

SEIU, L. 300, 5 OCB2d 33 (BOC 2012)

(Rep) (Docket No. AC-46-09)

Summary of Decision: The Union sought to amend Certification No. 8-85 to add the titles Administrative Procurement Analyst, Levels I, II, and III, and Administrative Quality Assurance Specialist. The City and NYCHA argued that the titles were excluded from collective bargaining as managerial and/or confidential. The Board found that the employees were eligible for collective bargaining and appropriately added to the certification. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION**

In the Matter of the Certification Proceeding

-between-

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 300,

Petitioner,

-and-

**THE CITY OF NEW YORK and
THE NEW YORK CITY HOUSING AUTHORITY,**

Respondents.

DECISION AND ORDER

On February 13, 2009, the Service Employees International Union, Local 300 (“Union”), filed a petition requesting that the Board of Certification add the titles Administrative Procurement Analyst (Title Code No. 82976) (“APA”) and Administrative Quality Assurance Specialist (Title Code No. 10080) (“AQAS”) to Certification No. 8-85, a bargaining unit including titles such as Buyer, Purchasing Agent, Quality Assurance Specialist, and related

titles.¹ The City of New York (“City”) and the New York City Housing Authority (“NYCHA”) argue that both titles are managerial and/or confidential and, therefore, all employees in those titles should be excluded from collective bargaining pursuant to § 12-305 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”). Based on the record, the Board finds that employees in the titles APA, Levels I, II, and III, and AQAS are eligible for collective bargaining because they do not satisfy the criteria for a managerial and/or confidential designation and are appropriately placed in the Union’s bargaining unit. Accordingly, the titles APA, Levels I, II, and III, and AQAS are added to Certification No. 8-85.

BACKGROUND

There are approximately 69 employees in the APA and AQAS titles working in a variety of in-house positions at 16 City agencies and NYCHA.² The Trial Examiner held eight days of

¹ The Union later clarified that it was seeking to represent only Levels I, II, and III of the APA title. Levels refer to managerial levels, not assignment levels.

² Throughout this decision, the following abbreviations are used for City agencies:

Comptroller’s Office	Office of the New York City Comptroller
DCAS	Department of Citywide Administrative Services
DEP	Department of Environmental Protection
DHS	Department of Homeless Services
DOC	Department of Correction
DOF	Department of Finance
DOHMH	Department of Health and Mental Hygiene
DORIS	Department of Records & Information Services
DOT	Department of Transportation
FISA	Financial Information Services Agency
FDNY	New York City Fire Department
HPD	Department of Housing Preservation & Development
HRA	Human Resources Administration
OEM	Office of Emergency Management
OPA	Office of Payroll Administration

hearing, at which one AQAS and 38 APAs testified. In addition, one AQAS and 68 APAs submitted surveys to the Board.³

Administrative Quality Assurance Specialist

The job specification for an AQAS provides that all personnel in the title are “involved in the management of quality assurance work.” (Joint Ex. 1) Typical assignments include:

Under managerial direction, with latitude for the exercise of independent judgment and decision, serves as a deputy to a quality assurance manager by: assisting in organizing, administering and supervising the day-to-day activities of the quality assurance organizational unit/program; participates in setting, modifying and implementing quality assurance policies/procedures, and in maintaining standards; plans, monitors and evaluates the work of Associate Quality Assurance Specialists; advises supervisors on complex inspectional problems; conducts hearings and negotiations with vendors at an administrative level; assists in the preparation and review of contract specifications; participates in pre-bid conferences on complex matters; sets up vendor plant inspections; assists in the evaluation of pre-awards; plans and implements in-service training programs; conducts special complex studies and prepares appropriate reports; prepares the budget; monitors and documents work performance. Performs assignments equivalent to the above.

Under administrative direction, with wide latitude for the exercise of independent judgment and decision, manages and coordinates activities of a quality assurance organizational unit/program. In addition to performing duties similar to those described above, performs more responsible tasks, such as the following. Sets quality assurance policies and standards to support the mission of the agency.

Reviews reports and recommendations; works with subordinates, procurement personnel, and/or vendors/contractors and their legal representative to resolve disputes and other operational problems; examines and approves recommendations for contract awards and modification of contracts, the release of partial payments, and the request for release of material under inspection; attends hearings

³ All surveys that were submitted by the City were considered by the Board, including a second set that was submitted on January 6, 2012.

and board meetings as the technical advisor on quality assurance matters to executive staff on quality assurance matters; acts as representative of executive staff on various boards and/or committees; directs the planning of in-service training programs.

(*Id.*) The direct line of promotion to AQAS is from Associate Quality Assurance Specialist (All Specialties), a title represented by the Union.

The City presented testimony from one AQAS. Clifford Francis is an AQAS Level I and the Deputy Director of the Bureau of Quality Assurance (“BQA”) at DCAS. BQA operates under the Division of Municipal Supply Services, and it is responsible for assuring the quality of goods procured by the City under DCAS and Citywide administrative contracts. Francis reports directly to the Executive Director of BQA. He supervises employees within the five units of BQA: Inspection, Fuel Oil, Health and Safety, Food Procurement, and Automotive. As part of his duties, Francis is responsible for overseeing the Inspection group and employees within BQA who go out to the field to inspect products that are procured by the City. He assigns the inspectors to specific field locations or directs them to attend meetings or pre-bid conferences. Additionally, Francis attends meetings about three times a week with the Executive Director and sometimes the Deputy Commissioner and First Deputy Commissioner. At these meetings, Francis provides advice regarding the quality assurance of products.

Francis also reports to the Executive Director regarding time and leave issues as well as employee disciplinary issues. If necessary, he can write up employees, and he may attend disciplinary proceedings if called to testify. As Deputy Director, Francis is made aware of layoffs up to a year in advance of their occurrence. He also makes recommendations regarding the filling of positions and whether or not to close personnel lines.

Administrative Procurement Analyst

According to the job specification, an employee in the APA title performs the following typical assignments:

Under direction, with wide latitude for independent action and decision making, supervises a procurement unit or program of some size or complexity within agency involving the acquisition of goods, services and construction. Prepares overall work schedules and coordinates workflow. Oversees and manages pre-solicitation review activities; evaluates solicitation documents and works with program/user personnel to ensure that user needs are satisfied in a timely, cost effective manner and that technical specifications are in compliance with applicable regulations and are clearly understood by vendors and contractors. Reviews and approves contract specifications before advertising, to ensure conformity to the agency's requirements and federal/state/city mandates. Approves recommendations for contract awards, modifications, emergency purchases and extensions of time on contracts. Supervises the review of specifications by users in order to determine the most cost effective way of obtaining the required items. Reviews work of subordinates for effectiveness, efficiency and compliance with established rules and guidelines. Consults with and advises the Agency Chief Contracting Officer and other superiors on buying policies. Confers with, consults and advises department heads on problems relating to the procurement of goods, services and construction. Manages investigations pertaining to vendor responsibility decisions, vendor performance and product performance; or performs assignments equivalent to those described.

Under direction of the Agency Chief Contracting Officer (ACCO), with considerable latitude for independent action and decision making, serves in the capacity of Deputy ACCO in agencies requiring large scale procurement involving the acquisition of goods, services and construction. Enforces and monitors agency compliance with Chapter 13 of the City Charter and with the Rules of the Procurement Policy Board, Mayoral policies and procedures and procurement-related laws, rules and regulations. Enforces and monitors compliance with the requirements of the Minority and Women-owned Business Enterprises Development Program. Directs and supervises a procurement program of significant size or complexity within the agency involving the acquisition of goods, services and construction. Develops procedures for administration of contract and procurement activities, such as

solicitation, awarding and processing of bids and contracts; monitoring performances of vendors and contractors, and effecting contract changes and modifications. Coordinates training activities for agency and procurement staff. Manages the procurement staff in daily activities involving major procurement and contracting functions and in specifications for services, and negotiations of prices and terms with vendors, contractors and suppliers. May direct, coordinate and control the planning, implementation and supervision of the central purchase of goods, services and construction used by one [or] more City agencies. In temporary absence of the ACCO, may perform duties of that position.

(Joint Ex. 1). The direct line of promotion to APA is from Procurement Analyst, a title which is represented by the Union.

Although the job duties of APAs Levels I, II and III differ across agencies, the record revealed that many APAs perform substantially similar tasks. Typical duties of an APA include: providing advice regarding what type of procurement method would be best for a particular service that is requested; representing the agency in facilitating pre-proposal conferences; developing and implementing standard operating procedures to ensure agency compliance with NYC Procurement Policy Board Rules (“PPB Rules”), Environmentally Preferable Purchasing (“EPP”) laws, and Minority and Women-Owned Business Enterprise (“MWBE”) laws; ensuring that particular procurements do not violate any provision of the collective bargaining agreements; preparing contract documents and bids; recommending contract awards to the Mayor’s Office of Contract Services (“OCS”) and the Office of Management and Budget (“OMB”); ensuring that vendors comply with contracts; completing market research; processing small purchase payments and in-house impress requests; ensuring that delivered products comply with specifications; developing and reviewing budgets; monitoring expenditures; providing input on budget modifications, audits, and accountability reports; overseeing the timely processing of purchase orders; and ensuring that all bids are tracked and logged expeditiously. They also make

recommendations to their superiors regarding issues such as: contract management and modification; whether or not to “buy against” a certain vendor if it is non-compliant with the contract; annual procurement initiatives and strategies; department processes and workflow; and budgetary planning.⁴

Additionally, the majority of APAs serve as direct and/or indirect supervisors to other employees. In this capacity, APAs make recommendations regarding hiring, firing, promoting, transferring, and disciplining employees. A few of the APAs testified that they have participated in the grievance process as witnesses or made determinations at Step I. APAs also may approve overtime, make schedule changes, develop employees’ tasks and standards, and conduct evaluations. Furthermore, APAs may draft job descriptions and interview employees before making a recommendation regarding the best candidate. As supervisors, APAs may have access to employees’ salaries, job titles, and other personnel information. They may also become aware

⁴ The sample duties listed are derived from the testimony and surveys of the following APAs: at the Comptroller’s Office, Patricia Allen (Survey), Debra Ishman (Survey), and Shauna-Kay Gooden (Survey); at DCAS, Robert Aboulafia (Survey), Dana Abramovitz (Tr. 459-465, Ex. 26), Yat-Sun Chiang (Survey), Martin Cohen (Tr. 544-555, Ex. 36), Stephen Delmar (Survey), Gweneva Gavin (Tr. 322-337, Ex. 16), Daniel Hyams (Survey), Sultan Khan (Survey), Christine Norman (Tr. 556-573, Ex. 37), Louis Pastore (Tr. 574-590, Ex. 38), Liana Patsuria (Tr. 476-482, Ex. 29), Boris Pogorelis (Survey), Masha Rudina (Survey), Erkan Solak (Tr. 302-321, Ex. 15), Lester Spittle (Tr. 450-458, Ex. 25), Baotiang Tian (Tr. 470-475, Ex. 28), and Ian Yap (Tr. 466-470, Ex. 27); at DEP, Latoya Peterson (Tr. 130-138, Ex. 6) and Joseph Vaicels (Survey); at DHS, Jeffrey Clark (Tr. 181-193, Ex. 9) and Jacques Frazier (Tr. 352-357, Ex. 18); at DOC, Gennaro Agovino (Survey), Arnold Martin (Survey), and Scott Webber (Survey); at DOHMH, Catherine Endreson (Tr. 211-226, Ex. 11), Roberta Samuels (Survey), Margaret Tullai (Survey), and Lawrence Wolf (Tr. 165-180, Ex. 8); at DOT, Bahman Ghaffarsamar (Survey); at FDNY, Roman Shpolyamsky (Survey); at HRA, Margene Bowman (Survey), Joan Cusack (Survey), Blaise DiDio (survey), Wiwiek Chandra Rembrandt (Survey), Adoracion Tolentino-Mount (Survey), and Donna Wilson (Survey); at HPD, John McKaie (Tr. 363-366, Ex. 19); at OEM, Erika Yan (Survey); at OPA, Aamer Parvez (Survey); and at TLC, Jeremy Halperin (Survey).

of layoffs prior to their implementation and make recommendations regarding which employees should be targeted.⁵

In general, the APAs' recommendations regarding subordinate employees must be approved by their direct supervisors. Additionally, recommendations regarding layoffs generally need to be approved by the agencies' Human Resources Department and/or OMB.

A number of APAs provided more specific descriptions about their job functions that show details beyond the typical procurement-related activities described above. These duties are described below.

Department of Citywide Administrative Services

Within DCAS there are two departments which deal with procurements. The Division of Municipal Supply Services ("DMSS") is responsible for the procurement of all goods throughout the City that exceed the small purchase level of \$100,000. DMSS also executes and manages Citywide requirements contracts, which are multi-year agreements for indefinite quantities of goods that any City agency can access. In contrast, the Office of Contracts is responsible for procurements that are specific to DCAS, rather than Citywide.

Within DMSS, there are four major purchasing groups, which are supervised by APAs Level III serving in the office title of Purchase Director/Deputy Agency Chief Contracting Officer ("DACCO"): Darlene Molina-Summers, Anson Telford, and Jennifer Chang.⁶ Each purchase group handles the procurements for a particular subset of goods. These Purchase Directors are supervised by Robert Cleary, an APA Level IV whose office title is Assistant Commissioner/ACCO.

⁵ The sample supervisory duties are derived from the testimony and surveys of APAs listed in footnote 4, as well as those APAs who are discussed individually below.

⁶ At the time of the hearing, a fourth Purchase Director/DACCO position was vacant.

Darlene Molina-Summers is the Purchase Director/DACCO in charge of “Group 2” at DMSS. This group is responsible for office equipment, paper products, drug and pharmaceutical products, hospital and lab equipment, safety equipment, and furniture. Molina-Summers is in charge of ensuring compliance with PPB Rules. She also manages pre-solicitation conferences where contract terms and specifications are discussed with possible vendors. Molina-Summers meets with the Assistant Commissioners and the Deputy Commissioner approximately once a week to discuss bid solicitation policies, contract awards, vendor performance, and potential lawsuits. At these meetings, she makes recommendations regarding whether to “buy against” a vendor if the vendor is not performing in accordance with the contract. She also worked with ACCO Cleary to devise an alternative contract award process where the contract would have an effect on voting procedures throughout the entire City.

Anson Telford is the Purchase Director/DACCO in charge of “Group 3.” This group is responsible for contracts relating to food, water, coolers, dry ice, and forage. Telford is in charge of managing pre-solicitation conferences in which contract specifications are discussed with vendors to ensure that they can feasibly be met. If the vendors recommend changes, Telford may make modifications to the specifications on his own, or he may recommend these changes to ACCO Cleary. He also makes recommendations to the ACCO regarding negotiating lower prices from competing vendors. Additionally, he has made recommendations to the ACCO to combine certain contracts or to eliminate foods from contracts that would not comply with the Mayor’s nutritional guidelines. Telford participates in meetings with the Deputy Commissioner, ACCO Cleary, other ACCOs, as well as with executive directors from other areas in DMSS. In these meetings, he provides information regarding food contracts or general information about the food industry.

Jennifer Chang is the Purchase Director/DACCO in charge of “Group 4.” This group is in charge of machinery, tools, hardware, clothes, textiles, chemicals, paints, metal, and plumbing supplies. Chang reviews work for accuracy and compliance with the PPB Rules as well as all other applicable regulations. Chang meets daily with ACCO Cleary to discuss procurement topics and makes recommendations regarding the buying and bidding processes. For example, she recommended that the price escalation clause that is used in contracts should be modified so that it is based on manufacturing realities instead of the Producer Price Index that is published by the U.S. Department of Labor.⁷ She also recommends cost-saving measures, such as scanning documents into the system instead of printing them. Additionally, she made a recommendation to use an email and online system to alert bidders of projects, although this recommendation has not been adopted. Chang attends monthly meetings with the ACCO as well as other Purchase Directors in order to discuss report formats and regulation compliance.

Office of the Comptroller

Lois Johnson is an APA Level III and the Division Chief for Contract Registration in the Comptroller’s Office of Contracts. One of Johnson’s primary duties is to review all of the contracts that are submitted to her office to ensure that they are accurate, appropriate, and in compliance with PPB Rules and any other applicable oversight laws. If so, they are then entered into the computer system. Johnson and her staff generally make these determinations. However, sometimes the contract will be passed onto others, such as the Director or the Comptroller, for higher review. Other times, the ACCO of the agency in question may be contacted to answer questions regarding the appropriateness of the contract. Johnson often makes recommendations regarding changes in the contract review process and vendor performance quality. When the

⁷ Chang testified that this recommendation was being explored. However, it is not clear whether it was ever implemented.

PPB Rules were being discussed, Johnson communicated to the PPB Board what rules the Comptroller thought were necessary. Additionally, Johnson is required to report to the agency's backup facility in Staten Island within three days of a disaster if anything should happen to prevent the computer system from working. She attends frequent meetings with the Deputy Comptroller and various City agencies, at which she makes recommendations regarding the contract review and approval process, and issues with the new computer systems are discussed.

Bernarda Ramirez is an APA Level III and the Chief of Procurement Services/DACCO in the Administrative Services Unit. Ramirez is generally responsible for all of the agency's procurement activities. In this capacity, she developed a new monitoring system for submitting and approving procurements electronically instead of by hand. She also consults with and advises the ACCO and other superiors on contracting policies. For example, when an insufficient number of bids are submitted for a particular procurement, Ramirez will recommend to the ACCO whether they should go ahead and award the contract to the lowest bidder anyway, or whether they should solicit additional bids. She also recommends budget cuts or shifting of funds from one unit of appropriation within the Other than Personnel Services ("OTPS") budget to another. Additionally, Ramirez attends weekly meetings with the Assistant Comptroller where she makes recommendations on issues such as funding, procurement, and personnel changes.

Department of Environmental Protection

Three APAs Level II who serve as DACCOs in DEP's Agency Chief Contracting Office, which is one of 16 bureaus within DEP, testified. Debra Butlien's unit is responsible for the procurement of contracts above the small purchase limit of \$100,000. She supervises a staff of 12 employees who are each responsible for a certain phase of the procurement process. Butlien

must gain approval from OCS' Chief Procurement Officer for the majority of the procurements she oversees. Butlien may attend various meetings in the ACCO's absence. During these meetings, she discusses the likelihood of whether or not particular procurements will meet the fiscal year deadline. She also may make recommendations regarding whether a Request For Proposal ("RFP") should be undertaken for a particular project. One particular recommendation that Butlien made, which was later implemented, related to the review of a form that was required to be submitted under the MWBE Law. In particular, Butlien recommended that bidders be instructed to keep the forms submitted under this law separate from the rest of the package so that it is easier for her office to review.

Ira Elmore's unit is also responsible for the procurement of contracts above the small purchase limit of \$100,000. Elmore makes recommendations regarding practices to ensure compliance with PPB Rules, agency regulations, and the MWBE laws. He also advises individual bureaus on the best methods for obtaining desired procurements. Additionally, he recommended a policy, which was later implemented, to allow these bureaus to make their own purchases below \$5,000. Elmore then completes a post-audit of these purchases to ensure that they adhere to City and agency guidelines.

Alan Wasserman's unit is primarily responsible for ensuring that DEP and its contractors comply with MWBE laws, New York's prevailing wage laws, and Davis Bacon requirements, where they apply. In ensuring compliance with the prevailing wage laws, Wasserman advises the Comptroller's Office of potential violations and also has the power to direct contractors to pay workers directly if there has been an underpayment. Additionally, Wasserman makes recommendations to the Commissioner or Deputy Commissioner regarding standard operating procedures that DEP should adopt in order to comply with these various laws. In particular, he

recommended the implementation of a subcontractor approval form to safeguard against subcontractors who should not be allowed on City worksites. This form was instituted by DEP and, later, OCS instituted the form Citywide. Wasserman also attends meetings where he may advise other City agencies which are unfamiliar with the requirements of various laws as to what kind of procedures have worked for DEP and what might work for them.

Department of Correction

Christine Erikson is an APA Level II and Director of DOC's Energy Management & Special Projects unit. Her main duties consist of energy management, oversight of the development and drafting of follow-up on various RFPs, and other special projects as required. She also makes budget recommendations with respect to staffing and equipment analysis, outsourcing opportunities, and the use of personnel-saving technology. Additionally, she provides feedback on energy and local laws regarding construction projects and determines the energy footprint and impact on planned capital projects. For example, she analyzed the carbon dioxide emission saving projects and developed a light replacement analysis. Erikson also represents DOC at high-level inter-agency meetings where energy savings, gas and electric negotiations, grant proposals and implementation, the impact of local laws, and inmate program implementation are discussed. She makes recommendations at these meetings regarding energy, the Leadership in Energy and Environmental Design certification system, project management, information technology, and procurement. Furthermore, Erikson states that some of the projects she works on have a labor relations component, such as evaluating outsourcing opportunities. In addition, she provides information to DOC's Director of Labor Relations on relevant projects. She also participated, as part of a team, in a walk-through with union representatives of new centralized inmate banking/cashier facilities on Riker's Island.

Department of Finance

Lisa Loren is an APA Level I and the DACCO of DOF's Supply Management and Contract Services Unit, which is part of DOF's Employee Services Division. As part of Loren's duties, she creates, implements, and maintains automated tools to measure and report unit performance improvement. She also creates standard operating procedures and procurement training documents. Additionally, Loren makes cost projections for multi-million dollar contracts for goods and services. Further, she makes recommendations to the Chief Financial Officer regarding funding surpluses or needs for contracted goods and services. She also provides input regarding whether to contract out or insource. Loren attends bi-monthly meetings with the Assistant Commissioner and others to discuss "agency goals and operations and their effect[s] [on] personnel, training, facility management, labor relations, contracts and overall performance outcomes." (Survey at 10). She also negotiates with contractors. Furthermore, she has access to information regarding the cost of outsourced labor for consulting and service contracts.

Debbie Maynard is an APA Level I and the Director of Purchasing in DOF's Supply Management and Contract Services Unit. Maynard is responsible for DOF's small purchases, which include goods and services up to \$100,000. In this capacity, she receives and reviews purchase requests, which she assigns to a particular buyer. She reviews and approves the buyers' bid evaluations and recommendations to ensure that they are correctly following the PPB Rules. Maynard also consults with the budget office to determine whether funding is available for particular procurements. If there is insufficient funding for a particular request, Maynard will make recommendations to the budget office for possible modifications. The budget office will make the final decision. For example, Maynard recommended, and the budget office approved,

the idea that DOF should rent water coolers instead of owning them. She also makes recommendations on Program to Eliminate the Gap proposals (“PEGs”), such as her recommendation to eliminate membership services that are not being used. If both the ACCO and DACCO are absent, Maynard may approve contract awards in the Financial Management System. Maynard also attends monthly meetings with the ACCO, Budget Directors, Assistant Deputy Commissioner, the DACCO, and Directors from other departments in order to discuss how to better serve the agency.

Department of Health and Mental Hygiene

Arlene Kelly is an APA Level I and the Director of Procurement in the Procurement/Purchasing Unit at DOHMH’s Office of the Chief Medical Examiner (“OCME”). She reports to an Administrative Staff Analyst (“ASA”) Level II in the position of ACCO. *See OSA*, 3 OCB2d 33 (BOC 2010) (finding ASAs Levels II and III eligible for collective bargaining, with certain exceptions), *affd.*, *Matter of City v. Bd. of Certification*, Index Nos. 402466/10 & 402496/10 (Sup. Ct. N.Y. Co. Oct. 27, 2011) (Kern, J.). Kelly is primarily responsible for OCME’s small purchases, which are 85% of the goods, services, and equipment that are ordered. She is also responsible for overseeing the Receiving department and the Materials Management division. In this capacity, she ensures that her staff complies with the PPB Rules, MWBE laws, and all other procurement-related laws and regulations. Kelly attends meetings with executive senior staff members which occur approximately bi-weekly. In these meetings, she has made recommendations regarding the need to purchase new equipment for the toxicology lab and has given a presentation to recommend a new automated requisition system. She also recommended changes to the “SpendMap End-Users Training Manual” to the ACCO

and the Deputy Commissioner of Administration. Kelly has provided information and documents to Human Resources personnel for their use in collective bargaining negotiations.

Deidre Snyder is an APA Level II and a Budget Director at OCME. She reports to the Assistant Commissioner of Finance. Snyder is responsible for reviewing requisition and purchase orders before they go to procurement to ensure there is adequate funding in the budget. She also helps develop grant proposals. Additionally, Snyder assisted the Assistant Commissioner of Finance in the development of a “New Needs” policy, which was then approved and implemented by the Deputy Commissioner. This consists of a form and procedure for programs to follow when a critical need arises during the year for which they need to submit a procurement request and cost analysis. Snyder also helped develop a form for programs to utilize when seeking reimbursement for travel, which was implemented by the Deputy Commissioner. Snyder attends senior staff meetings at which she recommends grant opportunities or proposes ways in which grant money could be spent. Further, Snyder has knowledge of layoffs prior to their occurrence and works with her supervisor to recommend staff to be targeted. This recommendation then goes to the Human Resources department for approval.

Department of Records and Information Services

Barbara Filiberto is an APA Level II and Budget Director in the Administration Unit of DORIS. She is generally responsible for handling DORIS’ budget in conjunction with the Deputy Commissioner. Together they determine how and where they may be able to make budget cuts in order to meet their targets for PEGs. A list of these proposals is then sent to OMB, which makes the final determinations. Filiberto also approves procurement documents, creates and submits variance reports, and enters revenue estimates into the system. Further, she

recommended that a records warehouse in Queens be shut down to reduce rent. The Deputy Commissioner decided to begin by shutting down only 25% of the warehouse.

Department of Transportation

Joseph Viccaro is an APA Level II and Director of Fleet Administration for DOT's Roadways Resource Management Unit. He reports directly to the Executive Director of Fleet Services, whose position was found eligible for collective bargaining by this Board in *Local 621, SEIU*, 78 OCB 2 (BOC 2006) (addressing the title Administrative Director of Fleet Maintenance). Viccaro is primarily responsible for assisting DOT bureaus in procuring vehicles. He regularly prepares requisitions and specifications for the vehicles that are purchased. Several times a year, Viccaro meets with the Executive Director, the Deputy Commissioner for Roadways and Repairs, and the individual bureaus in order to discuss which types of vehicles and procurement methods would be most appropriate. Viccaro makes recommendations in this regard, which are accepted sometimes.

Financial Information Services Agency

Paul Magrone is an APA Level II and ACCO in FISA's Business Services/Procurement Unit. He oversees all of the procurements for the agency, which mainly involve the purchase of computer equipment and software. As ACCO, he makes determinations regarding the best type of product and method of procurement to utilize. He has the authority to negotiate, approve, and disapprove contracts. Magrone has also been charged with managing the temporary hiring process and has set up policies and procedures to streamline the process and ensure that FISA's needs are met in a timely manner. In this capacity, he has negotiated hourly rates for consultants as well as fees for permanent employees that are hired through recruiters. Additionally, Magrone

attends weekly high-level meetings in which he makes recommendations regarding the best procurement methods for a certain item given the particular needs of FISA.

New York City Fire Department

Patricia Mims is an APA Level II and DACCO in FDNY's Procurement and Accounts Payable Unit of the Bureau of Fiscal Services.⁸ She is responsible for processing and approving procurements for services valued at \$100,000 or less. She also prepares weekly and monthly spending analyses for presentation to the Assistant Commissioner for Budget. Based on these calculations, Mims makes recommendations as to whether or not a particular unit's budget should be reduced to accommodate other units' shortfalls. Mims authored a procedure which requires the units to assign all purchases under \$5,000 to minority and women-owned businesses. She recommended this procedure to the Assistant Commissioner, who approved its implementation. Mims also assists in the administration of the Firehouse Expense Program, a \$225 annual grant given to firehouses pursuant to a collective bargaining agreement. In this capacity, she issues checks, collects documentation from each firehouse, and submits an Annual Accountability Report to the Comptroller's Office. She also ensures that Fire Prevention Inspectors are reimbursed for the use of their personal vehicles.

Malissa Smith is an APA Level I and an Assistant DACCO in FDNY's Bureau of Fiscal Services' Contracts Unit. She reports to an ASA Level III in the position of DACCO. *See OSA*, 3 OCB2d 33 (finding ASAs Levels II and III eligible for collective bargaining, with certain exceptions). Smith is responsible for procurement and contract administration for services in excess of \$100,000. She develops specific budgets for individual procurements and manages larger budgets for overall units. She makes recommendations as to whether or not particular

⁸ The Bureau of Fiscal Services is made up of the Procurement and Accounts Payable Unit, the Contracts Unit, and the Grant Unit.

procurements are possible in any given fiscal year. Smith also coordinates the contract bidding process and makes recommendations to the Law Department, OCS, and OMB as to which contract she believes should ultimately be chosen. Additionally, she ensures that all procurements comply with EPP laws. She also sits on the World Trade Center (“WTC”) Grants Compliance Committee and is responsible for developing procurements and specifications to comply with the WTC Medical Monitoring and Treatment Program.⁹ Further, Smith served as the project manager for the construction of two fast response fireboats. In this respect, she was involved in developing the budget and making sure that the project was progressing in a timely manner. She also identified the need to hire an outside engineer to serve as an advisor on the project. Smith participated in the Green Cleaning Pilot Program, in which she received information regarding specific cleaning materials that would be utilized by FDNY in order to ensure that they met OSHA requirements. She then presented this information to union representatives at labor-management meetings regarding the implementation of this program.

Department of Housing Preservation and Development

Jay Bernstein is an APA Level III and the DACCO at HPD’s Office of Legal Affairs/Procurement Services Division. Bernstein is responsible for handling all procurement matters relating to service contracts, and he ensures compliance with PPB Rules. He meets weekly with the different divisions within HPD to recommend the best methodologies for procuring services and to discuss the status of ongoing procurements. Where appropriate, he also approves pre-solicitation and review reports from these divisions, and their recommendations for contract awards. Additionally, Bernstein attends weekly meetings with

⁹ The WTC Medical Monitoring and Treatment Program was created through the use of grant money and provides for free comprehensive medical treatment to active and retired FDNY employees who responded to the 9/11 terrorist attacks at the World Trade Center.

the Assistant Commissioner or the Deputy Commissioner in which he makes recommendations regarding processes and timing of procurements. He also provides guidance on how to remedy any procurement problems that have arisen.

Human Resources Administration

Marion Harnik is an APA Level I and a Procurement Officer in HRA's Department of Home Care Management & Program Support Services. He develops RFPs and participates in pre-proposal conferences by responding to questions from prospective proposers. He directs the preparation and review of procurement documents for submission to HRA's Office of Contracts. Additionally, Harnik attends monthly meetings with the DACCO for Home Care Management at which he makes recommendations regarding RFPs, vendors, and general contract issues. For example, he recommended that central insurance costs should not be included in not-for-profit vendors' contracts since the City has separate contracts for insurance and, after discussion with OCS and the Corporation Counsel, this recommendation was adopted. He also helped formulate a procedure for monitoring doctors' assessments of Adult Protective Services' home care clients.

Office of Payroll Administration

Brian Newson is an APA Level II and serves as the Director of Management Review and Analysis in OPA's Bureau of Administrative Services and Systems. Newson heads a division that is responsible for reviewing, developing, modifying, and implementing procedures to comply with OCS, Comptroller's Office, Department of Investigation, or Department of Information Technology and Telecommunications policies. For example, he oversees the Continuity of Operations Planning project, which stemmed from an Executive Order. In this capacity, Newson works with other division directors to devise a plan for what would happen if there is a break or failure in any of the City's payroll processes. He also acts as OPA's Records

Management Officer, submitting grant proposals in order to enhance the Records Retention Programs. In the absence of OPA's ACCO and DACCO, Newson can register contracts of any dollar amount with the Comptroller's Office, provided that he follows the applicable procurement rules. Additionally, OPA has a unit that implements collectively bargained raises, and Newson may occasionally be called upon to review the payroll to ensure that these raises were implemented correctly. Newson also attends labor-management meetings to discuss procedures related to workplace violence prevention laws. Additionally, he may become aware of potential layoffs months in advance. When this occurs, Newson often works with other agency division directors to come up with alternatives for reducing the budget. Various budget options may be proposed and, ultimately, the agency heads will decide which proposals to submit to OMB, which will then make the final decisions.

New York City Housing Authority

Terry Eichenbaum, an APA Level II, is assigned to NYCHA's Supply Chain Operations ("SCO") Department, and reports directly to the Director of SCO. SCO is one of three purchasing groups within NYCHA, and it is responsible for purchasing materials, equipment and supplies for all NYCHA units. Orders of \$5,000 or more for materials are placed through SCO rather than by the individual departments.

Eichenbaum is responsible for overseeing the procurement of millions of dollars of materials and goods. This is done through both "blanket orders," which are long-term requirements contracts, as well as contracts for "one-time" items. Eichenbaum directs a staff of about 25 employees who are responsible for receiving, storing, and distributing materials, parts, and goods. Eichenbaum reviews requisition submissions in the Oracle computer system and takes various steps to approve and submit orders to NYCHA's Contracts Management Group.

Eichenbaum was a member of the committee that met with consultants and answered questions about the procurement process in order to assist in the development of the iSupplier system, which allows vendors to submit bids and be paid electronically. He is also a member of the Maintenance Committee, which is a sub-committee of the Specifications Committee, as well as the Janitorial Committee. Both committees discuss and make recommendations on how to utilize more “green” and sustainable products. For example, the Maintenance Committee made the recommendation, which was accepted, to get rid of manual clothes drying racks in developments that were causing injuries and were not “green.” The Janitorial Committee ensures that workers do not come into contact with any dangerous chemicals either by touching or smelling them. Eichenbaum also played a role in implementing a program in which NYCHA receives discounts when it pays vendors within ten days of receiving an invoice. He met with the legal team and changed the language in many purchase orders in order to ensure that this program was implemented at SCO.

POSITIONS OF THE PARTIES

Union’s Position

The Union seeks to add APAs Levels I, II, and III and the AQAS to its bargaining unit. The Union notes that courts have held that the exclusions for managerial and confidential employees are the exception to the Taylor Law’s policy of extending coverage to all public employees. These exclusions are to be read narrowly, with all uncertainties resolved in favor of coverage.

With regard to the managerial designation based on the formulation of policy, the Union avers that participation in policy formation must be regular, active, and significant. Policy

formulation does not extend to the determination of methods of operation that are merely technical. Moreover, policy formulation is limited to those few individuals who directly assist the ultimate decision makers in reaching decisions necessary to conduct the business of the agency. The exercise of discretion alone is insufficient for a managerial designation. Similarly, budgetary duties are not dispositive of managerial status. Finally, an employee who participates in the policy making process in an advisory role, as a resource person, or in a clerical capacity, does not formulate policy.

The Union further asserts that in order to be excluded from the bargaining unit based on involvement in labor relations activities, the employee must be either a direct participant in the preparation of the employer's proposals and positions in collective bargaining and an active participant in the negotiations itself, or have the authority to exercise independent judgment in the implementation of collective bargaining agreements. Similarly, it asserts that managers involved in personnel administration must exercise independent judgment and fundamental control over the direction and scope of the employer's mission.

Regarding the duty prong of the Taylor Law's test for confidential status, it is the employee's involvement in collective negotiations, the administration of collective bargaining agreements, or personnel administration that makes that person ineligible for collective bargaining. Regarding the relationship prong of the same test, an employee must be serving in a position of trust and confidence to an excluded manager. Satisfaction of one part of the confidentiality test might not satisfy the other. The secretive or highly sensitive nature of an employee's work alone does not compel a confidential designation, nor are budget formulation or supervisory duties alone dispositive.

The Union argues that none of the employees at issue meet the criteria for managerial and/or confidential status. Accordingly, no one should be excluded from collective bargaining representation.

City's Position

The City argues that the evidence presented demonstrates that the AQAS and APAs perform managerial and/or confidential duties that preclude their inclusion in the Union's collective bargaining unit. It contends that, given the variety of assignments performed by APAs within each individual agency, these employees possess a variety of different indicia of managerial and/or confidential status and an employee's "M-level" designation is not dispositive.

The City argues that direct participation in policy formulation is not essential to a finding of managerial status if the employee plays a role in the broad overall functioning of a department, division, or self-contained unit. It contends that an employee who may be assigned to work on special projects or problems and who makes recommendations that involve alternative methods of operation or administrative tasks that may affect personnel and staffing levels is managerial.

The City asserts that employees who review resumes, conduct applicant reviews, and make effective recommendations for hiring and promotion play a major role in personnel administration. According to the City, an employee who is involved in discussion of budget policy and fund allocation that impacts labor relations or who plays a responsible role in budget development will be considered a managerial employee.

The City asserts that APAs play active roles in effectuating both Citywide and agency-wide policy and personnel decisions, formulating agency budgets, and allocating resources. They also play key roles in determining PEG proposals. In such capacities, the City argues that

APAs have advance knowledge of layoffs and other confidential personnel information. In the role of helping administer the MWBE Development Program, many APAs exercise significant discretion in determining who should be awarded a grant or contract. Further, the City claims that many APAs represent management in contractually-mandated labor-management meetings and negotiations. They also engage in the development of standard operating procedures relating to the agency's mission.

APAs in the in-house titles of ACCO or DACCO negotiate and approve contracts for goods, services, and capital projects with outside vendors. The City claims that an ACCO or DACCO's discretion and authority to speak on behalf of the agency, and in some cases, the City, are clear and unmistakable indications of manageriality.

The City asserts that, at certain agencies, APAs are assigned to participate in labor relations, budget allocation and formulation, personnel administration, and disciplinary matters. It further argues that APAs working in the titles of ACCO, DACCO, and Budget Director have access to information having a significant impact on labor relations and personnel administration, such as the wages of outside consultants and contractors, and prospective layoffs. Such employees represent their respective agencies or units in meetings with Commissioners, Assistant Commissioners, Deputy Commissioners, and the public generally.

The City claims that many APAs serve in a confidential capacity as advisors on procurement and budgetary strategy to high-level managers who play major roles in personnel administration and labor relations.¹⁰ According to the City, the two-part test utilized by the

¹⁰ The City specifically asserted that the following employees should be deemed managerial and/or confidential: at DCAS, Jennifer Chang, Clifford Francis, Darlene Molina-Summers, Anson Telford, and Erkan Solak; at DEP, Debra E. Butlien and Alan Wasserman; at DOC, Gennaro Agovino and Christine Erikson; at DOF, Lisa Loren; at DORIS, Barbara Filiberto; at

Board “is used to determine whether the employees regularly have ‘access to confidential information concerning labor relations and/or personnel matters to such an extent that their inclusion in collective bargaining would lead to conflicts of interest inimical to the bargaining process and the full and fair representation of the employer’s interests.’” (City Br. at 8) (quoting *Dept. of Investigation Investigator’s Assn.*, 72 OCB 2 (BOC 2003)). The City argues that the AQAS and many APAs have access to confidential information which would create such a conflict. For example, the City asserts that many have access to information regarding potential hiring and layoffs, the cost of outsourced labor, and potential budget cuts.

The City concludes that it has satisfied its burden of proving that the AQAS and APAs are managerial and/or confidential employees ineligible for collective bargaining. It requests that the Board dismiss the Union’s petition in its entirety.

NYCHA’s Position

NYCHA argues that the APA title is managerial and, accordingly, employees in that title are not eligible for the rights available pursuant to NYCCBL § 12-305. NYCHA contends that Terry Eichenbaum clearly meets the definition of managerial under the NYCCBL. Specifically, it argues that Eichenbaum is a high-level manager reporting to SCO’s Director. Eichenbaum plays a substantial role in SCO, which serves the entire NYCHA community by purchasing all supplies, equipment, and goods. Eichenbaum negotiates with outside vendors to create long term contracts for goods. According to NYCHA, he is the only SCO employee authorized to approve items for shipping and payment to vendors.

NYCHA contends that Eichenbaum has a significant role in the development of NYCHA’s objectives and in the fulfillment of its overall missions as well as the methods, means,

FDNY, Patricia Mims and Malissa Smith; at FISA, Paul Magrone; at HPD, Jay Bernstein and John McKaie; at HRA, Blaise DiDio; at OEM, Erika Yan; and at OPA, Brian Newson.

and extent of achieving those objectives. According to NYCHA, “he has the authority to select among options, at least in his own unit, as part of a number of committees that later put proposed policies into effect.” (NYCHA Br. at 8) Furthermore, NYCHA argues that Eichenbaum is not merely engaged in research or in the collection of data so that others may develop policy proposals.

NYCHA also contends that, analogous to a position that the Board found to be managerial in *Local 621, SEIU*, 60 OCB 7 (BOC 1992), Eichenbaum makes recommendations concerning the overall direction of how SCO operates. Further, NYCHA argues that by promulgating appropriate policies, Eichenbaum plays an integral role in ensuring that procurement funds are effectively spent. It also states that he has an active role in implementing procedures which have been responsible for significant cost savings for SCO and NYCHA as a whole.

Finally, NYCHA notes that it has diligently applied the Board’s criteria when developing a position to be classified in the managerial class. As such, the language in the job specification, which clearly indicates that the position is within the “management class of positions” with varying degrees of latitude for independent action and decision making within the procurement unit, requires that the position function in a managerial capacity. NYCHA contends that a Board finding that the APA position is eligible for collective bargaining is inherently divergent from the intended language of the DCAS job specification.

DISCUSSION

In granting public employees the right to bargain collectively, the NYCCBL provides a limited exception for those employees whom this Board finds to be managerial and/or confidential:

Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. However, neither managerial nor confidential employees shall constitute or be included in any bargaining unit, nor shall they have the right to bargain collectively; provided, however, that *public employees shall be presumed eligible for the rights set forth in this section*, and no employees shall be deprived of these rights unless, as to such employee, a determination of managerial and confidential status has been rendered by the board of certification.

NYCCBL § 12-305 (emphasis added). The definitions of managerial and confidential are set forth in Civil Service Law (“CSL”) § 201.7(a), which is in Article 14, also known as the Taylor Law. Accordingly, when evaluating a public employer’s assertion that an employee should be excluded from collective bargaining as managerial and/or confidential, the Board applies the following statutory standard:

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).

CSL § 201.7(a); *see, e.g., DC 37*, 78 OCB 7, at 39 (BOC 2006), *affd.*, *Matter of City of New York v. NYC Bd. of Certification*, No. 404461/06 (Sup. Ct. N.Y. Co. Sept. 19, 2007); *see also Matter*

of *Shelofsky v. Helsby*, 32 N.Y.2d 54, 58 (1973) (finding that the statutory criteria for managerial and confidential designations are not unconstitutionally vague). “Significantly, the exclusions for managerial and confidential employees are an exception to the Taylor Law’s strong policy of extending coverage to all public employees and are to be read narrowly, with all uncertainties resolved in favor of coverage.” *CWA, L. 1180*, 2 OCB2d 13, at 11 (BOC 2009) (quoting *Matter of Lippman v. Pub. Empl. Relations Bd.*, 263 A.D.2d 891, 904 (3d Dept. 1999)) (internal quotation marks omitted); *Matter of NYC Health & Hosp. Corp. v. Bd. of Cert. of the City of New York*, 2007 NY Slip Op. 30921 (U) (Sup. Ct. N.Y. Co. Apr. 23, 2007) (Tolub, J.).

Only two types of managers are excluded from collective bargaining. The first is a manager “who formulate[s] policy.” Taylor Law § 201.7(a)(i). 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.” *State of New York*, 5 PERB ¶ 3001, at 3005 (1972); see *EMS Superior Officers Ass’n.*, 68 OCB 10, at 21 (BOC 2001); *Unif. Sanitation Chiefs Ass’n.*, 66 OCB 4, at 26 (BOC 2000). Employees who formulate policy “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 a person who participates with regularity in the essential process which results in a policy proposal and the decision to put such proposal into effect.” *State of New York*, 5 PERB at ¶ 3005; see also *OSA*, 78 OCB 1 (BOC 2006).

The Board has held that “[p]articipation in the formulation of policy must be ‘regular,’ ‘active,’ and ‘significant’ to support a finding of managerial status.” *CWA*, 78 OCB 3, at 11 (BOC 2006) (citing *UFOA, L. 854*, 50 OCB 15, at 20 (BOC 1992)). The definition of policy formulation is limited to “those relatively few individuals who directly assist the ultimate decision-makers in reaching the decisions necessary to the conduct of the business of the

governmental agency.” *State of New York (Dept. of Env. Conservation)*, 36 PERB ¶ 3029, at 3083 (2003) (finding managerial an employee who initiated a regulatory change proposal with “significant statewide implication,” formulated the long-term policy for the direction of the New York State Nursery program, and reallocated funding from efficiency studies to trade show promotions). For example, this Board has designated positions as managerial when the employees formulated policy by deciding how to protect the water supply system and planning DOHMH’s response to emergencies. *See CWA*, 2 OCB2d 13, at 16-21.

There is a key distinction between setting policy and promulgating procedures. “Policy sets the agency’s course whereas procedures are the practical steps taken to implement such policy, including the determination of methods of operation that are merely of a technical nature.” *Local 621, SEIU*, 4 OCB2d 57, at 24 (BOC 2011) (internal quotations omitted) (quoting *Matter of City*, Index No. 402496/10, slip op. at 4-5); *see also Lippman*, 263 A.D.2d at 899; *City of Binghamton*, 12 PERB ¶ 3099, at 3185 (1979), *affd.*, 12 PERB ¶ 3099 (1979). Additionally, “exercising a high level of expertise and technical skill in performing one’s duties does not warrant excluding that employee from collective bargaining.” *Local 621, SEIU*, 4 OCB2d 57, at 24 (citing *OSA*, 3 OCB2d 33, at 47). This is because, “[t]he exercise of discretion, alone, is insufficient for a managerial designation.” *CWA, L. 1180*, 2 OCB2d 13, at 13. “It is the condition under which discretion may be exercised, not the exercise of discretion itself, which we find relevant in determining manageriality. Employees who exercise their discretion only when permitted by policy, and exercise it within the specified guidelines of that policy, do not have the degree of freedom or authority to make decisions necessary to invoke managerial status.” *Id.* (quoting *UFOA, L. 854*, 50 OCB 15, at 23) (internal quotation marks omitted).

Notably, “budgetary duties are not dispositive of managerial status.” *CWA, L. 1180*, 2 OCB2d 13, at 14. “[W]hile involvement in budget formulation is one of the factors that this Board has considered in interpreting the Taylor Law definitions of managerial, those employees with budgetary duties who do not formulate policy or have a significant involvement in labor relations or personnel administration are not excluded from collective bargaining as managerial.” *Id.* at 15 (citing *CWA*, 78 OCB 3, at 39, 45, 51). Duties such as “preparing budget proposals, overseeing and maintaining unit budgets, overseeing OTPS budget, preparing management reports and tracking spending[,] calculating overtime needs based on prior years’ expenditures, determining historical trends and anticipating expenses, implementing budget reductions, budget reconciliation, grant oversight, and entering into contracts with vendors to have office equipment maintained, . . . are insufficient to establish that an employee formulates policy.” *Id.* at 22; *see also OSA*, 78 OCB 1, at 21, 25-26, 34, 36 (finding employees who prepare grant budgets, participate in allocating grant funds between facilities, allocate departmental expenses, prepare capital budget proposals, and make need-based recommendations for the departmental budget are eligible for collective bargaining).

The Board has previously addressed the eligibility for collective bargaining of employees who perform procurement-related activities, including DACCOs at six different agencies. *See OSA*, 3 OCB3d 33, at 49, 68, 118, 119, 123. For example, in *Local 621, SEIU*, 4 OCB2d 57 (BOC 2011), this Board found eligible the Director of Motor Transport for the New York City Police Department. His duties included overseeing an annual expense budget of approximately \$70-\$80 million; determining how the Fleet Services Division should best utilize its funding; approving vehicles and parts purchases; negotiating labor rates with vendors; deciding when to outsource work; writing and modifying specifications; developing RFPs; researching vendors;

and recommending “green” and efficiency improvements. Similarly, in *Local 621, SEIU*, 78 OCB 2 (BOC 2006), the Board found the title of Administrative Director of Fleet Maintenance (“ADFM”) eligible for collective bargaining, with one exception. ADFMs performed duties such as preparing the expense budget; approving new vehicle specifications; devising a program to outsource work; selecting vendors and procuring vehicles; writing standard operating procedures; updating existing procedures and manuals; recommending implementation of a vehicle inspection program; creating procedures for the proper stripping of police cars and to facilitate inspections; deciding to utilize warranty reimbursement money to fund overtime work; establishing a loaner vehicle program; and co-authoring DEP’s vehicle policy operator’s guide.

These budgetary and procurement-related duties are analogous to those of the majority of APAs Levels I, II, and III who testified or submitted a survey and do not rise to the level of policy formulation. Like ADFMs and the Director of Fleet Services, APAs routinely exercise discretion and expertise to make decisions regarding the best ways to procure needed supplies and services. In so doing, they have often promulgated standard operating procedures to ensure that the process is more efficient and in compliance with the PPB Rules or other laws and regulations. For example, many APAs testified that they had devised new forms and checklists that bidders, vendors, and employees must fill out in order to comply with these laws, such as a subcontractor approval form to safeguard against subcontractors who should not be allowed on city worksites. However, any discretion that APAs have in devising or improving upon procedures is exercised only within the specified guidelines of policies that are set by others. It is clear that other employees above the level of APAs have the ultimate authority to select among options and put a proposed policy into effect, while APAs are depended upon to implement those

policies. Thus, these duties do not rise to the level of policy formulation. *See Local 621, SEIU*, 78 OCB 2d, at 20.

A few APAs have gone beyond merely implementing policies set by others and have made recommendations to their superiors regarding procedures and operational decisions. For example, APAs have made recommendations to modify the price escalation clause that is utilized in City contracts; to authorize individual bureaus to make their own purchases below \$5,000; to outsource and/or to use personnel-saving technology; and to utilize more “green” and sustainable products. They have also made recommendations on the budgetary impact of staffing and equipment studies. In making these recommendations, APAs are routinely relied upon for their expert knowledge regarding procurement-related activities. Additionally, Lois Johnson, an APA at the Comptroller’s Office, testified that when the PPB Rules were being discussed she represented the Comptroller’s Office at a meeting with the PPB Board where she communicated the Comptroller’s recommendations. Although the record does not show that Johnson personally came up with the recommendations, it is clear that ultimately it is the PPB Board that formulates the policies governing all City procurements. Further, the majority of all recommendations that are made by APAs relate to how to adhere to the PPB rules and other applicable laws and policies, which are set by others. Therefore, the Board finds that APAs Levels I, II, and III do not formulate policy.¹¹ Additionally, the record does not reflect that the employee in the AQAS title has any policy-related duties.

¹¹ NYCHA argues that the language in its APA job specification clearly indicates that the position is within the “management class of positions” and, therefore, requires that the position be deemed managerial. This argument is not persuasive. The Board makes its determinations based on actual duties performed, and it has consistently stated that such language in a job specification is not controlling. *See, e.g., Local 621, SEIU*, 4 OCB2d 57, at 16 n. 16; *ADWA*, 56 OCB 11, at 19 (BOC 1995) (“Although a job description may state that [a] title is within the

The second type of manager excluded from collective bargaining is one “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.” Taylor Law § 201.7(a)(ii). To fall within this definition, an employee must be “a direct participant in the preparation of the employer’s proposals and positions in collective negotiations and an active participant in the negotiating process itself . . . having the authority to exercise independent judgment in the employer’s procedures or methods of operation as necessitated by the implementation of [collective bargaining] agreements,” or, concerning personnel administration, “exercise independent judgment and fundamental control over the direction and scope of the employer’s mission.” *County of Rockland*, 28 PERB ¶ 3063, at 3141-3142 (1995) (quoting *City of Binghamton*, 12 PERB ¶ 4022, at 4035).

However, “[t]here is a critical and long-standing distinction between managers involved in labor relations/personnel administration, who are excluded from collective bargaining, and the broader category of employees who perform supervisory functions, who are eligible for collective bargaining.” *OSA*, 3 OCB2d 33, at 66-67 (quoting *Lippman*, 263 A.D.2d at 901-902) (internal quotation marks omitted). Thus, even employees with a substantial role in hiring, firing, promotional, disciplinary, and staffing decisions have been found eligible for collective bargaining. *Id.* at 67; *see also CWA, L. 1180*, 2 OCB2d 13, at 92; *Local 621, SEIU*, 78 OCB 2, at 21; *CWA, L. 1180*, 76 OCB 4 (BOC 2005). Additionally, absent other labor relations and/or

management class of positions, that fact is not probative of the issue before us.”); *Local 621, SEIU*, 50 OCB 7, at 36 (BOC 1992).

personnel duties, advance knowledge of layoffs and making recommendations as to which or how many employees can be laid off falls within supervisory duties that do not rise to the level of managerial duties. *See CWA, L. 1180*, 2 OCB2d 13, at 92. As to the grievance process, “employees who ascertain factual matters when subordinate employees raise complaints and serve as witnesses to factual matters in grievance proceedings have been found eligible.” *OSA*, 3 OCB2d 33, at 67 (citing *Metro. Suburban Bus Auth. v. Pub. Empl. Relations Bd.*, 48 A.D.2d 206, 211-212 (3d Dept. 1975)); *see also Rockland Professional Mgmt.*, 28 PERB ¶ 3063, at 3065 (1995) (“A first step grievance role . . . could indicate supervision but would not satisfy [the] criterion [for exercising a major role in personnel administration].”); *CWA, L. 1180*, 76 OCB 4, at 23.

The record reflects that the AQAS and many of the APAs Levels I, II, and III perform supervisory duties such as making recommendations regarding hiring, firing, promoting, transferring and disciplining employees; serving as witnesses in grievance proceedings; developing employees’ tasks and standards; conducting employee evaluations; approving overtime; and directing work assignments. As discussed above, such duties do not warrant the exclusion of these employees from collective bargaining. Additionally, the Board finds that none of the employees at issue have any significant role in the negotiation or implementation of collective bargaining agreements. A few APAs stated that they occasionally participate in labor-management meetings.¹² Also, others stated that they sometimes make Step I determinations.¹³ These duties are insufficient to warrant a managerial designation. *See Local 621, SEIU*, 78 OCB

¹² Christine Erikson (DOC), Arlene Kelly (DOHMH), Malissa Smith (FDNY), and Brian Newson (OPA) testified and/or indicated in their surveys that they have performed this duty.

¹³ Bernarda Ramirez (Comptroller’s Office), Roman Shpolyamsky (FDNY) (Survey), and Malissa Smith (FDNY) indicated in their surveys that they have performed this duty.

2 at 21 (“[L]imited involvement in contractual grievances and labor-management meetings is not indicative of managerial status.”). Similarly, double-checking that salary raises have been correctly implemented by others, providing unspecified documents to other employees to utilize as part of their negotiations, issuing pay or expense reimbursement checks, and collecting documentation to ensure that collectively bargained reimbursement programs are carried out are not tasks that warrant exclusion from collective bargaining.¹⁴ Rather, these duties are routine in nature and do not demonstrate a major role in personnel administration or the administration of collective bargaining agreements. *See OSA*, 3 OCB2d 33, at 71 (stating that the processing of pay increases and administration of contractually mandated employee benefits are routine personnel duties that do not warrant a managerial designation) (citing *DC 37*, 30 OCB 31, at 23 (BOC 1983)).

As to confidentiality, “[e]mployees 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).”¹⁵ Taylor Law § 201.7(a). In order to meet this definition, the employee must meet both prongs of a two-part test: “(1) the employee . . . must assist a Civil Service Law § 201(7)(a)(ii) manager in the delivery of labor relations duties described in that subdivision--a duty oriented

¹⁴ These duties are derived from the testimony and/or surveys of Brian Newson (OPA), Arlene Kelly (DOHMH), Christine Erikson (DOC), and Patricia Mims (FDNY).

¹⁵ Managerial employees described in clause (ii) are those “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.” Taylor Law § 201.7(a)(ii).

analysis; and (2) the employee . . . must be acting in a confidential capacity to that manager--a relationship oriented evaluation.” *Lippman*, 263 A.D.2d at 902.¹⁶

The City asserted that the AQAS and a number of APAs are confidential and ineligible for collective bargaining because they have access to confidential personnel information regarding hiring, firing, potential layoffs, PEGs, and the cost of outsourced labor for particular services. However, we have consistently held that access to such information does not, on its own, warrant a confidential designation. *See Local 621, SEIU*, 4 OCB2d 57, at 28; *OSA*, 3 OCB2d 33, at 79. This is because “[k]nowledge of personnel or disciplinary matters is often inherent in supervisory positions and . . . does not encompass labor relations information significant to the basic mission of the employer.” *Lippman*, 263 A.D.2d 891, 903. Furthermore, involvement in budget formulation does not compel a confidential designation. *See OSA*, 3 OCB2d 33, at 79 (citing *Lippman*, 263 A.D.2d at 903 (finding that “limited involvement in budget preparation” does not support a confidential designation when the public employer “has not shown that the information to which they are exposed, and the duties they perform, have a direct relationship to and impact upon collective negotiations and the administration of collective bargaining agreements”), *affg.*, *State of New York (Unified Court Sys.)*, 30 PERB ¶ 3067, at 3167-3168 (1997) (finding that employee who prepared the policy committee’s annual budget was not confidential)). Here, the record does not establish that the AQAS or most of the APAs

¹⁶ The City argues that the two-part test utilized by the Board “is used to determine whether the employees regularly have ‘access to confidential information concerning labor relations and/or personnel matters to such an extent that their inclusion in collective bargaining would lead to conflicts of interest inimical to the bargaining process and the full and fair representation of the employer’s interests.’” (City Br. at 8) (quoting *Dept. of Investigation Investigator’s Assn.*, 72 OCB 2). However, this is not an accurate statement of law. Rather, “this language [has been] offered merely by way of explanation. Such remarks do not create a standard or test apart from that set forth in the statute.” *OSA*, 3 OCB2d 33, at 40 (quoting *CWA*, 2 OCB2d 13, at 101) (internal quotation marks omitted).

Levels I, II, and III assist a manager with significant involvement in labor relations and personnel administration in the performance of those duties. Therefore, they do not meet the first prong of the test for confidentiality.¹⁷

The only APA who may meet prong one is Christine Erikson. In her survey, Erikson states that she assisted DOC's Director of Labor Relations by participating in a team walk-through with union representatives of a new facility on Riker's Island. While the Director of Labor Relations is a manager as defined under § 201.7(a)(ii) of the Taylor Law, there is no indication in the record that Erikson has a confidential relationship with the Director of Labor Relations. Consequently, this employee does not meet the second prong of the confidentiality test.

For the reasons stated above, the Board finds that the titles APA, Levels I, II, and III, and AQAS are neither managerial nor confidential. Therefore, the employees are eligible for collective bargaining. The Board is satisfied that no evidence was presented to rebut the Union's assertion that the employees have a sufficient community of interest with members of the Union's bargaining unit. Accordingly, the titles APA, Levels I, II, and III, and AQAS are appropriately added to Certification No. 8-85.

¹⁷ The City also asserted that one FDNY employee, Malissa Smith, "develop[ed] confidential budget projections during labor negotiations." (City Br. at 38). However, there is no evidence to support this assertion. When asked during the hearing what role she had in advising any employee who is involved in collective bargaining negotiations, Smith replied, "I have . . . provided review and policy opportunities related to specific questions related to labor. It's specific to environmental procurement policy[.] I advise the [A]ssistant [C]ommissioner and the ACCO on potential issues related to the implementation of EPP regulations, specific to the green cleaning project." (Tr. 28-29). Consequently, this employee does not meet the first prong of the test for confidentiality.

ORDER

NOW, THEREFORE, pursuant to the powers vested in the Board of Certification by the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3), it is hereby:

ORDERED that employees in the titles Administrative Procurement Analyst (Title Code No. 82976), Levels I, II, and III, and Administrative Quality Assurance Specialist (Title Code No. 10080) are eligible for collective bargaining; and it is further,

ORDERED that Certification No. 8-85 (as previously amended) be, and the same hereby is, further amended to include the titles Administrative Procurement Analyst (Title Code No. 82976), Levels I, II, and III, and Administrative Quality Assurance Specialist (Title Code No. 10080), subject to existing contracts, if any.

Dated: October 9, 2012
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

