

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

Illinois Office of the Comptroller,)	
)	
Petitioner)	
)	
and)	Case No. S-UC-13-044
)	
International Union of Operating Engineers)	
Local No. 965,)	
)	
Labor Organization)	

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

On November 22, 2013, Administrative Law Judge (ALJ) Martin Kehoe issued a Recommended Decision and Order (RDO) in which he determined that the unit clarification petition filed by the Illinois Office of the Comptroller (Petitioner) was appropriate. Accordingly, the ALJ determined that pursuant to Section 3(n) of the Illinois Public Labor Relations Act, 5 ILCS 315, (Act), the Public Service Administrators (PSAs) employed by the Petitioner should be excluded from any existing bargaining units. The PSAs have been represented by the International Union of Operating Engineers, Local No. 965 (Union). The ALJ recommended that the Board reject the Union’s arguments in opposition to the petition.

Pursuant to Section 1200.135(b) of the Board’s Rules and Regulations, 80 Ill. Adm. Code §1200.135(b), both the Petitioner and Union filed timely exceptions to the RDO. The Petitioner filed a response to the Union’s exceptions.

For the reasons that follow, we affirm the ALJ’s conclusion that the unit clarification petition is appropriate and that the subject PSAs should be excluded from the existing bargaining units in which they were certified in Case Nos. S-UC-(S)-12-016 and S-UC-(S)-11-022,¹ as they are no longer public employees under the Act.

¹ The RDO contains a scrivener’s error when it identified the prior unit clarification petition in which the Comptroller’s PSAs were certified as Case No. S-UC-(S)-12-022.

I. Background

On April 5, 2013, the Governor signed into law Public Act 97-1172 , which amended the Illinois Public Labor Relations Act, 5 ILCS 315 (Act). The amendment included a change to the definition of public employee to exclude “a person who is a State employee under the jurisdiction of the Office of the Comptroller who holds the position of Public Service Administrator or whose position is otherwise exempt under the Comptroller Merit Employment Code.”

On May 13, 2013, the Petitioner filed a unit clarification petition in Case No. S-UC-13-044, seeking to exclude all PSAs it employs from existing bargaining units represented by the Union in which they were certified in Case Nos. S-UC-(S)-12-016 and S-UC-(S)-12-022. The Petitioner contended that the amendment to the Act was “self-effectuating” such that as of April 5, 2013, the PSAs were no longer included in the bargaining units. In the alternative, the Petitioner argued that the PSAs should be excluded based on a significant change in statutory law and that the Petitioner did not and could not agree to include the PSAs in the bargaining units after the effective date of the amendment.

On June 7, 2013, the Union responded to the petition by filing a pleading entitled “Labor Organization’s Request to Intervene and Motion to Stay ‘Corrected’ Unit Clarification Petition or in the alternative Request for Formal Hearing.” The Union argued, among other things, that the Board lacked jurisdiction to hear the unit clarification petition, the unit clarification petition sought to retroactively apply the amendment to the Act to remove the PSAs from the bargaining unit, and the PSAs could not be removed from the bargaining units until June 30, 2015, the expiration of the collective bargaining agreements covering the subject PSAs.

In his RDO of November 22, 2013, the ALJ specifically recommended finding the following: the Board had jurisdiction to hear the unit clarification petition; the amendment is not self-effectuating; a change in law occurred such that a unit clarification petition is appropriate; as of April 5, 2013, the Comptroller’s PSAs are not public employees; and contract interpretation issues are not properly before the Board in this proceeding.

The parties both filed exceptions and the Union sought leave to orally argue the matter. The Board granted the Union’s request, and the parties gave oral argument at the Board’s

February 11, 2014, meeting. Following the oral argument, the Board voted to consider the case at its March 11, 2014, meeting.

II. Discussion and Analysis

We find that the ALJ correctly held that the unit clarification petition was properly before the Board and should be granted.

As an initial matter, it is long-settled that representation issues, including issues related to the composition of an existing bargaining unit, are matters for the Board. 5 ILCS 315/9(a-6); *see also* Treasurer of Ill. v. American Fed. of State, Cty. and Munic. Employees, 30 PERI ¶53 (ILRB-SP 2013) (describing the five recognized situations where a unit clarification is appropriate). The Board's Rules provide for a mechanism whereby the composition of an existing bargaining unit can be altered as a result of a significant change in statutory or case law. 80 Ill. Adm. Code §1210.170; Treasurer, 30 PERI ¶53. The ALJ correctly determined that the unit clarification process outlined in the Rules is the appropriate means under the Act by which to remove the subject PSAs from the existing bargaining units, and that the April 5, 2013, amendment to the Act excluding the Petitioner's PSAs was not self-effectuating.

The Union argues that Petitioner is asking the Board to improperly apply the amendment to the Act retroactively to "gut" the parties' existing collective bargaining agreements, which is effective from July 1, 2012, through June 30, 2015, as it relates to the Petitioner's PSAs. We reject this argument. The issue before us is not one of retroactive application at all. Instead, the Petitioner is seeking the prospective application of the amendment to alter the composition of the bargaining units into the future based on a change in the law that occurred after the collective bargaining agreements were executed. As such, we need not address the Union's application of the Supreme Court's decision in Landgraf v. USI Film Products, 511 U.S. 244 (1994), the Illinois Supreme Court's adoption of Landgraf in Commonwealth Edison Co. v. Will Cty. Collector, 196 Ill. 2d 27 (2001), and the Board's application of Landgraf in Bd. of Trs. of the Univ. of Ill. at Chicago, 20 PERI ¶ 87 (2004), to determine whether the legislature clearly articulated the intended temporal reach of the amendment to the Act.

Relying on its belief that the Petitioner was seeking the improper retroactive application of the amendment, the Union argued that the Board lacked jurisdiction to rule on the present unit clarification petition. Because we find that the petition seeks only to apply the amendment prospectively, we reject this exception.

At oral argument, the Union acknowledged that the PSAs were no longer covered under the Act, but argued that they could only be excluded following the expiration of the current collective bargaining agreements covering the PSAs. Under both Board and Illinois Appellate Court precedent, it is well-established that the Board has the authority to remove from an existing bargaining unit, pursuant to the unit clarification petition mechanism, positions that are not covered under the Act. *See, e.g., City of Washington and Policemen's Benevolent Labor Comm.*, 27 PERI 3 (ILRB-SP 2011); *State of Ill., Dep't of Cent. Mgmt. Servs. v. Ill. Labor Relations Bd.*, 22 PERI 54, 364 Ill. App. 3d 1028 (4th Dist. 2006); *Treasurer of the State of Ill. and AFSCME Council 31*, 30 PERI 53 (ILRB-SP 2013). Given that the April 5, 2013, amendment of the Act manifestly constitutes "a significant change . . . in statutory or case law that affects the bargaining rights" of the subject PSAs, the unit clarification petition is clearly appropriate under the express terms of Section 1210.170(a)(3) of the Board's Rules. We find nothing in the Act, the Board's Rules, or applicable case law to support the Union's contention that the existence of a collective bargaining agreement precludes the removal of a covered position for the life of the agreement, where the position is expressly excluded from the coverage of the Act.

We further reject the Union's argument that the Petitioner may have violated the existing collective bargaining agreements. While an employer's failure to process grievances or failure to abide by the terms of a collective bargaining agreement while a unit clarification petition is pending could form the basis for an unfair labor practice charge, those issues are not presently before the Board. Therefore, we decline to address these allegations.

The Petitioner excepted to the RDO to the extent that the ALJ recommended that representation issues could raise an arbitral issue. We understand the RDO to recommend that potential contract violations, not representation matters, could raise an issue appropriate for an arbitrator. Therefore, we reject the Petitioner's exception.

Finally, we reject the remaining Union exceptions, as they are inconsistent with our ruling articulated above.

In sum, we affirm ALJ Kehoe's conclusion that the unit clarification petition is appropriate and that the PSAs should be excluded from existing bargaining units, as they are no longer public employees under the Act. Such exclusion shall be effective as of the date of the Executive Director's certification. The unit clarification petition is granted and the Executive

Director is directed to issue a certification excluding the subject PSAs employed by the Illinois Office of the Comptroller from the existing bargaining units in which they were certified in Case Nos. S-UC-(S)-12-016 and S-UC-(S)-11-022.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

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

/s/ Paul S. Besson
Paul S. Besson, Member

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

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

/s/ Albert Washington
Albert Washington, Member

Decision made at the State Panel's public meeting in Chicago, Illinois, on March 11, 2014; written decision issued at Springfield, Illinois, April 8, 2014.

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ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On May 13, 2013, the Illinois Office of the Comptroller (Petitioner) filed a unit clarification petition in Case No. S-UC-13-044 with the State Panel of the Illinois Labor Relations Board (Board) pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315 (2012) as amended (Act), and the Rules and Regulations of the Board, 80 Ill. Admin. Code, Parts 1200 through 1240 (Rules). The Petitioner seeks to exclude all Public Service Administrators (PSAs) it employs from the bargaining units originally certified in Case Nos. S-UC-(S)-12-016 and S-UC-(S)-12-022. Those PSAs have been represented by the International Union of Operating Engineers Local No. 965 (Union), which responded to the instant petition on June 7, 2013.¹ The Petitioner responded to the Union’s filing on June 14, 2013. After full consideration of all aspects of the controversy, I recommend the following.

¹ The Union asks the Board for “intervenor status.” Because I already consider the Union to be a regular party, I suggest that it is unnecessary to grant that particular request.

I. ISSUES AND CONTENTIONS

The Act grants “public employees” a variety of rights. Section 3(n) of the Act defines who those public employees are. That definition was amended to exclude all PSAs under the jurisdiction of the Petitioner. The amendment became effective on April 5, 2013. The petition at issue was filed in response to the amendment.

The Petitioner contends (1) that the Board should clarify that the exclusion of the PSAs was “self-effecting;” (2) that, “alternatively and without concession,” the PSAs should be excluded based on a significant change in statutory law; and (3) that the Petitioner did not and could not agree to include the PSAs in the bargaining unit subsequent to the effective date of the amendment. The Union disputes the Petitioner’s contentions and asks for either (1) a temporary stay of the instant petition or (2) a formal hearing. The Petitioner urges the Board to deny the Union’s request.

II. DISCUSSION AND ANALYSIS

The Petitioner’s Contentions

As indicated, the Petitioner initially contends that the amendment at issue was “self-effecting.” In support of that contention, the Petitioner notes that, when the legislature excluded the Petitioner’s PSAs, the legislature “also amended the Act to exclude, or changed the definition allowing for exclusion of, other employees” and, in those instances, “the legislature required that a petition for unit clarification be pending either at the time or on or after the effective date of the legislation in order for the employees to be excluded from the Act.” Purportedly, the legislature did not include language requiring a petition when it excluded the Petitioner’s PSAs from the Act’s definition of public employee. The Petitioner further notes that the legislature also

amended Section 6(a) of the Act by adding the phrase “and employees excluded from the definition of ‘public employee’ under subsection (n) of Section 3 of [the] Act.” Thus, according to the Petitioner, as of April 5, 2013 (the effective date of the amendment), the Petitioner’s PSAs no longer enjoyed the rights guaranteed by the Act “as a matter of law.”

In sum, the Petitioner seems to contend that its PSAs are excluded without a unit clarification petition being filed. To the extent that it must be addressed, I would reject that contention. On one hand, I would grant that, presently, the Act unambiguously declares that, as of the effective date of the amendment, the Petitioner’s PSAs are not public employees. However, the same part of Section 3(n) similarly excludes others such as managerial, confidential, and supervisory employees. Traditionally, the Board has required parties who seek to enforce such exclusions to do so via petitions. Moreover, the Board has consistently held that parties that seek to exclude individuals from a bargaining unit maintain the burden of proving that statutory exclusion. Stephenson County Circuit Court, 25 PERI ¶92 (IL LRB-SP 2009); City of Washington, 23 PERI ¶101 (IL LRB-SP 2007). I would apply those principles in this instance as well.

The Act and the Rules provide a reliable vehicle for enforcing and finalizing the statutory exclusion at issue. Section 9(a-6) of the Act states that an employer may file a unit clarification petition to clarify an existing bargaining unit. In relevant part, Section 1210.170 of the Rules clarifies that an employer may file such a petition when a significant change takes place in statutory or case law that affects the bargaining rights of employees. That sort of change has occurred and, accordingly, the Petitioner has appropriately filed a unit clarification petition. That petition provides the Board an opportunity to “officially” recognize that the Petitioner’s PSAs are now excluded from the Act’s definition of public employee. See State of Illinois,

Department of Central Management Services v. Illinois Labor Relations Board, State Panel, 364 Ill. App. 3d 1028, 1032, 848 N.E.2d 118, 121 (4th Dist. 2006). I recommend that the Board do so and grant the Petitioner's second contention.

While presenting its third contention, the Petitioner argues that Section 3(s)(2) applies only to supervisors and is inapplicable to its PSAs and the instant petition.² It appears to do so because of a position taken by the Union in an April 26, 2013 grievance letter. In that letter, the Union commented that Section 3(s)(2) of the Act permits non-public employees to be encompassed by the Act with the express permission of the employer. It then suggested that the Petitioner gave that sort of permission when it entered into a collective bargaining agreement (CBA) that covered the PSAs.

I find that the Union's June 7, 2013 filing did not formally present the Union's Section 3(s)(2) argument to the Board. Therefore, I see no clear need to rule on the Petitioner's third contention. However, to the extent that the Board finds that there is such a need, I would generally agree with the Petitioner's position, as the Petitioner's PSAs are so clearly excluded by statute and have not been shown to be supervisors. See State of Illinois, Department of Central Management Services, 30 PERI ¶80 (IL LRB-SP 2013); County of Bureau and Bureau County Sheriff, 29 PERI ¶163 (IL LRB-SP 2013); Village of Lisle, 23 PERI ¶111 (IL LRB-SP 2007). If necessary, I would also suggest that public employers generally do not have the authority to place statutorily excluded, non-public employees in bargaining units. See State of Illinois, Department of Central Management Services, 364 Ill. App. 3d at 1035, 848 N.E.2d at 124.

² Section 3(s)(2) of the Act states that a public employer may agree to permit its supervisory employees to form bargaining units and may bargain with those units.

The Union's Contentions

In its filing, the Union notes that the parties have completed two CBAs. It also notes that, on April 26, 2013, it filed grievances on behalf of the Petitioner's PSAs. Those grievances sought to have an arbitrator determine whether the two CBAs are enforceable despite the amendment at issue. Evidently, in a May 9, 2013 letter to the Union, the Petitioner indicated that, because of the amendment, it need not participate in the grievance process. The Union subsequently filed two petitions with the Illinois Circuit Court. Those petitions seek to compel the Petitioner to process the Union's grievances.

Here, the Union contends that the decisions that will come from its petitions will "trump" and "overrule" any Board decision, thereby "prospectively binding" the Board as to the appropriate interpretation of the amendment. According to the Union, the instant petition should therefore be stayed until the Circuit Court is "allowed to rule." I would deny the Union's stay request, as I see no reason to delay the handling of this case which presents, at its core, a representation issue. Representation issues are matters for the Board. See Tweedle Litho, Inc., 337 NLRB 686 (2002); Marion Power Shovel Company, Inc., 230 NLRB 576, 577 (1977); The R.W. Page Corporation, 219 NLRB 268, 270 (1975).

As indicated, the Union has also requested a formal hearing. Generally speaking, a unit clarification petition will be set for hearing under two circumstances: (1) where there are unresolved issues of fact or (2) where issues of representation are evident. See Board of Education of Unit District #5, 1 PERI ¶1133 (IL ELRB ALJ 1985). The facts of this case are not in dispute. (For example, there is no doubt that the employees at issue are in fact PSAs.) Indeed, the Union's filing essentially concedes that the instant petition presents a "purely legal issue."

Moreover, there is no clear “issue of representation” in the ordinary sense. Accordingly, I see no need to conduct a hearing.

In addition to its central request, the Union argues that the amendment does not affect and is not applicable to CBAs signed and enforceable prior to the amendment of the Act. That argument, however, fairly clearly raises an issue that must be solved by an arbitrator, not by the Board. See International Brotherhood of Electrical Workers, Local 193 v. City of Springfield, 2011 IL App (4th) 100905, ¶17, 959 N.E.2d 687, 690. Generally, the determination of representation issues does not depend on contract interpretation. See Tweedle Litho, Inc., 337 NLRB at 686.

The Union also asserts that the Petitioner’s refusal to process the Union’s grievances is an unfair labor practice. However, the instant case emanates from a unit clarification petition and, accordingly, does not strictly address that sort of issue. If the Union believes an unfair labor practice has been committed, it should file an unfair labor practice charge with the Board.

III. CONCLUSIONS OF LAW

I find that, as of April 5, 2013, the PSAs employed by the Petitioner are not public employees as defined by the Act.

IV. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the PSAs employed by the Petitioner be excluded from the bargaining units originally certified in Case Nos. S-UC-(S)-12-016 and S-UC-(S)-12-022.

V. 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 that statement. If no exceptions have been filed within the 14-day period, the parties will be deemed to have waived their exceptions.

Issued in Chicago, Illinois this 22nd day of November 2013.

**STATE OF ILLINOIS
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STATE PANEL**



**Martin Kehoe
Administrative Law Judge**