

9-PELRB-2016

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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

Petitioner,

v.

PELRB No. 310-15

LUNA COUNTY,

Respondent.

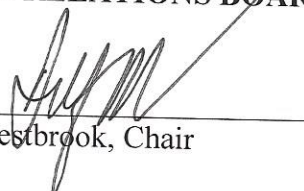
ORDER

THIS MATTER comes before the Public Employee Labor Relations Board (“Board”) at a regular meeting on May 3, 2016, to consider the *Hearing Officer’s Report and Recommended Decision* (“Report”), issued on March 18, 2016. On March 30, 2016, Respondent Luna County submitted an *Appeal to Board of Hearing Officer’s Recommendation*. Counsel for both AFSCME and Luna County were present at the Board’s May 3, 2016 meeting and presented oral arguments in support of their respective positions. The Board, having reviewed the pleadings and being sufficiently advised, and by a vote of 3–0, unanimously adopts the Hearing Officer’s findings of fact, conclusions of law, and recommended decision, and orders as follows:

IT IS HEREBY ORDERED AFSCME’s petition seeking recognition as the exclusive collective bargaining representative of Shift Liutenanents working at the Adult Detention Center in Deming, New Mexico is **GRANTED**.

PUBLIC EMPLOYEE
LABOR RELATIONS BOARD

Date: 5-13-16



Duff Westbrook, Chair

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AFSCME, COUNCIL 18,

Petitioner

and

PELRB No. 310-15

LUNA COUNTY,

Respondent

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

STATEMENT OF THE CASE: This matter comes before Thomas J. Griego, designated as the Hearing Officer in this case, on a Petition filed December 29, 2015 by AFSCME Council 18 seeking recognition as the exclusive collective bargaining representative for all non-probationary security personnel, including Correctional Officers, Sergeants and Lieutenants, administrative medical and maintenance employees working at the Adult Detention Center in Deming, New Mexico.

The County filed the requested list of putative employees to be included in the bargaining unit and on January 15, 2016 identified as an issue to be determined whether employees holding the rank of Sergeant and Lieutenant are excluded from collective bargaining as management and supervisory employees as those terms are defined by the PEBA, NMSA 1978 §10-7E-4.

At a Status and Scheduling Conference held January 27, 2016 a hearing was scheduled pursuant to NMAC 11.21.2.19 to be held Monday, February 22, 2016 at the Luna County Courthouse to take evidence and hear argument on the exemption issue.

At the Hearing the parties stipulated to the admission of all tendered exhibits subject to argument as to their relative relevance which I take to mean the weight that should be given each exhibit. Additionally, the County withdrew its objections to including I the bargaining unit, employees holding the rank of Sergeant, leaving the question whether Lieutenants as

the sole issue to be determined. After taking evidence from two of the Union's witnesses the parties, after conferring during a recess, agreed that the Administrative lieutenants were properly excluded from the bargaining unit. As a result the only employees remaining at issue are the Shift Lieutenants. Accordingly, in order to decide the matter before me I must determine:

- A. Whether the Shift Lieutenants share a community of interest with the other employees in the bargaining unit, and;
- B. Whether the inclusion of the Shift Lieutenants will render the unit inappropriate. In order to determine whether including the lieutenants will render the unit inappropriate I must determine whether they meet the statutory definition of confidential, supervisory or managerial employees.

On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability and reliability of testimony, I make the following

FINDINGS OF FACT:

1. The geographic work location of the petitioned-for unit is Adult Detention Center in Deming, New Mexico. (Petition ¶ 5; County's Statement of Issues January 12, 2016).
2. The Detention Center comprises 14 "pods" including a juvenile detention section. (Testimony of Lt. Sammy Griego TR disc 1 at 22:20 to 22:22.)
3. The proposed unit includes 38 employees who are not currently on probation and the Director's preliminary finding of sufficient support is confirmed. (Employer's employee list and County's Statement of Issues January 12, 2016).

4. There is not a collective bargaining agreement covering any of the employees in the proposed bargaining unit. (Petition ¶ 7; County's Statement of Issues January 12, 2016).
5. There are two types of Lieutenants working in the Adult Detention Center in Deming: a) "Shift Lieutenants, sometimes referred to as "Line Lieutenants"; and, b) "Administrative Lieutenants". (Testimony of Lt. Sammy Griego TR disc 1 at 16:18 to 16:23; Lt. Andrew Gilmore TR disc 2 at 24:00 to 24:30.)
6. The Shift Lieutenants work 12-hour shifts in overlapping "A" and "B" shifts corresponding to daytime and nighttime or "graveyard" shifts, three days per week, plus a fourth day every other week. (Testimony of Lt. Sammy Griego TR disc 1 at 16:46 to 17:10; Lt. Andrew Gilmore TR disc 2 at 24:50 to 24:58; County Exhibit 1 stating "...this position will be assigned a 12-hour shift schedule as necessary".)
6. Graveyard Shift Lieutenants supervise approximately 12 subordinates. (Testimony of Lt. Sammy Griego TR disc 1 at 34:17.)
7. Day shift Lieutenants "supervise" approximately 14 employees including two Sergeants. (Testimony of Lt. Mary Graines TR Disc 5 at 3:17.)
8. A typical work day for a "graveyard" Shift Lieutenant involves:
 - a. Attending a shift briefing conducted by the out-going shift supervisor, which includes completing a 10 minute "pass down paperwork" on a computerized report, and conducting a "head count" accompanied by a Sergeant. These tasks take approximately 15-30 minutes to complete. (Testimony of Lt. Sammy Griego TR disc 1 at 17:43 to 18:03; 24:58 – 25:37; Andrew Gilmore TR disc 2 at 27:00 to 27:50; 32:04 to 32:47.)

