

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In the Matter of

*McKinley County Sheriff's Association
Fraternal Order of Police
Petitioner,*

and

*McKinley County
Public Employer.*

DECISION AND ORDER DIRECTING ELECTION

On August 23, 1995, a hearing officer issued a Report and Recommended Decision 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 *McKinley County Sheriff's Association, Fraternal Order of Police and McKinley County*, Case No. CP 16-95(C). The proceeding commenced when the Petitioner, Fraternal Order of Police (FOP), filed a representation petition with the Public Employee Labor Relations Board (PELRB or Board) on December 9, 1994, seeking to represent a bargaining unit composed of approximately 40 positions with titles of supervisory receptionist; secretary-receptionist; custodian; telecommunicator; patrol officer (deputy, corporal); investigator; and sergeant. Upon completion of the administrative investigation under PELRB Rule 2, the Board's representative conducted a hearing on May 25 and July 15, 1995.¹

¹At the hearing the FOP stated that it was deleting the position of custodian from its petition. Also set for hearing on these dates, by mutual agreement of all parties, was the petition filed by the American Federation of State, County and Municipal Employees (AFSCME), in *AFSCME and McKinley County*, Case No. CP 22-95(C), seeking to represent some of the same positions sought by FOP (secretary-receptionist, telecommunicator,

In the report and recommended decision the hearing officer concluded that supervisory receptionist, secretary-receptionist, and telecommunicator should be excluded from the petitioned-for unit because those positions do not share a community of interest with the other positions. As for the position of sergeant, the hearing officer concluded that it was not a "supervisor" as that term is defined under the Act and, therefore, appropriate for inclusion.

McKinley County filed a timely request for review of the report and recommended decision under Rule 2.15(a); the Petitioner did not file an answer to the County's request as allowed under Rule 2.15(b). In its request for review, the County excepts to the following matters. One, it seeks the recusal or disqualification of Member Loy from participation in this case because of statements he allegedly made during settlement discussions which allegedly reflect his bias or prejudice towards the County's argument on the position of sergeant.² The County argues that to allow his continued participation denies it due process as provided for in the Act's § 12(B).³

custodian). In that proceeding the parties announced at the outset of the hearing that they had reached an agreement over the positions for inclusion in the bargaining unit. The parties' agreement included the positions of custodian, telecommunicator, and secretary-receptionist.

²This issue was one of several placed before the hearing officer by the County in the form of oral and written motions; all were denied by the presiding official. The sole issue from the motions on appeal by the County is Member Loy's participation.

³10-7D-12. Hearing procedures., states:

B. The board...shall adopt regulations setting forth procedures to be followed during hearings of the board[.] The procedures adopted for conducting adjudicatory hearings shall meet all minimal due process requirements of the state and federal constitutions.

Two, the County excepts to the hearing officer's finding and conclusion that a sergeant is not a "supervisor" as that term is defined in the Act's § 4(S).⁴ According to the County, the sergeant is a supervisor and should be excluded because he or she devotes a substantial amount of work time to the performance of supervisory duties and the hearing officer did not address this issue, i.e., amount of time devoted to supervisory duties. Furthermore, the hearing officer compared the job duties set forth in the position descriptions for sergeant and patrol officer in reaching his conclusion that a sergeant and patrol officer perform substantially similar duties to justify finding a sergeant as a non-supervisory position. The County argues that the hearing officer "ignore[d] Sections 112.02 and 112.03 of the Sheriff's Standard Operating Procedures Manual (SOP)." In this regard, the County notes that the Sheriff testified that the duties in the SOP are more accurate than the duties identified in the position descriptions. The County notes the expectations of the Sheriff in the duties to be performed by a sergeant and his or her subordinate the patrol officer: "Section 112.02 lists seventeen (17) different duties of the patrol sergeant, **all** are supervisory duties and **none** are repeated in Section 112.03 of the SOP, which details the expectations the Sheriff has for the Patrol Deputy." [Emphasis supplied.]

⁴10-7D-4. Definitions.

S. "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.

Additionally, the County states that the hearing officer's conclusion that a sergeant "occasionally" performs supervisory duties is based "upon an illogical conclusion that such a conclusion '...is the only way to reconcile the County's statement that working conditions are the same and its documents reflecting essential functions to be practically identical yet one position is supervisory and the other is not.'" The same working conditions for two positions, the County asserts, "has no relevance to the statutory definition of 'supervisor', in addition to being totally illogical."

