

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-10-222
)	
State of Illinois, Department of Central Management Services (Department of Revenue),)	
)	
Employer)	

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

On March 2, 2012,¹ Administrative Law Judge (ALJ) Anna Hamburg-Gal² issued a Recommended Decision and Order (RDO) in the above-captioned case, relating to a petition for representation filed pursuant to the majority interest provisions of Section 9(a-5) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010) (Act). The petition was filed by the American Federation of State, County and Municipal Employees, Council 31 (Petitioner or Union) and sought to add to the RC-10 bargaining unit represented by Petitioner, a number of attorneys employed by the Illinois Department of Central Management Services (Employer) at the Illinois Department of Revenue in the title of Senior Public Service Administrator (SPSA) Option 8L.³

The ALJ determined that four of the attorneys, Jerilyn Gorden, Paul Caselton, Mark Dyckman and Brian Fliflet, are supervisors within the meaning of Section 3(r) of the Act,⁴ and

¹ For a period of several months the Board agreed to the parties' request to defer its consideration of the exceptions filed in this case.

² The petition was originally assigned to former ALJ Sharon Wells who presided at the hearing.

³ Option 8L is the Employer's designation for positions requiring a license to practice law.

⁴ In relevant part, Section 3(r) provides:

for that reason their positions should not be added to the bargaining unit. She found that another attorney, Terry Charlton, is a public employee within the meaning of Section 3(n) of the Act,⁵ and that his position would be appropriately included in the RC-10 bargaining unit. Pursuant to stipulations entered by the Petitioner and the Employer, the ALJ also found that the positions of four attorneys, Augusto Lorenzini, George Logan, Melissa Reihei and William Haymaker, should be excluded from the unit because they are confidential employees within the meaning of Section 3(c),⁶ and because Haymaker is also a managerial employee within the meaning of Section 3(j).⁷ Finally, again pursuant to the parties' stipulations, the ALJ found that one additional attorney, James Chipman, is a public employee whose position should be added to the unit.

Pursuant to Section 1200.135(b) of the Board's Rules and Regulations, 80 Ill. Admin. Code §1200.135(b), Petitioner filed timely exceptions to the findings that Gorden, Caselton,

"Supervisor" is an employee whose principal work is substantially different from that of his or her subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, to adjust their grievances, or to effectively recommend any of those actions, if the exercise of that authority is not of a merely routine or clerical nature, but requires the consistent use of independent judgment. Except with respect to police employment, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising that authority, State supervisors notwithstanding.

⁵ In parts most relevant to this case, Section 3(n) provides:

"Public employee" or "employee", for the purposes of this Act, means any individual employed by a public employer ... but excluding all of the following: ... employees appointed to State positions of a temporary or emergency nature; ... managerial employees; short-term employees; confidential employees; independent contractors; and supervisors except as provided in this Act.

⁶ Section 3(c) provides:

"Confidential employee" means 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.

⁷ Section 3(j) provides:

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

Dyckman and Fliflet are supervisory employees, as well as to the ALJ's preliminary findings used to reach this conclusion.

The Employer also filed timely exceptions, excepting to the ALJ's finding that Charlton is not a supervisor or a managerial employee and to her finding that his placement in the RC-10 bargaining unit is appropriate. The Employer further excepted to the fact that the ALJ did not exclude Gorden, Caselton, Dyckman and Fliflet as managerial employees in addition to excluding them as supervisors. In addition, the Employer excepted to the fact the ALJ did not find all employees with term appointments, all at-will employees, and all employees exempt from the Illinois Personnel Code or exempt from the restrictions on hiring, promotions, transfers and recalls set out in Rutan v. Republican Party of Ill., 497 U.S. 62 (1990), are managerial or confidential as a matter of law. Finally, although the ALJ agreed with the Employer's contention that Gorden, Caselton, Dyckman and Fliflet are supervisors, the Employer excepted to aspects of the analysis the ALJ used to reach that conclusion.

After reviewing the RDO, exceptions, cross-exceptions, responses and the record, we affirm the ALJ's conclusions regarding the status of each of the employees. As explained below, we modify her analysis in only one respect, a modification that does not alter her conclusions.

I. Exclusion of Four Employees as Supervisors

In finding that Gorden, Caselton, Dyckman and Fliflet are supervisors, the ALJ found each met the three factors necessary for supervisory status as articulated in Section 3(r): (1) their principal work is substantially different from that of their subordinates; (2) they exercise one or more of the 11 statutory indicia of supervisory authority, and use independent judgment in doing so; and (3) they spend a preponderance of their work time on such tasks. City of Freeport v. Ill. State Labor Relations Bd., 135 Ill. 2d 499, 512 (1990).

With respect to the statutory indicia, the ALJ found Gorden has the supervisory authority to direct in that she assigns work and reviews and has responsibility for her subordinates' work while exercising independent judgment, but that she does not exercise independent judgment in completing performance evaluations. She found Gorden also exercised independent judgment with respect to granting overtime, but not with respect to granting time off. She rejected the Employer's contention that Gorden has the authority to issue discipline by use of independent judgment because the Employer never produced any evidence that Gorden had disciplined anyone, and it was impossible to ascertain whether she would exercise independent judgment if she ever did discipline someone.

The ALJ found Caselton also has the supervisory authority to direct because he assigns and reviews work and evaluates his subordinates with independent judgment and has the power to affect their terms and conditions of employment by approving their overtime requests and adjusting their grievances. As with Gorden, the ALJ found Caselton does not have the authority to discipline because he had only once issued an oral reprimand, and that was pursuant to instructions given by the Department of Revenue's general counsel.

Similarly, the ALJ found Dyckman has the supervisory authority to direct because he assigns and reviews work and evaluates his subordinates and has the power to affect their terms and conditions of employment by approving their overtime and time off requests. She rejected the Employer's contention that Dyckman also exercises the supervisory authority to hire because, though Dyckman interviews candidates for employment and makes recommendations that are almost always accepted, the general counsel subsequently interviews each candidate and makes a wholly independent assessment and Dyckman sometimes interviews candidates with Fliflet. She also rejected the Employer's contention that Dyckman has authority to discipline

and adjust grievances because Dyckman has never exercised either authority, and there was no basis for her to determine the extent to which he would exercise independent judgment if he were to do so.

Finally, the ALJ found Fliflet has the supervisory authority to direct because he assigns and reviews work and evaluates subordinates with independent judgment accompanied by the power to affect terms and conditions of employment by approving overtime and time off requests. She rejected the Employer's contention that Fliflet also disciplines and adjusts grievances for the same reason she rejected it for Gorden and Dyckman. She also rejected the Employer's contention that Fliflet has the authority to hire for the same reason she rejected the contention with respect to Dyckman, and because Fliflet had made recommendations for hire that were not implemented.

A. Petitioner's Exceptions With Respect to Gorden, Caselton, Dyckman and Fliflet

1. Exceptions with respect to principal work

Petitioner concedes that Dyckman's and Fliflet's principal work is substantially different from that of their subordinates and consequently that they meet the first element for supervisory status, but it excepts to the ALJ's finding that the same is true of Gorden and Caselton. It suggests that Gorden and Caselton's administrative tasks are de minimus, and argues that the nature and essence of the work they perform is the same as that of their subordinates—the provision of legal advice through memoranda, letters, legislation and regulations—and that the fact that they are “the last stop for the work flow” to the general counsel is insufficiently different. But even if we were to ignore those functions that Gorden and Caselton perform that

are not performed by their subordinates,⁸ we find that being ultimately responsible for the advice a division gives the general counsel and having the authority to reject subordinate's work product and require its re-working is qualitatively different from the work of being the initial analyst establishing proposals for the division's consideration. Applying the terminology of previous Board decisions used by the Illinois Supreme Court in City of Freeport, the "nature and essence" of their job is different, even though their work is not "obviously and visibly different" from that of their subordinates. 135 Ill. 2d at 511. We agree with the ALJ's determination that the first element has been met here in that the principal work of these four employees—being responsible for the content of their division's work product—is substantially different from that of their subordinates.⁹

2. Exceptions with respect to the statutory criteria

With respect to the statutory criterion of authority to direct, the Union takes issue with the ALJ's findings that: (1) Caselton has the authority to adjust grievances; (2) Dyckman and Fliflet approve time off; and (3) all four employees direct and assign work with the ability to affect terms and conditions of employment in their approval of overtime requests.

We agree with the Union and reject the ALJ's finding that Caselton has the authority to adjust grievances. The Union argues the only grievance Caselton received was from his own denial of a request for compensatory time (a denial made at the direction of his superiors) and

⁸ In fact, we agree with the ALJ's finding that both Gorden and Caselton perform functions distinct from those performed by their subordinates and reject the Petitioner's contention that these are de minimis.

⁹ The Union points out that advice given through private letter rulings (rather than through other types of letters, memoranda, regulations and legislation) go directly from Charlton to the general counsel, bypassing Gorden and Caselton, but it does not contest that for other forms of advice relevant to their particular tax areas, Gorden and Caselton are responsible for their respective division's work product. We note private letter rulings are qualitatively different from broadly applicable legislation, regulations or policies. As explained in the Department of Revenue's regulations, private "[l]etter rulings are binding on the Department only as to the taxpayer who is the subject of the request for ruling." 2 Ill. Admin. Code 1200.110(a).

that there was no evidence that he had the authority to adjust that grievance. The Employer provides no defense of this ruling in its response to the Union's exceptions. The ALJ's finding appears based on testimony provided by Caselton that is capable of being interpreted as stating he had, in adjusting the grievance, approved the use of compensatory time. However, earlier testimony shows Caselton had approved an initial request for compensatory time, then was told this was improper and so denied a second similar request. That denial led to the grievance and to his action with respect to the grievance. When speaking of his approval of the compensatory time, Caselton used the past tense, suggesting he was referring to his grant of the initial request and not to his action with respect to the grievance. And in his testimony Caselton also describes writing a report and passing it up to his superiors at the first level grievance stage, which suggests a passive role rather than a decision-making role. For these reasons, we find this testimony does not support a finding that Caselton has the authority to adjust grievances. Our reversal of the ALJ's finding on this point does not require that we reverse her determination that Caselton is a supervisor because, as we discuss below, we agree with her finding that he exercises the supervisory authority to direct in the assignment of work.

We agree with the ALJ's conclusion that Dyckman and Fliflet exercise independent judgment in approving time off. The Union argues Dyckman had never denied a request for time off and that he did not discuss the process he uses, which is true, but before Dyckman testified as part of the Union's rebuttal evidence, the general counsel had testified that Dyckman and Fliflet had complete discretion with respect to time off and that, except with respect to those on alternate schedules for whom there are guidelines, "it's a matter of case load, and it's a matter of assuring that the needs of the Department are met, and they are allowed their time." In other words, there is evidentiary support for the ALJ's conclusion that Dyckman (and Fliflet) used

independent judgment in granting time off. The fact that Dyckman said nothing on the topic does not establish the contrary. Fliflet's testimony that he simply makes sure the request slip is completed properly before signing has some probative value, but we deem it insufficient to warrant finding the ALJ's conclusion incorrect in light of the other testimony.

We also agree with the ALJ's finding that all four of these employees approve overtime, assign work, and direct. With respect to their approval of overtime, the Union points to the general counsel's testimony that they have authority to grant overtime limited only by budgetary concerns, to Fliflet and Dyckman's testimony that they approve overtime a couple of times a year, and to Dyckman's testimony that, given the infrequency, there are no real budgetary limitations on their authority. We fail to see how the Union's arguments does anything other than support the ALJ's conclusion that these employees do, in fact, have the authority to grant overtime as they wish.

With respect to the ALJ's conclusion that the four employees also assign work with the exercise of independent judgment, the Union acknowledges that "some work may be assigned in the litigation sections (those headed by Dyckman and Fliflet) based on skill as well as case load equalization, but it argues the two policy sections (headed by Gorden and Caselton) have "many" routine assignments based on specific areas of expertise. That many are routine of course suggests there are some that are not routine, as would be expected in such broad divisions of subject areas of tax law as income, use (sales), or property tax. The argument fails to show any error in the ALJ's determination, and we agree that the four employees use independent judgment in assigning work to their subordinates.

Finally, with respect to the ALJ's conclusion that the four employees direct the work of their subordinates, the Union argues that the testimony reveals they do so in different ways, with

Dyckman in one of the litigation sections maintaining an “open door” policy to allow his subordinates to approach him to strategize, while Fliflet in the other litigation section more routinely reviewing the cases his subordinates are working on. These differences in approach do not rule out direction; rather they confirm use of independent judgment in how to provide that direction. The Union also summarizes portions of Fliflet’s and Caselton’s testimony as indicating their interaction with their subordinates is no more than collaboration among professionals, *id.*, but Caselton’s testimony on the point appears self-serving, and Fliflet’s testimony on the topic supports the ALJ’s conclusion by confirming that he ensures arguments presented in litigation are consistent with departmental policy.

3. Exceptions with respect to preponderance of time

The Union’s final exception is to the ALJ’s conclusion that the four employees spend a preponderance of their employment time exercising their supervisory authority. It states the record supports finding that Gorden and Caselton spend the majority of their time drafting legal opinions, regulations, and legislation and consequently they cannot spend a preponderance of their time on supervisory matters.¹⁰ This line of reasoning either applies the majority of time test articulated in Dep’t of Cent. Mgmt. Serv. v. Ill. State Labor Relations Bd., 249 Ill. App. 3d 740, 749 (4th Dist. 1993), and rejected in Dep’t of Cent. Mgmt. Serv. v. Ill. State Labor Rel. Bd., 278 Ill. App. 3d 79, 83-86 (4th Dist. 1996), or it applies *dicta* from City of Freeport v. Ill. State Labor Rel. Bd., 135 Ill. 2d 499, 532 (1990), in an overly rigid fashion that was similarly rejected in Dep’t of Cent. Mgmt. Serv., 278 Ill. App. 3d at 83-86. The Appellate Court stated that “[w]hether a person is a ‘supervisor’ should be defined by the significance of what that person does for the employer, regardless of the time spent on particular types of functions.” *Id.*, 278 Ill.

¹⁰ The Union references Caselton’s testimony that he spends only 10% of his time on administrative and review tasks, and 90% of his time doing legal work similar to that of his subordinates, but this ignores Caselton’s responsibilities with respect to the content of his subordinates’ work.

App. 3d at 86. The ALJ's finding is consistent with that analytical approach, and we, too, find Gorden, Caselton, Dyckman and Fliflet meet the preponderance of time element.

In summary, we reject all of the Union's exceptions save one: that the ALJ erred in finding Paul Caselton has the authority to adjust grievances. That single variation from the ALJ's analysis does not alter the conclusion that Gorden, Caselton, Dyckman and Fliflet are supervisors within the meaning of Section 3(r) and thus not public employees within the meaning of Section 3(n), and that their positions should be excluded from the collective bargaining unit.

B. Employer's Exceptions

With respect to the ALJ's finding that Gorden, Caselton, Dyckman and Fliflet are supervisors excluded from the bargaining unit, the Employer raises two exceptions: (1) that the ALJ should not have required the Employer to provide specific examples of supervisory authority and (2) that the ALJ should have explicitly acknowledged consideration of the legislative history regarding the statutory exclusions from the definition of public employees that the Employer had referenced in its briefs. Neither exception has any bearing on the outcome of this case. Consequently, we need not, and do not address them.

II. Inclusion of Terry Charlton in the Bargaining Unit

The ALJ noted that the evidence with respect to Terry Charlton's position was sparse, but that Charlton's substantive duties were similar to those of his own subordinates with the exception that he completes their performance evaluations. She further noted that the only arguments raised by the Employer for his exclusion were that, because his position was a term appointment, it must be a managerial position or, alternatively, it may not appropriately be included in the RC-10 bargaining unit. She rejected the first contention that Charlton was managerial as a matter of law simply because he was a term employee, noting the Board has

consistently rejected such arguments.¹¹ The ALJ rejected the second contention that Charlton's placement in the RC-10 bargaining unit would be inappropriate because Charlton performs work similar to that of his subordinates, is functionally integrated with them, has contact with them on a daily basis, and shares a common supervisor. She noted he does not share all terms and conditions of employment with his subordinates because they are subject to the Personnel Code and his position is subject to the Personnel Code only for the limited period of his term appointment, but she found there were a sufficient number of the Section 9(b) factors to establish a community of interest and warrant his inclusion in the unit.¹²

The Employer raises four exceptions with respect to inclusion of Charlton in the unit: (1) that the ALJ should have found him managerial as a matter of law; (2) that she should have found his duties supervisory; (3) that she should have found him managerial "under the Act"; and (4) that she should have found the RC-10 bargaining unit inappropriate for his inclusion. Two of these arguments were waived; the others lack merit.

¹¹ The Employer points out that the cases cited by the ALJ that involve employees of the State of Illinois are currently pending review by the Illinois Appellate Court, but other of our decisions cited by the ALJ involving non-State employees hold the same, and one of our decisions involving state employees that was not cited by the ALJ specifically rejects the argument that term appointments are excluded from the protections of the Act and was affirmed by the Illinois Appellate Court, albeit in a non-precedential decision. State of Ill., Dep't of Cent. Mgmt. Servs., 25 PERI ¶68 (IL LRB-SP 2009), aff'd sub nom. Dep't of Cent. Mgmt. Servs. v. Ill. Labor Relations Bd., No. 4-09-0438 (Ill. App. Ct., 4th Dist., Dec. 28, 2010) (unpublished order).

¹² In relevant part, Section 9(b) provides:

The Board shall decide in each case, in order to assure public employees the fullest freedom in exercising the rights guaranteed by this Act, a unit appropriate for the purpose of collective bargaining, based upon but not limited to such factors as: historical pattern of recognition; community of interest including employee skills and functions; degree of functional integration; interchangeability and contact among employees; fragmentation of employee groups; common supervision, wages, hours and other working conditions of the employees involved; and the desires of the employees. For purposes of this subsection, fragmentation shall not be the sole or predominant factor used by the Board in determining an appropriate bargaining unit.

A. The Employer waived its argument that Charlton is a supervisor

In an exception consisting of three sentences, the Employer states that there was testimony that Charlton functions in a supervisory capacity, there was testimony that Charlton completes evaluations for subordinates, and the Board should find Charlton to be a supervisor. In its response, Petitioner points out that the parties had stipulated that Charlton was not a supervisor, that the Employer had not deviated from that position in its post-hearing brief, and that because of the stipulations, it was denied any opportunity to provide evidence establishing that Charlton was not a supervisor. Indeed, the parties had stipulated that Charlton was not a supervisor—the ALJ’s preliminary finding on the point is a verbatim repetition of that stipulation. The Employer does not even mention the stipulation and offers no reason why it would not control. We find the exception to have been waived.

B. The Employer waived its argument that Charlton’s duties render him a managerial employee as a matter of fact

The Employer also excepts to the fact that the ALJ failed to address whether Charlton’s *duties* are managerial “under the Act.” Presumably, the Employer is arguing that the ALJ should have found Charlton managerial under the definition contained in Section 3(j) of the Act based on the nature of his duties as opposed to the “managerial-as-a-matter-of-law” analysis based on the fact of his term appointment which the ALJ clearly did address, and reject.

This exception, too, is inconsistent with the parties’ stipulations, and we find it has been waived. The stipulation states: “The *sole* argument the Employer is raising for this position is that *by virtue of the fact this position is a term appointment*, it is *de facto* or *de jure* managerial under the Act.” (emphasis supplied). The Employer’s attempt to raise an argument that Charlton is managerial based on his duties at this very late date precludes Petitioner from presenting its evidence on the point, and the argument will not be considered.

C. Term appointments are not managerial as a matter of law

The argument that term appointments are managerial as a matter of law has previously been rejected by this Board. State of Ill., Dep't of Cent. Mgmt. Servs., 25 PERI ¶68 (IL LRB-SP 2009), aff'd, Dep't of Cent. Mgmt. Servs. v. Ill. Labor Relations Bd., No. 4-09-0438 (Ill. App. Ct., 4th Dist., Dec. 28, 2010) (unpublished order), and the Employer provides no sound reason to alter our position on that point. The Employer's argument begins by stating that, though term appointments are protected by the Personnel Code during their term and may be discharged only for cause, at the conclusion of the term these protections end and the Employer may discharge the employee even without cause. The Employer then argues that such term employees should not be cloaked with the "just cause" protections currently contained in its collective bargaining agreement with the Union, and that, therefore, they should be excluded from collective bargaining altogether.

In advancing this argument, the Employer appears to be operating under the assumption that a ruling deeming Charlton to be a "public employee" under the Act, and the resulting certification of the Union as the exclusive representative of Charlton's position as part of the existing RC-10 bargaining unit, would be tantamount to a Board order that Charlton's position be covered under the terms of the parties' current collective bargaining agreement, including the "just cause" provision. In response, we need only point out that, under the Act, our holding that Charlton is a public employee (based on our finding that the Employer has failed to demonstrate that any statutory exclusion applies to him), and the eventual certification of the Union as his collective bargaining representative, means simply that the parties have a mutual obligation to bargain in good faith over his terms and conditions of employment. Our ruling in no way suggests whether "just cause" protection, or any other particular term or condition of

employment, might or should be included in the parties' final bargain—that is a matter left entirely to the parties. Indeed, the Board is without authority to impose any particular collective bargaining agreement term on any party. As Section 7 of the Act makes clear, the mutual obligation to bargain in good faith “does not compel either party to agree to a proposal or require the making of a concession,” 5 ILCS 315/7 (2010). See also H.K. Porter Co. v. N.L.R.B., 90 S. Ct. 99, 107-08 (1970) (“It is implicit in the entire structure of the [National Labor Relations] Act that the [National Labor Relations] Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties.”) Both the National Labor Relations Board and the Illinois Educational Labor Relations Board have applied that general principle in holding that groups of employees who determine to join an existing bargaining unit are not automatically bound by the terms of that unit's collective bargaining agreement. Federal-Mogul Corp., Bower Roller Bearing Div., 209 NLRB 343, 344 (1974) (“We do not perceive either legal or practical justification for permitting either party to escape its normal bargaining obligation upon the theory that this newly added group must somehow be automatically bound to terms of a contract which, by its very terms, excluded them.”); Int'l Union of Operating Eng'rs, Local 399 & W. Ill. Univ., Case No. 2011-CA-0106-C (IL ELRB July 20, 2012). Because there is nothing in the Board's order which compels the Employer to agree to a “just cause” provision, or to any other particular term or condition of employment, the Employer's concern with respect to maintaining term employees' at-will status at the end of their terms provides no basis for excluding term employees from collective bargaining.¹³

¹³ The extent to which the parties would be obligated to bargain over any particular “just cause” proposal in relation to term appointees like Charlton is an entirely separate question under the Act which has not been presented to us in this case and which we do not address. Nor do we offer any opinion regarding the extent to which the parties' collective bargaining agreement, or any binding practices, might or might not require coverage under that agreement for positions newly added to an existing bargaining unit. Any such

D. Charlton's position is appropriately included in the RC-10 bargaining unit

Based on her assessment of the Section 9(b) factors, the ALJ found Charlton's inclusion in the RC-10 bargaining unit would be appropriate. She found he performed much the same work as his subordinates who were already in that unit, was functionally integrated with them, has contact with some of them on a daily basis, and shares a common supervisor in Gorden. During his term appointment, he is also similarly covered by the Personnel Code, though the Personnel Code ceases to control upon the end of his term appointment.

The Employer excepts to this finding, broadly stating "[i]t is completely inappropriate for term appointments to be placed into the RC-10, or any other existing bargaining unit, that contains 'just cause' protection and other similar contract language intended to cover employees that are subject to the Personnel Code." However, as the NLRB notes in the similar context presented in Federal-Mogul Corp., "[s]ingle contracts often have separate or special provisions for separate classifications, departments, or shifts, depending upon the extent to which the bargaining has developed agreement upon whether all-inclusive provisions are adequate—or inadequate—to deal with the problems of each such group." 209 NLRB at 344-45.

Turning more particularly to the Section 9(b) factors, the Employer acknowledges that, during his term, Charlton enjoys the protections of the Personnel Code, and it acknowledges that

Employees subject to the Personnel Code share a certain community of interest in that they are subject to terms and conditions of employment in accordance with the Personnel Code, including rules on candidate testing and selection, certification, performance appraisal, discipline and dismissal. Significantly, Jurisdiction B of the Personnel Code restricts the State's ability to hire and fire at will, thereby giving employees subject to these provisions a certain degree of job security.

question would be a matter which the Act leaves for resolution by the parties, either at the bargaining table, or through the grievance/arbitration procedures of the agreement.

Consequently, the Employer acknowledges that Charlton shares all these attributes with the employees already in the RC-10 bargaining unit. The only difference identified by the Employer is Charlton's at-will status upon the completion of his term. But that distinction does not outweigh all the other 9(b) factors to such an extent that Charlton's placement within the unit would be inappropriate. In any event, as we have noted above, neither the Board's determination that Charlton is a public employee under the Act, or that the existing RC-10 unit is appropriate for collective bargaining with respect to his position, by itself, requires any change in the current terms applicable to his term appointment.

III. Exclusion of Gorden, Caselton, Dyckman and Fliflet from collective bargaining because of at-will status.

The Employer argues that, in addition to excluding Gorden, Caselton, Dyckman and Fliflet on the basis of their supervisory status, the ALJ should also have excluded them because they are exempt from the Personnel Code and the restrictions imposed under Rutan v. Republican Party of Ill., 479 U.S. 62 (1990), i.e., because they are at-will employees. Because consideration of this issue is unnecessary to the outcome with respect to these four employees, we need not, and do not, address it.

Conclusion

For the reasons articulated above, we:

(1) affirm the ALJ's determination to exclude from the RC-10 bargaining unit positions held by Jerilyn Gorden, Paul Caselton, Mark Dyckman and Brian Fliflet, and to include the position held by Terry Charlton for the reasons she articulated, except that we find, contrary to the ALJ that Caselton does not have the ability to adjust grievances in addition to his ability to direct subordinates;

(2) find the Employer waived its arguments that Charlton is a supervisor or that his duties make him a managerial employee;

(3) do not address the arguments presented by the Employer which would merely provide a redundant basis for excluding the positions held by Gorden, Caselton, Dyckman and Fliflet;

(4) find that Charleton's position would be appropriately included in the RC-10 bargaining unit; and

(5) find that the ALJ's determinations with respect to the inclusion of James Chipman's position and the exclusion of positions held by Augusto Lorenzini, George Logan, Melissa Riahei and William Haymaker, which have not been excepted to, are binding on the parties but not otherwise precedential.

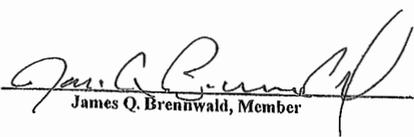
BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD



John Hartnett, Chairman



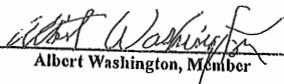
Paul S. Besson, Member



James Q. Brennwald, Member



Michael G. Coli, Member



Albert Washington, Member

Decision made at the State Panel's public meeting in Chicago, Illinois, on September 11, 2012; written decision issued at Chicago, Illinois, October 19, 2012.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

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

Case No. S-RC-10-222

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

I. Background

On April 7, 2010, 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 Senior Public Service Administrator (SPSA), Option 8L, in the Illinois Department of Revenue, in the RC-10 bargaining unit. The State of Illinois, Department of Central Management Services (Employer) opposes the petition, asserting that some of the employees sought to be represented are excluded from coverage under the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2010), as amended (Act), pursuant to the exemptions for supervisory and 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 September 21 and 22, October 12 and 21 and November 10, 2010, by Administrative Law Judge Sharon Wells. The case was transferred to the undersigned. 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.
3. The position currently held by William Haymaker, position number 40070-25-07-230-00-01, is **excluded** as managerial and/or confidential.
4. The positions currently held by Augusto Lorenzini and George Logan, position numbers 40070-25-07-210-00-01 and 40070-25-07-100-00-01, respectively, are **excluded** as confidential.
5. The position currently held by Melissa Riahei, position number 40070-25-07-260-00-01, is **excluded** from the bargaining unit based, in part, on the confidential duties which are currently part of the job duties of this position.
6. The position currently held by James Chipman, position number 40070-25-07-000-10-01, is properly **included** in the RC-10 bargaining unit.
7. The position currently held by Terry Charlton, position number 40070-25-07-120-12-01, is not supervisory within the meaning of the Act. The sole argument the Employer is raising for this position is that by virtue of the fact this position is a term appointment it is de facto or de jure managerial under the Act, or, in the alternative, as a term appointment, this position is not appropriately included in the bargaining unit known as RC-10.

III. Issues and Contentions

The issues are (1) whether any of the petition-for employees are supervisors under section 3(r) of the Act; (2) whether any of the petitioned-for employees are managerial under section 3(j) of the Act;¹ (3) whether the petitioned-for employee are de jure managerial because they are either Rutan-exempt, exempt from the Illinois Personnel Code's Jurisdiction B, or

¹ It is unnecessary to address the managerial as a matter of fact exclusion for Gorden, Caselton, Dyckman and Fliflet because they are excluded on the basis of their supervisory status, as discussed below.

serving term appointments; and (4) whether the RC-10 bargaining unit is the appropriate bargaining unit for employees who are so exempt from the Personnel Code or who are serving a term appointment.

The Employer argues that Jerilynn Gorden, Paul Caselton, Mark Dyckman and Brian Fliflet are supervisory and managerial under the Act. In the alternative, the Employer argues that Gorden, Caselton, Dyckman and Fliflet are managerial de jure because they are Rutan exempt and exempt from Jurisdiction B of the Personnel Code. Similarly, the Employer argues that Terry Charlton is managerial de jure because he is serving a term appointment. Finally, the Employer notes that the RC-10 bargaining unit and all other existing units are inappropriate for these employees because they are either Rutan exempt, exempt from the Personnel Code and/or serving term appointments.

The Union argues that Gorden, Caselton, Dyckman and Fliflet are neither supervisory nor managerial under the Act. The Union further asserts that none of the petitioned-for employees are managerial de jure because they are Rutan-exempt, exempt from the Personnel Code, or because they are term appointees. Finally, the Union contends that the RC-10 unit is appropriate for all employees at issue.

IV. Facts

The tax section of the Department of Revenue's Office of Legal Services has an income tax, a sales/excise tax, and a property tax division. The Office of Legal Services is headed by General Counsel John McCaffrey, the department's chief legal officer. The sales and income tax divisions are each divided into a policy section, located in Springfield, and a litigation section, located in Chicago. Jerilynn Gorden and Paul Caselton work in the policy section. Mark Dyckman and Brian Fliflet work in the litigation section.

All attorneys at issue are Rutan-exempt.² Paul Caselton, Jerilynn Gorden, Brian Fliflet, and Mark Dyckman are also exempt from the Personnel Code's merit and fitness requirements under Section 4d(3). Employees exempt from the Personnel Code's merit and fitness requirements under Section 4d(3) and exempt from Rutan are considered to be completely at will and may be

² The state classifies positions as either covered by the holding in Rutan v. Republican Party 497 U.S. 62 (1990) or exempt from it. If the position is covered, the employer cannot consider political affiliation in staffing the positions; if the position is exempt, those positions may be filled based on an individual's political affiliation.

dismissed from their positions for any non-discriminatory reason. Terry Charlton is an employee with a term appointment. He works under a four-year contract and is covered by the Personnel Code for the years of his appointment.