- b. The Lieutenants on day shift perform three counts per day taking 15-30 minutes each to complete. (Testimony of Lt. Andrew Gilmore TR disc 2 at 33:00 to 33:19.)
- c. The Lieutenants conduct “rounds” and the night shift Lieutenant conducts one round per shift. (Testimony of Lt. Sammy Griego TR disc 1 at 21:40 to 22:09; 23:36.)
- d. Conducting “rounds” takes approximately one hour for each side of the facility totaling approximately three hours per shift. (Testimony of Lt. Sammy Griego TR disc 1 at 22:20 to 23:13; 23:35 to 23:54; Lt. Andrew Gilmore TR disc 2 at 29:20 to 29:50.)
- e. Receiving inmate grievances or administering inmate discipline and entering relevant data into a computer system takes about 15-30 minutes. The three hours spent doing rounds includes administering inmate discipline and the 15-30 minutes previously identified as receiving inmate grievances. (Testimony of Lt. Sammy Griego TR disc 1 at 18:45 – 21:40; Lt. Andrew Gilmore TR disc 2 at 27:58 to 29:00; Lt. Mary Graines TR Disc 5 11:20 to 15:10.)
- f. According to the management’s witness, Lt. Graines, on the day shift Lieutenants may handle a work load of 50-60 inmate grievances per day, about 3% of which are “entered into the system” and which take about 2-3 hours per day to process. (Testimony of Lt. Mary Graines TR Disc 5 at 29:20 to 30:09). However, according to the facility’s SOP:
 - i. The shift sergeants are the “primary point of contact for inmate grievances” unless the grievance is against the sergeant. Grievance

- forms are obtained from the sergeant and it is the sergeant who determines whether a complaint is grievable. All grievances are logged onto the OMS system by the Sergeant, who signs dates and numbers the grievances. (Union Exhibit A at p.198.)
- ii. The sergeants forward grievances to the appropriate division or department head within two working days; however, if in the sergeant's discretion the situation threatens an inmate's immediate health or safety, the Sergeant may process the complaint immediately. (Union Exhibit A at p. 198.)
 - iii. The sergeants then determine the appropriate manager or lieutenant to receive the complaint, which may include an administrative lieutenant. (Union Exhibit A at p.198.)
 - iv. The lieutenant obtains the inmate's signature and returns the grievance to the sergeant. If a grievance is not resolved within five days the Lieutenant investigates any unresolved grievances. (Union Exhibit A at p.199.)
 - v. The shift Sergeant is responsible for following and monitoring operational grievance procedures. The Administrative Lieutenant will investigate the appropriate action taken by the appropriate sergeant or lieutenant the inmate may appeal a grievance decision to the director. Appeal forms are obtained from the shift sergeants. (Union Exhibit A at pp.199-200.)
 - g. Inmate disciplinary hearings are conducted on the night shift even if they were reported and investigated during the day shift. Hearings take about 30

minutes per day. (Testimony of Lt. Mary Graines TR Disc 5 at 29:20 to 30:09.)

- h. The Lieutenants compare a head count of inmates performed by a subordinate Corrections Officer to records of inmates maintained in the facility's computer system. A sergeant may sometimes "sign off" on a count report. (Testimony of Lt. Sammy Griego TR disc 1 at 25:36 to 26:24; 26:10.)
 - i. The Lieutenant may occasionally "work the floor" performing the same work as their subordinates when the facility is short staffed. (Testimony of Lt. Sammy Griego TR disc 1 at 23:13 to 23:37.)
 - j. Complete Bond paperwork, which takes about 30 minutes per bond, three or four times per shift. Sergeants may also complete the bond paperwork. (Testimony of Lt. Sammy Griego TR disc 1 at 23:50 to 24:38; Lt. Mary Graines 33:20 to 33:47.)
9. According to the County's County Exhibit 1, a Shift Lieutenant's duties, regardless of whether assigned to the day or the night shift, include the following:
- a. Under direction of the Detention Director, perform a variety of work as assigned in a wide range of areas focused on supervision of staff and inmates;
 - b. Ensure that Detention Sergeants and Officers are providing security, safety, health, and care of inmates confined in the Detention Center;
 - c. Learn, understand and be able to facilitate all the duties under Direct Supervision protocols. (According to the unchallenged testimony of Lt. Andrew Gilmore "Direct Supervision protocols" refers to the Department's Standard Operating Procedures and Post Orders);
 - d. Supervise and maintain adequate staffing on assigned shift, approving timesheets and leave requests.
 - e. Supervise the booking and release of inmates, inmate work details and feeding of inmates.
 - f. Conduct cell searches and head counts; transport and escort inmates; and facilitate the movement of inmates throughout the facility.
 - g. Oversight of training of Officers under his or her supervision on their job duties; Instructs in-service training and education of staff as assigned by Detention Director.
 - h. Ensure all work is completed appropriately and safely;

- i. Recommend disciplinary action to the Detention Director and implement discipline;
- j. Conduct briefings with staff; addresses operational issue in areas of responsibility and/or assignment;
- k. Supervise assigned Detention Sergeants and Officers; train, motivate and evaluates personnel; recommends training to the Detention Director; work with employees to correct deficiencies;
- l. Administer first aid when necessary and refer detainees to the attention of the medical staff as necessary;
- m. Process and administer all inmate requests and grievances;
- n. Review all facility admittances, releases and incident reports from assigned staff for accuracy, completeness, proper grammar, punctuation, and spelling;
- o. Conduct investigations and facilitate disciplinary process of inmate rule violations;
- p. Complete reports;
- q. Supervise and monitor and patrol security of designated areas of the facility and control traffic to and from specific areas;
- r. Report and document any unusual conditions of potential disorder and performs counts according to policy and directives;
- s. Facilitate Specialty Teams as assigned by Detention Director.

