

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

State of Illinois, Department of Central Management Services,)	
)	
Employer)	
)	
and)	Case No. S-DE-14-082
)	
American Federation of State, County and Municipal Employees, Council 31,)	
)	
Labor Organization-Objector)	
)	
and)	
)	
Leasa Ewing,)	
)	
Employee-Objector)	
)	
and)	
)	
John McPherson,)	
)	
Employee-Objector)	
)	
and)	
)	
Stanley Stam,)	
)	
Employee-Objector)	

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

I. BACKGROUND

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315/6.1 (2012) *added by* Public Act 97-1172 (eff. April 5, 2013), allows the Governor of the State of Illinois to designate certain public employment positions with the State of Illinois as excluded from collective bargaining rights which might otherwise be granted under the Illinois Public Labor Relations Act. There are three broad categories of positions which may be so designated: 1) positions which were first certified to be in a bargaining unit by the Illinois Labor Relations Board on or

after December 2, 2008, 2) positions which were the subject of a petition for such certification pending on April 5, 2013 (the effective date of Public Act 97-1172), or 3) positions which have never been certified to have been in a collective bargaining unit. Only 3,580 of such positions may be so designated by the Governor, and, of those, only 1,900 positions which have already been certified to be in a collective bargaining unit.

Moreover, to be properly designated, the position must meet one or more of the following five requirements:

- 1) the position must authorize an employee in the position to act as a legislative liaison;
- 2) the position must have a title of or authorize a person who holds the position to exercise substantially similar duties as a Senior Public Service Administrator, Public Information Officer, or Chief Information Officer, or as an agency General Counsel, Chief of Staff, Executive Director, Deputy Director, Chief Fiscal Officer, or Human Resources Director;
- 3) the position must be designated by the employer as exempt from the requirements arising out of the settlement of Rutan v. Republican Party of Illinois, 479 U.S. 62 (1990), and be completely exempt from jurisdiction B of the Personnel Code, 20 ILCS 415/8b through 8b.20 (2012), see 20 ILCS 415/4 through 4d (2012);
- 4) the position must be a term appointed position pursuant to Section 8b.18 or 8b.19 of the Personnel Code, 20 ILCS 415/8b.18, 8b.19 (2012); or
- 5) the position must authorize an employee in that position to have “significant and independent discretionary authority as an employee” by which the Act means the employee is either
 - (i) engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency; or
 - (ii) qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act, 29 U.S.C. 152(11), or any orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.

Section 6.1(d) creates a presumption that any such designation made by the Governor was properly made. It also requires the Illinois Labor Relations Board to determine, in a manner

consistent with due process, whether the designation comports with the requirements of Section 6.1, and to do so within 60 days.¹

As noted, Public Act 97-1172 and Section 6.1 of the Illinois Public Labor Relations Act became effective on April 5, 2013, and allow the Governor 365 days from that date to make such designations. The Board promulgated emergency rules to effectuate Section 6.1, which became effective on April 22, 2013, 37 Ill. Reg. 5901 (May 3, 2013), and the Board promulgated permanent rules for the same purpose which became effective on August 23, 2013, 37 Ill. Reg. 14,070 (Sept. 6, 2013). These rules are contained in Part 1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On August 21, 2013, the Illinois Department of Central Management Services (CMS), on behalf of the Governor, filed the above-captioned designation pursuant to Section 6.1 of the Act and Section 1300.50 of the Board's Rules. On August 23, 2013, John McPherson, and Stanley Stam, employees of the State of Illinois who each occupy one of the positions designated as excluded from collective bargaining rights, filed separate objections to the designation pursuant to Section 1300.60(a)(3) of the Board's Rules. On August 26, 2013, Leasa L. Ewing, an employee of the State of Illinois who occupies one of the positions designated as excluded from collective bargaining rights, similarly filed objections to the designation. On September 6, 2013, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) also filed objections to the designations. Based on my review of the designations, the documents submitted as part of the designation, the objections, the relevant portions of the evidentiary record in case no. S-RC-07-048 that I have taken judicial notice of, and the arguments submitted in support of those objections, I find that the designation to have been properly submitted and consistent with the requirements of Section 6.1 of the Act and consequently I recommend that the Executive Director certify the designation of the positions at issue in this matter as set out below and, to the extent necessary, amend any applicable certifications of exclusive representatives to eliminate any existing inclusion of these positions within any collective bargaining unit.

The following four positions at issue are all classified as Public Service Administrators (PSAs) Option 2, at the Illinois Department of Veterans' Affairs:

¹ Public Act 98-100, which became effective July 19, 2013, added subsections (e) and (f) to Section 6.1 which shield certain specified positions from such Gubernatorial designations, but none of those positions are at issue here.

37015-34-00-310-00-10	Ewing, Leasa	Fiscal Supervisor ²
37015-34-30-210-00-01	McPherson, John	Business Manager II at Quincy Veterans' Home
37015-34-50-220-00-01	Stam, Stanley	Supervisor of the Accounting Services Section at Manteno Veterans' Home
37015-34-40-200-00-01	Vacant	Business Administrator at the LaSalle Veterans' Home

AFSCME and the respective incumbent employees object to all the positions at issue.

CMS's designation petition indicates that the positions at issue qualify for designation under Section 6.1(b)(5) of the Act. CMS also filed two sets of supporting documents, CMS-104 position description forms and a summary spreadsheet for each position. The position description form states that it is a "complete, current and accurate statement of position['s] essential functions." The summary spreadsheet identifies the following information for each designated position: position number, name of incumbent, position title, whether the position is a term appointment, whether the position is Rutan exempt, the e-mail address of the incumbent in the position, the statutory category that serves as the basis of the exemption, whether the position is subject to an active representation petition with the petition number, and the job duties as identified in the attached position description.

Case No. S-RC-07-048

The positions at issue were subject to the representation petition filed in case no. S-RC-07-48. I am taking judicial notice of the following information. Any documents referenced are listed in the footnotes and Appendix of this RDO, and physical copies are included in the record of case S-DE-14-092.

In October 2006, AFSCME filed a majority interest representation petition seeking to include all PSA, Option 2s into existing bargaining unit RC-62. Ill. Dep't of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., State Panel, 2011 IL App 4th 090966 (4th Dist. 2011).³ CMS argued that over 130 of the PSA Option 2s, working at over 10 state agencies should be excluded from the bargaining unit because of their status was supervisory, managerial, or confidential employees as defined by Section 3 of the Act. Id., ¶ 6. Relevant to the instant case, CMS argued that the following employees of the Illinois Department of Veterans' Affairs (DVA) should be excluded under Section 3 of the Act: Trudy Long as confidential, John McPherson as managerial and

² The 104's and the spreadsheet do not identify a working title for this position. The title is identified from representation case S-RC-07-048, which is explained further above.

³ See Appendix.

confidential, Stephen as Obradovich managerial and confidential, and Ray Schneider as managerial and confidential.⁴ Id. ¶ 11. In November 2009, the Board issued a decision that in relevant part, adopted the ALJ's finding that CMS had failed to establish a question of law or fact as to whether 92 of the employees at issue within the petition should be excluded as supervisory, managerial, or confidential. Id. ¶ 13. Since the Board held that there was no issue of fact or law, a hearing was not required and the 92 employees were included in the bargaining unit. Id. ¶ 13⁵

CMS appealed the Board's decision, arguing that the Board erred in denying it an oral hearing, and, specific to this matter, erred in concluding that the employee's at the DVA were neither confidential nor managerial. Id. ¶ 19. The Appellate Court reversed the Board's ruling regarding 37 of the 92 employees, and remanded the case for a hearing before the Board. Id. ¶ 226. The Court ruled that a sufficient question of law existed as to whether the employees at the DVA were confidential as defined by Section 3(c) of the Act.⁶ Id. ¶ 221. The Court noted that it was CMS's burden to provide sufficient information to require an oral hearing, and that the Board erred in determining that CMS had not met this burden regarding these employees' status as confidential employees. Id. ¶ 121. The Court upheld the Board's decision regarding the employees' non-managerial status, but did not state whether it was because CMS had failed to provide sufficient evidence, or whether the evidence provided was definitive in that it demonstrated that the employees were not managers as defined by 3(j) of the Act.⁷ See Id. ¶ 122.

A hearing was scheduled for the fall of 2012. Two days of testimony were taken for two of the employees at the DVA.⁸ On October 31, 2012, Deborah Miller, Chief Fiscal Officer of the DVA, testified regarding Leasa Ewing's status as a confidential employee.⁹ On December 13, 2012, Bruce Vaca, the Administrator at the Illinois Veterans' Home in Quincy,¹⁰ and

⁴ Obradovich and Schneider are not longer employed at the DVA.

⁵ See Appendix, Certification of Representative.

⁶ Section 3(c) defines confidential employees, as employees who "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 or who, in the regular course of his or her duties, has authorized access to information relating to the effectuation or review of the employer's collective bargaining policies."

⁷ Section 3(j) defines managerial employees as employees "engaged predominantly in executive and management functions and charged with the responsibility of directing the effectuation of management policies and practices."

⁸ The Business Administrator position at the LaSalle Veterans' Home was vacant by the time the remanded hearings for S-RC-07-048 began. It is the Board's policy not to have a hearing when a position is vacant.

⁹ Leasa Ewing replaced Trudy Long. See Appendix, tr. 253-333.

¹⁰ See Appendix, tr.568-593.

McPherson, testified regarding McPherson's status as a confidential employee.¹¹ On November 14, 2012, testimony was scheduled to be given regarding Stanley Stam's status as a confidential employee,¹² but no testimony was given.¹³ To date there has been five days of testimony, regarding the 37 positions at issue in the representation case, but the record remains open. On March 22, 2013, the Board's General Counsel granted the joint motion to hold this case in abeyance.¹⁴ Since, the Board has not issued a decision in this matter, no legal or factual determinations have been made. I will only reference the contents of the hearing as necessary to properly address any relevant objections.

II. POSITION DESCRIPTIONS

a. Leasa Ewing

The position description for the employment position Ewing occupies states that the employee holding that position supervises subordinate staff in every aspect of the operation of the fiscal division under the administrative direction of the Fiscal Officer. Further, Ewing manages staff involved in the maintenance of agency fiscal records and budget preparation.

Ewing serves as special assistant to the Fiscal Officer on complex budgetary, fiscal, and accounting problems, and develops professional channels of communication with other state agencies regarding all aspects of the fiscal area. She performs complex accounting and auditing work which involves supervising professional and sub-professional staff engaged in maintaining a complex accounting subsystem involving all agency funds. She prepares complex statements and reports, and reconciles and analyzes data reports. Ewing provides advice on complex accounting problems, and on the implementation of new procedures and programs. She also reviews and recommends changes in accounting systems as needed, and reviews, authorizes, and supervises all expenditures made by the DVA.

Ewing also establishes and supervises the maintenance of adequate, updated accounting and control systems, and implements and supervises methods and procedures to comply with requirements as set forth by the Auditor General, CMS, Comptroller's Office, and the Governor's Office of Management and Budget.

¹¹ See Appendix, tr. 593-60.

¹² Stanley Stam is currently the Supervisor of the Accounting Services Section at the Manteno Veterans' Home. See Appendix, Employer's Pre-Hearing Memorandum.

¹³ See Appendix, tr. 338, 340.

¹⁴ See Appendix.

Ewing manages the preparation of the DVA's annual budget, and DVA's yearly and monthly spending plan. She is responsible for the preparation, review and analysis of the agency personal services and fringe benefits line budget, and coordinates all remaining line items for the agency-wide budget submission. She also projects all cash balances to determine future fund availability for the budget. She develops justifications for all budgetary lines, and prepares a variety of materials designed to explain and interpret agency programs. Ewing attends meetings with the Governor's Office of Management and Budget personnel to present and implement the budget, and acts as a consultant in pre-hearing conferences and during hearings with legislative and staff members by providing interpretation and explanation to these groups. Ewing manages the preparation of the DVA's yearly and monthly spending plan, which involves tracking and approving expenditures to assure proper timing of expenditure allocations and preparing variance explanations to the Governor's Office of Management and Budget.

Ewing creates and maintains agency fiscal policies and controls. This requires her to attend staff meetings in order to explain policies and guidelines as directed by the governor's Office of Management and Budget and CMS, and provides historical reference and advice regarding agency policies and procedures when necessary.

Finally, Ewing prepares and conducts performance evaluations in accordance with DVA requirements. She also assists with recruitment efforts to identify candidates for vacancies from diverse backgrounds, and ensures appropriate training is provided to maximize the retention of staff whose employment assists affirmative action goals.

b. John McPherson

The position description states that as the Business Administrator II, McPherson performs responsible managerial duties in the administration of the fiscal, business and service operations of the facility, plans, supervises, and controls the activities of fiscal and support sections, assists in the coordination of business administration and clinical services, all under the direction of the Superintendent, and confers with the Superintendent on special problems.

McPherson is responsible for the supervision, organization and control of Accounting, Trust Fund, Internal Control, Coffee Shop, Post Office, and Property Control services. He studies, recommends, and after approval, implements efficient procedures, methods and systems for more effective control, operation and management of the functions mentioned in his responsibility for supervision organization and control of these services.

McPherson assists in the planning and development of facility budget. He is responsible for preliminary budget preparation for assigned units. Once planning, development, and approval is complete, he is responsible for actual completion and submission of budget forms for the facility.

McPherson is a member of Quincy Benefit Fund Committee that oversees receipts and expenditures for Quincy Benefit Fund. He handles or oversees all bookkeeping for Quincy Benefit Fund. He is a member of Coffee Shop Committees that oversees all functions of the Home Commissary Store (Coffee Shop), and handles or oversees all bookkeeping for the Home Commissary Fund. He is responsible for all investments of the Home as well as custodial responsibility for the Petty Cash Fund.

Finally, McPherson assists in the selection, orientation, training, evaluation and management of employees assigned.

c. Stanley Stam

As Supervisor of the Accounting Service Section, Stam performs highly responsible administrative duties in planning developing and administering the fiscal accounting program of the facility, under the administrative direction of the Facility Operations Director at the Manteno Veterans' Home. Stam plans, develops and evaluates programs, policies and procedures relative to the total budget and accounting, trust funds, and maintenance collection from members. He directs budget preparations, allocates appropriations to the facility's programs. Under direct supervision, Stam coordinates Accounting Services Section with other services of the facility.

Stam plans, organizes, coordinates, supervises and maintains control of the Accounting Services Section, supervises key personnel responsible for administration and maintenance of the facility's Appropriation Accounting System and Member's Trust Fund Bank, reviews fiscal reports, conducts internal audits internal audits to ensure accuracy and fiscal responsibility, and assigns special projects and assignments as required to respond to informational request on behalf of the facility. He maintains policies and procedures of Accounting Services Sections, proposes changes for approval, and implements approved revisions.

Stam develops facility's overall allocation budget; allocates funding to the functional areas and establishes effective controls to monitor expenditures and commitments of all program funds. Review and monitors the status of facility funds and provides a monthly summary to the Facility Operations Director. He makes recommendations for future fiscal activities and

obligations. He provides input to the Facility Operations Director for the development of the annual Capital budget.

Stam supervises staff, assigns work, approves time off, provides guidance and training, gives oral and written reprimands, effectively recommends discipline greater than written reprimands as well as grievance resolutions, and completes and signs performance evaluations. He establishes annual goals and objectives, counsels staff on problems with productivity, quality of work and conduct, and determines staffing needs to achieve program objectives. Stam also reviews activity reports of subordinate staff.

Stam prepares facility financial statements and reports, responsible for the annual GAAP preparation and reporting on behalf of the facility; supervises subordinate staff involved with preparation of GAAP reports. He gathers, formulates and presents facility fiscal data which relates to facility accomplishments, goals, and future planning for which support is solicited. He maintains financial details relevant to facility operating costs, maintenance, repair and replacement of buildings, grounds, equipment and supply requests and expenditures.

Finally, Stam represents the facility Accounting Services Sections, serves as liaison with central office Fiscal staff and internal auditors, and other requesting parties. He directs staff in the preparation of documents requested or required by his liaison duties. He also sits on various other committees as directed by the Facility Operations Director, and other duties as required or assigned which are reasonably within the scope duties enumerated above.

d. Business Administrator at the LaSalle Veterans' Home (Vacant)

The CMS-104 position description states that this position serves as the Business Administrator at the LaSalle Veterans' Home. The Business Administrator performs highly responsible administrative duties in planning, developing and administering the fiscal accounting program of the facility. The Business Administrator plans, develops and evaluates programs, policies and procedures relative to the total budget and accounting services of the facility under the Administrative direction of the Home Administrator. Further, the Business Administrator coordinates fiscal, budget, appropriations, accounting, trust funds, home funds, accounts payables, maintenance collection from residents, stores, property control, petty cash, and equipment and supplies. He directs budget preparations, allocates appropriations to the facility's programs. Through subordinate staff, he oversees and directs operating procedures for the Facility Switchboard and Computer Operations Departments.

The Business Administrator plans, organizes, coordinates, supervises and maintains control of the facility's Fiscal Office, supervises key personnel responsible for administration and maintenance of the facility's Appropriation Accounting System, the Member's Trust Fund Bank, the Business Office, Procurement, and the General and Dietary Stores. He also audits to ensure accuracy and fiscal responsibility, and assigns special projects and assignments as required to respond to informational requests on behalf of the facility. He maintains policies and procedures of Accounting Services Section, and proposes changes for approval and implements approved revisions.

The Business Administrator develops the facility's overall allocation and capital budget, allocates funding to the functional areas and establishes effective controls to monitor expenditures and commitments of all program funds. He reviews and monitors the status of facility funds and provides a monthly summary to the Home Administrator. He makes recommendations for future fiscal activities and obligations to the Home Administrator. He provides fiscal projections for Home operations to Central Office Fiscal staff for budgetary preparations and fiscal reports.

The Business Administrator supervises staff, assigns work, approves time off, provides guidance and training, gives oral and written reprimands, effectively recommends discipline greater than written reprimands as well as grievance resolutions, completes and signs performance evaluations. He establishes annual goals and objectives; counsels staff with productivity, quality of work and conduct, determines staffing needs to achieve program objective and reviews activity reports of subordinate staff.

The Business Administrator prepares requisitions and bid proposals for purchases, contacts vendors to submit bids for items to be purchased; assembles all related documents and submits to Central Office for final purchase determination. He prepares contracts for leased equipment and personal services, completes required paperwork and supplies appropriate backup documentation, and signs and forwards completed contracts to central office Fiscal staff for review and final processing.

The Business Administrator manages Property and Stores sections at the facility, and ensures purchases and inventory functions are performed in accordance with State Property Control Act. He is responsible and accountable for facility compliance with Department Property Control Policies, and reports non-compliance to the Home Administrator. He monitors

and maintains facility product and equipment supply for the day-to-day operations. He is responsible for the facility's annual inventory audit, designates targeted audit areas, and develops auditing teams, and reports status and discrepancies to Central Office Fiscal staff. He also corrects discrepancies according to directions.

The Business Administrator prepares facility financial statements and reports, he is responsible for the annual GAAP preparation and reporting on behalf of the facility, supervises subordinate staff involved with the preparation of the GAAP reports. He gathers, formulates, and submits facility fiscal data to Central Office Fiscal staff, which relates to facility accomplishments, goals and future planning for which support is solicited. He maintains financial details relevant to facility operating costs, maintenance, repair and replacement of buildings, grounds, equipment and supply requests and expenditures.

Finally, the Business Administrator audits accounts payable and accounts receivable information, and Petty Cash Fund records and documents. He reviews transaction activity and reporting procedures to determine if proper accounting and fiscal methods are being applied, and reports any errors to Central Office Fiscal Department and submits adjustments for correction.

III. ISSUES AND CONTENTIONS

AFSCME generally objects to these designations, and the employees at issue and AFSCME specifically objects to the designations of the designations of Ewing's position, McPherson's position and Stam's position. AFSCME objects to the designations of all the employees at issue because, it argues that it has been denied due process, that CMS's submissions of the CMS-104 position descriptions do not accurately describe the job duties of the employment position at issue, and because the employees are not "supervisors" within the meaning of the NLRA.

AFSCME and the incumbent employees specifically object to the designation of the positions of Ewing, McPherson, and Stam for four reasons. First, these employees were all subject to representation petition S-RC-07-048, and the only issue raised at the hearing was whether they were confidential employees. Second, these employees were previously classified as merit compensation employees, then as AFSCME collective bargaining unit positions, and then reclassified back to merit compensation employees. While their status differed between merit compensation and collective bargaining, their day-to-day activities did not differ under

either status. Third, the employees argue that they do not administer discipline or make policy decisions regarding the discipline of subordinates. The “new contract” states that discipline can be administered by mid-managers represented by AFSCME as long as the positions are under the supervision of a merit compensation employee. Finally, the employees argue that they do not make any policy decisions, and all policy decisions are made by “higher level” management.

McPherson and Stam also each argue that as merit compensation employees they attend the executive staff meetings, but when they became bargaining unit employees they still attended the meeting but only to present information regarding their work areas, and were required to leave the meeting after their presentations. When their status changed back to merit compensation employees they were allowed to stay for the entire meeting.

IV. DISCUSSION AND ANALYSIS

a. due process

AFSCME was not denied due process: when the Governor filed designations for over 1,000 employment positions within one week, when CMS allegedly provided a lack of information in support of this designation petition, when the Board failed to provide pre-objection discovery, when there was a time lapse between AFSCME filing a representation petition and CMS filing this designation petition, or when the Board’s General Counsel denied AFSCME’s request to extend the due date to file objections to September 17, 2013.

As an administrative agency, the Board was created to carry out the Act’s purpose, and the Board is bound by the provisions of the Act. See 5 ILCS 315/5 (2012). The Act states that the Board’s procedures for determining whether these designations are proper must be consistent with due process. 5 ILCS 315/6.1 (2012). The purpose of procedural due process is to minimize error. See East St. Louis Fed’n of Teachers, Local 1220 v. East St Louis School Dist. No. 189 Financial Oversight Panel, 178 Ill. 2d 399, 419-20 (1997). Notice and an opportunity to be heard are necessary principles of procedural due process. Id.; Segal v. Dep’t of Ins., 404 Ill. App. 3d 998, 1002 (1st Dist. 2010) citing People ex rel. Ill. Commerce Comm’n v. Operator Commun., Inc., 281 Ill. App. 3d 297, 302 (1st Dist. 1996). Notice must be reasonably calculated “to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Segal, 404 Ill. App. 3d at 1002, citing Hwang v. Dep’t of Public Aid, 333 Ill. App. 3d 698, 707 (1st Dist. 2002).

Administrative agencies do not have the authority to question the validity of the statutes under which they were created. See Goodman v. Ward, 241 Ill. 2d 398, 411 (2011) see also Metropolitan Alliance of Police, Coal City Police Chapter No. 186, No. 6 v. Ill. State Labor Rel. Bd., 299 Ill. App. 3d 377, 379 (3rd Dist. 1998). In order to process these designations the Board added Part 1300 to its Rules and Regulations, which details the regulations by the Governor, the Board and any objectors must abide by when the Governor files such designation petitions. See 80 Ill. Admin. Code Part 1300. When an administrative agency has adopted rules and regulations under its statutory authority for carrying out its duties, the agency is bound by those rules and regulations and cannot arbitrarily disregard them. Springwood Assoc. v. Health Facilities Planning Bd. 269 Ill. App. 3d 944, 948 (4th Dist. 1995) citing Union Electric Co. v. Dep't of Revenue, 136 Ill. 2d 385, 391 (1990). Administrative rules have the force and effect of law and are presumed valid. People v. Molnar, 222 Ill. 2d 495, 508, (2006); Dep't of Cent. Mgmt. Servs., 406 Ill. App. 3d 766, 771 (4th Dist. 2011).

