OSA, 11 OCB2d 22 (BOC 2018)

(Rep) (Docket No. AC-1631-16)

Summary of Decision: OSA petitioned to add the title Patient Representative to its Staff Analyst bargaining unit. DC 37 intervened and sought to add the title to its Clerical bargaining unit. HHC argued that Patient Representatives are excluded from collective bargaining because they are managerial and/or confidential under Taylor Law § 201.7(a) and in the alternative, HHC Act § 7385(11). The Board found that the Patient Representative title is eligible for collective bargaining and that either bargaining unit is appropriate. The Board directed an election to ascertain the wishes of the employees as to their union representative. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

In the Matter of the Certification Proceeding

-between-

ORGANIZATION OF STAFF ANALYSTS,

Petitioner,

-and-

NEW YORK CITY HEALTH + HOSPITALS,

Respondent,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Intervenor.

DECISION AND DIRECTION OF ELECTION

On June 6, 2016, the Organization of Staff Analysts ("OSA") filed a petition requesting that the Board of Certification add the title Patient Representative (Title Code No. 00347C) to the Staff Analyst bargaining unit, Certification No. 3-88. On February 7, 2017, District Council 37,

AFSMCE, AFL-CIO ("DC 37") intervened and asserted that Patient Representatives should be added to its Clerical bargaining unit, Certification No. 46C-75. New York City Health + Hospitals ("HHC") argues that the Patient Representative title is excluded from collective bargaining under the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") and, in the alternative, the New York City Health and Hospitals Corporation Act, N.Y. Unconsolidated Law §§ 7381-7406 ("HHC Act").[1] The Board finds that the Patient Representative title is eligible for collective bargaining and that accretion to either bargaining unit is appropriate. Accordingly, the Board directs an election to ascertain the wishes of the employees as to their union representation.

BACKGROUND

At the time of the hearing in this matter, approximately 88 HHC employees held the Patient Representative title. The Trial Examiner held four days of hearing, at which 13 Patient Representatives testified. In addition, 74 Patient Representatives submitted surveys to the Board.[2]

According to HHC's position description, a Patient Representative:

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[1] We refer to New York City Health and Hospitals Corporation as "New York City Health + Hospitals" or "HHC" throughout this Decision and Order.

[2] The survey is an eleven-page questionnaire issued by the Office of Collective Bargaining. It first asks the employee to describe their job duties and responsibilities in the last twelve months and identify a percentage of time spent on each. The rest of the questions are divided by topic: labor relations responsibilities, personnel responsibilities, confidential status, budgetary responsibilities, supervisory functions, and role in policy formulation. Specific "yes or no" questions are followed by open-ended questions seeking descriptions and examples of the nature of the employee's responsibilities, their role at meetings, the subjects of these meetings, the type of information they have access to, and the type of recommendations and proposals they make. The final page is signed by a department head who affirms that he or she has reviewed and either concurs with the employee's statements or notes any disagreements. Organizational charts or a description of the Patient Representative's reporting lines were also provided. All surveys that were submitted by the employees were considered by the Board.

> [u]nder direction, serves as representative of hospital administration and provides a centralized complaint mechanism for patients, families and visitors to achieve a satisfactory resolution of problems. Focuses on potential problem areas to minimize the risk of health hazards to patient and to hospital and potential liability and consequent litigation processes. Humanizes patient[s'] hospital experience by interpreting and clarifying hospital policies, procedures, philosophy and routines to patient for better understanding.

(Ans., Ex. A) Examples of typical tasks performed by Patient Representatives are:

1. Acquaints patients with the purpose and philosophy of the hospital and the patient representative program. Interprets hospital policies and procedures to patients, families and visitors.

2. Communicates and demonstrates to the patient and his family, staff and the community, the concern and responsiveness of the institution in meeting the health needs of the individual.

3. Uncovers patient's feelings and concerns through direct interviews with patients and families, correspondence forwarded to hospital, staff referrals and telephone.

4. Documents all complaints, requests and compliments concerning the institution, its staff and services.

5. Analyzes and evaluates data to determine appropriate action and refers to cognizant resource person and/or agency for resolution.

6. Consults with appropriate staff as part of resolution process to ascertain corrective measures to be taken to resolve complaint for timely and effective response action.

7. Keeps patient fully informed of status of complaints.

8. May expedite delivery of patient's medical information to lawyers, insurance carriers and physicians.

9. May confer with the Finance Department and insurance carriers to ensure that appropriate billing systems have applied and takes any corrective action needed thru [*sic*] the Finance Department.

10. Attends staff meetings to appraise hospital administration of potential patient problems.

> 11. Recommends improvements or remedial or corrective actions concerning administration of services to avoid recurring patient complaints.
>
> 12. Maintains liaison with hospital staff, external authorities and agencies to facilitate resolution of patient problems.
>
> 13. Prepares reports and special studies. Conducts research as necessary in connection with functional responsibilities.
>
> 14. Provides access to interpreter when language barrier is a problem in communication with patient, families or visitors.

(*Id.*)[3]

Patient Representatives generally work in the guest relations or patient advocacy departments throughout HHC's facilities. The main function of a Patient Representative is to act as the liaison between the hospital or facility and the patients or their families. When a Patient Representative first meets with a new patient, he or she provides the patient with a packet of paperwork containing relevant information about the facility and its procedures, including topics such as the patient Bill of Rights, healthcare proxies, and advance directives. The Patient Representative answers any questions the patient may have and assists with paperwork.

Throughout the day, Patient Representatives aid with any issues that the patient may encounter and address patient complaints and grievances. A "complaint" is considered an issue that can be resolved within the same day, such as lost property, long wait times at the pharmacy, difficulty making an appointment, inadequate bathroom maintenance, poor staff attitude, and dissatisfaction with a care provider. If the Patient Representative cannot address the issue

[3] Qualifications for the Patient Representative title are a relevant Baccalaureate Degree and a minimum of one year experience in relevant work; or a relevant Master's Degree; or a satisfactory equivalent combination of relevant training, education, and experience.

personally, he or she will contact the appropriate person or department to resolve the problem. If the issue is one that cannot be resolved within 24 hours, the Patient Representative will prepare a written grievance and forward it to the relevant department for further action. Additionally, if the problem involves something that may become a legal issue, such as an allegation of sexual harassment, the Patient Representative will forward any information he or she gathers about the incident to the Risk Management department to conduct further investigation.

When handling paperwork or resolving minor issues, Patient Representatives may act as an interpreter for non-English speaking patients and their families. However, for more complex patient needs, outside vendors provide translation services. Additionally, one subset of Patient Representatives has the in-house title of Medical Interpreter. Their duties consist mainly of translating medical evaluations from one language to another so that the patient and doctor can communicate with one another.

Patient Representatives log the nature and time of all encounters they have with patients, as well as all complaints, grievances, or compliments received, in a computer database for tracking and analysis. Some Patient Representatives are also involved in conducting, monitoring, and analyzing the results of patient satisfaction surveys.[4]

Patient Representatives attend a variety of departmental or facility-wide meetings, some of which include high-level members of management. Some Patient Representatives also attend or serve as the chair or co-chair of patient grievance committee meetings, which occur approximately every two months. During these meetings, the committee reviews patient grievances and discusses

[4] One Patient Representative, Yomerys Reyes, performs unique functions. She is assigned to the Patient Financial Services department at HHC's Metropolitan facility. Her duties include coding medical claims for dialysis patients, making telephone calls to payers, coding and verifying insurance policies, confirming patient data, and identifying primary and secondary insurers.

best practices and recommendations for how to improve the patient experience. Examples of suggestions that Patient Representatives have made during the various types of meetings they attend include: informing nurses not to obtain confidential information during registration due to privacy concerns; plugging up wall sockets to prevent patients from charging cell phones in inappropriate locations; adding a "call bell" in the radiology department; ways to improve patient congestion and wait times; asking doctors and nurses to speak to patients in non-technical terms so that patients can better understand them; re-training staff on customer service or professionalism; adding signs to display policies regarding courtesy MetroCards and for hearing-impaired patients; distributing flyers to inform patients of the time that medication administration will cease for the day; and adding cameras to address property loss and theft issues. These recommendations must be approved or adopted by a member of a department's leadership.

An examination of the 74 surveys and the testimony of 13 witnesses reveals that only four of the Patient Representatives have limited roles in policy formulation.[5] Ariane Garcia testified that she provided information to her superiors when they formulated a policy regarding how patients could obtain sign language interpreters in a timely manner.[6] Another Patient Representative, Anneris Corporan, reviewed and revised the Patient Bill of Rights for the North Central Bronx facility, after it separated from Jacobi Medical Center. In particular, she testified that one of the revisions made was that patients would be given the Bill of Rights when they entered

[5] Only one Patient Representative, Shuntelle Stephen, answered "yes" to the survey question asking whether she has a role in the formulation of policy. Her testimony is incorporated into the above description of recommendations that Patient Representatives make at meetings.

[6] Garcia testified that she was asked to "provide input or to recommend whatever needed to be put in place for that policy based on . . . what I knew about the culture and about the law, disability, [and] people with disabilities." (Tr. at 125) She could not recall any of the specific recommendations that she made, nor did she identify any other examples of her participation in policy formulation in the eight years she has been a Patient Representative.

the emergency room, rather than later on when they are admitted. Corporan stated that she recommended that this practice be adopted because she was the only Patient Representative in the facility, and it was burdensome for her to be solely responsible for distributing the Bill of Rights. Her supervisor agreed with her and made the decision to transfer the responsibility to emergency room personnel. Lennard Gordon testified that during the 24 years he has been a Patient Representative, he once filled in for an Associate Director at the Kings County facility. In this role, he reviewed and edited documents pertaining to policies on advanced directives, the Patient Bill of Rights, do not resuscitate policies, and regulations for a joint commission. Gordon testified that this entailed making sure that the documents accurately reflected the current policies and relevant law. The remaining ten witnesses indicated that they have no involvement with formulating policy.

The majority of Patient Representatives do not supervise other employees. However, Corporan testified that she supervises one Community Associate and one other Patient Representative. With respect to the Patient Representative, Corporan testified that she interviewed her and made the final decision to hire her. Additionally, Jose Santiago testified that he supervises two Clerical Associates when his own supervisor is not present to do so. He also completes their evaluation forms. Ariane Garcia also testified that she supervised a volunteer Patient Navigator and that she completes a quarterly and annual evaluation for this employee.[7]

[7] Two other employees who did not testify indicated in their survey that they also supervise employees. Aristotle Tancio's survey indicated that he directly supervises seven employees in the titles Patient Representative, Case Manager, and Patient Navigator. His supervisory duties include assignment changes, overtime authorization, and writing tasks and standards. Diana Belozovsky's survey indicated that she indirectly supervises 14 other Patient Representatives. Her supervisory duties include overtime authorization.

None of the Patient Representatives indicated, through testimony or in their survey, that they perform any labor relations functions or that they assist a manager who is involved with collective bargaining negotiations or administration of collective bargaining agreements.

Procedural History

Over the four days of hearing held in this matter, the testimony of the Patient Representatives was, for the most part, similar and consistent with the description of the position in the job specification. Prior to the second day of hearing, the Trial Examiner e-mailed the parties and encouraged them to select their "best" witnesses to support their position and to avoid presenting more than one witness to testify to the same facts. (Trial Examiner Ex. 4) Following the second day of hearing, in which four additional witnesses testified, the Trial Examiner again advised the parties that the testimony was duplicative and, therefore, not particularly helpful or necessary for the Board's investigation. Consequently, the Trial Examiner asked HHC to produce a proposed witness list of additional witnesses and emphasized that "[t]estimony that would be helpful consists of testimony regarding job duties or responsibilities that differs from, or elaborates significantly upon, testimony we have already heard, the answers articulated in the surveys, and the duties listed in the job description." (Trial Examiner Ex. 6) HHC produced a list of 19 witnesses along with a brief description of the testimony he or she would offer. In this letter, HHC also stated:

> [HHC] respectfully objects generally to any limitation or restriction on the quality of its defense or the manner necessary for it to defend itself in this or in any other matter before the Office of Collective Bargaining. Nevertheless, [HHC] is cognizant that duplicative evidence is not an efficient use of time. To that end, of the approximately 88 potential witnesses we have excluded a majority of them and, in particular, excluded any pure "Language Interpreter" type Patient Rep. witnesses in the list above. [HHC] provides the foregoing list of witnesses as a concise and non-duplicative sampling of the relevant information from various Facilities. This

> sampling should allow [HHC] a full and fair opportunity to mount the defense of its choosing with advice of its counsel.[8]

(Trial Examiner Ex. 20)

The Trial Examiner examined the proposed witness list and the descriptions of the testimony HHC expected each witness would provide and compared it to previous testimony as well as the surveys. The Trial Examiner concluded that "[a]fter a careful evaluation, it is clear that much of the proposed testimony concerns Patient Representative duties about which we have already heard extensive testimony." (Trial Examiner Ex. 15) Citing the transcript, the Trial Examiner identified which witnesses had already testified to certain duties identified by HHC as requiring additional testimony. The Trial Examiner also determined that additional testimony was not required regarding uncontested duties about which there was extensive evidence in the record.[9] Regarding duties that had not previously been elaborated upon, the Trial Examiner directed HHC to provide a detailed offer of proof or affidavits from ten of the proposed witnesses. HHC

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[8] The letter also stated that:

> [HHC] reserves the right (as discussed) to supplement the foregoing brief descriptions and provide any additional offers of proof regarding why the foregoing witnesses are necessary and essential for [HHC's] defense of this matter. [HHC] further reserves the right to replace any of the foregoing witnesses with a relevant substitute witness in the event that the original witness is not available for testimony for any reason.

(*Id*.)

[9] These duties were set forth in the job description, and witnesses had testified concerning these duties. They included: addressing and investigating complaints for resolution; engaging staff to improve the patient experience; collaborating with other departments and all levels of staff to address delivery of service; acting as liaison with staff external authorities, and other agencies; participating in corrective measures; assisting with administrative and supervisory responsibilities; supervising subordinates; attending high-level meetings and making recommendations; participating in multidisciplinary staff meetings; and sharing ideas on how to expand patient experience [with] Executive Administration.

submitted its offer of proof, and the Trial Examiner conducted further analysis of the proposed testimony. The Trial Examiner concluded that the proposed testimony of three of the witnesses would be cumulative. With respect to the others, the Trial Examiner noted that "while some of the proposed testimony concerns the witness' possible role in policy matters, . . . HHC failed to provide the requested information regarding whether someone else reviewed, approved, or decided to implement any proposed 'policies.'" (Trial Examiner Ex. 19) Nevertheless, the Trial Examiner determined that it would be most expeditious to call the witnesses to testify to the details. Thereafter, HHC produced five additional witnesses who testified over two days of hearing.

Relevant Bargaining Units

OSA and DC 37 agreed that the Patient Representative title has a community of interest with the titles in both of their bargaining units and indicated a preference for an election to decide which Union would represent the Patient Representative title.

OSA's bargaining unit, Certification No. 3-88, consists of employees with titles including Senior Health Care Program Planner/Analyst, Clinical Business Analyst, and Senior Management Consultant (Business Organization & Methods). Employees in the Senior Health Care Program Planner/Analyst title plan, design, analyze, and evaluate programs and systems relating to the delivery of health care services. These activities are implemented "through consultation, liaison, and analytical functions." (OSA Ex. B) The duties and responsibilities of the Clinical Business Analyst title include the "on-going assessment, design, development and implementation of corporate-wide clinical systems." (OSA Ex. C) The Senior Management Consultant title is responsible for "providing advice on business organization and methods and for the establishment and implementation of programs for the evaluation, improvement, and regularization of normal business operations" and include tasks such as "cooperating and liaising with executive personnel

concerning problems and activities in the area of business organization." *OSA*, 8 OCB2d 19 (BOC 2015).

DC 37's bargaining unit, Certification No. 46C-75, consists of employees with titles such as Client Navigator, Clerical Associate, and Enrollment Sales Representative. The Client Navigator title is responsible for performing tasks "related to inquiries by the general public and facilitates the flow of clients. Primary duties include interaction with clients, providing information, explaining rules, regulations, policies and procedures." (DC 37 Ex. B) The duties of a Clerical Associate encompass "clerical related office activities utilizing manual and automated office systems." (DC 37 Ex. C) The duties of the Enrollment Sales Representative title include identifying members of the public who are qualified to join the MetroPlus health plan and "educat[ing] them as to the benefit of selecting MetroPlus as a managed care provider." (DC 37 Ex. D)

POSITIONS OF THE PARTIES

HHC's Position

HHC argues that the evidence presented demonstrates that the Patient Representative title performs managerial and/or confidential duties and is therefore exempt from collective bargaining under the Taylor Law. HHC claims that Patient Representatives play a critical role as representatives of the hospital administration. It maintains that the Patient Representative's central function is to take and resolve complaints, focus on minimizing risk to patients, minimizing potential litigation to HHC facilities, and humanizing the patient experience of the hospital and its policies. It further contends that employees working in the Patient Representative title "acquaint[] patients with hospital policy, interacting with patients to identify problem[] areas, and ultimately

participating in the formulation of policies, plans and standards of the Facility by recommending improvements and remedial/corrective actions." (HHC Br. at 37) In addition, HHC argues that Patient Representatives are confidential because they act in a confidential capacity as representatives of the hospital administration.

Alternatively, HHC argues that Patient Representatives should be excluded from collective bargaining under the HHC Act. According to HHC, HHC Act § 7385(11) provides a much broader exclusion from the right to representation than the Taylor Law or the NYCCBL. HHC contends that under the HHC Act it is not necessary to determine whether the duties of the Patient Representative rise to the level of "regular," "active," or "significant" participation in policy formulation. (HHC Br. at 51) It further argues that under HHC Act § 7405, any conflicts between the HHC Act and the Taylor Law must be resolved in favor of the HHC Act. As such, HHC contends that it has met its burden of proving that Patient Representatives are managerial and/or confidential and therefore ineligible for collective bargaining.

Finally, HHC reiterated its "continuing general objection to any limitation or restriction on the quality of its defense . . . ." (HHC Br. at 5, n. 8) In particular, HHC notes that the Trial Examiner determined that it was not necessary to hear testimony from all 88 Patient Representatives and instead limited the testimony to 13 witnesses.

OSA's Position

OSA argues that employees serving in the Patient Representative title are eligible for collective bargaining and should be added to OSA's bargaining certificate, which contains hundreds of employees who hold the same or similar positions. It contends that there is a presumption of eligibility for collective bargaining rights that has been codified in the Taylor Law and the NYCCBL and that HHC has not met its burden of demonstrating that Patient

Representatives meet the limited exception for employees who are found to be managerial or confidential.

OSA argues that it is clear that Patient Representatives are not managerial or confidential employees. While they have an important role in ensuring patient complaints are processed, they have no role in policy formulation, labor relations, or personnel administration. At most, they are resource people who provide data to those who make actual policy decisions. Furthermore, when evaluating whether an employee is considered confidential, the employer must demonstrate that the employee assists a manager in collective negotiations, or the administration of collective bargaining agreements, or personnel administration, and the employee must act in a confidential capacity to that manager. Patient Representatives do not have any confidential duties. Handling patients' medical records or other personal information is not considered confidential in this context.

Finally, OSA argues that the Board should apply collateral estoppel and *stare decisis* to once again reject HHC's argument that the HHC Act applies.

DC 37's Position

DC 37 argues that Patient Representatives share a community of interest with approximately 3,500 employees in its Clerical bargaining unit. Similar to these titles, Patient Representatives communicate with patients and staff, interact with the public and patients regarding their entitlement to healthcare, and are responsible for providing information to patients and acting as a liaison between patients and other hospital personnel.

DC 37 argues that Patient Representatives do not formulate policy by developing HHC's objectives and the means of fulfilling those objectives. At most, a Patient Representative is a resource person who informs supervisors about their experiences and makes recommendations for

how to improve patients' experiences, but lacks authority to implement policy. Additionally, DC 37 argues that the surveys and testimony show that any minor supervisory responsibilities fall short of the level of responsibility necessary to show that they are managerial employees. Furthermore, Patient Representatives have little to no labor relations or personnel responsibilities, and there is no evidence to demonstrate that they assist with labor management or personnel administration matters in a confidential capacity.

As such, DC 37 argues that the Patient Representatives title is eligible for collective bargaining and an election should be held to allow Patient Representatives to exercise their choice in selecting a bargaining representative.

DISCUSSION

As a preliminary matter, we reject HHC's general objection to "any limitation or restriction on the quality of its defense." (HHC Br. at 5, n. 8) The Trial Examiner conducted a thorough investigation into the actual duties of Patient Representatives, which included examining 74 surveys. Furthermore, while not required, the Trial Examiner exercised her discretion to hold a hearing in this matter. *See Matter of NYC Health & Hosp. Corp. v. Bd. of Certification of the City of NY*, 2007 NY Slip Op 30921(U) (noting that "the Board's granting of a hearing to determine [a title's] representation status is merely discretionary" and that the Board "may consider whatever evidence is at hand, whether said evidence is obtained through a hearing or otherwise"). After the witness testimony became cumulative and, therefore, no longer helpful to the Board's investigation, the Trial Examiner gave HHC the opportunity to present an offer of proof and/or proposed stipulation regarding additional witnesses. The Trial Examiner carefully evaluated HHC's proposed witness testimony and determined that many topics had already been discussed

at length and, therefore, it would not be necessary to hear additional testimony concerning these topics. With respect to the proposed testimony that appeared to be new or different, the Trial Examiner held two additional days of hearing at which five witnesses testified. The Board is satisfied that it has all the evidence it needs to make a determination in this matter.[10] Therefore, we find that HHC had a full and fair opportunity to present any and all evidence that it deemed relevant and that, in fact, it did so.

It is uncontested that the NYCCBL applies to HHC and its employees. *See* NYCCBL §§12-303(g)(2) and 12-304(b); HHC Act § 7390(5).[11] The NYCCBL presumes that public employees are eligible for collective bargaining but provides a limited exception for employees whom the Board finds are 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. The NYCCBL further provides that the Board of Certification has the "power and duty" to determine whether employees are managerial and confidential within the meaning of

[10] In its closing brief, HHC had the opportunity to make arguments based not only on the evidence received at the hearing but also on the surveys of employees who did not testify, which are part of the record.

[11] NYCCBL § 12-303(g) expressly includes HHC in its definition of a public employer, and NYCCBL § 12-304 provides that the NYCCBL shall be applicable to any public employer "subject to this chapter by state law" and its employees. HHC Act § 7390(5) provides that HHC and its employees are subject to the NYCCBL and the Taylor Law.

Civil Service Law Article 14 ("Taylor Law" or "CSL") § 201.7(a). *See* NYCCBL § 12-309(b)(4). 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 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) (Wetzel, J.); *see also Matter of Shelofsky v. Helsby*, 32 N.Y.2d 54, 58-61 (1973) (finding that the statutory criteria for managerial and confidential designations are not unconstitutionally vague).

At the outset, we once again reject HHC's arguments that the HHC Act sets forth an alternative definition for managerial and/or confidential employees that the Board should interpret and apply. We have consistently held, and the courts have affirmed, that the HHC Act and the NYCCBL are consistent in their mandate to apply Taylor Law § 201.7(a) to determine the eligibility of HHC employees for collective bargaining.[12] *See Matter of NYC Health + Hosp. v. Org. of Staff Analysts*, 2017 NY Slip Op 32393(U) (Sup. Ct. N.Y. Co. Nov. 13, 2017) (Edwards,

[12] Accordingly, we need not revisit HHC's arguments that the Taylor Law definitions do not apply. *See OSA*, 10 OCB2d 2, at 17 ("The doctrine of *stare decisis* recognizes that legal questions, once resolved, should not be reexamined every time they are presented") (quoting *Matter of Deposit Cent. School Dist. v. Pub. Empl. Rel. Bd.*, 214 A.D.2d 288, 290 (3d Dept. 1995)); *see also State of New York (Dept. of Correctional Servs.)*, 43 PERB ¶ 3039, at 3149 n. 2 (2010) (no need to repeat reasoning for rejecting arguments recently rejected in another matter).

J.) (affirming *OSA*, 10 OCB2d 2 (BOC 2017); *OSA*, 11 OCB2d 8 (BOC 2018); *OSA*, 8 OCB2d 28, at 18-19 (BOC 2015); *OSA*, 8 OCB2d 19, at 18-25, 32-36; *OSA*, 74 OCB 1, at 4-7 (BOC 2004); *CWA*, 40 OCB 5, at 15-23 (BOC 1987). *See also OSA*, 78 OCB 5, at 40-42 (BOC 2006), *affd., Matter of NYC Health & Hosp. Corp. v. Bd. of Certification of the City of NY*, 2007 NY Slip Op 30921(U) (Sup. Ct. N.Y. Co. April 23, 2007) (Tolub, J) (applying CSL § 201.7(a) to HHC employees); *OSA*, 78 OCB 1, at 5-8 (BOC 2006) (same); *DC 37*, 10 OCB 41, at 13-14 (BOC 1972) (same). Even in cases involving HHC employees, the courts have consistently held that 'the exclusion of managerial and confidential employees is an exception to the Taylor Law's strong policy of extending coverage to all public employees, and that exclusion is to be read narrowly, with all uncertainties resolved in favor of coverage." *NYC Health & Hosp. Corp.*, 2007 NY Slip Op 30921(U) (citing *Lippman v. Pub. Empl. Rel. Bd.*, 263 A.D.2d 891, 904 (3d Dept. 1999)).

Under the Taylor Law, there are only two types of managers are excluded from collective bargaining. The first is a manager "who formulate[s] policy." CSL § 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." *SEIU, L. 300*, 5 OCB2d 33 (BOC 2012) (quoting *State of New York*, 5 PERB ¶ 3001, at 3005 (1972)); *see also OSA*, 11 OCB2d 8, at 18 (BOC 2018); *EMS Superior Officers Ass'n.*, 68 OCB 10, at 21 (BOC 2001); *Unif. Sanitation Chiefs Ass'n.*, 66 OCB 4, at 26 (BOC 2000). Employees who formulate policy "include not only a person who has the authority or responsibility to select among options and to put a proposed policy into effect, but also a person who participates with regularity in the essential process which results in a policy proposal and the decision to put such proposal into effect." *OSA*, 11 OCB2d 8, at 18 (quoting *State of New York*, 5 PERB at ¶ 3005); *see also OSA*, 78 OCB 1 (BOC 2006).

Participation 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).

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

authority to make decisions necessary to invoke managerial status." *Id*. (quoting *UFOA, L. 854*, 50 OCB 15, at 23) (internal quotation marks omitted).

Furthermore, "[a]n employee who participates in the policy making process in an advisory role, as a resource person, or in a clerical capacity does not formulate policy." *CWA, L. 1180*, 2 OCB2d 13, at 13 (citing *OSA*, 78 OCB 1, at 19, 27) (finding eligible employees who gather and analyze data for use by upper management and employees who provide technical advice); *Local 1180, CWA*, 46 OCB 3, at 10 (BOC 1990) (finding eligible employees who are informed of new objectives, are asked to prepare procedures for achieving them, and attend conferences for the purpose of providing technical advice); *County of Rockland*, 28 PERB ¶ 3063, at 3144 (1995) (finding eligible a "high level supervisor with a great degree of technical skill" who evaluated current and future traffic safety policies and made recommendations)). As such, the court has found that "supervisors are not involved in policy formulation merely because they attend monthly meetings at which, based upon their field experience and technical expertise, they make suggestions on how to improve upon the methods by which mental health services are presented." *City of Nassau v. Nassau Cty. Pub. Empl. Rel. Bd.*, 283 A.D.2d 428, 428-29 (2d Dept. 2001).

For example, in *CWA*, 2 OCB2d 13, at 39 (BOC 2009), the Board found the position of Director of the Ombudsman Services Unit at the Human Resources Administration eligible for collective bargaining. Like Patient Representatives, the employee in that position responds to complaints from the public, works within his agency to resolve problems, and is called upon to provide information regarding issues of public concern. However, as the head of the ombudsman unit, his responsibilities also extend beyond those of Patient Representatives: he has authority to

change program operations.[13] The Board concluded that the employee "addresses operational concerns but does not formulate policy." *Id*.

Here, Patient Representatives consistently address and investigate patients' complaints and grievances, often collaborating with other departments and multiple levels of staff to resolve issues. They serve as ambassadors of the hospitals and facilities, by ensuring that patients' needs are addressed and mitigating potential risks whenever possible. Patient Representatives also attend multi-disciplinary and high-level meetings where they are relied upon to make recommendations on ways in which the patient experience can be improved. Additionally, some Patient Representatives translate medical evaluations, and a few assist with administrative and supervisory duties. We do not find that these duties rise to the level of policy formulation.

Patient Representatives participate in implementing policies by educating patients about specific policies such as the Patient Bill of Rights. Additionally, they regularly act to ensure that hospital policy is adhered to in relation to the service and care of patients. However, there is no evidence to demonstrate that Patient Representatives have the authority to "shape and define [the] overall operation, direction and objectives in furtherance of [HHC's] institutional mission . . . ." *Lippman*, 263 A.D.2d at 900. Rather, it is clear that other employees above the Patient Representatives "have the ultimate authority to select among options and put a proposed policy into effect," while Patient Representatives take steps on a daily basis to ensure proper implementation of those policies. *SEIU, L. 300*, 5 OCB2d 33, 32-33 (BOC 2012); *see OSA*, 11

[13] The Director of the Ombudsman Services Unit was "part of the team that determined how to set up the omsbudsman program." *CWA*, 2 OCB2d 13, at 39. As its first director, he "determined that the unit should respond to issues raised in correspondence that accompanied returned shelter allowance checks." *Id*. In addition, in the absence of his supervisor, he attends meetings with other City agencies "at which he has authority to make decisions that pertain his unit." *Id*.

OCB2d 8, at 20 (BCB 2018) (finding that highly skilled Directors of Planning function at a senior level of HHC as implementers and subject matter experts, not policy makers).

A few Patient Representatives have worked on editing policy documents to ensure that they properly reflect current policies and/or legal developments. In doing so, their role is to ensure that HHC implements its legal and regulatory obligations. The Board has recently found that similar modifications to policy documents, however, do not rise to the level of policy formulation. *See OSA*, 11 OCB2d 8 (finding eligible for collective bargaining a Director of Planning who participated in the modification of HHC's Patient Bill of Rights to clarify that it prohibits discrimination based upon gender identity and gender expression).

In addition, Patient Representatives serve as resource people. *See City of Nassau v. Nassau Cty. Pub. Empl. Rel. Bd.*, 283 A.D.2d 428, 428-29 (2d Dept. 2001); *OSA*, 11 OCB2d 8, at 21 (BCB 2018) (quoting *CWA, L. 1180*, 2 OCB 13, at 25 (BCB 2009)). They provide suggestions at high-level meetings regarding how patient experiences can be improved. For example, Patient Representatives have recommended ways in which hospital policies can be better communicated to patients, and they have recommended ways to remedy frequent patient concerns, such as long wait times at the pharmacy or difficulty making appointments. Not only must their recommendations be approved by others, but significantly, the nature of their recommendations concerns improving operational quality and efficiency, not policy formulation. *See OSA*, 3 OCB2d 33, at 58-59 (finding that duties such as improving the efficiency of payment operations do not rise to the level of policy formulation); *see also City of Binghamton*, 12 PERB ¶ 3099, at 3185 (finding that making suggestions concerning internal operating procedures of a department do not rise to the level of policy formulation).

Our finding that Patient Representatives do not formulate policy is consistent with prior determinations regarding employees who similarly address grievances and complaints on behalf of constituents. *See OSA*, 3 OCB2d 39 (BOC 2010) (no dispute regarding eligibility of Ombudsman (Juvenile Justice)); *CWA*, 3 OCB2d 32, at 28 (ordering an election for Customer Information Representatives at agencies throughout the City who respond to inquiries from the public and provide information); *see also County of Orange*, 29 PERB ¶ 3000.24 (1986) (certifying a bargaining unit that includes the title Ombudsman).

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 has 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." CSL § 201.7(a)(ii). "To fall within this exclusion, 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.'" *OSA*, 8 OCB2d 19, at 41 (quoting *County of Rockland*, 28 PERB ¶ 3063, at 3141-3142; *City of Binghamton*, 12 PERB ¶ 4022, at 4035 (1979)).

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 (2006); *CWA, L. 1180*, 76 OCB 4.

Here, none of the Patient Representatives testified, or stated on their survey, that they prepare for or conduct collective bargaining negotiations or play any role in the administration of agreements. As to personnel administration, the record demonstrates that a few Patient Representatives perform supervisory duties such as overseeing or directing the work of a few employees, completing evaluations and, in one instance, recommending who to hire for a position. However, the Board has found that "[s]uch routine supervisory duties do not warrant the exclusion of these employees for collective bargaining." *OSA*, 8 OCB2d 19, at 42 (finding eligible employees who perform the same supervisory duties, among others); *CWA, L. 1180*, 2 OCB2d 13, at 80-81 (BCB 2009) (listing various examples of supervisory functions and reiterating that supervisory functions are insufficient to establish managerial involvement in labor relations or personnel administration).

We also find that the Patient Representative title is not confidential. "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)."[14] CSL § 201.7(a). *See also* NYCCBL § 12-305 (employer has the burden to establish confidentiality). In order to meet this definition, the

[14] 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." CSL § 201.7(a)(ii).

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 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.

Here, the evidence demonstrates that Patient Representatives do not meet the first prong of the test for confidentiality. Of the 13 Patient Representatives who testified and the 61 others who submitted surveys, none indicated that they assist a manager with significant involvement in labor relations or personnel administration in the performance of those duties. As such, we find that Patient Representatives do not meet either prong of the test for confidentiality.[15]

Since Patient Representatives do not formulate policy, have significant involvement in labor relations or personnel administration, or assist a manager with significant involvement in labor relations or personnel administration, we find that the title is eligible for collective bargaining.

[15] HHC did not make a detailed argument regarding why it believes Patient Representatives should be designated confidential. Other than re-stating the law regarding confidentiality, HHC's only argument concerning Patient Representatives was that they "are confidential as they act in a confidential capacity as the representative of hospital administration." (HHC Br. at 37) However, we note that regarding access to confidential information in general, the record reflects only that the Patient Representatives may sometimes access confidential *patient* information. Access to this type of information is not relevant to the analysis of whether a title is deemed confidential and therefore excluded from collective bargaining. *See OSA*, 10 OCB2d 2 at 17 (quoting *Lippman*, 263 A.D.2d at 903) (knowledge of personnel or disciplinary matters does not warrant a confidential designation where it is limited and does not encompass labor relations information significant to the basic mission of the employer); *OSA*, 78 OCB 5, at 42 (access to confidential marketing information insufficient for a confidential designation); *OSA* 11 OCB 2d at 26 (confidential information concerning budget matters and implementation of projects insufficient for a confidential designation).

OSA and DC 37 agreed that the Patient Representative title has a community of interest with the titles in both units and indicated a preference for an election to decide which union would represent the title. HHC did not take a position on the appropriate unit placement of Patient Representatives should they be found eligible for bargaining. Given the parties' positions and the evidence before us, we find that accretion to either bargaining unit is appropriate because the Patient Representative job duties, qualifications, and/or working conditions are substantially similar to the Senior Health Care Program Planner/Analyst, Clinical Business Analyst, and Senior Management Consultant (Business Organization & Methods) titles represented by OSA and the Client Navigator, Clerical Associate, and Enrollment Sales Representative titles represented by DC 37.[16] Accordingly, we direct that an election be conducted among employees in the Patient Representative title to ascertain the wishes of the employees as to their union representation.[17]

[16] NYCCBL § 12-309(b)(1) provides that one of the Board of Certification's powers and duties is:

> to make final determinations of the units appropriate for the purposes of collective bargaining between public employers and public employee organizations, which units shall be such as shall assure to public employees the fullest freedom of exercising the rights granted hereunder and under executive orders, consistent with the efficient operation of public service, and sound labor relations….

[17] Pursuant to NYCCBL § 12-309(b)(2), the Board of Certification also has the power and duty:

> to determine the majority representative of the public employees in an appropriate collective bargaining unit by conducting secret-ballot elections or by utilizing any other appropriate and suitable method designed to ascertain the free choice of a majority of such employees, to certify the same as the exclusive bargaining representative thereof; to designate representatives; and to determine the length of time during which such certification or designation shall remain in effect and free from challenge or attack….

The Patient Representative title will be added to the bargaining unit represented by the union that receives a majority of the valid ballots cast.

ORDER AND DIRECTION OF ELECTION

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

ORDERED, that the employees in the title Patient Representative (Title Code No. 00347C), are eligible for collective bargaining; and it is further,

DIRECTED, that as part of the investigation authorized by the Board, an election by secret ballot be conducted under the Board's supervision, at a date, time, and place to be fixed by the Board, among the employees in the title of Patient Representative (Title Code No. 00347C), employed by New York City Health + Hospitals to determine whether these employees wish to be represented by the Organization of Staff Analysts or District Council 37, AFSCME, AFL-CIO for the purposes of collective bargaining and accordingly be added to the Staff Analyst bargaining unit or the Clerical bargaining unit. Employees in the title Patient Representative, employed during the payroll period immediately preceding this Decision and Direction of Election, other than those who have voluntarily quit, retired, or who have been discharged for cause before the date of the election, are eligible to vote; and it is further

DIRECTED, that within 14 days after service of this Decision and Direction of Election, New York City Health + Hospitals will submit to the Director of Representation an accurate list of the names and addresses of all the employees in the title Patient Representative who were employed during the payroll period immediately preceding the date of this Decision and Direction of Election.

Dated: August 22, 2018
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
CHAIR