

OSA, 11 OCB2d 8 (BOC 2018)

(Rep.) (Docket No. AC-1632-16)

Summary of Decision: The Union sought to amend Certification No. 3-88 to add the title Director of Planning. HHC argued that the title should be excluded from collective bargaining as managerial and/or confidential. The Board found that the employees in the title are eligible for collective bargaining and added the title to the bargaining unit. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION**

In the Matter of the Certification Proceeding

-between-

THE ORGANIZATION OF STAFF ANALYSTS,

Petitioner,

-and-

NEW YORK CITY HEALTH + HOSPITALS,

Respondent.

DECISION AND ORDER

On June 6, 2016, the Organization of Staff Analysts (“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) requesting that the title Director of Planning (Title Code Nos. 003546, 003543, and 003542) be accreted to Certification No. 3-88, a bargaining unit that includes such titles as Senior Health Care Program Planner/Analyst, Clinical Business Analyst, and Senior Management Consultant. New York City Health + Hospitals argues that the title at issue is managerial and/or confidential and therefore should be excluded from collective bargaining pursuant to § 12-305 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12,

Chapter 3) (“NYCCBL”) or, in the alternative, pursuant to the New York City Health and Hospitals Corporation Act, New York Unconsolidated Law §§ 7381-7406 (“HHC Act”).¹ The Board again finds that the NYCCBL and the HHC Act are consistent in mandating that Article 14, § 201.7(a) (“Taylor Law”), of the Civil Service Law (“CSL”) provides the applicable standard to determine eligibility. The Board also finds that HHC did not establish that the employees in the Director of Planning (“DP”) title are managerial and/or confidential. Accordingly, the DP title is eligible for collective bargaining. The Board further finds that the DP title is appropriately added to Certification No. 3-88.

BACKGROUND

HHC is a public health care system created by the HHC Act as a public benefit corporation. Its mission is to provide New Yorkers with comprehensive health services. HHC provides medical, mental health, and substance abuse services through its hospitals, nursing facilities, diagnostic and treatment centers, and community-based clinics throughout the City of New York (“City”). (*See* HHC Br. at 21)

The DP Position Description provides that a DP “directs, coordinates and evaluates the activities, projects and programs ... in order to attain the goals and objectives ascribed to by the Corporation.” (HHC Ex. 1) The DP Position Description provides that an employee in that title performs the following typical assignments:

1. Formulates and determines major questions, problems, planning and policy issues affecting the Office of Planning, and consults with Vice President on same.

¹ We refer to New York City Health and Hospitals Corporation as “New York City Health + Hospitals,” “HHC,” or “Corporation” throughout this Decision and Order.

2. Develops and promulgates policies, procedural guidelines, evaluative and monitoring techniques designed to insure the attainment of objectives and goals established by the Office of Planning.
3. Directs the design, development and implementation of health care planning programs and projects and provides health care facilities with requisite advisory, consultative, technical and professional services in assigned areas of responsibility.
4. Directs and coordinates the activities of organizational sections concerned with aspects of program planning. Directs staff, sets priorities, evaluates performance and provides ongoing guidance to subordinates.
5. Directs the design, development and implementation phases of a regionalization network of medical services for the Corporation's health care facilities consonant with the budgetary, financial and medical resources of the Corporation.
6. Directs program formulation for Ambulatory Care Service and coordinates the activities of ambulatory care programs.
7. Forecasts and plans for long-range health needs, directs and surveys new approaches to health care in other communities, provides projections for future capacity of HHC facilities and their ability to accommodate to changing health care needs including recommending and designing research studies, and assists in projects undergoing transition from the long-range planning phase to operational development.
8. Updates and maintains knowledge pertaining to experimental facilities developments and the integration of health care with community approaches elsewhere and advises the Vice President on these matters.
9. Maintains liaison with all other divisions of the Corporate Central Office in order to assure that program plans conform with major requirements thereof, and maintains close liaison with designated local planning person(s) as it relates to planning for a particular facility including regulatory agencies of Federal, State and City bodies.

(HHC Ex. 1)

The Board makes determinations based on actual duties performed and, thus, it is necessary to consider evidence beyond the job description.² At the time of the hearing, five HHC employees held the DP title.³ Three DPs work in HHC's Central Office: two in the Department of Planning Services ("Corporate Planning Services") and one in the Office of Facilities Development ("Facilities Development"). One DP works in the Office of Population Health ("Population Health") at HHC's OneCity Health ("One City") subsidiary; and one DP works at Bellevue Hospital ("Bellevue").⁴ Three DPs report to Assistant Vice Presidents, one to a Senior Assistant Vice President, and one to a Deputy Executive Director.⁵

The Trial Examiner held three days of hearing, at which all five DPs testified. Each DP also submitted a survey and their functional job description, which are part of the record.⁶ The

² We find that the duties of the individual DPs are sufficiently similar that they can be summarized and analyzed as a group. See *OSA*, 8 OCB2d 19, at 5, n. 3 (BOC 2015) (citing *Matter of City of New York v. Bd. of Certification of the City of NY*, 2011 NY Slip Op 32814(U) (Sup Ct, New York County 2011) (affirming a Board decision that did not summarize duties by employee and noting that "[t]here is no requirement that each employee be discussed individually")).

³ The DPs' salaries are between \$105,000 and \$138,000.

⁴ Two DPs in HHC's Central Office have four levels of management between them and HHC's President; the third has five levels of management. The DP at One City has four levels of management between herself and OneCity's Chief Executive Officer ("CEO"). There are two levels of management between the DP that works at Bellevue and the CEO of Bellevue.

⁵ The DP that reports to a Senior Assistant Vice President was, at the time of the hearing, reporting to a Vice President because the Senior Assistant Vice President position that he would normally report to was vacant.

⁶ 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

DPs' testimony was consistent with their surveys. The record established that the primary duty of a DP is to serve as a resource person providing expertise not found at the facility level and that the DPs have no role in labor relations, collective bargaining, or administering collective bargaining agreements, nor do they act in a confidential capacity in these areas to a manager who does.

DPs are subject matter experts and work at high levels within their departments. One Corporate Planning Services DP is an expert in subsidized housing and heads its Housing Unit.⁷ His primary responsibility is helping HHC staff, such as social workers, discharge planners, and case managers, when they run into difficulties in finding subsidized housing for soon to-be-discharged patients. The other Corporate Planning Services DP is an expert in LGBT issues, among other areas. The Facilities Development DP heads its Energy Unit, which manages HHC's energy budget and monitors the fuel usage of all HHC facilities.⁸ The Bellevue DP's expertise is in New York State's Delivery System Reform Incentive Program ("DSRIP"). His primary responsibility is working with various departments to implement the DSRIP projects.⁹ The Population Health DP is an expert on HIV and works in its HIV Services Office; her primary responsibility is helping HHC facilities meet their regulatory obligations.

of information they have access to, and the type of recommendations and proposals they make. The final page is signed by a department head who affirms that he or she has reviewed and either concurs with the employee's statements or notes any disagreements. Organizational charts or a description of the DP's reporting lines were also provided.

⁷ Corporate Planning Services' Housing Unit consists of the DP and an Assistant Director.

⁸ The Energy Unit is less than five years old, and the DP is its first head. It consists of the DP and three Assistant Directors.

⁹ DSRIP seeks to generate Medicaid savings by creating working partnerships of Medicaid providers and community groups known as a Performing Provider System ("PPS"). PPS members can re-invest the savings in DSRIP projects. HHC's OneCity subsidiary manages its PPS.

DPs are responsible for ensuring HHC's compliance with regulations. For example, the main role of the Population Health DP is assisting HHC facilities with State regulations and other guidelines with respect to HIV-related services. As another example, the Facilities Development DP ensures that each HHC facility over 50,000 square feet undergoes a City-mandated energy efficiency audit every 10 years.¹⁰ These audits help the Energy Unit assess whether HHC is in compliance with various mandates, such as the City Council's mandate not to use No. 6 oil.

In their roles as resource people, the DPs interact with senior management. For example, the Bellevue DP meets quarterly with Bellevue's CEO to keep him informed as to the progress of the DSRIP projects.¹¹ Another example is that in 2016, the Corporate Planning Services DP who is a LGBT expert met with the Executive Directors of some HHC facilities when HHC sought to be designated a "Leader in LGBT Healthcare Equality" by the Human Rights Campaign, the nation's largest LGBT advocacy organization.¹² The other Corporate Planning Services DP prepared a Vice President for meetings with the City's Human Resources Administration regarding funding proposals for supportive housing made by the Mayor and the Governor.¹³

¹⁰ The Energy Unit does not perform the audits; they are conducted by outside consultants or the New York Power Authority.

¹¹ This DP also keeps OneCity informed.

¹² In helping HHC to achieve the Leader in LGBT Healthcare Equality designation, this DP co-authored HHC's Guidelines on Providing Care to Transgender and Gender Non-Conforming Patients. The DP's supervisor edited and had final approval of these guidelines. This DP also helped HHC to modify its Patient Bill of Rights to clarify that it prohibits discrimination based upon gender identity and gender expression.

¹³ This DP educated the Vice President about the different supportive housing agreements, what they would mean for HHC and its patients operationally, and their advantages and pitfalls.

DPs also work on HHC committees responsible for capital projects and emergency operations, among other things.¹⁴ For example, the Facilities Development DP is one of eight people on HHC's Capital Collaborative committee, known as "C3," that prioritizes HHC's capital projects, which are projects that cost over \$35,000 and will last five or more years. These capital projects have been as large as \$100 million. The DP testified that "C3 can only make the recommendation" as the decision whether or not to fund a project is made by senior HHC managers.¹⁵ (Tr. 29) Another example is that a DP is Corporate Planning Services' representative on HHC's monthly Continuity of Operations committee, which addresses preparing HHC to be up and running within 12 hours of an emergency such as a hurricane or terrorist act. The DP's role on this committee is to serve as a liaison, and he is responsible for completing and maintaining the list of crucial staff members and their expertise. A third example is that the Bellevue DP is on-call three weeks a year as one of 50 employees rotated onto Bellevue's Disaster Response Team, which operates as a "buffer" between Bellevue's CEO, Chief Operating Officer ("COO"), and staff in an emergency. (Tr. 410) If there is an emergency that a Bellevue department cannot handle, they contact the on-call member of the Disaster Response Team whose job is to locate the proper people to address the emergency, which may require contacting Bellevue's COO or CEO.

¹⁴ The Corporate Planning Services DP that heads its Housing Unit gave no examples of duties involving HHC-wide committees. He only noted a presentation on subsidized housing he delivered with his superior to the Strategic Planning Committee of HHC's Board of Directors, in January 2015, prior to his promotion to DP.

¹⁵ This DP's supervisor is also on C3. If a facility is dissatisfied with the priority C3 assigns a project, the facility can appeal directly to higher management who can authorize funding for the project. C3 meets approximately six times a year. If a project arises that cannot wait for the next C3 meeting (for example, necessary repairs following flooding), the facility can make a request directly to HHC's higher management.

DPs liaison with City and State agencies to provide information concerning HHC's needs, goals, or programs and to improve HHC's patient services. For example, the Facilities Development DP helps HHC facilities apply for funds to address compliance issues from the City's Department of Citywide Administrative Services' Accelerated Capital Energy program and the State's Research Energy Development program. Another example is that the Bellevue DP is its contact person regarding the Mayor's initiative to enroll patients without insurance in insurance plans. A third example is that a Corporate Planning Services DP is on a New York State Department of Health ("NYSDOH") work group regarding Medicaid waiver programs; his role in the work group is to read and provide feedback on documents drafted by the NYSDOH.¹⁶ A fourth example is that the other Corporate Planning Services DP works with the City's Economic Development Corporation on providing community programming at a new 80-acre campus on Staten Island that includes some HHC-owned property. A fifth example is that the Population Health DP was on the HIV Health and Human Services Planning Council ("HIV Council").¹⁷

DPs also work with other outside organizations for similar purposes. Indeed, the Bellevue DP described his role as one of "outreach" to local health care providers to encourage referrals for specialty services to Bellevue. (Tr. 395) An example is that the Corporate Planning Services DP who is an expert on LGBT issues met regularly with the Human Rights Campaign; this DP also worked with the Independence Care System, a managed care provider, which operates out of HHC

¹⁶ The DP testified that the work group was open to anyone, including patients.

¹⁷ The HIV Council is a coalition of persons living with HIV/AIDS, care givers, governmental representatives, and community members that develops spending priorities for Ryan White CARE Act Part A funds. This DP also works on subgroups of the Governor's End the Epidemic Campaign, which seeks to increase collaboration between organizations providing HIV services, and was on a NYSDOH task force regarding implementing changes in the age of consent for HIV testing and treatment.

facilities and assists women with disabilities. Another example is that the other Corporate Planning Services DP spends the majority of his time arranging housing at Metro East 99th Street (“Metro 99”), a private housing development subsidized by Section 8 and low-income housing tax credits.¹⁸ A third example is that the Population Health DP helps HHC facilities receive the national Primary Care Medical Home certification.

Three DPs have roles in budgeting. The Facilities Development DP drafts for HHC’s Board some of the capital construction budgets of HHC’s energy efficiency projects; the largest that he has been directly involved with was for \$34 million.¹⁹ The Population Health DP participated in drafting HHC’s application for DSRIP funding for an HIV project for which she is now the project manager, allocating about \$5 million in grant money to other HHC facilities.²⁰ The Bellevue DP participates in allocating the DSRIP projects budget of \$5 to \$6 million.²¹

¹⁸ This DP worked on the logistics when the NYSDOH Medicaid Redesign Team visited Metro 99 “as part of the Harvard Kennedy School Ash Center’s Innovations in American Government Awards finalist evaluation process.” (HHC Ex. 5b, p. 4) He performed similar work when HHC used Metro 99 for internal public relations.

¹⁹ These budgets are included in resolutions that the Facilities Development DP drafts for HHC’s Board. The draft resolutions are reviewed by the DP’s immediate supervisor, an Assistant Vice President, and a Vice President before being presented to a subcommittee of HHC’s Board and then to the full Board for a vote.

²⁰ The DSRIP application for the HIV project was managed by an outside consultant firm under the oversight of several HHC Senior Vice Presidents.

²¹ There are eleven DSRIP projects, and the Bellevue DP testified that each DSRIP project is a “team effort” that operates by consensus. (Tr. 401) The team comes up with budgets and proposals that are presented to OneCity, which funds the DSRIP projects. Once funding is approved, the team puts the proposals into practice. One such project created a new department called Care Transitions to manage patients with a high risk for readmission. The Care Transitions project team initially had approximately 30 members. The DP met with physicians, nurses, and social workers regarding the new Care Transitions department, which was staffed by an outside vendor. HHC currently has a hiring freeze.

Two DPs have a role in HHC staff training. A Corporate Planning Services DP edited two on-line training courses, Introduction to Your LGBTQ Co-Worker and Introduction to Your LGBTQ Patient. This DP tracked the use of the on-line training, encouraging HHC employees who had not completed the training to do so. The Population Health DP coordinated a six-day training program related to teaching staff to identify and address common patient issues.

Only the two DPs who are unit heads supervise employees. The DP who heads Corporate Planning Services' Housing Unit supervises one Assistant Director. The DP who heads Facilities Development's Energy Unit supervises three Assistant Directors. These DPs have a role in hiring their subordinates and could have a role in disciplining them. Otherwise, DPs do not have advance knowledge of HHC hirings, layoffs, closures, or transfers. No DP has a role in the opening or closing of facilities. DPs in Corporate Planning Services may learn non-public information regarding future openings or closings of HHC facilities from co-workers in that department.

On their surveys, the two Corporate Planning Services DPs and the Bellevue DP stated that they have no role the formulation of policy, and their testimony was consistent with their surveys.²² The Population Health DP stated on her survey that she had a role in the formulation of policy but clarified in her testimony that, since becoming a DP, "there has not been a need for a formal policy development."²³ (Tr. 135) The Facilities Development DP also stated on his survey that he had a

²² The Corporate Planning Services DP who heads its Housing Unit also explicitly testified that he has no role in policy. (See Tr. 316)

²³ To explain how her work may impact HHC policies, the Population Health DP referred to an assignment from 2014 that she had under her previous title (Assistant Director of Planning), co-authoring HHC's Operating Procedure 120-21: Routine HIV Screening ("OP 120-121"), issued in December 2014. The purpose of OP 120-21 is "to provide guidance related to the development and maintenance of a facility-wide HIV screening program that is compliant with New York State Law governing HIV testing." (HHC Ex. 3d) The DP worked with her supervisor, among others,

role in the formulation of policy and testified that his unit is developing a master plan to achieve HHC's energy goals. The DP does not set these goals, but has a role in determining how to achieve them.²⁴ (See Tr. 30) For example, he oversees the energy efficiency audits that include recommended measures that individual HHC facilities can take to improve their energy efficiency, reduce costs, and cut greenhouse gasses. The DP selects among these options and makes recommendations, and he has set as a criterion for his recommendations that the projects have return on investment of 15 to 20 percent. Last year, the work of the Energy Unit reduced HHC's greenhouse gas emissions by eight percent and saved HHC over \$20 million.

POSITIONS OF THE PARTIES

HHC's Position

HHC argues that the evidence establishes that the DP title performs managerial and/or confidential duties and that the NYCCBL clearly provides that employees who are managerial or confidential do not enjoy the same right to be represented by a union as do other public employees. It also argues that the proper standard for determining eligibility for collective bargaining is found in the HHC Act, rather than in the NYCCBL.

HHC argues that the DP title should be considered managerial because DPs have major policy formulation, determination, and effectuation roles. HHC points to the Facilities Development DP being responsible for creating a master energy plan for all of HHC's facilities to

on drafting OP 120-121, which was reviewed and approved first by the Chief Medical Examiner and then brought before a council of all the CEOs of HHC's hospitals for final approval.

²⁴ The DP testified that this work is conducted by the Energy Unit as a whole, but that he has final say on the decisions of the Energy Unit. Examples of HHC's energy goals include reducing its greenhouse gas emissions by 50 percent by 2025 and 80 percent by 2050. The 2025 goal was set by an affiliation of hospitals and universities; the 2050 goal was set by the Mayor.

follow and the Population Health DP developing a system-wide operating procedure. HHC notes that the DP who heads Corporate Planning Services' Housing Unit plays a role in the broad overall functioning of his department as well as working on special projects such as counseling a Vice President on housing agreements, serving as an advisor on a NYSDOH taskforce, and as project manager on high profile patient matters.²⁵ HHC asserts that the work of the DP who is an LGBT expert is broader and far more reaching than policies made at the facility level, as he creates system-wide guidelines, including standardizing HHC's treatment of the LGBT community by creating and amending existing guidelines and system-wide documents. This DP also carried out the mandate of HHC President of ensuring that all HHC facilities receive the national designation as a LGBT Healthcare Equality leader. HHC claims that the Bellevue DP's work not only furthers HHC's DSRIP-related mission and goals, but also results in significant changes throughout Bellevue, "including in terms of new job positions and units being created." (HHC Br. at 48)²⁶

HHC further argues that the DP title should be considered managerial because three DPs play a responsible role in the preparation, discussion, development, and allocation of budgets. HHC notes that the Facilities Development DP reviews and prioritizes the entire HHC construction, energy, and capital needs projects, which can range up to \$100 million dollars, and that the Population Health DP and the Bellevue DP both manage multi-million dollar budgets.

HHC further argues that the DP title should be considered managerial because DPs hold high ranking positions, head entire units, and serve on HHC committees. HHC claims that all DPs are senior managers only approximately three levels of management below HHC's top executives,

²⁵ HHC alleges that the demeanor of the Corporate Planning Services DP who heads its Housing Unit appeared to support unionization and that his testimony should be viewed in that light.

²⁶ The record does not contain evidence of Bellevue hiring new HHC employees for DSRIP projects. The new DSRIP funded Care Transitions department is staffed by an outside vendor.

including the President and COO, and meet directly with HHC's Board of Directors. It notes that DPs head Corporate Planning Services' Housing Unit and Facilities Development's Energy Unit and describes the other DPs as being "units unto themselves." (HHC Br. at 49) DPs are assigned to represent HHC as experts on task forces, councils, or other collaborations.

Moreover, HHC argues that the DP title should be considered confidential because DPs have a significant role and access to personnel, labor relations related matters, and/or confidential matters. It claims that through the multi-million dollar grants they administer, the Population Health DP and the Bellevue DP have advance knowledge of job vacancies throughout HHC.²⁷ It notes that the DPs that head units have a supervisory role over their subordinates and would be responsible for any discipline. It further notes that the DPs who work in Corporate Planning Services have access to non-public information on openings, closures, and potential hiring.

HHC additionally asserts that the DP title should be excluded from collective bargaining under the HHC Act and argues that HHC Act § 7385(11) provides a much broader 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 the HHC Act and that the Board's decisions to the contrary are in error because they "reflect an incomplete and inaccurate consideration of the language in [HHC Act §§] 7385(11) and 7405." (HHC Br. at 28)

Accordingly, HHC concludes that it has satisfied its burden of proving that the DP title is managerial and/or confidential and ineligible for collective bargaining under both the NYCCBL and the HHC Act.

²⁷ The record does not contain evidence that these DPs have advance knowledge of new HHC positions and or that their budget allocations have increased HHC's headcount.

Union's Position

The Union argues that employees serving in the DP title are eligible for collective bargaining and should be added to the Union's bargaining certificate as it already represents hundreds of employees who hold the same or similar positions. It argues that there is a presumption of eligibility for collective bargaining rights in the Taylor Law and the NYCCBL and that HHC did not meet its burden of demonstrating that the employees in the DP title meet the limited exception for those employees found to be managerial or confidential.

The Union argues that none of the DPs are involved in the development of the specific HHC objectives to fulfill its mission or in determining the methods, means, and extent of achieving those objectives. It asserts that, while the DPs have high levels of technical expertise, they are too limited in their scope and authority to be considered policy makers but are resource people who provide data to those who make the actual policy decisions. The Union further argues that none of the DPs are involved in collective bargaining, labor relations, or personnel matters and that budgetary duties do not equate to policy formulation, noting that the Board found eligible for collective bargaining an employee who managed a budget of between \$70 to \$80 million.

The Union notes that the DP who heads Corporate Planning Services' Housing Unit testified that he has no policy role, no budget responsibilities, does not attend any high-level meetings, and is not currently participating in any committees. This DP has never had to discipline anyone and has no advance knowledge of layoffs, closures, or transfers. The Union asserts that the DP who is an expert in LGBT issues also does not exercise decision-making authority. The projects that he worked on were assigned to him by superiors, and the decisions to participate in those projects were made at levels far above him. The Union asserts that the goals of Facilities Development DP's master energy plan were set by others. The Union notes that he is one of eight

people on the C3 capital projects committee, that C3 only makes recommendations which can be rejected and appealed, and that C3 can be by-passed. Regarding the Bellevue DP, the Union asserts that he has no role in determining the DRSIP projects, has no authority to implement them directly, and that OneCity makes the ultimate decision on approving which vendors will be used and what funding will be given for the projects. Regarding the Population Health DP, the Union notes that she testified that she has not participated in updating or creating any policies since becoming a DP and asserts that she has never been involved in policy formulation as defined by the NYCCBL. The Union argues that her work on OP 120-121 reflected requirements imposed on HHC by State law as opposed to the development of HHC objectives. It further argues that this DP's attendance at high-level meetings and committees, as well as her collaborations with outside entities, are as a subject matter expert and resource person.

Finally, the Union argues that the Board should once again reject HHC's argument that the HHC Act provides the applicable standard for determining whether employees are eligible for collective bargaining. The Union asserts that the Board should apply the doctrines of collateral estoppel and *stare decisis* as it has previously rejected identical arguments in multiple prior proceedings. The Board has repeatedly reaffirmed that HHC Act § 7390(5) grants the Board jurisdiction over HHC and its employees, that the application of the Taylor Law to HHC employees is appropriate, and that there is no conflict between the NYCCBL and the HHC Act.

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). *See also DC 37*, 78 OCB 7, at 39 (BOC 2006), *affd Matter of City of New York v Bd. of Certification of the Off. of Collective Bargaining of the City of NY*, Index No. 404461/06 (Sup Ct, New York County Sept. 19, 2007) (Wetzel, J.).

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 AD2d 891, 904 (3d Dept 1999)); *see also Matter of NYC Health & Hosp. Corp. v. Bd. of Certification of the City of NY*, 2007 NY Slip Op 30921 (U) (Sup Ct, New York County 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). The Taylor Law § 201.7(a) 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 NY2d 54, 60 (1973) (upholding the statutory criteria for managerial and confidential designations as not being unconstitutionally vague).

We once again reject HHC's arguments that the HHC Act sets forth an alternative legal standard for determining managerial and/or confidential status. We reiterate what we have consistently held for over 40 years and which the courts have recently 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 OSA*, 10 OCB2d 2, at 17 (BOC 2017), *affd Matter of NYC Health + Hosp. v. Org. of Staff Analysts*, 2017 NY Slip Op 32393(U) (Sup Ct, New York County); *OSA*, 8 OCB2d 28, at 18-19 (BOC 2015); *OSA*, 8 OCB2d 19, at 18-25, 32-36; *OSA*, 74 OCB 1, at 4-7 (BOC 2004); *CWA*, 40 OCB 5, at 15-23 (BOC 1987). *See also OSA*, 78 OCB 5, at 40-42 (BOC 2006), *affd Matter of NYC Health & Hosp. Corp. v. Bd. of Certification of the City of NY*, 2007 NY Slip Op 30921(U) (Sup Ct, New York County 2007) (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). Accordingly, we do 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 AD2d 288, 290

(3d Dept 1995)); *State of New York (Department of Correctional Services)*, 43 PERB ¶ 3039, n. 2 (2010) (no need to repeat reasoning for rejecting arguments recently rejected in another matter).

We find that the DP title is eligible for collective bargaining because it does not meet the statutory definitions for a managerial and/or confidential designation. Employees in the DP title 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 NY Slip Op 32814 (Sup Ct, New York County 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 AD2d at 900-901; *City of Binghamton*, 12 PERB ¶ 3099, at 3185 (“The formulation of policy does not extend to the determination of methods of operation that are merely of a technical nature.”) For example, in *Local 621, SEIU*, 4 OCB2d 57, the Board found the Director of Motor Transport for the New York City Police Department (“NYPD”), who was “at the top of the table of organization for the Fleet Services Division and has expansive authority in managing its day-to-day operations,” eligible for collective bargaining. *Id.* at 24. Among other tasks, this employee was involved in determining the Fleet Services Division’s strategy for addressing the NYPD’s response to particular situations and made recommendations on how to make the fleet more green and efficient.²⁸ The Board found that although this Director “exercises a high level of discretion and independent judgment” he “does not determine policy, but, rather provides information upon which others make policy decisions, and then implements the resulting

²⁸ The scope of the Director of Motor Transport’s authority was very broad. He indirectly supervised the entire Fleet Services Division, which consisted of 420 employees, including 75 uniformed members; oversaw an annual budget of \$70 to \$80 million; was on the NYPD Request for Proposals Committee, which seeks vendors to provide spare parts; and was the City’s sole representative on the General Motors Law Enforcement Products Council that met at least twice per year to share ideas and discuss problems with General Motors’ products. He also worked very closely with the most senior level managers - only two or three levels below the Police Commissioner.

policies.” *Id.* at 25 (citing *OSA*, 3 OCB2d 33, at 45, 47-48; *Lippman*, 263 AD2d at 900-01; *Matter of County of Nassau v. Nassau County Pub. Empl. Relations Bd.*, 283 AD2d 428, 428-429 (2d Dept 2001)). *See also CWA, L. 1180*, 2 OCB2d 13, at 24; *OSA*, 78 OCB 1, at 41-43 (finding eligible Bellevue’s Director of Clinical Information Systems whose responsibilities include drafting policies, supervising non-represented employees, and working with senior management).

We find that the DPs do not have major policy formulation roles that require that the title be designated managerial. “The Board makes determinations based on actual duties performed.” *Local 621, SEIU*, 4 OCB2d 57, at 24 (citing *Matter of City of New York*, 2011 NY Slip Op 32814(U), * 5-6 (finding that the Board appropriately determined whether employees were managerial by examining the evidence submitted as to each employee’s actual duties and responsibilities)). *See also OSA*, 3 OCB2d 33, at 87; *CWA, L. 1180*, 2 OCB2d 13, at 48. Although the DP job description mentions that the title “[f]ormulates and determines ... policy issues” and “[d]evelops and promulgates policies,” the record establishes that DPs do not formulate policy within the meaning of the Taylor Law. (HHC Ex. 1)

Instead, the evidence established that DPs are high level advisors and planners who have a significant role in implementing policy. DPs perform tasks such as working with senior management, HHC committees, City and State agencies, as well as with non-government organizations as resource people and subject matter experts, helping HHC facilities comply with regulations. *See CWA, L. 1180*, 2 OCB2d 13, at 44-45, 47 (finding employee who represents the Comptroller at meetings with task forces, legislators, and district attorneys eligible for collective bargaining). Some DPs prepare budgets, manage projects or units, and train and supervise employees. The DPs are highly skilled and function at senior levels of HHC, but do so as implementers or resource people, not policy makers, as they provide information which others use

to make policy determinations. *See OSA*, 3 OCB2d 33, at 45; *OSA*, 78 OCB 1, at 19, 27 (finding eligible employees who gather and analyze data for use by upper management and employees who provide technical advice); *Local 1180, CWA*, 46 OCB 3, at 10 (finding eligible employees who are informed of new objectives for the purpose of providing technical advice).

For example, the Facilities Development DP is creating an energy plan for all HHC's facilities to follow and has set a benchmark rate of return for his recommendations of energy efficient capital projects. However, this work is undertaken to meet the goals of reducing greenhouse emissions set by others. Although he is on the committee that prioritizes HHC's capital projects and regularly works with HHC's Board members in the approval process for capital projects related to energy usage, in doing so, this DP "addressed operational concerns, he was not formulating policy." *CWA, L. 1180*, 2 OCB2d 13, at 25 (finding a Director of Finance, who oversaw several units and made recommendations to Assistant and Deputy Commissioners, eligible for collective bargaining). As such, the Facilities Development DP "does not have a significant role in formulating policy regarding [HHC's] mission." *OSA*, 78 OCB 1, at 43. This DP is clearly "in [an] important and fairly-high level informational, advisory and implementer role[]." *Lippman*, 263 AD2d at 900. Notwithstanding, providing high-level technical or expert advice does not necessarily warrant a managerial designation.²⁹ *See OSA*, 78 OCB 1, at 27

²⁹ The Population Health DP testified that she has not been involved in policy formulation since her promotion to DP and provided only a single example of what she believed to be policy work from 2014 undertaken when she was in a different civil service title: co-authoring OP 120-121 addressing HHC compliance with a new State law governing HIV testing. (*See Tr.* 135-6) Even if this task was performed as a DP, mere compliance with legal requirements and regulations does not rise to the level of formulating policy. *See SEIU, L. 300*, 5 OCB2d 33, at 32-33 (BOC 2012) (employees who "promulgated standard operating procedures to ensure ... compliance with ... laws and regulations" found eligible for collective bargaining); *OSA*, 3 OCB2d 33, at 48; *CWA, L. 1180*, 2 OCB2d 13, at 23-24, 27-28 (employees who developed standard operating procedures to comply with State laws and reviewed court mandated agency-wide health and safety policies are

(“[H]igh level supervisory or professional or expert technical personnel must be distinguished from those who perform functions such as contemplated in the Taylor Law definition of managerial employees in [§] 201.7(a).”) (quoting *DC 37*, 28 OCB 34, at 7 (BOC 1981)).

We also reject HHC’s argument that the DP title should be found managerial because DPs hold high-level positions, head units, meet with the most senior management, serve on HHC committees, and represent HHC as area experts to government and private organizations.³⁰ The Board has long found individuals who “function at high levels of the Employer’s administration ... eligible for collective bargaining.” *OSA*, 3 OCB2d 33, at 45. *See also OSA*, 78 OCB 1, at 35-36 (employee who reports directly to CFO found eligible for collective bargaining); *Local 621, SEIU*, 4 OCB2d 57, at 4 n.2, 6 n. 8, 10, 24 (title that regularly advises the Police Commissioner found eligible for collective bargaining). *See also Village of Suffern*, 38 PERB ¶ 3016, at 3057 (finding unit heads eligible).

We also reject HHC’s argument that the DP title should be found to be managerial because of DPs’ role in the preparation and allocation of budgets. We have repeatedly found that budgetary duties alone do not warrant a finding of managerial status.³¹ The Board has used the preparation

eligible for collective bargaining) (citing *NYC Deputy Sheriffs Assn.*, 70 OCB 3, at 10 (BOC 2002)). Thus, the record establishes that this employee did not participate in the formulation of policy within the meaning of the Taylor Law. The remaining three DPs neither asserted that they had a role in policy making, nor did the evidence show any regular involvement in policy-making.

³⁰ HHC incorrectly claims that all DPs are “approximately three ranks away from [HHC’s] top executives, including [its] President and [COO].” (HHC Br. at 47) Only the Bellevue DP, who has two superiors between himself and Bellevue’s CEO, may be considered so positioned. The other DPs have at least four superiors between themselves and HHC’s President and CEO.

³¹ For example, the Board found eligible for collective bargaining a Senior Management Consultant (“SMC”) who formulated budgets, ran the day-to-day operations of the Financial Management Department at a HHC facility, and reported directly to the facility’s CFO. *See OSA*, 78 OCB 1, at 35-36. The SMC made recommendations concerning the amount that should be allocated to capital projects, the allocation of the money received from Central Office among the

of budgets and the allocation of funds as “indicia of manageriality.” *OSA*, 3 OCB2d 33, at 43 (citing *OSA*, 78 OCB 1; *Matter of Civ. Serv. Tech. Guild, Local 375, DC 37, AFSCME v. Anderson*, 55 NY2d 618 (1981)). However, such indicia “are not a substitute for or an expansion of the statutory definitions and do not create any additional exclusions from collective bargaining.” *OSA*, 3 OCB2d 33, at 43 (quoting *CWA, L. 1180*, 2 OCB2d 13, at 14, and citing the dissenting opinion in *Matter of Civ. Serv. Tech. Guild, Local 375, DC 37, AFSCME v. Anderson*, 79 AD2d 541, 541 (1st Dept 1980), *revd* 55 NY2d 618 (1981) (noting that the Board used the guidelines “not slavishly, nor without reviewing the evidence as a whole, nor without constant reference to the statutory criteria and its goals”). Accordingly, DPs’ “budgetary duties are not dispositive of managerial status.” *OSA*, 3 OCB2d 33, at 43 (quoting *CWA, L. 1180*, 2 OCB2d 13, at 14).

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

departments, and moving money from fixed assets to cover costs. The Board also found eligible for collective bargaining employees who administer grants, including one in its HIV Services Unit who oversees \$21 million dollars. *See id.* at 20-1, 25-26, 34-36. *See also Local 621, SEIU*, 4 OCB2d 57, at 5, 25-26 (finding employee who oversees a budget of \$70 to \$80 million eligible); *CWA, L. 1180*, 2 OCB2d 13, at 22; *CWA*, 78 OCB 3, at 40, 45, 51 (BCB 2006); *Village of Suffern*, 38 PERB ¶ 3016, at 3057; *County of Putnam*, 20 PERB ¶ 3059, at 3128 (1987).

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).

Supervisory duties do not make employees ineligible for collective bargaining under the NYCCBL. “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.” *OSA*, 3 OCB2d 33, at 66 (quoting *Lippman*, 263 AD2d at 901).

We find that the DPs are not entitled to a managerial designation based on the measure of involvement with labor relations and personnel administration. All DPs stated in their surveys that they had no role in personnel, labor relations, or confidential matters, and their testimony was consistent with their surveys. The record contains no evidence of any DP 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.³²

We also find that the DP 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

³² Contrary to HHC’s assertions, the record shows no knowledge of or involvement in personnel decisions by DPs beyond those typical of a supervisor, such as the hiring of their own staff.

manager--a relationship oriented evaluation.” *OSA*, 3 OCB2d 33, at 38-39 (quoting *Lippman*, 263 AD2d at 902); *see also OSA*, 10 OCB2d 2, at 15-16 (same); *DC 37*, 78 OCB 7, at 40.

Regarding the duty-oriented prong of the test for confidential status, “the employee’s involvement in collective negotiations, the administration of collective bargaining agreements, or personnel administration makes him or her ineligible for inclusion in collective bargaining.” *OSA*, 78 OCB 5, at 41. As noted above, the record contains no evidence of any DP assisting in collective negotiations, the administration of collective bargaining agreements, or personnel administration. Therefore, they fail to meet the first prong of the confidential test.

We reject HHC’s argument that the DP title should be deemed confidential because some DPs supervise employees, as it is long-established that employees with supervisory duties are eligible for collective bargaining. *See, e.g., CWA, L. 1180*, 2 OCB2d 13, at 92 (listing examples of supervisory duties performed by employees eligible for collective bargaining); *Local 621, SEIU*, 78 OCB 2, at 21 (2006); *USCA*, 66 OCB 4, at 29-30. *See also Matter of Metro. Suburban Bus Auth. v. Pub. Empl. Relations Bd.*, 48 AD2d 206, 211 (3d Dept 1975) (finding that the distinction between managers and supervisors is “reasonable and has a sound basis”).

Similarly, we do not find that the DP title should be deemed confidential because some DPs may become aware of non-public information by virtue of their location in Corporate Planning Services or their managing DSRIP project budgets.³³ “[T]he secretive or highly sensitive nature of an employee’s work alone does not compel a confidential designation.” *OSA*, 78 OCB 5, at 41

³³ Managing a budget is not a basis for finding an employee confidential when the employer “has not shown that the information to which they are exposed, and the duties they perform, have a direct relationship to and impact upon collective negotiations and the administration of collective bargaining agreements.” *Lippman*, 263 AD2d at 903. *Lippman* affirmed *State of New York (Unified Court Sys.)*, 30 PERB ¶ 3067 (1997), which held that the employee who prepared a policy committee’s annual budget was not confidential.

(citing *Assn. of NYC ADAs*, 14 OCB 13, at 26 (BOC 1974); *DOI Investigator's Assn.*, 72 OCB 2, at 18 (BOC 2003)). Incidental access to confidential information does not make an employee ineligible for collective bargaining. See *OSA*, 78 OCB 5, at 42 (access to confidential marketing information was insufficient for a confidential designation); see also *OSA*, 78 OCB 1, at 22-23 (employee not involved in labor relations but with occasional access to labor relations information due to her office location found eligible for collective bargaining). Further, the confidential information possessed by DPs concerns budget matters and the implementation of projects, not the negotiation or administration of collective bargaining agreements.

For the reasons stated above, the Board finds that HHC has not met its burden of proving that the DP title is managerial or confidential. 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 DP title to 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 title Director of Planning (Title Code Nos. 003546, 003543, and 003542) subject to existing contracts, if any.

DATED: March 7, 2018
 New York, New York

SUSAN J. PANEPENTO

CHAIR

ALAN R. VIANI

MEMBER



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Monu Singh
Steven Star

NOTICE OF AMENDED CERTIFICATION

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

DATE: March 7, 2018 **DOCKET #:** AC-1632-16

DECISION: **11 OCB2d 8 (BOC 2018)**

EMPLOYER: New York City Health + Hospitals
55 Water Street – 26th Floor
New York, NY 10041

CERTIFIED/RECOGNIZED BARGAINING REPRESENTATIVE:

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

AMENDMENT: Certification No. 3-88 has been amended as follows:

Added: **Director of Planning**
(Title Code Nos. 003546, 003543, and 003542)