

we adopt that portion of the ALJ's RDO that finds certain of Davis's duties indicate she is a confidential employee. Because we conclude that Davis is a confidential employee for the reasons found by the ALJ, we do not address the cross-exceptions which urge that other of Davis's duties are also indicative of confidential status.

Procedural history

This is the second time we have addressed the petition for representation at issue in this case. The petition originally sought to add to the RC-10 bargaining unit eight attorneys employed at the Department of Central Management Services (CMS) in the title of Public Service Administrator, Option 8L, but the parties quickly agreed to exclude from the petition three who serve as labor relations counsel at CMS. By means of a response to a show cause order, ALJ Ellen Maureen Strizak allowed the Employer an opportunity to demonstrate that there were issues of fact or law warranting a hearing as to whether, as the Employer asserted, the remaining five attorneys were confidential or managerial employees excluded from Section 3(n)'s definition of a public employee by Sections 3(c) or 3(j) and consequently from inclusion in a collective bargaining unit as defined in Section 3(s) pursuant to our obligations under Section 9. Determining the Employer had failed in its response to demonstrate an issue of fact or law, ALJ Strizak issued an RDO in which she found the five remaining employees were neither confidential nor managerial employees, and recommended they be added to the RC-10 bargaining unit.

Upon our review of exceptions to ALJ Strizak's RDO, we agreed with her conclusions with respect to four of the five employees, but we reversed with respect to Erin Davis, and remanded for a hearing on whether she was a confidential employee. State of Illinois, Dep't of Cent. Mgmt. Serv., 26 PERI ¶83 (IL LRB-SP 2010), aff'd in non-precedential order sub nom. Ill.

Dep't of Cent. Mgmt. Serv. v. Ill. Labor Relations Bd., 2012 IL App. (4th) 100729-U, 28 PERI ¶91 (Ill. App. Ct., 4th Dist., Jan. 20, 2012).¹ On remand, ALJ Owen conducted the hearing on Davis's confidential status, and subsequently issued the RDO presently before us.

Issue presented

The core issue is whether Erin Davis is a confidential employee within the meaning of Section 3(c) of the Act, but the Petitioner has in its exceptions also raised issues concerning the scope of our remand order and the breadth of evidence the ALJ was permitted to consider. We address the scope of remand first, and the breadth of evidence in the context of the core issue. We do not address the cross-exceptions as they merely seek additional findings unnecessary to our resolution of this case.

Discussion and analysis

Definition and tests for confidential status

A confidential employee is defined as

an employee who, in the regular course of his or her duties, assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations or who, in the regular course of his or her duties, has authorized access to information relating to the effectuation or review of the employer's collective bargaining policies.

5 ILCS 315/3(c) (2010). The Illinois Supreme Court has stated that the purpose for the exclusion of confidential employees "is to keep employees from 'having their loyalties divided' between their employer and the bargaining unit which represents them." Chief Judge of the Cir. Ct. of Cook County v. Am. Fed'n of State, County and Mun. Employees, Council 31, 153 Ill. 2d 508, 523 (1992) (quoting City of Wood Dale, 2 PERI ¶2043, at 299, No. S-RC-261 (ISLRB 1986)).

¹ Although the Employer sought to have the Appellate Court rule on Davis's status when it reviewed our certification of the other four employees, the court found it lacked jurisdiction over that matter and explicitly declined to do so. Ill. Dep't of Cent. Mgmt. Serv., 2012 IL App (4th) 100729-U at ¶38.

It has approved of the Board's use of two primary tests for confidential status: the "authorized access" test and the "labor-nexus" test. Chief Judge, 153 Ill. 2d at 523.²

Under the authorized access test, an employee is deemed confidential if he "ha[s] authorized access to information concerning matters specifically related to the collective-bargaining process between labor and management." Id. (citing Wood Dale and West Harvey-Dixmoor School Dist. No. 147, 2 PERI ¶1054, at 134, No. 85-UC-0015-C (IL ELRB 1986)). Access to confidential information unrelated to the collective-bargaining process is insufficient. City of Evanston v. State Labor Relations Bd., 227 Ill. App. 3d 955, 978 (1st Dist. 1992); Bd. of Educ. of Cmty. Consol. H.S. Dist. No. 230 v. Ill. Educ. Labor Relations Bd., 165 Ill. App. 3d 41, 60-63 (1st Dist. 1987) (applying similar provisions of the Educational Labor Relations Act, such access irrelevant); Pullman-Standard Div. of Pullman, 204 NLRB 762 (1974). Moreover, mere capability of access is insufficient where such access is not authorized or intended by the employer. Niles Twp. H.S. Dist. 219 v. Ill. Educ. Labor Relations Bd., 387 Ill. App. 3d 58, 75-76 (1st Dist. 2008) (applying similar provisions of the Educational Labor Relations Act).

Under the labor nexus test, an employee holds confidential status if the employee "assists in a confidential capacity in the regular course of his or her duties a person or persons who formulate, determine or effectuate labor relations policies." Chief Judge, 153 Ill. 2d at 523. While the court used the disjunctive "or" in its articulation, it made clear that the person being assisted must perform all three functions for the labor nexus test to apply. Id. As the ALJ noted, merely providing statistical information upon which an employer's labor relations policy is based is insufficient to establish confidential status, Bd. of Educ. Comty. H.S. Dist. 230 v. Ill. Educ.

² A third test recognized by the Board and the courts, the "reasonable expectation" test, applies only where there is no collective bargaining unit in place, but it is expected that establishment of a unit would require the employee in question to assume confidential responsibilities. Chief Judge, 153 Ill. 2d at 523. Here, collective bargaining units are already in place, and the reasonable expectation test could not apply.

Labor Relations Bd., 165 Ill. App. 3d 41, 61-64 (4th Dist. 1987) (incorporating NLRB precedent to Illinois Educational Labor Relations Act).

ALJ's analysis

The ALJ applied both the labor nexus and the authorized access tests for determining confidential status, and found that some of Davis's duties made her confidential under both tests, while other of her duties would meet neither test. Specifically with respect to the labor nexus test, she found Davis confidential because of her collaboration with CMS Deputy General Counsel for Labor Relations Stephanie Shallenberger on Human Rights Commission charges that were related to collective bargaining agreement grievances and her assistance of Shallenberger and CMS Deputy Director of Labor Relations Robb Craddock by working on a case pending before the Civil Service Commission that impacted work performed by members of collective bargaining units. She found Shallenberger and Craddock were the types of superiors to whom the labor nexus test might apply because they formulate, determine and effectuate labor relations policy. She also found that Davis's work on these tasks fell within the ambit of her regular duties.

The ALJ found these same duties qualified Davis as a confidential employee under the authorized access test. In her role in helping to resolve the matter that concerned Human Rights Commission charges and related grievances, Davis had advance access to information concerning contract administration. She similarly had advance access to information concerning contract administration with regard to the Civil Service Commission case because it involved personal service contracts which might shift work out of bargaining units.³

³ The ALJ found, based on the evidence presented at hearing, that other tasks Davis performed were not indicative of confidential status. These included Davis's participation in determining what the Employer could do with respect to an employee's personal USB flash drive left in an agency computer, work on a class action grievance concerning status under the Fair Labor Standards Act (Davis's area of

Petitioner's exception regarding the scope of the hearing

In its exceptions, the Petitioner argues that the ALJ had exceeded the scope of this Board's remand order by considering all evidence of whether Davis was a confidential employee. It cites Quincy School Dist. No. 172 v. Ill. Educ. Labor Relations Bd., 336 Ill. App. 3d 1205 (4th Dist. 2006), for the proposition that, upon remand, a lower tribunal is bound to follow the mandate of the remanding court.

We find the ALJ correctly followed our remand directions. In our earlier decision, we held that the Employer's non-specific assertions that the representation of agencies and advice given to assistant attorneys general by Erin Davis and her counterpart in the Chicago office were insufficient to raise an issue of fact or law warranting a hearing, and that "[t]he sole exception is with respect to Erin Davis's representation before the Illinois Civil Service Commission in a case against the Petitioner."⁴ From this, the Petitioner argues the ALJ was limited to considering solely Davis's role with respect to the Civil Service Commission case. Over Petitioner's objections, the ALJ allowed the parties to provide evidence concerning other tasks performed by Davis, and in her analysis she considered those other matters.

The Petitioner's exception fails in two ways. First, it is inconsistent with the wording in the last paragraph of our decision, the portion that may be considered our mandate. We "remand[ed] the case for a hearing concerning whether Erin Davis is a confidential employee within the meaning of the Act." We did not specify that the hearing was to cover a narrower topic. Moreover, we adopted the ALJ's recommendation "with respect to the other four

expertise), development of an alternative work schedule plan, a telecommuting/telework policy, a light duty policy, responses to requests under the Freedom of Information Act, and work relating to the State budget.

⁴ Our holding with respect to Courtney O'Connell, who, like Davis, held the title of Assistant Personnel Counsel, was affirmed by the Illinois Appellate Court in Ill. Dep't of Cent. Mgmt. Serv., 2012 IL App (4th) 100729-U. In that appeal, the court refused to address our holding with respect to Davis, finding it lacked jurisdiction over her status because it had not been finally determined by an administrative agency.

employees,” but did not explicitly adopt any part of her recommendation with respect to Davis and thus did not foreclose consideration of all topics related to her purported confidential status.

Second, the exception blurs the distinction between a determination on whether an employer has raised sufficient issues of fact and law to warrant resolution of those issues through a hearing, and a post-hearing decision based upon all the evidence that may be presented through the hearing process. ALJ Strizak’s earlier recommendation, largely affirmed by this Board and then a reviewing court, was based on the Employer’s failure to make the minimal showing we require before we expend the resources of a hearing. Some of the Employer’s assertions had been inconsistent with evidence it submitted in response to ALJ Strizak’s show cause order, other assertions were simply too vague, and the Employer made no attempt to explain whether it viewed the evidence it was submitting as relevant to the labor-nexus test or the authorized access test for confidential status. State of Illinois, Dep’t of Cent. Mgmt. Serv., 26 PERI ¶83 (IL LRB-SP 2010), aff’d in non-precedential order sub nom. Ill. Dep’t of Cent. Mgmt. Serv. v. Ill. Labor Relations Bd., 2012 IL App. (4th) 100729-U, 28 PERI ¶91 (Ill. App. Ct., 4th Dist., Jan. 20, 2012). Despite these deficiencies, we found an issue had been raised with respect to Davis’s purported confidential status because of her role in the Civil Service Commission case. Id. Once we have found the Employer has made a threshold showing and determine to expend the resources of a hearing to examine confidential status, there is no sound reason for limiting the exploration of that status.

Courts have found our practice of issuing a show cause order followed by an ALJ determination of whether to grant the petition for representation or go to hearing to be somewhat analogous to summary judgment practice. Dep’t of Cent. Mgmt. Serv./Ill. Commerce Comm’n v. Ill. Labor Relations Bd., 406 Ill. App. 3d 766, 772-73 (4th Dist. 2010). Petitioner would have

us instead treat it as akin to a ruling on a motion in limine. We find no error in the ALJ's consideration of all of the evidence pertinent to Davis's purported confidential status.

Petitioner's exceptions regarding the ALJ's determination of confidential status

We also find no error in the ALJ's determination that two of Davis's duties demonstrate her confidential status. Her duties in relation to the Human Rights Commission charges overlap with collective bargaining agreement grievances, and her duties relating to a matter pending before the Civil Service Commission may determine who may performs work that is purportedly bargaining unit work. We agree with the ALJ that these duties meet both the labor-nexus and the authorized access tests for confidential status.

The Petitioner presents only two arguments in support of its position that the ALJ's determination with respect to these two duties is in error. Petitioner's primary argument is that the evidence fails to present a clear distinction between Davis's duties with respect to the cases before the Human Rights Commission and the Civil Service Commission and her other duties in which she has some interaction with labor relations counsel, and also that the evidence fails to present a clear distinction between Davis's duties in these areas and the similar duties performed by the other assistant personnel counsel who the Board determined in its earlier decision was not a confidential employee.

We acknowledge that the ALJ's recommended finding with respect to Davis appears on the surface to be at odds with our prior finding with respect to O'Connell in that Davis and O'Connell hold the same job title. But our decisions are based on the evidence presented to us concerning the employees' actual duties, and in the case of O'Connell the Employer failed to make the threshold demonstration in response to ALJ Strizak's order to show cause that there was even an issue of fact or law in support of its assertion that O'Connell was a confidential

employee. We found, contrary to the recommendation of ALJ Strizak, that it had made that threshold demonstration with respect to Davis, and upon full exploration of the issue in a hearing we are able to confirm that, as ALJ Owen recommends, some of Davis's duties show she is a confidential employee. That other of Davis's duties would (again, on the surface) appear to be similar in nature, yet were found by the ALJ to not be indicative of confidential status, is also based on the evidence presented. It is not our responsibility to draw a bright line between those of Davis's duties which show she is a confidential employee, and those which do not; our obligation is to determine whether Davis is a confidential employee and thus whether *any* one of her normally performed duties shows that she is. To prevail, Petitioner should persuade us that there is a *lack of evidence* that Davis's tasks with respect to the cases before the two commissions cause her to assist Shallenberger and Craddock in relation to contract negotiation or contract administration or provide her with access to information related to the collective bargaining process. Petitioner fails where it simply argues that the duties with respect to the commissions are similar to other duties the ALJ found not indicative of confidential status.

With respect to its obligation to demonstrate a lack of evidence of confidential status, the Petitioner does mention Davis's testimony that she spends very little time conversing with Shallenberger. However, unlike Section 3(r)'s definition of a supervisory employee, which generally requires an employee spend a preponderance of employment time engaged in supervisory tasks, Section 3(c)'s definition of a confidential employee does not involve a measurement of time spent on confidential tasks. It merely requires that the confidential tasks be performed "in the regular course of ... duties" rather than on an ad hoc basis. City of Chicago, 26 PERI ¶114 (IL LRB-LP 2010) (citing Chief Judge of Cir. Ct. of Cook County v. Am. Fed'n

of State, County and Mun. Empl., 218 Ill. App. 3d 682, 703 (1st Dist. 1991), aff'd, 153 Ill. 2d 508, 525 (1992)).

That Davis's confidential duties were not merely ad hoc assignments is evident from the fact that she had such duties relating to both her Human Rights Commission tasks and her Civil Service Commission tasks. It is also supported by additional evidence that is the subject of the Petitioner's remaining substantive exception.⁵ In determining that Davis's confidential activities were part of her normal duties, the ALJ references Davis's very recent participation in a discussion concerning a union proposal in the Civil Service Commission case. Petitioner cites County of Boone, 19 PERI ¶74 (IL LRB-SP 2003), for the proposition that evidence concerning the duties of the employees at issue will not be considered if it relates to activity occurring after a petition for representation is filed. But Davis's post-petition discussion of union proposals relates both to her duties at that time, and to her duties prior to the filing of the petition: specifically, whether those pre-petition duties were mere ad hoc assignments or part of her normal duties. We find no error in the ALJ's use of this evidence, and that the record as a whole supports her determination that Davis's duties with respect to the Human Rights Commission and with respect to the Civil Service Commission were performed in the regular course of her duties.

Employer's cross-exceptions

Because we find that Davis's duties with respect to the Human Rights Commission and with respect to the Civil Service Commission were part of her regular duties and meet the

⁵ The evidence Petitioner cites is actually not relevant. It cites a portion of the ALJ's RDO which references Shallenberger's testimony that she planned to have Davis testify concerning how Davis had determined which employees were subject to the Fair Labor Standards Act. This cannot demonstrate error because the ALJ determined Davis's duties with respect to the FLSA were not indicative of confidential status. However, we find Petitioner's argument pertinent to the ALJ's reference to Davis's duties with respect to recent union proposals, and consequently address it in that context.

requirements of both the labor-nexus test and the authorized access test, we are able to determine that she is a confidential employee within the meaning of Section 3(c) of the Act and that her position should not be added to the RC-10 bargaining unit. The Employer has filed cross-exceptions and argues the ALJ erred in finding that other of Davis's tasks did not involve confidential duties. Determining whether those duties are also confidential in nature is unnecessary to our resolution of this case, and consequently we decline to address the cross-exceptions.

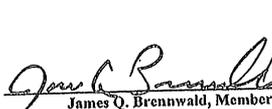
Conclusion

For these reasons, we adopt the ALJ's conclusion that Erin Davis is a confidential employee within the meaning of Section 3(c) of the Act, and that the position she currently occupies should be excluded from the RC-10 bargaining unit.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD


Jacalyn J. Zimmerman, Chairman


Paul S. Besson, Member


James Q. Brennwald, Member


Michael G. Coll, Member


Albert Washington, Member

Decision made at the State Panel's public meeting in Chicago, Illinois, on May 15, 2012; written decision issued at Chicago, Illinois, May 29, 2012.

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

American Federation of State, County and)
Municipal Employees, Council 31,)
)
Petitioner)
)
and)
)
State of Illinois, Department of Central)
Management Services,)
)
Employer)

Case No. S-RC-10-052

AFFIDAVIT OF SERVICE

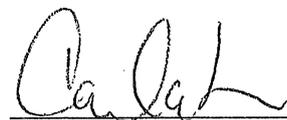
I, Elaine Tarver, on oath state that I have this 29th day of May 2012, served the attached **BOARD DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD STATE PANEL** issued in the above-captioned case on each of the parties listed herein below by depositing, before 5:00 p.m., copies thereof in the United States mail at 100 W Randolph Street, Chicago, Illinois, addressed as indicated and with postage prepaid for first class mail.

Mark Bennett
Laner Muchin
515 N State Street, Suite 2800
Chicago, Illinois 60654

Jacob Pomeranz
Cornfield and Feldman
25 East Washington, Suite 1400
Chicago, Illinois 60602



SUBSCRIBED and SWORN to
before me this 29th day
of May, 2012.



NOTARY PUBLIC