The Board received oral argument from the parties' representatives on November 8, 1995.⁵ At that time the County's representative reiterated the arguments identified above and voiced a concern or opposition to the Director being present with the Board during its consideration of this matter in closed session because the Director served as hearing officer and issued the report and recommended decision which is on appeal.

The Board has reviewed the hearing officer's report and recommended decision, considered the County's request for review, received oral argument on appeal, and weighed the whole record in this proceeding. We adopt the hearing officer's recommended decision and provide further findings and rationale.

⁵The Board initially sought to consider this matter at its October 17, 1995, meeting but granted the County's request to delay consideration until the PELRB's November meeting.

Exception One

We deny the County's exception seeking to recuse or disqualify Member Loy.⁶ At the hearing FOP argued against the County's motion; at the November meeting AFSCME's representative did not support the County's exception. We reviewed the transcript relied upon by the County and find it vague and inconclusive. In this regard, the exception does not state the precise statement allegedly made. Moreover, the County did not alert the hearing officer to the precise statement allegedly uttered by Member Loy; at the hearing the County mentioned only "comments" which allegedly reflected bias. In sum, the County has not established an adequate record of its objection.

The record does show, however, that the County was afforded two days of hearing to present and cross-examine witnesses before a hearing officer as well as submit documentary evidence. Thereafter the County filed a post-hearing brief and exercised its right to request review of the hearing officer's findings, conclusions, and recommended decision. Furthermore, the Board received oral argument from the County at the November meeting. We observe that the hearing officer agreed with the County's arguments to exclude many positions from the petitioned-for unit. The only position that the County did not prevail upon with the hearing officer was to exclude the position of sergeant. Given these findings we are not persuaded that the County has been denied due process. We note that counties, as political subdivisions, are not "persons" for purposes of the due process and equal protection provisions of the Fourteenth

⁶Member Loy did not participate in the decision concerning his disqualification or recusal.

Amendment to the U.S. Constitution and the state constitutional provision, article II, section 18, guaranteeing to “persons” due process and equal protection.⁷

Exception Two

The County’s exception concerning the position of sergeant is denied. We find that a sergeant performs duties that are substantially similar to those of his or her subordinates--patrol officers or deputies. This substantial similarity is a basis for the exclusion of a position from the scope of the statutory definition of “supervisor.” We also find that a sergeant “occasionally assumes supervisory or directory roles,” another exclusion set forth in the definition, and conclude that the occasional performance of supervisory duties does not constitute or equate to a substantial amount of time.⁸ Furthermore, we find that a sergeant’s duties and responsibilities are of a routine nature given the depth of detail and direction for daily operations reflected in the department’s standard operating procedures manual. In short, the sergeant is a lead employee with a role and function to ensure adherence to policies and procedures and exercising little, if any, independent judgement or discretion in the performance of daily assignments and execution of ministerial, administrative matters.

⁷See, e.g., *Williams v. Mayor*, 289 U.S. 36, 40 (1933); *City of Newark v. City of New Jersey*, 262 U.S. 192, 196 (1923); *Avon Lake City School District v. Limbach*, 35 Ohio St.3d 118, 518 N.E.2d 1190 (1988); *Penny v. Bowden*, 199 So.2d 345 (La.App. 1967); and *Village of Blaine v. Independent School District*, 272 Minn. 343, 138 N.W.2d 32 (1965).

⁸The word “occasional” is not defined in the Act. We shall construe that term according to its plain and ordinary meaning found in Webster’s *New Collegiate Dictionary*: “...now and then, sometimes...occurring at irregular or infrequent intervals..acting in a specified capacity from time to time[.]”

The County argued at the hearing that the most accurate reflection of duties performed were those contained in the position description for sergeant. The County's position is that the classification of duties by the personnel officer, an individual with 16 years of experience classifying positions for the Federal Government and proffered by the County as an expert witness, is dispositive of supervisory status and the determination of how much time an individual devotes to supervision. The personnel officer applied the principles and practices of the Federal Government's classification system when classifying the County's positions. The personnel officer's conclusion that a sergeant devotes a substantial amount of time to performing supervisory duties is based on her knowledge and application of that system.⁹

With respect to the personnel officer's conclusions, we note that the Federal Government, itself, does not follow its classification system's principles and practices in unit determination proceedings at the Federal level.¹⁰ Just as the Federal Government is not bound by that system,

⁹During day one of the hearing the personnel officer stated that the Federal classification system had been modified to a "much simpler system" for use by the County. During day two the County indicated that the Federal system had not been modified.

