1 PELRB No. 19

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In the Matter of

Local 7911, Communications Workers of America, AFL-CIO,
Petitioner,
and
Doña Ana Deputy Sheriffs' Association,
Fraternal Order of Police,
Petitioner,
and
Doña Ana County,
Public Employer.

DECISION AND ORDER

On October 14, 1995, a hearing officer (HO) 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 Doña Ana Deputy Sheriffs' Association, Fraternal Order of Police and Doña Ana County*, Case Nos. CP 20-95(C) and CP 23-95(C). On April 19, 1996, the HO issued a supplemental report in the cases pursuant to the PELRB's decision of January 12, 1996.

The proceedings commenced when Local 7911, Communications Workers of America (petitioner or CWA), filed a certification petition (CP) in Case No. CP 20-95(C) with the Public Employee Labor Relations Board (PELRB or Board) on January 18, 1995, seeking to represent a bargaining unit composed of approximately 55 positions with job titles such as sergeant, deputy, corporal, and investigator I and II in the Sheriff's Department for Doña Ana County (County or

public employer). On February 27, 1995, the Doña Ana Deputy Sheriffs' Association, affiliated with the Fraternal Order of Police (FOP), filed a petition in Case No. CP 23-95(C) to represent the same positions petitioned-for by CWA as well as seeking to represent the position of lieutenant.

The parties' agreed to consolidate the cases for hearing on July 25 and 26, 1995. 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 HO issued a report and recommended decision with findings of fact and conclusions of law: (1) the positions of lieutenant and support services sergeant are each a "supervisor" as that term is defined in the Act at § 4(S) and should be excluded from the bargaining unit; and (2) the positions of investigator II and patrol sergeant are not supervisors and, therefore, are appropriate for inclusion in the petitioned-for bargaining unit.

COUNTY'S EXCEPTIONS TO REPORT AND PETITIONERS' ANSWERS

Pursuant to Rule 2.15(a)[1] the County excepts to the following: (1) the HO's report was not issued within 15 workdays following close of the hearing as required by Rule 2.14 so "the

---

[1]Rule 2.15(a) states in relevant part:

> Within 10 days after service of the Hearing Officer's report...any party may file a request for Board review of the Hearing Officer's...recommended disposition. The request for review shall state the specific portion of the hearing officer's...recommended disposition to which exception is taken and the factual and legal basis for such exception. The request may not rely on any evidence not presented to the hearing officer[.] The request must be served on all other parties.

employer requests that the Board reject the report until such time as it complies with the Board rule"; (2) the HO's reliance on testimony from Sergeant Segovia because the County was not allowed to cross-examine him about "relevant portions of his employment record which would have a direct bearing on his credibility as a witness and his fitness for understanding the proper role and duties of a supervisor"; (3) the HO's failure to allow the County to examine Sergeant Segovia in "closed session" violates the County's "right to due process which is guaranteed in the [PEBA] Section 12 B.[2]; (4) the HO discounts the undersheriff's and support services sergeant's testimony regarding the amount of time devoted to supervisory duties; (5) the HO's conclusion that patrol sergeants no longer review the reports of their subordinates is "factually incorrect"; (6) the HO's conclusion that "certain administrative duties are not supervisory" such as "completing the shift roster. This is absurd!"; and (7) the HO's computation of time devoted to supervisory duties and time devoted to performing work substantially similar to that of their subordinates is mathematically incorrect.

Pursuant to Rule 2.15(b) petitioner CWA filed a response to the County's exceptions.[3] CWA argues that (1) the time limits in the Board's rules are directory, not mandatory, and there is no demonstration of prejudice to the County by the HO's delay in the issuance of her report

---

[2]10-7D-12. Hearing procedures., states:

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

[3]Rule 2.15(b) states that "[w]ithin 10 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." FOP did not file a written response to the County's exceptions.

and recommended decision[4]; (2) the County was not prejudiced by the HO's decision to disallow questioning of Sergeant Segovia's employment history because the County's reason for doing so is intended to intimidate and harass and personnel matters are confidential under the County's personnel ordinance; (3) the HO explained in detail the reasons why the testimony of certain individuals was more persuasive and consistent with the documentary evidence as compared to that testimony proffered by the undersheriff and support services sergeant; (4) the County "overinflates the amount of supervisory work performed" so the hearing officer "must look elsewhere for a more reasonable estimate of the supervisory work done"; (5) completion of the roster, which is used for conducting roll or taking attendance, is not the same as scheduling work, a task performed by lieutenants, a supervisory position; and (6) there is no mathematical error in the computation of time expended for supervisory duties compared to non-supervisory duties.

The County as well as petitioners CWA and FOP did not except to the HO's conclusions that lieutenants and the support services sergeant are supervisors and the position of investigator II is not a supervisor.

At the January 12, 1996, PELRB meeting, the Board exercised its discretion, pursuant to Rule 2.15(c) to "hear oral argument" from each party.[5] At that meeting the County reiterated the arguments in its written exceptions and raised the following additional issues for the first time:

---

[4] *Littlefield v. State of New Mexico*, 114 N.M. 390, 839 P.2d 134 (1992).

[5] Rule 2.15(c) states, in relevant part, that "the Board shall review any other issue properly raised by a party in a request for review. The Board shall conduct its review on the basis of the existing record and may, in its discretion, hear oral argument."

(1) requested that the Board reconsider its 5-minute time limitation on Rule 2.15 presentations; (2) not allow a hearing officer to promulgate policy decisions, (3) alluded to unidentified "problems" it had with the HO's conduct of the hearing, and (4) tendered new evidence never submitted at any prior stage of the proceedings that, the County asserts, demonstrates patrol sergeants are supervisors. Petitioners CWA and FOP opposed the consideration of any evidence not in the record as violative of Rule 2.15(c).

PELRB DECISION OF JANUARY 12, 1996

Following presentations from each representative and consideration of the HO's findings of fact and conclusions of law, the Board affirmed the HO's recommended disposition that the positions of lieutenant and support services sergeant are each a "supervisor" under the Act and the position of investigator II is not a "supervisor" under PEBA. Furthermore, the Board directed an election with the voter eligibility list to include the names of patrol sergeants. All ballots were to be impounded "pending resolution of the issue whether sergeants in the patrol division are supervisors under the PEBA. That matter has been left open for further Board review and supplementation of the record" in a hearing.

SUPPLEMENTAL REPORT,
COUNTY'S EXCEPTIONS AND PETITIONER CWA'S ANSWER

The remand hearing occurred on March 18, 1996, and the HO issued a supplemental report on April 19 finding that patrol sergeants are not supervisors. The County filed exceptions to the HO's conclusion, arguing that the HO improperly excluded evidence about the duties

performed by patrol sergeants. In doing so, the County asserts that the HO denied it due process and applied a different standard to the County's evidence compared to that of the petitioners thereby breaching the notion of "fundamental fairness." According to the County, the HO placed a burden of proof on the County which is not appropriate under Rule 1.18(a).[6] Moreover, the HO continues to rely in the supplemental report exclusively on the testimony of Sergeant Segovia to conclude that a patrol sergeant is not a supervisor. Based on its proffered but excluded statistical data and the testimony of its witnesses, the County estimates that at least 40 percent of the duties performed by a patrol sergeant are supervisory and the Board's "magic formula" for determining supervisory status is 50 percent. During its presentation on May 21 the County argued that the PELRB's intent in its motion to remand the case was to allow the County to present its evidence on patrol sergeants.[7] Petitioner CWA states, in essence, that the Board should deny and dismiss the County's exceptions for the reasons set forth in the supplemental report.

