

73 FLRA No. 1

DEPARTMENT OF THE ARMY
 FORT CARSON FIRE AND EMERGENCY SERVICES
 FORT CARSON, COLORADO
 (Activity)

and

AMERICAN FEDERATION
 OF GOVERNMENT EMPLOYEES
 LOCAL 1345
 (Petitioner/Labor Organization)

DE-RP-22-0001

ORDER DENYING
 APPLICATION FOR REVIEW

May 20, 2022

Before the Authority: Ernest DuBester, Chairman, and
 Colleen Duffy Kiko and Susan Tsui Grundmann,
 Members

I. Statement of the Case

In the attached decision and order (decision), Federal Labor Relations Authority (FLRA) Regional Director Timothy Sullivan (the RD) found that two incumbents in fire captain positions are not excluded from the bargaining-unit represented by the Labor Organization (Union). The Activity filed an application for review of the decision (application), arguing that, by concluding that the incumbents are not confidential employees under § 7103(a)(13) of the Federal Service Labor-Management Relations Statute (the Statute), the RD committed a clear and prejudicial error concerning a substantial factual matter, and failed to apply established law. For the reasons set forth below, we deny the Activity's application.

II. Background and RD's Decision

The Union filed a petition seeking to clarify the bargaining-unit status of two fire captain positions in the Activity's Operations Branch and one fire captain position in the Activity's Training Department. Only the two positions in the Operations Branch are at issue in this application, and therefore only the RD's findings as to those two positions will be discussed further. As relevant here, the Activity argued to the RD that the incumbents should be excluded from the bargaining unit as confidential employees under § 7103(a)(13) of the Statute.

The RD stated that an individual is a "confidential" employee, within the meaning of § 7103(a)(13), if: "(1) there is evidence of a confidential working relationship between the employee and the employee's supervisor and (2) the supervisor is significantly involved in labor-management relations."¹ The RD also noted that an individual "who actually formulates or effectuates management policies in the field of labor-management relations is considered a confidential employee."²

Applying these standards, the RD considered whether the incumbents and their supervisors (the assistant chiefs) are significantly involved in labor-management relations.³ The RD found that the assistant chiefs hold management meetings with the incumbents once or twice a month, but that grievances or other labor-related issues are not a regular topic of those meetings. On this point, the RD found that the assistant chiefs "do not regularly assist the [Activity] in responding to grievances or [unfair labor practices (ULPs)], do not participate in term or mid-term collective[-]bargaining agreement negotiations, and do not formulate labor relations policies or strategies" because the fire chief and deputy chief handle those matters "almost exclusively."⁴ The RD also noted that, although the assistant chiefs handle information requests made by the Union, they do not involve the incumbents in responding to such requests unless the incumbents are in possession of the information requested.

Based on these findings, the RD concluded that because the incumbents' supervisors are not significantly involved in labor-management relations, their positions do not satisfy the two-factor test for confidential employees. And the RD found that neither incumbent is "involved in

¹ Decision at 19 (citing *U.S. DOL, Off. of the Solic., Arlington Field Off.*, 37 FLRA 1371, 1371 (1990) (*DOL*)).

² *Id.*

³ *Id.* (citing *Broad. Bd. of Governors*, 64 FLRA 235, 236 (2009) (*Governors*) (Member Beck dissenting); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 55 FLRA 1243, 1246 (2000); *U.S. Dep't. of HUD, Wash., D.C.*, 35 FLRA 1249, 1255-57 (1990)).

⁴ *Id.* at 19-20 (noting that "all three Assistant Chiefs testified that they are *not involved in such matters*, and that the Fire Chief and Deputy Fire Chief are almost exclusively in charge of labor-management relations, including areas such as handling grievances and arbitration, responding to ULP charges, and negotiating contracts with the Union" (emphasis added)).

labor-management relations such as term or midterm contract negotiations, formulating labor-relations strategies, or responding to grievances and [ULP] charges.”⁵

The RD also distinguished the incumbents from other fire captains who were determined to be confidential employees.⁶ Specifically, the RD explained that, unlike the fire captains in *U.S. Department of the Air Force, Air Force Materiel Command (AFMC)*,⁷ the incumbents here meet with the fire chief “perhaps twice per year” instead of “four times per month.”⁸ Moreover, the RD found that the incumbents’ bi-annual meetings with the fire chief do not “concern[] the topic of labor-management relations,” in contrast to the fire captains in *AFMC*, who discussed matters related to labor-management relations and negotiations in their meetings with the fire chief.⁹

Additionally, the RD noted that one of the captains in *AFMC* “worked collaboratively with the union to develop a training plan before it [was] submitted to the fire chief for approval,”¹⁰ but the RD found “no evidence” that the incumbents here “work collaboratively with the Union to develop any policies or workplace initiatives in an analogous fashion.”¹¹

Based on these findings, the RD concluded that the incumbents are not excluded from the bargaining unit as confidential employees under § 7103(a)(13) of the Statute.

The Activity filed its application on March 21, 2022. The Union did not file an opposition to the Activity’s application.

III. Analysis and Conclusions

- A. The application does not demonstrate that the RD committed a clear and prejudicial error concerning a substantial factual matter.

The Activity alleges that the RD committed clear and prejudicial errors concerning substantial factual matters.¹² Specifically, the Activity argues that the RD failed to consider evidence which demonstrates that: (1) the incumbents give input on policies that the Activity is creating and submitting to the Union;¹³ (2) the assistant chiefs provide information in response to information requests from the Union;¹⁴ (3) the assistant chiefs provide input on matters being negotiated and negotiation strategy;¹⁵ (4) the assistant chiefs are generally aware of negotiations with the Union and are “frequently consulted” on such matters;¹⁶ (5) grievances and Union-related issues can be topics of conversation at officers’ meetings that the incumbents attend;¹⁷ (6) the incumbents are often involved in lower-level solutions to grievances;¹⁸ and (7) the incumbents are expected to contribute to the Activity’s position during preparations for collective-bargaining-agreement negotiations.¹⁹

The Authority may grant an application for review if it demonstrates that the RD committed a clear and prejudicial error concerning a substantial factual matter.²⁰ However, mere disagreement with the weight the RD ascribed to certain evidence does not provide a basis for finding that the RD committed clear errors in making factual findings.²¹ And an argument that the RD ignored certain evidence merely challenges the weight the RD ascribes to such evidence.²²

⁵ *Id.* at 5-6, 10.

⁶ *Id.* (citing *U.S. Dep’t of the Air Force, Air Force Materiel Command*, 67 FLRA 117 (2013) (*AFMC*)).

⁷ 67 FLRA 117.

⁸ Decision at 20.

⁹ *Id.* (citing *AFMC*, 67 FLRA at 118).

¹⁰ *Id.* (citing *AFMC*, 67 FLRA at 118).

¹¹ *Id.*

¹² Application at 1.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 1-2.

²⁰ 5 C.F.R. § 2422.31(c)(3)(iii).

²¹ *U.S. Dep’t of the Air Force, Air Force Materiel Command, 66 Air Base Group, Hanscom Air Base, Mass.*, 71 FLRA 81, 84 (2019) (*Hanscom*) (then-Member DuBester concurring) (citing *U.S. Dep’t of the Air Force, Air Force Life Cycle Mgmt. Ctr., Hanscom Air Force Base, Mass.*, 69 FLRA 483, 485 (2016) (*Air Force*); *U.S. Dep’t of VA, Med. Ctr., Hampton, Va.*, 65 FLRA 364, 366 (2010)).

²² *U.S. Dep’t of the Interior, Nat’l Park Serv., Ne. Region*, 69 FLRA 89, 91 (2015) (*Interior*) (citing *U.S. Dep’t of the Air Force, Dover Air Force Base, Del.*, 66 FLRA 916, 921 (2012)).

The record shows that, in finding that the incumbents are not confidential employees, the RD fully considered evidence regarding the first five factual matters.²³ With respect to the sixth matter, the Activity does not specify any particular statement in the record to support its assertion that the RD did not consider that incumbents are involved in lower-level solutions to grievances.²⁴ However, to the extent that the Activity is basing this assertion upon a statement by an assistant chief that one incumbent was “involved [with] a grievance over slippery floors,”²⁵ this testimony fails to establish that the RD committed a clear and prejudicial error concerning a substantial factual matter in this regard.²⁶

Finally, with respect to the seventh issue, apart from the Activity’s bare assertion that it expects the incumbents to contribute to the Activity’s position in preparation for negotiations with the Union, the Activity has failed to cite any evidence in the record or otherwise support its claim that the RD erred in not making this finding.²⁷

Therefore, we find that the Activity has not demonstrated that the RD committed a clear and prejudicial error concerning a substantial factual matter.

- B. The application does not demonstrate that the RD failed to apply established law.

The Activity argues that the RD failed to apply established law by concluding that the incumbents are not confidential employees under 5 U.S.C. § 7103(a)(13).²⁸ In support of this argument, the Activity contends that the

RD’s decision is inconsistent with *U.S. Department of the Navy, Commander, Navy Region Northwest, Fire & Emergency Services, Silverdale, Washington (Navy)*²⁹ and *U.S. Department of the Air Force, Air Force Material Command, 66 Air Base Group, Hanscom Air Base, Massachusetts (Hanscom)*.³⁰

Under § 2422.31(c)(3)(i) of the Authority’s Regulations, the Authority may grant an application for review when an application demonstrates that the RD has failed to apply established law.³¹ Section 7103(a)(13) of the Statute defines a “confidential employee” as “an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations.”³² To make this determination, the Authority considers whether the employee, in the normal performance of duties: (1) obtains advance information of management’s position regarding contract negotiations, the disposition of grievances, and other labor relations matters; (2) attends meetings where labor-management matters are discussed; (3) because of physical proximity to their supervisor, overhears discussions of labor-management matters; or (4) has access to, prepares, or types materials related to labor-management relations, such as bargaining proposals and grievance responses.³³ The Authority will also exclude as confidential any individual who actually formulates or effectuates

²³ Decision at 5, 19 (finding that although assistant chiefs “frequently consult fire captains on policy development since they possess on-the-ground expertise,” the incumbents and assistant chiefs “do not formulate labor[-]relations policies or strategies”); *id.* at 6 (finding that although “[Assistant Chief] Jones responds to information requests made by the Union under § 7114(b)(4) of the Statute; such requests are handled solely by Jones and the other Assistant Chief, Louis Montoya,” and that the Assistant Chiefs “do not involve [the incumbents] in that process unless the [incumbent] is in possession of the requested information”); *id.* (finding that although “[Assistant Chief] Jones may offer input to the Chief and Deputy Chief on labor-management negotiations,” neither he nor Assistant Chief Montoya participate in term or midterm negotiations with the Union); *id.* at 19-20 & n.151 (finding that the fire chief and deputy fire chief are almost exclusively in charge of labor-management relations); *id.* at 6 (finding that “[a]lthough grievances or other Union-related issues may be raised at officers['] meetings, they are not a regular topic of those meetings”).

