**PELRB PRACTICE , MANUAL**
**September 2026**

Compiled by PELRB Staff

The 2026 PELRB Practice Manual ("Practice Manual" or "Manual"), like the 2026 PEBA Legal Digest ("Digest"), has been substantially revised and updated.[1] The Manual is distinguishable from the PEBA because the Manual is intended meant to give the broad-stroke outlines of the Public Employee Bargaining Act (PEBA), NMSA §§ 10-7E-1 *et seq*., labor law generally, and typical PELRB procedures; and to provide black-letter law or standards where they exist.

Unlike the Digest, the Manual is not a comprehensive digest of all substantive Board orders and PEBA or labor law related judicial decisions. Instead of repeating all the citations from the Digest, the Manual tends to focus on select PELRB cases and comparable law under the National Labor Relations Act (NLRA)[2]. Otherwise, it largely refers the reader to the Digest for relevant Board orders or appellate decisions by provision or subject.[3] Accordingly, users should consult the Digest along with the Manual, as well as cases cited therein, and available on our website at https://www.pelrb.nm.gov/.

As with the Digest, **THIS DOCUMENT IS NOT A SOURCE OF LAW AND IS NOT TO BE CITED**. This document reflects the views of the individual PELRB staff compilers and is to be used solely as a guide or aid to practitioners. The contents of this document have not been reviewed or endorsed by the Board or any local board.

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[1] The Manual has been reorganized, to return to the structure and layout used when the Manual was first published in 2008, with the view that it is easier for lay users and less experienced practitioners to make sense of and navigate. The 2026 update also updates the substantive content including case citations; relegates lesser used procedures or information (history, local boards, elections, etc.) to the Appendices; and it deletes unnecessary, untimely or obsolete materials and/or lengthy process related case notes.

[2] The NLRA, 29 USC §§ 7101 *et seq*., governs certain private sector employers. Because the PEBA – like most states' public employee collective bargaining law – is largely based on the NLRA, "NLRA precedent should generally be followed when it concerns a PELRB provision that is identical or substantially similar and there is no cogent reason for varying from the NLRA precedent." *See UNM v. N.M. Fed'n of Teachers and American Ass'n of Univ. Professors*, 1998-NMSC-20, citing *Firefighters v. City of Las* Cruces *(Fire Fighters II)*, 1997-NMCA-031.

[3] The Digest, which will be referred to as "DIGEST" in citations herein, is organized by PEBA provision, PELRB Rules, and keyword/phrases so the Digest section referred to will generally be self-evident from the context, and will be provided otherwise.

# I. PEBA BACKGROUND

## A. Introduction

The Public Employee Labor Relations Board (PELRB) enforces and implements the N.M. Public Employee Bargaining Act (PEBA), NMSA §§ 10-7E-1 et seq. (2003; Amended 2020), which guarantees the right of "public employees" to form, join or assist a "labor organization" or union for purposes of collective bargaining, or to refrain from doing the same. *See* §§ 2 and 5.

The PELRB's does this primarily by processing Prohibited Practice Complaints (PPCs) and petitions concerning representation; holding evidentiary hearings; biennially noticing local board compliance with the PEBA and PELRB rules; conducting studies or requesting information from public employers and unions related to public sector collective bargaining and/or implementation of the PEBA; and engaging in rulemaking as needed.[4]

Prior to enacting its first collective bargaining law in 1992, NMSA 1978, §§ 10-7D-1 *et seq.* (PEBA I), New Mexico already had several decades of experience in public sector bargaining at local levels. After PEBA I expired in 1999 due to an internal "sunset clause," the Legislature enacted a second and very similar act in 2003. With the enactment of PEBA II, New Mexico rejoined the ranks of about 36 states[5] that have enacted a public employee collective bargaining statute. All such acts are based on the National Labor Relations Act (NLRA), 29 USC § 141, *et seq*. and the NLRA's precedent is therefore relevant and persuasive.[6]

## B. Basic rights and limitations under the PEBA

The purpose of the Act and the rights of public employees are set forth principally in, respectively, §§ 2 and 5, which provide as follows:

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[4] Section 18 speaks of the PELRB having a role in the appointment of a Federal Mediation and Conciliation Service (FMCS) arbitrator upon impasse but that is a scrivener's error because the PELRB lacks authority to appoint and FMCS arbitrator – that is FMCS's duty and responsibility.

[5] *See* ALRA Agencies | Association of Labor Relations Agencies - ALRA, Agency Directory.

[6] The quirk of New Mexico's public sector labor history led to the original provision for newly created and grandfathered local boards to act in the place of the PELRB if fully staffed, functioning, and meeting for business pursuant to duly enacted rules. Under both PEBA I and PEBA II, there were frequent disputes and a good number of judicial appeals involving local boards, but in 2020 the Legislature amended the PEBA significantly and some of those amendments were directed at the local board system. Under the 2020 amendments, no new local boards may be created; any existing local boards would have to abide by the provisions of PEBA and PELRB rules, and go no longer than 60 days with a board member vacancy; and failure to do that and recertify biennially would result in the local board ceasing to operate by automatic revocation of law. Now only three (3) local boards remain: Albuquerque, Albuquerque Public Schools, and Silver City, and the PELRB has jurisdiction over all other New Mexico public bargaining matters. Because of the diminished relevance of local boards, practice information related to them has been moved to an appendix. *See* Appendix C; *see also* DIGEST at Appendix – Local Boards. For a more complete history of the PELRB, *see* Appendix A; for section-by-section detailing of the 2020 amendments, *see* the DIGEST, *passim*.

***Section 2***, Purpose of act: "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 ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions."

***Section 5***, Rights of public employees (Amended 2020):
"A. Public employees, other than management employees and confidential employees, may form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion and shall have the right to refuse those activities."

"B. Public employees have the right to engage in other concerted activities for mutual aid or benefit. This right shall not be construed as modifying the prohibition on strikes set forth in Section 10-7E-21 NMSA 1978." [7]

The rights and responsibilities of exclusive representatives are set for in § 15, for those cases where the union has obtained certification the bargaining representative. ***Section 15*** rights were significantly expanded with the 2020 amendments and may give rise to violations under § 19(G) (other PEBA violations).

In addition to the forgoing §§ 2, 5, and 15 rights and responsibilities, PEBA also provides the ***following basic rights and responsibilities***:

- Right to an election upon a thirty percent (30%) showing of interest among the public employees of an appropriate bargaining unit; and right to an election by card count if cards are presented for a majority of the employees (50% + 1) and there are no intervenors. § 14(A) and (C).[8]
- Within ten days of filing a petition, the public employer shall provide the PELRB with a list of eligible employees; and it shall provide the union with the names, job titles, work locations, home addresses, personal email addresses and home or cellular telephone numbers of any public employee in the proposed bargaining unit. *See* § 14(A). (This information shall be kept confidential by the labor organization and its

[7] This section, amended in 2020, now largely tracks § 7 of the NLRA. However, the PELRB has historically followed NLRA precedent with regard to employee claims of concerted action for mutual aid, even before the 2020 amendment. *See*, *e.g., AFSCME Council 18 v. Dep't of Health*, 6-PELRB-2007 (adopting hearing examiner's finding that § 5 of PEBA provides "basically the same rights" as § 7 of the NLRA, and that the differences in text "appear[ed] to be directed to streamlining the language utilized in the NLRA, rather than limiting or narrowing the enunciated rights").

[8] The 2020 amendments to § 14 (Elections) made card counts the presumptive process to demonstrate majority support. *See* Secs. IV.A.3 and B.3, *supra*. An in-person, secret ballot election was conducted in 2026 concerning Doña Ana County Sheriff's Department, where the bargaining unit was represented by CWA and the International Union of Police Associations sought to represent the same employees. *See Int'l Union of Police and Doña Ana County and CWA*, 23-PELRB-2026 (Jul. 14, 2026; in re: Case No. 309-26). Before then, however, it had been years since the PELRB conducted a secret ballot election.

employees or officers.)

- Public employers and unions must negotiate in good faith over mandatory subjects of bargaining such as wages; hours and all other terms and conditions of employment except for retirement programs provided pursuant to PEBA or the Educational Retirement Act and payroll deduction of membership dues if a party requests bargaining on that subject. They must also bargain over the impact of professional and instructional decisions made by the employer, in the case of public schools and educational employees in state agencies. This duty to bargain in good faith is ongoing, even after the parties have entered into a collective bargaining agreement and during its term, unless it can be demonstrated that the parties clearly and unmistakably waived the right to bargain regarding a particular subject. However, no party may be required to renegotiate the existing terms of collective bargaining agreements already in effect. *See* §§ 17(A), (D) and (G); *see also* §§ 19(F) and 20(C) (prohibited practices for either party violating the duty); and DIGEST.
- PEBA also imposes on parties to a CBA specific deadlines and procedures by which to begin bargaining prior to the CBA's expiration. *See* § 18 (subsection A concerns the State and Subsection B concerns all other non-federal public employers in New Mexico).
- A labor organization that was recognized by a public employer as the exclusive representative of an appropriate bargaining unit on June 30, 1999, shall continue be recognized as the exclusive representative of the unit if still existing. *See* § 24(B). Such recognition shall not be affected by a local labor board ceasing to exist pursuant to § 10 (Amended 2020); and such a labor organization may petition for declaration of bargaining status under § 24(B).
- Adjudicatory hearings before the PELRB or a local board must meet all minimal due process requirements of the state and federal constitutions, *See* § 12(B), and DIGEST.
- Both the PELRB and any local board has the power to enforce the PEBA through the imposition of appropriate administrative remedies, which may include actual damages related to dues, back pay including benefits, reinstatement with the same seniority status that the employee would have had but for the violation, declaratory or injunctive relief or provisional remedies, including temporary restraining orders or preliminary injunctions. No punitive damages or attorney fees may be awarded. *See* § 9(F), and DIGEST.
- Local board rules shall conform to the rules adopted by the Board and shall not be effective until approved by an order of the Board. All rules promulgated by a local board shall comply with state law although they may vary from PELRB rule on good cause shown, with PELRB approval. A rule promulgated by the Board, or a local board shall not require, directly or indirectly, as a condition of continuous employment, that a public employee covered by PEBA pay money to a labor organization that is certified as an exclusive representative. *See* § 9(G); see also Appendix C herein, and DIGEST at Appendix.
- Any public employee acting individually may present a grievance without the intervention of an exclusive representative. At a hearing on a grievance brought by a

public employee individually, however, the exclusive representative shall be afforded the opportunity to be present and make its views known. *See* § 15(B).

- A public employer is required to provide an exclusive representative of an appropriate bargaining unit reasonable access to employees within the bargaining unit, including the right to meet with new employees, without loss of employee compensation or leave benefits, within thirty days from the date of hire for a period of at least 30 minutes but not more than 120 minutes, during new employee orientation. If the public employer does not conduct new employee orientations such meetings may take place at individual or group meetings. *See* § 15(C)(1).
- Concerning employees who are not new employees, reasonable access includes the exclusive representative's right to meet with employees during the employees' regular work hours at the employees' regular work location to investigate and discuss grievances, workplace-related complaints and other matters relating to employment relations; and the right to conduct meetings at the employees' regular work location before or after the employees' regular work hours, during meal periods and during any other break periods. *See* § 15(C)(2).
- A public employer shall permit an exclusive representative to use the public employer's facilities or property for purposes of conducting meetings with the represented employees in the bargaining unit at a time and place set by the exclusive representative as provided the meetings do not interfere with the public employer's operations. *See* § 15(C)(2).
- Within ten days from the date of hire and every 120 days for employees in the bargaining unit who are not newly hired employees, a public employer is also required to permit an exclusive representative access to the employer's records containing bargaining unit the employees' names and dates of hire, cellular, home and work telephone numbers, work and personal electronic mail addresses, home addresses or personal mailing addresses and employment information, including job titles, salaries and work site locations. *See* § 15(F) and (G); these amendments essentially codified requirements that evolved pursuant to case law. *See*, *e.g.*, DIGEST at §§ 15(A)(1), 17(A)(2).
- An exclusive representative shall have the right to use the electronic mail systems or other similar communication systems of a public employer to communicate with the employees in the bargaining unit regarding collective bargaining, including the administration of collective bargaining agreements, the investigation of grievances or other disputes relating to employment relations and matters involving the governance or business of the labor organization. *See* § 15(H); and DIGEST.
- Lastly, any party may obtain Board review of final hearing examiner determinations, except those concerning the sufficiency of a showing of interest, and whether or not to defer to grievance-arbitration. *See* 11.21.2.30, 11.21.2.35 NMAC, 11.21.2.36, 11.21.2.37(D), 11.21.2. 38(A), 11.21.3.13, 11.21.3.19, 11.21.2.13(A), and 11.21.3.22(E). Additionally, a party affected by final board rule, order, or decision may appeal that to a state District Court with venue. *See* § 23; DIGEST; and NMRA 1-074.

As referenced above regarding the right to information, some of these rights are original to the first PEBA, and some have been added or augmented over the years through case rulings and/or the 2020 amendments.

In any event, the purpose, benefits and structure of the Act is directed to ***balancing public employees' rights to organize and bargain collectively with their employers' interest in promoting cooperative labor-management relationships and ensuring "the orderly operation and functioning of the state and its political subdivisions***". *See* § 2. Additionally, public employees have the right to engage in other concerted activities for mutual aid or benefit, without it being construed as modifying the prohibition on strikes set forth in § 2. *See* § 5(B).

In aid of doing this achieving this balance, the PEBA further defines the rights of public employees and their employers in relation to their position and/or status.

The "***public employees***" referred to in § 5 to whom its PEBA coverage extends is defined in **§ 4(Q)**:

> "'public employee' means a regular non-probationary employee of a public employer; 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."

"Public employees" have been held to include employees of constitutionally independent universities, graduate students with assistantships, and contract employees with a reasonable expectation of continued employment; but not PRN or "as needed" nurses. *See UNM v. N.M. Fed'n of Teachers and American Assoc. of Univ. Professors*, 1998-NMSC-20, ¶ 50; *United Electrical, Radio and Machine Workers of America (UE) v. UNM*, 66-PELRB-2021 (Aug. 17, 2021); and *UE and UNM*, 73-PELRB-2021 (Nov. 9, 2021). They have been held to include EXOT employees who worked more than one year under at least one contract, many for years, and had a reasonable and verified expectation of being rehired. *See CWA v. Dept. of Cultural Affairs and SPO*, at D-202-CV-2026-07473 (May 15, 2026; in re: Case No. 130-25), pending appeal at D-202-CV-2026-05466; *see also* DIGEST.

Similarly, a "***public employer***" is defined in **§ 4(R)** as:

> "... the state or a political subdivision thereof, including a municipality that has adopted a home rule charter, and does not include a government of an Indian nation, tribe or pueblo, provided that state educational institutions as provided in Article 12, Section 11 of the constitution of New Mexico shall be considered public employers other than the state for collective bargaining purposes only".

"Public employers" have been held to include public facilities run by private contractors if the public governing body retains authority and control over the business, policies, operations and assets of the facility; medical "research corporations"[9]; and charter schools. *See USWA and Gila*

[9] *See* University Research Park and Economic Development Act, NMSA §§ 21-28-1 to 25 ("URPEDA"); and ). *AFT and IAMAW Local 794 v. UNM-Sandoval Reg'l. Med. Center*; 30-PELRB-2022 (Dec. 1, 2022; in re: PELRB 108-22. After this PELRB decision, URPEDA was amended to make clear they are public employers for purposes of the PEBA.

*Regional Medical Center and Grant County*, 1 PELRB No. 14 (Nov. 17, 1995); *AFT and IAMAW Local 794 v. UNM-Sandoval Reg'l. Med. Center*, 30-PELRB-2022 (in re: Case No. 108-22). *See also* DIGEST.

The Act's coverage has been held without explanation to not extend to employees of the judicial branch, presumably based on the separation of powers doctrine. *See Chamas-Ortega v. 2d Judicial District Court*, 7th Judicial Dist., Case No. CV-04-7883 (Mar. 10, 2006).

Additionally, PEBA expressly excludes some employees from its coverage, consistent with the NLRA:

a) Non-public school probationary employees – §§ 4(Q), 5
b) Confidential employees – §§ 4(G), 13(C)
c) Supervisors – §§ 4(T), 13(C)
d) Managers – §§ 4(N) (Amended 2020), 13(C)

There is now a considerable body of PELRB and Court decisions construing the statutory exemptions under a variety of facts to which interested parties may refer, *see* DIGEST at §§ 4(G), 4(N) (Amended 2020), 4(T), 13(C), but the exclusions are summarized as follows:

- ***Probationary Employees*, § 4(Q)**

The PEBA excludes all probationary employees except those employed at a public school. *See* §§ 5 and 4(Q); *see also* 11.21.1.7(B)(12) NMAC.

However, that the employer has designated an employee "probationary" 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 not to be probationary under UNM personnel regulations where she had worked in the same position doing the same job for almost a year, for six months as a temporary employee and five months as a regular employee; and where the stated purpose of probationary status was to "give the University the opportunity to evaluate" a new employee's performance and to allow the new employee "the opportunity to understand the mission and goals of the University and department and to demonstrate satisfactory performance." *See United Staff-UNM Employees Local No. 6155 v. UNM,* Case No. 101-05, Hearing Examiner Report at 11-13, 32-34 (Aug. 17, 2005); *see also CWA v. DCA*, *supra*, and DIGEST.

Once an employee's status has changed from probationary to non-probationary, an employer cannot revert the employee to probationary status. *See City of Albuquerque v. AFSCME Council 18*, 2011-NMCA-21.

- ***Confidential Employees, §* 4(G)**

The PEBA also excludes confidential employees. *See* §§ 4(G), 5, and 13(C). The exclusion of confidential employees is limited to those who assist and act in a confidential capacity to a person who exercises managerial functions in the field of labor relations. *NEA and Jemez Valley Public Schools,* 1 PELRB No. 10 (May 19, 1995). Thus, the PEBA's confidential employee definition requires an analysis of both the duties of the employee in question and the duties of the person he or she allegedly assists. *Id.*

Criteria considered in the past are whether the employee:

- is or could likely be on the employer's bargaining team
- is privy to the employer's District's labor-management policy or bargaining strategy
- has access to confidential financial or other data used in bargaining; or has input or involvement in the employer's contract proposal formulation.

*See American Federation of Teachers Local 4212 and Gadsden Independent School District*, 03-PELRB-2006 (May 31, 2006); *NEA and Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995); and DIGEST. As with the following exclusions and standards, this is a fact-intensive analysis.

- ***Supervisors*, 4(T)**

PEBA II excludes supervisors even though not expressly excluded under § 5, because they are expressly excluded under § 13(C). *See Santa Fe Police Officers' Association v. City of Santa Fe*, 02-PELRB-2007 (Oct. 14, 2007).

The PEBA definition of "supervisor" is very strict. That a position may be designated by the employer as supervisory and may in fact constitute a supervisory position under law other than the PEBA. "It is not the rank nomenclature (corporal, sergeant, lieutenant, captain, etc.) that is determinative but rather the facts related to whether the individual functions as a supervisor as defined under the Act." *N.M. Coalition of Public Safety Officers, Local 7911, CWA, AFL-CIO and Town of Bernalillo*, 1 PELRB No. 21 (July 7, 1997).

Instead, a three-pronged approach under § 4(T) is undertaken to determine whether an employee is a "supervisor" for purposes of applying the PEBA.[10] First, the employee must:

- devote a majority of work time to supervisory duties
- customarily and regularly direct the work of two or more other employees; and
- have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively.

If these requirements are met, then the second prong of the analysis is undertaken to determine whether the duties supposed to be supervisory in nature are such that the disputed employee:

- performs merely routine, incidental or clerical duties; or
- only occasionally assumes supervisory or directory roles; or
- performs duties which are substantially similar to those of his or her subordinates.

If the duties performed meet the above criteria the employee is not a "supervisor" as defined by

[10] The 2020 Amendment to the Act renumbered the definitions section so that the definition of "supervisor" formerly found at § 4(U) is now found at § 4(T)

the Act. Finally, even if the employee meets the foregoing criteria, he or she will not be a supervisor if he or she is:

- a lead employee; or
- an employee who participates in peer review or occasional employee evaluation programs.

*See NEA and Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995); *see also NEA and Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995) (identifying the three-part test embedded in the definition); and DIGEST. This is also a fact-based determination, and (as noted but always bearing repetition) in applying these criteria, the Board relies on actual job duties performed, rather than employer designations, definitions, expectations, job descriptions or standard operating procedure manuals. *See*, *e.g. N.M. State Univ. Police Officers Ass'n and New Mexico State Univ.,* 1 PELRB No. 13 (June 14, 1995); *see also* DIGEST.

➢ ***Management Employees*, § 4(N) (Amended 2020)**

The PEBA's definition of a "manager" exempt from coverage of the Act can be broken down into a two-part test:

1. the employee is primarily engaging in executive and management functions, and
2. he or she has responsibility for developing administering, or effectuating management policies, which requires the employee to do more than merely participate in cooperative decision-making programs on an occasional basis.

*See* § 4(N) (Amended 2020).

The first prong of the Act's test requires that an individual possess and exercise a level of authority and independent judgment sufficient to significantly affect the employer's purpose. The second prong requires that an employee creates, oversees, or coordinates the means and methods for achieving policy objectives and determines the extent to which policy objectives will be achieved. This requirement means more than mechanically directing others in the name of the employer but rather, requires an employee to have meaningful authority to carry out management policy. *NEA and Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995); and DIGEST.

Consistent with NLRB case law, the term "manager," unlike "confidential employee," is read to encompass all management policies and not just those relating to labor relations. The key inquiry is whether the duties and responsibilities of the alleged management employees are such that these individuals should not be placed in a position requiring them to divide their loyalty between the employer and the union. *NEA and Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995); and DIGEST. The 2020 amendment also expressly confirmed prior PELRB rulings, that an employee shall not be deemed a management employee solely because the employee participates in cooperative decision-making programs or whose fiscal responsibilities are routine, incidental or clerical.

Lastly, it is fundamental to effectuating public employees' rights under §§ 2 and 5 of the Act that selection of public employees' bargaining representatives be done ***democratically***. *Cf.* § 13(A) (that an essential factor in designating an appropriate bargaining unit is "assurance to public employees of the fullest freedom in exercising the rights guaranteed by the [PEBA]")[11]; *see* Sections III(B) and IV(B)(11), and Appx. D - Election Procedures, *infra*, and DIGEST, regarding the standards of proof for showing a violation of § 5 rights, and the establishment of majority desire concerning union representation (presumptively shown today by card count under the 2020 amendments).

As noted elsewhere, after the 2020 amendments, demonstration of majority support is done primarily through card count, unless there is an intervenor. *See* § 14(A), (C).

### C. PELRB Duties & Responsibilities

#### 1. Generally

Only the PELRB has authority to investigate and adjudicate PPCs or to process representation petitions within its jurisdiction, and it has certain statutory duties regarding PPCs and representation petitions, as well as monitoring local boards' compliance with the PEBA, and engaging in rulemaking to effectuate the Act. *See* § 9; *see also* PELRB Annual Reports.

The PELRB performs its duties under an administrative format that relies logistically on an Executive Director and staff for processing and adjudicating in the first instance those claims subject to its review. The Director has been delegated authority to act and, in turn, may delegate to other staff or outside contractors any of the authority delegated to the Director by the Board's rules, including designation of the hearing examiner. In administrative proceedings such as those before the PELRB, due process will ensure a fair hearing. *See* Sec. VI, Hearing Procedures, *infra*; *see also State ex rel. Battershell v. City of Albuquerque*, 1989-NMCA-045, *citing Morrisey v. Brewer*, 408 U.S. 471, 481 (1972) (due process is "flexible in nature and may adhere to such requisite procedural protections as the particular situation demands"); and DIGEST at § 12(B) (Hearings procedures-due process requirement).

Additionally, a variety of tight regulatory deadlines apply to all filings, and party or hearing examiner actions before the PELRB, although our rules provide for their extension for cause. *See* Appendix B, Summary of PELRB Timelines; *see also*, *e.g.,* 11.21.1.9 (Extension of time), and 11.21.1.31 (Time limits for Board actions) NMAC.

What specific work and responsibilities are required in a given case will vary widely. Every PPC, Petition, and pleading will be marked as received by date stamp; assigned a 100 series (PPCs) or 300 series (petitions) case number if not yet done; and returned to the filer; and returned to the original filer for service. Most PPCs and perhaps a quarter of petitions require a status and scheduling conference (*see* Sec. II, *infra*, Common Pre-Hearing Procedures). Thereafter, if the parties cannot reach an agreement on the PPC or Petition, the matter may be subject to dispositive motions and/or an evidentiary hearing on the merits. *See* Sec. V (Dispositive Motions) and Sec. VI (Hearing Procedures), *infra*. PELRB's duties are further outlined as follows.

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[11] Similarly, it is also a "cardinal policy" of the National Labor Relations Act is to protect "...the exercise by employees of full freedom to express their desires on union representation". *See* John. E. Higgins, THE DEVELOPING LABOR LAW (7th Ed., hereinafter "DLL"), Ch. 10, at 10-59 – 10-60.

### 2. Representation petitions

Because the PEBA governs public bargaining, typically interaction with the PELRB will have begun with a certification of a union to as exclusive bargaining representative of a group of employees sharing a community of interest, and not excluded under the PEBA as probationary, "irregular", confidential, supervisory, or managerial. Thus, as introduction and orientation, we begin with petitions, although the bulk of the PELRB's day-to-day process involves PPCs. Both are also discussed in greater detail below, beginning with PPCs as the more frequently germane subject.

There are several different types of representation petitions, which are discussed in more detail below (Sec. III, *infra*), and are the PELRB's "300" series of case numbers. Generally speaking, representation cases may involve the designation of appropriate bargaining units; and questions concerning representation (QCRs). If the dispute cannot be settled, a unit composition hearing will be held. *See* Sec. VI, *infra*. With the 2020 amendments, majority support is now largely resolved by card count, after a 30% showing of interest has been demonstrated. *See* §§ 13-14; 11.21.2 NMAC; and DIGEST.

The basic petitions for initial certification, and clarification, amendment and/or accretion petitions are the most commonly used representation processes today. *See* § 13; 11.21.2.23 NMAC; 11.21.2.35 NMA; 11.21.2.37 NMAC; 11.21.2.38; and Form #3 (Initial Certification), Form #4 (Amendment), Form #6 (Clarification/Accretion).

Once certified, a labor organization is the ***exclusive bargaining agent*** for the employees in the bargaining unit, which entails special rights and responsibilities. As exclusive representative, the union owes a duty to represent the interests of employees fairly and adequately in the bargaining unit members, whether they are members of the organizing union or not. *See* § 15, and DIGEST. (Note, however, that a claim by a public employee that the exclusive representative has violated this duty of fair representation or "DFR" must be filed in N.M. District Court, and it is barred if not brought within six months of the date on which the public employee knew, or reasonably should have known, of the violation. *See Callahan v. NM Federation of Teachers-TVI*, 2006-NMSC-010; *see also* DIGEST at § 9(F), and Keyword/Phrase Index – DFR Claims.)

Just as employees may petition the Board for recognition of a collective bargaining representative, they may also seek decertification of a previously recognized union, with a 30% showing of interest. However, a decertification Petition must be filed by a member of a labor organization or the labor organization itself; and there are specific windows in which it must be filed as discussed below. *See* § 16; and Form #8.

Other representation related petitions include severance from existing bargaining units; recognition as an incumbent representative, and intervention where another union is interested in representing some or all of the employees identified in a Petition for Certification. *See* 11.21.2.16 NMAC (Intervention); 11.21.2.36 NMAC (Certification of an Incumbent); and 11.21.2.41 NMAC (Severance); *see also* Form #7 (Severance), Form #20 (Intervention), and Form #5 (Recognition as Incumbent).

Typically, petitions will require a 30% showing of interest unless the petition simply seeks to certify a change that does not involve adding to the positions within a bargaining unit. Additionally, petitions will typically require a showing of change in circumstances if they seek to change an existing bargaining unit. Sample cards for the showing of interest and majority support for certification or decertification are available on our website. *See* Form #15 and Form #17, respectively.

Lastly, note that PPCs and petitions for representation or accretion may be alternatives to each other, when the dispute is about whether certain positions are included in a unit or not. *See AFSCME, Council 18 v. NMHSD and NM PELRB*, D-202-CV-2016-07671 (Jul. 19, 2017; in re: 23-PELRB-2016, Case No. 309-15); and DIGEST. However, PPCs arising as a part of an organizing campaign for recognition and certification as the bargaining representative must be asserted in separate PPCs, rather than as part of the petition case. *See CWA Local 7911 and Doña Ana County*, 1 PELRB No. 16 (Jan. 2, 1996); and DIGEST.

### 3. PPCs

Besides expressly providing for a variety of rights as outlined above, the PEBA also expressly prohibits certain acts or omissions in §§ 19 - 21. Hearing or otherwise resolving PPCs constitute the majority of the PELRB's day-to-day work today. *See* DIGEST, Annual Reports, and Board Order summaries available online. The following are delineated as prohibited acts. Sections 19 and 20 concern acts by public employers; and §§ 20 and 21 concern acts by unions or public employees; and a fillable PPC Form, applicable to any type of complaint, is available on the PELRB website (Form #1):

- Discrimination against a public employee regarding terms and conditions of employment because of the employee's membership in a labor organization. *See* § 19(A).
- Interference with, restraint, or coercion of a public employee in the exercise of a right guaranteed pursuant to the PEBA. *See* §§ 19(B), 20(B).
- Using 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. *See* § 19(B).
- Domination or interference in the formation, existence or administration of a labor organization. *See* § 19(C).
- Discrimination regarding hiring, tenure or a term or condition of employment in order to encourage or discourage membership in a labor organization. *See* §19(D).
- Discharge or Discrimination against a public employee because the employee has signed or filed an affidavit, petition, grievance or complaint or given information or testimony pursuant to the provisions of the PEBA or because a public employee is forming, joining or choosing to be represented by a labor organization. *See* §19(E).
- Refusal to bargain collectively in good faith with the exclusive representative. *See* §§ 19(F), 20(C).

- Refuse or failure to comply with a provision of the PEBA or Board rule. *See* §§ 19(G), 20(E).
- Refusal or failure to comply with a collective bargaining agreement. *See* §§ 19(H), 20(D).
- Discrimination against a public employee regarding labor organization membership because of race, color, religion, creed, age, sex or national origin. *See* § 20(A).
- Picketing homes or private businesses of elected officials or public employees. *See* § 20(F).
- Engaging in strikes, slowdowns and lockouts. *See* § 21.[12]

Note that 11.21.1.3.9 NMAC imposes a ***six-month statute of limitations*** on all PPCs. (Similarly, § 15(A) imposes a six-month statute of limitations on DFR civil actions.)

Sections 19(G) and 20(E) are referred to as "***catch-all provisions***" for violations of any substantive PEBA rights other than those specifically enumerated in §§ 19 to 21, rather than an opportunity for a complainant to establish duplicative violations for the same offense. As stated by the hearing examiner in *AFSCME v. Department of Corrections*, Case No. 150-07, to interpret § 19(G) otherwise "would result in duplicative liability, and it is unlikely the Legislature intended every violation of a subsection of § 19 to result in two separate counts of liability". *Id*., Hearing Examiner's Report at 3 (Feb. 6, 2008); *see also NMCPSO & Santa Fe County*, 10-PELRB-2017 (Oct. 3, 2017; in re: Case No. 118-17) (adopting and applying this ruling).

When cited correctly, the catch-all provisions are most frequently cited for claims asserting rights or violations under §§ 5 (rights of public employees), 15 (exclusive representatives), or 17(A)(1) (duty to bargain in good faith).

Lastly, note that many of these claims overlap. Breach of contract claims under §§ 19(G) or 20(D) may also involve breach of the duty to bargain in good faith under §§ 19(F) or 20(C). Additionally, §§ 19(A), 19(D), and 19(E) all expressly reference discrimination; while the § 19(B) prohibition on interference or coercion duplicates the language § 5, and also often implicates or overlaps with discrimination or retaliation claims arising under§§ 19(A), 19(D), and 19(E). *See* Sec. III *infra*, PPCs; and DIGEST. Presumably because of the overlap, certain regular practitioners and new *pro se* parties frequently cite all or many Section 19 provisions but that is not a recommended practice. The recommended practice, which is observed in the most successful claimants before the PELRB, is to carefully select the PEBA and/or PPC provision(s) that best fit the facts of a given case. *See* DIGEST.

Upon determination that the PEBA has been violated, the PELRB has the power to enforce the provisions of the PEBA through the imposition of ***appropriate administrative remedies***. *See* § 9 (Amended 2020); *see also* Sec. VII(F), *infra* (Post-Hearing Procedures - Remedies), and DIGEST. Those remedies have been clarified and/or expanded significantly in the 2020 amendments, to include actual damages related to dues, back pay including benefits, reinstatement with the same seniority status that the employee would have had but for the violation, declaratory or injunctive relief or provisional remedies, including temporary restraining orders or preliminary injunctions.

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[12] This provision, particularly when read in conjunction with § 20(F), protects the public and ensures the orderly operation and functioning of government operations.

No punitive damages or attorney fees may be awarded by the Board or local board. *See* § 9(F); Sec. VII(F), *infra* (Post-Hearing Procedures - Remedies); and DIGEST.

### 4. Monitoring local boards

Although only three local boards remain today (*see* Note 6, *supra*, and Appendix C, *infra*), the PELRB also has some minimal remaining duties related to monitoring local labor boards.

After June 30, 2020, no new local labor boards may be created. However, local boards existing as of July 1, 2021, may continue operating if prior to December 31, 2021, they submitted to the PELRB an affirmation that the public employer has elected to continue operating under the local board and each labor organization representing its employees has submitted written notice to the PELRB that it also elects to continue to operate under the local board; and they submit biennial recertification including documentation regarding the appointment or acceptance of all members. *See* §§ 9-10, and 11.21.5 NMAC; *see also* DIGEST at Appendix.

Today, as noted, only three (3) local boards remain: Albuquerque, Albuquerque Public Schools, and Silver City; and information concerning local boards is located at Appendix C herein.

### 5. Rulemaking

The PELRB is also empowered by § 9(A) to promulgate rules necessary to accomplish and perform its functions and duties as established in the PEBA, including the establishment of procedures for the designation of appropriate bargaining units, the selection, certification and decertification of exclusive representatives and for the filing of, hearing on and determination of complaints of prohibited practices.

The Board has enacted such rules and occasionally amends them over time to correct, update, or modernize its provisions to reflect statutory amendments or evolved practices. Our last rulemaking was in 2020 and was spurred by the 2020 PEBA amendments, for example. When the PELRB engages in rulemaking, the practice for the last decade or so has been to convene an *ad hoc* advisory committee of labor and management representatives, to develop consensus and facilitate rule approval. However, rulemaking is a lengthy, expensive, and labor-intensive process, so it is subordinated to staffing, workload, and budgetary limitations.

### 6. Pre-filing assistance

The PELRB's agents provide pre-filing procedural assistance to the public and are available at our Albuquerque office Monday through Friday, 9:00 a.m. to 5:00 p.m. daily (except for State holidays), to answer inquiries and assist members of the public who visit, telephone, or submit written inquiries mail or email.

Board agents will answer public inquiries regarding the PEBA and PELRB procedures as accurately, completely, and as concisely as possible but they may not give legal advice and should explain that advice cannot be given particularly during an organizational campaign or a labor dispute. Thus, the Board's agents will not offer an opinion as to whether any specific conduct violates the Act but may describe the types of conduct which, depending on all the surrounding circumstances, may constitute a violation of the Act, and refer inquiries to applicable provisions of the PEBA or the Board's rules. Furthermore, statements of the agent cannot be considered as an official pronouncement of law binding on the Agency. In circumstances where an individual is essentially seeking legal advice, the Board agent may suggest that the individual seek private counsel. Although under no circumstances should a specific attorney be recommended, the Board agent may direct an individual to the PELRB's lists of New Mexico labor relations contacts, or the State Bar Association attorney referral service.

## III. COMMON PRE-HEARING PROCEDURES

### A. Time limits, service, and conferral

As noted above, under 11.21.3.9, all PPCs must be filed within six months of the offense or discovery thereof. Additionally, many petitions will have filing windows associated with them. *See infra*, Sec. IV, Representation Petitions.

Any PPC, petition, motion, or Answer or Response filed thereto, must be served on the opposing party. *See* 11.21.1.23 NMAC; 11.21.1.24 NMAC; 11.21.2.9 NMAC; and 11.21.3.8(A) NMAC; *see also* PELRB Form #2, Answer to PPC.

Additionally, in the case of the PPC, the complainant will be directed by staff to file its evidence within 10 business days. (*See* 11.21.3.12(B).)[13]

Also, a representative of a party who is not an employee of the party shall file a signed notice of appearance with contact information, but the filing of a pleading containing that information is sufficient. *See* 11.21.1.11 NMAC.

Answers to PPCs are due in 15 business days of the PPC's filing, and responses to petitions are due in 10 business days of the filing or notice of adequacy. Responses to motions and requests for Board review are due in 10 business days, although responsive pleadings may be otherwise set by scheduling order. *See* 11.21.1.23 (Motions and responses); 11.21.2.12 (Petitions-information requested from parties); and 11.21.3.10 (Filing of Answer).

