OSA, 12 OCB2d 34 (BOC 2019)

(Docket No. RB-1671-19)

Summary of Decision: The issue of whether a specified public employee has managerial and/or confidential status was referred to this Board after being raised in an improper practice petition before the Board of Collective Bargaining. After a review of the evidence, the Board found that HHC did not overcome the presumption that the employee was eligible for collective bargaining at the time of her termination and referred the matter back to the Board of Collective Bargaining. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

In the Matter of

ORGANIZATION OF STAFF ANALYSTS,

-and-

NYC HEALTH + HOSPITALS.

DECISION AND ORDER

The undersigned Chair and Director of the Office of Collective Bargaining ("OCB Director") referred the issue of Letitia Biggs' eligibility for collective bargaining rights to this Board. In an improper practice proceeding filed by the Organization of Staff Analysts ("Union" or "OSA") and Biggs, the employer, NYC Health + Hospitals ("HHC") asserted as a defense that Biggs did not have standing to file the improper practice and that reinstatement and/or backpay could not be ordered as a remedy because she was a managerial and/or confidential employee at the time she was terminated.[1] The New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-309(b)(4) provides that the Board

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

of Certification has exclusive jurisdiction "to determine whether specified public employees are managerial or confidential." After a review of the evidence, this Board finds that HHC did not overcome the presumption that Biggs was eligible for collective bargaining rights at the time of her termination.

BACKGROUND

Procedural History

In an improper practice petition docketed as BCB-4274-18, the Union and Biggs alleged that HHC violated NYCCBL§ 12-306(a)(1) and (3) by terminating Biggs in retaliation for her participation in a union organizing campaign. HHC asserted that Biggs does not have standing to bring the improper practice and that reinstatement and/or backpay could not be ordered as a remedy because she was a managerial and/or confidential employee at the time she was terminated. The Union, however, argued that at all times Biggs remained eligible for collective bargaining as her duties were not managerial or confidential in nature. The BCB issued an interim decision that declined to reach the issue of Biggs' standing and referred the petition to the Trial Examiner for further processing. *See OSA*, 11 OCB2d 40 (BCB 2018). In doing so, the BCB noted that this Board's "determination on the representation petitions may have an impact on our ultimate determination of the merits of the claims presented here and/or the possible remedies."[2] *Id.* at 12. A hearing was held on the improper practice petition, and the parties filed briefs in support of their positions.

[2] The eligibility of Biggs' civil service title is pending in two representation petitions, which were subsequently consolidated: RU-1654-18, in which the Union seeks to represent Assistant Directors of Nursing and others, and RE-1655-18, in which HHC seeks a managerial and/or confidential designation for the titles. A hearing on the issues presented has not yet commenced.

On August 9, 2019, the Trial Examiner notified the parties that the OCB Director was referring the issue of Biggs' status to this Board for a determination, and she offered the parties the opportunity to place additional facts concerning Biggs' duties into the record. Although HHC objected to the referral of the matter to this Board, it indicated that it did not wish to engage in a hearing or otherwise present further evidence concerning Biggs' duties. Both parties instead chose to file briefs addressing Biggs' employee status.

Biggs' Duties and Responsibilities

At the time of her termination on January 25, 2018, Letitia Biggs was an Assistant Director of Nursing ("ADN"). HHC classifies the ADN title as a "Group 11" managerial title. According to HHC's position description, an ADN:

> Under general supervision of the Associate Director of Nursing, assists with the planning, organizing, directing, coordinating and evaluating of nursing service and education programs of the hospital, diagnostic and treatment center, or a major unit within the Department of Nursing. Performs related work.

(HHC Br., Ex. B) Examples of typical tasks performed by ADNs are:

1. Assists in developing policies, objectives and standards of nursing service and education.
2. Assists in the preparation of personnel, supply and equipment budgets.
3. Assists in the development of administrative procedures and programs of patient care.
4. May have responsibility for planning, organizing, directing, coordinating and evaluating the nursing service in a major clinical division, or a home health agency in a hospital, participating in selection, placement and follow-up of patients transferred to homes.
5. Assists with the planning, organization and conduct of a nursing education program.
6. May assume responsibility for planning, directing, coordinating and evaluating nursing service on the evening and night tours.
7. Directs activities of Supervisor of Nurses.
8. Prepares and makes periodic and daily reports on administrative matters relating to staff and patient management.

