

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL**

Water Pipe Extension, Bureau of,)	
Engineering, Local 1092,)	
)	
Petitioner,)	
)	
and)	Case No. L-RC-15-009
)	
City of Chicago,)	
Department of Water Management,)	
)	
Employer,)	

**DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL**

On February 4, 2016, Administrative Law Judge Kelly Coyle (ALJ) issued a Recommended Decision and Order in the above-captioned case finding that the Chief Dispatcher employed by the City of Chicago, Department of Water Management is not a supervisor within the meaning of Section 3(r) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2014), *as amended*, and recommending that the Chief Dispatcher be included in the petitioned-for bargaining unit. Thereafter, in accordance with Section 1200.135 of the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code, Parts 1200 through 1240, the Employer filed timely exceptions to the Recommended Decision and Order, followed by Petitioner's timely responses. After reviewing the record, exceptions and responses, we hereby affirm the Recommended Decision and Order for the reasons set forth by the Administrative Law Judge.

BY THE LOCAL PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

/s/ Robert Gierut
Robert M. Gierut, Chairman

/s/ Richard Lewis
Richard Lewis, Member

Board Member Anderson, dissenting:

I respectfully dissent and would reverse the Administrative Law Judge's finding that the Chief Dispatcher position is not excluded under Section 3(r) of the Act. The ALJ expressly found that when the Chief Dispatcher encounters poor performance, a violation of a work rule, a time and attendance problem, *etc.*, he can elect to discuss it with the employee or he can ask for a pre-disciplinary hearing. This Panel recently affirmed an Administrative Law Judge's conclusion that petitioned-for supervisors did have the authority to effectively recommend discipline, because, as the ALJ reasoned, a supervisor's broad authority to select a non-disciplinary approach to misconduct supported the finding that the supervisor possessed the complementary authority to effectively recommend a disciplinary approach. *Chicago Joint Board, Local 200, RWDSU, United Food and Commercial Workers, International Union and County of Cook (Health and Hospital System)*, 32 PERI ¶ 55 (IL ILRB-LP 2015). I would infer that the Chief Dispatcher implicitly has the authority to effectively recommend discipline because he has the authority to choose between selecting a non-disciplinary approach or initiating a formal disciplinary process, and, therefore, he has the requisite authority to monitor and instruct his subordinates with independent judgment. In that case, the Chief Dispatcher would also satisfy the preponderance requirement under either the qualitative or quantitative test,

as the ALJ concluded that the record established that the Chief Dispatcher spends the vast majority of his time overseeing Dispatchers and this activity is also the most significant task he performs.

In addition, this case presents a significant underlying public policy concern. The record indicates that the next person up the chain of command above the Chief Dispatcher oversees 2000 employees. Further, the unchallenged testimony presented at hearing is that Local 1092 does not allow its members to initiate disciplinary action against other members. Accordingly, if the petition is granted, the Chief Dispatcher, the person with day-to-day oversight responsibility for Central Dispatch personnel, may be dissuaded or even precluded from initiating discipline against his fellow union members. In that case, the City will be saddled with a supervisor clearly torn between the interests of his union and those of his employer. Such a result is at odds with the legislative intent that underlies the supervisory exemption.

For these reasons, I respectfully dissent from the majority's decision to affirm the ALJ's finding that the Chief Dispatcher is not a supervisor pursuant to Section 3 of the Act.

/s/ Charles E. Anderson
Charles E. Anderson, Member

Decision made at the Local Panel's public meeting in Chicago on April 12, 2016, written decision issued in Chicago, Illinois on May 3, 2016.

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Laborers, Local 1092,)	
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and)	Case No. L-RC-15-009
)	
City of Chicago,)	
Department of Water Management,)	
)	
Employer.)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On December 22, 2014, the Water Pipe Extension, Bureau of Engineering Laborers, Local 1092 (Union or Petitioner) filed a majority interest representation/certification petition in Case No. L-RC-15-009 with the Local Panel of the Illinois Labor Relations Board (Board) pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315 (2014) as amended (Act), and the Rules and Regulations of the Board, 80 Ill. Admin. Code, Parts 1200 through 1300 (Rules), seeking to represent the Chief Dispatcher employed by the City of Chicago (City or Employer) in the Department of Water Management.

A hearing was held on March 25, 2015, before the undersigned Administrative Law Judge (ALJ) in Chicago, Illinois. At that time, all parties appeared and were given a full opportunity to participate, adduce relevant evidence, examine witnesses, and argue orally. Both parties timely filed written briefs. After full consideration of the parties’ stipulations, evidence, arguments, and briefs, and upon the entire record of the case, I recommend the following.

