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STATE OF NEW MEXICO  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In the Matter of

*Local 7911, Communications Workers of America, AFL-CIO,*  
*Petitioner,*  
*and*  
*Dona Ana County,*  
*Public Employer.*

DECISION AND ORDER DIRECTING ELECTION

On September 14, 1995,<sup>1</sup> an administrative judge (AJ) 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 *Local 7911, Communications Workers of America, AFL-CIO and Dona Ana County*, Case No. CP 19-95(C).

This proceeding commenced when Local 7911, Communications Workers of America (Petitioner or CWA), filed a certification petition (CP) with the Public Employee Labor Relations Board (PELRB or Board) on January 3 seeking to represent a bargaining unit composed of approximately 55 positions identified as detention officers I, corporals and sergeants, among others, encumbered by employees at the Detention Center in Dona Ana County (County or Employer).

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<sup>1</sup>All dates herein are to calendar year 1995.

On July 21 and 24 the AJ conducted a hearing wherein all parties were afforded an opportunity to participate, adduce relevant evidence, examine and cross-examine witnesses, present oral argument, and file post-hearing briefs. After receipt of the testimonial and documentary evidence and post-hearing briefs, the AJ issued findings of fact and conclusions of law that: (1) the operations sergeant is a “supervisor” as that term is defined in the Act at § 4(S) and should be excluded from the bargaining unit; (2) other sergeants do not encumber supervisory positions and, therefore, are appropriate for inclusion in the petitioned-for bargaining unit; and (3) the training sergeant is not a “management employee” as that term is defined in the Act at § 4(M) and, accordingly, should be included in the bargaining unit.

On October 3 the PELRB received the County’s request for review, dated October 2, of the AJ’s report and recommended decision. In the request for review, filed pursuant to Rule 2.15(a), the County excepts to (1) the AJ’s reliance on and use of the analytical framework for the statutory definitions of “supervisor” and “management employee” set forth in *Jemez Valley Public Schools*, 1 PELRB No. 10 (May 1995); (2) the conclusion that certain sergeants are not supervisors; and (3) the conclusion that the training sergeant is not a “management employee.”

Petitioner responded to the County’s exceptions, as permitted under Rule 2.15(b), by filing a “Motion to Strike” wherein it argues that the request for review was untimely and an answer or response to the County’s exceptions. Neither Petitioner or the Employer filed exceptions to the AJ’s conclusion that the operations sergeant is a “supervisor” under the Act.

The Board initially sought to review this matter on October 17 but at that time it approved the County's request to defer consideration until the next meeting. On November 8 representatives for each party presented oral argument to the Board. Additionally, the County presented evidentiary documentation relating to the Federal Government's classification system. Specifically, the County noted that the Federal system of classifying positions would find 25 percent of a person's time devoted to supervisory duties as "substantial." Given the expertise, integrity, and overall quality of that system, the Board should follow Federal classification principles and practices when considering whether a sergeant is a "supervisor" under the Act. Furthermore, the County argued that catastrophic consequences would result from adopting the AJ's conclusion that shift sergeants are not supervisors. For example, there would be no supervisors in the detention facility but only bargaining unit employees. Consequently during a strike of the facility by these employees there would not be any supervisory personnel present to maintain order. Petitioner disagreed with the County's assertions and arguments; however, it did not object to the Board's receipt of evidence submitted by the County.

Before conducting our review of the AJ's report and recommended disposition of the bargaining unit issues as required by Rule 2.15(c), as well as consideration of the exceptions to the AJ's report, we address CWA's "Motion to Strike."

### **MOTION TO STRIKE**

Rule 2.15(a) states, in relevant part, that "[w]ithin 10 [work]days after service of the... report..., any party may file a request for Board review...of the recommended disposition."

As relevant to this proceeding, the word “service” is addressed in Rule 1.20: “[s]ervice of papers upon parties may be made by personal delivery or by depositing in United States Mail, first class postage prepaid.” The Board’s records show that the report, dated September 14, was deposited in the mail on that day and was received by the County’s representative on September 18. The County’s request for review, dated and postmarked October 2, arrived at the PELRB on October 3. We find that the 10-day period for requesting review commenced on September 19, the day after the report was received by the County’s representative. The 10-day period concluded on October 2, the date the request for review was “deposited in the United States Mail” as evidenced by its postmark. We find the County’s request for review to be timely and, consequently, deny the Petitioner’s “Motion to Strike.”

### COUNTY’S EXCEPTIONS

We turn to our review of the AJ’s recommended disposition of bargaining unit positions in dispute and consideration of the County’s exceptions as well as the Petitioner’s response thereto.

#### Jemez Valley Public Schools

The County asserts that the AJ’s use of and reliance on *Jemez Valley Public Schools*, 1 PELRB No. 10 (May 1995)(hereinafter *Jemez Valley*) for determining whether an employee is a “supervisor” under the Act violates PELRB Rule 3.12(d):

If notice of appeal is not filed within the time set out in Rule 3.12(a), ...the hearing officer's report and recommended decision shall be transmitted immediately to the Board which may pro forma adopt the hearing officer's report and recommended decision as its own. **In that event, the report and decision so adopted shall be final and binding upon the parties but shall not constitute binding Board precedent.**

[Emphasis added.]

Since the hearing officer's report and recommended decision in *Jemez Valley* was not appealed to the Board, "the application of any principles in that case," the County argues, "applied to any other case is a violation of PELRB rules." Comments by the AJ during the prehearing conference and hearing as well as conclusions in the recommended decision are based upon the "standard in *Jemez Valley*" that "can not be applied according to PELRB rules." The County concludes that it is "entitled to a new hearing on the merits of the case without being measured against an inapplicable standard."

We affirm the AJ's reference to and reliance on the statutory analytical framework contained in *Jemez Valley* for the following reasons. That case, such as the one before us, involved a representation proceeding and dispute over the appropriateness of a petitioned-for bargaining unit. Specifically, issues of unit inclusion or unit exclusion. All representation matters are investigated and adjudicated under Rule 2, REPRESENTATION PROCEEDINGS. The County's reliance on Rule 3, PROHIBITED PRACTICES PROCEEDINGS, as its basis to (1) contest the applicability of *Jemez Valley* in this Rule 2, representation proceeding, and (2) further assert a violation of the rules as well as a "right" to a new hearing, is misplaced and incorrect. The County offers no logic or rationale for its reliance on and use of Rule 3 when it files a request for review under Rule 2.

Furthermore, we find that *Jemez Valley* constitutes Board precedent because Rule 2.15(c) clearly states that “[w]hether or not a party has filed a request for review, the Board, within 60 days, shall review any recommended disposition regarding the scope of a bargaining unit made by the Director or a hearing officer.” Aside from *Jemez Valley*, other examples of Board review of reports and recommended decisions where there has not been an appeal filed are *Local 187, United Steelworkers of America, AFL-CIO/CLC and City of Carlsbad*, 1 PELRB No. 5 (January 1995) and *Local 2059, Santa Fe Firefighters Association and City of Santa Fe*, 1 PELRB No. 6 (January 1995). In view of these considerations, we find no basis in fact or law to support the County’s argument that Rule 3 is applicable in this case, a Rule 2 proceeding.

### Sergeants

The County disputes the AJ’s conclusion that approximately ten positions titled “sergeant”<sup>2</sup> do not fall within the definition of “supervisor” at § 4(S) in the Act:

“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 routine, incidental or clerical duties or who occasionally assume supervisory or directory roles or whose

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<sup>2</sup>In this exception the County’s refers to “sergeants” without reference to more specific titles--operations, training, shift, classification, juvenile, and transport. With respect to operations sergeant, neither party filed a request for review of the AJ’s finding that it is a “supervisor” under the Act. We conclude there is substantial evidence to support that finding and, therefore, exclude operations sergeant from the petitioned-for unit. Also the County does not assert that training sergeant is a “supervisor” but a “management employee” and address that matter separately. Commentary for this exception emphasized, as did the testimony during the hearing, on the duties of a shift sergeant. In this regard, the parties’ agreed during the hearing that duties for sergeants, regardless of title, are sufficiently similar. [Tr. 565-566]. We interpret the word “sergeants” in this exception, then, to encompass the positions of classification, juvenile, and transport as well as shift but not operations or training.

duties are substantially similar to those of their subordinates and does not include lead employees or employees who participate in peer review or occasional employee evaluation programs.

The definition commences with a 3-part test. That is, the individual must (1) devote a substantial amount of work time to supervisory duties, (2) customarily and regularly direct the work of two or more other employees, and (3) have the authority in the interest of the employer to hire, promote, or discipline other employees or to effectively recommend such action. If any one of the three items are not satisfied, then the employee is not a "supervisor." In the circumstances of this case, the AJ found that the position of sergeant did not satisfy the initial step in the 3-part test because he or she does not devote a substantial amount of time to supervisory duties.

In addition to the initial 3-part test, there are a number of exclusions in the definition. For example, positions where functions are routine, incidental or clerical are not supervisory as well as positions where the individual "occasionally assume[s] supervisory or directory roles[.]" Also, an employee is not a "supervisor" if he or she performs duties that are "substantially similar to those of their subordinates[.]" The AJ found that the sergeant performs duties that are substantially similar to those of his or her subordinates (corporals and detention officers). This finding, standing alone, causes the position of sergeant to be excluded from the definition of "supervisor" and appropriate for inclusion within the unit.

According to the County, the AJ did not recognize any supervisory duties other than those associated with paperwork. We disagree.<sup>3</sup> The Employer's assertion that the AJ did not consider evidence that sergeants perform supervisory duties other than those associated with paperwork is controverted by the AJ's recommended decision. In this regard, the AJ did find that the sergeants engage in supervisory activity other than those associated with paperwork. She concluded that the sergeants direct their subordinates (detention officers and corporals) within the meaning of the Act: "The sergeants direct their subordinates through assigning their work, overseeing their work and evaluating their work." [Decision at 23]. In addition to paperwork, the sergeants' duties "generally insure that the detention officers are doing their jobs" is further recognition that sergeants' direct subordinates. [Decision at 13]. Thus, the AJ did find that sergeants engage in supervisory activity other than those associated with paperwork.

