

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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

Petitioner,

PELRB No. 305-15

v.

BOARD OF COUNTY COMMISSIONERS OF THE
COUNTY OF SANTA FE,

Respondent.

ORDER

THIS MATTER came before the Public Employee Labor Relations Board ("Board") at a regular meeting on February 23, 2016, to consider the *Hearing Officer's Report and Recommended Decision* ("Report"), issued on November 17, 2015. Petitioner AFSCME submitted a request for Board review on December 4, 2015. Santa Fe County filed a response brief on December 18, 2015. Santa Fe County also submitted a Notice of Partial Appeal of Hearing Officer's Report and Recommended Decision on December 4, 2015. Counsel for both AFSCME and Santa Fe County were present at the Board's meeting and presented oral arguments in support of their respective positions.

Upon a vote of 3-0, the Board adopted the Hearing Officer's findings of fact, conclusions of law, and recommended decision, and ordered as follows:

IT IS HEREBY ORDERED AFSCME's petition seeking to accrete lieutenants assigned to the housing unit as shift commanders into an existing bargaining unit at the Santa Fe Adult and Juvenile Detention Centers is **GRANTED**.

IT IS FURTHER ORDER that AFSCME's petition seeking to accrete the Booking Lieutenant and the Fire Safety Lieutenant into an existing bargaining unit at the Santa Fe Adult and Juvenile Detention Centers is **DENIED**.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Date: 3-14-16



Duff Westbrook, Chair

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

In re:

AFSCME, COUNCIL 18,
Petitioner

v.

PELRB No. 305-15

SANTA FE COUNTY,
Respondent

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

STATEMENT OF THE CASE: This matter comes before Thomas J. Griego, designated as the Hearing Officer in this case, on a Petition filed June 18, 2015 by AFSCME Council 18 seeking to accrete employees holding the rank of Lieutenant into the bargaining unit it represents at the Santa Fe Adult and Juvenile Detention Centers. The County filed the requested list of employees to be accreted and the Union identified issues to be determined on July 6, 2015. At a Status and Scheduling Conference held July 21, 2015 deadlines were set for briefing the issue of how the burden of proof was to be allocated in this case and whether to stay the proceeding pending that determination. In a letter decision issued August 18, 2015 I denied the request for a stay and allocated the burden of proof as follows:

1. With regard to the elements to be proven in an accretion petition NMAC 11.21.38(A) governing accretions does not require a petitioner to show changed circumstances. Rather, the elements to be proven in an accretion petition are:
 - a. The employees to be accreted must not yet belong to any existing bargaining unit;
 - b. The employees to be accreted must share a community of interest with the employees in the existing unit;
 - c. Their inclusion in the existing unit must not render that unit inappropriate;

- d. 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.
 - e. If the number of employees in the group sought to be accreted is greater than ten percent 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.
2. With regard to the question of whether the employees sought to be accreted are exempt from collective bargaining under one or several of the enumerated exceptions in the PEBA §13(C), establishing one or more of the statutory exceptions constitutes a complete defense to the petition and is therefore in the nature of an affirmative defense. As the party alleging an affirmative defense I allocated the burden of proof regarding any statutory exemptions to the County.

The County sought and was granted interlocutory appeal of the letter decision and it was reviewed by the Board at its September 16, 2015 meeting. The Board adopted that portion of my Letter Decision that NMAC 11.21.38(A) governing accretions does not require a petitioner to show changed circumstances and that the Union that bore the burden of proof by a preponderance of the evidence as to the above elements. The Board also upheld me in my denial of the County's request that the Hearing on the Merits in this matter be stayed pending exhaustion of further appeal. However, the Board reversed me with regard to the burden of proof as to the statutory exemptions. The Board allocated the burden of proving

the absence of a statutory exemption to the Union as part of its burden to show by a preponderance of the evidence that inclusion of the position sought to be accreted would not render the existing unit “inappropriate”. See NMAC 11.21.38(A)(c).

A hearing on the merits was held Monday, October 05, 2015. At the outset, the parties stipulated to the admission of all tendered exhibits subject to argument as to their relative relevance which I take to mean the weight that should be given each exhibit. At the conclusion of the Petitioner’s case in chief the County moved for a directed verdict. I adopt the rationale espoused in *Melnick v. State Farm Mut. Auto. Ins. Co.*, 106 N.M. 726, 729, 749 P.2d 1105, 1108 (1988) when considering a Motion for a directed verdict. Under *Melnick* a motion for directed verdict a should not be granted unless it is clear that the facts and inferences are so strongly and overwhelmingly in favor of the moving party that the trier of fact believes that reasonable people could not arrive at a contrary result.

I denied the motion for directed verdict in as much as the Union had established its prima facie case and the movant argued incorrect elements needed to establish statutory exemptions. The County thereafter, through witness testimony further developed facts favorable to its position and all parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. A post-hearing briefing schedule was set at the conclusion of the presentation of evidence and both parties timely submitted their briefs. Both briefs were duly considered. The issues to be determined are:

- A. Whether the lieutenants to be accreted share a community of interest with the employees in the existing unit, and;

- B. Whether the inclusion of the lieutenants will render the unit inappropriate. In order to determine whether including the lieutenants will render the existing unit inappropriate I must determine whether they meet the statutory definition of supervisory, managerial or confidential employees.

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 OF FACT: By stipulation set forth in the parties' Stipulated Pre-Hearing Order the following facts are established:

1. The employees to be accreted do not belong to any existing bargaining unit.
2. The number of employees proposed to be accreted in the unit is six, and the total number of employees in the existing bargaining unit is approximately 98. The number of employees in the group to be accreted is less than 10% of the existing bargaining unit.

The following additional facts are established either by witness testimony or by the exhibits entered into evidence or by taking administrative notice of relevant facts established in the Board's records:

3. The Hearing Officer takes Administrative notice of the Board's records to establish that the current bargaining unit into which the Petitioner seeks to accrete Lieutenants is comprised of the following:

All non-probationary employees in the positions of Detention Officer, Corporal, Sergeant, Booking Clerk, Teacher, Therapist, Case Manager, Senior Case Manager/Electronic Monitoring, Case Manager/Electronic Monitoring, Life Skills Worker I, Life Skills Worker II, and YDP Assistant Shift Supervisor.

See, In re: NMCPSOA v. County of Santa Fe, 70-PELRB-2012 (Oct. 24, 2012)

(approving the recommended decision to accrete the sergeants into the unit).

4. The facility where the employees at issue work consists of 4 housing units with 6 pods in each; a medical department; booking department; laundry, warehouse, kitchen and administrative area. (Testimony of Lt. Charlie Valdez; TR 23.20 – 23.30).
5. The chain of command for the facility from lowest rank to the highest is:
 - a. Cadet
 - b. Officer
 - c. Corporal
 - d. Sergeant
 - e. Lieutenant
 - f. Captain
 - g. Major
 - h. Deputy Warden
 - i. Warden
 - j. Director of Public Safety

(Testimony of Lt. Charlie Valdez; TR 23:40 – 24:01; 1:08:50 - 1:14:06.)

6. The position of Captain was a recent creation having been instituted within six months preceding the hearing on the merits. (Testimony of Lt. Charlie Valdez; TR 1:09:30 - 35).
7. There is no bargaining history relevant to this proceeding. (Testimony of Rob Trombley and Bernadette Salazar).
8. The Post Order for the shift supervisor position (Shift Commander) admitted into evidence as Exhibit A, does not take into consideration the existence of the Captains positions as it pre-dates the existence of those positions by several years and so, does not accurately reflect the duties of that position. (Testimony of Lt. Charlie Valdez; TR 1:12:09).
9. Of the six positions the Union seeks to accrete, one is a Fire Safety Lieutenant who is also in charge of the warehouse and laundry and who supervises one subordinate.

Another is a Booking Lieutenant, a position that is currently vacant. The other four Lieutenants are shift commanders with similar duties. (Testimony of Lt. Charlie Valdez; TR 23.35 - 25.15.)

10. The work schedule for the four shift commanders is divided into a day shift (6:00 am to 6:00 pm) and a night shift (6:00 pm to 6:00 am) and into “A” card (working Sunday, Monday Tuesday and every other Wednesday) and “B” card (working every other Wednesday, Thursday, Friday and Saturday) with the result that there are four shifts in any given work week. (Testimony of Lt. Charlie Valdez; TR 25.20 - 25.54.)
11. There is no significant difference in the duties performed by Lieutenants on the day shift from those on the night shift attributable to the difference in shifts. (Testimony of Lt. Charlie Valdez; TR 39:40 – 40:27.)
12. Except for those working “administrative posts” Officers, Corporals and Sergeants work the same work schedule as that described above for the shift commanders. (Testimony of Lt. Charlie Valdez; TR 26.02 - 26.34; 1:24:29.)
13. The current bargaining unit includes “Unit Sergeants” who work shifts of eight hours duration, Monday through Friday each week, as well as “Shift Sergeants” who work the same “A card” – “B card” 12-hour shift set forth in finding No. 9 above. (Testimony of Sgt. Daniel Solis; TR 1:39:45 – 1:40:08; Lt. Aaron Garcia; TR 3:50:35.)
14. Officers, Corporals, Sergeants and Lieutenants are all hourly employees. (Testimony of Lt. Charlie Valdez; TR 27.10 - 27.14; Testimony of Sgt. Daniel Solis; TR 1:40:25 – 1:40:40.)
15. The salary range for the Lieutenant position is \$18.2428 per hour to \$27.3642 per hour. (Joint Exhibit 3.)

16. Upon promotion from Sergeant, Lieutenant Valdez' fringe benefits did not change. (Testimony of Lt. Charlie Valdez; TR 28:32 – 28:42 Testimony of Sgt. Daniel Solis; TR 1:40:25 – 1:40:49.)
17. The daily duties of a Lieutenant assigned to a housing unit may be summarized as follows:
- a. 5-10 minutes prior to a shift the Lieutenant prints out a form daily uniform inspection sheet, form break roster, form sign-in sheet, form leave sheet and form post assignment roster. Printing those forms takes approximately 5 minutes. (Testimony of Lt. Charlie Valdez; TR 29:12 – 31:36).
 - b. The shift commander, who is usually a Lieutenant but who may be a Sergeant, (Testimony of Lt. Aaron Garcia; TR 4:02:13 – 4:03:21; Lt. Charlie Valdez; TR 1:06:18) conducts a 15 minute shift briefing at the beginning and end of each shift. (Testimony of Lt. Charlie Valdez; TR 31:48).
 - c. Conduct a “sharps count” as the medical unit undergoes its shift change. The sharps count takes about 45 minutes to one hour to perform and is also performed by Corporals or Sergeants. (Testimony of Lt. Charlie Valdez; TR 32:31; Lt. Aaron Garcia; TR 4:03:16).
 - d. Perform a “wake up call” (Testimony of Lt. Charlie Valdez; TR 32:36) along with Sergeants and or/Corporals, which includes a visual inspection for contraband. The “wake up call” takes 1 hour to 1½ hours to complete. (Testimony of Lt. Charlie Valdez; TR 34:43).
 - e. The Lieutenant completes a daily shift report (which includes an inmate count at both the beginning and ending of each shift) on a format provided by upper management to report any incidents. The initial report data takes

approximately 35-40 minutes to complete and is updated as the shift progresses. (Testimony of Lt. Charlie Valdez; TR 34:07).

- f. Lt. Valdez testified that during the last two hours of his shift he finalizes his shift report to include any incidents that may have occurred in the interim and gathers daily paperwork from all units to be given to the Major as a packet. "Daily paperwork" includes shake down reports, sanitation and fire safety sheets, inspection reports, utility cart inspection reports, count sheets, control inventory sheets and segregation logs already completed by subordinates. (Testimony of Lt. Charlie Valdez; TR 41:40- 42:32).
- g. Sergeants and Corporals complete shift reports in the Lieutenants' absence. (Testimony of Lt. Charlie Valdez; TR 38.29 – 38.64).
- h. Shift reports are filed by, and rounds conducted by Sergeants "quite often". (Testimony of Lt. Charlie Valdez; TR 38:38 – 39.04).
- i. The Lieutenant conducts the inmate count by matching names posted on a board of some kind with names appearing in an electronic data bank maintained in the facility's computer system. (Testimony of Lt. Aaron Garcia; TR 3:51:50 – 3:54:03.)
- j. Occasionally, discrepancies between the inmate list posted on the above-referenced board and that in the electronic data bank occur due, for example, to unlogged transportation of an inmate, which must be reconciled by the shift Lieutenant. (Testimony of Lt. Aaron Garcia; TR 3:51:50 – 3:54:03.)
- k. The Lieutenants' daily routine includes making job assignments as needed on any given shift. (Testimony of Lt. Aaron Garcia; TR 3:42:00 – 3:42:13.)

- l. Following the morning count the Lieutenants conduct “rounds” throughout the unit to which they are assigned to ensure that subordinate officers are doing their jobs, to address employee and inmate issues. Depending on what issues arise, conducting rounds takes approximately ½ hour to 2 ½ hours.
(Testimony of Lt. Charlie Valdez; TR 36:34 – 38:04; 1:03:47 - 48).
 - m. Sergeants and Corporals also perform rounds just as lieutenants do.
(Testimony of Lt. Charlie Valdez; TR 38:04 – 38:29).
18. A Shift Sergeant may perform all aspects of the Shift Lieutenants job in the Lieutenant’s absence. (Testimony of Sgt. Daniel Solis; TR 1:42:20 – 1:42:30; Testimony of Lt. Aaron Garcia; TR 3:12:40 - 3:12:52.)
19. Sergeants serve as the shift supervisor once or twice a month. (Testimony of Lt. Aaron Garcia; TR 3:12:34 – 3:13:20.)
20. A lieutenant is not responsible for any shift that is supervised by a sergeant
(Testimony of Lt. Aaron Garcia; TR 3:13:20 – 3:13:35.)
21. There are no education, training or certification requirements that are not also required for sergeants in order to qualify for the job of lieutenant. Years of experience is the primary factor used to determine when a sergeant may be promoted to lieutenant. (Testimony of Warden Mark Caldwell; TR 2:09:31 – 2:09:59.)
22. As appears from the Memorandum concerning discipline, Exhibit 2, no specific level of discipline is called for. The procedure for completing such memoranda is to not recommend a specific level of discipline but instead to find that a violation of policy occurred and that discipline is merited, leaving the specific discipline to be meted out to the discretion of the “facility administrator” meaning the Warden. (Testimony of Lt. Charlie Valdez; TR 45:50 – 46:23.)

