

2018 ANNUAL REPORT

New Mexico Public Employee Labor Relations Board

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**STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

**2018
ANNUAL REPORT**

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This report was prepared by the staff of the New Mexico Public Employee Labor Relations Board under its authority to “conduct studies on problems pertaining to employee-employer relations” found in NMSA §10-7E-9(2) and to keep the Board members informed regarding the results and trends surrounding its business. By publication of this report the Board seeks to provide a public service disseminating general information concerning its functioning and its role in New Mexico’s public employee labor relations.

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INTRODUCTION

When its first statewide public employee collective bargaining law was enacted in 1992, NMSA §§ 10-7D-1 *et seq.* (PEBA I), New Mexico had already experienced decades of public sector collective bargaining, primarily at local levels. After PEBA I expired in 1999 due to its “sunset clause,” the Legislature enacted a second and very similar act, NMSA §§ 10-7E-1 *et seq.* (PEBA II), in 2003. In the interim years between the two Acts a number of public employers continued to permit collective bargaining under their own ordinances or resolutions, some of which predated PEBA I and some of which were created and approved under PEBA I.

As a consequence of this history, New Mexico’s PEBA contains a number of provisions designed to protect pre-existing local boards, bargaining units, bargaining representatives and collective bargaining agreements (CBAs). The creation of new local boards is also authorized.

This report explains the role of the New Mexico Public Employee Labor Relations Board (PELRB) in enforcing the rights of public employees to organize and collectively bargain or to refrain from forming, joining or assisting a union and in ensuring the right of local public employers to set up new local boards or to continue operating under grandfathered local ordinances.

The PELRB encourages the peaceful resolution of public employee collective bargaining disputes thereby promoting its statutory objective of “promoting harmonious and cooperative relationships between public employers and public employees” while simultaneously protecting the public interest by ensuring “the orderly operation and functioning of the state and its political subdivisions”. The rate at which cases brought to the Board are settled reflects the Board’s favoring resolution of public employee collective bargaining disputes ahead of litigation where possible. For example, during this reporting year, six of the 13 PPCs initiated during 2018 that were not summarily dismissed (46%), were resolved by agreement.

The Board’s adjudicatory function serves the critical purpose of resolving allegations of discrimination or retaliation because of an employee’s involvement in union activities or refusing such activities, discriminating against a public employee with regard to union membership because of race, color, religion, creed, age, sex or national origin or because of the employee’s non-membership in, or opposition to the union, domination or interference in the formation, existence or administration of a labor organization and refusing to bargain collectively in good faith. The Board also adjudicates claims that either labor or management have refused or failed to comply with the Public Employee Bargaining Act or board rule; or have refused or failed to comply with a collective bargaining agreement.

The data compiled by the Board during this reporting period indicate that most of the issues requiring adjudication involve the obligation to “bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties” (8 of 16) or questions concerning an employer’s interference with or coercion of a public

employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act (5 of 16). *See*, NMSA §§10-7E-17(A)(1), 19(B), (C) and (F) and § 20(C).

Representation Cases

Under the PEBA, employees may organize in units represented by labor organizations of their own choosing for the purpose of bargaining collectively with their employers concerning wages, hours and other terms and conditions of employment. One of the Board's major functions is to determine the appropriateness of those collective bargaining units based on guidelines established in PEBA and relevant case law. The Board also determines whether the employees in an appropriate bargaining unit wish to be represented by a particular labor organization. This is principally done through secret ballot elections supervised by the Board. Employee representatives seeking to represent a bargaining unit file a petition with the Board that must be supported by at least 30 percent of the employees in the unit.

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

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

Just as employees may petition the Board for recognition of a collective bargaining representative, they may also seek decertification of a previously recognized representative. A member of a labor organization or the labor organization itself may initiate decertification of a labor organization as the exclusive representative if 30 percent of the public employees in the bargaining unit file a petition for a decertification election. *See* PEBA §19. Decertification elections are held in a manner substantially the same as that for certification. There was one Petition for decertification of a bargaining unit filed during the reporting period – *Jennifer Poling & NEA-Clayton*; PELRB 307-18. Petitioner prevailed over the union, winning a majority of support for decertifying the unit of employees in the Clayton School District. Related to, but distinct from decertification are those instances in which a union “disclaims” its interest in continuing to represent a unit this Board had previously certified. Three disclaimers of interest were filed in 2018:

- 1) *AFSCME Council 18 & City of Moriarty and the Moriarty Dep't. of Pub. Safety*; PELRB 302-18;
- 2) *AFSCME and Hidalgo County*; PELRB 310-18;
- 3) *AFSCME, Local 3103 and San Miguel County*; PELRB 311-18.

The Board's rules provide a procedure for parties to petition the Board for amendment of certification to reflect changes such as a change in the name of the exclusive representative or of the employer, or a change in the affiliation of the labor organization. (NMAC 11.21.2.35). The Board has also established procedures to clarify the composition of an

existing bargaining unit where the circumstances surrounding the creation of an existing collective bargaining unit are alleged to have changed sufficiently to warrant a change in the scope and description of that unit, or a merger or realignment of previously existing bargaining units represented by the same labor organization, (NMAC 11.21.2.37) and for the accretion of unit employees who do not belong to an existing bargaining unit, but who share a community of interest with the employees in the existing unit. (NMAC 11.21.2.38) The accretion procedure is frequently used to allocate newly created positions to appropriate bargaining units or to merge two or more existing units.

Please refer to the Operations Summary herein for details on the representation issues brought to the Board for resolution during the 2018 reporting period.

Approval of Local Boards

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

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

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

By reference to the Operations Summary herein the reader will see that as in the prior reporting period, there were no petitions for approval of a local boards filed during the 2018 reporting period.

Prohibited Labor Practice Cases

The Board enforces and protects the rights guaranteed both public employers and employees under PEBA through the investigation and adjudication of charges of prohibited labor practice charges (PPC). The board has the power to enforce provisions of the Public

Employee Bargaining Act through the imposition of appropriate administrative remedies. (NMSA §10-7E-9).

