

Dep't of Investigation Investigator's Assn. V. City & DOI,72 OCB 2 (BOC 2003) [2-2003 (Cert)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

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In the Matter of

NEW YORK CITY DEPARTMENT OF
INVESTIGATION INVESTIGATOR'S
ASSOCIATION, affiliated with the
NEW YORK STATE UNION OF POLICE
ASSOCIATIONS,

Petitioner, Decision No. 2-2003
-and- DOCKET NO. RU-1238-01

THE CITY OF NEW YORK and THE NEW
YORK CITY DEPARTMENT OF
INVESTIGATIONS,

Employer.
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DECISION AND DIRECTION OF ELECTION

On February 16, 2001, the New York City Department of Investigation Investigator's Association ("Union") filed a petition, Case No. RU-1238-01, seeking to represent employees of the New York City Department of Investigations ("DOI") in the titles Confidential Investigator, Levels I-III, Special Investigator.¹ The City of New York ("City") filed a response to the petition asserting that the petitioned-for employees are managerial and/or confidential and are therefore not eligible for collective bargaining. The parties presented their cases in seven days of hearing before the Director of Representation. In support of their position, DOI offered testimony of the

¹ Petitioner also sought to represent "Deputy Chief Investigators" and "Chief Investigators." These are both "in-house titles," held by persons in either the civil service title of Confidential or Special Investigator, and therefore will not be addressed in this proceeding.

First Deputy Commissioner, Assistant and Deputy Commissioners, an Inspector General, and Special Investigators. Petitioner offered the testimony of a Deputy Inspector General, and Special Investigators in support of its position. We find that the titles Confidential Investigator, Levels I-III, and Special Investigator are not managerial because they are not significantly involved in policy-making and do not engage in budget formulation, labor relations, grievance handling, or collective bargaining on behalf of the agency. Further, the duties and responsibilities of Confidential Investigators and Special Investigator do not meet the statutory criteria defining confidential employees. Confidential Investigators, Levels I-III, and Special Investigators are therefore eligible for collective bargaining.²

BACKGROUND

The Confidential Investigators (CIs) and Special Investigators (SIs) (collectively referred to as “Investigators”) whom Petitioner seeks to represent work for DOI.³ DOI is responsible for investigating corruption in City government including, but not limited to, conducting background checks on new employees; investigating employee misconduct and criminal activities;

² The City has asserted that the Board of Certification’s (“Board”) Order in *District Council 37*, Decision No. 8-95, precludes the granting of the instant petition. There the Board approved a stipulation by the parties to accrete the title “Investigator (Discipline)” to an existing bargaining unit. The stipulation also provided that the City would seek to change the title of certain employees to “Confidential Investigator,” and the parties agreed that those employees, “as of the date of execution of this Stipulation, perform duties and responsibilities which would be found to be confidential . . . and therefore should not be included in the bargaining unit so long as they continue to perform those duties.” We do not find that our approval of the parties’ stipulation in that matter precluded a determination on the instant petition eight years later. Our determination here is based on a full and complete hearing which included detailed testimony of the job duties currently being performed.

³ As of January 1, 2002, DOI employed approximately 185 Investigators.

investigating potential violations of the Conflicts of Interest Law; investigating and certifying City contractors; protecting and maintaining the security of the City's information technology infrastructure; and preventing corrupt practices within City government by studying and recommending improvements in management practices and operations. The agency has broad investigatory powers including the authority to examine all documents maintained by an agency and to compel employee cooperation with DOI investigations.

Within DOI, Investigators are assigned to work in the Offices of the Inspector Generals ("IGs"), or other units such as Corruption Prevention and Management Review Bureau ("CPMRB"), Audits, Background & Investigations, Complaint Intake & VENDEX (or vendor unit), the Citywide Information Security Architecture Formulation and Enforcement Unit ("CISAFE"), Covert Services, or for the Commissioner for Investigation of the City School District. An Assistant Commissioner, Deputy Assistant Commissioner, or Director is in charge of each unit, and reports to one of several Deputy Commissioners. The Deputy Commissioners report to the First Deputy Commissioner and the Commissioner.

