

District Council 37,78 OCB 7 (BOC 2006) [Decision No. 7-2006
(Rep) (Docket No. AC-6-03), **affirmed, *Matter of City of New York v. NYC Bd. of Certification, Index No. 404461/06 (Sup. Ct. N.Y.Co.Sept. 19, 2007) (Wetzel, J.)***]

Summary of Decision: Union's petition sought to add the title Investigator (Employee Discipline) to its bargaining unit. The City asserted that the petitioned-for employees are confidential pursuant to a stipulation of settlement previously entered into by the parties. The Board found that the stipulation does not apply to employees in the titles Investigator (Discipline) and Investigator (Employee Discipline) hired after the parties' stipulation was executed and held that these employees are eligible for collective bargaining. (***Official decision follows.***)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION**

In the Matter of the Certification Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

**THE CITY OF NEW YORK AND
RELATED PUBLIC EMPLOYEES,**

Respondents.

DECISION AND ORDER

On March 4, 2003, District Council 37, AFSCME ("DC 37" or "Union"), filed a petition seeking to represent employees of the City of New York ("City") in the title Investigator (Employee Discipline) (Title Code No. 06688) and add them to its bargaining unit, Certification No. 37-78. The City alleges that employees in the petitioned-for title are confidential pursuant to a Stipulation of Settlement ("Stipulation") entered into by the parties on April 14, 1995, and, therefore, excluded from collective bargaining. This Board finds that the Stipulation does not apply to employees in the

titles Investigator (Discipline) and Investigator (Employee Discipline) who were hired after April 14, 1995, and holds that these employees are eligible for collective bargaining.

BACKGROUND

Title History

On June 15, 1988, the Union filed a petition, docketed RU-1006-88, with the Office of Collective Bargaining (“OCB”), seeking to accrete the title Investigator (Discipline) (Title Code No. 06316) to Certification No. 37-78. On August 2, 1988, the City opposed the petition on the ground that incumbents in the title are confidential employees and, therefore, excluded from collective bargaining under §12-305 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”).¹

After several adjournments of hearing dates to allow the parties to engage in settlement discussions, the parties informed the Trial Examiner that they had reached an agreement. On April 14, 1995, the parties entered into a Stipulation, which the Board approved in *District Council 37*, Decision No. 8-95. In the Stipulation, the parties agreed that the title Investigator (Discipline) would, in certain agencies, be accreted to DC 37’s Certification No. 37-78, and in all other agencies

¹ Section 12-305 provides in relevant part:

Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. However, neither managerial nor confidential employees shall constitute or be included in any bargaining unit, nor shall they have the right to bargain collectively; provided, however, that public employees shall be presumed eligible for the rights set forth in this section, and no employee shall be deprived of these rights unless, as to such employee, a determination of managerial or confidential status has been rendered by the board of certification; . . .

would be recognized as confidential and converted to the title Confidential Investigator. The

Stipulation stated in relevant part:

SECOND: The parties agree that employees in the title of Investigator (Discipline) [Title Code 063136] employed in the agencies specified in this Paragraph Second perform duties and responsibilities similar to those performed [by] employees in the unit referred to in Certification No. 37-78 (as amended), and otherwise share a community of interest with those in Certification No. 37-78 (as amended):

Department of Sanitation;
Human Resources Administration;
Department of Juvenile Justice;
Department of Correction;
Department of Health;
Department of Parks and Recreation.

THIRD: Effective upon the date of execution of this Stipulation, the City agrees that those employees *currently serving* in the title Investigator (Discipline) [Title Code 06316], employed in the agencies designated in Paragraph Second, herein, shall be accreted to Certification No. 37-78.

FOURTH: The parties further agree that those employees *currently serving* in the title Investigator (Discipline) [Title Code 06316] in all other agencies, as of the date of execution of this Stipulation, perform duties and responsibilities which would be found to be confidential within the meaning of the New York City Collective Bargaining Law and the New York Public Employees Fair Employment Act, and therefore should not be included in the bargaining unit so long as they continue to perform those duties. The parties also agree that the New York City Mayor's Office of Labor Relations shall recommend that the New York City Personnel Director convert those employees *currently serving* in the title Investigator (Discipline) [Title Code 06316], other than those specified in Paragraph Second herein, to the title Confidential Investigator [Title Code 31143]. The modification of these employees' titles shall be undertaken without any loss in salary and benefits to incumbent employees.

FIFTH: DC 37 hereby agrees that insofar as its petition seeks representation of employees in the title Investigator (Discipline) [Title Code 06316], in all agencies using the title as of the date of execution of this Stipulation, other than those designated in Paragraph Second, that that part of its petition will be withdrawn, upon the approval of this Stipulation by the Board of Certification. (Emphasis added).

After the Board issued *District Council 37*, Decision No. 8-95, the New York City Office of Labor Relations (“OLR”) forwarded the decision to the New York City Department of Citywide Administrative Services (“DCAS”). According to the City, DCAS did not follow OLR’s recommendation to convert to the Confidential Investigator title employees considered confidential pursuant to the Stipulation. On August 22, 1995, Sherry Shultz, Director of Classification and Compensation for the Division of Citywide Personnel Services of DCAS, sent a memorandum to Michael Davies, Assistant Commissioner of OLR, informing him that DCAS had authorized the issuance of Investigator (Employee Discipline) Temporary Title Code No. 06688 for those employees considered confidential under the parties’ Stipulation and pursuant to *District Council 37*, Decision No. 8-95. The memo stated:

[The salary range for Investigator (Employee Discipline)] is equivalent to Confidential Investigator (TC No. 31143) which is a classified Non-Competitive title authorized for the Department of Investigation, Board of Education, and Housing Authority only. The salary range is also equivalent to Investigator (Discipline) (TC No. 06316) which is a temporary title authorized for all Mayoral agencies. This [Investigator (Employee Discipline)] title is not reclassified from any existing title, but should be excluded from collective bargaining. Therefore, it will be covered by the Management Benefits Fund.

In accordance with the stipulation of settlement cited in Board of Collective Bargaining Decision No. 8-95, only employees in the departments of Sanitation, Juvenile Justice, Correction, Health, Parks and Recreation, and Human Resources Administration shall remain in the title of Investigator (Discipline)(06316). All other incumbents of Investigator (Discipline) will be moved to the subject new title at their current levels and salaries with all fees waived upon appointment. As agreed, OLR will notify the affected agencies to move incumbent employees to the new title. All future appointments in Mayoral agencies to positions performing the investigation of employee discipline must be reviewed by the Department of Personnel prior to hiring to determine the appropriate title to which appointment should be made.

On September 25, 1995, the First Deputy Commissioner for OLR sent a memo – similar to the Shultz memo – to the following agencies: Fire Department of the City of New York (“FDNY”),

Taxi and Limousine Commission (“TLC”), Department of Probation (“DOP”), Department of Housing Preservation and Development (“HPD”), Department of Buildings (“DOB”), Department of Environmental Protection (“DEP”), Department of Finance (“DOF”), Department of Transportation (“DOT”), Department of General Services, and Department of Consumer Affairs (“DCA”)². The memo stated that employees in the title Investigator (Discipline) who were considered confidential pursuant to the Stipulation as outlined in *District Council 37*, Decision No. 8-95, should be moved to the title Investigator (Employee Discipline).

Current Proceeding

On March 4, 2003, DC 37 filed the instant Petition to Amend Certification seeking to accrete the title Investigator (Employee Discipline) to its bargaining unit. After several conferences with the parties, the Trial Examiner ordered a hearing to determine whether employees presently serving in the titles Investigator (Discipline) and Investigator (Employee Discipline) and who were hired after April 14, 1995, are managerial and/or confidential and, therefore, excluded from collective bargaining. The parties were advised that the Board would consider the relevance of the Stipulation referring to employees “currently serving” in the title Investigator (Discipline). The hearing was held over seven days at which the City offered testimony from 17 employees in the title Investigator

² OLR’s memo included the following almost identical language from the Schultz memo: In accordance with the stipulation of settlement cited in Board of Collective Bargaining Decision No. 8-95, only employees in the departments of Sanitation, Juvenile Justice, Correction, Health, Parks and Recreation, and Human Resources Administration shall remain in the title of Investigator (Discipline) (06316). All other incumbents of Investigator (Discipline) should be moved to the subject new title at their current levels and salaries with all fees waived upon appointment. All future appointments in Mayoral agencies to positions performing the investigation of employee discipline must be reviewed by the Department of Personnel prior to hiring to determine the appropriate title to which such an appointment should be made. Agencies should contact the Department of Personnel at (212) 487-6491.

(Discipline) and 19 employees in the title Investigator (Employee Discipline). In addition, 66 employees in both titles completed a survey, compiled by the Trial Examiner in conjunction with the Union and the City, regarding their job duties, labor relations responsibilities, personnel responsibilities, confidential status, budgetary responsibilities, supervisory functions, and role in policy formulation. All the surveys were admitted into evidence.

As of April 6, 2006, 30 employees in the title Investigator (Discipline) were employed in the following City agencies: seven in the Department of Correction (“DOC”), four in the Department of Health and Mental Hygiene (“DOH”), two in the Department of Juvenile Justice (“DJJ”), six in the Department of Parks and Recreation (“DPR”), one in DOP, six in the Department of Sanitation (“DOS”), and four in the Human Resources Administration (“HRA”). Four of these 30 employees, John Dillard, Migdalia Santiago-Ortega, Joseph Spiers, employed by DOC, and Tracey Jordan, employed by DJJ, were serving in the title at the time the parties entered into the Stipulation, and the remainder were hired after April 14, 1995.

As of April 6, 2006, 41 employees in the title Investigator (Employee Discipline) were employed in the following City agencies: 15 in DOB, one in DCA, four in the Department of Design and Construction (“DDC”), one in DEP, two in DOF, three in DHS, one in DOT, 10 in FDNY, two in HPD, one in the New York City Law Department (“Law Department”), and one in TLC. All of the employees in this title were hired after April 14, 1995, and thus after the parties entered into the Stipulation.

Job Descriptions for Investigator (Discipline) and Investigator (Employee Discipline)

The job specification for Investigator (Employee Discipline) is identical to the job specification for Investigator (Discipline). (City Exs. A and B.) The duties and responsibilities for

each title encompass “the performance of highly confidential and sensitive investigations and studies” in the following areas:

1. Administrative misconduct and incompetency of agency officials or employees.
2. Violations of Agency/City rules and regulations by agency officials or employees.
3. Development and implementation of plans and programs for the control and prevention of misconduct or incompetent practices, including internal security.

Both titles are non-competitive and are broken down into three Assignment Levels based on the level of responsibility and/or technical expertise required. “Under supervision, with latitude for independent action and decision,” a Level I employee:

1. Performs surveillances, interrogates subjects and witnesses, and examines and analyzes employee records.
2. Maintains case records, prepares reports, and analyzes agency records.
3. Makes recommendations as to the appropriate action to be taken following investigation.
4. Testifies at hearings.
5. May testify at court proceedings.
6. May work in close coordination with City investigatory agencies.
7. Analyzes and evaluates existing and proposed agency procedures.
8. Conducts security surveys of agency operations and facilities.
9. Develops security plans.
10. Performs training in detection and control procedures to limit misconduct and incompetency to other agency staff.

“Under general supervision, with considerable latitude for independent action and decision,” a Level

II employee:

1. Performs work as described above in cases requiring a high degree of specialization and/or technical expertise.
2. Supervises a small unit of subordinates performing duties as indicated in Assignment Level I above.
3. Trains subordinates in basic investigative methodologies.
4. Interprets rules, regulations, codes and policies for subordinates.
5. Assists in the supervision of a large unit performing investigations.

6. In the temporary absence of the supervisor, may perform the duties of that position.

“Under direction, with a wide latitude for independent action and decision,” a Level III employee:

1. Supervises a large unit performing disciplinary investigations.
2. Advises subordinates on difficult matters and interpreting rules, regulations, codes, and policy for the guidance of the investigating staff.
3. Serves as a consultant in the investigation of difficult cases.
4. Plans and coordinates investigation schedules and assignments.
5. Prepares, reviews, evaluates, and acts on all reports and recommendations submitted for administrative action.
6. Supervises training programs.
7. Conducts highly complex or special investigations.
8. In the temporary absence of the supervisor, may perform the duties of that position.

In order to be qualified, candidates are required to have either (1) a four-year high school diploma or its equivalent and four years of full-time experience in at least one of the fields of accounting, auditing, correction administration, criminal justice administration and planning, forensic science, inspection, investigation, law enforcement, personnel administration, police service, and security, or in a major operational area of the agency in which the appointment will be made; (2) a baccalaureate degree from an accredited college; or (3) education and/or experience that is equivalent to (1) and (2).

Of the 66 employees who submitted surveys, 13 employees receive salaries in the range \$ 45,000 to \$ 60,000 and the rest \$ 30,000 to \$ 45,000.

Testimony by Agency

Employees in the title Investigator (Discipline)

Department of Sanitation

The Equal Employment Opportunity Office (“EEO Office”) for DOS investigates internal

employee complaints of discrimination as well as complaints that come from the State Division of Human Rights or the U.S. Equal Employment Opportunity Commission. Theresa Neal, an Investigator (Discipline) Level III, holds the office title of Deputy Director at the EEO Office. She is currently represented by DC 37. She reports directly to the EEO Director who is an Administrative Staff Analyst II. Neal oversees two employees, Eduardo H. Camarano, an Investigator (Discipline) Level II, and a Secretary. Her primary duties include performing complaint intake, conducting investigations, writing reports, and submitting her findings and recommendations to the EEO Office Director. The Commissioner of DOS decides whether to proceed on a recommendation. Neal has also assisted the Director on special projects such as disparate impact studies, statistical studies, and recruitment campaigns. In the Director's absence, she may respond to inquiries or attend meetings, "but ultimately he [the Director] attends promotions, review boards, [and] employee evaluation reviews." (Tr. at 11.)³ In an emergency, Neal may approve a sick day or sick time but "ultimately, again, the Director signs off on it." (Tr. at 12.)

Neal's knowledge of layoffs prior to an official announcement was limited to one instance when her office worked with the personnel department to ensure that there was no disparity regarding the employees slated for layoffs, and Neal had access to a list of their names and start dates. Neal's limited involvement in hiring entails reviewing the hiring packages received by the EEO office to ensure that the best qualified candidate is hired. She has no role in firing employees and, although she has attended meetings of a board that determines whether to fire a probationary employee, she has no vote on that board.

Neal reviews Camarano's reports before they are submitted to the Director. She does not

³ Tr. = transcript

sign the timesheets of her supervisees but does sign off on their performance evaluations, which are reviewed and signed by the Director. According to her survey, Neal does not have labor relations duties nor budgetary responsibilities.

Camarano, who is also represented by DC 37, does not directly supervise any employees. His main duties on a daily basis involve reviewing statements, handling phone calls, and reviewing documentation. Camarano also conducts interviews of complainants, respondents and witnesses, and reviews personnel records, including performance evaluations and time and leave records. He has no role in disciplinary matters, terminations, promotions, or hiring. He has not participated in the grievance process nor testified at hearings. Camarano does not have access to confidential information concerning labor relations and when asked whether he has access to proposed policies before they are implemented, he responded: “No, because when it comes to policy, I am not involved at all, at my level.” (Tr. at 38.)

Department of Juvenile Justice

Jemnard Thomas, an Investigator (Discipline) Level II represented by DC 37, works for the Disciplinary Affairs Unit of DJJ where he conducts investigations concerning allegations of employee misconduct, such as time and leave violations, insubordination, and child abuse. Thomas conducts interviews, reviews medical reports, and writes reports. He does not supervise any employees. He reports directly to the Director of Disciplinary Affairs, to whom he submits his findings and who decides whether further action is warranted. Thomas does not represent DJJ at any grievance steps and has no involvement in the promotion, hiring, or firing of employees. He does not attend departmental meetings. In one instance, Thomas testified at a hearing regarding the findings in his report after an investigation. He stated, “They just wanted me to be a witness to the

fact that I put down in these incident reports, I interviewed this witness.” (Tr. at 55.)