As an administrative agency the Board is bound to follow the Act and the Board's Rules and Regulations. The only issue is whether the objections raise an issue of fact or law that might overcome the presumption that the designations of the employment positions are consistent with Section 6.1 of the Act. Whether the Board's rules comply with due process is not within my limited scope of authority. With this in mind, I will now address the basis for AFSCME's objection that it has been denied due process.

i. Governor filed petitions designating over 1,000 employees within one week

AFSCME was not denied due process when the Governor designated over 1,000 employee positions as exempt from the collective bargaining provisions of Section 6 of the Act within one week.

Section 6.1 of the Act limits the number of designations and the time in which the Governor has to file them. The Act allows the Governor to designate up to 3,580 employee positions as exempt from the collective bargaining provisions of Section 6 of the Act between April 5, 2013 and April 5, 2014. The Act limits the Governor in the number of positions he can designate and the amount of time he has to make those designations, but the Act does not set a limit on the amount of positions in each designation petition, or require the Governor to spread out the designation petitions over the course of the one-year period. Therefore the Act does not prohibit the Governor from filing designation petitions containing over 1,000 employment

positions within one week. Therefore, AFSCME was not denied due process when the Governor designated over 1,000 employees as exempt for the collective bargaining provisions of Section 6 of the Act in less than one week.

ii. lack of information provided by the State

AFSCME was not denied due process based on the designation petition's alleged lack of information. Under 6.1(b)(5) a position qualifies as exempt when it possesses "significant and independent discretionary authority." To support its position the job duties of the positions at issue qualify under Section 6.1(b)(5), CMS submitted the CMS-104 position descriptions for each employment position, which are the "complete, current and accurate statement of position['s] essential functions." Here, the relevant information is the job duties, and CMS provided the job duties of the positions at issue, thus the State did not provide a lack of information. Therefore AFSCME was not denied due process.

iii. lack of procedure to obtain additional information

AFSCME was not denied due process by the application of the Board's administrative rules which are silent to pre-objection discovery.

AFSCME's objection that the Act and the Board's Rules lack any procedure to obtain any additional information is beyond my authority to review. As stated above, the Board's function is to interpret and implement the Act. The Act and the Rules are both silent as to a procedure to obtain additional information prior to filing objections to the gubernatorial designation, therefore the Board is not required to provide a method.

As noted above, the provided position descriptions are the "complete, current and accurate statement of position['s] essential functions." Since the Rules and the Act are silent to pre-objection discovery, and AFSCME has not demonstrated how a procedure for additional discovery prior to filing objections in this case would lead to other relevant information, the Board is not required to provide a method for such discovery. Therefore, AFSCME was not denied due process by the application of the Board's administrative rules which do not specify a method to obtain additional information prior to filing objections.

iv. time lapse between AFSCME filing a representation petition and CMS filing this designation petition

The time lapse between AFSCME filing a representation petition and CMS filing this designation petition does not support AFSCME's contention that it has been denied due process.

Section 6.1 of the Act establishes three categories of positions that can be designated based on the status of the representation petition. These categories are: 1) positions that were certified into bargaining units on or after December 2, 2008, 2) positions that were subject to pending representation petitions when 6.1 was added to the Act on April 5, 2013, and 3) positions that have never been certified into a collective bargaining unit. The Act requires that the Governor make any designations within 365 days from April 5, 2013, thus the Governor can make designations through April 4, 2014. Under the first category, a position that was certified into a bargaining unit up to approximately five years before the effective date of the Act is eligible to be designated under Section 6.1. In order to be certified the union must first have filed a representation petition. Given this time frame, it is evident the legislature contemplated extensive periods of time between a union filing a representation petition and the Governor filing a designation petition involving the same group of employment positions.

Under the second category, a position within any pending petition is eligible for designation. Given that the legislature contemplated a time frame of over five years between when a certified representation petition was first filed and when the gubernatorial designation was filed, it can be inferred that the absence of a time frame between when a representation petition that remains pending was filed, and when a gubernatorial designation is filed is an intentional omission. Also, because AFSCME has not explained how such a time lapse denies it due process, I find this argument unpersuasive. Therefore, AFSCME was not denied due process because of the time lapse between AFSCME's last filed representation petition and CMS's filing of this designation petition.

v. General Counsel's denial of "sufficient" additional time

AFSCME was not denied due process when the Board's General Counsel denied AFSCME's request to extend the due date to submit objections to September 17, 2013.

Section 6.1(b)(5) provides "within 60 days after the Governor make a designation under this Section, the Board shall determine, in a manner that is consistent with the requirements of due process, whether the designation comports with the requirements of this Section." Section 1300.60(a)(3) of the Board Rules and Procedures provides that "the collective bargaining representative or incumbent employee shall have 10 days from the date of service of the designation to object." See 80 Ill. Admin. Code 1300.60. As an administrative rule, the Board's time limit with which to object to the designation petition is presumed valid.

Here AFSCME filed motions requesting extensions of time to file objections. AFSCME requested that the due date to file objections be extended from September 3, 2013 to September 17, 2013. The Board's General Counsel issued an Order granting the request by extending the due date to September 6, 2013, but denied any further extension, because that would jeopardize the Board's ability to provide due process and still meet its statutory requirement to issue a decision by October 8, 2013.

The General Counsel's refusal to allow AFSCME additional time beyond September 6, 2013, was in light of the Act's requirement that the Board issue a decision in this case within 60 days. Further, while I have no authority to question the validity of the Act or the Rules under which the Board administers the Act, it is of note that the time limits imposed by the Rules are reasonable given the statutory time frame the Board has to process each designation petition. The Act requires that the Board determine the lawfulness of the designation within 60 days from the date of filing. CMS filed this designation petition on August 21, 2013, and the Act requires the Board to determine whether these designations comport with Section 6.1 of the Act by October 20, 2013. As the General Counsel explained in his Order, the last Board meeting before the decision is required to be issued will be held on October 8, 2013. In order for the Board to issue a decision, the Board must allow: (1) time for the parties to file objections; (2) time for the Administrative Law Judge (ALJ) to review the petition, any objections, and hold a hearing, if necessary, in order to draft, issue, and serve its Recommended Decision and Order (RDO); (3) time for the parties to file exceptions to the ALJ's RDO; (4) time for the Board and its staff to review the RDO and any exceptions; (5) time for the Board to set an agenda for the Board meeting, pursuant to the Open Meetings Act;¹⁵ and (6) time for the Board to rule on the ALJ's recommendation before it can issue a written decision. Granting AFSCME's request to extend the objection due date to September 17, 2013, would likely leave insufficient time for the procedural protections contemplated by Part 1300 of the Board's Rules, and for the Board to issue its decision by the required deadline. Therefore, AFSCME was not denied due process when the Board's General Counsel denied AFSCME's request to extend the due date to submit objections to September 17, 2013.

Therefore, AFSCME was not denied due process when the Board applied its rules here.

¹⁵ The Open Meetings Act requires the Board to post an agenda for each regular meeting to be posted at the Board's principal office and at the location where the meeting is to be held at least 48 hours in advance of the meeting. See 5 ILCS 120/2.02 (2012).

b. substantive objections

CMS's designation of the positions at issue is proper because they are presumed proper under the Act, and the objections do not raise an issue that might overcome that presumption.

Section 6.1 of the Act states that "any designation made by the Governor shall be presumed to have been properly made." Here, CMS designated the positions at issue under Section 6.1(b)(5) which allows designation of positions that "authorize an employee in that position to have significant and independent discretionary authority as an employee." Section 6.1(c) goes on to explain that a position authorizes its holder with the requisite authority when the position is a "supervisor" within the meaning of the National Labor Relations Act, or is "manager" within the meaning of the Illinois Public Labor Relations Act. While CMS ultimately bears the burden to demonstrate that the employee has discretionary authority, because there is a presumption that the designation is proper, the objector must raise an issue that might overcome that presumption.

Supervisor under the NLRA

The NLRA defines a supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C.A § 152(11).

Employees are supervisors if (1) they hold the authority to engage in any of the above listed supervisory functions, (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and (3) their authority is held in the interest of the employer. NLRB v. Kentucky River Comm. Care, Inc., 532 U.S. 706, 713 (2001); see also Oakwood Healthcare Inc., 348 NLRB 686, 687 (2006). Independent judgment is a key issue in determining whether an employee is a supervisor under the NLRA. See Id. at 689. Judgment is not independent if it is controlled by a higher authority, such as verbal instructions, or detailed instructions or regulations. Id.

Managerial

To qualify as a managerial employee under Section 6.1 of the Illinois Public Labor Relations Act, the employee must meet one of two tests. The first test requires the employee to

1) be engaged in executive and management functions; and 2) be responsible for the effectuation of management policies and practices of the Agency. The second test requires that the employee “represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of the Agency.”

Regarding the first prong of the first managerial test, the Appellate Court has noted that executive and management functions generally, but not solely, consist of ensuring that the agency operates efficiently. Dep’t of Cent. Mgmt. Serv. (Pollution Control Bd.), v. Ill. Labor Rel. Bd., State Panel, 367 Ill. Dec. 821, 826 (4th Dist. 2013); State of Ill. Dep’t of Cent. Mgmt. Serv. (Ill. Commerce Comm’n) v. Ill. Labor Rel. Bd., State Panel, 406 Ill. App. 3d 766, 774, (4th Dist. 2010)(commonly referred to as ICC). The Board has defined executive and management functions as those functions which specifically relate to the running of an agency or department, including the following: establishment of policies and procedures, preparation of the budget, or the responsibility for assuring that the department or agency operates effectively. Cnty. of Cook (Oak Forest Hospital) v. Ill. Labor Rel. Bd., 351 Ill. App. 3d 379, 386, (1st Dist. 2004) State of Ill., Dep’t of CMS (Healthcare and Family Serv.), 23 PERI ¶ 173 (IL LRB-SP 2007) (commonly referred to as INA). Executive functions require more than simply the exercise of professional discretion and technical expertise. Cnty. of Cook (Oak Forest Hospital) v. Ill. Labor Rel. Bd., 351 Ill. App. 3d 379, 386 (1st Dist. 2004); City of Evanston v. State Labor Rel. Bd., 227 Ill. App. 3d 955, 975 (1st Dist. 1992); INA, 23 PERI ¶ 173 (IL LRB-SP 2007); State of Ill. Dep’t of Cent. Mgmt. Serv., 1 PERI ¶ 2014 (IL SLRB 1985). An employee is not a manager if the employee's role is advisory and subordinate, because final responsibility and independent authority to establish and effectuate policy determine management status. Dep’t of Cent. Mgmt. Serv. v. Ill. State Labor Rel. Bd., 278 Ill. App. 3d 79, 87 (4th Dist, 1996).

The second prong of the first managerial test requires that the alleged managerial employee exercise responsibility for directing the effectuation of such management policies and practices. Cnty of Cook (Oak Forest Hospital) v. Ill. Labor Rel. Bd., 351 Ill. App. 3d at 386; INA, 23 PERI ¶ 173 (IL LRB-SP 2007); Dep’t of Cent. Mgmt. Serv., 2 PERI ¶ 2019 (IL SLRB 1986). An employee directs the effectuation of management policy when he/she oversees or coordinates policy implementation by developing the means and methods of reaching policy objectives, and by determining the extent to which the objectives will be achieved. Cnty. of Cook (Oak Forest Hospital) v. Ill. Labor Rel. Bd., 351 Ill. App. 3d at 387; INA, 23 PERI ¶ 173

(IL LRB-SP 2007); State of Ill. Dep't of Cent. Mgmt. Serv. (Public Aid), 2 PERI ¶ 2019 (IL SLRB 1986). Such individuals must be empowered with a substantial measure of discretion to determine how policies will be affected. Cnty. of Cook (Oak Forest Hospital) Cnty. of Cook (Oak Forest Hospital) v. Ill. Labor Rel. Bd., 351 Ill. App. 3d at 387; INA, 23 PERI ¶ 1736 (IL LRB-SP 2007).

The second managerial test requires that the employee's "effective recommendations" direct the effectuation of management policies. Because supervisors often make decisions based on a variety of factors, the "litmus test" of whether the employees' recommendations are influential is whether the recommendations "almost always persuade the superiors." ICC, 406 Ill. App. 3d at 777 citing Nat. Labor Rel. Bd. v Yeshiva Univ., 444 U.S. 672, 677 (1980).

i. CMS-104 position descriptions

1. verification

AFSCME's objection that the position descriptions are insufficient because CMS did not verify their accuracy is factually incorrect. The position descriptions were submitted as an attachment to the designation petition. The petition requires that the individual filing on behalf of the Governor attest that "the statements contained [within the petition and its attachments] are true to the best of [his] knowledge and belief." The objection that the position descriptions are insufficient because CMS did not verify their accuracy is factually incorrect and therefore does not raise an issue that might overcome the presumption that this designation is proper.

2. evidence of job duties

Any objection that there is "no evidence that employees could exercise all or any of the duties listed [in the position description] without being actually given the authority," does not present an issue that might overcome the presumption that the designation is proper. To be properly designated under Section 6.1(b)(5) "the position must authorize an employee in that position to have 'significant and independent discretionary authority' as an employee," with *authorize* being operative word. Here, the position descriptions are the authorizations that grant the employees the ability to exercise the job functions stated therein. Whether the employees actually exercise the authority granted within the position description does not determine whether the position is properly designated under Section 6.1(b)(5). To prevail and demonstrate that the employee lacks the authorization, AFSCME must provide a counter example. Simply stating that CMS provided no evidence that the employee actually exercised its authority is

insufficient. Therefore, since AFSCME has not provided specific examples to support its contention that the employees at issue are not in fact authorized to exercise the duties as described in the position descriptions, its argument does not raise an issue that might overcome the presumption that this designation is correct.

3. testimony that CMS-104 position descriptions are inaccurate

AFSCME's argument that testimony taken during a previous representation hearing indicating that the position descriptions are not accurate, does not overcome the presumption that the designations are correct, because AFSCME references testimony regarding employment positions not at issue in this case, and does not provide evidence that the position descriptions at issue are incorrect.

AFSCME's argument that many of the 104 position descriptions are 20 years old and that there has been "ample testimony" that such position descriptions are inaccurate, is inconsistent with the facts as presented in this case. In support of its argument AFSCME cites to testimony taken in case S-RC-07-048. However, the hearing for case S-RC-07-048 involved 37 employees at 10 different state agencies. Ill. Dep't of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., State Panel, 2011 IL App 4th 090966 ¶ 121. AFSCME is referring to testimony regarding the status of an employee at Illinois Department of Employment Security, whose job description was last updated in 1993.¹⁶ The employees at issue in the designation petition are employed by the DVA. A general argument that testimony that a specific position description was inaccurate does not by extension mean that all position descriptions are inaccurate.

AFSCME's argument that the position description is too old to be accurate only applies to McPherson's employment position.¹⁷ AFSCME and the employees at issue were all served with the petition, the position descriptions, and a spreadsheet summary. AFSCME and each of the three employees holding positions at issue filed objections to this designation, based on the documents CMS submitted. Here, neither AFSCME nor McPherson objected that the information within the position description is inaccurate. Also, because McPherson was given the opportunity to contradict the position description and did not, for the purposes of this designation only, I find that McPherson's position description is accurate.

¹⁶ See Appendix, tr. 546 - 549.

¹⁷ Ewing's position description was updated in 2010, McPherson's position description was updated in 1995, Stam's position description was updated in 2006, and the vacant position, the Business Administrator at the LaSalle Veteran's Home position description was updated in 2007.

AFSCME next argues that even more recently updated position descriptions are also inaccurate, and as support cites to the testimony regarding the position of Field Auditor Supervisor at Illinois Department of Employment Security.¹⁸ For the reasons listed above, because the position descriptions within one agency are inaccurate, does not by extension mean that all position descriptions in every agency are inaccurate. Also, because neither AFSCME nor either of the two employees specifically objects to the contents of their position descriptions, for the purposes of this designation only, I find that their positions descriptions as submitted are accurate. Therefore, because of the lack of specific evidence to support AFSCME's argument that the position descriptions at issue are inaccurate, AFSCME has failed to raise an issue of fact or law that might overcome the presumption that the designations are proper.

ii. Business Administrator at LaSalle Veterans' Home

AFSCME fails to raise an issue that might overcome the presumption that the Business Administrator has been designated properly as a manager under Section 6.1 of the Act.

1. supervisor under the NLRA

AFSCME's argument that this position is not a supervisor under the NLRA because the employee holding this position does not exercise the duties he is authorized to conduct fails to raise an issue to overcome the presumption, because the designation is presumed proper under Section 6.1(d) of the Act, and the position description does not limit Business Administrator's discretion, accountability or independent authority to exercise her supervisory duties. As noted above the objectors have the burden to raise an issue that might overcome the presumption that the designation is proper. The job description provides that the employee within this position is authorized to be responsible and accountable for facility compliance with Department Property Control Policies, and that he is responsible for the facility's annual inventory audit, by targeting audit areas and developing auditing teams. As noted above, authorized is the operative word. Since the position is vacant, the position description is the only piece of evidence for this position. In order for an objector to raise an issue that might overcome the presumption that the designation is proper, the objector must identify specific language which negates or contradicts the presumption that the position is authorized to exercise supervisory authority, discretion, accountability, or independent judgment. Since AFSCME has not done this, the objection does not raise an issue that might overcome the presumption that the designation is proper.

¹⁸ See Appendix, tr. 338, 340, 344, 348, 355-359.

iii. Ewing

1. previous hearing

AFSCME's argument that when CMS previously sought to exclude Ewing from a collective bargaining unit the only issue was whether she was a confidential employee, does not raise an issue that might overcome the presumption that this designation is correct.

Contrary to AFSCME's contention, res judicata does not bar CMS from arguing that the Ewing's position is supervisory and managerial. The doctrine of res judicata applies only if the following three requirements are satisfied: 1) there is a final judgment on the merits rendered by a tribunal of competent jurisdiction, 2) there is an identity of parties, and 3) there is an identity of cause of action. Judge of the 12th Judicial Circuit (River Valley Juv. Detention Ctr.), 28 PERI ¶137 (IL LRB-SP 2012) citing Downing v. Chicago Transit Auth., 162 Ill. 2d 70, 73-74 (1994). Res judicata does not apply here because the representation case is currently pending before the Board, and thus a final judgment has not been made. Without the first prong of the res judicata test being met, analysis of the remaining two prongs is unnecessary. Since the Board has not issued a decision, the fact that CMS did not previously argue that Ewing's position was either managerial or supervisory does not prevent CMS from making this argument in this case.

AFSCME also argues that there was no testimony that Ewing has discretionary authority to conduct her job duties. As AFSCME itself argues, the scope of the testimony was limited to Ewing's status as a confidential employee. An employee can possess confidential status without exercising discretionary authority. See Chief Judge of Circuit Court of Cook Cnty. v. Am. Fed. of State, Cnty. and Mun. Employees, 153 Ill. 2d 508, 523 (1992) (explaining that an employee must meet at least one of three tests to be a confidential employee). Thus any testimony that Ewing exercises discretionary authority might not have been necessary to determine Ewing's confidential status. Therefore AFSCME's argument that CMS previously did not argue that Ewing was either a managerial or supervisory employee, does not raise an issue that might overcome the presumption that she has been designated properly as a managerial and/or supervisory employee as defined by Section 6.1(c) of the Act.

2. merit compensation status v. bargaining unit status

Ewing's objection that her day-to-day job activities did not change when her status shifted between a merit compensation employee and collective bargaining unit employee does

not raise an issue that might rebut the presumption that her position has been properly designated under Section 6.1 of the Act.

Ewing's position was certified into bargaining unit RC-62 as an Option 2 employee. On November 18, 2009, pursuant to the Illinois Appellate Court's decision in Ill. Dep't of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., State Panel, the Board's active Executive Director excluded the positions at issue from the bargaining unit, pending the disposition of a hearing to determine each position's status.¹⁹ See 2011 IL App 4th 090966 ¶121. The Court was specific that its ruling did not imply "that as a matter of law these disputed PSA 2 employees must be excluded from the bargaining unit," only that CMS "demonstrated reasonable grounds for believing that significant questions" were raised about these employees' status as confidential. Id. Given that the Board had previously certified the employees as bargaining unit members, and the Court's ruling that they might not necessarily be properly certified into the bargaining unit, it is reasonable that the Ewing's day-to-day job activities would not change. Furthermore, Ewing has not demonstrated as to why her status would require an alteration of her daily job activities. Therefore, the fact that Ewing's day-to-day job activities did not change when her status shifted between a merit compensation employee and a collective bargaining unit employee does not raise a sufficient issue of fact or law that might overcome the presumption that this designation is proper under Section 6.1 of the Act.

3. supervisor

AFSCME fails to raise an issue that might overcome the presumption that Ewing has been designated properly as a supervisor under Section 6.1 of the Act.

a. exercise authority

AFSCME's argument that Ewing is not a supervisor under the NLRA because she does not exercise the duties she is authorized to conduct fails to raise an issue that might overcome the presumption, because the designation is presumed proper under Section 6.1(d) of the Act, and the position description does not limit Ewing's discretion, accountability or independent authority to exercise her supervisory duties. As noted above the objectors have the burden to raise an issue that might overcome the presumption that the designation is proper. The job description provides that the Ewing is authorized to prepare and conduct performance evaluations of her two subordinate employees. As noted above, the issue is one of authority.

¹⁹ Corrected Partial Revocation of Certification, see Appendix.

The position description does not specifically limit Ewing's authority to exercise those duties. AFSCME's argument also fails because absent any evidence that Ewing does not in fact exercise these duties, there is a presumption that she does exercise these duties. Therefore, because Ewing is authorized to exercise supervisory duties, and AFSCME has not provided any evidence that Ewing is not authorized to exercise these duties, this objection fails to raise an issue that might overcome the presumption that she does.

b. discipline

Ewing's argument that she does not create disciplinary policy or administer discipline does not overcome the presumption that she has been designated properly under Section 6.1 of the Act as a supervisor.

To meet the first prong of the supervisor test under Section 6.1 of the Act, the employee must hold the authority to engage in *any one* of the following supervisory functions: hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline other employees, responsibility to direct them, to adjust their grievances, or effectively to recommend such action. See 5 ILCS 315/6.1, 29 U.S.C.A § 152(11); NLRB v. Kentucky River Comm. Care, Inc., 532 U.S. at 713.

Ewing's argument that she does not perform any disciplinary functions merely indicates that she does not perform one of the indicia necessary to have supervisory authority. In order to effectively raise an issue for hearing Ewing must negate all indicia, or one of the other requirements of the three part supervisor test. Based on Ewing's position description she conducts performance evaluations, recruits new employees, and assists in training. Therefore, Ewing's contention that she does not administer discipline does not raise an issue that might overcome the presumption that the designation is proper.

