

BEFORE THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD

IAFF LOCAL 4366,

Petitioner,

06-PELRB-2009

vs.

PELRB No. 321-08

SANTA FE COUNTY,

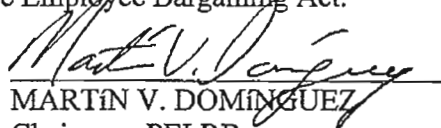
Respondent.

ORDER AND DECISION

THIS MATTER having come before the Public Employee Labor Relations Board on May 1, 2009, and the Board having heard argument and being otherwise fully advised;

IT IS HEREBY ORDERED that the Hearing Examiner's decision is reversed.

The Board finds and concludes that Battalion Commanders are supervisory and possibly managerial employees and, therefore, inclusion of them in the existing bargaining unit is not appropriate and is not permitted under the Public Employee Bargaining Act.


MARTIN V. DOMINGUEZ
Chairman, PELRB

Date: May 7, 2009

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

IAFF LOCAL 4366,

Petitioner,

&

PELRB Case No. 321-08

SANTA FE COUNTY,

Respondent.

HEARING EXAMINER'S REPORT

This matters comes before the undersigned on a Representation Petition (Petition) filed on October 10, 2008 by the International Association of Fire Fighters, Local 4366 (Union or Petitioner). The Union seeks to accrete the Battalion Captain position into an existing bargaining unit of Santa Fe County (County) firefighters.¹ A representation hearing was held on December 15 and 17, 2008 and January 6 and 13, 2009. For the reasons discussed below, the undersigned finds and concludes the Battalion Captains share a community of interest with the existing bargaining unit, and do not meet the definitions of “supervisor,” “manager” or “confidential employee” under the Public Employee Bargaining Act (PEBA), NMSA 1978 §§ 10-7E-1, *et seq.*, although the Union must still demonstrate majority support for its Petition, rather than a mere showing of interest as with small and uncontested accretions.

¹ The Union utilized a Petition for Election rather than Petition for Accretion because it accurately surmised the County would argue this position is statutorily excluded, thereby creating a “question concerning representation.” *See* NMAC 11.21.2.38(B) and NMAC 11.21.2.37(C) (providing petitions for accretion are a type of clarification, and prohibiting the use of a clarification petition where any question concerning representation is presented); *see also* Developing Labor Law (5th Ed.) at 540 (a question concerning representation may concern majority support *or* unit inclusion/exclusion).

JURISDICTION

There is no dispute that the County 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 primarily that Battalion Captains share a community of interest with their subordinates. It also argues they do not meet the statutory definitions for supervisors or management employees under PEBA. It argues Battalion Captains are not supervisors because they do not devote a majority of their time to directing the work of two or more subordinates, and their personnel decisions can and are overturned by the Assistant Chief of Operations. They are not managers because they only periodically assist in formulating policy and this role has more to do with any individual BC's specialized knowledge, than his or her rank. They are not confidential employees because they do not spend a majority of their time exposed to confidential information.

The County argues primarily that Battalion Captains are supervisors because they are charged with the ultimate responsibility of overseeing an entire countywide shift, including approximately 18 employees at five (5) stations, as well as any volunteer firefighters; direct the day-to-day operations of their shift; are significantly involved in the hiring, promotion, discipline and evaluation of their subordinates; oversee scheduling for their shift; ensure compliance with policies and directives; and do not engage in substantially the same work duties as their subordinates. The County also argues BCs are confidential employees because they are privy to personnel information and bargaining

strategy, and they are management employees because they develop, administer and effectuate management policies.²

ISSUES

1. Was there a change of circumstances surrounding the creation of the original bargaining unit, and do Battalion Captains share a community of interest with those bargaining unit members?
2. Are Battalion Captains supervisors under § 10-7E-4(U)?
3. Are Battalion Captains managers under § 10-7E-4(O)?
4. Are Battalion Captains confidential employees under § 10-7E-4(G)?
5. If covered under PEBA, may the BCs accrete into the existing bargaining unit upon a showing of interest or must the Union demonstrate majority support for its Petition?

BURDEN OF PROOF

Pursuant to NMAC 11.21.1.22(A), “[i]n 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, here the Union bears the burdens of production and proof as to the issue of accretion, which in this case includes the issue of whether or not the Battalion Captains

² The County additionally argues the lieutenants should be removed from the bargaining unit as supervisors based on testimony at the representation hearing, and that the entire matter was filed frivolously and under false pretenses. As to the lieutenants, the undersigned concludes they engage in supervisory duties but are lead employees because they spend the vast majority of their duty hours working along side their subordinates on calls. The claim of frivolousness or false pretence is presumably based on testimony suggesting the Union may have filed the Petition to prevent the implementation of a new anti-fraternization policy that would have had a direct impact on a particular Battalion Captain and his romantic relationship with a subordinate firefighter. However, the undersigned concludes the Petition is not frivolous, meaning without merit, since the BCs either are covered under PEBA or, in the event the Board disagrees, the case presents such a close question. Therefore, the Union’s initial motivation in filing the Petition is not relevant.

are supervisors, managers or confidential employees.³ See NMAC 11.21.38(A) and (B) (accretion shall not render the existing unit inappropriate, and a petition for accretion is a type of petition for clarification) and PEBA § 13(C) (an appropriate bargaining unit shall not include supervisors, managers or confidential employees).

FINDINGS OF FACT

Organizational structure, staffing, hours and work locations

1. In the Santa Fe County Fire Department, there are five (5) fire stations:
 - a. No. 60, also known as “Administration” or “Admin, which is located on Highway 14 near Interstate 25 and includes both the Department administration offices and a fire station;
 - b. No. 50, Pojoaque;
 - c. No. 61, off of Highway 599 and near Aqua Fria Village;
 - d. No. 70, near Edgewood; and
 - e. No. 80, near Arroyo Hondo at 285 and I-25.

All five Fire Stations—but not Administration—are staffed by three rotating, 48-hour shifts, Shifts A, B and C. (Tsosie testimony.)

2. The Fire Department personnel can be loosely described as “administrative” or “field” staff.
3. Administrative personnel include the command staff and/or certain specialized “non-Battalion Captain” positions. All of these positions perform primarily administrative

³ This case is distinguishable from the recently decided *NMCPSO-CWA Local 7911 and City of Rio Rancho*, PELRB Case No. 319-08, because in that case the Union was petitioning in the alternative for the creation of a new unit *or* accretion, and as to the basic issue of unit inclusion or exclusion in the non-clarification context, “no party shall have the burden of proof.” See NMAC 11.21.2.22(A). New Mexico rules are also, apparently, distinguishable from practice under the National Labor Relations Act (NLRA) and/or the National Labor Relations Board (NLRB), which the Petitioner points out, puts the burden of proof on the party alleging a position is “supervisory” or otherwise excluded under the act. See Petitioner’s Post-Hearing Brief at 8, and cites therein.

job functions and work Monday through Friday, 8:00 a.m. to 5:00 p.m. Additionally, almost all work out of Administration.⁴ Administrative staff, in descending order, are as follows: (a) Chief Stan Holden; (b) Deputy Chief Dave Sperling; (c) a Public Information Officer and three Assistant Chiefs, including Assistant Chief Kimmett Holland, who is in charge of Operations and Training; and (d) four specialized captains, including EMS Captain Michael Mestes, Training Captain Karl Ehl, Fire Prevention Captain Granvill Patty, and Fire Prevention Captain for Wild Lands Gregory Gallegos.⁵ (Tsosie, Holliday and Holland testimony.)

4. Field staff includes three (3) Battalion Captains⁶ (a.k.a. “BCs” or “Field Shift Captains”), approximately 10-12 lieutenants, and approximately 30 firefighters below the rank of lieutenant. All field staff are charged with the primary responsibility of responding to—or in the case of BCs, ensuring proper response to—all types of fire, rescue and medical emergencies. Additionally, all field staff work out of an assigned fire station, on a 48-hour on/96-hour off rotating shift. (*Id.* and Ex. R-43 – Ex. R-45.) However, BCs are not “crew” because they are not assigned to a “med unit” or

⁴ The sole exception is Captain Patty, the Fire Prevention Captain, who works at a separate, unnumbered facility located a few miles away, on Highway 14.

⁵ At an early Status Conference the County raised the argument that it would be inappropriate to accrete only certain captain positions, the BCs, and not the other captain positions. After receiving testimony about the different work hours, locations and functions of the four “non-Battalion Captains,” the undersigned advised the County she believed the record up to that point established it would be appropriate to accrete only BCs. She also advised that if the County disagreed it would need to call the non-Battalion Captains to testify and rebut the existing record. The County declined to call any non-Battalion Captains, and has therefore apparently acquiesced in the findings and conclusions that the BCs may be treated separately from other captains.

⁶ Battalion Captain Neely objects to Assistant Chief Holland’s characterization of BCs as “field staff,” because Neely views his position alternatively as “management,” and the “line between” field staff and management. The undersigned concludes Battalion Captains have administrative and supervisory duties but are still field staff because of their primary job duties and work hours.

vehicle, and are not required to regularly respond to all calls for service. (Neely testimony.)

5. At the time of the hearing, the BCs included:

- a. Mike Neely, over A Shift;
- b. Sten Johnson, over B Shift; and
- c. Reed Shelton, over C Shift.

Since the hearing, BC Shelton has voluntarily demoted himself out of a BC position. (Ex. R-27 and Shelton testimony; *see also* Respondent's Pot-Hearing Brief at 2, 4.)⁷

6. Battalion Captains are assigned to Fire Station 60 and spend most of their time there, but they also spend a fair amount of time traveling between all of the stations during their shift. (Tsosie and Shelton testimony; *see also* Ex. P-21.) The Chief and Assistant Chiefs, in contrast, never travel to the other stations. (Holliday testimony.)

7. The Battalion Captains are the communication link between the crew and the Chief, Deputy Chief, and Assistant Chiefs. (Shelton and Holliday testimony.) The Battalion Captains have frequent communications with the administrative hierarchy during regular business hours, but little or no contact during the evening or weekend. (*Id.*) When communicating with Administration, the BCs are generally just relaying notice of incidents and occurrences rather than seeking direction, or permission for a particular course of action. (Holland testimony.)

8. Generally, the Department has at least two to three personnel below the rank of lieutenant at every station, and it currently aims to have a lieutenant or the Shift BC

⁷ There was also testimony suggesting Captain Sten Johnson intends to retire in very the near future. (Neely testimony.)

assigned to every station for each shift. (Tsosie, and Neely testimony; *see also* Ex. P-1 and Ex. P-18 – Ex. P-20.)

