

exceptions, and the responses, we reverse the RDO and remand for a hearing on whether the petitioned-for employees are managerial employees.

Procedural history and issue presented

In response to the petition for representation, the Employer filed a position statement, claiming: 1) both Arnand Rao, the sole employee in the title of Environmental Scientist II, and Alisa Liu, the sole employee in the title of Environmental Scientist I, were supervisory, managerial, and confidential employees within the meaning of the Act; 2) because their positions were exempt from the Personnel Code, they were de facto managerial positions; and 3) also because of that Personnel Code exemption, Rao and Liu's representation within the RC-63 bargaining unit would be inappropriate. The ALJ then issued the Employer an order to show cause why the petitioned-for employees should not be certified, instructing the Employer to submit specific evidence showing that there existed a question of fact or law concerning these bases for exclusion from the collective bargaining unit. With respect to alleged supervisory status, she requested evidence concerning the three statutory elements of the definition of a supervisor contained in Section 3(r) of the Act.¹ With respect to alleged managerial status, she requested information on how each formulates policy and how each effectuates policy as required by the definition of a managerial employee in Section 3(j) of the Act. The Employer responded with six exhibits and a three-page memorandum in which it argued that Rao was a supervisory employee and that Rao and Liu were both managerial employees.

¹ Section 3(r) provides this basic definition:

"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.

After considering the evidence submitted, the ALJ determined the Employer had failed to raise an issue of fact or law, and thus there was no need for an oral hearing. She found: 1) neither Rao or Liu were managerial employees; 2) Rao was not a supervisor; 3) neither Rao or Liu was excluded from the protections of the Illinois Public Labor Relations Act merely because they were exempt from the Personnel Code; and 4) the fact Rao and Liu were exempt from the Personnel Code did not mean placement of their positions within the RC-63 bargaining unit would render it an inappropriate unit. The Employer's exceptions to the ALJ'S findings abandon all claims for exclusion but one: that Rao and Liu are managerial employees. Thus, the issue before us is whether the Employer has raised an issue of fact or law concerning Rao's and Liu's managerial status.

Discussion and analysis

In support of its claim that Rao and Liu are managerial employees, the Employer references only three documents: Rao and Liu's position descriptions, and an affidavit submitted by then-acting Chairman and current Executive Director of the PCB, G. Tanner Girard. The relevant portion of the position descriptions² state:

Under the direction of the Chairman, works directly with coordinating Board Members and staff attorney hearing officer on regulations assigned to the Board Member; serves in an advisory capacity to Board Members and staff hearing officers, evaluating technical and scientific data and formulating regulatory policies on pollution control.

These position descriptions contain an ambiguity as to whether it is the PCB Members and PCB hearing officers who "formulat[e] regulatory policies on pollution control" or it is Rao and Liu who do so. The ambiguity is on a key point as policy formulation and implementation is a hallmark of managerial status. Dep't of Cent. Mgmt. Serv. v. Ill. Labor Relations Bd., 2011 IL App. (4th) 090966 ¶135 (citing Dep't of Cent. Mgmt. Serv./Ill. Commerce Comm'n v. Ill. Labor

² Despite a slight clerical error, this portion of Liu's position description essentially tracks that of Rao.

Relations Bd., 406 Ill. App. 3d 766, 775 (4th Dist. 2010)) (touchstone of managerial status is independent authority to establish and effectuate policy).

Girard's affidavit provides some explanation that may resolve the ambiguity, but is itself so succinct as to provide little confidence in a resolution. In relevant part, he states:

In the work that they perform, both Mr. Rao and Ms. Liu are involved in the review and drafting of policies which affect the operation of Pollution Control Board generally. Both are responsible for variously drafting, reviewing, interpreting, analyzing, and otherwise evaluating legislation, rules, decisions, and technical and/or scientific data that the Chairman, Board Members, and the Board's legal staff use in formulating regulatory policies and adjudicating contested cases.

Given our preference for evidence particular to duties actually performed, like Girard's affidavit, over generally worded position descriptions of duties that may merely be theoretical, N. Ill. Univ. (Dep't of Safety), 17 PERI ¶2005 (IL LRB-SP 2000) (position descriptions least helpful form of evidence), and the authority holding that the party seeking to exclude its employees from collective bargaining should bear the burden of presenting evidence, Vill. of Broadview v. Ill. Labor Relations Bd., 402 Ill. App. 3d 503, 506 (1st Dist. 2010); County of Cook v. Ill. Labor Relations Bd., 369 Ill. App. 3d 112, 123 (1st Dist. 2006); Dep't of Cent. Mgmt. Serv. v. Ill. Labor Relations Bd., 382 Ill. App. 3d 208, 220-21 (4th Dist. 2008), we understand why the ALJ concluded there was no issue of fact or law under these circumstances. Nevertheless, there is an aspect to this particular case that causes us to reject the ALJ's recommendation and instead remand for a hearing.

The Employer's argument that Rao and Liu are managerial employees relies on a broad reading of Dep't of Cent. Mgmt. Serv./Ill. Commerce Comm'n v. Ill. Labor Relations Bd., 406 Ill. App. 3d 766, 774 (4th Dist. 2010) ("ICC"), a decision issued on December 28, 2010, after the petition filed in this case; in fact, issued just one day before the Employer submitted its response

to the ALJ's rule to show cause. That decision, along with its companion case decided that same day, Dep't of Cent. Mgmt. Serv./Ill. Human Rights Comm'n v. Ill. Labor Relations Bd., 406 Ill. App. 3d 310 (4th Dist. 2010) ("HRC"), concerned administrative law judges who issue recommended decisions that either can serve as the final determination of an adjudicative agency (HRC) or might constitute "effective recommendations" for final determinations of an adjudicative agency (ICC). The Employer now seeks to apply the ICC holding in a context that does not involve administrative law judges or an agency that is exclusively adjudicative in nature. In essence, it wishes to argue that Rao and Liu are managerial employees because the PCB's core function is to make State environmental policy, and, it asserts, the Environmental Scientist I and II make recommendations of environmental policy that are effective.

We do not here pass judgment on whether the ICC holding applies in the manner proposed by the Employer, nor whether the evidence would support application of this theory in this particular case. However, in exploring this theory, we would prefer that the evidentiary record be more fully developed, particularly, as the ICC court directed in its remand, on the extent to which the PCB accepts policy recommendations made by Rao and Liu. The single day between issuance of the ICC decision and the time that the show cause response was due may not have been sufficient for the Employer to have gathered evidence on that point. It is because of our desire to address this legal issue in the context of a more fully developed record, and not because we see any particular shortcomings in the ALJ's analysis or adequacy in the Employer's response to the rule to show cause, that we remand this matter with direction that an evidentiary hearing be held on the topic of Rao's and Liu's potential managerial status.

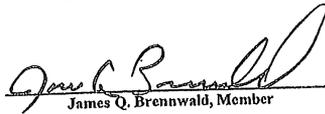
Conclusion

For these reasons, we reverse the ALJ's determination to add the Environmental Scientist I and Environmental Scientist II positions to the RC-63 bargaining unit, and remand for a hearing on whether these are managerial positions.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD


Jacaly J. Zimmerman, Chairman


Paul S. Besson, Member


James Q. Brennwald, Member


Michael G. Coll, Member


Albert Washington, Member

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