The AJ concluded, however, that "[t]he amount of supervisory direction undertaken by the sergeants also appears to vary from sergeant to sergeant. The facts further demonstrate that the amount of time a sergeant spends directing may be limited, or eliminated, depending on how busy

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<sup>3</sup>The record reveals that witnesses were reluctant to attribute percentages to "what they considered supervisory duties because all the sergeants at this facility do not exercise the same degree of initiative or demonstrate the same degree of authority." [Decision at 29]. Conducting a representation hearing is not an exact science and, even under the best of circumstances, obtaining precisely accurate testimony from witnesses may be difficult. When witnesses are averse to explaining how much time they spend or devote to particular duties, gleaned reliable information from the record presents a challenge to a presiding official and the Board. An explanation for this aversion may be the nature of work performed at the center as described by the administrator and others. Related to the nature of the work performed is the reality or practicality that, despite the Act's reference to "amount of work time [devoted] to supervisory duties," a witness' workday may not fall into ready-made compartments of work labeled supervision and non-supervision. Despite these difficulties we find that the witnesses' approximations reflect their good faith, best efforts to describe a typical workday and we find the AJ's determination, based on testimony from several witnesses, of time devoted to supervisory duties to be supported and corroborated by other evidence and, therefore, reliable and persuasive.



and short-handed a shift may be.” [Decision at 29]. Based on the testimony and documentation, the AJ concluded that sergeants spend “approximately 30% of their time engaged in completing paperwork, some of which consisted of the supervisory duties of performing evaluations and reviewing subordinates paperwork. Most of that time, however, consists of the sergeants filling out his or her own paperwork.” We find there is substantial evidence supporting the AJ’s conclusion on this issue, e.g., sergeants do not devote a substantial amount of time to those supervisory duties set forth in the Act.

We agree with the AJ that sergeants possess some supervisory authority as contained in the definition, i.e., customarily and regularly direct two or more employees, have authority in the interest of the employer to recommend promotion (through evaluation), and recommend discipline. The possession of this authority is insufficient, however, to conclude that an employee is a supervisor under PEBA for the law suggests that the amount of time devoted to these supervisory duties be compared to the performance of duties “substantially similar” to subordinates. Nonsupervisory duties performed by a sergeant are (1) walking the floor of the jail, (2) checking for contraband, (3) handing out or delivering meals, (4) answering the telephone, (5) cleaning the facility, (6) removing detainees from the cellblocks for court appearances or release, (7) performing intake interviews, (8) escorting detainees to showers, (9) conducting visual searches, and (10) escorting visitors to and from jail. Comparing time spent on these “other” duties performed by the sergeants--and also performed by their subordinates the detention officers and corporals--to the amount of time devoted to supervisory duties leads to the conclusion that the sergeants perform work substantially similar to that of their subordinates rather than devoting a substantial amount of time

to supervisory duties. A shift sergeant's supervisory duties require much less time (30 percent according to the AJ) than other duties performed by a sergeant during the course of a shift. In fact we find that a sergeant devotes less than 30 percent of his or her workday to supervision because that percentage includes (1) up to 5 percent for conducting performance evaluations, an annual event; and (2) time devoted by sergeants to their own paperwork which encompasses duties "substantially similar" to those performed by their subordinates, i.e., non-supervisory duties.

Although the AJ found that during a shift the sergeants are "generally insuring that the detention officer are doing their jobs," this oversight function performed by them does not overcome the fact that they perform the same ten duties, noted above, side-by-side, with their subordinates.<sup>4</sup> Rather than serving as a supervisor, sergeants are lead workers at the center. That is, they perform most, if not all, of the duties as those of their subordinates; they explain tasks to them and expedite the work of a shift which is small in number of personnel. Supervisory functions are incidental and occasional to the duties performed as a member of the shift. PEBA specifically excludes a lead worker from inclusion in the definition of supervisor because these employees lack the type of authority and responsibility attendant to supervisory status.

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<sup>4</sup>Sergeant Carbon, the only witness who is currently a shift sergeant, testified that the sole duty she performs which is different from the duties of her subordinates is her responsibility to conduct evaluations once a year. [Tr. 555]. The AJ concluded that conducting evaluations annually for five or six subordinates consumes no more than 5 percent of each workday; we noted, previously, this is a generous allocation of time. The other two witnesses to testify about a shift sergeant's duties are not currently performing those duties but had performed them in the past. Even if the Board uses the 30 to 40 percent figure stated by Sergeant Roach (operations sergeant) as expended on paperwork each day, not all of that time is, as the AJ found, devoted to supervisory duties. Sergeant Roach testified that she devotes the "largest portion" of her time to supervisory duties but observed, candidly, that her statement was made without knowledge of or reference to the supervisory indicia in the Act.

In other words, the Act contemplates that a “supervisor” exercise independent judgement and discretion as opposed to performing routine, incidental or clerical duties. In the circumstances of this case, the evidence shows that sergeants routinely follow the standard operations procedures manual for direction when dealing with police agencies and attorneys, among others, when a supervisor is absent. Furthermore, they use a “decision tree” to determine whether there is a need for a visual search of a detainee which minimizes, if not eliminates, discretion in that area of responsibility. Where a sergeant may exercise some discretion (uniform compliance, on-the-job training, compliance with code of conduct), that same level and scope of discretion may also be exercised by corporals and detention officers--two positions that the County and Petitioner agree are appropriate for inclusion in the unit.

Our finding that the sergeants are lead workers is buttressed by the fact that the center is chronically understaffed. Witnesses’, including those testifying on behalf of the Employer, described the facility and work accomplished there in terms of lack of personnel or staff and its resulting impact on operations.<sup>5</sup> Our reading of the record illustrates a “team” effort undertaken by members of a shift, sergeants and detention officers alike, to accomplish tasks. The operations sergeant and facility’s administrator noted this “team” approach necessitated by short staffing.

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<sup>5</sup>The County argues that the AJ inappropriately relied on witnesses’ testimony to conclude the facility was understaffed. Prior to reaching such a conclusion, the Employer argues, the AJ should have conducted research outside of the record to determine whether the facility is “truly understaffed.” This argument is without merit. The AJ relied upon testimony from the Employer’s witnesses who, under oath, swore to the working conditions at the facility. The AJ considered the testimonial and documentary evidence presented during the hearing. Once the hearing concluded, the report and recommended decision flowed from the record established by the parties to the proceeding. The AJ’s conclusion on staffing is a product of the testimony and evidence offered and accepted into the record.

The County argues that its “expectations” for sergeants include supervision even when they are performing the work of subordinates. We consider actual duties performed since “expectations” may not surface or materialize. The Employer’s assertion that duties in the position description were “ignored” by the AJ must be contrasted with the testimony of individuals who stated that some of those duties, relied upon by the County in its assertion of supervisory status for a position, are not performed because of staffing problems (e.g., post duties) or discontinued or modified (e.g., briefing sessions for an entire shift now conducted between two employees on one-to-one basis and labeled “pass on”) for other reasons.

Additionally, we are not persuaded by the Employer’s assertion that even though a sergeant is simultaneously performing the same work of a subordinate the sergeant is doing it as a supervisor and therefore the task is supervisory. The Employer’s position means that while conducting a visual search, performing an intake interview, searching for contraband, or answering the telephone the sergeant is simultaneously engaged in supervision. This assertion does not make sense. When the sergeant cleans the jail floor, the task (cleaning) is not supervisory simply because the sergeant performs it. According to the operations sergeant whether a sergeant is on the catwalk or on the floor pushing a cart, the superior (sergeant) and subordinate (corporal) are performing the same task (both are counting heads). The County’s assertion, drawn to its logical conclusion, means an employer could label every task supervisory in nature and exclude classes or groups of employees from the Act’s coverage.<sup>6</sup>

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<sup>6</sup>We have previously addressed the effect or result of efforts to exclude whole classes of employees in *County of Santa Fe*, 1 PELRB No. 1, 34 (1993).

In sum, an examination of testimony from witnesses and all documents leads us to conclude, as did the AJ, that (1) sergeants do not devote a substantial amount of their work time to supervisory duties and (2) sergeants perform duties which are substantially similar to those performed by their subordinates. Also, we find and conclude that sergeants are lead workers. Consequently, the position of sergeant is appropriate for inclusion in the bargaining unit.

### **Training Sergeant**

The AJ found that the training sergeant is not a “management employee” as that term is defined in the Act at § 4(M):

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

The statutory definition has a 2-part test. It requires an employee to engage primarily in executive and management functions. The Board interprets this to require an individual possess and exercise a level of authority and independent judgement sufficient to significantly affect the employer’s purpose. “A management employee exercises discretion within, or even independently of established employer policy and must be aligned with management...[A]n employee may be excluded as managerial only if he or she represents interests by taking or recommending

discretionary actions that effectively control or implement employer policy.”<sup>7</sup> The second part of the test for a “management employee” requires the employee to participate in “developing, administering or effectuating” management policies which we have interpreted to mean “creating, overseeing, or coordinating” the means and methods for achieving policy objectives and the ability to determine the extent to which policy objectives will be achieved.

We adopt the AJ’s finding that the training sergeant is not a “management employee” for the following reasons. The training sergeant’s wholesale lifting of policies from other organizations or, as described by the center’s administrator, the “pirating” of policies, is a routine function in this case. This routine or perfunctory task involved contacting those organizations to request a copy of its policy. The administrator identified this as “why re-invent the wheel?” [Tr. 199-201, 235]. There is the finding that the idea for a policy or its formulation is not the domain reserved for the training sergeant but, as the administrator indicated, any employee may bring forth a policy idea. In this regard, the determination to develop a policy--regardless of its source--resides with the administrator. Additionally, there are numerous levels of review and revisions that policies cycle through before final adoption such as those involving visual search and incentive pay plan. Finally, the philosophy statement in the policy and procedures manual states any changes to current policies “will be drafted by the [administrator].”

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<sup>7</sup>*NLRB v. Yeshiva University*, 444 U.S. 672, 103 LRRM 2526 (1980). We reaffirm our position that “[w]here provisions of PEBA are the same as or closely similar to those of the [National Labor Relations Act], we will give great weight to interpretations of such provisions made by the [National Labor Relations Board] and reviewing courts.” *County of Santa Fe*, 1 PELRB No. 1, 43 (1993).

The administrator testified that “99% of the time” his changes to the policies prepared by the training sergeant are “cosmetic.” This statement, offered in isolation, is not reflective of the sum and weight of testimony by the administrator. For example, the training sergeant is not utilized by the administrator in a managerial capacity consistent with the statutory definition. Rather, the administrator testified that the sergeant is an “administrative assistant.” [Tr. 163]. Other testimony from the administrator revealed the training sergeant’s work to be extensively reviewed and revised by others within and without the facility. Representative of that kind of review is the incentive pay plan, the administrator’s “brainstorm,” which coursed through the departments of finance and personnel and the county manager’s office.

Even if the training sergeant administered the incentive pay plan as argued by the County we find the administration of 1 out of approximately 400 plans, policies or procedures to be insignificant. In this regard, the administrator testified that the (1) training sergeant does not administer, implement or coordinate these matters and (2) operations sergeant is “the enforcement policy to insure that our policies are functioning, and it’s her job...to supervise the shifts to insure that the policies and procedures or new information is passed out as it may need to be passed to the staff” and “we [administrator and operations sergeant] develop policies and procedures.” [Tr. 45, 56, 157]. The County asserts that the training sergeant “must independently determine which policies, or portions thereof, will become the Employer’s policy”; however, the overwhelming testimonial evidence points to the performance of this duty by the administrator and operations sergeant.

The County asserts that the AJ has an “obligation” to consider whether the training sergeant should be considered a “confidential employee”<sup>8</sup> and, in not doing so, committed error. The record shows that the AJ did inquire about labor relations duties currently performed by the training sergeant or, as contemplated by the administrator, to be performed by the training sergeant. No such duties are currently assigned or contemplated. [Tr. 253-254]. To the extent that access to or responsibility for maintaining personnel records is indicative of confidential status, we observe that the administrator assigns those duties and responsibilities to his administrative secretary. In sum, the training sergeant is not a “confidential employee” and we find no error by the AJ.

Moreover, neither party raised confidential status as an issue at the hearing. We do not find (contrary to the County’s contention) that there is an “obligation” for a presiding official to initiate and resolve an argument (confidential employee) not advanced by a party at the hearing. The duties and responsibilities of a hearing officer--detailed in Rule 2.12(c) and (d)--do not involve an affirmative obligation to advance and determine an issue of statutory exclusion not presented or argued by a party, as here, at the hearing.

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<sup>8</sup>“Confidential employee” is defined in the Act at § 4(F):

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

Rule 1.3f. further defines it by specifying that a “confidential employee” is a “person who formulates, determines and effectuates a public employer’s employment, collective bargaining or labor relations activities, including grievance processing[.]” The statutory definition and rule were applied by a hearing officer in *Jemez Valley* and, thereafter, adopted by the Board in that decision.



In concluding that the training sergeant is not a “management employee,” we find, as did the AJ, that the incumbent does not satisfy the statutory definition’s 2-part test. That is, the incumbent is an employee who (1) is not engaged primarily in executive and management functions and (2) is not involved in developing, administering, or effectuating management policies. The totality of testimony and documentation cause us to deny the Employer’s exception.

### Federal Classification System and “Strike”

With respect to the County’s arguments and evidence on the use of or reliance on the Federal Government’s classification principles and practices and presented for the first time in this proceeding at the PELRB’s November meeting, we find them to be without merit. The Federal Government, itself, does not follow or apply that system when making unit determinations.<sup>9</sup> Just as the Federal Government is not bound by its classification system, neither is the State of New Mexico’s PELRB. Nowhere in the Act does it state that the word “substantial” in the definition of “supervisor” must be defined in accordance with Federal classification principles and practices. The Federal system is not dispositive of the issue. Despite the praiseworthy commentary by the County about that system, evaluations or studies of it have led to recommendations that it be abandoned.<sup>10</sup>

As for a “strike” situation and the concern about lack or paucity of supervision at the facility, the Act’s § 21 prohibits public employees, such as those involved in this dispute, from engaging in

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<sup>9</sup>*U.S. Department of the Treasury, Bureau of the Mint, U.S. Mint, Denver, Colorado*, 6 FLRA 52 (1981) and *Animal and Plant Health Inspection Service, Department of Agriculture and American Federation of Government Employees, AFL-CIO, Local 3106*, 15 FLRA 250 (1984).

<sup>10</sup>See *Federal Job Classification*, U.S. General Accounting Office, GAO\GGD-96-20 (November 6, 1995).

a “strike.” Furthermore, the County’s argument that including sergeants in the unit results in no supervision at the facility is an overstatement. We find that sergeants do spend time performing supervisory duties but they do not perform such duties a substantial amount of the time when compared to the overall duties for the position. Based on the mandates of the Act’s § 4(S), where the supervisory duties are not performed a substantial amount of time, then that position falls outside of the definition’s reach.

The Board’s decision to (1) deny Petitioner’s “Motion to Strike,” (2) deny the County’s exception dealing with *Jemez Valley*, and (3) find that the operations sergeant is a “supervisor” was made in open session during the November 8 meeting. The Board’s decision that the training sergeant is not a “management employee” and other sergeants as not supervisors<sup>11</sup> was made in open session at its December 12 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:

**Included:** Certified detention officers up to and including the rank of sergeant including corporal, juvenile detention corporal, booking officer (clerk), medical technician, shift sergeant, classification sergeant, transport sergeant, juvenile sergeant, and training sergeant.

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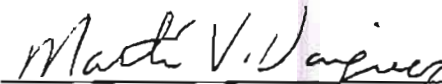
<sup>11</sup>Member McCorkle voted to find sergeants as supervisors.

**Excluded:** Operations sergeant as well as other positions that are supervisory, confidential, and management as defined in the Act.

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 Communications Workers of America or CWA and "No Representation."

The PELRB Director shall determine whether to conduct the secret ballot election by mail ballot procedures or onsite. Within ten (10) workdays from the date of the issuance of this decision, the County shall provide to the Director, and serve upon the Petitioner CWA, 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.

For the Board.

  
Martín V. Domínguez  
Chairman

January 2, 1996

**STATE OF NEW MEXICO  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD  
OFFICE OF THE DIRECTOR**

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In the Matter of )  
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Communications Workers )  
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Petitioner, )  
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Dona Ana County, )  
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Public Employer. )  
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Case No. CP 19-95(C)

**ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER**

On January 3, 1995, the Communications Workers of America, Local 7911, (Petitioner or Petitioner), filed a Representation Petition in Case No. CP 19-95(C), pursuant to the Public Employee Bargaining Act (Act or PEBA), NMSA 1978 §§10-7D-1 to 10-7D-10. (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).<sup>1</sup> The Petitioner seeks to represent a unit of personnel at the Dona Ana County Detention Center (Employer or Detention Center).

<sup>1</sup> On May 18, 1995, the American Federation of State, County and Municipal Employees (AFSCME) filed its petition to intervene in this matter, Case No. IP 2-95(C).

Administrative Law Judge Bridget A. Burke heard the case on July 21, and 24, 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 Communications Workers of America, Local 7911, is a labor organization within the meaning of §10-7D-4(J) of the Act.
2. The parties stipulate, and I find, that Dona Ana County is a public employer within the meaning of §10-7D-4(Q) of the Act.
3. The parties stipulate, and I find, that there is no history of collective bargaining between the parties to this hearing.
4. The parties stipulate, and I find, that there is no contract bar to an election in this case.
5. The parties stipulate, and I find, that the petitioned-for unit is appropriate.
6. A question of representation exists, at this time, as the Employer declines to recognize the Petitioner as the exclusive bargaining representative of the employees in the petitioned-for unit.

## II. Issues

1. Whether the Detention Center sergeants are supervisory employees under the PEBA and therefore must be excluded from the petitioned-for bargaining unit?<sup>2</sup>
2. Whether the training sergeant is a managerial employee under the PEBA and therefore must be excluded from the petitioned-for bargaining unit?

## III. Findings of Fact

### Background

The Dona Ana County Detention Center consists of an adult unit and a juvenile unit. The adult unit houses over 220 detainees. The detainees include individuals charged and/or convicted of misdemeanors and felonies. The juvenile unit usually contains fewer than 20 juvenile detainees. The Detention Center provides detention services for the following law enforcement entities: Dona Ana County, Las Cruces, Hatch, Mesilla, Sunland Park, U.S. Marshal's Service, U.S. Drug Enforcement Agency, U.S. Immigration and Naturalization Service, New Mexico State Police and New Mexico State University Police. The Detention Center bills these entities for housing detainees. This is done by taking the total operating costs and dividing it by the number of prisoner days utilized. In 1994, it cost \$53.81 per day to house a detainee. This year it costs approximately \$70 per day per detainee. Last year, for the first time, the Detention Center operated a completely self sufficient facility; the facility generated enough money from fees it collected to pay for the operation of the jail.

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<sup>2</sup>The Employer does not argue that the training sergeant is a supervisory employee.

The building itself consists of two main areas. The administrative offices of the jail which include the administrator, the deputy administrator, the classification sergeant, the training sergeant, the operations sergeant and the records clerk. The other part of the building is the actual secure facility where the detainees are housed. The detainees are "indirectly" supervised by staff because most of them are housed dormitory-style in cellblocks. There are approximately 40 detainees to a cellblock. There are also a few individual cells and several four-person cells. This is considered "indirect" management of prisoners because Detention Center personnel periodically make rounds through the actual cellblocks but they do not "directly" observe or work in the detainees' living space. The new Detention Center facility, which is under construction, and due to be completed in January, will include "direct" observation of the detainees. Rather than the dormitory-style cellblock of the current jail, the new facility will be "podular direct." A detention officer will supervise a single pod of 26 or fewer prisoners. The detention officer will supervise the detainees from the detainees' living space instead of making rounds through the whole jail. The new facility will have space to house 555 detainees. Break-resistant glass will replace bars in the new facility. This will allow for easy observation of the detainees.

During the day, there is a lot of activity at the Detention Center. Detainees are brought into the facility, others are transported to court or other jurisdictions, and some are released. This activity is accompanied by a great deal of paperwork, as is nearly every aspect of the staffs' interaction with the jail population. Other activity at the facility is a

result of visitors. Visitors to the jail include family members, probation officers, lawyers and U.S. Marshals.

### **Administrator**

The Detention Center staff is organized in a paramilitary structure. The administrator, Frank Steele, is the head of the organization. He handles the budget, purchasing and discipline for the jail. He works Monday through Friday, from approximately 7:30 am to 6:00 pm. Sometimes he works on holidays or evenings. He determines the policies and procedures to properly operate the facility. He also works with the District Attorney's Office, the U.S. Marshals' Office, and the County's legal department. Lately, the administrator has been very busy with the construction of the new facility.