9. The Battalion Captain position was created in 2005. They oversee and ensure operations for the entire County, as well as acting as a guide and resource for those Stations or shifts lacking a lieutenant. When the Department was smaller, it relied instead on Regional Lieutenants—a position created in about 2002—to provide supervision for all shifts at a given Station. As the Department grows the Regional Lieutenant position is being phased out and replaced by the Battalion Captains and Shift Lieutenants, who oversee their assigned Station during their shift. Today there are only two Regional Lieutenants left, at Stations 60 and 80. (Shelton, Neely and Holland testimony.)
10. Prior to the filing of the instant Petition, the County had initiated the process of creating a “Battalion Commander” position due to continued growth of the Department. (Salazar and Holland testimony.) Under the plan, funding permitting, the current Battalion Captains would be promoted to fill the new Battalion Commander positions, and thereafter the existing lieutenants would be promoted to the position of Shift or Station Captain and new lieutenants would be hired. (Holland testimony.) These changes, also instituted as the Department has grown, are necessitated under the “incident command” system, under which any supervisor should have only a limited number of personnel reporting to him or her directly. When the BC position was first created, there was one BC over a shift of about eight (8) subordinates; today there is one BC over a shift of 18 to 21 personnel. (Holland testimony and Ex. P-1.)

11. Besides the paid firefighters, the County also has 200-300 volunteer fire fighters, organized by District. The Volunteer District Chief generally oversees these firefighters. However, because they share missions and also some facilities and equipment with the paid staff, the volunteers also subject to the Battalion Captains' command and control at scenes and also when facility or resource allocation issues arise. (Shelton and Neely testimony.)
12. The existing bargaining unit includes approximately 40-42 Fire Protection Specialists, Firefighters/EMTs, Firefighter/Paramedics, and Firefighter/Lieutenants, including Regional Lieutenants. The existing bargaining unit was certified in PELRB Case No. 332-04 without a representation hearing, prior to the creation of the Battalion Captain position. (Ex. R1, CBA, ¶ 2; Tsosie testimony; *see also* PELRB Case No. 332-04.) The three (3) Battalion Captains comprise less than 10% of the existing bargaining unit.

Daily job duties and functions of bargaining unit personnel

13. During a typical shift, the busiest station, Pojoaque or No. 50, will average about eight (8) calls a shift, although it could be as few as two (2) calls or as many as eighteen (18) calls during a two-day shift. Stations 60 and 61 average slightly fewer calls. Stations 70 and 80 are the slowest stations. They average about half the calls as Pojoaque, receiving an average of two (2) calls a day.⁸ (Holliday and Neely testimony.)

⁸ These figures, corroborated by two separate witnesses, are about four times as high as suggested by the testimony of Captain Neely. He testified the Department receives an average of 800 to over 1,000 calls a year. Because these figures are corroborated, the undersigned credits these figures over BC Neely's.

14. The vast majority of Department dispatches, 80-90%, are for EMS or emergency medical service calls. Only about 10-20% of the calls concern fires. Generally, 10-15% of the total calls—including EMS and fire—are “major” or “critical” calls, meaning they concern such things as multiple vehicle accidents, hazardous materials, structural fires, or mass casualties. The rest are “routine” calls. However, the busiest station, Pojoaque, may have as many as 25% that are critical calls. (Tsosie, Shelton and Holliday testimony.)
15. Lieutenants, including Regional Lieutenants, regularly go out on both routine and major calls, along with their shift subordinates. (Holliday and Neely testimony.)⁹
16. Other than when responding to calls, the typical “routine” day of a lieutenant and firefighter is as follows:
- a. 7:00 a.m., arrive and receive a five to ten (5-10) minute report from outgoing crew, such as issues regarding the truck, or equipment shortages;
 - b. 7:10 a.m., load equipment onto truck, check truck battery and radio, and do paperwork associated with these things, pursuant to specific written policies;
 - c. 7:40 a.m., begin the daily assignment designated by policy for that particular day, *e.g.*, clean the station on Sunday, etc.;
 - d. noon, have lunch and then catch up on sundry duties or have some down time;
 - e. afternoon, be ready for calls, finish daily tasks not completed that morning, work on projects such as prepare Fire Prevention Month presentations, or conduct orientation for new hires. (Tsosie and Holliday testimony).

⁹ Assistant Chief Holland testified that Regional Lieutenants did not regularly go on calls but BC Neely testified they do. The undersigned credits Neely’s testimony over that of that of Holland, because CB Neely works more closely with Regional Lieutenants so has better personal knowledge of their customary and ordinary duties.

17. The Department “Standards Manual” (hereinafter SOP) prescribes the action that off-going shifts must take on Day 2 of the shift prior to shift change, such as cleaning the quarters. (Ex. P-6.) Department SOP also prescribes the field staff’s daily tasks, which typically apply to Day 1 of the shift. The assigned general daily tasks are as follows:

- a. Sunday: clean the crew quarters;
- b. Monday: check equipment shared with regional volunteers on Monday;
- c. Tuesday: clean the station grounds;
- d. Wednesday: clean all station apparatus and the bays, and submit timesheets every other week;
- e. Thursday: prepare, document and forward “pre-plans” within the region;
- f. Friday: check and restock the regional med unit vehicle, and check the med unit equipment therein, on the first Friday of each month; and
- g. Saturday: attend training developed by the Training Division, and implemented by or under the direction of the Battalion Captain; perform any duties missed earlier in the week due to high call volume or weather; complete a medical stock inventory on the first Saturday of each month and forward it to Admin; and wax the regional med unit on the second Saturday of January and the second Saturday of July.

The specific details of how to perform each general assigned task are also stated. For instance, on Sunday the Station crew must “do a thorough cleaning of ... kitchen, day room, office, sleeping rooms, and bathrooms,” “wash[], dr[y], fold[] and put away”

towels and other station linen,” and water station plants. (Tsosie and Lovell testimony; *see also* Ex. P-6.)

18. Besides field staff's daily routines, the SOP also outlines what firefighters are expected to do in various other situations, and how they are supposed to do it. The SOP addresses pay and leave issues; shift trades; shift and annual leave bids; sick leave management; implementation of the 48/96 hour shift, and coordination of additional days worked out of cycle; EMT-Paramedic and paramedic clearance, and their training and mentoring requirements; implementation of, and duties and responsibilities arising under, the incident command system; how duty crews shall respond to fire and EMS calls; how to address fire insurance inquiries; how to conduct a fire arson investigation; use, staffing, and stocking of the medical emergency response vehicle; obtaining authorization and reimbursement for Department travel and training; and incidents and issues or problems requiring notification to the duty BC. (Ex. P-2 – Ex. P-5, and Ex. P-7 – Ex. P-16.) The firefighters refer to the SOPs “for all questions.” (Tsosie testimony.) These policies apply to all Department personnel, including Battalion Captains. (Tsosie and Shelton testimony.)
19. Variances from the daily duties, such as unusual training, duties or assignments typically originate with Assistant Chief Holland and are then relayed to firefighter personnel by the Battalion Captain. (Tsosie testimony.) However, lieutenants as immediate supervisors can and do also change the daily tasks, such as when other matters have a higher priority, or are more appropriately done on a different day during the two-day shift. (Holliday and Holland testimony.)

20. Because the Department's daily tasks and procedures are comprehensively set out by policy, the firefighters do not generally require much direction. To the extent direction is needed in the performance of either daily duties or call response, lieutenants usually provide it to the firefighters and Battalion Captains usually provide it to the lieutenants or those firefighters that do not have a lieutenant assigned to their shift. (Tsosie, Shelton and Holland testimony.)
21. Although it is undisputed that BCs do not spend a majority of their work time directing the work of their subordinates, (Neely testimony), BCs do regularly engage in the following tasks related to directing their subordinates. They review dispatch records with the crews and otherwise conduct spontaneous training as the opportunity occurs. (Ex. P-21, entries for 11/29/08 11:30 a.m. – 1:00 p.m., 1:30p.m. – 15:00 p.m.; 12/5/08 9:30 a.m. – 11:30, 1:30 p.m. - 2:30 p.m., 5:00 p.m. – 5:30 p.m.; 12/6/08 9:15 a.m. – 10:30 a.m., and Shelton testimony.) BCs also regularly speak with the lieutenants during the course of the shift regarding things. (*Id.*, entries for 11/29/08 8:30 - 9:30 am.; 11/30/08 11:15 a.m. – 12:00 p.m.; 12/6/08 7:30 p.m. – 8:00 p.m., and Shelton testimony.) BCs also have frequent work discussions with the crewmembers. (*Id.*, entries for 11/29/08 9:00 p.m.-11:30 p.m.; 12/1/08 7:30 a.m. – 8:00 a.m. and 9:30 a.m. – 10:00, and Shelton testimony.)¹⁰ Finally, lieutenants seek their BC's assistance in directing lower ranked subordinates, when problems or issues arise. (Ex. R-14.)

¹⁰ BC Shelton was, not surprisingly, unable to recall the substance of these various work "discussions." However, they are clearly distinguished by BC Shelton from more informal conversations, which he designates in his log by the phrase "visit with." (*Compare* Ex. P-21, entries for 11/29/08, 11:30 a.m., 1:30 /m.; 12/1/08 3:30 p.m.; 12/5/08 9:30 a.m., 12/6/08 9:15 a.m.)

BCs' daily or routine job duties and function, compared to those of other field staff

22. During the morning briefing, the Battalion Captain is briefing with the outgoing or incoming BC. This typically takes 30-45 minutes and usually concerns such issues as noteworthy calls and incidents, any problems with equipment or apparatus, scheduling issues, any personnel matters, and any citizen complaints. Then, during the morning equipment check, most Battalion Captains check their own vehicle. BCs also join their crew in training. (Tsosie, Shelton, and Holland testimony; *see also* Ex. P-21.)¹¹
23. Battalion Captains, however, do not do regular apparatus check or regular medical unit check. Nor are they accountable for other daily duties generally, although they can and sometimes do participate in such duties.¹² (Shelton and Holland testimony.) The Battalion Captains are also not present for the new hire orientations, which are conducted by lieutenants. (Tsosie testimony.)
24. Battalion Captains may wait for calls and run calls with the paramedic and firefighters. (Tsosie and Shelton testimony.) However, the Battalion Captains are more likely to be traveling between or calling the various other stations, and performing their various administrative duties. (Shelton and Neely testimony, and Ex. P-21.) The amount of routine calls taken varies considerably between BCs, with BC Shelton attending the most and BC Neely attending the fewest, but even BC Shelton does not always run routine calls. (Tsosie, Shelton, Neely and Holliday

¹¹ BC Neely testified these shift change briefings “can take up to two hours,” but BC Shelton testified he “never” had such a briefing last that long. The undersigned credits BC Shelton’s testimony as being more likely and corroborated by his log.

¹² BC Neely never cleans his office, quarters or truck because the crews voluntarily do it for him. (Neely testimony.) In contrast, BC Shelton would often engage in daily activities with the crews. (Shelton testimony; *see also* Ex. P-21 entries at 11/30/08, 9:00 p.m., 12/1/08 3:30 p.m.; 12/2/08, 5:45 a.m. – 7:00 a.m., and 12/6/08, 8:00 p.m. – 8:45 p.m.)

testimony; *compare also* Ex. P-21, entries showing BC Shelton ran no calls on 11/29/08, four calls on 11/30/08, no calls on 12/1/08, three calls on 12/5/08 and no calls on 12/6/08 *to* Holliday testimony that BC Shelton generally only attended calls regarding large events.)

25. Routine tasks and responsibilities unique to the Battalion Captain include the following:

- a. communicating information from Administration to the firefighter crews and the volunteers;
- b. providing Administration with requests and information from the firefighter crews or volunteers;
- c. acting as liaison between the paid crews and the regional volunteers;
- d. ensuring adequate resource allocation throughout the County;
- e. listening to the radio and, if necessary, rerouting dispatch calls to more appropriate stations, as necessary;
- f. resolving scheduling and staffing issues, such as arranging for replacements for unexpected absences, approving or disapproving requests for leave and shift trades, and authorizing shift-holdovers as needed;
- g. arranging for replacement apparatus or mechanic services as needed, in case of breakdowns;
- h. arranging for additional crews and apparatus as needed at large incident scenes;
- i. determining the need for and arranging medical transportation out of the area as needed;

- j. restocking the narcotics at the various stations, removing and disposing of expired narcotics, and investigating, resolving and reporting any discrepancies in the drug logs;
- k. filling out reports of injury and workers compensation paperwork;
- l. arranging for replacement crew in event of injury;
- m. communicating and coordinating with other organizations and agencies as needed;
- n. responding to requests and inquiries from Assistant Chief Holland;
- o. working on special assignments from Chief Holden or Assistant Chief Holland;
- p. drafting and disseminating “shift briefing emails”;
- q. responding to lieutenants’ questions or concerns and providing direction to lieutenants, including as to the lieutenants’ direction of their subordinates;
- r. calling lieutenants daily at the other stations, and visiting the other stations at least once a shift, to check in, keep apprised of what is going on and answer any questions;
- s. conducting “QI” or quality improvement with crew by going over noteworthy radio tapes, to discuss how to properly route and respond to particular calls;
- t. otherwise doing on-the-spot staff training as needed and/or upon request during the shift;
- u. promoting increased participation by paid and volunteer staff at trainings;
- v. addressing personnel issues, including: ordering and issue uniforms; assembling, distributing and picking up Human Resource forms; investigating

and resolving negative interactions between paid staff, paid staff and volunteers, or staff and other agencies or the public; issuing discipline to lieutenants and assisting lieutenants in the discipline or counseling of lower ranked subordinates; and receiving and forwarding grievances; and

w. attending occasional command retreats, every-other-week “operation command” meetings, and numerous other regular meetings with Chief Holden and/or the Deputy Chief, the Assistant Chiefs and the other Captains.

(Tsosie, Shelton, Holland, Neely and Holliday testimony; *see also* Ex. P-8, P-21, Ex. R-14, Ex. R-26, Ex. R-33 – Ex. R-35, Ex. R-39 – Ex. 42, and Ex. R-45.)

26. Visits to the individual Fire Stations usually last about forty-five minutes or up to an hour and a half. (Shelton and Holliday testimony; *see also* Ex. P-21.) If the Battalion Captain is at a station during daily assignments, clean up or mealtime, he may join that crew in that activity. (Shelton testimony.) However, it is not a regular occurrence for the BC to join the crews in those tasks. (Holliday and Neely testimony.)

27. It is the lieutenant, rather than the Battalion Captain, that is responsible in the first instance for “making sure” all crewmembers assigned to a shift do their work, get their daily assignments accomplished, maintain their equipment and apparatus, and are ready to respond to emergencies. (*Id.*) However, Battalion Captains in turn make sure all staff, including lieutenants, are following proper procedures. (Ex. R-32.)

28. Lieutenants determine what crew members will go out on which calls and vehicles, and with whom they shall partner on calls. This determination is made based generally on who needs the most guidance and who has the most experience.

- (Holliday testimony.) However, BCs ensure the proper resource and manpower allocation to calls throughout the County. (Shelton and Neely testimony; *see also* Ex. P-21, entry for 12/5/08 at 11:30 a.m.)
29. Finally, lieutenants, rather than the Battalion Captain, assume primary responsibility for building and landscape maintenance. (*Id.*; *see also* Ex. R-35.) However, if the shift lieutenant cannot resolve a building or landscape issue, he or she will refer the matter to the Battalion Captain, or even Assistant Chief Steve Moya, in charge of Finance and Logistics, and the BC or Assistant Chief Moya handles issues for those stations or shifts that do not have a lieutenant. (Shelton testimony; *see also* Ex. R-35 and Ex. P-21 entry for 12/1/08 at 10:30 a.m.)
30. The lieutenant lets the Battalion Captain know if there is anything the lieutenant or the crew needs from Administration, and when issues arise related to the volunteer firefighters, subordinates or the public. (Holliday testimony.) Similarly, Battalion Captains notify Administration of significant incidents and occurrences. However, unlike the lieutenants, BCs receive very little oversight from above on how to resolve issues, unless a formal complaint is raised through the chain of command or a novel problem is presented. (Neely, Holland and Shelton testimony.)
31. Grievances can be and are submitted to lieutenants, captains or Assistant Chiefs: whoever is the grievant's immediate supervisor. (Tsosie and Neely testimony.) BCs have also been the subject or threatened subject of grievances. (Neely testimony.)
32. Battalion Captains have some limited special training that is distinct from the crew. (Shelton testimony.) Special training has included a three to five (3-5) day

conference at Fire Expo in Las Vegas with the Chief and Assistant Chiefs in 2005, and one to two (1-2) hours of Human Resources or supervisory training. (*Id.*)

33. In comparison, lieutenants do not undergo special training but are required to pass a special skills test to be promoted to that position. (Shelton, Tsosie and Holland testimony.) That testing used to be performed by BCs but is now conducted and graded by an outside agency. (Holland and Holliday testimony.) Paramedics also go through special skills testing to become certified as paramedics. BCs Shelton and Neely, and also Lieutenant Holliday have all participated in preparing “mega codes” used to test the paramedic applicants. (Shelton, Neely and Holliday testimony.)
34. Captains make between \$19.17 and \$28.75 an hour, lieutenants make \$16.54 to \$20.38 an hour (or about 71-86% of what captains make), and Firefighter/EMTs make \$12.62 to \$15.55 an hour (or about 76% of what lieutenants make). (Ex. R-2.)

Interchangeability of job duties and roles

35. Fire personnel may fill shifts “up,” but not “down.” For instance, a Battalion Captain or lieutenant may work for a firefighter. However, to act as or fill in for a Battalion Captain, you have to have undergone “BC orientation,” which generally only lieutenants have gone through.¹³ (Tsosie and Shelton testimony.) There are no shift trades with any of the non-Battalion Captains, and BCs do not fill in for Assistant Chief Holland. (Tsosie testimony.) The Assistant Chiefs also rarely fill in for Battalion Captains, (Shelton testimony), and never fill in for lieutenants. (Holliday testimony.)

¹³ The witnesses said “generally,” but no examples were cited in which a firefighter with a rank lower than lieutenant had undergone BC orientation.

36. Battalion Captains are required to run calls involving such major incidents as multiple vehicle accidents, hazardous materials, structure fires, or mass casualties. (Tsosie, Shelton and Holland testimony; *see also* Ex. R-48.) Battalion Captains are not required to and do not generally go on the more routine calls unless other nearby personnel area already on a call. For instance, Battalion Captains generally only have to go to about 10-15% of the EMS calls, which constitute 80% to 90% of all calls. Of the remaining 10-20% calls, which are fire calls, Battalion Captains generally only have to go to a third (1/3) of those.¹⁴ However, some Battalion Captains, such as Captain Shelton, “run calls frequently, as often as [they] can provided [they are] not doing something more important.” (Tsosie and Shelton testimony.)

37. If a Battalion Captain is attends a call, he or she will not necessarily be the incident commander. (Tsosie and Neely testimony.) The Incident Commander is in charge of overall supervision, which includes making sure the fire is put out, and making sure there are provisions for the firefighters while doing so, (Holliday testimony), and the first person on the scene that is competent to handle the call is supposed to be the incident commander. (Tsosie and Neely testimony.)

38. However, as a practical matter the Battalion Captain will usually be the Incident Commander for larger or more serious calls. (*Id.*) Additionally, even when the BC is not the Incident Commander, concerns about how the incident was handled will

¹⁴ Lieutenant Holliday testified that 25% of the Pojoaque Station’s calls are critical calls, and the Battalion Captains attend about 75% of those. He further testified that less critical calls account for about 75% of Pojoaque’s call volume, and the Battalion Captains attend about 25% of those. According to these figures, the BCs would be responding to about 38% of all Pojoaque calls. Pojoaque, which is the busiest station, may represent a sizeable outlier from that of the other stations. However, Med 60—which lacks a Shift Lieutenant—is almost as busy. Additionally, elsewhere Lieutenant Holliday testified that BCs only attend large events and that BC Shelton had not responded to a single call in the County in the two weeks prior to January 6, 2009; the day Lieutenant Holliday testified. These facts all seem at such a severe variance with each other that the undersigned is inclined to discount Lieutenant Holliday’s testimony as careless or hyperbolic where, as here, it varies from that of several other more credible witnesses.

still generally be directed to the BC, as the person ultimately responsible for the Shift. (Neely testimony.) Accordingly, while on calls, BC Neely at least frequently will not be working alongside his subordinates, but will instead be observing and evaluating the others, and directing them if necessary. (*Id.*)

39. Administrative personnel such as the Chiefs or Public Information Officer Wheeler will generally only attend calls in the case of inadequate staffing, if he or she is in the area, or for very high profile calls. (Shelton testimony.) Under these parameters, Assistant Chief Holland attends calls about one to two times a month. (Holland testimony.)

Attendance of Command Staff meetings

40. The Department occasionally has daylong retreats for “command staff.” These typically involve long range or five-year planning for the Department, and address expansion, training, budget, personnel and other matters associated with long range planning. The attendees generally only include the Chief, Deputy Chief, Assistant Chiefs and all the captains. (Shelton and Holland testimony; *see also* R-26.)
41. The Department also has shorter and more regularly scheduled “strategic planning” and/or “operation command” meetings, which are generally held every other week. These meetings are called by the Chief to discuss such issues as budgetary matters, the assignment of new staff, how to handle special operations matters with new staff, personnel matters, and the general status of collective bargaining negotiations. Battalion Captains also attend these meetings. As a result, BCs have input on the assignment of new personnel, and they are privy to budget information and the status of contract negotiations. They are also privy to sensitive personnel issues, such as

inadequate performance and discipline, even concerning employees who are not on their shift. (Shelton, Holland, and Neely testimony; *see also* Ex. R-40.)

42. Although participation in these command staff meetings is generally limited to ranks Captain and higher, there is one exception: Lieutenant Lovell, who frequently attends these administrative or command meetings in his capacity as Training Lieutenant. Lieutenant Lovell works in the Training Division at Administration and he does not engaged in day-to-day supervision at a Fire Station, like the other lieutenants. (Lovell testimony; *see also* Ex. P-1.)

