

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

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In the Matter of the Petition of
ORGANIZATION OF STAFF ANALYSTS,

DECISION NO. 17-91

DOCKET NO. RU-1067-90

-and-

THE CITY OF NEW YORK and RELATED
PUBLIC EMPLOYERS.

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DECISION AND ORDER

On January 9, 1990, the Organization of Staff Analysts ("OSA") filed a petition seeking to add to its Certification No. 3-88 those employees in the titles Staff Analyst (12626) and Associate Staff Analyst (12627) who were not previously found by the Board of Certification ("Board") to be managerial or confidential and who are not presently represented by OSA. Accompanying the petition was a letter and list which OSA claimed demonstrated that it represented well over the necessary 30% for a showing of interest in the unit for which it had petitioned.¹ The City of New York, represented by its Office of Labor Relations, ("the City"), requested, and was granted, several extensions of time in which to submit a

¹ Rule 2.3 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules") states, in pertinent part, as follows:

b. Simultaneously with the filing of the petition petitioner shall:

1. In the case of a petition for certification, submit to the Board evidence that at least thirty (30) per cent of the employees in the appropriate unit, or in each appropriate unit, desire petitioner to represent them for the purposes of collective bargaining;

* * *

Inasmuch as we find that the petition filed by OSA in January 1990 constitutes a petition for clarification, rather than a petition for certification (see infra, at 11), it was not necessary for OSA to submit a 30% showing of interest.

response to OSA's petition. Thereafter, on November 14, 1991, the City filed a "verified answer" to the petition.² OSA submitted a response to the City's "verified answer" by letter dated November 22, 1991.

BACKGROUND

Proceedings involving the Staff Analyst series of titles (Staff Analyst, Associate Staff Analyst and Administrative Staff Analyst) commenced in 1975.³ The proceedings concerned petitions filed by four unions, and the intervention of a fifth union.⁴ The City objected to the petitions shortly after they were filed, arguing that the employees are managerial or confidential within the meaning of the New York City Collective Bargaining Law ("NYCCBL") and, therefore, excluded from collective bargaining. The Board thereafter began an investigation of the unions' request to represent Staff Analysts and the City's objection thereto.

The Board has issued six interim decisions in this matter, each addressing the question of whether employees in the Staff Analyst series of titles are managerial and/or confidential. In Decision Nos. 39-80 and 20-82, the Board determined that the City had established a prima facie case as to

² We note that the OCB Rules do not provide for the filing of an "answer" to a petition filed in a representation proceeding before the Board of Certification. Instead, an interested party, such as the City in the proceeding herein, is invited to file a response to the petition so that it may state its position.

³ Docket Nos. RU-521-75; RU-533-75; RU-702-79; RU-704-79; RU-707-79 and RU-730-79.

⁴ OSA, previously affiliated with Local 237, International Brotherhood of Teamsters, voted to disaffiliate from that union on October 11, 1983. OSA thereafter filed a motion to intervene in the representation case. Upon receipt of sufficient evidence that OSA is a bona fide organization, as well as a no-strike affirmation and an adequate showing of interest in the proposed bargaining unit of Staff Analysts and Associate Staff Analysts, in March 1984, the Board granted the motion to intervene and substituted OSA for Local 237, International Brotherhood of Teamsters in the proceedings.

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 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. 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. 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.⁵

In Decision No. 20-82, the Board also determined that the City had the burden of producing additional evidence and argument in support of its claim concerning Staff and Associate Staff Analysts who were not within the categories of its prima facie case.⁶ Hearings to determine the public

⁵ OSA subsequently challenged the Board's interim findings. In Decision No. 21-84, the Board confirmed its findings, but deferred decision on the status of those Staff Analysts and Associate Staff Analysts who were the subject of the rebuttal case presented by OSA between May 9 and October 4, 1984. Thereafter, in Decision No. 5-85, the Board determined that 45 of the Staff Analysts and Associate Staff Analysts challenged by OSA were managerial or confidential and declared ineligible for collective bargaining; 39 were not managerial or confidential and were declared eligible for collective bargaining.

