

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

American Federation of State, County and)	
Municipal Employees, Council 31,)	
AFL-CIO,)	
)	
Petitioner)	
)	Case No. L-RC-11-009
and)	
)	
County of Cook,)	
)	
Employer)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On December 27, 2010, the American Federation of State, County and Municipal Employees, Council 31, AFL-CIO filed a majority interest representation/certification petition in Case No. L-RC-11-009 with the Local Panel of the Illinois Labor Relations Board (Board) pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315 (2010), as amended (Act), and the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin Code, Parts 1200 through 1240 (Rules). This petition seeks to include four employees in the position of Building Custodian I employed by the Cook County Health & Hospitals System at the John H. Stroger, Jr. Hospital of Cook County in the existing bargaining unit certified in Case No. L-UC-08-011.¹

A hearing was held on February 1, 2011, before Administrative Law Judge John Clifford in Chicago, Illinois. At this time, all parties appeared and were given a full opportunity to participate, adduce relevant evidence, examine witnesses, and argue orally. Briefs were timely filed by both parties. After full consideration of the parties’ stipulations, evidence, arguments, and briefs, and upon the entire record of this case, I recommend the following:

¹ According to the evidence presented, the four employees in dispute are George May, Keith Beal, Jerome Smylie, and Richard Price.

I. PRELIMINARY FINDINGS

1. The parties stipulate, and I find, that the Employer is a public employer within the meaning of the Act.
2. The parties stipulate, and I find, that the Employer is subject to the Board's jurisdiction as set out in the Act.

II. ISSUES AND CONTENTIONS

The central issue to be resolved is whether the petitioned-for employees are supervisory employees within the meaning of Section 3(r) of the Act. The Employer contends that the petitioned-for employees are supervisors and must be excluded from collective bargaining under the Act. Petitioner contends that the petitioned-for employees are not supervisory employees within the meaning of Section 3(r) the Act.

III. FINDINGS OF FACT²

Each of the four employees at issue holds the title of Building Custodian I (or "manager") and works in the Environmental Services Department of the John H. Stroger, Jr. Hospital of Cook County. Since May of 2010, the Environmental Services Department has been without a director. Consequently, the department is overseen by its two assistant directors, Stevie Binion and Ronald Harrison. Managers report directly to these assistant directors and function as superiors over two groups of subordinate employees described as "supervisors" and building service workers (or "BSWs"). Each of the four managers generally oversees the implementation

² The following facts are based, in part, on the testimony of Stevie Binion, an assistant director of the Environmental Services Department. No other witnesses were called by either party.

of a variety of custodial services during a particular shift. In addition, when a supervisor is absent, a manager assumes some of that supervisor's duties.

When a manager observes unsatisfactory conditions and it appears that a subordinate is at fault, the manager reports the observation to an assistant director. Subsequently, the assistant director determines the appropriate level of discipline. After this exchange, the manager may have the authority to issue a written reprimand.

A BSW was once issued a written reprimand by a supervisor after failing to follow that supervisor's instructions. However, after it was determined that the BSW had been given confusing instructions by two supervisors, a manager and the assistant directors intervened and decided to withdraw the discipline. Managers are generally expected to clear this kind of decision with the assistant directors before intervening in this way.

On a separate occasion, after conducting an inspection, a hospital director determined that the conditions of a particular area of the hospital were unsatisfactory and called for the discipline of the employee responsible for the area. A manager reported these circumstances to Binion, who indicated to the manager that it was appropriate for him to go forward with discipline. Subsequently, the manager issued a supervisor a written reprimand for his unsatisfactory performance and his failure to make a follow-up inspection of work assigned to a BSW. The manager could not have issued this discipline without consulting with an assistant director.

If a manager discovers a BSW who is not in the correct place and a supervisor is not present, the manager has the authority to discipline that employee. According to testimony, a BSW has been "written up" for being found outside of his assigned area.

Testimony generally indicates that managers are responsible for determining the schedules of supervisors and BSWs. When determining a schedule, managers usually follow the

schedule of the previous month. However, a manager may adjust a schedule in order to respond to a staffing shortage. Managers are also responsible for planning inspections.

Managers conducted evaluations of supervisors on one occasion in 2009. While these evaluations were placed in the supervisors' personnel files, the evaluations merely alerted the evaluated employee of perceived deficiencies.

IV. DISCUSSION AND ANALYSIS

The Employer asserts that the managers at issue are supervisors within the meaning of Section 3(r) of the Act.³ Under that Section, petitioned-for employees are supervisors if they: (1) perform principal work substantially different from that of their subordinates; (2) possess authority in the interest of the Employer to perform one or more of the 11 indicia of supervisory authority enumerated in the Act; (3) consistently exercise independent judgment in exercising supervisory authority; and (4) devote a preponderance of their employment time to exercising that authority. City of Freeport v. Illinois State Labor Relations Board, 135 Ill. 2d 499, 512, 554 N.E.2d 155, 162 (1990); Village of Justice, 17 PERI ¶2007 (IL SLRB 2000); Village of Bolingbrook, 19 PERI ¶125 (IL LRB-SP 2003); Village of New Lenox, 23 PERI ¶104 (IL LRB-SP 2007). The party which seeks to exclude an individual from a proposed bargaining unit has the burden of proving that statutory exclusion. Chief Judge of the Circuit Court of Cook County,

³ Section 3(r) of the Act states, in relevant part:

“Supervisor” is an employee whose principal work is substantially different from that of his or her subordinates and who has the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward or discipline employees, to adjust their grievances, or to effectively recommend any of those actions, if the exercise of that 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 that authority, State supervisors notwithstanding.

18 PERI ¶2016 (IL LRB-SP 2002); County of Boone and Sheriff of Boone County, 19 PERI ¶74 (IL LRB-SP 2003).

Principal Work Requirement

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. Freeport, 135 Ill. 2d at 514, 554 N.E.2d at 162; Northwest Mosquito Abatement District, 13 PERI ¶2042 (IL SLRB 1997), aff'd, 303 Ill. App. 3d 735, 708 N.E.2d 548 (1st Dist. 1999). If that work is obviously and visibly different, the principal work requirement is met. Freeport, 135 Ill. 2d at 514, 554 N.E.2d at 162. However, in other cases, where the alleged supervisor performs functions facially similar to those of his subordinates, the Board has looked at what the alleged supervisor actually does to determine whether the “nature and essence” of his work is substantially different from that of his subordinates. See Freeport, 135 Ill. 2d at 514, 554 N.E.2d at 162; City of Burbank, 1 PERI ¶2008 (IL SLRB 1985); Village of Alsip, 2 PERI ¶2038 (IL SLRB 1986).

Though the record lacks meaningful descriptions of the subordinates’ work, a general departmental hierarchy has been established in which supervisors are subordinate to managers and BSWs are subordinate to those supervisors. Nevertheless, despite this general hierarchy, the work of managers and supervisors is not always obviously and visibly different. Furthermore, the record lacks a true basis upon which it could be determined that the nature and essence of this work substantially differs.

As indicated above, testimony indicates that managers assume some of the work of supervisors when they are absent. According to testimony, this occurs “quite a bit.” Like a supervisor, managers oversee the work of BSWs. This occurs even when supervisors are not

absent. In general, managers are allegedly responsible for the implementation of various services during a particular shift. However, signifying a similar role, a supervisor has been disciplined for work assigned to a BSW under his control. Testimony also briefly indicates that both managers and supervisors have some authority to “write up” a subordinate. Although each evaluated a different set of employees, in 2009, both managers and supervisors conducted evaluations of their subordinates. In addition, while supervisors are not currently responsible for scheduling or planning inspections, supervisors have been more involved in those processes in the past.

In light of the foregoing, it cannot be said that the Employer has proven that managers perform principal work which is substantially different from that of their subordinates. On the other hand, the record provides no analogous evidence indicating that managers and BSWs perform any similar work. Further, while the record does not blatantly provide evidence demonstrating that BSWs uniquely “perform cleaning and various other custodial work” (as suggested by the Employer in its initial objection), the record does intuitively suggest that the managers’ “main undertaking” differs from the main undertaking of the subordinate BSWs. See Freeport, 135 Ill. 2d at 513, 554 N.E.2d at 162; Illinois Secretary of State, 1 PERI ¶2009 (IL SLRB 1985). Accordingly, to the extent that managers’ work is substantially different from that of the BSWs, the Act’s principal work requirement has been satisfied.

Supervisory Indicia

With respect to the second and third prongs of the Act’s supervisory definition, the Employer must establish that the employee at issue has the authority to perform or effectively recommend any of the eleven indicia of supervisory authority listed in the Act and consistently exercise that authority with independent judgment. 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. Freeport, 135 Ill. 2d at 531, 554 N.E.2d at 170; Chief Judge of the Circuit Court of Cook County v. American Federation of State, County and Municipal Employees, Council 31, 153 Ill. 2d 508, 531, 607 N.E.2d 182, 193 (1992); Justice, 17 PERI ¶2007. 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 review. City of Peru v. Illinois State Labor Relations Board, 167 Ill. App. 3d 284, 289, 521 N.E.2d 108, 112 (3rd Dist. 1988); Peoria Housing Authority, 10 PERI ¶2020 (IL SLRB 1994), aff'd by unpub. order, Docket No. 3-94-0317 (3rd Dist. 1995); Justice, 17 PERI ¶2007. In this case, the Employer asserts that managers direct and discipline within the meaning of the Act.

Direct

Concerning the authority to direct, the Employer centrally argues that managers are responsible for the direction of their subordinates as set forth in an admitted job description. In general, the authority to direct requires the alleged supervisor to be responsible for the work of his subordinates and have the authority to make operational decisions affecting those subordinates in the areas of assigning work, granting time off or vacation requests, evaluating subordinates, reviewing work, and instructing how work is to be performed. See Illinois Department of Central Management Services (Department of Professional Regulation), 11 PERI ¶2029 (IL SLRB 1995). A review of the record, however, does not reveal this type of supervisory authority.

The admitted job description generally states, for example, that a manager “[d]evelops work procedures” and “establishes performance standards” for supervisors and BSWs. However, no testimony or additional evidence provides any explanation of these alleged activities. Furthermore, these bare assertions clearly fail to address whether such activities require the use of independent judgment. The admitted job description also briefly suggests that managers conduct regular inspections and tours of assigned shifts, but this activity is not developed in the record. Specifically, concerning this activity, Binion simply noted that managers “are responsible for planning any inspections or anything that has to do with rounds with people in the particular areas that we [the Environmental Services Department] serve.” Similarly, without any clarification or confirmation in the record, the admitted job description notes that managers are “[r]esponsible for the follow up of in-service training for the employees.”

A party asserting a statutory exclusion cannot satisfy its burden by relying on vague, generalized testimony or contentions as to an employee’s job function. Instead, the Board requires that a party support its arguments with specific examples of the alleged supervisory, managerial, or confidential status. State of Illinois, Department of Central Management Services, 24 PERI ¶112 (IL LRB-SP 2008); County of Union, 20 PERI ¶9 (IL LRB-SP 2003). Furthermore, job descriptions alone are generally considered insufficient evidence to establish employees’ duties or their supervisory status. See Northern Illinois University (Department of Safety) 17 PERI ¶2005 (IL LRB-SP 2000); County of Union, 20 PERI ¶9 (IL LRB-SP 2003); State of Illinois, Department of Central Management Services, 25 PERI ¶184 (IL LRB-SP 2009); City of Carbondale, 27 PERI ¶68 (IL LRB-SP 2011). By simply alleging these general responsibilities in this way, the Employer has not met its burden.

The Employer indirectly observes that the responsibility for formally evaluating work performance is evidence of the authority to direct when the evaluation is used to affect the evaluated employees' pay or employment status. See City of Naperville, 8 PERI ¶2016 (IL SLRB 1992); Illinois Department of Central Management Services (Division of Police), 4 PERI ¶2013 (IL SLRB 1988). Indeed, on one occasion in 2009, managers conducted evaluations of their subordinate supervisors. However, the record clearly indicates that these evaluations could not be used to affect the evaluated employees' pay or employment status. Rather, these evaluations merely alerted the evaluated supervisors of deficiencies. Further, no adverse consequences followed a poor evaluation. Consequently, the managers' evaluations do not serve as evidence of the authority to direct within the meaning of the Act.

As suggested above, the Board has found that the authority to direct subordinates includes the authority to assign work to those individuals. See City of Sparta, 9 PERI ¶2029 (IL SLRB 1993); County of Cook, 15 PERI ¶3022 (IL LLRB 1999). While not particularly alleged by the Employer, it could be argued that managers assign work to the extent that they are responsible for determining the schedules of their subordinates. As noted, limited testimony also briefly suggests that managers play some role in the planning of inspections. Nevertheless, the Employer has altogether failed to demonstrate that managers use independent judgment when exercising the supervisory authority to direct as required by the language of Section 3(r) of the Act. Managers' schedules usually follow the preceding month's schedule and only appear to deviate in response to staffing shortages. Because the Village presented no additional record evidence demonstrating how work is assigned, the managers' assignment of work appears to be routine in nature. See Boone, 19 PERI ¶74; Village of North Riverside, 19 PERI ¶59 (IL LRB-SP G.C. 2003).

In addition, the Board has held that any function of direction does not rise to supervisory direction within the meaning of the Act absent evidence that the alleged supervisor also possesses significant accompanying discretion to affect his subordinates' employment in areas likely to fall within the scope of union representation, that is, their terms and conditions of employment. See City of Bloomington, 13 PERI ¶2041 (IL SLRB 1997); Sparta, 9 PERI ¶2029; Naperville, 8 PERI ¶2016. Evidence of such discretion is absent from the record. Moreover, the Board has held that, in the vast majority of circumstances, the day to day direction of subordinates, such as the oversight of and review of their work and the assignment of tasks, does not by itself entail any significant impact upon the terms and conditions of the subordinates' employment. Bolingbrook, 19 PERI ¶125. Accordingly, the Employer has not demonstrated supervisory status by proving that the managers direct within the meaning of the Act.

Discipline

The Employer argues that managers have the authority to discipline subordinates "and discipline has in fact been given to subordinates." As noted above, managers have the ability to report unsatisfactory conditions to an assistant director. After the assistant director makes a determination regarding the appropriate level of discipline, the manager may have the authority to issue a written reprimand. The Employer argues that the discipline given by the managers "is not altered by any supervisor of a higher authority." However, according to policy, discipline is not issued by a manager before that discipline is independently reviewed by an assistant director. Because the managers' discipline generally follows direction from or significant review by their superiors, independent judgment is not exercised.⁴ See Metropolitan Alliance of Police v.

⁴ Although there was testimony that managers can issue a "write up" when they find a BSW outside of his assigned area, nothing in the record indicates what processes the manager undertakes to determine if the BSW should be disciplined. Moreover, the record generally indicates that the assistant directors play a significant role in all discipline. Thus, I cannot find that managers consistently use independent judgment in exercising this alleged

Illinois Labor Relations Board, 362 Ill. App. 3d 469, 478, 839 N.E.2d 1073, 1081 (2nd Dist. 2005); Division of Police, 4 PERI ¶2013. Furthermore, disciplinary authority is not truly supervisory in nature unless it affects an employee's terms and conditions of employment. Boone, 19 PERI ¶74. Although the record reflects that a manager has issued a written reprimand, it is not clear that this kind of discipline has any effect on either the supervisors' or the BSWs' terms and conditions of employment. Accordingly, the Employer has not demonstrated that managers possess the authority to discipline within the meaning of the Act.

Preponderance Requirement

The fourth prong of the supervisory test requires that the alleged supervisor devote a preponderance of his or her employment time exercising supervisory authority, as defined by the Act. Freeport, 135 Ill. 2d at 532, 554 N.E.2d at 171. The Illinois Supreme Court, in Freeport, interpreted the preponderance standard to mean that the most significant allotment of the employee's time must be spent exercising supervisory functions. Id. Stated another way, the employee must spend more time on supervisory functions than on any one non-supervisory function. Id. Since the Freeport decision, two panels of the Fourth District of the Illinois Appellate Court have issued different interpretations of how preponderance can be analyzed. The first interpretation defines preponderance as requiring that the employee spend a majority, or more than 50% of his time, engaged in supervisory activity. State of Illinois Department of Central Management Services (Department of Children and Family Services) v. Illinois State Labor Relations Board, 249 Ill. App. 3d 740, 746, 619 N.E.2d 239, 244, 9 PERI ¶4014 (4th Dist. 1993). The second interpretation of preponderance relies on whether the supervisory functions

authority. Freeport, 135 Ill. 2d at 520, 554 N.E.2d at 165. Furthermore, to meet its burden, the Employer must demonstrate by clear and specific evidence that the employee falls within the excluded category, but has not done so in this instance. See State of Illinois, Department of Central Management Services (Illinois Gaming Board and Illinois Department of Revenue), 26 PERI ¶149 (IL LRB-SP 2011); Bolingbrook, 19 PERI ¶ 125.

are more significant than the non-supervisory functions. State of Illinois Department of Central Management Services v. Illinois State Labor Relations Board, 278 Ill. App. 3d 79, 85, 662 N.E.2d 131, 135, 12 PERI ¶2024 (4th Dist. 1996). For the following reasons, the employees at issue meet neither formulation of the preponderance requirement.

Without additional analysis or citation to the record, the Employer simply concludes that managers spend the entirety of their work day performing supervisory activities set forth in the admitted job description. However, under either formulation of the statutory preponderance requirement, mere conclusory evidence, in the absence of specific facts and criteria, is not sufficient to meet the burden of proof to establish that a putative supervisor meets the preponderance prong of the four-prong test. See City of Chicago (Department of Public Health), 27 PERI ¶15 (IL LRB-LP G.C. 2011); Bolingbrook 19 PERI 125. Moreover, the admitted job description provides absolutely no indication of how managers devote their time to any of these alleged activities.

The Act's delineation of the fourth prong, on its face, restricts the work time that is relevant under a self-referential standard which harks back to the second and third prongs of the supervisory test. See City of Chicago, 27 PERI ¶15. The second and third prongs address the authority to undertake or effectively recommend various supervisory functions (indicia). The exercise of that authority, as indicated throughout this analysis, requires the consistent use of independent judgment. In turn, the time that is relevant under the fourth prong, so far as determining whether the preponderance of work time requirement is met, is employment time actually spent exercising that authority. Id. That actual time does not, for example, include work time spent directing or disciplining employees when such activities do not amount to direction or discipline within the meaning of the Act. Id., see Downer's Grove v. Illinois State Labor

Relations Board, 221 Ill. App. 3d 47, 55, 581 N.E.2d 824, 829 (2nd Dist. 1991). Because the above analysis reveals that managers neither direct nor discipline with independent judgment, the Employer cannot satisfy the preponderance requirement.

Binion's testimony does provide a general overview of how managers divide their time, but this testimony does not address the alleged supervisory activities. According to this testimony, 20% of managers' time is spent meeting with a group of people including the management team responsible for the nursing units and patients, 20% is spent walking with supervisors and discussing the issues of a particular area, 20% is spent dealing with scheduling and paperwork, 20% is spent "walking and noticing things on their own," and 15% is spent in meetings or having conversations with assistant directors about changes the managers want to make.

The evidence does not support a finding that managers spend a majority of their employment time on supervisory tasks. As suggested above, however, Department of Central Management Services states that "preponderance" can mean superiority in numbers or superiority in importance. Department of Central Management Services, 278 Ill. App. 3d at 85, 662 N.E.2d at 135. More narrowly, this panel of the Fourth District of the Illinois Appellate Court avoids the use of a strictly mathematical "majority-of-time" test and notes that whether a person is a supervisor should be defined by the significance of what that person does for the employer, regardless of the time spent on particular types of functions. Id.⁵

⁵ While this panel appears to avoid a purely mathematical approach, Department of Central Management Services also observes, as noted above, that Freeport indicates that in order for an employee to be considered a supervisor under the fourth prong of the supervisory definition, the alleged supervisor must spend more time on supervisory functions than on any one nonsupervisory function. Department of Central Management Services, 278 Ill. App. 3d at 85, 662 N.E.2d at 135; Freeport, 135 Ill. 2d. at 532, 554 N.E.2d at 171; Secretary of State, 1 PERI ¶2009 (IL SLRB 1985). To be clear, because no precise delineation of the managers' work exists in the record, this kind of analysis cannot be conducted without conjecture.

Neither the Employer nor the instant record provides a clear illustration of the “significance” of the managers’ allegedly supervisory activities. While managers do appear to play some limited role in the disciplinary process, this function is rarely performed, if ever. Managers may also play a role in the creation of schedules, but this routine activity was not shown to consume an appreciable amount of a manager’s time. On one occasion, managers conducted evaluations of their subordinate supervisors, but this activity was not addressed in detail and the record does not clearly indicate that the activity will be repeated in the future. In general, such infrequent activity is unlikely to constitute the “most significant allotment” or a “notable expenditure” of the managers’ employment time. See Illinois Secretary of State, 20 PERI ¶11 (IL LRB-SP 2003); Chief Judge of the Circuit Court of Cook County, 19 PERI ¶123 (IL LRB-SP 2003). Under these circumstances, the Employer has not shown that the managers’ supervisory functions are more significant than their non-supervisory functions. Accordingly, the Employer has not demonstrated that the managers are supervisors within the meaning of the Act.

V. CONCLUSIONS OF LAW

1. I find that the petitioned-for employees in the position of Building Custodian I are not supervisory employees as defined by Section 3(r) of the Act.
2. I find that the petitioned-for employees in the position of Building Custodian I are not excluded from collective bargaining under Section 3(s) of the Act.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the petitioned-for employees in the position of Building Custodian I be included in the existing bargaining unit certified in Case No. L-UC-08-011.

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 14 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 10 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 5 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed with the Board's General Counsel at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 14-day period, the parties will be deemed to have waived their exceptions.

Issued at Springfield, Illinois, this 19th day of October, 2011.

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



Martin Kehoe
Administrative Law Judge

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Case No. L-RC-11-009

DATE OF
MAILING: **October 19, 2011**

AFFIDAVIT OF SERVICE

I, Lori Novak, on oath, state that I have 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 1:30 p.m., on the date listed above, copies thereof in the United States mail pickup at One Natural Resources Way, Lower Level Mail Room, Springfield, Illinois, addressed as indicated and with postage prepaid for first class mail.

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Lori Novak

SUBSCRIBED and SWORN to
before me, **October 19, 2011**



NOTARY PUBLIC