4. manager

AFSCME fails to raise an issue that might overcome the presumption that Ewing has been designated properly as a manager under Section 6.1 of the Act.

a. the first managerial test

AFSCME's argument that there is no evidence that Ewing was ever authorized to exercise her discretion to the extent that she has "significant independent authority" regarding the adoption of management policies or the effectiveness of such policies, fails to raise an issue that might overcome the presumption that the designation is proper. AFSCME's argument fails because, as noted above, the designation is presumed proper under Section 6.1(d) of the Act, and

arguments must negate the facts that the presumption is based upon. Here, Ewing establishes and supervises the maintenance of adequate, updated, accounting and control systems to ensure compliance with the requirements of the Auditor General, Department of CMS, Comptroller's Office, and Governor's Office of Management and Budget. Since the position description specifically limits her ability to exercise independent authority to create her own accounting and control system, Ewing is not a manager under the first test. However, this alone, does not raise an issue for hearing, because the second managerial test provides that making effective recommendations meets the managerial requirement under Section 6.1(c) of the Act. Therefore, AFSMCE's argument that Ewing does not meet the first managerial test, when considered in context, does not raise an issue that might overcome the presumption that the designation is proper under Section 6.1(c) of the Act.

b. policy decisions

Ewing's objection that she does not make any policy decisions does not raise an issue that might overcome the presumption that she is a manager as defined by section 6.1(c)(i) of the Act, because an employee is a manager when she makes "effective recommendations."

The second managerial test under Section 6.1 requires that the employee "represent management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency." Ewing's position description states that she "provides advice. . . . on the implementation of new procedures and programs," and "reviews and recommends changes to the accounting system as needed." The second managerial test requires that the employee make "effective recommendations" that "almost always persuade the superiors." ICC, 406 Ill. App. 3d at 777. In order to overcome the presumption that these duties meet the requirement of the second managerial test, Ewing must demonstrate, or effectively argue that her recommendations do not always persuade her superiors. See Id. Therefore, since Ewing does not address the effectiveness of her recommendations, her argument that she does not make any policy decisions does not raise an issue that might overcome the presumption that she is a manager as defined by Section 6.1(c)(i) of the Act.

iv. McPherson

1. previous representation hearing

AFSCME's argument asserting that CMS did not argue that McPherson was either a supervisor or a manager in case S-RC-06-048 does not raise an issue that might overcome the

presumption because it misrepresents the facts, and because CMS is not barred by res judicata to make new arguments.

As noted in the facts above, CMS did argue that McPherson was both managerial and confidential, and it was the Appellate Court that remanded the case to be heard only on the confidential issue. See Ill. Dep't of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., State Panel, 2011 IL App 4th 090966 ¶ 121. On first glance, the Court's failure to remand the case on the managerial issue could potentially raise an issue that might rebut the presumption that these employees are managers under Section 6.1 of the Act. However, upon more careful review, I find that it does not for several reasons. First, the Court did not definitively state that McPherson was not a manager under section 3(j) of the Act. Second, in representation cases, the burden is on CMS to raise the issue that the employee is a manager under 3(j), and here the burden is on AFSCME to raise the issue that the employees are not managers under 6.1(c)(ii). Third, even if the Court had explicitly stated that the employees were not managers under the 3(j) definition of "managerial employee," the definition of manager under 6.1(c)(i) differs, and any reliance on the Court's interpretation of 3(j) must reconcile those differences. Here, AFSCME has not provided any argument to reconcile the definitions. Fourth, as with Ewing's hearing, the scope of the testimony at McPherson's hearing was limited to McPherson's status as a confidential employee. An employee can possess confidential status without exercising discretionary authority. See Chief Judge of Circuit Court of Cook Cnty. v. Am. Fed. of State, Cnty. and Mun. Employees, 153 Ill. 2d at 523. Thus any testimony that McPherson exercises discretionary authority would not necessarily have been pertinent.

Also, as explained above, because the case is still pending before the Board, res judicata does not prevent CMS from raising additional arguments regarding McPherson's supervisory status even though his position description has not changed since 1995.

Therefore AFSCME's argument that CMS previously did not argue that McPherson was either a managerial or a supervisory employee, does not raise an issue that might overcome the presumption that he had been designated properly as a managerial and/or supervisory employee as defined by Section 6.1(c) of the Act.

2. merit compensation v. bargaining unit member

For the reasons stated above under the analysis of Ewing's position, the fact that McPherson's day-to-day job activities did not change when his status shifted between a merit

compensation employee and an employee within a collective bargaining unit does not raise an issue that might rebut the presumption that his position has been properly designated under Section 6.1 of the Act.

Furthermore, while McPherson's "day-to-day" activities might have remained the same, the fact that his status as a bargaining unit employee changed his eligibility to attend the entire executive staff meetings suggests that his function at the meeting was supervisory, managerial or confidential in nature. This is explored further below. Therefore, the fact that McPherson's day-to-day job activities did not change when his status shifted between a merit compensation employee and a collective bargaining unit employee does not raise a sufficient issue of fact or law that might overcome the presumption that this designation is proper under 6.1 of the Act.

3. executive staff meetings

McPherson's argument that his attendance at the executive staff meetings altered when his status as merit compensation changed to a bargaining unit employee does not raise an issue that might overcome the presumption that the designation is proper.

McPherson does not explain why his status as a bargaining unit member required that he no longer allowed him to attend the entirety of the executive staff meetings. The fact that his attendance was altered when he became a bargaining unit member does suggest that his merit compensation duties would somehow exclude him for the bargaining unit, but absent an argument as to why, any finding as whether this exclusion was based on his managerial status would be conjecture. However, since the reason for his exclusion from the executive staff meetings was properly addressed in the previous hearing, my analysis will be based on the prior testimony of Bruce Vaca and McPherson. In 1996, McPherson began attending the executive staff meetings as a merit compensation employee. As a merit compensation employee McPherson is involved in the discussions regarding union grievances, and potential strikes. In 2009 McPherson was certified into a collective bargaining unit, at which time he attended the executive staff meetings only to inform the executive staff of the work areas McPherson oversees, and left the meeting once his presentation was complete. On behalf of CMS, Bruce Vaca testified that McPherson was excluded from the remainder of these meetings because if he attended he would be privilege to confidential information regarding union grievances and strike strategy. In 2011, McPherson's certification was revoked and his status reverted to a merit compensation employee. The testimony is contradictory over whether McPherson contributed to

these discussions when he did attend the entire meeting, but it is clear that he was authorized to contribute his ideas in order to formulate management strategy. Because McPherson's status as a merit compensation employee authorizes him to contribute in management strategy sessions, his attendance at these meetings fails to raise an issue that might overcome the presumption that this designation is proper.

4. supervisor

AFSCME fails to raise an issue that might overcome the presumption that McPherson has been designated properly as a supervisor under Section 6.1 of the Act.

a. exercise authority

AFSCME's argument that McPherson is not a supervisor under the NLRA because he does not exercise the duties he is authorized to conduct fails to raise an issue to overcome the presumption, because the designation is presumed proper under Section 6.1(d) of the Act, and the position description does not limit McPherson's discretion, accountability or independent authority to exercise his supervisory duties. As noted above the objectors have the burden to raise an issue that might overcome the presumption that the designation is proper. The job description provides that the employee within this position is authorized to assist in the selection, orientation, training, evaluation and management of employees assigned. As noted above, authorized is the operative word. The position description does not specifically limit McPherson's authority to exercise those duties. AFSCME's argument also fails because absent any evidence that McPherson does not in fact exercise these duties, there is a presumption that he does exercise these duties. Therefore, because McPherson is authorized to exercise supervisory duties, and AFSCME has not provided any evidence to the contrary, this objection fails to raise an issue that might overcome the presumption that he has been properly designated at a supervisor under Section 6.1(b)(5) of the Act.

b. discipline

McPherson's argument that he does not perform any disciplinary functions fails to overcome the presumption that the designation is proper for the same reason that Ewing's argument fails. Negating one of the possible bases for supervisory authority does not raise an issue for hearing, and based on McPherson's position description he assists in hiring, training, evaluation and management of employees which are three of the other possible indicia. Further, McPherson states that he makes suggestions regarding discipline, and "effectively

recommending” any other indicium of authority is in itself indicia. Therefore, McPherson’s contention that he does not administer discipline does not raise an issue that might overcome the presumption that the designation is proper.

5. manager

AFSCME fails to raise an issue that might overcome the presumption that McPherson has been designated properly as a manager under Section 6.1 of the Act.

a. first managerial test

AFSCME’s argument that there is no evidence that McPherson was ever authorized to exercise his discretion to the extent that he has ‘significant independent authority’ regarding the adoption of management policies or the effectiveness of such policies does not raise an issue that might overcome the presumption that the designation is proper. AFSCME’s argument fails because, as noted above, since the designation is presumed proper under Section 6.1(d) of the Act, arguments must negate the facts that the presumption is based upon. Here McPherson does effectuate and implement policies, but only does so after his recommendations have been approved. Since the position description specifically limits his ability to exercise independent authority regarding policy changes, without approval, McPherson is not a manager under the first test. However this does not raise an issue for hearing, because the second managerial test provides that making effective recommendations meets the managerial requirement under Section 6.1(c) of the Act. Therefore, when considered in context, AFSCME’s argument that McPherson does not meet the first managerial test does not raise an issue that might overcome the presumption that the designation is proper under Section 6.1(c) of the Act.

b. policy decisions

McPherson’s objection that he does not make any policy decisions does not overcome the presumption that he is a manager as defined by section 6.1(c)(i) of the Act..

The second managerial test under Section 6.1 requires that the manager “represent management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.” McPherson’s position description states that he “recommends and after approval, implements efficient procedures methods and systems for more effective control operation and management of Account, Trust Fund, Internal Control, Coffee Shop, Post Office, and Property Control services,” in which McPherson is “responsible for supervision, organization and control” of those services. In order to prevail here the

objections must demonstrate, or effectively argue that McPherson's recommendations are not always followed because his supervisors are not always persuaded by his recommendations. See ICC, 406 Ill. App. 3d at 777. Since McPherson does not argue that his recommendations are not always followed, McPherson's argument that he does not make any policy decisions does not raise an issue that might overcome the presumption that he is a manager as defined by Section 6.1(c)(1) of the Act.

v. Stam

1. previous hearing

AFSCME's argument asserting that CMS did not argue that Stam was either a supervisor or a manager in case S-RC-07-048 does not raise an issue that might overcome the presumption, for the same reasons as stated above.

First, as noted in the summary of case no. S-RC-07-048 above, CMS did argue that Stam was both managerial and confidential. The Appellate Court remanded the case to be heard by the Board only on the confidential issue. Second, as stated above, the Court's failure to remand the case on the managerial issue does not raise an issue that might rebut the presumption that these employees are managers under Section 6.1 of the Act. Finally, since the representation case is still pending before the Board, res judicata does not prevent CMS from raising additional arguments regarding Stam's supervisor status. Therefore AFSCME's argument does not raise an issue that might overcome the presumption that Stam has been designated properly as a managerial and/or supervisory employee as defined by Section 6.1(c) of the Act.

2. merit compensation v bargaining unit

For the reasons' stated above under the analysis of Ewing's and McPherson's positions, Stam's objection that his day-to-day job activities did not change when his status shifted between a merit compensation employee and an employee within a collective bargaining unit does not raise an issue that might rebut the presumption that his position has been properly designated under Section 6.1 of the Act.

Furthermore, while Stam's "day-to-day" activities might have remained the same, just as McPherson states, Stam's status as a bargaining unit employee changed his eligibility to attend the entirety of the executive staff meetings. This inability to attend the entirety of the meeting suggests his role at the meetings while he was a merit compensation employee was supervisory, managerial or confidential in nature. Therefore, the fact that Stam's day-to-day job activities did

not change when his status shifted between a merit compensation employee and a collective bargaining unit employee does not raise a sufficient issue of fact or law that might overcome the presumption that this designation is proper under Section 6.1 of the Act.

3. executive staff meetings

Stam's argument that his attendance at the executive staff meetings altered when his status as merit compensation changed to a bargaining unit employee does not overcome the presumption that this designation is proper.

Stam does not argue why his status as a bargaining unit member prevented him from attending the executive staff meeting in their entirety. Unlike McPherson, there is no testimony as to why Stam was not allowed to remain in the meeting. The testimony provided by Vaca does detail the purpose and contents of the meetings. However, without an explanation as to why Stam was excluded from the full meeting, or what his role he plays at these meetings, and based on the reason McPherson was excluded, it must be assumed that Stam was excluded based upon either his loss of managerial and or confidential status. Therefore, Stam's attendance at these meetings fails to overcome the presumption that this designation is proper.

4. supervisor

AFSCME fails to raise an issue that might overcome the presumption that Stam has been designated properly as a supervisor under Section 6.1 of the Act.

a. exercise of authority

AFSCME's argument that Stam is not a supervisor under the NLRA because he does not exercise the duties he is authorized to conduct fails to raise an issue to overcome the presumption, because the designation is presumed proper under Section 6.1(d) of the Act, and the position description does not limit Stam's discretion, accountability or independent authority to exercise his supervisory duties. The job description provides that Stam is authorized to supervise staff, assign work, approve time off, provide training, adjust grievance, complete performance evaluations, give oral and written reprimand, and recommend greater disciplinary action of his six subordinate employees. The position description does not specifically limit Stam's authority to exercise those duties. AFSCME's argument also fails because absent any evidence that Stam does not in fact exercise these duties, there is a presumption that he does exercise these duties. Therefore, because McPherson is authorized to exercise supervisory duties, and AFSCME has not provided any evidence to the contrary, this objection fails to raise

an issue that might overcome the presumption that he has been properly designated at a supervisor under Section 6.1(b)(5) of the Act.

b. discipline

Stam's argument that he does not perform any disciplinary functions fails to overcome the presumption that the designation is proper for the same reason that Ewing's and McPherson's arguments do. Based upon Stam's position description he supervises staff, assigns work, approves time off, provides guidance and training, and gives oral and written reprimands, gives effective recommendations for discipline greater than written reprimands and grievance resolution, and completes performance evaluations. Further Stam's argument that he merely makes disciplinary recommendations, does not raise an issue, because in order for his recommendations to be evidence that he does not have management authority, he must demonstrate that his recommendations are not mostly followed. The position description specifically states that Stam makes effective disciplinary recommendations, and Stam has not made any arguments regarding the effectiveness of his recommendations. Therefore, Stam's contention that he does not administer discipline does not present a sufficient issue of fact or law that might overcome the presumption that the designation is proper.

5. manager

AFSCME fails to raise an issue that might overcome the presumption that Stam has been designated properly as a manager under Section 6.1 of the Act.

a. first managerial test

AFSCME's argument that there is no evidence that Stam was ever authorized to exercise his discretion to the extent that he has 'significant independent authority' regarding the adoption of management policies or the effectiveness of such policies, does not raise an issue that might overcome the presumption that the designation is proper. This argument fails because, as noted above, since the designation is presumed proper under Section 6.1(d) of the Act, arguments must negate all the facts that the presumption is based upon. Here, Stam does effectuate and implement policies, and similar to McPherson, Stam's recommendations on the adoption of such policies are subject to approval. Since the position description specifically limits his ability to exercise independent authority regarding the creation of new policies, without approval, Stam is not a manager under the first test. However this does not raise an issue for hearing, because the second managerial test provides that making effective recommendations meets the managerial

requirement under Section 6.1(c) of the Act. Therefore, considered in context, the argument that Stam does not meet the first managerial test does not raise an issue that might overcome the presumption that the designation is proper under Section 6.1(c) of the Act.

b. policy decisions

Stam’s objection that he does not make any policy decisions does not overcome the presumption that is a manager as defined by section 6.1(c)(i) of the Act, because an employee is a manager when he makes “effective recommendations.”

The second managerial test under Section 6.1 requires that the employee “represent management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.” Stam’s position description states that he “maintains policies and procedures of Accounting Services section” and “proposes changes for approval and implements revisions.” In order to prevail here, Stam’s objections must demonstrate, or effectively argue that his recommendations are not always followed because Stam’s supervisors are not always persuaded by his recommendations. See ICC, 406 Ill. App. 3d at 777. Therefore Stam’s argument that he does not make any policy decisions does not raise an issue that might overcome the presumption that he is a manager as defined by Section 6.1(c)(1) of the Act.

V. CONCLUSION

Pursuant to Section 1300.60 of the Board’s Rules, I find that the designation is proper based solely on the information submitted to the Board and the objections fail to overcome the presumption that the designation is proper under Section 6.1 of the Act.

VI. RECOMMENDED ORDER

Unless this Recommended Decision and Order Directing Certification of the Designation is rejected or modified by the Board, the following positions Illinois Department of Veterans’ Affairs are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

37015-34-00-310-00-10	Fiscal Supervisor
37015-34-30-210-00-01	Business Manager II at Quincy Veterans’ Home
37015-34-50-220-00-01	Supervisor of the Accounting Services Section at Manteno Veterans’ Home

VII. EXCEPTIONS

Pursuant to Sections 1300.130 and 1300.90(d)(5) of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,²⁰ parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order in briefs in support of those exceptions no later than 3 days after service of this recommended decision and order. Exceptions shall be filed with the Board by electronic mail at an electronic mail address designated by the Board for such purpose, ILRB.Filing@illinois.gov, and served on all other parties via electronic mail at their e-mail addresses as indicated on the designation form. Any exception to a ruling, finding conclusion or recommendation that is not specifically urged shall be considered waived. A party not filing timely exceptions waives its right to object to this recommended decision and order.

Issued at Chicago, Illinois this 20th day of September, 2013.

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

/s/ Deena Sanceda _____

**Deena Sanceda
Administrative Law Judge**

²⁰ Available at www.state.il.us/ilrb/subsections/pdfs/Section1300IllinoisRegister.pdf

APPENDIX
Recommended Decision and Order case no. S-DE-14-082

S-RC-07-082 evidentiary documents added to the record

1. Ill. Dep't of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., State Panel, 2011 IL App 4th 090966 (4th Dist. 2011).
2. Certification of Representative
3. Testimony of Deborah Miller regarding Lease Ewing, tr. 141, 143, 254-333.
4. Testimony of Bruce Vaca regarding John McPherson, tr.567-593
5. John McPherson's testimony, tr. 594-604.
6. Employer's Pre-Hearing Memorandum
7. E-mails between the Board's General Counsel and the parties, agreeing to an abeyance
8. Testimony of James McCarte regarding Maureen Gibbons, tr. 508, 543-549.
9. Testimony of Jacqueline Jones, tr. 338, 340, 344, 348, 355-359.
10. Corrected Partial Revocation of Certification

H

Appellate Court of Illinois,
Fourth District.
The DEPARTMENT OF CENTRAL MANAGE-
MENT SERVICES, Petitioner,

v.

The ILLINOIS LABOR RELATIONS BOARD,
STATE PANEL; Jackie Zimmerman, Michael Coli,
Michael Hade, and Albert Washington, the Mem-
bers of Said Board and Panel in Their Official Ca-
pacity Only; John Brosnan, in His Official Capacity
Only as Illinois Labor Relations Board Executive
Director; Administrative Law Judge Colleen Har-
vey, in Her Official Capacity Only; The Laborers
International Union of America, Illinois State Em-
ployees Association, Local 2002; Service Employ-
ees International Union Local 73; and the American
Federation of State, County, and Municipal Em-
ployees, Council 31, Respondents.

No. 4–09–0966.

Sept. 28, 2011.

Background: Department of Central Management Services sought review of decision of the Illinois Labor Relations Board, which rejected Department's characterization of certain employees as confidential, managerial, or supervisory employees under the Labor Relations Act.

Holdings: The Appellate Court, [Steigmann, J.](#), held that:

- (1) Board erred in denying certain employees of the Department of Central Management Services an oral hearing to determine whether or not they were excluded from collective bargaining unit;
- (2) certain Department of Revenue employees were confidential employees who were excluded from the collective bargaining unit;
- (3) certain Department of Natural Resources employees were confidential employees who were excluded from the collective bargaining unit;
- (4) certain Department of Revenue employees were

managerial employees who were excluded from collective bargaining unit; and
(5) certain Department of Revenue employees were supervisory employees who were excluded from collective bargaining unit.

Affirmed in part, reversed in part, and re-
manded.

West Headnotes

[1] Appeal and Error 30 ↪767(1)

30 Appeal and Error

30XII Briefs

30k767 Striking Out

30k767(1) k. In general. [Most Cited Cases](#)

When violations of supreme court rules hinder or preclude review, appellate court will strike a brief.

[2] Labor and Employment 231H ↪1866

231H Labor and Employment

231HXII Labor Relations

231HXII(J) Judicial Review and Enforcement of Decisions of Labor Relations Boards

231HXII(J)1 Review by Courts

231Hk1866 k. Scope and extent of review in general. [Most Cited Cases](#)

Appellate court reviews the Illinois Labor Relations Board's decision to deny an oral hearing for clear error.

[3] Constitutional Law 92 ↪3929

92 Constitutional Law

92XXVII Due Process

92XXVII(C) Persons and Entities Protected

92k3928 Government Entities

92k3929 k. In general. [Most Cited Cases](#)

Department of Central Management Services has no constitutional right to procedural due process. [U.S.C.A. Const.Amend. 14.](#)

[4] Labor and Employment 231H 1793

231H Labor and Employment

231HXII Labor Relations

231HXII(I) Labor Relations Boards and Proceedings

231HXII(I)9 Hearing

231Hk1793 k. Necessity for or right to hearing. **Most Cited Cases**

The Illinois Labor Relations Board must hold an oral hearing only if it has reasonable grounds for believing that the case presents significant questions that persist despite the parties' written submissions. 80 Ill.Admin. 1210.100(b)(7)(C).

[5] Labor and Employment 231H 1793

231H Labor and Employment

231HXII Labor Relations

231HXII(I) Labor Relations Boards and Proceedings

231HXII(I)9 Hearing

231Hk1793 k. Necessity for or right to hearing. **Most Cited Cases**

Labor Relations Board erred in denying certain employees of the Department of Central Management Services an oral hearing to determine whether or not they were excluded from collective bargaining unit because they were either confidential, managerial, or supervisory employees under the Labor Relations Act. S.H.A. 5 ILCS 315/1 et seq.; 80 Ill.Admin. 1210.100(b)(7)(C).

[6] Labor and Employment 231H 1878

231H Labor and Employment

231HXII Labor Relations

231HXII(J) Judicial Review and Enforcement of Decisions of Labor Relations Boards

231HXII(J)1 Review by Courts

231Hk1877 Questions of Law or Fact; Findings

231Hk1878 k. In general. **Most Cited Cases**

When the question is purely one of law, appellate court affords no deference to the Illinois Labor

Relations Board; review in that circumstance is de novo.

[7] Administrative Law and Procedure 15A 781

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak781 k. In general. **Most Cited Cases**

On administrative review, a "mixed question of fact and law" is one that involves the examination of the legal effect of a particular set of facts; a mixed question is one in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or whether the rule of law as applied to the established facts is or is not violated.