REVIEW AND DISPOSITION OF COUNTY'S EXCEPTIONS

We have conducted a whole record review of the proceeding before us and, for the reasons set forth below, deny and dismiss all exceptions filed by the County to the HO's findings of fact and conclusions of law. Unless modified herein, we adopt those findings and conclusions as our final action, decision and order.

---

[6]Rule 1.18(a) states, in relevant part, that "...no party shall have the burden of proof in a representation...proceeding."

[7]At the February 1996 meeting the Board's Director sought clarification of the Board's January decision to remand the case for hearing; however, the County objected to any consideration of the matter by the Board. *PELRB Official Minutes* (February 14, 1996).

1. **Report and Recommended Decision**

With respect to the County's exceptions to the initial report, specifically, the issuance of it beyond 15 workdays following the close of a hearing, we find the time limit to be directory and not mandatory and, thus, conclude that Rule 2.14 has not been violated. If there is a violation, we find and conclude that the County has not been prejudiced or suffered inequity in the delayed disposition of its statutory obligations to deal on wages, hours and other terms and conditions of employment with an exclusive representative. Accordingly, we do not reject the HO's report and recommended decision but deny and dismiss the County's exception.

As for the County's exception that it has been denied due process, we deny and dismiss it--as well as those exceptions or concerns focusing on time limits for presentations, policymaking by a hearing officer, and unidentified problems with the conduct of the hearing--for the following reasons. Counties, as political subdivisions, are not "persons" for purposes of the due process and equal protection provisions of the Fourteenth Amendment to the U.S. Constitution and the state constitutional provision, article II, section 18, guaranteeing to "persons" due process and equal protection.[8] The five minute limitation on presentations to the Board, in the circumstances of this case, is reasonable because Rule 2.15(c) states that the decision to permit any oral argument at this stage of the proceedings resides solely with the Board. More importantly, the County was afforded an opportunity to develop its case during

---

[8]See, e.g., *Williams v. Mayor*, 289 U.S. 36, 40 (1933); *City of Newark v. City of New Jersey*, 262 U.S. 192, 196 (1923); *Avon Lake City School District v. Limbach*, 33 Ohio St.3d 188, 518 N.E.2d 1190 (1988); *Penny v. Bowden*, 199 So.2d 345 (La.App. 1967); and *Village of Blaine v. Independent School District*, 272 Minn. 343, 138 N.W.2d 32 (1965).

three days of hearing as well as during proceedings leading up to the hearings and, thereafter, the filing of two post-hearing briefs. A hearing officer does not promulgate or make public policy for every unit determination is reviewed by the Board as required by Rule 2.15(c). We find no evidence or argument to support the County's allusion to problems with the conduct of the hearing. We acknowledge that the County disagrees with the conclusions of the hearing officer, and has a regulatory and statutory right to seek review of those conclusions. We advise litigants before the Board, however, that any suggestion of improper conduct on the part of a hearing officer is highly inappropriate absent evidence of bias or a showing of some impermissible motive which might lead to an inference of bias. Without such evidence we will not entertain mere allegations of impropriety on the part of a presiding official.

With respect to the HO's conclusion that a patrol sergeant is not a "supervisor" under the Act[9], we find the conclusion to be based on the testimony of five witnesses (including that of the undersheriff and support services sergeant) as well as all relevant and admissible evidence submitted in accordance with the Board's rules and not, as the County asserts, based exclusively on the testimony of Sergeant Segovia. In this regard, we find that the County's proffer of new evidence under Rule 2.15(a) for the first time at the January meeting is not in accordance with

---

[9]PEBA § 4(S) defines "supervisor" as:

> 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 unambiguous wording of that rule--"The request [for review] may not rely on any evidence not presented to the hearing officer." By offering the evidence, the County seeks to have the PELRB violate its Rule 1.23, Appeal or Review by the Board, which states in part that "[r]eview by the Board shall be based on the evidence presented or offered at the earlier stages of the proceeding and shall not be de novo." Furthermore, the County was afforded an opportunity to recall Sergeant Segovia during a subsequent hearing, but did not, and it never tendered any documentation within the County's purview about his employment record. In this regard, the sergeant's testimony focused on the duties of a patrol sergeant, a non-supervisory position, and not the duties of a lieutenant--a supervisory position--which the County sought to examine through the sergeant.

