

1 **FRENCH, Judge.**

2 {1} Jocelyn Hotle, Dan Rand, and Mike Alexander (Petitioners) appeal the district
3 court’s denial of Petitioners’ motion for rehearing following the district court’s
4 affirmance and adoption of the Public Employee Retirement Board’s (PERB) order,
5 which found that Petitioners, employed by the County of Bernalillo (the County) as
6 Court Security Officers (CSO), qualified for coverage under Municipal General
7 Member Coverage Plan 3 (General Member Plan 3), not Municipal Police Member
8 Coverage Plan 5 (Police Plan 5). We affirm.

9 **BACKGROUND**

10 {2} In June 2011, the County’s human resources office contacted the Public
11 Employees Retirement Association’s (PERA) deputy director to determine whether
12 the position of Security Specialist was qualified for Police Plan 5. According to the
13 Public Employees Retirement Act, NMSA 1978, §§ 10-11-1 to -142 (1987, as
14 amended through 2016), Police Plan 5 applies to a PERA member who “is employed
15 as a police officer by an affiliated public employer, other than the state, and who has
16 taken the oath prescribed for police officers[.]” Section 10-11-2(M)(5); *see id.*
17 (defining “municipal police member”); *see also* § 10-11-80 (regarding the
18 applicability of Plan 5). PERA reviewed the job description of a Security Specialist
19 provided to it by the County and concluded that the duties of a Security Specialist did

1 not meet the requirement of being “employed as police officers.” Thus, PERA
2 concluded that Security Specialists were correctly covered under General Member
3 Plan 3. PERA’s determination was not appealed.

4 {3} In June 2013, the County’s human resources office again contacted PERA, this
5 time seeking a determination on the eligibility of the County’s CSO position for
6 inclusion in Police Plan 5. The County asked PERA to “reevaluate” the formerly
7 named Security Specialist position because the “job description ha[d] been changed
8 significantly.” PERA reviewed the new job description and again determined that the
9 duties described did not meet the requirement of “being employed as a police
10 officer[,]” and therefore CSOs were covered under General Member Plan 3 rather than
11 Police Plan 5.

12 {4} The County immediately emailed PERA asking it to reconsider because the
13 union representative and the union’s attorney were certain that CSOs qualify for
14 Police Plan 5 based on the state statute that requires CSOs to be peace officers. *See*
15 NMSA 1978, § 4-41-11.1(A) (1981). PERA stood by its initial determination, finding
16 that Section 4-41-11.1 does not alter the job duties of the CSO position.

17 {5} The union filed an administrative appeal to the PERB on behalf of Petitioners.
18 After a hearing, the hearing officer issued a recommended decision summarizing the
19 testimony at the hearing and upholding PERA’s determination. The PERB then issued
20 an order adopting the hearing officer’s recommended decision and denying

1 Petitioners’ administrative appeal. Petitioners appealed to the district court, which
2 upheld the determination of the hearing officer as adopted by the PERB. The district
3 court denied Petitioners’ motion for rehearing and this Court granted their petition for
4 writ of certiorari.

5 **DISCUSSION**

6 {6} We must determine whether CSOs are “employed as police officers” and
7 therefore qualified for Police Plan 5, entitling them to greater benefits than the current
8 plan under which PERA has classified the position.

9 {7} “Upon a grant of a petition for writ of certiorari under Rule 12-505 [NMRA],
10 this Court conducts the same review of an administrative order as the district court
11 sitting in its appellate capacity, while at the same time determining whether the district
12 court erred in the first appeal.” *City of Albuquerque v. AFSCME Council 18 ex rel.*
13 *Puccini*, 2011-NMCA-021, ¶ 8, 149 N.M. 379, 249 P.3d 510 (alteration, internal
14 quotation marks, and citation omitted). “This Court applies the same statutorily
15 defined standard of review as the district court. The district court may reverse an
16 administrative decision only if it determines that the administrative entity acted
17 fraudulently, arbitrarily, or capriciously; if the decision was not supported by
18 substantial evidence in the whole record; or if the entity did not act in accordance with
19 the law.” *Miller v. Bd. of Cty. Comm’rs*, 2008-NMCA-124, ¶ 16, 144 N.M. 841, 192
20 P.3d 1218 (alterations, internal quotation marks, and citations omitted).

