STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

STATE OF NEW MEXICO,
Complainant,

v. **PELRB No. 146-11**

AFSCME COUNCIL 18,
Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board for ratification of the Hearing Officer's Decision regarding the State's Motion to Disqualify the Executive Director. Upon a 2-0 vote at the Board's June 6, 2012 meeting (Board Chair Duff Westbrook being absent);

IT IS HEREBY ORDERED that the Hearing Officer's letter Decision of May 9, 2012, including the Findings of Fact and Conclusions of Law and the Rationale stated therein, shall be and hereby is adopted by the Board as its Order.

Date: June 6, 2012

Wayne E. Bigham

Wayne Bingham, Vice-Chair
Public Employee Labor Relations Board

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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Governor

THOMAS J. GRIEGO
Executive Director

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May 9, 2012

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Re: ***State of New Mexico v. AFSCME Council 18; PELRB No.146-11.***

Dear counsel:

I am in receipt of a the State's Motion to disqualify the Executive Director from continuing to serve as the Hearing Officer in this case and to appoint an alternate Hearing Officer. A Response to the Motion was filed by the Respondent on May 4, 2012. I find that the Executive Director, Thomas J. Griego, is designated as the Hearing Officer in this case and that the Motion to disqualify me is untimely filed. I also find that there is nothing in the receipt of supporting information through the Board's screening and investigative process generally, or in this case specifically that renders the Executive Director partial or biased in any way or which otherwise renders the process followed in this case procedurally insufficient. Petitioner alleges no facts that a reasonable person would accept to support an inference that the process followed by the Executive Director in the manner described in the State's Motion any way deprives the State of due process, or indicates a predisposition as to the outcome of this case so as to deprive the State of a fair and impartial tribunal. I find that none of the grounds for disqualification under NMAC 11.21.1.13 to have been met. I find The Executive Director is not constrained by NMAC 11.21.3.12(B) to receiving only such supporting evidence as the Complainant chooses to submit. Such an interpretation of the Rule is not consistent with the quest for truth inherent in the duty to investigate charges. The first two sentences of

NMAC 11.21.3.12(B) require that "After screening a complaint, the director shall investigate the allegations. The director need not await the filing of an answer before commencing the investigation." The third sentence of the rule provides that: "At the director's request, the complainant shall immediately present to the director all evidence available to the complainant in support of the complaint, including documents and the testimony of witnesses." That third sentence places an obligation on the Petitioner, not a limitation on the Director in conducting his or her investigation. It provides a tool for the Director's use in conducting an investigation but it is not reasonable to construe it to be the entirety of the investigation.

Based on the foregoing the Hearing Officer concludes that the interpretation given the requirements of NMAC 11.21.3.12 (B) by the Executive Director in this case in consistent with the objectives set forth in NMAC 11.21.3.6 in that it is an efficient and effective investigative process for collection and evaluating information to determine whether public employers, public employees or labor organizations have engaged in activities or conduct that constitutes a violation of the Public Employee Bargaining Act and that the State's interpretation is less so, because it would limit the screening process to those facts the petitioner chooses to share upon request. Accordingly, the Motion to Disqualify the Executive Director and appoint an Alternate Hearing Officer should be and is **DENIED.**

My rationale for the above recommended decision is as follows:

I. The State's Motion is untimely.

The more recent procedural history of this case includes the following material actions: The State filed a Motion for Default Judgment in this case and a recommended decision denying that motion entered on January 20, 2012. A status conference was held March 8, 2012 where a briefing schedule was set regarding a pending Motion filed by the union to dismiss the case. Following briefing as scheduled a recommended decision was entered on April 3, 2012 denying that motion and the matter was scheduled for trial on the merits with attendant pre-hearing deadlines set. The State then filed the instant Motion to disqualify the executive director and to appoint a new hearing officer on April 24, 2012.

The grounds under which a hearing officer may be disqualified are set forth in NMAC 11.21.1.13:

> "No board agent, member nor hearing examiner shall decide or otherwise participate in any case or proceeding in which he or she (a) has a financial interest in the outcome; (b) is indebted to any party, or related to any party or any agent or officer of a party by consanguinity within the third degree; (c) has acted on behalf of any party within two years of the commencement of the case or proceeding; or (d) for some other reason or prejudice, he or she cannot fairly or impartially consider the issues in the proceeding."

