

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-11-004
)	
State of Illinois, Department of Central Management Services (Department of Agriculture, et al.),)	
)	
Employer)	

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

On November 15, 2011,¹ Administrative Law Judge (ALJ) Elaine L. Tarver issued a Recommended Decision and Order (RDO) in the above-captioned case, granting a petition for certification of representative filed pursuant to the majority interest provisions of Section 9(a-5) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010) (Act), by the American Federation of State, County and Municipal Employees, Council 31 (Petitioner or Union). The Petitioner sought to add to its existing RC-62 bargaining unit a number of employees of the Illinois Department of Central Management Services (Employer) employed at the Departments of Agriculture, Employment Security, Historic Preservation, or Revenue (at the Liquor Control Commission), or at the Human Rights Commission, the Board of Investment, or the Pollution Control Board, who held the title of Private Secretary I.

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

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.

timely response. After reviewing the RDO, exceptions, response and record, we affirm the RDO and find that the Private Secretary I positions at issue should be added to the RC-62 bargaining unit.

Procedural history

The Employer initially filed a position statement objecting to the petition for representation based on the contention that the petitioned-for employees were confidential employees within the meaning of Section 3(c) of the Act, not public employees within the meaning of Section 3(n), and therefore should be excluded from the Act's coverage.² However, the Employer subsequently withdrew this initial objection and argued instead that the petitioned-for employees should be excluded because of their exemption from Jurisdiction B of the Illinois Personnel Code, 20 ILCS 415 (2010) (Code). The case was first assigned to ALJ Joseph F. Tansino who allowed the Employer to submit an offer of proof in support of its arguments, and the Petitioner filed a response to the Employer's offer of proof. ALJ Tansino determined that the matter should be resolved without a hearing, and on January 19, 2011, issued an RDO recommending that the petitioned-for employees be included in the unit. The Employer timely filed exceptions, and the Petitioner timely filed a response.

On June 10, 2011, we issued a written decision rejecting the Employer's contention that the Private Secretary Is were excluded from the protections of the Illinois Public Labor Relations

² Section 3(n) provides, in relevant part:

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

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.

Act simply because their positions were exempt from the hiring and termination restrictions of Jurisdiction B of the Personnel Code. State of Illinois, Dep't of Cent. Mgmt. Serv. (Dep't of Ag.), Case No. S-RC-11-004 (IL LRB-SP June 10, 2011). However, the Board remanded the matter for the limited purpose of exploring whether placement of these "Code-exempt employees" within the proposed RC-62 collective bargaining unit would render that unit inappropriate—to determine, for example, whether there already existed Code-exempt employees in the unit and whether the Employer had acquiesced to their inclusion.

The case was reassigned to ALJ Tarver who, after receiving the parties' responses to a questionnaire, determined there was no need for a hearing and issued the RDO presently under our consideration. In this RDO, ALJ Tarver noted that the Employer admits the RC-62 bargaining unit already includes Code-exempt employees, and, for at least some of them, the Employer had acquiesced to their inclusion. ALJ Tarver also noted the Employer had obviously agreed to the collective bargaining agreement that includes a provision prohibiting discharge without just cause. She rejected the Employer's contention that the employees' status as Code-exempt employees would make their inclusion within the RC-62 unit inappropriate. She also rejected the Employer's contention that inclusion within RC-62 was inappropriate because a different unit, the RC-14 unit, might have been a better fit.

Exemption from the Personnel Code

The Employer's first exception is a repetition of the argument it made in the brief in support of its exception to the initial RDO: that exemption from the Personnel Code requires exclusion from rights granted under the Illinois Public Labor Relations Act. We addressed that argument in our June 10, 2011, decision which remanded for the limited purpose of addressing issues relating to unit appropriateness, and consequently will not revisit the issue.

Appropriateness of the unit

The Employer also again excepts to the ALJ's finding that the petitioned-for RC-62 unit is appropriate. ALJ Tarver acknowledged the Private Secretary Is share some of the skills and educational requirements of the Executive Secretary Is who are represented within the separate RC-14 bargaining unit, and in some instances have common supervision with them, but stated the issue before her was not whether placement within the RC-14 unit would be appropriate, but whether placement within the RC-62 unit would be inappropriate. She found no evidence that it would be. She also referenced concern for the right of employees to "full freedom of association, self-organization, and designation of representatives of their own choosing" as provided in Section 2 of the Act and as recognized by the Illinois Appellate Court in City of Chicago v. Ill. Labor Relations Bd., 396 Ill. App. 3d 61, 71 (1st Dist. 2009).

The Employer excepts to the ALJ's statement that there was no evidence that placement within the RC-62 bargaining unit would be inappropriate. It asserts that the collective bargaining agreement for the RC-62 unit was initially negotiated with the intent that only employees certified under the Personnel Code would be included, and argues that the employees in that unit shared a community of interest in part because they were subject to the same terms and conditions of employment as spelled out in the Personnel Code, and the Private Secretary Is obviously do not share that portion of the community of interest.

In support of its assertion regarding the intent of the parties at the time the original collective bargaining agreement was entered, the Employer cites a portion of the parties' master agreement which indicates it was made between AFSCME and "the DEPARTMENT OF CENTRAL MANAGEMENT SERVICES and all Departments, Boards and Commissions *subject to the Personnel Code* and whose vouchers are subject to approval by the Department of

Central Management Services, of the State of Illinois” (emphasis supplied).³ Obviously this provision says nothing *directly* about the employees contemplated to be represented by AFSCME or covered by the agreement, but the Employer suggests it does so indirectly by describing the employing entities in terms of the Personnel Code.

The argument does not work. The exemptions from the Personnel Code are articulated in terms of positions, and certain broad categories of positions are defined in terms of the employing entity, but these most notably are positions under the legislative and judicial branches of government or under boards or commissions or executive officers other than the Governor. See generally 20 ILCS 415/4c (“general exemptions”) and 4d (“partial exemptions”); see particularly 20 ILCS 415/4c(2) (positions under constitutional officers), 4c(3) (positions in the courts), 4c(4) (positions in the legislative branch) (2010). Looking at how these exemptions are articulated, it seems the language used in the master agreement was intended to make clear that the agreement was not between AFSCME and, say, the Secretary of State or the Administrative Office of the Illinois Courts, but between AFSCME and that portion of the State under the direct authority of the Governor. Suggesting that the language is an attempt to differentiate between groups of employees reporting to the Governor—those who are subject to the Code versus those who are not subject to the Code—seems unlikely where the language is describing the targeted *employers* in terms of being subject to the Code.

The Employer does not address, and the record does not demonstrate, whether there were any Code-exempt employees within the bargaining unit at the time the original agreement was entered, nor does the Employer address whether the parties have subsequently entered into new collective bargaining agreements after Code-exempt employees were admitted to the unit

³ The master contract is available on the website maintained by the Department of Central Management Services at http://www2.illinois.gov/cms/Employees/Personnel/Documents/emp_afscme1.pdf.

(though they almost certainly have). In any event, the RC-62 unit already has employees who are exempt from the Personnel Code and, if they have just cause protection, do so only because the Employer has agreed to give them this protection by means of its entry into a collective bargaining agreement which makes no distinction between Code-exempt employees and those subject to the Code. See Griggsville-Perry Cmty. Unit School Dist. No. 4 v. Ill. Educ. Labor Relations Bd., 2011 IL App (4th) 110210, leave to appeal granted, No. 113721 (Ill. Sup. Ct. May 30, 2012) (vacating arbitration award on basis that, until parties include a just cause provision in their collective bargaining agreements, at-will employees remain at-will); see also our decision issued today in Dep't of Cent. Mgmt. Servs. (Dep't of Revenue), Case No. S-RC-10-222 at 13-14 (IL LRB-SP Oct. 19, 2012). Whether existing Code-exempt employees within the unit have just cause protections or not, adding more such employees to the unit would not destroy the already existing community of interest within the unit.

