

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

Service Employees International	)	
Union, Local 73, CLC-CTW,	)	
	)	
Petitioner	)	
and	)	Case No. L-RC-11-006
	)	
City of Chicago,	)	
	)	
Employer	)	

**ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND  
ORDER**

On or about October 27, 2010, the Service Employees International Union, Local 73, CLC-CTW (Petitioner or Local 73) filed a majority interest Representation/Certification Petition with the Illinois Labor Relations Board, Local Panel (Board) pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315 (2010) (Act) and the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Adm. Code, Sections 1200 through 1240 (Rules), seeking to represent in a new, stand-alone bargaining unit composed of the “supervising investigators” of the Independent Police Review Authority of the City of Chicago (Employer or City-Authority). There are approximately 11 such employees. The Employer objected to the supervising investigators being represented for purposes of collective bargaining, contending that they were supervisory and/or managerial employees within the meaning of the Act. Upon a review of the Employer’s position statement, I determined that issues were raised warranting hearing regarding those employees. Additionally, shortly before the instant

Hearing in the case, I allowed the Employer to raise a new issue, over objection, namely that even if the supervising investigators were determined to be public employees within the meaning of the Act, they could not be represented in a separate, stand-alone unit because such a unit would be inappropriate as undue fragmentation or proliferation of bargaining units.

Therefore, a hearing was held on January 12, 2011, in Chicago, Illinois, at which time all parties appeared and were given a full opportunity to participate, adduce relevant evidence, examine witnesses, argue orally and file written briefs. After full consideration of the parties' stipulations, evidence, arguments and briefs,<sup>1</sup> and upon the entire record of the case, I recommend the following.

#### **I. PRELIMINARY FINDINGS**

The parties stipulate, and I find, that:

1. The Employer, the City of Chicago, is a public employer within the meaning of Section 3(o) of the Act.
2. The Employer is subject to the jurisdiction of the Board's Local Panel pursuant to Section 5(b) and 20(b) of the Act.
3. The Petitioner, Service Employees International Union, Local 73, CLC-CTW, is a labor organization within the meaning of Section 3(i) of the Act.

#### **II. ISSUES AND CONTENTIONS**

As previously noted, the Employer objects to the Petition on the basis that the supervising investigators are either supervisory or managerial employees under the

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<sup>1</sup> Subsequent to the Hearing I allowed, upon motion, an extension of the Briefing period. Additionally, upon my determination that I had not been clear at the hearing regarding the matter, I permitted reply briefing notwithstanding Petitioner's objections. Upon a review of the record and the case as a whole, I have not discerned how Petitioner's interests were prejudiced by such rulings, other than by any consequent delay in issuing this Decision.

Act, and, hence, cannot be represented. Additionally, in a conference before the instant hearing, the Employer raised a new objection that if the supervising investigators were public employees and, therefore, could be represented for purposes of collective bargaining, the separate bargaining unit herein sought would be inappropriate fragmentation of the work force and proliferation of bargaining units.

The Petitioner contends that the Employer has not met its burden of proof requisite to establish that the supervising employees are supervisory or managerial employees within the meaning of the Act. In addition, it objected at the hearing (and continues to object) to my ruling that the Employer could raise after its Position Statement filed in this case the new issue of whether a stand-alone bargaining unit is inappropriate. I set this matter out here so as to afford Petitioner an opportunity to file exceptions more easily as to that ruling. However, I remain satisfied that under the Rules at Section 1210.100(b), the Employer could raise and change its position in this manner regarding the appropriateness of the unit.<sup>2</sup>

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<sup>2</sup> Section 1210.100(b) provides in relevant part:

- 3) All employers served with a majority interest petition shall file a written response to the petition within 14 days after service of the petition. The response filed shall set forth the party's position with respect to the matters asserted in the petition, including, but not limited to, the appropriateness of the bargaining unit and, to the extent known, whether any employees sought by petitioner to be included should be excluded from the unit. The employer must also provide at this time clear and convincing evidence of any alleged fraud or coercion in obtaining majority support. If a party agrees to the appropriateness of the unit proposed in the petition, it shall so indicate. If a party disagrees with the unit proposed in the petition, it shall describe with particularity what it considers to be an appropriate unit, and shall include a description of the job titles and classifications of the employees to be included and of those to be excluded. The Board's agent shall grant reasonable requests for extensions of time to prepare a position statement based upon the size or scope of the petitioned for unit.

### III. FINDINGS OF FACT<sup>3</sup>

In September 2007, the Employer created the Independent Police Review Authority (IPRA) as an independent department.<sup>4</sup> Its function is to receive all allegations of misconduct made against Chicago Police Department (CPD) members (officers). The charges are received regardless of source, some of which are retained for investigation. For example, IPRA investigates allegations that officers used excessive force, initiated violence, coerced through threats of violence, or engaged in domestic violence. The IPRA investigates as well allegations of verbal abuse which reflects prohibited bias, such as racial epithets. Finally, even where no allegation of misconduct occurs, IPRA automatically investigates some incidents. Thus, for example, IPRA investigates all incidents where officers discharge a fire arm or use a Taser in the line of duty where bodily harm to individuals could occur.<sup>5</sup> Similarly, IPRA also investigates, regardless of whether an allegation of misconduct is made, so-called "extraordinary occurrences in police custody" such as serious injuries, death or attempted suicide of persons held in

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- 4) The setting forth of a party's position with respect to the appropriate unit shall not be deemed to waive or otherwise preclude the right of that party to subsequently assert a different position with respect to what unit it considers appropriate.

<sup>3</sup> Due to the nature of the work of the supervising investigators, the parties have agreed that copies of various exhibits would be redacted. The parties also agreed that the Petitioner would not use the exhibits outside of this proceeding. Both parties understood that under the Illinois Freedom of Information Act, the Board may be legally compelled to release information. Upon a foundation being laid, the Petitioner did not object to the Employer's 61 exhibits.

<sup>4</sup> Some of the Authority's work originally fell within the jurisdiction of the Chicago Police Department's Office of Professional Standards (OPS). Hence, some of the standard operating procedures and policies still in effect are OPS procedures and policies. I note that the Authority's in-take employees continue to receive Internal Affairs complaints that are then transferred to the CPD for its own investigation and processing.

<sup>5</sup> The transcript refers to "tazer". I believe it is common knowledge that a Taser is a device that uses electroshocks to disrupt one's control of muscles. Tasers are made by Taser International.

custody. The IPRA thus in some manner is involved in some 2,500-2,900 cases annually, approximately 2,000 of which involve alleged police misconduct.

To receive such allegations and conduct such investigations, the Authority employed approximately 90 employees at the time of the hearing.<sup>6</sup> The Authority employs one or two retired police officers, but the supervising investigators here at issue and their subordinate investigators are not, as rule, otherwise peace officers. "Line" employees are basically divided into two types of teams: intake teams (sometimes termed rapid intake teams) who initially receive allegations of misconduct and then investigating teams. It is clear that, over time, the distinction between intake and investigating teams has become somewhat blurred; as I will detail later, intake teams are now expected to, at least as in some cases, secure some forms of evidence as rapidly as possible. The intake teams have employees in the positions of intake aides and some investigators. Investigation teams are composed of investigators.

IPRA has three levels of investigators: IPRA Investigator III, Investigator II and Investigator I. The levels correspond to skill and experience. The Investigator I position is an entry-level investigative position, although new hires sometimes are placed at an Investigator II or Investigator III level if they have had years of investigative experience elsewhere. Investigator I employees are employees at a level of mastering simple investigations and learning skills and, as well, of obtaining practice on some harder investigations. Investigator II employees are "in the middle" of the workforce in terms of skills and experience. Thus, Investigator IIIs are expected to handle the most complex investigations as well as provide guidance and input to co-workers in the Investigator II

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<sup>6</sup> In addition, there were approximately seven vacant positions, resulting in 97 budgeted positions.

and Investigator I positions within their respective teams and, also, as a “resource to the office”.

Each investigative team, then, is headed by a supervising investigator. The supervising investigators assure that the Authority’s mission is fulfilled not by personally doing investigations themselves, but by making sure investigations are conducted: they assign investigations to investigators on their teams, do “case management” with the individual investigators in which they direct them on how to conduct the investigations, and then review the investigations finished and submitted as to whether the investigations are truly completed. Supervising investigators do not assign themselves investigations to perform.<sup>7</sup>

In addition to these supervising investigators who oversee teams, there is one additional supervising investigator. That supervising investigator oversees the office support staff. That support staff includes four clerical employees. Those clerical employees write letters regarding investigations, scan and upload documents regarding investigations onto computers, and staff the Authority’s reception desk. Additionally, that particular supervising investigator oversees three other clerks who staff a file room; those file room clerks among other responsibilities assure that completed investigations are properly submitted to the Chicago Police Department (CPD) for review there. The support staff supervising investigator likewise oversees a transcriptionist, who transcribes audio-recorded interviews, and, also, an evidence /property custodian.

In organizational terms, above the supervising investigators are a “coordinator” of investigations who oversee the supervising investigators on an office-wide basis and, as

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<sup>7</sup> Some supervising investigators, upon promotion to that position, retain the cases they had been assigned previously as investigators and complete them.

well, two deputy chief administrators. Above the coordinator and deputy chiefs is the Chief Administrator of the Authority.<sup>8</sup>

#### Assignment of Work

There may be four to six investigators to a team. Each team may thus, in total, have on average some 200 to 250 ongoing investigations at any one time. However, one supervising investigator and her team had some 350 ongoing cases at the time of the hearing, with her most recently hired investigators having perhaps 40 cases each and her more experienced investigators having as many as 73 cases.

At the time of the hearing, Investigator Coordinator Duffy, who was very experienced in investigations, examined cases as initiated by in-take, and then assigned them to the various teams by sending the cases to the corresponding supervising investigators. Normally, supervising investigators will in turn assign the particular cases to particular investigators on their team.<sup>9</sup> The basis for how supervising investigators assign cases to investigators on their teams has been variously described. However, no description is simple, and each description offered in evidence indicates that supervising investigators have both discretion and some shrewd thought processes to complete when assigning cases. For example, one supervising investigator testified he did such assignments by rotation, but then immediately and without hesitation testified that he also considered the individual investigators' respective workloads including whether their respective workloads were largely composed of more or less complex investigations,

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<sup>8</sup> Other staff not in the direct chain of command here considered include a General Counsel, a director of public affairs, an assistant commissioner who oversees administrative and financial matters, and a staff assistant to the Chief Administrator.

<sup>9</sup> However, on infrequent occasions Duffy has directed at least one investigating supervisor that particular cases should be assigned to particular individual investigators.

whether the individual investigators already had “media” cases (*i.e.*, cases receiving media attention, which complicates investigation) among their assigned cases, and, finally, their respective levels of experience, besides the nature of the case to be assigned. That testimony from a supervising investigator tracks fairly well with that of the Chief Administrator, who testified that supervising investigators, when assigning cases to individual investigators on his or her team, consider factors of workload balance, the types of cases and the skill levels (skill sets) of investigators, along with the complexities of cases and whether particular cases will develop particular needed skills on the part of particular investigators.<sup>10</sup>

#### *Review and monitoring of work*

Generally speaking, a supervising investigator is responsible for ensuring that everything necessary for a thorough investigation is done by the investigator assigned the particular case. A supervising investigator performs that function not by performing investigations himself, but by monitoring investigations as they progress, reading

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<sup>10</sup> In this as in other aspects of her testimony, the Chief Administrator basically testified about what she “knew” in terms of what supervising investigators and their superiors had, over time, told her they did. Such testimony was admitted without objection into the record and, of course, represents the knowledge on which the Chief Administrator bases her own day to day oversight of the Authority. I therefore deem her testimony generally reliable, credible evidence, despite its hearsay nature. I note in that regard that as to this particular point, namely the basis on which supervising investigators assign cases to individual investigators, her testimony was later corroborated during the hearing by a witness called by the Petitioner. That strengthens my confidence in her testimony generally. In any event, I deem Petitioner to have waived any general hearsay objection to her testimony, although Petitioner is certainly free to urge that the nature of her knowledge should affect the weight given her testimony on specific points.

