STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE),

Petitioner,

v. **PELRB No. 307-20**

UNIVERSITY OF NEW MEXICO BOARD OF REGENTS,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board on a Motion by the United Electrical, Radio and Machine Workers of America ("UE") for review of the Hearing Officer's Report and Recommended Decision. After hearing oral argument, reviewing the Recommended Decision, the request for review and response thereto and being otherwise sufficiently advised the Board voted 3-0 to adopt Executive Director Thomas J. Griego's Recommended Decision and findings therein with the following amendments:

A. Finding of Fact Number 11: "The term "Regular Employees" is defined for purposes of this case as those who are "appointed for an indefinite period of time subject to satisfactory performance and availability of funding"" is stricken.

As opposed to the recommended conclusions of law, the Board makes the following conclusions of law:

1. The Board finds that the Public Employee Bargaining Act (PEBA) does not exclude graduate student from its definition of regular employees;

2. The PEBA specifically includes work funded in whole or in part by grants or other third-party sources;
3. Other public employees with definite terms are guaranteed collective bargaining rights; and
4. Graduate students fall within the PEBA's definition of public employee.

THEREFORE, THE BOARD adopts the Hearing Officer's Report and Recommended Decision with the above modifications and directs the Executive Director to proceed with the processing of the petition consistent with this Order.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Aug. 17, 2021
DATE

Marianne Bowers
MARIANNE BOWERS, BOARD CHAIR

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA,

Petitioner,

and **PELRB No. 307-20**

UNIVERSITY OF NEW MEXICO BOARD OF REGENTS,

Respondent

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

STATEMENT OF THE CASE: This matter comes before Thomas J. Griego, designated as the Hearing Officer in this case, on a Petition filed by United Electrical, Radio and Machine Workers of America (UE) seeking a card-check pursuant to NMSA 1978, § 10-7E-14(C) (2020) for recognition of a unit consisting of all full-time and part-time graduate students engaged in instruction and/or research at the University's campuses at Albuquerque, Gallup, Taos, Los Alamos and Valencia County. Petitioner contends that all of the petitioned-for positions are employees of the University, whose labor "on behalf of the University" is acknowledged as playing "an important role in the success of the teaching and research functions of the University." Moreover, Petitioner contends that the petitioned-for employees are "regular nonprobationary employees" of the University, as that term is understood in PEBA. Petitioner contends that, under the "Community of interest" factors set forth in *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962), the petitioned-for unit constitutes an appropriate bargaining unit under PEBA.

The University contends that graduate students do not receive wages, but financial support in the form of a stipend for the various assistantships at issue and therefore, are not employees of the

University. Furthermore, due to the defined period of assistantship status, graduate students are not "regular" employees as contemplated by the PEBA and are analogous to temporary employees, not eligible to organize. The bargaining unit sought is not within one of the designated occupational groups recognized by the PEBA, nor would the individuals share a community of interest under application of the *Kalamazoo* factors because the stipend amounts, duration, funding sources, duties, hours, and work locations vary greatly among the different types of graduate assistants as well as across the departments awarding such assistantships. Finally, there is no history of collective bargaining in New Mexico involving graduate students nor would establishing such bargaining unit support the efficient administration of government.

Pursuant to 11.21.1.22(A) NMAC, neither party has a burden of proof regarding this proceeding.

The University moved for Summary Judgment on February 19, 2021, on three grounds: First, that the uncontested facts established that graduate students are not "public employees" as that term is defined in the PEBA and, therefore, are ineligible for inclusion in any bargaining unit. Second, graduate students' relationships with the University are primarily educational, not economic in nature so that engaging in collective bargaining would not be appropriate. Finally, graduate students do not comprise an occupational group pursuant to NMSA 1978 § 10-7E-13(A) (2020).

The Union responded on March 5, 2021, arguing that under the facts of this case it is undeniable that the University's graduate assistants are "employees" of the University. Further, their educational relationship with the University does not foreclose a finding that they are statutory employees covered by the Act and the fact that their positions do not fall within one of the delineated occupational groups in § 13(A) of the PEBA is immaterial because that section provides that an appropriate bargaining unit may be defined based either on occupational groups or upon "clear and identifiable communities of interest in employment terms and conditions and related personnel matters."

On March 10, 2021, I denied the Motion for Summary Judgment, rejecting the NLRB's "primary purpose" analysis in favor of statutory construction of § 10-7E-4(Q) of the PEBA, as it defines a "public employee" permitted to bargain under the Act. By so doing, questions of material fact remained concerning the relationship among the various types of graduate assistants and the University foreclosing Summary Judgment.