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

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

A party may obtain Board review of the report and recommended decision by filing a notice of appeal within ten (10) days following service of the hearing officer's report, whereupon the Board will either determine an appeal on the papers filed or, in its discretion, may also hear oral argument. The Board's Decision may adopt, modify, or reverse the hearing examiner's recommendations or take other action it may deem appropriate such as remanding the matter to the hearing examiner for further findings or conclusions. Even when no appeal to the Board is taken the hearing examiner's decision is transmitted to the board which may *pro forma* adopt the hearing examiner's report and recommended decision as its own. In that event, the report and decision so adopted shall be final and binding upon the parties but shall not constitute binding board precedent. (NMAC 11.21.3.19) The Board is empowered to remedy PPC's through the imposition of appropriate administrative remedies (PEBA §9). The Board has authority to petition the courts for enforcement of such orders. *See*, NMSA §23.

Please refer to the Operations Summary herein for details on the prohibited labor practices brought to the Board for resolution during the 2018 reporting period.

Impasse Resolution Cases

The Board has limited powers related to bargaining impasses between employers and employees under the Act, acting primarily as a monitor and facilitator of mediation and arbitration performed by other entities. Similar but distinct procedures apply to the State and its employees and employees of other political subdivisions of the state or special districts under the PEBA. Although both procedures call for mediation of bargaining impasses under the auspices of the Federal Mediation and Conciliation Service impasse procedures followed by the state and exclusive representatives for state employees are employed within a specific time frame:

(1) If an impasse occurs by October 1, during negotiations required to have begun in June of any particular bargaining year, either party may request mediation services from the Board. The Board does not provide those mediation services itself but a mediator from the Federal Mediation and Conciliation Service is assigned by the board unless the parties agree to another mediator;

(2) The mediator provides services to the parties until the parties reach agreement or the mediator believes that mediation services are no longer helpful or until November 1, whichever occurs first;

(3) If the impasse continues after November 1, the matter is referred to arbitration under the auspices of the FMCS. The arbitrator's decision shall be limited to a selection of one of the two parties' complete, last, best offers and is "final and binding" as that term is understood under Section 17 of the PEBA and the Uniform Arbitration Act [44-7A-1 NMSA 1978].

The impasse procedure followed by all other public employers and exclusive representatives is similar in that, if an impasse occurs, either party may request from the board or local board that a mediator be assigned to the negotiations and unless the parties agree on a mediator one from the FMCS is assigned. The specific time frame for requesting bargaining, declaring impasse and proceeding to arbitration applicable to the state as an employer are not applicable to public employers other than the state. If impasse continues after a thirty-day mediation period, either party may request arbitration from the FMCS. As under the process followed by the State as an employer the arbitrator's decision shall be limited to a selection of one of the two parties' complete, last, best offers and is "final and binding" as that term is understood under Section 17 of the PEBA and the Uniform Arbitration Act [44-7A-1 NMSA 1978].

The Board's role in the impasse procedure is limited to monitoring the parties' progress through mediation and arbitration to the extent the parties self-report that progress. It takes no active role in that process. During this reporting period staff have been monitoring impasse in negotiations for the State employee contracts and in the City of Espanola.

Rulemaking Activity

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

The Board undertook amendment to its rules to effect electronic filing and service during the prior reporting period. Approval of those rule changes was delayed due to the passage of HB 58 changing the process for agencies to follow. The Board was able to complete approval and publication in 2018 adding a definition of the term "Delivering a copy" as it pertains to service or filing of pleadings or other documents to include sending a copy by "electronic submission" in accordance with additional changes made to NMAC 11.21.1.10 or 11.21.1.24.

The term "electronic submission" was defined as meaning "the filing of a pleading or other document with the Board using the electronic system established by the PELRB" and the

phrase “On a form prescribed by the director” pertaining to the filing of documents with the Board was defined so as to include the electronic data submitted by use of any interactive form posted for that purpose on the board’s website.

The Board re-defined the term “probationary employee” so as to make clear that solely for the purpose of determining rights under the PEBA non-state employees a public employee may not be considered to be a probationary employee for more than one year after the date he or she is hired by a public employer. The term “Unit clarification” was changed to make clear that the term includes a change in union affiliation.

As stated the goal of the rule changes made in 2018 was to permit electronic filing and service. The foregoing changes were made in order to accommodate the changes necessary to NMAC 11.21.1.10 regarding filing with the director or the board and to NMAC regarding service. Those rules were modified as follows:

11.21.1.10 FILING WITH THE DIRECTOR OR THE BOARD: To file a document with the director or the board, the document may be either hand-delivered to the board’s office in Albuquerque during its regular business hours, or sent to that office by United States mail, postage prepaid, or by the New Mexico state government interagency mail or by sending a copy by facsimile or electronic submission. The director will be responsible for recording the filing of documents to be filed with the board, as well as documents to be filed with the director.

A. Time of filing: A document will be deemed filed when it is received by the director. For hand-delivered or mailed documents the date and time stamp affixed by the receiving board agent will be determinative. For faxed or electronically transmitted documents the time and date affixed on the cover page or the document itself by the board’s facsimile machine or receiving computer will be determinative. ~~Documents sent to the board via facsimile (“fax”) transmission will be accepted for filing as of the date of transmission only if an original is filed by personal delivery or deposited in the mail no later than the first work day after the facsimile is sent.~~

B. Additional time after service by mail: Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three (3) days shall be added to the prescribed period. Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three (3) days. If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday.

C. Signatures: Party’s or their representatives filing electronically thereby certify that required signatures or approvals have been obtained before filing the document. The full, printed name of each person signing a paper document shall appear in the electronic version of the document. All electronically filed documents shall be deemed to contain the filer’s

signature. The signature in the electronic document may represent the original signature in the following ways:

(1) by scanning or other electronic reproduction of the signature; or

(2) by typing in the signature line the notation “/s/” followed by the name of the person who signed the original document.

