IN THE NEW MEXICO COURT OF APPEALS

CITY OF ALBUQUERQUE,

Petitioner-Appellee,

vs.

No. 28,846

Bernalillo County
Honorable William F. Lang
District Judge

JUAN B. MONTOYA, Director
of the PUBLIC EMPLOYEE
LABOR RELATIONS BOARD and
the PUBLIC EMPLOYEE LABOR
RELATIONS BOARD,

Respondents-Appellants,

AFSCME COUNCIL 18 and
LOCAL 624,

Real Party in Interest-Cross-Appellant.

APPELLANTS' BRIEF-IN-CHIEF

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SUMMARY OF PROCEEDINGS

1. Statement of the Nature of the Case.

The nature of the proceeding below is one for writ of superintending control issued against Respondents-Appellants. Respondent-Appellant Public Employee Labor Relations Board (PELRB) is created by Section 10-7E-8 of the Public Employee Bargaining Act (PEBA), NMSA 1978, §§ 10-7E-1 to -26 (2003, as amended). The PELRB has adopted rules under which it serves as the appellate tribunal to hear and decide prohibited practice complaints (PPCs). See Sections 10-7E-9, 10-7E-12 and Rule 11.21.3.19 (A) NMAC. Respondent-Appellant Director Juan B. Montoya serves as hearing officer or examiner to adjudicate such cases and to make recommended findings and decisions to the PELRB. Parties appearing before the hearing officer or examiner may appeal those recommendations of the Director to the PELRB. See Rules 11.21.3.16 to 11.21.3.19 NMAC. The PELRB's decisions are the final agency action and are subject to judicial review pursuant to Section 10-7E-23, an exclusive statutory review mechanism.

The dispute in this cases arises out of a proceeding brought by an employee of the City of Albuquerque upon a prohibited practices complaint before the City's local labor-management relations board for resolution. However, following the hearing on that complaint, the third member of that local board, the "neutral,"

recused, and the other two members deadlocked, with the result that the local board was unable to decide the merits of that complaint. Having no forum in which to hear and decide his prohibited practices complaint, the employee, through AFSCME, brought his complaint to the State labor board, the Public Employee Labor Relations Board, to hear and decide his prohibited practices complaint.

No decision has been made by the PELRB with respect to that prohibited practices complaint filed with the State labor board. Petitioner-Appellee City of Albuquerque asserts lack of jurisdiction by the PELRB to entertain the employee's prohibited practices complaint under Section 10-7E-26 (A), known as the "grandfather clause" of PEBA. No decision has been made by the PELRB with respect to the contested assertion that it lacks jurisdiction. The PELRB asserts that its authority and duty to decide the jurisdictional issue was improperly thwarted by the district court's issuance of its peremptory writ of superintending control, contrary to law. Appellant Montoya, acting as hearing officer for the PELRB, asserts that jurisdiction lies in the State labor board to entertain the prohibited practices complaint filed with it.

2. Statement of the course of proceedings, disposition below and summary of relevant facts.

In June of 2007, AFSCME, on behalf of union member Steve Griego, filed a prohibited practices complaint (PPC) with the local labor board of the Petitioner-Appellee City of Albuquerque (City) alleging that the City had refused to hire Mr.

Griego for a position for which he was qualified based upon his union activities (R.P. 28-29). Mr. Griego's PPC was not decided by the City's local labor board, because the City's board was unable to reach a decision in his case. The City board's third member, the "neutral," recused, and a deadlock occurred between the two voting members (one management and one labor) (R.P. 92, ¶ 3).

Because Mr. Griego could not obtain a decision upon his PPC before the City's local labor board, AFSCME, on behalf of Mr. Griego, filed that same PPC with the State labor board (R.P. 32-36), and Director Montoya commenced the PELRB's hearing process in accordance with the PELRB's rules adopted pursuant to PEBA.

The City moved to dismiss the PPC filed with the State labor board, asserting that the PELRB lacked jurisdiction of the PPC filed with it and further arguing that the President of the City Council could appoint a replacement for the recused "neutral" (R.P. 38-40). The City also filed with the City's local labor board a motion to appoint an interim board member, asking the local labor board to implement § 3-2-15 of the local labor ordinance and to advise the President of the City Council of the local labor board's inability to proceed and the President's need to appoint an interim local labor board member to participate in the proceedings (R.P. 58-59).

Mr. Griego's PPCs, both that filed with the City labor board and that filed with the State labor board, are identical. They both allege that in May and June of 2007 the City refused to hire Mr. Griego for an electrician 3 position for which he was well qualified because of his Union activity, constituting discrimination in violation of the City's ordinance (R.P. 28-29; R.P. 32-35). Mr. Griego has not yet obtained a decision upon either PPC.

The City contends that the PELRB lacks jurisdiction of the PPC filed with it because, under NMSA 1978, § 10-7E-26 (A), known as PEBA's "grandfather clause," the City's local labor ordinance is the only applicable provision and PEBA is inapplicable (R.P. 7, ¶ 33; R.P. 51, ¶¶ 11, 12). The provision of the local labor ordinance, § 3-2-15, at issue and upon which the City's motion to appoint an interim member was based, provides:

> (D) In case the Board must meet in accordance with this article during the absence of a member of the Board, the President of the City Council shall appoint an interim Board member from the public at large with due regard to the representative character of the Board....

(R.P. 23).