[8] Labor and Employment 231H 1878

231H Labor and Employment

231HXII Labor Relations

231HXII(J) Judicial Review and Enforcement of Decisions of Labor Relations Boards

231HXII(J)1 Review by Courts

231Hk1877 Questions of Law or Fact; Findings

231Hk1878 k. In general. **Most Cited Cases**

When reviewing mixed questions of law and fact before the Illinois Labor Relations Board, appellate court gives a diminished amount of deference by asking whether the Board's decision is clearly erroneous; in this context, a finding is clearly erroneous if, despite the existence of some evidence to support the finding, the evidence in its entirety leaves the reviewing court with the definite and firm conviction that the finding is a mistake.

[9] Labor and Employment 231H 1878

231H Labor and Employment

231HXII Labor Relations

231HXII(J) Judicial Review and Enforcement of Decisions of Labor Relations Boards

2011 IL App (4th) 090966, 959 N.E.2d 114, 355 Ill.Dec. 86, 191 L.R.R.M. (BNA) 3108
 (Cite as: 2011 IL App (4th) 090966, 959 N.E.2d 114, 355 Ill.Dec. 86)

ment of Decisions of Labor Relations Boards

231HXII(J)1 Review by Courts

231Hk1877 Questions of Law or Fact;

Findings

231Hk1878 k. In general. Most

Cited Cases

If there could be two reasonable but opposing views of whether the facts satisfy the statutory standard, the Illinois Labor Relations Board cannot have committed clear error by choosing between those views.

[10] Labor and Employment 231H 982

231H Labor and Employment

231HXII Labor Relations

231HXII(A) In General

231Hk977 Employees Within Acts

231Hk982 k. Supervisory personnel.

Most Cited Cases

For purposes of statutory definition under Illinois Public Labor Relations Act of a managerial employee as “an individual who is engaged predominantly in executive and management functions,” an “executive” or “manager” is someone who runs the agency or department by, for example, formulating policies and procedures and preparing the budget. S.H.A. 5 ILCS 315/3(j).

[11] Labor and Employment 231H 982

231H Labor and Employment

231HXII Labor Relations

231HXII(A) In General

231Hk977 Employees Within Acts

231Hk982 k. Supervisory personnel.

Most Cited Cases

For purposes of statutory definition under Illinois Public Labor Relations Act of a “managerial employee” as “an individual who is engaged predominantly in executive and management functions,” a managerial employee not only has the authority to make policy but also bears the responsibility of making that policy happen; that is, managerial employees do not merely recommend policies or give advice to those higher up the em-

ployment chain, they actually direct the governmental enterprise in a hands-on way. S.H.A. 5 ILCS 315/3(j).

[12] Labor and Employment 231H 982

231H Labor and Employment

231HXII Labor Relations

231HXII(A) In General

231Hk977 Employees Within Acts

231Hk982 k. Supervisory personnel.

Most Cited Cases

The touchstone of status as a managerial or executive employee under the Illinois Public Labor Relations Act is the independent authority to establish and effectuate policy. S.H.A. 5 ILCS 315/3(j).

[13] Labor and Employment 231H 982

231H Labor and Employment

231HXII Labor Relations

231HXII(A) In General

231Hk977 Employees Within Acts

231Hk982 k. Supervisory personnel.

Most Cited Cases

Managerial status for purposes of the Illinois Public Labor Relations Act can also include those who make effective recommendations; that is, those employees who make recommendations that are almost always implemented. S.H.A. 5 ILCS 315/3(j).

[14] Labor and Employment 231H 982

231H Labor and Employment

231HXII Labor Relations

231HXII(A) In General

231Hk977 Employees Within Acts

231Hk982 k. Supervisory personnel.

Most Cited Cases

An individual is a “supervisor” for purposes of the Illinois Public Labor Relations Act if all three of the following propositions are true: (1) the individual has principal work substantially different from that of his or her subordinates; (2) the individual has authority on the employer's behalf to perform at least one of the outlined indicia of su-

pervisory authority—namely, the authority to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, to adjust their grievances, or effectively recommend any of those actions; and (3) the individual spends a preponderance of his time in the job performing supervisory tasks. S.H.A. 5 ILCS 315/3(r).

[15] Labor and Employment 231H ↪1179

231H Labor and Employment

231HXII Labor Relations

231HXII(D) Bargaining Representatives

231Hk1171 Bargaining Units

231Hk1179 k. Confidential employees; labor nexus. [Most Cited Cases](#)

The Illinois Department of Revenue Research Office public service administrator option two employees were “confidential employees” pursuant to the Illinois Public Labor Relations Act, and thus, were excluded from collective bargaining unit, where, in the regular course of their job duties, these employees had authorized access to the Governor's nonpublic budget proposals. S.H.A. 5 ILCS 315/3(c).

[16] Labor and Employment 231H ↪1179

231H Labor and Employment

231HXII Labor Relations

231HXII(D) Bargaining Representatives

231Hk1171 Bargaining Units

231Hk1179 k. Confidential employees; labor nexus. [Most Cited Cases](#)

The Illinois Department of Revenue Budget and Planning Office public service administrator option two employees were “confidential employees” pursuant to the Illinois Public Labor Relations Act, and thus, were excluded from collective bargaining unit, where, in the regular course of their job duties, the employees assisted and acted in a confidential capacity to their supervisor, who was clearly involved in formulating, determining, and effectuating the Department of Central Management Services' policies related to labor relations. S.H.A. 5 ILCS 315/3(c).

[17] Labor and Employment 231H ↪1179

231H Labor and Employment

231HXII Labor Relations

231HXII(D) Bargaining Representatives

231Hk1171 Bargaining Units

231Hk1179 k. Confidential employees; labor nexus. [Most Cited Cases](#)

Illinois Department of Natural Resources (IDNR) Office of Administration public service administrator option two employee was a “confidential employee” pursuant to the Illinois Public Labor Relations Act, and thus, was excluded from collective bargaining unit, where, in the regular course of his job duties, he had authorized access to information related to the effectuation or review of Department of Central Management Services' (CMS) collective-bargaining policies, such as access to IDNR's long-range strategic plans and staffing needs, which was information that would certainly relate to or impact the effectuation or review of CMS's collective-bargaining policies. S.H.A. 5 ILCS 315/3(c).

[18] Labor and Employment 231H ↪1179

231H Labor and Employment

231HXII Labor Relations

231HXII(D) Bargaining Representatives

231Hk1171 Bargaining Units

231Hk1179 k. Confidential employees; labor nexus. [Most Cited Cases](#)

Illinois Department of Natural Resources (IDNR) Office of Land Management public service administrator option two employee was a “confidential employee” pursuant to the Illinois Public Labor Relations Act, and thus, was excluded from collective bargaining unit, where employee had authorized access to information relating to the effectuation or review of collective-bargaining policies. S.H.A. 5 ILCS 315/3(c).

[19] Labor and Employment 231H ↪1178(2)

231H Labor and Employment

231HXII Labor Relations

231HXII(D) Bargaining Representatives**231Hk1171 Bargaining Units****231Hk1178 Supervisory Employees****231Hk1178(2) k. Particular em-**

ployees. **Most Cited Cases**

Illinois Department of Revenue (IDOR) Office of Publication Management public service administrator option two employees were “managerial employees” pursuant to the Illinois Public Labor Relations Act, and thus, were excluded from collective bargaining unit; they engaged predominantly in management functions in that they developed and revised IDOR publications and policies and directed the effectuation of management policies and practices. S.H.A. 5 ILCS 315/3(j).

[20] Labor and Employment 231H ↪1178(2)**231H Labor and Employment****231HXII Labor Relations****231HXII(D) Bargaining Representatives****231Hk1171 Bargaining Units****231Hk1178 Supervisory Employees****231Hk1178(2) k. Particular em-**

ployees. **Most Cited Cases**

Illinois Department of Revenue employees were “supervisory employees” pursuant to the Illinois Public Labor Relations Act, and thus, were excluded from collective bargaining unit; although employees' supervisor signed off on many of the disciplinary measures they took with their subordinates, the evidence showed that their recommendations were effective in that they were almost always adopted by their supervisors. S.H.A. 5 ILCS 315/3(r).

[21] Labor and Employment 231H ↪1178(2)**231H Labor and Employment****231HXII Labor Relations****231HXII(D) Bargaining Representatives****231Hk1171 Bargaining Units****231Hk1178 Supervisory Employees****231Hk1178(2) k. Particular em-**

ployees. **Most Cited Cases**

Illinois Department of Revenue employees

were “supervisory employees” pursuant to the Illinois Public Labor Relations Act, and thus, were excluded from collective bargaining unit, where employees had authority to independently assign and monitor work, evaluate employees, and approve time off for their subordinates. S.H.A. 5 ILCS 315/3(r).

***117 Joseph M. Gagliardo, Mark W. Bennett, Lawrence Jay Weiner** (argued), Special Assistant Attorneys General, Chicago, for Central Management Services.

Lisa Madigan, Attorney General, State of Illinois, **Michael A. Scodro**, Solicitor General, Paul Racette (argued), Assistant Attorney General, for IL Labor Relations Board, State Panel.

Jacob Pomeranz (argued), **Mark S. Stein**, Cornfield & Feldman, Chicago, for AFSCME Council 31.

OPINION

Justice **STEIGMANN** delivered the judgment of the court, with opinion.

****89 ¶ 1** In October 2006, correspondent, the American Federation of State, County, and Municipal Employees, Council 31 (AFSCME), filed a majority interest representation petition under the Illinois Public Labor Relations Act (Act) (5 ILCS 315/1 through 27 (West 2006)) with the Illinois Labor Relations Board (Board), seeking to include certain employees of petitioner, the Illinois Department of Central Management (CMS), in AFSCME's existing RC-62 bargaining unit.

¶ 2 In November 2009, the Board issued a decision, (1) rejecting CMS's argument that it was entitled to an oral hearing on each of the disputed CMS employees classified as a Public Service Administrator, Option 2 (hereinafter, PSA 2)—which is a characterization assigned to State employees who perform many different jobs in many different agency divisions—and (2) concluding that none of the disputed PSA 2s were (a) confidential, (b) managerial, or (c) supervisory employees under the

Act. *American Federation of State, County & Municipal Employees, Council 31*, 25 PERI ¶ 161 (ILRB State Panel Nov. 6, 2009) (Nos.S–RC–07–048, SRC–08–074)(hereinafter, 25 PERI ¶ 161).

¶ 3 CMS appeals, arguing that the Board erred by (1) denying it an oral hearing on several of the disputed PSA 2 employees and (2) concluding that none of the disputed PSA 2s were (a) confidential, (b) managerial, or (c) supervisory employees under the Act. Because we agree that (1) the Board erred by denying an oral hearing regarding several disputed PSA 2 **90 *118 employees and (2) the Board's decision regarding the PSA 2s who were granted an oral hearing was clearly erroneous, we affirm in part, reverse in part, and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In October 2006, AFSCME filed a majority interest representation petition under the Act with the Board, seeking to include certain CMS employees in an existing RC–62 bargaining unit.

¶ 6 In October 2007, CMS submitted an offer of proof related to its PSA 2 employees. CMS proffered that of the more than 500 PSA 2s at issue, the parties agreed that a certain number should be included in the existing bargaining unit, while others should be excluded. CMS claimed that its offer of proof set forth factual support for its claim that the remaining disputed PSA 2s should be excluded as supervisory, managerial, or confidential employees under the Act.

¶ 7 Following an initial, multiple-day administrative law hearing, the administrative law judge (ALJ) sent a December 2007 letter to CMS, noting that CMS's offer of proof had been incomplete and conclusory. The ALJ concluded that CMS would have to submit a detailed offer of proof before any further hearings on the disputed PSA 2s could be held. That same month, co-respondents, the Laborers International Union (LIU) and Service Employees International Union (SEIU), each filed a

majority interest representation petition under the Act, seeking to include the PSA 2s in a new bargaining unit.

¶ 8 In January 2008, the ALJ consolidated the election petitions filed by (1) AFSCME and (2) LIU and SEIU (hereinafter, the unions). Shortly thereafter, CMS filed two lengthy offers of proof, and the unions responded.

¶ 9 In May 2008, the ALJ concluded that an election should be held, ordering the results sealed until the ALJ could decide which of the disputed PSA 2s should be included in the existing bargaining unit.

¶ 10 In its intermediate order and later in its October 2008 order, the ALJ found that CMS had established, through its offers of proof, that questions of law or fact remained to be resolved as to some of the disputed PSA 2s, but not others. *American Federation of State, County & Municipal Employees, Council 31*, 25 PERI ¶ 161 (Administrative Law Judge's Recommended Decision and Order, Aug. 18, 2009) (Nos.S–RC–07–048, S–RC–08–074) (hereinafter, ALJ decision, 25 PERI ¶ 161). Specifically, the ALJ found, in relevant part, that CMS had established a question of law or fact sufficient to require an oral hearing as to the following 44 employees:

Illinois Department of Revenue (IDOR)

Research Office

- * Ruth Ann Day (confidential)
- * Ryan Gallagher (confidential)
- * Thomas Regan (confidential)
- * Hector Vielma (confidential)
- * Hans Zigmund (confidential)

IDOR Budget and Planning Office

- * Lisa Ackerman (confidential)

* Andy Grapes (confidential)

IDOR Office of Publication Management

* Virginia Bartletti (managerial)

* Teresa Blauvelt (managerial)

* Beau Elam (managerial)

* Candace Erwin (managerial)

* Vickie Harvey (managerial)

***119 **91** * Sheri Hoff (managerial)

* Teresa Richards (managerial)

* Jennifer Schwitek (managerial)

* Julie Southwell (managerial)

* Susan Spada (managerial)

IDOR Motor Vehicle Use Tax Division

* Mary Green (supervisory)

IDOR Sales Tax Division

* Chet Billows (supervisory)

* Mitzi Brandenburg (supervisory)

* Susan Lonzerotti (supervisory)

IDOR Document, Control, and Deposit Division

* Joseph Terry Emmett (supervisory)

IDOR Individual Processing Division

* Paula Hamrock (supervisory)

* Monica Marchizza (supervisory)

* Dottie Perkins (supervisory)

* Cathy Scott (supervisory)

* Sheila Washburn (supervisory)

IDOR Excise Tax Division

* Brock Reynolds (supervisory)

* Brian Spelman (supervisory)

IDOR Taxpayer Assistance Division

(Chicago)

* Mike Mikels (supervisory)

(Statewide)

* Linda Bennett (supervisory)

* Denise Byrne (supervisory)

* Sherry Sampson (supervisory)

* Janine Stroble (supervisory)

* Claire Tegtman (supervisory)

* Jim Walkington (supervisory)

IDOR Business Processing Division

* Kevin Anguish (supervisory)

* Mary Austin (supervisory)

* Donna Mast (supervisory)

* Matt Smith (supervisory)

* Shirley McGlennon (supervisory)

* Brenda Cawley (supervisory)

Illinois Department of Natural Resources (IDNR)

Office of Administration

* Terry Von Bandy (confidential)

IDNR Office of Land Management

* Jeffery Oxencis (confidential).

¶ 11 The ALJ thereafter recommended that the PSA 2s for which it found that no questions of law or fact remained should be included in the bargaining unit. Specifically, the ALJ found that CMS had failed to establish a question of law or fact, and thus, no oral hearing was required with regard to the status of the following 92 employees:

Illinois Department of Aging (Aging)

* Rhonda Baer (supervisory)

CMS Internal Auditors Unit

* Lennel Beaty (confidential)

* MaryJo Behnke (confidential)

* James Bick (confidential)

* Patrick Burns (confidential)

* Jeffery Derrick (confidential)

* James Dickey (confidential)

* Susan Duke (confidential)

* Jennifer Ford–Mitchell (confidential)

* Cornine Fuchs (confidential)

* Kermit Hellrung (confidential)

* Stefanie Kent (confidential)

* Catherine Madonia (confidential)

* **120 **92** * Larry Marques (confidential)

* Randy Martin (confidential)

* Dennis McGill (confidential)

* Sudershan Mittal (confidential)

* David Mueth (confidential)

* Jerry Nimmons (confidential)

* Ellen Perry (confidential)

* Terri Rauworth (confidential)

* Daniel Ryan (confidential)

* Edward Schofield (confidential)

* Theodore Tracy (confidential)

* James Walker (confidential)

* John White (confidential)

* Anthony Woods (confidential)

CMS Audit Supervisors and Managers

* Diane Geary (supervisory)

* Doris Green (supervisory)

* Jane Hewitt (supervisory)

* George Kotty (supervisory)

* Suzanne Lewis (supervisory)

* Brent Nolen (supervisory)

* John White (supervisory)

* David Williams (supervisory)

CMS Bureau of Property Management

* Greg Owens (confidential)

* Heather Patterson (confidential)

* Neil Scott (confidential)

CMS Group Insurance Division

* Dan Ewald (supervisory, managerial, confidential)

* Dan Reter (supervisory, managerial, confidential)

CMS Bureau of Communications and Computer Services

* Druanne Allen (managerial)

CMS Bureau of Administrative Operations, Office of Finance and Management

* Tamara Bartnick (managerial and confidential)

* Linda Gillespie (managerial)

* Tammy Compton (managerial)

CMS Bureau of Communications and Computer Services

* Leslie Barrow (managerial)

* Beverly Connolly (managerial)

* Kathie Wilson (managerial)

Illinois Department of Employment Security (IDES) Employees

* Rex Crossland (supervisory)

* Roger DuBois (supervisory)

* Steven Kiolbasa (supervisory)

* Donald McClain (supervisory)

* Josephine Jones (supervisory)

* Drasko Petrusich (confidential)

* Barton Aplebaum (managerial)

* Robert Eggebrecht (confidential)

* Robert Baldridge (supervisory)

* Curtis Williams (supervisory)

Illinois Department of Financial and Professional Regulation (IDFPR) Employees

* Beverly Bangert (supervisory)

* Patrick Hyde (supervisory, managerial)

* George Preski (managerial)

Department of Human Services (DHS) Employees

* Cheryl Custer (managerial, confidential)

* Mario Lopez (managerial, confidential)

* Bernard Miller (managerial)

* Jamie Nardulli (managerial)

* Albert Okwiegunam (managerial)

* **121 **93** * Moses Tejuoso (managerial)

* Theresa Woodcock (supervisory)

Illinois Department of Public Health (Public Health) Employees

* Ann Geraci (managerial)

* Theresa McLean (managerial)

IDOR Employees

* Vicky Clark (managerial)

* Brett Lindsey (managerial)

* Brian Horn (supervisory)

* Carol Snodgrass (supervisory)

* Thomas Crouch (supervisory)

* Tina Towsley (supervisory)

* Cecil Denton (managerial)

* JoEllen Mahr (supervisory)

* Fred Spittler (supervisory)

* Kathy Clark (supervisory)

* Ron Rosenfeld (supervisory)

State Employee Retirement System (SERS) Employees

- * Lawrence Stone (managerial)
- * David O'Brien (confidential)

Illinois State Police Employee

- * Lee Wright (managerial, confidential)

Illinois Department of Veterans Affairs (Veterans Affairs) Employees

- * Trudy Long (managerial, confidential)
- * John McPherson (managerial, confidential)
- * Stephen Obradovich (managerial, confidential)
- * Ray Schneider (managerial, confidential)

Illinois Department of Health and Family Services (IDHFS) Employee

- * Gary Decausemaker (confidential)

IDNR Employees

- * Guy Beggs (managerial)
- * Janet Davis (supervisory)
- * Truman Scheller (supervisory, managerial, confidential)

Illinois Department of Corrections (DOC) Employee

- * Mary Ann Bohlen (supervisory).

¶ 12 In November 2008, the ALJ conducted the oral hearing to determine whether the remaining 44 PSA 2s should be included in the existing bargaining unit. In August 2009, the ALJ issued its recommendation and decision, finding that not a single one of the remaining PSA 2s was a(1) confidential, (2) managerial, or (3) supervisory employee under the Act. The ALJ thereafter recommended that all

the disputed PSA 2s be included in the existing bargaining unit. ALJ decision, 25 PERI ¶ 161, at 758. CMS challenged the ALJ's recommendations to the Board.

¶ 13 In November 2009, the Board issued its decision, (1) rejecting CMS's argument that it was entitled to an oral hearing on each of the disputed PSA 2 employees and (2) agreeing with the ALJ that none of the 44 disputed PSA 2s were (a) confidential, (b) managerial, or (c) supervisory employees. 25 PERI ¶ 161, at 737–38. The Board then ordered the impounded ballots opened and tallied. 25 PERI ¶ 161, at 738. The ballots later revealed a vote in favor of AFSCME representation.

¶ 14 This appeal followed.

¶ 15 II. PROLOGUE

[1] ¶ 16 Initially, we note that CMS's brief in this case violates [Illinois Supreme Court Rule 341\(h\)\(6\)](#) (eff. July 1, 2008) (the “Statement of Facts” must “contain the facts necessary to an understanding of the **94 *122 case, stated accurately and fairly *without argument or comment* ” (emphasis added)). When violations of supreme court rules hinder or preclude review, we will strike a brief. [Cottrill v. Russell](#), 253 Ill.App.3d 934, 938, 192 Ill.Dec. 733, 625 N.E.2d 888, 890 (1993).

¶ 17 Although CMS's brief in this case comes close to hindering our review, CMS has nonetheless made sufficient references to representations of facts to allow us to review this case. However, we caution CMS to avoid such violations in future appeals.

¶ 18 III. ANALYSIS

¶ 19 CMS argues that the Board erred by (1) denying it an oral hearing on each of the disputed PSA 2 employees and (2) determining that none of the disputed PSA 2s were (a) confidential, (b) managerial, or (c) supervisory employees under the Act. We address CMS's contentions in turn.

¶ 20 A. CMS's Claim That the Board Erred by

Denying It an Oral Hearing on Each of the Disputed PSA 2 Employees

¶ 21 CMS first contends that the Board erred by denying it an oral hearing—which CMS claims is a matter of due process of law—on each of the disputed PSA 2 employees. Specifically, CMS asserts that the Board erred when it disregarded its own rules by denying CMS a hearing on each employee, given that its five offers of proof and 3,598 pages of supporting exhibits, containing uncontested facts, justified reasonable cause to allegedly believe that, despite its filings, significant questions existed as to whether each of those employees was confidential, managerial, and supervisory. As to several of CMS's submissions, we agree.

¶ 22 1. *The Standard of Review and Procedural Due Process*

¶ 23 The article of the Code of Civil Procedure known as the Administrative Review Law, specifically section 3–110 (735 ILCS 5/3–110 (West 2008)), governs judicial review of a Board decision certifying a labor organization as the exclusive bargaining representative of a group of employees. Appeals from such decisions must be made directly to the Illinois Appellate Court. 5 ILCS 315/9(i) (West 2010). According to section 3–110, such appeals “shall extend to all questions of law and fact presented by the entire record.” 735 ILCS 5/3–110 (West 2008).

