

EMS Superior Off. Ass'n v. City, 68 OCB 10 (BOC 2001) [10-2001 (Cert Corr)]

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF CERTIFICATION

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In the Matter of

EMS SUPERIOR OFFICERS ASSOCIATION,

Petitioner

Decision No. 10-2001

-and-

Docket No. RU-1234-98

THE CITY OF NEW YORK,

Respondent

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**CORRECTED DECISION AND ORDER**

On November 17, 1998, the EMS Superior Officers Association (“Petitioner” or “Union”) filed a petition in Case No. RU-1234-98 seeking to represent 26 employees of the New York City Fire Department in the title Supervising Emergency Medical Service Specialist, (“SEMSS”) detailed as Deputy Chief and Division Commander, in a separate bargaining unit. On September 15, 1999, the City filed a response to the petition asserting that the petitioned-for employees are managerial and/or confidential and therefore not eligible for collective bargaining.<sup>1</sup>

A Trial Examiner designated by the Board held eight days of hearing in this matter between November 1999 and November 2000. Post-hearing briefs were filed by both parties on or before March 20, 2001.

We find that SEMSS, detailed as Division Commanders, Division Commander in Charge

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<sup>1</sup> The following abbreviations will be used herein: transcript - “Tr.”, Petitioner’s exhibit - “Pet. Ex.”, and Respondent’s exhibit - “Resp. Ex.”

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of Special Training, and Deputy Chiefs, (Title Code M5035E) are not managerial and/or confidential and are therefore eligible for collective bargaining. However, we also find that the positions Division Commander in Charge of Emergency Medical Dispatch (“EMD”) and Deputy Chief in Charge of Special Planning are managerial and therefore not eligible for collective bargaining.

**BACKGROUND**

Petitioner seeks to represent employees who work as Division Commanders and Deputy Chiefs in the New York City Fire Department Bureau of Operations - Emergency Medical Service Command (“EMSC”). The Chief of EMSC is the highest ranking official within EMSC; immediately below him is the Assistant Chief of EMSC. The Chief of EMSC reports to the Fire Department Chief of Operations, who, in turn reports to the First Deputy and Commissioner of the Fire Department.<sup>2</sup> EMS Command employs about 2,500 employees.

Subordinate to the Chief and Assistant Chief of EMSC are six Division Commanders and thirteen Deputy Chiefs.<sup>3</sup> Each Division Commander is in charge of a specific geographic area and a varying number of facilities staffed by Captains, Lieutenants, Paramedics and Emergency Medical Technicians (“EMTs”). Two or three Deputy Chiefs assist each Division Commander.

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<sup>2</sup> At the hearing, the parties stipulated to the exclusion of the Chief of EMSC and the Assistant Chief of EMSC from the unit sought. Tr. 4-5.

<sup>3</sup> There are Division Commanders and Deputy Chiefs who work on the firefighting side of the Fire Department and are represented by Uniformed Fire Officers Association. *See Unif’d. Fire Officers Ass’n., Local 854, IAFF*, Decision No. 15-92.

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Each division is responsible for providing basic and advanced emergency life support functions and transportation to hospitals. The number of employees in each division varies from 200 to 600. In addition to the six geographic divisions, there is a Division Commander in Charge of Training, a Division Commander in Charge of Emergency Medical Dispatch (“EMD”), and a Deputy Chief in Charge of Special Planning.

Individuals in the titles in issue participate in the managerial pay plan, level III. The Division Commanders’ salaries range from \$85,601 to \$107,102. The Deputy Chiefs’ salaries range from \$69,237 to \$84,863.

**DESCRIPTIONS OF THE JOBS**

***Division Commanders***

The general job description for the Division Commander position states:

[t]he Division Commander is responsible for planning, directing, controlling, and coordinating the operations of the Emergency Medical Service Command (EMSC) within an assigned EMS division, and is responsible for the effective and efficient delivery of emergency medical services within the division. Reports directly to the Assistant Chief of the EMSC and supervises over Deputy Chiefs. Performs rotating on-call duty as EMSC Major Response Chief for city-wide operations, and is subject to 24-hour emergency recall.

Resp. Ex. #6.

***a. Assigned to Divisions<sup>4</sup>***

Division Commanders assigned to a division are responsible for supervising, organizing, evaluating, and maintaining the overall operation and delivery of EMS services in a specific

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<sup>4</sup> Division Commanders are also referred to as “Chiefs.”

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geographic area. The Division Commanders are given some discretion and latitude to operate their divisions efficiently. They determine how many ambulances to operate and the amount of personnel necessary at a given time to maintain services within a division. The record is silent on whether Division Commanders have a direct role in determining the number of ambulances purchased or maintained by EMSC. Similarly, there is no evidence that Division Commanders have authority to hire new personnel. Rather, the evidence shows that their responsibilities concern the allocation of resources made available to the divisions by personnel higher up in the Fire Department or EMSC. Also, Division Commanders spend about 20% of their time in the field responding to emergencies and supervising the provision of pre-hospital care.<sup>5</sup>

A typical Commander's day starts on the way to work, when the Commander logs into a computer in the car and communicates with the Resource Coordination Center and individual officers to see whether any specific situations require immediate attention. Upon arriving at the office, a Commander completes administrative tasks such as signing off on payroll and overtime slips, or responding to inquiries regarding unusual occurrences or special incidents. A Commander may attend meetings with community boards, other chiefs, or voluntary hospitals' administrations. The remainder of the day is spent in the field monitoring performance of employees and effectiveness and efficiency of the operation. On the way home in their car, each

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<sup>5</sup> At the scene of an emergency, the Division Commander may be the highest ranking officer of the EMSC (Incident Commander). However, if there are other units of the Fire Department's Bureau of Operations present, the highest ranking fire officer becomes the Incident Commander and is in charge of all operations at the scene. In such instances, the Incident Commander consults with and is required to be "guided by" the highest level EMSC officer on the scene.

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Commander makes contact with the Resource Coordination Center again.

Division Commanders do not appear to have any responsibilities concerning budget preparation and allocation of funds. They do, however, have some personnel administration responsibilities including scheduling,<sup>6</sup> assignment changes, and approval of overtime authorizations. They have the ability to transfer permanently and reassign employees within their divisions. They are responsible for ensuring adequate performance from their subordinates and can effectively recommend commendations and upgrades. Division Commanders have the authority to supercede the overtime equalization caps in order to maintain appropriate operating levels. The record indicates that Division Commanders can also effectively recommend performance-based discipline or termination. However, Division Commander's exercise of discretion in initiating discipline and formulating penalties is restricted by the EMS Operating Guide which sets forth conduct for which discipline is appropriate and describes the types and range of penalties appropriate for specific misconduct. Joint Ex. #1. Usually discipline is initiated by Captains and Lieutenants, but where it is contested, the Division Commanders and Deputy Chiefs must review and approve of the proposed discipline.

The Division Commanders' involvement in labor relations is limited to meeting with union representatives in order to resolve safety, scheduling, or overtime issues within their respective divisions. These meetings are held regularly in order to resolve issues prior to a

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<sup>6</sup> At the time the hearing was held, Chief Gabriel, a Division Commander, did the scheduling for all the Deputy Chiefs. His draft of the schedule, was subject to approval by the Chief and Assistant Chief of EMSC, who often make changes to ensure that proper coverage is maintained.

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grievance being filed or at the early stage of the grievance process.<sup>7</sup> Division Commanders have no direct involvement in the collective bargaining process.<sup>8</sup> However, Division Commanders do give advice to the Chief and Assistant Chief of EMSC (who develop bargaining proposals) and have been solicited for comments on various union bargaining proposals, such as on the impact of a union bargaining proposal to increase the mandated time to return to duty for an on-the-job injury from 30 to 90 days.

Division Commanders regularly attend meetings conducted by the Assistant Chief of EMSC. Discussion at these meetings, which are held at least once a month and often as much as once a week, include response times and other performance statistics, training, equipment use issues, safety issues, special events, overtime assignments and levels, use of annual leave and other staffing/coverage issues.

Policies and procedures governing EMSC operations are set forth in the Emergency Medical Service Command Operating Guide (“Operating Guide”) and in EMS Command Orders (“Command Orders”). The Operating Guide contains detailed policies and procedures that apply to all employees and are issued by the Fire Department’s Chief of Operations. Command Orders are developed by the Office of the Chief of EMSC and are issued with the approval of the Chief

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<sup>7</sup> Captains, who also conduct and/or attend these meetings, are eligible for collective bargaining. *See Unif’d. Fire Officers Ass’n, Local 854, Int’l Ass’n of Fire Fighters*, Decision No. 62-70.

<sup>8</sup> The Assistant Chief of EMSC is the liaison to the Fire Department’s Office of Labor Relations and Personnel. He works on various labor relations policy committees, attends collective bargaining sessions, and works closely with the Director of Labor Relations. He regularly attends meetings with the unions to discuss various labor relations and grievance issues.

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of Operations. Accordingly, both the Operating Guide and Command Orders are generated by senior level management and/or their staff.

Division Commanders prepare Division Memoranda that contain instructions and information relative to the operation and/or function within a division and must conform with Fire Department and EMSC rules. Division Memoranda concern subjects such as procedure for restocking medication inserts, special plans to reduce ambulance turnaround time, a specific description of Lieutenants' tour responsibilities which supplements and refines those set forth in a Command Order, instructions on gaining access to specific locations, instructions and procedures on maintaining communication with the Resource Coordination Center, instructions on locating emergencies on parkways, highways and expressways, and deadlines for weather emergency reports. Within each division, Commanders may also initiate and implement pilot programs that are temporary attempts to increase performance or efficiency. However, these trial programs require review and approval of the Chief and Assistant Chief of EMSC prior to implementation.

Division Commanders sometimes participate in developing Command Orders. However, the record contained no evidence that developing Command Orders is a significant or regular part of their jobs. As in the case of the equitable distribution of overtime policy, their comments and recommendations were solicited prior to the drafting or issuance of the Command Order. In other instances, their involvement was more direct. For example, in January 1998, the Commander of Division Two issued a memorandum specifying the responsibilities of Lieutenants within the Division. Previously, the Operating Guide described these duties. The Division Two

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memorandum, however, breaks down the responsibilities by assignment (Conditions Car Supervisor, Hospital Supervisor, etc.), and describes with greater particularity the individual responsibilities. It sets forth a specific number of calls the Patrol Supervisor should respond to each tour, the number of quick check inspections which should be performed each tour, and the number of patients who should be observed each tour. In January 1999, the Chief of Operations issued a Command Order detailing the job responsibilities of the Conditions Car Supervisor, but listed only general responsibilities rather than the requirements specified in the Division Memorandum. Therefore, at most the Division Memorandum was used as a guide for the Chief of Operations to issue a general operation-wide directive concerning Conditions Car Supervisors' job responsibilities.

Other examples of Division Commanders' involvement in the issuance of Command Orders are described below. In 1998 and 1999 certain Command Orders initiated by Division Commanders described pilot programs unique to particular divisions -- a dual dispatch pilot in Staten Island and a Division Captain pilot for Division Three. These two pilot programs were implemented by the Chief of Operations rather than by the Commanders because the implementation required the assistance of other divisions and/or departments, and therefore required issuance by an authority higher than Division Commander.

In 1999 the Fire Commissioner formed a committee, including a Division Commander and a Deputy Chief, as well as the Assistant Chief of EMSC, the Director of Labor Relations, and a Chief Fire Marshal to study the issuance, use, and maintenance of soft body armor. The Fire Commissioner ultimately issued a Command Order adopting some, but not all, of the committee's

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recommendations.

Also in 1999, the Assistant Chief of EMSC asked the Division Five Commander, Chief Gabriel, to draft a Command Order concerning the guidelines for Known Vacancy Overtime (“KVO”) postings consistent with the current known vacancy posting, and overtime equalization policies. Chief Gabriel did so with the assistance of a Lieutenant in the Bureau of Operations.<sup>9</sup> The Command Order discussed where and when the KVO schedule should be posted and directed the station supervisors to review overtime use, solicit volunteers to fill vacancies, and utilize personnel consistent with the overtime equalization policy, already established by Command Order.

***b. In Charge of Training***

The Division Commander in Charge of Training for EMS reviews curriculum, manages the operations at two training buildings, conducts new employee training, and evaluates the emergency vehicle operation course. The curriculum he teaches is mandated by New York State. He reports directly to the Executive Director of Fire and Life Safety, who in turn reports to a Deputy Commissioner and the Commissioner of the Fire Department. The Division Commander in Charge of Training also supervises about 90 employees including Captains, EMTs, Paramedics and clerical support personnel. He has been involved in revising training procedures for refresher training and has proposed training on administering Albuterol, however, any changes made to training curriculum, policy, or procedures requires the approval of the Executive Director of Fire and Life Safety. The Division Commander in Charge of Training has been involved in the

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<sup>9</sup> Lt. Bedell, who assisted Chief Gabriel, is in a bargaining unit.

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collective bargaining process to the extent that he has been solicited for his opinion on a union bargaining proposal which had impact on the training program.

***c. In Charge of Emergency Medical Dispatch***

The Division Commander in Charge of EMD coordinates the receipt and dispatch of ambulances throughout New York City. He supervises about 300 employees – Captains, Lieutenants, EMTs, and Paramedics and reports to the Assistant Commissioner of Dispatch Communications for the Fire Department. He oversees assignment and reassignment of personnel within his division and monitors overtime. He reviews recommended discipline and determines the appropriate penalties for those employees under his supervision. The Division Commander in Charge of EMD regularly meets with union delegates or executive board members to discuss Bureau issues such as overtime and working conditions. He is also involved in Equal Employment Opportunity issues, is the EMD Bureau’s liaison with the Bureau of Investigations and Trials (“BITS”), and is privy to confidential information concerning on-going investigations of Bureau employees.

The Division Commander in Charge of EMD is paid about \$15,000 more than most of the Division Commanders and just slightly less than the Chief of EMSC. Resp. Ex. #3. It appears, however, that this difference may be a result of the individual’s position as Executive Director of EMS prior to its consolidation with the Fire Department.<sup>10</sup> However, the Division Commander in Charge of EMD is the highest ranking official in charge of the EMS dispatch operation and is the

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<sup>10</sup> At the time the hearing, the position of Division Commander in Charge of EMD was held by David Diggs.

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most knowledgeable person about this section of the Bureau.

The Division Commander in Charge of EMD is directly involved in setting operations policy for his division. Specifically, he rewrote the response time policy. He assisted the Assistant Commissioner of Dispatch Communications, and the Chief and Assistant Chief of EMSC in developing radio response policies and integrating the voluntary hospitals into the 911 system. Both of these policies were implemented as Command Orders. In addition, the Division Commander in Charge of EMD has the authority to issue Dispatch Operations Orders in emergency situations when the Assistant Commissioner of Dispatch Communications is not present, albeit infrequently. He attends special meetings with the Fire Commissioner, Deputy Fire Commissioners, Assistant Commissioner of Dispatch Communications, and the Chief and Assistant Chief of EMSC. However, generally his purpose at these meetings is to address a specific situation by providing an explanation of EMD's actions. The Division Commander in Charge of EMD attends labor-management meetings a few times a year with the Fire Commissioner and Assistant Commissioners. His role at these meetings is to provide information to answer the unions' questions. He drafts the budget for his section of the Bureau and submits it to the Assistant Commissioner of Dispatch Communications for inclusion with the overall Bureau budget.

### ***Deputy Chiefs***

The general job description for the Deputy Chief position provides the following:

Supervises and evaluates the operational activities of a number of ambulance stations consisting of EMS Captains, Lieutenants, Paramedics and EMTS on an assigned tour of duty. Monitors and assesses static and dynamic conditions, and has operational decision-making authority to initiate activities to improve the

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performance, efficiency and effectiveness of EMSC operations on the tour. Conducts frequent on-site observations of field activity, patient care, and line supervision for quality assurance and improvement, as well as to promote a high level of pre-hospital care skill. Visits and inspects ambulance stations and outposts on a regular basis to monitor and address roll calls; ensure cleanliness, review human resources, staff allocation, safety, and security of the station; and provide support and guidance to field officers in the performance of their duties.

Resp. Ex.# 7B.

**a. *Assigned to Divisions***

The responsibilities of Deputy Chiefs assigned to divisions are confined to a specific geographic location. In the course of their regular assignments, Deputy Chiefs assist the Division Commanders in achieving the mission or operational goals of the division. They maintain the delivery of EMS services by scheduling, supervising, planning, and coordinating staff. They respond to major incidents, multiple casualty incidents, or other unusual incidents, monitor and evaluate pre-hospital care, and provide EMSC oversight at the scene. They interact on a day-to-day basis with the voluntary hospitals, closely monitor unit locations, and attend meetings in the absence of the Division Commander. They do not control budget expenditures or have any other involvement in budget-making.

Deputy Chiefs spend about 40 percent of their time in the field monitoring performance – far more than the Division Commanders. Whereas Division Commanders tend to work day shifts, Monday through Friday so that they are available for meetings with senior level administration, the Deputy Chiefs are often assigned to work evening and night shifts. Deputy Chiefs work two schedules: Sunday through Thursday, and Tuesday through Saturday. Once a month each deputy works an overnight shift for a three or four day period. Also on a rotating basis, the Deputies act

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as the “City-wide Chief” or “six Charlie car” during the midnight tour. This assignment involves visiting various divisions, checking up on units, and issuing command decisions, if needed.

During a six Charlie car tour, a Deputy Chief can override overtime caps when needed.

Deputy Chiefs do not regularly attend Division Commanders’ meetings; however, they are encouraged to attend, if they are on duty during the meeting time. Deputy Chiefs also meet with shop stewards in order to resolve issues concerning assignments and the physical plant specific to the battalions they oversee.

***b. In Charge of Special Planning***

The Deputy Chief detailed as the Executive Manager in Charge of Special Planning in the Bureau of Operations works in the operations department and, among other things, is in charge of planning for special events which require the deployment of EMS and Fire resources. Special events planning occupies about 50% of his time. He supervises about twelve people and reports directly to the Fire Department Chief of Operations.<sup>11</sup> He attends meetings with representatives of other agencies such as the Secret Service, U.S. Coast Guard, and the Mayor’s Office of Emergency Management. His role at these meetings as a representative of the Fire Department is to evaluate the City’s need for EMS and Fire resources and determine deployment. In determining deployment needs, he reviews statistical information generated by other Operations personnel. The Deputy Chief in Charge of Special Planning interacts daily with the Chief of Operations, and the Chief and Assistant Chief of EMSC and participates in discussions

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<sup>11</sup> Five of his subordinates are in the document control unit, one is in charge of awards and citations, and four subordinates are in the planning unit. During large events the planning staff can increase temporarily.

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concerning policy formulation, overtime, and complaints. The Chief Operations confers with the Deputy Chief in Charge of Special Planning on all issues except those concerning technical firefighting. The Deputy Chief in Charge of Special Planning also interacts regularly with the Fire Commissioner concerning the planning of special events. Finally, he determines and schedules which units are taken out of service on a given day for training or medical examinations.

The Deputy Chief in Charge of Special Planning is assigned to investigate all medical-related complaints which the Fire Department receives from citizens, Commissioners, Firefighters or EMTs. His investigation can involve meeting with Medical Affairs Bureau, BITs, and field personnel. The information he gathers is confidential and can form the basis for discipline. He prepares a report on his findings, consults with the Chief of Operations, and can recommend discipline to BITs or the Fire Commissioner.

Further, the Deputy Chief in Charge of Special Planning appears to have a regular role in policy-making. He is in charge of the document control unit and initiates and/or reviews all documents/publications in the Bureau of Operations prior to issuance. He often suggests revisions to policies and initiates new policies. At the time of the hearing, the existing Deputy Chief in Charge of Special Planning participated in developing programs to take units out of service for a day for medical examinations, arranging deployment to service the voluntary hospitals, and establishing the practice of fit testing for respirators.<sup>12</sup> Any policy changes or revisions initiated by the Deputy Chief in Charge of Special Planning are discussed with the Chief of Operations,

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<sup>12</sup>The Deputy Chief in Charge of Special Planning participated in implementation of State-mandated fit testing and annual medical examinations.

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and the Chief and Assistant Chief of EMSC prior to implementation.

The Deputy Chief in Charge of Special Planning interacts with the labor relations department concerning whether new policies or policy changes interfere with contractual obligations. He assists the Chief of Operations generally in collective bargaining and labor relations.<sup>13</sup> He is authorized to attend Fire Department executive board meetings in Chief of Operation's absence.<sup>14</sup> He reviews overtime expenditures and budgetary expenses for EMS deployment and recommends future budgetary needs.

**POSITIONS OF THE PARTIES**

***The Union's Position***

The Union asserts that the Division Commanders and Deputy Chiefs are eligible for collective bargaining and that the Board has found eligible many similarly situated employees such as Sanitation Chiefs, Project Planners, Deputy Wardens, Administrative Fire Marshals, and Deputy Directors of Motor Equipment Maintenance (Sanitation).<sup>15</sup> The Union argues that the

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<sup>13</sup> The Deputy Chief in Charge of Special Planning participates in meetings with the unions. The Chief of Operations also relies on the assistance of the Chief and Assistant Chief of EMSC, and his Chief of Staff (Chief Fire Marshal).

<sup>14</sup> The Deputy Chief in Charge of Special Planning does this only once or twice a year. At these meetings he must make a report to the Fire Commissioner on Operations matters. The Chief of Operation's Chief of Staff is also authorized to attend executive board meetings when the Chief is absent.

<sup>15</sup>*Unif'd. Sanitation Chiefs Ass'n*, Decision No. 4-2000; *Dist. Council 37, AFSCME*, Decision No. 4-97, *confirmed sub nom. City of New York v. District Council 37*, 1999 WL 367093 (Sup.Ct. N.Y. Co. 1999); *Assistant Deputy Wardens Ass'n.*, Decision No. 11-95; *Unif'd. Fire Officers Ass'n, Local 854, IAFF*, Decision No. 15-92; *Local 621, Serv. Employees Int'l*

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Division Commanders and Deputy Chiefs do not have a regular or significant role in determining or formulating policy, but implement policy pursuant to the Operating Guide and Command Orders issued by higher level management. The Division Commanders' and Deputy Chiefs' interaction and communication with higher level policy-makers are not of a regular or significant nature that would remove them from eligibility for collective bargaining. For example, Division Memoranda for the most part are instructional or informational directives that merely implement established policy. The Union argues that Division Commanders and Deputy Chiefs cannot change policy so that it conflicts with the Operations Guide or Operations Orders and the evidence shows that higher levels of management make real policy changes such as contracting out ambulance service from voluntary hospitals and use of safety vests. Moreover, the Union asserts that the Division Commanders are four to six levels below the Fire Commissioner in the hierarchy of the organization and do not attend the Commissioner's senior staff meetings.

Finally, according to the Union, Division Commanders and Deputy Chiefs are not confidential employees because they do not have a regular or significant role in labor relations, contract administration, or personnel administration. The Union contends that the limited role Division Commanders and Deputy Chiefs play in resolving union complaints is not indicative of confidential status. In addition, these employees do not act in a confidential capacity to a managerial employee who is directly involved in collective bargaining or labor relations. Accordingly, the Union asserts that the City has failed to meet its burden of proving that Division Commanders and Deputy Chiefs are managerial and/or confidential and therefore they are eligible

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*Union, Decision No. 7-92.*

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for collective bargaining.

***The City's Position***

The City asserts that the Division Commanders and Deputy Chiefs are managerial because they have an active role in citywide programs to increase productivity, efficiency, and safety of the EMS operations, they represent the City in labor management meetings, they regularly initiate, develop and effect operating procedures and regularly participate in the process of policy-making. In the alternative, the City argues that even if all of the Division Commanders and Deputy Chiefs do not regularly perform these duties, they are subject to such assignments at any time and, therefore, are managerial.

The City claims that the Division Commanders and Deputy Chiefs exercise significant discretion and independent judgment in decision-making, including policy-making authority. Division Commanders participated in response protocol and safety vest committee meetings; developed the medication restock pilot program, hospital restocking process, and other pilot programs; developed descriptions of Lieutenants' tour and tour Captain responsibilities; developed methods to improve turnaround time; and standardized known vacancy overtime postings. All of these duties are examples of the Commanders' policy-making authority and/or regular participation in the policy-making process.

The City also asserts that the Division Commanders have labor relations, budgetary, personnel and disciplinary responsibilities. Commanders are regularly involved in collective bargaining and labor management discussions inasmuch as they provide Assistant Chief of EMSC feedback on the operational impact of the union's bargaining proposals, and regularly meet with

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shop stewards concerning issues which arise in their divisions. The Division Commanders have authority over personnel matters including transfer and assignment of personnel within their division, endorsement of discipline and the penalties, including termination, upgrade recommendations, and the power to override overtime caps in order to ensure proper staffing.

According to the City, the Division Commander in Charge of Training, is also managerial and/or confidential inasmuch as he is directly involved with formulating policy for the division of training and with the collective bargaining process. His policy-making authority includes overall responsibility for updating curriculum consistent with changes in New York State Department of Health regulations and reducing the number of days required for refresher training for EMTs and paramedics. His involvement in the collective bargaining process-- reviewing union demands and advising senior management on the demands impact on the training process-- is, the City says, another one of the indicia of the Division Commander in Charge of Training's managerial/confidential status.

The City asserts that the Division Commander in Charge of EMD is managerial and/or confidential based on his personnel, budgetary, and policy-making duties. The City argues that the Division Commander in Charge of EMD is independently responsible for completing and submitting a budget for EMD to the Assistant Commissioner and for setting policy concerning radio operating procedure, dispatch coverage, position coverage, and anything else in the overall dispatch operation, including response-time policies. He regularly accompanies the Assistant Commissioner to meetings with the Fire Commissioner, Deputy Fire Commissioner, Chief of the Fire Department, and Chief of EMS Operations. He is directly involved in labor relations, for he

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meets with the union to resolve issues concerning overtime, working conditions, and time and leave requests. He also has the authority to assign employees and recommend discipline and is privy to confidential information from the BITs due to his investigative role in the disciplinary process and certain EEO responsibilities.

With respect to the Deputy Chiefs, the City asserts they have the same responsibilities and indicia of managerial/confidential status as the Division Commanders since the Deputy Chiefs assist the Division Commanders in achieving operational goals and are often called upon to act as a Division Commander either in the absence of the Division Commander, during night-time shifts, or on the mandatory “six Charlie car” rotation. According to the City, the Deputy Chiefs’ involvement as members of the safety vest committee and the Deputy Chief in Charge of Special Planning’s involvement in formulating regulations concerning medical examinations and fit-testing of firefighters demonstrate that Deputy Chiefs participate in policy formulation and implementation. Deputy Chiefs also have direct labor relations functions due to their supervision of employees, meetings with shop stewards on issues of assignments and safety, attendance at meetings with the Assistant Chief of EMSC and contribution to discussions about union bargaining proposals.

**DISCUSSION**

This Board finds the Division Commanders assigned to specific divisions, the Division Commander in Charge of Training and Deputy Chiefs are not managerial and/or confidential and are therefore eligible for collective bargaining. We also find, however, that the Division

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Commander in Charge of Emergency Medical Dispatch and the Deputy Chief in Charge of Special Planning are managerial within the meaning of Section 12-305 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3)(“NYCCBL”).

Under the NYCCBL, employees are presumed to be eligible for collective bargaining.<sup>16</sup> Therefore, when an objection to the bargaining status of a title or position 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 Civil Service 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 as reliable indicia of managerial status: the number of subordinate employees; area of authority; involvement with labor relations; preparation of budget and allocation of funds; involvement in personnel administration; and the formulation, determination and effectuation of an employer’s

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<sup>16</sup> Section 12-305 of the NYCCBL states, in pertinent part, that “[p]ublic employees shall be presumed eligible for the rights set forth in this section . . . .”

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policies.<sup>17</sup> The formulation of policy has consistently been held to be the single most important factor of managerial status.<sup>18</sup>

In defining policy formulation, we have stated that “policy” is an objective of a governmental agency to fulfill its mission and the methods, means, and extent of achieving such objectives.<sup>19</sup> Employees who “formulate” policy include those with the authority or responsibility to select among options and to put a proposed policy into effect, as well as those who ‘regularly participate’ in the “essential process” which results in a policy proposal and the decision to put such proposal into effect.<sup>20</sup> Participation in the formulation of policy must be “regular,” “active,” and “significant” to support a finding of managerial status.<sup>21</sup>

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<sup>17</sup>*Assistant Deputy Wardens Ass’n.*, Decision No. 11-95 at 21-22; *Civil Serv. Technical Guild, Local 375*, Decision No. 45-78, *rev’d Civil Serv. Technical Guild, Local 375 v. Anderson*, N.Y.L.J. 10/9/79 at 10 (Sup.Ct., N.Y. Co.), *aff’d* 79 A.D. 2d 541, 434 N.Y.Sup.2d 13 (1<sup>st</sup> Dept. 1980), *rev’d* 55 N.Y.2d 618, 446 N.Y.S.2d 264 (1981). For cases considering: number of subordinates, *see Serv. Employees Int’l Union, Local 144*, Decision No. 43-69; scope of authority, *see District Council 37*, Decision No. 19-71; involvement in labor relations, *see Local 371, Dist. Council 37*, Decision No. 46-72; *Civil Serv. Bar Ass’n.*, Decision No. 19a-70; preparation and allocation of budget, *see Civil Serv. Technical Guild, Local 375*, Decision No. 5-85; *Civil Serv. Forum, Local 300, SEIU*, Decision No. 8-72; personnel administration, *see Allied Bldg. Inspectors, Local 211, I.U.O.E.*, Decision No. 13-86; *Communications Workers of America*, Decision No. 63-72.

<sup>18</sup>*District Council 37*, Decision No. 4-97; *District Council 37*, Decision No. 34-81.

<sup>19</sup>*District Council 37*, Decision No. 4-97 at 31; *Unif’d. Fire Officers Ass’n., Local 854, IAFF*, Decision No. 15-92 at 19-20; *District Council 37*, Decision No. 34-81 at 7.

<sup>20</sup>*Unif’d. Fire Officers Ass’n., Local 854, IAFF*, Decision No. 15-92 at 19-20; *District Council 37*, Decision No. 36-82 at 14.

<sup>21</sup> *Unif’d. Fire Officers Ass’n., Local 854, IAFF*, Decision No. 15-92 at 19-20; *District Council 37*, Decision No. 36-82 at 14.

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Applying the above criteria to the instant matter, we find that the Division Commanders and Deputy Chiefs assigned to a specific geographic divisions, and the Division Commander in Charge of Training, which the City claims to be managerial, are eligible for bargaining. The evidence shows that Division Commanders and Deputy Chiefs do not regularly participate in the policy-making process. They regularly issue Division Memoranda that primarily concern implementation of previously existing policies or practices. Further, drafting and initiating Command Orders and pilot programs is not a regular or significant part of the Division Commanders' jobs. In most instances, such as the Command Orders concerning Lieutenants' job duties and use of soft body armor, the Division Commanders' recommendations were considered, but modified prior to issuance of the Order.<sup>22</sup> Similarly, implementation of any pilot programs require advance approval of the Chief and Assistant Chief of EMSC. Therefore, the evidence fails to establish that Division Commanders have significant regular involvement in policy-making or the requisite independent authority to develop or implement policy.

In addition, the Division Commanders' regular attendance at meetings with the Assistant Chief of EMSC is not equivalent to participation in policy formulation. The evidence shows that the vast majority of topics discussed at these meetings are informational in nature and concern implementing policies or procedures which have been developed by other Operations personnel. Moreover, there was insufficient evidence to demonstrate that the information exchanged at these meetings was confidential.

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<sup>22</sup> Moreover, these Command Orders were not necessarily "policies." Rather, the Conditions Car Supervisor and the known vacancy overtime Orders merely codified, modified, or restated existing policies or procedures.

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Further, the record revealed that Division Commanders have only limited involvement in labor relations. They meet with union officials to resolve issues which arise in the divisions but do not participate in overall bargaining or preparation for bargaining other than to offer occasional information to higher level personnel, who are directly involved in the collective bargaining process. Although Division Commanders endorse disciplinary actions and may be involved in meetings with union representatives concerning discipline, the Operating Guide, issued by the Chief of Operations, describes misconduct warranting discipline and the proposed penalties. Accordingly, the Division Commanders exercise little independent discretion or authority in their labor relations functions.<sup>23</sup>

Finally, Division Commanders do not have any budgetary responsibilities. Thus, while Division Commanders have ample supervisory responsibilities as demonstrated by the number of subordinates, their discretion in allocating resources in order to maintain the day-to-day operation of EMS services, and by their duties to schedule and assign work, and transfer and evaluate employees within their divisions, these responsibilities fall short of the level that can be found managerial. Moreover, we note that there was no evidence that the Division Commanders have access to any confidential information, or have a high level role in grievance handling, personnel decisions such as hiring, or resource procurement or planning.

We find that the Division Commander in Charge of Training is also eligible for collective bargaining. His duties as head of the EMS training department are operational in nature and do

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<sup>23</sup> The Deputy Chiefs' role in labor relations is the same as that of the Division Commanders, but the geographic scope of their involvement is smaller.

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not appear to require a significant amount of discretion or independent judgment. The curriculum he teaches is established by the State, and any changes to training policy or procedures requires approval of his superiors. The City presented no evidence to show that his responsibilities in the training department include regular or significant policy-making duties. In addition, the Division Commander in Charge of Training has no greater role in labor relations than the other Division Commanders; he merely provides his opinion concerning bargaining proposals when requested. Nor did the City present evidence concerning any role the Division Commander in Charge of Training has in personnel matters, budget-making, or allocation of funds. Accordingly, we find that the Division Commander in Charge of Training is eligible for collective bargaining.

A review of the totality of the division-based Deputy Chiefs' duties also leads us to the conclusion that they are eligible for collective bargaining. The City presented little evidence that the Deputy Chiefs have any regular participation in policy-making, collective bargaining, and/or budget preparation. To the extent they have responsibilities such as assigning work, handling grievances, meeting with union representatives, and implementing policies and procedures, the Deputy Chiefs do not exercise independent discretion but generally follow the parameters set forth in the Operating Guide and/or carry out the orders of their superiors in the organization. Thus while the Deputy Chiefs, like the Division Commanders, possess supervisory responsibilities -- they spend at least 40% of their time in the field participating in, supervising, or observing the delivery of emergency medical services -- they lack sufficient independent decision and policy-making responsibilities to make them managerial.

Our conclusion here is consistent with our findings in other cases concerning uniformed

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services employees at similar levels in their departments. In *Unif'd. Sanitation Chiefs*, Decision No. 4-2000, we held that Borough and Assistant Borough Superintendents, among others, were eligible for bargaining. We found that these employees did not have an active or substantial role in policy-making, because although they had substantial discretion in implementing policy and running their commands, any exercise of discretion had to be within the boundaries of specific agency guidelines. In addition, we held that their duties to revise, improve and/or create procedures, and improve efficiency and quality of service involved a high level of professional judgment, but were not the equivalent of policy formulation. *Id.* at 28-29.<sup>24</sup>

The facts of this case are distinguishable from several other cases on which the City bases its assertion that the Division Commanders and Deputy Chiefs are managerial and/or confidential.<sup>25</sup> Generally, in all the cited cases where employees were held to be managerial, such finding was based on evidence of regular and significant involvement in the policy-making process.<sup>26</sup> Moreover, the City's argument that the Division Commanders and Deputy Chiefs are

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<sup>24</sup> See also *Unif'd. Fire Officers Ass'n.*, Decision No. 15-92 (Administrative Fire Marshals found eligible for bargaining).

<sup>25</sup> *Local 154, District Council 37, A.F.S.C.M.E.*, Decision 73-68, cited by the City, does not support its assertion that the titles in issue are managerial. Rather, in that case, the Board held that Principal and Supervising Human Rights Specialists are not managerial because their duties are operational in nature and they lack regular and significant participation in the policy-making process.

<sup>26</sup> See *Civil Serv. Technical Guild, Local 375, AFSCME*, Decision No. 5-85 (Staff Analysts and Associate Staff Analysts who were found managerial possess either a significant role in the budget-making or audit process, determine overall agency staffing and reductions, develop agency-wide plans to accomplish the agency's mission, or have a direct role in administering the collective bargaining agreement. In addition, those employees found to be confidential had direct access to confidential personnel information and/or a significant role in

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managerial because they are subject to managerial assignments at any time, is not convincing. In *Serv. Employees Int'l Union, Local 444*, Decision No. 43-69, we noted that the titles Director of Operations, City Superintendent, Principal Superintendent, and Supervising Superintendent were not actively engaged in, but subject to, labor relations assignments, *Id.* at 9, and held that those titles were managerial and/or confidential. However, we did not hold that an employee whom the agency may ask to step into the shoes of a managerial employee, is therefore managerial. Rather, the employees in issue were found to be managerial and/or confidential because of their access to confidential information and involvement in the policy-making process.

Here, the Division Commanders simply do not create policy, nor are they an integral part of the process. Although in theory, they could be asked to perform the duties of the Assistant Chief of EMSC or another superior, the evidence indicates that this is not a regular occurrence or a significant part of their job. Accordingly, the Division Commanders and Deputy Chiefs do not possess a significant and regular role in the policy-making process, and do not possess a

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compiling confidential personnel information); *District Council 37*, Decision No. 6-84 at 17 (Superintendents at the Bureau of Water Supply held managerial because their advice and recommendations on policy issues were regularly sought and heavily relied upon by Division Chiefs); *District Council 37*, Decision No. 34-81 at 8 (Director of Residential Child Care held managerial because he had “great latitude in the development of the kinds, as well as quality, of services offered by his facility”; Principal Consultant held managerial because of her regular and significant role at policy-making meetings with the agency’s Commissioner); *Local 803, Int'l Brotherhood of Teamsters*, Decision No. 63-74 (OTB Area Managers found managerial based on their participation in formulation of bargaining demands, regular attendance and effective participation in policy-making meetings); *City Employees Union, Local 237, Int'l Brotherhood of Teamsters*, Decision No. 97-73 (two security Lieutenant titles found not managerial because their functions were ancillary to the basic mission of the agency (HRA) and therefore their policy-making duties were not integral to the agency’s mission. Security Captain was found managerial because of greater involvement in agency-wide policy-making and because he had the authority to implement security-related policy).

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combination of other indicia of managerial status sufficient to warrant their exclusion from collective bargaining.

However, two of the employees in the petitioned-for titles do possess the authority which necessitates finding them managerial. The Division Commander in Charge of EMD (SEMSS, Level III) is the individual in charge of dispatch for the Citywide EMS operation. Similar to the Division Commanders, he has numerous supervisory responsibilities including assignment and reassignment of personnel, monitoring overtime, and recommending discipline and determining penalties. However, the Division Commander in Charge of EMD also has direct and regular involvement in budget preparation for his department and policy-making. He reports directly to the Assistant Commissioner of Dispatch Communications, and has assisted him and the Chief and Assistant Chief of EMSC in developing at least three policies relating to the dispatch operation. In addition, the Division Commander in Charge of EMD has EEO responsibilities that give him access to confidential information. He attends special meetings with the Fire Commissioner and his Assistants on EMS issues and attends labor-management meetings at a high level when information concerning dispatch is needed. Although the Division Commander in Charge of EMD may not possess independent authority to make policy, at a minimum his participation is akin to an “expert advisor” concerning the operation of the dispatch department, and, therefore, his role in policy-making is significant.<sup>27</sup> Accordingly, we find that based on his scope of authority, involvement in budget and policy-making, and access to confidential information, the Division Commander in Charge of EMD is managerial.

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<sup>27</sup> See *District Council 37, AFSCME*, Decision No. 19-71 at 11.

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Likewise, the Deputy Chief in Charge of Special Planning (SEMSS, Level II) is managerial. This position is unique among the Deputy Chiefs because the Deputy Chief in Charge of Special Planning reports daily and directly to Chief of Operations and has a regular and significant role assisting him in several respects. In addition to his special planning functions, the Deputy Chief in Charge of Special Planning investigates all medical-related complaints and prepares reports on his investigations. He has a regular and active role in making policy inasmuch as he oversees the document control unit which initiates, reviews, and publishes all Bureau of Operations policies, procedures, and guide books. The Deputy Chief in Charge of Special Planning also regularly interacts with high level management – the Chief and Assistant Chief of EMSC – in performing these tasks and his special planning functions. He participates in budgeting process by reviewing overtime and other expenses for the EMS operation and by projecting future budgetary requirements. Finally, the Deputy Chief in Charge of Special Planning participates in labor management meetings with the Chief of Operations and is authorized to attend the Fire Commissioner’s executive board meetings in Chief of Operation’s absence.

In sum, the Deputy Chief in Charge of Special Planning has an integral and significant role in the policy-making process and regularly participates in high level policy meetings, although he does not appear to possess independent discretion in policy-making. The duties of this position do not pertain merely to the supervision or maintenance of the field operation, but are executive-managerial in nature. Accordingly, we find that the position of Deputy Chief in Charge of Special Planning is managerial.

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Finally, as the City has not objected to the unit sought by Petitioner, and since the employees sought have supervisory responsibilities, a fact which justifies a bargaining unit separate from non-supervisory employees, we find that a unit of SEMSS, detailed as Deputy Chiefs and Division Commanders is appropriate for bargaining. Petitioner submitted evidence that a majority of the employees in the bargaining unit have given it check-off authorization to receive their dues. Accordingly, we do not find that an election is warranted in this matter, and will certify Petitioner as the exclusive bargaining representative of the unit found appropriate.<sup>28</sup>

**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 positions Deputy Chief in Charge of Special Planning and Division Commander or Chief in Charge of Emergency Medical Dispatch (within the title SEMSS, detailed as Deputy Chief and Division Commander) and the same hereby are designated managerial, and are exempt from collective bargaining, and it is further,

ORDERED, that the remaining contested employees in the title SEMSS, detailed as Deputy Chief and Division Commander in the Fire Department Bureau of EMS are eligible for collective bargaining; and it is further,

ORDERED, that the petitioned-for bargaining unit of SEMSSs, detailed as Deputy Chiefs and Division Commanders, is an appropriate bargaining unit, and it is further,

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<sup>28</sup> *Locals 237 and 832, IBT*, Decision No. 14-80 at 4-5.

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CERTIFIED, that the EMS Superior Officers Association is the exclusive representative for the purposes of collective bargaining for the unit found appropriate.

DATED: December 5, 2001  
New York, New York

MARLENE A. GOLD  
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Chairperson

DANIEL G. COLLINS  
\_\_\_\_\_  
Member

GEORGE NICOLAU  
\_\_\_\_\_  
Member

## NOTICE OF CERTIFICATION

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

**DATE:** December 5, 2001

**DOCKET #:** RU-1234-98

**DECISION NUMBER:** 10 -2001

**EMPLOYER:** The City of New York, c/o City of New York Office of Labor Relations, 40 Rector Street, New York, New York 10006

### **CERTIFIED/RECOGNIZED BARGAINING**

**REPRESENTATIVE:** EMS Superior Officers Association, P.O. Box 562, Maspeth, New York, New York 11378.

**BARGAINING UNIT:** Certification No. 10-2001 includes the following title(s)/codes:

Supervising Emergency Medical Service Specialist, detailed as Deputy Chief and Division Commander (Title Code M5035E)

## **NOTICE OF DESIGNATION**

This notice is to acknowledge that the Board of Certification has issued an Order designating a title/position managerial and/or confidential as follows:

**DATE:** December 5, 2001

**DOCKET #:** RU-1234-98

**DECISION NUMBER:** 10 -2001

**EMPLOYER:** The City of New York, c/o City of New York Office of Labor Relations, 40 Rector Street, New York, New York 10006

### **CERTIFIED/RECOGNIZED BARGAINING**

**REPRESENTATIVE:** EMS Superior Officers Association, P.O. Box 562, Maspeth, New York, New York 11378. [pursuant to Cert. No. 10-2001]

**DESIGNATION:** The positions of Supervising Emergency Medical Service Specialist, Level II, detailed as the Deputy Chief in Charge of Special Planning, and Supervising Emergency Medical Service Specialist, Level III, detailed as the Chief in Charge of Emergency Medical Dispatch, are designated managerial and are therefore excluded from collective bargaining.