Ass. Of NYC Assis. DA v. City, 14 OCB 13 (BOC 1974) [(Decision No. 13-74 (Cert.)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

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In the Matter of

ASSOCIATION OF NEW YORK CITY
ASSISTANT DISTRICT ATTORNEYS
IN THE CITY OF NEW YORK,

Petitioner

DECISION NO. 13-74

-and-

DOCKET NO. RU-281-71

THE CITY OF NEW YORK AND
RELATED PUBLIC EMPLOYERS
(THE DISTRICT ATTORNEYS IN
THE FIVE COU14TIES WITHIN
THE CITY OF NEW YORE) ,

Respondent

-and-

CIVIL SERVICE BAR
ASSOCIATION,

Intervenor.
- - - - - - - - - - - - - - - - -X

A P P E A R A N C E S:

STROOCK & STROOCK & LAVAN, ESQS.
By Joseph L. Forstadt and
Vivienne W. Nering, Esqs.
for Petitioner

NEIL D, LIPTON, ESQ.
for Respondent

JULIAN JACKSON, ESQ.
for Intervenor

DECISION, ORDER, AND
DIRECTION OF ELECTION

On August 31, 1971, the Association of New York City Assistant District Attorneys in the City of New York(Association), filed its petition for certification as collective bargaining representative of Assistant District Attorneys and Criminal Law

Investigators, hereinafter jointly referred to as ADAs, [1] employed by the District Attorneys in each of the five counties comprising New York City. The City, appearing on behalf of itself and the District Attorneys, moved to dismiss the petition, alleging that the Association is not a labor organization as defined by the flew York City Collective Bargaining Law (NYCCBL),, The City alleges, further, that ADAS are managerial and confidential employees within the meaning of the NYCCBL.

We ordered that a hearing be held on the preliminary disputed issue of the Association's status as a labor organization; and we granted the request of Civil Service Bar Association (CSBA), that it be permitted to intervene in the proceedings except with respect to the preliminary issue of the Association's status as a labor organization (Decision 'No, 80-71). A hearing was held pursuant to our order, As a result of that hearing, we concluded and found that the Association is a labor organization as defined by the NYCCBL; and we ordered that a hearing be held on the Association's petition (Decision No. 2472).

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[1] Criminal Law Investigators are law school graduates employed prior to admission to practice On admission to practice they automatically advance to the title of Assistant District Attorney, with an increase in pay,

Fifteen days of hearings were held, commencing July 25, 1972, and ending April 13, 1973. The Association, CSBA and the City appeared and participated. All of the parties submitted written post-hearing argument in support of their respective positions; these were filed in August, 1973.

The Board has carefully reviewed the record herein which consists of over 1700 pages of testimony and numerous exhibits. lie have also studied the comprehensive briefs submitted by the parties.

Issues Presented

1. Managerial and/or confidential status of the employees petitioned for:

   a. by reason of similarity of ADAs to AAGs who are classified as managerial by operation of law under 520107 of the Civil Service Law;

   b. under tile standards and criteria generally applicable in proceedings under cg1173-4.1 of the 14YCCBL for finding as to managerial or confidential status of employees.

2. Appropriate unit:

a. ADAs and Criminal Law Investigators (Petitioner's position);

b . all attorneys employed by the City of New York plus all eligible ADAs in all counties in New York City (the City'. position);

c. addition of ADAs to the unit now represented by Civil Service Bar Association (Intervenor's position).

Functions and Duties of
Attorneys Represented by CSBA

CSBA was certified in 1967 (by CWR No. 44-67) as representative of attorneys in the Attorney Occupational Group up to and including tie level of Supervising Attorney. It represents a bargaining unit of approximately 450 attorneys employed in various City departments and agencies, including the Corporation Counsel's office -where it represents only competitive class attorneys, and not the exempt attorneys.