23. After completing a discipline memorandum such as that seen in Exhibit 2, a Lieutenant submits the form to the Major who reviews it as to whether he concurs that discipline is called for and may make changes to the form; the recommendation of a specific discipline is made by the Major. (Testimony of Lt. Charlie Valdez; TR 46:50 - 57:26; Lt. Aaron Garcia, 3:15:20 – 3: 17:40.)
24. Captain Edward Roybal testified that when he was a Lieutenant his recommendations for discipline were not always followed. (TR 4:20:20-4:22:32.)
25. Major Nelson Abeyta testified that although lieutenants do not recommend the specific discipline to be meted out they will render an opinion about “what is going on with” the employee subject to discipline and will state generally whether the discipline should be more or less severe. He generally concurs with a lieutenant’s opinion. (TR 4:20:00 – 4:21:21.)
26. Other witnesses testified similarly with regard to oral recommendations not reflected on the written memorandum being made by lieutenants (Testimony of Warden Mark Caldwell; TR 2:24:26 - 2:30:30; Captain Edward Roybal; TR 4:20:20-4:22:32; Exhibit 2) and that at any stage after the Major proposes discipline, the discipline may be modified or overturned. (Testimony of Lt. Charlie Valdez; TR 46:50 57:26.)
27. Lt. Valdez testified that in his six years as a Lieutenant he has submitted hundreds of discipline memoranda such as is seen in Exhibit 2 and has never been asked by the Major to provide a specific level of discipline. (TR 6:34:15 to 6:35:19.)
28. Daniel Solis, when serving as a shift supervising sergeant, was reprimanded in writing by Warden Caldwell for recommending a specific level of discipline in a discipline memorandum. As part of the reprimand he was instructed to request only an

unspecified “appropriate disciplinary action”, using that particular phraseology.

(Testimony of Sgt. Daniel Solis; TR 6:35:35- 6:37:45.)

29. Following review by the Major the discipline is forwarded to the Warden who then contacts the Human Resources Department and awaits further direction before issuing intended discipline. (Testimony of Warden Mark Caldwell; TR 2:30:33 – 2:31:09.)

30. Generally speaking, the Human Resources Department upholds the recommendation made although there have been times when it has changed the proposed discipline. (Testimony of Bernadette Salazar, TR 5:53:30.)

31. Occasionally the Human Resources Department or the County’s legal advisors will change the intended discipline; however, most often the recommended discipline is upheld by the Human Resources Department. (Testimony of Warden Mark Caldwell; TR 2:32:02 – 2:34:06.)

32. After receiving direction from the Human Resources Department the Warden or his designee schedules a pre-disciplinary hearing before imposing the intended discipline. (Testimony of Warden Mark Caldwell; TR 2:31:09 – 11.)

33. Captain Edward Roybal testified that when he was a Lieutenant, and now as a Captain, he was and is not informed of the outcome of discipline he recommends. (TR 4:20:20-4:22:32.)

34. Sergeants as well as lieutenants fill out disciplinary forms such as is seen in Exhibit 2. (Testimony of Lt. Charlie Valdez; TR 49:00 – 49:56 Sgt. Daniel Solis; TR 1:41:13 – 1:42:05.)

35. Supervisor training is done by the Human Resources Department and such training is not limited to Lieutenants. (Testimony of Bernadette Salazar; TR 5:55:20- 5:57:02.)

36. The Human Resources Department has an active role in hiring new employees for the Detention Center. (Testimony of Bernadette Salazar; TR 5:57:50.)
37. Lt. Aaron Garcia testified that approximately 30% of the lieutenant's day shift time involves activities requiring the exercise of independent judgment. He contrasts that with Lieutenants assigned to the night shift when there are fewer ranking officers available, when he estimates 85 to 90% of the lieutenants' activities require the exercise of independent judgment. (TR 3:24:11-3:24:22.)
38. When asked more specifically about the actual duties performed, Lt. Garcia testified that the lieutenants conduct shift briefing and assign posts, which takes 15 to 30 minutes. They determine their shift's overtime needs and make those assignments. He did not testify as to an amount of time it takes to make overtime assignments. They complete a daily paperwork routine into which they have no substantive input and which takes approximately 20-30 minutes to complete. Part of their paperwork routine comprises reviewing paperwork submitted by subordinates in order to identify grammatical errors and improve legibility. That review is a joint duty of corporals and sergeants as well as the lieutenants. (TR 3:24:22 - 3:28:45.) Lieutenants spent the rest of their shifts doing "rounds", which he testified requires the exercise of independent judgment about 50-60% of the time. (TR 3:31:40.)
39. Captain Roybal testified that about 20% of the time lieutenants are engaged in completing paperwork and that only 10% of that time requires the lieutenant to exercise discretion or independent judgment. (TR 4:52:18.)
40. As an example of his exercise of independent judgement Lt. Garcia related an incident in which a grease fire broke out in the kitchen and he used a chemical extinguisher located nearby to extinguish the fire. Concerning the incident he

testified: “At that point you don’t think, you just do, you know”. (Testimony of Lt. Charlie Valdez; TR 3:35:50.)

41. Lieutenants create performance improvement plans (PIPs) for their subordinates as may be required from time to time. The Warden reviews all PIPs prepared by lieutenants and occasionally has sent them back for further development. Once approved by the Warden, the submitting Lieutenant will meet with the subordinate to discuss the evaluation. (Testimony of Warden Mark Caldwell; TR 2:35:49 - 2:37:52.)
42. An employee’s Performance Evaluation Form, an example of which was admitted into evidence as Exhibit 1, may be taken into consideration when promotion decisions are made. (Testimony of Warden Mark Caldwell; TR 2:35:49 -2:37:52; Cpt. Edward Roybal 4:46:00 – 4:47:15.)
43. Employee Performance Evaluations are conducted annually and lieutenants evaluate the Sergeants they supervise. (Testimony of Warden Mark Caldwell; TR 2:35:21.)
44. Administrative personnel for each department in the County, including its Detention Center, have authority to change a performance evaluation if training requirements have not been met. (Testimony of Bernadette Salazar; TR 6:22:43.)
45. Submitted evaluation forms are frequently changed by those in the chain of command above the lieutenants’ grade. (Testimony of Lt. Charlie Valdez; TR 52:32 – 55:50; Lt. Aaron Garcia; TR 3:38:10- 3:39:27; Cpt. Edward Roybal 4:46:00 – 4:47:15.)
46. Lieutenants do not have the authority to make hiring decisions for the detention center on behalf of the employer. (Testimony of Lt. Charlie Valdez; TR 50:21-26.)
47. The Lieutenants’ role in the hiring process is limited to participation on interview panels where they ask pre-determined sets of questions prepared by the Human

Resources Department. They then return their notes to the Human Resources Department for review. The process calls for them to rank the applicants from best to worst but they make no recommendation as to which of the applicants should be hired. (Testimony of Lt. Charlie Valdez; TR 49:50 – 52:32; Warden Mark Caldwell; TR 2:18:19 – 2:21:21; Lt. Aaron Garcia; TR 4:07:00-4:07:09; Maj. Nelson Abeyta; TR 4:28:30-4:29:35.)

48. The Lieutenants' role in the promotion process is similar to that in the hiring process: Lieutenants participate on interview panels where they ask pre-determined sets of questions prepared by the Human Resources Department, then returning their notes to the Human Resources Department for review. They are called upon to rank the applicants from best to worst but make no recommendation as to which of the applicants should be promoted. (Testimony of Lt. Charlie Valdez; TR 52:32 – 55:50); Lt. Aaron Garcia; TR 3:40:07- 3:42:00; Maj. Nelson Abeyta; 4:29:35-4:30:08.)
49. Post Orders exist for each grade or rank providing guidance for how those holding such rank is to act in the course of work. Lieutenants have no role in preparing post orders. (Testimony of Lt. Charlie Valdez; TR 58:00 – 1:00:26; 1:06:03.)
50. In addition to Post Orders for each grade or rank a separate set of post orders exists for "Shift Supervisor" regardless of the rank held by the person serving as Shift Supervisor at any given time. Post Orders do not cover every conceivable situation that may arise. (Exhibit J-4; Testimony of Lt. Charlie Valdez; TR 1:06:18; Warden Mark Caldwell; TR 2:39:04 – 2:40:32.)
51. Post Orders do not cover every "minutia" of the job, regardless of rank and a certain amount of independent judgment to perform their jobs is required of every

detention center officer regardless of rank. Testimony of Lt. Charlie Valdez; TR 1:06:30 – 1:06:58; 1:07:59).

52. A document memorializing an Annual Review of Policies and Procedures and Post Orders for the County's Adult Detention Facility, admitted into evidence as Exhibit 4, lists two Lieutenants as department heads to whom the memo is directed, inviting them to participate policy development: the Lieutenant in charge of booking (now a Captain) and the Lieutenant in charge of Fire and Safety. Some Sergeants were included on the list. (Testimony of Warden Mark Caldwell; TR 2:16:50; 3:01: 40 – 3:02:52.)
53. Other than as outlined above lieutenants have no role in developing management policies and no role in collective bargaining for the employer. (Testimony of Lt. Charlie Valdez; TR 1:00:56 – 1:01:21.)
54. Major Abeyta testified that he receives policy recommendations from lieutenants but his testimony did not include estimates of the time involved in formulated or relating such recommendations or the frequency with which they may be made. (Testimony of Major Nelson Abeyta; TR 4:36:00.)
55. Lieutenants review leave requests from their subordinates to verify that those requesting leave have accrued the amount of leave requested and to ensure that if leave is granted that there will be sufficient officers scheduled. A lieutenant's approval of leave is reviewed by the Major who may reverse the approval. (Testimony of Lt. Charlie Valdez; TR 1:00:18 - 1:00:26; Warden Mark Caldwell; TR 2:48:20 – 45. Lt. Aaron Garcia; TR 3:36:30- 3:38:13.)

56. Cpt. Edward Roybal testified that a lieutenant's imposition of a requirement that a subordinate requesting sick leave produce a doctor's note verifying the need for the leave is governed by County personnel policy. (TR 4:49:40 – 4:50:03.)
57. Part of the lieutenants' duties includes assisting subordinates to improve their job skills. (Testimony of Lt. Charlie Valdez; TR 1:03:18 – 1:03:36.)
58. Part of the Sergeants' duties includes assisting subordinates to improve their job skills. (Testimony of Lt. Charlie Valdez; TR 1:07:30 – 1:07:41.)
59. The lieutenants' duties include addressing inmate complaints, identifying safety concerns "in a moment of crisis" instruct subordinates and follow up to ensure issues are being handled "as the matter requires", all of which requires some measure of independent judgment. (Testimony of Warden Mark Caldwell; TR 2:45:30 – 2:47:48.)
60. Lieutenants determine a shift's overtime needs and when the need arises, first seeks volunteers for overtime based on a "bucket list" (seniority system). If sufficient staffing is not obtaining by recourse to the bucket list, the Lieutenant may assign mandatory overtime. (Testimony of Warden Mark Caldwell; TR 2:49:01 – 2:49:53; 3:03:06-3:04:03; Lt. Aaron Garcia; TR 4:01:20 – 4:02:16; Cpt. Edward Roybal; TR 4:50:29 - 4:50:49.)
61. Specific tasks are assigned by Lieutenants to their subordinates and Lieutenants may recommend that subordinates receive additional training. Training is usually conducted in-house on an *ad hoc* basis and instructors may be, but are not always, Lieutenants. (Testimony of Warden Mark Caldwell; TR 2:49:53- 2:51:00.)

62. Where outside training is available or requested the Lieutenants typically relay training opportunities that have been compiled by the Detention Center's Training Officer, who is a Sergeant. (Testimony of Lt. Aaron Garcia; TR 4:05:50 – 4:05:53.)
63. Warden Caldwell testified that Lieutenants may be called upon to create a policy or procedure used operationally or may meet with upper management just to receive information to be relayed to their subordinates. When asked for an example of a project where a Lieutenant had input on operational policy he pointed to a single incidence when the Fire Safety Lieutenant provided direction. The Warden acknowledged that Lieutenants usually have no authority to go forward with any operational changes. (Testimony of Warden Mark Caldwell; TR 2:55:14.)
64. Lieutenants have historically had no role in collective bargaining for the employer, and are not usually asked to participate as part of the management collective bargaining team. (Testimony of Lt. Charlie Valdez. Tr. 1:01:02 – 1:01:12.)
65. There are sergeants who currently earn more than the beginning hourly rate shown on the lieutenant's pay scale. (Testimony of Warden Mark Caldwell; TR 3:01:00 – 3:01:06.)
66. Lieutenants supervise more than two employees. (Testimony of Lt. Aaron Garcia; TR 3:09:38-3:10:56.)
67. In the event of emergency during a shift lieutenant will report either to the Major or the assigned duty officer who holds a rank above Lieutenant. Lieutenant Garcia estimated that he contacts the assigned duty officer about twice a week. (Testimony of Lt. Aaron Garcia; TR 3:1:00 – 3:12:10.)
68. Lieutenant Garcia estimated that during 90% of his work time he operates independently using his own judgment. (TR 3:12:21.) However, when asked to

outline his daily duties he testified some post assignments operate by themselves and others can't. TR 3:42:15 – 55.

69. Lieutenants may attend “a few” “supervisory meetings” that are not also attended by their subordinates e.g. discussions of job duties determined by upper management that are then relayed to their subordinates. (Testimony of Lt. Aaron Garcia; TR 3:54:30 – 3:55:30.)

70. Both lieutenants and sergeants submit “critical incident reports” but a Lieutenant has authority to “override” a sergeant’s report. Critical incidents requiring a report occur about once a week. (Testimony of Lt. Aaron Garcia; TR 3:55:40 – 3:55:50.)

71. Both lieutenants and sergeants share responsibility for managing high risk inmates to ensure safety in the facility (Testimony of Lt. Aaron Garcia; TR 3:56:00 – 3:57:17.)

72. Cpt. Edward Roybal testified that when he was a sergeant he was assigned to run a shift. (TR 5:02:40) and that Sergeants also perform all of the shift supervision duties that Lieutenants perform. (TR 5:06:56- 5:09:20.)

73. Although there are some differences between the duties shown on the job description for lieutenants and those performed by sergeants pertaining to duties that the County’s Human Resources Director believes compel a finding that lieutenants are “supervisors”, their duties are substantially the same. (Testimony of Bernadette Salazar; TR 6:15:20 – 6:18:59.)

74. There is no difference in the employment fringe benefits received by Detention Center employees based on rank. (Testimony of Bernadette Salazar; TR 6:33:22- 43.)

REASONING AND CONCLUSIONS OF LAW:

The Public Employee Labor Relations Board has subject matter jurisdiction to hear this petition and personal jurisdiction over the parties. (Stipulated in the parties' Pre Hearing Order)

Legal Standard

Under the PEBA § 13(A), this Board is charged with the duty of designating appropriate bargaining units for collective bargaining. "Appropriate bargaining units" must be established on the basis of occupational groups or "clear and identifiable communities of interest in employment terms and conditions and related personnel matter among the public employees involved". §10-7E-13(A) NMSA (1978). The unit need only be "an appropriate bargaining unit," not necessarily the "most" appropriate bargaining unit. *See NEA-Belen, supra; See also American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 610 (1991). As has been established by the Board in this case on interlocutory appeal, AFSCME bears the burden of proving: (1) That the Lieutenants it seeks to accrete do not yet belong to any existing bargaining unit; (2) That those Lieutenants share a community of interest with the employees in the existing unit; and, (3) That their inclusion in the existing unit does not render that unit "inappropriate" as that term is used in cases decided under the PEBA §13(A).

The parties have stipulated that the first element - that the Lieutenants do not belong to any existing bargaining unit - is met. With regard to whether they share a community of interest with employees in the existing unit, I conclude as follows:

I. Lieutenants Share a Community of Interest With Employees in the Existing Bargaining Unit.

To determine whether employees share a community of interest with those in an existing bargaining unit, this Board has historically applied what are colloquially referred to as the "Kalamazoo factors", adopted by the NLRB in *Kalamazoo Box Corp.*, 136 NLRB 134 (1962). *See AFSCME & Dept. of Corr.*, 2-PELRB-13, Hearing Officer's Recommended Decision at p.

17, n.1 (Oct. 17, 2012); *NEA-Belen & Belen Fed. of School Employees & Belen Consol. Schools*, 1-PELRB-2 (May 13, 1994). Those factors are: (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 factor is conclusive.¹

Of the six positions the Union seeks to accrete, one is a Fire Safety Lieutenant who is also in charge of the warehouse and laundry. Another is a Booking Lieutenant, a position that is currently vacant. The other four serve as “shift commanders” within the County’s Adult Detention Center facility and with common duties. The facility where the employees at issue work consists of four housing units with six pods in each, a medical department, a booking department, a laundry, a warehouse, kitchen and administrative area. The lieutenants assigned to a housing unit on the various shifts at issue here are all subject to the same chain of command structure with each other and with their subordinates in the bargaining unit. (See Finding No. 5). I attribute little weight to testimony claiming that a lieutenant’s contact with the Major differs from that of other designated shift supervisors of lesser rank because he or she may hear confidential information. Little weight is given because the assertion is pure speculation. No specific examples was given of any such confidential information being shared with lieutenants that is not shared with others and the preponderance of the evidence

¹ The NLRB modified the factors in *In re: Specialty Healthcare*, 357 NLRB No. 83 (2011), *enfd. sub. nom. Kindred Nursing Centers East LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). However, that modification is limited to rehabilitation centers and other non-acute health care facilities and is inapplicable here. After *Specialty Healthcare* employees at those types of facilities will no longer be subject to the “special test” formerly applicable to them. Instead, the Board will apply the same “community of interest” standard the Board has applied in other industries. However, if an *employer* contends that a proposed unit inappropriately excludes certain employees, it now will have to demonstrate that the employees it seeks to include share “an overwhelming community of interest” with the employees in the proposed unit, meaning that the employer must show that the “community of interest” factors “almost completely” overlap between the petitioned-for unit and the job classifications the employer seeks to add.

is that most times lieutenants act as mere conduits of information from the Major, Deputy Warden and Warden to subordinates.

Except for those lieutenants working “administrative posts” such as the Fire Safety Lieutenant and the Booking Lieutenant, and “Unit Sergeants” the shift supervising lieutenants share the same work schedule as bargaining unit Officers, Corporals and Sergeants working at the facility. They have the same method of compensation as their bargaining unit subordinates - they are all hourly employees subject to overtime compensation. At any point in a lieutenant’s tenure with the County his or her hourly wage rate may be higher than their subordinates in the bargaining unit. However, Sgt. Daniel Solis testified that his current hourly rate is \$23.65, which is greater than the midpoint for the lieutenants’ salary range (\$18.2428 - \$27.3642) established by Exhibit J-3. Warden Mark Caldwell also testified that there are bargaining unit Sergeants employed at the Detention Center who make more than the \$18.2428 per hour shown on the Lieutenants’ pay scale as the beginning wage for that rank. A difference in the amount of the hourly compensation rate is not a difference in the method of payment. Differences of \$1.00 to \$2.00 per hour that might possibly exist when comparing the hourly wages of one or another sergeant in the bargaining unit with one or another Lieutenant is not so significant a difference in compensation so as to compel exclusion from the bargaining unit. Lieutenants, sergeants, corporals and officers all receive the same fringe benefits. (See Finding 71).

I do not consider the fact that bargaining unit members bid for shift assignments whereas Lieutenants are assigned their shifts to be a significant difference as long as the shifts to which they bid or are assigned are the same. There is nothing on the record to suggest that the duties performed by Lieutenants dictates that shift assignment is a necessity for them in preference to bidding. Rather, shift bidding is a benefit of the bargaining unit collective

bargaining agreement that includes safeguards for adjusting the shift bid for duty assignments requiring special qualifications, training, and experience. (See Ex. J-1, p.10, Article 9 (G) and (H)). If they are included in the bargaining unit there is no reason to doubt that lieutenants will bid for shifts just as their subordinates do.

Therefore, the hours of work, method of compensation and employment benefits for lieutenants assigned to supervise a Housing Unit are all the same as those for their subordinates in the bargaining unit and those factors militate in favor of including them in the bargaining unit.

The four lieutenants assigned to supervise a housing unit spend all of their work time at the same facility as their subordinates. They have daily and near-constant contact with their subordinate bargaining unit sergeants, corporals and corrections officers throughout their shifts.

There are no qualifications for the job of lieutenant—apart from years of experience—that are not also required of sergeants. Several of the "specific duties as assigned" described in the relevant post orders for lieutenants (Ex. J-4) and sergeants (Ex. A) are identical. E.g.: "supervise staff and inmate activities to ensure compliance with Santa Fe County Adult Detention Facility Policy and Procedures"; ensure staff have performed required training; and ensure all posts, as outlined in the Master Assignment Roster, are staffed. Compare Ex. J-4, at 23, with Ex. A, at 2-3. More importantly, lieutenants and shift sergeants are largely interchangeable, as sergeants can fill in for lieutenants for the entire shift, or for specific tasks during the shift if the lieutenant is otherwise occupied. For example, sergeants and corporals perform the "sharps counts" as well as the lieutenant. Lieutenants conduct the morning "wake up" routine, but do so along with sergeants and corporals. All three ranks conduct "rounds". Sergeants can prepare the shift reports and if they observe an infraction

of the employer's rules they complete the same memorandum reporting the infraction as a lieutenant would. Shift sergeants, like lieutenants, can decide to shut down a post when an emergency transport is required. The evidence supports a conclusion that sergeants can and do perform every task a lieutenant performs whenever the lieutenant is unavailable. The role of the Lieutenants assigned to a housing unit was referred to throughout the hearing as that of a "Shift Supervisor" or "Shift Commander". However, that role is not restricted to the lieutenant rank and is fulfilled at times by bargaining unit members below that rank. Lt. Valdez testified that during his tenure with the County he had been the shift commander when he was a sergeant and when he was a corporal as well as under his current lieutenant rank. His testimony is supported by Ex. J-4, Security Post Order 11, directed to the "Shift Supervisor" without reference to that Supervisor's rank because the job can, and is, performed by sergeants as well and corporals, both included in the bargaining unit.

I give little weight to the Employer's claim that lieutenants remain ultimately responsible for their shifts and required reports regardless of whether they or their subordinates serve as a shift supervisor. Testimony asserting that claim is not credible because a lieutenant cannot reasonably be held responsible for events occurring on a shift or entries on a report of which he or she has no knowledge. There is no evidence that that a lieutenant has ever been held to such a standard. Nor do I find it credible that sergeants serve as Shift Supervisors only as a training tool because the Lieutenant is not present to train him or her in any sense of the word. A sergeant or a corporal does not assume shift supervision duties under the watchful eye of a training Lieutenant but in the absence of a Lieutenant. The employer enjoys the benefit of having a Shift Supervisor, fully vested with the authority of that assignment, in the absence of the lieutenant without any layer of additional oversight or correction that would support a conclusion that sergeants or corporals serve in that

capacity merely as a training tool. To the contrary, Lt. Alvarez testified that some sergeants need no training at all before assuming the duties of a Lieutenant. Testimony to the effect that all of the lieutenants' duties constitute planning and organizing is not credible since they plainly do not. As it appears they are largely the same duties as those done by their subordinates those duties cannot all constitute planning and organizing simply because it is a lieutenant performing them without the absurd result of an organization populated by all planners and no one actually performing the work planned.

The County argues that because promotion to the rank of Lieutenant requires four years of experience as a supervisor and sergeants have been found by this Board not to be "supervisors" under the Act, none of the sergeants qualify for promotion but for their training by a supervising lieutenant. This argument falls into the category of arguing a "false equivalence"- that is, describing a situation of logical and apparent equivalence, when in fact there is none. While the County's syllogism uses the same term -"supervisor" in both its major and minor premises, in fact it is a term with different meanings in each premise. Under the PEBA, the term "supervisor" is a term of art denoting the criteria specifically delineated under the statute for determining whether one is to be included in collective bargaining. As the term is used in the Act a finding that one is not a "supervisor" for collective bargaining purposes does not mean that one performs no supervisory duties at all nor does it mean that one may not be deemed a supervisor for other purposes, such as meeting requirements for promotion under County Personnel policies.

Exhibit J-4 is called a Security Post Order for "Shift Supervisor" - notably it is not a Post Order for "Lieutenants". This is because sometimes sergeants serve as the Shift Supervisor as well as lieutenants. One witness testified that he served as a shift supervisor when he held the rank of corporal. Pointing out differences between the Post Order for Shift Supervisors

and that for Sergeants (Ex. 4) might be more persuasive if sergeants and corporals did not also serve in the role of Shift Supervisor. Furthermore, the County simultaneously argues that Post Orders do not address every instance that may arise on a shift and then argues that differences in duties therein are dispositive. One cannot presume that duties outlined in Exhibit 4, is all that the sergeants do. That is why this decision, in accordance with Board precedent, relies more upon the testimony of what the Lieutenants and Sergeants do on a daily basis that it does Post Orders or Standard Operating Procedures. Finally, while the language in the referenced Post Orders may be different from one another, there is a remarkable similarity in what they call upon the people occupying the two positions to actually *do*. That similarity is borne out in the witness testimony. Therefore, the differences noted by the County are given little weight and where there are differences they are not so great so as to demonstrate the positions do not share common interests and working conditions.

Based on the foregoing I conclude that the lieutenants assigned to a housing unit employ the same skills and perform the same functions as their subordinates in the bargaining unit. They share a sufficient community of interest with bargaining unit members because they share similar wages, similar hours, common supervision among themselves, reporting directly to the same chain of command. That there was no evidence introduced to show that Life Skills Workers and other Youth Development programs staff, teachers, therapists or case workers or other bargaining unit workers are all within the same chain of command as the lieutenants is not persuasive. They may or they may not be within the Lieutenants' chain of command - there is no evidence either way. But there is evidence to show that the lieutenants share the same chain of command as their subordinates performing duties similar to their subordinates in the bargaining unit. That is the more important evidence and there is nothing on the

record to suggest that lieutenants are supervised any differently than is anyone else in the bargaining unit.

Similarly, there is no requirement that the union must demonstrate the complete absence of any differences between lieutenants' education, training and experience levels and those of other bargaining unit members. If that was the measure, each position would have to have its own bargaining unit. Rather, the Union's burden is to show that there exist no differences so great that including lieutenants in the unit would be inappropriate based on commonality of interests. That it has amply done, demonstrating that there is no difference between the lieutenants' education, training and experience but the passage of time. Neither is it the Union's burden to show that Lieutenants spend time interacting with each position in the bargaining unit. It is sufficient to show that they work in the same facility interacting daily and throughout the day with some (if not most) of the employees in the bargaining unit.

A. Considering the Booking and the Fire Safety Lieutenants Apart From Shift Commanders, They Also Share a Community of Interest With Employees in the Bargaining Unit.

With regard to the Booking Lieutenant and the Fire Safety Lieutenant. We know that they work an eight-hour shift, five days a week that is different than the lieutenants assigned to a housing unit. However, the difference in the work schedule by itself is not enough to exclude them from bargaining. I note that the current bargaining unit includes "Unit Sergeants" who also work shifts of eight hours duration, Monday through Friday each week. There has been practically nothing introduced into evidence as to what these two lieutenants' duties are on a daily basis, but we do know that they share similar wages and employment benefits, work at the same geographic location, work similar hours, serve under common supervision reporting directly to the same chain of command as do bargaining unit members.

Therefore, by application of the *Kalamazoo* factors, they also share a community of interest with others in the bargaining unit and are not excluded from collective bargaining on that basis.

A conclusion that the lieutenants share a community of interest with members of the existing bargaining unit does not end our inquiry however, because NMSA 1978 §10-7E-13(C) provides that the Board shall not include in an appropriate bargaining unit supervisors, managers or confidential employees. This leaves yet to be resolved the question whether the lieutenants are excluded under one or more of the statutory exemptions so that including them in the bargaining unit would render it “inappropriate”.

II. Lieutenants Assigned to Housing Units Are Not Managerial, Confidential or Supervisory Employees as Those Terms are Used in the PEBA. Therefore, They Are Not Excluded From Collective Bargaining Under NMSA 1978 §§10-7E-13(C) and 10-7E-4(G), (O) or (U).

A. Confidential Employees Exemption Analysis

As the term is used in the PEBA a "confidential employee" means a person who devotes a majority of his or her time to assisting and acting in a confidential capacity with respect to a person who formulates, determines and effectuates management policies. NMSA 1978 §10-7E-4(G). *See also, NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995). Thus, PEBA's confidential employee definition requires an analysis of (1) the duties of the employee in question and (2) the duties of the person he or she allegedly assists. *Id.* Criteria considered in the past are whether the employee:

- (a) is or could likely be on the employer's bargaining team;
- (b) is privy to the employer's labor-management policy or bargaining strategy;
- (c) 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-PELRB-2006 (May 31, 2006);

NEA & Jemez Valley Public Schools, 1 PELRB No. 10 (May 19, 1995). As contrasted with the “management employee” exception discussed below, for the employee to be deemed “confidential”, the management policies to which he or she is privy must be related to the "employer's employment, collective bargaining or labor relations activities." *CWA Local 7076 v. Worker's Comp. Admin*, 5-PELRB-09 (Apr. 6, 2009).

No witness testified, nor do any of the documents admitted into evidence establish, that the lieutenants have ever served on the employer’s bargaining team, that they are privy to the employer’s labor-management policy or bargaining strategy or that they either have access to confidential financial or other data used in bargaining or have input or involvement in the employer’s contract proposal formulation. To the contrary, Lt. Charlie Valdez testified without contradiction that he had no role in collective bargaining for the employer, and has never been asked to participate as part of the management team. Tr. 1:01:02 – 1:01:12.

Therefore, the lieutenants do not meet the definition of confidential employees by a preponderance of the evidence.

Management Employees Exemption Analysis

NMSA 1978 §10-7E-4(O) defines a "management employee" as one who “is engaged primarily in executive and management functions and is charged with the responsibility of developing, administering or effectuating management policies. An employee shall not be deemed a management employee solely because the employee participates in cooperative decision-making programs on an occasional basis”.

The first prong of the Act's test for whether an employee is a “management employee” requires in examination of whether that employee both possesses and exercises a level of authority and independent judgment sufficient to significantly affect the employer's purpose.

The second prong requires an examination of whether such employee creates, oversees or

coordinates the means and methods for achieving policy objectives and determines the extent to which policy objectives will be achieved. This second requirement means more than mechanically directing others in the name of the employer but rather, requires an employee to have meaningful authority to carry out management policy. *See, NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995).

Consistent with NLRB case law, the term “manager” unlike “confidential employee”, is read to encompass all management policies and not just those relating to labor relations. The key inquiry is whether the duties and responsibilities of the alleged management employees are such that these individuals should not be placed in a position requiring them to divide their loyalty between the employer and the union. *NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995).

The preponderance of the evidence in this case establishes that lieutenants have no effective role in developing management policies. Post Orders and policy directives are developed by the Warden, thrice removed from lieutenants on the chain of command. I ascribe little weight to testimony by the Employer’s witnesses to the effect that management relies on the lieutenants for policy formulation because the daily activities of the lieutenants as outlined herein do not support that assertion. Virtually no time at all is attributable to policy formulation. Warden Caldwell testified that lieutenants may be called upon to create a policy or procedure used operationally but when asked for examples of such policy development he could point to only a single incidence when the Fire Safety Lieutenant provided direction on a policy within the scope of his responsibilities and he acknowledged that lieutenants have no authority to go forward with any operational changes. While lieutenants may attend a few meetings with management that are not also attended by their subordinates, those meetings are to discuss job duties that are already determined by upper management that are then

related to their subordinates. In weighing the question of whether lieutenants are management employees I take into account the existence of two captains, the major and the deputy warden in the chain of command. While they may be privy from time to time to confidential information about disciplinary infractions they have investigated they do not thereby have any effective control over management policy nor does the information necessarily placed them in a position requiring them to divide their loyalty between the employer and the union. The union shares with the employer a desire to impose fair discipline for just cause. An investigator of an infraction leading to discipline will never be called upon to simultaneously serve as a representative for the employee simply because of his or her inclusion in the bargaining unit.

Witness testimony about what the lieutenants do every day, particularly in light of existing Post Orders, does not support a conclusion that they possess and exercise a level of authority and independent judgment sufficient to significantly affect the employer's purpose. On the question of lieutenants' independent judgment the County commits the fallacy of "proving too much". The County took pains to establish that Post Orders do not cover "every conceivable situation" that may arise; that they do not cover every "minutia" of the job. No set of Post Orders can, nor are they intended to, account for the universe of possibilities that exists in the realm of adult detention. The County argues, in effect, that: 1) an arbitrarily contrived model whereby Post Orders encompass all conceivable minutia of the lieutenants' duties can or should exist; 2) the reality is that SFCDC Post Orders do not resemble that model; and therefore, 3) the lieutenants exercise of independent judgment is not proscribed by Post Orders. This is not a sound argument. That the lieutenants' independent judgment is not proscribed because the pinnacle of perfect Post Orders has not been attained, it by no means follows that their exercise of independent judgment is

unfettered. The preponderance of the evidence suggests that the lieutenants exercise independent judgment is limited consisting of little more than “mechanically directing others in the name of the employer” without meaningful authority to carry out management policy. Although one lieutenant estimated that during 90% of his work time he operates independently using his own judgment, the outline of daily duties herein does not support that assertion and that same lieutenant testified that some post assignments “operate by themselves” which is inconsistent with operating on independent judgment 90% of the time. If Post Orders effectively apply only 10% of the time, I would question the necessity of such orders in the first place. Another lieutenant estimated that 85 to 90% of the Lieutenants’ activities require the exercise of independent judgment but when asked more specifically about the actual duties performed, he offered that the lieutenants conduct shift briefing and assign posts, (which takes 15 to 30 minutes) they determine their shifts’ overtime needs and make assignments; (no amount of time ascribed) ; they complete a daily paperwork routine that includes reviewing paperwork submitted by subordinates in order to identify grammatical errors and improve legibility (20-30 minutes) and spend the rest of their shifts doing “rounds”, which he testified requires the exercise of independent judgment about 50-60% of the time. When asked for an example of his exercise of independent judgement, one witness related an incident in which a grease fire broke out in the kitchen and he used a chemical extinguisher located nearby to extinguish the fire. Concerning the incident he testified: “At that point you don’t think, you just do, you know”. None of these activities suggest the exercise of independent judgment to affect the employer’s policies. I am not persuaded by testimony that the lieutenants are essential elements of the Detention Center’s desire for a “holistic” management approach because their actual duties performed do not bear out such an approach in actual practice and because any such need appears to have

been fulfilled by the recent creation of the new position of Captain having been instituted within 6 month preceding the hearing on the merits. For these reasons I conclude that the lieutenants assigned to housing units are not management employees.

Finally, I note that application of the *Kalamazoo* factor of regularity of contact with other employees does not imply that regular contact must be had with every position in the bargaining unit. It is enough that the Lieutenants have daily contact throughout their entire shift is all of their subordinates and all at the same facility. That there may be other bargaining unit employees at another of the employer's facilities in the same county with whom the Lieutenants have less contact does not militate against their inclusion on the bargaining unit.

I am not able to reach the same conclusion with regard to the Booking and the Fire Safety Lieutenants. There is scant evidence on the record as to the specific duties the lieutenants in these two positions perform. Because this Board has placed the burden of proof on the Union to show the *absence* of factors that would lead one to conclude management employee status, in the absence of more evidence as to what these two positions do on a daily basis I am compelled to conclude that the Union has not met its burden of proof with respect to those two positions.

B. Supervisory Employees Exemption Analysis

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 PEBA. PEBA §4(U), sets forth a three-part test a putative supervisor must satisfy: 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) does the employee perform merely routine, incidental or clerical duties? (ii) does the employee only occasionally assume supervisory or directory roles? (iii) does the employee perform duties which are substantially similar to those of his or her subordinates; (iv) does the employee perform as merely a lead employee? or, (v) does the employee merely participate in peer review or occasional employee evaluation programs? See §4(U).

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 and secondarily on job descriptions, Post Orders 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).

In *AFSCME v. NM Dept. of Corrections*, D-202-CV-2013-01920, (May 15, 2014), the District Court noted that PEBA's definition of supervisor is a term of art: "Although lieutenants may be 'supervising' in the ordinary sense of the word, 'supervisor' is a term of art with a specific

statutory definition that includes more than simply giving direction to subordinate employees." For this determination, the employees' actual job duties, rather than job titles or ranks is controlling. *In re: NM. Coalition of Public Safety Officers, Local 7911, CWA, AFL-CIO & Town of Bernalillo*, 1-PELRB-21 (1997). See also, *N.M. State University Police Officers Association and NM State University*, 1-PELRB-13 at 5-6 (job duties, not titles or job descriptions control). The parties do not dispute that the Shift supervising lieutenants assigned to the housing units supervise two or more employees. Consequently that element is not at issue. It does not appear, however that the lieutenants spend a majority of their work day performing tasks that meet the definition of "supervisory" as the PEBA uses that term. As appears by the Findings of Fact herein, a significant portion of the lieutenant's day is spent doing rounds (anywhere from a low of 1.15 hours to a high of six hours), doing the count (two hours), and waking up inmates and inspecting their cells (1 to 1.5 hours). The count involves the purely administrative task of verifying physical counts with what the board reports and what the electronic system records. The inmate wake up involves entering the inmates' cells, inspecting them for contraband and waking the inmate up. These do not constitute supervisory tasks. While the lieutenant does check on other employees' welfare during rounds, 80-90% of the time spent on rounds is spent dealing with inmates. Time spent dealing with inmates is not supervisory in nature notwithstanding management witness' testimony that it may sometime involve following up on tasks designated to subordinate employees. Importantly, sergeants and corporals, both bargaining unit positions perform the rounds if the lieutenant is unable to do so.

Another significant portion of the lieutenant's day is spent dealing with paperwork, either in the form of printing out the documents (20 minutes at the beginning of the shift), preparing the shift report, which records the events of the shift (35 to 45 minutes throughout the

shift), or sorting and compiling the daily reports from the units (whatever time is left from 4-6 at the end of the shift). All of this work is "merely routine, incidental or clerical duties" excluded from the definition of supervisory tasks. Lieutenants approve employee requests for leave, but their approval is limited to the administrative task of determining whether the employee has sufficient leave banked and whether there is adequate coverage if the leave is granted. The lieutenants' leave approval can be overturned by the Major. Similarly, a lieutenant's ability to assign overtime work is limited by requirements that he first seek volunteers based on a "bucket list" (seniority system). Only if sufficient staffing is not obtained by recourse to the bucket list may the Lieutenant assign mandatory overtime. Lieutenants may recommend that subordinates receive additional training but Lieutenants do not train their subordinates directly. Training is usually conducted in-house on an *ad hoc* basis and instructors may be, but are not always, lieutenants.

Where outside training is available or requested the Lieutenants typically relay training opportunities that have been compiled by the Detention Center's Training Officer, who is a Sergeant. These are all administrative functions excluded from the definition of supervisory duties under §4(U).

Warden Caldwell testified that Lieutenants may be called upon to create a policy or procedure used operationally or may meet with upper management just to receive information to be relayed to their subordinates. As stated in the prior analysis the Warden's example of a project wherein a lieutenant had input on operational policy was not persuasive. 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. 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 both the promotion and discipline process is limited to the annual performance evaluation of their subordinates and participation on interview panels. The evaluations are performed on a standardized form prepared by Human Resources staff and are completed based on instructions and training provided by Human Resources Department. Because of this structure there is no basis for the County's argument that a lieutenant recommending disciplinary action against a subordinate presents a conflict arising out of his investigatory role and his status as a bargaining unit member. Bernadette Salazar testifying on behalf of management said that was the case when a single union *officer* (contrasted with a bargaining unit member) expressed confusion over his role in one disciplinary proceeding. That event, if true, speaks more to the union officer's need for training than it does to any inherent conflict that I find does not exist. Accordingly, they are the sort of occasional peer review or evaluation program contemplated by PEBA as not being an indication of supervisory status.

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). For the reasons stated herein I conclude that the work performed by

lieutenants compared with their subordinates lies primarily in their responsibilities for roster adjustments, counts and reporting verification and other administrative paperwork. Thus, much of the work lieutenants engage in "is of a routine or clerical nature that does not rise to the level of supervisory duties. 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*.

Excluding the rounds and counts that are also performed by their subordinates I count only 1 hour and 15 minutes of the lieutenants 12 hour shift that arguably may be attributable to administrative duties that a supervisor might perform. For the reasons herein I do not conclude that they rise to the level of supervisory duties. Accordingly, I conclude that lieutenants in Santa Fe County Detention Center do not routinely exercise independent judgment to affect and implement the policies and objectives of their 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 and therefore, 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. I reach that conclusion for the following reasons:

1. When a lieutenant witnesses an infraction of the rules, he or she prepares an initial report and submits it through a captain to the major. That report, however, does not recommend any particular form of discipline. Instead it recommends merely that the employee be "held to disciplinary action as deemed appropriate" or requests "appropriate disciplinary action." It is the Major, who assesses the severity of the infraction and the employee's disciplinary history and makes a

recommendation to the warden as to what type discipline is appropriate. If the warden concurs, the discipline is then sent to the Human Resources Department for its approval. The same process is undertaken by sergeants when they observe infractions. I give little weight to testimony seeking to establish that although lieutenants do not indicate a specific level of discipline on the disciplinary memoranda they submit they do make "informal" oral recommendations to the Major regarding the level of discipline deemed appropriate. Such testimony is inconsistent with the written example of discipline admitted into evidence and is rebutted by the testimony of Sgt. Daniel Solis who was reprimanded for having made such a specific recommendation in a memorandum he submitted.

2. The preponderance of evidence supports a conclusions that performance evaluations performed by the lieutenants are merely participation in peer review or an occasional employee evaluation program. Employee Performance Evaluations are conducted annually and Lieutenants evaluate the Sergeants they supervise. But Administrative personnel for each department in the County, including its Detention Center, have authority to change a performance evaluation if training requirements have not been submitted and evaluation forms are frequently changed by those in the chain of command above the Lieutenants' grade.
3. Lieutenants to not have the authority to make hiring decisions for the detention center on behalf of the employer nor do they effectively recommend who should be hired. The Lieutenants' role is limited to participation on interview panels where they ask pre-determined sets of questions prepared by the Human Resources Department. They then return their notes to the Human Resources

Department for review. The process calls for them to rank the applicants from best to worst but they make no recommendation as to which of the applicants should be hired.

4. The Lieutenants' role in the promotion process is similar to that in the hiring process: Lieutenants participate on interview panels where they ask pre-determined sets of questions prepared by the Human Resources Department, then returning their notes to the Human Resources Department for review. They are called upon to rank the applicants from best to worst but make no recommendation as to which of the applicants should be promoted.

RECOMMENDED DECISION:

The Lieutenants share a community of interest with the employees in the bargaining unit. They do not meet the statutory definitions of confidential employees or of supervisors under PEBA, and are therefore are not excluded from PEBA's coverage on the basis of either of those two exceptions. The lieutenants assigned to a housing unit on various shifts do not meet the definition of management employees and are therefore not excluded from bargaining on that basis either. However there is insufficient evidence to determine that the Fire and Safety Lieutenant and the Booking Lieutenant are, or are not management employment and so the union has not met its burden of proving their inclusion in the unit would not render it inappropriate. Therefore, the lieutenants assigned to the housing units as shift commanders may be appropriately accreted into the existing bargaining unit because at least 30% of the lieutenants seek to be accreted and they number less than 10% of the number of employees in the existing unit.

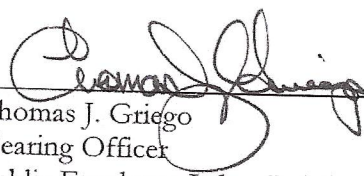
Accordingly, the Petition should be **GRANTED** as to them but **DENIED** as to the Booking Lieutenant and the Fire and Safety Lieutenant.

Although it is not an element that needed to be established by the Union in this case it appears that the recent creation of the position of Captain with administrative duties above lieutenants in the chain of command, was sufficient changed circumstances to merits consideration of this accretion petition.

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 within 10 work days of this opinion and otherwise comply with NMAC 11.21.3.19.

Issued, Tuesday, November 17, 2015.


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