

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

**INTERNATIONAL ASSOCIATION OF MACHINISTS  
AND AEROSPACE WORKERS (IAMAW), AFL-CIO,**

**Petitioner,**

**and**

**PELRB 303-22**

**UNIVERSITY OF NEW MEXICO SANDOVAL  
REGIONAL MEDICAL CENTER,**

**Respondent.**

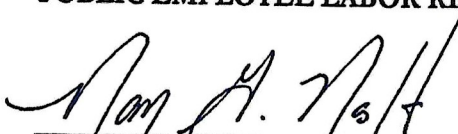
**ORDER**

**THIS MATTER** came before the Public Employee Labor Relations Board (hereinafter the "Board") at its regularly scheduled meeting on September 6, 2022 upon the request of the University of New Mexico Sandoval Regional Medical Center ("Respondent") for review of that part of the Hearing Officer's Report and Recommended Decision dated August 11, 2022 concluding that six employees were employed in a probationary status at the time the above-captioned petition was filed and therefore should not be included in the employee list for the purposes of an election or card check. Respondent requested review on September 1, 2022., arguing that its employees undergo an "orientation period" that is not the same as a probationary period.

After hearing the parties' oral arguments, reviewing the pleadings, and being otherwise sufficiently advised, the Board voted 3-0 to affirm the Hearing Officer's Report and Recommended Decision.

**THEREFORE**, the Hearing Officer's Report and Recommended Decision dated August 11, 2022 is **AFFIRMED**.

**PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

  
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HON. NAN NASH, BOARD CHAIR

*14 September 2022*  
\_\_\_\_\_  
DATE

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

**INTERNATIONAL ASSOCIATION OF MACHINISTS  
AND AEROSPACE WORKERS (IAMAW), AFL-CIO,**

**Petitioner,**

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**PELRB No. 303-22**

**UNIVERSITY OF NEW MEXICO SANDOVAL  
REGIONAL MEDICAL CENTER,**

**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, for hearing on the merits of issues concerning whether the unit proposed by the Petitioner is an appropriate bargaining unit and if not, what constitutes an appropriate bargaining unit in this case.<sup>1</sup> NMSA 1978 §10-7E-13(B) requires that the Board shall hold a hearing on unit composition before designating an appropriate bargaining unit within thirty days of a disagreement arising between a public employer and a labor organization concerning the composition of a unit.<sup>2</sup> In this case, on June 3, 2022, the Hospital contested the Petition's inclusion of per diem positions as not being "regular" employees subject to the Public Employee Bargaining Act as defined in NMSA 1978, § 10-7E-4(Q) (2020). The Hospital further contested the petitioned-for bargaining unit on the ground that some of the employees the Union petitioned to represent are excluded from coverage of the Act as probationary, supervisory, managerial, or confidential employees. See NMSA 1978, §§ 10-7E-5 and 10-7E-13.

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<sup>1</sup> NMSA 1978 §10-7E-13(A) provides that upon receipt of a petition for representation the Board shall "designate the appropriate bargaining units for collective bargaining".

<sup>2</sup> The 30-day time limit established in PELRB rules for the Board to conduct a hearing are directory rather than mandatory. *AFSCME and Los Alamos County Firefighters v. County of Los Alamos*, 1 PELRB No. 3 (Dec. 20, 1994), citing *Littlefield v. State of New Mexico*, 1992-NMCA-083, 114 N.M. 390.

Scheduling a hearing on the appropriate unit composition was delayed, first by the limited availability of counsel, but also because of a dispute over whether the Hospital's employee list submitted on June 13, 2022 complied with the requirements NMSA 1978, § 10-7E-14(A) (2020) and NMAC 11.21.2.12(B) (concerning its obligation to provide the names, job titles, work locations, home addresses, personal email addresses and home or cellular telephone numbers of employees in the proposed bargaining unit.)<sup>3</sup>

While the parties' dispute over the employee list was pending, a Scheduling Conference was conducted on June 29, 2022 setting a hearing on unit composition for July 13, 2022 contingent upon confirmation the availability of co-counsel for SRMC. SRMC moved to vacate that setting on July 6, 2022 due to unavailability of co-counsel, which motion was granted and the unit composition hearing re-scheduled to take place July 27, 2022.

The hearing on unit composition took place as re-scheduled with Youtz & Valdez, P.C. appearing for the Petitioner, International Association of Machinists and Aerospace Workers ("IAMAW") and Samantha M. Hults of Rodey Dickason Sloan Akin & Robb P.A. appearing for Respondent University of New Mexico Sandoval Regional Medical Center ("UNM SRMC" or "the Hospital"). By prior stipulation the parties reached partial resolution of the contested issues in this case, presented to the Director as the first orders of business at the hearing as follows:

1. Whether any of the petitioned-for employees are employed on a per diem basis, and who those employees are, has been resolved by agreement of the parties. SRMC has provided a list of the per diem employees and the Union agreed that per diem employees will not be part of the bargaining unit petitioned for in this case.

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<sup>3</sup> After I wrote to SRMC's counsel requesting supplementation of the Employer's list on June 14, 2022 the Hospital submitted a supplemented list on June 16, 2022, but disputed issues remained. Those issues were heard by this Board on July 12, 2022, which resulted in this Board's Order 16-PELRB-2022, (July 21, 2022), denying SRMC's objections to providing employee contact information to Director Griego, ordering SRMC to "immediately comply with Director Griego's request for a list of employees in the proposed bargaining unit that includes the contact information specified in Section 10-7E-14(A) of PEBA".

Therefore, this issue is moot and no longer needs to be heard by the Director or the Board.

2. Whether the Petition included “scheduler” positions, and if Vanessa Maler and Tanya Humphries are employed in positions that should be included in the employee list has been resolved by agreement of the parties so that the two scheduler positions occupied by Vanessa Maler and Tanya Humphries will be in the proposed bargaining unit and their names included on the Employer’s employee list.

3. With the union’s agreement not to pursue representation of per diem employees in this case, the question of whether certain of the Hospital’s employees are “regular nonprobationary employee[s]” of the Hospital as defined by Section 4(Q) of the PEBA, no longer needs to be heard by the Director or the Board.

4. The parties agreed that Benny Chavez was not a Director as of the date the petition was filed and therefore, he will be included on the employee list for purposes of a card check or election and that issue is no longer before the Director or the Board.

As a result of the foregoing stipulations the following two issues are before me for consideration:

- A. Whether Facilities Services Maintenance Technician Leads (Lead Maintenance Mechanic) and Lead Housekeepers are “supervisor[s]” as that term is defined in Section 4(T) of the PEBA.
- B. Whether the Hospital employees Melissa Chacon, Alexis Heslop, Lupita Munoz, Sandra Vigil, Jason Rimbart and Nadine Chaves, were employed in a probationary status at the time the instant Petition was filed and whether such employees should be included in the employee list.

All parties hereto were afforded a full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. In lieu of oral closing arguments, both parties filed simultaneously submitted legal briefs on August 3, 2022. 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:** The following facts are stipulated by the parties:

1. Petitioner is a “labor organization” as that term is defined in Section 4(K) of PEBA. Pre-Hearing Order (“PHO”) at 6, ¶ 1.
2. Pursuant to Senate Bill 41, Respondent is a “public employer” for the limited purposes of the PEBA and as that term is defined in Section 4(R) of PEBA. PHO at 6, ¶ 2
3. The following job titles utilized by the Hospital are included in the petitioned-for bargaining unit, and their status as public employees is entitled to collective bargaining rights is authorized under Senate Bill 41 and PEBA: Authorization Specialist, Charge Entry Specialist, Cook, Cook II, Dietary Aide, Journeyman, Food Service Worker, Food Service Worker-Floater, Housekeeper, Maintenance Technician, Materials Coordinator, OR Orderly, Patient Assistant Representative, and Security Officer, Security System Specialist/Officer . PHO at 6, ¶ 3.
4. The following job titles utilized by the Hospital are the employees the Hospital contends are “supervisory” employees: Facilities Services Maintenance Technician Lead (also called Lead Maintenance Mechanic) and Lead Housekeeper. PHO at 7, ¶ 4.
5. The Hospital does not employ a “Food Service Lead” or any comparable position such as a Dietary Aide Lead, Food Service Worker Lead or Cook Lead. PHO, at 7, ¶ 5.

6. The Hospital does not employ a “Security Guard Lead” or any comparable position such as a Security Officer Lead. PHO at 7, ¶ 6.
7. The job title “PCMH Coordinator” included on a version of the employee list, but which is not part of the Union’s petitioned-for unit should be, and has been, removed from the employee list. PHO at 7, ¶ 7.
8. Will Martinez, employed by UNM SRMC as a Lead Housekeeper, was called by UNM SRMC as a witness at the hearing to testify concerning his job duties. Audio Record Part 1, at 00:15:23 – 00:16:30.
9. Tony Molina, employed by UNM SRMC as a Lead Maintenance Mechanic, was called by UNM SRMC as a witness at the hearing to testify concerning his job duties. Audio Record Part 3, at 00:35:55 – 00:37:25.
10. Joint Exhibit 1 is the Job Description of the Lead Housekeeper. It was revised May 9, 2022, nine days prior to the effective date of HB 41 (May 18, 2022), which deemed UNM SRMC a public employer for the purposes of PEBA. NMSA 1978, § 21-28-7(B)(2) (2022).
11. Joint Exhibit 2 is the Job Description of the Lead Maintenance Mechanic. Like Joint Exhibit 1, it was revised May 9, 2022, nine days prior to the effective date of HB 41 (May 18, 2022).
12. Union Exhibit 4 is the prior version of the Lead Maintenance Mechanic Job Description. Audio Record Part 3 at 00:45:08 – 00:47:05 (Tony Molina testimony).
13. Comparing Union Exhibit 4 with Joint Exhibit 2 shows that UNM SRMC added the following language to the job description nine days before it became subject to PEBA:

- a. Under Job Summary and Scope: “Devotes a majority of work time to supervisory duties and regularly directs the work of two or more other employees.” This is a near quote of a portion of the definition of supervisor in Section 4(T) of the PEBA, made applicable to UNM SRMC on May 18, 2022.
- b. Under Essential Functions: “Administers or makes recommendations regarding performance evaluations, promotions, administration of personnel policies with staff, hiring or discipline.”

14. Will Martinez testified concerning his job duties that “... basically I do all the functions that a normal housekeeper should do but I also have extra responsibilities on me.” Audio Record Part 1, at 00:59:48 – 00:59:59.
15. Will Martinez testified that his usual shift is 9:00 a.m. to 5:30 p.m. Monday through Friday and that Housekeepers work either a day shift (8:00 a.m. to 5:00 p.m.), an evening shift (5:00 p.m. to 1:30 a.m.) or a graveyard shift (10:30 p.m. to 7:00 a.m.), although one works from 7:00 a.m. to 3:30 p.m. Testimony of Will Martinez, Audio Record Part 1 at 00:37:00 – 00:38:26.
16. According to Will Martinez, there are six Housekeepers who work the day shift, six who work the evening shift, and two that work the graveyard shift. Testimony of Will Martinez, Audio Record Part 1 at 00:21:08 – 00:22:02.
17. Will Martinez is typically not on UNM SRMC premises during the evening or graveyard shifts so that he is not physically present to supervise Housekeepers working during those shifts. Testimony of Will Martinez, Audio Record Part 1 at 00:38:27 – 00:39:07.
18. Will Martinez carries a phone that allows Housekeepers to contact him to answer questions during his shift but when he leaves for the day, he gives that phone to

another Housekeeper so that he or she can answer such questions. Testimony of Will Martinez, Audio Record Part 1 at 00:48:10 – 00:48:28.

