STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

American Federation of State, County and Municipal Employees, Council 31,	)	
Petitioner	)	
and	)	Case No. S-RC-09-202
State of Illinois, Department of Central Management Services (Illinois Commerce Commission),	)	
Employer	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD STATE PANEL

On July 2, 2012, Administrative Law Judge (ALJ) Anna Hamburg-Gal issued a Recommended Decision and Order (RDO), recommending that the Illinois Labor Relations Board, State Panel, find that employees of the State of Illinois, Department of Central Management Services (Employer) in the job title Technical Advisor IV who work at the Illinois Commerce Commission (ICC) are not managerial employees within the meaning of Section 3(j) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010), and add their positions to the existing RC-10 collective bargaining unit represented by the American Federation of State, County and Municipal Employees, Council 31 (Petitioner).[1]

The Employer filed timely exceptions to the RDO pursuant to Section 1200.135 of the Board's Rules and Regulations, 80 Ill. Admin. Code. § 1200.135. The Petitioner filed a response

[1]We have previously ruled on this case. On December 30, 2010, ALJ Eileen L. Bell issued an RDO, recommending we find that the employees at issue were not managerial employees within the meaning of Section 3(j) and that their positions be added to the existing RC-10 collective bargaining unit. In fact, she found the Employer had failed to raise an issue of fact or law warranting an oral hearing on the matter. We found such issues had been raised, and remanded for the evidentiary hearing which led to ALJ Hamburg-Gal's RDO presently before us.

and cross-exceptions to two of the factual findings the ALJ made prior to reaching her conclusions. The Employer did not respond to the cross-exceptions. After reviewing the record, briefs, and exceptions, we accept the ALJ's recommendation with respect to one employee, but reject it with respect to three others.

Issues Presented

At issue is whether four technical advisor IVs, Richard Favoriti in the ICC's Advisory Section, James Weging in the Solicitor Section, John Feeley in the Trial Section and Christine Ericson in the Federal and External Issues Section, are managerial employees. The exceptions focus on the traditional test for managerial status, and abandon an earlier asserted managerial-as-a-matter-of-law theory.[2] The cross-exceptions question the ALJ's finding that (though she concludes he is not a managerial employee) Favoriti performs some management functions by (1) recommending rules to the Commission which are adopted unchanged and (2) authoring staff reports recommending the initiation of formal citation proceedings and drafting initiating orders.

The ALJ's Recommendation

There are two Appellate Court decisions of particular relevance to this case. The first is the Illinois Appellate Court, Fourth District's 2010 decision in Dep't of Cent. Mgmt. Servs./Ill. Commerce Comm'n v. Ill. Labor Relations Bd., 406 Ill. App. 3d 766 (4th Dist. 2010) (ICC), addressing managerial status in the context of administrative law judges at the ICC. The second is the same court's 2009 decision in Dep't of Cent. Mgmt. Servs/Dep't of Healthcare & Family Servs. v. Ill. Labor Relations Bd., 388 Ill. App. 3d 319 (4th Dist. 2009) (DHFS), in the context of attorneys who represent an agency in internal hearings before administrative law judges. After summarizing the test for managerial status as most recently articulated in ICC, ALJ Hamburg-

[2] The Employer's exceptions claim error in failing to find managerial status under either test, but its supporting brief focuses solely on the traditional test for managerial status.

Gal applied that test to the four attorneys at issue, each of whom has a superior technical advisor V, and each of whom performs a distinct set of duties. She found none were managers.

The ALJ found Richard Favoriti in the ICC's Advisory Section, does engage in executive and management functions when he effectively recommends that the Commission adopt his rules and initiate citation proceedings, but that he is not managerial because he does not predominantly perform these functions. She found other of his duties did not constitute engagement in executive and management functions: answering questions from utilities, outside attorneys, or Commission attorneys and staff and acting as an assistant to commissioners.

Citing to DHFS, she found that James Weging's primary function of defending the ICC's orders in court on appeal exemplifies the exercise of professional discretion and legal analysis typical of tasks performed by attorneys in the course of litigation and thus were not managerial or executive in nature. Similarly, she found John Feeley's duties of representing ICC staff in administrative hearings that are conducted within the ICC are purely legal and not managerial or executive.

Finally, the ALJ found that Christine Ericson in the Federal and External Issues Section did not predominantly perform executive and management functions, nor effectuate Commission policy. There was no indication Ericson's role of "flagging" matters for consideration by others within the ICC's Federal Energy Policy (FEP) group involved her recommending particular action, or that such recommendations were routinely followed, or that they would broadly affect ICC's policies and goals. Her effective recommendations concerning filings in cases pending before the Federal Energy Regulatory Commission (FERC) did not effectuate management policies or constitute the primary means by which the ICC fulfills its mission, nor did her participation in work groups by flagging issues or giving advice to individual commissioners

who sit on multi-state boards because flagging issues is insufficient and her advice too infrequent and insufficiently broad to constitute managerial authority. The evidence did not support finding that Ericson's advice given the ICC as a body was effective. Finally, the ALJ found Ericson's review of legislation was necessarily infrequent and therefore not a predominant function.

Employer's Exceptions

In the brief in support of its exceptions, the Employer states that it is the traditional test for managerial status that applies, not the managerial-as-a-matter-of-law analysis it had earlier suggested as an alternative. It states Favoriti engages in management functions when he prepares comments on pending legislation, drafts regulatory rules, offers his legal opinion regarding the effectiveness of legislative matters and their impact on the ICC, and when he initiates citation proceedings by assuring the legal sufficiency of that action.

The Employer states Weging engages in management functions when he represents the ICC on appeal, and when he provided recommendations on a pending rate case. It claims he is "determining the specific methods or means of how the employer's services will be provided" by determining what position the Commission will take on a case. With respect to the ALJ's citation to the Appellate Court's decision in DHFS, the Employer states Weging performs some tasks not referenced by the court in that case: he handles subpoena requests and initiated a guideline procedure to get a utility owner out of business. Furthermore, the court had indicated the case for managerial status was weakened where an attorney's work product was reviewed by superiors, and Weging's supervisor performs only minimal review. In any event, the Employer argues, the court rejected the notion that an employee must operate independently to be viewed managerial.

The Employer similarly stresses the scant review given Feeley's litigation work, and also states Feeley performs other tasks not typically performed by any attorney in that he drafts rule language, participates in bill reviews, researches statutory compliance issues, and drafts legal opinions. It argues that, because the ICC's ultimate rulings are precedential, the role Feeley plays during the course of litigation before the ICC impacts the ICC's goals and policy objectives.

The Employer points out that Ericson is the only attorney who deals with FERC. She monitors FERC matters, advises how they will impact ICC operations, and recommends how ICC should proceed. She participates in working groups of multi-state organizations, and flags issues of interest to the ICC so that it can determine whether to take a position. If the ICC determines to litigate, she advises how to proceed. The Employer criticizes the ALJ's use of the court's ICC decision as support for finding that Ericson cannot be managerial because her recommendations do not constitute the primary or exclusive means by which the ICC fulfills its mission of regulating utilities. It states the ALJ errs by finding Ericson's role too narrow in scope to constitute effective recommendations on major policy issues. It argues the court's ICC decision does not require that the employee must effectuate policy on a broad scale in order to be managerial.

Petitioner's Cross-Exceptions

In addition to filing a response to the Employer's exceptions, the Petitioner filed cross-exceptions. While not disagreeing with the ALJ's conclusion that Favoriti is not a managerial employee, the Petitioner does except to her finding that he does perform some managerial functions. It argues that Favoriti's drafting of rules did not constitute a managerial function, describing his role as receiving a policy initiative from others, and expressing it in the pre-

determined format of a rule proposal. It notes Favoriti did not advocate before the Commission for adoption of the rule, and did not know if it had been adopted. Similarly, the Petitioner argues that Favoriti's role in initiating citation proceedings does not constitute performance of managerial functions. Again, it describes his role as taking information supplied by others and placing into the proper, pre-determined format. In both instances, Petitioner suggests Favoriti is merely using his technical legal knowledge and professional skills as an attorney.

Analysis and Determination

This case once again presents the issue of the nature of attorney work: are attorneys merely disinterested hired professionals and technicians, or in their capacity as legal advisors do they become so involved in the management of their client/employer's operations that they are the equivalent of managerial employees? The facts show four attorneys with very different types of involvement, warranting different results.

1. John Feeley

As an attorney in the Trial Section, John Feeley essentially represents ICC staff in hearings held before ICC ALJs prior to the ALJs' formulation of recommendations that may be adopted by the ICC and which may then constitute the end product of the ICC's process by which it regulates utilities or other entities and subject matters. While a professional exercising the skills necessary in trial advocacy, Feeley is a cog in the internal machinery rather than a representative of the ICC as an entire entity, and he is a couple of layers removed from the point at which it can be said that the ICC is formulating or at least effectuating policy. His role is very similar to that of the attorneys at issue in DHFS who represented that agency "in internal hearings before administrative law judges," and who were not managerial employees. As the court stated, the tasks they perform "[m]ostly ... are the tasks that any attorney would perform in

the course of litigation." 388 Ill. App. 3d at 332. It found the status of a managerial employee requires more than the exercise of such professional discretion and technical expertise, and that the Board could reasonably conclude these hearing attorneys were not managerial employees. Id.

Feeley's non-litigation tasks listed by the Employer are not qualitatively different. The Employer states he drafts rules, reviews pending bills, performs compliance reviews, drafts legal opinions and advises regarding statutory interpretation. He also drafted a stipulation, and composed a draft order. The court in DHFS listed similar tasks as indicative of typical attorney work, insufficient to demonstrate managerial status:

> In addition, the petitioned-for employees may draft rules and legislation[,] work with the Attorney General's office preparing cases when [the agency] is the plaintiff in a civil action[,] work with state and federal prosecutors in preparing criminal cases against providers[,] prepare exceptions to [a]dministrative [l]aw [j]udges' recommended decisions, and prepare [d]ecision [m]emos to authorize settlements.

The ALJ found Feeley's position fails to meet either element of a managerial employee, and we agree. His main function is not executive or managerial and, because the very purpose of the administrative hearings at which he appears is to decide between what staff proposes and another course of action, he cannot be said to effectively recommend the means by which policy is effectuated. Such a finding would suggest the hearings are more dressing than substantive, and there is no evidence in support of such an assumption. As with the attorneys in DHFS, Feeley is not a managerial employee.

2. James Weging

James Weging, too, performs traditional attorney functions, but from a different perspective. If Feeley was a cog within the ICC machinery, Weging represents the machine as a

whole, or the product of the machine. He does so in two categories of cases, with different implications for purported managerial capacity. First, he spends the majority of his time representing the ICC in judicial review of ICC determinations. In that capacity, an attorney's role is to defend the agency's decision, not to alter or help derive the agency's rationale. In this role, he does not meet the first element of managerial status because he does nothing "amount[ing] to the running of an agency or department, such as by establishing policies and procedures, preparing the budget, or otherwise assuring that the agency or department operates effectively." He does not meet the second element because he does not "oversee[] or coordinate[] policy implementation through development of means and methods of achieving policy objectives, determine[] the extent which the objectives will be achieved, and is [not] empowered with a substantial amount of discretion to determine how policies will be effected."

However, Weging also defends and otherwise represents the ICC in state and federal court outside the context of administrative review, including in original actions to enforce Commission orders. This creates more opportunity for an attorney's litigation advice to spill over into advice that concerns changing the way the agency operates, or even its policy objectives. For example, the evidence shows one instance where Weging convinced the ICC to seek a supervisory order from the Illinois Supreme Court in an attempt to sort out which district of the Illinois Appellate Court should retain venue to review an ICC order, a strategic move with potential to impact parties' ability to forum shop when seeking court review of ICC decisions and thus with potential to have a broad impact on the ICC and its operations. The Employer cites a 2005 Board decision for the proposition that "determining what position the Commission will take on a case, and how the argument will be presented in court" is "determining the specific methods or means of how the employer's services will be provided." Dep't of Cent. Mgmt.

Servs., 21 PERI ¶205 (IL LRB-SP 2005).[3] Application of that precedent suggests Weging is engaged in managerial functions.

Otherwise, Weging gives legal advice to the Commission and staff, and drafts and reviews documents. This was found insufficient in the DHFS case. In its exceptions, the Employer adds that Weging also handles subpoena requests for the ICC, but we find this, too, is common attorney work, not indicative of managerial status. However, the Employer also points to Weging's work in advising how to revoke a particular utility's Certificate of Public Necessity and Convenience (necessary for a utility to stay in business as a utility), and in doing so in establishing a guideline for that particular task. This seems qualitatively different, and again more in the nature of managerial work.

While we consider this a very close matter, we believe that Weging's activities in representing the ICC outside the context of administrative review and in developing litigation strategy renders him a managerial employee.

---

[3] In an RDO adopted by the Board in that 2005 decision, the ALJ stated:

> AFSMCE's argument discounts the record evidence that the attorneys utilize their independent discretion and legal analysis in performing their duties rather than a rote application of existing policy and procedure. Even given that the attorneys are engaged in executive and management functions in the development of Department policy and procedure through the drafting of legislation, rules, opinion letters and recommended decisions, their role in this regard does not satisfy the first part of Section 3(r) [sic, read 3(j)]. This is because in performing these functions the attorneys do not exercise "final responsibility and independent authority to establish and effectuate policy". Rather, the attorney's drafts or reviews are subject to the review and approval of their superiors who have made substantial changes to both the form and substance of the attorneys' work product.

We note that, in determining the employee at issue was not managerial, the ALJ relied upon the need for final responsibility and fully independent authority, grounds more recently found inappropriate by the Appellate Court. See Dep't of Cent. Mgmt. Servs. v. Ill. Labor Relations Bd., 2011 IL App (4th) 090966 ¶135; ICC, 406 Ill. App. 3d at 775.

3. Richard Favoriti

Unlike Feeley and Weging, and unlike the attorneys in DHFS, Richard Favoriti is not a litigator. He is an attorney employed in the ICC's Advisory Section which functions as ICC's in-house counsel. According to the ALJ's summary of his job description and testimony, he

> researches and drafts legislation, analyzes proposed legislation, and advises the ICC on legislative initiatives; he plans and conducts extensive and complex research to determine statutory compliance by applying legal methods and procedures with reference to the legal implications involved; he confers and advises ICC staff on complex issues of statutory interpretation and compliance; he also performs other duties, special projects or research, as required or assigned which are reasonably within the scope of duties enumerated within his job description. In addition, Favoriti has special expertise in pipeline safety and accordingly handles related matters.

Looking more in depth at Favoriti's work, the ALJ noted that, on one occasion, he served as an assistant to the Commission, drafting legal advice relating to several questions. Also when staff wishes to initiate a citation proceeding, Favoriti not only drafts the initiation order contemplated to be placed before the Commission, but also helps draft the report supporting that recommendation. Favoriti has also helped draft proposed rules, and helped draft proposed amendments to legislation as a consequence of the legal advice he gave in response to a question regarding disclosure. As did the ALJ, we find these tasks to be executive and management functions and consequently reject Petitioner's cross-exceptions.

