15-PELRB-2026

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:
Communications Workers of America,

Complainant,

v. **PELRB No. 130-25**

Department of Cultural Affairs, and the State Personnel Office,

Respondents.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board at its regularly scheduled meeting on May 5, 2026, upon a request for Board review of the Hearing Officer's Report and Recommended Decision issued in the above-named case. Having reviewed the record, heard the arguments of the parties, and being otherwise sufficiently informed, the Board, by unanimous vote, hereby adopts the Hearing Officers Recommended Decision.

DocuSigned by:
Nan Nash
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Date: 5/12/2026

Nan Nash, Board Chair

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HEARING EXAMINER'S REPORT AND RECOMMENDATIONS

Introduction

This matter comes before the undersigned pursuant to a Prohibited Practice Complaint filed by the Communications Workers of America (Union, CWA or Complainant) against the Department of Cultural Affairs (DCA) and the State Personnel Office (SPO) (collectively, Respondents), on October 9, 2025.

The PPC alleges that SPO and DCA have violated Sections 5(A)[1], 19(B)[2], 19(C)[3], (F)[4], and 19(G)[5] of the Public Employee Bargaining Act (PEBA), NMSA 1978 § 10-7E-1, et seq., by failing and refusing to accept and process the dues deduction cards of certain employees (referred to variously as "EXOT employees" or employees in EXOT positions) who occupy three positions

[1] *See* Section 5(A) (giving public employees the right to "form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion").

[2] *See* Section 19(B) (making it a prohibited practice for a public employer to "interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act or use public funds to influence the decision of its employees or the employees of its subcontractors regarding whether to support or oppose a labor organization that represents or seeks to represent those employees, or whether to become a member of any labor organization").

[3] *See* Section 19(C) (making it a prohibited practice for a public employer to "dominate or interfere in the formation, existence or administration of a labor organization").

[4] *See* Section 19(F) (making it a prohibited practice for a public employer to refuse to bargain collectively in good faith with the exclusive representative).

[5] *See* Section 19(G) (making it a prohibited practice for a public employer to "refuse or fail to comply with a provision of the Public Employee Bargaining Act or board rule").

recently accreted to the bargaining unit: "Customer Service Rep-A, 505CSA; Security Guard-A, 505SGA; and Set & Exhibit Designer-O, 505SEO". *See* Case 305-25, Petition dated 2/27/25; Amended Certification dated 3/25/25.

A Status and Scheduling Conference was held on November 4, 202; and a Scheduling Order issued on November 10, 2025; pursuant to which the Parties cross-filed motions for full or partial summary judgment. On January 5, 2026, the undersigned issued an Interim Order on those motions, determining that the positions at issue, termed "EXOT" employees by the Employer, are generally "temporary" employees and not covered by PEBA (*Id*. at 3, 28), but that genuine questions existed as to whether the six employees who have worked their position "significantly more than 12 months are in fact 'temporary', or otherwise irregular such as to require their exclusion from the bargaining unit as amended by accretion in March 2025: Austin Moore, Jacob Saavedra, Mariah Williams, Adriana De La Cruz, Rosemary Gallegos, and Randy Gomez." (*Id*. at 3, 28-29.) That decision is hereby adopted and incorporated herein by reference except where specifically noted otherwise.

On January 16, 2026, a hearing on the merits was held concerning the seven employees who have worked for the DCA for longer than one year, and post hearing briefs were timely filed on February 9, 2026. Based upon the preponderance of the record, the undersigned reiterates and REAFFIRMES her previous conclusion that bona fide temporary employees are excluded from PEBA's coverage because not "regular…employees" as defined under Section 4(Q) of PEBA.

She also finds and concludes that the six (6) NHCC EXOT positions at issue are not bona fide temporary positions, or otherwise so inherently irregular as to be excluded from Section 4(Q); and that the six (6) employees at issue have fulfilled their probationary period in fact for purposes of collective bargaining under PEBA, and/or otherwise meet the conditions under law to become classified employees. Accordingly, the undersigned recommends that the PPC be SUSTAINED as to these six EXOT employees and a remedy be provided as outlined below.

Next, based upon the exact same fact record and reasoning, she reconsiders and reverses her earlier determination that,

> …the employees who have been employed 12 months or less are bona fide temporary employees, given that their employment is contract-based for finite periods at a time, the number and occupancy of the seven EXOT positions have been a moving target all year, and the employees work widely varying scheduled that are determined solely for the benefit of the employer.

(Interim Order at 28.) However, any claim these other EXOT employees may have is not yet ripe, and the DISMISSAL of the claims concerning those employees is therefore hereby REAFFIRMED.

APPEARANCES AND RECORD

For the Union	
Stephen C. Curtis, Esq.	Youtz & Valdez, PC
Emily Hanawalt	DCA Employee and Witness
Rosemary Gallegos	DCA Employee and Witness
Megan Green	CWA President and Witness
For the Respondents:	
Taylor Lueras, Esq.	Park and Associates, LLC
Ty Ryburn	DCA Director and Witness
Cynthia Sandoval	SPO Deputy Director and Witness

In addition to the sworn testimony of the foregoing five (5) witnesses, the Parties stipulated to the admission of 13 Union exhibits and 12 exhibits for the Respondents. (*See* Appendix A.)

Findings of Facts

The following facts are found by a preponderance of the evidence:[6]

Background/Parties

1. The Union, Communications Workers of America or CWA, represents a bargaining unit of employees at various State Agencies, including the Respondent, the Department of Cultural Affairs (DCA), which includes the National Hispanic Cultural Center (NHCC).
2. The State Personnel Office (SPO) is a signatory of the collective bargaining agreement (CBA) between the State and CWA and has been selected by the Governor as the CBA administrator for the State of New Mexico. It was involved in the facts giving rise to the instant case as contract administrator. (CBA; Interim Order.)

[6] *See* Relevant Legal Standards, *infra*.

March 2025 Accretion to the Unit Amended in 2023

3. The bargaining unit was first certified in or about 2004. The certification was amended in 2023 to accrete the positions of "Customer Service Representative", "Security Guard", and "Set & Exhibit Designer". The job codes of these positions were, respectively: R4051, M9032, and J1027. (U-2, 31-PELRB-2023, PELRB Case No. 312-22; Green testim.)
4. In March 25, 2025, the PELRB amended the certification to accrete the positions of "Customer Service Representative", "Security Guard", and "Set and Exhibit Designer" working "all across New Mexico including Albuquerque, Santa Fe and Las Cruces." (Case 304-25 Petition, emphasis added.)
5. This certification was approved by the Board on April 3, 2025, in 9-PELRB-2025, with the accreted positions now identified by SPO and the PELRB in turn as "Customer Service Rep-A, 505CSA; Security Guard-A, 505SGA; and Set & Exhibit Designer-O, 505SEO" (U-3, Board Order and Case 304-25 Amended Certification, emphasis added.)
6. The amended certification was based on a series of findings, including that "[t]he Petition does not raise a question concerning representation and it is supported by a sufficient showing of interest from a majority of the employees in the positions to be accreted." (*Id*., at 3.)
7. This determination, in turn, was based on information provided, and representations made by SPO purporting to act on behalf of DCA. Specifically, as part of the certification process in PELRB Case No. 304-25, Jeffrey L. Peaten III, Labor Relations Manager for SPO, informed the PELRB that the Petition raised no issues:

> Pursuant to NMAC 11.21.2.12(B), please see the attached list of Department of Cultural Affairs employees assigned to the classifications of Customer Service Representative – A, Security Guard – A, and Set & Exhibit Designer – O. The Department of Cultural Affairs does not dispute the petition for the accretion of the positions identified into the bargaining unit.

(U-10, emphasis added.)

8. Additionally, SPO through Mr. Peaten also provided an employee list at that time. (*Id*.) It is notable or distinguishing for (a) adding A or O designations to the CSR, SG and SED positions; (b) providing new and different job codes as provided in 2023, although the same job title; (c) expressly identifying the positions and "'TEMP' or 'EXOT'"; and (d) for

identifying only individuals employed at the National Hispanic Cultural Center (NHCC).[7] The list was as follows, although only the six (6) underlined names still worked in these positions by the time dispositive briefing, and it is those six (6) that the hearing focused on:

	Name Job	Job Title	Job Code and Classification
(1)	Austin Moore	Customer Service Rep - A	505CSA "TEMP" or "EXOT"
(2)	Jacob Saavedra	Customer Service Rep - A	505CSA "TEMP" or "EXOT"
(3)	Gabriella Vigil	Customer Service Rep - A	505CSA "TEMP" or "EXOT"
(4)	Mariah Williams	Customer Service Rep - A	505CSA "TEMP" or "EXOT"
(5)	Samantha Goombi	Security Guard - A	505SGA "TEMP" or "EXOT"
(6)	Adriana De La Cruz	Set & Exhibit Designer - O	505SEO "TEMP" or "EXOT"
(7)	Rosemary Gallegos	Set & Exhibit Designer - O	505SEO "TEMP" or "EXOT"
(8)	Randy Gomez	Set & Exhibit Designer - O	505SEO "TEMP" or "EXOT"
(9)	Jacob Gutierrez	Set & Exhibit Designer - O	505SEO "TEMP" or "EXOT"
(10)	Cody Kelien	Set & Exhibit Designer - O	505SEO "TEMP" or "EXOT"
(11)	Coral Massoth	Set & Exhibit Designer - O	505SEO "TEMP" or "EXOT"

(U-1; R, spreadsheet; Green testim.)

9. The difference between the 2023 and 2025 position designations and job codes are that those of the 2023 amendment dealt with regular classified employees. The March 2025 accretion was intended by the Union to specifically accrete employees designated by the DCA as "TEMP" or "EXOT", who fill the positions at NHCC designated as Customer Service Representative – A, Security Guard – A, and Set & Exhibit Designer – O. (Green testim., Audio 2 at 48:24-52:47, 54:12-55:55, 1:10:11-1:10:35; U-1.)
10. The undersigned infers from these facts that the reason SPO provided a list of NHCC EXOT employees in March 2025 is that they were the only Customer Service, Security Guard and Set Designer employees within the DCA whose positions were not already included in a bargaining unit.

SPO Rejection of Dues Cards for EXOT Employees

11. On March 27, 2025, CWA submitted the dues deduction/membership cards for two of the current EXOT employees, and SPO declined to process them, stating that it was because they had not completed a probationary period. (U-12 and U-13; Green testim.)

[7] The March 2025 eligible employee list identified or described the employees' work "location" as "ABQ-History & Literary Art", but the record otherwise references the National Hispanic Cultural Center (NHCC).

12. On or about June 12, 2025, CWA again submitted the dues authorization cards for several of the current EXOT employees. SPO again declined to process the dues cards, this time stating the employees were in a temporary position. (*Id*.)
13. Thereafter, SPO's labor relations office clarified as follows:

> My initial email mistakenly indicated that we were unable to process membership dues because they were on probation, whereas I should have explained that we were unable to process dues because they are temporary employees. I apologize for the error, but they are, in fact, designated by DCA as EXOT temporary employees. If CWA believes they are mistakenly designated as EXOT temporary employees, it should contact the DCA, as EXOT employees are not covered under the classified service and SPO has not oversight as to how they are designated.
> (U-13 at 1.)