While the particular supervising investigator may attempt to determine the capabilities of the investigators, I note that the supervising investigator is not seen as responsible for the formal training of the investigators. Such training-needs are determined by coordinators.

interview reports and reviewing final case reports.<sup>11</sup> In theory any investigator has a huge number of possible ways and means of investigating any particular case, but not all possible means of investigation are undertaken as to each case. Therefore, a part of the supervising investigator's duty is review submitted investigation reports and monitor on-going investigations to determine if in a given investigation, the investigator has chosen the best means to investigate the allegations filed in a way appropriate to the particular case.

Monitoring and reviewing investigations can be understood only within the context of some background information regarding individual investigations. In monitoring an investigation's progress, one key point in any case is whether a personal affidavit from a witness can be obtained or, if not, some adequate substitute. Approximately 50% of investigations are closed because there is no specific evidence by affidavit or tape of what occurred. Thus, for example, a complaint of police brutality will be closed unless someone will sign an affidavit of what he or she witnessed or experienced or, else, a videotape or other satisfactory substitute evidence is obtained. The supervising investigator decides whether enough has been attempted to secure such an affidavit or other equivalent evidence. When an investigator wants to close a case because such evidence is not present, the supervising investigator may, for example, determine that potential witnesses need to be contacted and interviewed as to whether

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<sup>11</sup> I have already remarked that supervising investigators are not assigned investigations. On very infrequent occasions they might assist an investigator who is having difficulties completing an investigation by, say, directly obtaining a document. Additionally, from time to time a supervising investigator will "shadow" (accompany) an investigator in the field work to observe the investigator's performance. When accompanying the investigator, the supervising investigator will "help". However, providing assistance in that regard is not part of their job function. Less than 1% of their work time is spent assisting investigators who are having difficulties, and supervising investigators very rarely shadow.

they would sign an affidavit or that the possibility of some videotaping camera must be ruled out, before the case is closed. If the supervising investigator decides that enough unavailing effort has been put forth by the investigator to find such evidence, he can then determine to close the investigation. Decisions by the supervising investigator that an investigation should be closed because the necessary affidavit or equivalent evidence cannot be secured with what seems the appropriate amount and direction of effort, are not reviewable by any superior.

That leaves the 50% of investigations in which there is a signed affidavit or equivalent evidence. Such investigations go forward with still more effort: locating and securing additional witnesses and their evidence, securing other related evidence and, in some instances, interviewing the individual officer who allegedly engaged in wrongdoing after informing him of the charges being investigated.<sup>12</sup> As I will detail later in this Decision, the supervising investigator can by monitoring the cases in progress provide instructions to investigators.

I have spoken in terms of percentages of all cases. For example, I have set out that 50% of cases end when a determination is made that no witness-affidavit or equivalent evidence can be secured with appropriate investigative effort, and that in the other 50% of cases there is such affidavit or equivalent evidence. To continue on in terms of percentages of all cases, in 47 to 48% of cases, the investigator reports that although there is a sworn affidavit or equivalent evidence, the allegations are not sustained, are

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<sup>12</sup> To require an officer being investigated either to present a written report or to undergo an interview marks a major milestone in a case, as either action requires that all possible allegations have been sought and can be specified. Additionally, once the officer has given the statement or interview, the investigator, can, depending on the case, thereafter possibly determine that the officer lied and then add that to the list of offenses in the case.

unfounded or that the officer is exonerated. Those become the investigator's recommendations. To approve, the supervising investigator must agree that all investigatory steps appropriate to the case have been followed. If the supervising investigator approves, that again closes the particular investigation without further review by superiors. Thus, 97% of cases are disposed of by the supervising investigator's decision, without further review within the Authority.<sup>13</sup>

That leaves the two to three percent of cases in which the investigator recommends that the complaint or allegation was "sustained," and as to which the supervising investigator, upon review, also believes the allegations are sustained. There, again, the supervising investigator must agree that the proper investigative steps appropriate to the particular case have been followed. The supervising investigator then makes a recommendation as to the discipline believed appropriate, and those investigations then are reviewed by the Deputy Chief and then the Chief Administrator in turn. They must also approve, before the final result is "signed off" as the result of the investigation.

Thus, at any one point in an investigation, a variety of evidence might be sought depending on the case. When a case is newly filed, there is -obviously- an effort to secure physical evidence such as videos and the initial witness affidavit.<sup>14</sup> Some investigators will during the course of every month sit down with an employee and

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<sup>13</sup> Moreover, the Authority's decision is not one to which complaining parties can file exceptions or take appeals. Complainants receive a letter explaining the outcome of the investigation, but they are not given reasons why the allegations were rejected.

<sup>14</sup> The testimony in this case lists various kinds of evidence which might be relevant in particular cases. Some time ago a supervising investigator and several other employees devised a "case checklist" which some supervising investigators use to ensure that all seemingly appropriate and indicated evidence is sought.

review cases as to what has been done and should be done, sometimes a checklist is used to indicate that all checked items should have been done (or the investigator should have reasons why they have not been done).

When an investigator submits a "write-up" of an investigation, then, the supervising investigator responds – as I have set out – not only with substance in terms of instructing the employee about avenues of investigation to undertake or not. However, the supervising investigator also provides instructions in terms of grammar, spelling, writing style and analysis. Even if the supervising investigator agrees with the result or conclusion of the investigation as determined by the investigator, the supervising investigator will give those instructions -- in the form of "edits" – back to the investigator to then incorporate into a revised draft. The supervising investigator approves of the report, colloquially "signs off" on the report, only when such changes have been performed.

I have mentioned monitoring as an investigation progresses. Almost monthly an investigator will ask his or her supervising investigator for advice or direction about a case. However, in effect the investigator wants to know – in advance – whether if he reported and recommended closing the case, the supervising investigator would "let it pass" or approve of doing so.

However, the process of the supervising investigator monitoring and reviewing work of investigators just set out is subject to limitations and exceptions. True, in 97 to 98% of all investigations, the investigator will in one way or another recommend closing out a case without action against an officer, and, where the supervising investigator

agrees, that ends the investigation without further review by the Authority generally or the supervising investigator's superiors in particular. However, in those 2 to 3% of situations in which the investigation concludes with action recommended against the officer, the report as approved by the supervising investigator is subject to review by the Deputy Chief and then the Chief Administrator. In those situations, the Deputy Chief and the Chief will in turn make changes even as to points of grammar, each sending the investigative report back for changes and, on rarer occasions, for additional substantive steps to be taken.

Moreover, whatever instructions the supervising investigator gives to an investigator are not binding upon the investigator. The investigator may challenge their correctness rather than submit to the instruction. In such situations, the investigator and supervising investigator are to contact the investigative coordinator or a Deputy Chief, who will determine what is, in fact, to be done. For example, in one situation an investigator found that a complaint was not sustained or that the officer was exonerated, but the supervising investigator believed the proper result was that the complaint was sustained. The supervising investigator and the investigator contacted Deputy Chief Weedan, who then decided what result would apply. The evidence reveals a similar incident occurred in which the Coordinator Michael Duffy resolved how to handle case. An investigator can in addition, disagree with an instruction and insist that the coordinator or Deputy Chief (or any administrator above the supervising investigator) review the matter and determine who is correct. For example, investigators regularly contact the coordinator where the investigator feels enough information has been

obtained that the investigation is complete but the supervising investigator feels more information is necessary.

That ability to disagree pertains as well to the final results of an investigation. Most disagreements occur as to whether an investigation should be regarded as "sustained". As I have set out, investigators and supervising investigators may disagree, as of course also may coordinators and the Chief Administrator. It is recognized that when anyone disagrees with a categorization of a case, that person need not "sign that case". Thus, at all levels, including the supervising investigator's subordinate investigator, the person involved may simply disagree and not sign the final report as categorized. I recognize that where there is a difference of opinion between the investigator and the supervising investigator as to whether an investigation is sustained, the common practice is that they approach coordinator Weedan to see if he can resolve their differences; however, although there is that attempt to reconcile differences, it is understood, I find, that the subordinate can, ultimately, continue to disagree with his superior, the supervising investigator.

At hearing, evidence was introduced regarding the use of what may be termed Standard Operating Procedures regarding investigations. There are manuals, some materials dating back to the agency-predecessor to the Authority, which attempt to set out standard procedures particularly applicable when a case is just starting as "intake". There is also a checklist of possible things to investigate developed by supervising investigators in the past, as I have mentioned. However, upon a review of the evidence as a whole, and even given the workday fact that any organization tends to run on any given day along the same lines as it ran the previous day, I determine that such materials do not much

restrict the ability of the investigators, or the supervising investigators, to determine within very wide parameters how particular cases should be investigated. To be sure, a case found sustained – one of that small two to three percent of cases -- is on this record reviewed carefully indeed at all levels and one part of that review is to see if common investigative steps were taken. That is, to my mind, to be expected. After all, the policemen who are the subjects of such cases and their attorneys no doubt eagerly examine what is cited against them to see whether obvious investigative mistakes were made. Presenting sustained investigations subject to easy critique for glaring flaws would defeat the purpose of the organization. But in the vast majority of cases, on this record, I am nonetheless convinced there is a wide range of choices as to what should be done.

#### *Approving time off and absences*

Investigators are eligible for various forms of time off work. They may be eligible for annual scheduled vacations, for more impromptu use of vacation time not so scheduled, for using “comp time” and for other forms of paid time off from work. Close to a thousand such time-off forms and requests are generated annually.<sup>15</sup>

As a background to all time off requests, the practical restraints on employees being absent must be understood. For an investigator, taking time off from work

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<sup>15</sup> In my findings, I have relied heavily on the testimony of the Chief Administrator. However, some parts of that testimony were simply not helpful. In testifying about Employer Exhibit 55, the Chief Administrator remarked that the Exhibit “looks like this is for time off” (Tr. 85) and, hence, begged the question of whether it was. On testifying as to Employer Exhibit 42, she remarked that something “might have been” and stated something to the effect that a matter was “not going into at this time”. (See Tr. 80). I do not regard such lapses in her testimony such as to undermine the weight to be given to it generally, but to demonstrate that care needs to be taken with her testimony, as that of other witnesses, in making sure that what is said at one point is not undercut by testimony a moment or two before or later in answer to another question.

impinges upon one or another of three "functions". He is one of many investigators office-wide and therefore one consideration is that the office has enough investigators at any one time. An investigator is a member of a team; hence, one general consideration is that not too many members of his team are absent at any one time. That concern about his team's numbers are heightened in two distinct situations: the investigator may be on some particular weekend otherwise scheduled and assigned to work because that is his team's assigned, rotating weekend duty or, instead, the investigator may be requesting time off during a particular time period that correspond to his team's doing a special "watch" such as serving as a response team for night time serious incidents.