Each morning the administrator holds a briefing. It normally lasts between twenty minutes and an hour. The following people usually attend the administrator's briefing: the deputy administrator, the operations sergeant, shift sergeant, records officer, classification sergeant, training sergeant, transport sergeant, social worker and medical staff. If the administrator is not there, the briefing is done by the deputy administrator. At these briefings the staff discusses the adult and juvenile detainee population, necessary building maintenance, bookings, releases, training, transport issues and disciplinary problems. The briefings also keep the staff caught up on what transpired in the previous 24 hours.

Normally, the administrator's duties do not require that he leave the premises. When he does leave the building during the day, he relies upon the deputy administrator



and operations sergeant to run the Detention Center. The administrator considers himself a "hands on" administrator.

### **Deputy Administrator**

The deputy administrator is next in the chain of command. Captain Mochen is the deputy administrator. His duties include dealing with warrants, extraditions and bonds. The deputy administrator is considered the jail's disciplinarian. He also works with other detention facilities.

### **Sergeants**

There are nine sergeants at the Detention Center: one classification sergeant, one transport sergeant, one juvenile sergeant, one operations sergeant, one training sergeant, and four shift sergeants. Most of the sergeants report to the operations sergeant, but the operations sergeant and training sergeant report to the deputy administrator and administrator. The sergeants wear black battle dress uniforms consisting of black polo shirts with a badge silk-screened to the shirt and black trousers. The shirt also has gold-colored sergeant's stripes. The sergeants are classified as C11's according to the County's personnel classification system and a sergeant's first step salary is \$18,983.

The classification sergeant is Joe Alvarez. He determines what level of security is appropriate for detainees as they enter the facility. This includes identifying detainees who may be suicide risks. He also heads the jail's disciplinary committee. According to the organizational chart, the following people report to him: one detention officer in the commissary, one detention officer in visitation, one detention officer in recreation, the

social worker and the disposition officer. The classification sergeant evaluates these employees.

The transport sergeant is Patrick Howie. He is responsible for moving detainees from the facility to court, medical facilities, and all over the state for hearings. Four transport officers report to the transport sergeant. This sergeant is also in charge of supplies for maintaining the facility. This includes cleaning supplies, toiletries, and eating utensils.

The operations sergeant is responsible for insuring that the facility's policies and procedures are communicated to and carried out by staff. Sergeant Cheryl Roach is the operations sergeant. She works outside of the jail itself. She has her own office near the administrator, deputy administrator, classification sergeant and training sergeant. She reports to the deputy administrator for some things, and the administrator for others. She works Monday through Friday from 8:00 am to 5:00 pm.

Her duties are more administrative in nature than those of the other sergeants. The administrative nature of her work includes a lot of paperwork. In addition to her responsibilities to complete her own paperwork, she also reviews paperwork completed by the sergeants concerning the detainees and she handles the paperwork related to the building's maintenance. As a result of these duties, she has very little contact with the detainee population. In fact, the only interaction she has with the detainees occurs when inmates file grievances that cannot be handled by a detention officer or shift supervisor. In such cases, the shift supervisor passes the detainee's grievance on to the operations

sergeant and she may go to the detainee to try to resolve the problem. She is also responsible for scheduling detainees' disciplinary hearings.

The sergeants, the booking officer and the facility's maintenance worker report to the operations sergeant. The operations sergeant also performs their evaluations. The operations sergeant has authority to recommend discipline of the sergeants. In addition, she is charged with handling personnel grievances filed by detention officers and sergeants. She also received training on the B-Pad evaluation video used to hire new detention officers. The B-Pad requires the job applicant watch eight different scenarios on video tape. The applicant's responses to the taped situations are also video-taped. The administrator asked several staff members (sergeants and detention officers) to train to learn how to score, or evaluate, an applicant's test.<sup>3</sup> After the staff member has scored the applicant's test he or she turns the results over to personnel. The staff member knows whether the applicant has passed or failed the B-Pad, but he or she does not know whether the candidate will be hired because of other factors the personnel department weighs in creating the eligibility list. The other factors include previous experience, military experience and education.

When the operations sergeant is gone the deputy administrator or classification sergeant fills in for her. She rarely has had to fill in as a shift sergeant. She is also responsible for the facility's maintenance and repair. In addition, the operations sergeant holds monthly sergeants' meetings. These meetings give the sergeants an opportunity to

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<sup>3</sup> Although all the B-Pad evaluators were originally sergeants and detention officers, at least one of the detention officers has since been promoted to the rank of corporal. No one at the hearing could recall what B-Pad stands for.

discuss changes that have been made and/or should be made at the facility. If a shift sergeant experiences a problem or emergency during the night, weekend, or holiday, he or she will call either the operations sergeant, the deputy administrator or the administrator.

The operations sergeant is not paid more than the other sergeants, in fact some receive higher salaries than she receives because they have worked there longer. The operations sergeant has not received more training than the other sergeants and she receives the same benefits as the other sergeants.

The training sergeant is Patricia Ross.<sup>4</sup> She reports to the deputy administrator for some issues and the administrator for others. She is certified as a trainer by the American Corrections Association. The training sergeant also works in the administrative part of the building, separate from the jail, and works Monday through Friday, from approximately 7:00 am to 5:00 pm. The training sergeant is responsible for conducting the training courses offered at the Detention Facility. Some of the training courses she has taught include a basic 40 hour training course, an advanced 40 hour training course, a training course for supervisors, first aid course, CPR courses and a course on sexual harassment.

In addition to her actual training responsibilities, she also has worked extensively on producing the facility's policy manual. Sometimes the administrator will tell the training sergeant to create a specific policy, sometimes the training sergeant approaches the administrator with ideas for policies, and sometimes policies are based on suggestions

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<sup>4</sup> Sergeant Ross is also the president of the Petitioner union.

from other employees. In most cases, the training sergeant "pirates" an existing policy from another institution or professional association and tailors it to fit the facility's needs. According to the administrator, the training sergeant does not determine whether to create or "pirate" a policy, but she may come across something she believes is useful and she will bring it to the administrator and they will discuss it. And then, and only then, is a policy generated. All of her work is subject to the administrator's approval. Normally the administrator does not make more than cosmetic changes to her drafts, but sometimes he does rewrite a policy.

Occasionally, other entities, including the County attorney and State's risk management department, get involved with reviewing drafts of policies. For example, the training sergeant drafted a new visual search policy in response to a number of lawsuits being filed against the Detention Center.<sup>5</sup> After the training sergeant drafted the policy the County attorney, State risk management department, and the administrator re-worked the policy many times before it reached its final form. Another example of a policy the training sergeant helped create is the jail's incentive pay policy. The administrator told the training sergeant he wanted an incentive pay policy and told her what he wanted it to include and asked her to prepare a draft. Subsequently the County manager, the County financial department and the County personnel department were involved in developing this policy.

The administrator sees the training sergeant as a management employee, although he testified that she does not administer, implement or coordinate Detention Center policy.

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<sup>5</sup> A visual search is what formerly was referred to as a strip search.

He sees those responsibilities as his own. The training sergeant, however, is involved in the development of management policy and she helps administer the facility. The training sergeant does not have any authority to evaluate or recommend discipline of subordinates.

Sergeant Ross held the position of training officer prior to her promotion to training sergeant. Her responsibilities now are basically the same as they were prior to her promotion, except that she is coordinating the transition to the new facility. This requires that she coordinate the work of six transition committees and that she write policies for the new facility.

There are four shift sergeants and one juvenile sergeant.<sup>6</sup> The juvenile sergeant and juvenile corporal work Monday through Friday from 8:00 am to 5:00 pm. In addition to the juvenile sergeant and the corporal there are two detention officers. There are only two detention officers in juvenile because of the smaller number of juvenile detainees compared to the adult unit.<sup>7</sup> When the juvenile sergeant and corporal are not on duty, or two-thirds of the time, the detention officers run the shift themselves.

In the adult unit, one sergeant is assigned to each of the four shifts. Each shift also normally includes a corporal and four or five detention officers. Usually the "shift supervisor" is a sergeant, however, sometimes it is a corporal. Whether the shift supervisor is a corporal or a sergeant, he or she has the same authority as shift supervisor. There are two night shifts and two day shifts. The shifts are 12 hours long and a shift works for two days on, then has two days off, and then is on again for a three-day

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<sup>6</sup>The parties stipulated that the juvenile sergeant's duties and the shift sergeants' duties are substantially the same.

<sup>7</sup>The Employer mistakenly states in its post-hearing brief at 15, that the juvenile sergeant supervises five people.

weekend. Each shift works every other weekend. The shift sergeants work in the actual jail facility itself with the members of their shift.

At the beginning of a shift the shift supervisor conducts a "pass-on" briefing with the shift supervisor from the previous shift. At this time the outgoing shift supervisor advises the incoming shift supervisor of what transpired during his or her shift and the keys, radio and "pass-on" book are turned over to the incoming shift supervisor. Soon after a shift begins, a head count is conducted to insure that the actual count of detainees matches the count on paper at the beginning of the shift. Normally this work is done by the detention officers, but when there is not enough staff, which happens often, it will be done by the shift supervisor.

There is inadequate staff to have "post assignments." Post assignments are specific "posts" assigned to officers who only do the duties of the one job they are posted to perform. For instance, if one officer is posted to the booking area, he or she would remain in booking and only do the duties which booking entails. Since there is not enough staff to have post assignments it is necessary for sergeants, corporals and detention officers to work as a team and therefore the staff is largely interchangeable. The shift sergeant is responsible for assigning work to the corporal and detention officers. The shift sergeants can do this however they choose. Some rotate shift members through different positions and some do not. During a shift, assignments will be made to booking, the control room, transportation and the floor. Sometimes the officers ask to work a specific assignment. For example, if a detention officer is not feeling well, he may request to work in the control room. This job requires that the person watch video monitors and

is more sedentary than walking the jail every 30 minutes as other detention officers are supposed to do.