Hiring and mentoring of new hires

43. For the past several years, the Department has instituted a Training Academy for screening applicants for employment. As part of this new process, applicants must first pass a written test. If successful, they then have a physical agility test. Battalion Captains may act as evaluators for the agility test. If the applicants are successful on the agility test, they will have a panel interview. The panel interview is conducted by an Assistant chief, captains and lieutenants, and a Human Resources representative. If the applicants pass that, they will interview with the Chief. Finally, if successful at that interview, they will go through drug, physical and psychological testing. (Shelton testimony.)
44. Upon hiring or entering the Training Academy, new hires are assigned a mentor. Mentors are usually lieutenants, paramedics or firefighters and are appointed by Assistant Chief Holland. (Shelton testimony.) However, the pairing is largely based on the Shift BC's recommendation as the person most familiar with the affected field personnel. (Neely testimony.)

Subordinate evaluation responsibilities

45. Battalion captains are responsible for evaluating their subordinate lieutenants once a year. These are forwarded up the chain of command for review. (Shelton testimony and Ex. R-22.)
46. Lieutenants, in turn, evaluate their subordinate paramedics and firefighters once a year, or more often for probationary employees. (Tsosie testimony, and Ex. R-18, Ex. R-19 and Ex. R-21.)
47. BCs and lieutenants fill out the evaluations based on their observations of their subordinates' work performance, after some instruction from Human Resources. They then forward the evaluations up the chain of command for review. (Tsosie, Shelton and Holland testimony.)
48. In one instance, a lieutenant was instructed to amend an evaluation. (Tsosie testimony.) The amendment was a downgrade, because the lieutenant's evaluation did not take into consideration the fact that the employee was under pending discipline. When the lieutenant refused to amend the evaluation as instructed, Battalion Captain Neely amended it. (Tsosie, Holland and Neely testimony, and Ex. R-20.)

Disciplining and the termination of subordinates

49. The Department uses progressive discipline, but discipline is relatively rare. (Holland testimony and Ex. R-1, Sec. 13.2(A); *see also* Ex. R-11 – R-14 concerning three instances of disciplined misconduct in 2008.)
50. Battalion Captains and lieutenants may verbally coach or orally reprimand the firefighters for poor performance. (Shelton testimony; *see also* Ex. R-34.) They may

also suspend lieutenants or firefighters from such things as shift trades, for violations of the shift trade policy. (Neely testimony.)

51. Battalion captains and lieutenants also initiate more formal discipline, such as written reprimand or higher. (Shelton testimony.) In the case of written reprimand or higher, the recommendation will be passed up through the chain of command, (Holland testimony), but the recommendation is nonetheless effective since carried out where warranted. (Ex. R-11 – Ex. R-14.)
52. Either BCs or lieutenants may discipline lower ranked firefighters. (Ex. R-14, BC Johnson disciplining a firefighter.) However, in keeping with the chain of command system, it would usually be inappropriate for a Battalion Captain to initiate discipline of a lower ranked firefighter without the input of that firefighter's Shift Lieutenant. (Shelton testimony; *see also* Ex. R-14, both BC Johnson and Lt. Golden involved in the events and oral warnings leading up to the written reprimand.)
53. After progressive discipline has been utilized, termination may be appropriate. Any one may recommend termination, whether lieutenant, Battalion Captain or Assistant Chief. In either case, as with other discipline, the recommendation will be passed up through the chain of command, and a BC may sit on the termination panel. (Holland testimony.)
54. The Chief ultimately approves all discipline greater than oral reprimands, but such discipline will still be forwarded to the County Manager and/or Human Resources. (Salazar testimony; *see also* Ex. R-1, Sec. 13.2(B).)
55. If the discipline is greater than a written reprimand, such as a suspension without pay, demotion or dismissal, the employee is entitled to a pre-disciplinary hearing with the

County Human Resources Director. He or she may then appeal the Human Resources Director's decision to the City Manager. (Salazar testimony; *see also* Ex. R-1, Sec. 13.B(4).)

Development of policies

56. Administration generally drafts SOPs. (Shelton and Holliday testimony.) However, Battalion Captains also draft policies or initiate new procedures for matters in which they have particular interest, competence or experience. (*Id.*)

57. For example, Captain Shelton has developed policies or procedures related to the training and orientation of cadets, part time or voluntary staffing protocols, and rescue operations, and Captain Neely has initiated policy changes concerning uniform allotment and the minimum number of personnel allowed off per Shift. (Ex. R-31, Ex. R-37, Ex. R-38, Ex. R-39 and Ex. R-28; *see also* Shelton and Neely testimony.)

58. Frequently, the BCs raise the policy amendments on their own initiative. Other times, they are directed by Assistant Chief Holland to develop a policy. However, even then the BCs largely develop the policy with little or no further guidance from the Assistant Chief. (Neely and Holland testimony.)

59. By way of comparison, there have been one or two occasions in the past when a lieutenant that was not an Acting BC has drafted a policy, and maybe one occasion when a firefighter/paramedic has drafted a policy. (Tsosie, Shelton and Holliday testimony.)

Shift scheduling

60. All Battalion Captains have some responsibilities concerning shift scheduling, although some are assigned more scheduling responsibilities than other BCs.

61. Generally, overall shift schedules and locations, and leave are determined by a seniority-based bidding system. (Ex. P-4 and Ex. P-5; *see also* Tsosie testimony.) Chief Holden or Assistant Chief Holland decides when bidding will occur, which is usually once or twice a year. (Tsosie testimony; *see also* Ex. P-18 – Ex. P-20.) They then assign a BC responsibility for conducting the bidding system.
62. Currently Battalion Captain Neely has this assignment, as well as approving overtime, but other BCs still perform some of the shift bid work. (Neely testimony and Ex. P-21, entries for 12/5/08 at 8:15 a.m. and 4:15 p.m.)
63. Additionally, all Shift BCs are regularly required to adjust schedules and ensure appropriate staffing in the event of out-of-cycle or unexpected absences, leave requests, shift trades or shift-holdovers during their Shift. (Shelton, Holland and testimony; *see also* Ex. P-21.)
64. When a firefighter calls in sick, he or she will usually notify the Shift Lieutenant, but that is supplemental to notifying the Battalion Captain, since the BC is in charge of ensuring adequate staffing and resource allocation. (Holliday testimony.)
65. The BCs have clerical assistance from Administrative Assistant Karen Griego in carrying out their scheduling duties. (Neely testimony and Ex. P-21, entries for 12/1/08 at 9:00 a.m.. and 12/5/08 at 8:00 a.m.)
66. For BC Neely, the “key responsibility” of BCs is their oversight over scheduling, to ensure adequate staffing for the Fire Stations. (Neely testimony.)

Other special assignments

67. Chief Holden and/or Assistant Chief Holland regularly give Battalion Captains other special assignments, as well. (Shelton and Holland testimony.) For example, Captain

Neely is currently assigned general budget forecast responsibilities, as well as the primary scheduling responsibilities already noted. He has also had responsibilities related to reconfiguring crews and stations, and he has recently conferred with Human Resources regarding collective bargaining negotiations. (Neely testimony)

68. Captain Shelton is charged with maintaining, and instructing personnel in the use of, the “task book” for new recruits. (Shelton and Neely testimony; *see also* Ex. R-31.) BC Shelton has also been charged with drafting press releases to promote the Training Academy, drafting policies, evaluating various software the Department has considered purchasing, and evaluating the Department’s budgetary needs for training and technical rescues. (Shelton testimony; *see also* Ex. R-36, Ex. R-37 and Ex. 39.)
69. In carrying out these special assignments, BCs generally need little guidance from Administration, although many of the projects require final review and approval by the Chief. (Shelton and Neely testimony.) Moreover, in carrying out these assignments, the BCs may direct their subordinates to assist them, such as when BC Shelton directed several crewmembers to attend software demonstrations to assist him in evaluating the vendor’s product. (Shelton testimony; *see also* Holliday testimony that BCs delegate tasks to lieutenants.)
70. In contrast, only smaller projects are generally delegated to lieutenants, such as building maintenance, preparation of Fire Prevention Month presentations, or ordering and maintaining equipment or apparatus. (Tsosie, Shelton and Holland testimony.) However, on at least one occasion a lieutenant was given a significant project, when Lieutenant Holliday was directed to speak to a reporter for a story the

Assistant Chief wanted done in *The New Mexican*, regarding the growth of the Department. (Holliday testimony.)

DISCUSSION AND CONCLUSIONS OF LAW

I. Assuming BCs are not statutorily excluded, accretion is appropriate.

To amend an existing bargaining unit, the Petitioner must show two things initially: (1) “the circumstances surrounding the creation of the existing collective bargaining unit ... have changed sufficiently to warrant a change in the scope and description of that unit;” and (2) that the positions sought to be added “share a community of interest with the employees in the existing unit,” such that their “inclusion in the existing unit would not render that unit inappropriate.” *See* NMAC 11.21.2.37(A) and NMAC 11.21.2.38(A).

Here, the bargaining unit was certified in 2004 and the BC position was created in 2005. Therefore, circumstances surrounding the creation of the bargaining unit have changed sufficiently to warrant its reexamination.

In making the community of interest determination, the PELRB utilizes the NLRB’s *Kalamazoo* factors, although no single community of interest factor shall be conclusive: (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; and (8) the lack of integration with the work functions of other employees, or interchange with them. *See NEA-Belen & Belen*

Federation of School Employees & Belen Consolidated Schools, 1 PELRB No. 2 (May 13, 1994), citing *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962).¹⁵

Here, the Battalion Captains and their subordinates: are all hourly employees and are subject to the same pay classification system, although BCs are, not surprisingly, paid at a higher pay grade than their subordinates (Salazar testimony; *see also* R-2); work the same 24/96 rotating shift; have similar employee benefits, except for those negotiated pursuant to collective bargaining agreement (*see, e.g.*, Neely testimony that BCs contribute twice as much to their pensions as do employees covered by the current CBA); are subject to the same basic chain of command structure, and work rules and regulations; and are primarily responsible for providing, or for ensuring the adequate provision of, fire and medical emergency services during their shift. Although there are differences in their daily job functions it is a difference of emphasis, particularly when compared with the difference between job functions of BCs and higher administrative staff. Similarly, although BCs have greater contact with Administration personnel than do their subordinates, BCs still have far more contact with their subordinates than with Administration personnel. Finally, although lower ranked subordinates are not interchangeable with BCs, BCs can perform all of their subordinates' shifts, and the higher ranked subordinates—lieutenants—can do the BCs' work if they have completed "BC orientation."

¹⁵ *Kalamazoo* also stated a ninth factor, the history of collective bargaining. However, that factor is not relevant here, where the BC position was created after the formation of the original bargaining unit. In contrast, the Petitioner cites other NLRB cases that raise such factors as "bargaining history in the industry ...; ... and ... desires of the employees." Petitioner's Post-Hearing Brief at 9. The record does not clearly reflect, as the Petitioner suggests, that more than one BC wants to be in the bargaining unit, and much of the industry practice outside of New Mexico that Petitioner references is not directly applicable in light of statutory differences. *See infra*. However, in any event, these criteria are not relevant under prior PELRB precedent.

Based on the foregoing, Battalion Captains share a community of interest with the lieutenants and firefighters, and their accretion into the existing bargaining unit would not render that unit inappropriate provided they are not otherwise excluded as supervisors, or management or confidential employees.

II. Battalion Captains are supervisors.

Legal Standards.