We find that patrol sergeants spend occasional and insubstantial time performing supervisory work such as review of subordinates' reports. The shift roster is used for conducting roll, i.e., taking attendance, a non-supervisory duty, which is a visibly and obviously different function than scheduling work which is performed by the lieutenant, a supervisor. We also note the problems with reliability of statistical data submitted by the County after the close of the initial 2-day hearing and accepted by the HO into the record. Finally, there is no mathematical error by the hearing officer on the computation of time devoted to supervisory and nonsupervisory duties; up to 35 percent of a patrol sergeant's time is devoted to supervisory duties; the remaining time is devoted to statutorily defined non-supervisory work that is routine in nature and requires adherence to strict procedural guidelines or standards.

The County's exception, i.e., patrol sergeants perform supervisory work for a substantial amount of time, rests on its disagreement with the determination of supervisory and non-supervisory work. The Act clearly accords that function and decision, when the parties are in dispute, to the Board by its making findings of fact and conclusions of law through the hearing and adjudication process. The testimony of the support services sergeant, a supervisor, that every task he does is a supervisory task, without regard for the statutory definition, does not make sense and results in the hyperinflation of time devoted to supervisory duties as testified to by that individual and relied upon by the County in its exceptions. For example, the support services sergeant testified that a patrol sergeant investigates traffic accidents and that the same work--investigating accidents--is performed by the deputies (subordinates) to patrol sergeants. The task is not a supervisory task when the patrol sergeant performs it and, at the same time, a non-supervisory task when the deputy does it. Another example is the support services sergeant's testimony that when he is issuing or writing a traffic citation he is thinking as a supervisor even though he acknowledged that a deputy performs the same task. The statutory definition excludes from its coverage those positions where the supervisor (patrol sergeant) performs duties substantially similar to those of their subordinates (deputies). The County's argument that every duty performed by a supervisor is a supervisory duty, when drawn to its extreme conclusion, means a public employer could label every task supervisory in nature and exclude classes or groups of employees from the Act's coverage without regard for the statutory definitions and Board's role in adjudicating unit determination issues.

Concerning the testimony of the undersheriff, he acknowledged that a patrol sergeant performs duties similar to those of subordinates: making traffic stops, monitoring criminal activity, issuing tickets, responding to calls, making arrests and testifying in court. He also acknowledged that he could not ascertain how much time a patrol sergeant devotes to the 15 essential duties of the position. Furthermore, the undersheriff testified that there are no data or statistics to show how much time a patrol sergeant devotes to patrol duties and no data from dispatch to show the number of calls responded to by a deputy and patrol sergeant.

As with the position of investigator II, a position found by the HO to be non-supervisory and not excepted to by the County, we find that the patrol sergeant's not being assigned to a specific district by a lieutenant but, rather, being allowed to roam, and the patrol sergeant's listening to the radio to assist subordinates is the result of his or her experience as a lead employee and not the result of performing supervisory functions as defined and identified in PEBA § 4(S).

2. Supplemental Report

In its written exceptions to the supplemental report, the County asserts that the HO "erred in limiting the evidence to a specific time which was inconsistently applied to the disadvantage of the Employer" because she limited evidence to the time period preceding the filing of the representation petition (January 1995) but, in the initial report, accepted evidence for the time period following January 1995. This is, according to the County, a "different standard" applied by the HO to the County and results in the "denial of the Employer's right to due process and