AFSCME opposed the City's motion to dismiss its PPC filed with the State labor board, because (1) the City misrepresents the Ordinance language on which its motion to appoint an interim board member is based; (2) the PELRB retains jurisdiction because the local ordinance section at issue does not qualify for

"grandfathering," and (3) the PELRB does not defer cases to local boards where the appropriate local board is not fully functional and operational (R.P. 70-78).

Appellant Director Montoya, after holding the City's motion in abeyance for a period of time in order to allow the parties time to attempt to negotiate appointment of a third neutral board member, denied, on February 7, 2008, the City's motion to dismiss, rejecting the City's argument that the President of the City Council could appoint someone to replace the "neutral" (R.P. 91-95). Director Montoya did so on grounds that the employer's unilateral selection of two members of a three-member board, whose composition is intended to be balanced in a way to assure overall neutrality, violates PEBA, because such appointment could permit a less than neutral board to adjudicate labor-management disputes contrary to provisions of PEBA (R.P. 91-95).

Director Montoya's conclusions supporting his denial of the City's motion to dismiss may be summarized, in part, as follows: (1) The City's method of temporary appointment of board members is contrary to the fundamental provision of the Public Employee Bargaining Act, requiring that a local board be balanced--one member appointed by labor, one member appointed by management, and those two members recommending appointment of the third party neutral; (2) section 3-2-15 (D)'s "absence" provision is not to be used where an already properly appointed member exists; and (3) the inability of the City's local labor board to

adjudicate AFSCME's PPC filed on behalf of Mr. Griego creates an unacceptable vacuum wherein some City employees are left without a venue to adjudicate their labor disputes contrary to their rights under the Public Employee Bargaining Act (R.P. 94). Director Montoya's February 7, 2008 letter further advised that a scheduling order would be prepared and sent to the parties (R.P. 95).

Appellant Director Montoya's decision, as a hearing officer empowered solely to make recommendations to the PELRB, to deny the City's motion to dismiss is subject to review by the PELRB, as is any decision on the underlying merits of the PPC filed with the PELRB. See Rule 11.21.3.19 NMAC. The PELRB has yet to make a decision on the jurisdictional issue raised by the City.

The City filed in the district court, on February 28, 2008, its petition for writ of prohibition and/or superintending control and for stay of the Board's proceedings (R.P. 1-12 and attached exhibits A-O, R.P. 13-101). On February 28, 2008, without notice to the Board or its Director or to their counsel, the district court, purporting to act on an "emergency writ," entered an ex-parte peremptory writ of superintending control against Appellant PELRB and Appellant Director, which stayed all proceedings pending before the State labor board in the case of AFSCME v. City of Albuquerque, PELRB Case No. 162-07, which is Mr. Griego's PPC brought on his behalf by AFSCME. (R.P. 102-103). The record

shows that the ex-parte peremptory writ of superintending control that the court issued on February 28, 2008 was filed February 29, 2008.

Appellants PELRB and Montoya filed their motion to dismiss pursuant to Rule 1-012 (B) NMRA, asserting a lack of subject matter jurisdiction, failure to exhaust administrative remedies and lack of ripeness, together with their supporting memorandum (R.P. 128-129; R.P. 130-139). AFSCME, Real Party in Interest, joined their motion to dismiss (R.P. 126-127). The City filed no response to that motion.

On May 1, 2008, a hearing was held by the district court, at which time the court verbally denied the Appellants' Rule 12 (B) motion to dismiss and made the February 28, 2008 (file date February 29) ex-parte peremptory writ of superintending control permanent, even though Rule 12 allows a defendant, whose Rule 12 (B) motion is denied, ten days within which to file an answer (T.R. 14-18). On May 9, 2008, Appellants filed their motion for reconsideration of the court's May 1, 2008 rulings (R.P. 160-167), which the court denied on May 12, 2008 (R.P. 178). Appellants filed their answer on May 12, 2008 (R.P. 169-177).

The court's verbal rulings on May 1, 2008 were thereafter reduced to written form by entry of the court's June 26, 2008 Order, from which Appellants have appealed (R.P. 213-214). In its order, the court denies Appellants' motion to dismiss; grants the City's petition; orders that the PELRB lacks jurisdiction of the

PPC filed with it and directs that it cease all proceedings in that case; and orders that the peremptory writ of superintending control issued on February 29, 2008 be made permanent (R.P. 213-214).

ARGUMENT

POINT ONE

THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS AND IN MAKING PERMANENT THE PEREMPTORY WRIT OF SUPERINTENDING CONTROL, BECAUSE THE DISTRICT COURT LACKED JURISDICTION UNDER N.M. CONST., ART. VI, SECTION 13 TO ISSUE ITS WRIT. NO "INFERIOR TRIBUNAL" HAS YET ACTED ON OR BEEN PRESENTED WITH THE PPC OR THE "GRANDFATHER CLAUSE" ISSUE. THE PELRB'S ABILITY TO ADJUDICATE WAS IMPROPERLY TRUNCATED BY THE DISTRICT COURT'S ISSUANCE OF ITS WRIT PROHIBITING ADJUDICATION BY THE PELRB.

A. Standard of Review.

The appellate court reviews jurisdictional issues and issues of law raised on appeal under a de novo standard of review. State v. Heinsen, 2005-NMSC-035, ¶ 6, 138 N.M. 441, 121 P.3d 1040; State v. Garcia, 2005-NMCA-065, ¶ 10, 137 N.M. 583, 113 P.3d 406.

