

STATE OF NEW MEXICO  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AMERICAN FEDERATION OF STATE,  
COUNTY AND MUNICIPAL EMPLOYEES,  
COUNCIL 18, AFL-CIO ,

Petitioner,

vs.

PELRB 305-16

STATE OF NEW MEXICO  
DEPARTMENT OF HEALTH,

Respondent.

ORDER

**THIS MATTER** comes before the Public Employee Labor Relations Board on a Petition by the American Federation of State, County and Municipal Employees, New Mexico Council 18, AFL-CIO appealing Director Griego's Recommended Decision. Parties presented oral argument to the Board at its regularly scheduled meeting on November 14, 2017. The Board being sufficiently advised, by a vote of 2-0 (Chair Westbrook being absent) finds the following:

- A. There is sufficient evidence demonstrating that Director Griego did not err in finding:
- 1) that the state employees to be accreted into the bargaining unit do not share an "overwhelming community of interest" with other union members; and
  - 2) that the state employees are supervisors and/or managers exempt from bargaining.

**THEREFORE THE BOARD** upholds Director Griego's Decision to deny the accretion of Home Health Aide Supervisor and Psychiatric Technician Supervisor positions into the existing bargaining unit. The Petition for Accretion is **DISMISSED**.

**PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

11-16-17  
DATE

  
R.E. BARTOSIEWICZ, BOARD VICE-CHAIR

STATE OF NEW MEXICO  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AMERICAN FEDERATION OF  
STATE, COUNTY and MUNICIPAL  
EMPLOYEES, NEW MEXICO COUNCIL 18,  
AFL-CIO,

Petitioner,

v.

PELRB No. 305-16

STATE OF NEW MEXICO,  
DEPARTMENT OF HEALTH,

Respondent

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

**STATEMENT OF THE CASE:** This matter comes before Thomas J. Griego, designated as the Hearing Officer in this case, on AFSCME's Petition for Unit Clarification, wherein it seeks to accrete into the existing bargaining unit it represents at the State of New Mexico Department of Health, Home Health Aide Supervisor and Psychiatric Technician Supervisor positions working for the Department's Los Lunas Community Program. The employees at issue work for the Department in its Los Lunas Community Program, which provides services to individuals with developmental and intellectual disabilities, such as community support, community integrated employment, support in the home and dental services. Describing the several types of clients to whom these services are provided, Jill Marshall, Executive Director, explained Home Health Aides provide the program's services to developmentally and intellectually disabled individuals that require medical care. Some of those clients are immobile. Ms. Marshall explained Psychiatric Technicians provide services to individuals who may have disabilities although they are mobile, but also have behavioral issues that may require physical intervention. Such services are provided pursuant to a "Developmental Disabilities Waiver", which was established to avoid institutionalization of such individuals as described.

A hearing on the merits was held at the PELRB offices in Albuquerque on Wednesday, August 02, 2017. At the beginning of the hearing, Respondent orally renewed its Alternative Motion to Dismiss for Lack of Jurisdiction or for Summary Judgment filed July 12, 2016 because, pursuant to PELRB Rule 11.21.2.37(A), an accretion petition may not be brought regarding grandfathered bargaining units.<sup>1</sup>

All parties hereto were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to submit closing briefs in lieu of oral argument. Both briefs were duly considered. On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

**FINDINGS OF FACT:** I incorporate the following facts from my Recommended Decision in *AFSCME, Council 18 v. New Mexico Department of Health* PELRB 305-16 as it involves the same parties:

1. AFSCME is a labor organization as defined in § 10-7E-4(L) of the Public Employee Bargaining Act (PEBA), §§ 10-7E-1 *et seq.*
2. DOH is a public employer as defined in § 10-7E-4(S) of PEBA. (Prior Findings of Fact in Amended Report on Parties' Joint Petition for Unit Clarification in AFSCME and DOH, PELRB No. 312-09).

Additionally, I find as follows:

3. Petitioner filed a Petition for Clarification (Accretion) on March 8, 2016 seeking to accrete Home Health Aide Supervisors and Psychiatric Tech Supervisors working for

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<sup>1</sup> In its original Motion, the Agency cited two cases – *IAFF v. Silver City*, 2-PELRB-08 and *NMCP SO v. Rio Rancho Police Department*, 4-PELRB-09. In my Letter Decision denying the alternative motion I regarded the Agency's reliance on those cases as a misreading of them and quoted the Hearing Officer's statements therein to the effect that Rule 11.21.2.37(A) does not stand for the proposition that a grandfathered bargaining unit must remain forever static. Rather, significantly modifying a grandfathered bargaining unit should normally be done through the election process (including card counts) and a demonstration of majority support, in preference to a showing of 30% interest.

the DOH's Los Lunas Community Program into an existing bargaining unit that includes Home Health Aides and Psychiatric Technicians (PTOs). (Petition for Clarification herein and Stipulations in PHO).

4. The Public Employee Labor Relations Board has subject matter jurisdiction to hear this petition and personal jurisdiction over the parties. (Stipulated in PHO).
5. The employees to be accreted do not belong to any existing bargaining unit. (Stipulated in PHO).
6. The number of employees proposed to be accreted in the unit is 32 and the total number of employees in the existing bargaining unit is greater than 6,000, which is less than 10% of the existing bargaining unit. (Stipulated in PHO).
7. Grandfathered units may be clarified pursuant to NMAC 11.21.2.38(B) and 11.21.2.37(A) provided the clarification is otherwise appropriate under PEBA standards and any accretion is done by election rather than merely upon a showing of 30% showing of interest as ordinarily contemplated under NMAC 11.21.2.38(B). (Letter Decision Denying Motion to Dismiss or for Summary Judgment quoting the Hearing Officer's Report and Recommended Decision *NMCP SO v. Rio Rancho Police Dep't*, 4-PELRB-09).
8. Psychiatric Tech Supervisors have the following duties and working conditions in common with PTOs:
  - a. Both are compensated hourly for their work and may earn overtime for hours worked more than 40 in a workweek.
  - b. PTOs and Psychiatric Tech Supervisors are within the same organizational structure, with a Residential Coordinator, a Residence Supervisor and Director above them on an organizational chart.