The shift supervisor has paperwork he or she must complete during the shift. This includes filling out his or her own required paperwork such as transposing payroll information from time cards to other forms and completing evaluations. A shift supervisor also reviews and approves the detention officers' completion of detainees' release records. These paperwork responsibilities take at most up to 30% or no more than 4 hours of the shift supervisors' 12-hour shift.<sup>8</sup> Furthermore, no more than 5% of that 30% figure is spent on completing evaluations of subordinates. Each employee is evaluated annually and there are only five or six staff on each shift to be evaluated.

When a shift supervisor is not completing or reviewing paperwork, he or she is walking the floor of the jail, checking for contraband, handing out meals to the detainees, answering the phone, cleaning, removing detainees from the cellblocks who have court appearances or who are to be released, performing intake interviews, taking individuals out for showers, conducting visual searches, escorting visiting lawyers or others and generally insuring that the detention officers are doing their jobs. When a shift supervisor walks through the jail he or she is observing the detainees and what is going on in the jail, in addition to making sure the detention officers are doing their jobs. When a shift supervisor performs a "walk through" he or she is looking for the same things a detention officer would be looking for. The only difference is that the shift supervisor is not

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<sup>8</sup> The record contains conflicting testimony about how much time a shift sergeant spends doing paperwork. Sergeant Roach testified she spent 30% to 40% of her time as a shift sergeant completing paperwork. Sergeant Ross testified she spent no more than 20% of her time as a shift sergeant completing paperwork. Thus, I arrived at 30% as a compromise between the two witnesses, as I found both witnesses to be very credible.



expected to walk through every 30 minutes like a detention officer who is assigned to the floor. Therefore, the shift supervisor spends around eight hours, of a twelve-hour shift, engaged in much of the same work as the detention officers.<sup>9</sup>

Several witnesses referred to the jail being short of staff. As a result, it is necessary for all members of a shift, including the shift supervisors, to pitch in and work where needed in the facility. On occasion, it is necessary for a shift supervisor to spend an entire 12-hour shift working as a detention officer because the shift is short a detention officer, or because the jail is particularly busy. In addition, as jail policy requires that female staff members deal with female detainees, female shift sergeants are often called upon to assist with female detainees when it comes to performing visual searches if a female detention officer is unavailable.

The shift staff consider the shift supervisor in charge of the shift. This is borne out by the fact that the shift supervisor has certain authority the detention officers do not possess. For instance, the shift supervisor has authority to authorize overtime, by calling someone in to work, if a shift member is absent from work. The following day the shift supervisor must explain the reason for the overtime to the administrator. In addition, requests for time off are handled by the shift supervisor. Moreover, only a shift supervisor can call a lock down, use pepper gas to control a detainee or decide to use a restrainer board to subdue a detainee. Also, if medical personnel is unavailable, it is up to

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<sup>9</sup> Again, Sergeant Roach and Sergeant Ross had different experiences in the amount of time each of them spent doing duties other than paperwork. Sergeant Roach thought she spent no more than seven hours a shift doing things other than paperwork, while Sergeant Ross testified she spent 80% of her time, or 10 hours, during a shift doing the same duties as a detention officer. Sergeant Cardon, currently a shift sergeant, testified that the only thing she does that her subordinates do not is evaluations. As a result of the foregoing, I find that the shift supervisors spend at least eight hours a shift engaging in duties similar to those performed by detention officers.

the shift supervisor to decide whether a detainee needs medical attention outside of the jail.

Although a corporal could, and has evaluated detention officers in the past, the shift sergeants normally carry out this function. Some sergeants and detention officers received training to evaluate detention officer job candidates on the B-Pad video test given to evaluate the job candidates' reactions to certain situations. In addition, the shift supervisors have authority to give verbal reprimands and recommend further discipline if necessary. Such a recommendation would go to the operations sergeant, then to the deputy administrator, then to the administrator, then to County personnel department and ultimately the County manager.

A shift supervisor periodically contacts superiors for direction in handling certain situations. A shift supervisor will likely call the operations sergeant or the deputy administrator prior to denying a detainee's visitation with someone to make sure that he or she has management's support. Likewise, if confronted with an emergency situation and the shift supervisor is unsure how to proceed, he or she will also contact the operations sergeant or the deputy administrator prior to acting. In summary, however, the shift supervisor runs the shift the way he or she wants to and is accountable for what occurs on his or her shift.

### **Corporals**

As explained above, the corporals act as the shift supervisor in the sergeant's absence. Also as previously mentioned, when the corporal is the shift supervisor he or she has the same authority as the sergeant. Some sergeants give their corporals shift

supervisor duties even when the sergeant is present. For instance a sergeant may have his or her corporal sign-off on paperwork to release detainees even though the sergeant could do it himself. Other corporals will only do this duty when they are the shift supervisors. When the sergeant is the shift supervisor, the corporal and the detention officers have basically the same duties, which are explained more fully below.

The corporals also wear the same black battle dress uniforms as the sergeants except that their shirts have gold-colored corporal's stripes. They are classified by the County's personnel classification system as C09's and a first step corporal's salary is \$17,215.

In the past, corporals have evaluated detention officers, although currently this is only done by sergeants. Other than the current way evaluations are handled, there is no distinction between a corporal's acting as the shift supervisor and a shift sergeant acting as the shift supervisor.

#### **Detention Officers**

The detention officers work throughout the Detention Center. They can be assigned to booking, transport, visitation, recreation or floor duties. Their uniforms are black battle dress uniforms consisting of black polo shirts with a badge silk-screened on to it with black trousers. The detention officer's name and a ribbon appear over his or her heart on the shirt. This position is classified as C07 on the County personnel department's classification system. The salary of a newly hired detention officer starting out at the first step is \$15,619.

When a detainee arrives at the jail a detention officer performs a medical intake interview on the detainee. During the night, weekends, or holidays, if the detention officer finds a serious medical condition he or she may ask the corporal or sergeant whether to admit the person to the jail or require the arresting agency remove the person because no medical personnel are on duty at the jail. If the person is accepted, the booking clerk uses the computer to retrieve information, if any is available, on the individual. It is necessary for the detention officer to know the detainee's criminal history in order to determine whether to conduct a "pat down" or a visual search of the detainee. After either the pat down or visual search is conducted the detainee is taken to the cellblock.

As mentioned above, the officers normally perform head counts at the beginning of each shift. This is also done before "chow time." When the detainees are given meals, the trustees<sup>10</sup> with the assistance of one or two officers distribute meals three times a day. If the shift is short on staff, the shift supervisor will help do this job. At night, the detention officers clean the facility with the help of the trustees. Shift supervisors have been known to assist with these responsibilities as well.

The detention officers' other duties include completing paperwork associated with bookings, releases and showering detainees. In addition, each time an officer does a cell check he or she is supposed to make a log entry. Officers assigned to floor duty are supposed to walk around the jail, observe the detainees and look for contraband every 30 minutes. Some officers actually do this less frequently. A "walk through" could take as little as five minutes, but should take between fifteen and thirty minutes to complete. In

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<sup>10</sup> A trustee is a detainee who has been assigned to work in the kitchen.

addition, they are responsible for obtaining necessary supplies and toiletries for the detainees. The officers must also handle phone calls regarding court appearances and scheduling matters for detainees and assist with escorting visitors into the facility if necessary. Normally, one officer is assigned to the control room to monitor the activities of the jail from approximately 20 video monitors. All of the doors in the jail are controlled electronically from this room. The control room is also where the bond box and keys are kept.

The shift supervisor assigns detention officers to their work assignments, however, detention officers can and do request certain assignments and depending on the shift supervisor and the circumstances such a request may be granted. Due to some problems in the past, detention officers are not supposed to carry the shift supervisor's keys. The detention officers are also not allowed to carry the keys to the bond box and they are not supposed to sign over the bonds that are received during a shift.

### **Booking and Records**

The booking and records department is run by a detention officer. One booking clerk and one records clerk report to the booking and records officer. The booking and records officer reports to the operations sergeant.

### **Medical Services and Meals**

Medical services at the jail are provided by medical technicians. They work during the day shift, Monday through Friday. In addition to tending to the medical needs of the detainees, the technicians or a booking officer, determine during a medical screening at the time of booking if a person has psychological problems.

The jail contracts with an outside business to provide meals for the detainees. The staff and trustees distribute the meals to the detainees three times a day.

### **Hire/Promotion/Discipline**

The Detention Center's hiring process consists of the following steps. First, the County advertises for a detention officer vacancy. Second, the applicant completes a County employment application form. If the application is deemed acceptable the personnel department administers a written test for hiring detention officers. If the applicant passes that test, then the applicant sits for the B-Pad. After personnel receives the candidate's B-Pad score it is combined with the individual's education and experience to create an eligibility list of qualified candidates for the administrator to examine. The administrator prefers not to simply hire the person at the top of the list without conducting interviews. He conducts personal interviews of the qualified candidates and he has the final say as to who is hired. Once someone is selected he or she must successfully complete a drug screening test and then undergo a psychological test. After being hired, the new detention officer must complete a six-month probationary period.

The shift sergeant completes the six-month evaluation of the new detention officer. According to the administrator, the shift sergeant's evaluation of the officer plays a role in someone's removal from probationary status, but permanent status is not totally dependent on the shift sergeant's assessment of the individual. In fact, generally when a shift sergeant completes an employee's evaluation, the administrator may seek out additional comments on a particular detention officer rather than relying exclusively on a sergeant's evaluation. After a sergeant completes the evaluation then it is reviewed and

signed by the deputy administrator who passes it on to the administrator for his review and signature. In these matters, a sergeant can be overruled by the deputy administrator and/or administrator and this has occurred in the past. The administrator can also overrule a sergeant's suggestion that someone not be retained after the probationary period. However, even the administrator may only recommend continuing an employee's probationary status to the County personnel director and County manager. They have the final say on such matters. In fact, the County manager has ignored the administrator's decisions to hire and terminate certain individuals.

The Detention Center also has a personnel selection, retention and promotion policy. According to the policy the following factors will be considered when hiring, retaining and promoting personnel: written tests; oral interviews; background investigation verification; physical examination on new hires and when necessary in considering retention and promotion; job performance; special qualifications; and the needs of the facility.

At the Detention Center, promotions are a result of the administrator determining a need exists for additional positions and the necessary arrangements are then made with the personnel department to post the positions. Then tests, developed by the administrator and training sergeant, are given to the candidates and interviews conducted. It is preferable for a panel of persons from outside the jail to conduct the interviews. Ideally, the panel contains no jail staff to avoid the appearance of favoritism. This was not the case, however, when the County created the corporal position. Although the administrator could not recall the exact makeup of that panel, he testified that some

sergeants from the facility participated in the interview process. Additionally, the administrator testified that an employee's evaluations are a factor in his or her being considered for a promotion. The facility also has a policy stating that performance appraisals shall be considered in deciding promotions, disciplinary matters and other personnel actions.

