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-11-062
State of Illinois, Department of Central Management Services,	)	
Employer	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD STATE PANEL

On March 5, 2013, Administrative Law Judge (ALJ) Heather Sidwell issued a Recommended Decision and Order (RDO) in the above-captioned case in which she determined that two employees of the Illinois Department of Central Management Services (Employer or CMS), Alisa Liu and Anand Rao, working at the Pollution Control Board (PCB) in the titles Environmental Scientist I and II, respectively, are pubic employees within the meaning of Section 3(n) of the Illinois Public Labor Relations Act, 5 ILCS 315/3(n) (2012). The ALJ rejected the Employer's contention that the positions are managerial employees within the meaning of Section 3(j) of the Act and recommended that the positions be added to the RC-63 bargaining unit.

Pursuant to Section 1200.135(b) of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200 through 1240 (Board Rules), the Employer filed timely exceptions to the RDO. The Union filed a response.

In its exceptions, the Employer reiterates its argument that the Environmental Scientists are managerial employees as a matter of fact. The Employer also now argues that these employees are managerial employees as a matter of law under the decision in Department of Central Management Services (Pollution Control Board) v. Illinois Labor Relations Board, 2013 IL App (4th) 110877 ("PCB").

Based on our review of the RDO, record, exceptions and response, we affirm the ALJ's decision and reject the Employer's exceptions for the reasons that follow.

1. Discussion and analysis

We adopt the ALJ's conclusion that the Environmental Scientists fail to satisfy the test for managerial authority set forth in Section 3(j) of the Act.[1] Regardless of whether the PCB's final orders reflect the Environmental Scientists' drafts, the scientists do not engage in executive and management functions when they write PCB decisions because they lack the requisite discretion and authority.

In Department of Central Management Services/Illinois Commerce Commission v. Illinois Labor Relations Board, 406 Ill. App. 3d 766, (4th Dist. 2010) ("ICC"), the Appellate Court, Fourth District, emphasized that ostensibly managerial employees must wield power to direct the enterprise. 406 Ill. App. 3d at 779 (Where an employee makes effective recommendations on policy the court will "look beyond the formal structure of the employee's participation in the enterprise...and take account of the power that the employee actually

[1] We take administrative notice of the PCB decisions that the Employer attached to its post-hearing brief because they are a matter of public record, readily available on the PCB's "E-Library" at http://www.ipcb.state.il.us/ECLL/EnvironmentalCaseLawAndLibrary.asp Nevertheless, the ALJ's decision to strike those documents from the Employer's post-hearing brief was consistent with our rules because their submission caused that brief to exceed 50 pages in length and constituted an impermissible attempt to introduce evidence after the close of the record and not by way of testimony, exhibits, or stipulations. 80 Ill. Admin. Code. 1200.60, 1200.130. We note that neither the ALJ's decision to strike these documents, nor our decision to take administrative notice of them impacts the outcome of this case.

wields."). Indeed, "the employee must possess and exercise authority and discretion which broadly [a]ffects a department's goals and means of achieving its goals." Department of Central Management Services/Department of Healthcare and Family Services v. Illinois Labor Relations Board, 388 Ill. App. 3d at 330 ("DHFS") (citing Dep't of Cent. Mgmt. Servs. v. Ill. State Labor Rel. Bd., 278 Ill. App. 3d 79, 87 (4th Dist. 1996)). As such, it is "the authority to make independent decisions and the consequent alignment of the employee's interests with management's" that are the "hallmarks of managerial status." Office of the Cook Cnty. State's Attorney v. Ill. Local Labor Rel. Bd., 166 Ill. 2d 296 (1995); but see Dep't of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., 2011 IL App (4th) 090966 ¶187 (finding employee managerial even though she merely articulated and documented policies formulated by others).

