



The Employer filed timely exceptions to the RDO pursuant to Section 1200.135 of the Board's Rules and Regulations, 80 Ill. Admin. Code, Parts 1200 through 1240 (Rules), and the Petitioner filed a timely response. After reviewing the record, briefs, exceptions and response, we adopt the ALJ's findings of fact and recommended decision for the reasons that follow.

The sole issue is whether the members of the proposed unit are managerial employees. If they are, they are not public employees within the meaning of Section 3(n) of the Act and are not entitled to protections provided under the Act.<sup>2</sup>

After carefully considering the issue, both under the statutory definition of a managerial employee contained in Section 3(j) of the Act and the judicially created "managerial as a matter of law" analysis applied in cases like Office of the Cook County State's Attorney v. Ill. Local Labor Relations Bd., 166 Ill. 2d 296 (1995), the ALJ concluded that the Employer failed to support its position. We agree.

While the Employer submitted a great deal of documentary evidence, little is relevant to the precise issue before us. With its position statement, it submitted over 800 pages of documents, and in response to the ALJ's order to show cause, submitted an additional 60 pages. However, over 80 percent of the first set of documents, and nearly all of the second set had to do with what the Petitioner, AFSCME, does. The remainder concerned what the Employer, ISBE, does as an agency, and nearly none of the evidence concerned what individual employees do.<sup>3</sup>

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<sup>2</sup> In relevant part, Section 3(n) provides: "Public employee' or 'employee', for the purposes of this Act, means any individual employed by a public employer ... excluding ... managerial employees." Section 3(j) provides: "Managerial employee' means an individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices."

<sup>3</sup> While the Employer stated that some employees act as hearing examiners, it did not identify any within the proposed unit who had, nor evidence that, in doing so, they would have been functioning in a managerial capacity. In fact, the hearing examiners send recommendations to the ISBE's general counsel, who submits his own recommendations to the ISBE, which makes the final decision, so the hearing examiners clearly are not functioning as surrogates for the ISBE by issuing decisions that can effectively

The ALJ's determination that the Employer failed to demonstrate that the employees were managerial within any heretofore recognized legal meaning of that term is unassailable. Indeed, in its brief in support of its exceptions, the Employer states the ALJ dealt with issues it did *not* raise, including "whether certain individual petitioned-for employees met the managerial exclusion." Typically, an employer's assertion that it never raised the issue of whether individual employees met the definition for managerial employees is fatal to an employer's position that its employees should be excluded on the basis that they are managerial employees. However, the Employer has a theoretical basis for exclusion that is entirely unrelated to the statutory definition of managerial employees. Its argument is that "*all* ISBE employees should be excluded from the bargaining unit under the managerial exclusion or an implied managerial exclusion because of the unique nature of the Employer and because of AFSCME's substantial involvement in partisan political activity and lobbying." We have carefully considered the argument, and ultimately find it without merit.

The ISBE is somewhat unusual in that it is created directly by the Illinois Constitution under the article concerning "Suffrage and Elections," Ill. Const. art. III, sec. 5, rather than by legislative enactment. However, the Board has jurisdiction over employees in various offices created under the executive branch article of the constitution (Governor, Attorney General, Comptroller, Secretary of State, Treasurer) and of employers created under the judicial branch article, Kane County v. Carlson, 116 Ill. 2d 186, 205-206 (1987) (application of the Illinois Public Labor Relations Act to the judicial branch does not violate the constitutional requirement of separation of powers). It does not have jurisdiction over employees of the General Assembly

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serve as the final agency determination regarding a core function as was the concern in Dep't of Cent. Mgmt. Serv./Human Rights Comm'n v. Ill. Labor Relations Bd., 406 Ill. App. 3d 310 (4th Dist., 2010).

because Section 3(n) explicitly excludes them,<sup>4</sup> but employees of the ISBE are not similarly excluded.

For a representational democracy, the functions of the ISBE are critical, and consequently the legislature has, in the Election Code, prohibited employees from running for, or being appointed to, political office and the legislature has placed other unique limitations on ISBE employees' political activity:

No employee of the State Board of Elections ... shall engage in any partisan political activity whatsoever, except to vote at elections, nor shall such person contribute, either financially or in services or goods or any other way, to any political party, candidate or organization engaged in political activity.

10 ILCS 5/1A-13 (2010).<sup>5</sup> The Petitioner seeking to represent the ISBE employees, AFSCME, is politically active. Most of the documents the Employer submitted to the ALJ were intended to demonstrate that fact, but they need not be parsed for the Board to accept that proposition.

The fact that these employees need to be apolitical raises several concerns, but does not preclude collective representation. If instead of the politically active AFSCME, the employees here sought representation by a newly formed labor organization which vowed not to create a political action committee or otherwise become engaged in political processes, most of the Employer's reasoning would fall away. Thus, the Employer's arguments do not support its position that these employees are precluded from protections of the Act.<sup>6</sup>

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<sup>4</sup> Section 3(o) also excludes the General Assembly from the definition of a "public employer" and employment by a public employer is necessary to meet the definition of a "public employee" in Section 3(n). There is no similar exclusion of the ISBE from the definition of a public employer.

<sup>5</sup> The Employer submitted into evidence ISBE's manual of Policy and Procedures which includes in Part IV a Code of Conduct adding the following to the statutory restrictions: "Staff shall avoid even the appearance of engaging in any partisan political activity, except when attendance at a partisan gathering occurs as part of one's official duties with the agency."

<sup>6</sup> In contrast, if these employees truly were managerial employees within the meaning of Section 3(j) of the Act, the concern for inherent conflict would be present regardless of the nature of the collective representative.

Collective representation by a politically active representative raises concerns, but unavoidable violation of the Election Code is not one of them. The employees can be represented, yet decline to participate in their representative's political demonstrations, letter writing campaigns, lobbying, and other political activity, but these issues are not presently before us, and we would not have primary authority to directly enforce the Election Code in any event.<sup>7</sup>

The concern that remains is the one the Employer stresses: that in ensuring that signatures on election materials match, that campaigns' financial information statements are accurate, and that election results are accurately tallied, the employees may be tempted to shade things in favor of those candidates actively supported by their collective representative. In some ways this concern is similar to those one might have that Department of Labor employees or Department of Employment Security employees might favor their representative when reviewing matters arising out of regulation of the representative in its role as an employer, or that Department of Revenue employees might have when reviewing assessed values or exemption status of property owned by their representative—concerns that obviously would not warrant finding they could not be represented. On the other hand, a representative's participation in the political process is closer to the core of its essential purposes than is the employment of persons or ownership of real property. Political engagement is one means of representing the employees. Does that make a difference?

The Act provides the answer. The absolute core of the representative's purposes involves activity regulated by this Board. That is likely the reason Board employees are statutorily prohibited from being collectively represented. 5 ILCS 315/3(n) (2010) (excluding from the definition of public employee "employees of any agency, board or commission created by this

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<sup>7</sup> We note the cards used as evidence of majority support do not include authorization for dues deductions, and the Employer has not raised any issue concerning union dues.

Act"). In fact, there are 14 other explicit exclusions drawn on the basis of employment by particular entities or employment in unique positions, *id.*, but employment by the Illinois State Board of Elections is not one of them.<sup>8</sup> One can assume from this set of exclusions that, where the legislature deemed regulation of a collective bargaining representative's activities might create intolerable conflicts for the regulator's employees, it has acted to exclude the regulator's employees from protections of the Act. And by application of the tenet of legislative interpretation, *inclusio unius est exclusio alterius*, City of St. Charles v. Ill. Labor Relations Bd., 395 Ill. App. 3d 507, 509-10 (2d Dist. 2009), one can also assume it did *not* intend to exclude employees of particular entities not listed. In similar fashion one might assume from a 2005 amendment to the Election Code, which excluded ISBE employees from the Personnel Code but did *not* similarly exclude them from the Public Labor Relations Act, that the legislature did not perceive a need to exclude ISBE's employees from collective bargaining. Public Act 93-1091 (eff. March 29, 2005).

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<sup>8</sup> In addition to independent contractors, supervisors and managerial, confidential, short-term, temporary, and educational employees, Section 3(n) of the Act excludes from the definition of "public employees":

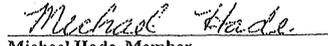
- employees of the General Assembly of the State of Illinois;
- elected officials;
- executive heads of a department;
- members of boards or commissions;
- the Executive Inspectors General;
- any special Executive Inspectors General;
- employees of each Office of an Executive Inspector General;
- commissioners and employees of the Executive Ethics Commission;
- the Auditor General's Inspector General;
- employees of the Office of the Auditor General's Inspector General;
- the Legislative Inspector General;
- any special Legislative Inspectors General;
- employees of the Office of the Legislative Inspector General;
- commissioners and employees of the Legislative Ethics Commission; [and]
- employees of any agency, board or commission created by this Act....

We are compelled to follow the legislature's lead and apply the Act as written, not as it might have been written. Consequently we adopt the ALJ's recommendation, and order that the Petitioner be certified as the exclusive representative of the bargaining unit as proposed.

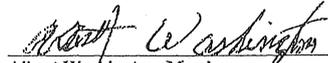
BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

  
Jacalyn J. Zimmerman, Chairman

  
Michael Coli, Member

  
Michael Hade, Member

  
Jessich Kimbrough, Member

  
Albert Washington, Member

Decision made at the State Panel's public meeting in Chicago, Illinois, on September 13, 2011;  
written decision issued at Chicago, Illinois, October 24, 2011.

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-11-122

Illinois State Board of Elections, )

Employer )

AFFIDAVIT OF SERVICE

I, John F. Brosnan, on oath state that I have this 24th day of October, 2011, served the attached DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD STATE PANEL issued in the above-captioned case on each of the parties listed herein below by depositing, before 5:00 p.m., copies thereof in the United States mail at 100 W Randolph Street, Chicago, Illinois, addressed as indicated and with postage prepaid for first class mail.

Melissa Auerbach  
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Mark Luster  
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Laner, Muchin  
515 N. State Street, 28<sup>th</sup> Floor  
Chicago, IL 60610



SUBSCRIBED and SWORN to  
before me this 24th day  
of October 2011.



NOTARY PUBLIC