Having concluded the Battalion Captains share a community of interest, it is still necessary under the plain language of PEBA and its rules to separately determine whether the BCs are covered under PEBA. In this regard, the parties' primary arguments address the possible supervisory status of Battalion Captains as defined under PEBA. *See* § 10-7E-4(U) (defining "supervisors"), and § 10-7E-13(C) and *Santa Fe Police Officers' Association v. City of Santa Fe*, 02-PELRB-2007 (October 14, 2007) (collectively excluding supervisors, as defined, from the Act's coverage).¹⁶

Section 10-7E-4(U) establishes a basic three-part test for "supervisor" under which the employee must: (1) "devote[] a *majority* of work time to supervisory duties;" (2) "*customarily and regularly* direct[] the work of two or more other employees; and"(3) have "*authority* in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively." *Id.* (emphasis added). However,

¹⁶ Contrary to what is suggested by the Petitioner, under PEBA community of interest is irrelevant to the question of whether or not a position meets the statutory definition for supervisor. *See In re McKinley County Sheriff's Association Fraternal Order of Police & McKinley County*, 1 PELRB No. 15 (Dec. 22, 1995) (the sameness or similarity of working conditions between putative supervisor and subordinates is not a criterion in the statutory definition of supervisor, but instead relates only to community of interest); *compare* Petitioner's Post-Hearing Brief at 10-11. Nor does the case cited by Petitioner for this proposition support the claim. *See City of Columbia v. Missouri State Board of Mediation*, 605 S.W.2d 192 (Mo. Ct. App. 1980). The *City of Columbia* case did not, as Petitioner asserts, permit accretion of fire Captains based solely on shared community of interest notwithstanding their daily direction of work activities of their subordinates. *Id.* at 195. Rather, accretion was based on the facts that the fire "captains were entitled to exercise only limited independent judgment and discretion when acting to supervise the men in their company and that captains had no effective authority in hiring, promotion, transfer or discharge of those working under them." *Id.*

even if this initial three-part test is met, the employee will still not be 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 a supervisory or directory role;” (iii) the employee performs duties which are “substantially similar” to those of his or her subordinates; (iv) the employee is merely a “lead employee;” or (v) the employee merely “participates in peer review or occasional employee evaluation programs.” *Id.*; 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).

In making the foregoing determinations, the Board relies on actual job duties. 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 *In re Communications Workers of America, Local 7911 & Dona Ana County (“Dona Ana County Detention Center”)*, 1 PELRB No. 16 (Jan. 2, 1996).

Application.

1. Hiring, promoting or disciplining employees.

Addressing the easiest issue first, the Battalion Captains do not hire or promote, or effectively recommend the hiring or promotion of employees,¹⁷ but they do have the authority to discipline subordinates and effectively recommend their discipline.

¹⁷ BCs do evaluate their subordinate lieutenants, annually. However, there was no evidence presented as to how or whether these evaluations are considered in promotions in pay grade or rank, or other personnel decisions. Additionally, lieutenants are generally promoted from within, (Tsosie testimony), so they are not probationary employees and their evaluations are therefore unlikely to have any effect on hiring. Additionally, although

As to hiring, BCs sit on new hire panels, but so do lieutenants, Assistant Chiefs and representatives from Human Resources. Additionally, their joint recommendation is then reviewed de novo in a subsequent applicant interview by the Chief. Thus, the BCs' recommendations for new hires are diluted and advisory, rather than "effective." See, e.g., *City of Des Moines v. Public Employment Relations Board*, 264 N.W.2d 324, 328 (Sup. Ct. Iowa 1978) (a personnel recommendation is not "effective" when the ultimate decision maker conducts a "de novo" investigation, rather than largely relying on the recommendation).¹⁸

As to promotions, BCs do evaluate their subordinate lieutenants annually. However, there was no evidence presented as to how or whether these evaluations are considered in promotions in pay grade or rank, or other personnel decisions. Additionally, because lieutenants are generally promoted from within, (Tsosie testimony), they are not probationary employees and their evaluations are therefore unlikely to have any effect on hiring. Finally, BCs' work in developing mega codes for the testing of paramedics does not correlate to a "recommendation" for their hire, and BCs are longer involved in the testing of applicants for lieutenant.

¹⁸ The Iowa Public Employee Relations Act defines "supervisor," as does the NLRA, as "an individual having capacity, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment." See Iowa Code § 20.4(2). Like that of the NLRA, case law from other public bargaining jurisdictions may also be persuasive in applying PEBA, provided the precise statutory language is given, it is comparable to that of PEBA and its relevance to the instant proceeding is explained. See *Santa Fe Firefighters & City of Santa Fe*, 1 PELRB No. 6 (Jan. 19, 1995).

Notwithstanding the foregoing, however, BCs do directly discipline their subordinates by issuing oral reprimands and suspending them from such privileges as participating in shift trades. BCs also affectively recommend higher discipline, such as the issuance of written reprimands and suspensions without pay.

Exhibits R-11 through R-14 demonstrate that in some cases Battalion Captains issue the higher discipline, while in other cases Assistant Chief Holland issues it. Moreover, even when issued by the Assistant Chief, discipline is ultimately approved by the Chief and then confirmed or formalized by the County Human Resources Department, and with additional appeal rights in the case of suspension without pay or termination. However, the foregoing does not de minimize the effectiveness of a BC's initial recommendation. As an initial matter, the layers of process and review are consistent with the chain of command system and the CBA, (Ex. P-1, Sec. 13), as well as constitutional due process principles. *See Cleveland Board of Education v. Lauderhill*, 470 US 532 (1985) (recognizing a property interest in public employment, and imposing rights of response and review in the case of suspensions without pay and terminations).

Moreover, while a Battalion Captain's recommendation can hypothetically be reversed at any on of these stages, there is no evidence that such happens frequently or at all. *See City of Vicksburg, Mississippi*, 761 F.2d 1036, 1042 (5th Cir. 1985) (under the NLRA, evaluations and recommendations for discipline are effective even though subject to review).¹⁹ There is also no evidence that the Chief typically conducts a "de novo" investigation, rather than largely relying on the BCs' recommendations. *Compare City of Des Moines, supra*. Rather, it is apparent from the supporting documents in Exhibits R-

¹⁹ The NLRA defines "supervisor" the same as the Iowa act. *See* Note 18. The NLRA and public bargaining statutes that follow it are distinct from PEBA in not having a "majority of work time" requirement. However, as discussed *infra*, that requirement is not relevant to this particular prong.

11 through R-14 that discipline is still generally issued based on the Battalion Captain's initial recommendation. Thus, the undersigned infers the point of such review is generally to ensure consideration of matters that might have been overlooked by or unknown to the person making the recommendation, such as prior disciplinary action in the employee's personnel file. *See, e.g., 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) at 21-22

Moreover, it is not relevant that the BCs may not unilaterally impose more serious discipline, or may not frequently impose any discipline at all. This prong is written, like similar language in the NLRA, "in the disjunctive with the existence of any one of the statutory powers, regardless of the frequency of its exercise, being sufficient..." *See NLRB v. Pilot Freight Carriers, Inc.*, 558 F.2d 205, 206 (4th Cir. 1977). Thus, "it is not the exercise of authority, but the delegation of authority, which is indicative of the attributes of a 'supervisor.'" *See County of Montcalm v. Michigan Employment Relations Commission*, 599 N.W.2d 504, 509 (Ct. App. Mich. 1999).²⁰

Nor is it relevant lieutenants have the same authority to evaluate and discipline employees. Although this fact has been dispositive in one other jurisdiction,²¹ PEBA does not require the position in dispute to have sole, exclusive authority to take or recommend the personnel action in question to be a supervisor, assuming other factors are met. Additionally, as found above, the lieutenants here are lead workers, notwithstanding their supervisory authority or duties. *See Note 2, supra.*

²⁰ The term 'supervisor' is not defined under the Michigan police and firefighter compulsory mediation law, or the state Public Employment Relations Act, *See Mich. Comp. Laws § 423.231 et seq.* and § 423.201 *et seq.*, so the Michigan courts utilize the NLRA definition.

²¹ *See, e.g., Firefighters of Brattleboro v. Brattleboro Fire Department*, 415 A.2d 243 (Vt. Supp. Ct. 1980).

2. Directing the work of subordinates.

The next issue is whether Battalion Captains “customarily and regularly direct[] the work of two or more other employees.” It is undisputed that each Battalion Captain is in charge of a countywide shift. By virtue of this, the Battalion Captains are responsible for ensuring the smooth and effective operation of five Stations, including oversight of approximately 18-21 paid crewmembers and up to 200-300 volunteers. Each BC also has 3 to 5 lieutenants reporting directly to them. Nonetheless, several issues are raised under this prong.

First, the Union argues PEBA’s definition of supervisor requires the disputed position to spend a *majority* of its work time directing the work of subordinates, *see* Petitioner’s Post-Hearing Brief at 5, and Note 2, while the testimony is uniform and undisputed that the Battalion Captains here do not spend the majority of their work time directing the work of their subordinates. However, the undersigned rejects the Union’s contention in this regard as unsupported by the plain language of PEBA.

The statute expressly provides the direction of employees need only be “customary and regular,” not that it constitute a majority of the work time. Indeed, the PEBA’s basic three-prong test provides separate elements for (a) the amount of time spent in general supervisory duties—a majority; (b) the relative frequency that the work of a certain number of subordinates is directed—customarily and regularly, for two or more people; and (c) the existence of *any* authority to take *or* effectively recommend certain personnel action, including promotion and discipline. Because of how these different elements are treated, “supervisory duties” must necessarily be broader than merely directing the work of, or disciplining, subordinates. *See infra*; *see also State v.*

Rivera, 134 N.M. 769, 773 (2003) (construction of one provision of a statute should not render other provisions “null or superfluous”). Additionally, if the statute were constructed to require supervisors to spend a majority of time literally disciplining and directing their subordinates, “it is difficult to image a company officer who would qualify” unless he or she was “assigned to a particularly unruly team.” See *City of Freeport v. Illinois State Labor Relations Board*, 554 N.E.2d 155, 173 (Sup. Ct. Ill. 1990) (dissent).

The second issue presented under this prong arises from testimony that lieutenants tend to directly oversee the activities of firefighters while lieutenants and lower ranked firefighters, for the most part, do not require direction because their daily duties are largely proscribed by comprehensive SOPs. (Tsosie and Holliday testimony.) This raises the issue of whether the Battalion Captains exercise independent judgment in customarily and regularly directing the work of two or more subordinates. See *Firefighters & City of Santa Fe* (“*City of Santa Fe Firefighters*”), 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 this issue, the following findings are relevant. BCs are ultimately responsible for overseeing and ensuring all operations within the entire county. Battalion Captains direct subordinates to assist them with their assigned responsibilities. Although lieutenants are the first-line supervisors,²² they seek the BC’s assistance personnel or discipline issues arise. (Ex. R-14.) Additionally, BCs still customarily and regularly direct lieutenants, lower ranked crewmembers and voluntary firefighters through repeated

²² But, as noted above, they are lead employees because they spend a majority of their work time engaged in substantially the same work as their subordinates. See Note 2, *supra*.

and extensive discussions and training. Moreover, from the amount of time devoted to the communications with both the crew in general and the lieutenant, the undersigned infers BC are not merely parroting well-known policies, but are imparting genuine guidance and direction, and responding to questions.

