STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 18 Appellant, v. BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY, THE NEW MEXICO COALITION OF PUBLIC SAFETY OFFICERS, AND THE NEW MEXICO PUBLIC EMPLOYEE LABOR RELATIONS BOARD, Appellees.	No. D-101-CV-2014-01195 (Consolidated with D-101-CV-2014-01700)

MEMORANDUM DECISION

This matter comes before the Court on appeal from two orders of the New Mexico Public Employee Labor Relations Board ("PELRB") regarding certification of an exclusive bargaining representative for the non-probationary employees at a Santa Fe County correctional facility. The American Federation of State, County, and Municipal Employees, Council 18 ("AFSCME") appeals from PELRB's April 18, 2014 order approving three New Mexico Coalition of Public Safety Officers ("NMCPSO") Petitions for Amendment of Certification as the

exclusive representative for Santa Fe County employee bargaining units and denying AFSCME's Petition for Certification regarding the correctional facility employees. NMCPSO, in turn, appeals from PELRB's July 2, 2014 order certifying AFSCME as the exclusive representative of the bargaining unit after the close of NMCPSO's collective bargaining agreement with the County. Having reviewed the parties' extensive briefs and the whole record, the Court determines that PELRB's orders in this matter are supported by substantial evidence and, as such, affirms both orders.

Background

In their broadest description, these consolidated cases concern two attempts by AFSCME to replace NMCPSO as the exclusive representative for a bargaining unit of non-probationary, non-supervisory employees at the Santa Fe County Adult Detention Center. The first petition was ultimately unsuccessful, but the second triggered an election overseen by the PELRB Executive Director in which AFSCME ultimately prevailed over NMCPSO's objections as to procedural irregularities. The facts pertinent to these petitions follow.

Prior to 2012, NMCPSO participated in representation for three bargaining units in Santa Fe County by and through NMCPSO-CWA Local 7911. (RP 88[1].) The NMCPSO-CWA Local 7911 was a local affiliate of the Communication Workers of America ("CWA") founded with the help of seed money furnished by the national union. (RP 103-04.) The first bargaining unit consisted of the all non-probationary certified deputy sheriffs, corporals, and sergeants employed by the Santa Fe County Sheriff's Department. (RP 88.) The PELRB certified the Santa Fe County Sheriff's Association as the exclusive bargaining representative for this unit. (RP 186.) The Sheriff's Association, was, for all relevant periods to this case, an affiliate of NMCPSO-CWA Local 7911. (*See id.*) In July of 2004, Santa Fe County began withholding dues from the paychecks of this bargaining unit's employees on behalf of the Santa Fe County Sheriff's Association. (RP 190-203.) The second bargaining unit consisted of all regular, non-probationary, non-management, non-supervisor employees of the Santa Fe County Adult Detention Center and Youth Development Program. (RP 226-28). The PELRB recognized "CPSO-CWA Local 7911" as the exclusive representative for this bargaining unit on November 17, 2006 (RP 222-23), and by July 2008, Santa Fe County was withholding dues from employees within the unit on behalf of NMCPSO-CWA Local 7911 (RP 190-203). Finally, the third bargaining unit consisted of all non-

[1] For the purposes of citation, "RP" denotes a reference to the record on appeal for case number D-101-CV-2014-01195, and "CRP" denotes a reference to the record on appeal for case number D-101-CV-2014-01700.

probationary, non-management, non-supervisory employees of the Santa Fe County Regional Emergency Communication Center. (RP 156-58.) The PELRB approved this certification on November 14, 2008 (RP 168), and the County was withholding dues for the members by June 2009 (RP 190-203).

NMCPSO was not registered with the State of New Mexico as a separate entity from the CWA until 2011. (RP 98.) At that time, a dispute between the NMCPSO leadership and the local CWA leadership began to strain the partnership between the two. (*See* RP 103-04.) This dispute precipitated a disaffiliation agreement dissolving NMCPSO-CWA Local 7911 and dividing its constituents among the two unions. (RP 269-71.) Under the agreement, all three Santa Fe bargaining units described above would be represented by NMCPSO. (*Id.*)

On October 8, 2013, AFSCME filed with the PELRB a petition seeking certification as the bargaining representative for non-probationary employees of the Santa Fe County Corrections Department. (RP 264-313.) In effect, the petition argued that the post- disaffiliation NMCPSO was a new organization rather than a continuation of the now defunct NMCPSO-CWA Local 7911, so the collective bargaining agreement between the NMCPSO-CWA Local 7911 and the County did not operate as a bar to new elections regarding the union affiliation of the Corrections Department bargaining unit. (*Id.*) Following this petition, NMCPSO filed three "Petitions for Amendment of Certification Name Change" for each of

the three Santa Fe County bargaining units described above. (RP 220-21, 233-34, 234-44.) At the time, the County was withholding dues for each of the three bargaining units under the vendor name "CWA." (RP 188.)

The PELRB consolidated these four petitions and assigned a single hearing officer to consider their merits. (RP 260-62.) On December 2, 2013, the hearing officer held a scheduling conference for a combined hearing on the petitions. (*Id.*) The hearing officer filed his report, apparently in error, on December 20, 2013, the same day that the final briefs were due (RP 178-85). The officer then refiled on January 3, 2014, but the document was substantively the same and retained the December 20, 2013 date. (RP 84-91.) The report found that the transition from NMCPSO-CWA Local 9711 to NMCPSO did not raise a question regarding representation sufficient to involve the PELRB in the internal affairs of the union, so it suggested that AFSCME's petition be denied and that NMCPSO's three petitions be granted. (*Id.*) Subsequently, the PELRB issued an order accepting the hearing officer's report without modification on April 18, 2014. (RP 27.) The first case in consolidated matter, D-101-CV-2014-01195, arises from AFSCME's appeal from this April 18, 2014 PELRB order. (RP 1-7.)

Meanwhile, the collective bargaining agreement between NMCPSO-CWA Local 7911 and the County of Santa Fe regarding the County Corrections Department was set to expire on June 28, 2014. (RP 291-310.) With this deadline

approaching, the AFSCME filed an amended Petition for Certification regarding this bargaining unit on April 4, 2014. (CRP 66-69.) This petition, unlike AFSCME's previous attempt to displace NMCPSO, sought certification during an "open" period after the end of the then operative collective bargaining agreement. (*Id.*) In response to this petition, on April 16, 2014, the County delivered a preliminary list of employees who would be eligible to vote in a representation election to both AFSCME and NMCPSO. (CRP 60-64.) On May 7, 2014, the PELRB Executive Director issued a Report and Scheduling Letter that found no bar to AFSCME's April 7 petition and enjoined NMCPSO from finalizing a new collective bargaining agreement with the County. (CRP 46-47.)

The May 7 Executive Director's report initiated proceedings for an election between NMCPSO and AFSCME for exclusive representation of the Corrections Department employees. Pursuant to the terms therein, the unions and County signed a Consent Election Agreement on May 28, 2014. (CRP 42-45.) This document set out a series of agreements regarding the timing and conduct of the election including a requirement that the County provide the unions with a final list of the eligible voters by June 4, 2014. (*Id.*) The unions never received this final list of voters. (CRP 28.)

On June 11-12, 2014, the PELRB Executive Direct supervised the election pursuant to the May 28 agreement. (CRP 25-26.) Without a final list of eligible

voters, the election officials determined eligibility according to the April 16 list, and staff separately sequestered ballots from all apparently ineligible voters. (CRP 12.) At first count, the uncontested ballots showed a tie between AFSCME and NMCPSO, each with thirty-six votes; eleven ballots remained uncounted as representing ineligible voters according to the April 16 list. (CRP 25-26.) To break the tie, the Executive Director asked the Santa Fe Correction Department Human Resources Director to produce an updated list of eligible voters based on the pay period immediately preceding the election. (*Id.*) From this updated list, the Executive Director then determined that eight of the eleven sequestered ballots were eligible to be counted; the Director orally asked for any objections from NMCPSO and AFSCME before recording the eight eligible ballots. (CRP 35.) Hearing no objections from either union, the Director then tallied the additional ballots and determined that AFSCME won the election with forty-three ballots cast in its favor as compared to thirty-eight cast in NMCPSO's favor. (*Id.*)

Following this result, the NMCPSO filed a Motion to Set Aside Election Results with the PELRB on June 19, 2014. (CRP 31.) The motion stated that the "second list [of eligible voters] was not known to officials of the NMCPSO and in fact may not have been appropriately certified" and complained of the "other irregularities of the vote." (*Id.*) On July 1, 2014, the PELRB held an evidentiary hearing regarding these allegations. (CRP 14-16.) The following day, NMCPSO

filed another document arguing, in conclusory fashion, that the election procedures violated NMAC 11.21.2.24, NMAC 11.21.2.27, and NMAC 11.21.2.30. (CRP 17-20.) Subsequently, the Executive director issued a report consisting of three broad findings: (1) "each of the challenged ballots were cast by voters who met the definition of an 'eligible voter' in NMAC 11.21.2.24;" (2) "no error was committed by the Election Supervisor in treating the challenged ballots;" and (3) "using the revised list to resolve ballot challenges was both appropriate and necessary." (CRP 14-16.) The PELRB ratified this report without modification on July 14, 2014 (CRP 14-16.) In response, NMCPSO filed a Motion to Stay Proceedings with the PELRB and an administrative appeal with the Court initiating case number D-101-CV-2014-01700. (CRP 1-2, 12.)

Discussion

I. Standard of Review

In reviewing an administrative decision, the Court sits in an appellate capacity. Rule 1-074(A) NMRA. In the particular context of decisions rendered by the PELRB, district court review is authorized by NMSA 1978, Section 10-7E-23(B) (2003). The appropriate standard of review is defined therein as follows: "[a]ctions taken by the board or local board shall be affirmed unless the court concludes that the action is (1) arbitrary, capricious[,] or an abuse of discretion; (2) not supported by substantial evidence on the record considered as a whole; or (3)

otherwise not in accordance with law." *Id.* The party challenging the ruling has the burden to demonstrate grounds for reversal. *Smyers v. City of Albuquerque*, 2006-NMCA-095, ¶ 5, 140 N.M. 198, 141 P.3d 542

An administrative ruling is arbitrary and capricious if it "is unreasonable or without a rational basis when viewed in light of the whole record." *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806. In making this determination, the Court must be careful not to "retry the case . . . or substitute its judgement for that [of the administrative agency]." *Id.* (alternation original) (internal quotation marks and citation omitted).

Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rayellen Res. Inc. v. N.M. Cultural Props Review Comm'n*, 2014-NMSC-006, ¶ 18, 319 P.3d 639 (quoting *Jones v. N.M. State Racing Comm'n*, 1983-NMSC-089, ¶ 20, 100 N.M. 434, 671 P.2d 1145). To determine whether a conclusion is supported by sufficient evidence, the Court must engage in review of the whole record. *Smyers*, 2006-NMCA-095 at ¶ 52. In this review, the Court views evidence "in a light most favorable to the Board's decision and employs a deferential standard to the decision concerning areas within the agency's expertise." *San Juan College v. San Juan College Labor Mgmt. Rels. Bd.*, 2011-NMCA-117, ¶ 3, 267 P.3d 101.

Finally, a ruling is not in accordance with the law if "the agency unreasonably or unlawfully misinterprets or misapplies the law." *Archuleta v. Santa Fe Police Dept.*, 2005-NMSC-006, ¶ 18, 137 N.M. 161, 108 P.3d 1019. The Court is not bound by an agency's interpretation of law and reviews matters of law de novo. *Rayellen*, 2014-NMSC-006 at ¶ 16. However, the Court may afford some deference to the interpretation of statutes within an agency's "field of expertise". *City of Deming v. Deming Firefighters Local 4521*, 2007-NMCA-069, ¶ 6, 141 N.M. 686, 160 P.3d 595.

II. The Court affirms the April 18, 2014 PELRB order because there is sufficient evidence to conclude that the disaffiliation agreement between NMCPSO and CWA did not constitute a change in representation.

The first case in this matter, number D-101-CV-2014-01195, arises from the PELRB's decision to grant NMCPSO's three so-called name-change petitions pursuant to Section 11.21.2.35 NMRA after its disaffiliation from the CWA. In effect, AFSCME claims that this name change in fact represents a change in representation that would allow organizations besides NMCPSO to vie for the right to represent the affected bargaining units.

A petition for amendment of certification under the New Mexico Public Employee Bargaining Act must conform with Section 11.21.2.35 NMRA. Therein, "[t]he director shall dismiss such a petition within thirty (30) days of its filing if the director determines that it raises a question concerning representation and the

petitioner may proceed otherwise under these rules." *Id.* This language establishes a compulsory standard. If the disaffiliation does raise a question concerning representation, then the PELRB committed reversible error by granting NMCPSO's petitions.

In determining whether an internal change in union affiliation raises a question concerning representation, New Mexico courts apply the same standard under the New Mexico Public Employee Bargaining Act as would be applicable under the National Labor Relations Act. "Absent cogent reasons to the contrary, we should interpret language of the PEBA in the manner that the same language of the NLRA has been interpreted, particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the same time the PEBA was enacted." *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, ¶ 15, 123 N.M. 239, 938 P.2d 1384. Under the national standard, changes in the affiliation of an incumbent union raise a question concerning representation if they present a "good-faith" and "reasonable" question as to "whether a majority of the unit employees continues to support the union." *Raymond F. Kravis Ctr. for the Performing Arts*, 351 N.L.R.B. 143, 146 (2007), *enforced*, 550 F.3d 1183 (D.C. Cir. 2008).

Absent explicit evidence to the contrary, a change in a union's affiliation does not raise reasonable questions as to continuing majority support where there

is substantial continuity between the pre- and post-affiliation union. *Id.* at 147. To determine whether a change maintains substantial continuity, courts consider the "totality of the circumstances" and ask whether the change is "sufficiently dramatic" as to alter a union's identity. *Id.* (quoting *May Department Storts*, 289 N.L.R.B. 661, 665 (1988), *enforced*, 897 F.2d 221 (7th Cir. 1990)); *see also N.L.R.B. v. Fin. Inst. Employees* ("*Seattle-First*"), 475 U.S. 192, 206 (1986). For instance, one indicator of continuity between pre- and post-affiliation unions is similarity of local structure and services. *See id.* at 148-49. In *Kravis Center*, the N.L.R.B. determined that a local union's merger with five other locals did not raise a question concerning representation. *Id.* The board reasoned that relative continuity in the size of dues, makeup of committees, day-to-day leadership, vacation fund contributions, and pension funds all evidenced that the "merger did not result in such a dramatic change to the Union as to raise a question concerning representation." *Id.* at 148. Likewise, the Supreme Court has established that "an affiliation does not [necessarily] create a new organization, nor does it result in the dissolution of an already existing organization." *Seattle-First*, 475 U.S. at 206 (1986) (quoting *Amoco Production Co.*, 239 N. L. R. B. 1195 (1979)). The court provided a series of examples of changes that would suggest a change in a union's identity: "This would be the case where the union amends its constitution or

bylaws, restructures its financial obligations and resources, or alters its jurisdiction." *Id.*

Notably, the absence of a union election regarding a change in affiliation does not raise a question concerning representation. *Kravis Ctr.*, 351 N.L.R.B. at 146. The National Labor Relations Board once employed a two prong test for questions concerning representation whereby it granted petitions to amend certification where the unions members had "an adequate opportunity to vote on affiliation" and "there was substantial continuity between the pre- and post-affiliation union." *Seattle-First*, 475 U.S. at 199. The Supreme Court validated this standard on the ground that it adequately balanced a policy interest in "stable bargaining relationships" with the Board's interest in the "integrity of its procedures." *Id.* at 208. Without establishing that this two-prong approach was the minimum requirement, the Supreme Court based its decision on the fact that such a test limited interference in the internal affairs of unions to cases where affiliation changes were "dramatic." *See id.* at 206. In later interpretations, the N.L.R.B. has interpreted the Supreme Court's guidance in *Seattle-First* to conclude that the core determination turns upon the "sentiment of a majority of the bargaining unit employees." *Kravis Ctr.* 351 N.L.R.B at 146. This conclusion suggests that the first prong of the old test, an election amongst union members, is unnecessary; the absence of a vote indicates nothing about employee sentiment regarding support

for a newly affiliated union and would not necessarily reflect the sentiments of the majority of employees (as opposed to just union members) within the unit. *See id*. at 147. Centering the inquiry upon the sentiments of unit employees leaves only the second prong of the old standard, "substantial continuity," intact. *Id.*

Here, the Court finds that sufficient evidence on the record supports the Hearing Officer's conclusion of substantial continuity between NMCPSO and NMCPSO-CWA Local 7911 because the transition did not alter the substance of the unit's representation. The Hearing Officer concluded, based on his review of the evidence, that "the membership [of the bargaining unit] is not currently represented by a new labor organization or one forced upon them." (RP 90.) In effect, this conclusion suggests that the identity of the NMCPSO after the transition was not dramatically altered. Such a finding has a sufficient basis in the evidence on the record. As in *Kravis Center*, the record shows that dues continued to be paid at the same rate and were even remitted to the same location. Additionally, all of the local leadership of the NMCPSO remained after the transition. Finally, the benefits of representation, including pension arrangements and other agreements with the County of Santa Fe, remained substantially the same in spite of the transition because the collective bargaining agreement remained unchanged throughout the disaffiliation process. All of these points of similarity between unit member's experience before and after the transition suggest that the

Hearing Officer's finding of "substantial continuity" is supported by substantial evidence.

The Court finds no sufficient evidence to support the Hearing Officer's determination that the transition between NMCPSO-CWA Local 9711 and NMCPSO adequately protected the electoral due process rights of union members, but this error is harmless because the proper standard for determining whether an affiliation change raises a question concerning representation does not rely upon due process. The Hearing Officer premised his report on an application of the two-prong *Seattle-First* test. (RP 90.) AFSCME rightly points out that this recital of law is curious given that the report does not enter any findings of fact which would suggest that electoral due process was properly protected during the NMCPSO-CWA Local 9711 to NMCPSO transition. Indeed, there is no evidence of any election or consultation within the union before the transition. Thus, the hearing officer did commit error in finding that the transition process satisfied the two-prong *Seattle-First* test. This error is, however, harmless. As noted above, the N.L.R.B. has, since the *Seattle-First* decision, interpreted the Supreme Court's guidance to mean that the two-prong test, while a sufficient gauge of questions concerning representation, is not a necessary inquiry. Instead, continuity, as a proxy for a union's "identity" in the eyes of the majority of unit employees, is the proper focus of judicial and administrative determinations. As such, the Hearing

Officer's findings of fact regarding continuity throughout the transition, analyzed above, are sufficient to sustain his result.

Accordingly, the Court finds sufficient evidence to affirm the PELRB's April 18, 2014 order over AFSCME's objections.

III. The court affirms the July 14, 2014 PELRB order because there is sufficient evidence to conclude that the procedural irregularities apparent in the record did not prevent a fair election.

The second case in this matter, number D-101-CV-2014-01700, arises from NMCPSO's contention that the PELRB erred when it did not set aside the results of the June 11-12, 2014 representation election at the Santa Fe County Corrections Department. NMCPSO effectively makes two interrelated claims. First, it claims that Santa Fe County's failure to furnish a list of eligible voters on June 3, 2014 is grounds to set aside the election for violation of the consent election agreement. It later reframed this argument under the doctrine expressed in *Excelsior Underwear Inc.*, 156 N.L.R.B. 1236 (1966). Second, it claims that other procedural irregularities, including an untimely pre-election conference, an untimely notice of election, and insufficient time to comply with the absentee voting provisions of the consent election agreement, amount to grounds for setting aside the election.

Again, the proper standard for determining whether an election ought to be set aside is derived from federal interpretations of the National Labor Relations Act insofar as the language in the Public Employee Bargaining Act is substantively

similar. *See Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, ¶ 15, 123 N.M. 239, 938 P.2d 1384.

Under the federal standard, "[t]he results of a Board-supervised representation election are presumptively valid." *N.L.R.B. v. Flambeau Airmold Corp.*, 178 F.3d 705, 707 (4th Cir. 1999). The party challenging an election carries a heavy burden: it must show "by specific evidence" that improprieties occurred and that they "interfered with the employees' exercise of free choice to such an extent that they *materially affected* the election results." *See Millard Processing Services, Inc. v. N.L.R.B.*, 2 F.3d 258, 261 (8th Cir. 1993) (emphasis added). With regards to procedural irregularities, federal courts have established that, absent evidence of "vice" wherein defects in election mechanics gave "either union or employer an extra advantage," there is a "mandatory duty" to certify the results of an election. *Miami Newspaper Printing Pressmen's Union v. McCulloch*, 322 F.2d 993, 997-98 (D.C. Cir. 1963). Further, any alleged advantage or disadvantage must be considered "in the light of realistic standards of human conduct" with cognizance that "a union election 'by its nature is a heated affair'" *Flambeau Airmold Corp.*, 178 F.3d at 707 (quoting *Farms of North Carolina, Inc. v. N.L.R.B.*, 128 F.3d 841, 844 (4th Cir. 1997)).

Applying this standard, NMCPSO has not met its burden to show material disadvantage resulting from either source of procedural irregularity apparent on the

record in this case. Accordingly, the Court finds sufficient evidence to affirm the PELRB's decision.

A. The County's failure to provide an *Excelsior* list on June 3, 2014 did not compromise the fairness of the election because the oversight similarly affected both candidate unions.

Among the "elements that prevent or impede a free and reasoned choice" and constitute potential electoral unfairness, apparent "lack of information with respect to one of the choices available" amongst the eligible voters provides sufficient reason to set aside the results of an election. *See Excelsior Underwear Inc.*, 156 N.L.R.B. 1236, 1239-40 (1966). Accordingly, the N.L.R.B. has established the following standard: within seven days after a consent election agreement, an employer must file an election eligibility list containing all addresses of all eligible voters. *Id.* at 1240. The PELRB has recognized that this requirement, known commonly as the "*Excelsior* Rule," applies in substantially the same fashion under the New Mexico Public Employee Bargaining Act. *See S.S.E.A. v. Socorro Consol. Sch. Dist.*, 05-PELRB-2007, ¶ 2. Despite its formalistic structure, the N.L.R.B. does not require that the *Excelsior* Rule be "mechanically applied." *See Telonic Instruments*, 173 N.L.R.B. 588, 589 (1986). Rather, elections should be certified where employers "substantially complied" with the *Excelsior* requirements and any deviations therefrom caused limited "prejudicial effect on the election." *See Woodman's Food Markets, Inc.*, 332 N.L.R.B. 503, 503 (2000).

In the first instance, courts consider whether any deviations from the *Excelsior* rule could have had a determinative effect in purely numerical terms. *See id.* at 504. Considering the "percentage of omissions" from the required disclosure of all eligible voters, the first determination is whether the "omissions may have compromised the union's ability to communicate with a determinative number of voters." *Id.* For instance, in *Woodman's Food Markets*, the board set aside an election wherein fourteen total names were erroneously omitted from the *Excelsior* list and the union lost the election by only 13 votes. *Id.* at 505.

Once the numerical analysis reveals potential unfairness, the proper focus in determining whether an employer substantially complied with the *Excelsior* Rule should be on the "degree of prejudice" the complaining party suffered in access to channels of communication with the electorate. *See Woodman's Food Markets*, 332 N.L.R.B. at 504. With regards to this inquiry, *Excelsior* expressed the central concern:

> [W]ithout a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a result, employees are often completely unaware of that point of view.

156 N.L.R.B. at 1240-41. The fear is that one party to an election, typically the employer, will have a substantial advantage with regards to accessing the electorate. *See Pole-Lite Industries, Ltd.*, 229 N.L.R.B. 196, 197 (1997).

Accordingly, in order access potential prejudice, the proper inquiry is whether, under the circumstances, the complaining party would have had "sufficient opportunity to communicate with the employees in the unit prior to the election." *See Commercial Air Conditioning Co.*, 226 N.L.R.B. 1044 (1976). In *Commercial Air Conditioning Co.*, the board refused to set aside an election in which the petitioner union received the *Excelsior* list indirectly only four or five days prior to the election. *Id.* The board reasoned that: "Petitioner failed to notify anyone that it had not received the list until more than a week later [after the *Excelsior* due date] . . . . Its failure to seek the list earlier . . . indicates that it did not really need the list . . . ." *Id.* at 1044.

Finally, the employer's explanation for the omissions may affect judicial judgement of the unfairness stemming from failure to abide by *Excelsior* Rule. *See Woodman's Food Markets*, 332 N.L.R.B. at 504. For instance, in *Bear Truss, Inc.*, the board determined that the employer's failure to furnish the names and address of ten of the one hundred and forty two potential voters did not warrant setting the election aside despite a very close ballot count of sixty seven in favor of representation and sixty nine against. *See Bear Truss, Inc.*, 325 N.L.R.B. 1162 (1998). The board noted that its decision was highly contingent on the fact that the employer showed no evidence of bad faith: "we emphasize the absence of evidence that the illegible names and incorrect addresses on the Excelsior list were due to

intentional misconduct or bad faith on the part of the Employer." *Id.* at 1162. Likewise, in *Telonic Instruments*, the board found that the "absence of any suggestion in the evidence that the errors were attributable to gross negligence or an unwillingness on the Employer's part to afford the Union fill access to all eligible employees" partially dispositive in its decision to confirm an election result. 173 N.L.R.B at 589.

Here, it is undisputed that the County failed to provide an updated *Excelsior* list on June 3, 2014 and that this oversight involved a potentially dispositive group of voters. Well aware of this fact, the PELRB found that the election supervisor's ad hoc procedures, using the April 16 list to establish initial eligibility and a new list only to resolve contested ballots if potentially dispositive, was "appropriate and necessary." (CRP 14-16.) The relevant inquiry to determine whether this conclusion rests upon sufficient evidence is whether the April 16 list represents substantial compliance with the *Excelsior* Rule or substantial noncompliance because the discrepancies between the April 16 list and the final eligibility list produced on June 12 prejudiced NMCPSO's access to the electorate.

The Court finds substantial evidence that NMCPSO was not prejudiced by the County's failure to provide an updated *Excelsior* list as required in the consent election agreement because it had substantial access to the potential electorate. NMCPSO was an incumbent union. As such, its position within the workplace is

significantly different than that analyzed in *Excelsior*. NMCPSO cannot claim that it had no method of reaching the electorate because, unlike a union attempting to organize an unrepresented plant, it does have significant means, as the present bargaining unit representative, of reaching the employees with its message. NMCPSO certainly cannot claim it was relatively more prejudiced than AFSCME, an outside union that received no more information than NMCPSO. Further, this case is similar to *Commercial Air Conditioning Co.* in that NMCPSO's failure to request the list ahead of the election suggests that it did not need the information in order to fully implement its campaign strategy. Considering the record in whole, there is substantial evidence to conclude that NMCPSO had sufficient access to the electorate to ensure its message was disseminated amongst eligible voters and that the election itself fairly represented the informed choices of participants.

Finally, there is no evidence in this case that the County acted in bad faith or with any preference for AFSCME. Without such a finding, this case falls within the more permissive framework articulated in cases like *Bear Truss* and *Telonic Instruments*. Indeed, the decision in *Bear Truss* is particularly helpful in this case because, as in that case, the discrepancies between the list of eligible voters provided to the unions and the list ultimately used to determine whether ballots would be counted included enough votes to potentially sway the election. *Bear Truss* supports the conclusion that the PELRB's ad hoc approach to administering

the election was "appropriate" in that it emphasizes that, in the absence of intentional misconduct or bad faith, there is a strong presumption that board supervised elections fairly represent the sentiments of the bargaining unit. NMCPSO has not met its heavy burden of proffering specific evidence to the contrary.

Accordingly, regarding the County's failure to provide NMCPSO and AFSCME a list of eligible voters on June 3, 2014 per the consent election agreement, the Court affirms the PELRB's decision to confirm the election results over NMCPSO's objections

B. The Court does not reach analysis of the potential fairness effects stemming from the other procedural irregularities in the June 11-12, 2014 election because NMCPSO did not preserve such considerations for appellate review.

NMCPSO also alleges that a number of procedural irregularities and deviations from the consent election agreement besides the County's not providing the June 3 list prevented a fair election and provide grounds for this Court to set the result aside. The Court need not dispose of these arguments on the merits because they were not raised in a timely fashion to permit them to be considered in substantive form by the PELRB below.

Sitting with appellate jurisdiction, the Court is obliged to review the case litigated below "not the case that is fleshed out for the first time on appeal." *Spectron Dev. Lab. V. Am. Hollow Boring Co.*, 1997- NMCA-025, ¶ 32, 123 N.M.

170, 936 P.2d 852. Rule 12-216(A) NMRA establishes the requirement to preserve an issue for review on appeal. The rule states: "To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked . . . ." Rule 12-216(A) NMRA. According to this standard, where the record fails to indicate that an argument was presented to the body below, unless it is jurisdictional in nature, it will not be considered on appeal. *Woolwine v. Furr's, Inc.*, 1987-NMCA-133, ¶ 20, 106 N.M. 492, 745 P.2d 717; *accord. N.M. State Bd. of Psychologist Examiners v. Land*, 2003-NMCA-034, ¶ 5, 133 N.M. 362, 62 P.3d 1244 ("When acting in its appellate capacity, the district court's scope and standard of review is limited in the same manner as any other appellate body.").

In the case of administrative proceedings, untimely objections based on regulatory rules will not be considered on appeal. *See N.L.R.B. v. Rhone-Poulenc, Inc.*, 789 F.2d 188, 192 (3d Cir. 1986). *Rhone-Poulenc, Inc.* involved a certification election before the N.L.R.B. *Id.* Therein, the board's regional director advised the employer that it had five days from the date of the election to furnish objections. *Id.* at 187. The employer raised three objections within the time period and, a few days later, submitted employee affidavits as evidence. *Id.* The court held that new allegations, not within the original three objections, contained within these affidavits, were not eligible for review by either the board below or the appellate courts. *Id.* at 192.

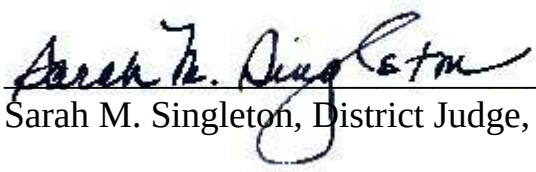
Here, the record does not evidence that the PELRB was prompted to review NMCPSO's complaints regarding procedural irregularities aside from the *Excelsior* list because it did not raise these issues in a timely fashion. Following the election, the PELRB Executive Director informed counsel for both AFSCME and NMCPSO that any objections regarding the conduct of the election must be raised within five days of service of the tally: June 19, 2013. (CRP 35.) On that very day, NMCPSO filed its objection citing the County's failure to provide the June 3 list and more general "procedural irregularities." There is no evidence that NMCPSO raised any of the three specific irregularities cited on appeal at the PELRB's July 1, 2013 evidentiary hearing, and the report filed after the Executive Director's investigation into NMCPSO's objection makes no mention of these irregularities. In short, there is no evidence on the record that these objections were "fairly invoked" with any specificity within the established time limits. Indeed, the first time that these irregularities appear in any detail is NMCPSO's July 2, 2014 response to the Executive Director's investigation. As in *Rhone-Poulenc, Inc.*, this filing, which introduced evidence that substantially expanded the scope of NMCPSO's objections, did not require review by the PELRB, and accordingly, these new objections were not preserved for review by this Court.

Accordingly, this Court declines the invitation to review these allegations on the merits and finds no reason to disturb the PELRB's ruling on this matter.

Conclusion

For the aforementioned reasons, the Court finds no error sufficient to overturn the PELRB's orders in either matter. As such, the Court affirms PELRB's orders in both cases.

It IS SO ORDERED.



Sarah M. Singleton, District Judge, Div. 2

On the date of acceptance for efiling copies of the above decision were eserved on those registered for eservice in this matter.