The basic duties and responsibilities of a Confidential Investigator, Level I are:

Under general direction, with much latitude for independent action or decision, performs surveillances, interrogates subjects and witnesses, examines and analyzes financial records. Maintains case records, prepares reports, analyzes agency records. Makes recommendations as to appropriate action to be taken following investigation. Testifies at hearings and court proceedings. Works in close coordination with federal, state and city investigation and law enforcement agencies. Analyzes and evaluates existing and proposed agency procedures. Performs handwriting analyses. Conducts security surveys of agency prevention and control programs. Performs training in corruption deterrence, detection and control to other agency staff. To the extent necessary, investigates possible illegal or improper activities of contractors or other persons or organizations which

receive monies from or through the agency or are regulated by it.⁴

(Joint Ex. #6.)

The vast majority of Investigators, assigned to IG offices, are responsible for investigating complaints of wrongdoing, corruption, or abuse of authority or City property. The subject of the investigation may be a City employee, contractor, vendor, union, or anyone who is suspected of wrongdoing. Investigators' primary responsibility is to conduct the investigation or fact finding. They review the source of the allegation, develop an investigation plan, interview witnesses, review documents, conduct surveillance and/or undercover work, and prepare investigation reports. Investigators also assist agencies in identifying corruption hazards. They examine whether there were any agency policies, procedures or practices which may have contributed to the misconduct and then recommend responses to those hazards and ways to prevent future misconduct.

Often Investigators work on cases in cooperation with persons in the New York City Police Department ("NYPD"), District Attorneys' offices, Office of the State Attorney General, or other state and federal law enforcement agencies. A number of police officers and detectives employed by the NYPD are assigned to DOI and work side-by-side with the Investigators. These police officers conduct the same types of investigations as do the Investigators. The officers are assigned their own independent investigations and also assist on other investigations.

At the conclusion of an investigation, the Investigator drafts a closing memorandum, which sets forth the facts and conclusions as to whether any wrongdoing has occurred. In

⁴ Descriptions for Levels II and III add supervisory responsibilities and give greater latitude than that for Level I for independent action and decision-making, including interpreting rules, regulations, codes, and policies.

preparing the closing memoranda, Investigators will discuss the case with a supervisor and develop their conclusions and recommendations. All recommendations are developed in coordination with and reviewed by an Assistant IG or an IG. The reports may include recommendations to pursue criminal prosecution or disciplinary action. The report may also include recommendations for safeguards to prevent future wrongdoing, such as: improve timekeeping procedures, specifically in the area of safeguarding time keeping records; enforce the requirement that employees who serve on jury duty submit receipts reflecting time served; establish a process by which the general public can identify non-City employees on City property and implement a system to monitor their presence; implement closer supervisory review of clerk transactions involving money and property transfers; restrict physical access to employee work areas; require employees to document their Easy Pass use. Policy and procedure for DOI itself is created and revised by executive staff – the Commissioner, Deputy Commissioners, Assistant Commissioners, and the General Counsel.

An IG or Assistant IG communicates all final reports to the agency involved. Each agency has discretion whether to implement any recommendation concerning discipline of an employee or concerning ways to prevent future misconduct. In some instances Investigators will meet with agency personnel at the conclusion of the investigation to discuss recommended changes. Furthermore, Investigators may be asked to testify in disciplinary proceedings that have resulted from their investigation.⁵

⁵ DOI has the authority to take over the role of Disciplinary Advocate for an agency and impose its own penalties. Neither party presented evidence that DOI has ever exercised this authority or imposed its own disciplinary penalties. The only testimony concerning Investigators' direct involvement with discipline concerned one incident in which DOI assisted an agency in establishing a disciplinary process.

