

meaning of Section 3(j) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010) as amended (Act).²

The Employer filed timely exceptions to the RDO pursuant to Section 1200.135 of the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code Parts 1200 through 1240, and the Respondent filed a timely response. After reviewing the record, briefs, exceptions, and response, we adopt the ALJ's findings of fact and recommended decision for the reasons articulated in the recommended decision. We find the Employer's exceptions without merit for the reasons which follow.

Illinois courts have consistently recognized that to be a manager within the meaning of Section 3(j) of the Act, an employee must meet two criteria: 1) she must be engaged predominantly in executive and management functions; and 2) she must be charged with the responsibility of directing the effectuation of management policies and procedures. Dep't of Cent. Mgmt. Serv./Ill. Commerce Comm'n v. Ill. Labor Relations Bd., 406 Ill. App. 3d 766, 774-75 (4th Dist. 2010) (ICC); Vill. of Elk Grove Vill. v. Ill. State Labor Relations Bd., 245 Ill. App. 3d 109, 121 (2d Dist. 1993); City of Evanston v. Ill. State Labor Relations Bd., 227 Ill. App. 3d 955, 974 (1st Dist. 1992). The ALJ found Bradshaw met neither criterion, and we agree. The Employer criticizes the ALJ for applying what it terms "old" law, yet we find he analyzed this case by applying the most applicable recent judicial decisions, most notably ICC, 406 Ill. App. 3d 766, and Dep't of Cent. Mgmt. Serv./Human Rights Comm'n v. Ill. Labor Relations Bd., 406 Ill. App. 3d 310 (4th Dist. 2010) (HRC), both of which address the managerial status of administrative law judges and both of which were issued the same day the Appellate Court

² Pursuant to Section 3(j):

"Managerial employee" means an individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices.

remanded this case to us for further consideration of whether administrative law judge Bradford was a managerial employee. The Employer cites nothing that indicates any authority relied on by the ALJ has been overturned, and we find he has referenced no cases that are no longer authoritative.

More specifically, the Employer argues the ALJ improperly focused on whether, by submitting recommended decisions to her superiors for potential approval by the Secretary of DHS, Bradshaw set or effectuated policy. It references a recent judicial decision explaining that it is not essential for an employee to formulate policy in order to be considered a managerial employee. But the ALJ recognized this, citing ICC for the same proposition offered by the Employer, RDO at 8 n.7, and further noting that employees may be deemed managerial if, instead of formulating policy, they perform other types of activities that broadly impact the employer's operations such as preparing the budget or assuring effective and efficient operations. RDO at 8 (citing, among other authority, Dep't of Cent. Mgmt. Serv./Dep't of Healthcare & Family Serv. v. Ill. Labor Relations Bd., 388 Ill. App. 3d 319, 330 (4th Dist. 2009) (DH&FS)). The ALJ primarily discusses Bradshaw's potential for formulating policy because that was the only sort of managerial activity the Employer had suggested to him. Similarly, Employer refers us to no type of activity performed by Bradshaw which has the potential to be deemed managerial other than making policy. For the reasons articulated by the ALJ, we too find Bradshaw is not engaged predominantly in executive and management functions.

With respect to the second criterion listed in Section 3(j) of the Act—whether the employee is “charged with the responsibility of directing the effectuation of management policies and practices”—the Employer claims the ALJ “invented” a requirement that an employee must determine “the specific methods and means of how services would be provided.”

In fact, that wording has been applied by the Board since its second year of existence, and its use has been approved by reviewing courts since 1992. City of Evanston, 227 Ill. App. 3d at 975 (citing State of Ill., Dep't of Cent. Mgmt. Serv. & Public Aid, 2 PERI ¶2019 (IL SLRB 1986)). It was repeated in ICC in 2010, 406 Ill. App. 3d at 775.

The Employer interprets this long-recognized standard as an absurd requirement that, to be a manager, Bradshaw must, for example, not only determine *whether* a party's name should be placed on the Healthcare Worker Registry, but personally write that name into the registry. That is a misinterpretation of the requirement. The case law does not require that a manager personally provide the particular service of the employer, but rather that she determine the means by which the employer will provide the service. Under the Employer's hypothetical, Bradshaw's performance of the ministerial task of writing the name into the registry would not make her a manager, but whoever made the decision that administrative law judges like Bradshaw should perform that ministerial task might be a manager. Correctly interpreted, we find no error in the ALJ's application of the well-established requirement that a manager must be the type of person who determines the specific methods and means of how services will be provided.

With respect to the traditional test for managerial status derived directly from the statutory definition in Section 3(j),³ the Employer finally notes that Bradshaw's recommended decisions are very rarely rejected by the Secretary of DHS, and that courts have found that "an advisory employee who makes 'effective recommendations' can be managerial." That is true, as recognized by the ALJ, RDO at 13 (citing ICC, 406 Ill. App. 3d at 775), but not all effective recommendations are managerial in nature, and the types of recommendations Bradshaw makes, regardless of whether they are effective, cannot make her a manager within the meaning of

³ In DH&FS, 388 Ill. App. 3d 319, the Appellate Court, Fourth District described the two tests for determining managerial status, and labeled one the "traditional test" and the other the "alternative test."

Section 3(j). She merely applies specific facts presented to her to legal standards developed by others for the various programs administered by DHS. Her recommended decisions, even if approved by the Secretary, are not generally available to the public and are never cited back to her as binding precedent, so even to the extent she might “nudge” the law in a particular direction within the pre-established set of standards, that nudge does not effectively alter those standards.

Moreover, the evidence of record reveals that, while the Secretary only rarely outright rejects a recommendation presented to her that originated with Bradshaw, between Bradshaw and the Secretary are layers of intermediate supervisors who review Bradshaw’s drafts and can edit and even alter their substance before they reach the desk of the Secretary. Under these circumstances, the rate of rejection by the Secretary is, alone, insufficient to establish that Bradshaw effectively controls the outcome of the cases before her, ICC, 406 Ill. App. 3d at 775-76 (considering employee’s decisive influence); Dep’t of Cent. Mgmt. Serv. (Env’tl Protection Agency), 26 PERI ¶155 (IL LRB 2011) (considering employee’s control), much less controls some broader managerial tasks through case determinations. Since it is the party seeking to exclude individuals from the protections of the Act that bears the burden of proof, County of Cook v. Ill. Labor Relations Bd., 369 Ill. App. 3d 112, 123 (1st Dist. 2006), we are compelled under the evidence presented to find Bradshaw is not a managerial employee within the meaning of Section 3(j).

Contingent upon our rejection of its arguments under the traditional, statutory test for managerial status, the Employer offers an argument that Bradshaw is managerial as a matter of law under the judicially created alternative test as recently applied in HRC, 406 Ill. App. 3d 310. The ALJ properly recognized that in applying this alternative analysis, courts have typically

relied on three factors: 1) close identification of an office holder with the actions of his subordinates; 2) unity of their professional interests; and 3) power of the assistants to act on behalf of the office holder. Chief Judge of the 16th Judicial Circuit v. Ill. Labor Relations Bd., 178 Ill. 2d 333, 344 (1997). The Employer claims that all three factors are currently present, but a comparison with the most recent application of the analysis in HRC shows this clearly is not the case. The court found administrative law judges at the Human Rights Commission were managerial as a matter of law because the Human Rights Act provided that certain of their decisions were incapable of being reviewed by the Human Rights Commission and consequently the administrative law judges had the power to act on behalf of the Human Rights Commission. HRC, 406 Ill. App. 3d at 316. That is the opposite of the present situation where Bradshaw is incapable of issuing a decision without review by layers of superiors and she never functions as a surrogate for the Secretary issuing a decision in her place. Under the alternative test, we are again compelled to find that Bradshaw is not a managerial employee.⁴

Finally, the Employer presents one additional argument broader than either the statutory or the alternative analyses. It suggests Bradshaw must be excluded from the RC-10 bargaining unit to eliminate the potential that her loyalties may be divided if confronted with the question whether to place a fellow union member on the Health Care Worker Registry and by doing so precluding him from his past employment. See 20 ILCS 1705/7.3 (2010). We note that all employees owe a duty to their employer, and consequently all employees who are members of

⁴ In so finding we are not suggesting that Bradshaw's decisions are unimportant. They are necessary to properly administer the various programs entrusted to the DHS. To say, as the Employer does, that they are "core" functions of DHS is, however, an exaggeration and certainly so in the context of the alternative analysis. Unlike the Human Rights Commission at issue in HRC, DHS is not at its core an adjudicative agency, but an administrative, funding, and regulatory agency with adjudicative duties ancillary to those core tasks. Consequently, Bradshaw's role in the adjudicative process does not create the same sort of identity or unity with the Secretary that the administrative law judges at the Human Rights Commission did with the Human Rights Commission.

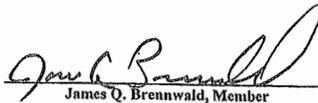
collective bargaining units have the potential to have their loyalties divided between their employer and their fellow workers. The General Assembly recognized that such a division of loyalties could not be tolerated in certain categories of employees, and for that reason excluded defined groups of employees, including managerial employees, from Section 3(n)'s definition of a public employee and thus from the protections of the Act. But Section 6 of the Act expressly provides the protections to the Act to all other public employees not expressly excluded, and consequently we cannot use the broad concern about divided loyalties to exclude a broader range of employees than the range found appropriate by the General Assembly.

Because the Employer has failed to demonstrate that Susan Bradshaw is a managerial employee under either the traditional or the alternative tests for that term, we conclude that she is not a managerial employee and that her public service administrator option 8L position should be added to the RC-10 bargaining unit.

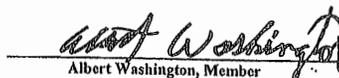
BY THE ILLINOIS LABOR RELATIONS BOARD, STATE PANEL


Jacalyne J. Zimmerman, Chairman


Paul S. Besson, Member


James Q. Brennwald, Member


Michael G. Coli, Member


Albert Washington, Member

Decision made at the State Panel's public meeting in Chicago, Illinois, on February 7, 2012; written decision issued at Chicago, Illinois, February 23, 2012.