

Local 621, SEIU, 4 OCB2d 57 (BOC 2011)

(Rep) (Docket No. AC-61-10).

Summary of Decision: The Union filed a petition to amend Certification No. 55-70 to add the title Director of Motor Transport (Police Department). The City argued that the title was managerial and confidential, and, therefore, should be excluded from collective bargaining. The Board found that the title was eligible for collective bargaining, and, accordingly, added the title Director of Motor Transport to Certification No. 55-70. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION**

In the Matter of the Certification Proceeding

-between-

LOCAL 621, SERVICE EMPLOYEES INTERNATIONAL UNION,

Petitioner,

-and-

THE CITY OF NEW YORK,

Respondent.

DECISION AND ORDER

On November 23, 2010, Local 621, Service Employees International Union (“Union”) filed a petition requesting that the Board of Certification add the title Director of Motor Transport (Police Department) (“Director of Motor Transport”) (Title Code No. 92580) to Certification No. 55-70, the bargaining unit that includes approximately 200 employees in titles such as Supervisor of Mechanics (Mechanical Equipment) (“SMME”) and Administrative Director of Fleet Maintenance (“ADFM”). The City of New York (“City”) argues that the Director of Motor Transport title is managerial and confidential, and, therefore, should be excluded from collective bargaining pursuant to § 12-305 of the New York City Collective

Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”). The Union argues that the title is eligible for collective bargaining because it is not a policy-formulating position, but, rather, a high level, policy-implementing supervisory position (with technical expertise) similar to ADFMs, who the Board found to be eligible for collective bargaining. This Board finds that the title is eligible for collective bargaining because it does not satisfy the criteria for managerial or confidential status. Accordingly, the title Director of Motor Transport is added to Certification No. 55-70.

BACKGROUND

One City employee holds the civil service title of Director of Motor Transport (Police Department), which is utilized solely by the New York City Police Department (“NYPD” or “Department”). Since at least 2006, the NYPD employee serving in the Director of Motor Transport title has held the in-house position of Director of Fleet Services. Over the course of two days of hearings, the City offered testimony from the current and former Directors of Motor Transport, and the Union offered testimony from the Union President, a SMME/shop steward, and a Supervising Supervisor.

According to the job specification, the Director of Motor Transport has the following duties and responsibilities:

Under general direction, with wide latitude in the exercise of independent judgment and decision making, is responsible for the purchase, maintenance and disposal of Police Department motor vehicle equipment; is responsible for the management, administration and supervision of the Motor Transport Division; performs related work.

(Joint Ex. 6). The following are examples of typical tasks:

Establishes work standards and procedures for the maintenance and repair of all motor vehicle and related equipment.

Monitors and establishes policies on cost, effectiveness, personnel, repair, safety programs and suppliers.

Maintains liaison with Departmental units; City, State and Federal agencies; and professional and employee organizations.

Directs training and safety programs for assigned personnel.

Plans, implements and directs all programs relating to the operation of the Motor Transport Division.

Provides technical expertise and advice on equipment and related matters.

Maintains confidential records relating to Department motor vehicles.

(Joint Ex. 6). The title requires a baccalaureate degree from an accredited college and five years of full-time paid experience acquired in a large scale program of motor equipment maintenance and repair, three years of which must have been in a responsible executive capacity, or the equivalent education and/or experience. There is no direct line of promotion.

The Union assert that the duties and responsibilities of ADFMs, whom the Board found to be eligible for collective bargaining in *Local 621, SEIU, 78 OCB 2 (BOC 2006)*, are substantially similar to those of the Director of Motor Transport. The job specification for the ADFM title states that the position has the following duties and responsibilities:

Under general direction, with latitude for the exercise of independent judgment, is responsible for managing the activities of a major segment or bureau performing maintenance and repair operations on a large fleet of motor vehicles and other equipment. In the temporary absence of the supervisor, may perform the duties of that position.

Under executive direction, with wide latitude for the exercise of independent judgment and initiative, advises on policy, coordinates

and directs the procurement and/or operation, maintenance and repair of a large fleet of motor vehicles and other equipment.

(Union Ex. 1).

The current Director of Motor Transport is Gregory Dimesa. Dimesa was promoted to Director of Motor Transport on September 24, 2010. Prior to his promotion, Dimesa served in a Deputy Director position and held the unionized title of SMME Level II. As the Director of Motor Transport, Dimesa directly supervises four unionized employees: Deputy Inspector and Commanding Officer Vincent LoRusso; ADFM Edward Cleary; Deputy Director Stephen McKay (SMME Level II); and Deputy Director Vincent Tullo (SMME Level II).¹ Director Dimesa reports to Robert Martinez, the Executive Director of the Support Services Bureau, who was Dimesa's predecessor from November 2006 through May 2010.² When Martinez was the Director of Motor Transport, he reported to Chief McGrann, the former Assistant Chief in charge of Support Services Bureau. Chief McGrann was represented by the Captains Endowment Association for purposes of collective bargaining. *See Local 621, SEIU, 78 OCB 2, at 8.*

The Director of Motor Transport is in charge of the day-to-day operations of the Fleet Services Division and is responsible for ensuring that there are a sufficient number of vehicles at each command. The NYPD's Fleet Services Division is responsible for fleet management and

¹ Dimesa also supervised Tullo, Cleary, and McKay prior to becoming Director of Motor Transport. McKay and Tullo were promoted to Deputy Directors when Dimesa was promoted to Director of Motor Transport. Dimesa reorganized their responsibilities, assigning them some of the tasks that he performed as Deputy Director. Dimesa reported to LoRusso when he was a Deputy Director, but now LoRusso reports to Dimesa. LoRusso is represented by the Captains Endowment Association for collective bargaining purposes.

² As Executive Director of the Support Services Bureau, Martinez reports directly to the First Deputy Commissioner, but in many cases he also reports directly to the Police Commissioner. The Support Services Bureau is comprised of four subunits: Central Records; Property Clerk; Printing Section; and Fleet Services. The heads of each of the four subunits report directly to Executive Director Martinez.

accounting for the NYPD's diverse 8,147 vehicle fleet, including the procurement, maintenance, and relinquishment of vehicles.³ Likewise, its mission is “[t]o keep all Department vehicles in the safest working order and maintain maximum vehicle availability and economic proficiency.” (City Ex. 1).⁴ The Fleet Services Division is comprised of twelve shops and approximately 420 employees, 75 of which are uniformed members of the NYPD.

The Director of Motor Transport oversees an annual expense budget of approximately \$70-\$80 million, which is provided by the Deputy Commissioner of Management and Budget.⁵ Director Dimesa determines how the Fleet Services Division can best utilize its funding, which has been cut by \$10 million each of the last three years.⁶ Director Dimesa and his colleagues analyze the fleet and then determine which vehicles need to be replaced. Director Dimesa approves all plans to purchase vehicles.⁷ Similarly, when Martinez was the Director of Motor Transport, he requested the development of an aging chart to track the age of the vehicles and then he and the deputy directors determined which vehicles to purchase and which current

³ The NYPD's vehicles include radio motor patrol vehicles, trucks, tow trucks, rescue trucks, motorcycles, and golf carts.

⁴ The Fleet Services Division additionally “[d]evelops vehicle specifications, fabricates special use equipment and tools and conducts research and development on the latest equipment and personal safety devices.” (City Ex. 1). The Fleet Services Division also administers the NYPD's Automated Fueling System and provides tow trucks upon request for major events.

⁵ Martinez testified that, when he was the Director of Motor Transport, Budget Management decided how much money the division received, but there was an opportunity to request additional funding from the Police Commissioner and Budget Management.

⁶ In a fully-funded year, the Fleet Services Division receives approximately \$34 million to purchase vehicles; in the past few years, however, it received \$24 million.

⁷ We take administrative notice of our finding in *Local 621, SEIU, 78 OCB 2*, that ADFM Steven Weir—the sole ADFM held to be in a managerial position—“approves vehicle purchases, relinquishment requests, vehicle specifications, preventive maintenance programs, and vehicle leasing for City agencies[,]” including the NYPD, and that his “policies and procedures determine city-wide and agency fleet size.” *Id.* at 19.

vehicles' life cycles were to be extended. Auto mechanics and supervisors made recommendations about the purchase of vehicles, and these recommendations were ultimately passed along to Director Martinez. Director Martinez and his colleagues would forward their vehicle replacement proposals to the Commissioner of Budget Management and Chief McGrann of the Support Services Bureau.⁸ Director Martinez had the final decision regarding the contents of the proposal. Although Chief McGrann had the authority to overrule Director Martinez, he generally did not exercise such authority due to Director Martinez's technical expertise and intimate knowledge of fleet operations.⁹

Director Dimesa also approves all plans to purchase parts, and he structures the parts accounts depending on the types of vehicles, the age of the vehicles, and the availability of parts accounts. In addition to purchasing parts, Director Dimesa makes the final decision regarding which parts are salvaged from vehicles at the end of their life cycles. For example, Director Dimesa decided that the Fleet Services Division would not reuse brake products. Director Dimesa also decides whether to take engines out of vehicles and hold on to them in stock or to send vehicles to auction with their engines intact. Given Director Dimesa's expertise in parts, he has expanded the salvage program to light bezels, tail lights, and automotive glass. When Martinez was the Director of Motor Transport, he also expanded the salvage program. In particular, Director Martinez determined that light bars from decommissioned vehicles should be reused on new vehicles because they cost \$3,000 each and the NYPD only received \$100 each

⁸ Director Martinez also dealt directly with the Police Commissioner about the purchase of vehicles. The Police Commissioner consulted with Martinez because of his expertise, but he had the ultimate authority regarding vehicle purchases.

⁹ In addition to vehicle acquisitions, Director Martinez also determined the technologies in which the NYPD should invest, such as, for example, cryogenics, which involved freezing metal parts, such as brake rotors, to minus 300 degrees Fahrenheit. This pilot program extended the life of brake rotors and this method of freezing rotors was determined to be cost-effective.

when the light bars were returned to the manufacturer. Director Martinez also decided to reuse police car doors because each door salvaged and reused saves approximately \$1,500.

Director Dimesa is responsible for monitoring the money expended for warranty labor and parts and negotiating the labor rate with automobile manufacturers on an annual basis. The NYPD operates as an in-house warranty vendor for automobile manufacturers, which allows the NYPD to repair vehicles under warranty in its own shops. The manufacturers reimburse the NYPD for the cost of parts and labor. Currently, Director Dimesa is negotiating with Nissan and Toyota to obtain in-house warranty status with those two manufacturers. When Martinez was the Director of Motor Transport, he also had responsibility for warranty work. He and his colleagues made decisions about when to outsource work by sending warranty work to dealerships. Depending on available funds and workload, they would outsource glass work, seat repairs, and body work. Director Martinez decided which vendors to use, such as, for example, a particular Ford dealer in New Jersey.

Director Dimesa is involved with the proactive preventative maintenance program, a pilot program that has assisted the Fleet Services Division in determining which vehicles should be selected for preventative maintenance each week. This initiative is an effort to decrease vehicle out-of-service rates. Director Dimesa has the authority to decide whether to apply this program to other groups of vehicles. Director Martinez similarly participated in the FleetStat program, which involved analyzing performance indicators—such as the out-of-service rate for the total fleet, emergency services, emergency response vehicles, etc.—by division and by shop. Director Martinez and his colleagues monitored out-of-service rates and questioned districts about their performance indicators on a weekly basis.

Director Dimesa is working with the Mayor's Office of Operations to make the fleet more "green" and efficient. Director Dimesa attends meetings at the Mayor's Office and at the Department of Citywide Administrative Services ("DCAS"). He has made suggestions to "green" the fleet with hybrid vehicles.

Director Dimesa additionally has been working with Executive Director Martinez and the Police Commissioner's office to find a new way to secure laptop computers in vehicles because the existing mobile digital terminal does not fit in some of the NYPD's smaller vehicles. Accordingly, Director Dimesa is in the process of selecting a vendor to create a dashboard mount that will hold the laptops. The Police Commissioner approved the decision to put laptops on the dashboard of smaller vehicles.

