

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

----- x

In the Matter of the Application of
THE CITY OF NEW YORK,

Petitioner,

For an Order declaring the following positions in the Department of Consumer Affairs managerial and/or confidential pursuant to Section 2.20 of the Revised Consolidated Rules of the Office of Collective Bargaining: Assistant Director of Enforcement; Deputy Director of Personnel; Deputy Director of License Issuance; Deputy Director of Complaints; Director of Public Information; Deputy Director of Adjudication; Attorneys; Secretary to the Deputy Commissioner; Secretary to the Director of Budget and Administration; and Secretary to the Director of Personnel,

DECISION NO. 3-90

DOCKET NO. RE-159-87

-and-

LOCAL 1180, COMMUNICATIONS WORKERS OF AMERICA; LOCAL 1549, DISTRICT COUNCIL 37, AFL-CIO; LOCAL 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; LOCAL 371, SOCIAL SERVICES EMPLOYEES UNION, DISTRICT COUNCIL 37, AFL-CIO,

Respondents.

----- x

DECISION AND ORDER

On January 30, 1987, the City of New York ("City"), appearing by its Office of Municipal Labor Relations, filed a petition pursuant to Section 2.20 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules") seeking a determination that certain positions in the Department of Consumer Affairs are managerial and/or confidential within the

meaning of Section 12-305¹ of the New York City Collective Bargaining Law ("NYCCBL"). By letter dated February 10, 1987, the City amended its petition which, as amended, affects employees serving in the following civil service titles:

Principal Consumer Affairs Inspector (2);²
Office Associate (1);³
Principal Administrative Associate (6);⁴
Attorney (1).⁵

¹ Section 12-305 of the NYCCBL, in relevant part, provides:

[N]either managerial nor confidential employees shall constitute or be included in any bargaining unit, nor shall they have the right to bargain collectively.

² The City named "Local 371, Social Service Employees, District Council 37, AFL-CIO" as the certified bargaining representative for employees in the title Principal Consumer Affairs Inspector. We note, however, that the certified representative of the unit in which these employees are included is "District Council 37, AFSCME, AFL-CIO and/or its affiliated locals." Decision No. 37-78, as amended.

³ The certified representative of the unit in which employees in the title Office Associate are included is "District Council 37, AFSCME, AFL-CIO, and its affiliated locals." Decision No. 46C-75, as amended.

⁴ The certified representative of the unit in which employees in the title Principal Administrative Associate are included is "Communications Workers of America." Decision No. 41-73, as amended. We note that one of the six positions, although vacant when the petition was filed (see Decision No. 4-88, note 1, at 2), was filled prior to the commencement of hearings in this matter and, thus, is a subject of this proceeding.

⁵ The certified representative of the unit in which employees in the title Attorney are included is "Local 237, International Brotherhood of Teamsters, and its affiliate, Civil Service Bar Association." Certification No. CWR-44/67, as amended.

Background

Prior to the initiation of investigatory hearings in this matter, motions were filed by District Council 37, AFSCME, AFL-CIO ("D.C. 37"); by Local 237, International Brotherhood of Teamsters ("Local 237") on behalf of itself and its affiliate, the Civil Service Bar Association ("CSBA"); and, separately, by CSBA, seeking dismissal of the City's petition on various procedural grounds. The Board of Certification ("Board") issued an Interim Decision and Order (No. 4-88) on May 19, 1988, denying the motions in their entirety. However, the Board ordered the City to submit certain additional information which would clarify and substantiate the petitioner's claims of managerial and/or confidential status as a precondition to determining whether a hearing in this matter was warranted.