10. According to the County's County Exhibit 2, a Shift Sergeant's duties, regardless of whether assigned to the day or the night shift, include the following:

- a. Manage employees, including scheduling, training, evaluating and counselling them.
- b. Working closely with, and carrying out orders from, the facility's administration.
- c. Operating copiers, fax machines and computer terminals, postage machines, handheld and desktop calculators, multiline telephones, communications equipment and security devices and controls.
- d. Filing and retrieving information including time sheets, vehicle records, dispatch logs, booking and release logs and other related records promptly and accurately.
- e. Receiving and conveying telephone and oral messages to other personnel.
- f. Attending position-related meetings and seminars and reliably reporting back to his or her supervisor.
- g. Maintain basic knowledge of SOP's and applicable New Mexico Statutes.
- h. Receiving, recording and conveying financial payments to the proper personnel in an accurate, prompt and discrete manner.

11. Lt. Graines testified for management that Day Shift Lieutenants conduct "investigations allegations" or inmate grievances and that those investigations require the exercise of independent judgment regarding the application of SOP's or Post Orders or other state or federal laws, (Testimony of Lt. Mary Graines TR Disc 5,

15:00 to 16:20). However, she also testified that SOP's determine the level of discipline to be meted out in inmate grievances (Testimony of Lt. Mary Graines TR Disc 5 at 15:40 to 15:50) and a sergeant or "anyone else" could make those assessments based on the SOP's. (Testimony of Lt. Mary Graines TR Disc 5 at 15:58 to 16:08).

12. Internal Investigations are conducted by the Administrative Lieutenants. (Testimony of Lt. Sammy Griego TR disc 1 at 37:52 to 38:28; Disc 2 at 5:15 to 6:05.)
13. When serving on a hiring panel Lieutenants follow a script and ask only questions prepared beforehand by the Director and at the conclusion of the interview, the panel makes its recommendation to the Director for whom to hire. (Testimony of Lt. Sammy Griego TR disc 2 at 6:15 to 7:55; 8:55 to 9:33; Lt. Mary Graines Disc 5 at 30:50.)
14. A Day Shift Lieutenant performs most, if not all, of the same functions as a night shift Lieutenant, such as attending a shift briefing, "pass down paperwork" on a computerized report, conducting a "head count", receiving inmate grievances or administering inmate discipline and entering relevant data into a computer system conducting one round per shift and conducting disciplinary hearings, but Lieutenants working the night shift are more concerned with completing reports whereas the day shift Lieutenants concentrate more on training subordinates, movement of inmates e.g. releases and court transport, and interaction with the public. Testimony of Lt. Andrew Gilmore TR disc 2 at 25:00 to 25:20; County Exhibit 1.)
15. Although the Lieutenant working the night shift is considered to be "in charge of the facility" because the Director is not present during those hours, the Lieutenant still

calls the Director for guidance or direction 3 or 4 times per week. (Testimony of Lt. Sammy Griego TR disc 1 at 32:30 to 34:01.)

16. While Lieutenants may issue verbal warnings and written warnings to their subordinates, authority to do so is not exclusively theirs because the County's Progressive Discipline Policy calls for a determination to issue a verbal or written warning as well as a suspension to be made by the employee's "Supervisor and Human Resources Director or designee". (Testimony of Lt. Sammy Griego TR disc 1 at 18:45 to 21:40; Union Exhibit B, pp. 16-18.)
17. Discipline at any level beyond verbal warnings and written warnings are administered by others of a higher rank or position including the County Manager and it is the Facility Director who decides the appropriate level of discipline. A Lieutenant may recommend an appropriate level of discipline and his or her recommendations are "sometimes" accepted by the Facility Administrator. (Testimony of Lt. Sammy Griego TR disc 1 at 26:45 to 27:41; Lt. Andrew Gilmore TR disc 2 at 34:50 to 36:00.)
18. Verbal and written reprimands are the lowest levels of a five level disciplinary procedure that also includes written reprimand, Suspension, Demotion and Dismissal. (Union Exhibit B, pages 16-18.)
19. The employer's hiring practice includes an oral interview of applicants by a panel of Correctional staff. Shift Lieutenants have occasionally been assign to participate on hiring panels but do not routinely do so. That task is usually assigned to an Administrative Lieutenant. (Testimony of Lt. Sammy Griego TR disc 1 at 27:50 to 28:15; Testimony of Lt. Andrew Gilmore TR disc 2 at 34:30 to 34:50.)
20. Lieutenants complete employee evaluations on forms provided by the County, subject to the Director's approval and the Director has occasionally "kicked back"

- evaluations asking that adjustments to be made. (Testimony of Lt. Sammy Griego TR disc 1 at 28:15 to 29:10.)
21. Part of the Lieutenants' duties includes approval of their subordinates' leave requests by completing a form on a computer. Leave approval takes approximately five minutes every other week. (Testimony of Lt. Sammy Griego TR disc 1 at 29:23 to 29:57.)
 22. Shift Lieutenants are not assigned to a post, whereas their subordinates are assigned to a post by the Lieutenants. Testimony of Lt. Sammy Griego TR disc 1 at 43:30 to 43:35.)
 23. Lt. Griego could identify only a single issue, Emergency Response Training on which he was asked for help in developing a policy and his contribution was primarily borrowed from an existing policy in Doña Ana County. (Testimony of Lt. Sammy Griego TR disc 2 at 10:50 to 11:06 and 11:24.)
 24. A sergeant also gave input into the development of the Emergency Response Training Policy. (Testimony of Lt. Sammy Griego TR disc 1 at 40:33 to 42:22.)
 25. Sergeants perform all of the above functions (Testimony of Lt. Sammy Griego TR disc 2 at 2:30 to 3:01; Testimony of Lt. Andrew Gilmore TR disc 2 at 27:59 to 31:39.)
 26. Completing bond paperwork takes about 30 minutes per bond. The number of bonds processed varies from day to day. (Testimony of Lt. Andrew Gilmore TR disc 2 at 27:59 to 31:39.)
 27. Correctional Officers, Sergeants and Lieutenants are paid on a bi-weekly basis, subject to the same regulations regarding overtime, compensatory time, time sheet reporting requirements, annual pay increase standards merit pay adjustment

