

32-PELRB-2024

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

**HOBBS PROFESSIONAL
FIREFIGHTERS ASSOCIATION,
IAFF LOCAL 4384,**

Petitioner,

and

PELRB No. 303-24

CITY OF HOBBS,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board at its regularly scheduled meeting on August 6, 2024 upon a request by Petitioner for Board review of the Hearing Officer's Report and Recommended Decision, issued in this case on July 10, 2024. Having reviewed the file, heard argument from the parties, and being otherwise sufficiently advised, the Board voted 2-1 (Member Nelson dissenting) to affirm the Hearing Officer's Report and Recommended Decision.

WHEREFORE, HPFFA, IAFF Local 4384's Amended Petition for Election/Card Count is hereby DISMISSED, except insofar as it pertains to EMT Specialists, whose inclusion in the unit is not disputed. Staff are directed to issue an amended certification reflecting their inclusion in the unit.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Signed by:

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MARK MYERS, CHAIR BY DESIGNATION

8/9/2024
DATE

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

In re:

**HOBBS PROFESSIONAL
FIREFIGHTERS ASSOCIATION,
IAFF LOCAL 4384,
Petitioner,**

and

PELRB No. 303-24

**CITY OF HOBBS,
Respondent.**

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

STATEMENT OF THE CASE: This matter comes before Thomas J. Griego as the designated Hearing Officer, on the Union's Petition for Election/Card Count on behalf of EMT Specialists and Fire Captains who seek to join the bargaining unit. The bargaining unit was originally certified in 2005 by the City of Hobbs Labor Management Relations Board excluding the positions of Battalion Chief, District Chief, and Lieutenants (Station Commanders). In 2013, the position of Lieutenant was reclassified to the newly created rank of Captain and because it seeks to accrete previously unrepresented positions, this Petition need not claim changed circumstances.¹ In the alternative, the Union asserts that changed circumstances have taken place since 2005 such that the Captains and EMT Specialists inclusion in the bargaining unit is proper. The Petition also seeks to include and

¹ NMAC 11.21.2.37(A) provides concerning Unit Clarification: "... where the circumstances surrounding the creation of an existing collective bargaining unit are alleged to have changed sufficiently to warrant a change in the scope and description of that unit, or a merger or realignment of previously existing bargaining units represented by the same labor organization, either the exclusive representative or the employer may file with the director a petition for unit clarification...". NMAC 11.21.2.37(A) stands in contrast to NMAC 11.21.2.38(A) concerning accretion of employees who do not belong, at the time the petition is filed, to any existing bargaining unit, who share a community of interest with the employees in the existing unit, and whose inclusion in the existing unit would not render that unit inappropriate. The accretion rule does not require a showing of changed circumstances when, as here, the number of employees in the group sought to be accreted is greater than ten percent of the number of employees in the existing unit. Pursuant to 11.21.2.38(C), in such instances the PELRB shall presume that their inclusion raises a question concerning representation, and the petitioner may proceed only by filing a petition for an election (or card check).

Fire Captain (including Fire Prevention). It is the Union's position that because the position "Fire Captain" did not exist at the time of the original certification of the of the bargaining unit, their inclusion or exclusion has never been previously addressed and there are no significant questions or issues of unit scope, unit inclusion or exclusion, or the status of the employer or labor organization. The Union further asserts that based on their actual duties, Fire Captains do not qualify as supervisory, managerial, or confidential employees excluded from collective bargaining.

The City contends that this Petition seeks to change the scope of the bargaining unit and so, must allege changed circumstances sufficient to warrant the change in scope. The position of Lieutenant was reclassified to the higher rank of Captain due to an increase in supervisory and managerial duties added to the position to alleviate the pay compression between positions in the bargaining unit and supervisory and managerial positions outside of the bargaining unit. Throughout the labor relations and bargaining history between the parties, the position of the parties has been to exclude the Lieutenant and Captain positions from the bargaining unit. Because the Petition seeks to add more than 10 percent of the existing bargaining unit and seeks to add the position of Captain, which Respondent asserts is supervisory and managerial, the Petition does, indeed, present significant questions or issues of unit scope, unit inclusion or exclusion, and while the Response does not oppose the inclusion of EMT Specialists, it does object to including the Fire Captains because, as supervisory or managerial employees, their inclusion would render the unit inappropriate under NMSA 1978 § 10-7E-13(C).

A hearing on the merits was held on June 5, 2024 in the Offices of New Mexico Workforce Connections, 204 W. Park St. Hobbs, New Mexico 88240. In preparation for that Hearing, the parties entered into a Stipulated Pre-Hearing Order entered May 30, 2024. According to that Stipulated Pre-Hearing Order, the issues before me for decision are:

1. Whether the position of Captain has been certified as, and historically has been, excluded from the bargaining unit as formed in 2005 under the jurisdiction of the local Hobbs Labor Management Relations Board.
2. If the position of Captain has been historically excluded from the bargaining unit, whether Petitioner has sufficiently asserted and, if so, whether the circumstances surrounding the creation of the bargaining unit have changed sufficiently to warrant a change in the scope and description of the unit.
3. Whether the position of Captain qualifies as supervisory such that it should be excluded from the bargaining unit as statutorily barred.
4. Whether the position of Captain qualifies as managerial such that it should be excluded from the bargaining unit as statutorily barred.

FINDINGS OF FACT:

1. On August 6, 2004, the Hobbs Professional Firefighters, IAFF local 4384, Petitioned the New Mexico Public Employee Labor Relations Board (PELRB) for recognition as the exclusive representative for “Firefighters & Fire Officers/EMT-B, EMT-I, EMTP, employed by the City of Hobbs. (Exhibit 1, Testimony of Nicholas Goulet, Hobbs H.R. Director; Special Notice of Board file in re: PELRB No. 355-04).
2. Because the City of Hobbs had applied for approval of an ordinance creating a local labor-management relations board, then Director of the PELRB, Juan Montoya, wrote to the parties on August 10, 2004 informing them that IAFF’s Petition for Recognition was to be held in abeyance pursuant to NMAC 11.21.5.9 then in effect while the application for approval of the Hobbs local board was processed. (Special Notice of Board file in re: PELRB No. 355-04).