B. Argument.

The Appellee City sought a peremptory writ of superintending control under Article VI, Section 13 of the New Mexico Constitution, and the district court

granted the writ on the asserted basis that Appellant PELRB lacked jurisdiction under PEBA's "grandfather clause" to entertain the PPC that AFSCME filed with the State labor board. However, no "inferior tribunal" had acted on, or has yet acted on, that PPC or on the jurisdictional issue under PEBA's "grandfather clause, Section 10-7E-26 (A).

Article VI, Section 13 provides that the district courts have the power to issue writs in exercise of their appellate jurisdiction of all cases originating in inferior courts and tribunals in their respect districts. When the City sought and obtained a peremptory writ of superintending control, which the court thereafter made permanent, all that had happened was that Appellant Director Montoya, acting as hearing officer, had denied the City's motion to dismiss and intended to schedule further proceedings before the Director, as hearing officer, upon the merits of the PPC.

Ultimately, the Director's action denying the City's motion would have been reviewable in the normal course by the PELRB, a three-member adjudicative body that hears and decides appeals of the Director's recommended decisions under Rule 11.21.3.19 NMAC.[1] That adjudicative body, the PELRB, would have

[1] Rule 11.21.3.19 provides that parties aggrieved by the hearing officer's recommended decisions may appeal to the PELRB. The appealing party must specify which findings, conclusions or recommendations of the hearing officer to which exception is taken. The opposing party may file a response. Oral argument before the PELRB is permitted. The PELRB then decides the appeal and issues its

decided whether it did or did not have jurisdiction in light of Section 10-7E-26 (A), commonly known as the "grandfather clause," and the appellate court decisions construing that section of law.[2] However, the PELRB's ability to decide that issue was improperly truncated by the district court, before the PELRB had even had the opportunity to consider the issue.

The writ of superintending control that issued here was not issued against an "inferior tribunal" as required by the Constitution, because that tribunal had not been presented with the case or with the jurisdictional issue involved in the case arising under Section 10-7E-26 (A). Essentially, the writ issued against a hearing officer, whose recommended decision and ruling on the City's motion to dismiss are in no way binding on the PELRB. The district court's appellate or supervisory jurisdiction under Article VI, Section 13 was not properly invoked, because the

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decision, either adopting, modifying or reversing the hearing examioner's recommendations or taking other appropriate action. If a notice of appeal is not filed, the hearing examiner transmits his report to the PELRB, which may adopt the hearing examiner's report and recommended decision as its own, but in that even, the decision does not constitute binding board precedent.

[2] Section 10-7E-26 (A) provides, in part:

> A public employer other than the state that prior to October 1, 1991 adopted by ordinance, resolution or charter amendment a system of provisions and procedures permitting employees to form, join or assist a labor organization for the purpose of bargaining collectively through exclusive representatives may continue to operate under those provisions and procedures....

PELRB has not yet made a decision, nor has its adjudicatory processes before its Director, acting as hearing officer, been concluded in this case.

How the PELRB will ultimately decide the jurisdictional issue arising under Section 10-7E-26 (A) remains to be seen and is not known, but whatever its ruling in that regard, the PELRB's decision is appealable by either the City or by AFSCME to the district court under Section 10-7E-23 (B).[3]

The PELRB is, first and foremost, charged with the duty and empowered to decide, initially, jurisdictional issues arising under PEBA. In the context of a jurisdictional dispute based on the "grandfather clause" of PEBA, the New Mexico Court of Appeals held, in City of Deming v. Deming Firefighters, 2007-NMCA-069, ¶ 14, 141 N.M. 686, 160 P.3d 595, that the Public Employee Labor Relations Board has the authority, initially, to determine its own jurisdiction and remanded the case to the Board to determine that question. Further, this Court stated, in City of Deming, "the PELRB must ... make the threshold determination of its jurisdiction." Id. at ¶ 16. See also Cibas v. N.M. Energy, Minerals & Nat. Res. Dep't, 120 N.M. 127, 132, 898 P.2d 1265, 1270 (Ct. App. 1995) (State Personnel

[3] Section 10-7E-23 (B) provides, in part:

> A person or party, including a labor organization affected by a final rule, order or decision of the board or local board, may appeal to the district court for further relief....

Board "retains the authority at all times to examine facts and make a finding concerning its own jurisdiction, subject, of course, to review by the courts").

PEBA's "grandfather clause," Section 10-7E-26 (A), is not as clear-cut as the district court mistakenly believed. That section provides that a public employer that, before October 1, 1991, adopted a system of provisions and procedures permitting employees to form, join or assist a labor organization for collective bargaining purposes may continue to operate under those provisions and procedures. However, this Court did not read section 10-7E-26 (A) so literally as to "grandfather" virtually every pre-existing (before October 1, 1991) labor ordinance and its provisions; concluding, instead, that a certain provision of a pre-existing city labor ordinance that was contrary to PEBA was not "grandfathered."

Similarly, the New Mexico Supreme Court, in Regents of UMN v. Federation of Teachers, 1998-NMSC-020, ¶ 43, 125 N.M. 401, 962 P.2d 1236, did not read Section 10-7E-26 (A) so literally as to "grandfather" the university's pre-existing collective bargaining system that failed to extend the right to collectively bargain to all employees who have been afforded that right under PEBA. The Court, in Regents, at ¶ 4, noted that the PELRB's duties include the duty to enforce the provisions of PEBA. This duty, therefore, underscores the need and authority of the PELRB to first decide the jurisdictional issue arising under Section 10-7E-26 (A), an issue that is endowed with policy considerations, is not black-and-white

statutorily and must be reserved for decision, at least initially, by the statutory adjudicative body empowered to decide this issue, which is the PELRB, the board created by PEBA to administer PEBA.