1. Jerilynn Gorden

Jerilynn Gorden is the deputy general counsel for the sales and excise tax division of the Department of Revenue's legal services bureau. The sales and excise tax section provides legal advice to all areas of the Department of Revenue other than income tax.³ The section's attorneys draft technical advice memoranda to answer questions concerning the law's application and respond to similar technical requests for assistance via email. For example, they explain to the audit division staff how the law applies to specific audits. In addition, the division's attorneys review all legislation pending in the general assembly which affects sales and excise taxes and they write rules and regulations which are processed through JCAR. They also draft general information letters (GILs) to taxpayers, respond to taxpayer inquiries, and draft private letter rulings which are reviewed by the private letter ruling committee.

Technical advice: Gorden sits on the technical review committee for sales, excise and property tax. The committee consists of auditors, attorneys and deputy general counsel Dyckman. Gorden's subordinates in the legal division also attend the meetings to assist her as necessary. The committee meets on a regular basis to discuss issues involving audits. The auditors ask Gorden and her subordinates to give technical advice on how the law applies to their audit questions. Gorden and her subordinates then look at the materials submitted by the auditors and research the issues, reconvene before the meeting to discuss their responses to the auditors' questions, and then present their findings to the committee. McCaffrey also testified that the committee "develops policy" for auditors concerning their positions on audits.

Bill review: Gorden also undertakes bill reviews. Her division analyzes bills drafted and introduced to the legislature by parties outside the department and makes recommendations to the department as to whether it should oppose/support the bill or remain neutral on it. Gorden and her subordinates prepare reports on the proposed legislation. Gorden always reviews and approves the reports before they are passed to the general counsel and has ultimate responsibility

³ These areas include motor fuel, cigarettes, liquor, sales taxes, services taxes, electricity tax and telecom tax.

for their preparation. The general counsel reviews Gorden's reports but he only rarely disagrees with them or modifies them. The bill review documents are next sent to the legislative liaison and then to department's legislative affairs office to the director of legislation. Ultimately, the department almost always adopts Gorden's recommendations.

Proposing and drafting legislation: Each year prior to the legislative session, the department asks the deputy general counsels to propose legislation for introduction to the legislature. The proposed legislation may constitute revenue enhancing proposals or operational legislation. Revenue enhancing proposals are generated by Gorden and McCaffrey who compile a list of ideas for legislation; McCaffrey rejects or accepts the ideas on the list. Operational legislation requires the contribution of ideas from all members of the department. Legislation proposals are then passed to the senior staff and then to the legislative committee which decides whether the department will ultimately propose the legislation.

The legislative committee, composed of the program directors within the department including the head of policy and communications, head of the informal conference board, the head of the audit bureau, the director, Caselton, Gorden and other senior staff, analyzes and debates the proposed legislative initiatives and determines whether the initiatives will proceed.

If the committee decides to proceed with the ideas for legislation, then Gorden and her subordinates, under Gorden's oversight and review, draft the legislation. Once drafted, legislation is sent to McCaffrey for approval, then back to the legislative committee for a second approval. The legislative committee determines whether to accept or reject the proposals and makes the final recommendation on legislative issues to the director. Gorden must make any change the legislative committee instructs her to make. The Director must approve the committee's decision. Then the legislation is ultimately sent to the Governor's office so that the bill may later be introduced by the legislative office. The legislative committee and McCaffrey have made substantive changes to Gorden's proposed legislation.

Drafting rules and regulations⁴: The sales and excise tax section drafts regulations and rules when new laws come into effect and when audit issues arise. Any attorney in Gorden's section, including Gorden herself, may take the lead in drafting. When Gorden writes an initial draft, she shows it to the general counsel who decides whether it "looks good"; he may make

⁴ The distinction between rules, regulations and legislation is not clear from the record. Accordingly, they are addressed separately, though the process by which the attorneys draft them are similar.

changes to Gorden's initial draft before approving the regulation and sending it to the revenue policy group (RPG).

The RPG comments on the regulation and sends its comments back to the drafter. The sales and excise tax section evaluates the comments and determines whether to change the regulation or rule by incorporating the group's feedback. Gorden may take a substantive comment to McCaffrey, inform him that the proposed change is a good one, and ask his opinion. McCaffrey may provide his opinion, then approve the draft regulation, and send it to the legislative committee.⁵

The legislative committee discusses the regulations and may provide comments or recommend changes. For example, it may remove a date from the regulation rendering it a "little different." If the legislative group approves the regulation, the Director signs a memo drafted by Gorden on behalf of the general counsel, summarizing the regulation, to approve it. The Director has the final say as to whether the committee's recommendations are accepted and incorporated into the regulation. McCaffrey then sends the regulation to the Governor's office which must grant the department approval to post it. The regulation is next sent to the Director's advisory group, comprised of practitioners picked by the Director, which provides comments on the regulation. Gorden's group evaluates the comments, discusses them with McCaffrey, and sometimes makes the group's recommended changes.

Finally, the regulation is sent to JCAR for first notice, a period that allows for public comment. The person listed as first contact on JCAR is the individual who drafted the regulation which may be Gorden or one of her subordinates. During the rule/regulation-adoption process, Gorden may meet with JCAR staff to respond to questions and to ensure that the staff understands the rule. The second notice period permits department staff to make suggestions and recommendation of a technical nature such as punctuation and word changes. Gorden decides whether to accept or reject those changes.

Private letter ruling committee: Gorden attends the private letter ruling committee meetings. She helps decide whether the department should issue a private letter ruling, helps determine its content, and drafts the ruling. McCaffrey has final authority to determine the

⁵ Gorden attends the legislative committee along with Paul Caselton, assistant director Jody Winnett, Director Mike Clemens, General Counsel John McCaffrey, Audit Division Head, Dan Hall, Legislative Liaison Jim Nicholson and his two liaison assistants, Milton Laflour and Adam Howell attend. Other individuals attend as needed if the group requires their input.

content of the private letter rulings and whether the department should issue them at all.

Representative of the Department: Gorden is asked to represent the department by testifying in legislative committees on legislation which is drafted or reviewed by the department. In testimony, she explains the reasons for the department's support or opposition to the legislation and its implications on Illinois, its revenue, and its citizens. While Gorden testified once before a legislative committee, she does not usually undertake such tasks.

a. Supervisory authority

Gorden has five attorney subordinates, four Technical Advisor Advanced Program Specialists (TAAPSs), and Terry Charlton, Senior Counsel of Sales and Excise Tax. Charlton is Gorden's only direct report. Gorden also has one administrative assistant who performs work for all the attorneys in the division.

All the attorneys in the sales and excise tax division, including Gorden, write technical advice memoranda, respond to technical advice requests via email, provide the audit division with information concerning the application of the law to specific audits, write rules and regulations and see them through the JCAR process, respond to taxpayer inquiries, draft private letter rulings, and review all legislation which affects sales and excise taxes. Unlike her subordinates, Gorden is ultimately responsible for the work product that leaves the sales and excise tax division and for ensuring that assignments are completed with the requisite quality and sufficiency. Further, Gorden does not issue general information letters, while her subordinates do.

Gorden assigns her subordinate attorneys work based on their experience or expertise in certain practice areas and has complete discretion in making such assignments.⁶ While the general counsel has assigned work to Gorden's subordinates directly, he does so rarely.

Gorden is also responsible for following up on assignments to make sure that the work is completed. She reviews the work of her subordinate TAAPSs attorneys when she assigns them work directly.⁷ She ensures that their work is clear, that it makes sense, that the target audience

⁶ For example, Rick Walters receives work relating to public utilities and telecom because that is his area of expertise. Similarly, Deborah Bogus receives research assignments because she has experience working as a researcher and a clerk in the appellate division. Sam Moore receives work concerning statutory construction, statutory drafting, allocation and local taxes.

⁷ Charlton performs most of the review of the sales and excise tax attorneys' work. However, as noted above, Gorden reviews all draft legislation.

will understand it, and that the argument is substantively well-supported. If Gorden and her subordinates disagree over the work's substance, they will discuss the matter and argue it back and forth. If the subordinate has expertise in the area and feels strongly about his position, Gorden will follow her subordinate's position. If Gorden and the subordinate cannot agree, they will present both positions to general counsel McCaffrey who decides which position the subordinate should ultimately take; in making such decisions, McCaffrey has sometimes changed Gorden's recommendation. Under those circumstances Gorden and her subordinate rewrite the memo. Gorden's subordinates will also voluntarily seek out her advice on professional matters.

Gorden completes performance evaluations for Charlton and the administrative assistant. The general counsel gives Gorden complete discretion in filling out her subordinate's performance evaluations because she has day-to-day contact with them and is aware of their performance. The general counsel has never changed Gorden's evaluations of her subordinates. Gorden also signs off on the evaluations Charlton completes for his direct reports, the TAAPSs.

She also approves time off and has never denied a subordinate's time off request. However, the general counsel has set forth certain rules regarding time off which provide that Gorden cannot grant time off during a legislative session.

Gorden has discretion to approve overtime. As testified to by Mark Dyckman and Brian Fliflet, the department's policy provides that deputies may grant overtime only if the proposed overtime tasks are work-related.

She has authority to grant subordinates permission to attend continuing legal education (CLE) conferences on state time, though the general counsel must grant final approval. The general counsel has never overturned the deputy general counsels' decisions concerning CLE conference attendance for their subordinates.

The general counsel testified that Gorden has the authority to discipline her subordinates however Gorden has never exercised her authority to discipline because there has never been a situation where such discipline was required.

Gorden may hear grievances, but there is no evidence in the record that she has done so.

McCaffrey testified that Gorden spends 10-15% of her time on administrative responsibilities including signing and reviewing evaluations, approving time off and assigning work and that she spends about 45% of her time reviewing her subordinates' work which includes meeting with her subordinates to discuss their assignments. Gorden testified that she

spends 65% to 70% of her time performing the same work as her subordinates and that she spends only about 30% of her time signing off on time sheets, performing evaluations, reviewing work, and discussing her subordinates' assignments or interpretations of the law.

2. Paul Caselton

Paul Caselton is the deputy general counsel for the income tax division of the Department of Revenue's legal services bureau. The income tax division performs similar functions to that of the sales and excise division, but with a focus on matters concerning the Illinois Income Tax Act. The attorneys in the income tax division draft technical advice memoranda, advise the audit division, perform bill reviews, issue private letter rulings, and draft rules/regulations and legislation, in the same manner as the attorneys in the sales and excise tax division.

Caselton performs bill reviews, writes general information letters (GILs), private letter rulings and technical advice memoranda, and drafts rules/regulations and legislation. He employs the same procedures as Gorden does in the sales and excise division.

Like Gorden, Caselton also sits on a technical review committee, composed of auditors and senior attorneys from the legal division, to discuss issues involving audits and to answer technical questions auditors pose, though the focus of his committee is income tax rather than sales and excise tax. Similarly, Caselton also attends the legislative tracking committee which discusses proposed regulations and determines whether they should move forward. Finally, Caselton represents the department by testifying in legislative committees on legislation drafted or reviewed by the department. However, he does not usually perform this function and does so only when his specific technical expertise is required.

a. Supervisory authority⁸

Caselton oversees two Technical Advisor Advanced Program Specialists (TAAPSs) attorneys, Brian Stocker and Heidi Scott, and one administrative assistant. While Caselton

⁸ At hearing, the Employer addressed Gorden's and Caselton's job duties together, noting that they performed their functions in a similar manner, albeit with respect to different tax subfields and different subordinates. Indeed, both parties on brief address Caselton's and Gorden's duties together, occasionally noting differences where relevant. Accordingly, it is proper to extrapolate that the way in which Caselton fulfills his duties is the same as the way in which Gorden performs hers. See, State of Ill., Dep't of Cent. Mgmt. Serv. (Ill. Dep't of Corrections), 28 PERI ¶ 46 (IL LRB-SP 2011) (where parties agreed that petitioned-for employees performed the same or similar duties, Board made no distinctions between them though their performance evaluations differed).

performs all the functions performed by his subordinate TAAPS attorneys, he drafts more regulations and legislation than the other attorneys do. Further, unlike his subordinates, McCaffrey testified that Caselton has ultimate responsibility for work issued from his section.⁹

Caselton assigns his subordinate attorneys work based on their experience or expertise in certain practice areas and has complete discretion in making such assignments. While the general counsel has assigned work to Caselton's subordinates directly, he does so rarely.

In addition, Caselton reviews his subordinates' general information letters, private letters, technical advice memoranda, bill reviews, and draft legislation, and discusses that work with his subordinates. If Caselton disagrees with a subordinate's approach, he tries to resolve it with the subordinate. Caselton may bring the matter to McCaffrey if he cannot resolve it on his own. McCaffrey only sometimes changes Caselton's decisions.¹⁰ All regulations, legislations, bill reviews and private letter rulings are passed to McCaffrey for final approval.

Caselton also completes performance evaluations for his three direct reports. The general counsel usually accepts the evaluations as written by Caselton and has rejected only one evaluation.

Caselton has authority to grant subordinates permission to attend continuing legal education conferences on state time, though the general counsel must grant final approval. The general counsel has never overturned Caselton's decisions concerning CLE conference attendance for his subordinates.

He approves time off by signing vacation slips. He has denied two requests for time off because he was told to do so. While he had initially granted one of those requests, for subordinate Heidi Scott, the department's timekeeper told him that granting time off under the circumstances of Scott's case was against the rules. As a result, Caselton denied that request.

He has heard first step grievances. When an employee grieved denial of time off, Caselton heard and denied the grievance at the first step.

Caselton disciplined one employee at McCaffrey's instruction. McCaffrey specifically

⁹ While Caselton testified that he is not responsible for his subordinates' work, this testimony contradicts more specific testimony from McCaffrey that Caselton has ultimate responsibility for reports on legislation proposed by parties outside the department, even if those reports are prepared by his subordinates, and Caselton's own general testimony that he reviews his subordinates' work product.

¹⁰ While the frequency with which McCaffrey accepts such decisions was advanced only with respect to Gorden, the Employer addressed Caselton and Gorden's duties together at hearing, and both parties addressed these employees' duties together on brief. As noted earlier, extrapolations are appropriate here.

directed Caselton to issue an oral reprimand concerning that employee's use of time off. An oral reprimand is documented, becomes part of the employee's personnel file, and is used as part of the progressive discipline system.

Caselton testified that he spends close to 90% of his work time performing the same tasks as his subordinates and that he spends only 10-15% of his time reviewing his subordinates' work. McCaffrey testified that Caselton spends approximately 40% of his time assigning and reviewing work, evaluating his subordinates, and performing administrative oversight functions. McCaffrey's testimony is consistent with Caselton's job description which provides that Caselton spends 20% of his time "review[ing] and manag[ing] the operational activities of attorneys engaged in administering Income Tax legal programs and services" and "provid[ing] technical and legal advice to subordinates which must be considered in resolving complex legal issues." Further, the job description states that Caselton spends another 20% of his time providing guidance and training to his subordinates, completing their performance evaluations, approving their time off, and counseling staff on problems with productivity, quality of work and conduct. According to the job description, Caselton spends another 20% of his time serving as the Department's legal advisor for its Illinois Income Tax related functions, 10% of his time assisting the general counsel in preparation of legislation, meeting with agencies which report to the governor, and preparing analysis of bills introduced to the General Assembly, 10% of his time drafting and reviewing rules and regulations and providing technical advice to the audit bureau, 10% of his time responding to taxpayer inquiries, 5% of his time assisting his superiors in analyzing and preparing tax refund or collection cases, and 5% of his time performing other miscellaneous duties.¹¹

3. Mark Dyckman

Mark Dyckman is the deputy general counsel for the sales, excise and property tax litigation division of the Department of Revenue's legal services bureau in Chicago. That division performs litigation in property tax exemption cases and advises the department's local government services bureau on technical or legal matters which concern the state's role in administering the property tax code.

¹¹ The union objects to these time estimates, however it did not introduce specific evidence to refute these numbers nor did it otherwise provide a breakdown of the time Caselton spends on each of the listed functions.