D. Demand for original: A party shall have the right to inspect and copy any pleading or paper that has been filed or served by facsimile or electronic submission if the pleading or paper has a statement signed under oath or affirmation or penalty of perjury.

11.21.1.24 SERVICE: Service of papers upon parties may be made by personal delivery or by depositing in United States mail, first class postage prepaid, or by both facsimile (“fax”) 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. Each document served shall be accompanied by a signed certification stating the name and address of each person served and the date and method of service. The certification may be placed on the document served.

A. The Board may serve any document by electronic submission to an attorney or party or its representative under this rule.

There were other grammatical or punctuation changes of minor significance made as well and the sections were re-numbered to reflect the substantive additions and deletions.

2018 OPERATIONS SUMMARY

28 cases were filed in 2018, six fewer than in 2017 – a 29% decrease from the average over the preceding 5 years. Of those, 11 were representation cases (including one petition for decertification) compared with 10 filed in the preceding reporting period. No local labor board approval petitions were submitted. 17 Prohibited Labor Practice Complaints were filed in 2018 compared to 25 the year prior. The fewer filings suggests that 2018 was a period of relative labor peace and that union resources were allocated more to organizing and bargaining rather than in litigation before the Board.

Of the 10 Representation Petitions filed in 2018, three involved clarification of bargaining units to remove eliminated positions and to recognize position title changes or in one case, to change the name of the recognized bargaining representative. There were two accretion petitions filed during the reporting period. Those Representation Petitions are detailed below:

In our case *In re: AFSCME, Council 18 & N.M. Children, Youth and Families Department*; PELRB 301-18 the parties jointly petitioned the PELRB to amend the Certification of the Exclusive Representative issued in 2012 for a unit of Teachers and Basic Education Teachers

who work for the Juvenile Justice Services Division of CYFD. The Joint Petition was filed in order to identify the jobs in the bargaining unit by job classification and number rather than working title, in order to make clear that all subject matter teachers are included in the unit but Registrars, Speech and Language Pathologists that are not now included were never intended to be included in the original Certification.

In *AFSCME, Council 18 and City of Moriarty Police Dep't.*, PELRB No. 302-18 the Board recognized the union's disclaiming its interest as the bargaining unit representative for the City of Moriarty Police Department employees. The Board has no formal procedure for union disclaimers but has developed a practice patterned after that followed by the NLRB, adding Notice and an opportunity to object.

Cibola County filed a Petition to Amend the PELRB's Certification of the bargaining unit represented by the New Mexico Coalition of Public Safety Officers (NMCP SO). The Union did not oppose the Petition because after the County closed its Detention Center the positions formerly employed by the County at that facility and included within the original 2014 certified bargaining unit, no longer exist. Dispatchers and Dispatch Supervisors represented by NMCP SO remain in the represented amended bargaining unit. See *In re: Cibola County and New Mexico Coalition of Public Safety Officers*; PELRB 303-18.

In *AFSCME, Local 3103 and San Miguel County*; PELRB 304-18 the union sought to accrete the position of Animal Control Officer into an existing unit comprising San Miguel County's Detention Center employees. Upon initial review, the Director found that dues deduction authorization cards were insufficient to satisfy the "showing of support" required by NMAC 11.21.2.38 because they did not demonstrate that the signing employee wishes to be "represented by the exclusive representative as part of the existing unit." See, NMAC 11.21.2.38(B). Therefore, there was a Question Concerning Representation present and the Petition was summarily dismissed as required by 11.21.2.37(B).

In *Wagon Mound Education Ass'n. & Wagon Mound Public Schools*; PELRB 305-18, on October 4, 2018 the PELRB certified two separate units after the Union prevailed in an election: 1) a "Professional/certified" unit consisting of licensed, certified staff including teachers, counselors and the school nurse; and, 2) a "Support Staff" bargaining unit comprised of maintenance employees, the maintenance supervisor (Leadman), educational assistants, the administrative assistant, cook, and the bus drivers.

In *City of Rio Rancho & Rio Rancho Police and Dispatchers Ass'n.*; PELRB 306-18, the City sought amendment of certification of a bargaining unit represented by Rio Rancho Police and Dispatchers Association. (See *NMCP SO & City of Rio Rancho*, PELRB 303-17). That case was consolidated with an earlier case filed by Rio Rancho Police and Dispatchers Association as PELRB 309-17, which also sought clarification of the unit. The City's case, however, also sought to accrete the positions of Crime Analyst, Property and Evidence Tech, Lead Property and Evidence Tech, and Public Safety Aide into the existing unit. On October 4, 2018 the Board approved a Stipulated Order approving the name change and adding the positions as requested. An amended Certification of Representation was issued effective September 18, 2018.

An election decertifying the union was held on June 8, 2018. See *Jennifer Poling & NEA-NM and NEA-Clayton and Clayton Public Schools*; PELRB 307-18. The PELRB certified the election results decertifying the union on October 4, 2018.

In *Classified School Employees Council-Las Cruces, Local # 4994 & Las Cruces Public Schools*; PELRB 308-18, the Union sought to accrete positions into the existing bargaining unit. After negotiation the parties narrowed disputed issues to whether the positions of Computer Technician Level 2, District Computer Technician Level 1, District Computer Technician Level 2, District Instructional Technology Support Technician Level 2 and LCPS YV Operation Manager are “confidential” employees as that term is defined in the Public Employee Bargaining Act; and, whether inclusion of the above-listed positions would render the existing bargaining unit “inappropriate”. See, NMSA 1978 Section 10-7E-12 (A). The decision of the Board’s hearing Officer finding that the positions are not confidential and therefore may be included in the bargaining unit was issued November 29, 2018 and the decision was not appealed to the full Board for review.

AFSCME and Taos County jointly requested amendment of the Certification of a previously recognized unit in order to sever Sheriff’s Deputies from an existing “wall to wall” bargaining unit with remaining white and blue collar workers to be represented by a separate AFSCME Local. See, *AFSCME, Local 2911 & Taos County*, PELRB 309-18. On October 4, 2018 the Board approved the clarification and an Amended Certification issued for each unit. Clerical errors were subsequently corrected by Amended Orders and Certifications. Two additional disclaimers of interest by AFSCME Locals are seen in *AFSCME & Hidalgo County*; PELRB 310-18, *AFSCME, Local 3103 & San Miguel County* PELRB 311-18. Both disclaimers were recognized by the Board at its November 5, 2018 meeting.

The above cases represent a small increase in such filings from prior years. In the opinion of PELRB staff it is too soon to tell whether this small increase portends anything long term. It perhaps is on the front end of a longer trend to be realized in 2019 as a result of the decision in *Janus v. American Federation of State, County and Municipal Employees, Council 31, et al.* This category of cases will be followed with interest and reported on in the next reporting period. There were no petitions requesting approval of local boards or ordinances filed in the reporting period.

17 of the 28 cases filed during the reporting period were Prohibited Labor Practice Complaints (PPCs) compared to 25 PPCs filed in 2017. As previously stated, this represents a decrease that may be attributable to a period of relative labor peace, particularly in light of the fact that only two of the PPCs required a hearing on the merits. Three of the cases filed during the reporting period are awaiting a hearing on the merits.

As of this writing only five PPCs were settled prior to hearing in 2018 compared to 13 cases resolved by settlement in the prior reporting period. (See Table E). While this is an obvious decrease in the *number* of cases settled, it still represents approximately 50% of the total PPCs filed, indicating that the lower number of settlements is a function of the lower number of PPCs filed overall.

Two PPCs were summarily dismissed for facial inadequacies - *Clay Cullison v. Santa Fe County*; PELRB 101-18; and *Clay Cullison v. Santa Fe County*; PELRB 125-17.

Only two cases were resolved by a merits hearing during the reporting period: *AFSCME, Council 18 and Tony Vigil v. San Miguel County*; PELRB 103-18 and *AFSCME, Local 3277 v. City of Rio Rancho*, PELRB 113-18. In the San Miguel County case the Board's Hearing Officer Dismissed the PPC after a merits hearing finding there was no failure to bargain in good faith and insufficient evidence to sustain allegations that the County discriminated against Tony Vigil with regard to terms and conditions of employment because of his membership in a labor organization; that the County interfered with, restrained or coerced him in the exercise of a right guaranteed by the Act; or that it otherwise discriminated against him or the Union because of anti-union bias. The County established its affirmative defenses that non-discriminatory reasons for all actions taken, that those acts comported with the parties' CBA and it met its obligation to bargain the reorganization and its effects when it bargained that CBA. No further obligation to bargain had been proven. The Union did not appeal the decision to the full Board.

In the *Rio Rancho* case, after a merits hearing was convened on December 17, 2018, the parties reached an agreement to make a preliminary injunction issued by the Board permanent and move the case into District Court. That agreement was reviewed and approved by the PELRB at its regular Board meeting on January 8, 2019.

A merits hearing has been held in *CWA v. Third Judicial District Attorney's Office*, PELRB 112-18 in which the union alleged that the discharge or constructive discharge of several union activists employed by the District Attorney's Office in Doña Ana County was in retaliation for activities protected under the PEBA or whether the same employee's discharge or discipline interfered with, restrained or coerced them in the exercise of protected concerted activities. See NMSA 1978 Sections 10-7E-19(A), (B), (D) and (E). However, as of this writing the decision has not yet been written.

Six cases remain to be heard on their merits:

- a. *NEA-Deming v. Deming Public Schools*; PELRB No. 111-18 (alleging failure to bargain in good faith in violation of NMSA 1978 Section 10-7E-19 (F) and (G)).
- b. *AFSCME, Local 3277 v. City of Rio Rancho*; PELRB No. 113-18 (alleging interference and coercion of employees for exercising PEBA rights in violation of NMSA 1978 Section 10-7E-19 (B), domination or interference in labor union in violation of Section 19 (C), refusal to bargain in good faith in violation of Section 19 (F) and failure to comply with the parties' Collective Bargaining Agreement in violation of Section 19 (H)).
- c. *AFSCME v. State of New Mexico*; PELRB 114-18 (alleging violations of NMSA 1978 Sections 10-7E-19 (B), (C), (G) and (H) arising out of the State ceasing dues deductions following the U.S. Supreme Court's decision in *Janus v. American Federation of State, County and Municipal Employees, Council 31, et al.*
- d. *CWA v. State of New Mexico, et al.*; PELRB No. 115-18 mirrors the case above by AFSCME and levies charges similarly alleging violations of NMSA 1978 Sections 10-7E-19 (B), (C), (G) and (H) arising out of the State ceasing dues deductions

following the U.S. Supreme Court's decision in *Janus v. American Federation of State, County and Municipal Employees, Council 31, et al.*

- e. *AFSCME, Council 18 v. N.M. State Personnel Office and N.M. Corrections Dep't.*; PELRB No. 116-18 (alleging that new policies imposed by the Department violated NMSA 1978 Sections 10-7E-19 (F), (G) and (H).
- f. *CWA v. NMDOH, Sequoyah Adolescent Treatment Center*; PELRB No. 117-18 (alleging violations of Sections 19(B),(F), (G) and (H) of the PEBA by unilateral implementation of a revised work schedule.

The PELRB consistently meets its performance measure of resolving filed PPCs within 180 days and this year is no exception. The combined average for resolution of all filed PPCs was 133 days – well under the 180 days goal. Removing settled cases from the calculation and considering only those cases proceeding to a hearing on the merits yields a result that those cases were resolved at the PELRB level within an average of 88 days – again, well within the 180 days performance measure. See Table A.

As in the preceding reporting period, school districts, municipalities and counties throughout the State were the largest source of filings in 2018 constituting a combined 63% of all cases filed. As might be expected, labor organizations representing city, county and school district employees comprise the most frequent petitioners. AFSCME, Council 18 or its affiliates, as has historically has been the case, remained the most frequent filer during 2018 filing five PPCs and six representation petitions (41% of the total filings), The Communications Workers of America or its affiliates filed six of the PPCs filed during 2018, but no representation petitions accounting, for 22% of the cases. NEA-NM or its affiliates filed three PPCs, two representation petitions and was the object of one decertification petition, accounting for an additional 22% of all filings.

Filing by individual petitioners constituted approximately 11% of the total filings, which staff considers an anomaly. See Tables B and C.

Along with the statistical data on cases filed and those concluded within the reporting year summaries of final orders issued by the Board and relevant court decisions are contained in this report. The court case summaries are informational only and should not be relied upon for legal research.

SUMMARY OF BOARD ORDERS

1-PELRB-2018

CULLISON & SANTA FE COUNTY (January 17, 2018). (PELRB 125-17).

The Board affirmed Director Griego's dismissal of the PPC on the ground that, after being informed that the complaint was inadequate because it did not specify the sections of the PEBA alleged to have been violated and no amendment to cure the deficiency was filed within the time allowed. Dismissal was compelled by operation of NMAC 11.21.3.12.

2-PELRB-2018

NEW MEXICO COALITION OF PUBLIC SAFETY OFFICERS & RIO RANCHO
POLICE AND DISPATCH ASSOCIATION (January 17, 2018). (PELRB 307-17).

The PELRB affirmed Director Griego's Summary Judgment dismissing the Union's Petition for Severance of Dispatchers from an existing bargaining unit including Police Officers. The Board affirmed the Director's rationale that while the Board has some degree of discretion in an initial petition for certification to determine the propriety of any given bargaining unit, the same measure of discretion is not allowed in the case of a severance petition.

In an initial representation case pursuant to § 10-7E-13 (A) the Board is not necessarily bound by the delineated occupational groups, i.e. blue-collar, secretarial clerical, technical, professional, paraprofessional, police, fire and corrections, but may also designate an appropriate bargaining unit based on clear and identifiable communities of interest in employment terms and conditions and related personnel matters or by agreement of the parties. See, *In re: NEA-Belen*, 1 PELRB No. 2 (April 11, 1994), citing *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962).

In the context of a severance petition, however, PELRB rules permit severance of employees in the occupational groups specifically delineated in § 13 without the ability to fashion an appropriate unit based on clear and identifiable communities of interest:

"A severance petition is a representation petition filed by a labor organization that seeks to sever or slice a group of employees who comprise one of the occupational groups listed in 10-7E-13 NMSA from an existing unit for the purpose of forming a separate, appropriate unit..." See 11.21.2.41 NMAC (2004).

The dispatchers were found not to be within one or more of the several delineated occupational groups. Severing the unit as proposed would result in an inappropriate unit. The Board also adopted the rationale that the principle of "the orderly operation and functioning of the state and its political subdivisions" espoused by NMSA 1978 § 10-7E-2 disfavors the needless proliferation of bargaining units or fragmentation of the work force. See NMSA 1978 §§ 2 and 13(A). See also, *In re: NEA-Belen*, *supra* (adopting a general anti-fragmentation policy).

The case was appealed to the District and remains on appeal at the time of this writing.

3-PELRB-2018

NEW MEXICO COALITION OF PUBLIC SAFETY OFFICERS & SANTA FE
COUNTY (January 17, 2018). (PELRB 118-17).

The Board affirmed and ratified a Summary Judgment Decision by Director Griego dismissing the case. According to his Decision the record was "devoid" of any evidence connecting the events alleged in the Amended PPC and the subject employee's status as a union member or officer or any facts that would support a conclusion that his rights to form, join or assist his union have been impaired or interfered with in any way. Therefore, the claim brought under § 19 (B) for retaliation for or interference with an employee union representative conducting union business was properly dismissed. Similarly, the evidence was

insufficient to support the Union's claim that the County dominated or interfered in the formation, existence or administration of a labor organization so that its § 19(C) claim was also properly dismissed

Because the Union erred in relying on notice requirements under the Police Officer Employer-Employee Relations Act that did not apply under the facts of this case for its claim that the County violated § 19 (E) NMCP SO's claim that its member was discriminated against because he did not receive or review a copy of a complaint failed for lack of supporting evidence.

NMCP SO also alleged several instances of failure to bargain in good faith in violation of § 19 (F). The Summary Judgment drew a distinction between the concept of *breach* of a duty and a *change* to policies and contract giving rise to the duty to bargain. While there was arguably evidence to support a claim that the County breached its obligations under the parties' contract, the record was once again "devoid of any evidence whatsoever that the County unilaterally changed them without bargaining."

Furthermore, the parties' CBA belied the notion that the County has failed to bargain the mandatory subjects alleged. Misconduct reporting rules and complaint investigation rules were bargained as appears by Sections 2A, 2C3, 28, 29 and 30. Requirements for compliance with Sheriff's regulations appear in Section 2. Administration of Sheriff's Department administrative investigations, including notice and reporting requirements and POEERA application have all been bargained as appears by Sections 2A, 2C3, 28, 29F and 30. The imposition of discipline, including whether progressive discipline principles apply was bargained in Section 29 when the parties agreed that the County reserves the right "... to discipline the bargaining unit employee as it determines to be necessary." In Section 1, the Preamble to the CBA the parties agreed that "The Sheriff's Office Standard Operating Procedures, the Santa Fe County Human Resources Handbook or other policies and procedures promulgated through the authority of the Sheriff shall govern any issues not agreed to "in the CBA)". In light of the foregoing it was apparent to the Director that each matter underlying the union's claim of failure to bargain in violation of Section 19(F) has been bargained by the parties and each is currently part of their CBA. Each is therefore "covered" by the CBA.

NMCP SO alleged refusal or failure to comply with a provision of the Public Employee Bargaining Act or Board rule in violation of § 19 (G). Because that claim rested upon the allegations that the Employer failed to bargain the application of its reporting rules contrary to §§ 5, 15(A), and 17(A) of PEBA, allegations that the County violated that section of the Act cannot form the basis of its claim that the County failed to comply with a provision of the Public Employee Bargaining Act or Board rule in violation of § 19(G).

Based on the foregoing, the union's claim that the County violated § 19 (H) of the PEBA by refusing or failing to comply with the parties' CBA and that claim was dismissed as well for insufficient counter-evidence under Rule 56.

4-PELRB-2018

CWA & THIRD JUDICIAL DISTRICT ATTORNEY'S OFFICE (January 17, 2018).
(PELRB 310-17).

The PELRB approved a Consent Election Agreement between the parties and approved by the Director seeking to represent trial attorneys, assistant trial attorneys, senior trial attorneys and deputy district attorneys in the Third Judicial District Attorney's Office in Las Cruces, N.M. and Ordered Director Griego to proceed with the election as agreed by the parties.

5-PELRB-2018

CWA & THIRD JUDICIAL DISTRICT ATTORNEY'S OFFICE (February 8, 2018).
(PELRB 310-17).

Because of a calendaring error the election scheduled to be held as a result of the Board's Order in 4-PELRB-2018 was not held. At its regularly scheduled meeting on February 6, 2018, the Board approved a new Consent Election Agreement by the parties calling for a re-scheduled election to be held on February 16, 2018 in Las Cruces, N.M. and ordered Director Griego to proceed with the election as agreed by the parties.

6-PELRB-2018

COMMUNICATIONS WORKERS OF AMERICA & THIRD JUDICIAL DISTRICT
ATTORNEY'S OFFICE (February 7, 2018). (PELRB 310-17).

Following an election in Doña Ana County the PELRB certified the ballot tally and ordered the Director to issue a Certificate of Representation recognizing CWA as the exclusive representative for a unit comprising d hereby certifies that Communications Workers of America (Union) has demonstrated a sufficient basis for recognition as the exclusive bargaining representative for those employees in the following bargaining unit comprised of employees of the Third Judicial District Attorney's Office:

Trial Attorneys, Assistant Trial Attorneys, Senior Trial Attorneys and Deputy District Attorneys, excluding All Probationary, Managerial, Confidential, or Supervisory Employees as defined by the PEBA.

7-PELRB-2018

OPEN MEETINGS ACT RESOLUTION (July 20, 2018).

The PELRB passed its annual resolution setting forth procedures to comply with the Open Meetings Act, Section 10-15-1 *et seq.* (NMSA 1978).

8-PELRB-2018

AFSCME, COUNCIL 18 & CITY OF MORIARTY AND THE MORIARTY DEP'T OF
PUBLIC SAFETY (July 20, 2018). (PELRB 302-18).

At its regularly scheduled July meeting the Board approved a disclaimer of any interest in further representation of employees of the City of Moriarty filed by AFSCME Council 18.

9-PELRB-2018

CIBOLA COUNTY and NEW MEXICO COALITION OF PUBLIC SAFETY OFFICERS (July 20, 2018). (PELRB 303-18).

The PELRB ratified an Amended Certification of Representation stipulated by Cibola County and the New Mexico Coalition of Public Safety Officers removing certain positions from representation by NMCP SO to reflect the fact that the Cibola County's Detention Center closed and the positions formerly employed by the County at that facility and included within the original 2014 certified bargaining unit, no longer exist. The represented positions of Dispatchers and Dispatch Supervisors remain represented in the amended bargaining unit.

10-PELRB-2018

WAGON MOUND EDUCATION ASSOCIATION and WAGON MOUND PUBLIC SCHOOLS (October 4, 2018). (PELRB 305-18).

The PELRB approved the Certification of two bargaining units represented by Wagon Mound Education Association; one comprising Support Staff, and the other comprising Certified Employees. The Director was ordered to issue Certificates of Representation for each unit as appropriate.

11-PELRB-2018

RIO RANCHO POLICE AND DISPATCHERS ASSOCIATION and CITY OF RIO RANCHO (October 4, 2018). (PELRB 306-18 & 309-17 Consolidated).

The Board approved the parties' agreement to change the unit description to reflect current job titles and to add five additional positions to the unit to include (1) Crime Analyst; (2) Property and Evidence Tech; (3) Lead Property and Evidence Tech; (4) Public Safety Aid and (5) Communications Shift Supervisor. The Board also approved amendment of the certification of representation to reflect a change in the name of the recognized representative from "Rio Rancho Police and Dispatch Association" to "Rio Rancho Police and Dispatchers Association".

12-PELRB-2018

AFSCME COUNCIL 18 v. N.M. HUMAN SERVICES DEPARTMENT (October 4, 2018). (PELRB 123-17).

The PELRB affirmed the Director's decision dismissing the Union's Complaint and adopted his Findings of Fact and Conclusions of Law as its own without modification. To wit: AFSCME did not meet its burden of proof with regard to its claims that the New Mexico Human Services Department committed Prohibited Labor Practices pursuant to § 19(F) of the PEBA (refuse to bargain collectively in good faith with the exclusive representative); § 19(G) (refuse or fail to comply with a provision of the Public Employee Bargaining Act or board rule), and/or § 19(H) (refuse or fail to comply with a collective bargaining agreement) by implementing productivity measures in the Fall of 2017. Conversely, the preponderance of the evidence was found to have supported HSD's affirmative defense that the productivity quota at issue was not subject to bargaining based on Articles 15 and 18 of the

CBA as well as the question whether its Income Support Division acted within its scope of authority under the CBA.

13-PELRB-2018

JENNIFER POLING AND NEA-CLAYTON & CLAYTON MUNICIPAL SCHOOLS (October 4, 2018). (PELRB 307-18).

The PELRB approved the results of a decertification election in re: National Education Association-Clayton & Clayton Municipal Schools.

14-PELRB-2018

AFSCME, LOCAL 2911 v. TAOS COUNTY (October 4, 2018). (PELRB 309-18).

Upon a Joint Petition for Severance filed by AFSCME, Local 2911 and Taos County the Board recognized and adopted the parties' stipulated severance of Sheriff's Deputies from the existing "wall to wall" bargaining unit leaving white and blue collar workers as a separate unit. The Board recognized AFSCME 1193 as the exclusive representative for white and blue collar workers and AFSCME Local 2199 as the exclusive representative for Deputies and ordered the Executive Director to issue amended certificates of representation consistent with its Order.

15-PELRB-2018

AFSCME, LOCAL 3277 v. CITY OF RIO RANCHO (November 13, 2018). (PELRB 113-18).

Upon an agreement by the parties to do so, the Board made its earlier entered preliminary injunction permanent, so that an immediate appeal could be taken to the District Court where other cases involving the impact of the *Janus* case are currently being litigated. Resolution of the issues on appeal in those related cases will resolve the underlying PPC in this case.

SUMMARY OF COURT DECISIONS

1. *AFSCME Council 18 v. N.M. Dep't. of Workforce Solutions*, Second Judicial District Cause No. D-202-CV-2017-07924 (November 9, 2018; J. Campbell). (In re: PELRB 102-17). The Department of Workforce Solutions appealed to the Second Judicial District Court from an Order of the PELRB affirming the Hearing Officer's determination that the Department committed a Prohibited Labor Practice by unilaterally increasing the number of inspections Labor Law Administrators are to perform from 20 to 25 per month. The District Court affirmed the Board's determination that the number of inspections to be performed by bargaining unit employees is a mandatory subject of bargaining under NMSA 1978 Section 10-7E-17(A)(1) and denied the Department's Motion for reconsideration of its affirmance. No further appeal was sought and the case closed on January 11, 2019.

2. *New Mexico Coalition of Public Safety Officers Ass'n. v. City of Rio Rancho*, Second Judicial District Cause No. D-202-CV-2018-01350 (September 7, 2018). (In re: PELRB 307-17). On February 26, 2018 NMCPSOA appealed to the Second Judicial District Court (J. Lopez) from an Order of the PELRB affirming its Hearing Officer's decision denying the union's Petition for severance of Police Dispatchers into a bargaining unit apart from Police Officers. The District Court affirmed the Board's Order on September 07, 2018 and dismissed the appeal. No further appeal was pursued.

PRIOR YEAR PENDING APPEALS

1. The PELRB consolidated *NEA-Deming & Deming Public Schools*; PELRB No. 304-17 and 305-17 and its Decision and Order 9-PELRB-2017 (August 15, 2017) upheld the Hearing Officer's granting the Union's Petition to Amend Certification to affect a name change and his decision to confer incumbency status on the Union representing an existing wall-to-wall unit. An appeal of that Order was taken by the Deming Public Schools on August 30, 2017 and the case has remained on appeal throughout the reporting period as *Bd. of Ed. for Deming Public Schools v. National Education Ass'n.-Deming and State of New Mexico Public Employee Labor Relations Board*, No. D-202-CV-2017-06276.
2. In May of 2015 the State appealed from a decision of the PELRB finding that the State created a past practice of paying union representatives for time spent on grievances. CWA cross-appealed the Board's dismissal of its claim that the State acted in bad faith. See *Communications Workers of America, AFL-CIO v. State of New Mexico and New Mexico Public Employee Labor Relations Board*, No. D-202-CV-2015-03814. (In re: *CWA, Local 7076 v. State of New Mexico*; PELRB 122-14). The District Court (J. Butkus) upheld the Board on March 15, 2017. The State sought and was granted a Writ of Certiorari in September of 2017 and the case has remained before the Court of Appeals during the reporting period as Case No. A-1-CA-36331.
3. AFSCME, Council 18 filed a Petition seeking accretion of Home Health Aide Supervisors and Psychiatric Tech. Supervisors employed by the Department of Health, Los Lunas Community Program on March 8, 2016. (In re: PELRB 305-16). Its Petition was denied by the PELRB on November 16, 2017. The Board subsequently denied interlocutory appeal of the Director's denial of the Union's Motion for Reconsideration on January 19, 2017. The union appealed those decisions to the District Court on December 18, 2017 as *AFSCME, Council 18 v. State of New Mexico, Dep't. of Health and New Mexico Public Employees Labor Relations Board*, Cause No. D-202-CV-2017-08953. This case has remained on appeal during the reporting period and oral argument is scheduled to be heard on January 29, 2019.