Although the preponderance of the work performed by attorneys represented by CSBA relates to civil matters, there are some attorneys in the unit who handle criminal, quasi-criminal, and family court matters. In the main, however, ADAs have primary responsibility for criminal prosecution in New York City and attorneys in the CSBA unit represent the City in civil matters.

Functions and Duties of ADA

Over 450 ADAs are employed in the five counties within the City of New York. Most are hired directly from law school. All are employed as exempt employees. [2] Approximately 750 of those hired each year leave at the end of four years for other employment.

ADAs handle and process criminal charges. They appear before grand juries, judges, and appellate courts. The Criminal Court functions sixteen hours a day and ADAs are there, at work, during those hours, ADAs assigned to the Homicide Bureau are from time to time on twenty--four hour call.

ADAs work closely with City police officers and with Detective Investigators; the latter group, like the police, are represented by a labor organization for collective bargaining. The ADAs perform no labor relations function.

In November, 1968, each of the five District Attorneys elected, with Mayoral approval, to make the NYCCBL applicable to the employees of his office.

Except for the District Attorney himself, none of his legal staff has a Civil Service title higher than that of ADA. However, there are higher office titles. ADAs with the office title of Bureau Chief head the various bureaus which typically are: Criminal Court, Homicide, Supreme Court, Rackets, Appeals, Narcotics, Indictment, Complaints, Frauds. In addition, there are other less formal office designations such as Senior Assistant, Senior Associate and persons designated as "in charge" of small groups of employees. It is the responsibility of each Bureau Chief to see that leis bureau is functioning effectively. Each Bureau Chief supervises the ADAs in his bureau and assigns them as he deems necessary. In many bureaus, there are Deputy Bureau Chiefs, and in some there are Assistant Bureau Chiefs. The Assistant Bureau Chiefs are responsible for certain bureau administrative matters, such as keeping the calendars. Deputy Bureau Chiefs assist the Bureau Chiefs, and substitute for them when they are absent or unavailable. In the usual case, when the Bureau Chief is present the Deputy Chief has only such responsibilities as are specifically designated.[3]

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[3] A Deputy Bureau Chief in one District Attorney's office testified that for most matters he has the same authority as his Bureau Chief, but that his is an exceptional case.

ADAs promoted to the level of Bureau Chief receive increases in pay. Except for a few cases of ADAs with substantial seniority, Bureau Chiefs receive higher pay than the ADAs they supervise.

Over the Bureau Chiefs, in New York County, there are a Chief Assistant and an Executive Assistant; and in Bronx County, a Chief Assistant, an Executive Assistant and a First Assistant. These last rank just below, and work closely with, the District Attorney.[4]

Chief Assistant District Attorney Seymour Rotker of the Bronx District Attorney's office testified extensively, as did Bronx District Attorney Burton B. Roberts, New York County District Attorney Frank S. Hogan, and Mr. Hogan's Executive Assistant, David S. Worgan. All testified in general and conclusory terms that ADAs play a substantial role in the formulation of office policy, in that ideas, suggestions and "input" from ADAs had resulted in changes in office policy and in the adoption of new policies. Their testimony consisted, in the main, of general statements attributing participation in policy making to ADAs based upon adoption of their suggestions or ideas.

The testimony covered operations of the District Attorney offices in New York and Bronx Counties, and to some extent in Kings County. The parties stipulated that the facts are substantially similar with respect to the District Attorneys offices in the remaining counties.

The more specific testimony of Association witnesses, including former ADAs Hoffman (clew York), Silberstein (Bronx) , and ADAs Dudley (New York)., Schechter (Kings), and Schwam (Bronx), while diverging sharply from that of City witnesses on the matter of ADA participation in policy-making, confirmed that there is considerable use of ADAs as a source of information-of all kinds. This use of ADAs is consistent with the professional level of services rendered by ADAs and demonstrates sound management practice.

We have carefully considered the numerous citations to the record in the briefs of both parties. Based upon this review as well as our own study of the record, we set forth below some of the testimony which we find both representative and significant.

