

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

In re:

**UNITED ELECTRICAL,
RADIO and MACHINE
WORKERS OF AMERICA,**

Petitioner,

and

PELRB 307-20

UNIVERSITY OF NEW MEXICO,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board (“Board”) on the University of New Mexico’s request for Board review of Executive Director Thomas J. Griego’s Recommended Decision. The Board, after reviewing the pleadings, hearing oral argument and being otherwise sufficiently advised, voted 2-0 (Board Chair Mark Meyers being absent) to adopt Executive Director Griego’s Recommended Decision with direction that the parties proceed with a card check that is to be scheduled without delay.

THEREFORE, THE BOARD adopts Director Griego’s Recommended Decision as its own and the parties shall proceed with a card check.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

11/09/2021
DATE


MARK MEYERS, 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
CONCERNING APPROPRIATE BARGAINING UNIT**

STATEMENT OF THE PROCEEDING: On August 17, 2021 the Public Employee Labor Relations Board issued its Order 66-PELRB-2021 concluding *inter alia* that the Graduate Students at issue in this case are “public employees” as that term is understood in the Public Employee Bargaining Act and directing the Board’s Executive Director to proceed with processing the instant Petition.

Because the Employer disputes the appropriateness of the petitioned-for bargaining unit and the status of Petitioner as a labor organization under the PEBA, the next step in the process is for the Hearing Officer to determine those disputed issues.¹ In furtherance of the Board’s directive in its

¹ The Employer contends that 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 the factors set forth in *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962), typically followed by this Board. The University takes this position because the amounts paid, duration of work performed, 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. Also, there is no history of collective bargaining in New Mexico involving graduate students and evidence that establishing such bargaining unit does not further the efficient administration of government. As concerns the Petitioner’s status as a “labor organization” under the Act, UNM contends that Petitioner is a 501(c)(5) organization that is not registered to do business in New Mexico. Because the New Mexico Taxation and Revenue Department requires a 501(c)(5) organization to register for a New Mexico tax identification number (CRS) in order to conduct business in the state, United Electrical, Radio and Machine Workers of America does not qualify to be a labor organization as defined by NMSA 1978 § 10-7E-4(K) (2020).

Order 66-PELRB-2021, I held a Status and Scheduling Conference on August 27, 2021, at which the parties agreed that sufficient evidence exists on the present record to determine the disputed issues. I requested supplemental briefs outlining each party's best evidence concerning the appropriateness of the petitioned-for bargaining unit and the status of Petitioner as a labor organization. Those briefs were timely received on September 29, 2021 both of which were duly considered. Based on those briefs and the evidence accepted into evidence during the five-day hearing on the merits held between March 30, 2021 and April 29, 2021, I incorporate all facts found by the Board in its Order 66-PELRB-2021 and make the following additional

FINDINGS OF FACT:

1. Of the approximately 4,000 graduate students at the University of New Mexico under the purview of the Office of Graduate Studies, approximately 1,500 hold some form of an assistantship, e.g. Teaching, Research, Graduate and Project Assistantships. Coonrod Test., Hearing Day 5, Part 5 at 0:04:56 – 0:06:00.
2. Graduate assistantships are described as "...a financial award for part-time work in teaching or research while pursuing study toward an advanced degree" (Ex. HHH at UE000835); and as "... a type of financial aid and work opportunity available to graduate students. There are 4 types of assistantships at UNM: Teaching, Research, Graduate and Project assistantships. Assistantships pay an hourly wage or monthly stipend to the student. Students receiving assistantships may teach, help grade class assignments, do research or other academic work." Ex. HH at UE000704.
3. The four types of assistantships identified in Exhibit HH at UE000704 are administered by the Office of Graduate Studies (OGS), which reviews and approves the employment contract between the University and the assistant, sets the minimum stipend amounts, oversees background checks when needed, ensures that the employees receive the employer-

provided healthcare, and ensures that the employee undergoes the employer-required training. Coonrod Test., Hearing Day 5, Part 4 at 0:33:13 - 0:36:43; 0:12:13 – 0:12:35. For example, Exhibit HHH at UE000834 provides “Graduate Studies will review all contracts to verify whether or not a background check is required and will coordinate with Human Resources... to initiate the background check”; and at UE000838 provides “Hiring units must identify the assistantship positions in their units in which the graduate student works in any capacity directly with minors. Hiring units must ensure that any advertisement or recruitment information for these positions states explicitly that a background check is required for the position and that future or continued employment in the position is contingent upon obtaining and maintaining a satisfactory background check.”

