

OSA, 7 OCB2d 2 (BOC 2014)
(Rep) (Docket No. AC-63-11).

Summary of Decision: The Union sought to amend Certification No. 3-88 to add the title Administrative Community Relations Specialist, Levels I, II, and III. The City argued that the title is excluded from collective bargaining as managerial and/or confidential. The Board found that, with certain exceptions, the title is 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-

ORGANIZATION OF STAFF ANALYSTS,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On July 8, 2011, the Organization of Staff Analysts (“Union”) filed a petition requesting that the Board of Certification add the title Administrative Community Relations Specialist (Title Code No. 10022) (“ACRS”), managerial Levels I, II, and III, to Certification No. 3-88, a bargaining unit including titles such as Administrative Staff Analyst (Non-Managerial), Associate Staff Analyst, and Senior Planning – Scheduling Analyst. Respondent New York City Housing Authority (“NYCHA”) reached a settlement with the Union covering all NYCHA

employees in the ACRS title.¹ The remaining Respondent, the City of New York (“City”), argues that the title is managerial and/or confidential and, therefore, all employees in the title 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, with certain exceptions, the title ACRS Levels I, II, and III is eligible for collective bargaining and appropriately added to the certification.

BACKGROUND

As of December 2012, there were 38 employees in the ACRS title working in a variety of in-house positions at eight City agencies.² The Trial Examiner held eleven days of hearing, at

¹ NYCHA and the Union agreed in principle to a settlement prior to the onset of the hearings and NYCHA employees did not testify at the hearings. The parties agreed that all currently existing positions classified as ACRS are eligible for collective bargaining and shall be represented for that purpose by the Union, with the exception of the following four positions which are designated managerial and/or confidential: Borough Deputy Director, Queens; Borough Deputy Director, Brooklyn; Borough Deputy Director, Bronx; and Assistant Director, Community Operations Administration.

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

Comptroller’s Office	Office of the New York City Comptroller
DEP	Department of Environmental Protection
DOHMH	Department of Health and Mental Hygiene
DOT	Department of Transportation
DPR	Department of Parks and Recreation
DYCD	Department of Youth and Community Development
FDNY	New York City Fire Department
HRA	Human Resources Administration

which 36 ACRSs testified. Thirty of the 36 ACRSs also submitted a survey to the Board.³ All surveys are part of the record.

The job specification for the ACRS title provides that an employee in the ACRS title performs the following typical assignments:

Under general direction, with wide latitude for the exercise of independent judgment and decision, is responsible for planning, developing, coordinating and/or administering programs which promote effective community relations and are responsive to problems in areas such as housing and development, transportation, health and environmental protection; or is responsible for coordinating, evaluating and administering a health education program to meet the needs of poverty area residents; or performs assignments equivalent to those described.

Under general direction, with a minimum of supervision and with wide latitude for the selection of management techniques and the exercise of independent judgment, manages a program involving community organization or development and coordinates its integration with other functions being performed within a large human services agency; or directs a major activity or program of the agency in which a number of diverse or complex functions must be integrated; or performs work requiring outstanding abilities in one of the most complex of specialized, technical or professional fields and which has clear cut policy implications throughout the agency.

Under executive direction, with very wide latitude for the exercise of independent judgment and decision, is responsible for evaluating for quality, effectiveness and meeting of community needs, all programs which deal with matters such as addiction services and police-community relations; or performs assignments equivalent to those described.

(Pet., Ex. A)

³ The number of employees at City agencies working in the ACRS title fluctuated between the date the petition was filed and the conclusion of the hearings in early 2013. In an Affidavit dated August 26, 2011, the City asserted that there were approximately 70 ACRSs working at 11 City agencies.

Within each City agency, ACRSs serve in a range of positions and have varying duties and responsibilities, generally within the area of public outreach and communication. Many oversee a program, department or unit. Generally, they manage community relations and/or social service programs and the budgets for such programs. Many of them perform substantially similar tasks. Typical duties of an ACRS include: overseeing and administering community outreach programs; developing a budget for these programs; allocating budgetary funds; creating grant proposals to obtain funding; implementing policies on relevant issues; training and overseeing staff; working with staff to implement policies; serving as a liaison between the City agency and the community; and attending meetings with agency and/or City Hall officials.

Additionally, the majority of ACRSs have direct and/or indirect supervisory duties. ACRSs make recommendations regarding hiring, firing, promoting, transferring, and disciplining employees. A few of the ACRSs testified that they have participated in the grievance process as witnesses or made determinations at Step I. ACRSs also may approve overtime, make schedule changes, develop employees' tasks and standards, and conduct evaluations. Furthermore, ACRSs may draft job descriptions and interview employees before making a recommendation regarding the best candidate. As supervisors, ACRSs may have access to employees' salaries, job titles, and other personnel information.⁴

⁴ The sample supervisory duties are derived from the testimony and/or surveys of the following ACRSs: at DEP, Shane Ojar; at DOHMH, Sabrina Baronberg, Deborah Lomax, Darrin Taylor, Colette Raspanti, Miranda Jones, and Janet Nival; at DOT, Brenda Rivera, Matthew Cavallino, Louvinia Nixon, Alice Cortes, and Anne Koenig; at DEP, Edward Feldman; at DYCD, Desmond Lewis, Andre White and Frances Yen; at FDNY, Suzanne Sebert, Michele Maglione, Irene Sullivan and Nafeesah Noonan; at HRA, Karen Branch-Kum, Joyce Ghigliotti, Carol Finch, and Audrey Diop.

In general, the ACRSs' recommendations regarding subordinate employees must be approved by their direct supervisors. Additionally, recommendations regarding layoffs generally need to be approved by the ACRSs' supervisor and/or a human resources representative.

More specifically, the employees who testified and/or submitted surveys have the following positions and duties.

Office of the Comptroller

Michelle Centeno is the Director of Outreach in the Comptroller's Bureau of Labor Law. The Bureau of Labor Law sets the prevailing wage rates and supplemental benefits for all City agencies and also enforces the prevailing wage. One of Centeno's primary duties is to educate the community and other City agencies about the prevailing wage. She advises City agencies on how to detect fraud when reviewing certified payroll and other reports and advises community groups on how to recognize a prevailing wage job site and compile evidence to assist a potential claimant who suspects underpayment by an employer. She also investigates prevailing wage complaints that are filed with the Comptroller's office. In this capacity, she conducts site visits, reviews documents, and prepares her own preliminary audit to assess whether the complaint has validity. She also handles the Bureau's information line and refers callers to the appropriate department or agency for intake on prevailing wage claims. Centeno attends meetings at the departmental level as well as agency meetings, at which she discusses program initiatives. She has made a number of recommendations that were adopted, including implementing a search engine to assist the public in locating unclaimed funds after a settlement is reached in a prevailing wage case.

Ismael Malave works in the Comptroller's Department of Public Affairs, which is the agency's principal liaison to governmental agencies and the public. Malave's duties primarily

involve assisting with the preparation and follow up of the Comptroller's itinerary and events. He responds to invitations on the Comptroller's behalf, manages the Comptroller's schedule, and drafts briefing memos for the Comptroller pertaining to such matters as which agencies they are collaborating with on an event as well as relevant constituency matters. For example, if the Comptroller speaks at a university commencement ceremony, Malave will brief him on background issues such as the historical background of the school, the number of students, the type of degrees conferred, and any pertinent issues relating to the school. He has also performed advance work for the Comptroller at events and has appeared in his absence when he is unavailable.

Department of Environmental Protection

Shane Ojar serves at the Director of Community Partnerships in the DEP's Bureau of Communication and Intergovernmental Affairs. The unit serves as a liaison with the community. It resolves issues and undertakes proactive research to inform the community about work being performed by the agency currently or in the future and ensures that the community is not being negatively impacted by such work. To this end, Ojar strategizes with senior staff on achieving these outreach objectives and makes recommendations. For example, a community was concerned that a public walkway that is part of a neighborhood non-DEP waste water plant was not being properly maintained. Ojar proposed a plan for DEP to provide seed money to establish a nonprofit organization to handle the maintenance work. His boss, the Associate Commissioner agreed to the idea, and the plan was implemented.

Department of Health and Mental Hygiene

Sabrina Baronberg, Magda Desdunes, and Wanda Newton work in the Bureau of Chronic Disease Prevention and Tobacco Control, which is a part of DOHMH's Health Promotion and

Disease Prevention Division. Within the Bureau, Baronberg is the Director of the Food Access and Community Health Unit. The Unit's mission is to decrease disparities in access to healthy food in the City. In her capacity as Director of the Unit, Baronberg develops, implements, and evaluates programs designed around improving access to healthy food. Baronberg oversees the five programs in the Unit, each of which has its own manager and staff. She also oversees all administrative functions relating to the programs, including hiring, contracts, and payments. She allocates budgetary funds to the five programs, but presents it to her supervisor for approval. Baronberg meets with the Bureau's Assistant Commissioner every two weeks to discuss programmatic information and how her programs are impacting the community.

Magda Desdunes is the Education Coordinator for the Communications Unit, within the Bureau. Desdunes' responsibilities are to plan and coordinate any education and media outreach to special populations, including identifying populations requiring special education outreach and developing appropriate communication efforts for them. In addition, she coordinates the development and distribution of health education materials and assists in tracking all education and media projects for the unit with regard to the impact and reach of the campaigns as measured by the number of inquiries received by the 311 line. As a Bureau liaison for the 311 line and the DOHMH call center, she counsels and coaches program representatives.

Wanda Newton is the Director of Administration for the Operations and Planning Section within the Bureau. Newton spends about half of her time working on the Bureau's personnel and other than personnel services ("OTPS") budgets. This involves managing staff, including staff funding and vacancies, reporting on spending, and allocating funding for each program within the Bureau. Newton allocates funding for all the goods and contractual services falling under the OTPS budget. She also develops budgets in preparation for pursuit of a grant. Newton

participates in meetings with high level managers relating to budget and personnel issues. Newton also provides some programmatic support and created and implemented the policy for the use of overtime by Bureau employees.

Deborah Lomax and Darrin Taylor serve as Deputy Directors of the Bronx District Public Health Office and the Brooklyn District Public Health Office, respectively. Both offices are under DOHMH's Health Promotion and Disease Prevention Division. The function of the District Public Health Offices is to serve as a liaison between DOHMH and the community to address health disparities and to focus DOHMH's programs on community districts. In their capacity as Deputy Directors of District Public Health Offices, Lomax and Taylor have similar job duties. Both manage the programs and staff within their respective offices, implement policy decisions, and interact with the community. They review the budget to determine how to allocate the money and make recommendations about how to obtain additional funding. Both also meet with the Assistant Commissioner. Lomax sometimes attends meetings in the Assistant Commissioner's place.

Colette Raspanti is the Deputy Director of Nursing at the Correctional Health Services, part of the Health Care Access and Improvement Division. Correctional Health oversees the contract for the healthcare services provided to inmates on Rikers Island and other correctional facilities, including drafting the policies that the healthcare service provider must follow. Raspanti is part of the Service Delivery Assessment Unit. Her primary duty is to supervise and monitor the eight public health nurse auditors in that unit. These nurse auditors are monitoring the vendor to verify that it is meeting the requisite criteria. Raspanti expedites audit data that goes in to a report for the Commissioner.

Astrid Soto is a Divisional Human Resources Generalist in the Bureau of Administration, which is part of DOHMH's Health Care Access and Improvement Division. Soto primarily works for Correctional Health Services and reports to the Executive Director of Human Resources, Budgets and Labor Relations. She interacts daily with the Executive Director, reviewing the status of issues involving hiring, labor relations, and time and leave. Soto assists in selecting a civil service title for a position, but plays no role in the collective bargaining process. She also attends biweekly meetings with the Assistant Commissioner of Health Services to discuss any pending Correctional Health Services staffing issues. With regard to personnel, Soto screens resumes for candidates within her division and is involved with the interview process. She is also the "point person" on disciplinary matters and refers matters to the labor relations office.

Trevor Napier is the Director of Community Partnerships in the Bureau of Public Affairs, which is part of DOHMH's Division of Policy and External Affairs. He serves as the agency's liaison to its 600 partners participating in the Take Care New York initiative, as well as state, local, and federal partners and community boards. He engages these partners via social media and face-to-face meetings to gather feedback and respond to complaints. He attends meeting with divisional directors to report on indicators and attends monthly meetings with divisional directors to report on the goals and objectives of community affairs projects. Napier has made recommendations such as suggesting a new strategy by which to engage community partners to ensure they are abreast of new department initiatives, which involved providing a series of workshops and face-to-face visits with community partners.

Janice Blake is the Director of the Health Research Training Program ("HRTP") and Episcolars Unit in the Bureau of Public Health Training, within the Division of Epidemiology.

The H RTP and Epischoolars programs are both year-round internship programs that are open to undergraduate, graduate, and professional school students. Blake's unit matches students to projects in the agency.

Miranda Jones is the Director for Early Intervention-facilitated Enrollment in the Office of Health Insurance Services. Her unit facilitates the enrollment of clients and their children into public health programs such as Medicaid and Child Health Plus and assists families in applying for entitlements such as food stamps. Jones directs the Medicaid Spend Down Program, which helps families to obtain and maintain insurance so that their children can receive Early Intervention services. She meets weekly with the Directors for Operation, Fiscal, and Quality Assurance, as well as the Executive Director of the Program. One recommendation that Jones made – and which was adopted – was to set up a kiosk with a computer so that when clients arrived at the office, they could be screened on mandated questions for Medicaid renewal.

As the Administrator of the Microbiology Section at the Public Health Laboratory, Janet Nival works directly for the Laboratory's Assistant Commissioner. She interacts with the Assistant Commissioner on a daily basis regarding any pertinent matters. She also participates in other regular meetings with Associate Directors and Assistant Commissioners on various budgetary, personnel, and logistics issues. Nival writes the budget for her section. Accordingly, senior management advises her as to what routine grants they require, and she researches the costs, overhead, and other relevant factors and calculates it into the budget. She also helps draft budget proposals. Once funds arrive, Nival administers them and monitors them to verify that they are being used for the correct purpose.

Department of Transportation

Brenda Rivera, Matthew Cavallino, and Louvinia Nixon work in DOT's Sidewalk and Inspection Management ("SIM") Division. Rivera is an Assistant Commissioner and Cavallino is the Executive Director of Operations for the Office of Special Events and Banners, a unit within the SIM Division. Nixon is the SIM Division's Director of Administration.

Rivera, as Assistant Commissioner of the Office of Special Events and Banners, oversees and coordinates all the parameters for street events that take place in the City including street fairs, parades, and bike and running events with the goal of verifying that the route is safe. Any major event that takes place in the five boroughs and involves roadways is coordinated through her office. Rivera manages logistics for large scale events, including the Marathon, the Thanksgiving Day Parade, New Years' Eve Times Square, Bike Tour, U.S. Open, Summer Streets, and the United Nations General Assembly. As Assistant Commissioner, she plays a major role in deciding which routes should be used for events. She also oversees the inspection and repair of all Citywide event routes and locations. She also oversees the administration of DOT's Banner Unit, which issues permits for banners on street light poles. She approves the graphics for banners and verifies that they will comply with DOT policies.

Rivera meets with the SIM Division's Deputy Commissioner on a weekly basis to review events for the week and any special matters on which they made need to consult. She also meets with the DOT First Deputy Commissioner every week and the DOT Commissioner once a month on event-related matters. Rivera will sometimes fill in for the Deputy Commissioner at DOT senior staff meetings when he is unavailable. To ensure compliance with DOT safety regulations and policies and procedures for events and to determine event specifications, Rivera works with the Mayor's Office of Citywide Events, event producers, City agencies, and DOT personnel.

With regard to policy formulation, Rivera developed a policy to permit entities to place logos on banners in certain instances. Because advertising is not allowed on the banner, she devised distinctions so that logos could be utilized under certain circumstances. She also recommended changing the Local Law to better clarify requests from City Councilpersons. In addition, Rivera instituted a policy to assist with communication between other DOT units. Specifically, she devised a book detailing every event in the City for the current year and the following year so that staff outside of her unit has advance notice of events. This avoids conflicts such as scheduling a street repair on the same date as an event. The book is periodically updated and posted online on DOT's SharePoint page.

Cavallino works directly under Rivera. As Executive Director of Operations, he evaluates, plans, and coordinates operations for Citywide events impacting transportation. This includes handling event logistics and managing and supervising field operations, overseeing enforcement of construction permits, and supervising administration and operational staff to conduct inspections in accordance with the DOT's administrative procedures, rules and regulations. Cavallino also serves as the DOT's community liaison with regard to communicating transportation policies relating to Citywide events. He also makes budget recommendations to the Deputy Commissioner.

As the SIM Division's Director of Administration, Nixon provides administrative and managerial support to SIM's Deputy Commissioner and his four Assistant Commissioners. She also performs budget and personnel oversight. On budgetary matters, Nixon communicates with vendors for products and services to see if they are able to perform the work required and investigates problems with current vendors. On personnel matters, she meets regularly with the Deputy Commissioner, who is responsible for approving all personnel-related matters for the

SIM Division, and acts as directed on these matters. Nixon participates in the agency's quarterly meetings with union delegates and leaders to discuss employer and facility-related matters. She has three direct reports and participates in the hiring process for the Sidewalk Unit, which is a division of SIM.

Alice Cortes is the Executive Director of Administration for the DOT's Roadway, Repair and Maintenance Division ("RRM"). The RRM Division consists of three units: Fleet, Arterial Maintenance, and Street Maintenance. Cortes' job is to manage administrative matters for the Division. In that capacity, she works directly for RRM's Deputy Commissioner and interacts with him on a daily basis. He directs her on all administrative, budget, and personnel issues, and she acts accordingly to make sure the staff carries out the necessary tasks. Cortes attends budget-related meetings on the Deputy Commissioner's behalf and sometimes acts on his behalf for administrative purposes, such as signing purchase orders up to a certain dollar amount. On a budgetary level, Cortes oversees management of the Division's personnel services and other than personnel services. For the latter, she verifies that the requisite funds are available and the contracts in place in order for the operations to work.

Anne Koenig is the Executive Director of the Office of Franchises, Concessions and Consents ("OFCC"). The OFCC is part of DOT's Office of Legal Affairs and is responsible for agreements with private companies and individuals that allow them to use City streets and sidewalks for a fee. Koenig is responsible for overseeing the awarding of agreements to private entities to use City streets and sidewalks. She verifies that DOT has agreements with those entities and that they comply with its terms. She's also involved, in conjunction with the legal department, with the negotiation of those agreements. Koenig reviews revocable consent proposals and makes sure that other agencies approve. She signs the agreement along with the

Mayor's Office of Contracts and then verifies that it is properly registered with the Comptroller's Office. Regarding franchises, Koenig's role is to collect revenue and address whatever related issues arise. The decision as to how to ultimately resolve an issue is made by the Corporation Counsel and DOT's General Counsel. Koenig has made recommendations such as proposing to the General Counsel and others that the agency grant permission to a new bus franchisee to increase fares. Koenig meets regularly with a security working group comprised of representatives from various agencies. The group reviews proposals from property owners who want to put something on the sidewalk to deter truck bombs. She sets the agenda for the group and is responsible for the follow up.

Desiree Odom is the Director of Support Services in DOT's Human Resources and Facilities Management Division. She reports to the Deputy Commissioner for Human Resources and Management. The Division oversees the Facilities, Personnel, Payroll, Labor Relations, Drug and Alcohol, Training, Safety and Health units at DOT, as well as the Advocate's Office. Odom testified that she acts as a chief of staff to the Deputy Commissioner, interfacing regularly with the staff of the units comprising the division and following up on tasks and assignments given to directors reporting to the Deputy Commissioner. For example, she worked with the program director who reports to the Deputy Commissioner to implement a workplace violence prevention program by preparing and evaluating a form and testing out the program. Odom attends bimonthly meetings with the Deputy Commissioner and the Director of Labor Relations and has access to information such as employee grievances, improper practices, and labor management interactions. She reviews managerial position descriptions, which must be submitted when an employee becomes a manager, to verify them for accuracy prior to submission to DCAS.

Department of Parks and Recreation

Edward Feldman is a Deputy Chief Fiscal Officer in DPR's Office of Management and Budget. At the time of the hearing, Feldman testified that he spends over half of his time managing the FEMA reimbursement process resulting from Hurricane Sandy damage on the agency's behalf. In that role, he is DPR's primary signatory on the grant monies and makes eligibility determinations, although he does not make the final eligibility decision. Feldman works with the DPR Commissioner, as well as City Hall, the City's Office of Management and Budget, and the Law Department on this matter. In addition, Feldman oversees DPR's OTPS budget and makes decisions on OTPS funding and allocations, reviews major contracts, and signs off on purchase orders. He has the authority to sign off on central budget issues but consults with DPR's Assistant Commissioner for Management and Budget regarding decisions involving funds over \$100,000. Feldman also oversees DPR's Planned Action Report ("PAR") system, which tracks in-house titles, hiring and promotions, as well as the agency's Computer Resources Division.

Sarah Aucoin is the Director of the Urban Park Rangers ("UPR"), a division of DPR's Bureau of Public Programs. The UPRs run environmental education programs as well as a wildlife management program. As Director, Aucoin is responsible for the oversight and supervision of UPR program policies, administrative operations, field operations, and budget allocation, as well as strategic planning and grant management for UPR programs. With regard to grants, Aucoin seeks private and public funds to support UPR operations. She submits grant proposals, which must be approved by DPR's Chief Fiscal Officer, to her supervisor. She also supervises the recruitment, training, and evaluation of UPR staff. Aucoin attends high level agency meetings and makes recommendations, primarily on wildlife-related issues.

Department of Youth and Community Development

William Kamen is the Director for Internal Review and an Assistant General Counsel in the Office of Legal Affairs. Kamen oversees and coordinates audits conducted by City, State, and federal agencies involving DYCD's fiscal, procurement, and programmatic operations; prepares agency-wide reports and responses to audit reports; and analyzes audit recommendations. He also edits program and fiscal manuals and provides legal research and advice on regulatory issues. Kamen meets with senior management at DYCD in connection with issues relating to audits and regulatory requirements and provides analysis and recommendations to them. For example, he has recommended the use and format of participant timesheets, requiring a signature for the Summer Youth Employment Program, documentation of participant eligibility, clarification of exit dates, and compliance with Selective Service registration for other youth programs.

Desmond Lewis works in DYCD's Contract Agency Finance Department as the Deputy Director of the Audit Unit. The Audit Unit ensures that nonprofit organizations funded by the agency comply with audit procedures. Lewis trains and supervises staff members, who review audit reports. He plays a role in hiring outside auditing firms, which conduct the audits. He also performs outreach to nonprofits to inform them about upcoming staff visits and meets with those nonprofits that are not in compliance with the DYCD's contract. Lewis makes decisions regarding whether to investigate a nonprofit for noncompliance; however, the Director provides the final approval for an investigation.

Andre White and Frances Yen work in the Division of Community Development as the Director of the Summer Youth Employment Program and the Deputy Director of the Office of Immigrant Initiatives, respectively. White is responsible for the operation of the Summer Youth

Employment Program, including oversight of its operations, policies and budget. He meets with the senior management on budgetary issues and represents the agency at inter-agency meetings, programs, and conferences.

The Office of Immigrant Initiatives grants funds to community-based organizations to conduct immigrant-related services and provide money for civics classes and domestic violence services. As Deputy Director of the Office, Yen oversees the drafting of reports pertaining to contracts with community-based organizations. She also monitors contracts, develops new contracts and amendments, and analyzes reports.

New York City Fire Department

Suzanne Sebert and Irene Sullivan work in the Office of the First Deputy Commissioner. Suzanne Sebert is the Assistant Commissioner of the Family Assistance Unit, which is part of the Department of Intergovernmental Affairs. The Family Assistance Unit was formed after 9/11 to assist the families of Firefighters who were lost or injured on that day, as well as any other FDNY family with a member who is killed, injured, or seriously ill, and any members who died after 9/11 as a result of their work on that day. Sebert is responsible for developing policies to address issues unique to the population her unit serves and generally has control over the formulation and implementation of those policies. She reports to First Deputy Commissioner Shacknai and an Associate Commissioner and has monthly supervisory meetings with them. Among subjects they discuss are new policies that Sebert is considering for the Unit and their implications on other parts of the FDNY. For example, she is currently working with the U.S. Department of Justice to set up policies to administer a possible extension of federal benefits to families of those who have cancer as a result of 9/11. She also works with the Associate Commissioner on policy changes before the City Council. For example, they are addressing the

way a mayoral benefit is awarded to line-of-duty members. On budgetary matters, Sebert is responsible for monitoring the \$200,000 in donated funds and has substantial control over their expenditure, in conjunction with the FDNY Foundation. However, expenditures over \$5,000 are approved by the First Deputy Commissioner.

Sullivan is the Director of Grant Development, a department that also falls within the Office of the First Deputy Commissioner. In that capacity, she writes the FDNY's grant proposals, which amount to about \$50 million a year. To prepare the proposals, Sullivan works with the Commissioner, the Chief of the department, and other staff chiefs to determine priorities, and makes recommendations as to what the proposals should look like and what projects stand the best chance of being funded. She has also been involved in creating the Grant Development Office's goals and its mission. Suggestions for new programs are filtered through her. Sullivan also works with the U.S. Department of Homeland Security ("DHS") as the FDNY's main point person to make sure that the FDNY's needs and goals for terrorism preparedness funds are known, and that it gets its fair share of federal funding. She represents the FDNY at DHS conferences and writes a section of the State preparedness report describing the FDNY's status.

Michele Maglione is the Assistant Commissioner for Recruitment and Diversity. The functions of the Recruitment and Diversity Unit, which is within the Bureau of Administration, are to recruit for Firefighter, EMT, paramedic, and fire protection inspector titles and to run certain FDNY programs, including a diversity training program, a leadership development program for teens, and a component of the FDNY's High School for Fire and Life Safety. Maglione develops strategies to diversify the FDNY. She manages the FDNY's Diversity Training Program and works with external organizations such as United Woman Firefighters and

the Vulcan Society to develop mentoring programs to recruit and retain women and people of color in fire service careers.

Following the issuance of a federal court order compelling the FDNY to diversify, Maglione's unit is responsible for executing an attrition mitigation plan. To ensure compliance with the court order, Maglione meets with the First Deputy Commissioner several times a week. She also works with the FDNY's recruitment consultant, a court monitor, and Deputy Mayor Cas Holloway and his staff.

With regard to policy formulation, Maglione is the "architect" of the FDNY's recruitment campaigns. She created a separate recruitment plan for each job title and designed and implemented the policies for the 2010-11 Firefighter Recruitment Drive. Maglione also created and implemented policies for FDNY-related "Curriculum Development and Critique" at the High School. She also established a phone bank for contacting all job applicants for firefighter positions to communicate information about the application process. Although she discussed the phone bank idea with the First Deputy Commissioner, for example, she is given significant latitude to implement policy in the unit. On budgetary matters, Maglione determines what portion of the OTPS budget is allotted to recruitment. She also initiates requests for additional recruitment funds and makes recommendations for OTPS funding. Maglione meets frequently with the Assistant Commissioner for Budget and Finance to discuss budgetary needs for recruitment efforts.

Nafeesah Noonan is Deputy Director of Recruitment and Diversity and works directly under Maglione in the unit. Noonan has significant responsibilities for the FDNY's Exploring Program, including directly supervising and training the 25 Post Advisers, who are the program's youth mentors. She also oversees the phone bank, which is staffed with 30 phone agents and

three supervisors. Noonan wrote the scripts used by the phone bank and also developed the scope of work for a diversity tracking database.

Linda Rizzotto is the Associate Director for Mental Health for the FDNY's 9/11 Health Program. The mission of the program is to monitor and treat persons exposed physically and/or psychologically to the 9/11 disaster. Rizzotto's duties include overseeing the daily function of the mental health screening component of the program, hiring, training, and structuring staff patterns for the mental health component of the program, participating in research meetings related to mental health data collection, overseeing the production of client satisfaction survey reports, and developing and implementing methods for improvement of program service delivery. Rizzotto recommended the implementation of a 9/11 retiree client satisfaction survey.

Human Resources Administration⁵

Karen Branch-Kum, Carol Finch and Joyce Ghigliotti work in the agency's Office of Constituent Services ("OCS"), which is part of the Office of Community Affairs and Immigrant Services within the Department of Social Services. The OCS addresses benefit-related questions and concerns from the public. Branch-Kum is OCS' Director of Constituent Communications. She oversees the constituent communications program, including ensuring that cases and inquiries are answered within the mandated 14-day period and that constituents are receiving all the benefits to which they are entitled. Branch-Kum has made recommendations that were subsequently adopted. For example, she recommended the creation of a separate telephone unit to consolidate all phone inquiries into a single office and helped to develop the standard to create

⁵ A record provided by the City of City employees in the ACRS title as of December 14, 2012 lists Elovne Nembhard and Walter Ellis as HRA employees. However, neither employee testified or submitted a survey. The City has not met its burden of demonstrating that these employees are ineligible for collective bargaining. Accordingly, they are deemed eligible. *See* NYCCBL § 12-305.

uniformity amongst the workers so that they all ask the same questions and follow the same procedures when constituents call, in order to meet mandated time frames. She also recommended using an “IVRS” system to accommodate the volume of calls that the unit receives. The program has 30 staff members, of which Branch-Kum has four direct reports. Two of those direct reports are Ghigliotti and Finch.

Ghigliotti and Finch are the Deputy Director of Constituent Communications and Communications Unit Manager, respectively. Both work in the Office of Constituent Services under Branch-Kum and supervise employees handling constituent complaints and inquiries. Ghigliotti stated in her survey that 50 percent of her time is spent on “[w]orkflow review and/or creation of constituent complaints/inquiries within the Internet Quorum (IQ) system and close out. Insuring letters and information relayed is accurate and clear.”

The remaining two ACRSs who testified – Joanne Bailey and Audrey Diop – work in the Office of Citywide Health Insurance Access (“OCHIA”). Bailey is the Director of Policy Analysis and Research, and Diop is the Director of Public Health Insurance Initiatives. Both report to HRA’s Executive Deputy Commissioner. Bailey’s primary duties consist of policy analysis and review and making recommendations, such as suggestions for how additional funding can be provided through Medicaid for health care coverage for homecare workers. She also assists with outreach and education on health insurance, including drafting and reviewing health insurance fact sheets for distribution to the public. In carrying out her duties, Bailey routinely interfaces with a Deputy Mayor at City Hall and meets with high level HRA managers such as the head of the Medicaid program.

Diop’s primary duty is to administer the HealthStat Initiative, which works with community-based organizations, health insurance companies, and City agencies to identify

uninsured City residents and connect them to health insurance coverage. In that capacity, Diop monitors the activity of various partners through an internet-based database to ensure that the work her unit does to identify uninsured residents is carried out. Along with other OCHIA directors, she is responsible for developing a marketing budget, a resource budget, and a translation budget. She also plays a role in the Family Planning Benefit Program by identifying populations that are implicated by it and recommended developing an online application for the program.

POSITIONS OF THE PARTIES

Union's Position

The Union seeks to add ACRS Levels I, II, and III to its bargaining unit consisting of Staff Analysts and related titles. It argues that all of the employees in the ACRS title are eligible for placement in the bargaining unit.

Courts have held that the exclusions for managerial and confidential employees are the exception to the New York State Public Employees' Fair Employment Act's ("Taylor Law") policy of extending coverage to all public employees. These exclusions are to be read narrowly, with all uncertainties resolved in favor of coverage. Employers who oppose a petition for certification have the burden of demonstrating the managerial or confidential status of each employee.

In determining whether employees should be designated managerial, the Board has consistently held that the formulation of policy is the single most important indicia of managerial status. To support a finding of managerial status, participation in policy formation must be regular, active, and significant. While attendance at high-level meetings may indicate a policy

role, when the employee attends such meetings solely as a resource person, to provide analysis to the decision makers, or only when a supervisor is unavailable, such attendance is not indicative of managerial status. Moreover, the Union contends that regular meetings with high-level managers addressing primarily operational matters are not policy-making sessions. The Board has applied the managerial exemption to a small number of employees who lack ultimate authority; however these are employees whose participation in the essential process of developing agency policies is regular, active and significant. In addition, policy formulation does not necessarily extend to the provision of technical or expert advice. Finally, the Union asserts that an employee who assists in the development of policy but lacks the authority to implement it or must seek approval through the chain of command should not be designated managerial.

In order for a manager who is involved in collective bargaining or personnel administration to be designated managerial, the Union avers that he or she must directly participate in the participation of the employer's proposals and positions in collective negotiations and be an active participant in the process itself. The number of direct or indirect subordinates alone does not correlate with managerial status. Rather, the manager must play a significant role in labor relations or personnel administration. With regard to discretion over budgetary matters, the Union contends that such discretion must be significant to the agency in order to be designated exempt from eligibility. Moreover, the size of a budget is not necessarily indicative of managerial status if the employee's discretion is confined to approving routine or predictable expenditures.

With regard to personnel administration, routine supervisory duties, such as approving overtime, involvement in employee discipline, assigning workloads, or writing evaluations does

not meet the criteria for managerial designation. Moreover, an employee's assignment to an agency's personnel or human resources unit does not necessarily constitute the type of personnel work that exempts an employee from Taylor Law coverage. An employee's role in discipline may indicate managerial or confidential status, but in determining managerial status, the inquiry is to the amount of authority and discretion the employee exercises.

The employer must demonstrate that the employee meets a two-pronged test to be designated as confidential. First, the employee must assist a manager in collective negotiations, the administration of collective bargaining agreements, or personnel administration. Second, the employee must act in a confidential capacity to that manager. The Union avers that the objective is to determine if the employee's access to the information would create a conflict inimical to the bargaining process and the employer's interests.

City's Position

The City argues that the evidence presented demonstrates that the ACRSs perform managerial and/or confidential duties that preclude their inclusion in the Union's collective bargaining unit. The Board has determined that an employee's role in policy formulation is the most important consideration denoting indicia of managerial status. Managerial employees regularly participate in the essential process that results in a policy proposal and the decision to effectuate such proposal. The City avers that this includes initiating, developing, and effectuating standard operating procedures pertaining to the agency's mission. It contends 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 argues 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 an employee who is a member of a committee or attends meetings where union bargaining demands are discussed and the agency's response is developed and actively participates in the discussion is a managerial employee. It contends that employees who review resumes, conduct applicant reviews, and make effective recommendations for hiring and promotion play a major role in personnel administration and are therefore managerial. According to the City, an employee who is involved in discussions of budget policy and direction that impacts labor relations or plays a responsible role in budget development will be considered a managerial employee.

Regarding confidential status, the City claims that the Board uses a two-part analysis to determine whether employees 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 employee's interests." (City Brief, at 8)

The City notes that the job specification for the ACRS title provides for duties that encompass a broad amount of discretion and effectuate the mission of the employer in a managerial capacity. It contends that ACRSs also act in confidential capacities to high level officials and, as such, should be deemed managerial.

The City argues that most of the ACRSs working in City agencies play active roles in Citywide programs aimed at increasing productivity, efficiency, and safety through the development of new programs and devising alternate means of carrying out established programs. It contends that a number of ACRSs engage in the regular effectuation, initiation, and

development of standard operating procedures relating to the agency mission. Thus, it argues, they all regularly participate in the essential process that results in policy proposals and the formulation of methods of fulfilling established purposes. The City avers that while many ACRSs may not possess all the typical indicia listed by the Board, the Board does not require each employee to embody all the possible indicia in order to sustain a finding of managerial status.

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

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 Assn.*, 68 OCB 10, at 21 (BOC 2001); *Unif. Sanitation Chiefs Assn.*, 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 (BOC 2009).

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 (BOC 2010)). 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 vast majority of ACRSs who testified do not formulate policy. However, the evidence reflects that there are three positions that are appropriately designated managerial as a result of their policy formulation role. The FDNY's Assistant Commissioner of the Family Assistance Unit, Suzanne Sebert, serves a prominent role in developing and implementing the Fire Department's policy on funding for families directly affected by the 9/11 tragedy. For example, she is currently working with the U.S. Department of Justice to establish policies to administer an extension of benefits to families of FDNY members who got cancer as a result of 9/11, a subject that no one in the Fire Department has ever addressed. Further, Assistant Commissioner Sebert regularly meets with the FDNY's First Deputy Commissioner to discuss new policies that she is considering implementing for the unit and the effect they may have on the rest of the FDNY. She also works with the Associate Commissioner on policy changes before the City Council. For example, they are addressing the way a mayoral benefit is awarded to line-of-duty members.

Similarly, the FDNY's Assistant Commissioner for Recruitment and Diversity, Michele Maglione, plays a critical role in the agency's efforts to diversify its firefighters. She is the "architect" of the FDNY's recruitment campaigns, formulating the policies for her unit with regard to these campaigns and creating a distinct recruitment plan for each job title for which the FDNY seeks diverse candidates. Assistant Commissioner Maglione also created and implemented the policies for the FDNY's 2010-11 Firefighter Recruitment Drive. In addition, Maglione devised and created a phone bank for contacting all job applicants for firefighter positions to communicate information about the application process with the goal of diversifying the job application pool.

Brenda Rivera, DOT's Assistant Commissioner for Special Events and Banners, also holds a major policy role in her agency. She is a critical player in determining what routes will be used for major Citywide events, including the Marathon, the Thanksgiving Day Parade, New Years' Eve Times Square, Bike Tour, U.S. Open, Summer Streets, and the United Nations General Assembly. Assistant Commissioner Rivera coordinates with the Mayor's Office, event producers, and other agencies to ensure that all events comply with safety regulations and with DOT units to ensure that road work does not coincide with events. She also meets regularly with the DOT Commissioner to discuss event planning and related matters. Assistant Commissioner Rivera instituted a system to notify others in the agency of all annual events in the City to avoid conflicts, such as having street repairs scheduled for the same date and location as a major event. She also expanded DOT's banner program considerably. She has the authority to make exceptions to the City's "no advertising" on banners policy. She has used that authority to revise the policy and expand its parameters to permit logos on banners for certain major public events such as the Super Bowl and ticker tape parades.⁶

In contrast, the remaining ACRSs do not formulate policy. They perform tasks such as educating the community about the prevailing wage; implementing a web search engine to assist the public in locating unclaimed funds following resolution of prevailing wage cases; determining appropriate rules for the use of overtime by agency employees; making strategy recommendations for apprising community organizations of new agency initiatives; setting the agenda for an interagency working group; assisting in the implementation of a workplace

⁶ We take administrative notice that the Board previously determined that the position of DOT Assistant Commissioner for Special Events was managerial when previously held by an Administrative Staff Analyst, and therefore was exempt from collective bargaining. *See OSA*, 3 OCB2d 33, at 32 (BCB 2010), *affd.*, *Matter of NYC Dist. Council of Carpenters v. Gold, et al.*, Index No. 114353/08 (Feb. 2, 2010).

violence prevention program; managing the agency's FEMA reimbursement process resulting from Hurricane Sandy damage; overseeing the tracking system for the agency's in-house titles, hiring and promotions; seeking grant funding for agency programs; coordinating audits conducted by City, State and federal of the agency's programs; assisting in determining whether to investigate a nonprofit organization for noncompliance with the agency's contract; collaborating on the drafting of the FDNY's grant proposals; writing the scripts for a phone bank; developing the scope of work for a diversity tracking database; recommending the implementation of a 9/11 retiree client satisfaction survey; recommending the creation of a separate telephone unit to consolidate all phone inquiries regarding public benefits and create uniform responses; and drafting and reviewing public health insurance fact sheets.

They also make operational decisions such as allocating funding for goods and services in the OTPS budget; overseeing the award of agreements to private entities to use city streets and sidewalks; making eligibility decisions for FEMA reimbursement funds; and identifying populations that are implicated by agency-administered programs. However, none of these duties rise to the level of policy formulation under the NYCCBL.

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 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 most ACRSs perform supervisory duties such as making recommendations regarding hiring, firing, promoting, transferring and disciplining employees; 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 ACRSs stated that they occasionally participate in labor-management meetings.⁷ Other ACRSs stated that they sometimes make Step I determinations.⁸ These duties are also insufficient to warrant a managerial designation. *See Local 621, SEIU, 78 OCB 2 at 21* (“[L]imited involvement in contractual grievances and labor-management meetings is not indicative of managerial status.”).

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).”⁹ 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

⁷ Desiree Odom (DOT), Louvinia Nixon (DOT), and Edward Feldman (DPR) testified and/or indicated in their surveys that they have performed this duty.

⁸ Colette Raspanti (DOHMH), Miranda Jones (DOHMH), Darrin Taylor (DOHMH), and Andre White (DYCD) testified and/or indicated in their surveys that they have performed or have the authority to perform this duty. Ms. Jones indicated that she has also participated in Step II hearings.

⁹ 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 902.¹⁰

The record reflects that, with the exception of one witness, the ACRSs who testified do not 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.

Desiree Odom is the only ACRS who meets the first prong of the test for confidentiality. Odom testified that she acts as a chief of staff to DOT’s Deputy Commissioner for Human Resources and Management, who oversees the Personnel and Labor Relations units. She assists the Deputy Commissioner in carrying out her duties, and attends meetings with the Deputy Commissioner and higher ups in the division, such as the Director of Labor Relations. While the Deputy Commissioner for Human Resources and Management is a manager as defined under § 201.7(a)(ii) of the Taylor Law, there is no indication in the record that Odom has a confidential relationship with the Deputy Commissioner. Consequently, this employee does not meet the second prong of the confidentiality test and is not excluded from collective bargaining as managerial or confidential.

With the exceptions of the three City positions found managerial by the Board and the four NYCHA positions agreed upon as managerial and/or confidential by the parties, the Board

¹⁰ The City argues that the two-part test is utilized by the Board “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 Brief, at 8) (quoting *Dept. of Investigation Investigator’s Assn.*, 72 OCB 2, at 20 (BOC 2003)). 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).

finds that the title ACRS, Levels I, II, and III, is 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 title ACRS, Levels I, II, and III, is appropriately added to Certification No. 3-88.

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 title Administrative Community Relations Specialist (Title Code No. 10022), Levels I, II, and III, are eligible for collective bargaining with the exceptions of the positions of Assistant Commissioner for the Family Assistance Unit and Assistant Commissioner for Recruitment and Diversity at the New York City Fire Department; Assistant Commissioner for the Office of Special Events and Banners at the New York City Department of Transportation; and the Borough Deputy Director, Queens; Borough Deputy Director, Brooklyn; Borough Deputy Director, Bronx; and Assistant Director, Community Operations Administration at the New York City Housing Authority, which are designated managerial and excluded from collective bargaining; and it is further,

ORDERED that Certification No. 3-88 (as previously amended) be, and the same hereby is, further amended to include the title Administrative Community Relations Specialist (Title Code No. 10022), Levels I, II, and III, subject to existing contracts, if any.

Dated: January 10, 2014
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

NOTICE OF AMENDED CERTIFICATION

This notice acknowledges that the Board of Certification has issued a Decision and Order as follows:

DATE: January 10, 2014 **DOCKET #:** AC-63-11

DECISION: **7 OCB2d 2 (BOC 2014)**

EMPLOYERS: The City of New York, represented by the Office of Labor Relations
40 Rector Street, 4th Floor
New York, NY 10006

New York City Housing Authority
250 Broadway, 9th Floor
New York, NY 10007

CERTIFIED/RECOGNIZED BARGAINING REPRESENTATIVE:

Organization of Staff Analysts
220 East 23rd Street, Suite 707
New York, NY 10010

AMENDMENT: Certification No. 3-88 has been amended to add the following title/code:

**Administrative Community Relations Specialist, Levels I, II, and III
(Title Code No. 10022)**

NOTICE OF DESIGNATION

This notice is to acknowledge that the Board of Certification has issued an Order Amending Certification designating a title/position confidential as follows:

DATE: January 10, 2014 **DOCKET #:** AC-63-11

DECISION: 7 OCB2d 2 (BOC 2014)

EMPLOYERS: The City of New York, represented by the Office of Labor Relations
40 Rector Street, 4th Floor
New York, NY 10006

New York City Housing Authority
250 Broadway, 9th Floor
New York, NY 10007

CERTIFIED/RECOGNIZED BARGAINING REPRESENTATIVE:

Organization of Staff Analysts
220 East 23rd Street, Suite 707
New York, NY 10010

DESIGNATION: **Administrative Community Relations Specialists (Title Code No. 10022) in the following positions are designated managerial and are therefore excluded from collective bargaining:**

**Assistant Commissioner for the Family Assistance Unit and
Assistant Commissioner for Recruitment and Diversity
at the New York City Fire Department; and**

**Assistant Commissioner for the Office of Special Events and Banners
at the New York City Department of Transportation; and**

**Borough Deputy Director, Queens;
Borough Deputy Director, Brooklyn;
Borough Deputy Director, Bronx; and
Assistant Director, Community Operations Administration
at the New York City Housing Authority.**