargaining; or has input or involvement in the employer's contract proposal formulation. *See, e.g., American Federation of Teachers Local 4212 and Gadsden Independent School District*, 03-PELRB-2006 (May 31, 2006), Case 309-05, adopted and attached Hearing Examiner Report, citing *Jemez Valley*.[5]

However, in continuing to apply the *Jemez Valley* decision, it has been overlooked that in 2004 the Board amended NMAC 11.21.1.7(B)(6). The rule now simply reiterates the language of § 10-7E-4(G), providing a confidential employee is "a person who devotes a majority of his time to assisting and acting in a confidential capacity with respect to a person who formulates, determines and effectuates management policies." *See* NMAC 11.21.1.7(B)(6) (3-15-04) (emphasis added). Thus, the Board has come full circle back to the language of PEBA. What is unknown, however, is the Board's intent and meaning in doing so.

III. Possible Significance of the Rule Change

In promulgating the 2004 rule, the Board may have intended to disavow *Jemez Valley* and any other interpretation that would require a "labor nexus" to exclude confidential employees. *See* Employer's and Intervenor's Brief at 5 (the omission of the 1993/1994 limiting language "shows that the PELRB has *already decided* there is no labor nexus restriction on PEBA's definition of confidential employee") (emphasis in original).

This would be consistent with "plain language" statutory construction principles discussed by the WCA and SPO in their brief. *See, e.g., U.S. Express, Inc. v. State Taxation & Revenue Dep't*, 2006-NMSC-17, ¶ 11, 139 N.M. 589 ("[i]f the meaning of a

[5] This Report also was not appealed, but was independently reviewed as required under NMAC 11.21.2.2(C) and thereafter adopted.

statute is truly clear, it is the responsibility of the judiciary [and adjudicative agencies] to apply it as written and not second guess the legislature's policy choices"). Additionally, the New Mexico Legislature is presumed to have been aware of the NLRB's 60+-year tradition of interpreting the "confidential employee" exception to require a labor nexus, such that its refusal to impose a similar labor nexus requirement under PEBA arguably reflects a deliberate policy choice on its part to not do so. Furthermore, by adding the "majority of time" requirement under PEBA II, the Legislature could have been intended to balance what would otherwise have been an overly broad exclusion without a labor nexus. *See* § 10-7E-4(G).

However, that is not the only possible explanation for the PELRB's rule change. The Board may have amended the rule because it concluded PEBA's and the NLRB's definitions were sufficiently similar to warrant identical implementation without recourse to additional regulatory language.

This would have been consistent with the Board's history and clear predilection for following well-established precedent under the NLRB, even in the face of substantial streamlining of language. *See Regents of UNM v. NM Federation of Teachers*, 1998 NMSC 20, ¶18, 125 NM 401, 408, citing *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997 NMCA 44, 123 NM 239 ("absent cogent reasons to the contrary," interpretations of the NLRA must generally be followed in interpreting substantially similar PEBA provisions, "particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the time the PEBA was enacted"); and *Pita S. Roybal v. Children, Youth and Families Department*, 02-PELRB-2006 (May 12, 2006) (interpreting PEBA to include *Weingarten* protections despite the fact that PEBA does

not contain the same language as the NLRA, "to engage in concerted activities for mutual aid and protection," on which the *Weingarten* right was grounded). Additionally, continuing to apply the NLRB-derived "labor nexus" would avoid the "nonsensical" results that could arise if the broad exclusionary language were applied literally, *see Jemez Valley*, ALJ Report at n. 28, even with a "majority of time" requirement. *See Santa Fe and AFSCME*, 1 PELRB 1 at 26 (1993) (construction must not render a statute's application absurd or unreasonable, or lead to injustice or contradiction).

IV. Conclusion

Ultimately, however, all of the foregoing is speculation and at this point the undersigned is required to apply existing Board precedent. *See AFSCME and Los Alamos County Firefighters v. County of Los Alamos*, 1 PELRB 3 (Dec. 20, 1994) (the Board's hearing officers are bound by the formal decision of the Board). Because the Board has re-affirmed the NLRB and *Jemez Valley* "labor nexus" since the rule change, *see Gadsden Schools*, *supra*, the undersigned herby concludes she is compelled to continue to apply this precedent.

However, the undersigned takes administrative notice that the exact question presented here—the continuing validity of *Jemez Valley* in light of the 2004 rule change—was not raised before or considered by the board in the 2005 *Gadsden Schools* case. Accordingly, the undersigned simultaneously certifies to the Board the question stated at the start of this Decision, on grounds of administrative efficiency.

The proper interpretation of "confidential employee" under PEBA is a dispositive and threshold question of law that will determine the scope of any future evidentiary hearings or stipulations of fact in this case. The undersigned therefore requests a ruling

on this question from the Board now, to avoid either unnecessarily extensive fact-finding or a subsequent remand for failure to adequately develop the record below.

