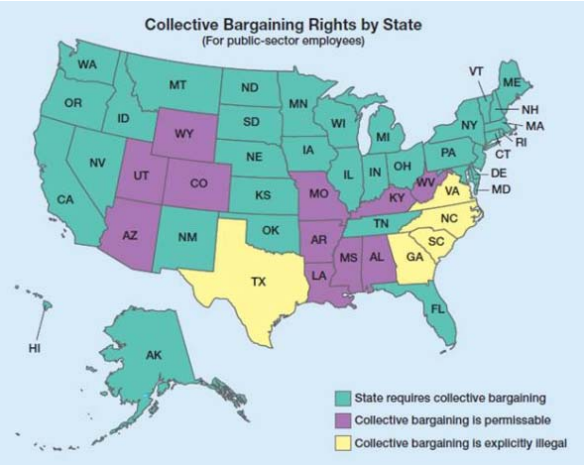
LOCAL LABOR MANAGEMENT RELATIONS BOARDS

- Creation
- Duties & Responsibilities
- Best Practices

STATUTORY OVERVIEW

- 33 states have public employee bargaining
- 7 permit local labor boards
- Other States' approaches:
  - Oregon
  - Maryland
  - Nevada
  - New York



STATUTORY OVERVIEW. Of the 33 states authorizing statewide public employee collective bargaining under the supervision of a state board, seven, including New Mexico, also permit local entities to form their own boards. Oregon is the only state other than New Mexico to provide for continued operation of grandfathered local labor boards. See Oregon Revised Statutes § 243.772. Notable provisions from among those statutes providing for local boards include Illinois, where the statute provides for the State Labor Board to be divided into three "panels"; the State Panel, the Local Panel. A separate Educational Labor Relations Board is established to deal with collective bargaining issues in the state's school districts. Similarly, the Maryland statutes establish a "Public School Labor Relations Board" distinct from the State Labor Relations Board. Two of those states permitting a local option also impose a population requirement so that only the largest of the local entities may exercise the local option. Nevada does not permit statewide collective bargaining but the State has established a Local Government Employee-Management Relations Board to supervise collective bargaining for those local entities that have opted to engage in collective bargaining. In New York there once were as many as 20-30 local boards in existence. However, all but New York City and one other locality have petitioned for and been granted dissolution of their local boards in order to come

under the jurisdiction of the state board.

INTRODUCTION

- PEBA I
  - 1991-1999

- PEBA II: NMSA 1978 §10-7E-1 et seq.
  - 2003 onward

- Section 10 authorizes the creation of new local boards

INTRODUCTION. New Mexico's public employee collective bargaining law (NMSA 1978 Section 10-7E-1 *et seq*. (2003) provides for the preservation of pre-existing local labor boards, bargaining units and collective bargaining agreements and representatives as well as for the creation of *new* local boards. See NMSA 1978 Sections 10-7E-10 and 11 (2003). It is this second category of local boards- those created after 2004 - referred to as "Section 10 boards" that is the subject of this presentation.

Under § 10(A) of the New Mexico PEBA, public employers other than the State have a substantive right to create their own local labor boards that have the same duties and responsibilities as the PELRB, provided that:

the local board is approved by the PELRB; and,
the local board adopts rules and follows all procedures and provisions of PEBA unless otherwise approved by the PELRB.

Pursuant to the foregoing and Section 26(A) of the Act dealing with "grandfathered" ordinances, a local ordinance, even those recognized as having grandfathered status, may not seek to exclude from coverage employees covered under PEBA. See

Regents of UNM v. NM Federation of Teachers, 1998 NMSC 020; and *City of Deming v. Deming Firefighters Local 4521*, 2007-NMCA-069. See NMSA 1978 Sections 10-7E-10 and 11 (2003) appended hereto as Appendix A.

Even those local public employers operating grandfathered local ordinances (those adopted prior to October 1, 1991) would have to comply with Sections 10-7E-10 and 11 *if* a "substantial change" to the ordinance was made after January 1, 2003. In PELRB Cases 118-11 and 302-11 the local IAFF alleged that the definition of 'supervisor' in the City's grandfathered ordinance violated PEBA. The issue was not decided by the Board because a settlement agreement was reached in which the City agreed to change the definition of 'supervisor' in its labor ordinance to mirror PEBA and the union agreed to waive any claim that such changes constituted "substantial changes" which would alter the City's grandfathered status. In contrast, TVI/CNM had grandfather status but voluntarily adopted the model ordinance in PELRB Case 206-05.

Under PEBA I, New Mexico district 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 *Board of County Commissioners of Otero County et al. v. State of New Mexico Public Employee Labor Relations Board,* Twelfth Judicial Dist. Case No. CV 93-197 (July 13, 1993, J. Leslie C. Smith); and *AFSCME v. Santa Fe County,* First Judicial Dist. Case No. SF 93-2174 (July 8, 1994, J. Herrera). The New Mexico Court of Appeals also confirmed PEBA's supremacy over conflicting provisions in local ordinances created pursuant to PEBA I. See *Las Cruces Professional Firefighters v. City of Las Cruces* (Firefighters I), 123 NM 239 (1996); and *Las Cruces Professional Firefighters v. City of Las Cruces* (Firefighters II) 123 NM 329 (1997). Finally, the New Mexico Supreme Court confirmed the supremacy of PEBA's definitions of "public employee" and "supervisor" over those of grandfathered provisions. See *Regents of UNM v. N.M. Federation of Teachers,* 125 N.M. 401 (1998).

On this issue, the relevant statutory language Courts PEBA I relied on, did not change under PEBA II so significantly that a different result would obtain after the enactment of the second version of New Mexico's public employee bargaining law. For example, in *City of Deming v. Deming Firefighters* 2007-NMCA-69, at ¶10, the Court of Appeals did not consider the change in §5 of the act defining those subject to the Act as "Public employees, other than management employees, supervisors and confidential employees" to "Public employees, other than management employees and confidential employees" in PEBA II, to be material to an analysis of whether or not the city could assign supervisory status based on job title rather than job responsibilities.

LOCAL BOARD FORMATION (§10-7E-10(A))

- With PELRB approval
- Public Employer other than the State
- Enacts ordinance, resolution, or charter amendment creating local board
- Once created, assumes duties and responsibilities of PELRB
- Shall follow all provisions of PEBA
  - Unless otherwise approved by PELRB
  - Limits on variations
    - Even grandfathered ordinances must cover employees covered by PEBA (*Regents*)
    - Substantial change in grandfathered ordinance (*IIAF &TVI*)
- PELRB has authority to review for compliance

Since the effective date of PEBA II in 2003 the PELRB has approved 56 local boards has revoked the approval of one such local board. See *McKinley County Federation of United School Employees v. Gallup-McKinley County School District Labor Management Relations Board,* PELRB Case No. 103-07. Revocation of the local ordinance for Hidalgo County is pending as of this writing. In the Gallup McKinley case, the local board was found to have effectively amended its resolution through rulemaking and the resultant amendment conflicted with §§ 14(A) and (D) and § 19(B) of the PEBA. When the local board failed to timely rescind or amend the rule, its approval was revoked.

In a similar case that did *not* result in revocation of local board approval, a PELRB hearing examiner found that Gadsden Independent School District effectively amended its resolution by refusing the union's recommendation for appointment to the local board because the person did not reside in the local area. See *American Federation of Teachers Local 4212 v. Gadsden Independent School District,* PELRB Case No. 169-06, letter decision (Nov. 2, 2007). In that case, which was not appealed to the PELRB, the School District complied with the hearing examiner's directive to cease and desist from imposing a residence requirement unless and

until it was approved by the PELRB pursuant to NMAC 11.21.5.13.

A current (as of November 2019) list of local boards follows (all are § 10 boards unless otherwise indicated) :

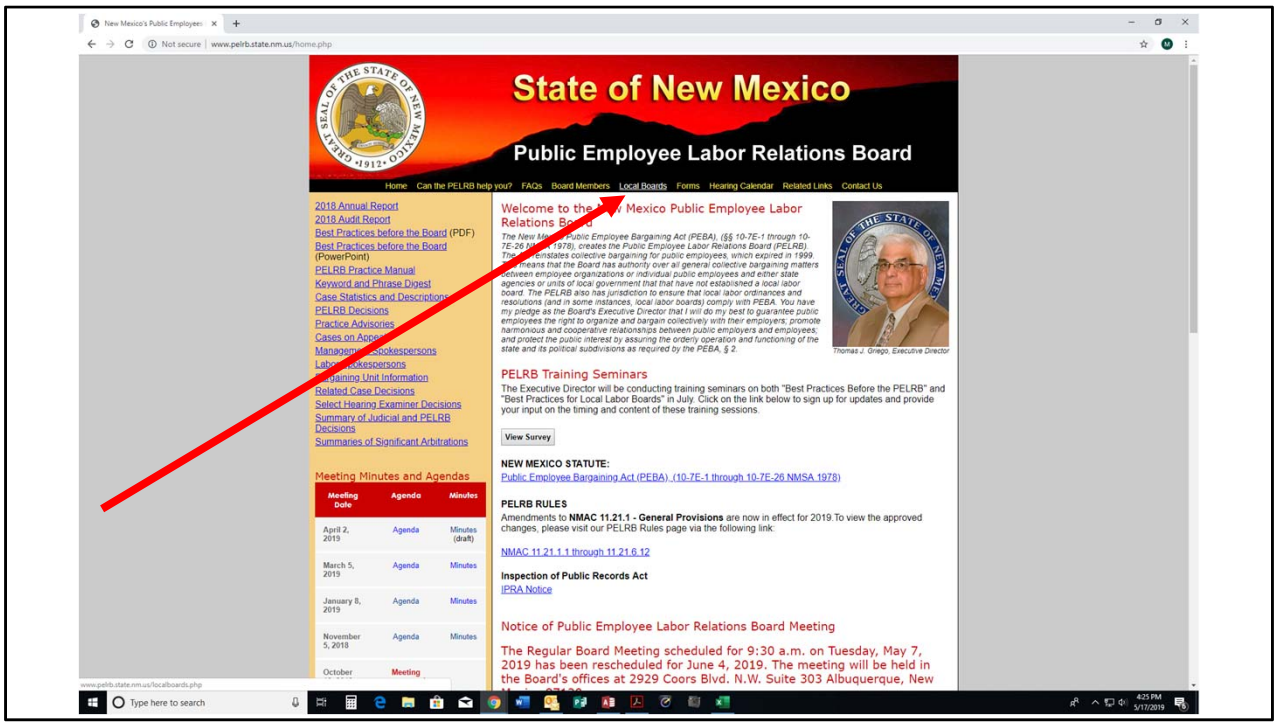
Alamogordo Labor Management Relations Board (§ 26(A))
Alamogordo Public Schools Labor Management Relations Board
Albuquerque-Bernalillo County Water Utility Authority Labor Management Relations Board (§ 26(A))
Albuquerque Labor Management Relations Board (§ 26(A))
Albuquerque Public Schools Board of Education (§ 26(A))
Aztec Municipal School District Labor Management Relations Board
Belen Labor Management Relations Board
Belen Consolidated School District Labor Management Relations Board
Bernalillo County Labor Relations Board (§ 26(A))
Chama Valley Indep. School District Labor Management Relations Board
Chavez County Labor Management Relations Board
City of Belen Labor Management Relations Board
Clovis Labor Management Relations Board
Clovis Municipal Schools Labor Management Relations Board
CCNM (TVI) Labor Management Relations Board
Cuba Independent Schools Labor Management Relations Board
Curry County Labor Management Relations Board
Deming Labor Management Relations Board (§ 26(B))
Dona Ana County Labor Management Relations Board
Dulce Independent Schools
Eddy County Labor Management Relations Board
Farmington Labor Management Relations Board (§ 26(A))
Gadsden Indep. Schools Labor Management Relations Board
Gallup Labor Management Relations Board
Grants Labor Management Relations Board
Hobbs Labor Management Relations Board
Lake Arthur Municipal School District Labor Management Relations Board
Las Cruces Labor Management Relations Board (§ 26(B))
Las Vegas Labor Management Relations Board (§ 26(B))
Lea County Labor Management Relations Board
Lincoln County Labor Management Relations Board
Los Alamos County Labor Management Relations Board
Los Lunas Labor Management Relations Board
Los Lunas Public Schools Labor Management Relations Board
Loving Schools Labor Management Relations Board

Luna County Labor Management Relations Board
McKinley County Labor Management Relations Board
NM Highlands University Labor Management Relations Board
NM State University (NMSU) Labor Management Relations Board
Northern NM College Labor Management Relations Board
Otero County Labor Management Relations Board
Portales Labor Management Relations Board
Raton Labor Management Relations Board (§ 26(A))
Rio Rancho Public Schools Labor Management Relations Board
Roosevelt County
Roswell Labor Management Relations Board
Ruidoso Municipal School District Labor Management Relations Board
San Juan College Labor Management Relations Board
Santa Fe Community College Labor Management Relations Board
Silver City Labor Management Relations Board (§ 26(A))
Socorro Labor Management Relations Board
Socorro Schools Labor Management Relations Board
Taos Labor Management Relations Board
Tucumcari Labor Management Relations Board
University of New Mexico Labor Management Relations Board
Western NM University Labor Management Relations Board
Zuni Schools Labor Management Relations Board
Not all of these approved local boards are confirmed 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.

PROCEDURE FOR LOCAL BOARD FORMATION
11.21.5 NMAC

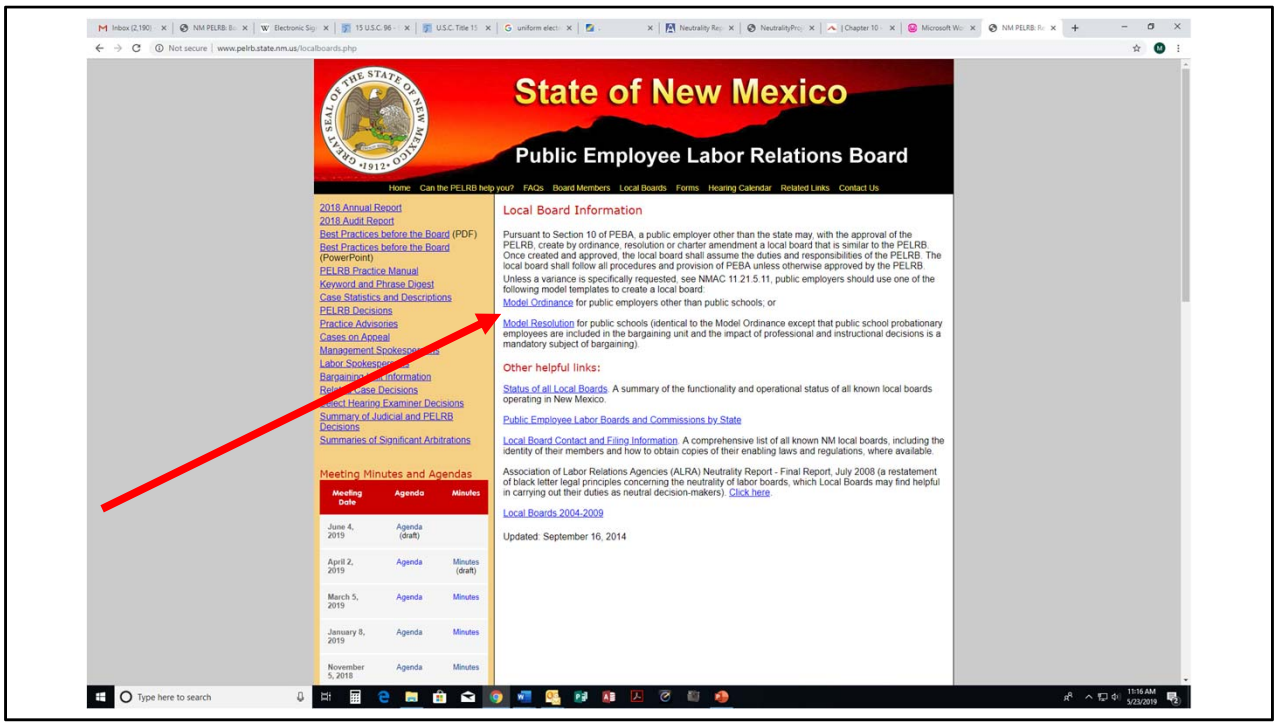
- Begins with filing of Application
- Model Resolution on PELRB Website

PROCEDURE FOR APPROVAL OF LOCAL BOARDS UNDER §10. Creating a local public employee labor relations board under §10 begins with the filing of an "application" for approval of such a local board with the PELRB. See, NMSA §10-7E-10, Appendix A hereto and NMAC 11.21.5.1 *et seq.*, Appendix B). The PELRB has published templates for a model resolution and a model ordinance designed to ensure compliance with the PEBA's requirements for approval of local boards. These templates may be found on the PELRB website at www.state.nm.us/pelrb under the "Local Boards" tab at the top of the page. (See screen shot of webpage tab for local board templates). If necessary, a public employer may propose variances from the templates pursuant to section 11.21.5.10 NMAC if the unique facts and circumstances of the relevant local public employer are deemed by the Board to be reasonable and necessary to effectuate the purposes of the Act. See NMAC 11.21.5.9 and11.21.5.10, appendix B. Only one variance has been granted. See *In re: Application of the University of New Mexico for Approval of Local Board,* 04-PELRB-2006 (May 31, 2006), *aff'd National Union of Hospital and Health Care Employees, District 1199 NM v. UNM,* 2nd Judicial Dist. Case No. CV 2006-04505 (May 14, 2007). (See procedure in subsection b below for requesting a variance from the template.)



https://www.pelrb.state.nm.us/home.php

Link to Local Boards page is in the middle at the top of the home page



https://www.pelrb.state.nm.us/localboards.php

Link to the PDF of the model local ordinance (or resolution for school districts) is on the Local Boards page.

PROCEDURE FOR LOCAL BOARD FORMATION
11.21.5 NMAC

- Begins with filing of Application
  - Must Include at a minimum(11.21.5.9):
    - Name of Employer
    - Name, address, and phone number of local public body
    - Copy of ordinance, resolution, or charter amendment (hard copy + digital)
    - Evidence that it has been passed or passage is imminent
    - Must use template/model (unless applying for variance)
- Model Resolution on PELRB Website
- Variance for unique facts & circumstances (11.21.5.10)
  - Has only happened once (UNM)

Contents of Application. The application for approval shall include, at a minimum, the name of the local public employer; the name, address and phone number of the local governing body; a complete and fully integrated copy of the proposed resolution, ordinance or charter amendment creating the proposed local board, along with an electronic document or compact disk containing the same information; and the evidence that the proposed resolution, ordinance or charter amendment has either been approved by the local governing body, or submitted for approval pursuant to local procedures.

Proposed Variances. All proposed resolutions, ordinances or charter amendments must follow the board approved templates provided, however, that the public employer may propose variances to the templates where appropriate, pursuant to section 11.21.5.10 NMAC. Upon receipt of an application for approval seeking variance from the board approved templates, the director holds a status conference with the local public employer or its representative and any identified interested labor organizations, to determine the issues and set a hearing date. Upon setting a rule-making hearing, the director shall issue notice of the hearing and in the event that the board determines that such variance is warranted, and the

resolution, ordinance or charter amendment otherwise conforms to the requirements of the Act and these rules, it shall authorize the director to proceed with processing the application. (NMAC 11.21.5.10).