I. PRELIMINARY FINDINGS

- A. At all times material, the City has been a public employer within the meaning of Section 3(o) of the Act.
- B. At all times material, the City has been subject to the jurisdiction of the Local Panel of the Board pursuant to Section 5(b) of the Act.
- C. At all times material, the Union has been a labor organization within the meaning of Section 3(i) of the Act.

II. ISSUES AND CONTENTIONS

The City argues that the Chief Dispatcher is a supervisor within the meaning of Section 3(r) of the Act.¹ More specifically, the City contends that the Chief Dispatcher's primary duties are substantially different from the work of his subordinates; that he has the authority to direct, reward, and discipline his subordinates using independent judgment; and that he performs these duties a preponderance of the time. The Union argues the opposite. In support of its argument, the Union contends that the Chief Dispatcher's work is not substantially different from his subordinates' work; that none of his duties require the use of independent judgment as most are rote clerical duties; and that even if he possesses supervisory authority, he spends little time actually performing those functions.

III. FINDINGS OF FACT

The City's Department of Water Management (Department) supplies fresh, drinkable water to approximately 42% of Illinois's population and conveys the City's sewage to the Metropolitan Water Reclamation District. The Department is divided into several different areas including the Bureau of Operations and Distribution (Bureau). The Bureau installs and maintains

¹ Initially, the City raised an additional objection arguing that the petition lacked majority interest. However, the City withdrew that objection at hearing.

all of the City's water and sewer mains, as well as anything attached to those mains such as fire hydrants and drinking fountains. Managing Deputy Commissioner William Bresnahan oversees the Bureau's operations and its approximately 2000 employees. The Bureau is also comprised of different sections including Central Dispatch. The at-issue Chief Dispatcher, Joe Pusateri, oversees Central Dispatch and reports directly to Bresnahan.

A. Organization and Responsibilities of Central Dispatch

Operating 24 hours a day, seven days a week, Central Dispatch processes all calls and complaints regarding the City's water and sewer system. If citizens discover a water or sewer problem, they can call 311 and make a complaint; 311 employees record the complaint in 311's Citizen Service Request system (CSR). Citizens can also call Central Dispatch directly to register a complaint. Central Dispatch's Emergency Crew Dispatchers (ECDs or Dispatchers) process the calls that come in directly to Central Dispatch and pull any complaints made to 311 by reviewing CSR.² Once the Dispatchers receive a complaint, they send an Investigator to observe the reported issue, and the Investigator determines whether any repairs are necessary. If repair work is needed, the Dispatchers get any dig tickets or other necessary permits, contact the City's utilities services to mark gas and electrical lines, and convert the complaint ticket in CSR to a repair ticket. Most of the Dispatchers are assigned to cover specific zones of the City: the North District, the Central District, or the South District. Other Dispatchers are only responsible for securing the required permits or dig tickets for repair crews.

The Dispatchers directly report to the Foreman of Construction Laborers and ECDs (Foreman). According to Bresnahan, "[the Foreman is] the actual – I mean, from my observation of it, he's the actual supervisor who sits right with them and is the, you know, front line

² In addition to the ECD title, several employees in the position of laborer are assigned to Central Dispatch and perform the same duties as the Dispatchers. However, for the sake of simplicity, I will collectively refer to the ECDs and Laborers as *Dispatchers*.

supervisor for the [Dispatchers].” Central Dispatch’s only Foreman, Kevin Smith, primarily works Monday through Friday, 7:00 a.m. to 3:30 p.m. Smith reports directly to the Chief Dispatcher. Smith, as well as the Dispatchers and laborers, are represented by the Union.

Several administrative employees work in Central Dispatch as well: the Administrative Assistant IIs and IIIs, the Senior Data Entry Operator, and the Data Entry Operator (collectively, clerical employees). These employees report to the Chief Dispatcher. Bresnahan testified that these positions perform similar clerical-type functions. “They close out – mostly on the sewer side, they close out the sewer inspection tickets and the cleaning tickets . . . They don’t differ a lot, just basically their title.” The clerical employees are represented by the American Federation of State, County, and Municipal Employees, Council 31 (AFSCME).

B. Chief Dispatcher Joe Pusateri

As Chief Dispatcher, Pusateri oversees all operations and employees of Central Dispatch. He typically works Monday through Friday, 8:30 a.m. to 5:00 p.m. Unlike Foreman Smith, Pusateri is not stationed on the Central Dispatch floor but does have an office just down the hall.

1. Authority to Assign Work

Pusateri can assign work to the Central Dispatch employees. For example, the Dispatchers typically work in the same District each shift, but Pusateri can reassign them to a different District if necessary. Additionally, during one of the City’s severe cold weather systems, Bresnahan and Assistant Commissioner Lucy Anderson were working to create a notification system to get information from Central Dispatch to Bresnahan and other Water Department deputies “so that we could make some decisions as far as whether we needed to keep the crews out on the street longer to do investigations for no water frozen surfaces.” After Bresnahan and Anderson told Pusateri what kind of information they were looking for, Pusateri

created a report and “instructed his dispatchers – as a matter of fact, he had also picked which dispatchers he was going to have to make sure that they were responsible to get that information out to us in a timely manner.” Pusateri has also decided which current Dispatchers would be responsible for training new employees. Further, if Pusateri receives a call directly about a water or sewer issue, he can ask a Dispatcher to take care of the problem.

Pusateri can also delegate some of his duties regarding the Dispatchers to Foreman Smith. When asked what kind of work Pusateri would assign to Smith, Bresnahan stated that he did not know of any specific examples but it would be “[w]hatever he needs to get done.” He also testified “[a] lot of our – a lot of our functions become, you know, standard operating procedure that we do the same thing every day . . . so I am not sure there’s a lot of you know, having to give new instructions on every day.”

Pusateri can also assign work to the clerical employees. According to Bresnahan, those tasks generally involve closing out tickets in CSR and testified “I would think that they pretty much know what to do on a daily assignment. I mean, it becomes pretty much routine.” Pusateri testified that he typically only communicates with one of the clerical employees, Mary Jones, and that Jones breaks down the work amongst the other employees. “I am involved basically where there’s problems, you know, minor, why did she get more work than me, things like that. That’s basically what I do.”

2. Authority to Instruct and Monitor

A significant part of Pusateri’s responsibilities is monitoring the Central Dispatch employees. In short, as Bresnahan testified, “he makes sure that they are present and doing their jobs.” With regard to Foreman Smith, Bresnahan testified that Pusateri makes sure Smith completes any tasks that Pusateri assigned.

As for the Dispatchers, Pusateri essentially ensures that they handle calls and complaints adequately and in a timely manner by directly observing the Dispatchers and reviewing CSR. More specifically, Pusateri makes sure Dispatchers answer calls in a timely manner, send complaints to the proper District, timely assign tickets to Investigators, and send out the right equipment to reported issues. Pusateri also reviews CSR to see if the Dispatchers filled out complaint tickets properly. Bresnahan testified that “[e]ach ticket has a series of flex questions that go along with those, [he makes] sure that those questions are answered as best as possible with as much information as we can get that would assist our crews in knowing what they are looking for.” If Pusateri finds a mistake, he may simply correct it himself or tell the Dispatcher to correct the error. Pusateri also monitors CSR to pinpoint possible issues. For example, he looks to see if a certain category of complaints is too high. If Pusateri notes an issue in a particular District, he will point it out to the Dispatcher. Pusateri testified that the Dispatchers usually know how to correct their mistakes. “They have a lot to do. I mean, mistakes are going to happen, people are going to overlook things. I just want – I feel like that what I do is moderate, to make sure that I can keep up with it, keep up with the mistakes. They know what to do right away.” Pusateri also makes sure that the employees are closing out complaints in CSR “in a timely manner so that we don’t have to go out and reinvestigate a job.”

Bresnahan testified that Pusateri spends 80-90% of his time monitoring the Central Dispatch employees. Pusateri, on the other hand, testified that he spends about 30-35% of his time reviewing CSR and 10% working directly with the Dispatchers on the Dispatch floor.

3. Authority to Schedule and Grant Overtime

Pusateri also has some responsibility regarding his subordinates’ schedules. For vacation requests, Pusateri can approve or deny an employee’s request for vacation time depending on

whether Central Dispatch will have adequate staffing.³ When Pusateri receives a vacation request from the Dispatchers, he looks at how many other people are working or already have the day off. Pusateri testified that Deputy Commissioner Duane Hightower, a superior of Pusateri who reports to Bresnahan, told him not to drop below three people on shift. “We can never drop below three. We cannot have two people on the shift.” According to Bresnahan, there is not minimum staffing requirement and Hightower does not have the authority to set a minimum requirement. However, Bresnahan also testified that Central Dispatch generally needs three Dispatchers to operate. “It’s been like that for a long time. Probably the number of districts that we have is three, and so that each person will be responsible for a third of the city . . . So although there’s no actual written policies, the number of people, that’s traditionally what we’ve had is three.” Pusateri also testified that he rarely denies the clerical employees’ vacation requests.

