

**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-12-006
)	
State of Illinois, Department of Central Management Services,)	
)	
Employer)	

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

On March 13, 2013, ALJ Martin Kehoe issued a Recommended Decision and Order dismissing a petition filed by the American Federation of State, County and Municipal Employees, Council 31 (Petitioner or Union). The petition sought to add Administrative Law Judges¹ employed by the Illinois Department of Financial and Professional Regulation (IDFPR or Employer) to the existing RC-10 bargaining unit.

ALJ Kehoe held that the IDFPR ALJs should not be included in the unit because they are managerial employees under Section 3(j) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2014), as amended. Addressing the first prong of the managerial test, he found that the ALJs are engaged predominantly in executive and management functions because they spend most of their work time conducting hearings, responding to motions, ruling on evidentiary issues, and

¹ Their formal title is Public Service Administrator, Option 8L – Administrative Law Judge.

writing ALJ reports.² Addressing the second prong of the test, he found that the ALJs direct the effectuation of agency policies because their ALJ reports help run the agency.³ They function as recommendations to agency decision-makers concerning a major portion of the agency's work—the regulation of professionals, banking institutions, and financial institutions—which the decision-makers accept an “overwhelming majority” of the time.

However, he rejected the Employer's alternative, proffered bases for exclusion, that the ALJs are managerial as a matter of law and managerial because they are at-will and exempt from the Illinois Personnel Code. He likewise rejected the Employer's attempt to supplement the record following the hearing with a revised exhibit (“Exhibit H”) summarizing the rate at which the directors and the boards accept the ALJs' decisions.⁴

Pursuant to Section 1200.135(b) of the Board's Rules and Regulations, 80 Ill. Admin. Code §1200.135(b), the Petitioner filed timely exceptions to the ALJ's finding that the petitioned-for employees are managerial as a matter of fact. The Employer filed a response supporting the ALJs ultimate decision to exclude the petitioned-for employees from the unit. The Employer excepted only to the ALJ's decision to strike Employer's Exhibit H and declined to except to the ALJ's legal conclusions concerning the alternative bases for exclusion.

We affirm the ALJ's decision to exclude the petitioned-for employees as managerial under Section 3(j) of the Act for the reasons stated in the RDO. We likewise affirm the ALJ's decision to strike Employer's Exhibit H from the record because the Union has had no opportunity to cross-examine the individual who produced the exhibit or to otherwise verify the

² The first prong of the managerial test provides that a managerial employee is an “individual who is engaged predominantly in executive and management functions.” 5 ILCS 315/3(j) (2014).

³ The second prong of the managerial test provides that a managerial employee must be “charged with the responsibility of directing the effectuation of management policies and practices.” 5 ILCS 315/3(j) (2014).

⁴ The Employer submitted into evidence an earlier version of the same document, which contained some mistakes and omissions.

exhibit's accuracy. We note that the Employer did not except to the ALJ analysis with respect to the alternate proffered bases for exclusion and we therefore let the ALJ's analysis on those matters stand as non-precedential.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

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

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

/s/ John R. Samolis
John R. Samolis, Member

/s/ Keith A. Snyder
Keith A. Snyder, Member

/s/ Albert Washington
Albert Washington, Member

Decision made at the State Panel's public meeting in Chicago, Illinois on December 15, 2015,
written decision issued in Chicago, Illinois on March 14, 2016.

**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-12-006
)	
State of Illinois, Department of Central)	
Management Services,)	
)	
Employer)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On August 15, 2011, the American Federation of State, County and Municipal Employees, Council 31 (Petitioner) filed a majority interest petition in Case No. S-RC-12-006 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 Board, 80 Ill. Admin. Code, Parts 1200 through 1240 (Rules). This petition seeks to include the “Public Service Administrator, Option 8L – Administrative Law Judge” position employed by the Illinois Department of Financial and Professional Regulation (IDFPR or Employer) in the existing RC-10 bargaining unit.¹

A hearing was held on November 29, 2011 before the undersigned in Chicago, Illinois. At that time, all parties appeared and were given a full opportunity to participate, adduce relevant evidence, examine witnesses, and argue orally. Briefs were timely filed by both parties. Subsequently, on January 20, 2012, the Petitioner filed a motion to strike certain documents attached to the Employer’s post-hearing brief and those portions of the Employer’s post-hearing

¹ As of November 29, 2011, this position was occupied by Michael Lyons and Sadzi Oliva.

brief that reference those attached documents. 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

1. The parties stipulate and I find that the Employer is a public employer within the meaning of the Act.
2. The parties stipulate and I find that the Petitioner is a labor organization within the meaning of the Act.

