

BEFORE THE PUBLIC EMPLOYEE
LABOR RELATIONS BOARD

NMCP SO-CWA local 7911,

Petitioner,

vs.

04-PELRB-2009
PELRB Case No. 319-08

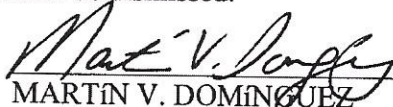
CITY OF RIO RANCHO POLICE DEPARTMENT,

Respondent.

ORDER AND DECISION

THIS MATTER having come before the Public Employee Labor Relations Board upon the appeal of NMCP SO-CWA local 7911 of the Hearing Examiner's recommended decision dismissing the representation petition filed by NMCP SO seeking certification of a bargaining unit comprised of all lieutenants employed at the Rio Rancho Police Department, the Hearing Examiner having found and concluded following a hearing in this cause that said lieutenants are "supervisors" and thus excluded from coverage under the Public Employee Bargaining Act, and the Board having heard argument of the parties on the appeal of this matter and being otherwise fully advised;

IT IS HEREBY ORDERED that the recommended decision be and hereby is adopted by the Board and that the representation petition be dismissed.


MARTIN V. DOMINGUEZ
Chairman, PELRB
Date: 04/06/09

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

NMCP SO-CWA Local 7911,

Petitioner,

and

PELRB Case No. 319-08

City of Rio Rancho,

Respondent.

HEARING EXAMINER'S REPORT

This matters comes before the undersigned on a Representation Petition (Petition) filed on September 30, 2008 by the New Mexico Coalition of Public Safety Officers - Communications Workers of America Local 7911 (NMCP SO or Union). NMCP SO seeks certification of a bargaining unit comprised all lieutenants employed at the Rio Rancho (City) Police Department (Department), or accretion¹ of such lieutenants into an existing bargaining unit represented by the Rio Rancho Department of Public Safety Association, an NMCP SO affiliate (hereinafter Association).²

¹ The City argues in its post-hearing brief that accretion is not an issue before the undersigned because the petition does not formally seek accretion, and because the Union waived any accretion claim at the Oct. 27, 2008 Status and Scheduling Conference. *See* Respondent's Post-Hearing Brief at Note 1. However, the parties stipulated that one issue to be addressed is what is the appropriate bargaining unit, if lieutenants are covered under PEBA—an issue that only arises in this case in the context of accretion—and that stipulation now controls. *See* Pre-Hearing Stipulations, ¶ 5(b). In any event, PELRB rules require a party to proceed by way of petition for election rather than petition for accretion wherever the proposed action raises a question concerning representation. *See* NMAC 11:21.2.36(B) and NMAC 11.21.2.37(B). Additionally, at the Oct. 27 conference the Union amended its initial apparent waiver of accretion by adding "but that may come down the road depending on the complexity of how it goes." Accordingly, accretion is properly before the undersigned.

² The Association is also known as the "Rio Rancho Police, Fire & Dispatch Association." The first name is used in the Association's filing with the New Mexico Public Regulations Commission. The second name is used in the current collective bargaining agreement between the City and the Association. (Harvey testimony.) The Association intends to change its name again in the near future, if it has not yet done so. *See* Note 5, *infra*.

A representation hearing was held in this matter on December 18-19, 2008. For the reasons discussed below, the undersigned finds and concludes the police lieutenants do not meet the definition of "manager" but do meet the definition of "supervisor" under the Public Employee Bargaining Act (PEBA), NMSA 1978 §§ 10-7E-1, *et seq.* However, in the event the Board concludes the lieutenants *are* covered under PEBA, the undersigned recommends they be certified as a separate bargaining unit represented by NMCPSO.

JURISDICTION

The parties stipulate the City is a public employer under §10-7E-4(S) of PEBA; and the Union is a labor organization under §10-7E-4(L) of PEBA. Accordingly, the PELRB has jurisdiction to decide this matter.

PARTIES' POSITIONS

The Union argues that the Rio Rancho Police Department and the duties of its lieutenants have undergone drastic changes since the existing bargaining unit was formed in 1989. The existing bargaining unit includes police officers through the rank of sergeant, and in 1989 sergeants oversaw day-to-day operations while captains and lieutenants exercised more management responsibilities. During the 80s and 90s, however, lieutenants were "stripped" of their decision-making and command authority, which now resides solely in the Deputy Chief and, to a lesser extent, the captains. Therefore, the Union argues, lieutenants now perform essentially the same functions as sergeants, who also supervise lower ranking officers.

The City argues that the job functions of lieutenants have not changed for the most part but, to the extent they have, it is to increase both their managerial and

supervisory responsibilities due to expansion of the Police Department patrol officer staff and the institution of the Community Policing Initiative. It also argues that the supervisory functions of sergeants and any similarities between sergeants and lieutenants in this regard are not relevant.

ISSUES

1. Are police lieutenants excluded managers under § 10-7E-4(O)?
2. Are police lieutenants excluded supervisors under § 10-7E-4(U)?
3. If “no” to both questions, may police lieutenants be accreted into the existing bargaining unit?

BURDEN OF PROOF

Pursuant to NMAC 11.21.1.22(A), “[e]xcept in unit clarification proceedings, no party shall have the burden of proof in a representation ... proceeding. Rather, ... the hearing examiner shall have the responsibility of developing a fully sufficient record for a determination to be made ... In a unit clarification proceeding, a party seeking any change in an existing appropriate unit, or in the description of such a unit shall, have the burden of proof and the burden of going forward with the evidence.” *Id.* Accordingly, no party bears the burden as to basic issue of unit inclusion or exclusion, but the Union bears the burden of production and proof as to the issue of accretion. *See* NMAC 11.21.38(B) (a petition for accretion is a type of petition for clarification).

FINDINGS OF FACT

Based on the evidence, the undersigned finds the following by a preponderance of the evidence:

Events surrounding and subsequent to the formation of the original bargaining unit

1. The Association was formed in 1989, and it and the City entered into their first collective bargaining agreement (CBA) that same year.³ At that time, the Association was not yet an affiliate of NMCP SO.⁴ (Harvey testimony.)
2. At that time, the City's police, fire fighter and dispatch personnel were organized into a single entity called the Department of Public Safety. Department positions included a Chief (also known as the "Director"), captain, lieutenants, and "public safety officers." The public safety officers performed dual roles as police and EMS/firefighter. (*Id.*)
3. At that time, the Association petitioned for and was certified to represent a bargaining unit comprised of dispatch personnel and public safety officers in the rank of sergeant and lower. (*Id.*)
4. In 2001 the Department of Public Safety was realigned. The police and fire functions were separated into independent Departments and positions were created and/or reorganized to manage and fulfill the firefighter functions.⁵ (*Id.*)
5. In April of 2006, the Police Department upgraded one of its two existing captain positions to Deputy Chief of Operations. At that time, the remaining captain position was unfilled and it remained unfilled for about two years. During that period of time, Deputy Chief Kellogg assumed about 30-40% of all captain duties,

³ The parties orally stipulated at the hearing that the existing unit is grandfathered under §24(B) of PEBA.

⁴ The Association affiliated with NMCP SO in 2000. (*Id.*)

⁵ Since the filing of the instant Petition, NMCP SO has successfully petitioned to sever the firefighters from the existing bargaining unit of represented by the Association. *See* PELRB Case No. 322-08. Attendant to that reorganization, the Association apparently intends to change its name again to "Rio Rancho Police & Dispatch Association." *Id.*, Certification dated Jan. 16, 2009.

and the remainder were distributed roughly evenly between all of the lieutenants.
(Kellogg testimony.)

6. In or about 2008, a second captain position was re-authorized, to replace the position previously upgraded to Deputy Chief. At the end of July 2008, Lieutenants Tanya Smith and Steven Beckett were promoted into the two captain positions. (Smith, Beckett and Kellogg testimony.)
7. One captain, currently Captain Smith, oversees the Monday through Thursday weekday shifts. One captain, currently Captain Beckett, oversees the Thursday through Sunday weekend shifts. (Ex. 10.) Additionally, Captain Smith oversees the Traffic Division and Captain Beckett oversees the Criminal Investigations Division (CID) and Specialty Services. (Smith and Beckett testimony.)
8. Presently, there are six lieutenants. This includes four patrol lieutenants, one lieutenant over the traffic division, and one lieutenant over CID and Specialty Services such as court security, animal control, and fleet and maintenance. (Ex. 10 and Connors testimony.) Under the lieutenants, there are presently a total of 17 sergeants, 9 detectives, and 84 officers, including corporals. (Ex. 10.)
9. Each patrol lieutenant oversees three overlapping shifts (also known as "squads"), comprising a 15 to 16 hour period during either the weekdays (M-Thu) or the weekend (Th-Su). The three assigned shifts include three sergeants who report directly to each patrol lieutenant, as well as 14-15 patrol officers below the rank of sergeant. (Ex. 10.)
10. The lieutenant over the Traffic Division oversees personnel working, collectively, Monday through Friday, from 7:00 a.m. to 6:00 p.m. The Traffic Division

- includes one sergeant who reports directly to the lieutenant, as well as one detective and six officers below the rank of sergeant. (*Id.*)
11. The lieutenant over the CID and Specialty Services oversees personnel working, collectively, Monday through Friday, from 6:00 a.m. to 5:00 p.m. CID and Specialty Services include 4 sergeants who report directly to the lieutenant, as well as 8 detectives and 14 officers below the rank of sergeant. (Ex. 10.)
 12. Over the years, the Department has grown considerably. For instance, when now-Lieutenant Griffith began working for the Department in 1993, there were about 60-80 employees, and its size is now double that. Additionally, the number of non-sworn personnel has grown tremendously during that same time. (Griffith testimony.)
 13. The City Police Department, like many other public safety departments around the country, follows an "incident command" principle under which any supervisor should have no more than five to seven (5-7) personnel reporting to him or her and under his or her direct supervision. (Beckett testimony; *see also* Ex. 13 at 5-6.) The theory behind the low span of control is that a supervisor must be available to provide needed direction in a potentially high volume of critical incidents, and the City and its law enforcement personnel could be liable for failure to prevent negative outcomes if there is inadequate supervision. (Ex. 13 at 5-6.)
 14. Accordingly, as the size of the City and police force has grown, the number and layers of supervisors has increased to prevent any single supervisor's span of control from burgeoning beyond a safe level. (Griffith and Kellogg testimony.)

Additionally, a Community Policing Initiative (CPI) was implemented beginning in 2006 to supplement the traditional incident command system, by focusing on preventative rather than reactive policing. *See infra*. The creation and filling of the Deputy Chief and captain positions, and use of the CPI model have coincided generally with the growth of the City and the Police Department.

Past functions and duties of Department personnel

15. In and prior to 1989, when the grandfathered bargaining unit was created, captains were the Department's policy makers. They wrote and interpreted policy; placed individuals on leave with pay; recommended terminations; and directed the workforce as they saw fit. (Harvey testimony.)
16. At this time, lieutenants acted as a liaison between captains and sergeants. They were the highest-ranking police officer in the field until 2:00 a.m.; they oversaw command operations; and they set policy governing criminal investigations. They also had authority to direct the work force and allocate squad personnel between shifts, and they had direct input on discipline and the creation of new policies or programs. (*Id.*) Lieutenants also had considerable input in both day-to-day operations and the strategic vision of the Department. (Griffith testimony.)
17. In 1989, both captains and lieutenants also had greater cooperative input in the budget process. Lieutenants, in particular, were usually tasked with putting together budget requests, and presenting them to the Director and the City Council and/or City Manager. (Harvey testimony.)
18. In contrast, during this time sergeants only oversaw day-to-day operations. They assumed command over squads or personnel on a given shift, but they still did the

same job alongside their subordinates, relaying the instructions of their lieutenants. (*Id.*)

19. In 2001, at about the same time the Department of Public Safety was reorganized into separate police and fire departments, new policies were instituted, some pursuant to collective bargaining agreement (CBA). As a consequence, the Police Department's policy-making functions became more concentrated in the Chief. All recommendations concerning the budget were now required to go up through the chain of command. Additionally, authority to make recommendations concerning hiring or firing was placed in review boards, and authority to make recommendations concerning changes to the Standard and Procedures (hereinafter "SOPs") was placed in a "SOP Committee." (Harvey and Connors testimony; *see also* Ex. 5, SOP Sec. II, Ch. 4, Art. 2 and Art. 3; *and* Ex. 6, SOP Sec. III, Ch. 3, Art. 2.)

20. As a result of changes since 1989, 2001 or later,⁶ lieutenants' present day job functions and duties have changed in some but not all respects.

Present functions and duties of Department personnel

Making and interpreting Department policies, generally

21. Lieutenants no longer have any special role in making or initiating consideration of new policies. Today, pursuant to the CBA, the Director approves all policies,

⁶ The City is correct in noting the Union cannot quite pin down when the asserted changes occurred. *See* City's Post-Hearing Brief at 16. Mr. Harvey testified the relevant changes occurred shortly in or around 1989 and 2001, but counsel for the Union also argues relevant changes occurred when the Deputy Chief and captain positions were created and/or filled, and the CPI model implemented. *See, e.g.,* Union's Post-Hearing Brief at 7, 15 and 21. (To perhaps avoid inconsistency with Mr. Harvey's testimony, the Union conveniently but incorrectly re-dates some of those events to 2001. *Id.* at 3.) The undersigned generally uses the dates of 1989 and 2001 in the following sections, but findings are also made *infra* concerning the impact, if any, of later changes on lieutenants' duties and responsibilities.

after they have been fully considered and recommended by an SOP Committee comprised of various ranks from officer to captain, as well as representatives of the Union. (Harvey and Connors testimony; *see also* Ex. 6, Sec. III, Ch. 3, Art. 2, SOP Committee.)

22. Nonetheless, lieutenants continue to regularly interpret Department policies, procedures, goals and objectives for the benefit and guidance of their subordinates. (Connors, Smith and Griffith.)

23. First, lieutenants attend the daily staff meeting with their shift sergeants and officers,⁷ and they also regularly meet with their beat sergeants and officers. At these meetings they discuss policies, procedures, problems, issues, goals and objectives. (Connors, Smith and Griffith testimony and Exhibit 1.) Neither type of meeting is "lieutenant led." Sergeants conduct the daily shift briefings, and the CPI or beat meetings are generally "committee" style meetings facilitated by the lieutenant or sergeants. (Connors, Griffith and Harris testimony.) Nonetheless, during these meetings lieutenants regularly relate their understanding of or interpret the Department's policies, goals and objectives. (Connors testimony.) Additionally, they stand by to make sure the sergeants are providing correct interpretations. (Griffith testimony.)

24. Second, lieutenants also generally meet with their shift and/or beat sergeants on a daily basis, and sergeants routinely contact their lieutenants during the day with issues and questions concerning policies and procedures. For instance, Lieutenant

⁷ Lieutenant Connors testified lieutenants are required to attend these daily briefings. Lieutenant Griffith initially testified attendance at these daily briefings was a regular part of his "average day," but thereafter testified lieutenants' attendance is not mandatory. The undersigned credits the Lieutenant Connor's testimony over that of Lieutenant Griffith.

Connors "touches base" with his beat sergeants on a daily basis, and he also spends about 10-15% of his patrol time directing his subordinates in proper policy and procedure. Lieutenant Comacho meets with his sergeant everyday for 5-10 minutes, and then exchanges text-messages with his sergeant throughout the day as problems and issues arise. When she was a lieutenant, Captain Smith interacted daily with her sergeants, to ensure her shifts and beat were running pursuant to Department policies, procedures, goals and objectives. (Connors, Comacho and Smith testimony.)

25. As a natural part of the chain of command, sergeants in turn discuss issues, problems with their subordinates, the corporals and patrol officers. (Connors testimony.) In doing so, sergeants relay to their subordinate patrol officers the interpretation of Department, policies, procedures, goals and objectives that has been provided to the sergeants by their lieutenants.

Setting policy governing criminal investigations

26. Although policy-making functions generally reside in the Director and the SOP Committee, there are no policies offered into the record that govern criminal investigations, other than those related to certain limited aspects of the patrol and traffic enforcement functions. (Ex. 5-8.)
27. Neither Captain Beckett (who was previously the lieutenant over CID, and is still over CID as a captain) nor any other witness testified to a diminishment in the CID lieutenant's authority or ability to exercise independent judgment in determining how best to proceed with a given criminal investigation.

28. Accordingly the undersigned infers the CID lieutenant continues to “set policy governing criminal investigations” as they did in 1989 or 2001, as testified to by Mr. Harvey.

Directing the work force

29. Due to the nature of the chain of command, lieutenants generally direct their sergeants, who in turn relay that direction to subordinate patrol officers. Thus, lieutenants for the most part direct ranks below sergeant only indirectly. (Connors and Harris testimony.)

30. Many sergeants, and lower officers as well, do not need specific direction in how to perform their day-to-day tasks because they are well-trained professionals. (Harris, Comacho and Griffith testimony.)

31. Nonetheless, lieutenants commonly and regularly direct or guide the work of their subordinates. For instance, Lieutenant Connors spends about 10-15% of his patrol time directing his subordinates in proper policy and procedure. Lieutenant Comacho spends about 35% of his time in the field engaged in work distinct from that of his subordinates, such as coordinating the logistics for special operations and otherwise directing his subordinates in the field.⁸ As part of his “average” or “routine day,” Lieutenant Griffith “allows” his sergeants to conduct daily briefings to improve their rapport with the squad, and he also oversees and directs

⁸ Lieutenant Comacho testified that he spends 65% of his time in the field doing “substantially the same” job functions as his subordinates, when asked how much of his time in the field was spent engaged in such activities as coordinating the logistics for special operations and directing employees, as opposed to engaging the same work as his subordinates. Although Lieutenant Comacho also denied having much to “teach” his subordinates because he was new to the Traffic Division, the undersigned treats that as undue modesty in light of Lieutenant Comacho’s demeanor and statements evidenced elsewhere. The undersigned also infers that coordinating the logistics for special operations necessarily entails directing the work force. (As discussed further in Note 11 below, the Union misremembers or mischaracterizes Lieutenant Comacho’s testimony concerning this “65%.”)

them in their handling of citizen complaints. In his CPI duties, Lieutenant Griffith also directs his subordinates in how to frame and collect the empirical data in support of their pet goals and objectives to avoid rejection by the Deputy Chief, *see infra*.

Command operations, strategic vision, and the various liaison and administrative duties

32. Besides regularly meeting with and directing their sergeants and other subordinates, lieutenants are also assigned various administrative responsibilities. Some involve internal liaison functions and relate more to the Department's day-to-day operations, while others involve external liaison functions and relate more to the Department's command operations and strategic vision. Some may involve both internal and external liaison functions.
33. For instance, lieutenants regularly hold CPI meetings to discuss quarterly strategy for their assigned beat, conduct internal investigations,⁹ and attend command staff meetings related to staff studies or reports. (Kellogg testimony.)
34. Lieutenants are also assigned special projects, which include or have included the following: scheduling and staffing, including handling the shift and leave bids; establishing and maintenance of the Telestaff system used to fill the shifts for patrol officers that call in sick; overseeing special events, including coordinating the resulting overtime schedules;¹⁰ coordinating various "special ops" related to traffic and DWI enforcement; gang enforcement; preparing the first draft of

⁹ Although either lieutenants or sergeants may conduct IA Investigations, (Connors and Harris testimony), it is more commonly done by lieutenants. (Kellogg testimony.)

¹⁰ Captain Smith initially did this task when she was a corporal and then a sergeant, but the task was eventually transferred to a lieutenant after the opening of the Santa Ana Star Convention Center because it entailed too much administrative work for a patrol officer, and was interfering with patrol duties. (Smith testimony.)

sections of the CPI manual;¹¹ and conducting CPI training for sergeants on down.¹² (Connors, Comacho, Smith and Griffith testimony.)

35. Another special assignment is responding to citizens' complaints,¹³ and other personnel related matters. Both lieutenants and sergeants are assigned to respond to citizens' complaints. (Connors and Griffith testimony.) Presently, Lieutenant Griffith is the lieutenant primarily responsible for citizen complaints. (Kellogg testimony.) He spends about one third of his work time on citizen complaints or similar personnel matters. Sergeants spend about one half of their work time on citizen complaints and other personnel matters, because they "are always supervising" their patrol officers. However, when a citizen complaint is assigned to a sergeant, Lieutenant Griffith is still responsible for following up on the complaint to ensure it is resolved, and directing the sergeant to resolve it if the sergeant did not already do so. (Griffith testimony.)

36. Lieutenants also attend numerous meetings with outside agencies, such as meetings related to: the purchase and maintenance of scheduling software; TRACs, a federally funded program concerning the use of information technology in law enforcement; LINKS, a statewide law enforcement information sharing program; the Middle Rio Grand Task Force on Narcotics; gang enforcement;

¹¹ The Union attributes Captain Smith as testifying data for the CPI Manual was compiled by sergeants and only typed up by the lieutenants. See Union Post-Hearing Brief at 26. However, Captain Smith was referring to statistical crime data used in the quarterly beat reports, not the initial drafting of the CPI Manual. In contrast, she testified each lieutenant initially prepared a section of the CPI Manual, although sergeants may have had input. (See Ex. 13 at 32.)

¹² Although some of these tasks or projects were one-time, non-occurring events, they are a fair proxy or illustration of the types of other special, non-occurring tasks likely to be regularly scheduled in the future.

¹³ Lieutenant Comacho gave considerably different testimony concerning citizen complaints than what follows. It is disregarded to the extent not consistent with the findings herein, which are based more credible testimony.

Thirteenth Judicial District's pending cases; cooperative law enforcement efforts with U.S. Marshals; issues related to the juvenile justice system; traffic safety advisory commissions; and fleet maintenance liaison with the City. (Connors, Comacho, Smith, Beckett and Kellogg testimony.)

37. The amount of time devoted to meetings with outside agencies can vary quite a bit based on the lieutenant's shift and division. Patrol lieutenants working during weekday hours spend the most work time engaged in such meetings—about 50% of their work time. Lieutenants working weekends, evenings, or in the Special Services or Traffic divisions spend less work time on such meetings. The weekend graveyard shift lieutenant spends the least amount of time spent on such meetings, at about 2 hours a week. (Connors, Harris, Comacho, Smith, Beckett and Griffith testimony.)
38. In performing these various liaison and administrative duties, lieutenants represent the interests and pursue the goals and objectives of the Department. They do so, moreover, largely without specific direction from their captains or the Deputy Chief, although they—like their subordinates—keep their chain of command aware of what they are doing. (Beckett testimony.)
39. In performing duties related to day-to-day operations, and attending internal meetings, lieutenants continue to act as a liaison between the captains and the lower ranks as they did in 1989 or 2001, as testified by Mr. Harvey. Additionally, in attending meetings with outside agencies, lieutenants now also act as a liaison between the Department and the larger community. There is no evidence this was a regular duty prior to 1989 or 2001, and lieutenants' present day duties in this

regard appear to have arisen and grown tremendously along with the growth of the City and the Police Department.

40. In contrast to lieutenants, the administrative duties of sergeants are limited to directing the a thirty-minute squad briefing, filling out and reviewing subordinates police reports, reviewing time sheets, and attending a monthly sergeants' meeting. The sergeants' administrative duties generally take up only an hour or two a day. Sergeants also rarely attend meetings with outside agencies.¹⁴ (Harris testimony.)

Hiring, evaluation and discipline of subordinates

41. Today, unlike in 1989 or 2001, lieutenants have no unique role in hiring and a diminished role in discipline, although they continue to evaluate their subordinate sergeants.
42. Previously, lieutenants had the authority to and did effectively recommend the hiring of personnel. Today, although a lieutenant can only informally recommend a person be hired, and the official recommendation for hiring is made to the Director by a hiring committee (or "oral review board"). The hiring committee has several members. The members are usually lieutenants and sergeants, but sometimes may be a lower ranked officer as well. (Connors testimony)
43. Both lieutenants and sergeants evaluate their immediate subordinates' performance annually, or more often in the case of probationary employees. (Ex. 1 and 3, and Connors testimony.) Thus, lieutenants evaluate their sergeants'

¹⁴ Lieutenant Comacho testified lower ranks do attend such meetings. However, according to Sergeant Harris, attending such meetings is not a regular part of sergeants' average workday. To the extent there is inconsistency, the undersigned credits the testimony of Sergeant Harris over that of Lieutenant Comacho. Additionally, the undersigned infers attending these types of meetings is not a regular part of patrol officers' average workday either.

work performance and sergeants evaluate their corporals' and officers' work performance. (Connors testimony.)

44. In performing evaluations, lieutenants and sergeants use their judgment to rank whether an employee meets, does not meet or exceeds expectations in fifteen to twenty different categories. They are only directed to change their evaluations for typographical errors. (Connors testimony.) The evaluations are sent up the chain of command, and are considered in awarding promotions.¹⁵ (Ex. 6, SOP Sec. III, Ch. 3., Art. 16, § B(1); *see also* Smith testimony.)

45. Lieutenants also continue to have authority to issue at least certain types of discipline. (Connors testimony.) This represents a change from 1989 or 2001, when lieutenants had authority to effectively recommend discipline of any type.

46. Today, discipline is categorized as "Class I" or "Class II" violations of Department SOPs. "Class I" violations are those that result in administrative sanctions, meaning suspension, demotion, discharge or any action affecting the employee's property interest not to include take home car privileges. "Class II" violations are those that can be managed through corrective or disciplinary action meaning, respectively, (a) training, counseling, performance improvement plans, and/or written or verbal warnings, or (b) written reprimands and/or loss of take home car privileges. (Ex. 5, SOP Sec. II, Ch. 4, Art. 3 at 1.)

¹⁵ Lieutenant Connors testified that evaluations are not used at all to determine pay raises or terminations. However, SOP Sec. III, Ch. 3., Art. 16, § B(1), requires positive evaluations as a criteria for promotion. Additionally, Lieutenants Smith testified that all the Department policies are closely followed and updated as needed, and as such are an accurate reflection of Department practices. Although the City argues—to what end it is unclear—that the Department SOPs are out of date, *see* Respondent's Post Hearing Brief at 12, a number have been revised within a year of the hearing. Accordingly, I credit the written policy as corroborated by Lieutenants Smith's testimony, over Connor's uncorroborated testimony.

47. Both lieutenants and sergeants are authorized to issue corrective or disciplinary action for Class II violations, such as verbal or written warnings. (Connors and Harris testimony; *see also* Ex. 5, SOP Sec. II, Ch. 4, Art. 3, §A(3).) Sergeants take corrective action, at least, more frequently than lieutenants because they are more likely to be in the field observing their subordinates' conduct. (Connors and Harris testimony.)
48. To issue discipline greater than a written reprimand (*e.g.*, for Class I violations), the matter must be proceed through an Internal Affairs (IA) Investigation and a hearing before the Internal Review and Hearing Board (or "IRB" as called by the witnesses), before being ultimately decided by the Director. The IA Investigation may be performed by a lieutenant or a sergeant, but is usually done by a lieutenant. The IRB has several members, usually lieutenants and sergeants, but sometimes a lower ranked officer as well. (Harvey, Connors and Kellogg testimony; *see also* Ex. 5, SOP Sec. II, Ch. 4, Art. 2 and Art. 3.)

Budgetary functions

49. Today, lieutenants still make budgetary recommendations for their division, if they feel money is required, but they are not as strong a driving force behind the budget as they once were.
50. Typically, deadlines and instructions related to the budget are relayed down from the City Manager, through the chain of command, and lieutenants then direct their sergeants and patrol officers to determine what their division or squad's budgetary needs are. Once the subordinates' input is received the lieutenants draft a "wish

list" and submit it to the Director, who usually amends it. (Connors, Harris and Comacho testimony.)

51. Lieutenants also have a role today in implementing and administering the budget and grants for any division or program to which they are assigned. However, in doing so, they utilize the help of City Grant Administrator, Kathy Fox. (Connors testimony.)

Patrol duties and responding to calls for service

52. All lieutenants continue to engage in actual patrol duties, as they always have, but their time and ability to do so is limited by the amount of administrative duties they have. Accordingly, lieutenants generally only patrol as necessary to keep apprised of their assigned beat and ensure the smooth functioning of their shift. (Connors, Smith and Beckett testimony.)

53. Lieutenants also continue to respond to calls for service. However, unlike sergeants and patrol officers, lieutenants are not generally assigned or required to respond to calls for service. They do so only on more serious calls, when the call involves violence, when their shift is shorthanded, and/or if they are nearby and it is a call that could involve personal injury. (Connors, Comacho, Smith, Beckett and Griffith testimony.)

54. When they respond to a more routine call, lieutenants typically do so only as back up, or they direct a subordinate officer to make the arrest. As back up they are generally evaluating their subordinates, and providing direction as needed. When attending a more serious incident, meaning one concerning a large-scale incident, the lieutenant on the scene will generally be the incident commander or scene

manager. His or her role in that case is to maintain an overview of the incident or operation, ensure overall scene management, and direct subordinates.¹⁶ (Connors, Comacho, Smith, Beckett and Griffith testimony.)

55. Consistent with the foregoing, lieutenants do not generally issue citations (also known as “tickets”), offense/incident reports or crash reports (both a.k.a. “police reports”), or make arrests.¹⁷ For instance, at 6 lieutenants to 17 sergeants, lieutenants are 35% of the size of the sergeant population. However, they are responsible for only 2-16% of the tickets, police reports and arrests for which sergeants are responsible.¹⁸ (Ex. 12.) The comparative and total difference for these activities as between lieutenants and patrol officers is even greater, given the difference in their numbers and relative patrol frequency. At the time of the hearing there were 84 patrol officers under the 17 sergeants, and typically a given

¹⁶ Although in theory anyone can be the incident commander it will usually be the lieutenant, or sometimes a particularly well-experienced and competent sergeant. (Smith, Connors and Harris testimony.)

¹⁷ Some witnesses attribute this to the fact that arrests and tickets inevitably result in off-duty work spent in court or at administrative hearings, and lieutenants—unlike sergeants and subordinate patrol officers—are not paid overtime for such work. Accordingly, lieutenants do not take it upon themselves to assume patrol related functions in more mundane situations, but instead tend to do so only when required by the serious nature of the call, staffing shortages and/or personal proximity. (Connors and Comacho testimony.) Some witnesses attribute this to the fact that lieutenants, unlike sergeants and lower ranks, are permitted to and do frequently wear civilian clothes, and drive unmarked police cars that do not have a “cage” separating the front and back seats, radars or video cameras. Thus, they frequently are not equipped to properly execute stops or arrests. (Smith and Griffith testimony.) Still others attribute it to the fact that lieutenants must remain available to assume command responsibility if a large-scale problem arises. (Beckett testimony.) The undersigned infers that all three rationales apply, although perhaps with different weight for different lieutenants.

¹⁸ The City argues the higher percentages for lieutenant issued citations should be discounted, because there is evidence the majority of those citations were issued while the lieutenants were working on federally funded operation for which overtime pay was available. *See* Respondent’s Post Hearing Brief at 7-8; *see also* Ex. 12 and Smith testimony. However, there is no evidence that performing such federally funded overtime duties is not also a recurring and likely part of lieutenants’ job duties.

sergeant will be responsible for only about 20 to 30% of the citations, police reports and arrests as the average patrol officer.¹⁹ (Smith testimony.)

56. Also consistent with the foregoing, for the most part the lieutenants' various rank-specific administrative duties prevent them from spending more than 30% to 45% of their work time in the field with their subordinates. (Connors,²⁰ Beckett and Smith testimony.) There are, however, two notable exceptions.

57. Lieutenant Griffith, the lieutenant over the weekend graveyard shift, spends about 67-75%²¹ of his work time in the field, and the majority of this time is engaged in patrol functions similar to that of his subordinates. However, this shift is short-staffed by two positions, and the lieutenant on this shift is traditionally not assigned many administrative duties any way. Additionally, although Lieutenant

¹⁹ There is no evidence that the personnel ratios for lieutenants, sergeants and patrol officers were dramatically different in 2007 or earlier in 2008, so the undersigned infers these ratios provide a good approximate value for purposes of this finding.

²⁰ Lieutenant Connors initially testified that his time is split "50/50" between outdoor patrol functions and administrative or indoor functions. Upon questioning he amended his testimony to state that he spends "40 to 50%" in patrol functions. The Union incorrectly attributes Lieutenant Connors as having testified to "patrolling 3/4 of the time" during his shift, and spending only "1-3 hours per day maximum in office" (sic). See Union Post-Hearing Brief at 16, 17 and 22. It was Sergeant Harris, not Lieutenant Connors, who testified to spending 1-3 hours a day in the office. It was Griffith who testified to spending 3/4 of his time on patrol.

²¹ Lieutenant Griffith testified that he spends "3/4" of his time "out and about" on patrol, but he also testified that he spends "1/3" of his time resolving and addressing citizen complaints. Some of that time may be spent in the field and therefore included in the 3/4 estimate, but maybe not. Curiously, the Union asserts that Lieutenant Griffith works a 16-hour shift, with half of that time being " 'present' that is, not in meetings or in the office doing other clerical functions but available for service calls 1/2 of the time, 8 hours," and that "[o]f those 8-hours he is patrolling 3/4 of the time." See Union's Post-Hearing Brief at 16. If this were accurate, that would mean Lieutenant Griffith performed substantially the same task as his subordinates—e.g., patrolling and/or responding to calls for service—only 6 hours or 37.5% of the 16 hours worked. However, Lieutenant Griffith instead testified that he, like the other lieutenants, is responsible for a 16-hour shift, for which he is present or on-duty 50% or a little over the time (8 hours or more), and on-call the remainder of the time. Lieutenant Griffith also testified that he spent 60% of his time on "CPI duties" and "40% on patrol duties." From this the City argues, "Lt. Griffith testified ... he spends about 60% of his time on CPI management/supervisory duties." See Respondent's Post-Hearing Brief at 11. However, the City mischaracterizes Lieutenant Griffith's testimony. Taking all of Lieutenant Griffith's testimony on this issue together, it is clear he was primarily referring to patrolling within his CPI beat (Beat 4, the largest and most crime-ridden in the City), versus patrolling Citywide.

Griffith believes he issues tickets more frequently than other lieutenants and “some sergeants,” he still only responds to calls for service involving violence, and there is no evidence that he consistently issues tickets or police reports or makes arrests in numbers comparable to his subordinates.²² (Griffith testimony.)

58. Another exception is Lieutenant Comacho, who is in charge of the Traffic Unit, also known as the Motorcycle Unit. Lieutenant Comacho spends a substantial amount of time in the field. He does so primarily because he “loves to go on calls” and enjoys patrolling on his motorcycle,²³ and secondarily to build solidarity with his subordinates and earn their trust.²⁴ Lieutenant tends to make a similar number of stops as his subordinates. He also responds as back up to all the “exciting calls.” However, Lieutenant Comacho is still no more likely than other lieutenants to issue tickets or police reports or to make arrests, and he does so far less frequently than sergeants or patrol officers. Additionally, when responding to calls as back up Lieutenant Comacho largely spends his time “just waiting around.” Lieutenant Comacho also admits that he is required to go “in

²² Upon questioning, Lieutenant Griffith could only recall two to three arrests or “cuffings” in the last year, two tickets in the last week, and once police report in the last quarter, prior to the hearing.

²³ Lieutenant Comacho was also quite frank that he loves to ride his assigned motorcycle as part of his shift. He testified he was instrumental in lobbying to making the Traffic Unit an all-motorcycle unit, including obtaining the necessary funding and training. Additionally, while in the field, he regularly “shoots over” to the Department’s lot at Intel to “do some training and get better on [his] bike.”

²⁴ Lieutenant Comacho justifies his actions based on a supposed directive from the Deputy Chief, that “if you spend 80% of your time in the office and 20% of your time in the field, those numbers should now be reversed.” No other witness confirmed this “80/20” directive, and Deputy Chief Kellogg denied that he made any such directives. He testified he only told the lieutenants to spend more “face time” in the field, to better supervise their sergeants and patrol officers by demonstrating to them that the lieutenants are available and familiar with shift activities. Lieutenant Griffith could not recall a specific quantification, although he recalled the Deputy Chief saying, “I want you on the street with your people.” Lieutenant Griffith’s testimony is more consistent with and basically corroborates that of Deputy Chief Kellogg, so their testimony is credited over that of Lieutenant Comacho.

and out” of the office all day to meet his various administrative responsibilities. (Comacho testimony.) Finally, when Lieutenant Griffith over the Traffic Division, he spent almost all of his time inside performing administrative functions, and “very little” time on patrol. Accordingly, the undersigned infers Lieutenant Comacho spends less time in the field and engaged in substantially the same work as his subordinates as testified to, and/or that much of his time in the field is spent there based on personal choice rather than bona fide shift requirement.²⁵

New duties: the Community Policing Initiative (CPI)

59. In addition to their standard administrative and patrol or shift duties, patrol lieutenants and the traffic lieutenant are also assigned a particular beat as part of

²⁵ Lieutenant Comacho’s testimony suggested that he met the supposed 80/20 directive, and he also testified that he spent 65% of his time on patrol engaged in substantially the same duties as his subordinates. (Lieutenant Comacho did not testify, as the Union asserts, that he spent 65-80% of his time performing the same duties as his subordinates. See Union’s Post-Hearing Brief at 23. The Union, at one point, also misattributes this same mischaracterized figure to Lieutenant Griffith. *Id.* at 17.) The undersigned rejects all of Lieutenant Comacho’s testimony in the regard as unreliable. First, according to all the other witnesses’ testimony, it would be virtually impossible for *any* lieutenant to meet the alleged 80/20 directive while still meeting his or her various administrative duties (except for the weekend graveyard lieutenant, who has far fewer administrative duties). Lieutenant Comacho in particular is responsible, among other things, for coordinating special event details; coordinating special Traffic operations such as targeting aggressive drivers, DWI checkpoints, and saturation patrols; gang enforcement; and overseeing Beat 2 under the Community Policing Initiative, *see infra*. Second, all of Lieutenant Comacho’s testimony on this particular issue was equivocal and/or inconsistent. For instance, he never testified unequivocally that he did in fact spend 80% of his time in the field. When pressed by the undersigned, he talked around the issue for about 5 or 10 minutes and then, when pressed again, stated, “I [uh] ... try to get out as much as possible, so I say [uh]... I’m adhering to that 80/20.” This has the ring of someone trying to reconcile his or her conduct with a policy believed to be in effect. He also qualified his testimony in other respects, such as by testifying that he was required to spend 80% of his time on patrol, and that *of the time on patrol* he would spend “65% of that” engaged in substantially the same duties. Another example is his later testimony that “yes” he is “required to respond to calls,” “because of the 80% requirement,” when all other witnesses agreed lieutenants are not required to respond to calls for service absent emergency circumstances. Finally, it seems extraordinarily unlikely that Lieutenant Comacho could spend 65% of 80% of his work time (or about 52% total) literally engaged in the same work as his subordinates, in light of his other administrative duties, his arrest, ticket and police reports statistics, and his testimony that he spends much of his time on as back up just “waiting around.”

the Department's Community Policing Initiative (CPI).²⁶ This duty and function did not exist in 1989 or 2001.

60. Under the CPI program, the City is divided into five beats. Each beat is assigned one lieutenant, who oversees that beat. Under each lieutenant, there are two to three sergeants and 10 to 15 officers.²⁷ (Smith and Kellogg testimony; and Ex. 11.)
61. Each beat member is expected to "own" their assigned beat, and to become well informed of and proactively work to solve the unique problems within his or her beat. (Smith, Harris and Griffith testimony.)
62. Lieutenants in particular: monitor the criminal activity within their assigned beat; identify and analyze trends or problems; establish standards by which to evaluate the problems and proposed solutions; ensure the input and cooperation of all beat officers in developing such tactics; focus the officers' thoughts and efforts by repeatedly subjecting their suggestions to the standards previously established; assemble, refine and articulate the beat team's research, ideas and strategies into a comprehensible quarterly beat plan (hereinafter "beat plan") that includes appropriate goals and specific, measurable, attainable, realistic and timely objectives for obtaining those goals; oversee the plan's implementation; report back up the chain of command on the effectiveness of that implementation; and modify, change or discontinue the identified goals and objectives over the

²⁶ Although the Criminal Investigations Division lieutenant does not have an assigned beat, he or she is also responsible for preparing quarterly reports providing an overview of CID activities, unit statistics, and significant events such as investigations capped by arrests or indictments. (Ex. 14, 10/11/07 CID Quarterly Report.)

²⁷ Beat 4 also has a detective assigned to it. (Ex. 10.)

following quarters as appropriate. (Smith, Becket, Kellogg and Griffith testimony; *see also* Ex. 13 at 25.)

63. However, all witnesses understand CPI to represent “collaborative action” between patrol officers, sergeants and lieutenants, and empowerment of all three groups—especially patrol officers—to engage in decision making and problem solving within their assigned beat. (Griffith and Smith testimony; *see also* Ex. 13 at 4, 7, 8, 20, and 23-25.)²⁸ For instance all beat members, but especially the sergeants and patrol officers, regularly drop in on various businesses and schools in their beat, so constituents know their faces and to inquire if there is anything they can do for that business or school. (Harris and Comacho testimony.) Additionally, subordinates frequently compile the necessary underlying data on which the beat plans will be based, either upon the lieutenants’ direction or upon their own initiative. (Harris, Smith and Griffith testimony; *see also* Ex. 13 at 23, indicating that beat officers should generally gather the data to be analyzed by the lieutenants.) Finally, it is undisputed that all beat plans are developed with the informed input and collaboration of all the assigned patrol officers and sergeants. (Smith, Beckett and Griffith testimony.)

64. In preparing beat plans, lieutenants operate within the general framework of the Department’s policies and procedures. (Kellogg and Griffith testimony.) However, the Department’s policies are only guidelines and all ranks have the authority to determine whether it is appropriate to follow or vary from a particular policy or procedure in a given instance. (Kellogg testimony; *see also* Ex. 5,

²⁸ Lieutenant Griffith claimed that only officers were empowered by CPI, not lieutenants. That characterization is rejected as being inconsistent with the rest of his and others’ testimony as to lieutenants’ specific CPI tasks, duties and responsibilities discussed herein.

“General Standard” introductory paragraph and Ex. 13, CPI Manual, at 24.) Thus, the only real limits imposed on the formulation of beat goals and objectives are that they be: “legal and moral and good for the department” and “not forbidden” under the SOPs, (Griffith testimony), as well as specific, measurable, attainable, realistic and timely. (Smith, Griffith, and Kellogg testimony.)

65. Almost all beat plans show solid effort and independent judgment in both analyzing and prioritizing the beat’s main issues, and identifying targeted, effective solutions and measurable improvements. (Ex. 14, Quarterly Beat Reports for Lieutenants Smith and Comacho.) Some beat plans are particularly excellent, because the lieutenants engage in extensive data compilation and very sophisticated analysis. For example, Lieutenant Maxon’s beat plans for Beat 1 reflect a tremendous amount of research and analysis. (Ex. 14, Beat 1 generally; *see especially* 4/17/08 Quarterly Beat Plan and the “Beat One Directed Patrol” document attached to the 11/15/07 Quarterly Beat Plan.) Likewise do Lieutenant Adam’s more recent beat plans. (Ex. 14, Beat 5, Quarterly Plans for 1/21/08, 5/5/08 and 7/24/08 *compared to* 10/18/07 Quarterly Plan.)
66. Sometimes, however, beat plans are put together simply as a result of lieutenants brainstorming with their sergeants and patrol officers. (Smith and Griffith testimony.) These may be quite short, at 2 pages to 3 pages, and may merely tack on a handful statistical or other data sheets without explanation or analysis. (Ex. 14, Beat 4 Quarterly Plans for 11/2/08 and 5/8/08.)
67. The CPI system also utilizes more specialized, interim “tactical plans,” which are geared to a particular criminal activity or geographical area. (Smith and Beckett

testimony.) Although the lieutenants usually prepare these themselves, (Ex. 14, Beat 4, 1/31/07 and 11/25/07 tactical plans by Lieutenant Griffith; and Beat 5, 5/20/08, 5/15/08, 4/9/07, 3/2/07, 2/20/07 and 2/1/07 tactical plans by Lieutenant Adams), they may also be prepared by sergeants or officers. (Ex. 14, Beat 1, 1/14/08, 8/12/07 and 10/16/07 tactical plans; and Beat 4, 1/31/07 tactical plan.) When a subordinate prepares the tactical plan, it will usually be reviewed and signed off by the beat lieutenant prior to being forwarded to the Deputy Chief,²⁹ and/or appended to the quarterly beat plan. (Ex. 14, Beat 1, 1/14/08 and 10/16/07 tactical plans by Sgt. Wiseman; 1/31/07 Beat 4 tactical plan by Sgt. Bielenberg; *see also* Beat 1 1/17/08 and 11/15/07 Quarterly Plans' attachments.) The Deputy Chief also may comment to the submitting sergeant or officer about that tactical plan. (Ex. 14, 11/15/07 Beat 1 Quarterly Plan's 10/16/07 tactical plan attachment.)

68. It is the beat lieutenant who is ultimately responsible for articulating problems and solutions in the beat plans, and ensuring active, effective CPI implementation by his or her subordinates. (Smith and Kellogg testimony; *see also* 10/18/07 Beat 4 Quarterly Plan, with comments from Deputy Chief Kellogg that it is inadequate to "instruct" and "enlighten" the subordinate beat officers, and requires further analysis and follow up with the officers; 2/7/07 Beat 2 memo from Lieutenant Comacho to his subordinates updating them on the results of their excellent CPI efforts; and 4/4/08 Beat 2 Quarterly Plan in which Lieutenant Comacho assumes responsibility for his beat's poor statistical performance during his FMLA

²⁹ This, moreover, is not a mere "courtesy" under Chain of Command principles, as the Union asserts. *See* Union's Post Hearing Brief at 21. In military and paramilitary structures, the chain of command is generally required to be followed absent exigent circumstances.

absence; *see also* Ex. 13 at 23, charging the beat lieutenant with compilation and analysis of data collected by beat officers.)

69. Although some lieutenants have in the past delegated preparation of their beat's quarterly plan to their sergeants or officers, this is the exception rather than the norm. (Smith testimony.) Exhibit 14 contains 38 quarterly beat plans, only 3 of which were submitted solely by sergeants or officers.³⁰ *See* Ex. 14, 10/15/07 Beat 2 Quarterly Plan; 11/13/07 Beat 2 Quarterly Plan; and Ex. 14, 10/13/07 Beat 3 Quarterly Plan.) Even in the case of a beat plan prepared by subordinate sergeants or officers, it is the beat lieutenant to whom the Deputy Chief's comments and direction for follow-up are directed. (Beckett and Kellogg testimony, and Ex. 14, 10/15/07 Beat 2 Quarterly Plan.)

70. All quarterly beat plans are sent up the chain of command, for ultimate approval by the Deputy Chief of Operations, prior to implementation by the beat lieutenants. (Beckett testimony.) Nonetheless, the Deputy Chief's involvement in crafting the beat plans is generally limited to reviewing the beat plans' goals and objectives to see if they are specific, measurable, attainable, realistic and timely. If they do not meet these criteria, he will direct the lieutenants to further develop or follow up on the beat plan. (Smith, Beckett and Griffith testimony; *see also* Ex. 14, 10/15/07 Beat 2 Quarterly Plan; 10/18/07, Beat 5 Quarterly Plan; and 10/13/07, Beat 3 Quarterly Plan.) Additionally, the Deputy Chief has

³⁰ Lieutenant Griffith has a beat report in which a subordinate sergeant was listed on the "from" line, but the report was in fact signed by Lieutenant Griffith as well as his two subordinate sergeants. (Ex. 14, 10/15/07 Beat 4 Quarterly Beat Report.) Additionally, one of the 3 quarterly reports submitted in fact by subordinates covered a period of time in which the responsible lieutenant was out on FMLA leave. (Smith testimony.) The remaining two, which were for Lieutenant Comacho's beat, were submitted either during or shortly before his three-month long birth-related FMLA absence. (Comacho testimony and Ex. 14, 4/4/08 Beat 4 Quarterly Report.)

occasionally rejected beat plans whose goals and objectives were too narrow, simplistic or easily achieved, or whose goals did not address the most relevant criminal activity within the beat. (Kellogg and Griffith testimony.)

71. For example, for several years Lieutenant Griffith urged graffiti as a high priority goal, because of graffiti's huge, negative impact on the quality of life of residents and businesses within the beat. For a long time, the Deputy Chief rejected Lieutenant's prioritization of this goal. When his beat officers continued to push graffiti as a quality of life, Lieutenant Griffith directed his officers to go through old police reports to obtain more accurate data on the relative frequency and seriousness of graffiti, which was frequently mislabeled as "criminal property damage." Ultimately, armed with better data and more persuasive justifications, Lieutenant Griffith convinced the Deputy Chief that combating graffiti was, after all, an appropriate high priority goal for Beat 4.
72. Lieutenant Griffith's beat plans are generally rejected and rewritten 3-5 times before being finally accepted by the Deputy Chief, due to inadequate goals and a lack of measurable objectives. (Griffith testimony.) Lieutenant Griffith is unique in this regard, as no other lieutenant or other witness has testified to similar rejections, although other plans are occasionally marked up or the adequacy of their goals and objectives commented upon.
73. The amount of time spent and the resulting quality of the beat plans and tactical plans varies considerably. Nonetheless, effective lieutenants spend at least 15-20% of their work time on their quarterly beat plan, and about 5% of their work time on specialized tactical plans. (Beckett testimony.) Lieutenants are subject

to discipline for failure to meet their responsibilities concerning the development or implementation of CPI beat plans.³¹ (Beckett and Smith testimony.)

Interchangeability and minimum staffing issues

74. When a lieutenant is out on vacation or sick leave, another lieutenant must take his calls or questions from the absent lieutenant's sergeants. In contrast, when a sergeant gets sick or is on leave, his lieutenant, his corporal or a sergeant working an overlapping shift may take his calls. (Connors, Comacho and Beckett testimony.)
75. When a lieutenant is out, no replacement is assigned because lieutenants are not counted towards critical or minimal staffing. When a sergeant is out, his position must generally be filled to meet minimum staffing requirements. (Beckett testimony.)
76. All lieutenants are responsible for the minimum staffing requirements of their shift or division, (Kellogg testimony), even though their job in that regard is made easier today by the Department's use of the Telestaff software. However, a lieutenant—unlike a sergeant—may override the Telestaff minimum staffing requirements if necessary. (Kellogg and Griffith testimony.)³²

Wages, hours and terms and conditions of employment of lieutenants

77. Lieutenants are salaried employees, while the ranks below them are all hourly employees. (Harvey testimony.)

³¹ Although no lieutenant had yet been disciplined in this regard by the time of the hearing, a disciplinary interview on this issue was scheduled for a day following the close of the instant hearings. (Smith testimony.)

³² Lieutenant Griffith denied having this authority but conceded he has administrator level access to Telestaff, the scheduling software. From this the undersigned infers lieutenants may override minimum staffing requirements, although Telestaff will keep the shift on an "alert" or "warning" status because of the variance from the software protocol.

78. Most lieutenants work indoors a majority of the time, and are not ordinarily required to patrol or respond to calls. Sergeants and lower ranks work out of doors a majority of the time and the bulk of their job is generally taken up with patrol duties and responding to calls. The exceptions are Lieutenant Comacho and Lieutenant Griffith. (Connors, Harris, Comacho and Griffith testimony.)
79. Lieutenants, unlike their subordinates, have flexible schedules. Sergeants and lower are assigned a particular shift or "squad" within their beat, such as Weekday (M-Th) or Weekend (Th-Su), 6:00 a.m. to 4:00 p.m., 8:00 a.m. to 6:00 p.m., 11:00 a.m. to 9:00 p.m.; 2:00 or 3:00 p.m. to 12:00 a.m., 5:00 p.m. to 3:00 a.m., or 8:00 p.m. to 6:00 a.m. (Ex.10.) Lieutenants, in contrast, are generally responsible for three shifts spanning a 15- to 16-hour period of time, and they have the discretion to chose which ten-hour period they will work during the time in which their squads are on shift. (*Id.* and Connors and Griffith testimony.) The lieutenants are then on-call for the remaining hours that his or her assigned squads are on duty. (*Id.*)
80. Lieutenants are not required to wear a uniform, as are sergeants and patrol or traffic officers. Accordingly, these lieutenants typically only wear a uniform one or two days a week. (Smith testimony and Ex. 7, SOP Sec. VII, Ch. 1, Art. 2.) The exceptions are Patrol Lieutenant Griffith and Traffic Lieutenant Comacho, both of whom spend more time on patrol than their peers.
81. When lieutenants do wear a uniform, it is largely the same as that of their subordinates and superiors except for the color and amount of braiding on their

Class A dress hat; collar insignia or other indicia of rank; and the lieutenants' use of a tie. (Ex. Ex. 7, SOP Sec. VII, Ch. 1, Art. 2.; *see also* Smith testimony.)

82. All police department personnel from Chief or Director down are certified law enforcement personnel, (Beckett testimony), and all are subject to the same various work rules and SOPs. (Ex. 4, Section 206 and Ex. 5, introductory page.)

DISCUSSION AND CONCLUSIONS OF LAW

I. Lieutenants are not managers.

Legal Standards.

PEBA excludes management employees from its coverage. *See* § 4(O), § 5 and § 13(C). PEBA's definition of manager can be broken down into a two-part test: the employee is (1) primarily engaging in executive and management functions; and (2) 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. *NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995).

For an employee to be engaged primarily in executive or management functions, he or she must "possess and exercise a level of authority and independent judgment sufficient to significantly affect the employer's purpose." *Id.* at 32. For an employee to have responsibility for developing, administering or effectuating management policies, he or she 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." *Id.* (emphasis added).

Application.

Deputy Chief Kellogg views the lieutenants as managers for two reasons. First, under the CPI model lieutenants are responsible for creating and implementing creative and effective goals and objectives necessary to solve the problems within their assigned beats. Second, while acting in their shift or patrol capacity, lieutenants have authority to affect changes in or override department policies. For example, Lieutenant Griffith recently worked with the SOP Committee to affect a change in an outdated arrest warrant policy. Another example he gave is that lieutenants can override minimum staffing requirements, which sergeants need approval to do.

Addressing the easiest issue first, the undersigned concludes the abilities to recommend policy changes to the SOP committee and to override staffing software parameters do not significantly affect the employer's overall purpose of law enforcement. *Cf. Jemez Valley.*

The issue of authority and independent judgment related to CPI is a closer call, however. In establishing and implementing goals and objectives to target particular problems within their assigned beat, lieutenants are exercising independent judgment and do significantly affect the Department's purpose. *Id.* Additionally, at least within their assigned beats, the lieutenants are creating, overseeing and coordinating the means and methods for achieving the Department's overall policy objectives. *Id.*

Nonetheless, the lieutenants still do not determine the extent to which the Department's policy objectives will be achieved. *Id.* Specifically, lieutenants lack authority to unilaterally prioritize Departmental objectives, and are not permitted to implement overly narrow, simplistic or "easy" CPI goals. For example, in the past

Deputy Chief Kellogg routinely rejected Lieutenant Griffith's quarterly beat plans to the extent they elevated the control and reduction of graffiti as a primary objective, over that of other beat crimes. Additionally, the Deputy Chief has in the past rejected a number of Lieutenant Griffith's goals for combating issues in his beat, because they were too simplistic or easy, or failed to meet the specific and measurable criteria. *Compare In re Communications Workers of America, Local 7911 & Dona Ana County ("Dona Ana County Detention Center")*, 1 PELRB No. 16 at 35-44 (Jan. 2, 1996) (a training sergeant is does not develop administer or effectuate policy where higher administration reviews and extensively amends the training sergeant's draft training materials).

Conclusion.

For the foregoing reasons, the Rio Rancho police lieutenants are not managers as defined under PEBA, although they do meet several of the individual criteria through their CPI functions.

II. Police lieutenants are supervisors.

Legal Standards.

PEBA also excludes supervisors from its coverage. *See* § 4(U), § 13(C) and *Santa Fe Police Officers' Association v. City of Santa Fe*, 02-PELRB-2007 (October 14, 2007). Under § 4(U), 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 § 4(U); see also *NEA-Jemez Valley and Jemez Valley Public Schools*, 1 PELRB 10, adopted and attached ALJ Report at 39-42 (1995), as amended by § 10-7E-4(U).³³ In making the foregoing determinations, the Board relies on actual job duties performed where they vary from employer expectations, job descriptions or standard operating procedure manuals. See *New Mexico State University Police Officers Association and New Mexico State University (NMSU)*, 1 PELRB No. 13 (Jun. 14, 1995); *In re McKinley County Sheriff's Association Fraternal Order of Police & McKinley County*, 1 PELRB No. 15 (Dec. 22, 1995); and *Dona Ana County Detention Center*, *supra*.

Application.

1. Taking or recommending certain personnel action in the interests of the employer.

Addressing the easiest issue first, Rio Rancho police lieutenants have the authority to take or effectively recommend relevant personnel action in the interest of the employer. First, lieutenants evaluate their subordinates and those evaluations are required to be considered for merit raises. Thus, lieutenants effectively although

³³ Sometimes the Union refers to the correct "majority of work time" standard under the modern statute, see § 10-7E-4(U), but other times it refers to the old "substantial amount of work time" standard under the prior PEBA, see § 10-7D-4(S), suggesting that only "a lot" is required. Compare Union's Post-Hearing Brief at 12 and 19, to *id.* at 13, 14 and 18. However, "substantial" was never interpreted to mean merely "a lot" or "significant" as suggested, but rather to mean "nearly all." See *NMSU, supra*.

indirectly recommend promotions in pay grade. Second, lieutenants directly discipline their subordinates by issuing verbal warnings written reprimands.³⁴ Sergeants have the same authority to evaluate and discipline employees but that is not relevant for this element, since it is not required that the position in dispute have sole or exclusive authority to take or recommend certain personnel action.

2. Directing the work of subordinates.

The next issue is whether lieutenants customarily and regularly direct the work of two or more employees. It is undisputed that every lieutenant here is in charge of certain shifts or division(s), and most are also in charge of an assigned beat. By virtue of these assignments every lieutenant oversees a shift of approximately 9 to 27 subordinates, with 1 to 4 sergeants reporting directly to them. Additionally, the patrol and traffic lieutenants each oversee a beat of approximately 12 to 18 subordinates, including 2 to 3 sergeants and, in one case, a detective. Nonetheless, two issues are raised under this prong.

First, there was testimony that sergeants tend to directly oversee the activities of patrol officers while sergeants, for the most part, do not require direction from their lieutenants. (Connors and Harris testimony.) Additionally, Lieutenant Comacho over the traffic division has only one sergeant reporting to him outside of the CPI context. Therefore, one issue here is whether lieutenants customarily and regularly direct the work of two or more subordinates. 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,

³⁴ The Union is simply incorrect when it argues that lieutenants lack authority to discipline other employees, and that discipline is only issued "by a review board." See Union's Post-hearing Brief at 13-14, and 22. In so arguing the Union is apparently confusing the testimony concerning the different types or classes of violations for which discipline can be issued. See *supra*.

uniform, or normal intervals.” “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.

Second, there was also testimony that the actions of all officers, including sergeants and lieutenants, are largely proscribed by Department policies and procedures. (Griffith testimony.) Therefore, another issue presented is whether lieutenants exercise independent judgment in directing the work of their subordinates. See *Firefighters & City of Santa Fe*, 1 PELRB No. 6 (Jan. 19, 1995) (requiring the use of independent judgment in directing subordinates), and *McKinley County Sheriff’s Association*, *supra*. (ditto).

As to both of these issues, the following findings are relevant. Lieutenants generally attend daily briefings with all their subordinates, at which they will frequently provide guidance concerning Department policies, procedures, goals and objectives. They also have daily conferences or meetings with their sergeants, at which they provide one-on-one guidance concerning those general issues and also any specific issues for that day. They are also regularly contacted throughout the day by their sergeants, who seek the lieutenant’s guidance or approval concerning problems or issues arising during that shift. Lieutenants regularly observe their officers while acting as back up on calls, to evaluate their subordinates’ performance and be available for instruction and guidance. They also regularly assume the incident commander or scene manager role at large incident scenes or operations, where they oversee the operation of the entire scene or operation, and ensure adequate direction of all officers on site. Finally, in their CPI function, beat lieutenants regularly delegate and direct beat activities concerning data

collection, community liaison, and the development and implementation of the tactical and quarterly plans, although any of these CPI duties may also be initiated by the lower ranks *sua sponte*.

Based on these findings the undersigned makes the following findings of ultimate fact. Lieutenants frequently train, lead, organize and energize the shift and beat activities of their subordinates. As to CPI functions in particular, lieutenants also regulate and determine the course of beat activities. Moreover, lieutenants do all of these things at normal and recurring intervals. Finally, they exercise independent judgment in carrying out these activities and directing their subordinates.

Unlike in the *Santa Fe* firefighters case, here the Department Policies and Procedures Manual is not so “complete, thorough” and “all-inclusive” that any direction of employees lacks independent judgment because made “standardized” and routine.” *Id.* at 7-8 and 10. In general, the policies are intended only as a guide, and all officers are expected to use their independent judgment in applying those policies. (Ex. 5, introductory paragraph.) As a matter of practice, however, all officers look to their supervisors for guidance and approval in applying the policies and procedures, and meeting goals and objectives, and in this vein sergeants regularly consult with their lieutenants. Moreover, the policies that are particularly standardized are those addressing uniforms, gun use, maintenance of evidence, and proper stop and arrest procedures. (*See, e.g.,* Ex. 7, Sec. VII, Ch. 1, Art. 2, Uniforms, and Sec. VII, Ch. 3, Art. 3, Firearms; and Ex. 8, Sec. IX, Ch. 3, Art. 10, Vehicle Mounted Video Cameras, Sec. IX, Ch. 3, Art. 12, Motor Vehicle Stops, and Sec. IX, Ch. 3, Art. 14 DWI Enforcement.) These, however,

are areas for which public safety and constitutional protections demand a greater constraint on the exercise of discretion by *all ranks*, even the Chief and Deputy Chief.

Other policies, in contrast, refer only to “goals,” general “responsibilities” and practices, “criteria,” undefined measures to be taken “as needed,” and “reasonable” or “appropriate” methods and responses to a situation. (*See e.g.*, Ex. 8, Sec. IX, Ch. 3, Art. 1, Traffic Unit, Sec. IX, Ch. 3, Art. 2, Selective Traffic Enforcement Programs, and Sec. IX, Ch. 3, Art. 5, Traffic Crash Investigation, Sec. IX, Ch. 3, Art. 6, DWI Enforcement Checkpoints, Sec. IX, Ch. 3, Art. 8, Suspended License, Sec. IX, Ch. 3, Art. 9, Traffic Enforcement Procedures, Sec. IX, Ch. 3, Art. 11, Motorist Services, and Sec. IX, Ch. 3, Art. 13, Traffic Direction and Control.) Interpreting these latter types of regulations requires reference to training, the exercise of judgment, and—where those are not sufficient—guidance from supervisors.

Nor are lieutenants merely facilitating the performance of or explaining job duties to their subordinates, relaying instructions from the Captains or Deputy chief, or ensuring subordinates adhere to established procedures, like the McKinley County Sheriff’s sergeants who were held to be supervisors. *See McKinley County Sheriff’s Association* at 10-11. Instead, the lieutenants here are more like the McKinley County Sheriff’s Lieutenants, which the parties agreed were supervisory. Specifically, the lieutenants here exercise discretion and independent judgment in directing employees since they interpret policies and procedures, guide their subordinates’ use of judgment, direct and delegate CPI activities as appropriate, and are ultimately responsible for the effective overall operation of their shifts or division(s) and their beat. *Id.* at 11 (McKinley County Sheriff’s lieutenants are excluded because their position “requires use of independent

judgment in directing employees,” since they are “responsible for the supervision of the patrol division and its units”).

3. Amount of work time spent on true supervisory duties that are distinct from the duties of subordinates.

We now turn to the final, interrelated issues: whether lieutenants devote a majority of their work time to supervisory duties, or whether they instead primarily engage in routine, clerical duties and/or perform substantially the same duties as their subordinates, such that they are in fact lead employees rather than supervisors under PEBA.³⁵ Because of the overlap between these elements of the supervisory definition, “analyzing them at the same time is more helpful than attempting to examine them separately.” See *Dona Ana County Detention Center*, ALJ Report at 28. In particular, supervisory duties are marked by the use of independent judgment, and supervisors are distinguished from lead employees who typically do substantially the same job as their subordinates except for occasional clerical duties that do not require independent judgment. See, e.g., *McKinley County Sheriff’s Association*, *supra* (sergeants are not excluded supervisors, but are instead lead workers, where the majority of their work time is consumed by duties of a routine nature and closely aligned with those also performed by subordinate patrol officers and deputies).

As to these interrelated issues, the undersigned incorporates by reference the previous discussion concerning lieutenants’ direction of the work of their subordinates, and also notes the following relevant facts. Depending on the shift and division, almost all lieutenants spend 55% to 70% of their work time in doors working on administrative

³⁵ See *Dona Ana County Detention Center*, ALJ Report at 28 (because of the overlap between these elements of the supervisory definition, “analyzing them at the same time is more helpful than attempting to examine them separately”).

matters unique from the patrol and traffic enforcement duties performed by their subordinates. These tasks include ensuring the smooth operation of their shifts and beats; identifying problems within their beat; gathering information through statistical data and the operations and reports of their subordinates; crafting solutions to the problems in their beat; and overseeing different programs and handling various administrative responsibilities as assigned, including acting as Department liaison for meetings with outside agencies.

The Deputy Chief assigns much of this work, and the lieutenants typically report their progress and results back up the chain of command. However, there is no evidence that the Deputy Chief specifically instructs lieutenants in how to conduct these assignments, even though the lieutenants represent the interests of and effect out the goals and objectives of the Department in conducting these activities. Thus, the lieutenants are exercising their independent judgment in effectuating the Department's purposes through their miscellaneous special assignments. Additionally, these tasks are of a very distinct nature from the administrative tasks performed by sergeants when they are working in the office. As Sergeant Harris testified, a sergeant's administrative tasks are largely limited to reviewing the timesheets and police reports of his or her subordinates, and attending the daily thirty-minute squad briefing.

Of these duties, meetings with outside agencies, CPI duties and handling citizen complaints warrant particular consideration. Together, these types of duties take up the bulk of the lieutenants' non-patrol time. For instance about 50% of a weekday lieutenants' work time will usually be taken up with meetings, and at least 25% of lieutenants time is taken up with CPI duties. In contrast, the weekend evening

lieutenant—Lieutenant Griffith—has far fewer duties related to acting as a liaison to and meeting with outside agencies. However, he is assigned the more problematic beat, Beat 4, which requires more CPI time, and he is also assigned the task of addressing citizen complaints, which takes up about 1/3 of his workday.

These types of duties also require the greatest exercise of independent judgment. In handling citizen complaints, the lieutenant exercises his own judgment and also reviews the acts and judgment so the sergeant assigned this task, to ensure the public's confidence in the City's police force remains secure. In meeting with outside agencies and handling citizen complaints, the lieutenants are acting as representatives in fact of the Department, and effectuating and pursuing the Department's goals and objectives on a larger stage—that of a judicial district, or a region, or state-wide.

Through their CPI duties, most lieutenants are expected to and do exercise independent judgment in analyzing crime statistics for their beat, and crafting cogent, well-tailored goals and objectives for reducing the most salient and significant crimes in their beat. In doing so, lieutenants delegate “grunt work” to their subordinates, such as pulling old police reports, and also follow up with their CPI officers to evaluate their individual efforts. (Griffith testimony and Ex. 14, Beat 2, Comacho 2/6/07 CPI memo to beat subordinates.) Although the lieutenants occasionally continue a prior plan, or even adopt a colleague's plan, they do so only after exercising independent judgment to determine that the prior plan is appropriate this quarter, in their beat. (Ex. 14, Maxon 7/24/08 Beat 1 Quarterly Report.)

Thus, this is not a case where much of the administrative work lieutenants engage in “is of a routine or clerical nature, such as recording attendance,” or creating shift

rosters rather than engaging in actually scheduling. *Int'l Ass'n of Fire Fighters Local No. 2430 and Town of Silver City*, PELRB Case No. 308-07, Hearing Examiner Report (Mar. 7, 2008); and *Dona Ana Deputy Sheriffs' Association, supra*. Rather, they routinely exercise independent judgment to affect and implement the policies and objectives of the Department. *Disting. Dona Ana County Detention Center* (shift and transport sergeants' administrative duties of completing actions reports, payroll or ordering supplies are not supervisory in nature). Additionally, lieutenants' patrol-related or non-administrative work also involves overseeing, reviewing and/or evaluating subordinates' work when they are attending a call for service as back-up, act as the incident commander of larger scenes, or engage in their CPI function. *Silver City and Dona Ana County Sheriff's Assoc.*

Notwithstanding the foregoing facts, the Union president argues lieutenants have, over the past two decades, been "stripped" of decision-making and command authority due to growth of the Department, creation of the captain positions, and changes in Department management philosophy and style. Lieutenant Griffith also testifies that "no one has independent judgment" under the policies and procedures, and that "only officers" are empowered under the CPI model, "not lieutenants." He further testifies that he has the same responsibilities as a non-lieutenant, "anyone" could be in charge of large scenes and tactical operations, and "the supervisory role only arises when employees fail to follow SOPs," and then it will probably be a sergeant addressing the matter. Finally, he pointed to the fact that the Deputy Chief routinely requires him to rewrite his quarterly beat goals and objectives. Other union witnesses testified in a similar vein. For example, several do not believe lieutenants are "supervisors" because a supervisor "tells people

what to do and answers questions,” while by the time a police officer has become a sergeant he or she generally does not need supervision. (Connors and Harris testimony.) Additionally, Lieutenants Connors, Comacho and Griffith all feel they spend no time, or as little as 10-15% of their work time, supervising the work of their subordinates when they are out on calls.

The undersigned rejects all of these characterizations. First, the changes in the Department between 1989 and the present, while sufficient enough to warrant consideration of a clarification petition, *see infra*, did not in fact amount to an evisceration or loss of supervisory function in lieutenants. Rather, the growth of the Department and its ensuing organizational changes has caused a metamorphosis of the types of supervisory duties performed by lieutenants. Lieutenants have lost some supervisory duties, such as hiring and termination, and others have been modified, such as their scheduling responsibilities. However, they also have numerous other supervisory duties, such as their CPI duties, duties arising from their assignment to cooperative programs with outside agencies, and a host of other administrative duties.

Second, both “supervisory duties” and the opportunity for independent judgment under Department policies are much broader than understood by the Union’s witnesses. “Supervisory duties” do not include merely directing the work of subordinates. If that were so, the Act would not make those things two separate prongs in the definition of “supervisor.” *See* §4(U) and *State v. Rivera*, 134 N.M. 769, 773 (2003) (construction of one provision of a statute should not render other provisions “null or superfluous”). Nor does the mere existence of comprehensive policies prevent the exercise of discretion or independent judgment. Here, the policies themselves state they are only guides, and it is

clear on their face that their application to specific situations requires the use of independent judgment. Moreover, all witnesses agree that when there is a question as to the interpretation of policies and procedures lieutenants provide that interpretation or guidance, whether it be by telephone call initiated by a sergeant, while the lieutenant is on back up to a call, or when the lieutenant is the incident commander for a large scene. Thus, this case does not present a situation where lieutenants' exercise of independent judgment and discretion is strictly limited by reliance on such things as decision trees and the standard operating procedures manual. *See Dona Ana County Detention Center.* Moreover, that sergeants or other officers frequently do not require guidance, or may themselves act as incident commanders does not affect the analysis as to whether lieutenants spend a majority of work time in supervisory duties that require the exercise of independent judgment.

Third, all protestations from the Union witnesses that they do nothing of merit all day long in the nature of supervisory duties must be taken with a grain—or dose—of salt, and understood in context of the whole record. Lieutenant Connors only spends about 40-50% of his time in the field and 10-15% of that time is spent directing his subordinates. Additionally, he has only recently returned to patrolling a beat after six years in the Support Services Bureau, so he is still familiarizing himself with the patrol duties of his subordinates. (Connors testimony.)

Lieutenant Comacho is also new to Traffic, so does not direct his subordinates because he feels like he has “nothing to teach” them at this time. (Comacho testimony.) In any event, much of Lieutenant Comacho's testimony about the amount of time spent on patrol and engaging in the same duties as his subordinates is largely suspect because

internally consistent and contradicted by other Union witnesses. When taken in context with all the other evidence, his testimony demonstrates that he mainly works alongside his subordinates as a matter of personal predilection, rather than as a formal or even de facto job requirement. Additionally, his CPI reports and communiqués reflect his understanding that he in fact has very important supervisory duties under the CPI model, to guide, direct, focus, motivate and encourage his subordinates. (Ex. 14, 4/4/08 Beat 2 Quarterly Plan in which Lieutenant Comacho assumes responsibility for his beat's poor statistical performance during his FMLA absence; *see also* 2/7/07 Beat 2 memo from Lieutenant Comacho to his subordinates updating them on the results of their excellent CPI efforts.)

As for Lieutenant Griffith, he works a weekend graveyard shift that has two vacancies. Thus, he is required by circumstances to actively engage in patrol work along with his subordinates and, in any event, all witnesses agreed weekend and evening shifts are assigned fewer administrative tasks and tend therefore to engage more frequently in standard patrol duties. Additionally, Lieutenant Griffith's testimony demonstrates he has much more discretion and ability to exercise his independent judgment than he testified. For instance, when he was required to rewrite several CPI quarterly beat reports Lieutenant Griffith was being held to the requirement of his rank to exercise independent judgment in collecting data and marshalling persuasive arguments in support for the goals and objectives proffered by his subordinates, rather than merely restating the inarticulate problems and solutions expressed by his subordinates in a brainstorming session.

Finally all of the cases cited by the Union, and the representation case most recently heard by the Board, are distinguishable from the instant case because in all of

these other cases the supervisor in question spent the majority of their work time engaged in substantially the same job duties as his or her subordinates. In these cases, the disputed positions were held to be lead employees because they spent the majority of their work time performing substantially the same job duties as their subordinates. For example, in *Silver City*, the Fire Department captains and lieutenants spent the vast majority of their work time in station cleaning and training, right alongside their subordinates, and the only unique job functions were either not truly supervisory in nature (such as making roster changes), or amounted to only an infinitesimal part of their work time (such as preparing annual evaluations). Similarly, in *Dona Ana County Detention Center*, when not completing paperwork, all sergeants except the operations sergeant spent an average of 8 of their 12 shift hours engaged in much of the same work as the detention officers, such as walking the floor, checking for contraband, cleaning and moving detainees, in addition to making sure their subordinates were doing their jobs. See also *In re Classified School Employees Council-Las Cruces & Las Cruces Schools*, 1 PELRB No. 20 (Feb. 13, 1997) (head custodians and supervisory custodians were not excluded supervisors because they performed substantially the same work as their subordinates and therefore functioned as a lead employee); *In re McKinley County Sheriff's Association Fraternal Order of Police & McKinley County*, 1 PELRB No. 15 (Dec. 22, 1995) (sergeants' actual duties fell within the role and function of a lead employee where they perform the same duties as subordinate deputies, and their supervisory functions were "incidental to the duties performed as a member of the work shift"); *New Mexico State University Police Officers Association and New Mexico State University*, 1 PELRB No. 13 (Jun. 14, 1995) (university police department sergeants are

not excluded supervisors where 75% of their work time was spent engaged in the same patrol duties as their subordinates, such as patrolling the university, issuing citations, appearing in court, and providing support or backup to other officers).

Thus, this case is more like that of the New Mexico State University (NMSU) police department telecommunicator supervisor, and the Dona Ana County Detention Center operations sergeant. The NMSU police telecommunicator supervisor was held to be an excluded supervisor because, like here, he was responsible for the overall supervision of subordinate personnel; had scheduling responsibility; disciplined and evaluated subordinates; was responsible for other telecommunicators' proficiency training; and there was no evidence presented demonstrating that he did not devote a majority amount of work time to supervisory duties, or that he performs substantially the same duties as his subordinates. *See NMSU, supra.* Indeed, here the evidence affirmatively demonstrates that lieutenants do devote a majority amount of their work time to supervisory duties, and they do not perform substantially the same duties as their subordinates.

Similarly, the Dona Ana County Detention Center operations sergeant was held to be an excluded supervisor and she, like the lieutenants here, she: was responsible for insuring facility's policies and procedures are communicated to and carried out by staff; generally worked at the administration office rather than at the jail (or here, in the field); had duties that are primarily administrative in nature; other personnel reported to her; she performed evaluations and could impose discipline; if problems arose during the shift, she was called by her subordinate sergeants (or, here, another lieutenant is called if the shift lieutenant is unavailable for calls); she used her independent judgment in exercising

her authority and she exercised that authority in the interest of the employer; her work was substantially different from that of the other sergeants; and the other sergeants did not fill in for her in her absence. *Dona Ana County Detention Center*, ALJ Report at 7-9 and 32-35.

Finally, the undersigned concludes it is not relevant that lieutenants may perform substantially the same duties as their subordinates from time to time, or more frequently, depending on their shift and personal predilection. Unit exclusion or inclusion cannot be made based on a shift assignment that is subject to regular change, or on unilateral conduct by the employee that is not a de facto requirement of the job position.

Conclusion.

For the foregoing reasons, the Rio Rancho police lieutenants meet the statutory definition of supervisory under PEBA, and are therefore excluded from PEBA's coverage. Accordingly, the undersigned recommends the instant Petition be **DISMISSED.**

III. In the alternative, lieutenants are not appropriately accreted to the existing bargaining unit.

However, in the event the Board concludes the lieutenants do not meet the statutory definition of either "supervisor" or "manager," the undersigned next analyzes the question of whether the lieutenants may be appropriately accreted into the existing bargaining unit if they are not excluded from PEBA's coverage, or whether they must instead be certified as a separate bargaining unit.

In this case, accretion raises three issues under PELRB rules: (1) whether there was sufficient change of circumstances from the creation of the original unit to now

warrant a change to that unit; (2) whether a grandfathered bargaining unit may be accreted or clarified at all; and (3) whether accretion is otherwise appropriate. police lieutenants share a community of interest with the members of the existing bargaining unit. See NMAC 11.21.38(B) and 11.21.2.37(A) (together requiring a change in circumstances and also suggesting grandfathered bargaining units are excluded from their application), and NMAC 11.21.378(A) (requiring a community of interest between the new and existing groups of employees).

First, circumstances surrounding the creation of the original bargaining unit have changed sufficiently to warrant a clarification of that bargaining unit if otherwise appropriate to do so. Contrary to an earlier decision, the undersigned concludes the change in the definition of supervisor from PEBA I, NMSA § 10-7D-4(S), to PEBA II, NMSA § 10-7E-4(U), does not itself constitute sufficient change of surroundings circumstances. See *Int'l Ass'n of Fire Fighters Local 2430 and Town of Silver City*, PELRB Case No. 308-07, Hearing Examiner decision at 30-31 (Mar. 7, 2008); see also § 10-7D-4(S) (repealed) (supervisors “devote[] a substantial amount of work time to supervisory duties”), and PEBA II, NMSA § 10-7E-4(U) (supervisors “devote[] a majority of work time to supervisory duties”).³⁶

That conclusion was based on the erroneous determination that the petitioned for positions (fire fighter captains and lieutenants) were originally “only excluded by operation of a ‘supervisor’ definition that is no longer effective.” *Id.* at 31. That determination, in turn, rested on the assumption that the earlier “substantial” definition excluded more employees than the current “majority” definition because “substantial”

³⁶ This was not an issue raised by the parties but is raised under the plain language of the statute and rules and as such should nonetheless be addressed.

would be akin to “significant,” such as 30% of work time. *See Santa Fe Police Officer’s Association and City of Santa Fe*, 02-PELRB-07 at 4 (Oct. 14, 2007) (the new act “narrowed the definition of ‘supervisor’ in comparison to the former PEBA”). However, under the prior PEBA, the PELRB interpreted “substantial” by its meaning under Webster’s Dictionary to mean “largely but not wholly that which is specified,” so greater than a majority. *New Mexico State University Police Officers Association and New Mexico State University*, 1 PELRB No. 13 (Jun. 14, 1995). Thus, the new “majority of work time” definition represents an expansion rather than a narrowing of the definition, because employees may spend less time engaged in supervisory activities to be excluded under that definition. Accordingly, it was error to infer in the *Silver City* case that employees doing the same job as today would have been excluded under the earlier definition of supervisor.

Nonetheless, in the instant case, factual circumstances surrounding the original certification have changed. The Police Department has reorganized and expanded considerably, and job duties of lieutenants have evolved. Although the undersigned rejected the argument that such changes amounted to a loss of supervisory status, the undersigned would still have found the changes were of a sufficient magnitude to warrant considering a clarification petition.

As to the second issue, it is undisputed that the Rio Rancho bargaining unit has been grandfathered since about 1989. The ability to accrete to or clarify grandfathered units has not been resolved by the PELRB. The undersigned has previously concluded that NMAC 11.21.38(B) and 11.21.2.37(A) absolutely prohibit accretion in the case of grandfathered bargaining units. *See Santa Fe Police Officer’s Association and City of*

Santa Fe, PELRB Case No. 325-06, Hearing Examiner decision at 3-4 (May 30, 2007). In *Santa Fe*, the undersigned held these rules reasonably implemented PEBA by freezing grandfathered bargaining units, in recognition that although grandfathered units are statutorily deemed “appropriate” under Section 24(A) they may not in fact be appropriate because certified by agreement of the parties rather than after a contested representation hearing. In so implementing PEBA, NMAC 11.21.3.37(A) and NMAC 11.21.3.38(B) “protect the parties’ expectancy interests, and also prevents grandfathered units from becoming even more potentially inappropriate.”

However, the undersigned subsequently expressed reservations over the policy implications of such a harsh policy. See *Int’l Ass’n of Fire Fighters Local 2430 and Town of Silver City*, PELRB Case No. 308-07, Hearing Examiner decision at 30-31 (Mar. 7, 2008). In *Silver City*, she observed

[n]otwithstanding 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 ... 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).

Silver City Hearing Examiner Report at 31. The undersigned reaffirms that view today, and concludes that grandfathered units may be clarified *provided* the clarification is otherwise appropriate under PEBA standards, and any accretion is done so by election rather than merely upon a showing of thirty percent (30%) showing of interest as ordinarily contemplated under NMAC 11.21.2.38(B).

Nonetheless, as to the third issue, the undersigned finds that accretion is not appropriate in this case. First, Rio Rancho Department of Public Safety Association is

the exclusive representative of the existing bargaining unit, but it did not file the instant Petition. Although the Association is now an affiliate of NMCP SO, there is no evidence in this record that NMCP SO thereby has standing to request accretion (or even certification) on behalf of the Association.³⁷

Second, the Rio Rancho police lieutenants do not share a community of interest with the existing bargaining unit under the *Kalamazoo* factors adopted by the prior PELRB. 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). Community of interest factors under *Kalamazoo* include: (1) differences in method of wages or compensation; (2) differences in work hours; (3) differences in employment benefits; (4) separate supervision; (5) degree of dissimilar qualifications, training and skills; (6) differences in job functions and amount of working time spent away from the employment or plant situs; (7) the infrequency or lack of contact with other employees; (8) the lack of integration with the work functions of other employees, or interchange with them; and (9) the history of collective bargaining. *Kalamazoo, supra*.

The lieutenants here are subject to the same basic chain of command structure, and work rules and regulations, and they have frequent contact with sergeants and, to a lesser extent, patrol officers. However, the lieutenants have a different method of compensation; do not work according to a preset shift and have discretion in determining

³⁷ In another case concerning NMCP SO and a different type of affiliate, the undersigned found sufficient identity of interest to impute knowledge and certain legal duties between NMCP SO and that affiliate. See PELRB Case No. 133-08. However, the facts introduced and the legal issues considered were sufficiently different in that case that the undersigned will not take administrative notice of and draw any inferences from that decision here.

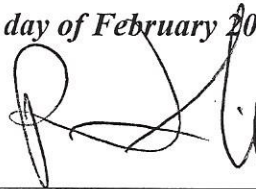
their schedule; have discretion in wearing a uniform; have different job functions because they are not required to be on patrol and respond to calls; spend a significant part of their work time at the police headquarters or other office environments doing administrative rather than patrol work on the streets; and lack interchange in job function with sergeants and patrol officers, who are not qualified to fill the lieutenants position when lieutenants are absent.

Accordingly, if the PELRB determines the Rio Rancho police lieutenants are covered under PEBA, the undersigned hereby **RECOMMENDS** the Board **DIRECT AN ELECTION** among lieutenants as a separate bargaining unit, to be represented by NMCPSCO-CWA Local 7911 rather than the Rio Rancho Police, Fire & Dispatch Association.

REQUEST FOR REVIEW

Pursuant to 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 13th day of February 2009.



Pilar Vaile
Deputy Director
Public Employee Labor Relations Board

APPENDIX

SUMMARY OF EVIDENCE ADMITTED INTO THE RECORD

1. **Exhibit 1.** Job Description, Lieutenant. Admitted upon party stipulation.
2. **Exhibit 2.** Job Description, Corporal. Admitted upon party stipulation.
3. **Exhibit 3.** Job Description, Public Safety Sergeant. Admitted upon party stipulation.
4. **Exhibit 4.** Personnel Policies and Work Rules.
5. **Exhibit 5.** Standards and Procedures, opening page (regarding General Standard and Format, Responsibilities, Distribution and Authority), and excerpts from Section II (Sec. II, Ch. 4, Art. 2, Internal Investigations; and Sec. II, Ch. 4, Art. 3, Review of Alleged Misconduct).
6. **Exhibit 6.** Standards and Procedures, excerpts from Section III (Sec. III, Ch. 1, Art. 1, Organization and Function; Sec. III, Ch. 2, Art. 1, Functional Organizational Chart; Sec. III, Ch. 3, Art. 1, Special Committees and Boards; Sec. III, Ch. 3, Art. 2, SOP Committee and Sec. III, Ch. 3, Art. 16, Promotions and Transfers; and Citizen Report, Sec. III, Ch. 3, Art. 19).
7. **Exhibit 7.** Standards and Procedures, excerpts from Section VII (Uniforms and Insignias, Sec. VII, Ch. 1 Art. 2; and Firearms, Sec. VII, Ch. 3, Art. 3).
8. **Exhibit 8.** Standards and Procedures, excerpts from Section IX (Traffic Unit, Sec. IX, Ch. 3, Art. 1; Selective Traffic Enforcement Programs, Sec. IX, Ch. 3, Art. 2; Traffic Engineering, Sec. IX, Ch. 3, Art. 3; Utilization of Crash Reconstructionist, Sec. IX, Ch. 3, Art. 4; Traffic Crash Investigation, Sec. IX, Ch. 3, Art. 5; DWI Enforcement Checkpoints, Sec. IX, Ch. 3, Art. 6; Radar

Assignments, Sec. IX, Ch. 3, Art. 7; Suspended License, Sec. IX, Ch. 3, Art. 8; Traffic Enforcement Procedures, Sec. IX, Ch. 3, Art. 9; Vehicle Mounted Video Cameras, Sec. IX, Ch. 3, Art. 10; Motorist Services, Sec. IX, Ch. 3, Art. 11; Motor Vehicle Stops, Sec. IX, Ch. 3, Art. 12; Traffic Direction and Control, Sec. IX, Ch. 3, Art. 13; and DWI Enforcement, Sec. IX, Ch. 3, Art. 14).

9. **Exhibit 9.** Disciplinary Notification.
10. **Exhibit 10.** Work Schedule, Sep. 1, 2008 - Mar. 2, 2009.
11. **Exhibit 11.** Police Beat Map.
12. **Exhibit 12.** Memorandum dated Nov. 21, 2008 from Cpt. T. Smith to Director R. Boone.
13. **Exhibit 13.** Community Partnership Initiative.
14. **Exhibit 14.** CPI Beat Plans, covering Oct. 2006 through Dec. 2008.
15. Testimony of Steve Harvey, President of NMCP SO-CWA Local 7911, and a Police Sergeant on early retirement from the City.
16. Testimony of Lieutenant Greg Connors.
17. Testimony of Sergeant James Harris, President of local NMCP SO affiliate.
18. Testimony of Lieutenant Pete Comacho.
19. Testimony of Captain Tanya Smith.
20. Testimony of Captain Steven Beckett.
21. Testimony of Deputy Chief Scott Kellogg.
22. Testimony of Lieutenant David Griffith.