

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

-----X
:
In the Matter of
:
LOCAL 621, S.E.I.U., AFL-CIO,
Petitioner, : Decision No. 7-92
-and- : Docket Nos. RU-973-86
RU-974-86
DEPARTMENT OF SANITATION, CITY :
OF NEW YORK, Respondent. :
:
-----X

DECISION AND ORDER

On August 13, 1986, Local 621, S.E.I.U., AFL-CIO ("Local 621" or "the petitioner") filed petitions with the Board of Certification ("the Board"), docketed as RU-973-86 and RU-974-86, seeking to add three employees in the title Director of Motor Equipment Maintenance (Sanitation) ("Director")¹ and seven employees in the title Deputy Director of Motor Equipment Maintenance (Sanitation) ("Deputy Director")², respectively, to its existing Certification No. 55-70, as amended

¹ The Directors who testified in this proceeding and the units to which they were assigned are as follows:

John Basak, Director, Field Operations Unit
Frank Bianco, Director, Central Repair Shop
John Henneberry, former Director, Special Projects.

² The Deputy Directors who testified in this proceeding and the units to which they were assigned are as follows:

Al Leiter, Deputy Director, Field Operations Unit
Frank Capobianco, Deputy Director, Field Operations Unit
John Brady, Deputy Director, Field Operations Unit
Jack Zimmaro, Deputy Director, Central Repair Shop
Werner Dangel, Deputy Director, Central Repair Shop
Roger Liwer, Deputy Director in charge of the Material Management and Production Control Unit.

Although the petition filed in the case docketed as
(continued...)

by Certification No. 50-82, covering the following titles:

Supervisor of Mechanics (Motor Vehicles) ("SMMV")
Supervisor of Auto Mechanics
Supervisor of Auto Machinists
Supervisor of Machinists.³

The City of New York, Department of Sanitation ("the City" or "the respondent") opposed the petition filed by Local 621, claiming that the titles are managerial and/or confidential and, therefore, ineligible for bargaining under §12-305 of the New York City Collective Bargaining Law ("NYCCBL").⁴

Sixteen days of hearing were held between January 13, 1987 and June 17, 1987, during which time the parties were given a full opportunity to present evidence and arguments in support of their respective positions.⁵ In

²(...continued)

RU-974-86 indicates that Local 621 seeks to add seven employees in the title Deputy Director, Motor Equipment Maintenance, we note that the evidence presented in this proceeding deals with only six Deputy Directors.

³ We note that subsequent to the filing of the petitions herein the title Supervisor of Ironwork was accreted to Certification No. 50-82.

⁴ Section 12-305 of the NYCCBL states, in relevant part, as follows:

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).

⁵ On January 13 and 15, 1987, Local 621 presented evidence in support of its argument that the Directors and Deputy Directors were doing the same work performed by employees designated as Supervising Supervisors (also referred to as "Chiefs") and Assistant Supervising Supervisors (Class I) (also
(continued...))

addition, an inspection of the Central Repair Shop was conducted on July 28, 1987.

The City and Local 621 filed post-hearing briefs on January 15, 1988. Thereafter, the record was closed with the submission of reply briefs on March 4, 1988.⁶

⁵(...continued)
referred to as "Assistant Chiefs") within the Civil Service title Supervisor of Mechanics (MV). In presenting this evidence, Local 621 intended to show that the work now being performed by the Directors and Deputy Directors is the same or nearly the same as the work previously performed in the non-managerial title. After completing the second day of hearings, the Trial Examiner assigned to the case wrote a letter to the parties, dated January 21, 1987, informing them that evidence concerning work performed prior to May 1984 by employees in alleged predecessor titles to those of Director and Deputy Director is not relevant to a determination of the managerial and/or confidential status of the disputed titles and, therefore, would not be admitted into evidence. In reaching this determination, the Trial Examiner cited a line of prior Board decisions which held that only the duties actually performed by the employees in the disputed titles are determinative of the employee's status.

On February 9, 1987, Local 621 filed an appeal of the Trial Examiner's ruling. Local 621 contended that in determining the managerial/confidential status of the titles at issue, "the Board should take into account the similarity between the work now performed by Directors and Deputy Directors as compared to the work previously performed by Chief and Assistant Chiefs." The City opposed Local 621's appeal. By letter dated February 11, 1987, the City claimed that "the sole query with regard to duties and responsibilities must devolve upon the duties and responsibilities of the titles under consideration." Thereafter, on February 18, 1987, Local 621 filed a reply.

On February 18, 1987, the Board, in its Decision No. 2-87, affirmed the ruling of the Trial Examiner. The Board held that "Inasmuch as no determination has previously been made pursuant to Section 2.20 concerning Directors and Deputy Directors or any alleged predecessor title, evidence concerning duties performed in the past by Chiefs and Assistant Chiefs is not relevant."

⁶ It is the policy of the Board of Certification in cases concerning the alleged managerial and/or confidential status of titles in dispute to determine the status of the position in question, not the status of the employee or employees who are currently filling that position. Accordingly, the fact that some
(continued...)

BACKGROUND

The Department of Sanitation ("Department") is responsible for the collection and disposal of refuse generated in the City of New York. The Department has two main operational components: (1) the Bureau of Cleaning and Collection ("BCC") which gathers refuse and other waste matter; and (2) the Bureau of Waste Disposal ("BWD") which disposes of the refuse in the various landfills and waste burning facilities around the City.

The Bureau of Motor Equipment ("BME") is part of the Department's Support Services Division. The mission of the BME is to purchase, repair and maintain the approximately 6200 vehicles and machines which are owned by the City and required for the BCC and BWD to do their jobs. The BME, which employs approximately 1,250 employees, is divided into the following

⁶(...continued)
of the Directors and Deputy Directors who testified at the hearings in this proceeding are no longer employed in that position has no bearing on the Board's decision herein.

units:

ADMINISTRATION, BUDGET AND PERSONNEL:⁷ This unit, headed by Maurice Hogan, an Administrative Manager, is responsible for the preparation of the BME's budget, interviewing and hiring BME personnel, distributing and collecting performance evaluations, producing a newsletter, monitoring the submission of and responses to employee suggestions, and administration of the blood program.

FIELD OPERATIONS: The Field Operations Unit is responsible for the repair and maintenance of the Department's equipment in its seven borough shops and seventy district garages located throughout New York City, as well as the Fresh Kills Operation (Plants I and II). Preventative maintenance and day to day repairs are done at the district locations; semi-major and major jobs, such as brake or spring jobs, engine changes and transmissions, are generally done at the borough shops. Approximately 725 employees work in the Field Operations Unit.

John Basak has been the Director in charge of the Field Operations Unit since January 1986. Reporting directly to Mr. Basak are his office staff, which includes an Executive Assistant; an Assistant Supervising Supervisor, Class II; a Staff Analyst; Office Associates; Mechanics; and three Deputy Directors: Al Leiter, Frank Capobianco and John Brady.

The Deputy Directors are responsible for supervising the borough shops and the satellite garages. Within each borough shop an SMMV, designated as an Assistant Supervising Supervisor, Class II, reports to the Deputy Director. The titles of employees working in the borough shops and satellite garages are Foreman, Supervisor, Auto Mechanic, Auto Service Worker, Welder, Blacksmith, Iron Worker, Auto Electrician, Clerks, Stock Handlers and Senior Storekeepers.

CENTRAL REPAIR SHOP ("CRS"): This unit, which includes approximately 300

⁷ None of the Directors or Deputy Directors at issue in this proceeding work in the Administration Unit.

employees, is responsible for the fourth and fifth floors of the CRS, as well as the Forge Shop located on the second floor. The fourth floor operation involves primarily "off-vehicle" rebuilding work, while the fifth floor concentrates on "on-vehicle" work.