NMAC 11.21.1.14(A) requires that "[a] motion to disqualify a board agent, member or hearing examiner in any matter, based upon the foregoing criteria, shall be filed with the board, with copies served on all parties, ***prior to any hearing or the making of any material ruling involving the pending issues.***" (Emphasis added.) The procedural history as outlined above indicates at least two material rulings involving pending issues as well as at least one status and scheduling conference at which briefing schedules were set on pending matters as well as deadlines related to the merits. Accordingly, the Motion is untimely.

II. The State's Motion and supporting affidavit overlook a substantial body of Administrative Law permitting the combination of both the investigative and adjudicative functions not only in the same Agency but in the same individual. Such combination of functions is appropriate under the facts and circumstances of this case specifically and cases brought before the PELRB generally.

The State presumes without adequate support that "The Executive Director cannot be both investigator and hearing examiner." See, Motion to Disqualify Executive Director and Request for Appointment of Alternate a Hearing Officer, page 2 ¶ 1. There is a substantial body of case law in the Administrative Law realm to the contrary not referenced by the State in its Motion. For example, In ***Winthrow v. Larkin***, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712, (1975) a physicians examining board conducted an investigation into whether a doctor had committed certain proscribed activities. The physician alleged a due process violation when the same board that conducted the investigation also adjudicated the matter against him. At page 47-48 of the decision the Supreme Court held that the contention that the combination of the investigative and adjudicative function necessarily creates and unconstitutional risk of bias in an administrative adjudication must overcome a presumption of honesty and integrity in those serving as adjudicators and it must convince that, under a "realistic appraisal of psychological tendencies and human weakness", conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented. The Supreme Court then noted that similar claims have been squarely rejected in several of its prior decisions" ***Id.*** at 48 *citing* ***In re FTC v. Cement Institute*** 333 U.S. 683 (1948). See also, ***Kennecott Copper Corp., v. FTC***, 467 F.2d 67, 79 (10th Cir. 1972) (Congress designed the FTC to combine the functions of investigator, prosecutor and judge and that "the courts have uniformly held that this feature does not make out an infringement of the due process clause of the Fifth Amendment".)

In declining to find that the combining of investigatory and adjudicative necessarily deprives one of a fair and impartial tribunal ***Winthrow*** drew several comparisons between the judicial and the administrative processes. The Supreme Court noted that it was "very typical" for members of administrative agencies to receive the

results of investigations, to approve charges or complaints, institute enforcement proceedings, and then to participate in the ensuing hearings and that this mode of proceeding does not violate due process of law. What heads of agencies do in approving the institution of proceedings is much like what judges do in ruling on demurrers or motions to dismiss. The ***Winthrow*** Court expanded on the comparison to judges:

> "Judges repeatedly issue arrest warrants on the basis that there is probable cause to believe that a crime has been committed and that the person named in the warrant has committed it. Judges also preside at preliminary hearings where they must decide whether the evidence is sufficient to hold a defendant for trial. Neither of these pretrial involvements has been thought to raise any constitutional barrier against the judge's presiding over the criminal trial and, if the trial is without a jury, against making necessary determination of guilt or innocence. Nor has it been thought that a judge is disqualified from presiding over injunction proceedings because he has initially assessed the facts in issuing or denying a temporary retraining order or preliminary injunction... We also remember that it is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around."

Id. at p. 56. *Internal citations omitted.*

Davis v. U.S. Dep't of Health, Education and Welfare 416 F. Supp. 448 (S.D.N.Y. 1976), *citing* ***Winthrow v. Larkin,*** noted that the Hearing Officer in ***Winthrow*** made both the initial review *and* the preliminary determination in that case; the implication being that the rule espoused therein applies equally to investigative and adjudicatory powers being combined in a single agent of any given board, because that was, in fact, the situation in that case.

To the extent any doubt remains that ***Winthrow*** stands for the proposition that an individual hearing officer may perform both investigatory and adjudicative functions, those doubts should be dispelled by ***Pangburn v. CAB,*** 311 F. 2d 349 (1st Cir. 1962), footnoted in ***Winthrow,*** which held that more is required to find a due process violation that the mere fact that a board or its agent had prior "contact with a particular factual complex" particularly when the Board was following a legislative mandate to investigate and report. See also, ***Skelly Oil Co. v. FPC***, 375 F.2d 6, 17-18. (10th Cir. 1967). In ***Skelly***, a group of Petitioners sought to disqualify two Commissioners claiming that each had prejudged an issue. One Commissioner was accused of personal bias against the producers. The charge stemmed from public addresses made by that commissioner three years previously. The 10th Circuit Court found "no basis for disqualification arises from the fact or assumption that that a member of an administrative agency enters a proceeding with advance views on important economic matters in issue."