A hearing on the merits was held over a five-day period beginning on March 30, 31 and April 1, 2021, and continuing on April 26 and 29, 2021. All parties hereto were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Closing briefs in lieu of oral argument were submitted by the parties on May 18, 2021. Both briefs were duly considered. On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

FINDINGS OF FACT:

I incorporate the following facts from my Letter Decision on Motion for Summary Judgment in this case, to the extent they are not rendered inaccurate by subsequent evidence as noted herein:

1. Respondent is a public employer as that term is defined in § 10-7E-4(R).
2. By filing the instant Petition, UE seeks to represent individuals not currently in an appropriate bargaining unit. (Motion for Summary Judgment Statement of Fact No. 2, modified).
3. Petitioner seeks to represent a unit consisting of all full-time and part-time graduate students engaged in instruction and/or research at the University's campuses at Albuquerque, Gallup, Taos, Los Alamos and Valencia County, including the following positions:
    a. Graduate Assistant Regular;

b. Graduate Assistant Special;
c. Project Assistant;
d. Research Assistant;
e. Teaching Assistant Regular;
f. Teaching Assistant Special; and
g. Teaching Associate.

(Motion for Summary Judgment Statement of Fact No. 3, modified).

4. The PEBA defines a public employee subject to the Act in NMSA 1978 § 10-7E-4(Q) (2020) as a "regular nonprobationary employee of a public employer; provided that, in the public schools, 'public employee' shall also include a regular probationary employee and includes those employees whose work is funded in whole or in part by grants or other third-party sources".
5. Assistantships are not publicized for employment to the general public but, rather, are offered solely to current and admitted graduate students.
6. Only graduate-degree-seeking students, enrolled in graduate programs for a minimum of six credit hours per semester of degree related courses, while in good academic standing, are eligible for assistantships.
7. Assistantships are term appointments contingent upon availability of funds, satisfactory performance of the student, subject to department/program policies, and academic eligibility.
8. The benefits provided to graduate students holding assistantships are not equivalent to those offered to regular employees of the University. For example, graduate students receiving an assistantship are not eligible for flexible spending accounts; life, accidental, death and dismemberment insurance and disability benefits; long-term care insurance; retirement plans; annual leave; accumulated sick leave; catastrophic leave; employee assistance services; tuition remission; and dependent education program. Assistantship recipients receive the fully paid

benefit of the Student Health Plan administered by BlueCross BlueShield of New Mexico through Academic Health Plans while the University's regular employees choose between LoboHealth or Presbyterian health plans under which they pay a portion of the cost of their medical insurance. (Motion for Summary Judgment Statements of Fact Nos. 9 and 10, modified).

9. Assistantship recipients may receive two weeks of medical leave which is not tracked in the Human Resources system unlike employees who accrue sick leave and have accruals and usage tracked in the Human Resources system. (Motion for Summary Judgment Statement of Fact No. 10, modified).
10. Unlike other University employees, graduate students coming from out-of-state and holding assistantships of at least 10 hours a week for half the semester receive a waiver to reduce out-of-state tuition to in-state tuition rate.

Additionally, I find the following based on the evidence produced at the Hearing on the Merits:

11. The term "Regular Employees" is defined for purposes of this case as those who are "appointed for an indefinite period of time subject to satisfactory performance and availability of funding". Exhibit 1, UNM Administrative Policies and Procedures Manual - Policy 3200).
12. Graduate students are provided an assistantship for a limited period, typically a semester and never more than one academic year. Testimony of Julie Coonrod, Hearing Audio Day 5, Part 4 at 1:13:12 - 1:13:40.
13. A graduate student with an assistantship may begin as a graduate assistant, followed by a teaching assistantship and then a project assistant or a research assistant depending on funding and the assistantships available. Moreover, assistantships are granted for definite periods, usually a semester, requiring varying levels of enrolled credit hours, and can be

cancelled if the student does not meet a minimum grade point average or demonstrate satisfactory progress during any semester in which they are enrolled in a graduate program. Exhibits A at p. 4; C at pp. 5, 32; D at p. 3; E at pp. 62, 79 - 80; F at p. 40; G at p. 14; I at p. 17; L at p. 33; M at p. 1; N at p. 20.

REASONING AND CONCLUSIONS OF LAW: It is my intention in this analysis to determine and give effect to the intentions of the Legislature. 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." *Id.* (internal quotation marks and citation omitted). In this case, it is important that UNM's collective-bargaining policy conform to the purpose for which the Legislature created PEBA. My statutory construction analysis begins by examining the words chosen by the Legislature and the plain meaning of those words. "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." *State v. Hubble*, 2009-NMSC-014, ¶ 10, 146 N.M. 70, 206 P.3d 579 (internal quotation marks and citation omitted). Unless ambiguity exists, this Court must adhere to the plain meaning of the language. *State v. Davis*, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064. My role is to construe the PEBA as written and I 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).

Therefore, the outcome of this case rests upon statutory construction of NMSA 1978 § 10-7E-4(Q) of the PEBA, as it defines a "public employee" permitted to bargain under the Act. Answering that question in the negative would render moot questions concerning occupational groups or clear and identifiable communities of interest in employment terms and conditions and related personnel

matters among the public employees involved. Similarly, while much evidence was introduced on both sides of the question whether the various graduate assistants are common law employees at all, answering that question in the affirmative becomes meaningless if ultimately those employees are not "regular employees" entitled to bargain under the Act. Therefore, for purposes of this Report and Recommended Decision, I assume without deciding that all graduate assistants herein are common law employees in order to concentrate on whether they are also statutory "regular employees" entitled to coverage of the New Mexico Public Employee Bargaining Act.

I. APPLYING THE PLAIN MEANING RULE OF STATUTORY CONSTRUCTION, THE PREPONDERANCE OF THE EVIDENCE SUPPORTS A CONCLUSION THAT THE GRADUATE ASSISTANTS THE PETITIONER SEEKS TO REPRESENT ARE NOT PUBLIC EMPLOYEES COVERED BY NEW MEXICO'S PUBLIC EMPLOYEE BARGAINING ACT.

A. Analysis of the Definition of a "Regular Non-Probationary Employee" Subject to the Public Employee Bargaining Act.

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. The term "public employee" is defined in NMSA 1978 § 10-7E-4(Q) as:

> "… a regular nonprobationary employee of a public employer; provided that, in the public schools, "public employee" shall also include a regular probationary employee and includes those employees whose work is funded in whole or in part by grants or other third-party sources;"

Our PEBA does not further define what it means to be a "regular" employee. The National Labor Relations Act does not use the term, so graduate student assistantship cases decided under the NLRA do not shed light on whether they would be considered regular employees under New Mexico's PEBA. As stated in my Letter Decision denying UNM's Motion for Summary Judgment

(March 10, 2021), because the definition of "public employee" under PEBA includes only "regular" employees, it encompasses a narrower category of covered employees than would the more general term of "employee" as is found in the (NLRA), so that cases decided under the NLRA cannot be used as guidance in this matter.[1]

As commonly understood the word "regular" means usual, normal or habitual. It is the antonym of "casual" or "irregular" so that an employee holding a job where the expectation is that employment will continue on an ongoing basis with established schedules and without limits on the employment's duration, would typically be understood to be "regular employees". The vernacular meaning seems to have carried over into the statutory schema of several of those states permitting public employee bargaining.

My review of all 35 states (plus the District of Columbia) permitting public employee collective bargaining revealed only one instance in addition to New Mexico, where the term "regular employee" is part of the definition of public employees subject to its Public Employee Bargaining Act: 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."

At par. 11 of that section, the Maine statute further defines "University, academy or community college employee" as:

> "…any regular employee of the University of Maine System, the Maine Maritime Academy or the Maine Community College System performing services within a campus or unit…"

[1] Although the question of whether graduate assistants, research and teaching assistants, etc. may engage in collective bargaining has been addressed in the private sector many times by the National Labor Relations Board, the results there have been mixed and conflicting, vacillating between adopting, then abandoning the "primary purpose" test. The definition of a statutory employee under the NLRA is akin to the common-law definition of "employee" and 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.

Read together, paragraphs 8 and 11 of the Maine law is consistent with the common understanding of regular employment as excluding from collective bargaining, employees of its Universities employed under a contract for a specific duration as not being employed "on a continual basis". That interpretation is consistent with how I understand the term "regular nonprobationary employee" used by the New Mexico Legislature in its definition of a public employee under the PEBA.

Although they did not use the term "regular employee", several of those states reviewed excluded from coverage under their collective bargaining statutes, all term or temporary employees, effectively applying the same limitation as would a statute extending those rights only to "regular" employees without using the term. For example, the Maryland State Personnel and Pensions Code at § 3-102 excludes from coverage of the Act:

> "(7)(i) a temporary or contractual employee in the State Personnel Management System; or
> (ii) a contractual, temporary, or emergency employee in a unit of the Executive Branch with an independent personnel system…
> (9) *an employee of the University System of Maryland, Morgan State University, St. Mary's College of Maryland, or Baltimore City Community College who is*:
> (iii) a member of the faculty, including a faculty librarian;
> (iv) *a student employee, including a teaching assistant or a comparable position, fellow, or post doctoral intern*;
> (v) *a contingent, contractual, temporary*, or emergency employee;
> (vi) *a contingent, contractual, or temporary employee whose position is funded through a research or service grant or contract*, or through clinical revenues…"

(Emphasis added).

Similarly, Michigan's Public Employee Collective Bargaining law Mich. Compiled Laws Sec 423.1 *et seq*. provides:

> "The statute applies to all persons holding a position by appointment or employment in the government of the state, in the government of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service. *Graduate student research assistants and any individual*

whose position does not have sufficient indicia of an employer-employee relationship using the 20-factor test announced by the internal revenue service of the United States department of treasury in revenue ruling 87-41, 1987-1 C.B. 296 is not a public employee entitled to representation or collective bargaining rights under this act."

(Emphasis added).

2019 Minn. Statutes Chapter 179A(3)(14) likewise excludes from coverage of its public employee bargaining law part-time, temporary or seasonal employees generally, and specifically excludes "full-time undergraduate students employed by the school which they attend under a work-study program or in connection with the receipt of financial aid, irrespective of number of hours of service per week..."

Nevada's public sector labor law, Nevada Rev. Statutes Sec. 288.425, defines an "Employee" covered by the Act as:

"1. "Employee" means a person who:
(a) Is employed in the classified service of the State pursuant to chapter 284 of NRS; or
(b) Is employed by the Nevada System of Higher Education in the classified service of the State or is required to be paid in accordance with the pay plan for the classified service of the State.
2. *The term does not include…*
(d) A temporary employee who is employed for a fixed period of 4 months or less…
(f) Any person employed by the Nevada System of Higher Education who is not in the classified service of the State or required to be paid in accordance with the pay plan of the classified service of the State…

(Emphasis added).

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."

Ohio's Public Employees Collective Bargaining Act, Ohio Rev. Code Sec. 4117.01(C) defines

"Public employee" as:

"…any person holding a position by appointment or employment in the service of a public employer, including any person working pursuant to a contract between a public employer and a private employer and over whom the national labor relations board has declined jurisdiction on the basis that the involved employees are employees of a public employer, except…
(11) Students whose primary purpose is educational training, including graduate assistants or associates, residents, interns, or other students working as part-time public employees less than fifty per cent of the normal year in the employee's bargaining unit…
(13) Seasonal and casual employees as determined by the state employment relations

board;
(14) Part-time faculty members of an institution of higher education…"

South Dakota also excludes from collective bargaining students working as part-time employees twenty hours per week or less and temporary public employees employed for a period of four months or less. SD Cod. Laws Sec. 3-18-1 to 18.

In contrast, Wisconsin expressly extends bargaining rights to research assistants of the state's Universities See Wisc. Stat. 111.81(7)(d),(e) and (f).

None of the state cases referred to in the Union's closing brief were decided under a statute defining "public employee" as a "regular nonprobationary employee" as does our PEBA, nor do their definitions of "public employee" exclude employees in temporary, seasonal or irregular employment status, which is the distinguishing characteristic of a "regular employee". Accordingly, cases decided under those states' statutes are given little weight.

I do take some guidance from other instances where the term "regular employee" is found in New Mexico statutes other than the PEBA or cases construing that term. In the context of a qualified immunity case, *Cockrell v. Board of Regents of NMSU*, 1999 NMCA 73, 127 N.M. 478, 983 P.2d 427, relied on New Mexico State University's employee handbook definition of "regular employee". At Section 5:07 of that handbook the term "regular employee" is defined as being an employment category "with no required termination date".

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.

In this case, Exhibit 1, UNM Administrative Policies and Procedures Manual - Policy 3200, defines the term "Regular Employees" as those who are "appointed for an indefinite period of time subject to satisfactory performance and availability of funding". I accept that definition as the operative one,

not only because it comports with my understanding of the common parlance and because I can find no countervailing definition in New Mexico jurisprudence, but because it is consistent with the Legislature's definition of the term in NMSA 1978 § 10-7E-4(Q).

B. Graduate Students Holding Assistantships are Not "Hired" or Appointed for an Indefinite Period. Their Contracts are for a Defined Period, Thus Excluding Them From the Definition of Regular Employees.

The preponderance of the evidence establishes that whatever the varying terms, hours conditions and amounts paid under the various graduate assistantships at issue here, all are for a limited period, typically a semester and never more than one academic year. They are not for an "indefinite period of time" as required to meet the understanding of the term "Regular Employees" in the vernacular and in my understanding of legislative intent.

I am persuaded by UNM's argument that any "guarantee" of assistantships refers to the commitment to funding by the particular department accepting a student into the graduate program, not to a guarantee, promise, or offer of any particular assistantship. For example, Alana Bock testifying for the Petitioner asserted that the American Studies Department guarantees four years of funding as set forth in the American Studies Handbook. Hearing Audio Day 1, Part 3 at 3:48 - 4:05. The American Studies Handbook, on which her testimony is based, provides:

> "All students accepted in the PhD program are awarded multiple years of full funding (contingent on remaining in good academic standing for this duration). This funding includes a monthly stipend, tuition remission for graduate coursework up to twelve (12) credit hours each long semester, and health insurance benefits. Funding packages for PhD students are comprised of a combination of half-time teaching assistantships, graduate assistantships, and other potential fellowship opportunities, such as nominations for the New Mexico Higher Education Department Graduate Scholarship for eligible students."

Exhibit A at p. 4.

I do not interpret the phrase "multiple years of full funding" to comport with Ms. Bock's assertion that she is guaranteed four years of funding for her assistantship. The American Studies Handbook

comports with UNM's argument that any commitment to fund assistantships refers to the commitment to funding by the particular department accepting a student into the graduate program. That understanding is consistent with Ms. Bock's own individual assistantship contracts, introduced into evidence as Exhibit Y, which are for a one semester term. Even if she had been guaranteed funding for a full four years of her graduate studies program, that would still constitute "employment" for a definite term, inconsistent with regular employment.

Similarly, a student in the English Department's graduate program testified that assistantships are "not guaranteed at all" during the summer months. Testimony of T. Balderas. Hearing Audio Day 2, Part 4 at 0:35:55 – 0:36:22. That testimony is supported by the terms of the Assistantship Contracts in evidence, Exhibits P – AA, inclusive. That evidence establishes that it cannot reasonably be disputed that there is no expectation of continuation of an assistantship if not from one semester to another, but certainly beyond the Spring semester into the summer months.

That graduate students may change from one kind of assistantship to another as they progress toward their degrees and that they can be withdrawn for failure to maintain varying levels of enrolled credit hours or if the student does not meet a minimum grade point average is inconsistent with notions of regular employment.

See also testimony of Naomi Ambriz, Hearing Audio Day 2, Part 1 at 0:25:00 – 0:29:25. (Throughout her graduate studies she has been a Project Assistant, a Research Assistant, a Teaching Assistantship for Southwest Studies, a Graduate Assistantship for Southwest Studies, a Teaching Assistantship for Chicano Studies, and a Graduate Assistantship for the Women's Center); testimony of Alin Badillo-Carrillo, Hearing Audio Day 2, Part 2 at 6:40 - 7:25. (As a graduate student Ms. Badillo-Carrillo has been offered at least five different assistantships: a Graduate Assistantship in Latin American Studies; a Project Assistantship in Latin American Studies; a Teaching

Assistantship in Spanish; a Research Assistantship with Cradle to Career; and a Graduate Assistantship in Chicano Studies.)

The various assistantships and possible fellowships demonstrate there is no expectation of continuing the particular assistantship and, therefore, no regularity.

DECISION: I conclude that by a preponderance of the evidence the full-time and part-time graduate students engaged in instruction and/or research at the University's campuses as petitioned for herein, are not public employees subject to the Act as defined by NMSA 1978 § 10-7E-4(Q) (2020) and their inclusion in any bargaining unit under the Act would render that unit inappropriate pursuant to NMSA 1978 § 10-7E-13 (2020). Having determined that the petitioned-for group are not public employees subject to the Act, there is no need to consider the history of collective bargaining concerning other bargaining units that may include term employees. Any voluntarily recognition of a bargaining unit including such employees does not impact a decision by this Board whether UNM is to be compelled to bargain with the group petitioned for in this case. If any ambiguity in that position needs to be resolved, such resolution is properly in the Legislature's domain. Neither is it necessary to consider whether the petitioned-for employees share a community of interest.

For the foregoing reasons, UE's Petition seeking a card-check for recognition of a unit consisting of all full-time and part-time graduate students engaged in instruction and/or research at UNM's various campuses, is **DISMISSED.**

Issued, Friday, June 11, 2021.

Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board
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Albuquerque, New Mexico 87120