- standards P.E.R.A. and R.H.C.A. requirements, insurance benefits and classification and pay plan, leave, paid time off and holiday schedules. (Union Exhibit B.)
28. Lieutenants have no daily interaction with the Facility Director of the Human Resources Director. Testimony of Lt. Andrew Gilmore TR Disc 2 at 39:09 to 39:32.)
29. When a critical incident occurs the night shift Lieutenant must make a decision whether to activate the Emergency Response Team (CERT), but may not independently initiate the response. In the past, the CERT has been deployed only once. (Testimony of Lt. Sammy Griego TR disc 1 at 40:33 to 42:22; Disc 2 at 1:00 to 1:07.)
30. During the day shift the Facility Administrator is present and primarily responsible for the facility but In the Director's absence the Shift lieutenants are responsible for the facility. (Testimony of Lt. Mary Graines TR Disc 5 at 3:32 to 3:59.)
31. Lieutenant Graines, testifying for management considers all of her time at work to be supervision because her subordinates are Lieutenants in training and everything she does is training. (Testimony of Lt. Mary Graines TR Disc 5 at 5:33 to 7:20.)
32. SOP's cover most of what the Detention Lieutenant's do on a daily basis; however, SOP's and Post Orders do not explain everything that needs to be done on a shift and a Lieutenant must use independent judgment when SOP's do not govern a particular situation. (Testimony of Lt. Sammy Griego TR disc 1 at 31:08 – 31:11; Testimony of Lt. Mary Graines TR Disc 5, 8:50 to 9:49.)
33. SOP's mandate the level of discipline to be meted out. (Testimony of Lt. Mary Graines TR Disc 5 at 14:30.)

34. The County's Post Orders for each position contain lists of itemized scheduled duties and non-scheduled duties, each with discreet timeframes for their completion to be accomplished each day. (Union Exhibit C).
35. The County's Post Orders for each position contain a statement to the effect that it is the duty of every officer to provide a safe and secure environment for inmates incarcerated in the Detention facility. (Union Exhibit C).
36. Facility Director routinely accepts her recommendations for discipline. Testimony of Lt. Mary Graines TR Disc 5 at 18:16.)
37. Pay raises are dependent on evaluations. (Testimony of Lt. Sammy Griego TR disc 1 at 45:10 to 45:15; 46:50 to 48:56; Lt. Mary Graines TR Disc 5 18:17 to 19:00.)
38. Additional justification on evaluation needed for additional raise. (Testimony of Lt. Mary Graines TR Disc 5 at 20:11 to 21:20.)
39. Re: hiring panel interviews: recommendations are routinely accepted. (Testimony of Lt. Mary Graines TR Disc 5 at 18:16.)
40. Taught how to process bond paperwork by her Lieutenant when she was a sergeant just as she is now teaching her sergeants. (Testimony of Lt. Mary Graines TR Disc 5 at 23:58 to 24:38.)
41. Lt. Graines gave "input" on the existing Standard Operation Procedures as did several other employees. (Testimony of Lt. Mary Graines TR Disc 5 at 24:55 to 26:06.)
42. Attended a Lieutenants retreat to discuss budgeting and training needs. (Testimony of Lt. Mary Graines TR 26:17 to 26:55.)

43. Day shift lieutenants conduct rounds by doing a physical count with Sergeant and comparing that to a sign-in sheet. (Testimony of Lt. Mary Graines TR Disc 5 at 7:30 to 8:50.)
44. According to the County's Policies and Procedures Manual. "...Staff are encouraged to participate actively in policy and procedure development through suggestions to their supervisors and through review of specified sets of specialized policies and procedures maintained in each department. (Union Exhibit A at pp. 5-6.)
45. Lieutenant Griego testified that he played no role in developing the County's Standard Operating Procedures (SOP's); they were prepared by the Facility Director. (Testimony of Lt. Sammy Griego TR disc 1 at 30:30 to 30:50.)
46. Incident reporting is established by SOP's and does not require an exercise of independent judgment. (Union Exhibit A at pp. 8-11.)
47. Systems of communication between staff and inmates as well as staff and their supervisors are established by SOP's. (Union Exhibit A at pp. 12-13.)
48. Lieutenants do not participate in the facility's budget formulation. (Union Exhibit A at p. 19.)
49. The Director, not the shift Lieutenants approve payments of bonds from commissary funds and the Director audits the funds annually. (Union Exhibit A at p. 23.)
50. Medical staff and the booking officer have discretion to refuse custody for medical or mental illness reasons. (Union Exhibit A at pp. 206 -207.)
51. The jail director approves work release. Union Exhibit A pp 272-273.
52. Luna County Detention Center follows a progressive discipline policy set forth in a SOP Union Exhibit B pp 25-16.

53. A verbal reprimand is one of five levels of discipline and the least severe of the five and a Sergeant a issue a disciplinary "write up" as well as a Lieutenant. Union Exhibit B pp 25-17. (Testimony of Lt. Sammy Griego TR disc 2 at 1:40 – 1:47.)
54. Notice of the reason for the discipline, all evidence supporting the discipline and an opportunity to respond. The Lieutenant is not involved in the pre-determination process. For discipline more severe than a verbal warning the County uses a pre-determination hearing wherein he or she is given. (Union Exhibit B at p 17.)
55. Lieutenants may be a part of the informal grievance process but are not included as part of the formal grievance process. (Union Exhibit B at p. 18.)
56. Lieutenants share with their subordinates a common system of compensation and benefits, wear a similar uniform, share work areas and maintenance of records. (Union Exhibit B at pp 19- 29.)
57. Scheduled duties for a juvenile detention Officer's Master control officers, booking officers, floor officers, control room officers medical officers, transport officers entire shift is set forth in a Post Order Exhibit C.
58. Conduct a briefing of the oncoming shift exists at all position's post orders. (Union Exhibit B pp. 25-17.)
59. Preparation of housing rosters used to compare with a head count is considered by the County to be an administrative task. (Union Exhibit C, Booking Officer Post Order p. 1.)
60. While it is true that, as the witnesses testified, that lieutenants are responsible for inmate and employee safety and security at the facility, according to post orders all detention officers without reference to rank are responsible for safety and security of the facility. (Union Exhibit C.)

REASONING AND CONCLUSIONS OF LAW:

The Public Employee Labor Relations Board has subject matter jurisdiction to hear this petition and personal jurisdiction over the parties. (Pre-Hearing Stipulation (a)). Pursuant to 11.21.1.22(A) NMAC, neither party has the burden of proof with respect to the contested issue. (Pre-Hearing Stipulation (b)).

Legal Standard

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

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

I. Lieutenants Share a Community of Interest With Their Subordinate Employees.

To determine whether employees share a community of interest with those in an existing bargaining unit, this Board has historically applied what are colloquially referred to as the

“Kalamazoo factors”, adopted by the NLRB in *Kalamazoo Box Corp.*, 136 NLRB 134 (1962). See *AFSCME & Dept. of Corr.*, 2-PELRB-13, Hearing Officer’s Recommended Decision at p. 17, n.1 (Oct. 17, 2012); *NEA-Belen & Belen Fed. of School Employees & Belen Consol. Schools*, 1-PELRB-2 (May 13, 1994). Those factors are: (1) method of wages or compensation; (2) hours of work; (3) employment benefits; (4) separate supervision; (5) job qualifications; (6) job functions and amount of time spent away from employment situs; (7) regularity of contact with other employees; (8) level or lack of integration; and (9) the history of collective bargaining. No single factor is conclusive. ¹

The four positions at issue in this case serve as “Shift Lieutenants” within the County’s Detention Center facility and with common duties. There is no prior bargaining history relevant to whether they are appropriately in the bargaining unit. The lieutenants at issue are subject to the same chain of command structure with each other and with their subordinates in the bargaining unit. The Shift Lieutenants share the same work schedule as Corrections Officers and Sergeants working at the facility. They share a common method of compensation as their bargaining unit subordinates - they are all hourly employees subject to overtime compensation. Shift Lieutenants receive the same fringe benefits as their subordinates. They have daily and near-constant contact with their subordinate sergeants and corrections officers throughout their shifts and little to no daily contact with the Facility Director.

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

Comparing County Exhibits 1 and 2 reveals no significant qualifications for the job of lieutenant, apart from three years of experience as a Corrections Sergeant, or in the alternative, possession of a Bachelor's degree in any field, that are not also required of sergeants. Most of the specific duties performed by Shift Lieutenants, such as conducting rounds, counts and otherwise ensuring the safety and security of the facility are also performed by their subordinates.

The preponderance of the evidence supports a conclusion that most of the work performed by the Shift Lieutenants is also performed by their subordinates. For example, comparing County Exhibits 1 and 2:

- a. Just as Lieutenants are tasked with performing a variety of work "focused on supervision of staff and inmates", so do Sergeants manage employees, including scheduling, training, evaluating and counselling them. While Lieutenants "supervise and maintain adequate staffing on assigned shift, approving timesheets and leave requests" that same duty falls within the purview of the Sergeants' duty to "manage employees", which expressly includes scheduling of employees.
- b. While Lieutenants "ensure" that Detention Sergeants and Officers are providing security, safety, health, and care of inmates confined in the Detention Center, all Detention Center employees are likewise charged with responsibility for the security, safety, health, and care of inmates.
- c. The Shift Sergeants' duty to maintain basic knowledge of SOP's and applicable New Mexico Statutes is essentially the same as the Lieutenant's duty to "learn, understand and be able to facilitate all the duties under Direct Supervision protocols", which are the SOP's and Post Orders.
- d. Just as Lieutenants conduct cell searches and head counts; transport and escort inmates; and facilitate the movement of inmates throughout the facility, so do their subordinates.
- e. Lieutenants share a common obligation to complete required reports with their subordinates.

Based on the witness testimony, both Lieutenants and Sergeants attend and conduct shift briefing and "pass down" procedures taking 15-30 minutes at the beginning and end of each day. Both conduct counts taking approximately 1½ hours per day. Both perform rounds that

include grievance processing for approximately 3 hours each shift. Both complete bond paperwork taking approximately 2 hours on the day shift. Consequently Lieutenants spend about 7½ hours of each 12-hour shift performing essentially the same duties as their subordinates. Furthermore, the evidence supports a conclusion that Sergeants can and do perform every task a lieutenant performs whenever the lieutenant is unavailable.

They share a sufficient community of interest with bargaining unit members because they share similar wages, similar hours, common supervision among themselves, reporting directly to the same chain of command.

The union is not called upon to demonstrate the complete absence of any differences between lieutenants' education, training and experience levels and those of their subordinates. Rather, the Union's burden is to show that there exist no differences so great that including lieutenants in the unit would be inappropriate based on commonality of interests. That it has done, demonstrating that there is no difference between the lieutenants' education, training and experience but the passage of time. The preponderance of the evidence demonstrates that they work in the same facility interacting daily and throughout the day with their subordinates and little if at all with management personnel.

Based on the foregoing, upon application of the *Kalamazoo* factors I conclude that the Shift Lieutenants share a community of interest with other employees in the putative bargaining unit.

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

bargaining unit would render it "inappropriate". Although my understanding of the pleadings in this case is that only the managerial and supervisory exemptions were at issue, in its opening statement and introduction of evidence the union alluded to all three exemptions and so I consider all three in my analysis in order to conform to issues actually litigated.

