

74-PELRB-2021

STATE OF NEW MEXICO PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

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

Petitioner,

and

PELRB NO. 303-21

NEW MEXICO CHILDREN, YOUTH
and FAMILIES DEPARTMENT,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board ("Board") on Respondent New Mexico Children, Youth and Families Department's ("CYFD") appeal of the Hearing Officer's Report and Recommended Decision to accrete petitioned-for employees into the existing bargaining unit.

The Board, after reviewing the pleadings and being otherwise sufficiently advised, voted 3-0 to adopt the Hearing Officer's Report and Recommended Decision.

THEREFORE THE BOARD adopts Director Griego's Hearing Officer's Report and Recommended Decision as its own and directs the Executive Director to proceed with the processing of the petition consistent with this Order.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

12/09/2021
DATE


MARK MYERS, BOARD CHAIR

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

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**STATE OF NEW MEXICO, CHILDREN,
YOUTH AND FAMILIES DEPARTMENT,**

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 determination of the following issues:

1. Whether the petitioned-for employees are “supervisors” as that term is used in Section 4(T) of the PEBA.
2. Whether the petitioned-for employees are “management employees” as that term is used in Section 4(N) of PEBA.
3. Whether the petitioned-for employees share a community of interest with employees in the existing state-wide AFSCME bargaining unit.
4. Whether the inclusion of the petitioned-for employees in the existing state-wide AFSCME bargaining unit would render that unit inappropriate.

On May 20, 2021 Petitioner filed an accretion petition pursuant to 11.21.2.38 NMAC seeking to include the Juvenile Corrections Officer Supervisor, Youth Care Specialist Supervisor, Physical Plant Supervisor, Supervisor of Education, Transports & Visitation, and Security Threat Officer working

for the CYFD Juvenile Justice Facilities, in an existing bargaining unit comprising the following positions:

Social & Community Service, Purchasing Agent, Xcpt; Training & Development; Management Analyst; Financial Specialist; Clinical, Counseling & School; Mental Health & Substance Abuse; Social Worker, All Other; Probation Officer & Corr Trmt; Social & Human Service Assistant; Community & Social Service Spec; Clergy; Teacher Assistant; Registered Nurse; Dental Hygienist; Psychiatric Technician; Medical Records & Health Info; Cook, Institution and Cafeteria; Personal & Home Care Aide; Eligibility Interviewer, Govt; Receptionist & Information Clerk; Production, Planning & Exped; Secretary, Xcpt Legal, Medical & Exec; Office Clerk, General; Office & Admin Spport Worker, Computer System Analyst; Health Educator; Instructional Coordinator; Dietitian and Nutritionist; Information and Record Clerk, All; Accountant and Auditor; Occupational Health and Sfty Spec.; Business Analyst; Apps. Dev. 3; IT Tech. Spprt. Spec 3.

CYFD's Statement of Issues indicates that the "official" job title for these employees is Juvenile Correctional Officer ("JCO") Supervisor, but that some of the employees work under the alternative "working title" of Fire Safety Sanitation Officer, Classification Officer Supervisor, Maintenance Supervisor, or Security Treat Officer. The JCO Supervisors, except for those working under the working title of Fire Safety Sanitation Officer, Maintenance Supervisor or Security Threat Officer, are sometimes known as "Youth Care Specialist Supervisors."

The following three additional issues were originally presented for consideration:

5. Whether positions can be accreted into a grandfathered bargaining unit.
6. Whether changed circumstances exist to warrant an accretion.
7. Whether an accretion can occur without an election.

However, AFSCME contended that those issues are settled by existing case law and are not actually issues in need of resolution in this case. The parties' Amended Pre-Hearing Order called for those

three issues to be argued and decided as a preliminary matter after convening the hearing but before taking evidence.

A hearing on the merits was held on August 23, 24 and 25, 2021. Prior to taking evidence and testimony each party stipulated to the withdrawal of certain proffered exhibits and stipulated to the admission of the amended exhibits. As set forth in the Amended Pre-Hearing Order, the first matter addressed were the arguments concerning whether positions can be accreted into a grandfathered bargaining unit, whether sufficient changed circumstances existed to warrant an accretion and whether an accretion can occur without an election. After hearing argument, I decided that all three issues are established law in our jurisprudence and so are not at issue in this case; i.e., that the positions can be accreted into a grandfathered bargaining unit, positions at issue in this accretion petition are not historically excluded positions as that term is used in the NLRB cases relied upon by the CYFD, whether by agreement of the parties or adjudication of the propriety of their exclusion; nor is NLRB procedures requiring an election applicable under this Board's rules, particularly, NMAC 11.21.2.38. No changed circumstances are required for an accretion petition of this sort and to the extent changed circumstances are required to support an accretion such circumstances are found to exist because the positions at issue did not exist at the time of the original unit certification and a Petition is not time-barred by the passage of time since creation of the positions. Further, no election is required for accretion of positions constituting less than 10% of the bargaining unit. The matter then proceeded to be heard without contested issues 5, 6 and 7, having determined that they do not apply in this case.