- c. While the positions above them on an organizational chart, Residential Coordinator, Residence Supervisor and Director all work in the Los Lunas Community Program's administrative offices, while PTOs and Psychiatric Tech Supervisors work in the clients' residences.
  - d. Psychiatric Tech Supervisors perform all the 34 "Specific Role Duties" performed by PTOs and shown on their Job Description and as testified by the both parties' witnesses. Conversely, PTOs perform Psychiatric Tech Supervisors' duties numbered 16-34 on their Job Description and as testified by both parties' witnesses. (Exhibits J-2 and J-3; Testimony of Eduardo Rodriguez, Kelly Scalf, Delilah Trujillo, Jessica Maestas.)
  - e. Both spend a minimum of 4 hours, to a maximum of approximately 7 to 7.5 hours of an 8-hour work shift in "direct patient care". (Testimony of Eduardo Rodriguez, Kelly Scalf, Delilah Trujillo, Mary Hendrix.)
9. Psychiatric Tech Supervisors play no role in the development of the employer's policies nor do they have a role in collective bargaining.
10. Psychiatric Tech Supervisors perform the following duties and working conditions that are not performed by, or shared with, PTOs:
- a. Whereas PTOs work one of three 8-hour shifts (Day, Swing and Graveyard) Testimony of Eduardo Rodriguez, and are assigned to their respective shifts by a shift bidding process in the parties' CBA (Testimony of Kelly Scalf) all Psychiatric Tech Supervisors are assigned to the Day Shift. (Testimony of Kelly Scalf.)
  - b. Psychiatric Tech Supervisors are responsible for scheduling PTOs using a Master List generated by upper management and unlike PTOs may

disapprove leave requests to ensure shift coverage and may approve or disapprove overtime hours. (Testimony of Kelly Scalf.)

- c. PTOs do not perform Psychiatric Tech Supervisors' scheduling and supervisory duties numbered 1-15 on their Job Description. (Exhibit J-3; Testimony of Eduardo Rodriguez.)
- d. Performance of the duties enumerated as 1-15 on the Psychiatric Tech Supervisors' Job Description is not required of PTOs (Exhibit J-3; Testimony of Eduardo Rodriguez) and I find their performance to require an exercise of independent judgment beyond that required of PTOs.
- e. Psychiatric Tech Supervisors are responsible for training inexperienced staff once or twice a year. (Exhibit 10; Testimony of Eduardo Rodriguez and Monico Abeyta.)
- f. Psychiatric Tech Supervisors are trained to manage clients' checkbooks and have audit responsibilities in that respect beyond PTOs. (Testimony of Eduardo Rodriguez and Monico Abeyta.)
- g. Psychiatric Tech Supervisors have responsibility for data entry into the Therap system described as a complex electronic record of all data relating to a client and services provided, the client's medical records, incident management, and training. Soon, the Therap system will also include billing for the services provided. This system is the tracking device to ensure the client is receiving the correct services and supports, the correct medications, the home is a safe and clean environment, the well-being of the client is ensured, the nutritional requirements for the client are followed, and the staff

are properly training in the services to be provided, the client's needs, and the client's preferences. (Testimony of Jill. Marshall )

h. Seven years of experience as a PTO is required before a PTO can become a Psychiatric Tech Supervisor. (Testimony of Kelly Scalf.) Psychiatric Tech

i. Supervisors are responsible for ensuring proper staffing by developing schedules and seeking volunteers for coverage or mandating overtime.

(Exhibit 42; Testimony of Jessica Maestas and Monico Abeyta).

11. By "Ensuring ISP, Long Term Vision, goals and objectives are implemented", enumerated as specific Role Duty No. 15 for Psychiatric Tech Supervisors, (Exhibit J-3; Testimony of Eduardo Rodriguez) and by evaluating employee performance and (Testimony of Monico Abeyta) I find they are responsible for ensuring compliance with the employer's policy.

12. Psychiatric Tech Supervisors evaluate their staff, by taking notes on their performance throughout the year, continually monitoring, evaluating, and advising on the work done by subordinates, and doing formal documentation on probationary employees quarterly and regular employees annually. (Testimony of Jessica Maestas and Monico Abeyta). The evaluations involve the Psychiatric Technician Supervisor setting goals and expectations for the staff and determining if the goals and expectations were met, what improvements need to be made, and if additional training of the staff member is necessary. (Exhibits. 3, 14, 26; testimony of Jill Marshall)

13. Psychiatric Tech Supervisors are designated as Certified Trainers for such training as Behavioral Support and "Talkabout" (assessment, risk management, behavioral



support, and crisis intervention). (Exhibits 6, 10; testimony of Delilah Trujillo, Eduardo Rodriguez, and Monico Abeyta).

14. The Weekly Residential Supervisor's Checklist delineates the multitude of responsibilities of the Psychiatric Tech Supervisors and Home Health Aide Supervisors to correct any deficiencies by issuing directives to staff or providing additional training. (Exhibit 44).
15. Home Health Aide Supervisors share the following duties or working conditions with Home Health Aides:
  - a. Both are compensated hourly for their work and may earn overtime for hours worked more than 40 in a workweek. (Testimony of Mary Hendrix.)
  - b. Both are within the same organizational structure, with a Residential Coordinator, a Residence Supervisor and Director above them on an organizational chart. (Testimony of Mary Hendrix.)
  - c. While the positions above them organizationally all work in the Los Lunas Community Program's administrative offices, both Home Health Aides and Home Health Aide Supervisors work a minimum of 4 hours a day in the clients' residences. Work time outside of a client's residence are spent at "dayhab", that is, planned activities outside of the home based on each client's individual needs and interests, such as, computer work, exercise, gardening, shopping, volunteering, job skill development, etc. so that very little time is spent at the administrative offices. (Testimony of Mary Hendrix.)
  - d. Home Health Aide Supervisors perform all the 34 "Specific Role Duties" performed by Home Health Aides shown on the Home Health Aide Job Description and as testified by the both parties' witnesses. Conversely, Home

Health Aides perform Home Health Aide Supervisors duties numbered 16-49 on the Supervisor Job Description and as testified by both parties' witnesses. (Exhibits J-4 and J-5; Testimony of Mary Hendrix.)

