UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2
THE NEW SCHOOL,
Employer/Petitioner
and
INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE & AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, LOCAL 7902,
Union

DECISION AND ORDER

I. INTRODUCTION

Pursuant to a Stipulated Election Agreement in Case No. 02-RC-227006, an election was held September 24, 2018 among certain employees of The New School ("New School," "the Petitioner," or "the Employer"). As a result of that election, the above-named Union was certified as the exclusive collective-bargaining representative of a unit comprising all full-time and regular part-time providers of healthcare services to students at the New School, including therapists, counselors, registered nurses, certified nurse midwives, social workers, certified registered physicians’ assistants, psychologists, registered dietitian nutritionists, and certified health education specialists employed by the Employer at and out of its facility at 80 Fifth Avenue, New York, NY. However, because the parties could not agree on the inclusion or exclusion of physicians, nurse managers, assistant directors, or the directors of Wellness and Community Health, the employees in those classifications were neither included in nor excluded from the bargaining unit. The challenged ballots were insufficient to affect the outcome of the election.

Following certification, the Employer and Union agreed that physicians, nurse managers, and assistant directors were appropriately included in the unit, but continued to disagree regarding the inclusion/exclusion of the Director of Wellness and Director of Community Health positions. Accordingly, the Employer filed the instant unit clarification petition on about November 21, 2018.

Hearing Officer Patricia Belonis conducted a hearing in this matter January 23 and 25, 2019, and the parties submitted briefs in support of their respective positions on February 1, 2019. As described more fully below, after consideration of the briefs, and based on the record
and relevant Board cases, I find the evidence fails to establish that the two disputed positions are managerial. The certification is hereby amended to include those positions.  

II. THE EMPLOYER’S OPERATIONS

The Employer is an institute of higher education, comprised of five colleges and over ten thousand students. At any one time, it employs about four thousand workers, including faculty, academic administration, and central administration. Starting in about 2014, various of the Employer’s student support services, including academic advising, career services, international student services, Title IX, student health services, and residents’ lives, were brought together under the umbrella of Student Success. That umbrella entity comprises approximately 25 programs and 145 staff, across approximately 19 departments.  

At the top of the management structure for Student Success is Senior Vice President for Student Success Michelle Relyea. Three positions directly report to her: a Senior Manager for Business Operations and two Associate Vice Presidents for Student Success, Anne Marie Klotz and Monique Rinere. In turn, six Senior Directors, two Assistant Vice Presidents, and one Director report to Associate VPs Klotz and Rinere. Immediately below those nine positions, is a mix of Directors, Senior Directors, Assistant Directors, and an Assistant Vice President.  

Assistant Vice President for Student Health Services Tracy Robin is one of the two Assistant Vice Presidents who reports to Rinere. Robin supervises four Directors within Student Health Services: Director of Counseling Services Jerry Finkelstein and Director of Medical Services Jayne Jordan-Levy are not in dispute; Director of Wellness Rachel Knopf-Shey and Director of Community Health Tamara Oyola-Santiago are the two positions in issue.  

Since about 2010, the Employer has grouped its administrative personnel into four broad areas: Academic Administration, Management, Professional, and Support. The Employer uses seven “career path” levels to classify job descriptions and, broadly speaking, circumscribe compensation for each position/job classification. Each career path level is defined in very general terms by a description of the essential duties of jobs at that level. The New School’s Human Resources department, by Assistant VP Irwin Kroot and staff member Lauren Tomlinson, classify job descriptions that are submitted to them by comparing the descriptions to the career path level essential duties and a set of about 200 job profiles that the Employer maintains, to assign a career path level and a compensation range.  

III. THE DISPUTED DIRECTOR POSITIONS

The Employer presented two witnesses: Assistant VP of Human Resources Irwin Kroot and Senior Vice President of Student Success Michelle Relyea. Kroot’s knowledge regarding the disputed positions was based on job descriptions that he had received from Tracy Robin in her...
role as their supervisor. Kroot admitted he could not say whether those job descriptions accurately reflected the day-to-day duties of those positions. Relyea had observed Knopf-Shey and Oyola-Santiago at staff meetings, but primarily based her testimony on documents and reports from others (e.g., Tr. 84:13–14 ("most of my conversations around their work have been with Tracy Robin"); 84:25–85:1 ("those are the areas in which I’ve heard what [Knopf-Shey and Oyola-Santiago] are doing"); 90:15–16 ("I have [Knopf-Shey and Oyola-Santiago]’s strategic plan that was shared with me that says it was created by them"); 90:25–91:1 ("Tracy Robin, who is the assistant vice president of that area, shares with [me] and the associate director what has been presented to her” about budgeting); and 92:23–25 ("so based on what I am reading here" [when asked to describe Er. Exh. 8, the 2018–2021 Wellness and Health Promotion Mission and Program Plan])). Tracy Robin did not testify.

Knopf-Shey and Oyola-Santiago both began working for the Employer in December 2009 as Health Educators. They were reclassified as Assistant Directors in 2014, and then as Directors in about February 2018. That second reclassification was accomplished with the assistance and support of Tracy Robin. Robin submitted the revised job descriptions to the Employer’s Human Resources department, where they were reviewed by Kroot’s colleague. The revised job descriptions were developed with the assistance of Relyea, specifically for the purpose of promoting Knopf-Shey and Oyola-Santiago. Based on those descriptions, Knopf-Shey and Oyola-Santiago were promoted from Assistant Directors to Directors. The Employer, however, did not present any testimony that the job descriptions accurately reflect the day-to-day activities of the two Directors. Notably, both Relyea and Oyola-Santiago testified that the part of the job description which purported to characterize the two Directors’ supervisory authority was inaccurate.

According to Kroot, all job descriptions for Director-level positions at the New School share the same essential duties, which are those set forth at career path level five. In particular, he cited the third and fourth bullet points of that level’s essential duties description as “critically important” to concluding that a given job description described a position at that level. The Employer appears to argue that Director positions are uniformly managerial by virtue of the essential duties descriptions which supposedly characterize all such jobs.

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3 Those two items read, respectively, “Delegated authority and responsibility to implement policies with an area of responsibility, consults with manager on major policy changes affecting functions within a central department or school” and “Interprets internal or external challenges that may impact programs or work processes within a central department, function, or school, and works independently with others to improve the execution of programs or work processes accordingly.”

4 As noted above, however, the Employer did not present testimony that the duties set forth in the job descriptions correspond to day-to-day duties. Additionally, the Employer failed to establish that any other Director positions were managerial or that the features which made such positions managerial were reflected in the job descriptions of the two Directors at issue. Consequently, the two job descriptions failed to advance the claim that the two directors formulated or implemented high-level policies on behalf of the New School.
Relyea testified that she had observed Knopf-Shey and Oyola-Santiago participate in meetings wherein they had “represented” their “areas,” but did not describe such participation. In that regard, Relyea stated that:

1. The two Directors “managed” the peer health advocacy program called “New You,” but did not describe that management beyond saying the two hired students\(^5\) to act as peer advocates, took those students on a retreat, and “work[ed] on developing the content, the curriculum,” for preparing those students to act as peer health advocates;
2. The two Directors were “empowered to make the decisions and use their discretion to make sure they’re providing the services and programs that our students need,” but did not describe how that authority had been exercised, what its limits were, or the extent to which that authority was effective, beyond saying that Oyola-Santiago “participated in strategic planning efforts;” and,
3. The two Directors had achieved certain of the goals set forth in the Wellness and Health Promotion Mission and Program Plan 2018–2021, such as (i) continuing the Peer Health Advocacy program, (ii) obtaining stipends for peer health advocates that were not paid by federal work-study funding, (iii) continuing training of resident advisors and security personnel in opioid overdose prevention, including naloxone use, (iv) introducing health promotion education into student orientation materials, and (v) working with the International Student Services, but did not identify what high-level Employer policies were thereby formulated or implemented and did not describe how Knopf-Shey and Oyola-Santiago exercised discretion in achieving those goals.

In her testimony, Knopf-Shey described her job as “addressing the...health concerns...most prominent in...the student population, [i.e.,] eating, sleeping, having sex, doing drugs[,]...drinking...[and] being stressed,” through peer-to-peer training, group trainings, workshops, and other educational programs. Similarly, Oyola-Santiago characterized her work as “looking at...communities within the New School” and developing health promotion programs for those specific communities.\(^6\)

Each summer since they began working for the New School, Knopf-Shey and Oyola-Santiago, with input from Tracy Robin, drafted a strategic plan for the coming year. According to Oyola-Santiago, Robin had final authority over those plans. Knopf-Shey testified that those plans embodied the “Public Health 101” approach of performing a community assessment and designing programs or plans to address the needs identified in that assessment.

\(^5\) The Employer explicitly disavowed any claim that Knopf-Shey and Oyola-Santiago are supervisors. Additionally, the record (i) is inconclusive as to whether the students Knopf-Shey and Oyola-Santiago hire have any expectation of continued employment, and (ii) fails to indicate what proportion of the Directors’ work involves hiring or other indicia of 2(11) status.

\(^6\) Knopf-Shey testified that she and Oyola-Santiago did not create the Peer Health Advocacy program but did modify the curriculum and training program for peer health advocates.
Knopf-Shey testified that she made budget recommendations for her department, but that she never saw the final budget, there was no official separate budget for wellness and health promotion, she did not have discretion how to spend what was available to her department, and she typically did not know what proportion of that budget was available to be spent. She was provided a company credit card for purchases but was also given a set of guidelines on how to use it and sometimes had to obtain prior approval for purchases with that card.

Knopf-Shey further testified about various occasions on which she and Oyola-Santiago made recommendations to implement changes in the Employer’s health practices:

1. The two attempted to revise the Employer’s sexual violence policy and were told they did not have the authority to do so;
2. In June 2018, Tracy Robin directed Knopf-Shey to cease offering individual diet counseling to students;
3. Knopf-Shey and Oyola-Santiago recommended training resident advisors and front-line security guards on opioid overdose prevention and naloxone use, but the institution of mandatory training for those positions was done by the Residence Life department;
4. Knopf-Shey sought to change what foods were sold to students through vending machines on the twelfth floor of the Employer facility at 6 E. 16th Street, but that proposal was rejected;
5. Since 2011, Knopf-Shey and Oyola-Santiago have been recommending, without success, that the Employer hire more health educators;
6. Knopf-Shey and Oyola-Santiago advocated for promoting the availability of the gym facility to the whole student population, but that idea was rejected;
7. Knopf-She and Oyola-Santiago proposed training all faculty on how to address “micro-aggression” in the classroom, but were told the Employer did not have the necessary budget; and,
8. Since 2010, Oyola-Santiago has recommended included training on sexual consent in the student orientation process, without success.

IV. STANDARDS AND ANALYSIS

“Managerial employees are defined as those who formulate and effectuate high-level employer policies or ‘who have discretion in the performance of their jobs independent of their employer’s established policy.’ General Dynamics Corp., 213 NLRB 851, 857 (1974).” Republican Co., 361 NLRB 93, 95–96 (2014). “[M]anagerial status may not be based on decisionmaking which is part of the routine discharge of professional duties. Only if the

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7 In many of these instances, neither the Employer nor the Union clarified when these events occurred, leaving unclear whether those incidents illuminate the two individuals' authority as directors, assistant directors, or health educators.
activities of professional employees fall outside the scope of the duties routinely performed by similarly situated professionals will they be found aligned with management.” Montefiore Hospital and Medical Center, 261 NLRB 569, 570 (1982) (footnote omitted).

The party seeking to exclude an individual as managerial bears the burden of proof. LeMoyne-Owen College, 345 NLRB 1123, 1128 (2005); Waste Management de Puerto Rico, 339 NLRB 262, 279 (2003). “[T]he party asserting managerial status must prove actual - rather than mere paper - authority... We emphasize the need for specific evidence or testimony regarding the nature and number of faculty decisions or recommendations in a particular decisionmaking area, and the subsequent review of those decisions or recommendations, if any, by the university administration prior to implementation, rather than mere conclusory assertions that decisions or recommendations are generally followed.” Pacific Lutheran University, 361 NLRB 1404, 1421 (2014).

Based on the record as set forth above, the Petitioner has failed to identify any policies or procedures which were developed by the two Directors in issue here. At most, the record reveals that the two Directors have exercised their professional judgment to (i) identify health concerns in the student population and (ii) propose training and education programs to address those health concerns. Knopf-Shey testified that identifying population health concerns and proposing methods for treating those concerns was a basic public health practice. Thus, Knopf-Shey’s testimony was that such program development was a standard duty of professionals in her and Oyola-Santiago’s line of work. That exercise of professional judgment, then, was “part of the routine discharge of professional duties,” Montefiore Hosp., 261 NLRB at 570, and does not demonstrate alignment with management. Indeed, that activity is, as Relyea testified, analogous to providing medical or counseling services, but at the population rather than individual level. Thus, the program development activity described by Knopf-Shey is like the diagnosis and prescription activity routinely performed by similarly situated health professionals, viz., doctors and counselors, who are indisputably not managerial.

In short, the public health practices suggested by Knopf-Shey and Oyola-Santiago are not the central, high-level, or management employer policies contemplated by Board law in analyzing whether an individual is a manager. See Pacific Lutheran University, 361 NLRB 1404, 1417 (2014) (examining faculty decision-making in areas of academic programs, enrollment management policies, finances, academic policies, and personnel policies and decisions); see also Simplex Industries, 243 NLRB 111 (1979) (“The Supreme Court and the Board, in determining managerial status, weigh the facts elicited to determine whether or not the persons at issue are involved in the formulation, determination, and effectuation of management policies”).

In its submission, the Petitioner relies on Miller Electric Co., 301 NLRB 294 (1991), to argue that because the two Directors in this case provide health education and training, they are “aligned with management.” But Miller Elec. does not stand for the proposition that trainers are managers or otherwise aligned with management. Rather, the important fact in that case was the employee at issue was responsible for the policies followed by supervisors. 301 NLRB at 298 (“All aspects of work performed by the training department and the actual training of employees and supervisors came under his overall responsibility...It is...difficult to imagine that an individual would not be considered...managerial where the individual...develops an extensive
manual for the training of supervisors.”) In other words, the employee in Miller Elec. was responsible for establishing personnel policies. Here, the Directors are not responsible for training individuals in management policies, particularly not personnel policies, but rather, their trainings concern how students can live healthier lives. That kind of training does not weigh in favor of finding that the Directors are aligned with management.

Further, even if public health program proposals constituted “high-level employer policies” of the appropriate kind, the evidence adduced before the hearing officer fails to establish that the two Directors “take[] or recommend[] discretionary actions that effectively control or implement employer policy.” NLRB v. Yeshiva University, 444 U.S. 672, 683 (1980). The Employer witnesses did not give any specific evidence or testimony about the Employer’s review of the Directors’ program proposals. Indeed, the only such specific evidence came from the two Directors themselves and that testimony was inconsistent with a conclusion that their recommendations were almost always followed and, therefore, effective. Pacific Lutheran, 361 NLRB at 1421. That is, the two Directors testified that their recommendations were frequently rejected by management.

In short, the Employer witnesses gave only conclusory testimony regarding the exercise of discretion and implementation of employer policies by the two Directors. (E.g, Tr. 91:4-7 ([Knopf-Shey and Oyola-Santiago] are empowered to make the decisions and use their discretion to make sure they’re providing the services and programs that out students need”). Such testimony does not meet the Employer’s burden to establish that the Directors actually exercise control or make effective recommendations.

Consequently, the evidence does not establish that the two Director positions should be excluded from the bargaining unit.

IV. CONCLUSIONS AND FINDINGS:

The Petitioner’s request for unit clarification is granted. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time providers of healthcare services to students at the New School, including therapists, counselors, registered nurses, certified nurse midwives, doctors, social workers, certified registered physicians' assistants, psychologists, registered dietitian nutritionists, and certified health education specialists, physicians, nurse managers, assistant director, director of wellness, and director of community health employed by the Employer at and out of its facility located at 80 5th Avenue, New York, NY.

Excluded: All other employees, including non-professional employees, office clerical employees, guards, and supervisors as defined in the Act.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board’s Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days
after a final disposition of the proceeding by the Regional Director. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: February 26, 2019

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