Issued this 6th day of March, 2009

Pilar Vaile
Deputy Director

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 7076,

Petitioner,

and

PELRB Case No. 301-09

WORKERS' COMPENSATION ADMINISTRATION,

Employer.

EMPLOYER AND INTERVENOR'S JOINT BRIEF REGARDING CONFIDENTIAL STATUS OF ECONOMIST-A

The Employer, Workers' Compensation Administration ("WCA"), by and through its Assistant General Counsel, Roberta Y. Baca, and the Intervenor, State Personnel Office ("SPO"), by and through its attorneys, Tinnin Law Firm, a professional corporation, submit this joint brief in support of their position that the individual assigned to the WCA Economist-A position at issue is a confidential employee who should be excluded from the bargaining unit represented by Petitioner Communications Workers of America, Local 7076 (the "Union").

I. PEBA'S DEFINITION OF CONFIDENTIAL EMPLOYEE REQUIRES NO LABOR NEXUS.

New Mexico's Public Employee Bargaining Act ("PEBA") provides that "[p]ublic employees, other than management employees and confidential employees, may form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees . . . ." § 10-7E-5 NMSA 1978 (2003). Thus, the statute prohibits the inclusion of confidential employees in collective bargaining units. PEBA defines a confidential employee as "a person who devotes a majority of his time to assisting and acting in

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a confidential capacity with respect to a person who formulates, determines and effectuates management policies." § 10-7E-4(G) NMSA 1978 (2003).

The Hearing Officer has asked the parties to address whether PEBA's confidential employee exception should be limited, in accordance with National Labor Relations Board ("NLRB") precedent, to "employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies *in the field of labor relations*." WCA and SPO submit that there is no basis for such a restrictive reading of PEBA. Under well-established rules of statutory construction, the interpretation of a statute, including PEBA, should not depart from the statute's plain language "unless it is necessary to resolve an ambiguity, correct a mistake or an absurdity that the Legislature could not have intended, or to deal with an irreconcilable conflict among statutory provisions." *Regents of Univ. of New Mexico v. New Mexico Fed. of Teachers*, 1998-NMSC-20, ¶ 28, 125 N.M. 401 (interpreting PEBA's grandfather clauses). A New Mexico court "will not read into a statute or ordinance language which is not there, particularly if it makes sense as written." *Id.* Neither should the PELRB.

PEBA's definition of confidential employee plainly and unambiguously includes any "person who devotes a majority of his time to assisting and acting in a confidential capacity with respect to a person who formulates, determines and effectuates management policies." The plain wording of the statute does not allow for any interpretation limiting confidential employees to those who assist and act in a confidential capacity with respect to persons who exercise managerial functions *only in the field of labor relations*. Interpreting the statute to require such a "labor nexus" would be reading in language that simply is not there, contrary to the canons of statutory construction. There is no ambiguity, mistake, absurdity or irreconcilable conflict that would justify ignoring the plain wording of this statute.

The PELRB has stated that it will rely on the NLRB's interpretations of the National Labor Relations Act ("NLRA") only where provisions of PEBA are the same as or closely similar to those of the NLRA. *County of Santa Fe & AFSCME*, 1 PELRB No. 1, 43 (Nov. 18, 1993). Where provisions of the two statutes are not the same or closely similar, the PELRB has disregarded the NLRB's interpretations. *See New Mexico State Univ. Police Officers Ass'n & New Mexico State Univ.*, 1 PELRB No. 13, 3 n. 1 (Jan. 22, 1995). Unlike PEBA, Section 2(3) of the NLRA, which defines "employee," contains no express exclusion for confidential employees. 29 U.S.C. § 152(3). Thus, there is no provision whatsoever in the NLRA defining confidential employees, much less one that is the same as or closely similar to PEBA's definition. The NLRB's labor nexus test for identifying confidential employees was developed through case law as a policy matter in the absence of any explicit statutory language addressing the issue. *See NLRB v. Hendricks Co. Rural Elec. Membership Corp.*, 454 U.S. 170, 178 (1981). This narrow, agency-created definition should not be imported to graft language onto PEBA when New Mexico's Legislature has spoken on the matter and has seen fit to adopt a broader definition of confidential employees.

The NLRB refined the labor nexus test to its current form in 1956 and has consistently applied it for over fifty years. *See Hendricks*, 454 U.S. at 188-90. It must be assumed that our Legislature was familiar with this longstanding NLRB precedent when it drafted PEBA in 2002.[1] Indeed, the drafters of PEBA's statutory provision even used the NLRB's decisional policy language to a point, as PEBA's definition of "confidential employee" tracks the NLRB's definition nearly verbatim up to and including the phrase "managerial functions." If the Legislature had deemed it appropriate to impose a labor nexus restriction, it would have been a

[1] The original PEBA incorporated language identical to the current definition of confidential employee in 10-7D-4(F) NMSA 1978 (1992).

very simple matter to continue echoing the NLRB's language and to add the phrase "in the field of labor relations" at the end of the definition. The absence of that phrase surely is no accident and indicates that the Legislature made a conscious decision to adopt a more expansive definition of confidential employee. "If the meaning of a statute is truly clear, it is the responsibility of the judiciary [and the PELRB] to apply it as written and not second guess the legislature's policy choices." *U.S. Xpress, Inc. v. State Taxation & Revenue Dep't*, 2006-NMSC-17, ¶ 11, 139 N.M. 589.