²⁴ Application at 1.

²⁵ Application, Ex. 2 (Jones Aff.) at 10.

²⁶ *U.S. Dep’t of the Navy, Naval Facilities Eng’g Command, Mid-Atl., Norfolk, Va.*, 70 FLRA 263, 267 (2017)

(citing *U.S. Dep’t of the Army, U.S. Army Corps of Eng’rs Logistics Activity Ctr., Millington, Tenn.*, 69 FLRA 436, 437-38 (2016) (*Army Millington*) (stating that a party’s “citation to contradictory evidence or opposing arguments does not demonstrate that the RD erred concerning a factual matter”); *Governors*, 64 FLRA at 237 (RD did not err by finding that employee’s involvement with grievances did not cause the employee to be “significantly involved in labor-management relations,” where testimony cited by the agency “fail[ed] to establish any advanced knowledge [by the employee] of management’s position in connection with [such] grievances”).

²⁷ *Air Force*, 69 FLRA at 485 (citing *Army & Air Force Exch. Serv., Dall., Tex.*, 55 FLRA 1239, 1241 (2000)) (finding union cited no evidence to support argument and therefore “failed to provide a basis” for the Authority to conclude that the RD committed a clear and prejudicial factual error).

²⁸ Application at 1, 2 (citing 5 C.F.R. § 2422.31).

²⁹ 70 FLRA 231 (2017).

³⁰ 71 FLRA 81.

³¹ 5 C.F.R. § 2422.31(c)(3)(i).

³² 5 U.S.C. § 7103(a)(13); see *Hanscom*, 71 FLRA at 82.

³³ *Hanscom*, 71 FLRA at 82 (citing *Navy*, 70 FLRA at 237; *AFMC*, 67 FLRA at 122; *U.S. DOL, Wash., D.C.*, 59 FLRA 853, 855 (2004)).

management policies in the field of labor-management relations.³⁴

The Activity argues that the RD's decision is inconsistent with *Navy* and *Hanscom* because the incumbents are involved in resolving lower-level grievances and because the Activity expects that the incumbents will contribute to the Activity's position in upcoming negotiations with the Union.³⁵ However, because this argument merely restates the Activity's disagreement with the RD's factual findings, we conclude that it does not demonstrate, based on the facts the RD found, that the RD erred in the application of established law.³⁶

We similarly reject the Activity's argument that the RD erred as a matter of law because the incumbents are "involved in disciplinary actions of subordinate employees who are union members."³⁷ On this point, we note that the Activity does not cite any evidence in the record to support this assertion. Moreover, to the extent that the Activity relies upon the RD's finding that the incumbents may recommend disciplinary actions of subordinate employees,³⁸ the Activity does not cite any precedent that required the RD to find that the incumbents are confidential employees based upon this finding.³⁹

Additionally, the Activity contends that the RD failed to apply established law by finding that the incumbents are not confidential employees because they attend meetings where labor-management matters could

be raised.⁴⁰ However, in the precedent cited by the Activity,⁴¹ the Authority found that the captains were confidential employees, in part, because they attended meetings in which agency representatives divulged confidential information regarding labor-management relations. And in both cases, the captains, by virtue of their attendance at those meetings, obtained advance knowledge about management's position concerning grievances, contract negotiations, and other labor-relations matters.⁴²

In its application, the Activity does not specify or further describe the meetings upon which it relies in support of its argument. However, to the extent that the Activity is referencing the biannual meetings the incumbents attend with the fire chief, the RD found – and the Activity does not dispute – that these meetings do not address the issue of labor-management relations.⁴³ And if the Activity is referencing meetings the incumbents attend with the assistant chiefs, the RD found, and the Activity does not dispute, that labor-management relations are not a regular topic of those meetings.⁴⁴ Moreover, unlike the captains in *Navy* and *Hanscom*, the RD found that the assistant chiefs conducting these meetings are not significantly involved in labor-management relations.⁴⁵ Based on these distinctions, we reject the Activity's

³⁴ *Navy*, 70 FLRA at 235 (citing *DOL*, 37 FLRA at 1377).

³⁵ Application at 2.

³⁶ *Army Millington*, 69 FLRA at 439 ("While citing Authority precedent in arguing that the RD failed to apply established law, these arguments instead challenge the factual findings of the RD, more so than the application of established law, and they do so by selectively presenting testimony from the record and advancing unsupported assertions about the incumbents' involvement in negotiations for a collective bargaining agreement. Challenging the weight, importance, or significance ascribed by the RD to various factual matters in the record does not demonstrate that the RD failed to apply established law." (citing *Interior*, 69 FLRA at 97)); *see also, e.g., U.S. DHS, CBP*, 68 FLRA 13, 15 (2014) ("As we have rejected the [a]gency's factual challenge, we also reject the [a]gency's claim that the RD reached an incorrect conclusion based on those factual errors.").

³⁷ Application at 2.

³⁸ Decision at 5.

³⁹ *Navy*, 70 FLRA at 232 & n.20 (concluding that there was no basis to find that the RD failed to apply established law where "the challenging party did not identify any Authority precedent with which the decision allegedly conflicted" (citing *U.S. Dep't of the Air Force, Joint Base Langley-Eustis, Va.*, 66 FLRA 752, 756 (2012))).

⁴⁰ Application at 2.

⁴¹ *Id.* (citing *Navy*, 70 FLRA 231; *Hanscom*, 71 FLRA 81).

⁴² *Navy*, 70 FLRA at 231 (noting that the RD found that the captains attended meetings where the chief had (1) discussed

preparation for an upcoming arbitration; (2) discussed management's stance on grievances; (3) revealed confidential upcoming changes in working conditions; and (4) admitted to those in attendance that the Agency may have committed a ULP); *Hanscom*, 71 FLRA at 81 (noting that the RD found that the captains attended management meetings where agency representatives discussed grievances, disciplinary actions, contract negotiations, job classifications, and other confidential labor-management matters).

⁴³ Decision at 20; *id.* n.156 (quoting testimony from an assistant chief that "we don't discuss labor relations at these meetings").

⁴⁴ *Id.* at 6, 10, 25.

⁴⁵ *Id.* at 19-20 (citing *Jones Aff.* at 8:6-8 ("The only people negotiating for us with the Union are the fire chief and deputy chief."); *id.* at 9:13-15 ("I have not been involved in any ULPs, [Equal Employment Opportunity Commission, or Merit Systems Protection Board] cases. I haven't participated in contract negotiations either."); *Montoya Aff.* at 6:22-24 ("I am not involved in the grievance process. I may be aware that one was filed but generally unless it's specifically against me where I have to respond, then I won't be involved. I haven't been involved in contract negotiations with the Union, nor do I formulate labor relations policies."); *Assistant Chief Hosack Aff.* at 6:20-22 ("I am not directly involved in contract negotiations with the Union, unless I'm pulled in for a very specific piece of it that I know a lot about. I am not regularly involved in formulating labor relations policies—that's mostly the fire chief and deputy chief—but I can be if requested.")).

argument that the RD misapplied Authority precedent in this regard.

Accordingly, we find that the Activity has not demonstrated that the RD failed to apply established law.

IV. Order

We deny the Activity's application for review.

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS
AUTHORITY
DENVER REGION**

Department of the Army
Fort Carson Fire and Emergency Services
Fort Carson, Colorado

-Activity

and

Case No. DE-RP-22-0001

American Federation of Government Employees
Local 1345

-Petitioner/Labor Organization

DECISION AND ORDER

I. STATEMENT OF THE CASE

A petition was filed by the American Federation of Government Employees, Local 1345 (Union), pursuant to Section 2422.1 of the Rules and Regulations of the Federal Labor Relations Authority (Authority). The purpose of the petition is to clarify the status of three Supervisory Firefighter positions, GS-0081-09, of the Department of the Army, Fort Carson Fire and Emergency Services, Fort Carson, Colorado (Agency). Two of these positions are currently encumbered by Mark Gass and Thomas Devlin. The third was encumbered by James McAllister at the time this petition was filed, but he has since been reassigned to a different duty station. The Agency asserts that the positions should be excluded from the unit pursuant to Sections 7112(b)(1) and (2) of the Federal Service Labor-Management Relations Statute (Statute) because they are both management/supervisory positions and confidential positions.

Pursuant to the provisions of Section 7105(e)(1) of the Statute, the Authority has delegated its powers in connection with the subject case to the undersigned Regional Director. The Region conducted an investigation and the parties provided information and their respective positions. The parties were also provided an opportunity to submit a brief after review of the evidence, and did so.

Upon the entire record in the subject case, I find and conclude as follows:

II. FINDINGS OF FACT

The Agency is part of Fort Carson's Directorate of Emergency Services, which provides law enforcement, fire, and emergency services for Fort Carson. Its mission is to "provide professional and reliable emergency services to the community we serve."¹

The Union is the exclusive representative for the following unit, certified on February 7, 2004 in Case No. DE-RP-04-0005:

Group No. 1

INCLUDED: All Wage Grade and General Schedule employees including Theater Specialist, GS-9, of Headquarters, Fort Carson; Medical Department Activity, Fort Carson; and U.S. Army Dental Activity, Fort Carson; Fort Carson, Colorado.