The fact that neither City of Deming nor Regents precisely addresses the jurisdictional issue here, namely, whether a provision of the City's ordinance that would permit, in Appellant Director Montoya's considered and informed opinion, appointment of a less-than-neutral board to decide a PPC, is hardly sufficient reason to wrest that decision from consideration and decision-making power by the PELRB. That an issue is "new" does not mean that the absence of controlling appellate authority on the issue enables a district court to issue a writ of superintending control against the statutory decision-maker, thus foreclosing that decision-maker from authority to consider and decide the issue. Appellant PELRB was, and remains, entitled, initially, to decide the jurisdictional issue arising under PEBA's "grandfather clause" when it is presented to it. Sound policy reasons, arising from the PELRB's knowledge and breadth of experience in administering PEBA's provisions, support allowing the PELRB to initially decide the issue.

Moreover, a court's use of a writ of superintending control is limited only to "exceptional circumstances." District Court of Second Judicial District v. McKenna, 118 N.M. 402, 405-06, 881 P. 2d 1387, 1390-91 (1994); State ex rel. Transcontinental Bus Serv., Inc. v. Carmody, 53 N.M. 367, 378, 208 P.2d 1073,

1080 (1949) (court may intervene by an appropriate writ under its power of superintending control "if the remedy by appeal seems wholly inadequate ... or where otherwise necessary to prevent irreparable mischief, great, extraordinary or exceptional hardship; writ may not be used as a substitute for an appeal). See also State ex rel. Hyde Park Co. v. Planning Comm'n of Santa Fe, 1998-NMCA-147, ¶¶ 12-13, 125 N.M. 830, 965 P.2d 949 (usual delay and expense inherent in all litigation is not "unusual or peculiar harm" that would justify use of an extraordinary remedy). The statutory appeal remedy under Section 10-7E-23, providing for judicial review of decisions of the PELRB, is entirely adequate and is an exclusive statutory review mechanism.

The trial court lacked jurisdiction under Article VI, Section 13 of the Constitution to issue and make permanent its writ of superintending control against Appellants, as no "inferior tribunal" had yet acted on or been presented with the jurisdictional issue here arising under the "grandfather clause," Section 10-7E-26 (A). Moreover, the PELRB was entitled, and remains entitled, to decide that jurisdictional issue, subject to judicial review under Section 10-7E-23.

POINT TWO

THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS AND IN MAKING PERMANENT THE PEREMPTORY WRIT OF SUPERINTENDING CONTROL, BECAUSE THE CITY HAS NOT EXHAUSTED ITS ADMINISTRATIVE REMEDIES.

A. Standard of Review.

The appellate court reviews jurisdictional issues and issues of law raised on appeal under a de novo standard of review. State v. Heinsen, 2005-NMSC-035, ¶ 6, 138 N.M. 441, 121 P.3d 1040; State v. Garcia, 2005-NMCA-065, ¶ 10, 137 N.M. 583, 113 P.3d 406.

B. Argument.

It is fundamental that a party must first exhaust available administrative remedies before applying to the court for relief. See State ex rel. Hyde Park Company v. Planning Comm'n of Santa Fe, 1998-NMCA-147, ¶¶ 12-13, 125 N.M. 830, 965 P.2d 949 (a party is required to pursue available administrative remedies before resorting to the courts for relief; the usual delay and expense inherent in all litigation is not "unusual or peculiar harm" that would justify the use of an extraordinary remedy); State ex rel. State Corporation Comm'n v. Zinn, 72 N.M. 29, 36, 380 P.2d 182, 186-87 (1963) (so long as the State Corporation Commission was proceeding under its statutory authority and administrative remedies had not been exhausted, the district court was without jurisdiction to entertain the proceedings).

In entertaining and proceeding to adjudicate the PPC at issue here, the PELRB's Director is proceeding pursuant to statutory authority and duly adopted rules of the Public Employee Labor Relations Board. Section 10-7E-9 requires the

PELRB to adopt rules "to accomplish and perform its functions and duties as established in the [PEBA], including the establishment of procedures for ... the filing of, hearing on and determination of complaints of prohibited practices." The PELRB has adopted such rules. The PEBA and implementing rules, 11.21.1.1 through 11.21.6.12 NMAC, provide an exclusive administrative remedy, a "plain, adequate, and complete means of resolution through the administrative process to the courts." Chavez v. City of Albuquerque, 1998-NMCA-004, ¶ 14, 124 N.M. 479, 952 P.2d 474.

The PELRB's jurisdiction to first hear and decide the PPC at issue here, including the jurisdictional issue raised here, is absolute, and judicial intervention at this point is not permitted. McDowell v. Napolitano, 119 N.M. 696, 700, 895 P.2d 218, 222 (1995) ("New Mexico law has long recognized that a party must exhaust all administrative remedies before applying to a court for relief unless the legal or statutory remedies are inadequate;" "exhaustion of administrative remedies is absolute 'where a claim is cognizable in the first instance by an administrative agency alone ... judicial interference is withheld until the administrative process has run its course'" [citing State ex rel Norvell v. Arizona Pub. Serv. Co., 85 N.M. 165, 170, 510 P.2d 98, 103 (1973)]. See also Derringer v. Turney, 2001-NMCA-075, ¶ 14, 131 N.M. 40, 33 P.3d 40 (a party is required to pursue available administrative remedies before resorting to courts for relief); Neff v. State,

Through Taxation and Revenue Dep't., 116 N.M. 240, 243, 861 P.2d 281, 284 (Ct. App. 1983) (one must exhaust administrative remedies before invoking the jurisdiction of the courts); State Racing Comm'n v. McManus, 82 N.M. 108, 111, 113, 476 P.2d 767, 770, 772 (1970) (district judge had no jurisdiction of a dispute, because of jockey's failure to first exhaust administrative remedies).

Additionally, the PELRB and the PELRB's Director cite the memorandum opinion of the New Mexico Court of Appeals in Gallup McKinley County Schools v. Public Employee Labor Relations Board, No. 26,376, in which this Court dismissed an appeal of an order denying mandamus, in which the appellant Schools contended that the Public Employee Labor Relations Board lacked jurisdiction to conduct proceedings on a prohibited practices complaint filed with it against appellant Schools, because appellant had a duly approved local board to hear such disputes. The Court of Appeals dismissed the appeal based on appellant's failure to exhaust administrative remedies.[4]

In Grand Lodge of Masons v. Taxation & Revenue Dept., 106 N.M. 179, 181, 740 P.2d 1163, 1165 (Ct. App.), cert. denied, 106 N.M. 174, 740 P.2d 1158, the court held, in the context of a declaratory judgment action, that "[j]urisdiction

[4] The attached memorandum opinion is cited as persuasive authority pursuant to Rule 12-405 (C). See also Gormley v. Coca-Cola Enterprises, 2004-NMCA-021, ¶ 10, 135 N.M. 128, 85 P.3d 252 (while an unpublished opinion of this Court is of no precedential value, it may be presented to this Court for consideration if a party believes it persuasive).

does not lie in the court until the statutorily required administrative proceedings are complete." Id. at 182, 740 P.2d at 1167. Particularly apt here, is the court's observation that "[t]he theory which underlies administrative law is that the issues with which it deals ought to be decided by experts." Id. at 180, 740 P.2d at 1165.

The jurisdictional issue that City raises involves the PELRB's interpretation of PEBA statutes and involves the administering agency's special expertise, namely that of the PELRB. The issue should be decided by the experts, namely, the members of the PELRB, made after hearing the matters in dispute.

Additionally, further factual development remains, most notably with respect to the merits of the PPC. Importantly, also, is the fact that the City participated in the proceedings before hearing officer Director Montoya by filing its motion to dismiss the PPC, which the Director acted upon. Only after the Director's ruling, which denied the City's motion, did the City file its suit here, having the improper effect of circumventing and frustrating the State labor board's normal adjudicative and appeal processes.

As to the jurisdictional issue here arising under the "grandfather clause" of Section 10-7E-26 (A), the PELRB's ultimate decision will necessarily be informed by the Court of Appeals decision in City of Deming v. Deming Firefighters, 2007-NMCA-069, 141 N.M. 686, 160 P.3d 595 and the Supreme Court's decision in Regents of UMN v. Federation of Teachers, 1998-NMSC-020, 125 N.M. 401, 962

P.2d 1236. Both cases construe narrowly PEBA's "grandfather clause," Section 10-7E-26. See City of Deming at ¶ 8; Regents at ¶ 27 (also stating: "When the scope of a grandfather clause is ambiguous, the court will construe it strictly against the party who seeks to come within its exception"). Neither case addresses, specifically, the applicability of the "grandfather clause" to a dispute as here, arising out of a "vacuum" created by the inability of the City's local labor-management relations board to decide a PPC case.

The PELRB's ultimate decision in this case will necessarily be informed by not only its special expertise, but also by other provisions of PEBA, such as, among others, Section 10-7E-3 ("In the event of conflict with other laws, the provisions of the [PEBA] shall supersede other previously enacted legislation and regulations") and Section 10-7E-10 (providing that a local board shall follow all procedures and provisions of PEBA unless otherwise approved by the PELRB; providing that the "neutral" third member of a local board is to be appointed on the recommendation of the first two (one representing labor and one representing management; and providing that in the case of vacancies on a local board, "[v]acancies shall be filled in the same manner as the original appointment").

The district court erred in denying Appellants' motion to dismiss and in issuing and making permanent its writ of superintending control. The City has failed to exhaust available administrative remedies.

POINT THREE

THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS AND IN MAKING PERMANENT THE PEREMPTORY WRIT OF SUPERINTENDING CONTROL, BECAUSE THE ISSUES IN THIS CASE ARE NOT RIPE, AND, THEREFORE, THE COURT LACKED JURSIDICTION TO ISSUE ITS WRIT.

A. Standard of Review.

The appellate court reviews jurisdictional issues and issues of law raised on appeal under a de novo standard of review. State v. Heinsen, 2005-NMSC-035, ¶ 6, 138 N.M. 441, 121 P.3d 1040; State v. Garcia, 2005-NMCA-065, ¶ 10, 137 N.M. 583, 113 P.3d 406.

B. Argument.

The "grandfather clause" issue that the district court decided against Appellants in issuing its writ is not ripe for judicial review. Although abruptly halted by issuance of the writ, administrative proceedings had been ongoing, and the PELRB should be permitted to resume those proceedings and to ultimately decide the jurisdictional and other issues, subject to judicial review under Section 10-7E-23.

The "[r]ipeness doctrine is rooted in the same general policies of justiciability as standing and mootness." 13A Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3532.1, 130 (2d ed. 1984).

"[T]he doctrine of ripeness is intended to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Skull Valley Bank of Goshute Indians v. Nielson, 376 F.3d 1223, 1237 (10th Cir. 2004). Lack of ripeness, like lack of standing, is a potential jurisdictional defect, which "may not be waived and may be raised at any stage of the proceedings, even sua sponte by the appellate court." Gunaji v. Macias, 2001-NMSC-028, ¶ 20, 130 N.M. 734, 31 P.3d 1008) (quoting Alvarez v. State Taxation & Revenue Dep't, 1999-NMCA-006, ¶ 6, 126 N.M. 490, 971 P.2d 1280).

"As applied in the context of an administrative proceeding, the doctrine of ripeness serves 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" Matter of U.S. West Communications, 1998-NMSC-032, ¶ 8, 125 N.M. 798, 965 P.2d 917 (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149 (1967)). See also Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985) (claim that application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations

to the property at issue); New Mexico Industrial Energy Consumers v. New Mexico Public Service Comm'n, 111 N.M. 622, 636, 808 P.2d 592, 606 (1991) (applying the ripeness doctrine, stating: "We are not in a position where we can evaluate the decision made in the hearing as they affect rates, because the Commission has not yet determined rates.... [W]e will not act upon it until the Commission has made a final determination and considered all of the evidence").

The district court erred in denying Appellants' motion to dismiss and in granting and making permanent its peremptory writ of superintending control. The issues in this case are not yet ripe. There has been no resolution of the issues, both the jurisdictional issue arising out of the "grandfather clause," Section 10-7E-26 (A), and the underlying merits of the PPC, by the statutory adjudicatory body in this case, the PELRB.

POINT FOUR

THE DISTRICT COURT ERRED IN ISSUING ITS EX-PARTE WRIT AGAINST APPELLANTS. NO "EMERGENCY" WARRANTED THE ISSUANCE OF AN EX-PARTE PEREMPTORY WRIT OF SUPERINTENDING CONTROL ON FEBRUARY 28, 2008.

A. Standard of Review.

The appellate court reviews jurisdictional issues and issues of law raised on appeal under a de novo standard of review. State v. Heinsen, 2005-NMSC-035, ¶

6, 138 N.M. 441, 121 P.3d 1040; State v. Garcia, 2005-NMCA-065, ¶ 10, 137 N.M. 583, 113 P.3d 406.

B. Argument.

The district court judge assigned to the case when filed, Honorable Judge Knowles, issued the court's emergency writ of superintending control, without notice to the parties against whom it was issued, on February 28, 2008, and it was filed February 29, 2008 (R.P. 102). At the hearing on May 1, 2008, counsel for Appellants pointed out to the then-assigned judge, Honorable Judge Lang, that the City had obtained, on February 29, 2008 an emergency writ of superintending control and that the matter was thereafter scheduled for hearing but that no hearing had been had on that emergency writ until today, May 1, 2008 (T.R. 8). Counsel for Appellants further argued to the court that there was no cause to obtain an emergency, ex-parte writ. The Respondent Director was at that time and has, at all times, been available, as well as his counsel (T.R. 8). In any event, counsel for Respondents-Appellants was today asking, on May 1, 2008, that the court grant Respondents-Appellants' motion to dismiss and dissolve the emergency writ (T.R. 8). Counsel's argument regarding the impropriety of the emergency, ex-parte writ was also argued in counsel's motion for reconsideration (R.P. 160-165, ¶ 15).

The Rules of Civil Procedure do not permit issuance of an ex-parte, emergency writ of superintending control. Even if analogous to a temporary

restraining order, such order can only be issued if: (1) it clearly appears from the facts shown by the verified complaint that immediate and irreparable injury will result before the adverse party or his attorney can be heard in opposition; and (2) the applicant's attorney certifies the efforts that the attorney made to give notice and the reasons supporting his claim that notice should not be required. Rule 1-066 NMRA. None of that appears in the verified complaint or in the order granting the emergency, ex-parte peremptory writ of superintending control (R.P. 1-12; 102-103). There was no attempt made by the City to comply with any of the requirements that would attend a court's grant of a temporary restraining order.

There clearly was no "irreparable harm." All that Appellant Director Montoya had done at that time was deny the City's motion in the PPC case that he was handling as hearing officer for the PELRB and indicate that a scheduling order would be prepared and sent to the parties (R.P. 95).

"Injunctive powers, as with other writs, must be properly invoked by legal process, which puts the party on notice and affords an opportunity to defend." State v. Bailey, 118 N.M. 466, 468, 882 P.2d 57, 59 (Ct. App.), cert. denied, 118 N.M. 256, 880 P.2d 867 (1994). Appellants were afforded no notice and no opportunity to defend against the City's "emergency" writ that it had obtained ex-parte against them.

The district court erred in issuing its "emergency," ex-parte peremptory writ of superintending control against Appellants.

POINT FIVE

BECAUSE RULE 1-012 NMRA ACCORDS APPELLANTS THE OPPORTUNITY TO ANSWER, THE GRANTING OF THE WRIT PETITION AND MAKING THE EMERGENCY WRIT PERMANENT ON MAY 1, 2008 WAS CONTRARY TO RULE 1-012.