As to training the crews with dispatch records, Shelton testified that in one case he “felt [the incident] was pertinent enough an issue that all the crews ought to have an opportunity to hear the tape because it was a good learning situation.” (Shelton testimony.) He also testified concerning QI of the volunteers that it is “more appropriate for a BC to do it” than the Shift Lieutenant. (*Id.*) As to his morning calls to the Shift lieutenants to “discuss daily schedule and any other issues,” he testified that this was not a job requirement but he elected to do it, so he obviously feels it improves the operation of his shift to do so. (*Id.*) Shelton also testified that, while responsible for evaluation software, he had crewmembers attend vendor demonstrations to assist him in that task, and that he would delegate scheduling responsibilities to subordinates when he had a higher priority duty to fulfill. (*Id.*) Nor do the BCs generally seek guidance or direction from their superior officers in directing their subordinates.

Based on these findings, the undersigned makes the following findings of ultimate fact. Battalion Captains frequently train, lead, organize and energize the shift activities of their subordinates, and oversee the smooth operation of countywide fire and emergency medical services. Moreover, Battalion Captains do all of these things at normal and recurring intervals. *See City of Rio Rancho* Hearing Examiner Report, *citing* Merriam-Webster Dictionary (“customarily” means “commonly” or “frequently” practiced or observed; “regularly” means “on a regular basis or at regular intervals,” meaning in turn

“recurring at fixed, uniform, or normal intervals;” and “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). Finally, the undersigned concludes the BCs exercise independent judgment in directing their subordinates.

In directing their subordinates, the BCs use “judgment, skill, ability, capacity, and integrity.” See *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 361 (1st Cir. 1980), citing *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949). Additionally, they are “left to their own devices to ensure the adequate performance of the [employees] under them. See *City of Freeport, supra* (discussing the “ultimate responsibility test” used by Federal courts in applying the NLRA).

Admittedly, the SOPs here are more detailed than those governing the Rio Rancho Police Department. See *NMCPSO-CWA Local 7911 and City of Rio Rancho*, PELRB Case No. 319-08, Hearing Examiner Report (Feb. 13, 2009) (discussing how policies touching on constitutional rights and the handling of firearms are restrictive, but other policies give considerable latitude to exercise independent judgment in determining how to respond to the particular situation). Nonetheless, the Battalion Captains’ exercise of independent judgment and discretion in directing subordinates is not strictly limited by reliance on such things as decision trees or Department SOPs. Compare *Dona Ana County Detention Center*. In particular, the SOPs here generally cover daily tasks related to station and equipment maintenance, and the execution of professional duties, while the BCs have regular occasion to either direct their subordinates in areas not covered by the SOPs, or to educate and guide them in meeting the SOP requirements. Nor are the

Department SOPs here so “complete, thorough” and “all-inclusive” as to make a BC’s direction in all circumstances “standardized” and “routine.” *City of Santa Fe Firefighters, supra* at 7-8 and 10. Nor are Battalion Captains merely facilitating the performance of or explaining job duties to their subordinates, relaying instructions from the Assistant Chiefs, Deputy Chief or Chief, or ensuring subordinates adhere to established procedures. *See McKinley County Sheriff’s Association* at 10-11.

Instead, the Battalion Captains here are more like the McKinley County Sheriff’s Lieutenants, which the parties there had agreed were supervisory, since BCs regularly direct their subordinates and are ultimately responsible for the effective overall operation of Department during their shift. *Id.* at 11. The Battalion Captains’ authority to direct their subordinates is also similar to that of fire captains that have been held to be supervisors under other bargaining statutes. *See City of Pittsburg v. Pennsylvania Labor Relations*, 556 A.2d 928, 932 (Commw. Ct. Pa. 1989) (under a definition substantially similar to that of the NLRA, fire captains are “clearly field supervisors” because they are the “ranking supervisor” responsible for Station operations and directing the firefighters at and away from fires)²³ and *Vicksburg Firefighters*, 761 F.2d at 1042 (under the NLRA, fire captains are supervisors, rather than “crew leaders,” where thirteen captains are superior officers to fifty-nine subordinates, they direct fires and, when not on fire runs, are responsible for the cleanliness of the station, apparatus and tools, and delegate

²³ The Pennsylvania Public Employee Relations Act, 43 PS Secs. 1101.101 *et seq.*, defines supervisors, in a manner substantially similar to that of the NLRA, as “any individual having authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or responsibly to direct them or adjust their grievances; or to a substantial degree effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely routine or clerical in nature but calls for the use of independent judgment.” *See* Sec. 301(6) (emphasis added). However, the Pennsylvania act only excludes “management level employees” from its coverage. *See* Sec. 301(2).

duties); *see also City of Grand Island v. AFSCME*, 185 N.W.2d 860 (Sup. Ct. Neb. 1971) (fire captains were excluded supervisors because they “have general charge of the personnel assigned to their station”).²⁴

3. Amount of work time spent on distinct and supervisory duties.

We now turn to the final, interrelated issues: whether Battalion Captains devote a majority of their work time to general supervisory duties requiring the use of independent judgment, or whether they instead primarily engage in routine, incidental and clerical duties and/or perform substantially the same duties as their subordinates, such that they are in fact lead employees.²⁵

As an initial matter, the undersigned concludes supervisory duties under PEBA are far broader than under NLRA, the Federal Labor Relations Act or the state statutes cited, or referenced in cases cited by, the Petitioner. The Board has generally viewed PEBA’s definition as narrower than that of the NLRA and other jurisdictions, since PEBA requires that a majority of time be spent on supervisory duties. However, this case illustrates that in other respects PEBA’s three-pronged definition is actually

²⁴ At the time of this decision, Nebraska had a definition of “supervisor” that was also essentially similar to that of the NLRA: “any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature but calls for the use of independent judgment.” *Id.* at 863-864 (emphasis added). However, the Nebraska statute was amended the following year to expressly exclude firefighters and police officers below the rank of Department head or his or her immediate assistant. *See* Neb. State Statute Sec. 48-816(3)(b); *see also Nebraska Association of Public Employees v. Nebraska Game and Parks Commission*, 247 N.W.2d 449, 450 (Sup. Ct. Neb. 1976) (discussing change).

²⁵ As noted in the *Rio Rancho* and *Dona Ana County Detention Center* cases, it is more helpful to analyze these elements at the same time due to their overlap, rather than attempting to examine them separately. 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).

broader, since PEBA does not limit supervisory authority to only certain particular, enumerated activities.²⁶

As discussed in the preceding section, PEBA lists several specific tasks—hiring, promoting, disciplining and directing employees—together with a general category or type of activity, all with varying frequency requirements. That they have varying frequency requirements further demonstrates the Legislature intended they be read as separate elements. Reading the three prongs as separate elements, and also reading them together with the other five provisos or limitations, the undersigned concludes “supervisory duties” is a catch-all phrase that includes various other administrative duties

²⁶ See:

- NLRA, Note 20, *supra*;
- FLRA, 5 USC § 7103(10) (defining “supervisor” as “an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees to adjust their grievances, or the effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term ‘supervisor’ includes only those individual who devote a preponderance of their employment time to exercising such authority”);
- Illinois Public Relations Act, Ill. Rev. Stat. Ch. 48, para. 1603(r), 5 ILCS 315/3(r) (defining “supervisor” as “an employee whose principal work is substantially different from that of his or her subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, to adjust their grievances, or to effectively recommend any of those actions, if the exercise of that authority is not of a merely routine or clerical nature, but requires the consistent use of independent judgment,” and “includes only those individuals who devote a preponderance of their employment time to exercising that authority ... ”);
- Iowa Public Employee Relations Act, Iowa code § 20.4(2) (same as the NLRA);
- Montana Public Employees Collective Bargaining Act, Mont. Code Ann. § 39-31-103(11)(a) – (b) (defining “[s]upervisory employee” as “an individual having the authority on a regular, recurring basis while acting in the interest of the employer to” engage in all the acts enumerated in the NLRA except directing employees and adjusting grievances, and additionally providing “[t]he authority described in subsection (11)(a) is the only criteria that may be used to determine if an employee is a supervisory employee”);
- South Dakota Public Employees’ Unions Act, SDCL § 3-18-1(2) (same as the NLRA—Petitioner cites an old regulatory definition since repealed); and
- Vermont Public Employee Bargaining Act, 21 VSA § 1502(13) (same as the NLRA).

The statutes of the two other jurisdictions referenced by the Petitioner omit a definition of supervisor all together, but the courts apply an ad hoc NLRA-like analysis. See:

- Revised Statutes of Missouri, § 105.500, and *City of Columbia v. Missouri State Board of Mediation*, 605 S.W.2d 192, 193 (Ct. App., W. Dist. 1980); and
- Florida Statutes, §447.203(4) and *Ocean City-Wright Fire control District v. Ocean City-Wright fire Fighters Association*, 440 So.2d 413 (Ct. App. Fla. 1983).

and responsibilities unique to the duties of the subordinates, provided these distinct duties require the exercise of independent judgment and are carried out in or substantially affect the interests of the employer.

In determining whether the BCs here spend a majority of their time in distinct “supervisory” duties as intended under PEBA, the undersigned incorporates by reference the previous discussions concerning hiring, promotion, discipline and direction of subordinates, and also notes the following relevant facts. The BCs are the senior officer in the field during their 24-hour shift. As such, they spend considerable part of their work hours on scheduling matters, and ensuring adequate resource allocation in the County. They also oversee, review and/or evaluate their subordinates’ work through extensive discussions with their subordinates, in conducting spontaneous training or QI, and acting as the incident commander of larger scenes.

Although there may be some variance based on personal predilection and/or seniority of rank and corresponding responsibilities, the evidence is overwhelming that all Battalion Captains spend the majority of their work time carrying out duties distinct from those of their subordinates. In this regard, they are distinguished from the fire captains and lieutenants in the *Silver City* case, and the captains in several of the cases cited by the Petitioner. *Compare Silver City, supra* at 27 (although they have supervisory duties and responsibilities, “a substantial portion of officers’ time from 9:00 a.m. to noon is spent cleaning the offices or on routine or non-supervisory paperwork, which are substantially similar to tasks of the Drivers and Firefighters); *Brattleboro, supra* at 245 (captains “perform[], in general, the same duties as firefighters”); *City of Des Moines v. Public Employment Relations Board*, 264 N.W.2d 324 (Sup. Ct. Iowa 1978) (station

captains and lieutenants, like the other crewmembers assigned to their station, engage primarily in “training, house duties, inspections and fire fighting,” although they are also responsible for the operation of their station, and assign house work, and perform limited administrative duties).

BC’s distinct supervisory functions and responsibilities include, among other things, being ultimately responsible for ensuring the smooth operation of the County’s fire and medical emergency services during their shift; ensuring adequate coverage through their scheduling responsibilities; ensuring adequate resource allocation of manpower, vehicles, apparatus and services throughout the County, such as by rerouting dispatch calls as necessary; maintaining, reviewing and, where needed, investigating restricted-drug inventories; spontaneously conducting training and education, for both paid and volunteer staff, as issues or questions arise; answering questions and resolving operational and personnel problems presented by the lieutenants; resolving issues that arise between paid and volunteer staff; attending shift change briefings and command staff meetings; selecting suitable mentors to be appointed for new recruits; annually evaluating their subordinate lieutenants, disciplining or recommending discipline for any subordinates as appropriate; drafting policies within their areas of special interest and expertise; keeping Administration apprised of noteworthy events and incidents, and of the questions and concerns of the lower ranked personnel; and managing and carrying out various administrative responsibilities as assigned by Assistant Chief Holland, related to such things as shift and leave bids, budgetary matters, the evaluation of expensive software for use by the Department, and preparation of news releases to advertise and promote the Training Academies.

Assistant Chief Holland assigns much of this work, based on instruction from the Chief, and the Battalion Captains may often report their progress and results back up the chain of command. However, there is no evidence that either the Chief or Assistant Chief Holland specifically instructs the Battalion Captains in how to conduct these assignments, even though the BCs represent the interests of and affect the goals and objectives of the Department in conducting these activities. Thus, the BCs are exercising their independent judgment in effectuating the Department's purposes through their regular operational duties and their miscellaneous special assignments.

However, notwithstanding all of the foregoing, the undersigned is still ultimately compelled to conclude the BCs here are not supervisors under PEBA because the majority of their administrative work "is of a routine, incidental or clerical" nature. Specifically, the majority of the BC's distinct work includes such things as assembling and delivering ordinary medical stock; ordering or assembling, dropping off and picking up such other items as uniforms, Human Resources forms or documents, or pay check stubs; driving between stations and filling up the BC truck's gas tank; going to pick up small building maintenance supplies such as caulk; and most likely part of their work concerning mail, email, other paper-work and "computer work" as well. *See* Neely and Shelton testimony and Ex. P-21; *compare to See Silver City, supra* (captains and lieutenants not supervisors where the majority of their administrative functions are filling out routine reports and other paperwork), *In re Local 7911, Communications Workers of America & Dona Ana Deputy Sheriffs' Association, Fraternal Order of Police and Dona Ana County*, 1 PELRB No. 19 (Aug. 1, 1996) (patrol sergeants are not supervisors where much of their distinct and administrative work is still non-supervisory in nature because it

does not require independent judgment, and their actual supervisory work is only occasional or an insubstantial portion of their overall duties), and *Dona Ana County Detention Center* (shift and transport sergeants' administrative duties of completing actions reports, payroll or ordering supplies are not supervisory in nature).

Comparing these routine duties to their non-routine, supervisory-level work it is initially surprising that the routine tasks could take up more time than the non-routine ones. However, that they do end up taking up the majority of the BCs' average day, is corroborated both by BC Shelton's Activity Log and BC Neely's testimony.

BC Shelton's Activity Log reflects that, during 5 days, the following amount of hours were spent on supervisory work: 11/29/08, 6 to 7.5 hours out of 11.25 non-"down time hours;" 11/30/08, 3.25 – 3.75 out of 11.50 non-down time hours; 12/1/08, 6 to 6.75 hours out of 13.25 non-down time hours; 12/5/08, 5.75 – 6.25 hours out of 11.75 non-down time hours; and 12/6/08, 5.25 to 6.25 hours out of 10.25 non-down time hours. This leads to a total of 26.25 to 30.5 hours (or an average of 28.37 hours), out of 56.75 non-down time hours being spent on non-routine, supervisory duties. This in turn means 45-52%, or an average of 48.5%, of all duties are non-routine and supervisory. See Ex. P-21.²⁷

²⁷ The variable ranges depend primarily on what percentage of time is spent on non-routine email, mail, other paperwork and "computer work," but also on how much time was spent on specific activities lumped with others in a single entry. For these, the undersigned used reasonable estimates to divide the time, based where possible on Shelton's testimony describing the various entries. "Non-down time" subtracts meals, breaks, items logged as downtime, and time spent cooking, getting dressed/showered, or watching movies; it does not include time spent working out since physical fitness is a critical job requirement. As stated in *Dona Ana Count Detention Center*, attached ALJ Report at 8, note 3, "[c]onducting a representation hearing is not an exact science and, even under the best of circumstances, obtaining precisely accurate testimony from witnesses may be difficult ... [D]espite the Act's reference to 'amount of work time [devoted] to supervisory duties,' a witness' [sic] workday may not fall into ready-made compartments of work labeled supervision and non-supervision. Despite these difficulties we find that the witnesses' approximations reflect their good faith, best efforts to describe a typical workday and we find the AJ's [sic] determination, based on testimony from several witnesses, of time devoted to supervisory duties to be supported and corroborated by other evidence and, therefore, reliable and persuasive."

In considering the foregoing, the undersigned is mindful that 11.75 of BC Shelton's logged hours were spent on station cleaning or running calls, and that BC Shelton was more likely to engage in these actions than the other two BCs. The undersigned is also mindful that in the recently issued *City of Rio Rancho* case she concluded that unit exclusion or inclusion determinations cannot be made based on unilateral conduct by or the personal management style of individual employees, when not a de facto requirement of the job position.

Nonetheless, the undersigned credits Shelton's figures for a number of reasons. First, Station 60 where the BC is assigned has no lieutenant. Logically, manpower limitations and call volume would—at least from time to time—require the BC to go on calls dispatched to Med 60. Second, BC Shelton's log is refuted only by BC Neely's vague testimony that he is a first line of management because he generally spends a majority of his time engaged in administrative duties distinct from the duties of his subordinates. However, when we carefully parse BC Neely's testimony, we see that much of his distinct administrative duties are also routine, incidental or clerical, such as: spending 45 minutes looking for a lost cell phone; getting his truck ready; taking orders for uniforms and directing subordinates to assemble uniform orders for his delivery; assembling, delivering and directing subordinates to fill out Human Resource forms; driving to other Stations; visit with crews; and listen to calls in the evening. (Neely testimony.) Finally, if BC Neely and BC Johnson do not spend either a comparable amount of time on calls or station cleaning as does BC Shelton, or more time on routine administrative duties, the record is unclear as to what they are doing in that time difference. This is particularly true as there is no evidence that BC Shelton either has

fewer non-routine duties, or has been held accountable for a failure to meet all of his non-routine, supervisory duties.

Based on the forgoing, it is not relevant that the BCs here, unlike the disputed employees in other representation cases, do not engage in substantially the same duties as their subordinates. This case is distinguishable from the recently issued *City of Rio Rancho* case, because there the lieutenants there did spend the majority of their time engaged in work a higher level of administrative work involving independent judgment, such as representing Department interests in meetings with outside agencies, and crafting and implementing goals and objectives for reducing crimes in their assigned beats. *Id.* and *City of Santa Fe Firefighters, supra*, ALJ Report at 11-12 (“[w]ithin the paramilitary structure of the Santa Fe Fire Department, the captains do not exercise supervisory authority sufficient to create conflict of interest or to destroy strong community of interest shared with rank and file firefighters...”); *see also Department of the Navy and IAFF*, 3 FLRA 325 (1980) (fire captains are not supervisors under FLRA where they “do have additional duties,” but “their overall employment time,” is spent on only routine and clerical duties rather than supervisory duties); *The Village of Elk Grove Village*, 613 N.E.2d 311, 317 (App. Ct. Ill. 1993) (fire lieutenants are not supervisors under the Illinois statute where “their work was substantially different from that of the fire fighters” but they “did not spend a preponderance of their employment time” engaged in supervisory duties).²⁸

²⁸ Because the statutes in both of these cases utilize enumerated “supervisory” tasks, *see* Note 27 *supra*, they are cited more for general illustration of the fact that field leaders may be engaged in substantially different work but still not be supervisors in fact. The FLRA example is particularly illustrative since that act, similar to PEBA, has a “preponderance of ... employment time” requirement.

Conclusion.

Admittedly, this is an exceedingly close case, unlike in *City of Santa Fe* or *Dona Ana County Detention Center*. Nonetheless, the Santa Fe County Fire Department Battalion Captains do not meet the statutory definition of supervisor under PEBA. Nor, on this record, will the BCs meet the statutory definition of supervisor when their position is converted to that of Battalion Commander, since there is no evidence their duties will change, only that a new layer of lead employees—the Station or Shift Captains—will be inserted at the Station level.

III. Lieutenants are not managers.

Legal Standards.

The County also argues BCs are excluded managers under PEBA. *See* § 10-7E-4(O), § 10-7E-5 and § 10-7E-13(C). PEBA’s definition of manager can be broken down into a two-part test: the employee is (1) primarily engaged 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.

The County argues the Battalion Captains here are managers because they develop, administer and effectuate policies concerning day-to-day duties, uniforms, staffing, scheduling, personnel assignment, assignment of mentors to cadets, cadet training, reconfiguration of fire stations, orientation of lieutenants, citizen complaints, and extended-forecasts of budgetary and training needs. The County’s arguments are not supported by the record.

First, the Battalion Captains have only limited involvement in certain of these areas, unique to the involvement of their subordinates. For example, the BCs’s involvement with the budge is limited to two areas, neither of which constitute management level responsibility: (1) attending meetings at which budgetary needs are discussed generally; and (2) BC Neely and BC Shelton’s advisory function in assembling budget forecast information to transmit to Assistant Chief Holland and the Chief. Additionally, lieutenants are also involved in cadet interviews and training, and all field staff’s involvement in policy development and training is more a function of specialized knowledge and personal interest, than rank.

Second, Battalion Captains’ involvement in certain other areas cannot be said to significantly affect the employer’s overall purpose, and/or does not constitute creating, overseeing and coordinating the means and methods for achieving the Department’s overall policy objectives. *Jemez Valley*. For example, the definition of manager does not

contemplate the exclusion of personnel merely because they draft or enforce policies concerning day-to-day duties, uniforms or training check-lists.

Finally, in none of these areas do the Battalion Captains determine the extent to which the Department's policy objectives will be achieved. *Id.* Rather, they are enforcing policy objectives as stated to them by the Chief, Deputy Chief and Assistant Chief Holland, among others. *See City of Pittsburgh v. Pennsylvania Labor Relations Board*, 556 A.2d 928 (Commw. Ct. Pa. 1989) (City of Pennsylvania fire Captains not managerial where they lack authority to initiate policies and issue general regulations; develop and change department programs; prepare whole budgets and unilaterally make purchases, rather than merely make suggestions concerning certain budgetary items or purchases; commit departmental resources in dealing with public groups).²⁹

Conclusion.

For the foregoing reasons, the Battalion Captains do not meet the statutory definition of management employee under PEBA.

IV. Lieutenants are not confidential employees.

Legal Standards.

Finally, the County argues the BCs are excluded under PEBA as "confidential employees," meaning employees who "devote a majority of [their] time to assisting and acting in a confidential capacity with respect to a person who formulates, determines and effectuates management policies." *See* § 10-7E-4(G). Prior PELRB precedent has limited the application of this exception to employees assisting persons who exercise

²⁹ Under the Pennsylvania Employee Relations Act, 43 P.S., Sec. 1101 *et seq.*, a "management level employee" is defined as one who is "involved directly in the determination of policy or who responsibility directs the implementation thereof and shall include all employees above the first level of supervision."

such managerial functions “in the field of labor relations.” See *NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995).³⁰

Application.

Common criteria considered in determining confidential status include whether the employee: is or could likely be on the employer’s bargaining team; is privy to the employer’s labor-management policy or bargaining strategy; has access to confidential financial or other data used in bargaining; or has input or involvement in the employer’s contract proposal formulation. See *American Federation of Teachers Local 4212 and Gadsden Independent School District*, 03-PELRB-2006 (May 31, 2006), adopted and attached Hearing Examiner Report, and *NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995).

Here, BCs are at best merely privy to some general information that pertains to collective bargaining, such as budget information, the general status of negotiations, and various personnel matters. However, BCs do not spend a majority of their time acting in a confidential capacity to Administrative. As the senior and de facto “head” BC, Captain Neely spends more time than the other BC working closely with management, but he still testified to only spending half of his time interacting with Command Staff. Moreover, some of that time is not spent in a “confidential capacity” related to “the field of labor relations,” but instead concerns special projects or general day-to-day operations.

³⁰ The prior PELRB adopted this limitation from the NLRB. The NLRA itself, 29 USC §§ 1 *et seq.*, does not provide an exception for confidential employees at all, and the exception was instead created through NLRB jurisprudence, and was therefore narrowly applied because extraneous to the statutory language. See *Developing Labor Law* (5th Ed.) at 2278-2281. Moreover, PEBA conspicuously omits the “field of labor relations” language from NLRA precedent. Notwithstanding these differences, however, the prior PELRB adopted the same narrow application in *Jemez Valley Schools*, upon careful consideration.

Thus, the Battalion Captains' involvement in Department labor relations matters is akin to that of the payroll manager in *NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995). She was held not to be confidential because any financial information to which she has access was also available to others, and she did not have any actual input in formulating contract proposals. *Id.*

Conclusion.

For the foregoing reasons, the Battalion Captains do not meet the statutory definition of confidential employee under PEBA.

V. Nonetheless, the Battalion Captains must still demonstrate majority support for their Petition.

Although BCs are held here to be covered under PEBA, a question is still presented as whether the Battalion Captains may be accreted upon a mere showing of interest, or whether they must instead demonstrate majority support.

Generally, NMAC 11.21.2.38(B) provides for accretion upon merely a showing of interest, rather than demonstration of majority support, if the group to be accreted is less than 10% of the existing unit, as is the case here. However, NMAC 11.21.2.37(C) requires a demonstration of majority support for accretion petitions, rather than mere showing of interest, so long as any question concerning representation is presented. *See* Note 1, *supra*.

Here, the Battalion Captains comprise less than 10% of the existing bargaining unit but questions have obviously been presented concerning unit inclusion. The Union appears to assert that no question concerning representation is presented under an accretion petition, so long as the group to be accreted is less than 10% of the existing

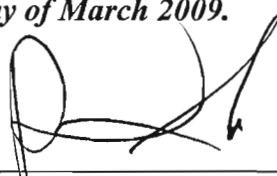
unit. *See* Petitioner's Post-Hearing Brief at 1-2. This position, however, is clearly wrong under the plain language of PELRB rules. As provided under NMAC 11.21.2.37(C) and NMAC 11.21.2.38(B), petitions for accretion are a type of clarification, and the use of a clarification petition is prohibited where any question concerning representation is presented. *Id.*; *see also* Developing Labor Law (5th Ed.) at 540 (a question concerning representation may concern majority support *or* unit inclusion/exclusion).

Accordingly, the undersigned RECOMMENDS the PELRB DIRECT AN ELECTION among the Battalion Captains.

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 2nd day of March 2009.



Pilar Vaile
Deputy Director
Public Employee Labor Relations Board

APPENDIX

EVIDENCE ADMITTED INTO THE RECORD³¹

1. Testimony of Firefighter Tsosie Ramos.
2. Testimony of Battalion Captain Reed Shelton.
3. Testimony of Lieutenant Dewey Holliday.
4. Testimony of Bernadette Salazar, County HR Director.
5. Testimony of Assistant Chief Kimmet Holland.
6. Testimony of Lieutenant Jim Lovell.
7. Testimony of Battalion Captain Mike Neely.
8. Exhibit P-1, Department schedule 11/15/8 through 12/31/08.
9. Exhibit P-2, Santa Fe County Fire Dept. Standards Manual (hereinafter "SOP"), Sec. 100 Art. 5 (Pay & Leave Issues).
10. Exhibit P-3, SOP Sec. 100 Art. 10 (Shift Trades).
11. Exhibit P-4, SOP Sec. 100 Art. 12 (Shift Bidding).
12. Exhibit P-5, SOP Sec. 100 Art. 14 (Annual Leave Bid)
13. Exhibit P-6, SOP Sec. 100 Art. 15 (Regional Staff Daily Routine).
14. Exhibit P-7, SOP Sec. 100 Art. 18 (Sick Leave Management).
15. Exhibit P-8, SOP Sec. 100 Art. 29 (48/96 Hour Shifts).
16. Exhibit P-9, SOP Sec. 400 Art. 4 (EMT-Paramedic and Paramedic Clearance).

³¹ Exhibits designated as "P-__" were introduced by the Petitioner Union, and the Respondent County introduced exhibits designated as "R-__". Almost all exhibits were admitted without objection or upon party stipulation or subsequent withdrawal of any objection. The exception was P-21, which the County argued was not reliable because created in contemplation of litigation. The objection was overruled because the exhibit was authenticated by the author while under oath so the author and the document were subject to cross examination, and because the contents were highly relevant being a contemporaneous description of daily job duties. Therefore any objection was determined to go to weight rather than admissibility under NMAC 11.21.1.17(A) and (B). The Union also initially objected to Ex. R-45, the BC's job description, but the objection was withdrawn after voir dire.

17. Exhibit P-10, SOP Sec. 500 Art. 1 (Incident Command).
18. Exhibit P-11, SOP Sec. 500 Art. 11 (Duty Crew Response).
19. Exhibit P-12, SOP Sec. 300 Art. 5 (Fire Insurance Inquiries).
20. Exhibit P-13, SOP Sec. 300 Art. 6 (Fire Arson Investigation).
21. Exhibit P-14, SOP Sec. 100 Art. 17 (Emergency Response Vehicle (ERV)).
22. Exhibit P-15, SOP Sec. 100 Art. 9 (Travel and Training).
23. Exhibit P-16, SOP Sec. 100 Art. 8 (Duty Battalion Captain Notification).
24. Exhibit P-17, Santa Fe County 7K Exempt Employee Timesheet.
25. Exhibit P-18, 10/31/08 Memorandum Re: Open Shift Bids.
26. Exhibit P-19, 11/7/08 Memorandum Re: Shift Bids.
27. Exhibit P-20, 10/30/08 Memorandum Re: Lieutenant Promotions.
28. Exhibit P-21, Log of Daily Activities by R. Shelton for 11/29/08, 11/30/08, 12/1/08, 12/5/08 and 12/6/08.
29. Exhibit P-22, 12/13/08 email attaching "blank" Job Description for Santa Fee County Fire-Captain Field Shift.
30. Exhibit R-1, Collective Bargaining Agreement between Petitioner and County.
31. Exhibit R-2, Santa Fe County Classification Plan Title Listing.
32. Exhibit R-3, Advance Requests for Leave (Isaac Garcia).
33. Exhibit R-4, Advance Requests for Leave (Michael Taradash).
34. Exhibit R-5, Advance Requests for Leave (Karena McLain).
35. Exhibit R-6, Advance Requests for Leave (Robert Herrera).
36. Exhibit R-7, Advance Requests for Leave (Samantha Ramirez).
37. Exhibit R-8, Advance Requests for Leave (Victor Montoya).

38. Exhibit R-9, Advance Requests for Leave (Stephen Vogel).
39. Exhibit R-11, Corrective/Disciplinary Action and related documents (Ramos Tsosie, regarding Incident on 8/22/08).
40. Exhibit R-12, Action Plan (from Captain Neely to Ramos Tsosie, 8/22/08).
41. Exhibit R-13, Corrective/Disciplinary Action and related documents (Ramos Tsosie, regarding Incident on 3/20 – 3/22/2008).
42. Exhibit R-14, Corrective/Disciplinary Action and related documents (Patricio Romero, regarding Incident on 3/20 – 3/22/08).
43. Exhibit R-18, Annual Performance Evaluation (Thomas Jimenez).
44. Exhibit R-19, Annual Performance Evaluation (Jason Noble).
45. Exhibit R-20, Annual Performance Evaluation (Patricio Romero).
46. Exhibit R-21, Annual Performance Evaluation (Jeremy Renda).
47. Exhibit R-22, Annual Performance Evaluation (Paul Serino).
48. Exhibit R-23, Annual Performance Evaluation (Ramos Tsosie).
49. Exhibit R-25, Annual Performance Evaluation (Samantha Ramirez).
50. Exhibit R-26, Agenda for Two-day Retreat for Command Staff.
51. Exhibit R-27, 11/18/08 email from R. Shelton Re: Demotion.
52. Exhibit R-28, 11/8/08 Memorandum from M. Neely Re: Annual Uniform Allotment.
53. Exhibit R-31, 10/31/08 email from R. Shelton Re: Task books.
54. Exhibit R-32, 7/28/08 email from R. Shelton Re: emergency reporting clarification.
55. Exhibit R-33, 6/21/08 email from R. Shelton Re: C Shift Saturday, June 21.
56. Exhibit R-34, 7/4/08 email from R. Shelton Re: B and C Shifts July 3d.
57. Exhibit R-35, 6/25/08 and 6/24/08 emails Re: Med 80 notes.

58. Exhibit R-36, 3/3/08 Press Release and accompanying 2/28/08 email from R. Shelton.
59. Exhibit R-37, 2/10/08 email from R. Shelton and accompanying PRN policy draft.
60. Exhibit R-38, 12/24/07 Memorandum from R. Shelton Re: Cadet Orientation.
61. Exhibit R-39, 1/28/08 email from R. Shelton Re: third quarter goals.
62. Exhibit R-40, Agenda for 3/27/08 Operation Command Meeting.
63. Exhibit R-41, Agenda for 2/28/08 Operation Command Meeting.
64. Exhibit R-42, Agenda for 1/31/08 Operation Command Meeting.
65. Exhibit R-43, Job Description, Firefighter/EMT I
66. Exhibit R-44, Job Description, Fire-Lieutenant
67. Exhibit R-45, Job Description, Fire-Captain Field Shift
68. Exhibit R-46, Job Description, Fire-Captain/EMS
69. Exhibit R-47, Job Description, Fire- Captain/Training
70. Exhibit R-48, 7/11/06 Memorandum from K. Holland Re: County BC

Page/Notifications.