EXCLUDED: All professional employees, guards, management officials, supervisors and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).

Group No. 2

INCLUDED: All Wage Grade and General Schedule employees employed by the U.S. Army Installation Management Agency, Fort Carson, Colorado.

EXCLUDED: All professional employees, guards, management officials, supervisors and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).

Group No. 3

INCLUDED: All non-professional employees employed by the U.S. Army Contracting Agency, Fort Carson, Colorado.

¹ Fort Carson Directorate of Emergency Services, "Mission," (online) available at

<https://www.carson.army.mil/organizations/des.html> (accessed Jan. 28, 2022).

EXCLUDED: All professional employees, management officials, supervisors and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).

Two of the positions at issue here—those encumbered by Gass and formerly incumbered by McAllister—are in the Agency’s Operations Branch, and the third—the one encumbered by Devlin—is in the Agency’s Training Branch. The Operations Branch is comprised of several fire stations, each of which is staffed by one or two Supervisory Firefighters (commonly referred to as “fire captains” or “captains”) who supervise several civilian firefighters and firefighter paramedics. Although each fire station in the Operations Branch specializes in one type of emergency response (e.g., aircraft fire and rescue, wildland, hazmat, etc.), they do not respond exclusively to those types of emergencies. Each station responds to any and all emergency calls and performs a variety of emergency services, including firefighting, medical emergencies, automobile accidents, and rescue operations.

Because each of these three positions have unique attributes, they are addressed individually below.

A. The Position Encumbered by Mark Gass

Gass is one of two captains at Station 33, which is the airfield station and specializes in aircraft fire and rescue (ARFF). Gass’s first day as fire captain was June 6, 2021, meaning he has been in this role for approximately eight months. He supervises approximately six civilian firefighters. His direct supervisor is Assistant Chief Ryan Jones.

Gass and his subordinates work three 48-hour shifts per pay period. These shifts are followed by 72 hours off, except for one off-period of 48 hours each pay period. During the 48-hour shifts they live and work together at the fire station, including engaging in non-duty activities like eating meals, watching television, and sleeping. Although the 48-hour shifts begin at 8 a.m., Gass arrives to Station 33 before then to get dressed, have a “pass-off” with the captain he is relieving (a “pass-off” is a discussion about what happened during the previous 48 hours, including any problems, issues, or station needs

that Gass should know about in advance of his shift), and to put the day’s schedule on a bulletin board.²

A typical day for firefighters at Station 33 might include a morning meeting; checking trucks and equipment to ensure everything is in working order for responding to emergencies; attending training courses on various types of emergency responses such as confined space training, wildland fire training, CPR training, and numerous others;³ eating lunch; practice exercises and drills such as unrolling fire hoses and putting up ladders; and one hour of mandatory physical fitness.⁴ The active portion of the day concludes around 5 p.m., at which point Gass and his subordinates eat dinner together and are then on “downtime” until they go to sleep.⁵ However, Gass spends a portion of each evening after 5 p.m. performing tasks unique to his role as fire captain.⁶

Their days are punctuated by responding to various types of emergency calls, including fires, traffic accidents, medical calls, gas leaks, commercial fire alarms, and medical incidents.⁷ A typical month might include approximately 15 emergency responses averaging around 20 minutes each but varying in length depending on the emergency.⁸ Although firefighters are on downtime starting at approximately 5 p.m., they may be required to respond to emergencies 24 hours a day if necessary.

Gass assigns and directs work each day for all of his subordinates. He will tell employees what they are assigned to do on any given day, including which training courses they will attend, which fire apparatus they are assigned to for the day, whether they’ll be driving the engine or fulfilling another role on the apparatus, and what chores they are expected to do around the fire station.⁹ When Station 33 responds to emergency calls, Gass acts as the incident commander, meaning that he delegates tasks and directs his subordinates on how to handle the emergency.¹⁰ If the situation requires a multiple-company response—meaning that Gass’s crew is not the only fire crew responding to the situation—Gass’s supervisor, Assistant Chief Jones, might then assume the role of incident commander.¹¹

Gass spends significant portions of each day performing similar duties to his subordinates. He often attends the same training courses as them, performs chores alongside them at the fire station, checks equipment and trucks, participates in practice exercises and drills, and joins them during their hour of physical fitness.¹² He

² Mark Gass Aff. at 1:1-5.

³ See Ex. 1, Fort Carson FES Annual Training Plan 2022 for a complete list of training courses.

⁴ Ryan Kindreich Affidavit at 1:7-12.

⁵ *Id.* at 1:11.

⁶ Gass Aff. at 2:17-19.

⁷ Jones Affidavit at 2:6; Gass Affidavit at 4:15-17.

⁸ Gass Affidavit at 4:15-17.

⁹ Charles Surratt Aff. at 3:4-9; Jones Aff. at 3:18-19.

¹⁰ Kindreich Aff. at 2:22-3:7.

¹¹ Jones Aff. at 2:14-16.

¹² Gass Aff. at 3:21-4:5; Surratt Aff. at 2:9-13; Kindreich Aff. at 2:17-21; Jones Aff. at 4:20-22.

maintains a supervisory posture while doing so—for example, if he sees someone inspecting equipment improperly, he might intervene and provide direction or guidance.¹³

Gass also spends significant portions of each day performing dissimilar duties that are unique to his role as a fire captain. In addition to showing up early to each shift to meet the outgoing captain for a “pass-off” and print out the day’s schedule, he arranges for his subordinates to attend training courses upon their request, and uploads a record of each employee’s training attendance into an Agency reporting system that tracks the number of training hours for each employee and types of training they have attended.¹⁴ He also develops and teaches new training courses, and updates training courses he has taught in the past.¹⁵ He is required to write a report following all emergency calls to which his company responds.¹⁶ He compiles a schedule for the following day, and he spends time responding to requests or inquiries from Assistant Chief Jones or higher-up supervisors such as the Deputy Chief.¹⁷ He is responsible for making budget requests for his company, which requires keeping a list of outstanding equipment and quality-of-life needs that arise during a fiscal year.¹⁸ He is one of four captains in charge of the ARFF firefighting program, which necessitates being a subject matter expert, procuring and maintaining ARFF equipment, and arranging 72 hours of ARFF training per year, including coordinating with other Agency components such as military units which have certain types of aircraft that are used for ARFF training.¹⁹

Each day after dinner Gass spends two or more hours at his desk away from his subordinates engaged in such tasks.²⁰

Gass also does his subordinates’ performance appraisals, which includes a mid-year and end-of-year evaluation. Gass evaluated six employees in October 2021, which entailed a 30-minute meeting with each employee as well as several hours of writing the evaluations after regular duty hours.²¹ Gass does not have the authority to issue performance awards, but he recommends his employees for awards, including submitting recommendations to Assistant Chief Jones that

certain employees receive cash awards, as well as submitting nominations for employee of the quarter.²²

Gass does not have authority to finalize a disciplinary action such as a suspension or removal against his subordinates but he can effectively recommend such action. Assistant Chief Jones authorizes Gass and the other captains he oversees to recommend discipline of any kind, up to and including removal, and one of Jones’ captains has done so in the past.²³

Gass is not authorized to approve new hires, but he and all the other fire captains are expected to participate in the hiring process by screening resumes and sitting on hiring boards.²⁴ Although Gass has not personally done so yet, the opportunity has not arisen in the eight months since he became a fire captain.

Although higher-up management officials often solicit the input of Gass and other fire captains when formulating department policies,²⁵ Gass has had little direct involvement in formulating policies during his eight-month tenure as a captain.²⁶ However, the Assistant Chiefs frequently consult fire captains on policy development since they possess on-the-ground expertise that informs new department policies and changes to existing policies.²⁷ Fire captains also frequently draft standard operating procedures (SOPs) and standard operating guidelines (SOGs) for various situations that arise in the course of emergency management. For example, Gass recently encountered a situation during an ARFF emergency response for which he believed there was no existing SOP and began drafting one following the incident.²⁸

Gass regularly attends management meetings. The Assistant Chief holds an “officers meeting” with all of his fire captains once or twice a month to relay expectations for them and their companies, discuss any new policies or directives that need to be implemented—for example, in a recent meeting they discussed new COVID-19 mitigation policies—and hear any issues the captains wish to raise.²⁹ Other topics raised at these meetings include new hires, personnel actions, and training and station assignments.³⁰ Gass and all the other captains also attend a bi-annual all-officers meeting with

¹³ Surratt at 2:10-12.

¹⁴ Gass Aff. at 2:2-18.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 2:19-3:11.

²⁰ *Id.* at 2:18.

²¹ *Id.* at 4:11-14.

²² Gass Questionnaire Responses, Oct. 7, 2021 (Gass Questionnaire I) at 10; Jones Affidavit at 6:12-16.

²³ Jones Aff. at 5:3.

²⁴ Jones Aff. at 5:5-10; Louis Montoya Aff. at 5:2.

²⁵ Jones Aff. at 7:10-8:5.

²⁶ Gass Aff. at 3:12-20.

²⁷ Jones Aff. at 7:10-17; Montoya Aff. at 6:1-13.

²⁸ Kindreich Aff. at 3:19-4:6.

²⁹ Jones Aff. at 3:6-12, 7:4-6.