As a further precondition to processing the petition, the Board directed the City to "submit a statement indicating that there has been a material change in circumstances that would warrant a different determination as to the managerial status of the two Principal Consumer Affairs Inspector positions covered by the petition," noting that in Decision No. 7-77, it had

determined that the four incumbents in the title at that time were not managerial employees.⁶

On July 15, 1988, the City served and filed a letter submission in response to the Board's Interim order. This submission did not include evidence in support of the City's application for two of the positions in dispute: (1) Principal Administrative Associate (Director of Public Information), which was vacant at that time;⁷ and (2) Attorney (Deputy Director of Adjudication), which, the City stated, was "now filled by an employee holding a title which is exempt from collective bargaining."

During the pendency of this matter, the City withdrew its application for the following positions specified in the amended petition: three of the Principal Administrative Associates (Deputy Director of License Issuance, Director of Public Information, Deputy Director of Personnel); and the Attorney (Deputy Director of Adjudication).

⁶ Section 2.20(f) of the OCB Rules provides that a petition filed subsequent to a prior Board finding of managerial or confidential status shall include a statement of facts demonstrating such a material change in circumstances as to warrant reconsideration of the status of the title or employee.

⁷ In accordance with longstanding Board policy, we shall make no determination as to the manageriality and/or confidentiality of the vacant position unless, prior to the commencement of hearings in this matter, the City supplies evidence that the position has been filled. E.g., Decision Nos. 4-88; 28-80; 45-78; 25-76; 19-75.

On May 4, 1989, the City and CWA submitted a Stipulation of Settlement, wherein they agreed that two other Principal Administrative Associate positions (Secretary to the Deputy Commissioner and Secretary to the Director of Budget and Administration) are not managerial and/or confidential. They further agreed to request that the Board declare the incumbent in the title Principal Administrative Associate (Deputy Director of Complaints, Henry McEvaddy) to be managerial and/or confidential.

On November 15, 1988, January 25, 1989, February 3, 1989 and March 9, 1989, hearings were held before a Trial Examiner designated by the Board of Certification ("Board") at which time testimony and evidence were received relating to the status of employees, each in a unit represented by D-C. 37, occupying the remaining positions in dispute:⁸

- (1) Stanley Kass, Principal Consumer Affairs Inspector (Assistant Director of Enforcement, Licensing Bureau);
- (2) Robert Kelley, Principal Consumer Affairs Inspector (Assistant Director of Enforcement, Weights and Measures Bureau); and
- (3) Debra Riley, office Associate (Secretary to the Director of Personnel).

At the hearing, D.C. 37 moved to dismiss the City's petition with respect to the two-Principal Consumer Affairs Inspector positions, on the basis that the July 15, 1968 response of the

⁸ It should be noted that none of the positions covered by the City's petition herein and represented by CWA or Local 237 was the subject of our investigation, as each of them was resolved by withdrawal or stipulation.

City failed to make a sufficient showing of changed circumstances. This motion is now before us.

Post-hearing briefs were served and filed by the City and D.C. 37 on May 12, 1989 and May 15, 1989, respectively.

Positions of the Parties

City's Position

Principal Consumer Affairs Inspector ("PCAI")

At the outset, the City opposes D.C. 37's motion to dismiss the petition based on the alleged insufficiency of the City's July 15, 1988 submission. The City asserts that implicit in the fact that the Board ordered the hearing was its acceptance of the City's submission as sufficient.⁹ The City also argued that the motion was untimely since D.C. 37 agreed to schedule hearings in the matter. In any event, the City asserts, "certainly the record in this case supports the ... position that circumstances have indeed changed at the Agency."