<p>Table A</p> <p>Agency 37900 Public Employee Labor Relations Board</p>		
Criteria	Outcome	Description
Percent compliance with statutes, with particular attention to due process, equal protection, the Public Employee Bargaining Act and Board rules.	100%	Staff ensures compliance with applicable laws and regulations by its standard operating procedures and by its centralized calendaring system. After review of all case files and Board meeting minutes for 2018, staff found no complaints that the Board violated rules or statutes, e.g. the Open Meeting Act, or otherwise failed to provide due process by the manner of conducting hearings or elections or by undue delay. Likewise, there were no self-reported incidents. There were two instances of incomplete audio records required by NMAC 11.21.1.15, but those did not result in complaints or allegations that the Board failed in its statutory duties.
Percent of decisions overturned on appeal	0%	For the reporting period, three cases were appealed to District Court. None were overturned. Please refer to the case summary section of this report for staff comment on a stay of PELRB proceedings issued in D-202-2018-05580.
Percent of cases resolved through agreement, mediation or arbitration prior to hearing	21%	Of the 29 cases filed during the reporting period 6 were settled or successfully mediated prior to conducting a full evidentiary hearing. (23 are pending)
Percent of cases resolved through agreement, mediation or arbitration post- hearing	0%	For the reporting period thus far, no cases have been resolved after the conclusion of a merits hearing.
Percent of prohibited practice complaints decided within 180 days of filing.	100%	Although on the average cases within the reporting period were closed within an average of 122 days there were two cases that exceed the 180 day requirement by approximately 20 days. (PELRB Nos. 102-18 and 109-18 are discussed in the analysis section.) Eight of the 2018 filed cases remain pending as of 1/18/19 several of which exceed the 180 day requirement (PELRB Nos. 105-18, 106-18, 107-18, 108-18 will be discussed in the analysis section). Despite the four cases exceeding the 180 day deadline the average number of days these cases have remained pending is 171 days.
Percent of prohibited practice complaints, not settled or withdrawn, decided within 180 days of filing.	14%	Of the 29 PPCs filed in the reporting period six were not settled or withdrawn and all but two completed within 180 days. 5 are pending. The average time taken by the Board to decide a PPC within the reporting period was 122.5 days. Of the cases that remain pending one, 108-18 greatly exceeds the 180 day deadline and will be discussed in the analysis section. The remaining four are within one to two months of reaching the 180 day requirement.
Percent of determinations of approval of local labor relations boards within 100 days of request to approval	N/A	There were no petitions for approval of local boards filed during the reporting period.
Percent of bargaining unit recognition petitions processed within 180 days of filing	100%	A total of eight petitions for recognition or clarification were filed during the reporting period. One petition for decertification and two union disclaimers of interest were processed by the Board during the reporting period. The average time in which the Board processed Representation Petitions was 93 days.
Percent determinations of approval of local labor relations boards, bargaining unit recognition petitions and prohibited practice complaints processed and completed within the applicable regulatory deadlines	90%	All of the cases exceeding the 180 day deadline are PPCs. Five of those cases are affiliated or consolidated cases involving the 3rd Judicial District and will be discussed in the analysis section. Of the remaining PPCs exceeded the 180 day limit because of the parties' requests to extend deadlines.

ALL CASES FILED WITH THE PELRB IN 2018 BY TYPE OF EMPLOYER OR RESPONDENT

Table B

Type of Employer or Respondent	Types of Cases					TOTAL
	PPCs	Representation Petitions	Decertification Petitions	Related to Approval of Local Board	Impasse	
State*	4	1				5
County	4	4				8
Municipality	1	1				2
Public School	3	2	1‡			6
Higher Education						
Medical Facility						
Other	5**					5
Court						
Union		2	1‡			3
Individual						
Local Labor Board						
TOTAL	17	10	2			29‡

*Cases involving both a State Agency and the State *qua* State are counted here

** All five cases in this category involve the Third Judicial District Attorney's Office

‡ Because interested parties in a decertification proceeding include both the union being decertified and the Employer, a single filing results in two types of Respondents so that the total will exceed the number of cases filed.

**ALL CASES FILED WITH THE PELRB IN 2018
BY PETITIONER OR COMPLAINANT**

Table C

Type of Petitioner							TOTAL
	PPCs	Representation Petitions	Petitions for Decertification	Related to Approval of Local Board	Impasse		
State*							
County		1					1
Municipality		1					1
Public School							
Higher Education							
Medical Facility							
Other							
Court							
Union	15	8					23
Individual	2		1				3
Local Labor Board							
TOTAL	17	10	1				28

*Cases involving both a State Agency and the State *qua* State are counted here

**ALL CASES FILED WITH THE PELRB IN 2018
BY PETITIONER AND TYPE**

Table D

Petitioner	Types of Cases					TOTAL
	PPCs	Representation Petitions	Petitions for Decertification	Related to Approval of Local Board	Impasse	
AFSCME Council 18	3	3				6
AFSCME Local 2516	1					1
AFSCME Local 3103		2				2
AFSCME Local 3277	1					1
AFSCME Local 2911		1				1
CWA	7					7
CSEC – Las Cruces		1				1
NEA-NM	1					1
NEA-Deming	1					1
Teachers Ass'n of Lordsburg	1					1
County		1				1
Individual	2		1			3
Wagon Mound Ed. Ass'n		1				1
Municipality		1				1
State						0

PPC OUTCOME 2018

Table E

Total PPCs Filed		17
Sustained (In whole or in part)		3*
By Hearing Examiner (w/o Board review)		
After Board Review	3	
After Review by Court		
Dismissed – no violation found		10
By Hearing Examiner (w/o Board review)	10	
After Board Review		
After Review by Court		
Summarily Dismissed		4
Dismissed after preliminary review (NMAC 11.21.3.12)	2	
Dismissed after Motion	2	
Deferred to Agency		
Deferred to Arbitration		
Dismissed on collateral estoppel grounds		
Deferred to local board		
Withdrawn and/or Settled		6
Withdrawn upon receipt of notice of facial inadequacy	1	
Withdrawn in favor of alternate venue		
Withdrawn as moot		
Settled prior to hearing	5	
Resolved after a Merits Hearing		3
Pending		7
Being processed at the PELRB	6	
Stayed or deferred for various reasons	1	
Matter is before the courts		
TOTAL PPCs CARRIED OVER FROM 2017		7

*This total includes PPCs that were settled and dismissed without a hearing

JUDICIAL APPEALS 2018

Table F

TOTAL PELRB DECISIONS APPEALED IN 2018		1
Appeals pending from prior years	3	
Appeals withdrawn		
Appeals dismissed for lack of prosecution		
Appeals dismissed on jurisdictional or venue grounds		
Decisions affirmed	2	
Decisions reversed		
Decisions affirmed in part, reversed in part		
Final Board Decisions Not Appealed Further		
Board Decisions For Which Time To Appeal Has Not Yet Run		3
		0