19. Comparing Joint Exhibit 1 with UNM SRMC Exhibit 4 shows that the Lead Housekeeper position shares the following identical job duties with Housekeepers:
- a. Select cleaning materials/supplies and use chemical dispensing machines according to procedure;
  - b. Clean assigned areas by removing the trash, high and low dusting, and using hospital approved disinfectant to clean all available lateral surfaces. Cleaning also includes washing walls, doors, doorframes, ceilings, ventilators, patient televisions and windows. Polish hardware, brass, furniture, mirrors, lighting fixtures, window sills, screens, vents, radiators, exteriors of cabinets and non-medical equipment;
  - c. Sweep and mop hard surface floors, vacuums carpets, spot-clean carpet using appropriate solution, and arrange furniture and equipment in an orderly fashion after cleaning assigned area;
  - d. Operate various types of cleaning equipment both mechanical and electrical to include vacuum cleaner, shop vacuum, mini extractor, auto floor scrubber and/or roto machine. Clean equipment and notify manager of equipment needing repair;
  - e. Report safety hazards to manager;
  - f. Hang cubicle curtains, window drapes, or reach high areas for other cleaning purposes which may require the use of a ladder;
  - g. Collect various types of waste from all areas of the hospital to include hazardous waste. Sanitize all garbage cans, and keep compactor area free of debris;
  - h. Collect soiled linen and stage for pick up and deliver clean linen;



- i. Collect and transport infectious waste using appropriate personal protection equipment in designated containers to staging area for vendor collection for appropriate destruction according to federal and state laws;
  - j. Clean Isolation rooms as outlined terminal cleaning procedures;
  - k. Terminal clean Operating Rooms and other sterile environments as outlined in terminal cleaning procedures and/or according to requirements as stated in governing agencies.
20. Like Housekeepers, Will Martinez has an assigned area for cleaning but currently, he acts as a “floater” cleaning an area that is not covered by another Housekeeper. When he is cleaning his assigned area, he is doing the same work as any of the Housekeepers. Testimony of Will Martinez, Audio Record Part 1 at 00:33:53 – 00:34:32.
21. Will Martinez spends six hours of his 8-hour shift cleaning his assigned area, work that is identical to that performed by the Housekeepers. Testimony of Will Martinez, Audio Record Part 1 at 00:34:32 – 00:34:53.
22. There are five employees in UNM SRMC’s maintenance department in addition to the Lead Maintenance Mechanic, a position held by Tony Molina: A Journeyman Electrician, a Journeyman Plumber and three Maintenance Technicians. Testimony of Tony Molina, Audio Record Part 3 at 00:37:47 – 00:38:13.
23. In UNM SRMC’s maintenance department, job assignments are made using a work order process, whereby requests for service are called or emailed in, and either the department’s Coordinator or Director completes a work order, assigning it to one of the department’s employees as may be appropriate in their judgement. Testimony of

- Gene Hernandez, Audio Record Part 2 at 00:13:45 – 00:14:48 and 00:27:33 – 00:28:46; Testimony of Tony Molina, Audio Record Part 3 at 00:40:42 – 00:41:30.
24. Copies of work orders admitted into evidence as Union Exhibit C, show that Tony Molina is assigned work on the same basis as the other employees in his group.
25. Except for tasks that require a plumber's license or electrician's license, Tony Molina does the same work pursuant to work orders as the other five employees in his group. This can include installing soap dispensers, snaking a toilet drain or dealing with furniture. Because he is the most familiar with UNM SRMC's automated computer-controlled systems, he is the one who most frequently performs those tasks. Testimony of Tony Molina, Audio Record Part 3 at 00:39:25 – 00:40:41.
26. Tony Molina spends around six hours of his eight-hour shift responding to work orders on the same basis as, and performing the same work as, the other five employees in his group, except when the Journeyman Electrician or Journeyman Plumber perform work requiring a license. Audio Record Part 3, at 44:38-45:07. The other two hours of his shift is mostly filled with escorting contractors or operating the computer-controlled automated systems. Testimony of Tony Molina, Audio Record at 00:56:11 – 00:56:43.
27. Neither Will Martinez nor Tony Molina have ever issued any discipline such as a write up, suspension or termination, to any employee in their group. Testimony of Will Martinez, Audio Record Part 1 at 00:39:08 – 00:40:06; Testimony of Tony Molina, Audio Record Part 3 at 00:38:27 – 00:39:24.
28. Whenever a situation arises calling for discipline beyond informally talking with the employees involved, the Lead Maintenance Mechanic and Lead Housekeepers refer it to Director of Facilities and Plant Operations for resolution as contrasted with

- language in their Job Descriptions Joint Exhibits 1 and 2, stating one of their essential functions to be “Administers or makes recommendations regarding performance evaluations, promotions, administration of personnel policies with staff, hiring or discipline.” Testimony of Will Martinez and Tony Molina, Id.; Exhibits J-1 and J-2.
29. Gene Hernandez, Director of Facilities and Plant Operations, confirmed that discipline was handled by him. He, not Tony Molina, has issued write-ups to the maintenance staff and Tony was not involved. Testimony of Gene Hernandez, Audio Record Part 2 at 00:8:45 – 00:10:08; 00:30:55 - 00:31:36 and 00:34:51 – 00:36:10.
30. The Lead Housekeeper Job Description, Joint Exhibit 1 designates one of the position’s Essential Functions as “Coordinate schedules and staffing for daily operations”. Exhibit J-1.
31. The Lead Maintenance Mechanic Job Description, Joint Exhibit 2 designates one of the position’s Essential Functions as “Plan work schedules and assign hours and areas of work to ensure adequate services for all areas of the hospital and off-site areas.” Exhibit J-2.
32. The manner in which both Will Martinez and Tony Molina fulfill their Essential Functions concerning scheduling, involves working with their Directors to generate a master annual schedule. Testimony of Will Martinez, Audio Record Part 1 at 00:42:33 – 00:44:19; Testimony of Tony Molina, Audio Record Part 3 at 00:49:48 – 00:51:24.
33. This master schedule takes about one day once a year to develop. Testimony of Gene Hernandez, Audio Record Part 3 at 00:37:55 – 00:40:27.

34. Employees in the Maintenance department pick their shifts on this master schedule based on seniority. Testimony of Gene Hernandez, Audio Record Part 3 at 00:49:48-00:51:24.
35. There are deviations from the master schedule possible whenever an employee wants to use personal time off benefits such as sick leave or annual leave (PTO). When employees want to use PTO, they prepare a request form, sign it and submit it to the responsible supervisor for approval. In both departments, the supervisor who approves the PTO forms is the Director, not the Leads. Testimony of Will Martinez, Audio Record Part 1 at 00:35:54 – 00:36:47; Testimony of Gene Hernandez, Audio Record Part 2 at 00:33:13 – 00:33:48; Testimony of Tony Molina, Audio Record Part 3 at 00:51:25 – 00:52:05.
36. The Housekeeper Job Description, UNM SRMC Exhibit 4, notes that the Housekeepers work “[u]nder the supervision of the EVS Director”, presently, Brenda Murray, who supervises all the Housekeepers, including the Lead Housekeeper, Will Martinez. Testimony of Will Martinez, Audio Record Part 1 at 00:40:06 – 00:40:14.
37. Both the Lead Housekeeper Job Description, Joint Exhibit 1 and the Lead Maintenance Mechanic Job Description, Joint Exhibit 2 designate as one of the position’s Essential Functions “Administers or makes recommendations regarding performance evaluations, promotions, administration of personnel policies with staff, hiring or discipline.” Exhibits J-1 and J-2.
38. The manner in which both Will Martinez and Tony Molina fulfill their Essential Functions concerning hiring is to engage in a collaborative process whereby they sit in on interviews of job applicants and give input on their views of the candidate after

the candidate answers predesignated questions prepared by HR or other management personnel. In the Maintenance department, Technicians and Journeymen may also sit in on the interviews and give their input. In the EVS department, they are currently on a fast-track process with different procedures, but when they were not on that fast-track process, employees from other areas of the hospital would also sit in on interviews. In the EVS department, the Director selects the candidates for interview; in the maintenance department, all employees decide who to interview. Testimony of Will Martinez, Audio Record Part 1 at 00:24:44 – 00:26:44; 00:40:15 – 00:42:14; Testimony of Tony Molina, Audio Record Part 3 at 00:41:31 – 00:44:25.

39. In contrast to the Job Description, Exhibit J-2, Tony Molina testified that he has no role in promotions and there have been no promotions in the Maintenance department during his time there as a Lead Maintenance Mechanic. Testimony of Tony Molina, Audio Record Part 3 at 00:44:26 – 00:44:38.
40. Similarly, there is no testimony on the record to support a conclusion that Will Martinez was involved in any promotions in his department as the Lead Housekeeper or that there had been any promotions in his department since he served in that position. Testimony of Will Martinez, Audio Record Part 1 at 00:15:00 – 01:08:07.
41. The only training the Lead Housekeeper and the Lead Maintenance Mechanic provide is informal on-the-job training. Testimony of Will Martinez, Audio Record Part 1 at 20:40-21:08; Testimony of Gene Hernandez, Audio Record Part 2, at 00:41:53 – 00:42:23; Testimony of Tony Molina, Audio Record Part 3 at 1:04:11 - 1:05:03.

42. UNM SRMC places new hires on an “orientation period” defined in policy to be “The period beginning the first day of work as directed by the employee’s Director/Manager and continues until the employee has been approved by the Director/Manager of the necessary skills and training for the job functions by completing a skills delineation list and the employee has completed the hospital’s formal orientation.” Joint Exhibit 3, at JT0034-35.
43. UNM SRMC policies refer to this period as either a “90-day orientation period,” as in Joint Exhibit 3 at JT0126 or a “90-day probation period,” Id. at JT0108.
44. UNM SRMC’s policy concerning Employee Orientation and Competencies, in addition to requiring employees to review UNM SRMC’s Personnel Manual, further provides in part:
- “All new employees must also attend an ‘in-class’ orientation session in order to successfully complete the orientation period. Competency Based Orientation (CBO) must be completed by new hires prior to the end of the orientation period.”
- Joint Exhibit 3, at JT0053.
45. In practice, the “orientation period” referred to is 90 days, necessary to ensure employees can “work independently...” after which, if the employee could not demonstrate the competencies for the job, the Hospital would let them go.
- Testimony of Gene Hernandez, Audio Record Part 2 at 00:33:13 – 00:33:48.
46. UNM SRMC’s Director of Human Resources described the orientation period as “time where you’re reviewing and assessing an employee’s skill level for the job.”
- Testimony of Colleen Bales, Audio Record Part 3 at 00:28:30 – 00:28:42
47. During the “orientation period” employees cannot use PTO (under policies in effect at the time of the petition), Joint Ex. 3, at JT0107 & JT0098, cannot utilize bereavement leave, id. at JT0100 and are “not eligible to receive a merit increase,

unless approved by the respective Executive Team member in conjunction with the Director of Human Resources.” Id. at JT0027.

## **REASONING AND CONCLUSIONS OF LAW:**

### **I. THE LEAD MAINTENANCE MECHANIC AND THE LEAD HOUSEKEEPER ARE NOT “SUPERVISOR[S]” AS DEFINED BY THE PEBA.**

A “supervisor”, as that term is defined in § 10-7E-4 of the Act, is excluded from collective bargaining so that their inclusion in a bargaining unit would render it “inappropriate”. See NMSA 1978 § 10-7E-13(C) (2020).<sup>4</sup> The Board has construed the definition of “supervisor” under the Act many times and I apply the test developed in our jurisprudence to determine whether Facilities Services Maintenance Technician Leads (also referred to as Lead Maintenance Mechanic or Maintenance Lead) and Lead Housekeepers employed by UNM SRMC may be included in the petitioned-for bargaining unit.

For a position to be deemed to be a “supervisor”, that position must: (1) devote a majority of work time to supervisory duties *and* (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. An employee must meet all three prongs of this first step in determining supervisory status or the employee is not a supervisor excluded under the Act.<sup>5</sup>

Even if an employee meets all of the above three elements, the subject position may nevertheless still not be a supervisor if: (1) the supposed supervisory duties performed are merely routine, incidental or clerical in nature *or* (2) the employee only occasionally assumes

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<sup>4</sup> Although not among those positions excluded under § 5, the PEBA excludes supervisors under § 13(C). See *Santa Fe Police Officers’ Association v. City of Santa Fe*, 02-PELRB-2007 (Oct. 14, 2007).

<sup>5</sup> The Union does not dispute that the Lead employees at issue here customarily and regularly direct the work of two or more other employees except to the extent that the lack of independent judgment may impact whether such direction constitutes “supervision”. Therefore, this decision concentrates on the first and third elements of the three-pronged test set forth by Section 4(T).

a supervisory role, *or* (3) the employee's duties are substantially similar to those of his or her subordinates, *or* (4) the employee is a "lead employee" or (5) he or she is merely "an employee who participates in peer review or occasional employee evaluation programs." Thus, while a position must meet all three of the threshold conditions to be deemed a supervisor any one of the five conditions enumerated in the second part of the definition will remove the position from the supervisor exemption. PEBA's definition of "supervisor" is a term of art - although one may be "supervising" in the ordinary sense of the word, the statutory definition includes more than simply giving direction to subordinate employees. For this determination, the employees' actual job duties, rather than job descriptions, job titles or ranks is controlling. See *AFSCME v. N.M. Dept. of Corrections*, D-202-CV-2013-01920, (May 15, 2014); *In re: N.M. Coalition of Public Safety Officers, Local 7911, CWA, AFL-CIO & Town of Bernalillo*, 1-PELRB-21 (1997); *N.M. State University Police Officers Association and N.M. State University*, 1-PELRB-13. Lieutenants in the New Mexico Department of Corrections were found not to meet at least two of the three criteria required by PEBA § 4(I) for supervisory status because: (1) they do not devote a majority amount of work time to supervisory duties and they do not have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively. It is arguable whether they met the third criterion as well, i.e., customarily and regularly directing the work of two or more other employees because of the absence of independent discretion in the direction of their subordinates except in rare circumstances. *AFSCME, Council 18 v. N.M. Dep't of Corrections*, 2-PELRB- 2013 (Jan. 23, 2013).

Among the many cases decided by this Board applying the PEBA's definition of "supervisor" to various fact patterns, I rely in large part upon *Santa Fe Firefighters Assoc. Local 2059 & City of Santa Fe*, 1-PELRB-6 (1995) and *McKinley County Sheriff's Assoc. FOP &*



*McKinley County*, 1-PELRB-15 (1995). In both cases, this Board determined that a key determinant in finding supervisory status is whether the employee is exercising independent judgment in contrast with routinely ensuring that procedures and policies are followed. Where an employee is merely relaying instruction from the employer or ensuring that subordinates adhere to established procedures, that individual is not a supervisor under the Act.

**A. The Lead Maintenance Mechanic and The Lead Housekeeper do not Spend a Majority of Their Work Time Performing Supervisory Duties.**

The first element of PEBA's definition of supervisor requires that an alleged "supervisor" must devote a majority of his or her time to "supervisory duties". As stated in *Santa Fe Firefighters Assoc. Local 2059* and *McKinley County Sheriff's Assoc. FOP, supra*, such supervisory duties typically include directing subordinates' work in a manner that requires the exercise of independent judgment distinct from the work of their subordinates, reviewing their paperwork for accuracy and completeness, overseeing their work and evaluating their performance; disciplining and recommending discipline; conducting meetings related to insuring that the employer's policies and procedures are communicated to and carried out by staff. See *In re: Communications Workers of America, Local 7911 & Doña Ana County*, 1 PELRB-16 (Jan. 2, 1996); *In re: AFSCME v. N.M. Dep't of Corrections*, 02-PELRB-2013 (Jan. 23, 2013), upheld on appeal in *N.M. Corrections Dep't. v. AFSCME, Council 18*, D-202-CV-2013-09120 (May 15, 2014); *In re: NMCP SO-CWA Local 7911 & City of Rio Rancho Police Department*, 04-PELRB-2009 (April 6, 2009); *In re: New Mexico Coalition of Public Safety Officers Ass'n & County of Santa Fe*, 78-PELRB-2012 (Dec. 5, 2012). Administrative tasks such as completing standard forms and reports do not constitute supervision.

In *AFSCME v. N.M. Dept. of Corrections*, D-202-CV-2013-01920, (May 15, 2014), the District Court noted that PEBA's definition of supervisor is a term of art: "Although lieutenants may be 'supervising' in the ordinary sense of the word, 'supervisor' is a term of art with a specific statutory definition that includes more than simply giving direction to subordinate employees." For this determination, the employees' actual job duties, rather than job titles or ranks is controlling. *In re: N.M. Coalition of Public Safety Officers, Local 7911, CWA, AFL-CIO & Town of Bernalillo*, 1-PELRB-21 (1997) ("It is not the rank nomenclature ... that is determinative but rather the facts related to whether the individual functions as a supervisor as defined under the Act."); *N.M. State University Police Officers Association and N.M. State University*, 1-PELRB-13 at 5-6 (job duties, not titles or job descriptions control).

The preponderance of the evidence does not support a conclusion that UNM SRMC's Facilities Services Maintenance Technician Lead and Lead Housekeeper spend a majority of their work time engaged in supervisory duties as that term is understood under the Act.