In general, cases are assigned and Investigators are supervised based on the Investigator's experience level, the nature of the allegation, and the complexity of the investigation. In some cases Investigators work closely with a supervisor, and in others they work with little oversight. A few Investigators may act as Assistant IGs and Deputy IGs. These individuals have supervisory responsibilities such as reviewing all the closing memoranda and recommendations of their subordinates. They may also handle day-to-day investigation work on more complex cases (those involving high level personnel or large amounts of money), and sign off on time sheets and vacation requests in an IG's absence.

Investigators in other units of DOI are also responsible for conducting investigations and writing reports containing findings and conclusions. In all instances, the Investigator's conclusions and recommendations are made in writing after consultation with and approval of supervisors and/or higher level staff. The nature of these investigations differs depending on the unit assigned. For example, the CISAFE unit is responsible for developing standardized security procedures to ensure the confidentiality and integrity of all the City's electronic information. Within that unit there are seven SIs who have background in information technology. They respond to allegations of interference with the City's information technology system, including fraud and corruption charges, and investigate related defects in the security of the system. Thus, they have access to the entire information technology infrastructure.

The approximately eleven CIs and one SI in the Background Investigation Unit review background investigation and financial disclosure information which certain City employees are legally required to submit. Information contained in these forms includes: individual's bank accounts, descriptions of assets and liabilities, and tax returns. In addition to interviewing the

employee or applicant, the Investigator will verify the information contained on the application by getting credit reports and checking motor vehicle and police records.

The VENDEX Unit conducts investigations on City contractors and vendors. The main duty of the five Investigators in this unit is to review submitted disclosure forms and check a database to determine if the proposed contractor or vendor has had a prior investigation or criminal conduct. The Investigator reviews any material DOI has relating to past conduct and forwards the information to the Director of the Unit, who is a SI. The Director then reviews the material and forwards whatever information is necessary to the requesting agency's Inspector General.

The Complaint Bureau and Records Unit takes in complaints from a variety of sources. The one Investigator, a CI, assigned to the Complaint Bureau, is the Director. The Director reviews the complaints which are received by clerical employees in the unit and determines where the complaint should be forwarded. In so doing, the Director may access the citywide Payroll Management System ("PMS") or the State Department of Motor Vehicle's records to get information on the complainant or the employees against whom the complaint was lodged. That same Director is in charge of the Records Unit, in which all the Agency's investigative files are maintained.

The two SIs currently assigned to CPMRB are responsible for examining policies and procedures of all City agencies. Investigators in this unit meet with agency staff and gather information concerning problems the staff are having. As with other units, Investigators in CPMRB draft reports summarizing their investigations and make recommendations to improve policy and procedures. Each report is reviewed by a supervisor, the Deputy Commissioner, and

the Commissioner of DOI before it is forwarded to the agency. Investigators in this unit make recommendations, for example to: change the manner in which an agency awards contracts and monitors those contracts; improve data security; and employ a consultant to study the agency's work flow process. The Investigator may assist the agencies to implement the recommended changes.

In performing their work, Investigators have access to most City records, including personnel records, disciplinary records, personal financial information, and the PMS system. In some instances the nature of the investigation may also give them access to such highly confidential documents as a civil service exam before it has been given, grand jury material, or subpoenaed documents. In certain circumstances, access to highly sensitive information in an investigation may be limited to certain Investigators or their superiors. However, generally, all information gathered in an investigation is contained in a file accessible to those working on the case. Investigators do not routinely have access to other DOI employees' personnel records but could have such access if called upon to investigate a complaint within DOI. In certain units such as Complaints, VENDEX, and some IG offices, clerical employees, police officers, and detectives also have access to the investigation files.⁶

The City's Department of Administrative Services - Department of Personnel ("DCAS") creates new titles following the provisions of the Civil Service Classification System. Civil Service Law ("CSL"), § 40 et seq. When the title SI was established, it was created in the "exempt class," and CI was created in the "non-competitive" class, Part I. Exempt status means,

