

CSBA, L. 237, 8 OCB2d 26 (BOC 2015)

(Rep) (Docket Nos. AC-72-13 & RE 181-13)

Summary of Decision: The Union filed a petition to amend Certification No. CWR-44/67 to add the title Assistant Advocate-PD. The City argued that employees in the title were exempt from representation as a matter of public policy. Subsequently, the City filed a petition to designate the employees as confidential. The Board found that the evidence did not establish that the employees were confidential and that public policy does not prevent their representation. Accordingly, the Board added the title to the Union's bargaining unit. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION**

In the Matter of the Certification Proceeding

-between-

CIVIL SERVICE BAR ASSOCIATION, LOCAL 237, IBT,

Petitioner,

-and-

THE CITY OF NEW YORK,

Respondent.

DECISION AND ORDER

On January 17, 2013, the Civil Service Bar Association, Local 237, International Brotherhood of Teamsters ("Union"), filed a petition pursuant to § 1-02(u) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") requesting that the title Assistant Advocate-PD (Title Code No. 30083) be accreted to the Attorneys bargaining unit, Certification No. CWR-44/67. The Assistant Advocate-PD ("AAPD") title is an agency-specific title used within the Department Advocate's Office ("DAO") of the New York Police Department ("NYPD")

or “Department”). The City of New York (“City”) initially opposed this petition on the ground that the representation of the employees at issue is contrary to public policy and statutory intent to confer exclusive authority over police discipline to the Police Commissioner. On June 18, 2013, the City filed a petition seeking a designation that the title AAPD is confidential and thus exempt from representation.¹ The Board finds that the City did not establish that the employees are confidential under § 12-305 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”) or that public policy prevents their representation. Accordingly, this Board holds that these employees are eligible for collective bargaining and adds the title to the Union’s bargaining unit.

BACKGROUND

Two days of hearing were held. Department Advocate Julie L. Schwartz testified on behalf of the City. Todd Rubenstein, Grievance Coordinator for the Union, AAPD Jessica Brenes, and AAPD Javier Seymore testified on behalf of the Union.

Structure of the DAO

The DAO prosecutes uniformed and civilian employees of the NYPD for violations of Departmental and Citywide rules and regulations. As of May 2013, the DAO’s legal staff consists of 15 AAPDs and 11 employees in the Agency Attorney title. (City Br., Ex. 2) The Agency Attorneys are represented by the Union and the eligibility

¹ The two cases were subsequently consolidated.

of their title for bargaining is not at issue in this proceeding.² Notably, despite the different titles, it is undisputed that AAPDs and Agency Attorneys are utilized by the DAO interchangeably. The Department Advocate testified that there were no tasks performed by AAPDs that were not performed by Agency Attorneys. Both titles analyze cases, evaluate evidence, make recommendations on the level of discipline to be issued against employees accused of misconduct, offer settlements to respondents, and present cases at trial. Indeed, the DAO Organizational Chart does not distinguish between Agency Attorneys and AAPDs as it uses the same abbreviation, “AA,” to represent both.

The DAO’s legal staff is divided into four teams: Trial Teams A and B, the Civilian Team, and the Civilian Complaint Review Board (“CCRB”) Team. Each team is led by a senior attorney designated as a Team Leader. The two Trial Teams handle cases involving alleged violations of disciplinary rules by uniformed personnel. Trial Team A consists of six attorneys and is subdivided into two groups.³ Trial Team B consists of nine attorneys and is subdivided into three groups.⁴ One attorney in each Trial Team group is designated as a supervising attorney, who may be either an Agency Attorney or AAPD. The Civilian Team consists of five attorneys and handles cases involving civilian

² On the same day that the City filed its petition seeking a confidential designation for the unrepresented AAPD title, it filed a petition to designate as confidential the DAO employees in the Union-represented titles of Agency Attorney and Attorney-at-Laws. That petition was dismissed as untimely under the contract bar rule. *See* OCB Rule § 1-02(g).

³ One of these groups reports both to Team Leader A and to Assistant Commissioner Kathleen M. Kearns.

⁴ One of these groups reports both to Team Leader B and to Special Counsel Nancy Slater. Another group reports both to Team Leader B and to an AA Level III assigned only to “Special Projects.”

employees of the NYPD. The CCRB Team, also consisting of five attorneys, handles matters initiated by the CCRB as well as Internal Affairs and integrity test cases.

The legal staff reports directly to an Executive Officer.⁵ The Executive Officer reports directly to Commanding Officer Inspector Louis W. Luciani.⁶ The Commanding Officer reports directly to Assistant Commissioner Kathleen M. Kearns. The Assistant Commissioner reports directly to the Department Advocate, who is the director of the DAO. Additionally, the Executive Officer, Commanding Officer, Assistant Commissioner, and Special Counsel Nancy Slater comprise the Executive Staff, which assists the Department Advocate in her day-to-day tasks.⁷

History of the AAPD Title

Both parties offered considerable testimony concerning the origin and use of the AAPD title. Between 1986 and 1997, the DAO hired new attorneys into the AAPD title. In 1995, an agreement was signed between the City and the Union concerning the Agency Attorney title (“Agreement”). In the Agreement, the Union consented to the placement of the Agency Attorney title in the non-competitive class, and the City agreed not to oppose the accretion of that title to the Attorney bargaining unit of the Union. (Union Ex. 1 at ¶¶ 7, 17) Between 1997 and 2006, the NYPD used the Agency Attorney title, rather than the AAPD title, for new attorney hires.

⁵ Captain Nicholas Muglia, who is represented by a union, had previously held the Executive Officer position. He was transferred into another department, and the position remained vacant through the submission of post-hearing briefs.