14. CWA filed the instant PPC in response on October 9, 2025.

NHCC Operations and Staffing

15. The NHCC is a campus with multiple buildings with different functions: the Performing Arts Center, the Visual Arts Museum, the Welcome Center, the History and Literary Arts Building, and the Education Building. (Audio Part 1 at 24:45-25:51.) The Welcome Center is open 10am to 5 pm, Tuesday through Saturday, and the Visual Arts Museum is open 10 am to 4 pm Tuesday through Sunday. (*Id.* at 36:08-37:06.)
16. The Welcome Center is open 10am to 5 pm, Tuesday through Saturday, and the Visual Arts Museum is open 10 am to 4 pm Tuesday through Sunday. *Id.* at 36:08-37:06. The Welcome Center is staffed with 2-3 Customer Service Representatives a day, and the Visual Arts Museum is staffed with one Customer Service Representative. All of the Customer Service Representatives at NHCC are classified as EXOT or temporary. (*Id.* at 33:59-34:33.) Additionally, Customer Service Representatives work in the box office at the Performing Arts Center when there are shows or rentals going on there. (*Id.* at 36:08-37:06.)
17. There are almost always shows going on at the Performing Arts Center. Eighty-five percent (85%) of last year's weekends had performances. (Audio 2 at 18:34-18:51; Audio Part 1 at 36:08-37:06 (had to call a moratorium on rentals due to performance staffing requirements.)

18. Historically, two of the EXOT Set and Exhibit Designers work in the Visual Arts Museum (there is only one at the current time because Jacob Gutierrez was recently terminated, but a second is anticipated to be hired soon). (*Id.* at 44:18-44:42.) Those Set and Exhibit Designers help with installations and de-installations, maintenance, collection work and preparator work. (*Id*. at 44:43-45:40.) The remaining EXOT Set and Exhibit Designers work in the Performing Arts Center, in one of the three theaters there, either in front of the house (Rosemary Gallegos) or in a tech position (the rest). (Audio Part 2 at 1:10-3:33.) In addition to working during shows, they also have maintenance to perform at times when there are no shows. (*Id*. at 40:36-41:19.)
19. The EXOT or temporary security guards do the same work and work in the same locations as the permanent security guards (Audio Part 1 at 47:48-49:25), and they work a full 80 hours per pay period. (Exhibit U-6.)
20. From these facts, the undersigned infers that the alleged "seasonal nature" or the likelihood of seasonal fluctuation of work at the NHCC is not its driving nature or characteristic. She further infers any such seasonal fluctuation does not require making the positions temporary from an operational or staffing perspective. It may be the positions would need to be part-time, flex-time, or such, and the employees taking the positions may be required to forego outside employment (*see* below). Nonetheless, there is nothing about the nature of the work itself – support of the various NHCC functions and operations – that renders it "temporary" in fact.

Nature, Duration, and Characteristics of the NHCC EXOT Positions

21. When the accretion Petition was filed in March 2025, there were eleven (11) of the petitioned-for EXOT employees, and by November 2025 briefing there were thirteen (13). However, as shown above, there is very high turnover in these positions and many of the EXOT employees left between filing and briefing and/or hearing. (CWA Resp. to Union MSJ, at p 3, No. 2.)
22. All employees occupying the EXOT positions at issue work under term-definite or temporary contracts executed for at least one full year, aside from some typographical errors. There is one contract with a 15-month duration, but that is an administrative error DCA is working to correct, and the duration of that contract should also be one (1) year.

(Resp. Exs. D-, F-H, K, individual Employment Contracts and Compensation Action Request Forms (CARFs); *see also* Ryburn testim.)

23. Each contract contains an express start and end date and terminates automatically upon expiration. However, everyone is re-hired back after a one day or longer gap unless they have some sort of pending HR issue. Additionally, on some occasions people have continued to work beyond their contract's expiration, or work in the "gap period", paid by the NHCC Foundation. Such gap periods may be for a day or two, a week or two, or longer. During COVID the gap lasted for 10 or 11 months, but that was obviously an exceptional circumstance. (Union Ex. 5, A. Martinez 6-3-20 email regarding firing and re-hiring; Resp. Exs. D-, F-H, K; Gallegos and Ryburn testim.)
24. The contracts are not automatically renewed although, as found above, the position holders are generally re-hired back into the same position after a gap. (U-5; Gallegos, Audio File 2 at 34:18-34:58; Ryburn, Audio File 3 at 7:06-7:4.) (Renewal is also technically contingent on operational need and budget but the record does not show either to have been an issue in recent years.)
25. These NHCC EXOT employees are paid hourly, and their contracts provide that they are not eligible for health benefits, retirement, or sick/annual leave. If they are sick or require time off for any reason, they simply do not work those hours and do not get paid for them. They are subject to termination at any time per the terms of the contracts signed by each employee. They do not accrue seniority, do not receive step increases. (Resp. Exs. D-, F-H, K; Ryburn and Sandoval testim.)
26. The EXOT designation is relatively recent, dating back only a few years, but these EXOT employees and/or positions at issue have always been treated as temporary ones. (Ryburn testim., Audio 3 at 1:10:26-1:13:14.) Nonetheless, they appear to have at least occasionally also been treated in the past as falling within the classified service, before the EXOT designation.[8]

[8] The Union points to U-4a, the 2022 employment offer for Mariah Williams, which states "This is a Classified **ONE YEAR TEMP** position" (emphasis in original), to argue that the positions at issue were within the "classified service" before redesignated as EXOT employees. (Un. Post Hearing Brief at ¶7.) This would not ordinarily be strong evidence because it could reflect a typo, and Ms. Williams herself did not testify. However, DCA itself referred to the position as being a "classified TEMP position" in the past. (Resp. Post Hearing Brief at 8.)

27. Additionally, the six (6) employees at issue have worked in their same positions for periods ranging from two and a half to 20 plus (2.5 – 20+) years, and they have all been regularly hired and fired, and all in the same manner, during those years. Moreover, the same applies to other long-term EXOT employees, although some either became permanent employees or ultimately left the NHCC:

    a. Current tech supervisor Jose (Pepe) Gallardo was a temporary employee from 2005 until 2016 (Audio Part 2 at 5:41-6:12);
    b. Former employee Santiago Candelaria was a temporary employee from 2005 until 2017 (*Id.* at 6:13-6:39);
    c. Former Darrel Piper started in 2007, and was a temporary employee until 2023 (*Id.* at 6:40-7:05);
    d. James Chavez was a temporary employee from 2005 until 2008 (*Id.* at 7:06-7:26);
    e. Current permanent Chris Acevedo was a temporary employee for two years prior to being placed in a permanent position (*Id.* at 7:27-8:18); and
    f. Current permanent employee Kirk Brown was a temporary employee for six years prior to becoming a permanent one (*Id.* at 7:27-8:18).

    (*See also* Gallegos testim.)

28. "EXOT" is a designation or salary plan developed by the Department of Finance and Administration for those employees who are not covered by the classified service. (Sandoval testim., Audio Part 4, at 22:00-22:05.) EXOT employees are administratively separate from classified state employees. They do not apply through SPO, are not listed on SPO job postings. DCA and SPO also treat them presently as not being subject to SPO Board rules governing benefits, discipline, evaluation, promotion, layoff, or appeal. (Ryburn, Audio File 3 at 19:15–19:35; Sandoval, Audio File 4 at 5:20.)

29. At DCA, the previously existing temporary positions were designated as "EXOT" by DCA relatively recently as an administrative convenience. DCA believes this designation helps them ensure "continuity of operations" at NHCC by letting DCA fill the positions each year more easily when the contracts are terminated. (Ryburn testim., Audio Part 3 at 30:57-33:10.)

30. The CWA/State bargaining units include other non-classified employees who are not controlled by SPO, including Treasurer's Office employees. (Green testim.; U-7, State Organizational Chart.)

31. Additionally, CWA/State units and the DCA-specific bargaining unit includes other employees besides "EXOT" or "TEMP" employees who work for the State under a personally signed contract stating the employee can be fired at any time. For instance, the

State, including DCA, also have employees who are designated as "STRM" or "TERM" interchangeably. STRM or TERM employees also sign such contracts, and are at-will employees, but are covered under the State Personnel Act and the CBA. (Sandoval testim. 6:06-7:01) They are listed amidst positions designated "Reg/Perm" but little else is known about the STRM or TERM positions under this record except that the CWA President herself is such an employee and she estimates 40% of the bargaining unit could be. (U-1, DCA employee list; CWA Resp. Ex. A, Green Aff, ¶ 12 and Green testim.)

32. However, the EXOT positions are distinguishable from the NHCC "Reg/Perm" employees at least, in that they also have variable schedules based on NHCC's staffing needs. No employee is guaranteed any minimum number of hours. These temporary employees can also elect not to work or to decline scheduled assignments. (Ryburn testim.) They may also hold outside employment without being required to disclose it to the state. (Gallegos testim.) Sometimes, the EXOT employees may be engaged in special projects for which the State pays half of their hours, and the NHCC Foundation pays the other half. (Hanawalt testim.) The undersigned infers from the foregoing that the variable nature of scheduling relates to the fact that, although there are lots of shows and events going on at the NHCC, most of the EXOT employees' schedules are built specifically around the various events, which are serial in nature. (Gallegos and Hanawalt testim.)
33. As found above, during the contract "gap periods" the NHCC EXOT employees will continue their same work but be paid by the Foundation. As such, all their work hours worked at and/or for the benefit of the NHCC are not recorded in SHARE. However, during the gap periods, they are working and paid as independent contractors of the Foundation rather than as State employees, not State employees. (Resp. Exs. O-1 through O-6, spreadsheet showing hours worked by the six employees employed longer than one year; Ryburn and Gallegos testim.)
34. By the time of pre-hearing briefing, the current 13 NHCC EXOT employees had been employed at NHCC for the following number of years and worked the following average hours per pay period:
    (1) Noah Gum, SG-A: eight (8) months, 72-80 hours per pay period;
    (2) Jacob Ramirez, SG-A: four (4) months, 72-80 hours per pay period;
    (3) Austin Moore, CSR-A: four (4) months, 33-72 hours per pay period;
    (4) Grace Saavedra, CSR-A: three (3) months, 37-62 hours per pay period

(5) Jacob Saavedra, CSR-A: four (4) years and two (2) months, 8-68 hours per pay period
(6) Mariah Williams, CSR-A: two (2) years and ten (10) months, 26-74 hours per pay period
(7) Adriana De La Cruz, SED-O: two (2) years and one (1) month, 32-80 hours per pay period
(8) Rachel Dodd, SED-O: for four (4) months, ranges from 28.5-80 hours per pay period
(9) Connor Donovan, SED-O: four (4) months, 4-56;
(10) Rosemary Gallegos, SED-O: twenty (20) years and three (3) months, 18-72 hours per pay period;
(11) Randy Gomez, SED-O: two (2) years and five (5) months, 35-80 hours per pay period;
(12) Cody Kelien, SED-O: eleven (11) months, 13-80 hours per pay period; and
(13) Lucas Lopez, SED-O: four (4) months, 37.5-80 hours per pay period.

(*Id*.; and U-9, Spreadsheet, Total DCA Service.)

35. Nonetheless, the EXOT employees' schedules are not completely uncertain or indefinite. All but one of these EXOT employees – who was on medical leave – have worked nearly every pay period since their date of hire. Additionally, while their annual average hours per pay period vary from 31 to 79 hours and average at 54.9 hours; they are designated by the DCA as "full-time"; two (2) of the 13 employees work more than the total, combined average of permanent full-time employees that use all their leave as accrued (at 67 hours per pay period); two (2) others work more than the total, combined average of permanent full-time, senior employees (at 59 hours per pay period); and only one (1) works less than permanent part-time. Additionally, their work schedules are usually set at least two weeks in advance, and they are required to discuss any schedule changes in advance with their supervisor. (U-1, U-6, and Union testim.)
36. Nor is their continued employment completely uncertain, despite the plain language of their individual employment contracts. As found above, the NHCC EXOT position holders are generally re-hired back into the same position after a gap in service. (U-5, 6-3-20 email and Gallegos testim.)
37. Additionally, when a position is made permanent, the NHCC within the DCA almost always offers the job to an incumbent occupant prior to posting it for outside hired. Accordingly, the undersigned reasonably infers that the positions filled by EXOT employees for more than one year have not been posted for permanent hire during that

time, although DCA has since hired more EXOT employees to fill the positions at issue (*see* ¶ 21, *supra*).

38. Curiously, in all cases, the NHCC EXOT employees share the same position number with one or more of the other EXOT employees at issue, such that no individual occupies a full position. DCA, as with the EXOT position generally, justifies this on administrative efficiency, and asserts it is something to be addressed through SPO rules and procedures. CWA challenged(es) the practice as illegal under State personnel or classification laws, and argues it is therefore further proof of the Respondents' illegal actions under PEBA. Specifically:

    (i) Noah Gum and Jacob Ramirez both share a Security Guard-A position, position number 10115872 (with the same rate of pay at $18.00/hour)
    (ii) Austin Moore, Grace Saavedra, Jacob Saavedra, and Mariah Williams share a Customer Service Rep-A position, position number 10116381 (with the same rate of pay at $19.61/hour);
    (iii) Rachel Dodd, Connor Donovan, and Randy Gomez share a Set & Exhibit Designer-O position, position number 10115774; and
    (iv) Adriana De la Cruz, Rosemary Gallegos, Cody Kelien, and Lucas Lopez each share a Set & Exhibit Designer-O position, position number 10116417 (with the same rate of pay at $19.61/hour).

    (U-1, Employee List; Ryburn testim.) Although this "position sharing" is justified by the Agency as minimizing the amount of time it takes to fill vacancies (Ryburn testim.), SPO regulations do not appear to permit this for positions within the classified service. Additionally, in the case of NHCC, it is also unclear under the record how the choice would be made between incumbents sharing a position, if the position is ever made permanent.

39. From these facts, the undersigned infers that the precarious nature of their employment status and/or designed lack of benefits cause the high EXOT turnover among certain NHCC EXOT employees. As such, high turnover cannot be the factual or logical justification for the EXOT position, because it is just as likely (if not more likely) that the limitations of the position and failure or refusal to post permanent positions for hire that drive the turnover.

40. The undersigned further finds the "EXOT" position is a contrived mechanism that is not reasonably warranted, justified, or required by legitimate business determinations and has the effect of impeding access to PEBA rights albeit perhaps unintentionally. She also infers and finds that any new NHCC EXOT employees would be made aware through "shop talk" that they have a reasonable certainty of reemployment, should the limited and flexible

hours (and lack of all or most benefits) not drive them away before then. This inference is particularly strongly supported by Union Exhibit 5, in which DCA Technical Supervisor Andres Martinez wrote as follows to seven NHCC employees on June 3, 2020:

> Even though we successfully changed you all to not get fired every year, new people in the State Personnel Office wanted you all changed back to your original status. And on Monday that change was made. All that said, I'm sorry to say, you'll all be back to fired and hired every year."

(*Id*. (emphasis added); *see also* Audio Part 2, at 12:00-13:37 (Rosemary Gallegos describing and agreeing that they were always fired and hired every year).

41. The undersigned also finds that neither being non-classified State employees, nor "work[ing] for the state under a personally signed contract stating the employee can be fired at any time", necessarily render an employee "irregular" for purposes of the PEBA, as seen in the established presence of certain other at-will, "STRM" or "TERM" employees in the existing CWA/State bargaining unit(s).

Relevant Portions of the CBA and the State Personnel Act[9]

42. Under Article 2 pf the Parties' CBA, all public employees must complete a period of probation. This aligns with SPA and SPB rules but is different from PEBA which only requires that a "public employee" be "a regular nonprobationary employee of a public employer…".[10] (NMSA § 10-7E-4(Q).)

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[9] The following findings do not require or depend upon interpretation of the Personnel Act or SPB Rules, merely the application of their plain, unambiguous language, as will be discussed below. To the extent their purpose is considered, relevant sections of the Act provide as follows:

- Section 10-9-2 states that "[t]he purpose of the Personnel Act is to establish for New Mexico a system of personnel administration based solely on qualification and ability, which will provide greater economy and efficiency in the management of state affairs. The Personnel Act is enacted under and pursuant to the provisions of Article 7, Section 2 of the constitution of New Mexico, as amended.
- Section 10-9-13.1 states that "[t]he legislature finds that residents of the state are a valuable resource in state employment because of their dedication and commitment to the state they live in. Therefore, the purpose of this act [10-9-13, 10-9-13.1 , NMSA 1978] is to encourage residents to remain in the state rather than moving out of state because of unsatisfactory employment opportunities in New Mexico.

[10] The provision goes on to add, "…; provided that, in the public schools, 'public employee' shall also include a regular probationary employee and includes those employees whose work is funded in whole or in part by grants or other third-party sources". However, the express exception for public school employee does not establish grounds from which to infer legislative intent to impliedly extend that express exception to other employees. The undersigned also objects to and rejects the Union's carving up of the clause related

43. Section 10-9-4 of the SPA provides that:

    The Personnel Act and the service cover all state positions except:
    A. officials elected by popular vote or appointed to fill vacancies to elective offices;
    B. members of boards and commissions and heads of agencies appointed by the governor;
    C. heads of agencies appointed by boards or commissions;
    D. directors of department divisions;
    E. those in educational institutions and in public schools;
    F. those employed by state institutions and by state agencies providing educational programs and who are required to hold valid certificates as certified school instructors as defined in Section 22-1-2 NMSA 1978 issued by the public education department;
    G. those in the governor's office;
    H. those in the state militia or the commissioned officers of the New Mexico state police division of the department of public safety;
    I. those in the judicial branch of government;
    J. those in the public defender department, upon implementation of personnel policies and rules by the public defender commission;
    K. those in the legislative branch of government;
    L. not more than two assistants and one secretary in the office of each official listed in Subsections A, B and C of this section, excluding members of boards and commissions in Subsection B of this section;
    M. those of a professional or scientific nature that are temporary in nature;
    N. those filled by patients or inmates in charitable, penal or correctional institutions;
    O. state employees if the board in its discretion decides that the position is one of policymaking; and
    P. disadvantaged youth under twenty-two years of age …
    (*Id*.)

44. However, positions and employees are separate, and Section 10-9-3(I) provides that "'employee' means a person in a position in the service who has completed his probationary period". (*Id*., emphasis added)

45. SPB Rules address probation status, as well as "term" and "temporary" employees under the Personnel Act.

46. Under SPB Rule 1.7.2.7(C), NMAC, "Temporary appointments" cannot equal or exceed one year. (*Id*., stating that a "'[t]emporary appointment' is the employment of a candidate in a position created for a duration of less than one year" (emphasis added).) (Under SPB

to school employees, to suggest that the grant-related sub-portion is an independent proviso. (Un. Post-Hearing Brief at 12 and note 2.)

Rule 1.7.2.11, temporary employees are further defined and qualified as being subject to expiration "with at least 24 hours written notice to the employee without right of appeal to the board.")

47. Under SPB Rule 1.7.2.7(B), "'[t]erm appointment' is the employment of a candidate in a position created for a special project or a state or federal funded program with a designated duration." (*Id*., emphasis added) Under SPB Rule 1.7.2.10, term employees are further defined and qualified as follows:

> TERM STATUS: Employees in term status who complete the one year probationary period required by 1.7.2.8 NMAC shall have all of the rights and privileges of employees in career status except that term appointments may be expired due to reduction or loss of funding or when the special project or program ends with at least 14 calendar days written notice to the employee without right of appeal to the board.

(*Id*.; *see also* SPB Rule 1.7.2.7(E), that "[c]onvert(ed)" means the changing of an employee to a different type of status.)

48. Under SPB Rule 1.7.2.8, "Probation",

> A. A probationary period of one year is required of all employees unless otherwise provided for by these rules.
> B. The probationary period includes all continuous employment in the classified service except temporary service.
> C. A break in employment of at least one work day or more will require an employee to serve another probationary period upon rehire into the classified service with the exception of those employees returned to work under 1.7.10.10 NMAC [return from RIFs] or 1.7.10.14 [return from job-related injury or illness, respectively].
> ...

(*Id*., emphasis added.) SPB Rule 1.7.2.12(H) further provides "[e]mployment in the exempt service shall not count towards the probationary period required by Subsection A of 1.7.2.8 NMAC" either.

49. Under SPB Rule 1.7.2.9, "Career Status", "[a]n employee in a career appointment attains career status beginning the day following the end of the probationary period required by 1.7.2.8 NMAC unless otherwise provided for by these rules." (*Id*., emphasis added.) (SPB Rule 1.7.10.9, Reduction in Force, also provides that "[n]o employee in career status shall be laid off while there are term, probationary, emergency or temporary status employees in the same classification in the same organizational unit." *Id*.)

50. SPO Deputy Director Cynthia Sandoval admitted that none of the exceptions to the classified service apply to the employees at issue. (Audio Part 4 at 22:50-26:31.) Similarly, DCA HR Director Ty Ryburn admitted that DCA does not consider the employees at issue to be of a professional or scientific nature, as required by the only exemption applied to temporary employees in Subsection L. Nor was he aware of any other exception that would apply. (Audio Part 3 at 39:05-40:38.)
51. Ty Ryburn also admitted that DCA was not following SPO regulations by calling the EXOT employees "temporary" because those regulations limit that to positions "created for a duration of less than one year.". (Audio Part 3 at 40:39-41:43; *see also* 1.7.2.7(C) NMAC ("'Temporary appointment' is the employment of a candidate in a position created for a duration of less than one year.").)
52. PEBA itself does not define temporary or term employees and the PEBA is subordinate to the Personnel in any event, so the PELRB applies the State's relevant definitions here.
53. Based upon the foregoing and applying the plain language of the Personnel Act and SPB Rules, the undersigned finds that the NHCC EXOT positions are not temporary or otherwise excluded from the Personnel Act's coverage and the classified service, because:
    - the EXOT positions are not of a nature ("professional or scientific") that may be filled on a non-classified temporary basis (NMSA Sec. 10-9-4(M);
    - no other "temporary" employees, or employees otherwise similar to the NHCC EXOT employees here, are excluded from the Personnel Act's coverage or classified service (NMSA Sec 10-9-4); and
    - the year-long or longer employment contracts for NHCC EXOT employees exceed the period allowed under relevant SPO law and regulation for "temporary appointments", in any event (SPB Rule 1.7.2.7(C), requiring appointment periods or terms of less than one year).
54. Based upon the foregoing and applying the plain language of the Personnel Act and SPB Rules, undersigned further finds that the NHCC EXOT positions are covered under the personnel Act and classified service because either:
    - they were, or were treated by DCA as, "term appointments" and the position holders automatically convert(ed) to classified positions after completion of a term for one year or greater (SPB Rules 1.7.2.7(B), 1.7.2.10, and 1.7.2.7(E)); or

- they were otherwise classified-eligible positions, because not excluded therefrom, for whom the position holders have or will become classified upon the 365th day of continuous service, since not temporary or otherwise shown to be exempt, and since their contracts were/are for one year at least before their first break in service occurred(s) under either the individual employment contracts and/or the NHCC EXOT positions' or prior positions' design. (NMSA Sec. 10-9-3(I), NMSA Sec. 10-9-4, and NMAC 1.7.2.8(A).)

55. In the case of NHCC EXOT employees who have served without interruption more than one one-year or longer contract, they have already come to "have all the rights and privileges of employees in career status except" as provided in either NMAC 2.7.2.8 (requirement to serve one year of probation) or NMAC 1.7.2.10 (providing for the accrual of classified service rights and privileges to term employees upon completion of one year in service). In the case of employees within their first one-year or longer contract, such rights will ripen if they similarly have uninterrupted service for one year.

RELEVANT LEGAL STANDARDS

The burden is on the Union as Complainant to establish by a preponderance of the evidence that the Respondents violated the cited sections of PEBA. *See* NMAC 11.21.1.22(B) (that "[i]n a prohibited practices proceeding, the complaining party has the burden of proof and the burden of going forward with the evidence") and NMAC 11.21.3.16; *Foster v. Bd. of Dentistry*, 1986-NMSC-009 at ¶10 (that the standard of proof applied in administrative proceedings is a preponderance of the evidence).

"To prove by the greater weight of the evidence means to establish that something is more likely true than not true [or] what is sought to be proved is more probably true than not true". *See AFSCME Local 2499 v. Bernalillo County,* PELRB No. 106-25, Hearing Officer's Report and Recommended Decision dated 9/22/25), citing *Campbell v. Campbell*, 1957-NMSC-001 at ¶24 (that preponderance of the evidence simply means the greater weight of the evidence) and NMRA 13-304 (uniform jury instruction).

PARTIES' POSITIONS

Union

The Union urges the undersigned to reconsider her original determinations, in the Interim Order, that (a) the March 2025 accretion was not binding; (b) bona fide temporary employees are excluded from PEBA's coverage; and (c) EXOT employees who have worked for the State one year or less are bona fide temporary employees. It also argues that these EXOT employees are not temporary in any event, as shown by the testimony of those who have worked there for many years, and one for more than 20 years. It argues that "[t]he EXOT and/or temporary label is just a ruse." It also argues that as a matter of both fact and law, Respondents' misclassification of these employees on paper does not deprive them of rights under PEBA." (Union Post Hearing Brief at 2; see also 16-17 for references to "ruse".)

The Union argues first that "SPO and DCA previously agreed that these employees are 'regular public employees'" and that "there can be no claim" of "mistake since the NHCC "EXOT" employees were the only DCA Customer Service Representatives, Security Guards or Set Designers that were not already included in the bargaining unit. It adds that "[t]he issue of their status as 'public employees' under PEBA could have, and should have been, litigated in the accretion petition." It also complains, "[n]or did [Respondents]y file any petition to seek to undo their agreement that these were public employees under PEBA. Instead, they unilaterally refused to give them the rights that the accretion provided them to be members of the Union and covered by the CBA." (*Id*. at 9-11.)

Next, the Union argues that the undersigned should reconsider her earlier determinations that PEBA excludes temporary employees from the definition of regular employees. It argues that "[t]here is no categorical exclusion of 'temporary' employee under PEBA" as there are for confidential employees, supervisors, and managers and the legislature could and would have written such an exclusion in if it intended. It points to *Regents of Univ. of New Mexico v. New Mexico Fed'n of Teachers*, 1998-NMS-020, ¶ 19, which specifically noted that only "[t]hree categories of employees are excluded by PEBA from the right to bargain collectively." It also notes that *Regents* dealt with a policy that expressly sought to exclude temporary employees, in addition to the positions at issue in the *Regents* case. It argues from this that "[t]he lesson of Regents is broader than credited by the Interim Order" because "[i]t teaches that exclusions to collective bargaining rights must come from the explicit text of the statute".

The Union also points to the UNM graduate students case, *UE & UNM*, 66-PELRB-2021 (8-17-21), which concluded graduate students holding assistantships are "regular public employees", "after a five-day hearing", although the hearing was before a Hearing Examiner, and the Board reversed him upon review. It likens the EXOT employees here to the graduate students in *UE* and urges the Board's decision in that matter be followed here. The Union also distinguishes the November 1, 2024 PRN-related District Court decision in *UHPNM v. SRMC,* D-202-CV-2023-09660. There the Court highlighted the "absurd[ity]" of construing "regular" to include "temporary" employees. The Union argues this was mere dicta and "'[f]rankly, that dicta is inconsistent with *Regents*." It also argues that one of the Maine statutes cited in the undersigned's Interim Order does not support the determination therein because it involved express exclusions of temporary employees. (*Id*. at 11-15.)

Lastly, the Union argues that "[i]n any event, Respondents have not demonstrated that these employees are in fact temporary", "because these employees have a legitimate expectation of continual employment." It notes that prior Board precedent argues against reliance on self-serving and self-created employer documents rather than actual employment practices. *See, e.g.*, *NMCPSO, Local 7911, CWA v. NM State University*, 1-PELRB-13 at 5-6 (disfavoring reliance job titles or descriptions in a unit composition hearing). Here, it argues, "the unrebutted testimony was that these employees are hired on a near permanent basis, even if DCA goes through the ruse of firing them and rehiring them every year and (mis)classifies them as EXOT employees."

In support it points to Ms. Gallegos, an NHCC employee for 20+ years from a practical or functional standpoint. It also points to *Winkie Mfg. Co. v. NLRB*, 348 F.3d 254, 257 (7th Cir. 2003), which distinguished between "'regular' seasonal employees and 'casual' seasonal employees". The Court affirmed the Board's conclusion that the former have "a reasonable expectation of reemployment in the foreseeable future". As such, the Court affirmed they "are sufficiently interested in the working conditions of the unit and are eligible to vote on placement in a unit with permanent employees, whereas casual employees with no such expectation are not". *Id*. The Union also points to all the evidence of comparable work conditions between the EXOT employees and other NHCC/DCA employees that are covered by the CBA.

It argues that these employees are like "regular seasonal employees" in *Winkie* and that their classification or designation on paper by DCA as "EXOT" or "temporary" is a "ruse" that "does not control over the actual employment practice, pursuant to which these employees expect

to be rehired year after year and are not, in fact, temporary." It also argues that the same goes true for all the other NHCC/DCA EXOT employees, including those who have not yet worked a year or longer. (*Id*. at 15-18.)

Respondents

The Respondents argue that the status of the six (6) EXOT employees who have worked significantly longer than one year for the NHCC is the only issue before the undersigned.

They also argue that the evidentiary record clearly and unequivocally establishes that

> [e]ach of the six individuals at issue works under a non-classified, term-limited EXOT contract that contains no probationary period, offers no personnel protections, and expressly identifies the position as temporary and not governed by the State Personnel Act. Their schedules are irregular and as-needed, their reappointment is contingent and episodic, and their pay fluctuates with programming needs. No evidence supports a finding that they are "regular nonprobationary employees" under the Public Employee Bargaining Act (PEBA).
>
> Moreover, any challenge to the creation, classification, or contractual structure of EXOT positions falls outside the jurisdiction of the Board in this proceeding. The Board's Interim Order clearly confines the scope of this case to a single question: whether these six individuals are covered by PEBA. That question has been answered by the record in the negative.

(Resp. Brief at 20.)

The Respondents emphasize the facts that the March 2025 Accretion Petition "referred only to job titles, and did not include job codes or position designations identifying the roles as EXOT"; "did not include the A or O designation"; and "contained no information about job codes for the positions sought to be accreted." (*Id*. at 2, citing Ryburn, Audio File 3 at 0:34.) As such, "DCA agreed to the inclusion of the named titles only because those titles also exist within the classified service". It asserts, however, that "DCA did not understand that the petition was being interpreted to include EXOT-designated positions, which are structurally distinct and not part of the classified systems." (*Id*. at 3, citing Ryburn, Audio File 3, at 55:24–58:10, and 58:45.) Instead, it argues, the Petition "addressed job classification in the abstract not the individual employment status of persons holding those titles." (*Id*. at 3)

The DCA also, of course, emphasizes all the differences and/or arguable "irregularities" as discussed and found above, between EXOT and other DCA or State employees. From these facts, it argues that the "EXOT contract structure" is "temporary, [and] non-classified by design"; that "scheduling and work assignments" are "irregular and event-driven" and EXOT hours and "[w]ork

assignments fluctuate significantly from pay period to pay period depending on NHCC's programming needs." (*Id*. at 3-7, *see also* Audio citations therein.) It also argues that the "employment gaps and payment via grants or Foundation" further support the conclusion that these are temporary and irregular employees, and it emphasizes that rehiring is not automatic. (*Id*. at 7-9, *see also* Audio citations therein.) The DCA also emphasizes the NHCC EXOT employees' "lack of integration into classified State employment", and the supposed inability of these employees to conclude a probationary period while in these EXOT-designated positions. Lastly, it emphasizes SPO's lack of involvement in creating or classifying these EXOT positions. (*Id*. at 9-12, *see also* Audio citations therein.)

From the facts it emphasizes, it argues that "[t]he six remaining individuals are temporary, irregular employees excluded from PEBA"; and "the collective bargaining agreement does not apply to EXOT employees." (*Id*. at 12-16). It also argues that the "accretion history did not determine individual eligibility" in this case; and that "no prohibited practice occurred." (*Id*. at 16-18). It further argues that "classification and contract issues are outside the scope of this proceeding", and that "the validity of the [EXOT employment] contacts is not at issue and accretion did not override PEBA eligibility." (Id. at 18-19.)

For these reasons, it argues that the Union has failed to meet its burden of proof. (*Id*. at 19-19.) In addition to requesting a finding that the six *employees* at issue are also temporary, and dismissal of the PPC, the Respondents ask the PELRB to "[c]larify that job classification titles alone do not determine eligibility under PEBA and that any future efforts to accrete positions must identify and analyze the underlying employment structure, including classification and probationary status." (*Id*. at 20-21.)

ANALYSIS AND CONCLUSIONS OF LAW

To begin with, recall, the Union here bears the burden of proof as the Complainant. *See* NMAC 11.21.1.22(B) and 11.21.3.16. In this case, the Union has cited to a battery of PEBA provisions but has failed to elucidate in its brief how or why it feels each provision was violated:

1. Section 5(A) (giving public employees the right to "form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion");

2. Section 19(B) (making it a prohibited practice for a public employer to "interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act or use public funds to influence the decision of its employees or the employees of its subcontractors regarding whether to support or oppose a labor organization that represents or seeks to represent those employees, or whether to become a member of any labor organization");
3. Section 19(C) (making it a prohibited practice for a public employer to "dominate or interfere in the formation, existence or administration of a labor organization");
4. Section 19(F) (making it a prohibited practice for a public employer to refuse to bargain collectively in good faith with the exclusive representative); and
5. Section 19(G) (making it a prohibited practice for a public employer to "refuse or fail to comply with a provision of the Public Employee Bargaining Act or board rule").

See, e.g., UHPNM v. SRMC, PELRB Case 119-25 Interim Order on Motion to Dismiss dated 9-15-25 (noting that "neither the Respondent nor the undersigned can be required to guess or speculate about what factual circumstances or harms are alleged" and the Complainant must "show a nexus between" the Sections alleged to be violated "and the factual averments").

A. Unarticulated Claims Dismissed

As a threshold matter, the undersigned dismisses the Section 19(C) and Section 19(F) claims, as not being adequately supported by the foregoing findings and/or argument.

The Union asserts that the Employer should have filed a Petition for Clarification and that its refusal to process the dues cards constituted a unilateral changes of work conditions, but the undersigned is not persuaded. That the Employer(s) could have taken different or perhaps better action in this case does not prove the Respondents acted with bad faith bargaining claim. The undersigned is similarly unpersuaded as to the unarticulated domination claim. Specifically, not every alleged violation of PEBA is an attempt to "dominate or interfere in...the administration of a labor organization."

Accordingly, the foregoing findings will be applied only to the remaining Section 5(A), Section 19(B) and Section 19(G) claims.

B. The Hearing Examiner Reiterates and Reaffirms Her Earlier Determination that Temporary Employees are Not Regular Employees, so Are Not Public Employees Eligible for Coverage under the PEBA, Irrespective of Accretion Certification

As discussed, the Union attempted to and thought it had accreted these exact employees in March 2025, and the Union desires the PELRB to hold the Respondents to their affirmations and representations in that case.

The undersigned rejects that request and reaffirms her earlier ruling. She will not belabor the point, which is discussed at length at pp. 14-18 in the Interim Order. She does, however, reiterate that,

> the undersigned recognizes that SPO's affirmations of fact in PELRB Case No. 304-25 would normally have binding, legal effect, under either general principles of estoppel/laches or collateral estoppel/issue preclusion. Nonetheless, another legal constraint controls the case at hand: the threshold requirement under PEBA that "public employees" covered by the Act shall only include "regular, nonprobationary employees" of a public employer. *See* Sec. 4(Q), Definitions.

(Interim Order at 17.)

Next, the undersigned reconsiders the question of whether Section 4(Q) of the PEBA includes temporary employees within its definition of "public employee".

Upon reconsideration of the Section's plain language, the Second Judicial District's recent decision in *UNM-SRMC v. UHPNM*, D-202-CV-2023-09660 (Order dated Nov. 11, 2024), and other persuasive and analogous authority, the undersigned reaffirms her original determination in the Interim Order "that Section 4(Q) does not include bona fide[11] 'temporary' employees within the meaning of 'regular...employees'". (Interim Order at 19.)

As noted, the Union argues that "temporary employees" are not excluded from the definition of public employees in PEBA, according to either *Regents of Univ. of New Mexico v. New Mexico Fed'n of Teachers ("Regents")*, 1998-NMSC-020, ¶¶ 20, 43, 125 N.M. 401, 962 P.2d 1236, or the PELRB's decision concerning graduate students, in *UE & UNM*, 66-PELRB-2021, PELRB Case No. 307-20 (Aug.17, 2021). The undersigned is not persuaded by CWA's arguments because it misreads the Court's decision in *Regents* and the misapprehends the relevance of the District Court's Order in the PRN case (*SRMC*) to the Board's and Hearing Examiner's decisions in the graduate student case (*UE*).

[11] Merriam- Webster Online Dictionary: "authentic, true, or real ". *See* https://www.merriam-webster.com/dictionary/bona%20fide (last accessed 1/5/26).

(i) *Regents* Does not Compel a Different Answer

First, the undersigned distinguishes *Regents* because it did not purport to resolve whether temporary employees were regular employees.

There, the Supreme Court of New Mexico affirmed the invalidation of portions of the University's labor policy that excluded certain categories of employees from collective bargaining". However, the Court's analysis focused exclusively on whether those exclusions were broader than those permitted under PEBA and whether UNM's policy was grandfathered under the Act, not whether temporary employees were covered.

The grandfathered clause under review had made reference in a single sentence to "temporary" employees" but the two consolidated cases themselves concerned technical and professional employees, not temporary employees. Additionally, that *Regents* is inapposite is also clear from further review of the case's language:

> "We conclude that those portions of UNM's labor relations policy that exclude categories of employees in violation of PEBA are not grandfathered…" (*Regents* ¶1.)
>
> …
>
> "The Policy expressly excluded certain categories of employees from the bargaining process including 'administrative, faculty and supervisory personnel' and 'professional and technical personnel.' UNM, Policy p B, at 3-4." (Regents ¶2, emph. added.)
>
> "PEBA excluded 'management employees, supervisors and confidential employees' from the collective bargaining process. Section 10-7D-5. However, it opened the process to several categories of public employees that were explicitly excluded by the UNM Policy. See § 10-7D-4(P) (defining 'public employee'); UNM, Policy p B, at 3-4." (*Regents* ¶3.)
>
> "The NMFT claimed that UNM's Policy barred the right of bargaining collectively to certain occupational categories whose inclusion PEBA required. The NMFT sought to represent non-faculty professional and technical employees." (*Regents* ¶5, emph. added.)
>
> "¶6 On the same day, the American Association of University Professors--Gallup Branch (AAUP) submitted a petition to UNM requesting recognition as the bargaining representative for teaching faculty, librarians, and academic counselors at UNM's campus in Gallup, New Mexico." The two cases were consolidated by the PELRB. (*Regents* ¶¶6-7, emph. added.)

In its first decision of several, the PELRB concluded that ""The UNM labor policy at issue is invalid insofar [as] it denies the rights to UNM faculty, professional and technical employees

under PEBA to join, assist or refuse same with respect to any labor organization." First Decision and Order, at 12." (*Regents* ¶8, emph. added.)

In its next decision, on the Representation Petition, "[t]he hearing officer recommended that … the PELRB 'issue [an] order invalidating that portion of UNM's existing Policy on Labor-Management Relations having to do with denying faculty, professional and technical employees the rights guaranteed under PEBA to join [or] assist labor organizations for the purpose of bargaining collectively over working conditions or refusal of same.' *Id*." (*Regents* ¶11, emph. added.)

> "The Board adopted the hearing officer's conclusions of law on two issues: 1. That portion of the UNM labor policy at issue is invalid because it denies the right to form, join or assist a labor organization to the faculty, professional, and technical occupational groups and also denies the right for such occupational groups to refuse to engage in such organizing activities." (*Regents* ¶12, emph. added.)
>
> …
>
> "'[A]bsent cogent reasons to the contrary, we should interpret language of the PEBA in the manner that the same language of the NLRA has been interpreted, particularly when that interpretation was a well-settled, longstanding interpretation of the NLRA at the time the PEBA was enacted.'…," citing *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, p. 15 , 123 N.M. 239, 938 P.2d 1384, 1388 [hereinafter *Fire Fighters II*]. (*Regents* ¶18.)
>
> …
>
> "The Act defines 'public employee' as 'a regular, nonprobationary employee of a public employer; provided that in the public schools, 'public employee' shall also include any regular probationary employee.' Section 10- 7D-4(P). ¶20 The UNM Policy, in contrast, excludes many more categories of employees:
>
> > B. MEMBERSHIP AND REPRESENTATION
> >
> > (1) Any permanent, full-time or parttime, staff employee of the University is free to join and assist any labor organization of his own choosing or to participate in the formation of a new labor organization, or to refrain from any such activities, except however, administrative, faculty and supervisory personnel, professional and technical personnel, security officers and guards, confidential employees and employees engaged in personnel work, temporary part-time employees and temporary full-time employees shall not be represented by any labor organization for the purposes of bargaining collectively with the University on wages, hours, or other working conditions"

(Regents ¶¶19-10, emph. added.)

It is true that the Court stated,

> …it is more logical to conclude that, when a term, comprised of more than one word, is expressly defined by a statute, and a shortened form of this term appears elsewhere in the statute in context similar to the use of the long form, and further, when the statute includes no separate definition for this shortened form, the court should presume that the two terms have one-and the-same definition…
>
> …
>
> UNM has failed to demonstrate that PEBA intends to distinguish between 'public employees' and 'employees.' UNM offers no rationale for its peculiar implicit assertion that an act called the 'Public Employee Bargaining Act' would regulate any employees other than 'public employees.'

(Regents ¶40-41, emph. added.)

However, the undersigned disagrees with the meaning the Union would give that phrase. Specifically, the Union seems to suggest the Court was saying there is no difference between "public employees" and "employees" under the PEBA. This is a gross mischaracterization, if that is what the Union is asserting. The Court in *Regents* was discussing the narrow construction of exceptions, such as grandfathered clauses, and the PEBA's grandfather clauses referenced "employees" rather than "public employees." As the Court wrote,

> Thus, UNM claims, employment policies established after October 1, 1991, cannot enlarge upon the three categories of 'public employees' that PEBA expressly excludes from the bargaining process, those being 'management employees, supervisors and confidential employees.' Section 10-7D5. However, UNM asserts that the use of the general term 'employees' in the grandfather clauses means that UNM is not required to open the bargaining process to all 'public employees' as they are defined under the Act. UNM seems to be saying that, even though it did not recognize all eligible 'public employees' as mandated by PEBA, it has earned grandfather status by recognizing at least a few categories of 'employees.'

(*Regents* ¶ 38, emph. added.) Additionally, the alleged "enlargement" of the express "exclusions" from PEBA noted in *Regents* concerned those in the definition of "appropriate bargaining unit", not exclusions arising from the definition of "public employee".

Besides *Regents* and this case involving completely different issues, the Court's conclusion in *Regents* made clear that it was not saying "employees" are the same as "public employees", as the Union suggests. (Union Brief at 13.) Rather, it was saying that PEBA references to "employee" in the grandfather clauses meant "public employees" as defined Section 4(Q). The Regents case does not stand for the proposition that the definition of "public employee" is immaterial or may be ignored, or that there is no general distinction between the two words or phrases "public employee" and "employee". As the Court stated,

> All the language of PEBA, taken as a whole, indicates that when the Legislature used the term 'employees,' it intended to refer only to 'public employees' as they are defined and regulated under the Act. *See New Mexico Pharmaceutical Ass'n*, 106 N.M. at 74, 738 P.2d at 1320 (construe the statute as a whole).

(Regents ¶41, emph. added.) And in case its meaning still was not clear enough, the Court added,

> ¶46 Thus, under PEBA, a grandfathered collective-bargaining policy must include 'appropriate bargaining units.' Section 10- 7D-26(B). Reading this grandfather provision in the context of PEBA as a whole, a bargaining unit is 'appropriate' only as defined by PEBA. Under PEBA's definition, these units must be comprised of 'public employees.' All classes of 'public employees' as defined by PEBA must have the right to form bargaining units or the units will not conform to PEBA's definition of 'appropriate bargaining unit.' As discussed above, UNM's Policy does not recognize all classes of 'public employees' as the term is defined in Section 10-7D-5 and Section 10-7D-4(P). Thus, UNM's Policy does not provide for 'the designation of appropriate bargaining units.' Section 10-7D-26(B). This failure on the part of UNM's Policy leads to the conclusion that Paragraph D of UNM's Policy, in which UNM defines 'appropriate bargaining unit,' is invalid and must also be denied grandfather status.

(Regents ¶46, emphasis added.)

The foregoing passage makes clear that it is "public employee" rights that are being protected under the PEBA, and that the PELRB and even the State Supreme Court must abide by the PEBA's definition of "public employee". But the Court added still more:

> The purpose of the Public Employee Bargaining Act … is to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by assuring, at all times, the orderly operation and functioning of the state and its political subdivisions.
>
> Section 10-7D-2 (emphasis added). Once again the Act makes clear that its very function is to extend the right to organize and bargain collectively to all "public employees" as they are defined by PEBA…

(Regents ¶48, emph. Added and internal citations omitted.)

