

**Matter of NYC Health + Hosps. v Organization of
Staff Analysts**

2019 NY Slip Op 30466(U)

February 26, 2019

Supreme Court, New York County

Docket Number: 450553/2018

Judge: Melissa A. Crane

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - IAS PART: 15

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In the Matter of the Application of

Index No. 450553/2018
[Mot Seq Nos. 001, 004, 005]

NYC HEALTH + HOSPITALS,

Petitioner,

For a Judgment and Order Pursuant to Article 78 of
the Civil Practice Law and Rules

- against -

ORGANIZATION OF STAFF ANALYSTS, THE
NEW YORK CITY OFFICE OF COLLECTIVE
BARGAINING; and SUSAN PANEPENTO,
as Chair of the Board and Director of the OFFICE
OF COLLECTIVE BARGAINING,

Respondents.

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MELISSA A. CRANE, J.

In this CPLR Article 78 proceeding, petitioner NYC Health + Hospitals (“HHC”),¹ seeks a judgment to vacate the decision and order that the Board of Certification of the New York City Office of Collective Bargaining (the “OCB Board”) rendered. Petitioner claims the OCB Board’s decision: (1) is arbitrary and capricious, and (2) applies an incorrect legal standard (Motion Sequence No. 001). The OCB Board and respondent Susan Panepento (“Panepento”), as Chair of the Board and Director of OCB, move to dismiss the Petition (Motion Sequence No. 004). Respondent Organization of Staff Analysts (“OSA”) moves separately to dismiss the Petition (Motion Sequence No. 005). For the following reasons, the court denies HHC’s Petition and dismisses this action.

¹Around November 2015, the “New York City Health and Hospital Corporation” rebranded as “NYC Health + Hospitals.”

STATUTORY FRAMEWORK

At issue are several sections of the New York City Health and Hospitals Corporation Act (the “HHC Act”) (McKinney's Uncons Laws of NY § 7381 [HHC Act § 1 et seq.]; L 1969, ch 1016, as amended), Article 14 of the Civil Service Law, also known as the Taylor Law (L 1967, ch 392; Civil Service Law, art 14, §§ 200-212), and the New York City Collective Bargaining Law (NYCCBL) (Administrative Code of City of New York § 12-301 et seq.).

Petitioner HHC is a public benefit corporation that the HHC Act created. Enacted in 1969, the HHC Act

“authorizes HHC to manage and operate the City’s municipal hospital system (McKinney's Uncons Laws of NY § 7386 [1] [a] [HHC Act § 6 (1) (a)]). The mission of HHC is to provide efficient, comprehensive health and medical resources to protect and promote the safety and welfare of New York City residents (McKinney's Uncons Laws of NY § 7382 [HHC Act § 2]). . . .

In conjunction with providing quality care to those in need, HHC was established to permit independent financing of municipal hospital construction and improvements and to facilitate professional management of the hospital system. It was intended to overcome the ‘myriad . . . complex and often deleterious constraints’ which inhibited the provision of care by the City in its own operation of the municipal health system (McKinney's Uncons Laws of NY § 7382)”

(*Council of the City of New York v Giuliani*, 93 NY2d 60, 65-66 [1999]).

Section 7385 of the HHC Act sets forth the “general powers” of HHC. Section 7385 (11) lists the following as one of those powers:

“To employ officers, executives, management personnel, and such other employees who formulate or participate in the formulation of the plans, policies, aims, standards, or who administer, manage or operate the corporation and its hospitals or health facilities, or who assist and act in a confidential capacity to persons who are responsible for the formulation, determination and effectuation of management policies concerning personnel or labor relations, or who determine the number of, and appointment and removal of, employees of the corporation, fix their qualifications and prescribe their duties and other terms of employment.

All such personnel shall be excluded from collective bargaining representation”

(HHC Act § 7385 [11][emphasis added]). The HHC Act states under Section 7405, in part, that “[i]nsofar as the provisions of [the HHC Act] are inconsistent with the provisions of any other law, general, special or local, the provisions of [the HHC Act] shall be controlling” (HHC Act § 7405).

