

City v. DC37, et. Al,28 OCB 34 (BOC 1981) [34-81 (Cert.)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

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In the Matter of the Application of

THE CITY OF NEW YORK,

Petitioner,

For an Order declaring employees
managerial or confidential pursuant
to Section 2.20 of the Revised
Consolidated Rules of the Office
of Collective Bargaining,

-and-

DECISION NO. 34-81
DOCKET NO. RE-109G-8

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO,

Respondent,

-and-

SOCIAL SERVICES EMPLOYEES UNION
LOCAL 371, AFSCME, AFL-CIO,

Intervenor.

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DECISION AND ORDER

On January 30, 1980, the City of New York, appearing by its Office of Municipal Labor Relations (the "City"), filed its petition with the Board of Certification (the "Board") seeking a determination that the 55 titles enumerated in Exhibit A thereto be declared managerial

or confidential within the meaning of Section 1173-4.1¹ of the New York City Collective Bargaining Law (the "NYCCBL"). The City sought to exclude employees in these titles from coverage in any subsequent collective bargaining agreement on the theory that:

[E]mployees of petitioner in the titles listed in Exhibit A p anticipate in the formulation and effectuation of policy or assist in the preparation for and conduct of collective negotiations, contract administration and personnel administration.²

In an Interim Decision, No. 28-80, issued on August 18, 1980, the Board ruled that:

(1) the petition would be dismissed as to those titles presently vacant unless the City furnished the Office of Collective Bargaining ("OCB") with information to the contrary prior to the commencement of hearings in the proceeding;

¹ Section 1173-4.1 of the NYCCBL reads as follows:
§1173-4.1 Rights of public employees and certified employee organizations. Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. However, neither managerial nor confidential employees shall constitute or be included in any bargaining unit, nor shall they have the right to bargain collectively; provided, however, that nothing in this Chapter shall be construed to: (i) deny to any managerial or confidential employee his rights under section 15 of the New York Civil Rights Law or any other rights; or (ii) prohibit any appropriate official or officials of a public employer as defined in this Chapter to hear and consider grievances and complaints of managerial and confidential employees concerning the terms and conditions of their employment, and to make recommendations thereon to the Chief Executive Officer of the public employer for such action as he shall deem appropriate. A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining unit.

² Paragraph 14 of the Petition herein.

(2) the petition would be dismissed as to 6 titles which the Board had previously adjudicated non-managerial unless the City supplied a statement of a change in circumstances prior to the commencement of the hearings; and

(3) in the interest of facilitating the hearing and processing of the case, the petition would be severed "along the lines of the certification in which the titles are included," and each part would be duly assigned a letter, from A to N, appended to a uniform docket number, i.e. - Docket No. RE-109-80.

With respect to the third ruling, the letter "G" identified the portion of the petition covering the following titles, which are included in Certification No. 37-78 (as amended):

Principal Consumer Affairs Inspector
Principal Inspector of Ports and Terminals
Principal Home Economist
Assistant Superintendent (Children's Institutions)
Principal Consultant (Early Childhood Education)
Superintendent of Adult Institutions
Supervisor III (Welfare)
Director of Residential Child Care
Supervisor III (Social Work)

Since such designation, seven of these nine titles have been withdrawn, and the Board hereby approves such withdrawal. The titles Principal Consultant (Early Childhood Education) and Director of Residential Child Care represent the remainder of the originally constituted RE-109G-80.

Hearings on the manageriality of these titles were held on November 19th and 24th, 1980, and May 7, 1981. The numerous extensions and postponements in the matter culminated in a May 28, 1981 letter to the union granting a final

extension with the explicit caveat that no further request by the union for adjournment would be considered. Accordingly, when the union failed to go forward with its case on the rescheduled date of June 4, 1981, the hearing was closed and the case processed for consideration by the Board.

MANAGERIAL STATUS OF THE EMPLOYEES

The Department of Social Services³ and the Agency for Child Development⁴ are two of the four New York City agencies which comprise the Human Resources Administration (OHRA). Though HRA oversees and coordinates the operations of its component agencies, each agency, headed by its own executive staff, maintains a substantially autonomous, albeit interdependent, existence within HRA.

There are currently 9 Directors of Residential Child Care in the Office of Direct Child Care Services, Department of Social Services ("DCCS"). According to the unrefuted testimony of Walter E. Logan, Deputy Director of DCCS, the Director is "fully responsible for the operation of the facility" to which he is assigned. The Director's responsibilities include:

- initiating and instituting changes to improve services;
- maintaining the facility in compliance with state standards;

³ The Directors of Residential Child Care work in the Department of Social Services.

⁴ The only incumbent in the title Principal Consultant (Early Childhood Education) works for the Agency of Child Development.

- developing new programs, often in conjunction with other agencies, and coordinating the input of the various agencies;
- projecting financial needs and formulating budget recommendations which are heavily regarded in the final decision of the appropriating body;
- exercising full discretion over the use of the ultimately allocated funds;
- actively and directly participating in the hiring process;
- making assignments within the facility;
- approving vacations and time-off;
- holding the first informal conference in the disciplinary process;
- recommending disciplinary action;
- attending labor management meetings;
- representing the agency before community groups; and
- occasionally participating in collective bargaining.

The Principal Consultant is one of the eleven members of the Executive Staff of the Agency for Child Development. ("ACD"). Florence Kennedy, the sole incumbent in that position, is the only member of the Executive Staff subject to collective bargaining. She is a union member, pays union dues, and her salary and overtime are governed by the collective bargaining agreement. She nevertheless has "equal weight" with the other executive staff members, She is, in fact, regarded as "the specialist" in early childhood education and is consulted regularly and extensively on various

matters for her opinions and recommendations. While she does not supervise anyone directly, she carries "key responsibility" in the agency as an extension of the Executive Director, and in that capacity is invested with a flexibility to "jump over various supervisory boundaries on a day-to-day basis."⁵ The Executive Staff, as a whole, discusses union demands and the views of each member are regarded in the formulation of a management response.

DISCUSSION

While the NYCCBL does not specifically define the term "managerial employee," Section 201.7(a) of the Taylor Law, made applicable to the City of New York by the Taylor Law's Section 212 "substantially equivalent" provision, states, in pertinent part, that:

Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in a personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment.

The difficulties in isolating the precise point where manageriality either begins or ends, as well as articulating a definition for and establishing the criteria by which to measure and assess manageriality, stem from the fluidity of

⁵ Testimony of Harmon Lamb, Executive Director for Planning, ACD.

recommendations flowing upward and directives downward.⁶ It has been consistently held that the single most important indicium, of manageriality is the formulation, determination and effectuation of an employer's policies. (American Federation of Labor, 120 N.L.R.B. 969, 973, 42 LRPM 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 Matter of Local 154, District Council 37, A.F.S.C.M.E., AFL-CIO, Decision No. 73-68)

One of the chief difficulties in identifying managerial employees is encountered where high level supervisory or professional or expert technical personnel must be distinguished from those who perform functions such as are contemplated in the Taylor Law definition of managerial employees in Section 201.7(a). Clearly the term "managerial," as used in this context, must mean something more than supervisory. In Decision No. 73-68, supra, the Board indicated that "the responsibilities and functions of

⁶ In the Matter of Services Employees International, Local 444, AFL-CIO, Decision No. 43-69.

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managerial-executives necessarily must be different and broader." In considering the above-recited duties of the Director of Residential Child Care, it seems clear that the Director is involved in far more than just the "day-to-day routine of following policy." (I.L.G.W.U. v. NLRB 339 F.2d 116, 57 LRRM 2540, 2545) He conceptualizes new programs, changes old ones and is otherwise given great latitude in the development of the kinds, as well as quality, of services offered by his facility.

With regard to the Principal Consultant, her significant participation in the formulation of policies warrants the same conclusion. In Decision No. 43-69, the Board was impressed by the fact that the incumbents in the four titles then before the Board attended and participated in meetings of the Commissioner and his staff, convened for the purpose of discussing matters of policy and planning. The Principal Consultant does not merely attend executive staff meetings. Her active participation in, and significant contribution to, such meetings is "... so clearly connected with the policy making process as to constitute a part of that process." (In the Matter of Association of New York City Assistant District Attorneys in the City of New York, Decision No. 13-74)

Although the Principal Consultant is not directly involved in collective bargaining negotiations on behalf of management, such involvement is not essential to a determination of manageriality. The Public Employment Relations Board of the State of New York ("PERB") has so held in Matter of State of New York, 5 PERB §3001 (1972):

Thus, it would appear to have been the intent of the Legislature that persons who formulate policy may be designated managerial even though they do not exercise a labor relations function.

* * *

The term "formulate". . . would appear to include not only a Person who has the authority or responsibility to select among options and to put a proposed policy, into effect, but also a person who participates with regularity in the essential process which results in a policy proposal and the decision to put such proposal into effect. (See Section 201 subd. 7 of the Civil Service Law, also known as the Taylor Law).

PERB, in discussing the formulation-of-policy criterion of manageriality, stressed the significance of participation in the policy-making process, regardless of whether the participation continues in the effectuation stage. The Executive Staff, of which the Principal Consultant is a member, discusses union demands and develops the agency's response to the demands. In Matter of Local 803, International Brotherhood of Teamsters, Decision No. 63-74, the Board regarded the role of Area Managers in the collective bargaining process to be sufficiently direct in view of

the vital importance of their contribution to the development of management bargaining policies. Hence,

Although Area Managers do not represent management at the bargaining table, they significantly participate in developing the employer's bargaining demands and in shaping the O.T.B.'s response to union bargaining demands.

In light of the foregoing, the Board is persuaded that the titles Director of Residential Child Care and Principal Consultant are managerial within the meaning of §1173-4.1.

O R D E R

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

ORDERED, that the request for the withdrawal from this petition of the titles Principal Consumer Affairs Inspector, Principal Inspector of Ports and Terminals, Principal Home Economist, Assistant Superintendent (Children's Institutions), Superintendent of Adult Institutions, Supervisor III (Welfare), and Supervisor III (Social Work) be, and the same hereby is, granted; and it is further

ORDERED, that the request herein for a determination that the titles Director of Residential Child Care and Principal Consultant (Early Childhood Education) are managerial within the meaning of Section 1173.4.1, be, and the

same hereby is, granted; and it is further

ORDERED that the titles Director of Residential Child Care and Principal Consultant (Early Childhood Education) be, and the same hereby are, deleted from Certification No. 37-78 (as amended).

DATED: New York, N.Y.
November 9, 1981

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

DANIEL G. COLLINS
MEMBER

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The titles and title code numbers of the employees affected by this decision are as follows:

Director of Residential Child Care	52496
Principal Consultant (Early Childhood Education)	51650