In *NEA-Jemez Valley & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995), a case decided under the original PEBA, the PELRB adopted an administrative judge's recommendation that the labor nexus test be incorporated into PEBA's definition of confidential employee. The administrative judge reasoned as follows:

> Because of the similarities between the definition found in the PEBA and NLRB caselaw, I will interpret the PEBA within the context of decades of labor law precedent, and not in a vacuum as if the drafters of this Act had no knowledge about the terms of art they included in the law. I will assume that the State legislators were familiar with labor law generally and the policy considerations for excluding confidential employees specifically.

Jemez Valley, 1 PELRB No. 10 at 21. WCA and SPO submit that this reasoning is flawed and *Jemez Valley* was wrongly decided. As discussed above, PEBA's definition of confidential employee contains no reference to labor relations and therefore is not at all similar to the NLRB's agency-created labor nexus test. As a result, it is inappropriate to look to NLRB precedent to interpret this provision of PEBA. Moreover, although it is valid to assume that the Legislature was familiar with NLRB precedent when it drafted PEBA, the conclusion that logically flows from that assumption is the opposite of the one drawn by the administrative judge in *Jemez Valley*. If the drafters of PEBA were familiar with the treatment of confidential employees under NLRB case law, then their omission of labor relations language from PEBA's

definition only underscores an intent *not* to import any labor nexus restriction into PEBA. The *Jemez Valley* judge's illogical conclusion to the contrary ignores the plain language of the statute and improperly second-guesses the Legislature's policy choices.

The absence of any labor nexus requirement under PEBA is confirmed by changes in the PELRB's regulatory definition of confidential employee. In the regulations it issued under the original PEBA, the PELRB expressly adopted a labor nexus restriction: "'Confidential employee' means an individual who assists and acts in a confidential capacity with respect to a person who formulates, determines and effectuates a public employer's *employment, collective bargaining or labor relations activities, including grievance processing.*" 11.21.1.7(B)(6) NMAC (2-25-94) (emphasis added). When the PELRB promulgated regulations under the current PEBA, however, it removed all references to labor relations in the rule defining confidential employee: "'Confidential employee' means a person who devotes a majority of his time to assisting and acting in a confidential capacity with respect to a person who formulates, determines and effectuates management policies." 11.21.1.7(B)(6) (3-15-04). Even more so than with the Legislature, one must assume that the PELRB was familiar with the NLRB's half-century-old labor nexus test. Furthermore, the PELRB must have been aware of the language of its own previous regulation when it drafted the current rule. Its omission of the labor relations language in reissuing the rule conclusively shows that the PELRB has *already decided* there is no labor nexus restriction on PEBA's definition of confidential employee.

II. WCA'S ECONOMIST-A POSITION IS A CONFIDENTIAL EMPLOYEE

The position at issue in this unit clarification proceeding is an Economist-A position at WCA currently held by Scott Goold. When the bargaining unit was originally certified, this position was excluded because it was a confidential supervisory position. In 2008, the position became vacant and WCA began recruiting for someone to fill it. After it was unable to attract a

candidate with the right combination of qualifications, WCA decided to remove the supervisory responsibilities of the position but never removed or intended to remove the confidential aspects of the position. Mr. Goold had previously applied each time the non-bargaining unit position was posted and ultimately was hired as the Economist-A. It is important to note that this Economist-A has held this position for only five months and has not yet been exposed to the full range of responsibilities it entails. He is still being trained to assume these responsibilities.

Notwithstanding the removal of supervisory responsibilities, this particular Economist-A position performs duties that require its exclusion from the bargaining unit as a confidential employee under PEBA. Again, PEBA defines a confidential employee *without limitation* as "a person who devotes a majority of his time to assisting and acting in a confidential capacity with respect to a person who formulates, determines and effectuates management policies." § 10-7E-4 NMSA 1978 (2003). Furthermore, PEBA contemplates that a position will be classified as confidential based on its job responsibilities, not its title.

