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State of New York Public Employment Relations Board Decisions from April 24, 2006

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from April 24, 2006

Keywords

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Comments

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**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

UNITED FEDERATION OF POLICE OFFICERS, INC.,

Petitioner,

- and -

CASE NO. C-5327

**STATE OF NEW YORK (OFFICE OF PARKS,
RECREATION AND HISTORIC PRESERVATION),**

Employer.

THOMAS P. HALLEY, for Petitioner

**WALTER J. PELLEGRINI, GENERAL COUNSEL (MICHAEL N. VOLFORTE of
counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the United Federation of Police Officers, Inc. (Federation) to the Administrative Law Judge's (ALJ) decision on a petition filed by the Federation seeking to represent the titles of Chief Regional Park Police 1, 2 and 3 employed by the State of New York (Office of Parks, Recreation and Historic Preservation) (State). The State objected to the petition on the grounds that the titles in question are managerial and/or confidential under §201.7(a) of the Public Employees' Fair Employment Act (Act), or in the alternative, that the most appropriate unit for these titles is the Security Supervisors Unit. Council 82, American Federation of State, County and Municipal Employees, AFL-CIO (Council 82), the collective bargaining representative for the Security Supervisors Unit, declined to intervene, as did the

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION ,

Petitioner,

-and-

CASE NO. C-5552

OCEANSIDE UNION FREE SCHOOL DISTRICT,

Employer,

-and-

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO,**

Incumbent/Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their

exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All Cleaner/Laborer, Security Aide, Custodian, Custodian in Charge, Custodian Repairman, Groundsperson, Messenger, Security Guard, Head Custodian I, Head Grounds Person, Assistant Head Custodian (Secondary Schools), Assistant Head Groundsperson, Duplicating Machine Operator, Maintainer (General Maintainer, Painter, Plumber, Carpenter), Elementary Head Custodian, Head Custodian II, Senior Maintainer, Supervisor of Grounds, Head Custodian III,

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: April 24, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

collective bargaining representative for the Security Services Unit, the New York State Correctional Officers, and the Police Benevolent Association, Inc.

EXCEPTIONS

The Federation excepts on the law and the facts to the ALJ's decision finding that the at-issue titles are confidential. The State filed cross-exceptions to the ALJ's decision contending that the ALJ erred on the law and the facts by not finding the at-issue titles to be managerial. The State also filed a response to the Federation's exceptions supporting the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.

FACTS

The facts are fully set forth in the ALJ's decision¹ and are repeated here only as necessary for our discussion of the exceptions.

The Federation filed a petition for certification on August 1, 2003, seeking to represent the civil service titles of Chief, Regional Park Police I [manages a small to medium-sized park region]; Chief, Regional Park Police 2 [manages the Niagara or Palisades region]; and Chief, Regional Park Police 3 [manages the Long Island or New York City region]. The employees holding these titles are employed by the State in the Office of Parks, Recreation and Historic Preservation.

The State filed a response to the petition that included several affirmative defenses, the most significant of which stated that the titles were appropriately

¹ 38 PERB ¶4027 (2005).

designated managerial/confidential or, in the alternative, that the most appropriate unit for the titles would be the Security Supervisors Unit.

The organizational chart of the New York State Park Police depicts the hierarchy of the Park Police. At the top, the Director of Law Enforcement is designated as Chief. The Assistant Director of Law Enforcement is referred to as Colonel and reports to the Chief. Employees in the title of Chief Regional Park Police 1, 2, or 3 are listed as Majors and report directly to the Colonel.²

The classification specification of the New York State Department of Civil Service for Chief Regional Park Police 1, 2, and 3 describes the illustrative duties of the Chief Regional Park Police 1, 2, and 3 as:

under administrative supervision of regional management staff, is responsible for all police activities in an assigned region; performs and directs special investigations; coordinates police operations with other regional programs and other police agencies; ensures the confidentiality and security of all police records; supervises all administrative functions for the police force, including budget preparation, maintenance of personnel and training records, equipment and supply inventory and control, and report preparation; manages the program for temporary police staff; assures that all police staff have appropriate certification and training; approves all disciplinary measures and terminations of police staff; approves and implements policies, procedures, rules and regulations; evaluates and approves stations and posts for police coverage and implements.³

Chief Michael Daly (hereafter Chief) testified regarding the duties actually performed by the Majors and stated that, because of the small size of the Park Police,

² Joint Exhibit #3.