For example, the Hospital argues that while its Lead Housekeeper does provide housekeeping services just as his subordinates do, those services "must be done in conjunction with his supervisory role." This is just a different permutation of the long-discredited argument that because one is designated a supervisor, everything (or nearly everything) they do at work, even though it may be the same work being performed by their subordinates, constitutes supervision. See *In re: New Mexico State University Police Officers Association and New Mexico State University*, 1 PELRB No. 13 (June 14, 1995) (discounting testimony that police sergeants are expected to supervise 100% of the time, where that expectation only results in the occasional performance or assumption of supervisory or

directory roles).<sup>6</sup> Consequently, I do not give weight to Mr. Martinez's testimony that as a Lead Housekeeper he spends approximately 75-80% of his time supervising other employees inasmuch as it suffers from a misconception of what constitutes "supervision" as a term of art under the Act. Elsewhere in his testimony, Mr. Martinez said he spends around 6 hours out of his 8-hour shift doing the same work as his subordinates, including cleaning the area assigned to him by his Director. Based on this estimate, the evidence supports a conclusion that 75% of the Lead Housekeeper's work is indistinguishable from that of his subordinates. This is consistent with his testimony that as a lead worker "basically I do all the functions that a normal housekeeper should do but I also have extra responsibilities on me."

Testimony of Will Martinez, Audio Record Part 1 at 00:59:48 – 00:59:59. Even if all of those "extra responsibilities" constituted supervision under the Act the Maintenance Lead clearly does not spend a majority of his work time performing them and when asked to detail which of his duties constituted supervision of his subordinates Mr. Martinez could not articulate what those supervisory duties might be.

With the arguable exception of maintaining proper staffing connected with subordinates' requests for PTO, the record is devoid of any evidence that any of the duties performed during the remaining 25% of a Maintenance Lead's workday (after accounting for those hours he performs work identical to his subordinates) requires independent judgment.

In its Closing Brief UNM SRMC points out that Mr. Martinez stated that there were instances when his Director deferred to his opinion regarding scheduling PTO and gave an example of one time the Director originally denied an employee's request for PTO but

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<sup>6</sup> UNM SRMC indicated in its Closing Brief that the Lead Housekeeper "oversees" the work of approximately six employees on the morning shift, six employees on the evening shift and three employees during the graveyard shift, but he can hardly be said to be supervising all of them because he does not work all three shifts. Although he carries a phone that allows Housekeepers to contact him to answer questions during his shift, when he leaves for the day, he gives that phone to another Housekeeper so that he or she can answer such questions.

after the Lead Housekeeper assured the Director that the shift would be covered, she changed her determination and granted the leave. That example leaves open the possibility that the original denial was preliminary, pending review of coverage and that in the absence of the Lead Housekeeper, the Director might have conducted that review herself and so, reversed her earlier denial anyway. In any event, such exercises of independent judgment, if that's what they are, are infrequent and *de minimus*.

I also conclude that the Facilities Services Maintenance Technician Lead does not spend a majority of his work time performing supervisory duties for many of the same reasons given in the Lead Housekeeper analysis. As did Mr. Martinez, the Lead Maintenance Mechanic, Tony Molina, testified that he spends about six hours out of his eight-hour shift doing the same work as his subordinates. As concerns Mr. Molina, that involves responding to work orders. Copies of work orders, admitted into evidence as Union Exhibit C, show that Tony Molina is assigned work on the same basis as the other employees in his group and he testified that except for tasks that require a plumber's license or electrician's license, Tony Molina does the same work pursuant to work orders as the other five employees in his group, such as installing soap dispensers, snaking a toilet drain or dealing with furniture. For the same reasons as are given for the Lead Housekeeper, I do not consider that work, which constitutes a majority of the work performed, to be supervision. As concerns work requiring the licenses held by his subordinate Journeyman Electrician or Journeyman Plumber, because he does not hold such licenses himself, (See the Required Qualifications and the Education/Experience sections of Exhibit J-2) the Lead Maintenance Mechanic cannot be said to be supervising such work, even if he peers over their shoulders or sat with them side by side observing them through the entire process, because he is not qualified to exercise any independent judgment with regard to such work. Similarly, his responsibilities for

monitoring automated computer-controlled systems because he is the one most familiar with them does not constitute supervision because any exercise of independent judgment concerns his own work, not those of his subordinates. Likewise, time spent escorting contractors on hospital premises is not supervision for multiple reasons, not least of which is that such persons are contractors, not employees. Neither does his authority and training for collecting and transporting infectious waste constitute supervision of others in any way. Therefore, I conclude that 75% of the time spent by the Lead Maintenance Mechanic during his shift is spent performing duties that are indistinguishable from those of their subordinates, and the work performed that is not similar is not supervisory

**B. The Lead Maintenance Mechanic and Lead Housekeeper do not Have Authority in the Interest of the Employer to Hire, Promote or Discipline Other Employees or to Recommend Such Actions Effectively.**

In addition to the requirement that an alleged “supervisor” must devote a majority of his or her time to “supervisory duties” Section 4(I) of the Act requires evidence that such employee must also have the authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively. However, if such employee performs merely routine, incidental or clerical duties or such employee only occasionally assumes a supervisory or directory role or those duties are substantially similar to the duties of the individual’s subordinates or they participate in peer review or occasional employee evaluation programs, such employee does not meet the definition of a “supervisor”. The definition of “supervisor” under the Act also expressly excludes lead employees.

The preponderance of the evidence in this case supports a conclusion that the Lead Maintenance Mechanic and Lead Housekeeper do not have authority in the interest of the

employer to hire, promote or discipline other employees or to recommend such actions effectively. The only involvement by both positions in the hiring process is their occasional participation on a panel of employees who interview applicants pre-screened by the Hospital's Human Resources Department, scoring their responses to questions pre-determined by the Human Resources Department or other management personnel such as the unit Director and, as a group (which may include employees recognized by the employer as non-supervisory), recommending those applicants the group thinks answered the questions best. This does not rise to the level of an exercise of "authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively" by the Lead Maintenance Mechanic and the Lead Housekeeper required by Section 4(I) to be deemed a supervisor. To the contrary, it constitutes participation in "peer review or occasional employee evaluation programs" expressly excluded from the definition of "supervisor" by Section 4(I).