Thus, nothing in *Regents* commands the decision the Union advocates. Instead, the undersigned reads it as standing for the opposite, as it repeatedly reiterates and emphasizes the primacy of the definition of "public employee" and the public purpose of extending collective bargaining rights to "'public employees' as they are defined by PEBA". (*Id.*)

(ii) *The Board's Decision in UE* Does not Compel a Different Answer in light of *UNM-SRMC v. UHPNM*, D-202-CV-2023-09660

Next, the Union argues that inclusion of temporary employees is supported by the PERLB Board's decision in the *UE* decision involving graduate Students. However, the undersigned concludes that the PELRB's determination *UE* that graduate students are regular employees is also not controlling, in light of the District Court's 2024 decision in *UNM-SRMC v. UHPNM*, D-202-CV-2023-09660 (Order dated Nov. 11, 2024).

As noted, in the PRN case the Court highlighted in dicta the "absurdity" of interpreting "regular…employee" to include "temporary" employees. Although it was dicta, it is highly telling that the issue of temporariness presented to the Court the clearest and most absurd example of an "irregular" employee being treated like a "regular" one. Nor was that dicta contrary to the 1998 *Regents* decision, as the Union asserts. As explained above, *Regents* had absolutely nothing to do with whether or not "temporary" employees are excluded, since it did not address them. It was determined that university "faculty" and "licensed and professional" employees were included among "public employees", which is hardly surprising or a smoking gun.

Additionally, this is consistent with what is done in other jurisdictions and before the NLRA where applicable, as discussed in the Interim Order. Yes, the Maine statute cited by the Union expressly excluded temporary employees. But the Hearing Examiner's broader point was and remains that most jurisdictions' labor laws either do not cover temporary employees or they treat temporary employees distinctly differently from regular permanent employees, by whatever means and/or language used therein.

As discussed in the Interim Order, *UE* involved graduate students in teaching and instruction, under assistanceships that were "term appointments" and "contingent upon availability of funds, satisfactory performance". *Id*. at H.E. Order, ¶ 7. In determining that such graduate students were "regular" employees covered under PEBA, the Board expressly struck the Hearing Examiner's finding, which he based upon a plain language reading of Section 4(Q), that "[t]he term 'Regular Employees' is defined for purposes of this case as those who are 'appointed for an indefinite period of time subject to satisfactory performance and availability of funding'".[12] In

[12] As noted in the October Interim Order, the National Labor Relations Board (NLRB) also typically applies a "date-certain" test, or a "reasonable expectation of further employment test", as Hearing Examiner Griego did in *UE*, but for purposes of determining whether an employee may vote in an election, or is excluded as

place of that finding, the Board determined among other things that the PEBA "does not exclude graduate student[s] from its definition of regular employees"; and "other public employees with definite terms", such as teachers through Section 4(Q), are guaranteed collective bargaining rights." *Id*.[13]

However, the Board's decision in *UE* was not appealed further, and the undersigned believes it should not be followed going forward because the validity of Board's ruling in *UE* has been put into question by the Second Judicial District Court's subsequent ruling in *UNM-SRMC v. UHPNM*.

As the Board will recall, in *UNM-SRMC v. UHPNM*, 26-PELRB-2022 and 59-PELRB-2023, PELRB Case 302-22, it reversed the Hearing Examiner again on the issue of "regular employee", regarding PRN or "as needed" nurses. In *SRMC*, the Hearing Examiner had distinguished the Board's grounds for previously reversing him as to graduate students, so he relied upon his earlier analysis in *UE* concerning graduate students. His determination that PRN nurses were not regular employees under Section 4(Q) of PEBA again turned on the plain language, and "commonly understood" meaning of "regular" as "usual, normal or habitual" and "the antonym of 'casual' or 'irregular". *See* 307-20, H.E. Order at 8.

Upon review of the PRN case on remand (*UHPNM v. SRMC*), the Board adopted all the Hearing Examiner's findings but again reversed him on the question of Section 4(Q), after rejecting his conclusion. The Board stated it "disagreed, and continues to disagree, with that conclusion because the determination whether a public employee is 'regular' depends on the nature of the employment relationship, and not, as the Hearing Officer concluded, upon the frequency of work or similarity of job duties." *See* 59-PELRB-2023 at 1.

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temporary from a unit of permanent employees. *See, e.g.*, *Phoenix New Times, LLC and The Newsguild-CWA*, 370 NLRB No. 84 (2021); and John E. Higgins, Jr., Developing Labor Law (6th ed., BNA, 2012), at 647-48 (regarding the two tests generally, and that the "date-certain" test is somewhat more prevailing), and 757-58 (regarding the exclusion of graduate students from overall faculty bargaining units). In her October Order, the undersigned treated the "date-certain" and "reasonable expectation" tests as usable interchangeably, but the record here confirms that they may instead be used in the alternative, depending on the facts and circumstances. The Union leans on the NLRB's "reasonable expectation" test in offering *Winkie Mfg*. at the post-hearing briefing stage, for instance, and it is an appropriate analytical fit to the facts herein. *See infra*.

[13] The Board was referring to that portion of this provision that relates to public school employees. In the undersigned's view, express language granting one specific subgroup a right does not support an inference that the legislature also intended to grant that right more broadly than specifically identified. *See also* Note 10, *supra*.

Ultimately, the Board determined that the word "regular" was "inherently ambiguous" because it could refer to different things, such as "frequency of an event or circumstances," or "a status". *Id*. at 2. It further concluded that "regular" under the PEBA "could refer to employment frequency, such as how often a person provides services to the employer", and "it could also refer to a legal status of the employee. *Id*. From there, the Board reasoned that it would thwart the clear purposes of the PEBA "if the right of public employees to organize, bargain and assert collectively bargained for rights was conditioned on the frequency of work, or on other idiosyncratic terms and conditions of work within the control of an employer." *Id*. at 3.

Unlike in *UE*, however, the public employer appealed the *UNM-SRMC* decision, and the District Court reversed the Board's interpretation of "regular" and "public employee" as to PRNs on grounds that the undersigned believes are relevant here, either directly or by analogy in an area where the answer has not been previously decided under New Mexico law. *See* Case No. 302-22, *UNM-SRMC v. UHPNM*, D-202-CV-2023-09660, Order reversing the PELRB, dated November 1, 2024 (J. Franchini).

In reversing the Board, the Court favorably assessed Hearing Examiner Tom Griego's plain-language-based analysis of Section 4(Q) that had originated in the *UE* matter. In doing so, the Court also emphasized the Board's interpretation would include temporary employees. It then stated that it would be "an absurd construction" of "regular" if it "mean[t]…there would be no exclusion for temporary employees". *Id*. at 13, citing *Chavez v. Bridgestone Americas Tire Operations, LLC*, 2022-NMSC-006, ¶ 40, 503 P.3d 332 (that "[w]e will 'take care to avoid adoption of a construction that would render [a] statue's application absurd or unreasonable or lead to injustice or contradiction'") (quoted authority omitted) (alteration in original).

The undersigned is not persuaded. First, she disagrees it was dicta, to determine whether a definition that also included temporary employees would be absurd. Second, even if it were dicta, it is significant to the undersigned that it was so patently obvious or even axiomatic to the Court, that the plain meaning of "regular" does not include "temporary" employees. However it is analyzed, though, the undersigned agrees that the word "regular" is not ambiguous, and she too favors the former Director's analysis of "regular" under PEBA as being better grounded in relevant labor law and the plain language of the PEBA that the Board's reversals. The undersigned also agrees that it would be absurd to construe Section 4(Q) in a manner that included "temporary" employees within the meaning of "regular" employees. Accordingly, the undersigned finds the

Court's conclusion as to temporary employees to be both highly persuasive on its merits and procedurally controlling on this question (exclusion of bona fide temporary employees) until reversed.

CWA notes that the District Court's decision is now up on appeal (*see* Ct. of App. Case No. A-1CA-42271), and it argues strenuously that the PRNs addressed in *UNM-SRMC v. UHPNM* are distinguishable from the "TEMP" or "EXOT" positions at issue here. Because of the cases' differences, CWA argues that the *UNM/SRMC* decision is not controlling here. CWA observes that in *UNM-SRMC*, "PRN Employee" was defined and limited under Hospital policy in very specific ways that are not applicable here. Instead, the employees here work every pay period absent an extended medical absence, are scheduled at least two weeks out, are classified as "full time" by SPO, and work hours that the Union argues compare favorably to the hours actually worked by other full-time state employees with leave entitlements.

These arguments, however, do not go to the issues of whether temporary employees are covered by the PEBA, or whether the NHCC EXOT employees are "temporary". These arguments instead to whether they are otherwise "regular". In any event, even if the many distinctions between PRN and NHCC EXOT employees were relevant, the undersigned would still conclude that bona fide temporary employees are sufficiently analogous to the PRN nurses in their overall "irregular" nature and/or characteristics, as to be similarly excluded from the PEBA's coverage under the District Court's analogous and relevant reasoning.

As Judge Franchini observed in *UNM-SRMC*,

> The phrase "public employee" is a term of art defined by statute…[An employee] cannot be considered a "public employee" unless and until [it] is determined to meet the statutory definition of a "public employee". Under PEBA a "public employee" is defined as a "regular nonprobationary employee of a public employer." Section 10-7E-4(Q)…

UNM-SRMC Order dated 11/1/24, at 10. The PELRB's "primary goal", like that of the Court, "is to ascertain and give effect to the intent of the legislature", and "we must assume the legislature chose its words advisedly to express its meaning unless the contrary intent clearly applies." *Id*. at 11, quoting *Diamond v. Diamond*, 2012-NMSC-022, ¶¶ 25, 28. Additionally, "in assessing intent, 'we look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended.'" *Id*.

Upon consideration of the plain language of Sec. 4(Q), the Court concluded that the Board had erred in its analysis to the extent it "appears to have substituted 'direct' for 'regular,' or perhaps

simply equated the two terms." *Id*. at 13, 15. Instead, the Board favored Hearing Examiner Thomas Griego's application of the plain-language analysis of "regular", the analogous authorities he cited, and his conclusion that "regular" simply means "usual, normal or habitual" and the "antonym of casual' or 'irregular'." *Id*. at 13-14.

Applying the plain language of Section 4(Q), and the Court's reasoning in *UNM-SRMC*, to the case at hand, the undersigned agrees and adds that whether control over the employee and their terms and conditions is direct or indirect is not the sole relevant criteria of whether an employee is "regular."

Rather, construction of the meaning of "regular" may often involve consideration of various position characteristics and factors, as discussed by Hearing Examiner Griego and the Court, including whether the work is temporary, probationary, casual, intermittent, seasonal, on-call, ad hoc, "lacking in continuity", irregular, etc. as well as whether the public employer's control is direct or indirect. [14] *See* Griego Report in UE at 14-15, citing Me. Rev. Stat. Tit. 26, § 1022(8) (2010) (University of Maine System Labor Relations Act, defining a "'[r]egular employee' as 'any professional or classified employee who occupies a position that exists on a continual basis'"); Me. Rev. Stat. Ann. tit. 26, § 979-A(6)(F) (2023) (State Employees Labor Relations Act) (excluding from the definition of "[s]tate employee" one "[w]ho is temporary, seasonal or on-call"); Ohio Rev. Code Ann. § 4117.0l(C)(13) (2015) (Public Employees Collective Bargaining Act) (excluding from its definition of "p]ublic employee" "[s]easonal and casual employees as determined by the state employment relations board"); N.H. Rev. Stat.§ 273-A:l, IX(d) (2014) (New Hampshire's Public Employee Labor Relations Act, which excludes from its definition of "[p]ublic employee" "[p]ersons in a probationary or temporary status, or employed seasonally, irregularly, or on call", construed in *Stratham*, *infra*); *Barber v. Los Alamos Beverage Corp.*, 1959-NMSC-007, ¶¶ 3, 27-28, 65 N.M. 323, 337 P.2d 394 (holding, in the worker's compensation

[14] Notwithstanding the reversal, the undersigned believes the Board was correct in its analysis insofar as it recognized that direct or indirect control could very well be a highly significant factor, depending on how the issue was presented. *See, e.g., The Atlanta Opera, Inc. and Make-Up Artists and hair Stylists Union, Local 798, IATSE*, 372 NRLB No. 95 (2023) (reaffirming the standard of *FedEx Home Delivery*, 361 NRLB 610 (2014) for determining independent contractor status, because independent contractors are expressly excluded from coverage of the National Labor Relations Act (NLRA); and this standard, like that under Restatement of Contracts (Second) – and IRS rules – considers direct or indirect control among other factors). The problem with its analysis, rather, was essentially concluding that was the only meaning or criterion of "regular".

context, that an individual, holding "regular employment" with a fire department, who was paid by the day to work for the defendant beverage company, was a "special," or "casual," employee, and as a result, not an employee under the worker's compensation law); and *In re Town of Stratham*, 743 A.2d 826 (N.H. 1999) (construing the definition of "public employee" in N.H. Rev. Stat.§ 273-A:l, IX(d) (2014) to exclude on-call and irregular employees based on the plain meaning of the terms as "lacking continuity or regularity of occurrence, activity, or function" and "ready to respond to a summons or command", respectively, and concluding that part-time officers working on-call on an irregular basis must be excluded from the bargaining unit).[15]

Thus, the undersigned would reach the same determination that bona fide temporary employees are excluded if applying the Court's analysis in *UNM-SRMC* by way of analogy rather than as a matter of presently controlling precedent. *Cf. id.* at 15 ("that a PRN employee is not 'regular' and is thus not a 'public employee' under Section 10-7E-4(Q) based on the meaning of the term discussed above in light of the undisputed facts in the present matter"). Nor is the undersigned persuaded by the Union's argument that the District Court's statement on the absurdity of construing "regular" to include "temporary" is contrary to *Regents*. As discussed above, *Regents* does not stand remotely for the proposition that "regular" includes "temporary", and it did not even construe the word "regular". As such, that case is simply not relevant to employees at issue here

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[15] Other examples illustrating a common "understandings" of "regular" employment no doubt abound, as most employment-related laws turn on the employee's status, even if the exact purposes of the statutes vary significantly. Besides the NLRB authorities referenced in Notes 12 and 14 above, the District Court in *UNM-SRMC*, for instance, referenced NMSA 1978, § 10-9-16 (1961). That is a provision of the State Personnel Act that states "[a]ll employees of the state holding positions brought into the *classified service* by the Personnel Act shall be continued in their positions and become regular employees without original examinations, if they have held the position for at least one year immediately prior to the effective date of the Personnel Act." That is the only reference to "regular employee" in State law of which the undersigned has been apprised. A crude and global internet search revealed only two other instances in which "regular employee" is specifically defined, in identical subsections of the U.S. Code of Federal Regulations regarding Foreign Relations, Subchapter M, International Traffic in Arms Regulations: § 120.64 and § 120.39. Both define a "regular employee", for what it is worth, as follows:

(1) An individual permanently and directly employed by the company; or
(2) An individual in a long term contractual relationship with the company where the individual works at the company's facilities, works under the company's direction and control, works full time and exclusively for the company, and executes nondisclosure certifications for the company, and where the staffing agency that has seconded the individual has no role in the work the individual performs (other than providing that individual for the work) and the staffing agency would not have access to any controlled technology (other than where specifically authorized by a license).

Not being persuaded otherwise, the undersigned reaffirms her October 2025 finding and conclusion that bona fide temporary employees are expressly excluded from PEBA because they are "irregular" employees according to plain language analysis. *See* 10-7E-4(Q).

C. NHCC EXOT Positions Are Not Bona Fide Temporary Positions; and The Six EXOT Employees Directly at Issue at the Hearing Have Worked At Least One Year in Their Position Without Interruption, So Are Covered Under PEBA

We next address whether the instant six (6) DCA EXOT employees at issue are in fact bona fide temporary employees, or if they are instead covered "public employees" under Section 4(Q). However, because all the facts except the length of initial uninterrupted service are the same for all NHCC EXOT employees, many of the ultimate findings and conclusions apply or will also apply to other NHCC EXOT employees.

1. The Case Requires Consideration and/or Application of the Personnel Act and SPB Rules

As an initial matter, the undersigned revisits her earlier indication to the Parties that she was "not inclined" to address claims related to classification. (October Order at 26.) Upon review of the record and the Parties' respective positions, it is clear that the Respondents themselves have put the State Personnel Act, SPB Rules and classification issues into issue by asserting that the EXOT employees at issue are not classified, are exempt from the classified service, etc.

As such, the undersigned may and will consider their provisions as relevant to determining the instant PPC under the PEBA. *See, e.g.*, PELRB Case 125-05, *CWA v. GSD* (dealing with the intersection of jurisdiction and relevance under the Personnel Act and PEBA and SPB and PELRB rules).

2. NHCC EXOT Employees are Term Employees, and the Six (6) at Issue at the Hearing Have Worked Longer For One Year So Are Covered Under the PEBA

Next, the undersigned turns to the record of the six (6) long-standing EXOT employees at issue at the evidentiary hearing. As found above, their years of service range from 2.5 to 20+ years, although none would meet the technical requirements of State probation IF they were indeed

temporary employees. *See* SPB Rule 1.7.2.8(B), "Probation" ("[t]he probationary period includes all continuous employment in the classified service except temporary service").

However, based on the plain language of the Personnel Act and SPB Rules these six NHCC EXOT employees are neither temporary nor otherwise excepted from classified service. As found above, "the Personnel Act and the service cover all state positions except specifically enumerated one, and the NHCC EXOT position does not fall into any of the exceptions, and are not of a "professional or scientific nature". *See* NMSA 10-9-4(M). Additionally, SPB Rule 1.7.2.7(C) provides that "temporary appointments" cannot equal or exceed one year and must instead be "created for a duration of less than one year").

Rather than being temporary appointments authorized under the State Personnel Act, the NHCC EXOT positions appear to be "term appointments" as defined in SPB Rules because for one year or long and treated and/or justified as such by the DCA (and SPO, derivatively or by acquiescence). Under SPB Rule 1.7.2.7(B), "'[t]erm appointment' is the employment of a candidate in a position created for a special project or a state or federal funded program with a designated duration." (*Id*.) The two criteria are written in the disjunctive and the undersigned finds and concludes that the NHCC performances and associated services meet both, based on the undisputed fact that these positions were State funded except when Foundation-funded, and based on DCA Director Ryburn's testimony that NHCC needed these EXOT positions to be temporary and/or irregular because of the short-term, serial and/or erratic nature of the performances and many related NHCC services.

Term status is well-defined under State law and the instant facts appear to apply, where every NHCC EXOT employee has worked and/or is working under a contract that is one-year or longer in duration. Under SPB Rule 1.7.2.10,

> Employees in term status who complete the one year probationary period required by 1.7.2.8 NMAC shall have all of the rights and privileges of employees in career status except that term appointments may be expired due to reduction or loss of funding or when the special project or program ends with at least 14 calendar days written notice to the employee without right of appeal to the board.

Id. Thus, upon being in their positions for one year, the status of six employees at direct issue converted by operation of law to became a part of the classified service, with certain exceptions. *Id.; see also* SPB Rule 1.7.2.7(E), that "[c]onvert(ed)" means the changing of an employee to a different type of status").

Additionally, although not exactly synonymous with "classified employees" as far as rights and protections, such term positions or employees are "regular" for purposes of PEBA, based on the foregoing discussions.

3. Even if Not Term Employees, the NHCC EXOT Employees Are Not Temporary or Otherwise Irregular and Have Completed The Required One-Year Probationary Period

In the alternative, the undersigned would find the NHCC EXOT positions and/or employees are nonetheless not bona fide temporary or irregular, for purposes of the PEBA, under the facts, the PEBA's plain meaning, and the "reasonable expectation" test; and that the six (6) employees who the hearing directly addressed are covered under the PEBA because they have all completed at least one year of continuous service.

That the NHCC EXOT employees are not otherwise irregular is clear from the findings above. These employees do the exact same or very similar job as any classified co-workers (security guards and set designers), and in some cases even constitute the entire force of NHCC employees of their category (customer service representatives). Thus, the only question is whether they are "temporary" or lacking a "reasonable expectation" of continued employment, because serving on a term-limited contract of at least one-year in duration.

As observed by the Seventh Circuit Court of Appeals in *Winkie Mfg. Co., Inc. v. NLRB*:

> …While the determination of whether a group of employees has a reasonable expectation of future reemployment is a fact-intensive determination for which there is no 'hard and fast rule,' *see NLRB v. Bar-Brook Mfg. Co.*, 220 F.2d 832, 834 (5th Cir. 1955), the Board regularly assesses the following factors: the size of the area labor force, the stability of the employer's labor requirements and the extent to which it is dependent upon seasonal labor, the actual reemployment season-to-season of the worker complement, and the employer's recall or preference policy regarding seasonal employees. *Maine Apple Growers, Inc.*, 254 NLRB 501, 502 (1981). *See also Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1179 (D.C. Cir. 2000) (citing the *Maine Apple Growers* factors); Office of the Gen. Counsel, Nat'l Labor Relations Bd., *An Outline of Law and Procedure in Representation Cases*, 199 (1999) (listing factors militating in favor of finding employees regular seasonal employees inclusion as: same labor force; preferences in rehiring former employees; similarity of duties and benefits; stabilized demand for and dependence on seasonal employees).

(*Id*., 348 F.3d 254 (7th Cir. 2003) (page unknown, decision located online here: https://law.justia.com/cases/federal/appellate-courts/F3/348/254/515161/) (last accessed 3/3/26).

This is a "multi-factor" and "flexible", and does not establish "numeric minimums for each factor". *Id*. Instead, "the Board [the NLRB] may evaluate whether the totality of a company's actual hiring practice fosters a reasonable expectation of reemployment among" the temporary workers. *Id*., citing *Maine Apple Growers*, 254 NLRB at 503 (1981) (explaining that an employer need not demonstrate a positive finding for each factor in order to sustain a finding of reasonable expectation of future employment). Ultimately, the NLRB looks to whether they "share sufficient interests in employment conditions with other employees to warrant their inclusion in the unit". *Id*.

Seasonal employees being a type or form of temporary employee, the undersigned finds that their treatment by the NLRB is relevant and somewhat instructional here, by way of analogy. Under this analysis, it is notable to the undersigned that the Board distinguishes between "regular seasonal employees" and casual employees with no such expectation; and concludes only the former share sufficient interests in employment conditions with other employees as to be appropriately included in the bargaining unit (for voting purposes).

