

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

Lourdes Perez

AFSCME COUNCIL 18,

Plaintiff-Appellee,

v.

D-202-CV-2013-01920

NEW MEXICO CORRECTIONS
DEPARTMENT,

Defendant-Appellant.

MEMORANDUM OPINION AND ORDER

THIS MATTER is an appeal under Rule 1-074 NMRA of an Order of the Public Employee Labor Relations Board (Board) which determined that lieutenants employed by the New Mexico Corrections Department (Department) do not meet the definition of “supervisor” under New Mexico’s Public Employee Bargaining Act (PEBA), NMSA 1978, §§ 10-7E-1 through -26 (2003, as amended through 2005). The Court **AFFIRMS** the Board’s Order.

I. BACKGROUND

Appellee AFSCME Council 18 (Union) filed a petition with the Board seeking to accrete lieutenants employed by the Department into the M3012 Correctional Officer and Jailer classification as listed in the applicable collective bargaining agreement. [Record Proper (RP) 304–06.] The New Mexico Administrative Code provides a procedure for accretion by which:

The exclusive representative of an existing collective bargaining unit, may petition the board to include in the unit employees who do not belong, at the time the petition is filed, to any existing bargaining unit, who share a community of interest with the employees in the existing unit, and whose inclusion in the unit would not render that unit inappropriate.

11.21.2.38(A) NMAC (2/28/2005). The Department opposed accretion on the grounds that lieutenants are supervisors as defined by PEBA and supervisors, unlike other public employees, may not participate in collective bargaining.

A Hearing Officer held an evidentiary hearing on September 12 and 13, 2012. The Hearing Officer first made a ruling that the burden of demonstrating accretion was appropriate fell on the Union. [Disk 1 (D1), Part 1a (P1a), 19:00.] Following this ruling, the Union presented three witnesses. At the close of the Union's case, the Hearing Officer denied the Department's motion for directed verdict. The Department then proceeded with its case which consisted of the testimony of seven witnesses.

On October 17, 2012, the Hearing Officer issued a Hearing Officer's Report and Recommended Decision. The Hearing Officer concluded that lieutenants employed by the Department do not meet the statutory definition of supervisor and therefore are not excluded from the collective bargaining rights PEBA confers on public employees. Accordingly, the Hearing Officer recommended the Union's petition to accrete the lieutenants be granted. [RP 31-49.] The Board adopted the Hearing Officer's findings of fact, conclusions of law, and recommendation on January 23, 2013. [RP 1.]

The Department appealed the Board's Order to this Court pursuant to NMSA 1978, § 10-7E-23(B) (2003) and Rule 1-074 NMRA.

II. LEGAL STANDARDS

PEBA provides for judicial review of orders issued by the Board. NMSA 1978, § 10-7E-23(B). The Court must affirm the order unless it is: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record considered as a whole; or (3) otherwise not in accordance with law. *Id.*; *see also* Rule 1-074(R) NMRA.

At issue here is the Board's determination that lieutenants employed by the Department do not meet the statutory definition of supervisor. PEBA defines "supervisor" as:

...an employee who devotes a majority of work time to supervisory duties, who customarily and regularly directs the work of two more other employees and who has the

authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively, but “supervisor” does not include an individual who performs merely routine, incidental or clerical duties or who occasionally assumes a supervisory or directory role or whose duties are substantially similar to those of his subordinates and does not include a lead employee or an employee who participates in peer review or occasional employee evaluation programs.

NMSA 1978, § 10-7E-4(U) (2003).

“When an agency that is governed by a particular statute construes or applies that statute, the court will begin by according some deference to the agency’s interpretation.” *Morningstar Water Users Ass’n v. N.M. Pub. Util. Comm’n*, 1995-NMSC-062, ¶ 11, 120 N.M. 579 (citation omitted). However, the court is not bound by the agency’s interpretation and may substitute its own independent judgment for that of the agency because it is the function of the courts to interpret the law.” *Id.* (citation omitted). “When reviewing administrative agency decisions courts will begin by looking at two interconnected factors: whether the decision presents a question of law, a question of fact, or some combination of the two; and whether the matter is within the agency’s specialized field of expertise.” *Id.* ¶ 10.

Under federal labor law, supervisory status is a question of fact and the burden is on the party asserting it. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 710–11, 121 S.Ct. 1861 (2001); *NLRB v. Quinnipiac Coll.*, 256 F.3d 68, 73 (2d. Cir. 2001). Under New Mexico law, however, the question presented here would appear to be a mixed question of law and fact because it involves the application of a statutory definition to a set of historical facts. *See Stanley J. v. Cliff L.*, 2014-NMCA-029, ¶ 8, __N.M.__, 319 P.3d 662; *see also City of Deming v. Deming Firefighters Local 4521*, 2007-NMCA-069, ¶ 6, 141 N.M. 686 (interpretation of PEBA is a question of law subject to de novo review). As discussed below, the Hearing Officer’s findings of fact are essentially undisputed; it is his application of the statutory definition that the Department challenges.

III. DISCUSSION

A. Hearing Officer's Report

1. Hearing Officer's findings of fact

A total of nine witnesses testified over two days. The witnesses included seven current or former lieutenants, the Human Resources Bureau Chief (who was called by both parties), and the Director of the Adult Prisons Division.

The Hearing Officer made the following findings of fact. The Department operates 24 hours a day, seven days per week. The 24-hour work day is divided into shifts of 12 hours duration. At least one lieutenant is assigned to each shift. Lieutenants generally report to captains, but on some shifts, particularly swing shift and graveyard shift, a lieutenant may be the highest ranking officer on duty and is responsible for the facility during those hours. The Hearing Officer further found that lieutenants perform a number of essential duties, including: conducting "hand off" briefings for shift changes; daily inspections of the work area; adjusting the work roster to accommodate unanticipated absences, personnel shortages and security needs; and overseeing rounds and inmate counts. [RP 32–34.]

He further found that lieutenants have the authority to require subordinate officers to work overtime at the end of their regularly scheduled shifts, to approve sick leave and overtime requests, but they do not have the authority to approve annual leave requests except on an emergency basis. Lieutenants direct the work of approximately 15 to 30 subordinate corrections officers, which consists of interpreting "post orders" that define the procedures to be followed for each work assignment. They conduct annual evaluations of each of their subordinates, which consists of making entries on a form, and they may make assignments to the Response Team unless a captain is on duty, in which case, the captain makes the assignments. Lieutenants are

responsible for completing a large amount of paperwork, including inmate counts and recounts, logs, rosters, and reports. [RP 33–35.]

The Hearing Officer also found that lieutenants must report rules infractions by their subordinates. [RP 35.] Lieutenants do not have access to their subordinates' personnel files. [RP 34.] All authority to hire and promote is vested in the warden. [RP 36.]

2. Hearing Officer's conclusions

The Hearing Officer noted that the statutory definition of “supervisor” consists of three elements, all of which must be met for an employee to qualify as a “supervisor.” The employee must: (1) devote a majority of work time to supervisory duties; (2) customarily and regularly direct the work of two or more other employees; and (3) have the authority to hire, promote, or discipline other employees or to recommend such actions effectively. [RP 37.]

The Hearing Officer also noted that even if this three-part test is met, the statutory definition contains several exclusionary factors, any one of which if met results in a determination that the employee is not a supervisor. Specifically, the employee is not a supervisor if: (1) the employee performs merely routine, incidental or clerical duties; (2) the employee occasionally assumes a supervisory or directory role; (3) the employee's duties are substantially similar to those of his subordinates; (4) the employee is merely a lead employee; or (5) the employee participates in peer review or occasional employee evaluation programs. [RP 37.]

Based on his findings of fact, the Hearing Officer concluded that the first and third elements of the statutory definition had not been met, and it was arguable that the second element also had not been met. Having reached this conclusion, the Hearing Officer found it unnecessary to consider the exclusionary factors in detail but he nevertheless expressed the

opinion that the evidence presented would support the conclusion that several of them had been met. [RP 44–45.]

B. Department’s arguments for reversal

The Department does not take issue with the Hearing Officer’s interpretation that the statutory definition of “supervisor” consists of a three-part test. Furthermore, although the Department refers to the substantial evidence standard, the Department does not appear to argue that any of the Hearing Officer’s findings of fact listed above are not supported by substantial evidence.

The Department’s primary argument on appeal is that the Hearing Officer did not properly apply the statutory definition, in particular, the first element of the definition. The basis of the argument is the Department’s contention that the Hearing Officer erred in determining which of the lieutenants’ activities constitute supervisory duties. The Department argues the Hearing Officer mischaracterized certain supervisory duties as administrative or clerical functions and disregarded evidence that lieutenants direct the work of subordinate employees. According to the Department, activities such as completing paperwork, conducting inspections, developing the roster, staffing various posts, and monitoring inmate counts qualify as supervising and should have been included when calculating how much time lieutenants spend on supervisory duties.

The Department also appears to challenge the Hearing Officer’s conclusion regarding the third element. According to the Department, the record shows that although the warden at each facility is the final decision maker with respect to discipline, the warden’s decision is based upon recommendations by lieutenants. [Statement at 7.]

C. Analysis

1. The first element: Whether lieutenants devote a majority of work time to supervisory duties

To satisfy the first element, the employee must devote a majority of work time to “supervisory duties.” The Hearing Officer calculated that lieutenants spend approximately 4.25 hours out of each 12-hour shift on duties that could be considered supervisory, and they therefore do not spend a majority of their time on supervisory duties. [RP 38.] The Department’s primary challenge on appeal is that the Hearing Officer erred in determining which of the lieutenants’ duties constitute “supervisory duties.”

Before addressing the Department’s primary argument, the Court first addresses its preliminary contention that the Hearing Officer “improperly determined that a supervisor must devote the majority of work time to supervisory duties[.]” [Statement at 11.] This contention is contrary to the statutory definition which expressly states that a supervisor is an employee who devotes a “majority of work time to supervisory duties.” The Hearing Officer therefore was correct in his approach of determining, based on the testimony presented, how many hours of each shift lieutenants are performing supervisory duties as opposed to nonsupervisory duties.

Regarding which duties constitute “supervisory duties,” the Court need not engage in a task-by-task analysis as the Hearing Officer did. It is sufficient for the Court to conclude that it was not arbitrary or capricious for the Hearing Officer to determine: (1) the use of independent judgment is required before an activity qualifies as a “supervisory duty” under PEBA; and (2) the duties of lieutenants largely do not require the use of independent judgment. The Court also concludes the Hearing Officer did not abuse his discretion by relying on federal authority to determine that the use of independent judgment is an important indicator of supervisor status. [RP 39–40.]

The term “independent judgment” does not appear in PEBA’s definition of “supervisor.” However, federal labor law has long held that the use of independent judgment is the hallmark of supervisor status under the National Labor Relations Act (NLRA). *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 573–74, 114 S. Ct. 1778 (1994) (citing 29 USC § 152(11)). The Department has cited no state law authority on the issue and does not claim the Hearing Officer erroneously relied on federal authority. The Department also does not claim that the use of independent judgment is not a relevant consideration with regard to the first element. Absent cogent reasons to the contrary, interpretations of the NLRA by the National Labor Relations Board and reviewing courts should act as a guide in interpreting similar provisions of the PEBA.¹ *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, ¶ 15, 123 N.M. 239. The Court therefore concludes it was permissible for the Hearing Officer to look to federal labor law to provide guidance and to consider the degree of independent judgment required for the tasks lieutenants perform when determining whether they are performing “supervisory duties” for purposes of PEBA.

To the extent the Department argues the findings are not supported by substantial evidence, the argument is without merit. Substantial evidence supports the Hearing Officer’s conclusion that the discretion of lieutenants is almost entirely constrained by post orders that are issued by the warden and, with rare exceptions, control nearly every aspect of prison operations. The testimony of the witnesses was essentially unanimous on this point.