By agreement of the parties the petitioned-for unit seeks to accrete only those JCO Supervisor positions at CYFD's "secure" facilities, i.e., the Camino Nuevo Youth Center and the Youth Diagnostic and Development Center in Albuquerque, and the John Paul Taylor Center in Las Cruces. The Petition does not seek to accrete any employees working at "non-secure" facilities i.e.,

the Albuquerque Boys and Girls Reintegration Centers and the Eagle Nest Reintegration Center. The parties also agreed that this Petition seeks to accrete those JCO Supervisor employees working the specialty posts of Maintenance Officer and Security Threat Officer but does not seek to accrete those JCO Supervisor employees working the specialty posts of Fire Safety or Classification Officer. All parties hereto were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. 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:

1. Complainant AFSCME is a “labor organization” as that term is defined in Section 4(K) of PEBA (NMSA 1978, § 10-7E-4(K) (2020)). (Amended Stipulated Pre-Hearing Order).
2. Respondent is a “public employer” as that term is defined in Section 4(R) of PEBA. (Amended Stipulated Pre-Hearing Order).
3. The PELRB has subject matter jurisdiction over this dispute, and personal jurisdiction over the parties. (Amended Stipulated Pre-Hearing Order).
4. The employees sought to be accreted are “public employees” as that term is defined in Section 4(Q) of PEBA. (Amended Stipulated Pre-Hearing Order).
5. The employees sought to be accreted do not belong to an existing bargaining unit. (Amended Stipulated Pre-Hearing Order).
6. The employees sought to be accreted are less than 10 percent of the existing statewide bargaining unit represented by AFSCME, which is roughly 6,000 employees. (Amended Stipulated Pre-Hearing Order).

7. JCO Supervisors in the three secure facilities all have the same job responsibilities and duties and the same level of autonomy and the Fire Safety Sanitation Officers, Classification Officer Supervisors, Maintenance Supervisors and Security Threat Officers are likewise have substantially the same job responsibilities and duties and the same level of autonomy at each facility. See Email from Stephen Curtice to Grusauskis and Griego dated August 18, 2021 outlining the parties' agreement and incorporated by reference as part of the record herein.
8. The petitioned-for unit is clarified as seeking accretion of only those JCO Supervisor positions at CYFD's "secure" facilities, i.e., the Camino Nuevo Youth Center and the Youth Diagnostic and Development Center in Albuquerque, and the John Paul Taylor Center in Las Cruces; not any employees working at "non-secure" facilities i.e., the Albuquerque Boys and Girls Reintegration Centers and the Eagle Nest Reintegration Center. The parties also agreed that this Petition seeks to accrete those JCO Supervisor employees working the specialty posts of Maintenance Officer and Security Threat Officer but does not seek to accrete those JCO Supervisor employees working the specialty posts of Fire Safety or Classification Officer. See, Hearing Audio Day 1, Part 1 at 0:02:20 – 0:03:35; Email from Stephen Curtice to Grusauskis and Griego dated August 18, 2021 outlining the parties' agreement and incorporated by reference as part of the record herein.
9. In 2001 the State Personnel Office used the same job code - G1092 - for Lieutenants working with adults in the Department of Corrections and those positions (now JCO Supervisor) working with children in CYFD. Hearing Day 1, Part 1 at 0:23:40 – 0:26:38.
10. JCO I, JCO II and JCO Supervisor job descriptions are part of a single series of job descriptions with similar job qualifications and responsibilities. Joint Ex. 2.

11. The Chain of Command at each of the three CYFD secured facilities is: JCO I, JCO II, JCO Supervisor, Program Managers, Deputy Superintendent and Superintendent. Weaver Test., Hearing Day 1, Part 2 at 0:02:44 – 0:04:04; Cornejo Test., Hearing Day 1, Part 4 at 0:05:20 – 0:06:54.
12. Above the Superintendent is the overall CYFD management organization structure. Weaver Test., Hearing Day 1, Part 2 at 0:04:22 – 0:04:50.
13. JCO Supervisors directly report to a Program Manager. Where there is more than one Program Manager at a facility, they split the JCO Supervisors between them. Weaver Test., Day 1, Part 2 at 0:02:55 – 0:04:04; Sanchez Test., Day 1, Part 4 at 1:08:05-1:08:50; Joint Exhibits 11, 45 and 63.
14. Although Program Managers typically work a more traditional Monday – Friday shift, there is always at least one on call at all times, referred to as the “Officer in Charge” (OIC). JCO Supervisors are expected to contact the OIC if something significant occurs on their shift. Weaver Test., Day 1, Part 2 at 0:04:51 – 0:05:15; Cornejo Test., Day 1, Part 4 at 1:00:56 - 1:01:24.
15. Each of the posts to which a JCO I, JCO II, or JCO Supervisor can be assigned is governed by detailed post orders. Weaver Test., Day 1, Part 2 at 0:30:11 – 0:31:06; Cornejo Test., Day 1, Part 4 at 0:59:36 - 1:00:54; Sanchez Test., Day 1, Part 4 at 1:27:15 -1:28:40.
16. For the three secure facilities at issue, the parties submitted 509 pages of those post orders, which direct staff in the performance of their duties. Joint Exhibits J-3 through J-70.
17. All staff signs that they have read and understood the relevant post orders each day. Weaver Test., Day 1, Part 2 at 0:30:11 – 0:31:06.
18. JCO Supervisors have no role in developing the post orders nor do they have any role in the development of any of CYFD’s written policies. Weaver Test., Day 1, Part 2 at 0:45:21 –