⁶ Inspector Luciani is represented by a union.

⁷ The Special Counsel reports directly to the Department Advocate.

The Department Advocate testified that in 2005, the then-Police Commissioner hired her to “professionalize” the office based on her prior experience as a seasoned prosecutor. (Tr. 10) They discussed potential and perceived conflicts of interest arising from the fact that many DAO attorneys were, at the time, uniformed members of the police force. Conflicts were a concern because uniformed members were tasked with prosecuting other uniformed members. Hiring civilian attorneys, they concluded, would eliminate such conflicts, as well as bring more litigation experience to the DAO’s work. The Commissioner and Department Advocate therefore decided to try to recruit civilian attorneys with more litigation experience. As the Department Advocate testified, they utilized the AAPD title in order to assist with this recruitment effort:

[W]hen I first started to look outside to make hires, we couldn’t find qualified people because the position as an Agency Attorney did not pay enough and the requirements were much lower. You didn’t need as much experience. So we spoke with the personnel bureau and we found out we had a title that hadn’t been used in a while, which was the [AAPD] title.

As a result of that, we were able to pay a little more not lucrative but a little bit better than what the Agency Attorney paid, and if we use that title we could broaden our recruitment, and we were able to do that and that’s why we switched and started to use that title.

(Tr. 12).⁸ Between 2006 and 2012, the DAO hired 25 new AAPDs.⁹

⁸ The City submitted additional evidence illuminating its reason for employing the AAPD title. In a May 26, 2009 hearing before the Civil Service Commission, Arnold S. Wechsler, the Assistant Commissioner of the NYPD’s Employee Management Division testified in support of authorizing 50 non-competitive positions within the AAPD title:

Although there is an existing Non-Competitive title of Agency Attorney that could perform this work, that title is represented by a union. We believe that the Police Commissioner should have the ability to select the legal personnel utilized as employee

Additionally, although the remaining Agency Attorneys are represented by the CSBA,¹⁰ the Department Advocate did not believe that their represented status prevented the Police Commissioner from organizing the DAO in a manner that allows him to most effectively exercise his disciplinary authority over the NYPD.¹¹ Furthermore, the Department Advocate is the final sign-off for any cases involving uniformed officers ranked Captain or higher, in order to avoid the appearance of conflict with the Commanding Officer and the then-Executive Officer, who was a uniformed Captain.

Duties of the AAPDs

The job specification for AAPD describes the duties and responsibilities of the title as “involving disciplinary investigation and prosecution of uniformed and civilian employees for violation of departmental and citywide rules and regulations, and researches and analyzes questions of fact and questions of law.” (City Pet., Ex. C)

There are three assignment levels. An AAPD Level I has the following tasks:

Interviews witnesses and gathers evidence relevant to cases. Evaluates evidence and witness statements as they

‘prosecutors’ in this agency’s disciplinary trial forum on a non-competitive basis, and we require a discrete non-competitive class title, with three assignment levels, to allow the Department to fill these positions with non-union represented employees.

(City Br. Ex. 3) The President of the CSBA testified in opposition to the measure.

⁹ During the same period, it classified one new hire as an Agency Attorney due to an administrative error.

¹⁰ All of the DAO’s 67 employees are represented by a union, with the exception of the Deputy Commissioner, the Assistant Commissioner, the Special Counsel, and the AAPDs.

¹¹ The Department Advocate testified: “I don’t believe it’s their union. I believe it’s that the limits of the title that the Agency Attorneys provided limited [the Commissioner] from creating a professional department advocate’s office.” (Tr. 57)

relate to departmental and citywide policies and procedures. May recommend prosecution.

Determines those legal questions requiring higher level opinion and refers them to supervisor.

Prosecutes disciplinary cases in trials before an NYPD Office of the Deputy Commissioner of Trials hearing officer.

Functions as legal advisor and guide to Integrity Control Officers in field commands and personnel in the Internal Affairs Bureau.

Appears in court to present motions, seek release of evidence and grand jury minutes and to obtain court orders requiring witnesses to appear at disciplinary trials.

Prepares briefs, motions, legal opinions, and other legal documents.

Recommends settlements and/or penalties where applicable.

Provides legal advice to supervisors and management regarding the enforcement and administration of departmental and citywide regulations.

(City Pet., Ex. C)

At Assignment Level II, an AAPD “perform[s] more sophisticated legal analysis and litigat[es] more complex and sensitive cases of misconduct.” (*Id.*) In addition to performing the duties of AAPD Level I, an AAPD Level II has the following typical tasks:

Acts as liaison to executive members of the department concerning procedures followed in prosecution of severe cases of misconduct.

Assists the supervisor in monitoring work flow and case status of unit personnel, ensuring compliance with deadlines.

May train less experienced attorneys and review their work.

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

(*Id.*) At Assignment Level III, an AAPD performs the following:

Under direction, with wide latitude for independent initiative, judgment and unreviewed action and decision making, supervises legal staff in the [DAO] performing difficult legal work involving disciplining NYPD employees or engages in complex and difficult legal research and analysis in the preparation of serious, complex and sensitive cases. Prepares comprehensive reports with recommendations for the Department Advocate and other executive level personnel.

Typical tasks of an AAPD Level III include the duties of Levels I and II as well as the following:

Prepares legal opinions on complex matters of major importance to the agency with possible impact on departmental and citywide rules and regulations.

Supervises subordinate legal staff and support personnel engaged in the research, preparation and prosecution of disciplinary cases of misconduct of employees. Assigns, monitors, reviews and evaluates the work of subordinate staff. Ensures that cases are processed in a timely manner and that deadlines are met.

Negotiates penalties and settlements; recommends termination, reduction or dismissal of charges, or probation as appropriate actions.

Advises executive staff of the impact of serious misconduct cases on department policies and procedures and makes recommendations concerning strategies to deal with impact of high profile cases on agency operations.

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

(City Pet., Ex. C)

The DAO handles several different types of cases. It may receive a case (i) upon the suspension of an NYPD employee; (ii) where the subject of a criminal prosecution remains employed by the NYPD upon the disposition of a criminal matter; or (iii) upon the completion of a non-criminal investigation. Additionally, each of the four teams of attorneys at DAO provides “advice and guidance.” (Tr. 15) In this role, attorneys will respond to inquiries from the investigation units and Internal Affairs as to the legal sufficiency of the evidence in a given matter. The DAO attorney reviews the file and, where appropriate, makes recommendations on next steps.

Attorneys are assigned cases through a daily rotation. Every day, one attorney on each team is “on call,” meaning that they are available for intake purposes or for advice and guidance. (Tr. 17) This includes all attorneys at all levels of both titles, although less-senior AAPDs are more likely to be scheduled for this duty than their more-senior counterparts. Attorneys serving in the higher-level titles may not be on as often because they also have more supervisory responsibilities.

Many matters can be resolved over the phone. Some investigators might call only for advice and guidance. Others might call with disciplinary matters that can be addressed through command discipline, which does not necessarily require DAO involvement.

A majority of calls result in an in-person meeting with the investigator called a “consultation.” (Tr. 107) As Brenes, an AAPD I on Trial Team B, testified:

In a consultation, I’ll sit with the investigator. I will have them just give me a narrative of what happened. From the narrative, I will ask questions. I will review the files sometimes to look at documents that might support their response or may, you know, give me more insight into what it is I want to know.

There are times where additional investigation work is needed. So I will give them advice as to why the additional investigative work is needed and what they should do to go about getting it done.

(Tr. 107-08) If the AAPD concludes that no additional investigative work is needed, he or she will take the investigator's file.

After the consultation, the AAPD will review the respondent's employment history and case law, and develop a recommendation as to whether the conduct at issue warrants command discipline, charges and specifications, or instructions not to repeat the behavior.¹² The AAPD will incorporate the recommendation, along with a summary of the consultation, into two separate documents, which are submitted into the DAO computer system. Once the documents are submitted, the AAPD will receive the officer's start date, performance ratings, educational background, a history of their command assignments, and their sick leave history. The AAPD will put this information into the computer system as well.

All information that the AAPD enters into the computer system is forwarded to the AAPD's immediate supervisor. Both AAPD witnesses testified that their immediate supervisor is an Agency Attorney Level III, a represented position. The supervisor reviews the AAPD's recommendation, discusses any needed changes with the AAPD, and forwards a revised recommendation either to a Team Leader or to the Assistant Commissioner.¹³ The file is then reviewed further and forwarded to the Executive

¹² At this stage in the process, the AAPD will generally not recommend a specific penalty.

¹³ Review at this early stage may be slightly different in the CCRB and Civilian Teams, where there is only one Team Leader and no designated supervisor.

Officer, then to the Commanding Officer. Additionally, any high profile cases, cases that will go to trial, Traffic Violations Bureau cases, and CCRB cases are further reviewed by the Department Advocate. Moreover, cases involving Captains or higher-ranked officers are forwarded directly from the AAPD's supervisor to the Department Advocate.

Following these reviews, the AAPD is advised, typically by the Commanding Officer, as to whether the AAPD's recommendation is accepted. If the recommendation concerns command discipline, the AAPD drafts a document requesting command discipline and setting out the supporting facts. The Commanding Officer reviews and signs that document, and the AAPD advises the investigator to contact the respondent's commanding officer.

When the Commanding Officer concludes that formal charges and specifications are appropriate, the AAPD drafts the charges. The AAPD then forwards the draft to their direct supervisor for review. Occasionally, at the AAPD's request, a member of the Executive Staff also reviews the charges. After the charges are reviewed and approved, the AAPD submits the charges to the DAO's Charging Unit, which is a team of uniformed officers responsible for serving charges upon the accused employee.

Formal disciplinary cases are then "steered" by the Department Advocate or a member of the Executive Staff. (Tr. 116). At the outset of the steering process, the AAPD initially drafts a "case analysis review" ("CAR"), which summarizes the facts, prior precedent, and a recommendation as to the appropriate penalty. (Tr. 156) Then, the AAPD discusses the case with either the Department Advocate or a member of the

Executive Staff, and may present the CAR to whomever is steering the case.¹⁴ At this stage, the AAPD might recommend a particular penalty, but the person steering the case makes the final determination. That recommendation forms the basis for settlement negotiations. The AAPD then summarizes the meeting in a “steering document.” (Tr. 159) He or she will also draft a “control conference” document, which alerts the Charges Unit that they should notify the respondent to appear for a trial. (*Id.*)

After steering, the AAPD enters into settlement discussions with the respondent’s attorney (who is often provided by their union). AAPDs are not authorized to deviate from the level of discipline recommended during the steering process.

If the respondent accepts the offer, the AAPD will ask the respondent to sign the negotiation and steering documents. The AAPD then edits or finalizes the CAR memorandum. These materials may be reviewed by a supervisor, but they are ultimately sent to the Department Advocate. After the Department Advocate endorses the documents, she sends the documents to the First Deputy Commissioner. The First Deputy Commissioner reviews the settlement and, if he approves, forward the documents to the Police Commissioner for final approval. Likewise, any recommended disposition with respect to a CCRB-referred case is forwarded to the Police Commissioner, even if the recommendation is for no disciplinary action.

If the respondent declines the settlement offer, the matter is tried before the Deputy Commissioner of Trials or one of his four Assistant Deputy Commissioners-Trials. Prior to the trial date, the AAPDs prepare their witnesses. AAPDs may also discuss trial strategy with their supervisors or the Department Advocate.

¹⁴ The Department Advocate estimated that she helps steer 50 to 70 percent of all cases that go to trial.

Trial preparation may also involve consultation with the other commands and offices within the NYPD. AAPDs must consult with the Pension Department to ascertain the time and leave status of a uniformed officer. An AAPD will also contact the Pension Department to determine if an employee has submitted their retirement papers, because any discipline against a retiring employee must be entered prior to their separation from service.

Similarly, AAPDs may confer with the Medical Department. If either the respondent or a potential witness is on sick leave, the AAPD will attempt to determine if and when they will be able to come to court. Additionally, an AAPD may need to contact the Medical Department in order to determine if the respondent has a disability or is being treated for mental health or drug abuse issues.

AAPDs may also speak with the NYPD Officer of Labor Relations (“NYPD OLR”) and the NYPD Employee Management Division (“EMD”). An AAPD may contact NYPD OLR when a case involves a non-uniformed (*i.e.* civilian) employee, in order to get certain contact or other background information. An AAPD may speak with EMD in order to discuss “early intervention classes for some respondents,” as well as to inform them about the disciplinary status of probationary officers and officers who have recently been promoted. (Tr. 180) As the Department Advocate explained, an officer will not get promoted if serious misconduct charges are pending against him/her.

Finally, if the case is one involving a parallel criminal investigation, AAPDs will consult with attorneys or other personnel in the offices of City and federal prosecutors. AAPDs also speak with Precinct Commanding Officers in order to obtain background reports about their respondents.

Disciplinary trials for uniformed officers are formal proceedings involving both direct- and cross-examination of witnesses. Trials typically last one or two days but can be longer, depending on the number of witnesses and witness availability. A decision on the discipline is issued by the Deputy Commissioner of Trials, and the AAPDs draft a memorandum in response to the Deputy Commissioner's findings. The length and complexity of these memoranda depend on the degree to which the AAPD prevailed at trial. For more complex memoranda, AAPDs may consult with the Executive Staff.

The role for AAPDs is more limited in civilian cases than in uniformed cases. In certain limited circumstances, AAPDs will provide the CAR memorandum to NYPD OLR. AAPDs may also represent the DAO's position in appellate proceedings.

Finally, the Department Advocate emphasized that her staff is heavily involved in disciplinary matters. She explained that “[e]verything that we do, because discipline touches everything, can have an impact on [an] issue that relates to collective bargaining.” (Tr. 37) For example, the DAO has prosecuted employees for timecard irregularities and for failing drug screening tests. Additionally, when asked if “advocates [can] perform their duties effectively and yet be shielded from exposure to labor relations information,” the Department Advocate replied:

No, I mean that's part of what they do. There's so many other issues. There's suspension, there's modifications, there's assignments, there's people we have to decide—they have to make recommendations to my captain on the status of a case, should they be taken off of modified status or should they be taken off of suspended duty status. They have to make recommendations on promotions, is this person eligible for a promotion or not, is this person eligible to be put back to full duty because of the significance of what discipline does. So no, every day they're involved in labor issues.

(Tr. 32) It is undisputed that Agency Attorneys and AAPDs do not participate in collective bargaining or advise negotiators.

POSITIONS OF THE PARTIES

City's Position

The City argues that AAPDs should be afforded confidential status based on Office of Collective Bargaining (“OCB”) and Public Employment Relations Board (“PERB”) precedent. The City also contends that the under Court of Appeals jurisprudence, AAPDs should be excluded from collective bargaining as a matter of public policy due to their role as the Police Commissioner’s agents in exercising his disciplinary authority.

Initially, the City alleges that OCB excludes managerial and confidential employees from bargaining in order to avoid a conflict of interest inimical to the bargaining process. It then argues that AAPDs meet both elements of the OCB’s two-prong test for a confidential designation. It contends that AAPDs assist the Department Advocate, a managerial employee involved in labor relations or personnel administration. The City further argues that AAPDs all report to her through supervisory designees and are privy to confidential information that impacts the outcomes of specific cases and which informs the way in which other managers and officers conduct investigations.

The City also contends that the Union fails to rebut the City’s evidence that AAPDs maintain a confidential relationship, through the chain-of-command, to the Department Advocate and her proxies. Thus, it charges that *DC 37, 78 OCB 7* (BOC 2006), *affd. sub nom. Matter of City of NY v. NYC Bd. of Certification*, No. 404461/06

(Sup. Ct. N.Y. Co. Sept. 19, 2007), is inapposite. The City argues that unlike in that case, where the employees deemed eligible for bargaining reported to superiors in represented titles, all attorneys in the DAO report to the Department Advocate. The City also asserts that *Matter of L. 456, IBT*, 40 PERB ¶ 4012 (ALJ 2007), cited by the Union, is inapplicable to the facts and law at issue in this proceeding.¹⁵ It also contends that no testimony credibly demonstrates that it ever agreed to cease using the AAPD title.

PERB, the City argues, maintains a different standard than OCB for determining confidentiality. It contends that PERB has found employees ineligible for collective bargaining based solely on the fact that the employee is “exposed to information not appropriate for the eyes and ears of unit members or their representatives.” (City Br. at 12) (quoting *Rockland Professional Mgmt*, 28 PERB ¶ 3063 (1995)). The City asserts that the work of AAPDs is inextricable from discipline since they assist the Department Advocate, and since their work is reviewed by her and the Police Commissioner. According to the City, AAPDs report to a managerial employee, review all investigations of misconduct, are aware of discipline before charges are filed, consult with investigators, provide advice to the commands, discuss the strength of the case, and recommend the appropriate level of discipline in collaboration with the Department Advocate and her designees. They draft charges and specifications, settlement documents, and documents requested by OLR, which handles cases appealed under collective bargaining agreements. These duties, the City argues, make AAPDs an integral part of the disciplinary process and warrant a confidential designation under PERB precedent.

¹⁵ In *Matter of L. 456, IBT*, a PERB ALJ concluded that a Communications Services Coordinator was not a confidential employee due to the lack of evidence that the employee maintained a confidential relationship with a managerial employee.

Additionally, the City alleges that AAPDs require a confidentiality designation as a matter of public policy. Relying on the Court of Appeals' decisions in *Police Benevolent Ass'n v. Pub. Employ't Relations Bd.*, 6 N.Y.3d 563 (2006), and *City v. Police Benevolent Ass'n*, 14 N.Y.3d 46 (2009), it argues that employees responsible for the investigation of misconduct and preferring of charges should not serve in represented titles because they are the Police Commissioner's designees in asserting his authority under § 434 of the Charter of the City of New York ("Charter") and § 14-115(b) of the Administrative Code.¹⁶

Further, the City contends that the record supports this argument. It alleges that AAPDs play a role similar to that of prosecutors. For example, AAPDs draft charges and specifications and recommend prosecution, settlement, or the institution of various

¹⁶ Section 434 of the Charter of the City of New York provides:

- a. The commissioner [of the New York City Police Department] shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department.
- b. The commissioner shall be the chief executive officer of the police force. He shall be chargeable with and responsible for the execution of all laws and the rules and regulations of the department.

Section 14-115(b) of the Administrative Code provides:

Members of the force, except as elsewhere provided herein, shall be fined, reprimanded, removed, suspended or dismissed from the force only on written charges made or preferred against them, after such charges have been examined, heard and investigated by the commissioner, or one of his or her deputies upon such reasonable notice to the member or members charged, and in such manner or procedure, practice, examination and investigation as such commissioner may, by the rules and regulations, from time or time prescribe.

penalties. They provide legal analysis and counsel to the Executive Staff of the Department regarding the impact of high profile disciplinary cases on the operation of the agency. AAPDs also represent the DAO's interests before OLR in certain civilian matters. These duties, the City contends, flow directly from the Commissioner's statutory powers.

Finally, the City responds to the Union's argument that the New York State Legislature could have, but declined, to explicitly exclude AAPDs from bargaining, as it did with respect to assistant attorneys general and assistant district attorneys. *See* Civil Service Law § 201.7(b) (deeming assistant attorneys general and assistant district attorneys as managerial as a matter of law). The City asserts that "the Legislature could not foresee all attorney titles which could be similarly situated to assistant attorneys general and assistant district attorneys." (City Br. at 30) It contends further that they may still be similarly situated even if they are not explicitly mentioned in § 201.7(b).

Union's Position

The Union argues that the City has not met its burden of establishing that the AAPD title should be designated confidential. Furthermore, the Union maintains that the title should be accreted to its bargaining unit because AAPDs share a community of interest with Agency Attorneys.

The Union first argues that AAPDs have no involvement in collective bargaining. To be confidential, an employer must establish a conflict of interest in collective bargaining matters, in which the employees have a relationship with a managerial employee that regularly provides access to confidential labor relations information. The Union argues that the Department Advocate's testimony that everything the DAO does

“can” have an “impact” on an issue that “relates to collective bargaining” suggests a standard so lax that it would encompass virtually every City employee. (Pet. Br. at 9) The fact that the DOA has disciplined officers for failing drug tests, as well as for other misconduct such as time and leave abuse, has no bearing on collective bargaining.

The Union contends that other tasks AAPDs perform do not meet the standard of confidentiality under the NYCCBL. The record shows that AAPDs’ involvement in promotions is limited to notifying the command as to the status of charges. They do not comment on whether someone should be promoted. AAPDs gather information from the Pension Department, but do not give the Pension Department legal advice. The Union also asserts that AAPD involvement with the Medical Division is limited to determining whether an officer will be able to attend his or her discipline trial; they do not have access to medical information without the officer’s consent. Further, the Union alleges, AAPDs do not make recommendations regarding investigatory practices to Internal Affairs and do not have knowledge of those recommendations.

The Union additionally alleges that AAPDs’ role in investigating and prosecuting disciplinary cases does not, standing alone, warrant a confidential status. Indeed, it argues, the Board has found Investigator (Employee Discipline) and CCRB Investigators eligible for collective bargaining despite their investigations of disciplinary violations. The Union also asserts that the AAPD title does not have sufficient discretion for a confidential designation. AAPDs make recommendations as to the level of discipline that should be sought, but the ultimate decision is made by a union-represented supervisor, or sometimes the Department Advocate. Accordingly, the Union concludes

that the City's petition for a confidential designation is not supported by either the factual record or legal precedent.

The Union additionally contends that the City has not shown that any conflicts of interest would arise if AAPDs were represented. On the contrary, Agency Attorneys, represented by the Union, have been performing the same role as AAPDs for almost twenty years, and the City did not have any examples of where their eligibility for collective bargaining created a conflict. Moreover, the Union asserts, there is no dispute that the NYPD began to use the AAPD title because the Department Advocate wanted the flexibility to offer higher salaries to attract employees with more trial experience. The Department Advocate testified that the fact that AAPDs are civilians eliminates most potential conflicts. Further, AAPDs report to union-represented uniformed titles and Agency Attorneys.

Finally, the Union notes that the City does not dispute its assertion that AAPDs have a community of interest with other members of its bargaining unit. Additionally, the Union argues that AAPDs have a strong community of interest with Agency Attorneys because their job duties in the DAO are substantially the same, they regularly interact, and both titles require admission to the bar. Accordingly, the Union requests that the Board add the title to the bargaining unit.

DISCUSSION

In this case, we must determine whether AAPDs are excluded from bargaining under the NYCCBL based on their alleged confidential status or, if not, whether public policy nevertheless forecloses AAPDs from representation.

Alleged Confidential Status

It is well-established that public employees are presumed to be eligible for collective bargaining and that the exception based upon managerial or confidential status is to be construed narrowly. *See* NYCCBL § 12-305; *Local 621, SEIU*, 4 OCB2d 57, at 22-23 (BOC 2011) (citing *Lippman v. Pub. Empl. Relations Bd.*, 263 A.D.2d 891, 904 (3d Dept. 1999)); *CWA, L. 1180*, 2 OCB2d 13, at 10-11 (BOC 2009) (same); *see also Town of Dewitt*, 32 PERB ¶ 3001 (1999) (“The Legislature’s policy statement accompanying [Civil Service Law Article 14 (“Taylor Law” or “CSL”) § 200] . . . emphasize[s] that the statutory exclusions, whether managerial or confidential, are to be read narrowly.”); *Lippman*, 263 A.D.2d at 894 (summarizing PERB’s longstanding position that “employees should not be excluded [from collective bargaining] except in very clear instances with all uncertainties resolved in favor of Taylor Law coverage”).

The Board of Certification applies the definition of “confidential” set forth in the Taylor Law. *See* NYCCBL § 12-309(b)(4). Section 201.7(a) of the Taylor Law 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 negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii).

CSL § 201.7(a); *DC 37*, 78 OCB 7, at 39 (BOC 2006), *affd. sub nom. Matter of City of NY v. NYC Bd. of Certification*, Index No. 404461/06 (Sup. Ct. N.Y. Co. Sept. 19, 2007).

The employer has the burden to establish confidentiality. *See* NYCBL § 12-305. To do so, it must meet a two-pronged test, showing that the employee: (1) assists a manager involved in collective negotiations, the administration of collective bargaining agreements, or in personnel administration; and (2) acts in a confidential capacity to that manager. *See OSA*, 3 OCB2d 33, at 38-39 (BOC 2010); *DC 37*, 78 OCB 7, at 43; *Lippman*, 263 A.D.2d at 902. The first part of the test is duty-oriented, while the second is relationship-oriented. *See UFA*, 4 OCB2d 57, at 28 (BCB 2011) (citing *Town of Dewitt*, 32 PERB ¶ 3001, at 3002). As the two parts of the test are distinct, satisfaction of one prong does not satisfy the other. *Id.*

The record does not support exclusion of AAPDs from collective bargaining. Although AAPDs do assist the Department Advocate in personnel administration and therefore satisfy the first prong of the test, the record does not establish that AAPDs act in a confidential capacity to the Department Advocate. Rather, the testimony demonstrates that AAPDs predominantly report to and are supervised by non-managerial bargaining unit members, such as Agency Attorneys, the Commanding Officer, and the Executive Officer.

We turn first to the duty-oriented prong. AAPDs provide legal advice to investigators, review disciplinary charges sought by the NYPD, negotiate settlements, and represent the DAO on disciplinary charges in administrative hearings. Trial work involves preparing witnesses, conducting direct- and cross-examination, and obtaining and utilizing background information about the accused employee in order to persuade the presiding Trial Commissioner that discipline is warranted. This trial work goes beyond the simple reporting of factual information, unlike the role played by

Investigators found eligible in *DC 37, 78 OCB 7*. We therefore find, due to the AAPDs' role as agency advocates in open disciplinary charges, they assist the Department Advocate, a managerial employee, in personnel administration, satisfying the first part of the confidentiality test.¹⁷

The employees do not meet the relationship-oriented prong. Our case law instructs that in the absence of a confidential relationship with a managerial employee with significant involvement in labor relations or personnel administration, the title at issue may not be excluded from collective bargaining. *DC 37, 78 OCB 7*, is illustrative. In that case, our conclusion that Investigators (Employee Discipline) were not confidential relied partly upon a finding that many of the Investigators reported to superiors who were eligible for collective bargaining. *See id.* at 43-44 (explaining 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"). Similarly, in *Local 621, SEIU, 4 OCB2d 57* (BOC 2011), we found that the Director of Motor Transport (Police Department) did not satisfy the second prong of our confidentiality test because he reported to a represented employee. *Id.* at 29 n.19. *See also OSA, 3 OCB2d 33*, at 152 (finding that employees were eligible for collective bargaining because "[w]hile some of these employees have knowledge of sensitive information . . . the record does not establish that they have a confidential relationship with a manager who has significant involvement in labor relations/personnel administration"). The record shows that AAPDs report to and are supervised by eligible employees. We therefore are unable to exclude them from collective bargaining based on a confidential status.

¹⁷ The parties do not dispute the Department Advocate's managerial status.

We are not able to conclude that the Department Advocate maintains a confidential relationship with the AAPDs because although she may meet with AAPDs in order to steer formal disciplinary cases, discuss trial strategy, or review the *Fogel* memoranda, there is no evidence that AAPDs keep the substance of these meetings confidential from their represented supervisors. To the contrary, the chain of command between AAPDs and the Department Advocate includes the Commanding Officer, the Executive Officer, a Team Leader, and a supervisor.¹⁸ Employees in these positions are represented and, importantly, regularly review the work of AAPDs.¹⁹ For example, the Commanding and Executive Officers both participate in the steering process and may themselves steer cases. Additionally, AAPDs may discuss trial strategy and their *Fogel* memoranda not only with the Department Advocate, but also with their immediate supervisors. Thus, the record does not show that interactions between AAPDs and the Department Advocate establish a confidential relationship. We therefore conclude that this relationship does not satisfy the second prong of our test.

The cases cited by the City do not alter this analysis. The employees deemed confidential in *CWA, L. 1180*, 2 OCB2d 13 (BOC 2009), reported *directly* to managerial employees. *See id.* at 101-106, 111-113. Similarly, we determined that an Equal Employment Opportunity (“EEO”) Officer position was confidential, in part, because the Commissioner of the Department of Citywide Administrative Services (“DCAS”) was the

¹⁸ AAPDs also may report to the Managing Attorney and the Special Counsel, neither of whom are in a union. The record does not establish that the Managing Attorney and the Special Counsel are managerial.

¹⁹ The Team Leader and supervisor positions may be filled either by represented Agency Attorneys or by the AAPD title.

employee's immediate supervisor. *Id.* at 101-102. The PERB cases cited by the City are similarly distinguishable.²⁰

The City's Public Policy Claim

In the alternative, the City contends that, even if we find that AAPDs are not confidential, we should nevertheless exclude them from bargaining because their title is an integral part of the prosecutorial arm of the Police Commissioner's disciplinary authority. We decline.

We are empowered to exclude public employees from collective bargaining only to the extent permitted by statute. Indeed, as the Court of Appeals has repeatedly affirmed, "agencies are possessed of only those powers expressly delegated by the Legislature, together with those powers required by necessary implication." *Matter of Beer Garden, Inc. v. NYS Liquor Auth.*, 79 N.Y.2d 266, 276 (1992); *Matter of Allstate Ins. Co. v. Rivera*, 12 N.Y.3d 602, 608 (2009). Accordingly, the Police Commissioner's authority, standing alone, does not permit us to foreclose AAPDs from collective bargaining as any such exclusion must be explicitly authorized by plain statutory text.

The NYCCBL, which governs labor relations in the City, provides that it is "the policy of the city to favor and encourage the right of municipal employees to organize and be represented . . ." NYCCBL § 12-302. With respect to eligibility for bargaining, the statute explicitly sets forth 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 and confidential status has been rendered by the board of certification." NYCCBL § 12-305 (emphasis added). Thus,

²⁰ Those cases concerned employees who maintained a confidential relationship with managerial personnel, which is not the case here.

public employees are presumed eligible for bargaining unless we find them to be “managerial” or “confidential,” as those terms are defined by the Taylor Law. *See* NYCCBL § 309(b)(4) (providing that the Board shall have the power “to determine whether specified public employees are managerial or confidential within the meaning of [CSL § 201(7)] and thus are excluded from collective bargaining”).

The Taylor Law and NYCCBL do not provide for any exclusions on the grounds of “public policy.” The Taylor Law allows a confidential designation only to those employees “who assist and act in a confidential capacity to managerial employees as described in clause (ii).” CSL § 201(7)(a). Although it does identify several positions that are managerial and/or confidential as a matter of law, none of these exclusions are applicable here. *See* CSL § 201(7)(b)-(g) (excluding from representation, *inter alia*, assistant attorneys general, assistant district attorneys, certain substitute teachers, certain police officers ranking captain or higher, certain seasonal teachers, and school plant managers). Moreover, we construe these exclusions narrowly and do not find AAPDs excluded from bargaining on the basis that they are similarly situated to any positions explicitly identified in the Taylor Law. *See Lippman*, 263 A.D.2d at 896.

Further, no legal principle warrants disruption of the above statutory framework, including the City’s purported public policy argument. It has long been settled that the definition of public policy is “the law of the State, whether found in the Constitution, statutes or decisions of the courts.” *Kraut v. Morgan & Bro. Manhattan Storage Co.*, 38 N.Y.2d 445, 452 (1976); *see also Mertz v. Mertz*, 271 N.Y. 466, 475 (1936) (“The public policy concept is a vague and variable phenomenon [W]hen we use the term we mean the law of the state, whether found in the Constitution, the statutes or judicial

records.”) (internal citations omitted). Accordingly, the City must reference a specific statute or judicial pronouncement.

Here, the City argues that the law that gives rise to its public policy argument is set forth in § 434 of the Charter of the City of New York (“Charter”) and § 14-115 of the Administrative Code. (City Br. at 14-15). Section 434 of the Charter provides:

- a. The [police] commissioner shall have cognizance and control of the government, administration, disposition, and discipline of the department, and of the police force of the department.
- b. The [police] commissioner shall be the chief executive officer of the police force. He shall be chargeable with and responsible for the execution of all laws and the rules and regulations of the department.

Section 14-115(a) of the Administrative Code provides that, in the case of police misconduct:

Members of the force . . . shall be fined, reprimanded, removed, suspended or dismissed from the force only on written charges made or preferred against them, after such charges have been examined, heard and investigated by the commissioner, or one of his or her deputies upon such reasonable notice to the member or members charged, and in such manner or procedure, practice, examination and investigation as such commissioner may, by the rules and regulations, from time to time prescribe.

Citing *Police Benevolent Ass’n v. Pub. Employ’t Relations Bd.* [*PBA v. PERB*], 6 N.Y.3d 563 (2006), and *City v. Police Benevolent Ass’n* [*City v. PBA*], 14 N.Y.3d 46 (2009), the City contends that union representation of AAPDs impedes the Police Commissioner’s sole authority over discipline. We do not find legal support for these arguments.

In *PBA v. PERB*, the Court of Appeals considered whether a bargaining agreement could include provisions addressing police discipline, where prior legislation provided that disciplinary authority over the police is committed to local officials.²¹ At issue was not the eligibility of police officers for collective bargaining but rather, presuming their eligibility, whether or not such officers could negotiate over discipline. *Id.* at 573. The Court found that the Charter and Administrative Code, having vested disciplinary authority with the Police Commissioner, removed discipline from scope of permissible negotiations.²² It did not find that the provisions rendered police officers ineligible for collective bargaining.

City v. PBA, 14 N.Y.3d 46, does not expand *PBA v. PERB* to encompass managerial and confidential determinations. There, the Court of Appeals refused to find that the NYPD had committed an improper practice by promulgating drug testing procedures without bargaining with the Union. Nevertheless, the Court's holding remained narrow. It emphasized:

²¹ The Court considered two consolidated cases. In one case, the Police Benevolent Association ("PBA") challenged PERB's determination that the City had no obligation to bargain over five contract proposals concerning police discipline. In the other, the Town of Orangetown sought to nullify a provision of its collective bargaining agreement providing for arbitration of police discipline. *PBA v. PERB*, 6 N.Y.3d at 571.

²² The analysis in *PBA v. PERB* does not allow us to exclude AAPDs on the basis of public policy. The Court found that the policy favoring collective bargaining should prevail only where a pre-Taylor Law provision of the Civil Service Law, setting out procedures for police discipline, was otherwise applicable. 6 N.Y. at 573. The Court then determined that the Charter and Administrative Code, due to a grandfather clause, superseded the operation of the relevant Civil Service Law provision and therefore absolved the NYPD of its obligation to bargain over police discipline. *Id.* at 573-75. Here, however, the City cites to no provision that allows the Charter and Administrative Code to supersede the statutory framework governing managerial and confidential employees.

[W]e are answering only the discrete question posed in this case: whether drug testing methodology and testing triggers are encompassed within the Police Commissioner's disciplinary authority and therefore are excluded from collective bargaining as a matter of policy. We are not saying that every step that the Commissioner takes or every decision that he makes to implement drug testing is excluded from bargaining. The full extent or limits of his unilateral disciplinary authority in the context of drug testing are simply not presented on this record.

Id. at 59-60. Thus, the very text of *City v. PBA* confirms that it is limited to the bargainability of drug testing methodology and testing triggers. It does not address the negotiability of other aspects of drug testing and is inapplicable to our analysis of whether public employees are eligible for collective bargaining rights.

Without the support of either statutory text or case law, we find no countervailing public policy to the NYCCBL's presumption of eligibility for collective bargaining. Membership in a union is inadequate to present a conflict of loyalties. *See DC 37, 78 OCB 7*, at 44. Nor does anything in the record suggest that the representation of AAPDs would interfere with the Police Commissioner's authority over the disciplinary process. Additionally, Agency Attorneys have been represented by the CSBA for over a decade, and nothing in the record establishes that their represented status has prevented the Police Commissioner from exercising his disciplinary authority over the NYPD.²³ At the same time, up until the hearing, two of the Department Advocate's immediate subordinates

²³ To the contrary, the record indicates that the NYPD began utilizing the AAPD title due to the difficulty in attracting more experienced litigators at the pay scale available to Agency Attorneys, and not because of any conflict of interest. Indeed, as the Department Advocate testified, "I don't believe it's their union. I believe it's that the limits of the title that the agency attorneys provided limited [the Commissioner] from creating a professional department advocate's office." (Tr. 57)

who supervised the attorneys in every aspect of their work were themselves represented by uniformed bargaining units.

Upon the full record, we cannot conclude that public policy requires us to exclude AAPDs from collective bargaining. Therefore, we find the AAPD title to be eligible for inclusion in the Attorneys bargaining unit.

ORDER

NOW, THEREFORE, pursuant to the powers vested in the Board of Certification by the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3), it is hereby:

ORDERED that employees in the title Assistant Advocate-PD (Title Code No. 30083) are eligible for collective bargaining; and it is further,

ORDERED that Certification No. CWR-44/67 (as previously amended) be, and the same hereby is, further amended to add the title Assistant Advocate-PD (Title Code No. 30083), subject to existing contracts, if any.

Dated: September 9, 2015
New York, New York

SUSAN J. PANEPENTO
CHAIR

CAROL A. WITTENBERG
MEMBER

ALAN R. VIANI
MEMBER



The Office of Collective Bargaining

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M. DAVID ZURNDORFER
PAMELA S. SILVERBLATT

DEPUTY CHAIRS

MONU SINGH
STEVEN E. STAR

LABOR MEMBERS

CHARLES G. MOERDLER

NOTICE OF AMENDED CERTIFICATION

This notice acknowledges that the Board of Certification has issued an Order Amending Certification as follows:

DATE: September 9, 2015 **DOCKET #:** AC-72-13 & RE 181-13

DECISION: **8 OCB2d 26 (BOC 2015)**

EMPLOYER: New York City Police Department
1 Police Plaza
New York, NY 10038

CERTIFIED/RECOGNIZED BARGAINING REPRESENTATIVE:

Civil Service Bar Association
225 Broadway, 43rd Floor
New York, NY 10007

AMENDMENT: Certification No. CWR-44/67 has been amended to add the following title/code:

Added: **Assistant Advocate-PD (Title Code No. 30083)**