They are not authorized to issue any discipline beyond verbal "correction" or documenting those verbal corrections, which corrections arguably do not rise to the level of discipline. Neither Will Martinez nor Tony Molina have ever issued any discipline such as a write up, suspension or termination, to any employee in their group. When they believe discipline beyond a verbal correction may be warranted, they are required to refer the matter to their respective unit Directors. Their testimony helps clarify what the phrase "Administers or makes recommendations regarding performance evaluations, promotions, administration of personnel policies with staff, hiring or discipline." (the language in their Job Descriptions, Joint Exhibits 1 and 2, describing one of their essential functions) means in practice. I am particularly persuaded in this regard by the testimony of Gene Hernandez, Director of Facilities and Plant Operations, who confirmed that he handled all discipline in that

department. He, not Tony Molina, has issued disciplinary write-ups to the maintenance staff and Mr. Molina was not involved in any of those.

As concerns making promotions or effectively recommending employees for promotion, Tony Molina testified, notwithstanding language in his job description, that he has no role in the promotion process and has never been involved in a promotion of anyone in the Maintenance department during his time there as a Lead Maintenance Mechanic. Similarly, there is nothing on the record to suggest that Will Martinez was involved in any promotions in his department as the Lead Housekeeper or that there had been any promotions in his department since he served in that position. I cannot conclude based on such evidence that the two positions have authority to promote their subordinates or to effectively recommend a promotion.

Based on the foregoing, I conclude that the Lead Maintenance Mechanic's and Lead Housekeeper's duties actually performed, do not meet at least two of the three threshold elements of a "supervisor" excluded from a bargaining unit under the Act – they do not have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively; and they do not devote a majority of their time to "supervisory duties".

**C. A Preponderance of the Evidence Establishes that The Lead Maintenance Mechanic and Lead Housekeeper are "Lead Employee[s]" Expressly Excluded From the Definition of a "Supervisor" under the Act.**

The Public Employee Bargaining Act, NMSA 1978 §10-7E-4(T) (2020) provides:

"supervisor" means an employee who devotes a majority 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 a supervisory or directory role or whose duties are substantially similar to those of the individual's subordinates and *does not include a lead employee* or an employee who participates in peer review or occasional employee evaluation programs.”

(Emphasis added).

The term “lead employee” is not further defined in the Act and so I rely on the common understanding of the term in as it exists in the field of labor relations. A “lead worker” or “lead employee” is commonly understood to refer to those employees who assign work to their co-workers and ensure its completion for a specified work group. While lead workers may assist in many supervisory functions, that assistance is typically limited to preparing or offering input rather than making the actual determinations or recommendations in the employer's interests. That common understanding underlies the decision by this Board *In re: Classified School Employees Council-Las Cruces and Las Cruces Schools*, 1 PELRB No. 20 (Feb. 13, 1997) wherein Head Custodians and Supervisory Custodians at Las Cruces Public Schools were found not to be supervisors under the PEBA because they performed the same work as their subordinates and functioned as a lead employee.

In the context of a Title VII claim where an employer's liability for workplace harassment may depend on the status of the harasser as a “supervisor”, the U.S. Supreme Court has held that an employee is a “supervisor” for purposes of vicarious liability under Title VII only if he or she is empowered by the employer to take tangible employment actions against the victim. See, *Vance v. Ball State University, et al.*, 570 U.S. 421 (2013). In its decision the

Supreme Court noted:

“Particularly in modern organizations that have abandoned a highly hierarchical management structure, it is common for employees to have overlapping authority with respect to the assignment of work tasks. Members of a team may each have the responsibility for taking the lead with respect to a particular aspect of the work and thus may have the responsibility to direct each other in that area of responsibility.”



The *Vance* decision draws a distinction between those employees “taking the lead with respect to a particular aspect of the work” exercising “overlapping authority with respect to the assignment of work tasks” and those employees who are truly supervisors by virtue of the authority vested in them by their employer to take tangible employment actions with respect to their subordinates. A similar distinction may be drawn under the facts of this case. The two employees at issue perform substantially all of the same work as do their subordinates, provide input on job assignments, make recommendations regarding performance evaluations, promotions, administration of personnel policies with staff, hiring or discipline but their supervision overlaps with that of their respective Unit Directors and they do not make the ultimate determinations or recommendations in the employer’s interests effecting their co-workers. Therefore, I conclude that the Lead Maintenance Mechanic and Lead Housekeeper positions are Lead Employees under the Act expressly excluded from the definition of a “supervisor”.

In Summary, the Lead Maintenance Mechanic and Lead Housekeeper positions do not devote a majority of their work time to supervisory duties. While they customarily and regularly direct the work of two or more employees, the majority of their work time is spent performing duties in their respective Maintenance and Housekeeping fields that are substantially the same as those performed by their subordinates. To the extent they assign tasks, ensure subordinates perform their job duties and complete their assignments, evaluate subordinates, conduct staff meetings, provide hands-on training for other employees and otherwise provide employee direction as needed, such work is in the nature of a lead worker’s duties. To the extent that they explain tasks to subordinates, their supervisory functions are incidental and occasional and, for the most part, do not require the

exercise of independent judgment and discretion because any such direction is circumscribed by the requirements of existing policies and operating procedures.

**II. UNM SRMC EMPLOYEES MELISSA CHACON, ALEXIS HESLOP, LUPITA MUNOZ, SANDRA VIGIL, JASON RIMBERT AND NADINE CHAVES, WERE EMPLOYED IN A PROBATIONARY STATUS AT THE TIME THE INSTANT PETITION WAS FILED SO THAT THEY SHOULD NOT BE INCLUDED IN THE EMPLOYEE LIST FOR PURPOSES OF AN ELECTION OR CARD CHECK.**

The Union contends that six employees appearing on the employer's list of those eligible to be in the putative bargaining unit had not completed their 90-day probationary period at the time the petition was filed and so, should not have been included: Melissa Chacon (Dietary Aide, DOH 3/18/22), Alexis Heslop (Dietary Aide, DOH 4/29/22), Lupita Muñoz (Food Service Worker, DOH 3/18/22), Sandra Vigil (Housekeeper, DOH 4/29/22), Jason Rimbert (Maintenance Technician, DOH 3/4/22), and Nadine Chavez (Patient Assistant Representative, DOH 3/18/22).