³⁰ Gass Questionnaire Responses, Jan. 26, 2022 (Gass Questionnaire II) at 1.

the Fire Chief, Deputy Fire Chief, and all the Assistant Chiefs in which upper management discusses Agency-wide issues such as policy and staffing.³¹

Gass is not involved in labor-management relations such as term or midterm contract negotiations, formulating labor-relations strategies, or responding to grievances and unfair labor practice (ULP) charges.³² Although grievances or other Union-related issues may be raised at officers meetings, they are not a regular topic of those meetings.³³

Gass has a working relationship with Assistant Chief Jones that includes discussing personnel issues about Gass's subordinates and potential changes to conditions of employment. For example, Gass receives guidance from Jones on how to accommodate employees who are experiencing personal issues, including possible accommodations such as the Family Medical Leave Act or reassignment to a different shift.³⁴ Gass and Jones also discuss personnel actions, including disciplinary issues within Gass's company and assignments or reassignments based on each employee's individual strengths and weaknesses.³⁵

Assistant Chief Jones does not assist management in responding to grievances, ULPs, equal employment opportunity (EEO) complaints, or Merit Systems Protection Board (MSPB) cases.³⁶ He does not participate in term or midterm contract negotiations with the Union, which is handled almost entirely by the Fire Chief and Deputy Fire Chief.³⁷ Jones may offer input to the Chief and Deputy Chief on labor-management negotiations but he does not sit at the negotiating table.³⁸ Jones responds to information requests made by the Union under § 7114(b)(4) of the Statute; such requests are handled solely by Jones and the other Assistant Chief, Louis Montoya.³⁹ The Assistant Chiefs do not involve Gass or any other fire captains in that process unless the captain is in possession of the requested information.⁴⁰

B. The Position Formerly Encumbered by James McAllister

McAllister was one of two captains at Station 34, which specializes in wildland fires. His first day in this position was March 1, 2020, meaning he has been a fire captain for approximately 23 months. He supervised four civilian firefighters at Station 34. His direct

supervisor is Assistant Chief Louis Montoya. At the beginning of 2022 he was reassigned to Station 32, which specializes in hazardous materials (hazmat).

McAllister's position is similar in many ways to Gass's. Like Gass, McAllister works 48-hour shifts followed by 72 hours off, except for one 48-hour off-period every two weeks. McAllister begins his shifts by checking his company's schedule to see if there are any scheduling conflicts that need immediate resolution. For example, on a recent day McAllister noticed that one firefighter was scheduled for a physical exam and another was scheduled to attend a leadership academy, leaving his company with only two firefighters for the day, so McAllister arranged for another apparatus to cover for his company while they were short-staffed.⁴¹ McAllister typically handles these scheduling issues prior to the start of the shift.⁴² He also has a pass-off with the outgoing captain before his shift begins, and often spends up to one hour before active duty begins checking and responding to emails from higher-up management officials or other fire captains.⁴³

A typical day for firefighters at Station 34 is similar to the typical day at Station 33 described above. This includes a morning meeting in which McAllister goes over the schedule and assigns work for the day, checking trucks and equipment for emergency response readiness, training classes and exercises, lunch around noon, an hour of physical fitness in the afternoon, and chores around the fire station.⁴⁴ Active duty typically ends around 5 p.m., at which point the company eats dinner and is on downtime until they go to sleep (although they are required to respond to emergency calls during downtime if necessary).⁴⁵ Like Gass, McAllister spends additional time each evening completing tasks unique to his position as fire captain.

The above-described typical days are punctuated by responding to emergency calls. Although Station 34's specialty is wildland fires, they respond to the same sorts of general emergencies described above (structure fires, commercial fire alarms, medical calls, traffic accidents, etc.).

Like Gass, McAllister assigns and directs work each day for all of his subordinates. He will tell employees what they are assigned to do on any given day, including which training courses are scheduled, which truck they are

³¹ Jones Aff. at 7:6-9.

³² Jones Aff. at 8:6-8; Gass Questionnaire II at 2.

³³ Gass Questionnaire II at 1.

³⁴ Jones Aff. at 3:2-6.

³⁵ *Id.* at 8:16-9:2.

³⁶ *Id.* at 9:3-13.

³⁷ *Id.* at 8:7-8, 9:14-15.

³⁸ *Id.* at 9:15-16.

³⁹ *Id.* at 9:3-11.

⁴⁰ *Id.*

⁴¹ James McAllister Aff. at 1:7-10.

⁴² *Id.* at 1:12.

⁴³ *Id.* at 2:1, 3:20-22.

⁴⁴ John Lidington Aff. at 1:8-2:1, 2:10-12; Christopher Braun Aff. at 3:2-4.

⁴⁵ Braun Aff. at 1:7-11.

assigned to for the day, whether they'll be driving the engine or fulfilling another role on the truck, and what chores they are expected to do around the fire station.⁴⁶ McAllister can also authorize firefighters' requests to swap shifts with each other.⁴⁷ When Station 34 responds to emergency calls, McAllister is the incident commander and is responsible for delegating tasks and directing his subordinates on how to address each situation.⁴⁸ Depending on the nature of the emergency, McAllister might be in command for the entire response or he might pass it off to Assistant Chief Montoya.⁴⁹

McAllister spends significant portions of each day performing similar duties to his subordinates. Much like Gass at Station 33, he often attends the same training courses as them, performs chores alongside them at the fire station, checks equipment and trucks, participates in practice exercises and drills, and joins them during their hour of physical fitness.⁵⁰ He may maintain a supervisory posture while doing so, including correcting firefighters who are performing equipment checks incorrectly or giving additional input during trainings to supplement what is being taught.⁵¹

McAllister also spends significant portions of each day performing dissimilar duties that are unique to his role as a fire captain. In addition to the pre-shift activities described above (reviewing the schedule, doing a pass-off with the outgoing captain, responding to emails), these duties include: submitting maintenance requests for his station and arranging maintenance repairs for his company's fire trucks;⁵² assisting employees who are being reassigned to other stations, including facilitating such reassignments with the Assistant Chief;⁵³ ensuring employees submit their time cards, and coordinating leave requests with the Assistant Chief;⁵⁴ participating in disciplinary investigations of his subordinates;⁵⁵ tracking equipment and quality-of-life needs for his company and including them in budget requests at the start of each fiscal year;⁵⁶ assisting employees with career development, including discussing their career goals and arranging relevant training courses, preparing certain employees to fill in as acting captain when McAllister is on leave, and helping employees draft

resumes and prepare for job interviews;⁵⁷ ensuring that minimal staffing requirements are met and coordinating with other captains to swap personnel for when necessary;⁵⁸ overseeing quality of life for his station, including building repairs and obtaining items like TVs, coffee makers, and furniture;⁵⁹ maintaining an equipment inventory and tracking equipment that is loaned out throughout the day;⁶⁰ ensuring that employees undergo required physical exams, collecting the resulting paperwork, and submitting it to the Fire Chief;⁶¹ collecting and submitting credit card receipts at the end of each month;⁶² maintaining a narcotics log;⁶³ ensuring compliance with COVID-19 vaccine requirements, including collecting proof of vaccination and/or medical and religious exemptions and submitting them to upper management;⁶⁴ and completing and distributing a daily fire weather report to the entire department.⁶⁵

McAllister also spends a significant amount of time arranging training for his subordinates in order to ensure that department-wide training requirements are fulfilled. This might involve arranging specific types of trainings for certain employees—for example, scheduling an EMS course for an employee who is enrolled in EMT school—or coordinating with the Training Department to schedule mandatory trainings for all employees.⁶⁶ McAllister is also in charge of uploading records into a tracking software of all training undergone by his employees, including the types of courses and number of hours spent on each discipline.⁶⁷ McAllister also keeps track of his employees' experience as it accumulates by documenting the number of hours spent responding to certain types of incidents (wildland fires, structure fires, etc.).⁶⁸

The Station 34 captains are also in charge of the Agency's wildland fire program. While still assigned to Station 34, McAllister was in charge (along with his co-captain at Station 34) of wildland training and certification, wildland equipment, and wildland logistics such as arranging and planning prescribed burns.⁶⁹ This included fielding and responding to outside requests for help from other agencies when responding to major wildfires, such as the Cameron Peak

⁴⁶ Lidington Aff. at 2:10-12; David Robbins Aff. at 3:1-4; Braun Aff. at 3:2-4; Montoya Aff. at 2:15-22.

⁴⁷ Montoya Aff. at 3:8-10.

⁴⁸ McAllister Aff. at 3:16-19; Lidington Aff. at 2:19-22; Braun Aff. at 3:14-17.

⁴⁹ McAllister Aff. at 2:18-19.

⁵⁰ *Id.* at 12:14-21; Lidington Aff. at 2:13-18; Montoya Aff. at 4:9-19; Robbins Aff. at 1:12-2:1.

⁵¹ Braun Aff. at 2:17-22; McAllister Aff. at 12:18-19.

⁵² McAllister Aff. at 2:2-7, 3:14-16, 4:15, 8:22-9:1.

⁵³ *Id.* at 3:9-10

⁵⁴ *Id.* at 2:11-15, 6:20-22.

⁵⁵ *Id.* at 3:6-12, 7:8-10.

⁵⁶ *Id.* at 4:4-8.

⁵⁷ *Id.* at 5:14-16, 7:20-21, 8:12-15.

⁵⁸ *Id.* at 7:11-13.

⁵⁹ *Id.* at 4:6-7, 7:13-14.

⁶⁰ *Id.* at 7:5-7.

⁶¹ *Id.* at 8:7-11.

⁶² *Id.* at 8:12.

⁶³ *Id.* at 8:21-22.

⁶⁴ *Id.* at 9:1-4.

⁶⁵ McAllister Questionnaire, Oct. 7, 2021 (McAllister Questionnaire I), at 4.

⁶⁶ McAllister Aff. at 4:12-14, 4:19-5:5.

⁶⁷ *Id.* at 9:9-10; Braun Aff. at 9:3-15.

⁶⁸ Braun Aff. at 9:7-12.

⁶⁹ Montoya Aff. at 3:12-20; McAllister Aff. at 5:8-13.

fire in Northern Colorado in 2020.⁷⁰ During such deployments, McAllister handled logistics for his crew such as sleeping arrangements, meals, and documenting injuries to his staff.⁷¹

Like Gass, McAllister conducts all of his subordinates' performance appraisals. He is authorized to handle low-level disciplinary actions on his own, and he can effectively recommend more severe discipline such as suspension or removal to upper management.⁷² He is not the deciding official for hiring but he has participated in screening resumes and interview reviews for new hires. He recommends employees for awards, and had done so five times as of October 2021.⁷³

McAllister has been involved to some degree in the development of certain Agency policies and implementation of existing policies. McAllister drafted the Agency's Peer Support Team Confidentiality Policy, Critical Incident Stress Guidelines, Personal Protective Equipment Program, and the Peer Support Team Confidentiality SOP and SOG.⁷⁴ He is co-authoring Incident Command Worksheets for each discipline (wildland, hazmat, ARFF, etc.), which set forth checklists for responding to different types of emergencies, and participated in the development of the Agency's Structural Firefighting Tactical Operations (TACOPS) Manual.⁷⁵ He represents the Agency at the U.S. Army Installation Management Command (IMCOM) Wildland Fire Working Group, which is comprised of representatives from numerous DOD firefighting facilities nationwide and was established to provide a "venue for information exchange and a broad, engaged forum to guide Army strategy related to wildland fire mission, policy, and resourcing."⁷⁶

Any policies or other Agency guidelines drafted by McAllister are reviewed and approved by Assistant Chief Montoya, with input from the Deputy Chief as well.⁷⁷

Also like Gass, McAllister regularly attends officers meetings held between Montoya and the captains he supervises. Montoya holds these meetings every other Saturday to communicate expectations and discuss any

issues raised by the captains. Montoya does not discuss labor relations or Union-related issues at these meetings.⁷⁸

McAllister is not involved in labor-management relations such as term or midterm contract negotiations, formulating labor-relations strategies, or responding to grievances and unfair labor practice (ULP) charges.⁷⁹

McAllister has a working relationship with Assistant Chief Montoya that includes discussing personnel issues about McAllister's subordinates and potential changes to conditions of employment.⁸⁰ For example, a subordinate of McAllister's was recently disciplined and McAllister coordinated the disciplinary process with Montoya, including recommending corrective actions to Montoya.⁸¹

Like Assistant Chief Jones, Assistant Chief Montoya does not assist management in responding to grievances, ULPs, equal employment opportunity (EEO) complaints, or Merit Systems Protection Board (MSPB) cases.⁸² He does not participate in term or midterm contract negotiations with the Union, which is handled almost entirely by the Fire Chief and Deputy Fire Chief.⁸³

C. The Position Encumbered by Thomas Devlin

Devlin is the only fire captain in the Training Branch. Devlin has been a fire captain since September 2009 and he served in the Operations Branch until he was assigned to the Training Branch approximately 3 years ago. The Training Branch operates the Agency's training program, including running the four-week Training Academy for new hires, arranging training courses for unique emergency situations such as confined space and vehicle rescues, and assisting firefighters with obtaining training certifications, amongst other things.

Military firefighters are often assigned to the Training Branch on a rotating basis, and Devlin is their direct supervisor while stationed there. The Agency would sometimes assign civilian firefighters to the training branch if they are on light duty for medical reasons—for example, a firefighter named Erik Holt was assigned to the

⁷⁰ McAllister Aff. at 5:20-6:6.

⁷¹ *Id.*

⁷² Montoya Aff. at 4:19-5:1.

⁷³ McAllister Questionnaire I at 11.

⁷⁴ McAllister Questionnaire Responses, Jan. 27, 2022 (McAllister Questionnaire II), at 4-5; Ex. 3, Ft. Carson Fire and Emergency Serv. (FCFES) Peer Support Team Confidentiality Policy; Ex. 4, FCFES Critical Incident Stress Guidelines; Ex. 5, FCFES PPE Program; Ex. 7, FCFES Peer Support Team Confidentiality SOP, Sept. 1, 2017; Ex. 8, FCFES Peer Support Team SOG.

⁷⁵ McAllister Questionnaire 2 at 4-5; Ex. 9, Incident Command Worksheets; Ex. 10; FCFES TACOPS Manual.

⁷⁶ McAllister Questionnaire 2 at 5; Ex. 11, IMCOM Army Wildland Fire Working Group Meeting PowerPoint, Oct. 18, 2021.

⁷⁷ Montoya Aff. at 6:12-13.

⁷⁸ *Id.* at 5:22.

⁷⁹ *Id.* at 6:14-16; McAllister Questionnaire 2 at 2-3.

⁸⁰ Montoya Aff. at 6:17-21.

⁸¹ McAllister Aff. at 3:6-12.

⁸² Montoya Aff. at 6:22-24.

⁸³ *Id.*

Training Branch from October 2020 until January 2022 while on light duty following an injury.⁸⁴ However, Devlin does not have any permanent civilian subordinates.⁸⁵ Devlin's immediate supervisor is Assistant Chief Joshua Hosack.

Devlin frequently fills in as an acting captain at one of the Operations Branch's fire stations when necessary, sometimes for several days in one month.⁸⁶ During such details he performs the same or similar functions as Gass, McAllister, and the other fire captains.

Devlin has the authority to effectively recommend discipline for employees and nominate them for performance awards.⁸⁷ He is also involved in the hiring process, including grading resumes and sitting on interview boards.⁸⁸

Devlin is involved to some degree in the creation and development of Agency policies, as well as the implementation of already-existing policies. For example, he assumed a leading role in revising performance appraisal standards—called DOD Performance Management and Appraisal Program, or DPMAP—for firefighters and paramedics.⁸⁹ This included soliciting input from all of the fire captains about potential changes to the existing DPMAPs, incorporating their input into revised DPMAP documents, and submitting and explaining the proposed revisions to the Deputy Fire Chief for approval.⁹⁰ Devlin was particularly well-suited for this role because of his extensive experience as a fire captain and because he runs the Agency's training program, which provides him with a strong sense of what tasks and skills the Fire Department's employees must be able to perform in order to succeed at their jobs.⁹¹

Devlin also drafted the following documents: The Agency's Firefighter Skill Evaluation Listing, which

“outlines the necessary job functions” for GS-04 through GS-07 firefighters and includes evaluation scoresheets for several specific tasks such as ladder deployment, hose deployment, and forceable entry;⁹² the Agency's Physical Agility Examination Guide;⁹³ and all SOGs for Driver/Operators, including the Apparatus Requirements and Preventative Maintenance SOG, the Compliance and Training SOG, and the Off-Road Driving, General Safety, and Traffic Hazards SOG.⁹⁴ He also created the education progression chart for the Agency's firefighter education program, which sets forth the training benchmarks firefighters must achieve to advance to the next GS level.⁹⁵

Devlin and Assistant Chief Hosack jointly revised the contract for the Agency's Pathways Program, which offers internship and employment opportunities for current students and recent graduates, including creating DPMAP elements to reflect the revised contract.⁹⁶ Devlin also works closely with Hosack to develop the Agency's annual training plan, which sets forth annual training requirements for each category of employee and sets forth the eligibility benchmarks for advancing to the next GS Level.⁹⁷ He also participated in the development of the Agency's TACOPS Manual.⁹⁸

Much like Gass and McAllister, Devlin regularly attends management meetings including officers meetings that are held 1-2 times per month. Devlin also fills in for Assistant Chief Hosack as Acting Assistant Chief whenever Hosack is out of the office. Devlin does this far more frequently than Gass, McAllister, and the other fire captains in the Operations Branch because Devlin is the only captain in the Training Branch, meaning that there is no one else to fill in for Hosack when Hosack is absent.⁹⁹ While serving as Acting Assistant Chief, Devlin attends meetings with upper management officials such as the Fire Chief and Deputy Fire Chief.¹⁰⁰ Devlin serves as Acting Assistant Chief approximately 12 times per year.¹⁰¹

⁸⁴ See Generally Erik Holt Affidavit.

⁸⁵ Joshua Hosack Aff. at 7:9-10; Email from Shawn MacDonald to Adam Johnson, Jan. 13, 2022 (“Mr. Devlin does not currently supervise any employees right now.”).

⁸⁶ Hosack Aff. at 2:20-3:2; Holt Aff. at 2:14-15, 3:18-19.

⁸⁷ Hosack Aff. at 4:12-20; Thomas Devlin Questionnaire Responses, Oct. 7, 2021 (Devlin Questionnaire I) at 7, 9.

⁸⁸ Hosack Aff. at 4:21-5:3; Devlin Questionnaire I at 3-4.

⁸⁹ Hosack Aff. at 3:4-15; Devlin Questionnaire Responses, Jan. 26, 2022 (Devlin Questionnaire II) at 3-4.

⁹⁰ Ex. 12, Emails between Thomas Devlin and Deputy Fire Chief Van Dyke, Assistant Chiefs, and Supervisory Firefighters, March 12-25, 2020.

⁹¹ Hosack Aff. at 3:12-15.

⁹² Devlin Questionnaire II at 3-4; Ex. 13, FCFES Firefighter Skill Evaluation Listing; Ex. 14, Email from Thomas Devlin to Assistant Chiefs Jones, Montoya, and Hosack, “Firefighter skill listing with times.pdf,” April 22, 2021.

⁹³ Devlin Questionnaire II at 3-4; Ex. 15, Ft. Carson Fire & Emergency Services Physical Agility Examination Guide.

⁹⁴ Devlin Questionnaire II at 3-4; Ex. 16, FCFES Driver/Operator: Apparatus Requirements and Preventative Maintenance SOG, Apr. 1, 2018; Ex. 17, FCFES Driver/Operator: Compliance and Training SOG, Apr. 1, 2018; Ex. 18, FCFES Driver/Operator: Off-Road Driving, General Safety, and Traffic Hazards SOG, Apr. 1, 2018.

⁹⁵ Devlin Questionnaire II at 3-4; Ex. 19, Career Progression Chart.

⁹⁶ Ex. 20, Emails between Thomas Devlin, Assistant Chiefs, and Deputy Fire Chief, “Pathways elements and contract,” Dec. 18, 2019.

⁹⁷ Ex. 21, Email from Thomas Devlin to Adam Johnson, Jan. 26, 2022, 2:59 p.m.; Ex. 22, 2022 FCFES Annual Training Plan.

