

OSA, 11 OCB2d 38 (BOC 2018)

(Rep) (Docket No. AC-1625-16)

Summary of Decision: The Union sought to add the following titles to its bargaining unit: Deputy Director of Tenant and Community Affairs, Deputy Director of Social and Community Affairs, Director of Tenant and Community Affairs, Assistant Director of Intergroup Relations, and Director of Social and Community Services. NYCHA argued that the titles are either vacant or excluded from collective bargaining because they are managerial and/or confidential. The Board dismissed the petition as to the vacant titles. However, the Board found the non-vacant titles, Director of Tenant and Community Affairs and Assistant Director of Intergroup Relations, eligible for collective bargaining and added them to the bargaining unit. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION**

In the Matter of the Certification Proceeding

-between-

ORGANIZATION OF STAFF ANALYSTS,

Petitioner,

-and-

THE NEW YORK CITY HOUSING AUTHORITY,

Respondent.

DECISION

On April 5, 2016, the Organization of Staff Analysts (“Union”) filed a petition requesting that the Board of Certification add the following titles to its Staff Analyst bargaining unit, Certificate No. 3-88: Deputy Director of Tenant and Community Affairs (Title Code No. 06446), Deputy Director of Social and Community Affairs (Title Code No. 06445), Director of Tenant and Community Affairs (Title Code No. 55091), Assistant Director of Intergroup Relations (Title Code

No. 55075), and Director of Social and Community Services (Title Code No. 60585). The New York City Housing Authority (“NYCHA” or “Authority”) argues that the Board should not certify those titles that were vacant when the petition was filed or became vacant thereafter. It further argues that the remaining titles are excluded from collective bargaining under the New York City Collective Bargaining Law (“NYCCBL”) because they are managerial and/or confidential. Consistent with the Board’s policy of not making eligibility determinations for vacant titles, the Board dismisses the petition as to the vacant titles: Director of Social and Community Services, Deputy Director of Social and Community Affairs, and Deputy Director of Tenant and Community Affairs.¹ The Board finds that the titles Director of Tenant and Community Affairs and Assistant Director of Intergroup Relations are eligible for collective bargaining and appropriately added to the Staff Analyst bargaining unit.

BACKGROUND

The Trial Examiner held two days of hearing, at which six employees testified. The employees also submitted surveys that were entered into the record.²

¹ On the date of filing, the Deputy Director of Tenant and Community Affairs and the Director of Social and Community Affairs titles were vacant. The Deputy Director of Social and Community Services title became vacant prior to the commencement of the hearing.

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 and descriptions of the positions were also provided. The Board considered all surveys submitted by the employees.

Director of Tenant and Community Affairs

According to NYCHA's position description, a Director of Tenant and Community Affairs

("DTCA") works:

[u]nder executive direction of the Authority...[and] is responsible for all social work services generally and for the programs of the Social Consultation and the Community Activities Divisions of the New York Housing Authority.

(Ans., Ex. C) Examples of typical tasks performed by a DTCA are:

1. Assists in the development and formulation of Authority policy with regard to tenant concerns including safety and community-related matters.
2. Formulates operational guidelines for the Office of Community Affairs in conformity with [the Authority's] policy.
3. Meets with representatives of tenant organizations, community programs, public officials and other community members to facilitate relations between the Authority's project management staff and tenant body.
4. Investigates instances of alleged discrimination by tenants and applicants for public housing [and] acts to ensure compliance with Authority policy and Federal, State and City laws against discrimination.
5. Attends seminars and conferences on matters related to public housing.
6. Prepares budgets and funding proposals for existing and projected programs [and] reports on the objectives and progress of these programs for review by Authority executives.

*Id.*³

³ Qualifications for the DTCA title are a baccalaureate degree and four years of full-time experience in a government agency or business firm conducting administrative or management studies or an equivalent combination of education and experience.

At the time of the hearing, there was only one employee in the DTCA title. She is the Director of the Health Initiatives unit within the Department of Community Engagement and Partnerships (“Community Engagement”), which “does not have a particularly large policy development role.”⁴ (Tr. 40) She oversees one of the five units reporting to the Executive Vice President (“EVP”) of Community Engagement.

The record established that the primary duty of the DTCA is to oversee the implementation of NYCHA rules issued in response to regulations that it is required to follow related to health, such as mold prevention, lead-based paint response, or pest management. Her work involves internal collaboration within NYCHA and consulting external advisory groups. For example, the DTCA oversees NYCHA’s implementation of the smoke-free rule of the United States Department of Housing and Urban Development (“HUD”), which directs all public housing authorities to prohibit the use of certain tobacco products in specific areas. As part of the implementation of this rule, the DCTA led a working group comprised of multiple NYCHA departments.⁵ She asked the department that operates mixed-finance housing developments if they were interested in implementing HUD’s smoke-free rule, and the working group reached a consensus about whether to recommend additional NYCHA developments for coverage.⁶ The DTCA then drafted a memorandum outlining the working group’s recommendations, which was sent to the Chair of NYCHA for review. The Chair returned it to the DTCA with her final decisions on the scope of

⁴ As Director of Health Initiatives, the DTCA has had several prior civil service titles, including the Union-represented title of Administrative Staff Analyst. There is no evidence that the duties she performs now are substantially different than when she was represented by the Union.

⁵ The work group is comprised of the members from NYCHA’s legal, operations, communications, resident engagement, and intergovernmental affairs departments.

⁶ HUD’s smoke-free rule did not apply to NYCHA’s mixed-finance housing developments.

implementation of the HUD smoke-free rule. Then the DCTA sent the memorandum to the procedures department to outline the specific activities that staff members need to perform in order to implement and enforce the HUD Rule.

The DTCA has a limited role in budgeting. NYCHA gave her a set amount for her unit, and she determines how it should be allocated. She also seeks funding from other sources.

She supervises up to four individuals. However, she is not involved in the collective bargaining process. She does not have any role in labor-management relations and is not present at any collective bargaining negotiations.

Assistant Director of Intergroup Relations

According to NYCHA's position description, an Assistant Director of Intergroup Relations ("ADIR") works:

[U]nder administrative direction, supervises the activities of the Intergroup Relations program in a City Agency [and] performs related work.

(Ans., Ex. E) Examples of typical tasks performed by ADIRs are:

1. Supervises the staff of the intergroup relations program engaged in the elimination of group prejudice, ignorance, and discrimination.
2. Assigns staff to specific phases of the program.
3. Reviews reports, and analyzes and interprets data submitted by staff.
4. Coordinates activities of the program with other City agencies having similar or related programs.
5. Supervises the planning of educational activities designed to prevent the development of intergroup problems.
6. Participates in the formulation and implementation of policies and procedures related to the program.
7. Maintains liaison with community groups and other city agencies, and participates in inter-agency conferences and meetings related to the objectives of the agency program.

*Id.*⁷

At the time of the hearing, five employees held the ADIR title. They work in the following departments: Community Engagement, the Office of Public/Private Partnerships (“Public/Private Partnerships”), the Department of Equal Opportunity (“Equal Opportunity”), and the Office of Safety and Security (“Safety and Security”).

The record established ADIRs gather and analyze information. This is the primary responsibility of the ADIR in Community Engagement, who is the Senior Advisor to the EVP of Community Engagement and attends meetings on her behalf. ADIRs frequently interact with other NYCHA departments and outside entities, such as non-profit organizations. For example, if a private company wants to renovate a NYCHA basketball court, the ADIR in Public/Private Partnerships will solicit the required information from the company and work with NYCHA’s legal department to get a licensing agreement fully executed.⁸ One of the two ADIRs in Equal Opportunity serves as the Public Accessibility Services Coordinator in the People with Disabilities Unit. In addition to interacting with the public, she prepares quarterly reports analyzing data regarding reasonable accommodations requested by residents and applicants.

The primary role of ADIRs is to implement NYCHA policies to comply with its legal obligations. The other ADIR in Equal Opportunity is the Deputy Director in the Office of Contract

⁷ Qualifications for the ADIR title include a Baccalaureate Degree and seven years of experience gained in such fields as intergroup relations, community relations, labor or industrial relations, law, social service, education, housing, research, investigation, personnel administration, or public relations; or a satisfactory equivalent.

⁸ She also serves as the Vice President of the Fund for Public Housing (“FPH”), a nonprofit organization staffed by the three NYCHA employees in Public/Private Partnerships. In this capacity, when an auditor suggests that FPH should have policies on issues such as conflicts of interest and whistleblowers, she works with an attorney to establish best practices for the nonprofit organization for approval by its Board of Directors or President.

Compliance.⁹ She reviews the policies and procedures of HUD, which as a condition of funding requires NYCHA to monitor its contractors and enforce the prevailing wage rules. The ADIR in Safety and Security analyzes Occupational Safety and Health Administration (“OSHA”) regulations and incorporates the changes into NYCHA’s training programs.¹⁰

In their role as implementers, ADIRs create guidelines. One ADIR put together a manual outlining existing HUD policies and procedures regarding the prevailing wage rules for all departments involved in procurement and administering contracts. Another ADIR similarly created a 15-page guidebook delineating what each NYCHA department that holds public events must do to comply with a local law requiring that notices of public events indicate the accessibility features of their facility and a contact person for reasonable accommodation requests. The ADIR in Safety and Security writes memoranda regarding specific safety requirements for NYCHA employees. In particular, she has drafted advisories for handling heat stress and selecting safe footwear.¹¹

ADIRs have limited involvement in their units’ budgets. Their role is to provide information regarding new needs for funding, forecast their revenue, and recommend expenses that can be eliminated.

⁹ She also serves as the Deputy Director of Equal Opportunity. In that capacity, she is temporarily responsible for all the units within Equal Opportunity if the Director of the Equal Opportunity is not available.

¹⁰ She serves as the Assistant Director of Safety and Security and reports to the Director of Safety and Security. In compiling the best safety practices in specialty fields, like elevator maintenance and repair, she recommends whether the subject matter expert should be a NYCHA department or an outside organization, such as OSHA.

¹¹ The safety footwear advisory included photographs and the process to request reimbursement.

ADIRs typically have supervisory responsibilities, such as providing feedback on work assignments, approving on time and attendance, issuing verbal or written counseling, and initiating the disciplinary process.

ADIRs are not involved in the collective bargaining process. The ADIR in Community Engagement indicated that in the event that her department were to go through a reorganization, she may be responsible for gathering information regarding staffing needs. The ADIR in Safety and Security has a collaborative relationship with Local 237, International Brotherhood of Teamsters, District Council 37, and other unions to help promote NYCHA's safety program. She is involved in day-to-day communication with Local 237's Safety and Health Coordinator on subjects such as what are the safest type of footwear for certain titles.

POSITIONS OF THE PARTIES

NYCHA's Position

NYCHA argues that the evidence presented demonstrates that the DTCA and ADIR titles perform managerial and/or confidential duties and are therefore exempt from collective bargaining under the Taylor law. According to NYCHA, the DTCA and ADIR titles should be considered managerial because their duties rise to the level of formulating policy. It argues that the Board has already determined that employees who make recommendations and proposals, effectuate those proposals, and participate in high level meetings are managerial. Three ADIRs oversee and implement policies and procedures. NYCHA characterizes one ADIR as having the ability to go beyond baseline standards required by HUD. ADIRs serve as liaisons for their department, analyze data, make recommendations, and create proposals. For example, the ADIR in the

Disabilities Unit monitors accessibility throughout NYCHA and created a guidebook to ensure compliance with a local law. Also, the ADIR in Safety and Security creates safety advisories.

Alternatively, NYCHA asserts that direct participation in the formulation of policy is not essential if the employee has a role in the broad functioning of a department or unit. According to NYCHA, factors such as the number of subordinate employees, the area of authority, involvement with labor relations, preparation of budget and allocation funds, and involvement in personnel administration are also reliable indicia of the managerial status.

NYCHA contends that employees with the DCTA and ADIR titles should be considered managerial because they are involved with the preparation of the budget and allocation of funds. NYCHA asserts that the ADIR of Community Engagement assists in developing budgets by meeting with employees to gather and analyze data.

In addition, NYCHA asserts that employees with the DTCA and ADIR titles should be considered managerial because they supervise employees. NYCHA notes that the ADIRs can initiate the disciplinary process and have the final sign-off on their subordinates' time and attendance. Although the ADIR of Community Engagement does not currently have a role in labor relations, NYCHA alleges that she might in the future.

NYCHA concludes that these facts are sufficient to prove that employees in the DTCA and ADIR titles are managerial and/or confidential and ineligible for collective bargaining under the NYCCBL.

Union's Position

The Union argues that employees in the DTCA and ADIR titles are eligible for collective bargaining and should be added to its bargaining certificate. It contends that NYCHA has not met

its burden of demonstrating that employees in the DTCA and ADIR titles meet the limited exception for employees who are found to be managerial and confidential.

The Union asserts that the employees do not directly formulate policy. Instead, their duties are limited to providing advice and guidance to their department, other departments within NYCHA, and any partnerships formed for the purposes of furthering the policies of their department and NYCHA. The ADIR of Community Engagement does not have any role in the formulation of policy. The DTCA of Community Engagement's responsibility is limited to overseeing NYCHA's implementation of HUD's smoke-free housing rule and similar rules or initiatives. The ADIR of Public/Private Housing drafts best practices for FPH that apply only to FPH, not NYCHA. The ADIR in the People with Disabilities Unit similarly collects data on reasonable accommodations and produces quarterly reports. Her creation of a compliance guide for a local law is a procedural duty, not a policymaking one. Additionally, while the ADIR of Safety and Security makes recommendations for safety-related issues and their improvements, she is never the final decision-maker.

The Union notes the DCTA and ADIRs do not have a role in creating budgets. The ADIR of Community Engagement only assists the EVP in gathering and analyzing information for the preparation of budgets.

Further, the Union argues that NYCHA has not met its burden to show that the employees in the DTCA and ADIR titles have a role with the collective bargaining process, labor relations, and/or personnel matters. Although the ADIR of Community Engagement testified that she might gather information during a reorganization, this assertion was purely speculative. Moreover, while the ADIR of Safety and Security meets with representatives from other unions to discuss safety

issues of mutual concern to labor and management, she is not involved in the collective bargaining process, and her duties are insufficient to exclude her from collective bargaining as managerial.

DISCUSSION

As a preliminary matter, we address the vacant titles. In its original petition, the Union requested certification of five titles. The Board has long-held that it will not to certify vacant titles. *See OSA*, 8 OCB2d 32, at 30 n.18 (BOC 2015); *see also OSA*, 56 OCB 2 (BOC 1995). Thus, the petition is dismissed as to Deputy Director of Tenant and Community Affairs, Director of Social and Community Affairs, and Deputy Director of Social and Community Services titles. We consider solely the DTCA and ADIR titles and find them eligible for collective bargaining.

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. Accordingly, “it is the public employer’s burden to overcome the statutory presumption favoring eligibility for collective bargaining.” *Local 621, SEIU*, 4 OCB2d 57, at 22-23 (BOC 2011)); *see also DC 37*, 78 OCB 7, at 39 (BOC 2006), *affd.*, *Matter of City of New York*

v. NYC Bd. of Certification, Index No. 404461/2006 (Sup. Ct. New York County Sept. 19, 2007) (Wetzel, J.).

Furthermore, the Board and the courts have long recognized that the managerial and confidential exclusions “are an exception to the Taylor Law’s strong public policy of extending coverage to all public employees and are to be read narrowly, with all uncertainties resolved in favor of coverage.” *CWA, L. 1180*, 2 OCB2d 13, at 11 (BOC 2009) (quoting *Matter of Lippman v. Pub. Empl. Relations Bd.*, 263 A.D.2d 891, 904 (3d Dept 1999)); *see also Village of Suffern*, 38 PERB ¶ 3016, at 3056 (2005) (deciding in favor of coverage where there is any doubt as to the managerial status of an employee).

The NYCCBL provides that the Board has the “power and duty ... to determine whether specified public employees are managerial or confidential within the meaning of [the Taylor Law].” NYCCBL § 12-309(b)(4). When evaluating a public employer’s assertion that an employee should be deemed managerial and/or confidential, and therefore excluded from collective bargaining, 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 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).

The Taylor Law provides for two managerial exceptions. The first is a manager “who formulate[s] policy.” CSL § 201.7(a)(i). Policy formulation is “the development of the particular

objectives of a government agency thereof in the fulfillment of its mission and the methods, means, and extent of achieving such objectives.” *OSA*, 11 OCB2d 22, at 17 (citing *OSA*, 3 OCB2d 33, at 22 (BOC 2010), *affd. sub nom. Matter of City of New York v. Bd. of Certification of the City of New York*, 2011 NY Misc. LEXIS 5119 (Sup. Ct. N.Y. Co. Oct. 27, 2011) (Kern, J.)). An employee who formulates policy “includes 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 22, at 17 (citing *OSA*, 3 OCB2d 33, at 22-23 (quoting *State of New York*, 5 PERB ¶ 3001, at 3005 (1972))). However, 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) (quoting *UFOA, L. 854*, 50 OCB 15, at 20 (BOC 1992)).

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 *OSA*, 3 OCB2d 33, at 22); *see also Lippman*, 263 A.D.2d at 899; *City of Binghamton*, 12 PERB ¶ 3099, at 3185 (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).

It is well established that “[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.” *OSA, 3 OCB2d 33, at 45* (consistently finding that employees who serve as resource people are eligible to participate in collective bargaining, such as the employee who presented tax options to the Water Board or making technical recommendations such as which credit cards taxis should accept); *CWA, L. 1180, 2 OCB2d 13, at 13* (citing *OSA, 78 OCB 1, at 19, 27 (BOC 2006)*) (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). The Board has found that although individuals who serve as resource people “may be highly skilled and function at high levels of the Employers’ administration, the individuals provide information upon which others make policy determinations.” *OSA, 3 OCB2d 33, at 45.*

The DTCA and the ADIRs have a primary and substantial role in implementing policies set to achieve compliance with laws and regulations. *See CWA, 2 OCBd2 13, at 23-24, 27-28* (finding that tasks such as implementation of programs and compliance with state and federal regulations did not warrant a managerial designation based on policy formulation). The DTCA oversees the implementation of NYCHA-issued public housing rules related to health, such as mold prevention, lead-based paint response, or pest management. ADIRs similarly oversee compliance with federal regulations by outlining requirements and procedures in manuals, guidelines, and advisories.

The evidence shows that the DTCA and ADIRs ensure that NYCHA documents properly reflect current policies and/or legal requirements. For instance, the ADIR in the Office of Contract Compliance drafts manuals outlining HUD policies and procedures regarding the prevailing wage rules for all departments involved in procurement and administering contracts. Additionally, the ADIR of Safety and Security drafted advisory memoranda outlining specific safety and security requirements for NYCHA employees.

In their role of policy implementers, DTCAs and ADIRs make recommendations, but do not “regularly participate in the process of selecting among proposals that further the mission of the agency.” *See CWA*, 2 OCB2d 13, at 13. For example, when obtaining best safety practices in specialty fields, such as elevator maintenance and repair, one ADIR recommends whether to consult a NYCHA department or an outside organization as the subject matter expert. The Board has previously found “employees who recommend, establish, and implement technical operational procedures or processes” are eligible for collective bargaining. *OSA*, 8 OCB2d 19, at 39 (BOC 2015).

The DCTA gave one example of a recommendation that exceeded the requirements needed to comply with laws and regulations. In the course of implementing HUD’s smoke-free policy at NYCHA, she suggested that the workgroup consider recommending that additional housing developments be smoke-free. She asked the NYCHA department that oversees the operations of mixed-finance housing developments whether they were interested in implementing HUD’s smoke-free rule. The ultimate recommendation was made by consensus of the workgroup, and it was the Chair of NYCHA who made the final determination. This example does not establish that the DCTA has a regular and significant role in expanding the implementation of policies or policy-

making.¹² Indeed, the unit she oversees is part of Community Development, which she testified does “not have a particularly large policy development role.” (Tr. 40)

While the Board has previously relied upon “indicia of manageriality,” such as preparation and allocation of budgets, these factors are not a substitute for policy formulation. *See OSA*, 3 OCB2d 33, at 43 (quoting *CWA*, L. 1180, 2 OCB2d 13, at 14). Thus, employees who have involvement with budgets have been found to be eligible for collective bargaining if their involvement does not have a significant impact on policy formulation. *See OSA*, 8 OCB2d 19, at 38 (finding employees who prepare budget proposals, oversee and maintain unit budgets, determine historical trends, anticipate expenses, and make need-based recommendations for the departmental budget eligible for collective bargaining). Here, the DTCA allocates the funds assigned to her unit, and some ADIRs recommend expenses that can be cut, gather and analyze data for the EVP of Community Engagement, and request additional outside funding. Accordingly, we find that the duties of the DTCA and ADIRs do not rise to the level of formulating policy under the Taylor Law.

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). The Board has held that “[t]o 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

¹² During her tenure as Director of Health Initiatives, she has held several civil service titles, one of which is Union-represented. There was no evidence that her duties varied when her civil service title changed.

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)).

The Board has long held that employees with supervisory roles are eligible for collective bargaining. *See OSA*, 3 OCB2d 33, at 66-67 ("There 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.") (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. *See id.* at 67; *CWA, L. 1180*, 2 OCB2d 13, at 80-81 (listing various examples of supervisory functions insufficient to establish managerial involvement in labor relations or personnel administration).

The DTCA and ADIGs have typical supervisory duties, such as overseeing the work of their subordinates, giving verbal or written counseling, recommending the initiation of disciplinary action, and approving time and attendance. None of the employees in the DTCA and ADIR titles prepare for or conduct collective bargaining negotiations or play a role in the administration of

collective bargaining agreements.¹³ The DTCA and ADIRs' supervisory duties are not grounds for a managerial designation. *See OSA*, 8 OCB2d 19, at 42 (finding eligible employees who perform the same supervisory duties, among others).

We also find that the DTCA and ADIR titles are not confidential.¹⁴ “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).”¹⁵ CSL § 201.7(a). *See also* NYCCBL § 12-305 (employer has the burden to establish confidentiality). In order to meet this definition, the employee must meet both prongs of a two-part test: “(1) the employee . . . must assist a Civil Service Law § 201(7)(a)(ii) manager in the delivery of labor relations duties described in that subdivision—a duty oriented 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 neither the DTCA nor the ADIR title meets the first prong of the test for confidentiality. Of the six employees who testified, none indicated that they assist a manager with significant involvement in labor relations or personnel administration in the performance of those duties.

¹³ Although one ADIR testified that she might have involvement in labor relations in the future, there was no evidence that her involvement would go beyond gathering data regarding staffing needs during a reorganization or that any such an assignment was forthcoming.

¹⁴ NYCHA did not assert any facts in support of its argument for a confidential designation.

¹⁵ Managerial employees described in clause (ii) are those “who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment.” CSL § 201.7(a)(ii).

Since the DTCA and ADIRs titles do not formulate policy, do not have a significant involvement in labor relations or personnel administration, and do not provide confidential assistance to a manager who has significant involvement in labor relations or personnel administration, we find that the titles are eligible for collective bargaining. In addition, the Board is satisfied that no argument or evidence was presented to rebut the Union's assertion that the eligible employees share a community of interest with the bargaining unit members. Accordingly, we add these titles to the Staff Analyst bargaining unit, Certification No. 3-88.

ORDER

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

ORDERED, that Certification No. 3-88 (as previously amended) be, and the same hereby is, further amended to include the titles Director of Tenant and Community Affairs (Title Code No. 55091) and Assistant Director of Intergroup Relations (Title Code No. 55075), subject to existing contracts, if any.

Dated: November 30, 2018
New York, New York

SUSAN J. PANEPENTO

CHAIR

ALAN R. VIANI

MEMBER



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NOTICE OF AMENDED CERTIFICATION

This notice is to acknowledge that the Board of Certification has issued an Order Amending Certification as follows:

DATE: November 30, 2018 **DOCKET #:** AC-1625-16

DECISION: **11 OCB2d 38 (BOC 2018)**

EMPLOYER: The New York City Housing Authority
250 Broadway
New York, NY 10007

CERTIFIED/RECOGNIZED BARGAINING REPRESENTATIVE:

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

AMENDMENT: The Staff Analyst bargaining unit, Certification No. 3-88,
has been amended to add the following titles:

Added: **Director of Tenant and Community Affairs**
(Title Code No. 55091)

Assistant Director of Intergroup Relations
(Title Code No. 55075)