In addition to these tasks, Favoriti answers legal questions submitted from staff, staff counsel, and even outside utilities. Some of his advice within the agency concerns the means or the extent to which the agency will fulfill its tasks. One notable instance involves legal advice concerning the most fundamental of managerial questions: "who's the boss?" When asked to review whether the ICC would be obligated to follow the Governor's executive order imposing furlough days, Favoriti observed that the ICC was created by the Illinois Constitution, and was

not an entity created by or under the authority of the Governor. Thus, he found the ICC was not subject to the Governor's directive. After receiving this advice, the Commission determined not to follow the executive order and did not impose furlough days. Favoriti's involvement in resolving this issue is clearly indicative of managerial status because it broadly concerns how the agency will be run and concerns the means the agency will use to achieve its mandate. He clearly did not have final authority in the matter, but that is unnecessary. Dep't of Cent. Mgmt. Servs., 2011 IL App (4th) 090966 at ¶135; ICC, 406 Ill. App. 3d at 775. In sum, we find the evidence sufficiently establishes that Favoriti is a managerial employee.[4]

4. Christine Ericson

Unlike Favoriti, Christine Ericson's role is not primarily internal, but relates to interaction between the ICC and outside entities, including federal agencies with authority to impose restrictions on the ICC like the Federal Energy Regulatory Commission and the Federal Communications Commission. Part of her tasks are as a litigator in that, like Weging, she represents the ICC in federal or State courts on complex appeals. There is no indication this is primarily in the context of administrative review by courts of ICC decisions. She also advises staff on statutory interpretation and matters of compliance, and part of her legal advice relates to fashioning comments the ICC may file before the FERC and FCC.

Ericson's main task, according to the ALJ, is to represent the ICC in matters pending before the FERC, and to advise the FEP—the group within ICC which handles policy matters on

[4] We do not find that Favoriti's role in reviewing pending legislation indicative of managerial status. Matt Harvey, a technical advisor V in another section, testified that agency decisions on whether to support or oppose pending legislation are made at the very highest levels within the ICC's substantive departments, and that for 90 percent of the legislation, the bill review initiates within those departments, which receive input from those like Favoriti in the Advisory Section, and then is finalized within those departments. Even with respect to the less than 10 percent of the bill reviews that are lead by the Advisory Section, the essential task involves using one's legal abilities and providing information to decision makers; at least there is here insufficient evidence to suggest a more direct role sufficient to meet the definitional standard for these tasks.

federal energy issues. The FEP, in turn, advises the Commission which must ultimately make the determination whether to intervene in FERC proceedings (proceedings, for example, initiated by consumers against an Illinois utility) where it finds the case is important or may impact Illinois. If it decides to do so, Ericson drafts the necessary documents and takes the necessary steps. FEP staff monitors and flags FERC matters for the ICC's attention, and Ericson does so with respect to legal issues. Similarly, FEP staff advises the ICC at bench sessions, and Ericson does so with respect to legal issues. Ericson does not, however, alter FEP staff's substantive positions.

Ericson also has duties with respect to the ICC's participation in multi-state agencies which oversee the interstate electric grid. Again, she flags issues for FEP's attention. Moreover, one ICC commissioner sits on each of the two agencies which cover parts of the State of Illinois, and Ericson not only works with them but is a member of the multi-state agency working groups. While Ericson does not represent the ICC as a whole, she generally represents the interest of the ICC in the work group. Ericson is also the state government representative on the North American Electric Reliability Corporation, which addresses the reliability of the electrical transmission grid. She also monitors the activities of other external organizations which develop energy policies, and her travel in this capacity is reimbursed when it is deemed critical to the ICC's needs.

Ericson provides legal advice to the ICC and its staff on matters related to these multi-state agencies. She makes recommendations regarding some of these issues, some of which have been followed, while others have not. She also advises individual commissioners regarding matters not docketed before the ICC but relating to the multi-state agencies, and offers advice

that is generally accepted. And Ericson reviews and analyzes proposed legislation, making an assessment as to whether it impacts Illinois and whether the ICC might want to take action.

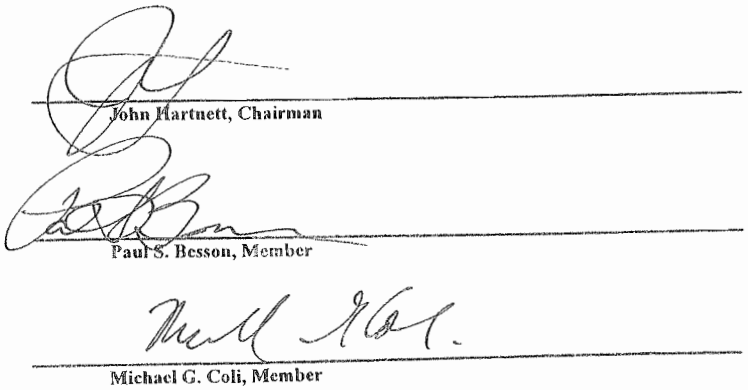
While Ericson's role in drafting documents after others have determined the ICC's course of action and other such tasks is too similar to that of the attorneys in DHFS to constitute a managerial role, her role as an advisor and gatekeeper with respect to those areas in which the ICC chooses to become involved in arenas outside the State and outside its role as regulator—either to protect its role as a regulator or to protect other interests it deems vital to the State of Illinois, its residents, or its business community—are indicative of managerial status. Where the ICC chooses to become involved in these arenas, the matter almost certainly involves executive and management functions and the means of effectuation of management policies and practices.

The record shows Ericson's duties include making recommendations on whether to become involved in such issues. It shows the ICC or its agents have on some occasions followed her recommendation, and on other occasions have not. The record also shows that Ericson flags for the ICC's attention issues pending before these outside entities that she deems important. She, in particular, is the one who seems to be responsible for looking for matters that are important from a legal perspective. If she does *not* flag a matter that *is* important to the ICC or to the State of Illinois that is pending before FERC, or in the U.S. Supreme Court, or before a multi-state agency, it does not make the matter unimportant, but means that the ICC decision-makers will not be able to act on that important matter. While her recommendations regarding what action to take are not necessarily followed, she does have power and influence on managerial decision-making sufficient to constitute managerial authority pursuant to the court's holding in ICC, 406 Ill. App. 3d at 776-77, and we find her to be a managerial employee.

Summary

We find that James Weging, Richard Favoriti, and Christine Ericson are managerial employees within the meaning of Section 3(j) and that their positions should not be added to the RC-10 bargaining unit. In contrast, we find that John Feeley is not a managerial employee, and affirm that part of the ALJ's recommendation that adds his position to the RC-10 unit.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD



John Hartnett, Chairman

Paul S. Besson, Member

Michael G. Coli, Member

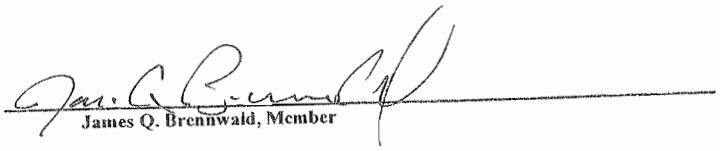
Member Brennwald, concurring in part and dissenting in part:

I join in the majority's conclusion that Feeley is a public employee, but respectfully dissent from that portion of the majority's decision that concludes that Weging, Favoriti and Ericson are "managerial employees" within the meaning of Section 3(j) of the Act. Under Section 3(j), an employee will be excluded from collective bargaining only if the employee is both predominantly engaged in executive and management functions, and charged with the responsibility of directing the effectuation of management policies. Based on the record evidence, it is clear that the predominant function of all four of the positions at issue is to perform the classic role of an attorney: providing legal counsel and legal representation to client decisionmakers—in this case, the members of the ICC and other ICC staff. While I do not think there is any question that, in this capacity, these attorneys play an important role in the ICC's

operations, that role is nevertheless purely advisory and subordinate. Instead of managing the agency—or any major component thereof—themselves, these attorneys are charged primarily with acting as the legal advisors and representatives of those who do. Unlike the ICC ALJs at issue in Department of Central Management Services/Illinois Commerce Commission v. Ill. Labor Relations Bd., 406 Ill. App. 3d 766, 943 N.E.2d 1136 (4th Dist. 2010), there is nothing in the record to suggest that Weging's, Favoriti's or Ericson's legal recommendations "almost always persuade" their superiors, in a way that would allow for an inference that, through their recommendations, they possess the authority to "establish and effectuate policy" for the agency. Id., 406 Ill. App. 3d at 777. ("[M]anagerial employees do not merely recommend policies or give advice that someone higher up is equally apt to take or leave; rather, they actually direct the governmental enterprise in a hands-on way." Id., 406 Ill. App. 3d at 775.) Nor do the facts of this case approximate the "most unique" factual circumstances present in Salaried Employees of North America (SENA) and AFSCME v. Ill. Local Labor Relations Bd., 202 Ill. App. 3d 1013, 1023, 560 N.E.2d 926 (1st Dist. 1990).

In my view, there would be compelling policy reasons to support the creation of a specific exclusion from collective bargaining for in-house counsel for public agencies, given the unique ethical obligations binding attorney and client, and the particular relevance in that context of the concern for avoiding divided loyalties in collective bargaining unit representation. However, and more importantly, it is clear that the State legislature has not chosen to enact legislation carving out any such *per se* exclusion—either for public sector attorneys in general, or for in-house counsel in particular. It is well settled that, as with any other position, before an attorney position can be excluded, it must satisfy all of the elements of one or more of the specific exclusions that are set out in the Act. Chief Judge of the Sixteenth Judicial Circuit v. Ill.

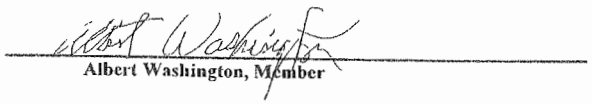
State Labor Relations Bd., 178 Ill. 2d 333, 347; 687 N.E.2d 795 (1997); Office of the Cook County State's Attorney v. Ill. Local Labor Relations Bd., 166 Ill. 2d 296, 305; 652 N.E.2d 301 (1995); Department of Central Management Services/Department of State Police v. Ill. Labor Relations Bd., 2012 IL App (4th) 110356, __ N.E.2d __; Department of Central Management Services/Department of Healthcare and Family Services v. Ill. Labor Relations Bd., 388 Ill. App. 3d 319, 902 N.E.2d 1122 (4th Dist. 2009). Because none of the four Technical Advisor IV positions meet the criteria for the Section 3(j) managerial exclusion, I would affirm the RDO in its entirety, and find that all of the employees at issue are "public employees" within the meaning of the Act.



James Q. Brennwald, Member

Member Washington, concurring in part and dissenting in part:

I, too, join the majority's decision concerning Feeley, but respectfully dissent from that part of the majority's decision which concludes that Weging, Favoriti and Ericson are managerial employees within the meaning of the Illinois Public Labor Relations Act. I offer no opinion regarding the potential merits of adding an exclusion to the Act for all in-house counsel, but fully agree with Member Brennwald's articulation of the reasons these three employees do not meet any statutory exclusion presently contained within the Act. I would find that Weging, Favoriti and Ericson are, like Feeley, public employees.



Albert Washington, Member

Decision made at the Board's public meeting in Chicago, Illinois on November 15, 2012; written decision issued in Chicago, Illinois on January 28, 2013.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

State of Illinois, Department of Central Management Services,	)	
Employer	)	
	)	Case No. S-RC-09-202
and	)	
American Federation of State, County and Municipal Employees, Council 31,	)	
Petitioner	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

I. Background

On June 30, 2009, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME or Union) filed a petition with the Illinois Labor Relations Board (Board) seeking to include the title technical advisor IV at the Illinois Commerce Commission (ICC) in the RC-10 bargaining unit. The State of Illinois, Department of Central Management Services (Employer) opposes the petition, asserting that the employees sought to be represented are excluded from coverage under the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2010), as amended, pursuant to the exemption for managerial employees.

In accordance with Section 9(a) of the Act, an authorized Board agent conducted an investigation and determined that there was reasonable cause to believe that a question concerning representation existed. A hearing on the matter was conducted on October 27 and 28, November 22, December 21, and February 2, 2012. Both parties elected to file post-hearing briefs.

II. Preliminary Findings

The parties stipulate and I find:

1. At all times material, the Employer has been a public employer within the meaning of Section 3(o) of the Act and the Board has jurisdiction over this matter pursuant to Section 5(a) of the Act.
2. AFSCME is a labor organization within the meaning of Section 3(i) of the Act.

III. Issues and Contentions

The issues are whether the petitioned-for employees, all of whom are attorneys, are managerial as a matter of fact within the meaning of Section 3(j) of the Act and/or whether they are managerial as a matter of law.

First, the Employer argues that the technical advisor IVs are managerial as a matter of fact because they are engaged in predominantly managerial functions and help effectuate the ICC's mission when they make effective recommendations to staff and the Commission on matters of policy. Specifically, the Employer notes that the technical advisors work directly with staff to help develop policy and offer staff and the Commission recommendations on policy-related matters which staff and the Commission regularly accept. The Employer additionally asserts that these employees are managerial as a matter of fact because their positions become the official positions of the Commission itself and because they are given autonomy and are only peripherally supervised.

Finally, the Employer argues that the technical advisor are managerial as a matter of law because they are designated as Special Assistant Attorneys General and because their legal positions become the official position of the Commission itself. Further, the Employer argues that Christine Ericson, in particular, is managerial as a matter of law because she is given significant discretion, is closely aligned with the commissioners, has a unity of professional interest with them, and is empowered to act on the commissioners' behalf.

The Union argues that none of the petitioned-for employees are managerial as a matter of fact because they neither have the authority and autonomy to establish departmental goals and means on a broad scale nor do they engage in any of the activities traditionally associated with executive or management functions. Rather, the Union notes that the technical advisor IVs simply provide legal advice.

The Union also disputes the Employer's assertion that the technical advisor IVs are managerial by virtue of their effective recommendations. Specifically, the Union asserts that the technical advisor IVs make no recommendations to the Commission and instead merely give staff legal advice or bring areas of interest to the attention of the commissioners. According to the Union, that legal advice, even if characterized in terms of recommendation, is not managerial in nature since it does not broadly affect the Commission's goals. Lastly, the Union notes that the Employer produced insufficient evidence to demonstrate that the recommendations are effective because, in many instances, the Employer did not show that the Commission followed or adopted them.

Next, the Union argues that the technical advisor IVs are not managerial employees as a matter of law because they are not surrogates to the commissioners under a statute which confers such authority and which describes their duties. Similarly, the Union asserts that the technical advisor IVs are not managerial as a matter of law by means of their designation as Special Assistant Attorneys General since there is no evidence that the technical advisors' functions are determined by the Attorney General Act, 5 ILCS 205/4 (2010), or that employees of the ICC with the Special Assistant Attorney General title are covered by that statute. Finally, the Union notes that the Employer has not presented any evidence that the technical advisors have a close identification with the Attorney General or that they may act on her behalf.

IV. Facts

The Public Utilities Act (PUA) provides that it is Illinois's policy to ensure "public utilities shall...be regulated effectively and comprehensively." 220 ILCS 5/1/102 (2010). The legislature created the Illinois Commerce Commission (ICC or Commission) to effectuate that policy and to oversee private companies that provide gas, electric, telecommunications, water, or sewage services to the public.[1] The ICC's mission is to pursue an appropriate balance between the interest of consumers and those service providers to ensure the provision of adequate, efficient, reliable, safe, and least-cost public utility services. The ICC furthers state policy concerning public utilities and achieves its mission by certifying entities that wish to provide such services, determining the manner in which those utilities operate, setting the rates they may

[1] The ICC also regulates certain aspect of transportation regulation, but the Office of the General Counsel (OGC) does not provide legal counsel to that section.

charge, ensuring the safety of gas pipelines, resolving disputes between customers and utility companies or between different utility companies, and working on policy initiatives pertaining to matters including the smart grid, electronic vehicles, retail choice for residential customers, telecom, gas, water, railroad safety, informational matters, and the efficient provision of public utility services.

1. Organizational Structure

The Commission is comprised of five members who, as a body, are charged with regulating public utilities in Illinois and who decide cases that come before them. The Commission may issue orders and formulate policy for the agency only upon a vote and by acting as a body. Each commissioner is entitled by statute to two assistants who help them in their cases.

