26-PELRB-2022

STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

UNITED HEALTH PROFESSIONALS OF NEW MEXICO, AFT, AFL-CIO,

Petitioner,

and **PELRB No. 304-22**

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 open meeting on November 19, 2022 upon the appeal of the United Health Professionals of New Mexico, AFT, AFL-CIO ("Petitioner"), from the Hearing Officer's Report and Recommended Decision dated August 23, 2022. The matter had previously come before the Board at its meeting on October 4, 2022, and the parties engaged in oral argument but the Board voted to table the matter. The Board thereafter carefully reviewed the Recommended Decision, the request for review, and the response thereto. Pursuant to the Public Employee Bargaining Act (the "PEBA"), NMSA 1978, Sections 10-7E-1 to -25 (2003, as amended through 2020), and being otherwise sufficiently advised, the Board voted 3-0 to reverse the Recommended Decision but only with respect to its conclusion that "SRMC employees employed on a per diem or 'PRN' basis are not 'regular' employees" for the purposes of the PEBA. As part of this decision, the Board voted to remand the matter to the Hearing Officer for the purposes of determining whether the PRN's share a community of interest with others in the petitioned-for unit. The Board further voted to deny UNM-SRMC's oral motion to find that the Board had issued a split decision at its October 4, 2022 meeting and could not thereafter issue a decision by majority vote at its November 19, 2022 meeting.

THEREFORE, the Hearing Officer's Report and Recommended Decision dated dated August 23, 2022 is hereby **REVERSED IN PART**, but only with respect to its conclusion that "SRMC employees employed on a per diem or 'PRN' basis are not 'regular' employees" for the purposes of the PEBA. The Recommended Decision is **ADOPTED** as to its remaining conclusions that found that house supervisors and charge nurses are not excluded from coverage under the PEBA and are appropriate for inclusion in the bargaining unit. This matter is hereby **REMANDED** to the Hearing Officer for the purposes of determining whether the PRN's share a community of interest with others in the petitioned-for unit. Additionally, UNM-SRMC's request that this matter be certified for an interlocutory appeal is **DENIED**, as a final decision on the bargaining unit has not yet been made.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

HON. NAN NASH, BOARD CHAIR

1 December 2022

DATE

STATE OF NEW MEXICO
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UNITED HEALTH PROFESSIONALS
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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.[1] 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.[2]

On May 18, 2022, United Health Professionals of New Mexico (UHP), an affiliate of the American Federation of Teachers (AFT), filed a Petition seeking to represent the following full-time, regular part-time, and per diem, non-probationary employees of the University of New Mexico Sandoval Regional Medical Center (SRMC or Hospital):

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[1] 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".

[2] 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.

Case Managers, Clinic Techs, CT Techs, Dietitians, EEG Techs, Emergency Medical Techs, Interventional Radiology Techs, Licensed Clinical Social Workers, Medical Assistants, Mammography Techs, MRI Techs, Nuclear Medical Techs, Occupational Therapists, Paramedics, Patient Care Techs, Pharmacists, PSG Techs, Physical Therapists, Physical Therapy Assistants, Radiological Techs, Registered Nurses, Rehabilitation Techs, Respiratory Therapists, Respiratory Therapy Assistants, Sleep Lab Techs, Social Workers, Special Procedures Techs, Speech Language Pathologists, Sterile Processing Techs, Surgical Techs, Techs, Ultrasound Techs, X-Ray Techs.

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) and contested inclusion of House Supervisors, Charge Nurses and Lead positions, included within the general job titles Petitioner seeks to represent, on the ground that they are excluded from coverage of the Act as supervisory or managerial employees. See NMSA 1978, §§ 10-7E-5 and 10-7E-13. The Hospital also objected that the there is an insufficient community of interest between licensed and unlicensed staff in proposed unit to constitute a single appropriate bargaining unit.

On June 16, 2022, the Hospital submitted a modified list along with a letter which clarified the job titles it utilizes.

A Scheduling Conference was conducted on June 29, 2022 setting a hearing on unit composition for July 25, 2022. That hearing date was subsequently postponed to August 03, 2022.

The hearing on unit composition took place as re-scheduled with Youtz & Valdez, P.C. appearing for the Petitioner, United Health Professionals of New Mexico, AFT (Shane Youtz) and Samantha M. Hults of Rodey Dickason Sloan Akin & Robb P.A. appearing for Respondent University of New Mexico Sandoval Regional Medical Center.

The following contested issues were presented for my consideration:

1. Whether the Hospital employees employed on a per diem or "PRN" basis are "regular" employees of SRMC as defined by Section 4(Q) of the PEBA.

2. Whether House Supervisors are "management" employees as defined by Section 4(N) of PEBA and, as such, excluded from coverage under the Act.

as those terms are defined in Section 4(T) and/or 4(N) of the PEBA.

3. Whether Charge Nurses are "supervisor[s]" as defined under Section 4(T) of the PEBA and, as such, excluded from coverage under the Act.

Based on the Closing Briefs, any prior claims that PRN employees and non-licensed employees do not share a community of interest with the Hospitals' licensed staff and that its House Supervisors are "supervisors" under the Act have been abandoned.

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 17, 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 p.7, ¶ 2.
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. Pre-Hearing Order ("PHO") at p.7, ¶ 3.