Additionally, Bresnahan testified that Pusateri has little authority to alter the shifts of Dispatchers. According to Bresnahan, “the only time that we would change shifts is if there’s a request for it . . . but that’s based on the union contract. So there’s not a lot of leeway outside the collective bargaining agreement as far as assigning people to shifts.”

Also, Pusateri can grant overtime. For example, if Pusateri does not have enough employees to cover a shift, he can, without receiving higher authorization, use overtime to have another employee cover the shift. However, he cannot assign overtime to a particular employee; the actual assignment of overtime to a specific person is governed by the employees’ contract. Other types of overtime, such as extending existing shifts due to weather emergencies, have to be approved by Bresnahan. However, Bresnahan typically approves Pusateri’s requests to use overtime.

³ Other types of leave requests are governed by the employees’ contracts.

According to Bresnahan, Pusateri does not spend much time on reviewing leave requests. Pusateri testified that he spends about 30-35% of his time processing payroll and dealing with vacation requests.

4. Authority to Evaluate and Reward

Pusateri is also responsible for conducting annual performance evaluations. On the evaluation form, Pusateri must rate the quality of the employee's work, the quantity of work, and the employee's dependability. The evaluation also provides that "[a] Final Rating below 70 will result in the withholding of a merit pay increase." However, Pusateri has yet to actually conduct any evaluations.

Although the evaluation form describes when a merit increase will be withheld, only the clerical employees represented by AFSCME are eligible for merit pay increases. Merit pay increases are processed separately and distinctly from the annual performance evaluations. When a clerical employee is eligible for a merit increase, Bresnahan receives a notice and, as he explained at hearing, "[w]e have the ability to approve or deny those based on the assessment of the supervisor." Pusateri does not have the authority to grant a merit increase; authority to approve merit increases falls to Bresnahan. However, Bresnahan does ask Pusateri for his opinion and Bresnahan always follow Pusateri's recommendations. In at least one instance, Pusateri recommended Bresnahan deny a merit increase.

5. Authority to Discipline

If Pusateri believes an employee is having a performance issue, he can either sit down and discuss the matter with the employee or request a pre-disciplinary hearing. Conduct that could warrant a pre-disciplinary hearing includes not performing duties adequately, violation of a work rule, and time and attendance problems. When Pusateri requests a pre-disciplinary hearing,

Pusateri, the employee, a union representative, and a hearing officer hold an informal hearing. During the pre-disciplinary hearing, the employee and Pusateri give their version of events. Following the hearing, according to Bresnahan, “it would be up to the hearing officer to determine how much time she’s going – how much, if any, discipline is going to be initiated, whether it’s verbal, oral, or a suspension.” The hearing officer then makes her disciplinary recommendation to Bresnahan. Bresnahan makes the ultimate decision on whether or not an employee should be disciplined. Pusateri does not spend much time on disciplinary issues – less than one percent.

6. Pusateri’s Other Duties

Aside from his duties as described above, Pusateri performs other various administrative duties. For instance, Pusateri runs various reports for Bresnahan and makes sure his employees’ equipment is in working order. He can also mediate employee disputes. If he cannot resolve the issue, Pusateri can refer the employees to one of the City’s dispute resolution programs.

IV. DISCUSSION AND ANALYSIS

The City argues that the Chief Dispatcher is a supervisor within the meaning of Section 3(r) of the Act. Under Section 3(r), employees are supervisors if they (1) perform principal work that is substantially different from that of their subordinates; (2) have the authority, in the interest of their employer, to perform any of the enumerated supervisory functions or effectively recommend such action; (3) consistently use independent judgment in performing those functions; and (4) spend a preponderance of their time exercising that authority. Chief Judge of Circuit Court of Cook Cnty. v. Am. Fed’n of State, Cnty. & Mun. Emps., Council 31, AFL-CIO, 153 Ill. 2d 508, 515 (1992).

Additionally, as the party asserting the statutory exclusion, the City has the burden of proving the Chief Dispatcher's supervisory status by a preponderance of the evidence. City of Chi., 25 PERI ¶ 2 (IL LRB-LP 2009); Cnty. of Boone and Sheriff of Boone Cnty., 19 PERI ¶ 74 (IL LRB-SP 2003). It "cannot satisfy its burden by relying on vague, generalized testimony or contentions as to an employee's job function." Cnty. of Cook, 28 PERI ¶ 85 (IL LRB-LP 2011). Rather, the City must "support its arguments with specific examples." Id. For the reasons that follow, I find that the record fails to establish that the Chief Dispatcher is a supervisor as defined by the Act.

A. Pusateri Performs Substantially Different Work from his Subordinates' Work.

As a threshold matter, the City must establish that the Chief Dispatcher performs substantially different work from his subordinates' work. Generally, this requirement is easily met if the alleged supervisor's work is obviously and visibly different from the other employees' duties. City of Chi. (Dep't of Sewers), 17 PERI ¶ 3017 (IL LRB-LP 2001). If the alleged supervisor's work is not obviously and visibly different, i.e. facially similar, the Board will apply the "nature and essence" test. City of Freeport v. Ill. State Labor Relations Bd., 135 Ill. 2d 499, 514 (1990). "The nature and essence test [is] a qualitative, rather than a quantitative analysis" Id. at 518. Under the "nature and essence" test, the Board examines "the manner in which the alleged supervisor performed his work, his rank within the supervisory hierarchy and the extent to which he exercised supervisory authority over his subordinates." Vill. of Elk Grove Vill., 8 PERI ¶ 2015 (IL SLRB 1992), *aff'd* 245 Ill. App. 3d 109 (2d Dist. 1993); *see* City of Freeport, 135 Ill. 2d at 514, 518.

Pusateri oversees several groups of employees: the Dispatchers, the clerical workers, and the Foreman of Construction Laborers. The Union argues that Pusateri performs substantially the

same work as the Dispatchers. I am not convinced. To be sure, Pusateri does perform some of the same work as the Dispatchers but the overall majority of his time is spent on paperwork, ensuring work is being done correctly, and checking for any potential issues that should be addressed. While some of the physical functions may overlap by virtue of all of the employees using the same computer system, the record establishes that the Dispatchers are responsible for processing service calls and Pusateri is responsible for ensuring the Dispatchers are actually doing so. He is also responsible for running reports, approving time off and overtime, and for evaluating their work performance. Further, I find the evidence establishes that Pusateri performs substantially different work from the clerical employees. The clerical workers are generally responsible for clerical duties, closing tickets, and filling out paperwork, whereas Pusateri, again, is responsible for overseeing their work.

The Central Dispatch position that arguably bears the most similarity to Pusateri's is the Foreman's position. The record evidence is not particularly in depth with regard to the Foreman's duties. However, the evidence does establish that the Foreman is, essentially, Pusateri's eyes and ears on the Dispatch floor. I also note, as the City points out, Pusateri is the only one who oversees the clerical employees, the only one who can approve or assign overtime, and the only one who can request a pre-disciplinary hearing. I find these distinctions sufficient to find that Pusateri's and the Foreman's work is substantially different. Even if their work was not obviously and visible different, I would still find the "nature and essence" of Pusateri's and the Foreman's work to be substantially different. They perform their work in different ways; the Foreman sits on the Dispatch floor observing the Dispatchers first hand, while Pusateri only spends a portion of his time directly observing his subordinates. Critically, Pusateri is

responsible for the Foreman's work and is tasked with ensuring that the Foreman is performing adequately.

Thus, I find that Pusateri performs substantially different work from that of his subordinates' and satisfies the first prong of the supervisor definition.

B. Pusateri has Authority to Perform Some Supervisory Functions Using Independent Judgment.

Next, under the supervisor definition's second and third prongs, the City must prove that the Chief Dispatcher possesses the requisite supervisory authority. In essence, the City must establish that Pusateri has the authority to perform one of the 11 enumerated supervisory functions, or recommend such action, while consistently using independent judgment. 5 ILCS 315/3(r). Employees use independent judgment when they choose "between two or more significant courses of action." Vill. of Bolingbrook, 19 PERI ¶ 125 (IL LRB-SP 2003). Conversely, decisions which are "routine or clerical in nature or made on the basis of an individual's superior skill, experience or knowledge" are not indicative of independent judgment. Id. When determining whether the alleged supervisor consistently uses independent judgment, the critical inquiry is how many times independent judgment may be required and not the number of times it is actually used. City of Freeport, 135 Ill. 2d at 520-521. As to whether or not an employee's recommendations are effective, a recommendation is effective within the meaning of the Act only if it is adopted as a matter of course with very little, if any, independent review. Cnty. of Cook (Health and Hosp. Sys.), 32 PERI ¶ 55 (IL LRB-LP 2015).

In this case, the City argues that Pusateri has the authority to discipline, reward, and direct, and that he performs these functions using independent judgment. I will discuss each activity in turn.

1. Pusateri Does Not Have the Authority to Discipline.

The City contends Pusateri can discipline by initiating disciplinary action against his subordinates and that he does so using independent judgment. Pusateri cannot actually discipline his subordinates. He can, however, recommend discipline by requesting a pre-disciplinary hearing if he believes an employee's conduct warrants such action. The record also demonstrates that Pusateri has the choice between requesting a pre-disciplinary hearing or taking no action on a variety of issues. As such, Pusateri can recommend discipline using independent judgement. However, the question remains whether Pusateri can *effectively* recommend discipline.

Although a "recommendation" implies some sort of review, effective recommendations are those that are almost always adopted and undergo little, if any, independent review. Dep't of Cent. Mgmt. Servs. v. Ill. Labor Relations Bd., State Panel, 2011 IL App (4th) 090966, ¶ 193; State of Ill, Dep't of Cen. Mgmt. Servs., 26 PERI ¶ 116 (IL LRB-SP 2010). In this case, Pusateri's recommendations for discipline are subject to independent review. When Pusateri requests a pre-disciplinary hearing, a hearing officer listens to Pusateri and the employee, considers the matter, and then makes her own recommendation to Bresnahan. Bresnahan then considers the hearing officer's recommendation and makes the ultimate decision on whether or not to discipline the employee. More problematically, the record fails to establish how frequently these hearings result in discipline. As such, the record fails to establish that Pusateri's disciplinary recommendations are actually effective. Given these deficiencies, I cannot find that Pusateri has the supervisory authority to discipline or effectively recommend discipline.

2. Pusateri Has Some Authority to Reward His Subordinates.

Next, the City argues that Pusateri has the authority to reward his subordinates because he can affect their eligibility to receive a merit increase. First, I note that only the clerical

employees are eligible for merit increases, not the Foreman or the Dispatchers. Further, the record does not establish that Pusateri has authority to reward employees in any manner besides the merit increases. Thus, I find that Pusateri does not have the authority to reward the Dispatchers or the Foreman. He may, however, have the authority to reward the clerical employees.

Pusateri is responsible for evaluating the clerical employees and must rate those employees using subjective criteria. For example, Pusateri is required to rate the quality of the employee's work. Thus, he must use his independent judgment. Also, according to the performance evaluation documents and Pusateri's testimony, any evaluation with a cumulative rating below 70 "will result in the withholding of a merit pay increase." Although Pusateri is responsible for performing the evaluations, Bresnahan is responsible for approving merit increases. However, Bresnahan testified that when an employee is eligible for a merit increase, he calls Pusateri and asks for his recommendation regarding whether to approve or deny the increase. The evidence also demonstrates that Pusateri's recommendations are effective because Bresnahan always follows them. I also note that in at least one instance, Pusateri recommended an employee's increase be denied which would seem to suggest that Pusateri uses his discretion when making his recommendation. As such, I find that Pusateri can recommend a reward for the clerical employees.

3. Pusateri Has Some Authority to Direct his Subordinates.

The City also argues that Pusateri has the supervisory authority to direct his subordinates. The term "direct" encompasses several different job functions, such as scheduling shifts, approving time off and overtime, assigning duties, overseeing and reviewing work, providing instruction on work to be performed, and evaluating work performance. Vill. of Bolingbrook,

19 PERI ¶ 125; Peoria Housing Auth., 10 PERI ¶ 2020 (IL SLRB 1994). “Direct” means more than simply being responsible for a shift. City of Chi., 10 PERI ¶ 3017 (IL LRB 1994). Alleged supervisors must “also possess significant discretionary authority to affect their subordinates’ employment in areas likely to fall within the scope of union representation, such as discipline, transfer, promotion or hire.” Cnty. of Lake, 16 PERI ¶ 2036 (IL SLRB 2000). The City contends that Pusateri directs his subordinates by assigning duties, instructing and monitoring work, approving time-off and overtime, and evaluating their work performance. Although Pusateri has some supervisory authority to direct as defined by the Act, many of the City’s arguments are unsupported by the record.

a. Pusateri Does Not Have the Supervisory Authority to Assign Duties.

In its post-hearing brief, the City contends that Pusateri assigns work to the Dispatchers by controlling what district they are assigned to. Generally, “[s]imply distributing work among unit employees is not ‘direction’ within the meaning of the Act, unless the assignment criteria are non-routine and require substantial discretion.” City of Chi., 10 PERI ¶ 3017. Although the record establishes that Pusateri has some control over where the Dispatchers are assigned, the record fails to establish when he would reassign the Dispatchers or what criteria he would use to do so. In essence, the record does not demonstrate that “the assignment criteria are non-routine and require substantial discretion.” Critically, the record is equally insufficient regarding what criteria he would use when assigning any other work to the Dispatchers, the Foreman, or the clerical employees. Without knowing how Pusateri would assign work, I cannot find that he has the authority to assign duties using independent judgment.

b. Pusateri Does Not Have the Supervisory Authority to Instruct and Monitor.

The City also argues that Pusateri has the authority to instruct and monitor his subordinates using independent judgment. In order for the oversight and review of his subordinates “to constitute the statutory authority to direct . . . [Pusateri] be actively involved in checking, correcting and giving instructions to subordinates, without guidelines or review by others.” Cnty. of Lake, 16 PERI ¶ 2036 (IL SLRB 2000); see City of Naperville, 8 PERI ¶ 2016 (IL SLRB) (“[D]irection, however, becomes supervisory where, in addition to being responsible for the proper performance of his subordinates, the supervisor is relied on to exercise significant discretionary authority, which affects the employment of his subordinates, in order to carry out that responsibility and to effectuate the policies of the employer.”)

With regard to the Dispatchers, the City argues that Pusateri monitors these employees by ensuring they are answering calls timely and courteously, reviewing the tickets to ensure they are filled out correctly, ensuring they are sending out Investigators quickly and efficiently, and making sure they are closing tickets. As a general matter, the City’s argument that Pusateri has the supervisory authority to direct relies on his ability to recommend discipline if an employee’s work is deficient. However, as I discussed earlier, the record does not establish that he can “effectively recommend” discipline. Nor does the evidence establish that Pusateri can otherwise “affect the employment” of the Dispatchers. These same deficiencies equally apply to Pusateri’s oversight of the Foreman. Without the ability to affect the Dispatchers’ and the Foreman’s employment, I cannot find that he has the supervisory authority to instruct and monitor these employees.

As to the clerical workers, it appears that Pusateri’s oversight is limited to answering questions as they arise. He is not actively involved in checking and correcting their work, if at

all. Thus, although he can certainly reward the clerical employees, he does not appear to have the supervisory authority to direct by monitoring their work.

c. Pusateri Has Some Authority to Affect His Subordinates' Schedules.

Next, the City contends that Pusateri directs his subordinates by impacting their work schedule by virtue of granting overtime and time off. Turning first to the question of overtime, generally, alleged supervisors do not assign overtime using independent judgment if they are required to assign overtime in accordance with a collective bargaining agreement. See Circuit Clerk of Champaign Cnty., 17 PERI ¶ 2032 (IL LRB-SP 2001). However, the alleged supervisors may still grant overtime using independent judgment if they have discretion to decide when overtime is needed. See Dep't of Cent. Mgmt. Servs./Dep't of Transp. v. Ill. Labor Relations Bd., State Panel, 2013 IL App (4th) 110825, ¶¶ 15, 52; Cnty. of McHenry, 15 PERI ¶ 2014 (IL SLRB 1999).

Here, overtime arises in two contexts: covering a Dispatcher's shift and extending a Dispatcher's shift due to emergency. With regard to the decision to cover a Dispatcher's shift, Pusateri does have the ability to cover a shift with overtime without getting higher authorization. However, whether he makes the decision using independent judgment is another matter. In essence, whether Pusateri uses independent judgment in this instance turns on whether Central Dispatch has a minimum staffing standard. I find that it does. The City argues that I should not find Central Dispatch has a minimum staffing requirement because Deputy Commissioner Hightower did not have the authority to tell Pusateri to staff at least three Dispatchers on a given shift. While that may be true, the fact remains that Pusateri's superior did instruct him not to drop below three employees which effectively removed Pusateri's discretion. Hightower's instructions notwithstanding, my conclusion that Central Dispatch has a minimum staffing

requirement ultimately rests on the fact that Bresnahan, Hightower's superior and the City's own witness, testified that although there is no formal written policy or standard, Central Dispatch needs three Dispatchers to operate. Thus, I cannot find that Pusateri's decision to grant overtime when the number of Dispatchers drops below three involves the use of independent judgment.

However, I do find that Pusateri uses independent judgment when he grants overtime due to emergency. In addition to granting overtime to cover a shift, Pusateri can request overtime to extend shifts if he believes it is necessary, and his requests are always granted. The record establishes that these overtime requests are generally based on the weather and when Pusateri believes he will need additional people. As there is no set standard for requesting overtime in the case of weather emergencies and Pusateri appears to use his discretion, I find that Pusateri can request or recommend overtime due to emergencies.

As for granting time off, similar to granting overtime to cover a shift, this issue turns on whether Central Dispatch has a minimum staffing standard. Again, as I concluded above, Central Dispatch does have a minimum number of Dispatchers it needs to operate. Pusateri testified that he will grant the request as long as the number of Dispatchers on a shift does not drop below three. As such, I cannot find that Pusateri grants the Dispatchers' time off requests using independent judgment. Furthermore, Pusateri testified that he almost always grants the clerical workers' requests. As his decisions regarding the clerical workers' requests are largely "routine," I cannot find that he grants these requests using independent judgment either.

d. Pusateri Does Have the Supervisory Authority to Evaluate Some of His Subordinates.

Finally, the City argues that Pusateri has the supervisory authority to evaluate. "[T]he responsibility to rate employee performance is evidence of supervisory authority to direct only if the evaluation affects the employee's employment status." Cnty. of Lake, 16 PERI ¶ 2036. The

record does not establish that the performance evaluations have any impact on the Dispatchers' or the Foreman's employment status. However, as I discussed earlier, the record does establish that the performance evaluations can affect the clerical employees because of the evaluations' connection to the clerical employees' merit increases. As Pusateri is tasked with evaluating the clerical employees and can, therefore, impact their merit increases, I find that he has the authority to evaluate within the meaning of the Act.

C. Pusateri Does Not Meet the Preponderance Requirement.

Under the fourth and final prong, the City must prove that Pusateri “devote[s] a preponderance of [his] employment time to exercising [supervisory] authority.” 5 ILCS 315/3(r). Illinois courts have set out two tests by which the City can prove this element. First, the City can show that Pusateri “spend[s] more time on supervisory functions than on any one nonsupervisory function.” City of Freeport, 135 Ill. 2d at 533; see also Dep't of Cent. Mgmt. Servs. v. Ill. State Labor Relations Bd., 249 Ill. App. 3d 740, 746-747 (4th Dist. 1993) (holding supervisory employees must spend more than 50% of their time on supervisory functions). Under this test, the only consideration is the time spent actually exercising the authority. Vill. of Downers Grove v. Ill. State Labor Relations Bd., 221 Ill. App. 3d 47, 56 (2d Dist. 1991).

The second test rejects the mathematical approach and instead focuses on the significance of the employee's duties. Dep't of Cent. Mgmt. Servs. v. Ill. State Labor Relations Bd., 278 Ill. App. 3d 79, 85-87 (4th Dist. 1996). Specifically, the Illinois Appellate Court stated that “[w]hether a person is a ‘supervisor’ should be defined by the significance of what that person does for the employer, regardless of the time spent on particular types of functions.” Id. at 86. Thus, Pusateri will meet the second test if his supervisory functions are more “significant” than his non-supervisory functions.

The City contends that “Pusateri meets the preponderance requirement under [either] of these tests because the vast majority of his workday, 80-90%, is spend directing his subordinates including giving them instructions and monitoring their work activities.” I disagree. Again, the record only establishes that Pusateri possesses the supervisory authority to evaluate and/or reward the clerical employees and grant overtime in the case of emergencies. Assessing the preponderance requirement under the first test, as is a consistent problem with this record, the evidence does not establish how much time Pusateri spends on either task. However, the record does establish that he spends the vast majority of his time overseeing the Dispatchers, a function I was unable to find he performs with the requisite supervisory authority. As such, I cannot find that Pusateri satisfies the first test.

Nor can I conclude that Pusateri satisfies the second test. The deficiencies in the record aside, it is abundantly clear from the witnesses’ testimony and from the City’s post-hearing brief, that Pusateri’s most important duty is the oversight of the Dispatchers. However, as I already discussed, the evidence does not establish that this oversight constitutes supervisory authority. Therefore, I find that the City failed to establish that Pusateri satisfies the final preponderance requirement.

V. CONCLUSIONS OF LAW

The Chief Dispatcher is not a supervisor within the meaning of Section 3(r) of the Act.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the Chief Dispatcher be included in the petitioned-for bargaining unit.

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, the parties may file exceptions no later than 14 days after service of this recommendation. Parties may file responses to any exceptions and briefs in support of the responses no later than 10 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the recommendation. Within five days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed, if at all, with Kathryn Zeledon Nelson, General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois, 60601-3103. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted in the Board's Springfield office. Exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. If no exceptions have been filed within the 14-day period, the parties will be deemed to have waived their exceptions.

Issued in Chicago, Illinois on February 4, 2016

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL**

/s/ Kelly Coyle _____
Kelly Coyle
Administrative Law Judge