Should it become necessary to hold an evidentiary hearing on this issue, WCA's evidence and testimony will show that the individual who occupies this position spends a majority of its time assisting the Economic Research Bureau ("ERB") Chief, Mark Llewellyn, in formulating and implementing the majority of the ERB's policy-making decisions. Mr. Llewellyn represents WCA as the main liaison between outside research organizations and internal staff on workers' compensation research studies, reports and data collection activities. For example, one of the ERB's responsibilities is a confidential employee survey that management uses to assist and effectuate internal policies. Those statistics and data are not available to internal personnel and are strictly confidential. Mr. Llewellyn also reviews, analyzes and proposes potential changes regarding allocation of WCA funds, such as analyzing any potential closing of field offices and/or furloughing of employees. Further, the ERB, through Mr. Llewellyn, advises WCA's

Director and Advisory Council on confidential and critical matters that impact the agency and the workers' compensation system, such as major changes to the Workers' Compensation Act, the development of the Medical Fee Schedule and statistical trends that are studied prior to major legislative recommendations. Thus, Mr. Llewellyn has significant responsibility for formulating, determining and effectuating policies that affect the management of WCA and the entire workers' compensation system. When Mr. Llewellyn is unavailable, this Economist-A will step into his shoes and directly advise the Director, the Advisory Council and senior management in his absence in confidential and critical matters.

In assisting Mr. Llewellyn to develop and implement WCA policies, this Economist-A position has regular access to confidential information – that is, information that is unavailable to most other WCA employees and to the public at large. For example, this position collects and analyzes confidential economic data used to develop and assess potential legislative proposals under consideration by WCA. While a legislative proposal does become public once it is made, the economic data underlying the proposal remains confidential, as do any draft proposals or alternative proposals that differ from the one ultimately advanced by WCA. The Economist-A position at issue has regular access to, and helps to develop, all of this confidential information. This position also helps to develop the methodology for setting the fees reflected in the Medical Fee Schedule used in administration of the Workers' Compensation Act. This methodology is confidential and quite sensitive because the Medical Fee Schedule generates significant controversy among various constituencies in the workers' compensation community. The delicate balance in the workers' compensation system among business, labor and other stakeholders requires impartial and unbiased input into WCA's recommendations. If this position were allowed to be associated with labor, the delicate balance could be upset.

In sum, WCA will show that this Economist-A position devotes a majority of its time to assisting and acting in a confidential capacity with respect to the ERB Chief, a person who formulates, determines and effectuates WCA's management policies. Therefore, this Economist-A is a confidential employee, as defined by PEBA, who must be excluded from the bargaining unit sought to be clarified by the Union.

Respectfully submitted,

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I hereby certify that on this 23rd day of February, 2009, a true and correct copy of the foregoing document was served via first class mail and facsimile upon the following:

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STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 7076, AFL-CIO	:	
Complainants,	:	
vs.	:	
STATE OF NEW MEXICO, WORKERS COMPENSATION ADMINISTRATION	:	**PELRB No. 301-09**
Respondent.	:	

COMMMUNICATIONS WORKERS OF AMERICA (CWA), LOCAL 7076, AFL-CIO'S BRIEF ON CONFIDENTIAL EMPLOYEES

COMES NOW CWA, Local 7076, and hereby submits its initial brief analyzing the appropriate legal standard regarding the applicability of the Public Employee Bargaining Act (PEBA) to confidential employees.

Introduction

PEBA, like the National Labor Relations Act (NLRA), excludes confidential employees from bargaining units. PEBA defines a confidential employee as someone, "who devotes a majority of his time to assisting and acting in a confidential capacity with respect to a person who formulates, determines and effectuates management policies." (PEBA, Section 4(G)). The PEBA exclusion is obviously drawn from the NLRB precedent, as expressly affirmed by the United States Supreme Court in NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 (1981). The NLRB's definition is very similar to the PEBA definition, and defines confidential employees as those persons who "assist and act in a confidential capacity to persons

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who formulate, determine and effectuate management policies in the field of labor relations." B.F. Goodrich Co., 115 NLRB 722, 724 (1956).

Although minor differences exist between the two definitions, the purpose, intent and interpretation of the confidential employee exclusion should be drawn from the NLRB's fifty-three years of experience with this exclusion. The primary purpose of the exclusion, as explained by the NLRB, is to prevent the inclusion of a very narrow group of employees in bargaining units. Specifically, those employees who have access to information which could be used for unfair advantage by a labor union may be excluded from that unit. Lincoln Park Nursing & Convalescent Home, 318 NLRB 1160 (1995).

Argument

I. The confidential employee exclusion is a narrow exclusion.

The NLRB has repeatedly emphasized that the confidential employee category is a narrow exception. In that regard, Board case law focuses generally on limiting the concept of confidential employees. The commonly understood import of the phrase is not reflective of the Board's interpretation of the exclusion. Confidential employees, as defined by NLRB rule, are not employees who have access to or even handle confidential employer information; rather, they are employees who have access to information which is directly related to determining and enforcing management policies. It is, in effect, a two part test; the employee must work with information which is identified as confidential information necessary to effectuate management policies, and the work performed by the employee must be in the form of assisting in the determination and enforcement of management policies. The mere handling of or access to confidential business or labor relations information, including personnel and financial records, is insufficient by itself to render an employee confidential. Lincoln Park Nursing & Convalescent

Home, 318 NLRB 1160 (1995). The Second Circuit decision, NLRB v. Meenan Oil Co., L.P., 139 F. 3rd 311 (2nd Cir. 1998), provides further guidance on the purpose of the exclusion. In Meenan Oil, the Second Circuit noted that confidential employees must work closely with a manager who formulates labor policies – that the relationship must be confidential in nature and that the business information must be that which would give the union a "significant strategic advantage in negotiations." Meenan Oil, at 318.

In Los Angeles New Hospital, 244 NLRB 960 (1979), the Board held that a supervisor's secretary is not a confidential employee. Similarly, the Board has rejected many employer requests to designate employees as confidential, including credit reporters (Dun & Bradstreet, 240 NLRB 162 (1979)), employees assisting and opening mail for persons effectuating labor policy (Air Express Int'l Corp., 245 NLRB 478 (1979)), fiscal officers (Community Services Planning Council, 243 NLRB 798 (1979)), and administrative secretaries (Ohio State Legal Services Association, 239 NLRB 594 (1978)). The applicability of the exclusion turns on whether the employee in question has the ability to pass information to the Union which would provide significant strategic advantage in negotiations. Without that ability, no reason exists to prevent that employee from recognizing rights set out in the NLRA and adopted by the State of New Mexico in PEBA.

II. PEBA's confidential employee exclusion is substantially similar to the NLRB's exclusion.

As the PELRB is well aware, the New Mexico Supreme Court set this Board's policy with relationship to the decisions of the NLRB in, Regents of the Univ. of N.M. v. M.M. Fed. of Teachers, 125 N.M. 401, 962 P.2d 1236 (2001). In that decision, the Supreme Court noted that "much of the language in PEBA was derived from the National Labor Relations Act," and for

that reason, "A[a]bsent cogent reasons to the contrary, [courts] should interpret language of the PEBA in the manner that the same language of the NLRA has been interpreted, particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the time the PEBA was enacted." Regents, at 408.

Given this judicial framework, the first question should be whether the PEBA's statutory definition of confidential employee appears to be derived from the NLRA. That answer clearly appears to be in the affirmative. The policies are nearly identical, with two exceptions. The first exception concerns the volume of "confidential" work which must be performed. Under NLRB decisional law, employees may be confidential employees even if a "relatively small percentage" of the employee's time is spent performing confidential duties. Raymond Baking Co., 249 NLRB 1100, (1980). In contrast, the PEBA definition requires that the employee in question devote "a majority of his time" to the performance of confidential duties. (PEBA, section 4(G)). This modification to the NLRB's policy was obviously directed towards reducing the scope of the confidential employee exclusion, and requires a showing by the employer that the employee in question be primarily employed for the purpose of assisting and acting in a confidential capacity.

The second deviation, as noted by Assistant Director Vaile in her cover letter, relates to the omission of the NLRB's phrase, "in the field of labor relations." The question raised by the legislature's omission is whether it intended that the definition of confidential information be viewed more broadly, and not limited to information which, if provided to the union, would harm the employer in negotiations. This Board has already ruled on the effect of this omission in NEA-Jemez Valley v. Jemez Valley Public Schools, (1995). In that decision the Board concluded that under PEBA "an employee's exposure to confidential information, other than

labor relations or bargaining strategy, would not give a union the unfair advantage in collective bargaining that the confidential exclusion is designed to protect against." Jemez Valley, at 21. Although some of the precise language has changed in the legislature's second iteration of PEBA, the Union asserts that the Jemez Valley decision is the correct and appropriate interpretation of the statutory definition of confidential employees. Any other reading transforms the confidential employee exclusion into a provision without a sound policy based rationale.

The current statutory definition of confidential employee still captures the intent of the NLRB rule. It is designed to exclude employees who work in a confidential capacity with respect to those who formulate, determine and effectuate management policies. The exclusion is designed to prevent the specter of passing information to labor in order to provide an unfair advantage in bargaining or contract administration. Under the broad view of PEBA, taking into account its purpose to allow employees to bargain collectively, no reasonable justification exists to support the notion that employees should be excluded if they work with a manager formulating, for example, public policy. This exclusion, if opened to such an interpretation, would serve to frustrate the goals of PEBA – allowing non-management employees the right to organize.

Conclusion

The exclusions contained section 5 of PEBA (managerial and confidential) are designed to make a distinction between employees and managers ("those employees engaged primarily in executive and management functions"). The legislature included the confidential employee exemption, which withholds the right to organize to a group of employees who would otherwise be covered under PEBA as non-managers. The effect of the confidential exemption, excluding

non-managers, only makes sense if it rationally related to the harm it is designed to prevent – the passing of information to the Union which would provide it with an unfair advantage in negotiations. As a consequence, the Union respectfully requests that this Board adopt the reasoning and rationale of the Jemez Valley decision.