Lastly, requests for continuances must be made in writing pursuant to 11.21.1.16(C) NMAC. For all non-dispositive motions, parties must confer and indicate in the motion whether the opposing party consents to its filing. *See* 11.21.1.23 NMAC. Additionally, it is best practice to confer in all cases of request for filing, extension or continuance, whether expressly required by the rules or not.

### B. Initial review and investigation

PELRB staff must conduct an initial screening of all PPCs and representation petitions. *See*

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[13] All PELRB deadlines are measured in business days unless the PEBA or rules state otherwise. *See* 11.21.1.8 NMAC (Computation of time in business days).

11.21.2.18(A) and 11.21.3.12(A) NMAC. The details of that review are laid out in those subsections, but it essentially assures that all relevant information is provided, a timely and facially valid claim or petition is stated under the PEBA, and the filer has certified that the document was served and its contents are true.

Such screening has been challenged and held not to create bias because it promotes the purposes of the PEBA and is authorized under our rules. *See* 11.21.2.13 and 11.21.3.12 NMAC; and DIGEST.

If the PPC or Petition are determined to be facially invalid, staff will notify the filer of the reasons for that determination, and give the filer five business days to cure the deficiency(ies) by providing additional evidence in support of the claim, and/or by filing an amended PPC or petition. If the amendment does not cure the filing, it will be dismissed if not withdrawn. *See* 11.21.2.13 and 11.21.3.12 NMAC. This decision is subject to board review. *See* 11.21.2.22 and 11.21.3.13 NMAC

### C. Answer or response, and other action

If the Petition or PPC are deemed adequate by the PELRB, the parties will receive notice of that from the PELRB).

In the case of PPC, the investigation period does not toll the time to file an Answer, which remains 15 business days from service of the PPC unless notice of invalidity is received before then. *See* 11.21.3.10 and 11.21.3.12 NMAC (PPC answer and investigation).

In contrast, in the case of a petition, a response will not be due unless or until staff give notice of facial validity and direct a response. In that case, they will generally be given 10 business days to state any objections or issues, and to produce a list of eligible employees, to verify the showing of interest if required. *Compare* 11.21.2.11 – 11.21.2.13 (Petitions - showing of interest, information requested, and investigation); and 11.21.3.10 and 11.2.3.12 NMAC (PPC answer and investigation).

Lastly, in the case of a petition, the employer must post a notice of the filing within 30 days of the filing, for 5 to 10 days, if it appears that the case presents a QCR. *See* 11.21.2.15 NMAC.[14] This notice will be provided by the PELRB if warranted, and alerts other unions engaged in organizing the same employees to file a petition to intervene and how to do so. *Id.*; *see also* Form # 14, Certification of Posting.

### D. Status and scheduling conference

In every case in which a dispute is presented (every PPC and about a quarter of all petitions), the matter is set for a brief Status and Scheduling Conference, which is held by Zoom. *See* 11.21.1.16(A) NMAC (Notice of hearing).

[14] The rule states five (5) days but the practice is to require posting for 10 days, which is the amount of time other interested unions have to file a petition for intervention. *See* 11.21.2.16.

At this conference, the parties may be asked to summarize their respective pleadings. Alternately, the hearing examiner may summarize the pleadings, to assist the parties in framing and narrowing the issues raised. The complainant or petitioner will usually be directed to contact the respondent to attempt settlement – or the respondent may be directed to do so in the case of *pro se* filers. *See*, *e.g.*, 11.21.3.15 NMAC (Pre-hearing settlement efforts).

Then we proceed to scheduling, which may include discovery, dispositive motions, and/or an evidentiary hearing on the merits of the PPC, or objections to the proposed unit composition in a Petition. *See* Secs. V (Dispositive motions) and VI (Hearing procedures), *infra*.

### E. TROs / Preliminary injunctions

Where a party believes they need immediate cessation of an act in alleged violation of PEBA, before a hearing on the merits can be conducted, it may seek a temporary restraining order (TRO) and/or preliminary injunction.[15]

The Board's authority to issue preliminary injunctions is now expressly provided in § 9(F) with the 2020 amendments, but its authority to issue preliminary injunctions was always referenced in § 23(A)[16] and it was long been upheld before the 2020 amendments, although an emergency evidentiary hearing may be required. Nonetheless, a preliminary injunction is an extraordinary remedy and must be justified under the circumstances. *See* DIGEST at § 9(F), § 23(A), and Keyword/Phrase Index.

Under New Mexico law, to obtain an injunction prior to a hearing on the merits, the burden will be on the Complainant or Petitions to present sufficient evidence demonstrating that (1) they will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause the Respondent; (3) issuance of the injunction will not be adverse to the public's interest; and (4) there is a substantial likelihood Petitioners will prevail on the merits. *See US-UNM v. UNM*, 33-PELRB-2026 (Sep. 10, 2026; in re: Case No. 114-25), and DIGEST; *see also LaBalbo v. Hymes,* 1993-NMCA-010, and *Starbucks Corporation v. McKinney*, 602 U.S. 339 (Jun. 13, 2024) (applying the same traditional four factors in a labor dispute, rather than a lesser standard as the union sought in *Starbucks*).

### F. Interlocutory appeals disfavored

Interlocutory appeals, or appeals of non-final decisions, are disfavored and the Board typically denies them without explanation, upon citation to 11.21.1.27. *See* DIGEST.

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[15] These two terms are used essentially interchangeably before the PELRB and by New Mexico courts. *See*, *e.g.*, § 9(F) (referencing "temporary restraining orders or preliminary injunctions" and § 23(A) (referencing "temporary relief and restraining orders"; and *City of Rio Rancho v. AFSCME Council 18, Local 3277*, D-202-CV-2019-1398 (in re: 1-PELRB-2019; Case No. 113-18).

[16] *Id*. ("[t]he board ... may request the district court to enforce orders issued pursuant to the [PEBA], including those for appropriate temporary relief and restraining orders").

### G. Deferrals

PELRB Rules provide for two types of deferral for PPCs: to arbitration proceedings, and to the proceedings of another administrative body. (Note that the existence of either situation may also give rise to a duty to exhaust contract or administrative remedies, which is discussed further below. *See* Sec. V.A.2, Motions to Dismiss-Exhaustion, *infra*.)

#### 1. Arbitration deferral[17]

The hearing examiner may, *sua sponte* or upon motion of any party, defer hearing a PPC that alleges a contract violation in favor of having the parties first proceed through the negotiated grievance-arbitration procedures. *See* 11.21.3.22 NMAC; *see also* DIGEST and *AFSCME v. Department of Health,* Case No. 168-06, Hearing Examiner's Decision (Jul. 17, 2007).

However, it dependent on the circumstances:

> § 19(H) and § 20(D) of PEBA are best understood as providing an alternate forum for contract disputes in the event that grievance-arbitration cannot provide an adequate remedy or is otherwise inappropriate, in exactly the same way that the LMRA provides an alternate forum in the courts for such a contingency.
>
> …
>
> Whether such claims should be deferred must be determined on a <u>case-by-case</u> basis, after examining the gravamen of the complaint to determine whether it primarily calls for interpretation of contract rights or statutory rights. If the complaint presents both types of claims, the question will be whether they are conceptually distinct and severable claims, or whether they are based on essentially the same facts.

*Id.*, Hearing Examiner's Decision at 9, 11 (Jul. 17, 2007) (underlined emphasis in original).

Deferral is allowed where the subject matter of the PPC requires interpretation of the CBA, the parties waive in writing any objections to timeliness or other procedural impediments to the processing of the grievance-arbitration, and the resolution of the contract dispute will likely resolve the issues raised in the PPC. *Id.*; *see also Collyer Insulated Wire,* 192 NLRB 837, 842 (1971) (deferral is appropriate when (a) the dispute arises within the confines of a collective bargaining relationship, (b) the employer has indicated its willingness to resolve the issue through the grievance-arbitration process, and (c) the contract and its meaning lie at the center of the dispute).[18]

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[17] Note that under the PEBA, the provisions of a CBA apply to all employees within the bargaining unit and that an employee cannot opt-out of arbitration provisions because he is not a member of the union. *See Luginbuhl v. City of Gallup,* 2013-NMCA-053. Nonetheless, a party can waive or lose its right to proceed by grievance-arbitration depending on the circumstances. *See AFSCME Local 3022 v. City of Albuquerque et al*, 2013-NMCA-049 (a union waived its right to proceed via arbitration where it "manifested an intent to forgo what it considered an inadequate remedy in favor of swifter justice before the district court", by seeking an injunction and temporary restraining order to prevent the City from closing a drug treatment program and laying off bargaining unit employees).

[18] Although a court generally determines whether "a controversy is subject to an agreement to arbitrate" (*see* NMSA § 44-7A-7(b)), where the parties have "clearly and unmistakably" reserved an issue to the

Deferral is not appropriate in the following cases:

- futility[19]
- employer obstruction of the grievance arbitration process
- breakdown of collective bargaining relationship
- the PPCs allege discrimination, interference with PEBA rights, or violation of another PEBA right that is independent of the contract

*See DOH*, Case 168-06, *supra*; *and* DLL, Chs. 17 V, 18 III, IV and V, and cites therein. *See also* DIGEST, and . *AFSCME Local 477 v. Public Reg. Comm'n*, Case No. 154-07, Hearing Examiner's letter decision on a motion to dismiss (Oct. 23, 2007) (distinguishing *DOH,* Case No. 168-06, *supra*, and denying a motion to dismiss where deferral would not have been appropriate because the employer's position there rendered grievance arbitration futile).

Additionally, the argument for deferral will be "far less compelling" as a matter of administrative efficiency" when the PPC raises both contract claims and other claims that are not appropriate for deferral. *Sheet Metal Workers Local 17*, 199 N.L.R.B. 166 (1972); *but see Dubo Manufacturing*, 142 N.L.R.B. 431 (1963) (deferring some claims and not others).

Deferral may also be declined where the contract language at issue is not ambiguous and does not, therefore, require an arbitrator's special expertise in contract interpretation. *See*, *e.g.*, *AFSCME v. State*, Case No. 143-07, Hearing Examiner's letter decision on Motion to Defer (Jan. 15, 2008); *see also Caritas Good Samaritan Medical Center*, 340 NLRB 61, 62-63 (2003) (where the terms of the CBA are "clear and unambiguous...the expertise of an arbitrator was not required to interpret the language to establish whether the Respondent violated the Act"); *Grane Health Care, Inc.*, 337 NLRB 432, 436 (2002) (where the terms of the CBA are "clear and unambiguous," the matter did not "turn on contract interpretation," and "therefore the special interpretation skills of an arbitrator would not be helpful"); and *Struthers Wells Corp.*, 245 NLRB 1170, 1171 n. 4 (1979) (that a claim should not be deferred where the CBA "provision is on its face clear and ambiguous," such that the issue "does not involve contract interpretation").

### 2. Administrative agency deferral

The hearing examiner may also defer hearing a PPC when "essentially the same facts and ... essentially the same issues" have been raised in an administrative proceeding before another

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arbitrator, then the arbitrator shall proceed to decide it. *See AT&T Techs., Inc. v. CWA*, 475 U.S. 643, 649 (1986); and *Clay v. N.M. Title Loans, Inc.*, 2012-NMCA-102, ¶ 10 ("[t]he Court uses ordinary state-law principles that govern the formation of contracts to determine whether the parties clearly and unmistakably agreed to arbitrate an issue, including arbitrability"). However, under a CBA (unlike in ordinary commercial contracts) it is usually quite clear that arbitrability is reserved unto the arbitrator, so much of this law will not be relevant to labor practitioners.

[19] Note however, that the futility claim may not rest solely on alleged "bias at the lower echelons of the grievance process." *See Douglas v. American Information Technologies Corp.*, 877 F.2d 565, 574 (7th Cir. 1989).

agency. *See* 11.21.3.21 NMAC; and DIGEST. Alternatively, the hearing examiner may request the other agency to hold its proceedings in abeyance; or the hearing examiner may continue processing the matter while the other agency does as well.

Under this rule, the PELRB may be able to coordinate its processing of related matters with the SPB and/or other boards charged with reviewing disciplinary action taken against public employees. Although the subject has not been tested, the decision of one agency to defer to the other will likely depend in large measure on the nature of the allegations raised by each side. For instance, deferral by the PELRB may be warranted where the defense of the discipline depends on complicated issues removed from PEBA, such as professional licensing, other bodies of law, egregious moral turpitude and/or criminal conduct, while the allegations of discrimination, retaliation, interference, or coercion under PEBA are comparatively straightforward. In contrast, deferral by the other agency may be warranted where the PPC and the appeal of the discipline allege a complicated fact pattern and/or history of PEBA violations, while the defense of the discipline consists of an instance or pattern of misconduct that does not pose unusual problems in evaluation and analysis.

Note that *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) principles may apply to give binding effect to the first ruling issued. *See, e.g., City of Deming v. Deming Firefighters Local 4521*, 2007-NMCA-069, ¶ 17 (raising possibility of preclusion where one labor board hears a matter also pending before another labor board); *see also Moffat v. Branch*, 2005-NMCA-103, ¶ 11 (for claim preclusion to bar a claim, "[t]he two actions (1) must involve the same parties or their privies, (2) who are acting in the same capacity or character, (3) regarding the same subject matter, and (4) must involve the same claim"); *Hyden v. Law Firm of McCormick, Forbes, Caraway & Tabor*, 1993-NMCA-008, ("[t]o invoke collateral estoppel ..., the moving party must show that (1) the subject matter or causes of action in the two suits are different; (2) the ultimate fact or issue was actually litigated; (3) the ultimate fact or issue was necessarily determined; and (4) the party to be bound by collateral estoppel had a full and fair opportunity to litigate the issue in the prior suit').

This means that where claim or issue preclusion principles apply, any decision of the PELRB may be constrained by the earlier determination made by an administrative agency. *See MCFUSE Local 3313 v. Gallup McKinley County Schools*, 8-PELRB-2026 (Mar. 19, 2026; in re: Case No. 102-25) (dismissing §§ 5, 15, 19(A), 19(B), 19(C), 19(D), 19(E), 19(F), 19(G), and 19(H) claims upon pre-hearing motion where the adopted record from the school board personnel hearing, to which these proceedings were deferred, established that termination was based on multiple grounds of serious misconduct, and was not pretextual).

## III. PROHIBITED PRACTICE COMPLAINTS (PPCs)

### A. Introduction

A PPC is initiated and filed by a public employee, the exclusive representative, or a public employer, alleging one or more violations of the subparagraphs of §§ 19 - 21. *See infra*, Secs. I.C.2, II(A)-(B).

Note that here is tremendous overlap between the various rights and prohibited practices, which is seen in the body of PELRB case law. *See*, *e.g.*, DIGEST at §§ 19(A)-(H). Some categories, such as domination of the union (§ 19(C)), breach of the duty to bargain in good faith (§§ 19(F), 20(C )), or simple breach of the CBA (§§ 19(H), 20(D)), are fairly discrete conceptually, even if they may intersect in some cases. The other most common collection of claims overlap more, but can still generally be organized into claims arising under §§ 5 and/or 19(B), related to concerted and protected activity; and discrimination and retaliation claims arising under §§ 19(A), (D) and/or (E).

After receipt of a PPC, PELRB Staff performs a preliminary review for facial adequacy based on the following regulatory criteria:

- Does the PCC set forth, at a minimum, the name, address and phone number of the public employer, labor organization, or employee against whom the complaint is filed and of its representative if known; the specific section of PEBA claimed to have been violated; the name, address, and phone number of the complainant; a concise description of the facts constituting the asserted violation; and a declaration that the information provided is true and correct to the knowledge of the complaining party?[20]
- Does the PPC allege a violation of NMSA 1978, §§ 19, 20 or 21 ?
- Was the PPC timely filed, meaning within six (6) months following the conduct claimed to violate the act or discovery thereof? *See* 11.21.3.9 NMAC.
- Was the PPC properly filed in the correct format? All papers required or permitted to be filed with the director, a hearing examiner or the Board shall be on an official form prepared by the director, if available, or on 8 $^{1}/_{2}$ by 11 white paper, double spaced. All papers shall show at or near the top of the first page the case name and, if available, the case number, and shall be signed by the filer. *See* 11.21.1.26 NMAC. The PPC may be either hand-delivered to the Board's office in Albuquerque during its regular business hours or sent to that office by United States mail, postage prepaid or by the New Mexico state government interagency mail. A document will be deemed filed when the director receives it. Documents sent to the Board via fax will be accepted for filing as of the date of transmission only if an original is filed by personal delivery or deposited in the mail no later than the first workday after the fax is sent.

*See* 11.21.1.10 NMAC. (As discussed in Sec. II.B, *supra*, the PPC will be reviewed for adequacy and can be cured at that stage or dismissed subject to Board review. *See* 11.21.3.12 and 11.21.3.13 NMAC.)

### B. Discrimination and retaliation claims – §§ 5(A), §19(A), (D), (E), 20(A)

#### 1. Generally

A union violates PEBA where it discriminates against an employee because of race, color, religion,

[20] Use of PELRB forms is not required, but the PPC form available online is drafted to ensure this information is presented. *See* Form #1.

creed, age, sex or national origin; and also if because of their anti-union activities or viewpoint. *See* §§ 5(A), 20(A). These types of claims have not been presented to the PELRB but could either entail the "*Wright Line* analysis" discussed next; raise DFR issues, which the PELRB does not handle, *see* Sec. I.C.3, *supra*; or be a matter deferred to an agency such as the Human Rights Commission, *see* Sec. II.G.2, Pre-Hearing Procedures - Agency deferral, *supra*.

More typically, discrimination/retaliation PPCs are filed against the employer. An employer violates §§ 19(A), (D), and/or (E) of the PEBA where their opposition to a protected activity or status is a substantial or motivating factor in their decision to take adverse action against an employee. In *Wright Line,* 251 NLRB 1083 (1980), the NLRB established the following two-part test to determine whether an employee has been disciplined or otherwise discriminated against for union activity, rather than for a legitimate business reason.

First the employee must "make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision" to take certain adverse employment action." *Id.* at 1089. A *prima facie* case is established by showing there was (a) union activity, (b) knowledge of such union activity, and (c) animus against the union. *See Carpenters Health & Welfare Fund,* 327 NLRB 262, 265 (1998).

Animus can be inferred from circumstantial evidence. *Id.* Mere animus alone, without adverse action, is not prohibited. *See, e.g., AFSCME v. Dept. of Health,* Case No. 168-06, Hearing Examiner Report (Aug. 30, 2007) (employer did not violate the act by merely calling a "mandatory" meeting in response to the circulation of a petition, when no penalty was threatened or in fact levied for failure to attend the meetings). Instead, animus is relevant to show a nexus or connection between the adverse action and the allegedly impermissible considerations. *See Carpenters, supra*. This was clarified in *Tschiggfrie Properties, Ltd*., Case 25-CA-161304, and such clarification was necessary to make clear that there must be some evidence, direct or circumstantial demonstrating that anti-union animus was a motivating factor in the adverse action at issue before the burden shifts to the employer to demonstrate the same action would have been taken in the absence of the unlawful motive.

Second, once a *prima facie* case is established, the burden will shift to the employer to establish that the same action would have taken place even in the absence of the protected conduct, or that the action would not have been taken "but for" the protected conduct. *Wright Line* at 1089. *See also* DIGEST: *NRLB v. Transportation Management Corp.,* 462 US 393 (1983); *Northern Wire Corp. v. NLRB,* 887 F.2d 1313, 1319 (7th Cir. 1989); and *Carpenters, supra,* at 266.

Although the evidentiary burdens shift back and forth under this framework, the ultimate burden of persuading the trier of fact always remains with the complainant. *See Goodenough v. CYFD et al.*, D-101-CV-2020-01743 (Apr. 30, 2021) (in re: PELRB 106-19, 9-PELRB-2020) (complainant failed to demonstrate that the department violated §§ 19(B) or 19(E), or that disparate treatment occurred, as the discipline was not a result of the employee having asserted their *Weingarten* rights but was for other legitimate business reasons); and *CWA v. Dept. of Health,* Case *No*. 108-08, Hearing Examiner Report (July 15, 2008) (applying the *Wright Line* test and concluding that, although the union established a *prima facie* case of retaliation, it failed meet its ultimate burden refute the Department's business justifications by a preponderance of the evidence).[21]

Note that, in *Wright Line* the court explicitly differentiated between "pretextual" and "dual motive" cases. It explained that the employer may put forth "what it asserts to be a legitimate business reason for its action. Examination of the evidence may reveal, however, that the asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon. When this occurs, the reason advanced by the employer may be termed pretextual. Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive." *Wright Line* at 1087; *see also case*; and DIGEST.

The distinction between pretext and dual motive may or may not be just semantics. In any event, to show pretext, a claimant must produce evidence of such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact-finder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non[retaliatory] reasons." S*ee MCFUSE Local 3313 v. Gallup McKinley County Schools*, 8-PELRB-2026 (Mar. 19, 2026; in re: Case No. 102-2); *see also* DIGEST.

### 2. Because of union involvement

Claim under this theory could include discrimination in hiring, tenure, other term and condition of employment, or discharge of an employee:

- because of union involvement
- to encourage or discourage membership
- because employee is forming, joining, assisting a union or
- choosing to be represented by a union

Overt adverse action, such as discipline or discharge is easy to ascertain. Other examples of action covered could include threats of and/or loss of benefits; assigning employees more difficult work tasks; changing their schedule; changing their work assignments; or reviewing their requests for a particular schedule or their requests for time off more critically, because they are engaged in union or other protected concerted activity. Some examples over the years have included the following:

- use of telephones
- use of state vehicles
- employer-critical statements at school board meetings

*See, e.g.*, *Corrections Dep't v. AFSCME Council 18,* 2018-NMCA-007 (in re: 11-PELRB-2009, Case No. 105-09) (regarding use of state vehicle to attend labor management meetings) *Peñasco Federation of United School Employees v. Peñasco Independent School District,* D-820-CV-2021-00029 (Sep. 10, 2021) (in re 5-PELRB-2021, Case No. 108-20, *aff'd in part, rev'd in part*); *cert. den.* A-1-CA-39990 (Mar. 31, 2022) (alleged discrimination/failure to renew contracts after

[21] *Compare Gonzales v. N.M. Dep't of Health, Las Vegas Med. Ctr.,* 2000-NMSC-029, ¶21, quoting *Reeves v. Sanderson Plumbing Prods., Inc.,* 120 S. Ct. 2097, 2106 (2000), and *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981) (all discussing a federal employment discrimination claim, which utilizes a similar burden shifting framework under *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-05 (1973)).

speaking up at a school board meeting about terms and conditions of employment); and *AFSCME Council 18 v. NM Tax & Rev. Dep't*, 55-PELRB-2012 (in re: Case No. 104-12) (restriction of use of telephone for union related matters); *see also* DIGEST.

Note that circumstances may exist where the employer's actions are deemed appropriate despite the perception by a complainant. *See*, *e.g.*, *AFSCME Council 18 v. NM Tax & Rev, Dep't*, 55-PELRB-2012 (in re: Case No. 104-12) (directed verdict against a claim regarding use of state phones where the evidence showed there were 40 hours of personal phone use for which the employee was disciplined, only two hours were related to union calls, and restriction of union related calls to the last 15 minutes of the day was not shown to interfere with union business); *see also* DIGEST.

### 3. Because of affidavit, complaint, etc.

This would include the discharge or other discrimination against an employee because he or she did the following, pursuant to the provisions of the PEBA:

- signed or filed an affidavit
- signed or filed a petition
- signed or filed a grievance or
- gave information or testimony

*See, e.g.*, § 19(E).

### 4. Because of non-membership in the union[22]

As referenced above, a union violates the PEBA by discriminating against a public employee because of the employee's non-membership in, or opposition to the union. *See* §§ 5, 15(A), 20(B), 20(E).

Illegal conduct could include discrimination in the processing of grievances, and discrimination in the negotiation or administration of the CBA. It would also include influencing or encouraging an employer to take adverse employment action against a non-member "or a member who has incurred the disfavor of the union's leadership," such as layoff, transfer, demotion, changing work schedule, removal of overtime opportunities, or discharge for reason other than failure to pay any required dues or contract administration fees. *See* John. E. Higgins, THE DEVELOPING LABOR LAW (7th Ed., hereinafter "DLL") Chapters 3.II.C; 7.III.A; 25.II.B.1.

However, a PPC filed by a public employee against a union must distinguish itself from a claim for breach of the duty to represent bargaining unit members fairly and adequately. *See Callahan v. NM Federation of Teachers-TVI*, 2006-NMSC-010 (that such a claim does not constitute a PPC under the PEBA and must instead be filed as a civil action with the district court). *See also Roybal v. AFSCME Council 18*, Case No. 102-06, Hearing Examiner Order of Dismissal (May 5, 2006),

[22] Once upon a time, this could have also involved claims concerning fair share dues, but those have been rendered unenforceable under the *Janus* decision, *see supra*, and the 2020 Amendments provided a safe harbor for fair share dues deduction made when fair share agreements were legal/enforceable. See § 17(E).

and *Hawkins v. Gallup McKinley County Schools*, 34-PELRB-2026 (Sep. 10, 2026; in re: Case No. 107-26); *Rivas v. NMHU and NMHU Faculty Association, NEA-NM*, 25-PELRB-2026 (Jul. 14, 2016; in re: Case No. 133-25) (all looking beyond the formal claims of interference with the PEBA rights and refusal to comply with the PEBA, and concluding that the essence of the PPC was nonetheless for breach of the duty to fairly represent a bargaining unit member); and DIGEST.

### C. Interference and/or coercion claims – §§ 5, 19(B)

#### 1. Generally

Section 5 (Amended 2020) prohibits interference with an employee's right to form, join or assist a labor organization for the purpose of collective bargaining or to refuse such activities. The first part of § 19(B), similarly, makes it a PPC to "interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act".

(The second part of § 19(B) prohibits the "use public funds to influence the decision of its employees or the employees of its subcontractors regarding" support or opposition of a union or exclusive representative. Only one case to date has alleged a violation of this, and the PPC was dismissed upon a hearing on the merits for lack of evidence of that and other claims. *See United Health Profs. of N.M. v. UNM-Sandoval Reg'l Med. Center*, 3-PELRB-2026 (Feb. 19, 2026, in re: Case No. 128-24) (union failed to meet its burden of proof regarding allegations that the hospital supported a decertification campaign against the Union); *see also* DIGEST.)

As observed above, there is frequently significant overlap among claims for discrimination under §§ 19(A), (D), (B) and (E) for discrimination and those under §§ 5 and 19(B)[23] for interference. *See* DLL, Chapters 6.I.C, 7.I., II.8 and III ("[t]he Board has noted since its earliest days that a violation by an employer of any of the ... subdivisions of Section 8," the NLRA prohibited practice section, "is also a violation of subdivision one," the NLRA's prohibition on interfering, restraining or coercing employees).

One distinction is that for interference/coercion cases – unlike with discrimination or retaliation cases – ***motive is not a critical element***. Under NLRB precedent it is well settled that "interference, restraint, and coercion ... does not turn on the employer's motive or whether the coercion succeeded or failed." Rather, "[t]he test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *See American Freightways Co.,* 124 NLRB 146, 147 (1959).

Accordingly, unlike with those other claims, a violation of § 5 can be found based on ambiguous language or conduct. *See Joseph Chevrolet,* 343 NLRB 7, 12 (2004) ("the test ... is not whether the statement is unambiguous; it is whether, from the standpoint of the employees, it has a reasonable tendency to interfere with, restrain or coerce the employees in the exercise of protected rights."); and *Double D Construction Group, Inc.,* 339 NLRB 303, 303 ("[t]he test ... is whether

[23] Beginning in 2014, the text dating back to the 2008 Manual was amended to attribute the following rights only to § 5, and the notation on the similarity between §§ 5 and 19(B) was deleted except in reference to the DLL quote and citation to that effect.

the words could reasonably be construed as coercive, whether or not that is the only reasonable construction”).

There are a host of facts and circumstances under which claims for interference or coercion could arise, but the most common over the years – before the PELRB or the NLRA – are summarized below.

### 2. Solicitation and distribution by employees

No-solicitation and no-distribution rules are facially invalid if phrased so broadly that they can be interpreted to prohibit protected solicitation. (Additionally, even if valid on their face, they will violate labor law if discriminatorily or punitively enforced as regards to union related solicitation.) *See* DLL, Chapters 6.II.B and 19.III.B.3.

Generally, employees on break or “non-duty” time can orally solicit fellow workers at any location on-site. However, such break-time oral solicitations may be prohibited in public locations or in “immediate patient care areas” in health care facilities. Additionally, the distribution of written materials may be prohibited both while an employee is on duty and in working areas. That is because in the case of distributions of written material, the potential for disruption of operations is greater. However, the solicitation to sign an authorization card is treated as a solicitation, rather than distribution of written material. *Id.*

Work time is for work, but the time outside working hours (such as rest and lunch breaks, and residential hours for employees working twenty-four (24) hour shifts, such as firefighters) is an employee’s time to use as he wishes without unreasonable restraint, where the employee is rightfully on company property. *See Republic Aviation*, 324 US 793 (1945), and *Our Way*, 268 NLRB 394 (1983); *see also Las Cruces Prof’l Fire Fighters v. City of Las Cruces,* 1997-NMCA-31; *AFSCME Council 18 v. NM Tax & Rev. Dep’t*, 55-PELRB-2012 (in re: Case No. 104-12) (regarding phone use by a steward during work hours); and DIGEST.

The right of an employee to enter or remain on the premises before or after his or her shift may also be restricted by work rule or policy, provided that:

- access is limited solely with respect to the interior of the facility and other work areas
- the policy is clearly disseminated to all employees, and
- the policy applies to off-duty employees seeking access to the plant for any purpose, including those not related to union activities.

*See Tri-County Medical Center,* 222 NLRB 1089 (1976) (stating the rule); *Central Valley Meat Co.,* 346 NLRB No. 94 (2006).

### 3. Buttons, T-Shirts, etc.

Labor law also strikes a balance concerning employees’ right to wear union buttons or T-shirts or post pro-union stickers while at work. Although this is generally protected activity, an employer nonetheless has a right to maintain an orderly work environment.

Accordingly, an employer may promulgate and enforce a rule restricting such activity "only where the prohibition is necessary because of 'special circumstances,' such as maintaining production and discipline, ensuring safety, preventing alienation of customers, adverse effects on patients in a health care institution, or where the message is inflammatory and offensive." Additionally, such a rule must apply to and be enforced equally against other non-union related communications. *See* DLL, Chapters 6.I.B.1; 6.I.B.3; 6.III.A.3; 6.II.A.4 and cites therein; *see also* DIGEG\ST.

### 4. Rights of non-employee union organizers

Under the NLRA, non-employee union organizers have fewer access rights than employees. Accordingly, they can be lawfully prohibited from accessing and distributing union literature on company property, provided:

- "reasonable efforts ... through other available channels of communication will enable it to reach the employees; and
- the employer does not discriminate against the union by allowing distribution of items by other non-employees.

*See NLRB v. Babcock & Wilcox Co.,* 351 US 105, 112-113 (1956) (regarding union access to private property), and *Lechmere, Inc. v. NLRB,* 502 US 527, 533-534 (1992) (regarding access to public property or quasi-public property, meaning private property that is open to the public). Under *Babcock and Lechmere*, if the employee does not live on the employer's property, "they are presumptively not 'beyond the reach'" of the union, and access to the employer's property may therefore be restricted. *Babcock, supra* at 113; and *Lechmere*, *supra* at 540, *citing Babcock*.

At the PELRB, access has been an issue at secured facilities such as public schools, medical or rehabilitation facilities, and corrections or detention facilities but few cases have been fully adjudicated and none subjected to appellate review to date. *See* DIGEST. However, the 2020 amendments made express the right of unions to access employees at the work site, provided that it "shall not interfere with the public employer's operations." *See* § 15(C)-(E).

### 5. Access to mail distribution systems and employee mailboxes

Under federal postal monopoly laws and regulations, employers may not distribute materials for anyone through their mail distribution systems free of charge, and this proscription applies to exclusive representatives and other unions as well. *See University of California v. Public Employment Relations Board*, 485 U.S. 589 (1988); and *Fort Wayne Community Schools v. Fort Wayne Educ. Ass'n, Inc.*, 977 F.2d 358 (7th Cir. 1992); *see also AFT v. Las Cruces Public Schools,* 130-06, Hearing Examiner Report at 14-16 (Feb. 28, 2007).

However, union officers or union employees may distribute such materials by hand into bargaining unit members' mailboxes, or through electronic mail systems (or other similar systems), free of charge; and they may not be prohibited from doing so if other groups are allowed to distribute materials in the same manner. *See 18 USCS* § 1694 and 39 CFR § 310.3(b)(1) (concerning the "letters of the carrier" exception to the postal monopoly); *Fairfax Hospital,* 310 NLRB 299, 305-306 (1993) (that a union may be granted direct access to mailboxes under this exception); *AFT v.*

*Las Cruces Public Schools,* 130-06, Hearing Examiner Report at 16-17 (Feb. 28, 2007).

Additionally, the 2020 amendments made express the right of unions to use the employer's email system, regarding collective bargaining or contract administration; investigation of grievances or other employment relations disputes; or "matters involving the governance or business of the union." *See* § 15(H)(1)-(3).

### 6. Interference with concerted activity

As alluded to elsewhere, the 2020 amendments to § 5, added express protection for concerted activity in mutual aid and support, with the addition of subsection (B).

This enshrined into statute the PELRB practice of tracking similar NLRA language by inference. *See, e.g.*, *AFSCME v. Dep't of Health*, 6-PELRB-2007 (Dec. 3, 2007; in re: Case No. 168-06) (construing the PEBA to protect concerted activity and provide *Weingarten* style rights before the 2020 amendment). Recent cases asserting § 5(B) and/or 19(B) include *Hawkins v. Gallup McKinley County Schools*, Hearing Examiner letter notices of facial inadequacy (Aug. 14 and 21, 2026; in re: Case No. 123-26); *Rivas v. NMHU and NMHU Faculty Association, NEA-NM*, 25-PELRB-2026 (Jul. 14, 2016; in re: Case No. 133-25), appeal pending at D-412-CV-2026-278; and *MCFUSE Local 3313 v. Gallup McKinley County Schools*, 8-PELRB-2026 (Mar. 19, 2026; in re: Case No. 102-25). All three cases, however, were dismissed pre-hearing upon motion for failure to state a claim and/or as a matter of law upon demonstration of lack of genuine dispute of material facts. *See also* DIGEST.

### 7. Disciplining a Steward for concerted activity

Similar claims for interference with concerted activity are frequently asserted in response to disciplining a steward or other union representative for alleged concerted activity. An employer may not discipline or otherwise penalize a union steward for statements, demeanor and/or certain conduct while engaged in union business. *See AFSCME Council 18 v. Bernalillo County*, 65-PELRB-2021 (Aug. 6, 2021; in re: Case No. 101-21) (employer violated §§ 19(B), 19(D) and 19(E) of the Act by its investigations of two employee union organizers); *AFSCME Council 18 v. Regulation and Licensing Dep't*, 4-PELRB-2013; and 5-PELRB-2013 (PEBA violated by disciplining steward processing grievances after the employer refused to recognize his status as designated steward); *see also Union Fork and Hoe Company*, 241 NLRB 907, 908 (1979) ("a steward is protected ... when fulfilling his role in processing a grievance" under substantially identical provisions of the NLRA); *United States Postal Service and San Angelo Local (San Angelo)*, 251 NLRB 252, 258 (1980) (stewards "are essentially insulated from discipline for statements made to management representatives which, if made in another context, would constitute insubordination").

However, a steward does not have unlimited immunity, or a *carte blanche,* when acting as a steward. For example, a steward may be disciplined for excessive or "opprobrious" conduct that is not part of the processing of a grievance or otherwise for purposes of mutual aid regarding terms and conditions of employment. A steward may also be disciplined for violating the CBA, legitimate work rules, or a direct order given while engaged in protected activity. *See, e.g.*, *Rivas* *v. NMHU and NMHU Faculty Association, NEA-NM*, 25-PELRB-2026 (Jul. 14, 2016; in re: Case No. 133-25), appeal pending at D-412-CV-2026-278; and DIGEST. *See also Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1034 (1976) (a steward may nonetheless be disciplined for excessive or "opprobrious" conduct in processing a grievance, if "the excess is extraordinary, obnoxious, wholly unjustified, and departs from the *res gestae* of the grievance procedure"); *U.S. Postal Service and San Angelo Local (San Angelo)*, 251 NLRB 252, 258 (1980), citing *Atlantic Steel Company*, 245 NRLB No. 107 (1979) (a steward loses protection for "opprobrious conduct," meaning conduct that is extreme, occurs outside the context of grievance processing, occurs in a location where grievances are not usually processed, and/or is not provoked by any unfair labor practices on the employer's part); and *U.S.P.S. and NALC, Sunshine Branch 504*, 350 NLRB 3, 5 (2007) (a steward may be disciplined for "clearly insubordinate conduct," such as disobeying a direct order, provided that the employer takes the same action "that it would have taken toward any other employee committing similar insubordinate acts").