[2] ¶ 24 We review the Board's decision to deny an oral hearing for clear error. See *Department of Central Management Services/Illinois Commerce Comm'n v. Illinois Labor Relations Board, State Panel*, 406 Ill.App.3d 766, 769–70, 348 Ill.Dec. 226, 943 N.E.2d 1136, 1140 (2010) (the Board's decision to deny an oral hearing is reviewed for clear error, noting that the denial of an “oral hearing” is not necessarily the denial of a “hearing” because written arguments could suffice as a hearing in the administrative context). A finding is clearly erroneous if, despite the existence of some evidence to support the finding, the evidence in its entirety leaves the reviewing court with the

definite and firm conviction that the finding is a mistake. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill.2d 380, 393, 261 Ill.Dec. 302, 763 N.E.2d 272, 280–81 (2001).

[3] ¶ 25 First, we note that despite CMS's assertion, CMS has no constitutional right to procedural due process. See *Department of Central Management Services*, 406 Ill.App.3d at 771, 348 Ill.Dec. 226, 943 N.E.2d at 1141 (concluding that the State and its political subdivisions, including CMS, have no constitutional right to due process). Nevertheless, CMS may insist that the Board comply with its own administrative rules. *Department of Central Management Services*, 406 Ill.App.3d at 771, 348 Ill.Dec. 226, 943 N.E.2d at 1141. Accordingly, we turn to whether the Board complied with its own hearing-procedure rules.

¶ 26 2. *The Pertinent Board Rules*

[4] ¶ 27 Under the Board's rules, an oral hearing, or administrative “trial,” is necessary only when “the opposing documents (and any resulting procedural forfeiture) fail to resolve an important question about the petition—or, in the language of the rule, only if ‘the investigation discloses that there is reasonable cause to believe that there are unresolved issues relating to the question concerning representation.’ 80 Ill. Adm.Code § 1210.100 (b)(7)(C), as amended by 28 Ill. Reg. 4172, 4192 (eff. February 19, 2004).” *Department of Central Management Services*, 406 Ill.App.3d at 773, 348 Ill.Dec. 226, 943 N.E.2d at 1143. Therefore, the Board must hold an oral hearing only if it has reasonable grounds for believing that the case presents significant questions that persist despite the parties' written submissions. *Department of Central Management Services*, 406 Ill.App.3d at 773, 348 Ill.Dec. 226, 943 N.E.2d at 1143. To determine whether reasonable grounds exist for believing that this case presents such questions and therefore whether the Board erred, we examine (1) the statutory right to collectively bargain and (2) CMS's submissions related to the disputed PSA 2s who were denied an oral hearing.

¶ 28 3. *The Statutory Right To Organize and Collectively Bargain, and Who Is Excluded*

¶ 29 Section 6 of the Act outlines the statutory right of State employees to organize and bargain collectively, in pertinent part, as follows:

“Employees of the State * * * have, and are protected in the exercise of, the right to self-organization, and may form, join or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours and other conditions of employment * * *.” 5 ILCS 315/6(a) (West 2008).

¶ 30 For purposes of the Act, “employees” are defined as “individual[s] employed by a public employer * * *[,] excluding * * * managerial employees; * * * confidential employees; * * * and supervisors.” 5 ILCS 315/3(n) (West 2008).

¶ 31 Managerial employees are those employees who are “engaged predominantly in executive and management functions and [are] charged with the responsibility of directing the effectuation of management policies and practices.” 5 ILCS 315/3(j) (West 2008).

¶ 32 Confidential employees, on the other hand, are those employees who, “in the regular course of [their] duties, assist[] and act[] in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations or who, in the regular course of [their] duties, ha[ve] authorized access to information relating to the effectuation or review of the employer's collective[-]bargaining policies.” 5 ILCS 315/3(c) (West 2008).

¶ 33 Supervisors are those employees who engage in work that is “substantially different from that of [their] subordinates and who ha[ve] 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 **96 *124 or clerical nature, but requires the consistent use of independent judgment.” 5 ILCS 315/3(r) (West 2008).

¶ 34 4. *CMS's Submissions Related to the Several Disputed PSA 2s Who Were Denied an Oral Hearing in This Case*

¶ 35 In a series of submissions filed between January 2008 and March 2008, CMS outlined, by department, the job descriptions and duties of the following 92 disputed PSA 2s who were later denied an oral hearing.

¶ 36 a. Section Manager, Aging
(Rhonda Baer)
(Supervisory)

¶ 37 Baer is a section manager of the circuit breaker/pharmaceutical division of Aging, responsible for directing 11 bargaining unit employees and assigning work and creating schedules for those employees. She also reviews her subordinates' work to assure accuracy. Baer completes all performance evaluations and coordinates training for her employees. In addition, Baer is responsible for approving leave requests.

¶ 38 b. CMS Internal Auditors Unit
(Lennel Beaty, MaryJo Behnke, James Bick,
Patrick Burns, Jeffery Derrick, James Dickey,
Susan Duke, Jennifer Ford–Mitchell, Cornine
Fuchs, Kermit Hellrung, Stefanie Kent, Catherine
Madonia, Larry Marques, Randy Martin, Dennis
McGill, Sudershan Mittal, David Mueth, Jerry
Nimmons, Ellen Perry, Terri Rauworth, Daniel Ryan,
Edward Schofield, Theodore Tracy, James
Walker, John White, and Anthony Woods)
(Confidential)

¶ 39 CMS Internal Auditors Unit is responsible for conducting confidential internal audits of State agencies. In doing so, the auditors follow applicable procedures and standards established by State law. The ethical requirements for this position mandate that the auditors remain independent of “external impairments” to ensure that they act objectively and professionally.

¶ 40 c. CMS Internal Audit Supervisors and Managers

(Diane Geary, Doris Green, Jane Hewitt, George Kotty, Suzanne Lewis, Brent Nolen, and David Williams)
 (Supervisory)

¶ 41 CMS Internal Audit supervisors and managers do not have hiring authority but actively participate in staff transfers. They also assign work, direct annual audit plans, and assign audits to their division auditors. The internal audit supervisors and managers (1) schedule overtime, holiday time, and time off, and (2) train, mentor, and monitor subordinates, including imposing discipline.

¶ 42 d. CMS Bureau of Property Management
 (Greg Owens, Heather Patterson, and Neil Scott)
 (Confidential)

¶ 43 CMS Bureau of Property Management employees are responsible for managing more than 700 facilities throughout the State. Specifically, they oversee payments to vendors and staff, and thus, have prior notice of staffing reductions that could potentially affect bargaining unit staff. These employees report directly to the chief financial officer for property management.

¶ 44 e. CMS Group Insurance Division
 (Dan Ewald and Dan Reter)
 (Supervisory, Managerial, and Confidential)

¶ 45 i. *Supervisory*

¶ 46 CMS Group Insurance Division employees Ewald and Reter supervise six and ****97 *125** eight insurance analysts, respectively. In this capacity, they assign cases, oversee those work assignments, and evaluate their subordinates' work on those assignments. These employees also set performance objectives and conduct performance evaluations on their subordinates.

¶ 47 ii. *Managerial*

¶ 48 CMS Group Insurance Division employees manage by creating policies that impact their unit and division. Specifically, they draft and revise the group insurance manual and are involved in developing and implementing group insurance

policies for sections of the insurance manual.

¶ 49 iii. *Confidential*

¶ 50 CMS Group Insurance Division employees are consulted prior to (and during) contract negotiations, particularly when those negotiations involve the collective-bargaining agreement and the group insurance statute. These employees play an active role in reviewing the benefits available to members and the way in which those benefits are articulated to members.

¶ 51 f. CMS Bureau of Communications and Computer Services, Appropriations Manager
 (Druanne Allen)
 (Managerial)

¶ 52 Allen is an appropriations manager with CMS's Bureau of Communications and Computer Services, responsible for administering annual appropriations "through budgetary and expenditure processes, management of budget allocations, application of obligation and expenditure controls, and verification of charges and approval of payments." This employee reports to the division chief and the bureau's chief fiscal officer.

¶ 53 g. CMS Bureau of Administrative Operations/Office of Finance and Management, Budget Analyst
 (Tamara Bartnick)
 (Managerial and Confidential)

¶ 54 i. *Managerial*

¶ 55 Bartnick prepares and administers the budget for "the key management offices within CMS." She manages contracts, including invoice approvals and contract compliance. Bartnick also administers funding and fiscal policies for the agreements between CMS, the Governor's office, and other agencies.

¶ 56 ii. *Confidential*

¶ 57 Bartnick plans the budget for her bureau and administers reductions, additions, changes, and head count for all funds within that bureau. She has access to legal contracts and expenditures related to outside legal representation in all labor and human relations matters. Bartnick also receives confiden-

tial details of the legal activities related to labor and human relations issues for CMS and the Governor's office.

¶ 58 h. CMS Bureau of Administrative Operations/Office of Finance and Management, Accounting Division Operations Manager
(Linda Gillespie)
(Managerial)

¶ 59 Gillespie oversees and directs the fiscal operations of the CMS accounting division. In doing so, she creates fiscal policies, including negotiating certain policies and procedures required to meet State standards. Gillespie also speaks on behalf of the bureau and negotiates audit issues with third-party auditors.

*126 **98 ¶ 60 i. CMS Bureau of Communications and Computer Services, Administration and Planning
(Leslie Barrow)
(Managerial)

¶ 61 Barrow is a systems administrator, which requires her to develop and implement policies and procedures for the security of the computer agency's system. She is responsible for entering and deleting all inventory in the system. Barrow handles all changes, including new procedures for the vendor payment system.

¶ 62 j. CMS Bureau of Administrative Operations/Office of Finance and Management, Financial Reporting Manager for the Accounting Division
(Tammy Compton)
(Managerial)

¶ 63 Compton oversees and directs the fiscal operations of the accounting division. In this capacity, she creates fiscal policies and procedures for agency-wide operations, as well as agencies doing business with CMS. Compton has authority to commit agency resources and is a key interface between CMS and external auditors.

¶ 64 k. CMS Bureau of Communications and Computer Services, Administrative Planning
(Beverly Connolly)

(Managerial)

¶ 65 Connolly manages the statistical services revolving fund at CMS. She reports directly to the business services chief, acting as an assistant to the division chief. Connolly is instrumental in establishing procedures for the billing of new rates structures, as well as billings for special projects. Connolly also develops rates and methodologies to properly bill the State for information technology services to recover costs, while preventing overages and audit issues.

¶ 66 l. CMS Bureau of Communications and Computer Services, Administration and Planning
(Kathie Wilson)
(Managerial)

¶ 67 Wilson works on vendor contracts and payments. She has helped develop, process, and enforce the rules that she created in response to changes in Illinois law.

¶ 68 m. IDES Audit and Accounting Supervisors, Financial Operations Experts, and Accounts and Payroll Managers
(Rex Crossland, Roger DuBois, Steven Kiolbasa, Donald McClain, Josephine Jones, Drasko Petrusich, Barton Aplebaum, Robert Eggebrecht, Robert Baldrige, and Curtis Williams)
(Supervisory, Managerial, and Confidential)

¶ 69 i. *Supervisory*

¶ 70 IDES employees DuBois, Jones, Kiolbasa, McClain, Crossland, Baldrige, and Williams supervise a number of IDES employees. They prepare several written reports and audit findings, spending the majority of their time, however, supervising subordinates. These employees also (a) play a role in hiring new employees and are responsible for training those new hires, (b) issue written and oral reprimands, (c) adjust grievances, and (d) evaluate their subordinates' job performance.

¶ 71 ii. *Managerial*

¶ 72 IDES employees Aplebaum and Baldrige manage and develop procedures and fees for licenses. These employees also possess final authority to make changes to their respective policies and

internal systems.

¶ 73 iii. *Confidential*

¶ 74 IDES employees Petrusich and Eggebrecht maintain detailed budget information**99 *127 and perform analyses directed by the chief financial officer. These employees have access to budget information that could impact union negotiations and potential strikes.

¶ 75 n. IDFPB Banking, Insurance, and Financial Institutions Divisions
(Beverly Bangert, Patrick Hyde, and George Preski)
(Supervisory and Managerial)

¶ 76 i. *Supervisory*

¶ 77 IDFPB employees Bangert and Hyde set performance objectives and evaluate their subordinates. They also (a) assign work and direct their subordinates in completing objectives, (b) authorize time off, (c) conduct training, and (d) handle employee complaints.

¶ 78 ii. *Managerial*

¶ 79 IDFPB employees Hyde and Preski develop and oversee licensing procedures pursuant to various State laws. They also recommend approval of certain processes and develop other internal procedures.

¶ 80 o. DHS Administrative, Budget, Mental Health Division, Fiscal, and Rehabilitative Division Employees

(Cheryl Custer, Mario Lopez, Bernard Miller, Jamie Nardulli, Albert Okwiegunam, Moses Tejuoso, and Theresa Woodcock)

(Supervisory, Managerial, and Confidential)

¶ 81 i. *Supervisory*

¶ 82 DHS employee Woodcock supervises a staff of 17 employees who process payroll. She develops and implements internal procedures to ensure timely processing of the invoices and payrolls processed in her section. Woodcock also (a) assists in the development of department-level policies and procedures, (b) establishes goals and objectives for subordinate staff, and (c) is responsible for discipline within her unit.

¶ 83 ii. *Managerial*

¶ 84 DHS employees Custer, Lopez, Miller, Nardulli, Okwiegunam, and Tejuoso (a) develop budget analyses and cost projections for spending plans, (b) review audit findings and coordinate audit reviews, and (c) develop and implement annual budgets. Some of these positions have frequent contact with the Governor's office to discuss budget issues.

¶ 85 iii. *Confidential*

¶ 86 DHS employees Custer and Lopez review budget options before they become public. Such information is "confidential and embargoed" until the Governor holds the budget address.

¶ 87 p. Public Health Budget Analysts
(Ann Geraci and Theresa McLean)
(Managerial)

¶ 88 Public Health employees Geraci and McLean (a) supervise and assist in formulating the agency's budget, working closely with the Governor's office and (b) prepare financial statements for federal grants, executing "signature control for all federal grant obligations and expenditures," respectively.

¶ 89 q. IDOR Motor Fuel Tax, Local Tax Allocation, Property Tax, Taxpayer Assistance, Central Processing, Customer Service, and Central Registration Divisions

(Vicky Clark, Brett Lindsey, Brian Horn, Carol Snodgrass, Thomas Crouch, Tina Towsley, Cecil Denton, JoEllen Mahr, Fred Spittler, Kathy Clark, and Ron Rosenfeld)

(Supervisory and Managerial)

¶ 90 i. *Supervisory*

¶ 91 IDOR employees Horn, Snodgrass, Crouch, Towsley, Mahr, Spittler, K. Clark, **100 *128 and Rosenfeld supervise trainees, prioritize work and approve time off for subordinates, and handle discipline of and evaluate subordinates. These employees spend the vast majority of their workday performing these supervisory functions.

¶ 92 ii. *Managerial*

¶ 93 IDOR employees V. Clark and Lindsey are responsible for the direction of the work performed in their division, using their own judgment and discretion. These employees also spend the vast majority of their workday maintaining staffing, administering oral and written discipline, handling grievances, training employees, approving time off, effectuating the policies and procedures established by the State legislature, and directing management policies.

¶ 94 IDOR employee Denton develops publication and website application for use by the public. He is also a policy maker, responsible for multiple grant programs.

¶ 95 r. SERS Internal Auditor and Administrative Services Division Chief Fiscal Officer
(Lawrence Stone and David O'Brien)
(Managerial and Confidential)

¶ 96 i. *Managerial*

¶ 97 SERS employee Stone conducts internal audits of the State's employee retirement system, while working closely with the agency director. In this regard, Stone completes reports and makes decisions as to changes that are made to the system.

¶ 98 ii. *Confidential*

¶ 99 SERS employee and chief fiscal officer O'Brien reports directly to the agency director. He is responsible for planning and preparing the agency budget and budget documents for submission to the Governor's office and the General Assembly. O'Brien also manages, directs, and supervises the activities of the technical staff in the administrative-services division. He establishes goals and objectives for the division, ensuring that his subordinates achieve those goals and objectives.

¶ 100 s. Illinois State Police Budget Analyst
(Lee Wright)
(Managerial and Confidential)

¶ 101 i. *Managerial*

¶ 102 State Police budget analyst Wright supervises employees and is responsible for department-wide accounting, voucher processing, financial re-

porting, and asset management. He is a staff advisor to the bureau chief. Wright reviews budget requests and determines whether those items should be included in the department's budget request that is presented to the Governor's office.

¶ 103 ii. *Confidential*

¶ 104 Wright, as a budget analyst, has access to highly confidential budgetary information, including advance knowledge of possible layoff scenarios for both union and nonunion employees.

¶ 105 t. Department of Veterans Affairs, Veterans Home Administrators
(Trudy Long, John McPherson, Stephen Obradovich, and Ray Schneider)
(Managerial and Confidential)

¶ 106 The veterans affairs and veterans home administrators serve as administrators and managers of the State-run veterans homes. In this capacity, these employees analyze, prepare, and review budgetary projections and proposals for the veterans homes. These analyses include projections for union costs.

*129 **101 ¶ 107 u. IDHFS Personal Services Budget Analyst
(Gary Decausemaker)
(Confidential)

¶ 108 IDHFS personal services budget analyst Decausemaker serves as a budget analyst for the child-support-enforcement budgeting program. In that position, he monitors and forecasts personal-services spending for the child-support-enforcement administrative fund, "costing out" decisions related to hiring and staffing activity such as salary increases, attrition rates, and overtime utilization. Such "cost-outs" could be provided to labor-relations staff to use in contract negotiations.

¶ 109 v. IDNR Accountants, Administrators, and Managers
(Guy Beggs, Janet Davis, and Truman Scheller)
(Supervisory, Managerial, and Confidential)

¶ 110 i. *Supervisory*

¶ 111 IDNR administrator Davis and manager

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Scheller supervise a number of subordinates, including, in Davis's case, an employee who had previously been excluded from the union as a supervisor. Davis disciplines and trains subordinates and conducts their performance evaluations.

¶ 112 Scheller is consulted by the labor relations staff and the human resources director regarding the fiscal implications of various contract proposals before such proposals are made at the bargaining table.

¶ 113 ii. *Managerial*

¶ 114 IDNR chief accountant Beggs maintains, coordinates, and implements the accounting systems and financial reporting for IDNR. He reports directly to IDNR's chief fiscal officer, recommending policy changes. Beggs also participates in writing and revising IDNR's policy on travel.

¶ 115 IDNR manager Scheller also reports directly to IDNR's chief fiscal officer, writing and recommending department policy changes. He is also responsible for all revisions to the department's finance handbook.

¶ 116 iii. *Confidential*

¶ 117 IDNR manager Scheller supervises 13 subordinates, including Davis. Another one of Scheller's subordinates, an accountant supervisor, has been excluded from the union as supervisory. He has disciplinary authority, with the ability to adjust grievances. Scheller also supervises training for his subordinates, monitors their work production, and conducts their performance reviews.

¶ 118 w. DOC Supervisor of Central Accounting
 (Mary Ann Bohlen)
 (Supervisory)

¶ 119 DOC supervisor of central accounting Bohlen directly supervises five subordinates and indirectly supervises the accounting staff and business administrations staff in DOC. Bohlen is charged with (a) hiring; (b) assigning and directing work; (c) scheduling time off; (d) training, mentoring, and monitoring; (e) completing performance

evaluations, (f) making recommendations for promotion, and (g) disciplining subordinates.

¶ 120 5. *CMS's Submissions, the Law, and the Board's Decision*

[5] ¶ 121 Although we agree that CMS's submissions were insufficient to require an oral hearing as to many of the disputed PSA 2 employees, given CMS's submissions and the oral-hearing standard established by the Board, we nonetheless are left with the definite and firm conviction**102 *130 that the Board erred by denying CMS an oral hearing on the following employees: (1) CMS Bureau of Property Management employees Owens, Patterson, and Scott as confidential; (2) CMS Group Insurance Division employees Ewald and Reter as confidential; (3) CMS Bureau of Administrative Operations/Office of Finance and Management employees (a) Bartnick as managerial and confidential and (b) Compton as managerial; (4) IDES employees (a) DuBois, Jones, Kiolbasa, McClain, Crossland, Baldrige, and Williams as supervisory, and (b) Petrusich and Eggebrecht as confidential; (5) DHS employees (a) Woodcock as supervisory and (b) Custer and Lopez as confidential; (6) IDOR employees (a) Horn, Snodgrass, Crouch, Towsley, Mahr, Spittler, K. Clark, and Rosenfeld as supervisory and (b) V. Clark and Lindsey as managerial; (7) Illinois State Police budget analyst Wright as confidential; (8) Department of Veterans Affairs employees Long, McPherson, Obradovich, and Schneider as confidential; (9) IDNR employees (a) Davis as managerial and (b) Scheller as supervisory (both of whom we note supervise employees who have previously been excluded as supervisory employees); and (10) DOC employee Bohlen as supervisory.

¶ 122 In so concluding, we do not mean to imply that as a matter of law these disputed PSA 2 employees must be excluded from the bargaining unit (see *Department of Central Management Services/Illinois Human Rights Comm'n v. Illinois Labor Relations Board, State Panel*, 406 Ill.App.3d 310, 316–17, 348 Ill.Dec. 240, 943 N.E.2d 1150,

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1156–57 (2010) (concluding that ALJs were managerial employees as a matter of law)). Rather, we conclude on this record only that CMS has demonstrated reasonable grounds for believing that significant questions are raised about these employees' status as supervisory, managerial, or confidential.

¶ 123 B. CMS's Claim That the Board Erred by Determining That the Disputed PSA 2s Were Not Confidential, Managerial, or Supervisory Employees Under the Act

¶ 124 CMS next contends that the Board erred by determining that the disputed PSA 2s were not confidential, managerial, or supervisory employees under the Act. As to the disputed PSA 2 employees who were granted an oral hearing, we agree.

¶ 125 Prior to addressing the substance of CMS's claims in this regard, we note that having previously analyzed CMS's submissions *vis-à-vis* the 92 disputed employees who were denied an oral hearing, we need not repeat that analysis here. As previously stated, we do not conclude that those PSA 2s who were denied an oral hearing must be excluded from the bargaining unit, only that CMS has demonstrated reasonable grounds for believing that the description submitted of those employees that we have listed presented significant questions about those employees' status as supervisory, managerial, or confidential. Accordingly, we extend our analysis to the remaining 44 disputed PSA 2 employees who had a hearing.

¶ 126 1. *The Standards of Review*

¶ 127 The particular standard of review we employ when reviewing the Board's findings depends on the nature of the question we are considering. When the question is purely one of fact, we deem the Board's resolution of that question to be “prima facie true and correct” (735 ILCS 5/3–110 (West 2008)), which means those questions are reviewed under the manifest weight of the evidence standard. *Carpetland U.S.A., Inc. v. Illinois Department of Employment Security*, 201 Ill.2d 351, 369, 267 Ill.Dec. 29, 776 N.E.2d 166, 177 (2002). “A finding is against the manifest weight of the evidence when

an opposite conclusion**103 *131 is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence.” *Vancura v. Katris*, 238 Ill.2d 352, 374, 345 Ill.Dec. 485, 939 N.E.2d 328, 342 (2010).