1 {8} An administrative decision “is arbitrary and capricious if it is unreasonable or
2 without a rational basis, when viewed in light of the whole record[,]” and in
3 evaluating the reasonableness of an agency’s action, we “may take into account an
4 agency’s expertise.” *Archuleta v. Santa Fe Police Dep’t ex rel. City of Santa Fe*, 2005-
5 NMSC-006, ¶ 17, 137 N.M. 161, 108 P.3d 1019. “Substantial evidence supporting
6 administrative agency action is relevant evidence that a reasonable mind might accept
7 as adequate to support a conclusion.” *Gallup Westside Dev., LLC v. City of Gallup*,
8 2004-NMCA-010, ¶ 11, 135 N.M. 30, 84 P.3d 78. “We apply a de novo standard of
9 review to administrative rulings regarding statutory construction.” *N.M. Corr. Dep’t*
10 *v. AFSCME Council 18, AFL-CIO*, 2018-NMCA-007, ¶ 9, 409 P.3d 983 (alteration,
11 internal quotation marks, and citation omitted).

12 {9} The Public Employees Retirement Act sets forth the applicability of the state’s
13 coverage plans for all public employees. Under the terms of Section 10-11-80, Police
14 Plan 5 applies to “municipal police members.” Municipal police members are public
15 employees who are employed as police officers and who have taken the oath
16 prescribed for police officers. Section 10-11-2(M)(5).

17 {10} The parties do not dispute that CSOs must take—and have, in fact, taken—the
18 oath prescribed for police officers. They dispute only whether Petitioners *are*
19 *employed as* police officers. Petitioners argue that CSOs are employed as police
20 officers because they are required by statute to be law enforcement officers, and law

1 enforcement officers are municipal police members for purposes of Police Plan 5
2 coverage. CSOs, according to Petitioners, “are required to be sworn law[] enforcement
3 deputies, equal in rank to all other [c]ounty deputies who qualify [for Police Plan] 5
4 under PERA.” Petitioners also contend that the codification of the requirement that
5 all CSOs be “commissioned as peace officers with full powers and responsibilities
6 while within the confines of the county courthouse” in Section 4-41-11.1(B) compels
7 their qualification for Police Plan 5.

8 {11} We are not persuaded that the terms of Section 4-41-11.1 dictate Petitioners’
9 inclusion under Police Plan 5. We examine the duties and functions of a CSO, the
10 testimony presented by Petitioners below, and the applicability of General Member
11 Plan 3 under which CSOs are currently covered, and conclude that the PERB’s
12 decision is not arbitrary and capricious, is supported by substantial evidence, and is
13 not contrary to law.

14 {12} The position description for CSOs, which the County provided to PERA to
15 determine whether CSOs qualify for Police Plan 5, summarizes the position and lists
16 specific duties. Generally, CSOs must “[p]erform assignments involving the
17 enforcement of measures prescribed to ensure the protection of individuals and
18 property associate[d] with the [d]istrict [c]ourts and adjacent facilities.” More
19 specifically, CSOs are tasked with the following:

1 1. Provide protective services for judges, court personnel, and other
2 individuals attending the [d]istrict [c]ounty legal proceedings.
3 Direct and advise the general public and court personnel about
4 security procedures established for the courts and promote the
5 understanding and compliance with safety standards developed to
6 ensure the welfare of the people[;]

7 2. Escort prisoners during court proceedings using approved security
8 methods and ensure that proper behavior is maintained. Conduct
9 searches (as required) for weapons, materials, equipment, etc., that
10 may jeopardize the safety of the general public. Maintain
11 continuous surveillance of individuals within the courts and
12 adjacent facilities[;]

13 3. Assist correction officer[s], police officer[s], and sheriff deputies
14 with various activities associated with security[;]

15

16 5. Conduct preliminary and follow-up investigations of criminal
17 acts[; and]

18 6. Prepare and maintain accurate reports and records.