REQUIREMENTS OF LOCAL BOARDS (§10-7E-10(B), (C), (D), and (E))

- (B): Three (3) members
  - One recommended by management
  - One recommended by labor
  - Those two recommend a third
- (C): One year terms
- (D): No other public office or employment; no conflict of interest
- (E): Get per diem
- Must report amendments to ordinance
  - PELRB has authority to revoke approval if non-compliant (*McKinley County & Gadsden ISD*)

SPECIFIC LOCAL BOARD DUTIES. Once approved by the PELRB a local board assumes the duties and responsibilities of the PELRB and is required to follow all procedures and provisions of the Public Employee Bargaining Act unless a variance petition has been approved by the Board. The duties of the Board are set out in NMSA 1978 Section 10-7E-11 (2003)

SPECIFIC LOCAL BOARD DUTIES §10-7E-11

- (A) Promulgate rules & procedures including:
  - Appropriate Bargaining Units
  - Selection, certification, and decertification of exclusive representatives (unions)
  - Filing of, hearing on, and determination of complaints for prohibited practices
- (B) Local Board ***SHALL:***
  - Hold necessary hearings and inquiries
  - Request information from employers and labor organizations to carry out its functions
  - Hire personnel or contractors as necessary to carry out its functions

The local board shall promulgate rules necessary to accomplish and perform its functions and duties as established in the Public Employee Bargaining Act, including the establishment of procedures for:

(1) the designation of appropriate bargaining units;

(2) the selection, certification and decertification of exclusive representatives; and

(3) the filing of, hearing on and determination of complaints of prohibited practices.

The local board shall also:

(1) hold hearings and make inquiries necessary to carry out its functions and duties;

(2) request information and data from public employers and labor organizations to carry out the local board's functions and responsibilities; and

(3) hire personnel or contract with third parties as the appropriate governing body deems necessary to assist the local board in carrying out its functions.

SPECIFIC LOCAL BOARD DUTIES §10-7E-11

- (C): Local Board ***MAY***:
  - Issue subpoenas for testimony or evidence
    - Must be similar to District Court form (civil)
    - Administer oaths and affirmations, examine witnesses and receive evidence
- (D): Local Board ***SHALL*** decide all issues by **majority vote** and issue its decisions in the form of **written orders and opinions**
- (E): Local Board has the power to enforce PEBA/Local Ordinance through "appropriate administrative remedies"

In connection with the hearings local boards are authorized to conduct, a local board may issue subpoenas requiring, upon reasonable notice, the attendance and testimony of witnesses and the production of evidence, including books, records, correspondence or documents relating to the matter in question. The local board may prescribe the form of subpoena, but it shall adhere insofar as practicable to the form used in civil actions in the district court. The local board may administer oaths and affirmations, examine witnesses and receive evidence. Please refer to Section V below for suggestions about how local boards should conduct hearings.
Local boards shall decide all issues by majority vote and shall issue their decisions in the form of written orders and opinions. In all instances where the local board conducts its business, some fundamental understanding of Roberts Rules of Order will help meetings to proceed efficiently. Please refer to Section VII below for a primer on Rules of Order.

A local board has the power to enforce provisions of the Public Employee Bargaining Act or a local collective bargaining ordinance, resolution or charter amendment through the imposition of "appropriate administrative remedies". See

Section VI below for a discussion of what constitutes an appropriate administrative remedy.

DESIGNATING A HEARING OFFICER

- Not necessary, Local Board can decide matters *en banc*
- Rules:
  - 11.21.2.19(B)
  - 11.21.23.14
  - 11.21.1.28

DELEGATION AND APPOINTMENT OF A HEARING OFFICER.

The Board may hold hearings and decide matters *en banc* or may appoint someone, including one of its members as a designated Hearing Officer as long as the Board subsequently reviews, affirms reverses or modifies the Hearing Officer's findings at a public meeting. The following procedures followed by the PELRB's Hearing Officers may be instructive:

> **Designation of Hearing Officer.** Pursuant to the Board's Rule 11.21.2.19, in a representation hearing the Board or the director shall appoint the hearing examiner, and the director may appoint himself or herself to serve as hearing examiner. In Prohibited Practices proceedings the Board has interpreted its rules to permit the director to appoint himself or herself as hearing officer in PPC hearings just as in representation proceeding. Rule 11.21.3.14 provides that upon issuing a notice of hearing, the director shall designate a hearing examiner, set a hearing, and serve a notice of the hearing upon all parties. This interpretation is supported by the general authority granted to the Director in Rule 11.21.1.28:

“Except as otherwise provided in these rules, the director shall have authority to delegate to other board employees or outside contractors any of the authority delegated to the director by these rules. In every case where these rules or the act provide for the appointment of a hearing examiner, the director or the board shall appoint the hearing examiner, and may appoint the director or a board member as the hearing examiner.”

DUTIES of the HEARING EXAMINER

- If there is no settlement agreement, the hearing examiner ***shall*** conduct a formal hearing
- Representation Petitions
  - Unit composition hearing not later than 30 days
    - Take sufficient evidence to make determination
  - Pre-Election Conference
    - Details of election (time, date, place, etc.)
  - Written Report
    - subject to Board review
- PPC
  - Conduct hearing
  - Take evidence necessary for resolution of complaint
  - Issue written decision
    - Subject to Board review

Duties of Hearing Officer. If there is a dispute between the parties regarding unit composition, or the director is satisfied that the issues can best be resolved in a hearing, the director shall issue and serve a notice of hearing. A hearing concerning unit composition shall be set for a date not later than 30 days following the director's notice of hearing or the director's receipt of notice of the dispute, whichever is sooner. A report and direction of election or a report and dismissal of petition shall be subject to board review. See Rule 11.21.2.18. The appointment process is similar in representation proceedings. See Rule 11.21.2.19. The hearing officer shall take evidence sufficient to make a full and complete record on all unresolved unit issues and any other issues necessary to process the petition. Details such as the time, date and place of the election, and whether there will be manual or mail ballots or a combination, shall not be resolved through the hearing process, but shall be resolved instead through the pre-election conference process. The hearing examiner may examine witnesses, call witnesses, and call for introduction of documents as discussed more fully below.

Obligation to Conduct a Hearing. In the absence of an approved settlement

agreement, the hearing examiner shall conduct a formal hearing, assigning the burden of proof and the burden of going forward with the evidence to the complainant, as stated in 11.21.1.22 NMAC. The hearing examiner, in his or her discretion, may examine witnesses, call witnesses, or call for the introduction of documents. See 11.21.3.16 NMAC.

BURDEN of PROOF

- Representation Petitions
  - No burden of proof
  - Hearing Examiner is responsible for developing a sufficient record to support determination
  - May request evidence from any party
- Unit Clarification
  - Party seeking change bears burden of proof
- PPC
  - Complaining party has burden of proof

Burden of Proof. In a prohibited practice proceeding, the complaining party has the burden of proof and the burden of going forward with the evidence. Except in unit clarification proceedings, no party shall have the burden of proof in a representation or factfinding proceeding. Rather, the hearing examiner shall have the responsibility of developing a fully sufficient record for a determination to be made and may request any party to present evidence or arguments in any order. In a unit clarification proceeding a party seeking any change in an existing appropriate unit or in the description of such a unit shall have the burden of proof and the burden of going forward with the evidence. See 11.21.1.22 NMAC.

PREHEARING SUGGESTIONS

- Prehearing conference is a good idea before evidentiary hearings
  - Disputed facts
  - Will take evidence and testimony to resolve
- Examples:
  - Bargaining unit disputes
  - Objections to the selection/certification/decertification of an exclusive representative (union)
  - PPC (most common)
- Inform parties of steps the prepare for hearing
- No evidence or witness testimony

PREHEARING AND HEARING SUGGESTIONS. The intent of this section is not to give legal advice but to describe best practices in the opinion of PELRB staff. Whenever a board needs to hold an evidentiary-type hearing, where testimony of witnesses or documentary evidence is necessary to establish disputed facts as contrasted with hearings where the disputants are arguing how law or policy should be applied to undisputed facts, holding a prehearing conference is advisable. Examples of instances when an evidentiary hearing may be necessary and therefore, a prehearing conference is advisable include:
1. Disputes over the designation of appropriate bargaining units;
2. Objections to the selection, certification and decertification of exclusive representatives and, most commonly;
3. Determination of prohibited practices complaints.

At a Prehearing Conference the board, or its designated hearing officer, informs the parties of the steps necessary to get ready for an evidentiary hearing – it is not the hearing itself. The board does not accept testimony or evidence at a prehearing conference. The parties do not bring witnesses or exhibits to the pretrial conference.

PREHEARING CONFERENCE

- Scheduling
  - Email parties with suggested dates (availability)
  - Once agreed to, send Scheduling Notice
- At the Prehearing Conference:
  - Rules of evidence
  - Set date of hearing and deadlines for exchange of evidence/witness lists
    - Prehearing Scheduling Order if necessary
    - Send Notice of Hearing after date is set
      - Must file Motion for Continuance to change time of hearing after Notice of Hearing is sent
  - Prospects of settlement?
  - Prehearing Motions?

Scheduling the Prehearing Conference. The practice at the PELRB for scheduling a Prehearing Conference is to email the parties with a request to schedule the conference and suggesting a few dates and times the board will be available for that purpose. Once a date for the conference has been agreed to, the board should send written notice of the scheduled date and time all entitled to notice.

What Occurs at the Conference? During the pretrial conference the board discusses rules the parties must follow for the presentation of evidence, sets deadlines for the exchange of information between the parties and sets the date for the hearing. Each party may be given a Pretrial Scheduling Order that describes the rules and deadlines agreed to at the conference. Each party should know ahead of the conference how many witnesses and exhibits he or she will use at the trial. The board will probably ask for this information. Some things to discuss at the conference include:

1. Prospects for settlement;
2. Whether there are any prehearing motions that must be decided before the parties may proceed with an evidentiary hearing such as a challenge to the board's jurisdiction and if so, when can such motion be heard or briefed;

3. Setting a date and time for a hearing on the merits;
4. Deadlines for the exchange of witness and exhibit lists, copies of listed exhibits, submission of a stipulated pre-hearing order containing such information as a statement of contested facts and issues including the relief sought and the party or parties bearing the burden of proof with respect to any issue, stipulation of those matters not in dispute; deadlines for any discovery permitted and for requesting subpoenas and any special needs to accommodate disabilities or translation services.
5. The Board will set a date, time and place for the hearing and send out a Notice of Hearing. To change a hearing date, a party must file a Motion for Continuance (postponement) before the scheduled hearing. The board or its designated Hearing Officer will decide whether to change the date.

WITNESSES

- Two (2) Kinds:
  - Lay Witness
    - Has personal knowledge of relevant facts
  - Expert witness
    - Is knowledgeable in specialized field
      - Training, education, experience
- Each party must identify their witnesses
  - Name, address, telephone number, expected testimony
  - Deadlines set at prehearing conference
- Can subpoena unwilling witnesses
  - Good idea even for willing witnesses
- Duty is on the parties to ensure witness appearance

Witnesses. There are two types of witnesses: lay and expert. A lay witness is anyone with personal knowledge of the facts in the case. A lay witness is generally not permitted to give an opinion or guess or speculate. An expert witness is someone who, as a result of training and experience, is knowledgeable in a specialized field and can give an opinion that will assist the Hearing Officer or board to understand the evidence or determine a fact in dispute.

Each party must identify by name, address, telephone number, and expected testimony, all witnesses that the party may call to testify at trial within deadlines set in the Prehearing Order or board rules. If a witness does not want to appear voluntarily at a hearing or trial, the party may serve a Subpoena on the witness. Parties are strongly advised to subpoena witnesses even when they volunteer to appear. If a witness has been subpoenaed but fails to appear, the party calling the witness can ask the court for a postponement (called a “continuance”) and an order requiring the witness to appear. If a witness has not been subpoenaed, the case will go on as scheduled even if the witness fails to appear as promised. All parties have the duty of ensuring their witnesses appear.

SUBPOENAS

- An order to appear at hearing
- Deuces Tecum
  - Order to bring documents with them
  - Request must describe documents with reasonable particularity
- Be prepared to pay witness fee and mileage
  - Witness isn't required to appear if it is not at least offered
- Form available on PELRB website

Subpoenas. A Subpoena is an order by the court for a witness to appear at a hearing or trial. A Subpoena Duces Tecum is an order by the court for the witness to bring specific documents. A form subpoena used by the PELRB may be obtained from the Board's website: www.pelrb.state.nm.us. To get a Subpoena for the production of documents or "Duces Tecum" a party must provide the Board with a description of the requested documents. If a party subpoenas a witness, that party should be prepared to pay the witness a witness fee and a mileage fee. If the fee is not paid, or at least offered, the witness does not have to appear to testify.

The link to the Forms page is to the right of the Local Boards link.

https://www.pelrb.state.nm.us/forms.php

EXHIBITS

- Documents or objects in support of claims/defenses
  - Photos
  - Contracts
  - Business records
  - Etc.
- Parties must exchange exhibits by deadline set at prehearing conference (in Prehearing Order)
- Must establish validity (authentication)
  - Stipulation (agreement of the parties)
  - Testimony
- Must ask Hearing Examiner to accept the evidence before it can be considered

Exhibits. Exhibits are documents or objects that a party uses in support of claims and/or defenses. Exhibits can include photographs, contracts, business or medical records, or any other item that may be important in the claim. The parties are required to exchange exhibits prior to the hearing according to deadlines set in a Prehearing Order. At trial, a party using a document as an exhibit must establish that the document is valid. This may be done by agreement or "stipulation" or may require a witness who can testify to the creation or authenticity of the document, along with the original or a clear copy of the document. During the hearing, each party must ask the Hearing Officer to accept each exhibit as evidence before he or she can consider the exhibit.

EVIDENCE

- No formal rules like the courts
- Admissible evidence:
  - Anything not objected to **OR** excluded by the hearing examiner
  - Hearsay OK (but not as persuasive as direct testimony)
- Inadmissible
  - Timely objected to or excluded by the Hearing Examiner because:
    - Irrelevant
    - Immaterial
    - Unreliable
    - Unduly repetitious or cumulative
  - Privileged
    - Attorney-client, Physician-patient, priest-penitent, etc.
    - Privilege can be waived, but must be waived by the person whose privilege it is (client, patient, penitent)

Evidence Admissible. The hearing examiner or board may receive any evidence not objected to, or may, upon the hearing examiner's or board's own initiative, exclude such evidence if it is irrelevant, immaterial, unreliable, unduly repetitious, cumulative or privileged.

Technical rules of evidence do not apply in administrative proceedings such as board hearings. And hearsay evidence may be admitted although its hearsay nature may affect the weight given it by the Hearing Officer. Irrelevant, immaterial, unreliable, unduly repetitious or cumulative evidence and evidence protected by the rules of privilege (such as attorney-client, physician-patient or special privilege) shall be excluded upon timely objection.

EVIDENCE (continued)

- Evidence can be tentatively accepted
- Residuum Rule:
  - Any decision must be supported by some evidence that would be admissible in a jury trial.
- Parties can only use evidence exchanged with the other party pursuant to the Scheduling Order issued after the prehearing conference
  - Hearing Examiner can allow other evidence upon a showing of good cause

In ruling of the admissibility of evidence, the hearing examiner may require reasonable substantiation of statements or records tendered, the accuracy or truth of which is in reasonable doubt. Evidence may be tentatively received by the hearing examiner or board, reserving a ruling on its admissibility until the issuance of a report or decision. See 1.21.1.17 NMAC.

While acknowledging that the rules of evidence do not apply in our hearings the Hearing Officer should also be aware that any decision rendered may not be devoid of support by any legally admissible evidence but must be supported by some evidence that would be admissible in a jury trial. This is known as the "residuum rule". See *Trujillo v. Employment Security Commission of New Mexico,* 610 P.2d 747, 94 N.M. 343 (N.M., 1980); *Jones v. Employment Services Division of Human Services Dept.*, 619 P.2d 542, 95 N.M. 97 (N.M., 1980). (A reviewing court is required by the rule to set aside an administrative finding unless supported by evidence which would be admissible in a jury trial.)

Evidence Limited by Scheduling Order

11.21.1.20 NMAC requires the parties to serve upon all other parties all documents it intends to introduce at the hearing and a list of all witnesses it intends to call, along with a brief statement of the subjects about which each witness is expected to testify. The hearing examiner may permit the admission in evidence of witness testimony or of documents not timely supplied under this rule if, in the hearing examiner's judgment, there was sufficient reason for the failure to timely supply the names or documents

CONDUCTING A HEARING

- Opening Statement by Hearing Examiner
  - Preliminary matters/prehearing motions?
- Opening statements
  - Summary not argument
- Petitioner/Complainant presents evidence/witnesses
  - Respondent/Employer can cross-examine
- Respondent/Employer presents evidence/witnesses
  - Petitioner/Complainant can cross-examine
- Petitioner/Complainant rebuttal, if requested
- Closing arguments
- Closing Statement by Hearing Examiner

OPENING HEARINGS. Typically, both parties to a hearing will be allowed to make a brief (5-10 minutes) opening statement in which they will describe the evidence they expect to produce and a summary of their case. This is not an opportunity for either to argue application of the anticipated evidence to the law. The following forms and procedures are followed by the PELRB in its hearings:

Form of Opening Statement by Hearing Officer:

"The hearing will be called to order at ____ o'clock on [date]. This is a [representation proceeding, prohibited labor practice hearing, or other hearing as may be appropriate] in PELRB Case No. _____.

The Hearing Officer presiding is _____ and this hearing is being held at _____. Will counsel and other representatives or the parties appearing in this matter please state their appearances for the record beginning with the [Petitioner, Complainant or movant as may be appropriate].

Before taking testimony or other evidence in this case I would like to inquire about the progress of any settlement negotiations of any of the issues in this case(1).

[Depending on the parties' response, take action as may be appropriate such as delaying the taking of evidence to allow settlement discussions to conclude, or proceeding directly to hearing if settlement efforts have failed.] If settlement discussions are required at any time during the hearing I will be glad to grant a reasonable recess for that purpose. As evidence develops during the hearing sometimes attitudes change that make settlement possible. I invite you to bear in mind as the hearing proceeds, that opportunities for discussion of settlement will be available upon request. (2)

Are there any preliminary matters or pre-hearing motions that need to be addressed before taking evidence?"

[Address any prehearing matters including the sequestration of witnesses. See Section II below].

The parties may make a brief opening statement or may elect to proceed directly with testimony. How do you wish to proceed?"

After opening statements, the Petitioner or Complainant presents his or her case by calling witnesses to testify and/or by presenting exhibits. The Petitioner or Complainant asks each witness questions. This is called direct-examination. When the Petitioner or Complainant finishes, the Respondent or Employer may ask the witness questions. This is called cross-examination.

After all of the Petitioner or Complainant's witnesses have testified, the Respondent or Employer may call and question his or her own witnesses and/or present exhibits. The Plaintiff can cross-examine the Defendant's witnesses. After the Respondent or Employer's witnesses testify, the Petitioner or Complainant has another chance to present rebuttal evidence. This is evidence given to explain or disprove facts presented by the Respondent or Employer.

(1)NMAC 11.21.3.15 regarding pre-hearing settlement efforts requires the director to have attempted settlement between the service of a notice of hearing and before commencement of the hearing. If the parties achieve a settlement, they shall reduce it to writing and submit it to the director for approval. If the complaint cannot be settled by the parties prior to the hearing, the matter shall proceed to hearing. However, the complaint may be settled by the parties at any time prior to hearing.

(2)NMAC 11.21.3.15 (D) provides that a complainant in a PPC proceeding may withdraw the complaint at any time prior to hearing without approval by the director or the board. However, after commencement of the hearing, the complaint shall not

be withdrawn or settled without the approval of the hearing examiner. Furthermore, after a hearing examiner's report has been issued, a complaint may not be withdrawn without board approval.

CLOSING HEARINGS

Closing Argument. When all of the parties have presented their evidence, the Hearing Officer may allow the parties to make a closing argument. A closing argument is a chance for the parties to summarize the facts and law established during the trial and show strengths and/or weaknesses in the case. Any party may request permission to file a post-hearing brief in lieu of oral argument. If such a request is made the hearing examiner shall permit all parties to file briefs and shall set a time, for the filing of briefs which normally shall be no longer than ten days following the close of the hearing. Briefs shall be filed with the director and copies shall be served on all parties of counsel of record. See Rule 11.21.2.20.

Form of Closing Statement by Hearing Officer.

"Thank you for your documentary submissions and testimony in this case. This concludes all submissions of evidence [or, if the record has been held open state the period and the purpose of doing so, limiting the opportunity for one party to submit new evidence that cannot then be challenged by the opposing party] and I will submit my written decision to the Board with a copy served on each of the parties within the time set forth in the Board's rules.(1) If any party requests permission to file a closing brief I will schedule the submission of briefs no more than 10 days after closing this hearing in lieu of making an oral closing argument.(2) Does any party request leave to file a written brief?"

[If not, proceed with closing statements. If yes, schedule submission and service of simultaneous closing briefs; no reply briefs].

"Are there any other matters that need to be addressed before concluding this hearing? [If yes, address those matters; if not, close the hearing].

There being nothing further, this hearing is now closed. We are off the record at ____o'clock."

After the hearing, the board or Hearing Officer will render a decision in writing. The Decision or Order states who won or lost the case and the appropriate administrative remedy to be administered. A party that does not agree with the decision or Order has the right to appeal to the District Court within 15 days after the final Board Order is filed.

(1) NMAC 11.21.3.18 and 11.21.2.20 both require the hearing examiner submit his or

her recommended decision with findings of fact, conclusions of law and the reason for the decision with 15 days of closing the hearing.
(2) Both NMAC 11.21.3.17 and 11.21.2.20 provide that if any party requests permission to file a post-hearing brief, the hearing examiner shall permit all parties to file briefs and shall set a time, for the filing of briefs which normally shall be no longer than 10 days following the close of the hearing. Briefs shall be filed with the director and copies shall be served on all parties.

HEARINGS:
SEQUESTERING WITNESSES

- Hearings are open to public under the Open Meetings Act
- Even so, parties can request that witnesses be sequestered
  - Sent outside so he or she can't hear other witnesses' testimony
- Discourages fabrication, inaccuracy and collusion
- Can't sequester
  - Parties or their representative if not a person
  - Person whose presence is essential
  - Those authorized by statute to be present
- Give boilerplate speech
- Remind witnesses not to talk to each other as they leave the stand

Separation of Witnesses – Sequester Witnesses During Hearing

Pursuant to the Open Meetings Act hearings before the board are open to public. Sometimes, one party or the other will ask that witnesses in the case be excluded from what is otherwise a public hearing in order to avoid their tailoring their testimony to comport with that of prior witnesses. This is known as a request to "sequester" a witness. Fed. Rul Evid. Rule 615 provides a good explanation of what is meant by "invoking the Rule":

"At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:
(a) a party who is a natural person;
(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
(c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or
(d) a person authorized by statute to be present."

The Notes of the Advisory Committee on the Rules provide further guidance:

"The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion. 6 Wigmore §§1837–1838. The authority of the judge is admitted, the only question being whether the matter is committed to his discretion or one of right. The rule takes the latter position. No time is specified for making the request.

Several categories of persons are excepted. (1) Exclusion of persons who are parties would raise serious problems of confrontation and due process. Under accepted practice they are not subject to exclusion. 6 Wigmore §1841. (2) As the equivalent of the right of a natural-person party to be present, a party which is not a natural person is entitled to have a representative present. Most of the cases have involved allowing a police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness. [Citations omitted]. Designation of the representative by the attorney rather than by the client may at first glance appear to be an inversion of the attorney-client relationship, but it may be assumed that the attorney will follow the wishes of the client, and the solution is simple and workable. See California Evidence Code §777. (3) The category contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation. See 6 Wigmore §1841, n. 4."

Guided by those principles, the PELRB have developed the following response to requests for the separation of witnesses:

"Counsel has invoked an exception to the open nature of this proceeding whereby witnesses may be excluded from the hearing so that they cannot hear other witnesses' testimony. This means that all persons who are going to testify in this proceeding with specific exceptions that I will tell you about may be present only when they are giving testimony. (1)

The exceptions are a party who is a natural person, an officer or employee of a party that is not a natural person designated as the party's representative by its attorney; a person whose presence a party shows to be essential to presenting the party's claim or defense, or a person otherwise authorized by law to be present. They may remain in the hearing room even if they are going to testify or have testified.

Excluding witnesses for this purpose also means that from this point on until the hearing is finally closed, no witness may discuss with other potential witnesses either the testimony that they have given or that they intend to give. The best way to avoid any problems is simply not to discuss the case with any potential witness until after

the hearing is completed. It is the responsibility of counsel to ensure that their witnesses comply with this instruction."

(1) N.M. Rule 11-615 while not binding is also instructive. At a party's request or on its own a court must order witnesses excluded so that they cannot hear other witnesses' testimony. Exceptions to the rule are a party who is a natural person, an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney, a person whose presence a party shows to be essential to presenting the party's claim or defense, or a person authorized by law to be present.

HEARINGS:
ADMINISTERING THE OATH

WITNESS OATH

- The truth, the whole truth and nothing but the truth
- Not required by PEBA, but does remind the witness of the importance of being truthful
- Can do affirmation if witness is averse to swearing an oath

INTERPRETER'S OATH

- Promise to translate faithfully and truly
- Affirmation OK

ADMINISTRATION OF OATH

Witness Oath. (Neither the PEBA, nor the rules promulgated thereunder require the administration of a witness oath before testimony may be taken. However, the reason for administering an oath as stated in N.M. Rule Evid. 11-603 is to "awaken the witness's conscience and impress the witness's mind with the duty to [testify truthfully]." An affirmation instead of an oath is acceptable so that if a witness refuses to swear or affirm on the basis of a religious conviction any formula of words that can reasonably be construed as a promise or undertaking to testify truthfully will suffice.(1) It is suggested that the Hearing Officer first inquire whether the witness has any objection to swearing an oath and if he or does have such an objection modify the language of the oath below so as to accommodate the objection):

"Do you solemnly swear [or affirm] that your testimony at this hearing will be the truth, the whole truth, and nothing but the truth under penalty of perjury?"

Interpreter's Oath

“Do you solemnly swear that you are fluent in both English and _____[foreign language] and that you will faithfully and truly, to the best of your skill, knowledge and ability translate from English to _____ [foreign language] and from _____ [foreign language] to English when called upon to do so during hearing under penalty of law?”

Witness Instruction Upon Completion of Testimony

It is recommended that as witnesses leave the witness stand upon completion of their testimony they be reminded that they are not to discuss their testimony with other witnesses until the hearing is completed.

(1) See, *Silver State Disposal Service*, 326 NLRB 84, 98-200 (1998) and *Union Starch & Refining Co.,* 82 NLRB 495, 496 (1949).

LOCAL BOARD DUTIES:
PROMULGATION of BOARD RULES

- Rules necessary to accomplish and perform its duties
  - Hold hearings and make inquiries necessary to carry out its functions and duties
  - Conduct studies on labor relations
  - Request data necessary to carry out its functions and duties
- Procedures for:
  - Designating appropriate bargaining units
  - Selection, certification, and decertifiaction of exclusive representatives
  - Filing of, hearing on, and determination of complaints of prohibited practices

PROMULGATION OF BOARD RULES. Among the statutory duties of the local board is the promulgation of rules necessary to accomplish and perform its functions and duties including the establishment of 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.

Further, The board shall:
hold hearings and make inquiries necessary to carry out its functions and duties;
conduct studies on problems pertaining to employee-employer relations; and
request from public employers and labor organizations the information and data necessary to carry out the board's functions and responsibilities.

The board may issue subpoenas requiring, upon reasonable notice, the attendance and testimony of witnesses and the production of evidence, including books, records, correspondence or documents relating to the matter in question. The board may administer oaths and affirmations, examine witnesses and receive evidence.

At a minimum, the local board should meet annually to enact an Open Meetings Act Resolution. NMSA 1978 Section 10-15-1(D) (2019) states that any public body affected by the Open Meetings Act "shall determine at least annually in a public meeting what notice for a public meeting is reasonable when applied to that public body." In effect, this means each public body must meet at least once a year to determine what constitutes reasonable notice for that body. The New Mexico Open Meetings Act Compliance Guide, Eighth Edition (2015) offers further guidance in its commentary on subsection (D):

"[Subsection D] also requires each public body to determine its notice procedures at least once a year in a public meeting. Accordingly, each public body should adopt an annual resolution or other announcement at a regularly scheduled open meeting stating its procedure for giving notice of meetings."

PARLIAMENTARY PROCEDURE

BASIC PRINCIPLES

- Courtesy
- Order
- Justice
- Equality for all
- Consideration of one thing at a time
- Majority prevails
- Minority is heard
- Absentees' rights protected
- OMA requirement of posting the Agenda 72 hours before meeting serves several of these purposes (also required by law for meeting to 'count'-courts can deem actions taken at improperly noticed meetings *ultra vires,* and declare them invalid

BASICS OF PARLIAMENTARY PROCEDURE. Following some form of parliamentary procedure will help the local boards to expedite business, ensure justice, provide equal treatment for all participants and conduct meetings in an orderly fashion. All references herein are to Roberts Rules of Order New Revised, 11th Edition but Robert Rules of Order is not the only way to conduct a meeting. Rules should be adopted to meet the needs of the organization and the community it serves. Rules of Procedure that are adopted by the Board are within the control of the Board and may be amended by majority vote. The purpose of rules of procedure is to assist the body in performing its duties more efficiently and with fairness to its members. Whenever rules of procedure fail to serve this purpose, the rules may be suspended.

Principles of Parliamentary Law

Courtesy.
Order.
Justice.
Equality for All.
Consideration of One Matter at a Time.
Right of the Majority to Prevail.

Right of the Minority to Be Heard.
Right of Absentees to Be Protected.

For public bodies, the Open Meetings Act provides that the agenda be available to the public in advance. By the agenda, the public is notified that those items listed on the agenda will be considered at that meeting.

PARLIAMENTARY PROCEDURE:
MOTIONS

- The basis of all parliamentary procedure
  - Brings up the business to be discussed/acted upon
- Once in front of the board, must be disposed of somehow
  - Adopted
    - Becomes official
  - Rejected
    - Not official
- Language should be clear and precise
  - Affirmative (can't move ***not*** to do something)

Motions. The motion is the basis of parliamentary procedure. The motion provides a method of bringing business (a question) before the body for consideration and action. A motion may itself bring its subject to the assembly's attention, or the motion may follow upon the presentation of a report or other communication. RONR 11th ed. p. 27; l. 14-18. Only one question can be considered at a time; once a motion is before the body, it must be adopted, rejected, or disposed of in some other way. RONR 11th ed. p. 59; l. 18-23. If the Main Motion is adopted, it becomes the officially recorded statement of an action taken by the Governing Board. RONR 11th ed. p. 104; l. 14-16. Main Motions should therefore be worded in a concise, un-ambiguous, complete, and affirmative form appropriate to such a purpose.

Example:

"I move we approve the purchase of the John Deere front end loader."

This is the proper way to state the motion in the affirmative EVEN IF the member really wants to defeat the purchase, in which case, the member wanting to defeat

the purchase would vote NAY. A Main Motion should not be offered if its effect is to propose that the body refrain from an action since the same result can be achieved by no motion at all. When a procedural matter has been discussed a member may state “I so move”. If the motion is very short and the members know exactly what is moved this can save time, but in most situations, that is not the case. The recording clerk should never hesitate to request clarification of the motion. Remember, this is going into the official record.

PARLIAMENTARY PROCEDURE:

ACTIONS

- **Amending a Motion**
- **Seconding a Motion**
- **State the Question**
- **Debate and Decorum**
- **Put the Question**
- **Tabling and Postponing**
- **Postponing Indefinitely**
- **Previous Question and Calling the Question**
- **Raising a Point of Order**
- **The Abstention Dilemma**

Amending a Motion. Amendment is used to modify the wording of a main motion.

An amendment must be germane to the main motion – it cannot introduce an independent question. It MAY be hostile to main motion. Its adoption does not adopt the main motion; that motion remains pending in its modified form. Rejection of the motion to amend leaves the main motion as it was prior to the amendment being offered. Amendments are typically offered to:

insert words or a paragraph within a motion
add words or a paragraph at the end of a motion
strike out words or paragraphs
strike out and insert words
substitute (strike out and insert paragraphs)

Seconding a Motion. The requirement of a second is for the chair's guidance as to whether the chair should *state the question*, thus placing it before the assembly. Its purpose is to prevent time from being consumed by the body's having to dispose of a motion that only one person wants to see introduced. RONR 11th ed. p. 36; l. 26-31. A second merely implies that another member agrees

that the motion should come before the meeting and not that he necessarily favors the motion. RONR 11th ed. p 36; l. 9-11. After debate has begun or, if there is no debate, after any member has voted, the lack of a second has become immaterial. RONR 11th ed. p. 37; l. 9-12. Too often, a body will discuss an issue then attempt to kill it by a "*lack of a second*" tactic. Governing Boards should go on record as rejecting a measure – either by the motion to postpone indefinitely or to vote the measure down.

State the Question. When a motion that is in order has been moved and seconded, the chair formally places it before the assembly by *stating the question*; that is, the chair states the exact motion and indicates that it is open to debate. Take note that neither the making of a motion nor the seconding places a motion before the assembly, only the chair can do that by *stating the question*. RONR 11th ed. p. 32; l. 25-27

Debate and Decorum. All questions and statements shall be directed through the presiding officer. The chair must recognize the member prior to speaking. One member should not interrogate another member or person speaking from the public except through the chair. During discussion, remarks made by the members should be confined to the motion or matter that has been stated by the chair. During discussion, voting members may not disturb the other members in any way that may be considered disruptive to the proceedings or the transaction of business, It is "out of order" to interrupt a speaker who "has the floor".

Put the Question. To "*put the question"* should not be confused with "stating the question". RONR 11th ed. p. 32 l. 21-24. To *Put the question is w*hen debate appears to have closed and the chair asks, "are you ready for the question"? If no one then rises to claim the floor, the chair proceeds to *put the question*---that is puts it to a vote. RONR 11th ed. p. 44; l. 12-18.

Tabling and Postponing. This is the most commonly misused motion. The purpose of this motion is to interrupt the pending business to permit doing something else immediately. It enables the body to set aside a pending question temporarily when something of immediate urgency has arisen or when more information is forthcoming. RONR 11th ed. p. 209; l. 25-30. It is also appropriate to table an item, or items, if the body wishes to take up an item that is later on the agenda or in the order of business. The motion to *Lay on the Table* is subject to a number of incorrect uses that should be avoided. It is out of order to move to lay a pending question on the table if there is no valid reason. An innocent misuse is to use this motion to postpone [action on] a pending item to another meeting. The appropriate motion in this case is to postpone (to a certain time). RONR 11th ed. p. 215, l. 10-15. It is good practice that if a question is tabled, it should be for a valid reason, then taken from the table at the current session (meeting). As stated if the intent is to delay or defer action, the motion is to *postpone* until a certain time. RONR 11th ed. p 179; l. 31-34.

Postponing Indefinitely. Adoption of a motion to postpone indefinitely kills the measure. This motion is beneficial if the body declines to take a position on the question without a direct vote, most often for political reasons. RONR 11th ed. p. 121; l. 4-9. This motion is cleaner than other tactics used to kill a measure, such as to table, lack of a second, or no motion to bring the issue on the floor.

Previous Question and Calling the Question. The Previous Question and Call the Question mean the same thing. Adopting this motion will bring debate to an immediate close. A motion such as "I call for the question" or "I move we vote now" is a motion for the *Previous Question.* RONR 11th ed. P 202; l. 2-8. A motion for the *previous question* or call for the question is an effective tool for ending a discussion that goes on-and-on–and-on repetitively but can be abused if it is used as a tactic to stop or avoid any debate or discussion. The *call for a question* requires a second and a 2/3 vote. This guarantees that one person cannot close debate–it is up to the entire body and is determined by a vote. By the same rule, the entire body does not need to allow unnecessary discussion to linger. This motion and procedure is also the solution to discontinue a filibuster. Before a vote is taken on the pending motion, a vote must be taken on the motion to "close debate". If the call for the question passes – debate closes and a vote on the pending motion is taken immediately. If the motion fails, debate continues. RONR 11th ed. P. 202; l. 18-24

Raising a Point of Order. It is the right of every member who notices a breach of the rules to insist on their enforcement thereby calling upon the chair for a ruling and enforcement. The chair should immediately make a ruling on the validity of the point (point well taken or point not well taken); or submit the point to the assembly for decision. Should the chair make a ruling without a vote of the assembly, two members, by moving and seconding, can appeal the ruling if so desired. RONR 11th ed. p. 249; l. 31-35--p. 250, l; 1-8. It is important to note that the exception to the timeliness of the point of order is in a case whereby a motion has been adopted that conflicts with the constitution or other laws. In such case, it is never too late to raise a point of order since any action so taken is null and void. RONR 11th ed. p. 251; l. 5-10. RONR goes on to say, "In ordinary meetings it is undesirable to raise point of order on minor irregularities of a purely technical character, if it is clear that no one's rights are being infringed upon and no real harm is being done to the proper transaction of business". RONR 11th ed. p 250; l. 12-15

The Abstention Dilemma. Roberts states that "although it is the duty of every member who has an opinion on a question to express it by this vote, he can abstain, since he cannot be compelled to vote". RONR 11th ed. p. 407; l. 11-20. In some instances an abstention may have the same effect as a negative vote. However, an abstention is counted as neither a "yes" vote nor a "no" vote. RONR 11th Ed. p. 390; l. 6-12. Board members have a responsibility to take a stand and vote on all matters on behalf of the people who appointed them. A local rule that requires board members to vote on all matters, unless there is a conflict of interest, is

definitely in order. See NMSA 1978 Section 10-7E-11(D) (2019).

LOCAL BOARD DUTIES:
OPEN MEETINGS ACT

- Must meet at least once a year to determine what constitutes reasonable notice for meetings
  - NMSA 1978 §10-15-1(D)
- Attorney General's Compliance Guide strongly recommends passage of a resolution
  - Compliance guide is available online from the AG's website (if you call and ask nicely, they may send you one in the mail)
  - Contains Model Open Meetings Act Resolution

OPEN MEETINGS ACT BASICS. The "Open Meetings Act," NMSA 1978, Sections 10-15-1 to 10-15-4, is also known as a "sunshine law." Sunshine laws generally require that public business be conducted in full public view, that the actions of public bodies be taken openly, and that the deliberations of public bodies be open to the public. Public access to the proceedings and decision-making processes of governmental boards, agencies and commissions is an essential element of a properly functioning democracy. The State Attorney General's Compliance Guide may be accessed at: https://www.nmag.gov/uploads/files/Publications/ComplianceGuides/Open%20Meetings%20Act%20Compliance%20Guide%202015.pdf.

OPEN MEETINGS ACT

- AKA "Sunshine Law"
- NMSA 1978 §10-15-1 to §10-15-4
- Applies to "*All meetings of a quorum of members of any board, commission, administrative adjudicatory body or other policymaking body of any state agency or any agency or authority of any county, municipality, district or political subdivision*"
  - This includes local labor boards

The State Attorney General's Compliance Guide may be accessed at: https://www.nmag.gov/uploads/files/Publications/ComplianceGuides/Open%20Meetings%20Act%20Compliance%20Guide%202015.pdf.

OPEN MEETING ACT: REQUIREMENTS

- Audio and Visual Recording
- Quorum
  - No 'Rolling Quorums'
- Reasonable Notice
  - Meet at least annually to determine what constitutes 'Reasonable Noitce'
- Recess/Reconvene
- Agenda
  - 72-hour rule
- Minutes

Recording. Audio and video recordings must be accommodated. See § 10-15-1(A)d.

Quorum Requirement. All meetings of a *quorum of members of any board*, commission, administrative adjudicatory body or other policymaking body of any state agency or political subdivision held for the purpose of formulating public policy; discussing public business, or for the purpose of taking any action within the authority or delegated authority of the policymaking body are to be public meetings, with limited exceptions. See Section H below. A "quorum" is one more than half of the public body's members and may exist even if members are not present together at same time and place, e.g. telephonic or video appearances. See § 10-15-1(B).

"Rolling Quorum" Prohibited. The quorum doesn't need to be in the same room to hold a meeting; they might discuss public business in a series of e-mails or phone calls, in person as well as over several days. This is called a "rolling quorum" and it's illegal unless the participants follow all the requirements of the Open Meetings Act.

Public bodies often adopt Robert's Rules of Order or a similar code of parliamentary procedure to govern the process for calling and conducting meetings and taking action. The Open Meetings Act is mandatory and will supersede any such local policy or procedure. The public body must take care not to violate the Open Meetings Act in its attempt to comply with its own parliamentary rules. While a violation of the Open Meetings Act will void the action taken, actions that do not comply with a body's own parliamentary rules may not be invalidated where there is no statutory violation.

In a 2016 summary judgment, a Third Judicial District Court Judge ruled that five of six Las Cruces city councilors and then-Mayor violated the OMA when the officials privately signed a June 11, 2002, letter asking a city ethics board to investigate possible ethics violations by a then-City Councilor, who was then the current mayor. The letter was found to be the product of a "rolling quorum". The former Mayor, who said he was aware of the Open Meetings Act requirements, was careful not to assemble an actual quorum— four members— of the seven-member city council to discuss the investigation, but by meeting separately with what amounted to a quorum of councilors in a series of meetings to reach a consensus, the council members circumvented the Open Meetings Act requirement that decisions be made in public.

Reasonable Notice. Public bodies must give reasonable advance notice of meetings. This requirement applies to all meetings of a quorum of the body whether open or closed. The board must determine what constitutes "reasonable notice" annually in an open meetings resolution. In most circumstances, the Attorney General will consider a notice procedure providing ten days advance notice for regular meetings, three days prior notice for special meetings and twenty-four hours advance notice for emergency meetings, to be reasonable. If a public body meets regularly on a specific date, time and place, e.g., the second Wednesday of each month at 7:00 p.m. at the city auditorium, the public body need not provide ten days advance notice for each individual meeting as long as the public body sets forth the requisite information in the public body's notice resolution and makes the resolution available to the public. See § 10-15-1(D).

Recessing and Reconvening. Sometimes, a board convenes a meeting and then, because of the length of the meeting or other circumstances, is compelled to recess and continue the meeting on another day. If this happens, the board, before recessing the meeting, must state the date, time and place for continuation of the meeting. Immediately after the meeting is recessed, the public body also must post notice of the continuation on or near the door of the place where the meeting originated and in at least one other location where it is likely that people interested in attending the meeting will see the notice. The public body may not discuss items

at the reconvened meeting that were not on the agenda of the original meeting. See § 10-15-1(E).

Agenda Requirement. Boards must include an agenda in their meeting notices or information on where a copy of the agenda may be obtained. With two exceptions, a public body must make the agenda available to the public at least 72 hours before a meeting. The 72-hour requirement applies regardless of whether it includes a Saturday, Sunday or holiday. For example, a public body holding a meeting on a Monday at 9:00 a.m. would meet the 72-hour requirement if it made the agenda available on Friday by 9:00 a.m. The exceptions to the 72-hour requirement apply to:

meetings held to address an emergency, which are discussed in more detail below, and;

public bodies that ordinarily meet more than once a week. Those public bodies must post a draft agenda at least 72 hours before a meeting and a final agenda at least 36 hours before the meeting.

A public body may discuss a matter, but cannot take action, unless the matter is listed as a specific item of business on the agenda. Action on items that are not listed on the agenda for a meeting must be taken at a subsequent special or regular meeting. See § 10-15-1(F).

Minutes Requirement. Boards are required to keep written minutes of all open meetings. (As discussed in the next section, minutes need not be kept during closed sessions.) Minutes of open meetings shall record at least the following information:
a. The date, time and place of the meeting;
b. The names of all members of the public body in attendance and a list of those members absent;
c. A statement of what proposals were considered; and
d. A record of any decisions made by the public body and of how each member voted.

This means that minutes must contain a description of the subject of all discussions had by the board, even if no action is taken or considered. The description may be a concise, but accurate, statement of the subject matter discussed and does not have to be a verbatim account of who said what. It may be useful, although it is not required, to also record in the minutes the other persons invited or present who participate in the deliberations.

A draft copy of the minutes is required to be prepared within ten working days of the meeting. Draft copies of minutes must be available for public inspection and should clearly indicate on the draft that they are not the official minutes and are subject to approval by the board. The public body must approve, amend or disapprove draft

minutes at the next meeting of a quorum, and the minutes are not official until they are approved. Official minutes open to public inspection under this Subsection are also subject to public inspection under the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12. See § 10-15-1(G).

OPEN MEETING ACT: EXCEPTIONS

- issuance, suspension, renewal or revocation of a license
- limited personnel matters
- deliberations in connection with an administrative adjudicatory proceeding
- discussion of personally identifiable information about any individual student
- discussion of bargaining strategy preliminary to collective bargaining negotiations
- Procurement Code exceptions
- attorney-client privilege pertaining to threatened or pending litigation
- discussion of the purchase, acquisition or disposal of real property or water rights
- long-range business plans or trade secrets of public hospitals
- Gaming Control Act exceptions

Exceptions to the Act. A few closures may be implied from or required by other laws or constitutional principles that specifically or necessarily preserve the confidentiality of certain information. Aside from these limited circumstances, however, no exception to the Open Meetings Act can be implied. § 10-15-1(H) prescribes the circumstances under which certain meetings or portions of meetings are not subject to the open meetings and minute-taking requirements of the Open Meetings Act. Because the basic policy established by the Act favors open meetings, the Act must be strictly followed when meetings are to be closed. As a general rule, meetings may only be closed when the matter to be considered falls within one of the enumerated exceptions defined in the Act and discussed in detail below:

> Meetings pertaining to the issuance, suspension, renewal or revocation of a license;
> Hearings at which evidence is offered or rebutted, however, must be open;
> All final actions taken as a result must at an open meeting;
> Limited personnel matters: discussion of hiring, promotion, demotion, dismissal, assignment or resignation of, or the investigation or consideration of complaints or charges against, any individual public employee does not

cover general personnel policy; limited to individual employees does not preclude an aggrieved public employee from demanding a public hearing final actions on personnel taken at open public meetings;
Deliberations in connection with an administrative adjudicatory proceeding. However, any hearing and final action after closed deliberation takes place in public;
The discussion of personally identifiable information about any student. This exception does not apply to discussions that apply to students generally. The exception does not apply if the student, parent or guardian requests public discussion;
Meetings to discuss bargaining strategy preliminary to negotiations between the policy-making body and a union representing public body's employees and collective bargaining sessions. OMA does not apply to discussions of general bargaining policy; Public Employee Bargaining Act permits closed meetings for consultations and impasse resolution;
Discussions of sole source purchases in an amount exceeding $2,500, contents of competitive sealed proposals solicited pursuant to the Procurement Code provided that the final action regarding the selection of a contractor is made in an open meeting.
Meetings subject to the attorney-client privilege pertaining to threatened or pending litigation in which the board is or may become a participant;
Meetings for the discussion of the purchase, acquisition or disposal of real property or water rights by the public body;
Public hospital board meetings to discuss strategic and long-range business plans or trade secrets;
Gaming Control Board meetings to dealing with confidential information under the Gaming Control Act.

OPEN MEETING ACT:
CLOSING A MEETING

- Must follow statutory procedures
  - Motion to close session
    - Must state authority
    - Reasonable specificity
      - Be careful not to make closure moot by being too specific
  - Roll call vote
  - Discussion limited to excepted matter
  - Motion to re-open session

Closed Meetings. The agenda of a meeting of a public body normally covers various topics, some of which may fall within the enumerated exceptions to the open meeting requirement of the Act. Before meeting in closed session, a public body must follow the procedures specified in Section 10-15-1(I) of the Act. As discussed below, there are different procedures for closing an open meeting and for holding a closed meeting separately from an open meeting. When an item is presented for discussion that may be considered in closed session, a motion for closure must be made by a member of the public body stating the authority for closure and the reason for closing the meeting with reasonable specificity. The subject announced will comply with the "reasonable specificity" requirement if it provides sufficient information to give the public a general idea about what will be discussed without compromising the confidentiality conferred by the exception. For example, a motion might be stated: "I move that the commission convene in closed session as authorized by the limited personnel matters exception to discuss possible disciplinary action against an employee" or, "I move that the board discuss the case of X vs. The County with the board's attorney in executive session as authorized by Section 10-15-1(H)(7) of the Open Meetings Act."

A roll call vote of the members present must be taken on the motion and the vote of each individual member recorded in the minutes. If the motion is approved, the public body shall convene in closed session to consider only the item or items covered by the motion voted on prior to closing the meeting. Unless an action requiring a vote in public is to be taken, the public body may adjourn the public meeting when it goes into closed session and not return to public session after it completes its closed meeting. If the public body does re-open the meeting after a closed session, the public body may follow whatever procedures it deems appropriate. The Act does not have any requirements for returning to open session after a closed session. A public body may sometimes need to meet in a special meeting to discuss only a matter that is covered by one of the exceptions defined in Section 10-15-1(H) of the Act. Under those limited circumstances, the public body must give notice of the meeting to its members and to the public in accordance with its policy regarding notice of special meetings or as may be reasonable under the circumstances. Such notice must state the exception to the Act or other legal authority that authorizes the closed meeting and must state the subject to be discussed with reasonable specificity. When noticed properly, these closed meetings may take place without having an open session before or after the meeting.

At a closed meeting held outside of an open meeting, topics that are not covered in the notice may not be discussed and no ordinary business, such as the approval of minutes from the last meeting, may be conducted.

Although not addressed by the Act, one issue that sometimes comes up is whether it is proper for a public body to permit persons other than its members to be present during a closed meeting. There is no single answer to this question, although generally a public body
may include anyone it wants in its executive session. In certain circumstances, however, considerations aside from the Act may affect the permissibility of allowing non-members to be present. For example, when a public body holds a closed session pursuant to Section 10-151(H)(3) of the Act to deliberate after an administrative adjudicatory proceeding, it probably should exclude other persons (except, perhaps, its attorney) from the closed session. Otherwise, it may give at least the appearance that the public body is improperly and unfairly receiving additional information about the matter before it without the participation of one or more of the parties to the proceeding.
A public body also should use caution when it permits persons other than the body's members and its attorney to attend a meeting that is closed under the litigation exception in Section 10-15-1(H)(7) of the Act. That exception expressly applies to meetings "subject to the attorney-client privilege," so the public body should consult with its attorney to ensure that the presence of other persons during the closed

session will not affect the privilege and, in turn, make the use of the litigation exception improper.

Section 10-15-1(J) is intended to reinforce the requirement that discussions during closed sessions be limited to topics that are expressly excepted from the open meeting requirements. Because closed meetings or executive sessions are not open, members of the public are naturally curious about their content and suspicious about any perceived misuse of the exceptions allowing closure. Including the required statement in their minutes, will remind public bodies that there are only a few proper justifications for closure and make them less likely to succumb to any temptation to expand closed discussions beyond the topic announced in the motion for or notice of closure.

LOCAL BOARD ETHICS

- Basic rule of thumb:
  - Keep it classy and derive no personal benefit from your official actions
    - If official action might benefit you personally, you must recuse yourself
- Governmental Conduct Act
  - NMSA 1978 §10-16-1 et seq.
  - Covers ***all*** officers and employees of ***all*** political subdivisions of the state ***and*** their agencies
  - Understanding ethical responsibilities is crucial
    - ***Official action must be solely for the public benefit***
  - Attorney General Compliance Guide
  - Just because any given action may be legal, doesn't mean it is ethical or the public will perceive it to be so

LOCAL BOARD ETHICS – INTRODUCTION. The Governmental Conduct Act, NMSA 1978, Chapter 10, Article 16 ("GCA"), as amended in 2011, covers officers and employees of all political subdivisions of the state and their agencies. The law's coverage makes it crucial that all state and local government officers and employees in New Mexico understand their ethical responsibilities as well as the specific prohibitions and limitations that ensure that public officers and employees conduct themselves solely in the interest of the public. To that end, the Attorney General has issued a Compliance Guide to assist in becoming more knowledgeable about the standards of conduct the GCA requires and assist in holding government representatives accountable. Some of the material in this section is borrowed from that compliance guide available at:

https://www.nmag.gov/uploads/files/Publications/ComplianceGuides/Governmental%20Conduct%20Act%20Compliance%20Guide%202015.pdf.

The intent of this section is to encourage board members to consider, not only what the law requires, but what board members ought to do. Just because any given action may be legal, doesn't mean it is ethical or public will perceive it to be so.

LOCAL BOARD ETHICS:

PUBLIC SERVICE ETHICS PRINCIPLES

- **Impartiality**
  - ***Absolutely essential***
  - Labor/management recommendation does not mean labor/management advocate
- **Independence**
  - Carry out functions without regard to political influences
- **Agency Personnel Must Communicate Ethics and Impartiality**
  - Legitimacy derived from public trust
  - Must recuse if there is an ***actual or apparent*** conflict of interest
  - Avoid even the appearance of impropriety

There are at least three guiding principles by which a labor board should operate:

A. **Impartiality.** Impartiality is the most essential attribute of a labor relations agency. An impartial labor relations agency seeks to effectuate the public policy embodied in its legal authorization for collective bargaining within the limits defined by that authorization and with strict impartiality as to the outcome of any particular dispute. Regardless of agency structure, board members or commissioners are charged with the duty to serve as public servants rather than partisans, to embrace the labor-management relations process, to observe recusal standards, and to decide disputes with integrity, from the legitimate perspective of the agency. NMSA 1978 §10-16-3 & 4. Labor relations agencies should not shy away from exercising their discretion within the considerable room for interpretation entrusted to them but should do so within the bounds of their legitimate authority.

B. **Independence.** Agency officials and personnel owe their allegiance to the enabling authority on which the agency is founded and must carry out their functions without regard to political influences that would distort that allegiance, regardless of whether they are adjudicating, administering or investigating. The ideal agency appointee is selected for knowledge and experience

in labor relations or capacity to acquire expertise, and not for ideological purity or political loyalty. Adjudicative agencies are quasi-judicial in nature and must operate with a level of independence comparable to that of the judiciary; should strive to decide matters before them in a principled manner and ensure that the agents carrying out the agency's functions maintain the independence necessary to preserve integrity. Agencies should not take ideological positions on pending or proposed legislation but may provide technical advice and may advise the legislature on the adequacy of funding and the consequences of inadequate funding on mandated agency activities. NMSA 1978 §10-16-3

C. **Agency Personnel Must Communicate Ethics and Impartiality.**

The agency's perceived and actual legitimacy requires affirmative communication of ethics and impartiality in all that it does. Acceptability of the agency and fulfillment of its mission critically depend on avoiding conflicts of interest and the appearance of conflicts of interest. Therefore, agency personnel should refrain from engaging in *ex parte* contacts or giving the appearance of *ex parte* contacts concerning matters pending before them. Agency personnel should disclose matters that might lead a reasonable person to inquire further. Agency personnel must recuse themselves whenever they are unable to say with confidence that they can act fairly and impartially in a particular matter; or, whenever they know that their impartiality may reasonably be questioned; or, whenever they, a close relative, a member of their household or a close friend have or could have an interest that could be directly affected by the proceeding. Agency personnel must recuse themselves from any case where they have applied for or are otherwise being considered for employment with a party or the law firm or other representative of a party in the proceeding; or, they were involved as a principal, representative or witness prior to joining the agency, but agency personnel are not automatically or permanently disqualified from acting in matters involving the individual's former employer or client or because a party is represented by the individual's former law firm. The Board's model ordinance prohibits current advocates for parties before the Board from serving to prevent the possibility that their employer or client is directly affected by any pending matters. NMSA 1978 §10-16-3(C). The doctrine of necessity may allow agency personnel to participate in matters in which they would otherwise be recused where there is no other choice, but the doctrine should be invoked sparingly and with safeguards against bias or the appearance of bias to the extent available. To avoid giving an appearance of prejudgment, agency personnel should not make public statements about matters pending before them.

LOCAL BOARD ETHICS:

ANALYZING ETHICAL DILEMMAS

- Personal Cost v. Right-against-Right
- Things to consider (in no particular order):
  - The values/principles involved
  - Individuals' circumstances (compassion)
  - Competing values/principles
  - Personal cost
  - Benefits weighed against detriments
  - Are my personal opinions influencing my decision?
  - Can personal opinions and ethical values be reconciled?
  - Is a particular course of action more consistent with a value to which you give greater importance?
  - Your responsibility as a public servant
  - What best promotes the public trust in your agency

Analyzing Ethical Dilemmas. There are generally two basic dilemmas you may encounter as a local board member:

1. Personal Cost Ethical Dilemmas; and,
2. Right-versus-Right Ethical Dilemmas.

Personal Cost Ethical Dilemmas involve those situations in which doing the right thing may come at a significant personal cost to you. These are also known as "Moral Courage Dilemmas." In a Right-versus-Right Ethical Dilemma, there are two competing sets of "right" values that must be weighed one against the other. In either instance resolution of the dilemma should involve asking yourself the following questions:

1. What ethical values, e.g. trustworthiness, loyalty, responsibility, respect or fairness, are involved in this decision?
2. Are there facts at issue that require exercise of compassion for one party or another?
3. Are any ethical values in conflict with "doing the right thing"?
4. What is the personal cost of "doing the right thing"?

5. What are the benefits to be achieved or the harm to be avoided by a particular decision? Said another way, is there a decision that does more good than harm even though both are reasonable under the law applied to the facts?
6. What are your personal opinions and do they unduly influence the decision?
7. Is there a decision that is consistent with both your personal opinions and ethical values?
8. Is there a course of action that is more consistent with a value that is particularly important to you?
9. What decision best reflects your responsibility as a public servant?
10. What course of action will best promote public confidence in the agency and your role in serving the community?

LOCAL BOARD ETHICS:

WHAT TO DO WHEN YOU SUSPECT A PROBLEM

- Step One: Analyze your motives first.
- Step Two: Figure out what the "wrong" might be
- Step Three: What are the legal and personal consequences
- Step Four: Speak with others to see if they share your concerns
  - If time permits (not for emergencies)
- Step Five: Discuss the issue with the individual
- Step Six: Determine whether external enforcement authorities should be contacted

What to do When You Suspect an Ethics Problem.
Step One: Analyze *your* motives first. Are you operating out of organizational loyalty or for some other reason such as disillusionment, defensiveness or desire to hurt or embarrass another?

Step Two: Figure out what the "wrong" might be by examining applicable law vs. broader ethical considerations. Once you've identified what the "wrong" might be, consider:

Step Three: What are the legal and personal consequences of letting the situation go unaddressed? Simply being accused of ethical transgressions can be devastating.

Step Four: If time permits, speak with others to see if they share your concerns. Talk with your supervisor, H.R. Department, Attorney, Trusted Friend or co-worker, other boards.

Step Five: Discuss the issue with the individual (or have a trusted confidant do so.) Try to figure out the motivation, identify gaps in your analysis. Assess the results of

the conversation before raising an ethical concern. Have all the facts and be respectful. Be earnest but not self-righteous. Do not raise your voice or make threats. Be fair. Do not assume bad motives, be open to additional facts and explanations. Be honest. Do not exaggerate or omit important facts.

Step Six: Determine whether external enforcement authorities should be contacted. How serious is the potential ethical violation? Is the ethical violation criminal in nature? Contacting the Media is not the best choice because it casts doubts upon your motives and is not an effective investigative agency. In fact, media coverage may hinder an internal investigation.

CONCLUDING THOUGHTS

- Public service does not entitle you to special treatment or special benefits.
- Pretend your Mom is watching
- Ends don't justify means
  - Justice is a process not an outcome

Concluding Thoughts. Public service is a commitment, but it does not entitle you to any special treatment or special benefit. If all your activities on the local board were public knowledge, what would you want to read about yourself on the front page of the newspaper or the lead story on the evening news? (Would you be able to explain your actions to your Mother?) How do you want to be remembered when your public service comes to an end? Some traps to avoid include thinking that the ends justify the means (there are limits as to how goals are achieved), rationalizing and assuming no one will know or that everyone is doing or has done the same thing.

QUESTIONS?

Thanks for coming

Good luck, we're all counting on you!