

**71 FLRA No. 17**

U.S. DEPARTMENT  
OF THE AIR FORCE  
AIR FORCE MATERIEL COMMAND  
66 AIR BASE GROUP  
HANSCOM AIR BASE, MASSACHUSETTS  
(Agency/Respondent)

and

INTERNATIONAL ASSOCIATION  
OF FIRE FIGHTERS  
AFL-CIO, LOCAL F-78  
(Union/Petitioner)

BN-RP-18-0007

ORDER DENYING  
APPLICATION FOR REVIEW

April 3, 2019

Before the Authority: Colleen Duffy Kiko, Chairman,  
and Ernest DuBester and James T. Abbott, Members  
(Member DuBester concurring)

**I. Statement of the Case**

In this case, we reaffirm that employees may be considered confidential under § 7103(a)(13) of the Federal Service Labor-Management Relations Statute (the Statute)<sup>1</sup> even if they do not personally negotiate contracts or grant and deny grievances.

The Union petitioned Federal Labor Relations Authority Regional Director Sandra J. LeBold (RD) to clarify the bargaining-unit status of two employees who occupy the position of assistant chief of operations (assistant chiefs) and two employees who occupy the position of station captain (captains). The RD found, as relevant here, that the four incumbents are confidential employees under § 7103(a)(13) and, thus, are excluded from the bargaining unit that the Union represents.

The first question before us is whether the RD failed to apply established law in finding that the incumbents are confidential employees. Because the RD's decision is consistent with Authority precedent, the answer is no.

<sup>1</sup> 5 U.S.C. § 7103(a)(13).

The second question is whether the RD committed a clear and prejudicial error concerning a substantial factual matter by considering hearsay testimony. The Union merely challenges the weight that the RD gave certain evidence. Because such an argument does not provide a basis for finding that the RD committed a clear and prejudicial error, the answer is no.

**II. Background and RD's Decision**

The Union filed a petition seeking to clarify the bargaining-unit status of the assistant chiefs and captains. As relevant here, the Agency argued to the RD that the incumbents have a confidential working relationship with the fire chief and deputy fire chief (deputy) and, thus, should be excluded from the bargaining unit as confidential employees under § 7103(a)(13) of the Statute.

The RD stated that an individual is a "confidential" employee, within the meaning of § 7103(a)(13), if: (1) there is evidence of a confidential working relationship between the employee and an agency representative; and (2) that agency representative is significantly involved in labor-management relations.<sup>2</sup>

First, the RD found that the fire chief and deputy are significantly involved in labor-management relations because they represent management in negotiations with the Union, and they respond to grievances and unfair-labor-practice allegations.

Next, the RD considered whether the incumbents have a confidential working relationship with the fire chief and deputy. The RD found that the incumbents attend management meetings – including the fire chief's weekly staff meetings – where Agency representatives discuss grievances, disciplinary actions, contract negotiations, job classifications, and other confidential labor-management matters. The RD found that, through their regular attendance at such meetings, the incumbents obtain "advance information" about management's position concerning grievances, contract negotiations, and other labor-relations matters.<sup>3</sup> The RD also noted that the chief of employee and labor relations (labor chief) testified that she and the fire chief include the incumbents on emails and phone calls with Agency

<sup>2</sup> See RD's Decision at 25 (citing *U.S. Dep't of the Navy, Commander, Navy Region Nw., Fire & Emergency Servs., Silverdale, Wash.*, 70 FLRA 231, 232 (2017) (*Navy*); *Nat'l Aeronautics & Space Admin., Glenn Research Ctr., Cleveland, Ohio*, 57 FLRA 571, 573 (2001) (*NASA*); *U.S. DOL, Office of the Solicitor, Arlington Field Office*, 37 FLRA 1371, 1377 (1990) (*DOL*)).

<sup>3</sup> RD's Decision at 27.

representatives concerning confidential labor-management issues.<sup>4</sup>

The RD also found that the incumbents provide input to Agency representatives in responding to grievances. For instance, the RD noted that a captain testified that he wrote a response to a grievance, submitted it to management for review, and then delivered the response directly to the grievant. In addition, the RD found that the incumbents assist management in preparing for negotiations with the Union. For example, the RD noted that a captain testified that he had worked directly with the fire chief concerning union proposals about overtime and callbacks. The RD also noted that an assistant chief worked to update a confidential flight-operation guide, which, upon implementation, could require bargaining with the Union.

The RD determined that the weight of the evidence supported finding that the incumbents have a confidential working relationship with the fire chief and deputy. Accordingly, the RD concluded that the incumbents are confidential employees under § 7103(a)(13) of the Statute, and should be excluded from the bargaining unit.

On February 13, 2018, the Union filed an application for review (application) of the RD's decision, and on February 27, 2018, the Agency filed an opposition.

### III. Analysis and Conclusions

A. The RD did not fail to apply established law on confidential employees.

The Union argues that “the RD failed to apply established law”<sup>5</sup> when she determined that the four incumbents are confidential employees.<sup>6</sup>

Section 7112(b)(2) of the Statute excludes “confidential employee[s]” from appropriate bargaining units.<sup>7</sup> And § 7103(a)(13) of the Statute defines a “confidential employee” as “an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations.”<sup>8</sup>

<sup>4</sup> *Id.* at 6; *see also* Tr. at 875-77, 880; Agency's Exs. 21 (email addressing employee's concern, with incumbents copied), 29 (quarterly management newsletter sent to incumbents with a note prohibiting further distribution).

<sup>5</sup> Application at 4 (citing 5 C.F.R. § 2422.31(c)(3)(i)).

<sup>6</sup> 5 C.F.R. § 2422.31(c)(3)(i) (recognizing failure to apply established law as a basis for granting an application).

<sup>7</sup> 5 U.S.C. § 7112(b)(2).

<sup>8</sup> *Id.* § 7103(a)(13); *see Navy*, 70 FLRA at 232.

The Union does not dispute that the fire chief and deputy “formulate[] or effectuate[] management policies in the field of labor-management relations,”<sup>9</sup> but contends that, under established law, the incumbents do not “act[] in a confidential capacity with respect to”<sup>10</sup> the fire chief and deputy.<sup>11</sup> To assess whether an employee “acts in a confidential capacity with respect to”<sup>12</sup> an agency representative who formulates or effectuates management policies in the field of labor-management relations, the Authority considers whether the employee: (1) obtains advance information of management's position regarding contract negotiations, the disposition of grievances, and other labor-management matters;<sup>13</sup> (2) attends meetings where labor-management matters are discussed; (3) because of physical proximity to a supervisor, overhears discussions of labor-management matters; or (4) has access to, prepares, or types materials related to labor-management relations, such as bargaining proposals and grievance responses.<sup>14</sup>

Applying the standards above, the RD concluded that the incumbents act in a confidential capacity with respect to the fire chief and deputy because the incumbents (1) obtain “advance information” on management's positions concerning confidential labor-relations matters when they attend regular management meetings and communicate with the fire chief, deputy, and labor chief; (2) provide input to Agency representatives regarding responses to grievances; and (3) assist management in preparing for negotiations with the Union.<sup>15</sup>

The Union argues that the RD erred because the management meetings that the incumbents attend do not concern “confidential” labor-management matters<sup>16</sup> or “ongoing labor[-]relations issues.”<sup>17</sup> But we reject that argument because the record shows that the management meetings, as well communications outside those meetings, provide the incumbents advance knowledge of management's position on labor-management matters such as grievances, classification, and contract

<sup>9</sup> 5 U.S.C. § 7103(a)(13).

<sup>10</sup> *Id.*

<sup>11</sup> *See* Application at 4.

<sup>12</sup> 5 U.S.C. § 7103(a)(13).

<sup>13</sup> *U.S. Dep't of Transp., FAA*, 71 FLRA 28, 29 (2019) (*FAA*) (Member Abbott concurring) (Member DuBester dissenting).

<sup>14</sup> *Navy*, 70 FLRA at 237; *U.S. Dep't of the Air Force, Air Force Materiel Command*, 67 FLRA 117, 122 (2013) (*Air Force*); *U.S. DOL, Wash., D.C.*, 59 FLRA 853, 855 (2004).

<sup>15</sup> RD's Decision at 27.

<sup>16</sup> Application at 5.

<sup>17</sup> *Id.* at 6.

negotiation.<sup>18</sup> In addition, the record reflects that the fire chief dismisses bargaining-unit employees – but not the incumbents – from meetings when discussing confidential labor-relations matters.<sup>19</sup> Thus, the record supports the RD’s finding that the incumbents obtain advance information about confidential labor-management matters.

The Union also argues that the RD’s decision is inconsistent with *National Aeronautics & Space Administration, Glenn Research Center, Cleveland, Ohio (NASA)*,<sup>20</sup> because there is no evidence that the incumbents “review[, draft[, [or] maintain[] correspondence[, or] open[] or answer[] mail or email for the fire chief or deputy . . . pertaining to any negotiation or grievances.”<sup>21</sup> In *NASA*, the Authority found that secretaries were confidential employees because their duties included reviewing correspondence, attending management meetings, and preparing documents on management’s behalf for grievances, negotiations, and personnel actions.<sup>22</sup> But the Authority did not hold that employees must manage the correspondence of an agency representative in order to be confidential employees. And here, the record shows that the incumbents obtain advance information about negotiations and grievances through the normal performance of their duties, regardless of whether they manage the fire chief’s or deputy’s mail or email.<sup>23</sup> Therefore, we reject the Union’s argument that the RD’s decision is inconsistent with *NASA*.

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<sup>18</sup> Tr. at 94-95 (deputy meets with incumbents to discuss “dealing with a grievance,” “negotiat[ing] the contract,” and classification matters), 198-200 (incumbents attend weekly staff meetings that may include discussion of grievances or classification), 213-14 (deputy informs incumbents that confidential matters “do[n]’t leave th[e] room”), 250 (assistant chief checks with fire chief before repeating information that may be confidential), 299-300 (assistant chief exercises judgment about whether to repeat information from fire chief or deputy to other firefighters), 315 (weekly staff meetings include discussion of labor-management matters), 423-24 (captain was told not to repeat confidential information), 600-04 (assistant chief has called Union officials directly to discuss bargaining-unit employees’ leave and conduct issues), 673 (assistant chief is copied on emails regarding labor-relations matters), 778 (captain briefed fire chief on uniform-changing procedures for bargaining-unit members), 789-90 (captain has been in management conversations about meeting training requirements, and captains must know firefighters’ medical appointments to monitor job qualifications), 857-59 (captain provided information needed to respond to a grievance).

<sup>19</sup> *Id.* at 780, 1100-01.

<sup>20</sup> 57 FLRA at 573.

<sup>21</sup> Application at 6.

<sup>22</sup> *NASA*, 57 FLRA at 571, 573-74.

<sup>23</sup> Tr. at 36-38 (negotiations and grievances), 94-96 (same), 208-09 (grievances), 663-64 (same), 782 (grievance over overtime), 857-60 (grievances).

The Union also contends that the RD misapplied established law because the incumbents have not participated in contract negotiations.<sup>24</sup> But the Authority does not require that an individual participate in negotiations to be considered a confidential employee. For example, the Authority has previously found individuals to be confidential employees based, in part, on their collaborative interactions with a union to draft agency policies and procedures.<sup>25</sup> Here, the record demonstrates that the fire chief has solicited input from the incumbents to prepare for contract negotiations.<sup>26</sup> In addition, an assistant chief testified that he helped to update an Agency standard operating procedure, which, upon implementation, could require bargaining with the Union.<sup>27</sup> The record also shows that the fire chief emails the incumbents about labor-relations matters.<sup>28</sup> Thus, the evidence supports the RD’s finding that the incumbents act in a confidential capacity with respect to the fire chief and deputy, even though the incumbents have not directly participated in contract negotiations.

Finally, the Union argues that the incumbents are not confidential employees because they are not “significantly involved” in labor-relations matters<sup>29</sup> – in other words, they do not formulate or effectuate management policies in the field of labor-management relations. Section 7103(a)(13) requires that a confidential employee have a working relationship with an *agency representative* who formulates or effectuates management policies in the field of labor-management relations, but does not require that the alleged confidential employee also formulate or effectuate such policies.<sup>30</sup> The Union does not challenge the RD’s determination that the fire chief and deputy are “significantly involved in labor-management relations.”<sup>31</sup> And to the extent that the Union is arguing that the incumbents do not spend enough time working in a confidential capacity to be excluded under § 7103(a)(13), the Authority has recently reiterated that the frequency and amount of time that an employee spends performing in such a capacity “may be relevant,” but is “not controlling.”<sup>32</sup> Thus, the Union’s argument lacks merit.

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<sup>24</sup> Application at 7.

<sup>25</sup> *FAA*, 71 FLRA at 30; *U.S. Dep’t of the Air Force, Edwards Air Force Base, Cal.*, 62 FLRA 159, 163 (2007).

<sup>26</sup> Tr. at 36, 678-79.

<sup>27</sup> *Id.* at 231-33.

<sup>28</sup> Agency’s Ex. 21; see Tr. at 882-83.

<sup>29</sup> Application at 7.

<sup>30</sup> *FAA*, 71 FLRA at 29; *Air Force*, 67 FLRA at 122.

<sup>31</sup> Application at 6.

<sup>32</sup> *E.g.*, *FAA*, 71 FLRA at 29 (citing *DOL*, 37 FLRA at 1382); *Air Force*, 67 FLRA at 122; *NASA*, 57 FLRA at 573.

In sum, we find that the Union has not demonstrated that the RD failed to apply established law.<sup>33</sup>

- B. The RD did not commit a clear and prejudicial error concerning a substantial factual matter by considering hearsay testimony.

The Union argues that the RD committed a clear and prejudicial error concerning a substantial factual matter by considering hearsay testimony to support her finding that the incumbents have a confidential working relationship with the fire chief and deputy.<sup>34</sup> However, mere disagreement with the weight that an RD accorded certain evidence is not sufficient to find that an RD committed a clear and prejudicial error concerning a substantial factual matter.<sup>35</sup>

The labor chief testified that the fire chief told her that he discusses confidential labor-relations matters with the incumbents.<sup>36</sup> The Union asserts that the RD committed clear and prejudicial error because her decision was “largely based” on the labor chief’s hearsay testimony, rather than other evidence.<sup>37</sup> However, the labor chief also testified, *from personal knowledge*, that she and the fire chief include the incumbents on emails and phone calls with Agency representatives concerning confidential labor-management issues.<sup>38</sup> And considering the record as a whole – including testimony from the fire chief, the deputy, the labor chief, the four incumbents, and three bargaining-unit employees – the RD found that the “weight of the evidence” showed that the incumbents have a confidential working relationship with the fire chief and deputy.<sup>39</sup> Further, the

record supports the RD’s finding.<sup>40</sup> Therefore, we find that the Union has not established that the RD committed a clear and prejudicial error concerning a substantial factual matter.<sup>41</sup>

#### IV. Order

We deny the Union’s application for review.

<sup>33</sup> See *Navy*, 70 FLRA at 233 (finding RD did not fail to apply established law in determining that firefighters who received advance knowledge of management’s labor-relations positions by attending the fire chief’s management meetings were confidential employees); *U.S. Dep’t of the Army, U.S. Army Aviation Ctr., Fort Rucker, Ala.*, 60 FLRA 771, 772 (2005) (finding RD did not fail to apply established law in determining that an employee who obtained advance information of management’s labor-management positions was a confidential employee).

<sup>34</sup> Application at 4; 5 C.F.R. § 2422.31(c)(3)(iii) (recognizing clear and prejudicial error concerning a substantial factual matter as a basis for granting an application).

<sup>35</sup> See, e.g., *U.S. Dep’t of the Air Force, Air Force Life Cycle Mgmt. Ctr., Hanscom Air Force Base, Mass.*, 69 FLRA 483, 485 (2016); *U.S. Dep’t of VA, Med. Ctr., Hampton, Va.*, 65 FLRA 364, 366 (2010) (citing *SSA, Office of Disability Adjudication & Review, Balt., Md.*, 64 FLRA 896, 902 (2010)).

<sup>36</sup> Application at 4 (citing Tr. at 880, 884).

<sup>37</sup> *Id.*

<sup>38</sup> Tr. at 875-77, 880; see also Agency’s Exs. 21, 29.

<sup>39</sup> RD’s Decision at 27.

<sup>40</sup> See notes 18-19, 23, 26-28 above. Member Abbott notes that he applies a preponderant evidence standard in reviewing an RD’s factual findings for the reasons he explained in his concurring opinions in *AFGE, Nat’l Joint Council of Food Inspection Locals, AFL-CIO*, 71 FLRA 69, 72-13 (2019) (Concurring Opinion of Member Abbott) and *FAA*, 71 FLRA at 31-32 (Concurring Opinion of Member Abbott).

<sup>41</sup> E.g., *U.S. DOD, Pentagon Force Prot. Agency, Wash., D.C.*, 62 FLRA 164, 170 (2007) (disagreement over evidentiary weight not sufficient to find that RD committed a clear and prejudicial error concerning a substantial factual matter); *Nat’l Credit Union Admin.*, 59 FLRA 858, 862 (2004) (same).

**Member DuBester, concurring**

I concur in the decision to deny the Union's application for review.

FEDERAL LABOR RELATIONS AUTHORITY  
CHICAGO REGION

U.S. DEPARTMENT OF THE AIR FORCE  
AIR FORCE MATERIEL COMMAND  
66<sup>th</sup> AIR BASE GROUP  
HANSCOM AIR FORCE BASE, MASSACHUSETTS  
(Agency/Respondent)

and

INTERNATIONAL ASSOCIATION OF FIRE  
FIGHTERS,  
AFL-CIO, LOCAL F-78  
(Union/Petitioner)

BN-RP-18-0007

DECISION AND ORDER  
ON PETITION

December 12, 2018

**I. Statement of the Case**

This case is before the undersigned Regional Director of the Federal Labor Relations Authority (the Authority) on a clarification of unit petition filed by the International Association of Fire Fighters, AFL-CIO, Local F-78, (Petitioner) pursuant to section 7111(b)(2) of the Federal Service Labor Management Relations Statute (the Statute)<sup>1</sup> and section 2422.1(b) of the Federal Labor Relations Authority’s Rules and Regulations (Regulations).<sup>2</sup> The petition seeks to clarify the bargaining unit status of the following individuals employed by the U.S. Department of Air Force, Air Force Materiel Command, 66<sup>th</sup> Air Base Group (Agency) at the Hanscom Air Force Base (AFB), Massachusetts:

- Assistant Chief of Operations  
Scott Rutherford
- Assistant Chief of Operations  
Glenn Haffner
- Station Captain  
Christopher Sprague
- Station Captain  
Daniel Stone

Specifically, the Petitioner seeks to include the four incumbents<sup>3</sup> in the national consolidated bargaining unit represented by the International Association of Fire Fighters, AFL-CIO, which includes all eligible employees in the Fire Protection Branch, Hanscom AFB, Massachusetts.<sup>4</sup>

A hearing on the petition was conducted on April 5-6 and June 13-14, 2018, pursuant to Section 7111(b)(2) of the Statute and Section 2422.17-22 of the Regulations. The matter was transferred to the Chicago Regional Office on November 13, 2018. The Hearing Officer made certain rulings during the proceedings, which appear to be free from prejudicial error, and are hereby affirmed. Based on the entire record, including the parties’ post-hearing briefs, the undersigned Regional Director, acting for the Authority, concludes that all four of the incumbents are excluded from the bargaining unit on the grounds that they are confidential employees within the meaning of section 7103(a)(13) of the Statute.

**II. Facts**

**A. The Bargaining Unit**

The consolidated bargaining unit at issue in the petition was originally certified on February 13, 1997 in Case No. CH-RP-60060 as follows:

Included: All eligible employees in the Fire Protection Branch, Tinker AFB, Oklahoma; Robins AFB, Georgia; Wright-Patterson AFB, Ohio; Kelly AFB, Texas; McClellan AFB, California; Brooks AFB, Texas; and Hanscom AFB, Massachusetts.

Excluded: All professional employees; management officials; supervisors; Fire Chiefs, Deputy Fire Chiefs, Fire Prevention Chiefs, Assistant Fire Chiefs, Station Chiefs and employees described by 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).

<sup>1</sup> 5 U.S.C. § 7111(b)(2)

<sup>2</sup> 5 C.F.R. § 2422.1(b)

<sup>3</sup> During the hearing conducted on April 5, 2018, the Petitioner amended its petition to remove the position of Assistant Chief of Prevention, as encumbered by Mark Webb, from contention.

<sup>4</sup> The International Association of Fire Fighters, AFL-CIO, authorized the Petitioner to pursue the clarification of its unit.

Then, on July 26, 2012, in Case No. CH-RP-12-0018, the FLRA issued a Certification of Consolidated Units, combining the above unit with a similar unit in Palmdale, California. The unit description was also updated to indicate that three locations—Kelly AFB, McClellan AFB, and Brooks AFB—were closed as part of the Base Realignment and Closure process and that no bargaining unit employees remained at these locations. The resulting unit description reads:

- Included: All eligible employees in the Fire Protection Branch, Tinker AFB, Oklahoma; Robins AFB, Georgia; Wright-Patterson AFB, Ohio; Hanscom AFB, Massachusetts; and all employees in the GS-081 series and the GS-2151 series of Plant 42, Palmdale, California.
- Excluded: All management officials, supervisors, and employees described in by 5 U.S.C. §7112(b)(2), (3), (4), (6) and (7); all nonprofessional employees other than those in the GS-081 and GS-2151 series of Plant 42, Palmdale, California; and all Fire Chiefs, Deputy Fire Chiefs, Fire Prevention Chiefs, Assistant Fire Chiefs and Station Chiefs at Tinker AFB, Oklahoma; Robins AFB, Georgia; Wright-Patterson AFB, Ohio; and Hanscom AFB, Massachusetts.<sup>5</sup>

The parties are currently subject to the June 22, 2017 Command Labor Agreement (CLA) between the Air Force Materiel Command and the International Association of Fire Fighters, AFL-CIO, as well as the November 13, 2013 Local Supplement Agreement between the 66<sup>th</sup> Air Base Group Commander, Hanscom Air Force Base, Massachusetts and the International Association of Fire Fighters (AFL-CIO) Local F-78.

## B. The Organization and Mission

All of the four incumbents work on the Hanscom Air Force Base (Hanscom) in Massachusetts. Hanscom is part of the Air Force Life Cycle Management Center, which is headquartered at Wright-Patterson AFB, Ohio. It is one of six centers under the Air Force Materiel Command (AFMC) and is the only center responsible for total life cycle management of Air Force weapon systems.

Hanscom's host unit is the 66<sup>th</sup> Air Base Group (ABG). The 66<sup>th</sup> ABG supports the Air Force acquisition mission, providing base, regional and readiness support for the Air Force Life Cycle Management Center, three Program Executive Offices, MIT Lincoln Laboratory, a variety of other tenant organizations, and a joint-service military housing community.

Organizationally, the incumbents are part of the 66<sup>th</sup> ABG's Civil Engineering Division (the Division). The Division's mission is to provide, operate, maintain, repair, restore, design, construct, and protect managed assets including infrastructure and facilities. It also executes environmental stewardship, real estate management, space management, fire emergency services, and readiness and emergency management services in addition to managing energy and utility systems, maintaining roads and grounds, providing facility and base sustainment services, overseeing privatized housing, and managing unaccompanied housing.

The Division has eight sections: Operations, Resources, Housing, Engineering, Environmental, Quality, Emergency Management, and Fire Protection. All four of the incumbents are assigned to the Fire Protection Section, which performs firefighting and/or rescue for all military and civilian structures and aircraft at Hanscom's facilities. The section also performs hazardous material response and stabilization, provides confined space rescue, and assists in emergency medical responses. It also has mutual aid agreements with four surrounding communities and a support agreement with the Massachusetts Port Authority's Laurence G. Hanscom Field in Bedford, Massachusetts to provide Air Rescue Fire Fighting. In carrying out this work, the Fire Protection Section responds to approximately 600 calls per year, the majority of which are medical. In addition to handling emergencies, the Fire Protection Section also provides training and inspections both at Hanscom and at other locations such as the Air Force Research Laboratory in Rome, New York.

### (i) The Fire Department

The Fire Protection Section, also referred to as the Hanscom AFB Fire Department, is divided into

<sup>5</sup> The position of "Station Captain" did not exist in the Hanscom Fire Department at the time the unit was either certified or added to the consolidated unit.

four sections: Administration, Dispatch, Prevention, and Operations.

The Administration Section is staffed by the Fire Chief, Deputy Fire Chief, and the Assistant Chief of Training. These individuals work sixty hours a week, on a Monday through Friday schedule which is comprised of four nine-hour shifts and a single twenty-four-hour shift. When working their twenty-four hour shift, the Chief and Deputy Chief support the Fire Operations Section. In addition to managing the Fire Department in general, this Administrative Section is also responsible for duties such as time keeping, record keeping, maintaining the Government Purchase Card program, and file maintenance.

The Dispatch Section, the formal name for which is the Fire Alarm Communication Center, is staffed by a Supervisor and four GS-5 Dispatchers.<sup>6</sup> The section is responsible for receiving and dispatching all emergency calls and for maintaining all call data. When the Dispatch Supervisor's shift ends at 4:00 p.m., the Assistant Chiefs of the Operations Section (Rutherford and Haffner) are responsible for the section. This involves ensuring that there is always a Dispatcher on duty.

The Prevention Section has a GS-11 Assistant Chief of Fire Prevention and is responsible for coordinating fire inspections, fire investigations, pre-fire plans, and fire prevention education programs.

The Operations Section includes the two GS-11 Assistant Chiefs of Operations at issue, the two GS-9 Station Captains at issue, seven GS-8 Lieutenants and twenty-five GS-7 Fire Fighters. The Operations staff members customarily work a forty-eight-hour shift and are then off duty for seventy-two hours. The shifts run on a rotating basis for an average of 144 hours every two weeks.

The Operations staff, including the four incumbents, is divided into seven groups. There are three groups on duty each shift and at least one of the groups always includes one of the four incumbents at issue. There are only two shifts a week during which one of the Assistant Operations Chiefs are not on the schedule. A work schedule describing which groups are assigned to work on which days was originally set forth in Hanscom Air Force Base General Operating Instruction #16 dated March 29, 2009. The current composition of the groups and which group is assigned to work which days was established between one of the incumbents, Scott Rutherford, and IAFF Local F-78 President Dale

Smith. The composition of each group remains fixed, but in the event that a Fire Fighter separates from the Department thereby creating an opening on his or her group, the other staff members may apply for it.

General Operating Instruction #16 also describes the Operation Section's daily work schedule. For each 24-hour period of an employee's work schedule, the active duty time runs from 6:30 a.m. to 4:00 p.m., with standby time from 4:00 p.m. to 6:30 a.m. This schedule sets forth at what times certain duties and activities are to be performed (*e.g.* vehicle inspections from 7:30 a.m. to 8:30 a.m., coffee break from 8:30 a.m. to 9:00 a.m. etc.). The Instruction also specifically provides that the "work schedule must be flexible to all management to react to: weather, emergencies, special requirements from the Commanders, etc., which might affect the daily routine." Accordingly, while the incumbents avoid deviating from the pre-determined schedule they can make adjustments as the need arises.

As described in more detail below, daily rosters are prepared by the Station Captains five days ahead of time and posted to a bulletin board. The assignments listed on the roster have been predetermined and absent an unscheduled leave or other event, the Operations staff knows what their assignments will be prior to their shift. Notable is that the Station Captains are not constrained to assign the employees in a particular group to work together on the same engine or performing a particular task. Rather, Sprague and Stone assign duties according to the skill sets and specialties of the individual staff members on duty.

## (ii) Chain of Command

The Fire Department is headed by the Fire Chief Mark Klempke, who replaced Robert Hildreth on April 6, 2018. The second in command is the Deputy Fire Chief, Daniel Dillon. Dillion has encumbered the position since 2005. He directly supervises, among others, the Assistant Chiefs of Operations, Rutherford and Haffner, who Dillon interacts with on a daily basis as they regularly brief him on the Fire Department's operations, purchases, time cards, and emergencies. Even though Dillion enjoys regular updates and has oversight of the department, he looks to the Assistant Chiefs to run the programs.

The Operations staff is divided into two separate chains of commands, one overseen by Haffner and the other by Rutherford. Each group includes a GS-9 Station Captain, three to four GS-8 Lieutenants, and twelve to thirteen GS-7 Fire Fighters.<sup>7</sup> Haffner's

<sup>6</sup> The GS-5 Dispatchers are part of the bargaining unit represented by the Petitioner.

<sup>7</sup> The position of Station Captain is also referred to as a Station Chief and the names are used interchangeably.

direct reports include Station Captain Christopher Sprague and four GS-8 Lieutenants. Rutherford's direct reports include Station Captain Daniel Stone and three GS-8 Lieutenants. With respect to the GS-7 Fire Fighters working under Haffner and the ones working under Rutherford, the Fire Department has assigned Sprague and Stone, respectively, as their immediate supervisors. As noted, in keeping with these chains of command, the scheduling of the seven work groups was arranged so that the four incumbents can work on the same days as their subordinates.

### (iii) Labor-Management Relations

The Fire Department's labor relations needs are serviced in part by Hanscom's Chief of Employee and Labor Relations, Kathy Owens. Owens testified that she works with the Fire Chief and the Deputy Fire Chief concerning the administration of the CLA and that they are involved in developing and effectuating labor management relations policies for their Department. Although Owens could not think of a specific occasion in which she met with one of the incumbents face-to-face, she testified that they are involved in confidential labor relations matters such as handling grievances. More specifically, Owens testified that expecting the Deputy Chief to handle labor relations matters without the incumbents would not, in her view, be possible.

Owens generally coordinates communication with the incumbents through the Deputy Chief, since the incumbents work on varying shifts and can be difficult to reach. That said, Owens has participated in phone calls regarding confidential employee and labor relations matters which included one or more of the incumbents. Similarly, Owens has been included on e-mail chains concerning confidential matters which also included one or more of the incumbents as recipients. For example, the Union filed a grievance concerning the Fire Fighters' duties in connection with the Department's Massport contract, and all four incumbents were copied on Chief Hildreth's e-mails with Owens.

As noted, the current CLA became effective on June 22, 2017. The Fire Department's former Chief, Robert Hildreth was on the Agency's negotiation team and he solicited input from the Department's management staff including the Assistant Chiefs of Operations. Sometime prior to the beginning of the hearing in April of 2018, the Air Force Materiel Command began the process of reviewing the CLA in preparation for its renegotiation. Dillon testified that in support of this

effort, Chief Hildreth solicited input from all four of the incumbents at issue both by e-mail and during a management staff meeting.

Concerning the parties' local supplement, as noted earlier, it became effective on November 13, 2013. The Agency's bargaining team included Chief Hildreth, Deputy Chief Dillon, and Kathy Owens. At the time, Haffner, Sprague, and Stone had yet to encumber their current positions. Scott Rutherford, however, had already encumbered the Assistant Chief of Operations position for several years. In that capacity, he provided input concerning specific topics such as overtime and reviewed the Department's proposals. With respect to other written agreements such as memorandums of understandings, none of the four incumbents are authorized to broker and/or sign them on their own. According to Owens, as most matters are covered in the local supplement the parties have only very rarely entered into separate agreements.

The incumbents are included in other labor relations matters as well and are often copied on memos and e-mails that the remainder of the Fire Department is not. For example, in February 2017, IAFF Local F-78 President Dale Smith e-mailed Chief Hildreth, Deputy Chief Dillion, Assistant Chief Webb, and all four incumbents asking to discuss an idea concerning the reduction of callback times.<sup>8</sup> The incumbents internally discussed its viability and the Department's eventual decision against permanently implementing Smith's proposal. In regard to grievances, pursuant to Article 7 of the CLA, employee grievances may be served on an immediate supervisor or the Fire Chief while union grievances are to be served on the Fire Chief.<sup>9</sup> The Fire Department's practice is to have the Fire Chief serve as the Step 1 Deciding Official, even though that is not explicitly required by the CLA. Concerning the processing of the grievance, the Fire Department often consults with Owens. Everyone on the management staff, including the four incumbents, is then allowed the opportunity to provide input concerning a course of action. In the case of a grievance that is filed against a specific supervisor, the Chief and Deputy Chief will meet with the supervisor individually as needed.

Every Monday the Fire Chief conducts a management meeting. The purpose of these meetings

<sup>8</sup> Kathy Owens was blind copied on this e-mail as well.

<sup>9</sup> Contrary to this policy, Sprague described an instance in which the Union served a grievance on him directly and only discussed it with the Chief after he responded to the Union. Kathy Owens subsequently reviewed his response as well.

is to review operations over the past week and weekend and to plan for the upcoming week. Labor relations matters such as planned changes to the employees' working conditions are often discussed. On average, the meetings last from an hour to an hour and a half. The meetings are attended by the Fire Chief, Deputy Chief, the Fire Prevention Chief, the Dispatch Supervisor, the Assistant Operation Chiefs, and Station Captains on duty.<sup>10</sup> One bargaining unit employee, Assistant Chief of Training Timothy Moore, attends the meeting as well, but is asked to excuse himself when the conversation turns to a confidential matter such as a grievance.

Additional management meetings are held as needed. In one recent example the supervisory staff, including the incumbents, discussed a new training requirement and the Union's interest in negotiating over it. The participants at these meetings may vary depending on work schedules but all four of the incumbents at issue have attended them. Meeting topics have included grievances, contract negotiations, and job classifications. It is commonly understood by the attendees that whatever is discussed stays behind closed doors, and the Department's management has also reminded the incumbents of that requirement. Similarly, the Chief or the Deputy Chief has talked to each of the incumbents individually concerning matters which they have deemed to be confidential.

The incumbents do not approve official time as the Union is to submit those requests directly to the Fire Chief. The Fire Department has not been involved in any arbitration, Equal Employment Opportunity Commission hearing, or a case before the Merit Systems Protection Board during the tenure of any of the four incumbents.

The Air Force also has supervisory training and, in keeping with the Agency's position that all four incumbents are supervisors, all four of them have completed the Air Force's on-line supervisor training courses. Among other issues, the courses covered topics such as leave, overtime, writing appraisals, equal employment opportunities, grievances, disciplinary actions, hiring, layoffs, and pay. According to the Chief of Employee and Labor Relations, the training includes a module specifically covering labor relations.

Locally, Kathy Owens trains management in part by publishing a quarterly newsletter covering employee and labor relations topics. The newsletter is e-mailed to all

supervisory personnel including the four incumbents.<sup>11</sup> The Agency has also required its supervisory personnel, again including the incumbents, to attend training conducted by the Federal Labor Relations Authority concerning the Statute.

### C. The Incumbents

#### (i) Assistant Chiefs: Rutherford and Haffner

The Air Force has classified the Assistant Chief of Operations positions as a "Supervisory Fire Fighter, GS-0081-11. As described in its Air Force Standard Core Personnel Document (core document or position description), the primary purpose of the position is to "[I]n charge of the management and supervision of fire protections operation shift personnel, in the performance of daily duties, fire ground situations, as well and the performance of care and maintenance of apparatus, equipment and facility." The Fire Department reviews the core document with Haffner and Rutherford on an annual basis to ensure its accuracy, and each testified that it accurately reflects the work they do.

The Assistant Chiefs have Senior Fire Officer (SFO) duties and sometimes serve as commanding officer while on emergency calls. Depending on the scale of an emergency, those duties might include evaluating the scene to determine what crews and vehicles are needed. In responding to calls, the Assistant Chiefs assume command of the incident, acting as Chief Officer, unless the scale of the emergency is such that it is necessary to call in the Deputy Fire Chief. Although the Chief Officer is in charge of the scene, the authority to delegate specific tasks to each Fire Fighter has been delegated to the Crew Chiefs for the vehicles that were dispatched to the scene. Serving as the Chief Officer requires a certification which both Rutherford and Haffner possess. As the senior ranking fire officer on the scene always assumes command, in the event that the Deputy Fire Chief is present, the Assistant Chief becomes the Operations Chief. Even in that capacity, however, the Assistant Chiefs still make determinations such as whether to call in additional help. For example, in the event of a hazmat incident, the incumbents will recommend whether to bring in emergency management staff with detection equipment. Even when the incumbents are at an emergency as the Chief Officer it is the GS-8 Crew Chiefs who give the Fire Fighters their specific instructions at the scene. On average, each Assistant Operations Chief goes on two emergency runs per shift.

<sup>10</sup> Sprague and Stone work alternate Mondays.

<sup>11</sup> Each of the transmittal e-mails includes the sentence "This e-mail has been sent to all supervisory and HR personnel. It is not intended for further distribution."

The Assistant Chiefs are also involved in staffing issues. The Fire Department avoids dropping below minimum staffing levels by offering unscheduled overtime or compensatory time. Both Rutherford and Haffner have the authority to make these initial decisions without securing Deputy Chief Dillon's approval. With respect to scheduled overtime, these requests have to be approved by Fire Marshall Thomas Schluckebier.<sup>12</sup>

Haffner and Rutherford also handle leave requests. Although the Fire Department solicits requests for annual leave for the next calendar year during the fall of the preceding one so as to pre-approve them, additional requests are inevitable. Approval of unscheduled leave turns in part on the Fire Department's staffing level on a particular day. Specifically, the Department's minimum staffing level dictates that if more than two people are off in the Operations Section, the Assistant Chiefs must deny a leave request rather than resorting to overtime. Rutherford handles leave requests from the employees under his chain of command a couple of times a week. With respect to the administration of leave, the Assistant Chiefs serve as "certifiers" while the Station Captains serve as timekeepers.

In regard to taking disciplinary actions, Article 6 of the parties' supplemental agreement covers disciplinary and adverse actions. Article 6, Section 2(a) provides that a disciplinary action includes oral admonishments, reprimands and suspensions of fourteen days or less. Section 2(c) provides that non-disciplinary counseling sessions, letters of caution, and counseling entries on an Air Force Form 971 do not qualify as disciplinary actions under the contract. While the Assistant Operation Chiefs have the authority to recommend and pursue a disciplinary action as needed, they do not have independent authority to implement any of the actions described in Section 2(a). That said, disciplinary and adverse actions, as defined in the contract, are initiated at the incumbents' level. With respect to taking any of the actions described in Article 6, Section 2(c), the incumbents do not need pre-approval from the Deputy Chief to implement them. In fact, Deputy Chief Dillon's expectation is that he should not have to deal with every employee counseling as this is the incumbents' role, and Owens testified that they have the authority to sign such actions.

Acting as first line supervisors for the Station Captains and GS-8 Lieutenants, Haffner and Rutherford write both annual Civilian Progress Review Worksheets (performance appraisal) and Midterm Feedbacks (progress review form). In doing so, they sign the appraisals as the "Rater." In his capacity as the

Station Captains' and Lieutenants' second line supervisor, Deputy Dillon signs their appraisals as the "Reviewer." Haffner testified that neither the Chief nor the Deputy Chief have asked him to change an appraisal and that he was involved in training Sprague and Stone as to how to complete them for their direct reports. Similarly, Rutherford could only recall one instance in which his recommendation was changed. In regard to the amount of time taken to complete a midterm review, Haffner estimated that he might spend only an hour completing the form, but his work is based on months of observation, note taking, and evaluation. Rutherford testified that he might spend four to six hours working on an appraisal. With respect to collecting support for his review, even if he personally did not observe a noteworthy act by one of his subordinates, he will interview someone who did in order to include it in the appraisal. Likewise, both gentlemen testified that they speak to their employees about their performance informally throughout the year. According to Rutherford, he is involved in such conversations once or twice a day. For example, as the incumbent Station Captains are new to their positions, the Assistant Chiefs have spent time coaching and mentoring them. If either Rutherford or Haffner determine that one of their subordinates needs training in a particular area, they also have the authority to independently schedule it.

Haffner and Rutherford also make recommendations with respect to step increases and performance awards. Concerning the latter, the Fire Department is notified as to how much money is available. This budget is referred to as a "bogey" and is usually equal to one percent of each employee's salary added together. While Dillon has recommended monetary adjustments to Haffner and Rutherford's award recommendations in order to stay within the Department's award budget, he has never otherwise challenged one of their decisions. The awards are, however, ultimately approved by Fire Marshall Schluckebier, as he is the designated "Award Approving Official" for the Fire Department. The Fire Department also shares a quarterly award program with the Civil Engineer Squadron, and the Assistant Chiefs make recommendations for those awards as well.

Rutherford and Haffner have also been involved with hiring and promotion actions. When the Fire Department created and filled the Station Captain positions, they along with the Fire Chief, Deputy Chief, and the Fire Prevention Chief reviewed applicant resumes and scored them according to a promotion matrix. Subsequent to Sprague and Stone's promotions, Rutherford and Haffner were also involved in determining who to promote to the newly vacant GS-8 Lieutenant positions. And, as filling these positions left the Fire Department with two GS-7 Fire Fighter vacancies, Rutherford and Haffner were involved in that recruitment process as

<sup>12</sup> Schluckebier oversees the Base's Civil Engineering Division, which includes the Fire Department.

well. According to Dillon, he had all four of the incumbents review applicant resumes because he wanted them to decide who would be working for them.

**(a) Scott Rutherford**

At the time of the hearing, Rutherford had worked for the Fire Department for approximately thirty years, the last ten of which he spent as a GS-11 Assistant Chief of Operations. He testified that his position description is accurate. In summarizing his duties, Rutherford testified that he is responsible for ensuring that the Fire Department is in compliance with minimum staffing levels on a daily basis, handling payroll and leave issues and assuming incident command on emergency calls. He also testified that while much of the preparation, execution and scheduling of assignments as described in his position description has been taken over by the Station Captains, he continues to perform this work in their absence. Rutherford also testified that his work as a supervisor extends beyond when their standby time begins at 4:30 p.m. as he remains in charge throughout the evening and overnight.

According to Rutherford, he exercises independent judgment in the performance of his duties. For example, in the event that the Fire Department's staffing falls below required levels, as the supervisor on duty he determines whether to call in additional staff using overtime. Rutherford estimated that he makes this determination once or twice a month. In regard to training the department, Rutherford conducts both planned and un-planned fire drills for the staff and evaluates how they performed. Although certain types of drills have to be conducted in concert with annual training requirements, he has the authority to determine what types of drills will be done and when. The Assistant Operation Chiefs are responsible for identifying department deficiencies, and Rutherford testified that he works closely with the Training Chief to address them.

In regard to labor relations, the Fire Department has designated Rutherford as its representative in various matters. For example, Rutherford was assigned to work with IAFF Local F-78 President Dale Smith to create the Operations Section's work groups and to determine which groups would work on which days of the week. Rutherford has also been the subject of both individual and Union grievances and has discussed them, confidentially, with the Chief and Deputy Chief. These conversations typically include a discussion of the facts, the Union's position, and management's plan for addressing the grievance. In Rutherford's experience, even though the Chief serves as the Step 1 deciding official, he is aware of management's position before it is shared with the Union.

With respect to handling employee complaints and potential grievances, Rutherford testified that he attempts to resolve matters at the lowest level when possible. In doing so, he has on occasion approached the Union independent of upper management. He estimated that such conversations may occur once a month. Similarly, Rutherford attempts to address potential disciplinary issues on his own and in doing so, is not required to secure his management's approval first. He estimated that he issues an oral or written counseling five times a year.

During his ten years as an Assistant Chief of Operations, Rutherford has played a role in hiring at least ten Fire Fighters and in promoting two or three of them. With respect to the hiring process, after a position has been advertised the Fire Department is provided with a list of applicants deemed qualified. As these lists have included unqualified candidates in the past, Rutherford reviews the applicant's credentials to ensure that they are qualified before it is given to the hiring official. On those occasions when Rutherford served as one of the hiring officials, Deputy Chief Dillon in his capacity as the approving official only disagreed with his selection on one occasion.

**(b) Glenn Haffner**

Haffner has encumbered the Assistant Chief of Operations position at Hanscom for about two years. He testified that the primary purpose described in his position description is accurate. He also confirmed that, pursuant to his position description, he assists with program planning as needed in a number of areas such as training, staffing, and drafting flight operating guides and instructions. For example, Haffner is responsible for the Respiratory Protection Program, and he assisted Deputy Fire Chief Dillon with developing a flight operating guide concerning the Rapid Intervention Team (RIT). With respect to Haffner's involvement with the operating guide, while some of its components were shared with the bargaining unit during development, the Fire Department considered it to be a confidential document for management only during the drafting stages. Haffner testified that with respect to determining what information can be disseminated to the staff in general, unless it concerns a labor relations matter, he can do this on his own. If a matter has an impact on labor relations, he consults with the Chief and Deputy Chief.

In regard to the percentage of time Haffner is occupied with supervisory duties, he testified that he talks to the staff all day long about various items such as training, leave issues, and mentoring. Haffner observes the staff at work to ensure that their tasks are being done correctly. Haffner is also one of the individuals to whom the employees report issues concerning the fire station itself (*e.g.*, HVAC, plumbing, vehicle repair) and to whom they

complain about matters such as their engine assignments. Haffner testified that such conversations occur on a daily basis and can last from five minutes to an hour depending on the issue. He believes that employees approach him as it is understood that he is the supervisor on his shifts.

Regarding the supervisory elements of his job, although he typically completes his work around 8:00 to 8:30 p.m., Haffner believes that he needs to be accessible as a supervisor during his entire shift. Even during meal breaks and his down time at the Station, Haffner is the official who enforces workplace rules (*e.g.*, feet off the furniture) and, as an Assistant Chief, is the point-of-contact at the Station throughout the night.

As to how Haffner reconciles his supervisor role with that of the Station Captains, he sees them as managing the interior of the Station while he, in turn, oversees them. For example, on those days Haffner is managing the Station with a Station Captain, he checks with them to ensure that the scheduled work for the day has been completed. In keeping with the Department's purpose for adding the Station Captain position, Haffner believes that things now run more smoothly as he is no longer immediately supervising fourteen to seventeen people. Haffner respects the Station Captains' authority; and, in those cases where a GS-7 Fire Fighter brings an issue to him directly, his first question is whether the Fire Fighter has already talked to his Station Captain. During those shifts in which a Station Captain is not on duty, Haffner will perform some of the supervisory duties normally performed by Sprague or Stone. For example, he handles overtime assignments and has the authority to decide when the staff can be released to engage in physical fitness (which is the last scheduled unit of the day before going on standby). With respect to assigning overtime, Haffner was the subject of a grievance filed by IAFF Local F-78.<sup>13</sup>

Haffner also will, when required, exercises independent judgement concerning corrective actions, but has not had occasion to discipline anyone in his chain of command thus far.

**(ii) Station Captains: Sprague and Stone**

The Air Force has classified the Station Captain/Chief positions as a "Supervisory Fire Fighter, GS-0081-09." As described in the position description, the primary purpose of the position is to be "responsible for oversight of the day-to-day operations of the fire station with

<sup>13</sup> Haffner has also been the subject of an unfair labor practice charge.

two or more firefighting crews (including a crew chief and assigned crew), who drive and operate firefighting vehicles of significant complexity, fight airfield and structural fires, perform crash and rescue operations, and assist in reducing and/or eliminating potential fire hazards." Although the Station Captains are in charge of the day-to-day operations, if the Deputy Chief or one of the Assistant Chiefs is *also* on duty, some matters are elevated above the Station Captain depending on what is involved. That said, staff questions and complaints always start with the Station Captain on duty.

The Station Captain position is relatively new at Hanscom, existing for only about seventeen to eighteen months. As described by Deputy Chief Dillon, the Fire Department sought to add a layer of supervision between the Assistant Chiefs of Operation and the Fire Fighters. Prior to its addition, each of the Assistant Chiefs was directly supervising seventeen employees, a supervisor-to-employee ration the Department found unacceptable. Deputy Dillon testified that if all four incumbents joined the bargaining unit, he would become the first level supervisor over thirty-eight employees and the results would be "devastating."

Sprague and Stone are the first individuals to encumber the Station Captain position at the Fire Department. In addition to improving the supervisor to employee ratio, the position was also intended to create another opportunity for advancement and to support the Fire Department's succession planning.

Sprague and Stone were promoted from Fire Lieutenants to Station Captains with the understanding that they would be assuming increased responsibility. The Department has been grooming them to assume an on-site command role by assigning them Chief Officer duties at emergency scenes as the station's manpower allows. On those occasions, one of the Assistant Chiefs or the Deputy Chief has monitored their handling of the scene over the radio. When not assuming command at an emergency, the Station Captains are in charge of their engine crews and function in the same capacity as a GS-8 Crew Chief.

The Station Captains work a 48-hour shift, which begins with a meeting with the outgoing Station Captain or Assistant Chief of Operations at 7:00 a.m. to review the events of the prior shift and to discuss whatever matters will need attention.<sup>14</sup> The shift change occurs at 7:30 a.m. at which time the Station Captain conducts rollcall and announces the crew assignments. Rollcall can take

<sup>14</sup> The Station Captain begins the second day of his shift at 6:30 a.m. as that is when employees calling in sick can begin leaving messages.

anywhere from five minutes to a half-hour depending on what is happening that day. At 9:00 a.m. whichever incumbent is on duty may also conduct a shift meeting to notify the staff about the order in which the day's duties will be performed. For example, while training is usually conducted in the afternoon, if the weather on a particular day would interfere with an afternoon training session, the Station Captain has the authority to modify the day's schedule.

In regard to making assignments, the Station Captains are responsible for preparing the "Daily Runsheet" which lists which Lieutenants and Fire Fighters are assigned to particular vehicles.<sup>15</sup> The Lieutenants and Fire Fighters who work together on an engine or vehicle are referred to as a "crew," and the Fire Department has five of them. The Runsheets are prepared and posted at least ten days ahead of time, and the Station Captains determine who is assigned to which vehicle/crew based on their assessments of the staff's individual talents and training needs. Completing the Daily Runsheet is, in large part, a routine exercise. Considerations such as what work is performed on a particular day, have already been set. For example vehicle checks and station cleaning are supposed to be done every Monday. Likewise, crew assignment to a particular detail only rotates on a quarterly basis. And, the number of Fire Fighters assigned to a particular vehicle is mandated by an Air Force Instruction. However, other aspects of assigning duties, such as having to accommodate training needs and adjusting for unexpected events such as an inoperative engines or tardy staff members can necessitate adjustments. In this regard, Sprague and Stone have the authority to reassign the staff as needed and to announce the changes during rollcall. They consider multiple factors, such as the certifications of the available Fire Fighters (to ensure that substitutes are properly credentialed). Making these types of adjustments is a regular occurrence. Sprague estimated that it might take him fifteen minutes to complete a single Daily Runsheet. While Stone testified that he spends approximately four to five hours a week on this task.

When crews are assigned to details, which are work assignments supporting the upkeep of the Fire Station, the crew of GS-7 Fire Fighters and the Crew Chief, a GS-8 Lieutenant, decide which crew member will perform each task (*e.g.*, cleaning the stove, mopping the floor etc.). When there is a conflict in this regard, the Station Captain becomes the final decision maker. In carrying out these types of assignments, the Station Captains are not routinely working alongside the Lieutenants and Fire Fighters. They are, however, responsible for following-up on whether the assigned

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<sup>15</sup> This document is created using the Automated Civil Engineer System (ACES), and is also referred to as a "shift roster" or the "daily roster."

work has been completed and have the authority to order a particular job to be done again if, in their view, the work is incomplete. The Station Captains also have the authority to make certain assignments that are not necessarily captured on the daily roster such as doing small engine repairs.

As compared with the Station Captains, the Fire Department views the GS-8 Lieutenants (Crew Chiefs or Fire Officer) not as supervisors but as Lead Fire Fighters. Lieutenants give direction to their three-member crews, while Station Captains oversee all twelve staff members on duty. While the Lieutenants may assign their crews to perform certain tasks during a particular event such as responding to an emergency call, unlike the Station Captains, they lack additional authority. For example, the Lieutenants do not write appraisals, approve leave, dispense disciplinary actions, or adjust grievances.<sup>16</sup> With respect to disciplinary actions specifically, if a Lieutenant is dealing with a situation that requires disciplinary action, the Lieutenant must bring it to one of the Station Captains. Finally, although the Lieutenants report directly to the Operations Chiefs, they are nevertheless required to perform the duties assigned to them by the Station Captains.

With respect to handling leave, Sprague and Stone have the authority to grant leave requests and are the officials designated to receive calls from Fire Fighters who need to request emergency leave. In the event someone's absence takes the shift below the minimum staffing level, similar to Assistant Operation Chiefs, Sprague and Stone have the authority to approve unscheduled overtime. The determination as to who will be offered overtime is dictated by Article 7 of the Local Supplement. The Station Captains prepare the overtime seniority list and are the ones who solicit overtime volunteers even if a higher ranking official happens to also be on duty. In the event that a volunteer to work overtime cannot be secured, the Station Captains have the authority to hold over a Fire Fighter who would otherwise be finishing his or her shift.

As Sprague and Stone are viewed as the Fire Fighters' first level supervisors, they have been given the authority to take corrective action when necessary. That action will initially take the form of an informal counseling. For example, Sprague informally counseled a Fire Fighter

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<sup>16</sup> The distinction between a Station Captain and a Crew Chief is acknowledged in "Purpose of the Position" section of the Station Captains' core document which provides that the Station Captain/Chief is responsible for oversight and direction of the day-to-day operations of a fire station including the Crew Chief and assigned crew. Similarly, the core document's description of the positions' classification specifically provides that the incumbent is to provide direction and supervision over work at the GS-7 and GS-8 levels.

who was failing to abide by the early relief policy and successfully remedied the issue before having to pursue formal discipline. If a counseling session proves to be ineffective, Sprague and Stone would issue formal counseling and the matter would advance up the chain of command as necessary. While Deputy Chief Dillon would expect Sprague and Stone to keep him apprised of such actions, he views them as having the authority to determine and administer disciplinary actions on their own. In the event that a serious disciplinary action is necessary, the incumbents are expected to consult with the Dillon, who in turn consults with Fire Chief and with Human Resources to determine an appropriate course of action. In regard to enforcing the Fire Station's rules on a day-to-day basis, Sprague and Stone enjoy the same level of authority as do Haffner and Rutherford.

Sprague and Stone also write annual and mid-term performance appraisals for their subordinates. In their case, they are dealing exclusively with the GS-7 Fire Fighters and serve as the Raters. (As noted above, second-level supervisors Haffner and Rutherford serves as "reviewers" in evaluating the GS-7 Fire Fighters.) Haffner testified that he does not tell Sprague how to rate a particular Fire Fighter. He sees himself as more of a proofreader, and Sprague is free to evaluate his subordinates as he see fit. Rutherford testified that during Stone's first cycle as a Rater, he spent quite a bit of time training Stone and helped him write the first five or six appraisals. With respect to the awards associated with the appraisal process, Sprague and Stone make these recommendations as well. As is the case with Haffner and Rutherford's award recommendations, they are approved by Schluckebier.

Both Sprague and Stone were involved in deciding who to promote up to the GS-8 Lieutenant positions they vacated. In doing so, they used the same promotion matrix, were involved in the same management discussions, and offered opinions which carried the same weight as the rest of the Department's management staff.

#### (a) Christopher Sprague

Sprague was promoted to a Station Captain in October 2016 and testified that he performs the duties described in his position description such as overseeing the day-to-day operations of the Station during his shift, counseling staff, and writing performance appraisals. In his view, regardless of the particular duty he is performing, he is always doing it in his capacity as a supervisor.

Although the staff normally begins Standby time at 4:30 p.m., Sprague testified that completing his responsibilities takes until 7:30 p.m. to 8:00 p.m. He spends that time handling administrative functions such

as completing equipment reports and supervisory work, such as completing the daily rosters and training schedules.

With respect to preparing performance appraisals and mid-term reviews for his ten direct reports, Sprague testified that this is an ongoing process as he is constantly observing their work. As to the amount of time he might spend actually writing a Civilian Personnel Worksheet (mid-term review) and a Civilian Rating of Record (annual performance appraisal), he described examples in which it took him one to two hours each. In regard to the award recommendations Sprague has made in connection with the appraisals he has written, he testified that they have been approved by upper management.

With respect to Sprague's involvement in labor relations matters, he was named in a grievance which involved an overtime dispute. Even though the incident occurred while Haffner and Stone were on duty, the employee viewed Sprague as his supervisor and named Sprague in the grievance. Sprague wrote the Fire Department's answer, reviewed it with upper management, and delivered it to the employee. Sprague testified that he also has the authority to work out issues with employees informally before they ripen into a formal grievance under the CLA. In 2017, Sprague also had occasion to work directly with the Fire Chief in responding to a Union proposal concerning overtime and callbacks.

#### (b) Daniel Stone

Before his promotion to Station Captain, Stone served for seventeen years as a Fire Fighter and for another thirteen years as a Lieutenant with the Fire Department. Stone testified that pursuant to his promotion, and in keeping with his new core document, his work has changed significantly from his time as a Lieutenant. For example, as a Lieutenant, he was only responsible for a three-member crew; and now, he is responsible for the Fire Station's operations as a whole during his shift.

Some of Stone's other assignments include overseeing the Fire Department's SIDA<sup>17</sup> badges in connection with its service agreement with the Massachusetts Port Authority. Stone meets with two to three of the staff members a week concerning their badge renewals. He also helps the Assistant Chief of Training, Timothy Moore, by selecting which crew members will be assigned to deliver certain training assignments based on his assessment of their strengths and weaknesses. Stone also essentially created a form to capture training assignments for the department. In Stone's absence,

<sup>17</sup> The Security Identification Display Area (SIDA) badge permits access to secure areas.

Sprague is authorized to modify the assignments as needed to accommodate issues like sick leave.

Stone also testified that he now sees himself as “middle management” because both the Union and the Assistant Operation Chiefs bring issues to him. Likewise, as tasks arise, the Assistant Chief will often bring them to Stone’s attention, and he in turn will make assignments to the Fire Fighters. Stone also handles complaints and issues raised by the Fire Fighters concerning their crew chiefs and coworkers. And while the Lieutenants and Fire Fighters are free to enjoy their “standby” time during the evening and on Sundays, Stone often has additional responsibilities to attend to such as writing performance appraisals.

In addition to the time Stone spends writing appraisals and mid-term reviews, he regularly observes his subordinates’ work and spends time attending individual meetings with each Fire Fighter to refresh his memory concerning their accomplishments as he is preparing the appraisal and again after it has been finalized. At the time of the hearing, Stone had completed two cycles as a rater. With respect to the accompanying awards Stone recommended, he recalled that apart from some minor changes, they were adopted by upper management.

In regard to Stone’s participation in labor relations matters, he has attended meetings and participated in phone calls during which such matters were discussed. For example, he has been on calls with Employee and Labor Relations Chief Owens concerning an issue raised by the Union concerning the SIDA badge program. Stone testified that he understood that whatever was discussed during such meetings was to remain confidential. In February 2017, Stone was also the subject of a grievance filed by one of the GS-8 Lieutenants concerning overtime. Rather than advancing to arbitration, the parties agreed to mediation. Although neither the grievant nor the Union met with Stone, the grievance was filed only two to three months into his tenure as Station Captain. In regard to resolving grievances in general, Stone testified that while he does not have authority to independently resolve a formal grievance, he can resolve issues before they ripen into a grievance.

Although formal counseling and disciplinary actions are infrequent at the Fire Department, Stone testified that on four or five occasions he has informally counseled a Fire Fighter in his office. He recalled that on three occasions he felt compelled to commit the counseling to writing. For example, Stone memorialized a counseling concerning a Fire Fighter who reported late for work and testified that he placed it into the employee’s personnel file kept in his office. On another occasion during which a Lieutenant refused Stone’s direction to have his crew clean their gear, Stone

exercised independent judgement by choosing to speak with the crew one-on-one instead of disciplining the Lieutenant or advancing his insubordination up the chain of command.

### **III. Positions of the Parties**

#### **A. The Agency**

According to the Agency, all four incumbents fall under the supervisory exclusion described in section 7103(a)(10) of the Statute as they exercise independent judgment and spend a majority of their active duty time exercising supervisor authority.

The Agency also asserts that the four incumbents should be excluded from the unit on the grounds that they are confidential employees within the meaning of section 7103(a)(13) because they are included in confidential meetings (including those involving Chief of Employee and Labor Relations, Kathy Owens) and consulted in connection with various labor-management relations matters.

#### **B. The Petitioner**

The Petitioner asserts that, while the incumbents perform some supervisory duties, they do so with limited authority and without exercising independent judgment. The Petitioner also asserts that, even if the incumbents did perform some supervisory duties, they do not spend a “preponderance” of their employment time engaged in them, as required by the Statute.

In response to the Agency’s separate assertion that the four incumbents fall under the section 7103(a)(13) confidential exclusion, the Petitioner asserts that the Agency has failed to present sufficient evidence. None of the incumbents testified that he formulated or effectuated labor relations policies and the Agency failed to present any documentary evidence which would suggest otherwise.

### **IV. Analysis and Conclusions**

Although the incumbents do perform some supervisory duties, the Agency has failed to establish that those duties occupy a preponderance of the incumbents’ time. Thus, the supervisory exclusion under Section 7103(a)(10) of the Statute does not apply. Regarding the confidential exclusion, the record shows that the incumbents act in a confidential capacity with respect to individuals (such as the Fire Chief and Chief of Employee and Labor Relations Kathy Owens) who formulate or effectuate management policies in the field of labor-management relations, and through the incumbents own work may obtain advance information on management’s

position concerning the disposition of grievances and other labor-management relations matters. The incumbents, therefore, are excluded from the Unit under Section 7103(a)(13) of the Statute.

### A. Supervisor

Section 7103(a)(10) of the Statute defines a supervisor as:

[A]n individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline or remove employees, to adjust their grievances or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term “supervisor” includes only those individuals who devote a preponderance of their employment time to exercising such authority.

For an individual to qualify as a supervisor, he or she need only possess one of the supervisory criteria listed in section 7103(a)(10) of the Statute or the authority to effectively recommend such action. *Soc. Sec. Admin.*, 60 FLRA 590, 592 (2005) (*SSA*). The focus must be on the type and nature of the work actually performed by the employee. *Soc. Sec. Admin., Balt., Md.*, 59 FLRA 137, 145 (2003). An employee’s job title or position description is not determinative. *U.S. Dep’t of Labor, Office of the Solicitor, Arlington Field Office*, 37 FLRA 1371, 1377 (1990).

The exercise of supervisory authority must involve the consistent use of independent judgment. If an employee’s actions are routine or clerical in nature, the employee will not be considered a supervisor. *Nat’l Mediation Bd.*, 56 FLRA 1, 8 (2000).

With respect to Fire Fighters, the Statute imposes the additional requirement that these employees “devote a preponderance of their employment time” to the exercise of supervisory authority. *U.S. Dep’t of the Army, Parks Reserve Training Ctr., Dublin, Cal.*, 61 FLRA 537, 541 (2006) (*Parks Reserve Training Ctr.*). The Authority has held that “preponderance” refers to the “majority” of an employee’s employment time. *U.S. Dep’t of the Air Force, Offutt Air Force Bases, Neb.*, 66 FLRA 616 (2012) (*Offutt AFB*). An incumbent’s “employment time” refers to work time as determined by the facts and circumstances of each case. *Parks Reserve Training Ctr.*,

61 FLRA at 541-542.<sup>18</sup> For example, in *U.S. Dep’t of the Navy, Marine Corps Base, Camp Pendleton, Cal.*, the Authority held that in determining whether the assistant fire chiefs who worked twenty-four-hour shifts were supervisors under of the Statute, “employment time” meant their “active duty time.” *U.S. Dep’t of the Navy, Marine Corps Base, Camp Pendleton, Cal.*, 8 FLRA 276, 278 (1982) (*Camp Pendleton*).

In this case, the record demonstrates that all incumbents exercise some supervisory authority in a manner that requires independent judgement. But, that they do not do so for a preponderance of their employment time.

### (i) The Assistant Chiefs: Rutherford and Haffner

With respect to the two Assistant Chiefs, Rutherford and Haffner, both described specific examples supporting their authority to assign work and direct employees in the performance of their duties. For example, Rutherford and Haffner serve as the Commanding Officer during emergency calls, have coached the Station Captains when preparing performance appraisals, and can order a crew to correct deficient work. Additionally, the incumbents have the authority to approve leave requests, to assign overtime when needed to maintain minimum staffing levels, and to issue informal disciplinary actions.<sup>19</sup> Both underwent specific supervisory training covering these subject matters. Finally, the incumbents can recommend employees for awards and are responsible for evaluating employees’ work performance.<sup>20</sup>

At least some of Rutherford’s and Haffner’s supervisory duties require the exercise of independent judgement. While some elements of the incumbents’ duties are routine in nature (*e.g.* the days on which certain duties and details are performed have been predetermined) there are also discretionary elements. For example, the incumbents have the authority to revise a Fire Fighters’

<sup>18</sup> In *Parks Reserve Training Ctr.*, the Authority found it unnecessary to decide the precise period of time that constitutes “employment time” for fire fighters as the employees in dispute did not exercise supervisory authority a majority of the time during the entire 24-hour shift *or* during the active work portion of the shift. 61 FLRA at 542.

<sup>19</sup> Granting leave is not one of the section 7103(a)(10) supervisory criteria. The Authority, however, relying on National Labor Relations Board precedent considers it a secondary indicia of supervisory status, along with attendance at management meetings and supervisory training sessions. *U.S. Dep’t of the Interior, Bureau of Indian Affairs, Navajo Area Office, Gallup, N.M.*, 45 FLRA 646, 654 (1992).

<sup>20</sup> The record did not establish that the Assistant Chiefs of Operations have the authority to transfer, furlough, layoff, or remove employees, or to effectively recommend such actions.

crew assignment to provide training opportunities and to juggle the order in which training and details are performed on any given day to accommodate conditions such as the weather. The incumbents also monitor the Fire Department's staffing level on each shift and determine whether and when to use overtime. Rutherford and Haffner also exercise independent authority in connection with deciding whether to discipline an employee and whether to handle a matter at their level or to elevate it the Chief or the Deputy Chief. The same holds true with respect to the adjustment of informal grievances and the evaluation of employee performance and award recommendations.<sup>21</sup> In addition, the record shows when the Assistant Chiefs assign and direct their subordinates, they consider, among other things, the relative skills, training and experience of employees, workload and work priorities as opposed to merely ensuring the requisite number of Fire Fighters is manning each vehicle or is on duty.

Ultimately, however, Rutherford and Haffner cannot be considered supervisors for purposes of the exclusion because they do not devote a preponderance of their employment time to supervisory activities. With regard to carrying out discipline, while Rutherford and Haffner have authority to enforce workplace rules, there is no evidence to support a finding that such activity accounts for any significant amount of time. On the contrary, the testimony supports the conclusion that the Fire Department runs smoothly and that there is rarely cause for engaging in disciplinary actions. In fact, while both incumbents have the authority to initiate discipline, Rutherford estimated that he has done so perhaps five times a year over his ten year tenure as an Assistant Chief, and Haffner testified that he has not had occasion to do so during his two year tenure.

As for staffing issues, Rutherford testified that he ensures that the Fire Department is in compliance with minimum staffing levels on a daily basis. That said, with respect to dealing with matters that impact staffing levels such as handling unscheduled leave, he only has to do so about twice a week. Likewise, since the Fire Department added the Station Captain position to its roster, many of duties formerly handled by the Assistant Chiefs such as dealing with the work schedules, crew assignments, overtime and leave requests are now largely handled by Sprague and Stone. With respect to hiring and promotion actions

specifically, although both incumbents have been involved in them, over the course of Rutherford's ten years as an Assistant Chief he has only been involved in approximately ten hiring actions and two to three promotions. With respect to Haffner, although the Chief and the Deputy Chief have solicited his input as well, there have only been approximately six such actions during the course of his two year tenure.

With regard to the incumbents' preparation of annual performance appraisals, midterm evaluations and award recommendations for his four direct reports, Rutherford estimated that each one takes approximately four to six hours. Viewed collectively, Rutherford might spend twenty-four to forty-eight hours performing this work during the course of the year. In regard to mid-term reviews, Haffner testified that it takes him approximately one hour to write one for each of the five individuals that he immediately supervises, which over the course of the year could take about five to ten hours of his time. Although the time spent actually writing the forms is limited both as to hours and frequency, both gentlemen testified that gathering the information upon which their recommendations are based is a continuous process that requires observing and speaking with their reports. While the Authority may consider both the time actually spent performing a supervisory duty and the time spent thinking about it, evidence of the later must demonstrate "the exercise of supervisory authority, that such authority is not merely routine or clerical (in) nature, and that such authority requires the consistent exercise of independent judgment." See *Parks Reserve Training Ctr.*, 61 FLRA at 543. The record must further demonstrate how much time is spent engaged in such observations. *Id.* Here, while the incumbents observe and speak with their reports, the only estimate as to the amount of time spent doing so was that it occurs on a daily basis. And, even assuming that the time spent engaged in these observations was significant, there is no evidence that such observations constituted the exercise of supervisory authority. On the contrary there was testimony to the effect that rather than observing the Lieutenants and Fire Fighters while they are performing their daily details the incumbents are engaged in other activities.

On average the Assistant Operation Chiefs go on two emergency calls per shift during which time they serve as either the Incident Commander or the Operations Chief. The majority of these calls are medical emergencies as opposed to structural fires involving the dispatch of all four vehicles and personnel. Although the Incident Commander is in charge of the scene, the specific duties assigned to each Fire Fighter are assigned by their Crew Chiefs.

<sup>21</sup> While performance evaluation responsibility is not listed among the supervisory indicia, the Authority considers performance evaluation duties as a supervisory function when the employee exercises independent judgment in evaluating employee performance, and that evaluation is relied on by upper-level management in taking any one of the listed supervisory functions (e.g., promote, reward, or terminate). *U.S. Dep't of Labor, Washington, D.C.*, 59 FLRA 853, 856 (2004).

Although both gentlemen described themselves as in charge of the Fire Station during those times when neither the Fire Chief nor the Deputy Chief are also on duty, that fact is insufficient to satisfy the preponderance test. *VAMC, Fayetteville, N.C.*, 8 FLRA 651, 660 (1982) (ALJ Decision) (the mere fact that a Fire Fighter may exercise supervisory authority at any time during the shift or that he or she has round the clock responsibility, does not require a finding that they are supervisors within the meaning of the Statute).

Finally, in weighing the evidence regarding the amount of time the Assistant Chiefs are exercising supervisory authority, among the seventeen individuals beneath them in the chain of command are the two Station Chiefs who also exercise supervisory authority as well as three or four Lieutenants who are at least somewhat involved in directing the activities of the Fire Fighters within their groups. Under these circumstances, and without clearer evidence as to the duration of time engaged in specific supervisory tasks by the two incumbent Assistant Chiefs, I cannot conclude that they spend more than half of their employment time exercising supervisory authority.

In light of the above findings, and the record as a whole, there is insufficient evidence to conclude that the Assistant Chiefs devote a preponderance of their employment time in exercising supervisory authority. This is true even if their employment time is measured as simply their active duty time. As such, the Assistant Chiefs are not excluded as supervisors within the meaning of section 7103(a)(10).

**(ii) The Station Captains:  
Sprague and Stone**

Similarly, although Station Captains Sprague and Stone exercise independent judgment in the course of certain supervisory duties, they also do not meet the preponderance test, and therefore cannot be excluded as supervisors.

The record demonstrates that the Station Captains have authority to engage in several of the section 7103(a)(10) supervisory functions. Both Sprague and Stone assign work to the Lieutenants and Fire Fighters and direct them in the performance of their duties. In addition, the Station Captains have the authority to assign overtime when needed to maintain minimum staffing levels, to recall employees, and to informally discipline employees.<sup>22</sup> Both Sprague and Stone testified that while it is unusual, each has taken corrective actions. Finally,

<sup>22</sup> The record did not establish that the Station Captains have the authority to transfer, furlough, layoff, or remove employees, or to effectively recommend such actions.

the Station Captains can recommend employees for awards and are responsible for evaluating employees' work performance.

Sprague and Stone will also assume "incident command" responsibilities on emergency calls as soon as they complete the requisite certifications and as manpower allows.<sup>23</sup>

Sprague and Stone exercise supervisory authority that is not merely routine or clerical in nature. The record demonstrates that, while many of the elements connected with the Station Captains' work are routine or based on predetermined rotations and schedules, many others require the exercise of independent judgment. Both Sprague and Stone testified, for example, that when accommodating unplanned events such as employee absences, they determine how to adjust work assignments to best use the Department's resources. Evaluating how to best utilize the staff's talents also comes into play when creating the crews for the Daily Runsheet, as expertise and experience can vary. Also in regard to staffing, while matters such as overtime are largely dictated by Article 7 of the Local Supplement, some discretion is involved as evidenced by the grievances filed against the Station Captains by employees who, in their view, were wrongly passed over. The incumbents also have the authority to rotate the order in which the station's daily details and trainings are conducted based on weather conditions.

Similar to Rutherford and Haffner, the incumbent Station Captains also write annual performance appraisals and mid-term reviews. While their ratings are reviewed by the respective Assistant Chief in their chains of command, their recommendations have largely been adopted even though both gentlemen are relatively new to their positions.

<sup>23</sup> In cases like this where the employees have only recently encumbered a position, the Authority considers duties to have been actually assigned where (1) it has been demonstrated that, apart from a position description, an employee has been informed that he or she will be performing the duties; (2) the nature of the job clearly requires those duties; and (3) an employee is not performing them at the time of the hearing solely because of lack of experience on the job. *U.S. Dept. of Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Ariz.*, 37 FLRA 239, 245 (1990) (*Interior, Yuma*). As applied here, upon promoting Sprague, Chief Hildreth asked him to secure his Fire Officer III certification so that he could perform Chief 2 duties at an emergency scene. Furthermore, the nature of the Station Captain's job requires the performance of incident command duties in certain circumstances and the incumbents lack of experience in performing those duties is due to the short period of time serving in that role. As such, to the extent the incident command duties encompass supervisory functions, they are considered.

Although the Station Captains are engaged in supervisory functions on a daily basis, the record does not support finding that doing so occupies a preponderance of their employment time. For example, while they conduct rollcall at the start of the day, it only takes about five minutes to a half-hour. While the composition of a particular crew can vary, its assignment of a particular detail, in addition to which details are to be performed on a particular day, have all been predetermined. The Station Captains merely populate the computerized template for the Daily Runsheet. Although Stone testified that he spends perhaps four to five hours a week preparing these forms, Sprague testified that preparing it only takes about fifteen minutes. Similarly as the employees are assigned to groups and those groups have already been assigned to work particular shifts and days of the week, the employee work schedule has already been set as opposed to Sprague and Stone having to create a new one each pay period.

As to overseeing the day-to-day operations of the Station, neither Sprague nor Stone routinely work alongside the crews while they are performing details such as cleaning and equipment maintenance. Rather, each crew determines on its own who will perform a particular task. During Standby time, in addition to having responsibility for the Station in general, Sprague testified that duties such as completing equipment reports, training, schedules and daily roster may take him until 7:30 p.m. or 8:00 p.m. each evening.

In regard to preparing performance appraisals and mid-term evaluations, Sprague does so for ten Fire Fighters and Stone for thirteen. Writing each one takes approximately one to two hours. Viewed altogether, Sprague spends approximately 20 to 40 hours per year performing this task. Similar to the testimony of the Assistant Operation Chiefs, both incumbents testified that in addition to the time they spend actually writing their subordinates' appraisals they are constantly observing their work. Similar to Rutherford and Haffner's testimonies, however, apart from describing this as a constant or continuous practice no estimates as to the actual amount of time spent were provided. Although Stone noted that he meets with each of this reports individually this is still a process which only takes place on an annual basis. Similarly, although the incumbents have the authority to take informal corrective actions as needed, there have been few instances during their tenures when this has proven necessary. Likewise, while the Chief and Deputy sought their input in connection with hiring new Fire Fighters, turnover at the Station is low and there have only been very few vacancies.

In sum, while the record establishes that Sprague and Stone do exercise supervisory authority, it is difficult from the record to determine how much time is spent

doing so. Here again, I would note that in determining the amount of time spent by the Station Captains in exercising supervisory authority, I am cognizant of the organization of the Fire Department, which includes two Assistant Operations Chiefs who exercise supervisory authority and three to four Lieutenants who are involved in directing employees within their group. Under these circumstances, and without clearer evidence as to the duration of time engaged in specific supervisory tasks by the two incumbents, I cannot conclude that they spend more than half of their employment time exercising supervisory authority, even if their employment time is measured as simply their active duty time. Accordingly, the Station Captains are not excluded as supervisors within the meaning of section 7103(a)(10).

### B. Confidential Employee

Section 7103(a)(13) of the Statute defines a "confidential employee" as "an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations." Section 7112(b)(2) of the Statute excludes confidential employees from bargaining units. The Authority has held that an employee is a "confidential" if (1) there is evidence of a confidential working relationship between an employee and a supervisor or agency representative; and (2) the supervisor or agency representative is significantly involved in labor-management relations. *DOL Arlington*, 37 FLRA at 1377; *Nat'l Aeronautics and Space Admin., Glenn Research Ctr., Cleveland, Ohio*, 57 FLRA 571, 573 (2001) (*NASA*); *U.S. Department of the Navy, Navy Region Northwest, Fire and Emergency Services, Silverdale, Wash.*, 70 FLRA 231, 232 (2017). The Statute also excludes employees as confidential who, in the normal performance of their job duties, may obtain advance information on management's position concerning negotiations, the disposition of grievances, and other labor-management relations matters. *Broadcasting Bd. of Governors*, 64 FLRA 235, 236 (2009); *DOL Arlington*, 37 FLRA at 1383. The reason for this is that management should not be faced with having bargaining unit members in positions where they could divulge advance information pertaining to labor-management relations to the union.

As to the application of these requirements, among the factors considered by the Authority are whether the individual (1) obtains advance information of management's position regarding contract negotiations, the disposition of grievances, and other labor relations matters; (2) attends meetings where labor-management matters are discussed; (3) because of physical proximity to their supervisor, overhears discussions of labor-management matters; and (4) has access to, prepares, or types materials related to labor-management

relations, such as bargaining proposals and grievance responses. *U.S. Dep't of Labor, Wash., D.C.*, 59 FLRA at 855.<sup>24</sup>

The frequency and the amount of an individual's working time devoted to labor relations matters may be relevant factors in determining confidential status, but are not controlling factors for section 7103(a)(13) purposes. *Id.* at 1382 citing *U.S. Dep't of Labor*, 33 FLRA 265, 267-68 (1988) (Authority rejected union's argument that a limited amount of actual confidential labor relations work does not provide a substantial basis for excluding employees from a bargaining unit).

In determining whether a supervisor or agency representative is significantly involved in labor-management relations, the Authority has identified responsibilities that are aspects of the formulation or effectuation of management policies in labor-management relations. These responsibilities include advising management on or developing negotiating positions concerning proposals, representing management in negotiations with the union, preparing arbitration cases for hearing, and consulting with management regarding the handling of unfair labor practices. *Broadcasting Bd. of Governors*, 64 FLRA at 236; *Interior, Yuma*, 37 FLRA at 240.

As applied here, the record established that the Fire Chief and Deputy Chiefs are significantly involved in labor-management relations. For example, as described in the Article 7 of the parties' CLA covering grievances, employee grievances are submitted to either the supervisor, the Fire Chief or his designee, and Union grievances are submitted directly to the Fire Chief. Although the former Fire Chief retired just before the opening of the hearing in April 2018, he was on the Agency's negotiation team for the operative June 22, 2017 CLA and solicited input from the incumbents concerning its next re-negotiation. Likewise, the Agency's negotiation team for the November 2013 local supplement included the Chief, Deputy Chief, and the Chief of Employee and Labor Relations Kathy Owens.

With respect to the administration of these negotiated agreements, rather than working independently, Owens testified that she works with the Chief and Deputy, as they are involved in effectuating labor-management relations policies for the Department. For example,

<sup>24</sup> In regard to whether an employee has a confidential working relationship with an agency representative who is significantly involved in labor relations, it is well established that neither typing, nor mere access to, documents constituting labor relations material alone is sufficient to establish confidential status. *See U.S. Envtl. Prot. Agency, Reg. IX, San Francisco, Cal.*, 16 FLRA 273, 275 (1984).

in connection with the administration of grievances her dealings with the four incumbents are usually coordinated through the Chief and Deputy Chief as opposed to contacting them directly.

**(i) The Assistant Chiefs:  
Rutherford and Haffner**

The record further established that both Rutherford and Haffner enjoy a confidential working relationship with the Chief and Deputy Chief. To that end, both incumbents attend the Fire Chief's weekly Monday morning staff meeting with the other Fire Department managers. In addition to briefing and discussing the general operations of the Department, other topics have included grievances and disciplinary actions. When the subject being discussed turns to a confidential labor management relations matter, the one attendee who is in the Petitioner's bargaining unit, Timothy Moore, is asked to excuse himself.

In addition to the weekly management meeting, the Chief convenes additional meetings as needed. In one example the Chief convened a meeting to address the Union's interest in negotiating over a training requirement connected with the Department's Massachusetts Port Authority contract. Other special meetings have covered topics such as grievances, contract negotiations, and job classifications. For example, although the parties' 2013 Local Supplement was negotiated before Haffner (or Sprague or Stone) encumbered their positions, Rutherford provided input concerning specific topics such as overtime and reviewed draft proposals. All four incumbents (Rutherford, Haffner, Sprague, and Stone) are expected to provide input to management negotiators leading up to renegotiation of the parties' CLA and Local Supplement.

As to the administration of the CLA, the incumbents have not only been consulted as to the disposition of grievances but they have worked directly with Fire Department management and Owens concerning any grievance in which they have been specifically named. Rutherford testified that, even though he is not the deciding official, he is nevertheless aware of management's position before it is shared with the Union.

The incumbents' involvement in confidential matters is not limited to grievances. For example, Haffner assisted Deputy Dillon with developing a draft flight operating guide concerning a Rapid Intervention Team. Implementation of this plan could require bargaining and its drafts were treated as confidential.

Thus, while their involvement with labor relations matters is somewhat limited, the weight of the evidence supports the conclusion that both Rutherford and Haffner

enjoy a confidential relationship with agency representatives who are significantly involved in labor-management relations. Namely, through their regular attendance at management meetings and their interaction with the Chief and Deputy Chief, they have advance information concerning grievances, plans for renegotiations of collective bargaining agreements, and other labor matters impacting the bargaining unit.

(ii) **The Station Captains:  
Sprague and Stone**

Similar to the Assistant Chiefs of Operations, the record supports finding that both Sprague and Stone enjoy confidential working relationships with the Chief and Deputy Chief. Specifically both incumbents attend the management meetings described above, and both will be expected to participate in management's preparation for renegotiation of the parties' collective bargaining agreement and other negotiations. Sprague, for example worked directly with the Fire Chief in connection with a 2017 Union proposal concerning overtime and callbacks. In another example, Stone recalled participating in a phone call with Chief of Employee and Labor Relations Kathy Owens concerning an issue raised by the Petitioner in connection with the SIDA badge program that he administers. Both Sprague and Stone have also been the subject of grievances and were privy to management's investigation and strategy in responding to them. While the testimony reflects that actual grievance responses are normally prepared by the Fire Chief or Labor Relations Officer, in one case, Sprague prepared a written response to a grievance, submitted it for review by his superiors, and then delivered it to the grievant.

While I have found that the record does not establish that any of the four incumbents exercise supervisory authority for most of their employment time, and are therefore not excluded from the unit as supervisors, the record does establish that the four incumbents are all *treated* as supervisors by the Agency. That the four incumbents are part of the management structure of the Fire Department further supports the conclusion that they will be privy to confidential labor relations information in that capacity.

**V. Order**

The Assistant Chief of Operations position encumbered by Scott Rutherford and Glenn Haffner and the Station Captain position encumbered by Christopher Sprague and Daniel Stone are excluded from the bargaining unit represented by the Petitioner as all four incumbents are confidential employees under Section 7103(a)(13) of the Statute.

**VI. Right to File Application for Review**

Under the provisions of section 2422.31 of the Authority's Regulations, a party may file an application for review of this Decision and Order with the Federal Labor Relations Authority within sixty (60) days. The contents of, and grounds for, an application for review are set forth in section 2422.31(b) and (c) of the Authority's Regulations.

The application for review must be filed on or before February 11, 2019, and must be filed with the Chief, Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 201, 1400 K Street, NW, Washington, D.C. 20424-0001. Documents hand-delivered for filing must be presented in the Docket Room not later than 5:00 p.m. to be accepted for filing on that day. The application for review may be filed electronically through the Authority's website, [www.flra.gov](http://www.flra.gov).<sup>25</sup>

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<sup>25</sup> To file an application for review electronically, go to the Authority's website at [www.flra.gov](http://www.flra.gov), select **eFile** under the **Filing a Case** tab and follow the detailed instructions.