As mentioned previously, the shift supervisors have authority to issue verbal reprimands and recommend further discipline if they believe it is warranted. This policy is also found in the Detention Center's policy manual as well as the County's personnel manual. If an employee receives a reprimand, it is retained for a year in his or her personnel file then purged. Any actual disciplinary action requires at the very least the deputy administrator's concurrence with the sergeant's recommendation, if not the administrator's agreement as well. In fact, the administrator said the only authority he has is to give a verbal or written reprimand.<sup>11</sup> He testified that anything of substance is done by the County manager. Only the County manager has authority to administer any greater discipline than an oral or written reprimand including suspension of an employee without pay or termination.

#### **Labor Relations**

The County will handle the Detention Center's labor relations matters. The administrator believes he will be involved and perhaps two additional unnamed Detention Center staff members.

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<sup>11</sup> Pursuant to policy, a written record must be made of verbal reprimands.



#### IV. Discussion and Analysis

The Employer argues that the sergeants are supervisors and therefore must be excluded from the petitioned-for unit. The Petitioner argues that the sergeants do not meet the statutory requirements to be declared supervisors under the PEBA.

##### Sergeants

The Detention Center employs nine sergeants. The Employer does not argue that the training sergeant is a supervisor. The remaining eight sergeants are the four shift sergeants, the classification sergeant, the transport sergeant, the juvenile sergeant and the operations sergeant.

The PEBA excludes supervisors from bargaining units because they are considered an extension of the employer. As representatives of the employer it would create an impermissible conflict to include them in a bargaining unit. Whether an employee is a supervisor depends upon his or her duties, and not his or her job title or classification. *New Mexico State University*, 1 PELRB No.13 (1995) (hereinafter *NMSU*). Therefore, if a disputed employee's duties demonstrate that his or her job meets the definitional requirements set forth in the Act, then he or she must be excluded from the proposed unit.

Section §4(S) of the PEBA defines supervisor in the following way:

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

The Board adopted the following analysis for determining whether an employee is a supervisor in *Jemez Valley Public Schools*, 1 PELRB No.10 (1995) (hereinafter *Jemez Valley Public Schools*): the employee must (1) devote a *substantial* amount of work time to supervisory duties; (2) *customarily* and *regularly* direct the work of *two or more other employees*; and (3) have *authority* in the interest of the employer to *hire, promote or discipline* other employees or to *recommend such actions effectively*. If these requirements are met the analysis continues to determine whether the disputed employee's exercise of supervisory duties is (i) merely *routine, incidental or clerical*; or (ii) if he or she only *occasionally* assumes supervisory or directory roles; or (iii) if he or she performs duties which are *substantially similar* to those of their subordinates; and finally (iv) it does not include lead employees or employees who participate in peer review or occasional employee evaluations programs. Even if the initial three-part test is met, if any of the subsequent questions found in the definition can be answered in the affirmative, the employee is a lead worker, or participates in peer review or occasionally evaluates an employee, then the employee is not a supervisor.

I apply the above analysis in a slightly different order for the sake of clarity. Accordingly, I begin by considering whether the sergeants customarily and regularly direct the work of two or more other employees. The answer is an unqualified yes. There are normally at least two, if not more subordinates working with the sergeants. The sergeants direct their subordinates through assigning their work, overseeing their work and evaluating their work. It is significant that the sergeants evaluate the work of their subordinates and that they have authority, as explained more fully below, to recommend

discipline of subordinates. The ability to evaluate and the authority to recommend discipline are important on the issue of directing other employees. Why? Because merely assigning work or monitoring the quality of work is trivialized if such authority is not accompanied by the ability to impact the behavior of those who are being assigned work or monitored. The conflict of interest underlying the supervisory exclusion is only present when a supervisor who directs subordinates has significant authority over terms and conditions of employment, that is, matters within the scope of union representation. In this case, the sergeants' overseeing and reviewing subordinates' work constitutes direction because the sergeants' possess other significant discretionary authority to affect their subordinates' terms and conditions of employment. Specifically, the sergeants have authority to issue oral reprimands and recommend more severe discipline. In addition, the sergeants have authority to authorize overtime and to grant time off. Therefore, the sergeants meet the requirement that they direct the work of two or more other employees.

Next, I consider whether the sergeants have authority in the interest of the employer to hire, promote or discipline other employees or effectively recommend such action. When something is done in the interest of the employer it is done to effectuate the employer's established policies. This is to be contrasted with decisions made by an employee based upon professional norms and standards. For instance, some work done by public works employees may be made upon industry-wide standards or norms for laying pipe or creating a safe work site, as opposed to simply carrying out employer policy. In addition, although the PEBA's definition of supervisor does not explicitly contain a requirement that an alleged supervisor exercise independent judgment, an implicit

requirement exists because the alleged supervisor's exercise of supervisory authority is "not to include individuals who perform merely routine, incidental or clerical duties."

The Employer argues that the sergeants are an essential part of the hiring process. According to the Employer, all employees of the County are tentatively hired subject to the satisfactory completion of a probationary period. Further, the Employer states, the process for removing an employee from probationary status and hiring them as a permanent employee is almost entirely dependent upon the recommendations of the sergeants.

The Employer's broad view of the "hiring process" is not supported by its own personnel manual or testimony of the administrator. When an employee is hired he or she is put on probation for six months. After six months the Employer, based on an evaluation performed by the employee's supervisor, decides whether to *retain* the employee, not to hire him or her. Furthermore, the personnel manual defines a probationary employee as:

A full-time or part-time employee *hired* to fill a position in the classified service who has not yet completed the probationary period of employment during which time the employee is terminable-at-will. (emphasis added)

The personnel manual also states that probationary employees accrue leave and are entitled to employee benefits. In addition, the "hire-in-date" is considered the beginning of the probationary period. Moreover, according to the manual, the probationary period is an integral part of the *evaluation* process, not the hiring process, and it is utilized for observing an employee's performance. Furthermore, the administrator's testimony does not support the Employer's argument regarding the use of the six-month probationary period evaluation. The administrator testified that a sergeant's evaluation of an officer

plays a role in the officer's removal from probationary status, but that the officer's permanent employee status is not totally dependent on the sergeant's assessment. In fact, the administrator testified that he usually seeks additional comments on an individual's performance rather than exclusively depending upon the sergeant's evaluation. Therefore, I do not find that the sergeants' completion of the six-month evaluation of probationary employees has anything to do with *hiring* those employees.

The Employer also mentions the sergeants' participation in "selection panels" for the "initial tentative hiring of employees."<sup>12</sup> Although it is unclear, I believe this is a reference to the sergeants' participation in the evaluation of B-Pad test takers. Again, the B-Pad is a test designed to evaluate how job applicants would respond to certain situations. The test consists of video-taped situations the applicant watches and then role-plays with or interacts with. The actual testing is also video-taped. Afterwards, the detention officer, corporal or sergeant reviews the applicant's responses and assigns the test taker a score. The results are then turned over to the personnel department. The staff member only knows whether the test taker passed or failed the B-Pad, and not whether the applicant will be hired or even how much weight will be given to the B-Pad score. The personnel department only considers the B-Pad results as a factor in whether to place someone on an eligibility list. Additional factors include previous detention center experience, military experience and education. Once the eligibility list is prepared it is up to the administrator to interview and hire new employees. Therefore, I find the sergeants who do B-Pad evaluations do not have what amounts to real authority to even recommend

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<sup>12</sup> Employer's post-hearing brief at 16.

hire. Moreover, since participation in the B-Pad process is not the exclusive province of the sergeants, but a responsibility shared with lower ranks, and the fact that it is only done by some, and not all, of the sergeants leads to the conclusion that this does not fall within the statutory ambit of supervisory authority to hire or recommend hire. Consequently, I find that the sergeants do not have authority in the interest of the employer to hire or recommend hire.

The definition also lists the authority to promote, or recommend promotion, as an indicator of supervisory authority. The Employer argues that the sergeant's evaluation of an employee is relied upon for promotion purposes. According to the Petitioner, the sergeants' evaluations and recommendations may be overruled by the deputy administrator or administrator and are only used to guide the administrator in his instruction to officers. Indeed, the evaluations are subject to the approval and signature of the deputy administrator and administrator, but this does not eradicate the sergeants authority to recommend promotion. Although evaluations play only a part in a decision whether to promote an individual, an individual must also be qualified for the position and successfully interview for the position, evaluations are considered in the decision whether to promote someone. This is confirmed by the facility's policy manual which states that performance evaluations shall be considered in promotions. Furthermore, the sergeants do this work in the interest of the employer and must exercise independent judgment when evaluating their subordinates. Although some of the sergeants' authority to direct could arguably be labeled routine or clerical in nature, or performed in furtherance of

professional norms, their authority to evaluate requires they exercise independent judgment. Therefore, I find that the sergeants have authority to recommend promotion.

Authority to discipline, or effectively recommend discipline is the final example of supervisory authority in the Act. The sergeants do have authority in the interest of the employer to discipline or recommend discipline. Again, when exercising this authority the sergeants are not merely making decisions based on professional norms or standards, but they are effectuating employer policy. Even though the only discipline they may administer is a verbal reprimand, the record reflects that they do exercise this authority. Sergeants have also recommended more severe disciplinary measures which the administration has on occasion followed. Thus, the sergeants have authority in the interest of the employer to discipline or recommend discipline.

Next I consider whether the sergeants devote a substantial amount of work time to supervisory duties. This requirement will be considered along with the concomitant statutory requirement that an alleged supervisor perform duties which are substantially different from those of his or her subordinates. The overlap between these two elements of the supervisory definition suggests analyzing them at the same time is more helpful than attempting to examine them separately. The sergeants engage in the following statutorily defined supervisory duties: they direct their subordinates through assigning work, overseeing the work of subordinates, and evaluating subordinates. They also have authority to recommend promotion, authority to discipline and authority to recommend discipline in the interest of the employer.