19 {13} CSOs must be currently certified and re-certifiable peace officers, and they
20 must be currently certified and re-certifiable “law enforcement officer[s].” CSOs must
21 pass a background investigation authorized and performed by the Bernalillo County
22 Sheriff’s Department, and they must pass a “[s]heriff’s review process.” According
23 to the position description, CSOs must “possess the ability to understand and apply
24 knowledge of policies and procedures for the [s]heriff’s [d]epartment and [c]ounty
25 [o]rdinances.”

1 {14} CSOs, in appearance, look like police officers. The job description states that
2 CSOs may be required to carry equipment associated with those employed as police
3 officers, including a firearm, a duty belt, handcuffs, and a baton, and they wear an
4 “officer’s uniform,” including a badge, and body armor, and operate security detection
5 devices, for example, an x-ray detector or a camera. They may also be required to
6 utilize materials associated with law enforcement, termed “various law
7 enforcement/office/court forms and paperwork” in the job description submitted to
8 PERA. CSOs are also required to take the oath of a police officer, and, as Petitioners
9 assert, they are required by statute to be peace officers. *See* § 4-41-11.1(B).

10 {15} However, PERA draws a distinction between peace officers and police officers,
11 and not all peace officers are police officers for purposes of PERA coverage. Peace
12 officers, in the Public Employees Retirement Act, include any employee “with a duty
13 to maintain public order or to make arrests for crime, whether that duty extends to all
14 crimes or is limited to specific crimes[.]” Section 10-11-26.2(B). Some plans, such as
15 Police Plan 5—as opposed to the general member plans available for peace
16 officers—are reserved for “municipal police members,” i.e., those employed as police
17 officers. Section 10-11-80; *see id.* (stating Police Plan 5 applies to municipal police
18 members); *see also* § 10-11-2(M)(5) (defining “municipal police member” as those
19 employed as police officers). Not every public employee with law enforcement type

1 duties, e.g., peace officers who have a duty to maintain public order and make arrests,
2 are employed as police officers and can claim coverage under a police plan.

3 {16} PERA classification turns on the duties and the performance of the duties
4 assigned to a particular employee. *See Serrano v. State Dep't of Alcoholic Beverage*
5 *Control*, 1992-NMCA-015, ¶ 6, 113 N.M. 444, 827 P.2d 159 (examining whether a
6 public employee met the definition of “police officer” for purposes of determining
7 whether he was improperly terminated by the agency that employed him; emphasizing
8 that “[t]he duties performed primarily determine whether a person’s employment
9 position is of a law enforcement nature”). Position qualification under Police Plan 5
10 depends not only upon the name of a position and the formally stated requirements of
11 a position as listed in a description of the position. Importantly, PERA classifications
12 are also based upon the substantive aspects of the work called for by the position.

13 {17} Presumably, Police Plan 5 provides greater retirement benefits to those that
14 qualify than other plans because those employed as police officers endure greater risks
15 and hazards in the performance of their jobs. *See* § 10-11-27.2(B) (explaining that the
16 Legislature intended another state police officer plan to cover those employed as
17 police officers because “it is appropriate to recognize the hazardous nature of the work
18 performed by state police officers”). The Legislature is justified in providing higher
19 coverage to those in higher-risk jobs, as it appears to have done with the creation of
20 Police Plan 5. Having recognized that not all those required to take the oath of a peace

1 officer are required to perform duties with the same attendant safety concerns, PERA
2 created multiple categories and coverage plans for peace officers. General Member
3 Plan 3, provided for in Section 10-11-26.2(B), provides coverage for peace officers,
4 specifically, peace officers whose duties include maintaining public order or making
5 arrests for crime, “whether that duty extends to all crimes or is limited to specific
6 crimes[.]” Section 4-41-11.1(B), upon which Petitioners primarily rely, requires only
7 what General Member Plan 3 also requires of those it covers: CSOs must be
8 commissioned as peace officers. It says nothing more about the nature of their work
9 duties and the circumstances under which those duties are to be performed.

10 {18} CSOs do not regularly operate vehicles in the performance of their duties, a task
11 that would increase the risk associated with their work. *See* § 4-41-11.1(B) (stating
12 that CSO work is confined to the county courthouse). CSOs also only have
13 jurisdiction to perform their assigned tasks “within the confines of the county
14 courthouse or as otherwise specified by the court.” *Id.* According to the testimony of
15 a CSO before the district court, CSOs “[b]asically . . . do the same thing [as] a deputy
16 does in the field” except they are “not in a patrol car,” and their duties are “confined
17 to the district courthouse.” The risk of danger associated with their job duties—e.g.,
18 investigation of crime and initiating arrests—is limited to an area where those duties
19 are less likely to occur in conjunction with the dangers of those same duties were they
20 to be performed elsewhere, say, for example, in a high crime area of the city at night

1 or in a vehicle patrolling roads and highways. Thus, we cannot conclude that the
2 PERB’s decision was without a rational basis and therefore arbitrary or capricious. *See*
3 *Archuleta*, 2005-NMSC-006, ¶ 17.

4 {19} Additionally, the position description, which explains that the function of CSOs
5 is primarily to provide security, also supports the decision below, and we conclude
6 that the PERB’s determination was not contrary to law and it was supported by
7 substantial evidence. *See* § 2.80.100.7(M) NMAC (defining, by PERA regulation,
8 “police member” as a person “who is employed as a police officer,” *not* to include the
9 following positions: “volunteers, juvenile correctional officer members, or employees
10 who do not perform primarily police functions including, but not limited to jailers,
11 cooks, matrons, radio operators, meter checkers, pound employees, crossing guards,
12 police judges, park conservation officers, and game wardens”). The job description
13 of a CSO provided to PERA supports its determination in several ways. Generally, the
14 summary of the position declares that CSOs are primarily responsible for tasks that
15 ensure the protection of individuals and property associated with the courts. The
16 essence of their work is, in substance and in name, security. More specifically, they
17 are to provide “protective services,” advise “about security procedures,” and “promote
18 the understanding and compliance with safety standards.” CSOs assist law
19 enforcement officers (correction officers, police officers, and sheriff deputies); they
20 are not employed to work as one. Despite Petitioners’ contention—that CSOs must

1 have knowledge of law enforcement functions; they may be equipped with a sidearm;
2 they must “maintain law and order”; they face the potential for physical confrontations
3 and exposure to bodily harm or death; and they must take quick action in emergency
4 situations—we review the whole record for evidence that supports the conclusion
5 reached by the agency, not for evidence that may substantiate the opposite result. *See*
6 *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-044, ¶ 12, 123
7 N.M. 329, 940 P.2d 177. Both the job description and the actual duties performed by
8 CSOs support the agency’s decision.

9 {20} Finally, we address Petitioners’ argument that the district court order is
10 erroneous for finding that CSOs “are not employees of the [s]heriff’s [d]epartment[.]”
11 and that they are not employed as police officers, “rather they are employed by the
12 [c]ourt.” Petitioners contend that testimony and evidence show that the CSOs are
13 employees of the sheriff’s department, and that they are sworn and commissioned
14 deputies, “who happen to be assigned to the [c]ourts.” The employment supervisor for
15 the County’s human resources office testified that the sheriff’s department does the
16 recruiting for CSO positions, interviews and makes selections for the position and,
17 therefore, it is the sheriff’s department, not the court to which the CSO is assigned.
18 But whether it is the sheriff’s department, or some other agency or subdivision, that
19 employs the CSOs is irrelevant. The analysis hinges on the substance of the duties
20 called for by the position. Police Plan 5 is intended for those *employed as police*

1 *officers*; it is the nature of the work and the possible limitations and restrictions placed
2 on the performance of the work, which could thereby alter the attendant risks of
3 danger and hazards associated with the work, that determines which public employees
4 are entitled to receive the benefits of the plan Petitioners seek, not the specific
5 department that employs them. *See Serrano*, 1992-NMCA-015, ¶ 6.

6 **CONCLUSION**

7 {21} For the foregoing reasons, we affirm the district court's affirmance of the
8 PERB's order.

9 {22} **IT IS SO ORDERED.**

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11 **STEPHEN G. FRENCH, Judge**

12 **WE CONCUR:**

13 _____
14 **LINDA M. VANZI, Chief Judge**

15 _____
16 **EMIL J. KIEHNE, Judge**