STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Service Employees International Union, Local 73,	)	
Petitioner	)	
and	)	Case No. S-UC-12-034
Illinois Secretary of State,	)	
Employer	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

On April 17, 2012, Administrative Law Judge (ALJ) Michelle N. Owen issued a Recommended Decision and Order (RDO) in the above-captioned case, recommending that the Illinois Labor Relations Board (Board) grant a petition filed by Service Employees International Union, Local 73 (Petitioner) concerning certain employees of the Illinois Secretary of State (Employer). Filed pursuant to Section 9 of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010), as amended (Act), and Section 1210.170 of the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code, Parts 1200 through 1240 (Rules), the petition sought to clarify that a collective bargaining unit of Secretary of State employees previously recognized in Case No. S-UC-04-046, as modified by Case No. S-RC-11-006, includes Executive I and Executive II positions that exist outside of the Employer's Drivers' Services Department. The Employer filed timely exceptions to the RDO pursuant to Section 1200.135 of the Rules, and the Petitioner filed a timely response. After reviewing the record, briefs, exceptions, and response, we adopt the ALJ's recommendations for the reasons which follow.

Background

In Ill. Sec. of State, Case No. S-RC-11-006, 28 PERI ¶68 (IL LRB-SP Oct. 24, 2011), appeal pending, No. 4-11-1075 (Ill. App. Ct., 4th Dist.),[1] we determined that employees of the Illinois Secretary of State in the job titles of Executive I and Executive II were neither supervisors nor managerial employees within the meaning of the Illinois Public Labor Relations Act, and that their positions should be added to a collective bargaining unit previously recognized in Case No. S-UC-04-046. Actually, our decision specifically holds that those Executive Is and IIs who work in the Drivers' Services Department should be included in the unit, although the original petition had sought to include all Executive Is and IIs and the parties stipulated that the sole witness who testified, though from the Drivers' Services Department, would provide testimony applicable to all Executive Is and IIs.[2] The fact that the Board's decision articulated a narrower unit than the unit at issue in the case and the unit litigated by the parties was not brought to the Board's attention until after a petition for administrative review had been filed and, critically, after the Board had filed the record in administrative review.[3]

The Petition for Unit Clarification

On February 7, 2012, Petitioner filed a unit clarification petition in the above-captioned case, seeking to clarify that the unit, as modified in Case No. S-RC-11-006, expressly includes all the Executive Is and IIs who had been at issue in that case, not just those in the Drivers' Services Department. Section 1210.170(a)(2) of the Board rules allow for unit clarification petitions where "an existing job title that is logically encompassed within the existing unit was

[1] Available at http://www.state.il.us/ilrb/subsections/pdfs/BoardDecisions/S-RC-11-006.pdf.
[2] In Case No. S-RC-11-006 the parties stipulated "that all of the other supervisors of these employees would testify as Mr. Lazzerini testified if asked the same questions." Ill. Sec. of State, Case No. S-RC-11-006 at 3, 28 PERI ¶68.
[3] Section 11(d) of the Act, provides: "Until the record in a case has been filed in court, the Board at any time, upon reasonable notice and in such manner as it deems proper, may modify or set aside, in whole or in part, any finding or order made or issued by it."

inadvertently excluded by the parties at the time the unit was established."[4] As noted by the ALJ, the Board has previously stated that the purpose of the unit clarification procedure is "not to change the scope of a bargaining unit, but to resolve unit composition questions which arise within the context of the parties' recognition agreement, the provisions of the Act or the unit described in a Board certification." City of Chicago, 9 PERI ¶3026 (IL LLRB 1993). A unit clarification petition is the appropriate method for adding positions to an existing bargaining unit if the exclusion from the unit at the time was unintentional or inadvertent. City of Chicago, Dep't of Purchasing, 1 PERI ¶3005 (IL LLRB 1985). The Board must ensure that "if the parties and the Board had been aware of the existence of the omitted position at the time of the initial representation proceeding and/or subsequent certification of the bargaining unit, that position would certainly have been included in the unit." Champaign County State's Attorney, 16 PERI ¶2024 (IL SLRB 2000).