The City submits that the evidence presented clearly establishes the existence of several criteria which the Board has considered in prior determinations of managerial status, i.e., participation in the formulation of policy, area of authority, salary range, and level of involvement in personnel matters. Of these criteria, the City emphasizes the role of Kass and Kelley

⁹ The City cites Decision No. 38-80.

in policy formulation, specifically the need to incorporate policy considerations into their decision-making. The City argues that Kass and Kelley play a significant role in fleshing out new concepts proposed by their superiors who, in turn, rely on the technical advice and recommendations of the PCAIs in reaching a final decision.¹⁰

Other criteria relied upon by the City as tending to establish the managerial status of these employees include: current salary levels which "fall squarely within the pay range for Management Employees;"¹¹ the power to transfer subordinates without prior approval of the Director;¹² involvement in personnel matters affecting subordinates (e.g., hiring, probationary period extensions, merit increases, promotions, transfers, terminations)."¹³

Office Associate

In support of its contention that the position of Office Associate in the Agency is confidential, the City submits that as the Secretary to the Director of Personnel, Riley has access, on a regular basis, to confidential information concerning labor relations and/or personnel matters.

¹⁰ The City cites Decision Nos. 6-84, 43-69.

¹¹ The City cites Decision No. 20-82.

¹² The City cites Decision No. 53-70.

¹³ The City cites Decision No. 13-86.

D.C. 37's Position

Principal Consumer Affairs Inspector

In its notion at the hearing in this matter, counsel for D.C. 37 contended that the additional information submitted by the City on July 15, 1988 "did not meet its burden to demonstrate a material change in circumstances in the title [of PCAI]." In addition, D.C. 37 submits that the change in circumstances should be measured from the issuance of Decision No. 34-81, when the Board last declared the title eligible for collective bargaining.¹⁴ D.C. 37 argues that the present incumbents perform essentially the same duties as were performed by their predecessors in 1981.

D.C. 37 maintains that the two positions clearly are not managerial when measured by the Board's well-established criteria.¹⁵ In support of this position, D.C. 37 asserts that Kass and Kelley are performing complex technical and supervisory duties which are consistent with their job description and

¹⁴ Approximately three years after the issuance of Decision No. 7-77, where the Board determined that incumbent PCAIs in the title at that time were not managerial, the City filed a petition seeking to have employees in this title, inter alia, removed from collective bargaining on the basis of claimed managerial and/or confidential status. However, before any investigatory hearings were held in that matter, the City withdrew its request. The Board approved the City's withdrawal in Decision No. 34-81.

¹⁵ In particular, the Union relies upon Decision Nos. 8-72 and 70-71, both of which concerned the status of the instant title.

different from the duties performed by the PCAI found to be managerial in Decision No. 8-72.¹⁶

Other factors relied upon by D.C. 37 to support its contention that Kass and Kelley should remain in collective bargaining include: a lower rank in the table of organization than even their immediate predecessors; limited powers and involvement in personnel matters; and salaries which admittedly are within the range of the Pay Plan for Management Employees but also are below the maximum that a PCAI is eligible to receive under the current collective bargaining agreement. This is a result, D.C. 37 maintains, of the City having partially frozen the managerial minimums since 1980 and other factors, e.g., longevity differentials and salary increases applied to incumbents already earning more than the new minimum.

¹⁶ In Decision No. 8-72, the Board determined that the title Principal Consumer Affairs Inspector was managerial on the basis of the following duties and functions performed by a single incumbent, Mr. Greenspan: (1) a significant portion of his actual duties were found to be outside the scope of typical tasks set forth in his job description; (2) he established an "orientation toward management interests and his importance to the department as a managerial employee"; (3) he directed the administration of departmental training programs; (4) he represented the department at national conferences; (5) he had a very important role in the preparation of the department's administrative manual; (6) he had the power to consult directly with Budget and other departments involving the capital budget; (7) he dealt directly with the Commissioner and his executive staff; and (8) his recommendations to the Commissioner were "invariably accepted."

Office Associate

With respect to the office Associate position, D.C. 37 submits that the City must demonstrate a material change in circumstances subsequent to the Board's prior determination concerning this position in Decision No. 11-76.¹⁷ In that case, D.C. 37 alleges, the Board denied the City's request to exclude from collective bargaining secretaries who report to various high-level agency officials, including departmental personnel officers.

In any event, D.C. 37 contends that Ms. Riley has only de minimis contact with truly confidential personnel matters. Because the record establishes that "she rarely, if ever, is privy to matters which directly impact on union-city labor relations or personnel matters of which the Union or other Union members would be unaware," D.C. 37 argues that the evidence does not warrant a Board finding of confidentiality.

¹⁷ This argument was raised for the first time in D. C. 37's post-hearing brief.

Evidence Adduced at Hearing

Principal Consumer Affairs Inspector

Assistant Commissioner Peter Lempin, the Agency's "Chief Operations Officer" asserted that he was responsible for the day-to-day operations of the six largest divisions of the Agency which includes the Enforcement Division (Tr. 29).¹⁸ Lempin testified that the two major missions of the Agency were consumer protection and licensing and referred to the Enforcement Division (which is subdivided into the Licensing and the Weights & Measures Bureaus) as "the heart and life blood of the operation" (Tr. 31). As such, Lempin stated, increases in this Division's size, scope of jurisdiction and productivity since his appointment as Assistant Commissioner in 1984 is, in part, responsible for the "tremendous growth" of the entire Agency. (Tr. 38.) To illustrate this point, Lempin testified that the number of "enforcement targets" has, and will continue, to increase, e.g., in 1988 the Agency assumed jurisdiction over the regulation of the tow-truck industry and will, in the very near future, take over from the Department of Health the licensing of food vendors.

Lempin characterized Kass and Kelley, the Assistant Directors of the Enforcement Division, as members of the management team (Tr. 65). As evidence of this, he claimed that circumstances sometimes require them to report directly to the

¹⁸

Page references are to the official hearing transcript.

Assistant Commissioner (bypassing the Director), depending on the "confidentiality" of a particular investigation (Tr. 63-64); that Kass and Kelley occasionally represent the Commissioner or Assistant Commissioner at business association meetings, community board meetings, or Mayoral Task Forces (Tr. 66); and that both make recommendations for setting the annual goals and targets of their respective bureaus (Tr. 60, 66-67). When asked to describe the roles that Kass and Kelley play in formulating policy, Lempin testified that they are asked to formulate the operational details of new concepts proposed by their superiors (Tr. 62-64).

Kass and Kelley testified that, on their own initiative, they coordinate routine industry-wide inspections ("sweeps") of vendors under the Agency's jurisdiction;¹⁹ use their discretion in targeting special sweeps on the basis of complaints about a particular industry;²⁰ that, on occasion, the Commissioner will consult with them concerning a particular investigation (Tr. 149, 273) or on technical matters (Tr. 187);²¹ that they have had

¹⁹ For example, the Principal Consumer Affairs Inspectors have initiated sweeps of turkey retailers during the holiday season and the horse-drawn carriage industry and amusement parks during vacation periods (Tr. 139).

²⁰ For example, Kelley testified that in response to concerns about the measuring devices used in the automobile lubricating industry, he conceived and implemented a plan to survey such establishments (Tr. 2,61, 302).

²¹ For example, Kass testified that he had been asked to attend meetings with the Commissioner to provide information concerning conditions in the field in relation to tow truck padlocking and children's sidewalk rides.

input into the development of the Agency's Anti-Corruption Plan to the extent that it involved their own subordinates (Tr. 158, 262); that they occasionally attend meetings at departmental and interagency levels, with and without the Director of their Division (Tr. 189, 274); and that they attend community board meetings (Tr. 166) and professional conferences (Tr. 265) as representatives of the Agency, although rarely, if ever, as the sole representative.

With respect to their involvement in personnel matters, Kass and Kelley testified that they supervise subordinates serving in the inspectorial titles of their own bureaus²² and, in most cases, independently may reassign these employees from squad to squad, within or between each other's bureau (Tr. 142, 296). The PCAIs also testified that they make recommendations to the Director concerning various personnel actions affecting their subordinates, i.e., disciplinary matters, merit increases, promotions to provisional titles, permanent transfers to positions outside their respective bureaus, and performance evaluations (Tr. 161, 203, 268, 291), but that their recommendations are not always accepted.²³

²² These titles include: Supervising Consumer Affairs Inspectors; Senior Consumer Affairs Inspectors; and Consumer Affairs Inspectors which, for purposes of collective bargaining, are included in a unit whose certified bargaining representative is D.C. 37. See Decision No. 37-78, as amended.

²³ For example, Kelley testified that the Assistant Commissioner rejected his recommendation that an employee's

(continued...)

The current annual salaries of Kass and Kelley are \$40,801 and \$39,721 respectively (Tr. 318). These amounts are above the minimum salary for Levels I, II and III of the Pay Plan for Management Employees, Personnel Order No. 88/3 (Joint Exhibit #2) and are approximately \$3,000-4,000 above the minimum set forth in the pay authorization for the title PCAI, effective July 1, 1988 (City Exhibit #3) (Tr. 358). Evidence was offered to establish that several factors, including length of service, may contribute to bringing a particular employee's salary above the minimum for the title (Tr.334-336).

Office Associate

The Office Associate, Debra Riley, reports directly to Johnny Bon, the Agency's Director of Personnel, who is a managerial employee.²⁴ As the Director of Personnel, he is responsible for personnel administration of the entire Agency, including, inter alia, payroll, timekeeping, personnel files, employment papers, performance evaluations, employee benefits (Tr. 362).

Bon testified that there are eleven employees in the Personnel Division of the Agency, that Riley is his only

(... continued)
probationary period be extended and the employee was terminated (Tr. 293).

²⁴ Bon's civil service title is Administrative Staff Analyst, which was declared managerial in Decision No. 21-84.

secretary, and that her duties include: opening Bon's mail; maintaining Bon's personal files (as distinguished from the Agency's personnel files); typing and filing confidential correspondence from Bon to the Commissioner and the Division Directors, or from the Commissioner to other agency heads, including the City's Personnel Director. Specifically, this correspondence deals with employee performance evaluations, terminations, promotions, merit increases (Tr. 363-366), desk audits (Tr. 417), recommendations on personnel changes (Tr. 421) and Bon's monthly synopsis to the Commissioner that contains "items or situations" that concern the Personnel Division, e.g., Bon's recommendations concerning the impact of the temporary Citywide hiring freeze on the Agency (Tr. 366) and implementation of the evaluation procedure for provisional employees who would achieve two years of continuous employment with the Agency (Tr. 375). Such correspondence, Bon testified, is filed in his personal files and the only individuals having access to these files are Riley, the Deputy Director of Personnel, and himself (Tr. 368). Riley is the only employee in the Agency's Personnel Department who is authorized to open Bon's mail, including correspondence marked "confidential" (Tr. 388).

Bon also testified that Riley is privy to information concerning the planned terminations of employees before the affected employees are so informed because her duties include typing draft letters of termination for the commissioner's

approval and signature (Tr. 379). Moreover, on at least two occasions, the draft of a termination letter was not approved by the Commissioner and the affected employees were not terminated (Tr. 379).

Finally, Bon testified that Riley is privy to sensitive information concerning personnel matters or internal policy because one of Riley's duties is to transcribe notes that Bon keeps of his meetings with the Commissioner. For example, Bon testified that information on a citywide hiring freeze was not made public until two weeks after a meeting was held between the Commissioner, his Executive Assistants, the Agency's Budget Director and himself. Bon stated that Riley was assigned to transcribe the notes he kept of that meeting (Tr. 384).

