STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

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

Petitioner,

and

PELRB No. 304-22

UNIVERSITY OF NEW MEXICO
REGIONAL MEDICAL CENTER,

Respondent.

ORDER ON REMAND

THIS MATTER comes before the Public Employee Labor Relations Board at its regularly scheduled meeting on November 7, 2023. On August 14, 2023 the 2nd Judicial District Court remanded Order 26-PELRB-2022 for the Board "to explain the reasons for its written determination that per diem or 'PRN' employees in the proposed unit are 'regular' employees under the PEBA ...." For the reasons that follow, the Board reaffirms Order 26-PELRB-2022.

Initially, the Board reaffirms its adoption of the Findings of Fact numbered 1 through 42 of the Hearing Officer's Report and Recommended Decision dated August 23, 2022. However, the Board rejects the Hearing Officer's conclusion that SRMC employees employed on a per diem or "PRN" basis are not "regular" employees for the purposes of the PEBA. The Board disagreed, and continues to disagree, with that conclusion because the determination whether a public employee is "regular" depends on the nature of the employment relationship, and not, as the Hearing Officer concluded, upon the frequency of work or similarity of job duties.

The Board's analysis is anchored by the PEBA definition of a public employee to mean "a regular nonprobationary employee of a public employer ...." NMSA 1978, § 10-7E-4(Q) (2020). The issue at hand is not whether the PRNs are public employees under this definition; they indisputably are. The issue is whether PRNs are "regular"

public employees. This presents a question of statutory construction.

The objective of a statutory construction analysis is to ascertain and give effect to legislative intent. The divination of intent begins with a consideration of the plain meaning of the statutory text and context. When that assessment identifies, or fails to resolve, an ambiguity, the divination process expands to consideration of the purpose of the enactment.

Depending on the statutory usage, the term "regular" can mean different things. That term can refer to the frequency of an event or circumstances, such as a "regular meeting". *See, e.g.,* NMSA 1978 § 49-1-9 (specifying frequency for regular meetings of land grant board of trustees). That term can also refer to a status, such as a "regular", as opposed to ad hoc, member of a board or commission. *See, e.g.,* NMSA § 3-56-4 (director of regional planning commission is the "regular technical advisor of the commission.").

As used in the PEBA definition of a public employee, the term "regular" is inherently ambiguous. "Regular" could refer to employment frequency, such as how often a person provides services to the employer. That term could also refer to a legal status of the employee. This inherent ambiguity is not resolved by the plain language or the context of the statutory language in which the term is used. For these reasons, the Board's construction of "regular" must be informed by the purpose of the PEBA. *See Baker v. Hedstrom*, 2013-NMSC-043, ¶ 15, 309 P.3d 1047 (stating rule of statutory construction); *Regents of Univ. of New Mexico v. New Mexico Fed'n of Teachers*, 1998-NMSC-020, ¶ 48, 125 N.M. 401, 962 P.2d 1236 (PEBA must be construed in light of its purpose).

The purpose of the PEBA is "to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and

its political subdivisions." NMSA 1978, § 10-7E-2. The Board concludes that these laudable objectives would in no way be promoted, and could be eroded, if the right of public employees to organize, bargain and assert collectively bargained for rights was conditioned on the frequency of work, or on other idiosyncratic terms and conditions of work within the control of an employer. That is so because certain public employers, such as Respondent, have discretion in the establishment of work hours and schedules. There is no meaningful criteria or measure to determine where along the continuum between a part-time and flexible schedule and a full-time salaried fixed schedule the right to PEBA protections should attach or detach. To the contrary, the public policy underlying the PEBA is best promoted by allowing all public employees on that continuum to organize and bargain. For these reasons, the Board concludes that "regular" in this context refers to some status of the employee, rather than to the schedule of the employee.

Nevertheless, identifying the particular status that the term "regular" contemplates remains a challenge. The status of a public employee could refer to whether the worker is permanent or temporary, classified or unclassified, direct or indirect, or some other dichotomous legal connotation. To resolve this ambiguity, the Board again refers to the purpose of the PEBA. But it also considers related personnel laws. Within such laws, the legislature has demonstrated that it uses the term "temporary" when it intends to refer to such an employment status. *See, e.g.,* Section 10-9-4(L) NMSA 1978 (exempting certain temporary employments from the Personnel Act). It has also demonstrated that it uses the term "classified" when it intends to refer to that employment status. *See, e.g.,* Section 10-9-13(D) NMSA 1978 (authorizing personnel board to promulgate rules relating to "classified" positions. These usages confirm that the legislature does not use "regular" as a synonym for "temporary" or "classified" when it intends for a law to refer to either category of employment.

