[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN PART 52

Index Number : 402466/2010
CITY OF NEW YORK
VS.
BRD OF CERTIFICATION OF THE
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. 402466/10

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION

FILED

OCT 27 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/25/11

CYNTHIA S. KERN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

----------x

In the Matter of the Application of
THE CITY OF NEW YORK; THE MAYOR'S OFFICE OF LABOR RELATIONS; JAMES F. HANLEY, as Commissioner of the Mayor's Office of Labor Relations and THE NEW YORK CITY HOUSING AUTHORITY,

Petitioners,

Index No. 402466/10

402496/10

For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules,

-against-

THE BOARD OF CERTIFICATION OF THE CITY OF NEW YORK; MARLENE GOLD as Chair of the Board of Certification of the Office of Collective Bargaining of the City of New York; THE ORGANIZATION OF STAFF ANALYSTS; and ROBERT J. CROGHAN, as President of the Organization of Staff Analysts,

Respondent.

----------x

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Petition and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Petitioners the City of New York (the "City") and the New York City Housing Authority

("NYCHA") bring this petition pursuant to Article 78 of the Civil Practice Law and Rules seeking a judgment annulling a determination of the New York City Board of Certification (the "Board") finding the vast majority of employees of NYCHA within a certain civil service title eligible for collective bargaining, with certain specified exceptions. The Board responds that its determination was not arbitrary or capricious nor did it act contrary to law. For the reasons set forth more fully below, the petitions are denied.

The relevant facts are as follows. On February 10, 2004, the Organization of Staff Analysts (the "OSA" or the "Union") filed a petition seeking to add the title Administrative Staff Analyst ("ASA") Levels II and III to those employees eligible for collective bargaining. The Board considered surveys filled out by many ASAs in which they were asked to describe their responsibilities as well as the testimony of 74 days of hearings in making its decision. The Board alleges that it ruled on each and every employee in the relevant titles identified by the City and NYCHA although it focused on those contested positions that the City and NYCHA claimed should be excluded from collective bargaining. The Board issued a decision finding that ASAs Levels II and III were generally eligible for collective bargaining, with certain specified exceptions. The City and NYCHA now challenge that determination as to the employees found to be eligible for collective bargaining.

The statute which governs collective bargaining at the state level is the Taylor Law. At the city level, the New York City Collective Bargaining Law ("NYCCBL") governs collective bargaining and is required by law to be substantially equivalent to the Taylor Law. The Public Employment Relations Board ("PERB") administers the Taylor Law. The Office of Collective Bargaining and its two constituent boards, the Board of Collective Bargaining and the Board of

Certification (as noted above, the "Board") administer the NYCCBL. The Board was created pursuant to Chapter 54 of the City Charter and is vested with the authority to determine whether employees are eligible for collective bargaining. The Taylor Law strongly favors extending eligibility for collective bargaining and all uncertainties are to be resolved in favor of such eligibility. *See Matter of Lippman v PERB*, 263 A.D.2d 891 at 904 (3rd Dept 1999). The NYCCBL specifically excepts employees who are managerial or confidential, as defined by the Taylor Law, from eligibility for collective bargaining.

The Taylor Law defines managerial and confidential employees as follows:

> 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).

Civil Service Law 201(7)(a). The NYCCBL explicitly adopts the definitions of "managerial" and "confidential" set forth in the Taylor Law. Therefore, there are two types of managerial employees: those who formulate policy and those who have a role in labor negotiations or a non-routine role in personnel administration. Confidential employees are only those who assist the second type of managerial employee.

The only question before this court is whether the determination of the Board that most of the subject employees were eligible for collective bargaining was arbitrary or capricious or contrary to law. *See Matter of Civil Serv. Empls. Assn., Inc. Local 1000 v New York State Pub. Empl. Relations Bd.*, 34 A.D.3d 884, 885 (3rd Dept 2006). This court finds that the Board's

determination was not arbitrary or capricious or contrary to law. Courts are to accord great deference to an agency's interpretation of the statute it is charged with implementing. *See Matter of Lippman v PERB*, 263 A.D.2d 891 (3rd Dept 1999). The Board's decision carefully sets out the definitions of who is a managerial or confidential employee and then applies those definitions to the individual employees. Although the Board did not devote an entire paragraph to each individual employee, rather listing them by category such as "managers who formulate policy" and "managers involved in labor relations/personnel administration," the Board does include specific citations to the evidence it relies on such as the surveys and specific pages in the hearing transcript in making its findings. There is no requirement that each employee be discussed individually, only that an individual determination based on the evidence is made.

NYCHA's primary argument as to why the determination is improper is that the contested employees are involved in the formulation of policy, thereby rendering them "managerial" and exempt from collective bargaining under the Taylor Law and NYCCBL. NYCHA essentially argues that all staff analysts formulate policy by virtue of their presence on "policy and procedure committees" and the fact that they may suggest or recommend policies. The courts have previously defined how policy should be interpreted under the Taylor Law and the NYCCBL. As the *Lippman* court put it, "to formulate policy is to participate with regularity in the essential process involving the determination of goals and objectives of [the employer] and of the methods for accomplishing those goals and objectives that have a substantial impact upon [their] affairs." *Lippman*, 263 A.D.2d at 899 (citations omitted). In addition, policy and procedures are very different. Policy sets the agency's course whereas procedures are the practical steps taken to implement such policy, including "'the determination of methods of operation that are merely of

a technical nature.'" *Id.* at 899 (citations omitted). Although some employees who advise ultimate decision makers may be deemed to formulate policy, all such advisers "are not automatically policy formulators to be designated as managerial and excluded from the Taylor Law's protections. Rather, the employer must demonstrate... that the subject employees participate in the essential processes by which [the employer] makes decisions regarding its mission and means by which those policy objectives can best be achieved." *Id.* at 900-01. The *Lippman* court also advises that determining which advisors are managerial employees does involve line-drawing and the question for the court is whether that line-drawing was arbitrary and capricious. *See id.* Here, the Board drew the line appropriately by examining the evidence submitted as to each employee's duties and responsibilities. In making its determination, the Board properly considered the statutory definition of policy and the courts' further elucidation of the term policy. It then applied that definition to the subject employees. Neither the Board's interpretation of the term policy nor its application to the subject employees was arbitrary or capricious.

NYCHA also argues that many of the ASAs at issue are managerial employees by virtue of "participat[ing] in all personnel decisions." However, the statute specifically requires that employees participate in personnel matters in a non-routine way in order to be considered managerial. The Board carefully reviewed the evidence as to every single ASA presented to it and determined that the overwhelming majority did not meet the statutory requirement. Its evidence-based decision cannot be said to have been arbitrary or capricious.

NYCHA also argues that the Board does not give enough credence to employees' in-house titles and that "persons in the titles of Director, Deputy Director, and Assistant Director are

managerial and/or confidential." In fact, the Board did make individual determinations as to each employee, as it should have.

NYCHA also claims that "all professional staff in the Budget Department, including the Assistant Directors and Deputy Directors at issue in the instant case, should be found confidential..." However, by law, confidential employees are only those who act in a confidential matter to managers who handle labor negotiations or non-routine personnel matters. NYCHA fails to adequately explain why all Assistant and Deputy Directors in the Budget Department would qualify as confidential employees.

Finally, NYCHA claims that the Board disregarded the evidence submitted by NYCHA. However, the Board's decision was evidence-based, as is shown by its citations to individual employee surveys and specific pages of the transcript of testimony before the Board.

The court now turns to the City's petition. The City's argument that the Board's determination is unfair as it is a global determination that will bind future employees is without basis and evinces confusion about the Board's role and the binding nature of its determinations. Although the Board analyzes each individual and his or her job responsibilities separately, its determination always applies to the person who replaces any employee already decided upon by the Board under the logical assumption that that person's duties will be largely the same.

The City also complains that the Board decision does not address certain employees. However, those employees were not among those challenged in the initial proceeding. As such, the City is barred from raising any issue as to them now. "A fundamental principle of Article 78 review is that judicial review of administrative determinations is confined to the facts and record adduced before the agency." *Rizzo v NYS Div. of Housing and Community Renewal*, 6 N.Y.3d

104, 110 (2005).

Accordingly, because the Board's determination was not arbitrary or capricious or contrary to law, NYCHA's and the City's petitions are denied. This constitutes the decision, judgment and order of the court.

Dated: 10/26/11

CK
J.S.C.

FILED

OCT 27 2011

NEW YORK
COUNTY CLERK'S OFFICE

CYNTHIA S. KERN
J.S.C.