BEFORE THE STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, (AFSCME) COUNCIL 18, AFL-CIO,

08-PELRB-2012

Petitioner,

v.

PELRB NO.'s 139-11 and 311-11

NEW MEXICO CORRECTIONS DEPARTMENT,

Respondent.

ORDER AND DECISION

THIS MATTER comes before the Public Employee Labor Relations Board for Hearing on Interlocutory Appeal of the Executive Director's Recommended Decision and Order of October 21, 2011. Upon a 3-0 vote at the Board's January 10, 2012 meeting;

IT IS HEREBY ORDERED that the Hearing Officer's Recommended Decision of October 21, 2011 including its Findings, Conclusions and Rationale shall be, and hereby are, adopted as the Order of the Board for the reasons set forth therein. The petition in PELRB No. 311-11, is facially adequate and there is nothing at this juncture to indicate that the Lieutenants' inclusion in the bargaining unit would render the proposed unit inappropriate. The Respondent has argued that unit Clarification is the appropriate way to proceed with this matter and so agrees with the result of the Hearing Officer's conclusion based on the finding that the group sought to be accreted is less than 10% of the number of employees in the existing unit. Accordingly their inclusion does not raise a question concerning

representation requiring an election, and the petitioner may proceed by filing a unit clarification petition. In addition as a sanction for its refusal to cooperate with the Board in the processing of this Petition by willfully refusing to provide requested information the Corrections Department shall be and hereby is estopped from further attack on the question of representation and it should be determined as the law of the case from this point forward.

IT IS FURTHER ORDERED that the Department of Corrections' Motion to Dismiss or Cure the Petition shall be and hereby is, **DISMISSED** as without merit. Although it appears the Motion was timely filed the Motion is dismissed for the other reasons outlined in the Hearing Officer's recommended Decision of October 21, 2011.

The parties are directed to meet and confer immediately on the question of whether a stipulation is possible that the employees sought to be accreted are already part of the bargaining unit. If such a stipulation is entered into, it shall be forwarded to the Executive Director and this matter closed.

If a stipulation that the employees sought to be accreted are already part of the bargaining unit is not possible, then the Respondent is directed to provide the Executive Director within seven calendar days of this letter a list of all members of the existing bargaining unit as requested previously on September 15, 2011. To the extent the Lieutenants sought to be accreted are not included in that list then the Respondent shall provide a separate list in alphabetical order showing all employees in the group sought to be accreted and their hire dates. Within the same seven day period the Respondent shall inform the executive Director of any

evidence it may have that the positions sought to be accreted should more appropriately be in a separate bargaining unit. Upon receipt of the list(s) required the Executive Director may then proceed to determine whether the requisite thirty percent (30%) of the employees in the group sought to be accreted wish to be represented by the exclusive representative as part of the existing unit by a card count.

Date: 1-22-12

Duff Westbrook, Chairman
Public Employee Labor Relations Board

BEFORE THE STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
(AFSCME) COUNCIL 18, AFL-CIO,

Petitioner,

v. **PELRB No. 311-11**

NEW MEXICO CORRECTIONS DEPARTMENT,

Respondent.

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

THIS MATTER comes before Thomas J. Griego as the designated Hearing Officer for a Hearing on the Merits held September 12, 2012 pursuant to a Supplemental Order issued by the Public Employees Labor Relations Board (PELRB) on July 10, 2012. Pursuant to that Order the issues to be decided are:

1. Whether the duties performed by the Lieutenants at issue in this case are such that they are "supervisors" excluded from collective bargaining as that term is defined by NMSA §10-7E-4(U).
2. If the positions at issue are not statutorily excluded as "supervisors" then whether 30% of the affected employees expressed interest in being represented by the Petitioner so that proceeding by the accretion pursuant to NMAC 11.21.2.38 is appropriate.

As determined at the beginning of the Hearing on the Merits pursuant to NMAC 11.21.1.22(A) a unit clarification proceeding is an exception to the rule that neither party has a burden of proof in a representation proceeding. In a unit clarification

proceeding, the party seeking to change an appropriate unit or description of such unit shall have the burden of proof and the burden of going forward with the evidence. Accordingly, the Union bears the burden of proof as to the issue of accretion by a preponderance of the evidence. *See,* NMAC 11.21.38(B) directing that a petition for accretion be processed as would a unit clarification petition.

All parties hereto were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to submit written post-hearing briefs. Both parties' closing briefs were duly considered. On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following findings and conclusions:

FINDINGS OF FACT:

1. The Employer operates 24 hours per day, seven days per week. To accommodate the hours of operation the work schedule is divided into shifts of 12 hours duration. At least one Lieutenant is assigned to each of the shifts. (Testimony of Sergio Sapien, Hector Cardenas,)
2. At each facility operated by the Department the Lieutenants report to a Captain who works during the day shift hours with the result that at least during the Swing Shift and Graveyard Shift hours Lieutenants are the highest ranking Correctional Officers working and are responsible for continuing operations of the Employer's facility during those hours. The Captain(s), in

turn, report to a Major who reports to the Deputy Warden and ultimately to the Warden of each facility. (Testimony of Sergio Sapien, Hector Cardenas.)

3. Lieutenants employed on the various shifts by the New Mexico Corrections Department (Hereinafter "Employer" or "Department") perform the following essential duties:

    a. Conduct a "hand off" briefing between shift changes for 10 – 15 minutes daily;

    b. Conduct a daily inspection of the work area including the facility perimeter the "tower", sub-armory, and control room, for safety or performance issues which takes about 20 minutes for each area.

    c. Adjust the work roster prepared for each shift by "Roster Management" to accommodate unanticipated days off or other shortages of personnel or to provide for other specified variances from the roster to accommodate security needs. Adjusting the roster consists of making changes on computer to a form prepared by administrative personnel and takes approximately 30 minutes to an hour each day.

    d. Part of the roster adjustment procedure includes making use of what is called a "bucket list" – a rotating list of employees to be mandated for overtime assignment. They also have authority to require subordinate corrections officers to work overtime at the end of their regularly scheduled shift by reference to a seniority based "overtime desired" list.

e. Lieutenants have authority to approve sick leave requests and overtime requests but may not approve annual leave except on an emergency basis.

f. Oversee Corrections Officers on "rounds" of the facility at least three times per shift taking a total of approximately 90 minutes per shift. During these rounds the inmate population is counted and the both the Lieutenants and their subordinates look for security breaches or violations of inmate rules. If one is noted, the lieutenant directs a subordinate corrections officer to correct the problem. The lieutenants do not usually physically accompany the Corrections Officers on their rounds but monitor the rounds remotely from a central control center.

g. The rounds result in a standardized form being generated by which the lieutenant verifies the count, which form is then submitted up the chain of command to a Captain.

h. Direct the work of approximately 15 – 30 subordinate corrections officers which consists of interpreting "post orders". The post orders by and large define the procedures to be followed for each work assignment. It is a rare occurrence that a situation arises on the job for which there is not an applicable post order.

i. Conduct an annual evaluation of each subordinate under his or her command which involves making entries on a designated form according to training provided by the Employer's Human Resources

Department. Given the number of subordinate employees and varying anniversary dates annual evaluations take approximately 4-5 hours per month.

j. Make assignments daily to the Response Team unless a Captain is on duty, in which case the Captain makes the assignments to the Response Team list. (Testimony of Sergio Sapien, Hector Cardenas, Jason Baca, Vistula Curry, Charles Miller, Joe Lytle,)

4. The difference between the duties of Sergeants (an acknowledged bargaining unit position) and Lieutenants is primarily found in the amount of "paperwork" that the Lieutenant is obliged to complete, compared to a Sergeant or Correctional Officer. Such "paperwork" consists of various logs, counts, rosters and reports. (Testimony of Sergio Sapien, Hector Cardenas, Jason Baca, Vistula Curry,). Completion of paperwork takes about 2 hours per day. (Vistula Curry).

5. Although Lieutenants must report rules infractions by their subordinates, they do not discipline employees; that authority is vested in the Warden of each institution aided by the Human Resources staff. The Lieutenants have no access to their subordinate's personnel files. Those records are maintained by Human Resources staff. Corrections Officers and Sergeants must also report rules infractions as Lieutenants do and reported infractions proceed up the chain of command to the Warden who has authority to discipline. (Testimony of Sergio Sapien, Hector Cardenas, Elona Cruz)

6. Whenever an infraction is reported Lieutenants make no specific recommendation for discipline. Authority to discipline employees was centralized in the Warden's position in order to avoid disparate discipline for similar offenses. The Human Resources Manager reviews all recommendations for discipline and has on occasion refused recommendations because proper procedures were not followed. (Testimony of Sergio Sapien, Hector Cardenas, Elona Cruz)
7. In the event there is an error in the count, both the corrections officer, or sergeant and the lieutenant involved are equally responsible for the error and equally subject to discipline. (Testimony of Sergio Sapien, Hector Cardenas).
8. At some point in the past lieutenants had authority to impose "informal reprimands" of their subordinates but that discretion was removed by Human Resources Manager Elona Cruz. (Testimony of Elona Cruz; Exhibit H).
9. All authority to hire and promote is vested in the Warden. (Elona Cruz).
10. Lieutenants are not routinely involved in the promotional process which is handled in accordance with the applicable CBA and/or Department policies.
11. At least 30% of the effected employees have expressed an interest in being represented by the Petitioner.

RATIONALE AND CONCLUSIONS OF LAW:

It is not disputed and has previously been found by this Board that the Department is a public employer under §10-7E-4(S) of PEBA and the Union is a labor

organization under §10-7E-4(L) of PEBA. Accordingly, the PELRB has jurisdiction to decide this matter.

I. Lieutenants Employed On The Various Shifts By The New Mexico Corrections Department Are Not Supervisors.

Legal Standard.

PEBA excludes "supervisors" from its coverage. *See* NMSA 1978 §10-7E-4(U). The term "supervisor" for our purposes is a term of art and not every function that the layman may interpret as being supervisory will satisfy the statutory requirement for supervisory status excluding someone from collective bargaining under the Public Employee Bargaining Act (PEBA). Under §4(U), a putative supervisor must satisfy a three-part test: the employee must (1) devote a majority of work time to supervisory duties; (2) customarily and regularly direct the work of two or more other employees; and (3) have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively. Moreover, even if this initial three-part test is met, the employee is not a supervisor under PEBA if any of the following questions can be answered in the affirmative: (i) the employee performs merely routine, incidental or clerical duties; (ii) the employee only occasionally assumes supervisory or directory roles; (iii) the employee performs duties which are substantially similar to those of his or her subordinates; (iv) the employee performs as merely a lead employee; or, (v) the employee merely participates in peer review or occasional employee evaluation programs. See § 4(U).

Analysis: In evaluating whether the lieutenants in this case meet the statutory definition of a "supervisor" I rely primarily on the testimony of the witnesses as to

their actual job duties performed where they vary from employer expectations, job descriptions or standard operating procedure manuals. *See, In re McKinley County Sheriff's Association Fraternal Order of Police & McKinley County*, 1 PELRB No. 15 (Dec. 22, 1995) (considering actual duties performed rather than written job descriptions or Standard Operating Procedures manuals); *In re Communications Workers of America, Local 7911 & Dona Ana County*, 1 PELRB No. 16 (January 2, 1996) (considering actual duties performed rather than written job descriptions and the employer's expectation that a position would engage in supervision while performing the work of subordinates); *In re Local 7911, Communications Workers of America & Dona Ana Deputy Sheriffs' Association, Fraternal Order of Police and Dona Ana County*, 1 PELRB No. 19 (August 1, 1996) (rejecting the significance of employer's designation of position as supervisor).

Based on the testimony of the witnesses and being generous to the employer in the estimation of time spent in duties that could even arguably be described as "supervisory" as contrasted with ministerial or administrative functions, I calculate approximately 4.25 hours on a 12-hour shift that may be considered to be supervisory. It cannot be said based on that testimony that the lieutenants at issue devote a majority amount of work time to supervisory duties.

With two exceptions, the witness testimony was consistent regarding supervisory and administrative duties performed by the lieutenants and the amount of time devoted to those duties. Captain Esteban Flores' testimony was not as reliable as other witnesses on the subject of the *current* duties of the lieutenants. Also, I do not credit the testimony of Jason Baca that 70% to 80% of his work time as a lieutenant

is spent directing or correcting the work of his subordinates, not only because his testimony is at odds with all of the other witnesses and is internally inconsistent when considered along with his testimony as to the amount of his time devoted to administrative duties, but because, if true, the competence of his subordinates would be seriously questioned. In light of the evidence regarding the existence of post orders delineating the duties and functions of each duty assignment it should give one pause before believing that the Department's correctional officers are able to correctly abide by their post orders only 20% of the time. There is no disciplinary history or other evidence presented aside from Lieutenant Baca's testimony to suggest that the need for such level of close supervision exists and so I am inclined to regard his testimony in that respect as good-natured hyperbole.

The witnesses were consistent in their testimony that post orders exist for every duty assignment at the Employer's facilities setting forth how each assignment is to be performed. The existence of and reliance upon post orders issued by the Warden of each institution is significant in that they are an indicia of the limitation if not the total absence of the lieutenants ability to exercise independent judgment. The witnesses' descriptions of what they perceived to be supervisory duties consisted primarily of interpreting the post orders for their subordinates when necessary. Of course, no set of standardized rules and procedures can anticipate every contingency and the testimony supports a conclusion that from time to time a lieutenant may be called upon to exercise independent judgment and discretion whenever a situation arises that is not covered under a post order. However, the witnesses testified that such instances rarely occur. When asked, witness Hector

Cardenas could not think of a single instance arising in his career that was not covered by a post order.

The Supreme Court in *NLRB v. Kentucky River Community Care,* 532 U.S. 706, 167 LRRM 2164 (2001) addressed the meaning of "independent judgment" and while rejecting the NLRB's categorical determination that decisions made through ordinary technical or professional judgment do not constitute the exercise of independent judgment, the Court did affirm the NLRB's discretion to determine the degree of independent judgment that an employee must utilize in order to be deemed a supervisor. The Court further recognized the existence of employer-specified standards, rules and regulations may constrain an employee's judgment to such a degree that the direction of others does not rise to the level of supervisory authority. *Id.* at 713-14. The weight of the testimony here supports a conclusion that the direction given by lieutenants to their subordinates is almost completely constrained by the post orders issued by the Warden of each facility and therefore, time spent enforcing compliance with those orders does not involve the exercise of independent judgment sufficient to constitute supervision as contemplated under PEBA. The lieutenants do have a degree of independent judgment exercised as may be necessary to close a non-mandatory post, and to impose inmate discipline but there is no evidence to indicate that the exercise of independent judgment in those areas is anything but occasional and in the case of inmate discipline, is not supervisory.

Neither do the lieutenants have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively.

With regard to discipline, lieutenants merely report instances of subordinates' deviation from policies or post orders without a recommendation of any specific level of discipline deemed to be appropriate. Any discretion that exists in the imposition of discipline resides entirely with the warden and the Department's Human Resources office. Similarly, the lieutenants play no role in the hiring or promotional process; that function resides solely with the warden and his or her Human Resources staff. The lieutenants' role in either the promotion or discipline process is limited to the annual performance evaluation of their subordinates. These evaluations are performed on a computerized standardized form prepared by Human Resources staff and are completed based on instructions and training provided by Human Resources staff. Accordingly, they are the sort of occasional peer review or evaluation program contemplated by PEBA as not being an indication of supervisory status.

It is my conclusion based on the testimony of the witnesses that the lieutenants in this case spend a significant amount of their time dealing with the roster, monitoring the count, filling out overtime paperwork, leave requests and other reports. The difference between the duties of sergeants, an acknowledged bargaining unit position, and lieutenants is primarily found in the amount of "paperwork" that the lieutenant is obliged to complete. All witnesses were more or less in agreement on that point; that the primary distinction between the duties performed by lieutenants and their subordinates is the paperwork for which they are responsible. None of these administrative functions involve the supervision or

direction of employees, nor do they involve the exercise of independent judgment because the lieutenants primarily make entries into pre-designed forms. Lieutenants do conduct daily briefings with all their subordinates of approximately 15-20 minutes duration per day at which they will sometimes provide guidance concerning Department policies, procedures, goals and objectives. They also regularly observe their subordinates by monitoring their work from a centralized control room. They also occasionally assume the incident commander or scene manager role during a "serious incident" where they oversee the operation of the entire scene or operation such as a cell extraction, and ensure adequate direction of all officers on site. But they do so in accordance with strict post orders and procedures established by the Department's upper management. This Board has long held that requiring the use of independent judgment in directing subordinates is required before such direction may be deemed supervisory under the Act. *See, Firefighters & City of Santa Fe,* I PELRB No. 6 (January 19, 1995). In accordance with that long-held principle we have the decisions rendered by this Board in *In re Communications Workers of America, Local 7911 & Doña Ana County*, 1 PELRB No. 16 (January 2, 1996) in which this Board held that County Detention Center sergeants, are lead workers, not excluded supervisors, because among other criteria their supervisory functions are incidental and occasional and, for the most part, their exercise of independent judgment and discretion is limited by reliance on such things as decision trees and the standard operating procedures manual. Similarly, McKinley County Sheriff Department sergeants do not exercise independent judgment, and therefore are not excluded from bargaining as supervisors where

they merely relay instructions from management or ensure subordinates adhere to established procedures and where the majority of time is consumed by duties of a routine, ministerial nature. *See, In re McKinley County Sheriff's Association Fraternal Order of Police & McKinley County*, 1 PELRB No. 15 (December 22, 1995).

A "supervisor" as that term as used in PEBA is to be distinguished from a "lead worker" whose "supervisory duties" are marked by the absence of the exercise of independent discretion. Among the indicia of a "lead worker" as contrasted with a true supervisor are those instances where the employee's supervisory functions "are incidental to the duties performed as a member of the work shift, such as expediting or facilitating the performance or completion of subordinate's duties or explaining tasks to new workers. *See, In re McKinley County Sheriff's Association Fraternal Order of Police & McKinley County*, 1 PELRB No. 15 (December 22, 1995). Jerry Roark, Director of Adult Prisons, testified that the primary distinguishing characteristic between work performed by lieutenants compared with their subordinates is the lieutenants' responsibilities for roster adjustments, counts verification (as contrasted with actual performance of the count) and other administrative paperwork. Thus, this is a case where much of the administrative work lieutenants engage in "is of a routine or clerical nature, such as recording attendance, or creating shift rosters rather than engaging in actually scheduling. *See, Int'l Ass 'n of Fire Fighters Local No. 2430 and Town of Silver City,* PELRB Case No. 308-07 (March 7, 2008); and *Doña Ana Deputy Sheriffs' Association, supra.* They do not routinely exercise independent judgment to affect and implement the policies and objectives of the Department. Administrative duties such as completing serious

incident reports in which the lieutenants merely compile the reports of others, or processing attendance records are not supervisory in nature. Management witnesses testified regarding the necessity of completing a "serious incident report" but as the name implies, a serious incident requiring such a report is an exception from the normal course and as argued in the Department's brief, the lieutenant merely "synthesiz[es] the report based on investigations and reports provided him or her by Corrections Officers and Sergeants.

In accordance with the foregoing I conclude that lieutenants in the Department of Corrections do not meet at least two of the three criteria required by PEBA §4(U); i.e., they do not devote a majority amount of work time to supervisory duties and they do not have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively. It is arguable whether they meet the third criterion as well, i.e. customarily and regularly directing the work of two or more other employees because of the absence of independent discretion in the direction of their subordinates except in rare circumstances.

Having reached this conclusion it is not necessary to weigh the extent to which the lieutenants' duties may be merely routine, incidental or clerical, the extent to which they assume supervisory or directory roles, perform duties which are substantially similar to those of his or her subordinates, or merely as a lead employee or the extent to which the performance evaluations they complete constitutes mere participate in peer review or occasional employee evaluation programs, because those criteria are not considered unless the initial three-part test is met.

Nevertheless, the evidence would support conclusions that the lieutenants' performance evaluations are merely participation in peer review or an occasional employee evaluation program, that they perform merely routine, incidental or clerical duties, and that they only occasionally assume supervisory or directory roles. Establishing any one of the foregoing establishes that they are not supervisors as that term is used by PEBA.

I am concerned that a decision that the lieutenants are not supervisors might be taken by some to mean that at any given facility during a shift other than the day shift where there is a captain, major, deputy warden or warden present, such facility is operating without a supervisor being present. But my concern is not so great that I can overlook the plain language of PEBA §4(U) and carve out an exception for that reason. Furthermore, I return to my earlier observation that in the context of this case the word "supervisor" is a term of art referring to the three-part test in PEBA §4(U) to be applied before a position may be excepted from coverage of the Act. It in no way implies that the lieutenants perform no supervisory duties at all or that they are not performing a vital function distinct from those performed by their subordinates and for which they receive additional compensation.

II. 30% Of The Affected Employees Expressed Interest In Being Represented By The Petitioner So That Proceeding By The Accretion Pursuant To NMAC 11.21.2.38(B) Is Appropriate.

Although NMAC 11.21.38(B) directs that a petition for accretion be processed as a unit clarification petition, it is not, strictly speaking, the same thing as a unit clarification petition. It differs in that in that a unit clarification proceeding under NMAC 11.21.37(A) requires a petitioner to show that the circumstances

surrounding the creation of an existing collective bargaining unit have changed sufficiently to warrant a change in the scope and description of that unit, or a merger or realignment of previously existing bargaining units represented by the same labor organization. On the other hand, NMAC 11.21.38(A) governing accretions permits an exclusive representative of an existing collective bargaining unit to petition for inclusion in an existing unit, employees who do not yet belong to any existing bargaining unit, without reference to changed circumstances being shown. NMAC 11.21.38(A) and (B) read together set forth the criteria for granting an accretion petition:

(1) The employees to be accreted must not yet belong to any existing bargaining unit;

(2) The employees to be accreted must share a community of interest with the employees in the existing unit;

(3) Their inclusion in the existing unit must not render that unit inappropriate;

(4) If the accretion petition is accompanied by a showing of interest by no less than 30% of the employees in the group sought to be accreted and if the number of employees in the group sought to be accreted is less than 10% of the number of employees in the existing unit, then the board shall presume that their inclusion does not raise a question concerning representation requiring an election and the petitioner may proceed under the rule governing a unit clarification petition.

(5) If the number of employees in the group sought to be accreted is greater than ten percent (10%) of the number of employees in the existing unit, the board shall presume that their inclusion raises a question concerning representation and the petitioner may proceed only by filing a petition for an election.

This Board has already determined that the lieutenant's inclusion in the existing unit would not render it inappropriate and there was no evidence introduced at the merits hearing that would alter that prior determination. See, Board Order and Decision herein entered 1-22-12. The Board also has already found that the group to be accreted is less than 10% of the number of employees in the existing unit and that their inclusion does not raise an issue of representation requiring an election. *Id.* This reading of the rules is consistent with the long-standing policy of this Board that PEBA is to be interpreted to effectuate the purpose of ensuring all covered public employees are afforded collective bargaining rights. *See, e.g., Regents of the University of New Mexico* v. *New Mexico Federation of Teachers,* 125 NM 401. (1998). It is difficult to imagine that PELRB Rules would be construed so as to forbid the subsequent accretion of non-supervisory lieutenants to an existing unit if they share a community of interest with the rest of the unit.

In addition to the foregoing it is my determination that the lieutenants share a community of interest with the existing bargaining unit under the *Kalamazoo* factors adopted by the prior PELRB decisions.[1] *See, NEA-Belen & Belen Federation of School Employees & Belen Consolidated Schools,* 1 PELRB No.2 (May 13, 1994)

The lieutenants here are subject to the same basic chain of command structure,

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[1] Community of interest shall be analyzed under the nine factors listed in *Kalamazoo Paper Box Corp.,* 136 NLRB 134 (1962), although no single community of interest factor shall be conclusive. Community of interest factors under *Kalamazoo* include: (1) differences in method of wages or compensation; (2) differences in work hours; (3) differences in employment benefits; (4) separate supervision; (5) degree of dissimilar qualifications, training and skills; (6) differences in job functions and amount of working time spent away from the employment or plant *situs*; (7) the infrequency or lack of contact with other employees; (8) the lack of integration with the work functions of other employees, or interchange with them; and (9) the history of collective bargaining.

and work rules and regulations, and they have frequent contact with sergeants and corrections officers. Although paid more, the lieutenants have the same method of compensation and work according to the same shift schedules. Although they have some different job functions, others are the same those in the bargaining unit and they spend all of their work time at the same facilities as their subordinates.

In light of my determination that the lieutenants at issue are not statutorily excluded as supervisors, application of the above criteria in this case means that I may determine the propriety of the petitioned-for unit, *if* the accretion petition is accompanied by a showing of interest by no less than 30% of the employees in the group sought to be accreted. Accordingly, the Board has ordered that I determine whether 30% of the affected employees expressed interest in being represented by the Petitioner so that proceeding by the accretion pursuant to NMAC 11.21.2.38 is appropriate.

The Employer provided three lists of employees pursuant to NMAC 11.21.2.12(B) which are part of the record in this case:

(1) A list of current Department lieutenants, (2) a list of employees the Employer asserts were agreed to be eligible for collective bargaining in 2004 and, (3) an updated version of the second list. There are 74 names on the list of current lieutenants provided by the Employer. 30% of those names would be 22 (rounded down from 22.2). Concurrently with the accretion petition the Union submitted signed and dated interest cards from 25 of the lieutenants appearing on the Employer's list. A 26th card was submitted by a lieutenant who did not appear on the Employer's list, but who was clearly a lieutenant at the time the petition was filed

and a 27th interest card was submitted by another lieutenant not appearing on the list for whom the discrepancy is not readily apparent. The two disputed cards are not material, however, because without them the Union has still shown at least 30% interest.

RECOMMENDED DECISION:

The Lieutenants employed by the Department do not meet the statutory definition of supervisors under PEBA, and are therefore are not excluded from PEBA's coverage. The lieutenants may be appropriately accreted into the existing bargaining unit. Accordingly, the instant Petition should be **GRANTED**.

APPEAL:

Either party may appeal this hearing officer's decision by filing a notice of appeal with the PELRB staff at 2929 Coors Blvd. NW in Albuquerque New Mexico 87120. Provisions for appeal are found at NMAC 11.21.3.19. An appeal must be filed within 10 work days of this opinion and otherwise comply with NMAC 11.21.3.19.

Issued this 17th day of October, 2012

Thomas J. Griego
Designated Hearing Officer
Public Employee Labor Relations Board
2929 Coors N.W., Suite 303
Albuquerque, NM 87120