- e. Both spend 7-8 hours of their 8-hour shifts in "direct patient care".

Testimony of Mary Hendrix

16. Home Health Aide Supervisors are subject to the following duties and working conditions perform that are *not* performed by, or shared with, Home Health Aides:

- a. Home Health Aides do not perform Home Health Aide Supervisors' scheduling and supervisory duties numbered 1-15 on their Job Description. (Exhibit J-5; Testimony of Mary Hendrix, Jessica Maestas and Shannon Campa.)
- b. Performance of the duties enumerated as 1-15 on the Home Health Aide Supervisors' Job Description requires an exercise of independent judgment beyond that required of Home Health Aides. (Exhibit J-5; Testimony of Mary Hendrix, Jessica Maestas and Shannon Campa.)
- c. Home Health Aide Supervisors review and ensure completion of various logs required to document the program's compliance with State and federal law. (Exhibits 31, 32, 33; Testimony of Jessica Maestas.)
- d. Home Health Aide Supervisors train their subordinates on proper completion of the logs as well as safety plans, emergency drills, Medical Emergency Response (MERP) and Interdisciplinary Team (IDT) plans, client progress notes, data tracking, Medication Administration Records and audits of same, mileage logs. (Exhibits 34 and 35; Testimony of Jessica Maestas and Luv Vigil.)

- e. Home Health Aide Supervisors has additional fiscal responsibilities requiring additional training regarding maintaining client checkbook balances, ordering supplies and maintaining fuel purchase logs and evaluating employees. (Exhibits 23, 24, 37, 45 and 46; Testimony of Jessica Maestas and Shannon Campa.)
  - f. Home Health Aide Supervisors attend regular supervisor meetings that are not attended by Home Health Aides. (Testimony of Jessica Maestas.)
  - g. Home Health Aide Supervisors interact with Department of Health Inspectors as they perform their audit and investigatory duties, Nurses and Guardians regarding client care issues. (Testimony of Jessica Maestas and Luv Vigil.)
  - h. Although they work an 8-hour day time shift, Home Health Aide Supervisors are responsible for scheduling, monitoring and evaluating activities on all three shifts. (Testimony of Shannon Campa.)
  - i. Home Health Aide Supervisors are responsible for training their subordinates (Exhibit 22; Testimony of Shannon Campa.)
  - j. Home Health Aide Supervisors adjust employee Kronos time records. (Exhibit 20; Testimony of Shannon Campa.)
17. Not all the Employer's clients require "line of sight" supervision and for those who do, "line of sight" supervision may be maintained while Home Health Aide Supervisors perform the duties found in paragraph 13 above. (Testimony of Jessica Maestas and Luv Vigil.)
18. The duties performed by Home Health Aide Supervisors as found above that are not performed by their subordinates takes a minimum of 4 hours to perform each day.

(Testimony of Jessica Maestas.) Unlike Psychiatric Technicians, Psychiatric Tech Supervisors are required to attend supervisory meetings, leadership meetings, inter-disciplinary team (IDT) meetings which involve care providers such as therapists and case managers for the client, pre-service individualized service plan meetings regarding the services a client needs or is requesting, and admission meetings for new clients into the program. (Ex. 38; testimony of Kelly Scalf and Onecimo Mirabal).

19. Psychiatric Tech Supervisors also have the authority to directly issue disciplinary actions of verbal counseling and written reprimands, as well as effectively recommend and administer suspensions and terminations. of Psychiatric Technicians. (Exhibits. 3, 9, 27; testimony of Eduardo Rodriguez, Delilah Trujillo, Jessica Maestas, and Monico Abeyta).
20. Psychiatric Tech Supervisors have the discretion to remove staff from a residence due to a pending investigation of abuse, neglect, or exploitation as well as to file such charges against a staff member. (Ex. 47; testimony of Jessica Maestas).
21. Psychiatric Tech Supervisors also attend and receive training not offered to their subordinates such as Managing Employee Performance, Effective Discipline, Leadership training, and Supervisory Training on Domestic Violence. (Exs. 17, 7, 12; testimony of Onecimo Mirabal). Psychiatric Technician Supervisors also have the authority to change a Psychiatric Technician's location assignment, shift assignment, or pass day (day off). (Ex. 43; testimony of Kelly Scalf).
22. the LLC has developed Expectations for Home Health Aides and Psychiatric Technicians as well as separate Expectations of House Supervisors. (Exs. 40 and 41).
23. Psychiatric Technician Supervisors are responsible for managing the clients' finances and maintaining the clients' checkbooks, ensuring bills are paid, and funds properly

allocated. (Exhibits. 6, 11; Testimony of Delilah Trujillo, Eduardo Rodriguez, Jessica Maestas, and Monico Abeyta).

**REASONING AND CONCLUSIONS OF LAW:** The Public Employee Labor Relations Board has subject matter jurisdiction to hear this petition and personal jurisdiction over the parties. Pursuant to 11.21.1.22 AFSCME has the burden of proof and the burden of going forward with the evidence on the contested issues. DOH renews the arguments made in its Motion to Dismiss for Lack of Jurisdiction or for Summary Judgment, its Motion for Reconsideration and Request for Interlocutory Appeal, all of which were denied. I incorporate by reference my rationale denying each of those Motions. DOH objects to proceeding with the traditional analysis in an accretion because it is never appropriate to accrete positions into a “grandfathered” bargaining unit. Aside from conflating both those employers grandfathered pursuant to Section 24(A) and those grandfathered pursuant to Section 24(B) as well as unit clarification proceedings (11.21.2.37 NMAC) with accretions (11.21.2.38 NMAC), I do not believe that the case decisions cited support a conclusion that a *per se* universal prohibition against accretion is required because of the existing unit’s grandfathered status. For example, neither *In re: Teamsters Nat. United Parcel Service Negotiating Committee v. N.L.R.B.*, 17 F.3d 1518 (C.A.D.C., 1994) or *In re: Laconia Shoe*, 215 N.L.R.B. 573 (1974), cited by DOH support that proposition:

“In this case, however, the Board declined to apply the community of interest test, holding that “the fact of [the clerks’] historical exclusion [from the bargaining unit] ... is determinative” that they could not be accreted to the unit except by a showing of majority sentiment among them.”