II. ISSUES AND CONTENTIONS

The Employer contends that the petitioned-for position is a managerial position within the meaning of Section 3(j) of the Act. The Petitioner disputes this contention. The Employer also proposes an additional, alternative basis for exclusion.

III. FINDINGS OF FACT

The IDFPR, a state agency, consists of three major divisions: (1) the banking division, which regulates banking entities and certain individuals such as loan originators in Illinois; (2) the financial institutions division, which regulates certain individuals in financial fields as well as financial institutions such as credit unions and pawnshops in Illinois; and (3) the professional regulation division, which regulates and licenses a range of professions in Illinois. Each of these divisions administers a number of related acts and is overseen by one of three separate division directors. The professional regulation division uniquely administers 55 separate acts that

regulate a particular kind of profession and, in general, require a corresponding board made up of a number of board members. All IDFPR employees ultimately report to Secretary Brent Adams, the head of the agency.

The IDFPR also maintains an office of legal affairs, which is presently headed by Kevin Connor, the agency's general counsel. The office of legal affairs, which employs a number of attorneys who serve in a variety of roles, is officially divided into six distinct units: (1) program counseling, (2) labor relations, (3) depository institutions, (4) professional regulation, (5) financial institutions, and (6) formal hearings. At the time of the hearing, the formal hearings unit included two attorneys functioning as administrative law judges (ALJs), Michael Lyons and Sadzi Oliva.² These two ALJs – the petitioned-for employees – are supervised by a chief ALJ, Donald Seasock, who, in turn, reports to the general counsel. In addition to his or her other responsibilities, the chief ALJ is responsible for assigning cases and duties to the two ALJs.

The ALJs' principal work involves cases (generally in the form of formal complaints, petitions, or appeals of agency orders) that are affiliated with each of the agency's three divisions. Each of the ALJs predominantly conducts a variety of formal hearings; responds to related legal motions and evidentiary issues; and, for each case, authors an ALJ report which includes the ALJ's case-specific findings of fact, conclusions of law, and recommendations.³ An ALJ report may also summarize the background of a case and describe the evidence and witnesses presented during a hearing. Once completed, the majority of ALJ reports that are generated for professional regulation division cases are generally submitted to the professional

² For banking and financial institutions divisions cases, the employees performing this function, Lyons and Oliva, are technically called hearing officers. Under different circumstances, the same employees have also been described as hearing referees. However, for expository convenience, this Recommended Decision and Order will simply refer to these employees as ALJs.

³ ALJs do not make similar recommendations for "default" professional regulation division cases. These default cases are instead transmitted directly to the appropriate board.

regulation board that administers the particular type of profession at issue in a report.⁴ As the IDFPR does not maintain analogous boards for its banking or financial regulation divisions, completed ALJ reports involving banking or financial regulation division cases are submitted directly to the corresponding division director.

Before it is finalized and submitted to a board or a director, an ALJ report may be reviewed by the chief ALJ. As part of this review, the chief ALJ may recommend “editorial,” “stylistic,” or “substantive” changes to the ALJ who authored the report. Separately, the chief ALJ may specifically choose to review those ALJ reports which are “of some significance or publicity” before those reports are passed on to the relevant board or director. According to her testimony, Oliva has made the changes that were recommended by Seasock after his review. However, testimony also indicates that ALJs are generally not directed how to ultimately decide a case. Instead, the ALJs are allegedly told to “follow the law.”

When an ALJ report is submitted to a professional regulation board, a copy of the record of the case affiliated with the report is also submitted to that board. This record includes the transcripts, the admitted exhibits, the pleadings, and any other documents that were generated during the course of the proceedings. ALJ reports involving professional regulation division cases are not sent to the parties when they are sent to the boards.

Each professional regulation division board formally examines the relevant ALJ reports and case records during board-specific meetings. ALJs do not attend these board meetings. Ultimately, a board can recommend that the professional regulation division director accept, reject, or modify any part of the ALJs’ findings of fact, conclusions of law, or recommendations. A board can also recommend that the director remand a case to an ALJ for more hearings.

⁴ Some kinds of professional regulation division reports may be submitted directly to the professional regulation division director. This would occur, for example, if an ALJ grants a motion which would entirely dismiss a case.

Once a professional regulation division board makes a final determination about a complaint, copies of the board's recommended order and the ALJ report are sent to the respondent and one of the agency's prosecuting attorneys. Respondents also receive a 20-day notice. During this 20-day period, parties can file responses or make submissions to the director of the professional regulation division before that director makes a final determination.⁵ Once the 20-day period passes, the prosecuting attorney prepares a draft order and sends that order, the board's recommended order, and the ALJ report to the director of the professional regulation division for his or her review. According to testimony, the director does not necessarily receive the complete record of a case.

A director's review concludes with a final order. This final order can accept, reject or modify any professional regulation board's findings of fact, conclusions of law, or recommendations. Additionally, a final order can accept, reject, or modify an ALJ's findings of fact, conclusions of law, or recommendations. A director can also remand a case back to an ALJ for a rehearing.

Beyond the issuance of ALJ reports, ALJs do not confer with or advise other agency staff.⁶ ALJs also do not propose bills or statutory amendments to the agency's rules and regulations. Professional regulation division boards are advised by other attorneys from the general counsel's office who attend board meetings. If a director needs counsel or wishes to be advised about a case, he or she may talk to a deputy general counsel assigned to that director's division.

ALJs have performed additional, secondary work, however. For example, an ALJ may be directed by the chief ALJ to conduct status hearings or function as a "motion judge." Oliva is

⁵ During the 20-day period, either the prosecuting attorney or the respondent can request a rehearing of the matter. However, as a general rule, prosecuting attorneys do not elect to do so.

⁶ However, an ALJ may choose to confer with another ALJ or the chief ALJ about a particular case.

also uniquely a member of a subcommittee of “the Governor’s Administrative Review Committee.”⁷

IV. DISCUSSION AND ANALYSIS

The Act’s Managerial Exclusion

The Employer asserts that the petitioned-for ALJs of the IDFPR are managerial employees within the meaning of Section 3(j) of the Act.⁸ The Act excludes such managerial employees from the class of employees who are entitled to engage in collective bargaining. Chief Judge of the Sixteenth Judicial Circuit v. Illinois State Labor Relations Board, 178 Ill. 2d 333, 338, 687 N.E.2d 795, 797 (1997).⁹ As the party seeking to exclude these ALJs from bargaining, the Employer has the burden of proving, by a preponderance of the evidence, that their position is statutorily excluded from bargaining as managerial employees. Illinois Department of Central Management Services (State Police) v. Illinois Labor Relations Board, 382 Ill. App. 3d 208, 220, 888 N.E.2d 562, 575 (4th Dist. 2008); Chief Judge of the Circuit Court of Cook County, 18 PERI ¶2016 (IL LRB-SP 2002). To make this determination, two tests have been developed: (1) the traditional test, which generally considers whether the petitioned-for employee is a managerial employee as a matter of fact, and (2) the alternative test of managerial employee status as a matter of law. Department of Central Management Services/Department of

⁷ According to testimony, the work affiliated with this subcommittee is performed “on work time.” This group has met once and is presently “instituting a pilot intra-agency mentoring program.” Allegedly, the “only thing” the group has done so far is to attempt to gather information about the institution of this program.

⁸ Section 3(j) of the Act states:

“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.

⁹ The Act’s managerial exclusion is intended to maintain the distinction between management and labor and to provide the employer with undivided loyalty from its representatives and management. County of Cook v. Illinois Labor Relations Board-Local Panel, 351 Ill. App. 3d 379, 386, 813 N.E.2d 1107, 1114 (1st Dist. 2004).

Healthcare and Family Services v. Illinois Labor Relations Board, State Panel, 388 Ill. App. 319, 330, 902 N.E.2d 1122, 1130 (4th Dist. 2009).

The Traditional Managerial Employee Test

As suggested, the traditional managerial employee test considers, factually, whether an employee conforms to the Act's definition of a managerial employee. Section 3(j) of the Act sets down two elements or criteria, both of which the employee must meet to be considered a managerial employee. First, the employee must be engaged predominantly in executive and management functions. Second, the employee must be charged with the responsibility of directing the effectuation of management policies and procedures. Department of Healthcare and Family Services, 388 Ill. App. 3d at 330, 902 N.E.2d at 1130; State of Illinois (Department of Central Management Services), 12 PERI ¶2024 (IL SLRB 1996).

As to the first criterion of the traditional test, the Act does not define "executive and management functions." However, the Board and the Illinois Appellate Court have indicated that these functions specifically relate to running an agency or department and may include such activities as formulating policy, preparing the budget, and assuring efficient and effective operations. Department of Healthcare and Family Services, 388 Ill. App. 3d at 330, 902 N.E.2d at 1130; Village of Elk Grove Village v. Illinois State Labor Relations Board, 245 Ill. App. 3d 109, 121, 613 N.E.2d 311, 320 (2nd Dist. 1993); City of Evanston v. State Labor Relations Board, 227 Ill. App. 3d 955, 974, 592 N.E.2d 415, 428 (1st Dist. 1992); State of Illinois, Department of Central Management Services, 21 PERI ¶205 (IL LRB-SP 2005).¹⁰ Further, to

¹⁰ As for the first criterion, it is not absolutely essential that a managerial employee formulate policy. To clarify, formulating policy is merely one example of running an agency. Department of Central Management Services/Illinois Commerce Commission v. Illinois Labor Relations Board, 406 Ill. App. 3d 766, 780, 943 N.E.2d 1136, 1148 (4th Dist. 2010). Other executive and management functions include, for example, using independent discretion to make policy decisions as opposed to following established policy, changing the focus of an employer's organization, being responsible for day-to-day operations, negotiating on behalf of the employer with its employees or the public, exercising authority to pledge an employer's credit, and attending managerial meetings. Department

meet the first part of the traditional managerial employee test, the employee must possess and exercise authority and discretion which broadly affects an agency's or a department's goals and means of achieving those goals. Department of Central Management Services v. Illinois State Labor Relations Board, 278 Ill. App. 3d 79, 87, N.E.2d 131, 136 (4th Dist. 1996); State of Illinois, Departments of Central Management Services and Public Aid, 2 PERI ¶2019 (IL SLRB 1986).

With respect to the second criterion, an employee directs the effectuation of management policy when he or she oversees or coordinates policy implementation by developing the means and methods of reaching policy objectives, and by determining the extent to which the objectives will be achieved. The employee must also be empowered with a substantial measure of discretion to determine how policies will be effected. City of Evanston, 227 Ill. App. 3d at 975, 592 N.E.2d at 428; State of Illinois, Departments of Central Management Services & Public Aid, 2 PERI ¶2019.

Initially, I note that the formal determinations of the petitioned-for employees clearly function as recommendations for others who, as a rule, ultimately have the power and the responsibility to accept, reject, or modify the same.¹¹ Generally, an employee is not a manager within the meaning of the Act if his or her role is merely subordinate or advisory, as it is the final responsibility and independent authority to establish and effectuate policy that determines

of Healthcare and Family Services, 388 Ill. App. 3d at 330, 902 N.E.2d at 1130; State of Illinois, Department of Central Management Services, 21 PERI ¶205; State of Illinois, Department of Central Management Services, 8 PERI ¶2052 (IL SLRB 1992). However, the record largely does not indicate that the petitioned-for employees are predominantly engaged in these other functions.

¹¹ Section 3(j) of the Act contains a "predominance component" requiring that employees be excluded from collective bargaining as managerial employees only if they are engaged "predominantly" in executive and management function and are also charged with directing the effectuation of management policies and practices. See State of Illinois, Department of Central Management Services, 28 PERI ¶160 (IL LRB-SP 2012); State of Illinois, Department of Illinois, Department of Central Management Services (Department of Human Services), 28 PERI ¶126 (IL LRB-SP 2012). As noted above, the ALJs at issue are predominantly engaged in conducting hearings, responding to related legal motions and evidentiary issues, and writing ALJ reports. This analysis reflects this fact.

managerial status under the Act. Village of Elk Grove Village, 245 Ill. App. 3d at 122, 613 N.E.2d at 320; City of Evanston, 227 Ill. App. 3d at 974, 592 N.E.2d at 428; State of Illinois, Departments of Central Management Services and Healthcare and Family Services, 23 PERI ¶173 (IL LRB-SP 2007). In other words, managerial 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. Department of Central Management Services/Illinois Commerce Commission v. Illinois Labor Relations Board, 406 Ill. App. 3d 766, 775, 943 N.E.2d 1136, 1144 (4th Dist. 2010); see State of Illinois, Department of Central Management Services (Environmental Protection Agency, Department of Public Health, Department of Human Services, Department of Commerce and Economic and Economic Activity), 26 PERI ¶155 (IL LRB-SP 2011).

That being said, an advisory employee who makes “effective recommendations” can nevertheless be considered a managerial employee within the meaning of the Act. Chief Judge of the Sixteenth Judicial Circuit, 178 Ill. 2d at 338, 687 N.E.2d at 797; ICC, 406 Ill. App. 3d at 767, 943 N.E.2d at 1138. Here, the Employer’s post-hearing brief concedes that the ALJs at issue are advisory employees. Yet, the Employer also contends that they make effective recommendations when they issue proposed orders which the IDFPR allegedly “almost always accepts, implements, and uses to regulate all the professions it governs” and thus must be excluded from representation under the Act.