⁶ Charged with preparing to go forward with the remainder of its affirmative case, the City proposed to have the New York City Director of Personnel conduct desk audits of the estimated 600 Staff Analyst and Associate Staff Analyst positions not covered
(continued...)

employee status of those Staff and Associate Staff Analysts commenced on May 21, 1985 and continued on a weekly basis until the parties entered into settlement discussions in the Fall of 1986. Before the settlement discussions commenced, however, the Board issued Decision Nos. 8-86 and 14-86. In Decision No. 8-86 the Board reviewed the testimony of more than 230 Staff and Associate Staff Analysts, and determined that 131 of those employees are not managerial or confidential and, therefore, are eligible for collective bargaining. In Decision No. 14-86, the Board reviewed the testimony of 120 Staff and Associate Staff Analysts, and determined that 88 of those employees are not managerial or confidential and, therefore, are eligible for collective bargaining. Thus, a total of approximately 369 Staff Analysts and Associate Staff Analysts had been found eligible for collective bargaining at the time Decision No. 14-86 was issued by the Board.⁷

⁶ (...continued)
by the interim decisions. Upon completion of the desk audits, the City stated that it is its position that those desk audited employees who are performing duties appropriate to the Staff Analyst or Associate Staff Analyst titles are managerial and/or confidential, and offered to submit those desk audits into evidence. OSA asserted that while some of the desk audits accurately reflect the duties performed by the employees involved, and that it was prepared to submit those audits to the Board for a determination of manageriality and/or confidentiality, many, if not most, of the audits do not reflect the subject employees' duties accurately. Thus, OSA strenuously objected to any procedure that would enable the City to establish its prima facie case simply by offering into evidence the disputed desk audits. Thereafter, the City indicated that it would not enter the desk audits into evidence. Instead, the City proposed to present testimony with regard to each of the employees in question.

⁷ Although a number of hearings were held after the settlement discussions began, the Board did not issue a decision covering the Staff and Associate Staff Analysts who testified at those hearings. The number of Staff and Associate Staff Analysts found eligible for collective bargaining referred to above, however, includes those employees that the City conceded were not managerial or confidential in the hearings held after Decision No. 14-86 was issued.

After Decision No. 14-86 was issued, OSA requested that a hearing be held to determine the unit appropriate for collective bargaining. After careful consideration, and based upon the status of the settlement discussions, the Board determined that it would be appropriate to consider the unit determination question before the final number of Staff and Associate Staff Analysts eligible for collective bargaining was decided. Accordingly, a hearing was held on September 30, 1987.

In Decision No. 21-87, the Board held that a separate unit consisting of Staff Analysts and Associate Staff Analysts is the most appropriate bargaining unit. Because the record in the case did not contain conclusive evidence of the desires of the employees as to the preferred bargaining representative, the Board directed that an election be held among employees in the title who were eligible to bargain collectively to determine the majority representative of the unit.⁸ An election was so conducted on April 21, 1988.

Finding that a majority of the Staff Analysts, Associate Staff Analysts and Program Research Analysts⁹ found eligible for collective bargaining and casting valid ballots in the election voted in favor of representation by OSA, the Board, in Decision No. 3-88, certified OSA as "the exclusive representative for the purpose of collective bargaining of all those Staff Analysts, Associate Staff Analysts, and Program Research Analysts employed by the City of New York and related public employers subject to the jurisdiction of the Board of Certification and found eligible for collective bargaining."

⁸ Since OSA had already submitted a showing of interest in the form of designation cards signed by more than 30% of the estimated 600 Staff and Associate Staff Analysts who were eligible for collective bargaining, the Board permitted it to be on the ballot. The other unions who were parties to the proceedings were given 30 days from receipt of the Board's decisions to submit a 10% showing of interest, whereupon they too would be permitted to be on the ballot.

⁹ In Decision No. 3-88, the Board noted that while Program Research Analysts were inadvertently omitted from the Direction of Election in Decision No. 21-87, they were clearly intended to be included in this unit.

At the time Decision No. 3-88 was issued by the Board, it was estimated that the total number of employees in the unit was 650.

POSITIONS OF THE PARTIES

City's Position

The City does not dispute that a unit consisting of all Staff Analysts and Associate Staff Analysts except those in managerial and/or confidential positions would be an appropriate bargaining unit, provided certain employees/positions identified in an attachment to its answer are deemed managerial and/or confidential by the Board. While the City admits that it does not have knowledge or information sufficient to form a belief as to whether OSA represents a majority of Staff and Associate Staff Analysts eligible for collective bargaining, it avers that no employee in any of the positions at issue in this petition has ever had the opportunity to express his or her wishes concerning which employee organization, if any, should be his or her employee representative. The City adds, however, that if the Board is satisfied with the proof of majority status presented to it by OSA, and in its best judgment determines that an election is unnecessary, the City will accept the Board's finding and will not oppose the petition on those grounds.

OSA's Position

In its response to the City's answer, OSA claims that it has already presented proof of its majority status, in accordance with the usual practices and procedures of the Board. OSA submits that contrary to the City's assertion, when a group is to be added to an existing unit in which the union has majority status, every individual in the group to be added need not be given an opportunity to express his or her wishes concerning union representation. OSA contends that the Board's long standing rule, almost universally followed in both the private and public sectors, is that if a union has proof of majority status in the appropriate unit, no election is required. Since OSA has submitted such proof, no election is required in this

case.

As to the employees/positions identified by the City in the attachment to its answer, OSA specified the employees/positions that it agreed are managerial and/or confidential and should be excluded from the bargaining unit; as well as the employees/positions that it claimed are not managerial/confidential and, therefore, are eligible for collective bargaining.

DISCUSSION

Considering the long and complex history of this proceeding, we believe it valuable to state at the outset that we affirm the findings of this Board in all of our prior decisions involving the Staff Analyst series of titles, reviewed supra at pages 2-7.

As to the instant matter, the petition filed by OSA in January 1990, we note that in Decision No. 3-88, we determined that a majority of the Staff Analysts and Associate Staff Analysts found eligible for collective bargaining and casting valid ballots in an election ordered and thereafter conducted at the direction of this Board voted in favor of representation by OSA. Accordingly, we certified OSA as the exclusive collective bargaining representative for all employees in the titles Staff Analyst and Associate Staff Analyst found eligible for bargaining.

Since that time, the number of Staff Analysts and Associate Staff Analysts employed by the City has increased and, as a result, the bargaining unit has expanded. Although our search of prior decisions has failed to disclose any similar cases decided by this Board or the New York State Public Employment Relations Board, we note that in the private sector once a union is certified by the National Labor Relations Board ("NLRB") as the exclusive collective bargaining representative it is presumed to continue to represent the bargaining unit even though the unit has grown in size since it was certified. In this regard, we note that in Ocean Systems, Inc., 227 NLRB No. 233 (1977), the NLRB held that a unit expansion of some 40%, in addition to

employee turnover, expressions of dissatisfaction and a two-year lapse of time since the election, did not provide, severally or jointly, sufficient basis for rebutting the presumption of majority status enjoyed by the certified union representative.¹⁰ Under the circumstances presented in this case, we see no reason not to follow the policy applied in the private sector. Consequently, we find that OSA was not required to file another petition for certification. Instead, we shall deem the petition docketed as RU-1067-90 as a petition for clarification.

Additionally, we find that the list submitted by OSA, while not necessary in a petition for clarification, serves to demonstrate that OSA continues to enjoy support from a majority of the Staff Analysts and Associate Staff Analysts that are eligible for collective bargaining. We reach this conclusion by counting all Staff and Associate Staff Analysts except:

¹⁰ Generally in the private sector, absent unusual circumstances, a union is irrebuttably presumed to enjoy majority status during the first year following its certification. Upon expiration of the certification year, the presumption of majority status continues but becomes rebuttable. The presumption of continuing majority status serves two important functions of Federal labor policy: (1) it promotes continuity in bargaining relationships; and (2) it protects the express statutory right of employees to designate a collective bargaining representative of their own choosing, and to prevent an employer from impairing that right without some objective evidence that the representative the employees have designated no longer enjoys majority support.

Although the employer may rebut the presumption of majority status after the certification year with less than actual proof that a union lacks majority support, the employer's burden is a heavy one. Thus, the NLRB has held that good faith doubt may not depend solely on unfounded speculation or a subjective state of mind. See, Pennco, Inc., 250 NLRB No. 93, 104 LRRM 1473 (1980).

The NLRB has further stated that a corollary of the overall presumption of continuing majority status is that, absent evidence to the contrary, new employees are presumed to support the incumbent union in the same ratio as those they replace. See Pennco, supra; King Radio Corp., 208 NLRB 578, 85 LRRM 1118 (1974); Laystrom Manufacturing Co., 151 NLRB 1482, 58 LRRM 1624 (1965). See also, NLRB v. Washington Manor, d/b/a Washington Manor Nursing Center (North), 519 F.2d 750, 89 LRRM 3044 (6th Cir. 1975), enf'g., 211 NLRB 324, 87 LRRM 1335 (1974).

1. those in positions previously excluded from bargaining by decision of the Board; and
2. those in positions currently filled by the employees listed in the appendix to this decision.

As to the Staff and Associate Staff Analysts referred to in paragraph 2 above, we note that the parties agreed that the positions filled by those employees were managerial and/or confidential based upon the Taylor Law definition¹¹ and the criteria generally considered by this Board in such cases.¹² We find that the petition and supporting documentation support their designation as such.

O R D E R

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

ORDERED, that the petition of the Organization of Staff Analysts which is deemed to be a petition for clarification of its Certification No. 3-

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 of (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and the conduct of collective negotiations or to have a major role in the administration or 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 In implementing Section 201.7(a) of the Taylor Law we have, in prior decisions, considered the following criteria:

- (1) the duties set forth in the job specifications;
- (2) inclusion of the title in the Managerial Pay Plan;
- (3) involvement in personnel administration, labor relations, or budget related functions;
- (4) salary level.

88 be, and the same hereby is, granted; and it is further

ORDERED, that the unit appropriate for purposes of collective bargaining, represented exclusively by the Organization of Staff Analysts, consists of all Staff Analysts, Associate Staff Analysts and Program Research Analysts except those in positions previously excluded from bargaining by decision of the Board of Certification and those currently in

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positions listed in the appendix to this decision.

DATED: New York, New York
December 17, 1991

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

APPENDIX

The employees and/or positions listed below are managerial and/or confidential and, therefore, excluded from collective bargaining:

1. With the exception of the positions held by the nine employees listed below who currently do not perform duties of a managerial or confidential nature, all Staff Analysts and Associate Staff Analysts in the New York City Police Department, Office of Management Analysis and Planning are excluded from collective bargaining. In so finding, we note that generally the work performed by Staff and Associate Staff Analysts in this unit is of a managerial and/or confidential nature. Therefore, that part of our decision herein which finds certain employees to be included in the unit for purposes of collective bargaining shall not serve as precedent should there be Staff and Associate Staff Analysts hired into this unit in the future.

Kenneth DeJohn
Ron Willdigg
Edith Levin
Simeon Wright
Arthur Haimo
Cheryl Francis
Donald Ross
John Stein
John McSherry

2. The following employees in the New York City Department of Personnel, Classification Unit are excluded from collective bargaining because they are managerial and/or confidential. Their jobs involve the classification of positions; they deal directly with unions on classification issues and have advance knowledge of potential classification changes:

Diana Calvert
Frank Porto
John Hannigan

3. The following employee in the New York City Department of Personnel, Bureau of Audits is managerial and confidential and, therefore excluded from collective bargaining, because her position as Chief of the unit requires that she conduct audits for out-of-title work grievances:

Elaine Berk

4. The following employees in the New York City Department of Personnel, Quality of Work Life Unit are confidential, and therefore, excluded from collective bargaining, because they represent the City half of the bilateral labor-management program. We note that the Quality of Work Life Unit was recently transferred from the Mayor's Office of Operations to the Department of Personnel. Prior to its transfer, the members of this unit were designated confidential employees:

Lisette Saravia
Lisa Tolchin

5. The following employee in the New York City Department of Personnel, Personnel Division is excluded from collective bargaining because she is managerial and confidential. She is the Chief of the Personnel Unit, which is responsible for all personnel actions at the New York City Department of Personnel:

Wanda Jackson

6. The following employees in the New York City Department of Personnel, Bureau of Exams are confidential, and therefore excluded from collective bargaining, because they are involved in special projects for the Personnel Director involving exam preparation and administration, and appeals of civil service exams:

Richard Green
Andrew Horn

7. The following employees in the New York City Department of Personnel, Investigations Unit are excluded from collective bargaining because they are confidential. They conduct very sensitive investigations which generally are not assigned to employees in the Confidential Investigator title:

Rachel Rivin
Daryl Jenkins

8. The following employees in the New York City Department of Personnel are confidential, and therefore excluded from collective bargaining, because they are the Executive Assistant to the First Deputy Personnel

Director and Executive Assistant to the Personnel Director, respectively:

Marisol Gomez
Ellin Hauser

9. The following employees in the New York City Department of Personnel are confidential, and therefore excluded from collective bargaining, because they are privy to information

concerning layoffs before it is made public:

James Hein
Anita Hollington

10. The following employee in the New York City Department of Personnel is excluded from collective bargaining because she is managerial. The position is responsible for advising other City agencies on the proper interpretation of the policies and procedures of the Department of Personnel and, therefore, requires an expert on personnel policies and procedures:

Susan (Mildred) Feinstein

11. Employees in the following positions are excluded from collective bargaining because they perform work of a confidential nature:

- a. All Staff Analysts and Associate Staff Analysts in the Human Resources Administration, Office of Personnel Services who spend a majority of their time on the classification of positions;
- b. All Staff Analysts and Associate Staff Analysts working in the labor relations office of any City agency;
- c. Up to two Executive Assistants to each Commissioner of each City agency;
- d. Up to two Executive Assistants to each First Deputy Commissioner of each City agency;
- e. All Staff Analysts and Associate Staff Analysts working as an Assistant to the agency-wide personnel officer;
- f. All Staff Analysts and Associate Staff Analysts working as an Assistant to the agency-wide budget officer;
- g. All Staff Analysts and Associate Staff Analysts who spend a majority of their time on the classification of positions.

12. Employees in the following positions are excluded from collective bargaining because they perform work which is of a managerial and confidential nature:

- a. All Staff Analysts and Associate Staff Analysts working as agency-wide personnel officers;
- b. All Staff Analysts and Associate Staff Analysts working as agency-wide budget officers.