17 F.3d 1518 at 1521 (emphasis added).

This suggests, not a blanket prohibition against accretion based on grandfathered status, but rather requiring proof of majority support before the accretion will be permitted:

“When a group has in fact been excluded for a significant period of time from an existing production and maintenance unit, the Board will not permit their accretion without an election or a showing of majority among them even if no other union could obtain representative status for them.”

*In re: Laconia Shoe*, 215 N.L.R.B. 573 (1974) (emphasis added).

While I agree (somewhat) with DOH that *usually* accretions are intended to add positions that were either reclassifications of previously included positions or new positions created after the representation election it is apparent that groups existing at the time of recognition that have been historically excluded, such as we have in the instant case may also be the subject of an accretion petition as long as it results in election or a showing of majority among them before the petition is granted. This analysis is consistent with the decision in my Letter Decision denying DOH’s alternative motion to Dismiss or for Summary Judgment re-affirming this Board’s position taken in *LAFF v. Silver City*, 2-PELRB-08 and *NMCP SO v. Rio Rancho Police Department*, 4-PELRB-09 to the effect that Rule 11.21.2.37(A) does not stand for the proposition that a grandfathered bargaining unit must remain forever static. Rather, significantly modifying a grandfathered bargaining unit should normally be done through the election process (including card counts) and a demonstration of majority support, in preference to a showing of 30% interest.

Consequently, the issues to be decided are these:

1. Whether Home Health Aide Supervisor and Psychiatric Technician Supervisors working for the Department of Health’s Los Lunas Community Program share a community of interest with the existing bargaining unit;
2. Whether they are management employees as defined by the PEBA in NMSA 1978 §10-7E-4 (O) (2003), and;

3. Whether they are supervisory employees as defined by the PEBA in NMSA 1978 §10-7E-4 (U) (2003).
4. Whether inclusion of the disputed positions would render the unit inappropriate for any other reason.

### **Legal Standard**

Under the PEBA § 13(A), this Board is charged with the duty of designating appropriate bargaining units for collective bargaining. “Appropriate bargaining units” must be established on the bases of occupational groups or “clear and identifiable communities of interest in employment terms and conditions and related personnel matter among the public employees involved”. §10-7E-13(A) NMSA (1978). The unit need only be “an appropriate bargaining unit,” not necessarily the “most” appropriate bargaining unit. See *NEA-Belen, supra*; See also *American Hosp. Ass’n v. NLRB*, 499 U.S. 606, 610 (1991). The parties have stipulated that the positions at issue do not now belong to any existing bargaining unit.

In contested cases such as this the “community of interest” test applies for determining the propriety of an accretion. In determining whether the petitioned-for positions share a community of interest with the existing bargaining unit, this Board follows the Kalamazoo factors adopted by the NLRB in *Kalamazoo Box Corp.*, 136 NLRB 134 (1962). See *AFSCME & Dept. of Corr.*, 2-PELRB-13, Rec. Dec. at 17 n.1 (Oct. 17, 2012); *NEA-Belen & Belen Fed. of School Employees & Belen Consol. Schools*, 1-PELRB-2 (May 13, 1994). Those factors are: (1) method of wages or compensation; (2) hours of work; (3) employment benefits; (4) separate supervision; (5) job qualifications; (6) job functions and amount of time spent away from employment situs; (7) regularity of contact with other employees; (8) level or lack of integration; and (9) the history of collective bargaining. No single factor is conclusive. That test involves an examination and balancing of such factors as “integration of operations,

centralization of managerial and administrative control, geographic proximity, similarity of working conditions, skills and functions, common control of labor relations, collective-bargaining history, and interchange of employees.” See also, *Gould, Inc.*, 263 N.L.R.B. 442, 445 (1982).<sup>2</sup>

Regarding whether Home Health Aide Supervisors and Psychiatric Technician Supervisors share a community of interest with employees in the existing unit, I conclude:

**I. HOME HEALTH AIDE SUPERVISORS AND PSYCHIATRIC TECHNICIAN SUPERVISORS WORKING FOR THE DEPARTMENT OF HEALTH’S LOS LUNAS COMMUNITY PROGRAM DO NOT SHARE SUFFICIENT COMMUNITY OF INTEREST WITH THE EXISTING BARGAINING UNIT SO THAT THEIR INCLUSION WOULD RENDER THE UNIT INAPPROPRIATE.**

While some *Kalamazoo* factors arguably weigh in favor of accretion the Health Aide Supervisors and Psychiatric Technician Supervisors share a community of interest with the existing bargaining I conclude that the collective-bargaining history, lack of interchange of employees and substantial differences in their required skills and functions, on balance, require a conclusion that there is no shared community of interest.

It is undisputed that the positions in question have been excluded from the bargaining unit since August 31, 1994, when, in case number CP 71-93(S), the PELRB realigned AFSCME bargaining units and PELRB No. 336-04 when a Certification of Majority Support was issued. AFSCME did not plead or produce evidence that at any time prior to the instant Petition it ever sought to cover the disputed employees in its collective bargaining agreement, much less that it sought to cover them initially. Because this Board has previously recognized a distinction between an accretion and a clarification pursuant to NMAC

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<sup>2</sup> *Gould* and *Kalamazoo* factors are similar and include integration of operations, centralization of managerial and administrative control, geographic proximity, working conditions interchange of employees and substantial differences in their required skills and functions and common control of labor relations.



