

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In the Matter of

United Steelworkers of America
Petitioner,

and

Gila Regional Medical Center
Public Employer,

and

Grant County Board of County Commissioners
Public Employer.

DECISION AND ORDER DIRECTING ELECTION

On May 8, 1995, an administrative judge (AJ) issued a Decision and Order pursuant to the Public Employee Bargaining Act of 1992 (PEBA or Act), NMSA 1978, §§ 10-7D-1 to 10-7D-26, (Repl. Pamp. 1992), in *United Steelworkers of America and Gila Regional Medical Center and Grant County Board of County Commissioners*, Case No. CP 17-95(C). This proceeding commenced when the Petitioner, United Steelworkers of America (USWA), filed a representation petition with the Public Employee Labor Relations Board (PELRB or Board) on January 3, 1995, seeking to represent a bargaining unit composed of service, clerical, and maintenance positions. Upon completion of the administrative investigation under PELRB Rule 2, the AJ conducted a hearing on March 15, 16, and 17, 1995, on the issues described below.

The AJ concluded that the Gila Regional Medical Center Board of Trustees (Trustees) is the "appropriate governing body" of the public employer, Gila Regional Medical Center (GRMC), for purposes of collective bargaining under the Act.¹ The AJ also concluded that the position of operating room technician II--a second issue in dispute--should be excluded from the petitioned-for unit of service, maintenance, and clerical employees because of the technical nature of the work performed by employees in that position. Finally, the AJ concluded that the position of clerk/phlebotomist is appropriate for inclusion in the unit. As a result of the AJ's findings, she directed a secret ballot election among certain employees petitioned-for by the USWA.

On June 23, 1995, the Petitioner USWA and Grant County (County) filed a "consolidated appeal" to the AJ's Decision and Order pursuant to Rule 2.15(a).² The GRMC's Trustees filed a response to the consolidated appeal as authorized by Rule 2.15(b). In their request for review, the Petitioner and County except to the AJ's conclusion that the Board of Trustees is the appropriate governing body of the public employer GRMC. Other AJ conclusions focusing on the positions

¹Related to the issue of appropriate governing body is the Grant County Board of County Commissioners' decision to authorize voluntary recognition of the USWA to be the certified, exclusive representative for the positions in the petitioned-for bargaining unit. In view of our decision in the instant proceeding, the PELRB did not approve on November 8, 1995, the voluntary recognition extended to Petitioner by the Grant County Board of County Commissioners.

²The PELRB Director approved the Petitioner's and Grant County's joint request for a 1-month extension of time in which to file its request for review.

of operating room technician II and clerk/phlebotomist are not excepted to by Petitioner, County or the Trustees.

On October 17, 1995, the PELRB conducted its review of this matter during a regular monthly meeting. The Board decided to request supplemental briefs from all parties. The directive to the parties stated that should the PELRB find and conclude that employees in this matter are employees of GRMC and assumed that to be covered under the Act, a "public employee" must be employed by a "public employer" then does (1) the PELRB have jurisdiction and (2) the reference to "local public body", which is not defined in the Act but is contained in PEBA § 7, serve to expand the definition of "public employer"? Petitioner USWA and GRMC filed supplemental briefs; the County did not file a brief. Upon receipt of the supplemental briefs, the Board entertained oral argument from the parties' representatives at the November 8, 1995, PELRB meeting.

Having reviewed the AJ's Decision and Order, as well as the consolidated appeal, the Trustees' response thereto, and the supplemental briefs, we adopt the Decision and Order and incorporate its findings of fact and conclusions of law into this final action, decision and order of the Board. In doing so, we conclude that the AJ's findings and conclusions comport with the PEBA, particularly the statutory definition of "appropriate governing body" defined in the Act at § 4.B. and the determination of the appropriate policy making body for the public employer, GRMC, as set forth in PEBA § 7.

We observe that the consolidated appeal represents a recycling of arguments and assertions previously presented to and addressed by the AJ. In fact, the only difference between the post-hearing brief filed with the AJ and the consolidated appeal are seven new paragraphs and two additional footnotes which are not dispositive of any issue before us. The one issue we address in detail, however, is the assertion that there is a principal-agent relationship between the County and Trustees. To support this assertion, the Petitioner and County argue a restatement of agency and rely upon County Commission Board Meeting Minutes from July 6, 1962, which state in part:

...the Board unanimously agreed that it is a more satisfactory arrangement to appoint a Hospital Board to be in charge of the operation of the Hillcrest General Hospital³ which will relieve the County Commissioners of deliberations on the routine hospital administration. The Board, however, retains its right and authority on general operation policy.

Other than submitting a copy of the minutes into the record, the Petitioner nor the County provide any explanation as to the meaning of this paragraph from a meeting held over 30 years past. Standing alone the minutes are cryptic and contradictory: the County Commission expresses interest in freeing itself from "deliberations on routine hospital administration," but also "retains its right and authority on general operation policy." We do not speculate about the Commissioners' motives in 1962. Furthermore, we find more demonstrative and persuasive evidence in the record as reflected by the County's conduct towards GRMC and the Trustees during the intervening 30 years.

³Before its reincarnation as Gila Regional Medical Center, the GRMC was called Hillcrest General Hospital.

That is, testimony from witnesses for Petitioner, the County and Trustees affirmed that exclusive control of the GRMC has resided with the Trustees for several decades. The record does not support the assertion that the County retains ultimate control of GRMC, its funding or budget. As noted in the AJ's report, the Trustees operate GRMC with little, if any, advice, guidance, or input from the County. Moreover, when the County has offered its advice as in its expressed disapproval of a decision by the Trustees concerning the contract awarded to a private-sector firm for managing the hospital, the Trustees proceeded to approve, execute and implement that agreement. We find the assertion regarding the County's liability for the hospital is disingenuous, at best, given the numerous references in the AJ's report to the County's complete and total disavowal of liability in cases involving employment litigation and medical malpractice at the hospital. The County does not insure against these risks because it considers them to be the province of GRMC which incurs the liability and costs associated with them. Finally, PEBA § 7 requires the PELRB to determine, as the AJ did, who is "charged with management of the local public body." As shown above, that body is the Board of Trustees in fact and law. Consequently, we find no merit to the assertion that there is a principal-agent relationship between the County and Trustees.

GRMC is a "public employer" within the meaning and intent of PEBA. It is an instrumentality, agency or institution of Grant County, and the GRMC's Board of Trustees is solely responsible for managing the hospital and for performing all tasks and assuming all responsibilities associated with the GRMC's employees. The County Commission of Grant County is estranged, distant and removed from the management of the hospital, including

managing the hospital's employment relations. It would be inconsistent with PEBA to characterize GRMC's employees as simply Grant County employees, whose labor relations are to be controlled and determined by the county commission.

It is undisputed by the parties that GRMC's employees are "public employees" and thus entitled to coverage under the PEBA. Under the facts of this case, the only "appropriate governing body" is the Board of Trustees of GRMC. In light of the legislature's use of the undefined term "local public body" in § 10-7D-7, which in other statutory contexts may include agencies, instrumentalities and institutions of political subdivisions,⁴ it is consistent with the PEBA under the facts of this case to conclude that GRMC is a "public employer" as defined in the Public Employee Bargaining Act.

Finally, Petitioner and County do not present any facts to demonstrate why a collective bargaining relationship involving GRMC's employees necessitates the inclusion of the County. In this regard, the AJ's finding of facts amply demonstrate that the County has no control over wages, hours, and other terms and conditions of employment for employees at GRMC.