The applicability of these case lies not only in refuting the notion that there exists some sort of a *per se* rule that the Executive Director cannot be both investigator and hearing examiner as well as to illustrate the rather high bar set under Administrative Law precedent before one meets the burden of demonstrating "some other reason or prejudice" the Hearing Officer in this case cannot fairly or impartially consider the issues in this proceeding required by NMAC 11.21.1.13 (d).

II. The State's Motion falls within the Doctrine of Necessity which militates in favor of Denying the Motion.

After the Kansas State Medical Board revoked a physician's license to practice medicine he brought an action to set aside and enjoin such order on the ground that it invaded rights guaranteed by the Federal Constitution. The case made its way to the 10th Circuit on the question whether the members of the Medical Board were prejudiced against appellant before the hearing started and because some of them were active in instigating the complaint. Dr. Hassig was president of the Medical Board and was also secretary of the Medical Society, in which capacity he served as the intermediary through whom complaints against physicians were cleared. In denying the physician's objections the Court in ***Brinkley v. Hassig***, 83 F.2d 351 (10th Cir. 1936) began its analysis by noting that an administrative tribunal acting as both prosecutor and judge has never been held to deny a constitutional right on that basis alone. On the contrary, many agencies have functioned for years, with the approval of the courts, which combine these roles. The Tenth Circuit used as an example the Federal Trade Commission which investigates charges of business immorality, files a charge in its own name as plaintiff, and then decides whether the proof sustains the charges it has preferred. The Interstate Commerce Commission and state Public Service Commissions may prefer complaints to be tried before them. Having restated the historical acceptance of combining investigative, prosecutorial and adjudicative functions in a single agency the Tenth Circuit then explained why combining those functions in a single agency representative likewise does not offend due process:

> "If an administrative tribunal may on its own initiative investigate, file a complaint, and then try the charge so preferred, due process is not denied here because one or more members of the board aided in the investigation. Assuming such preconceived prejudice, what is the answer? The statute provides but one tribunal with power to revoke a doctor's license, just as the Supreme Court of Kansas is the only body with power to disbar a lawyer. If such powers may not be exercised if the members of the board or court are prejudiced, then any lawyer or doctor, who commits an offense so grave that it shocks every right-thinking person, has an irrevocable license to practice his profession if he can get the news of his offense to the court or board before the trial begins. That will not do. The commendable efforts of the medical and legal professions to raise the standards of their professions by

> cleaning their own houses cannot be set at naught by any such rule of law."
> 83 F.2d at 357.

The Tenth Circuit then pronounced what has come to be known as "the doctrine of necessity":

> "From the very necessity of the case has grown the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises. If the law provides for a substitution of personnel on a board or court, or if another tribunal exists to which resort may be had, a disqualified member may not act. But where no such provision is made, the law cannot be nullified or the doors to justice barred because of prejudice or disqualification of a member of a court or an administrative tribunal."
> ***Id.***

The doctrine of necessity has been followed in ***Seidenberg v. New Mexico Bd. of Medical Examiners,*** 80 N.M. 135, 452 P.2d 469 (N.M. 1969).

As in the above-referenced cases, only the Public Employee Labor Relations Board has authority to investigate and adjudicate claims of prohibited labor practices of employers and employees under its jurisdiction. It does so under an administrative format that relies logistically on an Executive Director for processing and adjudicating in the first instance such claims, but subject to its review. The State acknowledges that the director has authority to delegate to other board employees or outside contractors any of the authority delegated to the director by the Board's rules and may appoint himself or a board member as the hearing examiner.[1] But the State also suggests that whenever the Director conducts an investigation a hearing officer other than the director must be designated under NMAC 11.21.3.14. State's Motion, p. 2 ¶2. This is not a fair reading of the Board's rules because the Director is required by NMAC 11.21.3.12 to conduct an investigation in every case. Under the State's suggested scenario the only way to avoid the necessity of delegating the hearing officer's responsibilities to an outside contractor or a Board member in every case would be to not conduct the initial investigation at all – a result the State's Motion suggests is the preferred method: "The former Executive Directors and Deputy Directors never utilized the investigatory procedures of requesting evidence in support of a prohibited practices charge likely due to the inability of the Directors to then serve as hearing officers and the limited budget disallowing the hiring of contracted hearing officers." See, State's Motion p. 4 ¶ 3. The State relies on the affidavit of former Deputy Director Pilar Vaile for that proposition. Putting aside any question of the accuracy of the affidavit with regard to taking matters