11.21.2.38(B) and 11.21.2.37(A) in the former that is not required in the latter, I decline to apply the historic exclusion analysis adopted by the NLRB in *Union Electric Co*, 217 NLRB 666 (1975) wherein the NLRB ruled that a *clarification* petition is not appropriate when it would “upset an established practice of such parties concerning the unit placement of individuals.” However, one of the factors to be considered under *Kalamazoo* includes the history of bargaining. The evidence in the instant case supports a conclusion that the bargaining history of the group at issue shows that AFSCME never, before now, sought to represent the Health Aide Supervisors and Psychiatric Technician Supervisors and certainly did not seek to bargain for them when the unit was initially established more than 20 years ago.

The primary reason I conclude that the positions sought to be accreted do not share a community of interest with the existing group is the near total lack of interchangeability among the employees. While it is true that Home Health Aide Supervisors and Psychiatric Technician Supervisors often perform some of the duties of their subordinates, there are critical duties performed by them that cannot be performed by their subordinates. Among these are annual or semi-annual training of inexperienced staff and their management of clients’ funds, bill paying responsibility a maintenance of their checkbook balances. They have audit and “Therap” data entry responsibilities that mean it is impossible for others in the bargaining unit to be used interchangeably with them.<sup>3</sup> Documentation required to be completed by Psychiatric Supervisors include Home Temperature Logs, Home Water Temperature Logs, daily home inspections by each shift, and Requests for Supplies.

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<sup>3</sup> Ms. Marshall described the Therap system as the electronic record of all client services provided, the client's medical records, incident management, and employee training. Therap ensures the client is receiving the correct services and medications, that the home is a safe and clean environment, the well-being of the client is ensured, the nutritional requirements for the client are followed, and the staff are properly training in the services to be provided, the client's needs, and the client's preferences are met.

(Exhibits. 31, 32, 33, 45). Psychiatric Tech Supervisors also audit the Medical Administration Reports to ensure staff is administering the proper dosage of medications, there are no missed medications or administrations, or administrations at the wrong time. It is self-evident how critical, indeed, how “vital” in the strictest sense of the word, is that distinct records audit function.

In addition to reviewing and auditing forms completed by their staff, Psychiatric Tech Supervisors are required to complete forms that are specific to them in their supervisor’s role. Psychiatric Tech Supervisors must document that they have provided “Individual Specific Training” to each staff member serving each client. (See, Exhibit 4). That training is not a minor function but involves instruction to subordinates on the client’s mealtime plan, behavior support and crisis, physical therapy plan, nutritional dietary plan, healthcare plan, safety, choice making, communication, strengths and abilities, learning style, individualized service plan, support network, cultural and spiritual values, medications, sexuality and relationships, decision-making, and routines, needs, and concerns. *Id.* The multitude of issues that must be delineated to staff and for which Supervisors are accountable for demonstrates the level and breadth of responsibility placed on the Psychiatric Tech Supervisor that cannot be shared with subordinates. Because of this important level of responsibility, seven years of experience as a Psychiatric Technician is required before promotion to Psychiatric Tech Supervisor.

There are additional indicia of a completely different skill set required of Psychiatric Tech Supervisors than are required of their subordinates. For example, Psychiatric Tech Supervisors are responsible for ensuring staffing is maintained by developing schedules and seeking volunteers for coverage or mandating overtime. Ms. Maestas stated she is responsible for managing the client’s household, submitting and approving work orders for

repairs and orders for needed supplies, and reviewing emails sent to supervisors. Those duties are not shared by their subordinates. Psychiatric Tech Supervisors are responsible for ensuring staffing is maintained by developing schedules and seeking volunteers for coverage or mandating overtime. They evaluate their staff on an ongoing basis by taking notes on their performance throughout the year, regularly monitoring, evaluating, and advising on the work done by subordinates informally and formally documenting their evaluations of probationary employees quarterly and regular employees annually. These evaluations require setting goals and expectations for the staff and determining if the previously set goals and expectations were met, what improvements need to be made, and if additional training of the staff member is necessary.

Unlike their staff, Psychiatric Tech Supervisors are designated as Certified Trainers for such training as Behavioral Support and “Talkabout” (assessment, risk management, behavioral support, and crisis intervention). As House Managers, Psychiatric Tech Supervisors are responsible for completing a monthly house checklist in which they inspect the residence both inside and outside, checking for any safety concerns, bugs, furniture problems, batteries are operational, fire extinguishers, water leaks and temperature, among other items.

Psychiatric Tech Supervisors also are responsible for completing and documenting In-Home Training Checklists and various safety drills such as fire drills and power failure, natural disaster, and terrorism response drills. Psychiatric Tech Supervisors are required to complete Certification of Expenditure Reports for any expenses from a client's account, gas purchase justification forms, and weekly residential checklists.

Ms. Maestas estimated the paperwork for the most part completed during periods of “direct patient care” takes her at least four (4) hours each day to complete so that while both Psychiatric Tech Supervisors and their subordinates in the bargaining unit are involved in

“direct patient care” not all time spent in “direct patient care” is spent in the same manner as their subordinates. For example, Ms. Maestas stated that one of her clients works Monday through Thursday for 2 ½ hours per day and during that time she will get 1 hour alone without the client to complete paperwork. The rest of her time needed for completing supervisory duties takes place while she is otherwise engaged in what would be called direct patient care. Mr. Monico Abeyta stated that due to his position being at an Intermediate Care Facility, he is given every Monday to work solely on paperwork away from the clients in the Facility, whereas the other days he must complete the paperwork while with the staff and clients. Mr. Abeyta stated his staff, which can vary from 2 staff members up to sixteen depending on the number of clients at any given time in the facility, are always working directly with clients and are not given a day away from clients to complete paperwork at their level. In other words, while both Psychiatric Technicians and Psych Tech Supervisors are involved in “direct patient care” the nature of the work providing that care and the time released from patient care to perform it, is often very different.