Both because vacation requests – by their length – may interplay with all three concerns and because vacations request are to be approved under a labor agreement that states "exactly how we have to give out annual vacation, and [that approval of requests] has to be based on seniority," annual vacation requests are handled by the Deputy Chief rather than supervising investigators. Investigators submit such requests in one calendar year for the following calendar year. Each December the Deputy Chief approves such annual requests in conformity with the labor agreement and the concerns just mentioned. Although the investigator thereafter, as the time period or periods for his particular vacation nears, submits a time-off request to his immediate supervising investigator, the Deputy Chief has thus already pre-approved that absence as vacation. Thus, whatever might be the role of a supervising investigator in dealing with time-off requests in other contexts, it is clear that when such a request is made conforming to a vacation pre-approved by the Deputy Chief the supervising investigator merely acknowledges what

that superior has already determined.<sup>16</sup> The Deputy Chief later signs such actual time off “edits”.

Changes to annual vacations, which, as I have set out, are pre-approved by the Deputy Chief, involve the supervising investigator in a different role. If, for example, as the pre-scheduled and pre-approved vacation nears, the employee wants to “add” use of a personal day at the beginning or end of the already-approved vacation period, the supervising investigator is to receive the form, determine whether the requested personal day falls at a point of year when a lot of staff are on vacation, and then discuss the situation with the Deputy Chief “just to make sure there is no office-wide issue [presented] by giving a personal day.” Thus, I view the situation of use of a personal day here or there as rarely rising to the level where the request raises the three already mentioned concerns, except possibly where the request falls at a time of the year where normally large numbers of employees on vacation; at such times, the supervising investigator makes no decision but puts the matter before the Deputy Chief to decide.

Somewhat similarly, from time to time an employee wishes to change his already scheduled and approved annual vacation to a different time period. Such requested changes possibly implicate the three concerns I have already mentioned. Therefore, the employee submits the request to the supervising investigator, who determines whether the requested change would leave the team understaffed on the particular period. If granting

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<sup>16</sup> In reaching that determination, I recognize that the Chief Administrator, in her testimony, characterized such time-off requests for pre-approved vacations as only “slightly different than other time edit forms on that respect”. (See Transcript (Tr.) 38, referring to Employer Exhibit (E. Ex) 8 and Tr. 86, referring to E. Ex. 59). Although it is possible to view that excerpt of her testimony as indicating that the supervising investigator’s roles as to other requests of time-off is equally a formality, I believe that is an unfair characterization given the balance and detail contained in her testimony as a whole.

the change would not leave the team understaffed, the Deputy Chief next reviews the request to determine whether granting it would leave the office as a whole understaffed. Although the Chief Administrator recognized that these are two separate and distinct considerations, she believed that “basically the supervising investigator can approve” such requests. That is, I infer, a reflection of practicality. If the supervising investigator believes that granting a staff member’s request would not leave the particular team understaffed, as a team, it would seem highly unlikely that granting that same request would leave the office as a whole understaffed in the view of the Deputy Chief and thus not able to respond to weekend and nighttime incidents on a particular watch.<sup>17</sup> It would seem reasonable that where the supervising investigator approves, the Deputy Chief would almost surely also approve, although they have different vantage points and considerations. I then infer from *that* circumstance, in turn, that where the annual vacation schedules have been set as to the investigators as a whole, some relatively few and occasional minor deviations spread over the various teams do not raise major problems or much concern regarding the three “functions,” although the Authority’s administration keeps a somewhat wary eye on such requests to change schedules.<sup>18</sup>

Finally, while I have spoken so far of vacation periods, such as the familiar week of vacation, it is true that under the labor agreement pertaining to the investigators, they may in effect reserve single days of vacation to request as time off as they may wish from time to time. Such days, when requests are made, are not pre-approved by the Deputy Chief for vacations. Such vacation requests for a single day can be made only for an

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<sup>17</sup> There is no record evidence of how such requests to change vacations are viewed, when the result – which would appear to happen easily enough – would mean that the person requesting the change would in effect have their preference ultimately granted despite their lower seniority.

<sup>18</sup> I draw here especially on the testimony to be found at Tr. 45, 83-84, and E. Exs. 40 and 13.

investigator's normal workday; by their nature, as a consequence, such requests do not raise implications regarding weekend or watch office-wide considerations. Thus, the sole question is consideration about team-staffing, and the supervising investigator has full authority to approve or not approve.<sup>19</sup>

Aside from vacations, the supervising investigator has some role to play in certain other changes of work schedules. If employees wish to switch their regular time off schedule, that can be done by approval of the supervising investigator if the switch is "okay". From time to time investigators wish to change their shift hours on a particular day, such as when they wish to be on duty at night in order to interview an officer on a night shift; supervising investigators routinely approve such shifts when they are "okay".<sup>20</sup> As to such requests, the supervising investigator has the sole authority and need not consult with any superior before approving or denying the request.

Too, there are miscellaneous requests for time off from work. Thus, from time to time, an employee will request to leave work early (i.e. before the end of his normal, scheduled work day). The supervising investigator will grant such requests – indeed must grant such requests – if the requests falls within the allowable uses of time set out in the AFSCME labor agreement covering the employee. Likewise, investigators may request time off during a work week; if that have worked hours that week such that

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<sup>19</sup> I here consider together testimony to be found at Tr. 70 and 79 concerning both E. Exs. 27 and 40.

<sup>20</sup> The sole example in the testimony given was the work-related reason of needing to interview a police officer in the course of an investigation, but the witness – the Chief Executive – went on to mention vaguely that such requests could come about for "whatever reason". I do not interpret that testimony to mean that an investigator could request a change from their normal hours of work on a particular day for reasons of personal convenience and personal off-duty plans or the like. Instead, I interpret the testimony to mean such requests may be presented based on whatever work-related reasons might arise.

compensatory time is available equivalent to the absence from regular scheduled work hours, the supervising investigator will grant the request. If the investigator has not worked such extra time that week, the investigator is to specify what accumulated time he wants to use to "make up" the time he would lose from work and thus avoid the loss in pay for that pay period; the supervising investigator then approves the time off request, asking that the employee submit a time slip to account for the time for payroll periods.<sup>21</sup>

As to the supervising investigator's role in approving or disapproving an employee working additional time in a pay period so as to accumulate overtime pay or "compensatory time" the employee can later use to avoid loss of pay during an absence, the evidence is complicated and a mixture of somewhat conflicting practices. First of all, the supervising investigator's role is evidentiary: he signs off that an employee did in fact work the hours in question. If a supervising investigator signs a slip indicating that an employee worked particular extra hours and thus earned overtime or comp time, the employee is normally paid the overtime or credited the comp time. The exception, where the supervising investigator is overruled, occurs where a timekeeper determines that despite working such hours the employee was not, in fact, entitled under the labor agreement for such overtime or compensatory time. There are hundreds of such requests each year, and the timekeeper discovers such mistakes in only a "very, very small" number of instances. I characterize this evidentiary aspect of the supervising investigator's role in overtime and compensatory time as that because it accords with the

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<sup>21</sup> If the employee requests using "comp time" accumulated in that pay period or earlier pay periods, to avoid loss of pay, the supervising investigator will grant the time-off request without, apparently, checking to see if the employee actually has accumulated comp time available for that purpose. I infer that is the practice, from the fact that from time to time – although infrequently – the time keeper will later determine that the employee did not have such time available and the employee presumably is docked pay.

balance of the Chief Administrator's testimony on that score. I acknowledge that at one point in the testimony (at Tr. 43) the Chief Administrator spoke in terms of the supervising investigator "awarding comp time", but within a few sentences testified in terms of the supervising investigator "signs off that, yes, in fact, that employee worked those hours and earned that comp time ... ." Moreover, I emphasize that the supervising investigator's signature on such a record does not create a direct chit, bankable upon the Employer's funds; instead, it is checked by the time keeper.

The supervising investigator has a limited role of approving or disapproving an employee working overtime or working extra time that will result in accumulating compensatory time.<sup>22</sup> The Employer has in the recent past changed policies as to the supervising investigators' role several times. At one point the supervising investigator could not approve such overtime or compensatory time; instead, to work overtime or accumulate compensatory time, an employee needed to have prior approval from a deputy administrator or coordinator. Then the Chief Administrator (after one or two missteps) formulated a policy that a supervising investigator could seek advance approval from a deputy administrator or coordinator of a "plan" for employees to work up to five hours of compensatory time a week. To be approved, a submitted plan had to demonstrate how productivity would be increased by such additional work. If the plan was approved, the supervising investigator who submitted it then could approve individual employees covered by the plan working up to five hours of such time a week but, nonetheless, was expected to monitor their use of such time and their productivity.

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<sup>22</sup> The Chief Administrator testified that others besides the supervising investigators approve investigator's overtime and compensatory time. No other information is available about the circumstances in which such individuals might approve investigators' overtime or working for compensatory time accumulation.

However, within that limit, namely of work amounting to less than five hours of compensatory time in a week and such work arising under an already approved plan that demonstrates productivity reasons for such work in general, a supervising investigator's approval of particular weekend work by a particular employee is then given what is termed "complete deference" by the coordinator or deputy chief who then additionally signs the slip as approving the time.

### *Performance Evaluation*

Supervising investigators complete and issue performance evaluations of their subordinates every six months. They do so on a form that consists of two pages of checking the appropriate box and then another page of additional comments that are intended to "follow along" (correspond to and explain) the various checked boxes. The supervising investigators' superiors set up a schedule for each supervising investigator for completion of such evaluations for each subordinates. Thus, the supervising investigator is told to prepare a draft performance evaluation as to a particular employee on a given date and submit that to his superiors.<sup>23</sup>

After the draft is submitted, a meeting is then held regarding the draft between the supervising investigator, the deputy/coordinator overseeing the supervising investigator, and the Chief Administrator herself or, either in addition to or substitution for the Chief Administrator, the First Deputy Chief Administrator, Mark Smith. According to the Chief Administrator, one purpose of the meeting is for the supervising investigator's superiors present at the meeting to gain information regarding the particular

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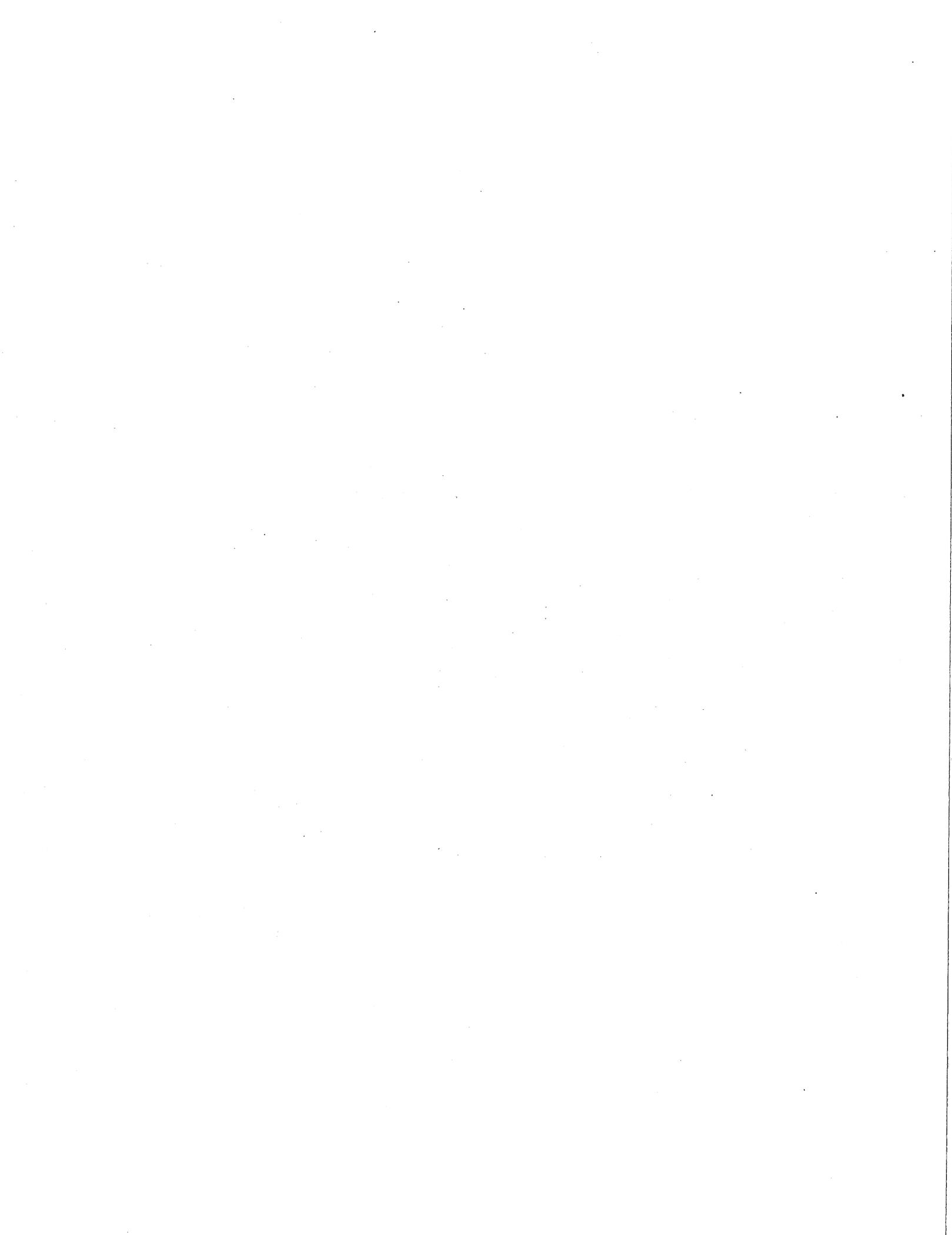
<sup>23</sup> I have written this description of the evaluation process around the situation of a supervising investigator evaluating the work of an investigator. However, the same process is used to evaluate the work performance of the clerical employees and the intake aides.

investigators' respective work-performances, as well as to hear from the supervising investigator their evaluation of the individual investigator.<sup>24</sup> I believe it is fair inference that the superiors, then, seek to obtain through the meeting information not recorded or intelligibly conveyed through the medium of the draft performance evaluation and to obtain an oral, more informal and complete performance evaluation than that contained in the draft evaluation. Thus, the draft evaluation is not largely accepted as a matter of course but serves as a springboard for a discussion in which more information and more description of any assessment of the employee is elicited.

The second purpose of the meeting is to "sort of improve" the draft evaluation as a written document. To do so, the superiors for the most part focus on the written comment/narrative part of the evaluation. For example, they will through the medium of the meeting guide the supervising investigator to be specific on any recommendations to be given to the employee. The superiors do not see the meeting as "necessarily" involving directing a change of the substance of the evaluation set out in the draft, but an opportunity for them to give the supervising investigator guidance about creating an evaluation that in turn will give guidance to the employee in question. Thus, for example, the superiors may question a supervising investigator in the meeting as to the specific kind of errors an employee commits, so as to prod the supervising investigator to craft specific suggestions to the employee so as to avoid those errors in the future. Likewise, if the supervising investigator states that an investigator is "excellent," the superiors – or at least the member of management present who knows – will then bring

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<sup>24</sup> I emphasize that this account is taken from the Chief Administrator's testimony because there is no document expressing the purposes of the meeting.



up the example of a case where the investigator's performance was not excellent and question the supervising investigator.<sup>25</sup>

During the meeting, apparently at or near its beginning, the superiors inform the supervising investigator that they intend to ask questions because they seek to have the supervising investigator clarify the draft evaluation. They also inform the supervising investigator that by the end of the meeting, all of those participating will know whether the superiors are in agreement or not with the supervising investigator as to the various "things" found in the evaluation (narrative comments and boxes checked). However, they inform the supervising investigator that ultimately the evaluation is the supervising investigator's. For example, if the supervising investigator still believes at the end of the meeting that an employee's work performance is generally excellent, that is how the evaluation will proceed even if his superiors disagree. And that situation, the Chief Administrator testified, "has happened."<sup>26</sup>

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<sup>25</sup> There is a passing reference in the Chief Administrator's testimony to a practice that arises when an investigator has served under several supervising investigators in the same six month period covered by the prospective evaluation, the responsibility for drafting is somehow divided up and both supervising investigators attend the meeting and things proceed as they do in other instances where only one supervising investigator performs the evaluation. I credit that it is so, although the exhibit referenced has to do with discipline.

<sup>26</sup> Petitioner introduced evidence to the effect that supervising investigators had been told not to mark the boxes for several categories as "excellent". However, in rebuttal, testimony indicated that supervising investigators had been told that if they marked boxes as "excellent," particularly in two categories, they would be expected to justify that designation with examples and reasons. Testimony indicated that in several instances, such "excellent" indications had been checked, explained and not disturbed upon submission. I find that explanation both reconciles any difference in testimony and evidence on this point and, besides, accords with the general evidence not in dispute that the draft recommendation is reviewed (in the meetings I describe) in considerable detail.

I do not take the testimony to mean that a draft-evaluation which sprang from an investigating supervisor's caprice, favoritism, personal malice or bigotry would, upon his insistence, be allowed to issue. However, I do credit the testimony what taken to mean that, aside from such hypothetical extreme examples, the investigating supervisor would have freedom to determine what he issued.

After the meeting, the supervising investigator takes the draft and revises it, putting forth a "final evaluation form". The form is submitted up to the appropriate deputy or coordinator. That person examines it to see if any additional point that came up at the meeting was left out, for example, unintentionally. The "final" is then returned for that revision or, if there is no revision to be made, simply returned to the supervising investigator for his actual issuing of the evaluation.<sup>27</sup> (If there was a point of disagreement between the superiors and the supervising investigator that was not changed from the first draft, that point is left undisturbed.)

To issue the performance evaluation, the supervising investigator must meet with the individual employee.<sup>28</sup> At that meeting the supervising investigator will give the employee the "final" (perhaps revised once again) evaluation form. If the employee wishes to write a rebuttal or comment and does so at or very soon after the meeting, the supervising investigator will attach such documents to the final evaluation. If the employee wishes to add such documents but does not do so immediately, the supervising investigator will inform the Chief Administrator that such additional documents are to be expected. In any event, whether the evaluation is or is soon to be contested or is accepted by the employee, the supervising investigator, after the meeting, submits the newly-issued evaluation to the Chief Administrator. The supervising investigator does not then discuss the evaluation with the Chief Administrator and, in fact, does not throughout the whole process have any separate discussions with the Chief Administrator.

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<sup>27</sup> Evaluations are submitted in ink.

<sup>28</sup> Each supervising investigator has a separate office-room with a door which can be closed, so that a meeting between the supervising investigator and a subordinate need not be conducted in full view and hearing of all employees. Similarly, each supervising investigator has in his individual office his own computer printer, so that he can print off materials about subordinates in privacy that could not be obtained by using the pool printers.

The issued-form is given to the Chief Administrator so that she can sign it to indicate she has received it. A copy is then filed. The Chief Administrator has never rejected a performance evaluation.<sup>29</sup>

Supervising investigators are said to spend one to two per cent of their work time engaged in preparing, submitting, discussing, revising, presenting and re-submitting their performance evaluations of their subordinates.

The impact of the preparation, completion and issuance of such performance evaluations is upon the institutional ethos of the Authority itself in a general way, upon the individual employees' pay and, it is thought, upon their chances of promotion. Generally speaking, such evaluations -- by demonstrating that the employees of the Authority are themselves subject to oversight and review -- in a sense reinforce in the minds of its personnel the mission of the Authority, namely to subject the police to such oversight, review and quality "feedback".<sup>30</sup>

Second, the impact of a performance evaluation upon pay occurs under the AFSCME-negotiated labor agreement as to step increases, amounting to perhaps three per cent of an employee's pay. An employee may have an overall excellent, good, marginal or unsatisfactory rating. Roughly, excellent means they are performing above their job-level, such as an Investigator I rated excellent who is therefore in effect evaluated as performing the more complex work of an Investigator II. Someone whose

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<sup>29</sup> At one point in her testimony, the Chief Administrator indicated that after an evaluation is prepared and "completed," she reviewed it. However, in detailing the process, the Chief Administrator indicated that she signed the evaluation to merely indicate receipt. Whether her review is confined to the earlier draft or if instead she also reviews the final, issued evaluation although she is at that point merely indicating receipt of it, is not clear on the record. I do not view resolution of that ambiguity as necessary to dispose of any issue in the case.

<sup>30</sup> Although the Chief Administrator's testimony on this point was brief, it could be: the insight about a connection between the Authority's external function and its internal process of evaluation was clear as soon as it was stated.

overall level is "good" is performing at their job level consistently. An employee who is rated as "marginal" sometimes performs at their job level but sometimes falls below that mark. An employee who is rated as unsatisfactory does not perform at their job level. Under the contract, an employee receiving a marginal or unsatisfactory rating does not receive their step increases. Most AFSCME-represented employees receive such increases, meaning they achieve good or excellent ratings. (Some longer-service employees who have topped out of the pay range receive such step increases only once every five years.) To deny a step increase, the Chief Administrator has to sign a form regarding the employee concerning their eligibility for such a step increase and then documenting that they received the disqualifying adverse evaluation.<sup>31</sup>

According to the Chief Administrator, the evaluations impact upon chances of promotion. Thus, an Investigator I who has received evaluations of "excellent" performance, meaning they are performing in the next higher grade or classification, would be normally regarded as most qualified for the next Investigator II opening based performance evaluations. To this there are several caveats. Of course it is true that the administrators who determine who is to be promoted put such applicants through a process, including interviews, and that thus the performance evaluations are at most only one factor being considered. Moreover, given the record, I think it important to recall that such performance evaluations may be issued even though the superiors disagree with

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<sup>31</sup> Thus, adverse evaluations do not affect cost of living increases, which at the time of the hearing had come to amount to approximately a two percent increase of wages an employee could expect, as compared to a three percent step increase which could, in effect, be denied based upon an adverse evaluation.

I note that evaluations are performed semi-annually, but that step increases, for all but the very long term employees, become due annually. It is not clear on this record if an employee must have two consecutive less-than-good evaluations to be denied his annual increase, and it is also not clear if a long-term employee may be denied his once every five years step increase based upon one, two or some other number of evaluations.

it, if the supervising investigator insists. The Chief Administrator testified that it “has happened” that such evaluations are issued despite such disagreements by the superiors, but I do not take that testimony to mean or imply more than it expressly says. For example, supposing the supervising investigator rated an Investigator I as excellent and his superiors did not agree and thought the performance merely good or, worse, marginal, I find that the supervising investigator can issue the excellent evaluation if he remains convinced that evaluation is accurate. However, supposing that the Investigator I might apply some time thereafter for promotion, I see no reason to suppose that the superiors who thought the employee’s true job performance was merely good or marginal would then feel bound to disregard their own judgment.

In contrast to the evaluations just mentioned, supervising investigators play a more informal role in the much more informal evaluation process concerning probationary employees. Some sorts of employees have a two-month long probationary period and others a six-month probationary period. Regardless of the length of the probation period, employees normally have worked for at least several – “a number” – of supervising investigators during their probation. Therefore, one or more deputy chiefs will, as the probationary period continues, “follow up” with each supervising investigator about each such probationary employee. They do so by obtaining an oral, informal evaluation of the probationary employee’s performance from each such investigating supervisor. At or near the end of the period, the deputy chief or deputy chiefs will talk to each one who supervised the employee again, and then the deputy chief or deputy chiefs will decide whether to retain the probationary employee or not past his probationary period, thus making him a “permanent” employee. The Employer’s witness at the

hearing testified to the effect that, as a matter of alleged fact, this process meant that "... the [individual] supervising investigator's evaluation of the probationary employee will determine whether they will pass probation or be let go," but of course that is on its face not true, because each such supervising investigator's opinion is sought and thus no single supervising investigator's evaluation is determinative.

#### *Grievance Handling*

Under the labor agreement with AFSCME covering the Investigators, the supervising investigators are to receive grievances as the first step and to provide the response at that Step in the contractual procedure. As far as AFSCME or employees are concerned, then, I find that the supervising investigators, acting in that capacity at the First Step, have the formal, apparent authority to respond in any way they wish, whether to deny a grievance on substantive grounds, to grant the grievance and retroactively change whatever action was done that gave rise to the grievance, or to claim that the grievance was filed untimely and thus cannot be processed under the procedure at all.

I base that determination both upon the testimony of the Chief Administrator, who urged that the supervising investigators had that actual authority and upon the fact that no evidence was introduced in this record that, say, employees or AFSCME had complained in the past that the supervising investigators did not have authority to deal with grievances. I expressly do not find that supervising investigators possess or exercise such actual authority on each and every occasion. Instead, I further find that supervising investigators actually have such authority, except in situations of grievances of such import or significance, for whatever reason, that the matter is in effect taken into the hands of superiors. Thus, for example, in the situation of one grievance (Union Ex. 7), a

superior was present at the particular grievance meeting and the superior signed the response to the grievance. However, although such situations undoubtedly do from time to time occur, I do not find that affects the main body of the evidence, which is to the effect that the supervising investigators have the apparent authority and on almost all occasions exercise the actual authority, to resolve grievances.<sup>32</sup> Likewise, although the Petitioner introduced evidence that one supervising investigator had never responded to grievances, had not been trained in how to respond to grievances and did not know how to respond to them, I find, given the fact that others have responded, that is not determinative.

#### Internal Discipline

Of course, the agency – and all of its employees – are in one sense involved with the possible discipline of Police Department staff. However, by “internal discipline,” I refer to the role of supervising investigators over their subordinates within the Authority itself.<sup>33</sup> In early 2010 – preceding the instant petition -- some of the supervising investigators requested training in how they could or were to discipline their subordinates under the AFSCME-negotiated collective bargaining agreement. The Authority arranged

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<sup>32</sup> In reaching that determination of the facts, I have considered, among other aspects of the evidence, Employer’s Ex. 54 and the transcript at p. 84. However, I find the combination of one-sentence testimony identifying an exhibit as indeed being a grievance, and the grievance-form itself, singularly unhelpful evidence.

<sup>33</sup> In my review of the evidence presented, I did not find helpful and did not put weight upon testimony of the type exemplified at Tr 84, which consisted of two-sentence testimony to the effect that the discipline issued as shown at Employer Ex. 53 resulted from a supervising investigator’s exercise of independent judgment and sole discretion; the Board’s experience has shown that it should not and does not rely upon such generalized testimony couched in terms of legal conclusions. On the other hand, although I note that no such conclusions were set forth in testimony about several other exhibits regarding discipline by the same supervising investigator, I do not necessarily draw any inference as evidence that no such independent judgment and discretion existed in those situations; given vapid comments mean little when uttered, their omission on the record is equally meaningless. See Tr 82-83 in connection to the Employer’s exhibits 46, 47, and 48.

for the City's Department of Human Resources to provide training in the theory and practice of progressive discipline; most notably, during that training the trainers provided the supervising investigators with a diagram or chart to aid them in "thinking through" situations of possible discipline. In addition, the Authority also secured, from the City's Law Department, a lawyer from the labor law section who reviewed the "rules" to be observed in disciplining union members.

The upshot of this training is that the supervising investigators were, in formal terms, instructed that there were different levels of discipline, that as individual situations arose the particular supervising investigator was under the suggested process to "get together" for a discussion with his superiors and others about what would be an appropriate level of discipline, although that was not suggested for a written reprimand or less severe form of discipline. However, the record is also clear that in the course of that training, again at the behest of the supervising investigators, an attempt was made to pre-determine, in effect, what conduct could be handled by a verbal counseling, by an oral reprimand or other discipline.<sup>34</sup> The reason for this request was that the supervising investigators wanted uniformity within the authority.<sup>35</sup>

However, although I find that that was the general intent of the training provided, the accepted practice thereafter has been much more limited in terms of discretion accorded the supervising investigator. Notwithstanding this attempt at setting uniformity and at having a regularized process of discussion, supervising investigators from time to

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<sup>34</sup> However, the particular exhibit that contains some of this attempt at uniformity and "office answers" may have been after the two training sessions, for further discussion at a supervising investigators' meeting.

<sup>35</sup> At another point, the Chief Administrator made clear that the supervising investigators gave input in a "give and take" with their superiors about an office policy on handling verbal counseling.

time will bring misconduct directly to the Chief Administrator.<sup>36</sup> The supervising investigator will on those occasions inform the Chief Administrator that he needs “to know this happened” and, after that preliminary, initiate a discussion about the amount of discipline. In theory, when a supervising investigator brings misconduct to the Chief Administrator’s attention, the Chief Administrator will then give the supervising investigator his “input”, which is a term normally implying that any decision is the supervising investigator’s to make. However, on at least one occasion, the Chief Administrator expressly made the decision as to the amount or severity of discipline rather than the supervising investigator.

In addition, as was remarked by the Chief Administrator in her testimony, although all supervising investigators have been trained to use and therefore presumably are able to use the disciplinary process forms, some supervising investigators do not “take the initiative” and therefore do not themselves discipline at all.<sup>37</sup> Significantly, there is no indication in the record that the Chief Administrator deemed this conduct of not initiating discipline and not disciplining at all was unacceptable, abnormal or a matter of

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<sup>36</sup> In one incident, a supervising investigator brought an instance of a subordinate’s behavior to the attention of his superior, who instructed him to create a memorandum that I view as similar in effect to a written warning, although the witness viewed it as not being discipline. However, the supervising investigator brought the matter to his attention only because he had been specifically instructed to make his superiors aware of any untoward incidents with the employee. The supervising investigator involved inferred from this that he had no independent discretion regarding discipline, but I would limit that observation to that employee; the fact that he had been specially instructed to bring all such incidents regarding that employee to the notice of his superiors indicates that he otherwise had discretion whether or not to report such incidents. To that extent, then, his testimony tokens a general discretion whether to report incidents which might result in discipline.

<sup>37</sup> See the objections I sustained as to leading questions couched as to supervising investigators choosing not to discipline, at Tr. 69, and the unobjected-to answer (in part) that “Not all supervising investigators take the initiative...” at Tr 68. I view the record-evidence as stating that some supervising investigators are not able, for whatever reason, to initiate discipline.

concern; mild, resigned exasperation best describes her demeanor at that point in her testimony.

Some misconduct and disciplinary matters are not handled at the supervising investigator level. For example, the City has a special policy and process for violence in the workplace; such matters are investigated and processed by a separate administrative office or group, and – as to the Authority – any related discipline is meted out by the Deputy Chief. Additionally, a supervising investigator will be “conflicted out” of discipline (as will a deputy chief) “if they are involved in sort of an interpersonal incident that has happened”.<sup>38</sup> . In addition, where the employee’s supervising investigator changes in mid-stream of a disciplinary situation, neither the employee’s new nor his former superior will administer the discipline; instead, the Chief Administrator signs and determines the discipline directly. Thus, in these three situations, what may be described as a policy indicates that the supervising investigator will not be responsible for discipline.

However, there are situations not easily categorized as ones wherein some policy indicates that the supervising investigator will not have the responsibility for discipline. For example, in a particular situation involving attendance misconduct extending over a considerable period of time, determining the appropriate discipline was deemed a matter requiring consultation with other departments of the City. In that particular case, involving an employee B.L., the factual situation had become complex and the sheer volume of consultations with other departments was deemed beyond the scope of a supervising investigator, although the First Deputy Administrator had ongoing

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<sup>38</sup> The Chief Administrator recollected that there had been two employees as to whom the supervising investigator was “conflicted out” of participating in the discipline process.

conversations with the supervising investigator as well. The First Deputy Investigator issued the discipline. In contrast, while all discharges of employees require consultation with other departments, in such cases the discipline will be in form issued by the supervising investigator: It was the amount of consultation, which reflected the complexity of the situation, which resulted in the discipline being issued by the First Deputy Administrator.

In the example just given, while the situation -- the First Deputy Administrator issuing the discipline -- was claimed to be an exception from the norm, the "norm" itself is apparently that as to any possible termination-case and any situation of complexity, particularly one not encountered before even when only suspensions were being sought, the Authority will have some consultations with other Departments, including the Law Department. Thus, I infer on this record that in some situations what is issued over the titular authority of a supervising investigator may in fact reflect the outcome of consultations at higher levels by his superiors and other Departments.

However, there is nothing inconsistent with that situation in which consultations are made, so to speak, above the supervising investigator's head, with the fact that the supervising investigator may have a significant role to play in the discipline. Thus, for example, in another situation where the notice of discipline was issued by the coordinator, the supervising investigator initially brought the alleged misconduct to the attention of his superiors, made his opinion that discipline was needed known to those superiors, was involved in discussions at the Chief Administrator's level about the matter, and, of course, saw his efforts result in discipline being issued although not over his signature.

To summarize, then, I find that the supervising investigators - or some of them - are not able to discipline although a majority are, and that the Employer has countenanced the situation that some supervising investigators do not discipline. Although by policy in a number of fact patterns and in situations of complexity involving lengthy consultations with other Departments, any actual discipline will be issued by a superior, the supervising investigator who initiates discipline will, on this evidence, be able to bring such matters to the notice of his superiors and any recommendation that *some* discipline be taken will likely be followed. Although, again, in formal terms the supervising investigators have been trained to issue such discipline, some are unable (and doubtless some might or might not be unwilling), to issue such discipline, including written reprimands and less severe penalties, without approval or review by superiors, while others in fact notify superiors of the situation and seek their recommendations as to courses to follow.

To put this evidence in perspective, then, I take the testimony of one witness, a supervising investigator. She has never issued oral or written warnings or suspended or terminated anyone, and she does not believe he has the authority to do so. Although I do not take that to mean that others have not issued oral or written warnings or that others necessarily likewise believe they have no authority. She has been instructed, she believes, to "consult" with her chain of command before doing anything regarding discipline; since she believes she has no authority to do anything regarding discipline, I infer that means, of course, she is to do nothing until she has been told what to do. However, the particular supervising investigator bases that belief in what she was instructed to do on what she understands statements to mean that were uttered in the

training class(es) I have mentioned; again, I do not take her belief as necessarily representative of what all investigating supervisors believe, but I take it as demonstrating that there is a wide range of the understandings of the supervising investigators.<sup>39</sup> That is consistent with the Chief Administrator's observation that some supervising investigators take no initiative about discipline. Thus, supervising investigators do not, as a group, choose on behalf of the Employer to determine or recommend discipline.

Note as to Rotations and MIRT, etc.

I will not detail here how coordinators, the superiors to the investigating supervisors, rotate night time on-call duty among themselves once every four weeks or how supervising investigators rotate such on-call duties approximately once every 12 weeks. The reason they do so is to assure "coverage" when there are serious incidents, such as incidents where policemen shoot civilians, at night. The coordinators assume such roles where there are multiple incidents in the night requiring immediate investigation. When a supervising investigator assumes such on-call duties, they are given for their rotation-of-on-call duty a special telephone/Blackberry device and a car.

About two nights a month and on a weekend, the supervising investigator oversees the "evening shift". If there are allegations that an officer allegedly caused a death or great bodily harm, the supervising investigator is responsible for letting the coordinator on call know of the incident, in part because those coordinators do wish to be aware of what is occurring. The supervising investigator will inform the coordinator of

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<sup>39</sup> However, I note that the evidence as to her knowledge and understanding is consistent with that of another supervising investigator. See Tr-228. I note in particular that that supervising investigator had in form issued a written warning, but was told to do so by his superior, Coordinator Mike Duffy who was acting as chief administrator at the time of the predecessor to the Authority.

what he intends to do, such as informing a coordinator following bodily injury that he wants to send an investigator to the hospital. The coordinator may override that intention, instead informing him (in that example) that he wants the supervising investigator to call out the MIRT team.

The MIRT team is the authority's Major Incident Reporting Team, a team assigned on a weekly basis to be called out in instances of weapon-discharge resulting in injury or death or extraordinary occurrences that take place from time to time in lockups or the like. The team for the week is assigned a radio and a computer and the MIRT phone, and that supervising investigator involved then becomes the receptionist for that team. Incoming calls regarding incidents of that nature are sent to the supervising investigator, who thereafter confers with the coordinator as to whether the coordinator wants the team or some part of it to respond at the scene and what the coordinator wants done. The supervising investigator will proceed to the scene of the incident, monitoring calls and taking any more incoming calls about the matter and be in contact with any investigator already at the scene or at the hospital. However, the supervising investigator does not make assignments of personnel on the team to the tasks, except as the coordinator directs. The supervising investigator at the scene is not responsible for anything but MIRT, and has no responsibilities at the scene otherwise except as the coordinator directs. Often, the supervising investigator "walks through" the scene with the team's shooting specialist.

#### Note on Work time

The evidence regarding the different activities encompassed in the work time of supervising investigators reveals the following. In one account, speaking broadly,

approximately 95% of the supervising investigators' time is spent in activities relating to instructing subordinates and overseeing subordinates' work.<sup>40</sup> The "other" part of their work time includes about one percent of their work time annually being spent in performing evaluations, discipline being less than a quarter of one percent of their work time, adjusting grievances being less than a half a percent of their worktime, and reviewing time off requests and the like constituting less than one percent of their work time. Attending meetings encompassing the supervising investigators and deputies once every several weeks and other office meetings amounted to a couple of percentages of their work time.

Another account, by another witness, was to the effect that approximately half of his work time was spent reviewing completed (or "supposed to be completed") investigations, reviewing that the investigation is done in terms of all investigative steps or routes appropriate have been attempted and completed, that the facts found matched the analysis, that the reports were free of grammatical errors or other problems. Such determinations that the investigation is done and all steps or routes appropriate taken is based, of course, on experience. However, *of that half of the work time spent reviewing work*, more than half (approximately 70 percent is spent reading what is submitted while the balance of time, approximately 30 percent or 15 percent of total work time, is spent

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<sup>40</sup> In the testimony at Tr. 128, approximately such a percentage was elicited through a question phrased in terms of time "spent directing and assigning their employees," which the witness re-phrased as "directing, assigning and supervising". Normally such evidence couched in terms of legal conclusions (for such phrases are drawn from the Act) is of little weight; here, however, I view the question and answer as being phrased in terms of the actual "functions you have described here today" previously set out in the testimony. In any event, it is the best evidence presented in that testimony.

discussing the case with the investigator and reviewing with them their "case management" as a case progresses.

Continuing with the same account, 35 percent of a supervising investigator's total work time is spent reviewing (reading) reports submitted as a case progresses. For example, an investigator may interview a subject and write a summary of an interview; the supervising investigator will review that summary to make sure it is grammatically correct, relevant and "makes sense"; if the summary is approved, it then is retained by the investigator to use as an attachment to whatever ultimate case-report he finally will submit at the conclusion of the investigation.

Some five to 10 percent may be spent with an investigator in situations where the investigator comes and asks for guidance or otherwise seeks out the supervising investigator. Yet another five to possible 10 percent is spent in meetings, in miscellaneous activities, in performing legal research, or in unusual matters that may crop up from time to time.

Taking both accounts together, which are differently enough expressed that one cannot say that they are flatly contradictory, it is my judgment that it is the one-on-one interaction with the investigators that constitute the most important activity of the supervising investigator's work. True, in one way or another, the review by reading of interview summaries and other ongoing matters as well as final case reports constitutes a greater amount of time. However, that review is guided by experience and, no doubt, commonsense. The art of determining what could be done lies in eliciting from the investigator both at regular intervals as part of case management and at the times when

the investigator comes to the supervising investigator both facts and non-existent facts and gaps and then determining what needs to be done, things not easily determined by a review of written records or reports.

I emphasize that supervising investigators, on this record, have no responsibility for hiring, transferring employees, layoffs, recall of employees, promotions, or any wide discretion in granting overtime or sick time or the like.

#### IV. DISCUSSION AND ANALYSIS

As the Board generally presumes that governmental employees are “public employees” covered by the Act, the burden of proof is placed on the party claiming otherwise. Chicago Newspaper Guild Local #34071 and Chief Judge of the Circuit Court of Cook County, 18 PERI ¶2016 at X-125 (ILRB SP 2002). Thus, although the Board conducts a neutral, fact-finding hearing to determine the disputed status of employees, the party claiming an employee statutorily excluded, and not the Board, “has the responsibility for establishing such exclusion” in terms of producing evidence on that record. Chief Judge, 18 PERI ¶2016, *Id.*, 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)”. This allocation of the burden of proof and responsibility for establishing the relevant facts in the record in terms of administering the Act tracks the rule of interpretation that the “Act was intended to extend bargaining rights broadly, and its exemptions should be narrowly construed.” American Federation of State, County and Municipal Employees, Council 31, and State of Illinois, Department of Central Management Services, 24 PERI 112 at 481 (ILRB SP 2008), *citing* City of Decatur v. American Federation of State, County and Municipal Employees Local 268, 122 Ill.2d 353, 522 N.E.2d 1219 (1988) *and, also*, County of Kane v. Carlson, 116 Ill.2d 186, 507 N.E.2d 482 (1987).

To overcome the general presumption that governmental employees are public employees, then, the party claiming exclusion must offer sufficient evidence. The standard of proof is preponderance. Chief Judge, 18 PERI ¶2016, supra, at X-125. That evidence must, when examined in total as that party's proof of the employee's excluded status, be more than just conclusory statements in testimony that the individual possesses supervisory or managerial authority, or effectively recommends its use, or that he uses independent judgment when doing so. Thus, merely to overcome the presumption such that the individual in question will be found exempt from the Act as excluded from the Act's coverage as a "public employee," the record established by the party seeking exclusion must contain specific examples demonstrating alleged supervisory, managerial or confidential status. State of Illinois, Department of Central Management Services, 24 PERI 112, supra, at 481 (ILRB SP 2008), *citing* County of Union, 20 PERI ¶9, fn.2 at 59 (IL LRB SP 2003). Moreover, to the extent some evidence offered must, by the nature of the case, be somewhat generalized, summarized or one step removed from specific examples, that evidence must come from a foundation adequate in the record to support it. *See* International Association of Fire Fighters, Local 2714 Village of North Riverside, 19 PERI ¶59 at 274, 275 and 276 (IL LRB SP-A.L.J 2003). If that initial, general presumption is overcome, then the determination that a disputed employee's status excludes him from the coverage of the Act (*i.e.* that he is not a public employee) will be based upon a preponderance of evidence standard. Chief Judge, 18 PERI ¶2016, *Id.*

In the instant case, the Employer alleges that the employees at issue, the supervising investigators, are supervisory employees within the meaning of the Act and, hence, are not public employees and are not covered by the Act.

#### **Supervisory Status under the Act**

Section 3(r) of the Act provides:

"Supervisor" is an employee whose principal work is substantially different from that of his subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, or to adjust their grievances, or to effectively recommend such actions, if the exercise of such authority is not of a merely routine or clerical nature, but requires the consistent use of independent judgment. Except with respect to police employment, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority State supervisors notwithstanding.

The Board has interpreted this provision as requiring that an employee must meet each of the four following criteria in order to be found a supervisor: 1) his principal work must be substantially different from that of his subordinates; 2) he must possess the authority to perform one or more of the enumerated supervisory functions, or he must effectively recommend the performance thereof; 3) his function, as such, must not be routine or clerical in nature, but must require the consistent use of independent judgment; and 4) he must devote a preponderance of his time to performing supervisory functions. American Federation of State, County and Municipal Employees, Council 31, and State of Illinois Department of Central Management Services (DCFS), 8 PERI ¶2037 at X-202, 207 (IL SLRB 1992), *aff'd*, 249 Ill.App.3d 740, 619 N.E.2d 239, *app. den.*, 153 Ill.2d 557, 624 N.E.2d 805 (1993).

### **Principal Work**

An analysis of the "principal work" portion of the supervisor test starts from the proposition that "an employee may engage in the same work as his subordinates the majority of his time, but if the essence of his work differs from that of his subordinates, a supervisory determination may result if other indicia are present," if in terms of nature

and essence his work differs substantially, meaning his work is very different. Fraternal Order of Police, Lodge 95 and Secretary of State, 1 PERI ¶2009 at VIII-55 (IL SLRB 1985).<sup>41</sup>

In determining whether the principal work requirement has been met, the initial consideration is whether the work of the alleged supervisor and that of his subordinates is obviously and visibly different. City of Freeport v. ISLRB, 135 Ill.2d 499, 554 N.E.2d 155, 162, 6 PERI ¶4019 (1990); Metropolitan Alliance of Police, Chapter 61 and Village of Justice, 17 PERI ¶2007 at X-70 (IL LRB-SP 2000). If that work is obviously and visibly different, the requirement is met, as the test of differing principal work is “easily satisfied where the work of the alleged supervisor is obviously and visibly different from that of the subordinates....” City of Freeport, *supra*, 554 N.E.2d at 162-63.

However, if the work is not obviously and visibly different, “the Board will [then] look at what the alleged supervisor actually does, to determine whether the ‘nature and essence’ of his work is substantially different.” City of Freeport, *supra*, 554 N.E.2d 162-163, although then the requisite finding that the work substantially differs must be that the “nature and essence of the alleged supervisor's functions is *very* different from that of his subordinates.” American Federation of State, County and Municipal Employees and City of Burbank, 1 PERI ¶2008 at VIII-49 (IL SLRB 1985); *see, also*, Secretary of State, *supra*, at VIII-55. In that analysis, to sustain a finding of substantially different work

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<sup>41</sup> The combination of quotation and paraphrase, however jumbled in appearance, reflects the Decision. The words quoted are from a longer passage the then-State Board extracted from an earlier Office of Collective Bargaining interpretative ruling regarding Executive Order No. 6, to which it then added comments apposite to the Act. In turn, the Illinois Supreme Court then quoted only the then-State Board’s extract from the Office of Collective Bargaining ruling, citing that passage as the State Board’s own interpretation, then adding its own comments applicable to the Act. City of Freeport v. ISLRB, 135 Ill.2d 499, 554 N.E.2d 155, 162 (1990).

where the work does not obviously and visibly differ, the Board, as stated in City of Freeport,

...must identify the point at which an employee's supervisory obligation to the employer conflicts with his participation in union activity with the employees he supervises...the potential for a conflict of interest lies in the supervisor's authority to influence or control personnel decisions in areas most likely to fall within the scope of union representation.

The purpose of this examination is to determine whether the "nature and essence" of the alleged supervisor's duties are substantially different from those of his subordinates keeping in mind, as the Freeport court stated, that

The nature and essence test [is] a qualitative, rather than a quantitative analysis. The existence of the supervisory authority, and the ability to use it at any time, changes the nature of the relationship between the [ranking officers] and the patrol officers to an extent which renders the nature of their functions very different despite their facial similarity.

City of Freeport, *supra*, 554 N.E.2d at 164-5. However, the mere possession of any supervisory indicia is itself insufficient to change the "nature and essence" of substantially similar principal work. American Federation of State, County and Municipal Employees, Council 31, and Chief Judge of the Circuit Court of Cook County, 6 PERI ¶2047 at X-318 (IL SLRB 1990).<sup>42</sup>

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<sup>42</sup> As I have previously noted, the Court in Freeport had set out as though the then-State Board's own formulation a lengthy extract the then-State Board had, in Secretary of State, *supra*, taken from an interpretative ruling of the Office of Collective Bargaining. At times thereafter,

In the instant case, I find that the principal work of the supervising investigators is substantially different from that of their subordinate investigators and clericals. Unlike the subordinate investigators, the supervising investigators are not pursuing investigations. Supervising investigators do not identify and gather evidence, conduct interviews, write summaries of interviews and interrogations or submit reports, as do their subordinate investigators. Similarly, they do not initially input complaints, as do the clericals. Instead, the supervising investigators oversee investigations in progress, assign cases to particular investigators and perform periodic "case-management" sessions with their subordinates as well as review final reports. In that process, they from time to time tell subordinate investigators what actions to take and the subordinate investigators undertake those actions. True, on occasion in some particular case a particular investigator may appeal that instruction to one or another of the supervising investigator's superiors, but I do not view that fact as undercutting the significance that, ultimately, it is the subordinate who conducts subject to instructions various investigations while the supervising investigator oversees and instructs the subordinates in their performance. That is a substantial difference in principal work.

Moreover, that difference is obvious and visible. The subordinate investigator's workday is spent, as I have noted, in securing and obtaining physical evidence, doing so by going to places such as crime scenes and hospitals and record-keeping places, as well as by interviewing complained-of policemen and finding and interviewing witnesses and viewing videotapes, as well as by writing reports and summaries of those activities. The

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decisions of the Board and the courts have again quoted that same extract. However, although the extract itself sets out a test or principal work formulated in terms of "major undertakings," that analysis seems to be last expressed and utilized with any vigor as separate and distinct from that analysis set out here in Police Benevolent Labor Committee, Incorporated, and County of Knox and Knox County Sheriff, 7 PERI ¶2002 at X-8 (IL SLRB 1990).

supervising investigator's workday, on this record, is spent talking to those subordinate investigators themselves, and not the witnesses or accused policemen and reviewing what evidence in an investigation has so far been assembled rather than going to various places to obtain more evidence. As I have noted in my findings of facts, less than one percent of a supervising investigator's time is spent in the field actually helping his subordinate investigators. Thus, to any observer, the activities of a supervising investigator and his subordinates would appear very different over the course of a workday. In any event, it is clear that the nature and essence of the principal work of the supervising investigators and their subordinates vary.

As I have determined that the supervising investigators' principal work obviously and visibly differ from that of their subordinates and, as well, differ from that of their subordinates in its nature and essence, I conclude that the subordinate investigators meet the first prong of the four-prong test of supervisory status under the Act, namely that their principal work differs from that of their subordinates.

#### **Statutory indicia and requisite exercise of independent judgment**

With respect to the second and third prongs of the Act's supervisory definition, it must be determined whether the putative supervisors have the authority to perform or effectively recommend any of the 11 indicia of supervisory authority listed in the Act and consistently exercise that authority with independent judgment. Even the ability to perform or effectively recommend one of the supervisory indicia is enough to support a finding of supervisory status. Chief Judge of the Circuit Court of Cook County v. American Federation of State, County and Municipal Employees, Council 31, et al., 153 Ill.2d 508, 607 N.E.2d 182, 186, 9 PERI ¶4004 (1992); City of Peru v. ISLRB, 167

Ill.App.3d. 284, 521 N.E.2d 108, 112, 4 PERI ¶4008 (IL SLRB 1988). Moreover, the use of independent judgment must involve a consistent choice between two or more significant courses of action and cannot be routine or clerical in nature or be made merely on the basis of the alleged supervisor's superior skill, experience or knowledge. City of Freeport, supra, 554 N.E.2d at 171; Chief Judge of the Circuit of Cook County, supra, 607 N.E.2d at 186; Village of Justice, supra, at X-71. Finally, an effective recommendation satisfying the Act's supervisor requirements is one that is adopted by the alleged supervisor's superiors as a matter of course with very little, if any, independent or de novo review, although the superiors' review need not be a rubber-stamp exercise. City of Peru, supra, at 521 N.E.2d at 113; City of Peoria Municipal Employees Association/American Federation of State, County and Municipal Employees and Peoria Housing Authority, 10 PERI ¶2020 at X-124 and fn. 41 at X-128 (IL SLRB 1994), *aff'd by unpub. order*, docket No. 3-90317 (3rd Dist. 1995); Village of Justice, supra, at fn. 9 at X-61. In this case, the Employer contends that the supervising investigators exercise supervisory authority under the Act to hire and promote, to adjust grievances, to direct them, and to discipline, suspend and/or discharge their subordinates, or effectively recommend the same. In addition, I have examined whether they can arguably be said to reward them.

#### *Discipline*

As I have found, the Authority has provided training to supervising investigators in how to "think through" situations of possible discipline they might encounter and the "rules" or practices to be observed in meting out discipline. Despite that training, some supervising investigators do not initiate discipline at all and the Employer accepts that

course of action. Hence, the record is clear that supervising investigators as a class do not consistently exercise discretion as to whether to discipline as choices between two or more significant courses of action.<sup>43</sup> However, all supervising investigators apparently have and exercise the discretion whether to report misconduct to superiors. Moreover, as I have noted, when a supervising investigator makes a recommendation known or simply brings an allegation of misconduct to the attention of his superior, that recommendation or report carries weight. That is consistent with the underlying business of the Authority. Again, although the point is obvious it cannot be stressed too much: the business of the Authority is the monitoring and investigation of police officers as well as their discipline.<sup>44</sup> Given that the business of the Authority is the investigation of and possible discipline of police officers, supervising investigators know what is misconduct, how it is proven and how recommendations are made. Thus, I infer, their recommendations as to internal discipline of Authority employees are likely given weight by their superiors – just as would be their recommendations regarding regular peace officers. Therefore, I find and conclude that the supervising investigators as a class retain and exercise discretion whether or not to report conduct as misconduct to their superiors, and that individual supervising investigators also retain and exercise discretion whether to make

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<sup>43</sup> As I have also set out in my findings, even a supervising investigator who chooses to initiate discipline may find that the situation's complexity, a need for out-of-department consultations or other causes dictate that a superior "takes over" the process. .

<sup>44</sup> I have noted in the factual discussion in this case the anomaly that both the supervising investigators and their subordinates are concerned primarily with the possible discipline of sworn peace officers employed by the City's police department. However, those officers are not their direct subordinates; the point of the Authority is precisely that the Authority's staff is separate and distinct from any tie with the Police Department's staff. They are to investigate the police and thus watch, so to speak, the watchmen. Therefore, I do not view the supervising investigator's role or work time spent as to possible discipline of police as constituting the exercise of discretion, as to one of the statutory indicia, in a manner that arises to the second and third prong of the four-prong test of supervisory status.

recommendations as to discipline to their superior and/or issue minor disciplinary penalties themselves. The reports of misconduct trigger action by their superiors, and their recommendations are carefully considered and, I find, "effective" within the meaning of the Act. Deciding whether to report discipline is thus an independently arrived-at decision, between two or more significant courses of action.

### *Grievance Handling*

As I have found, supervising investigators have the formal authority, under the labor agreement covering their subordinates, to handle, process and resolve grievances. Although the evidence indicates that some grievance-matters are so important or delicate that they are not to be resolved by the supervising investigators, that limitation does not affect their discretion regarding other grievances. Given the evidence presented, primarily the testimony on this score offered by the Employer in its case-in-chief, I find that the supervising investigators both have the formal authority to process and resolve grievances and, in fact, do so.

### *Reward*

The record clearly demonstrates that the supervising investigators have the formal authority, by their evaluations, to effectively grant or deny step increases to their subordinates. Therefore, the supervising investigators reward subordinate employees, within the meaning of the Act, for their performance.<sup>45</sup>

### *Direction*

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<sup>45</sup> I do not view the record as establishing that such evaluations contain specific enough instructions to employees about improving their performance that such evaluations can themselves be termed "direction" within the meaning of the Act.

As I have noted in the facts, the supervising investigators can issues instructions to subordinates. However, as to the investigators, the employees who form the bulk of subordinates, the situation is that the subordinates need not follow work-instructions when it comes to reports, investigations or other aspects of the work-product of the organization. Instead, the investigators can appeal those instructions to the supervising investigators' superiors. Those superiors then review the reasoning of the subordinate and the supervising investigator and determine what should be done. Thus, the supervising investigators insofar as the work product of the organization is concerned is more in the role of a trusted and skilled co-worker who serves as an advisor to other employees, than he appears to serve in the role of a superior in a hierarchy who can instruct an employee and by reason of his authority, ensure that the employee follows the instruction<sup>46</sup>.

Because instructions are thus advisory suggestions, I need not consider a question often presented in such cases as these. Often the question of whether a putative supervisor's instructions are advisory or, instead, commands and thus direction are determined by considering whether the putative supervisor has such control otherwise over the subordinate's terms and conditions of employment that his instructions indeed are directions within the meaning of the Act. Here, where instructions are undeniably matters which subordinates can freely disagree and seek to have overridden, no such

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<sup>46</sup> While it is true that, turning to matters such as assigning cases to employees and other, there is no record instance of appeal of such matters to the investigating supervisors superiors,' I find that at most, then, the supervising investigators do not *consistently* issue work instructions that must be followed.

analysis need be undertaken.<sup>47</sup> In summary, I therefore find that, as to direction, the work instructions issued by the supervising investigators do not rise to the level of direction under the Act.

#### Preponderance

Given that most of the time the supervising investigators review reports and investigative cases prepared by subordinates, but that their subsequent instructions to their subordinates are advisory and not binding, it is clear from the instant record that the supervising investigators do not spend a majority of their work time engaged in supervisory functions. Moreover, the supervising investigators' most significant activities are precisely that review of subordinates' work and issuing advice to them. Thus, the supervising investigators are not engaged in supervisory functions within the meaning of the Act a preponderance of their work time.

#### Managerial Status

In order for an individual to be exempted as a "managerial employee" the individual must be found to (1) be engaged predominately in executive and management functions; and (2) exercise responsibility for directing the effectuation of such management policies and functions. State of Illinois Department of Central Management Services (DCFS), 5 PERI ¶2002 (IL SLRB 1988); State of Illinois Department of Central Management Services (Dept. of Public Aid), 2 PERI ¶2019 (IL SLRB 1986). Both parts

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<sup>47</sup> If, notwithstanding my determination that since the supervising investigators' instructions need not be obeyed, they do not constitute direction in the meaning of the Act, the Board were to ask whether I thought they otherwise might constitute "direction", I would then determine that because a supervising investigators' instructions are accompanied by the supervising investigators having authority over such terms and conditions of employment as approving overtime, reward by evaluations and grievance handling, as well as by assigning cases to different investigators within teams, they would be instructions possibly constituting direction.

of the test must be met to support a finding of managerial status under the Act. State of Illinois Department of Central Management Services (Dept. of Conservation), 10 PERI ¶2037 (IL SLRB 1994)<sup>48</sup>.

An individual is engaged in “executive and management functions” when he is engaged in activities that relate to running an agency or department, which may include formulating policy, preparing the budget and overseeing effective and efficient operations. City of Evanston v. Illinois State Labor Relations Board, 227 Ill. App. 3d 955, 592 N.E.2d 415 (1992). Other indicia of executive and management functions include 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 an employer with its employees or the public and “exercising authority to pledge an employer's credit.” Circuit Clerk of Champaign County, 17 PERI ¶2032 (ILRB SP 2001); City of Chicago (Chicago Public Library), 10 PERI ¶3016 (IL LLRB 1994); State of Illinois, Department of Central

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<sup>48</sup> The Employer suggests that an application of the managerial exclusion as a matter of law is applicable here. This alternate test was first recognized in Office of the Cook County State's Attorney v. Illinois Local Labor Relations Board, 166 Ill.2d 296, 652 N.E.2d 301 (1995). It differs from the Board's traditional test in that the individual at issue need not have final authority as to any executive and management function but may instead meet the second prong of the analysis if he or she effectively recommends employer policy. State of Illinois, Department of Central Management Services, 21 PERI 205. The Board has recognized that the status of an individual as managerial as a matter of law is limited to individuals whose statutorily defined duties effectively make them surrogates for their employer. State of Illinois, Department of Central Management Services, 21 PERI 205. The Employer has shown no basis for applying this alternate test here, other than to suggest that because 97% of all cases investigated by the Authority are closed at the supervising investigator level, without further review of such closed cases, that renders the supervising investigators “surrogates” of the Authority. Thus, the Employer does not base its argument on the statutory responsibilities of supervising investigators but instead on reasoning which, by analogy in the private sector, would make most quality control inspectors at manufacturing plants surrogates of their corporate employers, because the parts they approve are not further inspected.

Management Services, 8 PERI ¶2052 (IL SLRB 1992). Managerial status is not reserved to those at the very highest levels of government. Salaried Employees of North America v. Illinois Local Labor Relations Board, 202 Ill. App. 3d 1013, 1020-21 (1st Dist. 1990). However, “[a]n employee is not a manager . . . if his role in policy development is subordinate or advisory since ‘it is the final responsibility and independent authority to establish and effectuate policy that determines managerial status under the Act.’” State of Illinois, Department of Central Management Services, 21 PERI 205 (ILRB SP 2005)(citations omitted).

An individual satisfies the second part of the test where the “individual directs the effectuation of management policies and procedures where the individual has substantial discretion to determine how and to what extent policy objectives will be implemented and the authority to oversee and coordinate the same.” State of Illinois, Department of Central Management Services, 21 PERI 205. The fact that the individual “performs duties essential to the employer's ability to accomplish its mission,” does not establish the individual as a managerial employee. The individual must be responsible for determining the “specific methods or means of how the employer's services will be provided.” Chief Judge of the 18th Judicial Circuit, 14 PERI ¶2032 (IL SLRB 1998). Although “effective recommendation or control rather than final authority” over employer policy is the relevant consideration, the employee must still “formulate and effectuate management policies by expressing and making operative the decisions of their employer.” Chief Judge of the Sixteenth Judicial Circuit, 178 Ill. 2d 333, 340; 687 N.E.2d 795, 798 (1997), quoting National Labor Relations Board v. Bell Aerospace Co., Division of Textron, Inc., 416 U.S. 267, 288, 40 L. Ed. 2d 134, 150, 94 S. Ct. 1757, 1768 (1974).

In the instant case, the Employer essentially contends that the supervising investigators are managerial employees, because, it alleges, they implement and effectuate (albeit do not formulate) policy and because they represent management interests by taking such discretionary actions that effectively control or implement employer policy. The tautology is clear enough, but I do not discern on this record the factual underpinning of broad responsibility to implement and effectuate even broad policies. The supervising investigators do not, in this view of the facts, determine for budgetary or other reasons that an investigation is complete, but instead instruct in an advisory capacity the subordinate investigators as to whether investigations seem complete-enough by accepted investigative standards. That is not a broad enough determination to rank as managerial decision making of implementing and effectuating policy, in my view; in any event, it is clear that subordinate employees can and do challenge this routine workaday oversight on occasion to the next higher level in the administration. Thus, the Employer here urges that the supervising investigators are managers as to routine and then only when subordinates raise no objection or question: that is not enough. That is not managerial status, but instead an experienced and trusted lead-man capacity.

#### Fragmentation

The Employer here makes two arguments. The first appears to rest upon misconceptions of the instant situation and the situation provided in earlier cases. The Employer cites cases to the effect that employees in the same job classification should not be placed in different bargaining units, forgetting that the employees here at issue,

supervising investigators, are not in the same classification as their subordinates.<sup>49</sup> More broadly, the Employer urges that employees similarly situated, should not be balkanized into different bargaining units as their collective strength in bargaining would be frustrated by their unit-placement while the Employer would be subjected to exponential increases in bargaining activity. However, balkanization clearly exists where public employees are not represented at all and each employee is employed at will; allowing these employees to organize collectively should, therefore, indirectly only enhance the bargaining strength of their subordinate investigators in the greater unit. True, the employees herein sought might be better served and have even more collective bargaining strength in the existing unit in which their subordinates are to be found, but that unit's representative has not petitioned for them. The duty of the Board is not to determine the most appropriate unit for a given set of employees, but whether the petitioned-for unit they desire is appropriate. Here the Employer essentially proposes that the employees at issue exercise no rights to organize, given that the existing unit has not petitioned for them. Hence, I reject the Employer's contentions that the unit herein sought is inappropriate under the Act.

## V. CONCLUSIONS OF LAW

1. The employees in positions in the Supervising Investigator job classification employed by the Independent Police Review Authority of the City of Chicago are not supervisory or managerial employees within the meaning of the Act and, therefore, are public employees within the

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<sup>49</sup> I am at a loss to understand how, on Brief, the Employer can assert on this record that the employees here sought, supervising investigators, are in the same classification as their subordinates, the investigators. The Employer thus seems to assert that its classification scheme is merely an artifice, but I find no factual basis for that implicit assertion on the record in this case.

meaning of Section 3(n) of the Act who may be represented for purposes of collective bargaining.

2. The employees in positions in the Supervising Investigator job classification employed by the Independent Police Review Authority of the City of Chicago being public employees who may be organize for purposes of collective bargaining, they may appropriately be represented in a stand-alone unit, the existing unit including their representatives not having sought to represent them.
3. The Petitioner, the Service Employees International Union, Local 73, CLC-CTW, having presented evidence of majority support under the Act,<sup>50</sup> becomes as of the date of the certification herewith ordered the exclusive bargaining representative under this Act of the petitioned-for employees, in a stand-alone unit.

## VI. ORDER DIRECTING CERTIFICATION

Unless this Recommended Decision and Order Directing Certification is rejected or modified by the Board, the Service Employees International Union, Local 73, CLC-CTW, shall be certified as the exclusive representative of all the employees in the unit set forth below, to be found to be appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment pursuant to Sections 6(c) and 9(d) of the Act.

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<sup>50</sup> If it is not otherwise clear on the record of the instant case, I record here that Petitioner presented evidence of majority support when it filed the instant Petition, presenting eight valid authorization cards for this approximate 11-person unit. There were no allegations of fraud or coercion with respect to the showing of interest.

**Unit:**

**Included:** All employees of the City of Chicago's Independent Police Review Authority in the classification Supervising Investigator.

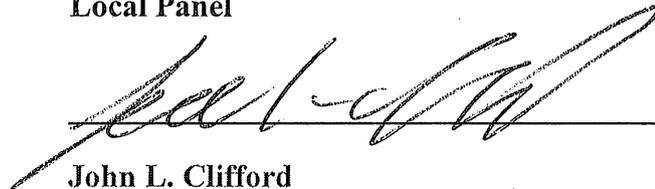
**Excluded:** All other employees of the City of Chicago's Independent Police Review Authority; all other employees of the City of Chicago; all confidential, managerial or supervisory employees, or short-term employees, as defined by the Act, and all elected officials of the City of Chicago.

**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 Recommended Decision and Order. 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, 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 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, on September 27, 2011  
Illinois Labor Relations Board  
Local Panel**

A handwritten signature in black ink, appearing to read "John L. Clifford", is written over a horizontal line.

**John L. Clifford  
Administrative Law Judge**

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

Service Employees International Union, )  
Local 73, CTW-CLC, )  
 )  
Petitioner )  
 )  
and )  
 )  
City of Chicago, )  
 )  
 )  
Employer )

Case No. L-RC-11-006

**AFFIDAVIT OF SERVICE**

I, Melissa L. McDermott, on oath state that I have this 27<sup>th</sup> day of September, 2011, served the attached **ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER** issued in the above-captioned case on each of the parties listed herein below by depositing, before 5:00 p.m., copies thereof in the United States mail at 100 West Randolph Street, Chicago, Illinois, addressed as indicated and with postage for regular mail.

Mr. Tyson Roan  
SEIU, Local 73  
300 South Ashland Avenue  
Suite 400  
Chicago, Illinois 60607

Mr. Lawrence J. Weiner  
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\_\_\_\_\_  
Melissa L. McDermott, ILRB

**SUBSCRIBED and SWORN to**  
Before me this 27<sup>th</sup> Day of  
**September, 2011.**

  
\_\_\_\_\_  
**NOTARY PUBLIC**