The Director of the CRS until May 1987 was Frank Bianco. Reporting directly to Mr. Bianco (and his successor, Lloyd Hackett) are his office staff (an Executive Assistant and a Secretary), Jack Zimmardo, Deputy Director in charge of the Fourth Floor and Werner Dangel, Deputy Director in charge of the Fifth Floor. Under the jurisdiction of Mr. Zimmardo are the Glass Shop, Upholstery Shop, Electric Shop, Engine Shop, Transmission Shop, Machine Shop, Radiator Shop and Unit Repair Shop. Under the jurisdiction of Mr. Dangel are the Tire Shop, Special Chassis, the Body Shop, the Forge and Tractor Shop, and the Passenger Car Shop. Reporting directly to Mr. Zimmardo and Mr. Dangel are two employees in the title Assistant Supervising Supervisors of Mechanics. Some of the titles of the employees working in the individual shops are Auto Mechanic, Diesel Mechanic, Auto Service Worker, Stock Handler, Welder, Sheet Metal Worker and Auto Machinist.

SPECIAL PROJECTS: The Special Projects Unit consists of various subdivisions including Engineering, Specifications, New Equipment, Research and Development, Warranty and Training. The responsibilities of the Director of Special Projects include purchasing new equipment, reviewing specifications, setting delivery schedules and penalties, evaluating sole source contracts and appearing before the Board of Estimate.⁸ Approximately 28 employees work in the Special Projects Unit in the following titles: SMMV; Supervisor Engineers; Automotive Specialists; Automotive Mechanics and Clerk.

At the time hearings in this proceeding were held the position of Director of Special Projects (previously held by James Henneberry) was vacant.

⁸ We take administrative notice of the fact that the Board of Estimate was eliminated under the revised New York City Charter.

Thereafter, in July or August 1987, the title was assigned to Gerald Manza, a SMMV, Class II.

MATERIALS MANAGEMENT AND PRODUCTION CONTROL: The Materials Management Division is involved in three functions - purchasing materials and parts, receiving goods and supervising the central warehouse. The Production Control Division is responsible for chairing the BME Labor Management Committees⁹, monitoring and maintaining the Profit Center System¹⁰ and conducting routine analyses or investigations on tools and equipment. Together these two divisions employ approximately 120 employees in the titles Executive Assistant; Principal Storekeeper; Purchasing Agent; Clerical titles (ranging from Office Aide to Principal Administrative Associate); Mechanics; Supervisor of Mechanics; Staff and Associate Staff Analysts and Principal Statisticians.

Until May 1987, the Materials Management and Production Control Unit was headed by Roger Liwer, a Deputy Director. Prior to his departure, Mr. Liwer also functioned as the senior staff person for all matters involving the BME and outside agencies.

The chain of command in the BME, in ascending order, is as follows:

Journeyman titles report to the Supervisor Mechanic,
Motor Vehicle

Supervisor Mechanic, Motor Vehicle reports to the
Assistant Supervising Supervisor,
Class II

Assistant Supervising Supervisor, Class II reports to
the Deputy Director

Deputy Directors report to the Director

⁹ The Labor Management Committees generally are composed of local trades people, local supervisors and Deputy Directors. In some cases, Directors, union representatives (usually the shop steward), members of the Deputy Commissioner's Labor Team and analysts from the Production Control Division will also participate on these committees.

¹⁰ Under the Profit Center System reports are produced analyzing the profitability ratio, which is the cost to produce one dollar worth of goods or services.

Directors report to the Deputy Commissioner

Deputy Commissioner reports to the Commissioner.

EVIDENCE ADDUCED AT THE HEARINGS

The evidence presented in this proceeding shows that all of the Directors and Deputy Directors at issue herein earn an annual salary of approximately \$62,000 and \$52,000, respectively¹¹, and are included in the Management Pay Plan. While all of the Directors and Deputy Directors testified that they work in excess of their regularly scheduled work week, they do not receive extra compensation or time off for such work.

Generally, the Directors' duties include reviewing and analyzing reports (e.g., equipment status reports, fleet size reports) to determine the condition of their operational area, patterns that are developing and potential problems that must be addressed. Directors use these reports to pinpoint where equipment is lacking and, therefore, to determine priorities in their work.

According to Mr. Basak, Directors have a more or less free hand in running their operation; the Deputy Commissioner never laid down rules and regulations for Directors to follow. Mr. Basak noted, however, that if he wanted to implement a new BME policy, such as taking some of the tractor work out of the field and bringing it into the CRS, he would first discuss it with the Deputy Commissioner.

Mr. Henneberry, the former Director of the Special Projects Unit, indicated that he would communicate directly with the vendor when the Warranty Reports showed a problem with a new piece of equipment. Mr. Henneberry further testified that he and Roger Liwer maintained contact with the Board of Estimate, which was responsible for approving or rejecting equipment contracts. They attended Board of Estimate meetings and answered questions concerning the recommended equipment.

¹¹ We note that Mr. Liwer's annual salary, at \$69,500, was significantly higher than that of any other Deputy Director.

Deputy Directors perform the duties of the Directors when the Directors are absent. Generally, their duties include visiting the shops and garages on a daily basis, monitoring the productivity of their operational areas and, when necessary, making adjustments to improve productivity levels. Adjustments may take the form of shifting people from one work location to another.

Mr. Basak and Mr. Bianco testified that within the established guidelines, Deputy Directors have a great deal of leeway in managing their areas of operation. They do not check with the Director unless a situation arises which involves something unusual, or concerns the entire Department. When an issue concerns the entire Department, the Director is required to handle it.

Deputy Director Leiter testified that he reports to his Director if a situation arises which requires that he make a determination (as opposed to a recommendation), or if he is unsure whether a particular piece of equipment should be repaired. Mr. Leiter stated that it is his job to review recommendations made by his subordinate employees and to pass those that have merit on to his Director.

With regard to the contracting-in program¹², the evidence presented in this proceeding shows that the Deputy Commissioner and the Directors decide which agencies and equipment to accept into the program. Thereafter, the Deputy Directors run the program; they decide the priority given to the work.

LABOR RELATIONS

COLLECTIVE BARGAINING - Directors and Deputy Directors do not play a direct role in collective bargaining negotiations between the City and the unions representing Department employees. While they might be asked to supply technical information needed by the City, Directors and Deputy Directors are not privy to the City's bargaining proposals.

¹² Under the contracting-in program, equipment from other City agencies are repaired in the various BME shops and garages.

DISCIPLINARY PROCESS - Informal disciplinary hearings are conducted by a Committee composed of Mr. Hogan, the charged employee's Director and Deputy Director and, very often, Mr. Liwer¹³. Also present is the Supervisor who filed the charges and the employee's counsel or union representative. The function of the Committee is to hear all of the facts giving rise to the complaint so it can determine whether the employee is innocent or guilty. When the employee is found guilty, the Committee makes a recommendation as to the appropriate discipline to be imposed. If accepted by the employee, the recommendation is implemented. The employee also has the option of rejecting the Committee's determination and requesting a hearing pursuant to Section 75 of the Civil Service Law, or filing a grievance under the collective bargaining agreement.

Mr. Bianco testified that if he is unavailable to participate in the informal disciplinary conference, the Deputy Director can take his place as the Hearing Officer, provided it is not a "severe case."¹⁴ If it is a "severe case" the hearing will be postponed.

GRIEVANCE PROCESS - Directors and Deputy Directors participate in the development of the Department's response to grievances filed at Step I of the contractual grievance procedure. Mr. Hogan testified that to formulate the Department's response, he consults with the Director or Deputy Director of the area concerned both to research the facts surrounding the grievance and to seek their opinion. With the exception of Mr. Liwer, all of the Directors and Deputy Directors testified that they do not get involved in the contractual grievance procedure past Step I. Mr. Liwer, on the other hand, testified that he has consulted with representatives of the Department's Office of Labor Relations, and has participated in the development of the Department's

¹³ Mr. Liwer testified that he is invited to attend all of the informal disciplinary hearings, and does in fact attend about 2/3 to 3/4 of them.

¹⁴ Mr. Bianco defined a "severe case" as one in which there is a chance that dismissal will be recommended.

response to grievances affecting his operational area at the higher steps of the grievance procedure.

INVOLVEMENT IN UNION MATTERS - Mr. Capobianco testified that since becoming a Deputy Director he has met with union officials to discuss, for example, the granting of an extension on the 30 day limitation for temporary transfers. In addition, the evidence presented in the record shows that all of the Directors and Deputy Directors participated as witnesses in a case filed by Local 621 in which the Union alleged that it was an improper practice to create the titles Director and Deputy Director.

MEETINGS

MEETINGS WITH THE DEPUTY COMMISSIONER - The Directors and Deputy Directors meet with the Deputy Commissioner every Monday to discuss the operation of the BME. Status reports are prepared for the weekly meeting and presented by the Directors. Deputy Directors also may give reports if the Director is absent, something unusual is happening in their operational area or if they were assigned a special project. Members of the Labor Team, including employees in journeymen titles, also attend the Monday meetings.

In addition to the Monday meetings, Mr. Bianco testified that he consults with the Deputy Commissioner before taking action in the "contracting in" program. He and the Deputy Commissioner discuss what the agency wants the CRS to do and whether the CRS should do that type of work. Mr. Bianco noted that he must check with the Deputy Commissioner "only for the first time. When we're going to a different city agency to establish a procedure...but once [the procedure] is established...then I have complete control over it." Mr. Bianco indicated that he and the Deputy Commissioner usually meet with the Commissioner and/or other representatives of the agency interested in the "contracting-in" program. At these meetings, Mr. Bianco describes the work of the CRS, notes any foreseeable problems in getting the equipment back to the agency, and recommends a maintenance program which fits their needs. The Director of the Field Operations Unit and one of the CRS Deputy Directors also may attend these meetings.

Mr. Liwer testified that he is in telephone contact with the Deputy Commissioner on average twice a day, and sees the Deputy Commissioner about three times a week. Their conversations generally concern progress on current projects, policy¹⁵ or developing a plan for the budget. Mr. Liwer testified that he checks with the Deputy Commissioner before acting on some matters that are not part of his routine functions or operation, or to get direction or information on a particular subject.

MEETINGS WITH THE COMMISSIONER - The Directors and some of the Deputy Directors testified that they have on occasion met with the Commissioner. Generally, those meetings have addressed problems with new equipment, and have involved the heads of other divisions of the Department and their assistants as well as the Deputy Commissioner and the vendor of the equipment. At some of these meetings, Directors were asked to supply technical information, while on other occasions the Directors were asked to make recommendations.

COMMITTEE MEETINGS - According to the record evidence, all of the Deputy Directors participate in the Labor Management Committees. The Directors, and on occasion the Deputy Commissioner, get involved with these Committees when and if something needs action.¹⁶

Mr. Autorino testified that the Directors and Deputy Directors attend the Foreman Improvement Committee meetings, along with two foremen representatives from Field Operations, two foremen representatives from CRS

¹⁵ Mr. Liwer defined policy as "an issue that will create a direction for the operation to go into, or that could have impact across the entire operation." Mr. Liwer further stated that "to me policy is also strategy, ... budget strategy." (Transcript pages 1595-1596).

¹⁶ Mr. Autorino, President of Local 621, testified that he could not recall any instance in which a Director or Deputy Director attended one of the contractual Labor Management meetings. It is unclear from the record whether the Labor Management Committees were established pursuant to the collective bargaining agreement and, therefore, whether the Labor Management Committees and the Labor Management meetings are one and the same.

and an Associate Staff Analyst from the Materials Management and Production Control Unit. Anything may be discussed at these meetings which Mr. Autorino characterized as "rap sessions".

BUDGET

OTHER THAN PERSONNEL SERVICES (OTPS) BUDGET¹⁷ - Prior to the beginning of the fiscal year, Directors and Deputy Directors determine how much money they want allocated to each budget code. To make sure that the BME does not overspend its budget, Mr. Hogan and Mr. Liwer may "shift" money from one budget code to another. Generally the Directors and Deputy Directors are not consulted when the "shifting" affects only unencumbered funds.

Mr. Hogan and Mr. Liwer also are responsible for preparing, presenting and negotiating the supplemental budget with the Bureau of the Budget.¹⁸

CAPITAL BUDGET¹⁹ - The role of Directors and Deputy Directors with regard to the capital budget is as follows: Directors and Deputy Directors may recommend the purchasing of a new piece of equipment. Thereafter, a feasibility-cost study is performed by the Production Control Unit. When completed, the study is reviewed by Mr. Liwer and the Director and Deputy Director in the affected area to determine whether to purchase the equipment, or to find something else. If the study shows that the equipment is cost effective it is usually purchased by the Department.

PERSONNEL BUDGET - Additional personnel may be requested in the supplemental budget. According to the record evidence, the Department's decision to increase the fleet size generally will result in an increase in

¹⁷ The OTPS budget is used to purchase parts and material. It is based on the previous years' budget plus two types of changes: 1) inflationary factors; and 2) increases and decreases in certain requirements.

¹⁸ A supplemental budget is prepared in cases where it is discovered that something unforeseen is needed in the middle of the year.

¹⁹ This budget category includes equipment that has a cost of more than \$15,000 and a life expectancy of more than five-years.

the number of employees required to repair and maintain the fleet. These are not decisions made by the BME staff on their own.

OVERTIME BUDGET - The overtime budget for the Field Operations Unit is calculated by considering the cost of charts²⁰, past history and special events. The evidence presented shows that each Deputy Director has his own overtime budget, which he is permitted to use based on his assessment of the needs of his operational area. The Deputy Directors indicated, however, that they usually inform the Director that they intend to assign work overtime before it is ordered. Requests for additional overtime money is made by the Deputy Director to the Director.

The majority of money allocated for the Field Operations Unit is used for scheduled overtime and chart days. The record shows that these elements of the overtime budget are somewhat fixed because there must be a minimum amount of coverage in each garage each day. Although Deputy Directors can decide that more charts are necessary or that a chart should be cancelled and overtime worked instead, the only scheduled overtime a Deputy Director may cut is overtime for service workers when it is necessary to conserve or make up for overspending from the previous week. Deputy Director Brady testified that with the money allocated in the overtime budget for charting Auto Service Workers, the Foreman can decide whether it is necessary to work Mechanics instead.

²⁰ "Chart days" or "chart overtime" refers to the practice of giving an employee one day off during the regular work week, Monday through Friday, and having him work on Saturday instead. Since Saturday work is at the rate of time and one half, the employee gets the equivalent of four hours of overtime pay.

PERSONNEL

RECORDS - The personnel records for BME employees are kept in several locations, including the Department's personnel office, Mr. Hogan's office, the field locations and the shops. Generally, the files kept in the personnel office and in Mr. Hogan's office include all records from the employee's day of hire; while the records kept in the shops and field locations include information dating only from the employee's assignment to that area. Directors and Deputy Directors have access to all of their employees' personnel records.

HIRING AND PROMOTIONS - Applicants for employment are screened by a committee composed of Mr. Hogan, Mr. Liwer and the Director and Deputy Directors of the area concerned. The committee recommends three candidates, who are then interviewed by a second committee composed of Mr. Hogan, Mr. Liwer, the Director and the Deputy Commissioner. In cases where there is a Civil Service list and the one-in-three rule applies, Mr. Hogan, Mr. Liwer and the Director and Deputy Director of the area concerned interview the top three candidates and recommend which candidate should be hired. Mr. Hogan indicated that it is unusual to bypass someone on the list.

With regard to the hiring of employees in journeymen titles, Directors and Deputy Directors may designate a Foreman, a Supervisor or any employee in the title concerned to conduct the interview.

With regard to promotions, the evidence presented in the record shows that Directors recommend which employees should be promoted.

PERFORMANCE EVALUATIONS - All Directors and Deputy Directors complete performance evaluations on the employees whom they supervise. Directors review and sign the performance evaluations completed by Deputy Directors; the performance evaluations completed by the Directors are not reviewed.

Mr. Capobianco testified that at the request of Mr. Basak, he and the other Deputy Directors in the Field Operations Unit have been involved in revising the evaluation standards used for employees in the title Supervising Supervisor, Class II. The project was incomplete at the time Mr. Capobianco

testified.

TITLE CHANGES²¹ - The evidence presented in the record shows that Deputy Directors generally decide which titles they need to run their shops, and whether a title used in their operation should be changed. The Directors may, from time to time, ask a Deputy Director why one title rather than another was requested.

TEST PREPARATION - The evidence presented in this proceeding shows that some of the Directors and Deputy Directors have been involved in preparing questions for Civil Service exams for the title SMMV. Mr. Hogan testified that the questions that were drafted were used on the last exam which was held in April 1983.

MERIT INCREASES - Directors and Deputy Directors have the authority to recommend merit increases for the employees that they supervise. Recommendations for merit increases are made in writing by the Foreman to the Deputy Director, which he may accept or reject. If the Deputy Director accepts the recommendation it is sent to the Director. The Director makes an independent evaluation of the employee's work by speaking to his immediate supervisor and checking the personnel records. If the Director decides a merit increase is warranted after completing his investigation, the recommendation is forwarded to Mr. Hogan's unit which completes the necessary paperwork and forwards it to the Department's Personnel Office. The number of merit increases that can be recommended, and the percentage increase that may be awarded, is limited by the Department's Personnel Office.

LEAVE REQUESTS - Directors and Deputy Directors are authorized to approve or disapprove the leave requests for the employees that they supervise. According to Mr. Bianco, in determining whether or not leave requests should be granted the only guideline to follow is to make sure the employee's leave will not interfere with the productivity of the operation.

²¹ "Title changes" refers to the decision to replace an employee who has retired or otherwise left the Department with someone in a different title.

TRANSFERS - Directors and Deputy Directors may transfer employees within their operational area on a temporary basis, usually for a period of 30 days or less. Limitations on the right to transfer employees are generally set forth in the applicable collective bargaining agreement. Deputy Directors usually inform the Director when a transfer from one borough to another is to last more than a few days so that a transfer slip may be completed for payroll purposes.

In his testimony, Mr. Autorino noted that Supervisors in the Field Operations Unit, be they Class II Supervisors or first line Supervisors, also may initiate temporary transfers when they are in charge of the operation, e.g., on Saturday's.

PLANNING THE PHYSICAL FACILITIES

Deputy Directors are responsible for locating new shops and, with the Engineers and the Borough Supervisors, designing the new facility based on the needs of their operation. Deputy Directors are responsible for making sure that the work contracted to be done is completed and, if not, reporting that fact to the Director.

INTERACTION WITH OTHER BUREAUS IN THE DEPARTMENT AND/OR AGENCIES IN THE CITY

Mr. Basak testified that he deals with employees in the BCC and the BWD on a daily basis. In addition, because the Field Operations Unit repairs equipment owned by other City agencies, Mr. Basak noted that he meets with various officials from other City agencies.

Mr. Liwer testified that in his role as Senior Staff person, he serves as a liaison between the BME and the BCC and the BWD in establishing the fleet size and vehicle requirements; the Office of Management and Budget on budget issues; the Controller's Office on audits and audit responses; the Mayor's Office of Operations for input into the Mayor's Executive Report; and with various City-wide committees. Mr. Liwer stated that, generally, he dealt with employees in the titles Deputy Commissioner, Assistant Commissioner, Program Director and Analyst.

Mr. Henneberry testified that as the Director of Special Projects he

dealt with the Chief of Operations of the BCC on a daily basis. Mr. Henneberry also indicated that when there was a problem with equipment he consulted with the vendor, often meeting with the head of company's engineering department, the President, Vice President or the owner.

POSITIONS OF THE PARTIES

Petitioner's Position

Local 621 contends that the City has failed to meet its burden of proving that the Directors and Deputy Directors are managerial and/or confidential employees and, therefore, its petition seeking to represent them should be granted.²² In clarification of its position, Local 621 states that it will concede that the position of Deputy Director in charge of Materials Management and Production Control is managerial and/or confidential if the Board is willing to "split the title". Local 621 notes that its concession is based on the fact that the position is distinguishable from the other positions at issue in this proceeding. If, however, the Board is unwilling to split the title, Local 621 maintains that that position, previously held by Mr. Liwer, should be found eligible for collective bargaining by the Board.

Local 621 alleges that the record in this proceeding establishes beyond any doubt that Directors and Deputy Directors supervise the areas over which they have jurisdiction, as was the case when they were called "Chiefs" and "Assistant Chiefs"; they do not formulate policy and have little or no impact in the decision-making process. To the contrary, Local 621 argues that the policies followed by the BME are set by the Deputy Commissioner, communicated by the Deputy Commissioner to the Directors and Deputy Directors, and conveyed by the Directors and Deputy Directors to the employees they supervise.

Local 621 argues that contrary to the City's assertion, the attendance

²² According to Local 621, the parties have stipulated that if the Directors and Deputy Directors are found eligible for collective bargaining, Local 621 is the appropriate unit to represent those titles. Therefore, Local 621 did not present any evidence on that issue.

of Directors and Deputy Directors at the Monday meetings does not support a finding of managerial status. Rather, Local 621 claims that like any other supervisors, at the Monday meetings Directors and Deputy Directors report on the status of their areas and are given directions for the running of their operations. That these meetings are not policy-making sessions, Local 621 submits, is further evidenced by the fact that they are regularly attended by members of the Labor Team.²³ Local 621 maintains that the lack of knowledge of BME operations by Directors and Deputy Directors also supports its claim that they are not managerial employees. In this connection, Local 621 asserts that some Directors and Deputy Directors do not know how the "spare factor and outage factor" is determined; do not know who has the authority to turn down or accept a request for overtime money; and do not know who sets the quota on the number of merit increases that can be given.

Local 621 contends that the record also demonstrates that Directors and Deputy Directors play no role in collective bargaining and have little or no role in interpreting union contracts. Directors and Deputy Directors participate in disciplinary proceedings only at the informal conference stage, which precedes the formal contractual grievance procedure. Therefore, Local 621 urges, on this basis as well, Directors and Deputy Directors do not fall within the statutory definition of managerial employees.

Local 621 submits that applying the alleged "indicia" of managerial status relied upon by the City to the record evidence shows that Directors and Deputy Directors perform essentially supervisory functions; they do not make policy, exercise independent judgment or play a role in labor relations or personnel administration. While Local 621 acknowledges that Directors and

²³ Local 621 defines the Labor Team as a joint Bureau of Motor Equipment and Bureau of Building Maintenance committee formed to resolve problems within those areas of the Department, to communicate with trade employees, and to be the "voice" of the employees. The Labor Team, which is composed of employees in the titles SMMV, Auto Mechanic, Welder, Carpenter and Bricklayer, reports directly to the Deputy Commissioner.

Deputy Directors are included in the Managerial Pay Plan and earn a substantial salary, it notes that salary is not a controlling factor in determining managerial status.²⁴ "Any other conclusion," Local 621 argues, "would allow respondent to convert any title to a managerial simply by raising the salary for that position."