3. The PELRB transferred jurisdiction of IAFF's Petition for Recognition to the Hobbs labor management relations board on September 13, 2004. (Special Notice of Board file in re: PELRB No. 355-04).
4. Exhibit 2 is a copy of a Petition submitted on February 2, 2005 by Hobbs Firefighters Association, IAFF Local 4384 to the City of Hobbs's Clerk apparently seeking its recognition of a group comprising Battalion Chiefs, District Chiefs, Lieutenants (Station Commanders), Paramedics, Driver/Engineers, Firefighters and the Fire Prevention Specialist. (Exhibit 2; Testimony of Nicholas Goulet, H.R. Director).
5. According to the minutes of the local labor board meeting held March 1, 2005 at which the Petition for Recognition of Hobbs Professional Firefighters Association, IAFF Local 4384 was taken up, the local board considered the Petition to be requesting the accretion of Battalion Chiefs, District Chiefs, and Lieutenants (Station Commanders) in "[a] potential bargaining unit pursuant to petition PELRB#355-04 from the Hobbs Professional Firefighters Association, Local 4384 in the bargaining unit *that already includes* Paramedics, Driver/Engineers, Firefighters and the Fire Prevention Specialist." (Emphasis added). Despite this ambiguity in the minutes, there is no record of a prior recognition of any bargaining unit at the Hobbs Fire Department prior to the March 1, 2005 meeting, so that the stipulation by the parties that the bargaining unit was formed in 2005 under the jurisdiction of the Hobbs Labor-Management Relations Board stands after the local board denied the Union's request to include battalion chiefs, district chiefs, and Lieutenants (station commanders) in the bargaining unit. (Exhibit 3).

6. The positions of Fire Department Lieutenant and Northern District Chief were eliminated and the position of “Captain” created 8 years later in 2013 combining duties of both those positions and adding new duties related to training². The Job Description for the Captain position borrows from the former Lieutenant (station commander) job description with the following notable differences:
 - a. The Fire Pay Grade for the position was raised from 220 to 225.
 - b. The job duties of the were amended to add: “Assists Training Officer with coordination of station training in the areas of Fire, EMS, Haz-Mat, Specialty Teams, and maintains proficiency of job knowledge and skills through training.”
 - c. A Captain will act as the Battalion Chief in the absence of the Battalion Chief, as assigned.
 - d. In addition to the Firefighter and EMS duties shared with other Firefighters and EMS personnel and as performed by the former Lieutenants additional duties of assisting with the delivery and management of the Fire/EMS/HazMat training programs and coordinating and performing training at assigned station. The Captain “Develops and presents classroom training sessions in both Fire and EMS related topics;” “Coordinates and performs Fire and EMS related training drills in order to reinforce classroom learned skills;” and “Assists with the coordination and training of new recruit training academy.” The Captain “Conducts CPR and First Aid instruction and re-certification classes.”
 - e. Responsible for the oversight of new recruits with mentor and firefighter QAB program.

(Exhibits 4 and 5; Testimony of Nicholas Goulet).

7. New minimum qualifications for the Captain position are “Five (5) years’ experience as a full time paid member of the Hobbs Fire Department with a minimum of one (1) year as a Driver/Engineer; or seven (7) years’ experience with a paid, career department, with at least two (2) years at a Captain level or equivalent and one (1) year as a Driver/Engineer or equivalent” and “Successful completion of Hobbs Fire Department’s Captain Development Program.” Captains must also possess a “Fire

² Exhibits 5 shows an effective date of 2022, but Mr. Goulet testified that date reflects the most recent date that it was reviewed and that the duties, qualifications, etc. appearing on the exhibit are the same as those in place when the position was created in 2013.

Officer I Certification; Instructor Certification within one year from date of appointment. This certification must be maintained including HazMat Technician Certification, or attend the first available HazMat Technician course”; “Must possess or obtain IFSAC Fire Officer II Certification within one year of appointment to the position;” and “Must possess or obtain BLS” and “all updates by AHA(American Heart Association);” “Must possess Fire Service Instructor I Certification.”

(Exhibits 4 and 5; Testimony of Nicholas Goulet).

8. The Hobbs Fire Department Organizational Chart, Exhibit A, indicates that the two Fire Prevention Captains work under the Fire Marshall (the equivalent of a Battalion Chief) on the Day Shift, 40 hours per week. The four “Shift Captains”, one at each station on each A, B or C shift, work under a Battalion Chief assigned to each shift on a 48-96 work schedule along with the Paramedics, Driver/Engineers, Firefighters and the Fire Prevention Specialist in the bargaining unit, which consists of a modified rotation period where each shift works two consecutive 24-hour shifts, followed by four consecutive days off.

(Exhibit A; Testimony of Nicholas Goulet; Testimony of Brandon Pittman).

9. Brandon Pittman testified about his experience as a Driver/Firefighter and as the Union President. He established that the Fire Prevention Captains do not supervise anyone. The Station Captains coordinate the monthly training scheduled as approved by the supervising Battalion Chief, either conducting the training themselves or assigning training to others on a daily basis. He has participated on hiring panels with all ranks at various times, asking pre-approved questions prepared by the Human Resources Department. When on interview panels with a Station Captain, the Captain did not control the interview. The City’s Human Resources Department “does the actual hiring.” His position has occasionally “filled in” for a Captain in its absence, taking responsibility for completing required reports reviewed by a Battalion

Chief who may request re-submission if not approved. He receives a 5% temporary increase in pay whenever he temporarily assumes Captain duties.

Evaluation of bargaining unit employees is initiated by the respective employee's "supervisor." That is typically the Captain – in this regard the organizational chart Exhibit A is inaccurate and ambiguous as to supervision because EMT Specialists are not supervised by Firefighters and Firefighters are not supervised by Drivers as might be implied by Exhibit A.

With a few exceptions for subcategories such as station supplies and food purchases, the Captains are not responsible for creating the Department's budget, beyond submitting a request for consideration once each year to a Battalion Chief. (Captain Carrillo testified that a Driver is in charge of his station's grocery budget).

The Captains work alongside Drivers, Paramedics and Firefighters daily, checking fire trucks and related equipment for proper working order for about 30 minutes each day, performing maintenance when needed, performing station cleanup, for about an hour to 1.5 hours every day. Physical Fitness being a necessary component of the job, Captains work out with the Drivers, Paramedics and Firefighters for about 1 hour daily. The rest of the time is spent responding to fire or EMT calls for service or standing by ready to respond.

(Exhibit A; Testimony of Brandon Pittman).

10. Captain Jairo Carrillo testified about the regular duties of a Fire Captain for the City of Hobbs and confirmed that under Exhibit A, Captains are the first line of supervision at their respective stations under the Battalion Chiefs. Once a year, Captains' station assignments are rotated as directed by the Battalion Chiefs. Staffing at each station is determined by the Battalion Chiefs. Captain Carrillo confirmed the

testimony by Mr. Pittman concerning Fire Prevention Captains (Fire Inspectors) not supervising anyone.

The Captains wear the same uniform as Drivers, Paramedics and Firefighters do except that their badges and collar pins are gold toned instead of silver toned, their badges display the rank “Captain” and the collar pins bear two bugles. On cross-examination he testified that formerly, Captains wore white uniform shirts rather than the blue uniform shirts worn by those below the rank of Captain. However, in a move designed to increase camaraderie, teamwork and morale, the current Chief changed the shirts to a uniform blue.

Captain Carrillo testified that Captains work with their designated Battalion Chief every day and engage in a “pass down” or “pass on” of requisite information at the beginning of each shift. It is the Battalion Chief that has authority to discipline employees, even though the disciplinary process is commonly initiated by a Captain. Captains may verbally counsel a Driver, Paramedic and Firefighter to improve their performance but any further action in the disciplinary process requires consultation with a Battalion Chief. Captains may investigate events that may result in discipline but that investigation is limited to completing forms created by the City’s Human Resources Department. Such events and other significant events are logged into a chronological database known as “Chrono” by the Captains one a month.

Captains may recommend discipline of employees at his or her station, but the discipline level is proscribed by the City’s progressive discipline policy or the punishment required by the City’s matrix followed in connection with its vehicle accident policy. Captain Carrillo has not taken disciplinary action against anyone in all his years as a Captain other than the vehicle accident reports described below.

Although he may be the point of contact for any discipline being taken, he informs the Battalion Chief of the perceived need for discipline and follows the Chief's direction as to any discipline. He cannot terminate anyone's employment and plays no role in any termination of employment.

In addition to the accident reports, Captains complete exposure reports concerning hazardous materials or infectious agents by completing forms prepared by H.R. and do not determine when the subject of such report may return to work.

Captains cannot reassign or transfer any Driver, Paramedic or Firefighter, nor can Captains suspend, layoff or recall or approve overtime; those decisions are made at the Battalion Chief level. Checking the entry and accuracy of overtime hours in the City's time keeping database, is different from a decision to approve overtime made by a Battalion Chief.

Captains evaluate the Drivers, Paramedics and Firefighters once each year by following a form and directions created by the City's Human Resources Department. Captain Carillo estimated that the performance evaluations take about 1.5 to 2 hours to complete for each of the 4-5 employees assigned, once a year.

Concerning the hiring process, Captain Carillo affirmed testimony by Mr. Pittman that the Captains have no direct authority to hire employees. He has "proctored" the hiring process following a procedure established by the City's Human Resources Department.

In a typical 48 hour work period, Captain Carillo attends a 5-minute pass on briefing with his Battalion Chief followed by a telephonic briefing attended by all the station Captains for another 5-10 minutes. He then briefs his crew on the information relevant to them from the two prior briefings for another 15-20 minutes. He then

participates in vehicle inspection with his crew for about an hour. As Mr. Pittman testified, he participates in cleaning duties, both inside and outside the station which takes about .5 to 1.5 hours to complete. He corroborated the estimated 1-1.5 hours of physical training with his crew every day. The form of physical training to be undertaken on any particular day is a joint decision that is not directed by him. His “Chrono” entries take about 10 minutes once a month.

The Captains are responsible for implementing the training schedule created by the Battalion Chiefs, including their own training as may be necessary. They do not approve leave or adjust employee’s time entries – both require Battalion Chief approval. Their approval of time sheets takes about 5 minutes for each of 5-6 employees. They attend pass on meetings daily devoting about 40 total minutes to that function and meetings with other Captains, Battalion Chiefs, Deputy Chief, and/or Chief, once a month. He testified to no budget authority, and no policy creation authority. He cannot “call back” employees (in lieu of standby pay). He estimated that 15-20% of his time is devoted to administrative tasks, proscribed by City Policy Department policy (SOGs) while the rest of his time is engaged in tasks shared with his subordinates, sleep time 5-7 hours per shift.

(Testimony of Jairo Carrillo).

11. Captain Lonnie Creed reiterated the testimony of other witnesses concerning the chain of command in consideration of Exhibit A, the frequent interaction between Battalion Chiefs and the Captains, the standardization of the progressive discipline process, no authority to discharge employees, transfer or suspend employees, no “call back” authority or ability to authorize overtime, participation in hiring only as a panelist with predesignated questions. He acknowledged that a panelist may ask

questions beyond those pre-prepared by HR, but added that HR can “override” any such questioning.

His testimony was consistent with that of Captain Carillo concerning the amount of time spent in “pass on” briefings, vehicle inspection, station maintenance, training, Chronos entries, evaluation of employees, monthly staff meetings, budgeting (except that he is responsible for submitting a budget request for janitorial supplies) sleep time, cooking, eating and working out.

He testified that he has not been called upon to process an employee grievance more than once in his 10 years as a Captain in the Hobbs Fire Department. His recommendations for discipline are routinely approved, 80 to 90 percent of the time. Whenever a call for service comes into the station, Captains do not go out on the “First Run” because they must remain behind to “run the station,” but may go out on the “Second Run.” Ultimately, it is the station Captain who is responsible for ensuring that calls for service are properly responded to by properly licensed personnel according to the nature of the call.

Concerning training, he noted that there are two types: the mandatory monthly training issued by the Department’s Training Officer (a Battalion Chief), and City-wide mandatory training. The Captains have the responsibility for ensuring that the required training gets done in addition to the other duties performed.

Notably, he sees the Captains’ job as being the implementation of the Battalion Chiefs and Chief’s “mission” at each station in the Department. When asked how he would describe his job to someone he just met at a social gathering, he answered to the effect that his job is to “watch over three guys and hang out.” He acknowledged getting an increase in pay when he became a Captain partly to address the

Department's pay compression issues and partly "to make decisions and be held responsible for those."

(Testimony of Lonnie Creed).

12. Fire Chief Mark Doporto's testimony did not depart significantly from the union witnesses concerning Captains' participation in the hiring, firing, disciplining and promotion process except to add that their evaluations are "rarely" changed by the Chief level and that he typically takes ½ day to complete each yearly evaluation of his subordinates. He added that it is the Captains' responsibility to ensure the confidentiality of all medical information by EMS personnel.
- He reviewed Exhibits 10-30 to point out the Captains role in interviewing, evaluating and making tactical decisions on each. He related an event when, as a Captain, he was asked to draft a new ordinance concerning false alarms, for which he borrowed extensively from other cities' ordinances. I do not consider that isolated event to be significant indicia of the Captains' ability to develop policy. Concerning timekeeping and the Chief's testimony about Exhibits 26-27, the Captains' time approval is limited to ensuring that the work hours are properly entered into the City's "Executime" program, not that the Captains approve deviations from the standard work schedule by any other employees. His testimony concerning Exhibits 31-33 corroborate the testimony of prior witnesses to the effect that Captains are responsible for ensuring that training schedules are complied with. He corroborated that station assignments are made by Battalion Chiefs, not Captains, though Captains may have "input." The Captains have sleeping quarters separate from those of the Drivers, Paramedics or Firefighters, even though they are at the same station.

Testifying on cross examination about Exhibits 11, 13 and 14 he corroborated prior testimony that Captains serve on hiring committees and that new hire testing is created by a private company. Concerning the question of whether Fire Prevention Officers are Captains for purposes of this Petition he acknowledged in connection with cross-examination about Exhibit 16, that his time as a Fire Prevention officer for the City was counted along with his time as a station Captain to qualify for the requisite three years as a Captain needed to qualify for his promotion to Chief and that he did not receive a change in his pay rate when he moved from Fire Prevention to station Captain.

13. Section 28 of the parties' CBA concerning Personnel Files and Chronological

Records provides in pertinent part:

“CHRONOLOGICAL RECORDS

Chronological records will continue to be used by the Hobbs Fire Department. Verbal counseling and verbal reprimands will be documented in the bargaining unit employee's chronological record. The employee shall be made aware of any documentation, positive or corrective, that is placed in their chronological record. The employee can at any time review their chronological record without question from supervisors. If the employee deems it necessary, the employee may place a written response to an entry so long as it is done within ten (10) calendar days of that specific entry being placed into the record. The written response to any chronological record entry shall be delivered by the employee to a supervisor, who will then place that response into the chronological record. The employee will have the opportunity to review their chronological entry to ensure the response is accurate. The parties will work together to develop a delivery system for all chronological correspondence that ensures transparency and accuracy in documentation.

Chronological entries should be made once every month for each member of the bargaining unit. Chronological entries should be both positive and/or corrective, and shall address those subjects the employee will be evaluated on during their annual performance evaluation. The period of relevance related to any chronological entries shall be limited to one year; the one year period of relevance shall coincide with the bargaining unit employee's annual performance review.”

Exhibit J-2; Collective Bargaining Agreement

REASONING AND CONCLUSIONS OF LAW:

I. THE POSITION OF CAPTAIN IN THE HOBBS FIRE DEPARTMENT WAS NOT EXCLUDED FROM THE BARGAINING UNIT AS FORMED IN 2005 UNDER THE LOCAL HOBBS LABOR MANAGEMENT RELATIONS BOARD AND HAS NOT BEEN HISTORICALLY EXCLUDED FROM THE UNIT SINCE THAT TIME.

It is self-evident that a position created in 2013 could not have been petitioned for, discussed and considered by the City of Hobbs Labor-Management relations Board in 2005. The position of Captain did not exist at that time. The City argues however, that because the initial bargaining unit certified in 2005 excluded the positions of Battalion Chief, District Chief, and Lieutenants (Station Commanders), and because the Lieutenant position was reclassified to the higher rank of Captain in 2013, that the exclusion of Lieutenants necessarily applies to the reclassified position after the fact.

If all that the City did in 2013 was re-name the position and increase its pay to relieve the wage compression, the issue of whether the petitioned-for Captains are the same as the previously excluded Lieutenants would arguably have merit. However, that is not what occurred. In 2013, the Lieutenant position went through reclassification, a term of art defined in the City's Personnel Rules as "...the process of analysis by which an established position is reviewed to determine whether the duties and responsibilities of that position have materially changed."³ The City acknowledges that changes were made to the Lieutenant (Station Commander) Job Description to increase its supervisory and managerial duties in addition to alleviating pay compression between positions in the bargaining unit and supervisory and managerial positions outside of the bargaining unit. Mr. Goulet testified

³ I take Special Notice of the City of Hobbs's Personnel Rules, City Ordinance No. 1141 effective April 4, 2022, which defines the term "Reclassification" as "...the process of analysis by which an established position is reviewed to determine whether the duties and responsibilities of that position have materially changed."

about added duties particularly related to training. A comparison of the Lieutenant Job Description from 2005 and that of the Captain in 2022 shows his testimony to be accurate. See Finding of Fact No. 6 concerning new duties related to assisting the Training Officer (a Battalion Chief) with coordination of station training in the areas of Fire, EMS, Haz-Mat, Specialty Teams, and performing training at assigned station such as CPR and First Aid instruction and re-certification classes. A Captain “Develops and presents classroom training sessions in both Fire and EMS related topics;” “Coordinates and performs Fire and EMS related training drills in order to reinforce classroom learned skills;” and “Assists with the coordination and training of new recruit training academy.” There are also new minimum qualifications for the Captain position so that the position has materially changed such that it cannot reasonably be said to be the same position as the Lieutenant considered by the local board in 2005. There is nothing in the minutes of the Hobbs labor board’s meeting minutes of March 1, 2005 to indicate on what basis it decided the Lieutenants and Battalion Chiefs were to be excluded from the bargaining unit nor does it set forth the evidence upon which it relied to support whatever legal theory it followed. The PEBA requires now, as it did in 2005, that local board rules conform to the rules adopted by the PELRB and that they shall comply with state law. See NMSA 1978 § 10-7E-9(G). The Board’s rule NMAC 11.21.1.15, substantially the same as now as in 2005, requires that all meetings of the board, specifically those at which unit determination is before the board, or a hearing examiner of the board shall be audio-recorded, or, upon order of the board may be transcribed, except those portions lawfully closed pursuant to the Open Meetings Act. Following the board’s approval of the minutes of a meeting of the board, the minutes shall become the sole official record of the meeting. Because the Hobbs local board did not issue a separate Order designating the unit containing Findings of Fact and Conclusions of law, it is impossible to

know whether its decision in 2005 comports with the PEBA. Consequently, for that reason alone, the instant Petition must be examined on its own merits for whether Captains are to be excluded from the bargaining unit pursuant to NMSA 1978 § 10-7E-13(C). No evidence was introduced at the Hearing in this matter on June 5, 2024 to show that since the creation of the Captain position in 2013 that the issue of their inclusion in the bargaining unit has ever been raised before now. The fact that successive Collective Bargaining Agreements have been negotiated between 2013 and the present in which the a Recognition Clause was negotiated without including Captains is not evidence of their historic exclusion because there was no evidence adduced to indicate that the Union tried and failed to include them by negotiation and because a Recognition Clause in a CBA does not determine unit scope, this Board or a local equivalent board does, through the PEBA's certification process. Therefore, I conclude that the position of Captain in the Hobbs fire department was not excluded from the bargaining unit as formed in 2005 and it has not been historically excluded from the unit since that time.

II. PETITIONER IS NOT REQUIRED TO PLEAD OR PROVE CHANGED CIRCUMSTANCES. HOWEVER, EVEN IF THE UNION WAS REQUIRED TO DO SO, THE CREATION OF THE NEW POSITION OF "CAPTAIN," IS SUFFICIENT CHANGE IN THE CIRCUMSTANCES SURROUNDING THE CREATION OF THE BARGAINING UNIT TO WARRANT EXAMINATION OF WHETHER A CHANGE IN THE SCOPE AND DESCRIPTION OF THE UNIT IS WARRANTED.

The City posits that the Petition before me is defective in that the Union failed to allege changed circumstances sufficient to warrant the change in scope of the unit that the Union's Petition seeks. The "changed circumstance" requirement comes from our Rule 11.21.2.37(A) concerning unit clarification "...where the circumstances surrounding the creation of an existing collective bargaining unit are alleged to have changed sufficiently to warrant a

change in the scope and description of that unit, or a merger or realignment of previously existing bargaining units represented by the same labor organization...”

The City overlooks or ignores the existence of PELRB Rule 11.21.2.38 concerning accretion, which does not require a change in circumstances:

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

B. If the number of employees in the group sought to be accreted is less than ten percent of the number of employees in the existing unit, the board shall presume that their inclusion does not raise a question concerning representation requiring an election, and the petitioner may proceed by filing a unit clarification petition under these rules. Such a unit clarification petition to be processed, must be accompanied by a showing of interest demonstrating that no less than thirty percent of the employees in the group sought to be accreted wish to be represented by the exclusive representative as part of the existing unit. No group of employees may be accreted to an existing unit without an election if the board determines that such group would constitute a separate appropriate bargaining unit.

C. If the number of employees in the group sought to be accreted is greater than ten percent of the number of employees in the existing unit, the board shall presume that their inclusion raises a question concerning representation, and the petitioner may proceed only by filing a petition for an election under these rules. Such a petition, in an accretion situation, must be accompanied by a showing of interest demonstrating that no less than thirty percent of the employees in the group sought to be accreted wish to be represented by the exclusive representative as part of the existing unit.”

The Petition before me for consideration is not a Petition under NMAC 11.21.2.37(A) concerning unit clarification, but instead is an Accretion Petition brought pursuant to NMAC 11.21.2.38. See Amended Petition filed herein on February 21, 2024.

There are a multitude of instances in which it would be appropriate to file a Unit Clarification Petition pursuant to NMAC 11.21.2.37, some of which are mentioned in the rule itself, e.g., a merger or realignment of previously existing bargaining units represented by the same labor organization. The PELRB will entertain a Unit Clarification Petition

whenever a dispute exists about whether certain positions are included in a unit or not, for reasons other than those specific to an accretion petition seeking to include in the unit employees who do not belong, at the time the petition is filed, to any existing bargaining unit, who share a community of interest with the employees in the existing unit, and whose inclusion in the existing unit would not render that unit inappropriate.

In this respect the Board follows the general/specific rule of statutory construction whereby the more specific statute will prevail over the more general statute. (“ [B]ecause we treat the specific statute as an exception to the general statute when there is no ‘clear expression of legislative intent to the contrary.’”) *State v. Farish*, 499 P.3d 622 (N.M. 2021) quoting *State v. Santillanes*, 27 P.3d 456, 130 N.M. 464, 2001 NMSC 18 (N.M. 2001).

For the above reasons, I conclude that the petitioner is not required to plead or prove changed circumstances. However, even if the union was required to do so, the creation of the new position of “captain”, elimination of the Northern District Chief and Lieutenant positions, folding their duties to into a new position of “Captain” adding additional training responsibilities are sufficient changes in the circumstances surrounding the creation of the bargaining unit to warrant examination of whether a change in the scope and description of the unit is warranted.

III. THE POSITION OF CAPTAIN IN THE HOBBS FIRE DEPARTMENT IS NOT A “SUPERVISOR” AS THAT TERM IS DEFINED BY NMSA 1978 § 10-7E-4(T) SUCH THAT IT SHOULD BE EXCLUDED FROM THE BARGAINING UNIT.

NMSA 1978 § 10-7E-13(C) (2020) provides that supervisory, confidential or management employees, as those terms are defined in § 10-7E-4 of the Act, are excluded from collective bargaining so that their inclusion in a bargaining unit would render it “inappropriate”.

NMSA 1978 § 10-7E-4(I) (2020) defines a “supervisor” as follows:

“‘supervisor’ means an employee who devotes a majority of work time to supervisory duties, who customarily and regularly directs the work of two or more other employees and who has the authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively, but ‘supervisor’ does not include an individual who performs merely routine, incidental or clerical duties or who occasionally assumes a supervisory or directory role or whose duties are substantially similar to those of the individual’s subordinates and does not include a lead employee or an employee who participates in peer review or occasional employee evaluation programs.”

The Fire Prevention Captains supervise no one, and so do not fall under the definition of “supervisor” in Section 4(T). No further analysis of their duties is required.

The preponderance of the evidence establishes that the station Captains do not devote a majority of their work time to supervisory duties. The Captains work a 48-96 work schedule along with the Paramedics, Driver/Engineers, Firefighters and the Fire Prevention Specialist in the bargaining unit. I consider the Captains performance evaluations to be supervision under the Act. During the approximate 2,496 work hours available per year (48 hours x 52 weeks) the evidence established approximately 10 hours were spent in those evaluations.

Although it is largely an administrative task, if I include timesheet approval in the category of supervision, that would add only about 30 minutes per week to supervisory duties. Again, being generous to management by including time spent in pass on meetings as supervision, the pass on meetings would add only about 40 minutes per day to that total. “Chrono” entries take about 10 minutes once a month so their inclusion as supervision is insignificant.

I cannot attach a numeric measure to the Captains’ duties in responding to fire or EMT calls for service. They do not commonly respond on the first runs but remain behind to manage the station. They are therefore not often on scene to supervise anyone on the response. Even when they do respond on a second run or a multiple alarm incident, the Captain will not always be the incident commander, and thus does not supervise anyone on the scene unless directed to do so. I was given no evidence as to such events and any time spent in

supervision. Training does not constitute supervision unless it is the Captain doing the training. The evidence shows that while Captains may be responsible for assuring their assigned station completes the training schedule created at the Battalion Chief level, they do not necessarily conduct the training themselves. The evidence is too indefinite to provide a useful numeric as to how much time Captains spend conducting training that I might consider as supervision.

Vehicle and equipment checks and maintenance performed alongside Drivers, Paramedics and Firefighters, cooking, eating, station cleanup, their daily physical fitness regimen taking about 8 hours per week **does not constitute supervision**. Neither does sleep time of 5-7 hours per 24 hour shift nor the majority of the remainder of their waking hours spent in standing by, ready to respond to calls for service.

Based on the foregoing it is clearly established that station Captains in the Hobbs Fire Department do not devote a majority of work time to supervisory duties. That fact alone is enough to conclude that they are not “supervisors” as defined by Section 4(I) of the Act.

It is not necessary, therefore, to continue with analysis of whether the evidence supports their authority to hire, promote or discipline other employees or to recommend such actions effectively, whether they have authority to approve leave requests or adjust employee’s time entries, can “call back” employees or budget or policy creation authority.

IV. THE POSITION OF CAPTAIN IN THE HOBBS FIRE DEPARTMENT IS A “MANAGER” AS THAT TERM IS DEFINED BY NMSA 1978 § 10-7E-4(N) SUCH THAT IT SHOULD BE EXCLUDED FROM THE BARGAINING UNIT.

As already mentioned, NMSA 1978 § 10-7E-13(C) (2020) includes management employees, among those excluded from collective bargaining so that their inclusion in a bargaining unit would render it “inappropriate”.

NMSA 1978 § 10-7E-4(N) (2020) defines a “management employee” as follows:

“‘management employee’ means an employee 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 or whose fiscal responsibilities are routine, incidental or clerical.”

The PEBA’s definition of a “manager” can be broken down into a two-part test:

1. The employee is primarily engaging in executive and management functions, and
2. He or she has responsibility for developing administering, or effectuating management policies, which requires the employee to do more than merely participate in cooperative decision-making programs on an occasional basis. See § 10-7E-4(N).

The first prong of the Act’s test requires that an individual possess and exercise a level of authority and independent judgment sufficient to significantly affect the employer's purpose.

The second prong requires that an employee creates, oversees or coordinates the means and methods for achieving policy objectives and determines the extent to which policy objectives will be achieved. This requirement means more than mechanically directing others in the name of the employer but rather, requires an employee to have meaningful authority to carry out management policy. *NEA and Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995).

I have little doubt that the station Captains meet the second prong of the test, not because the evidence supports a conclusion that the Captains create management policy, (evidence of having done so was pretty weak with testimony of only two instances over many years where Captains were asked to draft policy and their work consisted of cutting and pasting already existing ordinances or policies from other locales) but because the evidence shows that they administer or effectuate management policies. For example, the Captain Job Description

added duties relating to assisting the Battalion Chief Training Officer with coordination of station training in the areas of Fire, EMS, Haz-Mat, Specialty Teams, acting as the Battalion Chief in the absence of the Battalion Chief, as assigned. The Captain “Develops and presents classroom training sessions in both Fire and EMS related topics;” “Coordinates and performs Fire and EMS related training drills in order to reinforce classroom learned skills;” and “Assists with the coordination and training of new recruit training academy.” The Captain “Conducts CPR and First Aid instruction and re-certification classes” and is responsible for the oversight of new recruits through mentor and firefighter QAB program. Although the Captains testified that they do not always conduct the training themselves, it is they who are responsible for completing the training plan.

That level of training responsibility, particularly as it pertains to the oversight of new recruits through mentor and firefighter quality control programs is the kind of administering, or effectuating management policies contemplated by Section 4(N) of the Act.

I am also persuaded by the facts that Captains are the point of contact for employee discipline at his or her station and even though that discipline is proscribed by the City’s progressive discipline policy or City’s vehicle accident policy. Although those proscriptions may not support the supervisor exception analysis, it is an indicia of management status indicating that the Captains are administering or effectuating management policies by applying to management directive to the disciplinary process. Similarly, the annual evaluations and “Chrono” entries by the Captains are indicia of effectuating management policy because Chronological entries, both positive and/or corrective, and shall address those subjects the employee will be evaluated on during their annual performance evaluation. The Captains’ independent judgment as to what merits entry into the system and whether it is to be phrased as positive or corrective effectuates management policy.

The daily pass on meetings is the clearest example of how the Captains administer or effectuate management policy literally “passing on” to others in the station managements wishes for each shift’s activities particularly in consideration of one Captain’s testimony about their frequent interaction with Battalion Chiefs.

I gave little weight to their budgeting functions but greater weight to the fact that whenever a call for service comes into a station, Captains do not go out on the “First Run” because they must remain behind to “run the station.” Ultimately, it is the station Captain who is responsible for ensuring that calls for service are properly responded to by properly licensed personnel according to the nature of the call. I consider this to be strong evidence of Captains performing executive or management functions primarily and firefighter or EMT functions secondarily.

Employees exhibit the kind of authority indicative of management status “...when they exercise independent judgment to establish policies and procedures, to prepare budgets, or to assure effective and efficient operations. Managerial employees must exercise discretion within, or even independently of established employer policy and must be aligned with management.” *NEA and Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995).

To meet the second part of the test, the employee must “either create, oversee or coordinate the means and methods for achieving policy objectives and determine the extent to which policy objectives will be achieved” which “means more than mechanically directing others in the name of the employer” but instead requires “an employee [to] have meaningful authority to carry out management policy.” *Id.*

In *Santa Fe Community College-AAUP and Santa Fe Community College*, 4-PELRB-2017 (PELRB No. 311-16) I concluded that Faculty Chairs and Department Heads were managers.

Noteworthy for purposes of this Decision, I concluded that the PEBA did not require that

the employees must create or initiate management policies – rather, it requires that they create, oversee or coordinate the means and methods for achieving those policies. That is the standard that I am applying here.

The key to this case lies in the first prong of the test, particularly regarding the definition of what it means to be “primarily engaging in executive and management functions.”

As stated above in this decision, an element of determining whether one is a “supervisor” under Section 4(I) of the Act requires of whether one “devotes a majority of work time to supervisory duties.” Section 4(N) of the Act defining a manager, does not define manager status in terms of a majority of work time being devoted to managerial duties but speaks in terms of one who is “primarily engaging in executive and management functions”.

It is apparent that the legislature intended the measure of whether one is a manager to be something other than whether one spends a majority of one’s work time engaged in executive or management functions.

Again, referring to *Santa Fe Community College-AAUP and Santa Fe Community College, supra*, I find similarities among the College’s Directors and Department Heads and the Hobbs Fire Department Captains in terms of what it means to be “primarily engaging in executive and management functions.”

In *Santa Fe Community College*, I determined that the fact that its Department Chairs and Directors are “full-time faculty” did not exclude the possibility that the duties they perform as Directors and Department Chairs nevertheless constitutes being primarily engaged in executive and management functions. Likewise, the fact that Captains may also be full-time firefighters in Hobbs, does not mean that they are not primarily engaged in management function as defined by the PEBA. While the amount of time spent in the classroom teaching as their subordinates do was a factor to be considered, (I concluded that it was the

exception, rather than the rule, that Chairs and Directors spent 50% or more of their time teaching) other factors were determinative of the Department Chairs' managerial status:

1. They were responsible for the overall function of their assigned programs. This required each program to offer timely and relevant courses, function in accordance with relevant college policies as well as state and federal law, and meet its accreditation requirements. Directors were employed with the explicit expectation that they would maintain overall responsibility for the viability and continued existence of their program by developing, instituting and enforcing policies related to staffing, scheduling and accreditation. I find this function to be substantially similar to that performed by the Captains here in terms of the City Fire Department mission.
2. The Directors implemented their employer's policies governing the operation of their program, including policies that directly affect faculty and staff such as those with respect to hiring, discipline, and scheduling. The Directors were found to have full and broad discretion to implement policies, schedules, hiring decisions, clinical partnerships, etc. in ensuring the operation and continued accreditation of their programs. Again, the Captains are similarly responsible for implementing their employer's policies governing the operation of their assigned station, including policies that directly affect their subordinates including those with respect to hiring, discipline, and scheduling, even though they are not directly responsible for the final decisions on hiring, discipline, and scheduling.
3. Directors exercise discretion daily within, and independently of, SFCC policy, and create, oversee, or coordinate the means and methods for achieving policy objectives and determine the extent to which policy objectives will be achieved. The evidence showed that Directors are immediately and independently responsible for ensuring

their programs remain viable within the structure of SFCC. Similarly, the Fire Captains are responsible for the orderly operation of their assigned stations requiring them to create, oversee, or coordinate the means and methods for achieving the Fire Department's policy objectives and determine the extent to which policy objectives will be achieved.

4. Department Chairs were also responsible for the overall function of their assigned departments. The efficient operation of a particular department is fundamental to the College's purpose. This required the Chairs to ensure proper staffing, class and instructor scheduling, appropriate facilities and supplies. Beyond that, Department Chairs are also responsible for ordering their Department's supplies and books, advising students in their programs, including those taught by other faculty, addressing faculty concerns within their departments, representing their departments and the Community College on committees before the professional community and other educational institutions, building curriculum; and managing their Departments' budgets. Likewise, the evidence shows that the Captains at issue here, ensure proper staffing, particularly concerning EMT/Paramedic staffing on ambulance runs, class and instructor scheduling, appropriate facilities and supplies. The Captains are also responsible for ordering their station's supplies, notwithstanding that responsibility being occasionally delegated to a subordinate, and the Department Chairs' responsibility for advising students in their programs, including those taught by other faculty, is similar to the Captains' responsibility for mentoring and advising new recruits.

Because Department Chairs and Directors at the Santa Fe Community College are responsible for enforcing policies, and full-time faculty are responsible for complying with

those policies, I concluded that including them in the bargaining unit would necessarily require them to divide their loyalty between the Community College and the Union, thereby rendering the unit inappropriate. See *NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995).

See also, *American Federation of Teachers, Local 4212 and Gadsden Independent School District*, 03-PELRB-2006, PELRB Case No. 169-06 (May 31, 2006), in which Gadsden School day care managers were found to have met the definition of “manager” under PEBA because they have a number of duties related to executive and management functions that were unique compared with the duties of other day care workers, such as developing, administering, or effectuating management policies. Additionally, the *Gadsden Schools* case concluded that it was not relevant under the PEBA definition of “manager” that they spend approximately 60% of their workdays engaged in the same work as other day care employees.

A similar decision should be the result here. As is true in any case in which the Board is called upon to determine whether a group of employees may be managers under the Act, this case presents a mixed bag of facts, some weighing favor of, and some against, finding them to be managers. Among the many facts established at the unit composition hearing, I am reminded at this point of a question put to the Captains testifying for the union by its counsel concerning whether they “identify” more with management or with their subordinates. It would be a poor attorney indeed who did not prepare witnesses in advance for that kind of question and predictably the answers showed that they aligned themselves with their subordinates rather than the Battalion Chiefs, Deputy Chiefs and Chief above them in the chain of command. I found more enlightening, the answer to a line of questioning put to Captain Lonnie Creed by counsel for the City when she asked, concerning the increase to his base pay upon being promoted to Captain, for what he was

being paid more. He answered: “I would just sum it up to say [inaudible] the capacity to make decisions and be held responsible for those decisions.”

Ultimately, it matters only a little whether the Captains identify more with their subordinates than with those above them on the organizational chart, and then, the perhaps unintended consequence of that testimony was to illustrate that including them in the bargaining unit would necessarily require them to divide their loyalty between the City of Hobbs Fire Department and the Union, thereby rendering the unit inappropriate if they were to be included in it. Ultimately, what matters more than with whom the Captains self-identify, is the two-pronged test for determining managerial status established in law by NMSA 1978 § 10-7E-4(N).

Applying that two-pronged test, I conclude that Captains in the Hobbs Fire Department are primarily engaging in executive and management functions. Those functions include Assisting the Battalion Chief in charge of training with coordinating the training at their respective station for which they are assigned responsibility in the areas of Fire, EMS, Haz-Mat, Specialty Teams, and maintains proficiency of job knowledge and skills through training. The Captains develop and presents classroom training sessions in both Fire and EMS related topics; coordinate and perform Fire and EMS related training drills in order to reinforce classroom learned skills; and assist with the coordination and training of new recruits. They are responsible for the oversight of those new recruits providing mentoring and a firefighter quality assurance program.

Captains are the first line of supervision at their respective stations under the Battalion Chiefs and so are responsible for communicating and enforcing management policy to their subordinates. Captains work with their designated Battalion Chief every day and engage in a “pass down” or “pass on” of requisite information to their subordinates at the beginning of

each shift thereby communicating and enforcing management policy. They are an essential asset to the Battalion Chief that has authority to discipline employees. They initiate the disciplinary process, even though they may not ultimately issue the discipline. That is a management function. Captains verbally counsel Drivers, Paramedics and Firefighters to improve their performance, thereby enforcing management policies and directives. They investigate events that may result in discipline and must apply their knowledge of management policies, City, County, State and Federal law to determine whether discipline should be undertaken. Such events and other significant events are logged into a chronological database known as “Chrono” by the Captains one a month thereby promulgating management policy.

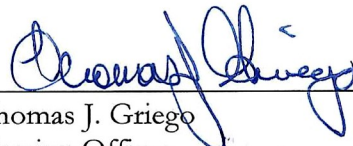
Captains act as a Battalion Chief in the absence of a Battalion Chief. As a result of the foregoing I conclude that Captains employed by the City of Hobbs Fire Department have responsibility for administering or effectuating management policies in a way that requires more than merely participating in cooperative decision-making programs on an occasional basis.

DECISION: The position of Captain in the Hobbs Fire Department was not excluded from the bargaining unit as formed in 2005 under the local Hobbs Labor Management Relations Board and has not been historically excluded from the unit since that time. Because of the difference between Rule 11.21.2.37 concerning unit clarification and Rule 11.21.2.38 concerning accretion, the Hobbs Professional Firefighters Association, IAFF Local 4384, is not required to plead or prove changed circumstances in this case. However, even if the union was required to do so, the creation of the new position of “Captain,” and the elimination of the Lieutenant and Northern District Battalion Chief positions, is sufficient change in the circumstances surrounding the creation of the bargaining unit to

warrant examination of whether a change in the scope and description of the unit is warranted. Having undertaken that examination I conclude that the position of Captain in the Hobbs Fire Department is not a “supervisor” as that term is defined by NMSA 1978 § 10-7E-4(T). However, I conclude that they are “managers” as that term is defined by NMSA 1978 § 10-7E-4(N) such that it should be excluded from the bargaining unit.

Accordingly, the Amended Petition by the Hobbs Professional Firefighters Association, IAFF Local 4384 “For Election/Card Count” filed herein on February 21, 2024 is hereby **DISMISSED** except as it pertains to the EMT Specialists whose inclusion was not at issue.

Issued, Wednesday, July 10, 2024.

A handwritten signature in blue ink, appearing to read 'Thomas J. Griego', is written over a horizontal line.

Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board
2929 Coors Blvd. N.W., Suite 303
Albuquerque, New Mexico 87120

State of New Mexico

Public Employee Labor Relations Board



Amended Certification of Representation

The undersigned hereby certifies that Hobbs Professional Firefighters Association, IAFF Local 4384, has demonstrated a sufficient basis pursuant to NMAC 11.21.2.38 to compel amendment of the certification of the bargaining unit with regard to the City of Hobbs employees it represents.

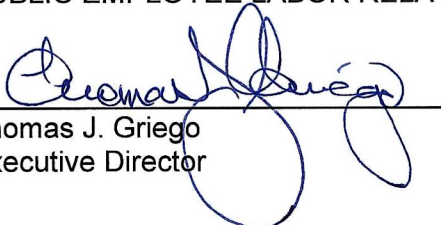
The undersigned makes this certification based on the following:

1. The Union filed a Petition on January 30, 2024, requesting amendment of the Certification issued by the Hobbs local labor board in 2005 of the unit of Firefighters & Fire Officers/EMT-B, EMT-I, EMTP, that it represents, to accrete EMT Specialists (including Paramedic and Intermediate), and Fire Captains.
2. On February 1, 2024, the Board's Executive Director found the Petition facially valid and sent notice requesting the employer's position statement. An Amended Petition was filed on February 21, 2024. That Amended Petition was deemed to be adequate on the same day and the City of Hobbs responded with objections to the inclusion of Captains. A hearing on that issue was held on June 5, 2024 after which the Board affirmed the Hearing Officer's report including EMT Specialists, but excluding Captains as "managers" pursuant to NMSA 1978 § 10-7E-4(N) at its meeting on August 6, 2024.
3. All questions concerning representation having been resolved and sufficient facts having been found under NMAC 11.21.2.38 to permit the accretion of EMT Specialists, certification of the bargaining unit shall be, and hereby is, amended to reflect its current description as follows:

Firefighters, Paramedics, Driver/Engineers, Fire Prevention Specialists and EMT Specialists.

ISSUED in Albuquerque, New Mexico on this 16th day of August, 2024 by:

PUBLIC EMPLOYEE LABOR RELATIONS BOARD


Thomas J. Griego
Executive Director

