

BEFORE THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD  
OF THE STATE OF NEW MEXICO

SILVER CITY PROFESSIONAL FIRE FIGHTERS,  
IAFF LOCAL 2430,

Petitioner,

vs.

TOWN OF SILVER CITY,

Respondent.

02-PELRB-08

PELRB Case No. 308-07

ORDER

THIS MATTER came before the Public Employee Labor Relations Board upon Respondent's appeal of the Hearing Examiner's Report. This case arose out of a petition filed by Petitioner seeking to include in the existing bargaining unit Captains and Lieutenants employed by the Silver City Fire Department. The Town of Silver City has opposed this inclusion, arguing that Captains and Lieutenants are not properly included in the existing bargaining unit.


It appears that the group sought to be accreted, consisting of Captains and Lieutenants, is greater than ten percent (10%) of the existing bargaining unit. Rule 11.21.2.38 (C) NMAC provides:

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 under these rules. Such a petition, in an accretion situation, must be accompanied by a showing of interest demonstrating that no less than 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.

In accordance with Rule 11.21.2.38 (C), the petition filed by Petitioner must be, and hereby is, dismissed. Petitioner may proceed by filing a petition for an election in accordance with the Public Employee Labor Relations Board's rules.



IT IS SO ORDERED.

  
MARTIN V. DOMINGUEZ  
Chairman  
Public Employee Labor Relations Board

Date: 05/02/08

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

**INTERNATIONAL ASSOCIATION OF FIRE  
FIGHTERS, LOCAL # 2430,**

**Petitioner,**

**and**

**PELRB Case No. 308-07**

**TOWN OF SILVER CITY,**

**Respondent.**

**HEARING EXAMINER'S REPORT**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

This matter comes before the Public Employee Labor Relations Board (PELRB) on a Petition for Clarification (Petition) filed on June 28, 2007 by the International Association of Fire Fighters Local 2430 (Local 2430 or Union). The Union seeks a determination by the PELRB that Captains and Lieutenants employed by the Silver City Fire Department (SCFD) are properly included in the existing, grandfathered bargaining unit of Firefighters/EMTs, and Drivers/Operators because they are not supervisors as defined under the current Public Employee Bargaining Act (PEBA), NMSA §§ 10-7E-1 *et seq.*

Two Status and Scheduling Conferences were held in this matter, one on September 5, 2007 and one on October 19, 2007, and a Representation Hearing was held on November 29-30, and December 10, 2007.

The day before the Representation Hearing, the Town of Silver City (Town) filed a Motion to Dismiss for lack of jurisdiction based on the existence of a 1975 Labor-



Management Relations Ordinance, Ordinance 582 (Ordinance), purportedly grandfathered and entitled preemptive effect § 26(A) of PEBA. The representation hearing, therefore, commenced with oral arguments and testimony related to the motion to dismiss. However, the Town withdrew its Motion to Dismiss before the representation hearing concluded, because it was unable to present witness testimony that the Local Board created by the Ordinance was currently “functional and actually operational,” *see In re AFT v. Gadsden Independent School District (Gadsden)*, Case Nos. 132-05 and 309-05 (oral ruling, Minutes, PELRB Board Meeting, August 19, 2005), meaning all three members of the Local Board have been appointed and rules have been promulgated, and the Local Board is meeting regularly to conduct business. Therefore, the Respondent’s arguments raised under the local Ordinance are not properly raised now. *See* Respondent’s Post-Hearing Brief at 10.<sup>1</sup>

Thereafter, the representation hearing resumed and after the hearing the record was held open and the Union was provided a period of time to indicate whether it desired to present additional witness testimony. The Union having declined to exercise this right, post-hearing briefs were thereafter filed upon request of the parties.

Having taken all factual and legal issues under advisement, having allowed the parties a full and fair opportunity to present their respective arguments, and having fully considered all relevant arguments and evidence in the record, the undersigned hereby finds, concludes and recommends that Captains and Lieutenants are properly included in

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<sup>1</sup> Nonetheless, the undersigned observes that the purportedly grandfathered Ordinance has a much broader definition of “supervisory” than PEBA. Under the New Mexico Supreme Court’s decision in *The Regents of the University of New Mexico v. New Mexico Federation of Teachers and American Assoc. of University Professors*, 1998 NMSC 20, 125 NM 401, any grandfathered provision that has the effect of narrowing the classification of public employee to whom PEBA grants protections is denied grandfathered status under Section 26 of PEBA. *See also City of Deming v. Deming Firefighters Local 4251*, 2007-NMCA-069, \_\_ NM \_\_.



the bargaining unit.<sup>2</sup> Nonetheless, the undersigned concludes that the instant Petition must be **DISMISSED** under PELRB Rule 11.21.2.38(B) and re-filed as a standard Petition for Election, although she recommends that the findings and conclusions resulting from the instant matter be reviewed immediately and be given preclusive effect in a subsequently filed Petition for Election.

### **ISSUES**

1. Do Captains and Lieutenants meet the current statutory definition of “supervisor”?
2. May the Petitioners proceed via the instant Petition?

### **FINDINGS OF FACT**

#### **Background facts.**

1. Local 2430 is a labor organization as defined under §4(L) of PEBA.
2. The Town of Silver City (Town) is a public employer as defined under § 4(S) of PEBA.
3. The Union currently represents a bargaining unit comprised of ten (10) regular, non-probationary Firefighters/EMTs and Drivers/Operators (individually “Firefighters” and “Drivers”) employed at the Silver City Fire Department (SCFD). The SCFD has three additional Firefighters/EMTs who are on probationary status and, therefore, are not yet in the bargaining unit.

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<sup>2</sup> Pursuant to PELRB Rule 11.21.1.22(A), the Union, as the party seeking change in an existing appropriate unit, has the burden of proof and the burden of production and proof as to whether circumstances had sufficiently changed warranting amendment of the original unit. However, under that same section, no burden of proof is assigned as to the issue of whether or not Lieutenants and Captains are supervisors under PEBA. *Id.*



4. The Petition seeks to add three (3) Captains and six (6) Lieutenants to the existing bargaining unit.
5. There is currently a collective bargaining agreement in place between the Union and the Town concerning the existing bargaining unit.
6. The firefighter bargaining unit is grandfathered under §24(A) of PEBA.

**SCFD personnel, facilities and staffing.**

7. The SCFD has two fire stations, Station 1 and Station 2, which are staffed twenty-four hours a day, from 8:00 a.m. to 8:00 a.m., by use of three rotating 24-hour long shifts, Shifts A, B and C.
8. Shifts A and B have seven personnel: one Captain; two Lieutenants; two Drivers; and two Firefighters, including probationary firefighters. (Exhibit 36.)
9. Shift C has eight personnel: one Captain; two Lieutenants; one Driver; and four Firefighters, including probationary firefighters. (Exhibit 36.)
10. The shift workers are divided between the two fire stations.
11. Station 1 is always staffed by at least one Captain, one Lieutenant, and at least one Firefighter. During Shifts A & B, Station 1 also has a Driver who is a paramedic. During Shift C, which has only one Driver, the Driver changes stations as needed but is usually assigned to work Station 1. During Shift C, Station 1 also has two Firefighters instead of one. (Muniz testimony.)
12. Station 2 is always staffed by at least a Lieutenant—usually the senior Lieutenant—and one Firefighter, and that is frequently or commonly the only personnel working at Station 2. (Medina and Muniz testimony.) There are two



exceptions to when Station 2 has only two personnel. One exception is Shift C, when Station 2 has one Lieutenant and two Firefighters. (Muniz testimony.)

13. The second exception relates to the non-paramedic Driver on each Shift, who changes stations as needed (although in the case of Shift C, as noted, this is the sole Driver and he or she usually works at Station 1). (Muniz testimony.)
14. The SCFD also includes four administrators who do not work at the fire stations or generally engage in tasks associated with fighting fires: the Chief, the Assistant Chief, the Fire Marshall and the Fire Marshall Trainee. These administrators work at the administrative offices and work a standard schedule of 8:00 a.m. to 5:00 p.m., Monday through Friday, instead of working 24-hour shifts and weekends.

**General responsibilities and conditions of employment of SCFD personnel, compared.**

15. The Fire Marshall and Fire Marshall Trainee are responsible for investigating the sources of fires, and as such do not oversee and/or are not ultimately responsible for SCFD operations or personnel.
16. The Chief is responsible for reporting to the Town Manager; preparing the SCFD's budget; ensuring fire services are provided to the Town; ensure the SCFD has and maintains the proper equipment; ensuring SCFD personnel receive the proper training; improving or maintaining, as necessary, the SCFD's insurance rating.
17. The Assistant Chief has many of the same duties and responsibilities as the Chief, fills in for the Chief when the Chief is sick. By personal aptitude and preference,



he typically assumes responsibility for preparing various administrative reports required of the SCFD.

18. Both the Chief and Assistant Chief are responsible—together with the Town Manager—for developing, administering and effectuating management policies for the SCFD. Much of the SCFD's policies exist in written protocols and procedures based on nation- and/or statewide standards, related to the handling of fire and medical emergencies. Many others are based on federal, state and/or local laws regarding personnel or human resource related subjects. Additionally, the Chief can promulgate policies verbally. In any event, the Chief relies on the Captains and Lieutenants to enforce the SCFD's policies.
19. The Chief and Assistant Chief are informally required by the City Manager to remain current in firefighter, EMT and other licensing and training because the SCFD is a small one. However, the Chief and Assistant Chief only go on calls one to two times a year, when there is a personnel shortage.
20. The Chief and Assistant Chief are required to have a bachelor's degree, while Captains, Lieutenants, Drivers and Firefighters are only required to have a high school diploma or equivalent.
21. Captains do not fill in for the Assistant Chief when the Assistant Chief is absent.
22. Captains, are required to have at least eight years in fire fighting experience and emergency operations; have been a Lieutenant for at least two years; have an Operators Class E driver's license and an EMT First Responder certification; and to. The Captain's basic job duties also include responding to fire and medical emergencies, but he or she has additional duties to supervise all shift personnel as



- needed, prepare various personnel and operations reports and records, and decide on the best method of fire extinguishment. (Exhibit 9.)
23. Lieutenants are required to have at least five years in fire fighting experience and emergency operations; have been a Driver for at least eighteen months; and have an Operators Class E driver's license and EMT-B or EMT-I certification. The Lieutenant's basic job duties also include responding to fire and medical emergencies, but he or she has additional duties to assist in the supervision of shift personnel as needed, prepare various personnel and operations reports and records, insure that apparatus and equipment are ready to respond, and assume the Captain's duties in his or her absence. (Exhibit 8.)
24. Lieutenants fill in for Captains, in the Captains' absence. The Captains and Lieutenants have the same basic responsibilities and job functions as one another. (Bencomo testimony.) Although Lieutenants are usually assigned to either Station 1 or 2, it is not uncommon for Lieutenants to change Stations. (Muniz testimony.)
25. Drivers are required to have been a firefighter for two years, and to have a New Mexico EMT-IV certification and an Operator Class E driver's license. The Driver's basic job duties are to drive and/or operate emergency vehicles, in addition to engaging in fire suppression and administering pre-hospital medical care, and to prepare reports documenting action taken on calls. (Exhibit 7.)
26. Drivers have occasionally served as "Acting Lieutenant" when the Lieutenant is out and the Driver has a lot of experience and is close to promotion. (Bencomo



and Fell testimony.) Additionally, Lieutenants typically act as Driver if responding to a call. (Fell testimony.)

27. Firefighters are required to have a current CPR certification and Class D driver's license, and be able to obtain a Operator Class E driver's license within three months of hire. They are also required to achieve their New Mexico Firefighter I and S-130/190 certification within one year of hire, and their EMT-I license within one year of hire or when class is available if hired as a EMT-Basic. The Firefighter's basic job duties are to respond to emergency and non-emergency calls related to fires or emergency medical situations, by engaging in fire suppression activities and/or by administering pre-hospital medical care pursuant to written protocol, and prepare reports documenting action taken on calls.

(Exhibit 6.)

28. Firefighters do not fill in for drivers (Fell testimony).

29. All SCFD personnel are Town employees and therefore all are subject to the same basic personnel ordinances, rules and regulations, manuals and/or policies.

30. The sole exceptions are related to pay. The Chief and Assistant Chief are salaried personnel and do not, therefore, receive overtime pay. (Brown testimony.)

Captains and Lieutenants also do not receive overtime pay, because they are "supervisors" for purposes of the Fair Labor Standards Act (FLSA) relating to the federal minimum wage and overtime laws. Thus, Captains and Lieutenants, like the Chief and Assistant Chief are on a different pay scale than Firefighters and (Brown testimony and Exhibits 8 and 9.) Additionally, bargaining unit members receive negotiated "incentive" pay increases pursuant to the collective bargaining



agreement, while non-bargaining unit members receive pay increases at the discretion of the Town.

31. All Shift employees, including officers and firefighters, must pass an annual physical fitness or agility exam. The Chief, Assistant Chief, Fire Marshall and Assistant Fire Marshall are not subject to this requirement.
32. Besides their different job requirements for greater but still related professional experience and certification, Captains and Lieutenants have also received additional training from that of Firefighters and Drivers concerning internal SCFD policies; relevant safety manuals; the Town's personnel manual; how to adequately document progressive discipline; how to properly evaluate employees; and OSHA requirements. (Brown and Sanchez testimony.) The purpose of this additional training is to make sure that Captains and Lieutenants follow and ensure their subordinate Firefighters and Drivers follow various requirements of law. (Brown testimony.)

**SCFD's paramilitary organization structure.**

33. The SCFD utilizes a "paramilitary" mode of organization and authority. This means that the Department has a definite chain-of-command in which communications and responsibility runs top-down from administrators such as the Chief and Assistant Chief, to line officers such as Captains and Lieutenants, to rank-and-file or subordinate personnel such as Firefighters and Drivers.
34. The Chief meets with or telephones Captains and Lieutenants regularly (usually on Mondays) to convey Departmental needs and objectives, which will in turn be relayed to Drivers and Firefighters by the Captains and Lieutenants. (Bencomo



- and Medina testimony). The Chief does not often hold Department-wide meetings or meet individually with firefighters, because generally information is relayed up or down through the chain-of-command. (Bencomo testimony.)
35. Similarly, the Captain calls the Station 2 Lieutenant at the start of each Shift to discuss what training and other tasks are scheduled for that day. (Medina testimony.) Thereafter, information regarding Departmental objectives and day-to-day operations is disseminated to Drivers and Firefighters at the communal breakfast hour. (Muniz testimony.)
36. The ranking officer on site at a given Station is always officially in charge of and responsible for the smooth, day-to-day operation of that Station and personnel. Similarly, the ranking officer of a Shift is ultimately responsible for the operation of the entire Shift, although immediate authority and responsibility concerning off-site operations and personnel is delegated to the ranking officer at that site. (Bencomo, Medina and Muniz testimony.)
37. Thus, the shift Captain is in charge of the SCFD in the absence of the Chief and/or Assistant Chief. The Lieutenants are in charge in the absence of the shift Captain. (Bencomo testimony.)
38. In practice, the Chief and/or Assistant Chief are rarely at Station 1 or Station 2, and the Captain is rarely at Station 2. Thus, the shift Captain is generally immediately in charge of Station 1 and also ultimately responsible for the rest of the Shift, and the Station 2 Lieutenant is generally immediately responsible for or in charge of Station 2. (Bencomo, Medina and Muniz testimony.)



39. As officers in charge of the Shift and/or Station, the Captains and Lieutenants are responsible for ensuring that: personnel properly maintain their equipment and timely respond to fire or medical emergency calls; no one sleeps in and all are out of their bunk and ready to report for duty at the required time; the required paperwork for a Shift and Station is filled out; all personnel attend training; all personnel are in uniform and conducting themselves in a professional manner; and a Shift is adequately covered with minimal overtime, through scheduling and the granting or denial of leave or shift change requests. (Bencomo, Medina and Muniz testimony.)

**Effect of the paramilitary structure on actual day-to-day job duties and functions.**

40. The “paramilitary” structure of organization, however, is largely relevant only to formal responsibility for a Shift or Station’s operations, and to coaching or disciplinary authority, and is not otherwise particularly relevant to Shift personnel’s day-to-day job duties.

41. In practice the day-to-day job duties and functions of the various Shift personnel tend to bleed into one another without clear demarcation. For instance, the day-to-day job duties and functions of Captains and Lieutenants are largely identical and interchangeable. (Bencomo and Muniz testimony.) This is particularly true as to the Station 2 Lieutenant. (Muniz testimony.) Similarly, because Lieutenants frequently act as a Driver, the day-to-day job duties and functions of Lieutenants and Drivers are also interchangeable to a large extent. (Fell testimony.) This is particularly true as to the Station 1 Lieutenant. (Muniz testimony.) Moreover, the job duties of all officers and non-officers regularly overlap (Medina and Muniz



testimony), because they work together as an integrated unit (Fell testimony), and are subject to similar although graduated experience and certification requirements. (Exhibits 6 – 9.)

42. Additionally, all Shift personnel tend to engage in the same general type of activities for most hours of the “normal” or average workday:

- a. At 8:00 a.m. Shift personnel arrive at their respective Station, and the officer in charge and the Driver meet with their respective outgoing counterparts to review what occurred on the prior shift.
- b. From 8:15 – 9:00 a.m. Station personnel have breakfast together as a Shift and plan their day, much of which is determined by consensus and the training needs of the various Shift personnel, although the ranking officer takes responsibility for coordinating the afternoon training.
- c. From 10:30 a.m. – 12:00 p.m., Station personnel engage in cleaning and equipment maintenance duties, and administrative duties. The Firefighters clean the Station public areas such as kitchen and bunk room, Drivers clean the truck bays and cleaning and performing maintenance on the trucks. Lieutenant and/or Captains clean the office area, and do various paperwork including: reviewing their subordinates reports, such as “incident reports” from emergency calls, accident reports and “after action reports” concerning unusual events occurring during the Shift; preparing their own paperwork such as daily Shift reports regarding attendance and other facility statistics and “after action reports.” Typically, at Station 1 the Lieutenant does the cleaning and the Captain does the paperwork; at



Station 2 the Lieutenant would be responsible for both. The Captain also has the additional duties of reviewing and revising standard operating procedures and personnel testing standards. Additionally, every Shift has a Scheduling Lieutenant who has initial responsibility for keeping track of attendance and late arrivals. He or she will receive and approve or disapprove requests for time off and schedule changes, although their decisions go up the chain of command and can be overridden. If the Shift is shorthanded and the Lieutenants finish their tasks early, they generally assist other personnel with their cleaning and maintenance tasks.

- d. From 10:30 a.m. – 12:00 p.m., personnel engage in classroom or in-house training, such as watching a training video or having lectures in essential skills, if cleaning and paperwork is finished before the lunch hour. At Station 1, which has greater personnel, this training usually occurs. At Station 2, which commonly has only two personnel, this training usually does not occur.
- e. From 1:00 – 4:00 p.m. personnel engage in either field training or more classes, as designated for that day. Training may be done by Station or by Shift. It may focus on reviewing basic or essential firefighter skills such as hydrant testing, hose testing or “catching hydrants” (pulling the feeder hose off the truck and attaching it from the hydrant to the pumper truck) if there are new hires on the Shift, or it may focus on preparing other personnel for upcoming promotions. In any case, either officers or non-officers may teach or lead the training.



- f. From 4:00 – 5:00 p.m. personnel have their physical fitness period, occasionally taken together such as through an organized run and when not still usually taken in proximity at the same gym;
- g. From 5:00 – 8:00 p.m. Station personnel are on personal time, in which they eat, study, watch television, read, etc., and all personnel including officers are generally engaged in the same types of personal activities; and
- h. At 8:00 p.m. Station personnel can go into the bunkroom to sleep if they desire, and all including the officers share the same bunkroom.

(Fell, Glick, Sanchez, Medina and Muniz testimony.)

43. At some point during the workday, some Shift personnel are also occasionally respond to public service calls such as to hang banners around town, replace traffic light bulbs, or provide educational demonstrations or talks to various groups. The Captain or the Chief will generally be the person to whom the request is made and who therefore directs the work be done, but this may be done by a Lieutenant as well. If the Captain or a Lieutenant receives the request, he or she does not clear first it with the Chief. (Muniz testimony.)
44. In regards to responding to emergency calls, in practice all shift personnel utilize their independent judgment in carrying out their daily job duties, much of which are dictated by written protocols and standards. Accordingly, they require little or no direct or “hands-on” instruction as to what to do during the calls, assuming a Lieutenant or Captain is present. (Fell and Sanchez testimony.)
45. In fact, however, response to emergency calls takes up a relatively small part of the workday (and, of course, a much smaller fraction of the 24-hour Shift). The



biggest part of Shift personnel's average workday involves Station cleaning, equipment maintenance, and skills training, which all shift personnel generally engage in. (Fell, Medina and Muniz testimony.)

46. A Shift employee that goes on calls regularly spends only about two to three hours in a twenty-four hour period going on such calls. (Fell testimony.) Of calls received, about 75 to 80 % are EMT or medical related, and about 75 to 90% of those medical calls are not serious or "Code" calls. (A "Code" is called when the medical alert is a serious one, such as because it involves a serious vehicle collision, or the patient has stopped breathing or is having or has had a stroke or heart attack.) (Bencomo and Fell testimony.) Although the exact number of fire calls each year is unknown, in 2005 the SCFD responded to calls for 48 smaller grass and wild fires (six of which occurred in two weeks), and it is estimated that it responded to several calls for large brush fires or structure fires in 2007.

(Bencomo testimony.)

47. Firefighters and Drivers are generally the only personnel that respond to less severe or non-"Code" medical, and small grass fire calls. Captains and Lieutenants do, however, generally attend calls for structure and larger fires and for more serious medical emergencies in which a "Code" has been called.

(Bencomo, Fell, Glick and Muniz testimony.)

48. Who ever is in charge of the scene of a medical or fire emergency call—be it Captain, Lieutenant, Driver or Firefighter—will prepare the "incident" report for that scene. He or she and anyone else responding to the call may also have to fill



- out an “after action report” concerning unusual occurrences. Both reports are reviewed by either the Lieutenant or the Captain if not prepared by one of them.
49. Who is in charge of the emergency scene is also dictated by protocols other than either the paramilitary structure or formal job descriptions. Generally, the person in charge will be the person with the most functional qualifications and experience. For instance, at a medical emergency scene, the person in charge will be the Paramedic if there is one responding to the call, even if a Lieutenant or Captain is also present. Because Lieutenants and Captains generally respond to structure and larger brush fire calls, however, they will generally be in charge or the “Incident Commander” of such fire scenes.<sup>3</sup> (Fell testimony.) Nonetheless, sometimes the first person to arrive at a fire will be the Incident Commander, and at least one Driver has in the past acted as Incident Commander. (Fell and Sanchez testimony.)
50. Whoever is the incident commander of a fire identifies the overall objectives and strategy for combating the fire. Additionally, he or she makes sure personnel are following safe tactics and methods, and ensures that no one is hurt. (Bencomo, Fell and Sanchez testimony.)
51. The most significant difference in the day-to-day duties of officers and non-officers can be summarized as follows:

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<sup>3</sup> The undersigned notes that the testimony concerning the “Incident Command System” was largely fractured and unclear. The Union’s Post-Hearing Brief adds considerable factual information and clarification that was not articulated in testimony. *See* Brief at 6-7. Any such information is not clearly supported in the record is not considered herein.



- a. Firefighters and Drivers work to keep their assigned apparatus, equipment and vehicles in a state of readiness, and are generally the personnel that respond to less severe or non-“Code” medical and small grass fire calls;
- b. Captains and Lieutenants, in contrast, ensure the Firefighters and Drivers are doing their job, review their subordinates’ incident reports, prepare various Shift reports, attend calls for structure and larger brush fires and more serious medical emergencies in which a “Code” has been called, and generally identify the overall objectives and strategy for combating a fire.

**Authority to hire, promote, discipline or terminate and frequency of doing so.**

- 52. Hiring, promotion, discipline and termination are not common or regular occurrences within the SCFD.
- 53. When they do occur, only the Town Manager, Alex Brown, has the actual authority to hire, promote, discipline or terminate SCFD employees. However, his ability to do so is constrained by both a lack of immediate personal knowledge of the employees’ job performance, and by public sector employees’ due process rights in employment. Thus, Mr. Brown relies on the recommendation of the SCFD Chief, Rudy Bencomo. (Brown testimony.)
- 54. Chief Bencomo, however, also has little direct knowledge of facts and circumstances warranting an employees’ promotion or discipline, because he does not customarily and regularly work at Station 1, Station 2 or emergency scenes. Accordingly, in making his own recommendations to the Town Manager, Chief Bencomo relies in turn almost entirely on the recommendations of his Captains



and Lieutenants, which are based on first hand observation. (Bencomo testimony, and Exhibits 5 and 5A.)

55. SCFD Captains, and Station 1 and Station 2 Lieutenants have made at least two joint recommendations for suspension without pay or termination since June 2005, which were reviewed by Chief Bencomo and approved by the Town Manager. (Brown and Bencomo testimony and Exhibits 4, 5 and 5A.) The recommendation for suspension was made by three officers and the recommendation for termination was made by five officers. (Exhibits 4, 5 and 5A.)
56. The number of promotions and new hires varies annually depending on retirement and other turnover, but normally there is only one promotion and two new hires made a year, on average. When a vacancy is filled, Captains and Lieutenants (and occasionally the Chief, Assistant Chief or a Driver as well) make joint recommendations. (Exhibits 10-14 and Bencomo testimony.) However, the recommendation process is essentially pro forma, because an applicant generally gets the position interviewed for if he or she passes the physical exam and background check, meets any other job qualifications, and gets to an interview. (Bencomo testimony.)
57. Captains, and Station 1 and Station 2 Lieutenants have issued at least twenty-two verbal or written reprimands since October 2000, which were reviewed and signed-off on by the then Chief and the Town Manager (Exhibits 1-3, 10-19, 21-25 and 27-35, and Bencomo testimony). At least one time, a Lieutenant who was acting as Captain reprimanded a bargaining unit employee, and the reprimand was



later discarded after the employee appealed to the Assistant Chief. (Glick testimony.)

58. At least one Captain and one Station 2 Lieutenant have issued written “counseling statements” to firefighters since August 2003, regarding deficient job performance. (Exhibits 20 and 26.)

59. Either Captains or Lieutenants conduct the sixth-month new hire evaluations, and the annual job performance evaluations of Firefighters and Driver/Operators (of whom there are 13 currently, with three on probationary or new hire status).

Captains conduct the annual job performance evaluations of the six Lieutenants. (Sanchez testimony and Exhibits 44 and 45.) Evaluations take up comparatively little time each year, even though they are based on observations made through out the year or six-month period. (Sanchez testimony.)

## ANALYSIS

### **I. Captains and Lieutenants do not meet the statutory definition of “supervisor.”**

#### **A. Legal Standards.**

Under PEBA, a putative supervisory position must satisfy a three-part test: the employee must (1) devote a majority amount 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 is merely a lead employee; or (v) the employee merely participates in peer review or occasional employee evaluation programs. *See, e.g., NEA-Jemez Valley and Jemez Valley Public Schools*, 1 PELRB 10, adopted and attached ALJ Report at 39-42 (1995).

As observed in *New Mexico State University Police Officers Association & New Mexico State University*, 1 PELRB 13, at 4 n. 3 (1995), the definition of “supervisor” under § 4(U) of PEBA is not the “same as or closely similar” to the definition contained in the §2(11) of the National Labor Relations Act (NLRA). As a result of these differences, the PELRB indicated that NLRA precedent is not helpful and the analysis for determining whether an employee is a supervisor under PEBA must instead track the language of PEBA, and PEBA precedent. *Id.*

Similarly, due to the fact-specific nature of representation proceedings, the PELRB has previously held that it will only consider precedent under other states’ bargaining acts when the proponent provides (1) the specific wording from the labor law of the jurisdiction from which the decision issued; (2) how the wording is similar or dissimilar to comparable wording in the New Mexico PEBA; and (3) a justification why the PELRB should find such decisions persuasive in the instant proceeding. *Santa Fe Firefighters & City of Santa Fe*, 1 PELRB No. 6 (1995). Thus, the Illinois, Missouri, Vermont, Iowa, Florida, California, North Carolina, Montana, Pennsylvania, Kentucky and federal public sector cases cited by the Petitioner and Respondent are not considered here, because they did not provide the relevant statutory language examined in those



cases, for comparison to PEBA. Accordingly, the undersigned shall analyze the record solely under the criteria established under § 4(U) of PEBA.

### **B. Application.**

#### **1. Captains and Lieutenants evaluate, discipline and effectively recommend the discipline of their subordinates.**

Here, the record clearly establishes that both Captains and Lieutenants evaluate, reprimand and counsel, and effectively recommend the higher-level discipline of Firefighters and Driver/Operators.

Credible testimony established that the Chief has little direct knowledge of facts and circumstances warranting an employees' promotion or discipline, and that he therefore relied almost entirely on the recommendations of the Captains and Lieutenants, which is based on first hand observation, in making his own recommendations to the Town Manager. In Chief Bencomo's words, the Captains and Lieutenants are his "eyes and ears," and they are expected to use their independent judgment in initiating or recommending discipline. The Chief only signs off on reprimands, which are lower level disciplinary action, to indicate to the Town Manager that the Chief is aware of the discipline. As for recommendations for more serious discipline, such as suspensions or terminations, the Chief and the Town Manager review the recommendation carefully to ascertain that it is facially warranted, but they do not perform an independent investigation of the facts.

In only one case has Chief Bencomo failed to follow the Captains' and/or Lieutenants' recommendation. Additionally, in only one case has he initiated discipline as Chief, and then it was for direct insubordination that he personally observed. Finally, in only one case has the Mr. Brown, the Town Manager, sent a recommendation back to



the initiating Captain or Lieutenant for reconsideration, and that was because the Town Manager had relevant information from the personnel file that could and did cause the initiating officer to change his or her recommendation.

Captains and Lieutenants also regularly evaluate subordinates once a year (or in six month intervals for new hires). Moreover, while their hiring interviews are pro forma, as found above, their evaluations of subordinates will be relevant to subordinates' promotions. *See, e.g., In re Communications Workers of America, Local 7911 & Dona Ana County*, 1 PELRB No. 16 (1996) ("Dona Ana County Detention Center"), attached and affirmed ALJ Report at 27 (that "[a]lthough evaluations play only a part in a decision whether to promote an individual," because "an individual must also be qualified for the position and successfully interviewed for the positions, evaluations are considered in the decision whether to promote someone").

Under this record, it is clear that the Captains' and Lieutenants' role in disciplining and evaluating employees and effectively recommending discipline such as suspensions and terminations go well beyond being "routine, incidental or clerical duties." Nor can the Captains and Lieutenants be said, under this record, to "merely participate[] in peer review or occasional employee evaluation programs." Moreover, the PELRB has recognized that evaluating, disciplining and effectively recommending the discipline of fellow bargaining units employees represents a potential conflict of interest where a "supervisor who directs subordinates has significant authority over terms and conditions of employment, that is, matters within the scope of union representation." *See Dona Ana County Detention Center*, attached and affirmed ALJ Report at 24.



However, Captains and Lieutenants fail to meet all the other PEBA criteria for “supervisor” and this conflict alone is not sufficient to exempt an employee from PEBA’s coverage when other criteria of “supervisor” are not met. *Id.*, Board Order at 9, 13 and ALJ Report at 28, 31 (concluding that Detention Center sergeants were not supervisors under PEBA, notwithstanding their having some supervisory duties related to evaluation, discipline, and generally overseeing the work of subordinates).

**2. Captains and Lieutenants do not customarily and regularly direct the work of two or more employees.**

Addressing the easiest issue first, credible testimony established by a preponderance that Lieutenants are not customarily and regularly in charge of two or more other employees, even assuming that being in charge of a Shift constitutes “directing” the work of the Firefighters and Drivers, as required under PEBA.

According to the Merriam-Webster Dictionary, “customarily” means “commonly” or “frequently” practiced or observed. “Regularly” means “on a regular basis or at regular intervals,” meaning in turn “recurring at fixed, uniform, or normal intervals.” As noted, Lieutenants are only in charge in the absence of the Captain and the Captain is generally at Station 1. Therefore, although it commonly occurs, the Station 1 Lieutenant is not “regularly” in charge of two or more employees. Similarly, Station 2 frequently has only two personnel assigned to it during a given Shift. Therefore, although it commonly occurs, the Station 2 Lieutenant is also not “regularly” in charge of two or more employee.

The undersigned observes that Chief Bencomo testified that both Stations were staffed with four personnel on each shift. However, comparing his testimony to Exhibit 36, the actual SCFD Employee Roster, it is clear that Chief Bencomo was only testifying



in general terms, since neither Shift A nor B have eight personnel, but rather only seven. Because the Chief was testifying in general terms, the undersigned credits the testimony of Captain Muniz regarding the specific assignments found above.

Second, the record does not establish that either Captains or Lieutenants customarily and regularly “direct the work” of their subordinates. According to the Merriam-Webster Dictionary, “direct” means “to regulate the activities or course of” or “to carry out the organizing” and “energizing,” as in to *direct* a project; or to “dominate and determine the course of” or “train and lead performances of,” as in to *direct* a movie. Here, all witnesses uniformly testified that all ranks of SCFD personnel rely on their independent judgment and known, written protocols in performing their job duties, and perform their job duties largely without instruction.

According to the uniform and undisputed testimony, at most Captains and Lieutenants (a) ensure Firefighters and Drivers are doing their jobs by reprimanding, coaching or recommending other discipline if they do not meet performance standards; and (b) at several fire scenes a year, determine the overall objectives and strategy for fighting the fire, which subordinates implement according to industry standards and without the need for individualized instruction or direction. The undersigned concludes that these two roles alone do not constitute customarily and regularly “directing the work” of subordinates as required under PEBA. *Cf. In re McKinley County Sheriff's Association Fraternal Order of Police & McKinley County*, 1 PELRB No. 15, 10-11 (1995) (that “where an employee is merely relaying instruction from a supervisor or ensuring that subordinates are adhering to established procedures, that individual is not a supervisor under the Act”), *Dona Ana County Detention Center*, ALJ Report at 24-25



(distinguishing evaluations based on professional norms and standards, from those that implement the employer's own policies and are therefore done "in the interest of the employer" and based on the evaluator's independent judgment, as required under PEBA), and *Jemez Valley Public Schools*, ALJ Report at 39-42 (that a maintenance supervisor who did not have to directly tell subordinate custodians what to do because they knew what needed to be done and completed their work without instruction from him was not a supervisor under PEBA).

**3. Captains and Lieutenants' do not devote a majority amount of work time to supervisory duties, and instead perform substantially the same duties as their subordinates.<sup>4</sup>**

Admittedly, Captains and Lieutenants—who, it is undisputed, do essentially the same jobs and have essentially the same functions as one another— are always expected to serve in a supervisory role because they are always charged with the duty of ensuring Firefighters and Drivers are doing their job and meeting the standards required of them. Nonetheless, testimony clearly establishes that they do not spend a majority of their work time in actual supervisory duties, and instead perform substantially the same duties as their subordinates. See *Dona Ana County Detention Center*, ALJ Report at 10 (that the sergeants' general "oversight function" of "ensuring that the detention officers are doing their jobs' ... does not overcome the fact that they perform the same [] duties ... side by side, with their subordinates").

First, as discussed in the preceding section, the Firefighters and Drivers require little or no "direction," and in any event, as found above, Captains and Lieutenants do not

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<sup>4</sup> See *Dona Ana County Detention Center*, ALJ Report at 28 (that "the overlap between these two elements of the supervisory definition suggests analyzing them at the same time is more helpful than attempting to examine them separately).



respond to most calls. In particular, as found above, there were only several large brush or structure fires in 2007, which a Captain and Lieutenant would normally attend.

Second, although the Captains' and Lieutenants' role in disciplining and evaluating employees and effectively recommending discipline such as suspensions and terminations is supervisory under PEBA, relatively little time is spent on such functions. Based on the documentary evidence provided, the average annual number of personnel actions or effective recommendations to be performed by Captains or Lieutenants is approximated as follows: ten (10) annual non-probationary Driver or Firefighter evaluations; six (6) annual Lieutenant evaluations; six (6) six-month evaluations for the three probationary employees; one recommendation for suspension or termination; and about three to four (3-4) reprimands or written counseling statements; and one termination or suspension, which is recommended by multiple Captains and Lieutenants. Thus, there are up to approximately 19 to 20 instances a year in which one of the three Captains or six Lieutenant will reprimand, counsel or otherwise evaluate an employee other than a Lieutenant in writing, or about two to three (2-3) instances per Captain or Lieutenant per year. Captains have the additional duty of annually evaluating Lieutenants, for an additional two (2) instances of evaluations per Captain per year, and for a total of up to four to five (4-5) instances per Captain per year. In the case of recommendations, three to five of the nine Captains and Lieutenant have made such a recommendation a year, on average.

Third, much of the paperwork Captains and Lieutenants engage in is of a routine or clerical nature, such as recording attendance, and doing their own administrative paperwork rather than reviewing that of their subordinates, and little time is spent on



evaluations, reprimands or recommending other discipline. *See Dona Ana County Detention Center*, Board Order at 9 and ALJ Report at 29 (that the sergeants' performing their own administrative paperwork is not a supervisory duty, like performing evaluations and reviewing subordinates' paperwork); and *Dona Ana Deputy Sheriffs' Association, Fraternal Order of Police and Dona Ana County*, 1 PELRB No. 19 at 9 (1996) ("Dona Ana County Sheriffs' Association") (that creating a shift roster and recording attendance are not supervisory duties, like reviewing subordinates' paperwork or actually scheduling work).

Finally, the majority of Captains and Lieutenants' work time (and the vast majority of their 24-hour Shift) is spent performing duties that are substantially similar to those of their subordinates. In the case of Firefighters' and Drivers' typical day, their unique job function is the two to three Shift hours spent responding to non-code medical calls. In the case of Captains' and Lieutenants' typical day, their unique job function is the up to three hours spent on cleaning the administrative office, and filling out and reviewing paperwork. That paperwork activity includes both routine, administrative paperwork, such as creating attendance and other statistical reports, and supervisory paperwork, such as scheduling tasks, reviewing subordinates' incident reports regarding emergency calls, and evaluating employees' job performance. As found above, evaluations and disciplinary actions are rare, and emergency calls constitute only several hours of each shift. Thus, a substantial portion of officers' time from 9:00 a.m. to noon is spent cleaning the offices or on routine or non-supervisory paperwork, which are substantially similar to tasks of the Drivers and Firefighters. Aside from the functions unique to each group, Captains, Lieutenants, Drivers and Firefighters spend the bulk of



their work time engaged in the substantially similar activities of cleaning the station, maintaining equipment, and engaging in training.

Chief Bencomo testified that Captains and Lieutenants are expected to act in a supervisory role during the entire 24-hour shift, to use independent judgment, to advise regarding the best fire fighting tactics and strategies, and to follow up behind Firefighters and Drivers to make sure they are doing their job and get counseled or reprimanded if they do not do their job. This expectation is reflected in their job descriptions. (Exhibits 8 and 9.) Similarly, Captain Muniz testified that he was a supervisor for “24 hours.” However, in the past the Board specifically rejected the probative value of testimony that police sergeants were “expected to supervise 100% of the time.” *See New Mexico State University*, Board Order at 6, n. 4. As the PELRB noted in *Dona Ana County Detention Center*, an employer’s “expectations” that officers will be responsible for supervising lower ranked employees even when they are performing the work of subordinates are not relevant under the PEBA definition of “supervisor.” PEBA requires consideration of duties actually performed, while “expectations” may not surface or materialize. *Id.* at 12. For the same reason, job descriptions are not dispositive under PEBA, only actual job duties. *Dona Ana County Detention Center* at 12, and *McKinley County Sheriff’s Association* at 7-8 and n. 10.

In one earlier PELRB case, an employee has been held to be an excluded supervisor under PEBA because—like Lieutenants and Captains here—he or she was responsible for the “overall supervision” of the communications personnel and their scheduling and proficiency training. In that case, however, the Board specifically noted that there was no evidence presented that either the putative supervisor did not devote a



substantial amount of work time to supervisory duties, or that he performed substantially the same duties as his subordinates. *See New Mexico State University, supra*, ALJ Report at 12-13 (regarding a police telecommunicator supervisor). Here, as discussed above, there is ample evidence of both factors.

#### **4. Conclusion.**

Based on the foregoing, the SCFD Captains and Lieutenants are more accurately characterized as “lead employees” under PEBA, rather than as true supervisors, even though they may be supervisors for other purposes, such as under FLSA, and even though they have some supervisory duties related to discipline, evaluations and generally overseeing the job performance of others. They are nonetheless lead employees under PEBA because they do not customarily and regularly direct the work of their subordinates; they do not devote a majority of their work time to other supervisory duties; and they perform substantially the same job duties as their subordinates.

In so finding and concluding, the undersigned explicitly rejects the Town’s argument that “absent the supervision of the Captains and Lieutenants, all other Fire Department employees would have no supervision” and this “could result in claims of liability against the Town ... under both state and federal law.” *See Respondent’s Post-Hearing Brief* at 1. As the PELRB observed in *Dona Ana County Detention Center*, the determination that personnel having some supervisory duties are nonetheless not “supervisors“ for purposes of PEBA “does not result in lack of supervision at the facility...” That is so “because these positions do have supervisory duties and responsibilities, just not enough compared to their overall actual day-to-day duties to meet the statutory definition for exclusion under PEBA.” *Id.*, ALJ Report at 18.



In so concluding, the undersigned also rejects the Respondent's implicit argument that Captains and Lieutenants are supervisors because they have been designated as such by the Town. *See, e.g.*, Respondent's Post-Hearing Brief at 4 (that "[i]ndividuals who are not supervisors are not eligible to sit" on interdepartmental disciplinary panels, while SCFD Captains and Lieutenants have sat on such panels). The PELRB has repeatedly rejected this argument in the past. Not only is the argument tautological, but it would enable an employer, by labeling positions as supervisory, to exclude whole classes or groups of employees from the Act's coverage, without regard to statutory definitions and the Board's role in adjudicating unit determination issues. *See Dona Ana Deputy Sheriffs' Association* at 10; *see also Dona Ana County Detention Center*, Board Order at 12, and *County of Santa Fe & AFSCME*, 1 PELRB No. 1, 34 (1993).

**II. The Union cannot proceed via Petition for Clarification-Accretion because a question concerning representation is deemed to exist.**

As noted, the Instant Petition was filed as a Petition for Clarification. PEBA's clarification rule requires a sufficient change in circumstances surrounding the creation of the original bargaining unit to warrant a change in the scope and description of the bargaining unit. *See* PELRB Rule 11.21.2.37(A). It also excludes grandfathered bargaining units from its application. *Id.* (allowing for unit clarification as warranted, "[e]xcept as provided in Section 24(A)"); *see also Santa Fe Police Officers Association and City of Santa Fe*, PELRB Case No. 325-07 (May 30, 2007 Hearing Examiner Decision at 3-4). Accordingly, the status conferences initially raised two issues besides whether Captains and Lieutenants met the statutory definition of supervisor.

The first issue was whether the change in the definition of "supervisor" from the former PEBA (hereinafter "PEBA I"), NMSA 10-7D-1 *et seq.*, to the current PEBA



(hereinafter “PEBA II”), NMSA 10-7E-1 *et seq.*, was a sufficient change in circumstances to warrant clarification. From PEBA I to present PEBA II, the amount of time to be devoted to supervisory duties changed from “a substantial amount of work time” to “a majority of work time.” *Compare* §10-7D-4(S) and §10-7E-4(U) (emphases added). This change is sufficient to warrant a change in the bargaining unit’s scope and description, if warranted under the new statutory definition.

The second issue was whether the grandfathered Firefighter bargaining unit could be clarified as requested under PELRB Rule 11.21.2.37(A), assuming the required change in circumstances. Notwithstanding the language of the rule, it is difficult to imagine that PELRB Rules would forbid the subsequent accretion of non-supervisory firefighters to a grandfathered unit if they shared a community of interest with the rest of the firefighters and were only excluded by operation of a “supervisor” definition that is no longer effective. *See, e.g., Regents of the University of New Mexico v. New Mexico Federation of Teachers*, 1998 NMSC 20, ¶ 43 (that PEBA is to be interpreted to effectuate the purpose of ensuring all covered public employees are afforded PEBA collective bargaining rights).

However, now that the representation hearing has concluded, it has become clear that there is a third issue, analysis of which is dispositive to this Petition and also sheds further light on the second issue. Specifically, although the Petition is styled as one for clarification, it is also a petition for accretion because it seeks to “add new employees to an existing bargaining unit.” *See Teamsters National United v. NLRB*, Case Nos. 91-1314 and 91-1317 (D.C. Cir. Mar. 25, 1994), 1994.CDC.0000130 <<http://www>.



versuslaw.com>; *see also* PELRB Rule 11.21.2.38(B) (that accretions are sought “by filing a unit clarification petition”).

PELRB Rule 11.21.2.38 authorizes accretion when the group to be accreted shares “a community of interest with the employees in the existing unit.” Based on the findings above, Captains and Lieutenants do share a community of interest with Firefighters and Drivers. In particular, they all: work and live closely together, work the same hours, are subject to the same personnel laws and policies other than overtime requirements and incentive raises under the existing CBA, perform much the same work and in the same location, work together in as an integrated unit, and are subject to similar although graduated experience and certification requirements. *See, NEA-Belen & Belen Federation of School Employees & Belen Consolidated Schools*, 1 PELRB No. 2 (May 13, 1994) (that 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), and *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962) (that the community of interest factors 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).

Nonetheless, a petition for accretion must be dismissed under PELRB Rule 11.21.2.38(C) “[i]f 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.” *Id.* This is because, in that case, it is presumed “that their inclusion raises a question concerning representation, and the petitioner may” therefore “proceed only by filing a petition for an election under these rules.” *Id.* A question of representation or “QCR” arises when a hearing is required “to determine whether the union ... represents a majority of the employees in an appropriate bargaining unit.” *See Developing Labor Law* (5th Ed.) at 540.

Here, as found above, there are six (6) lieutenants to be accreted into a group of eleven (11) firefighters, firefighter-EMTs, and drivers/operators. Thus, it is clear that the Petitioner cannot proceed through the chosen vehicle of a Clarification-Accretion Petition. However, it may still proceed by a regular Petition for Election and that the election will only be among the employees to be accreted, rather than among members of the existing bargaining unit.<sup>5</sup>

This election/clarification-accretion dichotomy is a standard policy under the National Labor Relations Act (NLRA) as well. *See Developing Labor Law* (5th Ed.) at 578-569 and 587, and footnotes and cites therein (that neither clarification nor accretion procedures can be used as an alternative to a petition for election when the object is to add a classification of employees that had been deliberately omitted from the original unit). The policy recognizes that allowing accretion upon a mere thirty percent (30%) showing of interest among employees to be accreted is acceptable in the name of

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<sup>5</sup> The undersigned observes that under usual NLRB procedures, a petition for unit clarification “must be filed ‘shortly after’ the contract is executed” and “[t]he Board generally dismisses unit-clarification petitions submitted during the term of a collective bargaining agreement, where the contract clearly defines the bargaining unit.” *See Developing Labor Law* (5th Ed.), 2007 Supp. at 86 and 273. Here, the date of the collective bargaining agreement is unknown to the undersigned but that grounds for an exception to the Petition was not previously raised by the parties.



administrative efficiency where the group to be accreted is relatively small, and no more than ten percent (10%) of the existing bargaining unit. However, it draws the line at a relatively low threshold (10%) of the existing bargaining unit, and requires a demonstration of majority support in all other cases, to effectuate the broader statutory policy of ensuring employees a say in the selection of their exclusive bargaining representative, if any. *See* Developing Labor Law (5th Ed.) at 578 and 590 (that “[a] cardinal policy of the Act is to protect the exercise by employees of full freedom to express their desires on union representation” and that, therefore, “[t]he Board has consistently indicated a somewhat restrictive attitude toward accretions in deference to the important statutory policy of employee free choice”).

When the issue is analyzed from this perspective, the true meaning of PELRB Rule 11.21.2.37(A) and the apparent prohibition against clarifying the scope or description of grandfathered bargaining units becomes clear. PELRB Rule 11.21.2.37(A) does not stand for the proposition that a grandfathered bargaining unit must remain forever static. Rather, it reflects and implements the general policy, as does PELRB Rule 11.21.2.38(C), that significantly modifying an existing bargaining unit should normally be done through the election process (including card counts) and upon a demonstration of majority support, rather than upon a mere showing of thirty percent (30%) interest.

The only difference is that the PELRB has determined in Rule 11.21.2.37(A) that any modification to the scope or description of a grandfathered bargaining unit must always be done upon a hearing to establish continued appropriateness, and upon a demonstration of majority support. This difference, moreover, is entirely reasonable, because under § 24 of PEBA, grandfathered bargaining units are legislatively deemed to



be appropriate and the grandfathered exclusive bargaining agent is legislatively deemed to continue to be recognized as such, within limits. Accordingly, it is reasonable to limit the grandfathered status of bargaining units and exclusive bargaining agents to comport with other provisions of PEBA, such as §13 (requiring appropriate bargaining units) and § 14 (requiring some kind of demonstration of majority support as the norm). *Compare Regents, supra* (similarly limiting the application of the grandfathering provision for local labor ordinances to comport with § 5 of PEBA, the public employees to whom collective bargaining rights shall be extended).

It may seem administratively inefficient to dismiss the instant Petition pursuant to PELRB Rule 11.21.2.38(C), only for it to be refilled as another representation petition that will look identical to the original Petition. This is particularly true because by instead deeming the Clarification Petition to be an Election Petition an election would be had, and that is the true purpose of rule's distinction. *See Santa Fe FOP, supra*. Nonetheless, dismissal and re-filing is what PELRB Rule 11.21.2.38(C) requires on its face. The undersigned apologizes to the parties and the Board for failing to note upon receipt of the Petition and employee list that the group to be accreted was greater than 10% of the existing bargaining unit.

#### **CONCLUSIONS OF ULTIMATE FACT AND OF LAW**

1. The PELRB has jurisdiction to hear the instant petition.
2. The Silver City firefighter bargaining unit is grandfathered under § 24(A) of PEBA.
3. Captains and Lieutenants share a community of interest in employment terms and conditions and related personnel matters, with other members of the firefighters



bargaining unit, and their inclusion in the existing unit would not render that unit inappropriate.

4. Lieutenants do not customarily and regularly oversee the work of two or more other employees, although Captains do.
5. Neither Captains nor Lieutenants customarily and regularly direct the work of Firefighters and Driver/Operators.
6. Captains and Lieutenants do discipline, evaluate and effectively recommend the promotion, suspension and termination of their subordinates.
7. Captains and Lieutenants do not spend a majority of their work time devoted to supervisory duties, but rather are lead employees because they perform substantially the same work duties as their subordinates.
8. The change in the definition of “supervisor” from PEBA I, NMSA 10-7D-4(S) to PEBA II, NMSA 10-7E-4(U) is sufficient to warrant a change in the scope and description of the bargaining unit, to include Lieutenants, under PELRB Rule 11.21.2.37(A).
9. However, because Captains and Lieutenants constitute a group greater than ten percent (10%) of the existing firefighter bargaining unit, PELRB Rule 11.21.2.38(C) requires the dismissal of the Petition for Clarification and its re-filing as a Petition for Election.

#### **RECOMMENDATION**

Consistent with the foregoing analysis and resulting conclusions of law, the undersigned hereby finds, concludes and recommends that the existing Silver City firefighter bargaining unit appropriately includes Captains and Lieutenants. However,

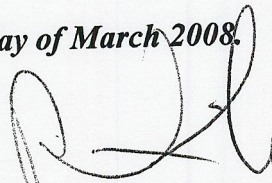


consistent with PELRB Rule 11.21.2.38(C), the undersigned nonetheless **DIMSISSES** the Petition because the group to be accreted is greater than ten percent (10%) of the existing bargaining unit. The Petitioner may re-file a regular Petition for Election, in which case the undersigned recommends that these findings, conclusions and recommendations be given preclusive effect.

### **REQUEST FOR REVIEW**

Pursuant to PELRB Rule 11.21.2.37(D) and PELRB Rule 11.21.2.22, any party may file a request for Board review within 10 business days after service of this Report. The request for review shall state the specific portion of the Report to which exception is taken and the factual and legal basis for such exception. The request may not rely on any arguments not previously raised before the undersigned. The request must be served on all other parties. Within ten business days after service of a request for review, any other party may file and serve on all parties a response to the request for review.

*Issued in Albuquerque, New Mexico this 7<sup>th</sup> day of March 2008.*



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Pilar Vaile  
Deputy Director  
Public Employee Labor Relations Board



## **APPENDIX**

### **SUMMARY OF EVIDENCE RECEIVED INTO RECORD<sup>6</sup>**

1. Testimony of Rudy Bencomo, Chief of the Silver City Fire Department.
2. Testimony of Alex Brown, City Manager of Silver City.
3. Testimony of Jeff Fell, Driver/Operator and EMT with the Silver City Fire Department and Local 2430 President.
4. Testimony of Pete Sanchez, Lieutenant with the Silver City Fire Department.
5. Testimony of Jesse Glick, Driver/Operator and Paramedic with the Silver City Fire Department.
6. Testimony of Eloy Medina, Lieutenant with the Silver City Fire Department.
7. Testimony of Ray Muniz, Captain with the Silver City Fire Department.
8. Exhibit 1, Reprimand and/or Warning Form.
9. Exhibit 2, Reprimand and/or Warning Form.
10. Exhibit 3, Reprimand and/or Warning Form.
11. Exhibit 4, Recommendation for suspension without pay.
12. Exhibit 5, Recommendation for termination.
13. Exhibit 5A, Recommendation for termination.
14. Exhibit 6, Job Description, "Firefighter/EMT Basic, Intermediate or Paramedic."
15. Exhibit 7, Job Description, "Driver/Operator/EMT-IV."
16. Exhibit 8, Job Description, "Fire Lieutenant."
17. Exhibit 9, Job Description, "Fire Captain."
18. Exhibit 10, Recommendation for Job Vacancy.
19. Exhibit 11, Recommendation for Job Vacancy.
20. Exhibit 12, Recommendation for Job Vacancy.
21. Exhibit 13, Recommendation for Job Vacancy.
22. Exhibit 14, Recommendation for Job Vacancy.
23. Exhibit 15, Reprimand and/or Warning Form.
24. Exhibit 16, Reprimand and/or Warning Form.
25. Exhibit 17, Reprimand and/or Warning Form.
26. Exhibit 18, Reprimand and/or Warning Form.
27. Exhibit 19, Reprimand and/or Warning Form.
28. Exhibit 20, Counseling Statement.
29. Exhibit 21, Reprimand and/or Warning Form.
30. Exhibit 22, Reprimand and/or Warning Form.
31. Exhibit 23, Reprimand and/or Warning Form.
32. Exhibit 24, Reprimand and/or Warning Form.
33. Exhibit 25, Reprimand and/or Warning Form.
34. Exhibit 26, Counseling Statement.
35. Exhibit 27, Reprimand and/or Warning Form.
36. Exhibit 28, Reprimand and/or Warning Form.

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<sup>6</sup> Exhibits 40-43 (respectively, a "Supervisor's Report of Injury," a "SCFD After Action Report," a "Leave Request" form, and a "SCFD Overtime Register") were introduced by the City, but subsequently withdrawn by the City upon objection from the Union on relevancy and cumulative grounds.



- 37. Exhibit 29, Reprimand and/or Warning Form.
- 38. Exhibit 30, Reprimand and/or Warning Form.
- 39. Exhibit 31, Reprimand and/or Warning Form.
- 40. Exhibit 32, Reprimand and/or Warning Form.
- 41. Exhibit 33, Reprimand and/or Warning Form.
- 42. Exhibit 34, Reprimand and/or Warning Form.
- 43. Exhibit 35, Reprimand and/or Warning Form.
- 44. Exhibit 36, Silver City Fire Department Employee Roster.
- 45. Exhibit 37, Silver City Fire Department Questionnaires.
- 46. Exhibit 38, Recommendation of suspension and other discipline.
- 47. Exhibit 39, Recommendation of termination.
- 48. Exhibit 44, Employee Performance Appraisal Form.
- 49. Exhibit 45, Employee Performance Appraisal Form.