In sum, the exception raised by the Petitioner and County in its consolidated appeal to the AJ's findings and conclusion that the appropriate governing body is the Board of Trustees at Gila Regional Medical Center is denied and dismissed.

⁴See NMSA 1978, § 41-4-3 of the Tort Claims Act. GRMC is a covered entity under that Act.

This final action was rendered by the Board during open session at its November 8, 1995, meeting.

ORDER

The Petitioner's and County's exception is denied and dismissed.

A secret ballot election shall be conducted among the employees in the unit described below.

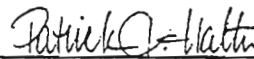
Included: A/R Billing Clerk, Art I Coder, Bereavement Counselor, Bio-Med Tech, Bio-Med Equipment Tech, Business Office Worker, C/S Tech, Cook, Department Secretary, Discharge Planning Clerk, DME Billing Clerk, Driver, EEG Tech, Electrician, Home Oxygen Tech, Home Health Aide, Homemaker Aide, Housekeeper, Indigent Fund Clerk, Inter-Dept. Clerk, Kitchen Aide I, Kitchen Aide II, Laundry Worker, Maintenance Engineer, Medical Records Clerk, Medical Assistant, Nursing Assistant, Payroll A/P Clerk, PBX Register Clerk, Pharmacy Clerk, Clerk/Phlebotomist, Project Specialist, Psych Tech, PT Tech, PT Aide, Radiology Clerk, Transcriber I, Transcriber Trainee, Transcriber II, Volunteer Coordinator, Ward Clerk, Allergy Tech, and Materials Clerk.

Excluded: All other employees including management, supervisors, and confidential employees as those terms are defined in the PEBA and the PELRB's rules and regulations.

In accordance with the Act and the Board's rules and regulations, eligible employees in the unit shall be given an opportunity to vote between representation by the United Steelworkers of America or USWA and "No Representation."

The PELRB Director shall determine whether to conduct the secret ballot election by mail ballot procedures or onsite at the employer's facilities. Within ten (10) workdays from the date of November 8, 1995, the GRMC shall provide to the Director, and serve upon the Petitioner USWA, an alphabetized list of all individuals eligible to vote in the election. The list will also include the job title for each eligible employee and his or her home address.

By the direction of the Board.



Patrick J. Halter
Director, PELRB

Date: November 17, 1995
Issued: Albuquerque, New Mexico

**STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

In the Matter of)	
United Steelworkers of America)	
Petitioner,)	
and)	
Gila Regional Medical Center)	Case No. CP 17-95(C)
Respondent,)	
and)	
Grant County Board of County Commissioners)	
Respondent.)	

ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

On January 3, 1995, the United Steelworkers of America ("Petitioner"), filed a Representation Petition in Case No. CP 17-95(C), 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 a combined unit of service, maintenance and clerical personnel at Gila Regional Medical Center ("Gila").

An Administrative Law Judge heard the case on March 15, 16, and 17, 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. After full consideration of the parties' stipulations, evidence, arguments, and briefs, and upon the entire record of the case, I make the following findings:

I. Stipulated Findings

1. The parties stipulate, and I find, that the United Steelworkers of America is a labor organization within the meaning of §10-7D-4(J) of the Act.
2. The parties stipulate, and I find, that there is no history of collective bargaining between the parties to this hearing.
3. Gila Regional Medical Center and the Petitioner stipulate that the petitioned-for unit is appropriate. The Grant County Board of County Commissioners ("County" or "County Commissioners") takes no position on the appropriateness of the petitioned-for unit.
4. A question of representation exists, at this time, as Gila declines to recognize the Petitioner as the exclusive bargaining representative of the employees in the petition.
5. The County, however, would recognize the Petitioner as the exclusive bargaining representative of the employees in the petition.

II. Issues

The first issue concerns who is the employer, specifically who is the appropriate governing body of the employer, for purposes of collective bargaining regarding the petitioned-for employees. The issue arose in the context of the County voluntarily recognizing the Petitioner as the bargaining agent of the petitioned-for employees. The Gila Board of Trustees contends that it is the appropriate governing body of the employer for purposes of the PEBA and as such declines to recognize the Petitioner prior to the employees voting for representation by the Petitioner in a Board administered election. The County, on the other hand, argues that it is the employer of the employees in question, or at least a joint employer, and that it may voluntarily recognize the Petitioner or at least, as a joint employer, participate in the collective bargaining process. A related matter concerns the PELRB's jurisdiction in this matter in light of a management contract between Gila and a private company.

The second issue pertains to the inclusion or exclusion of the Operating Room Technician II's ("OR Tech II's") in the petitioned-for unit. Gila challenged the Petitioner's inclusion of the OR Tech II's in the petitioned-for unit on the grounds that the OR Tech II's do not share a sufficient community of interest with the other employees to justify their inclusion in the bargaining unit. The Petitioner argues that the OR Tech II's are appropriately included in the bargaining unit. The County took no position on this issue.

The final issue is whether Wanda Mora is a Clerk/phlebotomist, and therefore appropriately included in the petition. Gila maintains Mora is a Clerk/phlebotomist and the Petitioner argues that she is not. The County also took no position on this issue.

III. Findings of Fact

A. Background

Gila Regional Medical Center is a general acute care hospital located in Silver City. The hospital is licensed for 68 beds, 10 of which are designated as mental health beds. Gila employs nearly 500 people, has annual patient admissions of approximately 3,500 and a daily patient census of 40. The hospital's annual budget is around \$25,000,000. Gila is a creature of statute. New Mexico law authorizes counties and other political subdivisions to operate and maintain hospital facilities. NMSA 1978 §§4-48B-1 to 4-48B-29 (Repl. Pamp. 1992) ("Hospital Funding Act") Pursuant to this statute, the County Commission appoints a five member Board of Trustees to govern the hospital.

Although Gila has been operating since 1983, the community has been served by a hospital since at least 1884. Ladies' Hospital provided care in Silver City from 1884 to 1937. In 1937, construction of Swift Memorial Hospital replaced Ladies' Hospital. In 1949, Swift Memorial became Grant County Hospital. The County leased the hospital from Silver City for \$1 a year. Apparently, during this time the County Commissioners acted as the hospital's Board of Trustees. Also around this time the hospital became known as Hillcrest General Hospital. Then in 1962, the County Commissioners decided

an independent board should manage the hospital and as a result resigned as the hospital Board of Trustees, and appointed three other individuals to act as trustees. A desire to remove the hospital from politics motivated this change.

By the late 1970's, Hillcrest General Hospital's physical plant had deteriorated significantly and the community's needs were outgrowing the hospital's ability to provide necessary care. The Board of Trustees determined that constructing a new hospital would be less expensive than renovating the old building. The Board of Trustees and hospital administration approached the County Commissioners about issuing bonds in order to finance the construction of a new facility. In 1982, the County issued \$5.7 million in general obligation bonds and \$7.5 million in revenue bonds pursuant to the Hospital Funding Act. The general obligation bonds are paid with property taxes collected by the County and the revenue bonds are paid by the hospital with hospital revenues.

During this time the Board of Trustees sought proposals from a number of private companies regarding the management of the new hospital.¹ The Board of Trustees selected Hospital Corporation of America ("HCA") to manage Gila in 1984. Initially, HCA appointed an interim hospital administrator or Chief Executive Officer ("CEO") and later the Board of Trustees chose a CEO, Ron McArthur, from a list of candidates provided by HCA.² In 1987, the Board of Trustees hired the current CEO, Steve Jacobson. Although Gila continues to contract with the same company, it is now called

¹ The acting County Manager testified that a requirement associated with the general obligation bonds led to the hospital's decision to enter into a management contract with a private company.