[constitutes] an affront to the concept of fundamental fairness." It also asserts that the HO violated Rule 1.18(a) by applying a burden of proof on the County in a representation proceeding. During its presentation to the Board on May 21, 1996, the County argued that the HO possessed a "closed mind" to consideration of any evidence on the issue of supervision by patrol sergeants. Indicative of this "closed mind" approach, the County maintains, is the HO's indication (prior to the March hearing) that the parties should present closing arguments rather than filing post-hearing briefs. The County asserts that Rule 2.13 accords a party the right to file a post-hearing brief.[10]

The exception on due process is addressed herein and, for the reasons set forth at page 7, we deny and dismiss the exception. We observe, concerning the concept of "fundamental fairness," that the Board's Rules 2.15 and 1.23 are designed to expedite the adjudication of disputes by having the parties not delay the presentation of evidence or raise previously unidentified issues for the first time before the Board in their exceptions. A "different standard" has not been applied to the County for statements or evidence accepted at the initial hearing were tendered by both parties and considered by the HO in accordance with Rule 1.13(c): "The hearing officer...may receive any evidence not objected to[.]" Neither party objected to the

---

[10]Rule 2.13, Briefs, states:

> If any party requests permission to file a post-hearing brief, the hearing officer shall permit all parties to file briefs and shall set a time for the filing of briefs which normally shall be no later than ten (10) days following the close of the hearing. Briefs shall be filed with the Director and copies shall be served on all parties.

proffer of such evidence at that time except for the County's concerns raised in its efforts to cross-examine Sergeant Segovia about his employment history. As we noted above, this could have been addressed by the County at the remand hearing but it chose not to pursue the matter. Also, there was testimony from individuals other than Sergeant Segovia at the initial hearing about the duties of the patrol sergeant and relied upon by the HO. The report and recommended decision at pp. 9-12 details why the testimony of the undersheriff and support services sergeant are not as persuasive as that of other witnesses and why their testimony did not comport with the County's documents.

Regarding Rule 1.18(a)--no burden of proof in a representation hearing--and Rule 2.13, filing of post-hearing briefs, the HO stated at the remand hearing that there is no burden of proof and, even assuming the County's exception on the application of this rule is meritorious, it does not warrant the summary reversal of the HO's findings of fact and conclusions of law. Although the HO permitted the filing of post-hearing briefs, we disagree with the County's interpretation of Rule 2.13, Briefs. It merely states that if "any party requests permission to file a post-hearing brief," then all parties shall be permitted to do so. There is no right to file a post-hearing brief; the matter is discretionary with the presiding official.

The County's exceptions to the HO's decision not to allow into the record at the remand hearing summaries of statistical data are denied and dismissed. The summaries proffered are unreliable. The County relies on Rule of Evidence 11-1006 as the basis for presenting summaries

of data in lieu of the original documents.[11] The rule requires that original documents be available to the opposing parties "at a reasonable time and place" and the County, in this case, offered to provide access to 15 boxes of documents on the day of the hearing.[12] Furthermore, when petitioner CWA received the summaries 1-week prior to the date of the hearing, its representative immediately informed the County that the summaries were without foundation because of problems with accuracy, reliability and relevancy. The County elected to delay until the day of the hearing to provide access to the documents. The County's offer does not comport with the rule.[13]

Admission into evidence of documents not timely supplied to the opposing counsel, and in the absence of a "sufficient reason", is discretionary with a presiding official under Rule 1.16. These matters--concerns or questions about reliability, accuracy, and relevancy for purposes of

---

[11]Rule 11-1106 states:

> Summaries. The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they be produced in court.

[12]Although the Board or its hearing officers are not required to follow formal rules of evidence in administrative adjudicatory proceedings, this does not mean that a presiding official may not consider or use as guidance fundamental evidentiary practices or principles to determine admissibility of evidence. We find that given the voluminous amount of documents the County seeks to place into evidence and the petitioners' interests in reviewing the documents, that applying a standard or principle for review of "reasonable time and place" prior to a hearing is appropriate.

