

L.211, IUOE, et. Al v. City, Dep't of Buildings, 38 OCB 13 (BOC 1986)
[13-86 (Cert.)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

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In the Matter of

ALLIED BUILDING INSPECTORS,
LOCAL 211, I.U.O.E.,

Petitioner,

-and-

DECISION NO. 13-86

CITY OF NEW YORK DEPARTMENT
OF BUILDINGS,

DOCKET NO. RU-930-84

Respondent.

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APPEARANCES:

Adam Ira Klein, Esq.
Mark Soroka, Esq., of Counsel
For: Allied Building Inspectors, Local 211, I.U.O.E.

Barbara Flessas, Esq.
Ralph Agritelley, Esq.
For: City of New York

DECISION AND ORDER

The Allied Building Inspectors, Local 211, I.U.O.E. (the "Union") has filed a representation petition with the Board of Certification seeking to have the employees in the title of Confidential operations Specialist (Buildings) accreted to its Certification No. 71-73, as amended.

The City opposes the petition on the grounds that the employees in the title Confidential Operations Specialist are managerial and/or confidential within the meaning of the New York City Collective Bargaining Law

("NYCCBL") and Section 201.7 (a) of the Civil Service Law.

By direction of the Board of Certification, this matter was assigned to a Trial Examiner for hearings on the issue of whether the employees serving in this title are managerial and/or confidential employees. Hearings were held on October 1, 1985 and January 7, 1986. The record was closed with the submission of post-hearing briefs on March 17, 1986.

BACKGROUND AND FINDINGS OF FACT

During June 1984, the Department of Buildings (the "Department") proposed that a City-Wide Field Operations Unit be created which would have the responsibility for guiding, monitoring and improving field operations in each of the five boroughs. The Unit was created in the fall of 1984. The Unit was eventually staffed with five employees, all in the non-competitive civil service title of Confidential Operations Specialist (Buildings) (hereinafter referred to as "Confidential Operations Specialist"). The in-house (office) title for the Confidential Operations Specialist is Deputy Chief.

As of the time of the hearings, the Confidential Operations Specialists were paid \$36,000 per year which is within the range of salaries which the City pays to

its managerial employees. The Confidential Operations Specialists are covered by the managerial health and welfare fund.

The five individuals hired to fill the Confidential Operations Specialist positions generally had previous service within the Department in one of the inspectional specialities. Three of the Confidential Operations Specialists were hired as specialists for the Construction area, one for Elevators and one for Plumbing. Their duties require them to work in virtually all parts of the City.

The current job description used by the Department states as follows:

General Statement of Duties and Responsibilities

Under direction of the Deputy Commissioner for Administration and Operations, with great latitude for the exercise of independent judgment or action, assists in the formulation of key departmental inspection policy designed to assure the highest standards of compliance with the New York City Structural Building Plan and to avoid or minimize the possibility of corruption; monitors, improves and assures the quality of all inspectors and inspectional processes throughout the five boroughs, as well as the material and equipment used in construction or alteration of City buildings and structures; performs related work.

Examples of Typical Tasks

Plans the administration and coordination of major City-wide, intra-borough and inter-borough inspection programs of construction, repairs, and alterations to structures, elevators, boilers, and mechanical installations.

Develops, implements, and evaluates new procedures, and ensures conformance with current departmental inspectional policy to ensure that the inspectorial function is carried out without compromise.

Performs technical evaluations concerning the quality of inspections performed by inspectorial personnel of the Department.

Interprets departmental rules, regulations, and pertinent codes and laws, and aids in the development of procedures to ensure the proper implementation of these codes and laws, with particular emphasis on the development of inspectional procedures to ensure that technical aspects of the departmental regulations are being met.

Monitors instituted procedures outside the routine chain of command to ensure uniformity, quality, and integrity of inspections, inspectors, materials and equipment throughout the five boroughs.