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

A. Confidential Employees Exemption Analysis

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

- (a) is or could likely be on the employer's bargaining team;
- (b) is privy to the employer's labor-management policy or bargaining strategy;
- (c) has access to confidential financial or other data used in bargaining; or has input or involvement in the employer's contract proposal formulation. *See American Federation of Teachers Local 4212 and Gadsden Independent School District*, 03-PELRB-2006 (May 31, 2006); *NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995). As contrasted with the "management employee" exception discussed below, for the employee to be deemed "confidential", the management policies to which he or she is privy must be related to the

"employer's employment, collective bargaining or labor relations activities." *CWA Local 7076 v. Worker's Comp. Admin*, 5-PELRB-09 (Apr. 6, 2009).

No witness testified, nor do any of the documents admitted into evidence establish, that the lieutenants have ever served on the employer's bargaining team, that they are privy to the employer's labor-management policy or bargaining strategy or that they either have access to confidential financial or other data used in bargaining or have input or involvement in the employer's contract proposal formulation. Therefore, the lieutenants do not meet the definition of confidential employees by a preponderance of the evidence.

B. Management Employees Exemption Analysis

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

The first prong of the Act's test for whether an employee is a "management employee" requires in examination of whether that employee both possesses and exercises a level of authority and independent judgment sufficient to significantly affect the employer's purpose. The second prong requires an examination of whether such employee creates, oversees or coordinates the means and methods for achieving policy objectives and determines the extent to which policy objectives will be achieved. This second requirement means more than mechanically directing others in the name of the employer but rather, requires an employee to have meaningful authority to carry out management policy. *See, NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995).

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

The preponderance of the evidence in this case establishes that lieutenants have no effective role in developing management policies. Post Orders and policy directives are developed by the Facility Director. I ascribe little weight to testimony by the Employer’s witness to the effect that management relies on the lieutenants for policy formulation because the daily activities of the lieutenants as outlined herein do not support that assertion. Virtually no time at all is attributable to policy formulation among either the SOP’s, job descriptions or testimony regarding the Lieutenants’ daily activities. Review of the County SOP Exhibit A at to participate actively in policy and procedure development through suggestions to their supervisors and through review of specified sets of specialized policies and procedures maintained in each department. Lt. Graines’ testimony regarding her participation in developing policy for the County established no specific role for the Lieutenants in policy development beyond that seen in the SOP’s general invitation extended equally to all employees regardless of rank. Lt. Griego could identify only a single issue, Emergency Response Training on which he was asked for help in developing a policy and his contribution was primarily borrowed from an existing policy in Doña Ana County. I note that a Sergeant also gave input into the development of the same Emergency Response Training Policy. While Lt. Graines testified that Lieutenants attend an annual retreat with the Director that is not attended by their subordinates, those meetings are to discuss “budgeting

and training needs” The witness did not testify to any meaningful contributions by the Lieutenants that might lead me to conclude that the discussions taking place are anything more than the Director communicating policies already determined by upper management. Lieutenants do not work alongside HR Department and Facility Manager or others responsible for policy. Their contact with these people is practically nil. The preponderance of the evidence supports a conclusion that Lieutenants at the Luna County Detention Facility perform no more than employee participation in cooperative decision-making on an occasional basis and therefore, do not rise to the level of formulating management policy as contemplated by the PEBA.

Nor does the evidence support a conclusion that they effectuate County policy in a manner that is distinct from any other County employee. Witness testimony about what the Lieutenants do every day, particularly in light of existing Post Orders, does not support a conclusion that they possess and exercise a level of authority and independent judgment sufficient to significantly affect the employer's purpose. I give little weight to the management witness, Lt. Graines, regarding the exercise of independent judgment for three reasons: First, her testimony regarding the level of independent judgment she exercises is at odds with the testimony of other witnesses and the facility's SOP's and Post Orders. For example, given the level of detail in the Post Orders' scheduled and non-scheduled required tasks the exercise of independent judgment in completing those tasks would be the exception, not the rule. While the County was careful to establish that Post Orders do not cover every conceivable situation that may arise, that fact does not result in a conclusion that Lieutenants therefore exercise independent judgment in effectuating management policy. In positing that Post Orders cannot anticipate the universe of possibilities that exists in the realm of adult and juvenile detention, the County argues, in effect, that: 1) a hypothetical

contrived model set Post Orders encompassing all minutia of corrections officers' duties is conceivable; 2) the reality is that the Luna County facility's Post Orders do not resemble that hypothetical model; and therefore, 3) the lieutenants exercise of independent judgment is not proscribed by Post Orders. This is not a sound argument. That the pinnacle of perfect Post Orders has not been attained, whereby Lieutenants' independent judgment is unnecessary, does not mean that their exercise of independent judgment is therefore unfettered. In reality, the Post Orders, as they exist, leave little room for the exercise of independent judgment by Lieutenants in effectuating management policy.

Second, Lt. Graines' testimony with regard to the level of independent judgment required during investigations of alleged inmate grievances is at odds with the facility's SOP's under which the shift sergeants are the "primary point of contact for inmate grievances" unless the grievance is against the sergeant. Grievance forms are obtained from the sergeant and it is the sergeant who determines whether a complaint is grievable. It is the shift sergeant who determines the appropriate division or department head to whom the grievance should be forwarded to whether to process the complaint immediately. While Lieutenants thereafter have a role in investigating grievances referred to them, the weight of the testimony is that it is the *Administrative* Lieutenants, whom the Union does *not* seek to include in the bargaining unit, who conduct those investigations. Lt. Graines also testified that SOP's determine the level of discipline to be meted out in inmate grievances and a Sergeant or "anyone else" could make those determinations.

Finally, the manner of questioning adversely effected the witness' credibility. The County's direct examination of Lt. Graines routinely consisted of posing conclusory statements in the form of a question, then asking the witness to agree with them. At the end of the direct

examination, I was left with the impression that the lawyer did the testifying and the witness was just along for the ride; a mere prop used only to get the County's points on the record. Pursuant to NMAC 11.21.1.17, even though the technical rules of evidence do not apply in hearings before me, I may exclude evidence that is "unreliable". Eliciting testimony in the manner described above calls into question its reliability.

Therefore, the preponderance of the evidence suggests that the Lieutenants' exercise independent judgment is limited, consisting of little more than "mechanically directing others in the name of the employer" without meaningful authority to carry out management policy. While it is true that Lieutenants determine their shifts' overtime needs, make post assignments and complete a daily routine that includes reviewing paperwork submitted by subordinates for accuracy and completeness these tasks are *de minimus* when compared to the majority of tasks performed during their shifts that are substantially the same as those performed by their subordinates. For these reasons I conclude that the Shift Lieutenants are not management employees.

C. Supervisory Employees Exemption Analysis

PEBA excludes "supervisors" from its coverage. See NMSA 1978 §10-7E-4(U). The term "supervisor" for our purposes is a term of art and not every function that the layman may interpret as being supervisory will satisfy the statutory requirement for supervisory status excluding someone from collective bargaining under the PEBA. PEBA §4(U), sets forth a three-part test a putative supervisor must satisfy: the employee must (1) devote a majority of work time to supervisory duties; (2) customarily and regularly direct the work of two or more other employees; and (3) have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively. Moreover, even if this

initial three-part test is met, the employee is not a supervisor under PEBA if any of the following questions can be answered in the affirmative:

(i) does the employee perform merely routine, incidental or clerical duties? (ii) does the employee only occasionally assume supervisory or directory roles? (iii) does the employee perform duties which are substantially similar to those of his or her subordinates; (iv) does the employee perform as merely a lead employee? Or, (v) does the employee merely participate in peer review or occasional employee evaluation programs? See §4(U).

In evaluating whether the lieutenants in this case meet the statutory definition of a "supervisor" I rely primarily on the testimony of the witnesses as to their actual job duties performed and secondarily on job descriptions, Post Orders and SOP's. *See, In re McKinley County Sheriff's Association Fraternal Order of Police & McKinley County*, 1 PELRB No. 15 (Dec. 22, 1995) (considering actual duties performed rather than written job descriptions or Standard Operating Procedures manuals); *In re Communications Workers of America, Local 7911 & Dona Ana County*, 1 PELRB No. 16 (January 2, 1996) (considering actual duties performed rather than written job descriptions and the employer's expectation that a position would engage in supervision while performing the work of subordinates); *In re Local 7911, Communications Workers of America & Dona Ana Deputy Sheriffs' Association, Fraternal Order of Police and Dona Ana County*, 1 PELRB No. 19 (August 1, 1996) (rejecting the significance of employer's designation of position as supervisor).

In *AFSCME v. NM Dept. of Corrections*, D-202-CV-2013-01920, (May 15, 2014), the District Court noted that PEBA's definition of supervisor is a term of art: "Although lieutenants may be 'supervising' in the ordinary sense of the word, 'supervisor' is a term of art with a specific statutory definition that includes more than simply giving direction to subordinate employees." For this determination, the employees' actual job duties, rather than job titles or

ranks is controlling. *In re: N.M. Coalition of Public Safety Officers, Local 7911, CWA, AFL-CIO & Town of Bernalillo*, 1-PELRB-21 (1997). See also, *N.M. State University Police Officers Association and NM State University*, 1-PELRB-13 at 5-6 (job duties, not titles or job descriptions control). The parties do not dispute that the Shift supervising lieutenants assigned to the housing units supervise two or more employees. Consequently that element is not at issue. It does not appear, however that the lieutenants spend a majority of their work day performing tasks that meet the definition of "supervisory" as the PEBA uses that term. As appears by the Findings of Fact herein, a significant portion of the lieutenant's day is spent doing rounds and counts. The count involves the purely administrative task of verifying physical counts with what the board reports and what the electronic system records. Rounds include entering the inmates' cells, inspecting them for contraband. These do not constitute supervisory tasks. While the lieutenant does check on subordinates' welfare and completion of their assigned tasks most of the time on rounds is spent dealing with inmates. Time spent dealing with inmates is not supervisory in nature notwithstanding management witness' testimony that it may sometime involve following up on tasks designated to subordinate employees. The lieutenants' subordinates also perform the rounds sometimes in the company of the Lieutenant.

Another significant portion of the lieutenant's day is spent dealing with paperwork, either in the form of printing out the documents and completing forms. Lieutenants approve employee requests for leave, but their approval is limited to the administrative task of determining whether the employee has sufficient leave banked and whether there is adequate coverage if the leave is granted. All of this work is "merely routine, incidental or clerical duties" excluded from the definition of supervisory tasks.

According to the facility's SOP Lieutenants may recommend that subordinates receive additional training but there is nothing in them to suggest that Lieutenants train their subordinates directly. Anyone, including Lieutenants, may be called upon on an *ad hoc* basis to conduct training but that function is not exclusive to Lieutenants.

I am not persuaded by Lieutenant Graines' testimony that all of her time at work constitutes supervision because her subordinates are "lieutenants in training" and everything she does is training them. There are three reasons I give this evidence little weight: First, to indulge the notion that all of her worktime is supervision because her subordinates are "lieutenants in training", is to engage in circular reasoning. The conclusion I am asked to reach based on Lieutenant Graines' testimony, i.e. that she is a "supervisor" assumes what it is trying to prove. To argue that by virtue of my Lieutenant's rank everything I do constitutes training my subordinates and therefore, because everything I do is training I am a supervisor is not a sound argument.