Additionally, to the extent a legitimate business justification is offered, and the claims overlap with intent or motive based claims, the PELRB hearing examiners will still use the *Wright Line* burden shifting analysis to evaluate whether the discipline would not have been issued "but for" the steward's protected activity. *See, e.g.*, *Rivas*, *supra*; and *MCFUSE Local 3313 v. Gallup McKinley County Schools*, 8-PELRB-2026 (Mar. 19, 2026; in re: Case No. 102-25); *see also* DIGEST.

### 8. Work rules that interfere with employees' PEBA rights

It violates the PEBA to promulgate work rules or restrictions with the intent to interfere with employees' rights under the PEBA, rather than for legitimate business purposes.

For example, an employer may impose limits on general fraternization during work time, but it may not forbid or prevent union organizational activities at all, even during non-working periods. *See Las Cruces Prof'l Fire Fighters v. City of Las Cruces,* 1997-NMCA-31 (*Firefighters II*).

Additionally, even otherwise legitimate restrictions violate the PEBA when promulgated for the purpose of interfering with organizations rights, "rather than to maintain production and discipline." *See Horton Automatics,* 289 NLRB 405, 409 (1988); and *Capitol EMI Music, Inc.,* 311 NLRB 997, 997 n.4 and 1006 (1993). *See also Corrections Dep't v. AFSCME Council 18*, 2018-NMCA-007 (in re: D-101-CV-2009-3457, 11-PELRB-2009, Case No. 105-09) (affirming the PELRB's finding of liability where the department denied employee union officers' request to use a state vehicle to travel to and from a policy review meeting with management, when other department employees attending the same meeting on behalf of management were allowed use of a state vehicle).

### 9. Refusal to provide an *Excelsior* list

Once a union has petitioned for recognition, it is entitled to a list of all employees within the proposed bargaining unit, and their telephone numbers and home numbers. *See* 11.21.2.12(B) NMAC; *SSEA, Local 3878 v. Socorro Consol. School Dist.*, 05-PELRB-2007 (Dec. 13, 2007), *citing Excelsior Underwear, Inc.,* 156 NLRB 1236 (1996); and *United Steel Workers of America*

*Local 9424 v. City of Las Cruces,* 3rd Judicial Dist., Case No. CV 2003-1599 (Apr. 1, 2005) (invalidating Las Cruces City Resolution 00-136 as inconsistent with State law as far as it forbids the disclosure of such information).

As one New Mexico Court ruled, a public employer's release of employee names and home addresses ensures that certification or decertification elections are fair, and public employees have the best opportunity to listen to all the arguments and decide for themselves whether they desire to be represented by a labor organization. *Rio Rancho Public Schools v. Rio Rancho School Employees' Union*, 13th Jud. Dist. No. D-1329-CV-2010-1987 (Nov. 5, 2013).

(Note that the right to names and addresses continues after certification, but thereafter its violation is typically cited under exclusive representative rights and/or the duty to bargain in good faith. *See, e.g.*, § 15(C) and 17(A)(1); *see also* Sec. III (E)(2)(a), *infra*.

**10. Refusal to permit union representation during discipline**

Denying an employee's request for union representation during an investigatory meeting may interfere with an employee's rights under  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", and particularly their right to "engage in other concerted activities or mutual aid or benefit". *See* § 5(B) (Amended 2020).[24] (It may also violate the parties' CBA, *see* § 19(H) and *infra*.)

To state a claim for violation of *Weingarten* rights, the Complainant must allege three elements:

(i) the employee requested the assistance of his or her bargaining representative for an "investigatory interview"

(ii) the employer denied the request and instead compelled the employee to appear unassisted

(iii) the employee reasonably believed the meeting or interview would result in disciplinary action.

*See Weingarten* at 256-257; *see also Roybal*, *supra*, and DIGEST.

The investigatory interview is not "literally limited to a formal interrogation," but rather is any

[24] The 2020 amendment to § 5 essentially codified prior PELRB decisions concluding that the bundle of union-represented employee rights, known in legal shorthand as "*Weingarten* rights," are also protected under the PEBA despite the difference – at the time – in language between § 5 of the PEBA and § 7. *See AFSCME, Council 18 v. Dep't of Health,* 6-PELRB-2007 (in re: Case No. 168-06); *see also AFSCME Council 18 v. CYFD,* 10-PELRB-2013 (May 15, 2013) (reaffirming that principle); [24] and *AFSCME Council 18 v. Albuquerque Parks and Rec. Dep't, et al*, Case No. 202-CV-2013-2891 (Oct. 11, 2013) (not questioning the principle, and seeming to presume the PEBA protected *Weingarten* type rights). Specifically, before the amendments, § 5 of the PEBA did not include Subsection (B) and the § 7 NLRA language concerning employee rights "to engage in concerted activities for mutual aid and protection," that was relied on in *Weingarten* and its progeny. The 2020 amendments resolved any lingering doubt, however.

examination that "involves questioning to secure information." *See NTEU v. FLRA*, 835 F.2d 1446, 1450 (D.C. Cir. 1987). Additionally, the employer is not required to bargain with the union representative attending the investigatory interview. *Id.* at 259.

In contrast to a *Weingarten* claim, to state a claim for discrimination or retaliation for exercise of *Weingarten* rights, the Complainant need not allege facts in support of the conclusion that a *Weingarten* right existed. Instead, the Complaint must only allege:

(i) the employee claimed and/or asserted a *Weingarten* right; and

(ii) thereafter the employee faced some discriminatory or retaliatory action as a result.

### 11. Interrogating employees about union views or activities

Questioning employees about their union sympathies or activities is not *per se* unlawful. Rather, the test is "whether, under all of the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by the Act." *See Rossmore House*, 269 NLRB 1176, 1177-1178 and n. 20 (1984), *enf'd. sub nom. Hotel Employees and Restaurant Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

Factors to consider include:

- whether the interrogated employee is an open and active union supporter
- the background of the interrogation
- the nature of the information sought
- the identity of the questioner
- the place and method of the interrogation
- the truthfulness of the reply
- whether a valid purpose for the interrogation was communicated to the employee and
- whether the employee was given assurances against reprisals

*Id.*; *see also NLRB v. Nueva Engineering, Inc.*, 761 F.2d 961 (1985) (interrogation was coercive because it took place in the foreman's office, the foreman had authority to hire and fire as he saw fit and he gave no assurances against retaliation); and *Millard Refrigerated Services*, 345 NLRB 1143, 1146-1147 (2005) (questioning objectionable where it occurred along with card solicitations and threats, it was made by supervisors with broad authority over their crews, and there was no evidence that the interrogated employees were open and active union supporters).

### 12. Threatening employees regarding union representation

An employer violates the right to form, join or assist a union without interference when it threatens employees with economic reprisals such as layoffs or termination, if employees select union representation. *NLRB v. Gissell Packing Co.,* 395 US 575, 616-618 (1969); *Nueva Engineering, supra*.

An employer also violates this section when it threatens employees that voting in the union will result in a loss of existing benefits while the parties bargain. *See, e.g., NLRB v. General Fabrications Corp.*, 222 F.3d 218, 231 ($6^{th}$ Cir. 2000) ("[a]n employer's statement that after unionization bargaining will begin 'from scratch' can be coercive depending on the context").

However, statements about the employer's economic situation that are based on objective fact are not prohibited. *Gissell* at 618. Similarly, "[i]n evaluating comments concerning 'bargaining from scratch,' the PELRB cases will draw a distinction between (1) a lawful statement that benefits could be lost through the bargaining process and (2) an unlawful threat that benefits will be taken away and the union will have to bargain to get them back." *See So-Lo Foods, Inc.*, 303 NLRB 749, 750 (1991).

### 13. Surveillance or recording of protected activity

Surveillance of employees engaged in protected union-related activity will generally tend to interfere with, restrain and/or coerce those employees in the exercise of their PEBA rights.

The PELRB has ruled that surveilling employees may have a legitimate purpose but it required notice and limitations where it could have chilling effects on the exercise of PEBA rights. *See McKinley County Fed. of United School Employees Local 2212 v. Gallup McKinley County Schools*, 19-PELRB-2020, Case No. 122-20 (Dec. 23, 2020). In that case, the PELRB issued a TRO or preliminary injunction regarding use of software to observe teachers, under NLRB authority that permits an employer, under its inherent management rights, to overtly surveil its employees' protected, concerted activities where necessary to further the company's legitimate security concerns, but prohibits such surveillance in a manner having a tendency "to interfere with, restrain, or coerce employees in the exercise of" such activities under § 8(a)(l) of the NLRA. *Id.*, citing *Nat'l Steel Shipbuilding Co.*, 324 N.L.R.B. 499 (1997), *enf'd*, 156 F.3d 1268 (D.C. Cir. 1998); and *Nat'l Steel Corp.*, 335 N.L.R.B. 747 (2001).

Additionally, the following acts of surveillance have been found to violate the NLRA:

- photographing employees engaged in protected activity, in the absence of a valid explanation conveyed to the employees in a timely manner – *see Randell Warehouse of Arizona, Inc.*, 247 NLR No. 56 (2006) (Randall II)
- following employees believed to be enroute to a union meeting – *see NLRB v. Nueva Engineering Inc.*, 761 F.2d 961 (1985)
- creating in the mind of an employee an impression that the employer is closely observing union organizational activity – *see J.P. Stevens & Co., Inc. v. NLRB*, 638 F.2d 676, 683 ($4^{th}$ Cir. 1980)

As both pleading and evidentiary issues, a complainant should be aware of the need to plead and prove facts sufficient to infer knowledge that protected union activity was occurring when the claim consists of someone observing or following co-worker stewards at the work site.

### 14. Denial of reasonable access between the union and employees

Employees have a right to be accessible to union organizers, to engage in organizing efforts, and to express their views in support of the union. The right of access typically involves both the right of employees to wear or post union insignia or advertisements and to distribute union materials during non-working periods; and the right of union access to employees at the workplace. *See generally* DLL, Chapters 6.I.B.1; 6.I.B.3; 6.III.A.3; 6.II.A.4 and cites therein

This is a complex area of law that has been shaped by balancing employees' first amendment considerations against the employer's right to orderly business environment and operations. (Issues of this nature have been raised before the PELRB but those cases have not resulted in a final order.)

### 15. Improper removal of appointees to the PELRB or a local board

An employer may not remove an appointee from a local board prior to the expiration of his or her term of service under the ordinance or resolution, without a hearing and a determination of just cause under the ordinance, such as by disqualification as a result of being an employee of a labor organization or a public employer. *See AFSCME v. Martinez*, 2011-NMSC-018 (that none of the PELRB members serve at the pleasure of the Governor; the Governor's responsibility under the Act and Article V, Section 4 of the New Mexico Constitution to "take care that the laws be faithfully executed" requires that the Governor respect the Act's requirement for continuity and balance by not attempting to remove appointed members of the PELRB; and constitutional due process requires a neutral tribunal whose members are free to deliberate without fear of removal by a frequent litigant in that forum, such as the Governor); *see also AFT Local 4212 v. Gadsden Independent School District,* Case No. 169-06, Hearing Examiner letter decision (Nov. 2, 2007) (regarding removal of the union-recommended appointee without a hearing, based on the unsupported belief that he was employed by a union).

Nonetheless, administrative appointments by a City Counsel President during temporary absences do not violate the Act. *See City of Albuquerque, v. Montoya,* 2012-NMSC-007 (March 6, 2012).[25]

### D. Dominating or interfering with the union – §19(C)

Under the NLRA, the essentially identical provision is directed against a very narrow type and limited number of activities, such as:

- Establishment of a "Company Union"
- Infiltration of unions by lower-level supervisors
- Failing to maintain neutrality between competing unions

*See generally* DLL, Chapters 8.I; 8.VII; 12.III.C.2; 13.VIII.A and B.

However, unions frequently cite this PEBA section incorrectly, such as for claims concerning limiting a union's access to employees; disciplining union stewards for union activity; direct dealing; and other claims involving interference with *employees'* PEBA rights.

[25] In fact, the PELRB Director has been thus appointed to serve on the City labor board when that board's Chair had a conflict. *See City of Albuquerque v. Tittmann, et al*, ABQ LB 25-07 (settled without a hearing).

Although it may intuitively seem like § 19(C) *should,* at the least, cover claims of retaliation for or interference with a steward's actions in conducting union business, such is not the case under NLRA precedent. Instead, under the NLRA such claims are asserted under §§ 8(a)(1) and 8(a)(3) of the NLRA, which correspond almost word-for-word with §§ 19(B) and 19(D) of the PEBA. *See Union Fork and Hoe Company*, 241 NLRB 907, 908 (1979) and *United States Postal Service and San Angelo Local*, 251 NLRB 252, 258 (1980).

Accordingly, in the early PEBA II years, one hearing examiner declined to extend § 19(C) to such claims and concluded that these claims should instead be asserted under § 19(B) and § 19(D). *See AFSCME v. Department of Corrections,* Hearing Examiner Report at 23, 16 (Feb. 6, 2008). However, in more recent years, such claims have sometimes been sustained under § 19(C). *See* DIGEST.

Another situation in which the PELRB has extended the application of this provision is for an employer's failure to give the union notice of a mandatory employee meeting concerning the terms and conditions of employment, when the union had previously alerted the employer that such notice was required and expected. *See AFSCME Council 18 v. Dep't of Health*, 6-PELRB-2007 (Dec. 3, 2007).

### E. Duty to bargain in good faith – §17(A)(1), § 19(F), and § 20(C)

#### 1. Generally

The PEBA imposes affirmative and reciprocal duties on exclusive representatives and public employers to "bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties." *See* § 17(A)(1); *See also* §§ 19(F) and 20(C).

This duty has been described as "the most unruly of the obligations" imposed under labor law, because "what constitutes 'good faith' ... is not readily ascertainable, although thousands of cases and exhaustive commentaries have undertaken the task." *See* DLL, Ch. 13.I.A; 13.I.B.2; 13.III; *see also* DIGEST at §§ 17(A)(1), 19(F), and 20(C). The issue is further complicated by the fact that there are in fact two standards, depending on what type of violation is alleged. Specifically, a violation of the duty to bargain in good faith can be either:

(i) A per se violation, in which actual intent or subjective good faith is irrelevant, but the conduct must be clear and unambiguous; or

(ii) a pattern of bad faith negotiation, in which an intent to frustrate bargaining can be inferred from conduct.

*See, e.g.*, *NLRB v. Advanced Business Forms Corp*., 474 F.2d 457, 465 (2d Cir. 1973); *see also* DIGEST; and *AFSCME Council 18 v. Dep't of Workforce Solutions*, 11-PELRB-2017 (in re: Case No. 102-17; concerning the duty to bargain over the number of inspections employees were required to perform each month), *aff'd* D-202-CV-2017-07924 (Jul. 26, 2018).

A union can be relieved of its duty to request bargaining over an issue if it is presented with a *fait* *accompli*[26] by the employer. This is a fact-dependent analysis. *See, e.g.*, *CWA v. State of NM*, 2019-NMCA-031, at ¶20, citing *Haddon Craftsmen, Inc.*, 300 NLRB 789, 790 (1990), and *Gratiot Cmty. Hosp. v. NLRB*, 51 F.3d 1255, 1260 (6th Cir. 1995) (reversing and remanding for additional fact finding on the State's intent, the zipper clause, and *fait accompli*).

Alleged violations of the duty to bargain are a frequent PPC subject, and readers are referred to the DIGEST at §17(A)(1), § 19(F), and § 20(C) for more information on those cases.

### 2. *Per se* violations

For *per se* violations, intent is not relevant, and the party could even have intended to enter into a contract as a general matter. *See NLRB v. Katz*, 369 U.S. 736 (1962) (that certain acts *per se* violate the duty to bargain in good faith "though the [party] had every desire to reach agreement ... upon an overall collective agreement and earnestly and in all good faith bargains to that end"). As the Developing Labor Law treatise describes it, *per se* violations of the duty to bargain typically constitute, instead of a refusal to bargain, a "*failure to negotiate*" as to a particular issue, or under certain conditions, "rather than an absence of good faith."

A "vague or ambiguous statement" is insufficient evidence to support a determination that an employer has committed a *per se* violation of the duty to bargain in good faith. *See NLRB v. Advanced Business Forms Corp.*, 82 LRRM 2161, 2166-2167 (2d Cir. 1973). This is particularly true where "events which occur before and after" the statement indicates an alternate "reasonable interpretation." *Id*. For this reason, one PELRB hearing examiner has concluded that in duty to bargain cases, the NLRB has implicitly rejected the "reasonable listener" standard that it utilizes in interference or coercion cases. *See NEA-Santa Fe v. Santa Fe Public Schools*, Case No. 123-06, Hearing Examiner Report (Sep. 26, 2006).

*Per se* violations include the following conduct.

#### a. Refusals to provide information

The duty to bargain includes the duty to provide, upon request, any relevant information necessary to negotiate, administer and police the CBA, and to represent all collective bargaining unit employees fairly and adequately. *See National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH*, 3-PELRB-2005 (Oct. 19, 2005); *see also AFSCME Locals 624, 1888, 2962 and 3022 v. the City of Albuquerque,* Albuquerque Labor Management Relations Board, Case No. LB 06-033 (Jun. 12, 2007); and DIGEST.

A claim for refusal to provide information is not subject to arbitration, *see* DLL, Ch. 13.IV and cites therein, and it is one of the most commons PPC subjects. The following types of information have been found to be "presumptively" relevant and necessary to negotiating and administering the CBA, under the PEBA and/or the NLRA:

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[26] A "fait accompli", pronounced "fate uh-COM-plee", is a French term that literally means "an accomplished fact".

- employee lists
- financial information if the employer asserts inability to meet a wage or benefit demand
- wage rate and wage calculation information (increasingly even as to non-bargaining unit members)
- time-study material and other information used in setting wage rates or incentives
- information on employee job classifications and how they are determined
- information related to hours
- insurance plan cost information and employee benefits under the plan
- worker's compensation policies
- information regarding COBRA coverage, and
- information regarding any other benefit or term and condition of employment.

*See* DLL, Ch. 13.IV and cites therein; *see also* DIGEST, and *United Health Professionals of N.M. v. UNM-Sandoval Reg'l Med. Center*, 8-PELRB-2024 (Feb. 8, 2024; in re: Case No. 109-23) (citing *Nat'l Union of Hosp. and Health Care Employees, Dist. 1199 v. UNMH*, supra), *aff'd* D-202-CV-2024-01995 (6/10/25).

Additionally, other information may be relevant and necessary to investigate and/or process grievances or PPCs, as part of the union's duties in administering or policing the contract and adequately representing bargaining unit members. Other common requests for information concern:

- information pertaining to possible loss of bargaining unit work
- information pertaining to claims of disparate treatment of bargaining unit
- members and or union representatives or supporters

As a practical matter, relevant and necessary information is usually in the possession of the employer and sought by the union, so as a PPC it is usually directed against the employer.

Note that such PPCs may be filed prematurely where the union "adamantly insist[s] on its right to have the information in the precise form demanded," or does not adequately inform the employer of the information's relevancy in those cases where relevancy is not presumed. *See Emeryville Research Center, Shell Development Co. v. NLRB*, 441 F.2d 880, 884 (9th Cir. 1971). When a PPC for refusal to provide information is filed prematurely, it "preclude[s] in effect, a test of the [employer's] willingness to give the Union access to the ... information involved on mutually satisfactory terms." *See American Cyanimid Co.*, 129 NLRB 683 (1960).

Additionally, the employer may timely raise an affirmative defense that the information is confidential or privileged based on either the employer's interests (such as trade secrets, standardized tests used to evaluate applicants, or non-union employees' wages) or employees' interests (such as drug test results, or medical reports). In either case, both sides will need to argue their particularized needs. If the employer raises a legitimate privacy interest, the union may be denied to the information or, if possible, the two competing interests may be balanced, such as by use of a protective order, submissions under seal to an intermediary, redaction of personal identifying information, or the production of aggregate rather than personal data. *See, e.g.*, *Detroit Edison Co. v. NLRB*, 440 US 301 (1979).

In contrast, a defense based on the Inspection of Public Records Act (IPRA), NMSA 1978, §§ 14-2-1 *et seq*., will be rejected. A union's right to information under the duty to bargain in good faith is not defined by the IPRA because the public policy and purpose underlying the IPRA is to ensure an informed electorate. *See National Union of Hospital and Health Care Employees, supra*; *see also AFSCME Locals 624 et al, supra* (concluding that while disclosure of such information cannot be compelled under IPRA, IPRA does not prevent its disclosure pursuant to established labor law).[27]

Additionally, even where the employer's action was within its management rights, they will still have to bargain over, and therefore meet and confer and provide information related to, the effects of the exercise of management rights where they impact terms and conditions in a non-*de minimis* manner. *See, e.g.*, *CWA Local 7076 v. Public Education Department*, *grounds* D-202-CV-2012-11595 (Aug. 9, 2013; in re: 76-PELRB-2012) (the employer's duty to provide information to the union in regarding a reduction in force is not met when the employer does the bare minimum of providing notice to, and meeting with, the union while purposely withholding information relevant to a layoff); and *AFSCME Council 18, Local 3999 v. City of Santa Fe*, 3-PELRB-2021 (Jan. 15, 2021; in re Case No. 106-20) (the city violated the PEBA when it failed to give a 28-day advance notice before furloughing employees).

**b. Refusal to meet and confer**

The PEBA requires the public employer and exclusive representative to bargain collectively in good faith. *See* § 17(A)(1), § 19(F), and § 20(C); *see also* DIGEST at §§ 17(A)(1), 19(F), and 20(C). The obligation to meet and confer relates to collective bargaining defined in § 4(F): "...the act of negotiating between a public employer and an exclusive representative for the purpose of entering into a written agreement regarding wages, hours and other terms and conditions of employment".

Under the NLRA, similar language has been interpreted as imposing a *per s*e duty to meet and confer in fact about mandatory subjects of bargaining, upon any party's request, and N.M. Courts and the PELRB have adopted the same interpretation. *See* NLRA § 8(d) (defining the term "to bargain collectively" as a duty "to meet at reasonable times and confer in good faith"); *NLRB v. Katz*, 396 U.S. 736, 743 (1962); *see also* DIGEST.

The duty to meet and confer in fact is violated when a party unreasonably and without good faith justification insists upon bargaining by mail or that the other party submit all its proposals in writing, despite the other party's request for personal meetings. *See* DLL, Chs. 12 and 13 and cites therein. However, this is a totality of the circumstances analysis. *Compare CWA v. Sierra County,* Case No. 123-07, Hearing Examiner letter decision of dismissal (July 28, 2008) (PPC dismissed

[27] *See* Section IV(A)(3), infra, for additional information on the confidentiality of collective bargaining materials.

where employer refused to meet face to face and demanded a written counter proposal, but employer's bargaining representatives were allegedly intimidated by the union's bargaining representatives, both parties were responsible for delays in bargaining, and the hearing examiner had previously ordered the parties to first exchange written proposals).

Over the years, numerous PELRB and New Mexico court decisions have illustrated the mutual *per se* duty to meet and confer about mandatory subjects of bargaining, upon any party's request. *See, e.g.*, *CWA Local 7076 v. Public Education Department*, *grounds*, D-202-CV-2012-11595 (Aug. 9, 2013; in re: 76-PELRB-2012) (emphasizing that there must be a "meaningful" notice and opportunity to confer); *see also AFSCME Council 18 v. HSD*, D-101-CV-2012-02176 (Jun. 14, 2013); *AFSCME Council 18 v. State*, 1-PELRB-2013; *NEA-NM v. Española Public Schools*, 4-PELRB-2011. Readers are referred to the DIGEST for additional citations related to this topic. Readers are referred to the DIGEST for additional citations related to this topic.

However, there is no obligation to reach an agreement and simply rejecting an offer will not state a claim for bad faith bargaining. *AFSCME Council 18 v. Dep't of Health*, 56-PELRB-2012 (Jul. 13, 2012; in re: Case No. 108-12).

#### c. Refusal to bargain pending resolution of a PPC

It is a *per se* violation of the duty to bargain in good faith to refuse to meet and confer pending the resolution of a PPC. *See RBE Electronics of S.D., Inc.,* 320 NLRB 80, 88 (1995).

However, a finding of liability may not be based on ambiguous statements, so this can be a difficulty claim to prove. *See NLRB v. Advanced Business Forms Corp.,* 82 LRRM 2161, 2166-2167 (2nd Cir. 1973); *see also NEA-Santa Fe v. Santa Fe Public Schools*, Case No. 123-06, Hearing Examiner Report (Sept. 26, 2006).

#### d. Bargaining directly with employees

As the NLRB has observed, once a union is certified as exclusive representative,[28] it "is the one with whom [the employer] must deal in conducting bargaining negotiations," and the employer "can no longer bargain directly or indirectly with the employees." *See General Elec. Co.,* 150 NLRB 192, 194 (1964), *enf'd,* 418 F.2d 736 (2d Cir. 1969), *cert den.* 397 US 965 (1970). As such, direct dealing constitutes a *per se* violation of the duty to bargain in good faith because "direct dealing, by its very nature, improperly affects the bargaining relationship." *Americare Pine Lodge Nursing & Rehab. Ctr.,* 325 NLRB 98, 99 (1997).

The prohibition against direct dealing extends to direct dealing concerning the discussion or settlement of grievances. *See AFSCME Council 18 v. Department of Corrections,* 04-PELRB-2007 (Dec.13, 2007). Direct dealing violations have also been found in such conduct as: promising benefits directly to employees to encourage decertification or changing of the union's bargaining

[28] Prior to certification but after the filing of a petition, direct dealing is also prohibited, but under the duty to maintain laboratory conditions, to avoid interfering with the right to form, join or assist a Union. *See* Sec. IV.A6, Petitions, *infra*.

agent; meeting with employees to actively discuss matters that are subjects of ongoing negotiations, or alterations of existing contract terms; and conducting attitude surveys while refusing to bargain. *See* DLL, Chs. 12.III.C.2; 13.II.B; 13.III.A; 13.3.B.7; 18.II.C.3; *see also* DIGEST.

#### e. Refusal to execute a contract

Execution of a written contract is expressly required under the PEBA. *Compare* PEBA § 17(A)(2) to NLRA § 8(d).[29]

Under the NLRA, refusal to execute a written contract has long and widely been held to constitute a *per se* violation of the duty to bargain in good faith. Nor may an employer insist on union member ratification of the contract prior to execution, unless that is a condition mutually agreed to by the parties prior to bargaining. *See Sierra Publishing Co.,* 296 NLRB 477 (1989).

However, "refusal to execute the contract will be lawful if there has been a failure to gain requisite approval of a principal; a misunderstanding as to terms; or failure to agree on all material terms." *See* DLL, Ch. 13.II.

#### f. Unilateral change of employment terms and conditions

It is a *per se* breach of the duty to bargain to "unilaterally" – and substantially, materially, and significantly, *see infra* – alter a "mandatory subject of bargaining", including one established by binding past practice, without first providing meaningful notice and opportunity to bargain to impasse[30] unless the requirement to bargain has been waived. *See generally* DLL, Ch. 13.II; and DIGEST; *see also AFSCME Council 18 v. HSD*, D-101-CV-201202176 (Jun. 14, 2013) (removal of security guards in violation of a past practice); and *CWA v. State*, Ct. of App. Case No. A-1-CA-36331 (unilateral disallowance of a past practice of using of state-paid time to prepare for and participate in grievance meetings, subject to the discretion of the employee's supervisor).

A "zipper" clause and/or a management rights clause are frequently relied on to show waiver by express agreement, which is discussed below.

Claims based on unilateral change of terms and conditions of employment are also one of the most common types of PPC brought before the PELRB, and readers are referred to the DIGEST for additional cases on this topic. *See also infra*.

[29] The only difference is that the PEBA requires it without qualification, while the NLRA requires it "if requested by either party."

[30] Note that the PEBA's impasse resolution procedures, differ from the NLRA in that whenever an impasse continues after the expiration of a contract, the existing contract continues in full force and effect until it is replaced. *See* § 18(D). However, this shall not require the public employer to increase any employees' levels, steps or grades of compensation contained in the existing contract.

### g. Mandatory subjects of bargaining

Mandatory subjects of bargaining include wages, hours or other terms and conditions of employment. *See* § 17(A)(1); *see also* DIGEST.

Wages includes any type of compensation, benefit or emolument for services performed, such as: piece rates, incentive wage plans, overtime pay, shift differentials, discretionary merit wage increases; holiday pay rate; the holidays to be paid, paid vacations, commissions, severance pay, pensions, and health insurance plans. *See* DLL, Chs. 13.I.B.3; 13.II.F; 16.III and 16.IV; and DIGEST. One hearing examiner, for example, determined that the duty to bargain is violated when an employer unilaterally re-designates a scheduled workday as an unpaid holiday, and requires the employees to use annual leave, make up the hours or take leave without pay. *See AFT v. Las Cruces Public Schools*, PELRB 130-06 (Feb. 28, 2007).

Hours include the number of hours worked in a day or shift; number of days worked in a week; work schedules and days off; implementation of swing shift; changing from fixed to rotating shifts; changes in overtime policies; curtailing work hours due to a decline in business needs; changing break times; adding an "on-call" day to a regular schedule; and policies providing pay for certain non-work activities. *See* DLL, Chs. 7.II.1.b; 13.I.B.3; 16.II;16.IV; 29.I.B; and DIGEST.

Other terms and conditions of employment include such things as: existing hiring practices reasonably believed to be discriminatory; layoffs and recalls; discharges; seniority, promotions and transfers; changes in operations having a significant impact, unless the right to make operational changes is reserved under the CBA; the effects of economically motivated partial closure of the business; probationary periods; attendance policies; safety and health regulation; dress codes; uniform policies; policies regarding carrying a gun and/or badge; applicant and employee examination requirements; employee drug and alcohol testing; vacation request or scheduling policies; policies concerning the time and place for union discussion with employees; time-keeping methods; work assignments; work duties; workloads; minimum production standards; work rules; subcontracting; elimination of bargaining unit positions; transfer of bargaining unit work outside of the unit, including by promoting unit employees into supervisory positions; grievance and arbitration procedures; past practices concerning providing and/or laundering uniforms; use of bulletin boards by unions; past practices concerning use of an employer's car; and past and future arrangements and conditions for negotiations, such as scheduling, agendas, locations, per diem and compensated leave allowances. *See* DLL, Chs. 13.I.B.3; 13.II.F; 16.III and 16.IV; *see also United Health Professionals of N.M. v. UNM–Sandoval Reg'l Med. Center*, 8-PELRB-2024 (Feb. 8, 2024; in re: Case No. 109-23), *aff'd* D-202-CV-2024-01995 (6/10/25) (regarding reassignments arising from layoffs); *AFSCME Council 18 v. State Personnel Board et al.*, 312 P.3d 674 (Ct. App. 2013) (regarding the adoption of a new definition of "shift work schedule"); *State v. AFSCME Council 18*, 2012-NMCA-114, *aff'd*, No. 33,792 (N.M. 2013); and *Albuquerque Ass'n. et al., v. City of Albuquerque, et al.*, 2013-NMCA-110; *cert. den.* Sup. Ct. No. 34,373 (11/20/13) (the latter two cases involved multi-year contracts for wage increases).

For additional PELRB cases addressing mandatory subjects of bargaining are, readers are referred to the DIGEST.

### h. Substantial, material, and significant change

To violate the duty to bargain, the change to the mandatory subject must be "substantial, material and significant," rather than *de minimis. See Alamo Cement Co.*, 281 NLRB 737, 738 (1986); *see also AFSCME Council 18 v. Hidalgo County*, 10-PELRB-2014 (Jun. 3, 2014; in re: Case No. 110-13). The following changes have been found to be substantial, material and significant:

- changing a shift schedule – *see Millard Processing Services, Inc.*, 310 NLRB 421 (1993)
- advancing the usual shift start time from 8:00 a.m. to 7:30 a.m. – *see Quality Engineered Prods. Co.*, 267 NLRB 593, 597 (1983)
- shortening or extending the length of a lunch break by half an hour – *see Litton Systems*, 300 NLRB 324 (1990); and *Fresno Bee*, 339 NLRB 1214 (2003)
- shortening or extending the length of a lunch break by fifteen minutes – *see Rangair Acquisition Corp.*, 309 NLRB 1043 (1992); and *Sertafilm*, *Atlas Microfilming Div.*, 267 NLRB 682
- changing the lunch break location to a non-centralized location that prevents employees from communicating during their lunch hour – *see AFT v. Las Cruces Public Schools*, 130-06, Hearing Examiner Report at 28 (Feb. 28, 2007).

These changes have been found to <u>not</u> be substantial, material and significant:

- extending a rest break by five minutes – *see La Mouse*, 259 NLRB 37 (1981)
- changing an employee's classification title where working conditions are only changed minimally – *see Alamo Cement Co.*, 277 NLRB 1031 (1985)
- newly requiring employees to take a short oral test on lectures and written materials given every year, when job position or security is not affected or impaired by the results – *see UNM Nuclear Indus.*, 268 NLRB 841 (1984)
- unilaterally assigning parking spaces when parking was previously allowed on a first-come, first-served bases – *see Dynatron/Bondo Corp.*, 176 F.3d 1310 (11th Cir. 1999).
- changing parking policy, with the result that a one-minute walk from the parking facility to the employer's entrance became a three-to-five-minute walk – *see Berkshire Nursing Home, LLC*, 345 NLRB No. 14 (2005)
- the transfer of duties between bargaining units, and/or changes to schedules or shifts when the reorganization of a workforce is necessary for legitimate business reasons – *see Bernalillo County Court Deputies Association v. Bernalillo County Sheriff's Office and Bernalillo County*, 54-PELRB-2021 (Jun. 1, 2021; in re: Case No. 121-20)

*See generally* DLL, Ch. 16.IV.A; *see also* DIGEST.

### i. Waiver

As noted, the duty to bargain must not have been previously waived. Waiver can occur either by inaction or by express contractual waiver or "coverage". *See* DLL, Ch. 13.IV.A; and DIGEST.

### (i) Waiver by inaction

First, the union can waive the duty to bargain by inaction, such as by failing to seek to bargain over a proposed change of which it has actual notice, and which was not presented as a "*fait accompli*." *See CWA v. State v. N.M. PELRB*, 2019-NMCA-031 (in re: D-202-CV-2015-03814 (3/15/17), PELRB Order 1-PELRB-2015, Case No. 122-14) (remanding back to the board to determine whether change to an alleged past practice was presented as a *fait accompli*); *see also NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030 (10th Cir. 1996); *Gratiot Community Hospital v. NLRB*, 51 F.3d 1255 (6th Cir. 1995); *Pinkston-Hollar Construction Services, Inc.*, 312 NLRB 1004 (1993); and *Haddon Craftsmen, Inc.*, 300 NLRB 789, 790 (1990).[31]

The union's duty to request bargaining is relieved if the change is presented as a *fait accompli*. Nonetheless, a "*fait accompli*" will not be found based solely on the fact that the notice presents the "proposed change ... as a fully developed plan or ... use[s] positive language to describe" the change. *Haddon Craftsmen, Inc.*, 300 NLRB at 790. In such a case, the union must still "act with due diligence in requesting bargaining," or "risk a finding that it has lost its right to bargain through inaction and, as a consequence, risk the dismissal of ... allegations because no objective basis exists to find or infer bad faith on the part if the employer." *Id.* at 790-791.

Once the employer provides appropriate notice to the union, "the onus" is then "on the union to request bargaining over subjects of concern." *NLRB v. Oklahoma*, 79 F.3d at 1036-1037 (internal citations and quotations omitted). If the union fails to do so it "will have waived its right to bargain over the matter in question" and "the filing of an unfair labor practice charge does not relieve the union of its obligation to request bargaining." *Id.*

The union may also be found to have waived bargaining by failing to make a timely demand, but these will be fact intensive questions. *See, e.g.*, *CWA Local 7076 v. Public Education Department*, D-202-CV-2012-11595 (Aug. 9, 2013; in re: 76-PELRB-2012) (remanding the matter for further findings); *CWA v. State and N.M. PELRB*, 2019-NMCA-031 (in re: D-202-CV-2015-03814, PELRB Order 1-PELRB-2015, Case No. 122-14) (concluding it was reasonable for the PELRB to reject the H.E.'s finding that CWA did not have the opportunity to request bargaining); and *Alarcon v. APS et al.*, Case. No. A-1-CA-34843, consolidated with *Central Consolidated School District No. 22 v. Central Consolidated Educ. Ass'n,* Case No. A-1-CA-34424 (J. Vigil) (concluding that the union did not waive its right to bargain over changes in duties and pay).

### (ii) Express Waiver

The union may also expressly waive the right to bargain over any given subject. Express waiver is typically supported by reference to the substantive content of the CBA, such as to a so called "zipper" clause or a "management rights" clause.

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[31] *But see NLRB v. Pepsi Bottling Co. of Fayetteville, Inc.*, 24 Fed. Appx. 104, 114-115 (4th Cir. 2001) citing *Roll and Hold Warehouse Distribution Corp. and United Steelworkers of America Subdistrict 1, AFL-CIO*, Case No.: 13-CA-33306, (Oct. 8, 1997) (all requiring formal notice rather than actual notice, based on the view that a union's role in the collective bargaining process is fatally undermined when it learns of the change incidentally upon notification to all employees).

A ***zipper clause*** provides that the collective-bargaining agreement is the complete agreement between the parties and purports to relieve them from bargaining during the term of the agreement. *See Radioear Corp.*, 214 NLRB 362 (1974); and *County of Los Alamos v. Martinez et al.*, 2011-NMCA-027 (rejecting the argument that the CBA's zipper clause constituted a waiver of any right to bargain over the paramedic training contracts).

Likewise, ***management rights clauses***, which typically reserve to the employer the right to act unilaterally with respect to specified subjects, may also be construed as a waiver. *See Allison Corp.*, 330 NLRB 1363, 1365 (2000). However, both the NLRB and the PELRB have refused to find that a management rights clause constituted a clear and unmistakable waiver where it was couched in very general terms and/or failed to make any specific reference to the particular subject at issue. *See Johnson Bateman Co.*, 295 NLRB 180 (1989); and *Los Alamos*, *supra* (rejecting both the union's argument that a strict "clear and unmistakable" standard should be applied and the county's argument that broad waiver clauses satisfy the clear and unmistakable requirement language, stating that "...the answer does not call for a rigid rule, formulated without regard for the bargaining postures, and applying *Radioear*, *supra* as the more reasoned approach); Waiver, *infra*; and DIGEST.

When an employer relies on a claim of waiver of the duty to bargain, it bears the burden of demonstrating such waiver "***clearly and unmistakably***," ***reading the contract "as a whole***." *See Provena Hospitals,* 350 NLRB 1 (2007) (regarding NLRB's clear and unmistakable waiver standard); and *Mastro Plastics Corp. v. NLRB,* 350 U.S. 270 (in determining whether a right was waived, a CBA, "[l]ike other contracts, ... must be read as a whole and in the light of the law relating to it when made").

Additionally, even where the union has clearly and unmistakably waived its right to bargain over an initial decision, management may still have a duty to bargain over the ***effects or impact*** of that management decision. Unless also waived, effects or impact bargaining is required when the decision "significantly and adversely affects a bargaining unit's wages, hours, or working conditions," *see Claremont Police Officers Association v. City of Claremont*, 139 P.3d 532 (Cal. 2006), and the impact is not "extremely indirect and uncertain." *See Fibreboard Paper Products Corp. v. NLRB*, 379 US 203, 223 (Stewart, J., concurring) (that such an "extremely indirect and uncertain" impact may alone "be sufficient to conclude that such decisions" do not concern "conditions of employment"); *see also First National Maintenance Corp. v. NLRB*, 452 US 666 (1981); and DIGEST.

Like waiver of the basic duty to bargain, waiver of the duty to engage in "effects bargaining" must also be clear and unmistakable. *See Allison Corporation*, 330 NLRB 1363 (2000)[32]; and *CWA v. State*, No. A-1-CA-36331 (Feb. 21, 2019; in re: 1-PELRB-2015, Case No. 122-14) (remanding to the PELRB for findings regarding whether the CBA's zipper clause precluded a finding by the Board of a binding past practice).

[32] *But see Enloe Medical Center v. NLR*B, 433 F.3d 834 (D.C. Cir. 2005) (advocating the "contract coverage" analysis for effects bargaining as well, reasoning that any intent of the parties to treat a decision and its effects differently should be reflected in some contract language or in the bargaining history).

Lastly, note that in the context of waiver of arbitration, the N.M. Court of Appeals has evaluated waiver based on three principles set forth in *Bd. Of Educ., Taos Mun. Sch. v. the Architects*. *See AFSCME Local 3022 v. City of Albuquerque et al.*, 2013-NMCA-049. First, mere delay or dilatory conduct does not automatically constitute waiver. Second, the court considers whether the party urging arbitration previously invoked the judicial system; if so, this could indicate an intent to waive arbitration. Finally, the extent to which the other party relied on the manifested intent to waive arbitration during court proceedings is also relevant. *Id*. (ultimately determining that AFSCME failed to invoke its right to arbitration and that, instead, AFSCME manifested an intent to forgo what it considered an inadequate remedy in favor of swifter justice before the district court; the lower court's order compelling arbitration was reversed); *see also* DIGEST.

**(iii) Contract coverage analysis**

Related to but analytically distinct from waiver, is the inquiry into whether the parties have already bargained over a subject.

As discussed above, a waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter. However, where the parties' CBA covers the matter, the union has *exercised* its bargaining rights. *See* A*FSCME Local 3022 v. Albuquerque-Bernalillo County Water Utility Authority*, 69-PELRB-2021 (Oct. 15, 2021; Case No. 108-21) )the employer did not refuse to bargain, as required by both Article 19(F) of the CBA and § 17(A) of the PEBA, because it already bargained for such job descriptions to be performed and approved in management's discretion, and it was not required to bargain the specific issue further, midterm); *see also AFSCME v. Santa Fe*, 11-PELRB-2020 (Sep. 21, 2020; in re: Case No. 101-20); and DIGEST.

The PELRB has generally engaged in a two-step analysis when confronted with a waiver issue. First, it is determined whether there has already been bargaining on the disputed issue. If the parties' agreement is germane to the issue, and there is no indication to the contrary, it is reasonable to conclude that the parties' bargaining encompassed that issue and the hearing examiner should then determine the agreement's effect on the parties' rights. Second, if the agreement is not applicable to the disputed topic or not dispositive of the issue, then the hearing examiner will determine whether the union waived its rights to bargain over the issue. This is not to say, however, that a broad management rights clause satisfies the contract coverage analysis. *See Santa Fe*, *supra*; and DIGEST.

Given this analysis, PPCs over unilateral changes should be reserved for situations where the contract does not speak to those issues and there was no bargaining or where a clear term of the contract was modified in violation of the duty to bargain in good faith.

**j. Maintenance of the *status quo*, and the doctrine of past practice**

Related to the issue of "unilateral changes," is the requirement to "maintain the *status quo*" regarding existing mandatory subjects of bargaining, after a petition for election is filed and/or during the course of bargaining. Besides preventing direct dealing and unilateral changes to terms and conditions, this requirement also prevents an employer from suspending all existing benefits and requiring the union to therefore "bargain from scratch," or from "zero." *See* Sec. IV.A.6, Petitions and laboratory conditions, *infra*.

The *status quo* may be based on an existing or just expired contract. Sometimes, however, it may arise under the doctrine of "past practices." Under this doctrine, if an employer had a past practice that required the use of no discretion on its part, for instance providing a 15-minute break, a predetermined and automatic annual raise, or a turkey lunch on Thanksgiving, it may not discontinue that practice unilaterally. As the U.S. Supreme Court declared in *Steelworkers v. Warrior & Gulf Nav. Co*, 363 U.S. 574, 581-82 (1960): "...the practices of the industry and shop – is equally a part of the collective bargaining agreement although not expressed in it."

For a past practice to be binding, three elements must be met. It must:

(a) be clear and consistent,
(b) be repeated over a period of time or have "longevity", and
(c) have mutuality of acceptance, rather than acquiescence.

*Id*. This standard has multiple implications. For instance, a past practice does not have mutuality if there were objections or expressions of dissatisfaction made at the outset of the practice. Additionally, a key distinction of past practices that are binding are those that involve working conditions or other benefits of peculiar personal value to employees, and which do not implicate such management rights as basic methods of operation or direction of the workforce.

A past practice will not be determined to be binding if there is insufficient evidence to establish it. *See CWA v. State of NM*, 2019-NMCA-31 (addressing a past practice of use of union time); *AFSCME Council 18 v. HSD*, No. D-101-CV-2012-02176 (Jun. 14, 2013) (addressing a past practice of security guards); *AFSCME Local 3022 vs. ABCWUA*, Hearing Examiner Report at 12-13 (Jul. 20, 2021; in re: Case No. 106-21); *AFSCME Local 3022 v. ABCWUA*, Letter Decision (Jun. 15, 2021; in re: Case No. 108-21) (addressing a past practice of hearing grievances before a now defunct local board); and DIGEST.

The presence of employer discretion in the exercise of a supposed past practice can also complicate the analysis. For example, "[a]n employer with a past history of a merit increase program neither may discontinue that program ... nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected. What is required is maintenance of pre-existing practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted." *Oneida Knitting Mills,* 205 NLRB 500, 500 n.1 (1973) (citation omitted); *see also NLRB v. Blevins Popcorn Co.,* 659 F.2d 1173, 1189 (D.C. Cir. 1981) (that the company could not discontinue annual reviews, but also "could not unilaterally determine the size of the increase that each employee would receive" and instead "it would be required to bargain over this discretionary element").

Additionally, in some situations, the doctrines of maintenance of *status quo* and past practice doctrines may have limited direct applicability to the public sector. For instance, in one case, the hearing examiner determined that the doctrines had limited applicability as to legislatively mandated pay increases and budgeting processes, which do not exist in the private sector. *See Int'l Union of Operating Engineers v. Central Consolidated Schools,* Case No. 130-06, Hearing

Examiner Report (May 9, 2007) (school does not breach *status quo* by issuing a legislatively mandated pay increase, and school's dissemination of budgeting documents and salary projections do not create a binding promise or *status quo* prior to formal approval of the school's budget by the state education department).

One question that has been raised occasionally over the years but not yet reviewed by the PELRB is whether an employer's directive implementing a contract can constitute or evidence a binding past practice. For example, in years past, the Office of the Governor had issued a memorandum mandating there be a face-to-face meeting between management and union representatives at each stage of the grievance process. One hearing examiner concluded the memorandum constituted binding past practice and was therefore incorporated into the CBA, because it was widely disseminated and known to the parties; spoke to an issue not directly covered by the contract; and did not contradict the contract. *See AFSCME v. Department of Corrections*, Hearing Examiner Report (Feb. 6, 2008).

Lastly, note that strong, clear and unequivocal language will be needed in a contract to negate the effect of a legally binding past practice. *See* DLL, at Ch. 12, § 12.7, p. 12-18; *see also* Elkouri and Elkouri: How Arbitration Works (8th ed.) at Ch. 12.8, Custom and Past Practice.

#### k. Bargaining over non-mandatory subjects

Finally, a *per se* violation occurs when a party conditions bargaining about mandatory subjects on the negotiation of a permissive or illegal subject of bargaining, or goes to impasse on a permissive or prohibited subject. *See e.g., AFSCME and Los Alamos County Firefighters v. Los Alamos County*, 1 PELRB No. 3 (Dec. 20, 1994) (it is a violation of the duty to bargain in good faith to impose agreement to ground rules as a condition of bargaining); *see also NLRB v. Borg-Warner Corp., Wooster Division*, 356 U.S. 342 (1958) (insisting to impasse on a permissive subject is prohibited) and *Benson Produce Co.,* 71 NLRB 888 (1946) (conditioning bargaining on a permissive subject is prohibited); *Sheet Metal Workers Local 91*, 294 NLRB 766 (1989) (insisting to impasse on an illegal subject is prohibited, but mere proposal is not); *Honolulu Star-Bulletin*, 123 NLRB 395, *enforcement denied on other grounds*, 274 F.2d 567 (D.C. Cir. 1959) (inclusion of an illegal subject in a CBA proposal is prohibited); and DLL, Ch. 16.IV (a permissive subject, in contrast to a mandatory subject, "may by mutual approval of the parties be incorporated into the agreement").

However, it cannot by definition be a violation of the duty to bargain in good faith to refuse to bargain over a permissive or illegal subject of bargaining. *See e.g., Int'l Union of Operating Engineers, Local 953 v. Central Consol. School Dist. No. 22*, Case No. 135-06 (Oct. 5, 2006) (a pre-2020 case dealing with "fair share", then a permissive subject of bargaining under § 9(G) of the PEBA, and now an illegal one).

Examples of ***permissive*** subject of bargaining include the following:

- those portions of management rights and waiver clauses that do not concern terms and conditions of employment
- interest arbitration upon impasse

- internal union affairs, such as that non-union members be allowed to vote at union meetings
- that employees ratify contracts; or that a contract would become void if the percentage of employee paying their dues by automatic deduction dropped below 50 percent
- whether employees are allowed to use union labels
- the settlement of pending PPCs – *see KBE Electronics of S.D., Inc.*, 320 NLRB 80, 88 (1995) (that it is a per se violation of the duty to bargain in good faith to refuse to meet and confer pending the resolution of a PPC)
- use of a stenographer or recording device in negotiations

Some examples of ***prohibited*** subjects of bargaining include:

- Fair share or agency fee provisions, where were permissible under § 9(G) before the 2020 amendments, but were declared unconstitutional and unenforceable by the U.S. Supreme Court in *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018)
- "hold harmless" clauses regarding sex discrimination
- modification of court approved settlements
- preference for union members
- a clause making the CBA terminable at will

### 3. Intent based violations

#### a. Generally

Bad faith in bargaining is inferred from the ***totality of circumstances***, or the entire course of conduct, both at and away from the bargaining table. *See NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 466 (2d Cir. 1973); and DLL, Ch. 13.III.B (anti-union conduct away from the bargaining table, to be considered, should be accompanied by conduct at the table that evidences bad faith bargaining).

Analysis also considers the actions of both parties, and responses thereto. *See e.g.*, *Komo Paper Prods. Corp.*, 208 NLRB 644 (1974) (an employer's take- it-or-leave-it position did not constitute bad faith bargaining where the union also refused to compromise on any of its demands); *White Cap, Inc.*, 325 NLRB 1166, 1170 (1998) (it is "appropriate to look at the Respondent's actions in light of the Union's bargaining conduct); and *Optica Lee Borinquen, Inc.*, 307 NLRB 705, 720-721 (1992) (no bad faith where "[n]egotiations opened on an antagonistic note," "[e]gos were on a collision course," and the resulting "struggle for control led to an exercise in bashing, and ultimate collapse of the negotiations, for which the Employer, could not alone be faulted").

Thus, the test for subjective bad faith has been recognized to be a "fluctuating one, 'dependent in part upon how a reasonable [person] might be expected to react to the bargaining attitude displayed by those across the table.'"

Bad faith has been inferred and described in a variety of ways over the years:

- a desire not to reach an agreement at all
- lack of sincere effort to reach common ground or a basis of agreement
- lack of serious intent to adjust differences and to reach an acceptable common ground; a take-it-or-leave-it attitude
- lack of an open mind or sincerity in negotiations
- an intent to simply frustrate bargaining; either completely or as it is going at that moment
- a desire to enter into a contract only on the party's own terms

*See e.g.*, *Times Publishing Co.,* 72 NLRB 676, 682-83 (1947); *Advanced Business Forms Corp.*, 474 F.2d at 466; *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960); *NLRB v. Montgomery Ward*, 133 F.2d 676, 686 (9th Cir. 1943) and *White Cap, Inc.*, 325 NLRB 1166, 1169117 (1998).

Notably, the desire to enter into a contract alone does not satisfy the duty to bargain in good faith, and it is the totality of circumstances and conduct that must be weighed. *See NLRB v. General Elec. Co.,* 418 F.2d 736, 761-62 (2d Cir. 1969) ("'[d]esire to reach agreement' may mean different things to different people" and under NLRA § 8(a)(5) "it must mean more than a willingness to sign a piece of paper," because "[t]he statute does not say that any 'agreement' reached will validate whatever tactics have been employed to exact it"); *see also Horsehead Resource Developing Co.*, 154 F.3d 328, 343 (6th Cir. 1998) (C.J. Martin, dissent) (that the mere desire to enter into a contract is not dispositive because any party would obviously desire to enter into a contract on its own terms).

Additionally, bad faith must be distinguished from mere "***hard bargaining***," which is permissible and "an inevitable aspect of labor-management relations." *See Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 758 (6th Cir. 2003); *see also Coastal Electric Cooperative*, 311 NLRB 1126 (1993) (hard bargaining permissible). It must also be distinguished from mere stubbornness. *See NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 154-155 (1956) (the duty of good faith "is not necessarily incompatible with stubbornness or even with what to an outsider may seem unreasonableness").

PEBA, much like the NLRA, specifically provides that the parties are not "required to agree to a proposal or make a concession." *Compare* the PEBA § 17(A)(2) and NRLA § 8(d) (the bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession"). Under § 8(d) of the NLRA, the U.S. Supreme Court has concluded in its so-called "freedom of contract" trilogy, that this language permits "the parties [to] 'take their gloves off' and to exert whatever economic pressure is at their disposal." *See* WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 105 (3rd Ed. 1993), citing *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952); *NLRB v. Insurance Agents' Union*, 361 U.S. 477 (1960); and *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965). Accordingly, "an employer's bargaining tactics are permissible as long as they are not designed or serve to affect the union's role in the collective-bargaining process or "used . . . as a means . . . to evade his duty to bargain collectively." *See White Cap, Inc.*, 325 NLRB at 1170-71 (1998), *citing American Ship Building v. NLRB*, 380 U.S. 300, 308 (1965).

Finally, because it is the entire course of conduct that is considered, a violation of the duty to bargain in good faith cannot be based solely on "stray statements indicating inflexibility," or isolated misconduct such as the withdrawal of a tentative agreement. *See* DLL, *supra*. Moreover, because this type of statement or misconduct is insufficient to support a conclusion of subjective bad faith, these claims will generally be premature if the parties have not already expended a certain amount of time and effort on negotiations. *But see NLRB v. Wright Motors, Inc.,* 603 F.2d 604, 608-609 (7th Cir. 1979) (claim not premature when filed after only three bargain sessions, when the employer insisted on unreasonable provisions; in such a case "the Union should not be compelled to continue the charade for more sessions before asserting its statutorily protected right").

Some examples of subjective bad faith and indicia thereof, under the totality of the circumstances test, follow.

#### b. Surface bargaining

A party violates the duty to bargain in good faith where it engages in surface bargaining, meaning it goes through the motions of bargaining but has no actual intent of entering into a contract. Factors of surface bargaining include:

- delaying tactics
- the nature of the bargaining demands
- unilateral changes in mandatory subjects of bargaining
- efforts to bypass the union as the exclusive representative of the bargaining unit employees
- failure to designate an agent with sufficient bargaining authority
- withdrawal of already agreed upon provisions without good cause, also called "regressive bargaining;" and
- the arbitrary scheduling of meetings.

*See Atlanta Hilton and Tower,* 271 NLRB 1600 (1984) (factors); and *Driftwood Convalescent Hospital,* 312 NLRB 247, 252 (1993) ("good cause" caveat).

#### c. Regressive bargaining

Regressive bargaining is the withdrawal of previous proposals and may be an indicator of bad faith bargaining. However, it is "settled" that regressive bargaining "does not per se establish the absence of good faith, but rather represents one factor in the totality of circumstances test." *Aero Alloys,* 289 NLRB 497 (1988); *NLRB v. Randle-Eastern Ambulance Service,* 584 F.2d 720, 725 (5th Cir. 1978).

Thus, the NLRB "examines the respondent's explanation for its change in position to determine whether it was undertaken in bad faith and designed to impede agreement." *White Cap, Inc.,* 325 NLRB 1166, 1169 (1998), *citing Merrell M. Williams,* 279 NLRB 82, 83 (1986) and *O'Malley Lumber Co.,* 234 NLRB 1171, 1179 (1978).

The NLRB has upheld regressive bargaining where: the employer advised the union it wanted timely ratification and implementation; granted additional benefits to ensure that goal; did not secure that goal because the contract was not timely ratified upon the union representatives' recommendation; and thereafter withdrew those additional benefits. *See White Cap, Inc.,* 325 NLRB at 1169.

#### d. "Bargaining from scratch"

An employer impermissibly "bargains from scratch" (also called "zero-based bargaining) when it begins negotiations from the legally required minimum wage, and with no benefits.

Arguably, bargaining from scratch is essentially a unilateral elimination of existing wage structures and benefits, but it is not treated as a *per se* violation under general labor law principles. *Compare* DLL at Ch. 13.II and 13.III. It may also be typically a prohibited retaliatory action, because done in response to the employees' decision to engage in collective bargaining.

However, contrary to popular belief, existing wages, hours and other terms and conditions are not an absolute floor or minimum from which future negotiations may only move upward. *See e.g., NLRB v. United Steel Serv.*, 159 Fed. Appx. 611, 612-613 (6th Cir. 2005) (the union made a misleading campaign statement by telling prospective bargaining unit members that the employer "was required by law to start negotiations on wages and benefits at the levels then in effect, from which point wages and benefits would only go up").

To the contrary, "there is no guarantee that the bargaining process will result in maintenance or improvement of existing benefits." *LaSalle Ambulance, d/b/a/ Rural/Metro Medical Services*, 327 NLRB 49, 51 n. 3 (1998). Even existing "benefits can be lost through the bargaining process," and "the normal give and take of negotiations," once different or additional benefits are sought. *Mediplex of Connecticut*, 319 NLRB 281, 289 (1995) (internal citation and quotations omitted); *see also Checker Motors Corporation*, 232 NLRB 1007, (1977); *Computer Peripherals, Inc.*, 215 NLRB 293, 294 (1974). That is because in such a situation the employer is not acting unilaterally, but rather in response to the union's decision to negotiate other benefits. Accordingly, without more, there is no basis for concluding the employer is bargaining in bad faith or acting in retaliation for having to bargain with the Union. *See e.g., Checker Motors* at 18; *Computer Peripherals* at 294.

#### e. Breach of ground rules

A breach of ground rules may also constitute a breach of the duty to bargain in good faith. *See Detroit Newspaper*, 326 NLRB 700, 703 (1998) (the NLRB should enforce ground rules where it finds "that the party's breach of ground rules was inconsistent with the general statutory obligation to bargain in good faith"); *see also Intl. Brotherhood of Police Officers, Local 320 v. Town of Merrimack,* Case No. P-0723-8, Decision No. 2004-182 (N.H. PELRB) ("[a]dherence to ... mutual ground rules reflects ... the statutory obligation the parties have to negotiate in good faith"), and *United Electrical, Radio and Machine Workers of America, Local 267 v. University of Vermont*, 21 NLRB 1206 (1998) (ground rules are "integral to the process of negotiating over substantive issues" and "integral to the dynamics of how negotiations over substantive issues will proceed").

Where the breach of ground rule does not, by itself, arise to the level of a breach of the duty to bargain in good faith, it may nonetheless be further indicia of bad faith. *See Inland Counties Legal Services and Workers Unidos*, 317 NLRB 941, 947 (1995) and *The Electric Materials Company (Temco)*, 2002 NLRB Lexis 540 at 156-159.

If the ground rules for collective bargaining negotiations reflect an understanding of tentative agreements, then an employer's withdrawal of tentative agreements does not, standing alone, constitute bad faith bargaining. *See AFSCME Council 18, Local 2499 v. Bernalillo County*, Hearing Examiner Report (Mar. 23, 2020; in re: Case No. 120-20) (the parties' agreed upon ground rules stated that neither party was bound by a tentative agreement until a full CBA was signed).

### f. Disclosing matters discussed in closed bargaining sessions

Another recurring and unresolved issue is whether a party violates the duty to bargain in good faith by publicly disclosing matters discussed in closed bargaining session pursuant to § 17(G)(2) of the PEBA. This practice is also referred to as bargaining around or behind the designated bargaining team.

There is some support for the proposition that such disclosure violates the PEBA. First, the PEBA requires these sessions be closed and, since the bargaining team itself is not a public body subject to the Open Meetings Act (OMA), "closed" would seem to mean confidential in this context. Second, the Board approved Template Ordinance and Template Resolution expressly prohibit public employers and labor organizations alike from "negotiating issues which are the subject of negotiations" with or through anyone other than "the appointed ... negotiating team." The Templates also state that "[it] is the intent of this language that the integrity of the negotiating process be maintained." *Id.* §§ 16(B) and 17(B); *see also* City of Albuquerque LMRO, ROA 1994 § 3-2-l0(C) (incorporating this language).

This interpretation, moreover, is consistent with the "accepted practice" in some states, which require that public sector "negotiations be conducted in private and unilateral public releases about negotiations sessions be prohibited prior to impasse," because "unilateral, one-sided public release of information about negotiations" is damaging to "the free exchange of views and compromise inherent in collective bargaining." *See e.g.*, *United Electrical, Radio and Machine Workers of America, Local 267 v. University of Vermont*, 21 VLRB 106 (1998)

Based on the OMA and other states' practices, one hearing examiner has concluded that such conduct violates the PEBA. *See Santa Fe Public Schools v. NEA-Santa Fe*, Case No. 122-06 (Sep. 27, 2006). However, there may be constitutional implications of such a ruling. *See, e.g.*, *City of Albuquerque v. Tittmann, et al*, ABQ LB 25-07 (asserting first amendment and legislative immunity defenses to a PPC alleging violation of ROA 1994 § 3-2-l0(C); matter settled without a hearing on the merits).

As an alternative, the parties may be able to avoid any first amendment concerns if they agree to ground rules that clearly and unambiguously impose confidentiality requirements on the negotiations.

#### g. Other indicia of bad faith

Under the broad totality of the circumstances test, a party may be bargaining in bad faith even if it is not engaged in surface bargaining, engaged in regressive bargaining, or breached significant ground rules, provided it seeks to frustrate bargaining, at least as it is going at that moment in time.

Subjective bad faith in bargaining can be demonstrated by the following additional conduct or indicia (some of which overlap with the surface bargaining factors):

- refusal to make concessions, proposals or counterproposals, unless "patently meaningless" or "patently unreasonable"
- intransigent insistence on unreasonable or overly broad management rights and waiver clauses
- engaging in dilatory tactics, such as procrastinating in executing or ratifying a contract; delaying the scheduling of meetings; canceling meetings without proposing any additional sessions; scheduling only brief bargaining sessions and taking numerous and long breaks during those meetings; and delaying the provision of information necessary to make and evaluate proposals
- seeking to coerce a party regarding the selection of its bargaining, and/or refusing to meet with a particular chosen representative in the absence of a "clear and present danger" or such severe ill will as to make bargaining impossible or futile
- sending a representative with inadequate authority to bargain
- imposing unreasonable conditions upon either bargaining or the execution of a contract, such as requiring the opposite party to withdraw pending grievances, or negotiate non-mandatory subjects of bargaining
- making unilateral changes while bargaining is underway
- bypassing the union to negotiate directly with individual employees
- commission of prohibited practices while bargaining is underway; or
- premature declaration of impasse and/or implementation of contract proposals

*See* DLL, Ch. 13.III.B. *See also Master Window Cleaning, Inc.,* 302 NLRB 373, 375 (1991) (premature implementation of contract proposal).

Additionally, under the NLRA, evidence of prior PPCs and/or matters settled may also be heard and considered as part of the "background" evidence for a subjective bad faith claim. Used in that manner, it would be further indicia of bad faith, if not too stale. *See AFSCME Local 3022 v. Albuquerque-Bernalillo County Water Utility Authority*, 68-PELRB-2021 (Oct. 18, 2021; in re: Case No. 107-21) (wherein complainant's PPC was previously decided in final and binding arbitration and affirmed in District Court).

However, a settlement agreement itself cannot be used as evidence of union animus absent a specific provision in the agreement to permit reliance therein as a litigated case. *See* DLL, Ch. 13.III.B.

## G. Violations of the PEBA or Board rules or orders – § 19(G) and § 20(E)

### 1. Generally

The standard for these claims will be whether a separate section of the PEBA is alleged to have been violated; and whether that separate section awards a specific substantive right; or whether the section is merely advisory, aspirational or precatory.

For example, in the early days under PEBA II, § 2 (the "Purpose" section), was frequently cited as having been violated by an employer or union for "failing to promote harmonious relations." However, § 2 does not provide any substantive rights and it is unlikely that the Legislature intended, by § 19(G) and § 20(E), to create substantive rights in a provision that does not itself provide a substantive right. Moreover, purpose sections of legislation are typically only intended as an aid to statutory interpretation, such as in analyzing whether a particular action violates or comports with the act in question.

Additionally, PELRB hearing examiners have rejected the argument that any other §§ 19 or 20 violation could support a violation of §§ 19(G) or 20(H). *See, e.g.*, *NMCPSO & Santa Fe County*, 10-PELRB-2017 (Oct. 3, 2017; in re: Case No. 118-17) (§ 19(G) claim dismissed where no separate violation of PEBA was alleged aside from § 19 claims, because "it is unlikely the Legislature intended every violation of a subsection of § 19 to result in two separate counts of liability").

### 2. Violation of PELRB rules

An employer violates § 19(G) where it effectively amends a resolution without prior PELRB approval, contrary to 11.21.5.13 NMAC, by instituting a policy requirement that board appointees be "local" to the area. *See AFT Local 4212 v. Gadsden Indep. School Dist.*, Case No. 169-06, Hearing Examiner letter decision (Nov. 2, 2007); *see also* Appendix C, herein, Local Boards; 2020 Amendments to §§ 9 and 10; and Part 5 of PELRB rules, 11.21.5 NMAC.

### 3. Interference with collective bargaining relationship

An employer violates § 19(G), in addition to § 19(C), where it interferes with the union's status as exclusive representative under § 15(A) and interferes in the resultant collective bargaining relationship, by failing to give notice of a mandatory employee meeting concerning the terms and conditions of employment to the employee's union. *AFSCME Council 18 v. Department of Health,* 06-PELRB-2007 (Dec. 3, 2007).

### 4. Violation of incumbent's rights

An employer violates § 19(G) where it refuses to recognize a grandfathered bargaining unit, and/or refuses to bargain with incumbent exclusive representatives prior to a demonstration of majority support. *See AFT Local 4212 v. Gadsden Indep. School Dist.*, Case No. 309-05, Hearing Examiner report at 10-13 (Jan. 4, 2006).

Section 24(B) provides that an incumbent union "recognized as the exclusive representative ... on June 30, 1999, shall be recognized as the exclusive representative on the effective date of [PEBA II]." Section 4(I) in turn defines "exclusive representative" as "a labor organization that ... has the right to represent all public employees in an appropriate bargaining unit for the purposes of collective bargaining." Thus, it necessarily follows that an immediate duty to bargain arises to bargain with the incumbent; and § 24(B) expressly requires a demonstration of majority support only to enter into a CBA and not to be recognized as the exclusive representative. *See Gadsden,* Case 309-05, *supra*; *see also* DIGEST.

## H. Violation of the CBA or "other agreements" - §§ 19(H) and 20(D)

### 1. Generally

The PEBA, like the NLRA, prohibits violation of a CBA. *Cf.* PEBA §§ 19(H) and 20(D); and NLRA § 185(a), 29 U.S.C. § 301(a).

In certain cases, the PELRB may not hear a contract claim, immediately or at all, since § 17(F) of the PEBA requires all CBAs to include a grievance procedure culminating in final and binding arbitration, and there may be a duty to exhaust those contract remedies before proceeding with a PPC. *See* Sec. II.G, *supra*, Pre-Hearing Procedures; and Sec. V.A.2, *infra*, Dispositive Motions)

If the PELRB does not dismiss or defer the contract claim, New Mexico law will govern contract interpretation. Traditionally, under New Mexico contract law (as under labor law generally) the intent of the parties in the event of a contract dispute is to be ascertained from the plain language of contract in the first instance, and recourse to extrinsic evidence (*e.g.*, testimony or documentary evidence going to what one party, or another thought or intended the contract to mean) is generally only allowed if the terms of the contract are unclear or ambiguous. *See Brown v. American Bank of Commerce*, 1968-NMSC-096. A contract is ambiguous if, considered as a whole, it "is reasonably susceptible to different constructions." *See Kirkpatrick v. Introspect Healthcare Corp.*, 1992-NMSC-07. Ambiguity is not established simply because parties differ on contract's proper construction, however. *Id.*

More recently New Mexico courts have tended to allow extrinsic evidence at the outset, as to surrounding circumstances, to ascertain whether a contract term is ambiguous. However, the decision to do so appears to be within the sound discretion of the trier of fact, such as if a *prima facie* case of ambiguity is presented, the disputed language is a term of art in the industry, and/or the record requires additional evidence. *See C.R. Anthony Co. v. Loretto Mall Partners*, 1991-NMSC-070 ("[w]e hold today that in determining whether a term or expression to which the parties have agreed is unclear, a court may hear evidence of the circumstances surrounding the making of the contract and of any relevant usage of trade, course of dealing, and course or performance").[33]

Additionally, in construing the contract, it "should be interpreted as a harmonious whole to effectuate the intentions of the parties, and every word, phrase or part of a contract should be given meaning and significance according to its importance in context of the contract." *Brown*, *supra*. It is not the province of courts or agencies "to amend or alter the contract by construction," and the contract language must instead be interpreted to "enforce the contract which the parties made for themselves." *Id.*

Quite a few of the PPCs before the PELRB have asserted violation of the CBA and readers are referred to the DIGEST for additional case notes on this subject.

#### 2. "Other agreements"

Section 20(D) also prohibits *unions* from violating "other agreement[s]" between the union and employer. *Id.* The failure to apply this same prohibition to employers in § 19 was likely a clerical or drafting error, and the prohibition will probably be applied even handedly to both employers and unions.

"Other agreements" has been interpreted to include ground rules. *See Santa Fe Public Schools v. NEA-Santa Fe*, Case No. 122-06 (Sep. 27, 2006); *see also Intl. Brotherhood of , Local 320 v. Town of Merrimack*, Case No. P-0723-8, Decision No. 2004-182 (N.H. Public Employee Labor Relations Board) (concluding that ground rules "constitut[e] a valid contract between the parties," and "constitute an agreement, in and of itself, between the parties," because "[i]n form it is dated and executed and its content expresses, in part, standards of conduct or obligations of the parties related to their negotiations").

However, under the duty to bargain, it may sometimes be appropriate and lawful to "retreat from" or "depart from" ground rules where they hinder bargaining. *See Detroit Newspaper Agency*, 326 NLRB 700, 703-704 (1998).

"Other agreements" logically also include Memorandums of Understanding, and settlement agreements concerning grievances and PPCs. *AFSCME Council 18 v. Regulation and Licensing Department*, 5-PELRB-2013 (Feb. 21, 2013).

### I. Picketing, strikes and slowdowns prohibited – §§ 20(F), 21(A), 21(B)

Unions and public employees are prohibited from picketing the homes or private businesses of elected officials or public employees. *See* § 20(F). Additionally, lockouts, strikes and slowdowns—and their instigation or encouragement—are also prohibited. *See* §§ 21(A) (strike); 21(B) (lockout); *see also* DIGEST.

[33] Indeed, this construction seems almost necessary to prevent the exception from swallowing the rule, with the resultant evidentiary free-for-all.

These provisions balance the interests of public employees to engage in collective bargaining with the interests of the public and purposes of the PEBA "to **p**romote 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* § 2, Purpose.

## V. REPRESENTATION PETITIONS

### A. Introduction

#### 1. Types of petitions

As noted above, there are a variety of certification related Petitions, which are designated as "300 series" cases according to the Board's case tracking system and assigned a case number accordingly; and PELRB Forms are available on our website.

The following types of representation petitions, recall, are provided for under the PEBA and/or PELRB rules:

- Petition for Certification, *e.g.*, the initial petition
- Petition for certification as incumbent
- Clarification petition
- Accretion petition
- Severance petition
- Decertification petition
- Petition for amendment of certification

Additionally, PEBA provides for the following organizational rights, limitations, and remedies in relation to the filing of a representation Petition:

#### 2. Initial investigation

As with PPCs, after receipt of a petition, Staff performs a preliminary review for facial adequacy based on the following:

- Was the Petition filed on or substantially similar to a form prescribed by the Director? *See* Representation Forms available online.
- Does the form include, at a minimum, the following information?
    - The petitioner's name, address, phone number, state or national affiliation, if any, and representative, if any
    - The name, address and phone number of the public employer or public employers whose employees are affected by the petition
    - A description of the proposed appropriate bargaining unit and any existing recognized or certified bargaining unit

- The geographic work locations, occupational groups, and estimated numbers of employees in the proposed unit and any existing bargaining unit
- A statement of whether or not there is a collective bargaining agreement in effect covering any of the employees in the proposed or any existing bargaining unit and, if so, the name, address and phone number of the labor organization that is party to such agreement
- A statement of what action the petition is requesting

  *See* 11.21.2.8 NMAC.

- Does it contain excluded employees? *See supra* and §§ 4, 5, 13.
- A petition shall contain a signed declaration by the person filing the petition that its contents are true and correct to the best of his or her knowledge. *See* 11.21.2.8 NMAC.
- Did the petitioner file with a copy of any collective bargaining agreement in effect or recently expired, covering any of the employees in the petitioned-for unit? *See* 11.21.2.10 NMAC.
- Is the petition supported by a thirty percent showing of interest in the existing or proposed bargaining unit, if required? *See* 11.21.2.8 NMAC.

If the petitioner or an intervenor has submitted an insufficient showing of interest, they have the opportunity to submit an additional showing of interest within five days. Staff then reviews the additional showing of interest to determine whether the total showing of interest submitted by the party is sufficient to sustain its petition or intervention. If the party does not provide an additional showing of interest in the reasonable amount of time given by staff, the petition may be dismissed with notice. *See* 11.21.2.23 NMAC.

### 3. Showing of interest or authorization cards

The facial adequacy review will also consider the showing of interest or authorization cards in particular, and there are other characteristics of them to be aware of as well.

The showing of interest or authorization cards may be a regular union membership card, an application for membership, or a petition signed and dated by eligible bargaining unit members. However, at a minimum the showing of interest must state that each employee signing wishes to be represented for the purposes of collective bargaining by the petitioning labor organization. Additionally, each signature shall be separately dated. Under PELRB practice, a simple dues deduction card is not a sufficient showing of interest because it does not contain an unambiguous statement that the signer is authorizing the putative representative as the exclusive representative for collective bargaining purposes.

Additionally, authorization cards generally "must have been signed during the union's current organizing campaign," and "cards signed more than a year prior to the union's demand for recognition may be considered 'stale' and thus not count toward the union's majority." *See* DLL, Ch. 12. III A. 1-A. 3. But this is only a general rule, and courts have allowed use of older cards under the NLRA. *See Grand Union Co.,* 122 NLRB 589 (1958), *citing NLRB v. Piqua Munising*

*Wood Products Co.*, 109 F.2d 552, 554 (6th Cir. 1940) (rejecting the argument that designation cards dated two years before the union's demand for collective bargaining could not be counted, under the "well-established rule of evidence that when the existence of a personal relationship or state of things is once established by proof, the law presumes its continuance until the contrary is shown or until a different presumption arises from the nature of the subject matter"), *Safeway Stores, Inc.*, 99 NLRB 48, 49, and 56 (1952) (counting as proof of majority status cards that were over one year old and had not been repudiated by the employees); *Knickerbocker Plastic Co., Inc.*, 104 NLRB 514, 529 (1953), *enf'd.* 218 F.2d 917 (9th Cir. 1955).

Moreover, the employer's unfair labor practices interrupting an organizing campaign in effect toll the running of the clock on card signing. *See Blue Grass Industries, Inc.*, 287 NLRB 274, 290 (1987); *see also Northern Trust Co.*, 69 NLRB 652 (1946) (cards that were only ten and eleven months old when the petition was filed remained valid for demonstrating majority support when the processing of the petition was delayed several years through no fault of the union).

Next, by regulation, a union's showing of interest is confidential and always remains the property of the union. *See* 11.21.1.21 NMAC. The confidentiality of a union's showing of interest under this regulation has been upheld, even against demands for production made pursuant to the Inspection of Public Records Act (IPRA), NMSA 1978, §§ 142-1 *et seq*. *See City of Las Cruces v. PELRB*, 1996-NMSC-24, and *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-26.

Note also that vague or conclusory claims as to the genuineness of the expressions of desire to be represented are routinely dismissed. *See* Herbert, William A., *Card Check Labor Certification: Lessons from New York*, 74 Alb. L. Rev. 93 (2010) (describing a case, *Addison Central School District*, before another state's labor board, where their director rejected an employer's request for the scheduling of an election premised on allegations that several employees had informed the employer that they regretted signing the dues authorization cards and were unaware of the representation procedures, because in the representation investigation the employer was unable to substantiate its conclusory assertions). Additionally, misspelled printed names on the authorization cards do not, by themselves, indicate fraud; and it must be shown that the challenged cards affected the validity of the remaining cards included in the count.

Lastly, note that pursuant to the New Mexico Uniform Electronic Signatures Act (UETA), NMSA §§ 14-16-1 to 14-16-21, electronic signatures may be used to support a showing of interest. If electronic signatures are used as support, the petition must include the following to ensure the authenticity of the signatures:

b) Each electronic interest card must have the following required information:

- the signer's name
- the signer's email address or other known contact information (e.g., social media account)
- the signer's telephone number
- the language to which the signer has agreed (e.g., that the signer wishes to be represented by ABC Union for purposes of collective bargaining or no longer wishes to be represented by ABC Union for purposes of collective bargaining)
- the date the electronic signature was submitted and

- the name of the employer

c) A Declaration explaining how the procedures for collecting the electronic interest cards ensure:

- that the electronic or digital signature is that of the signatory employee and
- that the employee herself signed the document and
- that the electronically transmitted information regarding what and when the employees signed is the same information seen and signed by the employees

As is now the case with handwritten signatures, an electronic signature submitted in support of a showing of interest that meets the requirements set forth above is presumed to be valid absent sufficient probative evidence warranting an investigation of possible fraud. Mere speculation or assertions of fraud are not sufficient to cause the Agency to investigate.

### 4. "An" appropriate bargaining unit

Under § 13(A), the Board is charged with the statutory duty of designating appropriate bargaining units for collective bargaining. *See* DIGEST.

As discussed at the outset, there are several important exclusions: probationary, "irregular", confidential, supervisory and managerial employees, whose inclusion would render a proposed bargaining unit "inappropriate." *See* §§ 4(N) (Amended 2020), 4(Q), 4(R), 4(T) 13(B), and Sec. II.B, *supra*. Aside from those exclusions, however, there is no absolute rule of law as to what constitutes an appropriate bargaining unit. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, at 491, (1947).

To be deemed "appropriate," proposed bargaining units" must meet the following statutory criteria:

- a proper "community of interest" or "occupational group"
- principles of efficient administration of government
- the history of collective bargaining
- the assurance to public employees of the fullest freedom in exercising rights guaranteed by PEBA

*See* § 13(Amended 2020).

***Occupational groups*** generally are identified as blue-collar, secretarial clerical, technical, professional, paraprofessional, police, fire and corrections are only advisory, not mandatory. *See NEA-Belen and Belen Consolidated Schools*, 1 PELRB 2 (May 13, 1994), and adopted and attached ALJ Report. Accordingly, when determining whether a proposed unit is appropriate, the Board does not limit its inquiry to whether the jobs in a particular unit fall within one of the identifiable occupational groups but also examines whether clear and identifiable communities of interest in employment terms and conditions and related personnel matters exist.

"***Community of interest" factors*** include similarities or differences in:

- the method of wage or compensation
- the hours of work
- employment benefits
- separate supervision
- job qualifications
- job functions and amount of time spent away from employment situs,
- regularity of contact with other employees
- level or lack of integration
- the history of collective bargaining

*See NEA-Belen*, 1 PELRB No. 2, citing *Kalamazoo Paper Box Corp*., 136 NLRB 134 (1962); *Santa Fe Community College-AAUP and Santa Fe Community College*, 4-PELRB-2017 (PELRB No. 311-16); *see also* DIGEST.

Section 13 also refers to the efficient administration of government, collective bargaining history and assurance of the fullest freedom in exercising rights guaranteed by PEBA as "essential" factors to be considered. Under the principle of "efficient administration of government" the bargaining unit should not promote unnecessary and needless proliferation of bargaining units or fragmentation of the work force. *See* § 13(A); *NEA-Belen*, *supra* (adopting a general anti-fragmentation policy); and DIGEST.

Importantly, the unit need only be "an appropriate bargaining unit," not necessarily the "most" appropriate bargaining unit. *See NEA-Belen*, *supra*; *See also American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 610 (1991). Additionally, only the petitioned-for bargaining unit will be considered and certified, unless it is truly inappropriate, and an appropriate unit is identified by the PELRB from within the petitioned-for grouping. *See NEA-Belen*, *supra*; *see also, American Hosp. Ass'n*, *supra* at 610 ("the initiative in selecting an appropriate unit resides with the employees") and *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008) (in challenging a petitioned-for unit "the employer must do more than show there is another appropriate unit," and instead must show that unit is "truly inappropriate") (citations omitted). The difference between *an* appropriate unit and *the most* appropriate unit rests in the fact that sharing a community of interest does no more than establish a unit that is *prima facie* appropriate, and "more than one appropriate collective bargaining unit logically can be defined in any particular factual setting." *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000). That a unit with "different contours" might exist is immaterial. *Id.*; *see also* DIGEST.

If there is a dispute about the appropriate bargaining unit, a hearing regarding unit inclusion and exclusion will be necessary. Except in the case of unit clarification hearings, where the burden of proof is on the party seeking any change in an existing appropriate unit or in the description of the unit, neither party shall have the burden of proof. Instead, it is the duty of the hearing examiner to fully develop a record sufficient to decide the matter. *See* 11.21.1.22(A) NMAC; *see also* Hearing Procedures, *See* VII, *infra*; *see also* DIGEST.

Because there is no bright line rule, and because it is the Board's tasks to make the unit determination, the Courts will not substitute their judgement and will defer to the Board's unit determination if supported by substantial evidence, not "truly inappropriate", and otherwise in accordance with the law. *See Country Ford Trucks*, *supra* at 1189; and *San Juan College v. San Juan College Labor Management Relations Board*, 2011-NMCA-117.

Note also that, under NLRB decisions, a bargaining unit consensually agreed to by the parties will generally be accepted as lawful unless wholly inappropriate. *See* DLL, Ch. 11(I) and (II). *See also*, *San Juan Coll. v. San Juan Coll. Labor Mgmt. Relations Bd.*, 2011-NMCA-117 (Ct. App., 2011) (the PELRB is entitled to determine an appropriate bargaining unit without being hamstrung by having to declare "the most appropriate [bargaining] unit." *Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1084 (D.C. Cir. 2003) (emphasis omitted) (internal quotation marks and citation omitted); *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008).

**5. Questions concerning representation or "QCRs"**

A question of representation or "QCR" arises whenever an election and/or hearing is required "to determine whether the union ... represents a majority of the employees in an appropriate bargaining unit." *See* DLL, Ch. 31(B) and (C). Thus, QCRs may concern either (a) majority status, or (b) the appropriateness of the petitioned for bargaining unit.

As discussed below (Sec. IV.B.3, Initial petition for recognition), majority support is generally demonstrated by card count today. Where a QCR is presented as to unit inclusion or exclusion, there must be a hearing on unit inclusion and exclusion. *See* 11.21.2.17 NMAC; *see also* Sec. VI, Hearing Procedures, *infra*.

PEBA expressly prohibits several types of petitions, described below, if a QCR is presented

**6. Laboratory conditions & maintenance of the *status quo***

The employer is required to maintain "laboratory conditions" between the filing of a petition and the holding of an election, also referred to as the campaign or election period. *General Shoe Corporation*, 77 NLRB 124, 126 (1948).

The term "laboratory conditions" refers to maintaining the *status quo* as to existing terms and conditions of employment and to the prohibition on coercive speech or misrepresentations that could impair the election. The goal of the "laboratory conditions" requirement is to ensure employees' freedom of choice. *Id.*

Under this doctrine, threats are absolutely prohibited and the determination whether a threat was made will depend on the reasonable listener standard, as discussed above. *See* Sec. III.C.12, PPCs - Interference/Coercion, *supra*; *see also J.P. Stevens & Co., Inc. v. NLRB*, 638 F.2d 676, 683 (4th Cir. 1980). Additionally, an employer is prohibited from making misrepresentations that prevent employees from recognizing or evaluating election propaganda for what it is, such as forgery or other deceptive statements. *See Midland National Life Insurance Co. and Local 304A, UFCW*, 263 NLRB 127, 133 (1982). In the absence of such deceptive acts, employees can be taken to have expressed their true convictions in the secrecy of the polling booth. *See General Shoe Corp.*, *supra*;

*see also The Liberal Market, Inc.*, 108 NLRB 1481, 1482 (1954) (elections do not in fact occur in the controlled conditions of a laboratory and the goal is therefore "to establish ideal conditions insofar as possible," and to assess "the actual facts in the light of realistic standards of human conduct").

However, general misrepresentations made as part of election propaganda are not *per se* objectionable and do not require invalidation of the election. *See Midland National Life Insurance Co.*, 263 NLRB 127, 129 (1982); *United Steel Service, Inc.*, 340 NLRB 1999 (2003); *Maywood Hosiery Mills, Inc.*, 64 NLRB 146, 150 (1945) (it is not the Board's function to "censor the information, misinformation, argument, gossip, and opinion which accompany all controversies of any importance") and *Corn Products Refining Company*, 58 NLRB 1441, 1442 (1944) (that employees "undoubtedly recognize campaign propaganda for what it is, and discount it").

The duty to maintain the *status quo* also applies to prohibit unilateral changes to terms and conditions of employment during the campaign period. This ensures that bargaining unit members are not threatened or lured away from seeking union representation. *See Pearson Education, Inc.*, 336 NLRB No. 92 (2001*); NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964); *B&D Plastics, Inc.*, 302 NLRB 245, 245 (1991).

(As discussed *supra*, after certification changes to the *status quo* must be made pursuant to negotiations or impasse arbitration procedures. *See NLRB v. Katz*, 369 U.S. 736 (1962); *Koenig Iron Works, Inc.*, 276 NLRB 811 (1985). At this point, the purpose of maintaining the *status quo* is to preserve the integrity of negotiations and protect the Union's status as exclusive bargaining representative. *See, e.g., NLRB v. McClatchy Newspapers*, 964 F.2d 1153, 1162 (D.C. Cir. 1992); and Sec. III.E, *supra*, PPCs - Duty to Bargain in Good Faith.)

### 7. Limitations on electioneering

During an in-person secret ballot election, no electioneering is permitted within 50 feet of any room in which balloting is taking place. *See* 11.21.2.28 NMAC.

Additionally, neither the union nor the employer may make "captive audience" speeches during the 24 hours preceding an election. *See Peerless Plywood Co.,* 107 NLRB 427 (1953), and *San Diego Gas & Elec.,* 325 NLRB 1143, 1146 (1998) (clarifying that the *Peerless* prohibition on mass "captive audience" speeches on company time does not prevent either the employer or the union from campaigning in that 24-hour period through mailings, or from conducting mass meetings on the employees' own time if attendance is not mandatory).

### 8. Organizing rights and remedies

As noted above, the union and employees have certain rights to information, access, and expression during an organizational campaign, which attach before rights to access and information arise by virtue of certification of a union as the exclusive representative.

For example, the union is entitled to a list of all employees within the petitioned for bargaining unit, as well as their mailing addresses and home phone numbers. *See Excelsior Underwear, Inc.*, 156 NLRB 1236 (1996); and DIGEST. *See also SSEA, Local 3878 v. Socorro Consol. School Dist.*, 05-PELRB-2007 (December 13, 2007); *Rio Rancho Public Schools v. Rio Rancho School Employees Union,* 13th Judic. Dist., Case No. D-1329-CV-2010-1987 (Nov. 5, 2013) (school district's policy adopted pursuant to the PEBA requires the district to release employee names and home addresses to ensure "that certification elections or decertification elections are fair and public employees have the best opportunity to listen to all arguments and decide for themselves whether they desire to be represented by a labor organization"); and DIGEST.

The public employer shall also provide the petitioning union with reasonable access to employees within the proposed bargaining unit. This includes the right to meet at the work facility, subject to safety and operational concerns. Additionally, the employees can engage in oral communications regarding union interests in work areas while on break although oral communications, wearing, posting or distribution of written materials may be reasonably restricted to non-public or non-work areas, or off-site, due to the disruption such communications can cause if communications regarding non-union matters are similarly restricted and there are alternative channels of communication available to the union. Unions must also be allowed use of mailboxes, electronic or otherwise (but not "mail distribution systems"), to distribute materials if other organizations are provided such access. *See* Sec. III.C.14, *supra*; *see also* DIGEST.

If organizing rights are severely restrained or interfered with, the union may be able to obtain a *Gissel* bargaining order; additionally, parties may seek to have an election or card count overturned for exceptional violations of the Act. *See* Sec. III.B-C, PPCs – Interference, *supra*; and VII.F.10-11, Remedies, *infra*.

### B. Initial petition for recognition

#### 1. Generally

The basic and initial petition for recognition is filed by a union desiring to be designated as the exclusive bargaining agent of the described bargaining unit of employees.

The described unit will have to be an appropriate one that does not include probationary, confidential, supervisory or management personnel. *See* Secs. I.B, and IV.A.4, *supra*; *see also* DIGEST. Additionally, the petition will have to be supported by a 30% showing of interest among the petitioned-for employees. *See* the PEBA §§ 13 and 14; *See also* 11.21.2. NMAC, and DIGEST.

Once the petition is filed, the employer is on notice of the organizing campaign and organizing rights and remedies may be implicated. *See* Secs. III.C and IV.A.8, *supra*.

#### 2. Intervenors

As noted above, after receipt of a petition, the employer must post a notice of the filing of the petition if it appears that the case presents a QCR. *See* 11.21.2.15 NMAC; and Form #14 (Certification of posting). This notice alerts other unions engaged in organizing the same employees to file a petition to intervene and how to do so. *Id.*

An intervenor has 10 business days from the posting of the notice of filing of petition to file its own petition in intervention "seeking to represent some or all of the employees in the petitioned-for unit." *See* 11.21.2.16(A) NMAC. An intervention petition must also be accompanied by a 30% showing of interest among the employees petitioned for, in the petition for intervention. *See* § 14(B) and 11.21.2.16(A) and (B) NMAC.

If the intervenor provides a sufficient showing of interest, a secret ballot will be required although they are otherwise now rare and may also be conducted by mail or email (*see* next section), and the intervenor will also appear on the ballot. *See* § 14(B) and 11.21.2.16(C) NMAC.[34]

### 3. Demonstration of majority support

PEBA now authorizes card counts as a presumptively acceptable alternative to a secret ballot election to demonstrate majority support, where the union submits with its Petition authorization cards from a majority of the petitioned for employees. Before the 2020 amendments, only grandfathered or incumbent labor organizations were entitled to a card count, and in all other cases the employer could insist on an election without a show of cause. Section 14(C) now provides:

> "As an alternative to the provisions of Subsection A of this section, a labor organization with a reasonable basis for claiming to represent a majority of the employees in an appropriate bargaining unit may submit authorization cards from a majority of the employees in an appropriate bargaining unit to the board or local board, which shall, upon verification that a majority of the employees in the appropriate bargaining unit have signed valid authorization cards, certify the labor organization as the exclusive representative of all public employees in the appropriate bargaining unit. The employer may challenge the verification of the board or local board; the board or local board shall hold a fact-finding hearing on the challenge to confirm that a majority of the employees in the appropriate bargaining unit have signed valid authorization cards."[35]

As discussed above, staff will examine original cards submitted to ensure that they a "signed, dated statement" the card reflects the signor's "desire to be represented for the purposes of collective bargaining by the petitioning labor organization." Cards have been rejected where some information appeared to be in different handwriting and/or ink than other information, because the

[34] The previous edition (2024) of the Manual stated incorrectly that "[a]n intervenor's showing of interest must be among the appropriate bargaining unit as designated in the original petition rather than an alternate appropriate bargaining unit, unlike what is allowed under the NLRA", citing *AFSCME and County of Santa Fe Detention Center*, Case No. 316-06; *CWA and County of Santa Fe Detention Center*, Case No. 308-16 (requiring that an intervenor's petition be supported by an adequate showing of interest among the employees of the bargaining unit identified in the original petition); and NLRB Case Handling Manual ¶ 11023.2 (that an intervenor may petition for a substantially different bargaining unit, and its thirty percent showing of interest will be of their petitioned for unit, not the original unit). However, NMAC 11.21.2.16 expressly sates that a petition for intervention may "seek[] to represent some or all of the employees in the petitioned-for unit." *Id*. Going forward, the PELRB will abide by that rule unless amended.

[35] This amendment renders voluntary recognition – or "card count" recognition – moot; it was more important but rarely seen before the 2020 amendments. *See* 11.21.2.39 NMAC.

validity of the signature and date was thus made questionable.

The PELRB has addressed an employer's objections to the conduct of a Board-sponsored card check since the 2020 amendments. *See United Electrical, Radio and Machine Workers of America and UNM*, 12-PELRB-2022 (in re: Case No. 313-21). There it concluded that the card check process is a largely ministerial and/or self-executing one that is properly delegated to staff; and is not subject to employer observation due to the confidentiality of authorization cards. *See* 11.21.1.21 NMAC. There, the Board also confirmed that PEBA does not require the Board to use an updated bargaining unit list when conducting a card check proceeding, because the purpose of a card check is to test majority support as of the time a petition is submitted. *Id.*

However, there may be times where an election is called for, most recently with a case involving two unions including an incumbent. *See Int'l Union of Police and Doña Ana County and CWA*, 23-PELRB-2026 (Jul. 14, 2026; in re: Case No. 309-26); and Note 8, *supra*.

If an election is required and there are no disputes regarding unit inclusion or exclusion, the parties shall enter into a consent election agreement detailing the time, place and manner of election. *See* 11.21.2.17 NMAC. Under this rule, the election is held pursuant to the agreement only if the "agreement is not set aside at the Board's next regular meeting or the following regular meeting." *Id.* To avoid a two-month or longer delay, the agreement is typically put on the next Board agenda for formal Board approval, and the election is scheduled for as soon as possible after that meeting.

In addition to in-person elections, PELRB rules also provide for mail-in and electronic ballot elections. *See* 11.21.2.25 NMAC. When conducting an election by mail, electronic balloting or a combination of those methods this Board generally follows NLRB guidelines in the exercise of that discretion. Under NLRB precedent, mail ballots may be appropriate where (a) eligible employees are scattered over a wide geographic area, and (b) the employees' work schedules vary significantly, and they are not present at a common location at common times. *See San Diego Gas & Electric,* 325 NLRB 1143 (1998).

Note also that the PELRB is subject to the N.M. Uniform Electronic Transaction Act (UETA)[36], which allows electronic balloting and states that if the law requires a signature, an electronic signature satisfies the law if attributable to a person. NMSA 1978, § 14-16-7(D). However, the electronic signature must be "attributable to a person". NMSA 1978, § 14-16-9, and § 14-16-18. *See* GUIDELINES-FOR-UTILIZING-ELECTRONIC-SIGNATURES-FOR-A-SHOWING-OF-INTEREST.pdf. In accord with the UETA, the Board amended its election rules in 2020 to permit electronic balloting in several sections. *See* 11.21.2.25 NMAC, and 11.21.2.27 referencing 11.21.1.28 NMAC.

If a secret ballot election is needed, and in particular an in-person election, election procedures are provided at Appendix D, *infra*. Note that all elections will require a pre-election conference; a consent election agreement concerning essential voting conditions; and posting of a notice of the election for ten business days, at least ten business days before the election. Failure to do either will invalidate the election. *See* 11.21.2.25 and 11.21.2.26 NMAC; and DIGEST; *see also*

[36] NMSA §§ 14-16-2 and 18.

Appendix D, Election procedures.

### 4. Withholding recognition until successful election

Under the PEBA, as under the NLRA, an employer may generally refuse to negotiate with a non-incumbent union unless it demonstrates majority support, either through a secret ballot election or by card check. *See Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974); *see also* §§ 14(C) and 24(B), and Sec. IV.C. *infra* regarding incumbent labor organizations.

However, where the employer commits unfair or prohibited labor practices that impair an election, the Board may issue a remedial bargaining order based on a card count demonstration of majority support. *See NLRB v. Gissel Packing Co*., 395 U.S. 575 (1967). Additionally, an employer cannot disavow a demonstration of majority support that the employer itself solicited, such as through interrogations or other employee polling, in response to a union's demand for recognition. *See* DLL, Ch. 32 II(B) and citations therein.

### 5. Election bar

An election may not be conducted if an election or runoff election has been conducted in the twelve-month period immediately preceding the filing of the proposed representation petition. *See* § 14(E).

### 6. Contract bar and the window for filing a petition

An election may not generally be held during the term of an existing contract and a petition for election must be filed within a specific window of time. *See* § 14(E) incorporating § 16 by reference.

If the term of the current CBA is three years or less in duration the petition for election must be filed no earlier than 90 days and no later than 60 days before the expiration of the CBA. *See* § 16(B). Note that the 90/60 thirty-day window is calculated based on calendar days NOT business days. [37]

If the CBA is more than three years in duration, the petition may be filed at any time after the expiration of the third year. *Id.*

## C. Petition for certification as incumbent

### 1. Generally

A labor organization that was recognized by a public employer as the exclusive representative of an appropriate bargaining unit on June 30, 1999, shall be recognized as the exclusive representative

[37] This is because 11.21.1.8 NMAC concerns "days in which some action must or may be taken after a given event," while here the window occurs before the given event. Additionally, this interpretation follows the NLRA.

of the unit; and a bargaining unit established prior to July 1, 199 shall continue to be recognized as appropriate. *See* § 24. Such recognition shall not be affected by a local labor board ceasing to exist pursuant § 10 (Amended 2020). Additionally, such a labor organization may petition for a declaration of bargaining status under § 24(B).

The petition for certification as incumbent is the petition to use whenever a union seeks to establish that it was recognized on June 30, 1999, and to demonstrate current majority support for the purpose of entering into a new collective bargaining agreement. *See* § 24(B); 11.21.2.36 and 11.21.1.7(B)(3) NMAC; and PELRB Form #5. The procedure is the same as that for the initial petition for recognition under subparagraph IV.B, *supra*.

The question has arisen several times in recent years as to whether or not the protections or provisions for incumbents are provided only to *existing* exclusive representatives and bargaining units. It has been asserted by some employers that the fact that a non-existent union and unit was once recognized prevents certification of a new exclusive representative, under § 24. PELRB hearing examiners have rejected this argument, but the matter has not been fully or adequately addressed to date. *Compare Clovis Firefighters Ass'n, IAFF Local 3602 and City of Clovis*, 10-PELRB-2026 (Apr. 13, 2026, in re: Case No. 321-25) (reversing the H.E.'s determination that the union was not grandfathered because it had ceased to legally exist before the effective date of PEBA, concluding it was "compelled by the use of the word 'shall' in Section 24 of the PEBA to recognize IAFF Local 3602 – a new entity bearing the same name – as the incumbent exclusive representative of the incumbent bargaining unit"); *AFSCME v. Otero County*, Case No. 308-26, H.E. Minute Order (Jun. 26, 2026) (denying motion to dismiss a petition based on evidence that another union was certified as the exclusive representative nearly twenty years ago, where there was no evidence of contact or contract since then).

### 2. QCRs

An incumbent's petition does not present a QCR as to unit inclusion or exclusion, because § 24(A) deems the bargaining unit to still be appropriate. *Id.*; *see also NEA-Alamogordo and Alamogordo Public Schools*, 5-PELRB-2006 (June 1, 2006).

However, a QCR is presumed to exist as to majority support before the employer is obliged to execute a new CBA with the union. *See* § 24(B) and 11.21.2.36 NMAC; *see also* DLL, Ch. 10.I(B).2.b and citations therein. Obviously, an employer may voluntarily recognize an incumbent labor organization just as it may voluntarily recognize a labor organization after an initial certification for a new bargaining unit; and, as with initial petitions, card counts are now presumptively acceptable.

### 3. Duty to bargain and demonstration of majority support

The PEBA expressly states that an incumbent union shall be recognized as the exclusive representative unless and until it tries and fails to demonstrate majority support. Thus, there is still a duty to bargain with the incumbent union prior to the demonstration of majority support, even though the result of the negotiations cannot be reduced to a CBA until majority support is demonstrated. *See, e.g.*, *AFT Local 4212 and Gadsden Indep. School Dist.*, 3-PELRB-2006 (May

31, 2006).

Under 11.21.2.36 NMAC, an existing labor organization recognized on June 30, 1999, shall continue to be recognized as the exclusive representative of the unit and may petition for a "declaration of bargaining status" pursuant to § 24(B) (2020).

This Board has long held, even before the 2020 amendment to the  2020 amendments rendering card counts presumptively appropriate, that a reasonable interpretation of § 24(B) of the PEBA permitted incumbent unions to demonstrate majority by card count. *See NEA-Alamogordo and Alamogordo Public Schools*, 5-PELRB-2006 (June 1, 2006); and *AFT Local 4212 and Gadsden Independent School District*, 3-PELRB-2006 (May 31, 2006).

### 4. Accretion

There is some open question as to whether or when clarification/accretion petitions are permitted for incumbent bargaining units. *See* § 24(A); and 11.21.2.36 and 11.21.2.37 NMAC.

Under the former law, grandfathered bargaining units could not be the subject of a clarification petition, but the PELRB nevertheless allowed grandfathered bargaining units to be "reconciled" by evidentiary hearing, to determine which present-day job titles the parties would have intended to be included under the grandfathered bargaining unit and CBA. *See also IAFF Local 2430 v. Town of Silver City*, Case No. 308-07, Hearing Examiner Report (Mar. 7, 2008) (allowing, because of the change in the definition of "supervisor" under PEBA II, a bargaining unit to be "reconciled" by evidentiary hearing, to determine which present-day job titles the parties would have intended to be included accretion petition for an incumbent), and DIGEST.

However, if there is objection, this could be a barrier to accretion or clarification of an incumbent unit. *See, e.g.*, *Deming Public Schools v. NEA-Deming and N.M. PELRB*, consolidated Case Nos. D-202-CV-2017-06276 and D-202-CV-2018-05580 (Feb. 21, 2019; in re: 9-PELRB-2017, consolidated Case Nos. PELRB 304-17 and 305-17) (affirming the Board's conclusion that "[t]he Board's rule 11.21.2.37 NMAC expressly exempts bargaining units under Section [24(A)] ... from being subject to unit clarification except in limited circumstances not applicable here").

As with many cases, it depends on what is raised and asserted by the parties. Nonetheless, where circumstances surrounding the original creation of the incumbent bargaining unit have substantially changed positions, new positions could presumably be added to a grandfathered bargaining unit by a regular petition for initial certification; and the new unit could later be merged by the parties through the bargaining process to avoid unit fragmentation issues.

## D. Clarification petition

### 1. Generally

A clarification petition filed by either the exclusive representative or the public employer when the circumstances surrounding the creation of an existing bargaining unit have changed sufficiently to warrant a change in the scope and description of that unit, or a merger or realignment has occurred.

### 2. QCRs prohibited

A clarification petition must not raise a question concerning representation, or the petition must be dismissed. *See* 11.21.1.7(B)(17) and11.21.2.37 NMAC.

### 3. Change in circumstances

The PELRB's clarification rule follows NLRA precedent in requiring that there has been a sufficient change in circumstances surrounding the creation of the original bargaining unit to warrant a change in the scope and description of the bargaining unit, absent an election. *See* 11.21.2.37(A) and (B) NMAC (requiring the dismissal of the petition absent a demonstration of change of circumstances but permitting the petitioner to "proceed otherwise under these rules"); *Compare Laconia Shoe*, 215 NLRB 573 (1974) (that "[w]hen a group has in fact been excluded for a significant period of time from an existing ... unit, the Board will not permit their accretion without an election or a showing of majority [support] among them").

The change must be to the circumstances surrounding the creation of the bargaining unit, not just the circumstances of the unit members. *See AFSCME v. Human Services Dep't and PELRB*, No. D-202-CV-2016-07671 (Jul. 19, 2017; in re: Case No. 309-15) (concluding that there had not been a change in circumstances so that a petition for clarification is not the proper mechanism for resolving a dispute as to whether CSED attorneys are included or excluded from the bargaining unit); *see also Rio Rancho Police and Dispatchers Ass'n and City of Rio Rancho;* 11-PELRB-2018 (Oct. 4, 2018; in re: Case No. 309-17) (amending certification of representation to reflect current job titles and add five additional positions to the unit).

### 4. Timing

11.21.2.37 NMAC does not contain an express time limit on filing a clarification Petition, but ordinarily it should be filed within a reasonable time of the change in circumstances. *Cf.* DLL, Ch. 10-43 (describing one exception for a narrow category of accretion petitions); *see* Sec. VI.E.5, *infra*).

## E. Accretion petition

### 1. Generally

An accretion petition is a type of clarification petition filed by the exclusive representative to add employees to an existing bargaining unit. *See* 11.21.2.38(B) NMAC.

As with any clarification petitions, an accretion petition must not raise a question concerning representation (QCR) or the petition must be dismissed. *See* 11.21.2.37 NMAC, 11.21.1.7(B)(17).

Additionally, under PELRB rules, a petition seeking to add employees who constitute more than 10% of the existing bargaining unit is deemed to give rise to or create a QCR. *Id.*; *see also* and

*Sandoval County Prof'l Fire Fighters and Sandoval County*, Case 325-22, H.E. decision (Nov. 29, 2022) (accretion Petition dismissed with leave to file a petition for representation because the number of employees in the group sought to be accreted was greater than 10% of the number of employees in the existing unit).

Thus, if it is a small accretion, the process will be streamlined. Absence of QCR is presumed if the group to be accreted is less than 10% of the existing bargaining unit. *See* 11.21.2.38(B) NMAC. However, if the group to be added is greater than 10% of the existing bargaining unit, a QCR is presumed and the petition for accretion must be dismissed and a regular petition for certification filed instead. *See* 11.21.2.38(C) NMAC; *See also* DLL, Ch. 10 concerning QCRs generally.

### 2. Burden of proof

For a petition for accretion, the burden of proof is on the union to establish the following elements:

(i) the employees to be accreted must not yet belong to a bargaining unit;
(ii) they must share a community of interest with the existing group;
(iii) their inclusion must not render the unit inappropriate; and
(iv) the petition does not raise a QCR.

*AFSCME Council 18 and Santa Fe County*, 5-PELRB-2015 (Sep. 21, 2015, in re: Case No. 305-15).

If the number to be accreted is greater than 10%, the Board shall presume a QCR is raised and the petitioner may proceed only by filing a petition for an election. *Id.*

Note, however, that a demonstration of majority support among the group of employees to be accreted will still ultimately be required. Historically, only a 30% showing of interest among the employees to be accredited was required, consistent with NLRB and PEBA I practice. *See, e.g.*, *AFSCME Council 18 v. Corrections Dep't*, 60-PELRB-2012 (Jul. 13, 2012); and DIGEST. In the last few years, though, the PELRB has shifted to also requiring a showing of majority support under the theory that the purposes of PEBA favor and presume democratic expression of all eligible public employees' desires; and any additional burden on the petitioner is *de minimis* now that majority support is presumptively demonstrated by card count. Therefore, the lack of QCR discussed in Rule 2.38 is best understood as a rebuttable presumption related to community of interest and/or unit inclusion, rather than whether or not the petition must ultimately be shown to have majority support.

### 3. Application of the merger doctrine

Where smaller bargaining units have been merged into a single bargaining unit by the CBA, the "10% " is measured by the larger unit as merged, rather than 10% of the group of employees initially certified. *See Gibbs & Cox, Inc.,* 280 NLRB 953 (1986), and *The Greenwood Cemetery*, 280 NLRB 1359 (1986) (both applying the merger doctrine where the employer and union have agreed to merge separately certified or recognized units into one overall unit" by way of a single collective bargaining agreement that covers the merged units).

### 4. Showing of interest

A thirty percent (30%) showing of interest among the petitioned-for employees is required for a petition for accretion, unlike other clarification petitions. This means 30% of the group of employees to be accreted. *Compare* 11.21.2.38(B) to 11.21.2.37 NMAC; *see also* Sec. IV.A.3, regarding the requirements for an adequate showing of interest or authorization cards *supra*. *See supra*, regarding a showing of majority support thereafter.

### 5. Change in circumstance and timing

As with ordinary clarification petitions, an accretion petition should be filed within a reasonable time of the change in circumstances.

One limited exception related to timing is that an accretion petition may be filed during the certification year if the status of the employees was left unresolved by the Board's certification and parties were unable to resolve the issue through negotiations. *See* DLL, Ch. 10-43. Thus, the inclusion would have been contemplated at the time of the initial election petition, but the parties could not reach an agreement.

As with any clarification petition, one for accretion should not be utilized to add a sizable group that has been historically excluded from the existing bargaining unit, absent a change in circumstances and a demonstration of majority support. *See*, *e.g.*, *AFSCME Council 18 and Santa Fe County*, 5-PELRB-2015 (Sep. 21, 2015, in re: Case No. 305-15) (the burden is on the petitioner to establish all elements for accretion, including a change of circumstances); *N.M. Coalition of Public Safety Officers Ass'n v. Santa Fe County*, 70-PELRB-2012 (Oct. 24, 2012, in re: Case No. 304-12); and *Silver City Prof'l Firefighters, IAFF Local 2430 v. Town of Silver City*, 2-PELRB-2008 (May 2, 2008; in re Case No. 308-07) (if the group petitioned for accretion exceeds 10% of the existing unit, the union must proceed by petition for election among all employees under 11.21.2.38(C) NMAC.

However, the PELRB will typically allow such accretions without evidence of a change in circumstances if the employer does not raise an objection. *See* DLL, Ch. 10-43, *citing Radio Corp. of America*, 135 NLRB 980 (1962) (under NLRB precedent, a bargaining unit consensually agreed to by the parties will generally be accepted as lawful unless wholly inappropriate).

### 6. Community of interest and exclusions

There must be a community of interest between the existing bargaining unit and employees to be accreted. *See* 11.21.2.38(A) NMAC.

For example, in *CWA and Dep't of Public Education*, Case Nos. CP 29-95(S) and CP 30-95(S), Hearing Examiner Decision (Jan. 3, 1996), the hearing examiner demined to petition to accrete financial specialists and procurement specialists into a statewide paraprofessional unit, and the accretion of print shop employees into a statewide technical unit. Although such employees were initially hired under the same job classification, they went on to become part of a distinct work unit, wages were calculated differently, they had the option to use a different retirement system, there was no interaction between these and existing bargaining unit members, they were subject to separate discipline authority, and there was no history of bargaining between CWA and the Department as to the employees to be accreted, all of which pointed to a lack of economic relatedness between the subject employees and their bargaining unit member counterparts. *Id*.

Lastly, due to the community of interest requirement, probationary, confidential, supervisory and managerial employees are excluded as with initial petitions. *See*, *e.g.*, *IAFF Local 1687 and City of Carlsbad*, PELRB 308-17 (accretion petition denied because the positions to be accreted met the statutory definition of managers and were therefore excluded from the bargaining unit pursuant to §§ 14(N) (Amended 2020), 5, and 13; *see also* DIGEST.

### F. Severance petition

#### 1. Generally

This is a petition filed by a labor organization to sever a group of employees comprising one of the distinct occupational groups listed in § 13 of the PEBA, from an existing bargaining unit. *See* 11.21.2.41 NMAC; *NMCPSO and Rio Rancho Police and Dispatch Ass'n*; 2-PELRB-2018 (in re: Case No. 307-17) (petition for severance barred and dismissed by operation of 11.21.2.41 NMAC because severance of employees is limited to those in the occupational groups specifically delineated in § 13).

The procedure for filing a severance petition is the same as that for a basic Petition for Recognition described above, including the requisite 30% showing of interest among the group of employees to be severed, and demonstration of majority support. *See* 11.21.2.41 NMAC.

#### 2. Timing

A severance petition for must be filed during the 90/60 thirty-day window. *See* 11.21.2.41 NMAC.

#### 3. Distinct community of interest

Under the NLRA, a petitioner for severance must demonstrate that the group to be severed has a community of interest that is separate distinct form that of the rest of the bargaining unit. *See, e.g.*, *In re: Mallinckrodt Chemical Works, Uranium Div.,* 162 NLRB 387 (1966). However, since 11.21.2.41 NMAC only seems to require that the group to be severed fall in a specific occupational category, inclusion in such a category may create a presumption of distinctiveness.

### G. Decertification petition

#### 1. Generally

A decertification petition is filed by either a member of a labor organization certified as exclusive representative or by the exclusive representative itself seeking decertification of that union as the exclusive bargaining representative.

Other than the identity of the filer, the procedure for filing a decertification petition is the same as that for a basic Petition for Recognition under subparagraph IV(A) above, including the requisite 30% showing of interest. *See* § 16 and 11.21.2.8 through 11.21.2.35 NMAC.

Note that as regards the filer, the PEBA differs from the NLRA. Under the NLRA, a decertification petition need only be filed by a member of the bargaining unit, rather than a member of the union or union itself. *Compare* the PEBA § 16(A) and NLRA § 9(e)(1).

Additionally, a decertification petition will be dismissed if the affected union disclaims its interest. *See infra*; and DIGEST.

**2. Timing**

A decertification petition must also be filed during the 90/60 thirty-day window. *See* § 16.

**3. Showing of interest and the merger doctrine**

Where smaller bargaining units have been merged into a single bargaining unit by the CBA, the required showing of interest is 30% of the larger unit as merged, rather than 30% of the group of employees first certified. *See* § *Gibbs & Cox, Inc.,* 280 NLRB 953 (1986) and *The Greenwood Cemetery*, 280 NLRB 1359 (1986) (all applying the merger doctrine where the employer and union have agreed to merge separately certified or recognized units into one overall unit" by way of a single collective bargaining agreement that covers the merged units).

**4. No carve-outs allowed**

Under the NLRA, a decertification petition must address the overall existing bargaining unit (including as merged, if relevant, *see supra*), and it may not seek to carve out portions of an existing bargaining unit for decertification. *See, e.g. Ma's West*, 283 NLRB 130 (1987) (concerning a decertification petition filed on behalf of a single employer of a multi-employer bargaining unit); *American Consolidating Co.*, 226 NLRB 923 (1976) (same); and *Great Falls Employers Council, Inc.*, 114 NLRB 370, 371 (1950) (concerning a decertification petition filed on behalf of certain professional pharmacists within a multi-employer clerical bargaining unit).

The Board has expressed a preference for a Board supervised decertification election over employer sponsored polling as the means for determining majority support for decertification. *See NEA-NM v. Española Public Schools*, 17 PELRB 2013 (June 19, 2013).

**H. Disclaimer of interest and dismissal of petition**

The relationship between a recognized exclusive representative and the members of the bargaining unit is sometimes a fluid one. Fervor for union activities that accompanies an initial organizing effort may ebb and flow as workplace relationships change over time. Occasionally the relationship degrades to the point that one or the other party seeks to end the relationship altogether.

Typically the representative relationship is severed by means of a decertification petition filed by a bargaining unit and union member, *supra*, but occasionally it is the union that seeks to end the relationship whether for financial reasons or due to lack of support generally. For example, in *Teamsters 492 v. Curry County*, Case No. 308-14, the Union sought to disclaim its interest in representing the existing bargaining unit after having negotiated its first CBA for the unit when only one member of the unit showed up for the ratification vote. Similarly, the former edition of the Practice Manual indicated that during Director Griego's tenure, AFSCME disclaimed its interest in representing the McKinley County Corrections Officers after the members failed to ratify a successfully negotiated CBA. The parties in that case opined that high turnover in the corrections field is the largest factor in union disclaimer of interest cases.

Disclaimer offers unions in an untenable financial position a way out, even if years remain on the stated term of the CBA. A disclaimer of interest is an initiative by the union, and it differs from a decertification. While a petition for decertification requires a 30% showing of interest and vote of over 50%, a disclaimer is simply filed with the PELRB and notice posted for the affected employees.

A disclaimer of interest, like a successful petition for decertification, frees the membership to take independent legal action against an employer, being no longer obliged to go through the representative body (the union), or subject to the often plodding and frequently political grievance process.

In 2020 the Board amended its rules to expressly add provisions governing a union's written disclaimer of its interest in representing a unit for which it has been recognized as the exclusive representative. *See* NMAC 11.21.2.42. There is no special form for a disclaimer. In general, it should state that the disclaiming union waives and disclaims any right to represent (described) employees (or "employees involved in Case . . .").

To be effective, the disclaimer must be clear and unequivocal and made in good faith. *Retail Associates*, 120 NLRB 388, 391–392 (1958); *Rochelle's Restaurant*, 152 NLRB 1401 (1965); and *Gazette Printing Co.*, 175 NLRB 1103 (1969). In *International Paper,* 325 NLRB 689 (1998), the Board characterized the request as being one of "sincere of abandonment with relative permanency." Thus, a union's bare statement is not sufficient to establish that it has abandoned its claim to representation if the surrounding circumstances justify an inference to the contrary. *Beall Bros.* 3, 110 NLRB 685, 687 (1954). Its conduct, judged in its entirety, must not be inconsistent with its alleged disclaimer. *See H.A. Rider & Sons*, 117 NLRB 517, 518 (1957); *McClintock Market*, 244 NLRB 555 (1979); and *Ogden Enterprises*, 248 *Windee's Metal Industries*, 309 NLRB 1074 (1992).

If an issue is raised about it, the Board will carefully scrutinize the "good faith" element of disclaimer in this interest, and it will refuse to lift the contract bar if there is evidence of collusion between two unions to merely shift representation of the unit from one to the other. When there is no evidence of collusion, however, employers have been unsuccessful in raising the contract bar doctrine as an obstacle to a representation petition brought by a new union. *See Skilbeck, P.L.C., Inc.*, 345 NLRB No. 46 (2005); *see also NLRB v. Circle A & W Products Co.*, 647 F.2d 924, 927 (9th Cir., 1981).

In addition to collusive agreements to shift representation from one union to another, unions also face potential pitfalls in attempting to use disclaimer unilaterally to expand or contract the scope of the bargaining unit. *Skilbeck, supra*; *see also Mack Trucks, Inc*., 209 NLRB 1003 (1974) (that the scope of the bargaining unit has long been recognized as a matter that may not be unilaterally altered by either party).

In any inquiry into the effectiveness of a disclaimer, the union's contemporaneous and subsequent conduct receives particular attention. *See, e.g.*, *Miratti's, Inc.,* 132 NLRB 699 (1961); *Holiday Inn of Providence-Downtown*, 179 NLRB 337 (1969); and *Denny's Restaurant*, 186 NLRB 48 (1970). A disclaimer must not be accompanied by action that is inconsistent with the disclaimer, such as simultaneously seeking to process grievances, except where such grievance processing involves pre-disclaimer matters. *Denny's, supra*; s*ee also* Electrical Workers Local 58 (Steinmetz Electrical), 234 NLRB 633 (1978). Similarly, in *VFL Technology Corp*., 329 NLRB 458 (1999), a union's disclaimer issued pursuant to a "no raid" decision was considered ineffective where the union continued to represent the employees outside of that decision.

Occasionally, a union will decide to disclaim its interest in representing the bargaining unit following receipt of a decertification petition filed by one of its constituents. Rule 11.21.2.42 NMAC now provides that upon the filing of a union's disclaimer of interest, staff shall dismiss any petition to decertify the exclusive representative of the disclaimed unit that may be pending, but this simply codifies PELRB's existing practice of long standing. *See* DIGEST.

## V. DISPOSITIVE MOTIONS OR ACTIONS

Dispositive motions are those that resolve a dispute without or before an evidentiary hearing, and can apply to an entire filing, or specific claims therein. They are extraordinary and disfavored motions. *See, e.g.*, *Professional of New Mexico v. UNM-Sandoval Reg'l Med. Center*, 70-PELRB-2021 (Oct. 18, 2021; in re: Case No. 306-21) (regarding motions to dismiss).

### A. Motion to dismiss

Motions to Dismiss are typically based on either jurisdictional grounds, or failure to state a claim but other procedural grounds have also been asserted as discussed below. *See* DIGEST.

#### 1. Jurisdiction

Lack of jurisdiction may be alleged for a variety of reasons, such as the existence of local board; failure to exhaust administrative or contract remedies such as grievance arbitration; lack of timeliness; or the subject matter is preempted by the State Personnel Act or SPO rules or regulations.

If there is a functioning local board with jurisdiction over the subject of a PPC, the PELRB will routinely dismiss the PPC, requiring it to be refiled with the local board. *See* Digest. The PELRB has not had occasion to decide any cases involving preemption. The most common jurisdictional claim involve untimeliness, or failure to exhaust contract remedies, discussed next.

### 2. Failure to exhaust grievance-arbitration procedures

Failure to exhaust the contract remedy of grievance arbitration *may* constitute a jurisdictional bar requiring dismissal of the PPC if:

a) the subject matter is one for which grievance arbitration would have been appropriate; and
b) the employer has not challenged the appropriateness or jurisdiction of grievance arbitration.

The doctrine is a well-established one under the law and promotes administrative efficiency. Accordingly, generally a complainant should always plan to first exhaust negotiated grievance-arbitration procedures provided for in the CBA. *See, e.g.*, *Santa Fe Police Officer's Association v. City of Santa Fe*, 4-PELRB-2012 (Jan. 22, 2012; in re: Case No. 127-10 ("PEBA's prohibited practices procedures should not be applied to affect an "end run" around a missed opportunity to arbitrate a claim that the union acknowledges was properly arbitrable without at least making a *prima facie* case under §19).

However, this is a fact dependent and case-by-case determination. *Compare AFSCME v. Department of Health*, Case No. 168-06, Hearing Examiner Decision at 11 (Jul. 17, 2007) (concluding that, where there were no obstructions or impediments to the union's utilizing the grievance arbitration processes and deferral was otherwise appropriate, "failure to timely exhaust the grievance-arbitration proceedings as to claims turning on contract interpretation will constitute a jurisdictional defect requiring dismissal of the PPC"); and *Katz v. Belen Consol. Schools*, Case No. 113-26, Amended Hearing Examiner Order (Aug. 26, 2026) (denying the motion where the *pro se* complainant proceeded through all grievance steps and the union declined to advance it to, and pay for, arbitration); and DIGEST

Additionally, there are exceptions to the duty to exhaust contract remedies. First, exhaustion will not be required as to any claim for which deferral to grievance arbitration would be inappropriate. *DOH,* Case No. 168-06, *supra*. Second, the PELRB will not require exhaustion where the State Personnel Office (SPO) has indicated that it would oppose grievance and arbitration on grounds that challenged action was consistent with SPO rules and could therefore only be appealed to the SPO Director under Article 14, Section 1(B) of the CBA. *See AFSCME Local 477 v. Public Reg. Comm'n*, Case No. 154-07, Hearing Examiner letter decision (Oct. 23, 2007) (denying motion to dismiss, upon distinguishing *DOH,* Case No. 168-06, *supra*, and equating the employer's position to one that rendered grievance arbitration futile).

Ultimately, many such motions are denied, but this is also consistent with NLRA practices. *DOH,* Case No. 168-06, *supra*. (noting that "notwithstanding the evolution of a broad and far-reaching deferral doctrine, the deferral policy is not uniformly enforced").

### 3. Failure to state a claim

The PELRB follows New Mexico jurisprudence regarding dismissal motions. A motion to dismiss for failure to state a claim tests the legal sufficiency of a complaint, not the facts that support it. *Professional of New Mexico v. UNM-Sandoval Reg'l Med. Center*, 70-PELRB-2021 (Oct. 18, 2021; in re: Case No. 306-21); *see also* Rule 1-012(b)(6) NMRA. Under this analysis, all facts alleged in a complaint and reasonable inferences therein are taken as true, and all doubts are resolved in the non-movant's favor. *See Herrera v. Quality Pontiac*, 2003-NMSC-18, ¶ 2; *Southern Union Gas Co. v. New Mexico PUC*, 1997-NMSC-56, ¶ 27; *see also* DIGEST.

This is an extreme remedy that should be infrequently used, as the New Mexico Court of Appeals has observed. *Professional of New Mexico v. UNM-Sandoval Reg'l Med. Center*, 70-PELRB-2021 (Oct. 18, 2021; in re: Case No. 306-21), citing *McCasland v. Prather*, 1978-NMCA-098, ¶ 5, *Derringer v. State*, 2003-NMCA-073, ¶ 5, and *Town of Mesilla v. City of Las Cruces*, 1995-NMCA-058, ¶ 4.

Additionally, the PELRB follows New Mexico jurisprudence in utilizing the liberal "notice pleading" standard. *See AFSCME v. City of Rio Rancho*, Case No. 159-06, Hearing Examiner letter decision on City's Motion to Dismiss (Nov. 17, 2006) ("[b]ased on the similarity between PELRB and New Mexico Rule of Civil Procedure 1-008(A), it is apparent that PELRB rules, like New Mexico Rules of Civil Procedure, call for a notice pleading standard in testing the legal sufficiency of the complaint"). *See also Garcia v. Coffman*, 1997-NMCA-092, ¶ 11 (under the notice pleading standard, "it is sufficient that [the] defendants be given only a fair idea of the nature of the claim asserted against them sufficient to apprise them of the general basis of the claim") (internal quotations and citation omitted), and *Sanchez v. City of Belen*, 1982-NMCA-070 (the general policy under the notice pleading standard is to provide for "an adjudication on the merits" rather than allowing "technicalities of procedures and form" to "determine the rights of the litigants"); and .

Because New Mexico follows liberal notice pleading rules, technical deficiencies in the form of allegations will not generally support a dismissal for failure to state a claim. Dismissal under Rule 1-012(B)(6) is, instead, appropriate only where the non-moving party is not entitled to recover under any theory of the facts alleged in their complaint. *United Health Professionals of N.M. v. UNM-Sandoval Reg'l Med. Center*, 70-PELRB-2021 (Oct. 18, 2021; in re: Case No. 306-21); *see also* DIGEST.

#### 4. PELRB's or Staffs' failure to abide by time limits

The jurisdiction of the Board has been challenged because of its failure to abide by the time limitations set forth in its own rules. Those challenges have been routinely rejected, because these deadlines are directory rather than mandatory, and therefor do not implicate jurisdiction. *See* 11.21.2.18 NMAC, 11.21.2.21 NMAC, 11.21.3.14 NMAC and 11.21.3.18 NMAC; *AFSCME Council 18 v. State*, 33-PELRB-2012; *AFSCME and Los Alamos County Firefighters v. County of Los Alamos*, 1 PELRB No. 3 (Dec. 20, 1994); *Local 7911, CWA and Doña Ana County*, 1 PELRB No. 19 (Aug. 1, 1996), *citing Littlefield v. State of New Mexico*, 114 N.M. 390 (1992); and DIGEST.

### B. Motion for summary judgment

The PELRB has long followed N.M. Rules of Civil Procedure, Rule 1-056 when deciding a motion for summary judgment. *See AFSCME Council 18 v. Department of Labor,* 1-PELRB-2007 (Oct.

15, 2007; in re: Case No. 149-06); Rule 1-056 NMRA; and DIGEST.

Under Rule 1-056 NMRA, summary judgment shall be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id*. Like dismissal, summary judgment is an extraordinary remedy that is viewed with disfavor, unless warranted under the undisputed material facts and relevant law. *See MCFUSE Local 3313 v. Gallup McKinley County Schools*, 8-PELRB-2026 (Mar. 19, 2026; in re: Case No. 102-25, citing *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 8.

Nonetheless, summary judgment serves a vital function: to avoid unnecessary litigation and expense associated with full-blown trials over claims or defenses that are frivolous, without merit, or that cannot be proven. *See MCFUSE Local 3313 v. Gallup McKinley County Schools*, 8-PELRB-2026 (Mar. 19, 2026; in re: Case No. 102-25), and cites therein; *see also Agnew v. Libby*, 1949-NMSC-004 (that this rule is obviously designed to expedite litigation by eliminating needless trials and by avoiding frivolous defenses delaying determination of the legitimate issues); and *Martinez v. Logsdon*, 1986-NMSC-056 (trier of fact is not barred from *sua sponte* granting summary judgment if there is no material factual issues in dispute).

When filing a motion for summary judgment, the movant shall set out a concise statement of all material facts to which it is contended there is no genuine dispute. The facts set out shall be numbered and the motion shall refer with particularity to those portions of the record upon which the party relies. *See* Rule 1-056.

The respondent shall then file a response that includes a concise statement of all material facts as to which it is contended there is a genuine dispute, the facts set out shall be numbered, and the response shall refer with particularity to those portions of the record upon which the party relies. *DOL*, *supra.* Both sides may include supporting affidavits, based on personal knowledge and setting forth evidence that would be admissible at trial. *Id.*

In practice, however, summary judgement pleadings are rarely that organized in their presentment, and the hearing examiner may allow the parties to supplement their pleadings if needed and warranted based on available allegations and evidence.

If a motion for summary judgment is made and properly supported, the opposing party may not rely upon the mere allegations or denials of his pleadings or in the PPC, but rather must by affidavit and reference to the record, set forth specific facts showing there is evidence for the claim, and a genuine issue of material dispute for trial. *See also MCFUSE Local 3313 v. Gallup McKinley County Schools*, 8-PELRB-2026 (Mar. 19, 2026; in re: Case No. 102-25); and DIGEST.

### C. Withdrawal/dismissal of PPC

Presently, PELRB rules state that the hearing examiner is to attempt to settle a PPC with the parties. *See* 11.21.3.15(A) NMAC. PELRB rules also anticipate that the Director or hearing examiner will review settlement agreements, and the rules grant variable discretion and authority to dismiss the PPC based on the procedural posture. *See* 11.21.3.15. In practice, staff and hearing examiners do not get involved with settlement efforts beyond directing the parties to communicate to do so; and they do not generally inspect settlement agreements, unless the circumstances appear to warrant or require such involvement.[38]

# VI. EVIDENTIARY HEARING PROCEDURES

## A. Generally

If the PPC or a unit composition objection are not settled or dismissed, the hearing examiner will conduct an evidentiary hearing on the merits that comports with due process. *See* § 12(B); and 11.21.2.19 and 11.21.3.16 NMAC; *see also* DIGEST.

Administrative hearings such as this are conducted in such a way as to conform to fundamental principles of justice and the requirements of due process of law. However, administrative litigants' due process rights are primarily procedural: reasonable notice and an adequate opportunity to be heard on their claims and defenses. *See* 12(B); *Uhden v. The N.M. Oil Conservation Comm'n*, 1991-NMSC-089; *TW Telecom of N.M., L.L.C. v. N.M. Pub. Regulation Comm'n*, 2011-NMSC-029, ¶ 17; *see also City of Albuquerque v. Chavez*, 1998-NMSC-033 (using the three-factor "*Mathews* test" from *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976) as a framework for determining the appropriate amount of process to protect liberty, which requires consideration of the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and the Governments interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail).

Judge Henry J. Friendly (Second Circuit Judge) identified the following elements of a "fair hearing" in the administrative law context that are relevant before the PELRB:

- an unbiased tribunal
- notice of the proposed action and the grounds asserted for it
- an opportunity to present reasons why the proposed action should not be taken
- the right to call witnesses
- the right to know the evidence against one
- the right to have the decision based only on the evidence presented
- the making of a record
- a statement of reasons for the decision
- judicial review

J. Friendly, *supra*, available here.

In accordance with the foregoing elements of due process, the evidentiary hearing procedures conducted by the PELRB may include the following:

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[38] The 2024 edition of the Practice Manual reported that "[t]he Board has also previously interpreted this rule to not it to review a settlement achieved under Court annexed settlement facilitation after appeal from the Board's Order upholding its Hearing Examiner's Recommended Decision." No case name or number, or Board order number was referenced, however.

### B. Discovery

The only discovery expressly addressed under PELRB rules are

(1) the production of documents upon notice of ab evidentiary hearing, and pursuant to a subpoena issued by the PELRB, which the rules state shall be requested according to a scheduling order agreed to by the parties; and

(2) upon a motion and specific order showing good cause. In practice neither discovery nor complicated scheduling orders are typically required in PELRB cases.

*See* 11.21.19(A) NMAC (upon subpoena), and 11.21.20. (compelled upon motion).

However, the parties can always raise the subject of discovery at the initial status conference. Additionally, they may raise it afterwards, by filing and serving requests for productions and/or interrogatories, or by requesting the production of documents by subpoena. The N.M. Rules of Civil Procedure for the District Courts governing discovery will generally be followed as a guide. *See Katz v. Belen Consol. School*s, Case No. 113-26, Amended Hearing Examiner Order (Aug. 26, 2026) (denying most of the discovery requests, including for attorney-client communications, due to lack of good cause shown, but ordering the production of certain items that were clearly relevant and admissible, and their early production would narrow issues and could facilitate earlier resolution).

### C. Admissible evidence

The evidentiary hearing will not be strictly bound by formal rules of evidence, but they will guide the matter, in particular as to relevancy, reliability, materiality, privilege, and repetitious or cumulative evidence. *See* 11.21.1.17(A) *Id.* at (B) and (C).

Notably, hearsay will be allowed and may even provide "substantial evidence" to support a finding of fact or conclusion of law. *See Trujillo v. Employment Sec. Comm'n,* 1980-NMSC-054 (the legal residuum rule, which prohibits a finding or conclusion of liability based solely on inadmissible evidence, applies in New Mexico administrative hearings in which a "substantial right, such as one's ability to earn a livelihood, is at stake").

Nonetheless, there are standards for the admission of testimony. All witnesses must be sworn in and competent to testify, meaning they have personal knowledge of the subject matter, and their testimony is not privileged. PELRB hearing examiners also typically discourage the testimony of witnesses who are also presenting legal arguments, to avoid confusion as to whether a particular statement is sworn testimony and therefore admissible evidence, or merely legal argument. Additionally, unless foundation is stipulated to, all documentary evidence must be admitted through a witness capable of laying that "foundation," meaning attesting to its veracity and reliability, and that it is what it purports to be.

### D. Subpoenas

Subpoenas are issued by the hearing examiner, either upon a proffer of general relevance when issued on a party's motion, or without any showing of relevance required when issued on the hearing examiner's own motion. *See* 11.21.1.19(A) and (B) NMAC. A subpoena may be quashed upon motion. *See* 11.21.1.19(C) NMAC.

Duly subpoenaed State employees are eligible for paid administrative time pursuant to State Personnel Board rules. *See* 1.7.7.14 NMAC. Additionally, PELRB rules provide that the subpoenaing party shall be responsible for "any applicable witness and travel fees." *See* 11.21.1.19(D) NMAC.

### E. Order of case presentment

The parties may elect to begin with opening statements or proceed directly to witness testimony. Opening statements should address only what evidence is expected to be elicited; they are not argumentative in nature. Thereafter, the complaining party will put on its case-in-chief, by calling witnesses it desires to put under direct examination. All witnesses will be subject to cross-examination, and re-direct and re-cross are allowed where relevant and non-cumulative. The hearing examiner may also question witnesses, *see* NMAC 11.21.1.3.16(B), and in that case the parties will be able to cross-examine the witnesses based on the H.E.'s questions.

At the close of the complainant's or petitioner's case, and prior to initiating its own case, the Respondent may move for a directed verdict dismissing the PPC on grounds that there was no evidence admitted as to an element of the alleged violation. Under New Mexico case law, a motion for directed verdict should not be granted unless it is clear that "the facts and inferences are so strongly and overwhelmingly in favor of the moving party that the judge believes that reasonable people could not arrive at a contrary result." *See* DIGEST; *see also Melnick v. State Farm Mut. Auto. Ins. Co.,* 1988-NMSC-012, ¶ 11. "A directed verdict is appropriate only when there are no true issues of fact to be presented to a jury. The sufficiency of evidence presented to support a legal claim or defense is a question of law for the [district] court to decide." *Sunwest Bank of Clovis, N.A. v. Garrett,* 1992-NMSC-002, ¶ 9 (citations omitted).

If there is no motion for a directed verdict, or the motion is denied, the respondent shall put on its case-in-chief next.

At the close of the respondent's case-in-chief, the parties may make closing arguments. They may also request to file written post-hearing briefs, which shall generally be granted but remains within the hearing examiner's discretion. 11.21.3.17 and 11.1.2.20 NMAC; and DIGEST.

### F. Burden of proof

As noted above, the burden of production and persuasion (e.g., the burden of "proof") for PPCs is on the complainant, except as to affirmative defenses, and the burden in administrative proceedings such as ours is "preponderance of the evidence." *See* 11.21.1.22(B) NMAC and 11.21.11.3.16(A) NMAC; *see also* DIGEST at Rules 1.22, and 3.16, and Affirmative Defenses.

In contrast, for Petitions – except in the case of unit clarification hearings, where the burden of proof is on the party seeking any change in an existing appropriate unit or in the description of the unit – neither party shall have the burden of proof. Instead, it is the duty of the hearing examiner to fully develop a record sufficient to decide the matter. *See* 11.21.1.22(A) NMAC; *see also* DIGEST.

***Preponderance of the evidence*** simply means the greater weight 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. *MCFUSE Local 3313 v. Gallup McKinley County Schools*, 5-PELRB-2026 (Feb. 19, 2026, in re: Case No. 124-25), citing *Foster v. Bd. of Dentistry*, 1986-NMSC-009 at ¶10; *Campbell v. Campbell*, 1957-NMSC-001 at ¶24); and NMRA 13-304 (uniform jury instruction).

## VII. POST-HEARING PROCEDURES

### A. Introduction

After the hearing, the hearing examiner may leave the record open for a period to supplement the record. Upon closing of the record and receipt of post-hearing briefs, if any, the examiner shall write and issue a report of his or her findings of fact, conclusions of law, and recommended disposition. *See* 11.21.3.18 and 11.21.2.21 NMAC.

The hearing examiner will strive to issue reports within 15 business days following the close of the hearing or submission of post hearing briefs, whichever is later, but the deadlines are advisory (not jurisdictional), and may be extended for up to 20 business days at a time for good cause such as staffing or workload issues.[39] *Id.* *See also* 11.21.1.31; DIGEST; and *Local 7911, CWA and Doña Ana Deputy Sheriffs Ass'n FOP and Doña Ana County*, 1 PELRB No. 19. (Aug. 1, 1996), citing *Littlefield v. State*, 1992-NMCA-083 (that these time limits are directory rather than mandatory, and their violation does not require Board rejection of the report unless there is a demonstration of prejudice by delay).

Once the hearing is closed, the hearing examiner's decision will be rendered based on all relevant evidence admitted without objection. This means that if it is not prejudicial, the hearing examiner may deem the pleadings to be amended to conform to such evidence. *See AFSCME v. Dept. of Health,* Case No. 168-06, Hearing Examiner Decision and Recommendation on Respondent's Motion to Reconsider (Jan. 22, 2007); and DIGEST. *See also* Rule 1-015(B) NMRA (pleadings are deemed amended to conform with evidence received into the record when the issue is "tried by express or implied consent of the parties"); *Wynne v. Pino*, 1967-NMSC-254 (when the issues is tried by express or implied consent, "the trial court is obliged to treat the issue in all respects as it had been raised in the pleadings") (emphasis added), and *Foundation Reserve Insurance Co. v. Mullenix*, 1982-NMSC-038 ("[u]nder notice pleading, the evidence in a case may establish liability ... different from that alleged in the pleadings or otherwise anticipated by the parties").

[39] Ideally, the hearing examiner will document this in writing, so that the Agency does not have to report a deficiency in its performance measures, under which we are expected to meet 100% of the deadlines since they can be easily extended for cause.

However, where an issue is not raised in the complaint or fully litigated at the merits hearing, the record may be inadequate to support findings or conclusions as to that issue. *Trident Seafoods, Inc. v. NLRB,* 101 F.3d 111, 116 (D.C. Cir. 1996); *see also* DIGEST at § 12(B), regarding burden of proof).

As discussed in more detail next, if there is no appeal to the PELRB, the PELRB may and usually will *pro forma* adopt the report in a PPC; and it will review any decision independently. *See* 11.21.2.22(C) and 11.21.3.19(D) NMAC.

### B. Request for Board review of hearing examiner's decision

Interlocutory appeals are disfavored and only allowed with the hearing examiner's, Director's or PELRB's permission. *See* 11.21.1.27 NMAC; and DIGEST.

In contrast, any party may request Board review of a hearing examiner's dismissal, report on the merits, or final disposition of a matter within 10 business days of the service of the dismissal or report. *See* 11.21.3.13 NMAC (regarding dismissal of a PPC without a hearing on the merits) and 11.21.2.22 and 11.21.3.19 NMAC (regarding the final decision on the merits of Petitions and PPCs respectively).

The party requesting review must state the specific portion of the report to which exception is taken, and the factual and legal basis for the exception. *Id.* After a request is filed, the other party will have 10 business days in which to file a response. *Id.*; *see also* DIGEST. PELRB review is based on the record and/or on evidence presented or offered at earlier stages, and it is not a *de novo* review. *See* 11.21.1.27 and 11.21.2.22(C) NMCA; *see also* DIGEST.

Moreover, even if a request for review has not been filed, the Board shall still review the recommended disposition at its next regular board meeting, where it typically adopts the hearing examiner's report, to ensure that any required remedial action is taken and/or that assumption of requisite duties and responsibilities is clear. *See* 11.21.2.22(C) and 11.21.3.19(D) NMAC; *see also* PELRB Hearing Calendar and Board Minutes.[40]

In the case of petitions, it is generally understood that *pro forma* adoptions in the absence of a request for review shall have precedential effect, even as to unit clarification. *See CWA Local 7911 and Doña Ana County*, 1 PELRB No. 16 (Jan. 2, 1996); *but see/compare NMSU Police Officers Ass'n and NMSU,* 1 PELRB No. 13 (Jun. 14, 1995) (indicating that a *pro forma* adopted H.E. decision regarding unit inclusion would not have precedential effect).

In contrast, reports on PPCs that are *pro forma* adopted do not have precedential value, *see* 11.21.1.3.19(D) NMAC, although they will be binding on the parties, and will also generally be deemed persuasive by PELRB hearing examiners.

[40] Note that because Board review is not a "hearing" under PELRB rules, but instead and open meeting, it is noticed to litigants and the public alike by the posting of the relevant month's draft meeting Agenda on the Meetings, website page, and the meeting's location (typically via Zoom or at the PELRB offices) on our Hearing Calendar.

Under the NLRA, which also utilizes the whole record standard of review, the NLRB's "established policy is not to overrule an administrative law judge's credibility resolution unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." *See Blue Grass Industries, Inc. and UFCW, Local 68*, 287 NLRB 274, 274 n.2 (1987) (*citing Standard Dry Wall Products*, 91 NLRB 544 (1950), *enf'd.* 188 F.2d 362 (3d Cir, 1951)). This is particularly true for credibility determinations, because the hearing examiner had the benefit of observing a witness's demeanor first hand. *Id.*

Expressly not subject to review is a hearing examiner's initial decision to defer or not defer processing of a PPC pending arbitration, although the subsequent decision after completion of arbitration to dismiss the PPC or to further process it is subject to review. *See, e.g.*, 11.21.3.22(E) NMAC.

Lastly, note that because Board review is not a "hearing" under PELRB rules, but instead and open meeting, its meetings and Agenda are noticed to litigants and the public alike by the posting of the relevant month's draft meeting Agenda on the Meetings, website page, and the meeting's location (typically via Zoom or at the PELRB offices) on our Hearing Calendar.

### C. Motions to reconsider

The first PELRB held that it lacked jurisdictional authority to reverse or reconsider its final actions or decisions, because the legislature did not specifically grant it that authority. *See N.M.S.U. Police Officers Ass'n and N.M. State Univ.*, 1 PELRB 13 (June 14, 1995).

However, the present day PELRB has indicated willingness to hear such motions. *See AFSCME Council 18 v. Dept. of Health*, 6-PELRB-07 (Dec. 3, 2007) (the motion to reconsider allowed where the hearing examiner deemed the pleadings to conform to the evidence admitted without objection and found a violation of a claim not formally pleaded, and the respondent alleged prejedice; thereafter the motion was denied because the respondent failed to show prejudice).

### D. Enforcement of PELRB orders

If a party disregards or violates a PELRB order, the proper recourse is to seek judicial enforcement pursuant to § 23(A). Actions taken by the Board, or a local board, shall be affirmed unless the court concludes the action is:

(a) arbitrary, capricious or an abuse of discretion

(b) not supported by substantial evidence on the record considered as a whole

(c) otherwise not in accordance with law

*See* DIGEST. Additionally, the disregard or violation may form the basis of another PPC under § 19(G) or § 20(E).

As the Act is currently written, it contemplates the Board filing suit and seeking enforcement, and clearly the PELRB has an interest in ensuring that its orders are enforced. However, due to the PELRB's Board monthly meeting schedule, and small budget and staff, the best practice to ensure the quickest judicial enforcement may be for the prevailing party to seek judicial enforcement directly. *See, e.g.*, *Hatch POA v. Village of Hatch*, 9-PELRB-2026 and 31-PELRB-2026 (in re: Case 128-25) (a remedy was ordered in January 2026; the Board reviewed and pro forma that order in March 2026; the hearing examiner determined in, upon inquiry from the union and based on the evidence provided and in PELRB files, that the Village had notice and opportunity to appeal the March order but had not complied, and refused to participate in a show cause hearing on the issue; and upon review in August, the Board ordered additional hearings for October 2026, after the Village failed to seek review on the January decision, and requested review on the subsequent decision on non-compliance but failed to appear at the Board' next regularly scheduled meeting in September 2026, where the matter was noticed to be heard pursuant to the September Agenda and PELRB Hearing Calendar).

### E. Judicial review

The PEBA also provides the right to appeal final Board orders to the District Court. *See* § 23(B). That appeal must be filed within 30 days of the issuance of the decision. *See* Rule 1-074 NMRA and NMSA 1978, § 39-3-1.1 (1999). Thereafter, further appeal may be had only upon the granting of a writ of certiorari, which must be filed within 20 days of the decision appealed. *See* Rule 12-505 NMRA.

Section 23(B) of the PEBA instructs reviewing courts of the standard on review, which is the same as for enforcement: that "[a]ctions taken by the Board or local board shall be affirmed unless the court concludes that the action is (1) arbitrary, capricious [,] or an abuse of discretion; (2) not supported by substantial evidence on the record considered as a whole; or (3) otherwise not in accordance with law." *See supra*; and DIGEST.

On appeal, the court views the evidence in a light most favorable to the Board's decision and employs a deferential standard to the decision concerning areas within the agency's expertise. *San Juan College v. San Juan College Labor Management. Relations Board*, 2011-NMCA- 117, citing *N.M. State Bd. of Psychologist Exam'rs v. Land*, 2003-NMCA-034, ¶ 5; and *Las Cruces Prof'l Fire Fighters v. City of Las* Cruces *("Fire Fighters I)*, 1997-NMCA-44.

On issues of fact, the court does not generally substitute its judgment for that of the Board. *San Juan College*, *supra*. Instead, it examines the whole record to determine whether it supports the result by substantial evidence. *See UNM v. N.M. Fed'n of Teachers and American Ass'n of Univ. Professors*,1998-NMSC-20; and DIGEST. If the findings do not support the result, the reviewing court may adopt facts from the record before it. *Sanchez v. N.M. Dep't of Labor,* 1990-NMSC-016.

On questions of law or statutory construction, the District Court employs a *de novo* standard of review and it *may* substitute its judgment if the Board's was unreasonable or unlawful, but it also defers if the issue is within the Board's special area of expertise and its conclusions were not unreasonable or unlawful. *See, e.g.*, *Fed'n of Teachers*, *supra; Corrections Dep't v. AFSCME Council 18*, 2018-NMCA-007 (in re: D-101-CV-2009-3457, 11-PELRB-2009, Case No. 105-09), ***cert. den.*** No. S-1-SC-36688; *Selmeczki v. N.M. Dep't of Corr.,* 2006–NMCA–024, ¶ 13; *see also* DIGEST.

Note, however, that the Courts will not reverse the Board, even where arbitrary and capricious, if it was a harmless error. *AFSCME Council 18 v. Santa Fe County et. al.*, D-101-CV-2014-01195 consolidated with D-101-CV-2014-01700 (Jun 11, 2015; in re: 7-PELRB-2014).

### F. Remedies

#### 1. Generally

Either a PPC or a petition may give rise to an order and remedy, and the 2020 amendments made express the Board's and local boards' authority to enforce the PEBA through a variety of administrative remedies, including:

- actual damages related to dues
- back pay including benefits
- reinstatement with the same seniority status that the employee would have had but for the violation
- declaratory or injunctive relief
- or provisional remedies, including temporary restraining orders or preliminary injunctions.

*See* § 9(F) (Amended 2020); DIGEST. As noted above, however, no punitive damages or attorney fees may be awarded. *Id.*

The U.S. Supreme Court has noted that the NLRB's authority to order affirmative action "does not ... confer a punitive jurisdiction enabling the Board to inflict ... any penalty it may choose ... even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197 (1938). Accordingly, remedies should be tailored to cure the harm caused. The following remedies have been or are likely to be raised before the PELRB.

#### 2. Injunctions

Injunctions may be issued on an emergency and preliminary basis before a hearing on the merits, and/or they may be made permanent after a hearing on the merits. *See* Digest. For the requirements and burden of proof to obtain a preliminary injunctions, *see* Digest. *See* Sec. II.E, Common Pre-Hearing Procedures – TROs/Preliminary injunctions, *supra*.

#### 3. Postings

A common remedy is to order the posting of a notice that certain actions of a respondent have violated the PEBA. Such postings are generally for 30-60 days beginning as soon as the notice is issued to the employer. However, the posting time may be adjusted "to coincide with the actual operation of a seasonal business," such as for schools. *See* DLL, Ch. 32.III.

### 4. Cease-and-desist orders

A prohibitory cease-and-desist order is another common remedy. It orders the respondent to discontinue the specific action determined to violate the PEBA, as well as "any similar or related" conduct, and is typically issued in tandem with a Notice for posting. *Id.*

The cease-and-desist order and posting order will be the basic remedy for interference with, or restraint or coercion of employees in the exercise of, their PEBA rights. Where the employer has engaged in a pattern or practice of unlawful conduct, the cease-and-desist order may direct it to cease and desist from violating the law "in any other manner." *See* DLL, Chs. 31.III.B.10; 32.III.

### 5. Removal of documents from personnel file

Where the PPC alleges discipline was issued for discriminatory or retaliatory motives, an appropriate remedy may be removal of any improper discipline from the injured employee's personnel file. *See, e.g.*, *AFSCME Council 18 v. Bernalillo County*, Case No. 101-21; *see also* DIGEST; *compare Wal-Mart Stores, Inc. v. NLRB*, 400 F.3d 1093, 1100 (8th Cir. 2005) (ordering the expungement of a personnel file as to all activities found to be protected activity). Additionally, with the 2020 amendments specifying reinstatement and backpay are among possible remedies, the logical inference is that removing the taint and record of improper discipline remains among the "appropriate remedies" of old.

Removal of documents from the personnel file may avoid a dispute as to whether the PELRB or the SPB or another agency has jurisdiction to review disciplinary action taken in violation of the PEBA. *See e.g., CWA v. GSD*, Case 125-05. If the offending document is removed by PELRB order, there will then be insufficient evidence in the file for a SPB or other ALJ to subsequently conclude that the challenged disciplinary action was supported by just cause and/or principles of progressive discipline.

This remedy – like backpay and reinstatement, *infra* – may not be available where the discipline was supported by employee misconduct but issued in technical violation of contractual or other protections. For example, if the denial of contract right involved pre-hearing harmless error and did not prejudice an employee who was shown to have engaged in serious misconduct, a reasonable discipline will be sustained, and presumably documentation of such would remain in the employee's file. Additionally, where there was actual employee misconduct, record retention may be desired by the employer, for purposes of establishing progressive discipline in the event of future misconduct. *See AFSCME, Local 1529 v. Doña Ana County*, 34-PELRB-2025 (Nov. 11, 2025; in re: Case 112-25).

In contrast, document removal would likely be appropriate for a serious and prejudicial violation of the CBA or due process. *See Doña Ana County*, *supra*; *see also* DIGEST.

### 6. Backpay and reinstatement

Backpay and reinstatement, along with a cease-and-desist-order, are the most common remedies under the NLRA for cases where an employee was demoted or terminated in violation of the NLRA and may be expected to be equally common remedies under the PEBA.

Backpay has also been awarded by the PELRB where an improper unilateral change of a term and condition of employment resulted in a loss of pay to bargaining unit employees. *See*, e.g., *Classified School Employees Council of Las Cruces (Physical Plant Dept. Bargaining Unit) v. Las Cruces Public Schools*, Case No. 130-06 (Feb. 28, 2007, Hearing Examiner Report).

Before the 2020 amendment, it was occasionally argued that the PELRB lacked such authority, but that argument was consistently rejected. *See, e.g., AFSCME v. State*, Case 164-06, Hearing Examiner Report at 17 (Apr. 4, 2007) and *Taos Federation of United School Employees v. Taos Municipal Schools*, Case 119-08, School's Motion to Dismiss); *see also* DIGEST.

Like in the preceding discussion, backpay and reinstatement may not be appropriate remedies for violations of contractual protections, or *Weingarten* violations under the NLRA, if the employee was otherwise disciplined for just cause. *See* DLL, Ch. 6.III.B.4 and cites therein. In the case of *Weingarten* situations, these remedies are only authorized if the employee was disciplined as a direct result of having asserted *Weingarten* rights; and it is disallowed where discipline was based instead on proven misconduct by the employee. *Id.* Similarly, as noted above, backpay and reinstatement may not be appropriate where there was proven misconduct and any CBA or process violation was harmless or non-prejudicial. *See Doña Ana County*, *supra*; *see also* DIGEST.

#### 7. Returning employee(s) to the *status quo ante*

Returning parties to the *status quo ante* is probably the broadest type of remedy and will depend on the conduct found to violate the PEBA.

It could include, for example: rescinding work rules passed in violation of the duty to bargain; reinstituting past policies or practices that constituted terms and conditions of employment and were amended in violation of the duty to bargain; returning to prior work schedules, workloads or work assignments when those were changed in violation of the duty to bargain; or returning an employee to a prior work schedule, workload or work assignment when those were changed for discriminatory or retaliatory motives. *See* Digest.

#### 8. *Gissel* bargaining orders

A *Gissel* bargaining order is an order for a respondent to engage in bargaining, and it is issued upon a determination that the respondent seriously impeded an organizational effort, and/or refused to bargain without a good faith belief that the union lacked majority support. *See NLRB v. Gissel Packing Co., Inc.,* 395 U.S. 575 (1969); *see also United Health Professionals of N.M. v. UNM-Sandoval Reg'l Med. Center*, 8-PELRB-2024 (Feb. 8, 2024; in re: Case No. 109-23); ***aff'd*** D-202-CV-2024-01995 (6/10/25) (that a bargaining order was an appropriate remedy because it vindicates § 2 rights and enforces § 5 rights in the face of the employer's refusal to bargain over layoffs).

The "main concern in granting bargaining orders has been, and is, to correct and give redress for an employer's misconduct and to protect the employees from the effects thereof." *See Trading*

*Port,* 219 NLRB 298 (1975). Accordingly, such orders are retroactive, and effective as of the date the employer "embarked on a clear course of unlawful conduct ... sufficient ... to undermine the union's majority status." *Id.* at 301.

However, a bargaining order is "an extraordinary remedy." *See* DLL, Ch. 31.III.B.9. As such it is typically only issued when the employer's practices "have the tendency to undermine majority strength and impede the election processes." *Gissell*, 395 U.S. at 614.

#### 9. Decertification

Decertification is the remedy required under the PEBA where a union has caused or instigated a strike. *See* § 21(C).

#### 10. Punitive damages and attorneys' fees not allowed

Punitive damages and attorneys' fees are not appropriate administrative remedies, and are now expressly prohibited under the PEBA. *See* § 9(F) (Amended 2020); *see also AFSCME and Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994).

A different result may obtain, however, if an administrative decision is appealed to the District Court under the Courts' inherent power to impose sanctions, even against a public entity. The New Mexico Court of Appeals addressed that question in *Harrison et al. v. Bd. of Regents of UNM and Lovelace Health System, Inc., et al*., 2013-NMCA-105 (Sep. 5, 2013), *cert. granted* 10-1813, No. 34,349 (J. Garcia dissenting) (affirming the District Court's imposition of a $100,000 non-compensatory monetary sanction against a public entity).

#### 11. Setting aside election results

Setting aside an election, like issuance of a bargaining order, is an extraordinary remedy because it could contravene the principle of democratic selection—or rejection—of a representative. Accordingly, an election may only be set aside where the "record reveals conduct so glaring that it is almost certain to have impaired employees' freedom of choice." *General Shoe Corporation*, 77 NLRB 124, 126 (1948).

Additionally, it is untested as of yet if or how this standard will be applied in the context of a presumptive demonstration of majority support by card count rather than secret ballot and/or in-person election.

## APPENDIX A

## OVERVIEW OF PEBA AND PELRB HISTORY[41]

### Pre-PEBA, 1959 to 1992

As many New Mexico public sector labor practitioners know, various local governments within the State enjoyed collective bargaining rights and relationships for several decades before the State passed its first collective bargaining statute in 1992, with the enactment of NMSA §§ 10-7D-1 et seq. (PEBA I).

In 1959, the town of Farmington acquired a private electrical utility at which the workers were already organized and working under contract and the town renegotiated the CBA in 1962. In 1965, the Court upheld Farmington's authority to enter into a CBA where there was no applicable merit system in place. IBEW v. Farmington, 1965-NMSC-090.

In the following decades, prior to October 1991, a number of political subdivisions adopted public bargaining ordinances or resolutions, including the University of New Mexico (1970); Albuquerque Public Schools (1971); the City of Albuquerque (1977); University of New Mexico Hospital (1981); City of Deming (1991); Bernalillo County (1975); the City of Alamogordo (1990); the City of Farmington (1969); the City of Raton (1981). Additionally, the State Personnel Board promulgated rules pertaining to collective bargaining (1972). In 1989, the Court upheld the State Personnel Office's authority to enter into a CBA pursuant to agency rules, where the CBA did not "conflict with, contradict, expand or enlarge" rights provided under any existing or future state, county or municipal merit system. See AFSCME v. Stratton, 1989-NMSC-003.

Thus, over time a patchwork of collective bargaining practices and law developed, and a number of local governing bodies created their own labor boards to handle the resulting cases. However, in the early 1990s, labor organizations in New Mexico sought unified legislation governing public bargaining throughout the state. By January of 1991, AFSCME, CWA, FOP, IAFF, NEA-NM, the N.M Federation of Teachers and the N.M. Federation of Labor had formed the New Mexico Coalition of Public Employee Unions and began drafting and circulating proposed public bargaining statutes. Bills were introduced to the Legislature unsuccessfully in 1991, and again, with success, in January 1992; and on April 1, 1993, PEBA I became effective until July 1, 1999.

### PEBA I, 1992 through 1999

To accommodate New Mexico's pre-existing public employee bargaining schema, PEBA I included grandfathering provisions in §§ 24 and 26. Some advocates argued in the early days that the PEBA's conflicts provisions, §§ 3 and 17(B), were also intended to accommodate prior collective bargaining, by implicitly incorporating the *Stratton* decision into the PEBA. However, §§ 3 and 17(B) expressly prohibit only "conflict[s]". In contrast, *Stratton* prohibited enlarging

[41] This history combines the PEBA history traditionally located in the introduction of the Practice Manual and the "social history" of the PELRB that was included in the 2024 and 2025 Annual Reports, including a list of all Board members under PEBA II and the full text of the 2025 statements from former PELRB Directors Juan Montoya and Patrick Halter.

upon or expanding rights guaranteed under merit systems. Under New Mexico law a "conflict" would exist only where the ordinance is actually "antagonistic" to or inconsistent with a state law of general applicability because it permits an act the general law prohibits or prohibits an act the general law expressly permits. *Cf. New Mexicans for Free Enterprise v. City of Santa Fe*, 2006-NMCA-007, ¶¶ 39-43, and cites therein; *Smith v. City of Santa Fe,* 2006-NMCA-048. Ordinances that are complimentary to the general law and/or that concern aspects of the issue on which general state law is silent, do *not* conflict with the state law. *Id.*

The PEBAs was generally modeled on the NLRA. Accordingly, "absent cogent reasons to the contrary," interpretations of the NLRA must generally be followed in interpreting substantially similar PEBA provisions, "particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the time the PEBA was enacted." *See Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-031; *see also UNM v. NM Fed'n of Teachers and AAUP,* 1998-NMSC-020, ¶ 18 (citing and endorsing this language in *Fire Fighters,* in dicta), and *Santa Fe County and AFSCME*, 1 PELRB No. 1 at 43 (Nov. 18, 1993) (that NLRB precedent should generally be followed when dealing with the "same or closely similar" language).

However, there are notable differences between the New Mexico PEBA and NLRA. For example, the first PEBA provided for payroll deduction of union dues as a mandatory subject of bargaining if either party chose to negotiate the issue and the right to file a petition for decertification being limited to members of the certified union. *See* § 17(D) and § 16(A). Additionally, because the NLRA is oriented toward the private employer-employee relationship, the PEBA included other protections of the public interest and "orderly operation and functioning of government" by prohibiting strikes, slowdowns and lockouts, as well as the picketing of the homes and businesses of elected officials and public employees that do not exist in the NLRA. *See* §§ 2, 21 and 20(F); *See also* John E. Higgins, The Developing Labor Law (7th ed.) at Chs. 19-22 ("DLL").

The ability of employers, before the 2020 amendments (*see infra*) to "opt-out" of coverage under the PEBA by following grandfathered or their own locally adopted ordinance, resolution or charter amendment was also a substantial departure from the NLRA and illustrated a compromise between competing interests of labor and management reached in order to get the law passed. The bill originally drafted by the Coalition of Public Employee Unions would have required the State Board to approve grandfathered ordinances and resolutions only if they provided "substantially equivalent" rights to employees as those provided by the PEBA. The Coalition's bill also would not have permitted the creation of any new local boards.[42]

The Legislature of the time not only rejected the Coalition's proposed requirement of PELRB approval of grandfathered ordinances or resolutions but added an opt-out provision for newly created local boards over union protest. However, it did limit public employers' right to establish a new local board or operate a grandfathered one in two significant ways. First, new local boards would have to be approved by the state board and would have to meet the requirements of the PEBA unless otherwise approved by the state board. *See* § 10(A) (2003). Second, grandfathered

[42] As noted elsewhere and discussed further below, under the 2020 amendments, no new local boards may be created, all must be approved by the PELRB, and the remaining ones are subject to strict reporting and functionality requirements. Thus, the 2020 amendments relative to local boards essentially enacted the Labor Coalition's opt-out provisions previously rejected by the legislature in PEBA I.

local ordinances had to "permit public employees to form, join or assist any labor organization for the purpose of bargaining collectively through exclusive representatives," and had to have resulted in the designation of appropriate bargaining units, the certification of exclusive bargaining agents, and the negotiation of existing CBAs. *Cf.* § 10-7E-26(A) and § 10-7D-26(B) (both now repealed); *see also* § 13 concerning the Board's power and duty to designate appropriate bargaining units.

During this period, there were seven (7) judicial appeal decisions rendered concerning PEBA I, all or most of which concerned local boards. In these cases, New Mexico courts:

- confirmed the Board's authority under § 10 to review the content of labor ordinances and resolutions, as part of the process of approving local boards (*see Otero County et al. v. PELRB*, Twelfth Judicial Dist. Case No. CV-93-187 (Jul. 13, 1993) and *AFSCME v. Santa Fe County*, First Judicial Dist. Case No. SF 93-2174 (Jul. 8, 1994));

- confirmed the PEBA's supremacy over conflicting provisions in local ordinances created pursuant to PEBA I (*see Las Cruces Prof'l Firefighters v. City of Las Cruces*, 1997-NMCA-031, and *Las Cruces Professional Firefighters v. City of Las Cruces*, 1997-NMCA-044);

- confirmed the confidentiality of authorization cards, and the inapplicability of IPRA to them (*see City of Las Cruces v. PELRB*, 1996-NMCA-24); and

- confirmed the supremacy of the PEBA's definitions of "public employee" and "supervisor" over those of grandfathered provisions (*see UNM v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶¶ 44-4.

**PEBI I Board Members and Staff**

The very first NM-PELRB Executive Director under PEBA I was Walter Daugherty, a well-reputed arbitrator hailing from California. Walter returned to Los Angeles after setting up the office and was replaced by local New Mexico labor professional and arbitrator Patrick Halter on July 12, 1993. Director Halter served faithfully until June 30, 1999.

Members at the time of Director Halter's appointment were Bill Giron, Chair; Jim Ellis, Labor; and Jim Keaton, Management. Allen Ferguson, Assistant Attorney General, served as the Board's legal advisor. PELRB Members serve by appointment of the Governor and their service is entirely voluntary and uncompensated, other than payment of modest per diem fees (currently $45-95) and mileage. Nonetheless, the PELRB has had a tradition since its inception of being filled by highly competent and well-credentialed individuals. This tradition began with the very first and well-assembled Board under PEBA I – as former-Director Halter writes,

> Allen and I previously worked together at the Office of the General Counsel, Federal Labor Relations Authority, Washington, D.C. I had crossed paths with Jim Keaton over the years when he was an executive at General Motors in Detroit. I did not know Jim Ellis, retired to New Mexico from Boston, or Bill Giron. As I quickly learned, appreciated and leaned on, Bill Giron was a respected presence in any

> administration regardless of the incumbent party.[43]

During this time, Director Halter oversaw the certification of many bargaining units for the first time. He also processed about 55 applications for approval of Local Boards in the first years alone, and each case involved a separate Prohibited Practice Complaint (PPC). He observes that all the applications and PPCs were "practically identical". During his time, he sought to combat "misinformation about the state law" and the PELRB's role thereunder. His observation was that,

> decisions and Orders of the Agency were resented by some; and that Local Boards, for many, "represented a mechanism to blunt PEBA I until it expired in June 30, 1999" due to an internal sunset clause.[37]

The New Mexico Legislature attempted to reauthorize PEBA I before its sunset, but that legislation was vetoed by then-Governor Johnson and the State legislature could not override the veto. Accordingly, "at 5:03 p.m. [then-Director Halter] turned off the lights at the office and returned the office keys to the onsite property manager."

**PEBA II**

After PEBA I expired on July 1, 1999, repeated attempts at replacement legislation were vetoed until 2003, when a revised public employee collective bargaining law was successfully re-enacted. Colloquially referred to as "PEBA II," the 2003 law largely maintained the provisions of PEBA I as outlined above, except for the following significant changes:

- The required showing of interest for intervenors was increased from 10% to 30%. *Cf.* § 10-7D-14(A) and (B); § 10-7E-14(A) and (B).
- The percentage of eligible employees required to vote for a valid election decreased from 60% to 40%. *Cf.* § 10-7D-14(A) to § 10-7E-14(E).
- Parties were required to reduce their agreements to a written CBA, whereas a written agreement was discretionary under PEBA I. *Cf.* § 10-7D-17(A)(2), § 10-7E-17(A)(2).
- The impact of professional and instructional decisions was made a mandatory subject of bargaining as to public school employees and educational employees in state agencies. *Cf.* § 10-7E-17(G).
- Impasse resolution procedures were required to culminate in binding arbitration. *Cf.* § 10-7D-18(A)(5), § 10-7E-18(A)(8).
- A CBA continues in full force and effect in event of impasse until replaced by another, except as to any identified level, step or grade increases in compensation, *Cf.* § 10-7E-18(D).

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[43] Belarmino "Bill" Giron "had a distinguished career as a public servant" before his PELRB service. He served in the US Army during the Korean Conflict from 1948-52 and attained the rank of sergeant. Thereafter, he served as Consultant to the US Department of State, as Administrative Aid to Governor King, and as Assistant to the State of NM Commissioner of Public Lands. He also held various positions in the Department of Finance and Administration. He passed away in 2015. *See* https://www.legacy.com/us/obituaries/abqjournal/name/belarmino-giron-obituary?id=17808881 (last accessed 9/10/26.)

- Grandfathered collective bargaining units were required to be covered by a CBA on the date of PEBA II, rather than established through a representation election. *Cf.* § 10-7D-24, § 10-7E-24(A).
- Incumbent exclusive representatives continued to be recognized but must demonstrate majority support before an employer is required to enter into a new CBA. *Cf.*§ 10-7E-24(B). PELRB rules enacted under PEBA II provided for the certification of incumbent bargaining status upon a showing of majority support by card count while the rules promulgated under PEBA I did not require a demonstration of majority support. Cf. 11.21.2.36 NMAC and 11.21.2.36 NMAC.
- PELRB rules enacted under PEBA II permit the clarification or accretion of grandfathered bargaining units only by election petition, *See* 11.21.2.37(A) NMAC and 11.21.38(B) NMAC.
- Labor organizations involved in prohibited strikes lose their certification only as to the striking bargaining unit(s), not "any bargaining units," as under the former law. A one-year limitation on decertification was also eliminated. *Cf.* § 10-7D-21(C) and § 10-7E-21(C).
- Grandfathered ordinances or resolutions enacted prior to October 1, 1991 were not required to designate "appropriate bargaining units", certify exclusive bargaining agents or negotiate existing CBAs. *See* § 10-7E-26(B) (2003) (Repealed 2020).
- PEBA II also omitted "supervisors" in § 10-7E-5 as a class of employees excluded from the PEBA's coverage. However, the exclusion of supervisors from appropriate bargaining units was maintained in § 10-7E-13(A), with only minor grammatical variation. The PELRB has determined that the omission of "supervisors" from § 10-7E-5 of PEBA II was a clerical error. *See Santa Fe Police Officers' Association v. City of Santa Fe*, 02-PELRB-2007 (Oct. 14, 2007).
- Lastly, PEBA II did not contain a sunset clause, as did PEBA I.

Between 2003 and present, the PELRB issued many decisions, and many were appealed. Its earlier appeals were also dominated by local board matters, like under PEBA I. *See* PELRB Orders by year; and Court Decisions; *see also* Appendix C, herein and Digest – Appendix (Local Boards).

Between 2011 and 2013, the parameters of the PELRB's authority over local boards were largely established. *See, e.g.*, *City of Albuquerque v. Juan B. Montoya and the N.M. PELRB*, 2012-NMSC-007 (that the PELRB does not have concurrent jurisdiction over grandfathered local boards); *AFSCME v. Martinez and the State*, 2011-NMSC-018 (where respondent's local labor board is duly constituted and fully functional, the PELRB does not have jurisdiction over the parties or the subject matter for PPCs alleging violations that would come under the jurisdiction of the local board); and *Northern N.M. Community College*, 61-PELRB-2012 (Jul. 2, 2012; in re: consolidated Case Nos. 123-11, 124-11, 125-11, 130-11, 136-11 and 138-11), *aff'd* D-101-CV-2012-02100 (4/18/13) (nonetheless, where a local board is functioning, the Board nevertheless still has jurisdiction over PPC claims alleging violations of §19(G)). *See also* DIGEST – Appendix.

As public collective bargaining continued to mature in New Mexico, other issues were also resolved or greatly clarified. For instance, the supremacy of CBAs over contrary work rules, and their binding effect under state and federal constitutions was fully resolved in AFSCME *Council 18 v. State, State Personnel Board, SPB Director Perez, et al.*, 2013-NMCA-106. *Id.*; *see also* DIGEST.

Also resolved were the absolute duty of the State to bargain in good faith (*see, e.g.*, *CWA v. State*, 2019-NMCA-031 (Feb. 21, 2019) and *AFSCME Council 18 v. HSD*, No. D-101-CV-2012-02176 (Jun. 14, 2013; in re: 59-PELRB-2012, Case No. 151-11)); the absolute prohibition on disparate treatment in terms and conditions of employment because of union involvement or activities (*see, e.g.*, *Corrections Dep't v. AFSCME Council 18*, 2018-NMCA-007 (in re: D-101-CV-2009-3457, 11-PELRB-2009, Case No. 105-09), *cert. den.* No. S-1-SC-36688 (regarding use of a state vehicle to attend labor-management meetings); rights of incumbent labor organizations (*Deming Public Schools v. NEA-Deming and N.M. PELRB*, D-202-CV-2017-06276 (Feb. 21, 2019) (Consolidated with D-202-CV-2018-05580) (In re: PELRB 304-17 and 305-17, 9-PELRB-2017); requirements for a severance petition (*N.M. Coalition of Public Safety Officers Ass'n. v. City of Rio Rancho,* D-202-CV-2018-01350 (Sep. 7, 2018) (In re: PELRB 307-17, 2-PELRB-2018)); and requirements for a clarification petition (*AFSCME Council 18 v. Human Resources Services Dep't and N.M. PELRB,* Case No. D-202-CV-2016-07671 (Jul. 19, 2017; in re: 23-PELRB-2016, Case No. 309-15)).

Questions concerning the PELRB's authority and responsibilities were also resolved, such as the standard of review (*State v. ASCME Council 18 and CWA*, 2012-NMCA-114); the imperative obligation of labor boards to develop an adequate record (*Northern N.M. Fed'n of Educ. Employees v. Northern N.M. College Labor Mgmt. Relations Board*, 2016-NMCA-036); and the Board's authority to issue injunctive relief (*City of Rio Rancho v. AFSCME*, D-202-CV-2019-1398 (Oct. 28, 2019; in re: 1-PELRB-2019, Case No. 113-18))

Some issues have been raised and/or resolved in part; but uncertainty remains. On example is the meaning of "regular employee" under the PELBA's definition of "public employee". *See* DIGEST; *see also CWA and Dep't of Cultural Affairs (DCA) and State Personnel Office (SPO)*, 15-PELRB-2026 (May 12, 2025; in re: Case No. 130-25) (pending appeal at D-202-CV-2026-05466 (regarding the application of § 4(Q)'s "regular employee" to temporary employees, and whether an "EXOT" position was a bona fide temporary position) "; 31-PELRB-2026 (8-12-26; same case) (ordering the H.E. to conduct a hearing on the issue of "make-whole" relief ordered), pending appeal at D-202-CV-2026-07473; and *UNM-SRMC v. United Health Professionals of N.M.*, D-202-CV-2023-09660 (Nov. 1, 2024; in re: 59-PELRB-2023 and 26-PELRB-2023, Case No. 304-22) (pending further appeal in Ct. App. Docket No. A-1CA-42271) (PRN" or "as needed" nurses are not "regular employees" under PEBA).

Another significant issue pending on appeal is the extent to which an exclusive bargaining representative can, under the PEBA, contract with an employer to limit the representative's rights under the PEBA to information. *See CWA v. Workers' Compensation Administration (WCA)*, 26-PELRB-2026 (Jul. 14, 2026; in re: Case 115-25) (concluding the CBA's IPRA- and policy-based restriction of access to information did not trump the union's right to information under the PEBA), appeal pending at D-202-CV-2026-07473; *see also* 25-PELRB-2025 (May 15, 2026) (the Board amended and clarified its prior decision, upon reversal and remand from the district court), appeal pending atD-202-CV-2025-09870 (May 15, 2026).

**PEBA II Board Members and Staff**

The very first Board under PEBA II was comprised of Edmund "Joe" Lang, Esq., Chair and management nominee; Linda Vanzi, Esq., Vice Chair and labor nominee; and Lew Harris, Esq., formerly of the NLRB, as the neutral nominee. Vice-Chair Vanzi withdrew from the Board early in her term and was appointed as a District Court Judge[44]; she was succeeded by Pilar Vaile, Esq. (subsequently the Deputy Director and now the Exec. Director). Shortly thereafter, Member Harris was succeeded by Duff Westbrook, Esq., who would go on to be the longest serving Board Member (2005-2019), and the longest serving Chair (2010-2019). In 2005, Chair Lang passed away[45] and his position was filled by Martin Dominguez, Labor/Employment Relations Director of Los Alamos National Laboratory, and a former Member under PEBA I. That same year, Ms. Vaile was replaced by John Boyd, Esq., after she took the position of PELRB Deputy Director.

As of March 2026, the present Board is comprised of Chair Nan Nash (Hon.-Ret.), Vice-Chair Peggy Nelson (Hon.-Ret.), and Member Mark Myers. This is the longest serving Board to date and continues the PELRB tradition of being well-constituted by dedicated and competent Members: Chair Myers is a long-standing public servant coming from the public safety and corrections sectors and Members Nash and Nelson are retired State District Court Judges. A list of all past and present PEBA II Board Members, with years of service, is provided below. *See also* https://www.pelrb.nm.gov/meet-the-board/, for current Board membership and criteria for service.

Juan Montoya, Esq. was hired as the first Executive Director under PEBA II in October of 2003, and he served faithfully until his retirement on July 1, 2010.[46] He was aided at the time by the first Deputy Director, Judy DeAtley; and also by Bernadette Carian, who would serve as the Administrative Assistant to the PELRB until about 2012. Having the third full time employee in those days made it possible for the PELRB to develop summaries of all substantive Board and court decisions (posted in those days in a separate Word document), and the first PEBA Digest and Practice Manual.[47] Also significant was the service of Ms. Carian. Deeply appreciated by all staff and parties for her entire tenure with the PELRB, she was especially critical to the Agency during its early formation, and during the 2010-2012 period between Directors Montoya and Griego.

As former Director Montoya observed, in those early days, "[t]he Board didn't have office space, a communication system or a filing system; it's only connection to the world, including the state

[44] Vice-Chair Vanzi later advanced to the Court of Appeals and served as Chief Judge there before her eventual retirement in 2020.

[45] Chair Lang served in the Senate in the 1970s, and on the Bernalillo County Commission in the 1990s. He was a fixture in New Mexico politics, a successful lobbyist, and devoted to many good public causes including the PELRB. "An estimated 1,200 mourners, including a who's who list of New Mexico politicians, turned out" for his funeral services and he is still missed by many all these years later. *See* https://www.hhsalbuqclass64s50th.com/class_profile.cfm?member_id=6177961 (last accessed 9/10/26).

[46] Since his retirement, Director Montoya has served on the Albuquerque and Albuquerque Public School Labor Boards. *See* Appendix C – Local Board Information.

[47] The documents were first created by then-Deputy Vaile, and following editions retained the basic form and/or content over the years.

government, was a cell phone." After leasing office space, acquiring telecommunication equipment, and ordering furniture from NM Prison Industries in Los Lunas, "[t]he Board was operational and began hearing" cases. During the early years, a large number of employees of the State or its political subdivisions were successfully organized or reorganized, and their exclusive bargaining representatives certified. For instance, one 2003 AFSCME certification involved bargaining units at 15 different State agencies and covered nearly 7,000 State employees. *See* State/AFSCME Certification dated 8/7/03. Also, early PPCs frequently raised jurisdictional issues such as whether New Mexico Judicial Branch employees were covered (they are not)[48], or whether the employer under a grandfathered labor board could unilaterally select an interim neutral board member, in addition to selecting the management member (it was ultimately determined they can).[49]

Director Montoya observed about his years at the PELRB that some groups representing public employers harbored suspicion of the PELRB after its sunset and revival. For instance, one employer-side organization passed a resolution early in the life of the Board under PEBA II that negatively described the PELRB as being "pro-Union". Director Montoya countered this at the time and still does today by observing that "[i]n fact, the Board was always pro-collective bargaining, which is the reason for the PEBA's and the PELRB's creation in the first place." [43]

In June of 2012, after another short-lived out-of-state Director[50], Thomas Griego, Esq. was appointed as Executive Director, and he served faithfully until his retirement effective December 31, 2024. Like former-Director Montoya, former-Director Griego was aided by competent and long-serving assistants. Dir. Griego had multiple competent assistants who served ably for several years at a time, but one stands out for his longevity and the level of competence and knowledge that he brings: Legal Assistant II, and now Alternate Hearing Examiner, Matthew Huchmala.

Mr. Huchmala is legally trained, has worked as a licensed lawyer for several years in California, and is trained and experienced in mediation. He has been with the PELRB since 2016 and has provided particularly essential services during COVID-19, and again during the 2024/2025 transition in directorship. Since coming aboard in January 2025, the current Executive Director (Pilar Vaile, former Vice Chair and Deputy Director) has assigned him additional responsibilities as Alternate Hearing Examiner, and in Fiscal Year 2026, he began a course of study with the National Judicial College, through their Judicial Skills Development Certificate Programs in Administrative Law and ADR.[51]

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[48] *Chama-Ortega and Second Judicial Court*, D-202-CV-2004-07883 (Apr. 10, 2006; J. Kase, of Sixth Judic. Dist.).

[49] *City of Albuquerque v. Montoya*, 2012-NMSC-007 (reversing court of appeals in 2010-NMCA-100, which reversed the district court, which reversed the PELRB).

[50] Pam Gentry, if memory serves correctly, was a labor relations professional from California, and she served for one year, more or less.

[51] It is hoped that the PELRB will, over time, have sufficient budget for H.E. Huchmala to attain his Administrative Law Adjudication Skills Certificate through the NJC, as did Directors Montoya and Vaile before him. So far, has attended NJC's foundational two-week, in-person "Administrative Law: Fair Hearing" course; the six-week, online "Evidence for ALJs" course; the 40-hour, online "Civil Mediation" course; the week-long, in-person course on "Decision Making"; and the six-week online course, "Ethics and Judging: Reaching Higher Ground". (Records show that Director Griego attended many NJC courses also,

During the tenures of Director Griego and Legal Asst. Huchmala, significant amendments were made to PEBA II that tended to further strengthen the rights of public employees to engage in collective bargaining effectively. Effective July 1, 2020, the New Mexico Legislature amended PEBA II in numerous respects, as discussed further below. Another major trend during Director Griego's tenure was the 2023 clarification of the various State bargaining units that were first certified in 2003 and 2004, often on a "wall-to-wall" basis; and the general trend away from "wall-to-wall" or vague unit descriptions moving forward.

All in all, Director Griego oversaw the PELRB during times of great change, while also solidifying and standardizing its internal and external practices. He was unable to provide a personal reflection when solicited for the 2024 Annual Report due to other time commitments, but his presentations and communications reflect tremendous and well-deserved pride in the PELB; in staff efforts to systematize internal case handling procedures; in PELRB's strong record of timely processing matters with minimal reversals on appeal; and in making service on the Board sufficiently organized and desirable that it has retained longstanding, well-credentialed and highly experienced Board Members. Director Griego's tenure is also notable for digitizing and publishing relevant case law and Annual Reports on the website, to ensure timely access to these materials and compliance with NMAC 11.21.1.30. He will also long be remembered fondly.

Since coming on in January 2025, the new Executive Director (Pilar Vaile) has continued Director Griego's work of modernizing and updating the PELRB website and updating the decisional law and collective bargaining information available there. Director Vaile has built upon Director's prior work by digesting and summarizing prior case law along with maintaining ongoing posting; updating the Digest and Practice Manual; and collecting and posting collective bargaining information for the benefit of our clients and pursuant to 11.21.1.30 NMAC. She also updated our video hearing technology; and assisted in obtaining a temporary and then permanent injunction against an Executive Order of March 14, 2025, that would have gutted the Federal Mediation and Conciliation Service (FMCS), on whose services training, mediation and arbitrator selection/appointment services many of our clients/users depend. (In particular, use of FMCS arbitrator selection procedures is written in to the State CBAs and most if not all other public employers' CBAs.) We have also added a PELRB ChatBot, which we hope will further benefit our constituents. (If not, the service may be discontinued in future years, as the IT contract to maintain it, at $5,000/year currently, is a big-ticket item for the PELRB.)[52]

**2020 Amendments**

As noted, the PEBA was significantly amended effective July 1, 2020. In summary, the 2020

but not if or whether he attained the certificate.)

[52] We also did the considerable background work needed (development of comprehensive "workflows" trees), to obtain a proposal for a bespoke case management system that could calendar all operating (budget and audit) and case related deadlines; as well as track, sort and collate the various types of data needed each year for producing our Annual Report, reporting on our performance measures, and generating our next budget proposal. The latter would include things like number and type of cases filed; types of work places; ultimate disposition; time lapsed between filing and ultimate resolution. Ultimately, the proposal was way out of line with our budget, at $45,000-$50,000 to set up, and thereafter $7,000 to operate; while our budget requests today must focus on raising pay for the two FTE Staff.

amendments to the Act effected minor changes to the "Conflicts" section, § 3 substituting the word "rules" in place of "regulations" and striking the legal citation to the Personnel Act, "Sections 10-7-1 through 10-7- 19 NMSA 1978" in the listed laws that are not superseded by PEBA.

Additionally, the definitions section, § 4 changed masculine pronouns used in the Act to gender neutral language; deleted a citation to "Section 7 of the…Act" from the definition of "appropriate governing body"; deleted the definition of "fair share" as obsolete after the U.S. Supreme Court's decision in *Janus v. AFSCME, 585 U.S. 878* (2018). Also modified was the definition of a "local labor board", in light of changes to Section 9 and 10 discussed below. Further modified was the definitions of "management employee", to exclude those "whose fiscal responsibilities are routine, incidental or clerical" and "public employee" to clarify that it includes those whose work is funded in whole or in part by grants.

Section 5 was amended to add Subsection B concerning "concerted activities" to the protected rights of public employees, making express the Board's longstanding recognition of concerted activities as a protected category under § 5 of the Act before the 2020 amendment. *See* Secs. I.B and III.C, *supra*; and DIGEST.

Section 9 greatly clarified and/or augmented the administrative remedies available to the PELRB, including "imposition of appropriate administrative remedies, actual damages related to dues, back pay including benefits, reinstatement with the same seniority status that the employee would have had but for the violation, declaratory or injunctive relief or provisional remedies, including temporary restraining orders or preliminary injunctions. No punitive damages or attorney fees may be awarded by the board or local board." *See* § 9(F).

Section 14 was amended to permit a presumptive right to demonstrate majority support by card count, even over the employer's objection. *See* § 14(C); Sec. IV.B.3, Basic Petition, Demonstration of Majority Support, *supra*; and DIGEST; *see also* Appendix D, Election Procedures, *infra*.

Section 15 was amended to augment and clarify the exclusive representative's rights information and access to employees at the worksite. *See* § 15(C) – (I).

Section 17(D) was amended to require public employees who have authorized the payroll deduction of dues to a labor organization and wish to cease paying dues to provide written notice to their labor organization during a window period not to exceed ten days per year for each employee.

Perhaps the most significant change affected by the 2020 amendments appears in §§ 9 and 10, concerning local boards. The amendments materially altered §§ 9 and 10 so that now new local boards may be created and local boards may continue to exist only under certain circumstances, including maintenance of PELRB-approved rules and the appointment all three members, and biennial certification of such. *See* §§ 10(D) and 10(J).

Local boards that failed to timely submit the affirmation ceases to exist by operation of law as of January 1 of the next even-numbered year. *See* § 10(E). A local board may also cease to exist if:

- at any time after July 1, 2020, a local board has a membership vacancy exceeding sixty days in length (*see* §10(F)); or
- upon repeal of the local ordinance, resolution or charter amendment authorizing continuation of the local board; or a vote of a local board, which vote is filed with the PELRB (*see* §10(G)).

Once a local board ceases to exist for any reason, it may not be revived. *See* § 10(H). Section 10(I) further provides that and all matters pending before such local board shall be transferred to the PELRB for resolution. Some local boards were disbanded immediately and within the first biennial reporting year of the amendment (2021), many Local Boards were disbanded. In 2021 the number of Local Boards fell from 37 to only 15, as many Local Boards opted not to continue operations; and the number of Local Boards has continued to decline since then. In 2023, that number fell to eight (8), and now there are only three remaining (Albuquerque, APS, and Silver City). *See* Appendix C, *supra*, Local Board Information.

## PEBA II Board Members By Appointment Dates

Edmund "Joe" Lang, 2003-2005 (Chair)
Linda Vanzi, 2003 (now the Hon. (Ret.) Vanzi)
Lew Harris, 2004
Pilar Vaile, 2004-2005 (Vice-Chair)
Duff Westbrook, 2005-2019 (Chair 2010-2019)
Martin Dominguez, 2005-2009 (Chair)[53]
John Boyd, 2005-2010
Wayne Bingham, 2010-2013
Roger E. "Bart" Bartosiewicz, 2011-2019
James Shaffer, pre-2013-2016 Jay Bledsoe, 2016-2019
Maryanne Bowers, 2020-2023
The Hon. (Ret.) Nan Nash, 2020-PRESENT – CURRENT CHAIR[54]
The Hon. (Ret.) Peggy Nelson, 2023-PRESENT – CURRENT VICE-CHAIR
Mark Myers, 2020-PRESENT – CURRENT MEMBER

## Statement of Former Director Patrick Halter[55]
## PEBA I – July 12, 1993 - June 30, 1999

The Members of the PELRB appointed me as the Board's second Director on July 12, 1993. I followed the first Director, Walter Daugherty; Walter returned to Los Angeles after setting up the office. Members at the time of my appointment were Bill Giron, Chair; Jim Ellis, Labor; and Jim Keaton, Management. Allen Ferguson, Assistant Attorney General, served as the Board's legal

[53] Chair Dominguez was also notable for serving on the Board under PEBA I, from 1995 to 1996.

[54] Pursuant to NMAC 11.21.1.33 (Am. 2/11/20), the Chair and Vice-Chair functions now rotate annually among the three Members, changing every September.

[55] Former Directors Halter and Montoya provided these statements upon request of the new Director, which were quoted or cited here and in the 2024 and 2025 Annual Reports.

advisor. Allen and I previously worked together at the Office of the General Counsel, Federal Labor Relations Authority, Washington, D.C. I had crossed paths with Jim Keaton over the years when he was an executive at General Motors in Detroit. I did not know Jim Ellis, retired to New Mexico from Boston, or Bill Giron. As I quickly learned, appreciated and leaned on, Bill Giron was a respected presence in any administration regardless of the incumbent party.

PEBA, Act I, focused on connecting with the state's infrastructure - - mainly Department of Finance Administration. My experience with DFA is readily summed up in this manner. The Board's budget passed by the legislature during my first year was $263,000 and pennies. When I discussed it with DFA, I was informed only $247,000 would be allowed by them for the Board's operations. I mentioned this to Chair Giron and he wryly responded welcome to the world of DFA and move on. I followed his advice.

The Board emphasized processing the fifty-five applications for local boards; each application was accompanied by the filing of an prohibited practice complaint. The applications and complaints, despite the numbers, were practically identical. Although local boards were approved by the Board, they did not exist in reality. They were the product of a cottage industry of consultants spreading misinformation about the state law and radical dictates from the Board with me as the principal focus of local officials angst and vitriol. I recall a city attorney contacting me, exasperated over the local board and why I was initiating it. I explained my office had nothing to do initiating a local board application and talk to the city's consultant. Local boards represented a mechanism to blunt PEBA I until it expired on June 30, 1999. Governor Johnson obliged and vetoed the re-authorization legislation and the legislature did not override the veto. During the last budget cycle for the Board, the Governor prepared me for the sunset. I waws called to his office and handed a copy of the Board's budget marked zero in every line item.

On June 30, 1999, at 5:03 p.m. I turned off the lights at the office and returned the office keys to the onsite property manager. At that moment I believed I was functus officio but, surprise, I received a call from the Governor's office in August 1999 inquiring why our telephone had been disconnected. By that time I had followed Chair Giron's advice from 1993 and moved on.

## Statement of Former Director Juan Montoya, Esq.
## PEBA II – October 2003 through June 2010

The Public Employee Bargaining Act II was created by the Legislature and signed into law by Governor Bill Richardson in 2023. The Act created the Public Employee Labor Relations Board. Staff was hired in October 2003.

Staff consisted of a director, Juan Montoya, a deputy director, Judy DeAtley and as administrative assistant, Bernedette Carian. The Board didn't have office space, a communication system or a filing system; its only connection to the world, including the State government, was a cell phone.

Office space was obtained, a communication system went into place and furniture was purchased from the New Mexico Prison Industries in Los Lunas. The Board was operational and began hearing Prohibited Practice Complaints, Local Labor Board Approvals and Petitions for Representation.

At one point an organization of public employers passed a resolution stating that the state board was pro-union. In fact the board was always pro-collective bargaining, which is the reason for the PEBA's and the PELRB's creation in the first place.

The Board heard l00's of prohibited practice complaints, dozens of local labor board approvals and dozens of petitions for representation. These cases involved state agencies, counties, cities and other public authorities.

The only change in staff from October of 2023 through July of 2010 was that Judy DeAtley left the agency and Pilar Vaile was hired as the deputy director. The executive director, Juan Montoya, retired on July 1, 2010.

**APPENDIX B**

**Summary of PELRB Timelines**

NOTE: THIS APPENDIX IS INTENDED ONLY AS A HELPFUL AID AND ITS ACCURACY IS NOT WARRANTED – PLEASE CONSULT THE ACTUAL RULES TO CONIRM ANY DEADLINES

## I. General Rules Affecting Timelines

- Rule 1.8 – Computation: the computation of any deadline to take action begins the day after the given event being responded to, and it **excludes weekends and state holidays unless otherwise stated**. As such, all time is calculated in terms of ***business days*** unless the statute or rules indicate otherwise (such as by reference to calendar months, in Rule 1.29; or by reference to calendar days for run-off elections, in § 14D and Rule 2.32).

- Rule 1.9 – Extensions of Time: an extension of time for filing any required or permissive pleading **may be granted for good cause, if** the request for extension is **filed three business days before** the deadline.

- Rule 1.15 – Record of Proceedings: all meetings and hearings "shall be audio-recorded" if not transcribed upon the order of the Board, and the recordings "shall" be maintained for **one year** after either the close of the case or the close of the last judicial or board proceedings, whichever is later…"

- Rule 1.16(C) – Notice of Hearing:
  (A) a **status and scheduling conference "shall" be set in every case** not settled before then, to identify the issues and set a schedule for any discovery or motion practice, and to set the date of the hearing on the merits.
  (C) **a 20-day extension of time for conducting hearings may be granted for good cause** if **requested five (5) business days before** commencement; **and more time may be granted in "extraordinary circumstances.**
- Rule 1.23 – Motions and Responses to Motions: any party can file a motion and if they do the other party shall have **ten (10) business days** to file a response, unless a different deadline has been established by scheduling order.

- Rule 1.29 – Closing of Cases: the Executive Director or their designee may dismiss cases if there has been no activity in the last **six (6) months**, and that dismissal is not subject to Board review.

- Rule 1.31 – Time Limits for Board Actions: any time periods stated in the Rules by which the Director, a hearing examiner, or the Board must take action "may, **for good cause**" be "extended[ed] for a reasonable time, **not to exceed 20 workdays for each extension**…."

## II. Representation Petition Rules Affecting Timelines

- Rule 2.12(A) – Information Requested of Parties: within **ten (10) business days** of receipt of a representation petition, the Director or her designee shall request the position of any known, interested party.

- Rule 2.13(A) – Initial Investigation of Petition: within **thirty (30) business days**, the Director or her designee shall complete the investigation and determine facial validity, as well as if there are "significant issues of unit scope, unit inclusion or exclusion, labor organization or public employer status, bar to processing, or other matters that could affect processing". The petition "shall" be dismissed if not supported by an adequate (30%) showing of interest, and this dismissal is also not subject to Board review.

- Rule 2.15 – Notice of Filing of Petition: within **thirty (30) business days** of the petition's filing, the Director or her designee shall also determine if a hearing is needed and, if so, issue a Notice of Filing, which must be **posted** at the work site for **at least five (5) business days**.

- Rule 2.16 – Intervention: within ten **(10) business days** after the employer's posting of the notice of filing, any interested, non-grandfathered union may file a petition to intervene; and they shall be placed on the ballot and considered a party to the proceedings if they present a 30% showing of interest along with their petition. (Note, "[a]n incumbent labor organization shall have automatic intervenor status if it is not the petitioner…")

- Rule 2.18(A) – Investigation, Report, Notice of Hearing: The Director or her designee will take of one of three potential actions within **forty-five (45) business days** of posting of the Notice, if the parties are not proceeding by the consent election process (see Rule 2.17): (a) serve a report with a direction of election, (a) serve a report with a dismissal of the petition, OR (c) notice the matter for further hearing.

    - In the latter case, the hearing shall be set for no later than **thirty (30) business days** following the Notice of Hearing OR 30 days following PELRB "notice of the dispute, whichever is sooner".

- Rule 2.20 – Briefs: Parties may file post-hearing briefs within **ten (10) business days** of close of the hearing.

- Rule 2.21 – Hearing Examiner Reports: Reports shall be issued within **fifteen (15) business days** of the close of the record (including receipt of any post-hearing briefs).

- Rule 2.22 – Board Review of Reports:
  (A) Parties can request Board review of any Director or hearing examiner report or decision within **ten (10) business days** of the Report's issuance.

  (B) Rule 2.22(B) – within **ten (10) business days** after service of a request for Board review, the opposing party may filed a response.

- Rule 2.24(C) – Eligibility to Vote: at least **ten (10) business days** before the start of the election (or card count), the employer shall provide a list of all employees who are eligible to vote.

- Rule 2.25 – Pre-Election Conference:[56] A pre-election conference shall be held at least **fifteen (15) business days before the election, with at least five (5) business days' notice**.

- Rule 2.26 – Notice of Election: A Notice of Election shall be issued by the PELRB and shall be posted by the employer at least **ten (10) business days** before the election.

- Rule 2.30(E) – Challenged Ballots: if there are any challenges to voter eligibility, the PELRB shall try to resolve them "following the voting and before the votes are counted". If the challenges are not resolved, and the vote could be determinative, the PELRB shall investigate the challenges "as soon as possible…and shall issue a report thereon or a notice of hearing within **15 [business] days** of the election."

- Rule 2.32 – Run-Off Elections: Run-off elections "must be conducted within **the 15-day statutory period** following completion of the initial election". As such, it must be conducted within 15 calendar days, rather than within 15 business days. *See* §14(D).

- Rule 2.35 – Amendment of Certification: Such a petition "shall" be dismissed within **thirty (30) business days** "if…it raises a question concerning representation". After notice to relevant parties, an amended certification shall be issued within **thirty (30) business days** of the filing, if the amendment is determined to be appropriate.

- Rule 2.37(C) – Unit Clarification: If no question concerning representation (QCR) exists the hearing examiner "shall issue a report clarifying the unit within **30 days of the filing** of the petition if no hearing is determined necessary, **or** within 30 days **of the hearing** if a hearing is determined necessary…."

- Rule 2.39(C) – Voluntary Recognition: If no petition for intervention is filed within **10 business days** of notice of filing, "then the board shall consider the petition for approval of the voluntary recognition if accompanied by consent of the employer."

- Rule 2.41 – Severance Petition: A severance petition "may be filed **no earlier than 90 days and no later than 60 days before the expiration date of a collective bargaining agreement** or may be filed at any time after the expiration of the third year of a collective bargaining agreement with a term of more than three years."[57]

[56] Note, Representation Petitions are certified by card check today, unless there is an Intervenor or it is a Decertification Petition. *See* NMAC 11.21.3

[57] As with the rule related to run-off elections, the business day computation of Rule 1.8 should not be applied to the Rule 3.41is timeframe, because it tracks the window established for decertification petitions, which is stated without reference to business days. *See* § 16(B).

## III. PPC Rules Affecting Timelines

- Rule 3.9 – Limitations Period: A PPC must be filed within **6 months** of the challenged act/omission, or reasonable discovery thereof.[58]

- Rule 3.10 – Filing of Answer: **15 business days** after service of the PPC.

- Rule 3.12(A) – Screening/Investigation: a Complainant shall have **five business days** to cure any defect identified by the Director or her designee or withdraw the PPC, or it shall be dismissed.

- Rule 3.13(A) and (B) – Appeal to the Board of Director's Dismissal: a complainant can file a notice of appeal on dismissals within **10 business days**, after which time any party may file a response thereto within **10 business days**.

- Rule 3.14 – Notice of Hearing: If there is sufficient evidence to proceed, the Director "shall dismiss the complaint or set a hearing" within **30 business days** of the filing and "[a] hearing shall be scheduled within" **45 business days** of the filing.

- Rule 3.17 – Briefs: PPC post-hearing briefs are handled the same as under Rule 2.20 and shall be filed within **10 business days** of the close of the record.

- Rule 3.18 – Hearing Examiner Reports: For PPCs, hearing examiner reports shall be issued "within the same time limits and following the same requirements provided in 11.21.2.21", i.e., within **15 business days** of the close of the record.

- Rule 3.19 – Appeal to the Board of Hearing Examiner's Recommendation: "any party aggrieved" can file a notice of appeal within **10 business days**, after which time any party may file a response thereto within **10 business days**. The Board shall issue its decision within **60 days of the notice of appeal**.

- Rule 3.20 – Relief from…Determination: "[a] party may move to set aside a default determination within **30 days**." If the motion is supported by good cause, the Board or Director "shall order further proceedings as it deems appropriate" within **30 days** or it will constitute a denial of the motion.[59]

- Rule 3.22(D) and (E) – Arbitration Deferral: a PPC may be dismissed **one year** after arbitration deferral if no arbitrator award has yet issued by then; and that dismissal can be appealed pursuant to the terms/conditions of Rule 3.13 (e.g., a notice of appeal is to be filed within **10 business days** and any Response is to be filed **10 business days thereafter**).

[58] This deadline is specifically tied to months, so Rule 1.8 and business day computation would not apply.

[59] Staff observes that 30 calendar days is the more typical timeframe for filing motions to set aside default determinations.

## APPENDIX C

## LOCAL BOARDS

Local boards such as exist and existed in New Mexico are relatively rarer in the U.S., and their existence in New Mexico largely related to New Mexico's unique history in the evolution of public bargaining. *See* Appendix A, History, *supra*.

When PEBA II was enacted, it was one of seven among 30+[60]states authorizing statewide public employee collective bargaining under the supervision of a state board. However, prior PELRB research indicates Oregon was the only state other than New Mexico to provide for continued operation of grandfathered local labor boards, and it expressly disallows conflict with state public bargaining law. *See* Oregon Revised Statutes §243.772.

Local boards were, for a long time, a fractious and litigated issue before the PELRB. *See* Appendix A, History, *supra*. During PEBA I approximately, 55 local board applications were processed and presumably approved, but most of the local boards existed "on paper only". *See* Appendix A, Halter statement, *supra*.[61] Additionally, as noted in Appendix A, all or most of the appeals under PEBA I involved local boards. *Id.*; see also DIGEST. The experience was similar under PEBA II, at least in the early years.

The following is a list of §10 local board ordinances, resolutions or charters approved by the PELRB under PEBA II:

1. Alamogordo Labor Management Relations Board
2. Alamogordo Public Schools Labor Management Relations Board
3. Albuquerque-Bernalillo County Water Utility Authority Labor Management Relations Board
4. Albuquerque Labor Management Relations Board
5. Albuquerque Public Schools Board of Education
6. Artesia Labor Management Relations Board
7. Aztec Municipal School District Labor Management Relations Board
8. Belen Consolidated School District Labor Management Relations Board
9. Bernalillo County Labor Relations Board
10. Carlsbad Municipal Schools
11. Chama Valley Indep. School District Labor Management Relations Board
12. Chavez County Labor Management Relations Board
13. City of Belen Labor Management Relations Board
14. Clovis Labor Management Relations Board
15. Clovis Municipal Schools Labor Management Relations Board
16. CCNM (TVI) Labor Management Relations Board

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[60] This number has changed over time as public bargaining has been instituted, repealed or lapsed. PELRB records indicate there were approximately 33 such states in 2009, and now there are approximately 36 such states now. *See* ALRA Agencies | Association of Labor Relations Agencies - ALRA, Agency Directory.

[61] Besides the Board orders and a small number of hearing examiner decisions, the PELRB under PEBA II does not maintain files from PEBA I . Practitioners are referred to the State Archives for those records.

17. Cuba Independent Schools Labor Management Relations Board
18. Curry County Labor Management Relations Board
19. Deming Labor Management Relations Board
20. Dona Ana County Labor Management Relations Board
21. Dulce Independent Schools
22. Eddy County Labor Management Relations Board
23. Espanola Municipal School District Labor Management Relations Board
24. Farmington Labor Management Relations Board
25. Gadsden Indep. Schools Labor Management Relations Board
26. Gallup Labor Management Relations Board
27. Grants Labor Management Relations Board
28. Hidalgo County Labor Management Relations Board
29. Hobbs Labor Management Relations Board
30. Lake Arthur Municipal School District Labor Management Relations Board
31. Las Cruces Labor Management Relations Board
32. Las Vegas Labor Management Relations Board
33. Lea County Labor Management Relations Board
34. Lincoln County Labor Management Relations Board
35. Los Alamos County Labor Management Relations Board
36. Los Lunas Labor Management Relations Board
37. Los Lunas Public Schools Labor Management Relations Board
38. Loving Schools Labor Management Relations Board
39. Luna County Labor Management Relations Board
40. McKinley County Labor Management Relations Board
41. NM Highlands University Labor Management Relations Board
42. NM State University (NMSU) Labor Management Relations Board
43. Northern NM College Labor Management Relations Board
44. Otero County Labor Management Relations Board
45. Portales Labor Management Relations Board
46. Raton Labor Management Relations Board
47. Rio Rancho Public Schools Labor Management Relations Board
48. Roosevelt County
49. Roswell Labor Management Relations Board
50. Ruidoso Municipal School District Labor Management Relations Board
51. San Juan College Labor Management Relations Board
52. Santa Fe Community College Labor Management Relations Board
53. Sierra County Labor Management Relations Board
54. Silver City Labor Management Relations Board
55. Socorro Labor Management Relations Board
56. Socorro Schools Labor Management Relations Board
57. Taos Labor Management Relations Board
58. Tucumcari Labor Management Relations Board
59. University of New Mexico Labor Management Relations Board
60. Western NM University Labor Management Relations Board
61. Zuni Schools Labor Management Relations Board

As under PEBA I, many of these had nearly identical applications. Additionally, only 23 of these PELRB approved local boards were confirmed in 2020 as having appointed all three board members, having met to conduct business and having approved procedural rules necessary to be considered a fully functioning board. Many PPCs and appeals, therefore, addressed this serious issue.

Additionally, by the time of the 2020 amendments there were approximately six (6)[62] local boards operating under § 26(A), and four (4) operating under § 26(B) Boards.[63]

§26(A) Local Boards:

1. City of Alamogordo
2. City of Albuquerque
3. Albuquerque Public Schools
4. County of Bernalillo
5. City of Farmington
6. City of Raton

§26(B) Local Boards:

1. Las Cruces
2. Las Vegas
3. Deming
4. Silver City

Although the grandfathered boards generally were more likely than 10 boards to be functional and operating, at least on an as-needed basis, issues persisted with them as well.

For instance, between September 28, 2010 and June 15, 2011, four bargaining units representing City employees filed nine PPCs with the PELRB because at that time the City's labor board had not been operating for a period of time, creating a backlog of unheard cases. Ultimately, the cases were consolidated; it was determined that despite its prior inability to function, the City Labor Board was "fully functional" by the time the consolidated cases were being considered by the PELRB; and the matters were dismissed. *See American Federation of State, County and Municipal Employees, Local 1888 v. City of Albuquerque*, Case No. D-202-CV-2012-02239 (affirming that the matter should be dismissed but reversing the Board as to remand because it lacked authority to remand).

Additionally, issues with grandfathered local boards persisted as to the equivalency of rights afforded under them, compared to the PEBA, which was also complicated by whether it was a § 26(A) or § 26(B) local board.[64]

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[62] Raton's had been adjudicated to have only lost its grandfathered status as to certain provisions. *See IAFF Local 2378 and City of Raton*, PELRB No. 302-11 (June 20, 2013).

[63] Although the City of Deming originally had a §26(A) grandfathered ordinance, it made substantial changes to that ordinance after January 1, 2003 and by operation of the "substantial changes" clause of §26(A) is now regarded as having an ordinance grandfathered under §26(B).

[64] In summary, § 26(A) of the former Act governed the oldest local labor boards and provided for the continued operation of local boards created by public employers other than the state prior to October 1, 1991. Section 26(B) of the former Act was directed to grandfathered boards created after October 1, 1999,

Thus, issues related to local boards or ordinances and resolutions were regularly addressed in PEBA case law under PEBA I, and for the first 16 years under PEBA II before the 2020 amendments. *See* Appendix A, *supra*, History - Director Statements; PELRB Decisional Law indexes; and DIGEST Appendix.

As early as 2007, the PELRB had expressed its preference for "consistent and uniform administration of [the PEBA] ... throughout the State of New Mexico," and implicitly opposed local board actions that might "threaten...uniformity in the proper administration of PEBA", even by grandfathered boards. *Gallup-McKinley Schools, supra,* 3-PELRB-2007 (undated); *see also* DIGEST Appendix..

Nonetheless, the PELRB generally deferred to local boards as long as they were "fully functional and operational," meaning all members of the local board had been appointed, and the local board had promulgated rules and it was meeting and conducting business. *See In the Matter of the Disqualification of Deputy Director Pilar Vaile, AFT v. Gadsden Independent School District (Gadsden)*, Case Nos. 132-05 and 309-05 (oral ruling, Minutes, PELRB Board Meeting, August 19, 2005); *see also* DIGEST Appendix.

Accordingly, during this time PELRB hearing examiners routinely remanded matters that originated with the PELRB to newly formed local boards, upon a showing that the local board was functioning and operational. *See, e.g., Las Vegas Firefighters and City of Las Vegas*, Case No. 301-08 (Feb. 18, 2008); *Zuni FUSE v. Zuni Public School District*, Case No. 152-07 (Nov. 30, 2007); *National Federation of Educational Employees v. Northern New Mexico College*, Case Nos. 136-07 and 137-07 (Oct. 19, 2007); *IAFF, Los Lunas Local and Village of Los Lunas*, Case No. 312-07 (Oct. 18, 2007); *NMCPSO-CWA Local 7911 and Doña Ana County Sheriff's Department,* Case No. 321-06 (Nov. 1, 2006); *Alamogordo Firefighters Associations, IAFF Local 4348 and City of Alamogordo and Alamogordo Public Safety Officers Associations,* Case No. 312-06 (July 13, 2006); *AFSCME v. Doña Ana County*, Case No. 128-06 (July 12, 2006); *Los Alamos Firefighters Association Local 3279 v. County of Los Alamos*, Case No. 119-05 (July 11, 2006).

However, the PELRB would exercise jurisdiction when "consistency and uniform administration" of the PEBA was allegedly threatened. For example, in the *Gallup-McKinley County School District* Case, *supra*, the local board local had promulgated a rule that violated PEBA on its face, as well as a prior PELRB ruling interpreting another provision of PEBA. *Id*. at 3; *citing In re: Petition for Recognition as Incumbent Labor Organization NEA-Alamogordo and Alamogordo Public Schools,* Case No. 303-006 (June 1, 2006). The Board reasoned that the case therefore "raise[d] serious and significant issues affecting public sector collective bargaining statewide," and "issues that are important to the consistent and uniform administration of the …. PEBA, throughout the State of New Mexico." *Id.* at 1-2; *see also* DIGEST Appendix.

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or before October 1, 1999, but substantially amended after January 1, 2003. In contrast to § 26(A), § 26(B) imposed more PEBA compliance requirements than did § 26(A). Finally, local boards created after January 1, 2003, pursuant to § 10 of the PEBA were required to follow all procedures and provisions of the PEBA with limited exceptions. The distinctions among those three distinct types of local boards regarding how closely they must comport with the PEBA have been eliminated by the 2020 amendment to the Act.

During this time, where there was a functioning board the decision to exercise jurisdiction would be strongly affected by whether the matter concerned a §10 or a §26(A) board. For instance, where a § 10 local board had taken some generally applicable action that was both in violation of PEBA and threatened the uniform interpretation and application of PEBA statewide, the Board was more likely to assume jurisdiction than it might in the face of a § 26(A) grandfathered entity, such as was involved in the City of Albuquerque cases referenced above.

With the 2020 PEBA amendments, the lingering disputes related to local boards were largely resolved. With the amendment to §§ 9 and 10, and the repeal of §§ 11 and 26, it was declared that no new local boards may be created, and all local boards and ordinances or resolutions are now § 10 PELRB-approved boards. The 2020 amendments also made it clear that – just as the PELRB is required to promulgate rules necessary to accomplish and perform its functions and duties – so too are local boards, including procedures for the designation of appropriate bargaining units, the selection, certification and decertification of exclusive representatives and the filing of, hearing on, and determination of, complaints of prohibited practices.

Moreover, the PELRB is now empowered and required to review rules promulgated by a local board to ensure that such rules conform with the PEBA, and that any deviation from PELRB administrative rules is warranted by the particular circumstances of the local employer. Every local board shall notify the PELRB of any revisions of its rules or changes in its membership within thirty days of any such revisions. The Board in turn is to maintain current posting of that information. *See* § 10(C); *see also* Local Labor Boards - Public Employee Labor Relations Board.

Perhaps the most significant change effected by the 2020 amendments appears in § 10 concerning conditions placed on local labor boards' continued existence, the prohibition of new labor boards being created and the transfer of authority upon termination of local boards. Local boards existing as of July 1, 2021, ceased to exist unless by December 31, 2021, they had submitted to the PELRB an affirmation that the public employer subject to the local board has affirmatively elected to continue to operate under the local board and each labor organization representing employees of the public employer subject to the local board submits written notice to the Board that it also elects to continue to operate under the local board. *See* § 10(D).

A local board that fails to timely submit the affirmation shall cease to exist as of January 1 of the next even-numbered year. *See* § 10(E). A local board may also cease to exist if:

1. At any time after July 1, 2020, a local board has a membership vacancy exceeding sixty days in length (§10(F)).

2. Upon repeal of the local ordinance, resolution or charter amendment authorizing continuation of the local board; or a vote of a local board, which vote is filed with the PELRB (§10(G).

Once a local board ceases to exist for any reason, it may not be revived. *See* § 10(H). Section 10(I) provides that all matters pending before such local board shall be transferred to the PELRB for resolution and a prohibition against creating any new local boards after June 30, 2020, appears in § 10(J).

Effective July 1, 2020, no new local labor boards may be created as was previously permitted under PEBA II. However, local boards existing as of July 1, 2021, may continue operating after December 31, 2021, if they have submitted to the PELRB an affirmation that the public employer has elected to continue operating under the local board and each labor organization representing its employees has submitted written notice to the PELRB that it also elects to continue to operate under the local board. A local board that fails to timely submit the affirmation shall cease to exist. *See* § 10(E).

In 2020, the PELRB also amended Part 5 of its rules to provide procedures to effectuate the amendments. *See* 11.21.5 NMAC.

As of January 1, 2026, three (3) local boards now remain:[65]

1. *City of Albuquerque* **-** The City of Albuquerque's Labor Management Relations Board is comprised of the Hon. (Ret.) Ted Baca, Chair, and Members Juan Montoya and Bruce Perlman. They meet twice a month and average about 30 cases a year, 75% of which are estimated to settle without a hearing on the merits (*see* https://www.cabq.gov/clerk/administrative-hearings/labor-management-relations-board).

2. *Albuquerque Public Schools* **-** The APS Labor Management Relations Board is comprised of the Hon. (Ret.) Ted Baca, Chair, and Members Juan Montoya and Sandra Jo Sloan. Their case load is reportedly far smaller than that of the City of Albuquerque.

3. *Town of Silver City* **-** The most recent Board members currently listed on their website are: A.J. Tow, Tony Garcia, and Eddie Mendoza.

*See* Local Labor Boards - Public Employee Labor Relations Board.

As discussed in the 2024 and 2025 Annual Reports, the attrition of Local Boards has not resulted in a significant or obvious increase in PELRB filings. That could change, however, if the largest of the local boards (the City of Albuquerque's, with approximately 30 cases a year) were to cease operations. Notably, the members of the Albuquerque and APS Boards have been serving for many years and have evidenced their desire to resign, but there may be issues with the ongoing ability to staff volunteer boards or commissions such as the PELRB and local boards, given the high level of work, potential long hours, low pay, and the "aging out" of the generation(s) that have historically provided volunteer civic service.

[65] There had been four (4) remaining after the recertifications of 2023, but the city of Deming did not renew its biennial recertification by December 31, 2025.

## APPENDIX D

## ELECTION PROCEDURES

As noted above, in-person, secret ballot elections are now rare after the 2020 amendments to the PEBA, and the PELRB now processes petitions primarily and presumptively on the basis of card counts. *See* § 14(C) (Amended 2020); and Secs. IV.A.3 and B.3, *supra*. When elections are required under the circumstances, the following procedures will apply.

### 1. Manner of Election

Where a formal election is required – usually because of an intervenor – the parties may agree to either on-site, electronic balloting, or mail balloting in the Director's discretion. Although the rules expressly state a preference in favor of on-site balloting, electronic balloting and mail balloting become more frequent in response to the COVID-19 pandemic. *See* 11.21.2.25 NMAC.

### 2. Voter Eligibility

Employees in the bargaining unit shall be eligible to vote in the election if they were employed and on non-probationary status (except for public school employees, *see* § 4(Q)) during the last payroll period preceding the date of the consent election agreement or the direction of election issued by the hearing examiner or the Board, and are still employees in the unit on the date of the election. *See* 11.21.2.24(A) NMAC. *See also NEA- Carrizozo and Carrizozo Municipal Schools*, 1 PELRB No. 11 (May 19, 1995) (the list of employees eligible to vote must also include those individuals who have resigned, retired or whose contract has not been renewed for the next school year if those individuals are eligible to vote pursuant to 11.21.2.24(A) NMAC).

The employer shall provide the list of eligible voters at least 10 business days before the start of the election. *See* 11.21.2.27(C) NMAC. Employees who are not on the list of eligible voters may nonetheless file a ballot by using the challenged ballot procedures, *infra*.

### 3. Ballots

Each ballot shall provide a place to elect between the petitioning union, any intervenors that have provided a 30% showing of interest and shall include an option to select "no representation" except in the case of a run-off election where "no representation" was not one of the top two choices (*see* section 10 *infra*). Voting shall be by secret ballot prepared by the director and the position on the ballot shall be determined randomly. Additionally, electronic ballots are now allowed in accordance with the New Mexico Uniform Electronic Transaction Act (UETA). *See* 11.21.2.27(A) and (B) NMAC; and Sec. IV.A.3, Showing of Interest or Authorization Cards, *supra*.

### 4. Employee Accommodation

Public employers shall allow eligible employees sufficient time away from their duties to cast their ballots and shall allow their employees who have been selected as election observers sufficient time away from their duties to serve as observers, although employers are not required to change the work schedules of employees to accommodate voting hours. *See* 11.21.2.27(D) NMAC.

### 5. Absentee Ballots

Eligible employees may request an absentee ballot if they will be absent on the day of voting because of hospitalization, temporary assignment away from normal post of duty, leave of absence, vacation at a location more than 50 miles away from the polling place, or other legitimate reason. This is a departure from the practice under the NLRA, which does not allow absentee ballots. *See NLRB v. Cedar Tree Press*, 169 F.3d 794 (3d Cir. 1999), and NLRB Case Handling Manual ¶ 11302.4. An absentee ballot must be requested at least 10 business days prior to the commencement of the election, except for good cause shown. *See* 11.21.2.24 NMAC.

### 6. Observers

Each party is entitled to an equal number of observers to observe and assist in each polling area, and to witness the counting of the ballots. The number is in the discretion of the hearing examiner, but typically only one per polling location, per side, is allowed. Observers shall not be supervisory or managerial employees, or labor organization employees, although party representatives may observe the counting of the ballots. *See* 11.21.2.29 NMAC.

### 7. Electioneering

No electioneering is permitted within 50 feet of any room in which balloting is taking place. *See* 11.21.2.28 NMAC.

Federal law also provides that "[w]hoever intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote as he may choose…shall be fined under this title or imprisoned not more than one year, or both." Additionally, whoever commits electioneering too close to the polling place is guilty of a petty misdemeanor. *See* 18 U.S.C. § 594 (2020), Sec. C.

### 8. Challenged Ballots

Any observer or the PELRB election supervisor may challenge the eligibility of any person who seeks to vote. The election supervisor *shall* challenge anyone who is not on the previously provided list of eligible voters. Challenged ballots are placed in a separate envelope and will only be resolved and/or counted if they are or could be dispositive to the election results. If they could be dispositive, an investigation and/or hearing will be held on the voter's eligibility as soon as possible. *See*, 11.21.2.30 NMAC.

### 9. Tally of Ballots

It is the general practice to count the ballots immediately following the close of the polling, but the count can be conducted at a later time at the discretion of the election supervisor, if warranted by the circumstances. Immediately following the counting of the ballots, the election supervisor will serve a tally of ballots upon a representative of each party. The tally shall state:

- the total number of votes cast
- the number of votes cast for each labor organization listed
- the number of votes cast for no representation
- the percentage of employees in the unit who cast ballots
- the number of challenged ballots
- whether the 40% participation threshold was met and
- if the threshold was met, what the conclusive vote was.

### 10. Run-off Election

A run-off election is required if there are three or more choices on the ballot, at least 40% of eligible voters vote, yet no ballot choice receives a majority of the valid votes cast. Where necessary a run-off election will be held within 15 business days of the initial election, and between the two choices receiving the highest number of votes.

### 11. Objections to Election

Either party may file objections to conduct affecting the result of the election, within five (5) business days of the service of the election tally results. *See* 11.21.2.34 NMAC. Objections concerning bargaining unit composition, however, are not appropriate under this rule. *See Local 7911, Communications Workers of America and Doña Ana County*, Case No. CP 19-95(C), Supplemental Report of the Director in 1 PELRB No. 16 (March 4, 1996).

### 12. Certification

The election supervisor and/or staff will serve the certification of election results within 10 business days of service of final tally if no objections are filed. If the election results in the selection of a bargaining representative, the certification will state the name of the labor organization selected and sets forth the positions in the bargaining unit. If a majority of the employees choose "no representation" the certification will show that no labor organization was selected as the bargaining representative. *See* 11.21.2.33 NMAC.

Thereafter, the Board will review and affirm the election results and certification at its next regular board meeting, if supported by the record and all necessary procedures were followed. *See* 11.21.2.22(B); *see also N.M. Coalition of Public Safety Officers and Santa Fe County*, 24-PELRB-2013 (Sep. 16, 2013; in re: Case No. 306-13) (election invalidated for certain fatal procedural errors, including that (1) the consent election agreement was not approved by the Board prior to the election, and (2) "more importantly, notice of the right of competing unions to intervene was not posted prior to the election and there appears to be an interested union that seeks to intervene in order to compete with the petitioner for representation of the employees in the bargaining unit at issue").