STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

REGENTS OF THE UNIVERSITY OF NEW MEXICO, FOR ITS PUBLIC OPERATIONS KNOWN AS THE UNIVERSITY OF NEW MEXICO HOSPITAL, SPECIFICALLY INCLUDING THE UNM SANDOVAL REGIONAL MEDICAL CENTER,
Appellant,

v.

UNITED HEALTH PROFESSIONALS of NEW MEXICO, AFT, AFL-CIO,
Appellee.

D-202-CV-2023-09660

Opinion and Order
On Appellant's Motion to Stay

This matter comes to the Court's attention on Appellant's motion to stay application of Order 59-PELRB-2023 pending resolution of the appeal. The request for hearing is denied. The Court has reviewed the Statement of Appellate Issues and Reply, in addition to the briefing on this motion and the PELRB's order. The Court denies the motion.

Facts and Background

In May 2022, Appellee sought to exercise their collective bargaining rights under the Public Employee Labor Relations Act (PEBA), by submitting a petition for certification, supported by a showing of interest from a majority of the employees in the proposed bargaining unit. The parties disagreed regarding the appropriate composition of the bargaining unit. While the PELRB's hearing officer found that per diem, or PRN (*pro re nata*), employees are not "regular employees" for purposes of PEBA, the PELRB reversed this decision, without explanation.

On November 21, 2023, the PELRB, in Order 59-PELRB-2023, following remand

concerning the earlier order to explain the reasons for the PELRB's determination that PRN employees in the proposed unit are "regular" employees under PEBA, set out its reasoning and basis. Appellant filed notice of appeal of 59-PELRB-23 pursuant to Rule 1-074 NMRA December 20, 2023. On January 5, 2024, Thomas J. Griego, PELRB Executive Director, denied Appellant's motion for a stay of proceedings.

Discussion

In support of its position that it is automatically entitled to a stay, Appellant relies on Rule 1-062(E) NMRA: "When an appeal is taken by the state or an officer or agency thereof, or by direction of any department of the state, or by any political subdivision or institution of the state, . . . the taking of an appeal shall . . . operate as a stay." Appellant contends that this automatic stay applies even when the appeal is from an order of an administrative agency. *Cf. State ex rel. N.M. State Highway Dep't v. Silva*, 1982-NMCA-121, ¶ 44, 98 N.M. 549, 650 P.2d 833 ("SHD is a state agency; its appeal operated as a stay."). It further relies on NMSA 1978, §39-3-23 (1966), which provides: "When the appellant or plaintiff in error is the state, a county or a municipal corporation, the taking of an appeal or suing out of a writ of error operates to stay the execution of the judgment, order or decision of the district court without bond."

By their own terms, both Rule 1-062, addressing a stay of proceeding to enforce a judgment of the district court, and Section 39-3-23, concern enforcement of district court judgments and determinations. As a result, they do not apply to the administrative order at issue.

The sentence in *Silva* relied upon by Appellant is *dicta*. *Cf.* 1982-NMCA-121, ¶ 45 (observing that the writ of mandamus was improperly issued as there was an adequate remedy by appeal, and concluding that the writ could not be justified by speculation that SHD would not comply with the Board's order once the Court of Appeals' decision became final). Appellee relies

on a subsequent case from the Court of Appeals. *Tenneco Oil Co. v. N.M. Water Quality Control Comm'n*, 1986-NMCA-033, ¶¶ 5, 7, 105 N.M. 708, 736 P.2d 986 (observing that an appellate court may grant a stay of an action by the district court by rule, but noting that the appellate rule "does not specifically refer to the granting of a . . . stay from orders of a state administrative agency," comparing the matter to Rule 1-062). In reply, Appellant observes that the case does not apply because the state entity involved was not the appellant. *Id.* ¶ 1.

In any case, as Appellee points out in response, our Supreme Court adopted Rule 1-074 in 1996, long after both *Silva* and *Tenneco* were decided, expressly addressing "appeals from administrative agencies to the district court," Rule 1-074(A). Appellant, having brought the present appeal pursuant to the Rule, acknowledges this.

Rule 1-074(Q) provides, "[u]pon motion, the district court *may* stay enforcement of the order or decision under review," (emphasis added). Thus, Rule 1-074(Q) governs this Court's discretionary stay of enforcement of the PELRB's order.

"A motion for stay pending appeal must . . . state that a request for stay was previously made to the agency and was denied, or explain why seeking a stay from the agency in the first instance would be impracticable . . . ." Rule 1-074(Q)(1)(a). Appellant requested a stay below, which was denied, Motion, Ex. 1 (PELRB Letter Decision, issued by Thomas J. Griego, Executive Director), satisfying this requirement. While Appellee suggests that Appellant did not exhaust its administrative remedies because Appellant did not request that the PELRB review Greigo's denial of stay, Appellee offers no authority in support. *Cf. In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 ("We assume when arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority.").

In its motion for stay, Appellant must "[s]tate the reasons for granting a stay and the facts

relied upon to show that" it "will suffer irreparable injury unless a stay is granted;" "[A]ppellant is likely to prevail on the merits of the appeal;" "other interested persons," including Appellee, "will not suffer substantial harm if a stay is granted; and," finally, "the public interest will not be harmed by granting a stay." Rule 1-074(Q)(1)(c)(i)-(iv).

Asserting that it will be required to expend a significant waste of resources, Appellant argues that it will suffer irreparable injury unless a stay is granted. "An injury that is irreparable is without adequate remedy at law. . . . Thus, [a]n irreparable injury is an injury which cannot be compensated or for which compensation cannot be measured by any certain pecuniary standard." *State ex rel. State Highway & Transp. Dep't v. City of Sunland Park*, 2000-NMCA-044, ¶ 19, 129 N.M. 151, 3 P.3d 128 (citation, quotation marks, and quoted authority omitted) (alteration in original). Appellant contends that, unless the Court grants the stay, it will be required to negotiate and, potentially, ratify a collective bargaining agreement before the merits of this appeal are heard. Appellant observes that the negotiation process inherently creates expense and disruption for it. *Cf. Appeal of Univ. Sys. of N.H.*, 424 A.2d 194, 196 (N.H. 1980) (concluding "that the refusal of the board to stay negotiations pending an appeal on the question of unit determination was unreasonable," reasoning that "the public employer should not be forced to bargain while it has a good faith appeal pending" "[i]n the absence of irreparable harm to the employees," because "it is better to maintain the status quo pending appeal than to subject the employer to the expense and disruption of undertaking negotiations, which may constitute irreparable harm to the employer and may be rendered unnecessary by the result on appeal"). Appellant further argues that, without a stay, other predicated matters will go forward, referencing multiple Prohibited Practice Complaints that are pending, including several other matters currently on appeal.

The Court acknowledges that continuing negotiation would necessarily require some

expense, and that Appellant provides a single case from another jurisdiction that determined that the board's refusal to stay negotiations pending an appeal was unreasonable in the absence of irreparable harm to the employees. Appellant provides no such authority from our appellate courts. *Cf. Doe*, 1984-NMSC-024, ¶ 2. Further, Appellant provides no authority for its assertion that it potentially may be required to ratify a collective bargaining agreement. *Cf. id.* To the contrary, Appellee points out that "neither the public employer nor the exclusive representative shall be required to agree to a proposal or to make a concession." NMSA 1978, § 10-7E-17(A)(1) (2020). In its reply, Appellant persists in the contention that contract execution may be required without addressing the statute or offering any contrary authority. *Cf. Doe*, 1984-NMSC-024, ¶ 2. As Appellee observes, Appellant did not file the present motion for approximately six months following the notice of appeal, belying its argument as to irreparable injury. The Court concludes that the only injury Appellant has demonstrated is continuing negotiation, which is not substantial. *Cf. City of Sunland Park*, 2000-NMCA-044, ¶ 19 ("'The injury must be actual and substantial, or an affirmative prospect thereof, and not a mere possibility of harm.' . . . It is not enough that the party seeking injunctive relief merely claims irreparable harm; [the party] must come forth with evidence of the irreparability of [the] harm or inadequacy of any remedy.") (quoted authority omitted).

The next factor under Rule 1-074(Q)(1)(c)(ii) is whether Appellant is likely to prevail on the merits of the appeal. The standard of review Appellant must meet in order to prevail on the merits is whether the PERLB's order was arbitrary, capricious, or an abuse of discretion, was not supported by substantial evidence in the record, or was otherwise not in accordance with law. *Cf.* NMSA 1978, § 10-7E-23(B) (2003); *accord* Rule 1-074(R). Otherwise, [a]ctions taken by the board . . . shall be affirmed." § 10-7E-23(B). In its motion, Appellant focuses on proceedings

below subject to the Open Meets Act (OMA) and whether the PELRB erred in its determination that PRNs are "regular" employees under PEBA.

Appellant notes that the PELRB, pursuant to the OMA, is required to provide a notice of any meeting, NMSA 1978, § 10-15-1(F) (2013) ("Meeting notices shall include an agenda containing a list of specific items of business to be discussed or transacted at the meeting or information on how the public may obtain a copy of such an agenda."), and that, if proper notice is not issued, actions taken at that meeting are invalid, NMSA 1978, § 10-15-3(A) (1997) ("No resolution, rule, regulation, ordinance or action of any board . . . shall be valid unless taken or made at a meeting held in accordance with the requirements of Section 10-15-1 NMSA 1978."). Appellant recounts that the PELRB posted an agenda on its website stating that the meeting would be held at 9:00 a.m., while the meeting was instead held at 4:00 p.m., an error recognized by the PELRB at the meeting.

As Appellant acknowledges in its reply to its SAI, Appellee argued that the PELRB provided the link to the subject meeting with the correct time, observing that Appellant was in attendance. Appellant argued in its reply to the SAI that the error was not merely typographical as Appellee argued, but was instead a meaningful deviation from the requirement of the statute. Appellant references no authority beyond the statute that reversal is warranted due to the error. The Court concludes that the PELRB cured the typographical error by including the link to the 4:00 p.m. meeting and acknowledging the error. *Cf. Kleinberg v. Bd. of Educ. of Albuquerque Pub. Sch.*, 1988-NMCA-014, ¶ 30, 107 N.M. 38, 751 P.2d 722 (explaining "that procedural defects in the [OMA] may be cured by taking prompt corrective action," and concluding that the local board recognized that it had made an error by not holding a public meeting to take final action, held an open meeting with notice, and approved the vote, ensuring that a public record was created,

issuing a procedurally corrected decision, successfully curing its error).

PEBA defines a "'public employee'" as "a regular non probationary employee of a public employer." NMSA 1978, § 10-7E-4(Q) (2020). The term "regular" is undefined. *Cf.* § 10-7E-4 (PEBA definitions). Thus, the PELRB had the challenging task of interpreting an undefined, ambiguous term. The Court affords some deference to the PELRB's interpretation of PEBA. *Cf. Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 11, 120 N.M. 579, 904 P.2d 28 ("When an agency that is governed by a particular statute construes or applies that statue, the court will begin by according some deference to the agency's interpretation. . . . The court will confer a heightened degree of deference to legal questions that 'implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function.'") (quoted authority omitted). The Court recognizes, however, that it "is not bound by the agency's interpretation and may substitute its own independent judgment for that of the agency because it is the function of the courts to interpret the law." *Id.* ("The court should reverse if the agency's interpretation of a law is unreasonable or unlawful.").

The parties agree that PRNs are directly employed by Appellant, but are utilized on an as-needed basis when there is a vacancy or gap otherwise in the schedule. PRNs work on a continuous basis, and must be available to work at least eight hours per week. As a result, they may work a full week, may not work at all, or some period of time in between. Shift assignments are based in part on seniority, with full-time employees choosing their shifts first, part-time employees choosing second, and PRNs choosing last. PRNs and the other employees all perform the same work, and are not contract employees. PRNs are subject to the scheduling provisions, appropriate job description, and personnel and administrative policies.

Appellant argues that the PELRB's determination that PRNs are "regular" is contrary to

law. It recounts that the PELRB stated: "The issue at hand is not whether the PRNs are public employees under [§ 10-7E-4(Q)'s] definition; they indisputably are. The issue is whether PRNs are 'regular' public employees." Appellant contends that this is a clear misunderstanding of the definition, asserting that, by definition, an employee cannot be a public employee unless, first, they are a regular employee, because there is no such thing as a public employee that is not regular. However, as Appellee explains, Appellant is a public employer and PRNs were its employees. The question presented is whether they are "regular" as that term is used in Section 10-7E-4(Q).

Appellant states that the PELRB rejected the theory that "regular" references frequency because employers have discretion in setting hours and could unilaterally exclude employees from the bargaining unit. Appellant observes that the PELRB found that the term must refer to some employment status.

As Appellee states, the PELRB, in interpreting an undefined statutory term, properly relied on the purpose of PEBA. *Cf. Baker v. Hedstrom*, 2013-NMSC-043, ¶ 15, 309 P.3d 1047 ("We must examine Plaintiffs' interpretation in the context of the statue as a whole, including the purposes and consequences of the Act."); *Regents of Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶ 48, 125 N.M. 401, 962 P.2d 1236 ("[I]t is important that any public employer's collective-bargaining policy conform to the purpose for which the legislature crafted PEBA.").

> The purpose of [PEBA] is to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions.

NMSA 1978, § 10-7E-2 (2003). The PELRB explained, consistent with the purposes of PEBA, that the legislation's objective would be eroded if the right to bargain "was conditioned on the frequency of work, or other idiosyncratic terms and conditions of work within the control of an

employer," as "[t]here is no meaningful criteria or measure to determine where along the continuum between part-time and flexible schedule and a full-time salaried fixed schedule the right to PEBA protections should attach." 59-PELRB-2023, at 3.

In the briefing on the motion as well as in its SAI and reply, Appellant objects strenuously to the PELRB's discussion of the State Personnel Act, which Appellant explains does not apply. However, the Court concludes that, while the PELRB attempted to seek guidance from the State Personnel Act, it did not in fact apply it to the matter. *Cf. id.* at 3 (stating that "identifying the particular status that the term 'regular' contemplates remains a challenge," again referencing "the purpose of the PEBA," and "considering related personnel laws for the Legislature's use of the terms, "'temporary'" and "'classified'") (quoted authority omitted). Appellant argues that, rather, the PELRB should have considered the common understanding of the term and the construction of the term in other statutes, without citation. Motion, at 12; SAI, at 9.

The Court does not make any final determination as to the merits of this matter. However, the Court concludes that Appellant has not demonstrated likelihood of success on the merits sufficient to warrant a stay.

As to Appellant's burden of showing that UHP will not suffer substantial harm if a stay is granted, Rule 1-074(Q)(1)(c)(iii), Appellant argues that it is utilizing appropriate judicial procedures to address its concerns as opposed to committing a prohibited practice, and initial certification is being challenged. It further contends that maintenance of the status quo pending this appeal will not cause any harm to UHP or its members, and that, in fact, this would allow more efficient bargaining if all issues are resolved in their favor because passage of time will not invalidate or moot any tentative agreement reached during the course of the pending appeal. However, Appellant's arguments do not acknowledge the substantial harm of delay to Appellee.

This consideration appears on par with Appellant's injury of continuing negotiation.

Finally, as to whether the public interest would be harmed by granting a stay, Rule 1-074(Q)(1)(c)(iv), Appellant, noting that it operates a hospital, argues that avoiding unnecessary or prolonged disruption to the provision of medical services is in the public's interest. It does not explain how ongoing negotiations would cause disruption to the provision of medical services. On the other hand, Appellee argues that the Legislature has set the public policy at issue, and expects Appellant, as a public employer subject to PEBA, to follow the law. Appellee contends that Appellant's claim that it is effectively immune from PEBA is contrary to PEBA's public policy.

The Court agrees with Appellant that, in seeking to avoid waste of public funds during an appeal, safeguards both the public and the policy underlying PEBA. However, looking at all factors, particularly the insufficient showing that Appellant is likely to succeed on the merits, the Court concludes that a stay in this matter is not warranted.

Conclusion

Appellant's motion to stay is **DENIED**.

IT IS SO ORDERED.

Nancy J. Franchini

NANCY J. FRANCHINI
DISTRICT COURT JUDGE

A copy of the foregoing document e-filed
on this 5th day of September 2024.

Thomas Wilson TCAA
D-202-CV-2023-09660