Applying the "reasonable expectation of future reemployment" here, the results are clear: the NHCC EXOT employees share a near complete overlap of interests in employment conditions, and when they do not it is because they are placed in this artificial construct that does not comport with the State Personnel Act or SPB rules. Similar to what was seen in *Winkie Mfg.*, here "the employer ha[s] a policy" or practice "of recalling" or rehiring the temporary employees at the end of the season or term. *Id*. Also similar is that the NHCC also has "regular need" for the EXOT employees since the shows must go on – so much so that they will be paid through the Foundation for a period as needed, because "the show must go on" as they say. Additionally, as in Winkie Mfg. the "employees are drawn from a static and definable pool" for the most part: people who love the mission and work of the NHCC so much that many will forego ordinary benefits unless or until they can get a permanent position with the NHCC.

NHCC and DCA offer no reason why such permanent positions cannot be created, except administrative ease or convenience to the solving a problem of their own creation: lack of continuity of staffing needed to keep the NHCC shows going.

The undersigned cannot find better words to describe the situation here than those used by the Union:

> … Here, the unrebutted testimony established that these employees do expect to be employed from year to year, and over the past twenty years most have, several for more than a decade.
>
> Given the nature of the work and the number of employees involved, this can hardly be surprising. There are no permanent Customer Service Representatives, yet the so-called temporary ones staff the Welcome Center and Visual Arts Museum whenever it is open, in addition to covering the Box Office in the performing Arts Center. Temporary Security Guards do the exact same work as their permanent co-workers. And, Set and Exhibit Designers work nearly constantly because there are shows nearly every weekend and, even when there is not show, they have maintenance duties in the Performing Arts Center and help out in the Visual Arts Museum. These employees have worked during the so-called "gaps" in their employment because the work is always needed; in those instances, they get paid by grants. They work hours nearly analogous to full time employees, especially when considering that the SHARE reports provided by Respondents only capture hours paid directly by the state, not hours paid by grants.
>
> …
>
> This fact applies equally to those six employees who happened to have been employed more than a year at the time of this matter as it does to those who had been employed less than a year at that time. In this respect, the Union agrees with counsel for Respondents opening statement: the only distinction between six employees at issue after the Interim Order and all others is that these six employees have worked subsequent contracts. Audio Part 1, at 15:59-16:18. All can expect to be employed in the same position doing the same work in the upcoming year. For that reason, the Union respectfully requests that the Hearing Examiner reconsider her Interim Order and find that all of the employees at issue are, in fact, not temporary and are public employees under PEBA.

(Union Post-Hearing Brief at 17-18, emphasis in original.)

Under the totality of the facts presented here, the undersigned would find and conclude that the NHCC EXOT positions are not excluded as bona fide temporary positions, in the alternative to her finding and concluding that they are not excluded as term employees.

Nor is coverage of the six employees barred due to the limitations and restrictions placed on probationary employees and probation requirements, as the Respondents argue.

As testified by DCA Director Ryburn and reflected in the documentary record, the six (6) NHCC EXOT employees at issue at the hearing have previously been deemed and treated as if within the classified service. Nor is there any evidence suggesting that the nature of their various jobs changed in or near the time the NHCC EXOT position was created several years ago. Additionally, the same record reflects that the NHCC EXOT contracts are all one year or longer in

duration, and that all of the six (6) employees at issue thus served under at least one such one-year or longer contract. Therefore, they have already met the express terms of the one-year probationary period. *See* NMAC 1.7.2.8(A).[16]

4. The Foregoing Applies to All Other NHCC EXOT Employees but Their Claims are Not Yet Ripe Because They Have Not Completed a Full Year of Term or Probationary Service

Finally, the foregoing analysis prompts the undersigned to also revisit her prior determination that

> Based on the undisputed facts and standards discussed above, it is readily apparent that the employees who have been employed 12 months or less are bona fide temporary employees, given that their employment is contract-based for finite periods at a time, the number and occupancy of the seven EXOT positions have been a moving target all year, and the employees work widely varying scheduled that are determined solely for the benefit of the employer.

(Interim Order at 18.)

[16] In this case it was a fortuitous accident for the Union that DCA used EXOT contracts of at least one-year in duration, and that that is all that is required either for term or probationary employees to acquire classification rights and protections. *See* NMSA 10-9-4, NMAC 1.7.2.8(A), and 1.7.2.10. However, had the annual employment contracts been instead for less than one year, the undersigned believes there would still have been grounds for the undersigned to reject as irrelevant or insufficient the fact that the employer had designated an employee "probationary", or "probation ineligible". As correctly noted by the Union, such unilateral action will not necessarily be dispositive, and the hearing examiner may look to the background facts and the policy underlying the regulatory definition of "probationary" in making the determination of unit inclusion or exclusion. For example, in one case, an employee was held to have met her six-month probationary period under UNM personnel with similar continuity of service language, where she had worked in the same position doing the same job for almost a year, for six months as a temporary employee and five months as a regular employee, and the University had a full year to evaluate the employee's performance. *See United Staff-UNM Employees Local No. 6155 v. UNM*, PELRB Case No. 101-05, Hearing Examiner Report at 11-13, 32-34 (Aug. 17, 2005); *see also NMCPSO Local 7911*, 1-PELRB-13 at 5-6, *supra* (also rejecting reliance or overreliance unilateral job descriptions). Moreover, in a case, like here, where the employer was found to have violated the PEBA through the use of an unreasonable contrivance that was contrary to the purpose of both PEBA and the Personnel Act, imputing non-consecutive time spent on probationary status would be an appropriate measure because necessary to directly remedy the Respondents' violation of the PEBA, intentional or otherwise. *See* NMSA 10-7E-2 (that "[t]he purpose of the Public Employee Bargaining Act is to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions"); *see also* Note 9, *supra*, regarding Personnel Act's purpose(s)).

As the Union correctly observes, the evidence introduced at the hearing – and particularly Ms. Gallegos' testimony – made it abundantly clear that the only difference between these employees and the six for whom the hearing was formally held was that those six have worked longer than one year, and have been repeatedly fired and re-hired before.

As discussed in the Interim Order and then further demonstrated at the hearing, EXOT personnel or positions are generally subject to routine or frequent turnover and term limited contracts, but almost half or six (6) of them have held or filled their EXOT position for significantly longer than a year; all who do not quit or have HR/personnel issues are routinely rehired after a typically short gap of time in which they continue to work for the benefit of NHCC but are paid by the Foundation; and, if or when permanent positions are created, they are offered to incumbents. At the same time, the NHCC EXOT employees work various hours a week yet average 54.9 hours a pay period; shows are held 85% of the weekends; and the EXOT employees work side-by-side and perform the same work as their non-EXOT cohorts IF there are any.

Based on these facts, the Union establishes by a preponderance of the evidence that the nature and characteristics of the NHCC EXOT position does not render those employees "temporary" or "irregular" for purposes of the PEBA, because they share – or in some cases constitute the entirety of – a community of interest with their non-EXOT counterparts at DCA and/or NHCC.

Nonetheless, the lack of a year-long period of time for a term position to accrue rights, or to fulfill the one-year probationary review period, would still remain a bar to these employees' accretion to the bargaining unit, under the foregoing analysis. As such, the question of their coverage under PEBA is not yet ripe.

Accordingly, the undersigned retracts her determination that the other EXOT employees are bona fide temporary employees. However, no action can be taken at this point because their claims are not yet ripe. Should those employees choose to remain in the NHCC EXOT positions for a subsequent contract cycle, they will be covered under PEBA after serving a one-year contract; or, in the alternative, if they serve more than one-year non-consecutively and it is adequate to

evaluate their performance, consistent with what was described, determined, and/or recommended above.[17]

CONCLUSION AND RECOMMENDED DECISION

Based upon the foregoing findings, legal standards, reasoning and conclusions, the Hearing Examiner recommends that the PPC be SUSTAINED and remedied by (a) a declaration of violation of Sections 5(A), 19(B) and 19(H) of the PEBA; (b) an order directing the Respondents to cease and desist such violations, and to process the dues authorization cards of the six employees discussed herein, as well as the cards of future EXOT employees as they become eligible for bargaining unit membership consistent with this Report; (c) an order to post notice the Board's Order or similar notice where notices to bargaining unit employees at DCA, for 30 days; and (d) appropriate compensatory or "make whole" damages related to the improper denial of classified benefits for Austin Moore, Jacob Saavedra, Mariah Williams, Adriana De La Cruz, Rosemary Gallegos, and Randy Gomez, the amount of which is to be determined by the subsequent hearing or motion if not stipulated and agreed to by the Parties (within 30 days of the close of the hearing or as otherwise mutually extended by the Parties).

This is a final disposition as to the question of liability under the PEBA, and an aggrieved Party may obtain Board Review of this Recommendation pursuant to NMAC 11.21.3.19.

ISSUED this 11th day of March, 2026

Pilar Vaile
Exec. Dir. and Hearing Examiner
Public Employee Labor Relations Board

[17] The undersigned also observes that this is much like any other normal, ordinary or "regular" employee – e.g., rights accrue naturally upon completion of a period of performance review, unless they choose to move on elsewhere before those rights accrue.

APPENDIX A

STIPULATED EXIBITIS

For the Union
U-1, DCA Position List
U-2, 2023 Order Amending Certification 31-PELRB-2023, In re PELRB No. 312-22
U-3, 2025 Order Accreting Positions, 9-PELRB-2025, In re PELRB No, 304-25
U-4a, misc. 2022-2025 Employment Offers for M. Williams and D. Rivera
U-4b, 20254 Employment Offers for A. De La Cruz, C. Donnovan, R. Gallegos
U-5, 6/3/2020 email from A. Martinez to DCA EXOT employees regarding annual "firing"
U-6, Spreadsheet of average hours worked by EXOT employees per pay period
U-7, Organizational Chart, "Structure of New Mexico State Government"
U-8, CBA (Jul. 29, 2021 – Dec. 31, 2024)
U-9, 11/24/25 email from T. Luera to S. Curtice attaching a spreadsheet, "NHC Years of Service"
U-10, 3/19/25 email from SPO LR Manager J. Peaten forwarding a list of DCA EXOT employees and stating that DCA did not dispute the Petition for Accretion.
U-12, 4/24/25 email from SPO regarding inability to process dues authorization card for J. Gutierrez
U-13, 6/26/25 emails between SPO and CWA regarding inability to process dues authorization cards for J. Gutierrez, R. Gomez and C. Massoth

For the Respondents
R-D, 2025 Employment Offer and Compensation Action Request Form for A. Moore
R-F, 2025 Employment Offer and Compensation Action Request Form for J. Saavedra
R-G, 2025 Employment Offer and Compensation Action Request Form for M. Williams
R-H, 2025 Employment Offer and Compensation Action Request Form for A. De La Cruz
R-K, 2025 Employment Offer and Compensation Action Request Form for R. Gallegos
R-O-1, A. Moore Spreadsheet, hours worked per pay period from 11/8/25 to 10/10/25
R-O-2, J. Saavedra Spreadsheet, hours worked per pay period from 11/8/25 to 10/10/25
R-O-3, M. Williams Spreadsheet, hours worked per pay period from 11/8/25 to 10/10/25
R-O-4, A. De La Cruz Spreadsheet, hours worked per pay period from 11/8/25 to 10/10/25
R-O-5, R. Gallegos Spreadsheet, hours worked per pay period from 11/8/25 to 10/10/25
R-O-6, R. Gomez Spreadsheet, hours worked per pay period from 11/8/25 to 10/10/25
Unnumbered, 2021-2024 CBA