

District Council 37, 60 OCB 4 (BOC 1997) [Decision No. 4-97, aff' d, City of New York v. District Council 37, No. 403334/97 (Sup. Ct. N.Y. Co. Apr. 27, 1999).]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

-----X

In the Matter of

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

DECISION NO. 4-97

-and-

DOCKET NO. RU-929-84

THE CITY OF NEW YORK,

Respondent.

-----X

DECISION AND ORDER

On December 20, 1984, District Council 37, AFSCME, AFL-CIO ("DC 37" or "Union") filed an amended petition with the Board of Certification ("Board"), docketed as RU-929-84, seeking to add employees in the Project Planner title series to its existing Certification No. 26-78 (as amended).¹ On August 12, 1985,

¹ The amended petition included the following titles:

Assistant Project Planner (Mayor's Office) TC 06008
Project Planner (Mayor's Office) TC 05481
Senior Project Planner (Mayor's Office) TC 05482
Assistant Project Planner (Office of the Borough
President, Staten Island) TC 06022
Project Planner (Office of the Borough President,
Staten Island) TC 06023

On September 18, 1995, the Union amended the petition to include the following titles which it had previously overlooked:

Project Planner (office of the Criminal Justice
Coordinator) TC 51794
Senior Project Planner (office of the Criminal Justice
Coordinator) TC 51795

These titles were already part of the record in this case; the City had called an incumbent to testify as to his duties.

Communication Workers of America, Local 1180 ("CWA") filed a petition with the Board, docketed as RU-947-85, seeking to add employees in the Project Planner title series to its existing Certification No. 41-73 (as amended).²

The City of New York ("City"), by its Office of Labor Relations, opposed the petitions filed by DC 37 and CWA, claiming that the titles are managerial and/or confidential and, therefore, ineligible for bargaining under §12-305 of the New York City Collective Bargaining Law ("NYCCBL").³ On June 14, 1995, the City withdrew its objection as to the titles of Assistant Project Planner (Office of the Borough President, Staten Island) and Project Planner (Office of the Borough President, Staten Island).

Between January of 1986 and September of 1987 numerous hearing dates were scheduled but later adjourned at the request of the parties. In September of 1987, the parties requested that

² On September 20, 1993, after participating in several days of hearings in this matter, CWA withdrew its petition.

³ Section 12-305 of the NYCCBL states, in relevant part, as follows:

Rights of public employees and certified employee organizations. 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; ... (emphasis added).

the Board hold the matter in abeyance for an indefinite period of time pending the outcome of ongoing settlement discussions. On August 1, 1990, the Trial Examiner assigned to the case wrote to the parties asking to be updated on the status of the settlement discussions. The record does not contain any response to that letter. However, by letter dated February 20, 1992, DC 37 informed the Trial Examiner that the parties had been unable to settle the matter and requested that hearing dates be scheduled.

Ten days of hearing were held between August of 1992 and October of 1993, during which time the parties were given a full opportunity to present evidence and arguments in support of their respective positions. In November of 1993, the mayoral administration changed. Because the Project Planners are employed in the various mayoral policy offices which are structured around the priorities of the current mayor, the matter was again held in abeyance between November of 1993 of September of 1994.⁴ The examinations of the witnesses were then completed after six more days of hearing held between January and June of 1995.

The City and DC 37 filed post-hearing briefs on October 6, 1996. DC 37 filed a reply brief on November 9, 1996 and, thereafter, the record was closed with the submission of the City's reply brief on November 29, 1996.

⁴ The Giuliani administration eliminated entirely some of the offices that had existed under the Dinkins administration and restructured others.

BACKGROUND AND FINDINGS OF FACT

The Office of the Mayor employs approximately 700 people.⁵ Under the umbrella of the Office of the Mayor are numerous "business units", some of which employ Project Planners. Those employing Project Planners include the Office of HIV Health and Human Services Planning Council, the office of the Criminal Justice Coordinator, the office of Medicaid Managed Care, the Office of Construction, and the office of Contracts.⁶ According

⁵ Bruce McDougald, who is employed by the Mayor's Office of Personnel as the Personnel Director, testified that there were approximately 700 employees in the Office of the Mayor as of January. of 1995. Of those 700 employees, approximately 28 were Project Planners. By contrast, in 1993 under the Dinkins administration there had been approximately 60 Project Planners in the office of the Mayor.

⁶ In Decision No. 19-75, the Board found that all employees of the Executive Management and Executive and Administrative Services sections of the Mayor's Office (currently the Mayor's Office of Fiscal and Administrative Management, Citywide Services, and Correspondence Services) are managerial and/or confidential and, therefore, ineligible for collective bargaining. In Decision No. 7-84, the Board determined that the Mayor's Office of Operations is inherently managerial and/or confidential and determined that the employees of the New York City Commission for the United Nations and for the Consular Corps are managerial and/or confidential in accordance with a stipulation between the parties. Accordingly, to the extent that there are Project Planners employed in these units, they are exempt from the instant proceeding. Finally, in Decision No. 16-84, the Board found several named employees (and successor employees in the same position who perform substantially the same duties and functions) to be managerial and/or confidential; they were employed by the following units: the office for the Handicapped, the Voluntary Action Center, the Arson Task Force, the Midtown Enforcement Project, and the Office of Single Room Occupancy Housing. To the extent that these

(continued...)

to the City, it is the function of these offices to develop and implement policies that are consistent with the Mayor's agenda.

Because each of the units that employs Project Planners has a unique purpose or mandate, the work performed by the Project Planners varies by unit. For this reason, we will discuss each of the units separately.

At the beginning of the hearings in this matter, there were approximately 60 Project Planners employed by the Office of the Mayor. Because it would have been inefficient and repetitive to have all of the employees testify, the parties agreed that a representative group of Project Planners, and/or a supervisor familiar with the duties of the Project Planners, from each office would testify. Accordingly, the discussion that follows regarding the duties of the Project Planners is very broad. While it includes all of the duties performed by Project Planners in the offices which are relevant to this decision, the individual Project Planners do not necessarily perform all of the duties listed. Additionally, the discussion does not distinguish between Project Planners and Senior Project Planners.⁷ This is so because, on the record of this case, any distinction between these titles would not effect our determination; in some

6(... continued)
employees (or successor employees in the same position who perform substantially the same duties and functions) were Project Planners, they are also exempt from the instant proceeding.

⁷ The City presented no evidence regarding the duties of the Assistant Project Planners.

instances Senior Project Planners perform work that is strictly administrative and in other instances Project Planners perform policy related work.

The Office of HIV Health and Human Services Planning Council

The Office of HIV Health and Human Services Planning Council ("HIV Office") provides oversight to the various city agencies that have HIV related programs and services, the purpose of which is to coordinate their efforts and to ensure that they are advancing the Mayor's AIDS policies. It also provides the HIV Health and Human Services Planning Council ("Council") with a staff.

The Council came into existence as a result of the passage, by the United States Congress, of the Ryan White Comprehensive AIDS Resources Emergency Act ("Ryan White Act") of 1990, Title I, which provides emergency assistance to localities affected by the HIV epidemic. In order to be eligible for Title I grants under the Ryan White Act, the locality must establish a planning council and must file a grant application on an annual basis. It is the duty of that planning council to establish priorities for the allocation of funds among programs and file the application. In response to this federal legislation, the Council was created by Executive order No. 23 of 1991 ("E.O. 23"). The HIV Office coordinates and writes the federal application, articulating the City's position on how much money it should receive and what it

should be spent on.

Pursuant to E.O. 23, the Council has between 35 and 42 members, all of whom are appointed by the Mayor; from among the members of the Council, the Mayor designates a Chair. E.O. 23 provides that the membership of the Council must include, inter alia, representatives of health care providers, community-based and AIDS service organizations, social service providers, mental health care providers, local public health agencies, hospital planning agencies or health care planning agencies, and individuals living with HIV.

As a practical matter, in order to arrive at its decisions on the allocation of the Ryan White Act funds, the Council does not operate in a vacuum, but is given informational documents, prepared by Project Planners employed by the HIV Office, which afford direction and guidance as to how to allocate the funds amongst several programmatic areas, i.e. health services, mental health services, social services, housing, and substance abuse. The Project Planners report to the Director of the HIV Office who, in turn, reports to Mr. Johnson, the Chair of the Council and the Coordinator for AIDS Policy.⁸ The primary function of the Project Planners is to serve as the Council's staff.

⁸ As of the date Mr. Johnson testified, July 14, 1993, the Director position was vacant and the Project Planners were reporting directly to Mr. Johnson. As a result, Mr. Johnson was in daily contact with the Project Planners. Subsequently, a Senior Project Planner, Mr. Petroziello, was promoted to the Director position.

The Council has divided itself into "work groups," which are chaired by Council members, to address the programmatic areas; for example, there is a substance abuse work group. In their capacity as the Council's staff the Project Planners bring current issues regarding AIDS and HIV, and possible solutions, to the attention of the work group chairs. They prepare informational memoranda and position papers on AIDS and HIV issues and programs for consideration by the Council and the work groups. Working with the work group chairs, the Project Planners help to establish who will sit on the work groups, and to develop agendas for meetings and timetables for the attainment of goals. In the absence of the chairperson, the Project Planner will run the meeting. Finally, the Project Planners work with Mr. Johnson and the Council to establish a timetable for the completion of the annual federal application for Ryan White Act funds, and assist in the writing of that federal application.⁹

The Project Planners, working with the Director of the HIV Office and the Chair of the Council, come to a determination as to how much the Council should ask for with respect to the Ryan White Act funds. The work groups then focus on the specific

⁹ According to Mr. Johnson, the Ryan White Act dictates that the Council's recommendations must be accepted by the Mayor unless he finds that the recommendations are "totally out of line with City plans." Once the allocation of funds has been determined by the Council, contracts are awarded to service providers that offer the types of programs chosen by the Council. The number of contracts that can be awarded depends upon the total amount of Ryan White Act funds allocated to the City by the federal government in a given year. In 1993 the Council let approximately 250 contracts.

substantive issues related to their respective areas, making recommendations on the types of programs that should be funded. The recommendations of the work groups are forwarded to the Planning and Evaluation Committee, a subcommittee of the Council, which assesses the recommendations, poses questions to the work groups as to the positions that have been taken, and combines the work group recommendations into a comprehensive plan. The plan is then presented to the Council, and a vote is taken on its appropriateness. It is the responsibility of the Project Planner to be available in order to answer any question from the Committee or Council regarding the recommendations.

According to the testimony of Ron Johnson, the Project Planners provide leadership to the work groups and the Council insofar as they work with the chairs of the committees and work groups to determine issues to be raised at the committee and work group level, present those issues in the form of informational memoranda and position papers, and work to develop a schedule and timetable for the implementation of programs. He testified that, in presenting information to the Council, the Project Planners are not unbiased; presentations are intended to persuade the Council to effectuate particular policies. Mr. Johnson testified that they are seen as an extension of the Mayor, as they develop and carry out the Mayor's AIDS policy priorities. However, the Project Planners do not vote on any of the Council enactments. When a Project Planner does not agree with the Council, he or she may undertake a consensus building process, being afforded

complete freedom to speak at meetings and to attempt to persuade the Council to adopt their point of view.

The Project Planners are responsible for reaching out to and meeting people living with HIV, gathering their opinions as to how the funds should be allocated, and bringing this information back to the Council. To this end, they are involved in the development of community forums and evaluative questions, designed to elicit feedback as to the effectiveness of the funded programs. This information is used by the Project Planners to develop position papers which advocate policy changes that would assist people living with HIV. Other community related activities include training and assisting individuals to lobby on behalf of the City to secure more funds and to sit on the Board of a community based organization.

In furtherance of its role as Citywide Coordinator for AIDS policy, the HIV Office, through its Project Planners, may mediate between the Council and City agencies. For example, the Council wished to earmark funds to house homeless people with TB and HIV. This idea ran contrary to the Human Resource Administration's ("HRA") policy on housing people who are currently homeless, regardless of their health status. The HIV Office was informed by then Deputy Mayor Cesar Perales of this contradiction in policy and the Project Planners brought the problem to the Council's attention. Under the auspices of Mr. Johnson, they successfully urged the Council not to go forward with the plan until HRA had the opportunity to form a new policy for housing

people with AIDS.

From time to time, the Project Planners in the HIV Office are asked to work on ad hoc projects. For example, one of the Project Planners wrote an "analysis" for the Council's nominations committee. Using this analysis, the committee will make a recommendation to the Mayor as to which Council members should continue to serve and which should be replaced. The analysis set forth the goals and priorities of the Council and an opinion as to what groups should be represented on the Council in light of these goals and priorities. This Project Planner also served on a committee established to develop a strategy to deal with the fact that, in the Council's view, New York City did not receive an appropriate share of federal funds in 1993. Once a strategy was developed, the role of the Project Planner was to implement it by performing tasks such as drafting letters, subject to Council approval, to be sent from the Director of the HIV Office to the New York Aids Coalition.

Office of Construction

The Office of Construction is responsible for reporting to the Mayor on the status of the 3-4 billion dollars per year that the City spends on construction. The office oversees and monitors the various construction projects that the City's agencies have undertaken. It conducts regular meetings with the agencies to address problems that arise with these projects and

coordinates the submission of reports pertaining to agency construction projects.

Project Planners employed by the Office of Construction are required to have experience in the construction industry. While the work of the Office is divided up by agency, the Project Planners all perform the same duties, i.e. they analyze construction problems facing the agencies. In his testimony, Kenneth Holden, Director of the Office, used the term "problems" broadly; it could include, by way of example, technical issues, financial issues such as cost overruns, scheduling issues and issues surrounding compliance with applicable statutes. The term "analysis" as used by Mr. Holden includes, inter alia, identifying that a problem exists, asking questions of agency personnel in order to understand the problem, arranging for meetings where more than one agency is involved, and formulating possible solutions. According to the testimony, if a problem arises which relates to policy changes, the Project Planners may make a recommendation to the "Construction Services Division". For example, a Project Planner might recommend an incentive program for construction personnel.

Project Planners handle Personnel Action Reports ("PARs"), tentatively approving all construction related PARs for the Mayor. This covers all new hires in titles ranging from Engineering Level I to Deputy Commissioner. All PAR decisions must be finally approved by Mr. Holden. The Project Planners also assess grievances by architects and engineers that have been

referred to them by the office of Labor Relations ("OLR"). For example, where an Engineer Level I alleges that he or she is performing Engineer Level II work, the Project Planner will analyze the work to determine whether it is indeed out-of-title work and will report the findings to OLR. Project Planners have limited dealings with Unions insofar as they answer questions relating to decisions on PAR's or grievances; according to the testimony, they represent the Mayor's office in this regard.

The Project Planners in the Office of Construction serve as a "Technical Assistance Unit" which makes proposals and recommendations as to how the City agencies should handle technical construction problems. For example, they perform "research and development" functions for the Director. This duty includes tasks such as researching the effectiveness of a new product on the market to determine whether the City should use it and, if so, recommending modifications to the applicable City specifications to permit the product's use.

Project Planners in the Office of Construction coordinate the activities of the City's Prevailing Wage Investigators. The Project Planners inform the investigators of possible wage infractions committed by potential contractors and coordinate the submission of reports. They also help to train construction personnel to detect attempts, by construction contractors, to circumvent the prevailing wage regulations.

office of Medicaid Managed Care

In 1991, the New York State Legislature passed the Medicaid Managed Care Act, an Act which sets targets for enrolling Medicaid recipients in managed care programs. The Mayor's Office of Medicaid Managed Care ("Managed Care Office") was created in February, 1992, in order to implement the Medicaid Managed Care Act in New York City. The office monitors existing managed care plans; this task includes developing criteria by which to review the plans. The Office also receives applications from providers seeking to become participating managed care plans. In this connection, the Managed Care Office develops criteria to assess the qualifications of potential managed care plans. The office has the responsibility of administering non-clinical functions related to the managed care program, such as marketing and complaint handling.

The Project Planners employed by the Managed Care Office assist in the development of the criteria used to evaluate potential plans. When applications from potential providers are received by the office, the Project Planners make an initial determination as to whether they are qualified, or meet the criteria. If they deem a plan to be qualified, they will recommend approval by the Director of the Managed Care Office. If the Director approves, contract negotiations between the plan and the City will commence. In negotiating a contract, the parties use a standard form managed care contract, provided by

the City, as a starting point. In the early stage of negotiations, the Project Planners meet with provider representatives to discuss any concerns and/or problems the provider may have with the form contract. The Project Planners record these problems and may suggest possible modifications to the contract. From this point on, a supervisor will run the negotiations, with assistance from the Project Planner. The Director, with input from an attorney, has the final authority to approve a contract. Before the contract is executed, public hearings must be held and the Project Planner may be required to testify at the hearing.

Once the contract is executed, the Project Planner becomes the contract manager, performing an oversight function and providing technical assistance. In this connection, they assist in the development of criteria used to monitor the providers and gather, from the plans, the data necessary to determine whether the standards are being met. As technical operational problems arise, the Project Planner has sole responsibility to address and resolve them. Some examples of technical problems would include an inadequate number of doctors or numerous client complaints.

The Project Planners may be asked to work on ad hoc projects. For example, one Project Planner worked with the Director of the Office to analyze enrollment in managed care and develop ways to increase enrollment in parts of the city where enrollment is low.

Office of the Coordinator for Criminal Justice

The Office of the Coordinator for Criminal Justice ("OCCJ") oversees the City's criminal justice programs. These programs include, for example, the "alternatives to incarceration" initiative and the juvenile delinquency prevention program. This oversight primarily involves determining what programs will be funded, developing criteria or the RFP that will be used to evaluate applications for funding, evaluating the applications submitted and monitoring programs that ultimately receive funding. These functions involve interaction between the OCCJ and other City agencies involved with the criminal justice system.

The Project Planners in the OCCJ have areas of expertise. For example, one Project Planner has expertise in the area of juvenile justice. Within their areas of expertise, they make recommendations as to how funding priorities should be set amongst target populations and, therefore, amongst programs seeking funding.¹⁰ In arriving at these recommendations they consult with the Director of the OCCJ, who usually adopts the

¹⁰ The OCCJ is allocated money from a variety of federal and state sources. For example, it receives money from the State's block grant pursuant to the Juvenile Justice and Delinquency Prevention Act. This statute sets forth guidelines as to how the money is to be used. It is within these guidelines that the City must set its own priorities. It should be noted that several of the programs now funded under this act have been refunded year after year going back to the Koch administration.

recommendation. The recommendation is then put in writing and submitted to the Criminal Justice Coordinator; the recommendations are "almost universally" adopted at this level also. Final determinations on funding are made by a state criminal justice advisory group, which was formed by the Governor. When the advisory group holds hearings on funding, the Project Planners represent the City at these hearings.

Once funding priorities have been set, the Project Planners draft the RFPs used to solicit bids from potential service providers. The RFPs indicate, in a general way, the type of program that the City has given priority. For example, the RFP might seek programs aimed at helping juvenile sex offenders or youths who have already been through the criminal justice system. It is hoped that the RFP will solicit innovative programs that have not been tried before. It is the responsibility of the Project Planners, who sit on a selection committee made up of OCCJ employees, to evaluate the bids and assist the selection committee in identifying the "lowest ranking" bidder. Upon selection of a program, the Project Planners assist in the contract negotiations between the City and the program.

After a contract has been entered into and a program is in place, the Project Planner monitors the program's performance. This involves interacting with staff people at the program, Unit Directors and Deputy Commissioners at City agencies and employees

at state agencies that provide some funding.¹¹ The point of this monitoring is to assure that the service provider is living up to the terms of its contract and to determine whether the program is successful, or is achieving its objectives. This monitoring involves reviewing quarterly reports submitted by the programs, making site visits, and making suggestions for improving performance. Based upon his or her evaluation, the Project Planner will make a recommendation as to whether the program should be refunded.

When budget cuts have to be made in the area of criminal justice, the Project Planners will make recommendations as to where the cuts should be made amongst the programs under the office's auspices. They may also recommend defunding a program altogether.

Project Planners deal with issues related to the Court Facilities Master Plan which, pursuant to a statute, requires New York City to review its court facility needs for the next 20 years and to have a plan to meet those needs. The City's Department of General Services ("DGS") and the State Dormitory Authority are charged with overseeing the renovation, design and construction of court facilities. The Project Planners in the OCCJ interact with DGS, the state Office of Court Administration ("OCA"), and the State Dormitory Authority, to ensure that the 12

¹¹ The record does not contain any testimony regarding the level of staff that the Project Planners deal with at the state agencies.

to 15 active projects are progressing appropriately. They also advise these agencies on the Mayor's policy positions relating to the projects. They act as "capital coordinators" for the projects and participate in "Office of Management and Budget ("OMB") exercises" or discussions as to where cuts should be made and in what amount. This may entail making recommendations regarding staff reductions at the agencies involved with the Court Facilities Master Plan. Their recommendations in the budget area are "usually adopted.

In connection with the Court Facilities Master Plan, the Project Planners in the OCCJ make recommendations regarding long-term strategies to be implemented by the City. For example, one of the Project Planners drafted a "strategic policy statement." The policy statement addresses the financial burden that the court facilities mandate places on the City and sets forth strategies to be followed in order to limit this burden such as "lobby[ing] the Legislature for the repeal of Wicks Law to achieve cost savings in established capital construction projects." This recommendation was discussed with the Director of the OCCJ and approved of. It was then submitted to the Criminal Justice Coordinator, who approved it. According to the Project Planner who drafted the policy statement, recommendations such as these are usually adopted.

The Office of Contracts oversees the procurement or contracting activities of City agencies. To this end, the office maintains a contractor information system, known as VENDEX. VENDEX contains information on the performance of contractors who have previously done business with the City. The Office of Contracts has the responsibility of directing reforms to the City's procurement procedures. Additionally, it administers public hearings for contracts.

The duties of the Project Planners include organizing the operations of the office on a day to day basis. This entails making sure that all technical requirements with respect to contractor submissions are met, scheduling various meetings, handling questions from contractors and from the public, and reviewing correspondence. Where a Project Planner believes that an internal office operating procedure can be improved, he or she can make such a recommendation to the Director of the Office of Contracts, who will decide whether to implement the recommendation.

The Project Planners also run the day-to-day operations of a sub-unit of the office, the Public Hearings unit. That unit administers public hearings for contracts, real property, franchises and concessions and in rem property foreclosure releases. The Project Planners essentially see to it that the hearings take place in accordance with applicable rules and regulations; they compile and distribute calendars, prepare a master schedule of hearings, inform hearing participants of

upcoming deadlines, secure meeting rooms, and assure that participants have submitted a complete set of required documents. Upon completion of a hearing, a Project Planner will certify any "authorizing documents" that result from the hearings; these certifications must be signed-off on by a supervisor.

Project Planners working in the Office of Contracts serve as secretary to the VENDEX Board. As alluded to above, VENDEX is a database that centralizes information about contractors which is gathered, in part, from a questionnaire provided by the Labor Department. The secretary supervises the input of data, answering technical questions from the data entry staff. Because some of the information is derogatory and may affect the determination of whether a contract is awarded, accuracy of the entered data is paramount. Most of the information contained in the VENDEX system is available to the public upon request. The Project Planners administer the procedures relevant to information request, i.e., they make sure that requests are made in the appropriate form and are processed properly.

Frequently, contractors seek rulings on VENDEX procedures. For example, they may seek waivers of certain filings. The VENDEX Board, which consists of the Director of the office of Contracts and the Deputy Executive Comptroller for Contract Administration, issues these rulings. The secretary to the Board provides the information required by the Board to make such determinations. While the secretary participates in the decision-making process and makes recommendations, the Board

makes the final determination. However, the secretary's recommendation is considered.

The Project Planners attend meetings in the course of performing their duties; at these meetings, they represent the positions of the office of Contracts. For example, they attend meetings with the Comptroller's Office, which shares some policy making power with the Office of Contracts in the procurement area. At the Comptroller's meeting, they articulate the position of the Director of the office and provide input as to existing procurement policies that should be modified. However, any policy recommendations that they make are based on prior discussions with, and approval by, the Director of the Office of Contracts.

One of the Project Planners in the Office of Contracts performs legal work. Working with the office's General Counsel, she researches and analyzes legal issues concerning "non-responsibility" cases and "comptroller objections" and writes legal opinions for the Director.

POSITIONS OF THE PARTIES

As stated in the introductory paragraphs of this decision, the City opposes the representation petition filed by the Union on the ground that the titles, as used in the Mayor's office, are managerial and/or confidential. The Union, on the other hand, maintains that while the Project Planners perform complex and

sophisticated work, they do not formulate policy and, therefore, are not managerial employees. The parties' post-hearing briefs in support of their respective positions on the managerial/confidential status contain exhaustive analysis of the work of the Project Planners in each of the offices. We have considered the arguments made in those briefs. However, in the interest of administrative economy, we will not repeat those arguments in this decision.

The City also argues, in its post-hearing brief, that the Board lacks jurisdiction to decide this matter. The Union disagrees. The following is a summary of the parties, respective positions on this issue.

City's Position on Jurisdiction

The City maintains that Chapter 1 of the New York City Charter ("Charter") gives broad powers to the Mayor. Section 8(f) in particular, the City argues, gives the Mayor the right to organize and reorganize the executive office as necessary to carry forward his policies and agenda.¹² According to the City,

¹² Section 8(f) of the Charter provides:
Except as otherwise provided in section eleven, the mayor may, by executive order, at any time, create or abolish bureaus, divisions or positions within the executive office of the mayor as he or she may deem necessary to fulfill mayoral duties. The mayor may from time to time by executive order, delegate to or withdraw from any member of said office, specified functions, powers and duties, except the mayor's power to act on local laws or resolutions of the council, to act as a magistrate or to

(continued...)

§8(f) of the Charter and the NYCCBL must be "harmonized." To accomplish this "harmonization," the City argues, the Board should "defer to the Mayor's magnitude of discretion and authority he derives from the Charter" and refuse to exercise jurisdiction over the instant matter. The City argues that this is the only way to "avoid inconsistencies" between the Charter and the NYCCBL.

The City's argument sets forth these potential "inconsistencies." The City contends that Board review of the managerial/confidential issue in this case would infringe upon the Mayor's unilateral right "to organize and staff the executive office with individuals capable of carrying out his policies." This is so, the City argues, because the Mayor has already decided "to treat the Project Planners as managerial and/or confidential" and the Board must defer to that decision. Were the Board to "second guess" that decision, the City contends, it would be "embroil[ing] itself in the management and operation of the office of the City's chief executive officer" and in his right "to select those involved in his policy making process," "without statutory authority and in violation of the separation of powers." The City argues that this would be inappropriate because the New York State courts "have refused to second guess the executive branches of government involving non-justiciable

(... continued)

appoint or remove officials. Every such order shall be filed with the city clerk who shall forward them forthwith to the City Record for publication.

questions, by finding that to do so would embroil the judiciary in the management and operation of the executive branch of government."

According to the City, New York State law and the Charter require a referendum for any local law that "curtails" any power of an elected official; "a curtailment exists where a local law has an adverse impact upon an identifiable power of an elected official." Since unionization, which is permitted by the NYCCBL, would have an adverse impact upon the Mayor's Charter-given powers, the City argues, it must be seen as a curtailment. However, the City points out, the NYCCBL was enacted without a referendum. The City argues that for this reason, it is "especially important" that the Board defer to the Mayor's decision that the Project Planners are managerial/confidential employees.

In the City's view, more "inconsistencies" between the Charter and the NYCCBL would result were the Board to exercise jurisdiction and find the Project Planners eligible for collective bargaining. The City maintains that "unionization of employees in the executive office impedes the Mayor's charter-given rights to down-size and reorganize the executive office" and "unless the Mayor can structure his executive office as needed, he [will] be paralyzed from implementing the agenda upon which he [was] elected and which is his mandate." The City argues that unionization would also impede the Mayor's rights under the Charter because of the status quo provision of the

NYCCBL found in §13-311(d). Due to this provision, the City argues, "one mayor could be required to bargain over essential matters regarding the operation of his executive office staff which would bind his successor in direct contravention of Chapter 1 of the Charter, particularly §8(f)." Moreover, the City continues, if impasse is reached "the Board of Collective Bargaining, through its designated impasse panel, would be required to make decisions affecting key aspects of the Mayor's staff" and become "further embroil[ed] ... in the management and operations of the Mayor's Office."

Looking to the NYCCBL itself, the City argues that given the broad powers granted the Mayor under the Charter, "it is extremely unlikely that the NYCCBL was intended to treat the Mayor's Office as a municipal agency, as defined in NYCCBL §12-303(d)." Furthermore, the City argues, "[Sections] 12-304(b), (c), and (d) simply bear no logical relevance to the Mayor's office because their applicability requires that the Mayor's office either elect to be covered by the NYCCBL or that this be done pursuant to law," neither of which has taken place.

Union's Position on Jurisdiction

The Union argues that the Board has jurisdiction over the Mayor's Office by virtue of §12-303(d) of the NYCCBL, which defines a "municipal agency" as follows:

The term "municipal agency" shall mean an
administration, department, division, bureau, office,

board, or commission, or other agency of the City established under the charter or any other law, the head of which has appointive powers, and whose employees are paid in whole or in part from the city treasury, other than the agencies specified in paragraph two of subdivision g of this section.

The Union points out that, pursuant to §6 of the Charter, the Mayor may appoint the heads of administrations, departments, all commissioners and other officers not elected by the people. Moreover, the Union asserts, there is no doubt that the Project Planners are paid from the City treasury. Accordingly, the Union argues, the Mayor's Office falls within the definition of a municipal agency.

As for the City's argument that the Board should not exercise jurisdiction for public policy reasons, the Union refers the Board to §12-307b of the NYCCBL. The Union argues that while the NYCCBL requires bargaining over wages, hours, and terms and conditions of employment, it does not require bargaining over how the Mayor's Office is "run." The Union maintains that the statutory management rights clause protects the City's right to "organize, downsize and to determine the methods, means and personnel by which to accomplish its goals."

DISCUSSION

Jurisdictional Issue

The City argues, essentially, that two local laws, the Charter and the NYCCBL, must be harmonized in this case. The City seems to contend that because the Charter was enacted by

referendum, it should be given more weight than the NYCCBL. For this reason, the City argues, the Board should defer to the Charter and refuse to exercise jurisdiction in this case.

This argument overlooks the fact that the right of public employees to organize and be represented by public employee organizations is set forth in the Taylor Law¹³, a state law of general application. Similarly, it is pursuant to the Taylor Law that employees are presumed to be eligible for bargaining. When this Board makes a determination as to whether a title is ineligible for bargaining because it is managerial and/or confidential, it is administering and implementing the applicable provisions of Section 201.7(a) of the Taylor Law.¹⁴ It is a matter of black letter law that a state law, such as the Taylor Law, preempts the allegedly inconsistent provisions of a local law, such as the Charter.

In any event, pursuant to the express language of Section

¹³ Section 202 of the Taylor Law provides:

Public employees shall have the right to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing.

Section 203 of the Taylor Law provides:

Public employees shall have the right to be represented by employee organizations to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder.

¹⁴ Pursuant to Section 212 of the Taylor Law, Section 201.7(a), as well as Sections 202 and 203, are applicable to local governments.

12-303d of the NYCCBL, employees within the Mayor's Office are within the jurisdiction of the Board. That section defines a "municipal agency" covered by the NYCCBL as "an administration, department, division, bureau, office, board, or commission, or other agency of the City established under the charter or any other law, the head of which has appointive powers, and whose employees are paid in whole or in part from the city treasury. The Mayor's Office clearly constitutes an "administration" or "office," the head of which, the Mayor in this case, has appointive powers, whose employees are paid from the city treasury. While the City maintains that "it is extremely unlikely that the NYCCBL was intended to treat the Mayor's Office as a municipal agency," it has offered no authority to support this argument.

The City's argument that the Board should refuse to exercise its jurisdiction for public policy reasons is unpersuasive. First, a finding of eligibility for collective bargaining does not interfere with the City's right to "run" the Mayor's Office. As the Union points out, the management rights clause of the NYCCBL¹⁵ protects the City's right to organize, reorganize, downsize, and otherwise manage the Mayor's Office; mandatory subjects of bargaining include wages, hours and working conditions, not matters of management prerogative. Second, if the employees in the Mayor's Office in fact formulate policy, as

¹⁵ Section 12-307b.

the City argues they do, they will be found by the Board to be ineligible for collective bargaining.

Managerial/Confidential Issues

Under the Taylor Law, employees are presumed to be eligible for collective bargaining. Therefore, when an objection to the bargaining status of a title is made, the City has the burden of going forward to demonstrate that a title is ineligible for bargaining because it is managerial and/or confidential within the meaning of Section 201.7(a) of the Taylor Law.

The relevant language of Section 201.7(a) provides as follows:

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).

In implementing this Section of the Taylor Law, we have considered the following factors, *inter alia*, as reliable indicia of managerial status: the number of subordinate employees;¹⁶

¹⁶ Decision Nos. 11-95; 76-72; 46-72; 41-72.

area of authority;¹⁷ involvement with labor relations;¹⁸ preparation of budget and allocation of funds;¹⁹ involvement in personnel administration;²⁰ power to hire, assign and transfer personnel;²¹ and the formulation, determination and effectuation of an employer's policies.²² The last factor, the formulation of policy, has consistently been held to be the single most important indicium of manageriality.²³

The terms "policy" and "formulate" have been defined by the Board. "Policy" is the development of the specific objectives of a governmental agency to fulfill its mission, and the methods, means and extent of achieving such objectives.²⁴ "Formulate" includes not only those with the authority or responsibility to select among options and to put a proposed policy into effect, but also those who regularly participate in the "essential process" which results in a policy proposal and the decision to put such proposal into effect.²⁵

¹⁷ Decision Nos. 11-95; 6-84; 63-74; 19-71.

¹⁸ Decision Nos. 11-95; 5-85; 19A-70.

¹⁹ Decision Nos. 11-95; 5-85; 8-72.

²⁰ Decision Nos. 11-95; 13-86; 5-85; 45-78

²¹ Decision No. 7-92.

²² Decision Nos. 11-95; 15-92; 7-92; 34-81; 73-68.

²³ Decision No. 34-81.

²⁴ Decision Nos. 11-95; 15-92; 7-92; 32-82; 34-81.

²⁵ Decision Nos. 11-95; 15-92; 7-92; 36-82.

With respect to confidential status, we have relied upon the employee's relationship with managerial employees. Employees are confidential when that relationship regularly provides access to confidential information concerning labor relations and/or personnel matters to such an extent that 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.²⁶

Applying these criteria to the instant matter, we make the findings that follow with regard to the alleged managerial and/or confidential status of the Project Planner title series in each of the offices discussed above. While, in general, it is this Board's policy not to split titles by finding some employees managerial and others eligible for bargaining, an exception to the general rule will be made where it is justified by compelling evidence.²⁷ In the instant matter the fact that the Project Planners are employed in distinct offices and perform work unique to each office, justifies our consideration of splitting the Project Planner title series.

The Office of HIV Health and Human Services Planning Council

We find that the Project Planners in the HIV Office

²⁶ Decision Nos. 11-95; 13-86; 5-85; 32-82; 11-76; 13-74;
70-68

²⁷ Decision No. 26-76.

formulate policy within the meaning of the Taylor Law. The Council, on behalf of the Mayor, determines how to allocate federal funds among programs in order to best serve New York City's HIV infected population. The decisions made by the Council necessarily involve the development of policy; in order to arrive at its decisions the Council must set objectives, or priorities, in terms of providing emergency assistance and must determine "the methods, means and extent of achieving such objectives." If, by way of example, the Council were to determine that the City should make it a priority to address the issue of substance abuse and the spread of AIDS and that this should be accomplished by allocating a large block of federal funds for implementing a needle exchange program, it would have developed "a specific objective of a governmental agency" and "a means" of achieving that objective.

While the Council alone has the authority to select among options and to put a proposed policy into effect, the Project Planners are an integral part of the process which culminates in the Council's decisions. In a sense, the decision making process of the Council would not move forward without the guidance and direction provided by the Project Planners. The Project Planners provide the Council and the work groups with informational memorandum and position papers which make recommendations regarding the allocation of funds. This material provides a starting point for Council discussions and debate. The Project Planners also bring current issues and possible solutions to the

attention of the Council and the work groups. The recommendations of the Project Planners, which are not unbiased, are presented with the intent to persuade the Council to take a specific policy position. Perhaps most importantly, if the Council takes a position that a Project Planner does not agree with, he or she is free to speak at meetings in an attempt to persuade the Council to adopt another position. In sum, the role of the Project Planners involves broad and active participation in the formulation of policy.

Office of Construction

The evidence presented does not support a finding that the Project Planners in the office of Construction are managerial and/or confidential. Most importantly, they do not formulate policy within the meaning of the Taylor Law.

The Project Planners identify construction problems faced by the agencies, analyze these problems, and recommend solutions. The analysis of these problems, which include technical issues, financial issues, scheduling issues, and statutory issues including Prevailing Wage issues, requires a high level of skill and judgment but must be distinguished from policy formulation. As stated above, "policy" is the development of the specific objectives of a governmental agency to fulfill its mission, and the methods, means and extent of achieving such objectives. While the Project Planners are using their skills to insure that

a "specific objective" is fulfilled, i.e., that the City's construction projects are completed in a timely and efficient manner, they do not play a part in the development of that objective. Similarly, to the extent that the existence of an Office of Construction with oversight powers constitutes a "method" or "means" to achieve the City's objective of construction project completion, the Project Planners took no part in the development of that "method". It is more accurate to state that work of the Project Planners is designed to bring about conformity with established policy.

According to the record, a Project Planner might, on occasion, make a policy recommendation to the Construction Services Division. The example given was an incentive program for construction personnel. This type of policy recommendation, which must be passed upon by the Construction Service Division, does not amount to the broad and regular participation in policy formulation that is required to establish that an employee is managerial; rather, it involves a remote and irregular consultation with policy makers on a matter that is relatively minor in relation to the principal mission of the office.²⁸ The same can be said for a recommendation that the City modify existing bid specifications to permit the use of a new product.

The Project Planners in the Office of Construction participate in labor relations and personnel administration.

²⁸ Decision Nos. 61-69, 97-73.

However, in neither case does this participation rise to the level necessary to demonstrate manageriality. This Board has held that even where an employee participates in the first step of the grievance procedure, he or she can be considered non-managerial.²⁹ The employees in this office simply perform a factual investigation at the request of OLR; they do not participate in the grievance procedure. Similarly, while the Project Planners complete PARs approving new hires, which then must be authorized by the Director, the record before us does not indicate that they play any role in actually making the hiring decisions.³⁰

Office of Medicaid Managed Care

With respect to the Managed Care Office, we find that the Project Planners are not managerial and/or confidential. As with the Office of Construction, the Project Planners in the office of Medicaid Managed Care perform tasks which require a level of skill and professional judgment, but do not involve policy formulation.

The record indicates that the Project Planners assist, to some extent, in the development of criteria used to evaluate both the eligibility and performance of managed care plans. These

²⁹ Decision Nos. 19A-70; 6-69; 75-68.

³⁰ It seems more likely that these decisions are made at the agency level.

criteria can be considered a "policy" within the meaning of the Taylor Law because they constitute a "method" or "means" of achieving a governmental objective, namely implementation of New York's Medicaid Managed Care Act. However, the extent of the assistance provided by the Project Planners in this regard is not clear in the record. In any event, no evidence has been presented which would lead us to believe that the Project Planners are developing and implementing evaluative criteria without seeking supervisory approval. This Board has held that the preparation of procedures for implementing policy, without the authority to execute the implementing procedures absent approval of those in higher echelons, is indicative of a lack of managerial status.³¹

Other tasks performed by the Project Planners, including making an initial screening of a plan's eligibility and recommending approval for those that meet the eligibility standards, discussing the form contract with the plans in the early stage of negotiations, addressing technical problems with the plans, testifying at public hearings, and developing ways to increase enrollment in the managed care program, also do not rise to the level of policy formulation. These tasks, which may require a high level of skill, are nevertheless more in the nature of gathering and analyzing data, or making reports and suggestions, used in the formulation of policy. The Board has

³¹ Decision No. 13-74; 47-73.

held that gathering, supplying or analyzing data used in the formulation of policy is not sufficient in itself to warrant a finding of managerial status.³² Similarly, the Board has held that making investigations, reports and suggestions are not managerial functions.³³

As to this group of Project Planners, there is no evidence that they are involved in collective negotiations, have a role either in the administration of collective bargaining agreements or in personnel administration, act in a confidential capacity to a managerial employee, or regularly have access to confidential information relating to personnel or labor relations matters.

Office of the Coordinator for Criminal Justice

The record demonstrates that the Project Planners in the OCCJ regularly participate in the formulation of policy within the meaning of the Taylor Law.³⁴ Accordingly, we find that these Project Planners are ineligible for bargaining.

The City's Criminal Justice Coordinator makes policy decisions which include determining the City's objectives in terms of criminal justice and "the means, methods and extent of achieving such objectives." When the Project Planners make recommendations, which are almost always adopted, regarding the

³² Decision No. 5-85.

³³ Decision No. 73-68.

³⁴ See Decision No. 11-95; 45-78; 63-74.

allocation of funds amongst competing programs, they are participating in the essential process that precedes the Coordinator's decisions; the recommendations form the basis for the Coordinator's decisions. For example, where the Project Planners recommend that the City fund a program for juvenile sex offenders, they are participating in the development of a specific objective of a government agency, i.e., to target a particular population. When the Project Planners sit on the selection committee which chooses particular programs for funding, they are playing an integral role in determining "the means" of achieving a policy objective. When Project Planners evaluate the programs and make recommendations regarding refunding, they are making a determination as to "the means and extent" of achieving the City's objectives.

Similarly, the City's Criminal Justice Coordinator makes policy decisions which include determining the City's objectives with regard to the Court Facilities Master Plan and "the means, methods and extent of achieving such objectives." When the Project Planners prepare a policy statement and recommend strategies, as was done concerning the unfunded court mandate, they are participating in policy formulation as they are working to set objectives (limiting the cost of the mandate) and determine the method to achieve those objectives (lobbying for legislative changes).

Involvement in budgetary issues also is a factor to be considered in determining manageriality. In the case of the

OCCJ, it further supports our finding of manageriality. The Project Planners make recommendations regarding cuts amongst programs and defunding of programs. The Project Planners working with the Court Facilities Master Plan act as "capital coordinators" for the projects and participate in OMB exercises.

In sum, the Project Planners in the OCCJ play an integral role in the decision making process whereby the City sets its objectives concerning criminal justice. They make recommendations in such areas as funding and defunding of programs and long-term strategic positions the City should take on criminal justice issues. It is in this regard that the Project Planners in the OCCJ are distinguishable from those of most of the other offices under review herein. Like the Projects Planners in the HIV Office, the recommendations of the Project Planners in the OCCJ relate to the setting of the City's objectives. By contrast, the recommendations of the Project Planners in the other offices concern administrative matters, i.e., the administration or implementation of existing policy.

Office of Contracts

With respect to the Office of Contracts, we find that the Project Planners are not managerial and/or confidential. In fact, the work of the Project Planners in this office is almost entirely administrative or technical in nature.

For example, operating the office on a daily basis, assuring

that contractor submissions meet technical requirements, and suggesting ways to improve internal office operating procedures, are tasks which in no way implicate policy formulation. Similarly, operating the public hearings unit so as to make sure that hearings take place in accordance with applicable rules in no way implicates policy formulation. Operating the VENDEX unit essentially involves maintaining a database and administering public access to that database; this constitutes no more than administrative work necessary to implementing existing policies with respect to VENDEX. As for serving as secretary to the VENDEX Board and participating in decisions on rulings sought by contractors, this task requires the exercise of some professional judgment but does not involve policy formulation; instead, it involves the implementation of existing policy.

When the Project Planners from the office of Contracts attend the Comptroller's meetings and suggest ways to modify existing procurement procedures, they are involved in the formulation of policy to an extent. However, because their recommendations concern administrative matters, i.e., the improved implementation of existing procurement policies, this level of involvement does not render them ineligible for bargaining. This Board has held that where policy formulation amounts to merely expanding upon existing policy, it will not be considered a managerial function.³⁵ It is in this way that most

³⁵

Decision No. 47-73.

of the Project Planners, including those in the Office of Contracts, are distinguishable from those in the HIV Office and the OCCJ, who make recommendations relating to the setting of the City's objectives.

Finally, as for the legal functions performed by one of the Project Planners, the City has offered no evidence which would lead us to conclude that these functions are managerial; it has simply alleged that she researches legal issues and writes legal opinions.

Accordingly, for all of the reasons stated above, we find and conclude that all of the employees in the Project Planner title series, with the exception of those employed by the HIV Office and the OCCJ, are neither managerial nor confidential employees and are eligible for collective bargaining.

ORDER

Pursuant to the powers vested in the Board of Certification by the New York City Collective Bargaining Law, in contemplation of Section 201.7(a) of the Taylor Law, and pursuant to Section 12-305 of the New York City Collective Bargaining Law, it is hereby

ORDERED, that those employed in the Project Planner title series in the Mayor's Office of HIV Health and Human Services Planning Council be, and the same hereby are, designated managerial, and are exempt from collective bargaining; and it is

further

ORDERED, that those employed in the Project Planner title series in the office of the Coordinator for Criminal Justice be, and the same hereby are, designated managerial, and are exempt from collective bargaining; and it is further

ORDERED, that with the exception of those employed by the Mayor's Office of HIV Health and Human Services Planning Council and the Office of the Coordinator for Criminal Justice, all of the employees in the Project Planner title series be, and the same hereby are, designated eligible for collective bargaining; the Project Planner title series includes the titles Assistant Project Planner (Mayor's Office) TC 06008, Project Planner (Mayor's Office) TC 05481, Senior Project Planner (Mayor's Office) TC 05482, Assistant Project Planner (Office of the Borough President, Staten Island) TC 06022, and Project Planner (Office of the Borough President, Staten Island) TC 06023; and it is further

ORDERED, the Project Planner title series, as described in the preceding paragraph, be and the same hereby is, added, by accretion, to Certification No. 26-78 (as amended).

Dated: New York, New York
July 14, 1997

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER