

**STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT**

**FILED
2nd JUDICIAL DISTRICT COURT
Bernalillo County
3/15/2019 3:57 PM
James A. Noel
CLERK OF THE COURT
Dora Bozovic**

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

Appellant,

v.

D-202-CV-2017-08953

**STATE OF NEW MEXICO,
DEPARTMENT OF HEALTH, and
NEW MEXICO PUBLIC EMPLOYEES
LABOR RELATIONS BOARD,**

Appellees.

OPINION AND ORDER

Appellant AFSCME Council 18 appeals from the adverse decision of Appellee NMPELRB (the Board) in favor of Appellee State of New Mexico, Department of Health (the Department). The Court affirms.

Facts and Background

This matter concerns Appellant's Petition for Unit Clarification. Appellant sought to accrete Home Health Aide Supervisor and Psychiatric Technician Supervisor positions into Appellant's existing bargaining unit, which represents employees including Home Health Aides and Psychiatric Technicians. [Recommended Decision, at 1-2 (Transcript of Proceedings I, 39-67)] These employees work for the Department at its Los Lunas Community Program, providing services to individuals with developmental and intellectual disabilities, including community support, community-integrated employment, support in the home, and dental services. [Recommended

Decision, at 1] The provided services, pursuant to a “Developmental Disabilities Waiver,” are intended to avoid institutionalization in favor of a community-based model. **[Recommended Decision, at 1]**

The issues presented by the Petition were:

1. Whether Home Health Aide Supervisor and Psychiatric Technician Supervisors working for the Department of Health’s Los Lunas Community Program share a community of interest with the existing bargaining unit;
2. Whether they are management employees as defined by the PEBA in NMSA 1978[,] § 10-7E-4(O) (2003) . . . ;
3. Whether they are supervisory employees as defined by the PEBA in NMSA 1978[,] § 10-7E-4(U) (2003)[; and]
4. Whether inclusion of the disputed positions would render the unit inappropriate for any other reason.

[Recommended Decision, at 12-13] A hearing on the merits of the Petition was held August 2, 2017. **[Recommended Decision, at 2; CD 08/02/17]**

The Hearing Officer determined that Home Health Aide Supervisors and Psychiatric Technician Supervisors do not share sufficient community of interest with the existing bargaining unit, so that their inclusion would render the unit inappropriate. **[Recommended Decision, at 14]** This conclusion was based on the collective bargaining history, lack of interchange of employees, and substantial differences in the required skills and functions that, on balance, demonstrated no shared community of interest. **[Recommended Decision, at 14]** It found that Home Health Aide Supervisors and Psychiatric Technician Supervisors are “supervisors” excluded from collective bargaining under PEBA’s definition of the term. **[Recommended Decision, at 19]** Finally, the Hearing Officer concluded that these supervisors are managerial employees as defined by PEBA. **[Recommended Decision, at 25]**

Accordingly, the Hearing Officer found that Appellant did not meet its burden of proving that

the supervisors share an interest with other positions in the bargaining unit and failed to show that inclusions of these positions would not render the bargaining unit inappropriate, denying the Petition to accrete. **[Recommended Decision, at 29]** The Board, following oral argument by the parties, upheld the decision of the Hearing Officer and dismissed the Petition. **[Transcript of Proceedings I, 3-4]** Appellant timely appealed.

Discussion

The Court applies a whole-record standard of review of the Board's decision, determining whether the decision was arbitrary and capricious, not supported by substantial evidence, or otherwise not in accordance with the law. *See Selmecki v. N.M. Dep't of Corr.*, 2006-NMCA-024, ¶ 13, 139 N.M. 122, 129 P.3d 158. Our appellate courts have defined arbitrary and capricious as a decision that is unreasonable or without a rational basis. *Id.* The Court will not substitute its judgment for that of the Board. *See id.* Whether the decision was contrary to law is reviewed de novo. *Id.* Appellant, as the party challenging the decision, must demonstrate grounds for reversal. *See id.*

Appellant raises three issues. First, whether the Board erred in determining that the petitioned-for employees lack a community of interest with the existing bargaining unit; second, whether the Board erred in determining that those employees are "supervisors" as defined by PEBA; and third, whether the Board erred in determining that they are "management employees" as defined by PEBA.