When determining whether the ALJs’ recommendations are sufficiently effective, one could understandably attempt to determine the precise rate or frequency of acceptance. Certainly, the determination of whether an employee is managerial is to some extent a matter of the degree of authority exercised. See Palace Laundry Dry Cleaning Corporation, 75 NLRB 320,

323 (1947). However, it does not appear that mere frequency of acceptance necessarily demonstrates the effectiveness of recommendations. See State of Illinois, Department of Central Management Services (Illinois Commerce Commission), 29 PERI ¶76 (IL LRB-SP 2012). Moreover, the appropriate test is not simply the presence or absence of review. ICC, 406 Ill. App. 3d at 775, 943 N.E.2d at 1144. While such considerations may be weighed, the more accurate, nuanced test of effectiveness examines the actual power or influence of the recommendations. Id.; see State of Illinois, Department of Central Management Services (Illinois Commerce Commission), 29 PERI ¶76. The instant analysis attempts to resolve this issue in this light and, accordingly, endeavors to undertake a fact-based assessment of the control and authority actually asserted by employees at issue. See County of Cook, 351 Ill. App. 3d at 392, 813 N.E.2d at 1118; David Wolcott Kendall Memorial School v. National Labor Relations Board, 866 F.2d 157, 160 (6th Cir. 1989).

As an aside, I note that, in ICC, when construing the meaning of the term “effective recommendations,” the Fourth District of the Appellate Court of Illinois specifically recognized the U.S. Supreme Court’s interpretation of the same term in National Labor Relations Board v. Yeshiva University, 444 U.S. 672, 100 S. Ct. 856 (1980), the seminal case in this field. See ICC, 406 Ill. App. 3d at 775, 943 N.E.2d at 1145; National Labor Relations Board v. Florida Memorial College, 820 F.2d 1182, 1184 (11th Cir. 1987).¹² In Yeshiva University, the university faculty members whom the union had petitioned to represent not only absolutely controlled the academic policy of the university employing them (i.e., what courses would be

¹² According to the Illinois Supreme Court, the definition of a managerial employee in Section 3(j) of the Act is “very similar” to the definition of a managerial employee in Yeshiva University, Chief Judge of the Sixteenth Judicial Circuit, 178 Ill. 2d at 339, 687 N.E.2d at 797; ICC, 406 Ill. App. 3d at 776, 943 N.E.2d at 1145. Further, the Illinois Supreme Court has made it clear that the concept of “effective recommendations,” which the Supreme Court of the United States has held to be applicable to the managerial exclusion in Yeshiva University, applies with equal force to the managerial exclusion under the Act. Chief Judge of the Sixteenth Judicial Circuit, 178 Ill. 2d at 339, 687 N.E.2d at 798.

offered, when classes would be scheduled, to whom classes would be taught, teaching methods, grading policies, and graduation standards), but the university's central administration generally followed their advice on personnel matters as well (i.e., faculty hiring, tenure decisions, and granting sabbaticals and promotions). The faculty's decisions thus both controlled and implemented the employer's policy on a broad scale and, consequently, it was determined that the faculty members were managerial employees.

Here, I generally find that the petitioned-for employees possess little decision or policy-making authority comparable to the substantial, "pervasive authority" of the employees found managerial in Yeshiva University. See Florida Memorial College, 820 F.2d at 1184. Unlike the faculty members described, the petitioned-for employees have virtually no authority to implement or even recommend significant changes in areas beyond the cases assigned to them. See Office of the Cook County State's Attorney v. Illinois Local Labor Relations Board, 166 Ill. 2d 296, 301, 652 N.E.2d 301, 303 (1995); Chief Judge of the 11th Judicial Circuit, 16 PERI ¶2043 (IL SLRB 2000); David Wolcott Kendall Memorial School, 866 F.2d at 160. To this extent, it is not readily apparent that the petitioned-for employees would meet the relevant criteria under Yeshiva University and its progeny. See State of Illinois, Department of Central Management Services, 28 PERI ¶160 (IL LRB-SP 2012); State of Illinois, Department of Illinois, Department of Central Management Services (Department of Human Services), 28 PERI ¶126 (IL LRB-SP 2012).

Additionally, it is not immediately clear that the petitioned-for employees sufficiently exercise more than professional discretion or technical expertise when performing their predominant duties. Notably, executive functions require more than simply the exercise of professional discretion or technical expertise. Department of Healthcare and Family Services,

388 Ill. App. 3d at 330, 902 N.E.2d at 1130; County of Cook, 351 Ill. App. 3d at 387, 813 N.E.2d at 1114; State of Illinois, Department of Central Management Services, 25 PERI ¶68 (IL LRB-SP 2009); State of Illinois, Departments of Employment Security and Central Management Services, 1 PERI ¶2027 (IL SLRB 1985). Here, the petitioned-for employees, both of whom function as attorneys, are allegedly expected to “follow the law” in each case and have been characterized by the agency as “technical staff.” By using their professional discretion and skills, these ALJs no doubt perform duties essential to the agency’s ability to accomplish its mission, but it does not necessarily follow that they are therefore managerial employees. Department of Healthcare and Family Services, 388 Ill. App. 3d at 331, 902 N.E.2d at 1131; see General Dynamics Corporation, 213 NLRB 851, 857 (1974). Generally, only if an employee’s activities fall outside the scope of duties routinely performed by similarly situated professionals will he or she be found aligned with management. See County of Cook, 351 Ill. App. 3d at 390, 813 N.E.2d at 1117; Yeshiva University, 444 U.S. at 690, 100 S. Ct. at 866; Loretto Heights College v. National Labor Relations Board, 742 F.2d 1245, 1247 (10th Cir. 1984); Lewis and Clark College, 300 NLRB 155, 160 (1990); Montefiore Hospital and Medical Center, 261 NLRB 569, 570 (1982).

In any case, according to ICC, one appropriate way of approaching this issue is to compare the job functions of the petitioned-for employees to the overall mission of the IDFPR. If the responsibilities of a job title encompass the agency’s entire mission, one might reasonably argue that, by fulfilling those responsibilities, an employee helps to run the agency. Put another way, if an agency makes and implements policy through the issuance of orders, and these orders are “almost always” the petitioned-for employees’ recommended decisions, a good argument could be made that the petitioned-for employees make effective recommendations on major

policy and the implementation of such policy. ICC, 406 Ill. App. 3d at 778, 943 N.E.2d at 1146; see State of Illinois, Department of Central Management Services (Illinois Commerce Commission), 29 PERI ¶76.

In accordance with the foregoing, I note that the record indicates that the IDFPR, through its professional regulation division, regulates and licenses a range of professions in accordance with a number of separate acts. This particular responsibility, which appears to constitute a major portion of the agency's work or "business," generates a variety of cases which can include, for example, the prosecution of professionals via formal complaints as well as work related to efforts to apply for, renew, or reinstate certain professional licenses. Routinely, many of these cases are eventually assigned to the ALJs at issue. Though it may be performed less often than work related to the professional regulation division, the ALJs also apparently perform comparable work that is related to the IDFPR's banking and financial institutions divisions. To this extent, the subject matter of the ALJs' work largely appears to touch or exemplify much of what the agency is apparently "all about." See ICC, 406 Ill. App. 3d at 778, 943 N.E.2d at 1147.

I also note that, after conducting the hearings for assigned cases, the ALJs generate ALJ reports which, inter alia, recommend a final result for each case. Subsequently, these recommendations often become, in effect, the agency's final order or determination. In this way, it also generally appears that, while performing their predominant duties, the petitioned-for employees regularly play an integral role in the agency's accomplishment of its mission. Accordingly, to the extent that the ALJs' recommendations are sufficiently accepted or able to convince the agency's ultimate decision-makers, I find that the petitioned-for employees arguably "direct the effectuation" of agency policies as required by language of Section 3(j) of the Act. See ICC, 406 Ill. App. 3d at 780, 943 N.E.2d at 1148.

Continuing, I also find that a careful, laborious analysis of the complete record fairly clearly indicates that the overwhelming majority of the petitioned-for position's recommendations are ultimately adopted and implemented by the agency's final decision-makers. See Yeshiva University, 222 U.S. at 677, 100 S. Ct. at 859; Lewis and Clark College, 300 NLRB at 160. Indeed, based on the evidence presented, I find that it could reasonably be argued that the ALJs' recommendations are, in essence, "almost always" persuasive. See ICC, 406 Ill. App. 3d at 777, 943 N.E.2d at 1146. In addition, it generally appears that these same decision-makers are highly deferential to and considerate of the ALJs' reports and the records the ALJs develop. Thus, I also find that the ALJs' recommendations are largely effective in the "ordinary sense." See ICC, 406 Ill. App. 3d at 775, 943 N.E.2d at 1145. The fact that the final decision-makers of the agency may occasionally exercise their power to reject or modify an ALJ's recommendation presumably does not, in this context, diminish the ALJs' effectiveness. See ICC, 406 Ill. App. 3d at 776, 943 N.E.2d at 1145; Lewis and Clark College, 300 NLRB at 163; University of Dubuque, 289 NLRB 349, 352 (1988). Consequently, I am ultimately compelled to find that the ALJs at issue are managerial employees under the traditional test.

Managerial Employee as a Matter of Law

As indicated, in addition to the Board's traditional analysis under Section 3(j) of the Act, the Board may apply the alternative managerial employee test, which considers whether the employee is a managerial employee as a matter of law. Chief Judge of the Sixteenth Judicial Circuit, 178 Ill. 2d at 341, 687 N.E.2d at 798; State of Illinois, Departments of Central Management Services and Healthcare and Family Services, 23 PERI ¶173. Although no exact criteria define a managerial employee as part of this alternative analysis, the courts have relied on the existence of three factors in determining the petitioned-for employees were managerial as

a matter of law: (1) close identification of the office holder with actions of his or her assistants, (2) the unity of their professional interests, and (3) the power of the assistants to act on behalf of the public officer. Chief Judge of the Sixteenth Judicial Circuit, 178 Ill. 2d at 344, 687 N.E.2d at 800; Office of the Cook County State’s Attorney, 166 Ill. 2d at 304, 652 N.E.2d at 305; County of Cook, 19 PERI ¶58 (IL LRB-LP 2003), aff’d sub nom. County of Cook, 351 Ill. App. 3d 379, 813 N.E.2d 1107. The analysis of these factors is designed to indicate whether an individual stands in the shoes of or acts as a “surrogate” (i.e., a substitute or alter ego) of a superior office holder. ICC, 406 Ill. App. 3d at 782, 943 N.E.2d at 1150; State of Illinois, Department of Central Management Services, 21 PERI ¶205.

The definitive examples of acting in such a capacity are represented by the assistant public defenders in Chief Judge of the Sixteenth Judicial Circuit, 178 Ill.2d 333, 687 N.E.2d 795, and the assistant state’s attorneys in Office of the Cook County State’s Attorney, 166 Ill. 2d 296, 652 N.E.2d 301. County of Cook, 351 Ill. App. 3d at 391, 813 N.E.2d at 1118; see American Federation of State, County and Municipal Employees, Council 31 v. Illinois State Labor Relations Board, 333 Ill. App. 3d 177, 775 N.E.2d 1029 (5th Dist. 2002) (assistant appellate defenders); Salaried Employees of North America v. Illinois Local Labor Relations Board, 202 Ill. App. 3d 1013, 560 N.E.2d 926 (1st Dist. 1990) (attorneys employed by the City of Chicago Law Department). In these two definitive cases, the assistants, in accordance with their statutorily defined duties and responsibilities, made decisions or exercised the authority reserved to either the Kane County Public Defender or the Cook County State’s Attorney that, without any prior review or approval, committed these office holders to a specific course of action. Moreover, those employees were called upon to take numerous discretionary actions that

effectively controlled or implemented employer policy and possessed absolute discretion in handling their cases, almost never consulting with their superiors.

The instant record indicates that the ALJs at issue do not similarly act as surrogates for the IDFPR's directors or board members and, under no circumstances, are clothed with their powers and privileges. Rather, the directors, board members, and ALJs appear to perform fairly defined, dissimilar roles that are not interchangeable. This observation persuasively distinguishes the petitioned-for employees from the assistant state's attorneys, for example, who could act with the full power of the Cook County State's Attorney in his or her absence. Office of the Cook County State's Attorney, 166 Ill. 2d at 304, 652 N.E.2d at 304.

It also appears that, like the recommendations of ALJs at issue in ICC, 406 Ill. App. 3d 766, 943 N.E.2d 1136, and unlike those of the ALJs at issue in Department of Central Management Services/Illinois Human Rights Commission v. Illinois Labor Relations Board, 406 Ill. App. 3d 310, 943 N.E.2d 1150 (4th Dist. 2010), for example, the recommendations of the ALJs at issue never automatically become the final order of the agency. The record presents no instance or scenario which deprives a director of the power to gainsay an ALJ's recommendation. Accordingly, I find that the alternative test of managerial employee status as a matter of law is not satisfied in this instance.

Proffered Alternative Basis for Exclusion

The Employer's post-hearing brief separately argues that the petitioned-for position should be also excluded from representation as de facto or de jure managerial because it is both "at will" and exempt from the Illinois Personnel Code, 20 ILCS 415 (2010) (Code), and the United States Supreme Court's decision in Rutan v. Republican Party of Illinois, 497 U.S. 62,

110 S. Ct. 2729 (1990).¹³ However, the Board has repeatedly found no merit to such arguments, and I see no compelling reason to deviate from the Board’s established policy in this instance. See State of Illinois, Department of Central Management Services (Department of Revenue), 29 PERI ¶62 (IL LRB-SP 2012).

Section 3(n) of the Act contains a long list of employees specifically excluded. Yet, the Act contains no exception to the definition of a public employee for those exempted by the Code. The Board has determined that the legislature’s failure to specifically exclude Code-exempt employees must be construed as an indication that such employees cannot be excluded on that basis alone. Likewise, the Board has long held that, if the legislature intended for Rutan-exempt status or at-will classifications to require an automatic exclusion from the Act’s coverage, that exemption would have been specified by the Act itself, especially given that the exclusions therein are to be construed narrowly. State of Illinois, Department of Central Management Services (Environmental Protection Agency, Department of Public Health, Department of Human Services, Department of Commerce and Economic Activity), 26 PERI ¶155 (IL LRB-SP 2011); State of Illinois, Department of Central Management Services, 25 PERI ¶184 (IL LRB-SP 2009).

The Petitioner’s Motion to Strike

The Employer introduced Exhibits C and D during the hearing and both exhibits were formally admitted by the undersigned. Exhibit C includes a number of grouped documents or “packages.” Each package generally includes the ALJ report, board recommendation, and final order affiliated with a particular case. The packages included in Exhibit C were allegedly

¹³ In Rutan, 497 U.S. 62, 110 S. Ct. 2729 (1990), the U.S. Supreme Court held that public employers cannot consider political party affiliation when making hiring decisions that do not involve high level policy-making positions. State of Illinois, Department of Central Management Services, 25 PERI ¶184 (IL LRB-SP 2009). Rutan applies to all state agencies under the jurisdiction of the Governor. See State of Illinois, Department of Central Management Services, 10 PERI ¶2037 (IL SLRB 1994).

intended to represent the “entirety” of cases that involved formal hearings that were held during a specific two-year period. Exhibit D ostensibly charts whether the ALJ reports included in Exhibit C were accepted, rejected, or modified. Exhibit D was prepared by John Lagattuta, a former chief ALJ who is currently the agency’s labor relations director. Lagattuta was direct- and cross-examined about both of these exhibits. During cross-examination, it became clear that Exhibit D was inaccurate as initially presented.

The Employer’s post-hearing brief attempts to incorporate a new document titled Exhibit H and a new verified statement of Lagattuta that addresses Exhibit H. As defined by the Employer’s post-hearing brief, Exhibit H is a document the Employer “prepared subsequent to the hearing to better aid the trier of fact in analyzing evidence that was admitted in Exhibit C.” Allegedly, Exhibit H constitutes “a more detailed and accurate list” than what the Employer originally offered via the admittedly inaccurate Exhibit D. The Employer’s brief also asserts that “Lagattuta has sworn in his verified statement that the list considers only evidence already part of the public record in Exhibit C and corrects/explains analyses thereof.”

On January 20, 2012, the Petitioner filed a motion to strike Exhibit H, the verified statement, and those portions of the Employer’s post-hearing brief which discuss Exhibit H.¹⁴ Under the circumstances, I must grant the Petitioner’s motion. To rule otherwise would deprive the Petitioner of a fair opportunity to fully cross-examine Lagattuta; to thoroughly examine and scrutinize the new exhibit; to clarify the characterizations, inferences, and assumptions necessarily contained within the exhibit; and to properly present its own evidence to clarify or rebut the same. I also note, however, that this particular ruling is not meant to affect the status of the underlying aspects of the record that were properly introduced and admitted into evidence

¹⁴ The Employer did not specifically respond to this motion.

during the November 29, 2011 hearing and, accordingly, were independently assessed and analyzed by the undersigned.

V. CONCLUSIONS OF LAW

I find that the petitioned-for employees employed by the IDFPR in the position of “Public Service Administrator, Option 8L – Administrative Law Judge,” currently occupied by Michael Lyons and Sadzi Oliva, are managerial employees as defined by Section 3(j) of the Act.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the instant petition be dismissed.

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board’s Rules, parties may file exceptions to the Administrative Law Judge’s Recommended Decision and Order and briefs in support of those exceptions no later than 14 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 10 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge’s Recommendation. Within 5 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed with the General Counsel of the Illinois Labor Relations Board at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted at the Board’s Springfield office. The

exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 14-day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois, this 13th day of March, 2013.

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**



**Martin Kehoe
Administrative Law Judge**