Here, the Environmental Scientists wield no such power or authority when they draft full PCB decisions because the PCB members convey to the Environmental Scientists their positions concerning the outcome of a case before the scientists begin the drafting process, and the Environmental Scientists, in turn, draft the decision in conformity with the PCB member's position. As such, the PCB members' initial controlling involvement in the outcome of these cases renders the Environmental Scientists technical scriveners who articulate policies formulated by others and who simply support those decisions employing their technical expertise. In this respect, as the ALJ noted, the Environmental Scientists are unlike the ALJs at the Illinois Commerce Commission because they do not initially decide cases or formulate their own recommendations on agency policy. See State of Ill., Dep't of Cent. Mgmt. Servs. (Ill. Commerce Comm'n), 29 PERI ¶ 76 (IL LRB-SP 2012). Rather, they are more like other employees whom the Court and the Board have found to be non-managerial based on a lack of discretion and authority to influence agency policy and decision-making. See DHFS, 388 Ill.

App. 3d at 328, 330 (finding Office of Inspector General attorneys non-managerial when they evaluated the legal sufficiency of an alleged violation, but had no authority to determine the charges or sanctions in any given case); see also State of Ill., Dep't of Cent. Mgmt. Servs., 28 PERI ¶ 160 (IL LRB-SP 2012) (ALJs who worked within a rigid system of rules, statutes, and checks and balances did not engage in executive and management functions). Thus, the Environmental Scientists do not perform executive and management functions when they draft PCB decisions, and the PCB's subsequent acceptance of their drafts does not alter this conclusion.[2]

Finally, we reject the Employer's contention that the Environmental Scientists are managerial as a matter of law. In applying the managerial as a matter of law test, courts consider whether the employees are, in essence, surrogates for an office holder. Office of the Cook Cnty. State's Attorney v. Ill. Labor Rel. Bd., 166 Ill. 2d 296, 303 (1995). Three factors weigh heavily in finding employees surrogates and thus managerial as a matter of law: (1) a close identification of the office holder with the actions of his or her subordinates, (2) a unity of their professional interests, and (3) the power of the subordinate to act on behalf of the public office holder. Chief Judge of the 16th Judicial Cir. v. Ill. State Labor Rel. Bd., 178 Ill. 2d 333 (1997). In assessing these factors, courts focus on the statutory powers and duties of the type of employee at issue rather than on the specific tasks of any particular individual. Cook County State's Attorney, 166 Ill. 2d at 305. Formerly, absent a "detailed statutory apparatus'" which "'clothe[s] the employees with all the powers and privileges'" of the office holder, employees

[2] We similarly agree with the ALJ in finding that the scientists do not predominantly draft PCB decisions and that they therefore would not satisfy the first prong of the managerial test even if we found that function to be executive and managerial in nature. See DHFS, 388 Ill. App. 3d at 332 (staff attorneys who infrequently drafted a rule or legislation did not predominantly engage in executive and management functions).

would not be deemed managerial as a matter of law. DHFS, 388 Ill. App. 3d at 333 (quoting Cook Cnty. State's Attorney, 166 Ill. 2d at 305 (requiring statute that clothes employee with powers and privileges of the office holder)). More recently, the Fourth District Appellate Court held that employees may be managerial as a matter of law even absent such a statutory apparatus if they perform tasks that are substantially similar to those performed by judicial law clerks. PCB, 2013 IL App (4th) 110877 (finding attorney assistants to PCB members were managerial as a matter of law).

Here, it is clear that no statute clothes the Environmental Scientists with all the powers and privileges of the Board members because the Illinois Administrative Code contains no reference to the Environmental Scientists at all. Although the Code specifies the functions of the technical unit, it merely notes that the unit is one of the PCB's organizational sections which permits the Board to carry out its functions. Noticeably absent from the Code is any language that confers power or authority of the Board members on the Environmental Scientists. 2 Ill. Admin. Code 2175.110 (b)(3).

