

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

In re:

**AFSCME, LOCAL 2851
Petitioner,**

and

PELRB No. 305-20

**CITY OF LAS VEGAS,
Respondent.**

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board on remand from the New Mexico Fourth Judicial District Court in case number D-412-CV-2015-369 ordering the City of Las Vegas Labor Management Relations Board, and now this Board by operation of law after the Las Vegas Board ceased to exist, to enter findings of fact and conclusions of law concerning the Petitioners' Motion to Accrete bargaining unit positions. Executive Director Griego informed the Board that he reviewed the record before the City of Las Vegas Labor Management Relations Board including witness testimony and documentary evidence and submitted his Report and Recommended Decision containing the required findings of fact to the Board for review and approval at its regularly scheduled meeting on January 6, 2021. After review of the record and Recommended Decision, and being otherwise advised, the Board voted 3-0 to adopt Director Griego's Recommended Decision. The Board finds:

1. The City of Las Vegas Labor Management Relations Board has dissolved and is no longer operational.
2. The Board stands in place of the City of Las Vegas Labor Management Relations Board as the Board having statewide jurisdiction for enforcing the Public Employee Bargaining Act and its rules.

THEREFORE, THE BOARD adopts Director Griego's Amended Recommended Decision issued, December 30, 2020 including the Findings of Fact and conclusions therein.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

1/15/2021
DATE

Marianne Bowers
MARIANNE BOWERS, BOARD CHAIR

**STATE OF NEW MEXICO
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CITY OF LAS VEGAS,

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HEARING OFFICER'S AMENDED REPORT AND RECOMMENDED DECISION

STATEMENT OF THE CASE: This matter comes before Thomas J. Griego, designated as the Hearing Officer in this case, on remand from the District Court for findings of fact concerning a Petition to accrete, or add, certain employees of the City of Las Vegas (the City) into an existing “blue and white collar bargaining unit.” The Union’s closing brief before the City of Las Vegas Labor-Management Relations Board (Exhibit J001 to the Union’ Motion to Supplement the record before the 4th Judicial District Court, indicates that the Union sought to accrete five City positions into an existing bargaining unit and that the issues before the Las Vegas Board were whether the positions were not supervisors, managers or confidential employees and whether they shared sufficient community of interest with those in the existing unit so that their inclusion would not render the unit “inappropriate”. Although all three statutory exemptions appear to have been at issue, both the City’s Board and the District Court seem to have concentrated on only one of them, i.e. the supervisory exemption.

According to the background statement in the Court of Appeals Memorandum Opinion, while all of the positions sought to be accreted included the moniker “supervisor” as part of the job title, AFSCME asserted that the employees occupying the positions were not “supervisors” as that term is defined by the Public Employees Bargain Act (PEBA), NMSA 1978, §§ 10-7E-1 et seq. (2003, as amended through 2005).

On March 10, 2015, the City’s Labor Board held a hearing at which employees then holding the

positions at issue testified, as did some of their subordinates, AFSCME officials, and managerial representatives of the City. In addition, the City's Labor Board received numerous exhibits submitted by the parties, as well as a post-hearing brief from each party.

On April 27, 2015, the Board met to consider AFSCME's petition. After conferring in executive session the Board announced its decision to the effect that after consideration of a number of unspecified factors including the statutory definition of "supervisor" and federal law regarding exercising independent judgment, that "[AFSCME] ha[d] not met its burden of proof to accrete" as to each of the five individuals whose position the petition sought to accrete.

The City Labor Board did not identify specific evidence upon which it relied with except for one of the individuals, Benito Lujan. With regard to him the City's Board referred to the testimony of one employee supervised by Lujan that "she had been told by Mr. Lujan that he would write her up if she did certain things" to support its denial of the petition to accrete. The Board issued an oral ruling denying AFSCME's petition and excluding the five positions from the bargaining unit. Nearly five months later, on September 10, 2015, the Board issued a two-page order, titled "Order Dismissing Clarification Petition." The order contains neither a discussion of the evidence nor findings of fact to support the Board's decision and provides no explanation of the Board's ruling, despite the governing Board rule requiring that it file a report within fifteen days following the close of a hearing in which it makes findings of fact and conclusions of law and "adequately explain[s] the Board's reasoning." See City of Las Vegas, Labor/Mgmt. Relations Bd. Rules & Regulations, § II, Rule 2.13 then in effect. Instead, the Order merely stated that the Board found that AFSCME "has not met its burden of proof to accrete the position[s] into the bargaining unit."

The next day, AFSCME filed its notice of appeal in the district court and sent a letter to the Board to request the preparation and filing of the record proper in accordance with Rule 1-074 NMRA. Despite the requirement of Rule 1-074 NMRA providing that the agency shall file the record on appeal within thirty days, unless otherwise provided by law, the City's Board still had not filed the

record nearly three months later. AFSCME therefore moved for an order to show cause. The day after AFSCME filed a request for hearing on its motion, the Board filed approximately two hundred pages of documents designated as the “Record Proper”. Three weeks later, the Board filed an “Amended Record Proper,” containing numerous new documents and some, but not all, of the records originally filed in the first Record Proper and totaling nearly four hundred pages. AFSCME thereafter withdrew its motion for an order to show cause.

The district court then held a hearing on August 4, 2016. AFSCME arguing several points of error, both of law and of fact. The City argued that AFSCME had not met its burden to insufficient evidence to support the Board’s decision and that AFSCME was impermissibly trying to reargue the case before the district court. The City argued that there was substantial evidence to support the City Board’s Decision, specifically the Board’s determination that AFSCME did not “meet [its] burden”. After rebuttal by the Union the district court questioned both parties about the lack of findings of fact and conclusions of law, and the absence from the record of a recording or transcript of the merits hearing. The parties agreed that the case could be decided on the record before the district court and that the district court need not remand for findings or order the record supplemented with a recording or transcript of the merits hearing - a premise with which the Court of Appeals disagreed.

On August 15, 2016, the district court entered its own two-page written order upholding the City Labor Board’s decision. The Court of appeals granted AFSCME’s petition for a writ of certiorari.

On February 4, 2019 the Court of Appeals determined that the deficient record necessitates reversal, remand, and further proceedings. In so doing, the Court of Appeals opined:

“While the aforementioned deficiencies hamper efficient appellate review, it is the [local labor] Board’s and the City’s failure to file a transcript or recording of the merits hearing in accordance with Rule 1-07 4(H)(4) (providing that the record on appeal shall consist of “the transcript of the proceedings, if any”), that renders impossible any meaningful appellate review. As stated, we are required-as was the district court in its own appellate capacity-to review the record as a whole. Because neither a transcript nor a recording is part of the record before us, we assume that the district court did not order the City to supplement the record on appeal, despite the parties’ acknowledgment and the

district court's awareness that the district court did not have the complete record before it. The unexplained absence of a hearing recording or transcript necessarily forecloses effective appellate reviews both at the district court and before us-of whether the Board's decision is supported by substantial evidence in the record when viewed as a whole."

The Court of Appeals concluded that the district court erred in failing to direct the City to supplement the record on appeal with the transcript or recording of the merits hearing given that the primary issue before the district court was whether there was substantial evidence to support the Board's denial of AFSMCE's petition. Because of the nature of AFSCME's appeal and the whole-record standard of review, the district court could not have properly carried out its responsibilities under Rule 1-074 without undertaking an independent review of the entire record, including, critically, the merits hearing, as well as all evidence presented to the Board. Particularly, given the absence of findings of fact, conclusions of law and "scant reasoning" provided by the Board, when it rendered its decision, the district court was not in a position to draw an informed conclusion as to whether the Board's decision was supported by substantial evidence.

Based on the foregoing the Court of Appeals reversed the Order of the district court affirming the decision of the City's Labor Board and remanded to the district court with instructions that it direct the City to timely file a proper and complete record in accordance with all of the requirements of Rule 1-074(H), undertake whole record review of the entire record to determine whether substantial evidence supports the Board's determination that none of the five positions is eligible for accretion. In the event that no recording of the merits hearing was ever made or currently exists, the district court shall vacate the Board's decision and remand the case to the Board with instructions that it conduct a new merits hearing. The appellate court also allowed that "the district court may very well determine on remand that remanding to the Board for findings and conclusions is appropriate despite the parties' contention to the contrary, see Rule 1-074(I)(l), or that the parties should have to re-brief their arguments following the filing of the complete record proper in order to comply with Rule 1-074(K)-(M)."

On August 23, 2019 the 4th Judicial District Court issued its Order on Remand noted that the

parties had supplemented the record with the record of the hearing and post-hearing briefs but that it was unable to determine after review of the record on what specific facts the local labor board relied for its decision or the weight given any particular evidence. Therefore, the district court remanded the matter to the City's Labor Board for entry of appropriate Findings and Conclusions.

Since that time, the City of Las Vegas repealed its Labor Management Relations Ordinance. With the repeal of the ordinance, and pursuant to NMSA 1978 § 10-7E-10(G)(1) (2020), the Las Vegas Labor-Management Relations Board ceased to exist and all matters pending before it, specifically, the remand for Findings and Conclusions concerning AFSCME's accretion petition, the subject of the Court of Appeals Memorandum Opinion and the 4th Judicial District Court's remand. See NMSA 1978 § 10-7E-10(G) (2020).

In my review of this record I apply the statutes and rules as they now exist under which neither party bears the burden of proof in a representation proceeding. See 11.21.1.22 NMAC. However, the burden of going forward with the evidence on the question of whether employees are excluded from collective bargaining as supervisors has been determined by this Board to be best allocated to the Petitioner. See, *AFSCME, Council 18 v. Santa Fe County Board of County Commissioners*, 5-PELRB-15 (September 25, 2015, PELRB 305-15).

On the entire record in this case I make the following

FINDINGS OF FACT:

1. I take Special Notice of the Recognition section of the Collective Bargaining Agreement then in effect Article 2 Recognition, for the proposition that Petitioner AFSCME, Local 2851 has been recognized as the exclusive bargaining representative for a group of Blue and White Collar workers employed by the City of Las Vegas, pursuant to Las Vegas City Ordinance 05-47 then in effect. CBA, RP1 before the District Court, pp. 32-54,
2. There are five positions at issue in this Petition According to Exhibit A, RP1 before the District

Court, p. 341:

- a. Water Supervisor
 - b. Utilities Superintendent
 - c. Parks Supervisor
 - d. Public Facilities Supervisor
 - e. Zoning and Licensing Supervisor.
3. The education level of those holding each of the positions at issue is a High School diploma – the same as those their subordinates. (Hearing audio Part 1 at 00:020:09; 00:48:46; 2:07:19 - 2:08:10. Hearing audio Part 2 at 00:1:31; Exhibits H2.1 – 2.4; B2.1-2.6; D2.1-2.6.)
 4. Each of the positions at issue has two or more subordinates working under them. (Hearing audio Part 1 at 00:23:04 – 00:23:16; 2:09:30 - 2:11:10; 2:30:02- 2:41:19; Hearing audio Part 2 at 00:27:20 – 00:27:25; 00:02:35 - 00:15:10; 00:27:20 – 25; 1:08:00-1:13:20; 1:08:00 -1:13:20; 2:09:42 - 2:11:23; 2:09:42 – 2:11:23; 2:47:13 – 2:47:43; Exhibits 4, A, B, F.1, D1, D 2.1, J, K.)
 5. None of the positions at issue set create or contribute to creating city policy nor have they ever served on, or been asked to serve on, management’s negotiating committee for collective bargaining with the union committee nor are they privy to labor-management strategy . (Hearing audio Part 1 at 00:34:21 - 00:34:31; 2:28:50 - 2:29:35; 2:50:00 - 2:54:22; 00:14:40 - 00:15:10; 00:37:44 – 00:38:08. Hearing audio Part 2 at 00:37:40 - 00:37:44.
 6. None of the positions at issue have authority to hire, fire, demote, promote or discipline employees except for oral or written reprimands or to effectively recommend such actions, nor do their job descriptions include hiring, promotion or discipline duties. (Hearing audio Part 1 at 00:31:05-00:31:55; 00:30:43 – 00:31:05; 00:31:05 – 00:33:35; 00:40:00 – 00:47:00; 2:48:42 – 2:51:15. Hearing Audio Part 2 at 00:11:52 – 00:12:14; 00:12:50 – 00:14:35; 00:16:22 – 00:20:43; 00:33:20 – 00:35:19.
 7. The Zoning and Licensing Supervisor’s daily duties consist of:
 - a. Preparing information packets for presentation to the City’s Design Review Board, Planning and Zoning Commission and Board of Adjustment. (Hearing audio Part 1 at

00:21:10 – 00:21:21; 00:25:00 – 00:25:11.)

- b. Working with local surveyors, prepare surveys concerning lot splits or setting boundaries and present them to the above boards and commission for consideration before approval of requests before them. (Hearing audio Part 1 at 00:21:40 – 00:21:57; 00:25:11 – 00:25:17.)
 - c. Dealing with zoning request changes and presenting information to the Zoning Commission and the City Council thereafter if an appeal is filed. (Hearing audio Part 1 at 00:21:57 – 00:22:30; 00:25:17-32).
 - d. Presenting requests for Special Use permits to the “Board” (Witness was unclear whether was referring to the Design and Review Board or the Board of Adjustment). (Hearing audio Part 1 at 00:22:30 – 00:22:48).
 - e. Posting notice of any requested zone change to residents within a 100 ft. radius of the requested change assisted by Maria Perea. (Hearing audio Part 1 at 00:23:16 – 00:23:54.)
8. Before working on any of the foregoing, at the beginning of the workday the Zoning and Licensing Supervisor checks email related to those duties for approximately 15 to 20 minutes per day. (Hearing audio Part 1 at 00:26:24 - 00:26:47.)
 9. The Zoning and Licensing Supervisor and his subordinates all work an 8:00 a.m. to 5:00 p.m., five days per week schedule and he does not schedule his subordinate’s time. (Hearing audio Part 1 at 00:26:09 – 27:14.)
 10. On occasion the Community Development Director has given directives to, and assigned work to, the Zoning and Licensing Supervisor’s subordinate employees without consulting with him and he has no power to alter subordinate employees job duties. (Hearing audio Part 1 at 00:41:22 – 00:42:04.
 11. As an example of the foregoing, the Zoning and Licensing Coordinator, one of Zoning and Licensing Supervisor’s subordinates, serves on various committee assigned by the Community

Development Director, outside of any direction by the Zoning and Licensing Supervisor;

(Testimony of Floyd Lovato, Hearing audio Part 1 at 1:50:10 – 1:54:29.)

12. In addition to the foregoing, the Zoning and Licensing Coordinator testified that his daily duties include verifying business zoning regulation and licensing, meeting with the Zoning and Licensing Supervisor for 15-30 minutes each day to discuss what the “focus of the day” should be and that although his supervisor may assign priorities, he does not often do so. Testimony of Floyd Lovato, Hearing audio Part 1 at 1:54:30 - 1:55:51; 2:03:09 – 2:05:09.
13. The Zoning and Licensing Coordinator testified that he has “limited contact” with the Zoning and Licensing Supervisor after the morning meeting concludes and that he does not tell subordinates what needs to be done. Testimony of Floyd Lovato, Hearing audio Part 1 at 1:55:27- 1:55:46.)
14. When the Zoning and Licensing Coordinator assumed his duties upon being hired, he was oriented about how to perform those duties by “ladies in the office”, not primarily by the Zoning and Licensing Supervisor.(Hearing audio Part 1 at 2:01:20 – 2:01:45)
15. The Zoning and Licensing Supervisor has participated on a prospective employee interview committee following City prepared script but did not make hiring decisions and does not have authority to hire – the Community Development Director does. (Testimony of Floyd Lovato Hearing audio Part 1 at 2:16:15 – 2:18:43)
16. The Zoning and Licensing Supervisor’s subordinates perform their duties independently, without much direction. (Hearing audio Part 1 at 00:25:28 – 00:26:09.)
17. Directing subordinates’ work constitutes less than 5% of the Zoning and Licensing Supervisor workday. (Hearing audio Part 1 at 00:26:14 - 00:26:20.)
18. Subordinate employee timesheets are approved both by the Zoning and Licensing Supervisor and his supervisor, the Community Development Director. Timesheet approval takes about 10 minutes every other Wednesday. (Hearing audio Part 1 at 27:55 – 28:02; 2:05:20 - 2:05:45.)

19. The time spent approving timesheet approval includes approving requests for time off. (Hearing audio Part 1 at 00:57:45 – 58:15)
20. Concerning hiring, the Zoning and Licensing Supervisor's role is limited to participating on a prospective employee interview committee following City-prepared script. (Hearing audio Part 1 at 00:27:58 – 00:30:43.)
21. The Zoning and Licensing Supervisor has no role in establishing City policies or procedures. (Hearing audio Part 1 at 00:30:43 - 00:34:21.)
22. The Zoning and Licensing Supervisor position was never previously in bargaining unit. (Hearing audio Part 1 at 00:35:30 – 00:37:57.)
23. Subordinate employee annual evaluations are done by Zoning and Licensing Supervisor and approved by the Community Development Director. (Hearing audio Part 1 at 2:00:01 – 2:00:43.)
24. The Parks Supervisor reports to the City's Public Works Director and his daily duties include:
 - a. Outlining the division's work for the day for the first one to two hours each day while his crew make its "trash routes". Thereafter he works alongside his subordinates for the next five to six hours. (Hearing audio Part 1 at 2:09:30 – 2:10:45)
 - b. During the one to two hours at the beginning of the workday while his crew is engaged in "trash rounds" or at the end of his workday the Parks Supervisor completes paperwork such as obtaining purchasing quotes and purchase order processing. That work takes no more than one hour per day; often less. (Testimony Jeff Rudolph Hearing audio Part 1 at 2:11:30 – 2:12:40; Testimony Martin Gonzales Hearing audio Part 2 at 2:46:49.)
 - c. The Parks Supervisor works the same 40 hour per week; eight hours per day work schedule as do his subordinates. (Hearing audio Part 1 at 2:12:44.)
 - d. Both the Parks Supervisor and the Public Works Director approve employee time sheets but it is the Director who has final approval. (Hearing audio Part 1 at 2:12:56 – 2:14:00).

- e. The Parks Supervisor and his crew follow a pre-established procedure for maintaining parks on a daily basis. (Hearing audio Part 1 at 2:27:50 – 2:28:50.)
25. With regard to Parks Supervisor’s duties, his supervisor, the Public Works Director, testified that the Parks Supervisor schedules work at a morning meeting, but a master schedule is set bi-weekly by the Director (But Director has input on scheduling and manager makes the schedule.) (Testimony of Martin Gonzales, hearing audio Part 2 at 2:46:00 – 3:30:00; Exhibit F2.1.)
26. The Gas Utility Superintendent’s job duties include the following:
- a. Oversight of a maintenance crew comprising seven individuals. (A second position with same title performs more administrative duties supervised by Gas Manager and Utility Director).
 - b. Meet daily with the City’s Gas Manager to discuss scheduling work according to priorities set by the Gas Manager. (hearing audio Part 2 at 3:45 – 4:25)
 - c. Review and answer emails and perform job safety analysis during the first ½ hour, then meet with the maintenance crew for 15 minutes to discuss work for the day before going to the day’s job site. While on the job site he ensures that work performed by his subordinates comports with applicable City Codes. (Testimony of Jude Herrera, hearing audio Part 2 at 00:02:35 - 00:15:10.)
 - d. Perform routine paperwork administrative duties constituting approximately 20 to 25% of his work duties. Approximately 75% of his work is performed alongside his subordinates in the field. (Hearing Audio Part 2 at 2:25 – 11:10.) The Utilities Director acknowledged that while working alongside his crew The Gas Utilities Superintendent is doing same things as the crew “...but that is basically his choice.” (Id. at 2:47:13 – 2:47:43) and that even when working alongside his crew, he is supervising. (Id. at 2:49:11.)

27. The Gas Utility Superintendent fills in for his subordinates, performing their work in their absence and conversely, in his absence subordinates may assume his duties. Id. at 00:07:55 – 00:11:24.
28. Employees supervised by the Gas Utility Superintendent know the procedures to be followed to perform their work. (Id. at 00:02:35 - 00:06:58.)
29. Although the Gas Utility Superintendent may send a subordinate home for a safety violation, so may the City's Safety Liaison and any employee may contact the safety liaison to report safety violations. (Id. at 00:21:55 – 00:27:38.)
30. The Water Supervisor's duties include:
 - a. Occasionally serving as an Equipment Operator III on various projects as needed.
 - b. Meeting daily with his crew to set priorities, then meeting with Director to inform him of work for the day. Exhibit C13-14 serve as examples of planned work schedules completed during the morning meetings. (Id. at 1:33:00 – 1:34:23.)
 - c. Organizing work to be done on a weekly basis. The weekly schedule is taken from a detailed two-week schedule prepared by the Water Supervisor's supervisor, the Water Systems Manager. Exhibit C-14. 1:48:28.
 - d. Maintain equipment and materials.
 - e. Initiates discipline if needed for misfeasance in the field.
 - f. Review employee time sheets. (Id. at 1:30:30 – 1:39:15)
 - g. Serving as an on-call employee in case of emergency and assign subordinates to be on call. (The witness offered no testimony as to how often that may happen.) (Id. at 1:12:00 – 1:13:00.)
31. 90% of his time is in the field working alongside his crew, while 5-10% of work is in the office doing parts inventory, scheduling review time sheet and overtime approval (Exhibits B8 and 9) and job hazard analysis. For example, Exhibit B4 is an essential OSHA trenching form filled out

by the Water Supervisor as part of a project scheme, Exhibit B5. A further example is seen in the weekly safety meeting report form that can also be filled out by a subordinate employee who may conduct the safety meeting. Hearing Audio Part 2 at 1:20:00 – 1:20:45. Exhibits 6 and 7 and testimony at Hearing Audio Part 2 at 1:21:01 – 1:25:18; 1:15:43 – 1:17:31 indicate additional duties include performing job cost estimates, issuing emergency Public Service Announcements and communicating with customers. The Utilities Director acknowledged that while working alongside his crew The Gas Utilities Superintendent is doing same things as the crew “...but that is basically his choice.” (Id. at 2:47:13 – 2:47:43) and that even when working alongside his crew, he is supervising. (Id. at 2:49:11.)

32. Any certified “Competent Person”, a term of art in the City’s workforce based primarily on experience (Id. at 2:20:50 – 2:21:13) and who may be non-supervisory personnel, fill in for the Water Supervisor in his absence including performing the above-described administrative tasks. (Id. at 00:32:26 – 00:33:04.33.)
33. Exhibits C3 -7 are weekly safety meeting forms showing that subordinate employees also presented the meetings and completed the forms. Similarly, Exhibits C8 and 9, City trenching forms and Exhibits C10 - 12 (field log) completed by the Water Supervisor but an Operator 3 filled out form. (Id. at 1:27:37 - 1:32:40.) Exhibits C13 and 14 are examples of planned work schedules. All of the foregoing form completion is done during the morning meetings. (Id. at 1:33:00 – 1:34:23.)
34. One of the positions supervised by the Water Supervisor is Equipment Operator I. A comparison of their job descriptions, Exhibit B3.1-7, shows little if any similarity in their “Purpose and Nature” sections. (Id. at 1:18:07.)
35. A comparison of Exhibit C, which includes the job description for a Maintenance I position supervised by the Water Supervisor, with the job description for the Water Supervisor shows little similarity similar to in their “Purpose and Nature” sections except that both operate heavy

- equipment. The Maintenance I position acts as a lead worker in the absence of Water Supervisor essentially assuming the Supervisor's duties except with regard to initiating discipline, approving leave or obtaining price quotes. (Id. at 1:26:00 – 1:27:37; 2:16:23; Exhibits D3.1-6; D4 - 7.)
36. Exhibit C also contains the job description for another subordinate of the Water Supervisor, the Laborer position. As above, there are little or no similarities, in the “Purpose and Nature” section of the Laborer job description and the Water Supervisor's job description. See Exhibits C3 -7.
37. The description of weekly safety meetings shows others besides the Water Supervisor also presided over such meetings and completed the report forms. (Id. at 1:28:00 – 1:29:30, Exhibit C3 - 7).
38. Similarly, review of Exhibit C10-12 shows that the field log and City Trenching form usually completed by the Water Supervisor, are sometimes completed by subordinate personnel. (Id. at 1:27:37 - 1:32:40.)
39. The Water Supervisor is required to complete a Heavy Equipment Inspection report prior to using such equipment, though not required to perform the inspection himself. (Exhibits C15.1-2; Id. at 1:35:25.)
40. Exhibits C16 -17 are examples of annual personnel evaluations by the Water Supervisor. (Id. at 1:35:25.)
41. Exhibits C18 - 24 are time sheets and overtime authorization records, supporting witness testimony that the Water Supervisor has authority to hold over employees from the end of the scheduled shift if the assigned job is not done. (Id. at 1:35:25-1:40:40.) The process followed by the Water Supervisor for holding employees over beyond their scheduled work hours is to inform his superior and City Manager approval. (Id. at 2:00:54.) In fact, the Water Supervisor is *required* to report holding employees over to the Utilities Manager. 2:37:38 – 2:28:14.
42. The Water Supervisor's responsibility for controlling the overtime budget costs and fuel costs

- does not constitute involvement in creation of the City's or his department's budget but does constitute furthering the employer's policies. (Id. at 1:38:55 - 1:42:21; Exhibits 21 and 22; C23.
43. The Water Supervisor's responsibility for purchasing equipment, supplies and tools is exercised under broader budgetary constraints and so, is a purely administrative function. (Id. at 1:27:00 – 1:27:15; 1:42:30 – 1:43:30)
44. There is nothing in the Water Supervisor's job description to indicate that any of his duties require hiring, promoting or disciplining subordinate personnel. (Exhibit B2; C1.1 – C5.5; Id. at 1:52:14 – 1:53:11.) any involvement in such matters is limited to participating on advisory committees. (Id. at 2:00:54 – 2:03:33.) His involvement in discipline is limited to verbal and written reprimands; anything else requires upper management action. (Id. at 2:05:30.) If directed to conduct a disciplinary investigation, such investigation consists of filling in blanks on an incident report form (Id. at 2:07:25.)
45. Regarding Exhibits C9, a City Trench Report and C15.1 and Inspection Report, the Water Supervisor is responsible for making sure equipment is inspected but does not do the inspection himself. (Id. at 1:58:08.) All such reports are subject to review and approval by the City Manager. (Id. at 1:58:46.)
46. Even at the level of the Utility Director, the Water Supervisor's supervisor, there is no authority to hire or promote, much less at the Water Supervisor's level. (Id. at 2:08:40 - 2:08:48.)
47. Exhibit D47 are supervisor training certifications for Jude Herrera. Id. at 2:28:30 - 2:29:01. I note that other employees who are not supervisors may attend the same training depending on experience. (Id. at 2:36:00 – 2:36:42.)
48. Regarding the City's Public Facilities Supervisor's workday, the first five to ten minutes of the workday he meets with his Department Director to determine work for the day and to perform a necessary job safety analysis based on established guidelines. Afterward, he goes with his subordinates and performs work alongside them, representing about 75% of his time. (Hearing

audio Part 1 at 2:41:19 – 2:45:00.)

REASONING AND CONCLUSIONS OF LAW:

I. THE WATER SUPERVISOR, UTILITIES SUPERINTENDENT, PARKS SUPERVISOR, PUBLIC FACILITIES SUPERVISOR AND ZONING AND LICENSING SUPERVISOR ARE NOT SUPERVISORS, MANAGERS OR CONFIDENTIAL EMPLOYEES EXEMPT FROM COLLECTIVE BARGAINING AS DEFINED BY NMSA 1978 SECTION 10-7E-4 (2020).

A. ANALYSIS OF CONFIDENTIAL EMPLOYEE STATUS. The Public Employee Bargaining Act excludes confidential employees from its coverage. See § 10-7E-4(G), § 10-7E-5 and § 10-7E-13(C).

The exclusion of confidential employees is limited to those who assist and act in a confidential capacity to persons who exercise managerial functions in the field of labor relations. See *NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995). Thus, PEBA’s confidential employee definition requires an analysis of both the duties of the employee in question and the duties of the person he or she allegedly assists. *Id.* Criteria generally considered are whether the employee is or could likely be on the employer’s bargaining team, whether the employee is privy to the employer’s labor-management policy or bargaining strategy and whether the employee has access to confidential financial or other data used in bargaining; or has input or involvement in the employer’s contract proposal formulation. See *American Federation of Teachers Local 4212 and Gadsden Independent School District*, 03-PELRB2006 (May 31, 2006); *NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995). There is nothing in the duties or employer expectations for any of the positions at issue that suggest any of the usual criteria for confidential employee status are present. The preponderance of the evidence in this case supports a conclusion that none of the positions at issue serve in a confidential capacity to the employer as that term is understood under the PEBA.

B. ANALYSIS OF SUPERVISORY STATUS GENERALLY. To determine whether an employee is a “supervisor” as that term is used in the Act, I undertake a three-pronged analysis as to each of the positions at issue. First, the employee must devote a majority of work time to supervisory duties;

customarily and regularly direct the work of two or more other employees; and the putative supervisor must have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively.

If these requirements are met, then the second prong of the analysis is undertaken to determine whether the purported supervisory duties are merely routine, incidental or clerical duties; or only occasionally performed; or their duties are substantially similar to those of his or her subordinates. If the second prong criteria are met, the employee is not a “supervisor” even if the first prong criteria are met.

Finally, in construing whether the employee devotes a majority of work time to supervisory duties and whether it has authority to hire, promote or discipline other employees or to recommend such actions effectively, the employee will not be deemed to be a supervisor if those duties are performed as a “lead employee” or consists of participating in peer review or occasional employee evaluation programs. See NMSA 1978, §§ 10-7E-4(I) (2020). See also *NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995) adopting the Hearing Officer’s Report and Recommended Decision identifying the three-part test embedded in the definition.

In applying the three-pronged analysis to the facts in any given case, the PELRB relies on actual job duties performed, rather than employer designations, definitions, expectations, job descriptions or standard operating procedure manuals. See *New Mexico State University Police Officers Association and New Mexico State University*, 1 PELRB No. 13 (June 14, 1995); *In re: McKinley County Sheriff’s Association Fraternal Order of Police & McKinley County*, 1 PELRB No. 15 (Dec. 22, 1995); *In re: Communications Workers of America, Local 7911 & Doña Ana County*, 1 PELRB No. 16 (Jan. 2, 1996); *In re: Local 7911, Communications Workers of America & Doña Ana Deputy Sheriffs’ Association, Fraternal Order of Police and Doña Ana County*, 1 PELRB No. 19 (Aug. 1, 1996); *NEA v. Bernalillo Public Schools*, 1 PELRB No. 17 (May 31, 1996); *In re: New Mexico Coalition of Public Safety Officers, Local 7911, CWA, AFL-CIO & Town*

of *Bernalillo*, 1 PELRB No. 21 (July 7, 1997). Accordingly, the job descriptions submitted into evidence are given little weight unless no better evidence is available.

1. **Analysis of Water Supervisor's Supervisory Status.** It is undisputed that the Water Supervisor meets the second element of the first prong of the test for supervisory status in that he customarily and regularly directs the work of two or more other employees. Further analysis is required to determine whether that the position meets the first element of the first prong by devoting a majority of work time to supervisory duties. The evidence established that approximately 90% of his time is in the field working alongside his crew. I consider the phrase "working alongside his crew" to mean doing the same work as the crew both because The that is a reasonable inference to be drawn from the Water Supervisor's testimony overall and because the Utilities Director acknowledged that while working alongside his crew the Gas Utilities Superintendent is doing same things as the crew. I therefore give that phrase the same meaning that the management witness gave it regarding the Gas Utilities Superintendent.

Accordingly, I cannot consider the 90% of the Water Supervisor's time spent in the field working alongside his crew as satisfying the first element of the first prong of the supervisory test, because the second prong of the test removes that work from the definition of supervision as substantially similar to that of his subordinates.

Because so much of the Water Supervisor's work time is spent in this manner I do not undertake analysis of his remaining administrative duties that may constitute supervision because it is arithmetically impossible for those duties to constitute a majority of the employee's time.

The weight of the evidence also convinces me that the Water Supervisor does not have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively. There is nothing in the Water Supervisor's job description to indicate that any of his duties require hiring, promoting or disciplining subordinate personnel and any actual involvement in such matters is limited to participating on advisory committees. Although he may verbally reprimand his

subordinates and issue written reprimands it is debatable whether those actions constitute discipline at all or are better considered to be corrective action as a prelude to discipline. The record is silent on this point. What is clear is that anything else requires upper management action and if directed by upper management to conduct a disciplinary investigation, such investigation consists of filling in blanks on an incident report form requiring little or no exercise of independent judgment.

Based on the foregoing I conclude that the Water Supervisor position is not exempt from collective bargaining as a supervisor.

2. **Analysis of Utilities Superintendent Supervisory Status.** This position seems to be referred to throughout the testimony as “Gas Utilities Superintendent”. As with the Water Supervisor position, it is undisputed that the Utilities Superintendent meets the second element of the first prong of the test for supervisory status in that he customarily and regularly directs the work of two or more other employees. However, a second position with same title performs more administrative duties supervised by Gas Manager and Utility Director. No other evidence exists as to this second position and so, because the only evidence is that the position’s duties are more administrative I conclude the position does not supervise other employees as does the position analyzed herein and therefore is not statutorily exempt as a supervisor. Regarding the Gas Utility Superintendent’s job duties, approximately 75% of his work is performed alongside his subordinates in the field. He reports to the Utilities Director, who acknowledged that while working alongside his crew the Gas Utilities Superintendent is doing same things as the crew. This negates the employer’s view that even when working alongside his crew, he is supervising, by operation of the second prong of our three-pronged test.

Accordingly, I cannot consider the 75% of the Gas Utilities Superintendent’s time spent in the field working alongside his crew as satisfying the first element of the first prong of the supervisory test, because the second prong of the test removes that work from the definition of supervision as substantially similar to that of his subordinates.

Because so much of the Gas Utilities Superintendent’s work time is spent in this manner I do not

undertake analysis of his remaining administrative duties that may constitute supervision because it is arithmetically impossible for those duties to constitute a majority of the employee's time in supervisory duties.

There is little evidence on the record concerning the Gas Utilities Superintendent's authority to hire, fire, promote or otherwise discipline his subordinates. However, because there is evidence that authority resides above the Director's level at least two levels above the putative supervisor, I take the absence of evidence that the Gas Utilities Superintendent ever took disciplinary action (beyond *initiating* such action, which is different) to mean that he indicate that the duties of this position do not include hiring, promoting or disciplining subordinate personnel.

Based on the foregoing I conclude that the Water Supervisor position is not exempt from collective bargaining as a supervisor.

3. **Analysis of Parks Supervisor Supervisory Status.** Again, there is no dispute that the Parks Supervisor meets the second element of the first prong of the test for supervisory status in that he customarily and regularly directs the work of two or more other employees. My analysis of whether the position meets the first element of the first prong by devoting a majority of work time to supervisory duties begins with a summary of the position's typical daily duties. The evidence established his daily duties include outlining the work for the day and various other "paperwork" such as obtaining purchasing quotes and purchase order processing for the first one to two hours each day while his crew make its "trash rounds". The Utilities Director testified that the Parks Supervisor schedules work at a morning meeting, but a master schedule is set bi-weekly by the Director (But Director has input on scheduling and manager makes the schedule. Both the Parks Supervisor and the Public Works Director approve employee time sheets but it is the Director who has final approval. Thereafter, he works alongside his subordinates for the next five to six hours. They follow a pre-established procedure for maintaining parks on a daily basis requiring little or no independent judgment.

As with the Gas Utilities Superintendent position analysis there is little evidence on the record

concerning the Parks Supervisor's authority to hire, fire, promote or otherwise discipline his subordinates. However, because there is evidence that authority resides above the Director's level at least two levels above the putative supervisor, I take the absence of evidence that the Parks Supervisor ever took disciplinary action to mean that indicate that the duties of this position do not include hiring, promoting or disciplining subordinate personnel.

Based on the foregoing I conclude that the Parks Supervisor position is not exempt from collective bargaining as a supervisor.

4. **Analysis of Public Facilities Supervisor Supervisory Status.** During the first five to ten minutes of the Public Facilities Supervisor's workday he meets with his Department Director to determine work for the day and to perform a necessary job safety analysis based on established guidelines. That the work schedule is set in concert with the Director indicates that the Public Facilities Supervisor does not exercise independent judgment in that regard. Afterward, he goes with his subordinates and performs work alongside them, representing about 75% of his time. In this respect his duties are notably similar to those of the Water Supervisor, Utilities Superintendent and Parks Supervisor analyzed above in that the majority of his worktime he is engaged in work that is substantially the same as his subordinates. For that reason, even though it is undisputed that the Public Facilities Supervisor regularly supervises more than two employees but does not devote a majority of work time to supervisory duties. Those supervisory duties that are performed are merely routine, incidental or clerical duties; or only occasionally performed so that the position does not pass the second prong of the supervisor test.

As with the Water Supervisor, Utilities Superintendent and Parks Supervisor positions, the preponderance of the evidence supports a conclusion that the Public Facilities Supervisor does not have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively. Duties associated with participating in peer review or occasional employee evaluation do not evidence of supervisory status.

Based on the foregoing I conclude that the Public Facilities Supervisor position is not exempt from collective bargaining as a supervisor.

5. **Analysis of Zoning and Licensing Supervisor Supervisory Status.** The Zoning and Licensing Supervisor's daily duties consist primarily of:

- a. Preparing information packets for presentation to the City's Design Review Board, Planning and Zoning Commission and Board of Adjustment.
- b. Working with local surveyors, prepare surveys concerning lot splits or setting boundaries and present them to the above boards and commission for consideration before approval of requests before them.
- c. Dealing with zoning request changes and presenting information to the Zoning Commission and the City Council thereafter if an appeal is filed.
- d. Presenting requests for Special Use permits to the "Board".
- e. Posting notice of any requested zone change to residents within a 100 ft. radius of the requested change assisted by CADD Operator Maria Perea.

Although it is undisputed that this position supervises more than two employees, with the possible exception of posting notice of any requested zone change assisted by Maria Perea, there is nothing of a supervisory nature attached to any of the above duties.

It may reasonably be argued that before working on any of the foregoing listed tasks, at the beginning of the workday the Zoning and Licensing Supervisor performs some duties that might be considered to qualify as supervision. For example, meeting with the Zoning and Licensing Supervisor for 15-30 minutes each day to discuss what the "focus of the day" should be. Subordinate employee timesheets are approved both by the Zoning and Licensing Supervisor and his supervisor, the Community Development Director. Timesheet approval takes about 10 minutes every other Wednesday. The time spent approving timesheet approval includes approving requests for time off.

I consider that evidence together with evidence that the Community Development Director has given

directives to, and assigned work to, the Zoning and Licensing Supervisor's subordinate employees without consulting with him and he has no power to alter subordinate employees job duties assigned by the Community Development Director. The preponderance of the evidence supports a conclusion that the real supervisor of the Zoning and Licensing Supervisor's subordinates is the Community Development Director. That conclusion is further supported by the testimony of The Zoning and Licensing Coordinator that he has "limited contact" with the Zoning and Licensing Supervisor after the morning meeting concludes and that he does not tell subordinates what needs to be done.

Other duties, such as verifying business zoning regulation and licensing, while arguably constituting management, have no element of supervising others. For that reason, even though it is undisputed that the Zoning and Licensing Supervisor regularly supervises more than two employees, he does not devote a majority of work time to supervisory duties. Those supervisory duties that are performed are merely routine, incidental or clerical duties; or only occasionally performed so that the position does not pass the second prong of the supervisor test.

Furthermore, concerning the position's authority to hire, promote or discipline other employees or to recommend such actions effectively, the Zoning and Licensing Supervisor has participated on a prospective employee interview committee following City prepared script but did not make hiring decisions and does not have authority to hire – the Community Development Director does.

Concerning hiring, the Zoning and Licensing Supervisor's role is limited to participating on a prospective employee interview committee following City-prepared script.

Subordinate employee annual evaluations are done by Zoning and Licensing Supervisor and approved by the Community Development Director but such evaluations consist of participating in peer review or occasional employee evaluation programs that are not considered to be supervisory duties under the PEBA.

Based on the foregoing I conclude that the Zoning and Licensing Supervisor position is not exempt from collective bargaining as a supervisor.

C. Analysis of Managerial Status Generally. The term “manager” is defined by NMSA 1978, § 10-7E-4(N) (2020). To meet the definition an employee must be primarily engaging in executive and management functions and the employee must have responsibility for developing, administering, or effectuating management policies, which requires the employee to do more than merely participate in cooperative decision-making programs on an occasional basis.

After the 2020 amendments to the Act, Section 4(N) requires that in applying the above test 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. The first prong of the Act’s test requires that an individual possess and exercise a level of authority and independent judgment sufficient to significantly affect the employer’s purpose. The second prong requires that an employee creates, oversees or coordinates the means and methods for achieving policy objectives and determines the extent to which policy objectives will be achieved. “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 Public Schools*, 1 PELRB No. 10 (May 19, 1995).

Unlike the analysis for supervisory status the PELRB has held that the amount of time managers spend on duties similar to those of their employees is not determinative:

“Whereas to be a “supervisor” under § 10-7E-4(U) an employee must spend a ‘majority of work time’ performing supervisory duties, a ‘manager’ under § 10-7E-4(O) is one who is ‘engaged primarily in executive and management functions.’ Had the legislature intended the Board to analyze the time spent by putative managers to determine whether they spend more work time in managerial duties than in duties like their subordinates as we do when we analyze whether an employee is a supervisor, it would have used the same ‘majority of work time’ language used in § 10-7E-4(U). While the employee’s managerial duties may not be merely incidental, because, as § 10-7E-4(O) states, [a]n employee shall not be deemed a management employee solely because the employee participates in cooperative decision-making programs on an occasional basis’. Rather, the analysis of whether one is primarily engaged in managerial duties involves consideration of the reason for creation of the unique position apart from subordinates regardless of their performance of similar duties. In other words, if the position in question exists so that the employer has someone at the worksite who is

responsible for ensuring that management policies are properly developed and implemented, that person is a manager and is to be excluded from the bargaining unit.”

AFSCME, Council 18 v. New Mexico Department of Health, 2-PELRB-2017(PELRB 305-16); upheld on appeal, *AFSCME, New Mexico Council 18, AFL-CIO v. State of New Mexico, Dep’t of Health and New Mexico Public Employees Labor Relations Board*, D-202-CV-2017-08953, quoting *AFT v. Gadsden Schools*, 03-PELRB-2006.

Because some analysis of the duties actually performed is necessary to determine whether any given position’s reason for existing is primarily to perform executive and management functions, I do not read the Board’s prior cases cited above to mean that one should disregard the amount of time spent by a putative manager performing duties similar to those of their employees. Rather, the time spent in such disputes is not determinative.

In *AFT v. Gadsden Schools, supra*, this Board held that a significant number of distinct functions that differed from those of their subordinates were related to executive and management functions or developing, administering or effectuating management policies. The lesson of *AFSCME, Council 18 v. New Mexico Department of Health* and *AFT v. Gadsden Schools* is that emphasis is to be given the relative importance of (as contrasted the amount of time engaged in) management functions.

Accordingly, when deciding management status in this case I will concentrate on the primacy of management functions in the context of total duties performed by the purported manager, taking into account the requirement of Section 4(N) of the Act providing 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.

1. **Analysis of Water Supervisor’s Managerial Status.** I consider the following duties to be managerial in nature as contemplated by the Act:

- a. Organizing work to be done on a weekly basis.
- b. Inventorying parts, reviewing time sheets, approving overtime, performing job hazard

analysis, which includes completing essential OSHA trenching forms as part of a project scheme, conducting or attending weekly safety meeting reports.

- c. Job cost estimating, issuing emergency Public Service Announcements and communicating with customers on outages and other department related topics.
- d. Exercising control over his department's budget by approving or denying overtime requests and managing fuel costs by scheduling equipment use.
- e. Exercising control over his department's purchasing of equipment, supplies and tools.
- f. The Water Supervisor is required to complete a Heavy Equipment Inspection report prior to using such equipment, though not required to perform the inspection himself.

Although the Water Supervisor has some responsibility for work scheduling, the weekly schedule is taken from a detailed two weeks schedule prepared by the Water Supervisor's supervisor, the Utilities Manager and so does not require the level of independent judgement associated with true management functions. Similarly, while the Water Supervisor inventories parts, reviews time sheets approve overtime, job hazard analysis, which includes completing essential OSHA trenching forms as part of a project scheme, conduct or attend weekly safety meeting reports, those forms and subordinates also conduct the safety meetings.

The preponderance of the evidence supports a conclusion that although the position arguably may have some responsibility for administering or effectuating management policies, its duties do not require the employee to do more than merely participate in cooperative decision-making programs on an occasional basis. Similarly, although the Water Supervisor may be considered to be furthering the employer's policies by exercising control over his department's purchasing of equipment, supplies and tools, overtime budget and fuel costs those duties do not constitute involvement in creation of the City's or his department's budget. At his level, control is exercised under broader budgetary constraints and so, is a routine, incidental or clerical function not considered to be a management function pursuant to Section 4(N) of the Act. Likewise, performing job cost estimates, issuing emergency Public Service

Announcements, completing a Heavy Equipment Inspection report and communicating with customers.

2. **Analysis of Utilities Superintendent's Managerial Status.** The Gas Utility

Superintendent's management related duties include the following:

- a. Meeting daily with the City's Gas Manager to discuss scheduling work according to priorities set by the Gas Manager.
- b. Performing job safety analysis during the first ½ hour, then meet with the maintenance crew for 15 minutes to discuss work for the day before going to the day's job site. While on the job site he ensures that work performed by his subordinates comports with applicable City Codes.

As with the Water Supervisor position, the preponderance of the evidence supports a conclusion that although the position arguably may have some responsibility for administering or effectuating management policies its duties do not require the employee to do more than merely participate in cooperative decision-making programs on an occasional basis. While performing job safety analysis during the first ½ hour of the day and meet with the maintenance crew for 15 minutes to discuss work for the day before going to the day's job site such meetings and analysis is a routine, incidental or clerical function not considered to be a management function pursuant to Section 4(N) of the Act because while he ensures that work performed by his subordinates comports with applicable City Codes, he does not create those codes and the testimony is that his subordinates know the codes and procedures to be followed to perform their work.

3. **Analysis of Parks Supervisor Managerial Status.** The Parks Supervisor's

duties that may be considered managerial in nature include outlining the division's work schedule and completing paperwork such as approving employee time sheets, obtaining purchasing quotes and purchase order processing for the first one to two hours each day.

Although the position has some role in effectuating management policy by the foregoing duties, the position does not exercise the level of independent judgment required to be considered a manager under the Act. For example, although both the Parks Supervisor and the Public Works Director approve timesheets and overtime, it is the Director who has final approval. The work schedules shared at the Parks Supervisor's morning meeting is based on a master schedule set bi-weekly by the Director. The Parks Supervisor and his crew follow a pre-established procedure for maintaining parks daily. The preponderance of the evidence supports a conclusion that the Parks Supervisor is not exempt from bargaining as a manager. He is not primarily engaged in managerial duties demonstrating that the position exists so that the employer has someone at the worksite who is responsible for ensuring that management policies are properly developed and implemented because an employee shall not be deemed a management employee solely because the employee participates in cooperative decision-making programs on an occasional basis.

4. **Analysis of Public Facilities Supervisor Managerial Status.** The City's Public Facilities Supervisor's duties that I consider to be managerial in nature include meeting with his Department Director to determine work for the day and to perform a necessary job safety analysis based on established guidelines during the first five to ten minutes of the workday. Afterward, he goes with his subordinates performing the same work as they perform. Although it may be argued that while working alongside his subordinates, he is performing a management function by ensuring that work performed by his subordinates comports with applicable City Codes, like the Water Supervisor, he does not create those codes and his subordinates know the codes and procedures to be followed to perform their work. As with the Water Supervisor position, the preponderance of the evidence supports a conclusion that although the position arguably may have some responsibility for administering or effectuating management policies its duties do not require the employee to do more than merely participate in cooperative decision-making programs on an occasional basis. Any such duties are routine, incidental or clerical functions not considered to be a management function pursuant to Section 4(N) of the Act.

5. **Analysis of Zoning and Licensing Supervisor Managerial Status.** Duties that may possibly be construed as managerial in nature include preparing information packets for presentation to the City’s Design Review Board, Planning and Zoning Commission and Board of Adjustment. Although it may be argued that these packets represent a furtherance of the employer’s policies, the position has no role in establishing those policies – design standards, zoning regulations, etc. are all set by the governing body. Similarly, in working with local surveyors, preparing surveys concerning lot splits or setting boundaries and presenting them to the above boards and commission and presenting requests for Special Use permits, the Zoning and Licensing Supervisor is working from a strict set of regulations that requires little exercise of independent judgment to interpret. Similarly, verifying business zoning regulation and licensing, and time spent approving timesheet approval includes approving requests for time off and overtime are routine, incidental or clerical functions not considered to be a management function pursuant to Section 4(N) of the Act. Accordingly, the preponderance of the evidence supports a conclusion that although the position arguably may have some responsibility for administering or effectuating management policies its duties do not require the employee to do more than merely participate in cooperative decision-making programs on an occasional basis or to follow clearly established regulations requiring very little exercise of independent judgment so that the position is not

II. THE POSITIONS OF WATER SUPERVISOR, UTILITIES SUPERINTENDENT, PARKS SUPERVISOR, PUBLIC FACILITIES SUPERVISOR, ZONING AND LICENSING SUPERVISOR SHARE A SUFFICIENT COMMUNITY OF INTEREST WITH OTHERS IN THE EXISTING BLUE AND WHITE COLLAR BARGAINING UNIT TO CONSTITUTE AN APPROPRIATE BARGAINING UNIT UNDER THE ACT.

Concerning the Board designating an appropriate bargaining unit, NMSA 1978 Section 10-7E-13

(2020) provides in subsection A that:

“...Appropriate bargaining units shall be established 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...”

Neither party advances an argument that the propriety of the unit at issue here involves occupational group analysis. Rather, a shared community of interest analysis is called for in this case. In addition

to the foregoing Section 13 of the Act also provides that the essential factors in determining appropriate bargaining units shall include the principles of efficient administration of government, the history of collective bargaining and the assurance to public employees of the fullest freedom in exercising the rights guaranteed by the Public Employee Bargaining Act. Accordingly, it is not merely appropriate but necessary to include those factors as part of this analysis along with what are colloquially referred to as the “*Kalamazoo* factors,” adopted by the NLRB in *Kalamazoo Box Corp.*, 136 NLRB 134, and traditionally applied by this Board. See *AFSCME v. Santa Fe County*, 2-PELRB-2016, (Hearing Officer’s Report, p. 19); *AFSCME Council 18 v. Dept. of Health*, 13-PELRB-2017, (Hearing Officer’s Report, p. 13). *Kalamazoo* factors to be considered include:

- (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 *Kalamazoo* factor is conclusive but the Board undertakes an examination and balancing of all applicable factors. See *NEA-Belen*, 1 PELRB No. 2 (May 4, 1992); *AFSCME Council 18 and Dep’t. of Health*, 13-PELRB-2017,(Nov. 16, 2017); *San Juan College v. San Juan College Labor Management Board*, 2011-NMCA-117. See also *Luginbuhl v. City of Gallup*, 2013- NMCA-053, 302 P.3d 751.

A. Analysis of Proposed Bargaining Unit Members’ Method of Compensation and Employment Benefits and Hours of Work.

Upon review of Exhibits B-G I am able to find that the positions sought to be accreted shares with the existing unit that they are full-time permanent employees within various classifications with various pay grades under the City’s e Classified system. They all report their worked time as hourly, eight hours per day and 40 hours per week. All are paid bi-weekly. There is no evidence of actual pay rates and benefits for the positions at issue. However, the actual wages and benefits paid is less

important than similarity in the employees' wage ranges or pay plans, whether they are paid in a similar fashion (for example hourly) and whether they receive the same fringe benefits as part of their total compensation. In this case, all positions at issue share with the existing unit common rates and ranges of wages and fringe benefits. The Employer pays them hourly on a biweekly basis by check. Therefore, these factors weigh in favor of finding that accreting the positions at issue would not render the unit inappropriate.

B. Analysis of Proposed Bargaining Unit Members' Supervision. All positions sought to be accreted operate under their respective departmental organizational structures that include members of the existing bargaining unit and all of which culminate in authority under the City Manager. This factor also weighs in favor of finding that the proposed unit is appropriate. See *AFSCME, Council 18 v. Luna County*, 9-PELRB-2016, Hearing Officer's Report, p. 16, wherein a finding that the lieutenants at issue were subject to the same chain of command as their subordinates in the bargaining unit militated in favor of their inclusion in the unit.

C. Analysis of Proposed Bargaining Unit Members' Job Qualifications. None of the Positions at issue require education beyond High School. Although there are preferred qualifications and certification pertinent to each position beyond the minimum requirements, there is a fundamental commonality in the minimum requirements among the positions to be accreted and those in the existing unit. This factor militates in favor commonality of interest.

D. Analysis of Job Functions and Amount of Time Away From Employment Situs. There are no significant differences among the positions sought to be accreted and those in the existing unit concerning their job functions and amount of time away from the employment situs. With the exception of the Zoning and Licensing Supervisor all the positions to be accreted spend a majority of their time out of doors at various locations around the City of Las Vegas working alongside their subordinates in the bargaining unit. The Zoning and Licensing Supervisor in contrast works primarily in an office environment and is outdoors for limited periods. This difference does not

operate as a disqualifier however, because in this case the positions are being accreted into a unit of not only Blue Collar workers but White Collar workers commonly working in an office environment. This factor also weighs in favor of commonality of interest.

E. **Regularity of Contact With Other Employees.** All positions at issue have frequent contact with other employees in the bargaining unit. This factor weighs in favor of finding commonality of interest among all employees in the group.

F. **Level of Integration.** In each instance the employees to be accreted testified that in their absence most if not all of their duties may be performed by their subordinates. Those that cannot, typically are personnel-related duties over with the positions do not have full authority without their Director level approval. Occasionally one or more of the positions may assume the duties of their subordinates such as Equipment Operator. The preponderance of the evidence therefor supports a conclusion that the positions to be accreted enjoy considerable interchangeability with those they supervise. This factor weighs in favor of finding a commonality of interest.

E. **History of Collective Bargaining.** The Petitioner has a long history of collective bargaining with the City of Las Vegas and the then-current Collective Bargaining Agreement covering a unit combining both blue and white collar workers is part of the record proper. None of the positions at issue have historically been included in the existing unit, which is in the nature of an accretion petition, the very meaning of which is to bring into an existing bargaining unit positions that have not previously been included. The Petitioner spent considerable effort proving that the bargaining unit member promoted to the Zoning and Licensing Supervisor position, was allowed to remain a union member covered by the parties' CBA for some period of time during which the position supervised only one employee. Once the position supervised two employees the employee was no longer considered to be in the unit. There is nothing in that evidence to indicate that the *position* as contrasted with the *person holding that position* was ever in the bargaining unit. It is the

former, not the latter that would be a proper consideration under *Kalamazoo*. Accordingly, this factor does not weigh either in favor of, or against finding commonality of interest.

DECISION: By reason of the foregoing I conclude that accreting the Water Supervisor, Utilities Superintendent, Parks Supervisor, Public Facilities Supervisor and Zoning and Licensing Supervisor into the existing Blue and White Collar unit would not render the unit inappropriate and the recognition of this bargaining unit and its exclusive representative should be amended to reflect inclusion of those position in the bargaining unit. This decision may be reviewed by the Board if requested in accord with NMAC 11.21.2.22.

Issued, December 30, 2020.

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