In addition to the above stipulated facts I further find, based on the testimony and documentary evidence submitted at the hearing as follows:

3. The Union does not contest the Hospital's assertion throughout this proceeding that per diem positions are termed "pro re nata" ("PRN") in the medical field, which is a Latin phrase meaning "as the situation demands" or simply "as needed."
4. According to the Hospital's Personnel Manual, "All PRN staff are considered employees of Sandoval Regional Medical Center and are not contract employees. PRN staff must comply with scheduling provisions, appropriate job description, personnel and administrative policies." (Union Exhibit A at page 19; Testimony of Lilia Avila, Part 1 at 00:31:25; Testimony of Araceli Segura Miller Part 1 at 00:44:20).
5. PRN staff must be available to work at least eight hours per week and usually work more. (Union Exhibit A at page 18; Testimony of Lilia Avila, Audio Record at 00:30:00; Testimony of Araceli Segura Miller, Audio Record Part 1 at 00:40:00; Testimony of Adrienne Enghouse Audio Record Part 4 at 00:41:15).
6. Shift assignments for the subject employees are based in part on seniority using the Hospital's "shift wizard" software with full-time employees choosing their shifts first, part-time employees choosing second and PRNs choosing last. (Testimony of Pam Demarest, Audio Record Part 3 at 00:37:40).
7. PRN employees schedule their shifts based upon what is available after full time and part-time employees choose their shifts in order to provide staffing during any periods when there are insufficient FTE and PTE employees to fully staff a shift, floor or unit as needed. (Testimony of Lilia Avila, Audio Record Part 1 at 00:16:30; Testimony of Araceli Segura-Miller Audio Record Part 1 at 00:38:35 -00:40:31). Therefore, PRNs do not have a set schedule like a full-time or part-time regular employee. (Testimony of Lilia Avila, Audio Record Part 1 at 00:14:30 and 00:15:10).

8. When asked to fill in for an absent employee at the last-minute, a PRN is not obligated to accept the assignment if it is not within the days or times the PRN has committed to be available for work. (Testimony of Lilia Avila, Audio Record Part 1 at 00:15:40 - 00:41:12).
9. A PRN is able to substitute for a regular employee for part of a shift. For example, if a regular employee has a doctor's appointment, Ms. Avila can work a short period to allow for the person to attend their appointment and come back to the hospital. (Testimony of Lilia Avila, Audio Record Part 1 at 00:15:50 to 00:16:45).
10. PRNs provide their availability to SRMC and if SRMC needs them to fill-in for an FTE or PTE on leave or otherwise absent during the period a PRN is available, that PRN is called to work. If there is no such FTE or PTE absence, the PRN is not scheduled to work. (Testimony of Coreen Bales, Audio Record Part 1 at 1:03: 1:05:05).
11. Because the person a PRN fills in for is an employee whose position has been counted for staffing levels, PRNs are used to maintain those staffing levels. (Testimony of Coreen Bales, Audio record Part 1 at 1:02:20; 1:41:00; and 1:46:00).
12. PRNs are evaluated in the same manner and on the same criteria as other employees and, if they work a sufficient number of qualifying hours on their "as needed" schedules, they are eligible for the same health insurance coverage as a FTE or PTE. (Testimony of Pam Demarest, Audio Record Part 3 at 00:39:10; 00:43:25). However, Employees holding a PRN position are not eligible to receive certain other benefits enjoyed by FTE or PTE such as, paid time off (PTO)[3] (Testimony of Lilia Avila,

[3] PTO is benefit distinct from legislatively mandated emergency sick leave available to PRNs pursuant to the Healthy Workplaces Act, NMSA Sections 50-17-1 *et seq.* effective on July 1, 2022. The HWA requires private employers in New Mexico to allow employees to accrue and use a benefit called "earned sick leave" for various

Audio Record Part 1 at 00:16:45) Career Advancement Program (CAP) incentive payments or tuition reimbursement. (Testimony of Lilia Avila, Audio Record Part 1 at 00:17:18 to 00:18:26), see also, Testimony of Coreen Bales, Audio record Part 1 at 1:06:38 - 1:13:25); Union Exhibit A at ATF 088; Union Exhibit B re: Educational Leave, Employee Medical Crisis Leave at ATF 112; Employee Crisis Leave, Id. at AFT 157; Group Health, Dental or Life, Id. at AFT 161; Paid Bereavement Leave, Id. at 173; Paid Jury Duty Leave, Id. at 182; Paid Parental Leave, Id. at 189; Personal Leave, Id. at 212.

13. Pursuant to SRMC policy PRNs are among the first positions to be eliminated during a reduction in force (RIF). SRMC's Reduction in Force Policy, Union Ex. B at AFT 225-228 provides in pertinent part:

    "B. The reduction in force order will be determined by the classification of the position to be eliminated from the department (cost center) in the following order:

    1. First, temporary (including casual pool/per diem) employees
    2. Regular part-time employees
    3. Regular full-time employees"

14. After a RIF, SRMC policy prioritizes FTE and PTE over PRNs when being called back to work. SRMC's Reduction in Force Policy, Union Ex. B at AFT 227, §§ G and H.

15. Except for the "PRN" designation, the Hospital's form offer of employment to a PRN is the same as that for all other employees. (Hospital Exhibit 5).

reasons listed in the Act, like the employee's or their qualifying family member's illness or injury, or to deal with certain legal and family issues.

16. PRNs attend New Employee Orientation and must meet all of the other qualification requirements, e.g. criminal background check, drug screen and immunization records, as other employees do. (Hospital Exhibit 5).
17. PRNs and third-party contractors known as "Travelers" sometimes work as House Supervisors, assuming the same responsibilities as those employed by the Hospital on a full-time basis. (Testimony of Jennifer Rice; Audio Record Part 2 at 01:56:30).
18. Among the criteria for designation as a management employee under the Hospital's policy, is the requirement managers must be responsible for "at least one department budget," (Union Exhibit B, page AFT 109).
19. House Supervisors have no responsibilities over any departmental budgets and the SRMC computer drive where access to department budgets is located, is locked to House Supervisors. (Testimony of Adrienne Enghouse, Audio Record Part 4 at 00:50:22).
20. Among the criteria for designation as a management employee under the Hospital's policy, is the requirement managers must be assigned by an Executive Committee. None of the House Supervisors testifying were assigned by an Executive Committee. (Union Exhibit B, page AFT 109; Testimony of Adrienne Enghouse, Audio Record Part 4 at 00:53:45)
21. The primary task of a House Supervisor is "rounding"; whereby a House Supervisor walks the floor 3-4 times per day to perform tasks as necessary. Additionally, they serve as a resource for staff on nursing related questions and they address "immediate issues" on the floors. They also work on scheduling and deal with patient complaints. (Testimony of Jennifer Rice, Audio Record part 2 at 1:47:30.)

22. More specifically, Adrienne Enghouse testified that House Supervisors help decide where patients flow, in consultation with physicians and that they meet with physicians regarding other patient issues, determine what supplies are needed, assist with patient discharges, talk to patients' families, respond to codes. (Testimony of Adrienne Enghouse, Audio Record Part 4 at 00:46:15).

23. House Supervisors have no role in drafting the Hospital's policies. That role resides with the Hospital's various unit Directors. (Testimony of Pam Demarest, Part 3 at 00:35:55; Testimony of Adrienne Enghouse, Audio Record Part 4 at 00:54:40).

24. Concerning House Supervisors' authority to execute management level decisions, such as offering routine shift bonuses to attract employees to take unscheduled shifts, the Hospital's Chief Operating Officer testified that they cannot make such decisions without prior administrative permission. (Testimony of Pam Demarest, Part 3 at 00:31:50 – 33:00).

> "They do call the administrator on call to talk about those duties and responsibilities, to make sure they're doing the right thing."

(Testimony of Pam Demarest, Audio Record Part 3 at 00:31:55. See also, testimony of Adrienne Enghouse, Audio Record part 4 at 00:51:00 – 53:03).

25. Charge Nurses nearly always have an assigned patient load, as do their subordinate nurses. Testimony of Pam Demarest, Audio Record Part 3 at 00:44:35).

26. Charge Nurses interact with patients throughout their shifts. (Testimony of Pam Demarest Audio Record, Part 3 at 00:52:10).

27. Charge Nurses Donna Agler and Adrienne Enghouse both testified that they spend the majority of their twelve-hour shifts providing direct patient care, either with their own patient load or with assisting others in their patient care tasks. (Testimony of

Donna Agler, Audio Record Part 4 at 00:17:15; Testimony of Adrienne Enghouse, Audio Record Part 4 at 00:57:20).

28. With the exception of Harriett Smith's position, which splits her time between duties as an Educator and as a Charge Nurse, Charge Nurses at SRMC spend work time throughout each shift teaching other nurses how to perform medical tasks like wound care. However, such teaching is routinely performed by non-Charge Nurses as well because the nurses all help each other whether or not they are Charge Nurses. Testimony of Harriet Smith, Audio Record Part 2 at 00:37:40; 00:40:23; 00:41:40; 00:42:50.

29. Harriett Smith's position is unique at the Hospital in that she holds two concurrent positions – one as an Educator and the other as a Charge Nurse. (Testimony of Harriet Smith, Audio Record Part 2 at 00:35:44.)

30. The Charge Nurse's duties that differ from their subordinates consists of receiving a report from the preceding shift's Charge Nurse, making patient assignments, and completing the forms in the production tool which takes "just minutes" out of her twelve-hour shift. (Testimony of Donna Agler, Audio Record Part 4 at 00:37:00.)

31. It takes about five minutes for a Charge Nurse to decide which nurse is going to take care of which patient. (Testimony of Donna Agler, Audio Record Part 4 at 0:38:20).

32. The Charge Nurse's daily duties include monitoring patients, checking defibrillators, "look[ing] around to see what equipment is needed, deal[ing] with medication issues, answering unit phones, communicating with different departments, help[ing] take patients to other departments, talk[ing] to respiratory therapy, transferring patients to UNMH, arranging transport, covering for other nurses for lunch, breaks, etc.,

facilitating patient care with nurses." (Testimony of Donna Agler, Audio Record Part 4 at 14:20).

33. To the extent Charge Nurses direct the work of Patient Care Technicians (PCTs) it is the floor nurses assigned a PCT who is directly responsible for that employee, not the Charge Nurse. (Testimony of Pam Demarest, Audio Record Part 3 at 00:47:20).
34. The tasks directed to PCTs are routine (check vital signs, take patients to the bathroom), and are executed by both Charge Nurses and floor nurses. (Testimony of Harriet Smith, Audio record Part 2 at 00:48:18).
35. Other than assigning patients to floor nurses, Charge Nurses only occasionally direct their work because they are professionals who generally know what to do. In the event of an unforeseen emergency, such as a "cardiac event" the nurses follow established protocols. (Testimony of Donna Agler, Audio Record Part 4 at 00:21:42; Testimony of Adrienne Enghouse Audio Record Part 4 at 00:57:50).
36. The preponderance of the evidence is that Charge Nurses are not involved in employee evaluations and do not recommend promotions. (Testimony of Donna Agler, Audio Record Part 4 at 00:23:30, Testimony of Adrienne Enghouse Audio Record Part 4 at 1:02:15.)
37. To the extent Charge Nurses do participate in employee evaluations and recommend promotions they do so as part of an interview team. Testimony of Harriet Smith Audio Record Part 2 at 00:30:26).
38. The preponderance of the evidence is that Charge Nurses are not involved in hiring other employees. (Testimony of Donna Agler, Audio Record Part 4 at 00:24:27, Testimony of Adrienne Enghouse Audio Record Part 4 at 1:02:15.)

39. The preponderance of the evidence is that Charge Nurses are not involved in employee discipline, except to report potential disciplinary events to those who do have disciplinary authority. (Testimony of Donna Agler, Audio Record Part 4 at 00: 24:50; Testimony of Adrienne Enghouse Part 4 at 0:59:45.)
40. Harriet Smith, testifying for the Hospital claimed that Charge Nurses do have authority to discipline employees but acknowledged that she had never issued discipline and that the only role she has performed in disciplinary events as a Charge Nurse was as a witness. (Testimony of Harriet Smith, Audio Record Part 2 at 00:39:44).
41. In consultation with attending physicians, House Supervisors are in charge of patient "flow" through the hospital and are the highest level of employee on site during nights, weekends and Holidays. However, during those times there is also an Administrator assigned to be on-call so that when an issue comes up with staffing levels the best practice is for the House Supervisor to discuss it with the on-call CAO to determine the proper course of action. (Testimony of Jennifer Rice, Audio Record 2 at 1:16:56 to 2:07:45. See also, Joint Exhibit 2, House Supervisor Job Description).
42. Whenever there is an issue with an employee suspected of being under the influence of drugs or alcohol or a disaster response the House Supervisor is in charge and initiates ACLS protocols as necessary. Id.

REASONING AND CONCLUSIONS OF LAW:

I. THIS BOARD HAS BOTH PERSONAL JURISDICTION AND SUBJECT MATTER JURISDICTION TO DECIDE THE ISSUES IN THIS CASE

It is not disputed that Petitioner, United Health Professionals of New Mexico, AFT, a "labor organization" as that term is defined in Section 4(K) of PEBA. Neither is it disputed that in

that capacity it filed a Petition with this Board on May 18, 2022 seeking to represent a group of what it alleges to be public employees as defined by Section 4(Q) of the Act, employed by SRMC. SRMC is likewise acknowledged to be a "public employer" subject to the PEBA and as that term is defined in Section 4(R) of PEBA, following amendment to the University Research Park and Economic Development Act (NMSA 1978, § 10-7E-7 (2003)) designating research park corporations as public employers for the purpose of the Public Employee Bargaining Act, effective May 18, 2022. For reasons explained below in the context of SRMC employees "at will" status I agree with the assertion that the putative bargaining unit comprises public employees as defined by Section 4(Q) of the Act but whether I agreed or not, that initial determination nevertheless resides with this Board. Because UHP is a labor organization under the PEBA, SRMC is a public employer other than the State under the PEBA and the employees at issue are public employees under the Act, this Board has jurisdiction over the parties.

With Respect to the Petition herein and all other collective bargaining and labor relations matters between the parties, this Board has subject matter jurisdiction. This Board, and only this Board, has the legislatively mandated power and duty to determine appropriate bargaining units and to certify exclusive bargaining representative for such units. (NMSA 1978, § 10-7E-13 (2020)). It is in the proper exercise of that jurisdiction that initial determination of the issues before the Board as a result of the Union's Petition has been delegated to me as Hearing Officer for determination as set forth in this Report and Recommended Decision.

II. BECAUSE OF THEIR IRREGULAR EMPLOYMENT STATUS, WHICH DISTINGUISHES THEM FROM OTHERS IN THE PUTATIVE UNIT, THE EVIDENCE SUPPORTS A CONCLUSION THAT SRMC EMPLOYEES EMPLOYED ON A PER DIEM OR "PRN" BASIS ARE NOT "REGULAR" EMPLOYEES AND THEREFORE ARE NOT PUBLIC EMPLOYEES AS

DEFINED BY SECTION 4(Q) OF THE PEBA AND THEIR INCLUSION IN THE BARGAINING UNIT WOULD RENDER IT INAPPROPRIATE.

In 2021 this Board was called upon to construe for the first time the meaning of the term "regular employee" as it pertains to the definition of a "public employee" permitted to bargain under the Act. See NMSA 1978 § 10-7E-4(Q). In the context of graduate teaching and research assistants at the University of New Mexico, I recommended that this Board conclude that the graduate assistants were not "regular employees" as that term pertains to the definition of a "public employee" permitted to bargain under the Act, for a variety of reasons including that they were hired for a definite term, typically one semester at a time – a condition that is inconsistent with commonly understood notions of regular employment. The Board reversed that Recommended Decision, primarily because the PEBA does not expressly exclude graduate assistants from its definition of "public employee" and because other employees for definite terms (such as teachers on year-to-year contracts) are permitted to engage in collective bargaining under the Act. See *In re: United Electrical, Radio and Machine Workers of America and University of New Mexico Board of Regents,* 66-PELRB-2021(PELRB No. 307-20, August 17, 2021).

Because the facts in the instant case do not present an issue concerning workers employed for definite terms, the primary reason for the Board's Decision in 66-PELRB-2021, the remainder of my analysis of the term "regular employee" remains sound and I return to it for its application to this case.

As in the *University of New Mexico Board of Regents* case, it is my intention to determine and give effect to the intentions of the legislature by its intentional use of the phrase "regular employee". See *Att'y Gen. v. N.M. Pub. Regulation Comm'n*, 2011-NMSC-034, ¶ 10, 150 N.M. 174, 258 P.3d 453. (In determining legislative intent, one first looks to the "plain language of

the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended."). Then, as now, because the National Labor Relations Act defines employees subject to its provisions far more broadly than does New Mexico's Public Employee Bargaining Act's requirement that the Act covers regular nonprobationary employees, definition of a statutory employee under the NLRA is sufficiently different from the state Act's definition of a "public employee," so that we cannot look to NLRB analysis for meaningful guidance in this case.

My statutory construction of that phrase begins with the plain meaning of the term "regular employee"[4]. See *State v. Hubble,* 2009-NMSC-014, ¶ 10, 146 N.M. 70, 206 P.3d 579. ("Under the plain meaning rule, when a statute's language is clear and unambiguous, we will give effect to the language and refrain from further statutory interpretation. We will not read into a statute language which is not there, especially when it makes sense as it is written.") Unless ambiguity exists, this Board must adhere to the plain meaning of the language. See *State v. Davis,* 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064. Therefore, this Board is obliged to construe the PEBA as written and it should not second guess the legislature's policy decisions. See *State ex rel. Helman v. Gallegos*, 117 N.M. 346, 352, 871 P.2d 1352, 1358 (1994); *State v. Ortega*, 112 N.M. 554, 564, 817 P.2d 1196, 1206 (1991).

As SRMC reminds us in its closing brief, "Statutes must be construed so that no part of the statute is rendered surplusage or superfluous." *Western Investors Life Ins. Co. v. New Mexico Life Ins. Guar. Ass'n* (*In re Rehabilitation of W. Investors Life Ins. Co.*), 1983-NMSC-082; *Katz v. N.M. Dep't. of Human Servs., Income Support Div.,* 1981-NMSC-012, ¶ 18; *Diamond v. Diamond*, 2012-

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[4] The "nonprobationary" aspect of the term is discussed in the context of SRMC's new employee orientation period in *IAMAW and University of New Mexico Sandoval Regional Medical Center*, PELRB No. 303-22.

NMSC-022, ¶ 29. The legislature when exercising its authority "is presumed not to have used any surplus words in a statute; each word is to be given meaning." *State ex rel. Helman v. Gallegos, supra*. Furthermore, administrative processes may not be used to circumvent the clear intent of the legislature. *Western Investors Life Ins. Co., supra*, ¶ 14.

To give effect to the intent of the legislature by its adopting the phrase "Regular Non-Probationary Employee" as part of its definition in NMSA 1978 § 10-7E-4(Q) of a "public employee" entitled to the protection of the Public Employee Bargaining Act,[5] this Board must further construe what is meant by the phrase "… a regular nonprobationary employee of a public employer beyond its holding in the *University of New Mexico Board of Regents* case that the term does not exclude those employed for a definite term.

In the *University of New Mexico Board of Regents* case I relied in part upon *Cockrell v. Board of Regents of NMSU,* 1999 NMCA 73, 127 N.M. 478, 983 P.2d 427. *Cockrell*, in the context of a qualified immunity case, relied on New Mexico State University's employee handbook definition of "regular employee" as being an employment category "with no required termination date". Because defining the term "regular employee" as one employed for an indefinite term was rejected by the PELRB in 66-PELRB-2021, I do not rely on that case, cited by SRMC in its closing brief in this case, for the proposition that its policy's definition of a regular employee is synonymous with *Cockrell's* use of the term. SRMC goes further and cites *Cockrell* for the proposition that a regular employee is one that can successfully assert a property interest in employment so that he or she is entitled to due process before termination from a public employer. Inasmuch as SRMC asserts that all of its employees are "at will" subject to termination with or without cause, none of them would meet that

[5] NMSA 1978 § 10-7E-2 (2020) provides that the purpose of the Public Employee Bargaining Act is to guarantee "public employees" the right to organize and bargain collectively with their employers, among other stated purposes.

definition of who would be a regular employee. While I agree that a property interest in employment is indicia of regular employee status, there is insufficient basis to conclude that it is the single defining criteria so that no one who serves at will may be considered a regular employee under the Public Employee Bargaining Act. I cannot conclude that the New Mexico legislature intended by its amendment of the University Research Park and Economic Development Act designating research park corporations as public employers for the purpose of the Public Employee Bargaining Act, to simultaneously allow the exclusion of all its employees from coverage of the Act.

As useful as *Cockrell v. Board of Regents of NMSU* may be as precedence in the due process and immunity context, I decline to adopt *Cockrell's* rationale for the proposition that a regular employee under the Public Employee Bargaining Act is one that is entitled to due process before termination from a public employer.

Instead I look to the common understanding of the term in the workplace and construction of the term under other statutes. To paraphrase my analysis of what it means to be a "regular" employee from the *University of New Mexico Board of Regents* case, as commonly understood the word "regular" means usual, normal or habitual. It is the antonym of "casual" or "irregular" so that those working an irregular schedule, such as the PRN employees in this case, would not be a regular employee in the common parlance. I incorporate into this Recommended Decision the example cited in the *University of New Mexico Board of Regents* case[6] of the only other state permitting public employee bargaining where the term "regular employee" is part of the definition of public employees subject to its

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[6] In the *University of New Mexico Board of Regents* case I reviewed all 35 states (plus the District of Columbia) permitting public employee collective bargaining. That review revealed only one instance in addition to New Mexico, where the term "regular employee" is part of the definition of public employees – the University of Maine System Labor Relations Act cited above."

Public Employee Bargaining Act, i.e. the University of Maine System Labor Relations Act. Me. Rev. Stat. Ann., Title 26, §§ 1022(8) defines the term "regular employee" as: "…any professional or classified employee who occupies a position that exists on a continual basis." The definition of "regular employee" in the Maine law is consistent with the common understanding of regular employment as excluding from collective bargaining, those working an irregular schedule. Here, although the positions a PRN employee occasionally temporarily fills may be said to exist on a continual basis, it is the regular employee hired into that position, who "occupies" it, not the occasional PRN. PRNs do not have a set schedule like a full-time or part-time regular employee but schedule their shifts based upon what may be available after full time and part-time employees choose their shifts in order to provide staffing during any periods when there are insufficient FTE and PTE employees to fully staff a shift, floor or unit. Because the person a PRN fills in for is an employee whose position has been counted for staffing levels, and PRNs are only occasionally scheduled to maintain those staffing levels it is clearly that first person who occupies a position that exists on a continual basis, not the PRN.

This understanding of the term "regular employee" finds support in other public employee collective bargaining laws. Although New Hampshire's public employee collective bargaining law does not use the term "regular employee" New Hampshire Rev. Statutes Sec. 273-A:1: IX(d) excludes from its definition of "Public employee" "Persons in a probationary or temporary status, or employed seasonally*, irregularly or on call*." (Emphasis added). Similarly, Ohio's Public Employees Collective Bargaining Act, Ohio Rev. Code Sec. 4117.01(C)(13)

excludes from its definition of "Public employee" "Seasonal and *casual employees*[7] as determined by the state employment relations board;" (Emphasis added).

The review of other states' public employee collective bargaining laws also shows the converse of our issue to be true: No state expressly includes in its definition of "public employee", those employed in temporary, seasonal or irregular employment status.

Some guidance may also be found by reference to New Mexico statutes other than the PEBA or cases construing the term "regular employee" in other contexts. For example, in *Barber v. Los Alamos Beverage Corp.,* 1959 NMSC 7, 65 N.M. 323, 337 P.2d 394, the New Mexico Supreme Court affirmed that a laborer employed and paid by the day was not a "regular employee" for purposes of a Worker's Compensation claim.

Because I can find no countervailing definition in New Mexico jurisprudence, and because it is consistent with the legislature's definition of the term in NMSA 1978 § 10-7E-4(Q), I conclude that per diem or PRN employees are excluded from the PEBA's definition of "public employees" covered by the Public Employee Bargaining Act because they are not "regular employees". Because the Act applies only to "public employees" (See NMSA 1978 §§ 10-7E-2; 10-7E-5; 10-7E-13 and 10-7E-15) their inclusion in the bargaining unit petitioned for in this case would render it inappropriate.

III. HOUSE SUPERVISORS ARE NOT "MANAGEMENT" EMPLOYEES AS DEFINED BY SECTION 4(N) OF PEBA AND, AS SUCH, ARE NOT EXCLUDED FROM COVERAGE UNDER THE ACT. THEIR INCLUSION IN THE BARGAINING UNIT WOULD NOT RENDER IT INAPPROPRIATE.

[7] Casual employment is commonly understood to refer to a situation in which an employee is only guaranteed work when it is needed, and there is no expectation that there will be more work in the future. Casual employees are only compensated for time actually worked, which means they would not receive paid time off for holidays.

SRMC seeks to exclude House Supervisors in its employ from the collective bargaining unit on the ground that they are management employees whose inclusion would render the unit inappropriate. The Public Employee Bargaining Act, § 10-7E-13(C) provides:

> "The board or local board shall not include in an appropriate bargaining unit supervisors, managers or confidential employees."

At NMSA 1978 §10-7E-4(N) the Public Employee Bargaining Act defines the term "management employee" as:

> "…an employee who is engaged primarily in executive and management functions and is charged with the responsibility of developing, administering or effectuating management policies. An employee shall not be deemed a management employee solely because the employee participates in cooperative decision-making programs or whose fiscal responsibilities are routine, incidental or clerical;"

PEBA's definition of a "manager" can be broken down into a two-part test: First, whether the employee is *primarily* engaging in executive and management functions; and second, whether that employee has responsibility for developing administering, or effectuating management policies, which requires the employee to do more than merely participate in cooperative decision-making programs on an occasional basis. The first prong of the Act's test requires that an individual possess and exercise a level of authority and independent judgment sufficient to significantly affect the employer's purpose. The second prong requires an employee creates, oversees or coordinates the means and methods for achieving policy objectives and determines the extent to which policy objectives will be achieved. This requirement means more than mechanically directing others in the name of the employer but rather, requires an employee to have meaningful authority to carry out management policy. See, *NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995). Noteworthy for purposes of this Recommended Decision, PEBA's definition does not require that the employees must create or initiate management policies – rather, it requires that they create,

oversee or coordinate the means and methods for achieving those policies. It is also important whether the duties and responsibilities of the alleged management employees are such that these individuals should not be placed in a position requiring them to divide their loyalty between the employer and the union. *Id.* ("Employees exhibit such authority when they exercise independent judgment to establish policies and procedures, to prepare budgets, or to assure effective and efficient operations. Managerial employees must exercise discretion within, or even independently of established employer policy and must be aligned with management." *Id.*

To meet the second part of the test, the employee must "either create, oversee or coordinate the means and methods for achieving policy objectives and determine the extent to which policy objectives will be achieved" which "means more than mechanically directing others in the name of the employer" but instead requires "an employee [to] have meaningful authority to carry out management policy." *Id.*

It is difficult to conclude that House Supervisors are management employees when they do not qualify as such under the employer's own definition of a management employee. I refer to SRMC's policy regarding employment status that identifies a management employee as one who is "...appointed to their position by the Executive Team and those persons having the job titles or authority of Manager or Director" those having responsibility for "at least one department budget," or those who can be identified as management based on "who you report to within the organization chart." See UNM SRMC Human Resources Department Definitions, Union Exhibit B, ¶¶ 4.1 - 4.4, AFT 109).

None of the House Supervisors testified that they were appointed to their position by the Hospital's Executive Team, nor do they have responsibility for their respective departments' budgets. None have the title of Manager or Director and as they all report to their respective

departments' Directors, who do have some budgetary authority, I see nothing in the Hospital's organization that would weigh in favor of finding them to be managers under the Hospital's policy.

As far as the PEBA's criteria are concerned, the preponderance of the evidence does not support a conclusion that the House Supervisors are "primarily engaged in executive and management functions or that they are charged with the responsibility of developing, administering or effectuating management policies".

Jennifer Rice, a House Supervisor who testified on behalf of the Hospital, said that the primary task of a House Supervisor is to conduct rounds, whereby a House Supervisor walks the floor 3-4 times per day to perform tasks as necessary. Additionally, they serve as a resource for staff on nursing related questions and they address "immediate issues" on the floors. They also work on scheduling and deal with patient complaints. She indicated that House Supervisors are there as a resource to the staff for nursing related questions, they also work on scheduling and that they spend a lot of time dealing with patient complaints and addressing immediate issues on the floors. While some of those functions might arguably qualify as supervisory duties, they are not managerial in nature leaving me with no basis upon which I might conclude that House Supervisors primarily serve a management function because those primary functions do not rise to the level of developing, administering or effectuating management policies. The House Supervisors are not consulted in connection with drafting or changing Hospital policies, much less bear responsibility for writing such policies themselves.

Ms. Enghouse described the position's function as helping decide, in consultation with attending physicians, where patients "flow." More specifically, she explained that the House Supervisors meet with physicians regarding patient issues, go to each of the floors to

determine what supplies are needed, answer questions about charging, assist with patient discharges, talk to patients' families, respond to codes. Those functions do not rise to the level of developing, administering or effectuating management policies. To the extent that any of those functions constitute effectuating management policies, they are consistent with a common ethos shared by all hospital employees so that they do not present the possibility that Hose Supervisors will be compelled at some future point of taking a position at odds with those policies because of their inclusion in the bargaining unit.

For the foregoing reasons, I conclude that House Supervisors are not "management" employees as defined by section 4(N) of the PEBA and, as such, are not excluded from coverage under the Act. Their inclusion in the bargaining unit would not render it inappropriate.

IV. THE CHARGE NURSES ARE NOT SUPERVISORS AS DEFINED UNDER SECTION 4(T) OF THE PEBA AND AS SUCH, ARE NOT EXCLUDED FROM COVERAGE UNDER THE ACT.

A "supervisor", as that term is defined in § 10-7E-4(T) 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).[8] 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 Charge Nurses 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,

[8] 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).

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.[9]

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 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 §

[9] The record is unclear whether Charge Nurses customarily and regularly direct the work of two or more other employees. Although patient care technicians (PCTs) are nominally supervised of the Charge Nurse, in practice the floor nurse who is assigned a PCT is responsible for that employee, not the Charge Nurse. The tasks directed to PCTs are routine and are executed by both Charge Nurses and Floor Nurses alike. Excluding PCT from consideration the record is ambiguous as to whether the Charge Nurses supervise two or more Floor Nurses. Therefore, this decision concentrates on the first and third elements of the three-pronged test set forth by Section 4(T).

4(T) 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. Charge Nurses at UNM SRMC do not Spend a Majority of Their Work Time Performing Supervisory Duties.

As stated above, 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: NMCPSO-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 Charge Nurses spend a majority of their work time engaged in supervisory duties as that term is understood under the Act. For example, in addition to assisting their subordinates with their patient caseloads, Charge Nurses nearly always have their own individual patient loads as well. Caring for patients in the same manner as do their subordinates constitutes the

majority of the Charge Nurses' workday. Hospital's witnesses acknowledged that Charge Nurses are interacting with patients all day essentially agreeing with Charge Nurses Agler and Enghouse that they spend the majority of their shifts providing direct patient care, either with their own patient load or with assisting other floor nurses with their tasks. [10]

Although Charge Nurses from time to time will show an inexperienced floor nurse how to perform certain aspects of direct patient care, similar assistance to their less experienced colleagues are also routinely performed by non-Charge Nurses. As Ms. Enghouse testified: "We all help each other. . . Other nurses help other nurses even though they're not Charge Nurses."

