

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

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In the Matter of	:	
	:	
UNIFORMED SANITATION CHIEFS ASSOCIATION,	:	
	:	
Petitioner,	:	
	:	
-and-	:	
	:	Decision No. 4-2000
THE CITY OF NEW YORK,	:	Docket No. RU-1163-94
	:	
Respondent.	:	
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DECISION AND ORDER

_____ On June 13, 1994, the Uniformed Sanitation Chiefs Association (“Union”) filed a petition seeking to represent employees of the New York City Department of Sanitation (“Department”) in the titles of General Superintendent II (“GS II”), General Superintendent III (“GS III”), and General Superintendent IV (“GS IV”) as a separate unit. On September 22, 1995, the City wrote a letter to the Office of Collective Bargaining (“OCB”) opposing the petition on the grounds that the employees are managerial and/or confidential.

The Trial Examiner designated by the Board held 14 days of hearing in this matter. Post hearing briefs were filed by the Union and the City on August 26, 1999 and August 30, 1999, respectively.

BACKGROUND

The GS title has five assignment levels, GS I through V. In an earlier proceeding, docket no. RU-1090-91, the Union filed a petition seeking to represent GS levels II, III, and IV. The City took the position that the employees were managerial and/or confidential. Eleven days of hearing ensued,

but the petition was withdrawn prior to the filing of briefs. The entire record of RU-1090-91 was incorporated into the record in the instant matter.

At the outset of the hearings, the Union withdrew its request for representation of employees in the title GS IV. The Union also agreed not to seek representation of the following employees on the basis that they are confidential:

Deputy Director, Bureau of Waste Disposal
Chief of Field Inspection Audit
Director of Enforcement
Assistant Chief, Operations Management Division
Deputy Chief, Operations Management Division
Assistant Chief, Personnel Management Division
Deputy Chief, Special Assistant to the Director of BCC

There are two main operational components in the Department. The Bureau of Cleaning and Collection (“BCC”) is responsible for the collection of waste as well as various street cleaning programs, and the Bureau of Waste Disposal (“BWD”) is responsible for disposal of the waste. The BWD has 700 employees, the BCC has over 6,300 in the field and approximately 300 at headquarters. Another large component is the Bureau of Motor Equipment, whose approximately 900 employees are responsible for the purchase, repair and maintenance of Department vehicles.

The Union seeks to represent over 60 GS II and III positions. There are approximately 48 employees in the GS II title. Approximately 39 of the GS IIs work in the BCC. Of these, 23 are Assistant Borough Superintendents (“ABS”) who work in the boroughs and seven oversee the Superdistricts.¹ The other GS IIs in BCC work in various offices and units. The BWD has seven employees in the title of GS II. The remaining employees in that title are in the Executive and

¹ These districts cover a large geographical area and contain several sanitation districts.

Administrative Offices.

As for the GS IIIs that the Union seeks to represent, there are seven Borough Superintendents in the Department, one in each borough and two each in Brooklyn and Queens. The other GS IIIs include the Assistant Chiefs for Cleaning Operations, Collections Operations, Recycling Operations, Equipment Management Research and Development, Facility Management, and Bureau Operations. This level also includes the Night City Superintendent, the Director of Fresh Kills, the Director for Export Contract Management, and the Assistant Director for Safety and Training.

The Job Specification for GS (Sanitation) states:

General Statement of Duties and Responsibilities

Under general direction, supervises a Sanitation District of similar function; may be detailed to act in a higher level assignment; performs related work.

Examples of Typical Tasks

Supervises assigned personnel and directs sanitation functions such as cleaning, collection, waste disposal, snow removal and related and other activities in the various branches of the Department.

Performs administrative duties in Department offices, bureaus, districts, field locations and such other special duties or assignments, as directed by and at the discretion of the Commissioner of Sanitation.

May attend meetings with community groups and public organizations.

Qualification Requirements

One (1) year of permanent service in the title of Foreman (Sanitation)

Direct Lines of Promotion

From: Foreman (Sanitation) (70150) To: None

The individual employees' duties are described in Management Position Descriptions (MPDs).

The City appeals the Trial Examiner's ruling excluding from evidence City Exhibit 73, a group of 26 "Promotion Recommendation /Appraisals" of employees at issue. It also appeals the ruling that City Exhibit 49 A-FF, a group of "Personal Applications for Promotion" completed by GS IIs represented by petitioner, is admissible for certain sections only. Finally, it appeals the exclusion from evidence and cross-examination certain parts of the Personal Application of Edward

Vecchio, City Exhibit 49FF. The Union sought to enter into evidence a number of evaluations for GS Is and IIs after the record was closed, but that request was denied. The City claims all of the contested positions are managerial; those that the City further claims are confidential are noted in the Job Description.

JOB DESCRIPTIONS

The job descriptions are based upon the testimony of witnesses, the MPD's and other evidence in the record.

MEDICAL DIVISION

Director of Supervised Sick Leave

This position is currently held by a GS II. The incumbent is Chief Galligan. The Director reports to the Department's Medical Director, who reports to the Deputy Commissioner for Financial Management and Administration, who reports to the Commissioner. This position requires that the Director must plan, organize, direct and control all aspects of the Supervised Sick Leave Unit (SSL). The overall duties of the unit are to supervise all employees of the Department while on paid sick leave. The incumbent has recommended a number of changes including the institution of phone checks rather than visits, automation of the process by which an employee requests authorization to leave home, allowing certain employees to return to work without a medical exam. This position was once held by a GS I, who was a Local 444 member at the time.

Assistant Director, Division of Safety and Training

This position was held by a GS II from 1993 through 1999, when a GS III was assigned to the position. The Assistant Director reports to the Director of Safety and Training, a GS IV, who reports to the First Deputy Commissioner. The Assistant Director's major tasks are planning and

implementing safety and accident prevention programs and investigating and maintaining records concerning accident and injury reports. The Assistant Director is responsible for identifying needs and devising ways of meeting them. Some examples are: a point system to identify and discipline or train those employees with repeated accidents, development of procedures for transporting slow-moving vehicles that resulted in a General Order, review and revision of the vehicle damage report, and other instances where the official accident report forms were revised at his initiation.

BUREAU OF CLEANING AND COLLECTION

Deputy Director, Lot Cleaning Division

This position is held by a GS II. There are three levels between the Deputy Director and the Commissioner: the Directors of Lot Cleaning and of the Bureau of Cleaning and Collection and the First Deputy Commissioner. The summary description of duties on the MPD states that the Deputy Director plans, organizes and directs the operations of the lot cleaning division. The incumbent testified that the reference to planning relates to the scheduling of personnel and their assignments. He testified that Labor Relations section of his duties consists of attending labor-management meetings, administering command discipline (“BCAD”) and serving as a Step I hearing officer in grievances. He oversees a private tire vendor’s contract by determining the numbers of tires removed and scheduling the removal of the tires, but he did not make the decision to hire the private vendor. The Deputy Director initiated an innovation by having a computer program created to track all lots by computer rather than manually, which required the purchase of new computers. He also initiated a program for gaining access to locked private lots by obtaining a court order.

Assistant Chief, Cleaning Operations

A GS III occupies the position of Assistant Chief of Cleaning Operations. The MPD describes his overall duties as assisting in planning, analyzing and coordinating street cleaning programs. Part of the current job is to analyze trends to assist in the evaluation of how best to direct deployment of personnel according to data submitted to him. A Borough Superintendent testified that if his borough needed additional personnel above budgeted numbers, he would need the approval of the Chief or the Assistant Chief. He has the ability to review recommendations of the ABSs and approve them without consulting the Chief first. The incumbent states that he will review the routes for changing street cleaning signs but the decision to change the signs is made above his level.

Director of the Derelict Vehicle Office

This position is filled by a GS II. The Director works with the offices of the Assistant Commissioner for Contracting and the Department Counsel to initiate contracts for derelict vehicle removal and to consolidate the contract areas. The Director investigates the quality of prospective contractors and determines whether they are qualified. He also monitors performance and recommends termination of contracts, coordinates the unit that removes heavy objects, and keeps track of payments and billing of contractors. The current Director states that the old manual procedures used for vehicle removal were not changed to conform to a new automatic procedure until he identified areas that needed to be updated or modified.

Deputy Chief, Cleaning Operations, WEP Program

The Deputy Chief is a GS II and is responsible for coordinating and implementing of the Department's WEP (Work Experience) Program. The MPD states that the Deputy Chief assists in

planning, organizing and supervising the program and that he has broad latitude for independent action in decision making. His duties include estimating how many WEP's the Department could manage, developing guidelines and determining how the WEP's would be deployed. He coordinates the unit's activities with the Mayor's Community Assistance Unit, Police and Parks Department and the Department of Homeless Services.

*Assistant Chief, Collection Operations (Refuse)/ Assistant Chief, Collections Operations
(Recycling)*

The incumbents in these positions are GS IIIs. The Assistants, according to the MPD, under direction of the Chief, plan, direct, organize, supervise coordinates their respective collection functions. The Assistant Chief for Collection Operations (Refuse) makes reports and recommendations concerning productivity, and reassigns trucks and personnel as needed throughout the day. The Assistant Chief of Collection Operations (Recycling) coordinates the delivery of material to the composting site and monitors the amount or number of trucks and total tonnage. He also monitors productivity. He was responsible for initiating expansion of the compost program to Queens as well as the use of mechanical brooms to collect the composting material.

Deputy Chief, Refuse/Recycling Containerization

This is a GS II position. In conjunction with the borough commands, the Operations Management Division, the equipment office and union representatives, the Deputy determined in what districts a two-bin truck used for picking up containers should be introduced, adjusting targets if necessary. Reducing the targets would affect the budget because it would ultimately reduce the number of employees needed for this function. If he determines a procedure should be changed, he

changes it.

The then First Deputy Commissioner stated that the Deputy, with his information, “gives us the input that helps us eventually shape what the policy should be.” The Deputy holds labor-management meetings in the districts, working with the ABS for recycling, the business agent and shop stewards to devise ways to best meet recycling targets.

Assistant Chief, Equipment Management, Research and Development

The incumbent is a GS III who reports to the Bureau Chief. There are three levels between the Assistant Chief and the Commissioner. The MPD states that under the direction of the Chief, and with wide latitude to exercise decision making, independent judgment, policy making, initiative and authority, he assists the Chief in research development and equipment planning, organizing, directing, supervising, controlling and coordinating all bureau aspects for equipment management. He monitors the servicing of equipment and coordinates repairs with the Bureau of Motor Equipment (BME). He also reviews specifications and makes recommendations for new equipment, going to inspect new equipment before delivery to the Department. He allocates the new equipment and reallocates old equipment. This work is also performed in conjunction with the Deputy Directors of BME who are in bargaining.

Assistant Chief, Facility Management

This position is filled by a GS III. The Assistant Chief determines the space and needs and type of facilities required at new and current premises and reviews and sets priorities for repair to garages in consultation with Borough Superintendents and ABSs. For example, at the inception of recycling, which required new equipment, he determined how much additional space was necessary

and how it might be acquired. He visits and inspects possible sites, recommends sites and layout, and advises the architects of Department needs. He also monitors the progress on the construction of the building to make sure it meets specifications and that the facility will work. He is also responsible for the temporary relocation of personnel when necessary and deals with the unions to make sure the employees' needs are met.

Deputy Chief, Facilities and Equipment

This is a GS II position. The person in this position reports to both the Assistant Chief for Facility Management and the Assistant Chief for Equipment Management. He also inspects new equipment before delivery and he makes recommendations concerning equipment specifications. He is responsible for the daily equipment needs for BCC and the allocation of new equipment. His facility duties involve monitoring the progress of repair and construction.

Assistant Chief, Bureau of Operations

This is a GS III position. His duties include directing the operations, staff and training personnel for various units, maintaining and operating the city-wide radio system, transmitting orders through the city-wide telecommunications system, work in the snow control and property control units and work in the operations report section. The work in the operations report section includes receiving, typing, copying and distribution of unusual incident reports. The current Assistant Chief put together a procedural guide to follow in the event of a private carters' strike. The previous Assistant Chief oversaw a revision of the "Fuel and Lube" book, bringing it into line with the current procedures. He also revised the "Snow Manual." The Assistant Chief has the authority to change rates paid to vendors on his own, without approval of his superiors, and the money comes out of the

snow budget. He does not determine the amount of the budget.

Night City Superintendents

There are two shifts for this position: a four p.m. to midnight shift in which the incumbent is a GS III; and a midnight to 8 a.m. shift in which the incumbent is a GS II. The Night City Superintendents report directly to the Director of the BCC, with two levels between them and the Commissioner of Sanitation. These positions are responsible for all night operations of BCC during their shifts. Usually, the assignment of personnel or equipment is performed at the borough level. When there is an emergency, he may be called by the Mayor's Office of Emergency Management to have an officer report to a location. But if it is a major emergency, he may report to the ranking police officer and provide whatever assistance is needed, such as removing derelict vehicles and litter baskets from a riot scene. If it is snowing, the Superintendents follow the procedures in the snow manual.

Borough Superintendents

This is a GS III position. There are two levels between the Borough Superintendent and the Commissioner of Sanitation. They report to the Director of BCC. The MPD for the Borough Superintendent states that the primary responsibility is managing and coordinating sanitation services, cleaning of streets, removal of refuse, recyclables and snow and coordinating with the Bureau of Waste Disposal at the borough level. The position is ultimately responsible for every Department function within the borough, from implementing department policies and programs borough-wide and for overseeing their operation. If a pilot program is expanded city-wide, it is the Borough Superintendent's responsibility to implement it within that jurisdiction. The Borough

Superintendent is responsible for scheduling WEP workers and assigning the daily work.

The Borough Superintendent must work with the resources he has and figure out ways to reach the targets and improve service within those parameters. The Operations Management Division sets those overall targets. The Borough Superintendent cannot make changes that involve additional costs. If the Borough Superintendent wishes to reassign someone within the borough he is free to do so, with prior notification of his superiors. However, he must get approval from the Director if he wishes to transfer someone to a different bureau.

Assistant Borough Superintendents (Borough)

There are 38 GS II's assigned as Assistant Borough Superintendents (ABSs). There are three levels between the ABSs and the Commissioner of Sanitation: the Borough Superintendent, the Director of Cleaning and Collection and the First Deputy Commissioner. The MPD describes the ABSs duties as assisting the Borough Superintendent in daily operations of the Borough in planning, organizing, directing, controlling, coordinating all activities of the zone; train and instruct District Superintendents and supervisors on policies and procedures; review recommendations of subordinates for improvement of Borough and District operations; implement them with the Borough Superintendent's approval; chair labor-management committee meetings with district representatives to review existing operations and communicate issues brought to the Borough's attention.

There are two to five ABSs in each of the seven borough commands. They are responsible for the cleaning, collection, recycling, and snow operations of the borough, but not all of these functions are performed by the same ABS. An ABS fills in for the Borough Superintendent when he is not there. ABSs meet with the union to hear complaints from representatives and work out any

problems that they're having with cleaning, collection, recycling or problems with the facility or with repairs. In response, the ABSs, for example, may arrange to move trucks to increase productivity if everyone agrees to it or try to speed the process of getting a repair done at a facility. The Manhattan ABS put together the plans and procedures for a program that was eventually taken citywide. Other ABSs have instituted strategies for getting the best productivity out of the WEP program and for meeting scorecard objectives.

Assistant Borough Superintendents (Superdistrict)

Seven of the 38 ABSs in the field are in charge of Superdistricts. According to the MPD, this ABS is responsible for handling various aspects of cleaning, collection recycling and snow operations. As an example of their duties, an ABS redesigned collection routes and redistributed collection trucks so that the district could achieve productivity standards. Other measures for achieving Department goals have included instituting new routes, planning and organizing all household collection, identifying problems in his assignment area and proposing solutions. The ABSs attend labor-management meetings. They have the ability to reach agreements with the unions at the meetings. Those agreements can include agreements on the allocation of trucks within the district. According to one person who had been an ABS in a Superdistrict, the duties are like that of a District Superintendent (GS I), the difference being that the Superdistrict is larger. ABSs may play a role in employee discipline. They may investigate a complaint , act as a hearing officer in BCAD trials and rule on a penalty using guidelines. The ABSs do not fill in for the Borough Superintendent.

BUREAU OF WASTE DISPOSAL (BWD)

Director of Special Projects

This is a GS II position. There are two levels between this position and the Commissioner. His responsibilities include analyzing, reviewing and auditing administrative and operations procedures and to undertake varying special assignments including the closure of the Fresh Kills plants, personnel reductions and staffing guides. The Director also performs special assignments for the Director of BWD. The Director has represented the bureau in Step II grievance hearings, conducted command discipline, enforced procedures and acted as a prosecutor in enforcing summonses issued by the permit and inspection unit. He also goes to the field to determine whether employees are abiding by anti-corruption procedures. The City claims this position is confidential as well as managerial.

Director, Marine Transfer Station

This is a GS II position. There are four levels between this position and the Commissioner. In the four boroughs other than Staten Island, garbage is transported by truck to marine transfer stations where it is weighed and loaded on barges to be transported to Fresh Kills. The MPD states that he is responsible for analyzing, planning, coordinating and controlling the functions of the division. He has made operational changes to improve the overall efficiency of the division. For example, the Director implemented a system of unloading barges that increased the efficiency and time that barges could be unloaded without ceasing operations. This prevented contamination of paper being sold to outside vendors for recycling.

Director, Export Contract Management

This position was created in 1995 to address the growing emphasis on exporting waste as

Fresh Kills was being phased out. The MPD identifies the position as a GS II, but the incumbent has been promoted to a GS III. There are three employees between him and the Commissioner. The MPD lists his duties as converting plans to actions by setting short-term objectives and priorities, developing and deciding upon longer-term goals, objectives and priorities and deciding among alternative courses of action for the exportation of Municipal Solid Waste. For example, when the Commissioner decided that the initial exporting would take place in the Bronx, it was up to the Director to implement it. He formulated the contract, developed specifications, got bidders, made recommendations to the Bureau of Contracting Officer and then established procedures with the other bureaus and City agencies. He also makes recommendations with respect to training and implementation. The Director of the BWD meets with the Commissioner once a month; if the export program will be discussed, the Director of Export Management will attend as well.

Operations Support Officer

This is a GS II position, with three levels between him and the Commissioner. The MPD states that the Officer assists the Deputy Director in the overall daily operations of the bureau and in proposals for new and improved methods of operation. The Officer assembles information supplied from various divisions as to shortages in manpower or requests for manpower and directs the surpluses to where the shortages are within a system. He also directs tug movements to the Marine Transfer Stations and allots overtime.

FRESH KILLS

Director, Fresh Kills

This position is GS III. According to the MPD, the Director plans, analyzes, directs,

coordinates, and controls the functions of Fresh Kills, and is expected to make recommendations as to policy and procedure. The incumbent did not fill out his own MPD. As an example of planning, the incumbent stated that he is told how many boats to dig (unload) for the day, and he makes plans accordingly. If the number is unrealistic, he asks his superior to change the numbers and the superior makes the decision. When asked what policy recommendations he has made, the incumbent testified that he requested a Clean Team to clean the perimeter of Fresh Kills and that he really doesn't make policy, he makes moves that could better the operation. Within Fresh Kills, he has the authority to move personnel and equipment with out checking if it is operationally necessary. He, among others, was consulted by the Director of BWD to assess whether Plant 1 or Plant 2 should be closed first at Fresh Kills. The incumbent does not usually attend labor-management meetings, but members of his staff do.

Assistant Director of Fresh Kills

This is a GS III position. According to the MPD, the Assistant Director plans, analyzes, directs, coordinates and controls the function of the Division of Marine Unloading (Fresh Kills) and that he makes recommendations for policy and procedure. The Assistant Director handles the administration of Fresh Kills - for example, he oversees a centralized Timekeeping and Payroll Division and Personnel Board. He approves all time and leave requests. He fills in for the Director in his Absence and oversees the Land Cleaning Division.

Deputy Director, Fresh Kills

This is a GS II position. The Deputy Director mainly coordinates the activities of private contractors who install gas collection and leachate collection systems, which involves the

construction of walls around the whole landfill, ponds, and pipes to carry the leachate water and gas. The Deputy Director can also move personnel with the Assistant Director's approval, which he usually receives.

Deputy Directors, Plant 1 and Plant 2

This is a GS II position. Plants 1 and 2 are areas of Fresh Kills where waste collected citywide is brought by marine transfer stations. The Deputy Directors are in charge of the overall operations of their respective plants. One of the duties of the position is to attend labor-management meetings. They make recommendations regarding productivity improvements.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the MPDs should be scrutinized against the actual duties performed by the employees. The Union argues that the original MPDs, filled out by the employees, were returned to the employees by the then Deputy Commissioner, directing that certain "criteria" be included in the MPDs.² The Union argues that many of the MPDs were revised in accordance with these instructions. It contends that the statement in the memoranda that *some* GS III and II positions

² Memorandum from the Deputy Commissioner to Landers, City Exhibit 60A. The memorandum reads, in part:

Include the attached criteria and any Confidential aspects of the position . . .

All GS IV positions are considered Senior Advisers to the Commissioner and Deputy Commissioner in their area of responsibility. They also make recommendations that affect Department Policy and their MPD should reflect the importance of their position. Some GS III positions fall into this category and their MPD should also reflect this important criteria . . .

Memorandum from Deputy Commissioner to Montalbano. The memorandum reads, in part:

In BWD, some GS IIIs and IIs make recommendations that affect Department Policy and their MPD should reflect this aspect of their position . . .

fall into a managerial or confidential category is an admission against interest. It states that it shows that even DOS acknowledges that only some of the petitioned-for positions may fit those categories. The Union also argues that the then Deputy Commissioner's understanding of the definition of policy-making is wrong. It states that one of the then Deputy Commissioner's examples of policy-making included the evaluation of snow routes, spreader routes and advice on which routes should be added or deleted upon established criteria.

The Union argues that the Trial Examiner's rulings relating to the admissibility on all three items the City is challenging were correct. It argues that the Personal Application for Promotion and the Promotion Recommendation/Appraisal are marked as "Confidential-For Nominating Committee Use Only." The Union argues that the City has not made a strong showing of necessity to admit the documents despite the promise of confidentiality and that the volumes of other evidence are sufficient. The Union argues that should the Board determine that the Trial Examiner's rulings were incorrect, in whole or in part, the documents make no difference in the outcome of the case.

The Union states that a review of the facts and the law leads to the inevitable conclusion that all of the GS IIIs and IIs, except for those conceded to be managerial and/or confidential, are eligible for collective bargaining under the NYCCBL. For the ABSs, the Union argues that they implement policy, they do not formulate it. It argues that the ABSs do not play a major role in labor relations, contract administration or personnel administration.

The Union contends that the limited role played by the ABSs on labor-management meetings, command discipline and assignment and direction of personnel are indicative of supervisory or administrative responsibility and are not managerial or confidential. It claims that participation in

labor-management meetings on behalf of management is not an indication of managerial status where the ABS has no power to come to any agreement with the Union that would in any way change DOS policy on a given issue. It contends that the ABSs have no power to change basic numbers or operations except as agreed to with the union and within the perimeter of the union contract and the DOS general orders, guidelines and policy and procedure requirements. The Union states that GS Is, who are represented by a union, are occasionally the “management” representative.

The Union claims that although the ABSs who testified agreed that they conduct and adjudicate Command Discipline proceedings, there is no dispute that the BCADs are conducted within the framework of the General Order issued by DOS. It states that the General Order strictly limits the types of penalties that may be imposed, and the Commissioner must approve the recommended penalty before it is imposed. Also, the Union contends that the ABSs, along with the Borough Superintendents and the site supervisors, may summarily suspend subordinate employees for specific infractions and only in accordance with the guidelines. The Union states that the site supervisors are GS Is.

The Union states that the other GS IIs each bring a certain level of expertise to their job, have discretion in carrying out their functions and most make recommendations in their respective fields. However, the Union claims that this is not to be confused with managerial status. It argues that the difference is that the GS IIs are concerned with implementing policy and adhering to procedures. The Union argues that identifying problems and analyzing the problems³ requires a high level of skill

³ The Union includes in this term technical issues, financial issues, scheduling issues and statutory issues.

and judgment but must be distinguished from policy formulation.⁴ It claims that although some revise procedures or make recommendations to change procedures or even make recommendations to change policy, none of this shows that the individual is a manager. It argues that the main function of the GS IIs whether in the Borough or the specialized areas is operational, administrative, and involved with implementing policy, not policy making.

The Union contends that a review of the duties of the Borough Superintendents and the other GS IIIs show that they perform at a high level of administrative responsibility, have a significant amount of discretion and bring a significant amount of professionalism and expertise to their jobs, but that alone does not a manager make. It argues that the involvement of the Borough Superintendents in policy making is minimal, at best. It states that although the Borough Superintendents and the other GS IIIs function at a higher level than the GS IIs, all the arguments made in connection with the GS IIs are applicable.

The Union states that the Board has developed a list of criteria which it considers to be “reliable indicia” of managerial status. Although the Union contends that some of the indicia put an improper gloss on the correct meaning of “managerial,” it contends that these employees do not meet the test for managerial status. The Union gives several examples. It states that none of the Chiefs, except those conceded to be ineligible, are involved with labor relations to any meaningful extent. It argues that none of the employees here assist directly or have a role in collective bargaining and none play a role in personnel or contract administration.

The Union argues that while some of the employees are minimally involved in the budget,

⁴ The Union cites Decision No. 4-97.

it appears to be limited to making requests for items to be included in the budget, approving purchases within the existing budget and attempts to improve efficiency for cost savings. The Union contends that these duties are different from a manager, who is responsible for budget-making.

The Union, anticipating an argument by the City that the high salaries of the employees should be a significant consideration in determining the status of the employees here, states that there are several different groups of employees with similar or higher salaries who were found by the Board to be eligible for collective bargaining.⁵ It contends that the power to assign personnel is no longer relied upon by the Board as an indication of managerial status, and the inclusion in the Management Pay plan and/or relatively high salaries have been abandoned as effective criteria.

A criteria considered at times by the Board, the Union contends, is participation at high-level meetings, meetings with Commissioners or Deputy Commissioners on a regular basis. However, it argues, the occasional meetings testified to do not pass muster, particularly where, as here, the function of the employee is to provide technical information and know-how in a discussion.⁶ The Union states that the one formal meeting the these employees go to with high level officials is the Annual Meeting which also includes GS Is, who are represented by a union, in the group of attendees.

The Union asserts that another one of the criteria used by the Board is the place the employees have in the agency hierarchy, and a review of the DOS organization chart shows that the

⁵ The Union refers to the salaries paid to the Deputy Wardens, Decision No. 11-95, Administrative Fire Marshals, Decision No. 15-92, and Deputy Directors of Motor Equipment Maintenance, Decision No. 7-92.

⁶ The Union cites Decision No. 15-92 at 21.

contested employees are not among the upper echelons of the DOS employees. It contends that the ABSs are not even on the chart, the Borough Superintendents are four tiers away from the Commissioner and the other employees vary from eight tiers below to four tiers below the Commissioner. Finally, the Union argues that regarding bargaining history, the GS IIs (formerly Senior Superintendents) were in collective bargaining until 1979 when they were removed from the unit pursuant to a deal between Local 444 and the City. It argues that those employees, along with the contested GS IIIs should be reinstated to bargaining eligibility.

The Union believes that a separate bargaining unit of GS IIs and IIIs would be appropriate. However, it states that if the Board finds that a more appropriate unit would be in Local 444's bargaining unit which already includes supervisors and district superintendents, the Union would be amenable.

City's Position

The City appeals certain rulings by the Trial Examiner, as mentioned above. The City argues that the exclusion of evidence that will assist in clarifying how the contested employees participate in the essential process of policy formulation and effectuation is prejudicial to the City's case and prevents the Board from having "a complete record of all facts necessary for a fair determination of the issues," as required by Title 61, § 1-10(c). It also argues that neither the application nor the recommendation is a confidential document as a matter of law.

The City argues that all of the contested GS IIs and IIIs are managerial and that the Director of Special Projects at the BWD is confidential and managerial. The City states that all of them have some indicia of managerial status, some more than others, but that the Board has not required that

all factors be present for each employee in order to sustain a finding of managerial status.⁷

The City states that the petitioner will argue that, because the DOS is governed by a multitude of Operations Orders, General Orders, and manuals, that the Borough Superintendents and the ABS merely follow procedures and have no leeway for the exercise of independent judgment. The City argues that the policies, manuals and orders were once developed by the same process as those being developed today, *i.e.*, by consultations and contributions from the GSs in the field who will be carrying them out.

The City contends that when the First Deputy asks the BWD Director for analysis or a recommendation, the Director asks all the Directors reporting to him to give him feedback and that feedback is accepted, consolidated and then forwarded back to the First Deputy. In the BCC, the City argues that there are several ways in which policies and procedures are developed. It contends that when new programs are contemplated, whether they arise because of a government mandate or from the Commissioner's office, they may be initiated as pilots in the boroughs so there can be input from the Borough Superintendent and the ABSs as to how well the program works and their suggestions can be incorporated.

As examples, the City states that after it was determined that the closing of Fresh Kills would require that the City export waste, and the Commissioner decided to start in the Bronx, a GS II was assigned to turn the goal into an operating program. Another example, it contends, is after the Mayor decided that all City agencies would employ WEP workers, a GS II was brought from the field to the main office to devise procedures and to manage the program. It argues that the employees may

⁷ The City cites Decision Nos. 7-92 and 13-86.

develop procedures for a new program or revise procedures because of changed conditions or new concerns. The procedure for new procedures is generally the same, it claims. The Chief, Assistant Chief, or Deputy Chief drafts the procedure, and comments are solicited from the field through the Borough Superintendent. If the comments make sense, the City argues that the comments are included. All orders involving operations and personnel in the field that might have union ramifications are sent to the bureau chiefs, Borough Superintendents, and Night City Superintendents, the City contends. The City states that manuals such as the Snow Manual and the Fuel and Lube Book were revised by a committee appointed by the BCC Assistant Chief of Operations after drafts were reviewed by the Borough Superintendents and the ABSs.

The City states that Petitioner may argue that there are instances in which a GS I or a uniformed supervisor or even sanitation worker might perform one or another of the same functions as a GS II or III, but the determination must be made whether the contested employee is performing managerial duties. Petitioner may also argue that the lack of regular meetings indicates that the GS IIs and IIIs are not managerial, the City contends. In the instant matter, it argues that the lack of meetings with the Borough Superintendents and ABSs is evidence of the opposite because they operate very autonomously.

The City argues that the DOS is a department in flux as compared with other departments and that navigating changes through the system can be daunting, keeping in mind considerations of contractual agreements, department policy, regulatory and legal mandates. It contends that these challenges, navigating changes in a difficult environment, are the essence of management.

The City claims that the DOS emphasis is on increasing productivity through district-based

labor-management discussions. It asserts that it is the GS II ABSs who speak for management in these meetings, where targets are adjusted or negotiated, means of meeting targets determined, changes in equipment, the operation of the two-worker collection program and other productivity measures are arrived at. It contends that the GS IIs are given managerial responsibilities that go far beyond those of the Administrative Fire Marshals, the Deputy Wardens, and the Deputy Directors of DOSs own Bureau of Motor Equipment. Due to the general high level of experience possessed by these employees, it contends that there is very broad participation in the development and revision of programs and procedures designed to achieve the goals set by the Commissioner and the Mayor.

The City argues that the positions sought by petitioner all require broad and active participation associated with the methods of fulfilling established purposes.⁸ It contend that the employees in these positions clearly speak for management, convey and implement departmental policy and have substantial discretion and authority in connection with the performance of their duties.⁹ Accordingly, the City contends that the GS II and III positions are all managerial.

Finally, the City argues that in the even that the Board should find that some minority of the contested employees are not managerial or confidential, it would be inappropriate to split the title between those eligible and those ineligible for bargaining. Generally speaking, it states, the Board has refused to split a title absent compelling circumstances.¹⁰

DISCUSSION

⁸ The City cites Decision No. 73-68.

⁹ The City cites Decision No. 73-71.

¹⁰ The City cites Decision Nos. 7-92 and 26-76.

As a preliminary matter, we shall address the issue of the dispute over the admission into evidence of the Personal Applications for Promotion and the Promotion Recommendation/Appraisals. A careful review of the documents shows that, although they provide a great deal of specifics on the various day-to-day activities and accomplishments of the contested employees, they do not provide any significant additional, probative information that is unavailable in any of the testimony and exhibits already admitted into evidence. Therefore, having reviewed and considered the admissibility of the documents, we will not disturb the Trial Examiner's ruling.

Under both the NYCCBL and the Taylor Law, employees are presumed to be eligible for collective bargaining.¹¹ 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 negotiation or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii).

In implementing this section of the Taylor Law, we have considered the following factors, among others, as reliable indicia of managerial status: the number of subordinate employees;¹² area

¹¹ Section 12-305 of the NYCCBL states, in pertinent part:
“[P]ublic employees shall be presumed eligible for the rights set forth in this section . . .”

¹² Decision Nos. 4-97; 11-95; 76-72.

of authority;¹³ involvement with labor relations;¹⁴ preparation of budget and allocation of funds;¹⁵ involvement in personnel administration; power to hire, assign and transfer personnel; and the formulation, determination and effectuation of an employer's policies. The last factor, the formulation of policy, has consistently been held to be the single most important indicium of managerial status.¹⁶

The terms "policy" and "formulate" have been defined by the Board. "Policy" is the development of the specific objectives of a governmental agency to fulfill its mission, and the methods, means, and extent of achieving such objectives.¹⁷ "Formulate" includes not only those with the authority or responsibility to select among options and to put a proposed policy into effect, but also those who regularly participate in the "essential process" which results in a policy proposal and the decision to put such proposal into effect.¹⁸

Applying the above criteria to the instant matter, we find that all of the contested employees claimed by the City to be managerial are eligible for bargaining. The City argues that the employees should be found to be managerial based upon their participation in the policy-making process. Participation in the formulation of policy must be "regular," "active," and "significant," to support

¹³ Decision Nos. 4-97 and 11-95.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Decision No. 4-97 and 34-81.

¹⁷ Decision Nos. 4-97; 11-95 and 15-92.

¹⁸ *Id.*

a finding of managerial status.¹⁹ The testimony of the witnesses does not warrant a conclusion that the employees enjoy a status which is sufficiently close to the process by which policy decisions are made. Although it appears that there is an occasional adoption of recommendations and suggestions by these employees, it is clear from the testimony that, typically, such recommendations and suggestions are filtered up through the chain of command, and that these employees' normal function is to follow policy as set and implement it rather than to establish new policy.

For example, the Director of Special Projects at BWD was asked, as a result of the plan to close Fresh Kills, to discuss the various scenarios of how the Marine Transfer Stations ("MTS") could handle the anticipated changes.²⁰ Although the Director was asked to create the report, it appears there was no recommendation as to which scenario was best and the report was filtered up through two levels before it reached the Commissioner of the DOS. According to the testimony, it was either the Commissioner or City Hall that made the decision.²¹ Like the other contested employees, even though it appears that from time to time he may be asked to write such important reports, the decision is made above him and he does not make policy on the necessary "regular," "active," and "significant" basis. The remainder of his time is divided among other non-policy oriented activities.²²

¹⁹ Decision Nos. 15-92 (Administrative Fire Marshals: although a manager may consider the employees' opinions when making a policy decision, the managers commonly make policy decisions without conferring with the employees); 36-82; and 34-81.

²⁰ Tr. p. 996-1000.

²¹ Tr. p. 999.

²² Tr. p. 916-917, City Exhibit 39-S, MPD for Director, Special Projects.

The evidence demonstrates that while these employees have substantial latitude to use their independent judgement in implementing policy and running their commands, their discretion must be exercised within the boundaries of specified DOS guidelines. It is the conditions under which discretion may be exercised, not the exercise of discretion itself, which we find relevant in determining managerial status.²³ Though the MPDs speak of formulating policy, when compared with direct testimony, they appear a less accurate portrayal of the duties performed by the employees. Although the City may claim that a particular title is managerial and is excluded from collective bargaining, only the Board has the authority to make such a finding.²⁴

There have been many examples of how certain employees have revised, improved and/or created procedures. Although this task requires the exercise of professional judgment, it does not involve policy formulation.²⁵ Similarly, there have been many examples of how an employee has improved efficiency to meet targets and improve service. Again, this involves a high level of professional judgement, but it does not rise to the level of policy formulation. Throughout the pleadings and the testimony, we see that others, above the level of these employees, have the authority or responsibility to select among options and to put a proposed policy into effect or regularly participate in the essential process which results in a policy proposal and the decision to put such a proposal into effect. The contested employees have been counted on to implement those

²³ Decision No. 15-92.

²⁴ *Id.*

²⁵ At several points we saw that the employees' definition of policy-making differed from the Board's. For example, at Tr. p. 254, a witness described one of the "policy" changes the Director of Supervised Sick Leave made as "the granting of resumptions to full active duty over the telephone" for employees in a certain category.

policies. According to the testimony, these employees were not involved in the decisions to bring the WEP program to the DOS nor were they involved in the decision to close Fresh Kills. Rather, they were brought in after the decision was made to help in the implementation or improvement of procedures or supervision of the tasks.

The record in this proceeding shows that the contested employees do not play a considerable role in preparing for or conducting collective bargaining, that is, they do not significantly participate in developing the employer's bargaining demands and do not shape the employer's response to bargaining demands.²⁶ Although the contested employees are involved in the important task of administering collective bargaining agreements, such involvement is too far removed from the bargaining process to effectuate DOS labor policies. The testimony demonstrates that ABSs, at labor-management meetings, could shift trucks from one section to another to increase productivity, but they had to stay within a number provided by the Department and report the moves up the chain of command.²⁷ Furthermore, a witness testified that when an ABS agreed to move trucks between districts at a labor-management meeting, the department would not implement the plan because, in the witnesses opinion, it meant they were negotiating new productivity targets.²⁸

Some of the contested employees are involved in command discipline and the suspension of subordinate employees. In the past, this Board has held that where there are set guidelines for

²⁶ Cf. Decision No. 63-74 (although OTB Area Managers do not represent management at the bargaining table, they significantly participate in developing the employer's bargaining demands and in shaping the OTBs response to Union bargaining demands).

²⁷ Tr. p. 1104-1107.

²⁸ Tr. p. 1333-1334.

determining the penalties for the various disciplinary infractions, the role played by the employee in the disciplinary process was too limited to warrant designation as a managerial employee.²⁹ The testimony and the exhibits show that these employees are directed by established guidelines. For example, ABSs and Borough Superintendents, among others, adhere to General Order 96-14,³⁰ which spells out in detail the bases for suspension and who has authority to suspend and reinstate. Thus, the employees' role in the process is too limited to be considered managerial. Similarly, the employees' role in the grievance process is too limited to warrant such designation.³¹ While it is possible to show that an employee may fulfill enough criteria other than policy formulation to be considered managerial, the City has not established that for any employee at issue.

Regarding the alleged confidential status of the Director of Special Projects at the BWD, we find that the evidence fails to disclose that this individual's duties and responsibilities are of a confidential nature. With respect to confidential status, we have relied upon the employee's relationship with managerial employees. Employees are confidential when that relationship regularly provides access to confidential information concerning labor relations and/or personnel matters to such an extent that inclusion in collective bargaining would lead to conflicts of interest inimical to

²⁹ Decision Nos. 15-92 and 11-95 (Deputy Wardens).

³⁰ Union Exhibit 44. A former ABS and Borough Superintendent testified, at Tr. p. 1142-1143, that when he held those positions, he had to adhere to General Order 96-14 in suspending subordinate employees.

³¹ In prior decisions, particularly Decision No. 53-70, we held that employees that represent management at Step II grievances were managerial. Here, we have at least one contested employee who represents management at Step II grievances, the Director of Special Projects at the BWD. However, in Decision No. 53-70, other indicia of managerial status, *e.g.*, the regular and significant participation in central planning and formulation of department programs and policies, absent here, contributed to the designation.

the bargaining process and the full and fair representation of the employer's interests.³² Persons may not be classified as confidential on the ground that their work is of a generally secret or confidential nature. The confidentiality must relate directly to the employee's involvement on behalf of the employer in collective bargaining, the administration of collective bargaining agreements or the conduct of personnel relations in such a manner that inclusion of such employees in collective bargaining would give rise to conflicts of interest inimical to the bargaining process and to full and fair representation of the employer's interests.³³

The City argues that in view of the fact that he is involved in anti-corruption measures and has foreknowledge of those subject to discipline, and that he participates in the planning for staff reductions in the BWD, he must be declared a confidential employee. Although the testimony shows that he is indeed involved in such activities, utilizing the above standard, those activities do not rise to a level where the inclusion of this person in a collective bargaining unit would give rise to the necessary conflict of interest. Moreover, we note that anti-corruption portion of his duties is only one segment of many other duties, as we saw in his job description.

Accordingly, for all of the reasons stated above, we find and conclude that all of the contested employees are neither managerial nor confidential employees and are eligible for collective bargaining. The employees in the following positions, as ceded by the Union, shall not be eligible for collective bargaining:

³² Decision Nos. 4-97; 11-95 and 13-86. *See also* Decision Nos. 15-92 (determinations of confidential status are based upon the employee's relationship with managerial employees, and whether the relationship regularly provides access to confidential information regarding labor relations and/or personnel matters) and 13-74.

³³ Decision No. 48-82.

Deputy Director, BWD
Chief of Field Inspection Audit
Director of Enforcement
Assistant Chief, Operations Management Division
Deputy Chief, Operations Management Division
Assistant Chief, Personnel Management Division
Deputy Chief, Special Assistant to the Director of BCC

We also find that the Uniformed Sanitation Chiefs Association (“USCA”) is the appropriate unit for the employees. In doing so, we note that the City did not challenge the appropriateness of the USCA, and the petitioner has shown the required proof of interest. We must reject the petitioner’s proffered alternative. Local 444 is not a party to the proceedings and the record is devoid of evidence concerning the appropriateness of its unit.

ORDER

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

ORDERED, that the titles Deputy Director, BWD; Chief of Field Inspection Audit; Director of Enforcement; Assistant Chief, Operations Management Division; Deputy Chief, Operations Management Division; Assistant Chief, Personnel Management Division; Deputy Chief, Special Assistant to the Director of BCC, and the same hereby are, designated confidential, and are exempt from collective bargaining; and it is further,

ORDERED, that the remaining contested employees in the levels GS II and III be designated eligible for collective bargaining; and it is further,

CERTIFIED, that the Uniformed Sanitation Chiefs Association is the exclusive representative for purposes of collective bargaining for the eligible employees in levels GS II and III .

DATED: October 10, 2000
 New York, New York

MARLENE A. GOLD

CHAIRMAN

GEORGE NICOLAU

MEMBER

DANIEL G. COLLINS

MEMBER