Similarly, Home Health Aide Supervisors’ performance of the duties enumerated as 1-15 of the Job Description requires an exercise of independent judgment beyond that required of Home Health Aides. They are responsible for ensuring completion of various logs required to document the program’s compliance with State and federal law and train their subordinates on proper completion of the various logs previously described as well as safety plans, emergency drills, Medical Emergency Response (MERP) and Interdisciplinary Team (IDT) plans, client progress notes, data tracking, critical Medication Administration Records and mileage logs. They have fiscal responsibilities over client checkbook balances, ordering supplies and maintaining fuel purchase logs that their subordinates do not, requiring additional training and experience. Home Health Aide Supervisors attend regular supervisor

meetings that are not attended by Home Health Aides, they interact with Department of Health Inspectors as they perform their audit and investigatory duties. Whenever Nurses and Guardians require on-site contact with the DOH regarding client care issues, it is the Home Health Aide Supervisor that is the Department's point of contact.

Although they work an 8-hour day time shift, as do some of their subordinates, Home Health Aide Supervisors are responsible for scheduling, monitoring, training employees and evaluating activities on all three shifts. They adjust employee Kronos time records on all three shifts. One incident related by Ms. Vigil was that on one occasion, when she exercised her discretion based on staffing needs to deny a staff member's request for leave, the staff member threatened to file a complaint through the Union over the denial. That testimony indicates a lack of community of interest because it reveals an understanding by the staff that Supervisors oversee the operations and their decisions adverse to staff are properly redressed through the Union.

Considering the foregoing I do not conclude that AFSCME has met its burden of proving that Health Aide Supervisors and Psychiatric Tech Supervisors share a community of interest with other positions in the bargaining unit.

**II. HOME HEALTH AIDE SUPERVISORS AND PSYCHIATRIC TECHNICIAN SUPERVISORS WORKING FOR THE DEPARTMENT OF HEALTH'S LOS LUNAS COMMUNITY PROGRAM ARE "SUPERVISORS" EXCLUDED FROM COLLECTIVE BARGAINING UNDER THE PEBA. THEREFORE, THEIR ACCRETION WOULD RENDER THE BARGAINING UNIT INAPPROPRIATE.**

PEBA excludes supervisory and managerial positions from any bargaining unit. NMSA 1978

§10-7E-13 (C) 2003. PEBA defines a supervisor as:

"An employee who devotes a majority 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 'supervisor' does not include an individual who performs merely routine, incidental, or clerical duties or who occasionally assumes supervisory or directory role or whose duties are substantially similar to those of their subordinates and does not include a lead employee or an employees who occasionally participates in peer review or occasional employee evaluation programs."

§10-7E-4(U).

There is little dispute that Psychiatric Tech Supervisors perform a wide variety of duties that may be classified as "supervisory". For example, testimony of Ms. Maestas was typical of other Psychiatric Tech Supervisors: she was assigned to two residences with a total of seven staff of Psychiatric Technicians under her supervision. As a supervisor, she must audit all records of the client entered into the LLC's Therap data base to ensure not only that the documentation was properly and timely completed, but more importantly, that the services guaranteed to the client by law and agreement are being met. They are responsible for training the Psychiatric Technicians on how to properly complete all paperwork and how to care for the individual client. In the preceding section, I have reviewed Home Health Aide Supervisors' and Psychiatric Tech Supervisors' performance of the duties enumerated as 1-15 of the Job Description all of which are supervisory duties. Those duties take at least ½ of the supervisors 8-hour shift daily. Psychiatric Technician Supervisors supervise either in a residential setting or in the Intermediate Care Facility. For those who are assigned to a residential setting they are assigned to either one or two residences in which they supervise the staff and manage the home. Jessica Maestas testified that she received a significant increase in pay upon her promotion from Psychiatric Technician to Psychiatric Technician Supervisor due to the increased responsibilities and duties. Eduardo Rodriguez testified that when he was promoted from a Psychiatric Technician to a Psychiatric Technician Supervisor he received a 25% increase in pay. Mary Hendrix testified that as a Home Health Aide she

was paid \$7.50 an hour and as a Home Health Aide Supervisor she was paid \$14.85 an hour, which equates to a ninety-eight percent (98%) difference in pay.

All Psychiatric Technician Supervisors are assigned to work 8:00 AM to 4:00 PM rather than the day, swing, and graveyard shifts that Psychiatric Technicians are assigned to allow them to attend the numerous meetings with DOH administrators, Guardian and medical staff as well as required training.

Psychiatric Tech Supervisors also have the authority to directly issue disciplinary actions of verbal counseling and written reprimands, as well as effectively recommend and administer suspensions and terminations of Psychiatric Technicians. Mr. Abeyta testified about a 5-day suspension he imposed on one of his staff and the fact that he has recommended termination of staff resulting in their eventual termination. In addition, Psychiatric Tech Supervisors have the discretion to remove staff from a residence due to a pending investigation of abuse, neglect, or exploitation as well as to file such charges against a staff member. Ms. Maestas explained that if a Psychiatric Technician observes another Psychiatric Technician committing an act of abuse, neglect, or exploitation, such observation must be reported to the Psychiatric Tech Supervisor. Psychiatric Tech Supervisors also attend and receive training not offered to their subordinates such as Managing Employee Performance, Effective Discipline, Leadership training, and Supervisory Training on Domestic Violence. Psychiatric Technician Supervisors also have the authority to change a Psychiatric Technician's location assignment, shift assignment, or pass day (day off).

Home Health Aide Supervisors are held accountable for the same duties and responsibilities as Psychiatric Technician Supervisors, but work in a home with medically fragile consumers. Mary Hendrix, an Home Health Aide Supervisor and witness for the Union, testified that unlike her subordinates, she must read emails, check and schedule employees, set up

meetings for her staff, determine trainings needed for her staff and administer training, oversee the house, evaluate employees and talk with them providing coaching, counseling, and help to develop them, discuss problems with employees, and correct behaviors. She also explained that she is solely responsible for the consumer's checkbook, writing checks, receiving training on the checkbook, and reconciling the account. Ms. Hendrix further testified she reviews all forms completed by her staff and is responsible for addressing any deficiencies. Ms. Hendrix described the Data Tracking form as a document used in which staff identify the activities the consumer participated in and Ms. Hendrix is responsible for ensuring the activities meet the stated outcomes and action steps developed for the consumer. (Ex. 19). This document is important in providing integration of the consumer in the community and fulfilling goals for the consumer. The Supervisors must use independent judgment to determine actions that will foster progression toward the stated outcomes for the consumer.

Supervisors have a key role in the well-being and advancement of the clients to which they are responsible. To ensure the client's well-being and advancement, it is incumbent upon the Supervisors to properly direct their staff in their duties. In fact, Ms. Hendrix's Documented Verbal Counseling to a Home Health Aide for insubordination and unprofessional behavior for failing to follow her directive instructed the Home Health Aide that he is to "follow [her] directives and check in with [her] each morning to discuss the day's events." (Ex. 15 at p. 3). Following directives of the Supervisors is crucial to the health and welfare of the consumers. While the staff remains with the consumer or in the consumer's home during their assigned shift, Supervisors are either working in multiple homes or working outside of the home on duties particular to Supervisors. When asked how much time she spent in the home versus outside of the home, such as at Administration, Ms. Hendrix stated she spent four (4) to six



(6) hours outside of the home, unlike her subordinates who remain with the consumer or at the home for the staff's entire shift.

Like a Psychiatric Technician Supervisor, Shannon Campa, a Home Health Aide Supervisor for one (1) year, testified that she was assigned to supervise two (2) houses. She explained her role as a Home Health Aide Supervisor as one who oversees the staff, is responsible for finances of the consumer, scheduling, and disciplinary action. She approves requests for leave and overtime, evaluates employees, trains and directs employees on treatment of consumers, directs staff on the correct way to perform their duties, and is held more accountable than her subordinates. Ms. Campa also testified that training on Individual Specific Training alone takes her an hour or more, which she has been doing once to twice a week.

Ms. Luz Vigil testified regarding her duties as a Home Health Aide Supervisor for the past seven (7) years and her experience of nineteen (19) years with DOH and thirty-two (32) years in this field. Ms. Vigil testified that she supervises between four (4) and eight (8) Home Health Aides. Ms. Vigil stated she is the House Manager responsible for managing and effectuating all aspects of the LLCP in that residence. To do so, Ms. Vigil testified she must ensure all Home Health Aides properly and timely complete their duties, particularly, accurately complete all documentation of their duties to ensure the consumer's needs are met and the services are administered. Ms. Vigil stated she is responsible for training her staff on all their duties, which includes, but is not limited to, an Employee In-Home Training Checklist. (Ex. 34). This checklist details numerous items the Supervisor must train the staff on, such as: safety items to locate the fire extinguisher, first aid kits, fire drill procedures, breaker box, gas shutoff, and employee accident forms; staff responsibilities regarding telephone usage, chemical storage, food storage, breaks, cleaning responsibilities, meal

preparation, location of consumer files and medical crisis plans, checking temperatures, policy book, and shift change protocol; and vehicle usage and safety regarding policy on gas cards, wheelchair lift and tie downs, and vehicle emergency kits. In addition, Supervisors are responsible for monthly inspections and documentation of assistive technology provided to the clients and in the home. Ms. Vigil stated she schedules and conducts house meetings with her staff and determines the agenda to be discussed with staff at those meetings. She stated she is responsible for auditing a consumer's medications, ensuring refills are timely ordered, ensuring control of the medication is signed and documented, and ensuring proper medication count and administration. Ms. Vigil stated she has responsibility, that her subordinates do not, for maintaining client's individual files, staff documentation, rosters, night audits, schedules, medication logs and inventories, whether maintained in the consumer's home or administrative offices. Ms. Vigil stated that even when she assists her staff in direct care, her documentation requirements continue and she completes them throughout the day. She explained that while she may assist in direct care, she must focus on her documentation first and ensure that all her supervisory duties are completed as well as ensure her staff are completing their duties. Ms. Vigil also stated that while she may go on excursions with her consumer and other staff members, the staff is only responsible for the consumer, whereas she is still responsible for completing all paperwork, making phone calls to nurses and physical therapists, and other duties while on the excursion. She also stated she is a designated trainer to train on all outcomes. A significant amount of work time is required of Supervisors, who are often pulled from duties in the homes to which they are assigned to perform other duties at other locations. For example, Ms. Shannon Campa was pulled to perform an audit of a home in which there were multiple reports of abuse and neglect by staff members. (Testimony of Jill Marshall). Ms. Delilah Trujillo was



pulled on several occasions for various issues LLCP needed her to address such as lack of proper documentation in a home, failure to properly control medications, and problems with different government agencies. (Testimony of Jill Marshall). In placing Ms. Trujillo in this review position, Ms. Trujillo independently selected the staff to thereafter be assigned to the home. (Testimony of Jill Marshall). On this basis, I conclude that they spend a majority of their work time on supervisory duties that are not the same as those performed by their subordinates. They customarily and regularly direct the work of two or more other employees, and they have the authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively.

**III. HOME HEALTH AIDE SUPERVISORS AND PSYCHIATRIC TECHNICIAN SUPERVISORS WORKING FOR THE DEPARTMENT OF HEALTH'S LOS LUNAS COMMUNITY PROGRAM ARE MANAGERS AND THEREFORE, THEIR ACCRETION INTO THE BARGAINING UNIT WOULD RENDER IT INAPPROPRIATE.**

PEBA defines a managerial 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.”

§10-7E-4(O).

The positions being sought for accretion are managerial and, therefore, must be excluded from the bargaining unit. I reach this conclusion because the preponderance of the evidence convinces me that both The Psychiatric Technician Supervisors and Home Health Aide Supervisors are responsible for developing, effectuating, and administering management policies, are engaged in management functions. First, Psychiatric Technician Supervisors and Home Health Aide Supervisors operate independently at the homes and facility- it is they

who represent the employer's policies and interest at each worksite. Perhaps most importantly, Psychiatric Technician Supervisors are responsible for managing the clients' finances and maintaining the clients' checkbooks, ensuring bills are paid, and funds properly allocated. Psychiatric Technician Supervisors must also run reports on uncleared findings and reconcile those findings in the consumer's finances.