In order to determine whether the petitioned-for employees share a community of interest with the existing bargaining unit, the Board applies a multifactor test. The factors are the method of wages or compensation, the work hours, employment benefits, separate supervision, job

qualifications, job functions and amount of time spent away from the employment situs, regularity of contact with other employees, level or lack of integration, and the history of collective bargaining. *Kalamazoo Box Corp.*, 136 NLRB 134, 137 (1962); *AFSCME & Dep't of Corr.*, 2013 WL 12205590, 2-PELRB-2013, at n.1 (January 23, 2013).

Appellant argues that the Board applied an incorrect legal standard in its finding that interchangeability precluded a determination that the petitioned-for employees shared a community of interest with the existing group. It argues that the petitioned-for employees work in the same location, one of the various homes under the program, along with the other bargaining-unit employees, spending most of their shift performing the same tasks as their subordinates. Appellant observes that both groups are hourly non-exempt employees who can earn overtime, have the same benefits, and are subject to common supervision by higher management. Appellant asserts that the only difference in job qualifications are the years of experience. As to the interchangeability factor, Appellant argues that it means the degree to which employees are transferred in and out of a proposed bargaining unit, and applies only in cases where employees are frequently transferred in and out of the proposed bargaining unit, making the proposed unit inappropriate for collective bargaining purposes.

The decision acknowledged that some of these factors weighed in favor of accretion, but determined that other factors, on balance, required a conclusion that there was no shared community of interest between the Health Aide Supervisors and Psychiatric Technician Supervisors and employees in the existing bargaining unit. **[Recommended Decision, at 14]** As to the collective bargaining history, the positions had not been part of the bargaining unit initially or in the intervening years since 1994, when the AFSCME bargaining units were realigned. **[Recommended**

Decision, at 14-15] However, “[t]he primary reason [for the conclusion] that the positions sought to be accreted do not share a community of interest with the existing group is the near total lack of interchangeability among the employees.” **[Recommended Decision, at 15]**

The Hearing Officer’s Recommended Decision reflects that the factors set out in *Kalamazoo* were considered. The integration factor, described as “lack of integration with the work functions of other employees or interchange with them,” *Kalamazoo*, 136 NLRB at 137, was applied in a case which addressed a petition to sever truck drivers from the other employees in a shipping and receiving department. The board in *Kalamazoo* found that the drivers spent a substantial portion of their time working alongside, and performing exactly the same functions, as other production and shipping employees, and that these other employees also made truck deliveries, so the board “cannot say that the two truckdrivers constitute a separately identifiable unit.” *Id.* at 138. As the Department argues, the factor was appropriately applied in the present matter, although the ultimate conclusion differed.

While the Hearing Officer recognized “that Home Health Aide Supervisors and Psychiatric Technician Supervisors often perform some of the duties of their subordinates, there are critical duties performed by them that cannot be performed by their subordinates,” including training, management of client funds, bill-paying and checkbook-balancing, audit and data entry responsibilities, and documentation of home and water temperature, home inspections, and requests for supplies. **[Recommended Decision, at 15]** The Hearing Officer relied on the fact that Psychiatric Tech Supervisors further audit the reports to ensure staff is properly administering medications. **[Recommended Decision, at 16]** The Hearing Officer also looked to the different skill sets required of the Psychiatric Tech Supervisors, including their responsibility for scheduling

coverage or overtime as well as management of the client's household. **[Recommended Decision, at 16]** They are responsible for staff evaluation in addition to training, and for safety training and certification reports. **[Recommended Decision, at 17]**

As the Board points out in its response, these determinations were supported by evidence in the record. Petitioned-for employees performed specific duties, including training, management of consumer finances, audits, review and management of documentation, and review of records for proper medication administration. **[E.g., 3rd Supp. RP at 731-34; id. at 734-35; id. at 736-38; Audio 3:35-3:52]**

As to the second issue, the Board concluded that Home Health Aide Supervisors and Psychiatric Technician Supervisors are "supervisors" as defined in PEBA and thus excluded from collective bargaining under the statute, rendering the bargaining unit inappropriate. **[Recommended Decision, at 20]** The statute defines a supervisor as

an employee who devotes a majority amount of work time to supervisory duties, who customarily and regularly directs the work of two or 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 [or her] subordinates and does not include a lead employee or an employee who occasionally participates in peer review or occasional employee evaluation programs.

Section 10-7E-4(U).

The Hearing Officer relied on the testimony of some of these employees as illustrative of the duties that may be classified as supervisory, including a Psychiatric Tech Supervisor assigned to two residences in which she supervised seven staff employees, audited client records, and trained Psychiatric Technicians. **[Recommended Decision, at 20]** The Hearing Officer found that the

supervisory duties took at least one-half of the eight-hour shifts to complete, and that the Psychiatric Tech Supervisors were assigned an 8:00 AM to 4:00 PM shift rather than the day, swing, and graveyard shifts of Psychiatric Technicians to allow the supervisors to attend meetings with administration, staff, and carry out trainings. **[Recommended Decision, at 20-21]** The Hearing Officer relied on the testimony of Psychiatric Supervisors that recounted a five-day suspension imposed on a subordinate as well as a recommendation of termination that in fact resulted in termination. **[Recommended Decision, at 21]**

Similarly, for Home Health Aide Supervisors, the Hearing Officer observed that they had the same duties and responsibilities, including maintaining consumer checkbooks and reviewing forms completed by staff, as Psychiatric Technician Supervisors, but work with medically fragile consumers. **[Recommended Decision, at 21-24]** The Hearing Officer relied on testimony that they schedule and evaluate employees, run trainings, and have given verbal counseling and discipline to employees. **[Recommended Decision, at 22-23]** The Hearing Officer also relied on the fact that supervisors work multiple homes or outside the home while the staff employees remain with the consumer or in the consumer's home during assigned shifts. **[Recommended Decision, at 22]** The Hearing Officer found "that they spend a majority of their work time on supervisory duties that are not the same as those performed by their subordinates," "customarily and regularly direct[ing] the work of two or more other employees," as well as having the authority to hire, promote, or discipline other employees or recommend such actions. **[Recommended Decision, at 25]**

Appellant argues that the Board erred in finding that the Petitioned-for employees were "supervisors" as defined by Section 10-7E-4(U), contrary to the finding that they spent a majority of their time in direct patient care. Appellant asserts that it is contradictory to find that, for example,

supervisory duties take at least one-half of the eight-hour shifts daily but that from four hours to seven hours of each work shift is spent in direct patient care. It emphasizes the overlap of duties listed in the comparable job descriptions.

As the Department observes, however, the findings are reconciled by the evidence that showed that the Petitioned-for employees complete supervisory duties while providing patient care. For example, the hearing officer referred to the testimony of a Psychiatric Tech Supervisor, Jessica Maestas, who explained that she completed paperwork, which takes at least four hours each day, for the most part during periods of direct patient care. **[Recommended Decision, at 17-18; CD 08/02/17, at 3:52; 4:00-:02; 4:04-:05]** She explained that one of her clients works Monday through Thursday for about two and one-half hours, and she is able to complete one hour alone for paperwork; the remaining time needed for completing supervisory duties takes place while she is otherwise engaged in direct patient care. **[Id.]**

Monico Abeyta, a Psychiatric Technician Supervisor that had previously worked as a Home Health Aide Supervisor and a Psychiatric Technician, testified that he performed all direct patient care tasks common to subordinates, but explained that his duties “completely changed” as a supervisor, as he is responsible for ensuring standards are followed and completing necessary paperwork. **[See, e.g., 3rd Supp. RP 731-32]** He stated that he is given each Monday to work solely on administrative paperwork and not with clients, while on “the other days he must complete paperwork while working with the staff and consumers.” **[Id. at 732]**

Appellant argues that the supervisory duties are routine, incidental, or clerical. It points to the approval of leave requests and routine logging of a home temperature or home water temperature checks, as well as motion sensor checks, as examples. The Department, in contrast, recounts duties

such as ensuring that employees are providing appropriate services, medication administration, and nutritional requirements, and argues that these responsibilities cannot be considered routine or clerical, particularly in light of medically fragile consumers and those with developmental and intellectual disabilities.

The Court agrees that the finding that the duties are not merely routine, incidental, or clerical is supported by the record. [*See, e.g.*, 3rd Supp. RP 731-33 (describing responsibilities for training new staff, managing client finances, maintaining checkbooks, ensuring bills are paid and funds allocated, and working with auditors); CD 08/02/17, at 4:05] There is evidence supporting the finding that the petitioned-for employees are required to exercise independent judgment beyond that required of subordinates. [*Cf. id.*]

There is also evidence supporting the authority of these employees to hold the interest of the employer as to hiring, promoting, and disciplining subordinates. [3rd Supp. RP, at 733-34 (describing evaluating probationary employees quarterly and regular employees annually, addressing deficiencies in staff actions by issuing directives or providing additional training and job coaching, as well as having authority to “directly issue disciplinary actions of verbal counseling and written reprimands” and administer suspensions and recommend terminations)] Appellant characterizes these duties as occasional employee evaluations or peer review, *see* § 10-7E-4(U), rather than as true supervisory authority, pointing out that “[a]part from probationary employees, who are evaluated more frequently, the petitioned-for employees utilize the department’s evaluation form to evaluate employees once a year.” [SAI, at 15] However, the Board refers to evidence in the record that petitioned-for employees regularly supervise and direct the work of two or more subordinates, issue discipline such as suspension, and recommend termination. [3rd

Supp. RP at 733-34; 738, Audio 1:37-2:20] This includes formal documentation of performance and evaluation as well as quarterly evaluation during probationary periods. **[3rd Supp. RP at 733-34]**

Finally, Appellant argues that the Board erred in finding that the petitioned-for employees were management employees where it also found that a majority of their time was spent in direct patient care. A “management employee” is one “who is engaged primarily in executive and management functions and is charged with the responsibility of developing, administering or effectuating management policies.” Section 10-7E-4(O). But, “[a]n employee shall not be deemed a management employee solely because the employee participates in cooperative decision-making programs on an occasional basis” *Id.*

Appellant contends that the testimony shows that the petitioned-for employees spend almost all of their time in the consumers’ homes, providing either direct patient care along with their subordinates or completing paperwork. Appellant asserts that they do not draft policies or primarily engage in executive and management functions, again emphasizing that it is a legal impossibility for these employees to spend a majority of their time in direct patient care and be primarily engaged in management functions. Appellant argues that managing client checkbooks is not the same as managing an employer’s enterprise, observing that petitioned-for employees are supervised themselves by higher management.

As discussed above, the Court agrees with the Department that the finding that petitioned-for employees spend much of their time in direct patient care is not contrary to a finding that they perform supervisory or managerial duties at the same time. Evidence in the record supports the finding that they engaged in managerial duties. **[See 3rd Supp. RP 736-37 (testimony by the**

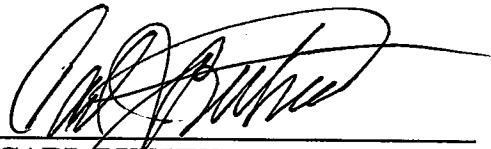
executive director that that petitioned-for employees are “required to decide what improvements need to be made and if additional training of the staff member is necessary or will be effective,” explaining that “she meets with the Psychiatric Technician Supervisors and Home Health Aide Supervisors individually and in group meetings to gather information on the Supervisors’ expectations, goals, and recommendations for improvement,” including monthly leadership meetings that result in policy decisions); CD 08/02/17, at 4:06-:08 (discussing supervisor and leadership meeting attendance)]

Appellant argues that the Board’s finding, that the petitioned-for employees allow the employer to have an individual at the work site who is responsible for ensuring that management policies are properly developed and implemented, making that person a manager to be excluded from the bargaining unit, is inconsistent with *AFSCME, 2-PELRB-2013*, at *7 (concluding that lieutenants were not supervisors even though they performed some supervisory or managerial duties). The Board, in response, distinguishes the case, observing that the authority to discipline employees was centralized in the warden’s position, *id.* at *6, and that lieutenants did not have authority to hire, promote or discipline other employees or to recommend such actions effectively, and rarely exercised independent discretion in the direction of subordinates, *id.* at 7, while here, petitioned-for employees are responsible for operation of the site, including subordinates, and issued discipline and recommended termination. [*See, e.g., 3rd Supp. RP at 737-39 (explaining that supervisors are involved in placement of consumers and staff members, provide feedback and opinions on administrative decisions in which policy is made, implementing corrective action, and scheduling staff)*] The Court agrees that the case is distinguishable.

Conclusion

Appellant has not met its burden of showing that the determination of the Board was unreasonable or without a rational basis, unsupported by substantial evidence, or otherwise not in accordance with the law. Thus, the Court **AFFIRMS**.

IT IS SO ORDERED.



CARL BUTKUS
DISTRICT JUDGE

A copy of the foregoing document was e-filed
this ___ day of _____, 2019.

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