Lieutenants 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

¹ The NLRA defines “supervisor” as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C. § 152(11).

subordinates when their conduct deviates from prescribed procedures. Though the witnesses perceived these responsibilities as supervisory in nature, they do not constitute supervisory duties for purposes of PEBA because lieutenants largely lack discretion when performing them. “[I]t is undoubtedly true that the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer.” *Ky. River Cmty. Care, Inc.*, 532 U.S. at 713–14. Such is the case here. Although the lieutenants are imbued with a great deal of responsibility, the record fully supports the Hearing Officer’s conclusion that their use of independent judgment and discretion is significantly circumscribed by post orders issued by the warden.

As the Hearing Officer stated, merely because lieutenants do not meet the statutory definition of supervisor does not mean they perform no supervisory duties at all. [RP 45.] Lieutenants may occasionally exercise independent judgment. For example, if a situation arises that is not covered by a post order, lieutenants may have to use independent judgment to determine how to handle the situation. Such occasions are rare, however. [D1, P1a, 51:00–54:00 (Sapient).] Thus, even though lieutenants may sometimes exercise independent judgment and perform supervisory duties, lieutenants are not supervisors for purposes of PEBA because they are not performing supervisory duties a majority of the time.

The Department argues the Hearing Officer improperly determined that lieutenants were performing “supervisory duties” only when they were giving specific directions to an employee. According to the Department, the Hearing Officer reached the wrong conclusion because he improperly focused only on the time lieutenants spend giving direction to other employees. The Department points to evidence that lieutenants routinely direct the work of their subordinates, and it argues that if the subordinates are performing their work properly, then there is no need for

lieutenants to give direction or corrections.

This argument appears aimed at the second element of the definition—the employee regularly directs the work of two or more other employees. However, the Hearing Officer did not find it necessary to reach a conclusion regarding the second element and his conclusion that lieutenants are not supervisors under PEBA does not depend on the second element. Accordingly, the Court need not address the second element.

Furthermore, the Court does not agree that the Hearing Officer found lieutenants were performing supervisory duties only when they were giving directions to other employees. Rather, the Hearing Officer's determination was based primarily on his conclusion that independent judgment is not necessary for most of the duties that lieutenants perform, regardless whether the duties involve giving direction to other employees.

Finally, contrary to the Department's position, lieutenants are not supervisors for purposes of PEBA merely because they oversee the work of subordinates and are responsible for ensuring that their subordinate employees are properly performing their assigned tasks. Lieutenants are superior to sergeants in the Department hierarchy and as such would be expected to give direction and guidance and to correct their subordinates' behavior. Although lieutenants may be "supervising" in the ordinary sense of the word, "supervisor" is a term of art with a specific statutory definition that includes more than simply giving direction to subordinate employees.

The Court concludes the Board did not act arbitrarily or capriciously, nor did it abuse its discretion when it determined the first element of the definition had not been satisfied. Furthermore, the conclusion is supported by substantial evidence. Given the evidence supporting the Union's position that lieutenants are not supervisors for purposes of PEBA, the Hearing

Officer acted within his discretion in denying the Department's motion for directed verdict.

2. The third element: Whether lieutenants effectively recommend discipline

With respect to the third element, the Department does not appear to claim that lieutenants have authority to hire, promote or discipline other employees, or that they effectively recommend hiring or promotion. The Department's argument regarding the third element appears limited to the Hearing Officer's conclusion that lieutenants do not effectively recommend discipline.

The record indicates that employee discipline is a highly regulated process governed by statute, Personnel Board rules, and the collective bargaining agreement. The Union's Exhibit B is a set of memoranda describing the Department's progressive disciplinary procedures in detail, mandating the steps in the disciplinary process, and prescribing forms and sample disciplinary action letters. [RP 114-59; D2, P3, 1:00 (Cruz).]

The testimony was consistent regarding the role of lieutenants in the disciplinary process. If a lieutenant observes an infraction of the rules by another employee, the lieutenant is responsible for conducting an investigation into the infraction. The lieutenant will write a memorandum describing the results of the investigation. Some witnesses testified that if a lieutenant determines that an infraction has occurred, the lieutenant will "recommend" discipline, or recommend that discipline be imposed "per policy." [D1, P1a, 41:00-44:00 (Sapien); D2, P1b, 16:00, 38:00 (Cardenas); D3, P3, 5:00 (Cruz); D4, P4, 2:00, 25:00 (Flores); D4, P4, 34:00 (Baca); D4, P5, 20:00 (Curry).] The lieutenant's memorandum is then forwarded to the warden. The warden determines if there is enough evidence to support disciplinary action and recommends a sanction suitable to the infraction. [D3, P3, 5:00-6:00 (Cruz).]

The warden's recommendation is then reviewed by an analyst in the human resources

department, then by the Human Resources Bureau Chief. Then it is reviewed by the Director of the Department, then by the legal department. At any point in this process, the warden's recommendation may be modified to ensure the proposed discipline is in line with discipline imposed for comparable infractions at the Department's other facilities, that it is appropriate, that there is sufficient evidence to support the proposed discipline, that there are no gaps in the process, and that there are no legal problems with the case. The process then returns to the warden to initiate notice of contemplated action. [D2, P3, 5:00–10:00.]

Given the multi-level review involved in the disciplinary process, it was not arbitrary or capricious for the Hearing Officer to conclude that lieutenants do not effectively recommend discipline. According to the testimony, lieutenants may identify, investigate, and report infractions of the rules, and the process they initiate frequently may result in disciplinary action. However, it cannot be said because of this that lieutenants are effectively recommending discipline. The Hearing Officer found that "lieutenants merely report instances of subordinates' deviation from policies or post orders without a recommendation of any specific level of discipline deemed to be appropriate." [RP 41.] The record supports his conclusion that it is the warden—with the input of multiple levels of higher review—who synthesizes the information and determines if there is sufficient evidence to uphold a recommendation that discipline occur.

Evidence was presented that lieutenants may occasionally give guidance and direction to subordinates or correct their subordinates' behavior. Some witnesses testified, for example, that lieutenants may "informally discipline" their subordinates regarding issues such as tardiness, uniforms, and grooming. [D3, P3, 55:00 (Flores); D4, P4, 26:00 (Baca); D4, P5, 21:00 (Curry).] However, Lieutenants do not have access to employee files and typically are unaware of how and whether similar infractions are punished at the Department's other facilities. [D3, P3, 8:00

(Cruz).] The Human Resources Bureau Chief testified that concerns regarding comparative discipline claims and the need for consistent application of disciplinary action at its facilities across the state caused the Department to remove supervisors' authority to issue reprimands that could be used as evidence in the disciplinary process. [D3, P3, 3:00–5:00 (Cruz).]




The Department argues the Hearing Officer improperly focused on the fact that lieutenants have no authority to recommend a particular sanction. However, the reason the Hearing Officer concluded lieutenants do not effectively recommend discipline is not only that they lack authority to select a particular sanction, but also because lieutenants lack discretion with respect to their recommendations. [RP 41.] Indeed, the very purpose of the multiple levels of review that occur after a lieutenant submits a report to the warden apparently is to remove discretion from the disciplinary process.

Upon review of the whole record, the Court concludes it supports the conclusion that the structure of the Department's disciplinary process is such that lieutenants essentially lack discretion with respect to their recommendations. Given the evidence of the nature of the Department's disciplinary process and the lieutenants' role in the process, it was not arbitrary or capricious for the Hearing Officer to conclude that lieutenants do not effectively recommend discipline and as a result, that the third element of the definition had not been met. The Board's conclusion that the third element is not satisfied in this case is therefore an independent basis upon which to affirm the Board's decision.

IV. CONCLUSION

The Court decision of the Board is affirmed.

IT IS SO ORDERED.




ALAN MALOTT
DISTRICT COURT JUDGE
5-15-14

This is to certify that a true and correct copy of
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