

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

In re:

**INTERNATIONAL ASS'N
OF FIREFIGHTERS, LOCAL 1687,
Petitioner,**

and

PELRB No. 308-17

**CITY OF CARLSBAD,
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 the merits of an Accretion Petition filed by the International Association of Firefighters, Local 1687 seeking to add the EMS Division Chief, the Fire Marshal and the Training Officer/Staff Development Officer positions to the existing Firefighter bargaining unit in the City of Carlsbad.

On September 22, 2017, Petitioner filed the instant accretion petition. Respondent filed a Motion to Dismiss the Petition on January 4, 2018 challenging the PELRB's jurisdiction on the ground that the City of Carlsbad is a grandfathered entity pursuant to § 26 (A) of the PEBA. The Motion to Dismiss was denied on March 13, 2018 and the City filed its and its Response to the Accretion Petition on April 5, 2018.

After a scheduling conference, a hearing on the merits was held Wednesday, July 11, 2018. At the outset of the hearing the parties stipulated to the admissibility of all proffered exhibits subject to argument as to the weight that should be given them. All parties hereto were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally regarding the witnesses' testimony. Closing Briefs were submitted by the parties on August 10, 2018 and both were duly considered. On the entire record in this case and from my

observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following findings. All record references are to the audio record:

FINDINGS OF FACT:

1. It is not disputed that Respondent, City of Carlsbad, as a municipal corporation is a public employer as defined in the Public Employee Bargaining Act (PEBA) §10-7E-4(S) (See Prehearing Order, Stipulated Fact A) and that Petitioner, IAFF Local 1687, is a labor organization as defined in the PEBA §10-7E-4(L) recognized by the City of Carlsbad as the exclusive bargaining representative for firefighters employed by the Carlsbad Fire Department. (See Prehearing Order, Stipulated Facts C, D and E).
2. The City of Carlsbad Fire Department provides fire prevention, fire suppression, and emergency medical services for the population of Carlsbad, New Mexico and southern Eddy County to the New Mexico state line. (Lopez testimony, 204:1-11).
3. The City employs firefighters in the Carlsbad Fire Department. (Prehearing Order, Stipulated Fact B).
4. The Fire Department operates five fire stations, including one at the Carlsbad Airport. (Lopez testimony, 201:21-24).
5. The Fire Department's central station, Station 1, and its administrative headquarters are located at 401 Halagueño Street, Carlsbad, New Mexico. (Lopez testimony, 192:10-21).
6. Although located at the same situs, the Fire Department's central station is divided into administrative and suppression sides, both administratively and physically. (Lopez testimony, 192:10-21).

7. City of Carlsbad Resolution No. 340, effective May 9, 1967, acknowledged that “firemen of the City of Carlsbad” have designated the Petitioner herein, International Association of Firefighters, Local 1687, “as their collective bargaining agent”. (Union Exhibit 1; CBAs Exhibits 2-6 inclusive).
8. Resolution No. 340 also designated the City Administrator as the City’s negotiator “in its dealings with” two recognized collective bargaining agents; one of which is the Petitioner herein. (Union Exhibit 1; PHO stipulation C).
9. The bargaining unit herein was recognized by the City of Carlsbad no later than June 13, 1967. (PHO stipulation E).
10. As a result of the negotiations authorized by Resolution No. 340 the City of Carlsbad entered into a contract or Collective Bargaining Agreement (“CBA”), effective July 1, 1967, in which the City recognized that the Petitioner “is the sole and exclusive representative of all Fire Department employees, with [the] exception of the Fire Chief and Assistant Chief...” (Union Exhibit 2).
11. Since its first 1967 contract, Petitioner and Respondent have entered into a series of successor CBAs, each of which contains a “Recognition” section setting forth the positions the parties agree are within the bargaining unit, demonstrating that its composition has changed by agreement over time as follows:
 - a. For the contract period December 1984 to December 1987 exceptions from the bargaining unit was extended from the Fire Chief and Assistant Chief to include Battalion Chiefs, Fire Prevention Officer, and Secretary. The positions covered by the contract were Apprentice Firemen; Firemen 1, 2 and 3; Engineers 1, 2 and 3; and Captains 1, 2 and 3. (City Exhibit E, Articles II and IX).

- b. For the contract period December 1988 to December 1990 the Training Officer and Fire Inspector were added to the list of position excluded from collective bargaining and there was no change to the covered employees. (City Exhibit F, Articles 2 and 9).
- c. For the contract period December 1990 to March 1994 there were no changes to the exceptions and no changes to the list of covered employees so that the positions excluded from collective bargaining were the Fire Chief, Assistant Chief, Battalion Chiefs, Fire Prevention Officer, Training Officer Fire Inspector and Secretary while the covered employees were Apprentice Firemen; Firemen 1, 2 and 3; Engineers 1, 2 and 3; and Captains 1, 2 and 3. (City Exhibit G, Articles 2 and 9).
- d. The contract covering the period March 1994 to March 1997 covered the positions of Apprentice; Apprentice EMT-P, Firefighters 1, 2, 3, 4 and 5; Engineer; Captain and Shift Commander. All other positions were excluded. (City Exhibit H, Articles 2 and 9).
- e. For the contract period March 1997 to March 2000 the parties agreed to that the covered positions were Apprentices; Apprentice EMT-Ps, Firefighters, Driver Operators; Lieutenants and Shift Commanders. All other positions were excluded. (City Exhibit I, Article 1 and Appendix A thereto).
- f. For the contract period April 15, 2000 to April 1, 2003 the title of “Apprentice” covered by the contract was changed to “Firefighter 1” and the contract continued to cover them along with Firefighters 2 and 3; Driver Operators; Lieutenants and Shift Commanders. All other positions were excluded. (City Exhibit J, Article 1 and Appendix A thereto).

- g. There were no changes to either the covered or the excepted position for the Contract period April 9, 2003 to April 1, 2006. (City Exhibit K, Article 1 and Appendix A thereto).
- h. For the contract period December 11, 2007 to April 1, 2009 the parties agreed that the Petitioner represented the positions of Firefighter Rookies 1, 2 and 3; Firefighters; Driver Operators; Lieutenants and Shift Commanders. All other positions were excluded. (City Exhibit L, Article 1 and Appendix A thereto).
- i. For the contract period May 12, 2009 to April 1, 2012 Battalion Chiefs were added to the bargaining unit and the job title “Engineer” was re-introduced and the title “Shift Commander” eliminated so that the covered unit comprised Firefighter Rookies; Firefighters; Engineers; Lieutenants and Battalion Chiefs. All other positions were excluded. (City Exhibit M, Article 1 and Appendix A thereto).
- j. There were no changes to the bargaining unit for the contract period April 1, 2012 to April 1, 2015. (City Exhibit N, Article 1 and Appendix A thereto).
- k. The bargaining unit description changed once again in the contract period April 1, 2015 to April 1, 2018 eliminating the job title “Firefighter Rookie” so that the covered unit comprised Firefighter-EMT-I; Firefighter-EMT-P; Engineer EMT-I; Engineer-EMT-P; Lieutenant-EMT-I; Lieutenant-EMT-P; Battalion Chief-EMT-I and Battalion Chief EMT-P. All other positions were excluded. (City Exhibit O, Article 1 and Appendix A thereto).

1. The parties current contract effective April 1, 2018 to April 1, 2021 makes no change in the April 1, 2015 to April 1, 2018 description of the bargaining unit. (City Exhibit P, Article 1 and Appendix A thereto).
12. City of Carlsbad Resolution No. 340, Union Exhibit 1, contains no provisions or procedures for permitting employees to form, join or assist bargaining units required by the PEBA § 26(A) does not create a local labor board or any mechanism to hear, determine and remedy alleged unfair or prohibited labor practices or to pass judgment on the composition of appropriate bargaining units necessary and incidental to the requirements of § 26(A), nor does it afford collective bargaining rights to all employees afforded that right under the PEBA contrary to § 26(A).
13. I take administrative notice of PELRB cause No. 1-PELRB-9 (May 2, 1995) in which the Petitioner herein, International Ass'n of Firefighters, Local 1687, was certified by this Board as an incumbent bargaining representative in the City of Carlsbad and in which the Board's finding that "...[Resolution 340] did not establish a system of provisions and procedures for labor relations" was not appealed; and, *International Ass'n of Firefighters, Local 1687 v. City of Carlsbad*, 216 P.3d 256, 2009 NMCA 97, 147 N.M. 6 (N.M. App. 2009) in which our Court of Appeals acknowledged that the Petitioner herein is the exclusive representative of firefighters employed by the City of Carlsbad under § 10-7E-15 of the PEBA and resolved the parties' bargaining impasse dispute by construing § 10-7E-17(E) of the PEBA applicable to the parties. See also, 1-PELRB-5 (January 12, 1995) in which this Board certified United Steelworkers of America, AFL-CIO/CLC, Local 187 as an incumbent bargaining representative in the City of Carlsbad, without the City disputing jurisdiction of this Board.

14. On September 22, 2017 Petitioner filed a Petition pursuant to 11.21.2.38 to accrete into the existing bargaining unit, the following three positions: EMS Division Chief, City Fire Marshal, and Staff Development Officer (Administrative Notice of Petition herein, filed September 22, 2017).
15. The City acknowledges that the three positions to be accreted exist within its Fire Department. (Prehearing Order stipulations F and G).
16. At the time of filing, the positions to be accreted did not belong to an existing bargaining unit. (Testimony of Fire Marshal John Miller, 16:7-9; Testimony of Local 1687 President Scott Maxwell, 148:23-25 & 160:20-22).
17. At the time of filing the Accretion Petition herein, the Fire Department employed 65 personnel as follows: 4 maintenance personnel, 2 secretaries, 5 management staff consisting of the Chief, Assistant Chief and including the EMS Supervisor, Fire Marshal, and Training Officer at issue here, 54 battalion chiefs, lieutenants, engineers, and firefighters, all of whom are members of the Bargaining Unit. (Lopez Testimony, 195:4-8, 201:1-20, Testimony of Assistant Chief Brian Mendoza, 254:4-15).
18. At the time of filing the Petition herein, four employees filled the three positions to be accreted, constituting 7.4% of the employees in the Bargaining Unit so that the instant petition does not raise representation concerns under NMAC § 11.21.2.38, because the Petition seeks to accrete less than 10% of the existing Bargaining Unit. (Prehearing Order stipulation B).
19. Each position to be accreted has historically been excluded from the Bargaining Unit. (Maxwell Testimony, 148:23-25 & 166:20-22, 1990 CBA, City Exhibit G at Article 2 (excepting the "Fire Chief, Assistant Chief, Battalion Chiefs, Fire

Prevention Officer, Training Officer, Fire Inspectors and Secretary" from the Bargaining Unit).

20. Providing emergency medical services to all of South Eddy County account for 85-90% of Fire Department responses - structure fires comprise a small percentage of responses. (Lopez Testimony, 213:15-25; Mendoza Testimony, 262:3-7; Miller Testimony, 29:20-23 and 76:9-16).
21. Firefighters, Engineers, Lieutenants, and Battalion Chiefs (known as the "suppression personnel" or the "suppression side" to distinguish them from those certified firefighters or EMS personnel who may be assigned primarily administrative or management duties) work in one of three shifts, with a minimum of 18 employees on each shift (requiring at least one lieutenant; one engineer, and one firefighter per station, pursuant to minimum manning requirements of the parties' CBA. (Miller Testimony, 16:3, 26:1-4, 35:1-3; Lopez Testimony, 201:1, 5-7 and 242:17-21; 2015 CBA, City Exhibit O at Article 13, Section 4: Minimum Manning).
22. To meet minimum manning requirements, firefighters must be Firefighter 2 and Emergency Medical Technician- Intermediate qualified. (CBA, City Exhibit O, Appendix A; Miller Testimony, 29:24-25, 30:1-3).
23. The suppression side employees work a shift schedule of two consecutive 24-hour shifts, followed by 96 hours off; also referred to as "48/96," (CBA, City Exhibit O, Article 2, Section 2; Ahrens Testimony, 79:23-25, 80:1; Lopez Testimony, 201:21-24).
24. Employees in the Bargaining Unit all work the above-described shift at one of five fire stations located in the City of Carlsbad and their duty station occasionally rotates. (Mendoza Testimony, 259:19-24).

25. The primary daily job duty of personnel in the Bargaining Unit is to serve as first responders on emergency calls and to maintain stations and equipment in support of that role. (Ahrens Testimony, 129:6).
26. Members of the Bargaining Unit are hired, fired, and promoted in accordance with bargained-for requirements, which typically places priority on test results and “union seniority”. (CBA, City Exhibit O at Article 9), Lopez Testimony, 248:3-25, 249:112).
27. As hourly employees, employees in the Bargaining Unit are eligible for special pay and overtime, as outlined in the collective bargaining agreement. (CBA, City Exhibit O at Article 6, Section 4, Article 9, & Appendix A).
28. Bargaining unit members are paid an hourly wage calculated from a salary figure based on a minimum required hours of 2,920 hours, an exception to the 40-hour-per-workweek overtime rule allowable under the Fair Labor Standards Act for Fire Departments. (Maxwell testimony, 159:23-25, 160:1-9 Miller Testimony, 21:3-8; Ahrens Testimony, 88:2-25, 89:1-4).
29. The EMS Supervisor, Fire Marshal, and Training Officer typically work a 40-hour workweek from Monday through Friday and are paid an hourly wage calculated from a salary figure based on a minimum required hours of 2,080 hours per year. (Miller Testimony, 26:15-25, 27:1; Testimony of Training Officer Ken Ahrens, 79:21-25, Lopez Testimony, 193:11-24, Mendoza Testimony, 260:3-41).
30. Whenever the EMS Supervisor, Fire Marshal, and Training Officer work more than 40 hours in a work week they receive overtime pay. (Miller Testimony, 24:47 – 25:03; Ahrens Testimony, 2:29:17 – 2:29:30).
31. The EMS Supervisor, Fire Marshal, and Training Officer all maintain individual offices on the administrative side of central station, within the administrative

headquarters of the Fire Department, and separate from the suppression side and truck bays where the Battalion Chief office is located. (Miller Testimony, 24:21-25, 25:1-25, 26:1-4; Ahrens Testimony 93:2-21; Lopez Testimony 192:10-21).

32. Outside of mass conflagrations or other extraordinary circumstances, none of the positions to be accreted are required to respond to emergency calls and provide fire suppression or emergency medical services. (Mendoza Testimony, 260:9-20, 261:2-21.)
33. The “extraordinary circumstances” under which one of the positions to be accreted would respond to provide fire suppression or emergency medical services have happened a "handful" of times, estimated between two and five times per year. (Ahrens Testimony, 80:19-25). Under the “extraordinary circumstances” described above, such as when a structure fire occurs, all of the management staff including the Chief and Assistant Chief, who are not members of the Bargaining Unit, are capable and willing to respond, and often do respond. (Miller Testimony, 27:17-19; Ahrens Testimony, 81:5-8).
34. The EMS Chief, the Fire Marshal and the Training Officer attend weekly staff meetings conducted by the Chief and Assistant Chief. (Lopez testimony, 195:11-21; Ahrens testimony, 93:2-21; Miller Testimony, 34:6-15).
35. The EMS Chief, Fire Marshal, and Training Officer regularly serve on the interview panel for new hiring and then score the applicants, which contributes to the Fire Chiefs ultimate hiring decision. (Ahrens testimony, 124:5-8; Lopez testimony, 191.9-25).
36. The EMS Division Chief does not regularly supervise two or more subordinate personnel, does not affect employee wages, benefits or approve overtime or leave

- requests, has no authority to hire, promote, reprimand, suspend, demote, or terminate any member of the Fire Department, nor does he effectively recommend such actions. (Exhibit T, EMS Division Chief Job Description).
37. The primary duties of the EMS Chief are to monitor, observe, and critique medical response and subsequent reports, to liaison with area hospitals and billing entities, to supervise the stocking and maintenance of all emergency medical equipment, to track emergency medical technician qualification and ensure compliance with continued education requirements, to determine and direct corrective action of subpar EMTs or performance, evaluate readiness for duty through examination of personal driving records, and generally directs and provide overall management of emergency medical services for the City of Carlsbad Fire Department. (Exhibit T, EMS Division Chief Job Description; Lopez Testimony, 220:21-24).
38. One of the responsibilities of the EMS Division Chief is to "...serve as the Chief Officer in command of Station #3 and as such shall be responsible for overall administration and maintenance of the station, its apparatus and equipment. His responsibilities...include...command of multi-agency scenes...scenes that demand non-routine resources, scenes that tax the resources of the CFD, and scenes that require a PIO." (Exhibit T, EMS Division Chief Job Description).
39. The EMS Chief prepares and submits to the Chief an annual budget request for equipment, medical supplies and ambulance service needs, and monitors the EMS budget for the department after approval, including ordering and purchasing equipment and supply. (Lopez testimony, 214:6-25, 215:1).
40. The EMS Chief is third in command, should both the Fire Chief and the Assistant Fire Chief be unavailable. (Lopez testimony, 196:2-9).

41. The EMS Chief acts as the liaison between the hospital, medical director, and the Fire Department for protocol and billing matters. (Lopez Testimony, 221:4-12, 220:21-24).
42. The EMS Chief represents the Fire Department on the Regional Trauma Advisory Committee as well as in negotiations with and discussions related to agreements with adjoining jurisdictions and various volunteer departments. (Lopez Testimony, 220:4-15, Mendoza Testimony, 267:12-19).
43. The EMS Chief reviews all medical run reports for quality control and management of reporting and regularly rejects reports for correction. (Exhibit T; Lopez Testimony, 216:13-24).
44. The EMS Chief responds to all public record requests related to medical reports. (Exhibit T).
45. The EMS Chief tracks licensure with the state pharmacy bureau for controlled substance permits and with the Public Regulations Commission for the ambulance services. (Lopez Testimony, 2: 5:7-25, 216:1-3).
46. The EMS Chief is also charged with reviewing the medical procedures and protocols adopted by the department and implementing any changes, through training and management. (Lopez Testimony, 221:4-12, Mendoza Testimony, 268:8-16).
47. The two primary areas of responsibility for the City's two Fire Marshals are: (1) to manage all arson investigations; and, (2) to conduct inspections of building for compliance with the Fire Code. (Miller Testimony, 16:13-20).
48. As the chief investigator, Fire Marshal Miller trains and manages the Arson Investigation Team, composed of six firefighters, direct individual team members on

investigations...and either drafts or reviews reports resulting from post-fire investigations. (Miller Testimony, 17:21; 41:3-19, 42:16-18; 45:2-19).

49. Fire Marshal Miller worked with the Chief on developing criteria for Arson Investigation Team and assesses Bargaining Unit members' practical experience for the purpose of advising the Chief on which bargaining unit members may be added to the Arson Investigation Team and thereby earn specialty pay. (Miller Testimony, 48:23-49:14; CBA, Exhibit O at Appendix A (table of specialty pay)).
50. As the chief investigator, and in connection with exercising his responsibility for training and managing the Arson Investigation Team, Fire Marshal Miller maintains certification files for all members of the team. (Miller Testimony, 73:13-23).
51. Fire Marshal Miller's duties include maintaining the City's fire code in light of Model Codes adopted internationally, and proposing amendments. (Miller Testimony, 38:5-19; 33:8-14).
52. With regard to his inspection duties the Fire Marshal inspects all the businesses in Carlsbad personally for fire code compliance and fire safety issues, including those inspections necessary for the business to obtain a state occupancy license. (Miller Testimony, 1:12- 13; 13:22-25; 49:25; 51:8-18; 53:9-19).
53. Fire Marshal Miller spends at least half of his time reviewing building plans, including those for new construction, with respect to fire prevention or meeting the fire code. (Miller Testimony, 11:13-17; 65:24-25; 66:1-14).
54. Regarding inspection of new construction, the Fire Marshal has discretion in determining whether and how the fire code is met and makes the primary determination whether someone is compliant or not. (Miller Testimony, 52:4-16, 54:3-17).

55. The Fire Marshall helps organize and coordinate fire prevention training in the schools. (Miller Testimony, 11:13-17).
56. The Fire Marshal responds to all public record requests concerning inspections or investigations. (Exhibit U).
57. The Fire Marshal reviews all run reports on fires for quality control and adequacy. (Miller Testimony, 39: 6-17).
58. The Fire Marshal plans, organizes, and implements fire prevention functions independently, performing the work independently. (SOP Policy 202, Exhibit Y, at 36; Miller Testimony, 33:15-34:2).
59. The Fire Marshal is fourth in command in the absence of the Chief. (Miller Testimony, 44:6-11).
60. The Fire Marshal works in the same office complex as the Chief and meets with the Chief on a daily basis. (Miller Testimony, 42:2-7; 53:20-24; Exhibit Y, at ¶ 5).
61. The Fire Marshal typically works a Monday through Friday 40-hour week [Miller, 54:18-20].
62. Fire Marshal Miller has an EMT-Basic license, (Miller Testimony, 12:13, 28:9-12), which is insufficient to meet minimum manning requirements of EMT-Intermediate certification. (Miller Testimony, 29:24 - 30:3; Exhibit O at Article 13, Section 4).
63. The Fire Marshal does not regularly supervise two or more subordinate personnel, has no ability to affect employee wages, benefits, or approve overtime or leave requests, nor does he have authority to hire, promote, reprimand, suspend, demote, or terminate any member of the Fire Department or to effectively recommend such actions. (Exhibit U, Fire Marshal Job Description; Miller Testimony, 21:00 – 24:00).

64. The Fire Marshal is not involved in the negotiation of collective bargaining agreements. (Miller Testimony, 24:28 – 24:32).
65. The Training Officer (also referred to as the Staff Development Officer) oversees and coordinates the Fire Department's training program to ensure that the Department's employees get required EMS, fire suppression and special technical skills training essential to performing the Department's primary function of protecting life and preserving property. (Ahrens Testimony, 79:8-12).
66. The Training Officer works in an office is located in the administrative side of the Department's central station, Station 1, and has daily interaction with the Chief and Assistant Chief. (Ahrens Testimony, 93:2-21; Mendoza Testimony, 262:23).
67. The Training Officer ensures that that initial training is scheduled and delivered by competent instructors from EMT-Basic, through Firefighter 1 and Firefighter 2, and through EMT-Intermediate, and maintains records of course completion so that personnel can maintain their required state licensure as well as for insurance rating purposes. (Ahrens Testimony, 86:10-20; 117:19-22, 118:4-10).
68. If the Training Officer is able, he will teach certain training modules himself to save money. (Ahrens Testimony, 85:17-22).
69. Apart from the initial training sequence, the Training Officer also manages and coordinates training to retain Federal Aviation Administration aircraft firefighting certification, mine rescue and confined space rescue, and dive rescue proficiency. (Ahrens Testimony, 94:6-13, 102:14-18; 112:21-25; 100:24-102:4; Exhibit Z).
70. The Training Officer evaluates all employee-student progress during the "Rookie School" and makes recommendations on retention to the Fire Chief based on individual evaluations. (Ahrens Testimony, 99:1-4, 19-25; Lopez Testimony, 226:22-

227:21 (that Chief relied on Training Officer's assessment that recruits were "not firefighter material" before terminating their employment).

71. The Training Officer does not regularly supervise two or more subordinate personnel, or approve overtime or leave requests and, has no ability to affect employee wages, benefits, no authority to hire, promote, reprimand, suspend, demote, or terminate any member of the Fire Department or to effectively recommend such actions. (Exhibit V, Ahrens Testimony, 1:49:42 – 1:53:40).
72. The Training Officer spends a majority of his workday coordinating, scheduling, and tracking training, and teaching training modules himself. (Ahrens Testimony, 116:14-17).
73. The Training Officer is also responsible for planning and managing the Department's Training Budget (Ahrens Testimony, 96:8-15; 119:8) and is charged with knowing Department's training needs and how to meet those needs without the Chief's intervention. (Lopez Testimony, 228:23-229:14).
74. The Training Officer is vested with discretion in the evaluation, recommendation, scheduling or approval of training, notably he has the ability to extend Personnel Qualification Evaluation deadlines. (Ahrens Testimony, 103:3-18; 104:16-24, 105:1-15, 109:10-16; Lopez Testimony, 256:1-5; Exhibits Q, R and S).
75. The Training Officer recommends personnel for mentoring, keeping records for assigning mentors based on noted abilities and performance. (Ahrens Testimony, 123:16-25).
76. The Chief routinely accepts the Training Officer's recommendation on evaluation or training needs and has never overruled the Training Officer's recommendation. (Lopez Testimony, 252:4-10, 20-24).

Any requested findings not set forth above are to be deemed denied.

LEGAL STANDARD:

As the party seeking to change an existing appropriate bargaining unit, Petitioner bears the burden of proof and of going forward with the evidence in this matter pursuant to NMAC §§ 11.21.1.22 (2018). Petitioner bears the burden of proof to initially establish the absence of statutory exemptions applicable to the positions to be accreted, that positions to be accreted demonstrate a community of interest, and that inclusion of the accreted positions will not render the Bargaining Unit inappropriate in any way. The Respondent bears the burden of proof with regard to any of its affirmative defenses.

NMAC Rule 11.21.2.38 provides:

A. The exclusive representative of an existing collective bargaining unit, may petition the board to include in the unit employees who do not belong, at the time the petition is filed, to any existing bargaining unit, who share a community of interest with the employees in the existing unit, and whose inclusion in the existing unit would not render that unit inappropriate.

B. If the number of employees in the group sought to be accreted is less than ten percent (10%) of the number of employees in the existing unit, the board shall presume that their inclusion does not raise a question concerning representation requiring an election, and the petitioner may proceed by filing a unit clarification petition under these rules. Such a unit clarification petition to be processed 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. No group of employees may be accreted to an existing unit without an election if the board determines that such group would constitute a separate appropriate bargaining unit.

C. 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.

REASONING AND CONCLUSIONS OF LAW

I. THIS BOARD HAS JURISDICTION OVER THE PARTIES AND THE SUBJECT MATTER OF THIS PETITION. THE CITY OF CARLSBAD'S RESOLUTION DOES NOT ESTABLISH PROVISIONS OR PROCEDURES FOR PERMITTING EMPLOYEES TO FORM, JOIN OR ASSIST BARGAINING UNITS AND IS THEREFORE, NOT "GRANDFATHERED" UNDER THE PEBA § 26(A).

Carlsbad argues that because its "system" established by Ordinance 340 has remained unchanged since 1967, the City is grandfathered under NMSA 1978, § 7-10-26 and therefore the Public Employee Relations Board is without jurisdiction to review this petition. This argument "begs the question" by restating the conclusion that it actually established a "system", as the basis for the conclusion. A plain reading of Carlsbad's Resolution 340 reveals that it does *not* establish provisions or procedures for permitting employees to form, join or assist bargaining units. The Resolution does not create a local labor board or any mechanism to hear, determine and remedy alleged unfair or prohibited labor practices or to pass judgment on the composition of appropriate bargaining units, for accretion or unit clarification or for enforcement of the parties' contract necessary and incidental to the requirements of § 26 (A). Resolution 340 does nothing more than designate the City Administrator as the City's negotiator with AFSCME the IAFF. Even if Resolution 340 could be construed to have established a system of provisions and procedures permitting employees to form, join or assist a labor organization for the purpose of bargaining collectively through exclusive representatives, it does so only with regard to some unspecified employees represented by AFSCME and IAFF and so, is insufficient to meet the requirements of § 26(A) that it extend bargaining rights to all employees afforded that right

under the PEBA. See, *Regents of University of New Mexico v. New Mexico Federation of Teachers*, 125 N.M. 401, 962 P.2d 1236, 1998 NMSC 20 (N.M. 1998). (A system that extended the right to collectively bargain to some, but not all, employees who have been afforded the right under the PEBA, did not satisfy the grandfather clause.)

This is not a case of first impression. This Board under PEBA I certified the Petitioner herein, International Ass'n of Firefighters, Local 1687, as an incumbent bargaining representative in the City of Carlsbad and in so doing found that "...[Resolution 340] did not establish a system of provisions and procedures for labor relations". See 1-PELRB-9 (May 2, 1995). That decision was not appealed to the District Court and so, may operate as *res judicata* or collateral estoppel. As stated in 1-PELRB-9 "An ordinance that merely authorizes the City Administrator to represent the City in collective bargaining negotiations does not 'establish a system of provisions and procedures for labor relations' under [the PEBA § 26 (A)]". *Id.* There is no significant difference between the language of § 26 under the former version of the PEBA and § 26 of the current Act that would justify departing from the decision in 1-PELRB-9. See also, *International Ass'n of Firefighters, Local 1687 v. City of Carlsbad*, 216 P.3d 256, 2009 NMCA 97, 147 N.M. 6 (N.M. App. 2009) in which our Court of Appeals acknowledged that the Petitioner herein is the exclusive representative of firefighters employed by the City of Carlsbad under § 10-7E-15 of the PEBA and resolved the parties' bargaining impasse dispute by construing § 10-7E-17(E) of the PEBA applicable to the parties without the City disputing jurisdiction of this Board. See also, 1-PELRB-5 (January 12, 1995), in which this Board certified United Steelworkers of America, AFL-CIO/CLC, Local 187 as an incumbent bargaining representative in the City of Carlsbad without an objection by the City as to the jurisdiction of this Board and the application of the PEBA to it. The City asserted "grandfathering" as an affirmative defense and so, bears

the burden of proof on that issue. The preponderance of the evidence as well as doctrines of collateral estoppel and *res judicata* compel a conclusion that Carlsbad's Resolution 340 is not a "grandfathered" provision under the PEBA § 26(A) and this Board has jurisdiction over the parties and the subject matter of this petition.

II. THE EMPLOYER'S PROPOSED CONCLUSION THAT THIS PETITION IS TO BE RESOLVED BY RECOURSE TO THE CBA'S GRIEVANCE ARBITRATION PROCESS IS WITHOUT MERIT.

It is not clear whether the City intends a collateral attack on the PELRB's jurisdiction or to argue as an affirmative defense that IAFF failed to exhaust administrative or contractual remedies as a bar to this Board action on its Accretion Petition, because it does not make those arguments in its closing brief. However, because the City submitted a Requested Conclusion that the parties' dispute should be resolved through negotiation and arbitration, I address that issue here.

Carlsbad conflates concepts of the *scope of bargaining* with this Board's statutory duty to determine appropriate bargaining units. While it is true that the scope of a bargaining unit is a permissive subject of bargaining as one of those "other issues agreed to by the parties" referenced in § 10-7E-1 of the Act and while it is also true that the parties have, in fact, bargained for the accretion of additional positions in the past, that does not mean that disputes over the propriety of a bargaining unit in the context of an accretion petition is a proper subject of grievance arbitration.

The cases cited by Carlsbad in support of its proposition all support the axiomatic precept that arbitration is appropriate where the subject matter requires interpretation of the CBA, and the resolution of the contract dispute will likely resolve the issues. *Cf. Collyer Insulated Wire*, 192 NLRB 837, 842 (1971) (deferral to arbitration is appropriate when (a) the dispute

arises within the confines of a collective bargaining relationship, (b) the employer has indicated its willingness to resolve the issue through the grievance-arbitration process, and (c) the contract and its meaning lie at the center of the dispute). Similarly, it is only when the parties have "clearly and unmistakably" reserved an issue to arbitration, that an arbitrator may decide it. See *AT&T Techs., Inc. v. CWA*, 475 U.S. 643, 649 (1986); see also *Clay v. N.M. Title Loans, Inc.*, 2012-NMCA-102, ¶ 10, 288 P.3d 888, 893 ("The Court uses ordinary state-law principles that govern the formation of contracts to determine whether the parties clearly and unmistakably agreed to arbitrate an issue, including arbitrability." (internal quotation marks and citation omitted)).

An Accretion Petition such as is before me here, does not arise under the contract nor do I find in any of the multiple CBAs in evidence any language that could be reasonably construed as a clear and unmistakable waiver of the Union's statutory right to have this Board determine its Accretion Petition. A colorable argument could be made that the PELRB would have a statutory duty to determine the propriety of a unit regardless of any parties' agreement. In the instant case there is simply no contract claim at all that would make these issues appropriate for arbitration. Nor is it a persuasive argument that the union should engage in futile bargaining where the employer so obviously opposes the accretion. To the contrary, this is a statutory claim arising under NMSA 1978 § 10-7E-13 (B) and (C) as well as rules promulgated by this Board pursuant to NMSA 1978 § 10-7E-9 (A). See, NMAC 11.21.2.37 providing procedures for the accretion of unit employees who do not belong to an existing bargaining unit, but who share a community of interest with the employees in the existing unit.

Exhaustion of the contract grievance procedure will not be required as to any claim for which deferral to grievance-arbitration would be inappropriate. See, Case 168-06 at 4-5, 16

(if the matter is not appropriately deferred to grievance-arbitration in the first instance, a motion to dismiss for failure to exhaust the grievance-arbitration procedure will be moot). For the reasons stated arbitration of bargaining unit composition in an accretion petition context is utterly inappropriate. On the other hand, NMSA § 10-7E-13 (B) expressly vests authority in this Board over any disagreement arising between covered public employers and labor organizations concerning the composition of an appropriate bargaining unit and requires the PELRB to hold hearings concerning the composition of the bargaining unit before designating an appropriate bargaining unit. By definition, an “appropriate bargaining unit” is one so designated by the PELRB. See, NMSA 1978 § 10-7E-4 (A). (“appropriate bargaining unit” means a group of public employees *designated by the board* or local board for the purpose of collective bargaining”). (Emphasis added).

Because § 10-7E-9 (A) extends PELRB’s jurisdiction to *all* claims brought under the Public Employee Bargaining and specifically over those requiring the designation of appropriate bargaining units, and because § 10-7E-9(F) grants the PELRB “...the power to enforce provisions of the [PEBA]”); *Regents of Univ. of N.M. v. N.M. Fed’n of Teachers*, 125 N.M. 401, 962 P.2d 1236; *Deming Firefighters Local 4521*, 141 N.M. 686, 160 P.3d 595. The Board has not only the power to adjudicate this Petition under Section 9(A) of the Act, but the duty to do so. Accordingly, I conclude that this Board has both subject matter and personal jurisdiction over the parties and claims herein; the parties’ contractual grievance arbitration process is immaterial to this proceeding.

MERITS ANALYSIS

Having determined that there are no procedural or jurisdictional impediments to IAFF’s petition I now turn my attention to its merits. I approach that analysis as a three-step process: First, I determine whether any of the State’s affirmative defenses prevent this Board

from entering an Order clarifying the unit as having always included the positions. For the reasons outlined above I have already determined that Carlsbad's affirmative defenses are dismissed.

I then proceed to the second step, which is to determine whether the preponderance of the evidence establishes that the positions to be accreted are statutorily exempt as management, supervisory or confidential employees. The Union has the burden of proving the absence of the statutory exemptions according to the Board's decision in *AFSCME, Council 18 v. Santa Fe County*, PELRB No. 305-15. If I determine that one or more of the statutory exemptions apply my analysis stops and I will dismiss the Petition. If I find they are not exempt, I then proceed to the third step: determining whether they are to be excluded from the bargaining unit for other legitimate reasons such as lack of a shared community of interest or their inclusion renders that unit inappropriate.

III. THE THREE POSITIONS AT ISSUE; THE EMS DIVISION CHIEF, THE FIRE MARSHALS AND THE STAFF DEVELOPMENT/STAFF DEVELOPMENT OFFICER ARE NOT "SUPERVISORS" AS THAT TERM IS DEFINED BY THE PEBA AND THEREFORE, THOSE POSITIONS ARE NOT EXEMPT FROM COLLECTIVE BARGAINING ON THAT BASIS.

To be deemed a supervisor exempt from collective bargaining according to the PEBA §10-7E-4(U), one must meet *all* of the three following criteria: (1) devote a majority¹ of work time to supervisory duties; (2) customarily and regularly direct the work of two or more other employees, and; (3) possess authority to hire, promote or discipline other employees or to recommend such actions effectively. If any one of these required elements is absent, the

¹ Both parties used the "substantial amount of work time devoted to supervisory duties" standard in the hearing and in their briefs, which was the standard to be applied under the former law. One of the notable changes to the PEBA when it was resurrected in 2003 was the requirement in §10-7E-4(U) was changed to a "majority" of work time devoted to supervisory duties must be established before an employee will be deemed to be a supervisor. My analysis here applies the "majority" standard.

employee is not a “supervisor” as that term is used by the Act. Furthermore, an employee that meets these three criteria is still not a supervisor if: (1) he or she performs merely routine, incidental or clerical duties or; (2) he or she only occasionally assumes a supervisory or directory role, or; (3) his or her duties are substantially similar to those of his subordinates, or; (4) he or she is a “lead employee”, or; (5) he or she is an employee who merely participates in peer review or occasional employee evaluation programs.

None of the three positions direct the work of any subordinates; the Union’s witnesses all testified so. The nature of their work is collateral to the fundamental mission of the Fire Department in Carlsbad to provide ready and able first responders on emergency calls to all of South Eddy County and to maintain stations and equipment supports that conclusion. The City’s witnesses did not refute the evidence on this point and Carlsbad seems to have abandoned any argument in its closing brief that any of the affected positions are supervisors, concentrating instead on their status as managers, exempt from collective bargaining under the PEBA §10-7E-4(O). Similarly the preponderance of the evidence supports a conclusion that none of the three positions devote a majority of work time to supervisory duties or possess authority to hire, promote or discipline other employees or to recommend such actions effectively, other than as part of interview panels or as test evaluators, which falls into the category of peer review or occasional employee evaluation programs that expressly are not indicia of supervisory status.

Accordingly, because the EMS Division Chief, Fire Marshals and Training/Staff Development Officer do not meet all of the threshold elements for supervisor status under the Act, they are not “supervisors” as defined in the PEBA are therefore, are not excluded from collective bargaining on that basis.

IV. THE POSITIONS AT ISSUE ARE NOT “CONFIDENTIAL” EMPLOYEES AS THAT TERM IS DEFINED BY THE PEBA AND THEREFORE, ARE NOT EXEMPT FROM COLLECTIVE BARGAINING ON THAT BASIS.

The exclusion of confidential employees under the PEBA § 4(G), § 5 and § 13(C) is limited to those who assist and act in a confidential capacity to persons who exercise managerial functions in the field of labor relations. See, *NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995). Criteria to be considered in establishing confidential status are whether the employee (1) is or could likely be on the employer’s bargaining team; (2) is privy to the employer’s labor-management policy or bargaining strategy; (3) 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).

Those criteria are consistent with the “labor nexus” test propounded by the NLRB and upheld by the United States Supreme Court. See, *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 189 (1981). The verbs “formulate”, “determine” and “effectuate” are to be read conjunctively; that is, all three conditions must be present. See *Greyhound Lines, Inc.*, 257 NLRB 477, 480 (1981); *Bd. of Educ., Dist. No. 230 v. Illinois Educational Labor Relations Bd.*, 518 N.E.2d 713, 723 (Ill. App. 1987).

As with the supervisory employee status analyzed above, the unrebutted testimony of the Union’s witnesses established that they do not assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. As with the question of whether the affected positions are “supervisors” under the Act, Carlsbad seems to have abandoned any argument in its closing brief that any of the

affected positions are “confidential” employees and the preponderance of the evidence supports a conclusion that none of the three positions is or could likely be on the employer’s bargaining team; is privy to the employer’s labor-management policy or bargaining strategy; and has access to confidential financial or other data used in bargaining; or has input or involvement in the employer’s contract proposal formulation. Accordingly, the EMS Division Chief, Fire Marshals and Training Officer are not “confidential” employees as defined in the PEBA and are therefore, not excluded from collective bargaining on that basis.

V. THE POSITIONS AT ISSUE ARE “MANAGERS” AS THAT TERM IS DEFINED BY THE PEBA AND THEREFORE, ARE EXEMPT FROM COLLECTIVE BARGAINING ON THAT BASIS. THEIR INCLUSION IN THE BARGAINING UNIT WOULD RENDER IT “INAPPROPRIATE”.

PEBA’s definition of a “manager” exempt from coverage of the Act can be broken down into a two-part test:

- A. the employee is primarily engaging in executive and management functions; and;
- B. he or she has responsibility for developing, administering, or effectuating management policies, which requires the employee to do more than merely participate in cooperative decision making programs on an occasional basis.

The first prong of the Act’s test requires that an individual possess and exercise a level of authority and independent judgment sufficient to significantly affect the employer’s purpose. The second prong requires that an employee creates, oversees or coordinates the means and methods for achieving policy objectives and determines the extent to which policy objectives will be achieved. This 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. *NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995). For purposes of this Recommended Decision it is particularly noteworthy that the PEBA does not require that the employees must create or initiate management policies. Rather, the definition is met if they only oversee or coordinate the means and methods for achieving those policies. “Employees exhibit such authority when they exercise independent judgment to establish policies and procedures, to prepare budgets, or to assure effective and efficient operations. Managerial employees must exercise discretion within, or even independently of established employer policy and must be aligned with management.” *NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995). To meet the second part of the test, the employee must “either create, oversee or coordinate the means and methods for achieving policy objectives and determine the extent to which policy objectives will be achieved” which “means more than mechanically directing others in the name of the employer” but instead requires “an employee [to] have meaningful authority to carry out management policy.” *Id.*

Applying the foregoing legal tests to the specific positions at issue here, yields the following results:

1. **EMS Division Chief.** The preponderance of evidence establishes that the EMS Division Chief meets the first prong of our two-pronged test: the position is primarily engaging in executive and management functions. The primary duties of the EMS Chief are to monitor, observe, and critique medical response and subsequent reports, to liaison with area hospitals and billing entities, to supervise the stocking and maintenance of all emergency medical equipment, to track emergency medical technician qualification and ensure compliance with continued education requirements, to determine and direct corrective action of subpar EMTs or performance, evaluate readiness for duty through

examination of personal driving records, and generally directs and provide overall management of emergency medical services for the City of Carlsbad Fire Department.

These are plainly management and executive functions.

The EMS Division Chief spends his time negotiating and executing agreements with adjoining providers as a representative and liaison to the Fire Department's medical director, area hospitals, or billing and collection agencies. The EMS Chief represents the Fire Department on the Regional Trauma Advisory Committee, coordinates and oversees EMS licensure, reporting, billing, and provision of ambulance services for Carlsbad's Fire Department, thereby effectuating the standard of patient care established by the City. It is significant that 85-90% of Fire Department responses are EMS calls, so that it may readily be seen how critical the EMS Chief's position is to effectuating management policy for the success of the Department's mission overall. In furtherance of these duties the EMS Chief reviews all medical run reports for quality control and management of reporting and regularly rejects reports for correction.

The EMS Division Chief has historically been excluded from the bargaining unit despite the parties, by agreement over a series of successive contracts, agreeing to expand the scope of the bargaining unit from time to time. That position is administratively and organizationally distinguished from EMS/Firefighters, Engineers, Lieutenants, and Battalion Chiefs, known as "suppression personnel" as a position that, while it may be held by a certified firefighter is primarily engaged in executive or management duties. Further evidence of the administrative and organizational differentiation from suppression personnel in the bargaining unit is found in the fact that the suppression side employees work a shift schedule of two consecutive 24-hour shifts, followed by 96 hours off. Those personnel may be assigned to any one of five fire stations. Those station assignments

occasionally rotate. Not so for the EMS Division Chief. He works at a single location – the administrative headquarters where the Chief’s and Assistant Chief’s offices are located, which, while located at the same address as the Department’s Station 1, is physically and administratively separated from the suppression side. In contrast to the suppression side work schedule, the EMS Division Chief works a 40-hour workweek from Monday through Friday and is paid an hourly wage calculated from a salary figure based on a minimum required hours of 2,080 hours per year. (Bargaining unit members are paid an hourly wage calculated from a salary figure based on a minimum required hours of 2,920).

I am aware that there is some overlap with job duties performed by Battalion Chiefs, who are within the bargaining unit. A collateral responsibility of the EMS Division Chief is to command Station #3, which means that the position is responsible for overall administration and maintenance of the station, its apparatus and equipment. However, his responsibilities also include assuming command of multi-agency response scenes, scenes that demand non-routine resources, scenes that “tax the resources of the CFD”, and scenes that require a PIO (Public Information Officer). He also responds to all public record requests related to medical reports. In these respects he is the “face” of the Department both with professional peers and with the public at large. Such additional duties are beyond those performed by Battalion Chiefs in the bargaining unit and are executive in nature. Additional management and/or executive functions of the EMS Chief include preparing and submitting to the Chief an annual budget request for equipment, medical supplies and ambulance service needs. The position then monitors the EMS budget for the department after approval, including ordering and purchasing. These duties, together with responsibility for reviewing medical run reports for quality control, revising medical protocols, tracking licensure with the state pharmacy bureau for controlled

substance permits and with the Public Regulations Commission for the ambulance services call upon the EMS Division Chief to exercise discretion and independent judgement in a manner that supports a conclusion that the positions duties are management and/or executive in nature. To the extent this position performs bargaining unit work, it does so rarely, under exceptional circumstances.

In light of the foregoing I conclude that the EMS Division Chief is a "management employee" as that term is defined by the PEBA § 4 (O). Accordingly, inclusion of the position would render the bargaining unit inappropriate because NMSA (1978) § 10-7E-13 (C) (2003) mandates that the PELRB shall not include managers in an appropriate bargaining unit. Pursuant to NMAC 11.21.2.38 the PELRB may only grant an accretion petition with regard to employees whose inclusion in the existing unit would not render that unit inappropriate. Because I have determined that including the EMS Division Director in the existing unit here, would render that unit inappropriate, I do not reach the question of whether they share a community of interest with employees in the bargaining unit. For the foregoing reasons the Accretion Petition should be denied with regard to the EMS Division Director.

2. Fire Marshal.

The two primary areas of responsibility for the City's two Fire Marshals are: (1) to manage all arson investigations; and, (2) to conduct inspections of building for compliance with the Fire Code. Although the position performs arson investigations in the same manner as the members of the Investigation Team, the position has additional responsibilities that differentiate the Fire Marshal position from the constituent members of the team. Managing all arson investigations includes training the Arson Investigation Team, composed of six firefighters, directing those team members as needed when they conduct

investigations and either reviewing reports team members' investigation reports or drafting his own reports in those cases on which he served as investigator. As the chief investigator, and in connection with exercising his responsibility for training and managing the Arson Investigation Team, the Fire Marshal maintains certification files for all members of the team. He worked directly with the Fire Chief on developing criteria for appointment to the Arson Investigation Team and assessing bargaining unit members' practical experience for the purpose of advising the Chief on who may be added to the Arson Investigation Team and thereby earn specialty pay. I tend to think of those responsibilities as falling under the category of management or executive duties. I recognize that reasonable minds may differ on that categorization. However, any such difference of opinion is not a material distinction because the Fire Marshal does not spend most of his time in those pursuits. Rather, most of his work time is spent personally inspecting all the businesses in Carlsbad for fire code compliance and fire safety issues, including those inspections necessary for the business to obtain a state occupancy license. In connection with those duties the Fire Marshal spends at least half of his time reviewing building plans, including those for new construction. In so doing he must manage his schedule, prioritize inspections and exercise independent judgement as to whether and how the fire code is met. This illustrates a daily exercise of discretion City Codes and independent decision making with regard to the means and methods for achieving City policy objectives. This function lies more clearly within the realm of management or executive duties and as most of the Fire Marshals time is spent in these endeavors I find the evidence in this area to be most persuasive.

In addition, the Fire Marshal's duties include proposing amendments to the City's fire code in light of international model fire codes representing the Department before the City

Council. He plans, organizes, and implements fire prevention functions including coordinating fire prevention training in the Carlsbad schools. He is the point of contact for the Fire Department on all public record requests concerning inspections or investigations. He reviews all fire-related run reports for quality control. He is not supervised in these management or executive duties and demonstrates the exercise of independent judgement in carrying them out. These are typical of one working in a management or executive position.

As was seen in the EMS Director position analysis the Fire Marshal maintains a physical and organizational separation from suppression side personnel in the bargaining unit. He works in the same office complex as the Chief and Deputy Chief and meets with the Chief daily. He works a Monday through Friday 40-hour week, unlike bargaining unit members. These facts lend support to the proposition that the Fire Marshal position has historically been recognized to be a management or executive position.

The same evidence that I have outlined above to support a conclusion that the Fire Marshal is primarily engaging in executive and management functions, also demonstrate that he has responsibility for administering or effectuating management policies beyond merely participating in cooperative decision making programs on an occasional basis. To the extent he is engaged in updating local codes to comport with international model codes, he is also engaging in the executive or management function of developing management policies.

In light of the foregoing I conclude that the Fire Marshal position is a "management employee" as that term is defined by the PEBA § 4 (O). Accordingly, inclusion of the position would render the bargaining unit inappropriate because NMSA (1978) § 10-7E-13 (C) (2003) mandates that the PELRB shall not include managers in an appropriate

bargaining unit. Pursuant to NMAC 11.21.2.38 the PELRB may only grant an accretion petition with regard to employees whose inclusion in the existing unit would not render that unit inappropriate. Because I have determined that including the Fire Marshal in the existing unit here, would render that unit inappropriate, I do not reach the question of whether they share a community of interest with others in the unit. For the foregoing reasons the Accretion Petition should be denied with regard to the Fire Marshal position.

3. Training Officer (a/k/a Staff Development Officer).

As with the other two position the IAFF seeks to accrete, The Training Officer is exempt as a manager because, as described by Training Officer Ahrens, he "oversee[s] and coordinates the training for the department to ensure that the department members get the training they need, both EMS, fire and special technical skills so they can go perform our primary function of protecting life and preserving property." This testimony describes a job that exists to effectuate management policy. The Training Officer is the only member of the Fire Department charged with scheduling training for the entire Department, budgeting for training needs as he determines and prioritizes them and tracking all training for individual licensure and external reporting. The Training Officer works in an office is located in the administrative side of the Department's central station, Station 1 where he meets daily with the Assistant Chief and weekly with the other management staff. It is undisputed that he teaches some of the required courses and while it may reasonably be disputed that teaching constitutes a management or executive function, it must be understood that teaching is not all that he does with regard to the grading objective tests and subjective evaluation of recruit performance or more advanced training. The Training Officer does not typically teach all recruit courses but testified that he will occasionally teach certain training modules himself to save money. More significant that his occasional teaching duties is the fact that the position

has responsibility for ensuring that initial training is scheduled and delivered by competent instructors from EMT-Basic, through Firefighter 1 and Firefighter 2, and through EMT-Intermediate. The Training Officer also manages and coordinates training to retain Federal Aviation Administration aircraft firefighting certification, mine rescue and confined space rescue, and dive rescue proficiency. This requires him to exercise independent judgment concerning the selection contracting and scheduling of instructors for modules most of which he does not teach himself. He maintains records of course completion so that personnel can maintain their required state licensure as well as for insurance rating purposes. These are all management or executive functions beyond teaching duties. The Training Officer is responsible for the overall functioning of his assigned department reporting directly to the Chief or his Deputy. The efficient operation of the training department, which includes scheduling appropriate facilities and staffing, budget control and maintaining supplies, is essential to Carlsbad Fire Department's primary mission of providing first responders to all EMS and fire suppression calls in Eddy County. Before the Carlsbad Fire Department can fulfill its purpose, its first responders must be thoroughly trained and certified. To the extent the position performs bargaining unit work it does so rarely and only under exceptional circumstances.

The above-referenced evidence demonstrates not only that the Training Officer is primarily engaging in executive and management functions but also, that he has responsibility for administering or effectuating management policies, beyond merely participating in cooperative decision making programs on an occasional basis.

In light of the foregoing, I conclude that the Training Officer position is a "management employee" as that term is defined by the PEBA § 4 (O). Accordingly, inclusion of the position would render the bargaining unit inappropriate because NMSA (1978) § 10-7E-13

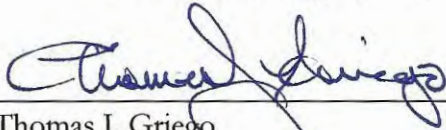
(C) (2003) mandates that the PELRB shall not include managers in an appropriate bargaining unit. Pursuant to NMAC 11.21.2.38 the PELRB may only grant an accretion petition with regard to employees whose inclusion in the existing unit would not render that unit inappropriate. Because I have determined that including the Training Officer in the existing unit here, would render that unit inappropriate, I do not reach the question of whether the position shares a community of interest with employees in the unit. For the foregoing reasons the Accretion Petition should be denied with regard to the Training Officer position.

RECOMMENDED DECISION:

The EMS Division Chief, the Fire Marshals and the Training Officer/Staff Development Officer positions in the City of Carlsbad Fire Department meet the statutory definition of managers and are excluded from the bargaining unit pursuant to §§ 10-7E-4(O) and 10-7E-5. Any requested conclusions of law not adopted in the rationale and conclusions herein are to be deemed rejected. Accordingly, the Petition for Accretion should be **DENIED**.

Either party may appeal this recommended decision by filing a notice appeal with the PELRB staff at 2929 Coors Blvd. NW in Albuquerque New Mexico 87120. Provisions for appeal are found at NMAC 11.21.3.19. An appeal must be filed within 10 work days of this opinion and otherwise comply with NMAC 11.21.3.19.1.

Issued this 17th day of August, 2018



Thomas J. Griego
Designated Hearing Officer
Public Employee Labor Relations Board
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Albuquerque, NM 87120