- 0:46:30; Sanchez Test., Day 1, Part 4 at 1:27:15 - 1:28:40; Lee Test., Day 1, Part 3 at 0:21:47 – 0:22:33.
19. JCO Supervisors do not have authority or ability to determine the post or schedule of their subordinates; that is, instead, determined by a post/shift bid. The only role JCO Supervisors have concerning their subordinates' schedules is approval of requests for leave and mandating overtime assignments when an employee calls in sick for a scheduled shift, neither of which require the exercise of any discretion or independent justice. Weaver Test., Day 1, Part 2 at 0:17:36 – 0:18:48; Cornejo Test., Day 1, Part 4 at 0:24:09 – 0:24:40; Sanchez Test., Day 1, Part 4 at 1:14:22-1:14:44; 1:53:38-1:55:10.
20. Concerning leave requests, the JCO Supervisors role is limited to verifying that the requestor has sufficient leave in his or her leave bank; if so, the JCO Supervisor approves the request. JCO Supervisors cannot approve more than one employee's leave request for the same day; the second employee must get the approval of the Program Manager. Weaver Test., Day 1, Part 2 at 0:18:49 – 0:20:13; Cornejo Test., Day 1, Part 4 at 0:24:41 – 0:25:41; Sanchez Test., Day 1, Part 4 at 1:54:13 - 1:55:10.
21. When mandating overtime assignments, the JCO Supervisors first offer the assignment to those on a list of overtime volunteers. Volunteers have 30 minutes to accept the position and if more than one accepts, the JCO Supervisor must assign the most senior employee. If no one volunteers, the JCO Supervisor must assign the person from the "Bucket List" who last worked a mandatory overtime shift. Weaver Test., Day 1, Part 2 at 0:20:14 – 0:21:00; Cornejo Test., Day 1, Part 4 at 0:20:42 – 0:21:38; Sanchez Test., Day 1, Part 4 at 1:11:57 - 1:14:21.

22. JCO Supervisors approve their subordinates' timesheets but this simply involves verifying that they are correct based on days and times worked. Weaver Test., Day 1, Part 2 at 0:17:10 – 0:17:35; Sanchez Test., Day 1, Part 4 at 1:14:46 - 1:15:49.
23. JCO Supervisors authority to discipline their subordinates is limited to verbal coaching and written documentation of that coaching. Weaver Test., Day 1, Part 2 at 0:41:26 – 0:44:10; Sanchez Test., Day 1, Part 5 at 1:24:23 -1:26:21. Even in those instances, they take direction from the Program Managers. Lee Test., Day 1, Part 3 at 0:18:16 – 0:19:40; Cornejo Test., Day 1, Part 4 at 0:29:36 – 0:33:06.
24. Other than as described above, discipline at CYFD is handled through the Department's Employee Relations Bureau (ERB) process whereby JCO Supervisors recommending discipline fill out what is called an "ERB Checklist" that simply documents the facts of what happened that the reporting JCO Supervisor believes should result in discipline. ERB investigates the matter and issues a recommendation as to discipline to the Deputy Superintendent or the Superintendent. JCO Supervisors do not recommend any discipline as part of this process. Weaver Test., Day 1, Part 2 at 0:41:26 – 0:44:10; Lee Test., Day 1, Part 3 at 0:19:41 – 0:20:24; Cornejo Test., Day 1, Part 4 at 0:29:36 – 0:34:09; Sanchez Test., Day 1, Part 5 at 1:24:23 - 1:26:21.
25. JCO Supervisors do not have the authority to hire or promote employees. JCO Supervisors participation in the hiring and promotion process is limited to occasionally serving on an interview panel made up of JCO IIs and management employees. The panel is given a set of pre-determined questions to read to the interviewee and records and grades their response. The panel, as a group, then makes a recommendation as to who gave the best interview. Importantly, JCO Supervisors have no role in determining which applicants for the positions are selected for the interview; that, like the final determination as to who to hire, is made by