Dated: February 23, 2009

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STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 7076,

Petitioner,

and

PELRB Case No. 301-09

WORKERS' COMPENSATION ADMINISTRATION,

Employer.

EMPLOYER AND INTERVENOR'S JOINT
SUPPLEMENTAL BRIEF REGARDING CONFIDENTIAL EMPLOYEES

The Employer, Workers' Compensation Administration ("WCA"), by and through its Assistant General Counsel, Roberta Y. Baca, and the Intervenor, State Personnel Office ("SPO"), by and through its attorneys, Tinnin Law Firm, a professional corporation (collectively the "State Agencies"), submit this joint supplemental brief to address arguments raised by Petitioner Communications Workers of America, Local 7076 (the "Union") in its Brief on Confidential Employees.

INTRODUCTION

The thrust of the Union's argument, as expected, is that PEBA's exclusion for confidential employees should be interpreted as requiring a labor relations nexus, in accordance with NLRB precedent and the PELRB's *Jemez Valley* decision under the original PEBA. As discussed in detail in the State Agencies' opening brief, *Jemez Valley* was wrongly decided and the PELRB should not rely on NLRB case law to paste a labor nexus requirement onto PEBA, since the plain language of PEBA's statutory definition (not to mention the PELRB's own rule) contains no such restriction and therefore differs materially from the NLRB's narrower, agency-created definition. The State Agencies submit this supplemental brief to address two corollary

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arguments raised by the Union. First, the Union is incorrect in denying the existence of a policy rationale for excluding confidential employees whose duties do not involve labor relations. Second, the Union misinterprets PEBA in arguing that the exclusion only covers employees who spend a majority of their time performing confidential duties.

ARGUMENT

I. EXCLUDING ALL CONFIDENTIAL EMPLOYEES FROM COLLECTIVE BARGAINING PREVENTS CONFLICTS OF INTEREST.

As discussed in the State Agencies' opening brief, the PELRB should apply the plain language of PEBA as written and refrain from second-guessing the Legislature's policy choice not to incorporate a labor nexus restriction into the definition of a confidential employee. However, to the extent the PELRB deems it necessary to identify a policy basis for applying the statute as written, the Union is mistaken in its contention that not requiring a labor nexus "transforms the confidential employee exclusion into a provision without a sound policy based rationale." (Union's Brf. at 5.) Preventing a union from gaining an unfair advantage in bargaining or contract administration is not the only policy rationale for excluding confidential employees from collective bargaining, even though it may be the only one recognized by the NLRB.

As the administrative judge recognized in *Jemez Valley*, both PEBA and NLRB case law require the exclusion of management employees from collective bargaining units whether or not their managerial responsibilities involve labor relations. §§ 10-7E-4(O) NMSA 1978 (2003), 10-7E-5 NMSA 1978 (2003); *Jemez Valley*, 1 PELRB No. 10 at 31 & n. 40. The policy rationale for this exclusion is that managers who exercise discretionary authority on behalf of the employer "should not be placed in a position requiring them to divide their loyalty between the employer and union." *Jemez Valley*, 1 PELRB No. 10 at 31.

In his partial dissent from the Supreme Court's decision approving the NLRB's labor nexus test for confidential employees, Justice Powell (joined by three other justices) argued that certain confidential employees are so closely aligned with management that they should be excluded from collective bargaining to avoid similar conflicts of loyalty, regardless of whether their duties involve labor relations:

> [I]t was to assure that those employees allied with management were not included in the ranks of labor that the Board originally developed the "supervisory," "managerial," and "confidential" employees exclusions from the Wagner Act. The Board recognized that employees who by their duties, knowledge, or sympathy were aligned with management should not be treated as members of labor. In the adversary system which our labor laws envision, neither management nor labor should be forced to accept a potential fifth column into its ranks. . . . [To] include within the rank and file confidential secretaries who are privy to the most sensitive details of management decisionmaking, who work closely with managers on a personal and daily basis, and who occupy a position of trust incompatible with labor-management strife . . . does a disservice to management and labor alike.

NLRB v. Hendricks Co. Rural Elec. Membership Corp., 454 U.S. 170, 193-95 (1981) (Powell, J., concurring in part and dissenting in part).

PEBA's definition of confidential employees reflects the Legislature's recognition that an employee who "devotes a majority of his time to assisting and acting in a confidential capacity with respect to a person who formulates, determines and effectuates management policies" is so closely allied with management that he, like managers themselves, should be excluded from the collective bargaining unit to prevent conflicts of interest that could compromise the union as well as the employer. Reading a labor nexus restriction into that definition would be an inappropriate arrogation of the Legislature's prerogative to determine sound public policy.