The Employer suggests the collective bargaining agreement for the RC-62 unit already has a just cause provision that “will not allow the parties to bargain collectively over such a crucial condition of employment.” It cites no authority in support of this proposition. As we explain in Dep't of Revenue, *supra*, the Employer's argument incorrectly assumes that a Board order finding the employees at issue to be public employees under the Act, and the subsequent certification of the Union as their collective bargaining representative, would require, ipso facto, their coverage under the just cause term of the collective bargaining agreement. However, under the Act, the Board's action in certifying the Union as the representative of the Private Secretary Is cannot, by itself, dictate that the employees be covered under a just cause provision, or under any other particular collective bargaining agreement term. Instead, the certification dictates exactly the result the Employer requests in the alternative—that the parties be required to bargain

over the Private Secretary Is' terms and conditions of employment, including any terms relative to discipline and discharge that are mandatory subjects under the Act. Therefore, the existence of a just cause term in the parties' collective bargaining agreement provides no basis either for excluding the employees from coverage under the Act, or finding inappropriate their inclusion in the existing RC-62 bargaining unit.⁴

Finally, in one portion of its argument the Employer stresses the Private Secretary Is "perform confidential secretarial duties." We assume it here uses confidential in the generalized sense, not the particularized sense involving access to information about, or assistance of a person in relation to matters concerning collective bargaining as required by Section 3(c) of the Act. The Employer withdrew its initial objection with respect to confidential status, and we do not believe it here intends to resurrect that argument. Even if it had, we would find the issue waived where the Employer's actions passed up not one, but two chances to convince an ALJ to hold a hearing on the topic, as well as a chance for the Board to consider the topic when we earlier reviewed ALJ Tansino's RDO. See 80 Ill. Admin. Code §1200.135(b)(2).⁵

⁴ As in Dep't of Revenue, *supra*, we offer no opinion regarding the extent to which any proposal relative to just cause protection for the Private Secretaries would be a mandatory subject of bargaining, as no such issue is presented by this case. Nor do we have any authority to address any issues between the parties with respect to the extent to which the parties' collective bargaining agreement, or any binding past practice, requires that employees newly added to a bargaining unit be covered under the terms of the collective bargaining agreement. Resolution of any such issues is a matter entirely within the control of the parties, either through negotiation or grievance/arbitration.

⁵ Section 1200.135(b)(2) of our Rules provides:

Exceptions and/or cross-exceptions shall specifically set forth the questions of procedure, fact, law or policy to which exception is taken, shall identify that part of the Administrative Law Judge's recommended decision and order to which objection is made, and shall state the grounds for the exceptions and shall include the citation of authorities unless set forth in a supporting brief. Any exception to a ruling, finding, conclusion or recommendation that is not specifically urged shall be deemed to have been waived. Any exception that fails to comply with the foregoing requirements may be disregarded.

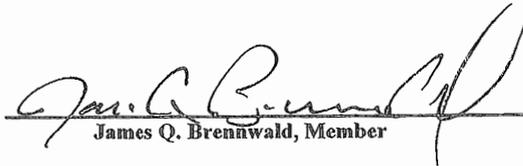
Conclusion

For these reasons, we affirm the ALJ's RDO and order that the Secretary I positions at issue be added to the RC-62 bargaining unit.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD



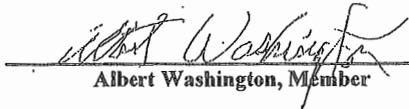
Paul S. Besson, Member



James Q. Brennwald, Member



Michael G. Coli, Member

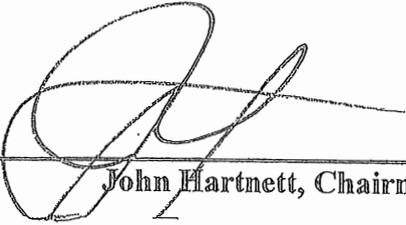


Albert Washington, Member

Chairman John J. Hartnett, dissenting:

I respectfully dissent from the majority's determination that placing private secretary positions within the RC-62 bargaining unit is appropriate. It is critically important to both parties that the unit we recognize be appropriate for collective bargaining, yet, based on the record before us, all we really know is that the unit already has other unspecified types of employees who, like the private secretaries, are exempt from the Personnel Code. That the parties have apparently been able to reach collective bargaining agreements while these other types of employees have been in the unit does not necessarily mean that including the private secretaries in the unit will have no adverse effect on the continued appropriateness of the unit.

The impact of their inclusion needs further exploration, and I would have remanded for an oral hearing to fully examine that issue.



John Hartnett, Chairman

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.

I. BACKGROUND

On January 19, 2011, the Administrative Law Judge (ALJ)² assigned to the case issued a Recommended Decision and Order rejecting the Employer's argument. The ALJ found no basis of law denying the petitioned-for employees the ability to organize simply because they are exempt from the Illinois Personnel Code under Section 4d(1), citing to the Board's long standing decision that if the legislature had intended for "Shakman-exempt" or "Rutan-exempt" status, or "at-will" classification to serve as a basis for excluding employees from collective bargaining, it would have expressly stated as much in the Act itself. AFSCME, Council 31 and State of Illinois, DCMS, 25 PERI ¶184 (IL LRB-SP 2009); Service Employees International Union, Local No. 73 and County of Cook, 24 PERI ¶36 (IL LRB-LP 2008); City of Chicago (Mayor's Office of Information and Inquiry), 10 PERI ¶3003 (IL LLRB 1993). Deciding that the petitioned-for employees are public employees within the meaning of the Act, the ALJ recommended the employees be appropriately included in the RC-62 bargaining unit.

On June 10, 2011 the Board issued its decision remanding this case for further review. The Board agreed with the ALJ's decision that being "Shakman" and "Rutan" exempt and exempt from Jurisdiction B of the Personnel Code were not automatic exceptions from the protections available under the Illinois Public Labor Relations Act. However, the Board held that, although the exclusions above had no bearing on the whether an employee is excluded from the protections of the Act, they may be relevant when determining whether a unit is appropriate. As such, the Board remanded the case to explore whether the code-exempt employees share a sufficient community of interest with those employees already in the RC-62 bargaining unit.

² This case was initially assigned to ALJ Joseph Tansino. On remand this case was administratively transferred to the undersigned.

Upon remand both parties were asked to respond to a questionnaire intended to explore the composition of the RC-62 bargaining unit. After reviewing those answers, I determined that this matter should be resolved without resorting to a hearing. On October 31, 2011, the Employer fully articulated its objections to the petition as it related to the factors according to Section 9(b) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010), as amended (Act).

I. ISSUE AND CONTENTIONS

The issue is whether the petitioned-for employees would appropriately be included in the RC-62 bargaining unit.

The Employer maintains its objection that the petitioned-for employees should be excluded from the petitioned-for unit because they are exempt from Jurisdiction B of the Personnel Code under Section 4d(1). The Employer further argues that based on several Section 9(b) factors, the RC-14 bargaining unit would be the more appropriate bargaining unit for the petitioned-for employees.

In response to the questionnaire, both parties agree that the RC-62 bargaining unit currently includes employees exempt from Jurisdiction B of the Personnel Code; that in some instances the Employer objected to their inclusion and in some instances the Employer agreed to their inclusion; and that all employees in the RC-62 bargaining unit are subject to the same "just cause" provision contained in the parties' collective bargaining agreement.

II. DISCUSSION AND ANALYSIS

The Board has noted that the effects of being subject, or not subject to, the Personnel Code, may change the calculus of factors required to be considered for determining whether the employees share a community of interest, and the appropriateness of a unit under Section 9(b) of

the Act.³ State of Illinois, Dep't of Cent. Mgmt. Serv. (Dep'ts of Transp. and Natural Resources), 14 PERI §2019 (IL SLRB 1998); State of Illinois, Dep't of Transp., 1 PERI §2011 (IL SLRB 1985).

I find that the petitioned-for employees are appropriately included in the RC-62 bargaining unit. The Employer's continued objection that the petitioned-for employees should be excluded from the protections of the Act because they are exempt from the Personnel Code still lacks merit. Because the Board already decided this issue, I will not provide further discussion on this point.

The Employer additionally raises the objection that the petitioned-for employees would be more appropriately included in the RC-14 bargaining unit based on Section 9(b) factors. The Employer maintains that Private Secretary Is share a community of interest with the Executive Secretary title series in the RC-14 bargaining unit for the following reasons: they have similar employee skills and functions, as they both perform secretarial work for a director or chairperson; they have similar educational backgrounds and experience requirements;⁴ and they share common supervision since both groups of employees work for some of the same department or division heads in the same locations.

³ Section 9(b) of the Act, in relevant part, states:

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.

⁴ The Employer argues that the Private Secretary Is and those in the Executive Secretary title series require identical education listing the following: knowledge, skill and mental development of two years of secretarial or business college and three years of secretarial experience; or completion of high school and five years secretarial experience.

The Employer is asking the Board to decide that the RC-14 bargaining unit is more appropriate than the RC-62 bargaining unit. The Board has consistently held that Section 9(b) of the Act does not require that a proposed unit be the most appropriate or the only appropriate unit. City of Chicago (Public Health Nurses), 396 Ill. App. 3d 61, 67 (1st Dist. 2009) quoting County of Cook (Provident Hospital), 369 Ill. App. 3d 112, 118 (1st Dist. 2006) (affirming the certification of a bargaining unit made up of upper level administrative assistants (AAIIIs and IVs) at one hospital in the county hospital system).

I note that Private Secretary Is and Executive Secretaries share some of the same skills and education requirements, and have common supervision in some instances. Nonetheless, the issue before the Board is not whether the placement of Private Secretary Is in the RC-14 bargaining unit represented by AFSCME, which did not seek to represent the Private Secretary Is, is appropriate. The Employer has presented no evidence to show that the RC-62 bargaining unit is inappropriate. Further, to accept the Employer's argument that the RC-14 bargaining unit is the only appropriate unit would be to deny the petitioned-for employees their rights under section 2 of the Act to "full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours and other conditions of employment or other mutual aid or protection." City of Chicago and Illinois Labor Relations Board, 396 Ill. App. 3d 61, 71(1st Dist. 2009) citing 5 ILCS 315/2 (2006).

The Employer admits that the RC-62 bargaining unit already includes employees who are exempt from Jurisdiction B of the Personnel Code and that it has agreed to include at least some of these employees. It also obviously agreed to the collective bargaining agreement that makes all RC-62 bargaining unit members subject to the same "just cause" provision. The Employer's present objection is in direct conflict with what the Employer has agreed to in the past. Without

evidence that the petitioned-for employees lack community of interest with those employees in the RC-62 bargaining unit, and without having any other objections, I cannot conclude that they should be placed in the RC-14 bargaining unit rather than the unit that they have selected.

Accordingly, I find that it is appropriate to include the Private Secretary Is in the RC-62 bargaining unit.

III. CONCLUSION

The Private Secretary Is are public employees within the meaning of the Act and the petition to represent them within the RC-62 bargaining unit should be granted.

IV. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the Private Secretary Is, as described below, shall be included in the RC-62 bargaining unit currently represented by the American Federation of State, County and Municipal Employees, Council 31.

INCLUDED: The Private Secretary I positions currently held by Lanade Bridges at the Illinois Human Rights Commission; Nicole Di Turi and Beverly Womack-Holloway at the Illinois Department of Revenue; Pamela Dryden at the Illinois Department of Employment Security; Gloria Jimenez and Nancy Miller at the Illinois Pollution Control Board; Kerry Lofton at the Illinois Department of Agriculture; Cecelia McNair at the Illinois Investment Board; and Katrina Weinert at the Illinois Department of Historic Preservation.

EXCLUDED: All supervisors, confidential and/or managerial employees as defined by the Act.

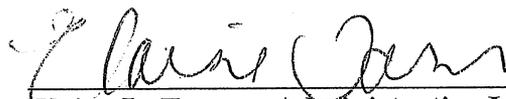
V. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those

exceptions no later than 14 days after service of this Recommended Decision and Order. Parties may file responses to exceptions, and briefs in support of the responses, no later than 10 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 5 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 with the Board's General Counsel, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions and cross-responses will not be accepted at the Board's Springfield office. The 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. The exceptions and cross-exceptions will not be considered without this statement. 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 15th day of November, 2011

**ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**



Elaine L. Tarver, Administrative Law Judge