The ICC is headed by an Executive Director, formerly Tim Anderson.[2] The Executive Director oversees six bureaus: the Bureau of Public Utilities is headed by Bureau Chief Gene Beyer; the Bureau of External Affairs, which includes the Consumer Services Section, is headed by Bureau Chief Randy Nehrt; the Bureau of Transportation is headed by Interim Bureau Chief Steve Matrischl; the Office of the General Counsel (OGC) is headed by General Counsel and Ethics Officer Mary Stephenson-Schroeder; the Administrative Law Judge section is headed by Bureau Chief Mike Wallace, the Bureau of Planning and Operations is headed by Bureau Chief Kenneth Hundrieser.[3] For purpose of this decision, the two most relevant sections of the ICC are the Bureau of Public Utilities and the OGC, addressed below.

The Bureau of Public Utilities (PUB) is comprised of the ICC staff who address technical aspects of public utility regulation. The staff includes economists, accountants, finance specialists, engineers, economists and policymakers. The PUB is split into three divisions, the Energy Division, headed by Director Harry Stoller, the Telecommunications division, headed by Director Jim Zolnierek, and the Financial Analysis Division, headed by Joy Nicdao-Cuyugan.[4] The Energy Division is again divided into six sections, the Policy Program section, the Federal

[2] Tim Anderson is no longer the Executive Director of the ICC and there is currently an acting director.
[3] The RDO addresses in depth only those sections relevant to this decision.
[4] The ICC reorganized the PUB 13 days after the hearing in this matter. The organization set forth in this RDO reflects the ICC's organization at the time of hearing, not as subsequently changed.

Energy Program, the Reliability Assessment Program, the Engineering Program, JULIE Enforcement, and the Pipeline Safety Program.

The OGC is the ICC's legal department and employs a total of 25 individuals including support staff. It is divided into four different groups, the Advisory Section, the Solicitor Section, the Trial Section and the Federal and External Issues Section. The four Technical Advisor IVs at issue in this case each practice in different sections[5]: Richard Favoriti works in the Advisory Section; James Weging works in the Solicitor Section; John Feeley works in the Trial Section; and Christine Ericson works in the Federal and External Issues Section.

While the technical advisor IVs' job descriptions are the same, in practice, they primarily perform only the tasks which reflect their assignment to their respective sections within the OGC. On occasion, a technical advisor from one section may be assigned to another section on a temporary basis or for a specific matter if a section is understaffed or if the technical advisor requests the change.[6]

1. The Advisory Section: Richard Favoriti

The Advisory Section functions as the ICC's in-house counsel. The attorneys in that section handle legislative matters for the Commission and also oversee general legal matters that are not part of a court case or part of an open docket. The Advisory Section attorneys work on bill reviews and rule-making, they testify before the legislature on bill review matters, and they may also help initiate low-level citation proceedings. In addition, they advise the Commission's staff, the bureau chiefs, OGC's general counsel, the Executive Director, commissioners' assistants, other ICC attorneys, and even the commissioners themselves on legislative and general legal matters.

Conrad Rubinkowski, technical advisor V, supervises the Advisory Section and oversees technical advisor IV, Richard Favoriti. Favoriti sometimes submits work to Rubinkowski for review. However, Rubinkowski could not recall any instances in which he was required to revise Favoriti's work or suggest changes.

---

[5] At the start of hearing, there were five technical advisors IVs at issue. However, before the close of hearing, technical advisor IV Janis Von Qualen moved out of that title.

[6] For example, Christine Ericson assisted in one appeal, although she is assigned to the Federal and External issues Section. Further, attorneys in all groups assisted in reviewing Bill 1652 on the Smart Grid.

According to Favoriti's job description and testimony, Favoriti researches and drafts legislation, analyzes proposed legislation, and advises the ICC on legislative initiatives; he plans and conducts extensive and complex research to determine statutory compliance by applying legal methods and procedures with reference to the legal implications involved; he confers and advises ICC staff on complex issues of statutory interpretation and compliance; he also performs other duties, special projects or research, as required or assigned which are reasonably within the scope of duties enumerated within his job description. In addition, Favoriti has special expertise in pipeline safety and accordingly handles related matters.

a. Duties Pertaining To Legislation

i. Bill Reviews

The OGC reviews all legislation pertaining to the regulation of public utilities. The Advisory Section performs the bill reviews for the OGC. The attorneys at OGC receive notice of new bills from the Office of Governmental Affairs Department which keeps track of all legislation that is filed. An individual from that department sends an email to certain staff members within the PUB and the attorneys in the Advisory Section alerting them of newly-filed legislation; the email identifies the legislation, requests a bill review, and indicates which department should take the lead in preparing it.

The subject matter of the bill determines which department takes the lead in bill review. For example, staff[7] in the Pipeline Safety Program take the lead in reviewing proposed or pending legislation concerning pipeline safety; staff in the Engineering Program take the lead in reviewing pending legislation concerning energy issues; Policy Program staff take the lead in reviewing pending legislation concerning economic issues; staff in the Financial Analysis Division take the lead in reviewing legislation relating to rates or finance; individuals in the consumer service section take the lead in reviewing legislation concerning consumer issues; OGC takes the lead in bill review when the legislation concerns primarily legal issues such as proposed changes to the PUA.

[7] Staff includes the bureau chiefs and the directors.

Favoriti testified that OGC takes the lead on bill review in only about 2-5% of cases and in no more than 10% of bills a year. For example, in the last legislative session, the Commission reviewed over 100 bills, but OGC took the lead only in one.[8]

When a section other than OGC takes the lead on bill review, staff develops an analysis of the bill and distributes it to members of that section for review, comment and suggestion. Matthew Harvey, supervisor of the Trial Section, testified that the decision to support, oppose or remain neutral on a bill is made at "extremely high" levels, by a manager of the financial, telecom or the energy divisions. The section's staff members then issue a report summarizing their analysis and initial opinions on policy concerns. They forward that report to the OGC where all technical advisors in the Advisory Section review the bill. When Favoriti conducts a bill review, he ascertains whether the review accurately reports the goals of the proposed legislation. Favoriti also identifies any legal concerns associated with the bill's proposed language. The Advisory Section attorneys then share their comments with each other and incorporate them in a response which OGC forwards to the division that initiated the bill review.[9] The initiating division then sends the final draft of the bill review to the Bureau of External Affairs with an email noting that the bill received input from all the relevant sections of the ICC. The Bureau of External Affairs reviews the bill review and can make changes to it. The Bureau then sends the bill review to the Commission which then reads the report and decides whether it should support, oppose, or remain neutral on the pending legislation. The Commission must approve and finalize all bill reviews.

When OGC takes the lead in bill review, Favoriti, Rubinkowski or Brian Allen, a technical advisor III in the Advisory Section, drafts the bill review. The drafter then shares it with the other members of the OGC team for review and suggestions. In cases where OGC takes the lead, Rubinkowski, not Favoriti, makes the ultimate recommendation as to whether the ICC should support, oppose, or remain neutral on the bill. Once all attorneys in the advisory section are satisfied with the bill review's contents, the bill review follows the process described above.

---

[8] Stephenson-Schroeder testified that the OGC takes the lead in about one fourth of the bill reviews. At least with respect to the most recent session, this percentage is not reflected by the actual numbers.

[9] Sometimes OGC sends the revised bill directly to the Bureau of External Affairs without first sending it back to the group that initiated the bill review. However, ideally, OGC does send the bill back to the initiating group.

ii. Answering legal questions from staff, utilities and outside attorneys

Attorneys in the Advisory Section answer questions from ICC staff, entities including utilities and other agencies, lawyers outside the ICC, and consumers. Those questions are first assigned to the OGC. Stephenson-Schroeder or Rubinkowski then forward the questions to a technical advisor of any level depending on the nature of the question and the technical advisor's skill level, availability and expertise.[10] The attorney assigned the question researches relevant statutes, regulations, and case law, analyzes the information, and provides a legal opinion responsive to the question posed. The attorneys do not seek to answer staff's questions on their own initiative. Rubinkowski testified that, "there's very few items that we think up on our own." Favoriti testified that he "does not get involved in policy."

Favoriti answers questions from staff concerning energy, gas pipeline and consumer issues. The questions address whether the law will permit staff's proposed course of action or whether such proposed course of action is feasible under the applicable statutes including the PUA or the Gas Pipeline Safety Act. Favoriti responds directly by email to the individual who made the inquiry, outlining his thoughts. He answers the questions by interpreting the statute, applicable case law, federal legislation, and the Code of Federal Regulations. Rubinkowski is not involved in Favoriti's answers and Stephenson-Schroeder does not always see Favoriti's responses.

Favoriti is not always apprised of the manner in which staff uses the information he provides. Thus, Favoriti does not always know whether staff follows his advice or whether his advice is almost always adopted. Staff members who receive the opinions offered by the Advisory Section are not obligated to accept them.

The Employer provided several examples in which Favoriti answered questions on behalf of staff, ICC attorneys, or individuals/entities outside the ICC. In the first example, Stoller contacted Favoriti advising him that the Commission sought to change reporting responsibilities within the Gas Pipeline Safety Program. He asked Favoriti whether the change was permissible under federal legislation. Favoriti undertook legal research to determine the Commission's responsibilities to the Hazardous Materials Safety Administration. Favoriti is unaware as to

[10] If the question is from staff, the staff member's supervisor may contact a technical advisor IV directly.

whether the Commission changed its responsibilities as a result of his legal research and advice or whether the reporting responsibilities remained the same.

In another example, Favoriti gave guidance to Roy Buxton in the Energy Division concerning the consequence of the Commission's failure to follow its own rules. The Commission is required by its rules to inspect meter shops operated by utilities but had no money for travel to undertake such inspections. Buxton asked Favoriti about the legal impact on the Commission if it did not perform the inspections. Favoriti answered Buxton's question by summarizing the inspection requirements and describing the consequences of staff's failure to comply with the Commission's rules, based on his legal research.[11] He also recommended that if the inspections did not take place then the Commission should document its efforts to comply by saving staff's travel requests to the inspection sites. Favoriti gave no opinion as to whether the Commission should conduct the inspections. He further testified that he did not know if his recommendations were followed.

Similarly, Favoriti responds to inquiries from the Consumer Services Division. For example, the Commission received an informal complaint from a consumer against an electrical utility in connection with a fire that occurred on the consumer's premises. The consumer inquired whether the utility was required under the statute to file a formal report with the Commission. Favoriti and a member of the Consumer Services Division, Director Peter Muntaner, worked together, looked at the applicable statute, and concluded that the utility had no such responsibility. They informed the consumer of their findings and advised the consumer of the Commission's procedures.

Likewise, Favoriti reviews executive orders at Stephenson-Schroeder's request to determine if ICC is required to follow them. Favoriti has reviewed between one and three executive orders. One or two of those concerned a furlough program. The order provided that state agencies under control of the governor were required to implement the furlough program. Stephenson-Schroeder asked Favoriti, Allen and Rubinkowski to determine whether those executive orders applied to the Illinois Commerce Commission. All three attorneys reviewed the executive order and various statutes. Based on the language of the executive order and the

[11] Favoriti copied Rubinkowski and the general counsel, among others, on his answer to the energy division to keep them apprised of the matter and to ensure that attorneys in the OGC would not give contradictory advice.

statutes, the attorneys determined that the ICC was not required to follow the order because the ICC was created by the legislature and was therefore not one of the Governor's executive agencies. Stephenson-Schroeder transmitted their advice to the Commission. The ICC chose not to follow the executive order based on the recommendation made by the Advisory Section attorneys.

Favoriti also answers inquiries from attorneys outside the ICC. For example, when the legislature amended the Public Utilities Act to allow alternative retail electric suppliers to submit applications for certification in Illinois, attorneys who represented supplier-applicants asked what their applications should include. Favoriti responded to those questions by reviewing the relevant statute and the rule that covered applications for alternative retail electric suppliers. Staff member Pat Foster also helped answer those questions.

In another example, Favoriti answered a question posed by counsel for a utility concerning the utility's duty to receive Commission approval on a change to its legal status from that of corporation to limited liability company. The utility's attorney believed that such a change did not require Commission approval under the Public Utilities Act. Favoriti researched the PUA, the Business Corporation Act and case law to determine that Commission approval was in fact required. Favoriti forwarded the information to Stephenson-Schroeder who provided the information to the attorney.

In another case, when a municipality experienced difficulties with a utility concerning their franchise agreement, its consultant asked the OGC whether the Commission had jurisdiction over such matters. Stephenson-Schroeder forwarded the question to Favoriti. Favoriti answered the question by considering the PUA and a rider filed by the public utility. Favoriti provided his answer without first discussing it with Rubinkowski. However, Favoriti specifically explained that his answer constituted his informal thoughts and that he did not speak for the Commission. He further explained that the municipality could receive such a formal answer only if it filed a petition with the Commission because such an answer could be delivered only by the commissioners acting as a body.

Finally, the Advisory Section attorneys may receive questions from other attorneys in the OGC who are participating in an open case.

i. Drafting legislation

Favoriti has helped draft amendments to legislation. In doing so, he followed directions received from Tim Anderson, the Executive Director. In one case, the Executive Director instructed Karl Pound, Manager of Revenues in the Administrative Services Section, to draft amendments to legislation which would achieve a certain defined goal and Favoriti worked with Pound to accomplish that predetermined end. Favoriti reviewed the amendments written by Pound with Patrick Foster, a part-time member of the Advisory Section, to ascertain whether Pound had accomplished the Executive Director's objectives.[12] Favoriti does not decide whether the ICC should pursue an amendment.

If OGC takes the lead in drafting a bill, Advisory Section attorneys may testify before the General Assembly to explain it. Favoriti has never testified at committee hearings or before the General Assembly.

ii. Rule making

Favoriti has drafted proposed rules on behalf of the ICC. In one case, Favoriti drafted a proposed rule for the Gas Pipeline Safety Program concerning the disclosure of gas pipeline inspections and audit information to the public. The impetus for the rule making arose because Stoller and Burk from the PUB wanted the Gas Pipeline Safety Program to make such information publicly available.[13] Stoller and Burk sought Favoriti's counsel to determine whether such disclosures would raise legal concerns. Favoriti noted that confidentiality provisions within the Public Utilities Act prohibited the disclosures but he recommended that the Commission could either take emergency action or initiate a rule-making to accomplish the desired result. Stoller and Burk chose to adopt the rule-making approach over the other one suggested.[14] Favoriti was then asked to draft a proposed rule along with a staff report which would be submitted to the Commission for consideration to initiate the rule-making. The work product on the rule was a collaborative effort between the Pipeline Safety Program and the Office of the General Counsel.

---

[12] Favoriti also worked with Brian Allen on an assignment concerning recent legislation pertaining to a Commonwealth Edison rate review performed by the Commission.

[13] Favoriti had no involvement in staff's decision to make such information available to the public.

[14] Favoriti played no role in deciding whether or not the agency wanted to pursue the rule.

Favoriti drafted the proposed rule in collaboration with Pat Foster. They consulted federal legislation and the PUA to ensure that the proposed rule complied with the Commission's statutory responsibilities. Once Favoriti and Foster drafted the rules, they were sent to Stoller and Burk who then forwarded them to Rubinkowski.

Favoriti also participated in writing the staff report which accompanied the rule. The staff report gave the Commission background information on the rule, provided the legal authority to support the proposed action, and contained a recommendation that the Commission initiate the rule making. Favoriti obtained the background information for the staff report from Burk and Stoller and used the Gas Pipeline Safety Act as legal authority to support the action.

Burk and Stoller submitted the staff report and proposed rule to the Commission. The Commission voted to initiate and propose the rules. The rule was sent to the Illinois Secretary of State and was published in the Illinois Register for first notice.[15] The rule is still pending and has not completed the first notice. As a result, the ICC has not yet adopted it.

iii. Acting as Assistant to the Commissioners

Technical advisors in the Advisory Section may act as assistants to the commissioners. In that capacity, they assist the Commission as a whole, not any one individual commissioner.[16] The commissioners may also ask staff from the PUB to serve as special technical assistants.

Favoriti served as assistant to the commissioners once upon request from Stephenson-Schroeder. He drafted responses to four or five legally related questions. Favoriti testified that he did not know whether the commissioners adopted his answers.

When technical advisors act as assistants to commissioners, Stephenson-Schroeder commonly does not see the attorneys' work product before it is transmitted to the commissioners and her oversight is minimal.

---

[15] As of that publication date, the public has 45 days to comment on the proposed rule. At some point after the 45 days, the ICC sends a second Notice of Proposed Rule-making to the Joint Committee on Administrative Rules. JCAR responds to the rules, objecting, stating there is no objection, or prohibiting the filing of the rules. If there is no objection, the ICC adopts the rule.

[16] Any attorney in the advisory section may be assigned as a commissioner assistant, regardless of job title. Such assignments depend on their availability, skill set, and area of expertise not their classification as technical advisor III, IV or V.

iv. Participation in citation proceedings

Favoriti has participated in helping initiate citation proceedings. Citation proceedings begin when the Commission issues an order initiating them. The decision to issue the order is based on a staff report which states that a utility has failed to comply with a Commission order, the PUA, or pipeline safety.

Before the Commission initiates a citation proceeding, staff must first identify the alleged violation and recommend that the Commission initiate citation proceedings on that basis. Once staff has made such a determination, Favoriti helps draft and edit a staff report which supports staff's recommendation and which sets forth staff's reasons to initiate the proceeding. He then reviews the staff report to ensure it is legally sufficient and that it conforms to the statutes and regulations. Favoriti also writes the draft initiation order put before the Commission which accompanies the report. The draft order contains legal language and background information supplied by staff that describes the findings of staff's audit or inspection. It states that "the staff report presents a sufficient basis to initiate a proceeding."

The staff report and draft order are then placed before the Commission for consideration. The Commission may adopt or reject staff's substantive recommendation to initiate the citation proceedings and Favoriti's supporting recommendation which affirms that staff's position is legally sound. Stephenson-Schroeder testified that the Commission almost always accepts the recommendations and signs the draft orders. When the Commission adopts the recommendations and initiates the citation proceeding, it becomes a docketed matter and is litigated before an ICC administrative law judge (ALJ). The outcome of the citation proceeding depends on the ALJ's findings. Parties may except to the ALJs' findings by appeal to the Commission. The Commission then ultimately decides whether or not there has been a violation.

2. The Solicitor Section – James Weging

The Solicitor Section, headed by Solicitor General and technical advisor V John Kelliher, handles appeals when parties challenge the ICC's decisions before state and federal courts in Illinois. It also defends suits taken by utilities against the Commission[17] and undertakes

[17] Such suits are rare and there have been none in the past five years.

original actions which enforce Commission orders in court against utilities that have not complied with them.[18]

James Weging is a technical advisor IV in the Solicitor Section. According to Weging's testimony and his job description, Weging represents the ICC before state and federal courts on complex appeals resulting from Commission action or represents the ICC on actions that are brought against the ICC in Federal or State courts; he represents ICC staff on various complex docketed matters before hearing examiners; he plans and conducts extensive and complex research to determine statutory compliance by applying legal methods and procedures with reference to the legal implications involved; he researches and drafts legal opinions on complex matters; he confers and advises ICC staff on complex issues of statutory interpretation and compliance; finally, he performs other duties, special projects or research as required or assigned which are reasonably within the scope of his job duties.

i. Appeals from ICC cases and original actions

Weging spends 70% of his time working on appeals made by parties to Commission orders. When Weging is assigned such an appeal, he first files an appearance in court. He then reviews the action to ascertain whether the appeal was properly taken and whether the court has jurisdiction over the matter under statute and the Illinois Supreme Court's rules. If the appeal was not properly taken, Weging files a motion to dismiss. If the appeal was properly taken, he defends the Commission's action in court by presenting case law and legal arguments to support the Commission's order in briefs and on oral argument. His arguments are based on legal research into applicable statutes, case law and regulations.

The attorneys in the Solicitor Section are very experienced and are given autonomy. However, Weging discusses his cases in depth with his supervisor, Kelliher, before he begins his writing process. When Weging and Kelliher disagree on which approach to take on a case, General Counsel Stephenson-Schroeder makes the final decision. In one case, Stephenson-Schroeder agreed with Weging's approach. Generally, Stephenson-Schroeder is aware of the Solicitor Section attorneys' legal positions only around 20% of the time, when that position may conflict with a Commission's previous ruling.

[18] In addition, the Solicitor Section may sometimes represent staff before the ICC's ALJs when the Trial Section is overloaded.

In addition, Kelliher reviews almost all of Weging's work product before Weging files it with the court. Kelliher checks the work for grammar, exposition and typos. He may also recommend language if Weging has not presented the ICC's position clearly enough or if Weging has made inaccurate representations of a cited case.

In one appeal, Weging recommended that the Commission file for a supervisory order in the Illinois Supreme court so that the court could address a jurisdictional issue. In that case, the same matter was pending in two different appellate court districts, the first and the second. The case was before both courts because a party had appealed an initial Commission order to one district, and then appealed a second order which the Commission issued upon rehearing of that case to a different district. The second district appellate court issued an order granting the first district jurisdiction. Weging disagreed with the court's decision and authored a memo to the commissioners recommending that the Commission file for a supervisory order in the Illinois Supreme Court so that the Supreme Court could address the question of which appellate court had jurisdiction. While the case concerned a legal procedural matter, it had strategic consequences. The Commission granted Weging the authority to pursue the matter with the Supreme Court. The Supreme Court denied Weging's motion.

An original action by the Commission is an enforcement action against a utility or telecommunications carrier which the Commission initiates when staff informs the Commission that an entity is not in compliance with a Commission order. Such cases are rare and there has only been one such case in the past eight years. Weging has participated in only one original action brought by the Commission. In such cases, Weging prepares a complaint for the court, provides the legal framework for the case, compiles all the necessary evidence in support of the ICC's position obtained from staff, and then prosecutes the case on behalf of the Commission.

Weging and all the other attorneys in the Solicitor Section must maintain a designation of Special Assistant Attorney General in order to represent the Commission. Thus, all Weging's court appearances and filings are made under that designation. While the attorneys in the Solicitor Section keep the Attorney General's office apprised of their litigations, the Attorney General does not exercise any day-to-day supervision over those attorneys. Further, in cases where the Attorney General brings an action against the ICC, none of the ICC attorneys designated as Special Assistant Attorneys General have the power to act on behalf of the Attorney General.

ii. Acting as assistant to the Commissioners

Weging is assigned to assist the commissioners as a body. He acted as an assistant four times in 2010, but none at all in 2011. Kelliher testified that Weging is assigned to such duties approximately three to four times a year.

In his capacity as assistant to the commissioners, Weging provides legal advice by answering the commissioners' initial and follow up legal questions pertaining to pending cases. Weging's answers are based on applicable statutes and case law; he usually presents them in memo form. In addition, Weging may also review the Commission's draft language for an order, upon the commissioners' request. Kelliher reviews all advice Weging provides to the commissioners, but neither Kelliher nor the General Counsel has ever overruled Weging's advice.

The Employer submitted several examples of Weging's work as an assistant to the commissioners. In one case, Weging drafted a memo concerning the Commission's potential enforcement action against a utility. The case addressed whether the utility had complied with a previous Commission order. Weging outlined the Commission's possible courses of action and noted that the Commission's main option was to initiate a civil penalty proceeding instead of obtaining a writ of mandamus in court. The Commission took neither option. In that same case, Weging also notified the commissioners that the language of the Commission's proposed order did not comport with the Act. The issue concerned whether the Commission could delegate authority to conduct an audit of a utility to someone other than the Commission. Weging opined that the Commission should remove reference to a particular portion of the Act because it did not clearly support the Commission's stated course of action. However, he noted that if the commissioners chose to keep the reference, they should also specify the manner in which the costs of the audit should be recovered. In reaching his determination he consulted the language of the order, the statute, and relevant regulations.

In another case, Weging addressed the legal basis for obtaining injunctive relief against a company before the conclusion of an investigation or citation proceeding. Weging researched the statute, rules and case law to conclude that the Commission could likely not obtain injunctive or equitable relief before the conclusion of an investigation or citation proceeding. Kelliher testified that he did not know what action the Commission took on the basis of Weging's legal advice, although he knows the Commission did not seek injunctive relief.

The commissioners also asked Weging follow up questions on that same case. Weging assessed the Commission Rules of Practice, the statute, and evidence provided by staff to recommend that the Commission open a formal docket to obtain certain information from the utility at issue.

In a third case, Weging answered questions which arose from the commissioners' desire to change their position in a pending rate case from a position they had previously established, and which was on appeal to the courts. Weging outlined the possible effects of the Commission's potential change of position on the reviewing court in a memo to Kelliher, but made no recommendations. Kelliher also answered the commissioners' questions on that issue, combined his answers with Weging's, and sent the answers to the commissioners.

In another example, Weging worked with the commissioners to draft a motion before the Commission which sought receivership against a water and sewer company that did not operate within the PUA's requirements. The Commission granted the motion and Weging drafted a receivership petition. When the company later went out of business, Weging wrote a memorandum and a draft revocation agreement to remove the utility's Certificate of Public Convenience and Necessity which had granted it authority to operate. Weging also set forth certain pitfalls the Commission should avoid in revoking the certificate and generally advised the Commission on how to proceed. The Commission acted in accordance with Weging's recommendations in revoking the utility's certificate. Kelliher testified that he did not recall that the Commission changed Weging's draft order.

iii. Subpoenas

Weging handles all subpoenas for witnesses and documents issued to the ICC, except those pertaining to the Transportation Division. He spends a total of 37.5 hours addressing subpoenas each year.

If a subpoena is for witnesses, Weging checks to see whether a witness fee check was included with the subpoena and ascertains the purpose for which the individual was subpoenaed. If there is no legal basis to bar the witness from testifying, Weging accompanies the witness to the deposition or trial and ensures that they do not inadvertently disclose confidential Commission information.

If a subpoena is for records, Weging consults staff to ascertain whether the ICC possesses the requested records, determines whether any of the documents are protected by statute or

Commission order from disclosure, and asks staff whether the request is too broad or burdensome. If the record is protected, Weging alerts the attorney issuing the subpoena. Similarly, if staff informs Weging that the request is too burdensome, Weging contacts the issuing party and asks them to narrow or clarify the subpoena. If a party insists on obtaining material that is protected from disclosure or declines to narrow or clarify the subpoena, Weging obtains permission from the Attorney General's office to file a motion to quash the subpoena in the appropriate circuit court. If the document is not protected by statute or order and the request is not too burdensome, then Weging instructs the clerk to collect and release the documents. While Weging informs Kelliher of his course of action, Weging makes the final decision as to how the Commission responds to subpoenas and Kelliher has never disagreed with his approach.

iv. Telecommunication Negotiated Cases

Since March 2009, Weging has handled all of the telecommunications negotiated agreement cases arising under 47 USC Sec. 252 of the Federal Communications Act. In those cases, telecom policy staff prepare an affidavit stating that the underlying agreement is not discriminatory and not against the public interest. Weging reviews the affidavits and undertakes some light editing. His review is routine, lasts a half an hour per case, and requires approximately 50 hours of Weging's work a year. Weging then enters the affidavit into the record before an ALJ who holds an evidentiary hearing on the matter. Since there are no issues or controversies in such cases, the ALJ simply prepares an order for the Commission to approve.

3. The Trial Section – John Feeley

The Trial Section, headed by technical advisor Matthew Harvey, represents ICC staff, the Commission's technical experts, in cases brought before the ICC's ALJs. There are nine attorneys in the trial section including technical advisor IIs, IIIs, IVs and Vs. Harvey usually assigns two technical advisors to a single case, although larger cases may require three attorneys. Technical advisor IVs act in a "first chair" capacity whereas technical advisor IIIs and IIs take "second chair" because the technical advisor IVs are more experienced, more legally proficient and have more professional and personal maturity than the IIs and IIIs.

According to Feeley's testimony and his job description, Feeley represents ICC staff on various complex docketed matters before the hearing examiners; he plans and conducts extensive and complex research to determine statutory compliance by applying legal methods and procedures with reference to the legal implications involved; he researches and drafts legal opinions on complex matters; he reviews legislation and analyzes proposed legislation, but has never drafted legislation or advised the ICC on legislative initiatives; he confers and advises ICC staff on complex issues of statutory interpretation and compliance; and he performs other duties, special projects or research, as required or assigned which are reasonably within the scope of his job duties.

i. Representing staff before ICC ALJs

Technical advisor IVs in the Trial Section represent the ICC's technical staff in proceedings before the ICC's ALJs. Staff, also referred to as "staff witnesses" in such proceedings, are the individuals the Energy Division, the Telecommunications Division, the Financial Analyst Division, and the Consumer Services Division. They include accountants, analysts, economists, engineers, and other non-legal experts. Staff have all the rights of a party to a case, although they may not appeal a Commission order. A member of staff is assigned as a case manager in each docketed matter.[19] The technical advisors work with staff from the discovery stage of a case through to the Commission's final order.

Contested cases come before ICC ALJs in one of several ways. First, a utility or telecommunications carrier may file an application or petition seeking relief. Second, consumers, or other parties including the Office of the Illinois Attorney General, the Citizens Utility Board or interested rate payers such as the Industrial Rate Payer Group, may file complaint cases against a utility. Third, the Commission may initiate a citation proceeding against a utility or carrier.

In cases initiated by an entity, staff and the technical advisors review the pleadings. The technical advisors ascertain the legal sufficiency of the pleadings and determine whether the pleadings request relief the Commission may grant. Staff develop their technical positions on the pleadings; the attorneys defer to staff in the areas of staff's expertise. The attorneys

[19] Technical advisors in the trial section are not assigned as case managers.

determine staff's legal positions and then file responsive pleadings on staff's behalf. Harvey testified that he only reviews and approves Feeley's work in relatively unusual cases and that he does not expect to see Feeley's pleadings before he files them.

Next, staff writes and issues data requests (i.e. discovery requests) which are served on the opposing party to the proceeding. The data requests set out a list of documents that staff requires to complete their analysis. Once staff writes the data requests, they are sent to the Trial Section attorneys litigating the case who read the data requests to familiarize themselves with the technical issues in the case. Sometimes, the attorneys make changes or propose suggestions to the data requests and send them back to the staff witnesses for revision. Often the attorneys' recommended changes are grammatical. While the attorneys may also make substantive changes to the data requests, staff has the final say with respect to the data requests' contents because the staff is in the best position to know the nature and extent of the information they require. Once staff witnesses incorporate the changes they see fit to include, the data requests are served on the parties. The technical advisors are copied on responses to the data requests. Staff may undertake a couple rounds of data requests.

If the opposing party files a non-responsive, untimely, or insufficient response to a data request, then the technical advisor IV informs the party's attorney and requests that the party voluntarily correct the filing. If the party fails to do so, the technical advisors file a motion to compel.

After staff receives all the data, they write their testimony which is filed prior to hearing. The Trial Section attorneys may be more or less involved in helping draft the witness's initial testimony, depending on the staff witness's experience. When the witness is less experienced, the attorneys may help formulate the witness's ideas and their positions. Oftentimes, however, technical advisors do not have much communication with staff regarding their testimony.

Once staff has prepared the testimony, they send it to the litigating attorneys in the Trial Section. One of the attorneys reviews the testimony first and then passes it to co-counsel.[20] Feeley reviews the testimony to ensure that it is comprehensible to the ALJ and the commissioners, that staff has neither misinterpreted a statute nor made legal arguments, that the portions of the PUA staff cited are actually at issue, that staff's position is consistent with the law and that the testimony is within the scope of the matter at issue. In unusual circumstances, OGC

[20] The order in which the attorneys read the testimony depends on their schedules not their job title.

Trial Section attorneys may rewrite staff's testimony on a "major level." But even in such cases, the technical advisors merely reorganize or reword the testimony and do not change staff's argument or their ultimate position. The litigating attorneys then discuss the testimony to ensure that they speak with one voice when giving staff suggested changes. Feeley sends comments back to the staff witnesses who then express whether they agree or disagree with the proposed changes. If Feeley and staff disagree over a suggested change, staff has the last say on technical matters and the attorneys have the last say on legal matters. If Feeley and staff are unable to resolve a dispute concerning the scope of testimony or their respective positions, Stephenson-Schroeder or another supervisor resolves the matter. The party with the burden of proof files its testimony first; the opposing party files rebuttal testimony. The process is repeated.

An ALJ then holds an evidentiary hearing to lay a foundation for the witness's testimony and to allow cross-examination by the Trial Section attorneys. Cross-examination is very limited and merely serves to add facts to the record. The staff witnesses inform the attorneys as to the lines of cross examination and write the cross examination questions. The attorneys review staff's cross examination questions, determine whether the questions are necessary or whether they addresses matters already in the record, and then ask the questions at hearing to supplement the record. Technical advisors may also draft the cross examination questions themselves after ascertaining what information staff would like to elicit.

After the hearing, staff and the parties file simultaneous briefs. The Trial Section attorneys do not write the entire brief from scratch. Rather, staff writes the portions of the ICC brief that pertain to their respective issues. The attorneys compile staff's sections together into one brief and write the legal argument. Any attorney to the case may write the legal argument, depending on which attorney has the time or has greater familiarity with the issues.

Then, staff and the attorneys engage in a collaborative process to edit and complete the brief. If staff and the attorneys disagree on a change, staff has the final say in technical matters and the attorneys have final say in the legal matters.

If the attorneys litigating the case themselves disagree concerning an interpretation of the law, they bring the matter to the General Counsel who consults with the Executive Director. The Executive Director then determines which arguments OGC should advance. Similarly, when staff and the OGC cannot resolve a matter concerning the direction of the case, the Executive Director makes the final determination. The attorneys then argue the position set forth by the

Executive Director. Other than on such occasions, Stephenson-Schroeder testified that she is rarely involved in determining the position taken by the trial section attorneys in their cases.

The briefs are filed on e-docket and served on the parties. The Trial Section attorneys may file reply briefs on staff's behalf. The process for drafting and editing the reply briefs is the same as for the initial briefs. The ALJ then issues a proposed order based on the evidence and briefs. The proposed order may agree with the position of staff, the position of any of the parties or it may set forth an alternate position.

Next, staff and the attorneys review the proposed order and engage in a collaborative effort to identify the exceptions they would like to make; staff does not always accept the recommendations made by technical advisor IV's concerning exceptions. Staff and the attorneys then draft the brief on exceptions following the same process as used to write the initial brief. Opposing parties and any of the intervenors may also file reply briefs on exceptions. Finally, the Commission issues its order based on the proposed order, the evidence, and the briefs on exceptions.

Feeley mostly represents staff in large rate cases. Rates are determined by the company's expenses, their investments, and the rate of return on their investments. Staff in the finance area give their opinion and analysis concerning the proper rate of return. Staff in engineering and accounting performs an analysis of the company's capital assets and new investments to determine how they should impact the company's rate. They also determine whether a company's investments were prudent.

Feeley does not make technical determinations concerning a company's expenses, investments and rate of return. However, he may undertake legal research on some aspects of rate development which have been addressed by statute, case law and prior commission orders. For example, while Feeley does not determine whether the amount of a company's investments is just—a task performed by staff—he ensures that the companies are not engaged in retroactive rate-making, which is prohibited by case law.[21] In addition, while Feeley does not determine whether an investment was imprudent—likewise a task performed by staff—Feeley helps insure that staff assess the matter of a company's allegedly imprudent investments based on facts known at the time, as required under cases law. Finally, Feeley insures that staff's position is

[21] Retroactive rate making occurs when a company attempts to use a historical test year that is too far in the past to ascertain its expenses.

consistent with the Commission's prior orders. If staff seek to advance a position inconsistent with the ICC's past actions, Feeley instructs staff to provide sufficient facts to allow the Commission to find a reasonable basis upon which to handle the matter differently.[22] Feeley then argues staff's position at oral argument.

ii. Work on Qualified Solid Waste Energy Facility (QSWEF) related matters

Feeley has legal expertise in issues concerning Qualified Solid Waste Energy Facilities (QSWEFs). Less than 5% of Feeley's work concerns QSWEFs.

QSWEFs generate electricity from solid waste and enter into procurement agreements with electrical utilities. Under Illinois law, QSWEFs are paid a rate for electricity that is higher than the avoided cost, or market price. The utilities that buy the electricity take a current tax credit which the QSWEFs repay, either 10 or 20 years later, pursuant to the PUA.

Many QSWEFs are entering their repayment mode. The Commission must issue orders defining the schedule for repayment of the tax credits. The schedule of payments is based on reports filed by the utilities with the Department of Revenue. Staff reviews those reports to monitor the amount that the QSWEFs repay and to ensure the QSWEFs make their required repayments. Feeley addresses QSWEF-related legal issues when there is a problem concerning repayment of tax credits.

In one case, Feeley formulated the legal theory for a bankruptcy proceeding against a QSWEF debtor which was brought by the ICC, through the Attorney General's office. His theory was based on an interpretation of a recently amended statute which added two more conditions to the QSWEF's repayment obligation. Feeley read the statute and determined that the new conditions should apply retroactively rather than prospectively. The bankruptcy court rejected that theory and found in favor of the debtor; the district court affirmed the bankruptcy court's decision. Following those decisions, Kelliher, Stephenson-Schroeder, Harvey, and Feeley discussed the issue and, based on Feeley's interpretation of the statute and case law, recommended that the Commission pursue an appeal of the matter in the appellate court. Feeley could not have made such a recommendation on his own. The Commission adopted their legal

[22] There is no res judicata pertaining to the Commission's orders. However, while the Commission may change its position, it must have a reasonable basis for doing so.

advice and the Attorney General's office subsequently filed an appeal on the Commission's behalf.

In another case, Feeley helped draft a stipulation and draft order which outlined the repayment obligations of three QSWEF entities that dissolved their partnership. Feeley based the drafted stipulation on staff's agreement with the company, the schedules set forth by staff, and the legal positions of the parties which were developed by Feeley through legal research and his discussions with Pat Foster. The draft order listed the amount of each QSWEF's repayment, described the parties' agreed upon schedules and requested that the Commission enter the order formalizing the stipulation. Feeley obtained the information in the draft order from staff and used the Commission's prior orders to complete the document. Once finished, Feeley forwarded the draft order and stipulation to Conrad Rubinkowski for approval. The documents were also subject to the approval of staff members Scott Tolsdorf and Steven Knepler in the Accounting Department and Joy Nicdao-Cuyugan, head of the Financial Analysis Division. The draft order and stipulation were submitted to the Commission for consideration.[23] The Commission adopted the order.

In that same case, a staff accountant discovered mistakes in the QSWEFs' repayment schedule. Feeley worked with the QSWEF's attorneys to formulate a corrected stipulation and repayment schedule. Feeley wrote a draft order and helped write a staff report reflecting the new schedules, but he left the essential terms of it blank for staff to complete. Staff then filled in the time period in which the entity should be required to repay the money.

iii. Rule-making

Feeley has participated in rule-making on approximately three occasions. In doing so, he represented staff before the Commission when the rule was docketed, participated in the informal process before the rules went to first notice, helped staff draft replies to comments on the rules and reviewed comments drafted by staff after first notice. Staff drafted the rules and the reports which recommended the ICC initiate the rule-making procedures. Feeley made no recommendations as to whether or not the staff should propose the new rule. There is no

[23] The submissions also included a Financial Analysis Division staff report to the Commission. They also included financial schedules created by Tolsdorf which analyzed repayment amounts and set for the repayment schedule.

indication from the record that Feeley helped draft the rule language.[24] In addition, Feeley has never drafted legislation.

iv. Answering questions from the public or from staff concerning non-docketed matters

Feeley occasionally answers questions from individuals outside the Commission upon request from Harvey or Stephenson-Schroeder. When he answers such questions, he notes that he does not speak for the Commission as a whole.

Feeley may also answer questions from staff members outside docket case matters. This occurs approximately two times a year. Von Qualen testified that technical advisors answer those questions based on legal research into relevant Commission orders, case law and the PUA.

v. Bill reviews

Feeley reviews any pending legislation identified by the Commission's legislative liaisons to ascertain whether the words of the law achieve the law's stated purpose and to determine whether the law, as written, has any unintended consequences. Feeley has never made a recommendation as to which position the ICC should take on pending legislation. Indeed, Feeley's supervisor, Harvey, testified that the decision to support, oppose or remain neutral on a bill is made at "extremely high" levels, by a manager of the financial, telecom or the energy divisions.

4. The Federal and External Issues Section – Christine Ericson

The Federal and External Issues Section, supervised by Technical Advisor V, Nora Naughton, handles matters before the Federal Energy Regulatory Commission (FERC) and the Federal Communications Commission (FCC).[25] The attorneys in that section also perform miscellaneous functions that do not fall neatly into the purview of the OGC's other sections.

Christine Ericson is a Technical Advisor IV in the Federal and External Issues Section. According to Ericson's job description and testimony, she represents the ICC before State and

[24] Janis Von Qualen, former Trial Section technical advisor IV, testified that some technical advisors IVs may draft rule language if staff is having difficulty doing so.
[25] The OGC no longer performs much work related to the FCC. Instead the bulk of this section's work concerns matters before FERC.

Federal Courts on complex appeals resulting from Commission action or represents the ICC on actions that are brought against the ICC in Federal or State Courts; she provides legal advice to the ICC when the ICC files comments before the FCC and FERC; she plans and conducts extensive and complex research to determine statutory compliance by applying legal methods and procedures with reference to the legal implications involved; she confers and advises ICC staff on complex issues of statutory interpretation and compliance; she researches legal opinions on complex matters; and she performs other duties, special projects or research, as required or assigned which are reasonably within the scope of her job duties.

i. Matters before FERC and counsel to the FEP Group

Ericson's main duties are to represent the ICC[26] in matters before the Federal Energy Regulatory Commission (FERC), a federal agency that regulates a number of energy sectors including hydropower, electricity, natural gas, and oil, and to counsel the Federal Energy Policy group (FEP), staff who handle the ICC's policy matters on federal energy issues.

The ICC may intervene in complaint cases that consumers file with FERC against Illinois utilities.[27] In such cases, the FEP reviews the complaint and recommends that the Commission intervene if the case may impact Illinois and if the matter rises to a high level of importance. If FEP recommends that the ICC intervene, an FEP group member asks Ericson to file a Notice of Intervention which helps the ICC monitor the complaint by ensuring that the ICC receives service of all filings in the docket. Ericson files a Notice of Intervention on behalf of the ICC. Ericson never files a Notice of Intervention without a request from FEP.

FEP and OGC then monitor the case and consider filing comments, submitting a pleading, or answering a motion. Usually, FEP staff flag items on which they would like to recommend a position and decide whether to ask the Commission's approval to file comments on those issues. Ericson may also flag FERC-related legal issues for FEP's attention. While OGC may also initiate the filing of comments, it does not usually do so; Ericson could not recall a case in which she had taken the lead in filing comments. FEP then writes the comments and forwards the draft to Ericson and Naughton for legal review.

---

[26] When attorneys from the ICC's OGC practice before FERC and the FCC, they represent the full Commission.

[27] When an individual files a complaint with FERC against an Illinois utility, the Commission is also served with it.

Ericson provides legal counsel to the Federal Energy Program Policy Group by reviewing the comments for legal support and ensuring they conform to the ICC's past positions. She researches matters at issue in the document, adds citations and legal arguments to bolster staff's position, points out matters that do not comport with the law and suggests corrective changes. However, Ericson does not alter the FEP staff's substantive positions. Ericson presents her edits to Naughton and Stephenson-Schroeder for review. The document is then returned to FEP staff who have the opportunity reject or incorporate Ericson's changes. FEP makes the ultimate determination on whether to incorporate Ericson's comments or legal positions and does not always do so. If FEP and Ericson disagree on whether to incorporate a suggested change, they try to come to an understanding. Ericson could not recall an instance in which they did not reach consensus.

Ericson may also draft pleadings on behalf of the Commission. Naughton makes a substantive review of Ericson's pleadings, edits them and reviews them to ensure they make sense to her and that they are consistent with past ICC actions.[28] Naughton and Ericson also try to show Stephenson-Schroeder the pleadings and comments. However, since Ericson has more expertise than her supervisor on FERC and FCC matters, they rely on her expertise.

Once FEP completes the comments and Ericson has drafted the pleadings, Ericson compiles the comments and the pleading together into a final product which she submits to the Commission. The full Commission then meets at a bench session to discuss pending matters and votes on whether to file the item.

Staff usually takes the lead in presenting items to the Commission and answers the commissioners' questions at the bench session. However, Ericson takes the lead in presenting when a case has more of a legal rather than a technical focus and has done so frequently. In 2008, 2009 and 2010, Ericson presented before the Commission at around half of all the bench sessions which dealt with FERC and FCC matters. In doing so, she provided a summary of the pleading or the matter at issue and stated the legal or procedural course of action she recommended the Commission take. The Commission always accepts Ericson's recommendations on these matters. While Ericson did not present any cases in 2011, she responded to questions in four or five of the approximately 17 to 19 bench sessions because it is

[28] The Employer introduced one pleading drafted by Ericson which Naughton did not supervise or review.

practice and protocol for attorneys who work on a matter to field the commissioners' questions at bench sessions.[29]

The Commission typically authorizes the filing of comments and makes changes to them only in rare instances. If the Commission decides to file the comments or pleadings, the OGC finalizes them. Ericson then signs the pleadings or comments and files them on behalf of the ICC, using her designation as Special Assistant Attorney General.[30] After the ICC has filed its comments or pleadings, FERC dockets them and the OGC monitors and follows the proceeding.

The ICC may also respond to motions in cases before FERC. Ericson has no independent authority to file motions and must clear such action with Naughton and Stephenson-Schroeder. In one case, a utility in a remand proceeding filed a motion to proceed using solely paper comments. Staff on the other hand wanted a full hearing and sought the OGC's cooperation to oppose the motion. Ericson agreed with the utility's position because it would save the expense of an evidentiary hearing. Ericson brought the controversy to Naughton who consulted the Executive Director. The Executive Director accepted Ericson's advice. As a result, the ICC ultimately did not oppose the utility's motion.

The Commission may also take a position on a FERC rule-making proceeding and does so using a process similar to that employed in complaint cases. FEP recommends that the ICC should file comments in the particular proposed rule-making. Staff writes the first draft of the comments. Ericson reviews the comments for legal support and consistency. Staff or Ericson presents the matter to the commissioners.

ii. Participation in Work Groups and Organizations Outside the ICC

Ericson participates in work groups of the Organization of MISO States (OMS) and Organization of PJM states (OPSI).

The Midwest Independent Transmission System Operator, Inc. (MISO) and PJM are Regional Transmission Organizations (RTO)[31] that provide open-access transmission service and monitor the high voltage transmission system to ensure reliable and efficiently energy

[29] This rule does not extend to those attorneys who have litigated cases before the ALJs and who therefore worked on docketed matters.
[30] Within the ICC, she also holds the title Assistant Solicitor General.
[31] RTOs operate the transmission grid for a number of transmission owners.

transmission. MISO operates throughout the Midwest United States and Manitoba, Canada.[32] PJM operates in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia.[33] The Organization of MISO States (OMS) and Organization of PJM states (OPSI) are organizations of state commissions and other interested parties that follow MISO's and PJM's activities before FERC to ensure that its policies are consistent with the needs of the states. They discuss, review and advise on regional transmission issues. The states within MISO comprise the OMS. The states within PJM comprise the OPSI. Illinois is a member of both OMS and OPSI because parts of Illinois are in the PJM region and parts of Illinois are in the MISO region. One ICC commissioner represents the state on the board of OMS, another represents the state on the board of OPSI.

Ericson reviews monthly agendas for MISO and OPSI committees; she flags issues for FEP's attention that may be of potential interest to the ICC. If Ericson views a matter of interest, she alerts Naughton and Randy Rismiller, the manager of the FEP group, to ask if they would like to recommend that the commissioners who represent Illinois on OMS and OPSI vote on certain items. If the matter concerns policy, Rismiller brings the issue to the commissioners' attention; if the matter concerns legal issues, Ericson points the matter out, after first reviewing the issue with Naughton and Rismiller.

In addition, Ericson co-chairs the work group of OMS on markets and tariffs.[34] It is a voluntary group whose purpose is to address market and tariff issues in the energy market as they arise. The work groups provide an opportunity for interested state staffers and legal advisors to discuss the various pending or potential issues that are relevant to the region. Ericson sets meetings for discussion and helps facilitate the meetings and the conference calls. The work group members send emails back and forth to try to address the MISO committees' actions. Individuals in the work group discuss those actions and may decide to respond or write comments. The group writes monthly status reports and an annual report to summarize the discussions of the work group. The report is then distributed to the OMS board members for their review. The work groups give the OMS board options and recommend comments that OMS should make. The work groups make no decisions. While Ericson generally represents the

[32] The ALJ takes administrative notice of this fact.
[33] The ALJ takes administrative notice of this fact.
[34] All FEP policy staff are members of all the workgroups.

interests of the Commission in the work groups, she does not represent the Commission as a whole.

Ericson is also the state government representative to the North American Electric Reliability Corporation, NERC. NERC was formed under the Energy Policy Act of 2005 and addresses the reliability of the transmission grid. It is industry driven and the committees are comprised of voluntary member of the industry. Ericson became the state government representative by submitting a ballot and being voted in for a two year term. As the representative, she reports back to the state on NERC's proposals and developments that impact reliability and retail rates.

In addition, Ericson monitors the activities of other external organizations including the National Association of Regulatory Utility Commissioners (NARUC), an association of regulators in the utility and energy area, and ISAC.[35] Ericson follows their development of policies concerning energy. She attends various meetings pertaining to the activities of the organizations she follows. Sometimes the ICC reimburses her for travel expenses. Reimbursement is granted only if the travel is critical to the ICC's needs.

Ericson alerts the FEP to matters of interest concerning activity on the wholesale energy markets and matters brought to her attention from her participation in workgroups pertaining to regional state committees. Ericson's participation in work groups and monitoring of external organizations take up a lot of Ericson's work time.

iii. Advice to staff and the Commission on non-docketed matters

Ericson also provides legal advice to staff and the Commission on federal issues that are not related to docketed matters. In one case FEP staff requested that the OGC assess the MISO non-disclosure agreement which MISO negotiated with the OMS to determine whether the ICC could or should become an Authorized Agency for purposes of obtaining MISO confidential data through the process established in MISO's tariff language. Essentially, staff sought to obtain certain confidential data. Ericson authored a memo stating that staff could not obtain such data without violating the consumer protection laws. She noted that "the MISO language as it stands still has some serious concerns for Illinois that need to be addressed before the ICC should sign on as an Authorized Agency under the MISO tariff language." Stephenson-Schroeder testified

[35] The record does not reveal the meaning of this acronym.

that the Commission did not sign on as an authorized agency under the MISO tariff and that position outlined in the memo is the one that the Commission currently follows. However, Ericson testified that the memo did not formally come before the full Commission at an open meeting since the Executive Director and the General Counsel decided not to bring the matter before the full Commission.

In another case, Ericson wrote a memo to evaluate the Energy Policy Act of 2005 and FERC's backstop transmission signing authority to address the provisions applicable to siting interstate transmission lines. Ericson read the statute, summarized it, and determined how it would impact the ICC's work at the state level. While Ericson made several recommendations based on her research, the Commission did not accept any of them. First, the memo stated "the ICC should send representatives to the DOE workshops"; the ICC sent no such representatives. The memo also stated that "the ICC also should actively comment in the DOE process"; the ICC did not comment on that process. Finally the memo recommended that ICC should encourage "FERC to hold harmless those states in which the consumers are harmed"; staff did not agree with that recommendation and it never went into effect.

In a third case, Ericson performed an analysis of a then-recent case on the Mobile-Sierra Doctrine which addressed the case's impact but made no recommendations.[36] The ICC took no action pertaining to the memo's contents.

Finally, Ericson once recommended that the ICC refrain from joining in an amicus brief filed by California Public Utilities Commission to support the Public Service Commission of the State of New York before the United States Supreme Court. Ericson stated "the OGC recommends that the ICC not take action at this time and not join the CPUC brief." The ICC accepted Ericson's recommendation and did not join in the amicus brief.

iv. Advice to Individual Commissioners

The individual commissioners at the ICC who participate in the activities of energy-related organizations such as OMS, OPSI and NARUC may ask Ericson questions pertaining to committee matters that touch on federal energy legal issues. Such questions are not routine, but when Ericson is asked, she offers advice and makes recommendations on such matters to the

[36] Ericson wrote the memo at Randy Rismiller's request to address the case's potential impact on the ICC's ability to bring complaints in light of settlements before FERC which concerned rates and tariffs.

inquiring commissioner. Stephenson-Schroeder generally testified that the commissioners accept these recommendations.

The Employer introduced one example in which commissioner O'Connell-Diaz requested Ericson's comments on the Department of Energy Vision, visioning document, to help her prepare for participation on a panel at the Department of Energy-NARUC forum. Ericson provided the commissioner with a 10 to 11 page response. Randy Rismiller, who was also asked to comment on the document, provided an email response to Ericson's work, objecting to some of her technical comments. Naughton testified that the commissioner accepted Ericson's comments over Rismiller's objections in preparing her presentation.

Individual commissioners do not contact Ericson directly regarding docketed ICC matters.

v. Review of legislation

Ericson sometimes reviews and analyzes proposed legislation which affects the ICC. She addresses the legal impact of the legislation and ascertains whether it is consistent with the ICC's prior orders or comments. If Ericson sees a policy impact to the legislation, she alerts staff. Ericson also makes an assessment as to whether or not the legislation impacts Illinois and whether the ICC might want to take action on the matter.

V. Discussion and Analysis

1. The Traditional Test

Section 3(j) of the Illinois Labor Relations Act provides that a managerial employee is "an individual who is [1] engaged predominantly in executive and management functions and [2] is charged with the responsibility of directing the effectuation of management policies and practices." 5 ILCS 315/3(j) (2010).

The first part of the statutory definition of a "managerial employee" describes the nature of the work to which the individual devotes most of his time. Dep't of Cent. Mgmt. Serv. (Ill Commerce Commission) v. Ill. Labor Rel. Bd., 406 Ill. App. 3d 766, 774 (4th Dist. 2010) ("ICC"). "Executive and management functions," amount to running an agency or department by establishing policies and procedures, preparing the budget, or otherwise assuring that the agency or department operates effectively. ICC, 406 Ill. App. 3d at 774 (citing, Am. Fed.of State, Cnty. & Mun. Employ. Council 31, 25 PERI ¶ 68 (IL LRB-SP 2009)); City of Freeport, 2 PERI ¶ 2052

(IL SLRB 1986). Employees need not create new policies to fulfill this requirement as long as they help run the agency. ICC, 406 Ill. App. 3d at 778 & 780. To determine whether employees help run the agency, one must compare their job functions to the agency's overall mission. Id. at 774. If the responsibilities of the petitioned-for employees in fulfilling their duties encompass the agency's entire mission, or a major component of it, the employees help run the agency. Id. at 778. In doing so, the employee must also possess and exercise authority and discretion which broadly affects an agency's or a department's goals and the means of achieving them. Dep't of Cent. Mgmt. Serv. v. Ill. State Labor Rel. Bd., 278 Ill. App. 3d 79, 87 (4th Dist. 1996) (discretion required).

The second part of the definition requires that managerial employees bear responsibility for making such policies happen, thus demonstrating that they possess authority that extends "beyond the realm of theorizing and into the realm of practice." ICC, 406 Ill. App. 3d at 774. An individual directs the effectuation of management policies and practices if he oversees or coordinates policy implementation through development of the means and methods of achieving policy objectives, determines the extent to which the objectives will be achieved, and is empowered with a substantial amount of discretion to determine how policies will be effected. Id. citing, Dep't of Cent. Mgmt. Serv., 278 Ill. App. 3d at 87.

Further, an advisory employee who makes effective recommendations on "major policy issues" may be managerial. ICC, at 780. The test of effectiveness is the "power or influence of the recommendations." Id.

i. Richard Favoriti

Favoriti does not engage in executive and management functions when he answers legal questions from utilities, outside attorneys, Commission attorneys or staff and when he acts as assistant to the commissioners. While he does engage in executive and management functions and effectuates the ICC's policy when he effectively recommends that the Commission adopt his rules and initiate citation proceedings, he is not managerial under the Act because he does not predominantly perform those functions.

Favoriti does not engage in management and executive functions when he answers questions from outside entities because there is no case law that supports the proposition that providing such legal advice entails running an agency or department by establishing policies and

procedures, preparing the budget, or otherwise assuring that the agency or department operates effectively. The fact that Favoriti specifically explains that he does not speak for the Commission and that his responses constitute his informal thoughts supports this conclusion. Indeed, the Employer has not even made an argument that such functions are managerial or executive in nature.

Similarly, Favoriti does not engage in executive or management functions when he answers legal questions from the commissioners as their assistant because there is no evidence that his answers constitute effective recommendations which broadly affect the ICC's mission and because he answers such questions infrequently. ICC, at 776 (effective recommendations are those that have power and influence and thereby achieve the effect they seek); Dept. of Cent. Mgmt. Serv. (Dept. of Healthcare and Family Serv.) v. Ill. Labor Rel. Bd., 388 Ill. App. 3d 319, 331 (employee must possess authority and discretion which broadly [a]ffects a department's goals and means of achieving its goals). First, Favoriti's answers are not managerial recommendations because the Employer has not shown that the Commission acted in conformity with Favoriti's responses or, accordingly, that Favoriti's answers broadly affect the ICC's policies. Second, since Favoriti provided such advice only on one occasion, his advisory functions in this respect cannot support a finding that he *predominantly* performs management tasks, were they deemed such. State of Ill. Dep't of Cent. Mgmt. Serv./Dep't of Healthcare & Family Serv., 388 Ill. App. 3d at 332 (attorneys' infrequent exercise of management and executive functions precluded a finding that they were managerial employees). Notably, the fact that Favoriti is not informed of the manner in which the Commission proceeds on his advice further supports a finding that Favoriti does not engage in executive and managerial functions, or otherwise "helps run" the agency, because employees engaged in such functions are, or should be, aware of the consequences of their allegedly managerial or executive actions.

Favoriti likewise does not perform executive and management functions when he answers staff's or attorneys' questions concerning the legal consequences of the ICC's proposed courses of action because in doing so he largely applies policies and procedures already established in statutes, regulations and case law to the situation at hand, regardless of whether following the law would enhance the effectiveness and efficiency of the ICC's operations.[37] For

[37] The Fourth District of the Illinois Appellate Court, in a non-precedential unpublished order, recently applied this rationale to affirm the Board's holding that an attorney with advisory duties similar to

example, when Stoller sought to change reporting responsibilities within the Gas Pipeline Safety Program, Favoriti determined whether the change was permissible under federal legislation. Again, when the Consumer Services Division inquired whether a utility was required under the statute to file a formal report with the Commission after a fire, Favoriti applied the applicable statutory language to conclude that the utility had no such responsibility. Lastly, when the General Counsel asked the Advisory Section to review whether the Executive Orders pertaining to the Governor's furlough program were applicable to the ICC, Favoriti reviewed the language of the order and statute to conclude that the ICC was not legally required to follow them. In each of these circumstances, Favoriti merely informed staff and his superiors of what the law required but made no recommendations as to whether staff or the Commission should move forward with policy initiatives or as to how the ICC should generally achieve its mission. See, State of Ill. Dep't of Cent. Mgmt. Serv., 26 PERI ¶ 132 (IL LRB-SP 2010).

Further, while Favoriti's advice to staff did arguably constitute a managerial function on one occasion, distinguishable from the cases referenced above, it nevertheless cannot support a finding of managerial authority because there is no evidence that staff or the Commission accepted his advice. In that case, Favoriti addressed the legal effect of the Commission's failure to perform inspections on meter shops as required under its rules. Favoriti's advice was managerial in nature because he not only applied law to the given facts but included a recommended course of action which both broadly protected the Commission from liability and defined the method and means by which the Commission would withhold its services. He advised staff that the Commission should insulate itself legally by saving staff's travel requests to the inspection sites, documenting the ICC's efforts to comply with the requirement. Accordingly, his recommendation protected the agency's overall legal "health" and helped determine the manner in which the ICC discontinued its meter inspection services. See, ICC, at 775 (individual directs the effectuation of management policies and practices if he or she "oversees or coordinates policy implementation through development of means and methods of achieving policy objectives, determines the extent to which the objectives will be achieved, and

---

Favoriti's was properly included in the unit. See, Dept. of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., 28 PERI ¶ 91, unpub. ord. (4th Dist. 2012) (it did not follow that assistant procurement counsel at CMS was managerial when his duty was to tell his employer what the law required, regardless of whether following the law would enhance the effectiveness and efficiency of CMS's operations).

is empowered with a substantial amount of discretion to determine how policies will be effected.") (quoting Dep't of Cent. Mgmt. Serv., 278 Ill. App. 3d at 87.)

Nevertheless, this example cannot support a finding of managerial authority because Employer has not demonstrated that Favoriti's recommendation was effective and that the Commission did in fact document staff's travel requests to the inspection sites, as Favoriti advised. ICC, at 775 (advisory employees are managerial only if their recommendations are effective).

Next, Favoriti is not engaged in executive and management functions when he drafts legislation because in doing so he merely applies his professional expertise to choices made by others and makes no recommendations. See, State of Ill. Dep't of Cent. Mgmt. Serv., 26 PERI ¶ 132 (IL LRB-SP 2010) (technical advisor IIIs at the ICC did not engage in executive or management functions when they drafted legislation where there was no indication that the employees helped determine the policy sought to be implemented by the draft legislation; separately addressing employee's direction to staff on legislative initiatives).[38] Here, the Executive Director tells Favoriti his desired objectives for the planned legislation. In turn, Favoriti drafts the language, and edits language drafted by staff, to achieve the Executive Director's predefined goals.

For the same reason, Favoriti does not direct the effectuation of management policies and practices sufficient to meet the second prong of the test when he drafts legislation because in such cases the Executive Director exclusively determines the means of achieving the agency's goals and Favoriti consequently lacks the requisite discretion to do so himself. Dep't of Cent. Mgmt. Serv., 278 Ill. App. 3d at 87 (discretion required).

Further, Favoriti does not engage in executive and management functions when reviewing bills for impact on the agency because he makes no recommendations concerning such legislation. While the Employer argues that Favoriti "advises the ICC on legislative initiatives," Favoriti merely sets forth the legal concerns associated with the bill's proposed language,

[38] Cf., State of Ill., Dep't of Cent. Mgmt. Serv., 21 PERI ¶ 205 (IL LRB-SP 2005) (ALJ described a framework in his facts under which supervisors gave attorneys the result they sought to accomplish and required them to draft legislation which effected that purpose or result; the ALJ noted in his discussion that such drafting could nevertheless constitute an executive or management function but found employees were non-managerial on other grounds).

whereas Rubinkowski, Favoriti's supervisor, recommends whether the ICC should support, oppose, or remain neutral on the relevant bills.

Moreover, even if Rubinkowski's recommendations are deemed Favoriti's own because Rubinkowski relies on and never changes Favoriti's work, most OGC reviews make no recommendation on what position the Commission should take on a bill and thus Favoriti's work on the few that do cannot consume a predominant portion of his time. Indeed, the testimony suggests that OGC makes such ultimate recommendations only in the 2-5% of bill reviews on which OGC takes the lead. In other cases, Harvey, supervisor of the Solicitor Section, generalized that the decision to support, oppose or remain neutral on a bill is made at "extremely high" levels, by a manager of the financial, telecom or the energy divisions, not by the technical advisor IVs.[39] Thus, in the vast majority of cases, Favoriti merely sets forth the legislation's legal impact in the nature of technical legal counsel rather than managerial direction and therefore does not predominantly perform managerial tasks in his bill reviews. See, State of Ill. Dep't of Cent. Mgmt. Serv./Dep't of Healthcare & Family Serv., 388 Ill. App. 3d at 332 (emphasizing distinction between managerial employees and professional employees exercising technical expertise).

Finally, Favoriti does not effectuate matters of policy under the second prong when he reviews legislation because it is unclear from the record whether the Commission routinely finalizes or accepts the attorneys' recommendations on bill reviews.

Likewise, Favoriti does not exercise executive or management functions when he drafts rules because staff determines both the rules' objectives and the means by which to achieve them. State of Ill. Dep't of Cent. Mgmt. Serv., 26 PERI ¶ 132 (IL LRB-SP 2010) (technical advisor who applied his professional expertise to initiatives set by others did not engage in executive or management functions). To illustrate, staff from Gas Pipeline Safety Program provided the impetus for a disclosure rule drafted by Favoriti because they wished to provide the public with information concerning gas pipeline inspections and audits. Similarly, staff determined the means by which to achieve that goal because they asked Favoriti to present legal mechanisms for lawful disclosure of the data and then chose rulemaking from among the options Favoriti presented. Accordingly, Favoriti did not engage in managerial or executive functions

[39] Harvey did not distinguish between those cases in which OGC takes the lead and those cases in which it does not.

when he drafted that rule because he neither decided to pursue disclosure of audit/inspection information, nor did he choose rulemaking as the way to achieve such disclosure legally.

Nevertheless, Favoriti performs management functions and helps effectuate Commission policies concerning the regulation of public utilities when he recommends that the Commission adopt his rules and when the Commission does adopt them unchanged, absent evidence of significant review. For example, in the case referenced above, Favoriti recommended that the Commission adopt a rule he drafted permitting public disclosure of gas pipeline audit and inspection information in a staff report. The Commission, in turn, voted to initiate and propose the rule. Further, there is no evidence the Commission undertook extensive review to substantiate Favoriti's position that the rule was legally sound and that it effectuated staff's policy. Accordingly, the evidence suggests that Favoriti's recommendation was indeed effective. ICC, at 777 (influence and power of recommendation is the litmus test of effective recommendation, but extent of review could be an indication of a recommendation's effectiveness).

Contrary to the Union's contention, in this context, it is immaterial that Favoriti did not formulate or initiate the policy advanced by the rule. ICC, at 780 (formulating policy is merely one example of running an agency and accordingly, it is not absolutely essential that a managerial employee formulate policy). Instead, it is sufficient that Favoriti acted in an advisory capacity to further the Commission's goals in promoting the safe and efficient regulation of public utilities by raising customer awareness of gas pipeline audits and investigations. Id.; But see, State of Ill. Dep't of Cent. Mgmt. Serv., 26 PERI ¶ 132 (IL LRB-SP 2010) (attorney who helped draft legislation but who did not determine the policy sought to be implemented by the draft legislation did not engage in executive or management functions, even though he may have "provide[d] direction ... on legislative initiatives").

Similarly, Favoriti engages in managerial and executive functions when he helps initiate citation proceedings by writing draft initiating orders and by helping author staff reports which recommend the Commission should initiate formal citation proceedings. In such circumstances, Favoriti's draft order affirms that "the staff report presents a sufficient basis to initiate" such a proceeding. Thus, although staff initiates the informal investigation, collects the evidence and advances a recommendation, Favoriti nevertheless engages in executive and management functions because he assures the ICC of the legal sufficiency of staff's initiative and spurs the

Commission's formal action. Similarly, Favoriti's recommendations on these matters are effective because Stephenson-Schroeder testified that the Commission almost always signs such draft orders and that she could not think of a case in which it did not.

In sum, although Favoriti engages in executive and management functions and effectuates the Commission's policies when he makes recommendations to the Commission that they should adopt his rules and when he helps initiate citation proceedings, he does not predominantly perform executive and management functions because his main duty, to counsel staff and the agency on legal questions, is non-managerial.

Thus, Favoriti is not managerial as a matter of fact.

ii. James Weging

Weging's primary function, to defend the Commission's orders in court on appeal, is not managerial or executive in nature and instead exemplifies the exercise of professional discretion and legal analysis typical of tasks performed by attorneys in the course of litigation.[40] State of Ill. Dep't of Cent. Mgmt. Serv./Dep't of Healthcare & Family Serv., 388 Ill. App. 3d at 332 (holding that staff attorneys in the Bureau of Administrative Litigation simply performed legal work and were not managerial).

Contrary to the Employer's contention, the mere fact that Weging makes decisions with respect to case strategy does not demonstrate that he performs executive and management functions because his autonomy to perform such non-managerial tasks does not change the character of his work. Id. (rejecting employer's contention that attorneys who made daily decisions with respect to cases performed executive or management functions; addressing attorney discretion *separately* from the nature of the work).

Nor do those tasks, typical of legal work, satisfy the second prong of the managerial test because the policies Weging advances are solely determined by the Commission's orders and because Weging's legal arguments to the court do not constitute recommendations indicative of managerial authority under existing precedent. First, Weging has no discretion to develop the means and methods of achieving the ICC's policy objectives contained in the orders or the method by which those policies will be effected since he plays no part in an order's development

[40] Because this activity comprises 70% of Weging's work time, it is unnecessary to address the managerial or non-managerial character of Weging's remaining duties under the Act.

or formulation.[41] Dep't of Cent. Mgmt. Serv., 278 Ill. App. 3d at 87 (substantial discretion to determine how policies will be effected is required to fulfill the second prong); But see, ICC at 780 (development of policy not necessary to find managerial authority where individual "direct[s] the effectuation" of existing policies through effective recommendation to superiors). Further, the fact that Weging may possess discretion to develop the legal arguments which support the ICC's orders does not demonstrate managerial authority. State of Ill. Dep't of Cent. Mgmt. Serv./Dep't of Healthcare & Family Serv., 388 Ill. App. 3d at 331-32 (finding attorneys' decisions regarding case strategy non-managerial).

Second, Weging's legal arguments on appeal do not satisfy the requirements of the ICC court's test concerning effective recommendations because they are not recommendations to Weging's superiors within the agency but rather to the court, an outside entity. ICC, at 779 (considering that ALJs might help run the agency if they made recommendations to *their superiors*, commissioners within the agency, which are almost always influential); See also, National Labor Relations Board v. Yeshiva University, 100 S.Ct. 856 at 859 (1980) (teachers deemed managerial where *central administration* followed their advice on personnel matters almost all the time). To illustrate, contrary to the employees in the cases cited above, Weging makes no recommendation to the Commission concerning the Commission's own policies which it then accepts almost all the time. Indeed, the Commission has already exercised its full powers and rendered final determination on those policies which Weging allegedly effectuates.

Further, even if the Board concludes that recommendations to an outside entity, such as the appellate court, may qualify as managerial, the Employer introduced no evidence as to whether Weging's recommendations are effective since there is no indication that the Court almost always affirms the Commission's orders because it is persuaded by Weging's legal arguments.[42] ICC, at 777, (effective recommendations are those which are influence and almost always persuade the superiors).

Thus, Weging is not managerial as a matter of fact.

---

[41] The ICC court's expanded test based on an employee's effective recommendations is addressed below.

[42] Indeed, Weging's argument on behalf of the Commission did not prevail at the Supreme Court in the one case the Employer introduced into evidence.

iii. John Feeley[43]

Feeley is a public employee under the Act because his main function, to represent staff in administrative hearings, is purely legal, not managerial or executive. An attorney does not engage in managerial or executive functions when he makes "daily decisions with respect to case strategy, specif[ies] charges against [an] alleged wrong-doer, identif[ies] potential witnesses and documentary evidence needed[,] engag[es] in appropriate discovery...and prepare[s] exceptions to administrative law judges' recommended decisions" even if those tasks may be essential to the employer's ability to accomplish its mission. State of Ill. Dep't of Cent. Mgmt. Serv./Dep't of Healthcare & Family Serv., 388 Ill. App. 3d at 331-32. Here, Feeley's specific tasks match those duties referenced by the court as non-managerial because he helps prepare data (i.e., discovery) requests, ascertains the legal sufficiency of pleadings, assures that staff's position or testimony is clear and consistent with case law, helps devises questions for cross examination, writes the legal analysis of briefs and presents staff's position at oral argument. Thus, Feeley's primary job duties are not managerial.

While the Employer argues Feeley must be managerial because he is only minimally supervised, the character of an employee's work is more probative of his managerial status than the extent to which he is supervised. 5 ILCS 315/3(j) (first prong addresses employee's *functions*). Further, while the court in State of Ill. Dep't of Cent. Mgmt. Serv./Dep't of Healthcare & Family Serv. referenced the fact that the employees at issue had no independent authority to settle cases, it upheld their inclusion into the unit based on the fact that the their work was better characterized as professional than managerial. Id. Indeed, the court emphasized that the petitioned-for attorneys' tasks were of the kind that "any attorney would perform in the course of litigation." Id. Similarly, Feeley's work is typical of litigation and is therefore not managerial, regardless of his alleged autonomy.

Moreover, the nature of Feeley's participation in litigation belies the Employer's assertion that he acts autonomously because it reflects a collaborative attorney-client relationship

[43] The Employer introduced evidence as to tasks which Feeley infrequently performs, including QSWEF work (comprises 5% of Feeley's work time), participation in rulemaking (three occasions total) and advice to staff (twice a year). These functions are not discussed below because regardless of their character as managerial or non-managerial, they do not make up Feeley's predominant tasks even when aggregated. See, State of Ill. Dep't of Cent. Mgmt. Serv./Dep't of Healthcare & Family Serv., 388 Ill. App. 3d at 332 (attorneys' infrequent exercise of management and executive functions precluded a finding that they were managerial employees).

subject to a superior's oversight on disputed matters in which both staff and superiors are careful to retain their authority: Staff, as "the client," has significant input in the case, manages it, determines all of the technical positions and has final say on technical matters. Moreover, Feeley must refer disputed matters to his superior for resolution if he and staff cannot resolve a disagreement as to the direction of the case or the scope of staff's testimony. Feeley must similarly raise matters with his superiors when he and co-counsel disagree. Under those circumstances, the General Counsel or the Executive Director decides the positions Feeley should argue. See, State of Ill. Dep't of Cent. Mgmt. Serv. (Pollution Control Board), 28 PERI ¶ 50 (IL LRB-SP 2011) (attorney assistants did not effectively recommend decisions before the PCB where Board members were careful to retain their authority both during the vote and in the process of drafting proposed decisions prior to voting).

Further, Feeley's litigation tasks do not satisfy the second prong of the managerial test because his duties are narrow in scope and because there is no evidence that the Commission routinely accepts his legal positions. First, Feeley's decisions concerning the trajectory of a case before an ICC ALJ do not broadly affect the ICC's goals and do not determine the means by which the ICC accomplishes its statutory duties or the extent to which the ICC implements its policy objectives. Rather, Feeley's decisions merely concern the admission of evidence, the scope of testimony, and the legal arguments relative to discrete cases and parties. Ill. Dep't of Cent. Mgmt. Serv./Dep't of Healthcare & Family Serv., 388 Ill. App. 3d at 332; see also State of Ill. Dep't of Cent. Mgmt. Serv. (Pollution Control Board), 28 PERI ¶ 50 (IL LRB-SP 2011) (finding that attorney assistants' tasks in assisting PCB members in issuing decisions in particular contested cases, and even in promulgating rules on specific environmental topics, did not "broadly" affect its mission or fundamental methods). Second, Feeley's legal positions do not constitute effective recommendations since there is no evidence that the ICC routinely accepts Feeley's legal positions as a matter of course. Ill. Dep't of Cent. Mgmt. Serv./Dep't of Healthcare & Family Serv., 388 Ill. App. 3d at 332. Absent such evidence of effective recommendation, it is immaterial that the outcome of the rate cases, those case on which Feeley primarily works, may arguably affect consumers of electricity across Illinois.

Next, Feeley does not engage in managerial or executive functions when he undertakes bill review because he has never recommended that the ICC should oppose, support or remain neutral on a bill. Rather, he merely exercises technical expertise to ascertain whether the words

of the law achieve their stated purpose and whether the language has any unintended legal consequences. Indeed, Feeley's supervisor, Harvey, testified that high level staff in other divisions—not Feeley— recommend whether the ICC should oppose, support or remain neutral on a bill. Thus, absent such a recommendation, Feeley's review of the legislation is simply an exercise of technical expertise and not a management or executive function.[44] See, State of Ill. Dep't of Cent. Mgmt. Serv./Dep't of Healthcare & Family Serv., 388 Ill. App. 3d at 332 (status of managerial employee requires more than the exercise of professional discretion and technical expertise)(internal quotes omitted).

Moreover, such review of legislation likewise does not meet the second prong of the managerial test because Feeley's advice is limited to informing the ICC of the legislation's legal effect and does not help determine, through a recommendation, or otherwise, the extent or the manner in which the ICC should implement the policy objectives contained in the bills. State of Ill., Dep't of Cent. Mgmt. Serv., 21 PERI ¶ 205 (IL LRB-SP 2005) (holding that review of legislation did not meet the second prong of the managerial test, even where attorneys did make recommendations, because there was no evidence that the attorneys had any responsibility to determine the extent to which the policy objectives in the proposed legislation would be implemented or that they had the authority to oversee and coordinate the implementation of those policy objective).[45]

Finally, Feeley does not engage in executive and management functions or effectuate ICC policy when he answers legal questions from the public. There is no case law to support the proposition that providing such legal advice to outside entities entails running an agency by establishing policies and procedures, preparing the budget, or otherwise assuring that the agency operates effectively.

Thus, Feeley is not managerial as a matter of fact.

---

[44] Notably, the Fourth District of the Illinois Appellate Court espoused a similar rationale in a recent non-precedential unpublished order. Dep't of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., 2012 WL 461870 (4th Dist. 2012) (an attorney is not managerial by virtue of his duty to tell his employer what preexisting legislation and rules require).

[45] In this case, the ALJ also held that such review was not managerial under the first prong because the attorneys lacked the final authority to decide what position the agency should take on the bill. As noted, earlier, final authority to determine such matters is no longer required to find managerial authority. Here, this case is cited for the ALJ and the Board's decision on the second prong which is still good law.

iv. Christine Ericson

Ericson is a not managerial within the meaning of the Act because she does not predominantly perform executive and management functions and does not effectuate Commission policy.

Ericson does not engage in executive and management functions when she flags pending FERC-related matters for FEP's attention because the Employer has not demonstrated that Ericson recommends FEP should take action on those matters, that FEP routinely does so upon Ericson's suggestion, or that Ericson's flagging of issues pertaining to individual cases broadly affects the ICC's policies and goals. First, the word flagging suggests that Ericson does not make recommendations as to whether FEP should consider a matter and rather implies that she merely raises matters of possible interest to FEP's attention which FEP may or may not pursue, at its own discretion. Further, even if the Board determines that Ericson's flagging constitutes a recommendation, there is no evidence that FEP customarily moves forward on matters which Ericson flags. Finally, a recommendation as to whether the FEP should draft comments on a case before FERC (on the ICC's behalf) is too narrow in scope to constitute a recommendation on a major policy issue which broadly affects the ICC's goals. See, ICC, at 779, (advisory employees may be managerial but they must make effective recommendations on *major policy* issues); Dep't of Cent. Mgmt. Serv. v. Ill. State Labor Rel. Bd., 278 Ill. App. 3d at 87 (employee must have discretion to broadly affect an agency's goals and the means of achieving them).

Similarly, Ericson does not engage in executive or management functions when she counsels FEP on FERC matters by reviewing their comments because her counsel is purely an exercise of professional and technical legal expertise which leaves the FEP's positions unchanged and thus requires no managerial discretion. Here, Ericson does not alter the FEP's substantive positions and merely undertakes legal research to add citations and argument to the comments, to ensure they are legally sound and to confirm that they conform to the ICC's past positions. Indeed, Ericson's limited involvement in substantive matters and FEP's freedom to reject her suggestions demonstrates that she acts in a non-managerial capacity to apply her professional expertise to initiatives advanced by others within the ICC. See, State of Ill. Dep't of Cent. Mgmt. Serv., 26 PERI ¶ 132 (IL LRB-SP 2010).

Next, Ericson's effective recommendations to the ICC concerning filings in cases pending before FERC do not render her managerial under the Act because they do not effectuate

management's policies or constitute "the primary means, if not the exclusive means, by which the Commission fulfills its statutory mandate of regulating public utilities."[46] ICC, at 779.

First, Ericson's recommendations do not direct the effectuation policy and are at most non-executive tasks essential to Employer's ability to accomplish its mission. Indeed, the decision to intervene in pending cases to file pleadings or comments does not put into force any of the ICC's regulatory goals nor does it even successfully advance the Commission's agenda on matters of policy absent evidence that the filings influence the ultimate outcome of a case in the ICC's favor. Moreover, since the effect of the filings on ICC's broader policies is uncertain, the Employer has not demonstrated how Ericson's recommendations, while arguably vital, initial steps towards achieving the ICC's goals, are anything more than non-managerial tasks. See State of Ill. Dep't of Cent. Mgmt. Serv./Dep't of Healthcare & Family Serv., 388 Ill. App. 3d at 331-32 (to direct the effectuation of management policies and procedures, employee must do more than just perform tasks essential to the Employer's ability to accomplish its mission).

Contrary to the Employer's contention, the fact that Ericson ensures draft comments conform to the ICC's past positions does not render her work managerial because it does not alter the conclusions that neither Ericson's recommendations, nor the comments themselves, direct the effectuation of management's policies in a broad way, as noted above.

Second, Ericson's recommendations do not constitute the primary or exclusive means by which the ICC fulfills its statutory mandate of regulating Illinois public utilities because the ICC does so through its orders on docketed matters which are produced through the administrative hearing process before ICC ALJs. See, ICC at 779 (considering structure of agency in determining whether advisory employee is managerial). In that process, the ALJs draft proposed orders recommending Commission action which, unlike Ericson's own recommendations concerning FERC matters, address virtually all areas within the ICC's purview: for example, they cite utilities that violate the PUA, set rates for energy across Illinois, initiate rulemaking,

---

[46] Contrary to the Union's contention, there is sufficient evidence from which to conclude that Ericson spends a predominant amount of her work time preparing and making effective recommendations to the Commission concerning matters pending before FERC. Here, FERC matters comprise Ericson's main duties, she frequently presents recommendations to the Commission concerning legal or procedural courses of action, and the Commission always accepts them. Although FEP initially decides whether the ICC should file comment, Ericson presents her own recommendations when the cases have more of a legal rather than a technical focus and has set forth her recommendations to the Commission at around half of all the bench sessions pertaining to FERC/FCC between 2008 and 2010.

certify utilities for operation and address negotiated agreements between utilities. Id. (noting breadth of ALJs' duties within the ICC). In contrast, Ericson's recommendations concern a very narrow range of Federal energy matters which relate to the wholesale energy market. While such cases, contrary to the Union's contention, may have broad implication on the regulation of energy in Illinois since FEP recommends that the ICC intervene in FERC matters only when the cases do rise to that high level of importance, Ericson's own participation in FERC matters is narrow in comparison to the ICC's larger structure and function in regulating Illinois public utilities.

Next, Ericson does not engage in executive and management functions when she participates in work groups by flagging issues for the ICC and FEP's attention or when she gives advice to individual commissioners who sit on the boards of OMS and OPSI. First, as noted above, the fact that Ericson flags issues for attention is not alone sufficient to indicate that Ericson possesses and exercises authority and discretion to broadly affect the ICC's goals and the means of achieving them. Dep't of Cent. Mgmt. Serv. v. Ill. State Labor Rel. Bd., 278 Ill. App. 3d at 87 (setting forth requirement for executive and management functions). In flagging these items, Ericson merely collects matters of interest, alerts her superiors and staff, and asks them whether they would like to make recommendations to individual commissioners who represent Illinois in OMS and OPSI to vote on certain items.

Second, Ericson's advice to individual commissioners cannot support a finding of managerial authority because it is too infrequent and does not show she helps direct the effectuation of ICC policy on a broad scale. As a preliminary matter, Ericson's advice to individual commissioners is not routine and therefore is not a task which comprises a predominant portion of her work time. State of Ill. Dep't of Cent. Mgmt. Serv./Dep't of Healthcare & Family Serv., 388 Ill. App. 3d at 332 (attorneys' infrequent exercise of management and executive functions precluded a finding that they were managerial employees). Further, any advice to individual commissioners on matters before external entities such as OMS and OPSI boards cannot help direction the effectuation ICC policy because only the Commission as a body may set and implement policy concerning the regulation of Illinois public utilities. Finally, the only evidence the Employer introduced concerning Ericson's recommendations, accepted by a commissioner, concerned the comments Ericson provided to help the commissioner prepare for participation on a panel at the Department of Energy-NARUC forum;

yet there is no indication that the presentation affected ICC policy or that it even represented the ICC's policies as a whole.

Nor does Ericson engage in executive and management function when she advises the ICC, as a body, because there is no evidence that in giving such legal advice, she makes effective recommendations on matters of policy. Indeed, in three examples introduced by the Employer, Ericson's advice to the commissioners was either rejected or not formally placed before the ICC for a decision. While the Commission did accept Ericson's recommendation to decline joining in an amicus brief before the United States Supreme Court, the Employer provided no evidence or argument as to how this recommendation affected ICC policy

Finally, while Ericson reviews proposed legislation that affects the ICC, that task cannot support a finding that she is managerial within the meaning of the Act because she necessarily performs it infrequently[47] and it is therefore not a predominant function. Id.

Thus, Ericson is not managerial as a matter of fact.

2. Managerial as a matter of law

Illinois Courts have also applied an alternative "matter-of-law" test to establish managerial status. The courts consider whether the employees are, in essence, surrogates for an office holder. Office of the Cook Cnty. State's Attorney v. Ill. Labor Rel. Bd., 166 Ill. 2d 296, 303 (1995). Three factors weigh heavily in finding employees surrogates and thus managerial as a matter of law: (1) a close identification of the office holder with the actions of his or her subordinates, (2) a unity of their professional interests, and (3) the power of the subordinate to act on behalf of the public office holder. Chief Judge of the 16th Judicial Circuit v. Ill. State Labor Rel. Bd., 178 Ill. 2d 333 (1997). However, in assessing these factors, courts focus on the statutory powers and duties of the type of employee at issue rather than on the specific tasks of any particular individual. Cook County State's Attorney, 166 Ill. 2d at 305. Necessarily then, absent a "detailed statutory apparatus" which "clothe[s] the employees with all the powers and privileges" of the office holder, the employees at issue will not be deemed managerial as a matter of law. Dep't of Cent. Mgmt. Servs./Dep't of Healthcare and Family Servs., 388 Ill. App. 3d at

[47] As noted, above, the evidence suggests that OGC rarely makes the ultimate recommendations on whether the ICC should support, oppose or remain neutral on a bill because OGC takes the lead in very few bill reviews.

333, quoting Cook County State's Attorney, 166 Ill. 2d at 305. Further, the Illinois Supreme Court has cautioned that the "manager as a matter-of-law" analysis should not be used to deem all publicly employed lawyers managerial employees under the Act. Chief Judge of the Sixteenth Judicial Circuit, 178 Ill.2d at 347; Office of Cook Cnty State's Attorney, 166 Ill. 2d at 305.

Here, none of the petitioned-for attorneys are managerial as a matter of law because no statute clothes them with all the powers and privileges of the ICC as a body. See State of Ill. Dep't of Cent. Mgmt. Serv. (Pollution Control Board), 28 PERI ¶ 50 (IL LRB-SP 2011) (managerial as a matter of law analysis did not apply where attorney assistants to Pollution Control Board members never functioned in place of the Board members). Thus, these employees cannot be managerial as a matter of law absent the requisite statute, even though the Employer argues that they are given significant discretion in practice, are closely aligned with the commissioners, are empowered to act on their behalf,[48] and share a unity of professional interest with them. State of Illinois, Dep't of CMS (Capital Development Bd.), 20 PERI ¶ 18 (IL LRB-SP) (statute required); State of Illinois Attorney General, (Public Aid Bureau), 27 PERI ¶ 67, (IL LRB-SP 2011) (the petitioned-for employees' actual duties are "largely irrelevant" under a managerial as a matter of law analysis); see also, Am. Fed. of State Cnty and Mun. Empl., 333 Ill. App. 3d 177, 775 N.E.2d 1029 (5th Dist. 2002) (it is the petitioned-for attorneys' authority to act as a surrogate to the office holder that determines employees' status as managerial under the alternative test, not the extent to which their supervisors exercise control over their work product; rejecting union's assertion that attorneys were not managerial as a matter of law because their superiors exercised some supervisory control); Cf. Ill. Dep't. of Cent. Mgmt. Serv. v Ill. Labor Rel. Bd., 406 Ill. App. 3d 310 (4th Dist. 2010) (ALJs were managerial as a matter of law because (1) ALJs' powers and duties were defined in the Illinois Human Rights Act and (2) the ALJs had the power to act on behalf of, and as surrogates of, the Human Rights Commission because their orders could automatically become the Commission's final order if no exceptions were filed).

---

[48] Notably, there is no evidence that the technical advisor IVs are empowered to act on the Commission's behalf absent the Commission's express consent or direction in each case or that their legal positions on policy become the Commission's own, absent review. Cf. Ill. Dep't. of Cent. Mgmt. Serv. v Ill. Labor Rel. Bd., 406 Ill. App. 3d 310 (4th Dist. 2010) (in some cases, the ALJs' decisions could become the Commission's own decisions by operation of law without need for Commission review).

Contrary to the Employer's contention, the technical advisors' designation as Special Assistant Attorneys General does not render them managerial as a matter of law because that designation does not make them surrogates for their direct employer, the ICC. See, State of Ill. Dep't of Cent. Mgmt. Serv., 26 PERI ¶ 132 (IL LRB-SP 2010) ("in the capacity of special assistant attorneys general, the Technical Advisor IIIs operate more as surrogates for the Attorney General as office holder than as surrogates for the ICC" and were therefore not managerial as a matter of law).

Thus, none of the petitioned-for attorneys are managerial as a matter of law.

VI. Conclusions of Law

The petitioned-for technical advisor IVs at the Illinois Commerce Commission are neither managerial as a matter of fact or managerial as a matter of law.

VII. 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, found to be appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment pursuant to Sections 6(c) and 9(d) of the Act.

INCLUDED: Technical advisor IV positions, currently occupied by Richard Favoriti, John Feeley, James Weging, and Christine Ericson.

EXCLUDED: All supervisory, managerial and confidential employees within the meaning of the Act.

VIII. Exceptions

Pursuant to Section 1200.135 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200-1240, the parties may file exceptions to this recommendation and briefs in support of those exceptions no later than 14 days after service of this recommendation. Parties may file

responses to any exceptions, and briefs in support of those responses, within 10 days of 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 the Board's General Counsel, Jerald Post, 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 2nd day of July, 2012

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

/s/ Anna Hamburg-Gal

Anna Hamburg-Gal
Administrative Law Judge

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

State of Illinois, Department of Central Management Services,	)	
Employer	)	
	)	Case No. S-RC-09-202
and	)	
American Federation of State, County and Municipal Employees, Council 31,	)	
Petitioner	)	

ORDER SEALING EXHIBITS

1. The Employer exhibits Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, and 17, comprised of selected portions of the Employer's confidential and protected records, shall be maintained under seal, until such further order of the Board.
2. The testimony contained in the hearing transcript regarding the "ComEd rate case" in pages 23 through 979 of the transcript herein, shall also be maintained under seal, until such further order of the Board.
3. The above specified exhibits and transcripted testimony may be disseminated only to counsel for the parties, including their associated attorneys, paralegals and investigators.
4. Any exhibits sealed pursuant to this Order shall not be unsealed absent an order of the Board upon a showing of good cause.
5. All referenced to sealed exhibits or testimony contained in the Recommended Decision and Order shall not identify the public utility or specific issue involved.

Issued at Chicago, Illinois this 1st day of July, 2012

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

/s/ *Anna Hamburg-Gal*

Anna Hamburg-Gal
Administrative Law Judge

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

American Federation of State, County and Municipal Employees, Council 31,	)	
Petitioner	)	
and	)	Case No. S-RC-09-202
State of Illinois, Department of Central Management Services,	)	
Employer	)	

AFFIDAVIT OF SERVICE

I, Eileen Bell, on oath state that I have this 2nd day of July, 2012, served the attached **ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD** issued in the above-captioned case on each of the parties listed herein below by depositing, before 5:00 p.m., copies thereof in the United States mail at 100 W Randolph Street, Chicago, Illinois, addressed as indicated and with postage prepaid for first class mail.

Justin Smock
Labor Relations Counsel
CMS
100 W Randolph Street, S-4-500
Chicago, Illinois 60601

Catherine L. Struzynski
Legal Counsel
AFSCME Council 31
205 N. Michigan Ave, Suite 2100
Chicago, Illinois 60601

Eileen L. Bell

SUBSCRIBED and **SWORN** to
before me this **2nd day**
of July 2012.

Carla St

NOTARY PUBLIC

NOTARY PUBLIC OFFICIAL SEAL STATE OF ILLINOIS
CARLA STONE
MY COMMISSION EXPIRES
OCTOBER 25, 2014