[6] ¶ 128 When, however, the question is purely one of law, we afford no deference to the Board. *Carpetland*, 201 Ill.2d at 369, 267 Ill.Dec. 29, 776 N.E.2d at 177. Our review in that circumstance is *de novo*. *Carpetland*, 201 Ill.2d at 369, 267 Ill.Dec. 29, 776 N.E.2d at 177.

[7][8][9] ¶ 129 Sometimes, though, the question cannot be accurately characterized as one purely of fact or purely of law, but is a mixed question of fact and law, in which case we employ an intermediate standard of review. *Carpetland*, 201 Ill.2d at 369, 267 Ill.Dec. 29, 776 N.E.2d at 177. A mixed question of fact and law is one that involves the examination of the legal effect of a particular set of facts. *AFM*, 198 Ill.2d at 391, 261 Ill.Dec. 302, 763 N.E.2d at 279. Put another way, “a mixed question is one ‘in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or * * * whether the rule of law as applied to the established facts is or is not violated.’” *AFM*, 198 Ill.2d at 391, 261 Ill.Dec. 302, 763 N.E.2d at 279 (quoting *Pullman–Standard v. Swint*, 456 U.S. 273, 289 n. 19, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982)). When reviewing these mixed questions, we give a diminished amount of deference by asking whether the Board's decision is clearly erroneous. *AFM*, 198 Ill.2d at 391, 261 Ill.Dec. 302, 763 N.E.2d at 279. In this context, a finding is clearly erroneous if, despite the existence of some evidence to support the finding, the evidence in its entirety leaves the reviewing court with the definite and firm conviction that the finding is a mistake. *AFM*, 198 Ill.2d at 393, 261 Ill.Dec. 302, 763 N.E.2d at 280–81. Again, the finding is that the undisputed facts do or do not satisfy the statutory standard, the meaning of which likewise is undisputed. *AFM*, 198 Ill.2d at 391, 261 Ill.Dec. 302,

2011 IL App (4th) 090966, 959 N.E.2d 114, 355 Ill.Dec. 86, 191 L.R.R.M. (BNA) 3108
 (Cite as: 2011 IL App (4th) 090966, 959 N.E.2d 114, 355 Ill.Dec. 86)

763 N.E.2d at 279. If there could be two reasonable but opposing views of whether the facts satisfy the statutory standard, the Board cannot have committed clear error by choosing between those views. *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

¶ 130 2. *Employees Excluded From the Statutory Right To Bargain Collectively*

¶ 131 As previously explained, section 6 of the Act outlines the statutory right of State employees to organize and bargain collectively. “Employees” are “individual[s] employed by a public employer * * * [.] excluding * * * managerial employees; * * * confidential employees; * * * and supervisors.” 5 ILCS 315/3(n) (West 2008).

¶ 132 a. *Managerial Employees*

¶ 133 Managerial employees are those employees who are “engaged predominantly in executive and management functions and [are] charged with the responsibility of directing the effectuation of management policies and practices.” 5 ILCS 315/3(j) (West 2008). Thus, managerial-employee status requires two parts: (1) being “engaged predominantly in executive and management functions” and (2) being “charged with the responsibility of directing the effectuation of [such] management policies and practices.” 5 ILCS 315/3(j) (West 2008).

[10] ¶ 134 Although the Act does not define “executive and management functions,” we have noted that “these functions amount to running an agency or department, such as by establishing policies and *104 *132 procedures, preparing the budget, or otherwise assuring that the agency or department operates effectively.” *Department of Central Management Services*, 406 Ill.App.3d at 774, 348 Ill.Dec. 226, 943 N.E.2d at 1143. In other words, executives and managers run the agency or department by, for example, formulating policies and procedures and preparing the budget. *Department of Central Management Services*, 406 Ill.App.3d at 774, 348 Ill.Dec. 226, 943 N.E.2d at 1144.

[11][12][13] ¶ 135 The second part of the statutory definition of managerial employee relates to how the agency or department is run. “A managerial employee not only has the authority to make policy but also bears the responsibility of making that policy happen.” *Department of Central Management Services*, 406 Ill.App.3d at 774–75, 348 Ill.Dec. 226, 943 N.E.2d at 1144. That is, managerial employees do not merely recommend policies or give advice to those higher up the employment chain, “they actually direct the governmental enterprise in a hands-on way.” *Department of Central Management Services*, 406 Ill.App.3d at 775, 348 Ill.Dec. 226, 943 N.E.2d at 1144. The touchstone of such status is the independent authority to establish and effectuate policy. *Department of Central Management Services*, 406 Ill.App.3d at 775, 348 Ill.Dec. 226, 943 N.E.2d at 1144. However, managerial status can also include those who make “effective recommendations”—that is, those employees who make recommendations that are almost always implemented. *Department of Central Management Services*, 406 Ill.App.3d at 775, 348 Ill.Dec. 226, 943 N.E.2d at 1144–45.

¶ 136 b. *Confidential Employees*

¶ 137 Confidential employees are those employees who, “in the regular course of [their] duties, assist[] and act[] in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations or who, in the regular course of [their] duties, ha[ve] authorized access to information relating to the effectuation or review of the employer's collective bargaining policies.” 5 ILCS 315/3(c) (West 2008).

¶ 138 Section 3(n) of the Act excludes confidential employees from the definition of “employees” to which the Act applies. 5 ILCS 315/3(n) (West 2008). In *Chief Judge of the Circuit Court v. American Federation of State, County & Municipal Employees, Council 31*, 153 Ill.2d 508, 523, 180 Ill.Dec. 288, 607 N.E.2d 182, 189 (1992), the supreme court explained this exclusion as fol-

laws:

“The purpose of excluding confidential employees is to keep employees from ‘having their loyalties divided’ between their employer and the bargaining unit which represents them. The employer expects confidentiality in labor [-]relations matters but the union may seek access to the confidential materials to gain a bargaining advantage. [Citation.]”

¶ 139 c. Supervisors

[14] ¶ 140 Supervisors are those employees who engage in work that is “substantially different from that of [their] subordinates and who ha[ve] 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.” 5 ILCS 315/3(r) (West 2008). Thus, an individual is a supervisor if all three of the following propositions are true: (1) the individual has principal work **105 *133 substantially different from that of his or her subordinates; (2) the individual has authority on the employer's behalf to perform at least one of the outlined indicia of supervisory authority—namely, the authority to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, to adjust their grievances, or effectively recommend any of those actions; and (3) the individual spends a preponderance of his time in the job performing supervisory tasks. *City of Freeport v. Illinois State Labor Relations Board*, 135 Ill.2d 499, 512, 143 Ill.Dec. 220, 554 N.E.2d 155, 162 (1990).

¶ 141 3. *The Board's Findings Related to the Several Disputed PSA 2s Who Were Granted an Oral Hearing*

¶ 142 After hearing evidence from CMS and the unions at an oral hearing, the ALJ made the following findings, which were later adopted by the Board.

¶ 143 a. The Findings as to the Employees CMS Claimed Were Confidential

¶ 144 CMS presented evidence that PSA 2 employees from the IDOR Research Office, IDOR Office of Budget and Planning, IDNR Office of Administration, and IDNR Office of Land Management were confidential employees under the Act. The Board rejected CMS's claim that those PSA 2 employees were confidential and adopted the following findings as to each of those offices.

¶ 145 i. *IDOR Research Office*
(*Ruth Ann Day, Ryan Gallagher, Thomas Regan, Hector Vielma, and Hans Zigmund*)
(*Confidential*)

“[CMS] asserts that the PSA * * * 2 employees in the Research Office * * * are confidential employees under the labor nexus test and the authorized access test. However, starting with the labor nexus test, [CMS] has failed to establish that the PSA * * * 2s in the Research Office, in the regular course of their duties, assist an individual who formulates, determines and effectuates labor relations policy. There is no evidence in the record that * * * the direct superior of the PSA * * * 2s * * * has any involvement with labor relations. [CMS] asserts that because the PSA * * * 2s communicate with ‘high level decision makers’ in the Governor's office, the PSA * * * 2s assist individuals who formulate, determine and effectuate labor relations policy. This assertion is unsupported, as [CMS] did not provide any evidence that these individuals in the Governor's [o]ffice are responsible for [CMS's] labor relations policy or are directly involved in collective bargaining negotiations. Even if the PSA * * * 2s did report to an individual who formulates, determines and effectuates labor relations policy, there is no evidence in the record that the PSA * * * 2s actually assist any individual in a confidential capacity in the regular course of their duties. The PSA * * * 2s have never participated in strategy meetings regarding collective bargaining or contract negotiations and are not privy to confidential documents regarding labor relations.

[CMS] has also failed to establish that the PSA * * * 2s in the Research Office are confidential employees under the authorized access test. As discussed above, there is no evidence that the PSA * * * 2s have access to information concerning sensitive matters arising from [CMS's] collective bargaining strategy. [CMS] asserts that the PSA * * * 2s are privy to the Governor's proposed budget before it is finalized. While the Governor's plans for the upcoming fiscal ****106 *134** year's budget is not public information prior to its release, the information does not have any connection to labor relations or collective bargaining negotiations. [CMS] also contends that the PSA * * * 2s may have advance notice of revenue shortfalls and therefore, are aware of potential budget cuts and layoffs. The record does not support this contention. Both Day and Vielma testified that they are not consulted as to how budget deficits should be addressed and they have no knowledge of whether there will be budget cuts or layoffs. The PSA * * * 2s' access to budget information does not establish that they meet the confidential standard." ALJ decision, 25 PERI ¶ 161, at 749.

¶ 146 ii. *IDOR Budget and Planning Office*
(Lisa Ackerman, and Andy Grapes)
(Confidential)

"[CMS] asserts that Ackerman and Grapes are confidential employees under the labor nexus test and the authorized access test. As for the labor nexus test, [CMS] has failed to show that Ackerman and Grapes, in the regular course of their duties, assist an individual [(Lewis)] who formulates, determines and effectuates [CMS's] labor relations policy. While there is some evidence in the record that Lewis is involved in collective bargaining negotiations, the record is unclear in determining the level of Lewis' participation in [CMS's] labor relations policy and strategy. Lewis has requested information to be used in negotiations from Ackerman and Grapes, but there is no evidence that Lewis is primarily responsible for [CMS's] labor relations matters, that he makes

recommendations with respect to labor relations strategy or that he drafts management proposals and counter proposals. Even if Lewis did formulate, determine and effectuate labor relations policy, Ackerman and Grapes do not assist Lewis in a confidential capacity in the regular course of their duties. On a daily basis, Ackerman and Grapes are responsible for developing and monitoring IDOR's budget. * * *

As for the authorized access test, [CMS] asserts that Ackerman and Grapes have access to confidential budget information and have performed cost analyses on [CMS's] collective bargaining proposals and layoff plans. First, there is no evidence in the record that Ackerman has authorized access to [CMS's] collective bargaining policy and strategy. Ackerman's primary duty is to develop and monitor certain aspects of IDOR's budget. She is privy to budget information that is not public, but this does not constitute confidential information as defined by the Act. On one occasion, Ackerman provided Lewis with budget information while he was in collective bargaining negotiations. However, there is no evidence that she has ever had access to collective bargaining proposals, layoff plans or [CMS's] collective bargaining strategy. * * *

Grapes' duties come closer than Ackerman's duties to meeting the confidential standard, but [CMS] still failed to establish that Grapes is a confidential employee under the authorized access test. Like Ackerman, Grapes' primary duty is to develop and monitor certain aspects of IDOR's budget. He is privy to budget and salary information that is not public, but this does not constitute confidential information as defined by the Act. Grapes has provided cost analyses on [CMS's] proposals and layoff plans, but simply providing financial data does not establish an employee is confidential as defined by the Act. ****107 *135** Grapes has never participated in collective bargaining negotiations or attended a meeting in which collective bargaining strategy was dis-

cussed. He has no knowledge of or input into [CMS's] collective bargaining strategy. When performing the cost analyses, Grapes has no knowledge as to whether the proposals will be shared with the union. As for layoff plans, Grapes has no knowledge as to whether the layoffs will actually occur and has no input into whether layoffs should occur.” *Id.* at 750.

¶ 147 iii. *IDNR Office of Administration*
Terry Von Bandy
(Confidential)

“[CMS] contends that Bandy is a confidential employee because he has direct contact with individuals who formulate, determine and effectuate labor relations policy and he has access to confidential labor relations policy. Starting with the labor nexus test, [CMS] did not establish that Bandy assists, in a confidential capacity in the regular course of his duties, an individual who formulates, determines and effectuates labor relations policy. While Bandy frequently meets with * * * IDNR's Chief Financial Officer and Human Resources Specialist * * *, direct contact with these individuals does not establish Bandy is a confidential employee under the labor nexus test. The record does not establish that [the CFO and HR specialist] formulate, determine and effectuate labor relations policy. [CMS] did not provide any examples to show that either [the CFO or HR specialist] have primary responsibility for labor relations matters, make recommendations with respect to collective bargaining strategy or draft management proposals or counterproposals.

Moreover, Bandy does not assist any individual in a confidential capacity in the regular course of his duties, as he is primarily responsible for monitoring fiscal operations and making budget recommendations. Bandy has never been present for collective bargaining strategy meetings or negotiations. While he makes budget recommendations regarding operating procedures, his recommendations involve general administrative concerns instead of collective bargaining matters.

When [the HR specialist] consulted with Bandy about a grievance, he provided her with budget information as to what [IDNR] could afford. Bandy does not have input into how grievances should be resolved and does not assist with grievances in the regular course of his duties. * * *

[CMS] has also failed to show that Bandy is a confidential employee under the authorized access test. While Bandy is privy to personnel records, staffing needs, and [IDNR's] long range strategic plans, this is not considered to be confidential information as defined by the Act. [CMS] asserts that Bandy's involvement in resolving grievances establishes that he has access to confidential labor relations information, but as discussed above, the evidence indicates that he simply provides budget information to [the HR specialist]. Bandy has never participated in strategy meetings regarding collective bargaining or contract negotiations or been privy to confidential documents regarding labor relations. He has no knowledge of or input into [CMS's] collective bargaining strategy.” *Id.*

¶ 148 iv. *IDNR Office of Land Management*
(Jeffery Oxencis)
(Confidential)

“[CMS] contends that Oxencis is a confidential employee because he has **108 *136 direct contact with individuals who formulate, determine and effectuate labor relations policy and he has access to confidential documents regarding labor relations. Under the labor nexus test, [CMS] failed to establish that [his supervisor] formulates, determines and effectuates [CMS's] labor relations policy. [His supervisor] has no input into whether a collective bargaining proposal will be accepted or whether a layoff plan will be implemented. [That supervisor] does not have primary responsibility for [CMS's] collective bargaining plans, nor does he participate in collective bargaining negotiations or draft management proposals and counterproposals.

Even if [Oxencis' supervisor] did formulate,

determine and effectuate [CMS's] labor relations policy, Oxencis does not assist [his supervisor] in a confidential capacity in the regular course of his duties. Oxencis' primary responsibilities include paying bills, monitoring the budget of the Office of Land Management and making budget recommendations to [his supervisor]. Oxencis has performed cost analyses on collective bargaining proposals and layoff plans, but he does not do so in the regular course of his duties. Moreover, simply providing financial data for use in collective bargaining negotiations does not establish that an employee meets the confidential standard.
* * *

Under the authorized access test, Oxencis, in the regular course of his duties, does not have authorized access to information concerning sensitive matters regarding [CMS's] collective bargaining strategy. Oxencis has regular access to the Office of Land Management's budget and salary information, but this does not constitute confidential information as defined by the Act. Oxencis may conduct cost analyses on collective bargaining proposals and layoff plans, but, as discussed above, merely supplying this information does not establish that Oxencis is a confidential employee. He has no knowledge of or input into [CMS's] collective bargaining strategy. All of the information Oxencis receives is from [his supervisor], who himself is not directly involved in collective bargaining negotiations or strategy.”
Id. at 750–51.

¶ 149 b. The Findings as to the Employees CMS Claimed Were Managerial

¶ 150 CMS presented evidence that PSA 2 employees from the IDOR Office of Publication Management were managerial employees under the Act. The Board rejected CMS's claim that those PSA 2 employees were managerial and made the following findings as to that office.

¶ 151 i. *IDOR Office of Publication Management (Virginia Bartletti, Teresa Blauvelt, Beau Elam, Candace Erwin, Vickie Harvey, Sheri Hoff, Teresa*

Richards, Jennifer Schwitek, Julie Southwell, and Susan Spada)
(Managerial)

“[CMS] asserts that the [IDOR Office of Publication Management employees] are managerial employees because they are responsible for developing and revising all publications used by IDOR. However, the record does not establish that [those employees] are predominantly involved in executive and management functions. [They] do not run an agency or department, oversee operations or have any involvement in preparing budgets. [CMS] contends that the [employees] formulate policy and procedure and therefore, meet the managerial standard. However, this contention is unsupported**109 *137 because the [employees] do not independently formulate policy and procedure. There are no examples in the record of incidents in which the [employees] themselves have formulated a policy or procedure. Instead, the [employees] act in a subordinate and administrative manner, working to accurately articulate, in IDOR documents, policies that have already been formulated. For most assignments, the [employees] consult with [others] as to the policy and how it should be expressed in the document. The only assignments for which the [employees] do not consult with [others] are those that involve minor modifications such [as] an address change. When involved in an assignment, the [other employees] must sign off on the final product and in some cases [other supervisors] must also approve the final product. * * *

[CMS] has also failed to show that the [employees] meet the second prong of the managerial test, that they exercise responsibility for the effectuation of management policy or oversee policy implementation. As discussed above, the [employees] do not independently formulate policy and therefore, they do not have final responsibility to implement and effectuate policy. Most of the documents drafted by the [employees] are reviewed and amended by

[others]. In some cases, the documents are also reviewed and amended by [supervisors], the respective Division Manager or the IDOR 1040 Committee. The [employees] do not exercise responsibility for the effectuation of management policy and functions.

Even those [employees] with unique responsibilities, such as Erwin, Blauvelt and Hoff, do not meet the Act's managerial standard. On the integrated tax project, [one of the supervisors] serves on the process[-]flow team and the correspondence team with the [employees]. Erwin's office is not located in the [Publication Management] office, but she regularly comes back to [that office] to discuss problems with [her supervisors]. The fact that Blauvelt meets with the employees in the Customer Service Bureau does not establish that she has managerial authority. All suggestions from the Customer Service Bureau go through [another] process. Moreover, Blauvelt provides [her supervisor] with her responses to the Customer Service Bureau's inquiries. Finally, Hoff has discretion to determine website content, but she is not actually establishing policy. She places documents on the website only after they have gone through [another] process. [The supervisor] reviewed the most recent website application that Hoff created." *Id.* at 751–52.

¶ 152 c. The Findings as to the Employees CMS Claimed Were Supervisory

¶ 153 CMS presented evidence that PSA 2 employees from the IDOR Motor Vehicle Use Tax Division, IDOR Sales Tax Division, IDOR Document, Control, and Deposit Division, IDOR Individual Processing Division, IDOR Excise Tax Division, IDOR Taxpayer Assistance Division (Chicago and statewide), and IDOR Business Processing Division were supervisory employees under the Act. The Board rejected CMS's claim that those PSA 2 employees were supervisory and made the following findings as to each of those offices.

¶ 154 i. *IDOR Motor Vehicle Use Tax Division (Mary Green)*

(Supervisory)

“[CMS] asserts that Green is a supervisor as defined by the Act, in that her **110 *138 principal work is substantially different from that of her subordinates, she has authority to discipline and direct her subordinates with independent judgment and she devotes a preponderance of her employment time to exercising that authority. As for the first prong, Green manages operations at the [s]ection's four locations and oversees the work of 11 subordinates. Green serves as Assistant Division Manager and may act as Division Manager in [her supervisor's] absence. Green fills in for [supervisors] for lunches and breaks and assists with balancing revenues, but otherwise she does not perform the same duties as the [supervisors]. On the whole, the record establishes that Green's principal work is visibly and obviously different from the principal work of her subordinates.

However, [CMS] failed to establish that Green disciplines her subordinates with independent judgement. First, [her supervisor's] involvement in every step of the disciplinary process limits Green from exercising discretion to decide whether to issue discipline. [Her supervisor] is aware of all pre-disciplinary meetings. While [her supervisor] does not sign off on oral reprimands and written reprimands before they are issued, he reviews documentation of all oral reprimands and written reprimands that are issued by Green. [Her supervisor] is aware of any situation involving a cash shortage because he reports all incidents involving cash shortages to Internal Affairs. In addition, the record is unclear in explaining how Green determines what level of discipline to issue. There is no evidence in the record to determine what happens at the pre-disciplinary meeting and how the meeting results in a certain level of discipline. [CMS] failed to address what Green does with the information she collects at a pre-disciplinary meeting, whether she discusses it with [her supervisor] or makes an independent determination as to what level of discipline is ap-

appropriate. For cash shortages that have been investigated by Internal Affairs, Internal Affairs makes a recommendation for the appropriate discipline. There is no evidence that Green has discretion to overrule Internal Affairs' recommendation. Green does not discipline her subordinates with independent judgment.

[CMS] contends that Green has authority to direct with independent judgment because she assigns work, schedules work shifts and completes performance evaluations. However, [CMS] failed to establish that Green has authority to direct as defined by the Act because there is no evidence that she possesses the necessary discretion to affect the terms and conditions of her subordinates' employment in areas such as discipline, transfer, promotion or hire. As for discipline, Green, as discussed above, does not exercise supervisory authority under the Act. With regard to transfer, promotion and hire, there is no evidence that Green has authority to transfer, promote or hire subordinates, or that she can effectively recommend such action. Green has participated in interviewing * * * candidates, but a Human Resources Specialist was present in all interviews and rated the candidates with Green.

Furthermore, Green's ability to conduct performance evaluations is not evidence of supervisory authority to direct. There is no evidence in the record that performance evaluations completed by Green impact her subordinates' terms and conditions of employment. Green has never withheld a pay increase due to poor performance, granted a bonus due to good performance or recommended **111 *139 that [a] * * * [t]rainee not be certified. Because [CMS] failed to show that Green has discretion to affect the terms and conditions of her subordinates' employment, Green does not exercise authority to direct as defined by the Act.

Green does not perform any of the 11 supervisory indicia with independent judgment and therefore, Green does not devote a preponderance of

her employment time to exercising supervisory authority." *Id.* at 753.

¶ 155 ii. *IDOR Sales Tax Division*
(Chet Billows, Mitzi Brandenburg, and Susan
Lonzerotti)
(Supervisory)

“[CMS] asserts that Section Managers Billows, Brandenburg and Lonzerotti are supervisors as defined by the Act because their principal work is substantially different from that of their subordinates, they have authority to direct and discipline with independent judgment and they devote a preponderance of their employment time to exercising that authority. As for the first prong, the Section Managers oversee operations in their respective sections, make assignments, approve time off and complete performance evaluations. Brandenburg monitors the work of 12 subordinates and Lonzerotti monitors the work of 13 subordinates. The Section Managers' principal work is visibly and obviously different from the principal work of their subordinates.

However, [CMS] did not show that the Section Managers discipline their subordinates with independent judgment. One incident in which Lonzerotti counseled two of her subordinates for productivity problems is the only example in the record of the Section Managers' disciplinary authority. There is no evidence that the Section Managers conduct pre-disciplinary hearings, issue documented oral reprimands, issue written reprimands[,] or recommend more severe discipline. The Section Managers do not discipline with independent judgment as required by the Act.

[CMS] asserts that the Section Managers have authority to direct with independent judgment because they assign work, monitor subordinates, approve time off and complete performance evaluations. However, there is no evidence that the Section Managers possess the necessary discretion to affect the terms and conditions of their subordinates' employment in areas such as discipline, transfer, promotion[,] or hire. There is no

evidence in the record that the Section Managers discipline, transfer, promote[,] or hire subordinates, or that they can effectively recommend such action.

Moreover, the Section Managers' ability to conduct performance evaluations does not establish that they have authority to affect the terms and conditions of their subordinates' employment. In most cases, [their supervisor] reviews the evaluations * * * before the evaluations are presented to the employees. [That supervisor] instructed Lonzerotti to add a comment to at least one evaluation. There is no evidence in the record that the Section Managers' [*sic.*] have ever recommended that an employee not receive a pay increase because of poor performance. Even if a Section Manager recommended that a pay increase be withheld, the recommendation would have to be approved by [that section manager's supervisor]. * * *

Finally, [CMS] failed to establish that the Section Managers perform any of the 11 supervisory indicia with independent judgment and therefore, the Section**112 *140 Managers do not devote a preponderance of their employment time to exercising supervisory authority." *Id.* at 754.

¶ 156 iii. *IDOR Document, Control, and Deposit Division*
(*Joseph Terry Emmett*)
(*Supervisory*)

"[CMS] asserts that * * * Emmett is a supervisor as defined by the Act, in that his principal work is substantially different from that of his subordinates, he has authority to discipline and direct his subordinates with independent judgment and he devotes a preponderance of his employment time to exercising that authority. As for the first prong, Emmett manages operations in his [s]ection, oversees the work of seven subordinates, approves time off and conducts performance evaluations. [Those] in Emmett's [s]ection are responsible for researching tax returns and responding to taxpayer correspondence. Emmett's prin-

cipal work is visibly and obviously different from the principal work of his subordinates.

As for discipline, Emmett has counseled employees and issued letters of counseling, but counseling does not constitute discipline as defined by the Act. In all other disciplinary incidents described in the record, Emmett did not exhibit the necessary discretion to decide whether to issue discipline. Emmett either consulted with a superior prior to issuing the discipline or was instructed to issue discipline by a superior. Emmett discussed the situation with [his superior] and Labor Relations prior to issuing oral reprimands to two subordinates. As for written reprimands, on one occasion, * * * Emmett's superior * * * instructed Emmett to discipline a subordinate and on another occasion, the Personnel Office directed Emmett to give his subordinate a written reprimand. [CMS] failed to establish that Emmett disciplines with independent judgment as required by the Act.

[CMS] also asserts that Emmett has authority to direct with independent judgment, as he assigns and monitors work, evaluates employees and approves time off. However, [CMS] failed to establish that Emmett has authority to direct as defined by the Act because there is no evidence that he possesses the necessary discretion to affect the terms and conditions of his subordinates' employment in areas such as discipline, transfer, promotion or hire. As for discipline, Emmett, as discussed above, does not exercise supervisory authority under the Act. With regard to hire, transfer and promotion, there is no evidence that Emmett has authority to hire, transfer or promote subordinates, or that he can effectively recommend such action.

Furthermore, Emmett's ability to conduct performance evaluations is not evidence of supervisory authority to direct because the evaluations do not affect the terms and conditions of his subordinates' employment. The evaluations completed by Emmett are reviewed by [his supervisor, and

his supervisor's supervisor], prior to Emmett presenting them to his employees. Emmett has never recommended that a subordinate's pay increase be denied due to work performance issues. If Emmett ever did recommend that his subordinate not receive a pay increase, the Personnel Office would have to approve the recommendation. Because [CMS] failed to establish that Emmett has discretion to affect the terms and conditions of his subordinates' ****113 *141** employment, Emmett does not exercise supervisory authority to direct.

Emmett does not perform any of the 11 supervisory indicia with independent judgment and therefore, he does not devote a preponderance of his employment time to exercising supervisory authority." *Id.* at 754.

¶ 157 iv. *IDOR Individual Processing Division (Paula Hamrock, Monica Marchizza, Dottie Perkins, Cathy Scott, and Sheila Washburn) (Supervisory)*

"[CMS] asserts that Section Managers Hamrock, Marchizza, Perkins, Scott and Washburn exercise supervisory authority in that their principal work is substantially different from that of their subordinates, they have authority to discipline, adjust grievances and direct with independent judgment and they devote a preponderance of their employment time to exercising that authority. As for the first prong, the parties stipulated that Hamrock, Marchizza, Perkins and Washburn perform principal work that is substantially different from the principal work of their subordinates. Scott oversees operations of the Quality Assurance Section, monitors the work of seven subordinates, approves time off and completes performance evaluations. [Others] in Scott's division perform quality review for the entire Individual Processing Division. While Scott performs quality review on a certain percentage of her subordinates' work, she is checking her subordinates' work, not the work of other sections in the [d]ivision. This is only one of her many respons-

ibilities. Scott's principal work is visibly and obviously different from the principal work of her subordinates.

[CMS] asserts that the Section Managers' disciplinary authority constitutes supervisory authority under the Act. However, the evidence indicates that the Section Managers lack the necessary discretion to determine whether to issue discipline. The Section Managers may independently counsel a subordinate, but this does not constitute discipline as defined by the Act. Prior to issuing an oral reprimand, the Section Managers present documentation of the employee's misconduct to [another] and sometimes Labor Relations. The oral reprimands are recorded in the employee's personnel file, but the involvement of [others] prevents the Section Managers from exercising independent judgment when determining whether to issue discipline. There is no evidence in the record that the Section Managers issue written reprimands or recommend more severe discipline. The Section Managers do not discipline with independent judgment.

Next, [CMS] asserts that the Section Managers' ability to adjust grievances constitutes supervisory authority as defined by the Act. In the one example in the record of a grievance presented to a Section Manager, Washburn denied the grievance and forwarded it to the second level. There is no evidence that a Section Manager has ever resolved a grievance. Therefore, the Section Managers do not adjust grievances with independent judgment.

[CMS] asserts that the Section Managers have authority to direct with independent judgment because they assign work, monitor the productivity of their subordinates, approve time off and complete performance evaluations. However, there is no evidence that the Section Managers possess the necessary discretion to affect the terms and conditions of their subordinates' employment in areas such as discipline, transfer, promotion or ****114 *142** hire and therefore, [CMS] failed to

establish that the Section Managers have authority to direct as defined by the Act.

The ability of the Section Managers to conduct performance evaluations does not establish that they have supervisory authority to direct because the evaluations do not affect the terms and conditions of their subordinates' employment. [A supervisor] reviews the evaluations completed by the Section Managers to ensure the ratings are properly supported before the evaluations are presented to the employees. There are no examples of the Section Managers effectively recommending that a subordinate's pay increase be withheld. Moreover, when evaluating * * * [t]rainees, the record indicates that the Section Managers discuss the employee's performance with [their supervisor] and provide her with documentation of the employee's performance prior to recommending that an employee should be terminated instead of promoted and certified. A Section Manager's recommendation to terminate [a] * * * [t]rainee must also be approved by Labor Relations. The Section Managers do not exercise authority to direct as defined by the Act.

Finally, the Section Managers do not perform any of the 11 supervisory indicia with independent judgment and therefore, the Section Managers do not devote a preponderance of their employment time to exercising supervisory authority.” *Id.* at 754–55.

¶ 158 v. *IDOR Excise Tax Division*
(*Brock Reynolds and Brian Spelman*)
(*Supervisory*)

“[CMS] asserts that Section Managers Reynolds and Spelman are supervisors, in that their principal work is substantially different from that of their subordinates, they have authority to discipline and direct with independent judgment and they devote a preponderance of their employment time to exercising that authority. As for the first prong, the Section Managers oversee the operations of their respective sections, monitor the work of their subordinates, approve time off and

complete performance evaluations. [The subordinates] in the Excise Tax Division process tax returns and correspond with taxpayers. While the Section Managers know how to perform the work of their subordinates, they do not perform that work on a regular basis. The Section Managers' principal work is visibly and obviously different from the principal work of their subordinates.

However, the record does not establish that the Section Managers discipline their subordinates with independent judgment. The Section Managers may independently counsel a subordinate and document the counseling in the employee's personnel file, but this does not constitute discipline under the Act. There is no evidence that the Section Managers have discretion to independently determine whether discipline is warranted, as [testimony showed] that the Section Managers usually discuss discipline with [others] prior to issuing it. If the Section Managers do not discuss discipline with [others] prior to issuing it, they inform [them] of the discipline after it is issued. Reynolds has issued oral reprimands and written reprimands for attendance violations, but there is no evidence in the record to establish how Reynolds determines which level of discipline to issue, whether he holds a pre-disciplinary meeting, is directed by a superior to issue the discipline or makes an independent decision. There are no examples of Section Managers**115 *143 recommending discipline more severe than a written reprimand. There are no examples of Spelman's involvement in disciplinary issues. There is not enough evidence in the record to establish that the Section Managers' authority to discipline constitutes supervisory authority as defined by the Act.

[CMS] also asserts that the Section Managers have authority to direct with independent judgment because they assign work, oversee subordinates, schedule work hours, approve time off and conduct performance evaluations. However, [CMS] failed to establish that the Section Man-

agers have authority to direct as defined by the Act because there is no evidence that they possess the necessary discretion to affect the terms and conditions of their subordinates' employment in areas such as discipline, transfer, promotion or hire. As for discipline, the Section Managers do not exercise supervisory authority under the Act. There is no evidence in the record that the Section Managers transfer, promote or hire subordinates, or that they can effectively recommend such action.

The ability of the Section Managers to complete performance evaluations does not establish that they have authority [to] affect the terms and conditions of their subordinates' employment. The evaluations completed by the Section Managers do not impact wage increases. The record indicates that the Section Managers rarely recommend that a subordinate's semi-automatic promotion * * * be withheld due to poor performance. A Section Manager in the Excise Tax Division most recently recommended that a semiautomatic promotion be withheld in 1999. The Section Managers' recommendations regarding promotions first must be approved by [a supervisor] and then go up the chain of review to [that person's superiors]. The Section Managers do not have discretion to impact the terms and conditions of their subordinates' employment, and therefore, they do not exercise authority to direct.

[CMS] failed to establish that the Section Managers perform any of the 11 supervisory indicia with independent judgment and therefore, the Section Managers do not devote a preponderance of their employment time to exercising supervisory authority." *Id.* at 755–56.

¶ 159 vi. *IDOR Taxpayer Assistance Division*
(Chicago)
(Mike Mikels)
(Supervisory)

“[CMS] asserts that Mikels exercises supervisory authority in that his principal work is substantially different from the principal work of his

subordinates, he has authority to discipline and direct his subordinates with independent judgment and he devotes a preponderance of his employment time to exercising that authority. As for the first prong, Mikels manages operations in the Taxpayer Assistance Division in Chicago, oversees the work of 13 subordinates, schedules work hours, makes assignments and completes performance evaluations, in contrast, [his subordinates] assist taxpayers who walk-in and call the office with tax questions. Mikels monitors [the subordinates'] work, to ensure they are providing accurate information to taxpayers, but he does not interact with taxpayers on a regular basis. Mikels' principal work is visibly and obviously different from the principal work of his subordinates.

[CMS] contends that Mikels disciplines with independent judgment, however there is no evidence that Mikels **116 *144 even counsels his employees without consulting a superior. In the one incident in the record in which Mikels counseled a subordinate, Mikels discussed the situation with [his superior] prior to the counseling. There is no evidence that Mikels issues oral reprimands or written reprimands or recommends subordinates for more severe discipline. [CMS] failed to establish that Mikels has authority to discipline with independent judgment as required by the Act.

[CMS] also asserts that Mikels has authority to direct with independent judgment, as he assigns and monitors work, approves time off and evaluates employees. However, there is no evidence that Mikels possesses the necessary discretion to affect the terms and conditions of his subordinates' employment in areas such as discipline, transfer, promotion or hire. Furthermore, Mikels' ability to conduct performance evaluations does not establish that he has authority to affect the terms and conditions of his subordinates' employment. The evaluations completed by Mikels do not impact his subordinates' wages. There are no examples in the record of incidents in which

Mikels, as part of an employee's evaluation, recommended that the employee not receive a semi-automatic promotion. At the time of the hearing, Mikels had concerns about whether to promote one of his * * * [t]rainees. [Two other employees] were both aware of the situation even though Mikels had yet to make a recommendation with regard to the employee. This evidence indicates that [the other employees] are involved in these decisions, limiting Mikels' ability to exercise independent judgment. Mikels' ability to complete performance evaluations and make recommendations as to * * * [t]rainees does not establish that he has supervisory authority to direct.

[CMS] asserts that the performance evaluations completed by Mikels do impact the terms and conditions of his subordinates' employment because Mikels reviewed past performance evaluations when determining which [subordinates] should be promoted * * *. While Mikels based his recommendation to promote the less senior employee on the employees' performance evaluations, there is no evidence in the record that Mikels' recommendation was effective. The record indicates that [other employees] were involved in the decision but is unclear in determining the degree to which they relied on Mikel's recommendation. Moreover, the evidence does not establish who actually made the final decision to promote the individual. Looking at the record as a whole, this one incident does not show that Mikels has authority to independently affect the terms and conditions of his subordinates' employment. Mikels does not exercise authority to direct as defined by the Act.

Mikels does not perform any of the 11 supervisory indicia with independent judgment and therefore, Mikels does not devote a preponderance of his employment time to exercising supervisory authority." *Id.* at 756.

¶ 160 vii. *IDOR Taxpayer Assistance Division*
(Statewide)

(Linda Bennett, Denise Byrne, Sherry Sampson,

Janine Stroble, Claire Tegtman, and Jim Walkington
(Supervisory)

“[CMS] asserts that the Section Managers in the Taxpayer Assistance Division, Bennett, Byrne, Sampson, Stroble, Tegtman, Walkington, are supervisors as defined by the Act, in that their principal**117 *145 work is substantially different from that of their subordinates, they have authority to discipline, adjust grievances and direct with independent judgment and they devote a preponderance of their employment time to exercising that authority. As for the first part of the supervisory test, the Section Managers oversee their respective sections, monitor subordinates, schedule, approve time off and complete performance evaluations. In contrast, most of the [subordinates] in the Taxpayer Assistance Division answer questions from taxpayers in either the call center or one of the division's walk-in locations. The [subordinates] in the Taxpayer Correspondence Section perform adjustments on taxpayer accounts. The Section Managers may assist the [subordinates] with complicated problems, but otherwise they do not perform the duties of the [subordinates]. The Section Managers' principal work is visibly and obviously different from the principal work of their subordinates.

There is little evidence in the record to support [CMS's] contention that the Section Managers discipline with independent judgment. The Section Managers' ability to independently counsel their subordinates does not constitute discipline under the Act. The Section Managers do not have independent discretion to determine whether to discipline, as they usually consult [a supervisor] before issuing oral reprimands and written reprimands. [That supervisor] was aware of the circumstances surrounding all oral reprimands in the record issued by Stroble. Walkington conducted a pre-disciplinary meeting to address [an employee's] tardiness, but he spoke with [his supervisor] prior to issuing a written reprimand to [that employee]. There are no examples in the record in

which a Section Manager acted with independent judgment when issuing discipline to a subordinate. Therefore, the Section Managers do not have authority to discipline with independent judgment.

Next, [CMS] asserts that the Section Managers' ability to adjust grievances constitutes supervisory authority as defined by the Act. When a grievance was presented to Walkington, he denied the grievance and forwarded it to [his supervisor], who resolved the grievance. There is no evidence in the record that a Section Manager has ever resolved a grievance. Therefore, the Section Managers do not adjust grievances as defined by the Act.

[CMS] asserts that the Section Managers have authority to direct with independent judgment because they assign work, monitor and evaluate their subordinates and approve time off. However, there is no evidence that the Section Managers possess the necessary discretion to affect the terms and conditions of their subordinates' employment in areas such as discipline, transfer, promotion or hire. As for discipline, the Section Managers, as discussed above, do not exercise supervisory authority under the Act. There is no evidence in the record that the Section Managers transfer, promote or hire subordinates, or that they can effectively recommend such action.

The ability of the Section Managers to evaluate subordinates does not constitute supervisory authority as defined by the Act. Evaluations completed by the Section Managers do not affect the terms and conditions of their subordinates' employment. While the Section Managers may recommend that a subordinate be certified or that a semi-automatic promotion be denied, there is no evidence that * * * such a recommendation [has been made] without first **118** **146** consulting with a superior. Tegtman recommended that [a subordinate] not receive a semi-automatic promotion * * *, but only after discussing [that employee's] work performance with [a supervisor]. The

Section Managers do not have discretion to independently impact the terms and conditions of employment of their subordinates and therefore, do not exercise authority to direct as defined by the Act.

Finally, [CMS] failed to establish that the Section Managers perform any of the 11 supervisory indicia with independent judgment and therefore, the Section Managers do not devote a preponderance of their employment time to exercising supervisory authority." *Id.* at 757.

¶ 161 viii. *IDOR Business Processing Division (Kevin Anguish, Mary Austin, Donna Mast, Matt Smith, Shirley McGlennon, and Brenda Cawley) (Supervisory)*

"[CMS] asserts that the Section Managers in the Business Processing Division * * * are supervisors because their principal work is substantially different from that of their subordinates, they have authority to discipline and direct with independent judgment and they devote a preponderance of their employment time to exercising that authority. The Section Managers oversee their respective sections and subordinates, make assignments, perform quality review and conduct performance evaluations. In contrast, the [subordinates] in the Business Processing Division process tax returns and respond to taxpayer correspondence. The Section Managers may perform the same duties as the [subordinates] if needed, but do not do so on a daily basis. The principal work of the Section Managers is visibly and obviously different from the principal work of their subordinates.

[CMS] asserts that the Section Managers discipline with independent judgment because they determine when discipline is warranted and counsel their subordinates for inappropriate conduct. However, the record does not support this assertion, as it describes only one incident in which a Section Manager was involved in issuing discipline. Smith counseled two of his subordinates, but only after discussing their conduct with [other

employee and a supervisor]. This one example does not establish that the Section Managers have authority to discipline with independent judgment.

[CMS] asserts that the Section Managers have authority to direct with independent judgment because they assign work, monitor the productivity of their subordinates, and complete performance evaluations. However, [CMS] failed to establish that the Section Managers have authority to direct because there is not evidence that they possess the necessary discretion to affect the terms and conditions of their subordinates' employment in areas such as discipline, transfer, promotion or hire. As for discipline, the Section Managers, as discussed above, do not exercise supervisory authority under the Act. There is no evidence in the record that the Section Managers transfer, promote or hire subordinates, or that they can effectively recommend such action.

Moreover, the ability of the Section Managers to conduct performance evaluations and make recommendations as to * * * [t]rainees does not establish that they have supervisory authority to affect the terms and conditions of their subordinates' employment. [The Section Managers' supervisor] reviews the evaluations**119 *147 completed by the Section Managers before they are presented to the employees, to ensure the ratings are properly documented and supported. If [that supervisor] believes a rating should be changed, the Section Manager must amend the evaluation and give it back to [the supervisor] for a second review. Mast spoke with [that supervisor] prior to recommending that [a t]rainee * * * be terminated. [The supervisor] and Mast met with [another employee], Labor Relations and Personnel to discuss [that trainee's] performance. There is no evidence that the decision to terminate [that trainee] was solely the result of Mast's recommendation. There are no examples in the record in which a Section Manager's recommendation on an evaluation impacted a subordinate's terms and

conditions of employment. Therefore, the Section Managers do not exercise authority to direct as defined by the Act.

The Section Managers do not perform any of the 11 supervisory indicia with independent judgment and therefore, the Section Managers do not devote a preponderance of their employment time to exercising supervisory authority.” *Id.* at 756–57.

¶ 162 4. *The Standard of Review as Applied to the Board's Adopted Findings*

¶ 163 Similar to the Board's findings related to the denial of an oral hearing as to several PSA 2 employees—which we have concluded was erroneous—we are likewise left with the definite and firm conviction that its findings were a mistake as to the 44 PSA 2s who were granted an oral hearing.

¶ 164 First, we note that neither party challenges the Board's factual descriptions as to any of the disputed PSA 2 employees. Instead, the parties assert only that the Board erred or did not err, respectively, when it applied the Act to those factual descriptions.

¶ 165 We have reviewed the Board's decisions in light of the deferential clear-error standard that applies here, but we can suspend our disbelief only so far. Following the Seventh Circuit's observation in a case that also involved deferential review, our review of the Board's decision for clear error in this case, while deferential, is not completely supine. *Thompson v. Alzheimer & Gray*, 248 F.3d 621, 624–25 (7th Cir.2001). Even in light of the clearly erroneous standard of review, we are compelled to conclude that the Board erred by finding that the PSA 2 employees should not be excluded from the bargaining unit under the Act. Specifically, we conclude that the Board erred by applying the job descriptions of the PSA 2s to its own recharacterized standards—which are not the standards required under the Act—as follows.

¶ 166 a. The Confidential PSA 2 Employees

¶ 167 i. *IDOR Research Office*
(Ruth Ann Day, Ryan Gallagher, Thomas Regan,
Hector Vielma, and Hans Zigmund)
(Confidential)

[15] ¶ 168 The Board included the IDOR Research Office PSA 2s in the RC–62 bargaining unit because it concluded that they were not confidential employees for purposes of the Act. Specifically, the Board concluded that although these employees have access to the Governor's proposed budget before it is made public, “the information does not have any connection to the labor relations or collective bargaining negotiations.” ALJ decision, 25 PERI ¶ 161, at 749. However, confidential employees**120 *148 include, among others, those employees who, “in the regular course of [their] duties, ha[ve] authorized access to information relating to the effectuation or review of the employer's collective bargaining policies.” 5 ILCS 315/3(c) (West 2008).

¶ 169 Here, in the regular course of their job duties, these employees have authorized access to the Governor's nonpublic budget proposals. Such access reveals information that would most certainly impact the effectuation—that is, the putting into operation of—CMS's collective-bargaining policies.

¶ 170 Accordingly, the IDOR Research Office PSA 2s should have been excluded from the bargaining unit as confidential employees.

¶ 171 ii. *IDOR Budget and Planning Office*
(Lisa Ackerman and Andy Grapes)
(Confidential)

[16] ¶ 172 The Board also included the IDOR Budget and Planning Office PSA 2s in the RC–62 bargaining unit because it concluded that they were not confidential employees for purposes of the Act. Specifically, the Board concluded that although evidence existed that (1) these employees' supervisor was involved in collective-bargaining negotiations and (2) these employees collected detailed budgetary information that the supervisor used in those labor negotiations, the employees were not

confidential employees because “there [was] no evidence that [the supervisor was] *primarily* responsible for [CMS's] labor relations matters, that he makes recommendations with respect to labor relations strategy or that he drafts management proposals and counter proposals.” (Emphasis added.) ALJ decision, 25 PERI ¶ 161, at 750. However, as previously outlined, confidential employees include, among others, those employees who, “in the regular course of [their] duties, assist [] and act [] in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations.” 5 ILCS 315/3(c) (West 2008).