Discussion

At the outset, we address D.C. 37's motion to dismiss the petition as to the title PCAI, based on the alleged failure of the petitioner to demonstrate a change in circumstances that would warrant a different determination from the Board's Decision No. 7-77.²⁵ A showing of changed circumstances is mandated by

²⁵ The additional argument that the City has an obligation to demonstrate a change in circumstances subsequent to our issuance of Decision No. 34-81, rather than Decision No. 7-77, an argument that D.C. 37 raised for the first time at the hearing, is rejected because Decision No. 34-81, with respect to the disputed title, was not a decision on the merits. See note 14, supra, at 8.

Section 2.20(f) of the OCB Rules.²⁶ In Decision No. 28-80, we noted that the policy underlying this requirement is to avoid unnecessary litigation of the status of employees in cases where there has been no change since the Board last ruled.

In its statement of July 15, 1988, the City cited the following facts in support of its claim of changed circumstances: the expansion of the Agency; the commensurate increase in the numbers of employees supervised by Kass and Kelley; and consequent changes in their responsibilities including, inter alia, greater involvement in personnel actions, the development of training programs and policy formulation. The City alleged further that the employees at issue now act in a confidential capacity both to the Director of their Division and the Assistant Commissioner of the Agency.

Implicit in our granting a hearing on the alleged managerial/confidential status of PCAIs Kass and Kelley was a determination that the information submitted by the City on July 15, 1988 was legally sufficient to warrant such a hearing. We accepted as true, for purposes of this determination, the allegations set forth in this submission. Similarly, in Decision No. 7-77, we found D.C. 37's assertion that the PCAI who was previously found managerial in Decision No. B-72 no longer served in the title and that there were four (new) incumbents instead of

²⁶

See note 6, supra, at 3.

one, sufficient to warrant reconsideration of the status of that title. In neither case was our determination a ruling on the ultimate issue of managerial and/or confidential status. We merely found a sufficient indication that surrounding circumstances had changed in a manner which might reasonably have resulted in a change in the duties of the positions whose status was at issue. For this reason, we shall deny D.C. 37's motion to dismiss the petition.

Principal Consumer Affairs Inspector

In Decision No. 32-82, we explained that Section 201.7(a) of the Taylor Law²⁷ established "four criteria to be used in designating persons as managerial. The first is formulation of policy, the other three deal with labor relations functions or responsibilities on behalf of the public employer." In that case, we stated:

²⁷ Section 201.7(a) of the Taylor Law, in relevant part, provides:

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....

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 [footnote omitted]. The term "formulate" would 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 would include persons who regularly participate in the essential process which results in a policy proposal and the decision to put such proposal into effect [footnote omitted]. It would not include one who simply engages in research or in the collection of data necessary for the development of a policy proposal [footnote omitted].

The remaining three criteria for managerial employees, ... specifically relate to labor relations functions of the employer: first, persons who may reasonably be required on behalf of the employer to assist directly in the preparation for or conduct of collective negotiations. However, mere consultation with supervisory personnel on the feasibility or implications of negotiation proposals does not provide a basis for designating such supervisory personnel as managerial [footnote omitted]. The second, administration of the agreement, requires a "major role in the administration of the agreement", which has been held to mean a role beyond that of routine or a clerical nature; rather, it requires that the person be one who has authority to exercise independent judgment in the implementation of the agreement. Simply participating in the first step of the grievance procedure has been held not to satisfy this criterion [footnote omitted]. The third, personnel administration, involves 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. Authority to hire or to recommend the retention of or the disciplining of employees would be indicia of supervisory status but would not satisfy this criterion [footnote omitted].

Applying these criteria to the instant matter, we find that the record does not sustain a finding of managerial and/or confidential status with respect to the PCAIs Kass and Kelley.

As to participation in the policy-making process, the Board is concerned with the essential process which produces the final decision.²⁸ We have long held that significant and responsible participation in that process is probative evidence of managerial status.²⁹ For example, in Decision No. 6-84, we found that employees in the title Superintendent of Sewer Service were managerial based upon, inter alia, their "broad and active participation associated with the formulation of objectives or methods of fulfilling established purposes." The Superintendents functioned not only as expert advisors, but also were an "essential link in the process of implementing departmental policy decisions."

In the instant matter, the evidence indicates that policy objectives of the Agency are conceived by those who are above the PCAI in the Agency hierarchy. The PCAIs are informed of new objectives and are asked to prepare procedures for achieving them. Moreover, when the PCAIs are called upon to take part in conferences with their superiors, it is for the purpose of providing technical advice. The evidence does not support the conclusion that these employees are an "essential link" in the formulation of policy at the Agency.

²⁸ Decision No. 6-84.

²⁹ Decision No. 43-69.

The record also reveals that the role of the PCAIs in personnel administration is limited to making recommendations to superiors, which are sometimes accepted and sometimes not. Kass and Kelley rarely, if ever, recommend that disciplinary action be taken against a subordinate.

With respect to their involvement with the labor relations functions of the employer, the record is devoid of any evidence that the PCAIs participate in the preparation for or conduct of collective bargaining or that they exercise independent judgment in the implementation of collective bargaining agreements.

Little weight can be given to the evidence concerning the current salaries earned by Kass and Kelley as an indicium of managerial status. The City did not substantiate its argument that these salary levels correspond to managerial-type duties, while D.C. 37 demonstrated that factors other than managerial status may account for a particular employee's salary being above the minimum for level III of the managerial pay plan. The evidence establishes, for example, that for several years after 1980 the minimum salary rates for managerial employees were frozen while salary rates determined by collective bargaining continued to increase. Moreover, Kass and Kelley, who have 25 and 26 years of service, respectively, received additional salary boosts in the form of longevity increases. In any event, it is well-settled that while salary level may be relevant factor to a determination of managerial status, it is not a controlling

factor.³⁰ In the present case, we find that salary is not a probative factor.

Upon consideration of the entire record herein, we find and conclude that PCAIs are not managerial employees. We note further that the City failed to elicit testimony or to make any legal argument tending to support its alternative position that Kass and Kelley are confidential employees. Therefore, on the record before us we cannot conclude that the PCAIs should be excluded from collective bargaining on any basis.

Office Associate

D.C. 37 alleges for the first time in its post-hearing brief that the City was required to demonstrate a material change in circumstances since the issuance of Decision No. 11-76, as a precondition to our processing the petition with respect to the Office Associate position. According to D.C. 37, that decision states that "all secretaries to departmental personnel directors [are] eligible for collective bargaining."

D.C. 37's reliance on Decision No. 11-76 is both belated³¹ and misplaced. No determination was made in that case concerning the managerial and/or confidential status of secretaries of

³⁰ Decision Nos. 20-82; 73-71; 79-68.

³¹ Alleging that a precondition to our consideration of the status of this title has not been satisfied for the first time at this stage of our investigation is, indeed, belated.

agency personnel directors. Since the City did not submit any supportive proof or documentation in response to the Board's request for same in that case, we dismissed this aspect of the petition without reaching the merits. Section 2.20(f) of the OCB Rules, upon which D.C. 37's contention is premised, requires a showing of changed circumstances only where there has been a prior determination relating to the managerial and/or confidential status of a position. This provision is, by its terms, inapplicable here.

With respect to confidential employees, Section 201.7(a) of the Taylor Law provides that employees should be so designated "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]."³² In Decision No. 13-74, we stated:

[T]he confidentiality must relate directly to the employees' involvement on behalf of the employer in collective bargaining, the administration of collective bargaining agreements or the conduct of personnel relations in such a manner that inclusion of such employee in collective bargaining units would give rise to conflicts of interest inimical to the bargaining process and to full and fair representation of the employer's interests.

Moreover, in City of Binghamton, 12 PERB ¶3099 (1979), PERB held that the Taylor Law:

³² Decision Nos. 13-86; 21-84; 32-82; 20-82; 11-76; 70-68. In Decision No. 20-82, we deemed the scope of confidential information also to include budget and fiscal data not intended to be disclosed to unions or their representatives.

[C]learly distinguishes between employees who may be designated as managerial if they "may reasonably be required ..." to perform certain managerial functions, and employees who "may be designated as confidential only if they are persons who assist and act in a confidential capacity"

This distinction conditions a designation as confidential upon a finding that the employee actually performs in a confidential capacity. We also give great weight to an employee's access on a regular basis to confidential information concerning labor relations and/or personnel matters.³³

Turning to the facts of the instant case, there is no dispute that Director of Personnel Bon's duties are intimately related to personnel administration. The record establishes that Riley, as his secretary, has regular access to Bon's confidential correspondence, notes and reports to the Commissioner outlining his thoughts on the implementation or impact of personnel policy changes on the Agency. She is also privy to Bon's recommendations concerning disciplinary matters, including contemplated employee terminations. Moreover, it is significant that Riley has access to such confidential information relating to Agency personnel prior to its release to the public or to the affected employee(s).³⁴

We find that the confidential duties performed by this Office Associate, as described above, are not de minimis, as D.C.

³³ Decision Nos. 13-86; 5-85; 11-76; 70-68.

³⁴ See e.g., Decision No. 36-82.

37 asserts. The record clearly demonstrates that Riley regularly acts in a confidential capacity to a managerial employee in the area of personnel administration. The statutory criteria for designation of an employee as confidential under the Taylor Law have been satisfied and Riley, therefore, should be excluded from collective bargaining.

Finally, we note that the City has withdrawn its application with respect to five of the petitioned-for Principal Administrative Associate positions (Deputy Director of Personnel, Deputy Director of License Issuance, Director of Public Information, Secretary to the Deputy Commissioner, and Secretary to the Director of Budget and Administration); that the City has requested withdrawal of its application with respect to the position of Attorney (Deputy Director of Adjudication); and that the City and CWA have jointly requested that the Board declare the incumbent in the sixth Principal Administrative Associate position (Deputy Director of Complaints, Henry McEvaddy) to be managerial and/or confidential.

ORDER

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) of the Taylor Law, and pursuant to Section 12-305 of the New York City Collective Bargaining Law, it is hereby

ORDERED, that the request for the withdrawal of this petition, as amended, with respect to five Principal Administrative Associate positions (Deputy Director of Personnel, Deputy Director of License Issuance, Director of Public Information, Secretary to the Deputy Commissioner, Secretary to the Director of Budget and Administration); and the Attorney position (Deputy Director of Adjudication) be, and the same hereby is, granted; and it is further

ORDERED, that Henry McEvaddy, a Principal Administrative Associate in the office title Deputy Director of Complaints, Department of Consumer Affairs, pursuant to the stipulation of the parties, is designated as managerial and/or confidential within the meaning of Section 12-305 and hereby is, excluded from the unit in Certification No. 41-73, as amended; and it is further

DETERMINED, that Stanley Kass and Robert Kelley, Principal Consumer Affairs Inspectors in the office titles Assistant Directors of Enforcement, Department of Consumer Affairs, are not

managerial and/or confidential within the meaning of Section 12-305; and it is further

ORDERED, that the application of the City for a determination that Stanley Kass and Robert Kelley, Principal Consumer Affairs Inspectors in the office titles Assistant Directors of Enforcement, Department of Consumer Affairs, are managerial and/or confidential within the meaning of Section 12-305, be and the same hereby is, denied.

DETERMINED, that Debra Riley, an office Associate in the office title Secretary to the Director of Personnel, Department of Consumer Affairs, is confidential within the meaning of Section 12-305; and it is further

ORDERED, that Debra Riley, Office Associate in the office title Secretary to the Director of Personnel, Department of Consumer Affairs be, and hereby is, excluded from the unit in Certification No. 46C-75, as amended.

DATED: New York, New York
February 20, 1990

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER