SUMMARY OF JUDICIAL AND PELRB DECISIONS

Rev'd 11/30/21

(Revised 11-30-21) Melissa Frank, Recompilation Assistant

COURT DECISIONS

1. *United Electrical Workers & UNM Board of Regents, PELRB 307-20.*
    - The union sought recognition as the exclusive representative for graduate students working for the university. The Hearing Officer found, based on UNM's internal personnel policies, that the graduate students were not 'regular employees' as that term is defined in the PEBA. The Board reversed this finding and held the graduate students to be regular employees under the PEBA who are entitled to bargain collectively through an exclusive representative. *See Order 73-PELRB-2021* This case has not been fully resolved and staff anticipate a lengthy appeals process.

2. *AFSCME, Council 18, Local 2851 v. City of Las Vegas, New Mexico and City of Las Vegas LMRB,* PELRB Case No. 305-20, Fourth Judicial District Case No. D-412-CV-2015-369 (San Miguel County) (A. Aragon) (November 22, 2021).

    - The City of Las Vegas Labor Management Relations Board sought to include five various supervisory positions and a superintendent position into the existing collective bargaining unit of blue-collar employees. The LMRB denied it and AFSCME appealed. During the process the LMRB ceased to exist pursuant to NMSA 1978, Section 10-7E-10(G)(1) (2020), causing the matter to be transferred to the NM PELRB. The HO issued a recommended decision stating neither party bore the burden of proof in a representation proceeding under the statutes and rules as they existed at that time. However, the burden of going forward with the evidence on the question of whether employees are excluded from collective bargaining as supervisors has been determined by this Board to be best allocated to the Petitioner. The HO found the positions did share a sufficient community of interest with others in the existing blue and white color bargaining unit to constitute an appropriate bargaining unit under the Act. The City appealed the decision and was denied.

3. *AFSCME, Council 18, Local 3022 v. Albuquerque Bernalillo County Water Utility Authority*, PELRB Case No. 107-21, Second Judicial District Case No. D-202-CV-2021-06572 (Bernalillo County) (J. O'Connell; November 17, 2021).

    - AFSCME alleged the Water Authority violated the parties' CBA in relation to continuing longevity pay when employees are promoted from one bargaining unit to another. The issue had previously been through binding arbitration in which the arbitrator held that longevity pay must continue when a promotion results in an employee moving from one unit whose bargaining agreement calls for longevity pay, to another bargaining unit, whose CBA does not include a longevity pay provision. That decision was affirmed by the District Court at which point it became a judgment of the Court pursuant to the New Mexico Uniform Arbitration Act, NMSA 1978, § 44-7A-24 (A) and (C) (2001). Relying on the doctrines of res judicata and collateral estoppel the Hearing Officer found the arbitrator's decision to be binding and rejected the Water Authority's claim that prior settlement agreements resolving unpaid longevity pay after specific promotions meant the Water Authority was absolved from complying with the arbitrator's decision. The Water Authority appealed to the PELRB for review of the Hearing Officer's decision and the Board affirmed that decision on October, 18 2021 (68-PELRB-2021). The Water Authority sought further review, appealing to the District Court on November 17, 2021 as D-202-CV-2021-06572. The PELRB will submit the Record on Appeal no later than December 17, 2021.

4. *Rhonda Goodenough v. State of New Mexico, CYFD, and New Mexico PELRB*, PELRB Case No. 106-19, First Judicial District Court No. D-101-CV-2020-01743 (Santa Fe County) (J. Biedscheid; April 30, 2021).

    - Goodenough claimed CYFD had terminated her for in retaliation for having filed a prior prohibited practice complaint, PELRB No. 103-19. The Hearing Officer concluded that Goodenough, "did not establish that disparate treatment had occurred, nor did she prove by preponderance of the evidence

that CYFD acted in a retaliation or restrained her right to conduct any protected activity in violation of the Public Employee Bargaining Act." As a result her claims for violation of §§ 10-7E-19(B) and (E) were dismissed. Goodenough appealed the dismissal to the Second Judicial District Court (No. D-101-CV-2020-01743). The District Court upheld the Board's dismissal agreeing with its finding that her termination was actually a result of her violation of the Children's Code, CYFD rules and a Court Order that occurred when she submitted confidential documents to the PELRB in support of her claim in PELRB 103-19. Goodenough then petitioned for review by the Court of Appeals, Case Number: A-1-CA-39777, The Court of Appeals after granting certiorari, dismissed the appeal on October 29, 2021. No further appeal was pursued.

5. *Hendrickson v. AFSCME Council 18,* 992 F. 3d 950 - Court of Appeals, 10th Circuit 2021.

    - Plaintiff sought retrospective relief for dues paid while a member of a trade union following the Supreme Court decision in *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31,* 138 S.Ct. 2448, 201 L.Ed.2d 924 (2018). The Plaintiff contended that, under *Janus*, the Union cannot retain dues that had been deducted from his paychecks or serve as his exclusive bargaining representative. In *Janus*, the Court said the First Amendment right against compelled speech protects non-members of public sector unions from having to pay "agency" or "fair share" fees—fees that compensate the union for collective bargaining but not for partisan activity.
    - Over the course of his employment, the plaintiff had signed three union membership agreements and due's deduction authorizations. The court found in favor of the defendants stating that the signed agreements were binding documents that the plaintiff freely entered into on multiple occasions and the *Janus* case did not permit the plaintiff to renege on his contractual obligations.
    - The Plaintiff included the Governor and Attorney General of New Mexico in his suit and sought a declaration stating that "the Union and [the Governor] cannot force public employees to wait for an opt-out window to resign their union membership and to stop the deduction of dues from their paychecks." Additionally, he sought a declaration that the New Mexico statute providing for exclusive representation "constitute[s] an unconstitutional violation of his First Amendment rights to free speech and freedom of association." These claims were dismissed because these officeholders do not enforce the exclusive representation statute. Rather, members of the Public Employee Labor Relations Board ("PELRB") do. The Public Employee Bargaining Act ("PEBA") provides for a union to serve as the exclusive representative for the employees in a bargaining unit. See N.M. Stat. § 10-7E-14. The PELRB "has the power to enforce provisions of the [PEBA]." The Governor and Attorney General therefore do not fall within the *Ex Parte Young* exception and thus have Eleventh Amendment immunity to this suit.

6. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31,* 138 S.Ct. 2448, 201 L.Ed.2d 924 (2018).

    - *Janus r*eversed the longstanding rule announced in *Abood v. Detroit Bd. of Ed*., 431 U.S. 209 (1977) that allowed employers to deduct "fair share" or agency fees from non-union members' pay and transfer those fees to the union. *Janus* held that "Neither an agency fee nor any other payment to the union may be deducted from a nonmembers wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." 138 S. Ct. at 2473.

7. *American Federation of State, County and Municipal Employees, Council 18 v. New Mexico Corrections Department*, D-202-CV-2013-01920 (2nd Judicial Dist. Feb. 22, 2013).

    - The Corrections Department appealed from the Board's Decision in PELRB 311-11 that Lieutenants are not "supervisors" as that term is defined in PEBA § 4(U) and their inclusion in an existing bargaining unit of Corrections Officers did not render the unit "inappropriate". The Second Judicial District upheld the PELRB on 5/15/14. The Hearing Officer therefore was correct in his approach of determining, based on the testimony presented, how many hours of each shift lieutenants are performing supervisory duties as opposed to nonsupervisory duties. *See* 08-PELRB-2012 (July 13, 2012) and 02-PELRB-2013 (Jan. 23, 2013).

- Regarding which duties constitute "supervisory duties," the Court concluded that it was not arbitrary or capricious for the Hearing Officer to determine: (1) the use of independent judgment is required before an activity qualifies as a "supervisory duty" under PEBA; and (2) the duties of lieutenants largely do not require the use of independent judgment.
- The Court also concluded that the Hearing Officer did not abuse his discretion by relying on federal authority to determine that the use of independent judgment is an important indicator of supervisor status and that even though lieutenants may sometimes exercise independent judgment and perform supervisory duties, lieutenants are not supervisors for purposes of PEBA because they are not performing supervisory duties a majority of the time.
- Additionally, given the multi-level review involved in the disciplinary process, it was not arbitrary or capricious for the Hearing Officer to conclude that lieutenants do not effectively recommend discipline. The lieutenants do not effectively recommend discipline not only because they lack authority to select a particular sanction, but also because lieutenants lack discretion with respect to their recommendations; indeed, the very purpose of the multiple levels of review is to remove discretion from the disciplinary process. As a result, the third element of the definition of a "supervisor" had not been met. That the third element was not satisfied was therefore an independent basis upon which to affirm the Board's decision.

8. *APOA, et al., v. City of Albuquerque, Albuquerque Police Department and Richard Berry*, 2013-NMCA-110, 314 P.3d 667.

- The requirements and obligations of the parties regarding the funding of a public employee collective bargaining agreement are statutorily controlled by the PEBA, the Labor Management Relations Ordinance and the specific terms of the CBA.
- The City's expenditures of funds to comply with the CBA was subject to both "the specific appropriation of funds" and the "availability of funds" under PEBA § 10-7E-17(H) and LMRO § 3-2-18.
- LMRO § 3-2-18, referenced in Section 2.1.1.5 of the parties' CBA, required the City Council to "adopt a resolution" appropriating funds to cover the economic components of the contract when the CBA was approved by the City in 2008. As such, the City adopted the appropriate resolution in 2008 to cover the economic obligation for the new three-year CBA. Multi-year collective bargaining agreements are beneficial to both sides and provide stability and continuity for both management and public employees.
- LMRO § 3-2-18 does not prohibit the City from adopting a contract that has fiscal implications over several years. Its re-opening requirement ensures that the City has a mechanism to address unexpected deficit spending or budgetary shortfalls that arise during the subsequent years of multi-year collective bargaining agreements.

9. *AFSCME, Council 18, AFL–CIO, CLC, v. State of New Mexico, New Mexico State Personnel Board, and Sandra K. Perez, Director of New Mexico State Personnel Board*, 2013-NMCA-106, 314 P.3d 674.

- The State Personnel Board adopted a regulation defining the phrase, "shift work schedule" differently than did Article 21, Section 5 of the State's Collective Bargaining Agreement with AFSCME. The Union prevailed at arbitration and sought enforcement of the arbitrator's decision asserting that the regulation violated the Contract Clauses of the United States and New Mexico Constitutions. The District Court dismissed the union's petition for injunctive and declaratory relief or failure to state a claim. However, the Court of Appeals reversed the district court because, having lost the arbitration, the State attempted to circumvent the arbitrator's decision and the State's obligations under the Agreement by adopting a definition that was the exact opposite of the definition adopted by the arbitrator. The Union adequately pled that the new regulation would substantially impair an existing contract right, to make the regulation unconstitutionally retroactive by impairing the Agreement in violation of the Contract Clauses of the United States and New Mexico Constitutions.

10. *AFSCME, Council 18 v. New Mexico Human Services Dep't,* (1st Judicial Dist. CV-2012-02176, J. Ortiz, June 14, 2013.)

- The presence of security guards at the workplace is a term and condition of employment and a mandatory subject of bargaining and the Court upheld the PELRB's determination that the employer impermissibly made a unilateral change in terms and conditions of employment without bargaining.
- HSD relied upon the management rights and scheduling clauses in its CBA as constituting a waiver by the union of its right to bargain removal of security guards but the Court, referring to another section of the same CBA that required HSD to negotiate in good faith prior to making any changes in terms and conditions of employment related to "reasonable standards and rules for employees' safety", found that HSD did not meet its burden of showing a clear and unmistakable waiver of the union's right to bargain those issues.

11. *AFSCME Council 18, AFSCME Local 1888, AFSCME Local 3022, AFSCME Local 624, and AFSCME Local 2962 v. The City Of Albuquerque,* (Ct. App. No. 31,631, April 17, 2013).

- Because of the City's Labor-Management Relations Ordinance grandfather the absence of an evergreen provision does not fundamentally violate the PEBA. The LMRO does not permit the City to unilaterally impose conditions of employment once a CBA has expired. Instead, the LMRO includes provisions for impasse resolution through mediation and *voluntary* binding arbitration. These provisions ensure that the Unions are participants in the determination of employment conditions even after a CBA has expired.
- The PEBA defines "collective bargaining" as "the act of negotiating between a public employer and an exclusive representative for the purpose of entering into a written agreement regarding wages, hours and other terms and conditions of employment." It says nothing about the relative effectiveness of the procedures adopted. *See City of Deming*, 2007-NMCA-069, ¶¶ 22-24, 141 N.M. 686, 160 P.3d 595, (stating that application of the grandfather clause is not dependent on an evaluation of the quality or effectiveness of the collective bargaining procedures).

10. *Northern New Mexico College, et al., v. PELRB and NFEE, AFT Local 4935*, (1st Judicial Dist. CV-2012-02100, J. Singleton, April 18, 2013.)

- PELRB acted correctly when it dismissed PPC's having concluded the College's labor management relations board is "duly constituted and fully functional."
- PELRB does have "subject matter jurisdiction" of PPC's and it acted consistently with the minimum requirements of PEBA. Its decision and order is consistent with the Court's understanding of jurisdiction and is consistent with PEBA. The College's appeal is therefore denied and the PELRB's Order and Decision is therefore upheld.
- Even if one accepts that the undisputed evidence shows that the management and labor representatives were appointed anew in 2011 and that they did not agree on a third "neutral" member, the previously agreed-upon "neutral" continues to serve in that position pursuant to Article XX, Section 2 of the New Mexico Constitution.
- Article XX, Section 2 of the New Mexico Constitution applies to Northern New Mexico College as a State institution.
- The PELRB, having decided that Northern New Mexico College's labor management relations board was duly constituted and fully functional, properly dismissed the Union's PPC's and because those PPC's were reviewed by the Board as an original tribunal, not as an appellate body, a remand of those matters to the local board would not have been procedurally appropriate.

12. *City of Albuquerque v. AFSCME, Local 1888,* 2nd Judicial Dist. CV-2012-02239 (consolidated), J. Baca, May 1, 2013.)

- Relying on the principle set forth in *Deming Firefighters* and re-affirmed in *City of Albuquerque v. Montoya,* 2012-NMSC-007, N.M., 247 P.3d 108, where the grandfather clause applies, PEBA does not apply and the PELRB does not have jurisdiction, concurrent or otherwise, that would allow it to remand PPC's not pending before a grandfathered local labor board back to the City Labor Board.
- The PPC's were properly dismissed but the PELRB was without jurisdiction remand to the local board for further proceedings – they did not originate at the local board and make their way via appeal or removal to the State Board.

13. *Luginbuhl v. City of Gallup, Gallup Police Department,* 2013-NMCA-053, 302 P.3d 751.

    - Petitioner as a public employee working for a public employer as those terms are defined in the PEBA is therefore subject to the PEBA and the grievance arbitration process in the applicable CBA, not the grievance process in the City's personnel rules for non-union employees.
    - An arbitration clause in a validly negotiated CBA does not fail for lack of consideration and the CBA at issue was supported by adequate consideration.
    - The CBA's arbitration clause is not vague or uncertain in its application.
    - Petitioner's contention that as a non-union member of the bargaining unit he is not bound by the agreement to arbitrate disputes is refuted by the plain language of the PEBA §§ 10-7E-15(A) and (B) and 20(D) is rejected. The Petitioner is bound by the requirement of the CBA as well as the PEBA that a grievance challenging termination is subject to binding arbitration.

14. *AFSCME, Council 18, AFSCME, Local 1888, AFSCME, Local 3022, AFSCME, Local 624 and AFSCME, Local 2962 v. City of Albuquerque,* 2013-NMCA-012, 293 P.3d 943.

    - The PEBA does not impose a requirement that the Courts review the City's LMRO for effectiveness, *citing City of Albuquerque v. Montoya*, 2012-NMSC-007, 274 P.3d 108.
    - Although the Legislature included requirements for compliance with PEBA in both PEBA I and PEBA II, that requirement is applicable only if a public employer other than the state adopts a system of provisions and procedures permitting collective bargaining after October 1, 1991. In such instances the grandfather clause does require for grandfather status that the newly adopted system include impasse resolution procedures equivalent to those set forth in the PEBA. But the Legislature specifically did not include any such requirement for public employers adopting ordinances prior to October 1, 1991.
    - PEBA § 17(E) requirement that agreement provisions that require the expenditure of funds shall be contingent upon the specific appropriation of funds by the governing body and the availability of funds applies to economic components of the extension of expired collective bargaining agreements under the PEBA evergreen provision. It is not an issue whether the City appropriated funds for or during the life of the agreement; no appropriation occurred to extend the agreements and the City contends it does not have funds sufficient to fund the extension. The PEBA leaves that determination to the legislative functions of the public employer.
    - The PEBA does not require the extension of existing collective bargaining agreements in conflict with Section 10-7E-17(E).
    - The complaint was moot with regard to two unions that entered into successor agreements with the City while the appeal was pending.

15. *State of New Mexico v. AFSCME Council 18 and CWA*, 2012-NMCA-114, 291 P.3d 600.

    - The State appealed two separate arbitrators' decisions determining that the State's pay package for FY 2009 violated the terms of the parties' CBA's. The arbitrators did not exceed their powers in finding that the legislature appropriated sufficient funds to cover the salary increases. The State previously had agreed to submit the issues of its interpretation of the legislative bills in question and

how it interpreted the language “average salary increase” in those bills to arbitration. The State was bound by the arbitrators’ legal and factual findings on the issues submitted.

- Even if the arbitrators committed legal or factual error, as the State claimed on appeal, the Court of Appeals found “no permissible basis for reviewing the merits of the issues that were arbitrated.” “[l]egal and factual mistakes, such as applying the wrong standard of proof, do not comprise an abuse of power” under Section 44-7A-24(a)(4).
- The arbitrators did not exceed their powers by issuing awards that allegedly require retroactive salary increases for the Unions’ employees in violation of Article IV, Section 27 of the New Mexico Constitution. The remedies mandated by the arbitrators were not “extra compensation” as used in Article IV, Section 27 for services performed in FY2009, but compensation that the Unions’ employees were entitled to and would have received were it not for the State’s violation of the Agreements.
- The arbitrators did not exceed their powers by mandating monetary relief that will require the Legislature to appropriate funds. The arbitration awards did not require further appropriation or a reappropriation of funds by the Legislature because arbitrators determined that the Legislature already appropriated sufficient funds in FY2009 for the State to meet its contractual obligations under the Agreements and that the State failed to meet its contractual obligation to distribute the funds according to the terms of the Agreements. The State’s representation that it has already used the funds appropriated by the FY2009 legislative appropriations should not affect the arbitrators’ decisions and awards in favor of the Unions.
- There is no difference between this case and other cases where adverse judgments are rendered against the State; as in those cases, the State cannot avoid its obligation to comply with the judgment by maintaining that compliance would require it to seek further appropriations from the Legislature.

16. *Northern Federation of Education Employees v. Northern New Mexico Community College, et al.* (July 2, 2012), upheld on appeal in First Judicial District Court Case No, D-101-CV-2012-02100.

    - The Board found Respondent’s local Labor-Management Commission to be duly constituted and fully functional, citing to the New Mexico Supreme Court’s decision in *AFSCME v. Martinez and the State of New Mexico*, 2011-NMSC-018, 150 N.M. 132, 257 P.3d 952. Therefore, the Board did not have jurisdiction over the parties and the subject matter in three of the consolidated PPC’s alleging violations that would come under the jurisdiction of the local board. The Board found that it did have jurisdiction over three other consolidated PPC’s alleging a violations of PEBA §19(G). With regard to those claims the Board held that the union did not meet its burden of proof needed to establish grounds for revocation of its approval of the local Board.

17. *City of Albuquerque v. Montoya*, 2012-NMSC-007, 247 P.3d 108.

    - As a result of a deadlock, Albuquerque’s local Labor Board could not adjudicate a PPC filed by AFSCME on behalf of one of its members, a City employee. The union then filed the same PPC with the PELRB and the City moved to dismiss for lack of jurisdiction. The PELRB Director determined that the PELRB had jurisdiction because the local ordinance was not grandfathered. The Director’s decision was upheld by the Court of Appeals but reversed by the Supreme Court.
    - The City Council President does not serve in either a "management" or a "labor" capacity, and therefore the City Ordinance provision that provides a procedure by which the City Council President appoints a member to the Local Board during the absence of a member does not violate the Act's grandfather clause requirement that a local ordinance create a system of collective bargaining.

18. *San Juan College v. San Juan College Labor Management Relations Board,* 2011-NMCA-117, 267 P.3d 101.

- The Board is charged with the statutory duty of designating appropriate bargaining units for collective bargaining. There is no absolute rule of law as to what constitutes an appropriate bargaining unit and courts will defer to the Board's decision on what constitutes an appropriate bargaining unit if that determination is supported by substantial evidence and otherwise in accordance with the law.

19. *AFSCME v. Martinez,* No. CV-2011-10200 (2nd Judicial Dist. Feb. 9, 2012, J. Nash) *cert. denied* Mar. 29, 2012.

    - Upon expiration of the labor-recommended appointee to the Board in July of 2011 six public employee labor organizations recommended his reappointment. The Clovis Police Officers' Association recommended appointment of someone else. Governor Martinez appointed the CPOA recommendation. Six unions then petitioned the Second Judicial District Court for a writ of mandamus to order the Governor to rescind her appointment of Bartosiewicz, rescind all PELRB decisions made during his time on the board, and to retroactively reappoint the former labor-recommended appointee. The Unions' petition was denied because the Court did not agree with the Unions' position that CPOA was without authority to make a recommendation. While the Governor solicited a PELRB recommendation to her liking no evidence was presented that by doing so she improperly interfered with the recommendation process.
    - PEBA does not prohibit local labor organizations from making recommendations.
    - The Governor is not compelled to appoint the labor member recommended by a majority of organized labor representatives.
    - Because CPOA's recommendation was valid the Governor had two labor recommendations from which to choose and her appointment was not an unconstitutional official action. *Compare, AFSCME v. Martinez,* 2011-NMSC-018, 150 N.M. 132, 257 P.3d 952.

20. *AFSCME v. Martinez,* 2011-NMSC-018, 150 N.M. 132, 257 P.3d 952.

    - The Governor may not use the broad removal authority under Article V, Section 5 of the New Mexico Constitution to remove members of the Public Employee Labor Relations Board who have the responsibility of adjudicating the merits of disputes involving the Governor.
    - None of the PELRB members serve at the pleasure of the Governor because the Public Employee Bargaining Act obligates the Governor to appoint one member recommended by organized labor, one member recommended by public employers, and one neutral member jointly recommended by these two appointees.
    - The Governor's responsibility under the Act and Article V, Section 4 of the New Mexico Constitution to "take care that the laws be faithfully executed" requires that the Governor respect the Act's requirement for continuity and balance by not attempting to remove appointed members of the PELRB.
    - Constitutional due process requires a neutral tribunal whose members are free to deliberate without fear of removal by a frequent litigant in that forum, such as the Governor. Due process considerations are also implicated because when the Governor reserves the power to remove board members at any time and for any reason, the Governor exerts subtle coercive influence over the PELRB, further compromising its balanced and fair character. "A fair trial in a fair tribunal is a basic requirement of due process." *Citing In re Murchison*, 349 U.S. 133, 136 (1955); *Reid v. N.M. Bd. of Exam'rs in Optometry*, 1979-NMSC-005, 92 N.M. 414, 416, 589 P.2d 198, 200.

21. *County of Los Alamos v. John Paul Martinez, et al*., 2011-NMCA-027, 150 N.M. 326, 258 P.3d 1118.

    - Any direct communication with a union represented employee made for the purpose of altering terms and conditions of employment constitutes a violation of the PEBA.

- There is no definition of the phrase “wages, hours and other terms and conditions of employment” in either the PEBA or the local ordinance so as to delineate exactly what constitutes a mandatory subject of bargaining.
- A union can contractually waive its right to mandatory bargaining if the waiver is expressed clearly and unmistakably. However, courts will not infer a waiver unless it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them.
- A “zipper clause”, standing alone, did not constitute a waiver as to a specific bargaining item. Such clauses are to be given such effect as the negotiating history and other surrounding circumstances seem to make appropriate.

22. *City of Albuquerque v. AFSCME Council 18*, 2011-NMCA-21, 149 N.M. 379, 249 P.3d 510.

    - Once an employee’s status has changed from probationary to non-probationary, an employer cannot revert the employee to probationary status.

23. *Akins v. United Steelworkers of America*, 2010-NMSC-031, 148 N.M. 442, 227 P.3d 744.

    - The New Mexico Supreme Court declined to limit a union’s liability for breach of a DFR by imposing a per se exclusion of punitive damages much as the U.S. Supreme Court has done for similar actions against federally regulated labor unions.
    - The unanimous opinion underscored the public policy served by punitive damages and held that “punitive damages should be available in DFR suits where the union’s conduct is malicious, willful, reckless, wanton, fraudulent or in bad faith.”

24. *IAFF Local 1687 v. City of Carlsbad*, 2009-NMCA-97, 147 N.M. 6, 216 P.3d 256.

    - Court of Appeals Reversed the district court’s grant of summary judgment to Union, granting summary judgment to the City.
    - Provisions of PEBA stating that arbitration awards are contingent on the appropriation and availability of funds prevail over the provisions of PEBA stating arbitration awards shall be final and binding.

25. *Akins v. United Steelworkers of America, Local 187*, 2009-NMCA-051, 146 N.M. 237, 208 P.3d 457.

    - Retroactive application of the six-month statute of limitations adopted by the PEBA was not appropriate in a suit brought by a union member for breach of a duty of fair representation. DFR actions are not within PEBA’s administrative framework because the PEBA does not specify breach of the DFR as a prohibited practice.
    - Punitive damages are available under New Mexico law against a union for breach of a DFR.

26. *City of Las Cruces v. Juan B. Montoya and PELRB*, Supreme Court of New Mexico, Case No. 31,629 (March 24, 2009).

    - Order dismissing petition for writ of prohibition against the PELRB from hearing a PPC that alleged the City’s local labor ordinance, grandfathered under §26(B) of PEBA, fails to meet the requirements of that section.
    - The Court provided no reasoning or analysis for dismissal. However, the underlying briefing to the PELRB and the Court demonstrates that both New Mexico Courts and the PELRB have routinely upheld the PELRB’s authority to review local ordinances’ compliance with PEBA, even where grandfathered; and that local boards grandfathered under §26(B) are subject to many more substantive requirements than §26(A) boards, and thus permit greater grounds for the PELRB’s exercise of jurisdiction to review such ordinances.

27. *Granberry v. Albuquerque Police Officers Assoc.,* 2008-NMCA-094, 144 N.M. 595, 598 189 P.3d 1217, 1220.

    - *Granberry* involved a claim for breach of the duty of fair representation against the Albuquerque Police Officers Association brought after it settled a prohibited practices complaint on behalf of four police sergeants and did not include non-dues paying members of the bargaining unit in the settlement. Summary Judgment granted by the District Court in favor of the Union was reversed on appeal because it is for a jury to resolve the question of whether Appellants were precluded from recovery by a particular APOA bylaw and whether APOA's actions breached its duty of fair representation, whether Appellants suffered damages, and whether APOA's actions were the proximate cause of those damages.
    - *See also, Howse v. Roswell Independent School Dist.,* 2008-NMCA-095, 144 N.M. 502, 188 P.3d 1253, .; *see also, Mario Alderete, et al. v. City of Albuquerque, et al.* NMCA No. 33,151; 33,380; 33,714 (consolidated) February 23, 2015 (unpublished memorandum opinion) finding that no breach of DFR occurred when union refused to file grievance if *City* was compliant with CBA); *Sanchez v. Jimenez et al. District of New Mexico, nmd-2:2012-CV-01122,* finding no breach of DFR when union negligently failed to file for arbitration within the appropriate time period.

28. *City of Albuquerque v. Juan B. Montoya and PELRB,* 2nd Judicial Dist., Case No. CV-2008-02007 (June 26, 2008, J. Lang).

    - Summarily granting a petition for writ of prohibition and superintending control before the PELRB could file its Answer, on grounds that the PELRB lacked jurisdiction to hear a PPC because the City of Albuquerque had its own, grandfathered, local board). Decision appealed as Court App. 28,846, Opinion Number: 2010-NMCA-100, *cert. granted* No. 32,570.

29. *Health Care Local 2166, National Union of Hospital and Health Care Employees District 1199 v. University of New Mexico Health Science Center*, 2nd Judicial Dist. Case No. CV 2007-8161 (Feb. 20, 2008, J. Nash).

    - A labor relations board has jurisdiction under §19(D) of PEBA, and the equivalent section of a local resolution or ordinance modeled on PEBA, to hear PPCs alleging the retaliatory discharge of probationary employees, for their participation in Union activities and in order to discourage Union membership.
    - Probationary employees' rights to form, join or assist a union are not protected under § 19(A).

30. *City of Deming v. Deming Firefighters Local 4251*, 2007-NMCA-069, 141 N.M. 686, 160 P.3d 595.

    - Upholding the PELRB's denial of grandfathered status to a provision of the City's local labor ordinance that defined certain classes of public employees (fire fighter lieutenants and captains) as "supervisors" and therefore automatically excluded from the coverage of the local ordinance.
    - Reversing the PELRB's and the District Court's denial of grandfathered status to the arbitration provision that was not final and binding.

31. *Gallup-McKinley County Schools v. PELRB and McKinley County Federation of United School Employees Local 3313*. Court of Appeal Case No. 26,376 (June 8, 2006).

    - Mandamus is inappropriate where the petitioner fails to exhaust its administrative remedies. "Where an appeal process is available to a litigant, mandamus is not an appropriate vehicle for challenging an administrative decision," and the extraordinary remedy of mandamus is not proper where the only consequences alleged are "the usual delay and expense inherent in all litigation." *Citing State ex rel. Hyde Park Co., LLC v. Planning Comm'n of the city of Santa Fe*, 1998-NMCA-146, ¶¶ 11 and 13, 125 NM 832.

- In the case below, 2nd Judicial District Case No. CIV-2005-07443 (Nov. 23, 2005) Judge Clay Campbell denied the Schools' Petition for Writ of Mandamus and Stay of Proceedings against the PELRB, finding that the PELRB did not infringe on a clear legal right of the School and did not exceed its authority under PEBA by exercising concurrent jurisdiction when a local board had been approved.

32. *Laura Chamas-Ortega v. 2d Judicial District Court, 7th Judicial Dist*., Case No. CV-04-7883 (Mar. 10, 2006, J. Kase).

    - Upholding the PELRB's determination in 1 PELRB 2004 that the PPC was not moot, even though the Complainant quit working for the courts, because the question involved an issue of substantial public interest and the issue was capable of repetition.
    - Reversing as arbitrary and an abuse of discretion the PELRB's determination that PEBA applied to court employees, "on the basis of grounds asserted[,] … and … the arguments and authority contained in" the Second Judicial District Court's statement of appellate issues and reply.

33. *Callahan v. NM Federation of Teachers-TVI*, 2006-NMSC-010, 139 N.M. 201, 131 P.3d 51.

    - A compensatory claim against a union for breach of its statutory duty, as exclusive representative, to fairly and adequately represent a bargaining unit member does not state a prohibited practice under PEBA. Additionally, the PELRB and local boards lack authority to either award monetary damages to an aggrieved union member for a union's breach of its duty of fair representation, or to order the Union to reinstate an employee allegedly improperly terminated as a result of the Union's breach. Therefore, such claims cannot be brought before a Labor Relations Board and must instead be filed in District Court. *See also*, *Callahan v. N.M. Federation of Teachers-TVI*, 2010-NMCA-004, 147 N.M. 453, 224 P.3d 1258. Both *Callahan* cases reiterate the holding in *Jones v. International Union of Operating Engineers*, 1963-NMSC-118, 72 N.M. 322, 330-32, 383 P.2d 571, 576-78.

34. *United Steel Workers of America, Local 9424 v. City of Las Cruces*, 3d Judicial Dist., Case No. CV-2003-1599 (April 1, 2005, J. Robles).

    - Ruling that the City of Las Cruces' refusal to provide the Union with bargaining unit members' home addresses constitutes a refusal to bargain in good faith, in violation of the local ordinance and PEBA, and ruling that City Resolution 00-136 is void as inconsistent with PEBA to the extent it forbids disclosure of the home addresses of bargaining unit employees to the Union.

35. *City of Albuquerque v. Chavez*, 1998-NMSC-033, 125 N.M. 809, 965 P.2d 928.

    - New Mexico Courts have found the "Mathews test" from *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), provides useful framework for determining the appropriate amount of process to protect liberty. "Under the Mathews test, identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

36. *The Regents of the University of New Mexico v. New Mexico Federation of Teachers and American Assoc. of University Professors*, 1998-NMSC-20,125 N.M. 401.

    - To be grandfathered under § 26(A), a local ordinance or resolution must constitute a system of provisions and procedures permitting public employees to form, join or assist any labor organization

and it must have been enacted before October 1, 1991. Thus, to remain grandfathered, provisions of a grandfathered labor ordinance or resolution may not deny the right to bargain collectively to any public employees who have been afforded this right under PEBA. Where a provision of a grandfathered ordinance or resolution does not meet the requirements under § 26(A) for grandfathered status, the particular provision shall be denied grandfathered status, not the ordinance or resolution as a whole.

- The New Mexico Supreme Court confirmed the supremacy of PEBA's definitions of "public employee" and "supervisor" over those of grandfathered provisions.
- When reviewing administrative agency decisions, the courts begin by looking at two interconnected factors: (a) is the question one of law, fact, or both; and (b) is the matter is within the agency's specialized field of expertise. If the agency decision is based upon its interpretation of its statute, the court will accord some deference, especially if the legal question implicates agency expertise. However, the court may always substitute its interpretation of the taw for that of the agency because it is the function of the court to interpret the law. If the court is addressing a question of fact, the court will accord greater deference to the agency's determination, especially if the factual issues concern matters in which the agency has specialized expertise.
- The party appealing the agency decision has the burden of showing that the agency action is (a) arbitrary and capricious, (b) not supported by substantial evidence, and/or (c) represents an abuse of the agency's discretion by being outside the scope of the agency's authority, clear error, or a violation of due process.
- "Substantial evidence" is evidence that a reasonable mind would regard as adequate to support a conclusion. If the agency's factual findings are not supported by substantial evidence, the court may adopt its own findings and conclusions based upon the information in the agency's record.
- When reviewing an administrative agency's findings of fact. courts apply the whole record standard of review, meaning the reviewing court looks at both favorable and unfavorable evidence. The reviewing court may not exclusively rely upon a selected portion of the evidence and disregard other convincing evidence if it would be unreasonable to do so. The decision of the agency will be affirmed if it is supported by substantial evidence in the record as a whole.
- It is the policy of New Mexico courts to determine legislative intent primarily from the legislation itself, because New Mexico has no state-sponsored system or recording the legislative history of particular enactments. Thus, New Mexico courts do not attempt to divine what legislators read and heard and thought at the time they enacted a particular item of legislation. If the intentions of the legislature cannot be determined from the actual language of the statue, then New Mexico courts resort to rules of statutory construction, not legislative history.

37. *Las Cruces Professional Fire Fighters v. City of Las Cruces* ("*Fire Fighters* II"), 1997-NMCA-31, 123 N.M. 239.

- Holding that the Las Cruces Fire Department's no-solicitation rule that encompassed rest breaks, lunch time, and residential hours presumptively violated § 19(B), and the city made no 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; thus, the record supported a finding that enforcement of the rule constituted a prohibited employer practice.
- Both PEBAs were generally modeled on the NLRA. Accordingly, "absent cogent reasons to the contrary," interpretations of the NLRA must generally be followed in interpreting substantially similar PEBA provisions, "particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the time the PEBA was enacted."
- Questions asked by a local board member at an administrative hearing concerning the possibility of compromise does not indicate prejudgment or bias where the board member directed the questions to both the employer and the union representatives, and he did not indicate what he thought the

compromise should be. A board member is not disqualified for bias simply because he was nominated by union interests, or because he had expressed support for aggressive unionization of the public sector prior to being appointed to the Board.
- Work time is for work, but the time outside working hours (such as rest and lunch breaks, and residential hours for employees working twenty-four (24) hour shifts, such as firefighters) is an employee's time to use as he wishes without unreasonable restraint, although the employee is rightfully on company property.
- It violates PEBA to promulgate work rules or restrictions with the intent to interfere with employees' rights under PEBA, rather than for legitimate business purposes. For example, an employer may impose limits on general fraternization during work time, but it may not forbid or prevent union organizational activities at all, even during non-working periods.

38. *Las Cruces Professional Fire Fighters v. City of Las Cruces* ("*Fire Fighters* II"), 1997-NMCA-44, 123 N.M. 329.

    - Local boards approved by the PELRB under § 10 are required to follow all procedures and provisions of the Act, and therefore must follow PEBA's definition of "supervisor" where the local ordinance's definition of supervisor differs.
    - In reviewing a labor board's decision on a claim of insufficiency of the evidence, the appellate court resolves all disputes of facts in favor of the prevailing party and indulges all reasonable inferences in support of the prevailing party. The courts do not reweigh the evidence or substitute their own judgment for that of the board.

39. *City of Las Cruces v. PELRB*, 1996-NMSC-24, 121 N.M. 688.

    - The PELRB rule providing for the confidentiality of a showing of interest in support of a petition for representation, *See,* 11.21.1.21 NMAC, is an authorized exception "as otherwise provided by law" to the Inspection of Public Records Act (IPRA), under § 14-2-1(F) of IPRA. *See Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-26, 283 P.3d 853.
    - PELRB regulations have the force of law if promulgated in accordance with the statutory mandate to carry out and effectuate the purpose of PEBA.

40. *Board of County Commissioners of Otero County et al. v. State of New Mexico Public Employee Labor Relations Board*, Twelfth Judicial Dist. Case No. CV-93-187 (July 13, 1993, J. Leslie C. Smith).

    - New Mexico district courts confirmed the Board's authority under § 10-7E-10 to review the content of labor ordinances and resolutions, as part of the process of approving local boards.

41. *AFSCME v. Stratton*, 1989-NMSC-003, 108 N.M. 163, 769 P.2d 76.

    - In 1989, the Court upheld the State Personnel Office's authority to enter into a CBA pursuant to agency rules, where the CBA did not "conflict with, contradict, expand or enlarge" rights provided under any existing or future state, county or municipal merit system.

42. *IBEW v. Farmington*, 1965-NMSC-090, 75 N.M. 393.

    - The Court upheld Farmington's authority to enter into a CBA where there was no applicable merit system in place.

BOARD DECISIONS

1. *In re: Bernalillo County Court Deputies Association v. Bernalillo County Sheriff's Office and Bernalillo County*, PELRB No. 121-20, 54-PELRB-2021.

- The Complainant filed a PPC alleging the Respondent breached a duty to bargain before changing shift hours and transferring bargaining unit work to non-bargaining unit employees. The opposing parties are in separate bargaining units, covered by separate CBAs, and represented by different unions. However, NMSA 1978, § 10-7E-6 allows the transfer of public employees unless limited by the provisions of the CBA. In this case, the CBA's Management Rights Clause stated that management could transfer unit employees and change shift hours in order to maintain the governmental operations entrusted to it by law. In the absence of any explicit restriction within the CBA, the complaint was dismissed.

2. *In re: Peñasco Federation of United School Employees v. Peñasco Independent School District*, PELRB No. 108-20 (2021).

    - Union employees claimed the School District had committed prohibited practices violating §§ 10-7E-19(A), (B), (D) or (E) (2020), by discriminating against several of the School's Union employees, some of whom were also Union Officers, after the Union members discussed the removal of the School's Superintendent at a few public-school board meetings while wearing Union insignia. Shortly following these events the Union member's contracts were not renewed for various School Board policy violations. Additionally, Union members had email correspondence circulated encouraging teachers to not participate in the District's voluntary grant survey. The District's Superintendent cited this action as insubordinate while the Union claimed it to be concerted activities, protected under section 5 of PEBA. After reviewing the evidence and utilizing the Wright Line analysis, the Hearing Officer found in favor of some Union members. Upon appeal, the Court affirmed the Hearing Officer's decision with exception to the concerted activities (due to the action having occurred prior to the 2020 PEBA amendments which added protection for concerted activities).

3. *In re: AFSCME, Council 18, AFL-CIO, Local 3022 v. ABCWUA,* PELRB No. 106-21.

    - A past practice will not be binding if there is insufficient evidence to establish it. Local 3022 "did not establish that the Water Authority deviated from past practice" and "the testimony presented at the hearing established that the Water Authority had a past practice of assigning new supervisors to a shift rather than having them immediately participate in a shift bid." The instant PPC is not based on allegations the Employer violated a past practice but is entirely based on breach of the parties' CBA and failure to bargain, as stated in the Stipulated Pre-Hearing Order, wherein Complainant alleges violations of § 17(A)(1) (requiring Respondent and AFSCME to "bargain in good faith on wages, hours and all other terms and conditions of employment"); § 19(F) (making it a prohibited practice to "refuse to bargain 13 collectively in good faith with the exclusive representative"); and § 19(H) (making it a prohibited practice to "refuse or fail to comply with a collective bargaining agreement"). To the contrary it is ABCWUA that is asserting a past practice when it argues that the Water Authority had a long history of assigning new supervisors to a shift of its choosing and that the Water Authority had a past practice of not allowing employees to bid on all available shifts, and instead included "qualifiers" limiting the shifts that were available.

4. *In re: NMCPSO and Rio Rancho Police and Dispatch Ass'n.,* 2-PELRB-2018*.*

    - A severance petition is a petition filed by a labor organization to sever a group of employees comprising an occupational group listed in § 10-7E-13 of PEBA, from an existing bargaining unit. The procedure for filing a severance petition is the same as that for a basic Petition for Recognition under subparagraph IV A above, including the requisite 30% showing of interest among the group of employees to be severed. *See* 11.21.2.41 NMAC. 11.21.2.41 NMAC.
    - The group to be severed must be one of the occupational groups listed in NMSA 1978, § 10-7E-13 (2020), e.g., blue-collar, secretarial, clerical, technical, professional, paraprofessional, police, fire or corrections.

5. *In re: DEA & Deming Public Schools,* PELRB No's. 304-17 and 305-17.

- The labor board concluded that the "[c]ontinued recognition of the existing wall-to-wall bargaining unit is mandated by NMSA 1978, Section 10-7E-24(A) which allows bargaining units established prior to July 1, 1999 to continue to be recognized as appropriate bargaining units" and "[t]he Board's rule 11.21.2.37 NMAC expressly exempts bargaining units under Section [10-7E-24(A)] … from being subject to unit clarification except in limited circumstances not applicable here."

6. *In re: AFSCME, Council 18 v. NM Department of Workforce Solutions,* PELRB No. 102-17, 11-PELRB-2017.

   - Hearing examiner granted the Department's Motion for a directed verdict as to the § 10-7E-19(F) and § 10-7E-19(H) claims. Additionally, the Union did not meet its burden of proof regarding whether denial of pay increases in connection with the pay band adjustment constituted a failure to bargain or a breach of the contract. Directed verdict was denied, however, as to whether NMDWS increased performance measures without bargaining. AFSCME appealed the Board's Order affirming the Directed Verdict to the District Court and NMDWS appealed the Board's Order concluding that it violated § 10-7E-19(F) and § 10-7E-19(H) when the Employer increased performance measures without bargaining. The District Court affirmed the Board's conclusion that the number of inspections employees were required to perform each month was a term or condition of employment and a mandatory subject of bargaining under the PEBA and that NMDWS violated § 10-7E-19(F) when it unilaterally changed the required number of inspections.

7. *In re: AFSCME, Council 18 v. NMHSD and NM PELRB*, PELRB No. 309-15, (D-202-CV-2016-07671).

   - AFSCME argued that a unit clarification petition was proper. The Board disagreed stating that the argument made, "confuses the merits of the underlying dispute with the threshold requirement to demonstrate changed circumstances. Neither the refusal to deduct dues, the creation of new positions, nor a change in supervision were changes sufficient to justify a petition for clarification. The court noted that prohibited practice complaints or petitions for representation or accretion were alternatives when the dispute is about whether certain positions are included in a unit or not. *See In re Kaiser Found. Hosps*., 337 NLRB 1061 (2002), describing longstanding doctrine that NLRB will not entertain unit clarification petition seeking to accrete historically excluded classification into the unit unless the classification has undergone recent, substantial changes. Changed circumstances is the threshold requirement for resolving the dispute in a unit clarification proceeding.

8. *In re: AFT v. Cuba Independent School District,* PELRB No. 129-14.

   - This case was opened on 11/3/2014 alleging that termination of an employee union representative was retaliation, interference with the union and coercion in violation of PEBA §19(A); §19(B); §19 (C); and a violation of contract or PEBA rights in violation of §19 (G) and §19 (H). The Hearing Officer granted Summary Judgment in favor of the Employer on 2/6/2015 holding that:
     - o The Union did not demonstrate the existence of a factual dispute requiring an evidentiary hearing on the question whether any of its employee's union activities, taken alone or in the aggregate, created anti-union animus, nor that any anti-union animus was a motivating factor in the decision not to renew her employment contract. *See* §19(D).
     - o The Union did not demonstrate the existence of a factual dispute requiring an evidentiary hearing on the question whether the employee was treated differently than any other employee based on her union activities. *See* §19(B)(3).
     - o The Union did not demonstrate a material issue of fact that would require an evidentiary concerning whether the District interfered with, restrained or coerced the employee in the exercise of a right guaranteed pursuant to the PEBA §19(B).
     - o The undisputed evidence reflects significant departures by the employee from the District's

policies coupled with marginal performance followed by forewarning and progressive discipline. That evidence has not been refuted and Complainant may not rest on the mere allegations of its complaint in response to a Summary Judgment motion.

- o Because alleged violation of PEBA § 5 (Interference and Coercion) were not supported, the union's §19(G) claims were without a basis in any section of PEBA other than §19. Accordingly, to avoid repetitive and duplicative liability, that claim was dismissed.
- o The undisputed evidence demonstrated legitimate, non-discriminatory reasons for the employee's termination that satisfy the contractual requirements at issue. Complainant may not rest on the mere allegations of its complaint in response to a Summary Judgment motion and so, the Union's claim for violation of §19(H) was dismissed.

9. *In re: Communications Workers of America, AFL-CIO v. State of New Mexico and New Mexico Public Employee Labor Relations Board,* 2019-NMCA-031, No. D-202-CV-2015-03814 (J. Butkus, March 15, 2017) (In re: PELRB No. 122-14).

- CWA filed a PPC over unilateral changes made by the State to its policy regarding paid time for employee union representative for their time spent filing and investigating grievances. The Hearing Officer found, and PELRB rejected, that a letter the State sent CWA presented a "fait accompli" by which the State relieved CWA from any duty to request bargaining and concurrently breached § 10-7E-19(F). The Court upheld the PELRB's rejection of the findings related to CWA being relieved of the duty to demand bargaining after waiting six months to file the PPC. According to the District Court the PELRB had evidence before it to support the conclusion that the State's letter was not a fait accompli. The Court concluded, therefore, that it was not unreasonable for the PELRB to reject the HO's finding that CWA did not have the opportunity to request bargaining. (Citations omitted). Regarding the State's cross-appeal the Court determined that PELRB's Order sustaining a violation of Section 10-7E-19(B) was inconsistent with its conclusion rejecting a finding of bad faith. Accordingly, the Order was reversed as arbitrary and capricious. The union sought and obtained a writ of certiorari and the Court reversed and remanded to the Board to determine whether the CBA's zipper clause eliminated the past practice of paying bargaining unit employees for time spent preparing for and participating in grievance meetings.
- After the State sent a letter to the union stating that it was discontinuing a past practice of allowing bargaining unit employees to use paid time (union time) to prepare for and participate in grievance meetings, subject to supervisor approval,. The union filed a Prohibited Practice Complaint alleging (*inter alia*) that the State had refused to bargain in good faith about the subject The Hearing Officer considered the Union's unchallenged evidence of the parties' past practice. Indeed, the State's own witness stated that he was aware of at least five instances in 2012 and 2013 in which employees who were not union officers or union stewards, were coded as utilizing union time in the payroll system." the Hearing Officer determined "the past practice of paying employees for preparing and attending their own grievance meetings as either union time or regular work time [was] clearly established." As a result, the Hearing Officer concluded that "the State violated PEBA § 10-7E-19(B) when it unilaterally altered a mandatory subject of bargaining and a longstanding past practice thereby unlawfully restraining and interfering with employees' rights under PEBA. The Hearing Officer's decision held that the letter presented the union with a fait accompli which relieved them of the duty to request bargaining over the subject of union time and found that the State had violated§ 10-7E-19(F). The Board reversed the Hearing Officer's determination of a violation of § 10-7E-19(F) citing the union's inadequate explanation of why it took no action in a six-month period to request bargaining. The District Court affirmed the PELRB's finding that no violation of § 10-7E-19(F) occurred because the union was not relieved of its duty to request bargaining because the State provided them sufficient time to do so and had not implemented the change before notifying the union. Having determined that the union had waived any claim about the timeliness of the States notice, the Court of Appeals reversed the District Court and held the Board's conclusion that no violation of § 10-7E-19(F) occurred was arbitrary and capricious because it had not considered the

State's intent when deciding the issue. The Board's decision "contains no indication that it considered the possibility that the State had already implemented, or was in the process of implementing, its stated shift in policy, so as to warrant a finding that the State had no intention of changing its mind." Id. at ¶23. The case was remanded to the PELRB to consider, in light of the Court of Appeal's decision, whether the State's actions constituted a fait accompli.

10. *In re: AFSCME, Local 3999 v. City of Santa Fe*, PELRB No. 111-14.

    - Case opened on 5/1/2014 alleging failure to provide information necessary for the grievance procedure.
    - The Director entered a Voluntary Dismissal after Complainant withdrew the PPC as part of a settlement agreement reviewed and approved on 7/14/2014.

11. *In re: Central Consolidated School Association v Central Consolidated School District,* 27-PELRB-2013.

    - Order Adopting the Hearing Officer's Recommended Decision.
    - Finding that the District Committed a PPC by refusing to hear grievances appealed to the school board pursuant to the CBA, violating NMSA § 10-7E-19(G) and (H).
    - Finding that the District Committed a PPC by giving three bargaining unit members stipends without negotiating those stipends, violating NMSA § 10-7E-17(A)(1), 19(C), (F), and (G).
    - Finding that the violated PEBA §19(H) by failing to follow Article 17 of the CBA when it hired a foreman from outside the Shiprock facility.

12. *In re: Weingarten v. NLRB. AFSCME, Council 18 v. N.M. Children, Youth & Families Dep't.* 10-PELRB-2013 (May 15, 2013).

    - Adopting the Hearing Officer's Recommended Decision. (2-1 Split)
    - Finding that Section 5 of PEBA provides "basically the same rights" as section 7 of the NLRA. The differences in text "appear to be directed to streamlining the language utilized in the NLRA, rather than limiting or narrowing the enunciated rights."
    - Finding that Weingarten-type rights exist under PEBA.
    - In his dissenting opinion, Board member Wayne Bingham wrote that he would reverse the prior Board decisions recognizing Weingarten rights for 3 reasons:
        1. No express grant of Weingarten rights in PEBA.
        2. PEBA's language is different than the NLRA's as it pertains to concerted activities for mutual aid and benefits – the language upon which the Weingarten decision was based.
        3. The NLRA applies only to the private sector.
    - See also 2-PELRB-2006 and 6-PELRB-2007.

13. *In re: AFSCME, Council 18 v. N.M. Regulation & Licensing Dep't,* 5-PELRB-2013 (Feb. 22, 2013).

    - Refusing to recognize an employee as union steward and disciplining that employee for acting as steward is a violation of § 19(A).
    - "Other agreements" should logically also include Memorandums of Understanding, and settlement agreements concerning grievances and PPCs.

14. *In re: Raton Fire Fighters Association, IAFF Local 2378 v. City of Raton,* 3 PELRB 2013 (June 20, 2013).

    - Where the local ordinances' definition of "supervisor" leaves out most of the criteria established by PEBA for testing whether a particular position is supervisory or not, including the rather basic criterion that a supervisor actually supervises someone it so broadly defines the term that it encompasses those who only occasionally assume supervisory or directory roles; or perform duties which are substantially similar to those of his or her subordinates, are "lead employees" and

arguably includes those who merely participate in peer review or occasional employee evaluation programs. Therefore, it impermissibly excludes a class of employees entitled to bargaining rights under the PEBA.

- Board held that where provisions of the City of Raton's grandfathered ordinance do not meet the requirements of § 26(A) (Repealed in 2020), for grandfathered status, the particular provision shall be denied grandfathered status, not the ordinance as a whole.
- Although the local ordinance contains a more expansive management rights reservation than the usual that reservation of management rights is expressly subject to other "restrictions contained in this section and the collective bargaining agreement and any provision of this Chapter". Therefore, it is merely a general reservation of management rights and such general reservations do not operate to defeat the obligation to bargain collectively over wages, hours and working conditions established by contract or under a collective bargaining law to the extent those subjects constitute mandatory subjects of bargaining. Consequently, the management rights clause in question did not violate

15. *In re: AFSCME, Council 18 v. N.M. Children, Youth and Families Dep't.* 1-PELRB-2013 (PELRB 122-12, May 15, 2013)

    - Public employees have the right to engage in other concerted activities for mutual aid or benefit. This right shall not be construed as modifying the prohibition against public employee strikes. See § 10-7E-5(B). The PELRB has historically followed the NLRA with regard to employees claiming protections for their activities either for union-related purposes aimed at collected bargaining or for other "mutual aid or protection" so that even before the 2020 amendment to the Act expressly protecting concerted activities for mutual aid or benefit such concerted activities enjoyed protected status.
    - PELRB held that furloughs are an exercise of management's reserved rights under an article of the parties' CBA reserving to management the right to relieve an employee from duties because of lack of work or other legitimate reason, or under sections reserving to management the right to determine the size and composition of the work force, or to determine methods, means, and personnel by which the employer's operations are to be conducted. Therefore, the State was not obligated to bargain further over the furloughs.

16. *In re: New Mexico Coalition of Public Safety Officers Ass'n and County of Santa Fe,* 78-PELRB-2012 (Dec. 5, 2012).

    - Sergeants were accreted into an existing bargaining unit because their actual duties as performed did not meet the three-part test established by the Board to determine whether an employee is a "supervisor" as that term is defined by the Act. The test included the following:
        - Whether there was sufficient "change of circumstances" from the creation of the original bargaining unit to now warrant a change in that unit;
        - Whether a grandfathered bargaining unit may be accreted or clarified at all; and
        - Whether accretion is otherwise appropriate, i.e., requiring a community of interest between the new and existing groups of employees.

17. *In re: CWA Local 7076 v. New Mexico Public Education Dep't,* 76-PELRB-2012 (Nov. 26, 2012).

    - The union was found to have waived bargaining by failing to make a timely demand. The District Court reversed the Board on the waiver issue and remanded the matter for further findings on which RIF effects are covered under the contract.
    - The Hearing Officer decided in favor of the Employer finding that the duty to bargain the effects of the layoffs identified in this case had been discharged prior to implementation of the RIF, but that the union waived bargaining the effects of the layoff at issue by failing to make a timely demand for bargaining. The Employer's Counterclaims were found to be without merit and were dismissed. The Union appealed the Decision first to the Board which upheld the Hearing Officer on 11/26/12.
    - The employer's duty to provide information to the union is not met when the employer does the bare minimum of providing notice to, and meeting with, the Union while purposely withholding information relevant to a layoff.

18. *In re: AFSCME Council 18 v. NM Tax & Rev. Dep't.,* PELRB Case No. 104-12, 55-PELRB-2012

    - An employee - union member was reprimanded by her supervisor allegedly for using state phones to conduct union business. The Union filed a PPC alleging that the reprimand violated §§ 19A, B, C, F and H of the PEBA. At a hearing on the merits May 16, 2012, the Hearing Officer granted the State's motion for directed verdict dismissing all claims. The PELRB affirmed the Hearing Officer's recommended decision concluding that there were substantial reasons for taking disciplinary action apart from the employee's union activities and affiliation. While the union established the employee's union affiliation and activities and established that correction and disciplinary action has been taken, it did not establish a nexus between the two. Relegating union-related calls to the last 15 minutes of the day, without more, was not enough when the evidence showed that there were 40 hours of personal phone use for which the employee was disciplined but only 2 hours of which were union related calls. The Union did not show that restricting union-related calls to the last 15 minutes of the day interfered with union business so that PEBA § 19(B) would be implicated. No evidence was presented as to any other specific provisions of PEBA or the parties' violated. Accordingly, there was no evidence to support a claim that PEBA § 19(G) or (H) was violated.

19. *In re: AFSCME, Council 18 v. State of New Mexico,* 33-PELRB-2012.

    - The jurisdiction of the Board has been challenged because of its failure to abide by the time limitations set forth in its own rules. *See* 11.21.2.18 NMAC, 11.21.2.21 NMAC, 11.21.3.14 NMAC and 11.21.3.18 NMAC. The challenge by the State Personnel Office arose after extensive pre-hearing motion practice including two separate motions to Dismiss filed by the State, a Summary Judgment motion, a Motion to have the merits heard by the Board *en banc* without a Hearing Officer, a Motion to Disqualify the Hearing Officer, all of which needed to be briefed and argued before they could be decided and which necessarily delayed holding a hearing on the merits of the Union's claims, coupled with a period when the Board was without an Executive Director to schedule and hold hearings, the State moved to dismiss the Union's claims for failure of the Board to hold a merits hearing within the deadlines set in the Board's rules.
    - The PELRB held that the limits established for the Board to investigate complaints and conduct hearings are directory rather than mandatory. Exceeding those limits does not require dismissal of the complaint. That decision is in accord with *N.M. Dep't of Health v. Compton,* 2000-NMCA-078, ¶¶ 12-13, 129 N.M. 474. (Although some mandatory statutory time limitations are jurisdictional, others are only intended to promote expeditious review. Under New Mexico case law, "mandatory statutory requirements…raise a bar to jurisdiction when the requirement [is] essential to the proper operation of the statute.")

20. *In re: AFSCME, Council 18 v. N.M. Regulation & Licensing Dep't,* 4-PELRB-2012 (Feb. 21, 2013)**.**

    - There is nothing in the CBA's requirement that the union provide the Employer a written list of the names, address, telephone numbers of those authorized to act on behalf of the Union and the extent of their authority that gives the Employer the right to veto the Union's designation of a steward because the steward's name is absent from the required quarterly listing, especially in light of the fact that the Employer would have refused to recognize the union's appointment of its steward regardless of whether the steward's name had been added to the list because the Employer's stated justification for its actions was that the parties' agreement "does not permit, authorize or contemplate an RLD Steward outside of Albuquerque, Santa Fe or Las Cruces work location areas." Thus, whether or not the name appears on a list is irrelevant to the reason given for refusing to honor his appointment. The steward's "post of duty" is irrelevant to the question whether he may serve as the designated union Steward.

- The Employer did not commit a PPC by refusing to allow a contested union steward to attend on paid status, meetings agreed to by the parties for purposes of administering their CBA because the CBA's definition of the term "Union officials" entitled to such leave listed the Local Union Presidents, Local Vice-Presidents, and "any other union official as designated by mutual agreement of the parties." The CBA does not include union stewards as an official for whom leave must be approved and it is plain from the context of the PPC and the parties' respective dispositive motions that the contested union steward is not mutually agreed to be entitled to such paid status. A different result obtains, however, with regard to the Employer's obligation under the CBA to grant leave for the investigation and processing of grievances, which was also denied the contested steward where the parties' CBA requires the Employer to allow union stewards paid leave "for the purposes of representing employees only within their respective agency at grievance meetings, disciplinary appeals based on suspension, demotion, or dismissal and cases to the PELRB".

21. *In re: AFSCME Council 18 v. New Mexico Regulation and Licensing Department,* 06-PELRB-2010 (June 25, 2010).

    - Reversing the hearing officer's decision and finding that the employee had waived rights to union representation when the employee retained an attorney and continued to waive those rights when the employee was provided with a written statement from his attorney allowing him to continue discussion of issues with his employer.

22. *In re: CWA Local v. New Mexico Environment Department,* 09-PELRB-2009 (July 6, 2009).

    - When a PELRB litigant is collaterally estopped from pursuing his or her PPC due to a previously rendered State Personnel Board (SPB) decision, that SPB decision shall only apply to that specific case, and shall not preclude the PELRB from reaching a different conclusion in a subsequent case involving similar facts.
    - A PELRB hearing examiner is collaterally estopped from reviewing for compliance with PEBA another agency's decision, in a matter based on essentially the same facts and issues, when the elements of collateral estoppel are met.
    - The PELRB is collaterally estopped from reviewing another agencies' decision for compliance with PEBA when the PELRB matter and the other agency's matters concern the same parties, or parties in privity, and the two cases concern the same ultimate issue of fact which was actually litigated and necessarily determined in the other forum.

23. *In re: CWA Local 7911 v. County of Socorro,* 08-PELRB-2009 (July 6, 2009).

    - PEBA's "evergreen clause", which states that expired contracts continue in full force and effect in the event of impasse until replaced by a subsequent written agreement, prevents an employer from implementing its last, best and final offer after impasse as may be done under case law interpreting the National Labor Relations Act (NLRA).
    - The Section 18(D) language, "[i]n the event impasse continues after the expiration of a contract: does not require that impasse be declared prior to the contract's expiration, for the contract to continue in effect.
    - Under Section 18(D), the Board cannot and does not require that a salary increase be granted or maintained by the employer after impasse.

24. *In re: IAFF Local 4366 v. Santa Fe County,* 06-PELRB-2009, PELRB Case No. 321-08 (May 7, 2009).

    - The Board reversed a hearing examiner's conclusion that Battalion Captains did not spend a majority of their time engaged in work requiring the exercise of independent judgment with the result that Santa Fe County Fire Department Battalion Captains may not be accreted into the existing bargaining unit because they are supervisory and possibly managerial employees.

25. *In re: AFSCME Council 18 v. New Mexico Department of Labor*, 01-PELRB-2007 (Oct. 15, 2007).

- A motion for summary judgment. and the response thereto, shall follow New Mexico Rules of Civil Procedure, specifically Rule 1-056 NMRA, for guidance.
- In a motion for summary judgment, the movant shall set out a concise statement of all malarial facts to 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. The respondent shall file a response that includes a concise statement of all material facts 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. Both sides may include supporting affidavits, based on personal knowledge and setting forth evidence that would be admissible at trial.
- 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 on 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.

26. *In re: Santa Fe Police Officers' Association v. City of Santa Fe*, 02-PELRB-2007 (Oct. 14, 2007).

- The PELRB has determined that the omission of "supervisors" from § 10-7E-5 of PEBA II was a clerical error.
- Where there is a conflict between general and specific statutory provisions, the specific provision shall control over the general provision. (Citing *Crutchfield* v. *New Mexico Dept. of Taxation and Revenue,* 2005-NMCA-022, 137 N.M. 26, and *Stinbrink* v. *Farmers Inc. Co.,* 1990-NMSC-108, 111 N.M. 179, 182.)

27. *In re: McKinley County Federation of United School Employees, AFT Local 3313 v. Gallup-McKinley County School District and Gallup-McKinley County School District Labor Management Relations Board,* 03-PELRB-2007 (undated).

- The PELRB has jurisdiction to review and remedy rule-making actions by a local board that amend the local ordinance, raise serious and significant issues affecting public sector collective bargaining statewide, and threaten the consistent and uniform administration of PEBA.
- The PELRB has jurisdiction to review and remedy a rule promulgated by a local board that violates § 14(A), § 14(D) and the PELRB's decision in *NEA-Alamogordo and Alamogordo Public Schools,* 05-PELRB-2006, by permitting an employer to determine whether an incumbent union could demonstrate majority support by election or card count and, in the event of election, by requiring that at least 50% of the total members of the bargaining unit vote for continuing representation. **Note:** The initial action was filed as a PPC, but the Hearing Examiner concluded that neither §19 nor § 20 provided for PPCs to be filed against local boards. The Hearing Examiner then recast the PPC as a request for re-approval of the local board and found jurisdiction under its general power of approval under § 10, and under the post-approval reporting requirements established under 11.21.5.13 NMAC. The Board upheld the Hearing Examiner's subsequent denial of the local Board's motion to dismiss for lack of jurisdiction but in doing so it stated that the "[PELRB] has jurisdiction of the prohibited practices complaint filed by the Union." After due notice and failure of the local board to rescind the offending rule, the prior PELRB approval of the local board was revoked.

28. *In re: AFSCME Council 18 v. New Mexico Department of Corrections,* 04-PELRB-2007. (December 13, 2007).

- Adopting and affirming the Hearing Examiner's Report, which concluded that the Department violated § 19(F) (duty to bargain in good faith) by meeting with an employee outside of the presence of the Union, to privately adjust a grievance filed by the Union on that employee's behalf.
- The discipline imposed by the Department in this and a related case (PELRB 113-12; 4-PELRB-2012, Feb. 21, 2013) was taken for an employee acting as a union steward against the wishes of the Employer, which acted improperly in refusing to recognize his appointment by the union as a steward, by denying him leave for union-related activities and by imposing discipline for attempting to act as a union steward. *See* 5-PLERB-2012.

29. *In re: SSEA, Local 3878 v, Socorro Consolidated School District,* 05-PELRB-2007. (December 13, 2007).

    - The failure to provide a Union with the names and home addresses of proposed bargaining unit employees interfere with, restrains or coerces the public employees in their right to form, join or assist a union for purposes of collective bargaining.

30. *In re: AFSCME Council 18 v. Department of Health,* 06-PELRB-2007, PELRB Case No. 168-06 (December 3, 2007).

    - The failure to give a union representative notice of a mandatory employee meeting concerning the terms and conditions of employment after the representative requested such notice constitutes interference with the union's status as exclusive representative and interference in the collective bargaining relationship, contrary to § 19(C).
    - "PEBA protects peaceful concerted activity for mutual aid and support to the same extent as does the NLRA… Comparing PEBA to the NLRA…the protections provided by PEBA are sufficiently similar to those provided by the NLRA to warrant the inference that the New Mexico Legislature intended to protect public employees engaged in more general concerted activities, not only those activities performed to assist a labor organization."
    - Once the hearing is closed, the hearing examiner's decision will be rendered based on all relevant evidence admitted without objection.
    - The present day PELRB has in one final Decision and Order provided that the appellant could file a Motion for Reconsideration showing prejudice, where the appellant had argued on appeal that the hearing examiner improperly raised sua-sponte the issue for which it was found liable.

31. *In re: AFSCME Council 18 v. State of New Mexico*, 07-PELRB-2007 (Dec. 13, 2007).

    - Concluding that the grievance and arbitration procedures that § 17(F) requires in all collective bargaining agreements are not required to apply to all disputes pertaining to terms and conditions and related personnel matters. Parties to a collective bargaining agreement can limit the scope of the required grievance and arbitration procedures to apply only to disputes concerning the interpretation, application and/or violation of the collective bargaining agreement.

32. *In re: Petition for Recognition, Federation of Teachers and Pecos Independent Schools,* 07-PELRB-2006 (Sept. 10, 2006).

    - Stay of negotiations by the PELRB pending any appeal to District Court is not warranted under the Act but stay of the obligation to reduce any agreement into a contract is appropriate. Stay of the obligation to reduce any agreement to writing in this particular case was denied because the School District is not likely to prevail on merits and neither public policy nor the equities favor such a stay.

33. *In re: NEA-Alamogordo and Alamogordo Public Schools*, 05-PELRB-2006 (June 1, 2006).

    - Public employers may insist on a secret ballot election, except as to incumbent unions.

- A petition for certification as incumbent, by definition, does not present a QCR as to unit inclusion or exclusion, because § 10-7E-24(A) deems the grandfathered bargaining unit to still be appropriate.
- Under 11.21.2.36 NMAC, the § 10-7E-24(B) demonstration of majority support is done through a card count even over the employer's objection, unlike in normal representation cases.

34. *In re: Application of the University of New Mexico for Approval of Local Board,* 04-PELRB-2006 (May 31, 2006).

    - Concluding that, under 11.21.5.10 NMCA, there is good cause to grant UNM a variance from the PELRB template resolution creating a local board, to add language regarding the "allocation" or "reallocation" of funds following the template's references to "appropriation" or "re-appropriation" of funds. The former terminology is more appropriate to UNM's situation, since the UNM Board of Regents "allocates" funds appropriated to it by the Legislature, rather than "appropriating" its own funds. The variance, therefore, promotes statutory clarity, avoids disharmony with § 17(E) of PEBA, is consistent with legislative intent, and places UNM on an equal footing with other governmental entities under PEBA.

35. *In re: American Federation of Teachers Local 4212 and Gadsden Independent School District*, 03-PELRB-2006, PELRB Case No. 169-06 (May 31, 2006).

    - Under § 24(B), an employer is required to negotiate in good faith with an incumbent labor organization prior to its demonstration of majority support, even though it is barred from reducing that agreement to writing prior to a demonstration of majority support. Otherwise, the incumbent labor organization could not meet the duties imposed on it under § 15 and § 17, as the unit's exclusive representative. **Note**: This decision was issued as part of a representation case, PELRB Case No. 309-05, and was adopted without further review by the Board after the School District withdrew its appeal.
    - The Amended Hearing Examiner's Report found and concluded: Administrative Interns, or "principals-in-training," are not excluded supervisors but are excluded confidential employees; Custodian Heads and other "head" employees are not excluded supervisors; Day Care Managers are excluded managers; Food Service Managers are excluded supervisors.
    - Under specified criteria, a school district's administrative interns, or "principals-in-training," were found to be confidential employees because they could be on a bargaining team and are regularly exposed to the District's labor-management policy.
    - An employer may not remove an appointee from a local board prior to the expiration of his or her term of service under the ordinance or resolution, without a hearing and a determination of just cause under the ordinance, such as by disqualification as a result of being an employee of a labor organization or a public employer.
    - An employer violates § 19(G) where it effectively amends a resolution without prior PELRB approval, contrary to 11.21.5.13 NMAC, by instituting a policy requirement that board appointees be "local" to the area. (Hearing Examiner's letter decision, Nov. 2, 2007).

36. *In re: AFSCME, Council 18 v. State of NM Dep't of Labor*, PELRB No. 149-06.

    - 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. 'The summary judgement procedures used in this case did not enable the PELRB to accurately assess whether the undisputed material facts entitle the DOL to summary judgment."

37. *In re: Pita* S. *Roybal* v. *Children, Youth and Families Department,* 02-PELRB-2006 (May 12, 2006).

- Concluding that an employee was not denied "Weingarten rights"—the right of employees to request and obtain union representation during investigatory meetings— in violation of PEBA where the purpose of the meeting was not to investigate or gather information, but rather to deliver a reprimand for previous conduct.

38. *In re: In the Matter of Petition for Recognition filed by Teamsters Local No. 492*, 01-PELRB-2006 (April 13, 2006).

    - Under § 24(B), a petition to represent certain employees will be dismissed where another union was the grandfathered exclusive representative of those employees. The new union argued that the grandfathered union had not acted timely to renew collective bargaining for this group of employees. The Board held that § 24(B) does not impose a time limit for an incumbent union to exercise its grandfathered status.

39. *In re: National Union* of *Hospital and Health Care Employees, District No.* 1199 *v. UNMH,* 3-PELRB-2005 (Oct. 19, 2005).

    - Concluding that the University of New Mexico Hospital's (UNMH) labor resolution lost its grandfathered status as a result of a substantive amendment in 2001 that added arbitration procedures for the hearing of grievances, and that "superseded and replaced in its entirety" the previously enacted policy or policies.
    - Also ruling that there is no abuse of discretion to decline to defer to arbitration when there is no final and binding arbitration before a neutral.
    - Thereafter, concluding that the Hospital violated PEBA by refusing to grant negotiated pay increases and to provide certain information necessary to administer the contract upon request; and concluding that interpreters and dieticians shared a community of interest with and were properly accreted into the existing bargaining unit of nurses and professional employees.
    - Where evidence has been received in the course of litigation without objection, a prohibited practice complaint may be amended to conform to the evidence.
    - Where the terms of a collective bargaining agreement are plainly stated, the intention of the parties
    - must be ascertained from the language of the contract. Absent a finding of ambiguity, provisions of a contract need only be applied, rather than construed or interpreted, and in that case, it is unnecessary and improper to consider witness testimony supporting an alternate interpretation of the contract language. The mere fact that the parties are in disagreement on construction to be given to the contract does not necessarily establish an ambiguity.

40. *In re: United Staff-UNM Employees Local No. 6155 v. UNM,* PELRB Case No. 101-05, Hearing Examiner Report at 11-13, 32-34 (Aug. 17, 2005).

    - An employee was held not to be probationary under UNM personnel regulations where she had worked in the same position doing the same job for almost a year, for six months as a temporary employee and five months as a regular employee; and where the stated purpose of probationary status was to "give the University the opportunity to evaluate" a new employee's performance and to allow the new employee "the opportunity to understand the mission and goals of the University and department and to demonstrate satisfactory performance."

41. *In re: Chamas-Ortega v. Second Judicial District*, 01-PELRB-2004 (Nov. 9, 2004).

    - The PELRB will hear a matter in which the issues have become moot if the matter involves issues of substantial public interest or issues capable of repetition yet evading review.
    - *See Laura Chamas-Ortega v. 2nd Judicial District Court, 7th Judicial Dist*. Ct. Case No. CV-04-7883 (March 10, 2006, J. Kase) in which the District Court reversed as "arbitrary and an abuse of

discretion" the Board's decision in *Chamas-Ortega v. Second Judicial District*, 01-PELRB-2004 (Nov. 9, 2004) holding that PEBA applies to employees of the New Mexico judiciary.

42. *In re: New Mexico Coalition of Public Safety Officers, Local 7911, CWA, AFL-CIO and Town of Bernalillo,* 1 PELRB No. 21 (July 7, 1997).

    - The PEBA definition of "supervisor" is very strict so that while a position may be designated by the employer as supervisory and may in fact constitute a supervisory position under law other than PEBA, "[i]t is not the rank nomenclature (corporal, sergeant, lieutenant, captain, etc.) that is determinative but rather the facts related to whether the individual functions as a supervisor as defined under the Act."
    - Community of interest is determined on a case-by-case basis.

43. *In re: Local 7911, Communications Workers of America and Doña Ana Deputy Sheriffs ' Association, Fraternal Order of Police and Doña Ana County*, 1 PELRB No. 19 (Aug. 1, 1996).

    - Duties performed by a sergeant are not supervisory merely because the County has designated the sergeant position to be supervisory. Otherwise, an employer could, merely by labeling positions as supervisory, exclude whole classes or groups of employees from the Act's coverage, without regard to statutory definitions and the Board's role in adjudicating unit determination issues.
    - Under the PEBA I definition of supervisor, 40% of work time was held to be insufficient to constitute "substantial amount of work time.
    - There is no right to file post-hearing briefs. Rather, the matter lies in the discretion of the hearing examiner. *See* 11.21.2.20 NMAC. **Note:** This rule, which is also relevant to 11.21.3.17 NMAC, provides that when any party requests permission to file a post hearing brief and that request is granted, then the hearing examiner shall permit all parties to file briefs. By this decision the Board has interpreted its rule to mean that if one party's request for submission of a written brief is granted, then all parties shall likewise submit briefs. Permission to submit written briefs in lieu of oral argument remains in the discretion of the Hearing Examiner and the rule should not be read to make the submission of written briefs mandatory upon request of any party.
    - The time limit established in PELRB rules for the issuance of a Hearing Examiner's report are directory rather than mandatory, so its violation does not require Board rejection of the report unless there is a demonstration of prejudice to the appellant by the Hearing Examiner's delay in the issuance of the report.
    - Request for review may not rely on any evidence or argument not presented to the hearing examiner. A five-minute time limitation on oral presentations to the Board as part of a request for Board review of a hearing examiner's decision does not violate due process. Such a time limit is reasonable under the circumstances because the decision to permit oral arguments at this stage of the proceedings resides solely in the Board's discretion, and the parties are afforded an opportunity to fully develop their cases prior to that stage of the proceedings.
    - Any suggestion of improper conduct on the part of a hearing officer is highly inappropriate absent evidence of bias or a showing of some impermissible motive which might lead to an inference of bias and without such evidence the Board will not entertain mere allegations of impropriety.
    - It is not reasonable to produce, on the day of the hearing, fifteen (15) boxes of original documents on which a summary is based. Summaries of evidence may be properly excluded in the hearing examiner's discretion when the opposing party and/or hearing examiner raise issues with the summaries' reliability, accuracy and relevancy and the proponent fail to produce the original documents on which the summaries are based at a "reasonable time and place" prior to the hearing.

44. *In re:* NEA v. Bernalillo Public Schools, 1 PELRB No. 17 (May 31, 1996).

    - The public employer retains the right to designate a position as supervisory in nature, but PEBA

provides the definition for supervisor for purposes of collective bargaining and unit composition, even over a conflicting definition of a local ordinance.

- The PELRB *may* review and invalidate portions of § 26(A) grandfathered ordinances that violate PEBA.
- In enacting § 26 (Repealed, 2020), the legislature did not intend that a public employer could lose grandfathered status in a garden-variety dispute over unit inclusion or exclusion of a particular employee.
- A statewide parent union has standing to bring claims on behalf of a local union.
- There is an affiliation and comity of interest between 'parent' NEA-NM and 'sibling' NEA-Bernalillo, including (1) negating or lessening a potential loss of members and dues; (2) eliminating or minimizing the potential harm flowing from an abridgement or denial of statutory rights; and (3) Seeking to influence the PELRB's interpretation of PEBA.
- A word is properly interpreted out of the statute and its presence did not accord a special meaning, where it was not used elsewhere and the Board finds its inclusion to be the result of awkward drafting.

45. *In re: Communications Workers of America, Local 7911 and Doña Ana County,* 1 PELRB No. 16 (Jan. 2, 1996).

    - The PELRB is not the proper forum to address claims of gender discrimination, even where Union asserts that the Doña Ana County withheld proper rank of lieutenant from a Detention Center training sergeant on the basis of her gender, and that such action interfered with the designation of an appropriate bargaining unit.
    - The ten-day time limit to seek review in a representation matter begins to run on day after receipt of a report and the request for review is timely filed if deposited into the mail on the tenth day. as evidenced by the postmark. *See* 11.21.2.22(A) NMAC.
    - The ten-day time limit to seek review in a representation matter begins to run on day after receipt of a report and the request for review is timely filed if deposited into the mail on the tenth day. as evidenced by the postmark. *See* 11.21.2.22(A) NMAC.
    - The Board is to independently review any recommended decision by a hearing examiner regarding the scope of the bargaining unit. *See* 11.21.2.22(C) NMAC.
    - Under 11.21.2.22(D) NMAC, an un-appealed recommended decision adopted by the Board in a representation matter can constitute binding precedent unlike an un-appealed recommended decision concerning a PPC that is pro forma adopted by the Board under 11.21.3.19(D) NMAC. Reliance on Board-adopted recommended decisions regarding the scope of a bargaining is also warranted under 11.21.2.22(C) NMAC, which requires the Board to independently review any recommended decision by a hearing examiner regarding the scope of the bargaining unit.

46. *In re: McKinley County Sheriffs Association, Fraternal Order of Police* and *McKinley County,* 1 PELRB No.
    15 (Dec. 22, 1995).

    - Vague and unspecific comments of a Board member are insufficient to preserve objection of bias particularly when record shows appellant otherwise granted due process regarding pleadings and oral arguments allowed and considered

47. *In re: United Steelworkers of America, Gila Regional Medical Center and Grant County Board of County Commissioners,* 1 PELRB No. 14 (Nov. 17, 1995).

    - There is no legal agency relationship between a County and its instrumentality or institution such as would make the alleged principal the public employer and appropriate governing body under PEBA where the institution routinely acts independently of the County, disregards County Commission

recommendations and where the County has historically denied legal liability related to the operation of the institution.
- The term “public employer” has also been found to include public facilities run by private contractors if the public governing body retains authority and control over the business, policies, operations and assets of the facility.

48. *In re: New Mexico State University Police Officers' Association and New Mexico State University,* 1 PELRB No. 13 (June 14, 1995).

- Testimony that police sergeants are expected to supervise 100% of the time only reflects the expectation that they will perform supervisory duties whenever called upon to do so. Where, in fact, the expectation only results in the occasional performance or assumption of supervisory or directory roles, the position meets the proviso in the definition for excluding a position from supervisory status.
- A telecommunicator supervisor is excluded from a bargaining unit where he is responsible for the overall supervision of the communications personnel; has sole scheduling responsibility: disciplines and evaluates subordinate telecommunicators or effectively recommends such action; is responsible for other telecommunicators' proficiency training; and there is no evidence presented demonstrating that he does not devote a substantial amount of work time to supervisory duties, or that he performs substantially the same duties as his subordinates.
- The definition of “supervisor” in PEBA is not the same as, or closely similar to, the definition contained in the NLRA because PEBA's definition is delimited by provisos that do not exist in the NLRA definition. Consequently, positions that *may* be supervisory under the NLRA and excluded from the bargaining unit under that act may not be supervisory under PEBA given the difference in definitions.
- Under the PEBA I definition of supervisor, "substantial" was interpreted "according to its plain and ordinary meaning found in Webster's New Collegiate Dictionary' to mean ·' ... considerable in quantity, significantly large.... being largely but not wholly that which is specified," and 25% of work time was held to be insufficient to meet this standard.
- An appropriate bargaining unit of police officers, investigators and telecommunicators does not include administrative secretaries, because there is no clear and identifiable community of interest between the two types of positions to justify varying from the normal designations under PEBA, or the NLRB precedent of treating safety officer and clerical employees separately. Specifically, clerical employees are not certified in law enforcement; they do not wear a uniform; they perform clerical duties; they do not work the same shifts as officers and telecommunicators and are not engaged in the same or even similar skills; the record does not show a great deal of contact between these employees and other members of the proposed bargaining unit; and the clerical employees' impact upon the primary function of the department is tangential.
- An administrative body such as the PELRB does not have the authority to reverse or reconsider its final action unless the legislature expressly granted the Board the power to do so, and the legislature did not do so.
- The Board may, upon review of the whole record, summarily adopt a Recommended Decision regarding unit inclusion or exclusion in the absence of exception, but that part of the Board's Decision will not have precedential effect.

49. *In re: NEA and Jemez Valley Public Schools,* 1 PELRB No. 10 (May 19, 1995).

- The secretary to a school principal who is or will definitely be on the school district’s negotiating team is confidential where she types and files documents related to labor relations matters and has access to the principals’ offices, even if she does not have substantive input in creating the documents typed or filed. On the other hand, the District’s payroll manager is not a confidential employee where she carries out her job functions almost entirely independent of anyone else, any financial information to which she has access is also available to others and while the financial

information she handles may be used by the employer for cost proposals in collective bargaining that use Supervisors does not require further input by the payroll manager.

50. *In re: Firefighters and City of Santa* Fe, 1 PELRB No. 6 (Jan. 19, 1995).

- Notwithstanding their job descriptions or the paramilitary structure of the Santa Fe Fire Department, captains are not supervisors under PEBA, but rather are lead employees with limited authority, whose duties are substantially similar to those of their subordinates including firefighting, and who exercise no independent judgment in directing other employees.
- Decisions from other jurisdictions cannot substitute for performing the community of interest analysis under § 13(A).
- An appropriate bargaining unit of firefighter personnel includes the position of fire captain but not the position of battalion chief, which is a supervisory position.
- That the Santa Fe Fire Department is organized into a paramilitary structure does not create a conflict of interest in having fire captains represented in a bargaining unit with subordinates or destroy the community of interest among these employees.
- Where the parties present decisions from other labor boards in representation proceedings, the fact specific nature of representation proceedings requires that each party's reliance upon such opinions be buttressed with (1) the specific wording from the labor law of the jurisdiction from which the decision issued; (2) how the wording is similar or dissimilar to comparable wording in the New Mexico PEBA; and (3) justification why the PELRB should find such decisions persuasive in the circumstances of the instant proceeding.

51. *In re: AFSCME and Los Alamos County Firefighters v. County of Los Alamos*, 1 PELRB No. 3 (Dec. 20, 1994).

- A union that has been decertified for strike activity cannot be barred from collecting dues.
- Section 10-7D-21(C) of PEBA I (Section 10-7E-21(C) of PEBA II) expressly provided for decertification "for a period of not more than one year." Where a union has engaged in illegal strike activity. Therefore, under PEBA I, a three-year bar on recertification could not be imposed.
- The time limit established in PELRB rules for the Board (or its agents) to conduct a hearing are directory rather than mandatory, so its violation does not deprive the Board of jurisdiction. *See* 11.21.2.18 NMAC.
- A local ordinance does not violate PEBA by requiring a party to elect between proceeding with a grievance and bringing a PPC regarding the same or substantially the same set of facts and circumstances or subject matter.
- The Board will reject exceptions based on technical violations of rules that are not alleged or proven to cause prejudice and that do not affect the outcome, such as issuing a decision more than twenty (20) after the close of a hearing or submission of post-hearing briefs.
- Prohibitions against interference with officials to obtain concessions, and against interference with "normal" negotiation processes are so vague and so broad as to chill employee rights guaranteed by PEBA and the Ordinance, including the right to organize and assist a labor organization.
- Prohibitions in a local ordinance on soliciting union membership during duty hours, and on using county time, property, or equipment for union business without advance approval of the County Administrator, do not promote the principles of the prohibited practice sections of PEBA. Such prohibitions do not exist in PEBA and are best addressed by employer rules and disciplinary procedures that are subject to the rights guaranteed by PEBA and are therefore not a proper subject for a PPC.
- An employer or a labor organization Violates its duty to bargain in good faith by placing unreasonable conditions on bargaining, such as by insisting upon agreement concerning “permissive" subjects of bargaining.

- Because ground rules for negotiation are permissive subjects of bargaining, it is a violation of the duty to bargain in good faith to impose them through a local ordinance as a precondition to bargaining.
- Punitive damages and attorneys' fees are not an appropriate administrative remedy. NMSA 1978, Section 10-7E-9(F) (2020) concerning Board and local board powers and duties.

52. *In re: NEA-Belen and Belen Federation of School Employees and Belen Consolidated Schools,* 1 PELRB No. 2 (May 13, 1994).

    - Signed authorization cards evidence employees' desire for union representation, and the Director's determination of sufficiency of the showing of interest is not subject to question or review. If a group of employees were not interested in representation by a particular union, they could have chosen not to sign the cards, they could have sought representation by a different union, or they could have organized their own independent union. They pursued none of these alternatives, and therefore the only evidence of their desire to be represented by a union is expressed in the showing of interest presented by the particular union seeking to represent them.
    - Occupational groups generally are identified as blue-collar, secretarial clerical, technical, professional, paraprofessional, police, fire and corrections are only advisory, not mandatory.

53. *In re: Santa Fe County and AFSCME,* 1 PELRB No. 1 (Nov. 18, 1993).

    - Interpretations of the NLRA must generally be followed in interpreting substantially similar PEBA provisions.
    - Where alternative impasse procedures are authorized for employers other than the stale, they must still be equivalent to PEBA's procedures.
    - The Board or local board must examine or investigate on a case-by-case basis to determine whether an exclusive representative caused, instigated, encouraged or supported a strike, before the sanction of decertification can be imposed.
    - An existing CBA cannot be automatically voided as a penalty for strike of voiding, without a case-by-case determination of whether the exclusive representative caused, instigated, encouraged or supported a strike.
    - Being a home rule jurisdiction under Article X, Sections 5 and 6 of the New Mexico Constitution does not shield a public employer other than the state from the PELRB's jurisdiction.