

Civil Ser. Bar Ass. v. City, 6 OCB 19A (BOC 1970) [Decision No. 19A-70 (Memo.)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

In the Matters
of
CIVIL SERVICE BAR ASSOCIATION
-and-
THE CITY OF NEW YORK AND RELATED
PUBLIC EMPLOYERS

DECISION NO.: 19A-70

DOCKET NOS.: RU-34-68
RE-10-68

A p p e a r a n c e s :

REAVIS & McGRATH, ESQS.
by Lawrence Boes, Esq.
JULIAN JACKSON, ESQ.
for Civil Service Bar Association
PHILIP J. RUFFO, ESQ.
by John P. Finneran, Esq.
for The City of New York

MEMORANDUM OPINION

On April 28, 1970, the Board issued its decision and order in the above matter (Decision No. 19-70), with a Memorandum Opinion to follow. The Board found that Principal Attorneys and their restored Rule X equivalents, employed by the City of New York and related public employers subject to the jurisdiction of the Board of Certification, are managerial employees; that Supervising Attorneys and their restored Rule X equivalents, so employed, are not managerial employees; and that the record herein is insufficient to permit of a determination as to whether some of the latter are confidential employees.

Accordingly, the Board dismissed a petition by Civil Service Bar Association (herein called the Association) for certification as exclusive bargaining representative of Principal Attorneys and their restored Rule X equivalents,

and denied a motion filed by the City to amend certain certifications by excluding therefrom as managerial and/or confidential employees, Supervising Attorneys and their restored Rule X equivalents. The motion was denied "without prejudice, to a further application to exclude specified Supervising Attorneys as confidential employees."

The instant case, involving the disputed managerial status of Principal and Supervising Attorneys, requires, in addition to the differentiation of managerial and supervisory functions (see Matter of Law Assistants Association of the City of New York, Decision No. 62-68), the equally difficult problem of distinguishing between managerial and professional roles (see Matter of Association of Municipal Statisticians, Decision No. 69-68).

Attorneys are employed in the City's Department of Law (Corporation Counsel's Office) and in various City departments and agencies.

The Department of Law is headed by the Corporation Counsel. Next in line are a First Assistant Corporation Counsel, an Executive Assistant Corporation Counsel (presently vacant), and a Special Assistant Corporation Counsel. Approximately one hundred Assistant Corporation Counsels, in the exempt class, serve at varying levels in the organizational set-up of the Department. The Department also employs competitive class attorneys listed in the Attorney Occupational group, which includes the following titles: Senior Principal Attorney, Principal Attorney, Supervising Attorney, Senior Attorney, Attorney (Specialty), Attorney, Assistant Attorney, Attorney Trainee.

Restored Rule X Attorney titles include: Assistant Counsel, Grade 4; Associate Assistant Corporation Counsel, Grade 4; Deputy Assistant Corporation Counsel, Grade 4; Law Assistant (Specialty) Grade 4; and Tax Counsel, Grade 4.¹

Principal Attorneys

The general statement of the duties and responsibilities of Principal Attorneys, set forth in the job specification, refers, in part, to outstandingly complex legal work having very significant financial or policy consequences. These services include the preparation and trial of court cases, arguing appeals, and drafting intricate contracts. Such services are not policy making. They are legal services rendered in connection with policies established by others. While of great importance, they are professional, not managerial functions.

The specifications do provide, however, that Principal Attorneys who are counsel to, or who advise the head of a City department or other agency, "assist in policy formulation." Five of the seven Principal Attorneys² are so assigned, and the record testimony is consistent with the job specification in this respect.³ The evidence further establishes that these Principal Attorneys represent management in disciplinary proceedings, in the arbitration of employee and union grievances, and participate, or assist the Office of Labor Relations, in collective bargaining negotiations.

The terms "Principal Attorney" and "Supervising Attorney" when used herein will include the restored Rule X equivalents thereof.

The record indicates at least one other Principal Attorney position, but no specific evidence thereof was adduced.

These Principal Attorneys are employed in the Department of Social Services, the Housing and Development Administration, the New York City Housing Authority, and the Office of Rent Control.

The sixth Principal Attorney, although in the Law Department, heads the Water Supply Section located in Kingston and Deposit, New York. The seventh heads the Brooklyn office of the Law Department's Tort Division. He has authority to decide whether cases should be settled or tried, whether judgments should be appealed, and to approve settlements up to \$10,000.

We note, further, that there has been no history of collective bargaining by Principal Attorneys under Executive Order 49 (1958), and that the City has included these titles in its Managerial Pay Plan.

In prior decisions, we have held that significant participation in the formulation and high level effectuation of policy, and representation of management in collective bargaining negotiations and other high level labor relations matters are criteria of managerial-executive functions (Matter of Service Employees International Union, Local 444, AFL-CIO, Decision No. 43-69).⁴ Accordingly, on the entire record, we find and conclude that Principal Attorneys and their restored Rule X equivalents are managerial-executives.

Supervising Attorneys

Supervising Attorneys were included in certifications issued by the City Department of Labor, under Executive Order No. 49 (1958) as early as 1962 (Certifications Nos. 4 NYCDL 49

Participation in the first step of a grievance procedure, usually handled by a lower level supervisory employee, has not been considered indicative of managerial status. (Matter of Terminal Employees Local 832, I.B.T., Decision No. 75-68).

and 5 NYCDL 109) and are included in the City-wide certification issued in 1967 (CWR No. 44-67). They are not included in the City's Managerial Pay Plan, but we attribute no significance to that fact, in view of the past history of collective bargaining and the City's present application.

Supervising Attorneys are employed in the Corporation Counsel's office and in other City departments and agencies. As in the case of Principal Attorneys, they render services in complicated and important legal matters. Such services, however, as noted above, involve professional, not managerial functions. Unlike Principal Attorneys, their job specification contains no reference to assisting in policy formulation.

Considerable conflicting evidence was presented concerning the services rendered by Harry W. Wachtler, a Supervising Attorney employed in the Department of Social Services. Mr. Wachtler is subordinate to Samuel Felder, General Counsel to the department and Director of its Bureau of Resources and Legal Services. Wachtler holds two office titles: Assistant to the Director of Bureau of Resources and Legal Services, and Director of the Division of Legal Services. He had served in the former title until April, 1968, when he was promoted to the latter title. Because no replacement was appointed, he has served in both functions.

The dual positions held by Wachtler, and the unusual nature of his services, largely administrative, clearly are not typical of a Supervising Attorney. Accordingly, we find little or no probative value in this evidence for the purposes of the issue herein.

Supervising Attorneys head five of the thirteen divisions of the Law Department. The Administrative Services Division is headed by a Director of Personnel, and the remaining seven divisions are headed by Assistant Corporation Counsels.

We note, in this connection, that the job specification for Principal Attorney includes service as "the principal assistant . . . to the head of a major legal division in the Law Department." The job specification for Supervising Attorney (one rank lower than Principal Attorney) contains no similar provision.

The Law Department's Director of Personnel testified, generally, that all Division Heads, including the five Supervising Attorneys, have "certain managerial responsibilities;" that they meet weekly with the Corporation Counsel on policy matters, recommend merit increases and disciplinary action, and "implement the department policies."

Upon more detailed questioning, however, it appeared that only one meeting had been held in the preceding nine months. That meeting concerned merit increases. At that meeting, the Division Heads were told the "norm" for merit increases and the criteria they were to apply if they recommended amounts greater or less than the norm. Concededly, the norm and the criteria were determined in advance of the meeting by the Corporation Counsel, the First Assistant Corporation Counsel, the Special Assistant Corporation Counsel, and the Director of Personnel. The individual merit increases subsequently granted admittedly were fixed by the same four individuals.

With reference to disciplinary action, it appears that a Supervising Attorney, acting as a division head, may make recommendations only. If his recommendation is approved, the charges are heard before a hearing officer who reports directly to the Corporation Counsel.

As an example of "implementation of department policy" the Personnel Director referred to holidays which fall on a Saturday or Sunday. In such instances, the division head determines whether attorneys in the division shall be excused on Friday or Monday.

No significant evidence was introduced as to the functions of other Supervising Attorneys.

Apart from the lack of testimony as to the duties and status of Supervising Attorneys generally, neither the job specification nor the evidence produced as to Supervising Attorneys serving as division heads in the Law Department, demonstrates managerial-executive status. The services rendered by these division heads are predominantly professional. Duties to the extent exercised in the instant situation such as the recommendation of merit increases or disciplinary action, time off, and work assignments are supervisory, not managerial functions. Accordingly, we find and conclude that Supervising Attorneys are not managerial-executives.

Confidential Employees

The record indicates that certain Supervising Attorneys represent, or may represent, the City in labor relations disputes involving City employees. The evidence is insufficient, however, to identify these employees or

properly to evaluate the nature of the services rendered. Our dismissal of the City's application in Case No. RE-10-68, therefore, is without prejudice to a further application to exclude specific Supervising Attorneys as confidential employees.

DATED: New York, N.Y.
May 18, 1970.

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

ERIC J. SCHMERTZ
M e m b e r