¶ 173 Here, in the regular course of their job duties—which we note does not necessarily require that the job duty be done with consistency or regularity—these employees assist and act in a confidential capacity to their supervisor, who is clearly involved in formulating, determining, and effectuating CMS's policies related to labor relations. Namely, these employees' supervisor utilized the budgetary information they collected, including detailed cost analyses, in CMS's labor negotiations.

¶ 174 Accordingly, the IDOR Budget and Planning Office PSA 2s should have been excluded from the bargaining unit as confidential employees.

¶ 175 iii. *IDNR Office of Administration*
Terry Von Bandy
(Confidential)

[17] ¶ 176 The Board next included the IDNR Office of Administration PSA 2, Von Bandy, in the RC–62 bargaining unit because it concluded that he was not a confidential employee for purposes of the Act. Specifically, the Board concluded that although Von Bandy has access to “personnel records, staffing needs, and [IDNR's] long range strategic plans,” he is not a confidential employee. ALJ decision, 25 PERI ¶ 161, at 750. Again, confidential employees include, among others, those employees who, “in the regular course of [their] duties, ha[ve] authorized access to information relating to the effectuation or review of the employer's

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collective[-]bargaining policies.” 5 ILCS 315/3(c) (West 2008).

*149 **121 ¶ 177 Here, in the regular course of his job duties, Von Bandy has authorized access to information related to the effectuation or review of CMS's collective-bargaining policies. Namely, Von Bandy has access to, among other things, ID-NR's long-range strategic plans and staffing needs, which is information that would certainly relate to or impact the effectuation or review of CMS's collective-bargaining policies.

¶ 178 Accordingly, Von Bandy should have been excluded from the bargaining unit as a confidential employee.

¶ 179 iv. *IDNR Office of Land Management*
(Jeffery Oxencis)
(Confidential)

[18] ¶ 180 Finally, the Board included the ID-NR Office of Land Management PSA 2, Oxencis, in the RC-62 bargaining unit because it concluded that he was not a confidential employee for purposes of the Act. Specifically, the Board concluded that although Oxencis (1) provides financial data for use in collective-bargaining negotiations and (2) has access to the Office of Land Management's budget and salary information, he is not a confidential employee. As we have repeatedly explained, confidential employees include, among others, those employees who, “in the regular course of [their] duties, ha[ve] authorized access to information relating to the effectuation or review of the employer's collective[-]bargaining policies.” 5 ILCS 315/3(c) (West 2008).

¶ 181 Here, in the regular course of his job duties, Oxencis has authorized access to information relating to the effectuation or review of CMS's collective-bargaining policies. Specifically, Oxencis has authorized access to (1) financial data used directly in collective-bargaining negotiations and (2) the Office of Land Management's budget and salary information, which would most certainly be used by CMS in effectuating its collective-bargaining

policies.

¶ 182 We note that in rejecting CMS's attempt to exclude Oxencis from the RC-62 bargaining unit as a confidential employee, the Board emphasized that Oxencis does not have “knowledge of or input into [CMS's] collective bargaining strategy.” ALJ decision, 25 PERI ¶ 161, at 751. Such strategic knowledge, however, is not required. Instead, as outlined above, to be a confidential employee, an employee need only have access to the information *relating* to the effectuation or review of the employer's collective-bargaining policies.

¶ 183 Accordingly, Oxencis should have been excluded from the bargaining unit as a confidential employee.

¶ 184 b. The Managerial PSA 2 Employees
 ¶ 185 i. *IDOR Office of Publication Management*
(Virginia Bartletti, Teresa Blauvelt, Beau Elam,
Candace Erwin, Vickie Harvey, Sheri Hoff, Teresa
Richards, Jennifer Schwitek, Julie Southwell, and
Susan Spada)
(Managerial)

[19] ¶ 186 The Board included the IDOR Office of Publication Management PSA 2s in the RC-62 bargaining unit because it concluded that they were not managerial employees for purposes of the Act. Specifically, the Board concluded that these employees were not managerial because they “do not independently formulate policy and [thus], do not have final responsibility to implement and effectuate policy.” ALJ decision, 25 PERI ¶ 161, at 751. However, exclusivity in the implementation of management policy is not a requirement under that Act. See **122*1505 ILCS 315/3(j) (West 2008) (managerial employees are those employees who are “engaged predominantly in executive and management functions and [are] charged with the responsibility of directing the effectuation of management policies and practices”).

¶ 187 Here, the Office of Publication Management PSA 2s (1) engage predominantly in management functions in that they develop and revise

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IDOR publications and policies and (2) direct the effectuation of management policies and practices. In other words, they direct the IDOR Publication Management Office in a hands-on way. The fact that these employees do not do so “independently” is unimportant, given that the Act does not require such independence in management functions.

¶ 188 Accordingly, the IDOR Office of Publication Management PSA 2s should have been excluded from the bargaining unit as managerial employees.

¶ 189 c. The Supervisory PSA 2 Employees

¶ 190 Before proceeding to our analysis related to those employees who the Board determined were not supervisory under the Act, we note that the definition of supervisor in this context has two prongs. Specifically, supervisors are those employees who (1) engage in work that is “substantially different from that of [their] subordinates”; and (2) “ha[ve] authority, in the interest of the employer, [(a)] to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, [(b)] to adjust their grievances, or [(c)] 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.” 5 ILCS 315/3(r) (West 2008). For each of the following employees, the Board concluded that their principal work is “visibly and obviously different from the principal work of her subordinates.” Neither party challenges the Board's determination in that regard. Thus, no question arises as to the first prong of that analysis. Accordingly, we address only the second prong in our analytical review.

¶ 191 i. *IDOR Motor Vehicle Use Tax Division*
(Mary Green)
(Supervisory)

[20] ¶ 192 The Board included IDOR Motor Vehicle Use Tax Division PSA 2 Green in the RC-62 bargaining unit because it concluded that she was not a supervisory employee for purposes of the Act. Specifically, the Board concluded that be-

cause Green does not discipline her subordinates with “independent judgment,” in that her supervisor is involved in “every step” of the disciplinary process. However, the Board's decision demonstrates that it improperly views “independent judgment” to mean that Green could not involve any other employee in her disciplinary decision-making process.

¶ 193 Here, the Board first noted that Green supervises 4 IDOR offices and 11 subordinates. In rejecting Green as a supervisor, however, the Board relied almost exclusively on the fact that Green's supervisor “signs off” on many of the disciplinary measures she takes, noting that certain incidents, such as those involving cash shortages, must be resolved by internal affairs. This analysis, however, ignores the third option of the second prong of the Act's definition of a supervisor. If an employee, such as Green, *effectively recommends* such discipline with independent judgement, that is sufficient to meet the Act's definition of a supervisor. See 5 ILCS 315/3(r) (West 2008) (those who “ha[ve] authority, in the interest of the employer, to * * * effectively recommend [discipline], if the exercise of that authority **123 *151 is not of a merely routine or clerical nature, but requires the consistent use of independent judgment”). The evidence shows that Green's recommendations are effective—that is, they are almost always adopted by her supervisor. The fact that Green involves her boss in decisions that her boss later implements not only does not exclude Green from supervisory status under that Act, it also makes her an effective and conscientious supervisor of State employees and resources.

¶ 194 Accordingly, Green should have been excluded from the bargaining unit as a supervisor.

¶ 195 ii. *IDOR Sales Tax Division*
(Chet Billows, Mitzi Brandenburg, and Susan
Lonzerotti)
(Supervisory)

¶ 196 The Board included the IDOR Sales Tax Division PSA 2 employees in the RC-62 bargaining unit because it concluded that they were not supervisory employees for purposes of the Act. Specific-

ally, the Board concluded that because, “[i]n most cases, [their supervisor] reviews the[ir] evaluations * * * before the evaluations are presented to the employees,” these employees were not supervisors under the Act. ALJ decision, 25 PERI ¶ 161, at 754. However, the Board’s decision demonstrates that the Board improperly interpreted “independent judgment” to mean that these employees could not involve their supervisor in their disciplinary decision-making process. Put another way, the Board incorrectly views “independent judgment” under the act as synonymous with “unilateral discipline.”

¶ 197 Here, the Board again ignores the third option of the second prong of the Act’s definition of a supervisor. That is, if employees, such as these section managers, effectively recommend such discipline with independent judgement, that is sufficient to meet the Act’s definition of a supervisor. See 5 ILCS 315/3(r) (West 2008) (those who “ha[ve] authority, in the interest of the employer, to * * * effectively recommend [discipline], if the exercise of that authority is not of a merely routine or clerical nature, but requires the consistent use of independent judgment”). The record reveals that these section managers’ recommendations as to discipline are effective. Indeed, as the Board pointed out, if modifications are made to the recommended discipline, it involves only minor modifications such as instructions to add “a comment” to subordinate evaluations.

¶ 198 Accordingly, the IDOR Sales Tax Division PSA 2s should have been excluded from the bargaining unit as supervisors.

¶ 199 iii. *IDOR Document, Control, and Deposit Division*
(Joseph Terry Emmett)
(Supervisory)

[21] ¶ 200 The Board also included IDOR Document, Control, and Deposit Division PSA 2 employee Emmett in the RC–62 bargaining unit because it concluded that he was not a supervisory employee for purposes of the Act. Specifically, the Board concluded that although Emmett has author-

ity to independently assign and monitor work, evaluate employees, and approve time off for his subordinates, he is not a supervisor because CMS failed to present evidence that he “possesses the necessary discretion to affect the terms and conditions of his subordinates’ employment in areas such as discipline, transfer, promotion or hire.” ALJ decision, 25 PERI ¶ 161, at 754. However, the Board incorrectly focused on what CMS failed to show, rather than what it did show.

¶ 201 Here, CMS presented evidence that Emmett has authority to independently**124 *152 *assign and monitor work*, evaluate employees, and approve time off for his subordinates. This job description clearly satisfies the requirement under the Act that a supervisor “direct” his subordinates with independent judgment. See 5 ILCS 315/3(r) (West 2008) (supervisors include those employees who “ha[ve] authority, in the interest of the employer, to * * * direct * * * if the exercise of that authority is not of a merely routine or clerical nature, but requires the consistent use of independent judgment”).

¶ 202 Accordingly, IDOR Document, Control, and Deposit Division PSA 2 employee Emmett should have been excluded from the bargaining unit as a supervisor.

¶ 203 iv. *IDOR Individual Processing Division*
(Paula Hamrock, Monica Marchizza, Dottie Perkins, Cathy Scott, and Sheila Washburn)
(Supervisory)

¶ 204 The Board included the IDOR Individual Processing Division PSA 2 employees in the RC–62 bargaining unit because it concluded that they were not supervisory employees for purposes of the Act. Specifically, the Board concluded that although these section managers independently counsel subordinates and issue reprimands, they are not supervisory because “the involvement of [others] prevents [them] from exercising independent judgment when determining whether to issue discipline.” ALJ decision, 25 PERI ¶ 161, at 755. However, the Board’s decision in this respect again

demonstrates that it improperly views the term “independent judgment” to mean that employees cannot involve anyone else in their disciplinary decision-making process.

¶ 205 Here, the Board—as it did throughout its decision—ignores the third option of the second prong of the definition of a supervisor. That is, if employees, such as these section managers, effectively recommend such discipline with independent judgment, that is sufficient to meet the Act's definition of a supervisor. See 5 ILCS 315/3(r) (West 2008) (those who “ha [ve] authority, in the interest of the employer, to * * * effectively recommend [discipline], if the exercise of that authority is not of a merely routine or clerical nature, but requires the consistent use of independent judgment”).

¶ 206 Accordingly, the IDOR Individual Processing Division PSA 2s should have been excluded from the bargaining unit as supervisors.

¶ 207 v. *IDOR Excise Tax Division*
(Brock Reynolds and Brian Spelman)
(Supervisory)

¶ 208 The Board included the IDOR Excise Tax Division PSA 2 employees in the RC–62 bargaining unit because it concluded that they were not supervisory employees for purposes of the Act. Specifically, the Board concluded that although these section managers (1) independently counsel subordinates and document that counseling in the employee's personnel file, (2) issue (a) discipline and (b) oral and written reprimands for attendance violations, they are not supervisors because the level of discipline imposed was unclear from the evidence and that they often consult others before issuing such discipline. The Board's decision in this respect, however, is yet another example of its improper view that the term “independent judgment” means that employees cannot involve anyone else in their disciplinary decision-making process.

¶ 209 Here, the Board again ignores the third option of the second prong of the Act's definition of a supervisor. That is, if employees, such as these

section managers,**125 *153 effectively recommend such discipline with independent judgment, that is sufficient to meet the Act's definition of a supervisor. See 5 ILCS 315/3(r) (West 2008) (those who “ha[ve] authority, in the interest of the employer, to * * * effectively recommend [discipline], if the exercise of that authority is not of a merely routine or clerical nature, but requires the consistent use of independent judgment”).

¶ 210 Accordingly, the IDOR Excise Tax Division PSA 2s should have been excluded from the bargaining unit as supervisors.

¶ 211 vi. *IDOR Taxpayer Assistance Division*
(Chicago)
(Mike Mikels)
(Supervisory)

¶ 212 The Board included IDOR Taxpayer Assistance Division (Chicago) PSA 2 employee Mikels in the RC–62 bargaining unit because it concluded that he was not a supervisory employee for purposes of the Act. Specifically, the Board concluded that although Mikels has authority to independently assign, monitor, and evaluate the work of 13 subordinates, as well as approve time off for those subordinates, he is not a supervisor because CMS failed to present evidence that he “possesses the necessary discretion to affect the terms and conditions of his subordinates' employment in areas such as discipline, transfer, promotion or hire.” ALJ decision, 25 PERI ¶ 161, at 757. However, the Board once again incorrectly focused on what CMS failed to show, rather than what it did show.

¶ 213 Here, CMS presented evidence that Mikels has authority to independently *assign and monitor work*, evaluate employees, and approve time off for his subordinates. This job description clearly satisfies the requirement under the Act that a supervisor “direct” his subordinates with independent judgment. See 5 ILCS 315/3(r) (West 2008) (supervisors include those employees who “ha [ve] authority, in the interest of the employer, to * * * direct * * * if the exercise of that authority is not of a merely routine or clerical nature, but re-

quires the consistent use of independent judgment”).

¶ 214 Accordingly, IDOR Taxpayer Assistance Division (Chicago) PSA 2 employee Mikels should have been excluded from the bargaining unit as a supervisor.

¶ 215 vii. *IDOR Taxpayer Assistance Division (Statewide)*

(Linda Bennett, Denise Byrne, Sherry Sampson, Janine Stroble, Claire Tegman, and Jim Walkington)

(Supervisory)

¶ 216 The Board included IDOR Taxpayer Assistance Division (Statewide) PSA 2 employees in the RC-62 bargaining unit because it concluded that they were not a supervisory employees for purposes of the Act. Specifically, the Board concluded that although these section managers (1) “oversee their respective sections, monitor subordinates, schedule, approve time off and complete performance evaluations,” and (2) counsel and discipline those subordinates, they are not supervisors because “[t]here is little evidence in the record * * * that the [s]ection [m]anagers discipline with independent judgment.” ALJ decision, 25 PERI ¶ 161, at 757. The Board’s decision in this respect, however, is yet another example of its improper interpretation of the term “independent judgment” to mean that employees cannot involve anyone else in their disciplinary decision-making process.

¶ 217 Here, the Board once again ignores the third option of the second prong of the Act’s definition of a supervisor. That is, if employees, such as these section managers, effectively recommend such discipline**126 *154 with independent judgment, that is sufficient to meet the Act’s definition of a supervisor. See 5 ILCS 315/3(r) (West 2008) (those who “ha[ve] authority, in the interest of the employer, to * * * effectively recommend [discipline], if the exercise of that authority is not of a merely routine or clerical nature, but requires the consistent use of independent judgment”).

¶ 218 Accordingly, the IDOR Taxpayer Assistance Division (Statewide) PSA 2 employees should have been excluded from the bargaining unit as supervisors.

¶ 219 viii. *IDOR Business Processing Division*

(Kevin Anguish, Mary Austin, Donna Mast, Matt Smith, Shirley McGlennon, and Brenda Cawley)
(Supervisory)

¶ 220 The Board included the IDOR Business Processing Division PSA 2 employees in the RC-62 bargaining unit because it concluded that they were not a supervisory employees for purposes of the Act. Specifically, the Board concluded that although these section managers (1) oversee their respective sections and subordinates, make assignments, perform quality review, and conduct performance evaluations, and (2) counsel subordinates and make recommendations as to whether trainees should be terminated, they are not supervisors because CMS did not present evidence that the ultimate determination with respect to discipline was solely the result of the section managers’ recommendations. 25 PERI ¶ 161, at 737. The Board’s decision in this respect is yet one more example of its improper view that the term “independent judgment” means that employees cannot involve anyone else in their disciplinary decision-making process.

¶ 221 Here, the Board one last time ignored the third option of the second prong of the Act’s definition of a supervisor. If employees, such as these section managers, effectively recommend such discipline with independent judgement, that is sufficient to meet the Act’s definition of a supervisor. See 5 ILCS 315/3(r) (West 2008) (those who “ha[ve] authority, in the interest of the employer, to * * * effectively recommend [discipline], if the exercise of that authority is not of a merely routine or clerical nature, but requires the consistent use of independent judgment”).

¶ 222 Accordingly, the Business Processing Division PSA 2 employees should have been excluded from the bargaining unit as supervisors.

¶ 223 IV. EPILOGUE

¶ 224 We note in closing that at oral argument in this case, we inquired into which of the tens of thousands of State executive branch employees would be excluded from collective bargaining under the Act. AFSCME's counsel responded that AFSCME believed that perhaps "the Governor and his policy team" would not be included because they report directly to the citizenry, but that most everyone else could be included. AFSCME's position is instructive because it demonstrates that AFSCME views the Board's interpretation of the Act the same way we do—extraordinarily broad. Unlike AFSCME, however, we do not believe that the General Assembly intended such a broad construction. Had that been the General Assembly's intention, it would simply have excluded the Governor and his policy team rather than excluding *all* managerial, confidential, and supervisory employees. See *People v. Smith*, 236 Ill.2d 162, 167, 337 Ill.Dec. 700, 923 N.E.2d 259, 262 (2010) (the primary goal of statutory construction is to "ascertain and give effect to the drafters' intention, and the most reliable indicator of **127 *155 intent is the language used, which must be given its plain and ordinary meaning").

¶ 225 V. CONCLUSION

¶ 226 For the reasons stated, we (1) affirm the Board's decision to deny an oral hearing to several disputed PSA 2 employees, but reverse the Board's decision to deny an oral hearing to the disputed PSA 2 employees listed in subsection A(5) of this opinion with directions that the Board provide those employees an oral hearing, and (2) reverse the Board's finding that the PSA 2 employees who were granted an oral hearing should not be excluded under the Act.

¶ 227 Affirmed in part and reversed in part; cause remanded with directions.

Justices APPLETON and POPE concurred in the judgment and opinion.

Ill.App. 4 Dist., 2011.

Department of Cent. Management Services v.
Illinois Labor Relations Bd., State Panel
2011 IL App (4th) 090966, 959 N.E.2d 114, 355
Ill.Dec. 86, 191 L.R.R.M. (BNA) 3108

END OF DOCUMENT

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

State of Illinois, Department of Central
Management Services,

Employer

and

American Federation of State, County and
Municipal Employees, Council 31,

Petitioner

and

Laborers International Union/Illinois State
Employees Association, Local 2002, Service
Employees International Union, Local 73

Petitioner

Case Nos. S-RC-07-048
S-RC-08-074

CERTIFICATION OF REPRESENTATIVE

An election having been conducted in the above matter under the supervision of the Illinois Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no valid objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the Illinois Labor Relations Board, IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for

American Federation of State, County and Municipal Employees, Council 31

and that, pursuant to Sections 6(c) and 9(d) of the Illinois Public Labor Relations Act, the said labor organization is the exclusive representative of all the employees INCLUDED in the existing **RC-62** bargaining unit in the classification of

Public Service Administrator, Option 2*

as set forth below, and are 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.

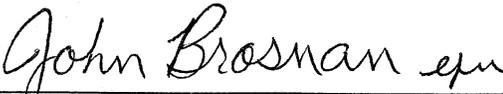
UNIT: See attached RC-62 Unit

* The following Public Service Administrator, Option 2 positions are excluded:

37015-12-05-321-00-01	37015-50-90-110-00-02	37015-44-71-220-00-01
37015-12-70-200-00-01	37015-47-10-000-00-01	37015-25-41-100-00-03
37015-13-30-150-10-01	37015-50-41-100-20-01	37015-46-00-000-01-02
37015-37-50-110-20-01	37015-44-71-230-00-01	37015-12-82-300-00-01
37015-10-74-050-00-21	37015-50-01-000-10-01	37015-10-08-410-00-01
37015-12-05-300-00-01	37015-44-71-210-00-01	37015-37-50-110-21-01
37015-50-33-100-50-01		

Issued at Springfield, Illinois, November 18, 2009.

ILLINOIS LABOR RELATIONS BOARD


John Brosnan, Executive Director

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

Following are the parties of record in this proceeding in Case Nos. S-RC-07-048 and S-RC-08-074

1. Illinois Labor Relations Board, State Panel
2. State of Illinois, Department of Central Management Services, Employer
3. American Federation of State, County and Municipal Employees, Council 31, Petitioner
4. Laborers International Union/Illinois State Employees Association, Local 2002, Service Employees International Union, Local 73, Petitioner

PSA
OPT. 2

STATE OF ILLINOIS
ILLINOIS STATE LABOR RELATIONS BOARD

Mail Ballot

State of Illinois Department
of Central Management Services
Employer
and
AFSCME Council 31
Petitioner
and
Laborers Int'l Union/Local
2002/SEIU Local 73
Petitioner

TALLY OF BALLOTS

Case No. S-RC-07-048
S-RC-08-074
Date 11-9-09

The result of the tabulation of ballots cast in the above-captioned election was as follows:

- | | | |
|-----|---|------------|
| 1. | Approximate number of eligible voters | <u>450</u> |
| 2. | Void ballots | <u>1</u> |
| 3. | Votes cast for <u>AFSCME</u> | <u>252</u> |
| 4. | Votes cast for <u>LIUNA/SEIU</u> | <u>56</u> |
| 5. | Votes cast for no representation | <u>17</u> |
| 6. | Valid votes counted (sum of 3, 4 and 5) | <u>325</u> |
| 7. | Challenged ballots | <u>16</u> |
| 8. | Valid votes counted plus challenged ballots (sum of 6 and 7) | <u>341</u> |
| 9. | Challenges are <input checked="" type="radio"/> sufficient to affect the results of the election. | |
| 10. | <u>AFSCME</u> has prevailed in this election. | |

For the Board:

A. DeK...

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately conducted, that the secrecy of the ballots was maintained, and that the result was as indicated above. We also acknowledge service of this tally.

FOR EMPLOYER:

[Signature]

FOR ORGANIZATION:

AFSCME [Signature]

SEIU/LIUNA [Signature]

C-4563