4. Assistantship salaries are based on minimum salary guidelines in alignment with university staff raises. Ex. HHH at UE000842.
5. The employment contracts in evidence as Exhibit P (Marley Russell), Exhibit R (Alin Badillo-Carrillo), Exhibit S (Naomi Ambriz), Exhibit U (Tania Balderas), Exhibits X, MMMM, and NNNN (Chauncey Gadek), and Exhibit UUU (Sarah Worland), are form contracts describing their respective job duties and performance period, identifying the appointment percentage in FTE terms, identifying the specific wage/stipend and payment dates (e.g. “on the last working day of each month”) and describing other terms and conditions of employment, including health insurance and tuition payments.
6. The assistantships can be as low as 0.10 FTE to as high as 1.0 FTE. Taha Test., Hearing Day 4, Part 2 at 0:19:45 – 0:20:28; Coonrod Test., Day 5, Part 4 at 0:42:50 – 0:44:12.
7. Exhibit HHH at UE000837 describes the same health insurance benefit and sick leave entitlement available to all assistantships as a benefit of their assistantship contracts.

8. Upon acceptance of an assistantship contract, the OGS sends out a form email to all Graduate Assistants, which states in pertinent part:
- a. “Congratulations! The Dean of Graduate Studies has approved your assistantship, contingent upon you meeting the terms and conditions outlined in your contract, as well as completing the required hiring documents. As an assistantship recipient, you play an important role in the success of the teaching and research functions of the University, and we look forward to your collaboration.”
 - b. “The University of New Mexico provides full payment of the assistantship recipient’s health insurance coverage premium on a semester-by-semester basis, provide the appointment percent is 25% or higher and all other eligibility criteria to hold the assistantship are met.”
 - c. “After your first pay date, you may view your pay stub by following the Pay Information link, then selecting the Employee Dashboard (Employee tab in LoboWeb).”
 - d. “If you have any questions about your assistantship responsibilities, contact your department and supervisor directly. Many departments require orientations/trainings for assistantship recipients before the start of classes. You are expected to work through the performance period dates indicated on your contract. Make sure you and your supervisor have reached a clear agreement about your duties and work schedule.”

The form email further requires the graduate assistant to provide proof of employment eligibility and to set up withholding allowances (W-4) and direct deposit, provide I-9 documents to be filled out once (not with every new assistantship contract), describes the schedule of stipends payments, informs the graduate assistant of the mandatory training

required of them and that failure to complete training will result in contract cancellation. Ex. KKKK at UE001499 - UE001500; Coonrod Test., Hearing Day 5, Part 5 at 0:15:08 – 0:15:10.

9. The UNM Faculty Handbook contains provisions that govern all Graduate Assistants including their access to the Faculty Ethics and Advisory Committee if accused of unethical conduct, that teaching or research assistants in their faculty capacity are covered by the Faculty Disciplinary Policy as follows:
 - a. “Graduate, teaching, research and project assistants, and teaching associates, occupy a dual role in the University (i.e. they are students who also perform various faculty functions). Some students are given teaching assignments, while the work of others supports instruction indirectly. Because of their dual role, assistants and associates in these positions share in the rights and responsibilities of both students and faculty. They must adhere to established guidelines and to standards of ethical conduct; they must be accorded the right to freedom from arbitrary and capricious suspension or dismissal from their assistantships.”
 - b. “As students, assistants and associates have all the rights and responsibilities of students when acting in that capacity as defined by University regulations. As teachers, assistants and associates have the responsibility of adhering to the standards of faculty professional ethics and following the policies and course guidelines of the department or supervisor for whom they act. When given discretion in the selection of instructional material and in the conduct of classes, they are responsible for exercising this discretion in a manner consistent with the guidelines for the course in which they instruct.”

c. “No graduate, teaching, research, or special assistant has a right to reappointment or to continuance in service beyond the contract period. However, assistants have the right to be secure from arbitrary or capricious dismissal. If an assistant is not satisfactorily performing assigned duties, the supervisor shall so inform the assistant and point out the unsatisfactory aspects of the work and how these should be corrected. If dismissal is contemplated after such warning has been judged ineffective, the assistant shall be given a written statement of the reasons for this action and have an opportunity to respond to the supervisor prior to the final decision. The assistant may be suspended with pay by the dean of the college/school if warranted, prior to the final decision. The assistant may appeal dismissal to any or all of the following: the department chair, the dean of the college/school, or the Dean of Graduate Studies.”

d. “If an assistant who is dismissed or not reappointed alleges that the decision violates academic freedom or Faculty Handbook procedures, or involves improper considerations, the assistant may appeal to the Academic Freedom and Tenure Committee pursuant to this Policy (Sec. 6.2), after completing the process of administrative appeal.”

e. “If a graduate, teaching, research or project assistant is dismissed and the student assistant believes that violation of academic freedom, improper considerations or prejudicial violation of the procedures specified in this Faculty Handbook are involved in the dismissal, he or she may appeal the dismissal to the Academic Freedom and Tenure Committee. In this context, student assistants shall be considered faculty.”

Ex. III at UE001000 - UE001105.

10. Teaching Assistants are the instructor of record for the courses they teach, and are responsible for developing materials for the course, teaching the course, grading student materials, holding office hours and answering student questions. The same course can be taught by teaching assistants, adjunct faculty or regular faculty; the tuition is the same to the student in either case. Worland Test., Hearing Day 1, Part 2 at 0:06:33 – 0:06:50; 0:13:00 – 0:13:50; Bock Test., Hearing Day 1, Part 3 at 0:08:53 -10:03; Russell Test., Hearing Day 1, Part 5 at 0:14:50 – 0:17:19; Ambriz Test., Hearing Day 2, Part 1 at 0:09:30 – 0:09:45; Balderas Test., Hearing Day, 2, Part 4 at 0:05:20 – 0:06:50; Ortiz Test., Hearing Day 4, Part 3 at 0:26:45 – 0:29:04.
11. Graduate Assistants perform a variety of duties that may include presenting lectures or teaching labs, conducting field research, collecting demographic data, performing lab experiments, helping the instructor of record (when they are not themselves the instructor of record) teach a course by grading papers, holding office hours, monitoring electronic bulletin boards, or performing administrative tasks such as serving as editorial assistants, taking notes and answering emails on behalf of University Institutes, assisting with graphic design and web support for University Offices, and working in university museums. Assistantship Contract of Tania Balderas Exhibit U; Bock Test., Hearing Day 1, Part 2 at 12:48 - 13:47; Day 1, Part 3 at 0:7:10 – 0:7:29; 0:19:00 – 0:21:47; 0:20:02 – 0:20:39; Day 2, Part 3 at 0:9:55 – 0:10:40; Coonrod Test., Hearing Day 5, Part 5 at 0:22:21 – 0:23:01; Gadek Test., Hearing Day 2, Part 3 at 0:16:25 -0:16:58; Day 2, Part 1 at 14:00 - 15:00; Taha Test. Day 4, Part 2 at 0:31:40 – 0:39:40; Exhibits P, R, S, U, X, Y, NN, OO, UUU, MMMM, and NNNN.
12. Research assistants perform research for the University, often pursuant to the terms of a grant the University receives. They conduct surveys and experiments, synthesize and analyze data and present reports. Gadek Test., Hearing Day 2, Part 3 at 0:16:25 -0:16:58;

- Assistantship Contract of Alin Badillo-Carrillo, Exhibit R; Taha Test., Hearing Day 4, Part 2 at 0:32:08 – 0:33:57.
13. The research to be done by a Research Assistant is determined by the University or the terms of the grant. Research duties can be specified in the assistantship contracts issues by the University. Badillo-Carrillo Assistantship Contract, Exhibit R.
 14. University faculty oversee the experiments conducted by Research Assistants. Levi Test., Hearing Day 5, Part 1 at 0:18:22; Taha Test., Hearing Day 4, Part 2 at 0:32:08 -0:33:57.
 15. University faculty serving as Principal Investigators hold regular meetings to direct the work of their Research Assistants. Gadek Test., Hearing Day 2, Part 3 at 0:19:54 – 0:20:35.
 16. Project Assistants' performance of tasks for the University, such as overseeing social media sites for a department or school, creating promotional materials, creating departmental websites, editing written materials, creating department resources such as booklets identifying department courses, or providing technical and operational support for other University instructors is included within the broad category of graduate employees whose primary job is instruction and/or research in consideration of that provision in the Office of Graduate Studies handbook (Ex. HHH at UE000836) wherein it is written that the Project Assistants perform work "required by a research grant, contract or special project" and that employment "associated with administrative/office support should not be classified as a project assistantship". Ortiz Test., Hearing Day 4, Part 3 at 0:30:24 – 0:31:50 and 0:39:45 – 0:43:00; Badillo-Carrillo Test., Hearing Day 2, Part 2 at 0:06:15 – 0:09:45; Ambriz Test., Hearing Day 2, Part 1 at 0:13:20 – 0:15:00.
 17. According to the parties' Stipulated Pre-Hearing Order and paragraphs 3 and 4 of the filed Petition, the Petitioned-for Unit consists of all full-time and part-time graduate employees whose primary job is instruction and/or research and who are employed at the Main

Campus (Albuquerque), as well as the branch campuses located in Gallup, Taos, Los Alamos, and Valencia, and includes 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.

It excludes all supervisory, managerial, and confidential employees.

18. Although there is no common “chain” of supervision for the various types of Graduate Assistants in the various Departments, all Graduate Assistants are supervised by an employee of the University who assigns them tasks and evaluates their performance. Ortiz Test, Hearing Day 4, Part 3 at 0:23:58 – 0:24:23; Worland Test., Hearing Day 1, Part 2 at 0:14:05 – 0:14:20; 0:17:14 – 0:17:45; 0:25:05 – 0:25:37; Ambriz Test., Hearing Day 2, Part 1 at 0:15:00 – 0:15:15; Bock Test., Hearing Day 1, Part 3 at 0:07:10 – 0:07:55; 0:19:00 – 0:21:47; Russell Test., Hearing Day 1, Part 5 at 0:06:28 – 0:06:50; 0:12:00 - 0:13:27 and 0:14:50 – 0:17:19; Gadek Test., Hearing Day 2, Part 3 at 0:10:42 – 0:11:10.
19. The Office of Graduate Studies ensures that each Graduate Assistant is appropriately supervised. Coonrod Test., Hearing Day 5, Part 4 at 0:34:44 – 0:34:49; Ex. 15. I decline to accept as a finding that some Graduate Assistants are not supervised at all.
20. Regardless of the form of assistantship, all Graduate Assistants can be disciplined or terminated by the University for misconduct or bad performance. Badillo-Carrillo Test., Hearing Day 2, Part 2 at 0:21:04 – 0:21:25; Balderas Test., Hearing Day 2, Part 4 at 0:18:26 – 0:19:15.
21. All assistantship contracts specify that reappointments are contingent on the availability of funds and satisfactory performance of assistantship recipient. Exhibit P (Marley Russell),

- Exhibit R (Alin Badillo-Carrillo), Exhibit S (Naomi Ambriz), Exhibit U (Tania Balderas), Exhibits X, MMMM, and NNNN (Chauncey Gadek), and Exhibit UUU (Sarah Worland).
22. All graduate assistants utilize University equipment and offices to perform their work.
Worland Test., Hearing Day 1, Part 2 at 0:14:30 – 0:14:45; Gadek Test., Hearing Day 2, Part 3 at 0:19:12 – 0:19:45; Balderas Test., Hearing Day 2, Part 4 at 0:24:42 – 0:25:20.
23. The amounts of stipends or hourly rates assigned to an assistantship vary not only among the different types of assistantships but also within specific assistantships. For example, the evidence demonstrates that stipends for teaching assistants vary from \$717.00 per month (Ex. DD) to \$1638.87 per month (Ex. MMMM); Graduate Assistants can be paid either hourly at \$16.00 - \$18.00 per hour (Ex. OO) or by a stipend varying from \$717.00 (Ex. Y) per month to \$1546.53 per month (Ex. U). Research Assistants' compensation was shown to vary from \$651.84 per month (Ex. NN) to \$2400.00 per month (Ex. NNNN) compared with one example of a Project Assistant compensated at the rate of \$19.92 per hour.
Exhibits P, R, S, U, X, Y, DD, NN, OO, UUU, MMMM, and NNNN.
24. As a fringe benefit, Graduate Assistants receive tuition assistance, which also varies from zero to 12 credit hours among the various assistantships. (Ex's. P, R, S, U, X, Y, DD, UUU, MMMM, NNNN).
25. The assistantships have varying work hours with some requiring a "normal" work schedule whereas others work on a late evening hours schedule or have no set work schedule. Test. Ambriz, Hearing Audio Day 2, Part 1 at 0:15:16 – 0:15:52; Test. Balderas, Day 2, Part 4 at 0:28:45 – 0:29:00; Test. Levi, Day 5, Part 1 at 0:08:38 – 0:09:15.
26. The workdays of Graduate Assistants are also varied, with some occurring during the "normal" workweek whereas others occur on weekends. Taha Test., Hearing Audio Day 4, Part 2 at 0:33:50 – 0:35:50.

27. The Graduate Assistants' work situs also varies. Depending on the department and type of assistantship a Graduate Assistants' work situs may be in a classroom or lab at one of the several UNM campuses, in the field throughout the state or at a location such as the United Way. Badillo-Carrillo Test., Hearing Day 2, Part 2 at 0:09:30 – 0:09:48; Part 3 at 0:09:44 – 0:10:20; Gadek Test., 0:12:10 – 0:12:50; 0:14:00 – 0:14:32; Taha Test., Day 4, Part 2 at 0:32:40 – 0:32:50; 0:37:00 – 0:37:30; 0:37:40 – 0:38:40.
28. Petitioner has represented employees in collective bargaining since 1936 and currently represents 35,000 workers nation-wide, including many in higher education such as 2,600 graduate student employees in Iowa since 1996. Meinster Test., Hearing Day 3, Part 2 at 0:09:15 – 0:09:44; 0:09:46 – 0:09:56.
29. Petitioner also represents approximately 100 workers in New Mexico in the private sector. Id. at 0:10:05 – 0:10:15.
30. The Petitioner is a "labor organization" as that term is defined in PEBA. NMSA 1978, § 10-7E-4(K) (2020).

REASONING AND CONCLUSIONS OF LAW:

The Public Employee Labor Relations Board has specific statutory duties regarding the designation of appropriate bargaining units as set forth in NMSA 1978 § 10-7E-13(A):

“Upon receipt of a petition for a representation election *filed by a labor organization*, designate the appropriate bargaining units for collective bargaining. Appropriate bargaining units shall be established on the basis of occupational groups or clear and identifiable communities of interest in employment terms and conditions and related personnel matters among the public employees involved. Occupational groups shall generally be identified as blue-collar, secretarial clerical, technical, professional, paraprofessional, police, fire and corrections. The parties, by mutual agreement, may further consolidate occupational groups. Essential factors in determining appropriate bargaining units shall include the principles of efficient administration of government, the history of collective bargaining and the assurance to public employees of the fullest freedom in exercising the rights guaranteed by the Public Employee Bargaining Act.”

(Emphasis added.)

Because a representation petition must be filed by a “labor organization” and the University disputes that the Petitioner herein is a labor organization as that term is defined by the PEBA, I address that question first before consideration of the petitioned-for unit is an appropriate one.

I. THE PREPONDERANCE OF THE EVIDENCE SUPPORTS A CONCLUSION THAT THE PETITIONER IS A LABOR ORGANIZATION UNDER THE PUBLIC EMPLOYEE BARGAINING ACT.

The University argues that because the Petitioner is a 501(c)(5) organization that is not registered to do business in New Mexico, and a 501(c)(5) organization is required by the State’s Tax Code to register for a New Mexico tax identification number (CRS) in order to conduct business in the state, Petitioner does not qualify as a labor organization under PEBA.

Whatever difficulties the Petitioner may face as a result of not being properly registered with state or federal taxing authorities, such registration is not an element of the PEBA’s definition of a labor organization. A separate enforcement mechanism exists in the Tax Code, over which this Board has no jurisdiction, and under which it has no duty. Determination of Petitioner’s status as a labor organization is based primarily on the definition of “labor organization” found in § 10-7E-4(K) of the PEBA as being:

“...an employee organization, one of whose purposes is the representation of public employees in collective bargaining and in otherwise meeting, consulting and conferring with employers on matters pertaining to employment relations.”

NMSA 1978, § 10-7E-4(K) (2020).

It cannot reasonably be disputed (and the University does not dispute) that one of United Electrical, Radio and Machine Workers of America’s purposes, if not its’ sole purpose, is the representation of public employees in collective bargaining and in otherwise meeting, consulting and conferring with employers on matters pertaining to employment relations. Since 1936 the Petitioner has served that

purpose. It currently represents 35,000 workers nationwide, including several in higher education. It currently represents approximately 2,600 graduate student employees in Iowa and has done so since 1996. It currently represents approximately 100 workers in New Mexico in the private sector. As is apparent from the Petition before us, its purpose is to represent the petitioned-for unit for collective bargaining purposes. Therefore, I conclude that the United Electrical, Radio and Machine Workers of America is a labor organization and properly a Petitioner under the Act.

II. THE PREPONDERANCE OF THE EVIDENCE SUPPORTS A CONCLUSION THAT THE PETITIONED-FOR UNIT IS AN APPROPRIATE BARGAINING UNIT.

Under the PEBA, NMSA 1978 § 10-7E-5 (2020) public employees other than management employees and confidential employees, may organize in units represented by labor organizations of their own choosing for the purpose of bargaining collectively with their employers concerning wages, hours and other terms and conditions of employment. As written above, one of the Public Employee Labor Relations Board's major functions is to determine the appropriateness of such collective bargaining units based on guidelines established in the PEBA, NMSA 1978 § 10-7E-13 (2020) and relevant case law.

A. The Graduate Students in the Putative Unit are not Management, Confidential or Supervisory Employees Statutorily Excluded From Collective Bargaining.

There is no issue before me concerning whether the Graduate Students at issue are management or confidential employees excluded from collective bargaining pursuant to NMSA 1978 § 10-7E-5 (2020) or supervisors whose inclusion would render the unit inappropriate pursuant to NMSA 1978 § 10-7E-13 (2020). The parties' Stipulated Pre-Hearing Order does not specify either of the statutory exemptions as being at issue and following five days of hearing the evidence establishes that the

Graduate Students are not management, confidential or supervisory employees excluded from bargaining under the Act.

B. The Petitioned-For Unit is “Appropriate” Pursuant to NMSA 1978 § 10-7E-13(A) (2020).

There is no absolute rule of law as to what constitutes an appropriate bargaining unit and courts will defer to the Board’s decision on what constitutes an appropriate bargaining unit if that determination is supported by substantial evidence and otherwise in accordance with the law. See, *San Juan College v. San Juan College Labor Management Relations Board*, 2011-NMCA-117. To be deemed “appropriate” as that term is used in the Act, proposed bargaining units shall be established:

“... on the basis of occupational groups or clear and identifiable communities of interest in employment terms and conditions and related personnel matters among the public employees involved. Occupational groups shall generally be identified as blue-collar, secretarial clerical, technical, professional, paraprofessional, police, fire and corrections. The parties, by mutual agreement, may further consolidate occupational groups. Essential factors in determining appropriate bargaining units shall include the principles of efficient administration of government, the history of collective bargaining and the assurance to public employees of the fullest freedom in exercising the rights guaranteed by the Public Employee Bargaining Act.”

NMSA 1978 § 10-7E-13(A) (2020).

I agree with the University that Graduate Assistants of any type are not included in any of the statutorily recognized occupational groups. Consequently, it is appropriate (because the PEBA permits recognition of an appropriate unit on the basis of *either* occupational groups *or* clear and identifiable communities of interest in employment terms and conditions and related personnel matters) to consider the various factors typically considered when considering whether a sufficient community of interest exists to justify finding the petitioned-for union to be an appropriate one. For this inquiry, it is not necessary for the Board to determine the only appropriate unit, or the ultimate unit, or the most appropriate unit - only that the unit is “appropriate”. See *Morand Bros. Beverage Co.*,

91 NLRB 409, 418 (1950); See also *NEA-Belen & Belen Fed. of School Employees & Belen Consol. Schools*, 1 PELRB-2 (May 13, 1994); *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 610 (1991).

Historically, the PELRB has applied the factors outlined in *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962), which are (1) method of wages or compensation; (2) hours of work; (3) employment benefits; (4) separate supervision; (5) job qualifications; (6) job functions and amount of time spent away from employment situs; (7) regularity of contact with other employees; (8) level or lack of integration; and (9) the history of collective bargaining. No single factor is conclusive. See *NEA-Belen & Belen Fed. of School Employees & Belen Consol. Schools*, *Id.* No single community of interest factor is conclusive, and the test cannot be mechanically applied as some elements may support one outcome, and others may indicate another outcome. Rather, the factors are a means of sifting through relevant facts to reach well-reasoned community of interest determinations.

Among the principles set forth in § 10-7E-13(A) *supra*, is “efficient administration of government” that must be considered when determining an appropriate bargaining unit. Therefore, I also weigh the Board’s preference against over-fragmentation of bargaining units throughout my consideration of the *Kalamazoo* factors as expressed in *NEA-Belen & Belen Federation of School Employees & Belen Consolidated Schools*, 1 PELRB No. 2 (May 13, 1994). (“Consequently, we adopt an anti-fragmentation policy to avoid unnecessary and needless proliferation of bargaining units. We do so because the failure to promulgate such a policy could have a deleterious effect on the efficient administration of government with simultaneous negative consequences for management, labor, and the community at large.”) To paraphrase the *Belen Consolidated Schools* case, striking a balance between public employees’ rights to self-determination and public employers’ rights to maintain stability in government operations may, under various circumstances, outweigh a one or another parties’ desire for separate units where the creation of such units would lead to fragmentation. 1 PELRB No. 2, *citing Mallinckrodt Chem. Works*, 162 NLRB 387, 64 LRRM 1011 (1966).

i. Method of calculating wages or other compensation and employment benefits.

The University argues that the method of compensation for the Graduate Assistants is so varied that it would not be appropriate to include them in a single bargaining unit. That variation takes two forms: (1) Some are paid hourly wages while others receive a stipend of a set amount; (2) the amounts themselves vary from a stipend as low as \$717.00 per month for one position to \$2400.00 per month for another. Hourly rates also vary from approximately \$16.00 - \$19.92 per hour.

This Board has recognized (in a case under PEBA I) that the Board's hearing examiner held that differences in how wages are calculated and assignment to distinct work units where the work was governed by the particular needs of the Department irrespective of the job classification justified separate bargaining units.² See *Communication Workers of America and State of New Mexico Department of Public Education*, PELRB Case No's. CP 29-95(S) and CP 30-95(S), Hearing Examiner Decision (Jan. 3, 1996) (denying the accretion of financial specialists and procurement specialists into a statewide paraprofessional unit, and the accretion of print shop employees into a statewide technical unit).

I do not consider either of these types of variations in calculating compensation to weigh against finding the petitioned-for unit to be appropriate. Variations in hourly rates are common among collective bargaining unit members and collectively bargained pay scales reflecting greater variations than are cited by the University based on differences in the specified work performed, required levels of training, education and experience. Likewise, it is a common feature of collective bargaining agreements to compensate some covered employees with stipend-like premium pay in addition to hourly wages that I do not consider the fact that some Graduate Assistants are paid hourly wages

² The difference in calculating wages was not the dispositive factor; the hearing examiner also found the employees had the option to use a different retirement system (the ERA rather than PERA), there was no interaction between these and existing bargaining unit members, they were subject to separate discipline authority, and there was no history of bargaining between CWA and the Department as to the employees to be accreted, all of which pointed to a lack of economic relatedness between the subject employees and their bargaining unit member counterparts.

while others receive a stipend, to enough of a difference that the propriety of the unit is jeopardized thereby. Graduate assistantships of all types are described as "...a financial award for part-time work in teaching or research while pursuing study toward an advanced degree". All four types of assistantships are administered by the OGS, which reviews and approves the employment contracts between the University and the assistants, sets the stipend amounts or hourly rate. There is no evidence establishing how many receive stipends as compared to those receiving an hourly wage. Accordingly, I cannot conclude that there are sufficient stipend recipients so that a separate bargaining unit for them would be of sufficient size to be meaningful in consideration of the efficient administration of government. Assistantship compensation is based on minimum salary guidelines aligned with University staff compensation. That compensation, whether by stipend or hourly wage is set forth in individual form contracts describing job duties, performance period, identifying the appointment percentage in FTE terms, identifying the specific wage/stipend and payment dates (e.g., "on the last working day of each month") and describing other benefits of employment, including health insurance and tuition payments.

I do not consider the lack of commonality of additional compensation in the form of tuition payment relief to weigh against finding a commonality of interest. Other fringe benefits weigh in favor of a single integrated unit. For example, all of the Graduate Assistants are offered the same insurance plan, receive the same sick leave benefit administered by OGS and called for in similar individual contracts.

Consequently, I conclude that consideration of the various Graduate Assistants' method of compensation weighs in favor of the petitioned-for unit being considered to be appropriate.

ii. Hours of work.

I acknowledge variation in the hours of work required of the various Graduate Assistants with some working a five-days per week schedule with hours set by the respective Assistants' Department head,

whereas others work late evening hours or have no set work schedule at all. Similarly, the workdays of Graduate Assistants are also varied, with some occurring during the “normal” workweek whereas others occur on weekends. Although at first glance it seems the wide variation in work schedules would weigh against a single bargaining unit, in the context of the employees being Graduate Students, it is more important to note that all are tied to the same semester system and the requirement that all must maintain their academic eligibility to retain their Assistantships, requiring great flexibility in scheduling in order to accommodate class schedules. In consideration of those facts the work schedules may be seen as similar in that their individual academic schedules must be taken into consideration and as those necessarily vary, so must the work schedules. Accordingly, I conclude that the variances work schedules do not render the unit inappropriate.

iii. Separate supervision. The Graduate Assistants work in different academic departments. Therefore, they do not have common supervision as that phrase is commonly understood. As stated in the OGS email to all Graduate Assistants upon acceptance of an assistantship, “If you have any questions about your assistantship responsibilities, contact your department and supervisor directly...Make sure you and your supervisor have reached a clear agreement about your duties and work schedule.” However, other than scheduling and evaluation, their terms and conditions of employment are set by the OGS and the policies it has established or as contained in the Faculty Manual. OGS is responsible for ensuring that each Graduate Assistant, regardless of department, is appropriately supervised. In this sense they are like employees in any large organization in which members of a bargaining unit report to and are being supervised by various department heads with the necessity of establishing separate bargaining units on that basis. Though supervised by different supervisors, all Graduate Assistants have in common certain due process rights whenever a supervisor finds an assistant is not satisfactorily performing assigned duties. The supervisor must first inform the assistant and point out the unsatisfactory aspects of the

work and how these should be corrected. If dismissal is contemplated after such warning has been judged ineffective, the assistant shall be given a written statement of the reasons for this action and have an opportunity to respond to the supervisor prior to the final decision. The assistant may be suspended with pay by the dean of the college/school if warranted, prior to the final decision. The assistant may appeal dismissal to any or all of the following: the department chair, the dean of the college/school, or the Dean of Graduate Studies.

Under the facts of this case, therefore, I conclude that separate supervision considerations do not render the petitioned-for unit inappropriate.

iv. Similarity or differences in job qualifications. Because the specific work performed varies from department to department it is self-evident that qualifications for an assistantship will vary from department to department. For example, the educational background needed for a Teaching Assistant in the English Department to teach a survey course in American Literature will be vastly different from that required of a Teaching Assistant in the Chemistry Department teaching a 100 Level Principles of Chemistry course. Again, as in any large organization these variances in the departments' job qualifications is ultimately less important than their shared qualification that they maintain the academic standards necessary to remain in a graduate student status and that the assistantships are available only while pursuing study toward an advanced degree. All Graduate Assistants are responsible for adhering to the standards of faculty professional ethics and following the policies and course guidelines of the department or supervisor for whom they act. Accordingly, I conclude that existing variances in the various departments' job qualifications for their Graduate Assistants do not render the petitioned-for unit inappropriate.

v. Job functions and amount of time spent away from employment situs. The Graduate Assistants' work situs vary so that my analysis looks less at whether they spend time away from a central situs as whether the different locations where they may perform their work is

significant enough to render the unit inappropriate. Depending on the department and type of assistantship a Graduate Assistants' work situs may be in a classroom or lab at one of the several UNM campuses, in the field throughout the state or at a private business location. Although they work in different departments for the same reasons set forth in my analysis of the supervision considerations I conclude that the different work locations are no different that the multiple worksite locations experience by many of our state agencies like the Children, Youth and Families Department or Department of Transportation where various work sites has not resulted in an inappropriate bargaining unit. As long as their relevant terms and conditions of employment are set by the OGS and the policies it has established or are contained in the Faculty Manual, the variance in worksites does not render the unit inappropriate.

While the specific duties performed by the various Graduate Assistants differ, their job functions share commonality in that Graduate Assistants perform a variety of duties that may include presenting lectures or teaching labs, conducting field research, collecting demographic data, performing lab experiments, helping the instructor of record (when they are not themselves the instructor of record) teach a course by grading papers, holding office hours, monitoring electronic bulletin boards, or performing administrative tasks such as serving as editorial assistants, taking notes and answering emails on behalf of University Institutes, assisting with graphic design and web support for University Offices and working in university museums. The Graduate Assistants have in common the same "menu" of possible duties that constitute the positions' function. As was found by this Board in its Order 66-PELRB-2021, a graduate student may begin as a Graduate Assistant, then serve as a Teaching Assistant followed by a Project Assistant or a Research Assistant depending on funding and the assistantships available, with the result that while their duties may vary from time to time, their function remains the same. Accordingly, I conclude that job function and employment situs considerations do not render the petitioned-for unit inappropriate.

vi. Regularity of contact with other employees. Because the approximately 1,500 Graduate Assistants work at one of several different UNM campuses and because of the noted differences in their work locations within each campus and department, and differences in their work schedules, it is reasonable to infer that Graduate Assistants do not have much contact with each other. I have searched the record and find no evidence directly related to the question of whether putative bargaining unit members do or do not have regular contact with each other. Therefore, I conclude that this factor does not support the putative unit being an appropriate one. However, because there are no groups of these employees that could reasonably exist as an alternative and there cannot exist a bargaining unit of a single employee, neither does this factor militate against this being an appropriate unit in consideration of the Board's preference against over-fragmentation of bargaining units.

vii. Level of or lack of integration. As discussed in connection with the various assistantships' specific work duties varying from department to department, it is reasonable to infer that those variances render employees in the putative unit less than fully integrated. However, the fact that Graduate Assistants may move from one type of assistantship to another or may even hold more than one kind of assistantship at a time lends itself to a conclusion that some measure of integration exist that weighs in favor of finding that this is an appropriate unit.


Section 13 also refers to the efficient administration of government, collective bargaining history and assurance of the fullest freedom in exercising rights guaranteed by the Public Employee Bargaining Act as "essential" factors to be considered.

viii. The history of collective bargaining concerning the putative unit. As UNM points out, there is no history of graduate students engaging in collective bargaining in New Mexico. Therefore, I can draw no conclusions for or against finding the petitioned-for unit be appropriate. The collective bargaining history of graduate students engaging in collective bargaining

in other states is not informative because of the unique statutory schemes in each state permitting their bargaining.

DECISION: For the foregoing reasons, and in consideration of the efficient administration of government; the absence of any history of collective bargaining and assurance to public employees of the fullest freedom in exercising rights guaranteed by PEBA, I conclude that the petitioned-for job titles form an appropriate bargaining unit and that Petitioner is a labor organization able to petition for recognition as an exclusive representative under the Act. The parties should be directed to proceed to the card-check required by PEBA.

Issued, Monday, October 04, 2021.



Thomas J. Griego
Hearing Officer
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