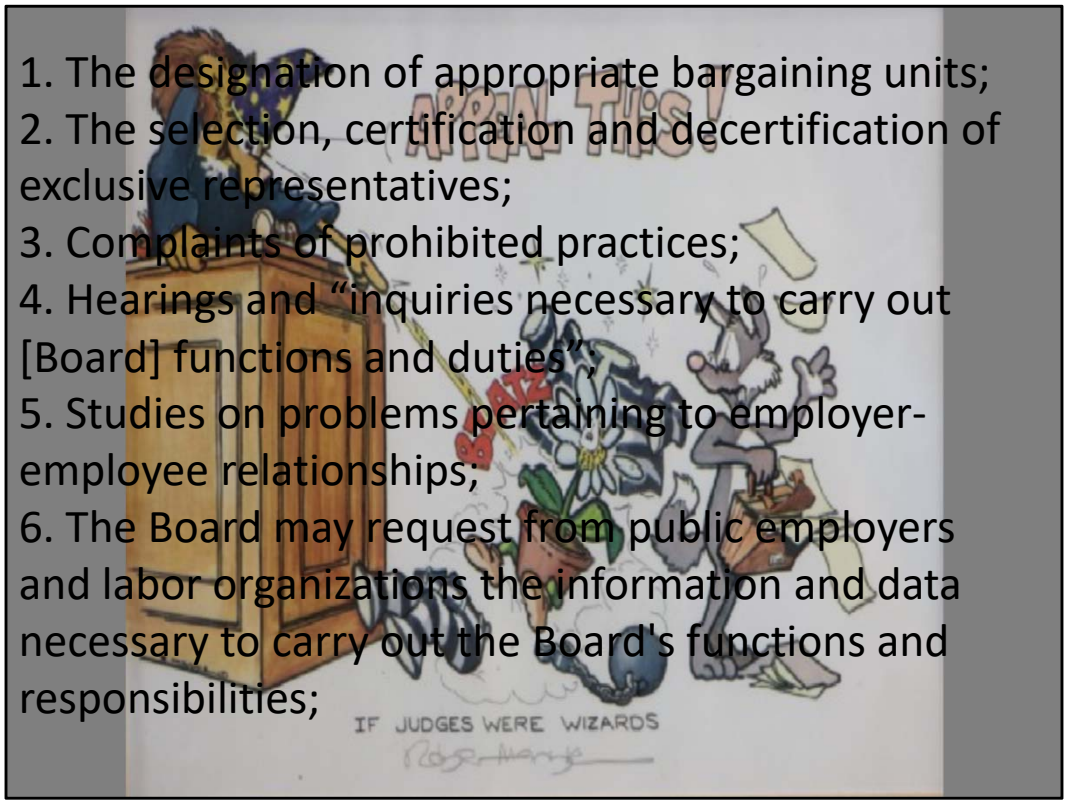
Introduction

The purpose of this presentation is to share some of the good and bad advocacy practices that I have seen in my tenure as Executive Director of the PELRB and my 34 years as a lawyer in employment and labor law cases.

• Proceedings before the PELRB are similar to Courtroom proceedings but although both are governed by due process considerations, some significant differences exist in procedure and practice. The degree of formality before the PELRB is somewhat less than you might expect before a court do not compromise your credibility or that of your client by lowering your standards of professionalism or courtesy. Give the presiding officer the same level of respect and deference that you would give a judge in a courtroom.

• Be mindful of the prohibition of *ex parte* communications, and if you have any doubt about whether your procedural question is proper, send an email with opposing party's counsel copied stating your issue.

• Arrive at any hearing on time or early - plan on appropriate travel time and logistics. • Be polite to all of the parties, and stay calm – don't get angry when the other side is doing their job well.



What sorts of "proceedings" are you likely to be involved in when practicing before the PELRB?

(1) the designation of appropriate bargaining units;
(2) the selection, certification and decertification of exclusive representatives; and
(3) the filing of, hearing on and determination of complaints of prohibited practices.

The board shall:
(1) hold hearings and make inquiries necessary to carry out its functions and duties;
(2) conduct studies on problems pertaining to employee-employer relations; and
(3) request from public employers and labor organizations the information and data necessary
to carry out the board's functions and responsibilities.

The first three are the most common proceedings. The first two, generally known as representation proceedings, often occur together – a petition for recognition as an exclusive bargaining representative usually requires the Board to determine the propriety of the bargaining unit to be represented.

Representation Cases

Under the PEBA, employees may organize in units represented by labor organizations of their own choosing for the purpose of bargaining collectively with their employers

concerning wages, hours and other terms and conditions of employment. One of the Board's major functions is to determine the appropriateness of these collective bargaining units based on guidelines established in PEBA and relevant case law. (See Key Word Digest re: "Appropriate Bargaining Units" - PELRA § 10-7E-13(A); www.state.nm.us/pelrb and the discussion therein re: community of interest standards, the principle of efficient administration of government and statutory exclusions based on actual duties performed. The Board also determines whether the employees in an appropriate bargaining unit wish to be represented by a particular labor organization. This is principally done through secret ballot elections supervised by the Board. Employee representatives seeking to represent a bargaining unit file a petition with the Board that must be supported by at least 30 percent of the employees in the unit.

Units may be certified without conducting elections if an employer does not question either the appropriateness of the unit or the majority status of a petitioning labor organization and agrees with the petition to certify the proposed unit.

Once certified, a labor organization is the exclusive bargaining agent for the employees in the bargaining unit. As exclusive representative, the union owes a duty to fairly and adequately represent the interests of employees in the bargaining unit members, whether or not they are members of the organizing union. *See* PEBA §15(A).

Just as employees may petition the Board for recognition of a collective bargaining representative, they may also seek ***decertification*** of a previously recognized representative. A member of a labor organization or the labor organization itself may initiate decertification of a labor organization as the exclusive representative if 30 percent of the public employees in the bargaining unit file a petition for a decertification election. *See* PEBA §19. Decertification elections are held in a manner substantially the same as that for certification.

The Board's rules provide a procedure for parties to petition the Board for ***amendment of certification*** to reflect changes such as a change in the name of the exclusive representative or of the employer, or a change in the affiliation of the labor organization. (NMAC 11.21.2.35). The Board has also established procedures to clarify the composition of an existing bargaining unit where the 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 a merger or realignment of previously existing bargaining units represented by the same labor organization, (NMAC 11.21.2.37) and for the accretion of unit employees who do not belong to an existing bargaining unit, but who share a community of interest with the employees in the existing unit. (NMAC 11.21.2.38) The accretion procedure is frequently used to allocate newly created positions to appropriate bargaining units or to merge two or more existing units.

Approval of Local Boards

Any public employer other than the state that wishes to create a local public employee labor

relations board shall file an application for approval of such a local board with the PELRB. *See*, NMSA §10-7E-10. Once created by ordinance, resolution or charter, and once approved by the PELRB, a local board assumes the duties and responsibilities of the PELRB and shall follow all procedures and provisions of the Public Employee Bargaining Act unless otherwise approved by the Board.

The PELRB has prepared and published templates for the creation of resolutions, ordinances or charter amendments (provided at www.state.nm.us/pelrb) designed to ensure compliance with the PEBA's requirements for approval of local boards. A public employer may propose variances from the templates pursuant to section 11.21.5.10 NMAC if the unique facts and circumstances of the relevant local public employer are deemed by the Board to be reasonable and necessary to effectuate the purposes of the Act. (NMAC 11.21.5.9)

Upon receipt of an application for approval seeking variance from the board approved templates, the director holds a status conference with the local public employer or its representative and any identified interested labor organizations, to determine the issues and set a hearing date. Upon setting a rule-making hearing, the director shall issue notice of the hearing and in the event that the board determines that such variance is warranted, and the resolution, ordinance or charter amendment otherwise conforms to the requirements of the Act and these rules, it shall authorize the director to proceed with processing the application. (NMAC 11.21.5.10).

Prohibited Labor Practice Cases

The Board enforces and protects the rights guaranteed both public employers and employees under PEBA through the investigation and adjudication of charges of prohibited labor practice charges (PPC). The board has the power to enforce provisions of the Public Employee Bargaining Act through the imposition of appropriate administrative remedies. (NMSA §10-7E-9)

After initial screening and investigation of a PPC but before conducting a hearing on the merits of any claim the Board's Director will facilitate settlement discussions in order to further the Board's preference for peaceful resolution of disputes thereby promoting its statutory objective of "promoting harmonious and cooperative relationships between public employers and public employees".

If the complaint cannot be settled by the parties prior to the hearing, the matter shall proceed to hearing. The hearing examiner has discretion to examine witnesses, call witnesses, or call for the introduction of documents (NMAC 11.21.3.16) after which the hearing examiner issues his or her report and recommended decision.

A party may obtain Board review of the report and recommended decision by filing a notice of appeal within ten (10) days following service of the hearing officer's report, whereupon the Board will either determine an appeal on the papers filed or, in its discretion, may also

hear oral argument. The Board's Decision may adopt, modify, or reverse the hearing examiner's recommendations or take other action it may deem appropriate such as remanding the matter to the hearing examiner for further findings or conclusions. Even when no appeal to the Board is taken the hearing examiner's decision is transmitted to the board which may *pro forma* adopt the hearing examiner's report and recommended decision as its own. In that event, the report and decision so adopted shall be final and binding upon the parties but shall not constitute binding board precedent.
(NMAC 11.21.3.19) The Board's powered to remedy PPC's through the imposition of appropriate administrative remedies has been interpreted to include reinstatement of employees with or without back pay, and pre-adjudication injunctive relief. The Board has authority to petition the courts for enforcement of such orders. *See* NMSA § 23.

Impasse Resolution Cases

The Board has limited powers related to bargaining impasses between employers and employees under the Act, acting primarily as a monitor and facilitator of mediation and arbitration performed by other entities.

Rulemaking

The PELRB is empowered by NMSA § 10-7E-9(A) to promulgate rules necessary to accomplish and perform its functions and duties as established in the Public Employee Bargaining Act, including the establishment of procedures for the designation of appropriate bargaining units, the selection, certification and decertification of exclusive representatives and for the filing of, hearing on and determination of complaints of prohibited practices. The Board has enacted such rules and over time the need to amend those rules may arise either to correct apparent errors or simply to adjust procedures to better serve the Board's mission or to comport with changes in the substantive law.

In Summary:

The Public Employee Labor Relations Board (PELRB) is the state agency charged with administering the PEBA. As such, the PELRB has authority and jurisdiction to enforce the provisions of the PEBA and the Board's rules and regulations. This means the PELRB has jurisdiction over all general collective bargaining matters between employee organizations or individual public employees and either state agencies or units of local government that have not established a local labor board pursuant to the PEBA. The PELRB also has jurisdiction to ensure that local labor ordinances and resolutions (and in some instances, local labor boards) comply with PEBA. The Board's mission is to: "guarantee public employees the right to organize and bargain collectively with their employers promote harmonious and cooperative relationships between public employers and employees and protect the public interest by assuring the orderly operation and functioning of the state and its political subdivisions." See PEBA, § 2 (Purpose of Act).

In carrying out this mission, the Board's primary functions are to:
1.promulgate rules as needed to perform its duties, including establishing procedures related to the determination of prohibited practice complaints, the approval of local boards, and the processing of petitions concerning representation,
2.hold hearings to determine appropriate bargaining units;
3.conduct secret ballot elections or other alternative appropriate procedures for determining whether public employees desire union representation;
4.approve voluntary recognition agreements;
5.certify the bargaining status of incumbent labor organizations;
6.certify, decertify, modify, clarify, accrete, and sever bargaining units;
7.hold hearings to determine whether a practice prohibited under PEBA has occurred and, if so, issue an appropriate administrative remedy;
8.issue temporary injunctive relief or restraining orders prior to a hearing on the merits, if warranted;
9.approve local boards, upon submission and consideration of an appropriate application;
10.revoke prior approval of local boards upon a determination that the local board no longer meets the requirements of § 10 of PEBA, notice of such finding, andadequate opportunity to cure the deficiency;
11.maintain a record of all hearings and proceedings;
12.timely issue written decisions related to the foregoing;
13.periodically compile, classify, index and publish its decisions;
14.educate public employers, public employees and unions as to their rights and responsibilities under PEBA;
15.gather information, conduct studies and disseminate information as needed concerning relations between public employers, public employees and bargaining agents; and
16.seek judicial enforcement of board orders as needed.

Pleadings. Your pleadings provide a lasting foundation for your case. They define the question in controversy between the parties and so, should do so with clarity and precision. Pleadings give fair notice of the precise case which is required to be met and the precise remedies sought. Avoid general "make whole" prayers for relief. Material facts must be clear and concise – avoid using ambiguous expressions, colloquialisms or hyperbole. Use plain but formal language that can be understood by the hearing officer or the Board.

- Get the facts right! Take your time to spot the issues.
- Create an outline to identify each cause of action you are asserting or responding to.
- In your outline list the elements of each claim. Refer to section 2 below regarding initial review. Plead material facts to prove or disprove each element - insulate your pleading against motions to dismiss.
- Be sure to review them before filing and again before preparing the pre-hearing order for your merits hearing.
- Ask yourself whether your pleading tells the story you want to tell.
- Are there facts in your pleading that are unnecessary or untrue?
- Are there facts in your pleading that are inconsistent with your current theory of the case?
- Are there facts in your opponent's pleading which help your case?
- Pleadings can be amended but it is difficult to withdraw admissions.

Whether you are filing a Representation Petition, Prohibited Practices Complaint or a Petition for approval of a local board there is a series of events prior to the actual hearing that are important and must be addressed with diligence.

1. Initial review. Upon receipt of a PPC or a Representation Petition the Director performs a preliminary review for facial adequacy, usually within 24 hours of receipt, for the following:

Representation Petition:

a. Does the pleading include, at a minimum, the following information:

In a Representation Petition

Does the pleading include the following information?

- **The petitioner's name, address, phone number, state or national affiliation, if any, and representative, if any;**
- **The name, address and phone number of the public employer or public employers whose employees are affected by the petition;**
- **Signed declaration the contents of the Petition or Complaint are true and correct to the best of the filer's knowledge;**
- **A description of the proposed appropriate bargaining unit and any existing recognized or certified bargaining unit;**
- **The geographic work locations, occupational groups, and estimated numbers of employees in the proposed unit and any existing bargaining unit;**
- **A statement of whether or not there is a collective bargaining agreement in effect covering any of the employees in the proposed or any existing bargaining unit.**

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Representation Petition:

a. Does the pleading include, at a minimum, the following information:

i. The petitioner's name, address, phone number, state or national affiliation, if any, and representative, if any;

ii. The name, address and phone number of the public employer or public employers whose employees are affected by the petition;

iii. Signed declaration the contents of the Petition or Complaint are true and correct to the best of the filer's knowledge;

iv. A description of the proposed appropriate bargaining unit and any existing recognized or certified bargaining unit;

v. The geographic work locations, occupational groups, and estimated numbers of employees in the proposed unit and any existing bargaining unit;

vi. A statement of whether or not there is a collective bargaining agreement in effect covering any of the employees in the proposed or any existing bargaining unit and, if so, the name, address and phone

number of the labor organization that is party to such agreement; a statement of what action the petition is requesting. (See, NMAC 11.21.2.8 Commencement of Case).

In a Prohibited Practices Complaint:

- **Does the Complaint allege a violation of sections 19, 20 or 21(A)?**
- **Was the PPC timely filed?**
- **Was the PPC properly filed in the correct format?**
- **Was the document properly delivered?**
- **Was your "faxed" pleading followed by an original filed by personal delivery or deposited in the mail no later than the first work day after the facsimile is sent?**
- **If submitted by a representative who is not an employee, is there a signed notice of appearance?**

Prohibited Practices Complaint:

i. Does the Complaint allege a violation of sections 10-7E-19, 10-7E- 20 or 10-7E-21(A) of PEBA? (See NMAC 11.21.1.7(10); Definition of "Prohibited Practices Complaint").

ii. 10-7E-19. Public employers; prohibited practices.

A public employer or his representative shall not:

A. discriminate against a public employee with regard to terms and conditions of employment because of the employee's membership in a labor organization;

B. interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act;

C. dominate or interfere in the formation, existence or administration of a labor organization;

D. discriminate in regard to hiring, tenure or a term or condition of employment in order to encourage or discourage membership in a labor organization;

E. discharge or otherwise discriminate against a public employee because he has signed or filed an affidavit, petition, grievance or complaint or given information or testimony pursuant to the provisions of the Public Employee Bargaining Act or because a public employee is forming, joining or choosing to be represented by a labor organization;

F. refuse to bargain collectively in good faith with the exclusive representative;

G. refuse or fail to comply with a provision of the Public Employee Bargaining Act or board rule; or

H. refuse or fail to comply with a collective bargaining agreement.

Section 10-7E-20. Public employees; labor organizations; prohibited practices.
A public employee or labor organization or its representative shall not:

A. discriminate against a public employee with regard to labor organization membership because of race, color, religion, creed, age, sex or national origin;

B. interfere with, restrain or coerce any public employee in the exercise of a right guaranteed pursuant to the provisions of the Public Employee Bargaining Act;

C. refuse to bargain collectively in good faith with a public employer;

D. refuse or fail to comply with a collective bargaining or other agreement with the public employer;

E. refuse or fail to comply with a provision of the Public Employee Bargaining Act; or

F. picket homes or private businesses of elected officials or public employees.

Section 10-7E-21. Strikes and lockouts prohibited.

A. A public employee or labor organization shall not engage in a strike. A labor organization shall not cause, instigate, encourage or support a public employee strike. A public employer

shall not cause, instigate or engage in a public employee lockout.

Was the PPC timely filed? Any complaint filed more than six (6) months following the conduct claimed to violate the act, or more than six (6) months after the complainant was either discovered or reasonably should have discovered, such conduct, shall be dismissed. (See NMAC 11.21.3.9).

Was the PPC properly filed in the correct format? A PPC shall be initiated by filing with the director a complaint on a form furnished by the director. The form shall set forth, at a minimum, name, address and phone number of the public employer, labor organization, or employee against whom the complaint is filed (the respondent) and of its representative if known, the specific section of PEBA claimed to have been violated; the name, address, and phone number of the complainant; a concise description of the facts constituting the asserted violation; and a declaration that the information provided is true and correct to the knowledge of the complaining party. The complaint shall be signed and dated, filed with the director, and served upon the Respondent.

Proper Delivery The document may be either hand-delivered to the board's office in Albuquerque during its regular business hours, or sent to that office by United States

mail, postage prepaid, or by the New Mexico state government interagency mail. The director will be responsible for recording the filing of documents to be filed with the board, as well as documents to be filed with the director.

Was your "faxed" pleading followed by an original filed by personal delivery or deposited in the mail no later than the first work day after the facsimile is sent?

A document will be deemed filed when it is received by the director. Documents sent to the board via facsimile ("fax") transmission will be accepted for filing as of the date of transmission only if an original is filed by personal delivery or deposited in the mail no later than the first work day after the facsimile is sent. (See NMAC 11.21.1.10).

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A word about electronic filing:

On May 1, 2018 the PELRB approved amendment of its rules to permit electronic filing and service of pleadings:

Proposed rules amendment (Revised 3/21/18):
11.21.1.7 DEFINITIONS:
A. Statutory definition: The terms defined in Section 4 of the act (NMSA 1978, Sec. 10-7E-4) shall have the meanings set forth therein.
B. Additional definitions: The following terms shall have the meanings set forth below.
(1) "Act" means the New Mexico Public Employee Bargaining Act (NMSA 1978, Sections 10-7E-1 through 10-7E-26 including any amendments to that statute.
(2) "Amendment of certification" means a procedure whereby an incumbent labor organization certified by the board to represent a unit of public employees or a public employer may petition the board to amend the certification to reflect a change such as a change in the name or the affiliation of the labor organization or a change in the name of the employer.
(3) "Certification of incumbent bargaining status" shall mean a procedure whereby a labor organization recognized by a public employer as the exclusive representative of an appropriate bargaining unit on June 30, 1999 petitions the board for a declaration of bargaining status under Section 24(B) of the act (NMSA 1978, Section 10-7E-24(B).
(4) "Challenged ballot" means the ballot of a voter in a representation election whose eligibility to vote is questioned either by a party to the representation case or by the director.
(5) "Complainant" means an individual, labor organization, or public employer, that has filed a prohibited practices complaint.
(6) "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.
(7) "Delivering a copy" as it pertains to service or filing of pleadings or other documents means: (1) handing it to the Board, to its agent(s), to opposing counsel or unrepresented parties; (2) sending a copy by facsimile or electronic transmission in accordance with NMAC 11.21.1.10 or 11.21.1.24; (3) leaving it at the Board's, opposing attorney's or party's office with a clerk or other person in charge thereof; or (4) if the attorney's or party's office is closed or the person to be served has no office, leaving it at the unrepresented person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.
(7) (8) "Director" means the director of the public employee labor relations board.
(8) (9) "Document" means any writing, photograph, film, blueprint, microfiche, audio or video tape, date a stored in electronic memory, or data stored and reproducible in visible or audible form by any other means.
(10) "Electronic submission" means the filing of a pleading or other document with the Board using the electronic system established by the PELRB.
(11) "Electronic Transmission" means any communication with the Board, its agents or parties by email or by electronic submission as defined herein.
(12) "On a form prescribed by the director" as used in these rules pertaining to the filing of documents with the Board, shall include the electronic data submitted by use of any interactive form posted for that purpose on the board's website.
(9) (13) "Probationary employee" for state employees shall have the meaning set forth in the State
Personnel Act and accompanying regulations; for other public employees, other than public school employees, it shall have the meaning set forth in any applicable ordinance, charter or resolution, or, in the absence of such a definition, in a collective bargaining agreement; provided, however, that for determining rights under the PEBA of non-state employees a public employee may not be considered to be a probationary employee for more than one (1) year after the date he or she is hired by a public employer. If otherwise undefined, the term shall refer to an employee who has held his or her position, or a related position, for less than six months.
(10) (14) "Prohibited practice" means a violation of Section 10-7E-19, 10-7E- 20 or 10-7E-21(A) of the act (NMSA 1978, Section 10-7E-19, 10-7E-20 or 10-7E-21(A).
(11) (15) "Public employer" means the state or a political sub-division thereof, including a municipality
that has adopted a home rule charter, and does not include a government of an Indian nation, tribe or pueblo, provided that state educational institutions as provided in article 12, Section 11 of the constitution of New Mexico shall be considered public employers other than state for collective bargaining purposes only.
(12) (16) "Public employee" means a regular non-probationary employee of a public employer; provided that, in the public schools, "public employee" shall also include a regular probationary employee.
(13) (17) "Representation case" or "representation proceeding" means any matter in which a petition has been filed with the director requesting a certification or decertification election,

or an amendment of certification, or unit clarification.
(14) (18) “Respondent” means a party against whom a prohibited practices complaint has been filed.
(15) (19) “Rules” means the rules and regulations of the board (these rules), including any amendments to them.
(16) (20) “Unit accretion” means the inclusion in an existing bargaining unit of employees who do not
belong to any existing bargaining unit, and who share a community of interest with the employees in the existing unit, and whose inclusion will not render the existing unit inappropriate.
(17) (21) “Unit clarification” means a proceeding in which a party to an existing lawful collective
bargaining relationship petitions the board to change the scope and or description of an existing bargaining unit; a change in union affiliation; to consolidate existing bargaining units represented by the same labor organization; or to realign existing bargaining units of state employees represented by the same exclusive representative into horizontal units, where the board finds the unit as clarified to be an appropriate bargaining unit and no question concerning, representation arises.
(18) (22) “Unit inclusions or exclusions” means the status of an individual, occupational group, or group
of public employees in clear and identifiable communities of interest in employment terms and conditions and related personnel matters, as being within or outside of an appropriate bargaining unit based on factors such as supervisory, confidential or managerial status, the absence thereof, job context, principles of efficient administration of government, the history of collective bargaining, and the assurance to public employees of the fullest freedom in exercising the rights guaranteed by the Public Employee Bargaining Act.

11.21.1.8 COMPUTATION OF TIME: When these rules state a specific number of days in which some action must or may be taken after a given event, the date of the given event is not counted in computing the time, and the last day of the period is deemed to end at close of business on that day. Saturday’s, Sundays and state recognized legal holidays observed in New Mexico shall not be counted when computing the time. When the last day of the period falls on a Saturday, Sunday or legal holiday observed in New Mexico, then the last day for taking the action shall be the following business day.
A. Additional time after service by mail. When a party must act within a specified time after service and service is made by mail, three (3) days are added after the period would otherwise expire. Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three (3) days. If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday.

11.21.1.24 SERVICE: Service of papers upon parties may be made by personal delivery, or by depositing in United States mail, first class postage prepaid, or by both facsimile (“fax”) transmission, or by electronic transmission and, by the next scheduled work day after sending a “fax” or electronic transmission, either personally delivering the document or

depositing it in first class mail, in which case the date of "fax" or electronic transmission shall be the date of service. Each document served shall be accompanied by a signed certification stating the name and address of each person served and the date and method of service. The certification may be placed on the document served.
A. The Board may serve any document by electronic transmission to an attorney or party or its representative under this rule.

11.21.1.10 FILING WITH THE DIRECTOR OR THE BOARD: To file a document with the director or the board, the document may be either hand-delivered to the board's office in Albuquerque during its regular business hours, or sent to that office by United States mail, postage prepaid, or by the New Mexico state government interagency mail or by sending a copy by facsimile or electronic transmission. The director will be responsible for recording the filing of documents to be filed with the board, as well as documents to be filed with the director.
A. Time of filing: A document will be deemed filed when it is received by the director. For hand-delivered or mailed documents the date and time stamp affixed by the receiving board agent will be determinative. For faxed or electronically transmitted documents the time and date affixed on the cover page or the document itself by the board's facsimile machine or receiving computer will be determinative. Documents sent to the board via facsimile ("fax") transmission will be accepted for filing as of the date of transmission only if an original is filed by personal delivery or deposited in the mail no later than the first work day after the facsimile is sent.
B. Additional time after service by mail: Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three (3) days shall be added to the prescribed period. Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three (3) days. If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday.
C. Signatures: Party's or their representatives filing electronically thereby certify that required signatures or approvals have been obtained before filing the document. The full, printed name of each person signing a paper document shall appear in the electronic version of the document. All electronically filed documents shall be deemed to contain the filer's signature. The signature in the electronic document may represent the original signature in the following ways:
(1) by scanning or other electronic reproduction of the signature; or
(2) by typing in the signature line the notation "/s/" followed by the name of the person who signed the original document.
D. Demand for original: A party shall have the right to inspect and copy any pleading or paper that has been filed or served by facsimile or electronic transmission if the pleading or paper has a statement signed under oath or affirmation or penalty of perjury.

11.21.1.12 EX PARTE COMMUNICATIONS: Except as otherwise provided in this rule, no party to a

pending representation, prohibited practices, or fact-finding other proceeding shall communicate, or attempt to communicate, with a hearing examiner assigned to the case, with the director, or with a board member, concerning any issue in the case, without, at the same time, transmitting the same communication to all other parties to the proceeding. It shall not be a violation of this rule to communicate concerning the status of a case, or to communicate concerning such procedural matters as the location or time of a hearing, the date on which documents are due, or the method of filing. It shall not be a violation of this rule for the director a party to communicate with the director a party during the investigatory phase of a representation, prohibited practices, or impasse resolution proceeding. It shall not be a violation of this rule for a party to communicate with anyone concerning any rulemaking proceeding of the board, or to communicate with the director, a mediator, or board member at the director's mediator's, or member's request.

11.21.1.15 RECORDS OF PROCEEDINGS:

A. All meetings of the board (whether general, special or emergency) and all rulemaking, unit determination, and prohibited practice hearings before the board or a hearing examiner of the board shall be audio-recorded, or, upon order of the board may be transcribed, except that board meetings or portions thereof lawfully closed shall not be recorded or transcribed, unless so directed by the board.

B. Following the board's approval of the minutes of a meeting of the board, the minutes shall become the sole official record of the meeting, and the audio tape of the meeting may be erased. The director shall keep audio tapes of the rulemaking, unit determination, and prohibited practices hearings for a period of at least one year following the close of the proceeding in which the hearing is held, or one year following the close of the last judicial or board proceeding (including any appeal or request for review) related to the case in which the hearing is held, whichever is later, or such longer period as may be required by law. No recording shall be made of any mediation proceeding, settlement discussion, or alternative dispute resolution effort except by agreement of all parties and participating officials. The board's recording or transcript shall be the only official record of a hearing.

C. Records of all rulemaking proceedings shall comport with the requirements of Title 1 Chapter 24 Part 25, General Government Administration Rules; Procedural Rules for Public Rule Hearings, incorporated herein by reference, as may be amended from time to time.

11.21.1.16 NOTICE OF HEARING:

A. After the appropriate notice or petition is filed in a representation, or prohibited practices or impasse
resolution case, the director shall hold a status and scheduling conference with the parties to determine the issues; establish a schedule for discovery, including the issuance of subpoenas, and pretrial motions; and set a hearing date.

B. Upon setting a rulemaking hearing, the director or the board shall cause notice of hearing to be
issued setting forth the nature of the rulemaking proceeding, the time and place of the hearing, the manner in which interested persons may present their views, and the manner in which interested persons may obtain copies of proposed rules. Notices of rulemaking

hearings shall be sent by regular mail to all persons who have made requests for such notice, and shall be published in at least one newspaper of general circulation in New Mexico at least thirty (30) days prior to commencement of the hearing.
C. A party to a representation, prohibited practices or impasse resolution other case in which a hearing is scheduled may request postponement of the hearing by filing a written request with the director, and serving the request upon all other parties, at least five (5) days before commencement of the hearing. The requesting party shall state the specific reasons in support thereof. Upon good cause shown, the director shall grant a postponement to a date no more than twenty (20) days after the previously set date. Only in extraordinary circumstances may the director grant a further postponement, or a postponement to a date more than twenty (20) days after the previously set date.

11.21.1.22 BURDEN OF PROOF:
A. Except in unit clarification proceedings, no party shall have the burden of proof in a representation or fact-finding proceeding. Rather, the director in the investigatory phase or the hearing examiner shall have the responsibility of developing a fully sufficient record for a determination to be made, and may request any party to present evidence or arguments in any order. In a unit clarification proceeding, a party seeking any change in an existing appropriate unit, or in the description of such a unit, shall have the burden of proof and the burden of going forward with the evidence.
B. In a prohibited practices proceeding, the complaining party has the burden of proof and the burden of going forward with the evidence.

11.21.2.23 OPPORTUNITY TO PRESENT FURTHER SHOWING OF INTEREST:
A. When the director finds that the petitioner or an intervenor has submitted an insufficient showing of interest in the unit petitioned for, the director shall notify the petitioner or intervenor, and that party shall have the opportunity to submit an additional showing of interest. The director shall then review the additional showing of interest to determine whether the total showing of interest submitted by the party is sufficient to sustain its petition or intervention.
B. In the event that the director, hearing examiner or board determines that a unit other than the unit petitioned for is appropriate and it appears to the board or director that the showing of interest filed by the petitioner or an intervenor is insufficient in the unit found appropriate, the director shall notify the petitioner or intervenor and give such party a reasonable amount of time in which to file an additional showing. If the party fails to file a sufficient showing within that time, the director shall dismiss the petition or deny intervenor status.

11.21.2.39 VOLUNTARY RECOGNITION:
A. A labor organization representing the majority of employees in an appropriate collective bargaining unit and a public employer, after a petition for certification has been filed, may enter into a voluntary recognition agreement in which the employer recognized recognizes the labor organization as the exclusive representative of all of the employees in the unit. Such petition shall be accompanied by a showing of majority support, which shall be verified

in accordance with the procedures of Section 11, above.
B. Prior to board approval of any voluntary recognition, the director shall post notice of filing of petition in the manner provided for in Section 15, above. The director shall also give notice to any individuals or labor organizations that register with the director to be informed of such petitions.
C. If an intervenor does not file a petition for intervention within ten (10) days then the board shall consider the petition for approval of the voluntary recognition if accompanied by consent of the employer.
D. The board shall treat a voluntary recognition relationship so established and approved the same as a relationship established through board election and certification, unless the board finds the agreed-to bargaining unit to be inappropriate. In that event, the board may require the filing and processing of a petition as provided for in these rules, and the conduct of an election, before recognizing the relationship.
E. If an intervenor files a proper petition pursuant to Section 16 above, within the ten (10) day time period, then the board may not approve a voluntary recognition, and the director shall proceed in the manner set forth for representation petitions as provided in Section 10 to 14 and 17 to 34 above.

Within a few days of filing the Director will conduct its initial review and will issue a letter informing the filer that either the Petition or complaint is “facially adequate” or, that it is “inadequate”. If found to be “inadequate” the Director will specifically set forth the reasons for the finding and will give the filer five days in which to cure the deficiencies either by filing an amended pleading or by providing additional submissions to cure the deficiency, or the Petition or Complaint will be dismissed pursuant to NMAC 11.21.2.13(B).

Some common reasons a Complaint is found to be inadequate:

1. Dates of events are not alleged so that I cannot determine whether the Complaint is timely filed or dates that are alleged are outside of the six month SOL.
2. Facts and circumstances are not alleged so that I cannot determine whether its states a claim in one or more of the subsections of Section 19 or Section 20.
3. No reference to the subsection of Section 19 or 20 that any acts set forth in the complaint are thought to have violated.

Initial Letter Adequate/Inadequate

- Short deadline to cure an inadequate pleading
- 10-day response triggers Status and Scheduling Conference
- 15 workdays to respond to a PPC
- Filer directed to contact opposing party for Scheduling conference

Within a few days of filing, the Director will conduct its initial review and will issue a letter informing the filer that either the Petition or complaint is "facially adequate" or, that it is "inadequate". If found to be "inadequate" the Director will specifically set forth the reasons for the finding and will give the filer ***five days*** in which to cure the deficiencies either by filing an amended pleading or by providing additional submissions to cure the deficiency, or the Petition or Complaint will be dismissed pursuant to NMAC 11.21.2.13(B).

In a Representation Proceeding, the Director's initial letter will ask the Employer within 10 days to provide a list of employees who would be in the bargaining unit as proposed, (NMAC 11.21.2.12 (B)) along with each party's statement of any issues of unit inclusion or exclusion that may be in dispute and any other issue that could affect the outcome of the proceeding. (NMAC 11.21.2.12 (A)).

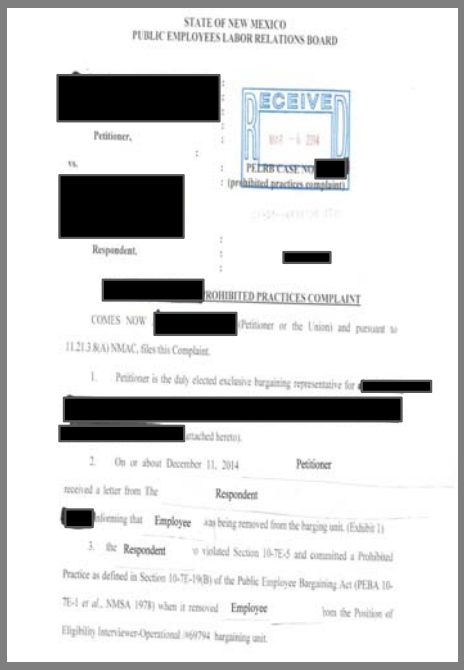
In a Prohibited Practice Proceeding, if the Complaint is "facially adequate" the Respondent employer, union or individual is required to file an answer within 15 workdays from receipt of the complaint. Failure to file an answer could result in the entry of a finding by default. In a manner similar to that followed in a Representation proceeding, the complainant will be asked to present all supporting evidence then available including documents and an outline of the testimony of any witnesses or their affidavits, within 10 days. Failure to respond to this request may result in dismissal of the PPC. NMAC 11.21.3.12(B)

The complainant is further directed to initiate contact with the employer or its representative to confer concerning a mutually acceptable date and time for a 20 minute Status and Scheduling Conference. The Director will give three alternate dates to choose from that are at least 15 days from the date of the initial letter so that it is likely that the opposing party has time to file a response or answer before the conference and any

supporting evidence, due within 10 days has been submitted. If additional suggested dates are needed, just ask. Once the Director is informed of the agreed-upon date he/she will send a scheduling notice to the parties. If the Director does not hear back from the parties by the deadline, he or she will set the conference at his convenience and send notice to the parties.

Let’s take a look at some pleadings that were found to be adequate and discuss their positive points.

Good Pleading Example



STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

[redacted]
Petitioner,
vs.
[redacted]
Respondent.

RECEIVED
[redacted]
PELRB CASE NO. [redacted]
(prohibited practices complaint)

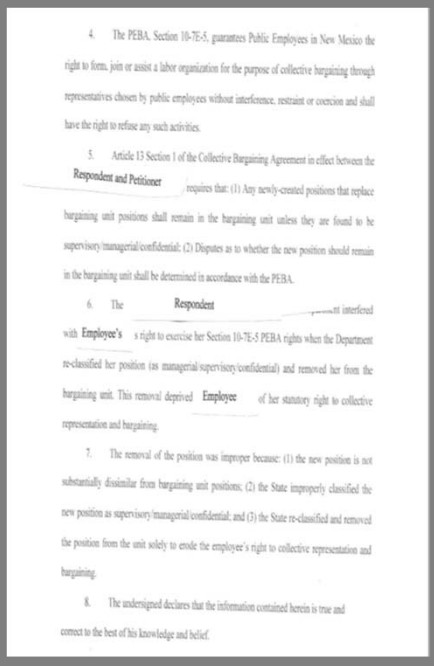
[redacted] PROHIBITED PRACTICES COMPLAINT

COMES NOW [redacted] (Petitioner or the Union) and pursuant to 11.21.3.8(A) NMAC, files this Complaint.

1. Petitioner is the duly elected exclusive bargaining representative for [redacted] attached hereto).

2. On or about December 11, 2014 Petitioner received a letter from The Respondent informing that Employee was being removed from the barging unit. (Exhibit 1)

3. the Respondent violated Section 10-7E-5 and committed a Prohibited Practice as defined in Section 10-7E-19(B) of the Public Employee Bargaining Act (PEBA 10-7E-1 *et al.*, NMSA 1978) when it removed Employee from the Position of Eligibility Interviewer-Operational /#69794 bargaining unit.



4. The PEBA, Section 10-7E-5, guarantees Public Employees in New Mexico the right to form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion and shall have the right to refuse any such activities.

5. Article 13 Section 1 of the Collective Bargaining Agreement in effect between the Respondent and Petitioner requires that: (1) Any newly-created positions that replace bargaining unit positions shall remain in the bargaining unit unless they are found to be supervisory/managerial/confidential; (2) Disputes as to whether the new position should remain in the bargaining unit shall be determined in accordance with the PEBA.

6. The Respondent interfered with Employee's right to exercise her Section 10-7E-5 PEBA rights when the Department re-classified her position (as managerial/supervisory/confidential) and removed her from the bargaining unit. This removal deprived Employee of her statutory right to collective representation and bargaining.

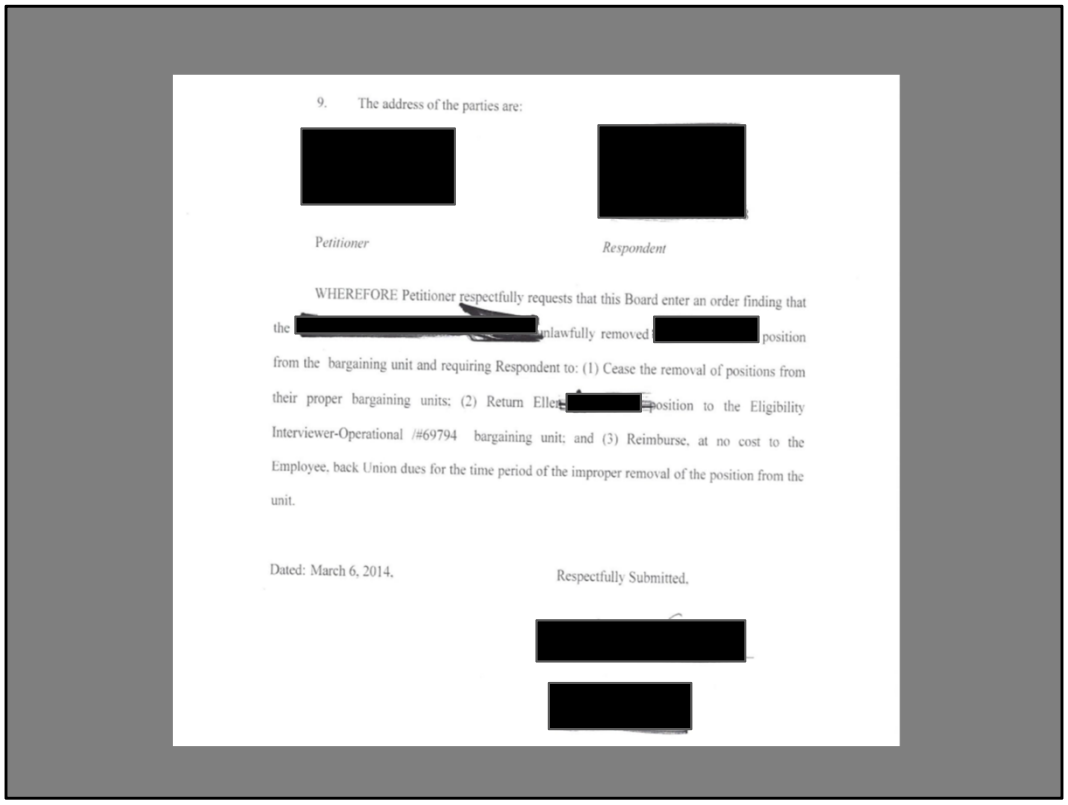
7. The removal of the position was improper because: (1) the new position is not substantially dissimilar from bargaining unit positions; (2) the State improperly classified the new position as supervisory/managerial/confidential; and (3) the State re-classified and removed the position from the unit solely to erode the employee's right to collective representation and bargaining.

8. The undersigned declares that the information contained herein is true and correct to the best of his knowledge and belief.

Why do I like this PPC? [Proceed through next slide]

NMAC 11.21.3.8 COMMENCEMENT OF CASE:
A prohibited practices complaint shall set forth at a minimum:

- name, address and phone number of the public employer, labor organization, or employee against whom the complaint is filed; (see paragraph 9)
- name, address and phone number of its representative if known; (See paragraph 9)
- the specific section of the act claimed to have been violated;
- the name, address, and phone number of the complainant;
- a concise description of the facts constituting the asserted violation; and
- a declaration that the information provided is true and correct to the knowledge of the complaining party.
- signed and dated, filed with the director, and served upon the respondent.



9. The address of the parties are:

[redacted] [redacted]

Petitioner *Respondent*

WHEREFORE Petitioner respectfully requests that this Board enter an order finding that the [redacted] unlawfully removed [redacted] position from the bargaining unit and requiring Respondent to: (1) Cease the removal of positions from their proper bargaining units; (2) Return Ellen [redacted] position to the Eligibility Interviewer-Operational /#69794 bargaining unit; and (3) Reimburse, at no cost to the Employee, back Union dues for the time period of the improper removal of the position from the unit.

Dated: March 6, 2014.

Respectfully Submitted,

[redacted]

[redacted]

STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

UNION 123,

Petitioner,

PELRB XXXX
(prohibited practices complaint)

PUBLIC EMPLOYER DEPARTMENT,

Respondent.

PROHIBITED PRACTICES COMPLAINT

COMES NOW Petitioner union and pursuant to 11.21.3.8(A) NMAC files this Complaint.

1. Petitioner is the duly elected exclusive bargaining representative for certain employees of Public Employer ABC at its Anywhereville facility. (Exhibit 1 attached hereto)

2. On or about December 11, 2014 Jane Q. Public, an employee within the bargaining unit described above, received a letter from Public Employer ABC informing her that she was being removed from the position of Highly Desired Employee I, a position within the bargaining unit described above. (Exhibit 1).

3. Respondent violated Section 10-7E-5 and committed a Prohibited Practice as defined in Section 10-7E-19 (B) of the Public Employee Bargaining Act Section 10-7E-1 *et seq.* NMSA 1978) when it removed Ms. Public from the position of Highly Desired Employee I.

4. The PEBA Section 10-7E-5, guarantees Public Employees in New Mexico the right to form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion and shall have the right to refuse any such activities.

5. Article 13 Section 1 of the Collective Bargaining Agreement in effect between Public Employer ABC and Union 123 requires that: "(1) Any newly created positions that replace bargaining unit positions shall remain in the bargaining unless they are found to be supervisory/ managerial/or confidential: (2) Disputes as to whether the new positions should remain in the bargaining unit shall he determined in accordance with the PEBA."

6. Respondent interfered with Ms. Public's right to exercise her Section 10-7E-5 PEBA rights when the Department re-classified her position as managerial/supervisory/ confidential and removed her from the bargaining unit. This removal deprived Jane Q. Public of her statutory right to collective representation and bargaining.

7. The removal of the position was improper because: (1) the new position is not substantially dis-similar from bargaining unit positions; (2) the Department improperly classified the new position as supervisory/'managerial/confidential; and (3) the Department re-classified and removed the position from the unit solely to erode the employee's right to collective representation and bargaining.

8. The undersigned declares that the information contained herein is true and accurate to the best of his knowledge and belief.

9. The addresses of the parties are:

Union 123	Public Employer Department
123 Union Blvd.	123 Agency Blvd
Anywhereville, NM 88888	Anywhereville, NM 88888
Attn: Joe Schmoe, Business Agent	Attn: Jane Doe, Dep't Secretary
Phone: (505) 555-5555	Phone: (505) 888-8888
Fax: (505) 444-4444	Fax: (505) 999-9999
email: Schmoeman@internet.com	email: Emplogal@internet.com
Petitioner	Respondent

WHEREFORE, Petitioner respectfully requests that this Board enter an order finding that the Public Employer department improperly removed Jane Q. Public's position from the bargaining unit and requiring Respondent to, (1) Cease the removal of positions from their proper bargaining units; (2) Return Jane Q. Public to the Highly Desired Employee I bargaining unit, and (3) Reimburse at no cost to the Employee, back Union dues for the time period of the improper removal of the position from the unit.

Dated: March 6, 2014

Joe Schmoe, Business Agent
c/o Union 123
123 Union Blvd.
Anywhereville, NM 88888

- name, address and phone number of the public employer, labor organization, or employee against whom the complaint is filed; (see paragraph 9)
- name, address and phone number of its representative if known; (See paragraph 9)

STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

UNION 123,

Petitioner,

PELRB XXXX
(prohibited practices complaint)

PUBLIC EMPLOYER DEPARTMENT,

Respondent.

PROHIBITED PRACTICES COMPLAINT

COMES NOW Petitioner union and pursuant to 11.21.3.8(A) NMAC files this Complaint.

1. Petitioner is the duly elected exclusive bargaining representative for certain employees of Public Employer ABC at its Anywhereville facility. (Exhibit 1 attached hereto)

2. On or about December 11, 2014 Jane Q. Public, an employee within the bargaining unit described above, received a letter from Public Employer ABC informing her that she was being removed from the position of Highly Desired Employee I, a position within the bargaining unit described above. (Exhibit 1).

3. Respondent violated Section 10-7E-5 and committed a Prohibited Practice as defined in Section 10-7E-19 (B) of the Public Employee Bargaining Act Section 10-7E-1 *et seq.* NMSA 1978) when it removed Ms. Public from the position of Highly Desired Employee I.

4. The PEBA Section 10-7E-5, guarantees Public Employees in New Mexico the right to form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion and shall have the right to refuse any such activities.

5. Article 13 Section 1 of the Collective Bargaining Agreement in effect between Public Employer ABC and Union 123 requires that: "(1) Any newly created positions that replace bargaining unit positions shall remain in the bargaining unless they are found to be supervisory/ managerial/or confidential: (2) Disputes as to whether the new positions should remain in the bargaining unit shall he determined in accordance with the PEBA."

6. Respondent interfered with Ms. Public's right to exercise her Section 10-7E-5 PEBA rights when the Department re-classified her position as managerial/supervisory/ confidential and removed her from the bargaining unit. This removal deprived Jane Q. Public of her statutory right to collective representation and bargaining.

7. The removal of the position was improper because: (1) the new position is not substantially dis-similar from bargaining unit positions; (2) the Department improperly classified the new position as supervisory/'managerial/confidential; and (3) the Department re-classified and removed the position from the unit solely to erode the employee's right to collective representation and bargaining.

8. The undersigned declares that the information contained herein is true and accurate to the best of his knowledge and belief.

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123 Union Blvd.	123 Agency Blvd
Anywhereville, NM 88888	Anywhereville, NM 88888
Attn: Joe Schmoe, Business Agent	Attn: Jane Doe, Dep't Secretary
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Fax: (505) 444-4444	Fax: (505) 999-9999
email: Schmoeman@internet.com	email: Emplogal@internet.com
Petitioner	Respondent

WHEREFORE, Petitioner respectfully requests that this Board enter an order finding that the Public Employer department improperly removed Jane Q. Public's position from the bargaining unit and requiring Respondent to, (1) Cease the removal of positions from their proper bargaining units; (2) Return Jane Q. Public to the Highly Desired Employee I bargaining unit, and (3) Reimburse at no cost to the Employee, back Union dues for the time period of the improper removal of the position from the unit.

Dated: March 6, 2014

Joe Schmoe, Business Agent
c/o Union 123
123 Union Blvd.
Anywhereville, NM 88888

- the specific section of the act claimed to have been violated;

STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

UNION 123,

Petitioner,

PELRB XXXX
(prohibited practices complaint)

PUBLIC EMPLOYER DEPARTMENT,

Respondent.

PROHIBITED PRACTICES COMPLAINT

COMES NOW Petitioner union and pursuant to 11.21.3.8(A) NMAC files this Complaint.

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3. Respondent violated Section 10-7E-5 and committed a Prohibited Practice as defined in Section 10-7E-19 (B) of the Public Employee Bargaining Act Section 10-7E-1 *et seq.* NMSA 1978) when it removed Ms. Public from the position of Highly Desired Employee I.

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5. Article 13 Section 1 of the Collective Bargaining Agreement in effect between Public Employer ABC and Union 123 requires that: "(1) Any newly created positions that replace bargaining unit positions shall remain in the bargaining unless they are found to be supervisory/ managerial/or confidential: (2) Disputes as to whether the new positions should remain in the bargaining unit shall he determined in accordance with the PEBA."

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7. The removal of the position was improper because: (1) the new position is not substantially dis-similar from bargaining unit positions; (2) the Department improperly classified the new position as supervisory/'managerial/confidential; and (3) the Department re-classified and removed the position from the unit solely to erode the employee's right to collective representation and bargaining.

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Attn: Joe Schmoe, Business Agent	Attn: Jane Doe, Dep't Secretary
Phone: (505) 555-5555	Phone: (505) 888-8888
Fax: (505) 444-4444	Fax: (505) 999-9999
email: Schmoeman@internet.com	email: Emplogal@internet.com
Petitioner	Respondent

WHEREFORE, Petitioner respectfully requests that this Board enter an order finding that the Public Employer department improperly removed Jane Q. Public's position from the bargaining unit and requiring Respondent to, (1) Cease the removal of positions from their proper bargaining units; (2) Return Jane Q. Public to the Highly Desired Employee I bargaining unit, and (3) Reimburse at no cost to the Employee, back Union dues for the time period of the improper removal of the position from the unit.

Dated: March 6, 2014

Joe Schmoe, Business Agent
c/o Union 123
123 Union Blvd.
Anywhereville, NM 88888

- the name, address, and phone number of the complainant;

STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

UNION 123,

Petitioner,

PELRB XXXX
(prohibited practices complaint)

PUBLIC EMPLOYER DEPARTMENT,

Respondent.

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Anywhereville, NM 88888	Anywhereville, NM 88888
Attn: Joe Schmoe, Business Agent	Attn: Jane Doe, Dep't Secretary
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email: Schmoeman@internet.com	email: Emplogal@internet.com
Petitioner	Respondent

WHEREFORE, Petitioner respectfully requests that this Board enter an order finding that the Public Employer department improperly removed Jane Q. Public's position from the bargaining unit and requiring Respondent to, (1) Cease the removal of positions from their proper bargaining units; (2) Return Jane Q. Public to the Highly Desired Employee I bargaining unit, and (3) Reimburse at no cost to the Employee, back Union dues for the time period of the improper removal of the position from the unit.

Dated: March 6, 2014

Joe Schmoe, Business Agent
c/o Union 123
123 Union Blvd.
Anywhereville, NM 88888

- a concise description of the facts constituting the asserted violation; and a declaration that the information provided is true and correct to the knowledge of the complaining party.

STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

UNION 123,

Petitioner,

PELRB XXXX
(prohibited practices complaint)

PUBLIC EMPLOYER DEPARTMENT,

Respondent.

PROHIBITED PRACTICES COMPLAINT

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6. Respondent interfered with Ms. Public's right to exercise her Section 10-7E-5 PEBA rights when the Department re-classified her position as managerial/supervisory/ confidential and removed her from the bargaining unit. This removal deprived Jane Q. Public of her statutory right to collective representation and bargaining.

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9. The addresses of the parties are:

Union 123 123 Union Blvd. Anywhereville, NM 88888 Attn: Joe Schmoe, Business Agent Phone: (505) 555-5555 Fax: (505) 444-4444 email: Schmoeman@internet.com	Public Employer Department 123 Agency Blvd Anywhereville, NM 88888 Attn: Jane Doe, Dep't Secretary Phone: (505) 888-8888 Fax: (505) 999-9999 email: Emplogal@internet.com
Petitioner	Respondent

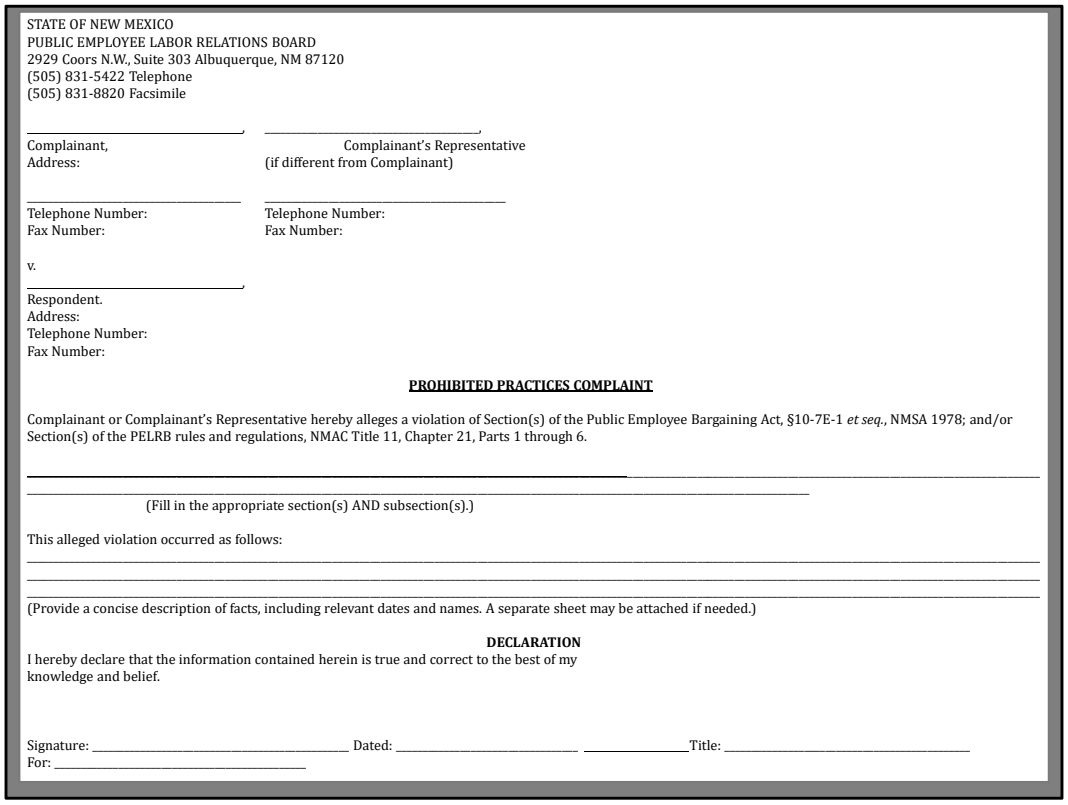
WHEREFORE, Petitioner respectfully requests that this Board enter an order finding that the Public Employer department improperly removed Jane Q. Public's position from the bargaining unit and requiring Respondent to, (1) Cease the removal of positions from their proper bargaining units; (2) Return Jane Q. Public to the Highly Desired Employee I bargaining unit, and (3) Reimburse at no cost to the Employee, back Union dues for the time period of the improper removal of the position from the unit.

Dated: March 6, 2014

Joe Schmoe

Joe Schmoe, Business Agent
c/o Union 123
123 Union Blvd.
Anywhereville, NM 88888

- a declaration that the information provided is true and correct to the knowledge of the complaining party.
- signed and dated, filed with the director, and served upon the respondent.
- Other good points:
  - ***Relevant*** facts supporting the Complaint's allegations And a clear request for relief. "Make whole" relief prayers are discouraged;
  - A Certificate of Service may be added or filed as a separate document.



STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD
2929 Coors N.W., Suite 303 Albuquerque, NM 87120
(505) 831-5422 Telephone
(505) 831-8820 Facsimile

_____, _____,
Complainant, Complainant's Representative
Address: (if different from Complainant)

_____ _____
Telephone Number: Telephone Number:
Fax Number: Fax Number:

v.

_____,
Respondent.
Address:
Telephone Number:
Fax Number:

PROHIBITED PRACTICES COMPLAINT

Complainant or Complainant's Representative hereby alleges a violation of Section(s) of the Public Employee Bargaining Act, §10-7E-1 *et seq.*, NMSA 1978; and/or Section(s) of the PELRB rules and regulations, NMAC Title 11, Chapter 21, Parts 1 through 6.

_____
_____
(Fill in the appropriate section(s) AND subsection(s).)

This alleged violation occurred as follows:
_____
_____
_____
(Provide a concise description of facts, including relevant dates and names. A separate sheet may be attached if needed.)

DECLARATION
I hereby declare that the information contained herein is true and correct to the best of my knowledge and belief.

Signature: _____ Dated: _____ _____Title: _____
For: _____

http://www.pelrb.state.nm.us/forms.php

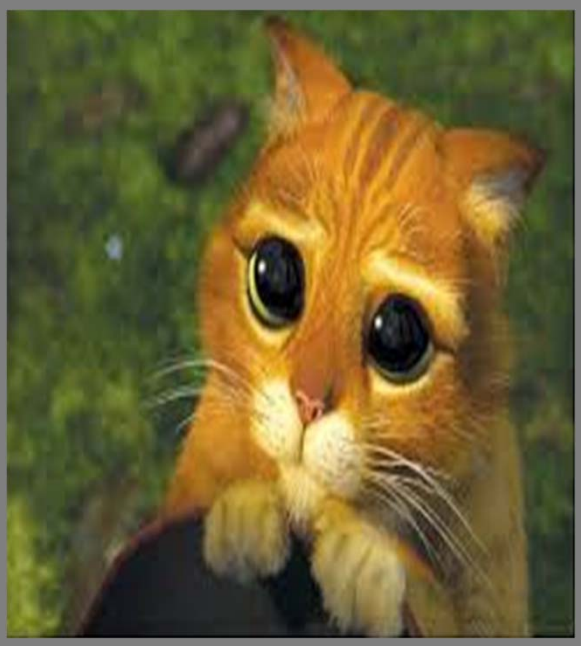
PELRB Form 1

Why take chances? NMAC 11.21.3.8 (A) re: COMMENCEMENT OF CASE provides "A prohibited practices case shall be initiated by filing with the director a complaint *on a form furnished by the director*.

Under the "Notice Pleading" doctrine other pleadings not on these forms will be accepted.

Adequately plead complaint

15 days in which to answer



Rule 8(a) of the Federal Rules of Civil Procedure provides that a complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief. Under Rule 12(b)(6), a court has the authority to dismiss a complaint if it fails to state a claim upon which relief can be granted. The PELRB follows New Mexico courts in utilizing the liberal "notice pleading" standard. See *AFSCME v. City of Rio Rancho,* PELRB Case No. 159-06, Hearing Examiner's letter decision on City's Motion to Dismiss (Nov. 17, 2006) ("[b]ased on the similarity between PELRB and New Mexico Rule of Civil Procedure 1-008(A), it is apparent that PELRB rules, like New Mexico Rules of Civil Procedure, call for a notice pleading standard in testing the legal sufficiency of the complaint"). See also *Garcia v. Coffman*, 1997-NMCA-092, ¶ 11, 124 N.M. 12, 946 P.2d 216 (under the notice pleading standard, "it is sufficient that [the] defendants be given only a fair idea of the nature of the claim asserted against them sufficient to apprise them of the general basis of the claim") (internal quotations and citation omitted), and *Sanchez v. City of Belen*, 98 N.M. 57, 60, 644 P.2d 1046, 1049 (Ct. App. 1982) (the general policy under the notice pleading standard is to provide for "an adjudication on the merits" rather than allowing "technicalities of procedures and form" to "determine the rights of the litigants"). One of the practical effects of the liberal pleading standard afforded by Rule 8(a) is that motions to dismiss are rarely granted.

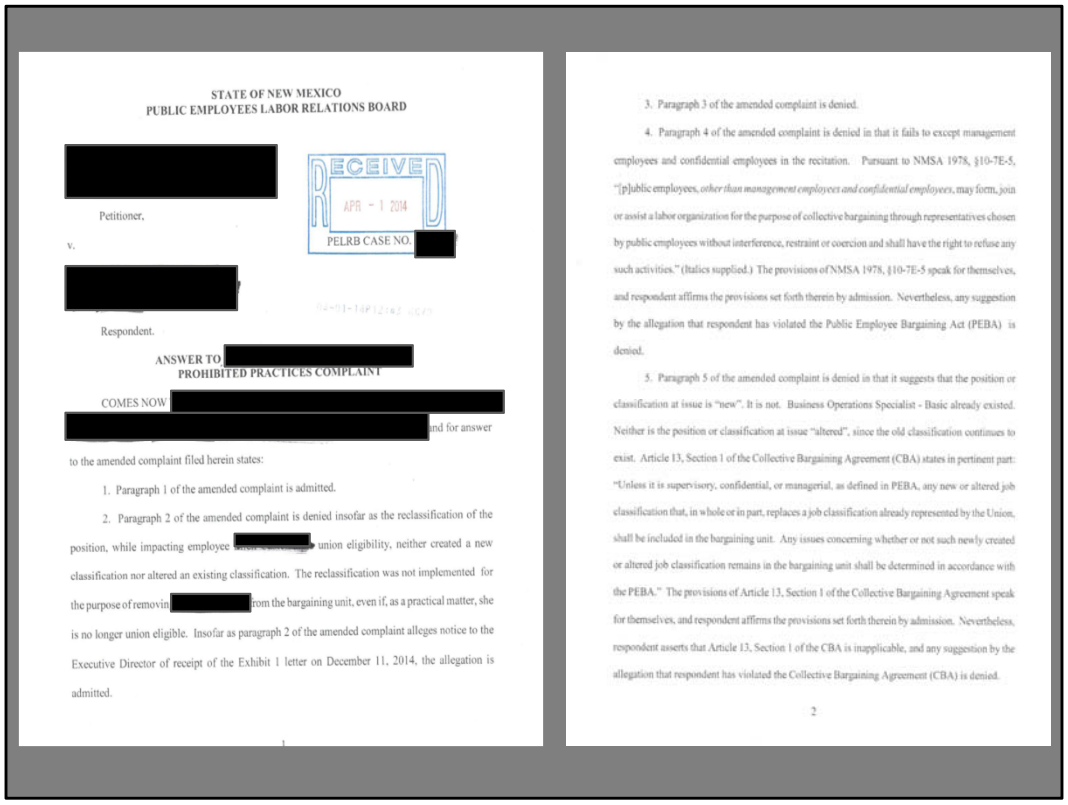
Another practical effect is that the Answer or Response is often elevated in importance because it may provide a level of specificity absent from a notice pleading level complaint. This becomes the first opportunity to impress upon the Hearing Officer the strengths of your position and the weaknesses of the complaint. This advantage is lost however, if the

Respondent engages in notice pleading itself, submitting only a pro forma response. The weakness of an initial notice pleading can be rectified by taking advantage of the opportunity to enhance your initial pleading presented by NMAC 11.21.3.12(B). Under that rule the Hearing Officer typically asks that the complainant present all evidence then available in support of the complaint, including an outline of witness testimony or their affidavits.

Deferral to Grievance-Arbitration Procedures. If your PPC alleges only a contract violation it is likely that the Hearing Officer will defer hearing it in favor of having the parties first exhaust the negotiated grievance-arbitration procedures. See NMAC 11.21.3.22.

Deferral is allowed where the subject matter of the PPC requires interpretation of the CBA, the parties waive in writing any objections to timeliness or other procedural impediments to the processing of the grievance-arbitration, and the resolution of the contract dispute will likely resolve the issues raised in the PPC. Id. See also Collyer Insulated Wire, 192 NLRB 837, 842 (1971) (deferral is appropriate when (a) the dispute arises within the confines of a collective bargaining relationship, (b) the employer has indicated its willingness to resolve the issue through the grievance-arbitration process, and (c) the contract and its meaning lie at the center of the dispute).

Deferral to Other Administrative Proceedings. The Hearing Officer may defer hearing a PPC when "essentially the same facts and … essentially the same issues" have been raised in an administrative proceeding before another agency." See NMAC 11.21.3.21. Alternatively, the Hearing Officer may request the other agency to hold its proceedings in abeyance; or the hearing officer may continue processing the matter while the other agency does as well.



STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

[redacted]

Petitioner,

v.

[redacted]

Respondent.

RECEIVED
APR - 1 2014
PELRB CASE NO. [redacted]

ANSWER TO [redacted]
PROHIBITED PRACTICES COMPLAINT

COMES NOW [redacted] and for answer to the amended complaint filed herein states:

1. Paragraph 1 of the amended complaint is admitted.

2. Paragraph 2 of the amended complaint is denied insofar as the reclassification of the position, while impacting employee [redacted] union eligibility, neither created a new classification nor altered an existing classification. The reclassification was not implemented for the purpose of removin [redacted] from the bargaining unit, even if, as a practical matter, she is no longer union eligible. Insofar as paragraph 2 of the amended complaint alleges notice to the Executive Director of receipt of the Exhibit 1 letter on December 11, 2014, the allegation is admitted.

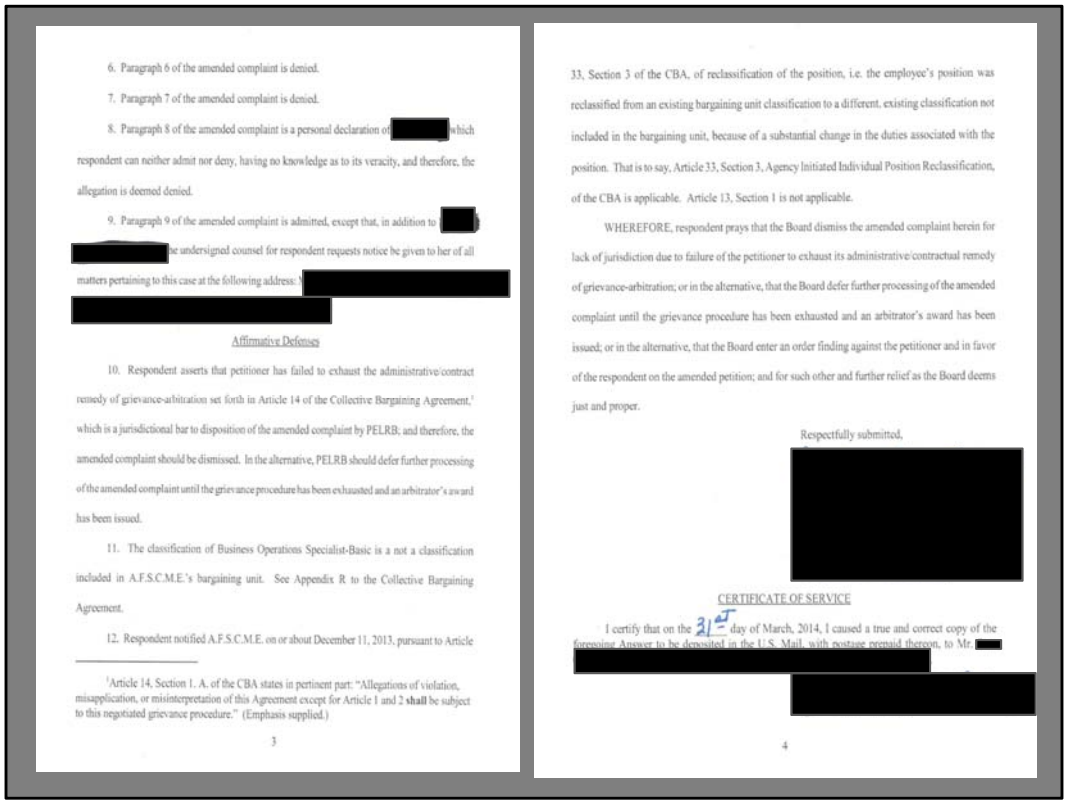
3. Paragraph 3 of the amended complaint is denied.

4. Paragraph 4 of the amended complaint is denied in that it fails to except management employees and confidential employees in the recitation. Pursuant to NMSA 1978, §10-7E-5, "[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 without interference, restraint or coercion and shall have the right to refuse any such activities." (Italics supplied.) The provisions of NMSA 1978, §10-7E-5 speak for themselves, and respondent affirms the provisions set forth therein by admission. Nevertheless, any suggestion by the allegation that respondent has violated the Public Employee Bargaining Act (PEBA) is denied.

5. Paragraph 5 of the amended complaint is denied in that it suggests that the position or classification at issue is "new". It is not. Business Operations Specialist - Basic already existed. Neither is the position or classification at issue "altered", since the old classification continues to exist. Article 13, Section 1 of the Collective Bargaining Agreement (CBA) states in pertinent part: "Unless it is supervisory, confidential, or managerial, as defined in PEBA, any new or altered job classification that, in whole or in part, replaces a job classification already represented by the Union, shall be included in the bargaining unit. Any issues concerning whether or not such newly created or altered job classification remains in the bargaining unit shall be determined in accordance with the PEBA." The provisions of Article 13, Section 1 of the Collective Bargaining Agreement speak for themselves, and respondent affirms the provisions set forth therein by admission. Nevertheless, respondent asserts that Article 13, Section 1 of the CBA is inapplicable, and any suggestion by the allegation that respondent has violated the Collective Bargaining Agreement (CBA) is denied.

2

Why do we like this Answer?



6. Paragraph 6 of the amended complaint is denied.

7. Paragraph 7 of the amended complaint is denied.

8. Paragraph 8 of the amended complaint is a personal declaration of [redacted] which respondent can neither admit nor deny, having no knowledge as to its veracity, and therefore, the allegation is deemed denied.

9. Paragraph 9 of the amended complaint is admitted, except that, in addition to [redacted] the undersigned counsel for respondent requests notice be given to her of all matters pertaining to this case at the following address: [redacted]

Affirmative Defenses

10. Respondent asserts that petitioner has failed to exhaust the administrative/contract remedy of grievance-arbitration set forth in Article 14 of the Collective Bargaining Agreement,[1] which is a jurisdictional bar to disposition of the amended complaint by PELRB; and therefore, the amended complaint should be dismissed. In the alternative, PELRB should defer further processing of the amended complaint until the grievance procedure has been exhausted and an arbitrator's award has been issued.

11. The classification of Business Operations Specialist-Basic is a not a classification included in A.F.S.C.M.E.'s bargaining unit. See Appendix R to the Collective Bargaining Agreement.

12. Respondent notified A.F.S.C.M.E. on or about December 11, 2013, pursuant to Article

[1]Article 14, Section 1. A. of the CBA states in pertinent part: "Allegations of violation, misapplication, or misinterpretation of this Agreement except for Article 1 and 2 **shall** be subject to this negotiated grievance procedure." (Emphasis supplied.)

3

33, Section 3 of the CBA, of reclassification of the position, i.e. the employee's position was reclassified from an existing bargaining unit classification to a different, existing classification not included in the bargaining unit, because of a substantial change in the duties associated with the position. That is to say, Article 33, Section 3, Agency Initiated Individual Position Reclassification, of the CBA is applicable. Article 13, Section 1 is not applicable.

WHEREFORE, respondent prays that the Board dismiss the amended complaint herein for lack of jurisdiction due to failure of the petitioner to exhaust its administrative/contractual remedy of grievance-arbitration; or in the alternative, that the Board defer further processing of the amended complaint until the grievance procedure has been exhausted and an arbitrator's award has been issued; or in the alternative, that the Board enter an order finding against the petitioner and in favor of the respondent on the amended petition; and for such other and further relief as the Board deems just and proper.

Respectfully submitted,

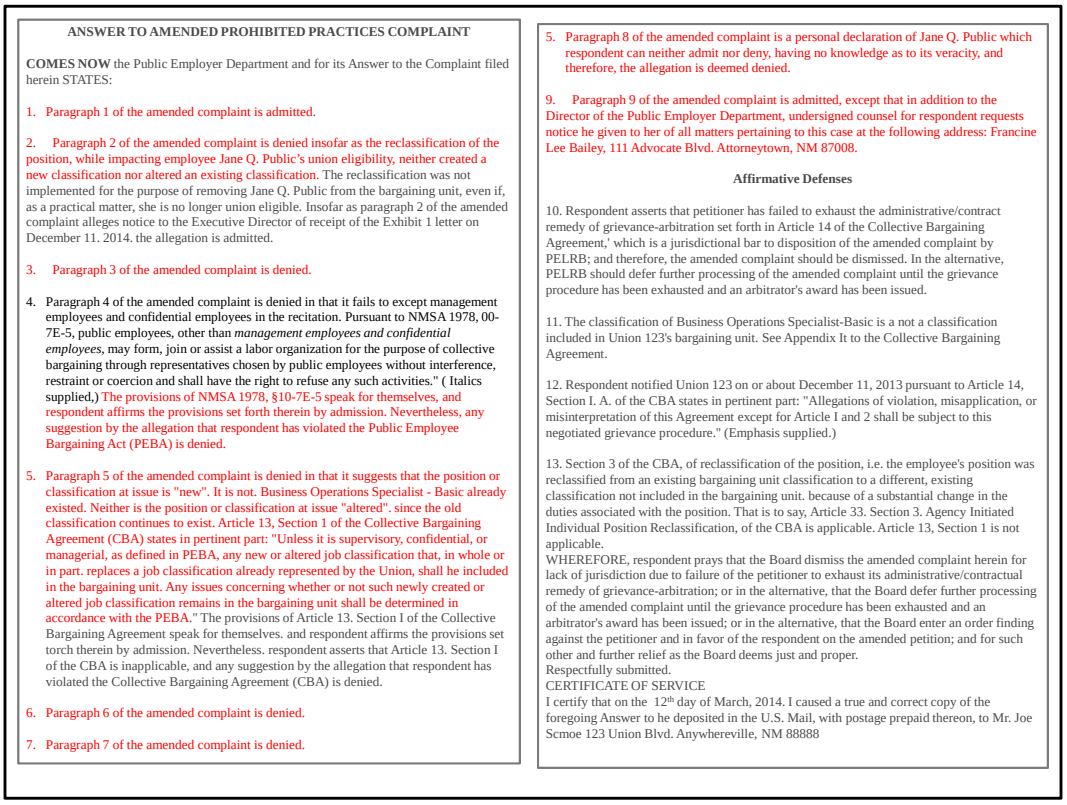
[redacted]

CERTIFICATE OF SERVICE

I certify that on the 31st day of March, 2014, I caused a true and correct copy of the foregoing Answer to be deposited in the U.S. Mail, with postage prepaid thereon, to Mr. [redacted]

4

Why do we like this Answer:



ANSWER TO AMENDED PROHIBITED PRACTICES COMPLAINT

COMES NOW the Public Employer Department and for its Answer to the Complaint filed herein STATES:

1. Paragraph 1 of the amended complaint is admitted.

2. Paragraph 2 of the amended complaint is denied insofar as the reclassification of the position, while impacting employee Jane Q. Public's union eligibility, neither created a new classification nor altered an existing classification. The reclassification was not implemented for the purpose of removing Jane Q. Public from the bargaining unit, even if, as a practical matter, she is no longer union eligible. Insofar as paragraph 2 of the amended complaint alleges notice to the Executive Director of receipt of the Exhibit 1 letter on December 11. 2014. the allegation is admitted.

3. Paragraph 3 of the amended complaint is denied.

4. Paragraph 4 of the amended complaint is denied in that it fails to except management employees and confidential employees in the recitation. Pursuant to NMSA 1978, 00-7E-5, public 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 without interference, restraint or coercion and shall have the right to refuse any such activities." (Italics supplied,) The provisions of NMSA 1978, §10-7E-5 speak for themselves, and respondent affirms the provisions set forth therein by admission. Nevertheless, any suggestion by the allegation that respondent has violated the Public Employee Bargaining Act (PEBA) is denied.

5. Paragraph 5 of the amended complaint is denied in that it suggests that the position or classification at issue is "new". It is not. Business Operations Specialist - Basic already existed. Neither is the position or classification at issue "altered". since the old classification continues to exist. Article 13, Section 1 of the Collective Bargaining Agreement (CBA) states in pertinent part: "Unless it is supervisory, confidential, or managerial, as defined in PEBA, any new or altered job classification that, in whole or in part. replaces a job classification already represented by the Union, shall he included in the bargaining unit. Any issues concerning whether or not such newly created or altered job classification remains in the bargaining unit shall be determined in accordance with the PEBA." The provisions of Article 13. Section I of the Collective Bargaining Agreement speak for themselves. and respondent affirms the provisions set torch therein by admission. Nevertheless. respondent asserts that Article 13. Section I of the CBA is inapplicable, and any suggestion by the allegation that respondent has violated the Collective Bargaining Agreement (CBA) is denied.

6. Paragraph 6 of the amended complaint is denied.

7. Paragraph 7 of the amended complaint is denied.

5. Paragraph 8 of the amended complaint is a personal declaration of Jane Q. Public which respondent can neither admit nor deny, having no knowledge as to its veracity, and therefore, the allegation is deemed denied.

9. Paragraph 9 of the amended complaint is admitted, except that in addition to the Director of the Public Employer Department, undersigned counsel for respondent requests notice he given to her of all matters pertaining to this case at the following address: Francine Lee Bailey, 111 Advocate Blvd. Attorneytown, NM 87008.

Affirmative Defenses

10. Respondent asserts that petitioner has failed to exhaust the administrative/contract remedy of grievance-arbitration set forth in Article 14 of the Collective Bargaining Agreement,' which is a jurisdictional bar to disposition of the amended complaint by PELRB; and therefore, the amended complaint should be dismissed. In the alternative, PELRB should defer further processing of the amended complaint until the grievance procedure has been exhausted and an arbitrator's award has been issued.

11. The classification of Business Operations Specialist-Basic is a not a classification included in Union 123's bargaining unit. See Appendix It to the Collective Bargaining Agreement.

12. Respondent notified Union 123 on or about December 11, 2013 pursuant to Article 14, Section I. A. of the CBA states in pertinent part: "Allegations of violation, misapplication, or misinterpretation of this Agreement except for Article I and 2 shall be subject to this negotiated grievance procedure." (Emphasis supplied.)

13. Section 3 of the CBA, of reclassification of the position, i.e. the employee's position was reclassified from an existing bargaining unit classification to a different, existing classification not included in the bargaining unit. because of a substantial change in the duties associated with the position. That is to say, Article 33. Section 3. Agency Initiated Individual Position Reclassification, of the CBA is applicable. Article 13, Section 1 is not applicable.

WHEREFORE, respondent prays that the Board dismiss the amended complaint herein for lack of jurisdiction due to failure of the petitioner to exhaust its administrative/contractual remedy of grievance-arbitration; or in the alternative, that the Board defer further processing of the amended complaint until the grievance procedure has been exhausted and an arbitrator's award has been issued; or in the alternative, that the Board enter an order finding against the petitioner and in favor of the respondent on the amended petition; and for such other and further relief as the Board deems just and proper.

Respectfully submitted.

CERTIFICATE OF SERVICE

I certify that on the 12th day of March, 2014. I caused a true and correct copy of the foregoing Answer to he deposited in the U.S. Mail, with postage prepaid thereon, to Mr. Joe Scmoe 123 Union Blvd. Anywhereville, NM 88888

Clear and specific numbered responses to each allegation of the complaint.

ANSWER TO AMENDED PROHIBITED PRACTICES COMPLAINT

COMES NOW the Public Employer Department and for its Answer to the Complaint filed herein STATES:

1. Paragraph 1 of the amended complaint is admitted.

2. Paragraph 2 of the amended complaint is denied insofar as the reclassification of the position, while impacting employee Jane Q. Public's union eligibility, neither created a new classification nor altered an existing classification. The reclassification was not implemented for the purpose of removing Jane Q. Public from the bargaining unit, even if, as a practical matter, she is no longer union eligible. Insofar as paragraph 2 of the amended complaint alleges notice to the Executive Director of receipt of the Exhibit 1 letter on December 11. 2014. the allegation is admitted.

3. Paragraph 3 of the amended complaint is denied.

4. Paragraph 4 of the amended complaint is denied in that it fails to except management employees and confidential employees in the recitation. Pursuant to NMSA 1978, 00-7E-5, public 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 without interference, restraint or coercion and shall have the right to refuse any such activities." (Italics supplied,) The provisions of NMSA 1978, §10-7E-5 speak for themselves, and respondent affirms the provisions set forth therein by admission. Nevertheless, any suggestion by the allegation that respondent has violated the Public Employee Bargaining Act (PEBA) is denied.

5. Paragraph 5 of the amended complaint is denied in that it suggests that the position or classification at issue is "new". It is not. Business Operations Specialist - Basic already existed. Neither is the position or classification at issue "altered". since the old classification continues to exist. Article 13, Section 1 of the Collective Bargaining Agreement (CBA) states in pertinent part: "Unless it is supervisory, confidential, or managerial, as defined in PEBA, any new or altered job classification that, in whole or in part. replaces a job classification already represented by the Union, shall he included in the bargaining unit. Any issues concerning whether or not such newly created or altered job classification remains in the bargaining unit shall be determined in accordance with the PEBA." The provisions of Article 13. Section I of the Collective Bargaining Agreement speak for themselves. and respondent affirms the provisions set torch therein by admission. Nevertheless. respondent asserts that Article 13. Section I of the CBA is inapplicable, and any suggestion by the allegation that respondent has violated the Collective Bargaining Agreement (CBA) is denied.

6. Paragraph 6 of the amended complaint is denied.

7. Paragraph 7 of the amended complaint is denied.

8. Paragraph 8 of the amended complaint is a personal declaration of Jane Q. Public which respondent can neither admit nor deny, having no knowledge as to its veracity, and therefore, the allegation is deemed denied.

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11. The classification of Business Operations Specialist-Basic is a not a classification included in Union 123's bargaining unit. See Appendix It to the Collective Bargaining Agreement.

12. Respondent notified Union 123 on or about December 11, 2013 pursuant to Article 14, Section I. A. of the CBA states in pertinent part: "Allegations of violation, misapplication, or misinterpretation of this Agreement except for Article I and 2 shall be subject to this negotiated grievance procedure." (Emphasis supplied.)

Answer provides additional *relevant* information or further explanation of admissions and denials helpful to the Hearing Officer's understanding of the issues.

ANSWER TO AMENDED PROHIBITED PRACTICES COMPLAINT

COMES NOW the Public Employer Department and for its Answer to the Complaint filed herein STATES:

1. Paragraph 1 of the amended complaint is admitted.

2. Paragraph 2 of the amended complaint is denied insofar as the reclassification of the position, while impacting employee Jane Q. Public's union eligibility, neither created a new classification nor altered an existing classification. The reclassification was not implemented for the purpose of removing Jane Q. Public from the bargaining unit, even if, as a practical matter, she is no longer union eligible. Insofar as paragraph 2 of the amended complaint alleges notice to the Executive Director of receipt of the Exhibit 1 letter on December 11. 2014. the allegation is admitted.

3. Paragraph 3 of the amended complaint is denied.

4. Paragraph 4 of the amended complaint is denied in that it fails to except management employees and confidential employees in the recitation. Pursuant to NMSA 1978, 00-7E-5, public 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 without interference, restraint or coercion and shall have the right to refuse any such activities." (Italics supplied,) The provisions of NMSA 1978, §10-7E-5 speak for themselves, and respondent affirms the provisions set forth therein by admission. Nevertheless, any suggestion by the allegation that respondent has violated the Public Employee Bargaining Act (PEBA) is denied.

5. Paragraph 5 of the amended complaint is denied in that it suggests that the position or classification at issue is "new". It is not. Business Operations Specialist - Basic already existed. Neither is the position or classification at issue "altered". since the old classification continues to exist. Article 13, Section 1 of the Collective Bargaining Agreement (CBA) states in pertinent part: "Unless it is supervisory, confidential, or managerial, as defined in PEBA, any new or altered job classification that, in whole or in part. replaces a job classification already represented by the Union, shall he included in the bargaining unit. Any issues concerning whether or not such newly created or altered job classification remains in the bargaining unit shall be determined in accordance with the PEBA." The provisions of Article 13. Section I of the Collective Bargaining Agreement speak for themselves. and respondent affirms the provisions set torch therein by admission. Nevertheless. respondent asserts that Article 13. Section I of the CBA is inapplicable, and any suggestion by the allegation that respondent has violated the Collective Bargaining Agreement (CBA) is denied.

6. Paragraph 6 of the amended complaint is denied.

7. Paragraph 7 of the amended complaint is denied.

8. Paragraph 8 of the amended complaint is a personal declaration of Jane Q. Public which respondent can neither admit nor deny, having no knowledge as to its veracity, and therefore, the allegation is deemed denied.

9. Paragraph 9 of the amended complaint is admitted, except that in addition to the Director of the Public Employer Department, undersigned counsel for respondent requests notice he given to her of all matters pertaining to this case at the following address: Francine Lee Bailey, 111 Advocate Blvd. Attorneytown, NM 87008.

Affirmative Defenses

10. Respondent asserts that petitioner has failed to exhaust the administrative/contract remedy of grievance-arbitration set forth in Article 14 of the Collective Bargaining Agreement,' which is a jurisdictional bar to disposition of the amended complaint by PELRB; and therefore, the amended complaint should be dismissed. In the alternative, PELRB should defer further processing of the amended complaint until the grievance procedure has been exhausted and an arbitrator's award has been issued.

11. The classification Conscientious Employee-Basic is a not a classification included in Union 123's bargaining unit. See Appendix It to the Collective Bargaining Agreement.

12. Respondent notified Union 123 on or about December 11, 2013 pursuant to Article 14, Section I. A. of the CBA states in pertinent part: "Allegations of violation, misapplication, or misinterpretation of this Agreement except for Article I and 2 shall be subject to this negotiated grievance procedure." (Emphasis supplied.)

Where matters are not in dispute, why put the Complainant to the burden of proving them? Admit allegations to the extent you can. If you can admit part but not all – do that, with an explanation.

ANSWER TO AMENDED PROHIBITED PRACTICES COMPLAINT

COMES NOW the Public Employer Department and for its Answer to the Complaint filed herein STATES:

1. Paragraph 1 of the amended complaint is admitted.

2. Paragraph 2 of the amended complaint is denied insofar as the reclassification of the position, while impacting employee Jane Q. Public's union eligibility, neither created a new classification nor altered an existing classification. The reclassification was not implemented for the purpose of removing Jane Q. Public from the bargaining unit, even if, as a practical matter, she is no longer union eligible. Insofar as paragraph 2 of the amended complaint alleges notice to the Executive Director of receipt of the Exhibit 1 letter on December 11. 2014. the allegation is admitted.

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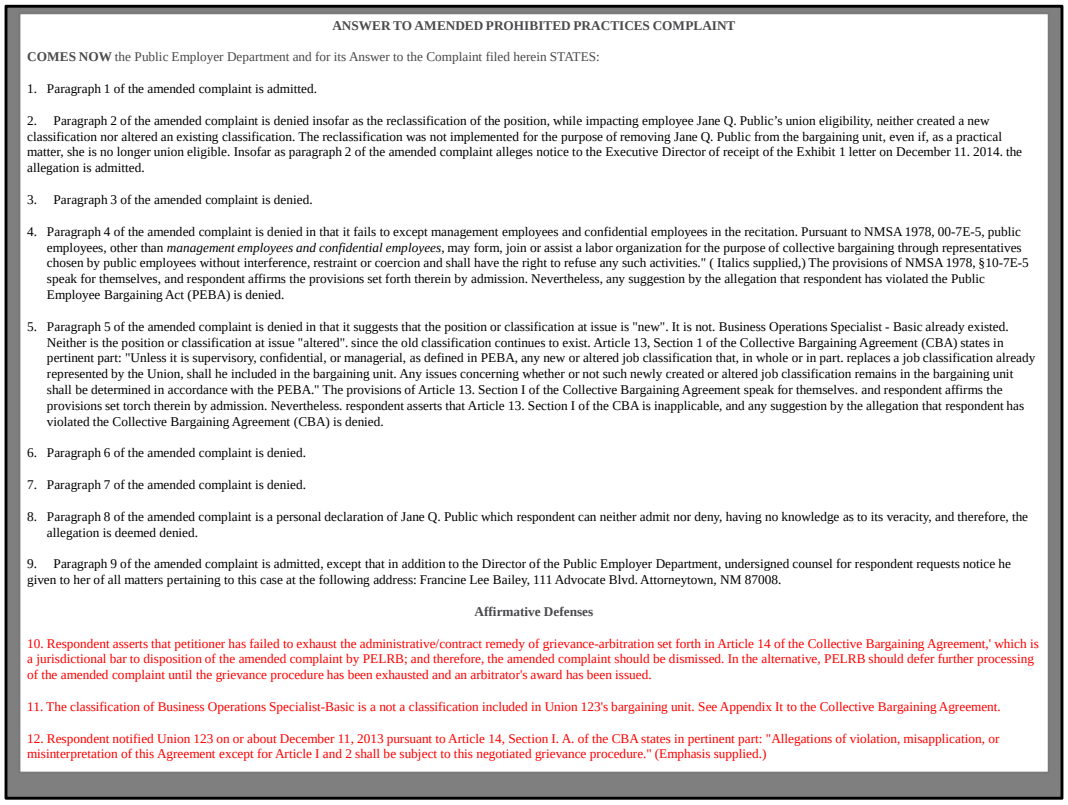
10. Respondent asserts that petitioner has failed to exhaust the administrative/contract remedy of grievance-arbitration set forth in Article 14 of the Collective Bargaining Agreement,' which is a jurisdictional bar to disposition of the amended complaint by PELRB; and therefore, the amended complaint should be dismissed. In the alternative, PELRB should defer further processing of the amended complaint until the grievance procedure has been exhausted and an arbitrator's award has been issued.

11. The classification of Business Operations Specialist-Basic is a not a classification included in Union 123's bargaining unit. See Appendix It to the Collective Bargaining Agreement.

12. Respondent notified Union 123 on or about December 11, 2013 pursuant to Article 14, Section I. A. of the CBA states in pertinent part: "Allegations of violation, misapplication, or misinterpretation of this Agreement except for Article I and 2 shall be subject to this negotiated grievance procedure." (Emphasis supplied.)

When Counsel is retained to Answer a PPC you may enter your appearance in the Answer itself putting all on notice of the correct contact information, both in the body of the Answer as is seen here as well as in the signature block.



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Affirmative Defenses

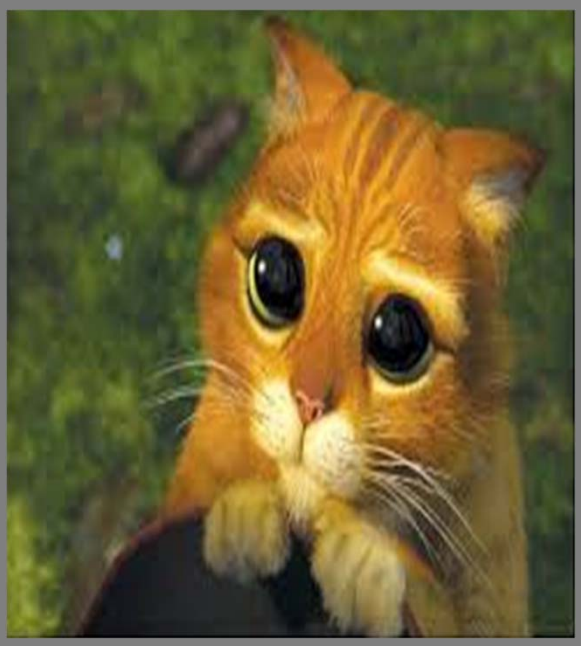
10. Respondent asserts that petitioner has failed to exhaust the administrative/contract remedy of grievance-arbitration set forth in Article 14 of the Collective Bargaining Agreement,' which is a jurisdictional bar to disposition of the amended complaint by PELRB; and therefore, the amended complaint should be dismissed. In the alternative, PELRB should defer further processing of the amended complaint until the grievance procedure has been exhausted and an arbitrator's award has been issued.

11. The classification of Business Operations Specialist-Basic is a not a classification included in Union 123's bargaining unit. See Appendix It to the Collective Bargaining Agreement.

12. Respondent notified Union 123 on or about December 11, 2013 pursuant to Article 14, Section I. A. of the CBA states in pertinent part: "Allegations of violation, misapplication, or misinterpretation of this Agreement except for Article I and 2 shall be subject to this negotiated grievance procedure." (Emphasis supplied.)

By using affirmative defenses that may be a complete defense to the charge the Hearing Officer is alerted to important threshhold issues that must be addressed prior to scheduling a merits hearing

Adequately plead complaint



Adequately plead complaint; Answer and default. If the complaint is adequately plead the director will issue a letter so stating giving the respondent fifteen days after service of a complaint to file and serve upon the complainant its answer admitting, denying or explaining each allegation of the complaint. If a respondent in its answer admits or fails to deny an allegation of the complaint, the director, hearing officer or board may find the allegation to be true. 11.21.3.10 NMAC. If a respondent fails to file a timely answer, the director shall serve on the parties a determination of violation by default, based upon the allegations of the complaint and any evidence submitted in support of the complaint. 11.21.3.11 NMAC.

Inadequate Complaint

Five days to amend or present additional evidence

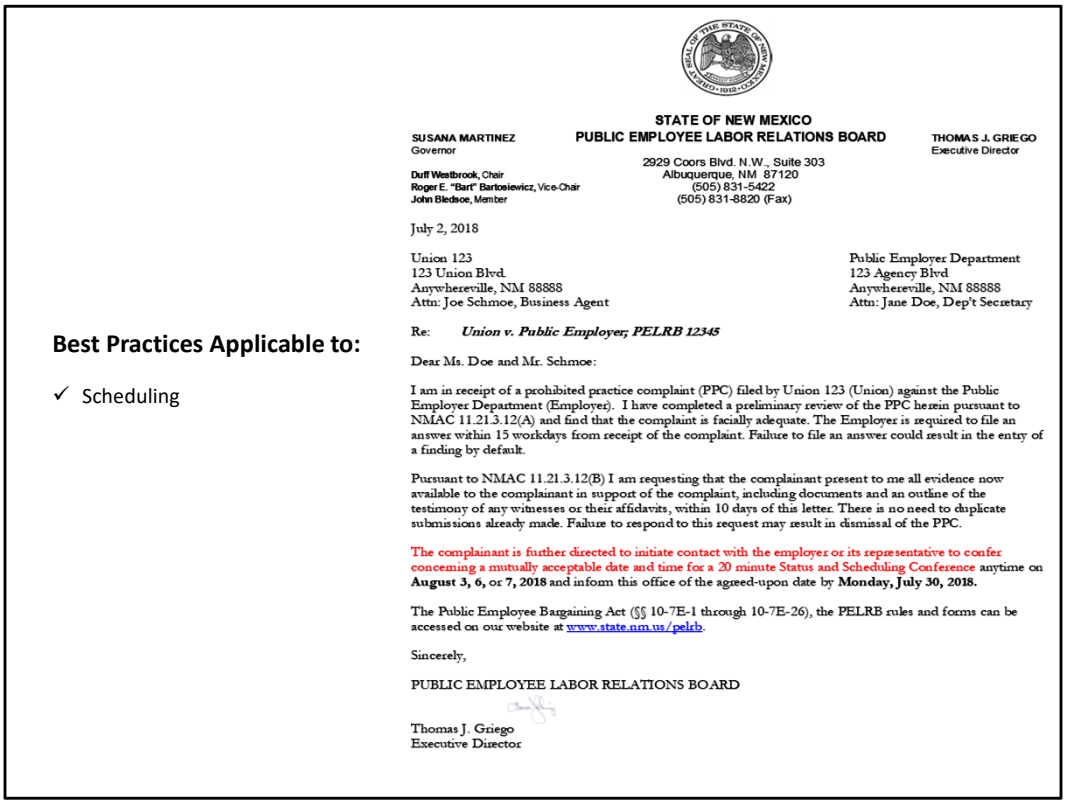
Inadequate complaint. If the complaint is found after preliminary review to be inadequate based on one or several of the above criteria the Director will issue a letter so stating, giving the complainant five days to either amend the complaint pursuant to NMAC 11.21.3.12 or present any additional evidence in support of the complaint that would cure the deficiency pursuant to 11.21.3.12(B). If the complainant fails to timely produce evidence in support of its complaint pursuant to the director's request, or fails to produce evidence that in the director's opinion is sufficient to support the allegations of the complaint, the director shall dismiss the complaint.

Best Practices Applicable to:

Scheduling, Communication, Offers to Settle/Narrowing the Issues, Motions Self-Represented Litigants, Misleading Correspondence and Mischaracterized Discussions, Service Issues, Difficult Counsel in Examinations, Cross- Examinations and Questioning.

Best Practices Applicable to:

- ✓ Scheduling



STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

SUSANA MARTINEZ
Governor

THOMAS J. GRIEGO
Executive Director

Duff Westbrook, Chair
Roger E. "Bart" Bartosiewicz, Vice-Chair
John Bledsoe, Member

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

July 2, 2018

Union 123
123 Union Blvd.
Anywhereville, NM 88888
Attn: Joe Schmoe, Business Agent

Public Employer Department
123 Agency Blvd
Anywhereville, NM 88888
Attn: Jane Doe, Dep't Secretary

Re: ***Union v. Public Employer, PELRB 12345***

Dear Ms. Doe and Mr. Schmoe:

I am in receipt of a prohibited practice complaint (PPC) filed by Union 123 (Union) against the Public Employer Department (Employer). I have completed a preliminary review of the PPC herein pursuant to NMAC 11.21.3.12(A) and find that the complaint is facially adequate. The Employer is required to file an answer within 15 workdays from receipt of the complaint. Failure to file an answer could result in the entry of a finding by default.

Pursuant to NMAC 11.21.3.12(B) I am requesting that the complainant present to me all evidence now available to the complainant in support of the complaint, including documents and an outline of the testimony of any witnesses or their affidavits, within 10 days of this letter. There is no need to duplicate submissions already made. Failure to respond to this request may result in dismissal of the PPC.

The complainant is further directed to initiate contact with the employer or its representative to confer concerning a mutually acceptable date and time for a 20 minute Status and Scheduling Conference anytime on **August 3, 6,** or **7, 2018** and inform this office of the agreed-upon date by **Monday, July 30, 2018.**

The Public Employee Bargaining Act (§§ 10-7E-1 through 10-7E-26), the PELRB rules and forms can be accessed on our website at www.state.nm.us/pelrb.

Sincerely,

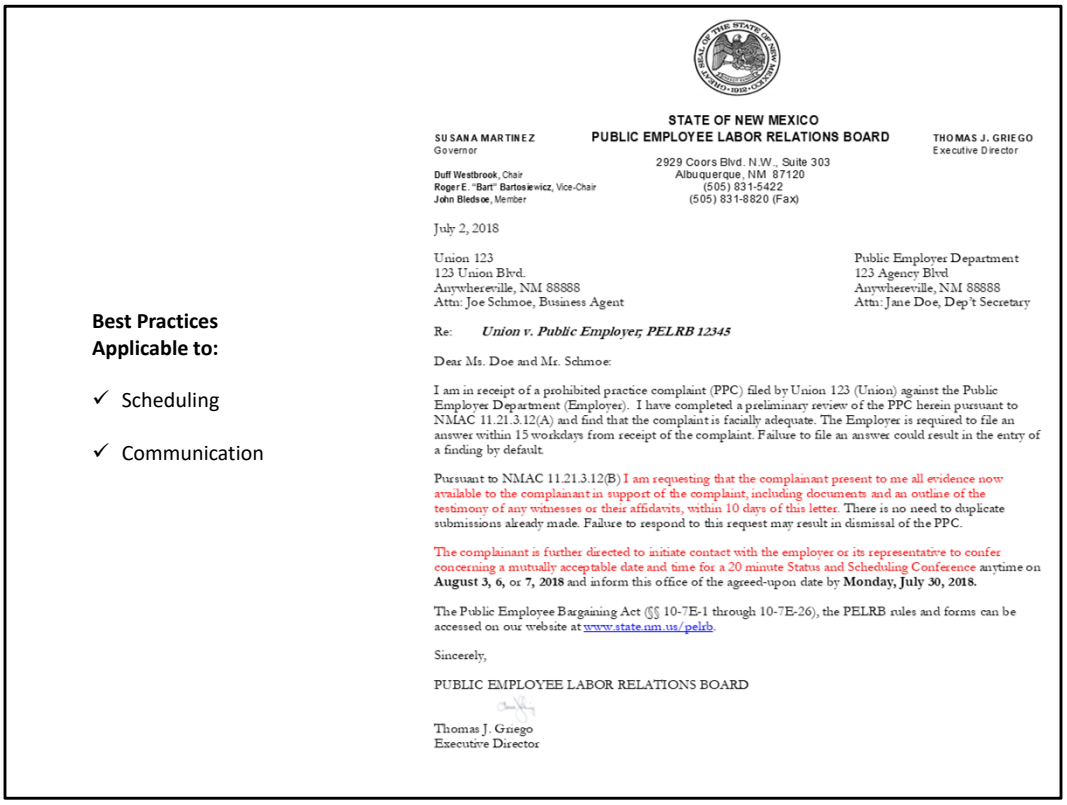
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Thomas J. Griego
Executive Director

Following initial review of your pleading the Director will issue a letter informing you either that he has found your pleading to be "inadequate" or "adequate". If deemed to be adequate, that is, ready to move forward for a determination, the Complainant or the Petitioner, as the person initiating the action, is assigned the task of communicating with the other side to schedule a Status and Scheduling Conference. Rather than the Hearing Officer scheduling the Conference and risking requests to vacate or recess, or taking the responsibility for scheduling over the phone or via email, this initial scheduling depends on counsel or parties cooperating with each other early in the process. Efficiency – few requests to vacate or reschedule. Experience has shown that the PELRB's method of placing the responsibility on the filer to initiate contact with opposing party to schedule a mutually acceptable date and time from among the three offered by the Director in the initial letter is not only the most efficient way to schedule quickly with minimal rescheduling, but encourages the parties to talk to each other early in the process. Often, the first time the parties representatives have spoken to each other it at the Status and Scheduling Conference.

Best Practices Applicable to:

- ✓ Scheduling
- ✓ Communication



STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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THOMAS J. GRIEGO, Executive Director

July 2, 2018

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Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Thomas J. Griego
Executive Director

Handling scheduling in this manner compels the parties to connect earlier rather than later. Often, contact for purposes of scheduling the Status and Scheduling Conference is the first time the parties have had an opportunity to talk about the Complaint outside of more formal grievance setting where defense mechanisms can act as a disincentive to resolution of issues. By requesting supporting documents, the representative is compelled to communicate with his or her client, further testing the merits of claims or defenses.

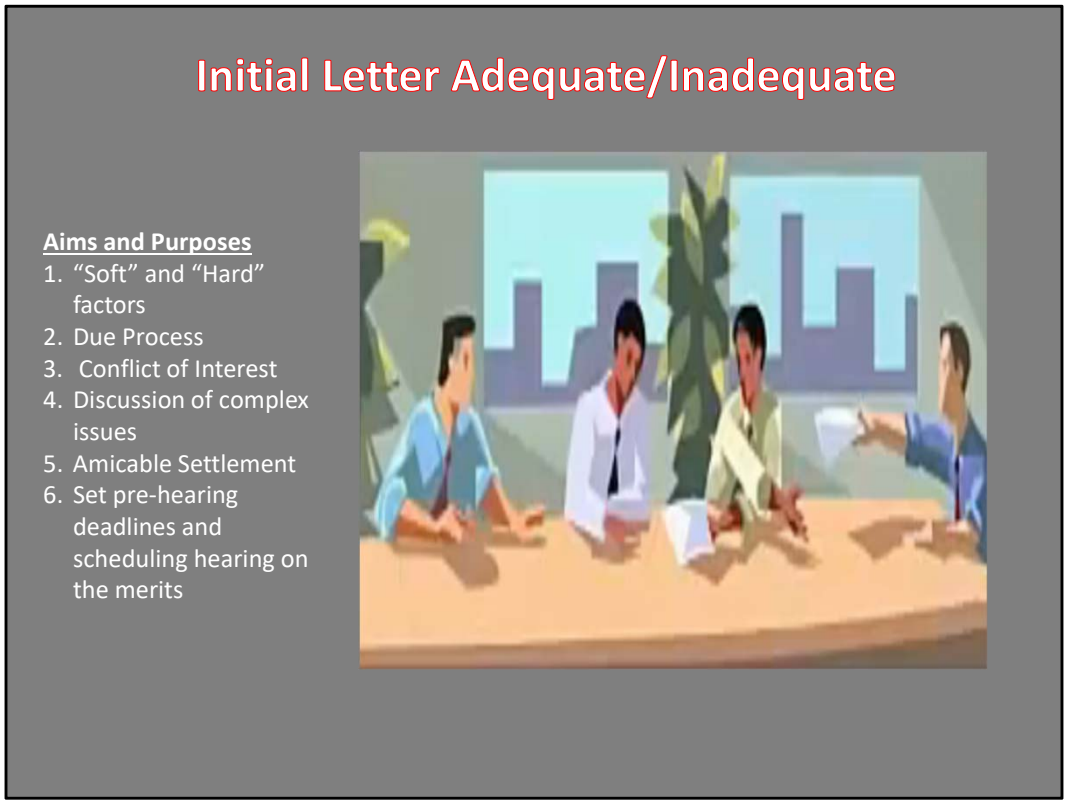
Communication
Contacting Matt with requests, make sure you cc me respect chain of command.

Staff CAN:

- Encourage you to seek legal advice from a licensed attorney or refer you to another agency that may be able to help you
- Refer you to sections of the PEBA and sections of the Board's Practice Manual that may be relevant to you inquiry
- Provide Board approved forms and instructions without advising any specific course of action
- Provide information about what is requested on forms WITHOUT suggesting specific words to put into the forms
- Provide general information about Board rules, available citations, legal terminology, administrative orders, procedures and practices
- Provide publicly available, non-sequestered information on docketed cases
- Provide general information about Board processes, procedures and practices, including

Board schedules and how to get matters scheduled
- Provide information about proper conduct when appearing before the Board or one of its Hearing Officers.

Staff CANNOT:
- Endorse specific lawyers or community resources, or contact them for you
- Perform legal research by applying the law to specific facts or expressing an opinion about what law applies or whether you should file a case
- Create documents for you
- Fill in forms for you
- Provide interpretation or application of Board or administrative rules or regulations, constitutional or statutory provisions, legal terminology and case law based on specific facts
- Provide you with information that has been restricted by court order, statute, rules or regulations or case law
- Explain Board orders or decisions, or assist or participate in communications with the Director outside the presence of opposing parties
- Advise you what to say



The PELRB strives to hold these conferences as early in the proceedings as possible in order to clarify procedural issues and to develop preliminary time limits. Whether a representation proceeding or a PPC matters before the Board are generally to be concluded within six months and more than half of all claims brought before the Board settle without the necessity of an evidentiary hearing, after a Status and Scheduling Conference. It is my opinion that requiring the litigants meet and confer face to face and to support their positions with evidence in the proximity to hard deadlines, facilitates mutual resolution of most disputes. An early organizational
Conference is common practice and may be considered to be "best practice" before the PELRB.

Aims and Purposes of an Early Conference

The aims are diverse and include "soft" factors, like establishing a cooperative spirit among the disputing parties and the Hearing Officer as well as "hard" factors, like the establishment of a procedural
framework regulating the course of the further hearing procedure. The pre-hearing-conference helps to create a first impression of the way the parties are approaching the issues in their dispute, how the Hearing Officer intends to handle the proceeding, the allocation of tasks and how the cooperation between the parties. It is important to form a common understanding of the proceedings, or even agree on a way how to proceed: How will the procedure be structured? What will be expected from the parties? Will discovery take place? How will the evidence-taking be structured? Sometimes, it may also serve to

determine at the outset which legal issues require detailed elaboration.

Such conferences serve the important purpose of bringing the parties together, therefore avoiding different expectations. In this context, it is important for the Hearing Officer to offer his or her own views and guidelines, but at the same time also to consider the expectations and wishes of the parties. A procedural hearing at this stage of the proceedings ensures that the file will be well prepared by all participants and that a common understanding regarding the substantive issues may be reached. These “soft” factors alone comprise advantages that outweigh the minor delay of the proceedings caused by not proceeding immediately to an evidentiary hearing.

“Hard” Factors include the Identification of Jurisdictional Problems that may be discussed and – hopefully – settled. Agreement on Procedural Issues and on a Preliminary Timeframe One of the main aims of early organizational hearings is to find agreement resulting in a Pre-Hearing order (PHO). Cut-off dates or the sequence of witnesses at the hearings. The establishment of a procedural time-table is one of the explicit features. A preliminary time-table can sometimes be established more easily at a personal meeting and thus take into consideration personal absences and holidays and generally set a time-schedule that the Hearing Officer will be able to stick to. In this regard, it should be made clear whether or not it will later allow postponements or other deviations from the agreed time-schedule.

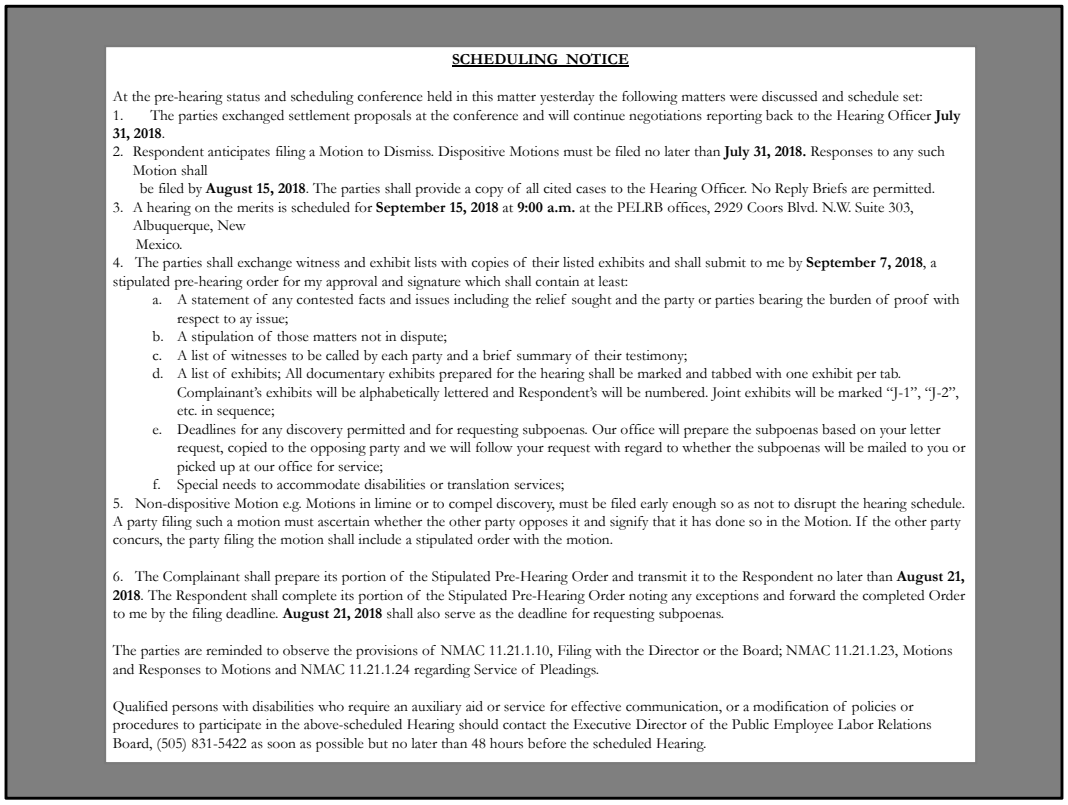
Conducting the Conference cuts off objections that one party or another never had an opportunity to fully present their case or that their right to be heard has been violated even if there was a formal hearing held. Conversely, use the Status and Scheduling Conference to ensure that you have had your “due process”.

Conflict of Interest Issues. Even though, according to most procedural rules, conflict of interest issues must be raised at the very beginning of the proceedings, and – according to best practice rules – the Hearing Officer is also bound to disclose any possible conflict of interest as early as possible, a first hearing is still a fairly early point at which it can be ascertained whether or not a conflict of interest on the part of an arbitrator exists.

For all of the above reasons, the PELRB favors “in person” conferences, coming together and sitting face-to-face. Not only is it more likely that different expectations and needs are actually uttered, but also the informal atmosphere before and after the meeting allows for talks between the parties’ counsel that might lead to settlement discussions. Of course, disadvantages include higher costs due to additional travel expenses and possibly also a slight delay, as it is usually more difficult to find a suitable time slot for a personal meeting than for a conference call. Such a conference call should then be well-prepared and conducted on the basis of a detailed agenda in order to ensure that all issues are covered.

The prior exchange of submissions is essential for the success of the pre-hearing-conference because of the complexity of some of the issues involved. Even though questions of organization will form an important

part of the organizational hearing, legal questions may also be touched, especially if the parties are open for an amicable settlement of the dispute or an attempt to settle amicably is made by the tribunal. Before talking about the venue, questions of recording and taking of evidence, it is necessary to know which witnesses of fact are expected – provided that they are known at this early stage – and whether there will be the need for the appointment of experts. The prior submission of all evidence known to the filer after the initial letter helps in this regard.



SCHEDULING NOTICE

At the pre-hearing status and scheduling conference held in this matter yesterday the following matters were discussed and schedule set:

1. The parties exchanged settlement proposals at the conference and will continue negotiations reporting back to the Hearing Officer **July 31, 2018**.
2. Respondent anticipates filing a Motion to Dismiss. Dispositive Motions must be filed no later than **July 31, 2018.** Responses to any such Motion shall be filed by **August 15, 2018**. The parties shall provide a copy of all cited cases to the Hearing Officer. No Reply Briefs are permitted.
3. A hearing on the merits is scheduled for **September 15, 2018** at **9:00 a.m.** at the PELRB offices, 2929 Coors Blvd. N.W. Suite 303, Albuquerque, New Mexico.
4. The parties shall exchange witness and exhibit lists with copies of their listed exhibits and shall submit to me by **September 7, 2018**, a stipulated pre-hearing order for my approval and signature which shall contain at least:
   a. A statement of any contested facts and issues including the relief sought and the party or parties bearing the burden of proof with respect to ay issue;
   b. A stipulation of those matters not in dispute;
   c. A list of witnesses to be called by each party and a brief summary of their testimony;
   d. A list of exhibits; All documentary exhibits prepared for the hearing shall be marked and tabbed with one exhibit per tab. Complainant's exhibits will be alphabetically lettered and Respondent's will be numbered. Joint exhibits will be marked "J-1", "J-2", etc. in sequence;
   e. Deadlines for any discovery permitted and for requesting subpoenas. Our office will prepare the subpoenas based on your letter request, copied to the opposing party and we will follow your request with regard to whether the subpoenas will be mailed to you or picked up at our office for service;
   f. Special needs to accommodate disabilities or translation services;
5. Non-dispositive Motion e.g. Motions in limine or to compel discovery, must be filed early enough so as not to disrupt the hearing schedule. A party filing such a motion must ascertain whether the other party opposes it and signify that it has done so in the Motion. If the other party concurs, the party filing the motion shall include a stipulated order with the motion.

6. The Complainant shall prepare its portion of the Stipulated Pre-Hearing Order and transmit it to the Respondent no later than **August 21, 2018**. The Respondent shall complete its portion of the Stipulated Pre-Hearing Order noting any exceptions and forward the completed Order to me by the filing deadline. **August 21, 2018** shall also serve as the deadline for requesting subpoenas.

The parties are reminded to observe the provisions of NMAC 11.21.1.10, Filing with the Director or the Board; NMAC 11.21.1.23, Motions and Responses to Motions and NMAC 11.21.1.24 regarding Service of Pleadings.

Qualified persons with disabilities who require an auxiliary aid or service for effective communication, or a modification of policies or procedures to participate in the above-scheduled Hearing should contact the Executive Director of the Public Employee Labor Relations Board, (505) 831-5422 as soon as possible but no later than 48 hours before the scheduled Hearing.

This is an example of the Scheduling Notice that will typically result form the Status & Scheduling Conference. Please be prepared to discuss settlement at the conference. The parties should have already discussed settlement and perhaps exchanged offers ***prior to*** the conference. The Director/Hearing Officer cannot act as a mediator but will take other steps to facilitate settlement. Deadlines will be set, so have your calendar ready.
Be aware of witness and principal availability. Know whether you will prefer a pre-hearing dispositive motion schedule or want to proceed without delay to a merits hearing. Even if a settlement is not possible, attention to such discussions is often successful in narrowing the issues that will eventually be heard at the Merits Hearing. (More on this on the next slide). Status Conference. Upon receipt of the response the Hearing Officer will set a Status and Scheduling Conference. See NMAC 11.21.1.16(A). At this conference, the parties may be asked to summarize their respective pleadings or the hearing officer may summarize the pleadings to assist the parties in framing and narrowing the issues raised. The Board favors settlement and the Hearing Officer is directed to encourage settlement. At the Status Conference the parties will be asked about settlement efforts taking place prior to the conference and the parties should have at least broached the subject with each by the time the conference takes place. See NMAC 11.21.3.15 Pre-Hearing Settlement Efforts.

A. Scheduling. If settlement does not appear likely, the Hearing Officer and parties will go back on the record and resume scheduling the matter for hearing. Scheduling may include discovery, pre-trial motions, briefing schedule for any summary motions, and the issuance of subpoenas. The only discovery expressly addressed under PELRB rules is the production of documents pursuant to a subpoena issued by the

PELRB, which the rules state shall be requested according to a scheduling order agreed to by the parties. See NMAC 11.21.19(A). In practice discovery is not typically required in PELRB cases. However, the parties can always raise the subject of discovery at the initial status conference. Additionally, they may raise it afterwards, by filing and serving requests for productions and/or interrogatories, or by requesting the production of documents by subpoena. New Mexico Rules of Civil Procedure for the District Courts governing discovery will generally be followed as a guide. Scheduling of Hearings. See NMAC 11.21.1.16(A). At the Scheduling Conference you will be working with your adversary and the hearing officer to schedule the merits hearing and any necessary preliminary hearings. Most disputes before the Board can be heard on their merits in a day or less. However, it is not unusual that several days are needed to completely present the case in chief and present defenses.

- For a multiple day (2-5 days) hearing, the ideal would be to schedule consecutive days for presenting testimony and documentary evidence. Consecutive day scheduling of hearings promotes continuity and permits the hearing officer to focus on the dispute with minimal outside interference.
- A sufficient number of hearing days should be scheduled to permit continuity of the hearing without intermittent adjournments. Preparation of the same witnesses again and again for adjourned hearing dates can be very costly and generally is unproductive. The scheduling of one or more hearing days than you anticipate will avoid suspension of the hearings due to scheduling conflicts, minimize the need for costly postponements, and allow the hearings to proceed with an enviable degree of continuity. This approach also allows a "buffer" if testimony from witnesses either under direct or cross, extends longer than originally estimated.
- Location of the hearing could be a factor. Merits hearings do not always have to be held at the PELRB offices. For the convenience of parties and witnesses and as long as budget permits, the merits hearing may be scheduled for a location where the witnesses are.

- Preparing and circulating a Pre-Hearing Order that will guide the conduct of the Hearing on the Merits. The Complainant or Petitioner has the responsibility for initiating the Pre- Hearing Order and must submit its portion along with witness lists and exhibits about 14 calendar days before the deadline set for filing the Stipulated Pre-Hearing Order, so plan ahead.

B. Other matters considered at the conference:
- the issue(s) to be decided;
- outstanding discovery issues and establishment of discovery parameters;
- the law, standards, rules of evidence and burdens of proof that are to apply to the proceeding;
- stipulations regarding facts, exhibits, witnesses, and other issues;
- the names of witnesses (including expert witnesses), the scope of witness testimony;
- the exchange of documentary evidence to be submitted;

- the extent to which testimony may be admitted telephonically, by deposition, by affidavit, or by any other means;
- whether a written opening statement should be prepared and submitted in support of your case;
- accommodating special needs;
- Requesting that subpoenas be issued. Here the PELRB practice differs from what one might be used to in the District Court or other Administrative bodies.

Communication:
Parties should communicate with the opposing side throughout the process. Doing so creates opportunities for settlement and narrowing of the issues. Always consult on scheduling. Parties should always consult with opposing side regarding his/her availability for a meeting, motion hearing or conference. **Update a timetable when necessary:** As the hearing date approaches, if you decide you may have to take additional steps not contemplated in the timetable (e.g. preparing reply materials, conducting cross-examinations not previously contemplated), you should promptly confer with opposing counsel to re-arrange the timetable, and if necessary, re-schedule the hearing date. If attempts have been made to consult with opposing side and he/she is non-responsive, it is reasonable for counsel to unilaterally request re-setting provided that opposing counsel is advised of the date, reasonable notice is provided and counsel is agreeable to an adjournment in the appropriate circumstances.

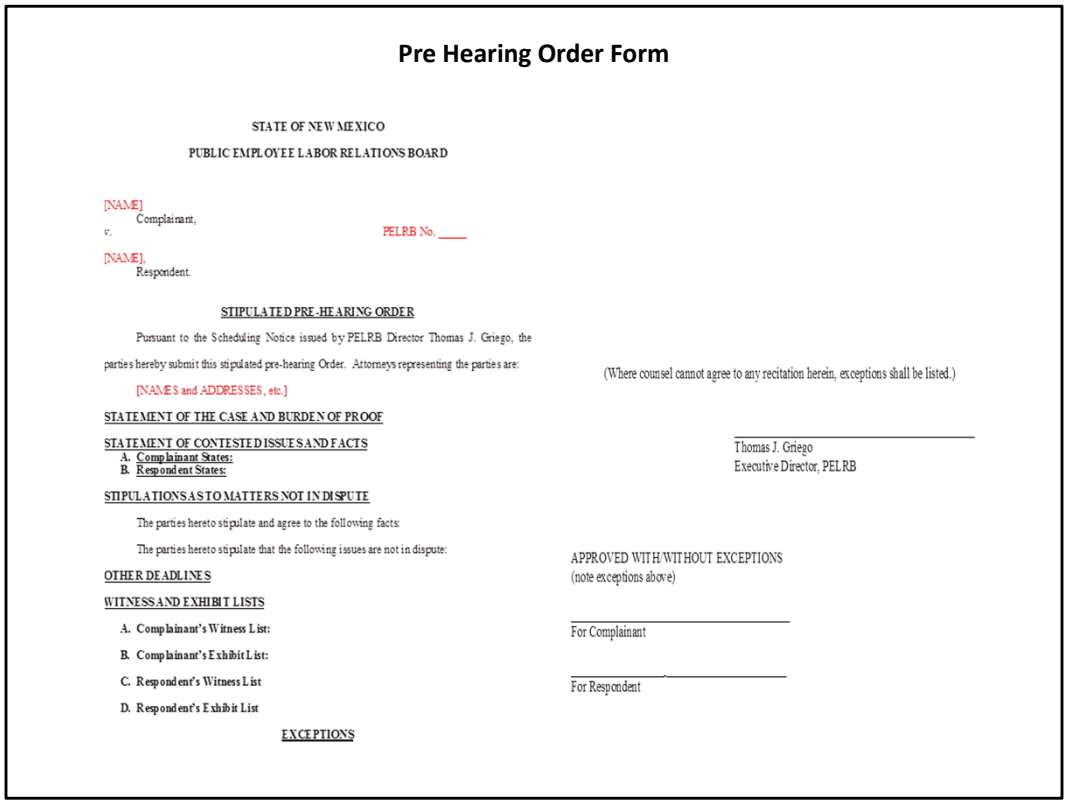
Offers to Settle/Narrowing the Issues:
It is not necessary to formally serve Offers to Settle in advance of preparing motion materials or in advance of the hearing of on the merits, but parties are encourages to make offers to settle early and often. If resolution on a point of law, rule, or authority, consider sending the opposing side your authorities having a frank discussion prior to preparing a full motion on the record.

Keep your clients involved in the ongoing discussions – do so may help with scheduling, to identify how costs can be saved and the matter perhaps resolved.

Motions consume a significant amount of time and expense. On the other hand, there may be offsetting savings and other benefits due to advance notice of evidence in an arena where formal discovery is limited and disfavored and in limiting the issues to be heard at the Hearing on the merits. Realistic timetables, active and regular engagement among counsel, and the identification of opportunities to narrow the issues can mean the difference between a motion that is heard in a reasonable amount of time and for a reasonable cost and a motion that drags on for months and consumes significant resources.

Below are some best practices that were developed and refined over my tenure at Director:

Pre Hearing Order Form



STATE OF NEW MEXICO

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

[NAME]
Complainant,
v. PELRB No. ____

[NAME],
Respondent.

STIPULATED PRE-HEARING ORDER

Pursuant to the Scheduling Notice issued by PELRB Director Thomas J. Griego, the parties hereby submit this stipulated pre-hearing Order. Attorneys representing the parties are:

[NAMES and ADDRESSES, etc.]

STATEMENT OF THE CASE AND BURDEN OF PROOF

STATEMENT OF CONTESTED ISSUES AND FACTS
A. Complainant States:
B. Respondent States:

STIPULATIONS AS TO MATTERS NOT IN DISPUTE

The parties hereto stipulate and agree to the following facts:

The parties hereto stipulate that the following issues are not in dispute:

OTHER DEADLINES

WITNESS AND EXHIBIT LISTS

A. Complainant's Witness List:

B. Complainant's Exhibit List:

C. Respondent's Witness List

D. Respondent's Exhibit List

EXCEPTIONS

(Where counsel cannot agree to any recitation herein, exceptions shall be listed.)

Thomas J. Griego
Executive Director, PELRB

APPROVED WITH/WITHOUT EXCEPTIONS
(note exceptions above)

For Complainant

For Respondent

PELRB Form #17 - Follow outlined provided in PHO:

A statement of any contested facts and issues including the relief sought and the party or parties bearing the burden of proof with respect to ay issue;
A stipulation of those matters not in dispute;
A list of witnesses to be called by each party and a brief summary of their testimony;
A list of exhibits; All documentary exhibits prepared for the hearing shall be marked and tabbed with one exhibit per tab. Complainant's exhibits will be alphabetically lettered and Respondent's will be numbered. Joint exhibits will be marked "J-1", "J-2", etc. in sequence;
Deadlines for any discovery permitted and for requesting subpoenas. Our office will prepare the subpoenas based on your letter request, copied to the opposing party and we will follow your request with regard to whether the subpoenas will be mailed to you or picked up at our office for service;
Special needs to accommodate disabilities or translation services;

BEST PRACTICES APPLICABLE TO MATTERS INVOLVING SELF-REPRESENTED LITIGANTS

Self-represented litigants create unique challenges for counsel and the PELRB to ensure that proceedings before the Board proceed efficiently and in a civil and professional manner. Some best practices that have been developed and refined over time and embody the principles of co-operation, communication and common sense are the following:

1. **Patience**, **Respect and Courtesy**: Self-represented litigants should be treated with the same respect and courtesy shown to other counsel. It's easy to feel frustrated when self-represented litigants, especially those who have not attended this **Best Practices Seminar**, are bringing or defending claims before the Board. In the face of this frustration you can drive yourself crazy, behave irritably, feel victimized, or try to force an outcome--all self-defeating reactions that alienate others and bring out the worst in them. Or, you can learn to transform frustration with patience. Patience doesn't mean passivity or resignation, but power. It's an emotionally freeing practice of waiting, watching, and knowing when to act. Knowing when to act is important, but so is knowing ***how*** to act when the time comes.

2. **Fairness, communication and co-operation:** Counsel should try to communicate with, and be fair with, self-represented litigants. This is consistent with a lawyer's duty to the administration of justice. If assisting a self-represented litigant will move the case forward without prejudicing counsel's client, and will not result in significant costs, counsel should strongly consider providing that assistance. You may be surprised how much can be accomplished with a simple phone call.

3. **Scheduling:** Counsel should consult in advance of the Status and Scheduling Conference with self-represented litigants; a mutually agreed-upon timetable to avoid misunderstandings will be entered so agree to what you can in advance. You're going to be asked about settlement negotiations, so have that conversations.

4. **Exceptions:** Counsel should consider it wise — and it is not uncivil — to deal with a self-represented litigant in writing only, particularly where a self-represented party has made a complaint about the lawyer. If necessary, counsel should have a witness, such as a staff person or an articling student, present for any non-written communications with a self-represented litigant in order to avoid having to become a witness in the proceeding. If this is not practical or possible, then counsel should document conversations with self-represented parties by sending confirmatory letters afterwards.

We'll speak more about this in the section regarding Misleading Correspondence and Mischaracterized Discussions

SUMMARY MOTIONS

Summary Motions

a. Failure to State a Claim. The PELRB follows New Mexico jurisprudence with regard to dismissal motions. A motion to dismiss for failure to state a claim tests the legal sufficiency of a complaint and all facts alleged in a complaint and reasonable inferences therein are taken as true. See Herrera v. Quality Pontiac, 2003 NMSC 18, ¶ 2, 134 N.M. 43, 46; Southern Union Gas Co. v. New Mexico PUC, 1997 NMSC 56, ¶ 27, 124 N.M. 176, 184. Because New Mexico follows liberal notice pleading rules, technical deficiencies in the form of allegations will not generally support a dismissal for failure to state a claim.

b. Failure to Abide by Time Limits. The jurisdiction of the Board has been challenged on the basis of its failure to abide by the time limitations set forth in its own rules. In AFSCME, Council 18 v. State of New Mexico, 33-PELRB-2012, The PELRB held that the limits established for the Board to investigate complaints and conduct hearings are directory rather than mandatory so that exceeding those limits does not require dismissal of the complaint. Compare, Robert Narvaez v. New Mexico Department of Workforce Solution and Southwest Tyre LTD., 2013-NMCA-079, Docket No. 32,149 (consolidated with 32,256) (filed April 23, 2013), cert. denied, June 19, 2013, No. 34,169. (An administrative agency is bound by its own regulations. An administrative error does not alter the failure to follow the regulations that require the Department to act promptly on claims. It certainly does not extend the time limits of the regulations.

c. Summary Judgment. The PELRB has long followed New Mexico Rules of Civil Procedure, Rule 1-056 when deciding a motion for summary judgment. See AFSCME Council 18 v. New Mexico Department of Labor, 01-PELRB-2007 (Oct. 15, 2007). Applying that rule the movant shall set out a concise statement of all material facts about which it is

contended there is no genuine dispute. The facts set out shall be numbered and the motion shall refer with particularity to those portions of the record upon which the party relies. See Rule 1-056 NMRA.

The respondent shall file a response that includes a concise statement of all material facts as to which it is contended there is a genuine dispute, the facts set out shall be numbered, and the response shall refer with particularity to those portions of the record upon which the party relies. Id. Both sides may include supporting affidavits, based on personal knowledge and setting forth evidence that would be admissible at trial. Id. If a motion for summary judgment is made and properly supported, the opposing party may not rely upon the mere allegations or denials of his pleadings or in the PPC, but rather must by affidavit and reference to the record, set forth specific facts showing there is a genuine issue of material dispute for trial. Id.

- Difficulty of Obtaining Summary Judgment. PELRB's rules permit the filing of a dispositive motion. However it is on a rare occasion that the motion will prevail. Summary Dismissal requires an assessment of the violating party's conduct weighed against the underlying principles that cases should be tried on their merits and that dismissal is so severe a sanction that it must be reserved for the extreme case and used only where a lesser sanction would not serve the ends of justice. See Gonzales v. Surgidev Corp., 120 N.M. 151, 158, 899 P.2d 594, 601 (1995) (stating that "causes should be tried on their merits" and that "depriving parties of their day in court is a penalty that should be avoided"); see also Reed v. Bennett, 312 F.3d 1190, 1195 (10th Cir.2002) (where district court granted summary judgment dismissing action after a party failed to file a response to a summary judgment motion, the sanction of dismissal "is a severe sanction reserved for the extreme case, and is only appropriate where a lesser sanction would not serve the ends of justice".

a. Burden Of Proof. In a prohibited practices proceeding the complaining party has the burden of proof and the burden of going forward with the evidence. NMAC 11.21.1.22(B). Granting a Motion for Summary Judgment is predicated on there being no material questions of law or fact that would preclude judgment in favor of the movant. See, Cain v. Champion Window Co. of Albuquerque, LLC, 142 N.M. 209, 164 P.3d 90 (Ct. App. 2007). Once the moving party has made a prima facie showing of the absence of a genuine issue of material fact, the burden shifts to the non-moving party to show a reasonable doubt as to a genuine issue for trial on the merits. Hansler v. Bass, 106 N.M. 382, 743 P.2d 1031 (Ct. App. 1987). Complainant has the burden of proof in a Prohibited Practices proceeding. NMAC 11.21.1.22.

Note: There are other valid reasons to file a summary judgment motion (if you can do so in good faith). Even if the Hearing Officer may not be inclined to grant it as to all counts, if there are numerous counts alleged, you may be able to reduce the claims and simplify the case for hearing. You can also draw out your opponent's evidence and arguments and educate the hearing officer as to what the case is about.

By filing a summary motion you may also compel your adversary to disclose the elements of

its case in advance of presenting the case at hearing, identify intended exhibits, experts, provide outlines of planned witness testimony and provide a summary of all claims.

BEST PRACTICES for DEALING with:

- Misleading Correspondence & Counsel Who Mischaracterize Telephone Discussions
- Service Issues
- Difficult Counsel in Cross-Examinations & Questioning

BEST PRACTICES for DEALING with MISLEADING CORRESPONDENCE and COUNSEL WHO MISCHARACTERIZE TELEPHONE and IN-PERSON DISCUSSIONS

To ensure that proceedings move forward efficiently, counsel often communicate through in-person meetings and over the telephone. Unlike written correspondence, these methods provide no precise record as to what was said. Counsel must feel comfortable that their words will not be misstated by opposing counsel.

Below are some best practices developed and refined to guide counsel when confronted by misleading correspondence and by counsel who mischaracterize tele-phone and in-person discussions.

These best practices reflect an application of the following principles of The Advocates' Society's Principles of Civility for Advocates:
Comments Made about Opposing Counsel -
Relations with Opposing Counsel (#29)
These best practices also reflect an application of the following principles of The Advocates' Society's Principles of Professionalism for Advocates:
An Advocate's Duty to Opposing Counsel (#1, #2)
An Advocate's Duty to the Profession (#4)
28. uncivil correspondence should avoid invective and responding in kind. Unless absolutely necessary, counsel should resist the temptation to provide a lengthy response or to engage in a protracted "letter writing campaign."

29. How to memorialize: Counsel should memorialize discussions with opposing counsel with sufficiently de-tailed memoranda for their files. If misleading accounts of discussions occur frequently, counsel should bring a student or other lawyer to witness the conversations (and as necessary, have that witness prepare notes to the file). If the conversation does not take place in per-son, counsel should advise opposing counsel that a wit-ness is present.
30. Do not stop talking unless absolutely necessary: While oral communication should be the starting point between opposing counsel, if frequent disagreements arise when communicating orally with opposing counsel, counsel should restrict his/her communication to writing; however, this should be a last resort.

BEST PRACTICES for DEALING with
SERVICE ISSUES

The evolution of the Rules of Civil Procedure has often lagged behind developments in technology. This is very apparent when reconciling the strict letter of the Rules relating to service with the modern realties of using technology in the practice of law. Civility demands that counsel be flexible in regard to service issues unless specific circumstances require otherwise.
Below are some best practices developed and refined to deal with common service issues. These best practices reflect an application of the following principles of The Advocates' Society's Principles of Civility for Advocates:

General Guidelines - Relations with Opposing
Counsel

Cooperating with Opposing Counsel

Conduct That Undermines Cooperation. Be reasonable: Counsel should consider consenting to reasonable arrangements with respect to service where required by the nature of the proceedings or the schedule. Insisting on strict compliance with the Rules of Civil Procedure can be uncivil and impede the orderly conduct of the proceeding. Refusing service after 4:00 p.m., refusing faxes over 16 pages or turning off the fax machine, and refusing to acknowledge service by e-mail or courier are examples of practices that may be uncivil. If opposing counsel engages in such conduct, counsel should consider raising such conduct at the appropriate time in the proceeding and seeking additional costs relating to any unnecessary steps required due to opposing counsel's refusal to accept or acknowledge service.
33. Technology is moving faster than the Rules: E-mail is a widely accepted form of business communication. Unless there are specific reasons not to, counsel should accept service by email. A best practice is to request and provide an acknowledgment that the e-mail has been received. Service by e-mail should not be used as a means to offload the costs of printing and binding. Where requested, paper copies of a record should still be provided.

BEST PRACTICES for DEALING with DIFFICULT COUNSEL in EXAMINATIONS, CROSS-EXAMINATIONS and QUESTIONING

Examinations and cross-examinations, questioning in family law proceedings and motions arising from these events consume significant resources and time. To facilitate the efficient and orderly progression of a case, counsel must be well-prepared, courteous and civil during examinations, cross-examinations and questioning.
Below are some best practices developed and refined to guide counsel on appropriate ways of conducting examinations, cross-examinations and questioning.
These best practices reflect an application of the following principles of The Advocates' Society's Principles of Civility for Advocates:
General Guidelines – Cooperating with Opposing Counsel

Summary Motions
a. Failure to State a Claim. The PELRB follows New Mexico jurisprudence with regard to dismissal motions. A motion to dismiss for failure to state a claim tests the legal sufficiency of a complaint and all facts alleged in a complaint and reasonable inferences therein are taken as true. See Herrera v. Quality Pontiac, 2003 NMSC 18, ¶ 2, 134 N.M. 43, 46; Southern Union Gas Co. v. New Mexico PUC, 1997 NMSC 56, ¶ 27, 124 N.M. 176, 184. Because New Mexico follows liberal notice pleading rules, technical deficiencies in the form of allegations will not generally support a dismissal for failure to state a claim.
b. Failure to Abide by Time Limits. The jurisdiction of the Board has been challenged on the basis of its failure to abide by the time limitations set forth in its own rules. In AFSCME, Council 18 v. State of New Mexico, 33-PELRB-2012, The PELRB held that the limits established for the Board to investigate complaints and conduct hearings are directory rather than mandatory so that exceeding those limits does not require dismissal of the complaint. Compare, Robert Narvaez v. New Mexico Department of Workforce Solution and Southwest Tyre LTD., 2013-NMCA-079, Docket No. 32,149 (consolidated with 32,256) (filed April 23, 2013), cert. denied, June 19, 2013, No. 34,169. (An administrative agency is bound by its own regulations. An administrative error does not alter the failure to follow the regulations that require the Department to act promptly on claims. It certainly does not extend the time limits of the regulations.
c. Summary Judgment. The PELRB has long followed New Mexico Rules of Civil Procedure, Rule 1-056 when deciding a motion for summary judgment. See AFSCME Council 18 v. New Mexico Department of Labor, 01-PELRB-2007 (Oct. 15, 2007). Applying that rule the movant shall set out a concise statement of all material facts about which it is contended there is no genuine dispute. The facts set out shall be numbered and the motion shall refer with particularity to those portions of the record upon which the party relies. See Rule 1-056 NMRA.

The respondent shall file a response that includes a concise statement of all material facts as to which it is contended there is a genuine dispute, the facts set out shall be numbered, and

the response shall refer with particularity to those portions of the record upon which the party relies. Id. Both sides may include supporting affidavits, based on personal knowledge and setting forth evidence that would be admissible at trial. Id. If a motion for summary judgment is made and properly supported, the opposing party may not rely upon the mere allegations or denials of his pleadings or in the PPC, but rather must by affidavit and reference to the record, set forth specific facts showing there is a genuine issue of material dispute for trial. Id.

- Difficulty of Obtaining Summary Judgment. PELRB's rules permit the filing of a dispositive motion. However it is on a rare occasion that the motion will prevail. Summary Dismissal requires an assessment of the violating party's conduct weighed against the underlying principles that cases should be tried on their merits and that dismissal is so severe a sanction that it must be reserved for the extreme case and used only where a lesser sanction would not serve the ends of justice. See Gonzales v. Surgidev Corp., 120 N.M. 151, 158, 899 P.2d 594, 601 (1995) (stating that "causes should be tried on their merits" and that "depriving parties of their day in court is a penalty that should be avoided"); see also Reed v. Bennett, 312 F.3d 1190, 1195 (10th Cir.2002) (where district court granted summary judgment dismissing action after a party failed to file a response to a summary judgment motion, the sanction of dismissal "is a severe sanction reserved for the extreme case, and is only appropriate where a lesser sanction would not serve the ends of justice".

a. Burden Of Proof. In a prohibited practices proceeding the complaining party has the burden of proof and the burden of going forward with the evidence. NMAC 11.21.1.22(B). Granting a Motion for Summary Judgment is predicated on there being no material questions of law or fact that would preclude judgment in favor of the movant. See, Cain v. Champion Window Co. of Albuquerque, LLC, 142 N.M. 209, 164 P.3d 90 (Ct. App. 2007). Once the moving party has made a prima facie showing of the absence of a genuine issue of material fact, the burden shifts to the non-moving party to show a reasonable doubt as to a genuine issue for trial on the merits. Hansler v. Bass, 106 N.M. 382, 743 P.2d 1031 (Ct. App. 1987). Complainant has the burden of proof in a Prohibited Practices proceeding. NMAC 11.21.1.22.
Note: There are other valid reasons to file a summary judgment motion (if you can do so in good faith). Even if the Hearing Officer may not be inclined to grant it as to all counts, if there are numerous counts alleged, you may be able to reduce the claims and simplify the case for hearing. You can also draw out your opponent's evidence and arguments and educate the hearing officer as to what the case is about.

By filing a summary motion you may also compel your adversary to disclose the elements of its case in advance of presenting the case at hearing, identify intended exhibits, experts, provide outlines of planned witness testimony and provide a summary of all claims.

BEST PRACTICES for DEALING with SERVICE ISSUES

BEST PRACTICES for DEALING with SERVICE ISSUES

Any motions, pleadings or papers filed subsequent to the PPC must be served on the respondent. Requests for continuances must be made in writing pursuant to NMAC 11.21.1.16(C). In all cases of request for extension or continuance, whether expressly required by the rules or not, the best practice is to:
(a) seek concurrence or indicate why concurrence was not sought or obtained;
(b) state the specific reasons for the request, rather than vaguely citing "schedule conflict" or "unavailability;" and
(c) in the case of continuances, propose alternate dates for which either all parties or the requesting party shall be available (the former in the case of unopposed motions, the latter in the case of opposed motions). See NMAC 11.21.1.23.

However, the complainant should not serve the PPC, because the PELRB must first conduct an initial screening of all PPCs. See NMAC 11.21.3.12(A). Thereafter, the PELRB shall either serve the PPC, or give the complainant notice of and opportunity to cure any defects.

2. Answer

An answer must be filed within 15 business days after service of the PPC. NMAC 11.21.3.10(A). Failure to do so may result in entry of a default judgment. NMAC 11.21.3.11. Typically, if an answer is not timely filed PELRB staff issues an Order to Show Cause, and sets the matter for a hearing to show why default judgment should not be

entered. If the answer is filed before that hearing, it will be deemed converted into a Status and Scheduling Conference.
Below are some best practices developed and refined to deal with common service issues. These best practices reflect an application of the following principles of The Advocates' Society's Principles of Civility for Advocates:

General Guidelines - Cooperating with Opposing Counsel

Conduct That Undermines Cooperation. Be reasonable: Counsel should consider consenting to reasonable arrangements with respect to service where required by the nature of the proceedings or the schedule. Insisting on strict compliance with the Rules of Service can be uncivil and impede the orderly conduct of the proceeding. The PELRB follows New Mexico courts in utilizing the liberal "notice pleading" standard. See AFSCME v. City of Rio Rancho, PELRB Case No. 159-06, Hearing Examiner's letter decision on City's Motion to Dismiss (Nov. 17, 2006) ("[b]ased on the similarity between PELRB and New Mexico Rule of Civil Procedure 1-008(A), it is apparent that PELRB rules, like New Mexico Rules of Civil Procedure, call for a notice pleading standard in testing the legal sufficiency of the complaint"). See also Garcia v. Coffman, 1997-NMCA-092, ¶ 11, 124 N.M. 12, 946 P.2d 216 (under the notice pleading standard, "it is sufficient that [the] defendants be given only a fair idea of the nature of the claim asserted against them sufficient to apprise them of the general basis of the claim") (internal quotations and citation omitted), and Sanchez v. City of Belen, 98 N.M. 57, 60, 644 P.2d 1046, 1049 (Ct. App. 1982) (the general policy under the notice pleading standard is to provide for "an adjudication on the merits" rather than allowing "technicalities of procedures and form" to "determine the rights of the litigants").

Refusing service after 4:00 p.m., refusing faxes over 16 pages or turning off the fax machine, and refusing to acknowledge service by e-mail or courier are examples of practices that may be uncivil. If opposing counsel engages in such conduct, counsel should consider raising such conduct at the appropriate time in the proceeding and seeking additional costs relating to any unnecessary steps required due to opposing counsel's refusal to accept or acknowledge service.

Technology is moving faster than the Rules: E-mail is a widely accepted form of business communication. Unless there are specific reasons not to, counsel should accept service by email. A best practice is to request and provide an acknowledgment that the e-mail has been received. Service by e-mail should not be used as a means to offload the costs of printing and binding. Where requested, paper copies of a record should still be provided.

BEST PRACTICES for DEALING with DIFFICULT COUNSEL in CROSS-EXAMINATIONS and QUESTIONING

BEST PRACTICES for DEALING with DIFFICULT COUNSEL in EXAMINATIONS, CROSS-EXAMINATIONS and QUESTIONING

Examinations and cross-examinations, questioning in PELRB proceedings consume significant resources and time. To facilitate the efficient and orderly progression of a case, counsel must be well-prepared, courteous and civil during examinations, cross-examinations and questioning.
Below are some best practices developed and refined to guide counsel on appropriate ways of conducting examinations.

General Guidelines – Cooperating with Opposing Counsel

There are a few advocates on both the labor side and the management side for whom getting under their adversary's skin seems more important than the result they achieve for their client. While this personality type is bound to surface from time to time, in my experience such advocates are not as successful as those attorneys who keep their "eye on the prize."

One tip for dealing with jerks is to not respond in kind or "rise to the bait". Often, bad behavior is done just to get a reaction or impress a client. Other tactics are: keeping calm, conducting important discussions with difficult personalities one-on-one rather than in front of an audience, and maintaining restraint and professionalism in written correspondence, such as emails. It is best ***not*** to include the Director in your email

messages back and forth with the thought in mind "I'll just include the director so he can see what a jerk my opponent is being." Communicate with Director or Hearing Officer only at the end of negotiations or when a decision is made.

Additionally, preparing yourself and your client regarding both the case and opposing counsel's personality is the best way to handle difficult opponent.

Good character is always remembered.

Finally, a difficult personality isn't going to change to please you or the Hearing Officer. Unlike your spouse or your friends or maybe even your colleagues, you have zero claim on this person's loyalty or affections. From their perspective, their attitude, their inflexibility, their attempts to bully you is seen as a part of doing their job. Although you may not be able to change the difficult opponent's habits, you can change the way you react to them.

Let's work through an example. You're at a hearing and your difficult opponent objecting "Irrelevant!" Over and over, even though the Hearing Officer keeps overruling the objections. You know that *he* knows his objections are groundless but he keeps objecting anyway.

You feel the urge to kill rising…..RISING! And what causes those feelings? Your thoughts. Before you were even aware of it, your brain responded to the objections with a series of thoughts:

"I'm doing something wrong. If I were managing this better he wouldn't be doing this."

"He thinks he can intimidate me because he can tell I'm inexperienced."

Or maybe your heart started pounding and you found it a little harder to breath. That's anxiety you're feeling Maybe you were thinking:

"I'm never going to be successful if I can't get through this line of questioning."

Each of these thoughts – or one of the thousands other similar thoughts you might have – causes a particular feeling. But those feelings are the result of *your thoughts about what opposing counsel is saying*.

I bet you know someone in your office who is unflappable. They don't care when opposing counsel yells at them, they never get mad, and they don't take anything personally. They hear the same things from the other side that you hear, but they just never get upset. It's not that they are superhuman. It's that they don't think the same thoughts about opposing counsel you think that cause anxiety, shame and anger for you. The good news is that means you can learn to be like them if you want. You just have to change the way you're thinking. Imagine how you would feel about opposing counsel if your thoughts were more like the following:

He’s all bluff.

It’s his job to show off for his client.

I’m handling this like a pro.

There’s nothing to worry about here.

I know I’m doing a good job.

This is how it’s supposed to go.

Read those over. Those are thoughts that produce the feelings of confidence, calm, and capability.

[Break]

Preparation for Any Board Hearing

Know the PELRB's Process
• Prior to any administrative hearing, review the specific administrative procedures for the specific hearing before the Board.
• Read thoroughly the agency's procedural regulations, rulings, policy manuals, or internal operating procedures that the agency may have adopted to govern its hearings.
• Consider Constitutional requirements of due process and other "common law" procedural requirements applicable to administrative agencies.

Preliminary Matters. Preparation. There is simply no substitute for a well-organized, logical presentation. This requires hard work well in advance of presenting your case. Review prior decisions by the presiding officer if possible, particularly regarding cases similar to yours.

- Gather information from other advocates about the particular practices of the presiding officer before whom you will appear, including other attorneys.
- How active a role does the presiding officer play in taking testimony from witnesses? How do they handle exhibits? Do they apply any evidentiary rules? What is the hearing officer's attitude toward clients, witnesses and advocates?
- Does the Board or your hearing officer preside with a firm hand or allow parties leeway and grant most requests?
- Should you be prepared for anything unusual about the hearing officer's conduct during

- hearings?

Reality check – you can't spend 50 hours learning the entire law relating to Prohibited Practices for a 10 minute hearing. A certain amount of wisdom is required, and this is where risk creeps in. Obviously zero preparation is too little. But there is such a thing as too much prep for many types of hearings. Knowing when to stop researching is an excellent practice to develop. Experience helps here – or just ask somebody who's done the same thing before.

Here are my essentials – these are the things you must know:

The facts – who is your client, what is their problem, and what do the pleadings you have filed actually say. Similarly, what does the other side's material say;
The purpose – what are you there for, what is it you want, and what is the tribunal's power to do what you want;
The principles – what is the fundamental law (statute or cases) dealing with what you want and what the other party says they want.

Hearing Day. You should arrive at the hearing room about 20 minutes before the scheduled start of the hearing. During this time, observe the layout of the room and identify where you and your witnesses, the opposing party and the hearing officer will be sitting. If you are an attorney, show your client where the witnesses will sit to testify. Becoming familiar with the layout of the hearing room and where each participant will be seated makes for a more organized flow of your presentation and more confident witnesses.

• Before the start of the hearing, proceed to set up any graphic displays which you intend to use. Having the graphics prearranged in the hearing-room reduces the likelihood of disruption of your presentation at the point when you actually refer these graphics to the attention of the hearing officer. A graphic identifying the relationship of the parties and other relevant entities can be a useful tool during an opening statement in complex matters where many parties are involved.

• Keep in mind that hearing, although informal, should-be carried out in a completely professional manner. Hearing Officers expect, and usually insist, that the parties, though adversaries, are cordial and respectful, not only to each other but to the hearing process as well. You also should be sure to exchange greetings with your adversary. It makes everyone's day considerably more pleasant knowing that the parties, while adversaries, are not at each other's throats.

• You should introduce yourself to the Hearing Officer. You may want to provide your business card. You also should introduce your client or introduce the representatives of

your agency or union.

• Before the opening statement it is good practice to designate a single party representative who, whether testifying or not, will be entitled (and expected) to remain in the hearing room during the course of the entire proceeding. It also may be prudent to request that the hearing officer exclude all other witnesses from the room except when they actually testify. This avoids a witness "parroting" prior testimony. Now you are ready to begin.

• Come to the hearing well- groomed and in accepted business attire (appropriate for you line of work). This shows respect for the proceeding.

• Your client should be present mentally and physically throughout the hearing. Clients who frequently text and answer e-mail or step out of the hearing to take “important” phone calls do not make a good impression.

Hearing Day

Other Tips

We gone through all the “Dos;” now let’s take a look at some “Don’ts.”

- Don’t try to convince the H.O. or Board that you’re right on every point
- Don’t Annoy
- Don’t display anger, animosity or rudeness. Don’t personalize everything or engage in personal attacks
- Don’t assume the H.O. shares your knowledge of the case.
- Don’t overlook what the H.O. or the Board thinks is important based on the questions they ask
- Don’t ignore a witness’s non-responsive answer

Choose your battles wisely; Don’t try to convince the H.O. or Board that you’re right on every point.
When is a battle not worth the aftermath? Consider the following guidelines. It's best not to engage when:

(1) There’s a low probability of winning without doing excessive damage

(2) Upon reflection, winning isn't as important as it originally seemed

(3) There likely will be a time down the line when you can raise the issue again with a different person or in a different way

(4) The other party's style is provocative whether speaking with you or others, so it’s not worth taking personally

(5) You could win on the immediate issue, but lose big in terms of the relationship

It’s easier to apply these choose-your-battle rules when you don’t feel strongly about an issue or when the relationship doesn’t have a lot of baggage. It’s precisely at such times, however, that they’re most needed.

- Don’t annoy. It's easy to be annoying without even knowing it, as Mark Twain said,

"There is nothing so annoying as to have two people talking when you're busy interrupting." Practice a little self-awareness, read the room, and reflect on how your behavior might affect other people. Don't worry too much about annoying the H.O. or the Board - you may fear that their annoyance will translate into an adverse ruling or some kind of bias as you proceed. I think this very rarely happens. Even the most crotchety of judges try to do the right thing. Some judges pretend to be annoyed as a way to get members of what might be generously called a loquacious profession to get to the darned point and move on as needed.

Here are a few of the ways that you could be getting on the Hearing Officer's or opposing party's nerves:

1. Making extraneous noises such as tapping the table or compulsively clicking a ball point pen, jingling pocket change, making faces. Aside from being personally distracting, remember that we are making an audio record. Conquer your habits of rolling eyes, dancing eyebrows and other annoying or distracting mannerisms. Do you want me to be focusing on your mannerisms or your submissions?
2. Not giving people your full attention. Multitasking may make you feel like you're getting a lot done, but it can get in the way of productive interactions with your coworkers, who have legit reasons to be annoyed if, every time they try to talk to you about a work issue, you keep writing emails and texting. Give people your full attention. If you're not in a situation in which you can give someone your full attention.
3. Being Late to hearings and conferences. The only way out – an abject apology. Unless your excuse is extremely good, I'd generally just recommend sticking with the apology unless you're asked to explain further.
4. Being disorganized. Picture this: your matter has been called, your opposition has spoken, and it's now your turn. You stand, begin your introduction…. and then you go to get your first case to speak to. And you can't find it. You also can't find your speaking notes or submissions. Your court documents are in piles in front of you that you can't remember the system for. After around 30 seconds, the silence becomes a little embarrassing. Know what you have, where it is, and how to find it if you need it. Use tabs, colors, piles, folders or whatever takes your fancy – just use something that works. Connected with, but not identical to, disorganization, is a failure to prepare.
5. Don't be the "one more thing" attorney: This is the attorney who always must have the last word.
6. Interrupting the trier-of-fact mid-sentence and then speaking louder than the Hearing Officer to avoid hearing what the Judge has to say, or continuing to argue with the Judge either after or during his or her ruling. I have some words of advice: Never interrupt anyone except with a proper objection. If the Hearing Officer or Board chairman starts talking, you should stop talking and listen to what he or she has to say, you might find their comments to be helpful. A related annoyance is the "I must respond to this right now" lawyer: This is the lawyer who interrupts his or her opponent either verbally or physically, such as popping up from the chair as soon as he or she hears something that he or she does not like. There is no reason why you can't wait politely for your turn. (And

the Jack-in-the-Box tactic is disruptive.)

7. Having the support of your client is a good thing but make sure you've instructed your client and others who may be attending an open hearing not to show that support by nodding their heads in agreement every time you make one of your brilliant points. I find it very distracting.

- Letting your emotions get the best of you is a BAD idea. What it does is have the tribunal start to think your argument has no merit and is founded completely in emotion. It is damaging to your client's case. It also suggests that your objectivity on the assessment of your client's arguments could be impeded, which is a professional ethics issue. Inside you might be going berserk, but on the outside you need to be in control, from your facial expressions, to your hands, to your feet, to your tone of voice. A bit of tactful emotional energy in your speaking can be beneficial – but keep it under your control, not the other way around.

- Certain acronyms, codes or Standard Operating Procedures may be commonplace to you, but unless you explain them to the Hearing Officer you may be speaking a foreign language that he or she does not understand.

Don't overlook what the H.O. or the Board thinks is important based on the questions they ask. It is disappointing when a lawyer jettisons an argument at the first quizzical word from the bench. Do not be too quick to abandon argument on an issue. Do not be deterred by what you perceive as a closed judicial mind. Do not confuse judicial bluntness with bias. If you are being given a rough time, it may just be the judge testing your knowledge of where you are going and how you intend to get there.

A. Opening Statements. Do not underestimate the importance of your opening statement. If the opening statement is set forth in a fair and reasonable manner it may create an opportunity to allow the other side to admit certain facts as stipulated by you. This will shorten the hearing, resulting in cost savings to both parties. A really good opening statement also shows the arbitrator that you actually understand the relevant issues and facts in the case. It can be used to explain to the arbitrator what evidence is important and why it is important. It is much easier to follow evidence and make notes if you know why the lawyer is leading certain evidence.

- Such a statement would contain the factual background of the claim, its problems and the relief sought. Don not assume that the H.O. or the Board remembers everything from your pleadings or PHO. It's up to you to stress those things you think are most important. If you have prepared a hearing claim book, you already have your written opening statement. Remember, clarity is paramount. The opening statement differs from a closing argument in that the hearing officer is more interested in what happened and why and what evidence you will submit to support your version of the events, not argument or intricate rules of law that may or may not apply.

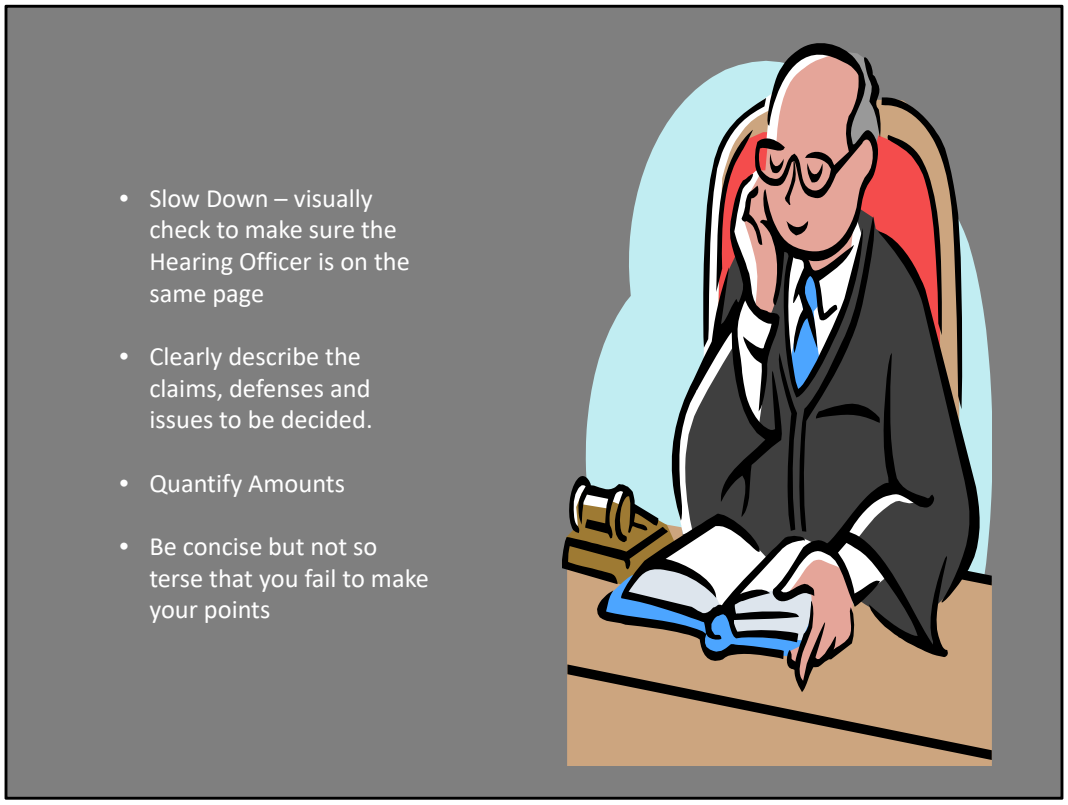
- Keep it Simple. The opening statement should be a well thought out, concise digest of your case. To maximize impact, the theory of damages and their justification should remain basically unchanged throughout the course of the case so plan well in advance of the hearing. Your opening statement should draw the hearing officer into your story. You should identify the parties and their relationship, the types and cause of the problems encountered by your client, the steps you took to deal with the problems and the

relief sought in the hearing proceeding. It is important to remember that the hearing officer is there to resolve the dispute, not effect a compromise. Therefore, always present your case in a manner which will allow the hearing officer to formulate a fair resolution to the dispute.

- The opening statement is not a substitute for sworn testimony. It is merely a presentation as to what you intend to prove. If there is 'a failure of proof, all the golden words in the opening statement will be for naught.

- A basic tenet to remember when planning your oral presentation is to keep it short and simple. Remember, even the most acute listener will get bored with long-winded orations containing a multitude of facts. Explain your case in the manner in which you would explain it to a friend or your spouse. Establish the strengths of your case and eliminate any misunderstanding about them. Simple concepts and simple words will bring about an effective result.

Opening Statements Watch video clip. (9 minutes, 55 seconds). Although presented as an opening statement to a jury, the same principles apply when presenting to a H.O. or the Board en banc.



Slow Down The way you speak is important. Almost everyone can find room for improvement here. Slow down. Remember that the judge is probably taking notes. Speak clearly and reasonably slow. A good rule of thumb is to speak no faster than a judge can write. For the most part, speak in short sentences, using plain simple language . . . Vary the cadence of your [speech]. Vary the length of your sentences and the tone of your voice. Pause often.
It would be tremendously educational. Lowering your voice can be as effective as raising your voice when emphasizing a point. Sprinkle in the occasional rhetorical question.

Competent counsel wear courtroom antennae, not blinders. They are alert to all of these things and more:

(a) that the time for the morning and afternoon recesses or the noon and end-of-day adjournments have arrived. If you find yourself about to commence a line of questioning that will go over the magic hour,
point that out to me and ask: "Would this be a convenient point at which to recess (or adjourn for lunch) Or, "I realize that it is not yet time for the morning recess, but could we break now so that I
might . . .?" ;
(b) that I am furiously making notes and falling behind in the task;
(c) that I am obviously lost in the documents or fumbling with the exhibits;
(d) that the witness has not answered the question asked, yet the next question is underway;

(e) that I am trying to attract the attention of counsel;

Clearly Describe Be sure to present your most important points first. In a Prohibited Practices case one might say something like "Union 123 claims the employer's no-solicitation rule that encompasses rest breaks, lunch time, and residential or after-duty hours violates Section 19(B) of PEBA. Thus, such rule constitutes a prohibited practice unless the city makes a showing that its firefighting efforts would be hampered if employees were permitted to engage in union organizational activities during times when fire fighters were not needed for emergency services." In a representation proceeding one might say "Union 123 requests certification of a bargaining unit that includes positions A, B and C. It is the Board's responsibility to designate an appropriate unit, not necessarily the most comprehensive or most appropriate unit. The PEBA Section 10-7E-13(A) provides the necessary guidance to the Hearing Officer for determining whether a proposed bargaining unit is an appropriate one: "Appropriate bargaining units shall be established on the basis of occupational groups or clear and identifiable communities of interest in employment terms and conditions and related personnel matters among the public employees involved. Occupational groups shall generally be identified as blue-collar, secretarial clerical, technical, professional, paraprofessional, police, fire and corrections. Essential factors in determining appropriate bargaining units shall include the principles of efficient administration of government, the history of collective bargaining and the assurance to public employees of the fullest freedom in exercising the rights guaranteed by the Public Employee Bargaining Act.

Be brief in making your points. You first want to implant in the mind of the judge the primary issue or issues in your case. Do your best to be objective, unemotional, polite, and respectful of the other party and the judge. The judge will be interested only in hearing the facts of your dispute. Don't raise your voice or make insulting remarks about the other party or any witness, no matter how angry you may become. During the hearing, speak to the judge and not to the other party. Most importantly, be truthful in everything you say.

Answer the judge's questions thoughtfully. If you don't understand a question, politely ask the judge to explain the question or to ask it in another way. Remember, too, that the judge is trying to apply laws that you might not know about. Therefore, don't get angry if the questions are on points that you don't consider important. The judge's questions may be of great importance to your case.

Quantify Amounts: Be prepared to show how any amounts such as dollar losses, the value of benefits or caseload numbers were determined. If calculations are complex, it may be helpful to provide a written summary. If the Respondent believes that the amounts presented by a Complainant or Petitioner are excessive or improper, be ready to explain why this might be so. If the defendant knows that all or any part of the amount claimed is owed to the plaintiff, it's okay to tell the judge that too.

Direct Exam: Hosting a Conversation

- Know what you want from the witness and steer the testimony toward obtaining that information
- Sequential Flow of Open Ended Questions to Tell the Story
- Guide the Witness in Transition Through Relevant Events
- Establish Witness Credibility – Frame Knowledge of the Case
- Every Needed Fact is Not a Fact for Every Witness
- Make Exhibits Part of Your Direct Exam
- Use Exhibits to Emphasize the Testimony
- Provide Context for the Exhibit Through the Testimony

5. Effective Direct and Cross-Examination. The testimony of the witnesses at the PPC proceeding will make or break your case. Unlike documentary and physical evidence, the parties have wide latitude in developing the nature and substance of this type of proof to suit the needs of the case. In presenting your claims or defenses, you will be relying on those witnesses you have already selected to testify and have exchanged with the opposing party with a copy to the hearing officer their identity and a synopsis of their testimony. The primary means by which the hearing officer establishes the facts to support his or her decision is by questioning your witnesses. Upon completion of each direct examination, your adversary has the opportunity to question or cross-examine your witness. The focus and methods of each type of examination differ considerably.

• Direct Examination. During direct examination you are presenting testimony to support your claim. In essence you want to elicit testimony from the witness that demonstrates the elements of your claim. It is out of the witness' mouth (not argument of counsel) that the story you want told comes.

a. The key ingredient to successful direct examination is a well-prepared, confident and knowledgeable witness. The credibility of a witness is constantly being assessed. A witness who appears natural and sure of his testimony is clearly more persuasive than an ill-prepared, nervous or antagonistic one.

b. Review well in advance with each witness every exhibit about which you intend to ask him questions. Conduct practice examinations the day or two before

testimony. Counsel your witness to listen carefully to each question and wait until the question has been completely asked before answering. In examining a skittish witness, it is advisable to suggest that, after the question has been asked, the witness should pause briefly to completely formulate a response before responding to the question. Counsel the witness not to anticipate any questions; you may need to change the order or wording of some questions as the testimony progresses. This should not create any problems if the witness listens to the question being asked and answers truthfully. For greater impact, the witness should face the Hearing officer when answering key questions.

c. Begin direct examination with questions regarding the witness' background (no matter how nervous, people usually feel comfortable talking on a topic about which they are familiar: themselves! If your witness is stumbling through documents due to nervousness, the hearing officer generally will allow the witness to be guided to facilitate the progress of the hearing. Along the same vein, leading questions as to background and routine subject matter usually will generally be permitted by hearing officer to enable the testimony to proceed expeditiously. Be careful, however, not to abuse this courtesy, or you may detract from the credibility of your witness.

• Direct Examination of Expert Witnesses. This is another area where the parties will benefit by stipulating to an expert witness' qualifications prior to the hearing and including that stipulation in the pre-hearing order. Before the hearing officer will consider, or even listen to, the opinion of your expert, you first must establish your witness' expertise in his subject matter. The recognition of an expert's expertise is based solely upon the judgment and discretion of the hearing officer.

a. Start by eliciting testimony which portrays the professional background and experience of your witness. Possession of a relevant academic degree, state license, or other certification is customary - but not essential. A well-educated, licensed professional with a solid reputation who currently engages in the profession which will be the subject of his testimony generally makes the most reliable and believable expert. On the other hand, an individual who possesses superior understanding of paint applications and defects by virtue of many years of working in the painting trade may possess a degree of expertise sufficient to be recognized by the hearing officer as reliable and competent for the purpose of the PPC proceeding.

b. After you feel confident that you have established the expertise of your wit ness and before you begin questioning about the matters in dispute, ask the panel to recognize your witness as an expert. At this point your adversary may ask the hearing officer for the opportunity to voir dire, that is, to probe the proffered expertise. A brief inquiry of your witness usually is allowed before the consideration and decision by the hearing officer on your request for recognition of your witness as an expert. Any objection to your request by your adversary will be addressed by the hearing officer at that time. It also should be pointed out that a party adequately experienced in dispute at issue may be his own expert. This is particularly apt where the party possesses adequate expertise and the

amount in dispute and the budget are small. Upon acceptance of your witness, the expert should provide an opinion based upon his experience as to the cause and effect of the actions and inactions of the parties.

Know what you want from the witness and steer the testimony toward obtaining that information

Sequential Flow of Open Ended Questions to Tell the Story

Guide the Witness in Transition Through Relevant Events

Establish Witness Credibility – Frame Knowledge of the Case

Every Needed Fact is Not a Fact for Every Witness

Make Exhibits Part of Your Direct Exam
Use Exhibits to Emphasize the Testimony
Provide Context for the Exhibit Through the Testimony

There is no rule of procedure explicitly permitting witnesses to give testimony in PELRB hearings via telephone. NMAC 11.21.2.19 (C) and (D) provide:

C. The hearing examiner shall take evidence sufficient to make a full and complete record on all unresolved unit issues and any other issues necessary to process the petition. Details such as the time, date and place of the election, and whether there will be manual or mail ballots or a combination, shall not be resolved through the hearing process, but shall be resolved instead through the pre-election conference process described in Section 25.
D. The hearing examiner may examine witnesses, call witnesses, and call for introduction of documents.

Other Administrative Hearings such as Social Security disability hearings have used video conferencing for both remote judges and remote claimants and their representatives. The requirement that testimony be give “in open court” may be read to include telephone testimony.

If the parties both do not consent to a witness giving evidence by telephone or video-conference then the Hearing Officer or Board on motion or on its own initiative may direct a telephone or video conference on such terms as are just.

The factors to be considered in exercising this discretion are:

(a) The general principle that evidence and argument should be presented orally in open

court;

Demeanor including facial expression is critical to judging credibility. [next slide watch video]

(b) The importance of the evidence to the determination of the issues in the case;

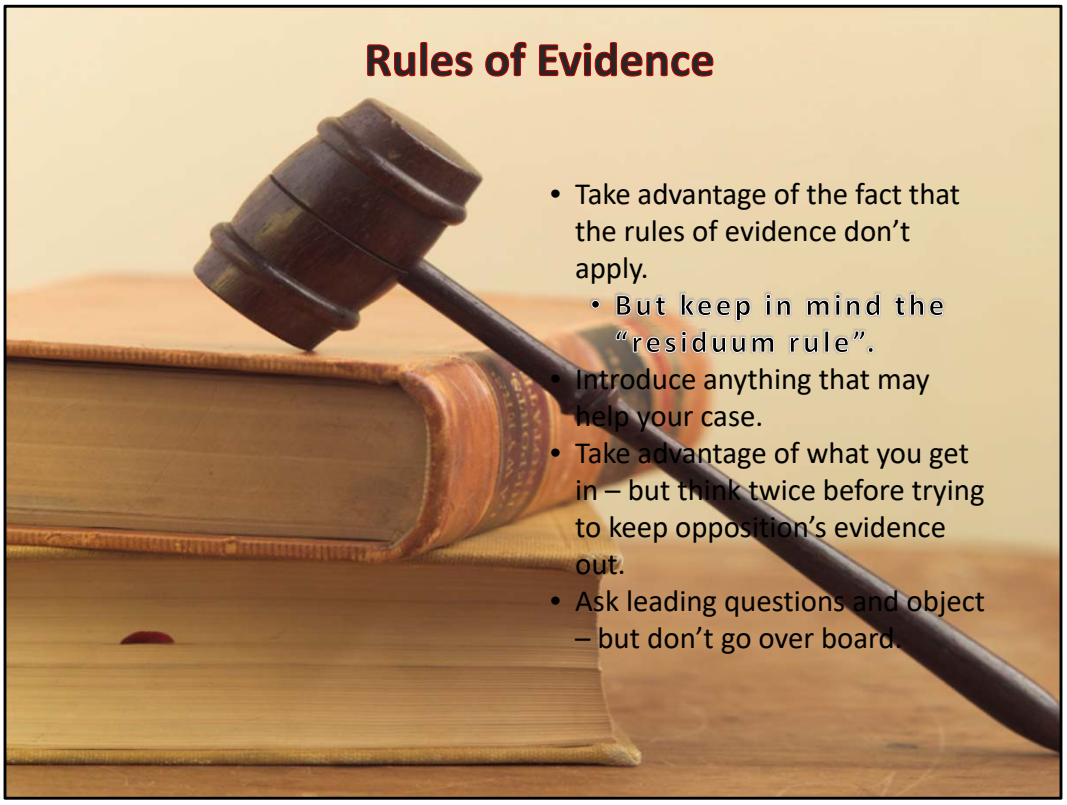
(c) The effect of the telephone or video conference on the court's ability to make findings, including determinations about the credibility of witnesses;

(d) The importance in the circumstances of the case of observing the demeanor of a witness;

(e) Whether a party, witness or lawyer for a party is unable to attend because of infirmity, illness or any other reason;

(f) The balance of convenience between the party wishing the telephone or video conference and the party or parties opposing; and

(g) Any other relevant matter.



Evidentiary Principles. A hallmark of an administrative hearing is the presentation of evidence free from complicated and legalistic rules of evidence. In hearing, practically anything relevant to the dispute usually will be admitted into evidence. The hearing officer will likely accept any document or other exhibit "for what it's worth," the presumption being that a seasoned hearing officer, unlike a juror at trial, will assess the exhibit's value and relevance to the dispute and give such evidence the weight to which it is entitled with little risk of undue prejudice.

NMAC 11.21.1.17 re: ADMISSIBLE EVIDENCE provides:

A. The technical rules of evidence shall not apply, but, in ruling of the admissibility of evidence, the hearing examiner or board may require reasonable substantiation of statements or records tendered, the accuracy or
truth of which is in reasonable doubt.

B. Irrelevant, immaterial, unreliable, unduly repetitious or cumulative evidence, and evidence protected by the rules of privilege (such as attorney-client, physician-patient or special privilege) shall be excluded
upon timely objection.

C. The hearing examiner or board may receive any evidence not objected to, or may, upon the hearing examiner's or board's own initiative, exclude such evidence if it is irrelevant, immaterial, unreliable, unduly

repetitious, cumulative or privileged.

D. Evidence may be tentatively received by the hearing examiner or board, reserving a ruling on its admissibility until the issuance of a report or decision.

On the other hand, where testimonial evidence is repetitious, rambling or irrelevant to the dispute, a direction by the Hearing officer to move to a new topic of examination is inevitable. Hearing will limit such evidence.

Rules of Evidence Take advantage of the fact that the rules of evidence don't apply. Hearsay is admissible easier to lay a foundation or reasonable substantiation of statements or records tendered

Residuum Rule While acknowledging that the rules of evidence do not apply in our hearings the Hearing Officer should also be aware that any decision rendered may not be devoid of support by any legally admissible evidence but must be supported by some evidence that would be admissible in a jury trial. This is known as the "residuum rule". See *Trujillo v. Employment Security Commission of New Mexico*, 610 P.2d 747, 94 N.M. 343 (N.M., 1980); Jones v. Employment Services Division of Human Services Dept., 619 P.2d 542, 95 N.M. 97 (N.M., 1980). (A reviewing court is required by the rule to set aside an administrative finding unless supported by evidence which would be admissible in a jury trial.)

Evidentiary Procedure. The presentation of your case should proceed like a good story, without distractions or interruptions.

1. Documentary evidence. The exhibits will be identified in advance of the hearing pursuant to a prehearing order. If possible, have the exhibits admitted before the hearing begins. For example, when questioning a witness on Claimant's Exhibit B, you want to avoid any break in the flow of the hearing for exhibit identification, idle discussion, or objection by your opponent. Often, a hearing officer will accept all exhibits into evidence *en masse* at the beginning of the first hearing.

- Some cases will require admission of exhibits one at a time. Some voir dire is inevitable. This is the label for the age old legal procedure given to your opponent's right to question a witness as to the authenticity of the proffered exhibits before the witness testifies using the exhibits. Brief questioning of your witness by your adversary is customarily allowed by the hearing officer before you may continue with your presentation. Advise your witness in advance of the likelihood of the allowance of some voir dire.

2. Testimonial evidence. As with the introduction of documentary evidence, hearing generally permits wide latitude in testimonial evidence. Typically, the testimony of a

witness should be based solely on personal knowledge. However, even hearsay (that which someone supposedly has told the witness) usually will be admissible "for what it's worth."

- There are two types of witnesses: fact witnesses and expert witnesses. Fact witnesses have personal knowledge of information relevant to the dispute between the parties. Generally speaking, fact witnesses come to possess such information through their own personal observation of conductor things. For example, an excavator may have knowledge of sub-surface conditions experienced at the job site.

- A person with specialized education, training or experience, resulting in. a high degree of knowledge or expertise in a particular discipline or work activity may be accepted as an expert and be allowed to provide expert opinion evidence in the proceeding. Experts generally are called to testify as to what went wrong at the workplace, why it went wrong, what caused the problem(s), what could have been done to correct the problem(s), and what effect the problem(s) had on the workplace and the parties.

3. Affidavits. Although often overlooked by attorneys and parties alike, the use of affidavits can be an effective and inexpensive means of bringing evidence before a hearing officer.

- Generally, the affidavit should frame what you want said in a manner which leaves no room for second guessing.

- A prudent hearing officer will require the offering party to justify the use of an affidavit. Some of the factors to be considered are whether the information in the affidavit is controversial or essential to the outcome of the case. For example, a hearing officer may be reluctant to accept an affidavit expressing a key fact upon which the ultimate decision hinges. Nonetheless, the affidavit of a nonparty public official may be perfectly suitable for use in describing the procedure employed by his or her office.