SRMC acknowledges that its new employees undergo an orientation period, usually 90 days in duration, but contends that is not a probationary period because its employees are "at - will", subject to discharge at any time for any reason or for no reason at all, and such status is inconsistent with a probationary period.

The dispute is significant because an accurate list of eligible employees existing at the time the Union's Representation Petition is filed is necessary in order to ascertain majority status, a pre-requisite for recognition of a bargaining unit and its exclusive representative. See NMAC 11.21.2.13. Because by definition, probationary employees typically are excluded

from coverage of the Act<sup>7</sup>, their inclusion on an employee list upon which the Director must rely for ascertaining majority support may adversely impact that determination.

This Board's regulations define a probationary employee for purposes of the Act:

“Probationary employee” for state employees shall have the meaning set forth in the State Personnel Act and accompanying regulations; for other public employees, other than public school employees, it shall have the meaning set forth in any applicable ordinance, charter or resolution, or, in the absence of such a definition, in a collective bargaining agreement; provided, however, that for non-state employees a public employee may not be considered to be a probationary employee for more than one (1) year after the date he or she is hired by a public employer. If otherwise undefined, the term shall refer to an employee who has held his or her position, or a related position, for less than six months.”

NMAC 11.21.1.7(B)(9).

I do not agree with UNM SRMC's argument that the Union by asserting SRMC's orientation period is the same thing as a probationary period for purposes of the Act, that it is arguing for an effective change in the at-will status of UNM SRC's employees. I see nothing on the record or in the Union's closing brief arguing such a position. While I acknowledge that in public employee jurisprudence the end of a probation period is often associated with a change in the at-will employment status of the probationer, I am not aware of any authority requiring that it must necessarily be so and UNM SRMC cites to none in its brief. In all instances that I am aware of in which a public employee's at-will status ends with his or her probation, that change in status is based on statutory or accompanying regulatory rights in an applicable ordinance, charter or resolution requiring just cause after the probationary period or is based upon express language requiring just cause found in a collective bargaining agreement; not because the probationary period ended perforce.

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<sup>7</sup> NMSA 1978, §10-7E-4(Q) (2020) defines what is a “public employee” as “...a regular *nonprobationary* employee of a public employer...” except as otherwise provided for employees of the public schools. (emphasis added).

As commonly understood, a probationary period is a length of time when a new employee is under evaluation, receives training or extra supervision either to learn the job or improve performance. To infer from the fact that a change in at-will employment status often, even usually, accompanies the end of probation, that the change in at-will status is a necessary component of completing a probationary period is to commit the fallacy of composition that arises when one infers that something is true of the whole from the fact that it is true of some part of the whole. In this case, it is fallacious to assert that the end of UNM SRMC employees' probationary (or orientation) period necessitates a change in their at-will employment status, because a probationary period serves a variety of functions, most of which are not ending at-will employment status. For example, UNM SRMC acknowledges that it places new hires in an "orientation period" delineated in its policy as "The period beginning the first day of work as directed by the employee's Director/Manager and continues until the employee has been approved by the Director/Manager of the necessary skills and training for the job functions by completing a skills delineation list and the employee has completed the hospital's formal orientation." Joint Exhibit 3, at JT0034-35. UNM SRMC witness Gene Hernandez testified that this "orientation period" is typically 90 days in duration and was necessary "because we need to make certain and comfortable that they can work independently...". The Hospital's Human Resources Manager, Colleen Bales, described the orientation period as "time where you're reviewing and assessing an employee's skill level for the job." The Hospital's policy provides "All new employees must also attend an 'in-class' orientation session in order to successfully complete the orientation period. Competency Based Orientation (CBO) must be completed by new hires prior to the end of the orientation period.". During this "orientation period" employees cannot use PTO (except as may be provided for in the recently enacted Health Care Workers Protection Act)

or bereavement leave and are not typically eligible to receive a merit pay increase except under certain limited circumstances. UNM SRMC policies refer to this period as either a “90-day orientation period,” or a “90-day probation period”.

All of the above aspects of the Hospital’s “orientation period” are consistent with the understanding of the term “probationary period” in the common parlance. This Board’s definition of “probationary employee” for non-state employees is silent on the question of at-will employment status and I will not import an element that is not in the common parlance into the Board’s definition.

Based on the foregoing, I conclude that for the purposes of applying the PEBA, (which is silent on the issue of at-will employment status) any difference between UNM SRMC orientation period and what is defined in the Board’s rules as the probationary period for non-state public employees is mere semantics. The six employees at issue in this case should not be included on the employee list pertaining to the IAMAW’s representation petition because they were in 90-day probationary status at the time the Petition was filed and they will not be considered for purposes of determining majority status.

**DECISION:** For the reasons set forth above, the Lead Maintenance Mechanic and the Lead Housekeeper positions are not supervisors as contemplated by the Act. They do not spend a majority of their work time performing supervisory duties. They do not have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively. Rather, a preponderance of the evidence establishes that the Lead Maintenance Mechanic and Lead Housekeeper are Lead Employees expressly excluded from the definition of a “supervisor” under NMSA 1978 §10-7E-4(T) (2020). Therefore, those positions are included as part of the appropriate bargaining unit in this case.

UNM SRMC employees Melissa Chacon, Alexis Heslop, Lupita Munoz, Sandra Vigil, Jason Rimbart and Nadine Chaves, were employed in a probationary status as the PEBA, NMSA 1978, §10-7E-4(Q) (2020), and the Board's Rule NMAC 11.21.1.7(B)(9) apply the term, at the time the instant petition was filed so that they should not be included in the employee list for purposes of an election or card check.

Issued, Thursday, August 11, 2022.



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