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

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| American Federation of State, County and Municipal Employees, Council 31, | ) | |
| Petitioner, | ) | Case No. L-RC-16-007 |
| and | ) | |
| City of Chicago, | ) | |
| Employer. | ) | |

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

On February 19, 2016, Administrative Law Judge (ALJ), Deena Sanceda issued a Recommended Decision and Order (RDO) in which she determined, among other things, that a prior agreement entered into between American Federation of State, County and Municipal Employees (AFSCME or Petitioner) and the City of Chicago (City or Employer) does not preclude the instant majority interest/representation petition filed by AFSCME 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 add a title to an existing bargaining unit. The City filed timely exceptions challenging only that aspect of the RDO; AFSCME filed a timely response.

We adopt the ALJ's findings of fact, analysis and conclusions as modified in this Opinion and Order. To assist the reader, we summarize some of the relevant facts below.

On August 5, 2015, AFSCME filed a majority interest petition seeking to add the title of Chief Programmer/Analyst (CP/A) to an existing bargaining unit[1] (Unit), and demonstrated majority support of the eleven employees in the petitioned-for title. The City opposed the petition,

[1] This is Bargaining Unit #4.

claiming it is barred by a 2001 Settlement Agreement (Agreement) between the City and AFSCME. In response, AFSCME argued that the 2001 Agreement does not bar the instant petition because the Board did not make a finding that inclusion of the CP/A position was inappropriate, or otherwise identify a reason for excluding the position, or specify the length of time the position would be excluded.

In 2001, AFSCME filed a unit clarification petition to add certain newly reclassified information technology positions to the Unit. After negotiations, AFSCME and the City executed the Agreement, which included their agreement "to exclude from the Contract (a) all other classifications listed in the attached Appendix A. . . ." The Agreement defined the Contract as the City/AFSCME collective bargaining agreement (CBA), and the referenced Appendix A listed the CP/A position and its predecessor positions among those to be excluded; however, the parties did not specify the reason for the exclusion or duration of time the positions would be excluded from the CBA. AFSCME further agreed to amend the then-pending unit clarification petition consistent with the terms of the Agreement. The Agreement also resolved a pending unfair labor practice charge and a grievance, both previously initiated by AFSCME against the City.

The parties ultimately agreed to a description of the clarified unit, and the Executive Director directed that the Unit be certified in accordance with that agreed description. The certification included the following exclusionary language:

EXCLUDE:

(1) Any and all positions in the Department of Personnel, the Office of Budget and Management, the Department of Law/Labor Division, the City Council, and the department of Business Information Services, except that positions in the title Computer Application Analyst I and Computer Application Analyst II will not be excluded in the Department of Business Information Services.

(2) The Senior Systems Programmer Position in the Department of Police currently occupied by Donald Krumrey; and

(3) All other City of Chicago positions and classifications not already included in an AFSCME bargaining unit, including all confidential, technical and

> professional employees, supervisors, managers, and all other persons excluded from coverage under the Act.

The question at issue is whether the 2001 Agreement bars AFSCME's instant petition to represent the CP/A positions. The ALJ correctly determined that the Agreement does not operate to bar the majority interest petition at issue and the arguments and authority proffered by the Employer in its exceptions fail to warrant an alternate conclusion. However, there is a fundamental distinction between the concept of a general exclusionary clause, which generally does not operate to bar a unit clarification petition, and the types of agreements, such as consent for election stipulations, to which parties are more likely to be bound. We clarify further these important distinctions.

The ALJ correctly determined that the 2001Agreement constitutes a general exclusionary clause. Both our Board and the NLRB have long held that such a general exclusion – one that does not identify the reason the position has been excluded, *e.g.*, a statutory exclusion or lack of community interest, *etc.* – is insufficient to bar a union's petition to represent excluded employees. However, under *Briggs-Indiana*[2], and its progeny, the NLRB recognized and enforced a general exclusionary clause that contained a union's express agreement to refrain from seeking to represent certain groups of employees for a reasonably short period of time. Similarly, our Board also has recognized that a general exclusionary clause that contains a union's express waiver of its right to represent excluded employees may operate as a bar.[3] Initially, the *Briggs-Indiana* line of cases required that such waivers be articulated in the body of a collective barging agreement.[4] Later, the NLRB modified that requirement, stating "while an agreement to refrain from organizing certain employees must be express, it does not necessarily have to be included in a collective bargaining

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[2] *Briggs-Indiana,* 63 NLRB 1270 (1945).

[3] *See Quincy Public Library and International Association of Machinists and Aerospace Workers,* 11 PERI ¶ 2041(IL SLRB 1995).

[4] See *Cesna Aircraft Company and International Association of Machinists, District Lodge No. 70, AFL-CIO,* 123 NLRB 855 (1959; *Walt Disney World Co. and Local 855, International Alliance of Theatrical State Employees and Motion Picture Operators of the United States and Canada, AFL-CIO,* 215 NLRB 421(1974.

agreement."[5] The Agreement at issue contains no such express waiver by the Union to refrain from organizing employees in the CP/A positions. It is a well-settled general proposition under the *Brigg-Indiana* doctrine, as well as Board precedent, that such a general exclusionary, as presented in this case, clause is not sufficient to preclude the Union from seeking to organize excluded employees.[6]

The City's reliance on the Board's decision in *Quincy Public Library* is misplaced. In that case, the union filed a petition to represent a number of positions, including two bookkeeper titles. The employer agreed to voluntarily recognize a unit that excluded the two bookkeeper positions, and the Board subsequently certified the unit in accord with the parties' agreement. Ten days after the Board's certification, the union filed a new petition seeking to represent the two newly excluded bookkeeper positions. Citing the *Briggs-Indiana* doctrine, the Board reiterated the well-settled rule that a general exclusionary clause without more, such as the one at issue in *Quincy Public Library*, is not sufficient to bar a union from seeking to organize excluded employees. The Board further affirmed that for such a general exclusionary clause to operate as a bar there must be a promise by the union to refrain from seeking to organize the employees. However, to address the specific and unique circumstances presented by *Quincy Public Library,* the Board essentially carved out an equitable exception to the general principle, finding that, under the circumstances presented in that case, the union had made an "inherent" waiver of its right to represent the excluded employees. Further, the Board imposed a 12-month bar similar to a certification bar, finding that such a limitation was reasonable *under the circumstances*. Accordingly, the instant case does not turn precisely on the question of whether the union has fulfilled its obligations under the Agreement, *per se*, but whether that Agreement, in and of itself, is capable of operating to bar the union from

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[5] *Lexington Health Care Group, LLC, d/b/a/ Lexington House and New England Health Care Employees Union, District 1199, AFL-CIO,* 328 NLRB 894, 896 (1999).

[6] See *Quincy Public Library and International Association of Machinists and Aerospace Workers,* 11 PERI ¶ 2041 (IL SLRB 1995).

seeking to represent these employees. As the ALJ concluded, the Agreement at issue is a general exclusionary clause as it does not identify the reason the positions have been excluded, or establish a length of time for the exclusion. It is well settled that such a general exclusionary clause cannot, absent an express waiver of its right to organize, bar a union from seeking to represent excluded employees. In *Quincy Public Library,* the Board was clearly responding to what it perceived to be unique circumstances involving questionable union conduct when it considered the otherwise general exclusionary clause in the parties' voluntary recognition agreement, and stated, "Nevertheless, we find it abundantly clear upon the facts presented that a waiver was inherent in the parties' agreement."

However, the Board's decision in *Quincy Public Library* cannot reasonably be read to constitute a wholesale rejection of the *Briggs-Indiana* doctrine so as to eliminate entirely the long-standing requirement that the agreement contain an express waiver of the union's rights to organize. First, throughout this relatively brief opinion in *Quincy Public Library*, the Board repeatedly referenced the "circumstances presented," thus signaling the exceptional nature of the Board's decision. Second, the Board expressly re-stated the *Briggs-Indiana* general rule requiring an express waiver of a union's right to refrain from organizing excluded employees. Accordingly, the resolution that the Board crafted finding the union's inherent waiver was effected in order to hold the union to the agreement in question in light of and limited to the unique circumstances presented in *Quincy Public Library*.

In particular, the Board's concern focused on the facts that 1) the union's agreement to exclude the two positions was so clearly the *quid pro quo* for the employer's agreement to waive its right to challenge the petition and go to hearing; 2) the union's second petition came immediately after the Board certified the unit based on the parties' agreement; and 3) the union's conduct constituted reneging on the deal with the employer and that the Board's allowing such conduct to

stand would seriously undermine future efforts to have parties reach agreements. Although the Board never used the words "bad faith," we read the Board's decision to include a strong suggestion that the Board regarded and treated the union's conduct as such.

The present case, however, presents no such comparable circumstances. The CP/A title was not in the original petition filed by AFSCME, the 2011 Agreement involved the resolution of additional disputes between the parties, and, importantly, AFSCME did not seek to represent the excluded employees in some absurdly truncated time following certification. So to the extent that whether AFSCME "fulfilled" its obligation under the Agreement may be a relevant inquiry, it would only be with respect to determining whether there exists such exceptional circumstances as motivated the Board's decision in *Quincy Public Library*.

Further, even if the record contained, and it does not, some suggestion of bad faith or overt inequity justifying a finding of a similar inherent waiver in the exclusionary clause at issue, the City's overarching argument still must fail. In *Quincy Public Library,* the Board flatly rejected the notion that the agreement at issue, and therefore in any *Quincy*-like circumstances, would operate as a perpetual bar. On the contrary, *Quincy Public Library*, as well as *Briggs-Indiana* line of cases recognizes that even express waivers operate as a bar only for a reasonable period of time. In *Quincy Public Library*, the Board found such a reasonable period of time to be 12 months. The City offers no authority for the proposition that even an otherwise valid waiver of a union's right to represent excluded employees should be enforced in perpetuity.

The remaining cases cited and arguments advanced by the City are equally -unconvincing, and we, therefore reject them. While the City also argues that the RDO is contrary to the Board's longstanding policy of holding parties to their agreements, the cases the City offers in support of that argument are entirely inapplicable to the instant case, but instead serve to demonstrate the difference between this matter and cases in which Board has held parties to their agreements.

In *City of Carmi*, 9 PERI ¶ 2012 (IL SLRB 1993), after the parties stipulated to a consent election, the employer sought to challenge the election results on the basis that some of the employees involved in the election were supervisors under the Act. The Board determined that the employer could not raise an objection to an election claiming the bargaining unit was improper absent a change in circumstances to justify a unit clarification. Similarly, in *Village of Bensenville,* 20 PERI ¶ 2012 (IL LRB-SP 2003), also relied on by the City, the Board held that having stipulated to a consent election that included sergeants, the employer could not challenge the public employee status of those bargaining unit members without demonstrating that their job duties had changes. Also, in *County of St. Clair* 2 PERI ¶ 2010 (IL SLRB 1986), the employer filed objections to the election including that five petitioned-for employees worked in satellite offices located in other counties that did not sign the stipulation for consent election. The names of these five employees were included on the voter eligibility list provided by the employer, and all five voted, unchallenged by the employer. The State Board denied the objections, stating "We cannot allow a party to consent to election to object to the election based upon an allegation that its own stipulated inclusions were improper." Further, in *City of Peru,* 15 PERI ¶ 2021 (IL SLRB 1999), the Board rejected the union's challenge of a ballot following a consent election, noting that it is well settled that a party is prohibited from challenging the ballot of an employee it voluntarily included in the bargaining unit in a consent election agreement.

As the cases cited by the City demonstrate, the Board does, in fact, have a long standing history of holding parties to their agreements when those agreements are in the context of stipulations that explicitly or implicitly define the propriety of inclusion in the bargaining unit. In those circumstances the Board imposes an obligation to show a change of circumstances in order to clarify the unit; however, such a requirement is wholly inapplicable in the context of a general exclusionary clause as presented in this case.

In sum, for the reasons stated herein, we affirm the ALJ's determination that the at-issue majority interest/representation petition filed by AFSCME is not barred by the 2011 Agreement between AFSCME and the City of Chicago, and direct that the American Federation of State, County and Municipal Employees, Council 31 shall be certified as the exclusive representative of all employees in the unit as follows:

Chief Programmer/Analyst to be INCLUDED in the existing Bargaining Unit #4.

The following positions are disputed[7] and therefore EXCLUDED under Section 1210.100(b)(7)(B) of the Board's Rules and Regulations, 80 Ill. Admin. Code §§1200-1300):

Positions currently held by Charles Spenser and Ulo Ormiste.

**BY THE LOCAL PANEL OF THE ILLINOIS LABOR RELATIONS BOARD**

/s/ Robert Gierut
Robert Gierut, Chairman

/s/ Charles Anderson
Charles Anderson, Member

/s/ Richard Lewis
Richard Lewis, Member

Decision made at the Local Panel's public meeting in Chicago, Illinois on April 12, 2016, written decision issued in Chicago, Illinois on June 30, 2016.

[7] In addition to arguing that the 2001 Agreement indefinitely precludes adding the CP/A position to the Unit, the City also objected to the petition on the basis that two of the CP/As are supervisors under the Act.

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| American Federation of State, County and Municipal Employees, Council, 31, | ) | |
| Petitioner | ) | |
| and | ) | Case No. L-RC-16-007 |
| City of Chicago, | ) | |
| Employer | ) | |

**ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER**

On August 5, 2015, the American Federation of State, County and Municipal Employees, Council, 31, ("Petitioner" or "AFSCME") filed a majority interest/representation petition in Case No. L-RC-16-007 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 add the title of "Chief Programmer/Analyst" to its existing bargaining Unit #4 consisting of professional employees employed by of City of Chicago ("Employer" or "City"). AFSCME also submitted sufficient evidence demonstrating a majority support of the 11 employees that hold the petitioned-for title.[1] The City objects to AFSCME's petition. After considering the parties' filings including their evidence and legal arguments, I recommend the following:

## I. BACKGROUND

To properly address the City contention that the Board's proceedings in Case No. L-UC-01-009 prohibit the instant petition, a brief recitation of those proceedings is necessary. In 2001, following the City's consolidation and reclassification of information technology positions,

[1] One of the twelve Chief Programmer/Analyst positions is vacant.

AFSCME filed unit clarification petition in Case No. L-UC-01-009 seeking to add some of the newly reclassified positions to Unit #4.[2] AFSCME described the petitioned-for unit as:

> INCLUDE: Systems Programmer, Senior Systems Programmer, Service Systems Programmer, Service System Programmers, Programmer Analyst, Senior Programs Analyst, Principal Programmer/Analyst, Principal Database Analyst, Computer Applications Analyst I and Computer Analyst II.
>
> EXCLUDE: Supervisors, Managerial, and Confidential employees as defined by the Act.

After lengthy discussions, the parties agreed to a description of the clarified unit and documented it in a settlement agreement ("Agreement"). The facts surrounding the Agreement are not in dispute. Relevant to the instant petition, paragraph 4 of the Agreement provides:

> [t]he parties hereby agree to exclude from the Contract (a) all other classifications listed in the attached Appendix A, [...]; (b) any and all positions in the Department of Personnel, the Office of Budget and Management; the Department of Law/Labor Division; the City Council; and the Department of Business Information Services, except that positions in the titles of Computer Applications Analyst I and Computer Applications Analyst II will not be excluded in the Department of Business Information Services; and (c) the Senior Systems Programmer position in the Department of Police currently occupied by Donald Krumrey.

The Agreement's preamble defines the "Contract" as the City's collective bargaining agreement with AFSCME. Appendix A is a memo that documents the 42 information technology positions that the City merged into 22 new positions. The memo identifies the new Chief Programmer/Analyst position and its predecessor positions as excluded from a bargaining unit, but does not provide the reasons for such exclusions. Also relevant to the instant petition is Paragraph 6 of the Agreement, which provides that AFSCME agreed to amend the then pending unit clarification petition "setting forth the additions to and exclusions from AFSCME's bargaining unit agreed to by the parties in paragraphs 3 and 4 of this Agreement"

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[2] I take judicial notice of the unit clarification petition and include it in the record of this case.

The parties filed the Agreement with the Board's Executive Director who subsequently certified the bargaining unit with the following exclusionary clause:

> EXCLUDE:
>
> (1) Any and all positions in the Department of Personnel, the Office of Budget and Management; the Department of Law/Labor Division; the City Council; and the Department of Business Information Services, except that positions in the titles of Computer Applications Analyst I and Computer Applications Analyst II will not be excluded in the Department of Business Information Services;
>
> (2) The Senior Systems Programmer position in the Department of Police currently occupied by Donald Krumrey; and
>
> (3) All other City of Chicago positions and classifications not already included in an AFSCME bargaining unit, including all confidential, technical and professional employees, supervisors, managers, and all other persons excluded from coverage under the Act.

## II. ISSUES AND CONTENTIONS

In the instant petition, AFSCME seeks to represent the following bargaining unit:

> INCLUDE: Chief Programmer Analyst to be included in the AFSCME represented bargaining Unit #4.
>
> EXCLUDE: All supervisory, managerial, and confidential employees as defined by the Act.

The City objects to the petition, arguing that the proposed bargaining unit is inappropriate because 1) Chief Programmer/Analysts Charles Spenser and Ulo Ormiste are supervisors as defined by Section 3(r) of the Act; and 2) the parties previously agreed to exclude every Chief Programmer/Analyst from the bargaining unit.

Regarding the City's second objection, it argues that AFSCME is indefinitely precluded from seeking to add the position to the bargaining agreement because the Agreement expressly excludes the Chief/Programmer/Analysts from bargaining Unit #4. Despite being given multiple opportunities to provide additional evidence, the City insists that the Agreement and the Board's

certification in Case No. L-UC-01-009 sufficiently support its contention. AFSCME argues that the 2001 certification does not prevent now adding the Chief/Programmer/Analysts to the unit because the Board did not find that it was inappropriate to include the position in the unit. AFSCME also contends that the Agreement does not bar the instant petition because the Agreement does not identify the reason the Chief/Programmer/Analyst position was excluded from the unit, nor does the Agreement identify that the position is excluded for a particular duration of time.

The City also moved to hold this petition in abeyance pending the issuance of Recommended Decisions and Orders in in Case Nos. L-RC-15-015 and L-RC-15-020, in which the assigned Administrative Law Judge is considering whether the Agreement bars those petitions. AFSCME opposes the City's motion.

## III. DISCUSSION AND ANALYSIS

### 1. Supervisory Status

The City's contention that two of the employees in the twelve petitioned-for positions are supervisors as defined by the Act does not raise a question of representation that prevents the unit's certification. When an employer objects to a majority interest petition on the basis that certain positions should be excluded from the bargaining unit, but the objection does not eliminate majority support, the Board will certify the proposed unit, but exclude all objected-to positions. City of Washington v. Ill. Labor Rel. Bd., 383 Ill. App. 3d 1112, 1119 (3rd Dist. 2008); 80 Ill. Admin. Code § 1210.100(b)(7)(B). The Board's Rules further provide that the petitioner may subsequently file a unit clarification petition to add the objected-to positions into the unit. 80 Ill. Admin. Code § 1210.100(b)(7)(B).

Here, the City objects that Charles Spenser and Ulo Ormiste are supervisors and cannot be included in the existing unit consisting of only public employees. However, the exclusion of these positions does not eliminate AFSCME's majority support. Because the unit can be certified while excluding the objected-to positions currently held by Charles Spenser and Ulo Ormiste, the City's objection regarding Charles Spenser's and Ulo Ormiste's supervisory status does not raise a question of representation requiring a hearing in this case.

**2. Agreement**

A. Abeyance

As an initial matter, I must determine whether I should stay my investigation into City's second objection pending the issuance of a Recommended Decision and Order in two other cases. The City contends that because the meaning of the Agreement is currently an issue in Case Nos. L-RC-15-015 and L-RC-15-020, it would save judicial resources to hold the instant petition in abeyance, pending the issuance of Recommended Decisions and Orders in those cases. AFSCME opposes this request, arguing that staying the investigation and further delaying possible certification of the instant petition is inconsistent with the Board's Rules.

Holding this petition in abeyance is inconsistent with the Act. The stated purpose of the Act is to provide an "expeditious, equitable and effective procedure for the resolution of labor disputes." 5 ILCS 315/2 (2015). It has been the Board's practice to only hold representation proceedings in abeyance where processing the petition would make a fair determination impossible, or would otherwise deprive the parties their right to the certification of an appropriate unit. Cnty. of DuPage and Sheriff of DuPage Cnty. v. Ill. Labor Rel. Bd., 395 Ill. App. 3d 49, 64-65 (2nd Dist. 2009) (noting that the Board held a representation petition in abeyance until the Board's petition for leave to appeal to the Illinois Supreme Court following

the Illinois Appellate Court's reversal of the certification of the positions was resolved because both representation petitions involved the same employment positions); Cnty. of Woodford, 14 PERI ¶2015 (IL SLRB 1998) (holding a decertification election in abeyance of the resolution of an unfair labor practice pursuant to Section 9(a) of the Act); Sarah P. Culbertson Mem'l Hosp., 21 PERI ¶139 (IL LRB-SP 2005); City of Chicago (Indep. Bridge Tenders Org.), 2 PERI ¶3022 (IL LLRB 1986).

Here, there is no question of fact. The parties only disagree over whether the Board's previous certification, which is based on the Agreement, prohibits the instant petition. Accordingly, I find that the issue can be resolved without holding an oral hearing. Since the City's first objection did not raise a question of representation, the meaning of the Agreement is the only remaining issue to consider. I find that granting the City's motion would cause unnecessarily delay, which is inconsistent with the Act's statutorily identified policy. Therefore, the City's motion is denied.

B. Meaning of the Agreement

Except in cases of historical recognition, the establishment of a collective bargaining relationship valid under the Act requires certification by the Board following the Act's representation procedures or following the Board's approval of the parties' voluntary recognition agreement. See Cnty. of Woodford, 14 PERI ¶2015; citing Chief Judge of the Circuit Court of Cook Cnty., 196 Ill. App. 3d 238 (1990); 80 Ill. Admin. Code §1210.10. The Board has a general policy of binding parties to their express agreements regarding bargaining unit inclusions and exclusions, and will certify units in accordance with those express agreements. Quincy Pub. Library, 11 PERI ¶2041 (IL SLRB 1995) (finding that it would be inappropriate, for at least a 12-month period, for the union to seek to add positions to a bargaining unit when the union and

the employer specifically agreed to exclude those positions only 10 days prior); Vill. of Bensenville, 20 PERI ¶12 (IL LRB-SP 2003); City of Carmi, 9 PERI ¶2012 (ISLRB 1993) (Board held that the employer can only move to statutorily exclude a position it previously stipulated belonged in the unit if it presents arguments that there has been a change in duties since the stipulation); Cnty. of St. Clair, 2 PERI ¶2010 (IL SLRB 1986) (Board held an employer to its stipulation after the employer filed election objections asserting that its own stipulated unit inclusions were improper). This policy is consistent with the concept, as articulated by the National Labor Relations Board, "that a party should be held to its express promise." Lexington Health Care Group, LLC, 328 NLRB 894, 895 (1999) (holding that because the union expressly agreed to refrain from organizing a particular group of employees for one year, it was precluded from doing so even though the express agreement was not contained in the parties' collective bargaining agreement); Briggs Indiana Corp., 63 NLRB 1270, 1271 (1945). The Board is not required to make a finding regarding the unit's appropriateness in order for a position to be included or excluded from the unit, because, as it did in Case L-UC-01-009, the Board will certify a bargaining unit when the parties' expressly recognize the unit's description.

The issue is what the parties intended regarding the Chief Programmer/Analyst position when they entered the Agreement. Since the City relies upon the Agreement and the Board's subsequent certification, and AFSCME did not submit or identify additional evidence for consideration, the Agreement is the only evidence of the parties' intent.

Upon initial inspection, the Agreement's operative paragraph 4 appears to reflect an intention to exclude the positions identified in Appendix A from the Contract, not the bargaining unit. However, a bargaining unit's composition is controlled by the Board's certification of the unit, not the positions recognized as included in a collective bargaining agreement. See Chief Judge

of 13th Judicial Circuit, 15 PERI ¶2006 (IL SLRB 1996) (employees in a particular position were not included in the bargaining unit and therefore excluded voting in a unit election because the parties had previously agreed to add the position to the bargaining unit and included the position in its collective bargaining agreement, but did not seek to have the position certified into the bargaining unit by the Board and only positions certified by the Board were included in the unit). Accordingly, whether the parties agreed to include or exclude certain positions from the Contract is not dispositive that those positions are excluded from the bargaining unit. However, the Agreement elsewhere identifies that in paragraph 4 the parties agreed to exclude the positions from "AFSCME's bargaining unit." Thus, the term "Contract" refers to both the parties' collective bargaining agreement and AFSCME's bargaining Unit #4. Therefore, upon review of the Agreement as a whole, it appears that the parties intended to exclude the Appendix A positions from the bargaining unit. For this reason, and because AFSCME does not argue otherwise, and the Board certified the bargaining unit based upon the Agreement, I find that the parties agreed to exclude the Chief Programmer/Analyst position from the bargaining unit.

The parties' interpretations differ as to whether the Agreement indefinitely precludes AFSCME from seeking to add the Chief Programmer/Analyst position to the unit. The City argues that the clear terms of the Agreement provide that AFSCME waived its organizational rights concerning the Chief Programmer/Analyst position. AFSCME argues that without identifying either a reason for the exclusion or a duration that the position is excluded from the unit, the Agreement does not preclude the instant petition.

The Board and the NLRB precedent provide that "[i]t is well settled that a general exclusionary clause, one which does not identify the reason for excluding certain employees, is *not* sufficient to preclude a union from seeking to organize the excluded employees." Quincy

Pub. Library, 11 PERI ¶2041; citing Peabody Coal Co. v. NLRB, 725 F. 2d 357, 362 (6th Cir. 1984) overruled on other grounds by Holly Farms Corp. v. NLRB, 517 U.S. 392, (1996); Peabody Coal Co. v. NLRB, 709 F. 2d 567 (9th Cir. 1983); Walt Disney World Co., 215 NLRB 421 (1974). An exclusionary clause, which identifies the employees outside the bargaining unit, which resulted from an agreement to exclude specific positions from the bargaining unit, does not constitute a union's waiver of its organizational rights with respect to those positions. Quincy Pub. Library, 11 PERI ¶2041. Rather, for such a general exclusion to operate as a waiver of its organizational rights there must also be a promise by the union to refrain from ever attempting to organize the employees. Id.; Lexington Health Care Group, LLC, 328 NLRB at 895 (reaffirming its waiver requirement but clarifying that it does not need to be limited to the parties collective bargaining agreement to be effective); Peabody Coal Co. v. NLRB, 725 F. 2d at 362; Cessna Aircraft Co., 123 NLRB 855 (1959) (holding that that it would only find waiver if the union expressly promised to refrain from seeking to represent particular employment positions and that an exclusion provision in the parties collective bargaining agreement did not constitute such a waiver) Briggs-Indiana, 63 NLRB 1270.

Although, the Board has found that a partial waiver is inherent in the parties' agreement to exclude particular employees via a general exclusionary clause, when, in return for the petitioner agreeing to abandon its request for the particular employees, the employer forfeits its right to a hearing and voluntarily recognizes the petitioner as the representative of the petition's remaining employees. See Quincy, 11 PERI ¶2041. Under those circumstances, the union does not indefinitely waive its organizational rights to these employees, rather the union waives its rights for a reasonable period, and the Board found that a reasonable duration was one year from the initial certification date. Id.

AFSCME did not seek to represent the Chief Programmer/Analyst when it filed the unit clarification petition, but it did expressly consent to exclude the position from the bargaining unit via a general exclusionary clause when it entered into the Agreement. The general exclusion is not a waiver of AFSCME's organizational rights. Thus, contrary to the City's contention, AFSCME is not indefinitely barred from seeking to add the Chief Programmer/Analyst to the existing unit. In order for AFSCME to fulfill its bargain with the City regarding the positions excluded in Appendix A, it must refrain from seeking to add those positions to the bargaining unit for a reasonable duration after it entered into the Agreement. Given that the parties entered into the Agreement fifteen years ago, and AFSCME only now seeks to add the Chief Programmer/Analyst to the unit, I find that it has long since fulfilled its bargain with the City regarding the Appendix A positions. Therefore, the Agreement does not preclude it from now seeking to add the Chief Programmer/Analyst position to bargaining Unit #4.

## IV. CONCLUSIONS OF LAW

1) The Employer's objections regarding the supervisory status of positions held by Charles Spenser and Ulo Ormiste do not affect AFSCME's majority status.

2) Holding the petition in abeyance pending the issuance of Recommended Decisions and Orders in two separate cases is inconsistent with Board policy.

3) The Agreement does not preclude the instant petition.

## V. RECOMMENDED ORDER

Unless this Recommended Decision and Order Directing Certification is rejected or modified by the Board, the American Federation of State, County, and Municipal Employees, Council 31 shall be certified as the exclusive representative of all the employees in the unit set forth below:

**Chief Programmer/Analyst** to be INCLUDED in the existing Bargaining Unit #4.

The following positions are disputed and therefore, EXCLUDED under Section 1210.100(b)(7)(B) of the Board's Rules and Regulations, 80 Ill. Admin. Code §§1200-1300):

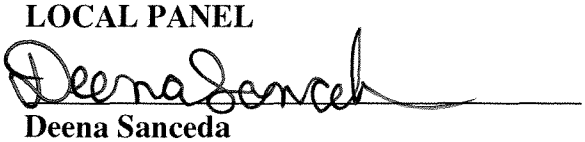
**positions currently held by Charles Spenser and Ulo Ormiste**.

## VI. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules and Regulations, the parties may file exceptions no later than 14 days after service of this recommendation. Parties may file responses to any 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 Nelson, General Counsel of the Illinois Labor Relation 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 at Chicago, Illinois, this 19th day of February, 2016**

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



**Deena Sanceda**
**Administrative Law Judge**