- Other factors usually considered are the unavailability of a particular witness for live testimony due to health, employment, or geographical problems.

- Your use of an affidavit may present a serious problem for your opponent as, quite obviously, this "witness" cannot be cross-examined readily. This results in an affidavit being highly effective in a subversive sense, and since it is not subject to cross-examination, it may be accepted by the panel as unopposed evidence. However, the sound practitioner should beware, for if the panel is not vigilant, affidavits can be abused and often receive more credit than they should by the hearing officer.

4. Evidence from third parties. Often testimony, documents or other information is sought from third parties (i.e. a person or company not a party to the hearing).

- The use of a subpoena to obtain such information is generally effective for this

purpose. The hearing officer has the power to subpoena third parties found within the jurisdiction to appear at a hearing to testify or produce documents. It is the better practice to have the subpoena signed by a hearing officer because a court upon an application to quash by the subpoena's recipient, may regard a subpoena signed by a hearing officer as an implied assertion by such hearing officer that the documents or witnesses sought by the subpoena are essential to the proceeding.

If it is true that the tendency exists to admit all evidence except that which is irrelevant, immaterial, unreliable, unduly repetitious or cumulative evidence, and evidence protected by the rules of privilege zealous attempts to exclude evidence will likely not be successful and risk irritating the Hearing Officer by wasting everybody's time.

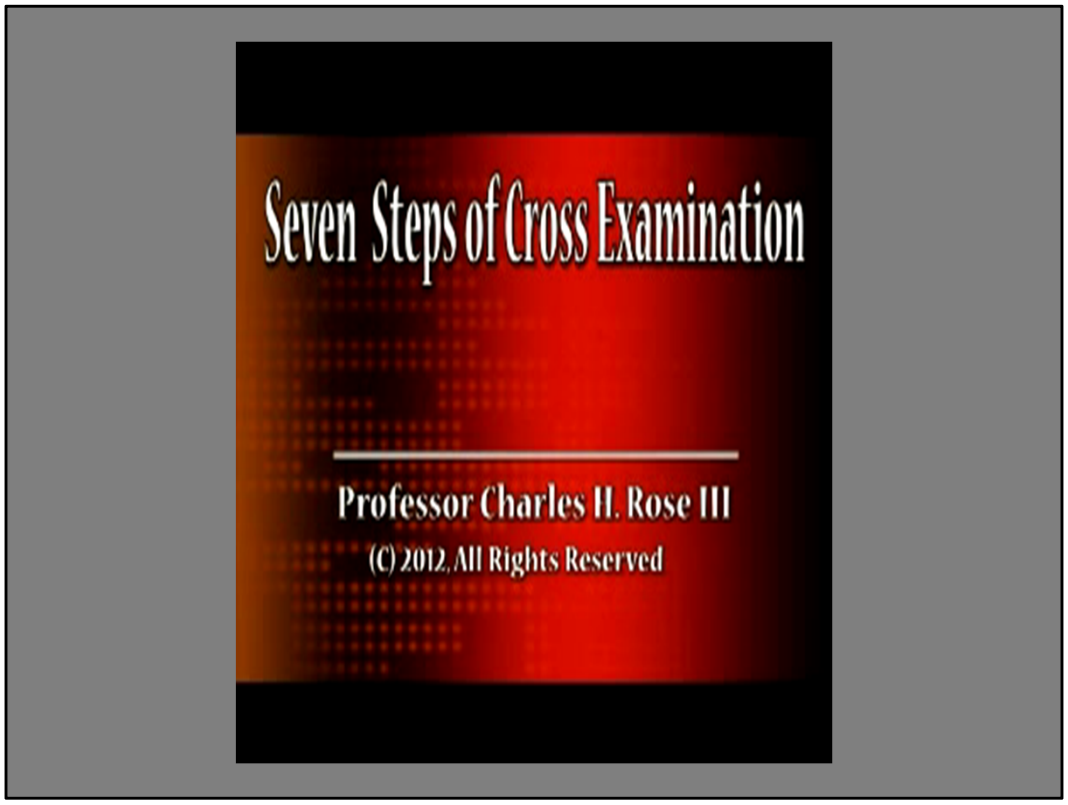
Leading Questions
Ask leading questions and object – but don't go overboard.

What is a leading question ?
A leading question suggests a particular answer that the questioner desires – most often a simple 'yes' or 'no' answer. Example:

- "You were in Los Angeles last week, weren't you?" (Leading question)
- "Were you in Los Angeles last week?" (Neutral question)

Because we're less strict that a Court would be with regard to Rules of evidence some leeway is given to permitting leading questions especially with regard to background question or collateral matters. But don't go too far- when it looks like counsel is testifying instead of the witness even I will put a stop to it!

Who may ask a leading question ?
- Witness's attorney, during direct examination, generally may not ask leading questions because then the attorney would be suggesting to the witness what the answer should be.
- Opposing attorney, during cross-examination, may freely ask leading questions in order to 'trick' the witness in answering, to discover contradictions, or to raise doubts in the minds of the jurors.



Cross-Examination. The goal of cross-examination is to impair the credibility of the witness and to impeach his testimony. Effective cross-examination of either lay or expert witnesses should consist of simple questions requiring one word or brief answers. In the case of experts, occasionally, you can use his prior published writings or testimony to achieve this goal. Impeachment should not be attempted by badgering the witness, which will alienate the hearing officer "from you and create sympathy for the witness (exactly the opposite of your goal). Cross-examination is limited to the subjects covered during direct testimony.

a. As you prepare to cross-examine your opponent's witnesses, bear in mind that your own witnesses need to prepare for their cross-examination. Much of your witness' anxiety over testifying may arise from the thought of cross- examination. He may fear that the other attorney or party will attempt to coerce him into saying or admitting something injurious to the case. Since you have thoroughly reviewed the contract and project documents, you have assessed your vulnerabilities and can prepare the witness for cross-examination through a series of dry runs. Engage in mock cross-examination of each witness utilizing whatever exhibits may be employed by your adversary. Familiarity with the topics upon which they will be cross-examined will usually ease their mind.

b. Redirect or re-cross examination is typically not allowed but may be in the discretion of the Hearing Officer. Instead, the Hearing Officer usually will ask his own clarifying questions and then make the witness available to the parties for further questioning based on any new areas of inquiries resulting from the Hearing Officer’s questioning. Further questioning by the parties after the Hearing Officer should be used

only to clarify statements already made. However, you will want to minimize the risk of having your witness testify differently than he or she may have earlier. Even if the Hearing Officer allows you to introduce new testimony on redirect of your witness this should be done cautiously because it opens the witness up for further cross-examination, which could develop contradictions in the initial testimony.

c. It is a pleasure to see a skillful cross examination of an arrogant or lying witness. I believe that cross-examination is one of the best ways that we have to find out whether or not someone is telling the truth. It is actually very hard to tell a consistent lie, thus a skilled and effective cross examiner can usually expose a liar. An effective cross examination does not require that you mock, bully, berate or intimidate a witness. The most effective cross examinations are often where the lawyer simply points out the internal inconsistencies of the witnesses' story or shows that the witness is so blinded by his own distorted view of the world that he loses all credibility.

Conversely, it is equally important that an advocate treat honest and impartial witnesses fairly and respectfully. Not only do you lose the respect of the Hearing Officer if you bully or attack honest witnesses, but if your method of questioning is overly aggressive it will rapidly lose it effectiveness. It is usually not a good idea to pick on a victim.

• Handling Objections. Attempts to introduce exhibits frequently draw an objection. Presentation of arguments by the parties on the issue of admissibility of the exhibit can be very disruptive to the testimony being offered by your witness. To avoid such objection, either attempt to agree in advance to all exhibits, or, at least, present the exhibit in advance to your adversary, advising him of your intent to introduce it. If no advance consent is readily available, ask your witness questions which provide the factual context out of which the exhibit arose. For example, if you want to introduce a concrete test cylinder lab report without calling a representative of the independent testing agency which conducted the test, ask your project manager witness to explain the concrete testing procedure employed during the project and then have him identify the reports received in overseeing the project testing procedure. This type of foundation for your test report exhibit serves well to promptly dispose of the disruptive objection.

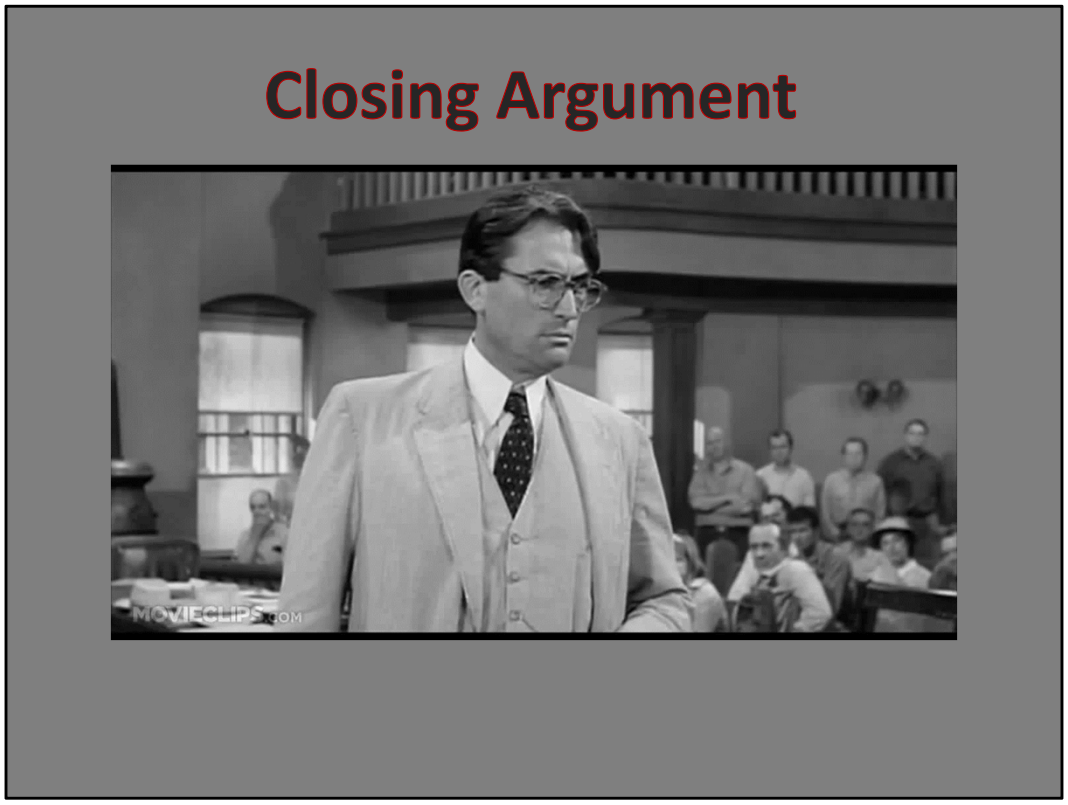
a. Questions which are confusing or ambiguous invite objection. Ask simple questions. There is no jury to impress. Everyone expects your witness to have rehearsed beforehand. Ask your questions and let your witness carry the narrative to the extent he is capable. If your question raises an objection, with- drawing it and rephrasing it into another question, if possible, is less disruptive to your witness' testimony.

b. Occasionally a party will seek to introduce witness testimony or a document that was not previously disclosed by the pre-hearing order. There is sometimes a need to permit such evidence where it is in the nature of rebuttal and there was not a prior opportunity to know that the witness or document would be needed. Fairness is the guiding principle here. If a surprise witness, document or gambit is sprung, the Hearing officer is

obligated to allow the disadvantaged party the opportunity to take steps to present a more balanced view. For example, the surprise witness may be allowed to testify only if he is subject to recall for cross-examination on another day, after there is opportunity to prepare.

- Scheduling of Witnesses. The scheduling of witness testimony is an important factor in determining the manner and sequence in which your story will be told. Normally, the first witness sets the stage and should provide testimony identifying the parties and the nature of the dispute. While your first witness is frequently your strongest, he need not be. He must, however, have the ability to set the stage for the story which will be more fully developed by the later witnesses. Your last witness should be capable of summarizing damages if any in terms of dollars and cents. In determining whom your witnesses will be, make sure you have at least one strong witness, that is, one who is knowledgeable, well-prepared, credible, and concise.

Frequently, the most effective witness is the person who was directly involved in the disputed conduct and can explain with first-hand knowledge the problems encountered and the effect of those problems in terms of such issues as violation of the CBA, rules or the Act.



Closing Argument. The purpose of the closing argument is to provide you with the opportunity to demonstrate that the evidence adduced during the hearing(s) proves your right to prevail. Use it for that purpose. As to each of your claims or defenses, refer to the particular documents and testimony which lend support to your position. It is also good practice to provide a written closing statement, specifically illustrating any money damages sought.

- Your closing statement should provide a narrative synopsis which is compelling, comprehensive and well-organized. Highlight the important information heard during the hearing, recount who testified and the highlights of their testimony, and define your claim and precisely what relief is sought. Use this opportunity to point out the failures of proof by the other side. Likewise, be sure to note during the hearings which Hearing officer found certain elements of your case interesting and emphasize those in their most favorable light.

- The Hearing Officer may ask penetrating questions of both presenters or ask hypothetical questions arising from their arguments. If by such discourse it seems to you that the Hearing Officer has already made up her or his mind, I caution you that appearances can be deceiving. The Hearing Officer may simply be using these questions and statements as a sort of Socratic learning tool. When an arbitrator indicates that he or she understands your argument that is not the same as saying that he or she agrees with the argument. Similarly it may well be that the arbitrator is simply playing the “devil’s advocate” to see if your argument stands up to close scrutiny. When the Hearing Officer

enters into a dialogue with you, he or she is handing you a golden opportunity because you are getting some insight about where the arbitrator is having trouble with your argument. It is a lot easier to try to persuade someone when you know what they are thinking.

- 11.21.3.17 BRIEFS: The filing of post-hearing briefs shall be permitted on the same basis as provided by 11.21.2.20 NMAC for briefs in representation cases. 11.21.2.20 BRIEFS: If any party requests permission to file a post-hearing brief, the hearing examiner shall permit all parties to file briefs and shall set a time, for the filing of briefs which normally shall be no longer than ten (10) days following the close of the hearing. Briefs shall be filed with the director and copies shall be served on all parties. When citing a case decision, always attach a copy of the case with the important language highlighted.

- As in all writings submitted to the Hearing Officer the brief should be readable and understandable with the minimal amount of legalese. If the law is clearly in your favor, a brief can be an important tool and may affect the ultimate decision made by the Hearing Officer. If the hearing transcript is available, cite the record wherever it is beneficial to reinforce your legal argument. The length of the brief is normally fixed by the Hearing Officer.

- In short, closing statements and/or legal briefs should be used to clarify testimony, highlight important factual and legal points and illuminate the opposing side's failure to prove its case.

TRANSCRIPT OF ATTICUS FINCH'S CLOSING ARGUMENT (TO KILL A MOCKINGBIRD – 1962)

Finch: To begin with, this case should never have come to trial. The State has not produced one iota of medical evidence that the crime Tom Robinson is charged with ever took place. It has relied instead upon the testimony of two witnesses whose evidence has not only been called into serious question on cross examination, but has been flatly contradicted by the defendant. Now there is circumstantial evidence to indicate that Mayella Ewell was beaten savagely by someone who led, almost exclusively, with his left [hand]. And Tom Robinson now sits before you, having taken "The Oath" with the only good hand he possesses -- his right.

I have nothing but pity in my heart for the Chief Witness for the State. She is the victim of cruel poverty and ignorance. But, my pity does not extend so far as to her putting a man's life at stake, which she has done in an effort to get rid of her own guilt. Now I say "guilt," gentlemen, because it was guilt that motivated her. She's committed no crime. She has merely broken a rigid and time-honored code of our society, a code so severe that whoever breaks it is hounded from our midst as unfit to live with. She must destroy the evidence of her offense. But, what was the evidence of her offense? Tom Robinson, a human being. She must put Tom Robinson away from

her. Tom Robinson was to her a daily reminder of what she did.

Now what did she do? She tempted a negro. She was white and she tempted a negro. She did something that in our society is unspeakable: She kissed a black man. Not an old uncle, but a strong, young negro man. No code mattered to her before she broke it, but it came crashing down on her afterwards.

The witnesses for the State, with the exception of the sheriff of Lincoln County, have presented themselves to you gentlemen -- to this Court -- in the cynical confidence that their testimony would not be doubted; confident that you gentlemen would go along with them on the assumption, the evil assumption, that all negroes lie; all negroes are basically immoral beings; all negro men are not to be trusted around our women, an assumption that one associates with minds of their caliber, and which is in itself, gentlemen, a lie -- which I do not need to point out to you.

And so, a quiet, humble, respectable negro, who has had the unmitigated TEMERITY to feel sorry for a white woman, has had to put his word against two white peoples. The defendant is not guilty. But somebody in this courtroom is.

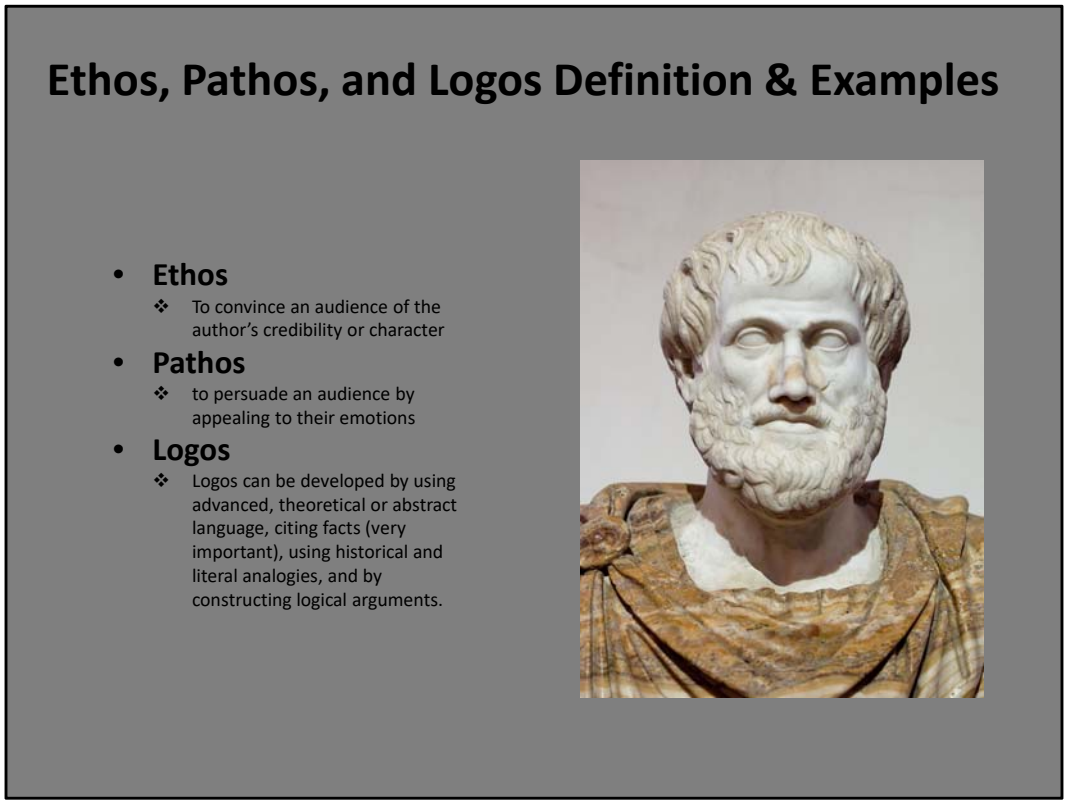
Now, gentlemen, in this country our courts are the great levelers. In our courts, all men are created equal. I'm no idealist to believe firmly in the integrity of our courts and of our jury system. That's no ideal to me. That is a living, working reality!

Now I am confident that you gentlemen will review without passion the evidence that you have heard, come to a decision, and restore this man to his family.

In the name of God, do your duty. In the name of God, believe Tom Robinson.

Atticus Finch uses **ethos**, **pathos**, and **logos** in his speech to the jury to persuade them of Tom's innocence. Atticus attempts to provide the jurors with a sense of duty to take the high road and acknowledge Tom Robinson as an equal in the courts…in this country our courts are the great levelers, and in our courts all men are created equal" (205). Atticus uses words like "honorable" and "great" because they elevate the importance of maintaining the long lived code of equality in the courts. After using emotion to build pity for Mayella Ewell, Atticus uses pathos to get the jurors to feel a connection with Tom by mentioning that "a quite, respectable, humble Negro who had the unmitigated temerity to 'feel sorry' for a white woman has had to put his word against two white people's" (204). Not only can this statement lead the jurors to take pity on Tom, but it can also relate the jurors to Tom by revealing that they all share pity for Mayella. Lastly, Atticus exhibits logos in his speech when he explains why Tom could not have been guilty: "There is circumstantial evidence to

indicate that Mayella Ewell was beaten savagely by someone who led almost exclusively with his left... and Tom Robinson now sits before you, having taken the oath with the only good hand he possesses -his right hand" (204). Atticus thoroughly disproves the possibility that Tom is guilty by providing solid evidence that is logically sound. Although Tom was ultimately found guilty, all of the persuasion techniques that Atticus uses make his speech more convincing overall.



Ethos, Pathos, and Logos Definition and Examples

Ethos, Pathos, and Logos are modes of persuasion used to convince audiences. They are also referred to as the three artistic proofs (Aristotle coined the terms), and are all represented by Greek words.

Ethos or the ethical appeal, means to convince an audience of the author's credibility or character.

An author would use ethos to show to his audience that he is a credible source and is worth listening to. Ethos is the Greek word for "character." The word "ethic" is derived from ethos.

Ethos can be developed by choosing language that is appropriate for the audience and topic (also means choosing proper level of vocabulary), making yourself sound fair or unbiased, introducing your expertise or pedigree, and by using correct grammar and syntax.

Pathos or the emotional appeal, means to persuade an audience by appealing to their emotions.

Authors use pathos to invoke sympathy from an audience; to make the audience feel what

the author wants them to feel. A common use of pathos would be to draw pity from an audience. Another use of pathos would be to inspire anger from an audience; perhaps in order to prompt action. Pathos is the Greek word for both “suffering” and “experience.” The words empathy and pathetic are derived from pathos.

Pathos can be developed by using meaningful language, emotional tone, emotion evoking examples, stories of emotional events, and implied meanings.

Logos or the appeal to logic, means to convince an audience by use of logic or reason.

To use logos would be to cite facts and statistics, historical and literal analogies, and citing certain authorities on a subject. Logos is the Greek word for “word,” however the true definition goes beyond that, and can be most closely described as “the word or that by which the inward thought is expressed, Lat. oratio; and, the inward thought itself, Lat. Ratio. (1) The word “logic” is derived from logos.

Logos can be developed by using advanced, theoretical or abstract language, citing facts (very important), using historical and literal analogies, and by constructing logical arguments.

In order to persuade your audience, proper of Ethos, Pathos and Logos is necessary.

Examples of Ethos, Logos and Pathos:

Example of Ethos:

"I will end this war in Iraq responsibly, and finish the fight against al Qaeda and the Taliban in Afghanistan. I will rebuild our military to meet future conflicts. But I will also renew the tough, direct diplomacy that can prevent Iran from obtaining nuclear weapons and curb Russian aggression. I will build new partnerships to defeat the threats of the 21st century: terrorism and nuclear proliferation; poverty and genocide; climate change and disease. And I will restore our moral standing, so that America is once again that last, best hope for all who are called to the cause of freedom, who long for lives of peace, and who yearn for a better future."

Democratic Presidential Candidate Acceptance Speech by Barack Obama. August 28th, 2008.

Example of Pathos:

"I am not unmindful that some of you have come here out of great trials and tribulations. Some of you have come fresh from narrow jail cells. And some of you have come from areas where your quest -- quest for freedom left you battered by the storms of persecution and staggered by the winds of police brutality. You have been the veterans of creative suffering.

Continue to work with the faith that unearned suffering is redemptive. Go back to Mississippi, go back to Alabama, go back to South Carolina, go back to Georgia, go back to Louisiana, go back to the slums and ghettos of our northern cities, knowing that somehow this situation can and will be changed."

I Have a Dream by Martin Luther King Jr. August 28th, 1963.

Example of Logos:

"However, although private final demand, output, and employment have indeed been growing for more than a year, the pace of that growth recently appears somewhat less vigorous than we expected. Notably, since stabilizing in mid-2009, real household spending in the United States has grown in the range of 1 to 2 percent at annual rates, a relatively modest pace. Households' caution is understandable. Importantly, the painfully slow recovery in the labor market has restrained growth in labor income, raised uncertainty about job security and prospects, and damped confidence. Also, although consumer credit shows some signs of thawing, responses to our Senior Loan Officer Opinion Survey on Bank Lending Practices suggest that lending standards to households generally remain tight."

Perhaps Counsel should consider summing up!

Any Questions before we sum up?

In this presentation we have discussed methods for

- Surviving the Director's initial review of your pleadings.

- We have seen examples of good pleadings, by which I hope we can avoid filing poor pleadings.

- We discussed Dispositive motions and how to make the most of your Scheduling Conference. We've seen how the Board's relaxed rules of evidence, while perhaps making the hearing proceed more quickly, has its own challenges that must be addressed, such as the "legal residuum" rule.

- I hope that you leave this presentation with some practical tips about how to prepare for any Board hearing and some sense of what to expect at the hearing so that your case presentations will be more effectual – better Opening Statements and Closing Arguments or Closing Briefs – more effective examinations of ***your*** witnesses and cross-examination of ***theirs.***

I appreciate this opportunity to listen to your ideas at this presentation. Listening is key to any useful dialogue; and dialogue is key to advancing the Board's agenda of guarantee public employees the right to organize and bargain collectively with their employers; promote harmonious and cooperative relationships between public

employers and employees; and protect the public interest by assuring the orderly operation and functioning of the state and its political subdivisions as required by the PEBA, § 2.

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