The issue is whether these supervisory duties comprise a substantial amount of the sergeants' work time. The Act does not define what substantial means, and the Board has not articulated exactly how it intends to interpret "substantial", however, the Board has found alleged supervisors' exercise of supervisory duties 25% of their work time to be insufficient to meet this requirement. *NMSU*. In this case, the witnesses expressed reticence about attaching percentages to what they considered supervisory duties because all the sergeants at this facility do not exercise the same degree of initiative or demonstrate the same degree of authority. Even so, I found that the sergeants spend approximately 30% of their time engaged in completing paperwork, some of which consisted of the supervisory duties of performing evaluations and reviewing subordinates paperwork. Most of that time, however, consists of the sergeant filling out his or her own paperwork. The amount of supervisory direction undertaken by the sergeants also appears to vary from sergeant to sergeant. The facts further demonstrated that the amount of time a sergeant spends directing may be limited, or nearly eliminated, depending on how busy and how short-handed a staff may be. Normally, even when a shift is not short-handed, when performing his or her supervisory role as shift supervisor, the sergeant spends up to 8 hours during a 12-hour shift engaging in the same types of work as his or her subordinates.

As a result, I conclude that the sergeants' supervisory duties do not take up a substantial amount of their work time. Repeatedly witnesses, including the administrator, referred to the facility being short-handed. This circumstance appears to have fostered a teamwork situation, whereby the members of a shift know what needs to be done, and



under the direction of the sergeant, or corporal, everyone does whatever is required during the shift. This teamwork mentality requires that the shift supervisor, be it a sergeant or corporal, pitch in and do the same work along side his or her subordinates because the efficient operation of the shift requires it. The Employer attempted to downplay these instances of the sergeant doing the same work as his or her subordinates by asserting that when this occurs the sergeant is also overseeing the work of subordinates and undertaking on the job training. The Employer appears to be arguing that even when the sergeant is doing the same work along side his or her subordinates he is doing it in a supervisory manner. Although it is conceivable that the sergeant is overseeing the work of subordinates while doing work with them, I find it unlikely given the facility's difficulties with staffing that every time a sergeant works along side a subordinate it is done for overseeing or training purposes. The fact that the jail is short-handed suggests that such use of personnel would be a luxury the Detention Center cannot afford.

Furthermore, there are some duties that when undertaken by a sergeant, such as conducting a visual search or showering a detainee, that would be impossible for the sergeant to be supervising anyone else at the same time because of the nature of the duty they are doing at that moment. One cannot perform a visual search of a detainee in one part of the facility and be overseeing the work done by detention officers on the floor of the jail at the other end of the building at the same time.

Moreover, as one of the Employer's witnesses testified, during a shift a sergeant may have to act as a detention officer the entire 12-hour shift. Also, the juvenile sergeant, who the parties stipulated has the same duties as the adult sergeants, is only on duty

Monday through Friday during the day shift. The other two-thirds of the time the two juvenile detention officers simply do their work without a sergeant. According to the administrator the juvenile detention officers "... take care of the shift, and in the event that they have a problem, they rely upon the adult section to assist them or to come to their aid."<sup>13</sup> The fact that the juvenile detention officers are without supervision two-thirds of the time leads me to conclude that they know what needs to be done on their shifts and are able to do their work without supervision.

Therefore, based on an examination of the actual job duties of the sergeants, and not merely what the Employer's expectations of what the sergeants should be doing, the sergeants do not meet the supervisory requirement that they devote a substantial amount of work time to supervisory duties, nor do they perform duties which are substantially different from their subordinates. The fact that the Detention Center is short-handed influences how much time the sergeants devote to their supervisory duties and the nature of the duties in which they engage. As a result of the foregoing analysis, I find that the sergeants are not supervisors within the meaning of the PEBA. This is not to say that they do not have supervisory authority. I found that they do possess supervisory authority in the areas of promotion and discipline. The Act, however, requires an alleged supervisor also devote a substantial amount of work time to supervisory duties and perform duties that are not substantially similar to those of his or her subordinates. The sergeants' duties do not meet these requirements.

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<sup>13</sup> Tr. 50-51.

## Operations Sergeant

According to the Employer, the sergeants, except for the training sergeant are all supervisors and should be considered supervisors as a group. Although the Employer did not argue that the operations sergeant should be considered separately from the other sergeants, I cannot ignore how different her job duties are from the other sergeants. There is a degree of interchangeability among the other sergeants that does not apply to the operations sergeant. Therefore, I will consider her supervisory status separately from the other sergeants.

The operations sergeant customarily and regularly directs the work of two or more employees as the sergeants, the booking officer and the maintenance worker all report to her. She directs their work by reviewing, for accuracy and completeness, the paperwork completed by the sergeants; overseeing their work and evaluating their job performances. In addition to her authority to evaluate the other sergeants, she also has authority to discipline or recommend discipline. As explained above, the authority to direct another employee rings hollow unless that authority is backed up with detrimental consequences for an employee who does not do as he is directed. Supervisory authority to direct must include discretionary authority to impact a subordinate's terms and conditions of employment. Here, as with the other sergeants, the operations sergeant can meaningfully direct the work of others. The operating sergeant possesses significant discretionary authority affecting the employment of her subordinates. As further evidence of her authority to direct I note that the operations sergeants holds monthly sergeants' meetings

and I find significant the administrator's testimony that the operations sergeant is responsible for insuring that the facility's policies and procedures are communicated to and carried out by staff

Next I consider whether the operations sergeant has authority in the interest of the employer to hire, promote or discipline. For the same reasons articulated above regarding the other sergeants, I do not find that the operations sergeant has authority to hire. The operations sergeant, however, does have authority to recommend promotions to the same extent that the sergeants do as a result of her duty to evaluate her subordinates. Furthermore, the County's personnel manual and Detention Center's policy manual give her authority to discipline or effectively recommend discipline because she is considered the sergeants' supervisor. She is the sergeants' first-line supervisor, and part of the disciplinary hierarchy for the detention officers and corporals. The operation sergeant's exercise of this authority requires independent judgment and is not routine or clerical. Therefore, I find that she also has authority to discipline or recommend discipline in the interest of the employer.

Does the operations sergeant devote a substantial amount of time to these supervisory duties? From the record it is clear that the operations sergeant's work time is devoted almost entirely to her supervisory duties or administrative duties she does not share with the other sergeants. The operations sergeant does not work in the jail like her subordinates, she works more closely with the deputy administrator and administrator on almost exclusively administrative matters. Much of her day is spent reviewing forms and paperwork filled out by the sergeants and when she finds an error she goes to the sergeant

responsible for making the correction. In addition, if a sergeant is faced with an emergency situation or unsure of how to proceed he or she will contact the operations supervisor, deputy administrator or administrator. This is true even during nights, weekends or holidays. Also, prior to denying a visitation a sergeant will contact the operations sergeant, deputy administrator or administrator to make sure his or her decision will be supported by the administration. This indicates a perception that the operations sergeant is aligned with management more so than the rank and file. Furthermore, the operations supervisor not only evaluates the sergeants and reviews their paperwork, but also holds their monthly meetings to discuss changes at the facility. Finally, when the administrator leaves the building during the day he relies upon the operations sergeant and the deputy administrator to run the facility. As a result, I find that the operations sergeant devotes a substantial amount of work time to supervisory duties.

Next it is necessary to consider whether the alleged supervisor's duties are substantially different from those of his or her subordinates. In this case, the operations sergeant's subordinates, the sergeants, have daily continual contact with the detainee population. Because the facility is often short-handed, it is necessary for the sergeants to work along side the detention officers and perform similar duties. The operations sergeant, on the other hand, has little contact with the detainees. The only time she interacts with the detainees is when a detainee files a grievance that a detention officer or sergeant cannot handle, for instance concerning a detention officer or sergeant. Otherwise, she stays in the administrative part of the building and has little contact with the actual members of a shift. Moreover, her responsibilities regarding the facility's

maintenance and repair further distinguish her duties from the other sergeants. Finally, she rarely would have to fill in for a shift sergeant, and if she is absent the deputy administrator or classification sergeant fills in for her.

Based on the foregoing facts, I conclude that the operations sergeant does not perform duties which are substantially similar to those of her subordinates. Therefore, the operations sergeant satisfies the definitional requirements for supervisory status under the PEBA. I find and conclude that the operations sergeant is a supervisor under the Act. Although it may appear awkward to find a person of a like rank to her actual subordinates to be their supervisor, I must apply the law to the facts before me regardless of job title or rank. In this case, the Employer placed a sergeant in a position to oversee and evaluate other sergeants. Contemplating her actual job duties makes her supervisory status inescapable. It is not implausible that the operations sergeant is a supervisor under the Act, and that the remaining sergeants are not supervisors since their job duties are very different. Furthermore, the Employer's argument that the training sergeant is not a supervisor, but a management employee, demonstrates that it is possible to distinguish among the actual duties of the sergeants and arrive at different conclusions based upon the job a particular sergeant does.

#### **Training Sergeant**

As previously mentioned, the Employer argues that the training sergeant is a managerial position and therefore the training sergeant should be excluded from the petitioned-for unit. The Employer contends that the training sergeant functions as a management employee, interacts with the administrator and that she has no responsibility

for any of the routine functions concerning the operation of the facility. Further, the Employer points to the job summary of the training sergeant's job description which states, that the training sergeant is "...responsible for the development and implementation of the facility training programs." The Employer also emphasizes a facility policy on training and development that reads as follows:

The facility requires that the Center's training programs are specifically planned, coordinated and supervised by a qualified Training Coordinator at a *managerial* level, on a full-time basis and that the Training Coordinator receives specialized training for the position. (emphasis added)

According to the Employer, the training sergeant exercises a great deal of independent judgment in carrying out her duties and she does not merely function in a mechanical capacity directing others in the name of the employer.

The Petitioner alleges that the training sergeant performs no management duties under the PEBA and therefore she should not be excluded from the bargaining unit. The Petitioner argues that the training sergeant's administrative duties are a result of the County's unwillingness to hire administrative staff and that her role with regard to developing policy is limited to that of "scrivener." According to the Petitioner, the training sergeant's training function is merely clerical in nature and consists of her maintaining the officers' training records. The Petitioner also erroneously states that the PEBA does not specifically define managerial employee, and urges the Board adopt the National Labor Relations Board (NLRB) caselaw standard on managerial employees.<sup>14</sup> Additionally, the Petitioner argues that the County is withholding from the training

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<sup>14</sup> The Petitioner does, however, indicate its awareness of the PEBA's definition of managerial employee at two other places in its post-hearing brief.

sergeant the appropriate rank of lieutenant indicating discrimination on the basis of gender in violation of public policy and argues that such discrimination is not in accord with the PEBA's guarantee of assurances of the fullest freedom in exercising rights under the PEBA. Finally, the Petitioner also argues that it can be inferred from the training sergeant's status as union president that elimination of all the sergeants from the unit "effectively destroys the unit." According to the Petitioner this constitutes illegal discrimination against the training sergeant and other sergeants for their union activity.

The PEBA requires the exclusion of management employees from appropriate bargaining units. The key inquiry when determining whether an individual is a management employee is deciding whether the duties and responsibilities of the employee, who exercises discretionary authority on behalf of the employer, is such that the individual should not be placed in a position requiring him or her to divide his or her loyalty between the employer and the union. *Jemez Valley Public Schools*. Section §4(M) of the PEBA defines a management employee as:

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

The definition consists of a two-part test: an employee will be deemed a managerial employee if he or she is (1) primarily engaging in executive and management functions; and (2) developing, administering, or effectuating management policies, which requires the employee do more than merely participate in cooperative decision making programs on an



occasional basis. *Jemez Valley Public Schools*. Both parts of the test must be met to support a finding of managerial status under the Act.

Is the training sergeant primarily engaged in executive and management functions? This part of the definition has been interpreted to require the alleged managerial employee possess and exercise a level of authority and independent judgment sufficient to significantly affect the employer's purpose. *Jemez Valley Public Schools*. Examples of such authority include exercising independent judgment to establish policies and procedures, preparing budgets, or assuring effective and efficient operations. Managerial employees must exercise discretion within, or even independently of established employer policy and must be aligned with management...[A]n employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy. *NLRB v. Yeshiva University*, 444 U.S. 672, 103 LRRM 2526 (1990).

The training sergeant is responsible for drafting and updating the Detention Center's policy and procedures manual. The training sergeant, however, does not have discretion in the performance of this duty independent of the employer's established policy. In fact, the training sergeant, either upon her own suggestion, the administrator's or a fellow employee's, "pirates" a policy from another institution or agency and tailors it to fit the Detention Center. According to the administrator, the training sergeant does not determine whether to create or "pirate" a policy, but she may bring an issue to his attention and they will discuss it. Then, and only after he directs it, is a policy generated. Afterward, the administrator reviews it and makes whatever changes he believes are

necessary. In some instances policies are subject to additional layers of review and revision by the County attorney, County manager, County personnel department, County financial department and State risk management office. As a result of the foregoing I do not find that the training sergeant's drafting policies for the policy manual requires that she exercise independent judgment to establish such policies and procedures.

This conclusion is supported by the philosophy statement in the Detention Center's policy manual which declares that the facility's policies will be drafted by the administrator and approved by the County manager. The very first policy that appears in the policy manual states that the administrator will, as required, amend and change policy and procedures to comply with the County commission recommendations. The policy also states that authority for implementation of this policy is delegated to the administrator. The policy goes on to state that all employees shall be encouraged to actively participate in policy and procedure development. This information indicates that it is the administrator who actually has authority to establish policy and procedures. Although the training sergeant plays an important role in drafting these documents, she does not possess the requisite discretionary authority necessary for a finding that she controls or implements employer policy.

Consequently, I find that the training sergeant does not engage primarily in executive or management functions. Although failure to meet the first prong of the managerial test is sufficient to conclude the training sergeant is not a management employee, I will also examine the training sergeant's duties in light of the second prong of the test.

The second prong of the managerial test has been read to mean the following:

*developing, administering, or effectuating management policies* should require an employee create, oversee, or coordinate the means and methods for achieving policy objectives and determining the extent to which the policy objectives will be achieved. This requirement should mean more than mechanically directing others in the name of the employer. It should be read to require an employee have meaningful authority to carry out management policy. *Jemez Valley Public Schools*.

The following illuminating exchange occurred between the Employer's representative and the administrator during the hearing:

- Q. (By the representative) Okay. So is it fair to say that she [the training sergeant] develops these management policies?
- A. (By the administrator) It would be fair to say that she is involved in the development of the management policies.
- Q. And is it also fair to say that she is -- she administers these management policies?
- A. Administers, that's a tough word, I think that's my job.
- Q. Okay. Does she make sure that they get in place?
- A. She disseminates the policies, yes.
- Q. Do does she implement them, effectuate them?
- A. No, I would not say that she actually I implements them. I think she provides them to those people who need to implement them, and I would go back to the operations sergeants, the shift sergeants, all of the sergeants that implement them within their supervision or whatever, their little organization.
- Q. So she coordinates that implementation with all of the sergeants by providing the information to them?
- A. I don't like the wording that you are using. I wouldn't say she coordinates it, she insures that they are provided with the information.

The administrator's description of the training sergeant's duties are consistent with the policy manual's description of her role concerning policy and procedure approval.

According to the policy manual:

The proposed document(s) shall be forwarded to the Administrator. The Administrator may disapprove or defer action on the proposal. When approved, the Administrator will forward it to the Procedures Coordinator [training sergeant]. After final typing is completed, the Coordinator shall arrange printing, publication and distribution of the document.

The record reflects that the training sergeant is a trusted and valued employee. In fact, the administrator lamented the fact that she does not hold a higher rank and that she is not paid more money. However, when describing how heavily he relies upon the training sergeant the administrator explained he depends upon her, "... almost like an administrative assistant."<sup>15</sup> The administrator's candid explanation of his dependence on the training sergeant is not consistent with the Employer's legal argument that the same employee is a managerial employee.

The training sergeant's "pirating" of policies from other institutions and tailoring them to fit the Detention Center and then turning them over to the administrator does not amount to an executive or managerial function. Neither does her coordination of information to be distributed to employees or maintenance of training records. Likewise, the fact that the training sergeant's job summary states that she is responsible for the development and implementation of the facility's training programs is not dispositive on the issue of managerial status. Just because a job description includes the words "development" and "implementation", or a policy calls a position "managerial", does not transform a position into a managerial one within the meaning of the PEBA. What really matters is the employee's actual job duties. Here the training sergeant's job duties are not those of a managerial employee.

Moreover, the training sergeant performed the same training and policy manual duties prior to her promotion to sergeant. The only other significant responsibility that she also performs now, and did not as an officer, is her coordination of the six transition

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<sup>15</sup> Tr. 63.

committees regarding the move to the new facility. Her responsibilities regarding the move also include her working on policies for the new facility. Given the training sergeant's abilities and the administrator's confidence in her, it is not surprising that he assigned her this task. Although these responsibilities are important and currently occupy a lot of the training sergeant's time, this responsibility alone without the ability to exercise independent judgment or discretion does not make the training sergeant a managerial employee.

Next, I consider some of the Petitioner's arguments. I decline the Petitioner's invitation to adopt the NLRB's managerial analysis as the PELRB has already endeavored to create its own caselaw on the subject. *Jemez Valley Public Schools*. The Petitioner also argues that the County is withholding the proper rank of lieutenant from the training sergeant indicating discrimination on the basis of gender. According to the Petitioner, such discrimination is contrary to the efficient administration of government and "the harm" would only be exacerbated if the training sergeant were excluded from the unit.<sup>16</sup> When the Petitioner first raised this argument during the hearing I expressed doubt about the PEBA's application to a claim of gender discrimination and about the PELRB's ability to address such an allegation. Even though the argument is now moot, as the training sergeant is not excluded from the unit, the Petitioner has nevertheless failed to persuade me that the PELRB is the proper forum for attempting to redress an allegation of gender discrimination.

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<sup>16</sup> Petitioner's post-hearing brief at 26.

Lastly, I consider the Petitioner's contention that the Employer's efforts to exclude the sergeants from the petitioned-for unit constitutes illegal discrimination by the Employer against the sergeants for their union activity. As proof of anti-union animus the Petitioner points to the Employer representative's clumsy distribution of an organizational chart containing the word "activist" scribbled next to certain sergeants' names and the fact that the training sergeant is the union president. While these facts *may* constitute a prima facie case of anti-union animus, they come no where near demonstrating a violation of the PEBA. In fact, the Petitioner argues that it can be "inferred" from the training sergeant's status as union president that elimination of all sergeants "effectively destroys the unit." As the Petitioner knows, however, cases cannot be made upon inferences, but rather require proof. Furthermore, even if the Petitioner has sufficient proof to show a violation of the anti-discrimination provisions of the Act, this proceeding is not the place to raise such issues. For future reference, as this argument is also rendered moot by my conclusions regarding the sergeants and training sergeant, if the Petitioner believes an employer is committing a prohibited labor practice it should file a prohibited practice charge, not raise such an allegation in a post-hearing brief to a representation proceeding.

Thus, for the reasons outlined above, I find and conclude that the training sergeant's actual job responsibilities, authority, and relationship to management do not establish that she is a managerial employee within the meaning of the PEBA.

## V. Conclusions of Law

1. The shift sergeants, classification sergeant, transport sergeant, and juvenile sergeant are not supervisors within the meaning of the Act and are therefore appropriately included in the petitioned-for unit.
2. The operations sergeant is a supervisor within the meaning of the Act and therefore is excluded from the petitioned-for unit.
3. The training sergeant is not a managerial employee according to the Act and therefore is appropriately included in the petitioned-for unit.

## 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 Communications Workers of America, Local 7911 and "No Representation."

### Unit

All Dona Ana County Detention Center employees in the following job classifications.

#### Included:

Detention officer, juvenile detention officer, detention corporal, juvenile detention corporal, booking officer (clerks), medical technicians, shift sergeants, classification sergeant, transport sergeant, juvenile sergeant and training sergeant.


#### Excluded:

All management employees, supervisors, confidential employees, the operations sergeant and all others.

## VII. Request for Review

Pursuant to Board Rule 2.15 any party may file a request for Board review within ten work days after service of this Decision. The request for review shall state the specific findings, conclusions, or recommendations to which exception is taken and shall identify the specific evidence presented or offered at the hearing that supports each exception. The request may not rely on any evidence not presented at the hearing. Within ten work days after service of a request for review, any other party may file and serve on all parties a response to the request for review.

Issued in Albuquerque, New Mexico, on September 14, 1995.

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