It is significant that the PEBA uses two different terms to quantify the amount of time a manager is employed in management duties compared to that spent by supervisors performing supervisory duties. Whereas to be a "supervisor" under §10-7E-4(U) an employee must spend a "majority of work time" performing supervisory duties, a "manager" under §10-7E-4(O) is one who is "*engaged primarily* in executive and management functions." Had the legislature intended the Board to analyze the time spent by putative managers to determine whether they spend more work time in managerial duties than in duties like their subordinates as we do when we analyze whether an employee is a supervisor, it would have used the same "majority of work time" language used in §10-7E-4(U). While the employee's managerial duties may not be merely incidental, because, as §10-7E-4(O) states, "[a]n employee shall not be deemed a management employee solely because the employee participates in cooperative decision-making programs on an occasional basis". Rather, the analysis of whether one is primarily engaged in managerial duties involves consideration of the reason for creation of the unique position apart from subordinates regardless of their performance of similar duties. In other words, if the position in question exists so that the employer has someone at the worksite who is responsible for ensuring that management policies are properly developed and implemented, that person is a manager and is to be excluded from the bargaining unit.

That analysis is consistent with the Board's Decision *In re: AFT V. Gadsden Schools*, 03-PELRB-2006, cited by DOH in its closing brief, wherein the PELRB held the amount of time spent on duties like those in the bargaining unit was not determinative. "Under PEBA, performing 'substantially similar' duties as one's subordinates does not detract from one's status as manager, as it would from one's status as supervisor." *Id.* at p. 8. In *AFT V. Gadsden Schools*, this Board held that five functions that differed from the subordinate Care employees in that case "are related to 'executive and management functions,' and/or 'developing, administering or effectuating management policies.'" *Id.* Similarly, I conclude that the 16 different duties on the Home Health Aide Supervisor and Psychiatric Technician Supervisor job descriptions that are not performed by bargaining unit employees in the instant case are all related to managerial functions. For example, a Psychiatric Technician Supervisor and Home Health Aide Supervisor responsibility for effectively supervising staff to produce well-trained, effective, and productive employees constitutes administering, or effectuating management policies and the duties exist for that reason. In contrast, the primary purpose of the duties performed by Psychiatric Technicians and Home Health Aides is to provide a service to the program's clients. The same may be said of a Psychiatric Technician Supervisor and Home Health Aide Supervisor responsibilities for observing and documenting work performance; implementing corrective action; participating in interviews for new hires and promotions; scheduling staff for consumer doctor appointments, training, and making duty assignments; completing duty rosters; completing required documentation and reports ensuring the home is clean, safe, and orderly; ensuring client's wants and needs are met; ensuring ISP, Long Term Vision, goals, and objective are implemented; maintaining training certifications; advocating for consumers; implementing and verifying behavior support plans; and attending assigned meetings.

The Los Lunas Community Program has developed written "Expectations" for Home Health Aide Supervisors and Psychiatric Technicians Supervisors. In general, House Supervisors (who are Psychiatric Technicians Supervisors and Home Health Aide Supervisors) are expected to inform teams of relevant information, ensure paperwork is timely submitted, that all deadlines are met, that all documentation is audited and signed, that schedules are completed, and ensure that employer policies and the collective bargaining agreement are followed. I conclude that those expectations constitute "administering and effectuating the management policies". Ms. Delilah Trujillo stated the supervisor meetings have centered around Supervisors getting into groups to develop and revise policies. Ms. Jill Marshall, Executive Director, stated she meets with the Supervisors one-on-one and in group meetings to gather information on the Supervisors' expectations, goals, and recommendations for improvement. In addition, she has been holding leadership meetings which includes the Supervisors and results in policy decisions. Ms. Marshall explained how litigation known as the "Jackson Lawsuit" that resulted in integration of individuals with disabilities in community-based living, rather than in institutions, came numerous regulations governing how services are to be provided to consumers, as well as audit procedures to ensure compliance. Ms. Marshall explained that because the program is funded by federal and state dollars, they are subject to auditing by the Social Security Administration, Jackson Lawsuit compliance auditors, Board of Pharmacy, Division of Health Improvement, Health Facility Licensing, and other state or federal institutions. It is the Home Health Aide Supervisors and Psychiatric Technician Supervisors who are responsible for meeting with these auditors to provide necessary information, accompany auditors during their work, demonstrate compliance, and correct any findings.

For all the above reasons, I conclude that The Union has not met its burden and the duties outlined constitute executive and management functions or reflect responsibility for developing, administering, or effectuating management policies. Those duties do not constitute "cooperative decision-making programs on an occasional basis." Accordingly, their accretion would render the bargaining unit inappropriate.

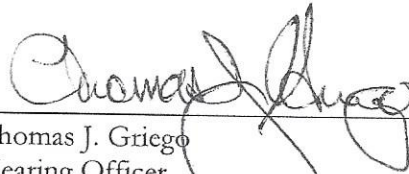
#### IV. CONCLUSION

AFSCME did not meet its burden of proving that Health Aide Supervisors and Psychiatric Tech Supervisors share an overwhelming of interest with other positions in the bargaining unit. The historical exclusion of those positions from the bargaining unit was a factor.

AFSCME has also failed to meet its burden of establishing the positions are not supervisory or managerial and for that reason, failed to show the inclusion of these positions would not render the bargaining unit inappropriate.

**DECISION:** Based on the foregoing, AFSCME's Petition to accrete Home Health Aide Supervisor and Psychiatric Technician Supervisor positions into an existing bargaining unit it represents at the State of New Mexico Department of Health, working for the Department's Los Lunas Community Program is hereby DENIED AND DISMISSED WITH PREJUDICE.

Issued, Friday, September 22, 2017.



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Thomas J. Griego  
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