II. CONFIDENTIAL EMPLOYEES NEED NOT DEVOTE A MAJORITY OF THEIR TIME TO THE PERFORMANCE OF CONFIDENTIAL DUTIES.

The Union contends that PEBA requires a confidential employee to "devote a majority of his time to the performance of confidential duties." (Union's Brf. at 4.) This interpretation also ignores the plain language of the statute. PEBA's definition actually provides that a confidential employee is "a person who devotes a majority of his time to *assisting and* acting in a confidential capacity with respect to a person who formulates, determines and effectuates management policies." § 10-7E-4(G) NMSA 1978 (2003) (emphasis added). The phrase "majority of his time" refers to the aggregate time spent by the employee in the performance of *two* activities: (1) assisting, and (2) acting in a confidential capacity with respect to, a person who formulates, determines and effectuates management policies. Thus, the definition does not require that confidential duties alone consume a majority of the employee's time.

According to the Union, the exclusion for confidential employees should cover only employees who spend a *majority* of their time assisting in the formulation and implementation of management policies directly related to collective bargaining or the administration of a collective bargaining agreement. It is difficult to imagine any non-managerial position in which an employee would spend more than half of his time helping to develop and implement management policies with a labor relations nexus. Interpreting the definition this restrictively would effectively read the confidential employee exclusion out of PEBA. This cannot be the result intended by the Legislature. Moreover, PEBA's use of the phrase "majority of his time," which does not appear in the NLRB's formulation of the test for confidential employees, further confirms that our Legislature made a conscious decision to adopt a definition of confidential employee that substantially differs from the NLRB's.

CONCLUSION

For the foregoing reasons, and for those set forth in their initial brief, WCA and SPO respectfully submit that the PELRB should not interpret PEBA's exclusion for confidential employees as requiring a labor nexus or as requiring the employee to spend a majority of his time performing confidential duties.

Respectfully submitted,

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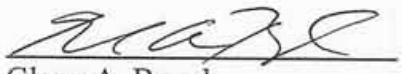

Glenn A. Beard

STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 7076, AFL-CIO	:	
Complainants,	:	
vs.	:	**PELRB No. 301-09**
STATE OF NEW MEXICO, WORKERS COMPENSATION ADMINISTRATION	:	
Respondent.	:	

COMMMUNICATIONS WORKERS OF AMERICA (CWA), LOCAL 7076, AFL-CIO RESPONSE BRIEF ON CONFIDENTIAL EMPLOYEES

COMES NOW CWA, Local 7076, and hereby submits its response brief analyzing the appropriate legal standard regarding the applicability of the Public Employee Bargaining Act (PEBA) to confidential employees.

Introduction

The State, in its brief on the issue before the Board, argues for a broad and sweeping definition of "confidential employee," to include employees who have absolutely no access to confidential information which could be used by the Union. The justification for its sweeping diversion from long accepted labor law is a mechanistic application of the plain meaning rule. The State, however, ignores the more important consequences of its argument and fails to consider the effect of its request -- a reading which would exclude potentially hundreds of State employees from protection under the Act. PEBA, just like the NLRA, is designed to provide regular employees with the power to organize and bargain. The exceptions to the grant of power are narrowly construed to protect the employer's ability to fairly manage the workplace. The

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"confidential employee" exception was designed for the limited purpose of preventing the inclusion of those who have access to information which could be used for unfair advantage by a labor union . *Lincoln Park Nursing & Convalescent Home*, 318 NLRB 1160 (1995).

The State unapologetically suggests that the exclusion should cut a much wider swath, but makes no attempt to explain the basis for excluding regular employees who have no access to information which could harm the employer's ability to fairly manage the workplace. Instead, without thoughtful explanation, the State insists that the Board must follow the plain meaning rule and create a broad confidential employee exception. In fact, the New Mexico Supreme Court suggests that such a simplistic approach to the plain meaning rule is not advisable: "Its [the plain meaning rule] beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the statute's meaning." *State ex rel. Helman,* 117 N.M. at 346, 353, 871 P.2d at 1359 (1994). Where the plain meaning rule leads to absurd conclusions – a rule without reason or a rule contrary to reason, it should be rejected. Here, the State asks this Board to do precisely this – adopt a rule without reason that is actually contrary to the reason the rule exists in the first place.

Argument

I. The intent of the legislature is harmed by a mechanical application of the plain meaning rule as regards confidential employees.

New Mexico Courts do not adhere to the notion of a formalistic application of the plain meaning rule. The plain meaning rule "must yield on occasion to an intention otherwise discerned in terms of equity, legislative history, or other sources." *Sims v. Sims,* 122 N.M. 618, 930 P.2d 153 (1996). In addition to looking at the statutory language, "we also consider the

history and background of the statute." *State v. Rivera,* 134 N.M. 768, 82 P.3d 939 (2004). The Court must review the words of the statute but also, "we review the overall structure of the statute and its function in the comprehensive legislative scheme." *State v. Smith*, 136 N.M. 372, 98 P. 3d 1022 (2004). "[A] statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter." 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:05, at 165 (6th ed., rev.2000).