In response to a major snowstorm that required the use of tow trucks, Director Dimesa is rewriting the specifications for tow trucks that the NYPD plans to order. The NYPD, for example, has decided to order only tow trucks and emergency services trucks with four-wheel drive. Director Dimesa is initiating these efforts, and two SMMEs are assisting him with rewriting the specifications. Proposed specifications will be submitted to DCAS, which will send them to vendors and seek bids. Executive Director Martinez will review the specifications prior to their submission to DCAS.

The Director of Motor Transport has a role in the development of Requests for Proposals ("RFP"). When Martinez was the Director of Motor Transport, he and his colleagues developed a RFP to outsource the auto parts contract, which, as Martinez described, would be "like bringing Auto Zone into your shop and the guy working behind the parts counter is the employee of [an outside] company." (Tr. 52). In other words, a contractor would manage the Fleet Services Division's stockroom operations and supply the Fleet Services Division with parts. One benefit

of the privatization of the parts operation is that approximately twenty mechanical personnel will be able to work on vehicle repair instead of working behind the parts counter. The other benefit is that the NYPD will now only pay for the parts that are used. Formerly, money was tied up in parts that were sitting on shelves, some of which became useless or obsolete when a vehicle model was discontinued.

Director Dimesa participated in the drafting of the auto parts contractor RFP and is a member of the RFP committee.¹⁰ Director Dimesa wrote the original specification, researched vendors, completed site surveys with his crew, and observed/evaluated a similar operation at the United States Postal Service. Committee members graded the proposals that were received and submitted their grades to the Agency Chief Contracting Officer's office ("ACCO"). The ACCO's office eliminated one vendor from consideration without conferring with the RFP committee. As of the date of the hearing, the NYPD was seeking best and final offers from the remaining candidates. The committee ultimately will submit a recommendation to DCAS, which will select the vendor.

Director Dimesa is also a member of the General Motors Law Enforcement Products Council, which is comprised of fleet managers from throughout the United States and Canada. They meet at least twice per year to share ideas and discuss problems with GM products. Director Dimesa is the City's sole representative on the Council, and he has been a member since 2003, including the time that he was a SMME Level II. Since becoming the Director of Motor Transport, Dimesa's involvement on the committee has not changed; however, he previously had to consult with his predecessors regarding his participation.

¹⁰ The RFP committee is comprised of Director Dimesa, Deputy Inspector LoRusso, Lieutenant Lester, the integrity control officer, Captain Iacone, who works at the Support Services Bureau, and SMME Gorgia, who is a materials manager at the Fleet Services Division. All members of the committee other than Director Dimesa are represented for purposes of collective bargaining.

Due to the Director of Motor Transport's subject matter expertise, the Director of Motor Transport is involved in determining the Fleet Services Division's strategy for addressing the NYPD's response to particular situations and events. For example, Director Martinez participated in an advisory capacity at meetings with his superiors during which he made various recommendations, such as the use of blue lighting on vehicles. At the request of Chief McGrann, Director Martinez researched blue lighting, started a pilot program, and then suggested the use of blue lighting on all vehicles to the Police Commissioner, who, in turn, granted him the permission to do it. Another initiative concerned the purchase of new message boards for NYPD vehicles. The Police Commissioner charged the Fleet Services Division with the task of finding a company that could build them, and Dimesa, in his former position as Deputy Director, submitted a proposed product to Director Martinez. Director Martinez submitted the proposal to the Police Commissioner for final approval. Similarly, Director Martinez suggested to the Police Commissioner that the NYPD install rumbler sirens on all vehicles. Once the decision was made, it was Director Martinez's job to implement the purchase and installation of the sirens, which required him to request funding and determine how to install the equipment on the vehicles. The Police Commissioner approved the expansion of this initiative to all precincts, and, currently, Director Dimesa is working with vendors to procure the sirens and install them on the vehicles. Director Dimesa will determine which vehicles will get rumbler sirens and the order in which the precincts will receive them.

The NYPD Patrol Guide sets forth the Department's standard operating procedure, while the NYPD Administrative Guide sets forth the Department's administrative procedures. Both documents are drafted by the Office of Management and Planning, and revisions are published monthly. Employees are bound by both the Patrol Guide and the Administrative Guide. In

addition to these Department-wide procedures, the Fleet Services Division issues internal memoranda to its employees. These memoranda are commonly referred to as FSD Memos and concern a variety of subjects, such as uniform, parking and vehicle inspection guidelines, overtime documentation, and off-duty employment applications. The Director of Motor Transport reviews each FSD Memo before it is circulated and provides final approval for its circulation. Although the Director of Motor Transport may draft FSD Memos, a substantial majority of the 19 FSD Memos that were issued since 2008 were signed by LoRusso. For example, when Martinez was the Director of Motor Transport, he or his staff would identify topics that needed to be addressed in response to various events, and then he would assign someone to write a FSD Memo.

The Director of Motor Transport indirectly supervises the Fleet Services Division's approximately 420 employees and handles personnel issues that arise on a daily basis. The Director of Motor Transport has the authority to temporarily transfer employees due to disciplinary problems, assign new employees based on the needs of the Fleet Services Division, and determine which employees get promoted. Regarding the hiring of employees, when Martinez was the Director of Motor Transport, he identified vacancies and filled the positions. He attended interviews on occasion, but, typically, ADFM Cleary and the Administrative Manager interviewed the candidates. Sometimes SMME Tullo or SMME Gilligan would attend the interviews as well. The interviewers would make a recommendation to Director Martinez, who had the authority to disapprove the recommendation. If, however, he approved their recommendation, then he would then submit it to his superior, who would, in turn, submit it to the Police Commissioner. The Police Commissioner would then make the final decision.

Regarding certain promotions, Director Dimesa explained that supervisors make recommendations to him, and, following an interview process, a selection committee presents him with a few candidates whom he then ranks.¹¹ Director Dimesa then discusses the committee's recommendation with Executive Director Martinez. When Martinez was the Director of Motor Transport, he was similarly involved in the promotion of employees, and he explained that, at times, he overrode the committee's recommendation of a candidate. Director Martinez would submit paperwork recommending the approval of a candidate for promotion, which would be reviewed by Director Martinez's superiors. Ultimately, the final decision would be made by the Police Commissioner.

When Martinez was the Director of Motor Transport, he had the authority to transfer Assisting Supervising Supervisors and Supervising Supervisors, but with regard to first-line supervisors like SMMEs and auto mechanics, Director Martinez's authority was limited by the respective collective bargaining agreements, which specify the circumstances under which employees may be transferred.¹² Thus, for example, Director Martinez could only transfer such employees for 90 days and 30 days, respectively.

As the Director of Motor Transport, Martinez made the ultimate decisions regarding the approval of leave, but the first-line supervisor would initially sign the request form. Director Martinez had the authority to rescind the first-line supervisor's approval.

Based on the entire record, the Director of Motor Transport does not have full discretion regarding what disciplinary measures should be taken against individuals. Director Dimesa has

¹¹ The selection committee is assembled by Director Dimesa and includes Dimesa, LoRusso, Cleary, Tully, McKay, and the personnel manager.

¹² The NYPD only has discretion with regard to the transfer of supervisors who are paid assignment differentials.

never recommended that any charges and specifications be brought against an employee nor has he submitted any charges to the Advocate's Office or attended any related disciplinary hearings. When Martinez was the Director of Motor Transport, he approved the recommendation of formal disciplinary charges and specifications, and he similarly had the authority to disapprove recommendations for discipline, which were typically made by first-line supervisors. All charges and specifications, however, were drafted by the Advocate's Office, which made the final decision regarding whether the charges and specifications would be issued. There is no evidence that the Director of Motor Transport has any involvement with respect to the contractual disciplinary process that often follows the issuance of formal charges and specifications.

The Director of Motor Transport has greater involvement with the command discipline ("CD") process. Director Dimesa has attended approximately 70% of the CD hearings since becoming Director.¹³ LoRusso has presided over nearly all of the CD hearings during Director Dimesa's and Director Martinez's tenures, although he usually confers with the Director of Motor Transport regarding his proposed resolution.¹⁴ When Martinez was the Director of Motor Transport, he and his colleagues would question the supervisor regarding why he or she believed that a particular employee deserved a CD. If a CD was warranted, then Director Martinez and his colleagues would issue it. Shop Steward Scott Osher has negotiated CD penalties with LoRusso; however, he has never negotiated CD penalties with Director Dimesa or Director

¹³ Dimesa also attended CD hearings as a SMME; however, he did not attend as many as he does now as the Director of Motor Transport.

¹⁴ Between 2003 and 2006, when Lenny Lesko served as the Director of Fleet Services, Lesko presided over CDs.

Martinez. Director Dimesa does not know whether there are limits regarding the discipline that can be imposed through the CD process.

The Director of Motor Transport has never attended a collective bargaining session or participated in the collective bargaining process.¹⁵

POSITIONS OF THE PARTIES

City's Position

The City argues that the Director of Motor Transport is a managerial and confidential position, and, therefore, should be designated exempt from collective bargaining. According to the City, the Director of Motor Transport is within the upper echelon of management because it is at the top of the table of organization for the Fleet Services Division and reports directly to the Executive Director of the Support Services Bureau, who, in turn, reports to the Chief of the NYPD and the Police Commissioner. The City contends that the Director of Motor Transport's authority is expansive because the incumbent manages the day-to-day operations of the Fleet Services Division, plays a role in the formulation and implementation of policies and programmatic initiatives, and has final approval on all budgetary and procurement matters within the Fleet Services Division.

According to the City, the Director of Motor Transport plays a significant role in the "essential process" of policy formulation and implementation. For example, Director Martinez oversaw the creation of a program to outsource the auto parts contracts, and Director Dimesa wrote the original specification for the RFP and is currently evaluating vendors. The Director of Motor Transport also created, expanded, and refined the FleetStat Program, which helps monitor

¹⁵ Lieutenant Patricia Feeley has represented the NYPD in collective bargaining sessions with Local 621.

vehicle performance and allocate resources more efficiently. The Director of Motor Transport has exercised his authority over the salvage program by deciding to use salvaged light bars on vehicles and determining that brake products could not be salvaged. The Director of Motor Transport has additionally played a role in selecting new message boards for vehicles and is in the process of selecting a vendor to install laptop computers in vehicles. The Director of Motor Transport also oversees the proactive preventative maintenance pilot program.

The City contends that the Director of Motor Transport speaks on behalf of management as a member of the General Motors Products Council because he makes recommendations and requests on behalf of the NYPD. According to the City, the Director of Motor Transport's participation on this committee has a substantial effect on the NYPD's fleet operations and other police fleets across the nation. The City argues that the Director of Motor Transport also speaks on behalf of management and the NYPD when he negotiates with vendors related to his authority over the warranty reimbursement program and other programmatic initiatives.

Due to the unique and highly technical nature of the fleet, the City argues that the Director of Motor Transport acts as an expert advisor to the Police Commissioner. In addition to providing input at high level meetings, the Director of Motor Transport makes recommendations and drafts proposals regarding NYPD policy initiatives, such as the decision to install blue lights and rumbler sirens on vehicles. The Director of Motor Transport used his budgetary authority to procure the necessary funds and determined which vehicles would be outfitted with the rumbler sirens. The Director of Motor Transport also has helped formulate policies for the use of hybrid vehicles through his participation in meetings at the Mayor's Office of Operations and DCAS.

Regarding budgetary responsibilities, the Director of Motor Transport has the ultimate authority over the Fleet Services Division's budget and its allocation of funds. The Director of

Motor Transport has the authority to select the vehicles and parts that the Fleet Services Division will purchase and the technologies in which the Fleet Services Division will invest.

The City argues that the Director of Motor Transport has a major role in personnel administration because he oversees over 400 subordinates and has the authority to hire, fire, assign, transfer, and promote employees, as well as rescind their leave approvals. The City alleges that the Director of Motor Transport is management's primary representative in the Fleet Services Division, and, therefore, plays a critical role in the grievance procedure prior to the Advocate's Office's involvement. The Director of Motor Transport has final approval over the decision to proffer disciplinary charges and has discretion over the resulting action. The Director of Motor Transport also attends 70% of the CD hearings and provides input regarding the disciplinary penalties. Because the Director of Motor Transport acts as a management representative in the disciplinary process, the City argues that the position must be deemed managerial in order to avoid the conflicts of interest that would arise if the Director of Motor Transport represents management in adversarial proceedings against his own union.