³ Joint Exhibit #1.

he and the Colonel maintain direct contact with the Majors.⁴ Given the job description for Major, the Chief expects the Majors to:

Administer the patrol forces within their location within their region, where they are assigned, in terms of maintaining control and accountability, in terms of ensuring that the police force's resources are properly utilized. By that I mean deployment of personnel, utilization of equipment and the obvious bottom line is to preserve life, liberty and detect offenders.⁵

Daly characterized the Majors' role in policymaking as advisory.⁶ He stated that he schedules meetings on a quarterly basis with the Majors, or more frequently if time permits. While these meetings produce recommendations for new policies, the ultimate decision on new policies is made by the Commissioner and the Chief.⁷

Daly stated that new candidates for hire as Park Police are put through a battery of tests, both mental and physical, as well as a background investigation. The Majors are responsible for the proper conduct of these tests, the background investigations, and their submission of recommendations for employment to the Colonel. On cross-examination, Daly admitted that the Majors' recommendations are not binding and that he has overruled their recommendations for employment of certain candidates.

On the issue of promotions, Daly stated that:

Majors sit on the Sergeant's board and make recommendations to him about a Sergeant's fitness for promotion. Again, these recommendations are not binding but merely advisory.⁸ For

⁴ Transcript, p. 13.

⁵ Transcript, pp. 5-16.

⁶ Transcript, p. 59.

⁷ Transcript, p. 74.

⁸ Transcript, p. 79.

promotions other than Sergeant, the Major in the region where the vacancy exists together with the Colonel and the Chief interview the candidates. The Chief and the Commissioner then select the successful candidate.⁹

Daly explained the labor-management process. Park Police Officers up to and including the rank of Captain are represented by a collective bargaining representative. At the region level, the Major participates in labor-management meetings on behalf of the State. The most important issue discussed at these meetings is employee scheduling¹⁰ and the agreement reached affects only that particular region.¹¹

After the close of the State's direct case, Major Richard Smith testified for the Federation and stated that with respect to discipline, the Colonel, together with the Office of Labor Relations, serves an accused officer with the notice of discipline.¹² The Personnel Policy requires a Major to ensure that an investigation of the change takes place. This is done in conjunction with the Internal Affairs Bureau (IAB).

DISCUSSION

The Federation argues that the ALJ erred in designating the title confidential, contending that the Majors are co-equal in responsibility with the IAB officers, who are covered by the Act and represented in a bargaining unit.

⁹ Transcript, pp. 38-40.

¹⁰ Transcript, p. 43.

¹¹ Transcript, p. 44.

¹² Transcript, p. 96; Council 82 Exhibit #1.

The State argues in its cross-exceptions that the ALJ erred by not designating the title managerial. However, the State's response to the Federation's exceptions supports the ALJ's decision.

Section 201.7(a) of the Act defines a public employee as a "person holding a position by appointment or employment in the service of a public employer." The statute excepts from this definition those individuals whom the Board may designate managerial or confidential. In order for a public employee to be designated either managerial or confidential, the criteria in §201.7(a) must be met.

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).

Here, the Federation argues that the Majors are at the very least co-equal to the IAB staff, all of whom are in a bargaining unit. Under the Department's organizational chart, the Majors report to the Colonel and the Chief in the performance of their duties, whereas IAB staff report to the Lieutenant Colonel, IAB, who, in turn, reports to the Chief. The Majors only contact with the IAB staff occurs during the investigatory stage of a disciplinary complaint against an officer. Furthermore, the record is devoid of the duties actually performed by IAB other than Smith's description of the investigation that occurs when an accusation is made against an officer.

We concur with the ALJ's determination that the Majors' duties do not warrant a managerial designation. This determination is supported by Daly's testimony, characterizing the Majors' role in policymaking as merely advisory. We have previously decided that employees who merely recommend and advise do not have a direct and powerful influence on policy formulation at the highest level, such as to warrant designation as managerial.¹³ Further, the record does not support a determination that the Majors assisted the Colonel or the Chief in collective negotiations or that they had a major role in the administration of agreements or personnel administration, the other bases under the Act for managerial designation. The Majors' personnel functions are limited to disciplinary investigations and serving on promotion boards. The Majors' role in the administration of agreements principally involves only labor/management discussions over scheduling.

We also concur with the ALJ's determination that the Majors meet the two-prong test for confidential designation enunciated in *Town of Dewitt*.¹⁴ We there held that the first part of the test is duty oriented while the second part of the test is relationship oriented, and the two parts are distinct; satisfaction of one might not satisfy the other.

We concluded in *DeWitt* that the employee assisting the manager must have a confidential relationship with the manager, involving trust and confidence. The performance of mere ministerial acts such as simple access to existing personnel

¹³ *County of Putnam*, 20 PERB ¶3059 (1987).

¹⁴ 32 PERB ¶3001 (1999).

information is not of the type that would create a conflict of interest or a clash of loyalties.¹⁵

Here, Daly testified that the Majors' actual duties include directing the patrol forces within their respective regions, in terms of maintaining control and accountability. Daly stated that he met at least quarterly with the Majors to discuss operational concerns related to their duties. Also, the Majors sit on promotional boards and make recommendations to Daly regarding candidates' suitability for promotion. The Majors are also involved in the investigation of disciplinary matters and make recommendations to Daly as to whether discipline is warranted.

This is the type of information that we have considered to be "not intended for the eyes and ears of the unit members or their representatives".¹⁶ Since the Majors report to the Colonel and the Chief with regard to this information and their recommendations are relied upon by the Chief, we may reasonably conclude that their duties involve assisting and acting in a confidential capacity to a policymaker who functions in a managerial capacity. We have held that an actual managerial designation is not a condition precedent for a confidential designation of the person working for the manager, if the manager clearly performs the duties which the Act considers managerial.¹⁷ If the duties of the manager fall within §201.7(a)(ii) of the Act, a

¹⁵ *Id.*, at 3003.

¹⁶ *Whitehall Cent Sch Dist*, 5 PERB ¶4013, at 4021 (1972); *City of Binghamton*, 12 PERB ¶4022, *aff'd*, 12 PERB ¶3099 (1979). See also *Nassau County BOCES*, 10 PERB ¶4071, at 4091 (1977), *aff'd*, 11 PERB ¶3032 (1978).

¹⁷ *Wappingers Cent Sch Dist*, 19 PERB ¶3059 (1986); *Byram Hills Sch Dist*, 5 PERB ¶3028 (1972).

confidential designation of the person who assists or acts in a confidential capacity to that managerial employee is proper.¹⁸ The record clearly establishes that the Majors serve in a confidential capacity to the Chief, who meets the criteria for designation as a managerial employee. We, therefore, find that the titles of Chief Regional Park Police 1, 2, and 3 are confidential employees within the meaning of the Act and are not entitled to representation.

Based on the foregoing, we deny the Federation's exceptions and the State's cross-exceptions and affirm the ALJ's decision.

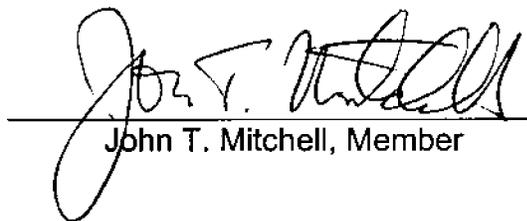
The petition is, therefore, dismissed in its entirety.

SO ORDERED.

DATED: April 24, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

¹⁸ See *County of Orange*, 31 PERB ¶3016 (1998).

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO,
NIAGARA FALLS BRIDGE COMMISSION UNIT,
NIAGARA COUNTY LOCAL 832,**

Petitioner,

CASE NO. CP-992

- and -

NIAGARA FALLS BRIDGE COMMISSION,

Employer.

**NANCY E. HOFFMAN, GENERAL COUNSEL (RICHARD V. STEWART,
JR. of counsel), for Petitioner**

**JAECKLE, FLEISCHMANN & MUGEL, LLP (MATTHEW C. VAN
VESSEM of counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Niagara Falls Bridge Commission (Commission) to a decision of an Administrative Law Judge (ALJ) granting a unit placement petition filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Niagara Falls Bridge Commission Unit, Niagara County Local 832 (CSEA), thus adding the title of Building Maintenance Foreman to CSEA's unit. The ALJ found that the Bridge Maintenance Foreman, a newly-created title, shared a community of interest with the employees in the unit represented by CSEA.

EXCEPTIONS

The Commission excepts to the ALJ's decision on the facts and the law. CSEA supports the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.

FACTS

The facts are fully set forth in the ALJ's decision and are repeated here only as necessary to address the exceptions.¹

The Commission was created by the governments of the United States and the province of Ontario to operate and maintain three bridge crossings between the United States and Canada, specifically, the Rainbow, Lewiston and Whirlpool bridges. The Commission has recognized CSEA as the representative of a unit consisting of Toll Collectors, Truck Compound Attendants, Toll Captains, Part-Time Employees, Maintenance Men, and Janitors. The following employees are excluded from the unit: Seasonal Temporary Employees, Maintenance Foremen and all other employees of the employer.

The Commission and CSEA are parties to a collective bargaining agreement for the term November 1, 1995 to October 31, 2000, and are engaged in negotiations for a successor agreement.

¹ 39 PERB ¶4005 (2006).

In 2004, the Commission moved into a new administration building and created the title of Building Maintenance Foreman.² Edward Washcalus was hired to fill the position and to perform semi-skilled maintenance duties and oversight of independent contracts as they relate to the administration building. All maintenance, janitorial, and service work required at the administration building is provided, pursuant to contract, by independent contractors, for example, window washing, landscaping, cleaning, and HVAC servicing. Washcalus prepared the bid specifications for the contractors and then made recommendations to Paul Janhunen, the Facilities Manager, for the selection of the contractors. Washcalus' primary responsibility is one of oversight of the building's systems, which consists of monitoring the building's various systems via computer, and scheduling the work of the private contractors. Utilizing the budgets of previous years, Washcalus prepares the building's annual budget request, under the supervision of Janhunen. Washcalus also performs snow removal and minor repairs that do not require the contractors.

The work schedule for the Building Maintenance Foreman is generally Monday to Friday, 7:30 a.m. to 3:30 p.m., but Washcalus is otherwise on-call to come into work if needed. For example, in the winter, he has reported earlier in the morning to remove snow and he has worked outside of scheduled hours to check for leaks when there is a heavy rain. Washcalus receives a full range of benefits, including health and dental insurance, vision insurance through the CSEA plan, accidental death and dismemberment insurance, a pre-tax 401(k) retirement plan, paid holidays, vacation and personal leave. Washcalus earns \$12.80 an hour.

² The Commission had rented administrative offices prior to 2004 and utilized the rental property's maintenance staff.

Toll Collectors and Toll Captains are included in the CSEA unit. There is no evidence as to the job duties performed by those titles, apart from what is apparent from their titles. The other unit employees represented by CSEA are blue-collar employees, performing work at the toll plazas of the Commission's three bridges; no unit employees work at the administration building. The job duties of the maintenance men and janitors include cleaning windows, mopping floors, cleaning bathrooms, shoveling snow, electrical work, plumbing, and maintenance and repair of the HVAC systems. They work shifts of 7:30 a.m. to 3:30 p.m. or 3:00 p.m. to 11:00 p.m., although the latter shift changes to 6:00 p.m. to 2:00 a.m. in winter to allow for snow removal. The hourly rate of pay for unit employees, including Toll Collectors and Toll Captains, ranges from \$17.96 an hour to \$22.60 an hour. Like Washcalus, unit employees receive health and dental insurance, albeit through different plans, vision insurance, and death and disability insurance. They also participate in a retirement plan. Unit employees are eligible for paid vacation and personal leave and time off on holidays, although on somewhat different levels than non-unit employees like Washcalus.

When Kerry Matlock, the Facilities Operation Supervisor, a non-unit title, is not present, unit employees may serve as acting Working Maintenance Foreman. In that capacity, unit employees delegate work as well as work alongside other unit employees. An acting Working Maintenance Foreman contacts contractors, shows them the work to be completed, and asks for price quotes.³

³ Transcript, p. 105.

DISCUSSION

The Commission presents several arguments in support of its assertion that the Building Maintenance Foreman is not appropriately placed in CSEA's unit.

The Commission argues that the Building Maintenance Foreman is a white-collar title that does not share a community of interest with the blue-collar employees in CSEA's unit. Neither the Act nor prior Board decisions require the creation of separate blue-collar and white-collar units.⁴ In *Wayne Central School District*,⁵ the Board held that "[n]otwithstanding the fact that there is often a conflict of interest between blue- and white-collar employees, there are circumstances in which the distinctions between them are blurred and their aspirations in collective bargaining can be adequately represented in a single negotiating unit." Here, there are blue-collar titles in the CSEA unit, some of whom perform duties similar to those that Washcalus may be called upon to perform, such as snow removal and minor maintenance. The remaining employees are involved in the collection of tolls at the three bridge toll plazas. We do not find on this record that there is such a difference in terms and conditions of employment of the Building Maintenance Foreman and unit employees to evidence a real or potential conflict of interest at the negotiating table; their salary and benefit levels are similar, as are their hours of work. To the extent that the Building Maintenance Foreman exercises some discretion in the performance of his job duties and supervises independent contractors, so too do unit employees performing the duties of an acting Working Maintenance Foreman.

⁴ *Incorporated Village of Lake Success*, 32 PERB ¶3013 (2005).

⁵ 17 PERB ¶3104, at 3162 (1984).

The Commission next argues that the Building Maintenance Foreman should not be included in the CSEA bargaining unit because the contractual recognition clause specifically excludes the title of Maintenance Foreman from the bargaining unit. We rejected a similar argument in *County of Rockland*,⁶ where we held that:

Although public employers and employee organizations are encouraged to agree upon the composition of bargaining units, as well as the terms and conditions of employment of unit employees, when a representation dispute arises, PERB has the statutory duty, pursuant to §207 of the Act, to determine the most appropriate bargaining unit consistent with the criteria contained therein. Agreements between the employer and the employee organization regarding unit inclusions and exclusions are, accordingly, not controlling.

In both *County of Rockland, supra*, and *Regional Transit Authority, Inc.*,⁷ we placed previously excluded titles in bargaining units pursuant to the statutory uniting criteria in §207.1 of the Act. We have long held that the most appropriate unit is the largest that permits for effective and meaningful negotiations. As long as there is no potential or actual conflict, employees who have different occupations and terms and conditions of employment may be grouped together if they share a general community of interest. While the Maintenance Foreman position is currently vacant, the job description for Working Maintenance Foreman evidences that both titles perform some of the same job duties. But unit employees and the Building Maintenance Foreman also perform similar job duties and share many terms and conditions of employment. The fact that the title of Maintenance Foreman has been excluded from the recognition clause of the CSEA-Commission collective bargaining agreement does not require us to exclude the

⁶ 28 PERB ¶¶3063, at 3143 (1995).

⁷ 35 PERB ¶¶3022 (2002).

Building Maintenance Foreman title as well, especially not when there is a community of interest shared by that title and the unit employees represented by CSEA.

Finally, the Commission posits that the title Building Maintenance Foreman might be appropriately placed in a unit of employees from the Ontario side of the Commission. No evidence was introduced to support such an argument and we decline to remand the matter for further evidence on this point.⁸

Based on the foregoing, we deny the Commission's exceptions and affirm the decision of the ALJ.

IT IS, THEREFORE, ORDERED that CSEA's unit placement petition is granted and the title of Building Maintenance Foreman is placed in CSEA's bargaining unit.

DATED: April 24, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

⁸ Likewise, we decline to address the argument raised by the Commission for the first time in its brief that CSEA has filed a grievance regarding the proper posting for filling the Building Maintenance Foreman position.

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

CITY OF ROME

CASE NO. E-2365

Upon the Application for Designation of
Persons as Managerial or Confidential.

**JAMES S. RIZZO, CORPORATION COUNSEL (TIMOTHY A. BENEDICT of
counsel), for Employer**

**NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of
counsel), for Intervenor**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Rome (City) to a decision of an Administrative Law Judge (ALJ) dismissing its application seeking to designate Valerie Cucura, Director of Information Services, as managerial or confidential under the criteria set forth in §201.7 of the Public Employees' Fair Employment Act (Act).¹ The title is in a unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA).

¹ Section 201.7(a) defines "public employee" as "any person holding a position by appointment or employment in the service of a public employer, except that such term shall not include for the purposes of any provision of this article other than sections two hundred ten and two hundred eleven of this article, ... persons who may reasonably be designated from time to time as managerial or confidential upon application of the public employer to the appropriate board.... 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)."

EXCEPTIONS

The City excepts to the ALJ's decision, arguing that the ALJ erred on the law and the facts and that Cucura directly and powerfully influences policy and acts in a confidential capacity to managerial employees in personnel matters. CSEA supports the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.

FACTS

The facts are fully set forth in the ALJ's decision and are set forth here only as necessary to address the City's exceptions.²

In 2001, then Mayor Joseph Griffo hired information technology specialist Cucura as its Director of Information Services to modernize the City's technology.³ The budget of the City's Information Technology Department, where Cucura is currently the only employee, increased from approximately \$96,000 annually in 2001 to \$755,481 in 2005, with most of the budget devoted to purchases of equipment, software, and technology. In 2002, Cucura supervised the upgrading of the City's telephone system. In 2003, the City's computers were upgraded. These upgrades were performed at the direction of Griffo, who told Cucura the results he wanted and left to her the method and means of accomplishing his goals, which included Internet access, e-mail and computer security.

² 39 PERB ¶4004 (2006).

³ The job description for the Director of Information Services provides, in relevant part, that the incumbent perform specialized work in both local-area and wide-area networks; develop short-term and long-term plans for the development of network technology growth; plan, direct and coordinate delivery of computer technology; study technical problems and develop solutions for both software and hardware; and provide technical guidance, assistance and/or training to staff. ALJ Exhibit #1.

Cucura testified that she has not designed a written Master Plan for the City's technology services. For example, she no longer has responsibility for the technology needs of the police and fire departments, as those entities have specialized needs. She has a "wish list", consisting of user demands and needs as communicated to her, a schedule of repair and replacement of existing equipment, and the Mayor's requests, such as the ability to monitor Internet usage by City employees. Her "wish list" is also comprised of long-range plans, which are modified by changes in the City's needs.

Cucura, together with the City's other department heads, submits budget proposals each year, requesting funding for that year's proposed technology upgrades, maintenance, additional equipment, applications or services by computer users. The Mayor and the City Treasurer review the budget submissions and may modify them. All of the budget requests are combined into a consolidated budget that the Mayor submits to the City's Board of Estimates and Control, which may modify the budget. That body then submits the budget to the City's Common Council for consideration and adoption. Cucura may be called upon to answer questions about her budget request by any of the reviewing bodies.

Cucura corresponds daily with the Mayor via e-mails, in which she details her activities and projects, and attends monthly department head meetings with the Mayor. Of the department heads employed by the City, four are titles in CSEA's unit,⁴ the rest are not represented.⁵ At these meetings, the department heads report on the activities,

⁴ These are heads of Information Services, Purchasing, Code Enforcement, and Parks and Recreation.

⁵ The Corporation Counsel, Commissioner of Public Works, Public Safety Commissioner, Director of Administrative Services, City Treasurer, City Clerk, Marketing Director, and Director of Community Planning and Development are not represented.

developments and events within their departments. Cucura discusses her activities, informing the others of any planned interruptions in service or installation of new equipment. She also solicits requests and comments from the others and may advise them, in general terms, of any misuse of equipment or technology that she has monitored.

Cucura is responsible for the security of the City's telecommunications and computer systems. She has installed filtering software, and each morning she releases off-network e-mail that the filter has quarantined after she scans it for viruses, spyware, and inappropriate images and language. City employees must agree to the City's Electronic Communications Policy, which prohibits personal use of the City's computers and Internet. Cucura monitors computer usage and reports abuses, such as excessive time on the Internet, to the Mayor, who may initiate discipline against an employee for violations of the Policy.

Cucura retrieves lost files and restores damaged files upon request by a user. She does not review the requested file, merely locating it on the server and sending it to the user's computer, unopened.

DISCUSSION

As relevant to our inquiry, the Act provides that "Employees may be designated as managerial only if they are persons (i) who formulate policy"⁶

As we recently noted in *State of New York (Dormitory Authority)* (hereafter, *Dormitory Authority*)⁷:

⁶ Act, §201.7.

⁷ 38 PERB ¶13029, at 3095-96 (2005).

In 1972, following the legislature's amendment to §201.7, which defined those managerial and confidential employees who would be excluded from the Act's coverage, we decided *State of New York*. In that case, we defined the term "formulation of policy." We found that "[i]n government, policy would thus be 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." In the context of the term managerial, we next determined who formulates policy. We determined that policy formulation would "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 a proposal into effect." Simply stated, it is the participation with regularity into the decision-making process that distinguishes a managerial employee from someone who is making a determination of methods of operation that are merely technical in nature. We have held that such a person may be a member of a management team. (footnotes omitted)

Here, unlike the titles under consideration in *Dormitory Authority*, the Director of Informational Services does not formulate policy. It is the Mayor and, to a lesser degree, the system users, who define needs and concerns that Cucura then addresses with instruction, or repairs and purchases that are in her budget requests. Cucura does not drive the City's technology program, she responds to others and provides the technical knowledge to meet those technology needs.⁸ Neither does Cucura participate in policy formulation at the department heads' meetings where department activities and programs are discussed, but policy is not set. Accordingly, Cucura is not a managerial employee within the meaning of the Act.

The City argues, alternatively, that Cucura is a confidential employee because of her access to employees' files and electronic communications and her responsibility to

⁸ See *City of Binghamton*, 12 PERB ¶3099 (1979).

report infractions of the City's Electronic Communications Policy to the Mayor, which might result in discipline.

In *Town of DeWitt*,⁹ the two-part test for designation of an employee as confidential within the meaning of the Act was clearly articulated:

The person to be designated must assist a §201.7(a)(ii) manager in the delivery of the duties described in that subdivision. Assistance alone, however, is not enough to support a designation. In addition, the person assisting the §201.7(a)(ii) manager must be one acting in a confidential capacity to that manager. The first part of the test is duty oriented, while the second is relationship oriented. As the two parts of the test are distinct, satisfaction of one might not satisfy the other. A person assisting a manager through the performance of duties confidential in nature is not necessarily the one performing those duties in a position which has a confidential relationship to the §201.7(a)(ii) manager. A person in a confidential relationship to a managerial employee might never perform or be expected to perform any of the duties warranting a confidential designation

It is the second prong of the test, in the main, which prevents employers from obtaining a confidential designation by assigning duties, even if confidential in nature, to employees without regard to the relationship existing between the employee assigned those duties and the §201.7(a)(ii) manager. (Footnote omitted.)

Cucura reports directly to the Mayor who, as chief executive officer, is certainly a managerial employee. Cucura also makes reports of a general nature to the other department heads at the monthly meetings, some of whom are in the CSEA bargaining unit and some of whom are not represented. Cucura's reports to the Mayor or the other department heads are insufficient to support a finding that she is a confidential employee. The mere reporting of work rule violations is a supervisory function, at best, but not sufficient to deprive an employee of representation rights.¹⁰ That Cucura may have access to files and communications if she chose to access them from another employee's computer is likewise insufficient to warrant a confidential designation.

⁹ 32 PERB ¶3001, at 3002 (1999).

¹⁰ See *Village of Kenmore*, 22 PERB ¶3044 (1989); *Newburgh Enlarged City Sch Dist*, 21 PERB ¶3047 (1988).

Finally, Cucura does not function in a "confidential" capacity, as defined in *Town of DeWitt, supra*, with the Mayor or any other managerial employee of the City. Cucura communicates with the Mayor primarily via daily e-mails and the monthly department head meetings to inform him of her projects and activities. The record does not reveal that the Mayor's plans and activities with regard to personnel or contract administration or collective negotiations are discussed in any detail with Cucura.

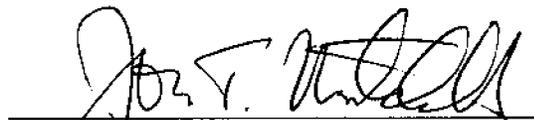
Based on the foregoing, we deny the City's exceptions and affirm the decision of the ALJ. The City's application to designate the Director of Informational Services as managerial and/or confidential is, therefore, dismissed in its entirety.

SO ORDERED.

DATED: April 24, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

FERN RUDIN-MOORE,

Charging Party,

CASE NO. U-25423

- and -

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondent,

- and -

**BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK,**

Employer.

FERN RUDIN-MOORE, *pro se*

**EDDIE M. DEMMINGS, GENERAL COUNSEL (THOMAS COOKE of counsel),
for Respondent**

**DANIEL MACRAY, DIRECTOR OF LABOR RELATIONS AND COLLECTIVE
BARGAINING (JOHN T. CULLEN of counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Fern Rudin-Moore to a decision of an Administrative Law Judge (ALJ) dismissing her improper practice charge alleging that District Council 37, AFSCME, AFL-CIO (DC-37) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act), when a DC-37 representative failed to respond to her inquiries regarding the status of a grievance that she had asked him to file on her behalf. Both DC-37 and the Board of Education of the City School District of the City of

New York (Board of Education) filed answers denying the allegations of the charge and, in addition, the Board of Education, a statutory party pursuant to §209-a.3 of the Act, alleged that Rudin-Moore failed to file a notice of claim, pursuant to §3813 of the Education Law.

Section 213.2(a) of PERB's Rules of Procedure requires a party filing exceptions to serve those exceptions on all other parties and to file proof of such service with the Board. The record indicates that Rudin-Moore filed exceptions with the Board on February 6, 2006, however, she failed to file proof that she had served DC-37 and the Board of Education at that time. On February 8, 2006, she was directed to provide the Board by February 17, 2006, with proof of service on DC-37 and the Board of Education. Rudin-Moore has failed to provide the necessary proof of service.

We have consistently held that timely service upon other parties is a component of timely filing.¹ Exceptions that have not been timely served will be denied, even if no objection to failure of service is received from the other parties to the proceeding.² Rudin-Moore filed exceptions with the Board on February 6, 2006, however, her exceptions were never served on either DC-37 or the Board of Education. The exceptions, not having been timely served, must therefore be denied.

¹ *Civil Service Employees Assn, Inc, Local 1000, AFSCME, AFL-CIO (Gore)*, 35 PERB ¶¶3012 (2002); *City of Watervliet*, 30 PERB ¶¶3024 (1997); *Ballston Spa Educ Assn and Ballston Spa Cent Sch Dist*, 25 PERB ¶¶3084 (1992); *United Fedn of Teachers (Costabile)*, 25 PERB ¶¶3034 (1992).

² *District Council 37, AFSCME and Board of Educ of the City Sch Dist of the City of New York (Zeigler)*, 36 PERB ¶¶3012 (2003); *Town/City of Poughkeepsie Water Treatment Facility*, 35 PERB ¶¶3037 (2002).

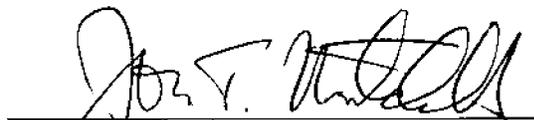
Based upon the foregoing, we do not reach the merits of Rudin-Moore's exceptions. Therefore, for the reasons stated herein, the exceptions are denied, and the ALJ's decision dismissing the improper practice charge is affirmed.

SO ORDERED.

DATED: April 24, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

CURTIS BIRTHWRIGHT,

Charging Party,

CASE NO. U-26457

- and -

NEW YORK STATE UNITED TEACHERS,

Respondent.

CURTIS BIRTHWRIGHT, *pro se*

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Curtis Birthwright to a decision of the Director of Public Employment Practices and Representation (Director) dismissing as deficient Birthwright's improper practice charge alleging that the New York State United Teachers (NYSUT) violated §§209-a.1(a), (b) and (c) and 209-a.2(a), (b) and (c) of the Public Employees' Fair Employment Act (Act). The Director dismissed the alleged violations of §209-a.1 of the Act as NYSUT is not a public employer within the meaning of the Act and the §209-a.2 allegations as NYSUT is not a public employee organization and owes no fair representation duty to Birthwright. Birthwright was in a bargaining unit represented by the Gates-Chili Teachers Association, which is affiliated with NYSUT.

In his exceptions, Birthwright alleges that the Director erred in determining that NYSUT was not properly named as the respondent. We deny those exceptions on procedural grounds.

Section 213.2(a) of PERB's Rules of Procedure requires a party filing exceptions to serve those exceptions on all other parties and to file proof of such service with the Board. The record indicates that Birthwright filed his exceptions on January 31, 2006,

however, he failed to file proof of his service of the exceptions on NYSUT at that time. On February 24, 2006, he was directed to provide the Board by March 6, 2006, with proof of service on NYSUT. Birthwright filed with us a notarized statement of service of the exceptions, indicating that NYSUT was served on March 2, 2006.

We have consistently held that timely service upon other parties is a component of timely filing.¹ Exceptions that have not been timely served will be denied, even if no objection to failure of service is received from the other parties to the proceeding.² Birthwright filed exceptions with the Board on January 31, 2006, however, his exceptions were not served on NYSUT until March 2, 2006. The exceptions, not having been timely served on NYSUT, must therefore be denied.

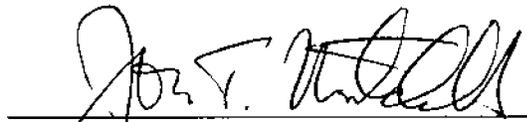
Based upon the foregoing, we do not reach the merits of Birthwright's exceptions. Therefore, for the reasons stated herein, the exceptions are denied, and the Director's decision dismissing the improper practice charge is affirmed.

SO ORDERED.

DATED: April 24, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

¹ *Civil Service Employees Assn, Inc, Local 1000, AFSCME, AFL-CIO (Gore)*, 35 PERB ¶3012 (2002); *City of Watervliet*, 30 PERB ¶3024 (1997); *Ballston Spa Educ Assn and Ballston Spa Cent Sch Dist*, 25 PERB ¶3084 (1992); *United Fedn of Teachers (Costabile)*, 25 PERB ¶3034 (1992).

² *District Council 37, AFSCME and Board of Educ of the City Sch Dist of the City of New York (Zeigler)*, 36 PERB ¶3012 (2003); *Town/City of Poughkeepsie Water Treatment Facility*, 35 PERB ¶3037 (2002).