

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

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In the Matter of

CIVIL SERVICE TECHNICAL GUILD,
LOCAL 375, AFSCME, AFL-CIO,

Petitioner,

DECISION NO. 21-84

-and-

LOCAL 1407, DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,

Petitioner,

DOCKET NOS. RU-521-75
RU-533-75
RU-702-79
RU-704-79
RU-707-79
RU-730-79

-and-

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

Petitioner,

-and-

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1180,

Petitioner,

-and-

CITY EMPLOYEES UNION, LOCAL 237,
IBT,

Intervenor,

-and-

THE CITY OF NEW YORK,

Respondent.

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DETERMINATION AND ORDER

On November 18, 1980 and June 10, 1982, respectively,
we issued our first and second interim decisions (Nos. 39-80

and 20-82) in this matter, finding that the City of New York ("the City") had established a prima facie case as to the managerial and/or confidential status of:

1. employees serving in the title Administrative Staff Analyst;
2. employees serving in the titles Staff Analyst and Associate Staff Analyst who, prior to their reclassification to the staff analyst series, had been excluded from collective bargaining by a decision of the Board of Certification ("Board") finding their predecessor titles to be managerial or confidential, if such employees continue to perform the duties of their predecessor titles; also, the successors to employees who held such previously excluded titles;
3. employees serving in the title Associate Staff Analyst who perform duties in the areas of personnel administration, labor relations or budget, who are paid at a rate equal to or in excess of the minimum pay level for employees in the Managerial Pay Plan.¹ These employees were found to be prima facie managerial;
4. employees serving in the title Associate Staff Analyst who perform duties in the areas of personnel administration, labor relations or budget, who are paid at a rate less than the minimum pay level for employees in the Managerial Pay Plan.

¹ At the time of that determination, the minimum pay level for employees in the Managerial Pay Plan was \$25,920. Effective July 1, 1983, the minimum was increased to \$27,734.

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These employees were found to be prima facie confidential, subject to the condition that the City provide the names of the managerial employees with whom these employees have a confidential relationship;

5. employees serving in the title Staff Analyst who perform duties in the areas of personnel administration, labor relations or budget. These employees also were designated prima facie confidential, subject to the condition that the City provide the names of the managerial employees with whom these employees have a confidential relationship.

In Decision No. 20-82, we also determined that the City had the burden of producing additional evidence and argument in support of its claim with respect to Staff Analysts and Associate Staff Analysts who were not within the categories of its prima facie case.

On July 2, 1982, a meeting was held at the Office of Collective Bargaining ("OCB") to discuss the further processing of this case. It was agreed that the City would provide a list of all Staff Analysts and Associate Staff Analysts alleged to be included in the categories indicating prima facie managerial or confidential status as delineated by the Board in Decision

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Nos. 39-80 and 20-82.² It was further agreed that the unions party to this matter would, within thirty days thereafter, respond to the information provided by the City.

The City complied with this agreement by submitting lists, by agency, of the Staff Analysts and Associate Staff Analysts allegedly covered by the Board's interim findings, together with the salary earned by each employee and, where relevant, the substantive areas in which the employee's duties lay (i.e., personnel administration, labor relations or budget). Additionally, with respect to Staff Analysts and Associate Staff Analysts deemed to be confidential under the Board's rulings, the City provided the name, title and managerial level of such employee's immediate supervisor. The latter information

² No information was required of the City with respect to employees serving in the title Administrative Staff Analyst, as the Board ruled that the City established a prima facie case as to the managerial and/or confidential status of the title as a whole. This decision was based upon the duties set forth in the job specification, upon the fact that five of the six predecessor titles to the Administrative Staff Analyst title were previously determined to be managerial or confidential in the Board's Decision No. 19-75 (the sixth title was deleted from the Classified Service), and upon the fact that the title was included in the Managerial Pay Plan.

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was required in order to comply with the definition of confidentiality set forth in section 201.7(a) of the Taylor Law, by which we are guided in such matters:

"[e]mployees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees [who perform a labor relations or personnel administration function]."

Each of the five unions party to the proceedings registered its objection to the Board's interim determinations and made known its intention to challenge the exclusion from collective bargaining of employees covered by such findings. Local 237, IBT argued additionally that the Board should find that the Staff Analysts and Associate Staff Analysts whose names did not appear on the City's lists constitute an identifiable and appropriate unit for collective bargaining. Local 237 requested that the Board order an immediate election in the proposed unit.

From July through September of 1982, the Lists of employees alleged to be included in the prima facie case of managerial and confidential status were distributed, amended by the City and reviewed by the unions. The unions were asked to make known to OCB their readiness to proceed with a rebuttal of the City's prima facie case. The City

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was charged with preparing to go forward with the remainder of its affirmative case concerning an estimated 600 Staff Analysts and Associate Staff Analysts who were not covered by the interim decisions.

While the City continued to take the position that all employees in the staff analyst series are managerial and/or confidential and should be found ineligible for collective bargaining, it suggested that a significant number of the employees not covered by our interim decisions might not be performing duties appropriate to their titles in the staff analyst series. On September 3, 1982, therefore, Bruce McIver, then Director of the City's Office of Municipal Labor Relations ("OMLR") wrote a letter to Arvid Anderson, Chairman of this Board, proposing to have the City Personnel Director conduct desk audits of all positions not covered by the interim decisions and, based upon the audit results, to offer employees found to be performing duties not appropriate to the Staff Analyst or Associate Staff Analyst title in which they were employed the option of reclassification to a title appropriate to the duties actually performed or reassignment to duties appropriate to the staff analyst titles. The City requested that we issue an order designating as managerial and/or

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confidential those employees whom the desk audits revealed to be performing duties appropriate to their titles.

Mr. McIver's proposal was circulated among the parties and discussed at a conference held on September 8, 1982. Efforts by the City to obtain the unions' consent to the proposal were inconclusive and, in December, 1983, the City began to conduct audits of approximately 600 Staff Analyst and Associate Staff Analyst positions.

In the interim, on October 21, 1983, the newly independent Organization of Staff Analysts ("OSA" or "the Union") filed a motion to intervene in the representation case, as the legal successor to Local 237, IBT.³ Upon receipt of sufficient evidence that OSA is a bona fide labor organization,⁴ as well as a no-strike

³ OSA, previously affiliated with Local 237, voted to disaffiliate from that union on October 11, 1983.

⁴ OSA's submission of its Constitution and By-Laws, a list of its officers, and an assertion that its primary purpose is to represent public employees concerning wages, hours and working conditions was deemed to satisfy this requirement.

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affirmation⁵ and an adequate showing of interest in a proposed bargaining unit of Staff Analysts and Associate Staff Analysts,⁶ we granted the motion to intervene and substituted OSA for Local 237 in these proceedings.⁷

At a conference held on April 6, 1984, attended by representatives of all parties to this matter, OSA indicated that it was ready to proceed with its rebuttal case.

⁵ Section 2.17(b) of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules") provides:

No public employee organization shall be certified as an exclusive bargaining representative unless it has filed with the Board a no-strike affirmation as required by the New York State Public Employees' Fair Employment Act.

See, N.Y. Civ. Serv. Law, §207.3(b).

⁶ A thirty percent showing of interest in a unit appropriate for collective bargaining, as required by Section 2.3(b) (1) of the OCB Rules, was satisfied by the submission of at least 365 valid designation cards. We note that OSA was the only one of the unions party to this case required to comply with Rule 2.3(b) (1) because only OSA seeks to represent a separate unit consisting entirely of employees in the staff analyst series. Each of the other organizations seeks to add to an existing unit those persons who, despite their classification in the staff analyst series, are performing duties similar to those performed by such titles as Accountant, Case-worker, or Principal Administrative Associate which are already represented by one of these organizations.

⁷ See, Minutes of a Meeting of the Board of Certification held on March 28, 1984.

Between May 9 and October 4, 1984, nine days of hearings were held, during which OSA presented 56 witnesses who testified concerning the duties performed by some 94 Staff Analysts and Associate Staff Analysts who were covered by our determinations of prima facie confidential status. Following direct examination by OSA's attorney, the City's representative cross-examined each witness. Counsel for each of the other unions also were afforded the opportunity to, and did, examine the witnesses, although neither the City nor any of the other unions produced witnesses of its own. At the conclusion of the hearings in this phase of the case, counsel for OSA made a statement in which the other unions concurred, urging that:

"since the hearings of the last eight months have shown that a substantial number of persons who had been found to be prima facie managerial or confidential by the OCB ... [are] not managerial or confidential and, therefore, since the overall burden of showing that employees belong in that category is on the employer, the burden should now shift back to the employer, if there are any additional persons that it wishes to find to be excluded from collective bargaining on the basis of being managerial/confidential."⁸

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Counsel for the City opposed this position, stating that the evidence produced by OSA was insufficient to overcome the City's prima facie case. The City requested an opportunity to file a written statement addressing the issue of whether or not the burden of proof concerning the manageriality or confidentiality of Staff Analysts and Associate Staff Analysts covered by the interim decisions should shift back to the City. The Trial Examiner granted this request. On October 15, 1984, the City submitted a letter brief on this issue, to which OSA responded by a letter dated November 5, 1984.

Additionally, in a letter dated October 19, 1984, the City set forth its position with respect to the staff analyst positions that have been the subject of desk audits conducted by the Department of Personnel. OSA addressed this issue by a separate letter, also dated November 5, 1984.

Positions of the Parties

A. The Prima Facie Case

The City asserts that, when the Board, in Decision No. 20-82, shifted the burden of going forward to the unions, it necessarily charged the unions with disproving the City's prima facie case by a preponderance

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of the evidence. OMLR notes that OSA's rebuttal case consisted in the testimony of only approximately 50 witnesses, some of whom OSA has conceded are managerial or confidential. This evidence, it is argued, is insufficient to rebut the Board's interim findings.

Moreover, since determinations of confidential status must be made on an individual basis, the City argues that a rebuttal case as to employees found prima facie confidential must also be presented as to every individual. Thus, assuming OSA has succeeded in refuting the City's prima facie case as to some staff analysts, there is no basis for a finding that it has rebutted the Board's determination as to all staff analysts.

Finally, in the event this Board determines that the prima facie case has been rebutted, in whole or in part, the City seeks an opportunity to present additional evidence in support of its case.

OSA argues that its rebuttal case was limited to the categories of employees found to be prima facie confidential and, therefore, no finding should, in any event, be made concerning the group of Associate Staff Analysts found prima facie managerial. OSA claims not to have received the list of employees alleged to come within

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this category of prima facie exclusion and asserts that it would be prepared to present a further rebuttal case upon receipt of an updated list of employees the City considers to be in this category.

As to the merits of its rebuttal case, OSA maintains that

“the overwhelming evidence relating to the employees whose names appear on the list provided by the City [demonstrates that they] are clearly not confidential

OSA notes, too, that determinations of confidential status must be made on a case-by-case basis. Accordingly, the Union argues, an evaluation of the employees included in its case must result in a reversal of our original findings of confidential status that were based upon categories of employees and not upon the duties of individuals.

OSA objects to affording the City a second chance to prove the confidential status of employees included in the prima facie case and urges the Board to issue a decision at this juncture finding that the City has not met its burden of proof. Nevertheless, if the City is afforded an opportunity to produce additional evidence, it should do so forthwith and before the issuance of any further decision by this Board.

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B. The Desk Audits⁹

The City maintains that any employee whose position has been the subject of a desk audit and who is found to be performing duties appropriate to the staff analyst title in which he is employed should, ipso facto, be deemed managerial and/or confidential. Thus, the City maintains, the Board should, without further proceedings, issue an order declaring ineligible for collective bargaining all Staff Analysts and Associate Staff Analysts who have been found to be appropriately classified. If necessary, however, the City is prepared to submit further evidence in support of its position as to this residual group, including the testimony of persons who conducted the audits and the testimony of the audited employees.

OSA concedes that some of the desk audits accurately reflect the duties performed by the subject employees, and is prepared to submit these audits to the Board for a determination of manageriality and/or confidentiality.

⁹ OSA challenged the City's desk audit and reclassification plan in an improper practice petition filed with the Board of Collective Bargaining. That proceeding, docketed as BCB-686-84, was dismissed in its entirety, on October 25, 1984, Organization of Staff Analysts v. City of New York, Decision No. B-22-84. Pursuant to Section 205.5(d) of the Taylor Law, the Public Employment Relations Board has asserted jurisdiction to review this decision. Matter of the Petition of Organization of Staff Analysts, PERB Case No. N-0002 (November 28, 1984).

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However, OSA maintains, most of the audits do not accurately reflect the duties performed by the employees involved. As to this larger number, OSA demands that the City be required to produce each audited employee to testify in support of the contention that such an employee is managerial or confidential.

OSA strenuously objects, on grounds of hearsay, to any procedure that would enable the City to establish a prima facie case simply by offering into evidence the disputed desk audits. It also objects to the City's request for additional opportunities to prove its case through the testimony of the auditors and/or of the individual employees, if the Board should find that the audits alone are insufficient. The Union urges that we require the City to proceed immediately and to produce the testimony of individual audited employees. If it cannot do so, OSA requests that we declare these employees eligible for collective bargaining in a unit of staff analysts.

Discussion

A. The Prima Facie Case

To date, we have issued two interim decisions in this matter which, if confirmed, would render ineligible for collective bargaining all employees serving in the title

Administrative Staff Analyst and various categories of employees serving as Associate Staff Analysts and Staff Analysts.¹⁰ We arrived at our determinations through the application of carefully considered guidelines and factors which, we believe, faithfully implement the criteria for a finding of manageriality or confidentiality prescribed by Section 201.7(a) of the Taylor Law.¹¹ These included:

- (1) the duties set forth in the job specifications;¹²
- (2) inclusion of title in the Managerial Pay Plan;¹³

¹⁰ These groups of employees are described at pages 2-3 supra.

¹¹ Section 201.7(a) of the Taylor Law provides, in relevant part, as follows:

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).

¹² See Decision Nos. 43-69; 45-78.

¹³ See Decision Nos. 19-75; 45-76.

- (3) prior exclusion from collective bargaining by virtue of a Board decision covering a predecessor title to the staff analyst series,¹⁴ or an entire City agency,¹⁵ or a segment of an agency;¹⁶
- (4) involvement in personnel administration,¹⁷ labor relations¹⁸ or budget-related¹⁹ functions; and
- (5) salary level.²⁰

The listed factors, as indicated, have previously been found by the Board to be reliable indicia of managerial and/or confidential status. They have also been found substantially equivalent to, and designed to accomplish the same end as, the criteria set forth in section 201.7(a)

¹⁴ In Decision No. 19-75, the titles Administrative Personnel Examiner, Principal Budget Examiner, et al. were excluded from collective bargaining. These titles subsequently were reclassified to Administrative Staff Analyst.

¹⁵ E.g., Decision No. 75-74 (OCB and OMLR).

¹⁶ E.g., Decision No. 70-68 (Personnel Examiner titles in the Department of Personnel).

¹⁷ See Decision Nos. 73-71; 63-72.

¹⁸ See Decision Nos. 43-69; 19A-70.

¹⁹ See Decision Nos. 73-71; 8-72.

²⁰ See Decision Nos. 79-68; 73-71.

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of the Taylor law.²¹

All of the petitioners and the intervening unions were afforded full and fair opportunity to rebut our interim determinations; however, only one organization, OSA, offered an affirmative rebuttal case. As previously noted, OSA's case consisted in a challenge to the alleged confidential status of some 94 Staff Analysts and Associate Staff Analysts. No evidence was offered, however, to rebut the interim decisions with respect to the Administrative Staff Analyst title, or with respect to employees in the Associate Staff Analyst title whom we found to be prima facie managerial.²²

While we find that a substantial issue has been presented by OSA with regard to employees whose alleged confidential status was specifically challenged, we must

²¹ See Decision Nos. 73-71; 45-78; 3-83. The New York Court of Appeals approved our reliance upon guidelines and criteria as appropriate aids in the implementation of Section 201.7(a) of the Taylor Law in Civil Service Technical Guild v. Anderson, 79 A.D. 2d 541, 434 N.Y.S. 2d 13 (Kupferman, J., dissenting), rev'd, 55 N.Y. 2d 618, 430 N.E. 2d 1317, 446 N.Y.S. 2d 264 (1981).

²² We do not consider OSA's claim that it did not receive the list of Associate Staff Analysts alleged to be prima facie managerial. We note that this list was provided to Local 237, OSA's predecessor in interest, and that OSA was aware that such a list had been requested by another union party to this case.

conclude that the Union failed to rebut, by a fair preponderance of the evidence, our interim decisions as to managerial or confidential status.²³ Accordingly, with the exception of the challenged individuals, whose status we shall examine more fully in a future decision, we now confirm Decision Nos. 39-80 and 20-82, and find ineligible for collective bargaining all employees covered thereby.

We emphasize that the processing of this representation case has been in the nature of an investigation rather than an adversarial proceeding.²⁴ We have not adhered to formal litigation procedures and have relied upon information provided by the City in response to questionnaires and guidelines formulated by OCB at various stages of these proceedings, in order to facilitate and expedite our investigation. And, while the burden of proof

²³ The City named 365 employees as prima facie confidential pursuant to our interim decisions. OSA's rebuttal case, even if persuasive as to all 94 employees covered thereby, simply involves too small a sample to warrant reconsideration of the basis for our earlier determinations.

²⁴ Section 2.20d of the OCB Rules authorizes the Board, in its investigation of a question as to the managerial or confidential status of employees, to:

"conduct informal conferences or hearings
or use any other suitable method of
resolving the matter."

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as to manageriality or confidentiality remained with the City at all times, once OMLR made a substantial showing this regard, we shifted the burden of going forward to the unions, also with a view to expediting the resolution of this case. It is important to note that we repeatedly reminded all parties of their respective obligations and burdens in this matter.

We have now received sufficient evidence to make an informed judgment as to the managerial or confidential status of some 1000 employees in the staff analyst series. We have afforded the unions every opportunity to demonstrate why we should not confirm our interim determinations, but none of the unions has persuaded us to reverse. Accordingly, we deem our investigation closed with respect to all employees covered by Decision Nos. 39-80 and 20-82, with the exception of the employees specifically and directly challenged by OSA, as noted above.

B. The Desk Audits

The positions of some 600 additional employees in the staff analyst series have now been the subject of desk audits conducted by the Department of Personnel. The audited employees are not included in any of the categories of staff analysts which we have found ineligible for collective

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bargaining. The City argues, however, that we should extend our findings of manageriality and/or confidentiality to include those employees whom the audits revealed to be performing duties appropriate to their staff analyst titles. OSA opposes such a finding and argues that the City should be required to present the testimony of each audited individual to support its position.

While we are persuaded by the City's prima facie case, confirmed in this decision, that a substantial number of employees in the staff analyst series are managerial and/or confidential, we decline to extend our decision to cover additional employees solely on the strength of an allegation that they are performing duties appropriate to their titles. No evidence has been offered concerning the duties performed by the employees whose positions have been audited. Assuming a proper foundation, including information as to the procedures followed, the audits would be admissible as evidence of the duties performed and of the alleged managerial and/or confidential status of audited employees. The appropriate time for consideration of such evidence is at a hearing which will be scheduled for the purpose of receiving such evidence.

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We emphasize that we have previously indicated to the parties herein our approval of the desk audit procedure as a device likely to facilitate our investigation of manageriality and confidentiality in this case and reiterate a request, repeatedly made in this matter, that the parties attempt, as a preliminary to further hearings, to resolve voluntarily any factual issues presented by the desk audits. With respect to any such disputes that have not been resolved voluntarily prior to hearing, we shall require that an objecting union specify, in the case of each audited employee, the precise nature of the objection, to which the City will have an opportunity to respond. In the event that such a procedure is necessary, it is our intention to request that the objections and rebuttal be by written submission prior to hearing.

C. Additional Titles

The three decisions now issued in this matter deal exclusively with the alleged manageriality and/or confidentiality of employees in the staff analyst series. However, two of the six petitions consolidated for decision in these proceedings involve employees serving in two distinct titles: Quantitative Analyst (Docket No. RU-521-75) and Program Research Analyst (Docket No. RU-533-75). In

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Resolution No. 77-25, the City Personnel Director earmarked these titles "for present incumbents only", indicating that the titles would be deleted from the Classified Service of the City of New York once employees serving in the titles, or appointed to the titles from eligible lists that either existed at the time of, or were established as a result of, an examination scheduled prior to the promulgation of Resolution No. 77-25, resigned, retired or otherwise vacated their positions. In Decision No. 12-79, we reiterated our determination that Docket Nos. RU-521-75 and RU-533-75 should be made a part of the staff analyst proceedings "since the functions of these three 'earmarked' titles were subsumed by the staff analyst series of titles."²⁵ In spite of the above history, Decision Nos. 39-80 and 20-82 did not deal with the representational claims for those two titles or with the City's objections thereto and, to date, no evidence has been offered concerning the duties performed by the employees in these titles. Therefore, upon scheduling hearings on the managerial and/or confidential status of desk audited employees, we shall also schedule a date or dates for the purpose of taking testimony concerning the duties

²⁵ We first ordered the consolidation of these petitions with the staff analyst case in Matter of City of New York and Local 375, Civil Service Technical Guild, Decision No. 45-78.

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performed by incumbents in the Quantitative Analyst and Program Research Analyst titles.

It is our hope that the issuance of this decision, confirming the basis for our interim determinations of manageriality and confidentiality, and finalizing our rulings with respect to the collective bargaining status of a substantial number of employees in the staff analyst series, will encourage the parties to this matter to work together toward a resolution of the remaining aspects of this case. The staff of the OCB stands ready to assist, in any way possible, a voluntary resolution of some or all of the outstanding claims.

O R D E R

Pursuant to the powers vested in the Board of Certification by the New York City Collective Bargaining Law, in contemplation of Section 201.7(a) and Section 201.7(a) 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 serving in the title Administrative Staff Analyst are managerial, and therefore are excluded from collective bargaining; and it is further

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DETERMINED, that employees serving in the titles Associate Staff Analyst and Staff Analyst who are described in the second decretal paragraph of our Order in Decision No. 39-80 and in the second, third and fourth decretal paragraphs of our Order in Decision No. 20-82 are managerial and/or confidential, and therefore are excluded from collective bargaining, this determination to exclude, however, individual employees whose status is under examination as described herein at page 18; and it is hereby

ORDERED, that the prima facie determinations set forth in our Decision Nos. 39-80 and 20-82 be, and the same hereby are, confirmed, subject to the exception noted above and in our decision herein.

DATED: New York, N.Y.
December 26, 1984

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER