

L.854, UFOA, IAFF v. City, 50 OCB 15 (BOC 1992) [15-92 (Cert.)]

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF CERTIFICATION

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In the Matter of the Certification  
Proceeding

-between-

Uniformed Fire Officers Association  
Local 854, IAFF, AFL-CIO,

DECISION NO. 15-92

Petitioner,

DOCKET NO. RU-1096-91

-and-

The City of New York,

Respondent.

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DECISION AND ORDER

On September 18, 1991, Local 854, Uniformed Fire Officers Association, IAFF, AFL-CIO ("the Union") filed a representation petition with the Board of Certification seeking to represent in a separate bargaining unit the employees in the title of Administrative Fire Marshall (Uniformed) ("AFM") within the Bureau of Fire Investigations ("BFI") of the New York City Fire Department. The Union did not seek to represent the AFM serving in the in-house title Chief Fire Marshal because it considers this position to be a managerial assignment. By letter dated December 3, 1991, the City of New York opposed the petition, claiming that the title is managerial and/or confidential and,

therefore, ineligible for bargaining under Section 12-305 of the New York City Collective Bargaining Law ("NYCCBL").<sup>1</sup>

By direction of the Board of Certification, this matter was assigned to a Trial Examiner for hearings on the issue of whether the employees serving in this title are managerial and/or confidential employees. During two days of hearings on June 22, 1992 and July 1, 1992, the parties were given a full opportunity to present evidence and arguments in support of their respective positions. The record was closed with the submission of post-hearing briefs on September 11, 1992.

In its petition, the Union sought to have the AFM title represented in a separate bargaining unit. With the consent of the City, by letter dated October 15, 1992, it amended its petition by seeking to represent the title "in any unit deemed appropriate, including ... representation in the existing UFOA bargaining unit or in a separate bargaining unit of Administrative Fire Marshals."

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<sup>1</sup>Section 12-305 of the NYCCBL states, in relevant part:

**Rights of public employees and certified employee organizations.** Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. However, neither managerial nor confidential employees shall constitute or be included in any bargaining unit, nor shall they have the right to bargain collectively; ... (emphasis added).

BACKGROUND AND FINDINGS OF FACT

To most effectively provide the public with comprehensive service, the New York City Fire Department is comprised of seventeen bureaus, each with particular responsibilities for fire prevention and protection. Many of these bureaus have within them numerous divisions for handling specialized matters, such as special operations and special units.

To maintain effective lines of command and communication among the 11,000 uniformed employees within these bureaus, the Department has developed a centralized hierarchical command structure. Each of the seventeen bureaus has one person in charge, such as a Chief Fire Marshall, Director, or Chief in Charge, responsible for running the command. The bureau head, who may have a support staff of some assistants or deputies, reports to one of approximately ten Assistant or Deputy Fire Commissioners. Each Assistant or Deputy Fire commissioner, who has responsibility for a specific policy area within the Department, such as budget and fiscal policy, personnel, or legal matters, reports to the Fire Commissioner, who has the ultimate responsibility for the whole Department.

The Bureau of Fire Investigation is responsible for the investigation of fires, determination of their origin and cause, detection of any incendiary conduct, and identification, arrest and prosecution of people responsible for setting fires. Its mission and goals are determined with reference to the

Administrative Code of the City of New York, the Penal Law, and the Criminal Procedure Law. BFI originated in 1863 but was not brought into the uniformed force until 1969, when the formerly civilian employees were incorporated into the uniformed force of the Fire Department. BFI has approximately 240 uniformed employees. Its organizational structure, in descending order, consists of the following in-house titles:

- Fire Commissioner
- Deputy Fire Commissioner
- Chief Fire Marshall
- Assistant Chief Fire Marshall
- Area Commanders
- Borough Commanders
- Supervising Fire Marshalls
- Fire Marshalls

This command structure became effective on May 20, 1992. The civil service title Administrative Fire Marshall currently has six employees serving in four in-house titles: Chief Fire Marshall John Stickevers, Assistant Chief Fire Marshall Thomas Sweetman, Area Commanders Thomas Clarke and Donald Forster, and Borough Commanders Joseph De George and Walter MCarthy.

Chief Stickevers is responsible for the command of BFI and has the ultimate authority to determine and implement its policies, administer its personnel city-wide, and coordinate its resources. Chief Stickevers reports directly to Deputy Commissioner Clinton, with whom he meets daily; Deputy Commissioner Clinton reports to Commissioner Rivera. Chief Stickevers is on call 24 hours a day, seven days a week. Although each of the other five AFMs serves as the Acting Chief

Fire Marshall on weekends, Chief Stickevers remains in constant communication with the command throughout the weekend and receives a direct report of the weekend's events on the following Monday morning.

As second in command to Chief Stickevers, Assistant Chief Sweetman directly supervises the Area Commanders, Borough Commanders, and headquarter staff operations. He meets with Chief Stickevers each day to discuss the affairs of the Bureau and provides advice, suggestions, and evaluations concerning Chief Stickevers' policy directives. Assistant Chief Sweetman regularly visits the borough commands and brings to Chief Stickevers' attention any policies or situations in need of special attention.

Until May, 1992, there were four commands covering the City of New York. AFMs Clarke, Forster, DeGeorge and McCarthy each supervised one of the four commands and performed identical duties. On May 20, 1992, the Department effected a budget cut. As a result, the BFI created two area commands, each of which is comprised of two borough commands. Area Commander Clarke oversees Brooklyn, Staten Island, and Manhattan south of 59<sup>th</sup> Street. Area Commander Forster oversees the Bronx, Queens, and Manhattan north of 59th Street. The Area Commanders supervise their respective commands, including all matters of personnel, discipline, assignment of work, and coordination of resources. Each Area Commander is directly responsible for the the Borough Commanders, the supervising fire marshalls, and fire marshalls

within his command. Each Area Commander serves as Acting Chief every fifth weekend and is responsible for interacting with other agencies, community leaders and politicians.

Each of the two Borough Commanders has administrative responsibility for his particular command, oversees investigations and supervises a staff of 20 supervising fire marshalls and 97 fire marshalls. Each Borough Commander serves as Acting Chief every fifth weekend, assumes the duties and responsibilities of Area Commanders when the Area Commander is absent or on leave, and acts as liason with the Police Department, District Attorney's office, Community Boards, and politicians.

The evidence presented in this proceeding shows that AFMs receive annual salaries in excess of \$70,000 and are included in the Managerial Pay Plan. AFMs are on-call twenty-four hours a day and do not receive overtime compensation for hours worked in excess of forty hours per week. There is no history of collective bargaining with regard to the titles at issue here.

#### POSITIONS OF THE PARTIES

##### Union's Position

The Union contends that the City has failed to meet its burden of proving that the Administrative Fire Marshalls ("AFMs") are managerial and/or confidential employees within the meaning of the New York City Collective Bargaining Law ("NYCCBL"). The Union has stipulated, however, that although the Chief Fire

Marshall is included in the title Administrative Fire Marshall, it does not seek to include this assignment in its petition because it regards that assignment as managerial.

The Union alleges that the record in this proceeding conclusively establishes that the AFMs do not formulate policy and have little or no involvement in the decision-making process; that at most they are supervisory employees. The Union contends that the AFMs serve as intermediaries between the Chief Fire Marshall and the field, where they implement the policies established by the Chief Fire Marshall and pass on to him suggestions gathered from their command. These responsibilities, petitioner argues, do not meet the criteria established by the Board to determine managerial status.

The Union alleges that the AFMs do not participate regularly or significantly in the process of formulating policy. Instead, the Union claims that the AFMs' role is limited to implementing and occasionally commenting on policies and decisions established and communicated to them by the Chief Fire Marshall. The Union argues that AFMs meet with the Chief Fire Marshall infrequently, that they play no role in the policy-making process, and that they have no authority to alter existing policy.

The Union alleges that contrary to the City's assertion, the attendance of AFMs at the Monday meetings does not support a finding of managerial status. Since the Acting Chief keeps the Chief Fire Marshall apprised of important events throughout the weekend, the Union argues that these meetings do not constitute

managerial functions but serve only to recapitulate the events that occurred during the weekend. That these meetings are not policy-making sessions, the Union submits, is further evidenced by the fact that the Chief's Assistant, a non-managerial employee, often attends.

The Union contends that the record also demonstrates that the AFMs have a limited involvement in personnel decisions. It argues that while the AFMs have discretion in the implementation of personnel decisions within their command, their discretion must be exercised within the boundaries of specified Department or Bureau guidelines. These operating guidelines sharply restrict the extent to which the AFMs can make manpower decisions, authorize overtime, and reassign employees. In any event, the Union submits, these actions involve only temporary assignments and approval of leave requests.<sup>2</sup>

Moreover, the Union argues that the AFMs' discretion remains limited when they stand in as Acting Chief on the weekends. The Union contends that in accordance with standing orders, the AFMs must inform the Chief Fire Marshall throughout the weekend of all important events and receive his approval for all permanent transfers of manpower or equipment, all modifications of policy, and all disciplinary matters.

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<sup>2</sup>Local 854 cites Decision Nos. 19A-70, 73-68, 13-74 and 34-81 in support of its assertion that the personnel functions performed by AFMs have traditionally been considered supervisory rather than managerial functions.



The Union contends that none of the AF`Ms have any role in labor relations and that they participate in disciplinary proceedings only at the initial informal investigative stage, requiring the AF`M to perform a supervisory function by investigating the matter and filing a report with his superior and the Chief Fire Marshall. Furthermore, with respect to contractual grievances, the Union contends that the Deputy Chief AFMs investigate alleged grievances at their inception and attempt to settle them before they are filed formally.

The Union submits that the record in this proceeding shows that the AFMs play no part in the collective bargaining process. Although the AFMs are involved in the administration of collective bargaining agreements, the Union contends that this involvement is limited to initial investigations of disciplinary matters and grievances and that such involvement is too far removed from the bargaining process to affect the employer's right to effectuate its labor policies.

The Union argues that AFMs perform essentially supervisory functions. Applying the "indicia of managerial status" relied upon by the City to the record, it contends that AFMs do not formulate policy, participate in the collective bargaining process, or have more than a limited involvement in labor relations or personnel administration. While Local 854 acknowledges that AFMs are included in the Managerial Pay Plan, it asserts that salary is not a controlling factor in determining

managerial status.<sup>3</sup> "If it were," the Union argues, "the employer would be at liberty to designate any title as managerial merely by unilaterally including it in the managerial pay plan."

The Union argues that although AFMs have been designated as managerial in the Department's table of organization, these documents, issued unilaterally by the City, do not serve as an accurate portrayal of the nature of the duties actually performed by the AFMs. In any event, the Union submits, it is well-settled that job specifications alone are not controlling as to managerial status.<sup>4</sup>

The Union further argues that an analogy can be drawn between the AFMs and other titles within the Fire Department and within the Police Department that the Board has previously designated as non-managerial. The Union submits that the record demonstrates that the AFMs have comparable levels of supervision, areas of responsibility, latitude in administering Departmental guidelines, and involvement in labor and personnel relations as other titles within the Fire Department and within the Police Department which are eligible for collective bargaining.

The Union disputes the City's assertion that AFMs are "confidential" employees. It states that their meetings with the

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<sup>3</sup>In support of its assertion, Local 854 cites Civil Service Technical Guild. Local 375. DC 37, A.F.S.C.M.E., AFL-CIO v. Anderson, 79 A.D.2d 541, 434 N.Y.S.2d 13(1980) rev'd on other grds, 55 N.Y.2d 618 (1981).

<sup>4</sup>Local 854 cites Decision Nos. 43-69 and 25-69 in support of its assertion.

Chief Fire Marshall cannot be of a "confidential" nature because they are also attended by Supervising Fire Marshall Knoblich, a non-managerial employee. Moreover, it argues that the record is devoid of evidence that AFMs act in a confidential capacity to the Chief Fire Marshall, who is the only officer who formulates policy.

With regard to the City's assertion that AFMs are "confidential" because they "regularly have access to confidential information in labor relations and personnel matters," the Union alleges that there is no evidence that AFMs work with confidential information. It notes, for example, that Supervising Fire Marshall Knoblich and Fire Marshal Peknic, Chief Stickevers' aide, were informed of the recent reduction in force at the same time as the AFMs, and that the budgetary information available to the AFMs is also freely available to the public.

Lastly, the Union contends that the sensitive investigations involving famous or public figures conducted by the AFMs do not constitute the type of confidential information sufficient to confer confidential status. The Union submits that the Taylor Law concerns only internal labor-management matters, not matters of privacy. Local 854 argues that this information does not affect the collective bargaining relationship or the administration of agreements and cites to Decision No. 13-74 in support of the proposition that AFMs cannot be classified as "confidential" simply because their work is of a confidential nature.

City's Position

The City contends that AFMs are both managerial and confidential employees under the NYCCBL and do not have the right to bargain collectively. The City submits that these employees should be classified as managerial because they regularly participate in formulating BFI policy and make suggestions, provide advice and counsel, and analyze the effects of implementation. In support of its position, the City notes that AFMs meet with Chief Stickevers in both formal and informal settings. In these meetings, the City alleges, they discuss BFI policies, perceived problems within the BFI, and ways to alleviate problems by altering existing policies or creating new ones.

The City contends that the essential role played by the AFMs in the BFI's policy-formulation process is further evidenced by their attendance at Monday meetings with Chief Stickevers. The City submits that at these meetings, the AFM who had City-wide duty for the weekend discusses with Chief Stickevers the events which transpired over the weekend, alerts him to problems, updates him on events and investigations underway, and gives him suggestions on how to resolve existing problems within the command. The City contends that Chief Stickevers follows these suggestions in the form of a Bureau-wide policy or an informal policy within the command where the problem exists.

The City maintains that in prior decisions the Board has established that in order to be classified as managerial an

employee need not possess the direct authority or responsibility to select among options and put a proposed policy into effect. Rather, an employee must only be a party to the policy-formulation process in such a way that he participates in the process which results in a policy proposal and the decision to put such proposal into effect.<sup>5</sup> In fact, the City argues, the Board has determined that "(p)articipation in the formulation of policy includes the process of the party with the decision making power seeking and relying upon the advice and recommendations of those subordinate to him when making policy decisions."

Applying these principles to the instant case, the City contends that the evidence shows that AFMs have substantial discretion and a wide degree of latitude in carrying out their duties and implementing the broadly stated policies of the BFI. Moreover, the City urges, the Board has previously held that individuals "who set priorities and determine what actions must be taken, in the form of rules and regulations to effectively and efficiently run their units, to meet the goals and standards set by the department, are managerial employees."<sup>6</sup>

The City contends that Assistant Chief Sweetman, for example, has "unfettered discretion" in effectuating the policies of the Bureau to meet the stated goals and standards. Chief

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<sup>5</sup>In support of its assertion, the City cites Decision Nos. 36-82, 6-84, and 7-92.

<sup>6</sup>The City cites Decision No. 7-92 in support of its assertion.

Sweetman's duties and responsibilities include implementing all directives of the BFI, supervising the headquarters staff, and serving as Acting Chief every fifth weekend or when Chief Stickevers is on leave. The City further maintains that one of Chief Sweetman's responsibilities, implementing the Bureau's response policy, requires the exercise of independent judgment.

The City asserts that because they set priorities and establish rules to run their units, Area Commanders Forster and Clarke enjoy a substantial degree of discretion and utilize independent judgment to implement the policies of the BFI. Each Area Commander makes all personnel decisions, deploys staff and assigns tasks to individuals in his command. The City contends that Area Commanders have discretion to alter existing policy within their command when, based on their independent judgment, such action is necessary "to defuse any type of volatile situation that may be occurring within (the) command or at the scene of an investigation." The City cites as examples the Bureau's response to the Happyland Social Club fire and the hotel fires in midtown Manhattan.

The City argues that Borough Commanders McCarthy and DeGeorge enjoy similar latitude in the exercise of discretion and independent judgment. The City maintains that to implement the policies of the BFI, the Borough Commanders may alter or suspend Bureau policy at an investigation or fire scene, allocate the necessary resources and personnel to conduct "sting" operations, and suspend Bureau policies, such as the dress code, to increase

morale within their command. In addition to implementing the policies of the BFI, the City asserts the Borough Commanders also formulate rules within their command to operate more effectively and efficiently and to reinforce the policies of the Bureau.

The City maintains that previous decisions of the Board support its claim that AFMs are managerial employees. It notes that the following factors have been considered in making determinations of managerial status under the NYCCBL:

- (1) position in the table of organization;
- (2) number of subordinate employees;
- (3) area of authority;
- (4) power to assign and transfer personnel;
- (5) involvement in personnel administration;
- (6) inclusion in the managerial pay plan;
- (7) history of collective bargaining;
- (8) salary range;
- (9) overtime compensation;
- (10) involvement in the disciplinary process.<sup>7</sup>

The City asserts that it has presented evidence showing that the duties required to be performed by AFMs render the title managerial with respect to all of the cited factors.

The City claims that AFMs are directly involved in the disciplinary process. It maintains that AFMs conduct investigations, provide information to form the basis of the charge, and under Command Discipline, propose and impose a

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<sup>7</sup>The City cites Decision Nos. 65-70, 19-71, 41-72, 46-72, 63-72, 76-72, 63-74, 22-75, 6-84, 5-85, 13-86, and 7-92 in support of this assertion.

We note that the Board has traditionally considered three other criteria when determining managerial and confidential status: preparation of budgets and allocation of funds; job specifications; and similarity with state civil service titles.

penalty. The City asserts that AFMs are vested with substantial discretion in determining the appropriateness of granting overtime compensation, and that except for certain limited circumstances, only AFMs are authorized to approve overtime.

The City notes that in prior decisions the Board has held that employees who regularly assist and act in a confidential capacity to persons who formulate, determine and effectuate policies in the field of labor relations and personnel matters are "confidential" under the NYCCBL. Applying this standard to the instant case, the City argues that AFMs are confidential employees because they regularly have access to confidential information and reports from the Commissioner's level as well as information regarding personnel reductions. The City notes that although the AFMs do not formulate policy regarding staff reductions, they are advised of the decision to reduce personnel and are involved in planning its implementation.

The City also contests Local 854's comparisons to other titles, found not to be managerial, within the Fire Department's Bureau of Fire and Police Department, and the implication that the duties of those positions should be compared with the duties of AFMs. These attempted comparisons, argues the City, were based on the level of supervision and the number of subordinate employees within each command. The City submits that this criteria is merely one of the many indicia of managerial status which the Board considers in determining whether a title is



managerial and does not, by itself, determine an employee's collective bargaining status.

The City maintains that the weight of the evidence presented in this proceeding supports the conclusion that AFMs assist in the formulation, determination and effectuation of all policies within the Bureau. Furthermore, the City argues, the evidence shows that AFMs have access to confidential information regarding labor relations and personnel matters. The City submits that the Board should find the title, employees and positions at issue herein to be managerial and/or confidential and, accordingly, dismiss the petition filed by Local 854.

#### DISCUSSION

In rendering determinations as to the managerial or confidential status of employees, we apply Section 201.7(a) of the Taylor Law, which provides, in relevant part, as follows:

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).

In implementing this section of the Taylor Law we consider the following factors as reliable indicia of managerial status:

- (a) position in the table of organization;
- (b) number of subordinate employees;
- (c) area of authority;

- (d) power to assign and transfer personnel;
- (e) salary range, involvement in personnel administration;
- (f) overtime compensation;
- (g) preparation of budget and allocation of funds;
- (h) inclusion in the Management Pay Plan and Welfare Fund;
- (i) history of collective bargaining;
- (j) personnel responsibility;
- (k) involvement in discipline and discharge;
- (l) job specifications;
- (m) similarity with state civil service titles.

We recognize that not all of these factors are relevant or applicable in any given case. Additionally, with respect to confidential status, we have relied upon the employee's relationship with managerial employees, and whether that relationship regularly provides access to confidential information concerning labor relations and/or personnel matters.

The formulation, determination and effectuation of an employer's policies is an important indication of manageriality.<sup>8</sup> Formulating policy means developing the specific objectives of a governmental agency to fulfill its mission, and the methods, means and extent of achieving such objectives.<sup>9</sup> Employees who formulate policy include not only those with the authority or responsibility to select among options and to put a proposed policy into effect, but also persons who regularly participate in the "essential process" which results in a policy proposal and the decision to put such proposal into effect.<sup>10</sup>

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<sup>8</sup>Decision Nos. 73-68; 34-81; 7-92.

<sup>9</sup>Decision Nos. 36-82; 7-92.

<sup>10</sup>Decision Nos. 36-82; 7-92.

The City contends that AFMs are managerial because they participate in formulating policy for the BFI. It maintains that this participation occurs through their formal and informal meetings with Chief Stickevers, in which discussions range from policy formulation and implementation to updates of investigations and notation of problems. The record discloses, however, that only Assistant Chief Sweetman is a regular and significant participant in the BFI's policy formulation process.

Assistant Chief Sweetman is the Bureau's Executive Officer. In addition to supervising the headquarters staff operations, the Area Commanders, and the Borough Commanders, his duties include providing suggestions, counsel, and analysis to Chief Stickevers concerning policy initiative and implementation. Meetings between the two men occur informally on a daily basis. Their discussion concerns updates of the daily affairs of the various commands, the assessment of plans and strategies to remedy existing problems within the Bureau, and the issuance of directives to increase the Bureau's efficiency. Assistant Chief Sweetman provides expert advice and, in effect, serves as a sounding board for Chief Stickevers. Such a situation enables Chief Stickevers to consider alternatives to a particular policy proposal as well as the potential effects of its implementation. Although Chief Stickevers maintains ultimate responsibility and exclusive authority for all policy decisions affecting BFI, Assistant Chief Sweetman is an essential participant in the

process which leads to the formulations of this policy.<sup>11</sup> We therefore find Assistant Chief Sweetman to be a managerial employee within the meaning of the Taylor Law and, accordingly, declare him ineligible for collective bargaining.

Although the civil service title Administrative Fire Marshal includes Chief Stickevers and Assistant Chief Sweetman, for purposes of clarity all further references to AFMs herein will concern only Area Commanders Clarke and Forster and Borough Commanders DeGeorge and McCarthy.

The evidence confirms that Chief Stickevers meets with the AFMs, discusses the affairs of their commands, elicits their opinions regarding the alleviation of problems, and confers with them about the implementation or alteration of policies. Participation in the formulation of policy, however, must be "regular," "active," and "significant" to support a finding of managerial status.<sup>12</sup> The record establishes that the AFMs' participation in the policy-formulation process is sufficiently limited to support the conclusion that AFMs do not meet the criteria necessary to confer managerial status within the meaning of the Taylor Law.

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<sup>11</sup>See Decision No. 19-71, wherein we explained, in declaring the assistant to a managerial employee ineligible for collective bargaining, that the assistant "is involved in, and familiar with, all functions and activities of the Administrative Manager and, in fact, at various times performs all of the duties of the Administrative Manager and fully replaces him when he is absent."

<sup>12</sup>Decision Nos. 73-68; 36-82; 34-81.

The evidence shows that although Chief Stickevers meeets with the AFMs, the frequency and nature of these meetings are such that AFMs do not regularly or significantly participate in making policy. The Chief may consider the AP74s' opinions when making a policy decision. The record discloses, however, that he commonly makes policy decisions without conferring with the AFMs, and that when such meetings do occur, the discussions generally concern the daily affairs of the boroughs rather than policy proposals. Furthermore, the record shows that only five formal staff meetings between Chief Stickevers and all of the AFMs have occurred in the last two years.

In Decision No. 61-69 we held that infrequent and irregular consultations fall short of the regular and significant participation in policy-making which is indicative of managerial status. "Active" and "regular" participation requires more than the random telephone calls and occasional meetings that occur between Chief Stickevers and the AFMs. In Decision No. 19-71 we recognized that an employee's participation in the policy-making process may be limited, but still significant enough to support a finding of managerial status. In the instant case, the evidence does not support such a finding. The extent to which Chief Stickevers makes policy decisions without consulting with the AFMs, as well as the lack of regularly scheduled meetings between Chief Stickevers and the AFMs, lead us to conclude that AFMs are

not "so closely connected with the policy making process as to constitute a part of that process themselves."<sup>13</sup>

With regard to the Monday meetings between Chief Stickevers and the Acting Chief for the weekend, we find they do not constitute significant participation in the policy-formulation process. Since the AFMs are required to keep Chief Stickevers apprised of all important events throughout the weekend, and receive his approval for all permanent transfers of manpower or equipment and all modifications of policy, we find that these meetings serve generally as a recapitulation of the events of the weekend. Similarly we find that the formal meetings between Chief Stickevers and the AFMs are merely a review of the affairs and problems of the borough commands and that the presence of Supervising Fire Marshall Knoblich, a non-managerial employee, further demonstrates that these meetings are not policy-making sessions.

The City contends that AFMs play a significant role in personnel matters, requiring the exercise of a substantial degree of independent judgment. The record indicates that AFMs have a certain amount of discretion and authority in carrying out their duties and responsibilities. Discretion, however, is not the touchstone if it must conform to the employer's established policy.<sup>14</sup> The evidence demonstrates that while AFMs have

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<sup>13</sup>Decision No. 13-74, at 27.

<sup>14</sup>Decision Nos. 73-68; 34-81.

substantial latitude to use their independent judgment in implementing policy and running their commands, their discretion must be exercised within the boundaries of specified Department guidelines. It is the conditions under which discretion may be exercised, not the exercise of discretion itself, which we find relevant in determining manageriality. Employees who exercise their discretion only when permitted by policy, and exercise it within the specified guidelines of that policy, do not have the degree of freedom or authority to make decisions necessary to invoke managerial status. We conclude, therefore, that AFMs do not exercise managerial discretion as contemplated by the Taylor Law.

The record discloses that AFMs exercise discretion outside the boundaries of stated guidelines only when making decisions concerning improvements in the efficiency of their respective commands and in response to emergency situations. AFMS may alter existing Departmental policy by suspending the dress code for example, in order to improve the morale of the rank and file. In order to evidence managerial status, however, any such exercise of discretion must be "importantly related to the mission of the agency" in order to evidence managerial status.<sup>15</sup> The principal mission of BFI is to investigate fires and to identify and arrest

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<sup>15</sup>See Decision No. 97-73, wherein we held that "(o)therwise any employees formulating procedures in a narrow functional area only incidentally related to the basic mission of the agency would be considered managerial."

persons suspected of arson. Personnel decisions affecting the morale of the rank and file are ancillary to the fulfillment of such duties. AFMs have the authority to suspend existing policy only emergencies, when such action is necessary to defuse a volatile or dangerous situation. Such occurrences are rare, and the AFMs' continued exercise of discretion in such situations would not be jeopardized by our decision in the instant case.

AFMs have substantial discretion within the agency in areas such as deployment of manpower and equipment, approval of leave requests, and performance of job evaluations. In order to be classified as managerial employees, however, AFMs must play a "major role" in personnel administration which is not "more concerned with the day to day routine of ... following policy, rather than establishing it."<sup>16</sup> We find that the functions performed by AFMs do not reach this level. AFMs perform essentially supervisory functions and act as a liaison between Chief Stickers and the rank and file in the boroughs.<sup>17</sup>

The record reveals that AFMs neither prepare for nor conduct collective negotiations, nor play a major role in the administration of agreements. With regard to the other factors relied upon by the Board in determining managerial status, we find that they also support the conclusion that AFMs are non-

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<sup>16</sup>Decision Nos. 73-68; 34-81; 13-86.

<sup>17</sup>See Decision 19A-70, wherein we held that "the recommendation of merit increases or disciplinary action, time off, and work assignments are supervisory, not managerial functions."



managerial employees. Although the Department's table of organization designates the AF?4s as managerial, we note that this document, issued unilaterally by the City, does not serve as an accurate portrayal of the duties performed by the AFMs. In addition, we have previously held that job specifications alone are not controlling as to managerial status.<sup>18</sup> Although the City may claim that a particular title is managerial and is excluded from collective bargaining, we held in Decision No. 7-92 that, under the NYCCBL, only the Board has the authority to make such a finding.

The evidence also discloses that AFMS play a limited role in the disciplinary process. When an employee agrees to "command discipline," set guidelines exist for determining the penalties for a variety of disciplinary infractions. Otherwise, the AFMs' participation is limited to informal investigation and reporting. In addition, although AFMs have the authority to reassign personnel, these transfers are not permanent, and occur only in emergencies or special situations.<sup>19</sup>

As to the alleged confidential status of AFMs, we find that the evidence fails to disclose that their duties and responsibilities are of a confidential nature. The Taylor Law requires that determinations of confidential status be based upon the employee's relationship with managerial employees, and

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<sup>18</sup>Decision No. 43-69.

<sup>19</sup>Decision No. 25-69.

whether that relationship regularly provides access to confidential information regarding labor relations and/or personnel matters.<sup>20</sup> The City has failed to prove either that such a relationship exists or that AFMs have access to confidential material. The inclusion of AFMs in collective bargaining units would not "give rise to conflicts of interest inimical to the bargaining process and to full and fair representation of the employer's interests."<sup>21</sup>

Accordingly, for all of the reasons stated above, we find and conclude that all of the employees in the title Administrative Fire Marshall, with the exception of Chief Stickevers and Assistant Chief Sweetman, are neither managerial nor confidential employees and are eligible for collective bargaining. We accept the parties' stipulation that the position of Chief, as it is presently constituted, is managerial within the meaning of the law. It appears to the satisfaction of the Board that the terms of the stipulation are consistent with the record adduced herein and with the rights established under the statute.<sup>22</sup>

The Union now represents employees in the titles Supervising Fire Marshal, Lieutenant, Captain, Battalion Chief and Deputy Chief. These are all supervisory title within the Fire

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<sup>20</sup>Decision Nos. 13-73; 20-82; 7-92.

<sup>21</sup>Decision No. 13-74, at 26.

<sup>22</sup>See, e.g., Decision No. 5-91.

Department which were formally Rule X titles. The titles already represented in the existing unit, Certification No. 1 NYC DL #24 have a similarity of job duties, skills, level of supervision, wage structure and salary range. Pursuant to the standards for determining appropriate units set forth in Section 1.02 (j), Title 61, of the Rule of the City of New York (formerly Section 2.10 of the Revised Consolidated Rule of the Office of Collective Bargaining), we find that accretion of the title at issue to Certification No. 1 NYC DL 124, as proposed by the Union in the amendment to its petition, is appropriate. This determination is consistent with our long-held policy of favoring broad-based occupational units and curbing the proliferation of additional groups by accreting new titles to existing units having a community of interest.<sup>23</sup>

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<sup>23</sup>Decision Nos. 46-75; 1-91.

ORDER

PURSUANT to the powers vested in the Board of Certification by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the in-house titles Chief Fire Marshall and Assistant Chief Fire Marshall be, and the same hereby are, designated managerial and confidential, and are exempt from collective bargaining; and it is further,

ORDERED, that the title Administrative Fire Marshall (Uniformed) be, and the same hereby is, designated eligible for collective bargaining; and it is further

ORDERED, that Certification No. 1NYC DL #24 be, and the same hereby is, amended to include employees in the title Administrative Fire Marshall (Uniformed).

DATED: New York, New York  
November 18, 1992

Malcolm D. MacDonald  
CHAIRMAN

Daniel G. Collins  
MEMBER

George Nicolau  
MEMBER