Charge Nurse Agler has worked in ICU since 2015 and describes her workday as involving very little supervision. She describes the daily tasks that differ from those of a subordinate Floor Nurse as getting a pass-down report from the preceding shift's Charge Nurse, making assignments for her shift taking that report into consideration, monitoring patients, (both her own and those assigned to subordinate Floor Nurses, if needed, and checking defibrillators. Such distinct tasks takes "just minutes" out of her twelve-hour shift. She estimated that deciding which nurse is going to take care of which patient takes about five minutes at the beginning of each 12-hour shift.

That further direct supervision of PCTs and Floor Nurses by Charge Nurses is not common, is underscored by witness statements to the effect that as trained, licensed professionals, they know what is expected of them, what they are to do and they go about doing it on a daily basis with a minimum of supervision. If an emergency arises, there are protocols in place informing the professionals how to proceed.

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[10] Although Hospital witness Harriett Smith did not agree that she spent the majority of her shift as a Charge Nurse providing direct patient care, she did concede that Charge Nurses provide direct patient care, throughout their shifts.

A few words need to be said concerning Harriett Smith's unique Charge Nurse position, splitting her time as an Educator and Charge Nurse. There is no evidence suggesting that any of the duties performed by and Educator constitute supervisory duties. To the contrary, the parties do not dispute that the position of Educator, is a bargaining unit position. That all her Educator duties are non-supervisory, weighs against a conclusion that her position devotes a majority of work time to supervisory duties.

B. Charge Nurses at UNM SRMC 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(T) 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 Charge Nurses employed by UNM SRMC do not have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively.

The preponderance of the evidence is that Charge Nurses are not involved in employee evaluations and do not recommend promotions at all. The Hospital's witness Jennifer Smith testified that her involvement in employee evaluations is limited to serving as part of an

interview team. Participation on such interview panels is expressly excluded from consideration by Section 4(T) of the Act. The definition of a supervisor does not include a "…an employee who participates in peer review or occasional employee evaluation programs."

The preponderance of the evidence is that Charge Nurses have no role in disciplining employees except to report acts that could result in an employee's disciple to the appropriate administrator or director. Although Charge Nurse Jennifer Smith claimed to have the authority to discipline her subordinates, she confirmed that she had never disciplined a subordinate and that her only role in disciplinary events to date was as a witness. The evidence, when taken as a whole, does not meet the rigorous standards set out in the Act to establish that Charge Nurses are supervisors. That testimony is consistent with Joint Exhibit 1, the Charge Nurse Job Description, which provides among the bulleted items in the "Essential Functions" field that Charge Nurses are expected to "Monitor and initiate corrective action to maintain the environment of care including equipment and material resources" and "Administers or makes recommendations regarding performance evaluations, promotions, administration of personnel policies with staff, hiring or discipline."

The witness testimony clarifies what in practice is the effect of the essential functions "[m]onitor and initiate corrective action" and "Administers or makes recommendations regarding performance evaluations, promotions, administration of personnel policies with staff, hiring or discipline" and weighs in favor of a conclusion that Charge Nurses do not have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively.

C. A Preponderance of the Evidence Establishes that Charge Nurses Employed by UNM SRMC are Lead Employees 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 Charge Nurses perform substantially all of the same work as do their subordinates, make 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 administrators and directors. They do not make the ultimate determinations or recommendations in the employer's interests effecting their co-workers. Therefore, I conclude that the Charge Nurses are Lead Employees under the Act expressly excluded from the definition of a "supervisor".

In summary, the Charge Nurses do not devote a majority of their work time to supervisory duties. While they arguably may customarily and regularly direct the work of two or more employees, the majority of their work time is nevertheless spent performing duties that are substantially the same as those performed by their subordinates. To the extent they assign tasks, ensure subordinates perform their job duties and compete their assignments, evaluate subordinates, 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, protocols and operating procedures.

CONCLUSION: This board has both personal jurisdiction and subject matter jurisdiction to decide the issues in this case. For the reasons set forth above, SRMC employees employed on a per diem or "PRN" basis are not "regular" employees because of their irregular, occasional employment status, which distinguishes them from others in the putative unit. Therefore, PRNs are not public employees as defined by section 4(Q) of the PEBA and their inclusion in the bargaining unit would render it inappropriate.

House Supervisors are not "Management" employees as defined by Section 4(N) of PEBA and, as such, are not excluded from coverage under the Act because they are not primarily engaged in executive and management functions and they do not have responsibility for developing administering, or effectuating management policies, which requires the employee to do more than merely participate in cooperative decision-making programs on an occasional basis. Their inclusion in the bargaining unit would not render it inappropriate.

Charge Nurses at UNM SRMC do not devote 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 they are Lead Employees expressly excluded from the definition of a "supervisor" under NMSA 1978 §10-7E-4(T) (2020). Therefore, the Charge Nurses are not supervisors as defined under Section 4(T) of the PEBA and as such, are included as part of the appropriate bargaining unit in this case.

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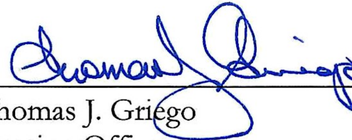

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