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-11-078
State of Illinois, Department of Central Management Services (Illinois Commerce Commission),	)	
Employer	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

On February 27, 2013, Administrative Law Judge (ALJ) Heather Sidwell issued a Recommended Decision and Order addressing a petition filed by the American Federation of State, County and Municipal Employees, Council 31 (Petitioner of Union) that sought to add six employees of the State of Illinois, Department of Central Management Services (Employer), in the job title Director at the Illinois Commerce Commission (ICC), to the RC-63 bargaining unit. The ALJ recommended that the Illinois Labor Relations Board, State Panel, find that Jerry Oxley and Peter Muntaner are managerial employees within the meaning of Section 3(j) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012), who should be excluded from collective bargaining. Further, she recommended that Torsten Clausen should be excluded on the basis that he is managerial as a matter of law. Next, she recommended tht the Board find that Harry Stoller, Joy Nicdao-Cuyugan, and Jim Zolnierek are public employees within the meaning of Section 3(n) of the Act, whose positions should be added to the unit. Finally, she rejected the

Employer' s contentions that any of the petitioned-for employees are supervisory or confidential employees within the meaning of Sections 3(r) and 3(c) of the Act, or because they are excluded from certain protections of the Personnel Code, 20 ILCS 415 (2012), and/or exempt from the requirements arising out of the Supreme Court's ruling in Rutan v. Republican Party of Ill., 497 U.S. 62 (1990).

Pursuant to Section 1200.135(b) of the Board's Rules and Regulations, 80 Ill. Admin. Code §1200.135(b), the Union and the Employer filed timely exceptions and cross-exceptions to the ALJ's Recommended Decision and Order. They each filed a response.

For the reasons that follow, we find that all petitioned-for employees are managerial as a matter of fact within the meaning of Section 3(j) of the Act. In so holding, we affirm the ALJ's conclusion that Jerry Oxley and Peter Muntaner are managerial as a matter of fact, reverse her conclusion that Torsten Clausen is managerial as a matter of law and instead find that Clausen is managerial as a matter of fact, and reverse the ALJ's conclusion that Harry Stoller, Joy Nicdao-Cuyugan, and Jim Zolnierek are public employees. Consequently, we do not address the parties' exceptions and cross-exceptions as they pertain to the other theories for exclusion or to unit appropriateness.

1. **Discussion and analysis**

a. Torsten Clausen – Director of the Office of Retail Market Development

We find, contrary to the ALJ, that Clausen is not managerial as a matter of law, but that he is managerial as a matter of fact.

As a preliminary matter, Clausen is not managerial as a matter of law because there is no statutory apparatus that clothes him with all the powers of the Commission and because he does not perform the functions of a judicial law clerk. Illinois Courts have applied an alternative

"matter-of-law" test to establish managerial status. The 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 Circuit 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 Cnty. State's Attorney, 166 Ill. 2d at 305. Formerly, absent a "detailed statutory apparatus'" that "'clothe[s] the employees with all the powers and privileges'" of the office holder, employees would not be deemed managerial as a matter of law. Dep't of Cent. Mgmt. Servs./Dep't of Healthcare and Family Servs., 388 Ill. App. 3d 319, 333 (4th Dist. 2009), 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. Dep't of Cent. Mgmt. Servs. (Pollution Control Bd.) v. Ill. Labor Rel. Bd., 2013 IL App (4th) 110877 ("PCB") (finding attorney assistants to Pollution Control Board members to be managerial as a matter of law because they performed law clerk-like functions and acted as surrogates to the office holders, even though no statute clothed them with the powers and privileges of the office holder).

Here, we observe that there is no statute that clothes Clausen with the authority of the Commissioners to promote the development of an effectively competitive retail electricity

market. The cited quote from the Public Utilities Act does not confer upon Director Clausen the authority to act in the Commissioners' stead with respect to such matters. 220 ILCS 5/20-102(d) (2012) ("The Illinois Commerce Commission should promote the development of an effectively competitive retail electricity market that operates efficiently and benefits all Illinois consumers"). Notably, Clausen is not managerial as a matter of law simply because the Commission has designated him to help the Commission achieve its statutory goals by tasking him to propose legislative actions that address barriers to competition. Cook Cnty. State's Attorney, 166 Ill. 2d at 305; Dep't of Cent. Mgmt. Servs./Dep't of Healthcare and Family Servs., 388 Ill. App. 3d at 333 (distinguishing between non-managerial employees who are merely designated by their employer to perform functions of the office holder and those who are managerial as a matter of law by virtue of their statutory power to perform such functions).

Further, Clausen does not meet the narrow exception carved out by the Court in PCB because there is no evidence that he performs "strikingly similar functions to that of judicial law clerks" such that he shares a unity of professional interest with the Commissioners sufficient to render him managerial as a matter of law in the absence of a statute conferring such authority. See PCB, 2013 IL App (4th) 110877 ¶ 36. Indeed, Clausen's position is different from that of law clerks in two main respects. First, Clausen does not draft Commission decisions. Second, he functions more as an advocate than as a neutral conduit for the Commission's actions because he frequently involves his office in docketed cases and helps prepare testimony to support staff's position before the Commission.

Nevertheless, we find that Clausen must be excluded from collective bargaining as managerial as a matter of fact because he functions as a gatekeeper with respect to issues concerning competition in the retail electric markets. See State of Ill., Dep't of Cent. Mgmt.

Servs. (Ill. Commerce Comm'n), 29 PERI ¶ 129 (finding employee managerial based on similar "gatekeeper" functions). Here, Clausen monitors the competitiveness of retail electric markets, identifies barriers to competition for the ICC's review, and proposes solutions to those barriers. If Clausen does not identify those barriers to competition, the Commission is powerless to address and remedy them, and his exercise of discretion effectively determines that the Commission will not take action. Although the Commission does not always accept Clausen's recommended course of action to remove those barriers he does identify, Clausen has power and influence on managerial decision making because he frames the issues raised before the Commission, and is solely responsible for the flow of information to the Commission concerning such barrier to competition as head of the Office of Retail Market Development.[1] Id.; State of Ill., Dep't of Cent. Mgmt. Servs. (Ill. Commerce Comm'n), 29 PERI ¶ 76 (ALJs were managerial when they framed the issues for the Commission's review).

Thus, we find that Clausen's position is not managerial as a matter of law, but is managerial as a matter of fact.

b. Jerry Oxley – Director of the Division of Information Technology Services

We affirm the ALJ's conclusion that Oxley is managerial as a matter of fact and reject the Union's exception that Oxley fails to predominantly perform executive and management functions.

Here, Oxley is predominantly engaged in executive and management functions because many of his duties broadly affect the agency's operations. For example, Oxley develops case management systems and makes evaluation forms used by the entire agency. State of Ill., Dep't of Cent. Mgmt. Servs., 30 PERI ¶ 38 (IL LRB-SP 2013) (finding that an employee who

[1] Clausen reports directly to the Executive Director and not to a bureau chief.

delivered and developed IT training for a state agency was managerial). Further, we reject the Union's contention that Oxley is a purely professional employee who exercises no managerial discretion in this respect because professional discretion and managerial authority are not mutually exclusive. State of Ill., Dep't of Cent. Mgmt. Servs., 30 PERI ¶ 38 (similarly rejecting the assertion that "persons with technical expertise in information technology necessarily do nothing other than bring their technical expertise to their positions.").

Moreover, Oxley's narrower, IT-related policy recommendations constitute executive and management functions because he helps determine the "IT means" by which the agency achieves its objectives. Dep't of Cent. Mgmt. Servs./Ill. Commerce Comm'n v. Ill. Labor Relations Bd., 406 Ill. App. 3d 766, 778 (4th Dist. 2010) ("ICC") (employees may be managerial if their responsibilities encompass a major component of the agency's mission). In fact, we have expressly held that information technology employees who have the "authority to broadly affect one of the means" by which the agency achieves its policy objectives satisfy the traditional test for managerial exclusion. Id. Here, Oxley meets this requirement because he developed a policy which outlines the approval process necessary to implement information content or structure changes to the ICC's websites, developed an Information Technology Request (ITR) policy which governs the use of IT resources, and is responsible for "creat[ing] the initial draft of the annual IT Strategic Plan...[which] ensures that the agency is always in a position to derive optimum benefit from its available resources and related information management assets."[2] Id. (finding that responsibility for "deployment" of IT resources constitutes an executive and management function).

[2] This statement is drawn from the Information Technology Request policy.

Contrary to the Union's contention, Oxley predominantly performs executive and management functions, even though he has only formulated two policies over a span of 10 years, because he performs additional functions which satisfy the test. Although sporadic or occasional participation in executive and management functions is insufficient to meet the statutory requirement that managerial employees predominantly engage in such tasks, "it is not absolutely essential that [an]... employee formulate policy" to be managerial. ICC, 406 Ill. App. 3d at 780 (quoted text). Thus, an employee may be managerial under the Act even if his predominant task is not the formulation of policy as long as it nevertheless constitutes an executive and management function.

Here, the Union overlooks the fact that Oxley has developed a case management system which has broad relevance to the agency's functioning as a whole and that he likewise created the performance evaluations used by the ICC. Notably, Oxley's status as Director of IT lends weight to the finding that he is predominantly engaged in executive and management functions because, as head of the IT Division and the top IT employee at the ICC, he likely is ultimately responsible for deployment of the division's resources. State of Ill., Dep't of Cent. Mgmt. Servs., 30 PERI ¶ 38 (Board inferred that employees who were, respectively, responsible for deployment of IT resources and held status as top IT employee, were predominantly engaged in executive and management functions).

Moreover, Oxley's work on the helpdesk does not undermine this conclusion, despite the fact that he spent 75% of his work time performing work at the helpdesk in the three months preceding the hearing. As a preliminary matter, Oxley's work on the helpdesk only rose to such a large percentage of his work time because of a grievance filed by the Union. He estimated that in the future he would perform only 34-40% of his work on the helpdesk and that it could even be

as low as 20-25% of his work time. Thus, Oxley's more recent helpdesk work does not preclude a finding that he predominantly performs executive and management functions.

Further, Oxley is responsible for directing the effectuation of management policies and procedures because the Commission has accepted all his policy recommendations. ICC, 406 Ill. App. 3d at 778 (the litmus test for effective recommendations is their influence).

Thus, we find Oxley's position is managerial based on his leading participation in formulating technological solutions to broad-reaching administrative problems such as case management, his status as the top IT employee, and his effective recommendations on IT policies.

c. Peter Muntaner – Director of the Division of Consumer Services

We affirm the ALJ's ultimate conclusion that Muntaner is managerial under the traditional test.[3]

Muntaner is a managerial employee based on his effective recommendation of policies and procedures concerning the response and processing of consumer complaints. First, the Union effectively concedes that the procedures established by Muntaner are characteristic of managerial and executive discretion because they are "not solely based on professional expertise." Further, the manner in which Muntaner approached the issue concerning complaint processing demonstrates managerial initiative because he "reviewed the Division's policy regarding the fast and efficient handling of informal complaints," identified the ICC's complaint processing flaws, and formulated policies to meet the Division's goals. State of Ill., Dep't of Cent. Mgmt. Servs.,

[3] We note that there is an inconsistency between the ultimate conclusion in the RDO (excluding Muntaner) and the phrasing in part of the discussion section (finding that Muntaner does not predominantly perform executive and management functions). However, this appears to be a mere clerical error. To the extent that it is not, we find, contrary to the ALJ, that Muntaner is predominantly engaged in executive and management functions, as discussed below.

30 PERI ¶ 38 (employee is managerial when he is a decision-maker and initiator who is responsible for effective operations). Second, Muntaner is likely predominantly engaged in such managerial functions by virtue of his position as head of the Consumer Affairs Division. Id. (individual's position as top IT employee strongly suggested that the employee was predominantly engaged in management functions). Third, Muntaner is responsible for directing the effectuation of management policies and practices because the Commission accepted all of his proposed policies and procedures and because he participated in training his subordinates and agency employees on the new consumer affairs procedures. ICC, 406 Ill. App. 3d at 774; State of Ill., Dep't of Cent. Mgmt. Servs., 30 PERI ¶ 38 (employee's responsibility for developing and implementing training demonstrated managerial effectuation of agency policy).

Thus, we find that Muntaner's position is managerial as a matter of fact.

d. Harry Stoller, Joy Nicdao-Cuyugan, Jim Zolnierek – Directors of the Public Utilities Division

We reverse the ALJ's findings with respect to Stoller, Nicdao-Cuyugan, and Zolnierek, and find that all three directors are managerial as a matter of fact for the reasons set forth below.

i. Harry Stoller

Stoller is a managerial employee within the meaning of the Act because he acts as a gatekeeper by making the final decision as to which Federal Energy Regulatory Commission (FERC) proceedings warrant the Commission's attention and participation.[4] The FEP addresses issues that arise at the Federal Energy Regulatory Commission (FERC) where the Commission acts as a litigant, advocating on behalf of Illinois retail energy consumers. It reviews consumer complaints filed by consumers against Illinois utilities and recommends that the Commission

[4] The facts which buttress this conclusion are found in Stoller's performance evaluation, the accuracy of which Stoller and the Union never disputed.

intervene if the case may impact Illinois and if the matter rises to a high level of importance. Stoller assures that FEP "focuses on issues of economic significance to Illinois electric and natural gas retail customers." His evaluation states that he is "ultimately responsible for the agenda of the Federal Energy Program (FEP)." In this respect, Stoller is an influential gatekeeper because he ultimately determines the cases that FEP recommends for the Commission's participation. State of Ill., Dep't of Cent. Mgmt. Servs. (Ill. Commerce Comm'n), 29 PERI ¶ 129 (employee's flagging and identification of important matters which might warrant the Commission's attention rendered employee managerial). While Stoller may not have final authority concerning the Commission's decision to intervene in a case, such final authority is unnecessary in light of his important gatekeeping functions. Id. (citing Dep't of Cent. Mgmt. Servs., 2011 IL App (4th) 090966 at ¶135; ICC, 406 Ill. App. 3d at 775). His exercise of discretion to not bring a particular matter to the FEP's attention necessarily controls the fact that the ICC will not become involved in that matter.

Thus, Stoller is managerial as a matter of fact.

ii. Joy Nicdao-Cuyugan

Similarly, we find that Joy Nicdao-Cuyugan is managerial because she is predominantly engaged in executive and management functions when she identifies obstacles to the smooth running of the agency and formulates solutions. Further, she is responsible for directing the effectuation of management policies and practices because she implements them to the benefit of the ICC as a whole.[5]

For example, Nicdao-Cuyugan noted constraints to obtaining easily accessible updated copies of the Public Utilities Act and the Illinois Administrative Rules upon which the Financial

[5] The facts which buttress this conclusion are found in Nicdao-Cuyugan's performance evaluation, the accuracy of which Nicdao-Cuyugan and the Union never disputed.

Analysis Division (FAD) staff frequently relies. She contacted and worked with the Information Technology Services Director and his staff to develop an ICC intranet site where regularly updated copies of the Act and rules could be electronically accessed in a convenient format. The broad-reaching impact and managerial character of Nicdao-Cuyugan's actions is evident from her evaluation which notes that "the resulting product benefited not only [Nicdao-Cuyugan's] division but every other division within the agency that relies upon the same documents."

Similarly, Nicdao-Cuyugan identified a problem concerning costs of network storage and subsequently initiated, formulated, and implemented a policy which solved that problem and saved the agency thousands of dollars each year. Specifically, Nicdao-Cuyugan realized that sending hyperlinks instead of electronic files could save the ICC money in network storage costs. Nicdao-Cuyugan established a new procedure mandating that all FAD case managers send only hyperlinks to staff instead of electronic files. The evaluation noted that "this procedure has a significant impact since FAD case managers are typically in charge of distributing numerous and voluminous rate-case related documents to the assigned staff." But see State of Ill., Dep't of Cent. Mgmt. Servs., 28 PERI ¶ 160 (IL LRB-SP 2012)(no managerial authority found where there was no evidence that the employees possessed the authority to initiate entirely new policies or to discontinue or modify existing policies).

Likewise, Nicdao-Cuyugan provided input concerning staff data requests on rate cases which have not been filed or which had been filed but not yet suspended. Her input "helped avoid a data request policy that would have unnecessarily limited FAD Staff's ability to conduct its work effectively."

These examples are indicative of self-initiated, broadly-applicable policy changes that amount to the executive and managerial running of the agency. Further, the fact that Nicdao-

Cuyugan initiated and implemented these changes in the span of one evaluation period strongly suggests that she is predominantly engaged in executive and management functions. State of Ill, Dep't of Cent. Mgmt. Servs. v. Ill. Labor Rel. Bd., 2011 IL App (4th) 090966 ("executives and managers run the agency or department by, for example, formulating policies and procedures and preparing the budget."); State of Ill., Dep't of Cent. Mgmt. Servs., 30 PERI ¶ 38 (managerial employees are "decision-maker[s]...and initiator[s]" who are "responsible for effective operations.").

Thus, the record demonstrates that Nicdao-Cuyugan is managerial as a matter of fact.

iii. Jim Zolnierek

Likewise, we find that Zolnierek satisfies the managerial exclusion under Section 3(j) of the Act.

As a preliminary matter, there is no dispute that Zolnierek satisfies the second prong of the managerial test because the ALJ determined that Zolnierek is charged with directing the effectuation of management policies and practices and the Union never excepted to this finding. Accordingly, the only issue addressed below is whether Zolnierek meets the first prong of the test.

Here, Zolnierek's participation in initiating a project to establish a telecommunications providers' database qualifies as an executive and management function. First, the project's initiation is managerial in nature because the initiators identified a systemic problem (failures in coordinating actions taken against carriers across the ICC's various divisions), formulated a broad-reaching solution which advanced the ICC's enforcement goals (establishment of a compliance database) and thereby help run the agency. ICC, 406 Ill. App. 3d at 774 (Executive and management functions," amount to running an agency or department by establishing policies

and procedures, preparing the budget, or otherwise assuring that the agency or department operates effectively); City of Freeport, 2 PERI ¶ 2052 (IL SLRB 1986).

Contrary to the ALJ's assertion, we find it immaterial that the email which evidences Zolnierek's participation in the project does not outline his precise role in the project's initiation because it nevertheless shows that Zolnierek played a significant part in identifying the problem and creating a solution. Here, Zolnierek takes part ownership of the decision to initiate the project because he consistently refers to "our proposed plan," "problems we have found," and actions that "we have been" taking. The fact that Zolnierek may have collaborated with others to find a solution does not undermine a finding that he meets the first prong of the test because Courts have held that the "Act does not require...independence in management functions." Dep't of Cent. Mgmt. Serv,. 2011 IL App (4th) 090966 ¶187. Moreover, the fact that Zolnierek is charged with directing the effectuation of the project lends support to the finding that his participation constitutes an executive and management function. See ICC, 406 Ill. App. 3d at 780 (running the department might or might not entail the creation of new policies, but it will always entail "directing the effectuation of existing policies.").[6]

Similarly, at least one of Zolnierek's recommendations, made upon reviewing the ICC's regulations, constitutes an executive and managerial recommendation because it proposes a novel method of investigating and resolving observed problems, which does not simply create a new rule to reflect legislative amendments.[7] But see State of Ill., Dep't of Cent. Mgmt. Servs.

[6] Notably, Zolnierek's functions are even more managerial and executive in nature than those performed by a Department of Revenue employee whom the Court recently deemed managerial because Zolnierek actually participated in the formulation of the initiative described above. Dep't of Cent. Mgmt. Servs. 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), rev'g Dep't of Cent. Mgmt. Servs. (Dep't of Revenue), 25 PERI ¶ 161 (IL LRB-SP 2009).

[7] The ALJ correctly notes that the decision to review the Commission's rules is not an executive and management function because it is a pre-scheduled and statutorily-mandated task. See State of Ill. Dep't

(Ill. Commerce Comm'n), 29 PERI ¶ 129 (attorney who did not make recommendations and who merely determined whether the words of a law achieved their stated purpose did not engage in executive and management functions). For example, Zolnierek proposed that staff commence informal workshops addressing rules pertaining to low income assistance program to determine the magnitude and significance of the problems inherent in ensuring its proper and effective use.[8] Further, he proposed that staff commence individual proceedings whereby new market entrants must seek the Commission's approval to participate in the low income subsidy program.

Further, the record establishes that the Commission accepted Zolnierek's recommendations contained in the memo, discussed above, and that his recommendations were therefore effective. Specifically, when asked about the memo's recommendations, Bureau Chief Gene Beyer testified that "we were able to get the commissioners' concurrence on Mr. Zolnierek's recommendation to begin the formal rule making and workshop process to edit or eliminate rules affected by the recent telecommunications laws."

Finally, the magnitude of both these projects, particularly the review and revision of the ICC's rules, supports the finding that Zolnierek is predominantly engaged in executive and management functions. The mere fact that not all Zolnierek's individual recommendations require the same level of discretion and managerial judgment therefore does not alter the conclusion that at least one of his predominant tasks is executive and managerial. State of Ill., Dep't of Cent. Mgmt. Servs. (Ill. Commerce Commission), 29 PERI ¶ 76 (declining to redefine

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of Cent. Mgmt. Servs., 26 PERI ¶ 132 (IL LRB-SP 2010) (technical advisor who applied his professional expertise to initiatives set by others did not engage in executive or management functions). However, as discussed below, that decision is not the basis for finding Zolnierek is predominantly engaged in executive and management functions.

[8] In particular, staff was concerned that it is "increasingly difficult to ensure that customers [who are] taking advantage of low income programs...receive subsidized...service[s]" and that it is similarly difficult to ensure that only low income customers who meet those eligibility requirements receive the subsidized services.

ALJs' predominant duties in terms of the different types of cases they heard; finding ALJs predominantly engaged in executive and management functions even when not all their recommendations required complex analysis).

Thus, we find that Zolnierek is managerial as a matter of fact.

2. Summary

We find that Jerry Oxley, Peter Muntaner, Torsten Clausen, Harry Stoller, Joy Nicdao-Cuyugan, and Jim Zolnierek hold managerial positions within the meaning of Section 3(j). We therefore dismiss the petition seeking to add these positions to the RC-63 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/ Michael G. Coli
Michael G. Coli, Member

/s/ Albert Washington
Albert Washington, Member

Member Brennwald, concurring in part and dissenting in part:

I join the majority's decision that Directors Oxley, Muntaner, Nicdao-Cuyugan and Zolnierek are managerial employees within the meaning of Section 3(j) of the Act, but respectfully dissent from the majority's determination that Directors Clausen and Stoller also meet the definition of managerial under the Act, based on the notion that their functions include serving as "gatekeepers" or "flaggers" charged with indentifying certain matters for the Commission's attention, consideration and action. Consistent with my dissent in State of Ill.,

Dep't of Cent. Mgmt. Servs. (Ill. Commerce Comm'n), 29 PERI ¶ 129, I see these employees' "gatekeeper" function as purely subordinate and advisory. In the absence of any evidence that either Clausen's or Stoller's responsibilities include making recommendations that "almost always persuade" the Commission, or that either employee otherwise has any responsibility for directing the effectuation of management policies, in my opinion neither position qualifies as managerial under Section 3(j). "[M]anagerial employees do not merely recommend policies or give advice that someone higher up is equally apt to take or leave; rather, they actually direct the governmental enterprise in a hands-on way." Dep't of Cent. Mgmt. Servs./Ill. Commerce Comm'n v. Ill. Labor Relations Bd., 406 Ill. App. 3d 766, 775 (4th Dist. 2010). I do not see the "gatekeeper" functions described by the majority as satisfying this standard.

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

Decision made at the State Panel's public meeting in Chicago, Illinois on December 17, 2013, written decision issued in Chicago, Illinois on February 14, 2014.

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American Federation of State, County and Municipal Employees, Council 31, Petitioner	)	
and	)	Case No. S-RC-11-078
State of Illinois, Department of Central Management Services (Illinois Commerce Commission), Employer	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On October 5, 2010, the American Federation of State, County and Municipal Employees, Council 31 (Petitioner/AFSCME) filed a petition in Case No. S-RC-11-078 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 individuals in the title of Director at the Illinois Commerce Commission (Director) in the existing RC-63 bargaining unit. The State of Illinois, Department of Central Management Services, Illinois Commerce Commission (Employer/CMS) opposes the petition, asserting that the petitioned-for positions are excluded from the Act's coverage pursuant to the exemptions for supervisory, managerial, and confidential employees. CMS further asserts that, if the positions are covered by the Act, it is not appropriate to include the Directors in the RC-63 bargaining unit.

A hearing was held by videoconference on June 27 and 28, 2011, before Administrative Law Judge Eileen Bell in Chicago and Springfield, 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.

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. At all times material hereto, the Employer has been a public employer within the meaning of Section 3(o) of the Act;
2. The Employer is subject to the jurisdiction of the State Panel of the Board pursuant to Section 5(a-5) of the Act;
3. The Petitioner is a labor organization within the meaning of Section 3(i) of the Act;
4. There is no history of collective bargaining with respect to the petitioned-for positions;
5. The petitioned-for positions are exempt from Jurisdictions A, B, and C of the Personnel Code, 20 ILCS 415, or are "non-code" positions, pursuant to Section 4c(12) of the Personnel Code;
6. The RC-63 bargaining unit includes both code and non-code positions; and
7. The positions of Director of Governmental Affairs, Director of Public Affairs, and Director of Administrative Services at the Illinois Commerce Commission are excluded from the Act's coverage.

II. ISSUES AND CONTENTIONS

The issues to be resolved are:

1. Whether the petitioned-for Director positions are excluded from the Act's coverage because:
    a. They are managerial employees within the meaning of Section 3(j) of the Act;
    b. They are supervisors within the meaning of Section 3(r) of the Act;
    c. They are confidential employees within the meaning of Section 3(c) of the Act; or
    d. They are "*de jure* managerial employees"; and
2. If the petitioned-for positions are not excluded from the Act's coverage, whether it is appropriate to include the positions in the existing RC-63 bargaining unit.

CMS argues that the petitioned-for positions are excluded from the Act's coverage because they are managerial employees, supervisors, and confidential employees. CMS also argues that the positions are "*de jure* managerial employees" because the positions are exempt from the decision of the Supreme Court in Rutan v. Republican Party of Illinois, 479 U.S. 62 (1990), and from the provisions of the Personnel Code. Finally, CMS asserts that, if the

petitioned-for positions are not excluded from the Act's coverage, it is inappropriate to include positions subject to these exemptions in the RC-63 bargaining unit.

AFSCME denies that petitioned-for positions are managerial employees, supervisors, or confidential employees under the Act, and concludes that the Director positions are therefore included in the Act's coverage. AFSCME also argues that it is appropriate to include the petitioned-for positions in the existing RC-63 bargaining unit.

III. FINDINGS OF FACT

1. Structure and Function of the Illinois Commerce Commission

The Illinois Commerce Commission (ICC/Commission) is a state agency created by the General Assembly and headed by a 5-member board of Commissioners. The Commission's powers and responsibilities are set out in the Public Utilities Act, 220 ILCS 5. The agency has regulatory authority over public utilities operating within the State, including telecommunications, water, and electricity providers; sewerage disposal; and oil and gas pipelines.

In order to perform its statutory duties, the Public Utilities Act instructs the Commission to employ an Executive Director to run the ICC's day-to-day operations. The Executive Director in turn has the statutory authority to organize the ICC's staff into such bureaus or sections as he or she deems fit. The staff is currently divided into the Bureaus of External Affairs, Transportation, Public Utilities, Administrative Law Judges, and Planning and Operations; the Offices of General Counsel and Retail Market Development; and Homeland Security. Each bureau is headed by a Chief, and is further divided into divisions headed by Directors. The positions at issue in this matter are the Director of the Office of Retail Market Development; the Director of Information Technology Services in the Bureau of Planning and Operations; the Director of Consumer Services in the Bureau of External Affairs; and the Directors of the Energy, Telecommunications, and Financial Analysis Divisions in the Bureau of Public Utilities. The Director of Homeland Security is currently included in a bargaining unit.[1] The parties have stipulated that the Directors of the Offices of Governmental Affairs and Public Affairs within the Bureau of External Affairs and the Director of Administrative Services within the Bureau of Planning and Operations are excluded from the Act's coverage.

[1] ILRB Case No. S-RC-10-130.

2. Policies and Procedures of the Illinois Commerce Commission

The Commission performs its statutory duty of regulating public utilities by issuing decisions in docketed cases. Once a case has been docketed, it is assigned to an Administrative Law Judge (ALJ) who is responsible for reviewing testimony and documentary evidence, holding a hearing, and issuing a proposed order in the matter. In these cases, the ICC's technical staff is responsible for preparing written testimony on issues related to their field of expertise. This testimony becomes part of the record in the docketed case, and is reviewed by the ALJ before issuing a proposed order. The Commission then has an opportunity to review the record before entering its final order in a docketed case.

The Commission also uses this procedure to formulate its regulations. These cases likewise require technical staff to prepare testimony and occasionally draft regulations that, following approval by the Commission and the Joint Committee on Administrative Rules, become new ICC rules.

Though the Commission has an Office of Governmental Affairs staffed with Legislative Liaisons, Directors may also be called on to perform legislative duties due to their technical expertise. This may include drafting position papers or testifying on behalf of the ICC before legislative committees.

The Commission employs a Human Resources Manager, Leigh Ann Myers. Myers and the other Human Resources staff are involved in a variety of supervisory tasks. Myers testified that the ICC's hiring procedure involves a panel made up of the immediate supervisor for the position to be filled and a Human Resources representative. Testimony indicated that a third person will typically sit on the panel as well. The panel is responsible for drafting hiring criteria and interview questions, conducting interviews and scoring applicants, and compiling the scores to determine which candidate to recommend. The agency's Executive Director then has the authority to approve the recommendation.

Directors are required to contact Human Resources whenever a disciplinary issue arises. Myers and her staff consult with the Director to determine what discipline he or she would like to impose, and then suggest discipline that is permissible under ICC policy and any applicable collective bargaining agreements. Once a disciplinary action has been decided upon, it must be approved by the Executive Director, Tim Anderson. Anderson testified that he has approved every recommendation for discipline that he has received during his tenure as Executive

Director. Myers noted that the ICC's Managers, who report to the Directors, are no longer involved in issuing discipline because they are included in the RC-63 bargaining unit. Therefore, any misconduct observed by a Manager is then addressed by a bureau Chief or a Director.

Finally, Myers testified that she is responsible for creating a strike plan every four years, prior to beginning negotiations for a successor collective bargaining agreement. These strike plans are disseminated to the Chiefs of the ICC's bureaus. Myers testified that the Chiefs in turn have discussions with the Directors to ensure that the strike plan would allow their divisions to function in the event of a strike. It does not appear, however, that the strike plan is actually disseminated to the Directors.

3. Torsten Clausen's Duties

Torsten Clausen is the Director of the Office of Retail Market Development (Office). His is the only position at issue that reports directly to Executive Director Anderson.

The Office of Retail Market Development was created by the Retail Electric Competition (REC) Act of 2006, passed by the 94th General Assembly. The REC Act provides that the Office is responsible for analyzing techniques used to promote retail electric competition in other states, monitoring existing market conditions in Illinois, identifying barriers to retail competition, and proposing solutions to the Commission and the General Assembly to overcome these barriers. [2] Clausen is the first person to hold the Director position. As Director, Clausen has the statutory authority to oversee the Office and to hire at least two subordinates to assist in fulfilling the Office's responsibilities.

The REC Act vests Clausen, as Director, with the responsibility for preparing and submitting an annual report to the Commission, General Assembly, and Governor. The report must detail the Office's accomplishments in promoting retail electric competition in the prior 12 months and include suggestions for legislative and regulatory action to further promote competition. Anderson testified that Clausen had been solely responsible for preparing and submitting this report in the years prior to the hearing in this matter.[3] In fact, a review of administrative materials in the public record indicates that the report submitted on June 30, 2010, was submitted to the Commission, General Assembly, and Governor under Clausen's signature.

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[2] 220 ILCS 5/20-110 (2010).

[3] Though Anderson testified that he believed recent amendments would require the Commission to approve the Office's report before its submission to the General Assembly and Governor, a review of the REC Act indicates that it has not been so amended.

Anderson testified that Clausen has been given authority to determine the best way to fulfill his statutory duties. Anderson also stated that Clausen has participated in the Commission's rulemaking process and has a role in drafting rules, although he did not clarify what that role is.

Clausen also determines which of the Commission's docketed cases involve retail competition issues, and has the authority to commit the Office to provide written testimony in those matters. He or his staff will then prepare testimony that promotes the ICC's policy in favor of retail market competition. Anderson testified that Clausen spends most of his time preparing testimony in docketed cases and meeting with competitive suppliers and other entities to ensure that policy objectives relating to competition are being met.

Anderson testified that Clausen is responsible for setting the Office's budget. It appears that the Office of the Executive Director is allocated an annual budget from funds appropriated to the ICC. It is unclear what process is then used to allocate those funds between the various bureaus and offices that report to the Executive Director. Anderson did, however, make it clear that Clausen is responsible for determining the amount of funds he needs to operate the Office and communicating that information to Anderson.

Clausen has two direct subordinates, the ICC's Market Development Associates. Both Associates are in the RC-62 bargaining unit. Clausen has the authority to discipline his subordinates pursuant to the procedure described above. However, Clausen has not disciplined either subordinate during his tenure as Director. Clausen was a member of the panel that interviewed and hired the two Associates. Clausen also has the authority to approve requests for time off, recommend overtime, evaluate his subordinates' job performance, train subordinates, and resolve grievances at the first level. Testimony did not establish whether the performance evaluations Clausen completes affect the pay or employment status of his subordinates. Furthermore, he has not adjusted any grievances during his tenure as Director. Anderson estimated that Clausen spends approximately 5% of his time exercising these functions.

4. Jerry Oxley's Duties

Jerry Oxley is the Director of the Division of Information Technology (IT) Services. He reports to Kenneth Hundreiser, Chief of the Bureau of Planning and Operations. Oxley's is the only position at issue that is subject to the Supreme Court's decision in Rutan.

Oxley writes IT policies for the ICC, such as the Web Site Enhancement Policy and the IT Request Policy submitted by CMS. The Web Site Enhancement Policy governs the process necessary to implement content or structural changes to the ICC's website, and applies to all agency staff. The IT Request Policy applies to all ICC staff, contractual employees, and vendors, and governs requests for IT products, services, and work. These policies are based on CMS guidelines and industry best practices. They must be approved by Hundreiser and Anderson; Hundreiser testified that the policies Oxley writes are approved 100% of the time.

Oxley also drafts desk procedures for the Division. These include every step necessary to resolve the most common technology problems the IT Services staff will encounter. The desk procedures Oxley drafts are not reviewed by Hundreiser. Oxley testified that he drafted desk procedures before he became Director, but that staff no longer assists with this task pursuant to a grievance arbitration award related to the job duties of IT Services employees.

Unlike many of the other Directors, Oxley is not involved in drafting regulations, does not prepare testimony for docketed cases, and has no legislative duties.

Oxley testified that he spends a minimum of 20% of his time, and up to 75%, assisting with calls to the IT Services help desk made by ICC employees who experience technological problems. He stated that he also helps the Division's programmers with their backlog by developing applications to serve as short-term fixes to satisfy users until their issues can be more fully addressed.

Oxley has nine direct and eight indirect subordinates, all but one of whom are in the RC-63 bargaining unit. Oxley has the authority to discipline his subordinates pursuant to the procedure outlined above. He has exercised this authority to issue an oral reprimand to a subordinate who was found to have altered his performance evaluation without his supervisor's knowledge or approval. Although Oxley would have authority to hire within the Division, no hiring has taken place during his tenure as Director. He has made two requests to promote his subordinates, both of which were denied. Oxley also has the authority to determine his subordinates' work schedule, approve requests for time off, evaluate his direct subordinates' job performance, train subordinates, and resolve grievances at the first level. He has exercised his authority over his subordinates' work schedule to suspend an employee's authorization to participate in the ICC's adaptable schedule program. Further, while Hundreiser testified that he only reviews Oxley's performance evaluations for typos, emails submitted by AFSCME make it

clear that Hundreiser substantively reviews the evaluations, comparing them to prior evaluations and taking into account any information reported to him by other staff, and then suggests substantive changes. Testimony did not establish whether the performance evaluations Oxley completes affect the pay or employment status of his subordinates. Oxley has not adjusted any grievances during his tenure as Director. He has, however, testified on behalf of the ICC at a grievance arbitration proceeding. His testimony was limited to outlining the duties of the employee who had filed the grievance. Finally, Oxley has the authority to recommend overtime to Hundreiser, subject to Anderson's approval. Hundreiser stated that Oxley's requests for overtime are always approved because "[i]t's obviously needed if [Oxley] proposes it." However, before recommending overtime, Oxley must provide an analysis showing the relative cost and benefits of addressing an IT issue after hours using overtime rather than during working hours. Hundreiser later admitted that Oxley would be instructed to perform tasks during work hours if Anderson determined that it was more appropriate than authorizing overtime. Hundreiser estimated that Oxley spends approximately 24% of his time exercising these functions.

5. Peter Muntaner's Duties

Peter Muntaner is the Director of the Division of Consumer Services. He reports to Randy Nehrt, Chief of the Bureau of External Affairs.

The Division of Consumer Services handles customer complaints. Nehrt testified that the Division's staff prepares testimony in docketed cases consistent with its policy of balancing the interests of consumers and utilities. While Muntaner does not prepare testimony, he does review testimony prepared by his subordinates.

Nehrt testified that Muntaner has duties relating to pending legislation that raises consumer issues. However, because he is based in Chicago and cannot travel to Springfield due to budgetary constraints, Muntaner would likely arrange for a subordinate to testify at committee hearings on these issues.

Muntaner is also responsible for updating the ICC's policy and procedures for handling customer complaints. Nehrt testified that Muntaner does this by reviewing trends in customer complaints to determine which policies and procedures need to be updated. CMS submitted three such procedures, outlining staff responsibilities in dealing with written correspondence and online complaints, the Division's plan to increase efficiency and reduce the need for follow up

questions to utilities responding to informal complaints, and actions the Division would take to ensure that consumers were made aware of the ICC's statute of limitations on formal complaints. Each of these had been drafted by Muntaner in consultation with Division staff, and approved by Anderson.

At the time of the hearing in this matter, Muntaner had taken on additional duties as the project manager for the audit of an alternative gas supplier. The audit, ordered by the Commission, is being performed by an independent auditor rather than ICC staff. The Commission's order set the parameters of the audit, and the auditor was chosen through a request for proposal process drafted by Muntaner. As project manager, Muntaner is also responsible for ensuring the chosen auditor develops and completes an audit plan within the time allocated.

Muntaner has four direct and 15 indirect subordinates, all of whom are in bargaining units, including the RC-63 bargaining unit. Muntaner has the authority to discipline his subordinates pursuant to the procedure outlined above. He has exercised this authority to order a pre-disciplinary meeting for an employee who was caught sleeping in his office during work hours. This pre-disciplinary meeting resulted in a five-day suspension. It is unclear, however, whether Muntaner or another party made the decision to issue the suspension. Although Muntaner would have authority to hire within the Division, no hiring has taken place during his tenure as Director. Muntaner also has the authority to approve requests for time off, recommend overtime, evaluate his direct subordinates' job performance, train subordinates, and resolve grievances at the first level. Nehrt testified that he does not review Muntaner's decision to grant or deny a request for time off. On at least two occasions, Muntaner has recommended overtime with compensatory time to allow subordinates to travel to Chicago for a hearing; both recommendations were approved by Nehrt. Though Nehrt testified that he reviews the performance evaluations Muntaner completes, he also stated that he had never rejected an evaluation. Testimony did not establish whether the performance evaluations Muntaner completes affect the pay or employment status of his subordinates. Muntaner has not adjusted any grievances during his tenure as Director. Nehrt estimated that Muntaner spends approximately 50% of his time exercising these functions, reviewing testimony prepared by his subordinates, and researching and updating ICC policy and procedures.

6. Harry Stoller's Duties

Harry Stoller is the Director of the Energy Division. He reports to Gene Beyer, Chief of the Bureau of Public Utilities.

Stoller has the authority to commit the Division to prepare written testimony in docketed cases that raise issues within the Division's field of expertise. While Stoller does review docketed cases to determine whether they raise issues for the Energy Division, the decision to involve the Division in a docketed case may also come from within the Energy Division's various departments, and Stoller may not be notified of the decision to become involved.

Only Stoller has the authority to represent the Division in budget decisions. Beyer testified that, once a budget is allocated to the Bureau, the Directors of the three divisions are responsible for presenting a case for their own budget, which Beyer will then review. After a budget is set, Beyer must approve any additional expenses.

Beyer testified that Stoller also has the authority to draft policy for his division and to participate in drafting policy for the ICC as a whole, although he could not recall any examples of Stoller doing so. Beyer did recall that Stoller had reviewed policies drafted by other bureaus and divisions, but was unsure whether Stoller had made or suggested changes to those policies.

Stoller has responsibilities relating to the ICC's rulemaking process, though the record does not specify what those responsibilities entail, nor whether the Commission had adopted any rules in which Stoller had participated. Stoller also has legislative duties. The Office of Governmental Affairs could ask Stoller to review pending legislation and draft a paper stating the ICC's position thereon, or assign a staff member of the Energy Division to do so.

The Energy Division regularly prepares written testimony in the Commission's docketed cases. Beyer testified that Stoller is responsible for both preparing testimony and for reviewing testimony prepared by his subordinates. Stoller also approves staff reports drafted by his subordinates. These reports recommend that the Commission issue a citation order in cases where a utility has violated a statute or regulation. The reports are also reviewed by Beyer and approved by Executive Director Anderson before being sent to the Commissioners. Beyer's testimony indicates that he substantively reviews these reports and suggests revisions. CMS submitted two staff reports Stoller had approved, both of which resulted in a citation order issued by the Commission.

Stoller has eight direct and 24 indirect subordinates, all of whom are in bargaining units, including the RC-63 bargaining unit. Stoller has the authority to discipline his subordinates pursuant to the procedure outlined above, though he has not exercised this authority during his tenure as Director. Stoller has been involved in the Division's hiring process, as described above; Beyer stated that he had never rejected one of Stoller's hiring recommendations. However, it is not clear whether Stoller's hiring recommendations represent his own judgment or the consensus of a hiring panel. Beyer testified that Stoller also has the responsibility to determine when a position should be filled and to seek approval to fill the position. Stoller also has the authority to approve requests for time off, recommend overtime, evaluate his direct subordinates' job performance, train subordinates, and resolve grievances at the first level. Beyer does not review requests for time off approved by the Bureau's Directors. CMS presented documentation showing that Stoller had approved the use of overtime to allow a staff member to travel to the site of an incident; because the situation apparently involved an emergency, Stoller gave his authorization without Beyer's prior approval. Both Stoller and Nicdao-Cuyugan have recommended overtime for non-emergency situations, and Beyer has denied those requests. Beyer testified that he did not know whether performance evaluations Stoller completes affect the pay or employment status of his subordinates. He further stated that he reviews these evaluations, and during Stoller's tenure as Director he has returned up to five to be corrected. Stoller has not adjusted any grievances during his tenure as Director. Furthermore, Beyer testified that he would review any resolution, and ask Human Resources to do the same, before any of his Directors would be permitted to resolve a grievance. Beyer estimated that Stoller spends 20 to 30% of his time exercising these functions.

7. Joy Nicdao-Cuyugan's Duties

Joy Nicdao-Cuyugan is the Director of the Financial Analysis Division in the Bureau of Public Utilities. Like Stoller, she reports to Beyer.

Like Stoller, Nicdao-Cuyugan has the authority to commit her Division to prepare written testimony in matters that raise issues within the Division's field of expertise. Nicdao-Cuyugan substantively reviews the testimony her staff prepares and suggests changes where appropriate.

Nicdao-Cuyugan also has the authority, like Stoller, to represent her Division in budget decisions. However, record evidence demonstrates that Beyer reviews and has denied her requests, including a request to purchase a shredder for the Division.

Testimony did not establish whether Nicdao-Cuyugan has responsibilities relating to establishing Division policy or the ICC's rulemaking process. However, like Stoller, she is responsible for preparing or reviewing position papers on pending legislation, and documentary evidence established that Nicdao-Cuyugan substantively reviews the papers prepared by her subordinates.

The Financial Analysis Division also prepares written testimony in the Commission's docketed cases. Nicdao-Cuyugan is responsible for both preparing testimony and for reviewing testimony prepared by her subordinates.

Nicdao-Cuyugan has four direct and 26 indirect subordinates, all of whom are in bargaining units, including the RC-63 bargaining unit. Nicdao-Cuyugan has the authority to discipline her subordinates pursuant to the procedure outlined above, although she has not done so during her tenure as Director. Nicdao-Cuyugan has been involved in the Division's hiring process, as described above; Beyer stated that he had accepted Nicdao-Cuyugan's hiring recommendations. However, it is not clear whether Nicdao-Cuyugan's hiring recommendations represent her own judgment or the consensus of a hiring panel. Beyer testified that Nicdao-Cuyugan also has the responsibility to determine when a position should be filled and to seek approval to fill the position. Furthermore, CMS submitted documentation indicating that Nicdao-Cuyugan made the decision to re-post a vacancy rather than hire a panel's third choice candidate when the panel's first two choices had declined an offer. Nicdao-Cuyugan also has the authority to approve requests for time off, recommend overtime, evaluate her direct subordinates' job performance, train subordinates, and resolve grievances at the first level. Beyer does not review requests for time off approved by the Bureau's Directors. Beyer testified that Nicdao-Cuyugan had resolved a grievance during her tenure as Director. However, she did so before her direct subordinates, the Division's four Managers, were included in the RC-63 bargaining unit. Therefore, at that time she had authority to resolve grievances at the second level rather than the first level. Beyer testified that he did not know whether performance evaluations the Bureau's Directors complete affect the pay or employment status of their subordinates. He further stated that he reviews these evaluations, and during Nicdao-Cuyugan's tenure as Director he has returned less than five to be corrected. Nicdao-Cuyugan has also given her approval for a subordinate to continue working on a part-time status. However, it is not clear whether her approval was necessary in order for the employee's status to be extended, or whether

the employee approached Nicdao-Cuyugan before approaching Human Resources as a courtesy. Beyer estimated that Nicdao-Cuyugan spends 20 to 30% of her time exercising these functions.

8. Jim Zolnierek's Duties

Jim Zolnierek is the Director of the Telecommunications Division. Like Stoller and Nicdao-Cuyugan, he also reports to Beyer.

Like Stoller and Nicdao-Cuyugan, Zolnierek has the authority to commit his Division to prepare written testimony in matters that raise issues within the Division's field of expertise. Zolnierek also has the authority to represent his Division in budget decisions.

Beyer testified that Zolnierek has the authority to draft policy for his division and to participate in drafting policy for the ICC as a whole. In early 2011, for example, Zolnierek participated in a decision to create a database that would allow the ICC to track telecommunications providers' compliance with the Commission's reporting requirements. Record evidence demonstrates that, after the decision to create a database was made, Zolnierek took the responsibility for emailing staff with responsibilities relating to compliance information to notify them of the decision and request their cooperation in the project.

Zolnierek also has responsibilities relating to the ICC's rulemaking process, and Beyer testified that Zolnierek had initiated an effort to complete a comprehensive revision of the ICC's telecommunications regulations, in light of intervening legislation. As a result of this review, regulatory changes were proposed, but the process of approving the changes was ongoing at the time of the hearing in this matter.

Like Stoller and Nicdao-Cuyugan, Zolnierek is responsible for meeting with legislative staff and testifying at General Assembly committee hearings. Furthermore, the Office of Governmental Affairs could ask Zolnierek to review pending legislation and draft a paper stating the ICC's position thereon, or assign a staff member of the Telecommunications Division to do so. However, Beyer provided no examples in which Zolnierek actually prepared, assigned, or reviewed a position paper.

The Telecommunications Division regularly prepares written testimony in the Commission's docketed cases. Beyer testified that Zolnierek is responsible for both preparing testimony and for reviewing testimony prepared by his subordinates. Beyer substantively reviews the testimony prepared by Zolnierek and suggests changes when necessary.

Zolnierek has six direct and five indirect subordinates, all of whom are in bargaining units, including the RC-63 bargaining unit. Zolnierek has the authority to discipline his subordinates pursuant to the procedure outlined above, although he has not done so during his tenure as Director. Likewise, Zolnierek has the authority to participate in the hiring process, but no hiring has taken place during his tenure as Director. The parties stipulated that Zolnierek has the same authority to hire as Stoller. Zolnierek also has the authority to approve requests for time off, recommend overtime, evaluate his direct subordinates' job performance, and train subordinates, and resolve grievances at the first level. Beyer does not review requests for time off approved by the Bureau's Directors. During his tenure as Director, Zolnierek has not recommended any overtime. Beyer testified that he did not know whether performance evaluations the Bureau's Directors complete affect the pay or employment status of their subordinates. He further stated that he reviews these evaluations, and during Zolnierek's tenure as Director he has returned less than five to be corrected. Zolnierek has not adjusted any grievances during his tenure as Director. Beyer estimated that Zolnierek spends 20 to 30% of his time exercising these functions.

IV. DISCUSSION AND ANALYSIS

1. Are the petitioned-for Director positions excluded from the Act's coverage?
    a. Are the Directors managerial employees within the meaning of Section 3(j) of the Act?

CMS asserts that all of the petitioned-for Directors are managerial employees, and are thus excluded from the Act's coverage. Section 3(j) of the Act 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 Board uses two tests to determine whether an employee is managerial: the traditional test, which considers whether the employee is a managerial employee as a matter of fact, and the alternative test, which considers whether the employee is a managerial employee as a matter of law. Department of Central Management Services/The Illinois Human Rights Commission v. Illinois Labor Relations Board, State Panel, 406 Ill. App. 3d 310, 315 (4th Dist. 2010) (quoting

Department of Central Management Services/Department of Healthcare & Family Services v. Illinois Labor Relations Board, State Panel, 388 Ill. App. 3d 319, 330 (4th Dist. 2009)).

To be a managerial employee under the traditional test, an employee must satisfy both parts of the statutory definition. The first prong of the definition requires an alleged managerial employee to be predominantly engaged in executive and management functions. Courts have stated that "executive and management functions" amount to the running of an agency. State of Illinois, Department of Central Management Services (Illinois Commerce Commission) v. Illinois Labor Relations Board (ICC), 406 Ill. App. 3d 766, 774 (4th Dist. 2010) (citing, State of Illinois, Department of Central Management Services (Department of Human Services), 25 PERI ¶ 68 (IL LRB-SP 2009); City of Freeport, 2 PERI ¶ 2052 (IL SLRB 1986)). This element may be shown where an alleged managerial employee establishes policies and procedures, prepares a budget, or otherwise assures that an agency runs effectively. ICC at 774 (citing City of Evanston v. Illinois State Labor Relations Board, 227 Ill. App. 3d 955 (1st Dist. 1992)).

The second part of the statutory definition requires that a managerial employee not only engage in executive and management functions, but also that his or her authority "extends beyond the realm of theorizing and into the realm of practice." ICC, 406 Ill. App. 3d at 774. Thus, in order to be a managerial employee under the definition in Section 3(j), an employee must have substantial discretion to determine how and to what extent policies will be implemented and have authority to oversee and direct that implementation. Village of Elk Grove Village v. Illinois State Labor Relations Board, 245 Ill. App. 3d 109, 122 (2nd Dist. 1993) (quoting City of Evanston, 227 Ill. App. 3d at 975).

As to the alternative test, the courts have relied on the existence of three factors in determining whether petitioned-for employees are managerial as a matter of law: (1) close identification of the office holder with actions of his or her assistants; (2) unity of their professional interests; and (3) power of the assistants to act on behalf of the public officer. Chief Judge of the Sixteenth Judicial Circuit v. Illinois State Labor Relations Board, 178 Ill. 2d 333, 342 (1997) (citing Office of Cook County State's Attorney v. Illinois Local Labor Relations Board, 166 Ill. 2d 296 (1995)). The analysis of these factors determines whether an employee possesses significant authority and discretion to discharge the mission of the employer—i.e., whether an employee acts as a surrogate for an office holder. Id.

At the outset, I note that none of the Directors, with the exception of Clausen, are managerial employees as a matter of law. Testimony has not established that they act as surrogates for the Commission. The Commission fulfills its statutory duty to regulate utilities in Illinois by issuing orders in docketed cases. The record does not establish that the Directors act on the Commission's behalf in these matters or otherwise have the authority to dispose of docketed cases, as did the assistant public defenders at issue in Chief Judge of the Sixteenth Circuit. Id.

Torsten Clausen

Clausen's predominant responsibility is to monitor the competitiveness of retail electric markets within and outside of the State, identify barriers to competition, and propose legislative or regulatory solutions to those barriers. It is Clausen who determines in the first instance what actions should be taken in order to promote retail electric competition in Illinois. However, in monitoring markets and recommending regulatory action, he nonetheless fails to meet the first requirement of the statutory definition because he neither has the final responsibility and independent authority to establish policy, nor does he make effective recommendations regarding policy. Generally, it is "the final responsibility and independent authority to establish and effectuate policy [which] determines managerial status under the Act." Village of Elk Grove Village, 245 Ill. App. 3d at 122 (quoting City of Evanston, 227 Ill. App. 3d at 975). An employee lacking this authority is merely advisory; however, an advisory employee who makes effective recommendations can be a managerial employee under the Act. See ICC, 406 Ill. App. 3d at 775 and 777. Any regulation that Clausen proposes must be adopted by the Commission. Therefore, Clausen's role in these matters is advisory. Further, the record provides nothing on which to base a conclusion that Clausen's recommendations are influential and therefore effective. With no evidence in the record concerning the frequency with which Clausen's recommendations are adopted by the Commission or the review they undergo, I cannot conclude that his responsibility for proposing regulations to address barriers to competition is an executive and management function.

It is clear, however, that Clausen's authority to recommend legislative action establishes his status as a managerial employee under the alternative test. With the adoption of the REC Act, the General Assembly determined that "the Illinois Commerce Commission should promote the development of an effectively competitive retail electricity market that operates efficiently

and benefits all Illinois consumers." 220 ILCS 5/20-102(d) (2010). This is done by proposing legislative action to address barriers to competition. In this matter, Clausen acts on behalf of the ICC. As such, I find that he exercises sufficient authority and discretion in discharging the ICC's mission of promoting retail electricity competition to support a finding that he is a managerial employee as a matter of law under the alternative test.

CMS's assertions that Clausen's role in setting the budget for the Office, his authority to involve the Office in docketed cases, and his responsibility for preparing written testimony in docketed cases constitute executive and management functions are unpersuasive. First, his role in setting the Office's budget is unclear. Testimony did not establish that Clausen does more than submit a request to Anderson to cover any expenses that arise from operating the Office. In any event, Clausen's budget is then subject to Anderson's approval. If this is the extent of his authority, it is insufficient to meet the requirements of the first prong of the statutory definition. See Village of Elk Grove Village, 245 Ill. App. 3d at 122 (role in budgeting is perfunctory and advisory where it simply requires budgeting for recurring stock items and other expenses as they arise, or where budget for new or discretionary expenses is subject to review and possible rejection). Furthermore, it appears Clausen's authority to commit the Office to prepare testimony in docketed cases merely involves reviewing docketed cases to determine which, if any, raise a retail electric market issue. This simple exercise of professional discretion or technical expertise is also insufficient to satisfy the first requirement. Id. (citing City of Evanston, 227 Ill. App. 3d at 975). Finally, the record simply does not establish that the testimony Clausen and his subordinates prepare sufficiently influences the Commission in issuing decisions to rise to the level of an effective recommendation.

Finally, because Anderson could not clarify the nature of Clausen's role in the ICC's rulemaking process, the record provides no basis for determining whether this role satisfies the first prong of the statutory definition.

I conclude that Clausen is not a managerial employee under the traditional test because he does not predominantly exercise executive and management functions. However, based on his responsibilities for proposing legislative action to address barriers to retail electric competition, I conclude that he is a managerial employee as a matter of law under the alternative test.

Jerry Oxley

CMS demonstrated that Oxley does establish policies and procedures, such as the Web Site Enhancement Policy and the IT Request Policy he prepared and the desk procedures he writes. CMS also established that Oxley has the authority to implement these desk procedures without approval from Hundreiser and that Hundreiser consistently approves policies that Oxley establishes, indicating that they are effective recommendations. In order to satisfy the first prong of the traditional test, an employee must possess and exercise a level of authority and independent judgment sufficient to broadly affect the organization's purposes or its means of effectuating those purposes. State of Illinois, Department of Central Management Services (Department of Human Services), 25 PERI ¶ 68 (IL LRB-SP 2009) (citing State of Illinois, Department of Central Management Services (Public Aid), 2 PERI ¶ 2019 (IL SLRB 1986)). Though the policies and procedures Oxley establishes are limited to the use and maintenance of the ICC's IT resources, this activity is sufficient to satisfy the first prong. By promulgating the policy and procedures that govern the use of IT resources by ICC employees, Oxley is clearly predominantly engaged in broadly affecting the ICC's operations. Furthermore, the Board has recognized that the fundamental nature of IT positions is to perform services enabling agencies to effectuate their programs. __ PERI ¶ ____, Case No. S-RC-10-220 (IL LRB-SP January 28, 2013).[4] Oxley clearly does so—the policies he effectively recommends and the desk procedures he implements control one of the means by which the ICC achieves its objectives, the use of IT. His importance in implementing the ICC's IT program and ensuring it runs effectively is highlighted by his work developing short-term fixes that allow the agency to function while the Division's developers work to develop long-term solutions. As such, Oxley satisfies the second prong of the statutory definition. Therefore, I conclude that Oxley is a managerial employee under the traditional test.

Peter Muntaner

CMS argues that Muntaner's responsibilities for committing the Division of Consumer Services to provide testimony in docketed cases, his legislative duties, and his role as project manager for an audit ordered by the Commission establish that he is a managerial employee. The record on each of these matters, however, falls short of establishing that Muntaner

[4] This decision is available on the Board's website at http://www.state.il.us/ilrb/subsections/pdfs/BoardDecisions/S-RC-10-220.pdf.

predominantly exercises executive and management functions. As discussed above, his authority to commit the Division to provide testimony in docketed cases is a simple exercise of professional discretion or technical expertise that is insufficient to satisfy the first requirement. His legislative duties satisfy a similar function: whereas prepared testimony instructs the ICC's ALJs and the Commissioners on technical issues to assist them in resolving docketed cases, any information Muntaner may supply in a position paper or through testimony at a legislative committee hearing will primarily inform the legislature of technical issues to assist the General Assembly in the legislative process. To the extent a position paper or legislative testimony may argue for or against a particular policy, the record does not establish that Muntaner has the authority to decide what position the ICC will take. As such, Muntaner's legislative duties are also simple exercises of professional discretion or technical expertise that are insufficient to satisfy the first requirement. Finally, his role as project manager is largely perfunctory as it is limited to ensuring that the chosen auditor completes an audit on time and within the parameters established by the Commission. The decision to order an audit and the parameters thereof were determined by the Commission.

CMS's assertion that Muntaner is a managerial employee as a result of the policy and procedures he establishes is more persuasive. The record discloses at least three instances in which Muntaner researched trends in consumer complaints, determined areas in which the ICC's response could be improved, and established procedural guidelines designed to meet specific goals he had set. Considering the organizational structure of the ICC, it appears that the Division of Consumer Services is the first branch of the ICC with which consumers involved in a dispute with a utility provider interact. While utility providers and industry insiders may interact with many ICC divisions, the Division of Consumer Services serves as the face of the ICC for the average citizen, thus establishing its importance within the agency. The record indicates that, following his review of trends in consumer complaints, Muntaner reviewed the Division's policy regarding the fast and efficient handling of informal complaints and the need to communicate necessary information to consumers. He then, in consultation with Division staff, drafted written policies designed to ensure that the Division's goals in these regards were met. While Muntaner does not have final and independent authority to implement these procedures, he does make effective recommendations. Of the three procedures that Muntaner drafted, all were approved by Nehrt and implemented. Furthermore, after the procedures where implemented, Nehrt testified

that Muntaner was responsible for training the counselors on the new procedures. Therefore, Muntaner satisfies both prongs of the statutory definition. I conclude that Muntaner is a managerial employee under the traditional test.

Harry Stoller, Joy Nicdao-Cuyugan, and Jim Zolnierek

As discussed above, the authority of the Directors of the Public Utilities Division to commit their divisions to prepare written testimony merely involves reviewing docketed cases to determine which, if any, raise an issue relating to their respective divisions. This a simple exercise of professional discretion or technical expertise. Their legislative duties and responsibilities for preparing written testimony are likewise insufficient to establish their status as managerial employees.

Furthermore, as with Clausen, the record does not establish that the Directors' authority regarding budgeting extends beyond submitting a request for Beyer's approval, which is insufficient to establish that the Directors engage in executive and management functions. Record evidence showing Beyer's denial of Nicdao-Cuyugan's request for a shredder indicates that the Directors' requests do not rise to the level of effective recommendations.

Finally, CMS asserts that the Directors' authority to draft policy and their roles in the ICC's rulemaking process establish that they are managerial employees. However, the record never clearly established that Nicdao-Cuyugan has the authority to draft policy for the Financial Analysis Division or that she has a role in the ICC's rulemaking process. Likewise, though Beyer testified that Stoller does have authority relating to policy for the Energy Division, the record does not establish the extent of that authority. There is no basis to determine whether Stoller's policy-making authority is merely perfunctory and advisory or whether it is sufficient to satisfy the first prong of the statutory definition. As to his role in the rulemaking process, the record does not establish what that role is. Therefore, I cannot conclude that either Stoller or Nicdao-Cuyugan has authority to establish policy or rulemaking responsibilities sufficient to constitute executive and management functions.

The record establishes Zolnierek's authority and responsibility as to these matters more clearly. For example, it appears that Zolnierek coordinated efforts to establish an agency-wide database that tracks telecommunications providers' compliance with statutes and regulations governing their operations. Zolnierek also initiated an effort to complete a comprehensive revision of the ICC's telecommunications regulations in response to statutory changes.

Nonetheless, the record does not support a finding that Zolnierek is a managerial employee. With regards to establishing the database, though his responsibility for implementing the decision to establish the database is clear, this merely satisfies the second prong of the statutory definition. It remains unclear what role Zolnierek played in reaching the decision. CMS submitted documentary evidence on this issue in the form of Zolnierek's email to staff requesting cooperation. In this email, he repeatedly references activities and decisions that "we" have made, without clarifying the other parties involved in the decision-making process. With no evidence regarding his role in the decision-making process, I can neither conclude that Zolnierek had final and independent authority to create the database nor that he made an effective recommendation as to the creation of the database. Finally, with regard to the revision of the ICC's regulation that Zolnierek allegedly initiated, the memorandum he submitted to the Commission on the topic indicated that this was part of a biennial review the Division regularly performs. Furthermore, most of the suggestions in Zolnierek's memorandum do not establish policy, but rather respond to policy changes by suggesting amendments and updates necessary to conform the ICC's regulations to new statutory law. The one suggestion that does not relate to changes in statute simply recommends establishing a panel to determine whether a change in ICC rules relating to lower income assistance programs is necessary to ensure the programs function as intended; the record does not go on to establish whether the Commission approved such a panel. The record is thus insufficient to support a finding that Zolnierek made an effective recommendation regarding policy and procedure.

I conclude that Stoller, Nicdao-Cuyugan, and Zolnierek are not managerial employees under the traditional test.

b. Are the Directors supervisors within the meaning of Section 3(r) of the Act?

Section 3(r) provides that a supervisor is an employee: (1) whose principal work is substantially different from that of his or her subordinates; (2) who has the 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; (3) who must consistently use independent judgment in the exercise of that authority; and (4) who devotes a preponderance of his or her employment time to the exercise of that authority. 5 ILCS 315/3(r) (2010).

To determine whether a person's principal work is substantially different from that of his or her subordinates, the Board first considers whether a person's position is obviously and visibly different. City of Freeport v. Illinois State Labor Relations Board, 135 Ill. 2d 499, 513 (1990). If it is not, the first prong of the statutory definition may still be satisfied where the nature and essence of a person's position is different from that of his or her subordinates. Id. At 513-14. The record does not support a finding that the Directors' principal work is obviously and visibly different from that of their subordinates because it appears that each of the Directors spends at least some time doing the same work as their subordinates, such as preparing testimony or assisting with the IT Services Help Desk. However, I nonetheless conclude that the first prong of the statutory definition is satisfied as to each Director because the nature and essence of their position is different from that of their subordinates. The purpose of the supervisory exclusion is to avoid the conflict of interest that may arise when supervisors, who must apply the employer' s policies to subordinates, are subject to control by the same union representing those subordinates. City of Freeport, 135 Ill. 2d at 517. While Directors are not performing tasks similar to those of their subordinates, they are responsible for applying the ICC's policies regarding overtime, requests for time off, work schedules, discipline, and other matters to their subordinates. This shows that the nature and essence of the Directors' position is different from that of their subordinates, and the first requirement of the statutory definition is satisfied as to all six.

The second prong is satisfied by a showing that an employee has the authority to engage in, or to effectively recommend, even one of the enumerated 11 supervisory functions. Only one indicium of supervisory authority is sufficient to indicate supervisory status, so long as it is also accompanied by independent judgment. Chief Judge of the Circuit Court of Cook County v. American Federation of State, County and Municipal Employees, Council 31, 153 Ill. 2d 508, 516 (1992). The third prong, the requirement that an alleged supervisor consistently use independent judgment when exercising supervisory authority, requires that the employee at issue "make choices between two or more significant courses of action without substantial review by superiors." Id. (quoting St. Clair Housing Authority, 5 PERI ¶ 2017 (IL SLRB 1989)). The frequency with which independent judgment might be required, rather than the number of times supervisory authority requiring independent judgment is actually used, controls the analysis under the third prong. City of Freeport, 135 Ill. 2d at 520-21.

Finally, the fourth prong requires that an alleged supervisor spend a preponderance of his or her time exercising supervisory authority that requires the consistent use of independent judgment. Preponderance can mean superiority in numbers or in importance, and this requirement can be met by a showing that an employee's supervisory functions are of such significance that they make up a preponderance of his or her duties in a qualitative sense. State of Illinois, Department of Central Management Services (Department of Corrections) v. Illinois State Labor Relations Board, 278 Ill. App. 3d 79, 86 (4th Dist. 1996).

Torsten Clausen

The preponderance of the evidence establishes that the ICC's hiring procedure involves a panel that develops selection criteria and interview questions, interviews and scores candidates, and makes a hiring recommendation. Thus, in hiring his two subordinates, Clausen would have served as a member of such a panel and tendered a recommendation to Anderson. This is insufficient to establish that he effectively recommends hiring. The Board has previously held that, where an alleged supervisor participates in a hiring panel, any single member's influence on the hiring decision is speculative and is insufficient to establish supervisory authority. State of Illinois, Department of Central Management Services (Department of Revenue), 29 PERI ¶ 62 (IL LRB-SP 2012) (citing City of Chicago, Department of Animal Care and Control, 25 PERI ¶ 152 (IL LRB-LP ALJ 2009)). Because the record provides no basis for determining that it was Clausen's recommendation, rather than a panel's, to hire the two individuals currently in the Associate position, his authority in regards to hiring is insufficient to establish that he is a supervisor.

The record also establishes the ICC's procedure for disciplining employees: before a Director can discipline a subordinate, he or she must meet with Human Resources and discuss the type of disciplinary action he or she would like to take. Myers and her staff then steer the Director to permissible disciplinary actions under ICC policy and any applicable collective bargaining agreement. Finally, all disciplinary actions must be approved by Executive Director Anderson. It is clear that the recommendations for discipline that Anderson receives are effective. Anderson testified that he has accepted every recommendation he has received during his tenure as Executive Director. Though he has not been involved in discipline during his tenure as Director, the record does not indicate that Clausen's authority to recommend discipline would vary significantly from the procedure detailed by Myers, or that his recommendations

would be less effective than others Anderson has received. Furthermore, the record does not establish that the involvement of Human Resources limits disciplinary options to such an extent that the Directors no longer exercise independent judgment in determining whether and what discipline to recommend. Therefore, Clausen's authority to recommend discipline satisfies prongs two and three of the statutory definition.

The agreement between AFSCME and CMS provides that all persons responsible for resolving a grievance at any level must be vested with the authority to settle the grievance, if appropriate. The record clearly establishes that Clausen is designated to address grievances at step one. However, the mere designation as the first step in a grievance procedure does not constitute supervisory authority. Village of Bolingbrook, 19 PERI ¶ 125 (IL LRB-SP 2003) (citing City of Aurora, 7 PERI ¶ 2026 (IL SLRB 1991) and State of Illinois, Department of Central Management Services (Bureau of Information and Communication Services), 5 PERI ¶ 2012 (IL SLRB 1989)). Additional evidence is needed to establish the applicability of the supervisory exclusion. Id. (citing City of Freeport, 135 Ill. 2d 499). For example, in Metropolitan Alliance of Police (Village of Woodridge) v. Illinois Labor Relations Board the Second District considered the designation of petitioned-for employees as reviewers of grievances at the first step. 362 Ill. App. 3d 469, 479- 80 (2nd Dist. 2005). While the court ultimately held that this designation, coupled with actual practice, was sufficient to establish the supervisory authority of the employees at issue, it relied on the fact that those employees had adjusted grievances in the past to distinguish that case from others in which employees who were empowered by contract to do so had never adjusted a grievance. Id. at 480. Thus, Metropolitan Alliance of Police supports the proposition that additional evidence beyond the mere designation as the first step in the grievance process is necessary in order to establish supervisory status. Absent such additional evidence in this matter, I am unable to conclude that Clausen's designation as step one in the grievance procedure constitutes supervisory authority.

Several functions can indicate the authority to direct: 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 County, 19 PERI ¶ 123 (IL LRB-SP 2003); County of Cook, 16 PERI ¶3009 (IL LLRB 1999); County 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). However, in order to rise to the level of supervisory authority, an alleged supervisor must exercise significant discretionary authority which affects the terms and conditions of his or her subordinates' employment. Village of Broadview v. Illinois Labor Relations Board, 402 Ill. App. 3d 503, 510 (1st Dist. 2010) (citing Illinois Fraternal Order of Police Labor Council v. McHenry, 15 PERI ¶ 2014 (IL SLRB 1999) and Chief Judge of the Circuit Court of Cook County, 9 PERI ¶ 2033 (IL SLRB 1993)).

Though Clausen does complete performance evaluations for his subordinates, the record does not establish that these evaluations affect his subordinates' pay or employment status. Therefore, this activity is insufficient to establish Clausen's supervisory status under the Act.

The ability to approve requests for time off or to approve overtime constitutes supervisory authority so long as the exercise of this authority involves the consistent use of independent judgment and is not of a mere routine or clerical nature. Village of Morton Grove, 23 PERI ¶ 72 (IL LRB-SP 2010) (citing City of Carbondale, 3 PERI ¶ 2044 (IL SLRB 1987)). Clausen clearly has the authority to approve requests for time off. The record does not suggest that he merely routinely signs off on requests for his subordinates, meaning there is no basis from which to conclude that his exercise of this authority is merely routine or clerical in nature. However, while it appears he has the authority to recommend overtime, because he has not done so during his tenure as Director there is no basis from which to conclude his overtime recommendations are effective.

Finally, Anderson's conclusory statements that Clausen has the authority to train and direct his subordinates do not establish that these activities rise to the level of supervisory authority. Even if I were to assume that sufficient facts exist to support Anderson's conclusion that Clausen has the authority to train and direct his subordinates, these bare assertions do not provide a sufficient basis for determining whether he must consistently use independent judgment in doing so.

Having found that Clausen exercises supervisory authority in disciplining his subordinates and approving requests for time off, and that he must consistently use independent judgment in doing so, I nonetheless find that he is not a supervisor because he does not do so a preponderance of his time. The record does not establish the amount of time Clausen spends on individual functions, supervisory or otherwise, beyond Anderson's testimony that he spends

approximately 5% of his time on all of his alleged supervisory responsibilities. Therefore, there is no basis in the record to determine that he meets the preponderance requirement from a quantitative standpoint. Moreover, CMS has failed to explain how these functions meet the preponderance requirement from a qualitative standpoint. CMS's only argument on this point is that the Directors have taken over allegedly supervisory duties as their subordinates have been placed in bargaining units, thus requiring the Directors to exercise this authority over both direct and indirect subordinates. However, the Board has stated that the ratio of supervisors-to-subordinates is not controlling. City of Chicago, 26 PERI ¶ 114 (IL LRB-LP 2010). With no additional indication of the significance of the time Clausen spends disciplining subordinates and approving requests for time off, the fact that Clausen may do so for both direct and indirect subordinates is insufficient to satisfy the preponderance requirement.

I conclude that Clausen is not a supervisor because he does not spend a preponderance of his time exercising supervisory authority.

Jerry Oxley

Though Oxley has not been involved in any hiring during his tenure as Director, Myers's testimony establishes that his authority in this regard would likely be as a participant on a hiring panel. As discussed above, this is insufficient to establish that Oxley is a supervisor.

As with Clausen, I find that testimony regarding the ICC's disciplinary process indicates that Oxley's recommendations on these matters would be effective, and that exercising this authority would require the consistent use of independent judgment.

It is clear from the record that Oxley does not have the authority to promote within the Division, nor are his recommendations on this topic effective. Hundreiser has twice denied Oxley's request to promote a subordinate.

The record establishes that Oxley is designated to resolve grievances at step one. Furthermore, it appears that he has been involved in the grievance process. The grievance involved a subordinate who felt he was performing duties beyond his job description and who was seeking a promotion to a title that included the duties he was performing. Having previously recommended such a promotion for this employee, Oxley informed the grievant that he did not have the authority to resolve the grievance to his satisfaction and signed off on step one of the grievance procedure. Thus, in this case, any independent judgment that may have been required of Oxley was preempted by previous decisions of his superiors. This example, therefore, is

insufficient to establish Oxley's authority to adjust grievances in practice. As discussed above, without additional evidence, I am unable to conclude that Oxley's designation as step one in the grievance procedure constitutes supervisory authority.

As discussed above, Oxley's responsibility for completing performance evaluations for his subordinates is insufficient to establish his supervisory status because the record does not indicate that these evaluations affect the pay or employment status of his subordinates.

The record does not suggest that Oxley merely routinely approves his subordinates' requests for time off. In fact, Hundreiser testified that he expected Oxley to ensure determine that the IT Services Division will be sufficiently staffed before he approves a request for time off. Therefore, there is no basis from which to conclude that Oxley's approval of his subordinates' requests for time off is merely routine and clerical in nature, and I conclude that the second and third prongs of the statutory definition are satisfied. The record also establishes that Oxley is responsible for recommending overtime for the Division. However, he does not have the authority to approve overtime, and it does not appear that his recommendations as to overtime are effective. Hundreiser's testimony about the cost-benefit analysis Oxley must prepare when recommending overtime indicates that Executive Director Anderson makes the final decision regarding overtime, and that he is likely to deny the use of overtime when he determines that it is more cost effective to undertake a project during work hours. This suggests that Oxley's bare recommendation is not influential.

Finally, Hundreiser's conclusory statements that Oxley has the authority to train and direct his subordinates do not establish that these activities rise to the level of supervisory authority. Even if I were to assume that sufficient facts exist to support Hundreiser's conclusion that Oxley has the authority to train and direct his subordinates, these bare assertions do not provide a sufficient basis for determining whether he must consistently use independent judgment in doing so

Having found that Oxley exercises supervisory authority in disciplining his subordinates and approving requests for time off, and that he must consistently use independent judgment in doing so, I nonetheless find that he is not a supervisor because he does not do so a preponderance of his time. The record does not establish the amount of time Oxley spends on most individual functions, supervisory or otherwise, beyond Hundreiser's testimony that he spends approximately 24% of his time on all of his alleged supervisory responsibilities. Oxley's

testimony made clear that he had and would likely continue to spend more time than that assisting on the help desk. Therefore, there is no basis in the record to conclude that he meets the preponderance requirement from a quantitative standpoint. Moreover, CMS has failed to explain how these functions meet the preponderance requirement from a qualitative standpoint. CMS's only argument on this point is that the Directors have taken over allegedly supervisory duties as their subordinates have been placed in bargaining units, thus requiring the Directors to exercise this authority over both direct and indirect subordinates. As discussed above, with no additional indication of the significance of the time Oxley spends disciplining subordinates and approving requests for time off, the fact that Oxley may do so for both direct and indirect subordinates is insufficient to satisfy the preponderance requirement.

I conclude that Oxley is not a supervisor because he does not spend a preponderance of his time exercising supervisory authority.

Peter Muntaner

Though Muntaner has not been involved in any hiring during his tenure as Director, Myers's testimony establishes that his authority in this regard would likely be as a participant on a hiring panel. As discussed above, this is insufficient to establish that Muntaner is a supervisor.

Likewise, Muntaner's involvement in disciplining his subordinates would be consistent with the procedure established by Myers's testimony. As detailed above, I find that testimony regarding the ICC's disciplinary process indicates that Muntaner's recommendations on these matters would be effective, and that exercising this authority would require the consistent use of independent judgment.

The record establishes that Muntaner is designated to resolve grievances at step one. As discussed above, however, additional evidence is needed to establish that Muntaner must consistently use independent judgment in the exercise of that authority.

As discussed above, Muntaner's responsibility for completing performance evaluations for his subordinates is insufficient to establish his supervisory status because the record does not indicate that these evaluations affect the pay or employment status of his subordinates.

Muntaner clearly has the authority to approve his subordinates' requests for time off. The record does not suggest that he merely routinely signs off on requests for his subordinates, meaning there is no basis from which to conclude that his exercise of this authority is merely routine or clerical in nature. Likewise, his recommendations as to overtime are effective—of the

two recommendations he has made, both have been approved—and there is nothing in the record to suggest that this task is merely routine or clerical. Therefore, I conclude that prongs two and three of the statutory definition are satisfied both as to Muntanter's authority to approve requests for time off and his effective recommendations for overtime.

CMS asserts that Muntaner's authority to train subordinates, assign tasks, and oversee work in the Division establish his status as a supervisor. Nehrt testified that Muntaner trains staff in the Customer Services Division by promulgating policies and procedures. As detailed above, while the implementation of these policies and procedures is conditioned on Nehrt's approval, Muntaner's recommendations on these matters are effective. This is sufficient to establish that he oversees the Division. However, in the vast majority of cases day-to-day review and oversight does not rise to the level of supervisory authority. Village of Bolingbrook, 19 PERI ¶ 125 (IL LRB-SP 2003). It is only when an alleged supervisor exercises discretionary authority that affects the terms and conditions of employment, such that the alleged supervisor would be potentially torn between his or her duty to the employer and loyalty to the union, that the second prong is met. Id. Based on Muntaner's authority to discipline his subordinates and evaluate their performance, I find that Muntaner's efforts to promulgate and implement these policies are sufficient to establish that his oversight of the Division rises to the level of supervisory authority.

CMS did establish that Muntaner has the authority to assign tasks. Emails submitted by CMS show Muntaner instructing Robert Koch, the Manager of the ICC's Consumer Service Counselors, to "please make sure we have addressed the issues" in a consumer complaint. Another email shows Muntaner asking staff who had worked on a special project in conjunction with the National Association of Regulatory Utility Commissioners (NARUC) to fill out a timesheet developed by NARUC. The Board has previously found that, where an alleged supervisor considers "the knowledge of the individuals involved, the nature of the task to be performed, the employees' relative levels of experience and skill, and the Employer' s operational need," he or she exercises independent judgment in assigning work. County of DuPage (Department of Public Works), 29 PERI ¶ 105 (IL LRB-SP General Counsel 2012) (citing County of Cook, 15 PERI ¶ 3022 (IL LLRB 1999)). Here, it appears that Muntaner merely addressed a consumer complaint issue to the appropriate department Manager and forwarded a

NARUC timesheet to employees who had worked on a special project. This is insufficient to establish that he must consistently use independent judgment in assigning work.

Having found that Muntaner exercises supervisory authority in disciplining his subordinates, approving requests for time off, recommending overtime, and overseeing the Division, and that he must consistently use independent judgment in doing so, I nonetheless find that he is not a supervisor because he does not do so a preponderance of his time. The record does not establish the amount of time Muntaner spends on individual functions, supervisory or otherwise, beyond Nehrt's testimony that he spends approximately 50% of his time on all of his alleged supervisory responsibilities and research. Therefore, there is no basis in the record to determine that he meets the preponderance requirement from a quantitative standpoint. Moreover, CMS has failed to explain how these functions meet the preponderance requirement from a qualitative standpoint. CMS's only argument on this point is that the Directors have taken over allegedly supervisory duties as their subordinates have been placed in bargaining units, thus requiring the Directors to exercise this authority over both direct and indirect subordinates. As discussed above, with no additional indication of the significance of the time Muntaner spends disciplining subordinates and approving requests for time off, the fact that Muntaner may do so for both direct and indirect subordinates is insufficient to satisfy the preponderance requirement.

I conclude that Muntaner is not a supervisor because he does not spend a preponderance of his time exercising supervisory authority.

Harry Stoller

Stoller has been involved in hiring during his tenure as Director. However, the record does not establish that his involvement went beyond participating as a member of a hiring panel. As discussed above, this is insufficient to establish that Stoller is a supervisor.

Likewise, Stoller's involvement in disciplining his subordinates would be consistent with the procedure established by Myers's testimony. As detailed above, I find that testimony regarding the ICC's disciplinary process indicates that Stoller's recommendations on these matters would be effective, and that exercising this authority would require the consistent use of independent judgment.

The record establishes that Stoller is designated to resolve grievances at step one. However, Beyer's testimony that both he and Human Resources would review Stoller's

resolution indicates that he does not have the authority to do so, and the record provides no basis for determining whether his recommendations on this matter would be effective. Furthermore, as discussed above, additional evidence would be needed to establish that Stoller must consistently use independent judgment in resolving grievances.

As discussed above, Stoller's responsibility for completing performance evaluations for his subordinates is insufficient to establish his supervisory status because the record does not indicate that these evaluations affect the pay or employment status of his subordinates.

Stoller clearly has the authority to approve his subordinates' requests for time off. The record does not suggest that he merely routinely signs off on requests for his subordinates, meaning there is no basis from which to conclude that his exercise of this authority is merely routine or clerical in nature. Likewise, I find that he has the authority to authorize overtime and that he does so with independent judgment. Though it appears his recommendations as to overtime are not effective because Beyer has denied them, the record establishes that Stoller can and has authorized overtime in order for Energy Division staff to respond to an emergency. Furthermore, it appears that his authority in this matter extends beyond routinely ensuring that overtime is authorized under ICC policy—he must determine who and how many employees to send in the event of an emergency. Record evidence indicates that Beyer disagreed with Stoller regarding his determination on this matter, strengthening the inference that Stoller must use independent judgment when authorizing overtime in an emergency situation.

CMS asserts that Stoller's authority to train subordinates, assign tasks, and review and oversee work in the Division establish his status as a supervisor. However, Beyer testified that training for Division employees is based on federal requirements. Because of these constraints, it does not appear that Stoller exercises independent judgment regarding training without additional evidence. The record does, however, establish that Stoller exercises sufficient independent judgment in assigning tasks. CMS provides two examples in which Stoller has exercised this authority. In the first, Anderson sent an email to several employees in the Energy Division forwarding a memorandum relating to a potential case. Beyer replied to Stoller with a question about a prior related issue, and Stoller forwarded the email to two of the Division's Managers and one Supervisor asking "could someone please put together [a response]"? It does not appear that Stoller made any determination regarding to whom this task would be assigned. However, the second example establishes Stoller's use of independent judgment in assigning

tasks. In that case, Stoller raised a question via email regarding Commonwealth Edison and, upon being told a particular employee was not in the office, decided to wait for that employee's response upon his return because "ComEd's his baby," showing that he assigns tasks based on the experience and expertise of his subordinates. Therefore, I conclude that the second and third prongs are satisfied with respect to Stoller's authority to assign tasks to his subordinates.

Finally, testimony on the issue of whether Stoller reviews work in his Division is conclusory and therefore insufficient to support a finding of independent judgment. Documentary evidence does not establish that he substantively reviews work produced by his staff. Furthermore, the record does not establish that Stoller exercises a discretionary authority to oversee the Division that affects the terms and conditions of his subordinates' employment.

Having found that Stoller exercises supervisory authority in disciplining his subordinates, approving requests for time off, and authorizing overtime, and that he must consistently use independent judgment in doing so, I nonetheless find that he is not a supervisor because he does not do so a preponderance of his time. The record does not establish the amount of time Stoller spends on individual functions, supervisory or otherwise, beyond Beyer's testimony that he spends approximately 20-30% of his time on all of his alleged supervisory responsibilities. Therefore, there is no basis in the record to determine that he meets the preponderance requirement from a quantitative standpoint. Moreover, CMS has failed to explain how these functions meet the preponderance requirement from a qualitative standpoint. CMS's only argument on this point is that the Directors have taken over allegedly supervisory duties as their subordinates have been placed in bargaining units, thus requiring the Directors to exercise this authority over both direct and indirect subordinates. As discussed above, with no additional indication of the significance of the time Stoller spends disciplining subordinates and approving requests for time off, the fact that Stoller may do so for both direct and indirect subordinates is insufficient to satisfy the preponderance requirement.

I conclude that Stoller is not a supervisor because he does not spend a preponderance of his time exercising supervisory authority.

Joy Nicdao-Cuyugan

Nicdao-Cuyugan has been involved in hiring during her tenure as Director. However, the record does not establish that his involvement went beyond participating as a member of a hiring panel. In fact, documentary evidence submitted by CMS, an email in which Nicdao-Cuyugan

tells Beyer that the Division would like to re-post a position after "our" first two choices had turned down the position, indicates that this is the extent of Nicdao-Cuyugan's involvement. Throughout the email, she repeatedly refers to "we" when describing the party who made the decision to re-post, indicating that this decision was a group effort. As discussed above, this is insufficient to establish that Nicdao-Cuyugan is a supervisor.

Likewise, Nicdao-Cuyugan's involvement in disciplining her subordinates would be consistent with the procedure established by Myers's testimony. As detailed above, I find that testimony regarding the ICC's disciplinary process indicates that Nicdao-Cuyugan's recommendations on these matters would be effective, and that exercising this authority would require the consistent use of independent judgment.

The record establishes that Nicdao-Cuyugan is designated to resolve grievances at step one. However, Beyer's testimony that both he and Human Resources would review the Directors' resolution indicates that she does not have the authority to do so, and the record provides no basis for determining whether her recommendations on this matter would be effective. Furthermore, as discussed above, additional evidence would be needed to establish that Nicdao-Cuyugan must consistently use independent judgment in resolving grievances.

As discussed above, Nicdao-Cuyugan's responsibility for completing performance evaluations for her subordinates is insufficient to establish her supervisory status because the record does not indicate that these evaluations affect the pay or employment status of her subordinates.

Nicdao-Cuyugan clearly has the authority to approve her subordinates' requests for time off. The record does not suggest that she merely routinely signs off on requests for her subordinates, meaning there is no basis from which to conclude that her exercise of this authority is merely routine or clerical in nature. However, Beyer's testimony that he has denied her recommendations for overtime indicates that her recommendations are not effective. Finally, the only evidence on Nicdao-Cuyugan's authority to schedule is an email by which one of her subordinates notified Nicdao-Cuyugan that she planned to request to extend her authorization to work part-time, and stated that she first wanted to make sure Nicdao-Cuyugan had no objections. This does not establish Nicdao-Cuyugan's authority to schedule her subordinates because the email clearly indicates that the request would be made to someone other than Nicdao-Cuyugan.

It does not appear that asking Nicdao-Cuyugan before making the request was anything more than a courtesy on the employee's part.

Documentary evidence submitted by CMS tends to establish that Nicdao-Cuyugan substantively reviews the work of her subordinates. Emails show that she reviews written testimony for more than mere substantive errors and recommends changes where appropriate. However, this is not sufficient to satisfy prongs two and three of the statutory test because the record does not establish that in doing so she exercises a discretionary authority to oversee the Division that affects the terms and conditions of her subordinates' employment.

Finally, Beyer testified that Nicdao-Cuyugan has the authority to train her subordinates and that she does so by explaining rate cases to new hires and ensuring that Division Managers train new employees. However, it appears that Nicdao-Cuyugan's training activities involve instructing new employees on ICC's policy and procedures based on her superior knowledge, skill, and experience. Thus, the record does not establish that she exercises independent judgment in training subordinates. Chief Judge of the Circuit Court of Cook County, 19 PERI ¶ 123 (IL LRB-SP 2003) (A supervisor uses independent judgment when exercising the authority to order training when he or she determines that a subordinate's performance is deficient and decides to order additional training rather than disciplining the subordinate.).

Having found that Nicdao-Cuyugan exercises supervisory authority in disciplining her subordinates and approving requests for time off, and that she must consistently use independent judgment in doing so, I nonetheless find that she is not a supervisor because she does not do so a preponderance of her time. The record does not establish the amount of time Nicdao-Cuyugan spends on individual functions, supervisory or otherwise, beyond Beyer's testimony that she spends approximately 20-30% of her time on all of her alleged supervisory responsibilities. Therefore, there is no basis in the record to determine that she meets the preponderance requirement from a quantitative standpoint. Moreover, CMS has failed to explain how these functions meet the preponderance requirement from a qualitative standpoint. CMS's only argument on this point is that the Directors have taken over allegedly supervisory duties as their subordinates have been placed in bargaining units, thus requiring the Directors to exercise this authority over both direct and indirect subordinates. As discussed above, with no additional indication of the significance of the time Nicdao-Cuyugan spends disciplining subordinates and

approving requests for time off, the fact that Nicdao-Cuyugan may do so for both direct and indirect subordinates is insufficient to satisfy the preponderance requirement.

I conclude that Nicdao-Cuyugan is not a supervisor because she does not spend a preponderance of her time exercising supervisory authority.

Jim Zolnierek

Though Zolnierek has not been involved in any hiring during his tenure as Director, Myers's testimony establishes that his authority in this regard would be as a participant on a hiring panel. As discussed above, this is insufficient to establish that Zolnierek is a supervisor.

Likewise, Zolnierek's involvement in disciplining his subordinates would be consistent with the procedure established by Myers's testimony. As detailed above, I find that testimony regarding the ICC's disciplinary process indicates that Zolnierek's recommendations on these matters would be effective, and that exercising this authority would require the consistent use of independent judgment.

The record establishes that Zolnierek is designated to resolve grievances at step one. However, Beyer's testimony that both he and Human Resources would review the Directors' resolution indicates that he does not have the authority to do so, and the record provides not basis for determining whether his recommendations on this matter would be effective. Furthermore, as discussed above, additional evidence would be needed to establish that Zolnierek must consistently use independent judgment in resolving grievances.

As discussed above, Zolnierek's responsibility for completing performance evaluations for his subordinates is insufficient to establish his supervisory status because the record does not indicate that these evaluations affect the pay or employment status of his subordinates.

Zolnierek clearly has the authority to approve his subordinates' requests for time off. The record does not suggest that he merely routinely signs off on requests for his subordinates, meaning there is no basis from which to conclude that his exercise of this authority is merely routine or clerical in nature. However, while it appears he has the authority to recommend overtime, because he has not done so during his tenure as Director, there is no basis from which to conclude his overtime recommendations are effective.

Like Nicdao-Cuyugan, it appears that Zolnierek is responsible for substantively reviewing written testimony prepared by his subordinates. However, this is not sufficient to satisfy prongs two and three of the statutory test because the record does not establish that in

doing so he exercises a discretionary authority to oversee the Division that affects the terms and conditions of his subordinates' employment.

Finally, the record does not establish Zolnierek's authority to train his subordinates with sufficient clarity to support a finding that he is a supervisor. Beyer's testimony on the topic indicated that "they" have embarked on a program to cross-train employees of the Telecommunications Division and that "they" have taken advantage of outside training opportunities. This testimony does not sufficiently establish Zolnierek's role in this process.

Having found that Zolnierek exercises supervisory authority in disciplining his subordinates and approving requests for time off, and that he must consistently use independent judgment in doing so, I nonetheless find that he is not a supervisor because he does not do so a preponderance of his time. The record does not establish the amount of time Zolnierek spends on individual functions, supervisory or otherwise, beyond Beyer's testimony that he spends approximately 20-30% of his time on all of his alleged supervisory responsibilities. Therefore, there is no basis in the record to determine that he meets the preponderance requirement from a quantitative standpoint. Moreover, CMS has failed to explain how these functions meet the preponderance requirement from a qualitative standpoint. CMS's only argument on this point is that the Directors have taken over allegedly supervisory duties as their subordinates have been placed in bargaining units, thus requiring the Directors to exercise this authority over both direct and indirect subordinates. As discussed above, with no additional indication of the significance of the time Zolnierek spends disciplining subordinates and approving requests for time off, the fact that Zolnierek may do so for both direct and indirect subordinates is insufficient to satisfy the preponderance requirement.

I conclude that Zolnierek is not a supervisor because he does not spend a preponderance of his time exercising supervisory authority.

c. Are the Directors confidential employees within the meaning of Section 3(c) of the Act?

CMS asserts that the employees in the petitioned-for positions are confidential employees because they have access to information regarding grievances as a result of their alleged supervisory duties. By this, it appears that CMS is referring to the Directors' authority to adjust grievances at the first level. Further, CMS argues that the Directors' role in strike planning establishes that they are confidential employees.

Section 3(c) provides that a confidential employee is one who, in the regular course of his or her duties, (1) assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations, or (2) has authorized access to information relating to the effectuation or review of the employer's collective bargaining policies.[5] 5 ILCS 315/3(c) (2010). Confidential employees are not public employees within the Act's definition. 5 ILCS 315/3(n) (2010).

The Directors' limited role in strike planning does not establish that they are confidential employees. First, the record establishes that Myers is responsible for formulating, determining, and effectuating management policies with regard to the strike plan. No testimony or documentary evidence indicated that the Directors assist Myers or act in a confidential capacity to Myers in completing the strike plan. Furthermore, the record does not establish that the Directors themselves have authorized access to the plan. Even if the record did establish that the Directors have authorized access, the ability to access the employer's strike plan does not necessarily establish an employee's confidential status under the Act. State of Illinois, Department of Central Management Services, Department of Healthcare and Family Services, 28 PERI ¶ 69 (IL LRB-SP 2011) (citing State of Illinois, Department of Central Management Services, 25 PERI ¶ 184 (IL LRB-SP 2009)).

Likewise, the Directors' authority to address grievances at the first level does not establish that they are confidential employees. While non-precedential decisions indicate that an employee who regularly represents his employer in high-level grievance proceedings likely will be involved in or privy to significant labor policy formulation, the Board has also held that employees who act as the first step in the grievance procedure are not confidential employees absent additional evidence that they have been involved in or in any other significant way privy to significant labor policy formulation. Village of Bolingbrook, 19 PERI ¶ 125, n.1 (IL LRB-SP 2003). In this case, the Directors' authority to adjust grievances at the first level, without additional evidence of their access to information relating to labor policy, does not establish that they are confidential employees.

I conclude that the petitioned-for Directors are not confidential employees within the meaning of Section 3(c) of the Act.

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[5] CMS does not claim that the Directors are confidential employees under the reasonable expectation test.

d. Are the Directors "*de jure* managerial or confidential employees"?

CMS argues that the Director's are "*de jure* managerial and confidential employees" because the petitioned-for positions are Rutan-exempt[6] and exempt from the Personnel Code under Section 4c(12).[7] Absent an agreement to the contrary, individuals who hold positions subject to these exemptions are employed on an at-will basis. CMS asserts that at-will positions should be considered *de jure* managerial employees so that the Governor retains the flexibility to hire and fire employees in these positions as dictated by the provisions of the Personnel Code, rather than being constrained by the collective bargaining agreement covering the RC-63 bargaining unit.

The parties stipulated that all of the petitioned-for positions are exempt from the Personnel Code. The job descriptions submitted by CMS establish that all of the petitioned-for positions, with the exception of the Director of IT Services, are Rutan-exempt. However, I am unable to find a basis in law for CMS's assertions on these issues. The Board has long held that if the legislature intended for "Shakman-exempt" or "Rutan-exempt" status, or "at-will" civil service classifications, to serve as a basis to exclude employees from collective bargaining, it would have expressly stated as much in the Act itself, especially given that exclusions to the Act are interpreted narrowly. American Federation of State, County and Municipal Employees, Council 31, 25 PERI ¶ 184 (IL LRB-SP 2009); Service Employees International Union, Local No. 73, 24 PERI ¶ 36 (IL LRB-LP 2008). Accordingly, I conclude that the Directors are not *de jure* managerial employees.

2. Is it appropriate to include the Directors in the existing RC-63 bargaining unit?

Section 9(b) sets forth the criteria to be considered by the Board in determining whether it is appropriate to include a position in a given bargaining unit:

> [I]n each case, in order to assure public employees the fullest freedom in exercising the rights guaranteed by this Act, [the Board shall decide] 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

[6] A Rutan-exempt position is one for which the political affiliation can be considered in making a hiring decision. The Supreme Court's decision in Rutan v. Republican Party of Illinois has been interpreted to allow the hiring of policymakers and "inner-circle" employees based on political affiliation. Rutan, 497 U.S. 62, 90 (1990) (Stevens, J., concurring) (political affiliation can be "relevant to [an] employee's ability to function effectively as part of a given administration.").

[7] Section 4c(12) provides that technical and engineering positions with the ICC are exempt from the classification and compensation (Jurisdiction A), merit and fitness (Jurisdiction B), and conditions of employment (Jurisdiction C) provisions of the Personnel Code. 20 ILCS 415/4c(12) (2010).

> 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.[8]

CMS claims that it is not appropriate to include the petitioned-for Director positions in the RC-63 bargaining unit because they are both Rutan-exempt and exempt from the Personnel Code pursuant to Section 4c(12), making them at-will positions.[9] CMS argues that at-will employees must be placed in a new bargaining unit in order to negotiate the terms and conditions of their employment. However, there is no legal basis to conclude that it is inappropriate to place an at-will employee in an existing bargaining unit that contains just-cause protection. American Federation of State, County and Municipal Employees, Council 31 and State of Illinois, Department of Central Management Services (Department of Revenue), 29 PERI ¶ 62 (IL LRB-SP 2012) (citing Federal-Mogul Corp., 209 NLRB 343, 344-45 (1974). In fact, 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- 345.

Turning to the factors enumerated in Section 9(b), the Directors spend at least some of their work time performing the same tasks as their subordinates. They work in the same office as some of their subordinates, have contact on a daily basis, and share common supervisors, the ICC Bureau Chiefs and Executive Director Anderson. Thus, a sufficient number of the Section 9(b) factors are met and I conclude that it would be appropriate to include the Directors in the existing RC-63 bargaining unit.

V. CONCLUSIONS OF LAW

1. Torsten Clausen, Jerry Oxley, and Peter Muntaner are managerial employees and therefore are excluded from the definition of public employees found in Section 3(n) of the Act.

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[8] 5 ILCS 315/9(b) (2010).

[9] As noted above, Jerry Oxley's position is not Rutan-exempt.

2. Harry Stoller, Joy Nicdao-Cuyugan, and Jim Zolnierek are not managerial employees, supervisors, confidential employees, or *de jure* managerial employees and are therefore included in the definition of public employees found in Section 3(n) of the Act.
3. I find that it is appropriate to include Harry Stoller, Joy Nicdao-Cuyugan, and Jim Zolnierek in the existing RC-63 bargaining unit.

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: Harry Stoller, Joy Nicdao-Cuyugan, and Jim Zolnierek to be added to RC-63.

EXCLUDED: Torsten Clausen, Jerry Oxley, Peter Muntaner, and all other confidential, supervisory, and managerial employees as defined by the Illinois Public Labor Relations Act.

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 27th day of February, 2013

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Heather R. Sidwell

Heather R. Sidwell
Administrative Law Judge