The City asserts that additional factors support its contention that the Director of Motor Transport is a managerial position: (1) it is a non-competitive, managerial civil service title with no history of collective bargaining; (2) it is included in the managerial pay plan and welfare fund; and (3) its title specification reveals that it was intended to be a management position.¹⁶

¹⁶ We do not consider the City's arguments regarding the Director of Motor Transport's inclusion in the managerial pay plan and welfare fund and the fact that the job specification states that the title is within the management class of positions. Our prior decisions have specifically disavowed these factors as indicating that a title is managerial. *See OSA*, 2 OCB2d 13, at 4, n.1 (explaining that inclusion in the managerial pay plan is "a factor that no longer precludes eligibility"); *ADWA*, 56 OCB 11, at 19 (BOC 1995) (finding a job description's statement that a title is within the management class of positions to be not probative).

The City claims that the Director of Motor Transport is also a confidential position because, through the Director of Motor Transport's close working relationship with the Executive Director of the Support Services Bureau, the Director of Motor Transport has access to information concerning labor relations, budget reductions, layoffs, and other sensitive personnel matters. Because the Director of Motor Transport negotiates the labor rate for outside contractors, the City contends that the Director of Motor Transport's actions have an effect on the prevailing wage for City employees pursuant to Labor Law § 220. The City argues that this duty creates the potential for the sort of labor-management conflict that concerned the legislature when it chose to exclude confidential employees from collective bargaining.

Lastly, the City argues that prior Board decisions regarding ADFMs and Deputy Directors of Motor Equipment Maintenance (Sanitation) ("Sanitation Deputy Directors") are not controlling and that the instant determination should be based upon the duties of the Director of Motor Transport. According to the City, the prior decisions should be disregarded because they concern distinct titles, which have less authority, less latitude for independent judgment, and less of a role in policy formulation. Moreover, the City contends that the Director of Motor Transport's ability to exercise his discretion is not limited and that the Board has already recognized that the Director of Motor Transport is one of the positions above ADFM that has the authority to put a proposed policy into effect.

Union's Position

The Union argues that the City has failed to satisfy its burden of establishing that the Director of Motor Transport is a managerial and/or confidential position. The Union contends that Director Dimesa's standing in the table of organization is consistent with an upper-level non-managerial supervisory position. Notably, Director Dimesa's predecessor reported to a non-

manager, and Director Dimesa supervises the same individuals that he supervised when he was a SMME.

The Union compares Director Dimesa's duties to those of employees in the titles of ADFM, Sanitation Deputy Director, and SMME, all of whom the Board has found eligible for collective bargaining. The Director of Motor Transport job specification is similar to the represented title of ADFM because the incumbents in both titles have primary responsibility for the day-to-day maintenance and repair of a City agency's fleet of vehicles. In the proceedings related to these other titles, the Board found employees with hundreds of subordinates to be eligible for collective bargaining. Therefore, although Director Dimesa supervises approximately 420 employees, this number of subordinate employees is not indicative of managerial status. In addition, the Director of Motor Transport's area of authority provides no basis for declaring the title managerial. The NYPD fleet is large, but the maintenance and repair operations are no more complex than the Department of Sanitation fleet for which the Sanitation Deputy Directors are responsible.

The Union argues that the Director of Motor Transport does not formulate policy, which is the most important indication of whether a title should be found managerial. The exercise of significant professional judgment in maintaining, repairing, and replacing the City's vehicles is not policy formulation. The NYPD's policies are set forth in the Patrol and Administrative Guides, which are drafted by the NYPD's Office of Management and Planning. The Director of Motor Transport must comply with these policies, and there is no evidence that the Director of Motor Transport has ever drafted any portions of these guides.

The Union maintains that the Director of Motor Transport's role in making recommendations and implementing the Fleet Services Division's expense budget is not

indicative of managerial status. The Director of Motor Transport is assigned a budget and must operate within the set parameters. While the Director of Motor Transport makes suggestions about the purchase of vehicles, the Executive Director of the Support Services Bureau has the authority to overrule the Director of Motor Transport and the Police Commissioner approves all decisions.

The Union submits that the Director of Motor Transport's participation in various projects also is not managerial. Although the Director of Motor Transport is involved in the decision to purchase vehicles, all decisions concerning vehicle acquisitions and fleet size are subject to review by DCAS, and the final decision is made by the Police Commissioner. While the Board previously found that ADFMs also exercise a high degree of technical knowledge, supervise fleet vehicle maintenance and repair, and are involved in vehicle acquisitions, these duties were not held to be managerial.

Additionally, there is no evidence that the Director of Motor Transport's role in outsourcing repair work is anything more than following guidelines and policies established by others. Negotiating rates with vendors and ensuring that subordinate employees account for their time is not policy-making.

Regarding the RFP program, Director Dimesa is a member of a committee helping to evaluate potential vendors; however, his inclusion on the committee is not evidence of managerial status because none of the other committee members are managers, and his involvement began when he was a SMME. The committee reports its findings and recommendations up the chain of command, and DCAS will make the final selection of the vendor.

Finally, the rumbler siren project provides further evidence that the Director of Motor Transport is non-managerial. The Director of Motor Transport's role is to implement the Police Commissioner's decision to expand the program to all police vehicles by requesting funding and determining how the equipment will be installed. Similarly, there is no evidence that the warranty reimbursement program or the salvage program was initiated by the Director of Motor Transport. Although the salvage program utilizes the Director of Motor Transport's specialized knowledge of parts to determine which ones can be reused effectively, it does not concern policy-making.

The Union asserts that the Director of Motor Transport has only minimal involvement with labor relations. There is no evidence that Director Martinez and Director Dimesa have ever attended a collective bargaining session or labor-management meeting, participated in the collective bargaining process, or had any involvement in contractual grievances.

The Union contends that the Director of Motor Transport's personnel administration responsibilities are not managerial. Like ADFMs, the Director of Motor Transport's discretion in implementing policy and running the operation must be exercised within guidelines set forth by his superiors and DCAS. For example, the Director of Motor Transport's approval of leave requests is a supervisory function performed routinely by ADFMs, Deputy Directors, and SMMEs. Moreover, leave requests are subject to defined policies and procedures, and the City has not claimed that the Director of Motor Transport is authorized to approve requests that ignore seniority or other operational limitations. In addition, while the Director of Motor Transport can recommend discipline, he has virtually no role in the bringing, investigation, or disposition of formal disciplinary charges, and his role in the CD process is limited.

Furthermore, the Director of Motor Transport's colleague who presides over the CD proceedings is represented for purposes of collective bargaining.

With respect to hiring and promoting employees, the Union argues that the Director of Motor Transport's role is not managerial. The Director of Motor Transport plays a *de minimis* role in the hiring of journey-level employees because he does not create the civil service list, does not conduct interviews, does not make the initial selection, and does not make the final decision. Furthermore, there is nothing in the record to suggest that the Director of Motor Transport has anything to do with civil service promotional process other than to submit paperwork recommending the promotion. The final decision is made by the Police Commissioner. Similarly, provisional promotions to SMME are approved at levels higher than the Director of Motor Transport, and the Director of Motor Transport's role is confined to making recommendations. Furthermore, the Director of Motor Transport's authority, under certain circumstances, to transfer employees is not unlike other non-managerial supervisory positions like ADFMs and is not indicative of managerial status.

The Union argues that the Director of Motor Transport is not a confidential position because the Director of Motor Transport has nothing to do with the collective bargaining process. The City has failed to show how the Director of Motor Transport's access to certain confidential information regarding subordinate employees would create a conflict of interest if the Director of Motor Transport was represented by the Union. Additionally, the City has failed to explain the extent to which the Director of Motor Transport has access to information beyond that which is known to employees' supervisors. Vague testimony concerning "confidential" or "sensitive" information about particular vehicles, disciplinary issues, provisional promotion selections, and the budget is insufficient to meet the City's burden.

DISCUSSION

Under the NYCCBL, public employees are presumed to be eligible for collective bargaining. *See* NYCCBL § 12-305. Public employees who are determined by the Board to be managerial and/or confidential, however, do not have the right to bargain collectively and may not be included in any bargaining unit. *See id.* Upon challenge by a public employer, the Board determines whether public employees are managerial and/or confidential. The NYCCBL explicitly adopts the definition of “managerial” and “confidential” employees set forth in Civil Service Law Article 14 (“Taylor Law” or “CSL”), stating that the Board shall have the power to “determine whether specified public employees are managerial or confidential within the meaning of subdivision seven of section two hundred one of the civil service law and thus are excluded from collective bargaining.” NYCCBL § 309(b)(4). Section 201.7(a) of the Taylor provides that:

Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii).

CSL § 201.7(a); *see also* NYCCBL § 12-309(b)(4); *DC 37, 78 OCB 7, at 39 (BOC 2006), affd. sub nom. Matter of City of N.Y. v. N.Y.C. Bd. of Cert.*, No. 404461/06 (Sup. Ct. N.Y. Co. Sept. 19, 2007). It is the public employer’s burden to overcome the statutory presumption favoring eligibility for collective bargaining, and “exclusions for managerial and confidential employees . . . are to be read narrowly, with all uncertainties resolved in favor of coverage.” *Lippman v.*

Pub. Empl. Rel. Bd., 263 A.D.2d 891, 904 (3d Dept. 1999); *see also Matter of NYC Health & Hosps. Corp. v. Bd. of Cert. of the City of N.Y.*, 2007 N.Y. Slip. Op 30921(U) (Sup. Ct. N.Y. Co. Apr. 23, 2007); *Local 621, SEIU*, 78 OCB 2, 16.

The first type of manager who is excluded from collective bargaining is one who “formulate[s] policy.” CSL § 201.7(a)(i). Policy is defined as “the development of the particular objectives of a government or agency thereof in the fulfillment of its mission and the methods, means and extent of achieving such objectives.” *OSA*, 3 OCB2d 33, at 22 (BOC 2010) (citing *State of N.Y.*, 5 PERB ¶ 3001, at 3005), *affd.*, *Matter of City of New York v. N.Y.C. Bd. of Cert.*, Index No. 402496/10 (Sup. Ct. N.Y. Co. Oct. 27, 2011) (Kern, J.); *see also EMS Superior Officers Assn.*, 68 OCB 10, at 21 (BOC 2001); *Unif. Sanitation Chiefs Assn.*, 66 OCB 4, at 26 (BOC 2000). An employee who formulates policy “include[s] not only a person who has the authority or responsibility to select among options and to put a proposed policy into effect, but also a person who participates with regularity in the essential process which results in a policy proposal and the decision to put such proposal into effect.” *OSA*, 3 OCB2d 33, at 22-23 (citing *State of N.Y.*, 5 PERB ¶ 3001, at 3005 (1972)); *see also OSA*, 78 OCB 1, at 7 (BOC 2006). “Participation in the formulation of policy must be ‘regular,’ ‘active,’ and ‘significant’ to support a finding of managerial status.” *CWA*, 78 OCB 3, at 11 (BOC 2006) (citing *UFOA, L. 854*, 50 OCB 15, at 20 (BOC 1992)). Accordingly, employees who participate in policy formulation are “those relatively few individuals who directly assist the ultimate decision-makers in reaching the decisions necessary to the conduct of the business of the governmental agency.”¹⁷ *OSA*, 3

¹⁷ The City asserts that it can rely on “indicia of manageriality.” In *OSA*, however, we reiterated that “[t]hese factors are not a substitute for or an expansion of the statutory definitions and do not create any additional exclusions from collective bargaining.” *OSA*, 3 OCB2d 33, at 43 (citing *CWA*, 2 OCB2d 13, at 14).

OCB2d 33, at 23 (citing *State of N.Y. (Dept. of Env'tl. Conservation)*, 36 PERB ¶ 3029, at 3083 (2003)).

We find that the Director of Motor Transport does not formulate policy within the meaning of the Taylor Law and the NYCCBL. Although the Director of Motor Transport is at the top of the table of organization for the Fleet Services Division and has expansive authority in managing its day-to-day operations, these facts alone do not warrant a finding of managerial status. The Board makes determinations based on actual duties performed, and, thus, it is necessary to consider evidence beyond, for example, the NYPD's organizational structure and use of the Director level in-house title. *See Matter of City of New York*, Index No. 402496/10, slip op. at 5-6 (finding that the Board appropriately determined whether employees were managerial by examining the evidence submitted as to each employee's duties and responsibilities and rejecting the assertion that the Board did not give sufficient credence to employees' in-house titles); *OSA*, 3 OCB2d 33, at 87; *CWA*, 2 OCB2d 13, at 48. Director Dimesa is highly-skilled, functions at a high level within the NYPD, and is involved in a number of important programmatic initiatives; however, while he may act as an expert advisor to the Police Commissioner regarding fleet issues, participation in the policy-making process in an advisory role does not constitute policy formulation. *See OSA*, 3 OCB2d 33, 44. Moreover, exercising a high level of expertise and technical skill in performing one's duties does not warrant excluding that employee from collective bargaining. *See OSA*, 3 OCB2d 33, 47.

The courts have recognized a key distinction between policy and procedures, as "[p]olicy sets the agency's course whereas procedures are the practical steps taken to implement such policy, including 'the determination of methods of operation that are merely of a technical nature.'" *Matter of City of New York*, Index No. 402496/10, slip op. at 4-5 (citing *Lippman*, 263

A.D.2d at 899). Director Dimesa determines methods of operation that are technical in nature and provides information and recommendations to his superiors as well as the General Motors Law Enforcement Products Council, including, for example, vehicle parts that can be salvaged, ways to make the fleet more “green” and efficient, a means of securing laptop computers in the NYPD’s smaller vehicles, and new specifications for tow trucks. In so doing, Director Dimesa exercises a high level of discretion and independent judgment. Such facts alone, however, do not equal policy formulation. *See OSA*, 3 OCB2d 33, 58-59; *City of Binghamton*, 12 PERB ¶ 3099, at 3185. We find that the input that Director Dimesa provides to his superiors constitutes technical advice, not the formulation of policy. *See County of Rockland*, 28 PERB ¶ 3063, at 3144 (finding a “high level supervisor with a great degree of technical skill” to be eligible for collective bargaining). Thus, Director Dimesa does not determine policy, but, rather, provides information upon which others make policy decisions, and then implements the resulting policies. *See Lippman*, 263 A.D.2d at 900-01 (explaining that “all employees who advise the ultimate decision makers are not automatically policy formulators to be designated managerial”); *County of Nassau v. Nassau Co. Pub. Empl. Rel. Bd.*, 283 A.D.2d 428, 428-29 (2d Dept. 2001); *OSA*, 3 OCB2d 33, at 45, 47-48.

The City’s argument that the Director of Motor Transport’s budgetary responsibilities are evidence of managerial status is unpersuasive. The Director of Motor Transport’s duties with respect to allocating funds from an annual expense budget and requesting funding for initiatives undertaken by the Department are not policy-making. We have previously held eligible for collective bargaining employees with budgetary duties similar to the Director of Motor Transport, including “overseeing and maintaining unit budgets,” and “we reiterate that these budgetary duties alone are insufficient to establish that an employee formulates policy.” *CWA*, 2

OCB2d 13, at 22; *see also FIT*, 42 PERB ¶ 3018 at 3063 (2009) (finding eligible for collective bargaining an employee who assisted in preparing the employer’s proposed budget and monitored the use of funds allocated to each department).

We note that, in *Local 621, SEIU*, 78 OCB 2, we found that ADFMs had significant responsibilities that are similar to Director Dimesa’s. Nevertheless, despite ADFMs’ “substantial latitude to use their independent judgment in implementing policy and running their respective areas,” we found that—with the exception of one employee at DCAS who has an essential role in policy formulation for all city-wide fleet activities—ADFMs were eligible for collective bargaining because their discretion is exercised within the boundaries of guidelines promulgated by DCAS and outlined by their superiors, some of whom are represented by a union for purposes of collective bargaining.¹⁸ *See id.* at 20. Similar to restrictions faced by ADFMs, the Director of Motor Transport’s discretion is generally exercised within the limits set forth by the Executive Director of the Support Services Bureau, his superiors, and the Police Commissioner. Moreover, in *Local 621, SEIU*, 78 OCB 2, we found that, while ADFMs’ examples of revising, improving, and/or creating procedures involved a high level of professional judgment, they did not rise to the level of policy formulation. *See id.* at 20.

The second type of manager who is excluded from collective bargaining is one who “may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and

¹⁸ Despite the City’s contentions, in *Local 621, SEIU*, 78 OCB 2, we did not find that the Director of Motor Transport is one of the positions above ADFM that has the authority to put a proposed policy into effect. The managerial status of the Director of Motor Transport was not at issue in that matter. At that time, the Director of Motor Transport reported to an employee who was represented for purposes of collective bargaining.

requires the exercise of independent judgment.” CSL § 201.7(a)(ii). To be managerial, this employee must be “a direct participant in the preparation of the employer’s proposals and positions in collective negotiations and an active participant in the negotiating process itself . . . have the authority to exercise independent judgment in the employer’s procedures or methods of operation as necessitated by the implementation of [collective bargaining] agreements,” or, concerning personnel administration, “exercise independent judgment and fundamental control over the direction and scope of the employer’s mission.” *OSA*, 3 OCB2d 33, at 34 (citing *County of Rockland*, 28 PERB ¶ 3063, at 3141-42 (1995)). Essentially, to be considered managerial based upon personnel administration duties, an employee must “participate in personnel matters in a non-routine way[.]” *Matter of City of New York*, Index No. 402496/10, slip op. at 5.

We find that the Director of Motor Transport is not managerial based on labor relations responsibilities because the record does not establish that Director Dimesa or former Director Martinez have ever had any involvement with the collective bargaining process or contractual grievances. We also find that the Director of Motor Transport is not managerial based on personnel administration responsibilities because he does not participate in personnel matters in a non-routine way. While the City argues that the Director of Motor Transport has a major role in personnel administration, there is a “critical and long-standing distinction” between managers involved in personnel administration that are excluded from collective bargaining, and “the broader category of employees who perform supervisory functions,” who are eligible for collective bargaining. *Lippman*, 263 A.D.2d at 901; *see also Metro Suburban Bus Auth. v. Pub. Empl. Rel. Bd.*, 48 A.D.2d 206, 211 (3d Dept. 1975). Director Dimesa’s duties related to hiring, assigning, transferring, promoting, and disciplining employees, as well as approving or rescinding their leave requests, are primarily supervisory in nature. *See OCB*, 3 OCB2d 33, at

68. This Board has held that such supervisory responsibilities do not constitute a managerial level of responsibility under the NYCCBL and the Taylor Law. *See, e.g., Local 621, SEIU*, 78 OCB 2, at 21; *see also Lippman*, 263 A.D.2d at 901-02; *County of Rockland*, 28 PERB ¶ 3063, at 3142. Employees in titles like the Director of Motor Transport, who are involved in command discipline and the suspension of subordinate employees, have been found to be eligible for collective bargaining. *See Uniformed Sanitation Chiefs Assn.*, 66 OCB 4, at 29-30.

Employees are determined to be confidential and ineligible for collective bargaining if they “assist and act in a confidential capacity to” managerial employees who are significantly involved in labor relations and/or personnel administration. *Id.*; *see OSA*, 3 OCB2d 33, at 22. Supervisory duties alone do not warrant a confidential designation. *See OSA*, 3 OCB2d 33, at 79. To be designated as confidential, an employee must: (1) assist a manager in the delivery of labor relations and/or personnel administration duties; and (2) be acting in a confidential capacity to that manager. *See OSA*, 3 OCB2d 33, at 38-39; *DC 38*, 78 OCB 7, at 43; *Lippman*, 263 A.D.2d at 902. The two parts of the test are distinct, and, therefore, satisfaction of one prong might not satisfy the other. *See Town of Dewitt*, 32 PERB ¶ 3001, at 3002.

Regarding the first prong, it is “the employee’s involvement in collective negotiations, the administration of collective bargaining agreements, or personnel administration [that] makes him or her ineligible for inclusion in collective bargaining.” *OSA*, 3 OCB2d 33, at 39 (citing *OSA*, 78 OCB 5, at 41 (BOC 2006), *affd. sub nom., Matter of NYC Health & Hosps. Corp. v. Bd. of Cert. of the City of N.Y.*, 2007 N.Y. Slip. Op 30921(U) (Sup. Ct. N.Y. Co. Apr. 23, 2007) (Tolub, J.)). Regarding the second prong, the employee “must be serving in a position the nature of which is one of trust and confidence, vis-à-vis the § 201.7(a)(ii) manager.” *OSA*, 3 OCB2d 33, at 39 (quoting *Town of Ulster*, 36 PERB ¶ 3001, at 3002).

We find that the Director of Motor Transport does not satisfy either prong of the confidential status test. The record does not establish that the Director of Motor Transport assists with labor relations and/or personnel administration duties or that he has a confidential relationship with a manager who has significant involvement in labor relations and/or personnel administration.¹⁹ There is no evidence that the Director of Motor Transport has access to any confidential information concerning labor relations, and the City's argument regarding the Director of Motor Transport's duty of negotiating the labor rate for outside contractors is unpersuasive. Similarly, the Director of Motor Transport's access to information about sensitive personnel matters is not dispositive because "knowledge of personnel or disciplinary matters is often inherent in supervisory positions and does not warrant a confidential designation where . . . it is limited and does not encompass labor relations information significant to the basic mission of the employer." *Lippman*, 263 A.D.2d at 903; *see also Matter of NYC Health & Hosps. Corp.*, 2007 N.Y. Slip. Op 30921(U), at 7-8. The Director of Motor Transport's access to information concerning budget reductions or confidential rental vehicles (undercover cars) also is not dispositive because the City "has not shown that the information to which [the Director of Motor Transport is] exposed, and the duties [he] perform[s], ha[s] a direct relationship to and impact upon collective negotiations and the administration of collective bargaining agreements." *Lippman*, 263 A.D.2d at 903; *see also Matter of City of New York*, Index No. 402496/10, slip op. at 5; *CWA*, 2 OCB2d 13, at 14-15, 22, 50-51; *DC 37*, 30 OCB 32, at 16-17 (BOC 1982) (finding employees, with confidential budgetary information, eligible in the absence of any relevance to collective bargaining).

¹⁹ We again note that the Director of Motor Transport previously reported to an employee who was represented for purposes of collective bargaining.

We have considered the City's remaining arguments and find them to be unpersuasive. In sum, the testimony and documentary evidence indicate that the Director of Motor Transport does not formulate policy, does not have a significant involvement in labor relations and/or personnel administration, and does not assist, in a confidential capacity, a manager, who has a significant involvement in labor relations and/or personnel administration. As a result, on this record, we are constrained to find that the Director of Motor Transport is eligible for collective bargaining. The City did not rebut the Union's assertion that the Director of Motor Transport has a sufficient community of interest with members of the Union's bargaining unit. Accordingly, the employee in the title Director of Motor Transport (Police Department) is appropriately added to Certification No. 55-70.

ORDER

Pursuant to the powers vested in the Board of Certification by the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3), it is hereby

ORDERED, that the employee in the title Director of Motor Transport (Police Department) (Title Code No. 92580) is eligible for collective bargaining; and it is further,

ORDERED, that Certification No. 55-70 (as previously amended) be, and the same hereby is, further amended to include the title Director of Motor Transport (Police Department) (Title Code No. 92580), subject to existing contracts, if any.

Dated: November 16, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

NOTICE OF AMENDED CERTIFICATION

This notice is to acknowledge that the Board of Certification has issued a Decision and Order as follows:

DATE: November 16, 2011 **DOCKET #:** AC-61-10

DECISION: **4 OCB2d 57 (BOC 2011)**

EMPLOYER: City of New York, Police Department
One Police Plaza
New York, New York 10038

CERTIFIED/RECOGNIZED BARGAINING REPRESENTATIVE:

Local 621, Service Employees International Union, AFL-CIO
75 Darcy Circle
Islip, New York 11751

AMENDMENT: Certification No. 55-70 has been amended to add the following title/code:

Director of Motor Transport (Police Department)
(Title Code No. 92580)