With regard to overtime compensation, Local 621 agrees that the salaries of the Directors and Deputy Directors do not vary based upon the number of hours they work. It argues, however, that the Request for Personnel Action forms filed by the Department with the New York City Department of Personnel demonstrates that their salaries were set by adding to their base pay the cash equivalent of the amount of overtime they are expected to work. For this reason, Local 621 disputes the City's assertion that Directors and Deputy Directors are not compensated for overtime work.

Local 621 maintains that the authority granted to Directors and Deputy Directors to assign and transfer personnel is limited, and consists almost entirely of temporary transfers of journeymen employees. Such transfers, Local 621 argues, are routinely made by supervisors. Therefore, the fact that Directors and Deputy Directors occasionally make such transfers does not distinguish them from first-line supervisors.

Local 621 submits that the record in this proceeding shows that Directors and Deputy Directors play a limited role in the preparation and allocation of the BME's budget. With regard to the OTPS budget and the capital budget, Local 621 claims that the role of Directors and Deputy Directors is similar to that of SMMV's in that employees in all three titles request additional tools and machinery through the chain of command; they are not involved in the decision-making process. Both OTPS and capital budget requests are analyzed and evaluated by the Deputy Director in charge of Materials Management and Production Control to determine whether they should

²⁴ Local 621 cites Decision No. 20-82 in support of its assertion.

be "pared down". Thereafter, they are accepted or rejected by the Deputy Commissioner.

With regard to the overtime budget, Local 621 contends that a close analysis of the evidence reveals that all but a small portion of the amount requested is "chart" overtime and constitutes a fixed cost, or is scheduled overtime which does not vary from day to day or from week to week. Consequently, Local 621 argues that Directors and Deputy Directors are permitted to exercise discretion over a minimal portion of the total amount budgeted which, in any event, remains closely controlled by the Deputy Commissioner. Thus, Local 621 urges, the City's reference to the overtime budget as an indicia of managerial status is a "red herring".

Local 621 further argues that the role played by Directors and Deputy Directors with regard to title changes is not indicative of managerial status. Local 621 notes that Deputy Directors are authorized to make recommendations on title changes to their Directors, and Directors are authorized to make recommendations to Mr. Hogan. In any event, whatever the authority of Directors and Deputy Directors in this area and its significance, Local 621 submits that title changes are rarely made.

Local 621 alleges that generally, the duty to interview prospective employees is not a sign of managerial status, as evidenced by the fact that SMMV's conduct interviews for journeymen employees. Moreover, Local 621 maintains, even when Directors and Deputy Directors are involved, as for example, when an employee is promoted to the position of SMMV, the interview and promotion process is essentially pro forma because one of the top three candidates on the Civil Service list must be selected by the Deputy Commissioner. Local 621 asserts that "[t]he top eligible is almost always selected."

Local 621 submits that preparing and reviewing evaluations, formulating tasks and standards and recommending merit increases are supervisory functions performed by SMMV's as well as Directors and Deputy Directors. Therefore,

Local 621 argues, the fact that Directors and Deputy Directors perform these duties does not support the City's assertion that they are managerial employees. In any event, with regard to the formulation of tasks and standards, Local 621 notes that there have been few, if any, changes since the appointment of Directors and Deputy Directors and, moreover, whatever discussions have taken place have involved SMMV's as well as Directors and Deputy Directors.

With regard to another indicia of managerial status, preparation of questions for Civil Service exams, Local 621 notes that the testimony presented in this proceeding shows that Directors and Deputy Directors have never performed this function while serving in the titles Director and Deputy Director. Therefore, it is not relevant to the Board's consideration.

As to the involvement of Directors and Deputy Directors in planning new or renovating the existing BME facilities, Local 621 notes that much of the work was done while the present Directors and Deputy Directors were serving in their previous titles, as Chiefs and Assistant Chiefs. Moreover, Local 621 contends that the role of Directors and Deputy Directors is confined to making recommendations to engineers, to employees in the Real Estate Division, or to other employees within the Department; they do not make final decisions on these matters. Thus, Local 621 argues, the role of Directors and Deputy Directors does not differ from that of SMMV's or journeymen employees who also make recommendations concerning the design of new and existing facilities.

Local 621 argues that even if Directors and Deputy Directors have requested that personnel be added to their operation, it does not follow that they are managerial employees. In this regard, Local 621 claims that the evidence presented shows that the Directors and Deputy Directors make requests only, which sometimes are denied. Further, at least one Deputy Director testified that the suggestion to obtain additional personnel often comes from the SMMV's.

Lastly, Local 621 contends that the right to approve or disapprove leave

requests is an indicia of the supervisory, not managerial, status of Directors and Deputy Directors.

Local 621 also disputes the City's assertion that Directors and Deputy Directors are "confidential" employees based upon their meetings with the Deputy Commissioner²⁵, access to "confidential" budgetary data and access to "confidential" personnel files. In support of its position, Local 621 contends that the Monday meetings do not place Directors and Deputy Directors in a "confidential" relationship with the Deputy Commissioner because they are not policy-making meetings. Members of the Labor Team, which is composed primarily of employees holding journeymen titles, also attend these meetings and, Local 621 notes, "[r]espondent does not suggest that these employees are 'confidential' merely because they attend the Monday meetings." Local 621 claims that apart from the Monday meetings and the occasional meetings held to discuss equipment problems, Directors and Deputy Directors have only limited contact with the Deputy Commissioner.

With regard to the City's assertion that Directors and Deputy Directors are "confidential" based upon their "... full and complete access to confidential budgetary ... documents at all times," Local 621 submits that there is no evidence in the record that the documents referred to contain confidential budgetary information or that the Directors or Deputy Directors ever sought access to them. Indeed, Local 621 alleges that if requested, these records would be made available to the public under the Freedom of Information Act.

Local 621 also maintains that Directors and Deputy Directors are not "confidential" based upon their access to personnel records. To the contrary, Local 621 claims that access to such files is a supervisory function, as

²⁵ Local 621 does not include Deputy Director Roger Liwer in this discussion noting that, in contrast with the other Directors and Deputy Directors, Mr. Liwer spoke with the Deputy Commissioner on average twice a day by telephone and met with him three times a week.

evidenced by the fact that SMMV's have the authority to review the same personnel records as Directors and Deputy Directors.

In its reply brief, Local 621 contests the City's reliance on the job specifications for the titles Director and Deputy Director. Local 621 claims that it is well established that job specifications are not controlling as to the nature of the duties performed or whether a position should be deemed managerial; the test is whether the duties actually performed are managerial.²⁶ Therefore, Local 621 argues, whether the job description states that the title is "managerial" is irrelevant.

Local 621 also submits that the City's reference to the determination of the New York State Civil Service Commission, finding the Director and Deputy Director positions both non-competitive and managerial, is "disingenuous" and "grossly unfair". Local 621 notes that it agreed not to oppose the reclassification of these titles by the Civil Service Commission (thus, in effect, stipulating to the Commission's decision) on the understanding that the issue of managerial and confidential status would be submitted to and resolved by the Board. According to Local 621, this concession was of obvious benefit to the City and, in return, Local 621 was assured of a forum in which to contest the alleged managerial and confidential status of the Director and Deputy Director titles.

Local 621 submits that it is "outrageous" for the City to claim that there has been no history of collective bargaining for this group of employees when the City succeeded in barring Local 621 from offering that proof in this proceeding.²⁷ Moreover, Local 621 challenges the City's reference to employees in other areas of the Department with whom Directors and Deputy Directors come in contact as "managers" noting that, to date, the Board has made no determination as to their status.

²⁶ Local 621 cites Decision Nos. 43-69 and 25-69 in support of its assertion.

²⁷ See Decision No. 2-87.

Finally, Local 621 questions the City's failure to give independent consideration to the Director and Deputy Director positions. "Given respondent's failure to submit any independent grounds for finding the Deputy Directors to be managerial," Local 621 argues, "they should be found non-managerial even if the Board decides that the Directors are managerial. Respondent has not satisfied its burden to show that the Deputy Directors are managerial by introducing evidence concerning the duties of the Directors."

Respondent's Position

The City contends that the Director and Deputy Director positions at issue in this proceeding are both managerial and confidential under the NYCCBL. Therefore, employees in those positions do not have the right to bargain collectively.

As to the alleged "managerial" status of the Directors and Deputy Directors, the City submits that the evidence shows that all of the employees in question are involved in policy formulation at the highest levels within the BME and the Department, and that their role is not of a routine nature. In support of its position, the City notes that all of the Directors and Deputy Directors participate in the Monday meetings, as well as in other meetings and conversations with the Deputy Commissioner in which a broad range of policy decisions are made. The City maintains that the identical situation was presented in Decision No. 43-69, except that the regularly scheduled weekly meetings attended by the employees in the titles at issue in that case were conducted by the Commissioner.

The City further contends that in Decision No. 43-69, as well as in other decisions, the Board has found that participation in the process of formulating policy does not require direct extensive participation in policy-making meetings. Rather, it can be related to the process by which decisions are arrived at and the degree of latitude employees have in implementing

broadly-stated policies.²⁸ In fact, the City argues, the Board has determined that "if employees are given broad discretion and authority and are allowed to take significant independent action they are managerial under the NYCCBL."

Applying these principles to the instant case, the City maintains that the Directors and Deputy Directors must be found managerial under the Taylor Law and the NYCCBL. The City contends that the evidence shows that Directors and Deputy Directors have plenary authority to determine all aspects of their area's operation, and can exercise virtually "unfettered discretion and personal judgment" in determining how to carry out the BME's basic mission of supplying, maintaining and repairing the Department's motor equipment. Moreover, the City urges, contrary to Local 621's assertion, Directors and Deputy Directors do not act merely as conduits bringing policies determined by the Deputy Commissioner to the supervisors below them, and bringing suggestions and recommendation made by their subordinate employees to the attention of the Deputy Commissioner.

The City claims that prior decisions of the Board also support a finding that the Directors and Deputy Directors are managerial employees. The City notes that in Decision No. 13-86, the Board listed the following factors which it has 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. preparation of budget/allocation of funds;
6. inclusion in managerial pay plan/ welfare fund;
7. history of collective bargaining;
8. personnel involvement;
9. job specification;
10. salary range;
11. overtime compensation;
12. involvement in discipline and discharge;
13. similarity with State Civil Service titles.

The City asserts that virtually all of the indicia of managerial status

²⁸ In support of its assertion, the City cites Decision Nos. 26-79, 41-72, 73-71 and 19-71.

identified in that decision are present in the positions/employees at issue herein.

With regard to position in the table of organization, the City claims that the BME's organizational chart shows that Directors report to the Deputy Commissioner, and have one managerial level above them and two supervisory levels below them. Deputy Directors, the City notes, report to the Directors²⁹, and have two managerial levels above them and one supervisory level below them.

As to the number of subordinate employees, the City contends that the evidence clearly shows that all of the Directors and Deputy Directors have authority over large groups of employees (ranging in number from 31 to 720). In addition, the City alleges that the Director and Deputy Directors in the Field Operations Unit have authority over a significant number of repair shops spread out over a large geographical area; while in the CRS, the Director and Deputy Directors have authority over large scale repair or production shops. Each of the Directors and Deputy Directors receive salaries in excess of \$50,000, and are in the Managerial Pay Plan/Management Benefits Fund. Although all of the Directors and Deputy Directors that testified indicated that they work in excess of the regularly scheduled work week, the City notes that none of these employees receive overtime compensation. It contends that contrary to Local 621's assertion, the record does not support the finding of a correlation between the salaries of Directors and Deputy Directors, the number of hours they work and the fact that they receive no overtime compensation. Rather, the City argues that all managers receive higher salaries in part because they are expected to work overtime even though it will not be compensated directly.

As to personnel related matters, the City submits that Directors and

²⁹ It is not disputed that Deputy Director Liwer was an exception to this rule in that while he was the Director of Materials Management and Production Control, Mr. Liwer reported directly to the Deputy Commissioner.

Deputy Directors have the power to assign and transfer employees within their area of operation, except as limited by the applicable collective bargaining agreements. This limitation, the City points out, is applicable to all managers in the City of New York. Further, the City notes that Directors and Deputy Directors are involved in recruiting and hiring new employees, making recommendations for merit increases, allocating overtime and evaluating the performance of the employees they supervise. The City argues that "[n]one of these functions can be described as being routine or clerical in nature, involving as each does, decision-making in which each Director and Deputy Director exercised a large degree of personal judgment."

On the issue of discipline, the City contends that Directors and Deputy Directors are intimately involved in the disciplinary process, they participate in the decision-making body and recommend disciplinary penalties. With regard to the preparation of budgets and allocation of funds, the City asserts that while all of the Directors and Deputy Directors participate in the preparation of the BME's capital and expense budgets, the Director of Material Management and the Director of Special Projects have even greater budgetary responsibilities because their jobs entail basic decision-making with regard to the purchase and receipt of millions of dollars worth of parts and motor equipment.

According to the City, the job specifications for the positions at issue in this proceeding clearly indicate that the Director and Deputy Director titles are in the management class. Since the job specifications accurately reflect the duties and responsibilities described by the Directors and Deputy Directors who testified in this proceeding, the City claims that the employees at issue herein are managerial. In support of its claim, the City refers to the fact that "the New York State Civil Service Commission clearly and unequivocally identifies these positions as being within the managerial class." Finally, the City notes that there has been no history of collective bargaining with regard to the titles at issue in this proceeding.

Regarding the alleged "confidential" status of the Directors and Deputy Directors, the City notes that in prior decisions the Board has held that employees who act in a confidential capacity to managerial employees and have access on a regular basis to confidential information concerning management's actions are "confidential" under the NYCCBL. Applying that standard to the instant case, the City argues, requires a finding by the Board that Directors and Deputy Directors are confidential employees because "at the very least" they have regular access to confidential personnel and budgetary information, and to confidential information concerning proposed management actions.

In support of its position, the City asserts that the evidence shows that Directors and Deputy Directors have unlimited access on a regular basis to information concerning personnel matters, which the Board has declared confidential in nature. The fact that an employee who is otherwise eligible for collective bargaining has access to such material, the City argues, does not render the material and access to it non-confidential. In any event, the City notes that these other titles and employees are not at issue in this proceeding, and argues that whether or not they have access to confidential material is irrelevant and should not be considered by the Board.

Additionally, the City asserts that all of the Directors and Deputy Directors are "regularly privy" to confidential information concerning a variety of managerial actions through their regular participation in the Monday meetings, and through their regular interaction with Mr. Hogan, the BME's Director of Personnel. According to the City:

In their interactions with those two managerial employees, it is clear that the role of the Deputy Directors and Directors cannot be said to be a routine or clerical one, as it is they who inform Hogan of personnel actions which he must take in response to changes in titles they have made. Similarly, with regard to areas dealt with in the "Monday meetings", the Deputy Directors and Directors are not only privy to policy decisions affecting the BME but are actually required to devise means for meeting area-specific requirements for suggested changes in overall bureau policy.

In its reply brief, the City responds to Local 621's assertion that it is not seeking to represent Deputy Director Liwer because his duties as the

Director of Materials Management and Production Control differ from those of the other Directors and Deputy Directors. The City notes that the job description for the title Deputy Director clearly indicates that an individual holding that title "[m]ay direct the operations of material management and production control." Therefore, it argues that contrary to the Union's assertion, "Mr. Liwer or the successor in his position must be considered as part of the group to be decided upon in the instant proceeding."

The City also contests Local 621's reference to Chiefs and Assistant Chiefs, and the implication that the duties of those positions should be compared with the duties of Directors and Deputy Directors. The City submits that "such argument was forestalled by the Board in its Decision No. 2-87 in which it held that evidence as to work performed by Chiefs and Assistant Chiefs was not relevant to the issues to be determined in the instant matter."

In conclusion, the City contends that the mass of documentary and testimonial evidence presented in this proceeding shows that each of the Directors and Deputy Directors is a high-ranking employee of the Department, "who has virtually unlimited authority to implement and determine policy within the area and over the large budget and large number of employees that he commands." Furthermore, the City argues, in terms of their scope, complexity, importance and exposure to confidential information, the duties of Directors and Deputy Directors far exceed those of other title/employees found by the Board to be managerial or confidential.³⁰ Thus, for all of the reasons stated above, the City submits that the petitions filed by Local 621 should be dismissed in their entirety.

DISCUSSION

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

³⁰ In support of its assertion, the City refers to two of the employees considered by the Board in Decision Nos. 14-86 and 5-85, Louis DiMartino and Joseph DiPiazza, respectively.

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).

As noted previously by the City, in implementing this section of the Taylor Law we have considered additional factors which we have found to be reliable indicia of managerial status, including position in the table of organization;³¹ area of authority;³² number of subordinate employees;³³ duties set forth in the job specifications;³⁴ involvement in personnel administration,³⁵ labor relations³⁶ or budget-related³⁷ functions. With respect to confidential status, we have relied upon the employee's relationship with managerial employees, and whether that relationship provides access on a regular basis to confidential information concerning labor relations and personnel matters.³⁸

Applying these criteria to the instant case, we make the following findings with regard to the alleged managerial and/or confidential status of the Directors and Deputy Directors at issue in this proceeding:

- all of the employees in the title Director Motor Equipment

³¹ See Decision Nos. 22-75; 63-74; 76-72.

³² See Decision Nos. 6-84; 63-74; 19-71; 43-69.

³³ See Decision Nos. 76-72; 46-72; 41-72; 65-70; 43-69.

³⁴ See Decision Nos. 5-85; 45-78; 43-69.

³⁵ See Decision Nos. 5-85; 63-72; 73-71.

³⁶ See Decision Nos. 5-85; 19A-70; 43-69.

³⁷ See Decision Nos. 5-85; 8-72; 73-71.

³⁸ See Decision Nos. 13-86; 5-85; 32-82; 11-76; 70-68.

Maintenance (Sanitation) are managerial and, therefore, ineligible for collective bargaining;

- with the exception of the position previously held by Roger Liwer, Director of the Materials Management and Production Control Unit, none of the employees in the title Deputy Director Motor Equipment Maintenance (Sanitation) are managerial or confidential;
- the position previously held by Deputy Director Roger Liwer is both managerial and confidential and, therefore, ineligible for collective bargaining.

THE DIRECTORS

The record in the instant case establishes that contrary to Local 621's assertion, the Directors do not function only as expert technical advisors. Rather, Directors are charged with testing and evaluating new policies and procedures employed in their operational areas and recommending changes to the Deputy Commissioner, their immediate supervisor, when necessary. Directors regularly participate in intra-Departmental and inter-agency meetings with the Deputy Commissioner and other high level staff at which their advice is solicited and their recommendations given considerable weight. With regard to the contracting-in program, the Director, in consultation with the Deputy Commissioner, is responsible for deciding which City agencies will be given an opportunity to participate in the program.

Unlike Deputy Directors who merely monitor productivity in the individual shops and garages, Directors set priorities for the entire operational area and determine what actions must be taken to meet the goals and standards set by the Department. In so doing, they establish rules and regulations to effectively and efficiently run their units. As the highest level of field employee in the BME, Directors are given substantial discretion and authority in carrying out their duties and responsibilities which extend City-wide and encompass an operating entity of great size in terms of personnel, equipment and the facilities under their control.

Our decision with regard to the Directors is in accord with prior decisions of this Board, wherein findings of managerial status were based, at least in part, on the fact that the employees in the titles under

consideration were the chief field officers in the Department.³⁹ Also relevant to the Board's determination was whether the employees had borough-wide or City-wide authority; the level of supervision below the Commissioner; and the role played in the formulation of policy. In Decision No. 63-74, we distinguished between Area Managers and Branch Managers employed by the Off-Track Betting Corporation ("OTB"), finding the former, but not the latter, to be managerial. In reaching this decision, we noted that Area Managers have a far greater impact on OTB operations because they are the employees chiefly responsible for the maintenance of OTB line functions and, therefore, have a wider scope of functions and a greater degree of responsibility and authority. This Board held that as the highest level of field employee in the OTB, Area Managers form a vital link in the Corporation's operations.

The phrase "formulation of policy" has been 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.⁴⁰ The term "formulation" has been held to include not only the person who has the authority or responsibility to select among options and to put a proposed policy into effect, but also the person who regularly participates in the "essential process" which results in a policy proposal and the decision to put such proposal into effect.⁴¹ While the Board's concern is not limited to the final act which changes a document from a proposal to a directive or policy statement, it would not include one who simply engages in research or in the collection of data necessary for the development of a policy proposal.

In the instant case, we find that the record supports a finding that the Directors regularly participate in the "essential process" which results in a

³⁹ Decision Nos. 63-74; 46-72; 19A-70; 79-68.

⁴⁰ Decision No. 32-82, citing State of New York, 5 PERB ¶3001 (1972).

⁴¹ Id. See also, City of Binghamton, 12 PERB ¶3099 (1979).

policy proposal and the decision to put such a proposal into effect. As the chief field officers, Directors bring a unique perspective to the Department's operation. For this reason, they are frequently consulted and often invited to attend meetings with the Deputy Commissioner, representatives of the BCC and the BWD, representatives from other City agencies and, on occasion, the Commissioner at which they are asked to make recommendations on matters affecting their unit, as well as the Department and the City.

In any event, we note that in Decision No. 19-71, this Board held that direct participation in the formulation of policy is not essential to a finding of managerial status where the employees in question play a role in the broad overall functioning of a department, division or self-contained unit. We stated that the fact that an employee is an expert advisor to the Commissioner, or in full charge of the borough offices, may be enough to classify them as "managerial-executive" employees. In so finding, we recognized that an employee's participation in the policy-making process may be limited, but not insignificant.

Thus, while it may not be said that all of the factors traditionally considered by the Board apply to the Directors (e.g., significant involvement in personnel, labor relations and budget related matters), we find that a sufficient number do to support a finding of managerial status. We note that in prior decisions, this Board has held that in determining whether employees are managerial or confidential we may find that individual functions are conclusive by virtue of their magnitude, or persuasive in combination with other factors, such as scope of authority or number of employees embraced by such authority.⁴²

THE DEPUTY DIRECTORS

While it is not disputed that Directors and Deputy Directors perform many of the same duties, we conclude that the wider range of the Directors' functions and the greater degree of responsibility they exercise justifies our

⁴² See e.g., Decision Nos. 6-84; 10-69.

finding Directors managerial and Deputy Directors non-managerial.⁴³ In reaching this decision, we are persuaded by the fact that the Directors' duties and responsibilities are much broader in scope in that they involve the BME's operation City-wide. Deputy Directors, on the other hand, function basically as liaisons between the field and the BME hierarchy; they gather information from the shops and garages under their command and pass it along to the Director.

The evidence presented in the instant case shows that unlike the Directors, Deputy Directors play no role in the analysis or presentation of information once it is collected. Occasionally, Deputy Directors are invited to attend meetings with the Deputy Commissioner and other high level staff. The purpose of their attendance at such meetings, however, is to supply technical data kept in the normal course of business; not to make recommendations concerning the unit they work in or the Department. In addition, while Deputy Directors are expected to stand in for Directors in the Directors' absence, the testimony presented shows that when it comes to important matters, such as hearings in "severe" disciplinary cases, Deputy Directors are not permitted to act. Rather, the matter will be held over and

⁴³ We note that our finding is supported by the testimony of Mr. Basak, who stated that his responsibilities as Director of the Field Operations Unit differ from those of his Deputy Directors in that:

They are just responsible for certain areas of the city [while] I'm responsible for the whole city. They deal directly with the foremen. I just deal at times with the foremen. They are out in the field on location every day in these boro shops. I go out there occasionally to the shops or the field locations ... I deal mainly with BCC and BWD on the higher level with them as far as setting fleet size and operations. they deal with the lower level on their areas.

According to Mr. Basak, "The only thing [Deputy Directors] may want clarified is a policy decision that will affect the department. That is outside of their role area. It might affect some other area." (Transcript pages 794-795).

considered when the Director returns.

With regard to the personnel related duties performed by the Deputy Directors, we note that some of those duties, such as the temporary transferring of employees from one location to another, are regularly performed by Foremen on Saturdays when they are in charge of the operation; while other duties, such as participation in the informal disciplinary conference, completing performance evaluations and processing leave requests, are indicia of supervisory, not managerial, status.⁴⁴

Finally, we note that while the City may claim that a particular title is managerial and, therefore, excluded from collective bargaining, under the NYCCBL only the Board has the authority to make such a finding.⁴⁵ Accordingly, we find that contrary to the City's assertion, whether or not the job description for the title Deputy Director states that it is in the management class of positions is not probative of the issue herein before the Board.

ROGER LIWER

Similarly, the fact that the job description for the title Deputy Director states "May direct the operations of materials management and production control" does not require a finding that the other Deputy Directors necessarily possess the same bargaining status as the person holding Mr. Liwer's position.⁴⁶ The evidence presented shows that Mr. Liwer's duties

⁴⁴ See e.g., Decision No. 10-69, wherein we held that high level supervisors do not rise to the level of managerial employees where they do not make policy, but rather, move the agency in the direction that has already been set. Other supervisory duties identified in that decision include the planning, assignment and review of the work of subordinates; responsibility for the satisfactory completion of work assigned to the unit; budget responsibilities limited to collection and analysis of data; routine personnel recordkeeping activities.

⁴⁵ See §2.20(f) of the Revised Consolidated Rules of the Office of Collective Bargaining.

⁴⁶ In Decision No. 43-69, we noted that while job specifications are valuable in making a determination as to the
(continued...)

differ significantly from those of the other Deputy Directors. Indeed, his duties are more like those of the Directors in that he is in charge of his unit and reports directly to the Deputy Commissioner. Further, in finding that Mr. Liwer is a managerial employee, we are persuaded by the record evidence which shows that Mr. Liwer participated in the development of a budget strategy, and made recommendations to the Deputy Commissioner concerning the overall direction of the BME. In his capacity as the senior staff person, Mr. Liwer testified that he meets with employees in the titles Deputy Commissioner, Assistant Commissioner, Program Director and Analyst representing other divisions in the Department, the Office of Management and Budget ("OMB"), the Controller's Office and the Mayor's Office.

With regard to Mr. Liwer's status as a confidential employee, our decision is based, in part, on his budget related responsibilities, which have a direct and immediate impact on the BME's employees.⁴⁷ Additionally, we find that Mr. Liwer appropriately is designated confidential based both on his frequent direct communication with the Deputy Commissioner and his relationship with Mr. Hogan, the Director of the Administration, Budget and Personnel Unit. The evidence presented shows that Mr. Liwer spoke with the Deputy Commissioner on average twice a day by telephone and met with him three times a week. Generally, Mr. Liwer testified, these conversations concerned current projects, matters having an impact on the future direction of the BME, or development of a strategy for the budget. As to Mr. Liwer's relationship with Mr. Hogan, the record in the instant case establishes that Mr. Liwer and

⁴⁶(...continued)
nature of the duties performed by a title or an individual, they are not, and should not be relied upon, as controlling proof.

⁴⁷ In Decision No. 11-76, we held that all of the employees in the Bureau of the Budget (renamed OMB) are confidential because OMB's budget related duties "directly affect labor relations in the City and may be expected to affect a particular municipal employee union, if not all such unions, at any given time."

Mr. Hogan often worked together as a team performing budget related duties which had a direct and immediate impact on the employees assigned to the various units in the BME.

While we recognize that it is the longstanding policy of this Board not to split a title by finding some employees managerial and others eligible for bargaining,⁴⁸ where compelling evidence is presented an exception to the general rule will be found.⁴⁹ In the instant case, the evidence presented concerning the duties performed by Deputy Director Liwer in his role as the Director of Materials Management and Production Control demonstrates that the functions he performs differ significantly from those performed by any of the other Deputy Directors.

Finally, we find that our determination in the instant case is consistent with our determinations in prior Board decisions, including Decision Nos. 5-85 and 14-86 referred to by the City. In Decision No. 14-86, Mr. DiMartino, a provisional Associate Staff Analyst in the Fiscal Services Unit of the BME, was designated managerial because of his involvement in special reports prepared for the Director of the Fiscal Services Unit. In Decision No. 5-85, Mr. DiPiazza, a Staff Analyst in the Manpower Unit of the Bureau of Personnel, was designated as confidential based on his relationship with the Deputy Director of Personnel, which afforded him regular access to confidential personnel information.

Accordingly, for all of the reasons stated above, we find that all of the employees in the title Director Motor Equipment Maintenance (Sanitation) are managerial; with the exception of the position previously held by Mr. Liwer, all of the employees in the title Deputy Director Motor Equipment Maintenance (Sanitation) are eligible for collective bargaining; and the position previously held by Deputy Director Liwer is both managerial and

⁴⁸ See Decision No. 26-76.

⁴⁹ See e.g., Decision Nos. 14-86; 8-86; 5-85; 8-72.

confidential.

O R D E R

Pursuant to the powers vested in the Board of Certification by the New York City Collective Bargaining Law, in contemplation of Section 201.7(a) of the Taylor Law, and pursuant to Section 12-305 of the New York City Collective Bargaining Law, is hereby

DETERMINED, that all of the employees in the title Director of Motor Equipment Maintenance (Sanitation) are designated as managerial employees within the meaning of Section 12-305; and it is further

DETERMINED, that the position of Deputy Director of Motor Equipment Maintenance (Sanitation) in charge of the Materials Management and Production Control Unit, previously held by Roger Liwer, is designated as managerial and confidential within the meaning of Section 12-305; and it is further

DETERMINED, that with the exception of the position of Deputy Director of Motor Equipment Maintenance (Sanitation) in charge of the Materials Management and Production Control Unit, previously held by Roger Liwer, none of the employees in the title Deputy Director Motor Equipment Maintenance (Sanitation) are designated managerial and confidential within the meaning of Section 12-305; and it is further

ORDERED, that all of the employees in the title Director of Motor Equipment Maintenance (Sanitation) and determined to be managerial be, and the same hereby are, declared ineligible for collective bargaining; and it is further

ORDERED, that the position of Deputy Director of Motor Equipment Maintenance (Sanitation) in charge of the Materials Management and Production Control Unit, previously held by Roger Liwer, and determined to be managerial and confidential be, and the same hereby is, declared ineligible for collective bargaining; and it is further

ORDERED, that with the exception of the position of Deputy Director of

Decision No. 7-92
Docket Nos. RU-973-86
RU-974-86

40

Motor Equipment Maintenance (Sanitation) in charge of the Material Management and Production Control Unit, previously held by Roger Liwer, all of the employees in the title Deputy Director Motor Equipment Maintenance (Sanitation) be, and the same hereby are, added to Certification No. 55-70, as amended.

DATED: New York, New York
May 19, 1992

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER