

NEW YORK CITY OFFICE
OF COLLECTIVE BARGAINING

Docket No. A-13534-10

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In the Matter of the Arbitration
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-between-
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DISTRICT COUNCIL 37, LOCAL 3621, OPINION
AFSCME, AFL-CIO
:
AND
On behalf of Vincent Variale, et al.
:
Petitioners, AWARD
:
-and-
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CITY OF NEW YORK and NEW YORK
:
CITY FIRE DEPARTMENT
:
SEIU 1199, NEW JERSEY HEALTH
:
CARE UNION
:
Respondents
:
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ARBITRATOR: Robert T. Snyder, designated by the parties pursuant to the Rules and Regulations of the New York City Office of Collective Bargaining

APPEARANCES: For the Petitioner Union:
Dena Klein, Esq.
Assistant General Counsel
District Council 37, AFSCME

For the Respondent Employer:
Steven Banks, Esq.
Assistant General Counsel
City of New York
Office of Labor Relations

HEARING: December 17, 2010, February 28,
March 18, and April 14, 2011

ISSUES: Whether the Employer, the New York City Fire Department, has assigned the grievants,

Supervising Emergency Medical Service Specialist Level II (Captains) to duties substantially different from those in their job specifications. If so, what shall be the remedy?

Preliminary Statement

This proceeding was commenced by the filing of a grievance on October 6, 2009 alleging a violation of Article VII Section 1C of the Collective Bargaining Agreement between the City of New York and Related Public Employers, including its Fire Department, herein the Fire Dept or NYFD, and District Council 37, AFSCME, AFL-CIO, and its constituent locals, including Local 3621, herein the Union. The Agreement is hereinafter described as the EMS Agreement. It was made effective July 1, 2002 to June 30, 2006 and has continued in effect to current date, as to its basic non economic terms, with periodic changes in salary and other economic terms. In that EMS Agreement, the City and Fire Dept (FDNY) recognized the Union as the sole and exclusive collective bargaining representatives for the bargaining unit of various titles in the classified civil service of the City, comprising the Emergency Medical Services (EMS), including EMS Cadet, Emergency Medical Specialist-EMT (Emergency Medical Technician), Emergency Medical Specialist Paramedic, EMS Trainee and Supervising Emergency Medical Service Specialist (SEMSS).

The violation alleged is that the Captains included in the classification of SEMSS are now responsible for supervising a division of multiple divisions which are the duties of a Deputy Chief. In essence, the grievant asserts that the EMS Captains are being assigned out of title work when assigned as Division (Duty) Captains.

Since this was a group grievance it was filed directly at Step III of the grievance procedure Article VII. Section 1(C) of that Article, among other definitions of the term "Grievance", provides that the term shall mean "A claimed assignment of Employees to duties substantially different from those stated in their job specifications."

In a letter dated November 3, 2010 from Joseph F. Tremiti, Review Officer of the City Office of Labor Relations, to the Union, the City determined at Step 3 of the grievance that the grievants are not working out of title and, accordingly, denied the grievance. Subsequently the Union made its request for arbitration, citing the alleged violation of Article VII 1(C) of the EMS Agreement and the matter was assigned to the undersigned arbitrator.

Four hearings were held, spread over four months, from December, 2010 to April, 2011. The respective counsel filed post hearing briefs, which have been carefully considered. The last brief was received on June 23, 2011, when the record was deemed closed. At the request of the arbitrator, the parties agreed to an extension for completion of the award. In the same communication from the respective counsel, I was advised in mid July to hold the case in abeyance pending discussions between the parties regarding possible withdrawal/settlement of a number of the Union's grievances, including this case. It was only by email sent in the last week of August was I informed by both counsel that there were no settlement discussions pending in this case and the Union will not be withdrawing its grievance.

The parties have been provided opportunity to make a full record, through direct and cross-examination of the witnesses each has provided, and by submitting documents in evidence and engaging in arguments in support of their respective positions.

RELEVANT JOB SPECIFICATIONS

SUPERVISING EMERGENCY MEDICAL SERVICE SPECIALIST (SEMSS) (Joint Ex. 3)

Duties and Responsibilities

Under general supervision, direct, supervises, and is responsible for the activities of Emergency Medical Specialists (Paramedics and EMTs) and other assigned staff; responds to calls and renders pre-hospital emergency medical care. All work is performed in accordance with FDNY policies and procedures and as legislatively prescribed in the requisite curriculum and allowed by Federal/State/Regional Protocols and in accordance with the level of training, state designated scope of practice and New York State and Regional Basic Life Support (BLS) and Advanced Life Support (ALS) Protocols. May be assigned to work in any FDNY Bureau, as required. There are two assignment levels within this class of positions. All personnel perform related work.

Assignment Level I (Lieutenant)

Relevant Tasks

In addition to performing the duties of an Emergency Medical Specialist (EMT or Paramedic), performs tasks such as the following:

Responds immediately to 911 assignments and renders appropriate pre-hospital emergency medical care.

Provides clinical supervision to the units operating within assigned geographic area of response.

Provides for the expeditious and effective operation of an ambulance station and outpost, and other EMS functions on an assigned tour, assuring proper and timely response to calls, appropriate pre-hospital care and the safe transfer of patients from the scene of assignments to the appropriate facility.

Inspects vehicles and equipment; safeguards and maintains Department equipment/property and facilities on assigned tour.

Maintains a clean and sanitary fleet within the assigned area of station; restocks or replenishes supplies to insure a state of readiness; refuels and performs minor repairs to vehicles.

Schedules and assigns Bureau of EMS personnel to their duties and vehicles; prepares daily tour rundowns to assure proper coverage; assure all assigned staff is properly licensed and certified.

May be required to investigate complaints regarding service, accident, and other incidents; prepares reports for injured employees.

Evaluates employee performance.

Directs and/or assists operations at major incidents and multiple casualty incidents (MCI), operating within the Incident Command System; is responsible for coordinating all pre-hospital care resources and operations at major incidents.

When assigned to the Bureau of Fire Communications, EMS Dispatch Operations supervises Emergency Medical Specialists operating computerized communications consoles via Computer Aided Dispatch (CAD); assists Emergency Medical Specialists in receiving, processing, and prioritizing 911 medical calls for assistance.

Assignment Level II Captain)

In addition to performing duties described in Assignment Level I, is responsible for the efficient and effective operation of an EMS Station and the coordination of station operations within the assigned Division. Supervises EMS Specialist Level I (Lieutenants) in the performance of their duties; provides direction, support and guidance to subordinates in the performance of their duties; serves as a resource person on policies, procedures and operational issues. Performs tasks such as the following:

Assigns personnel to the master staffing schedule to ensure maximum utilization of personnel resources. Evaluates staffing needs on an ongoing basis and takes necessary action.

Monitors, evaluates and takes necessary action to correct deficiencies in job performance of subordinate staff.

Administers and assures compliance with discipline procedures.

License and Certification requirements

-Valid certification by the State of New York as a Department of Health EMT or an AEMT Level 4-Paramedic

-Possession of a Motor Vehicle Driver License valid in the State of New York.

-Employees must maintain license and required certifications for the duration of employment.

TASK AND STANDARDS: EMS DEPUTY CHIEF (EMS OGP 104-08)
(Union Ex. 1)

Task #1

The Deputy Chief ensures proper utilization of "NYC911 EMS System" resources during assigned tour. (See Union Ex. 1 for the Standards)

Task #2

The Deputy Chief responds to major incidents, directs and coordinates EMS activities at the scene. (Id.)

Task #3

The Deputy Chief ensures effective communication through the chain of command. (Id.)

Task #4

The Deputy Chief performs field patrol; supervises and evaluates subordinates. (Id.)

Tasks #5

The Deputy Chief performs station visits to ensure efficient and effective Station operations. (Id.)

Task #6

The Deputy Chief monitors and evaluates ED performance during assigned tour (Id)

Task #7

The Deputy Chief performs Administrative tasks as directed by the Chief of EMS, designee, and/or EMS Division Commander. (Id.)

Task #8-The Deputy Chief provides pre-hospital care to patient(s). (Id.)

The Tasks and Standards pertaining to the EMS Deputy Chiefs have been set forth herein in the absence of any written job specification for this position. The Deputy

Chief position carries the same Civil Service title as the EMS Captain, but is paid at a higher salary level and is filled by detail from among EMS Captains.

RELEVANT NEW YORK STATE AND CITY CIVIL SERVICE LAW

Section § 61(2) of the New York State Civil Service Law prohibits out-of-title work. Specifically, it provides that “no person shall be appointed, promoted or employed under any title not appropriate to the duties to be performed and, except upon assignment by proper authority during the continuance of a temporary emergency situation, no person shall be assigned to perform the duties of any position unless he had been duly appointed, promoted, transferred or reinstated to such position in accordance with the provisions of this chapter and the rules prescribed thereunder.” (McKinney’s, N.Y. Civ. Serv. Law, § 61(2). [Emphasis added]

Section § 61(2) is applicable to New York City civil service employees pursuant to New York City Charter § 817(a), which provides:

All appointments, promotions, and changes in status of persons in the public service of the city shall be made in the manner prescribed by the constitution of the state and in accordance with the provisions of the civil service law and other provisions of law not inconsistent therewith nor with this charter.¹

Section § 5.1.1 of the Personnel Rules and Regulations of the City of New York also prohibits out-of-title work:

No person shall be appointed, promoted or employed under any title not appropriate to the duties to be performed and, except upon assignment by proper authority during the continuance of a temporary emergency situation, no person shall be assigned to perform the duties of any position unless duly appointed, promoted, transferred or reinstated to such position in accordance with the law and rules prescribed therefore. (Rules of the City of New York, 55 RCNY 12, Appendix A)² [Emphasis added]

Rule I-Definitions of the Personnel Rules and Regulations of the City of New York defines title as:

“Title” is the designation of a position based upon its duties and functions. (55 RCNY 12, Appendix A)

¹ Pursuant to New York City Charter § 811, the Commissioner of the Department of Citywide Administrative Services (“DCAS”) is responsible for citywide personnel matters and shall have all the powers and duties of a municipal civil service commission provided in the Civil Service Law.

² Chapter 55 of the Rules of the City of New York pertains to DCAS.

Findings of Fact

Originally, and for some years, the EMS function was part of the Health and Hospitals Corporation of the City. Then, in 1996, the EMS function was merged into the City Fire Department.

At the time of the hearing the City employed 32 EMS Chiefs and Deputy Chiefs, 75-80 Captains, 360 Lieutenants, 775 Paramedics, and 2000 EMTs (Emergency Medical Technicians).

A majority of the grievants, the EMS Captains, are employed in the Fire Department's Bureau of Emergency Medical Services and are assigned, respectively to a particular tour, one of three in a day, in a particular division. Tour 1 runs from 10:00 p.m. until 6:00 a.m. Tour 2 is 6:00 a.m. until 2:00 p.m. and Tour 3 is 2:00 p.m. until 10:00 p.m. There are five EMS divisions, one for each borough in the City of New York. The remaining grievants work either in the Bureau of Fire Communications, EMS Dispatch Operations, or in the Bureau of Operations, each office of which is located in downtown Brooklyn, New York.

In terms of the frequency of their assignments as Division Captains, the grievants fall into three groups: (1) those assigned every tour or 20 work days per month (the usual work assignment is 5 days on and 2 days off), (2) those assigned twice a week on average, or 8-10 days per month, and (3) those assigned twice a month.

SEMSS, level I (Lieutenant) and level II (Captain), is a competitive civil service title, requiring a civil service examination, administered by the New York City Department of Citywide Administrative Service (DCAS) in order to become an SEMSS level I (Lieutenant). However, in order to become a level II (Captain), one does not take an exam, but gets promoted by the employing agency, here, the Fire Department. As noted earlier, the bargaining unit of Captains and Lieutenants, also includes EMTs, Paramedics, cadets and trainees. The FDNY EMS titles of Deputy Chief and Division Chief (or Commander), however are not in the same bargaining unit or covered by the same collective bargaining unit as the grievant Captains. They are in a separate bargaining unit represented by the EMS Superior Officers Association. There are approximately fifteen (15) Deputy Chiefs, among the 32 Chiefs and Deputy Chiefs, assigned to cover all five boroughs of the City of New York.

According to the Fire Department records as of August, 2009, the annual base salary for a Captain (SEMSS level II) was \$59,162.00 and the annual base salary for an EMS Deputy Chief was \$86,265.00.

The Union presented seven witnesses.

Vincent Variale, an EMS level I Lieutenant since 2001, is also President of DC 37, Local 3621 which represents the EMS Lieutenants and Captains, and its grievance representative. It is he who investigated the complaints of EMS Captains and filed the instant grievance. In a document which he researched and created and which was received in evidence. (Union Exhibit No. 3) Variale broke down the EMS Captains according to their frequency of assignment as Division Captains. This document shows approximately 26 Captains serving as Division Captains twice month, approximately 35 serving as Division Captains eight to ten times a month (which also includes a number serving two to ten times a month), and approximately 24 Captains serving as Division Captains twenty times a month. According to Variale these figures represent a minimum number of Division Captain assignments per month and could be higher.³

What is a Division Captain, and how does his functioning, duties and responsibilities differ from the Captains not so assigned? First, the EMS Captains not so assigned, are uniformly designated and described as Station Captains. There are anywhere from 4 to 9 stations assigned to each of the 5 borough. A Captain is assigned to each of these stations. Under each Station Captain, reporting to him are either one or two Lieutenants, and at least two each EMTs and paramedics. Their duties and responsibilities are spelled out in the Job Specification set forth earlier herein.

Variale also noted that the EMS Captains, just as all other EMS classified employees, are required to maintain their certification as medical technicians by working in the field twice a month, thereby having been deemed to have provided medical services directly to patients.

The next Union witness, and grievant Thomas Luby, had been employed by the NYC Fire Department since 1986, in November, 2001 as an EMT and promoted to Captain in November, 2007. He has been assigned to Division 2, the Bronx since 2008 where he works the Tour I shift from 10:00 p.m. to 6:00 a.m.

As a Division Captain he does not have an assigned Station but is the dedicated duty Captain for the Borough of the Bronx. A Station Designation Chart shows eight stations in the Bronx, one Chief and three Deputy Chiefs for all three shifts and one headquarters or office station located at Jacoby Hospital. Each station is headed by a

³ These figures are approximate only, as they are based on Variale's investigation and inquiries, and not on Fire Department documents. Nonetheless, they provide important information on the frequency of monthly Division Captain assignments.

Station Captain, under whom are Lieutenants, and under them, EMTs and paramedics. A so called BLS unit has two EMTs and an ALS unit (or ambulance) has two paramedics.

As Division Captain, Luby is responsible for all stations in Division 2, the Bronx. On his Tour I there is one Deputy Chief on duty citywide. His direct supervisor is Chief Booth.

When shown the document received in evidence, listing the Tasks and Standards for Supervising EMS Specialist-Level II (Captain), Luby testified that its description of such assignments is not accurate as applied to him. He had a much bigger responsibility than indicated on the document.

His responsibilities as a Division Captain encompass the following. He touches base with the Coordinator in the FDNY's Resource Coordination Center (RCC) in order to ascertain where the EMS UNITS (ALS and BLS), as well as the Lieutenants and any specialty units are to be located within the Division for his tour and to be briefed on any events which may have transpired during the prior tour. Each Division has an RCC. The RCC for Division 2 is located at Station 20, the office at Morris Park Station, which is also Luby's own work station. However, 90% of his time is spent in the field.

Luby also logs into CAD, the computerized aided dispatch system for the FDNY. The system displays the actual locations and availability of the EMS units. Luby, as Division Captain is responsible for the whereabouts and functions of the Lieutenants, paramedics, EMTs and specialty units for the entire division of his tour. Obtaining this information is necessary in order for Luby to fulfill his responsibility for ensuring that the Division of his tour is efficiently staffed in order to respond to 911 calls. Captain Luby noted that a Station Captain does not receive an RCC rundown but rather, receives a station chart for his particular station.

After logging into CAD and receiving the RCC rundown Luby goes out into the field in order to monitor, via the radio and CAD in his special assigned FDNY vehicle, the 911 incidents that are called in and to respond to any major incidents among them. He remains in contact with the sole citywide deputy chief on his tour.

While making sure units are available to respond promptly to 911 calls during his tour of duty, Luby also deals with other issues involving treatment of patients resulting from 911 calls.

There are a variety of responses which he, as Division Captain, must determine arising from reported 911 incidents. Guiding his determination is an EMS Command

MCI Response Matrix prepared by Operations. MCI refers to Mass Casualty Incidents involving 5 or more patients. This document lists many types of incidents, including, among others, a range of fires depending on the number of alarms, explosions, building and structural collapses, power failures, bomb or hostage incidents, among others. Each incident lists whether, and the number of rescue ambulances, safety officers, Division Captains, Deputy Chiefs and Division Chief, specialty buses, that will be required to respond.

Luby, as Division Captain, is responsible for initially responding to an MCI incident and assuming control and authority there. Once he has responded, he can request additional employees and engage in interchanges with responders. They will include ALS or BLS units, a lieutenant who heads the Medical Branch under Luby's Direction. Luby will divide up resources and dialogue with the incident commander from a uniform discipline, whether fire chief or police commander depending on the nature of the incident. He could also coordinate with officials in Sanitation or Environmental Protection depending on the nature of the incident. If the incident commander requests additional resources, Luby will try to facilitate. Although a Deputy Chief may be called to an MCI, the Division Captain may still remain in charge if the Deputy Chief decides not to take the assignment.

It is to be noted that on MCIs, station captains are rarely assigned, unless the matter is a City wide incident. In the absence of a lieutenant available for assignment, a Station Captain will be dispatched in the lieutenant's place and report to the incident with a Battalion "B" designation.

Once an MCI has concluded, the Division Captain will release subordinates. In the course of his exercise of authority, the Div. Capt. Has optimal communication equipment, including cell phone, radio, and other high powered equipment inside his vehicle.

As to patient incidents, once at the scene Luby will investigate as to, e.g. narcotics pushed on patient, and interview the doctor assigned and will recommend action, if, for example, there has been a delay in response to the 911 call.

He will determine if training standards have been met in treating patients, and will generally monitor regular monthly training in terms of the drill components utilized.

If necessary, Luby will acquire additional vehicles for utilization at an MCI.

While as Division Captain, Luby will not normally adjudicate discipline called for by the conduct of subordinates, he will recommend action in this regard to the Station Captain as to those under him in the particular station.

Luby, as Division Captain, will also visit the hospital where patients are being treated to engage in triage, or taking up staffing issues or complaints about crews and work with the hospital administrator to resolve them. Luby also has responsibility to determine if too many EMS units are piling up at one hospital's emergency department, in which case, in consultation with the hospital's administrator or head triage nurse, he will direct certain EMS units to clear out their ambulances to correct the situation in a decision called a diversion.

At the direction of the Division Commander Luby also attends community board meetings, representing the FDNY EMS unit at such meetings in Riverdale, NYC.

In one incident, contrary to normal practice, Luby was held responsible for a delay in response time to 911 calls beyond 7 minutes. On November 2, 2010, Deputy Chief Ahee emailed Luby that as to the conduct of the officers dispatched, there is a lot to be addressed, and noted an average response time of 7:11 and sought a meeting to discuss early on November 5. Luby responded with an email on November 8 detailing distances traveled to the incidents on the date in question and noting the high call volume in the Bronx. In an additional response Luby noted that, "As previously discussed, those who decide to take advantage of inactivity when I am involved administratively or on an active MCI, will be handled accordingly."

Luby testified, without contradiction, that Deputy Chiefs and higher authority should be held responsible for complying with response time requirements. The interchange evidenced in these emails should have been held between Deputy and Division Commander. Nonetheless, Luby's responsibilities in this regard contrast with the lack of such responsibilities among Station Captains.

Luby noted that in carrying out his responsibilities as Division Captain he is basically doing the jobs every night itemized in the document dated February 7, 2006, and headed, Tasks and Standards. EMS Deputy Chief, with which he is familiar.

Having earlier listed the Tasks of the EMS Deputy Chief, I now incorporate the standards for each Task:

Tasks and Standards: EMS Deputy Chief

Task # 1: The Deputy Chief ensures proper utilization of "NYC 911 EMS System" resources during assigned tour

- Standards:**
1. Coordinates activities of Station Officers to ensure optimal of personnel, vehicles and equipment.
 2. Monitors unit status to ensure maximum in-service percentage of resources.
 3. Coordinates activities of the Division Resource Coordination Center.
 4. Ensures compliance with the equitable distribution of overtime procedures.
 5. Coordinates with the Fire Department Operations Center to ensure adequate citywide coverage.

Task # 2: The Deputy Chief responds to major incidents, directs and coordinates EMS activities at the scene.

- Standards:**
1. Ensures member safety while operating at emergency scenes.
 2. Monitors the radio and responds to incidents that have a potential for serious impact on EMS operations.
 3. Implements ICS as necessary to manage the medical branch/group of an incident.
 4. Ensures appropriate triage, treatment and transport of patients in accordance with regional protocols.
 5. Ensures that patient tracking is performed in compliance with Department regulations.
 6. Ensures that EMS resources are properly integrated into the overall management of the incident.
 7. Ensures that all patient information released is in Compliance with all Department regulations and HIPPA laws.
 8. Responds to assignments as directed by EMD and the Response Matrix.

Task # 3: The Deputy Chief ensures effective communication through the chain of command.

- Standards:**
1. While performing field patrol and station visits, discuss current Department operating procedures with members to ensure proper understanding.
 2. Obtain feedback from members on current operations.
 3. Review feedback received and discuss with Division Commander.
 4. Ensure that officers are aware of current policies/ Procedures and can explain them to subordinates.

Task # 4: The Deputy Chief performs field patrol, supervises and evaluates subordinates.

- Standards:**
1. Monitors Department radio at all times while on duty.
 2. Monitors the performance of units in assigned area

ensuring compliance with Department policies and procedures.

3. Monitors the activities of subordinate officers ensuring that their activities are directed towards the optimal use of resources.
4. Meets with officers and ambulance personnel and reviews performance, updates them on Department policies and reviews activity logs where applicable.
5. Respond to incidents that require inter-agency coordination, ensuring that the needs of the Department are met.
6. Ensures that field operations are being conducted in accordance with all applicable Department rules and regulations
7. Evaluates and ensures the quality of pre-hospital care being delivered is consistent with regional treatment protocols.

Task # 5: The Deputy Chief performs station visits to ensure efficient and effective Station operations.

- Standards:**
1. Reviews station performance with the on-duty officer.
 2. Inspect the station to ensure that there are no safety hazards, and take appropriate corrective action if necessary.
 3. Perform controlled substance audits as required and review compliance with audits.
 4. Inspect station physical plant to ensure compliance with Department rules and regulations.
 5. Review station schedules to ensure the appropriate use of personnel.
 6. Review Station records to ensure compliance with Department rules and regulations.
 7. Ensures compliance with time/leave regulations.

Task # 6: The Deputy Chief monitors and evaluates hospital ED performance during assigned tour.

- Standards:**
1. Monitors unit status at hospitals to ensure that units are not extended.
 2. Responds and/or directs subordinate officers to respond to problem emergency departments for evaluation and to clear units.
 3. Interact with hospital administrators to resolve issues with emergency departments.
 4. Makes determination on hospital diversions as required.

Task # 7: The Deputy Chief performs Administrative tasks as directed by the Chief of EMS, designee and/or EMS Division Commander.

- Standards:**
1. Reviews and approves monthly schedule to ensure the

- proper utilization of personnel.
2. Initiates, Reviews and/or endorses appropriate corrective/disciplinary action to ensure compliance with Department policies and procedures.
 3. Represent the Department, Chief of EMS and/or Division Commander at various governmental, community, inter-agency, and intra-departmental meetings.

Task # 8: The Deputy Chief provides pre-hospital care to patient(s).

- Standards:**
1. Provides care consistent with level of training and patient condition.
 2. Provides care in accordance with the New York State and Regional Protocols.

Contrary to the job specifications for SEMSS lieutenants and Captains which have been earlier set forth herein, there are not job specifications listing duties and responsibilities for Deputy Chiefs, who, as noted earlier herein, have been detailed for that position from among Division Captains.

Luby did note certain exceptions to his initial response. He does not perform Task #1, Standard 3 (coordinate the activities of the RCC) and Standard 5 (coordinate with the FDOC to ensure adequate citywide coverage), since Deputy Chiefs are responsible for the Division. Also, Luby does not perform Task #5, Standard 3 (perform controlled substance audits), Standard 6 (review station records to ensure compliance with FDNY rules and regulations) and Standard 7 (ensure compliance with time and leave regulations). Station Captains do the controlled substance audits for their Station once a week and monitor compliance with time and leave regulations for their Station. Deputy Chiefs also review and approve monthly schedules, Task #7, Standard 1.

During his cross-examination, Luby noted that he never saw and never allowed, a lieutenant to take or keep control at the scene of an MCI where a Division Captain was present.

As to adjudicating discipline, Luby will perform this duty involving lieutenants, EMTs and paramedical specialists on the occasions that the involved Station Captain is not available. Luby can also authorize overtime but cannot exceed the cap if one exists or applies. Neither can the Deputy Chief.

Luby was emphatic that Division Captains do not get involved in response time. Neither do Station Captains. Yet Luby was held responsible for response time in the November, 2010 incident described.

Luby reaffirmed that where a Battalion Captain is assigned to an MCI in lieu of a lieutenant, he, Luby, still retains his responsibility and is in overall charge of the FDs response to the incident.

Witness and grievant John DeSantis rose through the ranks, starting as EMT and paramedic, rising to SEMSS Level I Lieutenant in 1997, and, since January, 2009 having been assigned as Division Captain full time until July, 2010 and since then assigned to this classification 8 to 10 days per month (or twice a week, on average). He is currently assigned to Station 10, Yorkville, in Division 1 Manhattan where, as Station Captain, he is responsible only for the operations of his station. When assigned as Division Captain on his Tour 2 he is responsible for all stations in Division 1. There is one Deputy Chief assigned to his Tour in Division 1. As Division (or Duty) Captain, DeSantis is assigned a Ford SUV. As Station Captain he has no City vehicle assigned to him.

DeSantis confirmed the testimony of Luby in terms of the duties, he, as a grievant, performs as Division Captain. In addition to his other duties, previously described by Luby, he will sometimes still visit a station where a Station Captain is on duty, interchange with that Captain to ensure everything is operating smoothly.

Like Luby, DeSantis testified that he performs most of the duties set forth in the FDNY's Tasks and Standards for a Deputy Chief.

DeSantis also testified regarding a Grand Central (Station) Full Scale Exercise to which he was assigned by the FDNY on Saturday, October 13, 2010. The purpose was to test the response of FDNY Fire and EMS units, in conjunction with railroad staff, to an MCI at Grand Central Station. The FDNY Center for Terrorism and Disaster Preparedness was to conduct the test between 1000 and 1400 hours. The scenario involved a Metro North passenger train failing to stop in time, causing it to strike the impact bumper resulting in passengers claiming injuries. DeSantis was assigned as Division Captain along with a Lieutenant Conditions Officer.

It is noteworthy that no EMS Deputy Chief or Deputy Chief was present or assigned to the exercise.

At the event, DeSantis met with the FDNY evaluators and the Fire Chief. He also spoke with his subordinate staff, listened to his evaluation and spoke to the Fire Incident Commander about the final performance as written in the evaluation.

As to administrative tasks, DeSantis as Division Captain reviews the unit activity log, completes the inspection sheets for his vehicle and investigates and completes

unusual occurrence incident reports on notice forms and in response to the RCC which initiates the investigation.

Like Luby, DeSantis noted that he may be asked by Deputy Chief or Commander to adjudicate discipline in the absence of the Station Captain.

Another witness and grievant, Martin Miller, assigned as Division Captain 8 to 10 days per month, in Division 2, Bronx, confirmed the testimony of Luby and DeSantis that when assigned as Division Captain he is responsible for the EMS operations of all eight stations in Division 2 and performs the same duties and follows the same protocols when so assigned.

With respect to communication equipment he confirmed that Division Captains have assigned a portable 400. fire ground radio. He is also assigned an FDNY cell phone, which is passed from one Division Captain to another, and on which he communicates with Division RCC, and Fire Resources. He also has a borough-operated 800 megahertz radio, used to respond to different incidents within the borough, such as MCIs, also used to contact other Divisions without tying up the Division radio and used in large MCIs or inter agency incidents or where other supervisors need assistance. As Station Captain he has no cell phone, just the station's landline. In his assigned vehicle, he also carries protective equipment, technical equipment, a defibrillator, as well as a command board showing all units in the City.

On redirect examination, Miller testified to the differences in responsibilities between a Lieutenant and Division Captain in responding to an MCI. A field lieutenant must respond to and confirm the incident and indicate its potential, while a Division Captain can escalate the response, by calling for specialty units or more officers. It was during his direct examination that Miller disclosed that Captain Luby was the Division Captain who responded to the recent Atlantic City tour – bus incident which had many casualties.

As to his responsibilities regarding patients delivered by ambulance to hospital emergency departments, as Division Captain he can, and has, effectuated a diversion of scheduled incoming ambulances until such time as the backup of EMS units is mitigated and/or the hospital's problems, such as a power outage, are corrected. The Division Captain will contact FDNY's Diversion Desk at its Metro Tech headquarters in Brooklyn, and patients will be sent to a different hospital pending correction of the problem.

As Division Captain, Miller oversees at least 60 unit ambulances and specialty units available for emergency response. As Station Captain he oversees 6 ambulances.

As Division Captain he is assigned a Dodge truck which he picks up at the Division 2 command station 20 located at Jacoby Hospital (the Morris Park Station).

In describing his myriad duties as Division Captain Miller testified he oversees and is responsible for adequate staffing, reassigning personnel if necessary to fill vacancies, makes field assignments to cover incidents in response to 911 calls, coordinates field operations on major incidents, and with other agencies, including DEP (Dept of Environmental Protection), Police, Fire, Corrections, Emergency Management.

As to time and leave, Miller as Division Captain will act as a resource in an emergency, granting temporary approval for limited overtime. On MCIs, he functions as Medical Branch Director, which the Deputy chief can assume at his option, exercising authority to increase the number of ambulances assigned, assign specialty units, request different staffing. He oversees triage in dealing with injured patients, sets up temporary morgues and staging areas for particular incidents. In a hazardous material incident, he will coordinate with DEP and establish decontamination area, locations for removing injured from the scene and a standby area.

The specialty units include MERV or Major Emergency Response, MRTV or Respiratory Response Unit, and LSU or Logistical Support, OMA Med or on duty doctor.

When functioning as Station Captain Miller has no field response to any incidents.

While as Division Captain Miler is not normally held responsible for response time (but see incident where Luby was held responsible), one of his main goals is to seek to insure adequate resources are available in each Station on his tour to meet response time requirements. In fulfilling this goal he can reassign vehicles, redeploy staff and press units to comply.

He, as Division Captain, is tasked with seeking to have ALS units respond to 911 calls within 8 minutes or under where there is a life threatening emergency. And he may receive a telephone call from the Deputy Chief that response times are rising. This is not the same as being held responsible for meeting response time goals as Luby was on one occasion. A document received in evidence, prepared by the statistical unit of EMS for use by Division Captains in Division 2, for January 2011, breaks down times for each of the three tours, and all tours, in receiving assignment, enroute, on scene, to hospital, at hospital, and the time the Division Captains spend in the primary areas of their responsibility, and in being available for assignment outside such areas or at a facility.

When not responding to an MCI Miller seeks to ensure adequate resources are available to meet emergencies. He checks hospitals to determine whether there are sufficient ambulances so there will be no backup in triage. He checks to ensure adequate staffing at the different stations in Division 2, inspects ambulances and seeks to minimize physical plant problems such as lack of heat in the stations.

If there is a backup in treating patients at hospitals, Miller has authority to close the emergency room, or if there is equipment breakdown, or flooding, electrical or staffing issues, after consultation with hospital director, can place hospital emergency department on divergent status after notifying Fire Dept Operations Center and calling Divergent Desk at Fire Dept Headquarters.

At to discipline, he confirmed the testimony of the other Division Captains, that he can recommend such proceedings, although the actual institution or investigation is handled by the Station Captain.

During his cross-examination, Miller acknowledged he had no hand in creating the Master Monthly Schedule for Division Captains, listing their work assignments for the month. They are prepared by the Deputy Chiefs. Miller also agreed that the Deputy Chief on duty on his tour is responsible for the Division's operations, and he may have duties Miller is not privy to.

As to the tasks and Standards of EMS Deputy Chiefs, they are not unique to Division Captains. Lieutenants perform for example Tasks #3 and #4 to the extent that they communicate through the chain of command, and supervise and evaluate, EMTs and paramedics assigned to the station overseen by the Lieutenant. But, as pointed out by Miller, his responsibilities in the areas of chain of command and supervision are on a much different scale encompassing as they do, the coordination of all station operations on his tour and the placement and assignment of all inferior EMS staff assigned to all of the stations.

During his redirect examination Miller noted that Station Captains, unlike Division Captains, do not perform Task #2, responding to major incidents or coordinating EMS activities at the scene. While Lieutenants are responsible for initiating response to an MCI incident, only the Division Captain can escalate the response at the scene and take ultimate charge as Medical Branch Director, subject to the decision of the Deputy Chief if at the scene.

Another Union witness, John Nevins testified that he is assigned twice a month as a Division Captain. From 2001 to the present, Nevins has worked in the FDNY's

Bureau of Office Operations, in the Document Control Union, located at 9 Metro Tech, Brooklyn, NY. He is responsible for maintaining the EMS Operating Guide, making sure its policies and procedures are up to date and consistent with City of New York rules and regulations, and providing guidance and information to field personnel on the Guide.

Nevins noted that EMS personnel in offline positions like himself are required to perform a minimum of two tours a month in field operations in order to satisfy the requirement of the NYS EMT or paramedic recertification process of continuing patient care set by the NY State Department of Health Program.

The certification requires several elements, including participation in care courses once every six months, attending monthly station drills, and having patient contact two shifts per month.

His duties as Division Captain are performed in Division 5, Staten Island and part of Brooklyn on Tour 2. He arranges his tours in contact with the Division Commander or Chief to whom he reports. He started these tours when promoted to Captain in November, 2006.

The parties stipulated that Nevins' duties as Division Captain are substantially the same as the Division Captains duties performed by the previous grievant witnesses.

During his cross-examination Nevins noted that all offline EMS employees must perform EMS line duties, including patient care, at least twice a month. As Division Captain, his duties as Medical Branch Director in MCIs satisfies the requirement for patient care, even is he is not actually treating patients.

All other line employees satisfy the certification and recertification requirement of patient care through their normal duties. EMTs and paramedics work on ambulances and so have patient care. Lieutenants observe patient care on MCIs and Station Captains observe and perform patient care in the field when "riding battalion" (Taking the place of a Lieutenant).

The other off line Union witness, Eric Fay, an SEMSS Level II Captain since 2006, is assigned as a Division Captain twice a month. His regular other tours are as a Dispatch Commander assigned to the Bureau of Fire Communications, EMS Dispatch Operations at 2 Metro Tech, in Brooklyn. In this capacity, he processes incoming 911 calls and dispatches units to the scene, overseeing the EMS dispatchers, which include Lieutenants and EMTs, to ensure calls get dispatched in a timely manner.

When functioning as Division Captain he performs the same duties as Captain Martin Miller, and a stipulation was entered by the parties confirming that his duties are the same as all other Division Captains who previously testified.

Another Union witness was Debra Cali, who, in 1992 became an EMS Level II Captain and was detailed to EMS Deputy Chief in 2001 by Chief McCracken. As noted previously, Deputy Chiefs and Division Chiefs are represented for purposes of collective bargaining with the NYFD by the Superior Officers Association. Cali is currently the President of the Association where she is engaged in collective bargaining negotiations and maintaining the rights of her members.

Cali rose through the ranks since 1983, from EMT to paramedic in 1986, Lieutenant in 1989, Captain in 1992 and Deputy Chief in 2001. As Deputy Chief she has worked in several Boroughs. In November, 2009 she was assigned to Division 1, Manhattan. She now works in EMS Division 4 in Queens

As Deputy Chief, she provides Captains with the resources they need to complete their assignments and assists in whatever way and with whatever means are necessary. Captains, Lieutenants, EMTs and paramedics are all under her command.

She described the Division Captains as being responsible for responding to MCIs, checking on preparedness of stations on their tour to perform properly on emergencies, see that vehicles are properly inspected and in working order and that the Lieutenants in the various stations are performing properly. Division Captains also troubleshoot during their tour.

In contrast to the Station Captain, who is responsible for his station operation, the Division Captain is responsible for the operation of the entire division during his tour. Cali had been a Division Captain from 1995 to 1997 in Division 4 performing 20 tours a month, during the period that HHC had been in charge and when the EMS operation then merged into the Fire Department.

As Deputy Chief, Cali has administrative responsibilities, which include preparing monthly staffing schedules, investigative occurrence and incident situation reports, review vehicle (ambulance) standards and inspections, review disciplinary matters and prepare monthly reports to division, prepare emergency evacuation plan and field reports, and ensure necessary supplies are ordered in sufficient quantity.

As Deputy Chief, on Tour 2 she visits several stations, meeting the officers assigned, Captains and Lieutenants to discuss operational issues, including e.g. a shortage of equipment as well as new policies regarding a controlled substance audit.

She attends preparedness drills on her tour. She is required to attend them once a month, but attends more frequently to ensure the EMC staff meet standards.

She is very familiar with the EMS Command MCI Response Matrix, described previously, which lists the various events which trigger an MCI response by her and other staff. She monitors the radio which reports the incident, to which she responds, including to incidents outside her Division if no Deputy Chief is assigned.

She may take charge, as Medical Branch Officer, but will step back for a Division Captain, Lieutenant, a Deputy Chief or even a higher ranked officer to assume responsibility. When reporting to an emergency incident, whether MCI or non MCI she will meet with representatives of different agencies in order to coordinate a response. Depending on the nature of the emergency, these include Fire Department personnel, EMS, police, Consolidated Edison staff, American Red Cross, DEP personnel.

She provides oversight for both MCI and non MCI incidents.

She reviews reports prepared by Division Captains, relating to motor vehicles as well as other resources. She monitors her computer terminal and responds to hospital emergency department when there is an ambulance delay exceeding 30 minutes. Here Cali distinguished between "ambulance redirect," in which ambulances from different locations are directed to one hospital and "ambulance diversion", a situation in which she is notified to make a decision to place an institution on diversion, directing ambulances to refrain from bringing patients to emergency until the cause of the clogging problem is resolved.

Her time is divided between the division office, for administrative purposes, the field, and district locations. Her office in Division 4 is located at Fort Totten, No. 53.

Cali does not have or exercise command discipline as to inferior employees under her, except as to Captains, as to whom she received reports and does adjudicate discipline.

Cali exercises on a daily basis all of the Tasks set forth in the EMS Deputy Chief Tasks and Standards previously reprinted.

As to communication equipment, she is assigned all of the items which Division Captains receive, including cellular phone (Black Berry device), two radios, as well as an "Interoperability" radio which permits her to talk to other Agencies unhindered.

In describing the duties assigned to Division Captains, Cali repeated all of the duties previously attributed to them at length by the grievant witnesses who have previously testified. They include responding to MCI incidents in accord with the Matrix,

and exercising authority to extend capabilities, make station visits, seeing to proper staffing, inspect vehicles including ambulances for readiness, compliance and location, on MCI or 911 incident, take command at EMS Command Post or assign to District Captain or Lieutenant on scene.

Similarly, Cali applied most of the Deputy Chief Tasks to Division Captains, consistent with prior testimony, noting, in particular, that even as to Standard No. 5 of Task # 1 (Coordinates with the Fire Department Operations Center to ensure adequate citywide coverage), where only a Division Captain is on duty, he would be asked to ensure citywide coverage but would coordinate with the Deputy Chief on duty. The Division Captain could also be asked to respond to incidents that require inter-agency coordination in accord with Standard 5 of Task #4, depending on the unavailability of a Chief Officer on the tour.

During her cross-examination Cali agreed that many of the Standards listed from the Tasks described, in particular Nos. 1, 2,3, and 6 and 7 are also performed by either all Captains or subordinate EMS personnel, or all EMS officers.

Cali reiterated that while her civil service title is SEMSS Local II Captain, she has been detailed to a level of assignment as Deputy Chief without having taken any civil service test.

Again, on redirect examination, Cali reaffirmed that as to Task No. 4, Standard No. 6, while a Station Captain is responsible for field operations within the area covered by that station, the Division Captain is responsible for the field operations in the entire Division.

After the Union completed its presentation, the City called as its witness, Jerry Gombo, Assistant Chief of EMS Operations. Gombo oversees the NYC EMS System. In this capacity, he handles City labor relations with its Unions, District Council 37, Local 3621 representing EMS personnel from Captains to EMTs, and the Superior Officers Association, which represents EMS Deputy Chiefs and Chiefs. He also deals with personnel matters, including hirings, promotions for Supervisors, Deputy Chiefs and Chiefs, disciplinary charges and overseeing assignments of EMS staff. Division Commanders/Chiefs report to him directly. He rose through the ranks, beginning in 1979 as an EMT, ultimately assigned to his current position in 1998. He reports to EMS Chief Abdo Nahmod.

Gombo testified to the duties of SEEMSS Level 1 Lieutenants, which include responding to 911 calls and MCIs, performing ambulance inspections, making sure their

subordinates are rendering proper and quality patient care and treatment, and are in proper dress. A document the FDNY submitted in evidence, an EMS Command Order 2011-016, dated January 14, 2011, entitled Station/Conditions Officers shows which Conditions Officers (Lieutenants) are assigned to Station Desk coverage and those assigned to Response Battalion (out in the field responding to calls). The Response Battalion column shows the Stations within each Division to which Conditions cars and ambulances are assigned. The document also lists Hazard Tactical Unit (HAZ TAC) which are on assignment citywide.

Gombo explained the history of the institution of the position of Division Captains. They were first assigned in 1999 when a Pilot Program was begun in Division 3 in Brooklyn. Captains were assigned duty cars so as to supervise Lieutenants in the field. Since the Command Order in 1999, the program has been expanded to all five divisions. The Program has now been continued indefinitely. Today, Division Captains are employed on a regular basis in all 5 boroughs (Divisions). Their general duties have continued as contemplated in the original Command Order and have been expanded upon. Gombo also confirmed, for the most part, the Union's witnesses' testimony regarding their duties when assigned as Division Captains, and the fact that they spend more than 90% of their time in the field.

As described in the EMS Command Order, its purpose and scope is to "implement and define a pilot program using Captains for Division-wide coverage" and to outline "the duties and responsibilities of an EMSC Captain functioning in the role of a Division Captain". Its mission is "To ensure field assignment of a Captain in the Division at all times, promoting quality pre-hospital care and professionalism," and to "work to improve the performance and effectiveness of EMS resources by identifying areas of concern and recommend solutions to the Division Commander."

The section of the 1999 Command Order describing the responsibilities of the Division Captains, provides as follows:

3. RESPONSIBILITIES

3.1 Division Captains are expected to spend a majority of their tour of duty in the field, performing the following activities within their assigned response area, as directed through the EMS Division Commander or designee.

3.1.1 Provides ongoing field supervision to both Fire Department EMS Command and Voluntary hospital units assigned to their area, including monitoring of units' field activities, status and availability signals compliance, and proper radio protocol.

- 3.1.2 Provide support and direction to Conditions Officers.
- 3.1.3 Oversee station tour operations as they relate to maximizing unit deployment and performance.
- 3.1.4 Respond immediately and proactively within the response area to incidents including, but not limited to the following:
 - A. Multiple casualty incidents producing more than 5 patients or with unusual circumstances
 - B. Potential or unusual occurrences
 - C. Conflicts involving EMS Command resources
 - D. As directed by the Bureau of Communications
- 3.2 Division Captains shall review system performance data with the Division Commander, making recommendations for improvement based upon field experience concerning deployments, emergency department delays, and other issues.
- 3.3 Division Captains shall contact the Resource Coordination Center (RCC) supervisor and a Division Chief Officer at the start of their tour, advise availability, and be briefed on current events and activities as they relate to the Division.

It is noteworthy that none of the Division Captain's responsibilities involve reviewing performance data with Deputy Chiefs or contacting the Deputy Chief at the start of their tour. These interchanges are with the Division Commander or Division Chief Officer.

Gombo noted that, with respect to the EMS Command MCI Response Matrix, Division Captains have the latitude to respond and facilitate EMS operations even if they are not dispatched under the matrix. The Division Captains have primary responsibility in the field, overseeing Lieutenants in the field.

In terms of trainings done with the Fire and EMS Commands of the Fire Department, Gombo testified that there is a planning unit that sets up and facilitates exercises between the two Commands for "larger, city-wide drills", which can be used to "simulate mock disasters." As to the exercise to which Captain DeSantis was assigned at the Grand Central Station, Gombo stated this was a city-wide drill developed by the Terrorism Union of the FDNY. He helped plan it with Division Commander Villani, but was not present for it and neither was any Deputy Chief present at the exercise.

Chief Gombo testified to the differences between Deputy Chiefs and Division Captains. Deputy Chiefs are on duty the majority of time a Division Captain is assigned. Deputy Chiefs would supervise Division Captains. If the Captain has a problem he is encouraged to contact the Deputy Chief. Division Captains spend over 90% of their time supervising Lieutenants. The Deputy Chiefs daily duties include a field component half the time but also have an administrative function. Deputy Chiefs review time and leave of Division Captains and discipline them if necessary, and consult on daily basis with Division Commanders, while Division Captains do not. Deputy Chiefs use the RCC (Resource Coordination Center) as their eyes and ears as to staffing. They supervise RCC staff, while Division Captains get briefed by RCC staff. Deputy Chiefs evaluate Captains, while the Captains do not evaluate other Captains.

Deputy Chiefs attend a quarterly Chiefs meeting, including all Division Commanders and Deputies. At these meetings, they review performance indicators, discuss EMS trends, new protocols and new equipment and opening of new facilities. Division Captains do not attend.

As to response times, the Computer Aided Dispatch (CAD) system is constantly evaluated and the results are paged to EMS Chiefs every 3 hours, not to Division Captains. If response time is high – e.g. over 7 minutes on 911 calls, the information is routed to EMS Chiefs to evaluate to avoid a repetition, not to Division Captains.

As to this latter testimony, it is noted that the Tasks and Standards for EMS Deputy chiefs, to which attention is directed in the absence of any written specification of their duties and responsibilities, do not contain any reference to their supervision, discipline, consultations or review of their problems with Division Captains, even though the document referred to is dated February 7, 2006, seven years after the Command Order establishing Division Captains was issued.

Gombo did confirm that the duties of the grievants, when assigned as Station Captains, is reflected in the FDNY's Tasks and Standards for a Captain, and that such a document does not include their Division Captain duties. Those duties and responsibilities are spelled out in the 1999 EMS Command Order Previously described and quoted at length.

On cross-examination, Gombo testified that Deputy Chiefs perform the duties set forth in their EMS Task and Standards but added that "they may have more duties" which he did not identify.

When asked on cross-examination why Deputy Chiefs were not included in the 1999 Command Order as the title or position to whom Division Captains were directed to report, Gombo explained that the pilot program was initially implemented through Chief Robert Hannafay in that Division. This explanation is not compelling and undercuts Gombo's prior testimony regarding Deputy Chiefs' supervision of Division Captains, a function which received hardly any attention during the City's cross-examination of the grievants. As the roles of staff have expanded significantly since 1999, Gombo noted that today the Division Captains will perform their activities itemized in paragraph 3.1 through 3.2 as directed through Deputy Chiefs. However, the language of 3.1 of the Command Order, unchanged from 1999 to present date, states that Division Captains shall perform all of their activities which follow, "as directed through the EMS Division Commander or designee", not the Deputy Chief. Similarly, paragraph 3.2 of the Command Order continues unchanged the requirement that Division Captains review system performance data "with the Division Commander..."

Chief Gombo explained that as to the Grand Central Station exercise, a Deputy Chief was not assigned because it was anticipated that there would be fewer than 5 patient injuries and the exercise was more related to fire suppression.

Another Fire Department witness, Renee Campion has been Associate Commissioner in the NYC Office of Labor Relations since January 2010. In that capacity she negotiates collective bargaining agreements on behalf of the City with a variety of labor organizations, including with DC 37, Local 2507 on behalf of EMTs and paramedics, DC 37, with Local 3621 on behalf of EMS Lieutenants and Captains, and the EMS Superior Officers Association on behalf of Deputy Chiefs and Division Commanders.

Campion explained that there is no competitive civil service examination administered by DCAS for Deputy Chiefs and that it is an Agency decision to detail someone to the ranks of Deputy Chief from among Division Captains. Campion drew a parallel here with Detectives in the NYC Police Department represented by the Detective Endowment Association who are detailed to that position from among Police Officers represented by the Policemen's Benevolent Association, there being no separate civil service examination for Detective. The record also makes clear that while there is a civil service examination for SEMSS Lieutenant and Captain, there is no such examination for the title or position of Division Captain to which Station Captains are detailed.

Campion further noted that the job specification for Supervising Emergency Medical Service Specialist (SEMSS) covers employees assigned as Lieutenant, Captain, Deputy Chief and Division Commander. However, the record makes clear the differing Tasks and Standards for Lieutenants and Captains, distinct from Division Captains and distinct from Deputy Chiefs. Campion clarified her prior testimony on direct, when on cross-examination she acknowledged that Deputy Chiefs were not included as a job title in the written job specification issued by DCAS for SEMSS Level 1 Lieutenants and Level II Captains.

In rebuttal and sur rebuttal testimony, Union President Variale and Chief Gombo differed as to whether Division Captains as well as Station Captains attend monthly meetings with Deputy Chiefs and Chiefs at Division headquarters, and also including Chief Gombo to discuss response times, and operational issues. Variale testified he attended several meetings in Divisions 4 and 5 at which EMS Command attended and Captains were included. He has also been given updates by Union members confirming the attendance of Command individuals and Captains at these meetings. Chief Gombo, to the contrary, claimed he travels to Divisions regularly to meet with Deputy Chief and Chiefs without Lieutenants or Captains attending. However, Division Commanders regularly hold meetings with Captains at which he, Chief Gombo is not present.

The Position of the Parties

The Union which has burden of proof in establishing the merits of its grievance argues in its post hearing brief argues that when assigned as Division Captains, the grievants are performing duties substantially different from those contained within job specification as an SEMSS Level II Captain. As Division Captains, unlike Station Captains, they are responsible for the EMS operations and services provided by all stations in their Division. In performing these duties they are actually performing out-of-title duties belonging those of an EMS Deputy Chief.

Citing in its brief prior arbitration awards issued in disputes between NYC and DC 37, the Union asserts that neither the fact that some of the duties performed by the Division Captains lie within the job specification of a different or higher title, nor the fact that the grievants performed the out-of-title work less than fifty percent of their time, can defeat their claim, so long as they were regularly assigned to perform duties out of their job titles and those duties were substantially different from those of their job specification. *Local 375, DC 37 & Dept. of Env. Protection, A-9223-02* at 11 (Ginsberg,

2002), citing, with approval, NYC OCB A-6102-95 (Vianni, 2003), NYC OCB A- 7247-98 (Morganstern, 2003), and NYC OCB A-8271-01 (Stiefel, 2001).

And, as noted in another arbitration award, “where the CBA addresses the issue of out-of-title work, it does so with qualitative, rather than quantitative language, “quoting here the language of Article VII, Section 1(C), the same language as is contained in the instant CB Agreement. The Arbitrator further notes, “Adopting an arbitrary standard of close to 50% of an employee’s time before an employee can prevail on an out-of-title claim runs contrary to the plain language of the collective bargaining agreement.” *DC 37, Local 768 & New York City Health & Hospitals Corp., A-13056-090* (Moscovitch, 2009).

The Union finds further support for its argument in the New York State Civil Service Law § 61(2), as well as Section § 5.1.1 of the Personnel Rules and Regulations of the city of New York, (both of which have been previously set forth herein). The Union cites a decision of the NY Appellate Division issued in 2000 which found a violations of § 61(2) in the Village of South Glen Falls when the Village assigned police officers to exercise supervisory responsibility in the absence of the Police Chief, the sole Sargeant having resigned. The Court found such assignments to constitute out-of-title assignments by virtue of their being compelled to perform the duties of a higher grade without a concomitant increase in pay, frequently, and for long periods of time, unrelated to any temporary emergency requirement. The Court also noted such out-of-title work under the Civil Service Law had been established based upon a significant increase in supervisory responsibility. *Caruso v. Mayor of the Village of South Glen Falls, et al*, 278 A.D. 2d 608 (3rd Dept. 2000), citing *Matter of Rausch v. Pellegrini*, 237 A.D. 2d 771.

In summarizing the testimony of the grievants in describing their job duties as Division Captains, on working in the field and being responsible for the operations of all Stations and subordinate EMS personnel in their Division, including pre-hospital patient care and treatment rendered by all subordinate EMS staff in their division, ensuring the efficient and safe operations of all stations in their divisions, being responsible for meeting required response times within the division, directing operations at major incidents or MCIs, including becoming the Medical Branch Officer, escalating response and ordering in specialty units and coordinating with other agencies such as the NYPD and DEP e.g. for hazardous substance incidents, monitoring and authorizing diversion of ambulance units from emergency departments, the Division Captains are providing a

level of responsibility and authority which far exceed that contained in the job specification for SEMSS Level II Captain (or Station Captain).

The exercise of such broad supervision and control and inter agency coordination is not reflected in the SEMSS Level II job specification but is set forth in the Deputy Chief Tasks and Standards, including Task #3, and Task #2, Standards 3 and 6. Thus, the duties the grievants are performing are not only substantially different from those contained in the job description for an SEMSS Level II Captain, they are consistent with the duties of an EMS Deputy Chief.

Anticipating a City defense urged in the City's brief, the Union further argues that since Article VII, Section 1(C) of the grievance provision does not make reference to, or require, that the duties to which the grievants have been assigned substantially different from those stated in their job specification, be to a higher title, the fact that those duties are those performed by Deputy Chiefs who have been detailed or promoted to that position, is irrelevant to the merits of the grievants' claim. In further support of this position, the Union refers to the City's Personnel Rules and Regulations which broadly defines "Title" to mean the designation of a position based upon its duties and functions, and not by its classification. Therefore, there is no requirement that the higher level duties assigned to the Division Captains in this proceeding be encompassed by a particular type of title or position.

The Union cites, and attaches in support of this argument two decisions. In *City of New York v. District Counsel 37, et al*, 2010, NY Slip Op 5671 (1st Dept. 2010), the Appellate Division, First Dept. affirmed a decision of the Supreme Court NY County, *City of New York v. District Council 37, et al*, 2008 NY Slip Op 33243. The lower Court had confirmed an arbitration award in which the arbitrator had awarded the grievants a lump sum of money for their performed out-of-title work and had failed to rely on a particular job title for her calculation of the monetary remedy. In affirming the finding of the lower court, the Appellate Division concluded that, just as in the instant agreement, there was no requirement in the parties' collective bargaining agreement that the arbitrator was bound by in finding out-of-title work or in calculating the monetary award. The Appellate Division also confirmed that §100(1)(d)⁴ of the New York State Civil Service Law

⁴ §100(1)(d) "Nothing contained in this section shall be construed to prevent the award of a money remedy for the violation of a provision of a collective bargaining agreement prohibiting the assignment of employees to duties substantially different from those appropriate to the title to which the employees are certified. This subdivision may be supplemented, modified or replaced

provides for payment as a remedy in an out-of-title case, and that there is no restriction in the provision on the nature or calculation of the award.

The City of New York and its Fire Department argue in their post hearing brief that the job specification of the SEMSS Level II Captains, in clearly identifying within a Captain's duties "the coordination of station operations within an assigned Division "and supervis[ing] EMS Specialists Level I (Lieutenants) in the performance of their duties," encompasses the major duties performed by such Captains when detailed as Division Captains. Therefore, the duties performed by Division Captains cannot be deemed "substantially different" from their job specification.

Furthermore, the Division Captain cannot state a viable claim because they are assigned Division Captain duties on a sporadic basis.

The FDNY further argues that even if the Union was able to establish an out-of-title assignment, the request for a monetary remedy is not appropriate, in the absence of a second job specification which encompasses the alleged out-of-title duties, since both Captains and Deputy Chiefs are employees within the civil service title Supervising EMS Specialist, Level II.

In support of its initial argument, the City notes that during the Union's case-in-chief, it relied almost exclusively on the FDNY issued Tasks and Standards for both Deputy Chiefs and Level II Captains, and not the job specifications for Supervising EMS Specialist. In so doing, it failed to refer to the only operative document in an out-of-title claim, that being the job specification. The language of the determinative paragraph of the collective bargaining agreement is clear; it requires the grievants to assert "A claimed assignment... to duties substantially different from those stated in their job specification" [Emphasis added]. The City here cites in support and attaches an Arbitration award in *DC 37 Local 375, OCB No. A-12950-08* at 15-16 (Lowitt, 2009). In his award, Arbitrator Lowitt noted that a job specification is the operative document in an out-of-title case, and refused to give weight to a notice of examination which listed a title's tasks and standards. Relying on tasks and standards would be contrary to the clear language of the collective bargaining agreement, just as in the instant matter.

However, to the extent the evidence regarding Deputy Chief tasks and standards is even considered, those tasks are of a general nature performed by all EMS Officers. Even if there is overlap between tasks performed by Deputy Chiefs and Division

by provisions of collective bargaining agreements negotiated between the state and an employee organization pursuant to article fourteen of this chapter."

Captains a finding is not mandated that a petitioner (or grievant) is being compelled to perform out-of-title work, citing *Benson v. Governor's Office of Empl. Rels.*, 758 NYS 2d 242, at 245 (N.Y. Sup. Ct. 2003).

As to its second argument, the City and Fire Dept. assert that when Union members are assigned as Division Captains they are simply supervising Lieutenants in the field and coordinating EMS operations in their assigned Division, duties within their job specification, and even when so assigned the majority of the Captains perform these duties on a sporadic basis. Thus, the Division Captains who fall into categories 2 and 3 (twice a week and twice a month) do not perform the complained of duties often enough to sustain an out-of-title claim. Whether based on a test requiring a demonstration of 50% or more of their duties as out-of-title, or whether based on a test requiring those duties to be performed often enough to make them substantially different, the Union's claim falls well short.

In order for the Division Captains to be able to establish that the duties they are performing are "substantially different" from their job specification they must prove by a preponderance of the evidence that the duties which they have been directed to perform are not encompassed within their job specification, *District Council 37, Local 1549 v. Human Resources Administration*, OCB No. A-11953-06 at 8 (Gaba, 2008). Even if the duties claimed to be out-of-title are found in another job specification, inquiry must be made in order to determine whether those duties are also found in the employee's own job specification. *District Council 37, Local 1549 v. H.R.A.*, OCB No. A-11580-05 at 5 (Gavin, 2007). Here, the testimony of their own witness Captain Nevins, on cross-examination established that he is supervising Lieutenants and coordinating their operations when assigned as Division Captain.

Since in most cases when the grievants are assigned as Division Captains, there is a supervising Deputy Chief on duty, who is responsible for their discipline and work review, and the duties the Captains perform are mostly in the field while Deputy Chiefs mostly perform administrative duties, there is insufficient evidence to establish that Division Captains perform out-of-title Deputy Chief duties for a substantial period of their time.

Finally, the City and Fire Dept. assert that in order to receive a monetary award in an out-of-title claim, a grievant must prove that he is doing the work of another civil service title. The grievants cannot meet this burden since individuals assigned as Captains, and as Deputy Chiefs, are all in the civil service title Supervising EMS

Specialist. In pressing this argument the City and Fire Dept rely on an arbitration award in *Local 300, SEIU v. Department of Housing Preservation and Development*, OCB No. A-11989-06 at 9 (Stein, 2006). Arbitrator Stein noted that “The only way to recover a sum of money in an out-of-title grievance as defined by the City’s agreements with its various unions is to show that a large portion of an employee’s job is performed outside the specifications for the position of which he is an incumbent and those duties fall within the specifications for a more highly compensated title.” However, in the following sentence in his award, Arbitrator Stein notes that “... the duties and responsibilities listed in the specification of more generously compensated *positions* become relevant only if a union proves that the duties performed by the employee(s) filing an out-of-title claim are different than those in the specification for her/his position.” [Emphasis added]. The use of the term “position” here appears to undercut the reliance on the term “Title” in the earlier statement of the principle of law stated.

Analysis and Conclusion

The central issue in this proceeding is whether the EMS Level II Captains when assigned as Division Captains have been assigned to duties substantially different from those stated in their job specifications (Article VII, Section 1(C) of the CBA). The Union has the burden of establishing the merits of the grievance by a preponderance of the evidence.

What is the “job specification” of the Level II Captains which forms the predicate for the Union’s claim? Clearly it is the statement of duties and responsibilities for the Supervising Emergency Medical Service Specialist (SEMSS) set forth earlier in this award. To achieve this level of attainment, applicants are required to pass a civil service examination following which they may be promoted from Level I (Lieutenant) to Level II (Captains). The duties and responsibilities are first spelled out in an introductory paragraph. The primary duty is to direct, supervise and be responsible for the activities of Paramedics and EMTs and other assigned staff, to respond to calls and render pre-hospital emergency medical care. In the document there follows a list of relevant tasks for assignment to Level I (Lieutenant). Then comes a specification of additional duties for which an assignment Level II (Captain) is responsible. These include responsibility for the efficient and effective operation of an EMS Station and the coordination of station operations within the assigned Division. They are also responsible for supervision of EMS Specialists Level I (Lieutenants) in the performance of their duties; direct, support

and guide subordinates in their duties, among other duties. The listing of certain other responsibilities follow, including assigning personnel to master staffing schedule, evaluate staffing needs monitor and correct deficiencies in job performance of subordinates and administer compliance with discipline procedure.

The record establishes that most, if not all of these responsibilities, are carried out by Level II Captains as Station Captains, responsible for the operation for a particular Station, among multiple stations, in one borough of the City of New York among five such boroughs.

None of the responsibilities described relate to duties and responsibilities beyond the Captain's assigned Station, encompassing the borough (or Division) as a whole or beyond the borough or Citywide.

In contrast, the grievants called by the Union as witnesses, testified at length as to their division wide responsibilities when detailed to serve as Division Captain.

Among other responsibilities, Division Captains log into the CAD, monitor and assign and reassign subordinate staff, division wide, respond to emergencies and non-emergency incidents. They receive the division rundown on staffing locations and needs from the division Resource Coordination Center. They then spend the bulk of their time in the field to monitor via the radio and CAD in a specially assigned FDNY vehicle, the 911 incidents that are called in, and to respond to and be responsible at any major incidents among them, remaining in contact with the Deputy Chiefs assigned to their tour, whether there is only one, Citywide, as on the 10:00 p.m. to 6:00 a.m. tour, or there are two or three in the division.

None of these responsibilities, division wide, fall to the Station Captain. Neither is the Station Captain assigned the vehicle, specialized radio and communication equipment including cell phone provided the Division Captain.

Regarding MCI incidents, in his division and occasionally, citywide, the Division Captain is initially responsible for responding and assuming control and authority, e.g. to assign, reassign, add staff and additional resources and consult with responders and command officers from other discipline, depending on the nature of the incident. The Station Captain has none of these responsibilities, except in the absence of a Lieutenant assigned to the field (the Conditions Officer), a Station Captain will replace the Lieutenant and ride "Battalion." But even then the Division Captain is in overall charge of the FDs response to the incident. While Lieutenants are responsible for initiating responses to an MCI incident, only the Division Captain can escalate the response at the

scene and take ultimate charge as Medical Branch Director, subject to the decision of the Deputy Chief if at the scene. The Station Captain performs none of these functions or responsibilities.

Division Captains oversee as many as 60 unit ambulances and specialty units available for emergency response. They attend to hospitals, monitor patient care, implement triage decisions, and may divert ambulances if there is a backup and delay in receiving and treating patients in emergency departments. Station Captains exercise none of these duties.

As to discipline, while Station Captains are responsible for handling discipline among Station staff, Division Captains may, and have, recommended disciplinary action to a Station Captain as to subordinate staff, and have adjudicated discipline, at the request of Deputy Chiefs or Commanders on the occasions that the Station Captain is not available.

Regarding response time, a vital matter in administering emergency services to the public, particularly regarding major and catastrophic incidents, Division Captains have as a main goal to seek to ensure adequate resources are available in each Station on his tour to meet response time requirements. The Station Captain is only responsible for such resources in his individual Station. However, on occasion, as testified to by Captain Luby, Division Captains have been held responsible for meeting system wide response time goals in individual situations and have been required to explain failures to meet standards. This is not the case with Station Captains.

As can be seen, the weight of the evidence demonstrates a major disparity in the responsibilities of the Division Captains on the one hand, to insure adequate resources are available to meet emergencies and to oversee the emergencies responsibly, division wide, and the responsibilities on the other hand, of the Station Captains to direct their single stations.

This disparity is sufficient, in my judgment to warrant the conclusion that Division Captains have been assigned duties substantially different from those stated in their job specification.

Aside from the significant and persuasive testimony of the grievants in describing their responsibilities as Division Captains, the record provides a document, a Command Order describing their responsibilities as Division Captains since their assignment in 1999 – when a pilot program was instituted which has continued in all divisions and on an expanded basis to the present – which reinforces the conclusion I have reached.

It is noteworthy that while the City in its brief presses the point that only job specifications such as the SEMSS Level I (Lt.) and Level II (Capt.) document may be reviewed and examined in determining the merits of the grievants' claim that they performed substantially different assignments, and certainly not statements of Tasks and Standards for both EMS Captains and Deputy Chiefs, it has avoided commenting upon or dealing with the Command Order I have referenced.

As I have noted, this Order provides written confirmation for the extensive testimony of the grievants in describing their activities and responsibilities. While not entitled a job specification as such it is clear it represents the duties and responsibilities which the management of the EMS Bureau in the NYFD assigned to the newly created position of Division Captain. Indeed, in setting forth its purpose and scope, the order speaks of Division Captain duties and responsibilities. Its mission is described as ensuring field assignment of a Captain in the Division at all times thereby promoting quality pre-hospital care and improving the performance and effectiveness of EMS resources. As previously noted, Division Captains are to perform their activities as directed through the EMS Division Commander or designee, to review system performance data with the Division Commander and to contact the RCC supervisor and a Division Chief Officer at the start of their tour for a briefing.

It is self evident that the responsibilities described in this order are well beyond the responsibilities of EMS Level II (Station) Captains described in their job specification, to the extent that they constitute employee duties substantially different from those stated in the job specifications.

In reaching this conclusion I reject categorically the claim made by the City in its brief that coordination of Station operations by a Station Captain and supervising EMS Lieutenant encompass the major duties performed by Division Captains.

It is also evident that the duties and responsibilities to which the Division Captains have been assigned conform in many respects to those of Deputy Chiefs.

Both Division Captains Luby and DeSantis testified without contradiction that they perform most of the duties described in the EMS Tasks and Standards for a Deputy Chief. While subordinate EMS personnel also perform a number of the Tasks and Standards of a general nature described, only Division Captains perform them on a division wide basis and at such a responsible level. As testified to by Division Captain Martin Miller, his responsibilities in the areas of chain of command and supervision are on a much different scale, encompassing as they do, the coordination of all Station

operations on his tour, and the placement and assignment of all inferior EMS staff assigned to all of the stations.

Deputy Chief Debra Cali, who also had prior experience as a Division Captain, testified that most of the Deputy Chief Tasks and Standards are performed by Division Captains, even noting that where only a Division Captain is on duty in a particular division, he would be asked to ensure Citywide coverage but would coordinate with the Deputy Chief, in whatever borough then on duty, during the tour. A Division Captain could also be asked to respond to incidents that require inter-agency coordination in accord with Standard 5 of Task #4, depending on the non availability of a Chief Officer on the tour.

As to the criticism expressed in its brief by the City and FD, that reliance cannot be placed by the grievant in their overlapping Tasks and Standards with Deputy Chiefs, in the absence of a written job specification for them, the only comparison, in writing, must be made between the two Tasks and Standards documents. Furthermore, contrary to the City in its brief, Deputy Chiefs spend half their time in the field, aside from their administrative duties performed in their divisional office. It is as to their field assignments and duties that the close correlation in work functions between Deputy Chiefs and Division Captains has been made.

The foregoing conclusions have been reached with the knowledge that, to a certain extent, but probably less than Chief Gombo asserted, Deputy Chiefs do have authority over Division Chiefs, and perform tasks in the Office and in the field related to overall operational issues, monitoring performances, reviewing and approving monthly assignment schedules and attending quarterly meetings with all Division Commanders and Deputies, not performed by Division Captains.

As to the City's argument, regarding the sporadic nature of the assignments encompassed by the Command Order made to Division Captains, I reject it as lacking in merit. Clearly, those Division Captain assignments full time, 20 work days a month, are hardly sporadic or insufficient. The fact that others among the Division Captains are only assigned to their division wide responsibilities twice a week or 8 to 10 work days per month is also not legally significant. The basic question, as posed by Arbitrator Ginsberg in *Local 375, DC 37& DEP, A-9223-02*, in determining the merits of the grievants' claim is whether they "were regularly assigned to perform duties out of their job titles, and were those assigned duties substantially different than those in their job specifications." *Id* at 11. And, as cited by the Union in its brief, Arbitrator Moscovitch in

a 2009 award specifically relied on the language of Article VII, Section 1(C), which defines the grievance in the instant proceeding in terms which are qualitative in nature and does not require any particular percentage of an employees work time, much less 50%, to satisfy an out-of-title claim. *DC 37, Local 768 & NYC H&HC*, cited *supra*.

Just as in *Caruso v. Mayor of the Village of South Glen Falls*, cited *supra*, Division Captains have "... been assigned or compelled to perform the duties of a higher grade, without a concomitant increase in pay, frequently, recurrently, and for long periods of time, unrelated to any temporary emergency requirement" (citing *Rausch v. Pellegrini*). *Id* at 609. And, just as in *Caruso*, 278 A.D. 2d 608 (2000) "... out-of-title work under the New York Civil Service Law has been established based upon a significant increase in supervisory responsibility." *Id* at 4.

It also follows that the Union and the grievants' claim is not rendered moot by the fact that the grievants cannot overcome the strict ranking system of the FDNY and e.g. discipline an employee of the same rank or position.

I also reject the City's argument that the Union's request for a monetary remedy must be denied in the absence of a second job specification which encompasses the alleged out-of-title work duties since both Captains and Deputy Chiefs are employees within the Civil Service Title Supervising Specialist, Level II.

Since the term "Title" is broadly defined and characterized by the nature of the position's duties and responsibilities and not by its classification (see the City Personnel Rules and Regulations, Rule 1, set forth previously herein) there is no requirement that the higher level duties assigned to the Division Captains be encompassed by a particular type of title or position. In arguing otherwise, the City and FD are elevating form over substance. I do not find that the arbitration award in *Local 300, SEIU v. Department of Housing Preservation and Development*, cited *supra*, mandates such a result particularly given the ambiguous language in the award.

The decision cited and relied upon by the Union in its brief, *City of New York v. District Council 37, et al*, NY Slip Op 5671 (1st Dept, 2010) makes clear that monetary relief is available to grievants who establish their assignment to duties substantially different than those in their job specifications but who do not rely on a particular job title for the calculation of their monetary remedy. The Appellate Division further noted that the language of §100(1)(d) of the New York State Civil Service Law support this conclusion by providing for payment as a remedy in an out-of-title case without any restriction on the nature or calculation of the award. (§100(1)(d) set forth in fn. 4, *supra*).

In accordance with the request for remedy made by the Union in its brief, I will require that the grievants be awarded the difference in salary between that of an SEMSS Level II Captain and that of an EMS Deputy Chief for the times they have been assigned as Division Captains, from the filing of the grievance on October 6, 2009, until the date that the grievants are no longer assigned as Division Captains. The grievants who are entitled to this remedy are those who have been assigned as Division Captains twenty times a month, and eight to ten times a month.

Those grievants who have been assigned as Division Captains twice a month shall not be entitled to receive the difference in salary described, as they do not warrant a monetary remedy. However, the City and Fire Department shall cease and desist from assigning these grievants as Division Captains. The record reflects that these grievants can satisfy the certification and recertification requirement of patient care mandated by the New York State Department of Health through other means.

As for the issue of requiring payment of interest on the backpay, the Union has not requested such interest in its brief, although it did include interest in its statement of the remedy sought in its request for arbitration. In view of the remedy I have already required, and in the absence of aggravating factors such as dilatory tactics causing substantial delay, or egregious conduct, I shall not require interest be added to the award I have provided. However, I will reserve the right to award interest in the event of undue delay by the City and Fire Department in complying with the award. I shall retain jurisdiction of this matter pending compliance with the terms of my Award. Accordingly, having duly heard all of the proofs and allegations in this proceeding, I hereby render the following:

A W A R D

1. The grievance alleging that the Employer herein, the City of New York and its Fire Department, have assigned the grievants to duties substantially different from those in their job specification, is hereby sustained.

2. Those grievants who have been assigned as Division Captains twenty times a month, and eight to ten times a month, shall receive the difference in salary between that of an SEMSS Level II Captain and that of an EMS Deputy Chief, commencing with October 6, 2009 until the date that the grievants are no longer assigned as Division Captains. The normal Federal and New York State taxes and withholdings shall be deducted therefrom.

3. As to those grievants who have been assigned as Division Captains twice a month commencing with October 6, 2009, and continuing to current date, the Employer shall cease and desist from assigning those grievants as Division Captains.


4. The undersigned Arbitrator shall retain jurisdiction pending compliance by the Employer with the terms of this Award.



Robert T. Snyder, Arbitrator
Dated: September 30, 2011

STATE OF NEW YORK :
 :SS
COUNTY OF NEW YORK :

On this 30th day of September, 2011 before me personally came and appeared Robert T. Snyder known to me to be the individual described herein and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.



SANDA H. ZIN
Notary Public, State of New York
Qualified in New York County
Reg. No. 01216160313
My Commission Expires 02-05-2015

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