- HR or management staff. Weaver Test., Day 1, Part 2 at 0:38:38 – 0:40:41; Lee Test., Day 1, Part 3 at 0:38:38 – 0:40:41; Cornejo Test., Day 1, Part 4 at 0:25:42 – 0:29:35; Sanchez Test., Day 1, Part 4 at 1:23:26 - 1:24:22.
26. The actual day-to-day job duties of JCO Supervisors depend on whether they are “running shift” (sometimes called being the “Officer of the Day”) or not. The number of times a JCO Supervisor is “running shift” can vary from 2 - 3 times a month (Cornejo Test., Day 1, Part 4 at 0:8:06 – 0:8:35) to 2 - 3 times a week (Weaver Test., Day 1, Part 2 at 0:06:22 – 0:06:55) to 3 - 4 times a week (Sanchez Test., Day 1, Part 4 at 1:19:42-1:21:10).
27. On days JCO Supervisors are not “running shift” they spend most of their time in their units, interacting with and observing the clients (i.e., the juveniles) or handling special (and non-supervisory) “projects” assigned them by the Program Managers. Weaver Test., Day 1, Part 2 at 0:06:55 – 0:08:10.
28. While in the units, JCO Supervisors are doing basically the same tasks as JCO I and JCO II employees are doing. Weaver Test., Day 1, Part 2 at 1:19:42 - 1:21:10; Cornejo Test., Day 1, Part 4 at 0:08:36 – 0:10:50.
29. The majority of JCO Supervisors’ work time is spent interacting with clients working side by side with the JCO I and JCO II employees. Weaver Test., Day 1, Part 2 at 1:42:59 - 1:43:41; Cornejo Test., Day 1, Part 4 at 0:8:36 – 0:10:50.
30. A Security Threat Officer is a JCO Supervisor who has additional duties relating to searches of clients and intelligence gathering regarding gang activity. Such additional duties are non-supervisory and constitute 20% of that employee’s time at work. Security Threat Officers will use the days they are not “running shift” to handle these

- additional non-supervisory duties. Sanchez Test., Day 1, Part 4 at 1:05:37 - 1:07:18; 1:19:42 - 1:21:10.
31. When a JCO Supervisor is “running shift,” they get a pass down from the outgoing shift upon arrival, they prepare the response team list and the OT Bucket list, call out radio numbers, and announce response team and bucket list. They perform or verify a perimeter check. These purely administrative tasks can take 30 minutes to an hour. They also fill vacancies on the oncoming shift, through the volunteer/mandatory process described above. They also perform “rounds” where they go into each of the units, verify that post orders have been signed and interact with the clients. These rounds can take 1-2 hours. While the clients are in education (the vast majority of the day shift), they are also in the school making sure the clients are behaving and acting as an extra set of eyes. When the clients are on recreation, the JCO Supervisors are outside with the clients interacting with them. Weaver Test, Day 1, Part 2 at 0:23:42 – 0:25:32; 0:27:18 – 0:29:19; 0:29:29 – 0:30:10; 0:31:07 – 0:32:28; 0:33:56 – 0:34:44; Cornejo Test., Day 1, Part 4 at 0:18:12 – 0:24:08; Sanchez Test., Day 1, Part 4 at 1:09:39 - 1:11:56; 1:16:41 - 1:17:50; 1:18:46 - 1:19:41.
32. All JCOs work similar shifts, with JCO Supervisors in the units work a mix of 6 am – 2 pm (day) and 2 pm – 10 pm (swing or evening) shifts as well as a minimum of two (2) 10 pm – 6 am (graveyard) shifts per month. Testimony of Robert Nieto
33. Because their subordinates work different shifts than they do, it is not unusual for JCO Supervisors running shift to only have 30 minutes of interaction with their staff a day; the remainder is spent on administrative tasks or doing rounds. Sanchez Test., Day 1, Part 4 at 1:18:05 - 1:18:45.

34. The Maintenance Supervisor has a different set of daily job duties than other JCO Supervisors in that she has subordinates who are assigned to various parts of the facility. They follow a “work order system”, whereby a requester sends a work order by email to the JCO I or JCO II assigned to that portion of the facility with a copy to the JCO Supervisor. The JCO Supervisor handles work orders personally whenever the JCO I or II is not available. JCO Supervisors do a couple of “walkarounds” each week when she inspects the physical plant for defects. Those take a couple of hours a week. She is also responsible for inventory of keys, tools, capital assets, cameras and the facility’s car fleet. The majority of her work time (around 3 days a week, or 60%) is spent processing procurement documents concerning private contractors and escorting those contracted workers when they come to the facility to perform their work. Lee Test., Day 1, Part 3 at 0:07:15 - 0:14:55.

REASONING AND CONCLUSIONS OF LAW:

NMSA 1978 § 10-7E-2 (2020) guarantees all public employees the right to organize and bargain collectively with their employers except those who are “supervisors” as that term is defined in Section 4(T) of the PEBA or “management employees” as that term is used in Section 4(N)¹. See NMSA 1978 § 10-7E-5 (2020). In effectuating public employees’ rights under Sections 2 and 5 of the Act this Board is tasked with designating appropriate bargaining units for collective bargaining 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 and may not include in any such unit, supervisors, managers or confidential employees. See NMSA 1978 § 10-7E-13 (2020).

¹ Other exemptions from the general grant of public employees’ bargaining rights are not at issue in this case.

Following disposal of issues 5-7 in the Stipulated Prehearing Order, the issues before me for determination are: (1) whether the petitioned-for employees are supervisors, (2) whether the petitioned-for employees are management employees, (3) whether the petitioned-for employees share a community of interest with employees in the existing state-wide bargaining unit, and (4) whether the inclusion of the petitioned-for employees in the existing statewide bargaining unit would render that unit inappropriate. I address each issue in turn.

I. THE PETITIONED-FOR EMPLOYEES ARE NOT “SUPERVISORS” AS THAT TERM IS DEFINED IN SECTION 4(T) OF THE PEBA.

To be deemed a “supervisor” under Section 10-7E-4(T), a position must: (1) devote a majority of work time to supervisory duties *and* (2) customarily and regularly direct the work of two or more other employees *and* (3) have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively. An employee must meet all three prongs of the first step in the supervisory status or the employee is not a supervisor excluded under the Act.² Even if an employee meets these three conditions, it is nevertheless not a supervisor if: (1) the duties he or she performs are merely routine, incidental or clerical in nature *or* (2) he or she only occasionally assumes a supervisory role, *or* (3) his or her duties are substantially similar to those of his or her subordinates, *or* (4) he or she 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

² The Union does not dispute that the JPO IIIs at issue here customarily and regularly direct the work of two or more other employees except to the extent that the lack of independent judgment may impact whether such direction constitutes “supervision”. Because JPO IIIs do not meet the other two prongs of the three-pronged test set forth by Section 4(T), that element is not discussed further.

giving direction to subordinate employees. For this determination, the employees' actual job duties, rather than job descriptions, job titles or ranks is controlling. See *AFSCME v. N.M. Dept. of Corrections*, D-202-CV-2013-01920, (May 15, 2014); *In re: N.M. Coalition of Public Safety Officers, Local 7911, CWA, AFL-CIO & Town of Bernalillo*, 1-PELRB-21 (1997); *N.M. State University Police Officers Association and N.M. State University*, 1-PELRB-13. Lieutenants in the New Mexico Department of Corrections were found not to meet at least two of the three criteria required by PEBA § 4(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).

A substantial number of cases have been decided by this Board applying the PEBA's definition of "supervisor" to various fact patterns, some of which are cited by the Union in its closing brief and upon which I rely for this decision. For example, in *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), this Board determined that a key determinant in supervisory status is whether the employee is exercising independent judgment or routinely ensuring that procedures and policies are followed. Where an employer is merely relaying instruction from a supervisor or ensuring that subordinates adhere to established procedures, that individual is not a supervisor under the Act.

A. JCO Supervisors do not Spend a Majority of Their Work Time Performing Supervisory Duties.

The first element of PEBA's definition of supervisor requires that an alleged "supervisor" must devote a majority of his or her time to "supervisory duties". 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 monthly meetings related to insuring that the facility'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); *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); *NMCP SO-CWA Local 7911 & City of Rio Rancho Police Department*, 04-PELRB-2009 (April 6, 2009); *In re: New Mexico Coalition of Public Safety Officers Ass'n & County of Santa Fe*, 78-PELRB-2012 (Dec. 5, 2012). Administrative tasks such as completing standard forms and reports do not constitute supervision and where, as here, the discretion of JCO Supervisors is almost entirely constrained by post orders issued by Program Managers, Deputy Superintendent and Superintendent, much of what the Department's witnesses believed to be supervisory duties, are not, due to the absence of JCO Supervisors' independent judgment regarding them. Although JCO Supervisors may be called upon to interpret the post orders for their subordinates, to ensure subordinates understand and are properly executing their responsibilities and to correct subordinates when their conduct deviates from prescribed procedures, and although the Employer's witnesses perceived these responsibilities as supervisory in nature, they do not constitute supervisory duties for purposes of PEBA because JCO Supervisors lack discretion when performing them.³

To paraphrase what I stated in *AFSCME v. N.M. Dep't of Corrections, supra*, merely because JCO Supervisors do not meet the statutory definition of supervisor does not mean they perform no supervisory duties at all. JCO Supervisors may occasionally exercise independent judgment. For

³ Similarly, I give little weight to Respondent's Exhibits 34, 35, 36, 37 and 38 because they reflect goals, aspirations and expectations rather than actual duties and the amount of time spent performing them.

example, if a situation arises that is not covered by a post order, they may have to use independent judgment to determine how to handle the situation, but the preponderance of the evidence supports a conclusion that such occasions are uncommon. Thus, even though JCO Supervisors may sometimes exercise independent judgment and perform supervisory duties, they are not supervisors for purposes of PEBA because they are not performing supervisory duties a majority of the time. In this respect I do not give the Employer's witnesses' estimates of the amount of time JCO Supervisors spend performing supervisory duties much weight, because of their fundamental misunderstanding of what a supervisor under the Act is, and what duties qualify as supervisory, including administrative tasks such as completing forms, communicating with outside entities, Behavioral Health staff, Classification Officers, Education staff, and Medical staff in their estimates of time spent in supervision. Uncritically accepting at face value, the highest number of hours (10 – 15) hours per week) estimated by the Employer's witness Abraham Steward, and adding to that, unspecified estimates of time spent conducting weekly meetings with subordinates, I would be hard pressed to see how that disputed rises to a majority of the JCO Supervisors' work time. Certainly, the Employer's closing brief does not help in that regard by providing a proposed calculation. I do not credit those witnesses testifying that when a JCO Supervisor is assigned to be OD, almost all their eight hours shift is spent on operational decisions for the whole facility and is therefore supervision. Such testimony recycles the discredited notion that although one may be performing exactly the same tasks as one's subordinates, they are considered to be supervision merely by virtue of the performer's supervisory designation.

To the contrary, the testimony established that even when "running a shift" as OD (an occasional assignment), JCO Supervisors are involved in much the same, if not identical, administrative tasks that this Board has found to be not supervisory in *AFSCME v. N.M. Dep't of Corrections* and *New Mexico Coalition of Public Safety Officers Ass'n & County of Santa Fe, supra*. When not assigned to be OD,

they spend their time in the units involved in the same work as the JCO Is and JCO IIs e.g., interacting with the “clients” or in performing special projects for the facility. On those days, they are not supervisors at all. Rather, because they spend a majority of their time interacting with clients working side by side with the JCO I and JCO II employees, I conclude that the JCO Supervisors are lead employees as defined by § 10-7E-4(U).

I agree with the Union that CYFD appears to concede this point, because it elicited testimony that when JCO Supervisors are in the units and interacting with clients, they are “modeling” proper behavior and performance to their subordinates. Accordingly, JCO Supervisors do not meet the first prong of the initial three-pronged test for finding a supervisor under Section 10-7E-4(I) in that they do not devote a majority of work time to supervisory duties.

B. JCO Supervisors do not Hire, Promote or Discipline Other Employees or Effectively Recommend Such Actions.

As with the Department of Correction Lieutenants in 2-PELRB- 2013, *supra*, the preponderance of the evidence supports a conclusion that the petitioned-for employees here do not have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively. As noted in the findings of fact, JCO Supervisors only involvement (on a purely voluntary basis) is participation in a panel of employees (which can include JCO IIs) who interview candidates pre-selected by management, score their responses to questions pre-determined by management and, as a group (which may include employees recognized by the employer as non-supervisory), recommend the individual who answered the questions best. This does not rise to the level of “authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively” required by Section 4(I). To the contrary, it constitutes participation in “peer review or occasional employee evaluation programs” expressly excluded from the definition of “supervisor”.

Likewise, they do not have the authority to discipline or effectively recommend discipline. They are not authorized to issue any discipline beyond verbal “coachings” or documenting those verbal “coachings” by email. They often do so only at the direction of their managers. When they believe discipline beyond a verbal coaching may be warranted, they are required to complete a form “ERB checklist” documenting the perceived infraction. The Employee Relations Bureau (ERB) then investigates the matter and if substantiated, the ERB, not the JCO Supervisor, makes a disciplinary recommendation to the Deputy Superintendent or Superintendent. Their role in the particular disciplinary process at CYFD does not rise to the level of exercising authority in the interest of the employer to discipline other employees or to recommend such actions effectively. See *AFSCME & Santa Fe County* and *AFSCME & Department of Corrections, supra*.

II. THE PETITIONED-FOR EMPLOYEES ARE NOT “MANAGEMENT EMPLOYEES” AS THAT TERM IS DEFINED IN SECTION 4(N) OF THE PEBA.

Pursuant to NMSA 1978-10-7E-4(N) (2003), a “management employee” is one who is *primarily* engaged in executive and management functions and is charged with the responsibility of developing, administering or effectuating management policies. An employee “shall not be deemed a management employee solely because the employee participates in cooperative decision-making programs on an occasional basis or whose fiscal responsibilities are routine, incidental or clerical.” Because I have determined that JCO Supervisors spend most of their work time performing duties that are substantially similar to those of their subordinates, i.e., the care of the clients in the protection of the CYFD secure facilities, it cannot reasonably be argued that that are primarily engaged in executive and management functions. Rather, they are “primarily” involved in the care of the clients in the custody of the CYFD secure facilities. Likewise, because they do not possess and exercise a level of authority and independent judgment sufficient to significantly affect the employer’s purpose, those tasks they perform that to the layman may appear to be managerial, are

not. See *NEA & Jemez Valley Pub. Schools*, 1-PERB-10, ALJ Decision at 32 (May 19, 1995) quoted in *New Mexico Park Ranger's Law Enforcement Assoc. v. New Mexico Energy, Minerals and Natural Resources Dept.*, 14-PELRB-2020 (PELRB 301-20), at p. 11-12. (“Emphasis is to be given the relative importance of (as contrasted the amount of time engaged in) management functions.”).⁴

“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.” *NEA & Jemez Valley Pub. Schools, supra*.

To qualify under the first prong 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.*

The Employer’s closing brief does not clearly differentiate among those duties it claims are evidence of JCO Supervisors’ supervisor status as contrasted with those supporting its claim that they are managers. I do see that the Employer refers to its Unit Management procedure (Respondent’s Exhibit 5), arguing that JCO/YCS Supervisors have 25 enumerated responsibilities that are distinct from the responsibilities of JCO/YCS I and II staff, without specifying what those distinct responsibilities may be. My review of all the delineated responsibilities in Exhibit 5 revealed none that I found require the exercise of discretion within, or even independently of, established employer policy sufficient to rise to the level of management under the Act. Nor do the JCO Supervisors’

⁴ The 2020 amendment to the Act modified the definition of “management” employee so that 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, thereby adding the second prong to what is now a two-part test. Prior cases construing the first prong, which remained unchanged by the 2020 amendment, are still valuable precedent as to that analysis.

responsibilities for informing their subordinates about new information, reminding them of existing information that needs to be reemphasized, informing them of critical safety information during COVID and generally ensuring that all safety protocols, policies and procedures are followed ensuring that management obligations, duties, and rights under the Collective Bargaining Agreement are followed rise to that level.

CYFD refers to JCO Supervisors attending supervisor meetings with upper management for 1 to 2 hours each week in which information is conveyed both from upper management to the JCO Supervisors and from them to upper management. Merely serving as a conduit of information up and down the chain of command does not require the level of meaningful authority to carry out management policy required to meet the first prong of the test. Furthermore, such meetings fall within the second prong of the test whereby an employee “shall not be deemed a management employee solely because the employee participates in cooperative decision-making programs on an occasional basis.

The testimony in this case was unequivocal that JCO Supervisors have no role in the creation of, and development of, the CYFD policies and post orders that govern their day-to-day work lives and the manner and method of delivering service to their clients and the public. Testimony from Abraham Steward, Tamera Marcantel and Robert Nieto that once upon a time some JCO Supervisors had “input” when post orders were most recently revised by upper management, such input is so insignificant that it demonstrates an exception that proves the rule.

The quantum of evidence demonstrating that JCO Supervisors are charged with responsibility for developing, administering or effectuating management policies is practically nil, much less that they are engaged primarily for that purpose. They have no fiscal responsibilities to speak of other than to control overtime expenditures on their shifts. Accordingly, I conclude that the petitioned-for employees are not “management” employees as that term is defined in section 4(N) of the PEBA.

III. JCO Supervisors SHARE A COMMUNITY OF INTEREST WITH EMPLOYEES IN THE EXISTING STATE-WIDE BARGAINING UNIT AND THEIR INCLUSION IN THE EXISTING UNIT DOES NOT RENDER IT INAPPROPRIATE.

There must be a community of interest between an existing bargaining unit and employees to be accreted into it. See NMAC 11.21.2.38(A). This Board has long followed the factors set forth in *Kalamazoo Box Corp.*, 136 NLRB 134 (1962) to determine whether a sufficient community of interest exists. See *AFSCME & Dept. of Corr.*, 2-PELRB-13, Rec. Dec. at 17 n.1 (Oct. 17, 2012); *NEA-Belen & Belen Fed. of School Employees & Belen Consol. Schools*, 1-PELRB-2 (May 13, 1994). Those factors are: (1) method of wages or compensation; (2) hours of work; (3) employment benefits; (4) separate supervision; (5) job qualifications; (6) job functions and amount of time spent away from employment situs; (7) regularity of contact with other employees; (8) level or lack of integration; and (9) the history of collective bargaining. No single factor is conclusive.

Because in 2001 the State Personnel Office used the same job code - G1092 - for Lieutenants working with adults in the Department of Corrections and those positions working with children in CYFD (now referred to as JCO Supervisor), I incorporate the same analysis and conclusions as rendered in *AFSCME, Council 18 v. N.M. Dep't of Corrections, supra*, concerning the Lieutenant positions in that case. Hearing Day 1, Part 1 at 0:23:40 – 0:26:38. As the Lieutenants accretion did not render the statewide unit in that case inappropriate, following application of the *Kalamazoo* factors, I likewise conclude that JCO Is and JCO IIs in this case share a community of interest with JCO Supervisors. Because all CYFD employees are paid through the same method regardless of their status as bargaining unit, management, probationary, career, or appointment and, likewise, all receive the same employment benefits I conclude those factors weigh in favor of a shared community of interest. All JCOs work similar shifts. (CYFD would not claim supervisory status for JCO Supervisors if they did not). JCO Supervisors in the units work a mix of 6 am – 2 pm (day) and

2 pm – 10 pm (swing or evening) shifts as well as a minimum of two 10 pm – 6 am (graveyard) shifts per month. At the larger secure facilities, CNYC and YDDC, there is a minimum of one JCO Supervisor in each facility all the time. At JPTC, there is a minimum of one JCO Supervisor on the day and swing shifts every day, and JCO Supervisors are required to work a minimum of two graveyard shifts each month. Specialty JCO Supervisors (Maintenance Supervisors, Security Threat Officers) generally have the same schedule as their subordinates, though they may be called back to their facilities outside of those hours. This factor also weighs in favor of finding a community of interest exists.

JCO Supervisors are part of the same chain of command as JCO Is and IIs. They work at the job situs, and regularly have contact with each other. They have similar job qualifications the primary distinguishing factor being years of experience, which I do not conclude is significant enough to weigh that factor against a shared community of interest.

JCO Supervisors can and do perform the duties of JCO I and JCO II but the evidence is insufficient to determine whether any JCO II staff can perform the JCO Supervisor duties and responsibilities as the only distinguishing factor appears to be years of experience and education. The overlap in the functions performed by all JCO jobs despite there being an additional level of responsibilities of JCO Supervisors weighs in favor of a shared community of interest.

The history of collective bargaining between AFSCME and all state agencies under a master agreement with sub-agreements for each agency, which now includes Lieutenants in the Department of Corrections unit, show that including JCO Supervisors will not render the unit inappropriate.

DECISION:

For the foregoing reasons, I conclude that the petitioned-for employees are not excluded from collective bargaining as “supervisors” or “managers” as those terms are defined in the PEBA. They share a community of interest with employees in the existing state-wide bargaining unit and their

inclusion in that unit does not render it inappropriate. Accordingly, the Petition for accretion is GRANTED and the attached Amended Certification should issue unless directed otherwise upon review of this decision by the Board.

Issued, Monday, October 18, 2021.



Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board
2929 Coors Blvd. N.W., Suite 303
Albuquerque, New Mexico 87120

State of New Mexico

Public Employee Labor Relations Board

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Amended Certification of Representation

The undersigned hereby certifies that **American Federation of State, County and Municipal Employees, New Mexico, Council 18, AFL-CIO** (Union) has demonstrated a sufficient basis pursuant to NMAC 11.21.2.38 to compel amendment of the certification of the bargaining unit issued by this office on **August 7, 2003** with regard to a bargaining unit comprised of employees of the **Children, Youth and Families Department** by accreting the position of JCO Supervisor.

The undersigned makes this certification based on the following:


1. By a Petition filed **May 20, 2021** the Union requested amendment of the Certification of the Exclusive Representative of the above-referenced unit.
2. On **May 21, 2021** the Board's Executive Director determined that the Petition was facially valid and sent notice to AFSCME and CYFD requesting a statement of their positions no later than **June 4, 2021** as to whether the amendment should be made. CYFD responded that Juvenile Correctional Officer Supervisors in CYFD's secure facilities are management employees and/or supervisors, not appropriate for inclusion in a bargaining unit and do not share a community of interest with employees in the existing bargaining unit.
3. A hearing was held on August 23, 24 and 25, 2021 after which the Board's Hearing Officer determined that the petitioned-for employees are not excluded from collective bargaining as "supervisors" or "managers" as those terms are defined in the PEBA, share a community of interest with employees in the existing state-wide bargaining unit and their inclusion in that unit does not render it inappropriate. Accordingly, certification of the bargaining unit issued by this office on August 7, 2003 shall be, and hereby is, amended to reflect accretion of Juvenile Corrections Officer Supervisor, Youth Care Specialist Supervisor, Physical Plant Supervisor, Supervisor of Education, Transports & Visitation, and Security Threat Officer working for the CYFD Juvenile Justice secured facilities to read as follows:

B9151-Social & Community Service; C1023-Purchasing Agent, Xcpt; C1073-Training & Development; C1111-Management Analyst; C2099-Financial Specialist; F3031-Clinical, Counseling & School; G1023-Mental Health & Substance Abuse; G1029-Social Worker, All Other; G1092-Probation Officer & Corr Trmt; G1093-Social & Human Service Assistant; G1099-Community & Social Service Spec; G2011-Clergy; I9041-Teacher Assistant; K1111-Registered Nurse; K2021-Dental Hygienist; K2053-Psychiatric Technician;

K2071-Medical Records & Health Info; N2012-Cook, Institution and Cafeteria; P9021-Personal & Home Care Aide; R4061-Eligibility Interviewer, Govt; R4171-Receptionist & Information Clerk; R5061-Production, Planning & Exped; R6014-Secretary, Xcpt Legal, Medical & Exec; R9061-Office Clerk, General; R9199-Office & Admin Spport Worker, AO. D1051-Computer System Analyst; G1091-Health Educator; 19031-Instructional Coordinator; K1031-Dietitian and Nutritionist; R4199-Information and Record Clerk, All; C2011-Accountant and Auditor; K9011-Occupational Health and Sfty Spec.; D10231-IT Business Analyst; D10253-IT Apps. Dev. 3; D10303-IT Tech. Spprt. Spec 3; and G1095S-JCO Supervisor assigned to a CYFD secured facility.

ISSUED in Albuquerque, New Mexico on this 18th day of October, 2021 by:

PUBLIC EMPLOYEE LABOR RELATIONS BOARD



Thomas J. Griego
Executive Director