Second, the idea that everything a lieutenant does constitutes training subordinates is contrary to the Facility's SOP's. According to the County's County Exhibit 1, a Shift Lieutenant's duties include "oversight of training of Officers under his or her supervision"; not conducting that training themselves. Exhibit 1 calls for the Lieutenant to instruct in-service training and education of staff only "as assigned by Detention Director" and its directive that a lieutenant "recommends training to the Detention Director" would be meaningless if that training was accomplished by everything they do. Furthermore, the training that Exhibit 1 calls for Lieutenants to perform is expressly training "on their job duties"; not to assume new duties. Consequently the idea that subordinates are "Lieutenants in training" is not reasonable. No other Lieutenant testifying supports the notion that

because subordinates are "lieutenants in training" everything they do constitutes training them.

Finally, for the same reasons described in the analysis of the management employee analysis, the manner of eliciting testimony from management's witness calls into question the reliability of her statements.

I conclude that the lieutenants do not have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively. With regard to discipline, lieutenants have discretion to issue oral or written reprimands. However, the County's Progressive Discipline Policy calls for a determination to issue a verbal or written warning as well as a suspension to be made by the employee's "Supervisor *and Human Resources Director or designee*". (Emphasis added). Thus, it appears that the apparent ability to issue written and verbal reprimands does not belong to the Lieutenant alone but must be exercised only in concert with the County's Human Resources Director.

Furthermore, according to the facility's progressive discipline policy oral and written reprimands constitute only 2/5 of the discipline available to the employer so that at best Lieutenants may effectively recommend discipline in a limited sphere. They have no active role in the greater number of and most significant forms of discipline. Discipline at any level beyond verbal and written warnings are administered by others of a higher rank or position including the County Manager and it is the Facility Director who decides the appropriate level of discipline. A Lieutenant may recommend an appropriate level of discipline and his or her recommendations are "sometimes" accepted by the Facility Administrator.

Similarly, the lieutenants play a limited and occasional role in the hiring process and no role in the promotional process; those functions resides with the Facility Director and his or her Human Resources staff.

The employer's hiring procedure includes an oral interview of applicants by a panel of Detention Facility staff. Shift Lieutenants have occasionally been assigned to participate on these hiring panels but do not routinely do so. That task is usually assigned to an Administrative Lieutenant. When serving on a hiring panel Lieutenants follow a script and ask only questions prepared beforehand by the Director. After completion of the interview it is the panel as a collective that evaluates the responses and makes its recommendation to the Director as to who should be hired. It is not the Lieutenant who may be serving on that panel who makes that recommendation.

With regard to annual employee evaluations, they are performed on a standardized form prepared by Human Resources staff and are completed based on instructions and training provided by the Facility Director or the County's Human Resources Department.

Accordingly, the preponderance of the evidence is that the Lieutenants' evaluation of their subordinates are the sort of occasional peer review or evaluation program contemplated by PEBA as not being an indication of supervisory status.

A "supervisor" as that term as used in PEBA is to be distinguished from a "lead worker" whose "supervisory duties" are marked by the absence of the exercise of independent discretion. Among the indicia of a "lead worker" as contrasted with a true supervisor are those instances where the employee's supervisory functions "are incidental to the duties performed as a member of the work shift, such as expediting or facilitating the performance or completion of subordinate's duties or explaining tasks to new workers. See, *In re McKinley County Sheriff's Association Fraternal Order of Police & McKinley County*, 1 PELRB No. 15 (December 22, 1995). For the reasons stated herein I conclude that the work performed by lieutenants compared with their subordinates lies primarily in their responsibilities for schedule adjustments, counts and reporting verification and other administrative paperwork.

Thus, much of the work lieutenants engage in "is of a routine or clerical nature that does not rise to the level of supervisory duties. See, *Int'l Ass'n of Fire Fighters Local No. 2430 and Town of Silver City*, PELRB Case No. 308-07 (March 7, 2008); and *Doña Ana Deputy Sheriffs' Association, supra*.

Excluding the rounds and counts that are also performed by their subordinates I count only 4½ hours of the Lieutenants' 12-hour shifts that arguably may be attributable to administrative duties that a supervisor might perform. Administrative duties such as completing serious incident reports in which the lieutenants merely compile the reports of others, or processing attendance records are not supervisory in nature and therefore, they do not devote a majority amount of work time to supervisory duties and they do not have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively. For the reasons herein I do not conclude that they rise to the level of supervisory duties. Accordingly, I conclude that lieutenants in the Luna County Detention Center do not routinely exercise independent judgment to affect and implement the policies and objectives of the employer.

It bears repeating that under the PEBA, the term "supervisor" is a term of art denoting the criteria specifically delineated under the statute for determining whether one is to be included in collective bargaining. As the term is used in the Act a finding that one is not a "supervisor" for collective bargaining purposes does not mean that one performs no supervisory duties at all nor does it mean that one may not be deemed a supervisor for other purposes, such as meeting requirements for promotion or evaluation under the County's personnel policies.

Therefore, by application of the PEBA §4(U), I conclude that the preponderance of the evidence supports a conclusion that the Shift Lieutenants at the Luna County Detention Facility are not "Supervisors" required to be excluded from collective bargaining.

RECOMMENDED DECISION:

Because the Lieutenants share a community of interest with the employees in the bargaining unit. They do not meet the statutory definitions of management, confidential or supervisory employees under PEBA, and are therefore are not excluded from PEBA's coverage on the basis of any of those exceptions. Therefore, the Shift Lieutenants are appropriately included in the bargaining unit the Union seeks to represent.

APPEAL:

Either party may appeal this Recommended Decision by filing a notice of appeal with the PELRB staff at 2929 Coors Blvd. NW in Albuquerque New Mexico 87120 within 10 work days of this opinion and otherwise comply with NMAC 11.21.3.19.

Issued, Friday, March 18, 2016.



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