⁹⁸ Devlin Questionnaire II at 3-4.

⁹⁹ Ex. 23, Agency Org. Chart.

¹⁰⁰ Jones Aff. at 5:20-22; Devlin Questionnaire II at 2.

¹⁰¹ Hosack Aff. at 2:16-19.

Devlin is not involved in labor-management relations such as term or midterm contract negotiations with the Union or developing labor relations strategies. He is not involved in responding to grievances, ULP charges, or EEOC and MSPB cases.

Devlin has a working relationship with Assistant Chief Hosack that involves personnel issues such as hiring and discipline, as well as discussing potential changes to conditions of employment.¹⁰²

Assistant Chief Hosack is not directly involved in contract negotiations or formulating labor-relations policies, which is handled almost exclusively by the Fire Chief and Deputy Fire Chief.¹⁰³ He does not normally assist management in responding to grievances, ULP charges, or EEOC and MSPB cases, although he has had some limited involvement with such issues in the past.¹⁰⁴ He does, however, have a confidential relationship with the Fire Chief and Deputy Fire Chief, who oversee all labor-relations matters. When Devlin is serving as Acting Assistant Chief during Hosack's absence, Devlin assumes the same relationship with the Fire Chief and Deputy Fire Chief.¹⁰⁵

III. ANALYSIS

A. Supervisory Firefighters

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

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

preponderance of their employment time to exercising such authority.”

For an individual to qualify as a supervisor, he or she need only possess one of the supervisory criteria listed in section 7103(a)(10) of the Statute or the authority to effectively recommend such action.¹⁰⁶ Those criteria include hiring, directing, assigning, promoting, rewarding, transferring, furloughing, laying off, recalling, suspending, disciplining, or removing employees, or having the authority to effectively recommend such action.¹⁰⁷ Additionally, although not listed as an indicia of supervisory status in § 7103(a)(10), the authority to independently evaluate employee performance may constitute the exercise of supervisory authority.¹⁰⁸ The focus must be on the type and nature of the work actually performed by the employee.¹⁰⁹ An employee's job title or position description is not determinative.¹¹⁰

The exercise of supervisory authority must involve the consistent use of independent judgment. If an employee's actions are routine or clerical in nature, the employee will not be considered a supervisor.¹¹¹

With respect to firefighters, the Statute imposes the additional requirement that these employees “devote a preponderance of their employment time” to the exercise of supervisory authority.¹¹² The Authority has held that “preponderance” refers to the “majority” of an employee's employment time.¹¹³ An incumbent's “employment time” refers to work time as determined by the facts and circumstances of each case.¹¹⁴ For example, in *U.S. Dep't of the Navy, Marine Corps Base, Camp Pendleton, Cal.*, the Authority held that in determining whether the assistant fire chiefs who worked twenty-four-hour shifts were supervisors under of the Statute, “employment time” meant their “active duty time.”¹¹⁵

1. The Position Encumbered by Devlin Is Not a Supervisory Position.

An individual must supervise “employees” to be a supervisor under the Statute.¹¹⁶ The definition of employee does not include a member of the uniformed services, and individuals who supervise only military

¹⁰² *Id.* at 6:7-13

¹⁰³ *Id.* at 6:20-22.

¹⁰⁴ *Id.* at 6:14-19.

¹⁰⁵ *Id.* at 5:20-22; Devlin Questionnaire II at 2.

¹⁰⁶ *Social Security Admin.*, 60 FLRA 590, 592 (2005).

¹⁰⁷ 5 U.S.C. § 7103(a)(10).

¹⁰⁸ *U.S. Dep't of the Interior, Bureau of Indian Affairs, Navajo Area Office*, 45 FLRA 646, 650-51 (1992).

¹⁰⁹ *Social Security Admin., Baltimore., Md.*, 59 FLRA 137, 145 (2003).

¹¹⁰ *U.S. Dep't of Labor, Office of the Solicitor, Arlington Field Office*, 37 FLRA 1371, 1377 (1990) (*Arlington Field Office*).

¹¹¹ *Nat'l Mediation Bd.*, 56 FLRA 1, 8 (2000).

¹¹² *U.S. Dep't of the Army, Parks Reserve Training Ctr., Dublin, Cal.*, 61 FLRA 537, 541 (2006) (*Parks Reserve Training Ctr.*).

¹¹³ *U.S. Dep't of the Air Force, Offutt Air Force Bases, Neb.*, 66 FLRA 616 (2012) (*Offutt AFB*).

¹¹⁴ *Parks Reserve Training Ctr.*, 61 FLRA at 541-542.

¹¹⁵ *U.S. Dep't of the Navy, Marine Corps Base, Camp Pendleton, Cal.*, 8 FLRA 276, 278 (1982).

¹¹⁶ *Adjutant Gen., Del. Nat'l Guard*, 9 FLRA 3, 6 (1982) (citing 5 U.S.C. § 7103(a)(2)).

personnel will not be considered supervisors under the Statute.¹¹⁷

Here, although Devlin supervises a handful of military employees at any given time, as well as civilian employees who might be temporarily assigned to the Training Branch while on light duty, the Agency concedes that he does not have any permanent civilian subordinates. Therefore, even though he performs several supervisory functions such as recommending discipline and performance awards and assigning/directing work, he does not meet the statutory definition of a supervisor.

Accordingly, the position encumbered by Devlin is not excluded from the bargaining unit as a supervisor under § 7103(a)(10) of the Statute.

2. The Position Encumbered by Gass and the Position Formerly Encumbered by McAllister Are Not Supervisory Positions.

The record clearly establishes that McAllister and Gass exercise supervisory authority in the areas set forth in § 7103(a)(10) of the Statute, as they assign and direct work, evaluate their employees, and effectively recommend both discipline and rewards for their subordinates. The question then becomes whether they “devote a preponderance of their employment time” to the exercise of such supervisory authority.¹¹⁸ The facts and circumstances seen here dictate that “employment time” for these two employees consist of normal duty time from 8 a.m.-5 p.m., not including a one-hour lunch break, plus up to one hour of pre-shift activities such as scheduling and assigning work and doing a pass-off with the outgoing captain, plus two or more hours of post-shift work performing administrative duties at a desk.¹¹⁹

As described in more detail above, both Gass and McAllister perform a significant number of duties that are dissimilar from their subordinates. Many of these are supervisory in nature, including assigning work at the beginning of each day, running drills and practice exercises, serving as “incident commander” during emergency responses, attending management meetings, participating in the hiring process by screening resumes, and conducting performance evaluations.

However, many of these duties are not supervisory in nature as defined by the Statute, even if those duties are unique to their roles as fire captains and are not performed by any of their subordinates. Examples of such activities include: assisting employees in meeting their training requirements by ensuring that they are scheduled to attend mandatory classes and reporting their training attendance to the Agency; writing reports following all emergency responses; overseeing their company’s budgets and quality-of-life needs around the fire station; co-managing the ARFF and wildland programs; ensuring the submission of subordinates’ time sheets; and teaching training courses. Although these duties are dissimilar from those of their subordinates, they do not involve the exercise of any of the supervisory indicia listed in § 7103(a)(10) of the Statute. Rather, they are administrative in nature and do not involve the direct supervision of employees.¹²⁰

Additionally, both Gass and McAllister spend significant portions of their days performing tasks that are the same or similar as their subordinates. They often attend the same training courses as their subordinates, perform chores alongside them at the fire station, check equipment and trucks, participate in practice exercises and drills, and join them during their hour of physical fitness. To this end, McAllister estimated that similar duties such as “detector maintenance, training and making training plans, equipment checks and truck checks, chores around the station, and physical fitness” take up 3-4 hours per day.¹²¹ Although they both maintain a supervisory posture while doing so and will exercise such authority if necessary to correct or direct their subordinates’ actions in the moment, that fact is insufficient to satisfy the preponderance test: the mere fact that a firefighter may exercise supervisory authority at any time during the shift, or that he has round the clock responsibility, does not necessitate a finding that he is a supervisor within the meaning of the Statute.¹²²

Given that Gass and McAllister perform a significant amount of similar duties to their subordinates, and that many of their dissimilar duties are not supervisory in nature, they do not spend a preponderance of their duty time performing or exercising supervisory authority. The record shows that each spend approximately 1-2 hours per day assigning work in the morning prior to the start of their subordinates’ duty time, during the course of the

¹¹⁷ *Id.* at 6-7.

¹¹⁸ *Parks Reserve Training Ctr.*, 61 FLRA at 541.

¹¹⁹ *Id.* at 541-542 (“employment time” is work time determined by the facts and circumstances of each case).

¹²⁰ See *U.S. Dep’t of the Navy Commander, Navy Reg. Northwest Fire & Emergency Serv., Silverdale, Wash.*, 70 FLRA 231, 238 (2017) (*Navy Silverdale*) (upholding RD decision) (finding that “time spent by [fire] Captains entering training data into the computer and completing time cards or other

employment forms [is not] time spent exercising supervisory authorities because these tasks are administrative and routine in nature that do not involve direct supervision of employees.”).

¹²¹ *McAllister Aff.* at 12:14-16.

¹²² *U.S. Dep’t of the Air Force, Air Force Materiel Command, 66 Air Base Group, Hanscom Air Base, Massachusetts*, 71 FLRA 81, 99 (2019) (*Hanscom Air Base*) (upholding RD decision) (citing *Dep’t of Veterans Affairs, VA Med. Ctr., Fayetteville, N.C.*, 8 FLRA 651, 660 (1982)).

work day, and at the end of the day while planning the following day's schedule. Although Gass and McAllister exercise supervisory authority any time they respond to emergencies—either for the full duration of the emergency response or until an Assistant Chief arrives and assumes command—such emergencies are infrequent and do not consume a significant amount of duty time. In this regard, Gass estimated that he responds to approximately 15 emergency calls per month which lasted approximately 20 minutes on average,¹²³ which would represent approximately five hours of monthly duty time.

Gass also estimated that evaluations for his six subordinates consume “several hours a night for a couple of weeks” between writing the evaluations and holding a 30-minute meeting with each employee.¹²⁴ Even though he does this twice a year—once for a mid-year evaluation and again for a final evaluation—it makes up only a small portion of his yearly duty time.

Additionally, Gass and McAllister attend management meetings once or twice per month, and although they sometimes meet one-on-one with Assistant Chiefs Jones and Montoya to discuss management or personnel issues, such meetings are an infrequent occurrence when compared to their routine daily duties.

The Authority has previously considered several positions similar in nature to the ones at issue here and concluded that, although they exercise significant supervisory authority over their subordinates and perform dissimilar duties, they do not do so for the preponderance of their duty time.¹²⁵ Although the Authority resolves unit-eligibility questions on a case-by-case basis by applying the statutory criteria to the record developed in each case,¹²⁶ these comparable decisions involving very similarly-situated employees offer support for the conclusion reached here.

Accordingly, the positions encumbered by Gass and formerly encumbered by McAllister are not excluded from the bargaining unit as a supervisor under § 7103(a)(10) of the Statute.

B. Management Officials

The term “management official” is defined at Section 7103(a)(11) of the Statute as “an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency.” In determining whether an employee is a management official, the Authority looks at whether that person “(1) creates, establishes or prescribes general principles, plans or courses of action for an agency; (2) decides upon or settles upon general principles, plans or courses of action for an agency; or (3) brings about or obtains a result as to the adoption of general principles, plans or courses of action for an agency.”¹²⁷ The Authority also considers whether an individual's recommendations and findings are accepted and implemented, whether they have authority to make independent decisions, and the extent that their actions are reviewed.¹²⁸

The Authority has analyzed situations where the position in question has considerable subject matter expertise, and has found that the term “management official” is “reserved for a discrete category of employees whose responsibilities extend beyond that of a professional or technical expert.”¹²⁹ Employees with technical subject matter expertise have been found not to meet that threshold if they do not actually formulate or influence Agency policy.¹³⁰

1. Devlin Is a Management Official.

The record reflects that Devlin is meaningfully involved in the creation of certain Agency policies and updating existing policies. Although his policy drafts are subject to supervisory approval, they are often approved with little or no revision, meaning that he significantly influences Agency policy.

In this regard, Assistant Chief Hosack described Devlin as “has been really instrumental in driving policy and creating drafts to communicate down to the workforce. He's often involved in policy discussions and procedure . . . he was really the driving force in honing a lot of those [revised performance evaluation standards] and making them more attainable for our firefighters. He's brought in

¹²³ Gass Aff. at 4:15-17.

¹²⁴ *Id.* at 4:11-14.

¹²⁵ See *Hanscom Air Base*, 71 FLRA at 90-100; *Navy Riverdale*, 70 FLRA at 235-245; *Offutt AFB*, 66 FLRA at 616-619.

¹²⁶ *U.S. Dep't of the Air Force, Air Force Materiel Command*, 67 FLRA 117, 123 (2014) (citing *SSA, Baltimore, Md.*, 59 FLRA at 145).

¹²⁷ *United States Dep't of the Navy, Navy Undersea Warfare Ctr., Keyport, WA*, 68 FLRA 416, 432 (2015) (*Navy Keyport*).

¹²⁸ See e.g., *Dep't of the Interior, Bureau of Mines, Twin Cities Research Ctr., Twin Cities, MN*, 9 FLRA 109, 112-13 (1982).

¹²⁹ *Navy Keyport*, 68 FLRA at 423.

¹³⁰ See *U.S. Dep't of Energy Headquarters Washington, D.C.*, 40 FLRA 264, 271 (1991) (*DOE Washington*) (highly skilled professional attorneys found not to be management officials, despite frequently working independently).

probably a lot more for this stuff than the other captains have, given the nature of his position.”¹³¹

Devlin played a key role in revising performance evaluation standards for employees of multiple grade levels within the Fire Department.¹³² Devlin provided emails between himself and other fire captains, as well as between himself and the Assistant Chiefs and Deputy Chief, depicting the changes he made to these standards.¹³³ Although his revisions were reviewed by the Assistant Chiefs and Deputy Chief, they were accepted with little or no changes, and Assistant Chief Hosack described him as “the co-author of all of the DPMAPS [] elements for our BUEs.”¹³⁴

Devlin created the education progression charts for the Agency’s firefighter education program, which sets forth the training certifications firefighters must earn before advancing to a higher GS-level.¹³⁵ He also drafted the Agency’s Firefighter Skill Evaluation Listing, which is another key component of establishing firefighters’ job expectations and performance evaluations,¹³⁶ as well as the Agency’s Physical Agility Examination Guide, which sets forth the requirements for the Fire Department’s occupational fitness assessments.¹³⁷ Devlin drafted several SOGs for Driver/Operators, some of which gave rise to a demand to bargain from the Union.¹³⁸

Devlin plays a major role in developing the Agency’s annual training plan alongside Assistant Chief Hosack, and he assisted Hosack in updating the GS-4 “pathways” contract.¹³⁹

The nature of the above-mentioned policies supports the conclusion that Devlin is a management official. He is significantly involved in creating the Agency’s standards for evaluating and promoting employees, including spearheading major revisions to DPMAPs for all bargaining-unit employees and establishing benchmarks for on-the-job duties and educational attainment. In this regard, the Authority has

previously found the promulgation of these types of policies to indicate that an employee is a management official.¹⁴⁰ And although his work is subject to supervisory review, the evidence indicates that upper management depends on him for policy development and grants him substantial influence over the policy areas in which he is involved.

Accordingly, the position encumbered by Devlin is excluded from the bargaining unit as a management official under § 7103(a)(11) of the Statute.

2. Gass and McAllister are not Management Officials.

As described above, the record reflects that McAllister has been involved to some extent in the development of Agency policies, including drafting the Agency’s Peer Support Team Confidentiality Policy, Critical Incident Stress Guidelines, Personal Protective Equipment Program, and Peer Support Team Confidentiality SOPs SOGs, amongst other things. Although Gass has not been involved much in policy development during his eight months as a fire captain, Assistant Chiefs Jones and Montoya both testified that all the fire captains are expected to contribute to policy development since they possess on-the-ground expertise that informs new department policies and changes to existing policies.¹⁴¹

However, Gass and McAllister participate in the formulation of Agency policy to a far lesser extent than Devlin. Devlin is so heavily involved in developing and updating management’s performance appraisal standards for bargaining-unit employees that the Agency depends on him to fill such a role, whereas Gass and McAllister do not fulfill any sort of similarly specialized role. Rather, any contributions they make to Agency policy—such as McAllister’s drafting of Peer Support Team Confidentiality policies and SOPs/SOGs—are limited to specific areas in which they may have had recent

¹³¹ Hosack Aff. at 4:3-15.

¹³² See *Adjutant General of N.H. State Military Reservation, Concord, N.H.*, 13 FLRA 88, 89 (1983) (*N.H. Adjutant General*) (employee who promulgated performance evaluation criteria used in grading performance of employees found to be management official).

¹³³ Ex. 12, Emails between Thomas Devlin and Deputy Fire Chief Van Dyke, Assistant Chiefs, and Supervisory Firefighters, March 12-25, 2020.

¹³⁴ Hosack Aff. at 3:6-7.

¹³⁵ Devlin Questionnaire II at 3-4; Ex. 19, Career Progression Chart.

¹³⁶ Devlin Questionnaire II at 3-4; Ex. 13, FCFES Firefighter Skill Evaluation Listing; Ex. 14, Email from Thomas Devlin to Assistant Chiefs Jones, Montoya, and Hosack, “Firefighter skill listing with times.pdf,” April 22, 2021.

¹³⁷ Devlin Questionnaire II at 3-4; Ex. 15, Ft. Carson Fire & Emergency Services Physical Agility Examination Guide.

¹³⁸ See Ex. 2, Demands to Bargain Submitted by the Union to the Agency, at 12, 14; Devlin Questionnaire II at 3-4; Ex. 16, FCFES Driver/Operator: Apparatus Requirements and Preventative Maintenance SOG, Apr. 1, 2018; Ex. 17, FCFES Driver/Operator: Compliance and Training SOG, Apr. 1, 2018; Ex. 18, FCFES Driver/Operator: Off-Road Driving, General Safety, and Traffic Hazards SOG, Apr. 1, 2018.

¹³⁹ Devlin Questionnaire II at 3-4; Ex. 20, Emails between Thomas Devlin, Assistant Chiefs, and Deputy Fire Chief, “Pathways elements and contract,” Dec. 18, 2019.

¹⁴⁰ See *N.H. Adjutant General*, 13 FLRA at 89 (finding employee to be “management official” because he “has promulgated . . . the Standards of Evaluation Criteria used in grading the performance of employees”).

¹⁴¹ Jones Aff. at 7:10-17; Montoya Aff. at 6:1-13.

experience in their role as fire captains. This type of involvement resembles that of a “valuable and knowledgeable resource person” with expertise on day-to-day firefighting operations,¹⁴² and it is distinguishable from Devlin’s recurring and specialized contributions toward the area of establishing performance evaluation standards and career advancement benchmarks.

Accordingly, the positions encumbered by Gass and formerly encumbered by McAllister are not excluded from the bargaining unit as a management official under § 7103(a)(11) of the Statute.

C. Confidential Employees

A “confidential employee” is defined in Section 7103(a)(13) of the Statute as an employee who “acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations.”

An employee is a “confidential employee” if (1) there is evidence of a confidential working relationship between the employee and the employee’s supervisor and (2) the supervisor is significantly involved in labor-management relations.¹⁴³ Both factors must be present for an employee to be considered “confidential” within the meaning of section 7103(a)(13).¹⁴⁴

The Authority will analyze whether a position being considered for inclusion in the unit may, in the normal performance of duties, (1) obtains advance information of management’s position regarding contract negotiations, the disposition of grievances, and other labor relations matters; (2) attends meetings where labor-management matters are discussed; (3) because of physical proximity to their supervisor, overhears discussions of labor-management matters; and (4) has access to, prepares, or types materials related to labor-management relations, such as bargaining proposals and grievance responses.¹⁴⁵ The reason for this is that management should not be faced with having bargaining

unit members in positions where they could divulge advance information pertaining to labor-management relations to the union.¹⁴⁶

The frequency and the amount of an individual’s working time devoted to labor relations matters may be relevant factors in determining confidential status, but are not controlling factors for section 7103(a)(13) purposes.¹⁴⁷

An individual who actually formulates or effectuates management policies in the field of labor-management relations is considered a confidential employee.¹⁴⁸ Other responsibilities identified by the Authority in this regard include advising management on or developing negotiating positions and proposals; preparing arbitration cases for hearing; and consulting with management regarding the handling of unfair labor practice cases.¹⁴⁹

1. McAllister and Gass Are Not Confidential Employees.

The record supports the conclusion that McAllister and Gass frequently discuss matters concerning their subordinates with their supervisors, Assistant Chiefs Montoya and Jones, in private. However, the Assistant Chiefs do not regularly assist the Agency in responding to grievances or ULPs, do not participate in term or mid-term collective bargaining agreement negotiations, and do not formulate labor relations policies or strategies.¹⁵⁰ To this end, all three Assistant Chiefs testified that they are not involved in such matters, and that the Fire Chief and Deputy Fire Chief are almost exclusively in charge of labor-management relations, including areas such as handling grievances and arbitration, responding to ULP charges, and negotiating contracts with the Union.¹⁵¹ Accordingly, because Gass’s and McAllister’s supervisors are not significantly involved in labor-management relations, Gass and McAllister do

¹⁴² *Offutt AFB*, 66 FLRA at 618.

¹⁴³ *See Arlington Field Office*, 37 FLRA at 1371.

¹⁴⁴ *See U.S. Army Plant Representative Office, Mesa, AZ*, 35 FLRA 181 (1990).

¹⁴⁵ *U.S. Dep’t of Labor, Wash., D.C.*, 59 FLRA 853, 855 (2004).

¹⁴⁶ *Broadcasting Bd. Of Governors*, 64 FLRA 235, 236 (2009).

¹⁴⁷ *Arlington Field Office*, 37 FLRA at 1382 (citing *U.S. Dep’t of Labor*, 33 FLRA 265, 267-68 (1988) (Authority rejected union’s argument that a limited amount of actual confidential labor relations work does not provide a substantial basis for excluding employees from a bargaining unit)).

¹⁴⁸ *U.S. Dep’t. of Hous. & Urban Dev., Washington, D.C.*, 35 FLRA 1249, 1255-57 (1990).

¹⁴⁹ *U.S. Dep’t of Just. Fed. Bureau of Prisons U.S. Penitentiary Marion, Ill.*, 55 FLRA 1243, 1246 (2000).

¹⁵⁰ *Montoya Aff.* at 6:22-24; *Jones Aff.* at 9:13-18.

¹⁵¹ *Jones Aff.* at 8:6-8 (“I think right now the chief is keeping that circle pretty small. The only people negotiating for us with the Union are the fire chief and deputy chief.”) and 9:13-15 (“I have not been involved in any ULPs, or EEOC/MSPB cases. I haven’t participated in contract negotiations either—like I said earlier, the fire chief is keeping that circle pretty small at the moment.”); *Montoya Aff.* at 6:22-24 (I am not involved in the grievance process. I may be aware that one was filed but generally unless it’s specifically against me where I have to respond, then I won’t be involved. I haven’t been involved in contract negotiations with the Union, nor do I formulate labor relations policies.”); *Hosack Aff.* at 6:20-22 (“I am not directly involved in contract negotiations with the Union, unless I’m pulled n for a very specific piece of it that I know a lot about. I am not regularly involved in formulating labor relations policies—that’s mostly the fire chief and deputy chief—but I can be if requested.”).

not satisfy the two-factor test for confidential employees set forth above.¹⁵²

In reaching this conclusion, it is worth noting that the Authority previously found that employees who are similarly-situated to Gass and McAllister were confidential employees.¹⁵³ That case, however, is distinguishable from the one at hand. In *U.S. Department of the Air Force, Air Force Materiel Command (AFMC)*, the Authority upheld a Regional Director's finding that fire station chiefs are confidential employees because they met with the fire chief—who oversees the agency's labor-management relations—approximately four times per month, during which they would discuss “management's position” on workplace matters “and/or negotiation[s] with the Union.”¹⁵⁴

Here, conversely, the fire captains meet with the Fire Chief very infrequently—perhaps twice per year¹⁵⁵—meaning that they do not have the same type of relationship with a confidential employee as the employees at issue in *AFMC*, who met with the fire chief multiple times per month. Moreover, while the management meetings in *AFMC* frequently concerned the topic of labor-management relations, the evidence suggests that the officers meetings between the Assistant Chiefs and Fire Captains in this case do not address such matters.¹⁵⁶

Additionally, one of the employees in *AFMC* was found to be confidential in nature because, in part, he worked collaboratively with the union to develop a training plan before it is submitted to the fire chief for approval.¹⁵⁷ Here, there is no evidence that either Gass or McAllister work collaboratively with the Union to develop any policies or workplace initiatives in an analogous fashion.

Accordingly, I find that the positions encumbered by Gass and formerly encumbered by McAllister are not excluded from the bargaining unit as confidential employees under § 7103(a)(13) of the Statute.

2. Devlin Is a Confidential Employee.

Unlike the fire captains in the Operations Branch, Devlin is the only captain in the Training Branch and therefore fills in for Assistant Chief Hosack whenever Hosack is on leave. During these stints as Acting Assistant Chief, Devlin attends meetings with the Fire Chief and Deputy Fire Chief, who are significantly involved in labor-management relations. In this regard, all three Assistant Chiefs testified that the Fire Chief and Deputy Fire Chief handle the vast majority of labor-management issues, including term and midterm contract negotiations, formulating labor relations strategies, and responding to grievances and ULP charges.¹⁵⁸

Devlin's attendance at meetings with these officials, who are significantly involved in labor relations, supports the conclusion that he is a confidential employee.¹⁵⁹ Although he may appear infrequently at such meetings, the frequency and amount of time an employee spends in a confidential capacity may be relevant but is not controlling.¹⁶⁰ Accordingly, even though Devlin's presence at confidential meetings with the Fire Chief and Deputy Fire Chief is periodic, it is enough to require his exclusion from the bargaining unit.

I therefore find that the position encumbered by Devlin is excluded from the bargaining unit as confidential under § 7103(a)(13) of the Statute.

V. ORDER

The Supervisory Firefighter position encumbered by Thomas Devlin in the Training Department is excluded from the bargaining unit represented by the Union under § 7103(a)(11) and § 7103(a)(13) of the Statute. The Supervisory Firefighter positions encumbered by Mark Gass and formerly encumbered by James McAllister at Station 33 and Station 34, respectively, are not excluded from the bargaining unit represented by the Union.

¹⁵² *U.S. Army Plant Representative Office, Mesa, AZ*, 35 FLRA 181 (1990).

¹⁵³ *U.S. Department of the Air Force, Air Force Materiel Command*, 67 FLRA 117 (2013) (*AFMC*).

¹⁵⁴ *Id.* at 118

¹⁵⁵ See Jones Aff. at 7:6-9 (“We usually have a bi-annual all-officer meeting with the fire chief, deputy chief, other assistant chiefs The captains all attend this, it's mandatory, we pay them overtime for it.”).

¹⁵⁶ See Montoya Aff. at 5:22 (“We don't discuss labor relations at these meetings.”).

¹⁵⁷ *AFMC*, 67 FLRA at 118, 122 (quoting *U.S. Dep't of the Air Force, Edwards Air Force Base, Cal.*, 62 FLRA 159, 163 (2007)).

¹⁵⁸ Hosack Aff. at 6:20-22; Jones Aff. at 8:7-8, 9:14-15.

¹⁵⁹ See *AFMC*, 67 FLRA at 122 (rejecting union's argument that “mere attendance at meetings with managers does not illustrate that [employees] are involved in matters regarding labor relations” because those meetings were attended by agency representatives who were “significantly involved in labor management relations”) (quoting *NASA, Glenn Research Ctr., Cleveland, Ohio*, 57 FLRA 571, 573 (2001)).

¹⁶⁰ *Id.* (quoting *Arlington Field Office*, 37 FLRA at 1382).

VI. RIGHT TO SEEK REVIEW

The parties are hereby advised that, pursuant to section 2422.31 of the Regulations, you may file an application for review of my Decision and Order with the Authority **within sixty (60) days** of the date of my Decision and Order. The sixty (60) day time limit may not be extended or waived. Copies of the application for review must be served on me and on all other parties. A statement of such service must be filed with the application for review.

The application for review must be a self-contained document enabling the Authority to rule on the basis of its contents without the necessity of recourse to the record. The Authority will grant review only upon one or more of the grounds set forth in section 2422.31 of the Regulations.

Any application filed must contain a summary of all evidence or rulings relating to the issues raised together with page citations from the transcript, if applicable, and supporting argument. An application may not raise any issue or allege any facts not timely presented to the Regional Director. The application for review must be filed with the Federal Labor Relations Authority, Office of Case Control, 1400 K Street NW, Second Floor, Washington, D.C. 20424-0001, by close of business, March 22, 2022.

Pursuant to section 2429.21(b) of the Regulations, the date of filing will be determined by the date of mailing indicated by the postmark date. If no postmark date is evident on the mailing, it will be presumed to have been mailed five (5) days prior to receipt. An application for review filed by personal delivery shall be considered filed on the date it is received by the Federal Labor Relations Authority.

Timothy Sullivan
Regional Director
Denver Region
Federal Labor Relations Authority
1244 Speer Boulevard, Suite 446
Denver, CO 80204-2774

Dated: February 8, 2022