² County Commission meeting minutes reflect that Mr. McArthur came before the Commission on January 4, 1985, regarding the indigent fund which pays for hospital care for indigent residents of Grant County. The minutes also reflect that a motion was made and seconded to "accept" McArthur as administrator at Gila.

Quorum Health Resources, Inc. ("Quorum"). The management agreement between Gila and Quorum provides that the hospital retains all authority and control over the business, policies, operation and assets of the hospital except that Quorum manages the day-to-day business affairs of the hospital. The agreement further provides that the hospital does not delegate to Quorum any of the Board of Trustees' powers, duties, or responsibilities. It also states that all medical and professional matters shall be the responsibility of the Board of Trustees and medical staff.³ Pursuant to the contract, Quorum provides the hospital with a hospital administrator ("CEO") and a controller ("Chief Financial Officer" or "CFO"). These two individuals are employees of Quorum. The contract also provides that the hospital directs the investment of any excess cash resulting from hospital operations.

Following the construction of Gila, the County eventually auctioned the equipment left at Hillcrest General Hospital and the Hillcrest property. The proceeds of these sales went into the County's general fund.

B. Voluntary Recognition

In October of 1994, Armando Galindo, international staff representative for the United Steelworkers ("Petitioner"), attended the Gila Board of Trustees' meeting and asked the Board of Trustees to recommend that the County Commissioners voluntarily recognize the Petitioner as the exclusive bargaining representative of the hospital employees. Although the Board of Trustees did not immediately respond to Galindo's

³ The term "medical staff" refers to physicians who work at the hospital.

request, the Board of Trustees subsequently notified him in writing that they would not make such a recommendation to the County Commissioners. The Board of Trustees based this decision upon their desire that the hospital employees vote in a secret ballot election on the issue of a collective bargaining representative.

In November 1994, the County Manager, Michael Ciesielski, requested a legal opinion from the County Attorney regarding the County's authority to grant voluntary recognition to the Petitioner.⁴ In a memorandum dated November 16, 1994, the County Attorney, Steven Amland, concluded that the County could not recognize the Petitioner as the collective bargaining representative of the Gila employees. On November 16, 1994, Armando Galindo attended a County Commissioners' meeting requesting voluntary recognition by the Commissioners for the Petitioner. The Commissioners denied Galindo's request. On January 11, 1995, Mr. Amland provided another memorandum for the Commissioners regarding their authority to voluntarily recognize the Petitioner. Again, Amland concluded that the Commissioners lacked such authority. Also, on that day, Galindo again requested the Commissioners recognize the Petitioner as the collective bargaining agent of the hospital employees. After much discussion the Commissioners decided to delay acting on the voluntary recognition until they had more information.⁵ On February 8, 1995, at a special ten minute meeting of the County Commissioners to decide

⁴ The County contracts with the District Attorney for the Sixth Judicial District for the services of a "County Attorney."

⁵ Although the record does not reflect why, the County Commission decided to terminate Michael Ciesielski as County Manager at the January 11, 1995 meeting.

whether the County should grant voluntary recognition to the Petitioner, the Commission decided to grant the Petitioner's request.⁶

C. Gila Regional Medical Center

As previously mentioned, the County-issued bonds financed the construction of Gila in 1982. The County also owns the land that Gila is built on and the building itself. The \$8 million of equipment in Gila, however, is owned by the hospital and Gila pays its own utility and insurance expenses. The insurance expenses include worker's compensation, employer liability, comprehensive general liability, hospital professional liability, automobile liability, directors and officers' liability, fidelity bond and property damage. Gila is treated as a distinct entity from the County for liability purposes ranging from alleged medical malpractice to alleged employment discrimination to unemployment compensation.⁷ In the past, when the County has been named as a defendant in a lawsuit against the hospital, the County has disclaimed any responsibility for conduct occurring in the hospital.

Gila's budget is prepared by CFO David Glassburn and turned over to the Board of Trustees for its approval. Once approved by the Board of Trustees it is submitted to the

⁶ One of the three Commissioners, Commissioner Scholl, who at previous Commission meetings had voiced his concerns about voluntarily recognizing the Petitioner, did not attend the February 8, 1995 meeting. The remaining two Commissioners, Chairman Serna and Commissioner Santa Maria, decided to voluntarily recognize the Petitioner at the special meeting.

⁷ The record reflects that when the County has been named as a defendant in medical malpractice suits the County has denied liability on the grounds that the hospital is a separate entity from the County. Similarly, in an action alleging employment discrimination at the hospital, when named as an employer, the County argued, "...Grant County does not consider itself to be the employer in this case and, were it to take part in conciliation, would not be able to offer any relief in this matter. Although Gila is a county-owned hospital, it is organized as a separate entity from the County and is governed by its Board of Trustees."

Local Government Division of the State Department of Finance and Administration (“DFA”). The Board of Trustees also gives a copy of the Gila budget to the County Commissioners. The Hospital Funding Act requires the Trustees account annually for the receipt and expenditures of funds received for the operation of the hospital, but there is no requirement that the Commissioners approve the Gila budget. In fact, the County has nothing to do with the preparation or approval of the Gila budget.⁸

From time to time over the last two decades the hospital has requested funding from the County Commissioners for various items or lobbied for passage of tax measures which would benefit the hospital. For instance in 1973, based on a revenue sharing request, the Commission gave the hospital approximately \$9,000. The Commission appropriated nearly \$40,000 to the hospital in 1975, for certain construction projects and office equipment. In the early 1980’s, the hospital requested and the Commission agreed to issue \$5.7 million in general obligation bonds and \$7.5 million in hospital revenue bonds to pay for the construction of Gila. In 1985, and 1986, Gila lobbied the Commission regarding passage of the gross receipts tax to finance the indigent fund to compensate Gila for providing medical care to indigent residents of the County.⁹ Also in 1985, it appears as though the hospital CEO requested funding from the Commission for a piece of “equipment”. Whether the Commission granted this request and the amount requested is unknown. In 1986, the Commission agreed to pay for the construction of a \$55,000 garage for hospital-owned ambulances on the hospital property. In 1987, the hospital’s

⁸ Although the County has nothing to do with Gila’s budget today, there is evidence in the record that twenty years ago the County played some role in the approval of what was the County hospital’s budget.

⁹ Slightly over 56% of the indigent fund comes from gross receipts taxes and nearly 44% comes from the federal government because Gila qualifies as a sole community provider.

director of ambulance service requested and the Commission agreed to pay for the insurance on one of the hospital's ambulances that is stationed in the community of Cliff. Finally, in the late 1980's, the hospital asked the County to grade a portion of the hospital's parking lot to provide additional parking. This work cost approximately \$5,000. The County paid for the grading and the hospital paid for the paving and curbs for the additional parking. Since at least 1984, however, the hospital has operated almost exclusively from funds the hospital generated through the provision of patient care. In fact, in 1994, slightly over 95% of the hospital's revenue came from patients and third party payors, 4.1% came from monies collected for the indigent fund, and less than 1% came from grants.¹⁰

Over the years, Gila has expanded the scope of services it provides to the community. This included an ambulance service, outpatient mental health services, home oxygen service and durable medical equipment ("DME") business.¹¹ Gila has also purchased a building and is renovating it to serve as a rehabilitation center.

The State Department of Finance and Administration ("DFA") considers Gila to be a "local public body" as defined by §6-6-1 NMSA 1978. As such, Gila is required to submit its budget to DFA's Local Government Division to ensure compliance with any and all DFA mandates. Gila is also subject to the State Auditor's requirements for

¹⁰ Starting in 1992, the County incurred an ongoing deficit to Gila regarding indigent fund payments. Today the County owes Gila approximately \$1,000,000 in indigent fund payments for care Gila has provided to indigent residents of Grant County.

¹¹ Even though the ambulance service operates at a \$300,000 deficit each year, it is the only ambulance service in the County and the Board of Trustees believes it is a necessary community service. When the Board of Trustees decided to begin providing durable medical equipment at least one County Commissioner at the time voiced his concern that the hospital was expanding too rapidly. The Board of Trustees disregarded the Commissioner's objections to the hospital's entering the DME business.

governmental bodies. Like DFA, the State Auditor considers Gila a local public body and controlled by the laws and regulations that status carries with it.

Gila's nearly 500 employees work in many different sites. Most employees work at the hospital itself, but others work at the following locations: the outpatient mental health building across the street, the emergency medical services building next door, the Medical Square Clinic down the street, the DME building across the street, or patients' homes. Employees work one of three shifts at the hospital; the shifts are 7:00 am to 3:00 pm, 3:00 pm to 11:00 pm, and 11:00 pm to 7:00 am. All of the employees in the petitioned-for unit are paid on an hourly basis. They all use one of two computerized time clocks to record their respective shifts. The hospital employees are paid by the hospital, not the County. The hospital's CFO controls the account that all employee paychecks are paid from and the paychecks are printed with Gila Regional Medical Center on them. All full-time and certain part-time hospital employees are offered health insurance, life insurance benefits, vacation, cafeteria plan, sick leave, bereavement leave, tuition reimbursement and retirement plan. Although the hospital employees are eligible for the Public Employee Retirement Association ("PERA"), currently the hospital employees do not participate in PERA.¹²

The employees in issue are governed by Gila's personnel policies which are completely separate and distinct from those of the County. These policies are developed by Gila administrators. Gila has a progressive step discipline process culminating in a final step to the CEO. There is also a "problem solving policy" designed to resolve disputes

¹² The hospital employees formerly did participate in PERA, then some time during the 1970's the employees voted to discontinue participation in PERA.

between hospital management and hospital employees regarding hospital policies and procedures. This policy also involves progressive review by other parties, culminating in an appeal to the Board of Trustees.

D. Grant County

Grant County consists of approximately 30,000 residents and includes the communities of Hurley, Silver City, Bayard and Central. County residents elect the three-member Board of County Commissioners. The County Commissioners are the governing body of the County. They hire a County Manager to oversee the day-to-day operations of the County. There are approximately 110 County employees distributed among the sheriff's office, the clerk's office, the assessor's office, the treasurer's office, the road department, the building and facilities department, the maintenance department and the financial/personnel director's office.

The County has its own job and wage classification structure for County employees. Non-exempt County employees are represented by the American Federation of State County and Municipal Employees ("AFSCME") in two separate bargaining units; one unit consists of sheriff's deputies and the other unit consists of white collar and blue collar employees. Although hiring and firing of employees is done by each department, all County employees are provided with the same employee handbook. There is no interchange, nor transfer, of employees between the County and Gila.

All County employees' paychecks are issued by the County. County employees are paid from County revenues which come almost exclusively from the assessment of

property taxes, although some money comes from grants and gross receipts tax revenue. County employees' benefits include health insurance and PERA (retirement benefits).

State law also requires that the County submit audited financial statements to the State Auditor. Although it does not prepare Gila's audit, the County includes a copy of Gila's audit along with its own to turn over to the State Auditor.

E. Relationship Between the County and Gila

It is clear that the County Commission and Gila have enjoyed what could be described as a satisfactory relationship over the years. This basically positive existence, however, has been tempered by occasional disagreements between the Commissioners and the Board of Trustees. For example, in 1985, the Commission strongly suggested Gila purchase milk from a local vendor rather than the company Gila contracted with at the time. The Board of Trustees ignored this advice because Gila obtained a better price from the current vendor. Then in the late 1980's, the Commissioners informed the Board of Trustees that they could not spend public funds on breakfast items supplied to the Trustees at Board meetings held in the morning. As a result, others supplied the food for Board of Trustees' meetings. Another difficulty arose in 1990, when Gila entered the field of outpatient mental health services. This decision by the Board of Trustees meant that Gila would be competing with a private outpatient mental health provider in town. The Commission apparently did not welcome Gila's decision to undertake this expansion of its services.

There were also conflicts between the Board of Trustees and Commissioners regarding the Maternal and Child Health Council.¹³ The most memorable difficulty between the Commission and Board of Trustees arose over Gila's cancellation of an employment contract for the Maternal and Child Health Council's administrator who had been engaging in what could euphemistically be called financial irregularities. Pressure from the Commission ultimately led to the Board of Trustees rescinding the fiscally creative administrator's canceled contract and extending his contract an additional six months. Even in that instance, however, after the six months passed, the hospital discontinued its association with the person in question.

Then in 1992, the Commissioners notified the Board of Trustees that the Commissioners reserved the right to enter into management contracts regarding the management of the hospital. The Board of Trustees ignored this challenge to their authority by the Commissioners, and the Commissioners dropped the issue. Also around this time, apparently out of frustration, the Commission appointed one of the Commissioners to the Board of Trustees so that the Commission could better monitor hospital business. Today, however, no Commissioners serve on the Board of Trustees.

In sum, periodically Commission members have attempted to influence the Gila Board of Trustees' decisions regarding the operations of the hospital. These attempts have nearly uniformly been ignored, except in the instance of pressure exerted upon the

¹³ The Maternal and Child Health Act provides State funding for the provision of services relating to certain health education programs, hence the creation of the Maternal and Child Health Council. In the past the County has acted as the fiscal agent of the grant money and the hospital administered the programs. Recently the County Commission decided to make the hospital the fiscal agent as well as the administrator of the programs. The Council itself is made up of 20 volunteers and the hospital hires 5 individuals as paid staff to work on the programs.

Board of Trustees by the Commission regarding the administrator of the Maternal and Child Health Council and discontinuing the provision of breakfast at Board of Trustees' meetings.

F. Bargaining Unit

The Petitioner seeks to represent a bargaining unit consisting of service, maintenance and clerical employees. The petition encompasses over 40 job titles. Gila's wage scale is divided into 15 different grades. The petitioned-for unit includes employees in grades 1 through 8 and 10. The highest concentration of the petitioned-for employees is in the grades 1 (\$4.96-\$7.44 per hour), 2 (\$5.51-\$8.27 per hour) and 3 (\$6.39-\$9.59 per hour). Most of the employees in the petitioned-for unit work at the hospital, although some work at locations outside the hospital. Some of the other job titles in the proposed unit include Clerk/phlebotomist, Psych Tech and Ward Clerk.

Clerk/phlebotomists receive requisitions from the lab to draw patients' blood. They go to the patients' rooms, draw blood at the scheduled times and turn the blood over to lab techs to perform the necessary tests. The Clerk/phlebotomists report to the Director of the Laboratory. These employees are considered grade 2 on the Gila wage scale and receive between \$5.51 and \$8.27 per hour.¹⁴

Psych Techs are considered nursing assistants in the Psychiatric Department. The Psych Techs work with psychiatric patients in group sessions and go with the patients on

¹⁴ Other petitioned-for employees at this wage grade include the following job titles: Radiology Clerk; Medical Records Clerk; Discharge Planning Clerk; Nursing Assistant; Ward Clerk; Home Health Aide; PT Aide; Department Secretary; Volunteer Coordinator; PBX Registration Clerk; Driver; Pharmacy Clerk; and Kitchen Aide II.

group outings. They work under the direction of the Registered Nurse ("RN") in the mental health unit. Psych Techs must be familiar with a procedure called "take down" to safely subdue violent mental health patients. The Psych Techs are found at grade 4 on the Gila wage scale and earn between \$6.89 and \$10.34 per hour.¹⁵

Ward Clerks primarily perform clerical or secretarial functions including taking doctors' orders and filling out requisitions for lab work. One Ward Clerk works in each of the following departments: the Operating Room ("OR") and that Ward Clerk reports to the Director of the OR/PAR¹⁶; the Emergency Room and that Ward Clerk reports to the ER RN; the Med Surg I and that Ward Clerk reports to the Med Surg RN; the Med Surg II and that Ward Clerk reports to the Med Surg RN; the Maternal Child Health unit and that Ward Clerk (Perinatal Tech) reports to the Labor and Delivery RN; and the SCU and the Ward Clerk (Monitor Tech) reports to the SCU RN. Ward Clerks are paid at grade 2 on the Gila wage scale or between \$5.51 and \$8.27 per hour. Gila does not contest the appropriateness of the proposed unit except for the inclusion of the OR Tech II's.¹⁷

The hospital employs four OR Techs II's.¹⁸ They are non-licensed employees of the Nursing Department. They work in the operating room ("OR"). Qualifications include being a high school graduate or having a GED, CPR certification and OR Tech experience or certification.¹⁹ The OR Techs' training consists mostly of on-the-job

¹⁵ Other employees in the proposed unit found at this wage level are the PT Tech and Transcriber I.

¹⁶ Although the record is unclear, PAR appears to stand for Postpartum and Recovery.

¹⁷ The County took no position regarding the appropriateness of the petitioned-for unit.

¹⁸ The hospital does not currently employ any OR Tech I's. Therefore references to "OR Techs" in this decision concern OR Tech II's.

¹⁹ Although a certification process exists, currently none of the four OR Techs are certified.

training in instrumentation for each procedure, aseptic technique, knowledge of equipment and supplies, scrubbing and maintaining a sterile field. Comprehensive knowledge of physiology and anatomy is also required. OR Techs also periodically attend seminars or training outside of the hospital and hospital inservices at Gila regarding new equipment. Classification as an OR Tech II requires approximately one to one and one half years hospital experience in that job and the ability to function independently during a surgery.

The OR Techs are responsible for working in the sterile field of an OR procedure. They must prepare instruments and sterile supplies to be used during operative procedures, pass these instruments and supplies to the surgeons and otherwise assist the surgeons as necessary during surgery. They normally work the 7:00 am to 3:00 pm shift, but must take call for emergency OR cases after hours and on rotating weekends.²⁰ When "on call" an OR Tech is paid a flat hourly fee. He or she must carry a pager and remain within 20 minutes of the hospital. One OR Tech and one OR Nurse are on call 365 days of the year for emergency surgeries.

Although the OR Tech and OR Nurse could essentially fill in for one another during a surgery, the OR Tech almost exclusively assists the surgeon during the surgery, while the OR Nurse procures equipment for the OR Tech, delivers specimens to pathology, and takes phone messages. The OR Nurses' other duties which distinguish their jobs from the OR Techs' jobs include administering drugs and maintaining the patient charts.

²⁰ Home Oxygen Techs also carry pagers so that a patient may contact him or her from the patient's home in the event that the patient's oxygen machine fails after business hours. The Electrician in the petitioned-for unit also carries a pager and may be required to go to the hospital for an electrical emergency.

The OR Techs must be familiar with over 233 surgical procedures. This familiarity requires that the OR Tech know what instruments and supplies are necessary for the particular surgery, how the surgery is done, and the idiosyncrasies of each surgeon. The nature of the job requires that the OR Tech anticipate what action to take during a surgery and how the surgeon performs the surgery. The OR Techs maintain this familiarity by keeping "procedure cards" for each surgeon. A card is maintained for each type of surgery performed by every single surgeon. The card lists what instruments and supplies are needed for each specific procedure and suture.

Prior to the actual surgery, the OR Tech scrubs in for the procedure. This requires maintaining a sterile field and draping the patient. When the surgeon enters the room the OR Tech helps the surgeon glove and gown before the surgery. Once the surgery begins the OR Tech is responsible for providing "exposure" or removing blood from the surgical field by dabbing it away, providing retraction, or moving an organ out of the way. The OR Techs must know without being told by the surgeon when it is necessary to provide exposure. The same is true for providing the surgeon with the necessary instruments during the surgery. Once the OR Tech has assisted the same surgeon on enough surgeries he or she knows what instruments the surgeon uses during a particular operation and how the surgeon operates. A high degree of concentration is necessary on the part of the OR Tech during the operation in the event of an unexpected complication. The type of instruments necessary and action to take in the event of complications are a matter of personal knowledge and experience and not information which can be planned in advance or explained on the procedure cards.

During the surgery the OR Tech is responsible for counting the needles and sponges used, and at the end of a surgery he or she conducts three counts to insure that all equipment is accounted for prior to closing the incision. In some cases the OR Tech closes the incision on his or her own. Once the procedure is completed the OR Tech is responsible for cleaning the instruments and sending them to central supply for sterilization. He or she is also responsible for cleaning the surgical suite when they have to come in for an emergency surgery.

Each OR Tech normally performs five surgeries per day with twenty minutes between each surgery. At the end of the day the OR Techs restock their equipment. When not preparing for surgery, assisting with a surgery, or cleaning up after a surgery, an OR Tech is usually testing autoclaves, performing recordkeeping duties, or doing diagnostic tests on equipment. The OR Techs' responsibilities rarely require that they leave their department which includes the surgical suites, recovery room, holding room and supply room. Occasionally, however, they will perform a procedure in a patient's room or the intensive care unit, or go to central supply to sterilize instruments. Throughout the day the OR Techs have contact with the surgeons, nurses, anesthesia personnel and the ward clerk.

The OR Techs are responsible to the nurse on duty and ultimately the Director of the OR/PAR. During surgery, however, the OR Tech reports directly to the surgeon. The Director of the OR/PAR evaluates the OR Techs. The surgeons can have informal input into the evaluation of the OR Techs to the same degree that any doctor may comment on any hospital employee who performs patient care duties. The OR Techs are paid on an

hourly basis at a Grade 5 level.²¹ This job grade entitles the OR Techs and those in the same level to be paid between \$7.61 and \$11.42 per hour.

The job titles and corresponding wage grades for the other petitioned-for employees who do not appear in the text or footnotes above in this decision are as follows:

Grade 1 (\$4.96 - \$7.44)	Kitchen Aide I, Housekeeper, Laundry Worker, File Clerk, and Homemaker.
Grade 3 (\$6.39 - \$9.59)	Cook, Transcriber Trainee, Business Office Worker, DME Billing Clerk, AR/Billing Clerk, Home Oxygen Tech, and Materials Clerk.
Grade 6 (\$8.99 - \$12.41)	Bio Med Equipment Tech.
Grade 7 (\$9.70 - \$13.39)	EEG Tech.
Grade 8 (\$10.67 - \$14.72)	ART/Coder Abstractor.
Grade 10 (\$14.31- \$20.03)	Bio-Med Tech and Electrician.

G. Wanda Mora

The record reflects that Wanda Mora is a Clerk/phlebotomist in the pathology laboratory. Ms. Mora has been a pathology Clerk/phlebotomist since August 17, 1994.

IV. Discussion and Analysis

A. Who is the Appropriate Governing Body of the Employer?

The County has indicated a willingness to voluntarily recognize the Petitioner as the exclusive bargaining representative of the petitioned-for hospital employees. The Gila Board of Trustees argues that the County is not the employer of these employees and

²¹ Other employees in the proposed unit in this wage classification are the Maintenance Engineer, Medical Assistant, Project Specialist, Bereavement Counselor, AP/Payroll Clerk and Transcriber II.

therefore cannot recognize the Petitioner. The Petitioner contends that the County has the authority to recognize it as the representative of the petitioned-for employees.

The issue of who is the public employer for purposes of collective bargaining is an issue of first impression before the PELRB. Section 10-7D-4(Q) of the PEBA defines public employer in the following way:

“public employer” means the state or any political subdivision thereof including municipalities having adopted home rule charters and does not include any government of a tribe or pueblo;

Who may act on behalf of the public employer, or who is the governing body, is spelled out in §10-7D-7 of the PEBA:

The appropriate governing body of any public employer shall be the policymaking individual or body representing the public employer. In the case of the state, the appropriate governing body shall be the governor or his designee or, in the case of a constitutionally created body, the constitutionally designated head of that body. At the local level, the appropriate governing body shall be the elected or appointed representative body or individual charged with management of the local public body. In the event of dispute, the board shall determine the appropriate governing body.

The employer issue in this case must also be examined in light of the Hospital Funding Act. It is undisputed that Gila is a product of the Hospital Funding Act. Section 4-48B-2 states the Hospital Funding Act’s purpose which is:

- A. to encourage and enable counties and other political subdivisions to provide appropriate and adequate hospital facilities for the sick of the counties;
- B. to provide flexibility in financing construction, operation and maintenance of necessary hospital facilities; and
- C. to minimize the cost of constructing new hospital facilities and maintaining adequate hospital facilities in all geographic areas of the state.

It is also undisputed that the County, pursuant to the Hospital Funding Act, has delegated the actual day-to-day operations of the hospital to the Board of Trustees. Section 4-48B-10(A) of the Hospital Funding Act provides:

The county commissioners of a county...maintaining or operating a county hospital are authorized to appoint a hospital governing board...*The hospital governing board so appointed shall have the authority to exercise all powers that the county is granted by the Hospital Funding Act...*for the operation of such hospitals except the powers to issue bonds, call a mill levy election, levy the annual assessments for the mill levy authorized by the Hospital Funding Act and to dispose of real property of the hospital acquired with the proceeds of any bond issue. (emphasis added)

For purposes of the PEBA, the County fits the Act's definition of public employer in the sense that it is a *political subdivision* of the state. However, the definition of public employer must be read in conjunction with the provision of the Act regarding a public employer's *governing body*. Although the term "governing body" is not specifically defined in the PEBA, according to §10-7D-7 the appropriate governing body is the *policymaking body* representing the public employer. The Act further provides that at the *local level, the appropriate governing body shall be the elected or appointed representative body or individual charged with management of the local public body.*²² Therefore, the critical determination becomes who is *charged with management of the local public body?*

The local public body in issue is Gila. Gila's status as a county hospital is not in dispute. The public nature of Gila is further demonstrated by the fact that the DFA

²² The County suggests that this provision may be read to allow either the County, the Board of Trustees or Quorum to be the appropriate governing body for purposes of granting voluntary recognition to a union. This is true, but only the *policymaking* body, or bodies in the case of a joint employer relationship, can be declared an "appropriate governing body." In this case, there is no evidence that Quorum sets policy for Gila, and if it did, the PELRB's jurisdiction over these employees would be in question.

considers Gila a local public body and subjects Gila to the budgetary rigors associated with DFA approval of its annual budget. The State Auditor also considers Gila to be a local public body and subject to the auditing mandates controlling such entities. I find that the management contract between Gila and Quorum does not change the public character of this hospital because it provides that the hospital retains all authority and control over the business, policies, operation and assets of the hospital.

Determining who is charged with the management of Gila, the local public body, requires addressing the factual question of who has the authority to hire, promote, evaluate, discipline, discharge and set work rules for the employees in question.²³ The record reflects that the Gila Board of Trustees through its administrative staff has the sole authority to hire, promote, evaluate, discipline, discharge and set work rules for the Gila employees. Even two County Commissioners, as well as a former County Manager, and the acting County Manager, testified that the County has nothing to do with the daily operation of the hospital including employment issues.²⁴ Furthermore, the County has a completely separate personnel system with its own job classifications and wage scale wholly distinct from Gila.

Other distinguishing factors between hospital employees and County employees include the fact that County employees are paid from County monies generated from the collection of property taxes, County employees receive different benefits, and non-exempt County employees are already represented by a union in either the sheriff's deputies'

²³ See *Boire v. Greyhound Corp.*, 376 U.S. 473, 84 S.Ct. 894, 11 L.Ed. 849, 55 LRRM 2694 (1964).

²⁴ In fact, in a memorandum dated January 16, 1995, the County Attorney advised the County Commissioners that, "[S]ince the County does not deal on any level with management of the hospital employees, the Commission does not have the knowledge or expertise to clearly determine whether the employee classifications listed on the . . . petition comprise an 'appropriate bargaining unit.' "

bargaining unit or the blue/white collar bargaining unit. Finally, there is no exchange or commingling of employees between the County and hospital. The record is bereft of any evidence that the County has any policymaking authority with regard to Gila. There are, however, some connections between the County and Gila. Therefore, it is necessary to decide whether the County's ties to the hospital allow it to exert a sufficient degree of control over the hospital employees' terms and conditions of employment to require a finding of joint employer status.²⁵

The County Commissioners have a certain amount of authority regarding Gila because they are authorized by statute to appoint the Board of Trustees.²⁶ The County also has the authority to issue bonds. At the urging of hospital administrators the County issued \$5.7 million in general obligation bonds and \$7.5 million in hospital revenue bonds for the construction of Gila in 1982. Although the County pays the general obligation bonds with the proceeds from the collection of property taxes, Gila pays the revenue bonds with hospital revenues. In addition, a portion of the County collected gross receipts tax goes to the indigent fund which helps pay for hospital care given to indigent County residents. Hospital administrators also actively lobbied the County Commissioners for passage of this tax measure. Finally, based on requests from the hospital, the County

²⁵ The National Labor Relations Board ("NLRB") will find joint employer status when it can be shown that two or more employers co-determine those matters governing essential terms and conditions of employment. NLRB v. Browning Ferris Industries, 691 F.2d 1117, 259 NLRB 148, 111 LRRM 2748 (3d Cir. 1982); Tanforan Park Council v. NLRB, 656 F.2d 1358, 239 NLRB 1061, 108 LRRM 2630 (9th Cir. 1981); W.W. Grainger Inc. v. NLRB, 860 F.2d 244, 286 NLRB 94, 129 LRRM 2718 (7th Cir. 1988).

²⁶ The Petitioner points out that in 1962, when the County Commissioners resigned as the hospital Board of Trustees and appointed an independent Board of Trustees that the Commissioners' resolution to do so provided that the County Commissioners serve "as an ex-officio board." As pointed out by the Attorney General in 1969, in A.G. Op. No. 69-76, the Hospital Funding Act did not provide for ex-officio members. This led the Attorney General to conclude that the only entity to conduct the business of the county hospital board is the county hospital board. I draw the same conclusion as the Attorney General as the Hospital Funding Act continues to make no provision for ex-officio board members.

has sporadically provided funds for projects or equipment ranging from \$5,000 to \$55,000 over the last 20 years.

The County's authority to issue bonds is a significant, although not determinative, fact in this case. If the County had not issued the bonds in 1982, then Gila would never have been constructed. The Hospital Funding Act grants the County the authority to issue bonds. It is not unusual that only an elected body, as opposed to an appointed body such as the Board of Trustees, has the authority to issue bonds or call a mill levy. Important to the issue involved in this case is the fact that the Board of Trustees approached the County about issuing the bonds in order to finance the construction of the new hospital. The Board of Trustees' acute awareness of the adverse conditions at Hillcrest General Hospital motivated the County to issue the bonds in order to build a new facility. The same is true concerning Gila administrators' efforts to persuade the County Commissioners to vote in favor of the gross receipt tax which, in part, finances the indigent fund. The Board of Trustees and administrators in these instances were simply acting in the best interests of the hospital. Although the County's authority to issue bonds is significant, it is necessary to consider the impact of this single fact in the context of Gila's other finances.

With the exception of the issuance of the bonds, the funding provided by the County is insignificant in light of Gila's operations and budget. In fact, 95% of the Gila's revenues come from patient billings. Less than 4% of Gila's \$25,000,000 budget comes from the County. Especially interesting in this case, is the fact that since 1992, the County has been behind its indigent fund payments and today owes approximately \$1,000,000 to Gila.

Even if the County does not contribute substantially to the funding of Gila, it would be significant if the County exercised control over Gila's budget because that could impact the employees' terms and conditions of employment. In this case, however, the County has no authority to modify or reject Gila's budget. The Gila Board of Trustees develops its own budget and the County has no control or say regarding the budget. The Board of Trustees simply provides a copy of its budget to the Commissioners, as required by the Hospital Funding Act, after the fact.

As a result of the foregoing, I find that the Board of Trustees is the policymaking body representing the public employer and exclusively charged with the management of Gila. Therefore the Board of Trustees, and not the County, is the appropriate governing body for purposes of the Act. This conclusion is based on two factors. First of all, the Hospital Funding Act grants the Board of Trustees the authority to manage the day-to-day operations of the hospital.²⁷ Secondly, the County's conduct toward the hospital over the last 20 years, in particular the last 10 years, indicates that the Board of Trustees operates independently of the County. The County has nothing to do with the management of Gila, it does not control Gila's funding and it does not control Gila's budget process. Therefore, meaningful negotiations over the essential terms and conditions of employment on behalf of Gila do not require the presence of the County. The Board of Trustees can

²⁷ The Attorney General reached the same conclusion on a comparable issue prior to the enactment of the PEBA. In that Attorney General's Opinion, the question presented was, "What is the governing body in regard to the maintenance and operation of a county hospital---the county commissioners or the hospital board of trustees?" Although it involved an earlier version of the Hospital Funding Act, the Attorney General concluded that the board of trustees is the governing body of the hospital after its initial appointment. The Attorney General noted that the Hospital Funding Act authorized the county commissioners to appoint the trustees to manage and operate county hospitals. Finally, the Attorney General concludes that the county commissioner's authority is limited to a review of the annual accounting submitted by the board of trustees at the end of each fiscal year. A.G. Op. No. 57-255, October 8, 1957.

effectively bargain over wages, hours and working conditions of the hospital employees without the County.

The Petitioner maintains that the Hospital Funding Act permits the County to delegate authority to the Gila Board of Trustees, but that ultimate control and liability rest with the County. The Hospital Funding Act and more important the County's relationship with the hospital for the last 20 years do not support the Petitioner's "ultimate control" argument. It is conceivable that a county could retain ultimate control over an entity like a county hospital if it controlled its funding or had budget approval authority, but in this case the County has neither power. Furthermore, in the past when the County has disapproved of the Board of Trustees' actions or attempted to influence the Board of Trustees, the County was in virtually every instance ignored. The most significant rebuff of the County occurred in 1992, when the County informed the Board of Trustees that it and not the Trustees was the proper party to contract with a management company to run the hospital. Even that challenge to the Board of Trustees' authority went unheeded and the Trustees went ahead and contracted with a management company despite the County's objections. The County ceded "ultimate control" of the hospital when they appointed a Board of Trustees.

The Petitioner's contention that the County retains "ultimate liability" for the hospital is similarly unsupported. In fact, the record contains evidence of the exact opposite. The County has denied liability in medical malpractice as well as employment cases involving the hospital based on the hospital's being a distinct and separate entity from the County.

The County argues that if the Hospital Funding Act authorizes the County to grant the Gila Board of Trustees the powers the County itself is granted by the statute, then the County may withhold any and all of these powers. The County's argument has some appeal in theory, however, the practical application of such a theory in the complex world of managing a hospital is problematic. One cannot be a little bit pregnant, nor, under the facts of this case, can one manage a little bit of a hospital. The historical as well as current relationship between the County and Board of Trustees demonstrates that the hospital has traditionally operated independently of the County. To say that the Board of Trustees manage every aspect of the hospital and have historically done so independently of the County, but that the County is entitled to impose its own labor relations policy there has no support in law or reason.²⁸ Therefore, the Board of Trustees is the appropriate governing body of the employer for the petitioned-for employees.

B. OR Tech II's

Gila contends that the OR Techs do not belong in the petitioned-for unit because they lack a community of interest with the other employees in the proposed unit.

²⁸ The Petitioner cites Board of County Commissioners v. Padilla, 111 NM 278, 804 P.2d 1097 (N.M. Ct. App. 1990) for the proposition that county commissions have the power to direct the labor relations policies of subordinate levels of government. In Padilla, the New Mexico Court of Appeals held that a county commission could adopt a merit system or approve a collective bargaining agreement that included at least some of the county treasurer's employees. The county treasurer had challenged the county commission's action. In that case, however, the county commission set the treasurer's employees' salaries, so the court concluded that the county commission could also collectively bargain for those salaries. The Grant County Commission also has entered into collective bargaining agreements with a union for County employees whose salaries the County is ultimately responsible for. However, as indicated above, the County has nothing to do with setting salaries for Gila employees. Following the logic of Padilla, the Gila Board of Trustees would be the appropriate party to engage in collective bargaining with the Petitioner as Gila sets the employees' salaries. Although the holding of Padilla is consistent with the conclusion reached herein, that the Gila Board of Trustees is the appropriate party to negotiate with the Petitioner, I also point out that this case predates passage of the PEBA.

According to Gila, the OR Techs are technical employees and should not be included in a unit of service, maintenance and clerical employees. The Petitioner argues that the OR Techs do share a community of interest with the other petitioned-for employees based on shared interests in wages, hours and working conditions. As examples, the Petitioner points out that the OR Techs and other proposed bargaining unit employees are subject to the same policy manual, employee handbook, wage scale, evaluation criteria and that the OR Techs share the title "technician" with other employees. The County did not take a position on the appropriateness of the petitioned-for unit.

Resolution of this issue requires examining the facts in light of the following provision of the Act. Section 10-7D-13(A) of the Act provides in relevant part:

Appropriate bargaining units shall be established on the basis of occupational groups, a clear and identifiable community of interest in employment terms and conditions and related personnel matters among the public employees involved. Occupational groups shall generally be identified as blue collar, secretarial clerical, technical, professional, paraprofessional, police, fire and corrections. The parties, by mutual agreement, may further consolidate occupational groups. Essential factors in determining appropriate bargaining units shall include the principles of efficient administration of government, the history of collective bargaining and the assurance to public employees of the fullest freedom in exercising the rights guaranteed by the Public Employee Bargaining Act.

According to the Act, appropriate bargaining units shall be established on the basis of (1) occupational groups; and (2) a clear and identifiable community of interest in employment terms and conditions and related personnel matters among the public employees involved.

In this case the parties have agreed to the consolidation of the service, maintenance and clerical employees into a single unit. I find that this consolidation does not offend PELRB precedent regarding appropriate units. Determining whether the petitioned-for

employees share a community of interest is a more complicated matter. The analysis for deciding whether a group of employees share a community of interest requires an inquiry into the employees': (1) method of wages or compensation; (2) work hours; (3) employment benefits; (4) supervision; (5) qualifications, training and skills; (6) job functions and amount of working time spent away from the employment situs; (7) contact with other employees; (8) integration with the work functions of other employees or interchange with them; and (9) the history of collective bargaining. Belen Consolidated Schools, 1 PELRB No. 2 (1994).

The record reflects that there are similarities between the OR Techs and the other petitioned-for employees regarding their hourly compensation, work hours, benefits, lack of history of collective bargaining and to some degree supervision. The OR Techs unlike most other employees in the petition, however, must carry pagers and remain on call for emergency surgeries after work hours and on weekends.²⁹ The OR Techs training and skills also distinguish them from the other employees sought by the Petitioner. Even though none of the current OR Techs are certified, this position requires extensive on-the-job training in instrumentation for hundreds of surgical procedures, aseptic technique and comprehensive knowledge of physiology and anatomy. Achieving the OR Tech classification takes at least one to one and a half years of training. Also, OR Techs are required to maintain Cardio Pulmonary Resuscitation (CPR) certification.³⁰

²⁹ Of the over 40 job classifications in the petitioned-for unit the only other employees to carry pagers are the Home Oxygen Techs and the Electrician.

³⁰ The record does not reflect whether a similar requirement exists for any other employees in the petitioned-for unit.

The OR Techs actually assist the surgeons during operations and are expected to anticipate what to do, that is provide the surgeon with the appropriate instrument or suture, without being told throughout the surgery. Although the OR Techs formally report to the OR Nurse, and ultimately to the OR/PAR Director, during the five surgeries they assist with each day, they basically work under the surgeon's direction. No other petitioned-for employees work so closely with physicians. Furthermore, although the OR Techs have limited daily contact with other proposed bargaining unit personnel, for the most part they spend their working hours in the company of the surgeons and OR Nurses in the OR. There is no integration or exchange of work functions between the OR Techs and other petitioned-for employees. There is, however, some degree of interchange between the OR Techs and the OR Nurses, who are not included in the petition.

Based on the foregoing, I find that the OR Techs' work is sufficiently technical in nature to warrant their exclusion from a unit consisting of service, maintenance and clerical employees. The commonalities pointed out by the Petitioner regarding the OR Techs and the other employees in the proposed unit such as the employee handbook and the policy manual are shared by all hospital employees and not unique to the group the Petitioner seeks. Moreover, the fact that OR Techs and others in the proposed unit share the title "technician" is of little significance without facts suggesting more parallels regarding their qualifications, training and actual job functions. Furthermore, the mere absence of a license or certification is insufficient justification to combine the OR Techs and others in the petitioned-for unit. This is particularly true where, as here, a job requires

a degree of skill and use of independent judgment that suggests the position is a technical one.³¹ Therefore, the OR Techs are excluded from the petitioned-for unit.

C. Wanda Mora

The Petitioner challenged Gila's assertion that Wanda Mora worked at the hospital as a Clerk/phlebotomist. The record reflects that since August 17, 1994, Ms. Mora has been employed as a Clerk/phlebotomist in the pathology department. The Petitioner provided no evidence to dispute this during the hearing and did not raise this issue in its post-hearing brief. Therefore, I find that Ms. Mora is a Clerk/phlebotomist.

V. Conclusions of Law

1. The Gila Board of Trustees is the appropriate governing body of the public employer in this case for purposes of collective bargaining.
2. The OR Tech II's should be excluded from the petitioned-for bargaining unit of service, maintenance and clerical employees.
3. Wanda Mora is a Clerk/phlebotomist in the Gila pathology department and appropriately included in the petitioned-for unit.

³¹ Medical Arts Hospital of Houston, 221 NLRB 1017, 91 LRRM 1145 (1975) (OR Techs excluded from service and maintenance unit because of special education, training, skills and exercise of independent judgment; even though they were not licensed); Backus Hospital, 220 NLRB 414, 90 LRRM 1696 (1975) (Surgical Techs included in technical unit even though they were not certified); Rhode Island Hospital, 313 NLRB 343, 124 LRRM 1308 (1993) (Surgical Techs are technical employees even though they are not certified). *But cf.* Barnert Memorial Hospital Center, 217 NLRB 775, 89 LRRM 1083 (1975) (Certified OR Tech excluded from maintenance unit, noncertified OR Techs included because they performed same duties as nurse aides in unit, lacked formal training and not certified by the state).

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 the United Steelworkers of America and "No Representation."

Unit

All Gila Regional Medical Center employees in the following job classifications.

Included: A/R Billing Clerk, Art I Coder, Bereavement Counselor, Bio Med Tech, Bio-Med Equipment Tech, Business Office Worker, C/S Tech, Cook, Department Secretary, Discharge Planning Clerk, DME Billing Clerk, Driver, EEG Tech, Electrician, Home Oxygen Tech, Home Health Aide, Homemaker Aide, Housekeeper, Indigent Fund Clerk, Inter-Dept. Clerk, Kitchen Aide I, Kitchen Aide II, Laundry Worker, Maintenance Engineer, Medical Records Clerk, Medical Assistant, Nursing Assistant, Payroll A/P Clerk, PBX Register Clerk, Pharmacy Clerk, Clerk/phlebotomist, Project Specialist, Psych Tech, PT Tech, PT Aide, Radiology Clerk, Transcriber I, Transcriber Trainee, Transcriber II, Volunteer Coordinator, Ward Clerk, Allergy Tech and Materials Clerk.³²


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

³² The record reflects that Gila inadvertently excluded the job title Materials Clerk (or Materials Management Clerk) from the eligibility list given to the Petitioner prior to the hearing. Also, although the Union's petition did not specifically refer to the Bio Med Equipment Tech, the record shows that the Union seeks that job title in the petitioned-for unit. In an attempt to alleviate confusion about some of the job titles in the petition the record remained open after the close of the hearing to permit Gila to file a list of the correct job titles sought by the Petitioner (Exhibit 26B). The Union had an opportunity to review the list prior to its inclusion in the record. The Union did not object to the list provided by Gila. The record also indicates that Gila inadvertently excluded the job title ENT Tech. There is no ENT Tech in Exhibit 26(B). There is, however, an Allergy Tech which I assume is the ENT Tech referred to at the hearing. If there are other discrepancies between the Union's petition and Exhibit 26(B) the Union must clarify the job titles sought in the petition as it relates to Exhibit 26(B) as an administrative matter with the PELRB Director.

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 May 8, 1995.


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