Rotker testified that in the Bronx County Distrist Attorney's office there are occasional meetings held by the District Attorney with the ADAs. Characterizing such meetings, he testified:

> "I don't think any particular policy is decided at these meetings. It is too cumbersome. You know, because we have maybe about 60 or 70 attorneys who are present during the course of these meetings."

Rotker testified that the District Attorney regularly meets with Bureau Chiefs, once or twice a month, with no ADAs present. He further testified:

"The purpose of the meetings is to discuss

> and see that the office is functioning in an effective and efficient fashion; to determine what assignments should be effected on a monthly basis, trying to evaluate the progress of, and performance of, the various assistant district attorneys; seeking any recommendations, on some occasions, which might be forthcoming through a bureau chief from an assistant district attorney as to how to better effectuate the functioning of the office. That is about it." (emphasis supplied)

Rotker, Hogan and Worgan testified, in substance, that many Bureau Chiefs are permitted substantial freedom in the running of their bureaus.

District Attorney Hogan gave similar testimony concerning meetings of and with Bureau Chiefs in the New York County District Attorney's office. Mr. Hogan's direct testimony demonstrated with considerable clarity the extent to which the policy making process is confined to persons at the Bureau Chief level or higher. He testified as follows:

> "Q. Is there a chain of command in which a bureau chief plays a part?
>
> A. Yes, I think so, in the sense that we do have bureau chief meetings, and that I rely on the bureau chiefs or some senior associate in the particular bureau, in the absence of the bureau chief, to bring to my and other bureau chiefs' attention what is going on in his bureau - the backlog of cases, the desirability, perhaps of making a protest to the presiding justice with respect to tile usability of a judge.

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"It is a title with significance in that I rely primarily on the bureau chief to communicate what is of interest to me that is going on in that bureau; to sit with me and discuss the problem that he and his associates in that bureau are meeting.

Q. Mr. Hogan, you just testified that the bureau chiefs bring to your attention the workings of their various bureaus, that they bring to their Assistants, their men on their staff, what is the District Attorney's opinions with regard to the operation of the bureau?

A. I don't know how they put it. I think in most cases they probably would say, if there was something decided, at that level, that either it was decided at the bureau chiefs' meeting or that Hogan said it should be done this way."

In addition to showing that the Bureau Chief is the District Attorney's main source of information and one of the chief participants in the determination of policy, the testimony of City witnesses also established that decisions on non-routine promotions and salary increases are made at or above the Bureau Chief level.

There is a great deal of testimony on behalf of the City with regard to the conduct of cases by ADAs. The intended purpose of this testimony is to show that ADAs act with such complete independence as to constitute policy making. However, in matters such as dismissal of

cases, reduction of charges, plea-bargaining after commencement of trial, wiretapping and bugging, certain expenditures, appeals and various fixed guidelines controlling the ADAs conduct of cases, [5] the amount of required consultation with higher authority and the extent to which higher approval must be obtained in these matters, demonstrates that while the ADA is vested with discretion commensurate with his high level professional status and duty, it is not of such scope ox quality as to constitute the ADA a policy-making employee.

A series of witnesses, testifying on the basis of their personal experiences as ADAs in the New York, Bronx and Kings County District Attorneys' Offices, showed uniformly and in considerable detail that their work was

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Following is a list of citations to the transcript of the record herein, in which testimony appears on the points specified, establishing the necessity of approval by Bureau Chiefs or higher authority, or for adherance to established guidelines, for the activities mentioned:

SUBJECT	WITNESS	TRANSCRIPT PAGE
Dismissal of Cases	Dudley	1004

ADA handling case submits memo recommending dismissal of case to his Bureau Chief; if latter approves, it must then be submitted to Executive Asst. DA Worgan for approval.

subject to strict guidelines established at higher levels in their respective organizations.

[5](continued)

SUBJECT	WITNESS	TRANSCRIPT PAGE
Reduction of Charges	Rotker	73-74
It is standing policy that charges in Class A felonies may not be reduced by an- ADA.		
	Rotker	313-14
There are times when ADA seeks approval of higher authority on question of reduction of charges.		
Plea Bargaining	Rotker	105, 322
There can be no plea bargaining after commence of trial and even where ADA sees in case or other reason for accepting plea to a reduced degree of crime tile be approved by the District Attorney.		
Wiretapping and Bugging	Dudley	1034-35
Only the District Attorney may approve a wiretap request.		
Expenditures	Rotker	351
ADA must obtain Rotker"s approval for hiring expert witnesses.		
Appeals	Dudley	1038
The taking of appeals must be approved by the Bureau Chiefs of the Appeals Bureau and Criminal Court Bureau		
Fixed Guidelines	Rotker	331
There are guidelines or policies which vary in rigidity.		
	Dudley	1022
There are general guidelines within which ADA may exercise discretion.		

Edward R. Dudley, Jr., now an ADA in flew York County, testified that

lie had first (in 1968) worked in the Complaint Bureau; that there lie and other newcomers were given instructions by their bureau chief as to what to do in particular situations. Newly employed ADAs in the Complaint Bureau are instructed to draw all gambling complaints as misdemeanors unless advised by the Rackets Bureau that a particular complaint is- to be drawn as a felony; cases involving persons over 21 years old were not to be assigned to the Youth Counsel Bureau (where they could be disposed of without a permanent notation on the defendant's record), except upon approval from the bureau chief; hard drug cases were not to be sent to the Youth Counsel Bureau; pocketbook snatches involving no additional force were to be handled as Class "A" misdemeanors rather than as grand larceny; certain situations of marijuana possession were to be treated as violations rather than as misdemeanors; certain specific factors were to govern the amount of bail to be sought by the ADA.

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[5](continued)

Fixed Guidelines	Hogan	895

Certain office policies are laid down unilaterally by the DA and tie expects adherence.

There are numerous other instances of testimony throughout the record on each of the subjects cited here. The citations to the record are made solely for purposes of illustration and example.

Jeffrey C. Hoffman, an ADA in New York County from mid-1967 to mid-1971, testified that while he worked in the Criminal Court Bureau, the policy of the office with respect to the handling of prostitutes and gamblers was constantly changing. He testified:

> "We might be told, for example, at any given time, on all prostitution cases offer a violation regardless of the record. We want to pump them out of the courts. Other times we might be told nothing less than a "B" misdemeanor."

Again regarding prostitute cases:

> "... regardless of the background of the individual, the strength or weakness of the case, it was at one point in time, 'get rid of them,' another point in time 'prosecute them.' Another area like that was gambling, very similar."

Hoffman was asked whether he knew how the policy on prostitution was set. He gave the following testimony:

> "Q. Do you know how the policy itself was set?
>
> A. It was usually communicated to us by a bureau chief who said, 'the front office has said from this point on you do thus and so, that is what we did.'
>
> Q. Do you know how that front office, as you termed it, set this policy?
>
> A. I was never a party to it.
>
> Q. Do you know if any other Assistant District Attorneys were part of setting that policy?

A. Again, I was told by my Bureau Chiefs that there were certain policies set by Mr. Hogan in conjunction with, I guess, Mr. Worgan, some set by Mr. Hogan alone and others that were a result of Bureau Chief meetings wherein Mr. Hogan and Mr. Worgan and the Bureau Chiefs discussed certain things and then Mr. Hogan made a decision as to how the office would function in those areas."

Obviously, the examples of testimony set forth here do not exhaust the supply provided by the 1700-page record before us. They are cited as illustrations of the nature, quality and probative weight of the evidence upon which our decision is based.

Functions, Duties and-managerial
Status of Assistant--Attorneys General

The City asserts that the functions of ADAs closely resemble those of Assistant Attorneys General (AAGs); that in view of that similarity a recent Taylor Law amendment classifying AAGs as managerial and confidential also applies to ADAs.

The amendment, which became effective on June 2, 1972, amends 5201.7 of the Civil Service Law, which defines managerial and confidential employees under the Taylor Act, by adding the following language:

> ". . . for the purposes of this article, Assistant Attorneys General shall be designated managerial employees and confidential investigators employed in the Department of Law shall be designated confidential employees."

Albert R. Singer, Administrative Director of the New York State Attorney General's office, was called as a witness by the City. He testified that while the bulk of the work of the AAG is in the civil area, AAGs handle a good many matters in the criminal area. Among the latter, are matters in which District Attorneys and the Attorney General have concurrent jurisdiction, such as the securities fraud area; matters involving operations of the Attorney General Is organized crime task force throughout the state, and matters involving the Governor's designation of the Attorney General pursuant to Executive Law §63, to handle particular actions and proceedings which, absent such designation, a District Attorney would handle.

Singer further testified that AAGs, like ADA's, are exempt employees, terminable at will. He testified that there are approximately 325 Assistant Attorneys General in the employ of the Attorney General as well as close to 200 attorneys in Civil Service classifications such as Attorney, Senior Attorney, Associate Attorney and Principal Attorney.

With respect to the attorneys in Civil Service titles, Singer testified that many of these, like AAGs,- are responsible for the handling of cases. Many of them go to court, and at such times they are deputized as AAGS and are- permitted to represent the Attorney General, and that when they are at work in the office, many perform the same work as is performed there by AAGs.1

Singer noted that the original decision by the New York State Public Employment Relations Board (PERB) establishing a professional, technical and scientific unit placed both Assistant Attorneys General and Civil Service attorneys in that unit, except for certain positions specifically excluded. Ile testified that thereafter both AAGs and Civil Service attorneys in the office of the Attorney General were represented by a labor organization; that since passage of the recent amendment to the Taylor Act declaring AAGS managerial, AAGS no longer have been represented by a labor organization; that Civil Service attorneys, however, continue to be represented by a labor organization.

PERB, by Decision No. 2-3044, issued in April 1969, placed in the Professional, Technical and Scientific services unit attorneys in the Department of Labor with the title of Assistant Attorney General as well as those with Civil Service titles.

It excluded as confidential twenty-five AAGs in charge of bureaus and district offices, and a smaller number of attorneys with Civil Service titles. Thereafter, by Interim Decision in case No. E-0081, dated January 20, 1972, PERB noted its preliminary position with respect to AAG titles alleged by the State to be managerial or confidential. It proposed to find with respect to 265 positions of Assistant Attorney General, as well as ten positions of Confidential Investigator, that the positions belong in the Professional, Scientific and Technical group. A few months later, the State Legislature (in May 1972), at the request of the Attorney General, enacted the amendment to 5201.7 of the Civil Service Law referred to above.

The Issue of the Alleged Managerial Status of ADAs

The City urges several grounds as bases for its contention that ADAs are managerial employees. Its major argument is based upon the recent Taylor Act amendment declaring AAGs managerial. The City notes many areas of similarity and overlapping as between the duties of AAGs and ADAs. It points, in particular, to cases handled by AAGs under the "superseder" provision, i.e., X63 of the Executive Law, and to the work of the Attorney General's organized crime task force.

Referring to the group of AAGs headed by Assistant Attorney General Nadjari in New York City, the City asserts: "The work done by Nadjari's AAGs is the same as Hogan's ADAs." It contends that the factors "that led to the exclusion [from the right to be represented by a labor organization] of Assistant Attorneys General as a matter of law, are equally applicable-to the Assistant District Attorney."

The City makes the further-point that ADAs perform a unique function "which mandates [their] exclusion from coverage of the Act." The City agrees with and adopts the Association's use of the word "unique" in describing ADAs as compared with other City attorneys, and the use of the term "special environment',' in describing the area in which ADAs function. Counsel for the Association used those terms in oral argument, in support of the Association's contention that ADAs should not be combined with civil attorneys in the same unit. The City uses the terms in support of its argument that ADAs should be excluded from representation under the NYCCBL, arguing: "It is precisely that 'special environment' which mandates the exclusion of the ADAs...”

Finally, the City argues that the testimony of District Attorneys Hogan and Roberts and their top assistants warrants a finding that ADAs play a broad and active role in the policy making process and responsibly participate in that process.

With respect to the City's attempt to identify ADAs with AAGs in connection with the recent Taylor Act amendment, we have no difficulty in agreeing with the City's assertion that ADAs and AAGs, in many areas, do work of the same kind. However, we do not agree that the rights and status of ADAs under the New York City Collective Bargaining Law were changed by the special 1972 legislation amending the Taylor Act to exclude AAGs from bargaining. In enacting that amendment, the Legislature had the power to extend its effects to cover ADAs; it did not do so. The amendment is precisely and specifically addressed to AAGs and Confidential Investigators and to no other class or group of employees. The purpose of the amendment is to make inapplicable to AAGs the otherwise general rule that all public employees except those in managerial or confidential categories may organize and engage in collective bargaining, by specifically classifying AAGs as managerial employees. It is a long standing rule of construction, inclusio unius est exclusio alterius, 6/ § that a special rule, applicable to a specifically designated class or category, is not to be applied by inference or

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6/ In re Zalewski's Estate, 30 NYS 2nd 658.

analogy to another class or category. The rule is particularly apposite in the instant case where the same Legislature, in the same law, has created two rules; one of general application and the other of special purpose and effect.

It must be assumed that the Legislature knew what it was doing -and not doing- in enacting a special rule barring AAGs but not ADAs from collective bargaining. In short, there is no basis for our application of the pertinent portion of §201.7 of the Civil Service Law to ADAs. The City argues that AAGs and ADAs are essentially identical; in at least one respect - the applicability of the pertinent portion of 201.7 - they are not. We note that where PERB ruled on the right of AAGs to bargain prior to enactment of that portion of §201.7, it found that they were not managerial employees for purposes of the Taylor Act and that they were entitled to organize and to bargain collectively. Applying parallel reasoning here, and in the absence of special legislation relating to ADAs, we find that they are not managerial by reason of any applicability of the language of §201.7 of the Civil Service Law excluding AAGs from collective bargaining as managerial employees.

With respect to the City's contention that ADAs perform a unique function and work in a special environment, we do not agree with the City's conclusion that such facts constitute reasons warranting their exclusion from representation under the NYCCBL, inasmuch as such facts do not warrant a finding that ADAs are either confidential or managerial employees.

We have stated above that we do not agree with the City's contention that ADAs should be found to be managerial employees based upon their participation in the policy making process since that participation is, in our opinion, minimal. The testimony of the City's witnesses does not warrant a conclusion that ADAs enjoy a status which is reasonably close to the process by which policy decisions are made. Although it appears that there is an occasional adoption by the DA of recommendations and suggestions by ADAs, it is clear from the testimony that, typically, such recommendations and suggestions are filtered up through Bureau Chiefs and higher echelon assistants, and that the ADAs' normal function is to follow policy as set rather than to attempt to establish new policy. We find that, for the most part, policy making is effected by those at or above the Bureau Chief level and that decisions at that level are passed along to other ranks by the Bureau Chiefs.

Our finding on this issue is consistent with a number of our earlier decisions. In Platter of Association of Municipal Statisticians, Decision No. 69-68 we said:

> "Principal Statisticians, 'under general direction,' are responsible for 'program evaluation, statistical operations and research studies.' They do not formulate policy. Although they are called upon to exercise judgment and discretion, they do so-in a professional, rather than managerial, capacity. (I.L.G.W.U. v. N.L.R.B. 339 F2d 116, 57 LRR"Z 2540; R.C.I.A. v. N.L.R.B., 366 F2d 642, 62 LRRPZ 2839.) That they may supply information used in the formulation of policy by higher personnel, or analyze and interpret the results of research ' in relation to overall policy,' does no_t constitute them managerial-executives (see e.g. Westinghouse Electric Corp. v. N.L.R.B., 398 F2d 669 (CA6 1968)68 LRRM 2849 State Farm Ins. Co. v. N.L.R.B., (not off. rep' d..), 68" LRRM 3029, 3035) . "

In Platter of Local 1359, D.C. 37, Decision No. 5°-69 we again commented upon the distinction which must be drawn between the consultative and discretionary aspects of employment at a professional or highly skilled technician level and the far broader influence upon operations of the employer organization exercised by the managerial-executive employee. That decision reads, in pertinent part, as follows:

> "[The Director of Rent Research] supplies data which higher authority employs in the policy and decision making processes... the titles here under consideration... function for the most hart as highly skilled technicians. Their wore is important to the agency and its performance requires skills of a professional or semiprofessional level."

Again in Matter of Civil Service Bar Association, Decision No. 19-A-70, we dealt with the managerial status of professional employees, Supervising Attorneys, who perform supervisory duties and are a source of information necessary to the policy raking process. In that decision which, like Decisions 69-68 and 59-69, held the professional employees covered to be non-managerial, we said:

> "...as to the duties and status of Supervising Attorneys generally, neither the job specification nor the evidence produced as to Supervising Attorneys serving as division heads in the Law Department, demonstrates managerial-executive status. The services rendered by these division heads are predominantly professional. Duties to the extent exercised in the instant situation such as the recommendation of merit increases or disciplinary action, time off, and work assignments are supervisory, not managerial functions. Accordingly, we find and conclude that Supervising Attorneys are not managerial-executives."

The Issue of the Alleged Confidential Status of ADAs

The City advances two arguments to support its assertion that ADAs should be found to be confidential employees:

1. ADAs must maintain a relationship of flexibility and undivided loyalty with the District Attorney; and

2. There is a potential conflict of interest unless ADAs are found to be confidential employees because they may have occasion to investigate labor union activities involving City employees.

These arguments ignore the non-confidential status, for labor relations purposes, of the City police and County Investigators whose work is intertwined with that of the ADAs. The ADAs take the various steps which they do in the investigation and prosecution of crime and criminals, with the close assistance and involvement of members of the police force and other investigators who, for a considerable period of time, have themselves been represented by labor organizations.

We are not aware of nor has the City shown any instance where the membership of those employees in labor unions has given rise to any conflict of interest or impairment of their performance of their duties. There is no dispute and the record confirms that ADAs have been and are staunch supporters of the law and have diligently and unstintingly performed their duties without fear or favor. There is neither evidence in the record nor experience that would support the conclusion that their work would be any less diligent or effective in their investigation and prosecution of any group, including a labor union merely because of their membership in and representation by their own labor organization.

Section 201 of the Taylor Law classifies as "confidential" employees "who assist and act in a confidential capacity to managerial employees . . . " who" . . . assist directly in the preparation for and conduct of collective negotiations or . . . have a major role in the administration of agreements or in personnel administration . . . " Neither this definition nor the rulings of this Board in Decisions Nos. 70-68 and 63-72 contemplate the classification of persons as confidential employees on the ground that their work is of a generally secret or confidential nature. The confidentiality must relate directly to the employees' involvement on behalf of the employer in collective bargaining, the administration of collective bargaining agreements or the conduct of personnel relations in such a manner that inclusion of such employees in collective bargaining units would give rise to conflicts of interest inimical to the bargaining process and to full and fair representation of the employer's interests. No such confidential employment of ADAs has been alleged or proven here. We conclude, in sum, that ADAs are neither confidential nor managerial but rather professional employees.

BUREAU CHIEFS

This conclusion does not apply to Bureau Chiefs. Because the Bureau Chiefs meet on a regular basis with the District Attorney and the executive staff to discuss the operation of the various bureaus, acid because a District Attorney frequently consults with Bureau Chiefs when he or they have ideas concerning the operation of particular bureaus, which discussions significantly affect the policy which eventuates, the conclusion is warranted that the Bureau Chiefs are so closely connected with the policy making process as to constitute a part of that process themselves.

Mr. Worgan testified that a Bureau Chief, the Chief of the Homicide Bureau, without clearing with the District Attorney, deals directly with the Police Department in many matters of substance and is authorized to make changes in practice significantly affecting the liaison between the Police Department and the District Attorney's office in the processing of major criminal cases. Bureau Chiefs regularly direct and assign ADAs, evaluate work performance, make effective recommendations regarding promotions and salary increases. Under the circumstances, we conclude that the Bureau Chiefs are managerial. We are confirmed in this view by the fact that many Bureau Chiefs are permitted substantial freedom of action in important areas-(see Matter of Probation and Parole

Officers Association, etc., Decision No. 76-72). Both in terms of their participation in the internal functioning of their agencies, their regular and significant consulta tion with their respective District Attorneys on matters of policy and the discretion and authority with which they act on behalf of their offices in dealings with other agencies of government, the status and functions of Bureau Chiefs are typically managerial.

Inasmuch as Deputy Bureau Chiefs and Assistant Bureau Chiefs do not normally perform the functions of Bureau Chiefs, except on those occasions when, because of absence or unavailability, they substitute for Bureau Chiefs, we conclude, with one exception, that they are supervisory but not managerial employees. [7] The Deputy Bureau Chief of the Appeals Bureau of the Kings County District Attorney's. Office regularly and consistently performs the duties of the Bureau Chief. Under the special circumstances there prevailing, we accordingly find that the present incumbent in that position is a managerial employee.

Other ADAs below the level of Bureau Chiefs may also have supervisory responsibilities. They include persons having unofficial titles such as "Senior Assistant" or "Senior' Associate" and persons "in charge" of sections, court parts or' 'small bureaus.

The Appropriate Unit

We note that the CSBA is now involved in litigation with the City regarding the employment of attorneys in exempt Civil Service status. All ADAs are in the exempt class. Ile are of the opinion that pending clarification of the issue now in litigation, it would be pointless at this time to consider a unit including both ADAs and attorneys represented by CSBA. Ile will, therefore, create a separate unit for ADAs.

Description of Unit Found Appropriate

Accordingly, we find inappropriate the unit positions urged by CSBA and by the City, and we find appropriate the following unit: All Assistant District Attorneys and Criminal Law Investigators employed by the District Attorneys in the five counties comprising New York City, including Deputy Bureau Chiefs and Assistant Bureau Chiefs, but excluding Bureau Chiefs and all positions superior to Bureau Chief. Inasmuch as CSBA has adduced no showing of interest in the unit described above, we shall not direct that its name appear on the ballot.

The Election

We will, therefore, direct an election among the employees in the unit found appropriate in the preceding paragraph, to determine their desires concerning the purposes of collective bargaining.

ORDER AND
DIRECTION OF ELECTION

Pursuant to the powers vested in the Board of Certification by the New York City Collective Bargaining Law, it is hereby

ORDERED, that as part of the investigation ordered by the Board, an election shall be conducted by the Board, or its agents, at a time, place and during the hours to be fixed by the Board, among the Assistant District Attorneys and Criminal Law Investigators employed by the District Attorneys in the five counties comprising New York City, including Deputy Bureau Chiefs and Assistant Bureau Chiefs, but excluding Bureau Chiefs and all positions superior to Bureau Chief, such as Chief Assistant District Attorneys, Executive Assistant District Attorneys and First Assistant District Attorneys, who were employed during the payroll period immediately preceding the date of this Direction of Election (other than those who have voluntarily quit or who have been discharged for cause before the date of the election), and also excluding for the reasons set forth herein, the present incumbent in the position of the Deputy Bureau Chief of the Appeals Bureau of the Kings County District

Attorney's office, to determine whether or not they desire to be represented for the purposes of collective bargaining by the Association of New York City Assistant District Attorneys in the City of New York.

DATED: New York, New York

February 28 , 1974.

ARVID ANDERSON
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