¹⁰*U.S. Department of the Treasury, Bureau of the Mint, U.S. Mint, Denver, Colorado*, 6 FLRA 52, 53 (1981): "Bargaining unit eligibility determinations are not based on evidence such as written position descriptions or testimony as to what duties had been or would be performed by an employee occupying a certain position, because such evidence might not reflect the employee's actual duties."

As to expert testimony from a personnel specialist, the Federal Labor Relations Authority (FLRA), a Federal agency with functions and responsibilities (5 U.S.C. §§ 7105, 7112) similar if not identical to the PELRB's (10-7D-9 and 10-7D-13), stated: "Respondent's defense rests completely on its reliance on the so-called expert testimony of its position classifier....It may very well be that [she] is an expert in her own field, i.e., rendering advice to management concerning personnel-type problems, especially job classification...but...it does not follow that the FLRA should reach the same conclusion in applying the provisions of the [Federal sector labor law] to the same set of facts." *U.S. Department of the Army, Fort Sam Houston and AFGE Local 2154*, 8 FLRA 623 (1982). In sum, the FLRA makes bargaining unit determinations based on actual duties rather than position titles or classification. *Animal and Plant Health Inspection Service, Department of Agriculture and AFGE Local 3106*, 15 FLRA 250 (1984).

neither is the PELRB. Rather, we follow the practice of making findings based on the actual duties performed.¹¹ In reviewing the record to determine actual duties, we have concluded that a sergeant is occasionally involved with supervision as defined in the Act and does not devote a substantial amount of time to such duties. The majority of time is consumed by duties of a routine nature and closely aligned with those also performed by a subordinate, the patrol officer or deputy. Testimonial evidence confirms that, in the circumstances of this case, the actual duties for a sergeant are accurately represented in its position description where 9 of the 11 essential or major duties and responsibilities are virtually identical to the duties performed by a subordinate, the deputy, and contained in that position description too. This exceeds the statutory requirement to exclude a position from supervisory status where there is a substantial similarity of duties performed between superior and subordinate.

Another argument by the County is that the word “substantial” under Federal classification principles and standards is interpreted as 25 percent of an individual’s work time. Therefore, to conclude that 25 percent of a sergeant’s time devoted to supervisory duties is not “substantial,” as the PELRB did in another case, is incorrect according to the County. New Mexico law is well settled on the point that where a term is not defined in a statute, such as the word “substantial” in the Act’s definition of “supervisor,” then reference to and reliance on a dictionary definition of the word or term is appropriate and proper.¹² Nowhere in the Act does it state that the word “substantial” in the definition of “supervisor” must be defined in accordance

¹¹*FOP and NMSU*, 1 PELRB No. 13, n. 4.

¹²*State ex rel. Bingaman v. Valley Savings & Loan Association*, 97 N.M. 8, 636 P.2d 279, 281 (1981).

with the Federal Government's classification principles and standards. Those standards or principles are not binding upon the PELRB or dispositive of the issue before us.

We base our conclusions on the testimony and evidentiary record established before the hearing officer. That is, the personnel officer's exposure to the duties of the sergeant is based principally on a classification of those positions in 1985 or 1986.¹³ Other persons to testify about the duties of a sergeant was a sergeant in criminal investigations and the Sheriff. The sergeant testified to his personal, daily observation since 1993 of the sergeants and deputies working in the patrol units as a basis for his conclusion that sergeants devote a majority of their time to performing the same kind of work as that performed by their subordinates, the deputies. The Sheriff testified that a sergeant devotes 10 to 20 percent of his or her time performing supervisory duties. Additionally, the sergeant and Sheriff testified that since early 1993 there has been a change in the scope or role of the lieutenant, a supervisory position, which resulted in the sergeant performing more patrol duties.¹⁴

The County maintains that testimony by the sergeant and Sheriff is not as persuasive as that from its personnel officer (given her level of experience with the Federal classification system) and, furthermore, the organizational changes have not been identified by the Sheriff for

¹³In 1993 position descriptions were revised or updated to comply with the provisions of the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 42 U.S.C. § 12101 *et seq.* Also, in 1985-'86, the current personnel officer was serving as a consultant to the County.

¹⁴Another change has involved the position of captain, a non-bargaining unit position. Whereas that position was previously encumbered by an "honorary" captain working along side her husband and son, it is now encumbered by a person who is a certified law enforcement official.

inclusion in the position descriptions. We noted, above, the non-binding effect of the Federal classification system in this administrative, adjudicatory proceeding. As for the organizational changes, the County's Personnel Policy, Ordinance No. 12-94-057, § 4(A)(2) states that positions descriptions "are intended to be descriptive and explanatory and are not restrictive. The use of a particular expression or illustration as to duties, qualifications, or other attributes shall not be held to exclude others not mentioned nor to limit the power of supervisors to alter the detailed tasks involved in the duties of the positions."

Although the County relied upon the position descriptions during the hearing it now relies upon the Sheriff's standard operating procedures (SOP) manual wherein, the County maintains, all expectations or tasks for a sergeant are supervisory. To the extent the SOP is replete with expectations, they may not materialize or surface especially when juxtaposed against actual duties herein. Moreover, basing unit determinations on expectations without regard to the actual duties performed could result in the denial of statutory rights to classes of employees.¹⁵ Assuming that all expectations are supervisory, we reiterate our finding that the performance of them occurs occasionally rather than consuming a substantial amount of a sergeant's work time.

Furthermore, a key determinant in supervisory status is whether the employee is exercising independent judgement or routinely ensuring that procedures and policies are followed. Where an employee is merely relaying instruction from a supervisor or ensuring that

¹⁵We have previously addressed the effect or result of efforts to exclude classes of employees in *County of Santa Fe*, 1 PELRB No. 1, 34 (1993).

subordinates adhere to established procedures, that individual is not a supervisor under the Act. An SOP, by its nature and function, represents a managerial initiative to standardize processes and procedures to eliminate error and minimize discretion and independent judgement by employees in the execution of their duties. In this case, a sergeant's actual duties are of a routine, ministerial nature and fall within the role and function of a lead employee. That is, the leader (sergeant) performs the duties of the workers (deputies), expedites or facilitates the performance or completion of those duties, and explains tasks to new workers. Supervisory functions are incidental to the duties performed as a member of the work shift.

By contrast, the position of lieutenant appears to involve the performance of duties that go beyond simply ensuring established procedures and policies are followed and requires use of independent judgement in directing employees which satisfies the statutory definition for supervisor. For example, the lieutenant is responsible for the supervision of the patrol division and its units through the planning, controlling, and direction of the work, i.e., planning work schedules, determining types and numbers of employees to assign to each shift, and reassigning calls issued by telecommunications. Furthermore, the lieutenant is involved with the applicant review board whereas the sergeant's role in that process has been minimized if not eliminated by the Sheriff. The parties agree that the position of lieutenant is a supervisor under the Act and, therefore, not within the unit. Although there was no testimony by a lieutenant, we have no reason to believe or conclude that the parties' agreement to exclude the position is inconsistent with the definition of supervisor under the Act or Board precedent in this area.

We agree with the County's assertion that the same working conditions for a deputy and sergeant is not a criterion in the statutory definition of "supervisor." Finally, the County opposes the presence of the Director in closed session with the Board. The only comment in closed session from the Director to the Board was to persuade the Board not to consider Rule 1.14 Misconduct. That is, whether the County's representative should be found as having engaged in misconduct during the hearing when he filed a written motion intentionally late which served to disrupt and delay the hearing.¹⁶

In sum, sergeants are appropriate for inclusion within the bargaining unit because (1) they do not devote a substantial amount of time to supervisory duties, rather, they perform them on an occasional basis; (2) they perform work that is substantially similar to the work performed by their subordinates; and (3) they function as a lead worker.

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

ORDER

The County's exceptions are denied and dismissed.

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

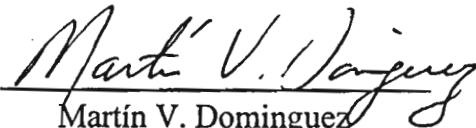
¹⁶No motion to disqualify pursuant to Rule 1.10 was filed by the County on this matter.

Included: All patrol officers (deputies and corporals),
investigators, and sergeants.

Excluded: Captain, lieutenant, supervisory receptionist, custodian,
secretary-receptionist, telecommunicator, and all others
such as confidential, management, and supervisory
positions as those terms are defined under the Act and
Board 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 Fraternal Order of Police or FOP and "No Representation." The PELRB Director shall determine whether to conduct the secret ballot election by mail ballot procedures or onsite at the public employer's facilities.

For the Board.


Martín V. Dominguez
Chairman

Date: December 22, 1995