The court's ultimate goal in statutory construction, "is to ascertain and give effect to the intent of the Legislature." *State v. Cleve,* 1999-NMSC-017, ¶ 8, 127 N.M. 240, 980 P.2d 23. It is "the high duty and responsibility of the judicial branch of government to facilitate and promote the legislature's accomplishment of its purpose." *State ex rel. Helman v. Gallegos,* 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994).

In this instance, this Board must take into account more than the absence of a few words in the statute – it must view the purpose of the statute as a whole, as well as the purpose of the confidential employee exclusion in the context of meeting the goals stated by the legislature in PEBA. A more holistic approach, as dictated by the decisions identified above, yields the inexorable result that no rational basis exists to interpret the confidential employee exclusion as suggested by the State.

II. The State's interpretation of the confidential employee exclusion frustrates the purpose of PEBA.

The legislature has identified the purpose of PEBA to include three distinct goals:

1. "To guarantee public employees the right to organize and bargain collectively with their employers;"

2. "To promote harmonious and cooperative relationships between public employers and public employees;"
3. "To protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions."

(Section 2.)

It is the first goal, the guarantee by the legislature for public employees the right to organize, that is important in this instance. The legislature has guaranteed public employees (defined in section 4(r), as "regular non-probationary employees") the right to organize and bargain collectively. The confidential employee exception directly denies that guarantee for a certain class of employees and is properly viewed as antagonistic to the legislature's stated purpose for adopting PEBA. It then follows that a section contained in the statute which is antagonistic to the goals of the law should be viewed with circumspection and should also be narrowly construed.

For what purpose has the legislature decided to deny its guarantee to a certain class of public employees, known as confidential employees? All of the history and reasoning borrowed from the NLRA suggests that the guarantee is designed for a specific purpose -- to prevent unfair advantage to the Union. The State, however, proffers no reason or justification for its suggested reading. Instead it argues that no explanation is necessary to justify this denial of a guarantee by the legislature. As explained above, the Supreme Court rejects the notion that a court or this Board should ignore the other factors necessary to understand legislation. In this instance what are the appropriate additional factors to evaluate? These factors are set out in Petitioner's initial brief and are summarized herein.

The New Mexico Supreme Court's decision in, *Regents of the Univ. of N.M. v. M.M. Fed. of Teachers*, 125 N.M. 401, 962 P.2d 1236 (2001), provides the logical compliment to the decisions directing courts on interpreting a statute, as explained above. Courts must look to the source of legislation. In the *Regents* decision the Supreme Court identified the source for the policy considerations justifying passage of PEBA: "much of the language in PEBA was derived from the National Labor Relations Act," and for that reason, "A[a]bsent cogent reasons to the contrary, [courts] should interpret language of the PEBA in the manner that the same language of the NLRA has been interpreted, particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the time the PEBA was enacted." *Regents*, at 408.

The State urges adoption of an interpretation of "confidential employees" that not only has been explicitly rejected by the NLRB, but one which is antithetical to the policy reasons supporting the existence of the "confidential employee" exception. The mere handling of or access to confidential business or labor relations information, including personnel and financial records, is insufficient by itself to render an employee confidential. *Lincoln Park Nursing & Convalescent Home*, 318 NLRB 1160 (1995). The reason for the existence of the "confidential employee exclusion is solely to prevent access to information by bargaining unit employees which would give the union a "significant strategic advantage in negotiations." *NLRB v. Meenan Oil Co., L.P.*, 139 F. 3rd 311 (2nd Cir. 1998). The State argues that this exclusion should be used to deny the legislature's guarantee of the right to bargain to regular employees who have no access to information that could give the union an advantage in negotiations.

What cogent reasons are advanced by the State to deny regular employees of the legislature's guarantee? None. The State provides no reason or argument supporting its request that this Board severely limit the legislature's guarantee to regular employees. And indeed no

policy reason exists in the long line of cases discussing the "confidential employee" exclusion. In fact, as argued previously the NLRB has explicitly rejected the reading suggested by the State as contrary to the purpose of the "confidential employee" exception. What we are left with is reason and ration, which suggests that the legislature's guarantees of the right to organize and bargain should be extended to regular employees who have no ability to give the union an advantage in negotiations. To do anything else would do damage to the clear intent of the legislature.

The current statutory definition of "confidential employee" still captures the intent of the NLRB rule. It is designed to exclude employees who work in a confidential capacity with respect to those who formulate, determine and effectuate management policies. The exclusion is designed to prevent the specter of passing information to labor in order to provide an unfair advantage in bargaining or contract administration.

Conclusion

The Union respectfully requests that this Board limit the definition of confidential employees in such a manner as to protect the legislature's guarantee to regular employees, of the rights to bargain and to organize.

Dated: March 6, 2009

Respectfully submitted,

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