The HHC Act further states:

“The corporation, its officers and employees, shall be subject to article fourteen of the civil service law[, also known as the ‘Taylor Law’] and for all such purposes the corporation shall be deemed ‘public employees’, provided, however, that chapter fifty-four of the New York City Charter²¹ and Administrative Code and Executive Order No. 52 dated September 29, 1967, promulgated by the mayor of the city of New York,³² shall apply in all respects to the corporation, its officers and employees except that paragraph seven and paragraph eight of said executive order⁴³ shall not be applicable to the corporation, its officers and employees”

(HHC Act § 7390 [5][emphasis added]).

The Taylor Law was enacted in 1967, two years prior to the HHC Act. Its purpose is set forth in Section 200 of the Civil Service Law:

“to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. These policies are best effectuated by (a) granting to public employees the right of organization and representation...” (Civil Service Law § 200). The statute grants “public employees” “the right to form, join and participate in . . . any employee organization of their own choosing” (Civil Service Law § 202) and affords public employees “the right to be represented by employee organizations, to negotiate collectively with their public employers in the determination of their terms and

² Chapter 54 of the New York City Charter, entitled “Collective Bargaining,” addresses, *inter alia*, the powers and duties of the OCB and the OCB Board.

³ Executive Order No. 52 (EO 52), implemented by the Mayor of New York City in 1967, sets forth procedures to govern collective bargaining.

⁴ Paragraphs 7 and 8 of EO 52 pertain to joint labor relations committees and grievance procedures.

conditions of employment, and the administration of grievances arising thereunder” (Civil Service Law § 203).

In 1971, the Taylor Law was amended to exclude employees designated as “managerial or confidential” from the definition of “public employee” (Civil Service Law § 201[7][a]). Those employees designated “managerial or confidential” are generally not entitled to rights and protections afforded to “public employees” under the Taylor Law, including the right to collective bargaining. Section 201(7)(a) of the Taylor Law states under what circumstances an employee may be considered “managerial or confidential:”

“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][emphasis added]).

Section 212 of the Taylor Law “permits local government bodies -- including New York City -- to enact substantive and procedural provisions governing labor relations, so long as they are ‘substantially equivalent’ to the Taylor Law” (*Levitt v Board of Collective Bargaining*, 79 NY2d 120, 126 [1992], quoting Civil Service Law § 212 [1], [2]). Utilizing its power under that section of the Taylor Law, New York City promulgated the NYCCBL, “its own regulations governing the collective bargaining of its employees” (*Matter of City of New York v District Council 37, Am. Federation of State, County & Mun. Empls., AFL-CIO*, 181 Misc 2d 131, 133 [Sup Ct, NY County 1999]). The NYCCBL provides that HHC is a “public employer” (NYCCBL § 12-303 [g]).

“Under the Taylor Law, the Public Relations Employment Board (‘PERB’) resolves disputes between the public employees and their employers, including disputes over the eligibility of classes of employees for collective bargaining The New York City Charter establishes the analogous Office of Collective Bargaining (‘OCB’)” (*id.*), a labor relations agency responsible for enforcing and administering the NYCCBL. Consistent with the Taylor Law, section 12-305 of the NYCCBL 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 employee shall be deprived of these rights unless, as to such employee, a determination of managerial or confidential status has been rendered by the board of certification*”

(NYCCBL § 12-305 [emphasis added]). The NYCCBL does not include its own definition of “managerial” or “confidential.” It provides however, that the OCB Board, “shall have the power and duty” “to determine whether specified public employees are managerial or confidential *within the meaning of subdivision seven of section two hundred one of the civil service law and thus are excluded from collective bargaining*” (NYCCBL § 12-309 [b][4][emphasis added]).

In this case, the OCB Board applied the criteria set forth in Section 201(7) of the Taylor Law to determine whether certain HHC employees were exempt from collective bargaining based on their status as “managerial or confidential” (NYCCBL § 12-309 [b][4]). HHC argues, *inter alia*, that the OCB Board’s decision that these employees were eligible for collective bargaining involved an error of law. HHC contends that Section 7385 (11) of the HHC Act has a more expansive definition of “managerial or confidential” than the Taylor Law. Petitioner further argues that, in situations where the provisions of the HHC Act are inconsistent with any

other law, the HHC Act “shall be controlling.” Accordingly, petitioner asserts that the OCB Board must apply the broader definition in the HHC Act, when deciding whether HHC employees are exempt from collective bargaining. For the reasons set forth below, the court rejects HHC’s position.

BACKGROUND

In June 2016, OSA filed a Petition with OCB to request that its collective bargaining unit add HHC employees that hold the title of Director of Planning. HHC opposed the application and sought to exclude those employees from collective bargaining because they constitute “managerial” and/or “confidential” employees under the HHC Act. HHC argued that Section 7385 (11) of the HHC Act establishes the standard applicable to HHC employees and articulates a much broader definition of “managerial” and “confidential” than in section 201(7) of the Taylor Law. HHC contended that the employees holding the Director of Planning title are managerial and/or confidential under the HHC Act and therefore, not eligible for collective bargaining. In the alternative, HHC argued that even under the more narrowly construed Taylor Law definition, these employees are managerial and/or confidential. Therefore, the OCB Board should deny OSA’s Petition.

The OCB Board conducted a three-day hearing on the Petition. The five employees holding the title Director of Planning testified and submitted job surveys and descriptions (Hearing Transcripts, NYSCEF Doc. No. 3; Surveys, NYSCEF Doc. Nos. 38-42). Afterwards, the OCB Board issued a decision, dated March 7, 2018, holding that the employees with the Director of Planning title are neither managerial nor confidential, and thus added the title to the collective bargaining unit (*Organization of Staff Analysts*, 11 OCB2d 8 (BOC 2018) [NYSCEF Doc. No. 2]). The OCB Board rejected HHC’s position that the Taylor Law is not the proper

standard for determining eligibility for collective bargaining for HHC's employees (*id.* at 11-15).

The OCB Board saw no reason to deviate from its prior course in this regard, explaining:

“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)”

(*id.* at 17-18).

In the decision, the OCB Board reviewed and evaluated the job surveys and testimony of each of the witnesses (*id.* at 2-11). It then set forth a detailed analysis of the exclusions from eligibility for collective bargaining under section 201 (7) (a) of the Taylor Law and concluded, based upon the evidence at the hearing, that the employees holding the Director of Planning title are not managerial or confidential employees (*id.* at 18-26).

On April 11, 2018, HHC commenced this CPLR Article 78 proceeding seeking to overturn the OCB Board’s determination pursuant to CPLR 7803 (3) (Verified Petition, NYSCEF Doc. No. 1). The OCB Board and Susan Panepento, as Chair of the Board and Director of OCB, move to dismiss the petition (Motion Sequence No. 004) and OSA moves separately to dismiss the petition (Motion Sequence No. 005). The Court granted the New York

City Municipal Labor Committee (“MLC”), an association that includes 98 New York City municipal labor organizations representing approximately 390,000 active New York City workers, permission to serve and file an amicus curie brief. MLC asks the court to uphold OCB’s decision (Brief of Amicus Curiae, NYSCEF Doc. No. 97).

DISCUSSION

Initially, the court notes that the hearing that preceded the determination under review was discretionary (*see* Rules of NY City Office of Collective Bargaining [61 RCNY] § 1–02[u][6]; Rules of NY City Office of Collective Bargaining [61 RCNY] § 1–02[v][4]). Therefore, the substantial evidence standard does not apply (*see Colton v Berman*, 21 NY2d 322, 329 [1967] [“Under CPLR 7803(4) the substantial evidence test applies only where a hearing has been held and evidence taken pursuant to direction by law”]; *Matter of Forlenza v Board of Educ. of Uniondale Union Free Sch. Dist.*, 256 AD2d 409, 409 [2d Dept 1998]). Thus, the relevant inquiry is whether the “determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion” (CPLR 7803[3]; *see Matter of Forlenza v Board of Educ. of Uniondale Union Free Sch. Dist.*, 256 AD2d at 409; *Burrell v Ortiz*, 128 AD2d 391, 392 [1st Dept 1987]).

HHC argues that the OCB Board’s determination relies upon an error of law in that the proper standard for deciding whether its employees are managerial and/or confidential is set forth in the HHC Act. Further, HHC contends that, even under the standard set forth in the Taylor Law, the determination was arbitrary and capricious because it ignored record evidence and departed from prevailing case law and past precedent. Both contentions lack merit.

A. The OCB Board Applied the Correct Standard to Determine whether the Employees are Entitled to Collective Bargaining

This court must first determine whether to accord deference to the OCB Board's interpretation of the relevant statutes.

“An administrative agency's interpretation of a statute is typically entitled to deference . . . , particularly where the interpretation involves specialized knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, provided that the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute Where, however, the question is one of pure statutory interpretation dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretative regulations are therefore to be accorded much less weight In the latter case, courts are free to ascertain the proper interpretation from the statutory language and legislative intent”

(*Matter of Peyton v New York City Bd. of Stds. & Appeals*, 166 AD3d 120, 135-136 [1st Dept 2018][internal quotation marks and citations omitted]; see *Matter of Webster Cent. Sch. Dist. v Public Empl. Relations Bd. of the State of N.Y.*, 75 NY2d 619, 626 [1990]; *Matter of Rosen v Public Empl. Relations Bd.*, 72 NY2d 42, 47-48 [1988] [issue of whether certain conduct constituted “employee organization” within the meaning of Civil Service Law § 201 (5) and was protected by Civil Service Law § 202 was a question of “pure statutory construction” dependent only on accurate apprehension of legislative intent with little basis to rely on PERB’s special competence or expertise in its administration of the Taylor Law]; but see *Matter of Civil Serv. Tech. Guild, Local 375, DC 37, A.F.S.C.M.E., AFL-CIO v Anderson*, 55 NY2d 618 [1981], adopting dissenting mem at 79 AD2d 541, 542-545 [1st Dept 1980][OCB “is an agency especially constituted to administer the Taylor Law in municipal labor relations. As such its construction of the Civil Service Law (where the Taylor Law is embodied) must be upheld unless it is either irrational or to contrary to public policy as to be legally (im)permissible”] [quotation marks and citations omitted]; *Matter of Lippman v Public Empl. Relations Bd.*, 263 AD2d 891, 893 [3d Dept 1999]).

Here, the question of whether the OCB Board must apply the definition of “managerial or confidential” in the Taylor Law in this context is one of pure statutory construction, which is a function of the courts (*see id.*).⁵ Therefore, the OCB Board’s interpretation does not bind this court. Nor need the court give its interpretation deference. Nevertheless, for the reasons that follow, this court’s construction of the statutes at issue is congruent with the OCB Board’s interpretation. Therefore, this court would reach the same result under either standard.

As set forth above, the Taylor Law grants public employees “the right to form, join and participate in . . . any employee organization of their own choosing” (Civil Service Law § 202) and affords them “the right to be represented by employee organizations, to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder” (Civil Service Law § 203). Although the statute makes an exception for employees designated “managerial or confidential” (*see* Civil Service Law § 201 [7]), such “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 Lippman v Public Empl. Relations Bd.*, 263 AD2d at 904).

⁵ Respondents contend that HHC should be collaterally estopped from arguing that the HHC Act, rather than the Taylor Law, applies. However, this issue of whether the Taylor Law criteria apply is “a question of law to which collateral estoppel has been held not to apply” (*Matter of Hop Wah v Coughlin*, 160 AD2d 1054, 1055 [3d Dept 1990]; *see American Home Assur. Co. v International Ins. Co.*, 90 NY2d 433, 440 [1997]; *Matter of McGrath v Gold*, 36 NY2d 406, 411 [1975]; *Matter of Department of Personnel v City Civ. Serv. Commn.*, 94 AD2d 5, 7 [1st Dept 1983]). Collateral estoppel “does not apply to bar relitigation of a pure question of law” (*Avon Dev. Enters. Corp. v Samnick*, 286 AD2d 581, 582 [1st Dept 2001]). Contrary to respondent’s contention, HHC is also not judicially estopped from advancing this argument. “The submission of a legal argument is of a different character than an inconsistent framing of one’s factual pleadings, and therefore not a basis for judicial estoppel” (*Excelsior 57th Corp. [Kern]*, 218 AD2d 528, 529-530 [1st Dept 1995]; *see Stop & Shop Supermarket Co. v Vornado Realty Trust*, 35 AD3d 241, 243 [1st Dept 2006]).

The statute explicitly states that “[e]mployees may be designated as managerial *only if* they” meet certain criteria and “designated as confidential *only if* they are persons who assist and act in a confidential capacity to managerial employees” (Civil Service Law § 201 [7] [a] [emphasis added]). Therefore, under the Taylor Law, those who do not meet the criteria listed in section 201(7) (a), read narrowly in favor of coverage, are “public employees” entitled to collective bargaining.

HHC is a “public employer” subject to the provisions of the Taylor Law and the NYCCLB (*see* Civil Service Law § 201 [6][a][v]; NYCCLB § 12-303 [g]). The HHC Act explicitly dictates that HHC and its employees are subject to the Taylor Law (*see* HHC Act § 7390 [5]). Notwithstanding, HHC asks the court to hold that some of its employees are not entitled to the rights afforded to public employees under the Taylor Law even though they qualify as non-managerial and non-confidential under section 201(7)(a). HHC’s position in this regard hinges on a purported conflict between section 7385 (11) of the HHC Act and section 201(7)(a) of the Taylor Law, thereby triggering the override provision in section 7404 of the HHC Act. However, this court does not read section 7385 (11) of the HHC Act and section 201(7)(a) of the Taylor Law as setting forth conflicting criteria to decide whether an employee is eligible for collective bargaining. The criteria set forth in section 7385 (11) of the HHC Act and section 201(7)(a) of the Taylor Law accomplish the same end -- i.e., to exclude from collective bargaining those individuals who may have conflicting loyalties, because of their involvement in labor policies. In arguing that the two statutes set forth conflicting tests, HHC contends:

“The scope of Section 7385(11) of the [HHC] Act Standard is much broader than the NYCCBL Standard in at least two important respects. First, Section 7385(11) excludes from ‘collective bargaining representation’ not only those ‘managerial personnel’ who ‘formulate policy,’ but also ‘such other employees’ who ‘*participate* in the formulation of plans policies, aims, standards’ of a ‘hospital.’ Section 7385(11)(emphasis added). The [HHC] Act does not require a review of the ‘process’ in which the ‘policy’ or ‘plans’

are formulated, nor does it provide any caveat as to the degree, frequency or significance of participation in the 'process' necessary to exclude an employee from the right to collective representation. So long as an individual 'participates' in policy or plan formulation, the statutory exclusion is met.

Second, by its terms, the [HHC] Act standard is not limited by either the *degree* of administrative, managerial, or operational responsibilities [an HHC] employee must perform, or the *type* of responsibility the employee must perform. In stark contrast, other than those who actually 'formulate' policy, the Taylor Law and NYCCBL only exclude as 'managerial' employees those who 'have a major role in the administration of agreements or personnel administration' and only if 'such role is not of a routine or clerical nature and requires the exercise of independent judgment'"

(HHC's Mem or Law in Support of Petition [NYSCEF Doc. No. 7], at 20-21 [emphasis in original]). The court rejects HHC's interpretation of the HHC Act as unreasonable. Carried to its logical conclusion, it would render employees who provide only clerical support or who perform solely ministerial tasks ineligible for collective bargaining, a result HHC concedes is not what the Legislature intended (*see People v Garson*, 6 NY3d 604, 614 [2006][courts are "governed by the principle that we must interpret a statute so as to avoid an unreasonable or absurd application of the law"] [internal quotation marks and citations omitted]). HHC also points out that section 7385 (11) of the HHC Act was enacted prior to the managerial/confidential employee exclusion in section 201(7)(a) of the Taylor Law. HHC contends that it stands to reason that the Legislature must have intended for the Taylor Law to set forth a more narrow standard than the one contained in the HHC Act, otherwise it would have specified that section 7385 (11) of the HHC Act does not preempt section 201(7)(a) of the Taylor Law. However, the absence of such a provision can cut both ways. In other words, assuming the Legislature did not perceive a conflict between the two provisions, there would be no need for this directive. It is also important that, when the Taylor Law was amended in 1971 to exclude managerial and confidential employees from collective bargaining, the OCB Board had been using criteria that were "substantially equivalent to the 1971 enacted Taylor Law definitions and

designed to accomplish the same end” (*Organization of Staff Analysis*, 8 OCB2d 19 [2015]; see *Communication Workers of Am., AFL-CIO*, 40 OCB, 5, 19 [1987]) [“at the time the HHC Act was passed, the Legislature was or should have been aware of prior decisions of this Board in cases which involved, inter alia, employees of HHC's predecessor, the Department of Hospitals, in which managerial/ confidential criteria were used which were substantially equivalent to the subsequently-enacted Taylor Law criteria. We believe that if the Legislature had intended that different criteria be applied by this Board with respect to employees of HHC, it would have said so in placing HHC under this Board’s jurisdiction”)].

Courts should also try to rationalize statutory provisions. “When two statutory or regulatory provisions are potentially in conflict, they should be construed in such a manner that the overriding purposes of both can be preserved” (*Matter of Lumpkin v Department of Social Servs. of State of N.Y.*, 59 AD2d 485, 490 [3d Dept 1977], *affd* 45 NY2d 351 [1978]). It “has . . . long been held that statutes which relate to the same or to cognate subjects are in pari materia and to be construed together unless a contrary intent is clearly expressed by the Legislature” (*Matter of Plato’s Cave Corp. v State Liq. Auth.*, 68 NY2d 791, 793 [1986]; see *Matter of Albany Law School v New York State Off. of Mental Retardation & Dev. Disabilities*, 19 NY3d 106, 121 [2012]). Section 7405 of the HHC Act setting forth the general proposition that the HHC Act controls in the event of an inconsistency with another law does not constitute evidence of a contrary intent. Rather, the statutory language, in particular HHC Act § 7390 (5) and Civil Service Law § 201 (6) (a) (v), indicates an intent for the provisions in the HHC Act and the Taylor Law to co-exist.

Additionally, in *Matter of Civil Service Technical Guild v Anderson*, the Court of Appeals, without mentioning section 7385 (11) of the HHC Act, upheld a decision of the OCB

Board in which the Board had applied the criteria set forth in section 201(7)(a) of the Taylor Law to determine whether certain HHC employees were “managerial” (*Matter of Civil Serv. Tech. Guild, Local 375, DC 37, A.F.S.C.M.E., AFL-CIO v Anderson*, 55 NY2d 618 [1981], *adopting dissenting mem at 79 AD2d 541, 542-545* [1st Dept 1980]). The dissent in the Appellate Division, that the Court of Appeals adopted, held that the OCB Board’s conclusions “were rationally based on articulated facts and in substantial conformance with the statutory criteria [set forth in section 201(7)(a) of the Taylor Law] and should, therefore, be upheld” (79 AD2d at 544). If this court were to hold that section 201(7)(a) of the Taylor Law does not apply to HHC employees, the result would run counter to *Matter of Civil Service Technical Guild v Anderson*.⁶⁵

Finally, another Justice of this Court recently upheld the OCB Board’s use of the standard set forth in section 201(7)(a) of the Taylor Law to determine the eligibility of certain HHC employees for collective bargaining (*see Matter of NYC Health + Hosps. v Organization of Staff Analysts*, 2017 NY Slip Op 32393[U][Sup Ct, NY County 2017] [Edwards, J.]).⁶ In that case, the court determined that HHC failed to demonstrate that the OCB Board “applied the wrong legal standard” (*id.*). Although this court is not bound by that order (*see Polo Elec. Corp. v Aspen Am. Ins. Co.*, 2016 NY Misc LEXIS 1241, *8-*9, n 4 [Sup Ct, NY County 2016]; *Detectives’ Endowment Assn., Inc. v City of New York*, 2012 NY Misc LEXIS 5473, *8-*9 [Sup Ct, Suffolk County 2012]; *Zagrosik v New York State Div. of Hous. & Community Renewal*, 12 Misc 3d 1076, 1080 [Sup Ct, NY County 2006]; *see also McKinney’s Cons Laws of NY, Book 1, Statutes § 72, at 143-144* [“A decision of a court of equal or inferior jurisdiction is not

⁶ Section 7385 (11) of the HHC Act is never mentioned in *Matter of Civil Service Technical Guild v Anderson*. However, it should be noted that it appears HHC never raised this as an issue in that case.

necessarily controlling, though entitled to respectful consideration”)), it nevertheless agrees with that court’s conclusion.

B. The OCB Board’s Determination is Supported by a Rational Basis and is Neither Arbitrary nor Capricious

HHC argues alternatively that even under the Taylor Law definition, the OCB Board’s determination should not be upheld because in declining to classify these employees as managerial and/or confidential, the OCB Board ignored record evidence and departed from its own precedent. The court disagrees.

“In reviewing an administrative agency determination, [courts] must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious Arbitrary action is without sound basis in reason and is generally taken without regard to the facts If the [reviewing] court finds that the determination is supported by a rational basis, [then] it must sustain the determination even if the [reviewing] court concludes that it would have reached a different result than the one reached by the agency”

(Matter of Natasha W. v New York State Off. of Children & Family Servs., 32 NY3d 982, 984 [2018][internal quotation marks and citations omitted]; see Matter of Jennings v New York State Off. Mental Health, 90 NY2d 227, 240 [1997][“rationality is the underlying basis for both the arbitrary and capricious standard and the substantial evidence rule”]; Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]).

Here, the OCB Board’s determination that the employees holding the title of Director of Planning are eligible for collective bargaining was rational and based on the facts. OCB supports its decision with hearing testimony and job surveys. While HHC highlights certain aspects of the evidence that may weigh in favor of a different result, the record as a whole, as well as case law and the OCB Board’s precedent in deciding such matters, provide a rational basis for the

conclusion OCB Board reached in this case. The OCB Board's determination in this regard should be accorded deference as a decision within its area of expertise.

Specifically, HHC asserts that the OCB Board ignored evidence that the subject employees played a role in the preparation and allocation of budgets. However, having budgetary responsibilities is "not dispositive of managerial status" (*Communication Workers of Am., Local 1180*, 2 OCB2d 13, 14 [2009]; *Communication Workers of Am., Local 1180*, 78 OCB2d 3, 39, 45, 51 [2006]; *Organization of Staff Analysts*, 78 OCB 1, 21, 25-26, 34, 36 [2006]; see also *Village of Suffern*, 38 PERB P 3016, 3057 [2005]; *County of Putnam*, 20 PERB P 3059, 3128 [1987]). Similarly, having supervisory duties alone is not dispositive. To meet a definition of "managerial," employees must, "in the exercise of their supervisory duties, alter or change [HHC's] procedures or operations and . . . have the power to set standards" (*Matter of Lippman v Public Empl. Relations Bd.*, 263 AD2d 891, 901 [3d Dept 1999]). Here, the evidence before the OCB Board does not support a conclusion that these employees play a role in doing so.

Further, while the subject employees provide advice and recommendations in their area of expertise, "all employees who advise the ultimate decision makers 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 [HHC] makes decisions regarding its mission and means by which those policy objectives can best be achieved" (*id.* at 901-902 [emphasis added] ["Although the subject employees perform an important role in, and have powers directly affecting, personnel administration, for example by making hiring, promotional, disciplinary, staffing and other recommendations, the record does not support the conclusion that they have *fundamental*

control over the direction and scope of UCS' mission or that they exercise independent judgment reflecting substantial discretionary responsibility, including standard setting” [*id.* emphasis added]; see *Matter of County of Nassau v Nassau County Pub. Empl. Relations Bd.*, 283 AD2d 428, 428-429 [2d Dept 2001]). The record does not support a conclusion that these employees had control over decisions regarding HHC’s mission or how to best achieve HHC’s policy objectives.

Finally, HHC contends that the employees here should have been classified as confidential, because they had advance knowledge of vacancies, supervisory responsibilities, and access to confidential and sensitive information. This contention is also without merit.

The definition of confidential employee under the Taylor Law “incorporates a two-part test, both prongs of which must be satisfied for designation: (1) the employee to be designated 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 assisting the section 201 (7) (a) (ii) manager must be acting in a confidential capacity to that manager-relationship oriented evaluation” (*Matter of Lippman v Public Empl. Relations Bd.*, 263 AD2d at 902). “[A]ll supervisory employees working with or for managerial employees are not automatically or presumably confidential employees within the meaning of Civil Service Law § 201 (7) (a) (ii)” (*id.* at 03). “[K]nowledge of personnel or disciplinary matters is often inherent in supervisory positions and does not warrant a confidential designation where . . . it is limited and does not encompass labor relations information significant to the basic mission of the employer” (*id.*). Therefore, an “employees’ access to and involvement in personnel records and matters, which are qualitatively and quantitatively narrow, is insufficient to support a confidential designation” (*id.*).

In this case, the OCB Board rationally determined that the record contained no evidence of the employees assisting in collective negotiations, the administration of collective bargaining agreements, or personnel administration, beyond those of a typical supervisor. As the OCB Board noted, “it is long-established that employees with supervisory duties are eligible for collective bargaining” (*Organization of Staff Analysts*, 11 OCB2d 8, 25 (BOC 2018) [NYSCEF Doc. No. 2][citing *Metropolitan Suburban Bus Auth. v Public Empl. Relations Bd.*, 48 AD2d 206, 211 (3d Dept 1975); *Communication Workers of Am., Local 1180*, 2 OCB2d 13, 92 (2009); *Local 621, Serv. Empls. Int. Union*, 78 OCB 2, 21 (2006); *Uniformed Sanitation Chiefs Assn.*, 66 OCB 4, 29-30 (2000)]). The OCB Board also rationally concluded that the subject employee’s incidental access to confidential information did not warrant classifying them as confidential (citing *Organization of Staff Analysts*, 78 OCB 1, 22-23 [2006]; *Organization of Staff Analysts*, 78 OCB 5, 42 [2006]).

Accordingly, the OCB Board’s conclusion that the employees with the title of Director of Planning are not managerial or confidential and, therefore, entitled to collective bargaining was not arbitrary and capricious. The court sustains the OCB Board’s determination.

Accordingly, it is

ADJUDGED that the Petition of the NYC Health + Hospitals for relief pursuant to CPLR Article 78 (Motion Sequence No. 001) is denied and the proceeding is dismissed; and it is further

ORDERED that the motions, pursuant to CPLR 3211, of respondents the Office of Collective Bargaining and Susan Panepento, as Chair of the Board and Director of the Office of

Collective Bargaining (Motion Sequence No. 004), and the motion of respondent Organization of Staff Analysts (Motion Sequence No. 005) are granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of these respondents.

Dated: **2-26**, 2019

ENTER:


HON. MELISSA A. CRANE, J.S.C.

HON. MELISSA A. CRANE
J.S.C.