9. Participates in the direction and implementation of a quality assurance program for nursing.
10. Attends and chairs regular staff meetings with nursing personnel.
11. Assesses nursing services by making rounds, conducting chart review and evaluating patient care.

(*Id*.)[3]

Biggs was assigned to work in HHC's Home Care program ("Home Care").[4] The functional job description for Biggs' position at Home Care is titled "Assistant Director,/ Intake" [*sic*] and states that this position reports to the Director of Intake.[5] (Union Ex. 1) The functional job description states that this type of ADN: "Evaluates patients referred to the home care agency. Plans and coordinates referrals for home care services." (*Id*.) The job duties are listed as:

1. Evaluates patients referred for home care whether referred from inpatient, ED, D&TC's [*sic*], community, physician practices or other.
2. In collaboration with social workers, family & patients, verifies insurance coverage of home health services.
3. Obtains and documents prior authorization for home care services from insurance providers.
4. Collaborates with the facilities discharge planning personnel, utilization review department and insurance case managers to facilitate safe transition back to the community.

[3] The listed required qualifications for the ADN position are a New York State professional nursing license and a Master's Degree in nursing administration, education, clinical specialty or the equivalent combination of field work and five years of nursing experience, three of which were in a supervisory or teaching capacity; or a Baccalaureate Degree in nursing and six years of nursing experience, four of which were in a supervisory or teaching capacity; or a satisfactory equivalent of education and experience.

[4] According to HHC, the Home Care program provides high-quality, personalized home care services for individuals in need of special care and support after a hospital stay or help with managing a chronic health condition. Home Care services include skilled nursing, physical therapy, clinical social work, care management, and care coordination. These services are offered to patients in Manhattan, Queens, Brooklyn, and the Bronx.

[5] Biggs testified that her functional title was referred to as Transitional Care Nurse ("TCN"), and both parties referred to it as such in their briefs.

5. Consults with physicians, nurses, social workers, discharge planners and other disciplines to establish a coordinated and patient centered home care plan.
6. Interviews the patient, family and caregiver and discusses the home situation, current needs, and any psychological factors that are relevant to the plan.
7. Completes referral information that includes intake data, essential background information, health conditions, course of medical care, and the plan of care.
8. Maintains liaison relationship with hospitals, clinics, physicians and insurance personnel, providing information and education on Organization services, coverage issues, patient status and related areas.
9. Participates in patient care conferences and in-services.
10. Collects and maintains statistical data on all referrals and submits them regularly as required.
11. Participate in quarterly PAC/UR Meetings, QI Meetings, PI projects and agency meetings as required.
12. Keeps abreast of home health issues, regulations and standards.
13. Participates in periodic educational programs offered to referral sources on home care issues and program.
14. Performs PRI's [*sic*] as needed.
15. Performs other related duties as assigned.

(*Id*.)

In addition to the position and job descriptions, details concerning Biggs' duties and responsibilities are set forth in a survey she completed and in her testimony during the improper practice proceeding.[6]

Biggs' primary responsibility as a TCN in Home Care was to generate referrals of patients who were being discharged from a hospital to the Home Care program, to assist the individuals

[6] The survey was submitted in the course of the Board's processing of a representation petition docketed as AC-1641-17, in which OSA sought to add the ADN title to the Staff Analyst bargaining unit. On February 8, 2018, it was withdrawn. Thereafter, the Union filed the petition docketed as RU-1654-18 seeking to represent the ADN title and other titles in a new bargaining unit.

with obtaining necessary paperwork, to process the referrals using a computer system known as the "EPIC" system, and to turn the patient referrals into admissions into the program.[7] In her survey, Biggs identified her duties as follows:

> Job Duty 1 70% of Time
>
> Processing and gathering patient information for the HHC HOME CARE Dept. aka "AT HOME CARE[.]" This information is referred by other sources in the hospital setting. The medical information becomes a case to be sent to Central Office so that home care services can begin in the patient's home.
>
> Job Duty 2 20% of Time
>
> Listening to patient, family and social worker complaints about the services and attempting to remedy the issues whenever possible[.]
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> Job Duty 3 10% of Time
>
> Identifying who patient's (PCP) or primary care physicians are and attempting to notify them that their patient was referred to our home care services[.] (Not our job. This is to be done by the visiting nurse at start of his/her first visit as part of the "coordination of Care model[.]")

(Biggs Survey)[8] Job Duty 3 refers to the process whereby TCNs must obtain what is known as a "face-to-face" attestation form from a patient's doctor in order to process the referral to the Home Care program if the patient is covered by Medicare or Medicaid.

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[7] The method by which Biggs obtained referrals to Home Care varied. When she worked at Harlem Hospital, she did rounds of the hospital and solicited referrals directly from patients and doctors. When she worked at Woodhull Hospital, she could only receive referrals from the Social Work department.

[8] The survey is an 11-page questionnaire issued by the Office of Collective Bargaining in consultation with the parties. It first asks the employee to describe his or her 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

TCNs have monthly productivity goals for how many patient referrals they are expected to generate. In order to get credit for a referral, the patient's information must be processed through the EPIC system, the patient's insurance must be verified, and if needed, a face-to-face form must be obtained.

In addition to these duties, Biggs attended mandatory, facility-wide meetings. Topics at these meetings included TCN productivity and expectations, as well as the discussion of problems with obtaining and correctly processing patient referrals. According to Biggs, she sometimes made recommendations for improving work processes at these meetings as well as during individual meetings with her supervisors. One such recommendation was that the Home Care program follow the "coordination of care" model that was followed by other agencies whereby nurses, social workers, home health aides, and physical therapists all communicated effectively with one another to produce a greater number of patient referrals. Biggs testified that her recommendations generally were not followed.

Biggs was directly supervised by a Senior Associate Director of Nursing. The Senior Associate Director of Nursing reports to a Chief Nursing Officer who, in turn, reports to the CEO of Home Care. Biggs herself did not perform any supervisory duties.

The record reflects that Biggs did not perform any labor relations functions or assist a manager who was involved with collective bargaining negotiations or the administration of collective bargaining agreements.

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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 the questionnaire and either concurs with the employee's statements or notes any disagreements.

POSITIONS OF THE PARTIES

HHC's Position

HHC first argues that it is "outside the scope of an Improper Practice Petition for the [BCB] or Trial Examiner to make a referral to [this Board]" for a determination as to Biggs' employee status under the NYCCBL. (HHC Br. at 4) Rather, HHC contends that the appropriate forum for such a determination is through the processing of the pending representation proceeding concerning the ADN title. Since it is undisputed that Biggs was a "Group 11" employee at the time of her termination, HHC argues that if the BCB finds that HHC committed an improper practice when it terminated Biggs, it may only determine "what, if any, redressability" she is entitled to as a "Group 11" employee. (*Id*.) According to HHC, the BCB cannot compel it to reinstate or pay backpay to a managerial employee who was in an unrepresented title at the time of her termination. Moreover, HHC contends that it would be "unprecedented" for the Board to determine that an employee was eligible for collective bargaining retroactively.[9] (*Id*.)

HHC next argues that the Civil Service Law Article 14 ("Taylor Law") and the NYCCBL are inapplicable to HHC and that it is instead bound by the standards set forth in the New York City Health and Hospitals Corporation Act, N.Y. Unconsolidated Law §§ 7381-7406 ("HHC Act"). According to HHC, HHC Act § 7385(11) provides a more expansive exclusion from the right to representation than the Taylor Law or the NYCCBL. It further argues that under HHC Act § 7405, any conflicts between the HHC Act and the Taylor Law must be resolved in favor of

[9] HHC also argues that, even assuming the Board could make a retroactive finding as to Biggs' employee status, there was no pending representation petition regarding the ADN title at the time that she was terminated. However, this is not accurate because the Union's petition in AC-1641-17 was not withdrawn until February 8, 2018, approximately two weeks after Biggs was terminated.

the HHC Act. In making these arguments, HHC does not address contrary findings by this Board, as well as the Supreme Court, New York County, and the Appellate Division, First Department. *See infra,* p. 16.

HHC did not make any argument as to why the duties that Biggs performed made her ineligible for collective bargaining. Instead, it contended that the Board and the Public Employment Relations Board ("PERB") have both held that a title must be examined in its entirety and not by individual employees. Therefore, it only set forth an argument regarding the ADN title in general. In this respect, HHC asserts that Chief Nurse Executives ("CNEs") regularly rely on ADNs to exercise expertise and discretion to manage their service lines on a daily basis. In addition, off-tour ADNs work night and evening shifts in which they may stand in the shoes of CNEs, Associate Directors of Nursing, or Deputy Directors of Nursing. In doing so, HHC claims that ADNs serve as "incident commanders" in charge of operations and are responsible for highly significant decisions. (HHC Br. at 15)

Further, HHC claims that ADNs are routinely involved in formulating policy by creating standard operating procedures for what is done on the hospital floor. According to HHC, CNEs afford the ADNs great autonomy in their decision-making and often ask ADNs to serve on committees in which policies are created. Additionally, HHC claims that ADNs make recommendations and decisions concerning staffing with respect to overtime, hiring, promotions, assignment changes, and orientation programs. In doing all of this, HHC alleges that ADNs directly assist the ultimate decision-makers in reaching the decisions necessary to conduct HHC's business.

Finally, HHC contends that ADNs are confidential employees because they work directly with CNEs to make personnel and budgetary decisions that concern labor relations and personnel matters such that inclusion in collective bargaining would create a conflict of interest.

Union's Position

OSA argues that under the NYCCBL the presumption is that employees are eligible for collective bargaining and that HHC has not met its burden of overcoming this presumption with respect to Biggs. OSA notes that this Board and the courts have consistently rejected HHC's arguments that the HHC Act applies and has instead found that the NYCCBL provides the applicable standard to determine employee eligibility for collective bargaining.

OSA asserts that Biggs' duties were limited to generating referrals of individuals being discharged from the hospitals to the Home Care program, assisting in getting necessary paperwork to process those referrals so they could be turned into admissions, and performing computer data entry. OSA contends that Biggs had, at best, minimal discretion in the performance of her duties. Moreover, although she occasionally made recommendations to her supervisors concerning ways to improve the process of obtaining patient referrals, the record reflects that she had no authority to implement these recommendations and that instead she was discouraged from making recommendations. OSA argues that Biggs had no role with respect to policy formulation, personnel administration, or collective bargaining. She also did not assist a managerial employee in a confidential manner. Consequently, OSA contends that Biggs was not managerial or confidential within the meaning of the NYCCBL and was therefore eligible for collective bargaining at the time of her termination.

DISCUSSION

The NYCCBL provides that public employees "have the right to self-organization, to form, join or assist public employee organizations" and that "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.[10] *See also* NYCCBL § 12-309(b)(4) (providing that this Board has the exclusive statutory "power and duty . . . to determine whether specified public employees are managerial or confidential").

The NYCCBL is unique in that it provides that improper practice petitions are decided by the BCB, which is comprised of labor, management, and neutral members, but questions concerning eligibility for collective bargaining rights are decided by this Board, which is comprised solely of the neutral members of the BCB. *See* NYCCBL § 12-309(a)(4), (b)(4); New York City, N.Y., Charter § 1172 (stating that the Board of Certification "shall consist of the impartial members of the [BCB]"). The BCB most recently acknowledged this bifurcation and this Board's exclusive jurisdiction to make determinations regarding an employee's status in its interim decision concerning OSA and Biggs' improper practice petition. *See OSA*, 11 OCB2d 40, at 11.

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[10] NYCCBL § 12-305 provides:

> 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.

The OCB Director has the authority to administer and oversee adherence to the provisions of NYCCBL § 12-309, which delineates the separate powers and duties of the BCB and this Board. *See* NYCCBL § 12-309(c)(1). Additionally, OCB's Rules of Practice and Procedure ("OCB Rules") provide that "[i]n its investigation of a question as to the managerial and confidential status of employees, the Board may conduct informal conferences or hearing or use any other suitable method of resolving the matter." OCB Rule § 1-02 (v)(4).

Here, the Director acted consistent with the NYCCBL, the OCB Rules, and the BCB's direction when she referred an issue essential to the underlying improper practice proceeding to this Board. As noted earlier, the BCB expressly stated that resolution of the issues presented in the representation petitions may impact its determination of the merits of or remedy to Biggs' improper practice petition. *See OSA*, 11 OCB2d 40, at 12.[11] As it is clear that the question of Biggs' eligibility for rights under the NYCCBL is within our exclusive jurisdiction, we therefore find that the question was appropriately referred to this Board.

The process of reviewing the managerial or confidential status of an individual employee is consistent with the plain language of the NYCCBL as well as with how this Board has previously analyzed this issue. NYCCBL § 12-309(b)(4) provides that this Board makes determinations as to "whether *specified* public employees are managerial or confidential . . . ." (emphasis added). *See also* OCB Rule §1-02(v) (permitting an employer to seek managerial and/or confidential designations for particular employees). Consequently, in making these determinations the Board has sometimes organized the facts by individual employees and conducted an individual-by-

[11] Moreover, HHC has asserted that if the BCB finds evidence of a violation of the NYCCBL it can only determine what remedy Biggs would be entitled to as an employee who was excluded from collective bargaining. Implicit in this assertion is that resolution of the question of Bigg's eligibility for collective bargaining is essential to the determination of a remedy in the improper practice proceeding.

individual analysis. *See OSA*, 8 OCB2d 28, at 3 n. 2 (BOC 2015). At times, this analysis has resulted in a title being certified for collective bargaining with exceptions made for certain positions that the Board finds to be managerial or confidential. *See e.g.*, *OSA*, 7 OCB2d 2 (BOC 2014); *OSA*, 3 OCB2d 33 (BOC 2010), *affd., Matter of City & NYCHA v. Bd. of Certif. & OSA*, Index Nos. 402466/10 & 402496/10 (Sup. Ct. N.Y. Co. Oct. 27, 2011) (Kern, J.); *CWA, L. 1180*, 2 OCB2d 13 (BOC 2009). Additionally, we have previously made determinations on the status of individual employees before a title as a whole has been certified to a bargaining unit. *See CSTG*, 38 OCB 14 (BOC 1986) (determining which specified Staff Analysts and Associate Staff Analysts were eligible or ineligible for collective bargaining); *CSTG*, 38 OCB 8 (BOC 1986) (same); *CSTG*, 34 OCB 21 (BOC 1984) (same); *CSTG*, 42 OCB 3 (BOC 1988) (certifying OSA as the exclusive representative for purposes of collective bargaining for all Staff Analysts, Associate Staff Analysts, and Program Research Analysts previously found eligible for collective bargaining). As such, we do not agree with HHC's assertion that the determination of Biggs' eligibility for collective bargaining rights cannot be determined until resolution of the pending representation cases, which concern the ADN title as a whole.

We also do not agree with HHC's assertion that this Board's finding regarding Biggs' eligibility would have a retroactive application. The NYCCBL presumes that employees are eligible for collective bargaining rights unless and until a determination is made by this Board finding that the employee is managerial and/or confidential. *See* NYCCBL § 12-305; *Procida*, 39 OCB 2, at 9-10 (BCB 1987) (finding that "[u]ntil such time as the Board may determine that petitioner is managerial and/or confidential within the meaning of the NYCCBL . . . petitioner retains his present status as a 'public employee' and may initiate an Improper Practice proceeding . . . ."); *Fashion Institute of Technology*, 31 PERB ¶ 4501 (ALJ 1998) (finding that since the

employer had never sought, and PERB had never issued, a determination designating the individual's position as confidential, she "remained a public employee as defined by [the Taylor Law]"). Consequently, our determination here has no retroactive effect different from the express language of the NYCCBL.[12]

When evaluating a public employer's assertion that a public employee should be deprived of their rights under the NYCCBL because of their managerial and/or confidential status, 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). The Board and the courts have recognized with specific reference to HHC employees that the managerial and confidential exclusions "are an exception to the Taylor Law's strong policy of extending coverage to all public employees and are to be read narrowly, with all uncertainties resolved in favor of coverage." *Matter of NYC Health + Hospitals v Organization of Staff Analysts*, 171 A.D.3d 529, 530 (1st Dept.

[12] We note that our determination is limited to Biggs' status. We are not determining the managerial and/or confidential status of the entire ADN title, which is pending before us in another proceeding, docketed as RU-1654-18 and RE-1655-18. Moreover, as Biggs was not represented by a union while she was employed, HHC had the right to unilaterally dictate the terms and conditions of her employment, and our determination here does not change that.

2019) (quoting *Matter of Lippman v. Pub. Empl. Relations Bd.*, 263 A.D.2d 891, 904 (3d Dept. 1999)); *see also Matter of NYC Health + Hospitals v Organization of Staff Analysts,* 2019 NY Slip Op 30466(U), *10 (Sup Ct, NY County 2019); *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. 2007); *Village of Suffern*, 38 PERB ¶ 3016, at 3056 (2005) ("Any doubt as to the managerial status of an employee must be decided in favor of coverage by the Act.").

Furthermore, it is well established that an employer's classification of a public employee is not determinative of an employee's rights under the NYCCBL. *See Local 375, CSTG*, 22 OCB 45, at 31 (BOC 1978), *revd. sub nom*., *Matter of Civ. Serv. Tech. Guild, Local 375, DC 37, A.F.S.C.M.E., AFL-CIO v. Anderson*, *revd.,* N.Y.L.J., Oct. 9, 1979, at 10 (Sup. Ct. N.Y. Co.) (Greenfield, J.), *affd.*, 79 A.D.2d 541 (1st Dept. 1980), *revd. on dissenting mem.*, 55 N.Y.2d 618 (1981) (rejecting the argument that HHC's classification of employees as managerial is controlling since only the Board can make such a determination). *See also United Fed'n of Law Enf't Officer*s, 40 OCB 11, at 14 (BOC 1987) (citations omitted) (classification decisions are within the jurisdiction of the NYC Department of Personnel but are distinguished from the establishment of appropriate units for collective bargaining, which is the responsibility of the Board); *OSA*, 33 OCB 22, at 23 (BCB 1984), *revd. in part on other grounds*, 18 PERB ¶ 3067 (1985) (remanded for hearing) (while City has right to reclassify employees, it cannot usurp the authority of the Board to determine appropriate unit placement of employees); *Local 621, SEIU*, 4 OCB2d 57, at 16 n. 16 (2011) (the Board does not consider inclusion in managerial pay plan and welfare fund or the fact that job specification labels the title within the management class of positions when determining whether a title is eligible for collective bargaining); *CWA, L. 1180*, 2 OCB2d 13, at 3 n. 1 (employer's inclusion of employees in managerial pay plan does not preclude eligibility for

collective bargaining); *OSA*, 11 OCB2d 16, at 2 n.1 (BCB 2018) (same). As such, the fact that HHC classified Biggs as a "Group 11" managerial employee has no bearing on our determination of her status under the NYCCBL.

Again, we 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. *See NYC Health + Hosp.*, 171 A.D.3d 529 (affirming *OSA*, 10 OCB2d 2 (BOC 2017)); *NYC Health + Hospitals v. Organization of Staff Analysts,* 2019 NY Slip Op 30466(U) (affirming *OSA*, 11 OCB2d 8 (BOC 2018)); *OSA*, 11 OCB2d 22 (BOC 2018); *OSA*, 8 OCB2d 28, at 18-19; *OSA*, 8 OCB2d 19, at 18-25, 32-36 (BOC 2015); *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., NYC Health & Hosp. Corp.*, 2007 NY Slip Op 30921(U) (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).[13]

Under the Taylor Law, 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

[13] 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. Relations 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). HHC fails to acknowledge, let alone address, *NYC Health + Hosp.*, 171 A.D.3d 529, in which the First Department considered and soundly rejected the exact same arguments HHC makes here. While HHC may ignore or disagree with the court's ruling, this Board cannot do so.

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; *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.

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 entity." *State of New York (Dept. of Env. Conservation)*, 36 PERB ¶ 3029, at 3085 (2003).

Biggs' primary duties were to solicit referrals of patients being discharged from the hospitals to the Home Care program, assist the individuals in obtaining necessary paperwork, verify a patient's insurance coverage, obtain face-to-face attestation forms from a patient's primary care doctor when necessary, process the referrals into a computer system by completing data entry, and convert the referrals into admissions. We do not find that these duties rise to the level of policy formulation. This finding is consistent with prior determinations regarding employees who similarly refer patients to medical services or health plans. *See NYSNA*, 54 OCB 2 (BOC 1994) (finding eligible for collective bargaining Case Management Nurses who prepare paperwork and refer patients to health services clinics or medical offices); *NYSNA*, 54 OCB 1 (BOC 1994) (finding

eligible for collective bargaining Discharge Planning Assessment Specialists who meet with patients and develop plans for post-hospital care); *OSA*, 78 OCB 5 (finding eligible for collective bargaining Enrollment Sales Representatives who market, verify eligibility, and enroll consumers in the MetroPlus health plan).

HHC argued that ADNs formulate policy by, among other things, creating standard operating procedures for the operation of the hospital floor. However, it did not assert that Biggs herself participated in such activity, and the record reflects that she did not.[14] Moreover, we have consistently held that there is a key distinction between setting policy and promulgating procedures, the latter of which does not render an employee managerial. *See SEIU, L. 300*, 5 OCB2d 33, at 30 (citing *Local 621, SEIU*, 4 OCB2d 57, at 24; *Lippman*, 263 A.D.2d 891, at 899; *City of Binghamton*, 12 PERB ¶ 4022, at 4035 (ALJ 1979), *affd.*, 12 PERB ¶ 3099 (1979).

The record reflects that Biggs made suggestions aimed at making the process of obtaining patient referrals more effective and efficient, both in facility-wide meetings as well as during meetings with her supervisors. However, she did not have the authority to implement these recommendations, which concerned the improvement of work processes. In addition, we do not find the suggestions she made or her role in making recommendations to be regular and effective participation in the formulation of policy. *See OSA*, 11 OCB2d 22, at 21 (citing *OSA*, 3 OCB2d 33, at 58-59; *City of Binghamton*, 12 PERB ¶ 3099, at 3185) (Patient Representatives found

[14] We note in this regard that although the ADN job specification states that an ADN "[a]ssists in developing policies, objectives and standards of nursing service and education," we have long held that managerial and/or confidential designations are based on actual duties performed, not merely the job specification. *See OSA*, 11 OCB2d 8, at 4 (Board makes determinations based on actual duties performed and therefore must consider evidence beyond the job description); *CWA, L. 1180*, 2 OCB2d 13, at 48 (employer's organizational structure, use of in-house titles and assignment levels are insufficient to provide a basis for determinations of title as a whole or by assignment level); *Assistant Deputy Wardens Ass'n*, 56 OCB 11, at 19 (BOC 1995) (job descriptions will not be relied upon as controlling proof as to what duties an individual actually performs).

eligible for collective bargaining where their recommendations had to be approved by superiors and concerned "improving operational quality and efficiency, not policy formulation").

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).

Here, the record reflects that Biggs did not participate in collective bargaining negotiations or play any role in the administration of agreements. She also did not play any role in personnel administration. As such, we find that Biggs' duties did not render her a managerial employee.

We also find that Biggs was not a confidential employee. "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). 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 891, at 902.

HHC argued that ADNs work with CNEs to make personnel and budgetary decisions that concern labor relations and personnel matters. However, it did not assert that Biggs participated in such activities, and the evidence demonstrates that she did not. Because she did not assist a manager with significant involvement in labor relations or personnel administration in the performance of those duties, she did not meet the first prong of the test for confidentiality.

In light of the above, we find that HHC did not present evidence sufficient to overcome the presumption that Biggs was eligible for rights under the NYCCBL, including "the right to self-organization, to form, join or assist public employee organizations," at the time she was terminated. We therefore refer this matter back to the Board of Collective Bargaining to make a determination on the improper practice petition docketed as BCB-4274-18.

ORDER

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

DETERMINED, that HHC did not overcome the presumption that Letitia Biggs was eligible for collective bargaining rights at the time of her termination; and it is further,

ORDERED, that the proceedings in BCB-4274-18 be, and the same hereby is, referred to the Board of Collective Bargaining for further processing and determination consistent with this decision.

Dated: November 13, 2019
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER