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In the Matter of :
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DISTRICT COUNCIL 37, AFSCME, AFL-CIO, :
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 :
Petitioner, :
 :
-and- : Decision No. 4-98
 :
 : Docket No. RU-1040-89
THE CITY OF NEW YORK, :
CIVILIAN COMPLAINT REVIEW BOARD :
 :
 :
Respondent. :
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DECISION and ORDER

On June 30, 1989, District Council 37, AFSCME, AFL-CIO ("DC 37" or "the Union") filed a petition docketed as RU-1 040-89. By this petition, DC 37 sought to accrete the title of "Investigator (CCRB Police Department),"¹ in the Civilian Complaint Review Board ("CCRB") of the New York Police Department ("Department," "NYPD," or "City"), to Certification No.37-78, as amended, covering social service and related titles. This petition was consolidated for hearing with the petition docketed as RU-1006-88, by which DC 37 sought to accrete the title of Investigator (Discipline) in other City agencies.

In October, 1989, the Office of Municipal Labor Relations ("OMLR" or "City") filed a letter, opposing the application on the grounds that the Investigators at issue were managerial or confidential employees and, therefore, excluded from collective bargaining under Section 12-305 of the New York City Collective Bargaining Law ("NYCCBL").²Numerous adjournments of

1 Title Code 06157.

2 Sec. 12-305 provides, "Neither managerial nor confidential employees shall constitute or be included in any bargaining unit, nor shall they have the right to bargain

scheduled days of hearing were requested and permitted in order to allow the parties to engage in settlement discussions. On June 16, 1993, the Trial Examiner conditionally granted the City's request to sever the two proceedings, holding in abeyance the bargaining status of the CCRB Investigators until, *inter alia*, the representation status of the Investigators in other agencies was determined.³

In July, 1993, the New York City Council passed and the Mayor signed legislation amending Chapter 18-A of the City Charter and reconstituting the Civilian Complaint Review Board as an entity outside the jurisdiction of the Police Department. The staff of the CCRB as it was previously constituted was transferred to and became employees of the newly constituted CCRB. This included employees in the title of Inspector. The Department of Personnel designation for the title was amended to read "Investigator (CCRB)," omitting any reference to the Police Department.

collectively. "

3 On April 14, 1995, the parties filed a Stipulation of Settlement concerning the bargaining status of the petition docketed as RU-1 006-88, concerning employees in the title of Investigator (Discipline). The terms of the stipulation were adopted by the Board of Certification in Decision No. 8-95. The stipulation states, in relevant part:

SEVENTH: The entering into of this Stipulation of Settlement shall not be deemed to constitute a precedent for the determination of any other dispute between the City of New York and the Union. In this regard, it is expressly understood that the arrangement herein is predicated exclusively upon the special circumstances of this matter and shall not be construed to represent any policy or procedure of the City of New York.
EIGHTH: *This Stipulation shall not be offered as evidence, nor introduced for any other purpose, in any other forum, including but not limited to, judicial, administrative, and/or any other proceeding except for the purpose of enforcing the obligations and . restrictions, as contained herein, which pertain to the parties to this Stipulation of Settlement. (Emphasis supplied.)*

By letter dated May 2, 1996, DC 37 renewed the request in petition RU-1 040-89 for accretion of the CCRB Investigator title to Certification No. 37-78, as amended. By letter dated June 6, 1996, the City renewed its opposition.

A hearing was commenced on September 12, 1996, and continued on September 19 and 26, and October 9. It addressed the preliminary matter of eligibility for bargaining. Post-hearing briefs were filed by the City and DC 37 on December 6, 1996. The record then was closed.⁴

BACKGROUND AND FINDINGS OF FACT

There is no dispute that the Civilian Complaint Review Board was reconstituted in July, 1993, to investigate and recommend action on complaints by members of the public against members of the Police Department that allege misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language.⁵ The CCRB is composed of 13 members, including five mayoral designates, five City Council designates, and three designated by the Police Commissioner. At the time of the hearing, the CCRB employed 103 individuals with a budget for 128. Of these 103, sixty-seven were Investigators assigned to three levels. The duties of employees in all three levels of the Investigator title are similar, with only the degree of complexity of assignments differentiating among them. The job description for the title states, in relevant part:

4 The City reserved the right to renew its request to pursue a line of inquiry regarding unit determination if the Board of Certification found the employees at issue eligible for bargaining.

5 Ch. 18-A, Sec. 440, City Charter; Local Law 1, 1993, *eff* July 4, 1993

This class of positions performs investigations of a highly confidential and sensitive nature with regard to alleged misconduct of New York City Police Department personnel. The position will compile information, prepare reports and make recommendations of disposition on alleged charges of Police Department personnel misconduct in the areas of use of excessive force, abuse of authority, discourtesy, use of ethnic slurs. The position will have three assignments levels based upon the complexity and responsibilities of the tasks performed. All personnel perform related activities.

Assignment Level I - Under supervision, with latitude for independent action and decision, performs some or all of the following tasks ... :interviews complainants and witnesses to take statement and determine the nature of alleged misconduct; researches, acquires and reviews evidence not available in Department records; interrogates subject personnel; prepares detailed reports and makes recommendations as to appropriate action to be taken following investigation; compiles statistical data related to case.⁶

The duties vary from one level to another in terms of degree of supervision required and of latitude for taking action and making decisions. In addition, Investigators at Level II handle more complex cases than those at Level I, but the degree of oversight and control is similar to Level I. Investigators at Level III act as supervisors of Level I and II Investigators. They also assist in actions relating to managerial requests for surveys and in-depth reports on investigative staffing, effectiveness and responsiveness to the public. Investigators comprise the majority of employees at the CCRB. The remainder of the staff is clerical and is represented by DC 37,

6 The language describing Level II and III investigators is similar except that Level II investigators act "under general supervision, with considerable latitude" while Level III investigators act "under direction, with wide latitude for independent action and decision."

We have long held that, while position descriptions are of some value in making a determination as to the nature of the duties and responsibilities of a title, they are not and should not be relied upon as controlling proof as to what duties an individual actually performs. See Decision Nos. 11-95,45-78 and 43-69. Testimony was presented herein indicating that the nature of the work actually performed by CCRB Investigators corresponds with the position description. See text surrounding Notes 11 through 19, *infra*.

assigned to the jurisdiction of Local 1549.⁷

Executive Director Eugene Lopez supervises day-to-day management of the CCRB staff. Deputy Director Florence Finkel directly oversees the work of the Investigators at issue in this proceeding. The position of Assistant Deputy Director was vacant at the time of hearing. Two Assistant Chief investigators, who hold the title of investigator, Level III, supervise four squads each. The squads consist of a supervisor with roughly ten Investigators in all three levels, depending upon staffing at the time.⁸

Director Lopez testified that an investigation begins when a member of the clerical staff in the Complaint Response Unit ("CRU") is contacted by phone or in person by a complainant.⁹ The clerical staff member completes a form using information reported by the complainant concerning, *inter alia*, the complainant's identity as well as that of the Police Officer against whom the allegation is made, and the nature of the allegation. Investigator Pat Patterson supervises the CRU.¹⁰ Director Lopez testified that, after a complaint is made, Patterson decides whether it is within the jurisdiction of the CCRB. If it is, Lopez assigns it to an Investigator, who is charged, under the position description and the City Charter, with determining whether an allegation

7 Vol. I, p.180:11-13.

8 Vol. I, p.207:23 - p.208:3.

9 The CCRB does not seek out complainants.

10 It is unclear whether Deputy Director Finkel directly supervises Patterson. No testimony was offered as to any duties in personnel administration or other relevant criteria for managerial classification with which Patterson may be involved.

against a police officer is substantiated, unsubstantiated, unfounded or exonerated.¹¹ Each investigator is granted a wide degree of latitude in deciding how to progress with the investigation, e.g., which witnesses to interview and which documents to subpoena in order to develop the factual record.¹² A supervisor examines a given Investigator's work once every couple of months to insure that progress is being made; however, the parameters of the investigative process are set by the CCRB, not by the Investigator.¹³

At the outset, an Investigator tells a complainant that the information given will be kept confidential to the extent allowed by law. Exceptions provide for information to be forwarded to the Police Commissioner for potential disciplinary action and to the District Attorney's office for potential criminal prosecution, if required under the particular circumstances of the case.¹⁴ Investigators are authorized to gain access to confidential files, including private medical records,¹⁵ files from the Internal Affairs Bureau at the Department,¹⁶ and 911 records.¹⁷ The issuance of subpoenas is entirely within the discretion of the Investigator, but s/he may may not

II Vol. I, p.138:22-24.

12 Vol. I, p.76:10-20.

13 Vol. I, p.100: 5-13.

14 Vol. I, p.67: 7-22.

IS Vol. I, p.73: 15-22.

16 Vol. I, p.89: 17-23.

17 Vol. I, p.91: 10-13.

issue subpoenas under his/her own signature; subpoenas are issued in Director Lopez' name.¹⁸ In addition to reviewing the documents above that are not available under the Freedom of information Act, the Investigator interviews witnesses to ascertain the validity of the complaint.

Upon concluding the investigation, an Investigator writes a recommendation to the CCRB: substantiated, unsubstantiated, unfounded or exonerated. The recommendation is based on an analysis of the facts, incorporating information s/he deemed relevant to the investigation. The CCRB accepts or rejects the Investigator's findings of fact, voting whether to accept the Investigator's recommendation or to dismiss the complaint. Only the CCRB itself may forward a substantiated complaint and make a recommendation to the Police Commissioner with respect to the imposition of discipline.¹⁹

Deputy Chief John Bieme, Commanding Officer of the Office of Labor Relations within the Police Department, testified that once an allegation reaches the Police Commissioner, the Department Advocate reviews the matter and then determines if there is sufficient evidence to prosecute the Police Officer through the internal disciplinary process.²⁰ If there is sufficient evidence or further evidence is necessary, the Department Advocate assigns a departmental prosecutor, who investigates the case. If the prosecutor finds sufficient evidence to warrant a trial, a proceeding is held before the Trial Commissioner.²¹ The Trial Commissioner then makes

18 Vol. I, p.81: 10-12.

19 Vol. I, p.131:23 - p.132:4.

20 Vol. III, p.4: 20-25.

21 Police discipline, including appearance before the Department's Trial Commissioner, is within the purview of the Department, not of OATH. Vol. III, p.5: 7-18.

a recommendation to the Police Commissioner.²² The Police Commissioner is under no duty to act upon the recommendations of the CCRB or the Trial Commissioner.²³

POSITIONS OF THE PARTIES

The City's Position

The City advances alternative arguments: (i) that the CCRB Investigators are managerial employees, or (ii) that they are confidential employees within the meaning of Section 12-305 of the NYCCBL.

To support its argument that Investigators are managerial employees, the City points to several factors. It asserts that the CCRB as an institution has unusually broad investigative powers exercised through the discretion of the Investigators under Director Lopez. It points to the testimony of Lopez to the effect that Investigators have a great deal of discretionary authority, decision-making power, and day-to-day responsibility for the conduct of any given investigation. The City bolsters this argument by pointing to the unusual subpoena power the Investigators can exercise with only *pro forma* review by the Director, and their near-absolute discretion in deciding the direction of the investigation, with only a few limiting parameters established by the CCRB for all Investigators.

In the alternative, the City argues that Investigators are confidential employees and

22 During a six-month period in 1995 in which a statistical estimate of typical operations was extrapolated, the CCRB determined that approximately 18 percent of 3,897 complaints were "substantiated," meaning that one or more of the allegations within a complaint were valid. Of the substantiated complaints, fewer than twenty percent resulted in the filing of charges.

23 Vol. III, p.5: 19-23.

should be excluded from collective bargaining. It asserts that the members of the CCRB are formulators and implementors of policy and that the Investigators act in a confidential capacity to the CCRB members with access by Investigators to documents classified as confidential by Section 50-a of the New York Civil Rights Law. It points to the CCRB's power under the New York City Charter to implement its own policy decisions.

The City draws an analogy between CCRB Investigators and Department of investigation("D01") Investigators. The latter are classified as confidential employees, ineligible for collective bargaining.²⁴ It supports this analogy with testimony by Jeffrey A. Hoerter, Esq., of the Office of the Chief of the Department. Lieutenant Hoerter testified that he serves in an advisory, research and analysis capacity. The City notes that D01 is the only other agency in the City which investigates employees of other departments. It points out that several employees of D01 serve in the title of "Confidential Investigator" and have access to a variety of records, files and materials on municipal employees. The City argues that this is comparable to the access to information which CCRB Investigators possess.

The Union's Position

The Union asserts that the City has failed to meet its burden of proof in overcoming the presumption that the employees at issue are eligible for collective bargaining under the NYCCBL. The Union points to the nature of the duties performed by employees serving in the title at issue.

24 See note 3, *supra*.

Specifically, the Union asserts that the CCRB and its Investigators are independent from the Police Department. It notes that an Investigator's recommendation is not dispositive of the CCRB's final determination that the CCRB recommendation, in turn, is not determinative of the Police Department finding, and that the recommendation of the Department's own Trial Commissioner is not controlling with respect to action taken by the Police Commissioner. The Union argues that the intervening steps between the recommendations of CCRB Investigators and the potential disciplinary personnel action by the Police Department are so numerous that no managerial or managerial-confidential relationship is created. Refuting the argument that the Investigators are managerial, the Union asserts that there is no significant or direct link between the recommendations of the Investigators and action taken by the Department, and, therefore, that Investigators cannot be considered to "play a major role in personnel administration."

The Union also argues that CCRB Investigators do not exercise independent judgment over personnel matters since their recommendation is not necessarily followed by either the CCRB or the Police Commissioner, despite the City's assertion that Investigators do act independently in completing their inquiries. The Union argues that it is independent judgment exercised in relation to a managerial task which qualifies an employee for the managerial exemption from collective bargaining, not merely some degree of independence of action. It argues that the City has not presented any evidence that the Investigators formulate policy.

Moreover, it argues that the "mission" of the CCRB is clearly defined in the New York City Charter. The Union asserts that the Civilian Complaint Review Board itself sets its own policies and procedures by authority of the City's Administrative Procedure Act, with no

involvement by the Investigators.

Finally, the Union asserts that the City has not provided any evidence that the Investigators meet any other, relevant criteria for being considered managerial employees.²⁵ For example, the Union maintains, they are not members of the Managerial Pay Plan. The Union contends that since the Board of Certification has considered the totality of the job performed when considering a question as to managerial status, a finding that the CCRB Investigators be managerial employees would be legally insupportable, it argues, since evidence was presented by the City only on two of the thirteen factors which the Board of Certification traditionally has considered in determining managerial status.

As to the City's argument that the Investigators are confidential employees, the Union argues that the City failed to demonstrate that Investigators act as confidential employees to managerial employees who deal with labor relations or personnel administration. The Union asserts that any relationship between managerial employees of the CCRB and the Investigators does not involve labor relations or personnel matters, since the Police Commissioner and not the CCRB implements discipline of Police Officers. As to the City's argument that, because the CCRB Investigators have access to documents that would be deemed confidential under Section 50-a of the New York Civil Rights Law, these employees should be deemed confidential under the NYCCBL, the Union asserts that the Board of Certification has required a relationship with a managerial employee dealing with subject of labor relations or personnel administration, which,

²⁵ The Union references the Board of Certification's articulated factors examined in determining manageriality of a title; see p.12--13, *infra*.

the Union argues, the City has failed substantiate with evidence in this case.

DISCUSSION

Section 12-305 of the NYCCBL grants public employees the right, *inter alia*, to bargain collectively through certified employee organizations of their own choosing. Under Article 14 (Public Employees Fair Employment Act) of the Civil Service Law ("Taylor Law"),²⁶ employees are presumed to be eligible for collective bargaining. When an objection to the bargaining status of a title is made, the City has the burden of going forward to demonstrate that a title is ineligible for bargaining because it is managerial and/or confidential within the meaning of Section 201.7 of the Taylor Law.²⁷

Implementing this section of the Taylor Law, we have considered, as reliable *indicia* of managerial status, factors including, *inter alia*, position in the table of organization,²⁸ number of

26 Chapter 392 of the Laws of 1967, eFF. September 1, 1967, as amended.

27 Section 201.7(a) of the Taylor Law provides, in pertinent part, as follows:

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 bargaining or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as *confidential* only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii). [Emphasis added.]

28 Decision Nos. 11-95, 22-75, 63-74, 76-72.

subordinate employees,²⁹ area of authority,³⁰ involvement with labor relations,³¹ preparation of budget and allocation of funds,³² involvement in personnel administration,³³ job specifications,³⁴ and the formulation, determination and effectuation of an employer's policies.³⁵ (Not all of these factors need be relevant or applicable in any given case.³⁶)

Formulating policy means developing the specific objectives of a governmental agency to fulfill its mission as well as the methods, means and extent of achieving such objectives.³⁷ Employees who formulate policy include, not only those with the authority or responsibility to select among options and to put a proposed policy into effect, but also persons who regularly participate in the "essential process" which results in a policy proposal and the decision to put such proposal into effect.³⁸

With respect to confidential status, we have relied upon the employee's relationship with managerial employees and whether that relationship regularly provides access to confidential

29 Id; see, also, Decision Nos. 76-72, 46-72, 41-72, 65-70, 43-69.

30 Id; see, also, Decision Nos. 6-84, 63-74, 19-71, 43-69.

31 Id; see, also, Decision Nos. 5-85, 19A-70, 43-69.

32 Id.; see, also, Decision Nos. 5-85, 8-72, 73-71.

33 Id; see, also, Decision Nos. 13-86, 5-85, 45-78, 63-72, 73-71.

34 Id; see, also, Decision Nos. 5-85, 63-72, 73-71.

35 Id.; see, also, Decision Nos. 15-92, 7-92, 34-81, 73-68.

36 Id.; see, also, Decision No. 36-82.

37 Id.; see, also, Decision Nos. 15-92, 7-92, 36-82.

38 Id; see, also, Decision Nos. 15-92, 7-92, 36-82.

information concerning labor relations and/or personnel matters to such an extent that 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.³⁹ However, employees may not be classified as confidential merely on the ground that their work is of a secret or confidential nature.⁴⁰ The confidentiality must relate directly to the employee's involvement on behalf of the employer in collective bargaining, the administration of collective bargaining agreements or the conduct of personnel relations in such a manner that inclusion of such employees in collective bargaining would give rise to conflicts of interest inimical to the bargaining process and the full and fair representation of the employer's interests.⁴¹

Turning to the facts of the present case, we consider first whether the CCRB Investigators are managerial employees. The City's witnesses testified that some Level III Investigators do have substantial numbers of other Investigators under their supervision and that Investigators in general have a great deal of discretion in pursuing their investigations. However, the Investigators' lack of control over the disposition of their recommendations indicates that they do not formulate or implement CCRB policy and that their discretion, while considerable in determining the manner of an investigation, is lacking in the context of labor relations within their own agency. In addition, the Investigators do not have the power to transfer CCRB

39 *Id*; see, also, Decision Nos. 13-86, 5-85, 32-82, 11-76, 13-74, 70-68.

40 See Decision No. 13-74 (assistant district attorneys, *not* ineligible for bargaining simply because, *inter alia*, they [i] perform same work as assistant attorneys general who are ineligible, or [ii] perform a "unique function" in a "special environment").

41 Decision No. 11-95, 48-82, 13-74.

personnel, do not prepare the CCRB's budget, and are not included in the Managerial Pay Plan. Moreover, the City has failed to present evidence on any of the other relevant criteria which we have articulated for determining managerial status. In short, the City's conclusion -- that the CCRB Investigators are managerial employees -- is simply not supported by the evidence.

With respect to the City's contention that the Investigators are confidential employees, the key factor which we consider here is whether they act in a confidential manner towards managerial employees with regard to personnel administration or collective bargaining. The evidence adduced at hearing does not indicate that the Investigators act in this fashion. The personnel management of the CCRB is handled by Director Lopez and Deputy Director Finkel, and possibly Ms. Patterson, although the City produced no evidence that Ms. Patterson has any control over the personnel decisions of the CRU.⁴² Investigators do not have access to the files of the personnel of the CCRB, only of the Police Department. The Department does not accept their recommendations automatically but instead conducts its own internal investigation to determine if it should act upon the complaint forwarded from the CCRB.

The mere fact that Investigators have access to "confidential" information within the meaning of the Civil Rights Law is not determinative of confidential status under the NYCCBL. As we have frequently stated, it must be demonstrated that this information is being utilized by the confidential employee's manager in matters dealing with labor relations or personnel.⁴³

42 Director Lopez testified that Investigator (Level III) Pat Patterson supervises the CRU, but the record is devoid of testimony addressing her role in personnel administration, if any.

43 See n. 39, *supra*.

While we find that CCRB Investigators act with broad individual discretion, it is the "condition under which the discretion may be exercised," not the exercise of discretion itself, which we find relevant to a determination of confidentiality.⁴⁴ In this case, an Investigator's discretion is bounded by policy directives set by CCRB members, as well as by the position description. The City has failed to present evidence to sustain its burden of proof on this point.

Finally, the City relies on a comparison to the DOL Investigators to support its contention that the CCRB Investigators are confidential employees. However, the final determination of the Board of Certification by which the DOL Investigators were held not to be eligible for collective bargaining was based on the terms of the stipulation of settlement which specifically bar consideration of that document as evidence in any proceeding other than to enforce the terms of the agreement. The instant matter is not such a proceeding. Further, there is no dispute here about the terms of that stipulation. The City's reliance on it and on the determination by the Board of Certification which merely adopted its terms with respect to employees serving in other positions is unavailing here. We find, therefore, that the CCRB Investigators do not work with personnel or labor relations information relevant to the managerial employees to whom they might be considered confidential.

Since this is so, based on the longstanding criteria which we have employed in such representation questions, we hold, therefore, that the employees in the title "Investigator, (CCRB)" are neither managerial nor confidential within the meaning of the NYCCBL but are, in fact, eligible for collective bargaining.

44 Decision Nos. 11-95; 15-92; 24-81; 73-68.

Beyond the managerial/confidential question, the Board of Certification also has the power and duty to make final determinations as to unit placement, pursuant to Section 12-309(b) of the NYCCBL. Unit determination is the sole, remaining issue here. Inasmuch as the City reserved the right to elicit testimony in hearing with respect to appropriate unit placement in the event the Board of Certification found the employees at issue to be eligible for bargaining, we shall permit the City to file an objection, within ten (10) days within receipt of this Decision, to the Union's request that the employees found eligible herein be added to the unit specified in the Union's petition. In the event that the City does file an objection, we shall order that a further hearing be held; otherwise, the title, Investigator (CCRB), shall be added, by accretion, to Certification No. 37-78, as amended.

ORDER

Pursuant to the powers vested in the Board of Certification in Section 12-305 of the New York City Collective Bargaining Law, it is hereby

DETERMINED, that all of the employees currently serving in the title of Investigator (CCRB), in Title Code 06157, be, and the same hereby are, designated eligible for collective bargaining, and, further, it is hereby

DETERMINED, that, if the City files an objection, within ten (10) days of receipt of this Decision, to the placement of the title Investigator (CCRB) in the unit specified in the Union's petition, we shall order that a further hearing be held; otherwise, the title, Investigator (CCRB), shall be added, by accretion, to Certification No. 37-78, as amended.

DATED: New York, New York
April 9, 1998
(Reissued May 1, 1998)

STEVEN C. DeCOSTA
Chairman

DANIEL G. COLLINS
Member

GEORGE NICOLAU
Member

The title and title code number of the employees affected by this decision are as follows:

TITLE TO BE ADDED

Investigator (CCRB)

[06157]