⁶ Clerical employees of DOI, as well as police officers and detectives who work on DOI investigations, have been found eligible for collective bargaining and are represented by unions.

among other definitions, that no exam exists for the title, and there are no specific job qualifications, salary ranges, job descriptions, or tasks and standards.⁷ In addition, the number of positions available in exempt titles is restricted, and the Civil Service Commission is required to approve an increase in the number of positions. For non-competitive titles, such as CI, an exam is not required, but such titles do have salary ranges, tasks and standards, and job descriptions, which define the experience and skills required and the duties and responsibilities of the position. There are no Civil Service restrictions on the number of employees who fill non-competitive titles. The Part I designation, assigned to the CI title by Department of Personnel, indicates that the title has confidential and policy-influencing functions.⁸

POSITIONS OF THE PARTIES

City's Position

The City asserts that CIs are managerial because as part of their investigations, they routinely make policy and procedure recommendations. The City points to a report which

⁷ Exempt employees by definition also report directly to the Commissioner and have the authority to stand in for their principals. However, neither the City's nor Petitioner's witnesses testified that SIs either report directly to the Commissioner or actually "have the authority to stand in for their principals."

⁸ A representative from the Personnel Department also testified that the following definitions are used by the Department when it determines that a non-competitive title warrants a Part I designation, which requires exclusion from disciplinary rights under § 75 of the CSL: confidential employees are those with duties and responsibilities requiring a substantial degree of personal trust and confidence between the incumbents and their principals; policy-influencing functions are defined as "duties and responsibilities for devising or for making substantial contributions to, plans, projects, programs, rules, procedures which will have general applicability." Employer Exhibit 22 - Internal Memorandum from Director of Classification and Compensation to Associate Personnel Director for Examinations.

indicates that in 2001, DOI made 148 written recommendations to various agencies to make corrective actions – which the City describes as policy and procedural changes – to limit waste and misconduct. These recommendations are formulated by CIs in the IG offices as well as the SIs in the CPMRB. Based on these functions, the City contends that CIs effectively participate in the policy-making process.

The City also asserts that CIs play a central role in personnel administration because they investigate employee misconduct and refer their findings to the employing agency. Although the agency has the actual authority to effectuate discipline, agencies rely on the CI's findings and recommendations. DOI, and specifically CIs, have assisted agencies by designing and crafting disciplinary proceedings. Further, DOI has the authority under an executive order to discipline employees. CIs' involvement in background investigations, which are integral to hiring and promotion decisions, is another example of their major role in personnel administration.

The City also contends that CIs' broad access to information, including employee personnel records, financial records, and most City records, makes them confidential and therefore ineligible for inclusion in a bargaining unit.

The City asserts that SIs' fundamental role is policy formulation. Like CIs, SIs recommend policy and procedural changes as a result of their investigations. Within CPMRB, the SI's role in this regard is most significant because that unit is solely responsible for evaluating agencies' policies and procedures and recommending changes. Also like CIs, SIs play a major role in personnel administration by conducting background investigations and recommending discipline. Access to highly sensitive or confidential information should also be a basis for excluding them from union representation. Further, the City argues that the designation

of SIs as “exempt” under CSL is an indicium of their highly sensitive and confidential nature. Such classification is limited to those employees who at times stand in the shoes of their principals.

Finally, according to the City, finding the Investigators eligible for collective bargaining is contrary to public policy. Because of the unique mission of DOI, the Investigators must have unfettered independence and objectivity. The City argues that permitting these employees to participate in collective bargaining would jeopardize the employees’ appearance of objectivity and independence and seriously inhibit the agency’s mission because employees may owe or appear to owe a duty to the Union or its members. In support, the City argues that Investigators have been called upon to conduct investigations of unions and their officers. Although other DOI employees and detectives have been found eligible for collective bargaining, Investigators should not, the City says, because they have independent discretion in their work which the other employees lack.

Petitioner’s Position

Petitioner asserts that Investigators are eligible for collective bargaining because they have no role in policy-making and personnel administration, and are not confidential employees. Petitioner argues that recommendations made by Investigators in closing memoranda are incidental to their main function, which is to conduct investigations and report the facts they discover. Further, any recommendations made are not the sole work product of the Investigators but are a product of a chain of personnel, of which Investigators are the “lowest link.” These recommendations are merely technical, not discretionary or policy-making. In formulating a recommendation, Investigators apply various laws and codes to a set of facts. The conclusions

are developed only after the Investigators consult with a supervisor.

Moreover, Petitioner contends that Investigators have no role whatsoever in formulation of internal DOI policy. The City failed to present evidence that Investigators have any role in collective bargaining, administration of collective bargaining agreements, or personnel administration. Rather, there is an office within DOI, which is not staffed by Investigators, that performs DOI's budget and personnel functions.

Petitioner argues that a finding that Investigators are eligible for collective bargaining is consistent with Board precedent and the New York State Public Employment Relations Board's ("PERB") decisions. Furthermore, Investigators do not meet the criteria to be "confidential" under the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") and the New York Civil Service Law, Article 14, ("Taylor Law"). Investigators do not assist labor relations or personnel managers in the delivery of labor relations or personnel functions. Petitioner claims that the City's argument that Investigators are confidential is based solely on the fact that they have access to information which is private or sensitive. No precedent indicates that access to this type of information is a basis upon which to find employees ineligible for collective bargaining.

Finally, Petitioner argues that there is no public policy basis upon which to deny Investigators the right to be represented by a union. The City has provided no support for its assertion that employees would engage in acts of misconduct, for example leak private or sensitive information, merely because they are unionized. In addition, the public policy provisions in the NYCCBL or Taylor Law narrowly define the eligibility exceptions. An employer's belief that unionization will be detrimental to its operations is not a factor in

determining whether employees are eligible for union representation, and this argument has been rejected by the Court of Appeals, the Board, and PERB.

DISCUSSION

We find that Confidential and Special Investigators are not managerial and/or confidential employees because they are not significantly involved in policy-making and do not engage in budget formulation, labor relations, grievance handling, or collective bargaining on behalf of DOI. Further, they do not assist or act in a confidential capacity to managerial employees responsible for labor relations or personnel functions. Confidential and Special Investigators are therefore eligible for collective bargaining.

Section 12-305 of the NYCCBL states, in pertinent part, that “public employees shall be presumed eligible for the rights set forth in this section . . . ,” such as the right to self-organization and the right to bargain collectively. Therefore, when the City objects to the bargaining status of a title, the City has the burden to demonstrate that a title is not eligible for bargaining because it is managerial and/or confidential. Under the NYCCBL, § 12-309(c)(4), determinations concerning employees’ eligibility for representation are made consistent with § 201.7(a) of the Taylor Law. *Communications Workers of America, AFL-CIO*, Decision No. 5-87. The relevant language of Section 201.7(a) provides:

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 negotiation 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). (Emphasis added.)

In implementing this section of the Taylor Law, we have consistently held that formulation of policy is the single most important factor indicating managerial status. *EMS Superior Officers Ass'n*, Decision No. 10-2001 at 21; *District Council 37*, Decision No. 4-97 at 31, *aff'd*, *City of New York v. District Council 37*, No. 403334 (Sup. Ct. N.Y. Co., Apr. 27, 1999); *Assistant Deputy Wardens Ass'n*, Decision No. 11-95 at 17-18; *District Council 37*, Decision No. 34-81 at 7; *Civil Serv. Technical Guild, Local 375*, Decision No. 45-78 at 5, *rev'd* *Civil Serv. Technical Guild, Local 375 v. Anderson*, N.Y.L.J., Oct. 9, 1979 (Sup. Ct. N.Y. Co.), p. 10, *aff'd*, 79 A.D.2d 541, 434 N.Y.S.2d 13 (1st Dept. 1980), *rev'd*, 55 N.Y.2d 264 (1981) (reinstating the Board's decision). We have also considered the following factors as reliable indicia of managerial status: the number of subordinate employees; area of authority; involvement with labor relations; preparation of budget and allocation of funds; and involvement in personnel administration.⁹

This Board has defined "policy" as an objective of a governmental agency to fulfill its mission and the methods, means, and extent of achieving such objectives. *EMS Superior Officers Ass'n*, Decision No. 10-2001; *Uniformed Sanitation Chiefs Ass'n*, Decision No. 4-2000. Employees who "formulate" policy include those with the authority or responsibility to select

⁹ For cases discussing the factors which are reliable indicia of managerial status see *Allied Bldg. Inspectors, Local 211, I.U.O.E.*, Decision No. 13-86 and *Communications Workers of America*, Decision No. 63-72 (personnel administration); *Civil Serv. Technical Guild, Local 375*, Decision No. 5-85 and *Civil Serv. Forum, Local 300, SEIU*, Decision No. 8-72 (preparation and allocation of budget); *Local 317, District Council 31*, Decision No. 46-72, and *Civil Serv. Bar Ass'n*, Decision No. 43-69 (involvement in labor relations); *District Council 37*, Decision No. 19-71 (scope of authority); *Serv. Employees Int'l Union, Local 144*, Decision No. 43-69 (number of subordinates).

among options and to put a proposed policy into effect, as well as those who “regularly participate” in the “essential process” which results in a policy proposal and the decision to put such proposal into effect. *Uniformed Fire Officers Ass’n, Local 854*, Decision No. 15-92 at 19-20; *District Council 37*, Decision No. 36-82 at 14. Participation in the formulation of policy must be “regular,” “active,” and “significant” to support a finding of managerial status. *Id.*

Here, the City has not demonstrated that CIs or SIs are managerial. The evidence shows that Investigators at DOI are primarily responsible for conducting various types of investigations. Additionally, Investigators have some responsibility for recommending changes designed to prevent corruption or other misconduct. The City argues that formulation of such recommendations – to improve timekeeping procedures, establish processes to monitor use of City property, implement closer supervisory review of clerk transactions, and require documentation of Easy Pass use – demonstrate that the Investigators are engaged in policy-making. To the contrary, the examples given are in the nature of procedural safeguards to prevent future misconduct and are not related to the methods, means, and extent of achieving the agency’s mission. In addition, the recommendations are general rather than specific suggestions, which are made without extensive input or consultation with the agency itself and are not binding on the agency involved.¹⁰ These recommendations are not made by the Investigators alone, but only after considerable consultation with supervisors and other higher-level personnel such as IGs or Assistant and Deputy Commissioners. Further, although the City asserts that the SIs assigned to CPMRB, in particular, are involved in policy-making, the City presented no evidence

¹⁰ There was little evidence to show the frequency with which agencies adopt recommendations, with or without modification, or what, if any, role Investigators may have in assisting in implementation of recommended changes.

which distinguished their duties or responsibilities or the nature of their recommendations from those made by Investigators in other units. As a result, SIs in CPMRB have no greater involvement in policy-making than Investigators in IG offices.

In addition, within DOI, Investigators are the entry level information gatherers, with few, if any, subordinate employees. Investigators have no role in personnel administration, collective bargaining, or budget-making. DOI maintains a separate personnel unit and budget office, and the City did not identify any Investigators who are assigned to those offices. Occasionally, a few Investigators who work as Assistant IGs and Deputy IGs sign off on time sheets or vacation requests in an IG's absence. However, these responsibilities are more supervisory in nature and are not a regular part of the Investigators' job. Further, the Investigators' role in the disciplinary process is primarily fact-finding. Investigations of City employees may result in recommendations for disciplinary action, but, as the City concedes, the authority to discipline remains with the employing agency, and, therefore, DOI's disciplinary recommendations are not binding. Moreover, the Investigators' responsibility to testify at disciplinary hearings or other proceedings is limited to describing the facts discovered in their investigations. Even employees who have a greater role or authority in the discipline process than do Investigators have been found eligible for union representation. *Lippman v. PERB*, 263 A.D. 2d 891, 32 PERB 7017 (3rd Dep't 1999) (employees who make hiring, promotional, disciplinary, and staffing recommendations, in addition to recommending, discussing and drafting changes in the courts' rules are not managerial); *City of Beacon*, 31 PERB ¶4020 (1998) (employee who conducts sensitive internal investigations, and recommends disciplinary actions is not managerial).

The standard to determine managerial status does not require that those employees who

perform highly sensitive or secret work be excluded from representation rights. We acknowledge that the Investigators' work can be highly sensitive and may require secrecy, depending on the persons or subject of the investigation, the information the Investigators have access to, and the nature of the allegations. However, the highly sensitive nature of the work they perform does not mandate managerial status. *District Council 37*, Decision No. 48-82 at 2 (Fraud Investigator found to be eligible for collective bargaining). Our finding that Investigators are not managerial is consistent with other decisions in which we found employees in highly sensitive positions performing investigatory work eligible for collective bargaining. *District Council 37*, Decision No. 4-98 ("Investigator (CCRB)"); *Ass'n of New York City Assistant District Attorneys*, Decision No. 13-74 (Assistant District Attorneys); *City Employees Union, Local 237, IBT*, Decision No. 58-70 (Detective Investigators); *City Employees Union, Local 237, IBT*, Decision No. 60-69 (Senior Detective Investigator); *Patrolmen's Benevolent Ass'n*, Decision No. 54-68 (Patrolmen and Detectives). The City argues that the investigatory titles previously found eligible for bargaining are distinguishable from the instant Investigator titles because Investigators focus on City employees and not the general public. We do not find this distinction significant because the fact that the subject of Investigators' work is often City employees does not make their work more like policy formulation or like other established criteria used to determine managerial status. *Cf. New York City Transit Authority*, 12 PERB ¶ 4028 (1979) (special investigators who investigate employees for job related misconduct and testify at disciplinary hearings are eligible for representation).

As to the issue of confidentiality, § 201.7(a) of the Taylor Law defines a "confidential" employee as one who acts in a confidential capacity to a managerial employee involved in

collective negotiations, the administration of collective bargaining agreements, or in personnel administration. To establish confidentiality, the employer must meet a two-pronged test. First, the employee must assist a manager in collective negotiations, the administration of collective bargaining agreements, or in personnel administration. Second, the employee must act in a confidential capacity to that manager. *Civil Serv. Employees Ass'n*, 32 PERB ¶ 3001 (1999).

This analysis is to determine whether the employee regularly has “access to confidential information concerning labor relations and/or personnel matters to such an extent that their inclusion in collective bargaining would lead to conflicts of interest inimical to the bargaining process and the full and fair representation of the employer’s interests.” *District Council 37*, Decision No. 4-98. **The secretive or highly sensitive nature of an employee’s work alone does not compel a confidential designation.** *Ass’n of New York City Assistant District Attorneys*, Decision No. 13-74, at 26. Rather, it is the employees’ involvement in collective negotiations, the administration of collective bargaining agreements, or personnel administration which makes them ineligible for inclusion in collective bargaining.

Here, Investigators are not confidential employees under the NYCCBL. There is no evidence that the work they perform is in the nature of assistance or acting in a confidential capacity to a managerial employee. The record does not demonstrate that Investigators assist managers in collective negotiations, administration of collective bargaining agreements, or in personnel administration. We reject the City’s claim that the confidential nature of Investigators’ work or the information to which they have access requires a finding of confidentiality. “Neither the statute, nor the rulings of this Board . . . contemplate the classification of persons as confidential employees on the ground that their work is of a generally secret or confidential

nature.” *Ass’n of New York City Assistant District Attorneys*, Decision No. 13-74 at 26; *Town of Dewitt*, 32 PERB ¶ 3001 (1999) (access to personnel or financial information “is not sufficient for confidential designation because the information is not of a type which presents any actual or apparent conflicts of interest or clash of loyalties.”)

The finding that Investigators are eligible for collective bargaining is not contrary to public policy. The public policy concerning eligibility for bargaining, as stated in §12-305 of the NYCCBL, presumes that employees are eligible for collective bargaining. This is not the first time the City has asserted that certification of a title would raise a conflict of interest such that the agency’s mission or employees’ performance could be impaired. In *Ass’n of New York City Assistant District Attorneys*, Decision No. 13-74 at 25, in which Assistant District Attorneys were found eligible for representation, the Board concluded:

[w]e 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 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.

Here, we reiterate the conclusion that mere membership in a union neither presents the appearance of a conflict nor is a conflict with an employee’s responsibility to perform assigned duties. Moreover, to the extent the City has asserts that investigations of unions or union officials could raise a conflict of interest against public policy, the record does not support this claim. Although the subject of the investigations may be union members or persons who hold a union office, no evidence exists that investigations targeted any specific union or persons acting in their capacity as union officials.

Finally, we are not persuaded by the City's assertions that the designation of SI as "exempt" and CI as "non-competitive" under the Civil Service Classification System requires a finding that these titles are managerial. While we may consider the "exempt" designation in determining managerial status, such designation is not binding on this Board. The Taylor Law provides a specific definition of managerial and/or confidential and contains no reference to the Civil Service Classification System. The criteria set forth in § 41 of the CSL for "exempt" and "non-competitive" titles are different from the factors used to determine managerial and/or confidential status under the Taylor Law and the NYCCBL. In addition, the definitions of "policy-influencing" and "confidential" used by DCAS to assign a "Part I" designation to non-competitive titles and the definitions of "policy-making" and "confidential" used by this Board differ significantly.¹¹ Indeed, previously this Board has certified a title in the exempt classification. *Ass'n of New York City Assistant District Attorneys*, Decision No. 13-74 at 26. Accordingly, we find that Investigators are not managerial or confidential, and are therefore eligible for collective bargaining.¹²

The Appropriate Unit

There having been no other objections to the unit as sought by Petitioner, we find that a

¹¹ See *supra*, at 9 n.8 for DCAS definitions, and *supra*, at 14, 18 for NYCCBL and Board definitions.

¹² Although it apparently abandoned the defense, the City initially claimed that Investigators should be found managerial based §201(7)(b) of the CSL which designates confidential investigators employed in the state's Department of Law as confidential employees. The exclusion of that title from collective bargaining was specific and unique to the state Department of Law, and is not applicable in the instant matter. See *Ass'n of New York City Assistant District Attorneys*, Decision No. 13-74 at 21 (the exclusion of assistant attorney generals from bargaining eligibility under the Taylor Law does not bar assistant district attorneys from collective bargaining).

separate unit of Confidential Investigators and Special Investigators employed by the Department of Investigations is appropriate. Petitioner submitted a sufficient showing of interest in the petitioned-for unit. We will, therefore, direct an election among the employees in the unit found appropriate to determine the employees' preferences for representation.

**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 an election shall be conducted by the Board, or its agents, at a time and place and during the hours to be fixed by the Board, among all the Confidential Investigators and Special Investigators who are employed by the Department of Investigations and 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), to determine whether these employees desire to be represented for the purposes of collective bargaining by the New York City Department of Investigation Investigator's Association, affiliated with the New York State Union of Police Associations.

ORDERED, that within fourteen days of the date of this Direction of Election, the City will submit to the Director of Representation an accurate list of the names and addresses of all the Confidential Investigators and Special Investigators who are employed by the Department of Investigations and 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).

DATED: April 4, 2003
New York, New York

MARLENE A. GOLD

Chair

CAROL A. WITTENBERG

Member

GEORGE NICOLAU

Member