STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

PROFESSIONAL FIRE FIGHTERS OF TORRANCE COUNTY, IAFF LOCAL 5441,

Complainant,

v. **PELRB No. 111-24**

TORRANCE COUNTY,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board at its regularly scheduled meeting on August 6, 2024 upon a request by Respondent to set aside the Determination of Default issued by the Hearing Officer on June 28, 2024. Having reviewed the file, hearing argument from the parties, and being otherwise sufficiently advised, the Board voted 3-0 to set aside the Determination of Default.

WHEREFORE, the Determination of Default is hereby set aside, and Staff are directed to proceed with the case in accordance with the Board's Rules.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Signed by: Mark Myers 4F5D60DCB87C42D...

MARK MYERS, CHAIR BY DESIGNATION

8/9/2024

DATE

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

PROFESSIONAL FIRE FIGHTERS OF TORRANCE COUNTY, IAFF LOCAL 5441,
Complainant

v. **PELRB No. 111-24**

TORRANCE COUNTY,
Respondent

DETERMINATION OF VIOLATION BY DEFAULT

THIS MA TIER comes before the Executive Director pursuant to NMAC 11.21.3.11 requiring that the director shall serve on the parties a determination of violation by default, based upon the allegations of the complaint and any evidence submitted in support of the complaint if respondent does not timely file an answer. Upon review of the pleadings and being otherwise sufficiently informed, I find as follows:

1. Professional Fire Fighters of Torrance County, IAFF local 5441(Union) filed a Prohibited Practice Complaint (PPC) on May 31, 2024, alleging that the County had County had violated §§19(A), (B), (D), and (E) through discrimination and retaliation against bargaining unit members for engaging in protected activities. On June 4, 2024, the Union amended its PPC to add additional allegations concerning actions by the County which occurred on June 2, 2024. I found the Amended Complaint to be facially adequate on June 6, 2024.

2. In support of its PPC, the Union provided documentation of the retaliatory discipline imposed upon the bargaining unit members, copies of the Torrance County Policies and the Torrance County Guidelines, and evidence rebutting the County's stated reason for terminating one of the bargaining unit employees.

3. The County filed and Answer to the Amended PPC on June 27, 2024, 16 days after being served with the Amended PPC.

WHEREFORE, I Conclude that Torrance County has violated Sections 19(A), (B), (D), and (E) of the PEBA, and the County is hereby ORDERED to:

- Cease and Desist from all violations of the PEBA;
- Remove all reference to the complained-of discipline from the personnel files of Larry Hughes, Brandon Porch, and Julie Fill;
- Rescind all portions of the social media policy and confidentiality rule that restrain protected concerted activities;

- Post a Notice to all employees for a period of 30 days informing them of the violations of the PEBA and stating what corrective actions have been or will be taken and containing assurances that it will comply with the law in the future;
- Reinstate Larry Hughes to the position he held prior to the complained-of discipline, and provide him backpay and back benefits from the date of his termination in an amount to be determined at a hearing on damages; and
- Provide the Union with damages for the union dues not deducted from Mr. Hughes wages from the date of his termination until his reinstatement in an amount to be determined at a hearing on damages.

It is further ordered that the Status and Scheduling Conference scheduled for July 15, 2024 will proceed as scheduled to discuss the scheduling of the hearing on damages necessitated by this Order.

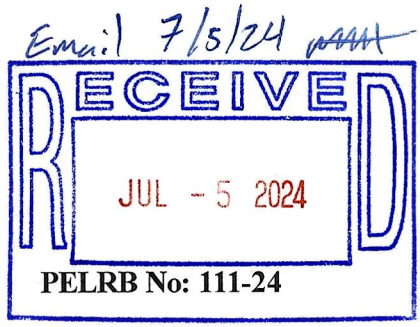
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Thomas J. Griego
Executive Director

Date June 28, 2024

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Email 7/5/24



PROFESSIONAL FIRE FIGHTERS
OF TORRANCE COUNTY, IAFF
LOCAL 5441

Complainant,

v.

TORRANCE COUNTY,

Respondent.

MOTION TO RECONSIDER DETERMINATION OF DEFAULT

Torrance County, through its undersigned attorneys, respectfully moves the Executive Director, or the Public Employee Labor Relations Board, to reconsider and reverse the determination of default issued June 28, 2024. As good grounds for the Motion, Torrance County offers the following arguments and authorities.

A. Entry of Default Here is Contrary to New Mexico Law and Public Policy.

In New Mexico, "...because default judgments are generally disfavored, any doubts about whether relief should be granted are resolved in favor of the defaulting defendant and, in the absence of a showing of prejudice to the plaintiff, causes should be tried upon the merits." Charter Bank v. Francoeur, 2012-NMCA-078, ¶ 11, 287 P.3d 333 (citations omitted); see also Sunwest Bank of Albuquerque v. Roderiguez, 108 N.M. 211, 1989-NMSC-011. "Default judgments are disfavored by the law, as are litigants who attempt to take advantage of an opponent's surprise, mistake, neglect, or inadvertence." Daniels Ins. Agency, Inc. v. Jordan, 102 N.M. 162, 1984-NMSC-116, ¶ 8.

Moreover, when a rule requires notice and hearing on a motion for default judgment, and none are given, the default judgment must be set aside as a matter of law. Gandara v. Gandara, 133 N.M. 329, 2003-NMCA-036, ¶ 10 62 P.3d 1211. The disfavor in which default judgments are held is especially strong when the defendant is the government, and may only be entered if the claimant establishes a claim or right to relief by evidence that satisfies the court. Harvey v. United States, 685 F.3d 939 (10th Cir. 2012) (citations omitted). Under Rule 1-055(E) NMRA, "No judgment by default shall be entered against the state or an officer or agency of the state…unless the claimant establishes the claimant's claim or right to relief by evidence satisfactory to the court."

In the present case, a host of reasons support reversal of the determination of default. First, the determination was issued a day *after* Torrance County filed its answer in the present case. Also, there is no prejudice whatsoever to Petitioner, and Petitioner has not even claimed there was. In fact, Petitioner itself has not even moved for default here, and undersigned counsel's staff was in regular contact with PELRB staff on the very subject of attempting to properly calendar the answer. Next, insofar as there is neglect or mistake on the part of Torrance County or its counsel, it is not clear how much there is, since the undersigned is unable to verify that he was ever served with the Amended PPC, or with the Executive Director's June 6, 2024 Letter regarding the Amended PPC, despite both Petitioner's counsel and the PELRB knowing that the undersigned was representing Torrance County as early as June 4, 2024. (see Exhibit A, June 4 email from Cortney Myers to Matt Huchmala). Petitioner's counsel served Torrance County's human resources director June 4, 2024 by email and also by certified U.S. Mail, which would add 3 days in which to answer under NMAC 11.21.1.10(B), which is how the Petitioner also represented service to the County. If 3 days are added, Torrance County's answer was early. So even assuming the ambiguous dates of

service resulted in a mistake chargeable to the undersigned, for which he is ultimately responsible, there was no neglect; but instead an earnest attempt to file the answer timely.

Next, while it appears there is no PELRB rule requiring notice and hearing before entering a default, there probably should be. Since the PELRB's role concerns governments and their employees, and since default is disfavored generally, and even more so when deployed against the government, a determination of default without notice and an opportunity to be heard, without a request by a party and issued *after* an answer was filed, rises to a violation of due process, is contrary to case law and the Rules of Civil Procedure, and at the very least, contrary to the stated public policy of New Mexico.

But besides all the legal reasons default is inappropriate, there are also practical reasons that relate to public safety. Petitioner wants Larry Hughes reinstated, though he was terminated for improperly administering fentanyl to a patient. Said another way, Mr. Hughes administered fentanyl—a highly addictive and possibly deadly narcotic–in the wrong form. He was not terminated because of his union involvement; another employee was terminated for the very same conduct in 2023. Documentation can be provided if so desired. In any case, Mr. Hughes grieved his termination and the parties were in the process of pursuing arbitration. Petitioner should decide which remedy it is electing in his case.

As the case concerns Julie Fill and Brannon Porch, Petitioner has taken the position that they should not even be investigated because of their union involvement. Ms. Fill has four matters in which it appears she possibly administered improper care, including to a newborn with a possible life-threatening medical conditions whose family Ms. Fill provided with inappropriate medical instructions; possible delay and improper care of a cardiac patient whose family had to instruct Ms. Fill how to use medical devices, where the patient died; possible failure to properly

transport a patient with neurological injuries; possible failure to properly transport a patient who fell with a positive loss of consciousness. The first three issues were received as complaints.

As for Mr. Porch, he is being investigated because a dose of Morphine, a controlled substance apparently in his custody, cannot be accounted for. More details can be provided regarding the conduct of these employees if the PELRB so desires, but until the full facts are established, Torrance County would prefer to protect the employees from any information that may turn out not to be true.

It should be stated that in none of these cases is discipline a foregone conclusion. But any employer, especially a public employer, has a duty to the public it serves to investigate these complaints. It would seem that a public sector union would understand this.

B. Conclusion.

Returning to the issue of default, there is nothing in PELRB rules, case law, Rules of Civil Procedure, or public policy that compels it; rather, the latter three compel the reversal of it. Also, without putting too sharp a point on it, it does not stretch far to say that prohibiting the County from investigating the complaints of misconduct could endanger the public. Torrance County should be allowed to investigate these complaints of misconduct. And accordingly, the County respectfully asks the Director, or the Board, to reverse the determination of default.

Respectfully submitted,

NM LOCAL GOVERNMENT LAW, LLC

By: */s/ Michael I. Garcia*
Michael I. Garcia
Randy M. Autio
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(505) 889-0983
michael@nmlgl.com
randy@nmlgl.com
Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of July 2024 I submitted the foregoing pleading electronically to the Public Employee Labor Relations Board via electronic mail to matt.huchmala@pelrb.nm.gov. I Further CERTIFY that a copy of the foregoing was also transmitted via electronic mail to the following as indicated below:

Daniel J. Sweat
Mooney, Green, Saindon, Murphy & Welch, P.C.
1920 L Street, N.W. Suite 400
Washington, D.C. 20036
tel. 202.783.0010
fax. 202.783.6088
dsweat@mooneygreen.com

/s/ Michael I. Garcia
Michael I. Garcia

From: Huchmala, Matt, PELRB
To: Cortney Myers
Cc: Griego, Tom, PELRB
Subject: RE: [EXTERNAL] IAFF Local 5441 v. Torrance County
Date: Tuesday, June 4, 2024 4:37:12 PM

Ms. Myers:

You have calculated the deadlines correctly. It is best to include both me and the Executive Director in your email communications, just in case.

Feel free to contact me using the information below if you have any questions or concerns.

Matthew Huchmala

Executive Administrative Assistant
Public Employee Labor Relations Board
2929 Coors Blvd NW, Suite 303
Albuquerque, NM 87120
matt.huchmala@pelrb.nm.gov
Ph: 505.831.5422
Fax: 505.831.8820

From: Cortney Myers <cortney@nmlgl.com>
Sent: Tuesday, June 4, 2024 3:26 PM
To: Huchmala, Matt, PELRB <Matt.Huchmala@pelrb.nm.gov>
Cc: dsweat@mooneygreen.com; Michael Garcia <Michael@nmlgl.com>
Subject: [EXTERNAL] IAFF Local 5441 v. Torrance County

Dear Mr. Huchmala and Mr. Griego,

I work for Michael I. Garcia, the attorney for Torrance County, Michael will be representing the County in this matter and is included in this email, michael@nmlgl.com. Also included is Mr. Sweat, counsel for the union.

We received a Prohibited Practices Complaint served by the Professional Fire Fighters of Torrance County, IAFF Local 5441 on May 31, 2024.

I am reaching out to confirm that all computation of time for the deadlines outlined in the Prohibited Practices Proceedings, NMAC 11.21.3, do not include weekends and New Mexico legal holiday as stated in Computation of Time, 11.21.1.8 NMAC. We plan on providing a

response on behalf of Torrance County no later than June 24, 2024.

If my reading of the procedures for this Board is in error, please let me know and I will adjust our deadline accordingly.

It also appears from the instructions on your website that all submissions can communication should be done through Mr. Huchmala's email address. Please let me know if I would also include Mr. Griego's listed email when sending our response.

Thank you for taking time to confirm this deadline and the correct line of communication.

Sincerely,

-Cortney

Cortney Myers
Paralegal
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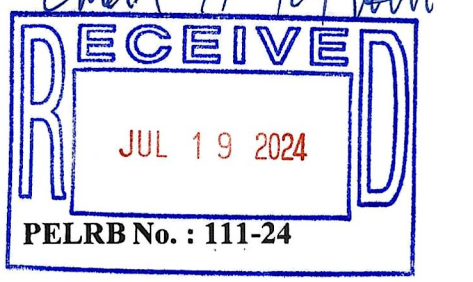
Telephone: (505) 889-0983
cortney@nmlgl.com

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Email 7/19/24



PROFESSIONAL FIRE FIGHTERS OF TORRANCE COUNTY, IAFF LOCAL 5441

Complainant,

vs.

TORRANCE COUNTY,

Respondent.

COMPLAINANT'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO RECONSIDER DETERMINATION OF DEFAULT

Complainant Professional Fire Fighters of Torrance County, IAFF Local 5441 ("Local 5441" or "Union"), by and through its undersigned counsel, respectfully submits this Response in Opposition to the Motion to Reconsider Determination of Default filed by Respondent, Torrance County.

PRELIMINARY STATEMENT

Reversing the Executive Director's Order for Determination of Violation by Default ("Order") is inappropriate. Generally, before setting aside an entry of default, Respondent must demonstrate both that they have good cause for failing to timely answer and that they have a meritorious defense. *Franco v. Fed. Bldg. Serv.*, 1982-NMSC-084, ¶ 5, 648 P.2d 791, 792. Although the New Mexico Supreme Court has held that defaults are not favored and cases are best decided on the merits, *Id.* at ¶ 4, a party's failure to satisfy both elements generally prohibits the

setting aside a default. *See Chase v. Contractors' Equip. & Supply Co.*, 665 P.2d 301, 305 (Ct. App. 1983).

Respondent cannot show good cause for their failure to timely file.[1] The administrative rules outlining practice before the New Mexico Public Employee Labor Relations Board ("PELRB") are clear and unambiguous, and Respondent was given full notice by the PELRB as to the date any answer was due. Willful disregard for deadlines and procedural rules when a party has full notice does not constitute good cause for setting aside a default. *See DeFillippo v. Neil*, 2002-NMCA-085, ¶ 29, 51 P.3d 1183, 1190. Furthermore, Respondent insinuates that Complainant has acted to "take advantage" of the Respondent by not properly serving the amended PPC. As shown below, Complainant properly served and attempted to learn the name of Respondent's counsel from Respondent to ensure that Respondent's counsel would be properly served. Looking at the facts in a light most favorable to Respondent, good cause is still absent because a party's confusion or uncertainty toward deadlines or rules of practice do not constitute good cause absent some other unusual factor. *See Wakeland v. N.M. Dep't of Workforce Sols.*, 2012-NMCA-021, ¶ 25, 274 P.3d 766, 773 ("Simply being confused or uncertain … is not the sort of unusual circumstance beyond the control of a party that will justify an untimely filing."). Finally, Respondent cannot show good cause by alleging that their due process rights have been violated. *Katzen Bros., v. U.S. E.P.A.*, 839 F.2d 1396, 1400 (10th Cir. 1988) (holding that when an agency employs default procedure reasonably allowing for notice and affording a reasonable time response, due process is not violated).

[1] Because "good cause" to set aside a default in the New Mexico requirement is identical to "good cause" to set aside a default under the federal rule, New Mexico courts look to federal case law for guidance. *Franco*, 648 P.2d at 792.

Furthermore, Respondent cannot show any meritorious defense requiring the PELRB to set aside the Executive Director's Order. To establish a meritorious defense, a party "must assert a valid legal theory and allege with some particularity facts that would support that legal theory; such facts are to be taken as true, but in order to reopen the judgment and proceed to trial, the factual issues presented must be genuine." *Magnolia Mountain LP v. Ski Rio Partners, Ltd.*, 2006-NMCA-027, ¶ 17, 139 N.M. 288, 294 131 P.3d 675, 681. Respondent does not present any genuine, underlying facts to support a meritorious defense in either of its pleadings. Second, Respondent posits an exhaustion of remedies argument which fails because the rights of public employees are statutory, putting them under the exclusive jurisdiction of the PELRB. *See* NMSA 1978 10-7E-5; NMSA 1978 10-7E-19.

Accordingly, the PELRB should deny Respondent's Motion to Reconsider Determination of Default.

ARGUMENT

I. The Executive Director's Order Should not be Reversed Because the Rules are Clear and Unambiguous, Respondent Had Full Notice, and No Due Process Rights Were Violated.

Respondent first asks the PELRB to overturn the Executive Director's Order due to a "host of reasons" that allegedly demonstrate good cause for their untimely answer. Resp't's Mot. Recons. 2. But overturning the Order is inappropriate here, because (1) Respondent's failure to follow the PELRB's clear and unambiguous rules—coupled with their failure to present an actual, genuine reason for their untimely filing—is willful disregard, (2) Respondent's insinuation that Complainant failed to serve them the amended prohibited practices charge falls flat upon examination of demonstrable facts, and (3) no due process rights were violated by the Executive

Director's Order. Reversing the Executive Director's Order would only undermine the PELRB's rules and practice while providing a period of extended cover for an employer's unlawful conduct.

1. The PELRB's Rules are Clear and Unambiguous

The willful failure to follow the PELRB's clear and unambiguous rules cannot be considered good cause for reversing the Executive Director's Order. Default was mandated because Respondent failed to file a timely answer. NMAC 11.21.3.10 states that "[w]ithin 15 days after service of a complaint, the respondent shall file with the director and serve upon the complainant its answer." "If a respondent fails to file a timely answer, the director **shall** serve on the parties a determination of violation by default." NMAC 11.21.3.11 (emphasis added). NMAC 11.21.1.8 spells out how days are calculated for filings.

The purpose of these rules is to "establish fair and expeditious procedures that further the purposes of [the PEBA]" and "protect the public interest by assuring, at all times, the orderly operation and functioning of the state and its political subdivision." NMAC 11.21.1.6. Generally, neither inadvertence or negligence alone nor ignorance of the rules will support a finding of good cause. *In re Kirkland*, 86 F.3d 172, 176 (10th Cir. 1996); *Lozano v. City of Roswell*, No. 09-cv-158 MCA/WPL., 2009 BL 279998 at *2 (D.N.M. Dec. 28, 2009); *see State v. Baca*, 2016 N.M. App. Unpub. LEXIS 41, at *4-5 (Ct. App. Feb. 4, 2016) (finding no good cause to reconsider untimely motion when motion was not filed within the twenty days required by rule).

Respondent claims that their answer was early because Complainant's counsel served Respondent by email and certified U.S. Mail on June 4, 2024, which they allege added 3 days to the deadline to answer under NMAC 11.21.1.10(B). Resp't's Mot. Recons. 2. But this claim only demonstrates Respondent's gross negligence with respect to the PELRB's rules and is not good cause for failing to timely answer. NMAC 11.21.1.10(B) concerns instances where service is only

conducted by U.S. Mail. NMAC 11.21.1.24, concerning service of papers upon parties, explicitly states:

> Service of papers upon parties may be made by personal delivery by depositing in United States mail, first class postage prepaid, by facsimile ("fax") submission or by electronic submission and, **by the next scheduled work day after sending a "fax" or electronic submission, either personally delivering the document or depositing it in first class mail, in which case the date of "fax" or electronic submission shall be the date of service.** (emphasis added)

Under these rules, it is clear and unambiguous that the timeline to answer began the day Complainant electronically served Respondent. Courts have upheld defaults on the sole ground that no timely answer was filed when there is a specified deadline in a rule. *See, e.g.*, *U.S. v. Tracts 10 & 11*, 51 F.3d 117, 120 (8th Cir. 1995) (holding that default was proper in a case where party's failure to timely answer in time according to rule's unambiguously stated time requirements). Any "ambigu[ity]" towards "dates of service" as claimed by Respondent is bluster. Resp't's Mot. Recons. 2-3. Therefore, such disregard for deadlines supports a conclusion that Respondent's untimely answer was culpable and cannot be good cause for reversing the Executive Director's Order.

Respondent claims they were in "regular contact with the PELRB on the very subject of attempting to properly calendar the answer." Resp't's Mot. Recons. 2. Viewing this in a light most favorable to Respondent, Respondent was confused or uncertain of the due date according to the rules. Yet such confusion or uncertainty does not constitute good cause. *See Wakeland*, 274 P.3d at 773. Because the rules are clear and unambiguous and Respondent cannot offer good cause for their late filing, the PELRB should deny Respondent's Motion.

2. Respondent Possessed Full Notice of the Amended Prohibited Practices Complaint

Respondent claims it is "not clear" how much "neglect or mistake on the part of Torrance County or its counsel" is present because the undersigned is "unable to verify that he was ever served with the Amended PPC." Resp't's Mot. Recons. 2. Respondent insinuates some mischief by Complainant because Complainant served Respondent on June 4, 2024—but not its counsel—at a time when Respondent's counsel had entered its appearance by. *See Id.* Put simply, respondent is misstating the sequence of events on June 4, 2024. On June 4, 2024, at 1:02 PM Eastern Time, Complainant's undersigned counsel emailed Respondent's Human Resource Director, Rochelle Wallace, asking which dates offered by the PELRB were acceptable for a status conference. This email also asked the name and contact information of any counsel Respondent has retained. A copy of this email is attached as Ex. 1. Complainant received no response from Respondent. At 3:55 PM Eastern Time, Complainant's undersigned counsel emailed Respondent's Human Resource Director, Rochelle Wallace, a copy of the amended prohibited practices complaint followed by depositing the amended prohibited practices complaint in first class U.S. Mail under the service rules stated in NMAC 11.21.1.24. Once again, Respondent did not reply. A copy of this email is attached as Ex. 2. Respondent's counsel, Cortney Myers, emailed Complainant at 5:26 PM Eastern Time informing Complainant of their appearance. *See* Ex. A to Resp't's Mot. Recons.

Respondent's failure to provide their counsel the amended prohibited practices complaint does not suffice as good cause. Upon service, Respondent was beholden to the PELRB's rules for timely answering. NMAC 11.21.3.10. Assuming the facts most favorable to Respondent, it is likely that Respondent simply did not provide the amended prohibited practices complaint to their counsel upon receipt. Understandably, this may have caused confusion for Respondent's counsel regarding deadlines and status of the case. In any event, this fact does not rise to the level of good

cause. *See, e.g., Admiral Home Appliances, a Div. of Magic Chef, Inc. v. Tenavision, Inc.*, 585 F. Supp. 14 (D.N.J. 1982), *judgment aff'd without opinion*, 735 F.2d 1347 (3d Cir. 1984) ("Corporation was on full notice of the service of the summons and complaint in a breach-of-contract action and its failure to timely transmit the documents to its attorneys for response was not a matter of mistake or inadvertence but of arrogance and disregard of potential consequences and, hence, no good cause was shown for setting aside the default."). As the record demonstrates that Respondent was properly served and put on notice under the PELRB's rules before Complainant's notice of the name and address of Respondent's counsel, no good cause for disturbing the entry of default can be asserted by Respondent.

3. Respondent's Due Process Rights are not Violated by Entry of Default

The Respondent believes that the Executive Director's Order violates due process requirements. The New Mexico Supreme Court has made clear that the fundamental requirements of due process in an administrative context are reasonable notice and opportunity to be heard and present any claim or defense. *Rayellen Res. v. N.M. Cultural Props.*, 2014-NMSC-006, ¶ 20, 319 P.3d 639, 647. Both parties received letters electronically and by U.S. Mail from the PELRB—dated May 31, 2024, and June 3, 2023—affirming the adequacy of the Complainant's prohibited practices complaint. These letters also provided explicit instructions stating that the "County is required to file an answer within 15 workdays from receipt of the complaint" and provided clear notice that "[f]ailure to file an answer to the [complaint], however, could result in the entry of a finding by default." Respondent was given reasonable notice and an opportunity to be heard and present any claim or defense within fifteen days. Due process does not require an agency to afford a petitioner all elements of a traditional judicial proceeding. *N.M. Dep't of Workforce Sols. v. Garduño*, 2016-NMSC-002, ¶ 21, 363 P.3d 1176. 1182. Moreover, PELRB's rules are not a

deviation from established New Mexico administrative agency practice. Various other New Mexico agencies operate under analogous rules requiring default for failure to adhere to agency rules. *See, e.g.,* NMAC 12.18.7.8(D) (requiring default for failure to appear at licensing hearing under the New Mexico Small Loan Act of 1955); NMAC 15.4.12.17 (requiring default when a respondent fails to timely answer a complaint before the New Mexico Gaming Control Board).

II. The Executive Director's Order Should not be Reversed Because Respondent Fails to Present a Meritorious Defense.

Respondent claims that there are practical reasons for setting aside the default premised upon public safety. However, none of these practical reasons can be classified as a meritorious defense because (1) Respondent fails to show genuine underlying facts in either of its pleadings and (2) Respondent relies on a "choice of remedies" defense that possesses zero merit. Consequently, even if the PELRB were to determine that Respondent possessed good cause for their untimely filing, the PELRB should not reverse the Executive Director's Order because Respondent has failed to present a meritorious defense in its pleadings.

A. Respondent Presents no Underlying Facts in Their Pleadings

Respondent fails to show genuine underlying facts in its pleadings supporting a meritorious defense, a requirement to have a default set aside. Respondent's untimely answer simply states that they were "not required to answer or otherwise respond" to each of Complainant's allegations while their motion acknowledges that they cannot speak to the facts they claim with any veracity. Consequently, PELRB should deny Respondent's instant motion.

To establish a meritorious defense, a party "must assert a valid legal theory and allege with some particularity facts that would support that legal theory; such facts are to be taken as true, but in order to reopen the judgment and proceed to trial, the factual issues presented must be genuine." *Magnolia Mountain LP v. Ski Rio Partners, Ltd.*, 2006-NMCA-027, ¶ 17, 139 N.M. 288, 294 131

P.3d 675, 681. "A litigant attempting to show a meritorious defense is subject to a heightened pleading requirement." *Id.* at ¶ 15.

In this motion, Respondent fails to show any genuine underlying facts for any defense regarding Complainant's allegation centering on Union Officers Julie Fill and Brannon Porch, choosing only to rely on a number of alleged "facts" continually qualified with "possible" or "possibly." The Complainant alleges in their amended prohibited practices complaint that two days after serving the initial prohibited practices complaint, Julie Fill and Brannon Porch were suddenly—and without any warning—placed on administrative leave pending a number of investigations concurrently opened against them. As for the legal conclusions proffered by Respondent for these retaliatory acts, Respondent itself admits that its underlying facts are not actually facts by stating, "Torrance County would prefer to protect the employees from any information that may turn out not to be true." Resp't's Mot. Recons. 4. Respondent simply claims that the PELRB should let them continue their retaliation, because they have an amorphous "duty" to the public to do that. All the while, because of Respondent's retaliatory acts, there is now currently only one operational ambulance serving the 3,346 square miles of Torrance County at any given time.

There are no underlying facts for a meritorious defense to be found in Respondent's answer either. The answer contains only refusals to answer any allegation or provide any fact refuting the amended prohibited practices complaint. In defense, Respondent claims it is not required to answer because Complainant's prohibited practices complaint was not adequately plead.

Respondent fails to present a meritorious defense sufficient to support a setting aside of a default by refusing to present any underlying facts in their answer. *Sunwest Bank of Albuquerque v. Roderiguez*, 109 N.M. 211, 214 (1989) (holding that allegations proffered in the answer or in

the motion must be more than bare legal conclusions that lack factual support, instead countering the cause of action by setting forth relevant legal grounds substantiated by credible factual basis). Contrary to Respondent's assertions, both the original and amended prohibited practices complaints filed by Complainant were adequately plead under the PELRB's standard. *See AFSCME v. City of Rio Rancho*, PELRB Case No. 159-06, Hearing Examiner's letter decision on City's Motion to Dismiss (Nov. 17, 2006) ("[b]ased on the similarity between PELRB and New Mexico Rule of Civil Procedure 1-008(A), it is apparent that PELRB rules, like New Mexico Rules of Civil Procedure, call for a notice pleading standard in testing the legal sufficiency of the complaint"); *see also Garcia v. Coffman*, 1997-NMCA-092, ¶ 11, 124 N.M. 12, 946 P.2d 216 (under the notice pleading standard, "it is sufficient that [the] defendants be given only a fair idea of the nature of the claim asserted against them sufficient to apprise them of the general basis of the claim") (internal quotations and citation omitted).

Courts have determined that parties fail to assert a meritorious defense sufficient to set aside a default entry when their responsive pleadings are merely a recitation of general denials without underlying facts. *See National Restaurant Ass'n Educ. Foundation v. Shain*, 287 F.R.D. 83 (D.D.C. 2012) (holding that corporate defendants failed to assert meritorious defense in their motion to set aside default in a trademark infringement action when they merely made a general denial of all allegations in plaintiff's complaint and supplied no factual basis for their laundry list of affirmative defenses). Considering Respondent presented no genuine underlying facts in their pleadings and recognizing that they cannot establish the veracity of their own underlying facts against Complainant, the PELRB should not disturb the Executive Director's Order, because Respondent failed to assert a meritorious defense.

B. Respondent's "Choice of Remedies" Defense is Contrary to Established PELRB Doctrine

Respondent's "choice of remedies" defense lacks merit and cannot be grounds for reversing the Executive Director's Order. The Respondent presents the "choice of remedies" defense to shield their termination of Union Officer Larry Hughes. Resp't's Mot. Recons. 3. Respondent alleges that Complainant is prevented from seeking remedial action before the PELRB, because Larry Hughes is individually pursuing a remedial action under the Torrance County Personnel Handbook. This defense is implausible and cannot serve as a basis for overturning the Executive Director's Order. The claims brought before PELRB are brought pursuant to the State's Public Employee Bargaining Act, over which the PELRB is the exclusive administrative arbiter. The PELRB has long contended that exhaustion is not required for any claim for which deferral to grievance or arbitration would be inappropriate in the first instance. *AFSCME, Council 18 and Andrew Gilmore v. Luna County* (holding that an arbitration process under the County's personnel ordinance is not a proper subject for deferral). Likewise, the Torrance County personnel handbook's arbitration process is not an appropriate replacement for a PELRB cause of action because a prohibited practices complaint concerns non-contractual, statutory rights such as retaliation, discrimination, or interference under the Act and over which the PELRB has exclusive jurisdiction. Therefore, the allegations brought forth by Complainant are not proper subjects for determination under the County's personnel handbook. Therefore, Respondent's "choice of remedies" defense cannot constitute a meritorious defense.

CONCLUSION

For the reasons stated above, Respondent cannot show either good cause or a meritorious defense. As a result, the PELRB should deny Respondent's Motion to Reconsider Determination of Default.

Respectfully submitted,

Professional Fire Fighters of Torrance County,
IAFF Local 5441

By: 

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STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

PROFESSIONAL FIRE FIGHTERS OF
TORRANCE COUNTY,
IAFF LOCAL 5441

PELRB No. : 111-24

Complainant,

vs.

TORRANCE COUNTY,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Complainant's Response in Opposition to Respondent's Motion to Reconsider Determination of Default was served on the following representatives of Respondent via email and U.S. Mail on July 19, 2024.

Michael I. Garcia
6121 Indian School Road NE, Ste. 202
Albuquerque, NM 87110
michael@nmlgl.com

Randy M. Autio
6121 Indian School Road NE, Ste. 202
Albuquerque, NM 87110
randy@nmlgl.com

Daniel J. Sweat

EXHIBIT 1

From: Daniel Sweat
To: rwallace@tcnm.us
Subject: Status and Scheduling Conference - PELRB 111-24
Date: Tuesday, June 4, 2024 1:02:00 PM
Attachments: 111-24 Petition adequate Ltr 6-3-24.pdf

Rochelle:

Considering the PELRB's determination that the complaint filed on behalf of IAFF Local 5441 is adequate, we must find a mutual date for conference. I have an arbitration June 24. However, I can make any time on June 25 or June 26 work. Is there a time on either of those days that works for you all?

If you all have retained counsel in this matter, please provide me their contact information so that I can reach out/coordinate with them.

Daniel J. Sweat (he/him)
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Washington, D.C. 20036
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dsweat@mooneygreen.com
*Admitted in DC and MD

EXHIBIT 2

From: Daniel Sweat
To: rwallace@tcnm.us
Subject: PELRB 111-24 Amended Complaint
Date: Tuesday, June 4, 2024 3:55:00 PM
Attachments: Amended Charge service.pdf

Hello:

Please find attached a copy of PELRB 111-24 as amended and refiled today. I've also mailed it to you all via certified mail.

This amended complaint has no effect on the fact that we must still determine a mutually acceptable date for the conference.

Daniel J. Sweat (he/him)
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