Dyckman's main job function is to oversee litigation involving property tax, sales tax, and excise tax. When Dyckman meets with the general counsel or director, he updates management on the sales tax litigation unit's cases.

Board of Appeals: He also sits on the Board of Appeals which determines the merits of a case on appeal and whether to approve the hearing examiners' proposals. The Board of Appeals makes recommendations on cases to the director who must sign off on the Board's decisions. The Board accepts approximately 95% of the hearing officer's recommendations, but the Employer introduced no evidence as to how often the Board's recommendations were accepted by the Director. Dyckman spends 5-10% of his work time as a member of the Board of Appeals. This is an appointed position and is not part of his job description.

Settlement authority: Dyckman has authority to settle cases up to \$500,000 at issue, though he must consult the general counsel or director on settlements when the case involves a policy issue which might draw media scrutiny. Ninety-six percent of cases in Dyckman's unit involve less than \$500,000. Dyckman uses his expertise to ascertain the risks of litigation and to determine whether the department should settle. He is also asked to make recommendations on topics concerning settlement and the risks of litigation.

Representative of the Department: Dyckman has represented the department when speaking to the Illinois Chamber of Commerce's Tax Committee to discuss the amnesty program and its rules. In that capacity, he discussed the department's policies and interpreted them for the Committee.

Technical advice: Dyckman, like Gorden, sits on the technical review committee for sales, excise and property tax. Dyckman's functions on the committee are similar to Gorden's and he answers auditors' questions in the same manner as Gorden does.

Memoranda: Dyckman also issues internal memoranda on property, sales and excise tax issues in which he performs an analysis of certain legal and factual issues and makes recommendations on topics including low-income housing tax credit financing and Farmland Assessment Certifications. The recommendations concern controversial issues with which the department must contend. Dyckman consults the general counsel if the matter concerns an important policy issue, but not if the matter concerns non-controversial statutory interpretation or ministerial functions

Dyckman wrote a memo to the director and the general counsel concerning low-income

housing tax credit financing which addressed how legal and rule-making issues might affect department policy. Dyckman did not consult with either the general counsel or the director as to the memo's contents prior to drafting it, although he did consult with the managers of the local government services bureau. In that case, the department followed Dyckman's advice and instituted a rule-making project which promulgated an administrative regulation. Dyckman wrote a second memo concerning farmland assessment certifications but his opinion was not adopted by the department because the project was put on hold. Dyckman writes such memos approximately twice a year.

Finally, Dyckman assists deputy general counsel Lorenzini in providing technical assistance for court cases and he interacts with practitioners on matters including settlement and discovery.

a. Supervisory authority

Dyckman has eight TAAPS attorney subordinates. His subordinates litigate cases on behalf of the department before the department's ALJs.¹² Dyckman assists them in difficult cases and participates in settlement negotiations, but does not usually litigate cases himself. Further, unlike his subordinates who address ministerial and technical tasks, Dyckman is extensively involved in matters concerning policy and rule-making. While Dyckman might work on such rule-making matters together with his subordinates, he does not usually assign that work for them to perform on their own. Further, Dyckman has authority to settle cases up to \$500,000 at issue, his subordinates do not. Lastly, Dyckman is ultimately responsible for the sales tax litigation unit's daily operations, subject to the Director's or the general counsel's ultimate approval, while his subordinates are not.

Dyckman assigns work to his subordinates based on their workload, skill set and interest level. He spends half an hour each week assigning approximately ten cases and has complete discretion in making such assignments.

Further, Dyckman reviews his subordinates' pleadings, ensures that his subordinates review and apply important court decisions, and follows up on his subordinates' cases to make sure that they are on track for a successful conclusion and that witnesses are prepared for

¹² These cases arise when the department makes a determination as to an individual's tax liability and the tax payer files a protest action seeking an administrative hearing. Alternatively, the taxpayer may also seek relief in the circuit court.

hearing. In addition, Dyckman's subordinates regularly ask his opinion on specific legal matters, consult with him if they have questions on cases or trial strategy, ask him for assistance, and brainstorm legal issues with him. Dyckman testified that his subordinates are free to litigate their cases and manage them as they see fit and that he does not perform any direct monitoring of their work. However, he has absolute authority to instruct his subordinates change their pleadings or to negotiate a witness list.¹³

In addition, Dyckman provides mentoring and training to new attorneys who are assigned to him for a certain period and teaches them the department's processes and procedures. Dyckman has complete discretion to determine when the attorney is prepared to handle his own docket.

Dyckman fills out his subordinates' performance evaluations. He has full discretion in completing them and sets his subordinates' objectives for the next year. The general counsel has never made a change in the evaluations Dyckman completes and does not even see the final evaluations.

He has the authority to approve or deny his subordinates' alternative work schedules, those which are four or nine days long instead of five, and has done so. CMS provides guidelines for instituting the four- and nine-day schedules. Further, the general counsel or the chief of staff denies part-time schedules and those which request extensive work-at-home time. Dyckman also considers his employees' case loads. He has never denied a request for an alternate leave schedule. The general counsel has never overturned Dyckman's decision to approve or deny alternative work schedules.

Dyckman also has authority to grant or deny flex time schedules which may change an employee's schedule from the standard 8:30 am to 4:30 pm to alternate times. The collective bargaining agreement includes a flex time memorandum which provides guidelines for instituting flex time schedules. When an employee faced medical issues, Dyckman proposed an alternate schedule that mixed FMLA-certified leave, approved dockage, work-at-home, and work-at-the-office time. Dyckman consulted a number of individuals concerning this alternative proposal including the general counsel and the chief of staff who gave him permission to draft it. Dyckman recommended the schedule's approval. The department accepted his recommendation.

¹³ While not explicitly stated in the record, it is likely that Dyckman also tries to resolve matters through consensus and may take disputed issues to the general counsel, as the other deputies do.

Dyckman has final authority to grant his subordinates' overtime requests and has done so.¹⁴ Before granting an overtime request, Dyckman must determine whether the tasks his subordinate proposes to perform during the overtime period are work-related. The general counsel does not see overtime requests unless overtime becomes excessive and becomes a budgetary problem. Overtime is not granted on a regular basis and is not excessive. As a result, the general counsel is not involved in Dyckman's overtime approval.

Dyckman also has authority to sign off on leave requests. He approves time off for his subordinates and follows pre-established guidelines to determine whether to grant the time off. He also determines whether to grant time off based on the attorney's case load and the needs of the department. He has never denied any subordinate's request for time off.

He has authority to grant subordinates permission to attend continuing legal education (CLE) conferences on state time. However, the general counsel must grant final approval. The general counsel has never overturned the deputy general counsels' decisions concerning CLE conference attendance for their subordinates.

Dyckman interviews potential job candidates for the office. He participates in first round interviews and judges the suitability of candidates and their expertise. Dyckman has interviewed and made recommendations on property tax attorneys for hire in Springfield. For example, Dyckman attended an interview for Mehpara Suleman, along with Fliflet and Lorenzini. Dyckman and Fliflet recommended that the department hire Suleman. Suleman was subsequently hired.¹⁵ The general counsel testified that Dyckman's recommendation on hiring are followed most of the time. However, all candidates are subsequently also interviewed by the general counsel.

The general counsel testified that Dyckman has the authority to discipline his subordinates, but Dyckman has never issued discipline.

Similarly, the general counsel testified that Dyckman has authority to hear first level grievances, but Dyckman has never adjusted a grievance.

Dyckman testified that he spends one third of his time on property tax issues, 10% of his time working on the Board of Appeals, 25% of his time on advising and discussing matters with his staff, and the remainder of his time attending meetings in which he provides advice and

¹⁴ All overtime requests must be made in advance.

¹⁵ The attorney general's office approves the hire. The attorney general's office has failed to approve a hire on only one occasion.

counsel.¹⁶ The general counsel testified that Dyckman spends between 55% and 60% of his time providing hands on supervision to his subordinates and performing related administrative tasks including completing performance evaluations, approving overtime, training and mentoring, and attending settlement conferences with his subordinates.

4. Brian Fliflet

Brain Fliflet is the deputy general counsel for the income tax litigation division of the Department of Revenue's legal services bureau in Chicago. Fliflet monitors all income tax litigation and advises the general counsel and the director as to the status of income tax litigation cases. Like Dyckman, Fliflet oversees his subordinate attorneys in the prosecution of cases before the department's administrative law judges and in court, interacts with practitioners on settlement and discovery matters, writes memoranda, and represents the department when speaking to taxpayer associations and bar association tax committees.

Settlement authority: Fliflet has authority to settle cases up to \$500,000 at issue. Half of the cases in Fliflet's unit involve less than \$500,000. Fliflet uses his expertise to assess the risks of litigation and to decide whether the department should settle.

Memoranda: Fliflet writes legal memos to answer auditors' questions regarding income tax policy or procedure. Fliflet explains the department's policies and provides direction on how the auditors should implement those policies. For example, a Department of Revenue bureau manager asked Fliflet how to implement the department's policy of eliminating sales between partnership and unitary partners. Fliflet performed an analysis of the legal and factual issues. He made recommendations on the topic in question based on his legal research and discussions with a colleague. Auditors and other department staff frequently ask Fliflet for his legal opinion on matters but Fliflet usually answers them without writing a memo.¹⁷ Fliflet writes memos only around three or four times a year.

Representative of the department: Fliflet represents the department when speaking to the Illinois Chamber of Commerce's Tax Committee to discuss the amnesty program and its rules. He provides the committee with information, interprets the department of revenue's

¹⁶ These include meetings with the director, senior legal staff, the general counsel, department employee groups, taxpayer groups and the private letter ruling committee.

¹⁷ A memo is generally required to explain how new decisions from the Supreme or Appellate Courts impact the department's policies.

policy, and advises the committee on the department's policies. Fliflet has also appeared before the state local tax committee of the Chicago Bar Association to make presentations on the office's procedures, to discuss recent court decisions and to convey the department's policy positions.

Signature authority: Fliflet has signature authority for the Director of the Department of Revenue on various documents including notices of decision issued by the income tax unit section and certificates of record. Certificates of record are used to certify that certain business records which the department introduces into evidence at hearing are regularly maintained by the department.

Technical review committee: Fliflet sits on the technical review committee for income tax. The technical review committee for income tax functions in the same manner as the technical review committee for sales, excise and property tax, described above.

b. Supervisory authority

Fliflet has eight attorney subordinates who report directly to him, one technical advisor II and seven technical advisor advanced program specialists (TAAPSs). Fliflet's subordinate attorneys litigate cases on behalf of the department after a taxpayer has filed a protest action against the department concerning his tax liability. Unlike his subordinates, Fliflet does not perform much litigation and does not draft motions or briefs, though he assists his subordinates in their work. Instead, he spends a third of his day attending meetings with the general counsel, director, Attorney General's office, taxpayers, and audit bureau personnel. He also spends a significant amount of time advising other areas of the department on income tax issues. Fliflet spends the remainder of his day answering phone calls and responding to emails. Finally, Fliflet has authority to settle cases in which up to \$500,000 is at issue; his subordinates have no such authority.

Fliflet spends 15 minutes a week assigning work to his subordinates and has complete discretion in doing so. Fliflet assigns cases to attorneys based on the attorneys' individual expertise and caseload.

Fliflet oversees and monitors his subordinates' cases once they are set for hearing to ensure they are on track for a successful conclusion, that the attorney is ready, that the witnesses are properly prepared, and that the attorneys' arguments are consistent with the department's

policies.¹⁸ He reviews his subordinates' case-related work product including their pleadings, ensures that the attorneys review and apply important new court decisions in their work and brainstorms with them to help develop successful arguments. Fliflet's subordinates ask him questions about evidentiary issues, statutory interpretation and complex income tax issues, however Fliflet testified that he does not hold formal case review conferences.¹⁹ Fliflet also attends settlement conferences with his subordinates who are required to obtain his permission before settling a case.

Fliflet is responsible for taking action if his subordinates' arguments are not consistent with departmental policy. In addition, he has authority to instruct his subordinates to change their pleadings or to alter a witness list. Fliflet bases his instructions on his knowledge of the subject matter and his understanding of the legal issues. Usually, however, if Fliflet and his subordinate disagree on trial strategy, they determine their course of action based on consensus. If Fliflet and his subordinate cannot reach a consensus, Fliflet brings the matter to the general counsel who decides which approach to take.

Fliflet also mentors and trains new attorneys by teaching them the department's process and procedures and then determines when they are ready to handle their own cases.

Fliflet fills out his subordinates' performance evaluations. He has complete discretion in completing them and sets his subordinates' objectives for the next year. The general counsel has never made a change in Fliflet's evaluations and, in fact, does not even see the final evaluations.

Fliflet approves time off for his subordinates. He considers the department's needs, the attorneys' caseload, whether the individual has enough leave time, and the department's pre-established guidelines to determine whether to grant it. Fliflet has never denied any request for time off.

Fliflet also approves alternate, four-day or nine-day, work schedules. Fliflet considers his subordinates' caseload in determining whether to approve the schedules. Further, like Dyckman, Fliflet must also apply the guidelines provided by CMS for instituting those alternate schedules.

Fliflet has final authority to approve overtime. Before granting an overtime request, Fliflet must determine whether the tasks his subordinate proposes to perform during the overtime

¹⁸ Most cases are resolved before hearing.

¹⁹ Fliflet testified that he does not discuss the cases with his subordinates unless they seek out such discussion, however this testimony is inconsistent with his earlier testimony that he actively monitors his subordinates' cases once they are set for hearing.

period are work-related. The general counsel does not see the overtime requests and is not involved in the approval process because overtime for department employees is not granted on a regular basis and is not excessive.

Fliflet has authority to grant his subordinates permission to attend continuing legal education conferences on state time, though the general counsel must grant final approval. Fliflet approves the request if the conference is free or if the employee is paying the registration fees.²⁰ Fliflet has never denied a request to attend continuing legal education conferences.

Fliflet approves his subordinates' request for outside employment. Fliflet determines whether to grant the request by ascertaining whether the request outside employment would raise conflicts of interest. Fliflet's decision is forwarded to the bureau manager, the general counsel, and the chief of staff for approval. The general counsel has never rejected Fliflet's approval of subordinates' request for outside employment.

The general counsel testified that Fliflet has the authority to discipline his subordinates, but Fliflet has never disciplined a subordinate.²¹

The general counsel testified that Fliflet has authority to hear first level grievances, but Fliflet has never heard a grievance.

Fliflet interviews potential job candidates for the office. He participates in first round interviews and judges the suitability of candidates and their expertise. Fliflet attended an interview for Mehpara Suleman with Dyckman. Fliflet and Dyckman recommended that the department hire Suleman. Suleman was subsequently hired. In addition, Fliflet attends law school career fairs as the face of the department. Fliflet wrote a memo on interviews he performed at a law school job fair and recommended the hire of certain candidates. The department accepted none of his recommendations because the department had no job openings. All candidates for hire are subsequently also interviewed by the general counsel who has final authority on all hiring decisions.

The general counsel testified that Fliflet spends between 55% and 60% of his time engaging in hands on supervision of his subordinates and performing related administrative tasks

²⁰ Fliflet was instructed that the department would not cover an employee's costs of attending an outside conference.

²¹ Fliflet counseled an attorney once when she misrepresented her sign in/out times. Fliflet spoke to the department's chief of staff to determine how to handle the situation. The chief of staff advised Fliflet to hold a counseling session. Fliflet counseled the employee and the issue was resolved.

such as completing performance evaluations, approving overtime, training mentoring and participating in settlement conferences with his subordinates. Fliflet admitted that he spends a “fair amount of time” working with his staff but noted that such time is spent brainstorming issues raised in a case to help his subordinates develop successful arguments. He testified that he spends around 15-20% of his time answering his subordinates’ questions, reviewing their motions and written documents, and ensuring they are prepared for hearing.

5. Terry Charlton

Charlton is serving a term appointment as Senior Counsel for the sales and excise tax division of the Department of Revenue’s legal services bureau. He reports directly to Gorden. The record does not contain extensive testimony on Charlton’s job duties. However, Gorden testified that Charlton performs “very much the same” work as she does, except for the fact that Gorden performs administrative (and substantive) oversight functions for Charlton that he does not perform for her and that she is responsible for the division’s work product while he is not. Gorden similarly testified that her own position was not substantively distinguishable from that of Charlton’s own subordinates, the TAAPS attorneys and technical advisors, except for the fact that she has broad responsibility for the division’s work, described above, while they do not. Logically, then, Charlton’s substantive duties are similar to those of his own subordinates with the exception that he completes their performance evaluations. See also, State of Ill., Dep’t of Cent. Mgmt. Serv., 21 PERI ¶ 205 (IL LRB-SP 2005) (noting that subordinate attorneys in the Department of Revenue’s office of legal services make private letter rulings, draft general information letters, write technical advice memoranda, and review and draft legislation).

V. **Discussion and Analysis**

1. Supervisory exclusion

The Employer asserts that Jerilynn Gorden, Paul Caselton, Mark Dyckman, and Brian Fliflet are supervisors within the meaning of Section 3(r) of the Act. Under that section, employees are supervisors if they: (1) perform principal work substantially different from that of their subordinates; (2) possess authority in the interest of the Employer to perform one or more of the 11 indicia of supervisory authority enumerated in the Act; (3) consistently exercise independent judgment in exercising supervisory authority; and (4) devote a preponderance of

their employment time to exercising that authority. City of Freeport v. Illinois State Labor Rel. Bd., 135 Ill. 2d 499, 512 (1990); Vill. of Justice, 17 PERI ¶ 2007 (IL SLRB 2000); Vill. of New Lenox, 23 PERI ¶ 104 (IL LRB-SP 2007); Vill. of Bolingbrook, 19 PERI ¶ 125 (IL LRB-SP 2003).

a. The Principal Work Requirement

As a threshold matter, petitioned-for employees may be deemed supervisors under the Act only if their principal work is substantially different from that of their subordinates. City of Freeport, 135 Ill. 2d 499, 554 N.E.2d 155; Vill. of Elk Grove Vill. v. ISLRB, 245 Ill. App. 3d 109 (2nd Dist. 1993); Cnty. of McHenry, 15 PERI ¶ 2014 (IL SLRB 1999); Northwest Mosquito Abatement Dist., 13 PERI ¶ 2042 (IL SLRB 1997), aff'd sub nom., Northwest Mosquito Abatement Dist. v. Ill. State Labor Rel. Bd., 303 Ill. App. 3d 735 (1st Dist. 1999); Vill. of Glen Carbon, 8 PERI ¶ 2026 (IL SLRB 1992). The initial consideration is whether the work of the employees in each of the disputed positions is "obviously and visibly" different from that of their subordinates. City of Freeport, 135 Ill. 2d at 511. If it is, then the principal work requirement is satisfied. If the work is not obviously and visibly different, that is, if it is facially similar to the work of their subordinates, then the determinative factor in such an inquiry is whether the "nature and essence" of the alleged supervisor's functions is very different from that of his subordinates. Id.

b. Supervisory Indicia, Independent Judgment and Need for Specific Examples

In addition to meeting the principal work requirement, the petitioned-for employees must exercise authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, discipline employees, adjust grievances, or effectively recommend any such action; they must also consistently use independent judgment in performing or recommending any of these functions. Chief Judge of the Circuit Court of Cook Cnty. v. Am. Fed. of State, County and Mun. Empl., Council 31, 153 Ill. 2d 508, 9 PERI ¶ 4004 (1992); City of Freeport, 135 Ill. 2d 499 (1990); Cnty. of McHenry, 15 PERI ¶ 2014 (IL SLRB 1999); Northwest Mosquito Abatement Dist., 13 PERI ¶ 2042 (IL SLRB 1997); Vill. of Glen Carbon, 8 PERI ¶ 2026 (IL SLRB 1992).

Independent judgment requires an employee to make a choice between two or more significant courses of action without significant review of the decision by the employee's

superiors. Metro. Alliance of Police, 362 Ill. App. 3d 469, 477-78 (2nd Dist. 2005). The choices cannot be merely routine or clerical in nature, nor can they be made merely on the basis of the alleged supervisor's superior skill, experience, or knowledge. City of Freeport, 135 Ill. 2d at 531-32. However, the Board has held that an employee's decisions concerning legal matters can, under certain specific circumstances, require the exercise of independent judgment, though they may also require professional and technical skill. Dep't of Cent. Mgmt Serv. (Dep't of Human Serv.), 28 PERI ¶ 16 (IL LRB-SP 2011).

Whether the Employer must provide specific examples to illustrate such independent judgment is a matter in dispute among the districts of the Illinois Appellate Court. On the one hand, the Fourth and Fifth Districts have held that the Employer is not required to provide evidence of specific instances in which petitioned-for employees exercise their supervisory authority; rather, a written policy or job description conferring such authority is sufficient for the Employer to meet its burden. Vill. of Maryville v. Ill. Labor Rel. Bd., 402 Ill. App. 3d 369, 932 N.E.2d 558, 342 (5th Dist. 2010); Ill. Dep't of Cent. Mgmt. Servs. v. Ill. Labor Rel. Bd., State Panel, 2011 IL App 4th 090966. On the other hand, the First and Third districts do require the Employer to prove by example that employees exercise their granted authority. Vill. of Broadview v. Ill. Labor Rel. Bd., 402 Ill. App. 3d 503, 508, 932 N.E.2d 25, 32 (1st Dist. 2010) (finding job descriptions alone and the theoretical possibility that a petitioned-for employee might otherwise discipline, reward, or adjust grievances was insufficient to meet the Village's burden of proof); City of Peru, 167 Ill. App. 3d 284, 291 (3d Dist. 1988) (holding job descriptions alone insufficient to prove supervisory authority); See also, Ill. Dep't of Cent. Mgmt. Servs. v. Ill. Labor Rel. Bd., State Panel, 382 Ill. App. 3d 208, 228-29 (4th Dist. 2008) (despite job descriptions purporting to vest employees with supervisory authority, Board could reasonably conclude that employees were not supervisors because they had never exercised supervisory authority "in practice").

Applying the approach of the First and Third District Appellate Courts, it is prudent to require the Employer to provide specific examples of petitioned-for employees' supervisory authority because job descriptions, departmental policy and general orders do not describe the "means and methods by which [an employee's] duties are accomplished on a daily basis." N. Ill. Univ. (Dep't of Safety), 17 PERI ¶ 2005 (IL LRB-SP 2000). Accordingly, such evidence does not permit the Board to ascertain whether the petitioned-for employee uses his independent

judgment in performing the task. Instead, this documentation generally describes the duties of employees in legally conclusive terms and is consequently the “least helpful” type of evidence in representation hearings.²² N. Ill. Univ. (Dep’t of Safety), 17 PERI ¶ 2005 (IL SLRB 2000); see also Quadcom Communications, 12 PERI ¶ 2017 (IL SLRB 1996), aff’d by unpub. order, Nos. 2-96-0479, 2-96-0728 (Ill. App. Ct., 2nd Dist., 1997), see also State of Ill., Dep’t of Cent. Mgmt Serv. (Dep’t of Transportation), 28 PERI ¶ 20 (IL LRB-SP 2011) (instances of actual performance of tasks is strong evidence of authority to perform those tasks).

c. Preponderance requirement

Finally, petitioned-for employees are deemed supervisory only if they spend the preponderance of their work time performing supervisory functions. To satisfy this test, employees must spend more time on supervisory functions than on any one nonsupervisory function. Dep’t of Cent. Mgmt. Serv. v. Ill. State Labor Rel. Bd., 278 Ill. App. 3d 79, 83-85 (4th Dist. 1996); State of Ill., Dep’t of Cent. Mgmt Serv., (EPA, DPH, DHS, DCEA), 26 PERI ¶ 155 (IL LRB-SP 2011), appeal pending, No. 4-11-0638 (Ill. App. Ct. 4th Dist.). The Employer must demonstrate such allotments of time by setting forth the employees’ day-to-day activities, as documented by specific facts in the record. State of Ill., Dep’t of Cent. Mgmt Serv., (EPA, DPH, DHS, DCEA), 26 PERI ¶ 155 (IL LRB-SP 2011) (citing, Stephenson Cnty. Circuit Court, 25 PERI ¶ 92 (IL LRB-SP 2009)); Vill. of Bolingbrook, 19 PERI ¶ 125 (IL LRB-SP 2003).²³

²² For example, here, Mark Dyckman spends a non-trivial percent of his work time serving on the Board of Appeals, a responsibility not referenced in his job description.

²³ The Board has held that the exercise of supervisory authority under the preponderance standard must be the “actual exercise” of supervisory authority. State of Ill., Dep’t of Cent. Mgmt. Serv., (EPA, DPH, DHS, DCEA), 26 PERI ¶ 155 (IL LRB-SP 2011) (noting that the actual time does not include work time spent in instructing employees or otherwise directing employees, when such instructions do not qualify as supervisory direction under the Act), citing Downer’s Grove v. Ill. State Labor Rel. Bd., 221 Ill. App. 3d 47, 55 (2nd Dist. 1992). The Board performs this preponderance calculation by explicitly excluding those tasks that do not require independent judgment. Conversely, the Board appears to permit inclusion of those tasks which do require such independent judgment but which do not alone affect employees’ terms and conditions of employment provided that other aspects of an employee’s direction have that requisite impact. State of Illinois, Dep’t of Cent. Mgmt. Serv., (EPA, DPH, DHS, DCEA), 26 PERI ¶ 155 (IL LRB-SP 2011) (noting that assigning work, approving time off and flex scheduling and approving overtime were merely routine decisions); Ill. Dept. of Cent. Mgmt. Serv. (Secretary of State), 28 PERI ¶ 68 (IL LRB-SP 2011) (holding that preponderance of time element not met where assignment, review and oversight of subordinates required no independent judgment and where only completion of evaluations both required the exercise of independent judgment and also affected subordinates’ terms and conditions of employment); State of Ill., Dep’t of Cent. Mgmt. Serv. (Ill. Commerce Commission), 26

i. Jerilynn Gorden

1. Principal work requirement

Jerilynn Gorden satisfies the principal work requirement because the nature and essence of her work is very different from that of her attorney subordinates. While Gorden and her subordinates each draft technical advice memoranda, respond to technical advice requests via email, counsel the audit division, draft rules, regulations and private letter rulings, review legislation and respond to taxpayer inquiries, only Gorden is responsible for all work product that leaves the sales and excise tax division and for ensuring that assignments are completed with the requisite quality and sufficiency. In addition, Gorden performs functions for her attorney subordinates that they do not fulfill for her: she follows up on their assignments to make sure that the work is completed, assigns them work, fills out their performance evaluations and approves their time off. In addition, Gorden's work is substantially different from that of her administrative assistant who performs clerical and not legal functions.

2. Direction

Gorden possesses the supervisory authority to direct because her authority to review work, assign work and evaluate her subordinates with independent judgment is accompanied by the power to affect their terms and conditions of employment when she approves their overtime in a similar manner.

The term direct encompasses several distinct but related functions: giving job assignments, overseeing and reviewing daily work activities, providing instruction and assistance to subordinates, scheduling work hours, approving time off and overtime and formally evaluating job performance when the evaluation is used to affect the employees' pay or employment status. Chief Judge of the Circuit Court of Cook Cnty., 19 PERI ¶ 123 (IL SLRB 2003); Cnty. of Cook, 16 PERI ¶ 3009 (IL LLRB 1999); Cnty. of Cook, 15 PERI ¶ 3022 (IL LLRB 1999), aff'd by unpub. order, No. 1-99-1183 (Ill. App. Ct., 1st Dist., 1999); City of Naperville, 8 PERI ¶ 2016 (IL SLRB 1992). To constitute supervisory authority to direct within the meaning of the Act,

PERI ¶ 84 (IL LRB-SP 2010) (noting that routine assignment of work could not be used in calculating the preponderance element; Board did not base its decision on the failure of assignment to affect terms and conditions of employment).

the petitioned-for employees' responsibility for their subordinates' proper work performance must also involve significant discretionary authority to affect the subordinates' terms and conditions of employment. Cnty. of Cook, 28 PERI ¶ 85 (IL LRB-SP 2011) (direction must affect employees' terms and conditions of employment); State of Ill., Dep't of Cent. Mgmt. Serv., 25 PERI ¶ 186 (IL LRB-SP 2009).

i. Assignment, review and oversight

Gorden assigns work with independent judgment because she considered the nature of the case as compared with the skills of the attorney to whom she makes the assignment. Cnty. of Cook, 15 PERI ¶ 3022 (IL LLRB 1999) (employees exercise independent judgment in direction when they consider factors such as “knowledge of the individuals involved, the nature of the task to be performed, the subordinates’ relative levels of skill and experience and the employer’s operational needs”).

Gorden reviews her subordinates’ work with independent judgment because she must ensure that her subordinates’ arguments are substantively well-supported, is authorized to challenge her subordinates’ legal conclusions, is not explicitly required to consult with General Counsel McCaffrey when she and a subordinate disagree on technical matters, and is responsible for all work that leaves her division.

Contrary to the union’s contention, the “collaborative” nature of Gorden’s direction—the fact that she discusses disagreements with her subordinate, sometimes defers to their technical expertise, or consults the general counsel—does not render her authority non-supervisory. Notably, the character of direction inevitably changes with the skill and experience of the subordinate and the superior. As is the case here, where the subordinate and the superior are both skilled professionals working in a highly technical sub-field, the superior’s supervision derives from the authority to challenge the subordinates’ conclusions, to require the subordinate to defend his position, and to decide whether to raise the issue with a higher authority for resolution. See for example, State of Ill., Dep’t of Cent. Mgmt. Serv., (Dep’t of Human Serv.), 27 PERI ¶ 71 (IL LRB-SP 2011) (petitioned-for employee exercised independent judgment in direction when she was required to determine whether it was first necessary to consult her own supervisor regarding her subordinates’ course of action).

Moreover, there is no evidence that Gorden is *required* to take matters to the General

Counsel if she and her subordinate disagree on technical matters. Further, the fact that a mechanism of review exists for Gorden's decisions does obviate her supervisory authority because Gorden has input into the editing process and there is no evidence that Gorden's subordinates regularly challenge her decisions. See, City of Chicago, 28 PERI ¶ 86 (IL LRB-LP 2011) (the ability of subordinate investigators to take any disagreements they may have with the instructions provided by the supervising investigator to a higher authority did not render those instruction advice; rather the advice constituted direction because the superior had input into the steps taken in the investigative process and the subordinate only rarely sought review of the superior's decision).

In addition, Gorden's review and oversight is more likely deemed supervisory here because she has broad and overarching involvement in, or responsibilities for, her subordinates' work product. State of Ill., Dep't of Cent. Mgmt. Serv. (Dep't of Healthcare and Family Serv.), 28 PERI ¶ 69 (IL LRB-SP 2011) (finding a broader range of petitioned-for employee's tasks constituted direction within the meaning of the Act including assessment of subordinate's investigation cases where the petitioned-for employee was involved in all of the investigations which took place in the office).

Next, Gorden's review of her subordinates' work requires the consistent exercise of independent judgment even though her choices are also informed by her superior skill and knowledge because she reviews technical legal work in a substantive manner to ensure the conclusions are well-supported. Dep't of Cent. Mgmt Serv. (Dep't of Human Serv.), 28 PERI ¶ 16 (IL LRB-SP 2011)(chief ALJ's substantive review of his subordinates' recommended decisions required the use of independent judgment); See also, State of Ill., Dep't of Cent. Mgmt. Serv., (Dep't of Human Serv.), 27 PERI ¶ 71 (IL LRB-SP 2011) (rejecting ALJ's determination that petitioned-for employee's answers to subordinates' questions concerning provision of social work services to mental health patients lacked independent judgment because they were based on her superior skill).

Further, Gorden's independent judgment is preserved despite such review and she nevertheless maintains a significant measure of control over the final outcome because McCaffrey only sometimes changes her decisions when they are challenged by her subordinates. See, State of Ill., Dep't of Cent. Mgmt. Serv., (Environmental Protection Agency, Dep't of Public Health, Dep't of Human Services, Dep't. of Commerce and Econ. Activity), 26 PERI ¶

155 (IL LRB-SP 2011) (Board considered whether employee possessed sufficient control over the department's policies or decisions in determining whether the Act's exclusion applied); Cf. City of Peru v. ISLRB, 167 Ill. App. 3d 284, 290 (3rd Dist. 1988) and Peoria Housing Auth., 10 PERI ¶ 2020 (IL SLRB 1994), *aff'd* by unpub. order, docket No. 3-90317 (3rd Dist. 1995) (finding that effect recommendations are those adopted by the alleged supervisor's superiors as a matter of course with very little, if any, independent review). Thus, Gorden reviews her subordinates' work with the requisite independent judgment.

Next, Gorden completes her subordinates' performance evaluations with independent judgment because she has ultimate discretion in filling them out. However, the performance evaluations alone are not evidence of Gorden's supervisory authority to direct because there is no evidence in the record that the performance evaluations affect her subordinates' terms and conditions of employment. See, Dep't of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., State Panel, 2011 WL 5119588 (4th Dist. 2011)(authority to complete evaluations that did not impact wages, or job security, in the absence of other authority to affect employees terms and conditions of employment did not constitute evidence of supervisory authority).

ii. Time off and overtime

I cannot find that Gorden approves time off with the requisite independent judgment because the Employer introduced no evidence as to the basis of Gorden's decisions on these matters. To the extent that Gorden must follow procedures set forth by the general counsel which provide Gorden cannot grant time-off during a legislative session, her decisions made on that basis lack independent judgment. Vill. of Morton Grove, 23 PERI ¶ 72 (IL SLRB 2007) (decisions regarding overtime and leave circumscribed by the Employer's policy are routine and clerical, not supervisory).

However, Gorden possesses the supervisory authority to grant overtime for her subordinates and does so with the requisite independent judgment because she must ascertain the character of the proposed overtime work before deciding whether to permit it.²⁴ Such an

²⁴ The Employer introduced evidence only as to the basis on which Fliflet and Dyckman approve overtime. However, strictures in Fliflet and Dyckman's divisions which permit the grant of overtime only for work-related matters must also apply to Gorden's own division because to find otherwise would require a presumption that the state funds employees' extra-professional activities. Accordingly, under these circumstances, it is permissible to extrapolate from Dyckman's and Fliflet's testimony that all the

assessment, though required by policy, requires the exercise of independent judgment because the policy itself provides no guidelines for its implementation and the criteria for judging a subordinate's work are not clear, strictly objective, or numerical. As such, its application differs from the application of those criteria which the Board has held narrows an employee's discretion to nothing. See, Vill. of Morton Grove, 23 PERI ¶ 72 (IL SLRB 2007) (grant of time off based on minimum manpower requirements not supervisory; overtime granted pursuant to detailed memo entitled "Overtime Selection Process" held nonsupervisory); State of Ill., Dep't of Cent. Mgmt. Serv., 25 PERI ¶ 5 (IL LRB-SP 2009) (no independent judgment used to discipline where policy required superior to discipline employee who was tardy three times in a month and when it set out the appropriate punishments for various attendance violations). As a result, Gorden's own assessment of her subordinates' proposed overtime functions and subsequent decision to grant overtime is supervisory because it necessitates the use of independent judgment. County of Cook, 27 PERI ¶ 58 (IL LRB-SP 2011) (Grant of overtime for nurses deemed supervisory to the extent that it did not rely on seniority or guidelines outlined in the personnel policy).

In sum, Gorden possesses the supervisory authority to direct because she assigns and reviews her subordinates' work with independent judgment, and her direction is accompanied by the discretion by affect her employees' terms and conditions of employment by granting overtime.

iii. Discipline and adjustment of grievances

Finally, though the Employer asserts that Gorden has authority to issue discipline and adjust grievances, such assertions alone cannot support a finding that Gorden possesses the requisite supervisory authority because she has never exercised such authority in practice, the Employer has introduced no evidence as to the basis on which Gorden might impose discipline or adjust grievances should the occasions arise, and it is therefore impossible to ascertain whether Gorden would exercise independent judgment in doing so. Ill. Dep't of Cent. Mgmt. Servs. v. Ill. Labor Rel. Bd., State Panel, 382 Ill. App. 3d 208, 228-29 (4th Dist. 2008) (Board could reasonably conclude that employees were not supervisors because they had never exercised supervisory authority "in practice").

Deputies, including Gorden, approve overtime by determining whether the proposed overtime tasks are in fact work-related.

3. Preponderance

Gorden spends a total of 55-60% of her time directing her subordinates because she spends 10-15% of her time performing administrative functions which fall into that category (signing and reviewing evaluations, approving time off, assigning work, etc.) and spends 45% of her time reviewing her subordinates' work, according to McCaffrey's testimony. Thus, Gorden meets the preponderance test by any definition because she not only spends more time on her supervisory functions than on any one non-supervisory function, she also spends a little more than half of her total work time performing supervisory tasks.

While Gorden herself testified that she spends only 30% of her time directing her subordinates, McCaffrey's estimation is more reasonable because Gorden is ultimately responsible for all work-product that leaves the sales and excise tax division, the volume of work produced by five attorney subordinates is necessarily considerable²⁵ and Gorden's review of it is substantive and thus reasonably time-consuming.

Further, contrary to the Union's contention, the process by which Gorden reviews her subordinates' work, exemplified by a professional discussion, is properly included in the preponderance analysis because it constitutes supervisory direction, as noted above. State of Ill., Dep't of Cent. Mgmt. Serv., (Dep't of Empl. Security), 11 PERI ¶ 2021 (ILSLRB 1995) (Tax audit supervisors deemed supervisory because they spent 45% of their work time reviewing and monitoring their subordinates work and 10-30% of their time discussing audits with their subordinates; discussion of work with subordinates included in time spent directing). Further, the fact that Gorden has a relatively small number of subordinates does not warrant a conclusion that she spends little time directing because she is ultimately responsible for all work in her section and is therefore broadly involved in her subordinates' work. State of Ill., Dep't of Cent. Mgmt. Serv. (Dep't of Healthcare and Family Serv.), 28 PERI ¶ 69 (IL LRB-SP 2011) (though petitioned for employee had only two investigator subordinates, the range of his involvement in

²⁵ While Charlton performs most of the review of the sales and excise tax attorneys' work, the breadth of the work produced in the division, which includes draft rules, regulations and legislation, advice to auditors, private letter rulings and general information letters, permits a finding that Gorden reviews sufficient work to comprise a preponderance of her work time, particularly since she also reviews all of Charlton's work, reviews all draft legislation, and, as noted, is generally responsible for all work which leaves the division.

the investigations suggested that he spends a preponderance of time engaged in direction). Thus, McCaffrey's estimation of Gorden's time spent on supervisory functions is not inflated. Cf., State of Ill., Dep't of Cent. Mgmt. Serv., (Environmental Protection Agency, Dep't of Public Health, Dep't of Human Serv., Dep't of Commerce and Econ. Activity) ("EPA/DPH/DCEA"), 26 PERI ¶ 155 (IL LRB-SP 2011) (Board deemed superior's characterization of the time petitioned-for employees spent on supervisory functions to be "inflated" when his combined percentage of time for tasks performed exceeded 100% and when he included clearly non-supervisory functions in his calculations).

Thus, Gorden is a supervisor under the Act.

ii. Paul Caselton

1. Principal work requirement

Paul Caselton satisfies the principal work requirement because the nature and essence of his work is very different from that of his subordinates. While Caselton and his subordinates each draft general information letters, private letter rulings, legislation and technical advice memoranda, and perform bill reviews, only Caselton is responsible for all work product that leaves the income tax division. Further, Caselton drafts more regulations and legislation than his subordinates and performs functions for them that they do not fulfill for him: he assigns them work and reviews it, fills out their performance evaluations, approves their time off, adjusts their grievances and disciplines them. Accordingly, the nature and essence of Caselton's work is substantially different from that of his subordinates.

2. Direction

Caselton possesses the supervisory authority to direct because his authority to assign work, review work, and evaluate his subordinates with independent judgment is accompanied by the power to affect their terms and conditions of employment when he approves their overtime and adjusts their grievances.

i. Assignment, review and oversight

Caselton assigns work with independent judgment because he considers the nature of the task as compared with the skills of the attorney to whom he makes the assignment. Cnty. of

Cook, 15 PERI ¶ 3022 (IL LLRB 1999) (employees exercise independent judgment in direction when they consider factors such as “knowledge of the individuals involved, the nature of the task to be performed, the subordinates’ relative levels of skill and experience and the employer’s operational needs”).

Further, Caselton exercises independent judgment when overseeing and reviewing his subordinates’ work even though his review is arguably “collaborative” and his decisions to change his subordinates’ work product are partly based on his professional expertise. As in Gorden’s case, Caselton’s “collaborative” review of his subordinates’ work does not undermine a finding of independent judgment because there is no evidence that Caselton is required to bring disputed matters to the General Counsel’s attention. As such, the initial decision to consult the General Counsel is itself an exercise of independent judgment. State of Ill., Dep’t of Cent. Mgmt. Serv., (Dep’t of Human Serv.), 27 PERI ¶ 71 (IL LRB-SP 2011) (petitioned-for employee exercised independent judgment when she was required to determine whether it was first necessary to consult her own supervisor regarding her subordinates’ questions).

Further, Caselton’s review of his subordinates’ work is substantive and of a professional or technical nature which the Board has recently held also necessitates a choice between two significant alternatives. State of Ill., Dep’t of Cent. Mgmt Serv. (Dep’t of Human Serv.), 28 PERI ¶ 16 (IL LRB-SP 2011) (chief ALJ’s substantive review of his subordinates’ recommended decisions required the use of independent judgment); See also, State of Ill., Dep’t of Cent. Mgmt. Serv., (Dep’t of Human Serv.), 27 PERI ¶ 71 (IL LRB-SP 2011) (rejecting ALJ’s determination that petitioned-for employee’s answers to subordinates’ questions concerning provision of social work services to mental health patients lacked independent judgment because they were based on her superior skill).

Moreover, Caselton exercises independent judgment even if his subordinates may unilaterally seek the General Counsel’s review of disputed matters because there is no evidence that such disputes are frequent and McCaffrey only sometimes changes Caselton’s suggestions. As such, Caselton maintains some control over the Employer’s final decision. See, City of Chicago, 28 PERI ¶ 86 (IL LRB-LP 2011) (the ability of subordinate investigators to take any disagreements they may have with the instructions provided by the supervising investigator to a higher authority did not render those instruction advice because the superior had input into the steps taken in the investigative process and the subordinate only rarely sought review of the

superior's decision); State of Ill., Dep't of Cent. Mgmt. Serv., (Environmental Protection Agency, Dep't of Public Health, Dep't of Human Services, Dep't of Commerce and Econ. Activity), 26 PERI ¶ 155 (IL LRB-SP 2011) (Board considered whether employee possessed sufficient control over the department's policies or decisions in determining whether the Act's exclusion applied); Cf. City of Peru v. ISLRB, 167 Ill. App. 3d 284, 290 (3rd Dist. 1988) and Peoria Housing Auth., 10 PERI ¶ 2020 (IL SLRB 1994), aff'd by unpub. order, docket No. 3-90317 (3rd Dist. 1995) (finding that effective recommendations are those adopted by the alleged supervisor's superiors as a matter of course with very little, if any, independent review).

Lastly, Caselton completes his subordinates' performance evaluations with independent judgment because he has ultimate discretion in filling them out. However, the performance evaluations alone do not demonstrate Caselton's supervisory authority to direct because there is no evidence in the record that the evaluations may affect his subordinates' terms and conditions of employment. See, Dep't of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., State Panel, 2011 WL 5119588 (4th Dist. 2011) (authority to complete evaluations that did not impact wages, or job security, in the absence of other authority to affect employees terms and conditions of employment did not constitute evidence of supervisory authority).

ii. Time off, overtime, scheduling

Caselton does not approve time off with the requisite independent judgment because he must follow guidelines for such approval and other rules set forth by the general counsel, which provide that time-off may not be granted during a legislative session. Vill. of Morton Grove, 23 PERI ¶ 72 (IL SLRB 2007) (decisions regarding overtime and leave circumscribed by the Employer's policy are routine and clerical, not supervisory). Indeed, the department once overrode Caselton's decision to grant a subordinate's time-off request because it fell outside the circumscribed limits of the policy and violated the department's rules. Accordingly, Caselton does not grant time-off with independent judgment.

However, Caselton approves overtime with independent judgment, as the other deputies do, because he must ascertain whether the proposed tasks are work-related using non-routine, non-clerical and subjective factors, in the absence of clearly-demarcated guidelines.²⁶ See

²⁶ As discussed above, the same strictures in Fliflet and Dyckman's divisions, which permit the grant of overtime only for work-related matters, necessarily apply to Caselton's own division.

discussion, *supra*; Cnty. of Cook, 27 PERI ¶ 58 (IL LRB-SP 2011) (Grant of overtime for nurses deemed supervisory to the extent that it did not rely on seniority or guidelines outlined in the personnel policy); Cf. Vill. of Morton Grove, 23 PERI ¶ 72 (IL SLRB 2007) (grant of time off based on minimum manpower requirements not supervisory; overtime granted pursuant to detailed memo entitled “Overtime Selection Process” nonsupervisory); Cf., State of Ill., Dep’t of Cent. Mgmt. Serv., 25 PERI ¶ 5 (IL LRB-SP 2009) (no independent judgment used to discipline where policy required superior to discipline employee who was tardy three times in a month and when it set out the appropriate punishments for various attendance violations).

In sum, Caselton’s responsibilities to instruct his subordinates and review their work, in conjunction with his authority to grant overtime and adjust grievances, discussed below, render his authority to direct supervisory within the meaning of Section 3(r) of the Act.

3. Adjustment of grievance

Caselton possesses the supervisory authority to adjust grievances with the requisite independent judgment because he has heard first step grievances and has unilaterally denied them. Notably, Caselton’s authority and his exercise of independent judgment derives not merely from his designation as the first-step in the process, but from the fact that he knows of his authority, is not required to contact the general counsel before making grievance-related determinations and the general counsel performs no independent investigation of the issues at the first step. State of Ill., Dep’t of Cent. Mgmt. Serv., 26 PERI ¶ 116 (IL LRB-SP 2010) (Local Office Administrators had authority to adjust grievances with independent judgment where they knew of their authority and were not required to contact their supervisor first to do so and where their decision to adjust grievances was made unilaterally). The fact that Caselton has never granted a grievance does not undermine a finding that he possesses such authority because there is no evidence that he routinely denies grievances.²⁷ Cf., Metropolitan Alliance of Police v. Ill. Labor Rel. Bd., 362 Ill. App. 3d at 479-480 (2nd Dist. 2005)(routinely denying grievances does not establish the requisite independent judgment to adjust grievances).

²⁷ Notably, in a non-precedential order, the Appellate Court held that an Employer’s failure to present evidence that the petitioned-for employee had ever settled a grievance at the first step did not undermine the finding that the employee exercised supervisory authority to adjust grievances. Vill. of Oak Brook v. Ill. Labor Rel. Bd., State Panel, 2011 WL 2468144 (2nd Dist. 2011).

4. Discipline

Caselton does not discipline his subordinates with the requisite independent judgment because he issued an oral reprimand only once, at the General Counsel's instruction, and there is no other evidence in the record which shows that the Employer upholds Caselton's disciplinary decisions or even that Caselton ever exercised his alleged authority to initiate discipline at his discretion. Cf., Vill. of Streamwood, 26 PERI ¶ 134 (IL LRB-SP 2010) (sergeants exercised supervisory authority to discipline their subordinates with independent judgment even though they were sometimes instructed to initiate the discipline and even though they consulted their superiors because they had also initiated discipline at their own discretion), aff'd, MAP, Streamwood Sergeants Ch. 217 v. Ill. Labor Rel. Bd., 2011 IL App (1st) 110144-U. As such, Caselton does not possess the supervisory authority to discipline his subordinates with independent judgment.

5. Preponderance requirement

Caselton is a supervisor within the meaning of the Act because, by McCaffrey's estimation, Caselton performs supervisory tasks (assignment, review, administrative oversight) for 40% of his work time whereas he spends only between 5% and 20% on each of his remaining functions, as set forth in his job description.²⁸ Thus, Caselton spends more time on supervisory functions than on any one non-supervisory function.

While the union objects to the job description's time estimates, notably it did not introduce specific evidence to refute these numbers or otherwise provide a breakdown of the time Caselton spends on each of the listed functions. Thus, it is reasonable and necessary to rely on the figures in Caselton's job description. State of Ill., Dep't of Cent. Mgmt. Serv. (Ill. Dep't of Corrections), 28 PERI ¶ 46 (IL LRB-SP 2011) (The Board held that "though we have found that a respondent employer has the burden to present evidence in support of a supervisory exclusion, we have never suggested that a petitioner labor organization need not present contrary evidence").

Further, though Caselton testified that he spends only 10-15% of his time reviewing his subordinates' work and that he spends close to 90% of his time performing the same work as his

²⁸ These numbers are drawn from Caselton's job description.

subordinates, McCaffrey's estimation is not inflated. As noted above, a petitioned-for employee's small number of subordinates does not alone render the preponderance of time element suspect, particularly, as in this case, where the employee has broad responsibility for, and involvement in, his subordinates' work product. State of Ill., Dep't of Cent. Mgmt. Serv. (Dep't of Healthcare and Family Serv.), 28 PERI ¶ 69 (IL LRB-SP 2011) (though petitioned for employee had only two investigator subordinates, the range of his involvement in the investigations suggested that he spent a preponderance of time engaged in direction). Cf., State of Ill., Dep't of Cent. Mgmt. Serv., (Environmental Protection Agency, Dep't of Public Health, Dep't of Human Serv., Dep't of Commerce and Econ. Activity) ("EPA/DPH/DCEA"), 26 PERI ¶ 155 (IL LRB-SP 2011) (Board deemed superior's characterization of the time petitioned-for employees spent on supervisory functions to be unreliable when he stated that employee with only three subordinates spent 70% of his time engaged in supervisory functions and when he included non-supervisory tasks in his calculation). Moreover, McCaffrey's estimations (40%) are more modest than those made by the witness EPA/DPH/DCEA (70%) and are thus more credible.

Thus, Caselton is a supervisor under the Act.

i. Mark Dyckman

1. Principal work requirement

Mark Dyckman satisfies the principal work requirement because his subordinates perform litigation while he does not usually litigate cases himself. Further, unlike his subordinates who address ministerial and technical tasks, Dyckman is extensively involved in matters concerning policy and rule-making. In addition, Dyckman has authority to settle cases up to \$500,000 at issue and is ultimately responsible for the sales tax litigation unit's daily operations, while his subordinates do not have authority to settle and are not responsible for the unit's operations.

2. Direct

Dyckman possesses the supervisory authority to direct because his authority to assign work, review work, and evaluate his subordinates with independent judgment is accompanied by the power to affect their terms and conditions of employment when he approves their overtime

and their time off.

i. Assignment, review and oversight

Dyckman exercises independent judgment when he assigns cases to particular attorneys because he considers the nature of the case as compared to the skills of the attorney to whom he makes the assignment and their area of interest. County of Cook, 15 PERI ¶ 3022 (IL LLRB 1999) (employees exercise independent judgment in direction when they consider factors such as “knowledge of the individuals involved, the nature of the task to be performed, the subordinates’ relative levels of skill and experience and the employer’s operational needs”).

Likewise, Dyckman oversees and reviews his subordinates’ work with independent judgment by employing an instructive approach to ensure his subordinates’ cases are on track for a successful conclusion while preserving his absolute authority to change his subordinates’ pleadings or witness lists. While Dyckman testified that he does not perform any direct monitoring of his subordinates’ work and that his subordinates are free to litigate as they see fit, such statements do not reflect Dyckman’s self-characterized hands-on approach to oversight in which he not only reviews, but helps formulate his subordinates’ approaches to trial by brainstorming with them, ensuring they are apprised of new, relevant cases, and answering their questions on trial strategy. Such an approach, coupled with Dyckman’s authority to change his subordinates’ final work product in a manner which may impact the outcome of a case, illustrates Dyckman’s authority to direct with independent judgment. See, Dep’t of Cent. Mgmt Serv. (Dep’t of Human Serv.), 28 PERI ¶ 16 (IL LRB-SP 2011) (a superior’s substantive changes to his subordinate’s work product and conclusions, combined with instruction, constitute supervisory direction even though his decisions were based on superior skill and knowledge where his choices required legal analysis).²⁹

Further, Dyckman also directs his subordinates during settlement conferences because he is both directly involved in settlement discussions and has broad and absolute authority to

²⁹ While not explicitly stated in the record, Dyckman likely tries to resolve disputes concerning his subordinates’ work product through consensus and he may similarly bring unresolved matters to the general counsel’s attention, as the other deputies do. As such, the analysis set forth with respect to the other deputies on this issue likewise governs Dyckman’s actions to the extent that Dyckman employs the same strategy.

grant/deny his subordinates permission to settle all cases,³⁰ to override his subordinates' settlement decisions, and, necessarily, to instruct them on the proper course of action in the event of a disagreement. State of Ill., Dep't of Cent. Mgmt. Serv. (Dep't of Healthcare and Family Serv.), 28 PERI ¶ 69 (IL LRB-SP 2011) (finding a broader range of petitioned-for employee's tasks constituted direction within the meaning of the Act including assessment of subordinate's investigation cases where the petitioned-for employee was involved in all of the investigations which took place in the office).

Lastly, Dyckman completes his subordinates' performance evaluations with independent judgment because he has ultimate discretion in filling them out. However, the performance evaluations alone do not demonstrate Dyckman's supervisory authority to direct because there is no evidence in the record that the evaluations affect his subordinates' terms and conditions of employment. See, Dep't of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., State Panel, 2011 WL 5119588 (4th Dist. 2011) (authority to complete evaluations that did not impact wages, or job security, in the absence of other authority to affect employees terms and conditions of employment did not constitute evidence of supervisory authority).

ii. Time off, overtime, scheduling

Dyckman does not approve/deny or recommend approval/denial of his subordinates' alternative work schedules with the requisite independent judgment because his decisions are based on routine and clerical factors including the guidelines provided by CMS for instituting the alternate schedules, the general counsel and the chief of staff's restrictions which prohibit work-at-home time and part-time schedules, and his subordinates' case loads. See, Vill. of Morton Grove, 23 PERI ¶ 72 (IL SLRB 2007).

Similarly, Dyckman does not grant or deny flex-time schedules with the requisite independent judgment because he bases his decision on the collective bargaining agreement which includes a flex-time memorandum with guidelines for instituting flex-time schedules. Id. (decision based on guidelines set forth in the collective bargaining agreement or circumscribed by the employer's specific policy do not require the use of independent judgment). Notably, the fact that Dyckman tailored a special schedule for a particular employee does not render his

³⁰ Of course, Dyckman may only grant permission to settle cases which he himself has the unilateral authority to settle--those in which less than \$500,000 is at issue. Notably, those cases make up 96% of all the department's cases.

recommendation to approve that schedule supervisory in nature, even though the department accepted his recommendation, because Dyckman devised the schedule within the confines of specific, pre-established guidelines.

However, like Gorden and Caselton, Dyckman approves overtime with independent judgment because he must ascertain whether the proposed tasks are work-related using non-routine, non-clerical and subjective factors, in the absence of clearly-demarcated guidelines. See discussion, *supra*; Cnty. of Cook, 27 PERI ¶ 58 (IL LRB-SP 2011); Cf. Vill. of Morton Grove, 23 PERI ¶ 72 (IL SLRB 2007); Cf., State of Ill., Dep't of Cent. Mgmt. Serv., 25 PERI ¶ 5 (IL LRB-SP 2009).

Similarly, Dyckman approves time off using independent judgment because he considers his subordinates' caseloads and the department's needs in the absence of pre-established departmental manning requirements. State of Ill., Dep't of Cent. Mgmt. Serv., Dep't of Empl. Security, 11 PERI ¶ 2021 (IL SLRB 1995) (alleged supervisors exercised supervisory authority in approving or disapproving subordinates' requests for vacation and personal leave, considering factors such as the employee's productivity and the department's staffing needs); Cf. City of Naperville, 8 PERI ¶ 2016 (IL SLRB 1992) (sergeants who determined whether to approve leave requests based on the department's pre-established minimum staffing requirements did not exercise independent judgment). These factors render Dyckman's time-off decisions supervisory though he is also limited by departmental rules which set forth the periods in which time-off may be granted.³¹ Cf. Vill. of Morton Grove, 23 PERI ¶ 72 (IL SLRB 2007) (decisions regarding overtime and leave *solely* circumscribed by the Employer's policy are routine and clerical, not supervisory).

3. Hire

Dyckman does not effectively recommend the hire of new employees because the Employer has not demonstrated that Dyckman's own recommendation influenced the outcome of the hire. First, although Dyckman interviewed tax attorneys for hire in the Springfield office, the

³¹ While the other deputies also grant time-off, their decisions as described in the relevant sections are not controlled by this analysis because there is no indication that they use similar criteria in their determinations. Further, Dyckman's approach to time off is multifaceted and does not self-evidently apply to different divisions with varying needs and functions, unlike the deputies' approach to overtime decisions, discussed above.

general counsel also interviewed those candidates before the department tendered offers of employment and therefore rendered Dyckman's own decision or recommendation ineffective under the Board's case law. See, City of Delavan, 22 PERI ¶ 41 (IL LRB-SP 2006)(subsequent interview by petitioned-for employee's supervisor rendered employee's own interview of candidates and his designation that the candidates were qualified for the position an ineffective recommendation). Although, McCaffrey testified that he almost always accepts Dyckman's recommendations for hire, such statements must be accorded less weight since McCaffrey made a wholly independent assessment of the candidate and did not explain how Dyckman's recommendation influenced his own evaluation of the proposed hire.

In addition, Dyckman performed at least one of those interviews in conjunction with Fliflet who also tendered a recommendation. Thus, neither deputy's recommendation may be deemed effective because there is no way to ascertain the effect or influence of either single recommendation on the department's hiring process. Pike Cnty. Hous. Auth., 28 PERI ¶ 13 (IL LRB-SP 2011) (hiring decisions reached by consensus are not supervisory); Peoria Hous. Auth., 10 PERI ¶ 2020 (IL SLRB 1994), aff'd by unpub. order, Docket No. 3-94-0317 (1995) (employee had no authority to transfer because that power was exercised in consensus with another employee); City of Chicago, Dep't of Animal Care and Control, 25 PERI ¶ 152 (IL LRB-LP ALJ 2009) (petitioned-for employee did not effectively recommend where he participated on a panel with two other employees; noting that any single member's influence was speculative and could be outweighed by another member's opinion).

4. Discipline and adjustment of grievances

Finally, though the Employer asserts that Dyckman has authority to issue discipline and adjust grievances, such assertions cannot support a finding that Dyckman possesses the requisite supervisory authority to do so because he has never exercised such authority in practice and the Employer has introduced no evidence as to the basis on which Dyckman might impose such discipline or adjust grievances should those occasions arise. Ill. Dep't of Cent. Mgmt. Servs. v. Ill. Labor Rel. Bd., State Panel, 382 Ill. App. 3d 208, 228-29 (4th Dist. 2008) (Board could reasonably conclude that employees were not supervisors because they had never exercised supervisory authority "in practice").

5. Preponderance

Dyckman spends 55-60% of his time on supervisory functions, according to McCaffrey, and therefore meets the preponderance test. Dyckman's own testimony that he spends only 25% of time on allegedly supervisory functions does not comport with the extent and nature of the direction including oversight, review and training he provides his eight subordinates, described above.³² As such, McCaffrey's time estimation does not appear inflated particularly because Dyckman has significant involvement in his division's litigation. See, State of Ill., Dep't of Cent. Mgmt. Serv. (Dep't of Healthcare and Family Serv.), 28 PERI ¶ 69 (IL LRB-SP 2011) (employee's range of his involvement in his subordinates' tasks and the fact that he helped "maps out a plan" for their work, suggested that he spent a preponderance of time engaged in direction). Cf., State of Ill., Dep't of Cent. Mgmt. Serv., (Environmental Protection Agency, Dep't of Public Health, Dep't of Human Serv., Dep't of Commerce and Econ. Activity) ("EPA/DPH/DCEA"), 26 PERI ¶ 155 (IL LRB-SP 2011) (Board deemed superior's characterization of the time petitioned-for employees spent on supervisory functions to be "inflated" when his combined percentage of time for tasks performed exceeded 100% and where employee had very few subordinates).

i. Brian Fliflet

1. Principal work requirement

Brian Fliflet satisfies the principal work requirement because his subordinates perform litigation while he does not usually litigate cases himself. In addition, Fliflet has authority to settle cases up to \$500,000 at issue and is ultimately responsible to advise the general counsel and the director as to the status of income tax litigation cases. In contrast, his subordinates do not have authority to settle and are not responsible to report on cases to the general counsel and the director. Further, unlike his subordinates, Fliflet spends a significant amount of time advising other areas of the department on income tax issues.

³² The union may argue that Dyckman does not provide as much direction as stated by McCaffrey because most cases settle and Dyckman chiefly provides his subordinates direction only once cases are set for hearing. Notably, the low percentage of cases taken to hearing does not render those cases less time-consuming. Indeed, these cases are more involved because they require a trial. Accordingly, McCaffrey's stated percentage is reasonable.

2. Direction

Fliflet possesses the supervisory authority to direct because his authority to assign work, review work, and evaluate his subordinates with independent judgment is accompanied by the power to affect their terms and conditions of employment when he approves their overtime and their time off.

i. Assignment, review, oversight

Fliflet exercises independent judgment when he assigns cases to particular attorneys because he considers the nature of the case as compared to the skills of the attorney to whom he makes the assignment. Cnty. of Cook, 15 PERI ¶ 3022 (IL LLRB 1999) (employees exercise independent judgment in direction when they consider factors such as “knowledge of the individuals involved, the nature of the task to be performed, the subordinates’ relative levels of skill and experience and the employer’s operational needs”).

Likewise, Fliflet oversees and reviews his subordinates’ work with independent judgment by employing an instructive approach to ensure his subordinates’ cases are on track for a successful conclusion, while preserving his authority to change his subordinates’ pleadings or witness lists. His review is substantive and thus supervisory even though he does not hold formal case review conferences because he assures that his subordinates’ analysis is consistent with departmental policy and that it applies relevant case law. Moreover Fliflet’s broad supervisory involvement is supported by the fact he “brainstorms” with his subordinates to help them formulate approaches to trial, to answer their questions on trial strategy, to mentor and train them, and to ultimately determine whether to change their final work product or whether they are ready to handle their own cases. Dep’t of Cent. Mgmt Serv. (Dep’t of Human Serv.), 28 PERI ¶ 16 (IL LRB-SP 2011) (a superior’s substantive changes to his subordinate’s work product, combined with instruction, constituted supervisory direction); See, State of Ill., Dep’t of Cent. Mgmt. Serv., (Department of Human Services), 27 PERI ¶ 71 (IL LRB-SP 2011) (petitioned-for employee who answered subordinates’ questions demonstrated independent judgment directing because she determined whether it was necessary to first consult her superior; rejecting ALJ’s determination that her answers lacked independent judgment because they were based on her superior skill); State of Ill., Dep’t of Cent. Mgmt. Serv., (Dep’t of Empl. Security),

11 PERI ¶ 2021 (ILSLRB 1995) (training of subordinates which required superior to set performance goals and determine whether additional training was necessary required the exercise of independent judgment).

Further, like Dyckman, Fliflet also directs his subordinates during settlement conferences because he is both directly involved in settlement discussions and has broad and absolute authority to grant/deny his subordinates permission to settle all cases, to override his subordinates' settlement decisions, and, necessarily, to instruct them on the proper course of action in the event of a disagreement. State of Ill., Dep't of Cent. Mgmt. Serv. (Dep't of Healthcare and Family Serv.), 28 PERI ¶ 69 (IL LRB-SP 2011) (finding a broader range of petitioned-for employee's tasks constituted direction within the meaning of the Act including assessment of subordinate's investigation cases where the petitioned-for employee was involved in all of the investigations which took place in the office).

As noted with respect to Gorden, Caselton and Dyckman, the fact that Fliflet bases his decisions in part on his legal expertise does not obviate the exercise of independent judgment. Indeed, his decisions on settlements and pleadings are particularly important, requiring a choice between two significant alternatives, because they determine the ultimate outcome of a case. See discussion supra and Dep't of Cent. Mgmt. Serv. (Dep't of Human Serv.), 28 PERI ¶ 16 (IL LRB-SP 2011). Similarly, Fliflet's review of his subordinates is supervisory even though he collaborates with them to reach consensus on disagreements, and even though the General Counsel may decide the course of action when Fliflet and his subordinates cannot agree, because there is no evidence that Fliflet is required to take disputed matters to a higher authority. Further, even if Fliflet's subordinates were entitled to automatic review of Fliflet's decisions, his role is nevertheless supervisory because he has input into the trial process and there is no evidence that Fliflet's subordinates frequently—or ever—seek review of his decision. See, City of Chicago, 28 PERI ¶ 86 (IL LRB-LP 2011).

However, Fliflet's responsibility to complete performance evaluations alone is not evidence of supervisory authority to direct because there is no evidence in the record that performance evaluations completed by Fliflet impact his subordinates' terms and conditions of employment. See, Dep't of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., State Panel, 2011 WL 5119588 (4th Dist. 2011)(authority to complete evaluations that did not impact wages, or job security, in the absence of other authority to affect employees terms and conditions of

employment did not constitute evidence of supervisory authority).

ii. Overtime, time off, scheduling

Fliflet does not approve/deny or recommend approval/denial of his subordinates' alternative work schedules with the requisite independent judgment because in doing so he applies guidelines provided by CMS and considers other routine factors such as caseload. Vill. of Morton Grove, 23 PERI ¶ 72 (IL SLRB 2007) (decision based on guidelines set forth in the collective bargaining agreement or circumscribed by the employer's specific policy do not require the use of independent judgment); see also, State of Ill., Dep't of Cent. Mgmt. Serv. (Dep't of Prof. Reg.), 11 PERI ¶ 2029 (IL SLRB 1995) (consideration of employee caseloads in making assignments renders assignment a routine and clerical function).

In addition, Fliflet's authority to approve time-off is supervisory because he must consider the department's needs in the absence of any pre-established departmental manning requirements, and his decision therefore necessitates the exercise of independent judgment. State of Ill., Dep't of Cent. Mgmt. Serv., Dep't of Empl. Security, 11 PERI ¶ 2021 (IL SLRB 1995) (alleged supervisors exercised supervisory authority in approving or disapproving subordinates' requests for vacation and personal leave, considering factors such as the employee's productivity and the department's staffing needs); Cf. City of Naperville, 8 PERI ¶ 2016 (IL SLRB 1992) (sergeants who determined whether to approve leave requests based on the department's pre-established minimum staffing requirements did not exercise independent judgment).

Similarly, Fliflet approves overtime with independent judgment because he must ascertain whether the proposed tasks are work-related using non-routine, non-clerical and subjective factors, in the absence of clearly-demarcated guidelines. See discussion, *supra*; Cnty. of Cook, 27 PERI ¶ 58 (IL LRB-SP 2011); Cf. Vill. of Morton Grove, 23 PERI ¶ 72 (IL SLRB 2007); Cf., State of Ill., Dep't of Cent. Mgmt. Serv., 25 PERI ¶ 5 (IL LRB-SP 2009). Further, the fact that the general counsel is not involved in the overtime approval process and often does not even see the requests from Fliflet's division adds weight to the finding the Fliflet exercises independent judgment in approving or denying the overtime. See, State of Ill., Dep't of Cent. Mgmt. Serv., Dep't of Empl. Security, 11 PERI ¶ 2021 (IL SLRB 1995) (petitioned-for employees exercised independent judgment where their own superiors did not review their grants and where their superiors only received the requests after the employee had taken the leave).

3. Discipline and adjustment of grievances

Though the Employer asserts that Fliflet has authority to issue discipline and adjust grievances, such an assertion alone cannot support a finding that Fliflet possesses the requisite supervisory authority because he has never exercised such authority in practice. In addition, the Employer has introduced no evidence from which the Board could determine that he would use independent judgment in doing so. Ill. Dep't of Cent. Mgmt. Servs. v. Ill. Labor Rel. Bd., State Panel, 382 Ill. App. 3d 208, 228-29 (4th Dist. 2008) (Board could reasonably conclude that employees were not supervisors because they had never exercised supervisory authority "in practice").

Further, while Fliflet counseled an employee once, there is no evidence that he documented the counseling session and that such documentation was placed in the employee's personnel file to be considered in progressive discipline. Vill. of Bolingbrook, 19 PERI ¶ 125 (IL LRB-SP 2003) (if verbal and written reprimands constitute discipline if they are placed in an employee's personnel file and form the basis for more severe discipline and have an effect on the employee's job status); See also, Cook Cnty. Medical Examiner, 6 PERI ¶3011 (IL LLRB 1990) (stating that discipline within the meaning of Section 3(r) of the Act is defined by its likely effect on an employee's employment); Carpentersville Countryside Fire Protection Dist., 10 PERI ¶2016 (IL SLRB 1994); City of Sparta, 9 PERI ¶2029 (IL SLRB 1993), *aff'd* by unpub. order, 11 PERI ¶4005 (1994); City of Burbank, 1 PERI ¶2008 (IL SLRB 1985). As such, the Employer has not demonstrated that the counseling session constitutes discipline.

4. Hiring

Fliflet does not effectively recommend the hire of new employees because the Employer has not demonstrated that Fliflet has influence over department's hiring decisions. First, although he interviewed students at a law school career fair and drafted a memo recommending some candidates for hire, the department hired none of those candidates.

Second, though Fliflet participated in an interview for, and recommended the hire of, an employee who was subsequently hired, he took such action in conjunction with Dyckman. Thus, neither deputy's recommendation may be deemed effective because there is no way to ascertain the effect or influence of either single recommendation on the department's hiring process. Pike

Cnty. Hous. Auth., 28 PERI ¶ 13 (IL LRB-SP 2011)(hiring decisions reached by consensus are not supervisory); Peoria Hous. Auth., 10 PERI ¶ 2020 (IL SLRB 1994), aff'd by unpub. order, Docket No. 3-94-0317 (1995) (employee had no authority to transfer because that power was exercised in consensus with another employee); City of Chicago, Dep't of Animal Care and Control, 25 PERI ¶ 152 (IL LRB-LP ALJ 2009) (petitioned-for employee did not effectively recommend where he participated on a panel with two other employees; noting that any single member's influence was speculative and could be outweighed by another member's opinion).

Lastly, the fact that the general counsel also interviews all candidates likewise renders it impossible to determine whether Fliflet's own recommendation influenced the outcome of the hire. See, City of Delavan, 22 PERI ¶ 41 (IL LRB-SP 2006) (subsequent interview by petitioned-for employee's supervisor rendered employee's own interview of candidates and his designation that the candidate were qualified for the position an ineffective recommendation); Chief Judge of the 16th Judicial Circuit v. Ill. Labor Rel. Bd., 178 Ill. 2d 333, 339-40 (1997) (the relevant consideration is effective recommendation or control rather than final authority' over employer policy).

5. Preponderance

Fliflet spends 55%-60% of his time, according to McCaffrey, on supervisory functions when he oversees his subordinates, reviews their work, trains them, participates with them in settlement conferences and performs direction-related administrative tasks (completing evaluations, approving overtime, etc.). Thus, Fliflet meets the preponderance test because he spends most of his time directing his subordinates and, necessarily, more time directing than performing any one non-supervisory function.

The Union argues that McCaffrey inflated Fliflet's time spent on supervisory functions and notes that Fliflet himself stated that he spends only 15-20% of his time answering his subordinates' questions, reviewing their motions and written documents, and ensuring they are prepared for hearing. While Fliflet conceded that he spends a "fair amount of time" working with staff, brainstorming issues raised in a case, helping subordinates develop successful arguments, and participating with them in settlement conferences, the Union contends that those functions are nonsupervisory and should not be included in the preponderance calculation.

As noted above, McCaffrey's estimation is not inflated and instead reflects Fliflet's broad

involvement in, and responsibility for, litigation within his division. For example, Fliflet's supervisory direction in settlement conferences is exemplified by his final authority to settle cases. Further, Fliflet directs his subordinates during brainstorming sessions because such activity, combined with the authority to change his subordinates work product, comprises supervisory instruction, training and mentoring. State of Ill., Dep't of Cent. Mgmt. Serv. (Dep't of Healthcare and Family Serv.), 28 PERI ¶ 69 (IL LRB-SP 2011) (acknowledging that broader range of activities constitutes direction under certain circumstances); Cf., State of Ill., Dep't of Cent. Mgmt. Serv., (Environmental Protection Agency, Dep't of Public Health, Dep't of Human Serv., Dep't of Commerce and Econ. Activity) ("EPA/DPH/DCEA"), 26 PERI ¶ 155 (IL LRB-SP 2011) (Board deemed superior's characterization of the time petitioned-for employees spent on supervisory functions to be "inflated" when witness included the performance of patently non-supervisory tasks in his calculation). See, State of Ill., Dep't of Cent. Mgmt. Serv. (Dep't of Healthcare and Family Serv.), 28 PERI ¶ 69 (IL LRB-SP 2011) (repeated involvement in subordinates' work combined with instructions constitutes direction).

2. Effect of Personnel Code/Rutan exempt status and term appointments on exclusions:
Jerilynn Gorden, Paul Caselton, Mark Dyckman, Brian Fliflet and Terry Charlton

The Employer argues that Gorden, Caselton, Dyckman, and Fliflet should be deemed managerial as a matter of law because they are exempt from the Personnel Code's merit and fitness requirements under Section 4d(3) of the Personnel Code, and because they are exempt from the Supreme Court's ruling in Rutan. 20 ILCS 415/4d(3) (2010). Further, the Employer argues that Terry Charlton should be deemed managerial as a matter of law because he is serving a term appointment.

However, the Board has repeatedly found no merit to such arguments. State of Ill., Dep't of Cent. Mgmt Serv., 28 PERI ¶ 50 (IL LRB-SP 2011); State of Ill, Dept of Cent.Mgmt Serv., (EPA, DPH, DHS, DCEA), 26 PERI ¶ 155 (IL LRB-SP 2011) (holding that exemption from the Personnel Code by section 4d(3) is not contained as an exclusion in the Act and that the General Assembly created, within the Act itself, all the exceptions it intended to create); State of Ill., Dep't of Cent. Mgmt Serv., 25 PERI¶184 (IL LRB-SP 2009) ("Shakman exempt" "Rutan exempt" or "at-will" civil service classification may not serve as a basis to exclude employees from collective bargaining); County of Cook, 24 PERI ¶ 36 (IL LRB-LP 2008)(if the legislature

intended for Shakman- or Rutan-exempt status, a term appointment, or at-will classifications, to require an automatic exclusion from the Act's coverage, that exemption would have been specified in the Act itself); City of Chicago (Mayor's Office of Information and Inquiry), 10 PERI ¶ 3003 (IL LLRB 1993). As a result, the petitioned-for employees are not managerial because of their exemptions from the Personnel Code and Rutan or because they are serving term appointments.

3. Unit appropriateness

The Employer argues that the RC-10 unit is not appropriate for the petitioned-for employees and that none of the existing bargaining units are appropriate either because all were negotiated generally for employees subject to the Personnel Code and contain no language including or addressing 4d(3) exemptions and/or term appointments.

Because I have found that Charlton is the only employee who is not a supervisory, the issue is whether Charlton is properly included in RC-10 even though he is serving a term appointment.³³

Charlton's inclusion in the RC-10 is appropriate because he performs work similar to that of his subordinates, is functionally integrated with them, has contact with some of them on a daily basis, and shares a common supervisor with some of them.

Section 9(b) sets forth the criteria to be considered by the Board in determining the appropriate unit issue:

[I]n each case, in order to assure public employees the fullest freedom in exercising the rights guaranteed by this Act, a unit appropriate for the purpose of collective bargaining, based upon but not limited to such factors as: historical pattern of recognition; community of interest including employee skills and functions; degree of functional integration; interchangeability and contact among employees; fragmentation of employee groups; common supervision, wages, hours and other working conditions of the employees involved; and the desires of the employees. For purposes of this subsection, fragmentation shall not be the sole or predominant factor used by the Board in determining an appropriate bargaining

³³ Notably, if Charlton's inclusion in any existing unit is deemed inappropriate, then he is barred from collective bargaining entirely since the term "collective bargaining" itself requires the presence of more than one employee in a single unit. City of Carbondale, 27 PERI ¶ 68 FN14 (IL LRB-SP 2011) (entire petition dismissed, though one petitioned-for employee qualified as non-supervisory, because the union petitioned for a stand-alone unit and a single employee could not constitute a bargaining unit); Vill. of Western Springs, 13 PERI ¶ 2034 (IL SLRB 1997); Vill. of Homewood, 18 PERI ¶ 2002 (IL SLRB ALJ 1997).

unit.

While Charlton does not share all terms and conditions of employment with his subordinate attorneys because he is only covered by the Personnel Code for the years of his term appointment, Section 9(b) does not require that the proposed unit be the most appropriate one. Cnty. of Cook (Provident Hospital) v. Ill. Labor Rel. Bd., Local Panel, 369 Ill. App. 3d 112, 118 (1st Dist. 2006). Here, a sufficient number of the 9(b) factors are met to warrant Charlton's inclusion in the unit: Charlton performs very much the same work as his subordinates because he writes private letter rulings, general information letters, technical advice memoranda, and draft legislation, as they do, and his duties differ from theirs only to the extent that he completes their performance evaluations. Further, he works in the same office as his subordinates and is supervised by Gorden who is likewise his subordinates' supervisor. Thus, his inclusion in RC-10 is appropriate and the parties may bargain different and special terms to cover Charlton's status as a term employee.

VI. 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: James Chipman and Terry Charlton to be added to RC-10.

EXCLUDED: Augusto Lorenzini, George Logan, Melissa Riahei, William Haymaker, Jerilynn Gorden, Paul Caselton, Mark Dyckman and Brian Fliflet, and all other confidential, supervisory and managerial employees as defined by the Illinois Public Labor Relations Act.

VII. Conclusions of Law

1. Jerilynn Gorden, Paul Caselton, Mark Dyckman and Brian Fliflet are supervisory employees within the meaning of Section 3(r) of the Act.

2. Terry Charlton is a public employee within the meaning of Section 3(n) of the Act.
3. RC-10 is an appropriate unit for Terry Charlton.
4. Pursuant to the parties' stipulations:
 - i. Augusto Lorenzini and George Logan are confidential employees.
 - ii. Melissa Riahei is a confidential employee.
 - iii. William Haymaker is a managerial and/or confidential employee.

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 March, 2012

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



**Anna Hamburg-Gal
Administrative Law Judge**