Further, the Environmental Scientists do not qualify as managerial as a matter of law under the Court's decision in PCB because their work, their authority, and their position with respect to individual Board members is different from that of the attorney assistants at issue in PCB. First, the Environmental Scientists do not perform functions "strikingly similar" to that of law clerks because they do not provide advice and direction with respect to legal issues. Rather, they function instead as non-lawyer technical professionals who by definition do not perform law clerk-type work. While we do not foreclose the possibility that non-lawyers may satisfy the managerial as a matter of law test, the PCB Court's express reference to the legal character of the attorney assistants' work and the judicial trend which has historically limited the managerial as a

matter of law exclusion to attorneys leads us to emphasize this distinction here. See PCB, 2013 IL App (4th) 110877 (attorney assistants); Dep't of Cent. Mgmt. Servs./Human Rights Comm'n v. Ill. Labor Rel. Bd., State Panel, 406 Ill. App. 3d 310 (4th Dist. 2010) (administrative law judges); Chief Judge of the Sixteenth Judicial Cir. v. Ill. State Labor Rel. Bd., 178 Ill. 2d 333 (1997) (assistant public defenders); Cook Cnty. State's Attorney v. Ill. Local Labor Rel. Bd., 166 Ill. 2d 296, 302 (1995) (assistant State's Attorneys); Ill. Secretary of State, 28 PERI ¶ 68, n. 10 (IL LRB-SP 2011) (noting that the managerial as a matter of law exclusion has been applied successfully only to attorneys).

Second, the Environmental Scientists lack the independent authority which serves as the basis for a finding than an employee is empowered to act as the office holder's surrogate. Unlike the attorney assistants, they do not collaborate with PCB members to arrive at decisions since the Board members determine the outcomes alone and in advance of the Environmental Scientists' participation. PCB at ¶ 36 (basing decision to exclude on the legal character of assistants' work and their "independent authority as surrogates"); see also State of Ill., Dep't of Cent. Mgmt. Servs., 28 PERI ¶ 50 (IL LRB-SP 2011), Members Coli and Kimbrough dissenting (reasoning that attorney assistants were managerial as a matter of law because they "collaborate one-on-one with their PCB members, not only in authoring decisions, but in arriving at decisions").

Finally, the Environmental Scientists' position with respect to individual Board members undermines a finding that they are managerial as a matter of law because the scientists here, unlike the attorney assistants in PCB, are not uniquely assigned to any particular Board member and in this respect are also different from law clerks who most oftentimes serve a single judge. PCB at ¶ 36 (noting the attorney assistants' unique duties).

In sum, we find that the Environmental Scientists are neither managerial as a matter of fact nor managerial as a matter of law and that they are properly included in the bargaining unit.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

/s/ John J. Hartnett
John J. Hartnett, Chairman

/s/ Paul S. Besson
Paul S. Besson, Member

/s/ James Q. Brennwald
James Q. Brennwald, Member

/s/ Michael G. Coli
Michael G. Coli, Member

/s/ Albert Washington
Albert Washington, Member

Decision made at the State Panel's public meeting in Chicago, Illinois on January 16, 2014, written decision issued in Chicago, Illinois on January 31, 2014.

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-11-062
State of Illinois, Department of Central Management Services (Pollution Control Board),	)	
Employer	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On October 7, 2010, the American Federation of State, County and Municipal Employees, Council 31 (Petitioner/AFSCME) filed an amended petition in Case No. S-RC-11-062 with the State Panel of the Illinois Labor Relations Board (Board) pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315 (2010), as amended (Act), and the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code, Parts 1200 through 1240 (Rules). This petition seeks to include the titles of Environmental Scientist I and II employed by the Illinois Pollution Control Board in the existing RC-63 bargaining unit. The State of Illinois, Department of Central Management Services, Pollution Control Board (Employer/CMS) opposed the petition, asserting that the petitioned-for positions are excluded from the Act's coverage pursuant to the exemption for managerial employees and that the Environmental Scientist II position is excluded pursuant to the exemption for supervisors. CMS further asserted that, if the positions are covered by the Act, it is inappropriate to include them in the RC-63 bargaining unit.

