

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF CERTIFICATION

-----X

In the Matter of the Application of

THE CITY OF NEW YORK,

Petitioner,

DECISION NO. 36-82

DOCKET NO. RE-117-80

For an Order delcaring all employees  
in the OFFICE OF ADMINISTRATIVE TRIALS  
AND HEARINGS OF THE NEW YORK CITY  
DEPARTMENT OF PERSONNEL managerial or  
confidential pursuant to section 2.20  
of the Revised Consolidated Rules of  
the Office of Collective Bargaining,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO  
COMMUNICATIONS WORKERS OF AMERICA,  
AFL-CIO; and LOCAL 237, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS,

Respondents.

-----X

In the Matter of

CITY EMPLOYEES UNION, LOCAL 237,  
INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, and its affiliate,  
CIVIL SERVICE BAR ASSOCIATION,

DOCKET NO. RU-857-82

Petitioner,

-and-

THE CITY OF NEW YORK,

Respondent.

-----X

DETERMINATION AND ORDER

By order of the Board of Certification, Professor Joseph R. Crowley was appointed as Trial Examiner in this matter. Hearings were held on October 27, 1980, February

8, 1982, and March 2, 1982. on July 8, 1982, in accordance with Part 12 of the Revised Consolidated Rules of the office of Collective Bargaining, the Trial Examiner rendered his Intermediate Report. The Report was duly served on all parties to this proceeding, who were given ten (10) days in which to file written exceptions thereto. The time in which to file such exceptions expired on August 2, 1982. No exceptions having been filed by any party hereto, we render the following decision, which adopts, as modified and set forth below, the Trial Examiner's Intermediate Report.

Pursuant to the powers vested in the Board of Certification by the New York City Collective Bargaining Law, and in contemplation of Section 201.7(a) and Section 214 of the New York State Civil Service Law, and pursuant to Section 1173-4.1 of the New York City Collective Bargaining Law, it is hereby

DETERMINED, that employees in the following titles in the Office of Administrative Trials and Hearings of the New York City Department of Personnel are managerial: Chief Administrative Law Judge, Administrative Law Judge, Executive Assistant; and it is further

DETERMINED, that incumbents of the following titles in the Office of Administrative Trials and Hearings are confidential: Law Clerk, Confidential Secretary, Staff Analyst,

Decision No. 36-82  
Docket Nos. RE-117-80  
RU-857-82

3

Office Aide, Confidential Court Officer; and it is hereby

ORDERED, that, insofar as the City seeks a finding by this Board that all employees in the office of Administrative Trials and Hearings of the Department of Personnel are managerial and/or confidential, the petition, except as otherwise set forth herein, be, and the same hereby is, dismissed; and it is further

ORDERED, that the petition filed by City Employees Union, Local 237, IBT and its affiliate, Civil Service Bar Association, Docket No. RU-857-82, seeking to add the title Administrative Law Judge to Certification CWR-44/67 (as amended) be, and the same hereby is, dismissed.

DATED: New York, N.Y.  
August 31, 1982

ARVID ANDERSON  
CHAIRMAN

MILTON FRIEDMAN  
MEMBER

DANIEL G. COLLINS  
MEMBER

TRIAL EXAMINER'S INTERMEDIATE REPORT

NATURE OF PROCEEDING

On January 31, 1980, the City of New York filed a petition (amended as of March 5, 1980) with the Office of Collective Bargaining, Board of Certification (Board), seeking to have all employees of the New York City Department of Personnel designated as managerial and/or confidential within the meaning of Section 1173-4.1 of the New York City Collective Bargaining Law (NYCCBL) and Section 201.7(a) of the Civil Service Law of New York State.

A hearing was held on October 27, 1980. Further hearings were adjourned at the request of the City pending a decision by the new Director of Personnel as to whether or to what extent the petition should be processed further. On November 4, 1981, the City requested permission to withdraw its petition except as to the employees of the Department of Personnel in the Office of Administrative Trials and Hearings (OATH). On November 18, 1981 the Board granted the City's request. Thereafter, hearings were held on February 8 and March 2, 1982. There are 20 employees in OATH.

On January 20, 1982, City Employees Union, Local 237, IBT, and its affiliate, Civil Service Bar Association

filed a petition (Docket No. RU-857-82), seeking to add Administrative Law Judges to Certification CWR-44/67 (as amended), covering various attorney and related titles. On March 9, 1982, the Board of Certification ordered that this case be consolidated for purposes of decision with Case No. RE-117-80 because all employees in the title of Administrative Law Judge serve in OATH.

District Council 37, AFSCME (D.C. 37) and Communication Workers of America (CWA) oppose this petition on the ground that no employee of OATH is managerial and that, in any event, employees in the job titles of Office Associate, Office Aide and Stenographer Specialist are not confidential employees within the meaning of NYCCBL Section 1173-4.1 and Section 201.7(a) of the Civil Service Law. D.C. 37 and CWA represent nine of OATH's employees.

#### BACKGROUND

##### Nature of the Agency

By Executive Order No.32, issued July 25, 1979, the Mayor of New York City established OATH under the direction of the Chief Administrative Law Judge. The Order provided that the Chief Administrative Judge would have the following responsibilities in addition to presiding over administrative trials and hearing:

- (a) To direct [OATH] with respect to its organization and management and to appoint its Executive Director;
- (b) To appoint to the position of Administrative Law Judge such persons as may be admitted to the practice of law in the State of New York and otherwise suited by training and experience for such duties;
- (c) To establish rules for the conduct of administrative trials and hearings including charges, specifications, motions, prehearing and post-hearing matters.

In a memorandum issued the same day as the order, the Mayor stated that all disciplinary, disability and other civil service trials for all City agencies would be conducted by OATH.<sup>1</sup> The Mayor's memorandum noted that the Administrative Law Judge's decision is generally limited to a report and recommendation to the agency head, who remains responsible for making the final decision based on the trial record.

Although OATH is within the Department of Personnel, it is autonomous save in matters of hiring or discipline, where the approval of the Director of Personnel is required. The only action in these areas taken by OATH has been hiring, and the Director has always given his approval. Ninety

---

<sup>1</sup> The Mayor indicated that the Police, Correction and Sanitation Departments, as well as the Human Resources Administration, would continue to conduct their own disciplinary trials.

percent of the hearings conducted by OATH are disciplinary hearings brought under Section 75 of the Civil Service Law.

### Personnel

In addition to the Chief Administrative Law Judge, there are four Administrative Law Judges.

Originally, OATH had an Executive Director, who acted as the alter ego of the Chief Administrative Law Judge in all administrative matters. This job title has been changed to Executive Assistant. The position was vacant at the time of the hearing.

There are three positions with the job title of Confidential Secretary. They serve as secretaries to the Chief Administrative Law Judge and to the other Administrative Law Judges.

There is one position with the job title of Staff Analyst.

There are also the following positions - Law Clerk (1), office Associate (2 - one position vacant), office Aide (1), Confidential Court Officer (1) and Stenographic Specialists (5 in grade III and 2 in grade I).

### Duties of Personnel

Chief Administrative Law Judge - He is the chief judicial officer of OATH. He is responsible for the overall

administration of OATH and its relations with City agencies, boards and commissions served by OATH. He is responsible for establishing and adopting rules and procedures for the conduct of hearings and matters related thereto. In setting policy on legal issues and procedures, he confers with the other judges. on other policy matters, such as relations with other City agencies, he confers with the Executive Assistant as well as with the other judges.

In addition, he conducts trials and hearings, and issues decisions thereon.

Administrative Law Judge - Their primary function is, of course, to conduct trials and hearings, and to write decisions. However, as noted above, they do participate in conferences with the Chief Judge in the determination of policy on issues of law and relations with other agencies.

Executive Assistant - Although the position is currently vacant, the Chief Judge intends to fill it. The Executive Assistant is the alter ego of the Chief Judge in the administration of the office. He, with the Chief Judge, establishes policies, makes budgetary decisions, and deals with other City agencies. He also represents the Chief Judge at various meetings.

Confidential Secretaries - These secretaries type the decisions of the judges. They attend the judges' con-



ferences, make notes thereon, and prepare memoranda summarizing the proceedings. They type memoranda reflecting the work product of the Law Clerk.

Staff Analyst - The incumbent in this position is S. DiPolo. She was originally a Confidential Secretary. She continues to perform the duties of a Confidential Secretary but has been given additional duties in terms of managing or overseeing the work flow through the office. She acts as office manager.

Law Clerk - The Law Clerk serves all of the judges. He is asked to brief issues for the judges, to read and review the briefs submitted by the parties, and to give the judges an evaluation as to the validity of positions taken therein. The judges have conferences with the Law Clerk concerning the results of the research and whether additional research is required. He also drafts portions of decisions.

Office Associate - Although two such job titles are authorized, there is only one incumbent. Her primary duty is scheduling cases, a task on which she spends about 90% of her time. This includes not only setting dates for a hearing but also setting up a file for each case. She sends out notices notifying the respondent, attorneys and witnesses as to the scheduled hearing. She deals with requests for

adjournments. In her former position of office Aide, she also typed decisions. In her present position, she has been called upon to type draft decisions twice in the past year. The Chief Judge testified that it would now be an exceptional circumstance for this Office Associate to be called on to type a decision.

Office Aide - She spends 90% of her time typing drafts of the judges' decisions or reports and recommendations. Her job location is in an office with Confidential Secretaries. She does not discuss the decisions with the judges.

Confidential Court officer - His duties include opening hearing rooms, maintaining order in the hearing room, directing the parties to the hearing room, acting as a messenger in picking up personnel records from agencies<sup>2</sup> and delivering to the agencies the judges' decisions, which are reports and recommendations. He also makes copies of the judges' decisions.

Stenographic Specialists - There are seven employees in this title. K. Perry is the working supervisor. They act as court reporters to record and to make transcripts

---

<sup>2</sup> These records were described by the City's witness, Judge Failla, as confidential, but it is difficult to comprehend how a judicial body could consider or use confidential records in its deliberations which would not be disclosed or available to the respondents.

of the proceedings at all trials and hearings. They are represented by CWA.

The stenographers work in their own room. Judges bring to the stenographers' attention corrections to be made in the record, either verbally or by way of a note attached to the transcript. At times a stenographer asks a judge to assist in the interpretation of the stenographic notes in the context of the proceedings. About a year ago, the stenographers did some typing of drafts of decisions, but they do not do so now.

Perry assigns cases to the other stenographers and evaluates their performance. She interviews applicants and has made two recommendations for hiring which were followed, but her recommendations as to termination were not.

#### POSITIONS OF THE PARTIES

##### City's Position

It is the City's position that all employees of OATH should be excluded from collective bargaining because they are managerial and/or confidential within the meaning of the NYCCBL and the Civil Service Law of the State of New York (Taylor Law).

Specifically, the City alleges that Administrative Law Judges have a major role in personnel administration and

formulation of policy and, thus, should be excluded as managerial. Furthermore, the City alleges that all other employees of OATH act in a confidential capacity to the Administrative Law Judges and, thus, should be excluded as Confidential.<sup>3</sup>

### Unions' Position

The Unions contend that the City has failed to establish that any employee in OATH is managerial and, therefore, any claim of confidential status must also fail. Assuming, arguendo, that some OATH employees are managerial, there is no showing in the record that the Office Associate, Office Aide, Law Clerk or Stenographic Specialists act in a confidential capacity to any managerial employee.

### DISCUSSION

OMLR seeks a determination that all persons employed in OATH are managerial or confidential within the meaning of NYCCBL Section 1173-4.1.

This section provides in pertinent part:

" ... neither managerial or confidential employees shall constitute or be included in any bargaining unit, nor shall they have the right to bargain collectively; ...."

---

<sup>3</sup> City brief, p.3

The above section does not define either managerial or confidential employee. Accordingly, we apply the criteria set forth in Section 210.7(a) of the Civil Service Law (Taylor Law), which provides in relevant part:

"... 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 personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii)."

Thus, there are established, by statute, four criteria to be used in designating persons as managerial. The first is formulation of policy; the other three deal with labor relation functions or responsibilities on behalf of the public employer.

With respect to formulation of policy, policy has been defined as the development of the particular objectives of a government, or agency thereof, in the fulfillment of its mission and the methods, means and extent of achieving such objectives.<sup>4</sup> The term "formulate" includes not only

---

<sup>4</sup> State of New York, 5 PERB ¶13001 at 3005 (1972).

a person who has the authority or responsibility to select among options and to put a proposed policy into effect, but also includes persons who regularly participate in the essential process which results in a policy proposal and the decision to put such proposal into effect.<sup>5</sup>

Of the other three criteria, the only one that would be pertinent, under the facts of this proceeding, would be the third criterion: whether the person may reasonably be required to have a major role in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment.<sup>6</sup>

#### Formulation of Policy

The City contends that the Chief Administrative Law Judge and the other Administrative Law Judges, as well as the Executive Assistant, are managerial because they are involved in the process of developing policies of OATH.

The Chief Administrative Law Judge is charged with the overall management of OATH and with establishing rules and procedures for the conduct of hearings and related

---

<sup>5</sup> Id.; City of Binghamton, 12 PERB ¶4022, aff'd, 12 PERB ¶ 3099 (1979).

<sup>6</sup> There is no evidence in the record that anyone at UATH directly assists in the preparation for and conduct of negotiations on behalf of the employer or has a major role in the administration of agreements.

matters. This latter responsibility is discharged in consultation with the other judges. The other judges also participate in the determination of questions relating to policy to be followed in resolving legal issues.<sup>7</sup> All this involves the methods, means and extent of achieving OATH's objectives and thus, I conclude, satisfies the criterion for managerial designation of formulation of policy.

As to the Executive Assistant, although the position was vacant at the time of the hearing, the evidence is clear that the Executive Assistant would be performing the same duties as those of the prior title, Executive Director. The Executive Assistant is the alter ego of the Chief Judge in administrative matters relating to OATH. Together with the Chief Judge, the Executive Assistant would determine personnel policies and budget matters. He would also participate with the Chief Judge in the setting of policies concerning relations with other City agencies and would represent the Chief Judge at meetings with other agencies.

Thus, I conclude that the Executive Assistant also satisfies the criterion for managerial designation of formulation of policy.

---

<sup>7</sup> There is nothing in the record to indicate that such acts of the Chief and other judges are subject to the approval of the Director of Personnel; rather, the Executive Order creating OATH expressly grants such power and responsibility to the Chief Judge.

Major Role in Personnel Administration

The primary subject of the trials and hearings conducted by the Chief and other Administrative Law Judges is discipline. As pointed out above, 90% of the trials and hearings are held pursuant to Section 75 of the Civil Service Law, which concerns "Removal and Other Disciplinary Action" against employees of City agencies. It is therefore abundantly clear that the Chief and other judges, by virtue of their role in the conduct of disciplinary hearings, play a major role in personnel administration. Certainly their role is not "of a routine or clerical nature" and does "require the exercise of independent judgment."

D.C. 37 argues that the decisions of the judges are not final, but are reports and recommendations subject to review by the Commissioner who designated OATH to hear such matter and, therefore, that Administrative Law Judges do not set policy. The fact is that the reports and recommendations of the judges usually have been adopted by the Commissioner involved.

Thus, I would conclude that the Chief Administrative Law Judge and the other Administrative Judges are also managerial because they have a major role in personnel administration.



Confidential Designation

Law Clerk<sup>8</sup> - The Law Clerk is involved in research for the judges in the preparation of their decisions. This involves discussions with the judges. He also drafts portions of the judges' decisions. He is thus privy to the thinking of the judges prior to their decisions. Obviously, the Law Clerk's role is a confidential one. Were it not, the judges would be inhibited in their utilization of the Clerk's services. I conclude that the Law Clerk should be designated confidential as he acts in a confidential capacity to persons who have a major role in personnel administration.

Confidential Secretaries - These persons type the decisions (involving disciplinary matters) of the judges, both drafts and final copies and, although these decisions do become public documents, they are not public until they are completed and delivered. The secretaries also participate in conferences attended by the Chief and other Administrative Law Judges wherein legal issues and policies pertaining to disciplinary hearings are discussed. They maintain the judges' files. I conclude that they act in a confidential capacity to the judges and thus satisfy the statutory criteria for designation as confidential.

---

<sup>8</sup> At the first hearing, the City stated that it sought managerial designation for the Law Clerk, but later it said it intended confidential status.

Staff Analyst - The person holding this title was formerly in the job title of Confidential Secretary. The evidence demonstrates that she still performs such duties and has taken on additional duties which are described as those of an office manager. However, since she still performs the duties of a Confidential Secretary, she should be designated as confidential for the same reasons that Confidential Secretaries are deemed to be confidential.

Office Associate - As noted previously, the only employee in this job title spends 90% of her time scheduling cases and setting up files for each case. She also sends out notices of hearings and handles requests for adjournments. In the past year, she did type drafts of decisions on two occasions but, as the Chief Judge testified, due to the acquisition of word processors, it is unlikely that this Office Associate will again be called upon to type decisions. I do not find any basis in the record to conclude that she acts in a confidential capacity to the Administrative Law Judges in the exercise of their role in personnel administration.

Office Aide - According to the record, this person spends 90% of her time typing drafts of the judges' proposed decisions. She is located with and directly assists the

Confidential Secretaries. Thus, she is privy to the thinking and possible disposition of disciplinary matters well before they are issued by the judges in final form.

D.C. 37 argues that since the judges' reports and recommendations are made available to the parties at a time prior to any action taken by a Commissioner with respect to the judges' report, there is no secrecy or confidentiality with respect to the judges' decisions. However, this argument fails to recognize that, prior to the issuance of the report by the judges, it is clearly a confidential matter. Nor does the fact that the judges' reports are not final, but are subject to acceptance by the Commissioner, detract from their confidentiality in the drafting process, for these hearings and decisions thereon form an important part of the disciplinary process.

I therefore conclude that the duties performed by this Office Aide, as described above, warrant her designation as confidential; she assists the judges in a confidential capacity.

Stenographic Specialists - As noted previously, their function is to record all trials and hearings and to prepare transcripts of the record. Their only contact with the judges is, at times, to receive corrections to be made

in the record or to seek assistance in the interpretation of their stenographic notes. In the past, they did assist in typing drafts of decisions, but this is no longer the practice. on this record, it cannot be said that they assist the judges in a confidential capacity. I therefore conclude that they should not be excluded from collective bargaining.

I reach a similar conclusion with respect to K. Perry, who is a working supervisor and stenographer. She assigns stenographers to cases. She did participate in the hiring process by interviewing two applicants and making recommendations which were followed. Her recommendations concerning termination were not followed, however on this record, I find no basis to exclude her from collective bargaining.

Confidential Court Officer - Many functions of this employee would not provide a basis for exclusion as confidential, such as preparing the hearing rooms, directing the parties, maintaining order and performing messenger services. However, he does do the duplicating of copies of the judges' decisions and reports. Obviously, this is done prior to the issuance of same and most likely would include the copying of drafts. To this extent he does act in a con-

fidential capacity.<sup>9</sup> Thus, I conclude that he should be excluded as confidential.

Therefore, I find and recommend as follows:

- (1) that the Chief Administrative Law Judge, Administrative Law Judges, and Executive Assistant be designated managerial;
- (2) that the Law Clerk, Confidential Secretaries, Staff Analyst, office Aide and Confidential Court Officer be Designated confidential;<sup>10</sup> and
- (3) that the office Associate and Stenographic Specialists not be excluded from collective bargaining.

July 8, 19 82

SIGNED  
Joseph R. Crowley  
Hearing Officer

---

<sup>9</sup> Cf. Office Appliance Operators in the Department of Personnel. Decision No. 11-76 at 10. It should be noted that our Decision No. 11-76, which dealt with a petition filed by the City in 1972 in which it sought to have excluded from collective bargaining, inter alia, all employees of the Department of Personnel, did not address the eligibility for collective bargaining of employees of OATH because, as noted at page 2 supra, OATH was only created in 1979.

<sup>10</sup> These recommended designations are not based on job titles as such but rather on the nature of the duties performed by the incumbents in such job titles.