

May 1995 J
Index #2

1 PELRB No. 10

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In the Matter of

*NEA-Jemez Valley
Petitioner,*

and

*Jemez Valley Public Schools
Public Employer.*

DECISION AND ORDER

On March 21, 1995, administrative judge (AJ) Bridget A. Burke of the New Mexico Public Employee Labor Relations Board (PELRB or Board) issued a report and recommendation finding that NEA-Jemez Valley's petitioned-for unit to include payroll manager, school secretaries, and maintenance supervisor was appropriate under the Public Employee Bargaining Act of 1992 (PEBA or Act), NMSA 1978, §§10-7D-1 to 10-7D-26, (Repl. Pamp. 1992). Based on this conclusion, the AJ directed a secret ballot election among the employees in the unit in Case No. CP 11-95(SD).

Neither party filed a request for review under Rule 2.15. Following our review of the whole record in Case No. CP 11-95(SD), we find that the AJ's analyses, interpretations and applications of the statutory definitions for confidential, management or supervisory status are appropriate and incorporate them in our final action. We adopt the AJ's report and recommendation as the Board's decision and order and attach it hereto.

ORDER

A secret ballot election shall be conducted among the employees in the following unit:

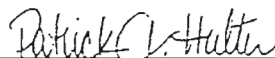
Included: All teachers, counselors, librarians, educational\instructional assistants, cooks, food service clerks\cashiers, custodians, warehouse manager, bookkeeper, federal projects\special education secretary, secretary\registrar Title V liaison, payroll manager, school secretaries, maintenance supervisor.

Excluded: All management employees, supervisors, and confidential employees as defined by the Act and all others.

In accordance with the Act and the Board's rules, eligible employees in the unit shall be given an opportunity to vote between representation by NEA-Jemez Valley and "No Representation."

The Board reviewed Case No. CP 11-95(SD) during closed and open session at its April 19 and May 17, 1995, meetings in Santa Fe, New Mexico, following notice and publication of the meetings pursuant to the Open Meetings Act, NMSA 1978, §§ 10-15-1 to 10-15-4 (Repl. Pamp. 1992).

By direction of the Board.



Patrick J. Halter
Director, PELRB

Issued: May 19, 1995
Albuquerque, New Mexico

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In the Matter of)
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 NEA-Jemez Valley)
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 Petitioner,)
)
 and)
)
 Jemez Valley Public Schools)
)
 Employer.)

Case No. CP 11-95(SD)

ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

On September 16, 1994, NEA-Jemez Valley ("Petitioner"), filed a Representation Petition in Case No. CP 11-95(SD) pursuant to the Public Employee Bargaining Act ("Act" or "PEBA"), NMSA 1978 §§ 10-7D-1 to 10-7D-26, (Repl. Pamp. 1992), and the Public Employee Labor Relations Board's Rules and Regulations ("Rules"), 4 N.M. Reg. No. 6, 475 (Mar. 31, 1993). The Petitioner seeks to represent Jemez Valley Public School teachers, educational assistants, cafeteria staff, custodial and maintenance staff, and secretaries in a single bargaining unit.

An Administrative Law Judge heard the case on February 10, 1995, at which time all parties were given an opportunity to participate, to adduce relevant evidence, to examine witnesses, to argue orally and to file written briefs. The hearing concerned the exclusion of five employees from the proposed bargaining unit. These employees are the payroll manager, the three school secretaries, and the maintenance supervisor. After full consideration of the parties' stipulations, evidence, arguments, and briefs, and upon the entire record of the case, I make the following findings:

L Stipulated Findings

1. The parties stipulate, and I find, that the Jemez Valley Public Schools, is a public employer within the meaning of §10-7D-4(Q) of the Act, and that the Public Employee Labor Relations Board ("Board") has jurisdiction over this matter.
2. The parties stipulate, and I find, that NEA-Jemez Valley is a labor organization within the meaning of §10-7D-4(J) of the Act.
3. The parties stipulate, and I find, that there is no history of collective bargaining between the Union and the Employer.
4. The parties stipulate, and I find, that there is no contract bar to an election in this case.
5. The parties stipulate, and I find, that the unit petitioned for by NEA-Jemez Valley is an appropriate unit.

6. A question of representation exists, at this time, as the Employer declines to recognize the Petitioner as the exclusive bargaining representative of its employees.

II. Issues

The first issue concerns whether the payroll manager should be excluded from the unit as a confidential or management employee. The second issue involves the alleged confidential status of the three school secretaries. The third issue is whether the maintenance supervisor should be excluded from the unit as a management or supervisory employee.

III. Findings of Fact

A. Background

The Jemez Valley Public Schools serve approximately 610 children. These children come from several communities including Ponderosa, Pinon, Jemez Springs, La Cueva, Vera Los Pinos, and the Zia and Jemez Pueblos.¹ The school district employs approximately 85 people and consists of three schools; the Jemez Valley Elementary School, the Jemez Valley Middle School and the Jemez Valley High School. The Employer's three school buildings are located in close proximity to one another on the

¹ Until recently the school district included the community of Rio Rancho. Due to population growth in Rio Rancho, the State Board of Education created a new school district for that community.

same campus as the central office building. The central office houses the superintendent and his secretary, the director of finance, the payroll manager and the bookkeeper.

The Jemez Valley Board of Education governs the school district. The Board of Education is composed of five members who serve for four year elected terms. The Board of Education hires a superintendent to oversee the operations of the school district. Gary Dwyer, Ph.D., is the superintendent of the school district. Dr. Dwyer in turn oversees the work of the two school principals, the director of finance and the director of instruction. The school district's budget is approximately three million dollars. The Employer is in the process of developing job descriptions for all of its employees. This process began at least two and one half years ago and is ongoing.²

At this time the Employer intends to have superintendent, Gary Dwyer, and the director of finance, Michael Erwin, on its negotiating team.³ It is likely that at least one, if not both, of the school principals will also be on the Employer's negotiating team. If the two current principals are with the Employer once negotiations commence, they will both be included on the Employer's team. Michael Garcia is the principal for the Elementary as well as the Middle School. The relatively small sizes of the schools allow Mr. Garcia to

² Of the three positions in issue in this case, a job description was available only for the school secretary.

³ The Employer's representative asked the superintendent the following question, "Is it possible that if you were in protracted negotiations over issues involving custodians, that Mr. Jaramillo [the maintenance supervisor] might sit at the bargaining table as part of the management team?" The superintendent answered, "Yes." However, when I asked the superintendent at different points in the hearing who would be on the Employer's negotiating team he did not mention Mr. Jaramillo. I do not find the testimony that *it is possible that Mr. Jaramillo might sit at the negotiating table if the Employer is involved in protracted negotiations with the custodians* persuasive on the issue of the composition of the Employer's negotiating team.

perform the duties of principal in two schools, and he divides his time between the two buildings. Louise Garcia-Sanchez is the principal for the High School.

B. Principals

The principals are basically responsible for hiring employees in their respective schools. When a principal has found someone he or she wishes to hire, he recommends the person to the superintendent, who in turn makes a recommendation to the Board of Education. Discharge of an employee would be handled in the same way, with the initial action undertaken by the principal, then he or she recommending discharge to the superintendent, and the superintendent bringing the matter before the Board of Education.

The principals evaluate the employees in their respective buildings, with the exception of the cafeteria workers who are evaluated by the cafeteria director. The teachers are evaluated on an annual basis pursuant to State law. The teachers' evaluation process includes classroom observation as well as a written evaluation. The non-certified staff are evaluated on an annual basis but according to a less rigorous process which also includes a written evaluation. All employees' evaluations are placed in the permanent personnel files maintained in the central office.

C. Director of Instruction

The director of instruction is Frances Strain. Ms. Strain reports to the superintendent and is responsible for administering federal programs, special education,

technology and construction projects in the school district. The school district's curriculum is her primary duty.

D. Director of Finance

The director of finance, Michael Erwin, is charged with managing the Employer's financial affairs.⁴ This includes the responsibility for budget development and long-range financial planning. He also must establish and supervise an accounting program to track the Employer's spending. He supervises all accounting operations and acts as payroll officer for the district. In addition, he supervises the payroll manager, accounts payable/accounts receivable personnel, food services coordinator, maintenance supervisor and transportation coordinator. This requires that he direct the district's support services, including contract services, transportation, purchasing, food services, business services, facilities management and capital improvements. He also develops a facility expansion program and supervises construction. He acts as advisor to the superintendent on all questions relating to operations and financial affairs of the district. His duties include assisting in recruiting, hiring, training, supervising, and evaluating all clerical, financial, and support staff. Finally, he arranges for internal auditing of school accounts and provides management guidance and training to school administrative personnel.

⁴The job description for this position refers to the title as director of finance and operations.

E. Payroll Manager

Frieda Solano is the payroll manager for the school district.⁵ She has held this position for nearly 15 years. She works from approximately 8:00 am to 5:00 pm each work day in the central office. Although Solano formally reports to Michael Erwin, the director of finance, she only interacts with him two or three times a week.⁶ When this occurs it is regarding the appropriate account code from which an employee is to be paid. Prior to the Employer's hiring a director of finance, Ms. Solano's duties included the Employer's budgetary matters in addition to its payroll. However, since the creation of the director of finance position, approximately three years ago, Solano no longer deals with the school district's budget. The budget now is exclusively the domain of the director of finance, Michael Erwin. Solano's duties almost exclusively concern the Employer's payroll. No employees report to Ms. Solano.

As her title suggests, Solano is charged with preparing the Employer's payroll.⁷ She uses a computer program to process the school district's 24 pay periods. The employees' salaries are initially determined by a State-approved salary schedule and modified according to any relevant deductions. When preparing job contracts for new employees Solano instructs them about various benefits offered by the Employer. Solano

⁵ At this time the school district does not have a job description for the payroll manager position, although one is currently being drafted for future use. Also, this position was formerly referred to as "business manager." The change from business manager to payroll manager occurred in 1994.

⁶ Solano is not certain of all of Erwin's duties. In fact, the only ones she is "aware of" are those which she formerly performed pertaining to the budget. These duties included sending monthly budget reports to the State and monthly budget reports to federal program directors.

⁷ The superintendent testified that he considers all of the payroll information handled by Ms. Solano to be confidential. (T.211)

fills in the information for each employee on the contract forms created by the State and used by the Employer. She enters the information from the contracts into the computer to create the Employer's above-described payroll. The types of information she enters into the computer affecting an employee's pay include deductions for insurance, sick leave, leave of absence, vacation, suspension, taxes, union dues, retirement, and garnishment. Any additional information she is responsible for organizing comes from the superintendent or director of finance. One example of information she receives from the superintendent is how much money will be available for employee salary increases. Each year the State informs the school district, through Dr. Dwyer, how much money will be available for payroll increases. These figures are public information.

Another one of Solano's duties is verifying information submitted by new employees regarding their education and experience which establishes how much they will be paid. To verify this information, Solano will obtain transcripts and contact former employers to confirm what employees have reported to the Employer. She is assisted in this duty by administrative secretary Barbara Perry.⁸ Additionally, Solano prepares quarterly reports which must be filed with the federal government. She also completes verification of employment letters for employees who are seeking loans. She handles phone calls from employees regarding questions about their paychecks. For instance, questions about direct deposit or what they believe are errors. She also completes the wage and hour report section of workers' compensation forms for employees. According

⁸ Ms. Perry's position is not in dispute. She is an administrative secretary in the central office. The parties have agreed that her position should be excluded from the petitioned-for unit.

to Solano, this merely requires filling in the blanks on the forms with the appropriate information. Also, when an employee leaves the school district she makes sure the employee receives his or her final pay and is aware of the insurance implications for departing from the Employer.

Solano has begun to train bookkeeper Kay Madelena so that she may fill in for Solano in the event that Solano is absent from work.⁹ When this training is completed, Madelena will have access to all of the financial data that Solano has access to at this time. Mr. Erwin has indicated to Ms. Solano that she will be trained in the future to serve as his "back up" in the event of an emergency. Although Erwin has been the director of finance for 1 1/2 years, this training has not occurred to date. Currently, if Erwin is absent from his job, his work simply waits until he returns.

To date, Solano has not prepared any figures or forecasts for the Employer relative to the possibility that the Union will be certified to represent the school district employees. Solano does not foresee that she will be handling or preparing any labor relations or collective bargaining information, unless it has to do with the efficiency of getting the payroll out. Even in the event that the Petitioner is certified, Solano would not have access to budget information during the development stage.

⁹ There is no dispute that Ms. Madelena's position is appropriate for inclusion in the petitioned-for unit.

Up until this time, Solano's duties have never required that she do any work related to any litigation on behalf of the Employer. She has also never been involved in the filing or processing of an employee's grievance. Solano testified that she does not participate in meetings where the Employer develops its management policies, nor does she participate in cooperative decision-making programs as part of her work. Solano testified that she is not involved in the creation of management policies, but that her duties do require her to administer and effectuate management policies that are set for the payroll. She spends approximately 50% of her day carrying out these management policies, and spends the balance of her day doing paperwork and reconciling the employees' benefits.¹⁰ Solano does not have discretion to change the Employer's policy in a minor or major way if a given situation should require it, she simply follows the Employer's policies. If Solano makes any changes to an employee's pay as a result of an error which the employee brings to her attention, she must inform the director of finance. Although purchase orders are normally signed by the director of finance, on occasion the director of finance or superintendent have asked Solano to prepare and sign a purchase order for the school district. Solano would not have the independent authority to sign a

¹⁰ Ms. Solano testified that she exercises independent judgment when carrying out the Employer's management policies concerning the payroll. However, when asked to give an example of this she referred to her responsibility to verify employee information regarding their education and experience. She does this by consulting the employee's transcripts, letters from former employers and through phone calls to former employers. She also referred to verifying amounts to be paid when an employee believes a payment error has occurred. I find that these types of verification work do not require the actual exercise of independent judgment. Furthermore, if an error is identified and if correcting it will impact the budget, Ms. Solano must inform the director of finance.

purchase order without the director of finance's permission and she does not have authority to pledge the Employer's credit. Solano considers herself to have a management position.

F. School Secretaries¹¹

There is one school secretary position in each of the three schools. Virginia Gallegos is the secretary at the elementary school, Diana Lucero is the secretary at the middle school, and Beverly Johnson is the secretary at the high school. The school secretary reports to the respective school principal. As principal at two buildings, Mr. Garcia spends approximately half of his day at the elementary school and half at the middle school. Ms. Garcia-Sanchez is the high school principal. Typically, the principals spend part of the day in his or her office, part of the day conducting classroom visits, and part of the day outside on the school grounds.

Each school secretary is charged with assuring the smooth and efficient operation of the school's office. This includes receiving and routing all incoming telephone calls, maintaining student records, keeping a daily staff attendance log and maintaining substitute records.¹² Their duties also involve assisting teachers with the preparation of materials, processing schedules, maintaining a log of visitors and distributing the faculty's mail. The school secretary must also act as the activity account manager which requires

¹¹ Although these positions were referred to during the hearing as secretaries to the principals, the Employer's job description designates them school secretaries.

¹² The secretaries contact with parents, teachers, the school nurse and students means they are exposed to personal information which they believe should be kept confidential. In addition, the school secretary job description states that they must maintain confidentiality regarding student records.

that she account for the money raised by a sponsoring activity and complete the necessary paperwork; within 24 hours the deposit must be brought to the central office for a second count and deposit. In addition, the school secretaries are responsible for completing orders and filling the schools' vending machines. This also includes counting the money from the machines and making a weekly deposit. According to their job description, they also oversee the training of any office aides. The secretaries collect supply orders from teachers in the spring and count and distribute the orders in the fall. They also collect and distribute paychecks twice a month. The secretaries work in the front office of the schools near the lobby or main entrance to each school. The principals' offices are next door or around the corner from the secretaries.

Virginia Gallegos, the elementary school secretary, has been with the school district for five and one half years. Ms. Gallegos spends at least 50% of her time on the telephone speaking either to parents, taking messages for teachers, or talking to the other school secretaries. Much of the rest of her day is spent completing paperwork, in the form of reports, for the school district. Mr. Garcia, the principal at the elementary school, opens his own mail and does most of his own typing and filing.¹³ Ms. Gallegos, however, has proof read some of his correspondence and she does some filing for him. This occurs infrequently, maybe twice a week. To date, Ms. Gallegos has never read nor proofed a document for Mr. Garcia concerning board policy or changing a school policy. The elementary students' files are maintained in a set of locked files in the copy room.

¹³ Although Mr. Garcia almost exclusively does his own typing, the printer he uses is located in the office where Ms. Gallegos works.

Ms. Gallegos keeps the key to these files and unlocks the files each day so that the teachers have access to the files. Gallegos is also responsible for the files containing permission slips, reports, and bookkeeping related to activities. Although Mr. Garcia maintains "working files" in a locked drawer in his desk, Ms. Gallegos has never seen the contents of these files. Ms. Gallegos testified that she has a key to Mr. Garcia's desk and could have access to those files if necessary. The teachers' formal personnel files are maintained by the central office.

Once a year, Mr. Garcia completes employee evaluations and Ms. Gallegos makes photo copies of the evaluations. The original is given to the employee and a copy is given to the central office. Ms. Gallegos only sees the evaluation after it has been signed by the employee.

Ms. Gallegos believes that she may be exposed to labor-management information if Mr. Garcia is on the Employer's negotiating committee. She also testified that she believed she would be responsible for contacting people to schedule a grievance hearing in the event one was required. To date Ms. Gallegos has not seen a grievance go through Mr. Garcia's office, nor has she been present when Mr. Garcia held a meeting with an employee.

Diana Lucero is the secretary at the middle school where Mr. Garcia is also the principal. She has held this position for approximately eight months. Each day Ms.

Lucero determines whether a substitute teacher is needed, distributes any information which the students or teachers need, completes the bookkeeping related to the activity accounts, fills out teacher attendance reports, and prepares a daily memo. The daily memo contains announcements for students and teachers. Ms. Lucero, like Ms. Gallegos, spends approximately 50% of her day on the telephone speaking to parents and others about school business. Ms. Lucero does some filing for Mr. Garcia, such as the memos that are given to the staff, purchase orders, weekly memo, and the daily memo. As at the elementary school, Mr. Garcia does most of his own typing. Ms. Lucero has access to Mr. Garcia's office and desk. To the best of Ms. Lucero's knowledge, Mr. Garcia does not keep any teacher records in his office. To date, she has also never seen any teacher evaluations or grievances, nor has she had occasion to sit in on a meeting between Mr. Garcia and another employee. She has set up meetings before between parents and teachers for Mr. Garcia.

Beverly Johnson is the high school secretary. She reports to the high school principal Louise Garcia-Sanchez. A typical day for Johnson includes opening Garcia-Sanchez's mail and typing the daily memo for the students. The teachers and students provide Ms. Johnson with the contents of this memo, which is read over the intercom each day and posted in the classrooms. She also types memos or letters for the principal. Although Johnson has typed a report for Garcia-Sanchez to go to the superintendent concerning the expulsion of certain students, she has not typed a report concerning district policy. Ms. Johnson also files the information relevant to student discipline and

attendance.¹⁴ Like the other school secretaries she spends a lot of time answering the telephone and directing calls. Johnson estimated she spends approximately 35% of her time on the phone. Because she has only held this position since August of 1994, Ms. Johnson has not seen any of the teachers' evaluations, but she expects that she will see them in the future. Ms. Garcia-Sanchez informed Ms. Johnson that she will make a draft of the evaluation and Ms. Johnson will be responsible for typing the formal evaluation. Johnson has access to Garcia-Sanchez's working files that include letters of reprimand and commendation and other matters for the teachers. She has also typed such letters for the principal. In addition, Johnson has typed what she called a "critique letter" for the principal that the principal sent to the teachers.¹⁵ Although Ms. Johnson has never seen the Employer's grievance policy prior to this hearing, she testified that she believed she would type the principal's response to a grievance brought by a school employee. She also testified that she believed if the principal were to conduct a grievance hearing, she would be included to take minutes. Ms. Johnson has been privy to certain written complaints given to the principal by teachers regarding class scheduling. In the event that Ms. Johnson is absent from work, the counselor's secretary, Verna Tosa, fills in for her.

¹⁴ Prior to Ms. Johnson becoming the high school secretary, Verna Tosa held this position. Ms. Tosa is currently the secretary in the counselor's office. Some of the duties traditionally considered to be the school secretary's have been given to Ms. Tosa. Recently, maintaining the attendance files became one of Tosa's duties.

¹⁵ These letters were sent out in response to complaints received by the principal that some teachers had used identical tests to those administered to students in previous years.

G. Maintenance Supervisor¹⁶

Mr. Daniel Jaramillo has been the Employer's maintenance supervisor for eight years. Jaramillo is in charge of maintaining the Employer's physical facilities. He begins each day at 6:45 am, and normally works until 4:30 pm or 5:00 pm. Mr. Jaramillo considers Dr. Dwyer to be his supervisor, and Dr. Dwyer evaluates Mr. Jaramillo.¹⁷ This time of year, Mr. Jaramillo reports to his office located in the high school prior to checking the buildings' heating units each day. Throughout the day, Mr. Jaramillo carries a two-way radio. Every day he contacts the custodians to see if he needs to perform any maintenance work in their buildings. If he is informed of a problem, for instance a leaky faucet or faulty heating unit, then he attends to the problem once he has finished making his rounds. Mr. Jaramillo also performs work as a result of receiving work orders. When a teacher needs to have work done, he or she submits a work request to the principal, who in turn submits the request to the superintendent, who signs the request and turns it over to Mr. Jaramillo.

When he is not actually tending to the Employer's maintenance needs, Mr. Jaramillo does related paperwork. This paperwork takes approximately one hour a day. Some of the paperwork concerns Jaramillo's responsibilities to monitor the sewer plant. Mr. Jaramillo keeps a log of what he does at the sewer plant each day, such as greasing

¹⁶ Currently no written job description exists for this position.

¹⁷ The organizational chart indicates Mr. Jaramillo reports to the director of finance, Mr. Michael Erwin. When asked if Mr. Erwin was his supervisor, Mr. Jaramillo replied, "Not that I know of." (T. 183)

the pumps, checking the oil, taking samples, or doing a visual inspection.¹⁸ He maintains a file of these logs and every three months gives it to the director of finance. The other paperwork he must complete concerns work requisitions.

If there is a maintenance project which Jaramillo is unable to perform, in the case of a repair project costing less than \$500, he suggests someone to do the work to Mr. Erwin. Normally, his recommendations are followed, although in the case of electrical work, Mr. Erwin thought it wise to split the work between two local electricians, rather than give all the work to just one. For a repair job exceeding \$500, Jaramillo, pursuant to State-promulgated district policy, obtains three bids on the work and turns the bid over to Mr. Erwin who makes a recommendation to Dr. Dwyer. Then the school district hires the contractor with the lowest bid.¹⁹

The school district employs four custodians.²⁰ One is assigned to the elementary school, one to the middle school, and one to the southeast part of the high school and one to the southwest part of the high school. One of the high school custodians also works at the administration building. The principals are considered the custodians' supervisors; they are responsible for hiring, evaluating, and if necessary discharging the custodians. During the three summer months, however, the custodians informally report to Mr.

¹⁸ Mr. Jaramillo must draw monthly samples of the water and bring it to a lab in Albuquerque for testing. Although performing this duty normally requires State certification, Mr. Jaramillo was "grandfathered into the system" because he has been doing this work for so many years. (T.195-96)

¹⁹ For instance, it costs between \$3,500 and \$4,000 to fill the district's propane tanks. Mr. Jaramillo is responsible for checking the propane tanks and obtaining bids to refill them when the amount of propane drops to a certain level. After securing three bids he then calls the lowest bidder to refill the tanks.

²⁰ Occasionally the school district hires a temporary worker to perform custodial duties in the summer.

Jaramillo. Each summer, the teachers in each building make a list of work that needs to be done in their building during the summer. The teachers give the list to the school principal who turns it over to Mr. Jaramillo. During the summer the custodians do the cleaning jobs in the buildings and Jaramillo does the repair work. According to Mr. Jaramillo, he does not directly tell the custodians what needs to be done, but rather they know what needs to be done as they go from room to room in each building.

Mr. Jaramillo has no authority to hire other employees, including custodians.²¹ He has never recommended that an employee be disciplined or fired, although he once recommended to a principal that an employee be evaluated because Jaramillo was not sure whether the employee had been evaluated in two years.²² The principals hire the custodians and evaluate the custodians. Mr. Jaramillo has attended at least two meetings called by the superintendent for employees Jaramillo referred to as supervisors and managers. Mr. Jaramillo has never written any management policies related to the school district's maintenance.²³

²¹ When asked who would hire a custodian in the summer if one was needed Mr. Jaramillo responded, "I assume they would have to be recommended by Mr. Dwyer and the Board." (T.193) The superintendent testified that in the future Mr. Jaramillo would be involved in hiring any new custodians. The Employer provided no evidence of this policy beyond the statements of the superintendent. The superintendent conceded that the principals would be involved in the hire of a custodian in the summer if they were available. But, if a principal were on vacation, he would "feel free to go ahead and have Mr. Jaramillo assist me." (T.248) I find the testimony of Mr. Jaramillo more persuasive on this issue. When asked whether he had any authority to hire custodians Mr. Jaramillo answered in the negative. (T.181)

²² Although Jaramillo brought this to one of the principal's attention, he did not know whether anything was ever done as a result of his suggestion. The school district did, however, terminate the employee in question at the end of that school year. Mr. Jaramillo did not know if this was a result of his comments.

²³ Employer Exhibit 6 is a document titled, "Jemez Valley Public Schools Maintenance Plan." When shown this exhibit by the Employer's representative Mr. Jaramillo stated that he had never seen it before and that he did not know who "put it together." (T.184) Later testimony by the superintendent revealed that the superintendent had created the document based on information from Mr. Jaramillo, but that Mr. Jaramillo had evidently never seen the document.

IV. Discussion and Analysis

The Petitioner seeks to represent a district-wide bargaining unit of school employees. The Employer asserts that certain employees are either confidential, supervisory or managerial employees and as such ineligible for inclusion in the petitioned-for unit. The Petitioner argues that none of the contested employees meet the Act's requirements for exclusion from the proposed bargaining unit.

A. Confidential Employees

The PEBA prohibits the inclusion of confidential employees in bargaining units. The Employer contends that the payroll manager and the school secretaries are confidential employees. The Petitioner argues that all four positions should be included in the petitioned-for unit. Section 4(F) of the PEBA defines a confidential employee in the following way:

“confidential employee” means a person who assists and acts in a confidential capacity with respect to a person who formulates, determines and effectuates management policies.

Rule 1.3(f) of the Board's Rules and Regulations further provides:

“confidential employee” means an individual who assists and acts in a confidential capacity with respect to a person who formulates, determines and effectuates a public employer's employment, collective bargaining or labor relations activities, including grievance processing.²⁴

²⁴The Employer contends that the Board acted beyond its authority in promulgating Rule 1.3(f). The definition of confidential employee found in Rule 1.3(f) is virtually identical to the one found in the Act except that the rule provides guidance for what is meant by the words “management policies” found in the Act. Rule 1.3(f) does this by explaining what types of management policies the Board is concerned about protecting by referring to a *public employer's employment, collective bargaining or labor relations activities, including grievance processing*. The rule does not rewrite the Act as asserted by the Employer. I decline the Employer's invitation to suggest the Board change the rule. Moreover, I find that it is not necessary for me to decide whether the Board acted improperly because I would reach the same conclusions with or without Rule 1.3(f).

The Board has previously indicated that it is helpful to consider the interpretations of the National Labor Relations Act (NLRA) by the National Labor Relations Board (NLRB) and reviewing courts where the PEBA and NLRA contain the same or similar language. County of Santa Fe, 1 PELRB No.1 (1994); County of Los Alamos, 1 PELRB No. 3 (1994). The NLRA does not contain a statutory exclusion for confidential employees. The NLRB and reviewing courts, however, have carved out such an exclusion through caselaw. As a result, employees who “assist and act in a confidential capacity to persons who exercise ‘managerial’ functions in the field of labor relations,” are considered confidential employees by the NLRB and as such excluded from bargaining units. Ford Motor Co., 66 NLRB 1317, 17 LRRM 394 (1946). Because a finding of confidential status removes the employee from a bargaining unit, the NLRB has tended to read the exclusion for confidential employees narrowly.²⁵

A clear example of a confidential employee is the secretary to a director of personnel or other managerial employee responsible for labor relations. The policy of excluding confidential employees from bargaining units is based on the belief that the employee’s access to confidential information relating to the employer’s bargaining strategy would place him or her in a position of potential conflict of interest. Westinghouse Elec. Corp. v. NLRB, 368 F.2d 669, 68 LRRM 2849 (6th Circ.1968). Since the possible conflict stems from disclosure of the employer’s collective bargaining strategy, the NLRB has concluded an employee’s access to confidential information, other

²⁵ See also, Robert A. Gorman, Basic Text on Labor Law, 39 (1976).

than labor relations matters, does not present a potential conflict of interest, therefore eliminating the need to exclude such an employee. Swift and Co., 129 NLRB 1391, 47 LRRM 1195 (1961). Consequently, I recommend that the Board also adopt this approach since an employee's exposure to confidential information, other than labor relations or bargaining strategy, would not give a union the unfair advantage in collective bargaining that the confidential exclusion is designed to protect against.²⁶ Because of the similarities between the definition found in the PEBA and NLRB caselaw, I will interpret the PEBA within the context of decades of labor law precedent, and not in a vacuum as if the drafters of this Act had no knowledge about the terms of art they included in the law. I will assume that the State legislators were familiar with labor law generally and the policy considerations for excluding confidential employees specifically.

The Act's confidential employee definition requires an analysis of (1) the duties of the employee in question and (2) the duties of the person he or she allegedly assists.²⁷ Nearly forty years ago the NLRB announced a similar two-part test in B.F. Goodrich Company, 115 NLRB 722, 37 LRRM 1383 (1956). In B.F. Goodrich, the NLRB declared, "only those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor

²⁶ I recommend the Board interpret the Act in this way, however, the same result can be achieved by reference to Rule 1.3(f).

²⁷ The PEBA does not specifically require that a confidential employee have access to confidential information. Some state public sector bargaining laws do have such a requirement. I am not by fiat creating an access test in the PEBA, in the analysis which follows, but rather I am acknowledging that it is the issue of one's access to sensitive employer labor relations information that gives rise to the policy of excluding an employee who *assists and acts in a confidential capacity a person who formulates, determines and effectuates management policies.*

relations," constitute confidential employees. In NLRB v. Hendricks County Rural Electric Membership Corporation, 454 U.S. 170, 108 LRRM 3105 (1981), the U.S. Supreme Court held that there is a reasonable basis in law for this "labor nexus" test, as enunciated in B.F. Goodrich, as opposed to a broader test which would exclude all employees with mere access to confidential business information. The same considerations should govern the application of the PEBA's confidential exclusion.²⁸ The purpose for the confidential exclusion is to prevent employees with access to the employer's confidential labor relations information from passing it on to a union to which they belong. Westinghouse Elec. Corp. v. NLRB, 368 F.2d 669, 68 LRRM 2849 (6th Cir. 1968). In order for public employers to bargain with unions on equal footing, it is necessary to exclude from bargaining units those employees who are privy to the public employer's bargaining strategy. With the Act and these policy considerations in mind, I turn to the facts of this case.

Preliminarily, however, I note that public sector bargaining is a relatively recent phenomenon in New Mexico. As a result, I suggest the Board adopt a "reasonable expectation test" for analyzing confidential status in cases where the employer has not

²⁸The Employer argues that employees need only process or have access to any type of confidential information to be excluded as confidential employees under the Act. The Employer refers to confidential information as student academic records, disciplinary records, medical records, and employee personnel matters. These types of records do not pose the conflict of interest to bargaining unit employees that exposure to labor relations data would. If the Employer's reasoning is followed it would be necessary to exclude all public employees who are health care employees and exposed to medical records from bargaining units. The same would be true for all public employees who are clerical personnel who work with personnel matters. There is probably additional information handled by public employees which is also deemed confidential by law. It would be nonsensical to preclude all public employees who are exposed to "confidential" information which does not relate to collective bargaining. Even in this case, the Employer does not argue that teachers, who have access to "confidential" academic records, must be excluded from the proposed unit.

engaged in collective bargaining in the past. Accordingly, the employee in question and his or her supervisor's roles in collective bargaining would be examined based on their current duties and a reasonable expectation that the employee in question will be performing confidential duties, within the meaning of the Act, in the future. As the Employer in this case has no history of collective bargaining, I will use this test in deciding confidential issues.

1. Payroll Manager

The first issue is whether the payroll manager is a confidential employee. The Employer maintains that the payroll information handled by the payroll manager is confidential. According to the Employer some of the time the payroll manager acts as a confidential to the superintendent, some of the time to the director of finance, and some of the time autonomously. The Petitioner argues that the payroll manager does not assist, nor act, in a confidential capacity to anyone, and therefore she cannot be a confidential employee as defined by the Act.

Whether the payroll manager is a confidential employee depends on satisfying the two prongs of the labor nexus test found in the PEBA's definition. Because the Employer has not engaged in collective bargaining before, it is necessary to consider this position in light of the above-mentioned reasonable expectation test. The first prong of the Act's definition concerns whether the payroll manager *assists and acts in a confidential capacity to someone*. The payroll manager and the superintendent's testimony at the

hearing made it very clear that the payroll manager carries out her job functions almost entirely independent of anyone else, including her supervisors.²⁹ Currently the payroll manager does not do typing or filing for anyone other than herself, and she works exclusively on payroll matters. Also, when asked if her job duties will change at all if the Petitioner is certified, the payroll manager answered in the negative. Furthermore, the payroll manager has not prepared any financial data for the Employer in anticipation that the Petitioner may be certified to bargain with the Employer. When asked if she believed she might have access to labor relations data in the future she answered, "...only if it's going to matter to the efficiency of getting payroll out."³⁰ Importantly, in the event that the Petitioner is certified, the payroll manager will not have access to budget information in the normal course of her duties.³¹ The director of finance is responsible for the Employer's budgetary matters. The type of data, unrelated to labor relations, handled by the payroll manager prior to collective bargaining will be the same type of data handled if the Union is certified.³²

²⁹ In fact, the Employer emphasizes this autonomy to argue in the alternative that this position is a managerial one.

³⁰ T.45.

³¹ The payroll manager's testimony revealed that she does not have any responsibilities associated with the budget. She did in the past, but that was prior to the Employer hiring a director of finance and her becoming the payroll manager. The fact that the director of finance indicated to the payroll manager that she would some day be trained to fill in for him is not persuasive on the issue of her confidential status. The record reflects that at this time when the director of finance is gone, his work is left until he returns.

³² Compare this situation to Montgomery Township Board of Education, 19 NJPER 24044 (NJ PERC Dir. 1993) and Shasta Union High School District, 14 PERC 21221(CA PERB ALJ 1990). In Montgomery Township Board of Education, the school board intended to assign confidential labor relations functions to the newly created payroll manager position. The PERC Director excluded the payroll manager from the unit of school personnel where the position's future job functions relating to confidential financial information to be used by the employer in labor negotiations were clear. In Shasta Union High School District, the budget/payroll analyst's advance knowledge of the school district's responses to the union's grievances and the district's bargaining proposals made the position a confidential one.

Furthermore, the bookkeeper, an uncontested bargaining unit employee, is being trained to fill in for an absent payroll manager. When she fills in for the payroll manager, the bookkeeper will have access to all of the financial data accessible to the payroll manager. In addition, the payroll manager acknowledged that the salary data she works with is public information. It would be pointless to deny a payroll position public employee status on the ground she was a confidential employee if the information she has access to is available to the union.³³ The fact that the payroll manager handles documents containing salary and personal data unrelated to labor relations does not support a finding of confidential status under the Act. West Harvey-Dixmoor School District No. 147, 2 PERI 1054 (IL ELRB 1986) (Confidential information handled by an allegedly “confidential employee” must be related to labor relations or collective bargaining, not other types of confidential business information.)³⁴

³³ See, Ashtabula Area City Schools Board of Education, 7 OPER 7050 (OH SERB 1989) (Confidential finding not warranted where employees in issue had access to personnel and financial data available to the employee association.). See also Pennsylvania Labor Relations Board v. Altoona Area School District, 389 A.2d 553, 559, 99 LRRM 2309, 2312 (1978) (The Pennsylvania Supreme Court stated, “We must remember that the term being defined is ‘confidential employee.’” The Court found a payroll clerk should only be excluded from a bargaining unit as a confidential employee if she has access to information not available to the public.)

³⁴ See also Board of Education of the Township of Willingboro, County of Burlington, 9 NJPER 14141 (NJ PERC HO 1983) (School district’s head payroll clerk was not a confidential employee where she merely collected raw budget data for use by school board in negotiations, and was not privy to board’s negotiating strategy.); Jackson County School District, 16 FPER 21169 (FL PERC 1990) (Payroll/Insurance/Finance Specialists simply provided computer generated cost data regarding salary and benefit schedules for the purpose of preparing collective bargaining proposals. Following submission of this data, there is no evidence that these employees are involved in proposal formulation.); In the Matter of the Employees of Conneaut School District, 14 PPER 14041 (PA LRB HO 1983) (Neither accounts payable bookkeeper nor payroll bookkeeper employed by school district were confidential employees where they costed out wage proposals for the employer, but were not aware whether the cost estimates were actually used by the employer in specific proposals presented to the union.); Redlands Unified School District, 13 PERC 20212 (CA PERB 1989) (Employee benefits clerk and payroll technicians who merely made cost projections or prepared other financial information for negotiations were not confidential employees.); and School Board of Collier County, 15 FPER 20071 (FL PERC 1989) (Payroll clerk not a confidential employee where school board failed to establish employee’s duties had “labor nexus.”).

Based on the foregoing analysis, the payroll manager does not meet the first requirement of the labor nexus test in the Act's definition. It is irrelevant whether her supervisors *formulate, determine and effectuate management policies* for the Employer as required by the second prong of the labor nexus test, because there is no evidence in the record to support a finding that the payroll manager acts in a confidential capacity to either of these individuals. Lastly, the Employer states that the payroll manager "assists or acts in the administration of the employer's policies" with respect to the superintendent or the director of finance.³⁵ This may be true, however, there is no evidence in the record that the payroll manager assists and acts in a confidential capacity to *a person* as required by the Act. Thus, I find that the duties of the payroll manager do not meet the requirements for confidential employee status.

2. School Secretaries

With regard to the school secretaries, the Employer again argues that under the Act's definition of confidential employee it is only necessary for an employee to process or have access to any type of confidential information to be excluded from the bargaining unit. For the reasons set forth above, I reject the Employer's broad interpretation of the word "confidential" as not intended by the drafters of this legislation and completely unworkable. The Petitioner asserts that the duties of the three school secretaries show that they are not confidential employees.

³⁵ Employer's Post-hearing Brief at 3.

The Petitioner also maintains that NLRB precedent requires that access to, or even typing labor relations documents is insufficient for finding someone to be a confidential employee; but that there must also be a showing of substantive input as well.³⁶ The Petitioner's assertion regarding the requirement of "substantive input" is not supported by the caselaw it cites as authority on the issue. In International Center for Integrative Studies/The Door, 297 NLRB 601, 133 LRRM 1177 (1990), in quoting Associated Day Care Services, 269 NLRB 178, 181, 115 LRRM 1217, 1220 (1984), the NLRB stated it will not find an employee "typing documents relating to labor relations matters to have confidential status 'unless it can be shown that the employee has played some role in creating the document or in making the substantive decision being recorded or that the employee regularly has access to labor relations policy information before it becomes known to the union or employees concerned.'" The Petitioner cites another case where the NLRB refused to deem an employee a confidential because she did not have substantive input into grievance handling, among other things. PTI Communications, 308 NLRB 918, 1442 LRRM 1261 (1992). I do not believe that NLRB caselaw ordinarily requires a "showing of substantive input" on the part of the disputed employee in order to exclude him or her as a confidential. Similarly, no such requirement is found in the PEBA, nor Board Rules, and I do not suggest the Board adopt such a standard through caselaw.

Whether the school secretaries should be excluded as confidential employees depends upon their meeting or failing to meet the requirements set forth in the Act.

³⁶ Petitioner's Post-hearing Brief at 16.

Pursuant to the Act's labor nexus test it is necessary to first evaluate the duties, or reasonable expectation of future duties of the disputed employee. The school secretaries have typing and filing duties, spend much of their time on the phone, and generally tend to the operation of the schools' offices. They have access to student academic, disciplinary, and medical records. They also may have limited access to employee personnel files. As I have indicated above, this "confidential", in the ordinary sense of the word, information is irrelevant to deciding the issue of confidential status.³⁷ What is relevant is whether these employees will be acting and assisting in a confidential, labor law sense of the word, capacity. Although I point out that this position is technically identified as school secretary, rather than principal's secretary, these employees do function as secretaries to the principals to the extent that the principals have secretaries.

I find that there is a reasonable expectation that the school secretaries' duties would require that in the future they will be acting or assisting the principals in a confidential capacity, thereby satisfying the first prong of the labor nexus test in the Act. To varying degrees, they type and file for the principals and have access to the principals' offices.

³⁷ In the Matter of East Lycoming School District, 14 PPER 14168 (PA LRB HO 1983) (Secretaries' access to personnel files and teacher disciplinary and grievance forms did not warrant confidential designation inasmuch as such documents were not used in collective negotiations.); School Board of Collier County, 15 FPER 20069 (FL PERC 1989) (School secretaries are not confidential employees and should be included in the bargaining unit where they had access to confidential matters contained in personnel files regarding potential discipline, employee evaluations, health and psychiatric information, or other matters affecting an employee's privacy because the required labor nexus is not established by access to such information.).

The second prong of the Act's labor nexus test requires that the person assisted by the alleged confidential *formulate, determine and effectuate management policies*.³⁸ The superintendent testified that at least one of the principals would be on the Employer's negotiating team. He was reluctant to identify which one, because one of the principals may be leaving the school district. There was no evidence that the superintendent's reticence to state who would be on the Employer's negotiating team was anything other than honest. However, this uncertainty about the principals' future duties regarding collective bargaining makes it impossible to know at this time whether they will *formulate, determine and effectuate management policies* as the second prong of the labor nexus test requires. Based on the facts of this case, if the principals are not appointed to the Employer's negotiating team, it is difficult to imagine how they could meet the requirements of the definition.

The Petitioner filed its representation petition nearly five months prior to this hearing. Yet, at the hearing, the Employer still did not who would be representing management at the negotiating table. If there is uncertainty about the principals' role in future collective bargaining, there can be nothing but uncertainty regarding the role of those employees who assist them.³⁹ Therefore, I find that at this time, it is impossible to

³⁸ As explained above, I am interpreting management policies to mean those related to labor relations. To find otherwise would depart dramatically from accepted labor law principles and unnecessarily broaden the exclusionary net cast by the confidential definition. Moreover, assuming the Board did not act beyond its authority in promulgating Rule 1.3(f), this conclusion is supported by the language therein. Also the placement of the word "and" in the definition indicates that the person assisted must do all three, and not simply one or two of the functions listed in the definition.

³⁹ In the Matter of the Employes of Wellsboro Area School District, 14 PPER 14205 (PA LRB HO 1983) (Secretaries to school district's elementary, middle, and high school were not confidential employees where principals were not members of district's bargaining team and secretaries did not have knowledge of district's bargaining policy.).

conclude that the school secretaries are confidential employees. To find otherwise, would not only have no basis in law, but might create an unwelcome precedent whereby Employers either claim to not know who will be on their negotiating teams or make overly generous assertions regarding the composition of their negotiating teams in order to exclude more confidential employees than required by the law. Therefore, without more information regarding the principals' roles with regard to labor relations, the school secretaries are properly included in the proposed bargaining unit.

B. Management Employees

The PEBA requires the exclusion of management employees from appropriate bargaining units. The Employer asserts that the payroll manager and maintenance supervisor positions are both managerial according to the Act's definition. The Petitioner argues that the evidence does not warrant a finding of managerial status for either position. Section §4(M) of the PEBA defines management employee in the following way:

“management employee” means an employee who is engaged primarily in executive and management functions and is charged with the responsibility of developing, administering or effectuating management policies. An employee shall not be deemed a management employee solely because the employee participates in cooperative decision making programs on an occasional basis.

The definition can be broken down into a two-part test: a managerial finding is warranted if the employee is (1) primarily engaging in executive and management functions; and he or she has responsibility for (2) developing, administering, or effectuating management policies, which requires the employee do more than merely participate in cooperative

decision making programs on an occasional basis.⁴⁰ Both parts of the test must be met to support a finding of managerial status under the Act. The key inquiry is whether the duties and responsibilities of these employees, who exercise discretionary authority on behalf of the employer, are such that these individuals should not be placed in a position requiring them to divide their loyalty between the employer and the union.

The NLRA does not contain a specific managerial exclusion, however through caselaw, such an exclusion has developed over the years. In NLRB v. Bell Aerospace Co., 416 U.S. 267, 85 LRRM 2945 (1974), the U.S. Supreme Court remanded a case concerning managerial status to the NLRB, cautioning the NLRB not to place too great an emphasis on job titles but on the employee's actual job responsibilities, authority, and relationship to management. On remand, the NLRB articulated the following definition of managerial employee:

[T]hose who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy...[M]anagerial status is not conferred upon rank-and-file workers, or upon those who perform routinely, but rather it is reserved for those who are closely aligned with management as true representatives of management. Bell Aerospace Co., 219 NLRB 384, 89 LRRM 1664 (1975).

⁴⁰ I will read the term "management policies" here consistently with NLRB caselaw to encompass all management policies and not just those relating to labor relations. At one time the NLRB held it would only exclude those employees whose managerial positions in labor relations or personnel would create a conflict of interest. This position was rejected by the U.S. Supreme Court in NLRB v Bell Aerospace, 416 US 267, 85 LRRM 2945 (1974). According to the Supreme Court, all managerial employees, regardless of whether their functions related to labor relations, must be excluded from bargaining units. As a result, I recommend the Board interpret "management policies" in the managerial definition to encompass all management policies, not simply management policies related to labor relations.

I recommend that the first part of the Act's test for managerial status, or *an employee who is engaged primarily in executive and management functions*, be read to require an individual possess and exercise a level of authority and independent judgment sufficient to significantly affect the employer's purpose. Employees exhibit such authority when they exercise independent judgment to establish policies and procedures, to prepare budgets, or to assure effective and efficient operations. Managerial employees must exercise discretion within, or even independently of established employer policy and must be aligned with management...[A]n employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy. NLRB v. Yeshiva University, 444 U.S. 672, 103 LRRM 2526 (1990).

In addition, I recommend the second part of the test be read to require the following. *Developing, administering, or effectuating management policies* should require an employee either create, oversee, or coordinate the means and methods for achieving policy objectives and determine the extent to which policy objectives will be achieved. This requirement should mean more than mechanically directing others in the name of the employer. It should be read to require an employee have meaningful authority to carry out management policy. Against this background I turn to the arguments of the parties and the facts of this case.

1. Payroll Manager

As indicated above, a finding of managerial status requires meeting both elements of the test found in the Act's definition. The Employer does not make any argument, or provide any proof, of how the payroll manager meets the first prong of the test, that is the requirement that she engage primarily in executive and management functions. The Petitioner argues that the payroll manager's duties do not resemble "executive and management" functions, but rather require that she carry out State and school board policies and to process information in a predetermined way over which she has no discretion.

The payroll manager's responsibilities include preparing employment contracts for employees, gathering employment and educational data on employees, maintaining information regarding deductions for insurance, leave, taxes, retirement and garnishment. All of this information is generated elsewhere and the payroll manager inserts the information into the appropriate places, whether it be on a form or part of a computer program. She collects this information in order so that she may produce the Employer's payroll. The record reveals that the payroll manager plays no role in the development of management policies. This is uncontested by the Employer.

It is also clear she has no discretion in the way in which she carries out the Employer's policies relative to the payroll. I find that the payroll manager does not exercise a level of authority and independent judgment in carrying out her payroll duties

sufficient to significantly affect the employer's purpose. This is not to say that she does not perform an important role, it simply means the Employer failed to demonstrate that the payroll manager's position meets the standard established by the Act. Furthermore, even if I were to find that the payroll manager engaged in *executive and management* functions as required by the Act, there is no factual basis for finding her duties required that she *primarily* engage in these functions. I find that the Act's requirement that a managerial employee be *primarily* engaged in executive and management functions is not met in this instance.

The duties of the disputed position also fail to satisfy the second element of the test found in the definition. The Employer correctly points out that the definition only requires that a management employee perform one of the functions listed in the second part of the test, that is *developing, administering or effectuating management policies*. If this part of the definition is read to require an employee either create, oversee, or coordinate the means and methods of achieving management policy objectives and determine the extent to which the policy objectives will be achieved, as I suggest above, the payroll manager fails to meet this element as well. The payroll manager may carry out management policy relative to the payroll, but she does not create, oversee nor coordinate the means and methods of achieving those policy objectives, nor does she determine the extent to which the policy objectives will be achieved. In fact, the director of finance is considered the Employer's "payroll officer."

It is undisputed that the payroll manager does not *develop* management policies. The board of education, superintendent or director of finance are responsible for creating school district policy. The record is clear that the payroll manager has nothing to do with the creation of the Employer's policies, nor does she participate in any form of cooperative decision-making programs. The Employer argues that the payroll manager does, however, *administer or effectuate* management policies. The payroll manager is almost exclusively responsible for the Employer's payroll, but she testified that she has no discretion to change an Employer policy in minor or major ways depending on individual circumstances, and that she must follow the Employer's policy. Much of her work consists of verifying information given to her by employees which does not require independent judgment. If she makes any changes to an employee's pay as a result of an error which the employee brings to her attention, she must inform the director of finance. She does not have the independent authority to sign a purchase order for the Employer without the director of finance's permission, and she does not have the authority to pledge the Employer's credit. She is not responsible for generating the information she works with, but rather it is given to her by other individuals.

Additionally, the payroll manager's testimony revealed that she does not have any responsibilities associated with the budget. She did in the past, but that was prior to the Employer hiring a director of finance and her becoming the payroll manager. That she could fill in for the director of finance to create budget projections, which are only done once a year, does not make her a manager. The record reflects that when the director of

finance is gone his work waits for him until he returns. The fact that the director of finance indicated to the payroll manager that she would some day be trained to fill in for him is not persuasive evidence of managerial status. And finally, the salary data she is responsible for is public information. Because of the absence of evidence indicative of managerial status, the fact that the payroll manager and the superintendent consider the position to be managerial must be accorded little weight. The payroll manager's duties do not require that she exercise any discretion on behalf of the Employer and there is no evidence that placing this position in the bargaining unit would force her to divide her loyalty between the Employer and the Union. Based on the foregoing, I find that the payroll manager is not a management employee within the meaning of the PEBA.⁴¹

2. Maintenance Supervisor

The Employer alleges that the maintenance supervisor is a management employee. The Petitioner argues that the maintenance supervisor's duties do not meet the requirements of the Act for managerial status and that the position belongs in the bargaining unit.

The maintenance supervisor is responsible for the upkeep of the Employer's physical facilities. He performs the physical maintenance of all the school district's buildings. If the maintenance supervisor is unable to perform a job, and the job is

⁴¹ Whether or not the Board adopts my suggestions for analyzing the two-part managerial definition, the payroll manager is not a managerial employee. A plain reading of the Act's definition applied to the facts herein, amply demonstrate that the Employer has failed to show the payroll manager should be excluded from the proposed bargaining unit.

estimated to cost less than \$500, pursuant to district policy, the maintenance supervisor suggests the director of finance hire an outside contractor. The record reflects these recommendations are usually followed. If the job is expected to exceed \$500, also pursuant to district policy, the maintenance supervisor secures three bids on the project and turns the bids over to the director of finance. The lowest bidder is hired to perform the work. In addition to the actual maintenance work he performs each day, the maintenance supervisor also spends approximately one hour a day completing paperwork which includes work requisitions and work logs.

Turning to the definition in the Act, the Employer again overlooks the first requirement in the managerial employee definition. There is no evidence that the disputed employee *is engaged primarily in executive and management functions*. The maintenance supervisor spends almost all of his time doing actual physical maintenance. His duties clearly do not require that he is primarily engaged in executive and management functions. This individual does not possess, nor exercise, a level of authority and independent judgment sufficient to significantly affect the employer's purpose, therefore the first element of the definition remains unsatisfied. As the Act requires meeting both requirements, the disputed position cannot be found to be a management employee. Even so, I will consider whether the second part of the definition is met, that is whether the employee in question has responsibility for *developing, administering or effectuating management policy*.

I have recommended reading this requirement to ask whether the employee creates, oversees, or coordinates policy implementation by developing the means and methods of achieving policy objectives and determines the extent to which the policy objectives will be achieved. The Employer focuses on the second part of the definition to argue that the maintenance supervisor was involved in the development, administration and effectuation of a document called the "Jemez Valley Public Schools Maintenance Plan." The Employer's entire argument that the maintenance supervisor is a manager appears to rest upon this document. The record, however, disclosed that the maintenance supervisor had never seen the document before it was shown to him at the hearing. The superintendent's subsequent testimony revealed that he had created the document based on information given to him by the maintenance supervisor. Even if the maintenance supervisor had a great deal of input toward the creation of this single document, this alone does not evidence managerial status because the maintenance supervisor is primarily engaged in maintenance work.

Moreover, the collection of bids and selection of the lowest bidder to complete work is done pursuant to State-mandated district policy and does not require the maintenance supervisor to exercise independent judgment. This type of activity does not rise to the level of managerial status as contemplated by the Act because it does not involve decision making which broadly affects the Employer's purpose.⁴² Decisions

⁴² See State of Illinois, Department of Central Management Services, 5 PERI 2004 (IL SLRB 1988); State of Illinois, Department of Central Management Services and Children and Family Services, 5 PERI 2002 (IL SLRB 1988).

which broadly impact the Employer's purpose are made by the superintendent, the director of finance and the school board.

The Employer suggests that there are additional facts warranting a finding of managerial status. These are the maintenance supervisor's attendance at "management staff" meetings, the possibility that he may be on the Employer's negotiating team, and the assertion by the Employer that the maintenance supervisor would be the first step respondent in the Employer's grievance procedure for custodians during the summer. First, although attendance at so-called "management staff" meetings is relevant, the key for demonstrating any exclusionary status is found in the disputed employee's job duties and functions. Second, I do not find the assertion that the maintenance supervisor may be on management's negotiating team credible. See Footnote 3 at 4. And third, although this subject is more fully examined below, I find the Employer's assertion regarding the custodians use of the grievance procedure during the summer to be specious in light of the superintendent and maintenance supervisor's testimony that the principals are the custodians' supervisors. Consequently, I find that the maintenance supervisor's duties fail to demonstrate he is a managerial employee as defined by the Act.

C. Supervisory Employee

The PEBA also excludes supervisors from inclusion in appropriate bargaining units. Whether an employee is a supervisor depends upon his or her duties, and not his or

her job title or classification.⁴³ If a disputed employee's duties meet the requirements set forth in the Act, then he or she must be excluded from the proposed unit. The Employer contends that the maintenance supervisor supervises four custodians and one temporary employee during the summer months.⁴⁴ The Petitioner asserts that the maintenance supervisor's duties do not meet the requirements set forth in the Act's definition of a supervisory employee. Section §4(S) of the PEBA defines supervisor in the following way:

"supervisor" means an employee who devotes a substantial amount of work time to supervisory duties, who customarily and regularly directs the work of two or more other employees and who has the authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively but does not include individuals who perform merely routine, incidental or clerical duties or who occasionally assume supervisory or directory roles or whose duties are substantially similar to those of their subordinates and does not include lead employees or employees who participate in peer review or occasional employee evaluation programs.

The analysis for determining whether an employee is a supervisor first requires satisfying a three-part test: the employee must (1) devote a *substantial* amount of work time to supervisory duties; (2) *customarily and regularly* direct the work of *two or more other employees*; and (3) have *authority* in the interest of the employer to *hire, promote or discipline* other employees or to *recommend such actions effectively*. If these requirements are met the analysis continues to determine whether the disputed employee (i) performs merely *routine, incidental or clerical duties*; or (ii) only *occasionally* assumes

⁴³ See *Winco Petroleum Co.*, 241 NLRB 1118, 101 LRRM 1100 (1979), *enforced*, 668 F.2d 973, 109 LRRM 2377 (8th Cir. 1982) (Giving employee title "supervisor" or even theoretical power to perform some supervisory functions does not convert rank-and-file employee into statutory supervisor.)

⁴⁴ Other than a reference to the Employer's occasional hire of a temporary worker in the summer, there is nothing in the record to show that this "temporary worker" would even be considered a public employee as defined by the Act and Rules, and therefore relevant to this analysis.

supervisory or directory roles; or (iii) performs duties which are *substantially similar* to those of his or her subordinates; and (iv) does not include lead employees or employees who participate in peer review or occasional employee evaluations programs. Even if the initial three-part test is met, if any of the subsequent questions found in the definition can be answered in the affirmative, the employee is a lead worker, or participates in peer review or occasionally employee evaluation, then the employee is not a supervisor.

The Employer overlooks a material element of the Act's definition. The Employer disregards the Act's requirement that a supervisor *devote a substantial amount of work time to supervisory duties*. The record reflects that the only time the maintenance supervisor even arguably might have limited supervisory duties over other employees is during three months of the year when the maintenance supervisor and custodians do work in the Employer's buildings. The Employer acknowledges that the alleged subordinates, the custodians, are supervised by the principals for the remaining nine months of the year. I find, that during those three summer months the custodians only informally report to the maintenance supervisor. The work done by the maintenance supervisor and custodians during the summer is a reflection of the lists compiled by the teachers of each building who give the list to the principal who gives the list to the maintenance supervisor. Even the alleged supervisor testified that he does not have to directly tell the custodians what to do, but rather they know what needs to be done and they go from room to room in each building until their work is complete. Furthermore, during that time, the maintenance supervisor is spending most, if not all, of his time doing maintenance work himself, not

performing supervisory duties as required by the Act. I find that these facts not only fail to meet the *substantial amount of work time* requirement of the Act, but also fail to satisfy the *customarily and regularly directs* component of the definition.⁴⁵

Additionally, I find that the evidence shows the maintenance worker does not have authority to hire, promote, discipline, nor discharge his alleged subordinates; he also does not have authority to effectively recommend any of these actions.⁴⁶ I find that only the principals have authority with regard to these functions. Since the maintenance supervisor's duties fall short of these requirements for supervisory status under the Act, I find this position should be included in the petitioned-for bargaining unit.

V. Conclusions of Law

1. The payroll manager is appropriately included in the petitioned-for unit.
2. The school secretaries are appropriately included in the petitioned-for unit.
3. The maintenance supervisor is appropriately included in the petitioned-for unit.

⁴⁵ See Palisades Community Consolidated School District No. 180, 1 PERI 1024 (IL ELRB HO 1984), where the Hearing Officer found the school district's supervisor of building and grounds should not be excluded from the bargaining unit as a supervisor. Even though he directed custodians in their work and interviewed potential subordinates, these factors were insufficient for exclusion as a supervisor since the preponderance of the alleged supervisor's duties were dedicated to manual maintenance and not supervisory tasks.

⁴⁶ See Footnotes 21 and 22 at 18. Also, compare these facts to O'Fallon Community Consolidated School District No. 90, 1 PERI 1052 (IL ELRB HO 1985), where the Hearing Officer found the Director of Maintenance and Custodial Services to be a supervisory employee because he (1) assigned work to subordinates; (2) conducted their evaluations; (3) possessed primary responsibility for discipline; (4) actively participated in the hiring process; (5) trained new employees; (6) spent a preponderance of his time on supervisory duties; (7) substantially participated in budget preparation; (8) received a higher rate of compensation than subordinates; and (9) received a negotiated rather than scheduled salary.

VI. Order Directing Election

Unless this Decision and Order Directing an Election is rejected or modified by the Board, a secret ballot election shall be conducted among employees in the unit defined below, at an appropriate time and place to be set forth in a Board or Director issued Notice of Election. In accordance with the Act and Rules, eligible employees in the following unit shall be given an opportunity to vote between representation by NEA-Jemez Valley and "No Representation."

All Jemez Valley Public School employees in the following job classifications.

Included: All teachers, counselors, librarians, educational/instructional assistants, cooks, food service clerks/cashiers, custodians, warehouse manager, book keeper, federal projects/special education secretary, secretary/registrar Title V liaison, payroll manager, school secretaries, maintenance supervisor.

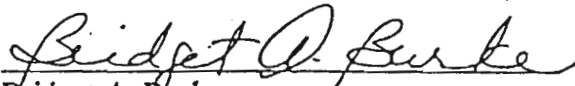
Excluded: All management employees, supervisors and confidential employees as defined by the Act and all others.

VII. Request for Review

Pursuant to Board Rule 2.15 any party may file a request for Board review within ten work days after service of this Decision. The request for review shall state the specific findings, conclusions, or recommendations to which exception is taken and shall identify the specific evidence presented or offered at the hearing that supports each exception.

The request may not rely on any evidence not presented at the hearing. Within ten work days after service of a request for review, any other party may file and serve on all parties a response to the request for review.

Issued in Albuquerque, New Mexico, on March 21, 1995.



Bridget A. Burke
Administrative Law Judge
Public Employee Labor Relations Board