On February 6, 2012, Administrative Law Judge (ALJ) Eileen Bell issued a recommended decision and order (RDO) concluding that CMS had failed to raise an issue of fact or law, and there was thus no need for an oral hearing. ALJ Bell found: (1) the Environmental Scientist II position is not a supervisor; (2) the petitioned-for positions are not managerial employees; (3) the petitioned-for positions are not excluded from the Act's protections merely

because they are exempt from the Personnel Code; and (4) it is appropriate to include the positions in the RC-63 bargaining unit. CMS filed timely exceptions. In a May 29, 2012, ruling, the Board remanded this matter for a hearing on the sole issue of whether the petitioned-for positions are managerial employees in light of the Illinois Appellate Court, Fourth District's decision in Department of Central Management Services/Illinois Commerce Commission (ICC) v. Illinois Labor Relations Board.[1] 406 Ill. App. 3d 766 (4th Dist. 2010). The Board reasoned that CMS may have been unable to incorporate the reasoning of the ICC decision into its response to the ALJ's order to show cause because the decision was issued one day prior to CMS's deadline to respond.

A hearing was held on July 25, 2012, before ALJ Bell in Chicago, Illinois. At that time, all parties appeared and were given a full opportunity to participate, adduce relevant evidence, examine witnesses, and argue orally. Briefs were timely filed by both parties. Subsequently, this matter was reassigned to me.

After full consideration of the parties' stipulations, evidence, arguments, and briefs, and upon the entire record of this case, I recommend the following:

I. PRELIMINARY FINDINGS

The parties stipulate, and I find, that:

1. The Petitioner is a labor organization within the meaning of Section 3(i) of the Act;
2. The Employer is a public employer within the meaning of Section 3(o) of the Act;
3. The Employer is subject to the jurisdiction of the Illinois Labor Relations Board;[2] and
4. If the Board finds that the positions of Environmental Scientist I and II are public employees within the meaning of Section 3(n) of the Act, it is appropriate to include the positions in the existing RC-63 bargaining unit.

[1] 29 PERI ¶ 16 (IL LRB-SP 2012).

[2] While the parties stipulated to the Board's jurisdiction pursuant to Section 5(b) of the Act, the Board's jurisdiction in fact arises under Section 5(a-5) of the Act. Nonetheless, the parties plainly stipulated to the Board's jurisdiction in this matter. Furthermore, the parties specifically stipulated to the Board's jurisdiction under Section 20(b) of the Act.

II. ISSUES AND CONTENTIONS

The sole issue following the Board's decision to remand this matter for hearing is whether the petitioned-for Environmental Scientists I and II are managerial employees within the meaning of Section 3(j) of the Act.

III. FINDINGS OF FACT

1. The Pollution Control Board

Adopted by the 76th General Assembly in 1970, the Environmental Protection Act, 415 ILCS 5, states that its purpose is "to establish a unified, state-wide program supplemented by private remedies, to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them."[3] In furtherance of that purpose, the Environmental Protection Act establishes the Pollution Control Board (PCB) as a quasi-legislative and quasi-adjudicatory body.

The PCB consists of five members appointed by the Governor with the advice and consent of the Senate. The Environmental Protection Act requires members to have verifiable technical, academic, or actual experience in the field of pollution control or environmental law and regulation. Testimony established that, at the time of the hearing in this matter, three of the PCB members were attorneys, one of whom had a degree in engineering. A fourth PCB member held a degree in environmental planning.

2. Proceedings Before the Pollution Control Board

The PCB fulfills its statutory obligations by issuing opinions and orders in a variety of contested and rulemaking cases. In addition to cases involving proposed rules and regulations, the PCB may hear enforcement complaints from citizens; appeals from rulings of the Illinois Environmental Protection Agency[4] (IEPA); administrative citation cases, which involve violations of the Environment Protection Act such as illegal dumping or burning; adjusted standards cases, in which a petitioner asks the PCB to alter a standard as applied to the petitioning party for a specified time period; and variance cases, in which a petitioner seeks an altered standard with no specified time limitation.

---

[3] 415 ILCS 5/2(b) (2010).

[4] The IEPA is another body created by the Environmental Protection Act. It is charged with the responsibility to inspect and monitor environmental conditions in the State.

In its quasi-legislative role, the Environmental Protection Act gives the PCB the authority to "determine, define and implement the environmental control standards applicable in the State of Illinois" by adopting rules and regulations.[5] Rulemaking cases before the PCB typically originate with a proposal from the IEPA. Alternatively, the PCB may docket a rulemaking case on its own initiative in order to enact "identical-in-substance" regulations. In identical-in-substance rulemaking cases, the PCB exercises its authority to adopt standards mandated by federal law.

Once the PCB has accepted a proposal for a rule, it receives written testimony from the IEPA's technical staff. At a hearing, proponents of the rule and other interested parties are given an opportunity to testify and answer questions. Following a period for final comments, the PCB member assigned for that purpose drafts an opinion and order. Testimony established that these opinions and orders have the following sections: background, procedural history of the proposed rule, legal framework, a summary of the proposal, a summary of the testimony and public comments, a discussion of issues raised by participants and the proponent's response, a conclusion, and an order containing the actual language of the rule.

Members of the PCB refer to this first draft of an opinion and order as a "discussion draft." Once a discussion draft has been prepared, it is circulated to the other members of the PCB and discussed at a closed deliberative session. The discussion draft is then amended to address any concerns raised during the deliberative session. The amended draft becomes an order of the PCB only after members vote for its adoption at an open session.

In its quasi-adjudicatory role, the PCB's procedures are similar. Following a hearing, a member will prepare and disseminate a discussion draft that is amended following discussion at a closed deliberative session. The PCB members then vote on a final draft that will become an order of the PCB.

3. Role of the Members and Attorney Assistants

The Environmental Protection Act provides that each PCB member may hire one assistant, with the Chairman hiring two assistants. At the time of the hearing in this matter, all of the assistants were licensed attorneys. Testimony established that the members work closely with their attorney assistants in creating a first draft. In fact, in an unpublished opinion the Appellate Court, Fourth District stated that the assistants function as judicial law clerks in

[5] 415 ILCS 5/5(b) (2010).

preparing the draft opinion and orders.[6] PCB member Johnson testified that his assistant writes the discussion draft in his cases 99% of the time, although he suggested that other members and their assistants may operate differently.

During the rulemaking process, the attorney assistant of the PCB member assigned to a rulemaking case will typically preside over the hearing in the matter. In non-rulemaking cases, one of the PCB's two hearing officers presides over the hearing.

Both the PCB members and their attorney assistants attend the closed deliberative sessions. Likewise, the member assigned to a rulemaking case and his or her attorney assistant attend the hearing in the matter and prepare questions for the participants. Testimony established that all of the PCB members and their assistants may attend hearings dealing with rules that are particularly controversial or otherwise significant.

4. Role of the Technical Unit

The PCB also employs the two petitioned-for Environmental Scientists, Anand Rao and Alisa Liu, who comprise the PCB's technical unit. Liu is employed by the PCB as an Environmental Scientist I; Rao, Liu's direct superior, is an Environmental Scientist II. The technical unit officially reports to the Chairman of the PCB, but may be assigned tasks by any of the PCB members.

The technical unit is involved predominantly in rulemaking cases. Rao testified that he and Liu typically review the testimony filed by the IEPA after the PCB accepts a rulemaking proposal. They may meet with the assigned PCB member and his or her assistant at that time and discuss issues related to the proposal. The Environmental Scientists then prepare questions for the PCB members to ask at the hearing on the matter. Rao testified that these questions are designed to complete the record where he and Liu have identified gaps in the technical information and to define any technical language. Johnson testified that, while PCB members and their assistants also draft questions, the technical unit's questions are typically more "insightful."

Rao and Liu may also assist in drafting the PCB's opinions and orders in rulemaking cases. It appears that this assistance is often limited to reviewing the draft prepared by a member or his or her assistant to ensure that the draft is technically accurate and scientifically supported.

---

[6] Department of Central Management Services (Pollution Control Board) v. Illinois Labor Relations Board, 2013 IL App. (4th) 110877.

For example, if the PCB's conclusion is not scientifically supported by the facts listed, the ESs will suggest adding facts from the record to strengthen the conclusion. Rao testified that the PCB accepts these changes 90- 95% of the time, but suggested that this is attributable to the fact that the changes are designed to support the PCB's desired outcome by strengthening the scientific support for the conclusion. Sometimes, the technical unit's assistance may extend to drafting, typically summarizing testimony and comments or sometimes drafting the discussion of technical issues. PCB Member Carrie Zalewski testified that she asks the technical unit to focus on the technical aspects of an issue when drafting, while she and her attorney assistant focus on applicable legal precedent and analysis. Very rarely—only three times in the year preceding the hearing in this matter—Liu or Rao actually writes the first draft of an opinion and order. This is done only at the request of the member assigned to a case or his or her assistant. Rao testified that when he and Liu are asked to participate in drafting, the issues are both technical and straightforward and the request is typically prompted by consideration of the attorney assistant's workload. The technical unit never begins drafting before discussing the matter with the member and his or her attorney, and the assigned member will often tell the technical unit the desired outcome before drafting begins. Rao and Liu spend 25- 30% of their time drafting portions of opinions and orders in rulemaking cases.

The technical unit appears to serve a similar function in adjusted standard and variance cases, which Rao stated were treated as site-specific rulemaking cases. In addition, the technical unit is responsible for ensuring that the petitions in adjusted standards and variance cases comply with the PCB's rules. Rao testified that he and Liu review petitions in these matters to determine whether the petitioner meets the procedural requirements for relief. If not, the ESs will draft a memo to the PCB indicating what information is missing or inadequate, and the PCB can ask the assigned hearing officer to issue an order for the missing information. Rao testified that they use a checklist to determine whether the procedural requirements are met.

Rulemaking, adjusted standards, and variances cases involve technical issues. Rao testified that he and Liu provide the PCB members with options of how to achieve a desired result; Johnson testified that he usually defers to the technical unit by voting in favor of one of the options they propose, but this is not always the case. When the PCB deals with a case that does not involve options, Johnson testified that the technical unit's role is to "school" the PCB using their technical expertise. He stated that this may be as simple as asking what an acronym

means or how a program works, but that Rao and Liu's technical expertise allows them to make sense of what would otherwise be very confusing technical "jargon." Rao gave an example of a rulemaking case involving groundwater monitoring, and stated that the technical unit simply explained to the PCB members the expected cost if rules relating to monitoring were implemented and the likely consequences if the rules were not.

In participating in this process, Johnson explicitly stated that the ESs do not formulate policy because only the PCB members vote. However, he continued to explain that the reason for the PCB's deferral to the technical unit's suggestions is Rao and Liu's expertise. Even then, Johnson explained that this deferral determines only one part of a larger opinion and order. Before voting on a rule, Johnson stated that he considers the testimony and input from his assistant and other PCB members in addition to the technical unit's input.

Finally, Rao testified that administrative citations, complaints, and appeals typically involve purely legal issues. As such, the technical unit's role is limited to explaining technical details at the PCB's request.

A quarterly report Rao prepared approximately six months before the petition in this matter was filed indicates that the technical unit was involved in 18 cases at that time. Testimony established that the PCB generally has 20 open rulemaking cases and 200 other open cases at any given time.

IV. DISCUSSION AND ANALYSIS

Section 3(j) provides that a managerial employee is "an individual who [1] is engaged predominantly in executive and management functions and [2] is charged with the responsibility of directing the effectuation of management policies and practices." 5 ILCS 315/3(j) (2010). Managerial employees are not public employees within the Act's definition. 5 ILCS 315/3(n) (2010).

The first part of the statutory definition describes the nature of the work to which an individual devotes most of his or her time. ICC, 406 Ill. App. 3d at 774. The Board has held that "executive and management functions" amount to the running of an agency, such as establishing policies and procedures, preparing a budget, or otherwise assuring that an agency or department runs effectively. Id. (citing, American Federation of State, County and Municipal Employees, Council 31, 25 PERI ¶ 68 (IL LRB-SP 2009); City of Freeport, 2 PERI ¶ 2052 (IL SLRB 1986)).

In ICC, the court held that an employee's status as a managerial employee may also be demonstrated by comparing an employee's job functions with the overall mission of the employer. ICC at 778 ("If the responsibilities of a job title encompass the agency's entire mission, or a major component of its mission, one might reasonably argue that by fulfilling those responsibilities, an employee helps to run the agency.").

The second part of the statutory definition emphasizes that a managerial employee's authority extends beyond the realm of theorizing and into the realm of practice. ICC, 406 Ill. App. 3d at 774. An alleged managerial employee directs the effectuation of management policies and practices if he or she oversees or coordinates policy implementation through development of means and methods of achieving policy objectives, determines the extent to which policy objectives will be achieved, and is empowered with a substantial amount of discretion to determine how policies will be effected. Id. at 775.

Generally, it is insufficient to establish managerial status that an employee's role in establishing and implementing policy is to "merely recommend policies or give advice that someone higher up is equally apt to take or leave." Id. at 775. However, in ICC the Fourth District made clear that an employee does not have to have final responsibility and independent authority in order to qualify as a managerial employee. Id. Instead, the court found in ICC that we must "look beyond the formal structure of an employee's participation in the enterprise... and take account of the power that the employee actually yields." Id. at 779. Thus, if an employee's recommendations are implemented in the form of managerial orders, the recommendation and order are treated as the same for the purposes of determining whether the managerial exclusion applies. Id.

Therefore, the Fourth District explained in ICC that an advisory employee may nonetheless be a managerial employee if he or she makes effective recommendations. Id. at 775 (citing Chief Judge of the Sixteenth Judicial Circuit v. Illinois State Labor Relaions Board, 178 Ill. 2d 333, 339- 40 (1997)). In determining whether an employee's recommendations are effective, the test is the influence of the recommendations. ICC at 777 (citing National Labor Relations Board v. Yeshiva University, 444 U.S. 672, 677 (1980)). While the review or scrutiny to which a recommendation is subjected may be indicative of its influence, the relevant inquiry is not whether an employee's superiors conduct de novo review of his or her recommendation, but whether the recommendation almost always persuades his or her superiors. ICC at 777.

CMS argues that the Environmental Scientists' responsibilities for reviewing and drafting opinions and orders of the PCB establish that they are managerial employees under the reasoning of the Fourth District in ICC. It is clear that Rao and Liu's responsibilities in rulemaking cases relate to a major component of the PCB's mission—establishing through administrative rulemaking the environmental standards of the State. Under the reasoning of ICC this suggests, but does not conclusively establish, that they help run the agency. However, to support a finding that he or she is engaged in executive and management functions, an employee must do more than simply exercise professional discretion or technical expertise. Department of Central Management Services (Department of Corrections) v. Illinois Labor Relations Board, 278 Ill. App. 3d 79, 87 (4th Dist. 1996). He or she must possess and exercise authority and discretion which broadly affects a department's goals and means of achieving its goals. Id. Therefore, I will examine each of Rao and Liu's responsibilities in rulemaking cases in turn to determine whether any rise to the level of executive and management functions.

When Rao and Liu review drafts written by PCB members and their assistants, testimony established that they are ensuring that the opinions and orders are technically accurate and the conclusions are scientifically supported by factual findings. This is a function not of any discretionary authority they possess, but of the environmental scientists' superior technical knowledge. Therefore, this responsibility does not entail the type of discretionary authority that would support a finding that Rao and Liu are engaged in executive and management functions.

Likewise, the technical units' responsibility for summarizing testimony is insufficient to establish their managerial status. In ICC the Fourth District emphasized that the ALJs at issue effectively carried out the regulatory duties of the Illinois Commerce Commission by issuing recommended orders, which were almost always adopted without substantial change. ICC at 779. ("[T]his procedure by which the ALJs hold hearings and issue recommended orders... is the primary means, if not the exclusive means, by which the Commission fulfills its statutory mandate of regulating public utilities."] Clearly, the Illinois Commerce Commission would exercise discretionary authority itself when ruling on cases; the Commission's ALJs therefore effectively exercised this authority when recommending rulings that were almost always adopted. Likewise, the PCB exercises discretionary authority when determining the final ruling in a rulemaking, adjusted standard, or variance case. However, summarizing the factual record to ensure that the final ruling is supported by evidence is a mere exercise of professional

discretion and technical expertise, rather than the type of discretionary authority that broadly affects the PCB's goals or means of achieving its goals. Therefore, even if Rao and Liu's summaries are effective, in preparing the summaries they do not exercise sufficient discretionary authority to establish their status as managerial employees.

In drafting technical portions of opinions, Rao and Liu may be confronted with one of two situations: first, there may be technical issues about which reasonable minds could differ, requiring the exercise of discretionary authority to resolve the issue; second, there may be no issue, and Rao and Liu would merely be required to explain technical information. The second situation is a function of the Environmental Scientists' superior technical expertise, and thus does not establish their managerial status. Meanwhile, in the first situation, it is the PCB itself rather than the environmental scientists that exercise the requisite discretionary authority. To say that an employee makes effective recommendations presupposes that he or she makes a recommendation in the first place. However, testimony established that, where technical issues exist, Rao and Liu merely present the PCB with options regarding how the issues can be resolved. Advising the PCB regarding the parameters of its own discretionary authority, without even recommending a particular course of action, does not require more than the mere exercise of professional discretion and technical expertise.

Finally, CMS argues that, like the ALJs at issue in ICC, Rao and Liu are managerial employees because they actually draft opinions and orders of the PCB which are almost always adopted without substantial change. This contention is unpersuasive for several reasons.

First, CMS has failed to establish that the drafts Rao and Liu are responsible for are almost always adopted without substantial change. At the hearing in this matter, CMS presented two examples of opinions and orders that the technical unit had drafted. However, none of the witnesses at trial established what the final order of the PCB was in these two matters. CMS attempted to cure this deficiency by submitting the final orders as attachments to its post-hearing brief; yet it did so in violation of 80 Ill. Admin. Code § 1200.60. ("All briefs shall be no more than a total of 50 double spaced pages with margins of at least 1/2 inch, including attachments. *All of the pages in excess of the 50 page limit will be rejected.*") (emphasis added).

Nonetheless, assuming that the PCB regularly adopts the drafts prepared by the technical unit without substantial changes, it appears that Rao and Liu do not possess or exercise the requisite discretionary authority when completing them. Testimony established that Rao and Liu

complete drafts not as a matter of course, but upon request when a PCB member's attorney assistant is too busy to do so and/or the issues are straightforward. Most importantly, they consult with the member assigned to a case or his or her attorney assistant before drafting begins and are instructed regarding the member's desired outcome. Therefore, any discretionary authority evidenced by these drafts is exercised by the PCB member assigned to the case rather than the technical unit. In some cases, the outcome is predetermined by federal law because the PCB is adopting identical-in-substance regulations. These examples are in stark contrast to the ALJs of the Illinois Commerce Commission, who were responsible for deciding in the first instance how to rule in a given matter.

Finally, testimony established that it is rare for the technical unit to complete entire first drafts. As such, it appears that they do not predominantly perform this function.

Therefore, Rao and Liu's responsibilities for reviewing and drafting opinions and orders do not rise to the level of executive and management functions. I conclude that the Environmental Scientists are not managerial employees.

V. CONCLUSIONS OF LAW

The petitioned-for Environmental Scientists I and II are not managerial employees within the meaning of Section 3(j) of the Act.

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.

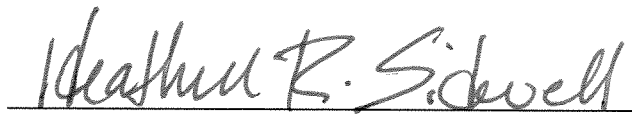
INCLUDED: Environmental Scientist I and Environmental Scientist II at the Pollution Control Board to be added to the RC-63 bargaining unit.

VII. 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 no later than 14 days after service of this recommendation. Parties may file responses to any 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 General Counsel of the Illinois Labor Relation Board, 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 5th day of March, 2013

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL



Heather R. Sidwell
Administrative Law Judge