The ALJ's Recommendation

The ALJ found the unit clarification petition appropriate because the existing job titles of Executive I and Executive II were logically encompassed within the S-RC-11-006 bargaining

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[4] Actually, Board Rules provide for three circumstances in which unit clarifications are appropriate, and courts have added two more. Section 1210.170(a) of the Board Rules provides that

> An exclusive representative or an employer may file a unit clarification petition to clarify or amend an existing bargaining unit when:
>
> 1) substantial changes occur in the duties and functions of an existing title, raising an issue as to the title's unit placement;
> 2) an existing job title that is logically encompassed within the existing unit was inadvertently excluded by the parties at the time the unit was established; and
> 3) a significant change takes place in statutory or case law that affects the bargaining rights of employees.

Courts have approved the use of unit clarification petitions when newly created job classifications have job functions similar to functions already covered in the bargaining unit, State of Ill., Dep't of Cent. Mgmt. Serv. v. Ill. Labor Relations Bd., 364 Ill. App. 3d 1028 (4th Dist. 2006), and where the employer asserts that the employees within a certified bargaining unit are statutorily excluded from representation, City of Washington v. Ill. Labor Relations Bd., 383 Ill. App. 3d 1112 (3d Dist. 2008).

unit, yet were inadvertently excluded from the certification. In fact, they were included in the petition filed in Case No. S-RC-11-006, the parties in that case had stipulated that the petition sought to include them, and the Employer's post-hearing briefs had noted this fact. The document the Employer submitted with its post-hearing brief had specifically referenced not only Executive Is and IIs within the Drivers' Services Department, but also those within:

> Administrative Hearings—Hearings/Central Operations
> Administrative Hearings—Hearings/Northern Operations
> Administrative Hearings—Hearings/Chicago Operations
> Library, Library Development, Literacy
> Business Services, Chicago Operations, Corporations
> Police, Fleet Maintenance
> Index, Notary Public
> Administrative Hearings—Springfield Support Services
> Index, Administrative Code

The ALJ also noted the Employer did not deny that the omission of these titles from the S-RC-11-006 bargaining unit had been inadvertent.

The ALJ rejected the Employer's request for a hearing on whether the petitioned-for employees were supervisors or managerial employees, noting the Employer had already been given a hearing in the earlier case and failed to make either demonstration.[5] The ALJ also rejected the Employer's attempt to challenge the showing of interest, noting there is no such requirement in a unit clarification proceeding.[6] Finally, the ALJ rejected the Employer's argument that it should defer ruling on the unit clarification petition until the Appellate Court had finished its review of the representation petition. She noted the Petitioner had conceded that any vacatur of the certification in Case No. S-RC-11-006 would necessarily apply to those added through the unit clarification procedure.

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[5] As noted in the Board's decision, the Employer called only one witness, and that witness's testimony was transcribed in just 21 pages. Serv. Employees Int'l Union Local 73, Case No. S-RC-11-006 at 4, 28 PERI ¶68.

[6] A showing of majority support had been made in the earlier representation petition for the entire unit which included all the Executive Is and IIs.

Employer's Exceptions

The Employer excepts to the RDO and argues that the petition should be dismissed because: (1) not all of the criteria required for granting a unit clarification petition have been met; (2) an oral hearing should be conducted "on the issues of representation and inclusion/exclusion"; and (3) the petitioned-for employees are supervisory and managerial employees. In an amendment to its exceptions, Employer presents a variation of its first exception, which we address in that context.

The criteria for unit clarification

The Employer's first basis for dismissal arises from the use of the word "and" in the list of three circumstances for which unit clarification petitions are permitted under Section 1210.170(a):

> An exclusive representative or an employer may file a unit clarification petition to clarify or amend an existing bargaining unit when:
>
> 1) substantial changes occur in the duties and functions of an existing title, raising an issue as to the title's unit placement;
>
> 2) an existing job title that is logically encompassed within the existing unit was inadvertently excluded by the parties at the time the unit was established; ***and***
>
> 3) a significant change takes place in statutory or case law that affects the bargaining rights of employees.

It is the Employer's position that use of this conjunction means a unit clarification petition may be filed only where all three circumstances are present. It cites a decision of the Illinois Supreme Court for the proposition that its interpretation is "elementary statutory construction."

We find the argument without merit. The case cited states "[t]his court long ago observed the obvious: '[t]he conjunction "and" ... signifies and expresses the relation of addition,'" citing a decision from 1901, but it immediately follows with this observation: "[o]f

course, the word 'and' is sometimes considered to mean 'or,' and vice versa, in the interpretation of statutes." People v. A Parcel of Property Commonly Known as 1945 North 31st Street, Decatur, Macon County, Ill., 217 Ill. 2d 481, 500 (2005) (finding it meant "and" in the statute at issue). As the Illinois Supreme Court more recently stated in a decision concerning an interpretation of Section 9(a-5) of the Illinois Public Labor Relations Act:

> In construing statutes, the strict meaning of words like "and" is more readily departed from than that of other words." .... Thus, if reading "and" in its literal sense would create an inconsistency in the statute or "render[] the sense of a statutory enactment dubious," we will read "and" as "or."

County of DuPage v. Ill. Labor Relations Bd., 231 Ill. 2d 593, 606 (2008).

The County of DuPage court found the legislature meant the disjunctive when it used "and" in Section 9(a-5). The same is true here. Section 1210.170(a) makes far more sense as describing three sets of circumstances for which a unit clarification petition would be appropriate, than it would if it were describing a single circumstance containing three necessary elements: a change in job duties, a simple mistake, and a change in law. Indeed, the latter interpretation would border on the absurd. To eliminate any ambiguity that may exist, we hold that Section 1210.170(a) describes three situations for which unit clarification petitions are appropriate, not a single situation with three elements. In similar fashion, the court decisions in State of Ill., Dep't of Cent. Mgmt. Serv. v. Ill. Labor Relations Bd., 364 Ill. App. 3d 1028 (4th Dist. 2006), and City of Washington v. Ill. Labor Relations Bd., 383 Ill. App. 3d 1112 (3d Dist. 2008), describe a fourth and fifth situation in which unit clarification petitions may be used.

In arguing that Section 1210.170(a) describes a single, three-element circumstance for unit clarification, the Employer made a concession which seemingly dooms its claim that the unit clarification petition at issue here was inappropriate. It stated: "While the ALJ is correct in concluding that the failure to include the petitioned-for employees into the existing bargaining

unit appears to be inadvertent, thereby fulfilling the second criterion, the first and third required criteria have not been met." The ALJ had noted that the Employer had never denied the exclusion of the Executive Is and IIs outside the Drivers' Services Department had been inadvertent, and in its initial exceptions the Employer had affirmatively conceded that point. Under our interpretation of Section 1210.170(a), such admitted inadvertence is sufficient to warrant unit clarification.

However, the day after filing its exceptions, the Employer filed an amendment to its exceptions[7] acknowledging "that the ALJ was correct in finding that the failure to include the petitioned-for employees was inadvertent" but maintaining that the second permitted circumstance is not present because Section 1210.170(a)(2) of the Board's Rules concerns inadvertent exclusion of "job titles," not inadvertent exclusion of individual employees. The argument touches on a flaw in the ALJ's RDO, but a flaw we consider a minor matter of semantics rather than one of substance. Section 1210.170(a)(2) allows a unit clarification petition where "an existing *job title* that is logically encompassed within the existing unit was inadvertently excluded by the parties at the time the unit was established," yet the RDO describes the petition as seeking to add the "petitioned-for employees." The more accurate description of the situation is that the petition filed in Case No. S-RC-11-006 had attempted to add to a collective bargaining unit the job title of Executive I and Executive II, but the Board inadvertently added only the positions in those titles in the Drivers' Services Department. The current petition seeks to clarify that the certification should include all positions in those titles,

[7] Board Rules do not specifically allow for the filing of amendments to the exceptions; indeed, allowing the filing of such amendments is inconsistent with the admonition in Section 1200.135(b)(2) that failure to urge specific points in exceptions results in waiver of those points. However, the Employer's amendment was filed within the time limitation for filing exceptions and in this instance we choose to address the point raised. In doing so, we do not intend to indicate that we will allow such amendments in future cases. Parties should continue to take care that the exceptions they file raise every point they wish us to consider, and should assume points not raised in the exceptions will be deemed waived.

including the positions outside of the Drivers' Services Department. In her recommended order, the ALJ should not have described this in terms of "petitioned-for employees," but the substance of her recommendation—that the unit should include all positions in the Executive I and Executive II job titles—is fully consistent with Section 1210.170(a)(2). Our final order will clear up any ambiguity on the point.

Right to an oral hearing on the issues of representation

With respect to a claimed right to an oral hearing, the employer asserts merely that there is a serious question as to whether a majority of the petitioned-for employees seek representation by the Petitioner. That is not relevant in the context of a unit clarification petition, and untrue in the broader sense. The ALJ properly noted that there is no majority interest issue in a unit clarification petition. The only issue is whether the bargaining unit previously recognized should be clarified. Moreover, we know from Case No. S-RC-11-006 that a majority of *all* the Executive Is and IIs wished to be represented by Petitioner. The petition filed in that case had been accompanied by evidence of majority support. Petitioner has certainly failed to show any reason for an oral hearing on the issue of majority status.[8]

Whether the Executive Is and Executive IIs outside of the Drivers' Services Department are supervisors or managerial employees.

The Employer's final exception states without elaboration or argument that the Executive Is and IIs at issue in this unit clarification petition are supervisors or managerial employees for

[8] Petitioner urges us to apply the doctrine of res judicata to this issue in that the Employer had full opportunity to demonstrate a lack of majority status in the S-RC-11-006 case, and failed to do so. The doctrine of res judicata provides that a final judgment on the merits rendered by a court of competent jurisdiction bars subsequent actions by the same parties or their privies on the same cause of action. Rein v. David A. Noyes & Co., 172 Ill. 3d 325, 334 (1996). It applies to matters that could have been offered to sustain or defeat a claim, as well as those that actually were offered. And it apparently can be applied to a decision of an administrative agency. Cf. Arvia v. Madigan, 209 Ill. 2d 520, 533-34 (2004) (not applying res judicata to a decision of the Secretary of State, but because that agency could not address the question of constitutionality). We need not address whether res judicata should apply because we find the issue of majority status is wholly irrelevant in the context of a unit clarification petition.

the same reasons the Employer argued in S-RC-11-006. We recognize that inclusion of this exception is intended to preserve the benefits that may accrue should the Appellate Court reverse our finding in Case No. S-RC-11-006 that the Executive I and Executive II positions are neither managerial or supervisory. Having stipulated in Case No. S-RC-11-006 that the evidence concerning managerial and supervisory status it had presented applied to *all* the Executive Is and IIs, the Employer has no room to present further argument on the point, and has not made the attempt. Under these circumstances, we do not apply the concept of waiver, but are nevertheless compelled to reject the position. Should the Appellate Court reverse our holding in Case No. S-RC-11-006 and find that the Executive Is and IIs are supervisors or managerial employees, that holding will apply to all the Executive Is and IIs including those in positions outside the Drivers' Services Department that are the subject of this unit clarification petition.

Order

For the reasons expressed above, and those articulated in the ALJ's RDO, we clarify that the Executive I and Executive II titles are contained within the unit recognized in Case No. S-UC-04-046 as modified by Case No. S-RC-11-006 and includes not only positions in those titles within the Drivers' Services Division, but also positions within those titles in the other departments.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

Jacalyn J. Zimmerman, Chairman

Paul S. Besson, Member

James Q. Brennwald, Member

Michael G. Coli, Member

Albert Washington, Member

Decision made at the State Panel's public meeting in Chicago, Illinois, on June 12, 2012; written decision issued at Chicago, Illinois, July 26, 2012.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Service Employees International Union, Local 73, CTW/CLC,	)	
Petitioner	)	
and	)	Case No. S-UC-12-034
Illinois Secretary of State,	)	
Employer	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On February 7, 2012, Service Employees International Union, Local 73, CTW/CLC (Union or SEIU), filed a unit clarification petition in Case No. S-UC-12-034 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). The Union seeks to include all Executive I and Executive IIs employed by the Illinois Secretary of State (Employer) that are not currently represented in the existing S-RC-11-006 bargaining unit, represented by the Union. On February 24, 2012, the Employer filed objections to the petition.[1] On February 28,

[1] In its objections, the Employer stated:

> [t]he Illinois Secretary of State objects to the unit clarification requested in the captioned petitioned for the reasons set forth in and based upon the evidence adduced at and briefs filed in ILRB Case No. S-RC-11-006, presently pending before the Appellate Court of Illinois for the Fourth District, Case No. 4-11-1075, which are attached hereto and incorporated herein by this reference. In addition, the Secretary of State questions whether a majority of the petitioned-for employees seek representation by the Petitioner SEIU Local 73.

Along with the letter, the Employer included the entire administrative record on appeal, which totaled nearly 5,000 pages of documents. On February 29, 2012, I sent an email to the Employer which stated:

2012, the Union filed a response. On March 7, 2012, the Employer submitted its clarified objections to the petition. On March 8, 2012, the Union filed a response to the clarified objections.

I. ISSUE AND CONTENTION

The issue to be resolved is whether the certification in Case No. S-RC-11-006 should be clarified to include the petitioned-for employees. The Union contends that the petitioned-for employees were inadvertently excluded from the certification in S-RC-11-006, which added all Executive I and Executive IIs employed by the Illinois Secretary of State in its Drivers' Services Department. The Union notes that the S-RC-11-006 petition sought to include *all* Executive I and Executive IIs not currently certified under S-UC-04-046 and S-UC-S-95-80, not just those working in the Drivers' Services Department. The Union asserts that an inadvertent error resulted in about 40 of the employees petitioned-for in Case No. S-RC-11-006 being improperly excluded from the unit.

The Employer argues that a unit clarification petition is inappropriate in this case. The Employer objects to the instant petition for the same reasons set forth in and based upon the evidence adduced at and briefs filed in Case No. S-RC-11-006; namely that the petition should be dismissed because the petitioned-for employees are supervisory and/or managerial employees within the meaning of the Act and cannot, as a matter of both fact and law, be included in any bargaining unit. The Employer also questions whether the Union holds majority status for the petitioned-for employees. In addition, the Employer contends that it has at least established

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I am not sure what briefs the Employer is referring to. I am also not sure what Employer objections the Union is referring to. Was there supposed to be a brief attached to the February 24, 2012 letter? I have two boxes worth of documents from the Employer. Could you please inform where the objections to the unit clarification are located?

grounds which require an oral hearing. Finally, the Employer asserts that the petition should be deferred pending disposition of S-RC-11-006, which is currently undergoing judicial review by the Illinois Appellate Court, Fourth District in Case No. 4-11-1075.

II. BACKGROUND

Petition in Case No. S-RC-11-006

On July 16, 2010, in Case No. S-RC-11-006, the Union filed an election petition seeking to represent "*All* Executive I and Executive II not currently certified under the Service Employees International Union Local 73 (S-UC-04-046) and under International Federation of Teachers Local 4408, Local 4051, Local 4407 (S-UC-S-95-80).[2] (emphasis added). On July 28, 2010, the Board converted the Union's election petition into a majority interest petition.

Hearing

On May 23, 2011, the Administrative Law Judge (ALJ) assigned to the case held a hearing. At hearing, the Employer argued that the petition and proceeding should be dismissed for want of jurisdiction because the Board did not conclude its hearing process or issue a certification within the 120-day deadline set forth in the Act. The Employer further argued that all of the petitioned-for employees were "supervisors" and some "managerial employees" as defined by the Act, and thus the petitioned-for unit was inappropriate.

In contrast, the Union argued that the Board did have jurisdiction. The Union further asserted that the Board must certify the petition *nunc pro tunc* to November 13, 2010 because of the passage of the 120-day deadline set forth in the Act. In addition, the Union asserted that the

[2] The Union had previously filed, on June 10, 2010, a majority interest petition in Case No. S-RC-10-042, seeking to represent "all Executive I and Executive II not currently certified under Service Employees International Union Local 73 (S-UC-04-046) and under International Federation of Teachers Local 4408, Local 4051, Local 4407 (S-UC-S-95-80)" The Union later withdrew its petition because it lacked the proper showing of interest.

Employer's managerial argument was waived before hearing. Finally, the Union argued that the petitioned-for employees were public employees as defined by the Act, the petitioned-for unit was appropriate, and accordingly, the petitioned-for unit should be certified.

ALJ's Recommended Decision and Order in Case No. S-RC-11-006

On August 1, 2011, the ALJ issued a Recommended Decision and Order (RDO), finding that the Board had jurisdiction, the Board would not issue certification *nunc pro tunc*, the Employer had not waived its managerial argument, the petitioned-for employees were not supervisors within the meaning of the Act, and the petitioned-for employees were not managerial employees within the meaning of the Act.

The ALJ's RDO noted that the parties had stipulated that the Union "seeks to add *all* full-time and part-time Executive Is and IIs employed by the Secretary of State to the existing bargaining unit in case number S-UC-04-046." (emphasis added). The ALJ also noted in her RDO that the Employer called a single witness: Gary Lazzerini, Director of Drivers' Services for the Metro Area. The Employer and the Union had stipulated at hearing that Lazzerini's testimony would be relevant for all of the employees at issue, not just those in the Drivers' Services Department. The ALJ noted in her RDO that Lazzerini's testimony lasted less than two hours, produced 24 pages of transcript, and did not identify any specific relevant parts of the Employer's documentary evidence. The ALJ also noted that Lazzerini mentioned no single employee by name, no single incident by date or occurrence, and referenced the documentary evidence only to confirm that all of the job descriptions were accurate. The Union called no witnesses in rebuttal.

In the "MATERIAL FACTS" section of the RDO, the ALJ stated that the employees at issue in the case were Executive Is and Executive IIs "who work in the *Drivers' Services*

Department of the Secretary of State." (emphasis added). The RDO only discussed the petitioned-for employees who worked in the Drivers' Services Department.

Finally, the "RECOMMENDED ORDER" stated that the Union "shall be certified as the exclusive representative of all the employees in the unit set forth below...INCLUDED: Petitioned-for Executive Is and IIs. EXCLUDED: All confidential, supervisory and managerial employees as defined by the Illinois Public Labor Relations Act."

The Employer filed timely exceptions to the RDO and the Union filed a timely response and cross-exceptions.

Decision and Order of the Board in Case No. S-RC-11-006

On October 24, 2011, the Board adopted the ALJ's recommendation, finding that the "Executive Is and IIs should be added to the collective bargaining unit previously recognized in Case No. S-UC-04-046." In its "Conclusion", the Board stated: "we find the Executive Is and Executive IIs employed at the Illinois Secretary of State's *Drivers' Services Department* . . . should be added to the collective bargaining unit previously recognized in Case No. S-UC-04-046." (emphasis added). In accordance, on November 1, 2011, the Executive Director issued a Certification of Representative. The certification stated: "the named labor organization is the exclusive representative of the following employees: all persons employed by the Illinois Secretary of State in its' *Drivers' Services Department* in the following titles: Executive I; Executive II." (emphasis added).

Appeal

On January 10, 2012, the Employer appealed the Board's decision to the Appellate Court for the Fourth District in Case No. 4-11-1075. The case is presently pending.

III. DISCUSSION AND ANALYSIS

Section 1210.170 of the Rules addresses unit clarification procedures:

> An exclusive representative or an employer may file a unit clarification petition to clarify or amend an existing bargaining unit when: 1) substantial changes occur in the duties and functions of an existing title, raising an issue as to the title's unit placement; 2) an existing job title that is logically encompassed within the existing unit was inadvertently excluded by the parties at the time the unit was established; and 3) a significant change takes place in statutory or case law that affects the bargaining rights of employees.[3]

The purpose of the unit clarification procedure is "not to change the scope of a bargaining unit, but to resolve unit composition questions which arise within the context of the parties' recognition agreement, the provisions of the Act or the unit described in a Board certification." City of Chicago, 9 PERI ¶3026 (IL LLRB 1993). A unit clarification petition is the appropriate method for adding positions to an existing bargaining unit if the exclusion from the unit at the time was unintentional or inadvertent. City of Chicago, Department of Purchasing, 1 PERI ¶3005 (IL LLRB 1985). The Board must ensure that "if the parties and the Board had been aware of the existence of the omitted position at the time of the initial representation proceeding and/or subsequent certification of the bargaining unit, that position would certainly have been included in the unit." Champaign County State's Attorney, 16 PERI ¶2024 (IL SLRB 2000) Finally, the unit clarification process does not require a showing of interest or an election. State of Illinois, Department of Central Management Services, 25 PERI ¶54 (IL LRB-SP 2009).

In this case, the Union argues that a unit clarification petition is appropriate because the Executive I and Executive II titles are logically encompassed within the existing unit but were

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[3] Courts have also approved the use of the unit clarification procedure in two other circumstances: when a newly created job classification has job functions similar to functions already covered in the bargaining unit, and where the employer asserts that the petitioned-for employees are statutorily excluded. City of Washington v. Illinois Labor Relations Board, 383 Ill. App. 3d 1112 (3rd Dist. 2008); State of Illinois, Department of Central Management Services v. Illinois Labor Relations Board, 364 Ill. App. 3d 1028 (4th Dist. 2006). Neither of these circumstances exists in this case.

inadvertently excluded from the certification. The Union contends that the RDO erroneously stated that the petitioned-for employees in Case No. S-RC-11-006 were all employed in the Drivers' Services Department. The Union contends that this error was inadvertent. The Union argues that due to this error, the Board then upheld the decision with the same error. The Union notes that no one caught the error until after the Employer had already appealed the decision to the Appellate Court.

The Union contends that the unit should be clarified to include the petitioned-for employees because the Employer has already stipulated that the employees in the instant petition were covered by the Union's prior petition in Case No. S-RC-11-006. The Union notes that the Employer stated in its post-hearing brief for Case No. S-RC-11-006 that it was stipulating that the Union "seeks to add *all remaining and unrepresented* full-time and part-time Executive Is and IIs employed by the Secretary of State to the existing bargaining unit as certified in Case No. S-UC-04-046." (emphasis added). The Union contends that further evidence that the petitioned-for employees were the subject of the petition in Case No. S-RC-11-006 is contained in Exhibit B to the Employer's Post-Hearing Brief for Case No. S-RC-11-006. The document was created by the Employer and submitted as evidence supporting the contention that all of the petitioned-for employees in Case No. S-RC-11-006 were either supervisory or managerial.[4] The document is entitled "Information Regarding Executive I and IIs" and lists not just those Executive I and IIs working in the Drivers' Services Department, but also those working in nine other departments.

[4] The document lists approximately 108 employees by name. It lists the employee's name, his or her title (Exec I or Exec II), whether he or she is a manager or assistant manager, his or her facility or work location, whether the work location is independent, and the number of subordinates supervised by the employee.

In addition, the Union argues that the Employer's argument regarding whether a majority of the petitioned-for employees seek representation by the Union should be disregarded because the Board's Rules do not require the petitioner to satisfy a showing of interest requirement for unit clarification procedures.

Moreover, the Union contends that a full hearing has already been held on whether the petitioned-for employees were supervisory or managerial, and, the Board has determined that they were instead public employees. The Union argues that to hold another hearing on the same employees, with the same evidence and same set of facts would be a waste of the Board's resources. Finally, the Union submits that it is aware that any final decision issued through the appeal process in Case No. S-RC-11-006 will also apply to the employees in the instant petition.

The Employer argues that the petition should be dismissed because the unit clarification procedure is not appropriate in this case because none of the five permitted circumstances are present. The Employer objects to the petition because it asserts that the petitioned-for employees are supervisory and/or managerial employees within the meaning of the Act and cannot, as a matter of both fact and law, be included in any bargaining unit.

The Employer also argues that because the petitioned-for employees' cards were signed and submitted on or about July 28, 2010, when the original election petition was amended to a majority interest petition, the signatures and cards are now 1 ½ years old, and therefore stale. Thus, the Employer argues that the signatures and cards cannot be considered as a basis for inclusion.

In addition, the Employer contends that it has at least established grounds which require an oral hearing. Finally, the Employer asserts that the petition should be deferred pending

disposition of Case No. S-RC-11-006, which is currently pending before the Appellate Court of Illinois for the Fourth District, Case No. 4-11-1075.

I find that the certification in Case No. S-RC-11-006 should be clarified to include the petitioned-for employees. To begin with, I find that a unit clarification petition is appropriate in this case. It is appropriate because the existing job titles, Executive I and Executive II, are logically encompassed within the S-RC-11-006 unit, and they were inadvertently excluded from the certification. Indeed, the petitioned-for employees were in fact included in the petition for Case No. S-RC-11-006. The petition stated that the Union sought to represent, "*All* Executive I and Executive II." (emphasis added). The petition was not limited to those employees working in the Drivers' Services Department. In addition, the parties stipulated at hearing that the Union "seeks to add *all* full-time and part-time Executive Is and IIs employed by the Secretary of State." (emphasis added). The stipulation was not limited to those employees working in the Drivers' Services Department. Moreover, the Employer noted in its post-hearing brief for Case No. S-RC-11-006 that it was stipulating that the Union "seeks to add *all remaining and unrepresented* full-time and part-time Executive Is and IIs employed by the Secretary of State to the existing bargaining unit as certified in Case No. S-UC-04-046." (emphasis added). Also, the document submitted with the Employer's post-hearing brief as evidence of the employees' supervisory and/or managerial status, entitled "Information Regarding Executive I and IIs", includes Executive I and IIs working in other departments besides the Drivers' Services Department. The document listed Executive I and IIs working in the Drivers' Services Department; Administrative Hearings—Hearings/Central Operations; Administrative Hearings—Hearings/Northern Operations; Administrative Hearings—Chicago Operations; Library, Library Development, Literacy; Business Services, Chicago Operations, Corporations; Police, Fleet

Maintenance; Index, Notary Public; Administrative Hearings—Springfield Support Services; and Index, Administrative Code. Moreover, the ALJ's Recommended Order stated that the unit included "Petitioned-for Executive Is and IIs", and did not limit the inclusion to those working in the Drivers' Services Department.

It should be noted that the Employer does not contest the fact that (1) the S-RC-11-006 petition sought to include the petitioned-for employees; (2) the Employer stipulated at hearing and noted in its post-hearing brief that the Union was seeking to add all full-time and part-time Executive I and IIs, not just those in the Drivers' Services Department; (3) the Employer stipulated at hearing that the single witness' testimony would be relevant for all of the employees at issue; (4) the Employer submitted "Information Regarding Executive I and IIs" as evidence of the petitioned-for employees supervisory and/or managerial status; and (5) the ALJ's Order included the petitioned-for employees. Further, the Employer has not denied that the omission of the titles from the S-RC-11-006 certification was inadvertent.

The purpose of the unit clarification procedures would be effectuated in this case because the petition does not seek to change the scope of the S-RC-11-006 bargaining unit. Rather, the unit clarification petition seeks to resolve a unit composition question which arose within the unit described in the S-RC-11-006 certification. The exclusion of the petitioned-for employees was unintentional and inadvertent. The omitted Executive I and Executive II titles would have certainly been included in the unit had the parties and the Board been aware of the existence of the omitted positions at the time of the certification of the unit. The S-RC-11-006 petition expressly stated that it sought to include the petitioned-for employees, the parties stipulated at hearing and the Employer noted in its post-hearing brief that the Union sought to include the petitioned-for employees, the Employer included the petitioned-for employees in a document

submitted as evidence in Case No. S-RC-11-006, and the ALJ's recommended order included the petitioned-for employees.

In addition, as the Union notes, a hearing has already been held on whether the petitioned-for employees are supervisory and/or managerial. Although the Board conducts a neutral, fact-finding hearing to ascertain the disputed status of employees, the party claiming that an employee is statutorily excluded, and not the Board, "has the responsibility for establishing such exclusion" in terms of producing evidence on the record. Chief Judge of the Circuit Court of Cook County, 18 PERI ¶ 2016 (IL LRB-SP 2002), citing Quadcom Public Safety Communications Systems, 12 PERI ¶ 2017 (IL SLRB 1996), aff ' d by unpub. order, 13 PERI ¶ 4011 (1997); Chicago Transit Authority, 17 PERI ¶ 3003 (IL LRB-LP 2000). Here, the ALJ found that the Employer had failed to provide sufficient evidence of the petitioned-for employees' supervisory and/or managerial status. The Employer has already been afforded its opportunity to dispute the status of the petitioned-for employees at hearing and thus, the Employer has no right to another hearing or "bite at the apple."

In addition, as the Union notes, the unit clarification process does not require a showing of interest. The Board's Rules on Unit Clarification Procedures, Section 1210.170, and the Rules on Showing of Interest, Section 1210.80, do not set forth a requirement that the petitioner satisfy a showing of interest for unit clarification petitions. Thus, the Employer's argument regarding whether the Union holds a majority status for the petitioned-for employees must be disregarded.

Finally, the Union has stated it is aware that any final decision issued through the appeal process in Case No. S-RC-11-006 would apply to the petitioned-for employees. Thus, there is no need to defer the petition pending disposition of Case No. 4-11-1075 before the Appellate Court

of Illinois for the Fourth District. To do so would prolong the present matter even further and constitute a waste of the Board's resources.

V. CONCLUSION OF LAW

I find that the petitioned-for employees were inadvertently excluded from the Certification of Representative in Case No. S-RC-11-006.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the SEIU Local, 73 unit certified in Case No. S-RC-11-006, be clarified to include the petitioned-for employees.

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 Board's General Counsel 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 17th day of April, 2012.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Michelle N. Owen
Administrative Law Judge