

Resolution, employees in the title Warden (Correction) Level II:

... did not then, nor do they now formulate policy; are not required to assist directly in the preparation for or conduct of collective negotiations; do not have any role in the administration of agreements or in personnel administration other than a routine or clerical nature; and exercise independent judgment only within the specific confines of the rules and regulations of the Department of Correction and the directions of their superiors.

By a letter dated October 29, 1991, the City of New York ("City") stated that it opposed ADWA's petition on the grounds that employees in the title Warden (Correction) Level II are managerial and/or confidential and, therefore, not appropriate for representation by the petitioner. In support of its position, the City submitted that a review of the duties and responsibilities of employees in this assignment level reveal "that these employees have a role in the administration of the Department of Correction and must exercise a high degree of independent judgment in their positions."

On November 7, 1991, the matter was assigned to a Trial Examiner for a hearing on the City's challenge to representation based on allegations of managerial and/or confidential status of the employees serving in the title Warden (Correction) Level II. At a pre-hearing conference held on March 5, 1992, several days of hearing on the question were scheduled.

On June 25, 1992, approximately one week prior to the start of the hearing in this matter, the City filed a motion to dismiss the petition on the grounds of a prior stipulation, which, it contended, had the effect of rendering the instant matter moot.⁴ The ADWA filed a response to the City's

⁴ In its motion to dismiss, the City argued that subsequent to the broadbanding in 1979, it and the ADWA entered into a stipulation, whereby it was agreed that only the title Warden (Correction) Level I would be included in the ADWA's bargaining unit. Thus, the City contended, the ADWA was now precluded from seeking to accrete the title Warden (Correction) Level II into its bargaining unit.

The stipulation, executed in January 1980, in pertinent part, provides:

(continued...)

motion on June 29, 1992. On July 1, 1992, the Board of Certification ("Board") rendered Interim Decision No. 8-92, which denied the City's motion to dismiss.⁵

Accordingly, ten days of hearing were held during 1992, on July 2nd, 6th, 8th and 9th, August 10th and 12th, November 2nd and 4th, and December 16th and 17th. Three additional days of hearing were held in 1993, on March 8th, 9th and 22nd.

During the hearing, the City sought to present testimony concerning the parties' intent in entering the aforementioned stipulation. The Trial

⁴(...continued)

It is hereby stipulated and agreed [that the certificate] be amended as follows: Add those employees in the title Warden (Correction) who are assigned under direction to assist in the administration of a larger correctional facility or command by serving as Tour Commander and/or Officer-in-Charge of an assigned Department of Correction field command; to serve as Executive Officer of a smaller facility or command; to serve as Training Officer at the Correction Academy; to serve in a command function over such activities as a central office unit or the Transportation Division; or to perform related work, but not those employees in the title who are detailed to act in a higher level assignment; and are paid within the salary range for those assigned to the Level I Warden duties listed above ... [emphasis added].

On April 30, 1980, the Board incorporated into Decision No. 12-80, the stipulated agreement of the City and the ADWA. The decision ordered that the ADWA would be the collective bargaining representative of employees who were employed at the first assignment level (Level I) of the newly created title.

⁵ In Decision No. 8-92, the Board held that the stipulation entered into between the ADWA and the City in 1980, did not, on its face, preclude the ADWA from seeking the accretion of the title Warden (Correction) Level II to its unit. The Board also held that, even if the parties intended to exclude any higher level title from representation by the ADWA, a stipulation to this effect would be in contravention of the New York City Collective Bargaining Law ("NYCCBL").

Examiner ruled that further evidence concerning the stipulation was not relevant to the proceeding. However, the City was permitted to make an offer of proof.

After the close of the hearing, on May 10, 1993, the City renewed its motion to dismiss on the basis of the stipulation and further moved to re-open the hearing to include additional testimony regarding the parties' intent concerning the stipulation. On May 12, 1993, ADWA filed an Affirmation in Opposition to the City's motions.⁶

On June 16, 1993, both the City and the ADWA filed post-hearing briefs. Thereupon, the record in this matter was closed.⁷

BACKGROUND AND EVIDENCE

The title Warden (Correction) was created in 1979 by Personnel Director Resolution No. 79-14. The job specification for the title provides for various assignment levels within the title, of which there are four. "Assistant Deputy Warden" is the office title used by the Department of Correction ("Department") for employees in the title Warden (Correction) Level I. "Deputy Warden" is the office title used for employees in the title Warden (Correction) Level II. Employees in assignment Levels III and IV serve in the

⁶ On May 14, 1993, the ADWA filed an improper practice petition against the City, alleging retaliation on account of the Union having filed the instant petition for representation. That matter was docketed as BCB-1580-93. A decision in that matter was rendered, on this date, by the Board of Collective Bargaining. See Decision No. B- -95.

⁷ The Board feels obliged to comment on the extended amount of time it has taken to issue a decision since the close of the record in this matter. This is due, in large part, to the fact that the Trial Examiner before whom the thirteen days of hearing were held left the employment of the agency before the case was completed, coupled with a large backlog of cases, a growing volume of litigation, a further decrease in legal and support staff, and the imposition of newly-mandated responsibilities on the agency.

office titles of "Warden," "Deputy Chief," "Division Chief" and "Chief of Department."

The job specification for the title (City N),⁸ dated March 21, 1979, provides as follows:

THE CORRECTION SERVICE

CODE NO. 70488

WARDEN (CORRECTION)

Duties and Responsibilities

_____ This is a management class of positions.

This class of positions encompasses responsible administrative or supervisory correctional work of varying degrees of difficulty and with varying degrees of latitude for independent initiative and judgment. There are various assignment levels within this class of positions. The following are typical assignments within this class of positions. All personnel perform related work.

Under direction, assists in the administration of a larger correctional institution by serving as Tour Commander and/or Officer-in-Charge of an assigned functional area, or serves as Executive Officer of a smaller institution, or serves as Training Officer at the Correction Academy, or commands a central office unit, or commands the Transportation Division, or may serve as principal assistant to the deputy to the head of an institution on the 8-4 tour.

Under general direction, serves as Executive Officer and/or assists the head of the institution in the management and administration of a larger correctional institution; serves in a command function over such activities as a central division or another operating division within the Department.

Under executive direction, administers a correctional institution with full responsibility for all activities of the institution, including program implementation, or commands a major central office division.

Under executive direction, supervises the Rikers Island Headquarters of the New York City Department of Correction; coordinates the operations of other facilities of the Rikers Island Complex; is responsible for all new building programs on Rikers Island.

Qualification Requirements

- _____ 1. Two (2) years of service in the title of Captain (Men) or Captain (Women); or
2. A satisfactory equivalent.

_____ ⁸ References to the City's and ADWA's exhibits are denoted as (City __) and (Union __), respectively.

that the Administrative Deputy Warden is responsible for the smooth operation of the facility administrative areas. In carrying out this duty, the Administrative Deputy Warden insures that staff is knowledgeable about their responsibilities; required reports are produced and accurate; equipment is properly running; there is enough food for the facility; and needed repairs are carried out. The Administrative Deputy Warden is also in charge of the general office and receiving room and responsible for custodial and civilian staff. Administrative Deputy Wardens are also responsible for attendance records, payroll, timekeeping, sick leave abuse, employee orientation, employee performance evaluations, transfer requests and uniform inspection. They also are responsible for the control of overtime in the facility, oversee the requisition of supplies and equipment, monitor contracts for renovations to the facility, and administer the food service operation.

Warden Vaughan testified regarding the duties of the Deputy Warden for Programs (City B). She stated that the Deputy Warden for Programs oversees all of the inmate activities in a facility and acts as a liaison with oversight agencies which set various mandates. The Deputy Warden for Programs also supervises his/her staff, such as the Program Captain or Recreation Captain. The Deputy Warden for Programs also prepares a budget for programs. As an example of the Deputy Warden for Program's liaison duties, Warden Vaughan explained that when visit hours were expanded at Rikers Island based on an agreement with an oversight agency, the Legal Aid Society, the Deputy Warden for Programs brought that information back to the facility, revised institutional orders accordingly, and is monitoring the expanded hours for overtime purposes. The witness testified that the Deputy Warden for Programs would write institutional orders dealing with programs. For example, Deputy Warden Coppola developed a plan to reorganize the work release program in order to insure an optimum selection of inmates into the program.

Warden Vaughan also testified regarding the duties of the Deputy Warden for Security (City C). The Deputy Warden for Security conducts daily checks

of the facility for any breaches of security, oversees the daily inventory of the arsenal (the area of the facility where weapons assigned to the facility are kept), initiates security improvements and commands the control room. The Deputy Warden for Security is responsible for the security of the general population inmates (those who may move freely through a facility) as well as special segregated units. The Deputy Warden for Security is also responsible for security searches, contraband control measures and designing and implementing escape prevention plans. He/she facilitates intelligence gathering and internal investigations and responds to riots, disturbances and hostages. The Deputy Warden for Security also acts as liaison with the Chief of Operations regarding security issues and has responsibility for the facility budget.

The Management Position Descriptions ("MPDs"), describe the various functions for each and every management position, its placement in the table of organization of the Department, and the dollar value of programs for which the position is directly responsible (City A through C and O-1 through O-18). Starting with the lowest uniformed rank, the Correction Officer reports to the rank of Captain, who reports to the rank of Assistant Deputy Warden, who reports to the rank of Deputy Warden. Generally, the levels of supervision above Deputy Warden are: Warden, Division Chief and Chief of Department. The Chief of Department reports directly to the Commissioner. The Deputy Warden functions as the second level of command within a correctional facility and the number of employees for whom a Deputy Warden may be responsible, which ranges from 38 (City O-16) to 401 (City A), is directly related to the type and size of facility.

Deputy Wardens are not significantly involved in personnel administration or labor relations. Although the Deputy Warden for Administration is responsible for processing all personnel actions within a facility, the record establishes that they do not have the authority to assign, transfer, discipline and discharge civilian employees. Warden Ralph

McGrane testified that when Deputy Warden Daniel P. Meehan sought to transfer a cook who was involved in an altercation with another food service employee, because the employee was subject to the authority of a civilian division head, the transfer could not be effected without the authorization of the facility head. As for uniformed personnel, Deputy Wardens can impose command discipline and make recommendations on the retention of probationary employees, including those which are represented by the ADWA. Warden McGrane testified that the Directive which addresses command discipline (Union 50), which defines it as an "informal, non-adversarial, non-judicial punishment available to a Commanding Officer to correct minor deficiencies and to maintain discipline among uniformed members within her/her command," allows Deputy Wardens some discretion as to the penalty recommendation, as long as the recommendation is within pre-established guidelines. He further testified that the penalty recommendation is not binding on the Warden or facility head.

All of the witnesses testified that the primary mission of the Department is the "Care, Custody and Control" of the inmate population. The record establishes that every operation and function of the Department is governed by specific Directives, Operations Orders, Teletype Orders, Letter Orders, General Orders, Memoranda, Rules and Regulations which emanate from the Chief of Operations and/or Commissioner of the Department (Union 1-34, 36-38, 40, 45-47, 50 and 57; City Q). The request of a "facility head or the head of a division or a Divisional Supervising Warden" for a variance from these procedures must be approved by the Commissioner (Union 37).

Deputy Wardens are evaluated on their ability to ensure compliance with all laws governing the Department and with Departmental rules, regulations, procedures and policies, as well as with consent decrees, minimum standards and other mandates (City Z-1); to ensure compliance with departmental policy concerning facility integrity control by developing and implementing procedures specific to the facility which would effectively insure facility security (City M, Z-3, WW, DDD, EEE); to ensure compliance with departmental

policy regarding usage of overtime by allocating staff in an effective manner and developing controls to minimize overtime expenditures (City M, Z-3, EE, WW, DDD, EEE); to support the facility management team by planning and executing administrative functions in a manner that has the maximum positive impact on attaining the facility's security and program goals (City M, Z-1, Z-2, Z-3, WW, XX, DDD, EEE). Warden Arnett Gaston and Deputy Warden Glanville Rabsatt testified that Deputy Wardens are also responsible for tailoring Departmental Directives and General Orders to suit the needs of a particular facility, by creating institutional orders (City K, JJ, KK, LL, MM, NN, RR, SS, TT, UU, VV). The record establishes that these institutional orders are written by Deputy Wardens for a particular function, are reviewed and approved by each of the other Deputy Wardens for the facility, and then are submitted to the Warden or facility head for final approval and signature. All witnesses testified that because of the high degree of regulation, Deputy Wardens do not have wide latitude for the exercise of independent judgment.

According to Wardens Vaughan and Gaston, Deputy Wardens are responsible for the initial drafting and submission of facility budgets for the coming fiscal year. The evidence presented shows that these budgets are submitted to the Warden or facility head for approval and subsequently communicated to Department headquarters for review and approval. It is also the Deputy Warden's responsibility to assure that the budget, once approved, is adhered to during the fiscal year. Deputy Wardens are evaluated on their ability to identify budget savings through post reductions and controlling and reducing the usage of sick leave and overtime.

The parties stipulated to a comparison of salaries between Assistant Deputy Wardens and Deputy Wardens (Joint 1). Assistant Deputy Wardens, upon entry to the rank, earn \$53,572 in base pay plus allowances. In their sixth year in rank, Assistant Deputy Wardens earn \$59,872 in base pay plus \$11,650 in allowances (which include longevity pay, uniform allowance, holiday pay, night differential, annuity and civil legal payments but not overtime), for a

total of \$71,522.¹⁰

Deputy Wardens, upon entry to the rank, earn \$67,443; they do not receive any allowances nor overtime. The maximum salary for a Deputy Warden after three years is \$80,467.¹¹

The evidence presented in this proceeding shows that all of the Deputy Wardens are included in the Management Pay Plan and the Management Welfare Fund, have never been included within a collective bargaining unit either before or after broadbanding of the title in 1979, and do not receive extra compensation for work in excess of their regularly scheduled work week.

Robert Daly, the Department's General Counsel testified that he was, inter alia, in charge of its Office of Labor Relations. In this capacity, Mr. Daly testified about the duties and responsibilities of Deputy Warden Kenneth Dubose, who is assigned to the Department's Operations Division. Mr. Daly testified that Deputy Warden Dubose attends strategy sessions, negotiating sessions with the various unions that represent Departmental employees, and is privy to confidential information regarding the City's negotiating position. According to Mr. Daly, Deputy Warden Dubose's duties and responsibilities include analyzing collective bargaining proposals under consideration by the City; performing the costing associated with various bargaining proposals made by the City; and advising the Department of the potential impact of any settlement proposals.

Finally, the City took exception to the Trial Examiner's ruling which precluded testimony by Mr. Daly concerning the 1980 stipulation. In an offer of proof, the City maintained that Mr. Daly's testimony would show that by excluding the Deputy Wardens from the ADWA bargaining unit in the 1980 stipulation, the parties intended that such title would not be included within

¹⁰ These salaries are effective November 1, 1992.

¹¹ There is one individual, a Deputy Warden-in-Command, who earns \$84,446 base pay.

the ADWA at any point.

DISCUSSION

The City's Renewed Motion to Dismiss and Motion to Re-Open

As a preliminary matter, we will address the exception taken to the Trial Examiner's ruling concerning the 1980 stipulation.

The City argues that when a stipulation is entered into between a union and the City excluding certain employees in a particular title, the stipulation should be upheld unless it can be shown that the agreement violates the NYCCBL or established Board policy. The City argues that the Board was mistaken in determining that the particular stipulation entered into between the ADWA and the City was invalid, as the agreement was executed voluntarily and with full knowledge by both parties.

The City contends that there are several ways to limit union membership without infringing on the rights conferred to employees by §12-305 of the NYCCBL. The City notes that there is no right of an employee to demand inclusion into a bargaining unit where there is no community of interest;¹² nor is a union bound to retain a member who is acting contrary to the its interest.¹³

The City explains that in the private sector, Section 151 of the National Labor Relations Act ("NLRA") protects "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." The City cites numerous cases in support of the proposition that in stipulated

¹² Wappingers Central School District v. Wappingers Congress of Teachers, NYSUT, 18 PERB ¶4047 (1985); City of Ogdensburg v. L. 687, I.B.T., 1 PERB ¶414 (1968).

¹³ Futterman v. New York State Nurses Association, 17 PERB ¶7530 (Sup. Ct. Erie County 1984); Civil Service Employees Association v. Michael and Samet, 13 PERB ¶4523, 4549 (1980).

unit cases, the National Labor Relations Board ("NLRB") defers to the intentions of the parties if those intentions are consistent with "any statutory provision or established board policy."¹⁴

The City also notes that in stipulated unit cases, evidence may be needed to establish the parties' intent when entering into the stipulation.¹⁵ The City explains that employers and unions are free to agree for themselves on the appropriate bargaining unit.¹⁶

Accordingly, the City argues that the instant petition is moot because the ADWA validly entered into a stipulation excluding the title Warden (Correction) Level II from the unit. Moreover, the City argues that since there is an issue of fact as to the parties' intent when the stipulation was entered into, the Board should modify the Trial Examiner's ruling excluding evidence of the parties' intent and re-open the hearing to allow the introduction of such evidence.

The ADWA argues that there is no language in the stipulation precluding the Union from seeking to accrete the title Warden (Correction) Level II into its bargaining unit, as the stipulation merely defines the members of the ADWA at the time the stipulation was entered. The Union further argues that the City's position is in contravention of §12-305 of the NYCCBL, in that it would deprive employees of a statutorily guaranteed right to bargain collectively through an organization of their own choosing.

Contrary to the City's suggestion that there is no community of interest

¹⁴ See, Hollywood Presbyterian Medical Center v. Local 399 Service Employees, 119 LRRM 1118 (1985); St. Peters Manor Inc. v. Teamsters Local 610, 110 LRRM 1207 (1982); SCM Allied Egrv Business v. Local 527, Printing & Graphic Communications Union, 116 LRRM 1158 (1984).

¹⁵ White Cloud Products v. UAW, 87 LRRM 1570 (1974).

¹⁶ Central States v. McClelland, 1993 WL 18979 (N.D. Ill., January 28, 1993); Hill-Rom Co. v. NLRB, 957 F.2d 454 (7th Cir. 1992); E.G. & H. v. NLRB, 949 F.2d 276 (9th Cir. 1991).

between Deputy Wardens and Assistant Deputy Wardens, the Union contends that these employees perform similar duties; are used interchangeably when necessary; possess identical skills, qualifications and training; and perform their duties under common supervision.

As for the motion to re-open in order to allow Mr. Daly to testify as to the intent of the parties when the stipulation was executed, the Union argues that because Mr. Daly was not a signatory, his testimony would be inadmissible as hearsay.

For the following reasons, we affirm the Trial Examiner's ruling and deny the City's renewed motion to dismiss and motion to re-open the hearing.

First, as we found in Decision No. 8-92, a reading of the language of the stipulation clearly does not support the position argued by the City. Again, we find that the language simply defines certain employees whom the parties agreed not to include in the certification. We discern no express or implied waiver of the right to seek to represent those employees in the future.

Second, and more importantly, even if the language clearly expressed that the parties intended a waiver of the ADWA's right to represent the title Warden (Correction) Level II at that time, a finding that the waiver was binding until the parties agreed otherwise would be contrary to statutory and public policy. In a case recently decided by the Public Employment Relations Board ("PERB"), Transit Supervisors Organization v. New York City Transit Authority, 27 PERB ¶3060 (1994), PERB reviewed a hearing officer's decision not to dismiss a petition because of a prior side letter agreement that the Transit Supervisors Organization ("TSO") would not seek to represent certain supervisory employees. In affirming the hearing officer, PERB found that it would have to be manifestly clear from the terms of the side letter that it was the parties' intent to prevent the filing of the representation petition at the time that such petition was filed. PERB stated that:

As a matter of statutory and public policy, we could not

allow a ban on representation petitions filed by a particular union on behalf of public employees to continue for an unknown and potentially unlimited period of time.

Because the side letter was silent as to its duration, PERB found that the TSO was bound to its terms only for the duration of the contracts under which the side letter arose or was continued.

In the instant matter, even if the language of the 1980 stipulation was unequivocal -- or if the testimony of record supported the City's contention that the parties intended to exclude employees in the title Warden (Correction) Level II from the ADWA's certification for an unlimited period of time -- such a waiver would be in contravention of the NYCCBL.¹⁷

Managerial/Confidential Issues

Upon consideration of the entire record herein, the Board renders the following decision:

Under the Taylor Law, employees are presumed to be eligible for collective bargaining. Therefore, when an objection to the bargaining status of a title is made, the City has the burden of going forward to demonstrate that a title is ineligible for bargaining because it is managerial and/or confidential within the meaning of Section 201.7(a) of the Taylor Law.

The relevant language of Section 201.7(a) provides 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 bargaining 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). [Emphasis added.]

In implementing this section of the Taylor Law, we have considered

¹⁷ Section 12-305 of the NYCCBL grants, inter alia, public employees the right "to bargain collectively through certified employee organizations of their own choosing."

additional factors as reliable indicia of managerial status, including: position in the table of organization;¹⁸ number of subordinate employees;¹⁹ area of authority;²⁰ involvement with labor relations;²¹ preparation of budget and allocation of funds;²² involvement in personnel administration;²³ job specifications;²⁴ and the formulation, determination and effectuation of an employer's policies.²⁵

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.²⁶ 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.²⁷

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 to such an extent that inclusion in

¹⁸ Decision Nos. 22-75; 63-74; 76-72

¹⁹ Decision Nos. 76-72; 46-72; 41-72; 65-70; 43-69.

²⁰ Decision Nos. 6-84; 63-74; 19-71; 43-69.

²¹ Decision Nos. 5-85; 19A-70; 43-69.

²² Decision Nos. 5-85; 8-72; 73-71.

²³ Decision Nos. 13-86; 5-85; 45-78; 63-72; 73-71.

²⁴ Decision Nos. 5-85; 63-72; 73-71.

²⁵ Decision Nos. 15-92; 7-92; 34-81; 73-68.

²⁶ Decision Nos. 15-92; 7-92; 36-82.

²⁷ Decision Nos. 15-92; 7-92; 36-82.

collective bargaining would lead to conflicts of interest inimical to the bargaining process and the full and fair representation of the employer's interests.²⁸

Applying these criteria to the instant case, we make the following findings with regard to the alleged managerial and/or confidential status of the title Warden (Correction) Level II, who serve in the office title of Deputy Warden:

- 1) with the exception of the position held by Deputy Warden Kenneth Dubose, none of the employees in the title Warden (Correction) Level II are managerial or confidential;
- 2) the position held by Deputy Warden Kenneth Dubose is confidential and, therefore, ineligible for collective bargaining.

The record establishes that although Deputy Wardens have a certain amount of discretion and authority in carrying out their duties and responsibilities, their discretion must be exercised within the boundaries of specific Directives, Operations Orders, Teletype Orders, Letter Orders, General Orders, Memoranda, Rules and Regulations of the Department. For example, the authority of Deputy Wardens in manpower decisions such as authorization of overtime (Union 47); control of sick leave abuse (Union 46); job assignments (Union 17); or transfers (Union 33A) is sharply restricted by various Directives and Operations Orders.

It is the condition under which discretion may be exercised, not the exercise of discretion itself, which we find relevant in determining manageriality.²⁹ In Decision No. 15-92, we found that:

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 necessary to invoke managerial status.

In this case, even the variance by a Deputy Warden from a Departmental Order, Directive, Rule and Regulation, Operations Order or any other order issued by

²⁸ Decision Nos. 13-86; 5-85; 32-82; 11-76; 13-74; 70-68.

²⁹ Decision Nos. 15-92; 34-81; 73-68.

the Commissioner is regulated by a Directive (Union 37). We conclude, therefore, that Deputy Wardens do not exercise managerial discretion as contemplated by the Taylor Law.

Deputy Wardens are not involved in the regular and effective formation of policy. Rather, the evidence demonstrates that Deputy Wardens have almost no latitude in their use of independent judgment in implementing policy. To the extent that their responsibilities include the development of institutional orders, those orders must conform to Directives issued from the Department's Office of Operations. Once a facility head is in receipt of such a Directive, it is assigned to the affected Deputy Warden, who is responsible for fashioning a procedure for its implementation in a particular facility. In essence, Deputy Wardens are responsible for the dissemination of information concerning the policies and objectives of the Department. Deputy Wardens do not, however, regularly participate in the "essential process" which results in a policy proposal; nor the decision to put such a proposal into effect.³⁰

With regard to personnel related duties performed by Deputy Wardens, Deputy Wardens for Administration have some discretion within the facility concerning the deployment of manpower through post reductions, controlling the usage of overtime, and evaluating the performance of probationary employees. These functions, however, are supervisory, not managerial.³¹ In order to be declared managerial, Deputy Wardens 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."³² We find that the functions performed by Deputy Wardens do not reach this level.

The record further reveals that, with one exception, Deputy Wardens

³⁰ Decision No. 36-82.

³¹ Decision No. 19A-70.

³² See Decision No. 15-92; see also, Decision Nos. 13-86; 34-81; 73-68.

neither prepare for nor conduct collective bargaining, nor play a major role in the administration of collective bargaining agreements.

The record also discloses that Deputy Wardens play a limited role in the disciplinary process. When uniformed personnel are subjected to command discipline, set guidelines exist for determining the recommended penalty.³³ It is also noted that Deputy Wardens have no authority to discipline civilian personnel.

As for the involvement of Deputy Wardens in the preparation of the budget and the allocation of funds, the record reveals that Deputy Wardens' authority in this area is limited to the submission of a proposed budget for his or her area of responsibility to the head of the facility for review and approval. Deputy Wardens are also responsible for meeting overtime targets set by the Department and reducing the usage of sick leave. These functions, however, are indicia of supervisory, not managerial, status.³⁴

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 we have the authority to make such a finding.³⁵ Although a job description may state that the Deputy Warden title is within the management class of positions, that fact is not probative of the issue before us.³⁶ We have long held that while job descriptions are of some value in making a determination as to the nature of the duties and responsibilities of a title, they are not and should not be relied upon as controlling proof as to what duties an individual actually performs.³⁷

³³ Decision No. 15-92.

³⁴ Decision Nos. 7-92; 10-69.

³⁵ Title 61, §1-02(t) of the Rules of the City of New York.

³⁶ Decision No. 7-92.

³⁷ Decision Nos. 45-78; 43-69.

With regard to Deputy Warden Kenneth Dubose's status as a confidential employee, our decision is based on his relationship with Mr. Daly, as the person in charge of the Department's Office of Labor Relations.³⁸ The record establishes that Deputy Warden Dubose is a regular member of the negotiating team and that his role is more than just one who "runs the numbers." Rather, he is called upon to assist the City's negotiators in reviewing contract demands from both an operational and cost stand point, is involved in the analysis and preparation of offers to the various unions that represent the Department's employees, and has access to confidential information within the meaning of the Taylor Law. To the extent that the duties and responsibilities of Deputy Warden Dubose's position includes these functions, the statutory definition of a confidential employee is satisfied.

Accordingly, for all of the reasons stated above, we find and conclude that all of the employees in the title Warden (Correction) Level II, with the exception of the position held by Deputy Warden Kenneth Dubose, are neither managerial nor confidential employees and are eligible for collective bargaining; and that the position held by Deputy Warden Dubose is confidential. Inasmuch as the petition for certification is for a unit of supervisory employees and non-supervisory employees, we shall permit the City ten (10) days to file an objection pursuant to Section 12-309b.(1) of the NYCCBL.³⁹ In the event the City does file an objection, we shall order that an

³⁸ Decision No. 63-72.

³⁹ Subject to the conditions set forth in NYCCBL §12-309b.(1), which provides, in pertinent part, as follows:

... where a petition for certification has been filed requesting a unit of supervisory and non-supervisory ... employees and the public employer objects thereto, the board of certification shall not include such supervisory ... employees in a bargaining unit which includes non-supervisory ... employees ... unless a majority of the supervisory ... employees voting in an
(continued...)

election be held; otherwise, the title Warden (Correction) Level II shall be added, by accretion, to Certification No. CWR 65-67 (as amended).

ORDER

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, it is hereby

ORDERED, that the position of Warden (Correction) Level II held by Kenneth Dubose be, and the same hereby is, designated confidential, and is exempt from collective bargaining; and it is further

ORDERED, that with the exception of the position of Warden (Correction) Level II held by Kenneth Dubose, all of the employees in the title Warden (Correction) Level II be, and the same hereby are, designated eligible for collective bargaining; and it is further

ORDERED, that the City shall be permitted ten (10) days to file an objection to the petition for certification of a unit of supervisory employees and non-supervisory employees, pursuant to Section 12-309b.(1) of the New York City Collective Bargaining Law; and it is further

ORDERED, that in the event the City does file an objection, an election pursuant to Section 12-309b.(1) of the New York City Collective Bargaining Law shall be held; otherwise, the title Warden (Correction) Level II shall be, and the same hereby is, added, by accretion, to Certification No. CWR 65-67 (as amended).

DATED: New York, New York
September 19, 1995

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS

³⁹(...continued)
election vote in favor thereof;

Decision No. 11-95
Docket No. RU-1093-91

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MEMBER

GEORGE NICOLAU
MEMBER