

CWA, L. 1183, 14 OCB2d 2 (BOC 2021)

(Rep) (Docket No. AC-1668-19)

Summary of Decision: The Union filed a petition to amend Certification No. 45-71, the Board of Elections bargaining unit, to add the title Senior Administrator (BOE). The City argued that employees in the title were managerial and/or confidential. The Board found that the evidence established that the employees are eligible for collective bargaining. Accordingly, the Board added the title to the Union's bargaining unit. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION**

In the Matter of the Certification Proceeding

-between-

**COMMUNICATION WORKERS OF AMERICA,
LOCAL 1183,**

Petitioner,

-and-

**THE CITY OF NEW YORK and
THE NEW YORK CITY BOARD OF ELECTIONS,**

Respondents.

DECISION AND ORDER

On September 17, 2019, the Communication Workers of America, Local 1183, (“Union”), filed a petition pursuant to § 1-02(u) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) (“OCB Rules”) requesting that the title Senior Administrator (BOE) (“Senior Administrator”) be accreted to Certification No. 45-71, a bargaining unit comprised of titles used exclusively at the Board of Elections of the City of New York (“Board of Elections” or “BOE”). The City of New

York (“City”) opposed this petition on the ground that the title is managerial and/or confidential. The Board finds that the employees in this title are not managerial or confidential under § 12-305 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”). Accordingly, this Board adds the title to the Union’s bargaining unit.

BACKGROUND

The Senior Administrator title is used exclusively at the Board of Elections.¹ There are ten employees currently in the Senior Administrator title. Senior Administrators serve as Coordinators of Early Voting.² There are two Coordinator of Early Voting positions in each borough reporting directly to Administrative Associates or equivalent titles.³

¹ We take administrative notice that the Board of Elections was established pursuant to New York State Election Law § 3-200 and has four primary responsibilities:

1. To conduct fair and honest elections, from local to federal levels;
2. To enfranchise all eligible New Yorkers to register to vote and to practice those rights;
3. To conduct elections, certify the canvas and to retain official records;
4. Voter outreach and education.

See <http://www.vote.nyc/page/mission-statement>.

² In January 2019, New York State enacted legislation to reform its election laws. This legislation established an early voting system that enabled voters throughout the State to vote in person during a designated period. The BOE created the position of Coordinator of Early Voting to head the Early Voting Department with responsibility for all functions of the early voting process.

³ While Senior Administrators hold the position of “Coordinators of Early Voting,” each borough refers to the position slightly differently. For example, “Co-Supervisor of Early Voting” in the Bronx, and “Democratic Supervisor of Early Voting” and “Republican Supervisor of Early Voting” in Manhattan. We are referring to all these positions with the general term “Senior Administrator.”

The Board of Elections is structured by county / borough. In Bronx County, for example, Borough management consists of two Deputy Chiefs. Under the Deputy Chiefs are two Administrative Associates. Employees in both the Deputy Chief and Administrative Associate titles are represented by the Union in the Board of Elections bargaining unit. Senior Administrators report to the Administrative Associates.

Similarly, in New York County, Borough management consists of two Deputy Chiefs. Directly beneath them are two Office Managers. The Office Manager position is equivalent to the Administrative Associate title in the Bronx and is also represented by the Union in the Board of Elections bargaining unit. In New York County, the Board of Elections is divided into the following departments: AVID (Voter Registration), List Maintenance, Absentee, Scanning, DRU, Poll Site, Poll Worker, Early Voting, Front Desk, EMS, and Technical. All departments are led by a team of bipartisan supervisors, and all those supervisors hold titles in the Union's bargaining unit except for the Senior Administrators. Senior Administrators in New York County report to Office Managers.

The initial posting of the Senior Administrator title, distributed July 22, 2019, lists the title as "Project Coordinator of Early Voting Department" and summarizes the position as follows: "Under direct supervision, the Coordinator of Early Voting Department [sic] is responsible for all functions of the Early Voting process, including supervision and training of the employees of the department. (City Ex. 2) The posting provides the following examples of typical work duties:

1. staff training, supervision and evaluation;
2. coordinating the duties of the borough's Early Voting Department;
3. making staff assignments and staff work schedules, establishing completion dates

- for Early Voting Department staff;
4. dissemination of Early Voting procedures, training materials, and early voting equipment; establishing procedures for handling public inquiries;
 5. preparing and distributing documentation related to Early Voting;
 6. liaising with City agencies regarding the conduct of elections and daily activities of the Board; and
 7. regular reporting to Board of Elections Executive Management, including attendance at Managers meetings.

(City Ex. 2)

As part of its investigation, the Board reviewed affidavits and other documents submitted in support of the parties' positions. The two Senior Administrators for New York County and the two Senior Administrators for the Bronx completed OCB surveys regarding their duties and responsibilities.⁴ Consistent with the job posting, the employees who completed the survey indicated that they are responsible for coordinating the early voting process, including supervising and training employees in their department. In the OCB surveys, Senior Administrators listed the following as their primary job duties:

⁴ 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.

1. train, supervise, and evaluate staff; collaborate with their co-supervisor and poll worker supervisors on training program for poll workers;
2. coordinate work schedules and establish completion dates for staff;
3. ensure that Early Voting poll workers are properly trained and assigned;
4. collaborate with VMF (Voting Machine Facilities) Early Voting supervisors on staffing and delivery of equipment and supplies;
5. oversee day-to-day operations at all Early Voting poll sites and troubleshoot poll worker and poll site issues; process payroll and review all coordinator journals;
6. respond to inquiries from poll workers, voters, District Leaders and other elected officials;
7. oversee the post-election certification process.⁵

All Senior Administrators who filled out a survey stated that they had no role in personnel, labor relations, or confidential matters. The record contains no evidence of any Senior Administrator being involved directly or indirectly in the preparation for and the conduct of collective bargaining or the administration of collective bargaining agreements or in personnel administration.

POSITIONS OF THE PARTIES

City's Position

The City argues that the Senior Administrator title is managerial and/or confidential and, as such, is not eligible for collective bargaining rights under the NYCCBL. The City

⁵ Sample duties are derived from the surveys of Alvin Samuels, Camile Montague, Donna Ellaby and Marlene Fiore.

asserts that Senior Administrators are deeply involved in policymaking, have substantial discretion in the performance of their duties, and at times speak for management. The City contends that these duties make Senior Administrator a managerial title.

In the alternative, the City argues that the Senior Administrator title should be considered confidential as employees in the title have regular access to confidential personnel and labor relations materials.

Union's Position

The Union argues that Senior Administrators are eligible for collective bargaining rights under the NYCCBL. The Union claims that contrary to the City's assertions, Senior Administrators are not involved in the formulation of policy, do not speak for management, and have only an ordinary supervisory level of discretion in carrying out policies made by those above them at the agency. Therefore, the Union claims Senior Administrators do not have a managerial role. Similarly, the Union asserts that Senior Administrators do not have regular access to information concerning labor relations or personnel matters, or act in a confidential capacity to managerial employees involved in those areas. Therefore, the Union argues that Senior Administrators are not confidential employees.

As to the unit accretion issue, the Union asserts that there is a clear community of interest between Senior Administrators and the rest of the bargaining unit. The Union argues that *District Council 37*, 8 OCB 19 (BOC 1971) mandates that all eligible Board of Elections employees be included in a single unit and notes that all past Board of Certification decisions relating to the Board of Elections have placed every title in question into that single unit. In particular, the Union notes that Senior Administrators report to supervisors who themselves are already in the bargaining unit and that the Senior

Administrator positions are at the same level in the organizational structure as all others in the bargaining unit. Accordingly, the Union concludes that the title should be added to its bargaining unit.

DISCUSSION

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, “[i]t 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). The Board and the Courts recognize 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.” *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 *Matter of NYC Health & Hosp. Corp. v. Bd. of Certification of the*

City of NY, 2007 N.Y. 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.”).

The NYCCBL further 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 § 201(7)] and thus excluded from collective bargaining.” NYCCBL § 12-309(b)(4). Section 201.7(a) of the Civil Service Law (“CSL”) (“Taylor Law”) provides, in relevant part, that:

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, 60 (1973) (upholding the statutory criteria for managerial and confidential designations as not being unconstitutionally vague).

We find that the Senior Administrator title is eligible for collective bargaining because it does not meet the statutory definitions for a managerial and/or confidential designation. The initial job posting and the completed surveys establish that employees in the Senior Administrator title are responsible for training and supervising poll workers and coordinating the operations of early voting centers. They do not formulate policy, are not involved in labor relations or personnel administration, and do not assist, in a confidential

capacity, a manager who has significant involvement in labor relations or personnel administration.

The first exclusion from eligibility for collective bargaining provided by the Taylor Law is a manager “who formulate [s] policy.” CSL § 201.7(a)(i). Policy formulation is “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.” *OSA*, 3 OCB2d 33, at 22 (BOC 2010), *affd.*, *Matter of City of New York v. Bd. of Certification of the City of NY*, 2011 N.Y. Slip. Op 32814 (U) (Sup. Ct. N.Y. Co. 2011) (quoting *State of New York*, 5 PERB ¶ 3001, at 3005 (1972)); *see also OSA*, 8 OCB2d 19, at 36 (same); *CWA, L. 1180*, 76 OCB 4, at 22 (BOC 2005); *EMS SOA*, 68 OCB 10, at 21 (BOC 2001); *USCA*, 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*, 3 OCB2d 33, at 22-23 (quoting *State of New York*, 5 PERB ¶ 3001, at 3005); *see also OSA*, 8 OCB2d 19, at 36 (same); *OSA*, 78 OCB 1, at 7; *CWA, L. 1180*, 76 OCB 4, at 22; *UFOA, L. 854*, 50 OCB 15, at 19-20 (BOC 1992); *DC 37*, 30 OCB 36, at 14 (BOC 1982). To support a finding of managerial status, the “[p]articipation in the formulation of policy must be ‘regular,’ ‘active,’ and ‘significant.’” *CWA, L. 1180*, 76 OCB 4, at 22 (quoting *UFOA, L. 854*, 50 OCB 15, at 20); *see also Local 621, SEIU*, 4 OCB2d 57, at 23; *OSA*, 3 OCB2d 33, at 23. “An 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;

Local 1180, CWA, 46 OCB 3, at 10 (BOC 1990); *County of Rockland*, 28 PERB ¶ 3063, at 3144 (1995)).

“Employees who recommend, establish, and implement technical operational procedures or processes” have been found eligible for collective bargaining. *OSA*, 8 OCB2d 19, at 38; *see also Lippman*, 263 A.D.2d at 900-901. Senior Administrators are responsible for making operational decisions to implement early voting but are not involved in the development of agency objectives that defines a policymaking role. Senior Administrators consistently stated in their surveys that they had no role in policy formulation. The record contains no evidence of any Senior Administrator having the kind of regular, active, and significant role in policymaking required for an employee to be considered managerial on that basis. Thus, we find that Senior Administrators do not have major policy formulation duties that meet the statutory definition of a managerial employee.

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.’” *OSA*, 8 OCB2d 19, at 41 (quoting *County of Rockland*, 28 PERB ¶ 3063, at 3141-3142 (1995); *City of Binghamton*, 12 PERB ¶ 4022, at 4035 (1979)) (BOC 2015) In the context of the implementation of collective bargaining

agreements, employees must have “the authority to exercise independent judgment in the employer’s procedures or methods of operation” to fall within the exclusion. *Id.* To fall within the exclusion in context of personnel administration the employee must ‘exercise independent judgment and fundamental control over the direction and scope of the employer’s mission.’” *Id.*

To the extent that Senior Administrators train other employees and supervise their work, such duties are insufficient to establish a managerial designation. It is well established that supervisory duties do not make employees ineligible for collective bargaining under the NYCCBL. *See, e.g., OSA*, 3 OCB2d 33, at 66 (BOC 2010) (quoting *Lippman*, 263 A.D.2d at 901)): “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.”

Accordingly, we find that the Senior Administrators do not have a role in labor relations and personnel administration that supports a managerial designation. All Senior Administrators who submitted surveys stated that they had no role in personnel or labor relations. The record contains no evidence that any Senior Administrator is involved directly or indirectly in the preparation for and the conduct of collective bargaining, the administration of collective bargaining agreements, or in personnel administration.

We also find that the Senior Administrator 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.” CSL § 201.7(a). *See also* NYCCBL § 12-305 (employer has the burden to establish confidentiality). For an employee to be

designated confidential, the employee must satisfy both prongs of a two-pronged test: “(1) the employee... must assist a [CSL] § 201(7)(a)(ii) manager in the delivery of labor relations [/personnel administration 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.” *OSA*, 3 OCB2d 33, at 38-39 (quoting *Lippman*, 263 A.D.2d at 902); *see also OSA*, 10 OCB2d 2, at 15-16 (same); *DC 37*, 78 OCB 7, at 40. As noted above, the record contains no evidence of any Senior Administrator assisting in collective negotiations, the administration of collective bargaining agreements, or personnel administration. Therefore, they do not meet either prong of the confidential test.

The Union asserts that Senior Administrators do similar work to other bargaining unit members, and the City did not contest that assertion. *See DC 37*, 8 OCB 19, at 7 (finding that Board of Elections employees were “interchangeable both laterally and vertically” and placed all Board of Elections titles into the single CWA-represented bargaining unit). In addition, Senior Administrators report to superiors who have been found to be eligible for collective bargaining by this Board. *Id.* at 14. This further supports our conclusion that Senior Administrators are eligible for collective bargaining. *See DC 37*, 78 OCB 7 at 43 (BOC 2006).

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 the Senior Administrator title to Certification No. 45-71.

ORDER

NOW, THEREFORE, pursuant to the powers vested in the Board of Certification by the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3), it is hereby:

ORDERED, that Certification No. 45-71 (as previously amended) be, and the same hereby is, further amended to include the title Senior Administrator (BOE) (Title Code No. 94201) subject to existing contracts, if any.

Dated: January 15, 2020
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER



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NOTICE OF AMENDED CERTIFICATION

This notice acknowledges that the Board of Certification has issued an Order Amending Certification as follows:

DATE: January 15, 2021 **DOCKET #:** AC-1668-19

DECISION: 14 OCB2d 2 (BOC 2021)

EMPLOYER: City of New York, Board of Elections
32-42 Broadway, 7 Fl
New York, NY 10004

CERTIFIED/RECOGNIZED BARGAINING REPRESENTATIVE:

Communications Workers of America, Local 1183
131 Avenue A 4
New York, NY 10009

AMENDMENT: Certification No. 45-71, the Board of Elections (BOE) bargaining unit, has been amended as follows:

Added: **Senior Administrator (BOE)**
(Title Code No. 94201)