Performs special assignments and projects under the direction of the Deputy Commissioner for Administration and Operations, involving study and analysis of buildings and structural inquiries, immediate alteration and installation or repairs.

The Confidential operations Specialists report to the Executive Chief Inspector. The Executive Chief Inspector holds weekly meetings with Confidential Operations Specialists to discuss the checking of Inspectors' work, training, staffing, procedures, need for new directives and City-wide standardization/uniformity. The Executive Chief Inspector reports to the Assistant Commissioner for Operations. The Confidential Operations Specialists also have a substantial amount of contact with the Assistant Commissioner for Operations who

sometimes attends the weekly meetings and sometimes gives the Confidential operations Specialists assignments. The Assistant Commissioner for operations reports to the Deputy Commissioner for Budget and Operations.

The Confidential Operations Specialists, the Executive Chief Inspector, the Assistant Commissioner for operations and the Deputy Commissioner for Budget and operations all work out of the Department's central office.

The Confidential operations Specialists' duties relate to the inspectional service the Department performs in areas of construction, plumbing and elevators. The Department generally performs these services with personnel assigned to the five Borough offices. The relevant employees in the borough offices are in various specialties of the titles Inspector; Associate Inspector Level I; Associate Inspector, Level II; and Administrative Chief. Inspector is the entry level position; Associate I performs as first level supervisor; Associate II performs as the next level supervisor (the Associate IIs are called Assistant Chiefs in the Construction area and Chiefs in the Plumbing and Elevator areas); and, the Administrative Chief is the highest inspectional title (he reports to the Borough Superintendent who is an engineer). The Inspectors, Associate I and Associate II

titles are all included in the bargaining unit to which the Union wishes to accrete the Confidential Operations Specialists. The Administrative Chief is a managerial title but not all the boroughs have that title.

The Confidential operations Specialists generally receive their assignments from the Executive Chief Inspector, but have received assignments from the Assistant Commissioner and on occasion from the Deputy Commissioner. The Department views the Confidential Operations Specialists as the "eyes and ears" of the central office.

The Confidential Operations Specialists spend a substantial amount of their time performing work related to the Department's "double-check" program. This entails randomly reinspecting the work of each inspector. The Confidential Operations Specialists always perform these reinspections together with a supervising inspector (Associate I or II) from the borough involved. The Confidential Operations Specialist and the Associate jointly perform the reinspection and jointly decide their findings. Then, the supervising inspector writes up their findings in a report which is countersigned by the Confidential Operations Specialist. The report consists of a technical evaluation of the inspector's report to high-

light any discrepancies between the original inspection and the reinspection. If the findings of the Confidential Operations Specialist and the supervising inspector are consistent with the original inspection, the fact is simply noted. If the Confidential Operations Specialist and Associate disagree with the original inspection, their findings are specified in the report. It is not their function to recommend that disciplinary action be taken. If the reinspection report cites some discrepancy from the original inspection, it is submitted at one of the weekly meetings that the Executive Chief Inspector holds with the Confidential Operations Specialists. If the mistake is significant, the Executive Chief Inspector raises the matter at a monthly meeting he has with the Assistant Commissioner for operations, the Deputy Commissioner for Budget and Operations and the Inspector General. Decisions regarding disciplinary action and/or charges of corruption are made at this meeting. Infrequently, a Confidential Operations Specialist is asked into the monthly meetings to answer a technical question.

Until December 1985, the Confidential operations Specialists spent nearly 80 percent of their time (four days a week) in the field working on reinspections. The fifth day each week was reserved for the weekly meetings in which the findings of the reinspections were discussed

along with other matters.

Since December 1985, the Confidential operations Specialists have spent 40 percent of their time (two days a week) working on the "double-check" program.

As a result of their work in the reinspection program, the Confidential Operations Specialists are expected to point out: 1) any inconsistency between boroughs in the implementation of Departmental policy; 2) need for changes in policy or procedures; and 3) areas in which additional training of the inspectorial staff is needed. In fact, the Confidential operations Specialists have made suggestions in each of these areas. An example of how the Confidential Operations Specialists' observations have resulted in Departmental changes relates to the work of Chief Plumbing Inspectors. The Confidential Operations Specialists noticed that the Chiefs were spending an undue amount of time actually making inspections and not enough time supervising. They raised the matter with the Executive Chief Inspector, who then authorized them to formally review the matter. The Confidential Operations Specialists' recommendations to improve the situation were accepted.

The Confidential operations Specialists have recommended that additional supervisory personnel be hired in

the construction specialty, and that recommendation was accepted also.

Another example of the Confidential Operations Specialists' observations leading to additional investigations relates to Certificates of Occupancy. A Confidential operations Specialist observed that an inspector did not catch an error made by an architect. Upon further investigation, it was shown that the inspector followed Department policy and procedure correctly and that there is a need for a new procedure. The Confidential Operations Specialist is presently in the process of investigating this situation.

The Confidential operations Specialists have been asked to assist in training inspectorial staff. The Confidential Operations Specialists are working on specific areas they noticed need more training and they prepared and will deliver a lecture during the regular training sessions. This is similar to the manner in which many supervisors from the borough offices now assist in the training programs.

Additionally, Confidential operations Specialists are occasionally given specific assignments to investigate the need for a change of procedure. When the Department believed there was a need to increase the number of inspections on amusement rides, a Confidential

Operations Specialist was assigned to make a recommendation. The Confidential Operations Specialist recommended that the number of inspections be increased, and they were.

Another example of a specific project was the assign of a Confidential Operations Specialist to review the use of personnel to perform plan examinations in the Elevator Division. One of the boroughs had a shortage of personnel. The Confidential Operations Specialist recommended that personnel from two other boroughs be transferred two days a week to the borough with the shortage. This recommendation was accepted and implemented by the Department.

In regard to personnel and labor relations, the Confidential Operations Specialists have no involvement with collective bargaining, grievance handling or labor/management committees. Their recommendations regarding promotions are sought, as are those of the supervisors in the boroughs. The Confidential Operations Specialists interview applicants for inspectorial jobs and attend civil service "pools". In this regard, their function involves the evaluation of the applicants' ability to meet the requirements of the job.

POSITIONS OF THE PARTIES

The Union's Position

The Union contends that the City has failed to establish that the Confidential operations Specialists should be excluded from bargaining as managerial and/or confidential employees. These employees may exercise high-level professional or technical functions but do not perform managerial duties and responsibilities.

In applying City-wide rules and regulations, the Confidential Operations Specialists discover technical errors in how existing rules and regulations are applied. Their function in the reinspections is to prepare data for others to possibly make policy decisions. In this regard, the Associate Inspectors II have equal duties to those performed by the Confidential Operations Specialists. It is also true that Associate Inspectors II have similar responsibilities to Confidential Operations Specialists in the areas of training, interviewing job applicants and recommending employees for promotion.

The Confidential Operations Specialists' involvement in training is also not a managerial function. Their notes must first be reviewed and approved by the head of training, who is an Associate Inspector II and is represented by the Union. The lectures are technical in

nature, relating to technical aspects of the inspectors' job, and do not reflect a change in policy or the formulation of policy.

The job specification of the Confidential Operations Specialist provides as a "typical task" technical evaluations and review of technical aspects of departmental regulations. Such reviews are not indicative of managerial status because the review is of operating procedures already formulated or already in existence and require approval before implementation.

The presence of a Confidential operations Specialist at a managerial meeting is clearly limited to his role as resource person for his specific knowledge in the technical area of either construction, elevators, or plumbing.

In regard to interviewing job candidates, the Confidential Operations Specialists have no role in setting, promulgating or developing job descriptions or the amount or quality of minimum technical experience or education required. The Confidential Operations Specialists simply work within the guidelines already promulgated by the Personnel Department of the agency and the New York City Department of Personnel.

The Confidential Operations Specialists are not paid

to make policy but to analyze, collect and report data in accordance with their particular training or expertise.

In conclusion the Union argues that the Confidential Operations Specialists' community of interest with other titles certified to the Union warrants accretion.

The City's Position

The Confidential operations Specialists are managerial and/or confidential employees within the meaning of the New York City Collective Bargaining Law and Board of Certification precedent. Their inclusion in collective bargaining will create conflicts with the City's right to formulate, determine and effectuate its policies without the assistance of Union-represented employees, interfere with the efficient operation of personnel matters, and disrupt managerial procedures.

The City-wide Field Unit was established so that the highest level of management could monitor the entire operation from the Central office. The Confidential Operations Specialists are the highest level inspectorial supervisors in the field. Confidential Operations Specialists are expected to have the discretion, expertise and judgment to determine why operational problems exist and how to solve those problems.

In the "double-check" program, the Confidential

Operations Specialists are doing much more than a simple inspection. Through the "double-check" program, the Confidential operations Specialists are asked to regularly monitor and review the work of regular inspectors, of Associate Inspectors I and II, and the procedure utilized in each borough to carry out the agency's mission. Confidential Operations Specialists are expected to exercise their discretion and independent judgment to determine whether problems in the operation involve corruption, incompetence, faulty procedures, or lack of staff. They then make recommendations to the highest level of management. They are involved in monitoring the quantity and quality of work and regularly making recommendations as to how to improve the work product and the operation.

Confidential Operations Specialists have weekly meetings with the Executive Chief Inspector, where procedures and policies are discussed and recommendations made.

It is clear that the Confidential Operations Specialists have a significant and responsible role in policy formulation. Many of the operation changes and training issues would never have been raised had it not been for the City-wide perspective brought by the Confidential Operations Specialists to the Department.

The Confidential operations Specialists have played

a role in personnel administration which involves the exercise of independent judgment. As a result of their work in the "double-check" program, they determine whether a problem involves wrongdoing or incompetence. They interview candidates for inspectorial jobs and routinely make recommendations for promotion. They also have evaluated and made recommendations regarding the utilization of staff time in one borough or another. They make recommendations as to where a new staff member will be utilized. They determine the areas in which training is needed and prepare their own training sessions.

They supervise the entire inspectorial program. They are at least parallel in authority to the Administrative Chief in the borough, a managerial title, and arguably above this title because their responsibility goes beyond the operation of any one borough office. They are an independent unit working directly out of the Central office with direct and repeated access to high level management.

The City concludes that the Board should issue an order denying the petition for accretion and finding the title of Confidential operations Specialist to be "managerial/confidential."

DISCUSSION

Managerial and confidential employees are excluded from bargaining units by Section 1173-4.1 of the NYCCBL. This exclusion is based on the premise that if managerial/confidential employees were permitted to bargain collectively it would create conflicts with the employer's right to formulate, determine and effectuate its labor policies with the assistance of employees not represented by a union with which it deals. In addition, the granting of bargaining rights to such employees would interfere with the efficient operations of personnel matters and disrupt managerial procedures.¹

In our recent decisions² we restated the guidelines used by this Board in determining managerial status. In accordance with the requirements of the Taylor Law,³ employees are to be designated as managerial only if they formulate policy, assist directly in the preparation for and conduct of collective negotiations or have a major role in the administration of agreements or in personnel administration. Employees are confidential only

¹ Decision Nos. 79-68, 43-69, 52-69, 63-74, 6-84.

² Decision Nos. 3-83, 6-84.

³ Civil Service Law §201.7(a).

if they assist and act in a confidential capacity to managerial employees.

In implementing the Taylor Law criteria in prior decisions, we have considered, inter alia, the following factors as indicia of manageriality:

- (a) position in the table of organization;
- (b) number of subordinate employees;
- (c) area of authority;
- (d) power to assign and transfer personnel;
- (e) preparation of budget/allocation of funds;
- (f) inclusion in managerial pay plan/welfare fund;
- (g) history of collective bargaining;
- (h) personnel involvement;
- (i) job specifications;
- (j) salary range;
- (k) overtime compensation;
- (l) involvement in discipline and discharge;
- (m) similarity with State civil service titles.

We recognize that not all of these factors are relevant or applicable in any given case.

Additionally, with respect to confidential status, we have given great weight to an employee's access on a regular basis to confidential information concerning labor relations and/or personnel matters.

Turning to the facts of the present case, we direct our attention first to the reinspection or "double-check" program, as so much of the Confidential Operations Specialists' time has been spent on this function. We find that Confidential Operations Specialists have a significant role in both gathering and evaluating informa-

tion concerning the competency and integrity of Inspectors. They exercise discretion and independent judgment to determine whether problems in the Department's inspectorial service involve incompetence, lack of expertise, faulty procedures, lack of staff, or corruption. We think that it is significant that they report their findings and recommendations directly to central office management and not to the borough command, as do the Associate I and II supervisors. The record shows that the central office considers the Confidential Operations Specialists to be the "eyes and ears" of top management into the daily operations of the Department. Their recommendations for dealing with problems are usually followed by top management. Over forty matters have been reported to the Inspector General for action as a result of their "double-check" activities.

Additionally, Confidential operations Specialists play an important role in hiring and promotional decisions. They review resumes and conduct 85 to 90% of the interviews of applicants for inspectorial jobs, and make effective recommendations as to the applicants' basic qualifications, background, and necessary skills. They make similar effective recommendations as to applicants for promotions within the Department.

Confidential operations Specialists also make effective recommendations regarding the assignment and utilization of staff. When staff is requested in more than one borough, it is the Confidential operations Specialists who evaluate and recommend where a new staff member will be assigned.

Another function performed by Confidential Operations Specialists is the determination of areas in which training of staff is required, and the preparation of appropriate training sessions. They are the only inspectorial employees in the Department who evaluate training from a City-wide perspective and who exercise their judgment to determine where and how the expertise of the Department's staff may be improved.

We observe that the number of Confidential Operations Specialists presently employed by the Department, five (5), would constitute less than one percent of the number of employees in the bargaining unit proposed by the Union (approximately 800). There is no suggestion that the City's request that these employees be declared managerial and/or confidential is intended to diminish the Union's representation of employees in the existing unit, or to preclude a significant gain by the Union.

Finally, we note that the salary of Confidential Operations Inspectors falls within the range of salaries

which the City pays its managerial employees, and that they are covered by the managerial health and welfare fund.

Based upon all of these factors, we conclude that employees in the title of Confidential Operations Specialist play a "major role" in the personnel administration of the Department of Buildings which requires the exercise of independent judgment and which "is not of a routine of clerical nature."⁴ We further conclude that Confidential Operations Specialists assist and act in a confidential capacity to managerial employees in the titles of Executive Chief Inspector and Assistant Commissioner for operations. They have access on a regular basis to confidential information concerning management actions to be taken as a consequence of reports of problems detected through the "double-check" program.

We therefore find that employees in the title of Confidential operations Specialist are both managerial and confidential within the meaning of §201.7(a) of the Taylor Law.⁵ The inclusion of such employees in collective bargaining is prohibited, since it would create conflicts of interest and interfere with the efficient operation of the City in personnel matters.⁶ Accordingly,

⁴ Civil Service Law §201.7 (a).

⁵ Civil Service Law, Article 14.

⁶ See, Decision Nos. 6-84; 63-74; 63-72; 19A-70; 52-69; 43-69; 79-68; 70-68.

the Union's petition herein must be dismissed.

O R D E R

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

ORDERED that the petition of the Allied Building Inspectors, Local 211, I.U.O.E., AFL-CIO, be and the same hereby is denied.

DATED: New York, N.Y.
October 6, 1986

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER