

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

City of Chicago (Office of Inspector General),)	
)	
Employer)	
)	Case No. L-RC-13-011
and)	
)	
American Federation of State, County and Municipal Employees, Council 31,)	
)	
Petitioner)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On January 10, 2013, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME or Union) filed a petition with the Illinois Labor Relations Board (Board) seeking to include the titles Investigator I, Investigator II, and Investigator III employed at the City of Chicago, Office of Inspector General (Employer) in the AFSCME-represented historical unit #3. The City of Chicago opposed the petition, asserting that the employees sought to be represented are excluded from coverage of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2012), as amended, pursuant to the exemption for managerial and confidential employees. In accordance with Section 9(a) of the Act, an authorized Board agent conducted an investigation and determined that there was reasonable cause to believe that a question concerning representation existed. A hearing on the matter was conducted on June 26 & 27, 2013. Both parties elected to file post-hearing briefs.

I. Preliminary Findings

The parties stipulate and I find:

1. At all times material, the Employer has been a public employer within the meaning of Section 3(o) of the Act and the Board has jurisdiction over this matter pursuant to Section 5(b) and 20(b) of the Act.

2. AFSCME is a labor organization within the meaning of Section 3(i) of the Act.

II. Issues and Contentions

The issues are whether the petitioned-for investigators are managerial as a matter of law, managerial as a matter of fact within the meaning of Section 3(j) of the Act, or confidential within the meaning of Section 3(c) of the Act.

The Employer contends that the investigators are managerial as a matter of law because they are “statutorily authorized surrogates” of the Inspector General in fulfilling the agency’s mission. The Chicago Municipal Code authorizes the Inspector General to employ assistants and the Employer asserts that the investigators’ duties correspond to the Inspector General’s own statutory mandates.

Next, the Employer argues that the investigators are managerial as a matter of fact because their duties encompass the IGO’s entire mission, or a major component of it, and they make effective recommendations which control or implement IGO policy. First, the Employer asserts that the investigators’ acts become those of the IGO because the IGO accepts the investigators’ recommendation to decline or refer a case 95-100% of the time and accepts their recommendations to sustain or not sustain a case 95.7% of the time. Finally, the Employer contends that the IGO’s diffused, collaborative, and delegated authority structure supports a finding of managerial status.

Further, the Employer contends that the investigators are confidential because they meet the reasonable expectations test, the authorized access test, and the labor nexus test. The Employer states that the investigators are confidential under the reasonable expectations test because the IGO will expect the investigators to continue assisting the Inspector General and his deputies regarding the formulation, determination, and effectuation of management policies with regard to labor relations, collective bargaining, and contract administration.

The Employer similarly contends that the investigators satisfy the labor nexus test because they assist the Inspector General and his deputies in developing and preparing reports which relate to collective bargaining and that they likewise assist him in investigating and reviewing collective bargaining policies and provisions.

Further, the Employer contends that the investigators satisfy the authorized access test because they have regular and authorized access to (1) confidential investigations that directly

relate to, and significantly impact, AFSCME collective bargaining agreements; (2) information regarding systemic and programmatic issues involving economy, efficiency, effectiveness, and integrity in the City's department programs and operations which likewise impact AFSCME and its members; (3) departmental books, records, and papers; and (4) the IGO database that maintains information on all complaints received by the IGO. In addition, the Employer asserts the investigators are confidential under this test because they have advance knowledge of a department's intent to take disciplinary action against an employee, insight into the rationale for such decisions, and knowledge of the Employer's litigation strategy in grievance arbitration and Human Rights Commission hearings.

Finally, the Employer argues that inclusion of the investigators in the bargaining unit would create an actual or perceived conflict of interest which would undermine public trust in the IGO as an objective, independent, and non-partisan agency.

The Union counters that the investigators are not managerial as a matter of fact because they do not satisfy either prong of the test. First, they do not engage in executive and management functions because they merely exercise professional discretion and apply technical expertise to determine if there is evidence to sustain a complaint. Further, the Union asserts that the investigators have no discretion to broadly affect the IGO's goals because the chief investigator controls all aspects of the investigation including the investigators' recommendations on the outcome of case. Second, the Union argues that the investigators do not determine the methods or means of how the IGO provides its services. The Union contends that the investigators' effective recommendations concerning the disposition of a case are not managerial because the investigators formulate them in conjunction with the chief and merely apply established rules to the results of the fact finding.

Next, the Union asserts that the investigators are not confidential by virtue of their investigative duties because their advance access to potential disciplinary recommendations fails to qualify as access to labor relations strategy. Further, the Union asserts that the investigators are not confidential, even though the office issues Audit and Program Review reports, because the investigators do not formulate the reports and purportedly have no advance knowledge of the reports' contents. Moreover, the Union notes that these reports are not confidential because they

are mere recommendations which are available to the public and do not contain labor relations strategy.¹

Finally, the Union dismisses the Employer's conflict of interest arguments as contrary to existing precedent.

III. Facts

1. Overview – Mission and Purpose of the Inspector General's Office

The Inspector General's Office (IGO) is an independent, nonpartisan oversight agency whose mission is to promote economy, efficiency, and integrity in the administration of programs and operations of City government. In particular, it aims to prevent, detect, identify, expose, and eliminate waste, inefficiency, misconduct, fraud, corruption, and abuse of public authority and resources. Further, it helps ensure that City officials, employees and vendors provide efficient, cost-effective government operations. The IGO achieves this mission through (1) administrative and criminal investigations, (2) audits of City programs and operations, and (3) inspections and review of City programs, operations and policies. It issues reports of its findings and makes disciplinary and policy recommendations.

Section 2-56-030 of the City of Chicago Municipal Code sets forth the Inspector General's powers and duties. These duties include, but are not limited to, the following: (1) to receive and register complaints and information concerning misconduct, inefficiency and waste within the city government; (2) to investigate the performance of governmental officers, employees, functions and programs, either in response to complaint or on the Inspector General's own initiative, to detect and prevent misconduct, inefficiency and waste within the programs and operations of the city government; (3) to promote economy, efficiency, effectiveness and integrity in the administration of the programs and operations of the city government by reviewing programs, indentifying any inefficiencies, waste and potential for misconduct, and recommending to the mayor and the city council policies and methods for the elimination of inefficiencies and waste, and the prevention of misconduct; (4) to report to the mayor concerning results of investigations undertaken by the IGO; and (5) to request information related to an investigation from any employee, officer, agency, or licensee of the city.

¹ The Union does not analyze the labor nexus test and the authorized access test separately on brief.

2. Organizational Structure

Joseph Ferguson is Inspector General of the City of Chicago. He delegates his authority to IGO personnel. William Marbeck is the Deputy Inspector General.

The IGO is divided into the following four sections: Hiring Oversight, Legal, Investigations, and Audit and Program Review (APR). Each section is headed by a Chief or Deputy Inspector General. Jonneida Davis oversees the Hiring Oversight section. Deputy Inspector General of Legal T.J. Hengesbach oversees the Legal section. Deputy Inspector General of Investigations (DIGI) Celia Meza oversees the Investigations section. Deputy Inspector General Lise Valentine oversees the APR section.

The investigation section is divided into three teams, each headed by a Chief Investigator (chief). Every team is assigned certain City departments. The teams investigate matters involving or arising out of their assigned department.

3. Confidentiality Requirements

The IGO must maintain the confidentiality of sources of information, investigatory files and reports. It may issue a public summary of each investigation resulting in sustained findings of misconduct which includes (1) the nature of the allegation or complaint, (2) the specific violations which result in sustained findings, (3) the Inspector General's recommendation for discipline or other corrective measures, and (4) the City's response to, and final decision on, the Inspector General's recommendation. However, it must not disclose the name of the individual who was the subject of the investigation until the IGO sustains the complaint and reports the violation. Even in such cases, the IGO may release the name of the individual subject to investigation only to the City department at issue, the United States Attorney, the Illinois Attorney General, and to the State's Attorney of Cook County.²

4. Investigators' Duties

Investigators receive complaints, help determine whether they should be opened for investigation, perform investigations, and draft summary reports which contain

² The IGO may divulge such information to others only if another exception to the confidentiality rules applies.

recommendations on the complaints' merits. The primary goal of an investigation is to establish facts.

a. Complaint Intake

The IGO initiates investigations based on information received from the individuals who submit complaints via phone, email, web, or in person. Alternatively, the IGO may commence an investigation on its own initiative.

The complaint investigation process begins with complaint intake. Each day, the IGO assigns a different investigator as On-Duty Investigator (ODI). The ODI receives complaints from the public. In that capacity, the ODI creates a complaint record, performs background research, and prepares material in consultation with the chief, for the chief's consideration. The ODI writes a report summarizing the information gathered. The report includes a recommendation to the chief that the IGO either open an investigation, decline to open an investigation, or refer the complaint to another agency. In deciding whether to recommend opening an investigation, the investigator considers the complaint, the complainant's statement, the nature of the complaint, and the preliminary documents. He bases his final decision on his professional experience, his knowledge of investigations, and the information and documents he has compiled. In particular, the investigator may consider the credibility of the complainant, the nature of the conduct, and its likely impact on City operation.

Once the investigator drafts the report, he sends it to the chief for review via email. The chief reviews the data in exactly the same manner as did the investigator. If the chief agrees with the investigator's recommendation, he initials the report and returns it to the investigator indicating that the report was sufficient. If the chief believes the initial report was insufficient, he may instruct the ODI to perform additional research. The chief is not required to agree with the investigator's recommendation. Once the chief approves the report, the investigator uploads the report into the remedy database.

The chief then makes his own recommendation to the DIGI to immediately open, routine open, decline, or refer the complaint. The DIGI holds a meeting of the Complaint Advisory Committee (CAC) which includes the DIGI, who chairs the meeting, the chief investigators, the Deputy Inspector General for the legal section, the Chief of Hiring and Oversight, and the Deputy for APR. The CAC reviews the complaint files which the chiefs and investigators have recommended for "routine basis" opening. The CAC discusses each file to determine whether

the complaint should be opened, closed, or referred. The CAC follows the investigators' recommendations between 95 to 100 percent of the time. The DIGI has final authority to determine whether the IGO should decline, refer, or open a complaint for investigation.

Once the IGO opens a case, the chief assigns the case to an investigator. The investigator reviews the documents in the file and develops a work plan³ which outlines the manner in which the investigator will proceed with the investigation. He discusses the work plan with the chief. The chief either approves the plan or suggests other investigative steps. The investigator meets with the chief on a daily basis to brief him on the progress of the cases. The chief monitors the plan throughout the investigation and the investigator advises the chief as to the investigation's progress. The investigator asks the chief to weigh in on his next course of action in the investigation.

b. Types of Investigations

The IGO conducts criminal and administrative investigations.

In criminal investigations, the investigators perform covert operations, sign search warrants, sign affidavits for "confidential overhears,"⁴ draft requests for subpoenas,⁵ and interview subjects. They sometimes partner with other law enforcement agencies and conduct joint investigations.

In administrative investigations, the investigators request documents using subpoenas and records requests, review those documents, perform surveillance, and conduct interviews of witnesses and complainants. Interviewees are often represented by union representatives and/or attorneys.

If an investigator determines that he needs to use the subpoena or document request process, the investigator obtains the subpoena or document request form from the shared drive, fills it out and emails it to his chief. The chief reviews document requests and subpoenas to ensure that the documents requested are relevant to the investigation. The chief might suggest changes to the language of the document and the investigator will make such changes. The chief sends the document to the staff assistant for issuance or service. The DIGI reviews every subpoena before the OIG serves it.

³ The work plan is a document that the investigator updates during the course of the investigation.

⁴ This is a covert recording method, the use of which requires a judge's permission.

⁵ The IGO serves subpoenas only on third parties and not city employees. City employees are required by statute to comply with the IGO's investigations.

c. Sustained versus Not Sustained - Closing Recommendation Memoranda

In not sustained cases, the investigator drafts a closing recommendation memorandum which contains a fact section, an analysis section, and a recommendation which advises the OIG to classify the case as not sustained. The investigator drafts the memo only after he discusses his approach with the chief and after the chief has approved it. The chief then sends the memo to the DIGI. If the DIGI agrees with the recommendation, the IGO closes the case and the decision to close the case becomes the IGO's final action on the matter.

In sustained cases, the investigator collaborates with an attorney to draft a closing recommendation memorandum and makes his recommendation jointly with the attorney. First, the investigator formulates his recommendation in consultation with his chief and does not recommend sustaining the case without the chief's approval. If the chief agrees that the case should be sustained, the chief asks the legal section to assign an attorney to the case. The attorney may suggest that the investigator take additional investigative steps. Investigators may change their recommendations based on discussions with their chief or the attorney assigned to the case.⁶

The attorney and the investigator then submit the report to the Inspector General who reviews it. They attend a sustained case meeting in which they present their findings, analysis, and recommendations to the Inspector General and senior staff. Investigators are sometimes directed to perform additional investigation after a sustained case meeting and may be instructed to rewrite or revise portions of the closing memo to incorporate additional analysis. When the Inspector General is satisfied with the contents of the document, he signs it. The Inspector General has final authority as to whether the IGO will recommend that a complaint be sustained. The Inspector General accepts the investigators' recommendations on the disposition of a case 95.7 percent of the time.

Once the Inspector General approves the decision, the IGO sends copies of the investigation's summary report to the Mayor and to the Commissioner of the City department affected by it. If the IGO issues a sustained finding against an employee, the City department at

⁶ Some attorneys prefer to draft the sustained case memo on their own with very little assistance and then later ask the investigators to provide review and comments. Other attorneys prefer to alter the closing recommendation memo after the investigator has drafted it. If the investigator drafts the memo, the chief sees and approves of it before it is transmitted to the attorney

issue has the discretion to take disciplinary action against the employee, to prepare charges against him, or to take no action at all.

If the department chooses to take action against the named employee, City of Chicago corporation counsel provides a draft of charges to the IGO before it issues them to the employee. Hengesbach asks the investigator who worked on the case to review the charges to ensure their accuracy. If the investigator is absent when the IGO receives the charges, an OIG attorney reviews the file instead.

Disciplined employees may appeal the matter to arbitration or to the Human Resources Board. Investigators assist the City of Chicago law department in preparing for these hearings by strategizing about the case, identifying relevant witnesses and documents, and testifying at hearings concerning the facts of an investigation. Investigators also testify in criminal trials, before grand juries, and at hearings for motions to suppress evidence. The subject of the investigation is represented by an attorney or a union representative. Investigators may be subject to cross-examination.

Marback testified that cases involving AFSCME bargaining unit members could not be “siloeed away” from investigators if they joined the unit. AFSCME employees are subjects, complainants, or witnesses in approximately 8-9% of the IGO cases involving non-business entities. Thirteen of the IGO’s 181 pending cases are related to AFSCME.⁷ Several IGO investigators have testified on behalf of the City against AFSCME employees in both criminal and administrative cases.

⁷ This number is accurate as of May 1, 2013.

5. Investigators' Collaboration with Other Sections of the IGO

Investigators may collaborate with the Hiring Oversight section. The Hiring Oversight section assures that the City maintains compliance with the orders in Shakman. The oversight compliance officers audit grievances to determine whether employees are using the grievance process to bypass Court-ordered hiring plans. If the Hiring Oversight section observes indicia of intentional misconduct or an effort to bypass the procedural requirements of the hiring plan, the Hiring Oversight section may refer the matter to investigation for a formal inquiry. In addition, investigators must consult with the hiring section in hiring-related cases to take advantage of the oversight employees' institutional knowledge.

Investigators collaborate and interact with the APR section in a similar manner. The APR section conducts performance audits of City programs and operations, issues public reports of its findings, and makes recommendations to improve the efficiency and effectiveness of City programs. Auditors and investigators refer to each other's work and share their institutional knowledge and expertise. For example, APR staff members ask the investigators for background information concerning the workings of the City. Further, Valentine sometimes asks investigators to fact-check APR reports. Valentine recalled three separate instances in which she had done so. In addition, investigators provide some suggestions for the reports' contents and perform some of the background work. However, the responsibility for the research and final production of the APR reports rests solely with the APR. There are no investigators assigned to the APR section.

In addition, Deputy Inspector General Valentine of APR asks investigators to identify systemic problems, inefficiencies, or wasteful practices within the City which might be ripe for an audit. APR staff members rely on the investigators' expertise to help them develop meaningful reviews of the City's programs. Investigators have made suggestions concerning issues that APR should address. In turn, APR has initiated audits based on recommendations made by investigators. In one case, Investigator Krista Simos investigated a complaint that alleged individuals were stealing paint out of a warehouse. Simos told her chief that this repeated problem might be an issue for APR to audit. The chief agreed and brought the matter to Valentine's attention. Simos had no further participation in that case.

6. Reports drafted by the Audit and Program Review Section

APR drafted a report entitled "Savings and Revenue Options." The Savings and Revenue Options document does not set forth recommendations and instead describes issues that the IGO believes warrant serious consideration by City officials. City officials review the options and determine whether they wish to act on the issues it raises.

APR also drafted a report entitled "Review of the Efficiency of Job Duties of Motor Truck Drivers." The report observed that City drivers sat idle for long periods of time because they were not allowed to perform the work done by employees covered by other collective bargaining agreements. The IGO determined that the City employed 200 motor truck drivers that it did not need, at a cost of \$18 million a year over the course of a 10-year collective bargaining agreement (CBA). The IGO called into question the manner and means by which the City Council vetted and approved CBAs. Further, it recommended that the City limit the duration of CBAs to a maximum of 4 years. It also recommended that the City should ratify CBAs only after it submitted to the City Council a comprehensive analysis of a CBA's impact on the delivery of City services, including a comparative cost-benefit analysis of staffing requirements and restraints on management rights. Further, it recommended that the City amend the CBA to include a reopener clause allowing for renegotiation of the CBA if the financial condition of the City changed significantly from the time when the parties first bargained. Ferguson testified that he did not know if any investigators had input into this document.

In addition, APR drafted a report entitled "Review of Opportunities for Civilianization in the Chicago Police Department." The report noted that 292 positions within the Police Department were clerical or administrative in nature but that they were being performed by sworn members of the Fraternal Order of Police. The IGO recommended that the Police Department civilianize those positions to save money. As a result of this recommendation, the City moved the positions out of the FOP unit and placed them into a different bargaining unit. Ferguson testified that an individual from investigations co-authored this report. That individual does not currently hold one of the petitioned-for positions.

APR similarly drafted a report entitled "Description of the Police Officer and Firefighter Collective Bargaining Agreements." It identified the cost impact, and place dollar amounts on, the various benefit pay and work rules contained in police and firefighter contracts. The stated purpose of the report was to "provide members of the City Council and City residents with plain-language information on the contract provisions so that as new contracts are negotiated, these

stakeholders may be better informed of the various provisions in the CBAs that determine compensation, work rules, and management rights in the delivery of public safety services.” Ferguson testified that he did not know if any investigators worked on this report.

Finally, APR drafted a report entitled “Budget Options for the City of Chicago.” The report contained options to decrease the City’s spending or to increase the City’s revenue. The cover letter of this document states that “the report’s intent is not to advocate for specific ways for the City to confront its fiscal difficulties, but rather to provide information to elected officials and the public to inform the debate over how to confront [the City’s fiscal] challenges.” It further states that “the report is intended merely to provide a background and framework for more detailed analysis and public discussion.” Investigator Kris Brown submitted many ideas concerning budget options to APR in response to a request by APR staff member Aaron Feinstein.

Ferguson approves all APR reports. Once he has approved them, he drafts a cover letter addressed to “the Mayor, Members of the City Council, the City Clerk, the City Treasurer, and the residents of the City of Chicago” and encloses the report. The report then becomes public.

IV. Discussion and Analysis

The petitioned-for employees are confidential under the authorized access test but not under the reasonable expectations test or the labor nexus test.

1. Confidential Exclusion

The purpose of the confidential exclusion is to prevent employees from having their loyalties divided between the employer, who expects confidentiality in labor relations matters, and the union, which may seek disclosure of management’s labor relations material to gain an advantage in the bargaining process. City of Evanston v. Ill. State labor Rel. Bd., 227 Ill. App. 3d 955, 978 (1st Dist. 1992).

The Act sets forth two tests to determine whether an employee is subject to the confidential exclusion, (1) the labor nexus test and (2) the authorized access test. The Board has also adopted the reasonable expectations test, which applies when no collective bargaining unit is in place. That test is discussed first below.

a. Reasonable Expectations Test

The investigators are not confidential under the reasonable expectations test because that test does not apply in this case.

The reasonable expectation test applies in the absence of a preexisting collective bargaining relationship where the workplace is therefore new to collective bargaining. Chief Judge of the Cir. Court of Cook Cnty. v. Am. Fed of State Cnty. and Mun. Empl., Council 31, 153 Ill. 2d 508, 524 (1992). It was designed to “determine...whether the onset of collective bargaining would reasonably bring the [petitioned-for] individual[s] confidential duties.” Chief Judge of the Cir. Court of Cook Cnty. 153 Ill. 2d at 524; State of Ill., Dep’t of Cent. Mgmt Servs. (Dep’t of Healthcare and Family Servs.), 28 PERI ¶ 69 (IL LRB-SP 2011); City of Burbank, 2 PERI ¶ 2036 (IL SLRB 1986).

Here, the IGO is not new to collective bargaining because two IGO staff assistants are already members of an AFSCME bargaining unit and have been included in a bargaining unit for approximately four years. See State of Ill., Dep’t of Cent. Mgmt. Servs. (Dep’t of Healthcare and Family Servs.), 28 PERI ¶ 69 (reasonable expectations test did not apply where the investigators and clerical employees of the Chicago office were in a bargaining unit); City of Springfield, 27 PERI ¶ 69 (IL LRB-SP 2011) (reasonable expectations test did not apply where the employer had a history of collective bargaining with at least two bargaining units); City of Chicago, 26 PERI ¶ 114 (IL LRB-LP 2010) (certifying IGO staff assistants into AFSCME unit #1).

Thus, the investigators are not confidential under the reasonable expectations test.

b. Labor Nexus Test

The investigators do not satisfy the labor nexus test because they do not assist, in a confidential capacity, any individual who performs all three required functions with respect to management’s labor relations policy—formulation, effectuation, and determination.

An employee is confidential under the labor nexus test if the employee, “in the regular course of his or her duties, assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations.” 5 ILCS 315/3(c) (2012). The person assisted by the employee must perform all three functions before a finding of confidentiality may be made. Chief Judge of the Cir. Court of Cook Cnty., 153 Ill. 2d at 523.

As a preliminary matter, the Inspector General and his deputies help formulate and determine labor relations policies because they draft and issue efficiency reports which make recommendations to City decision makers concerning collective bargaining which include recommendations as to the duration of collective bargaining agreements, the approval of collective bargaining agreements, the addition of reopener clauses, and the civilianization of certain bargaining unit positions.

Nevertheless, the investigators do not satisfy the labor nexus test, even though they regularly provide confidential assistance by fact-checking such reports,⁸ because the Inspector General and his deputies do not effectuate management policies regarding labor relations. Rather, they only provide recommendations related to collective bargaining and have no other role in the negotiation process. The Board has long held that an employee formulates, effectuates, and determines management's labor relations policies when he makes recommendations with respect to collective bargaining policy and strategy, drafts management proposals and counterproposals, evaluates union proposals, and participates in collective bargaining negotiations. State of Ill., Dep't of Cent. Mgmt Servs., 25 PERI ¶ 161 (IL LRB-SP 2009); State of Ill., Dep't of Cent. Mgmt Servs., 25 PERI ¶ 139 (IL LRB-SP 2009); Union Cnty. State's Attorney, 25 PERI ¶ 1 (IL LRB-SP 2009); Cnty. of Cook, 22 PERI ¶ 12 (IL LRB-LP 2006) aff'd by, 369 Ill. App. 3d 112, 124-25 (1st Dist. 2006); City of Darien, 9 PERI ¶ 2031 (IL SRLB 1993); Vill. of Homewood, 8 PERI ¶ 2010 (IL SLRB 1992). Further, Courts have suggested that an employee's participation in negotiations weighs heavily in favor of finding that such an employee performs all three functions. State of Ill., Dep't of Cent. Mgmt Servs., 2011 IL App (4th) 090966 ¶ 173 (supervisory employee formulated, effectuated, and determined labor relations policy when he used budgetary information and detailed cost analyses in negotiations, even though he did not make recommendations with respect to labor relations strategy or draft

⁸ As discussed more completely in section c, these reports qualify as confidential because they are kept confidential and relate to review of the Employer's collective bargaining policies. See Dep't of Cent. Mgmt. Servs., 2011 IL App (4th) 090966 ¶ 182, 165 (information relating to the effectuation or review of the employer's collective-bargaining policies is confidential; proposed budget was confidential where it was kept confidential prior to its disclosure to the public). Further, the investigators' assistance to the Inspector General and his deputies in fact-checking these documents occurs in the regular course of their duties because Valentine has asked investigators to fact-check APR reports on at least three discrete occasions and is likely to rely on the investigators' specialized institutional knowledge in the future, given her past reliance and the investigators' expertise. State of Ill., Dep't of Cent. Mgmt. Servs., 29 PERI ¶ 12 (IL LRB 2012) (Employee's work on grievance assignment was not ad hoc where she would likely perform such confidential assistance again, given her position and other duties).

management proposals and counter proposals); Chief Judge of the Cir. Court of Cook Cnty., 218 Ill. App. 3d at 705 (employee who advised director on collective bargaining matters did not perform all three functions where he was not on the employer's bargaining team and did not otherwise develop the employer's labor relations policies).

For example, in City of Chicago, the Board held that three supervisors formulated, effectuated, and determined labor relations policies when they respectively (1) made recommendations with respect to the Employer's collective bargaining policy and evaluated union proposals; (2) attended contract negotiations, reviewed union proposals, and coordinated department labor strategy; and (3) provided feedback to union proposals and made proposals to a City labor negotiator through the department's labor liaison. City of Chicago, 26 PERI ¶ 114. Likewise, in State of Illinois Department of Central Management Services, a supervisory employee formulated, effectuated, and determined labor relations policy when he made recommendations on labor policy changes and their implementation, resolved unfair labor practice claims, negotiated proposals with union representatives, and otherwise assisted the labor relations office with unfair labor practice, grievance, and contract negotiations issues. State of Ill., Dep't of Cent. Mgmt Servs., 27 PERI ¶ 31 (IL LRB-SP 2011).

By contrast, in County of Cook, the First District Appellate Court affirmed the Board's conclusion that a department head did not effectuate labor relations policies, even though he served on a committee that established them, because another employee had sole responsibility for bringing the employer's collective bargaining proposals to the table and for putting into effect the policies determined by the committees. Cnty. of Cook v. Ill. Labor Rel. Bd., 369 Ill. App. 3d 112, 124-25 (1st Dist. 2006) aff'g 22 PERI ¶ 12 (IL LRB-LP 2006). Likewise, in Village of Bloomingdale, the Board held that an employee who simply provided input regarding employer proposals before their presentation to the Village Board did not perform all three functions. Vill. of Bloomingdale, 23 PERI ¶ 40 (IL LRB-SP 2007).

Here, the Inspector General and his deputies do not effectuate management policies regarding labor relations because their collective bargaining-related recommendations constitute the sum total of their involvement in collective bargaining. Indeed, there is no evidence that they evaluate union proposals, draft the City's collective bargaining proposals, participate in collective bargaining negotiations, or even refine their recommendations after discussion with City decision-makers prior to issuing them. As such, the Inspector General and his deputies do

not engage in the give and take inherent in collective bargaining and are instead one step removed from the negotiation process. Consequently, they are not the type of supervisors who perform all three functions.

Thus, the Investigators do not satisfy the labor nexus test because the Inspector General and his deputies do not effectuate management's labor relations policy.

c. Authorized Access Test

The investigators are confidential employees under the authorized access test because, in the regular course of their duties, they assist City of Chicago law department attorneys in strategizing about grievance arbitration cases, have advance notice of the discipline that a City department will impose on an employee, and review the APR's efficiency reports for accuracy.

An employee is confidential under the authorized access test if, in the regular course of his duties, he "ha[s] authorized access to information concerning matters specifically related to the collective-bargaining process between labor and management." Chief Judge of the Cir. Court of Cook Cnty., 153 Ill. 2d at 523. Information related to the collective-bargaining process includes (1) the employer's strategy in dealing with an organizational campaign, (2) actual collective-bargaining proposals, and (3) information relating to matters dealing with contract administration. Dep't of Cent. Mgmt. Serv. (Dep't of State Police) v. Ill. Labor Rel. Bd., State Panel, 2012 IL App (4th) 110356 ¶ 27; City of Evanston, 227 Ill. App. 3d at 978. Mere access to confidential information does not create confidential status within the meaning of the Act when such information is not related to collective bargaining or contract administration. Niles Twp. H.S. Dist. 219, Cook Cnty. v. Ill. Educ. Labor Rel. Bd. ("Niles"), 387 Ill. App. 3d 58, 71 (1st Dist. 2008) ("labor relations' does not include hiring, performance or promotion or mere access to personnel or statistical information, even if that information is confidential"); City of Burbank, 1 PERI ¶ 2008 (IL SLRB 1985). As such, an employee's "access to 'confidential' information concerning the general workings of the department or to personnel or statistical information upon which an employer's labor relations policy is based is insufficient to confer confidential status." Dep't of Cent. Mgmt. Serv. (Dep't of State Police), 2012 IL App (4th) 110356 ¶ 27; City of Evanston, 227 Ill. App. 3d at 978. Likewise, merely supplying raw financial data for use in negotiations is insufficient to warrant exclusion under this test. Chief Judge of Circuit Court of Cook Cnty., 218 Ill. App. 3d at 705; but see Dep't of Cent. Mgmt.

Serv., 2011 IL App (4th) 090966 ¶ 168, 181 (employee is confidential if he has authorized access to financial data used directly in collective-bargaining negotiations, access to the employer's proposed budget before it is made public, and budget and salary information which would be used by the employer in effectuating its collective bargaining policies).

However, employees who are privy to an employer's litigation strategy in grievance arbitration cases and related litigation are confidential employees because they have information that is not yet known to the Union which could "hamper the Employer's ability to negotiate...[with the Union]...on an equal footing," if revealed. State of Ill., Dep't of Cent. Mgmt. Servs., 29 PERI ¶ 12. Similarly, employees who have prior knowledge of contemplated disciplinary action against an employee are confidential. State of Ill., Dep't of Cent. Mgmt. Servs., 30 PERI ¶ 38 (IL LRB-SP 2013)(employee with prior knowledge of contemplated discipline was found to be confidential even though there was no evidence that the employee in question was a bargaining unit member).

Here, the investigators satisfy the authorized access test because they are privy to the employer's litigation strategy in grievance hearings which result from their recommendation to sustain a case. Investigators testify in support of the Employer's case initiated as a result of the investigator's recommendation. In that capacity, they receive and review the employee's response to the charges. They then help the City's corporation counsel strategize about a case and identify witnesses and documents that may be relevant to its successful resolution. The investigators' active participation in these cases and their responsibility to further the Employer's goal of sustaining the charges lends additional weight to the testimony that they have authorized access to the Employer's litigation strategy. State of Ill., Dep't of Cent. Mgmt. Serv., 29 PERI ¶ 12 (employee who discussed an employee's grievance, his Human Rights Commission discrimination charges, and the possibility of settlement with CMS labor relations attorneys was confidential by virtue of her advance access to the Employer's position and strategy).

Second, investigators satisfy the authorized access test because they regularly have advance knowledge of contemplated discipline against City employees, including AFSCME bargaining unit members, when they receive and review draft charges from the City's legal department before the employer issues them to the employee in question. State of Ill., Dep't of Cent. Mgmt. Servs., 30 PERI ¶ 38 (employee with prior knowledge of contemplated discipline

was found to be confidential even though there was no evidence that the employee subject to possible discipline was a bargaining unit member).

Notably, the significant percentage of IGO complaints that pertain to AFSCME specifically—approximately 7%—and the inability of the IGO to wall investigators off from AFSCME-related investigations further support the conclusion that the investigators are confidential. See *Id.* (employee’s knowledge of contemplated discipline against non-bargaining unit member sufficient to render him confidential where there was no evidence that the employee could be walled off from information regarding one particular group of employees and not another).

Contrary to the Union’s contention, the extent of the investigators’ authorized access to the confidential information discussed above renders them distinguishable from other internal affairs investigators whom the Board has previously permitted to join the bargaining unit. First, unlike the investigators in the cases cited by the Union, the investigators in this case have authorized access to the Employer’s litigation strategies concerning its prosecution of the charges imposed. But see *City of Chicago*, 2 PERI ¶ 3017 (IL LLRB 1986) (investigators may be called to testify in grievance and criminal proceedings; no evidence presented concerning their exposure to the employer’s litigation strategy); *State of Ill., Dep’t of Cent. Mgmt. Servs.*, 24 PERI ¶ 33 (IL LRB-SP 2008) (OIG investigators may be called to testify in arbitration hearings regarding disciplinary actions; no evidence presented concerning their exposure to the employer’s litigation strategy).

Further unlike the investigators at issue in prior cases, the investigators here have authorized access to disciplinary charges, after the department has decided to impose discipline on the basis of the IGO’s recommendation, but before the charges are issued to employees. In fact, the investigators are required to review those charges for accuracy. As such, their authorized access to material related to the disciplinary process goes beyond mere access to the raw materials that may support the discipline and extends to advance notice of the department’s decision to impose discipline and to the particularities of the discipline imposed.⁹ *City of*

⁹This finding comports with the rationale set forth in an unpublished decision by the Fourth District Appellate Court which affirmed the Board’s denial of an oral hearing concerning the confidential status of an employee who merely recommended discipline on the basis of her application of the law to the facts, but who had no knowledge of a recommendation’s acceptance. *Dep’t of Cent. Mgmt. Servs. v. Ill. Labor Rel. Bd.*, 2012 IL App (4th) 100729-U (“DCMS”).

Chicago, 26 PERI ¶ 114 (Employees' access to actual notices of discipline or layoffs before the notices were set to employees rendered them confidential under the authorized access test because the notices pertained to contract administration); but see State of Ill., Dep't of Cent. Mgmt. Servs., 24 PERI ¶ 33 (investigators' access to particular individuals' personnel files, disciplinary files, files regarding ongoing investigations of such individuals, information regarding possible but not yet imposed discipline, does not constitute access to confidential information within the meaning of the Act) and City of Chicago, 2 PERI ¶ 3017 (IL LLRB 1986) (investigator specialists recommended discipline based on their investigations, recommendation was sent through command channel review, no indication that investigator specialists were informed as to whether command staff accepted the recommendation before the accused employee knew of that decision).

Finally, the investigators are confidential by virtue of their authorized access to APR reports. First, APR reports are confidential because some of them relate to the review and effectuation of the employer's collective bargaining policies and the IGO keeps them confidential. Here, APR reports assess the effect of the Employer's past negotiation strategies and recommend bargaining positions which the Employer may adopt to increase cost-savings and efficiency. Dep't of Cent. Mgmt. Servs., 2011 IL App (4th) 090966 ¶ 182 (Access to strategy not required to satisfy authorized access test, only access to information relating to the effectuation or review of the employer's collective-bargaining policies is necessary). For example, in one report, the IGO recommended that the City limit the duration of collective bargaining agreements from 10 to four years and to negotiate the addition of a reopener clause in City contracts so that the City could bargain new, more favorable terms, should economic circumstances change.¹⁰ Further, the OIG keeps APR reports confidential during their formulation and only releases them to the public and City decision-makers once they are completed. Id. at ¶ 165 (proposed budget was confidential where it was kept confidential prior to

¹⁰ Notably, these reports qualify as confidential, notwithstanding the Board's decision in City of Chicago, which found similar reports to be confidential "only in a generalized sense" and not related to collective bargaining. City of Chicago (IGO), 26 PERI ¶ 114 (IL LRB-LP 2010). The City of Chicago decision outlines the contents of only one report which, based on the Board's description, contains no recommendations made with respect to collective bargaining policies. Here, by contrast, the record is more detailed and the efficiency reports submitted by the Employer contain express recommendations concerning collective bargaining policy. Thus, the Board's prior holding, based on a more limited record, is less relevant here.

its disclosure to the public). Indeed, the fact that the Union could obtain knowledge of these recommendations even before they are transmitted to City decision-makers underscores the delicacy of this information and the need for maintaining its confidentiality prior to public disclosure, particularly during periods of active negotiation.

Second, the investigators have authorized access to APR reports in the regular course of their duties because Valentine has asked investigators to fact-check APR reports on at least three discrete occasions and is likely to grant investigators similar access to such documents in the future, given her past reliance on the investigators' specialized knowledge and their expertise. State of Ill., Dep't of Cent. Mgmt. Servs., 29 PERI ¶ 12 (IL LRB 2012) (employee's access to employer's litigation strategy and work on grievance assignments was not ad hoc where her position and current duties indicated that she would maintain such authorized access and perform confidential assistance again); State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Human Servs.), 28 PERI ¶ 16 (IL LRB-SP 2011) (drawing a distinction between infrequent but normal tasks and mere ad hoc assignments); see also City of Chicago, 26 PERI ¶ 114 (the fact that a task is performed only occasionally does not necessarily mean it is not performed in the regular course of duties); but see, Chief Judge of the Cir. Court of Cook Cnty. v. Am. Federation of State, Cnty. and Mun. Empl., Council 31, 218 Ill. App. 3d 682, 703 (1st Dist. 1991) (occasional substitution for a confidential employee insufficient to render employee confidential because substitution was not performed on a regular basis). Notably, the investigators' have confidential, authorized access to such reports, even though there is no evidence that the investigators reviewed the particular reports which contain collective bargaining-related recommendations, because the investigators' regular duties include review of APR reports more generally. See Treasurer of the State of Ill., 30 PERI ¶ 53 (IL LRB-SP 2013) (employee found to be confidential even though she had never been required to trouble shoot a preliminary budget document where her duties included such troubleshooting generally and where troubleshooting was not an ad hoc assignment).

Contrary to the Employer's contention, investigators' authorized access to the complaint database which houses all complaints received by the IGO, and their ordinance-mandated authorized access to all departmental books and papers, does not render them confidential because such documents are not confidential within meaning of the Act, though they may be confidential in a general sense. Niles, 387 Ill. App. 3d at 71 (employee's access to hiring,

performance, or statistical information does not satisfy the authorized access test even if that information is confidential); see also Chief Judge of Cir. Ct. of Cook Cnty., 218 Ill. App. 3d at 699 (statistics and financial data that go into making a decision are not confidential within the meaning of the Act); but see Dep't of Cent. Mgmt. Serv., 2011 IL App (4th) 090966.

Thus, the investigators are confidential under the authorized access test because, in the regular course of their duties, they have advance notice of discipline against City employees, knowledge of the Employer's litigation strategy in grievance arbitrations arising out of the investigators' recommendations to sustain a case, and authorized access to information relating to review of the Employer's collective bargaining policies. Since these investigators are excluded as confidential, there is no need to address their managerial status.

V. Conclusions of Law

The petitioned-for employees are confidential within the meaning of Section 3(c) of the Act.

VI. Recommended Order

It is hereby recommended that the petition filed in this case be dismissed.

VII. Exceptions

Pursuant to Section 1200.135 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200-1240, the parties may file exceptions to this recommendation and briefs in support of those exceptions no later than 14 days after service of this recommendation. Parties may file responses to any exceptions, and briefs in support of those responses, within 10 days of service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the recommendation. Within five 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, if at all, with the Board's General Counsel, Jerald Post, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted in the Board's Springfield office. 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. If no exceptions have been filed within the 14 day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois this 14th day of January, 2014

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

/S/ Anna Hamburg-Gal

**Anna Hamburg-Gal
Administrative Law Judge**