Conversely, there is no statutory corollary illustrating that the legislature uses the

terms "direct" or "indirect" or "special" to refer to a public employee's status. A "direct" employee is one who is under the control of and paid by the same employer. An "indirect" or "special" employee is under the control of one employer but paid by another, such as when an employee is provided by an employee leasing company. *See, generally, Brown v. Pot Creek Logging & Lumber Co.,* 1963-NMSC-172, ¶ 12, N.M. 178, 386 P.2d 602 (discussing special, or indirect, employee doctrine); *Barger v. Ford Sales Co.*, ¶ 4, 1976-NMCA-014, 89 N.M. 25, 546 P.2d 873 (same).

The Board takes administrative notice that the State of New Mexico has established numerous statewide price agreements under which public employers can procure the services of indirect employees.
(*See* https://www.generalservices.state.nm.us/state-purchasing/statewide-price-agreements/ Procurement Number 20-00000-21-00021A) (last visited Nov. 3, 2023); *see, also,* Sections 60-13A-1 to 60-13A-14 NMSA 1978 (authorizing employee leasing contractors to operate in New Mexico).

When a public employer obtains services through an indirect employee, the policies underlying the PEBA are implicated to a much lesser degree as compared to when a public employer engages an employee directly. In the latter context, the public employer has primary control over the core matters that are the subject of a CBA, such as wages and benefits. When a public employer engages employees indirectly, its control over such terms and conditions is at best secondary and possibly non-existent. It is the direct employer that generally determines wages and benefits. Because a public employer has, at best, only limited authority to control wage and benefits of indirect employees, applying the PEBA to indirect employments would be contrary to the practicalities of the employer-employee relationship and, in many cases, it would be impossible to attain compliance. Simply, an indirect employer cannot bargain over terms and conditions that it has no legal right to control. For these reasons, PEBA should not apply to indirect, or special, employment relationships. By construing

"regular" to refer to only direct employment relationships, the Board avoids the legal and practical difficulties that would obtain if "regular" included indirect or special employees. The Board concludes that was the legislative intent.

In reaching this conclusion, the Board considered and hereby disavows the Hearing Officer's assessment that "regular" requires a situational or comparative assessment of terms and conditions of employment. Nothing in the PEBA indicates that the right of employees to collectively bargain should depend on a specific employer's idiosyncratic hiring, retention, seniority, assignments or scheduling practices. To the contrary, that could frustrate the objectives of the PEBA by allowing the creative and nimble employer to avoid PEBA obligations.

Likewise, regularity should not turn on duty assignments. Again, that would allow the creative and nimble employer to avoid PEBA through creative staffing and work assignment strategies. Intuitively, employees who perform the same duties should be treated equally. However, as explained above, an employer who has both direct and indirect employees has limited, or no, authority to bargain over core terms and conditions of employment for the indirect employees. Thus, even if the direct and indirect employees are performing identical duties, working identical shifts, and have equivalent tenure, there is a legal justification for disparate application of the PEBA to direct and indirect workers.

In short, the Board concludes that the determination whether an employee is "regular" depends on the contractual status of the employee, not on employer specific variables such as duties, tenure or schedule. Those employer specific variables may determine community of interest, but have no bearing on the determination whether an employee is "regular". Simply, public employees are those with whom the public employer can meaningfully bargain over core terms and conditions of employment, such as the PRNs. That cohort is comprised of employees with whom the public employer can offer and agree to abide the full complement of collectively bargainable rights.

Conversely, that cohort does not include employees who have contracted through a third party who controls the meaningful terms and conditions of the employment agreement. The Hearing Officer's findings of fact establish that the PRNs are employees with whom the Respondent could set terms and conditions of employment. As such, PRN employees, directly employed, are regular employees of Respondent. For these reasons, the Board rejects the Hearing Officer's conclusion that the PRNs were not regular public employees.

Therefore, the Board Orders:

1. The PRNs are regular public employees;
2. In keeping with the foregoing, orders 8-PELRB-2023 and 9-PELRB-2023 are reaffirmed and given full force and effect.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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Peggy Nelson
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Peggy Nelson
BOARD CHAIR

11/20/2023
DATE