Department of Parks and Recreation

Caren Chin-Hoffman, an Investigator (Discipline) Level II represented by DC 37, works in the Parks Advocate’s Office, which investigates allegations of employee misconduct from DPR employees and the public. She reports directly to the Deputy Parks Advocate, an Associate Staff Analyst, who assigns her cases. She directly supervises six employees in the title Investigator (Discipline) Level I and indirectly supervises a Clerical Associate and a Principal Administrative Associate. On a daily basis, Chin-Hoffman works on her caseload, writes case reports, fields questions and phone calls, distributes cases, and supervises the other Investigators’ work on their caseload and in conducting surveillances. While conducting her work, she has access to employees’ personnel information that she obtains from central personnel. Chin- Hoffman does not sign off on timesheets and performance evaluations or have authority to approve time and leave. She also has no role in disciplining employees and does not participate in the grievance process. Her involvement in the hiring process was limited to one instance when she attended an interview along with other colleagues and gave her opinion on the candidate. On two occasions, Chin-Hoffman testified at a hearing; however, she recalled only one clearly – an unemployment case she investigated regarding an employee who was terminated by DPR. She attends management meetings rarely and only when a case she investigated is under discussion. Chin-Hoffman had no role in formulating the agency’s Standard of Conduct or any other agency policy.

Joseph K. Russiello, a provisional Investigator (Discipline) Level I represented by DC 37, works in the Parks Advocate’s Office. The Deputy Parks Advocate is Russiello’s direct supervisor. Russiello does not supervise any employees. The bulk of his work involves surveillance regarding

alleged violations of residence requirements or inappropriate behavior while on duty. He submits recommendations regarding his findings to the Deputy Parks Advocate and the attorney on the case, who together decide what course of action to take. His recommendations are adopted forty to fifty percent of the time. During an investigation, Russiello's involvement with union representatives is limited to briefing them before a scheduled investigatory interview with a represented employee. His role during interviews is to gather information for his reports. Russiello has never participated in the grievance process or testified on behalf of DPR. His access to personnel files is limited to disciplinary history and he is required to make requests for all other personnel information.

John Parrales, an Investigator (Discipline) Level I, who also works at the Parks Advocate's Office, testified that in addition to his regular duties, he is the only Investigator involved in coordinating DPR's drug testing program in compliance with agency and federal guidelines. The program involves conducting random drug tests, pre-employment testing for employees, and reasonable suspicion testing of employees in safety-sensitive titles. The actual testing is conducted by a vendor whom Parrales accompanies. His main role is to notify supervisors of the need to test certain employees and once the employees arrive at the testing site to inform them of the consequences of a refusal to participate in drug testing. On the one occasion he recommended that an employee be terminated for failing several drug tests, the employee's termination was based not on his recommendation but on the employee's failure to comply with his last chance agreement. Parrales had no role in formulating the procedures and policies that he follows.

Hanice Taverez, an Investigator (Discipline) Level I currently represented by DC 37, testified that her main duties at the Parks Advocate's Office are to investigate allegations of the misuse of time, misuse of City property, and corruption of employees, and to submit reports to the Deputy

Parks Advocate. She does not supervise any employees. She has access to personnel information and employees' disciplinary history through a DPR database that is used by all Investigators. Like Russiello, her interaction with union representatives is limited to briefing them on why an employee is being interviewed. She has never testified at any grievance steps or court proceedings and has never recommended that an employee be terminated. She does not attend meetings with upper level management.

Bayovanex Mena, an Investigator (Discipline) Level I currently represented by DC 37, has similar duties to Russiello and Taverz. She does not supervise any employees. In the course of her work, she interviews complainants and witnesses, obtains written statements, and conducts surveillance. She also conducts background checks for potential employees by filling out a form and submitting it to the Office of Court Administration. Mena does not make any recommendations and has never participated in the grievance process or testified at hearings. She does not attend meetings with upper level management.

Department of Health and Mental Hygiene

Jessica Reboyras, an Investigator (Discipline) Level II currently represented by DC 37, holds the office title of Supervisor of the Qualifications Unit at DOH. The Qualifications Unit performs pre-employment background checks on all candidates being hired by DOH. She reports directly to the Assistant Commissioner and supervises two employees, one in the title Investigator (Discipline) Level I, and another about to enter the Investigator (Discipline) title at the time of the hearing. In the course of her work, Reboyras conducts interviews, reviews a candidate's hiring package, credentials, employment history, and arrest notifications, and confirms whether a candidate is eligible to work in the United States. If Reboyras finds that a candidate is qualified, she informs the

DOH bureau seeking to hire that candidate. If she finds that a candidate is not qualified, she informs her supervisor, the Assistant Commissioner. She has access to personnel derogatory information and arrest notifications that she keeps confidential in accordance with DOH's standard to keep all employee information confidential. Reboyras's supervisory duties include assigning and overseeing the work of her two supervisees. She conducts on-the-job training for these employees who follow tasks and standards that were handed down to Reboyras from her former supervisor and have remained unchanged. Reboyras signs off on her two supervisees' timecards, vacation requests, and sick leave. She also signs off on these employees' performance evaluations that are then reviewed and signed by the Assistant Commissioner. She has given one of her supervisees a verbal warning when her performance needed improvement but has never disciplined either of her supervisees. Reboyras does not attend meetings or receive prior information about layoffs and has never testified in hearings.

Young Ah Kim, an Investigator (Discipline) Level I represented by DC 37, testified that her work is assigned and reviewed by Reboyras. She does not make the ultimate determination whether a candidate is qualified nor does she make recommendations. Any confidential information to which she has access is given to her by her supervisor. Reginald Wout, an Investigator (Discipline) Level I, works at DOH's Employment Law Unit. He investigates allegations of employee misconduct such as time abuse and violation of residency requirements. His duties include conducting surveillance, gathering information on employees being investigated, and writing reports. He does not supervise any employees and does not attend meetings with upper level management. Wout had no role in formulating the Employment Law Unit's standard of conduct.

Department of Correction

Patricia Gordon, an Investigator (Discipline) Level II currently represented by DC 37, works in DOC's EEO Office, which investigates complaints of discrimination from inmates. When she gets a complaint, she schedules interviews with witnesses, the complainant, and respondent, reviews documents, and gathers other information. Gordon writes reports with recommendations based on her findings, which are reviewed by the Deputy Director and the Deputy Commissioner. At times, she may recommend sexual harassment training conducted at a training academy, but she has no role in formulating such training and ultimately it is the Deputy Commissioner who has the authority to send an employee to training.

Ruben Benitez, an Investigator (Discipline) Level I currently represented by DC 37, works in the Investigation Division at Rikers Island which is "responsible for investigating all staff misconduct, uses of force involving inmates, escapes, erroneous discharges, homicide." (Tr. at 275.) Benitez reports to the Deputy Director of the Investigation Division. If he has a case regarding an allegation of "undue familiarity," when a staff member is accused of having either a personal or business relationship with an inmate, Benitez's investigation will include interviewing the parties allegedly involved as well as reviewing the staff member's personnel file, book duty, housing, and phone records, and the inmate's records. Benitez has no role in determining whether a case should be referred to the police. The Director of the Investigation Division has final authority on whether charges will be served on a respondent.

Darlene Perez, an Investigator (Discipline) Level I represented by DC 37, is assigned to the Investigation Division at Rikers Island. She investigates cases involving "use of force, employees' misconduct, arrest of staff, inmate death, erroneous discharges, [and] escapes." (Tr. at 296.) She

reports directly to the Associate Investigator, who is a Supervising Investigator II, who in turn reports to the Deputy Director.⁴ When investigating a case involving use of force by a staff member or inmate that results in serious injuries, Perez immediately goes to the facility in which the incident occurred, interviews the parties involved and any witnesses, and takes photos of the scene and of the injuries. After gathering such information, Perez returns to her office and writes a report. She submits her report to the Supervising Investigator for review, who in turn submits it to the Deputy Director. In employee misconduct cases, her interaction with union representatives is limited to briefing them before an investigatory interview. In performing her duties, Perez follows a standard of conduct and other written procedures for different types of cases and cannot deviate from them.

Human Resources Administration

Michael Harris, an Investigator (Discipline) Level III since 1999, has worked with HRA for 18 years. He is represented by DC 37. Harris works with HRA's Special Investigations Division, Office of Staff Resources, where he investigates employee misconduct, malfeasance, criminality, and fraud. He reports directly to the Assistant Deputy Commissioner who assigns his cases. He explained that in conducting investigations, he generally reviews employees' personnel records, conducts specific computer checks or field visits, and interviews witnesses and complainants. After his investigations, he submits his reports to concerned HRA area heads. He does not make disciplinary recommendations. Harris has testified at arbitrations and OATH hearings approximately three times a year regarding cases he has investigated. He does not supervise any employees, does not attend management meetings, and had no role in formulating HRA's code of conduct.

Michael Fitzpatrick, an Investigator (Discipline) Level III since 2000, works with and has

⁴ The title Supervising Investigator is represented by DC 37.

duties similar to those of Harris. He is represented by DC 37. Fitzpatrick reports directly to the Assistant Deputy Commissioner who assigns his cases. When Fitzpatrick handles residency cases, he first checks the address on file at HRA for the employee involved, then reviews payroll management, DMV, and property ownership records. After he completes his investigation, Fitzpatrick submits a report, which may include a penalty recommendation, to the Assistant Deputy Commissioner who signs it. The report is forwarded to the Legal Affairs Division and Employee Discipline Unit that determines what penalty is imposed. Fitzpatrick does not supervise employees, sign time cards, or complete performance evaluations.

Caroline Hernandez, who also works for the Division, was appointed to the provisional title Investigator (Discipline) Level II in 2004. She is currently represented by DC 37. Hernandez has duties similar to those of Harris and Fitzpatrick and reports directly to the Assistant Deputy Commissioner. She testified that during the course of her investigations, she has access to personnel records, the personnel management system, and the welfare management system, which contains information on employees who also receive public assistance. When she submits her reports to the Assistant Deputy Commissioner, she does not make penalty recommendations. Hernandez does not supervise any employees, sign time cards, or complete performance evaluations.

Employees in the title Investigator (Employee Discipline)

Department of Design and Construction

Angie Cerda, an Investigator (Employee Discipline) Level II, works in DDC's Office of Disciplinary Proceedings ("ODP") which investigates employee violations of DDC's rules and regulations. She works with Edwin Lewis and Hugh Williams, who share the same title. She does not supervise any employees. All three Investigators report directly to ODP's Director who assigns

their cases. Cerda testified that “as an investigator, I conduct surveillances, I also conduct interviews, and I also give recommendations and guidance to the directors and managers of our agency.” (Tr. at 320.) In the course of her work, she obtains access to personnel files and past disciplinary history by requesting such files from personnel. If warranted, she drafts disciplinary charges after discussing a case with the Director and referring to the agency manual. She also makes disciplinary recommendations to the Director who determines the actual penalties imposed. After she drafts charges, she serves the employee involved with a notice. Cerda attends Step I conferences but rarely testifies. She has testified in a hearing at the Office of Administrative Trials and Hearings (“OATH”). She had no role in formulating or updating any agency policies and procedures that she follows.

Lewis, an Investigator (Employee Discipline) Level II, has duties similar to Cerda’s. Lewis testified that in the course of his investigations he has access to prior grievance decisions through an ODP database only accessible to the Investigators. As part of his duties, Lewis escorts employees to drug and alcohol testing and escorts them home if they test positive. He is not involved in drafting charges for drug or alcohol violations. Lewis once attended an upper level management meeting at which he made a suggestion regarding the placement of security cameras to prevent theft from employee cubicles, but it was not adopted. He recalls one instance in which he participated at an informal conference after an investigation but only spoke when the Director asked him to.

Williams, a provisional Investigator (Employee Discipline) Level II, performs duties similar to those of Lewis and Cerda. He testified that he received on-the-job training from Lewis and other Investigators when he first joined ODP. He follows the policies and procedures of DDC when

performing his duties, but had no role in developing or updating them.⁵

Department of Transportation

Theodore Collins has held the provisional title Investigator (Employee Discipline) Level II since August 1999. In this title, he first worked in the Advocate's Office, which is responsible for investigating alleged violations of DOT's code of conduct. His reports were submitted to the Chief Investigator who would then submit them to the Judge Advocate for further review. In 2004 he became Supervisor of Special Investigations at DOT's Parking Division where he supervised five investigators in the title Parking Control Specialist, represented by the International Brotherhood of Teamsters. After his unit was disbanded in 2004, he was given the office title of Assistant Chief of Internal Security for the Meter Collections Unit where he supervised seven investigators responsible for "investigating instances of meter vandalism, meter money theft, misconduct, and violations of the code of conduct by members of the meter collections division." (Tr. at 370.) Collins was promoted to Chief of Meter Operations in 2005 and currently supervises approximately 150 employees. At the time of the hearing, Collins had been in the position for about five weeks. He reports to the Director of Field Services. He is no longer involved in the investigative process. As Chief, he signs his supervisees' timecards, including those of Deputy Directors, and is expected to conduct performance evaluations and discipline employees. Collins testified that he is currently involved in changing the standard operating procedures of meter collections, a task he assigned to his Deputy Chief, with whom he would review any changes.

⁵ Although we understand Williams's and Lewis's testimony that they anticipated discomfort in having to investigate members of the same union if they were represented, such feelings are not probative of the issues before the Board.

Fire Department of New York

Eugene Samojedny, a provisional Investigator (Employee Discipline) Level III, works in FDNY's Drug and Alcohol Testing Unit ("DAT"), which performs random testing, reasonable suspicion testing, and testing "for cause." Samojedny's office title is Chief Investigator. He testified that as Chief Investigator, he is in charge of "the day-to-day operation of the entire unit." (Tr. at 447.) He reports directly to the Special Assistant Counsel, an Agency Attorney III,⁶ and supervises nine Investigators and one PAA. Samojedny testified that for random testing, DAT conducts a test on one unit per day. He and the other Investigators work as a team and "basically we are just going out in the field, put the unit out of service, conduct formal roll call, verify the roster staffing, that is the manning that is actually on the roll call in the firehouse and verify the inconsistency." (Tr. at 442.) Reasonable suspicion testing occurs when there is a suspicion of tampering or adulteration of a random test and is conducted under direct observation from an Investigator of the same gender. The "for cause" testing is either requested by the chief medical review officer or any physician employed by the FDNY when an employee is returning to full-duty or when a supervisor suspects that an employee is under the influence of a controlled substance. When an employee tests positive, a disciplinary process commences. First, Samojedny receives the results from the lab, then he compiles documentation related to the testing, and, finally, he forwards all the information to the Medical Review Office ("MRO"). After the MRO's review and certification that the test is either positive or negative, he delivers the package to FDNY's Bureau of Investigation and Trials ("BITS") for disciplinary proceedings. Even though he receives the lab results, Samojedny is not involved in

⁶ Employees in the title Agency Attorney are represented by International Brotherhood of Teamsters, Local 237, and its affiliate Civil Service Bar Association.

determining whether a result is positive or negative.

Samojedny testified that for random testing, a compliance unit called the Management Analysis Planning Unit (“MAPS”), which maintains a database of all the units eligible for testing, generates a list of units to be tested, and sends the list in a sealed envelope to the Deputy Commissioner of the Bureau of Legal Affairs or DAT’s Special Assistant Counsel. The envelope is given directly to Samojedny, who places it in a safe in his office. He opens the envelope on the day or close to the day of testing to prevent prior notification to any individual. Although the envelope contains the units to be tested, the Deputy Commissioner and Special Assistant Counsel designate the tour to be tested based on the tour schedule and without knowing the contents of the envelope. Samojedny testified that he is “the one who opens the secure and sealed envelope, and I’m the first one who learns the information as to which unit is selected for random testing. That information is extremely confidential information.” (Tr. at 447.) He informs the other Investigators which unit and tour will be tested on the day of testing.

When he first became Chief Investigator, random testing had never been conducted, and he participated in developing the random testing protocol for FDNY after a panel created the policy. For example, in conjunction with the Special Assistant Counsel and a Supervising Emergency Medical Service Specialist, Level I (“SEMSS”) (EMS Lieutenant) from BITS, he assisted in developing the procedure whereby MAPS would generate the list, the list would be delivered to Samojedny’s superiors, and the sealed envelope would be secured in a safe in his office to maintain confidentiality.⁷ He also assisted in developing a confidential form, similar to a form required for

⁷ Employees in the title SEMSS Levels I and II designated as EMS Lieutenants and Captains are represented by District Council 37.

reasonable suspicion and “for cause” testing, which consists of two questions: 1) what type of medication a member would ingest 72 hours prior to the test and 2) what type of food the member would ingest within 24 hours of the test. Only the MRO sees the responses to the form.

Samojedny signs off on the time cards and performance evaluations of his supervisees and may discipline employees by conducting a supervisory conference and requesting disciplinary action from a superior. As to hiring, he conducts interviews with his superior and submits a selected candidate’s information to personnel for a background check.

Joseph Curran, an Investigator (Employee Discipline) Level II since 2004, works for DAT and reports directly to Samojedny. His office title is Screening Testing Technician. Samojedny informs him daily which unit will be randomly tested. He does not have advance notice of the list. Curran testified that the team goes to the firehouse and announces a random test. The team secures samples by sealing them separately. The Investigators then return to DAT to write reports, fill out chain of custody forms, and place the samples in a locked refrigerator. Curran learns of a positive test result after the MRO reviews the results and only if Samojedny informs him. His involvement in preparing any litigation package is limited to providing “any notes that were taken from that day, who was tested, any memos that were generated from the tour, anything that concerns that particular day’s testing.” (Tr. at 503.) He testified that he had no role in formulating any of the procedures for the tests. Curran has not participated in the grievance process or testified in arbitrations but has testified once at OATH that he was present during a random drug test.

Janine Jordan, an Investigator (Employee Discipline) Level II since 2004, works for DAT and reports to Samojedny. Her office title is Screening Testing Technician and she performs similar duties to Curran. Like Curran, Jordan becomes aware of a positive sample if Samojedny

informs her or after MRO's certification. She has no authority to decide what type of testing she conducts, and she had no role in formulating the procedures for testing. She does not recommend penalties for members who have tested positive. Jordan has testified once at OATH and at arbitrations regarding random testing in which she participated.

Thomas Mugno, an Investigator (Employee Discipline) Level II, works in FDNY's BITS, and reports directly to the Chief Investigator of BITS whose underlying civil service title is SEMSS Level II (EMS Captain). BITS investigates allegations of misconduct against firefighters, EMS personnel, and civilian personnel. The Chief Investigator assigns cases to Mugno. In the course of his investigations, Mugno interviews witnesses and reviews personnel and DMV records, which he obtains from the human resources department. He has served termination notices but does not testify at grievance hearings or participate in administrative proceedings. He makes recommendations to the Chief Investigator on whether charges are substantiated. Mugno testified that the other Investigators in BITS have the following underlying civil service titles: Emergency Medical Specialist-Paramedic, Emergency Medical Specialist – EMT, and SEMSS Levels I and II.

Sonia Rodriguez, an Investigator (Employee Discipline) Level II, works in the Absence Control Unit ("ACU"). She reports directly to EMS Lieutenant Pat Rom. At the ACU, she monitors leave absences of firefighters and FDNY's civilian employees for medical leave abuse. Rodriguez explained the rules and regulations regarding medical leave but testified that she had no role in determining the standards that trigger review of medical leave. She has no authority to determine whether an employee should be placed in the supervised program, and her recommendations are always reviewed by her superior.

Department of Homeless Services

Sheila Blanchard, a provisional Investigator (Employee Discipline) Level II, works for the Disciplinary Unit in the Legal Division of DHS. She did not submit a survey. Blanchard's unit is responsible for upholding DHS's code of conduct. She reports to the Chief Disciplinary Counsel and the Director of Discipline. She does not supervise any employees. Blanchard is responsible for all investigations regarding employee misconduct at DHS. In the course of her duties, Blanchard interviews witnesses, has access to personnel information, and reviews prior disciplinary history from the Disciplinary Unit's database. She prepares reports and makes penalty recommendations. If disciplinary action is merited, she prepares a report that she submits to a DHS attorney. Blanchard does not attend labor-management meetings and was not involved in formulating any policies.

Department of Environmental Protection

Daisy Drop, an Investigator (Employee Discipline), works in the Disciplinary Counsel's office and reports directly to the Director, who is an Agency Attorney Level IV. She updates the records of employees who are supposed to maintain valid New York State and commercial drivers' licenses. She monitors a database through the DMV whereby she can check whether licenses are valid. She also monitors arrest records. If an employee does not have a required license, she sends a letter to the employee's supervisor stating that the employee should not operate a motor vehicle. If an employee fails to obtain a valid license within a prescribed period, she schedules an interview that she attends only if requested by the Director. At the direction of her supervisor, Drop prepares stipulation agreements between the agency and the employee who has to renew the license. This duty entails filling out a standard form. Drop has no authority to sign a stipulation. She supervises and evaluates one Clerical Associate but does not sign off on time cards and cannot impose

discipline without approval from the Director.

Housing Preservation and Development

Robert Holliday, a provisional Investigator (Employee Discipline) since 1999, who holds the permanent civil service title Principal Administrative Associate, works for the Disciplinary Unit of HPD. He reports directly to the Disciplinary Unit's Director, who is an Administrative Manager Level I. Holliday does not supervise any employees. He testified that he is the Disciplinary Unit's "Senior Investigator," works on more complex cases, and guides the only other Investigator. After receiving an assignment from the Director, Holliday interviews witnesses and the employee who is the subject of the investigation, conducts surveillance, and reviews personnel files and prior disciplinary history. Before an investigatory interview, he briefs union representatives about the allegations. If warranted, Holliday will draft a stipulation agreement that is reviewed and signed by the Director. After his investigations, Holliday recommends discipline to the Director. He may also draft disciplinary charges that must be reviewed by the Director or the attorney assigned to the case. Holliday presents HPD's position at informal conferences and at Step I and Step II hearings and has testified at OATH. He meets with higher-level management only to discuss the details of a particular case he has investigated. He receives advance notice of a hiring or firing when such information is reported to the Disciplinary Unit.

Jose Pinero, an Investigator (Employee Discipline) Level I, works in HPD's Disciplinary Unit with Holliday, and reports directly to the Director. Pinero and Holliday perform similar duties. In approximately 40% to 50% of his cases, Pinero has participated in Step I and II hearings where he presents HPD's position. The Director must review and sign any disciplinary charges or stipulation agreements Pinero drafts.

Department of Finance

Timeko M. Hunte, an Investigator (Employee Discipline) Level III, works in the Department Advocate's Office ("DAO"). DAO is responsible for investigating alleged violations of DOF's code of conduct, policies, and procedures. In the course of investigating the cases, Hunte conducts interviews and reviews personnel records and payroll information. She also has access to an internal DAO database that contains prior disciplinary history, information which may affect her penalty recommendation for a particular violation. Hunte submits her recommendations to the Department Advocate, who determines how to proceed. If warranted, Hunte prepares disciplinary charges by referring to past charges and the code of conduct. The charges are then reviewed by the Department Advocate and the First Deputy Commissioner.

After the charges are served, the union representative involved typically contacts Hunte before the scheduled informal conference to discuss entering into a stipulation agreement in lieu of charges. If required, Hunte will draft a stipulation agreement that is signed by the employee, the union representative, the Department Advocate, and the First Deputy Commissioner. She does not sign stipulation agreements unless she requests permission from the First Deputy Commissioner to sign on behalf of the Department Advocate when she is absent.

If the case is not settled and proceeds to an informal conference, Hunte presents the City's case before an Informal Conference Leader, with the union representative and the employee present. She has also presented the City's case at Step II hearings and has testified at OATH twice after meeting with the Department Advocate. Hunte testified that she supervises one employee, Robert Freeman, who is also an Investigator (Employee Discipline). She signs his time cards only when the Department Advocate is absent and does part of his performance evaluation, which is completed by

the Department Advocate. Hunte attends review meetings every two months with the Department Advocate, a division head, and the liaison for the division concerned to update the division regarding pending cases or open stipulations. Hunte participates in the discussion only if it concerns her cases.

Robert Freeman, an Investigator (Employee Discipline), holds the underlying civil service title Fraud Investigator Level I. Freeman reports directly to the Department Advocate and has similar duties to Hunte. He does not supervise any employees and has no authority to sign stipulations on his own or on behalf of the Department Advocate.

Department of Buildings

Alexander Gonzalez, an Investigator (Employee Discipline) Level II, works for DOB's Office of Internal Audits and Discipline ("IAD"). IAD investigates allegations of employee misconduct, unlicensed activity, and unlicensed electrical work, plumbing, and construction. Gonzalez reports directly to the Executive Director and works with three Investigators (Employee Discipline) Level I, one other Investigator (Employee Discipline) Level II, and two Investigators (Employee Discipline) Level IV. He testified that the other Investigators of his level or below perform similar duties to his own. The rest of the staff is comprised of a Deputy Director, a college intern, a college aide, an attorney, and other administrative employees.

In the course of investigating a complaint, Gonzalez interviews the subject of the complaint, performs surveillance if necessary, and reviews time cards, personnel records, payroll records, prior disciplinary history, and criminal history. After his investigations, he completes closing memos that are submitted to the Director or Deputy Director, with whom he meets to discuss his recommendations. His interaction with union representatives is limited to briefing them about the allegations before an investigatory interview or to discuss a possible stipulation agreement to be

negotiated by IAD's attorney. Using a standard form and following the code of conduct in determining penalties, Gonzales has drafted stipulation agreements, which must be approved by the Director and the attorney.

Gonzales also conducts background investigations for DOB's new hires. He has participated in Step I conferences to answer questions regarding his investigations or findings but has not testified at Step III hearings, arbitrations, or OATH. Gonzales testified that he supervises the Investigators at Level II or below – Caroline Marmolejos, Kim Rivers, Dwayne Brown, Jonathan Vega, and Jennifer Vargas – and the college aide. He signs their time cards and completes their performance evaluations, which are reviewed and signed by the Executive Director. He does not assign cases to his supervisees. He interviews potential hires for IAD and submits his recommendations to the Executive Director.

Gonzales has performed a borough audit and reviewed standards of procedures in conjunction with the Building Special Investigation Unit. His role was to gather information and write a memo to the assigned attorney, who in turn completed a memo that was submitted to superiors such as Assistant Commissioners and Deputy Commissioners. He is at times asked to attend management meetings by his Director "but it's not imperative that I attend but at times I may need to explain an action that our office has taken." (Tr. at 856.) His subordinates do not attend these meetings.

New York City Law Department

James Abrams, an Investigator (Employee Discipline), works for the Labor and Employment Division of the Law Department. He reports directly to the Department Agency Advocate and, as the only Investigator in the Law Department, conducts all investigations regarding employee misconduct received by that agency. No clerical employees assist him. During the course of

investigating complaints, Abrams interviews the subject of the investigation, briefs union representatives before investigatory interviews, and drafts disciplinary charges in accordance with the Law Department's code of conduct. Abrams has access to personnel and disciplinary files and performs background investigations. He maintains the disciplinary files that are located in his office and accessible only to him and the Department Agency Advocate. All of his work is reviewed and must be approved by his superior. Abrams participated in an OATH hearing once where he testified about interviews he had conducted. He has attended grievance proceedings where he assisted the attorney handling the case. Abrams also functions as the Freedom of Information Officer's assistant. He testified that he has made suggestions for the code of conduct to his superior, but that none of them were implemented. He participates in the Financial Disclosure Program by handing out the forms to be filled out, collecting the completed forms, and delivering them to the Conflicts of Interest Board.

Other employees

Other employees in the titles Investigator (Discipline) and Investigator (Employee Discipline) who are employed by DOS, DJJ, DPR, DOH, DOC, HRA, DDC, DOT, FDNY, DHS, DEP, HPD, DOF, DOB, and the Law Department, who submitted surveys but did not testify, generally perform duties similar to other Investigators within the same agency. Three remaining employees in the title Investigator (Employee Discipline), who work in DOP, DCA, and TLC, submitted surveys but did not testify. Frank Bermejo works for DOP's Advocate's Office where he investigates allegations of employee misconduct. His duties include the intake of complaints, gathering background information, contacting complainants and witnesses, and preparing reports of investigations. He does not supervise any employees. Shiron Vick works for DCA's Disciplinary Advocate Office

where she investigates allegations of employee misconduct and incompetence. She submits disciplinary penalty recommendations to senior management who ultimately determine what penalty is imposed. Marshall Leroy Jr. is employed by TLC's Legal Department, Investigations Unit. During the course of investigating complaints, Leroy interviews witnesses and conducts surveillance. He also prepares reports and submits his findings and recommendations to superiors.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the parties' Stipulation, approved by the Board in *District Council 37*, Decision No. 8-95, does not preclude the employees currently serving in the title Investigator (Employee Discipline) from being eligible for collective bargaining. The Union asserts that the Stipulation specifically refers only to the title Investigator (Discipline), and pursuant to the Stipulation, the City agreed to convert employees in specified agencies holding that title to the title Confidential Investigator. The parties did not agree to convert the title Investigator (Discipline) to any other title.

The Union claims that the Shultz memo relied on by the City does not provide an adequate explanation as to why the Union did not receive notification regarding the creation of the petitioned-for title or the City's difficulties in implementing the terms of the Stipulation. Rather, the memo shows that the City made a unilateral decision to deviate from the terms of the Stipulation in violation of N. Y. Civil Service Law ("CSL") § 20 and § 22.⁸ Furthermore, the Union asserts that

⁸ CSL § 22 provides, in pertinent part:

Before any new position in the service of a civil division shall be created or any existing position in such service shall be reclassified, the proposal therefore, including

the memo demonstrates that the City understood the Stipulation's limitations. The memo states that only incumbent employees holding the title Investigator (Discipline) when the Stipulation was executed would be affected. Currently, however, employees serving in the petitioned-for title were hired after April 1995. They are in agencies that were not listed as affected agencies in OLR's memo. In addition, the Shultz memo explicitly states that "all future appointments to positions performing the investigation of employee discipline must be reviewed by the Department of Personnel prior to hiring to determine the appropriate title to which appointment should be made." Thus, the petitioned-for title cannot automatically be deemed managerial and/or confidential.

The Union claims that it is not required to prove a change in circumstance because there are no Board decisions that determine the status of the petitioned-for title and there is no agreement between the parties that the title is managerial and/or confidential.

The Union asserts that the testimony of employees in both the titles Investigator (Discipline) and Investigator (Employee Discipline), and the surveys submitted, demonstrate that these employees are eligible for collective bargaining. According to the Union, the Board has found eligible many similarly situated employees under the criteria established. In particular, the employees at issue do not formulate policy but work within established agency guidelines, policies and procedures, and exercise very little independent authority. The testimony revealed that the majority of Investigators are generally involved in gathering information from databases, surveillances, personnel records, and witness interviews. Such information would then be provided to a supervisor for review. Although

a statement of the duties of the position, shall be referred to the municipal commission having jurisdiction and such commission shall furnish a certificate stating the appropriate civil service title for the proposed position or the position to be classified. Any new title shall be created or any such existing position reclassified only with the title approved and certified by the commission.

some Investigators make recommendations, they have no authority to make unilateral determinations, and all final decisions are made by a superior.

According to the Union, the record does not support a finding that any individual Investigator engages in policy formulation. The purpose of gathering information is not for the formulation of policy but merely to investigate allegations. The Board has held that making investigations, reports, and suggestions is not a managerial function. If an Investigator is involved with policy, he or she is merely expanding on existing policy and should not be found ineligible for bargaining.

Further, the Union argues that most Investigators had no subordinates and had no authority to sign time cards or performance evaluations. When an individual did have such functions, it was in a supervisory capacity and not in a managerial role. Similarly, Investigators had minimal involvement in hiring or firing employees, and the final decisions were made by supervisors and/or the personnel department. Here, the evidence demonstrates that Investigators have a lack of independent authority.

Moreover, the testimony revealed that Investigators have minimal or no involvement in informal conferences, grievance hearings, administrative hearings or arbitrations. In the few instances that an Investigator was involved, his or her role was very limited. For example, Cerda stated that the majority of the time that she attended an informal conference, she usually did not testify, and she has only testified once at OATH. Collins and Curran have never testified at any grievance hearings. Similarly, Mugno and Hernandez have not participated at the grievance steps, OATH or arbitrations. Although Pinero presents HPD's cases at Step I and Step II of the grievance process, he did so for less than half of his cases. In addition, the record was devoid of any evidence that any Investigator had a role in budget preparation or allocation. The testimony of witnesses as

to the confidential information to which they had access was limited to employees' personnel records. Reboyras stated that she keeps information confidential in accordance with DOH's standards. Some Investigators testified that they had access to DMV records available from the state. Other Investigators stated that they have to request personnel files from the personnel department. When Investigators had access to a database at work, other employees also had access to the same information. Moreover, the Union argues that the fact that many Investigators work with employees or report to superiors whose titles have already been deemed eligible for collective bargaining is further proof that they are not confidential and do not work in a confidential capacity to a manager. For example, some Investigators reported to individuals in the Agency Attorney title, which has been found eligible for collective bargaining. Other Investigators worked with SEMSS Levels I and II (EMS Lieutenants and Captains) and Staff Analysts all titles the Board has deemed eligible for collective bargaining.

The Union asserts that any argument by the City opposing eligibility for collective bargaining because of a potential conflict of interest must be rejected. The testimony does not indicate any potential conflict of interest even when Investigators were represented by the same union as investigated employees. In the two instances when a witness expressed reservations about potential conflicts, the testimony was purely speculative.

Finally, the Union alleges that any determination by the Board that employees already represented by DC 37, even hires after April 1995, should no longer enjoy the rights of collective bargaining would be extremely prejudicial to these individuals and contrary to the statutory presumption of eligibility. The City had ample opportunity to petition the Board to designate employees in the title Investigator (Employee Discipline) as managerial and/or confidential, but

failed to do so since it created the title in 1995.

City's Position

The City argues that employees serving in the title Investigator (Employee Discipline) are confidential and, therefore, ineligible for collective bargaining. The parties' Stipulation, approved by the Board in *District Council 37*, Decision No. 8-95, designated that these employees have confidential status. Although converting employees to the title Confidential Investigator was too burdensome for DCAS, the administration did create the Investigator (Employee Discipline) title specifically for those employees considered confidential pursuant to the Stipulation. In seeking to accrete a title it previously agreed would not be accreted to its bargaining unit, the Union is in violation of the Stipulation and Decision No. 8-95.

The City further argues that the Union does not allege there has been a change in circumstance that would justify the Board's reconsideration of the status of these employees. According to the City, the fact that the duties and responsibilities of the petitioned-for title are identical to that of a represented title is not a sufficient reason to request the Board to revisit a determination on confidential status. By seeking to certify the petitioned-for title absent a change in circumstance, the Union violates the spirit of the Stipulation and Decision No. 8-95.

Moreover, the parties agreed that OLR would *recommend* that the employees would be converted to the Confidential Investigator title. Despite the Stipulation's language referencing "current employees," the parties continue to apply the terms of the Stipulation, executed in 1995, to new hires or transfers in the respective titles. Employees who were hired or transferred to the Investigator (Discipline) title at DOS, HRA, DJJ, DOC, DOH, and DPR after 1995 were automatically represented by the Union. Employees who were hired or transferred into the

Investigator (Employee Discipline) title at all other agencies were considered confidential without objection by the Union.

The City asserts that the testimony and the surveys demonstrated that the employees holding the title Investigator (Employee Discipline) assist managerial employees in the administration of employee discipline and act in a confidential capacity to those managers. The directors of the different agency disciplinary units rely on the Investigators to conduct employee misconduct investigations, interview witnesses, prepare disciplinary charges and stipulation agreements, make penalty recommendations, and represent the City's interests at administrative hearings regarding employee discipline. Because they are intimately involved in all aspects of employee discipline, they are ineligible for collective bargaining. Indeed, these employees regularly have "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." *Department of Investigation Investigator's Ass'n*, Decision No. 2-2003, quoting *District Council 37*, Decision No. 4-98.

For example, in Samojedny's case, his advance knowledge of units to be tested, along with his access to confidential information, creates a conflict of interest that precludes him from fairly performing his duties while participating in a bargaining unit. As to Collins, he was recently promoted to Chief of Meter Collections and supervises approximately 150 employees. As a managerial employee, he is involved in the formulation, determination, and effectuation of policy in regard to meter collections. In addition, the City asserts that DOT expects to change his title shortly to reflect his newly assigned managerial duties – he is no longer performing the duties of an Investigator. Hunte and Freeman prepare charges and advocate on behalf of DOF at Step I and Step

II hearings and testify at OATH. In addition, Hunte and Freeman make disciplinary penalty recommendations to their Director. Gonzales, in addition to his investigatory duties, meets with high-level managers when he presents audit results regarding operating procedures and departmental efficiency and also supervises all Investigators of his level or below. As all the Investigators in DOB perform the same functions, they are all confidential employees and should be excluded from collective bargaining.

DISCUSSION

This Board upholds the Stipulation as it applies to those employees who were “currently serving” in the title Investigator (Discipline) on or before April 14, 1995, when the Stipulation was executed. However, we find that the plain language of the Stipulation does not apply to employees in the titles Investigator (Discipline) and Investigator (Employee Discipline) who were hired after April 14, 1995. This Board also finds that the employees in these titles who were hired after April 14, 1995, are not managerial and/or confidential employees because they are not significantly involved in policy-making and do not engage in personnel administration or collective bargaining on behalf of their agencies. Further, they do not assist or act in a confidential capacity to managerial employees responsible for labor relations or personnel functions. Therefore, employees in these titles are eligible for collective bargaining.

First, we address the question whether the terms of the parties’ Stipulation apply to employees in the titles Investigator (Discipline) and Investigator (Employee Discipline) who were hired after April 14, 1995. This Board has previously held that a stipulation that excludes certain employees from representation does not preclude a union from seeking to represent those employees

in the future absent an express or implied waiver of the right to do so. *Assistant Deputy Wardens Ass'n*, Decision No. 11-95 at 14; *Assistant Deputy Wardens Ass'n*, Decision No. 8-92 at 8. However, even if a stipulation contains express language that the parties intended a waiver of a union's right to represent the employees at issue, the Board cannot allow such an agreement to continue for an unknown and potentially unlimited period of time because it would be in contravention of statutory and public policy. *Assistant Deputy Wardens Ass'n*, Decision No. 11-95 at 15; *Assistant Deputy Wardens Ass'n*, Decision No. 8-92 at 9; see also *New York City Transit Authority*, 27 PERB ¶ 3060, at 2 (1994) ("As a matter of statutory and public policy, we could not allow a ban on representation petitions filed by a particular union on behalf of public employees to continue for an unknown and potentially unlimited period of time."). Furthermore, in cases in which the Board has excluded employees from collective bargaining by designating them managerial or confidential, a challenge may be made after two years if circumstances have changed. *Assistant Deputy Wardens Ass'n*, Decision No. 8-92 at 9; see Section 1-02(v)(6) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1).

In *Assistant Deputy Wardens Ass'n*, Decision No. 8-92, the union filed a petition to add employees who serve in the title Warden (Correction) Level II to its bargaining unit. The City opposed the petition on the ground that the parties' 1980 stipulation of settlement, approved by the Board in a prior decision, precluded the union from seeking to represent those employees and made the matter moot. In its interim decision, the Board found that the language of the stipulation "simply defines certain employees whom the parties have agreed not to include in the [union's] certification." *Id.* at 8. Because the stipulation did not contain an express or implied waiver of the right to seek to represent those employees in the future, the Board denied the City's motion to dismiss.

In *Assistant Deputy Wardens Ass'n*, Decision No. 11-95, the union filed an amended petition to accrete employees who serve in the title Warden (Correction) Level II to its bargaining unit after the Board issued its interim decision in *Assistant Deputy Wardens Ass'n*, Decision No. 8-92. The City again opposed the petition based on the 1980 stipulation of settlement. Following a hearing ordered in the interim decision, the Board affirmed its prior decision and stated that even if the parties' stipulation had contained language indicating that the parties intended to exclude employees in the title for an unlimited period, "such a waiver would be in contravention of the NYCCBL." *Id.* at 15.

In the instant case, the plain language of the Stipulation expressly limits the scope of the parties' agreement to those employees "currently serving" in the title Investigator (Discipline) at the time the agreement was executed. Therefore, we uphold the Stipulation as it applies to the four employees who were currently serving in the title Investigator (Discipline) on or before April 14, 1995, and who continue to hold this title. However, the Stipulation does not contain any express or implied waiver of the Union's right to seek to represent employees hired after April 14, 1995, in the titles Investigator (Discipline) or Investigator (Employee Discipline). Thus, we find that the Stipulation does not preclude the Union from seeking to represent these employees. Moreover, because there are no written agreements or prior Board decisions that have designated these employees managerial and/or confidential, the Union is not required to prove a change in circumstances, and the City has the burden to prove that these employees are managerial and/or confidential and ineligible for collective bargaining.

NYCCBL § 12-305 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. Pursuant to NYCCBL § 12-309(c)(4), determinations concerning employees' eligibility for representation are made consistent with the N.Y. Civil Service Law Article 14 ("Taylor Law") § 201.7. *Communications Workers of America*, Decision No. 5-87 at 16-17. The relevant language of § 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).

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 Service Technical Guild, Local 375*, Decision No. 45-78 at 5, *rev'd*, *Civil Service Technical Guild, Local 375 v. Anderson*, N.Y.L.J., Oct. 9, 1979 (Sup. Ct. N.Y. Co.), at 10, *aff'd*, 79 A.D.2d 541 (1st Dep't 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. See *Allied Building Inspectors, Local 211, I.U.O.E.*, Decision No. 13-86; *Communications Workers of America*, Decision No. 63-72 (personnel

administration); *Civil Service Technical Guild, Local 37*, Decision No. 5-85 and *Civil Service Forum, Local 300, SEIU*, Decision No. 8-72 (preparation and allocation of budget); *District Council 37, Local 317*, Decision No. 46-72, and *Civil Service Bar Ass'n*, Decision No. 43-69 (involvement in labor relations); *District Council 37*, Decision No. 19-71 (scope of authority); *Service Employees International Union, Local 144*, Decision No. 43-69 (number of subordinates).

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 at 21; *Uniformed Sanitation Chiefs Ass'n*, Decision No. 4-2000 at 26. Employees who “formulate” policy include those with the authority or responsibility to select among options and to put a proposed policy into effect as well as those who “regularly participate” in the “essential process” that 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.

To establish confidentiality, an 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. *See New York City Department of Investigation Investigator's Ass'n*, Decision No. 2-2003 at 17-18; *Civil Service Employees Ass'n*, 32 PERB ¶ 3001 (1999). This test is to determine whether the employee regularly has “access to confidential information concerning labor relations and/or personnel matters to such an extent that his or her 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 at 13-14; see also *Civil Service Employees Ass'n*, 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 secretive or highly sensitive nature of an employee's work alone does not compel a managerial and/or confidential designation. *New York City Dep't of Investigation Investigator's Ass'n*, Decision No. 2-2003 (Confidential Investigator); *District Council 37*, Decision No. 4-98 (Investigator (CCRB)); *Ass'n of New York City Assistant District Attorneys*, Decision No. 13-74 (Assistant District Attorney); *City Employees Union, Local 237, IBT*, Decision No. 58-70 (Detective Investigator); *City Employees Union, Local 237, IBT*, Decision No. 60-69 (Senior Detective Investigator); *Patrolmen's Benevolent Ass'n*, Decision No. 45-68 (Patrolman and Detective). In *New York City Dep't of Investigation Investigator's Ass'n*, Decision No. 2-2003, the City opposed a petition to represent employees in the titles Confidential Investigator and Special Investigator on the ground that these employees were managerial and/or confidential. The Board, holding that the employees are eligible for collective bargaining, stated that its finding "is consistent with other decisions in which we found employees in highly sensitive positions performing investigatory work eligible for collective bargaining." *Id.* at 17. The Board rejected the City's assertion that designating employees in the titles Confidential Investigator and Special Investigator eligible for collective bargaining would raise a conflict of interest because "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." *Id.* at 19.

The job specifications and duties for Confidential Investigators and Special Investigators are

similar to those of the employees in this case.⁹ Just like Confidential Investigators and Special Investigators, employees in the titles Investigator (Discipline) and Investigator (Employee Discipline) are not managerial because they are not significantly involved in policy-making and do not engage in personnel administration, or collective bargaining. Investigators are primarily responsible for gathering information, conducting investigations, and preparing reports that are submitted to superiors for review. On the few occasions when Investigators attend meetings with higher-level management, they participate only when a particular case they have investigated is under discussion.

Furthermore, as to involvement in personnel administration or labor relations, Investigators have few, if any, subordinate employees. While a few Investigators have supervisory responsibilities, including signing off on time sheets or performance evaluations – which are reviewed by superiors – and very limited involvement in hiring and firing employees, such supervisory duties do not rise to the level of managerial status. *Communications Workers of America*, Local 1180, Decision No. 4-2005 (concluding that approving time and leave requests and preparing performance evaluations reviewed by superiors are supervisory duties that fall short of the level that can be found managerial). Although many Investigators make recommendations for disciplinary action, these recommendations are submitted to supervisors for review, and the authority to discipline and make final determinations rests with higher-level management. When preparing

⁹ The job specifications for Confidential Investigators and Special Investigators list identical duties and responsibilities to those of the Investigators in the instant case. *New York City Dep't of Investigation Investigator's Ass'n*, Decision No. 2-2003 at 3. The majority of Confidential Investigators and Special Investigators investigate complaints of wrongdoing, corruption, or abuse of authority or City property. During their investigations, “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.” *Id.*

stipulations of settlement of disciplinary charges, Investigators generally follow past stipulations and other guidelines and must submit them to superiors for approval. They do not have authority to sign these agreements. In addition, the Investigators' interaction with union representatives is limited to briefing them before an investigatory interview. The majority of Investigators' involvement in disciplinary hearings or other administrative proceedings is limited to testimony describing facts discovered in their investigations. In the few instances Investigators may present the City's case at a proceeding, such responsibilities are not a regular or significant part of their duties. Even employees who have a greater role or authority in the disciplinary process than do Investigators have been found eligible for union representation. *Lippman v. PERB*, 263 A.D.2d 891 (3rd Dep't 1999) (employees who make hiring, promotional, disciplinary, and staffing recommendations are not managerial); *City of Beacon*, 31 PERB ¶ 4020 (1998) (employee who conducts sensitive internal investigations and recommends disciplinary actions is not managerial).

Although we acknowledge that Investigators' work can be highly sensitive and may require secrecy, the highly sensitive nature of the work they perform does not mandate managerial or confidential status. *New York City Dep't of Investigation Investigator's Ass'n*, Decision No. 2-2003 at 16-17. Investigators are not confidential because the record does not demonstrate that they assist or act in a confidential capacity to managerial employees responsible for labor relations or personnel administration. Moreover, many of the Investigators report to superiors who have been found to be eligible for collective bargaining by this Board. For example, although one Investigator receives highly sensitive information, such as the list of units to be randomly drug tested, his direct superior holds the title Agency Attorney, a title this Board has previously found eligible.

Finally, we reject the City's assertion that certification of the titles at issue would raise a

conflict of interest such that the agency's mission or employees' performance could be impaired. Nothing in the record supports a claim that these employees will be unable to carry out the duties assigned because they will be represented for purposes of collective bargaining. As we have stated in prior decisions, the 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. *New York City Dep't of Investigation Investigator's Ass'n*, Decision No. 2-2003 at 19; *Ass'n of New York City Assistant District Attorneys*, Decision No. 13-74 at 26.

Accordingly, we find that employees in the titles Investigator (Discipline) and Investigator (Employee Discipline) are not managerial and/or confidential, and are, therefore, eligible for collective bargaining.

ORDER

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

ORDERED, that the employees in the titles Investigator (Discipline) (Title Code No. 06316) and Investigator (Employee Discipline) (Title Code No. 06688), are eligible for collective bargaining; and it is further,

ORDERED, that Certification No. 37-78 (as previously amended) be, and the same hereby is, further amended to include the titles Investigator (Discipline) (Title Code No. 06316) and Investigator (Employee Discipline) (Title Code No. 06688), subject to existing contracts, if any.

DATED: September 1, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

NOTICE OF AMENDED CERTIFICATION

This notice is to acknowledge that the Board of Certification has issued a Decision and Order as follows:

DATE: September 1, 2006 **DOCKET #:** AC-6-03

DECISION NUMBER: 7-2006

EMPLOYER: The City of New York, represented by the Office of Labor Relations
40 Rector Street, New York, New York 10006.

CERTIFIED/RECOGNIZED BARGAINING

REPRESENTATIVE:

District Council 37, AFSCME, AFL-CIO

AMENDMENT: Certification No. 37-78 has been amended to add the following Title/Code:

ADDED: **Investigator (Discipline) (Title Code No. 06316)**
Investigator (Employee Discipline) (Title Code No. 06688)