[13]It is clear from the rule that the "originals or duplicates" not the summaries must be made available for examination and copying at a reasonable time and place prior to the hearing. Implicit in this rule is the notion that if the originals or duplicates are not admissible then the summaries based thereon are not admissible. See *United States v. Conlin*, 551 F.2d 534, 538 (2d Cir. 1977), cert. denied, 434 U.S. 831 (1977); *Boyd v. Ozark* Airlines, *Inc.*, 419 F.Supp. 1061, 1065 (E.D. Mo. 1976), *aff'd*, 568 F.2d 50 (8th Cir. 1977).

admissibility--were initially placed before the County in the report and recommended decision (issued in October 1995) wherein the HO noted problems with the County's data on shifts submitted after the close of a 2-day hearing. In other words, the County was noticed of admissibility problems with statistical data six months before the remand hearing.

Assuming that the excluded evidence is relevant and reliable for the issue of whether a patrol sergeant devotes a substantial amount of time to supervisory duties, the County's estimation, proffered at the May 21 PELRB meeting, is that a patrol sergeant devotes at least 40 percent of his or her time performing supervisory work. This estimation of time is a decrease from the estimation provided by the undersheriff and support services sergeant who testified in July 1995 that 80 to 95 percent of the patrol sergeant's time was devoted to supervision. As noted in a prior Board decision, the term "substantial" means "...considerable in quantity, significantly large...being largely but not wholly that which is specified[.]"[14] We do not find 40 percent to be substantial. Also, we have noted the HO's consideration and evaluation of all testimony in her determination of the amount of time devoted to supervisory and nonsupervisory duties. In this regard, the support services sergeant testified that he performed duties we find to be substantially similar to that of his subordinate, the deputy, such as investigating traffic accidents, a non-supervisory task. The County's tendered evidence would, if admitted, discredit the testimony of its own witness. The undersheriff, moreover, testified that data on time devoted to patrol duties by a patrol sergeant or data from dispatch on number of calls responded to by a

[14] *New Mexico State University*, 1 PELRB No. 13, 5 (June 15, 1995), *aff'd*, Third Judicial District Cause No. CV 95-503 (June 28, 1996).

deputy and a patrol sergeant were not available and\or do not exist. In view of their testimony, the belated preparation and untimely proffer of data by the County in these proceedings, and the failure to tender it in accordance with the rule of evidence the County relies upon for admission of the data, we deny and dismiss the County's exception on the excluded evidence.

In summation, a patrol sergeant (1) performs duties substantially similar to that of his or her subordinate, (2) occasionally assumes supervisory duties, and (3) serves as a lead employee to subordinates during a shift. Each of these items, standing alone, is a basis for excluding a position from the supervisory definition in the Act. Because the position of patrol sergeant satisfies at least one of the statutory exclusions, we find it to be appropriate for inclusion in the bargaining unit.

ORDER

The County's exceptions are denied and dismissed.

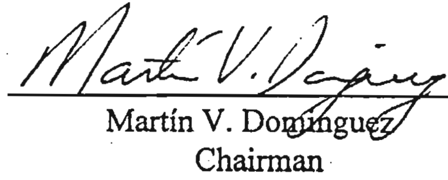
The position of patrol sergeant shall be included in the bargaining unit.[15]

Included: Investigator I, II; patrol sergeant; deputy, corporal.

Excluded: Lieutenant, support services sergeant, and all other positions including supervisor, confidential, and management as those terms are defined in the Public Employee Bargaining Act and the PELRB's rules and regulations.

[15]An election was conducted on or about February 25, 1996. Ballots were impounded. No objections to the conduct of the election were filed. At the May 21, 1996, PELRB meeting the ballots were counted. Petitioners exceeded the 60 percent requirement (PEBA § 14(E)) and CWA earned the popular vote for representing employees for the purpose of collective bargaining. On June 4, 1996, CWA was certified as the exclusive representative.

For the Board.[16]



Martín V. Domínguez
Chairman

Date of Issuance: August 1, 1996

[16]Member McCorkle was not present at the May 21, 1996, PELRB meeting.