A. Standard of Review.

The appellate court reviews jurisdictional issues and issues of law raised on appeal under a de novo standard of review. State v. Heinsen, 2005-NMSC-035, ¶ 6, 138 N.M. 441, 121 P.3d 1040; State v. Garcia, 2005-NMCA-065, ¶ 10, 137 N.M. 583, 113 P.3d 406.

B. Argument.

At the May 1, 2008 hearing, the court denied Respondents-Appellants motion to dismiss made under Rule 1-012 NMRA and concomitantly made the previously issued "emergency" writ of superintending control permanent. No answer had been filed, only the motion to dismiss. The court's action was contrary to Rule 1-012, which provides that a defendant has 10 days after the denial of a motion to dismiss to file an answer. It is the filing of an answer that puts a cause "at issue," which enables a court to thereafter enter a final judgment in a case. See Linton v. Farmington Municipal Schools, 86 N.M. 748, 750, 527 P.2d 789, 791

(1974) (general rule is that a cause is at issue when an answer is filed). See also Rule 1-012 (C) NMRA (providing that after the pleadings are closed, a party may move for judgment on the pleadings). In the case at bar, a final judgment, which was the entry of the permanent writ, was erroneously entered before the cause was "at issue" and before the pleadings were closed. Counsel for Appellants pointed out this procedural defect to the court at the May 1, 2008 hearing (T.R. 15-17).

The court's entry of a permanent writ on May 1, 2008 was erroneous and contrary to the requirements of Rule 1-012.

POINT SIX

THE DISTRICT COURT ERRED IN GRANTING THE PEREMPTORY WRIT OF SUPERINTENDING CONTROL. THE "GRANDFATHER CLAUSE" OF PEBA SHOULD NOT BE EXPANSIVELY CONSTRUED TO PERMIT THE EMPLOYER TO SELECT TWO MEMBERS OF A THREE-MEMBER LOCAL LABOR BOARD TO ADJUDICATE LABOR-MANAGEMENT DISPUTES, WHICH IS FUNDAMENTALLY CONTARY TO PEBA.

A. Standard of Review.

The appellate court reviews jurisdictional issues and issues of law raised on appeal under a de novo standard of review. State v. Heinsen, 2005-NMSC-035, ¶ 6, 138 N.M. 441, 121 P.3d 1040; State v. Garcia, 2005-NMCA-065, ¶ 10, 137 N.M. 583, 113 P.3d 406. Issues of statutory construction and analysis of law are

reviewed de novo. State v. Marshall, 2004-NMCA-104, ¶ 6, 136 N.M. 240, 96 P.3d 801.

B. Argument.

This argument is made on behalf of Appellant Montoya, hearing officer for the PELRB, whose decisions are subject to review by the PELRB, including his denial of the City's motion to dismiss. It is not known how the adjudicatory body under PEBA, the PELRB, would rule on this jurisdictional issue arising under PEBA's "grandfather clause," Section 10-7E-26 (A). For the reasons argued previously, the PELRB should be afforded the opportunity, as is its statutory right and duty, to rule on this issue, subject to judicial review under Section 10-7E-23 (B).

PEBA's "grandfather clause," Section 10-7E-26 (A), must be narrowly construed. Regents of UNM v. Federation of Teachers, 1998-NMSC-020, ¶ 27, 125 N.M. 401, 962 P.2d 1236 ("grandfather clause will be construed to include no case not clearly within the purpose, letter, or express terms of the clause;" "[w]hen the scope of a grandfather clause is ambiguous, the court will construe it strictly against the party who seeks to come within its exception"); City of Deming v. Deming Firefighters, 2007-NMCA-069, ¶ 8, 141 N.M. 686, 160 P.3d 595 (grandfather clause must be strictly or narrowly construed to apply only to cases within the purpose, letter or express terms of the clause).

Applying this principle of strict construction, the courts in both Regents and City of Deming refused to apply PEBA's "grandfather clause" to portions of the challenged policy or ordinance in dispute in those cases, because they were in conflict with PEBA. Portions of any pre-existing ordinance must be examined to determine whether those portions qualify for "grandfathering." Regents at ¶ 35.

In Regents, the New Mexico Supreme Court refused to "grandfather" UNM's policy that permitted only certain categories of employees to collectively bargain, in light of PEBA's extension of collective bargaining rights to all public employees, except those that are confidential, managerial and supervisory. This Court, in City of Deming, refused to "grandfather" that portion of Deming's labor relations ordinance that excluded fire department officers from bargaining units.

This Court, in City of Deming, did "grandfather" that portion of the ordinance concerning impasse procedures in the local ordinance, involving the use of advisory arbitration. This Court's rationale was based, in part, on the prior version of PEBA that required only advisory mediation to resolve an impasse. This Court stated: "Because advisory arbitration was originally considered appropriate impasse resolution procedure for all purposes, it was clearly acceptable for grandfather purposes." Id. at ¶ 22.

Although the facts of Regents and City of Deming are distinct from the facts giving rise to the current dispute regarding the intent and reach of the "grandfather

clause" and the meaning of a "system of provisions and procedures permitting employees to form, join or assist a labor organization" as used in Section 10-7E-26 (A), one resounding point is this: "[U]nder Regents, the existence of a system of provisions and procedures that meets the requirements of the grandfather clause is not necessarily a simple determination.... The grandfather clause is part of the PEBA and, according to Regents, must be construed with reference to the purpose and other provisions of PEBA." City of Deming at ¶ 12.

Thus, when the City states in its writ petition, which the district court granted, that pursuant to the "grandfather clause," its labor management relations ordinance is the only applicable provision, both the City and the district court are in error. When the City states in its writ petition, which the district court granted, that it may continue to operate under the provisions of its labor management relations ordinance merely because its ordinance was in effect before 1991, both the City and the district court are in error.[5]

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[5] The City's writ petition at ¶ 33 states:

> Pursuant to the grandfathering provision in § 10-7E-26A, the LMRO is the only applicable provision. PEBA does not provide that the LMRO is applicable only in the absence of a conflict. PEBA provides that if the LMRO was in existence prior to 1991, the labor board of the home rule municipality may continue to operate without reference to PEBA. Because the city meets these requirements, PEBA is not applicable.

R.P. 7.

As instructed by New Mexico's Supreme Court in Regents, Appellant Montoya analyzed that portion of the City's labor management relations ordinance at issue in this dispute, section 3-2-15,[6] and concluded that appointment by the President of the City Council of a substitute for the recused "neutral" was fundamentally inconsistent with PEBA, because a less than neutral board could be created to adjudicate an employee's labor-management dispute (R.P. 94). Essentially, management would have two seats at the table and labor would have only one, a result that is particularly grievous in the context of an adjudicatory proceeding involving an employee who alleges that management passed him over for a job for which he was qualified simply because of his union activities.

PEBA requires, and has always required, that a local labor board be a neutral body. To assure this, the local board adjudicating PPCs must be composed of a member appointed by management, a member appointed by labor, and a third member, the "neutral," who is jointly selected by the other two. See Section 10-

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[6] Section 3-2-15 provides, in part:

> (D) In case the [City labor-management relations] Board must meet in accordance with this article during the absence of a member of the Board, the President of the City Council shall appoint an interim Board member from the public at large with due regard to the representative character of the Board....

R.P. 23.

7E-10 (B); Section 10-7D-10 (B)[7] of PEBA I, which is the predecessor Public Employee Bargaining Act to the current PEBA II. Thus, a neutral body to hear PPCs is essential to the rights of employees who are entitled to collective bargaining rights under PEBA I and PEBA II.

Appellant Montoya rightly concluded that it is fundamental to PEBA's requirements, both I and II, that "a local board be balanced in that one member is appointed upon the recommendation of labor, another upon the recommendation of management and those two, together, recommend the third party neutral" (R.P. 94). Appellant Montoya correctly observed and concluded: "The City's existing board is unable to hear case number LB 07-21 because one of its board members has recused himself. The City ordinance providing a temporary board member in the case of an absent member on the labor board violates the PEBA" (R.P. 95). The State labor board must, therefore, step in to fill the vacuum. Appellant Montoya correctly concluded: "The inability of the City's board to adjudicate its case number LB 07-21 creates an unacceptable vacuum wherein some City employees are left without a venue to adjudicate their labor disputes contrary to their rights under the PEBA" (R.P. 94). In this case, the employee left without a forum to hear his dispute is Mr. Griego, who has been waiting quite some time for a fair hearing upon his PPC to which he is entitled.

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[7] 1992 N.M. Laws, Ch. 9, § 10.

A "system" that would permit a non-neutral body to adjudicate a labor dispute fairly brought forward by an aggrieved public employee is not a "system" that should be entitled to "grandfathered" status. The notion of such "system" is not something "old" that must be saved to "prevent harm," Regents at ¶ 25-26; rather, such notion is wholly foreign to PEBA I and PEBA II and to any sense of fair adjudication.

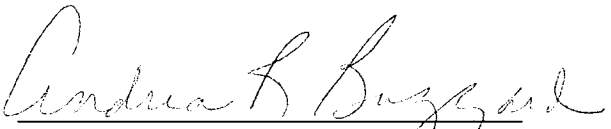
The district court erred in granting its peremptory writ of superintending control. PEBA's "grandfather clause" should not be construed to permit the employer to select two members of a three-member adjudicatory body to hear labor-management disputes.

CONCLUSION

Appellants respectfully pray that the district court's order entered on June 26, 2008, granting the petition for writ of superintending control, denying Appellants' motion to dismiss and making permanent the emergency writ, be reversed; that the district court be ordered to dismiss the City's case; that the writ of superintending control be quashed; and that the matter be remanded to the Public Employee Labor Relations Board for resumption by it of its adjudicatory processes with respect to AFSCME's PPC filed on behalf of Mr. Griego, which is AFSCME v. City of Albuquerque, PELRB Case No. 162-07.

Respectfully submitted,

GARY K. KING
Attorney General



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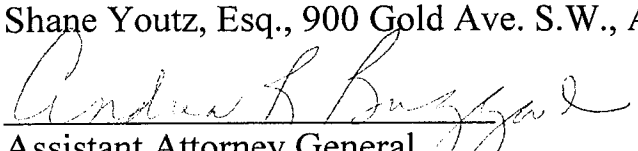
CERTIFICATE OF SERVICE

A true copy of the foregoing was mailed by first-class mail this 6 day of March, 2009 to Shelley Mund, City Attorney's Office, P.O. Box 2248, Albuquerque, NM 87103 and to Shane Youtz, Esq., 900 Gold Ave. S.W., Albuquerque, NM 87102.



Assistant Attorney General