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[1] NMAC 11.21.1.28 provides "Except as otherwise provided in these rules, the director shall have authority to delegate to other board employees or outside contractors any of the authority delegated to the director by these rules. In every case where these rules or the act provide for the appointment of a hearing examiner, the director or the board shall appoint the hearing examiner, and may appoint the director or a board member as the hearing examiner.

directly to the Board for hearings[2] there is no doubt that prior Directors and the former Deputy Director providing the affidavit did not conduct initial investigations in prohibited practices cases. The Board's Practice manual compiled by prior PELRB staff which included the affiant and two others, at page 53 states:

> "PELRB rules require the hearing examiner to conduct an initial review. NOTE, however, that the PELRB's initial review is NOT comparable to the initial investigation that the NLRB performs on "charges" prior to issuing an "unfair practice complaint." The PELRB lacks sufficient staff to conduct independent investigations separate from adjudication. Accordingly, the PELRB simply confirms facial adequacy, meaning the facts in the PPC states a violation of PEBA, and the six-month limitations period has not expired. *See* NMAC 11.21.3.12; *see also* NMAC 11.21.3.9."

It is my opinion that the prior procedure constituted an impermissible abrogation of the Director's duty to conduct an investigation established by NMAC 11.21.3.12. Under the rationale of ***Winthrow v. Larkin*** and its progeny it is not necessary to abandon that duty to avoid what the State in its Motion considers the inability of the director to serve as a hearing officer after he has asked for and received evidence in support of a prohibited practices charge prior to a merits hearing. Nor has the State always looked with favor on what it now posits as a solution. In ***AFSCME Council 18 v. State of New Mexico***, PELRB 144-09, now pending a hearing on the merits, the State moved for Dismissal of the PPC against it in part on the ground that the Executive Director had failed to conduct an initial screening upon receipt of the complaint in accordance with NMAC 11.21.3.12 and appealed the denial of its Motion to Dismiss to the PELRB on that basis. See Notice of Appeal p. 3.

Although our rules permit a Board member to be appointed to hear cases, appointment of a Board member to serve in such capacity would jeopardize the Board's ability to act as a reviewing body of any decision to be rendered by the Hearing Officer in this case in the event a quorum could not be reached. Also, an objection to the Executive Director acting as both Hearing Officer and Investigator is a clear indication that an objection would be raised by the State should a Board member also act in that capacity unless the doctrine of necessity and the precedent set by ***Winthrow v. Larkin*** are followed. But in that instance the appointment of a Board member would not be necessary in the first place The State's Motion acknowledges the Board's limited staff and lack of a budget for hiring a staff of investigators and/or alternate hearing officers. This fact does not bolster the State's position but rather underscores the wisdom of the doctrines espoused by ***Winthrow v. Larkin***, ***Brinkley v. Hassig***, and ***Seidenberg v. New Mexico Bd. of Medical Examiners.***

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[2] Review of Board Decisions and Orders for the period 2006 -2009 found none that appeared to have been made following a direct referral to it from the Director or Deputy or Deputy Director for fact finding.

Further guidance may be found in a recent decision by Justice Charles Daniels denying a Motion to recuse himself in the case of ***Matthew Chandler v. Hon. Leslie C. Smith and Hon. Michael T. Murphy,*** No. 33,252, October 26, 2011. At the outset it should be noted that the rules governing judicial recusal are far more stringent than those that apply here and there is no place thereunder for application of ***Winthrow v. Larkin*** or the doctrine of necessity. However, Justice Daniels in denying the motion concentrated on Rule 21-400(A) and (A)(I) that a judge should recuse when "the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge has a personal bias or prejudice concerning a party or a party's lawyer." Which is similar to NMAC 11.21.1.13 (d) ground for recusal "for some other reason or prejudice, he or she cannot fairly or impartially consider the issues in the proceeding." In his Opinion and Order Justice Daniels set forth several guiding principles, some of which have applicability here:

1. **A judge has a duty not to abdicate his or her responsibility to preside unless there is a sound factual and legal basis for recusal.**

"'recusal is reserved for compelling constitutional, statutory, or ethical reasons because a judge has a duty to *sit* where *not disqualified* which is equally as strong as the duty to *not sit* where *disqualified.' State v. Hernandez,* 115 N.M. 6,20, 846 5 P.2d 312,326 (1993)" (internal quotation marks and citations omitted. Emphasis in original).

2. **Viable challenges to a judge's impartiality must be reasonable.**

"The controlling standard in Code provision 21-400 (A) provides that a judge should recuse from a case when under the relevant circumstances the judge's impartiality "might reasonably be questioned." The case law has made it clear that the word "reasonably" has significance. In determining reasonableness, the inquiry is not made from the perspective of "a hypersensitive or unduly suspicious person." *Hook v. McDade,* 89 F.3d 350, 354 (7th Cir. 1996) (internal quotation marks and citations omitted). Rather, "[t]he objective, reasonable person standard ... is intended to promote public confidence in the impartiality of the judicial process." *In re African-American Slave Descendants Litigation,* 307 F.3 Supp. 2d 977,983 (N.D. Ill. 2004)."

3. **The decision whether a judge's impartiality might reasonably be questioned must be made on the basis of the true facts, and not on mere allegations, falsehoods, rumors, or unsupported suspicions.**

"The standard a judge must apply in deciding whether to step down from an assigned case 'is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.' *Microsoft Corp. v. United States,* 530 U.S. 1301, 1302 (2000) (rejecting recusal). In short, it is important to speak truth to falsity. A decision on whether a judge's impartiality can reasonably be questioned 'is to be made in light of the facts as they existed, and not as they were surmised or reported.' *Cheney,* 541 U.S. at 914 (rejecting recusal). No

matter how widely circulated or publicized, "inaccurate and uninformed opinion cannot determine the recusal question.' *Id.* at 924."

In elucidating on this principle, Justice Daniels wrote:

"In deciding the sensitive question of whether to recuse a judge, the test of impartiality is what a reasonable person, knowing and understanding all the facts and circumstances, would believe. It is for that reason that we cannot adopt a per se rule holding that when someone claims to see smoke, we must find that there is fire. That which is seen is sometimes merely a smokescreen. Judicial inquiry may not therefore be defined by what appears in the press. If such were the case, those litigants fortunate enough to have easy access to the media could make charges against a judge's impartiality that would effectively veto the assignment of judges. Judge-shopping would then become an additional and potent tactical weapon in the skilled practitioner's arsenal. Instead, the sensitive issue of whether a judge should be disqualified requires a careful examination of those relevant facts and circumstances to determine whether the charges reasonably bring into question a judge's impartiality... The same fundamental principle must apply in all cases of attacks or threats against a judge, whether they be physical attacks, reputational attacks, or attacks on a judge's integrity."

4. **A judge must keep an open mind, not an empty mind.**

'There is no question that a judge should maintain an open mind until a case before him or her is finally decided. But courts and legal commentators alike have recognized that there is no prohibition against a judge's thinking about issues and having preliminary thoughts before a matter is presented for final resolution. 'A decision-maker need not suspend his mental processes until all the evidence is in. An empty mind is not the same as an open mind, nor is a preliminary inclination the same as a final decision.' *Suggs* v. C. *W Transport, Inc.,* 421 F. Supp. 58, 62 (N.D. Ill. 1976)...In the perceptive words of the eminent federal jurist Judge Jerome Frank, quoted with approval by this Court in *United Nuclear,* 96 N.M. at 249,629 P.2d at 325 (1980) (rejecting recusal argument), 'Impartiality is not gullibility. Disinterestedness does not mean child-like innocence.' *In re JP. Linahan, Inc.,* 138 F.2d 650,654 (2d Cir. 1943) (rejecting recusal argument). 'An 'open mind,' in the sense of a mind containing no preconceptions whatever, would be a mind incapable of learning anything.' *Id.* at 652."

For the reasons stated above and guided by the afore-referenced principles and cases, the Motion to recuse the Executive Director and to appoint an alternate hearing officer is properly **DENIED**.

Sincerely,

Thomas J. Griego
Executive Director, PELRB