

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

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In the Matter of

LOCAL 154, DISTRICT COUNCIL 37,
A.F.S.C.M.E., AFL-CIO

DECISION NO. 73-68

-and-

DOCKET NO. R-51-67

THE CITY OF NEW YORK

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DECISION AND DIRECTION OF ELECTION

On June 30, 1967, Local 154 filed a petition with the New York City Department of Labor seeking certification as the collective bargaining representative of the Junior Human Rights Specialists, Human Rights Specialists, Supervising Human Rights Specialists and Principal Human Rights Specialists employed in the New York City Commission on Human Rights. Thereafter, the proceeding was transferred to the Office of Collective Bargaining pursuant to Rule 13.13 of the Consolidated Rules of the Office of Collective Bargaining.

On June 4, 1968, the Petitioner and the City executed an "Agreement for Determination of Representative by Check-off." Therein the parties agreed that Junior Human Rights Specialists and Human Rights Specialists constitute a unit appropriate for the purposes of collective bargaining. The parties also agreed that the alleged managerial status of employees in the titles of Supervising and Principal Human Rights Specialist would be determined by the Board of Certification after a hearing.

On June 11, 1968, the Board of Certification certified the Petitioner as the exclusive representative for the purposes of collective bargaining of all Junior Human Rights Specialists and Human Rights Specialists employed by the City of New York (Decision No. 24-68).

On July 22 and 23, 1968, a hearing was held before David I. Obel, Esquire, Trial Examiner.

Upon consideration of the record herein, and after due deliberation, the Board of Certification makes the following findings and conclusions, and issues the following decision:

I. Undisputed Matters

It is undisputed, and we find and conclude, that Petitioner is a public employee organization in fact and within the meaning of the New York City Collective Bargaining Law.

II. The Alleged Managerial Status
of the Supervising and Principal
Human Rights Specialist

The City opposes certification of the titles of Supervising and Principal Human Rights Specialists on the ground that the incumbents of these positions perform managerial functions in the Human Rights Commission. The Commission employs 5 Principal and 5 Supervising Human Rights Specialists. At the lower level, previously certified, there are 23 Human Rights Specialists and 3 Junior Human Rights Specialists.¹

As noted in prior decisions,² the Act does not expressly exclude "managerial" employees, nor does it define that term. Supervisory employees frequently are referred to as "part of management" or "arms of management." However, since supervisory employees clearly are within the coverage of the Act (see §1173-3.01), the term "managerial," as used by the City, necessarily must refer to more than supervisory status. For clarity, we shall refer to such employees as managerial-executives.

A. The New York City Human Rights Commission

The New York City Commission on Human Rights is a mayoral agency. It consists of 15 members appointed by the Mayor, one of whom serves as its full-time salaried chairman. The other 14 are not compensated.

The Human Rights Commission administers the Law on Human Rights. To fulfill its mission the Commission is organized into five units; Enforcement, Affirmative Action Programs, Administrative Services, Special Projects, and Public -Relations and information. The Enforcement Unit, under the direction of the General Counsel, consists of four divisions; Hearings, Legal, Investigation, and Contract Compliance. The Affirmative Action Programs Unit also consists of four divisions headed by the Deputy Executive Director of the Commission. The divisions in the Affirmative Action Unit are Community Action, Puerto Rican-Hispanic Affairs, Business and Employment, and Housing.

¹ Three Junior Human Rights Specialists, 6 Human Rights Specialists, 1 Supervising Human Rights Specialist/ and 1 Principal Human Rights Specialist are in the competitive class. The remaining titles are non-competitive.

² Matter of Municipal Statisticians, Decision No. 69-68; Matter of Local 154, D.C. 3T, A.F.S.C.M.E., AFL-CIO, Decision No. 67-68.

All five units are under the general direction of the Commission's Executive Director. The latter, in turn, reports to the Commission through its full-time chairman. The chairman also has his own assistant. Thus, the organization of the top level positions in the Commission is as follows: The Commission and its Chairman, with his Assistant, stand at the summit. On the next level is the Executive Director. Then come the General Counsel, the Deputy Executive Director and the heads of Administrative Services, Special Projects, and Public Relations and Information. Immediately below this level are the "operating divisions." It is at this level that the titles of Principal and Supervising Human Rights Specialists are found.

B. The Principal Human Rights Specialists.

According to the job specification, a Principal Human Rights Specialist:

"Under administrative direction, supervises a division in the Commission on Human Rights."

Some of the Principal's typical Personnel oriented tasks are planning, assigning and reviewing the work of the division, and planning, developing and conducting in-service training programs.

The specification further states that a Principal Human 'Rights Specialist:

"Formulates Commission policy and program recommendations with respect to the elimination of discrimination and segregation in housing, for effecting compliance with City policies and laws against discrimination, or for community relations and education to promote better inter group relations.

"Develops and recommends procedures and regulation for . . . tension prevention and control programs.

"Develops techniques of community organization, social action, education, conciliation, mediation, [and] persuasion for effecting changes in . . . discrimination.

"Formulates the development of technical and consultant services to property owners and managers to assist them in compliance with the housing law.

"In conjunction with representatives of City agencies, develops procedures for the handling of grievances of employees alleging discrimination."

On the other hand, the Commission's By-laws provide (SVII A.):

- "1. The Commission as a whole when convened in regular or special sessions shall in accordance with law consider and adopt agency policy and program. The Executive Director shall provide the Commission with recommendations and supporting data for making policy decisions.
- "2. The Commission as a whole shall consider and adopt agency policy, program and objectives. The Executive Director shall propose policy, program and objectives for consideration and adoption by the Commission."

Section VII A5 of the By-laws further provides that the Executive Director shall have "full responsibility and authority to carry out the policy and programs adopted by the Commission and shall submit regular reports to the Commissioner's on the progress of staff in carrying out the agency's policies and programs."

The Executive Director of the Commission testified that, from time to time, he meets with the Deputy Executive Director, the General Counsel, the Administrator, and the Public Relations Director "to discuss problems . . . that have been presented by the [division] chiefs, [and] . . . to make recommendations . . . to the Chairman or back to the divisions . . . for [further] discussion." He also stated that this group might generate its own ideas and submit them to the Chairman. In addition to these meetings, there is a regular Monday morning gathering at which those named above, together with the Chairman and the division chiefs, review operating problems.

The Executive Director testified that Principals make policy "in the sense that the program is an ongoing program and [the Principal] acts within the framework of a very general picture or frame of reference, which is set by the Commission" The Principal is responsible "for conceptualizing, for really developing the program and implementing [it]."

As an example of the foregoing, the Executive Director cited the development of an anti-discrimination-in-housing program. According to the witness, the Principal in charge of the Housing Division planned the program and submitted it to the Commission through his supervisor. After discussion at the Commission level, the program was approved virtually as submitted, and became the housing policy of the Commission.

The Executive Director also described the way in which the Principals in charge of the Business and Employment and Puerto Rican-Hispanic Affairs Divisions developed a testing program to assess the impact of personnel recruiting techniques on discrimination in employment. They implemented this program with the assistance of an outside consultant.

With respect to the scope of the policy-making role of the Principal in charge of the Business and Employment Division, the Executive Director testified that the Commission informs the Principal that it wants certain areas explored and the Principal then plans a program for such exploration. That is, he determines, for example, what staff he needs, how the staff shall be deployed, and whether outside consultants should be used. The Executive Director summarized the Principal's function in the following manner:

"In other words, he is fully responsible under a general guidance and general mandate from the Commission to move into a given program area and implement it."

On cross-examination, the Executive Director traced the organizational route travelled by recommendations prior to their adoption by the Commission and implementation by the staff. He indicated that policy proposals are transmitted from the lower levels of the organization, through the unit heads and division chiefs, to the level on which they are evaluated by the General Counsel, the Deputy Executive Director, and Executive Director, and, finally, to the Chairman and the full Commission.

In contrast, one of Petitioner's witnesses, who was the Principal in charge of the Community Action Division, testified that Principals have "very casual and very sporadic" policy-making responsibilities. To illustrate this point, she testified about her role in two areas -- school decentralization and the recent establishment of a Nationalities Division. As to the former, she had submitted analyses of various school decentralization plans and field reports on the progress of demonstration projects. As to the latter, she testified that no Principal had played any role in the establishment of the Nationalities Division.

The thrust of the witness's response to questions concerning the control and direction of policy administration was to indicate a major role in this area for the Executive Director, the Deputy Executive Director and the General Counsel. According to her testimony, she merely implements policy through program activity, although she also believes that exercises of some independent judgment and discretion is not inconsistent therewith. As she put it, "every professional would have to exercise some independent judgment and discretion in carrying out his duties." This includes the Junior Human Rights Specialist and the Human Rights Specialists, two related titles previously certified by the Board.

The Witness does not represent the Commission in collective bargaining, on joint labor committees or in grievance handling. She has no power to appoint, discharge, transfer or promote, and can administer only verbal discipline. She evaluates her staff every six months and submits the evaluations to the Executive Director. She earns \$14,300 per year, and is not entitled to overtime. Principal Human Rights Specialists are on the City's list of titles eligible for the City-Administered Management Welfare Fund.

Another Principal Human Rights Specialist, the chief of the Business and Employment Division, testified that he has not attended a Commission meeting for two and a half years. He also testified that he was not consulted on the employment of the last two persons appointed to his division.

C. The Supervising Human Rights Specialists

The Supervising Human Rights Specialists are unit heads. Their general function is stated in the job specification as follows:

"Under general direction supervises a unit engaged in inter-group relations activities, or serves as principal assistant to a division chief in the Commission on Human Rights . . ."

Specifically, the Supervising Human Rights Specialist:

"Plans, assigns, and reviews the work of the unit. Conducts in-service training programs. Guides . . . Human Rights Specialists in maintaining effective relationships with the various community organizations.

"Acts for the division superior in his absence.

"Works with (various groups, organizations, and associations] to enlist their cooperation in promoting . . . [the elimination of] group prejudice, ignorance and discrimination.

"Makes field investigations of complaints or investigations required for the execution of phases of the commission's Program.

"Prepares summaries of research findings and technical guides and outlines on inter-group methods and techniques for the use of the Commission's committees and sub-committees in planning and reviewing the activities of the Commission.

"Provides advisory services to agencies and institutions in relation to the development of sound educational programs in inter-group relations."

Petitioner's witness, a Supervising Human Rights Specialist in the Investigation Division, supervises three employees. He signs in and out, and is entitled to overtime. His title is not on the City's list of titles eligible for the City-Administered Management Welfare Fund. His principal responsibility is the processing of complaints alleging discrimination in housing. At some stage in his investigation, the witness tries to obtain the apartment from the landlord for the complainant. This effort is made at an informal conference and "persuasion" is the technique employed. If the landlord refuses to cooperate, the witness writes a report and recommendation to his supervisor, the Principal in charge of the division. The Principal then confers with the General Counsel and they decide what action should be taken. This Supervising Human Rights Specialist stated he would not even schedule a hearing on his own initiative.

The Executive Director testified that one of the Supervising Human Rights Specialists "has conceptualized a complete program and is in charge of it"; i.e., contract compliance, and the others are unit supervisors who are responsible for receiving complaints, assigning staff to process them, indicating areas for investigation, reviewing reports, and making recommendations to their respective division chiefs.

As to the relatively high placement of the Supervising Human Rights Specialist in charge of the Contract Compliance Division, the Executive Director gave this account:

"There was a notable lack of contract compliance. . . and the [General] Counsel and I discussed the need for a contract compliance program.

"I said to her that it would be good, and . . . the program, [which actually] emanated from the Commission level many years ago, [was developed by] one of our lawyers, who was in investigations.

"He conceived the program, developed it, gave it to the [General] Counsel, and it went up through channels and [was] approved by the Commission.

"And since it was his program, we . . . moved this particular staff person into the position [of chief]."

D. Discussion

Since the New York City Collective Bargaining Law, herein called the Act, contemplates the exercise of collective bargaining rights by supervisory employees (§1173-3.01), the responsibilities and functions of managerial-executives necessarily must be different and broader. Although not defined, or referred to, in the Act, the term "managerial employee" as used in labor relations, has been the subject of considerable litigation and numerous decisions. The criterion on which the greatest emphasis has been placed is the formulation, determination and effectuation of an employer's policies; that is, regular exercise of independent judgement or discretion in the formulation and promulgation of policy. (American Federation of Labor, 120 N.L.R.B. 969, 973, 42 LRRM 1075; I.L.G.W.U. v. N.L.R.B., 339 F.2d 116, 57 LRRM 2540, 2545). Discretion, however, "is not the touchstone if it must conform to the employer's established policy." (R.C.I.A. v. N.L.R.B. 366 F.2d 642, 62 LRRM 2837, 2839) The managerial role involves the broad and active participation associated with the formulation of objectives or the methods of fulfilling established purposes.

In the instant case, the power to determine "policy, programs and objectives" is vested exclusively in the Commission. (By-Laws, §VII A.) The responsibility of making recommendations is placed on the Executive Director (By-Laws, §VII A5), who is directly assisted therein by the Deputy Executive Director, General Counsel, Administrator and Public Relations Director. Meetings of this group and the Principal Human Rights Specialists, as the Executive Director testified, deal with "operating" problems.

Under the City's contention, ten of the thirty-three employees in this occupational group would be managerial-executives, although the Supervising and Principal Human Rights Specialists are the first two levels of supervision, performing traditional supervisory functions, and, in some instances at least, rendering the same types of services as the employees whom they supervise.

With respect to placement of the Supervising Human Rights Specialist at the head of the Contract Compliance Division, the testimony of the Executive Director indicates that: 1) the idea for the program originated many years ago at the Commission level; 2) the Executive Director and the General Counsel became aware of the absence of contract compliance and determined that a compliance program should be developed; 3) the task of developing such a program was given to a lawyer in the Investigation Division, a unit under the direct supervision of the General Counsel's office; 4) when the attorney who was assigned this task completed it, "it went up through channels and Laws) approved by the Commission" and, 5) because that attorney put the program into operational form, the Commission decided to have him administer it. Finally, it should be noted that "contract compliance" itself does not really describe a sphere of decision-making which calls for the exercise of managerial skills or functions. It is rather a means of achieving policy objectives. Thus, the role of the Supervising Human Rights Specialist in charge of Contract Compliance is not as significant, in a managerial initiative sense, as the testimony of the Executive Director suggested.

Undoubtedly, as in most agencies, suggestions concerning policy sometimes are made by lower level employees. But these suggestions are made to higher echelons which act as filters, sifting out unacceptable recommendations, modifying some, and remitting others for further study. Here, that filtering function is performed by the Executive Director assisted by the General Counsel, Deputy Executive Director, Administrator and Public Relations Director. The policy decisions, however, are made by the Commission itself.

The Principals do not represent management in collective bargaining, joint labor committees or grievance procedures. Nor do they exercise any significant degree of control of the administration of Commission policy.

The functions of the Principal and Supervising Human Rights Specialists, in making investigations, reports and suggestions, do not constitute managerial roles (State Farm Ins. Co. v. N.L.R.B., (1968) _____ F.2d _____, 68 LRP14 3029, 3035). The work of these employees while requiring skill and judgment, is "more concerned with the day to day routine of * * * following policy, rather than establishing it." (I.L.G.W.U. v. N.L.R.B. (1964), 339 F.2d 116, 57 LRRM 2540, 2545.)

On the entire record herein, we find and conclude that Principal and Supervising Human Rights Specialists are not managerial-executives.

III. The Appropriate Unit and
Representative Status

Our investigation discloses that a majority of the Principal and Supervising Human Rights Specialists have authorized dues check-off in favor of Petitioner. Accordingly, we find and conclude that a majority of said employees have designated and selected Petitioner as their collective bargaining representative.

Petitioner originally sought certification in a single unit consisting of the titles of Junior Human Rights Specialist, Human Rights Specialist, Supervising Human Rights Specialist, and Principal Human Rights Specialist. Pursuant to the stipulation of 'the parties, the first two titles already have been certified by the Board (Decision No. 24-68). At the hearing in this case, Petitioner stated that it had no objection to a separate unit consisting of the two titles in issue if the Board held that the incumbents thereof were entitled to engage in collective bargaining. The City took no position on the unit question.

The job specifications for the titles of Junior Human Rights Specialist and Human Rights Specialist contain no reference to any supervisory responsibilities. on the other hand, the job specifications for the titles of Principal and Supervising Human Rights Specialists contain general statements of supervisory responsibilities.³ Apart from the difference in supervisory responsibilities, the job specifications, and the

³ The Board takes administrative notice of the official civil service job specifications for the four titles involved herein. These job specifications are dated May 27, 1968.

testimony, reveal a broad community of interest among the four titles in the nature of the work performed and the determination of wages and working conditions.

Section 1173-3.01 of the New York City Collective Bargaining Law provides that supervisory employees "shall not be included in the same bargaining unit as non-supervisory . . . employees without the consent of a vote of a majority of the . . . supervisory employees involved." Accordingly, we shall conduct a self-determination election in which the Principal and Supervising Human Rights Specialists may decide whether they wish to be separately represented by the Petitioner or to be grouped with the titles of Junior Human Rights Specialist and Human Rights Specialist in the unit presently certified to the Petitioner.

DIRECTION OF ELECTION

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

DIRECTED, that an election by secret ballot shall be conducted under the supervision of the Board of Certification or its agents, at a time, place, and during hours to be fixed by the Board, to determine whether or not employees in the titles of Principal and Supervising Human Rights Specialists employed during the payroll period immediately preceding the date of this Direction of Election (other than those who have voluntarily quit or have been discharged for cause before the date of the election, desire to be represented for the purposes of collective bargaining in a separate bargaining unit, or whether they desire to be included in the existing unit of Human Rights Specialists and Junior Human Rights Specialists for which Petitioner is the certified collective bargaining representative.

DATED: New York, N.Y.

 November 25, 1968.

ARVID ANDERSON
C h a i r m a n

ERIC J. SCHMERTZ
M e m b e r

SAUL WALLEN
M e m b e r