

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

American Federation of State, County and Municipal Employees, Council 31,)	
)	
Petitioner)	
)	
and)	Case No. S-RC-08-130
)	
State of Illinois, Department of Central Management Services,)	
)	
Employer)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On May 15, 2008, the American Federation of State, County and Municipal Employees, Council 31 (Petitioner) filed a majority interest representation/certification petition in Case No. S-RC-08-130 with the State Panel of the Illinois Labor Relations Board (Board) pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315 (2010), as amended (Act), and the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin Code, Parts 1200 through 1240 (Rules). This petition seeks to include Public Service Administrator, Option 8L positions employed by the Illinois Department of Healthcare and Family Services (DHFS) in the existing RC-10 bargaining unit.¹

¹ On June 11, 2008, the Employer filed a position statement objecting to the petition. On January 28, 2009, Administrative Law Judge Ellen Strizak sent a letter to the Employer’s counsel, with a courtesy copy to the Petitioner, stating she reviewed the Employer’s responses to the petition, found no issues of fact or law in the case, and, therefore, was recommending the Executive Director certify the bargaining unit. Subsequently, on January 29, 2009, the Executive Director prepared a tally of majority interest and certified the Petitioner as the exclusive representative, ordering inclusion in the existing RC-10 bargaining unit. On December 28, 2010, upon considering the Employer’s appeal from the Board’s decision to certify the Petitioner as the exclusive representative, the Appellate Court of Illinois, Fourth District reversed the Board’s decision and remanded for issuance of an order to show cause. Consequently, on February 16, 2011, the Executive Director issued a revocation of certification in this matter and on March 2, 2011, Administrative Law Judge Deanna Rosenbaum ordered the Employer to show cause by providing evidence as to how the employee falls under the statutory managerial and supervisory exclusions previously asserted by the Employer. On April 1, 2011, the Employer submitted a response to the order to show cause.

A hearing was held on July 13, 2011, before Administrative Law Judge Joseph Tansino in Chicago, Illinois. At that time, all parties appeared and were given a full opportunity to participate, adduce relevant evidence, examine witnesses, and argue orally. Briefs were timely filed by both parties. After full consideration of the parties' stipulations, evidence, arguments, and briefs, and upon the entire record of this case, I recommend the following:

I. PRELIMINARY FINDINGS

1. The parties stipulate, and I find, that the Employer is a public employer within the meaning of the Act.
2. The parties stipulate, and I find, that the Petitioner is a labor organization within the meaning of the Act.
3. The parties stipulate, and I find, that the Board has jurisdiction to hear this matter pursuant to the Act.

II. ISSUES AND CONTENTIONS

The issues to be resolved are (1) whether the petitioned-for employees are managerial employees within the meaning of the Act and (2) whether one of these employees, William Kurylak, is a supervisory employee within the meaning of the Act. The Employer contends that all of the petitioned-for employees are managerial employees within the meaning of the Act and that Kurylak is also a supervisory employee within the meaning of the Act. The Petitioner contends that the petitioned-for employees are not managerial employees within the meaning of the Act and that Kurylak is not a supervisory employee within the meaning of the Act.

III. FINDINGS OF FACT²

The Bureau of Administrative Hearings (Bureau) of the Illinois Department of Healthcare and Family Services (DHFS) currently employs three Public Service Administrator, Option 8L positions. All three of these employees are attorneys. Two employees, Dora McNew-Clarke and Thomas Fischer, function as Administrative Law Judges (ALJs) while another employee, William Kurylak, functions as Supervising ALJ.³ Though the Supervising ALJ handles fewer cases than the ALJs, in general, all three of these employees impartially conduct hearings and draft recommended decisions on behalf of the Bureau. The Bureau is divided into two major sections: (1) the Vendor Hearings Section and (2) the Fair Hearings Section. However, the petitioned-for employees can also be assigned cases or other work that is unrelated to these two major sections. For example, Fischer and McNew-Clarke handle child support and administrative paternity cases.

All of the petitioned-for employees handle Vendor Hearings Section cases. Vendor Hearings Section cases are initiated by DHFS' Office of the Inspector General (OIG), which independently receives and investigates complaints involving a variety of vendors. Generally, these vendors have been authorized to bill DHFS for services provided to recipients of public assistance. If the OIG brings charges against a vendor, that vendor may request a hearing. Similarly, for child support cases, a respondent is entitled to a hearing if he or she disagrees with the OIG's determination that the respondent is behind on his or her child support obligations and owes a certain amount of money.

² The following facts are based, in part, on the testimony of Kyong Lee (Deputy General Counsel and former Chief ALJ), Ryan Lipinski (Chief ALJ), Dale Cone (Assistant General Counsel and designee of the Director for Vendor Hearings Section cases), William Kurylak (Supervising ALJ), Terri Shawgo (Bureau Chief of the Office of Labor Relations and the Bureau of Training), Thomas Fischer (ALJ), and Dora McNew-Clarke (ALJ).

³ When Lipinski became Chief ALJ, Kurylak and the two ALJs were included in a bargaining unit. Later, these positions were decertified and removed from the unit. Lipinski's testimony generally indicates that the duties of these positions have not changed she became Chief ALJ.

Review of Recommended Decisions

In general, after an ALJ completes a hearing, the ALJ is responsible for drafting an initial recommended decision and submitting that draft to the Supervising ALJ within a certain time period.⁴ Subsequently, the Supervising ALJ thoroughly reviews the ALJ's draft recommended decision. Once the Supervising ALJ conducts this review of the draft, the Supervising ALJ can "make changes" or recommend that the ALJ change the draft.

As part of this review, the Supervising ALJ and the ALJ that authored the draft may discuss the Supervising ALJ's recommended changes. While discussing a recommended change, the ALJ may be able to convince the Supervising ALJ that the ALJ's original position was correct. However, if the Supervising ALJ and the ALJ that authored the draft are unable to agree on the appropriateness of a recommended change, the Chief ALJ is included a discussion that may involve all three individuals. Ultimately, these disagreements are resolved by the Chief ALJ.

Once the Supervising ALJ completes his or her review, the draft recommended decision is submitted to the Chief ALJ. When the Chief ALJ receives a draft recommended decision, the Chief ALJ conducts his or her own substantive review and may conduct additional independent research. The Chief ALJ conducts this review even if the ALJ and Supervising ALJ do not dispute any recommended changes and are in agreement.

After the Chief ALJ's review, the Chief ALJ can recommend his or her own changes to the draft. At this stage, the Chief ALJ may also instruct an ALJ or the Supervising ALJ to conduct additional research. As part of the Chief ALJ's review, the Chief ALJ, the Supervising

⁴ Fair Hearings Section cases are largely handled by hearing officers who are not attorneys. However, McNew-Clarke has been assigned a number of these cases. For a Fair Hearings Section case, McNew-Clarke does not draft a recommended decision. Instead, McNew-Clarke drafts a "final decision." Fair Hearings Section drafts are not submitted to the Supervising ALJ. Depending on the case, this work either is reviewed by the Chief ALJ or the supervisor of the Fair Hearings Section.

ALJ, and the ALJ may discuss the draft and any proposed changes. Subsequently, the ALJ makes the changes suggested by the Chief ALJ. However, the Chief ALJ can also give his or her corrections to the Supervising ALJ. The Chief ALJ has final control over how each recommended decision is issued.

After the Chief ALJ's suggested changes have been made and the Chief ALJ has reviewed and approved of a recommended decision, the Chief ALJ signs a memo and a cover letter. The ALJ's recommended decision is not issued until the ALJ is directed to do so by the Chief ALJ. Once this direction is given, the recommended decision is transmitted to the respondent and a designee of the Director of DHFS.

For each case, after the period for exceptions has passed, the Director's designee, on behalf of the Director, substantively reviews the recommended decision in conjunction with whatever exceptions have been filed for that particular case and the responses to those exceptions.⁵ After this review, the designee summarizes the recommended decision, exceptions, and responses and drafts a final administrative decision letter. The designee's summary can propose, for example, that the Director adopt or remand a recommended decision.

Subsequently, these documents are sent to the Director for his or her final determination and signature. The Director's final determination is called a final administrative decision. In accordance with the Illinois Administrative Procedures Act, final administrative decisions are appealable to the Illinois Circuit Court.

Kurylak's Other Duties

As Supervising ALJ, Kurylak's main functions are monitoring the assignment of cases and reviewing the ALJs' draft recommended decisions. However, Kurylak has performed a variety of secondary functions as well. For example, as noted above, Kurylak conducts hearings

⁵ In this context, an exception is a written objection that is submitted to the Director or his or her designee.

and writes recommended decisions. Additionally, Kurylak presently performs a variety of duties related to procurement and vendor bankruptcies and is relied upon for drafting the initial “administrative maintenance budget” for the Office of the General Counsel (which houses the Bureau). For a number of years, Kurylak also created a “statement of material litigation.” However, it is not clear if Kurylak is expected to perform this particular function in the future.

The supervising ALJ is also responsible for creating a “first draft” of an annual performance evaluation for each of the ALJs. When evaluating the ALJs’ work performance, the Supervising ALJ considers the recommended decisions drafted by the ALJs. While the Supervising ALJ is generally aware of what hearings are being conducted, the Supervising ALJ does not monitor productivity on a daily basis. In the past, the Supervising ALJ has discussed annual performance evaluations with the evaluated employees.

Separately, the Supervising ALJ has also dealt with a variety of disciplinary issues. For example, Kurylak has orally counseled ALJs. Previously, this kind of counseling was used for minor offenses that could easily be corrected. The record also provides examples of written reprimands and an oral warning. Additionally, in the past, when a Chief ALJ saw something that deserved discipline, the Chief ALJ has instructed Kurylak to issue discipline. However, at the time of the hearing, Kurylak was not responsible for issuing discipline.

IV. DISCUSSION AND ANALYSIS

Managerial Status

The Employer asserts that all three of the petitioned-for employees are managerial employees within the meaning of Section 3(j) of the Act.⁶ As the party seeking to exclude the

⁶ Section 3(j) of the Act states:

petitioned-for employees from bargaining, the Employer has the burden of proving that their positions are statutorily excluded from bargaining as managerial employees. See Chief Judge of the Circuit Court of Cook County, 18 PERI ¶2016 (IL LRB-SP 2002). To make this determination, two tests have been developed, (1) the traditional test and (2) the alternative test of managerial employee status as a matter of law. Department of Central Management Services/Department of Healthcare and Family Services v. Illinois Labor Relations Board, State Panel, 388 Ill. App. 3d 319, 330, 902 N.E.2d 1122, 1130 (4th Dist. 2009). The Petitioner concludes that the petitioned-for employees are not managerial employees within the meaning of the Act and are not managerial employees as a matter of law.

The Traditional Managerial Employee Test

The traditional managerial employee test considers, factually, whether an employee conforms to the Act's definition of a managerial employee. The Act sets down two criteria, both of which an employee must meet to be considered a managerial employee. First, the employee must be engaged predominantly in executive and management functions. Second, the employee must be charged with the responsibility of directing the effectuation of management policies and procedures. Department of Healthcare and Family Services, 388 Ill. App. 3d at 330, 902 N.E.2d at 1130; State of Illinois (Department of Central Management Services), 12 PERI ¶2024 (IL SLRB 1996). For the following reasons, I find that the petitioned-for employees do not meet either criterion of the managerial definition.

As to the first criterion of the traditional test, the Act does not define "executive and management functions." However, the Board and the Illinois Appellate Court have indicated that these functions specifically relate to running an agency or department and may include such

"Managerial employee" means an individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices.

activities as formulating policy, preparing the budget, and assuring efficient and effective operations. Department of Healthcare and Family Services, 388 Ill. App. 3d at 330, 902 N.E.2d at 1130; Village of Elk Grove Village v. Illinois State Labor Relations Board, 245 Ill. App. 3d 109, 121, 613 N.E.2d 311, 320 (2nd Dist. 1993); City of Evanston v. State Labor Relations Board, 227 Ill. App. 3d 955, 974, 592 N.E.2d 415, 428 (1st Dist. 1992); State of Illinois, Department of Central Management Services, 21 PERI ¶205 (IL LRB-SP 2005).⁷ Further, to meet the first part of the traditional managerial employee test, the employee must possess and exercise authority and discretion which broadly affects an agency's or a department's goals and means of achieving those goals. Department of Central Management Services v. Illinois State Labor Relations Board, 278 Ill. App. 3d 79, 87, N.E.2d 131, 136 (4th Dist. 1996); State of Illinois, Departments of Central Management Services and Public Aid, 2 PERI ¶2019 (IL SLRB 1986).

Administrative Law Judges' Predominant Duties

As an initial matter, concerning the ALJs' predominant duties, it might be argued that by conducting hearings and drafting recommended decisions, the petitioned-for employees are, in effect, formulating the policies of DHFS or the Bureau and are thus engaged in executive and management functions. In general, by conducting hearings and drafting recommended decisions, the petitioned-for employees do appear to apply or carry out a variety of DHFS policies or rules.

⁷ As for the first criterion, it is not absolutely essential that a managerial employee formulate policy. To clarify, formulating policy is merely one example of running an agency. Department of Central Management Services/Illinois Commerce Commission v. Illinois Labor Relations Board, 406 Ill. App. 3d 766, 780, 943 N.E.2d 1136, 1148 (4th Dist. 2010). Other executive and management functions include, for example, using independent discretion to make policy decisions as opposed to following established policy, changing the focus of an employer's organization, being responsible for day-to-day operations, negotiating on behalf of the employer with its employees or the public, exercising authority to pledge an employer's credit, and attending managerial meetings. Department of Healthcare and Family Services, 388 Ill. App. 3d at 330, 902 N.E.2d at 1130; State of Illinois, Department of Central Management Services, 21 PERI ¶205; State of Illinois, Department of Central Management Services, 8 PERI ¶2052 (IL SLRB 1992). However, in general, the record does not indicate that the petitioned-for employees are predominantly engaged in these other functions.

Yet, these duties do not immediately suggest that the petitioned-for employees are independently responsible for formulating these policies or rules. The record does not suggest, for example, that the petitioned-for employees, by drafting recommended decisions, independently exercise the authority to initiate entirely new policies or discontinue or modify existing policies. Instead, the petitioned-for employees work entirely within a fairly rigid system of rules, statutes, and “checks and balances.” While exclusivity in the implementation of management policy is not strictly required under the Act, when a hearing concludes, the petitioned-for employees, in line with established policy, generally “apply the applicable rules and law” to draft a recommended decision that ultimately will be sent to the Director for his or her ultimate determination.

I also find that the recommended decisions that are drafted by the petitioned-for employees, even when viewed in the aggregate, do not obviously rise to the level of policy formulation, since that work has not been shown to entail decision-making which broadly affect’s DHFS’ or the Bureau’s goals or means of achieving those goals. See Chief Judge of the 11th Judicial District, 16 PERI ¶2043 (IL SLRB 2000); Chief Judge of the 18th Judicial Circuit, 14 PERI ¶2032 (IL SLRB 1998). Rather, the evidence suggests that whatever discretionary decision-making the petitioned-for employees undertake in performing these particular duties is largely exercised in connection with specific cases. Further, a recommended decision does not have immediate precedential value. Even if a particular recommended decision is upheld by the Director, only the respondent of that case is immediately affected. Moreover, when an employee drafts a recommended decision, the employee does not cite prior recommended decisions.⁸ While conducting his or her review of an ALJ’s recommended decision, the Chief ALJ may

⁸ At one point, the citation of prior recommended decisions was “expressly disallowed.” Further, though an ALJ may look at cases that have been appealed to the courts, the overall record does not demonstrate that the recommended decisions drafted by the petitioned-for employees significantly impact the formulation of overall department policy.

review prior decisions of the Bureau. However, the Chief ALJ is not bound by these prior decisions.

Separately, it could be observed that though the ALJs' recommended decisions are often adopted, the ALJs' written work is not automatically implemented as a matter of course. Instead, as a rule, this written work is reviewed and possibly revised or substantively modified by a series of superiors including the Supervising ALJ, the Chief ALJ, the Director's designee, and, ultimately, the Director. Because the petitioned-for employees' recommended decisions are automatically subject to the review and approval of superiors who have considerable independent authority to make substantial changes to both the form and substance of the petitioned-for employees' work, to some extent, the record intimates that the petitioned-for employees do not qualify as managerial employees. See State of Illinois, Department of Central Management Services, 21 PERI ¶205. If an employee's role in establishing policy is merely advisory and subordinate, the employee is not managerial, as it is the final responsibility and independent authority to establish and effectuate a policy that determines managerial status under the Act. Village of Elk Grove Village, 245 Ill. App. 3d at 122, 613 N.E.2d at 320; City of Evanston, 227 Ill. App. 3d at 974, 592 N.E.2d at 428; State of Illinois, Departments of Central Management Services and Healthcare and Family Services, 23 PERI ¶173 (IL LRB-SP 2007).

Nonetheless, an advisory employee who makes "effective recommendations" can be a managerial employee within the meaning of the Act. See Illinois Commerce Commission, 406 Ill. App. 3d at 774, 943 N.E.2d at 1144; National Labor Relations Board v. Yeshiva University, 444 U.S. 672, 684, 100 S. Ct. 856, 863 (1980).⁹ In part, the Employer argues that the petitioned-

⁹ As noted in Yeshiva University, 444 U.S. at 684, 100 S. Ct. at 863, consistent with the concern for divided loyalty, the relevant consideration is effective recommendation or control rather than "final authority." See also Chief Judge of the Sixteenth Judicial Circuit v. Illinois State Labor Relations Board, 178 Ill. 2d 333, 339, 687 N.E.2d 795, 798 (1997).

for employees' recommended decisions are effective recommendations and therefore evidence of managerial status under the traditional test. Accordingly, the Employer observes, for example, that although the draft recommended decisions go through a review process, the record is "replete with un rebutted evidence" that the drafts are "almost always" adopted by the Director "without modification."

However, in order to properly analyze the managerial issue at hand, this analysis must undertake a fact-based assessment of the control and authority asserted by the employees at issue. See David Wolcott Kendall Memorial School v. National Labor Relations Board, 866 F.2d 157, 160 (6th Cir. 1989). Although effective recommendation or control rather than final authority over employer policy is the relevant consideration, the petitioned-for employees must still formulate and effectuate management policies by expressing and making operative the decisions of their employer. County of Cook v. Illinois Labor Relations Board, 351 Ill. App. 3d 379, 387, 813 N.E.2d 1107, 1115 (1st Dist. 2004). Even though the majority of the petitioned-for employees' recommended decisions are ultimately accepted or implemented and may therefore be considered "effective" in one sense, the petitioned-for employees' authority is restricted and predominantly limited to non-managerial responsibilities.

Concerning this issue, Illinois Commerce Commission, 406 Ill. App. 3d at 765, 943 N.E.2d at 1144, when analyzing the term "effective recommendations," recalls the Supreme Court's analysis in Yeshiva University, 444 U.S. at 677, 100 S. Ct. at 859. As an aside, I suggest that the petitioned-for employees' authority might reasonably be distinguished from the broader authority of the employees at issue in Yeshiva University.¹⁰ In that case, the university faculty

¹⁰ According to the Illinois Supreme Court, the definition of a "managerial employee" in Section 3(j) of the Act is "very similar" to the definition a "managerial employee" in Yeshiva University. Chief Judge of the Sixteenth Judicial Circuit v. Illinois Labor Relations Board, 178 Ill. 2d at 339, 687 N.E.2d at 797; see also Illinois Commerce Commission, 406 Ill. App. 3d at 776, 943 N.E.2d at 1145. Further, the Illinois Supreme Court has made it clear that

members whom the union had petitioned to represent not only absolutely controlled the academic policy of the university (i.e., what courses would be offered, when classes would be scheduled, to whom classes would be taught, teaching methods, grading policies, and graduation standards), but the central administration generally followed their advice on personnel matters as well (i.e., faculty hiring, tenure decisions, and granting sabbaticals and promotions). The faculty's decisions thus both controlled and implemented the employer's policy on a broad scale and, consequently, it was determined that the faculty members were managerial employees.

Here, the petitioned-for employees possess little decision or policy-making authority comparable to that of the employees found managerial in Yeshiva University. Unlike the faculty members described, the petitioned-for employees' authority is neither far-reaching nor absolute. As noted, the cases heard by the petitioned-for employees, at best, affect the individual respondents in the individual cases. The petitioned-for employees have virtually no authority to implement changes in other areas. See Office of the Cook County State's Attorney v. Illinois Local Labor Relations Board, 166 Ill. 2d 296, 301, 652 N.E.2d 301, 303 (1995); David Wolcott Kendall Memorial School, 866 F. 2d at 160. In addition, the fact that the petitioned-for employees may make somewhat independent decisions with regard to carrying out their duties in each individual case does not mean that the petitioned-for employees' actions "transcend to the level of executive or management function." Chief Judge of the Eighteenth Judicial Circuit, 311 Ill. App. 3d 808, 815, 726 N.E.2d 147, 152 (2nd Dist. 2000).

With respect to the second criterion, an individual is not a manager simply because he or she performs duties essential to the employer's ability to accomplish its mission. Instead, as the

the concept of "effective recommendations," which the Supreme Court of the United States has held to be applicable to the managerial exclusion in Yeshiva University, applies with equal force to the managerial exclusion under the Act. Chief Judge of the Sixteenth Judicial Circuit, 178 Ill. 2d at 339, 687 N.E.2d at 798. The Board has incorporated "effective recommendations" into its interpretation of the term "managerial employee." Illinois Commerce Commission, 406 Ill. App. 3d at 776, 943 N.E.2d at 1145.

legislature explicitly stated in enacting Section 3(j), the attribute that sets the manager apart from other staff is his or her responsibility for directing the effectuation of management policy. See State of Illinois, Department of Central Management Services, 21 PERI ¶205; Chief Judge of the 11th Judicial District, 16 PERI ¶2043; Chief Judge of the 18th Judicial Circuit, 14 PERI ¶2032. An employee directs the effectuation of management policy when he or 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. City of Evanston, 227 Ill. App. 3d at 975, 592 N.E.2d at 428. Further, such individuals must be empowered with a substantial measure of discretion to determine how policies will be effected. Id.; see also State of Illinois, Departments of Central Management Services & Public Aid, 2 PERI ¶2019.¹¹

In this case, the ALJs conduct hearings and draft recommended decisions that may reflect management policy, but there is no clear evidence that these employees have any responsibility to determine the extent any policy objectives contained therein will be implemented or have the authority to oversee and coordinate the same. Further, the record reveals no clear evidence indicating that the petitioned-for employees have the authority or responsibility to determine, with substantial discretion, the specific methods or means of how services will be provided. To the contrary, the ALJs must routinely collaborate with superiors and consistently “apply the applicable rules and law” to come up with an advisory recommendations that are eventually submitted to the Director for his or her ultimate determination. An employee does not exercise

¹¹ Whereas the first part of the statutory definition of a managerial employee describes the nature of the work to which the individual devotes most of his or her time, that is, running the agency or department, the second part of the definition emphasizes that a managerial employee’s authority extends beyond the realm of theorizing and into the realm of practice. See Illinois Commerce Commission, 406 Ill. App. 3d at 774, 943 N.E.2d at 114. A managerial employee not only has the authority to make policy but also bears the responsibility of making that policy happen. Id.

sufficient discretion to make him or her a manager if the discretion utilized must conform to the employer's established policies. See Village of Elk Grove Village, 245 Ill. App. 3d at 121, 613 N.E.2d at 320; Chief Judge of the 18th Judicial Circuit, 14 PERI ¶2032 (IL SLRB 1998); City of Chicago (Mayor's Office of Information and Inquiry), 10 PERI ¶3003 (IL LLRB 1993); Chicago Park District, 8 PERI ¶3006 (IL LLRB 1992); Illinois State Appellate Defender, 4 PERI ¶2036 (IL SLRB 1988). The ALJs, therefore, do not appear to satisfy the second part of the Act's managerial definition under the traditional managerial employee test.

Under the instant circumstances, one way of approaching the managerial issue is to compare the job functions of the petitioned-for employees to the overall mission of DHFS. See Illinois Commerce Commission, 406 Ill. App. 3d at 778, 943 N.E.2d at 1146.¹² If the responsibilities of a job title encompass the agency's entire mission, one might reasonably argue that by fulfilling those responsibilities, an employee helps to run the agency. Put another way, if the agency makes and implements policy through the issuance of orders, and these orders are almost always the petitioned-for employees' recommended decisions, a good argument could be made that the petitioned-for employees make effective recommendations on major policy and the implementation of such policy. Similarly, the Employer maintains that the petitioned-for employees' duties and responsibilities in conducting hearings and then drafting recommended decisions "encompass a major component" of the mission of DHFS.

¹² Both parties' post-hearing briefs reference various aspects of a recent Illinois Appellate Court decision regarding the possible managerial status of the ALJs of the Illinois Commerce Commission (ICC). Illinois Commerce Commission, 406 Ill. App. 3d 766, 943 N.E.2d 1136 (4th Dist. 2010). Centrally, that particular case determined that the Board's denial of an "oral" hearing was clearly erroneous because there was, according to the Court, an unresolved issue as to whether the ICC ALJs in question were managerial employees within the meaning of the Act. Subsequently, the Court determined that the Board's certification of the union was premature because there remained a live question as to whether these ALJs were managerial employees. The Court did not purport to resolve that question one way the other. Instead, the Court indicated that the Board should do so and, accordingly, reversed the Board's initial decision and remanded the case for further administrative proceedings. On the other hand, the underlying questions of the instant matter, unlike those of the ICC case, can be determined in light of a full oral hearing which included the examination of witnesses. See Illinois Commerce Commission, 406 Ill. App. 3d at 769, 943 N.E.2d at 1140.

In its post-hearing brief, the Employer compares the petitioned-for employees with the ALJs discussed in Illinois Commerce Commission, 406 Ill. App. 3d 766, 943 N.E.2d 1136 (4th Dist 2010). Though the Board had not yet conducted a full hearing on the matter, in that case, when the Court considered the function of the Illinois Commerce Commission (ICC), it appeared that the ALJs of the ICC had “prominent roles in the fulfillment of that function.” Illinois Commerce Commission, 406 Ill. App. 3d at 778, 943 N.E.2d at 1147. More specifically, it appeared that the procedure by which those ALJs held hearings and issued recommended orders was the primary means, if not the exclusive means, by which the ICC fulfilled its statutory mandate of regulating public utilities. Furthermore, by their recommended orders, which the ICC almost always accepted without modifications, the ALJs of the ICC appeared to be “directing the effectuation” of the State’s policies regarding public utilities.

Broadly speaking, DHFS is organized into a number of divisions or primary areas of responsibility. One division generally oversees Medicaid and other medical programs while another division oversees child support enforcement. Another division oversees healthcare purchasing for the state. While each of the petitioned-for employees often plays a role in these aspects of DHFS’ mission, a variety of significant work is also carried out by other employees or elements of the agency.

For example, separate hearing officers often preside over Fair Hearings Section cases. By receiving and investigating complaints and by bringing charges, the Office of the Inspector General, which is separately maintained within the agency, also appears to play an independent but significant role within the larger mission of DHFS. While the record reveals little about the numerous other positions employed by this large state agency, the roles of these positions might properly be considered as well. Thus, to some extent, it cannot so easily be said that the

petitioned-for employees are “the whole game” when it comes to the larger mission of DHFS. See Illinois Commerce Commission, 406 Ill. App. 3d at 778, 943 N.E.2d at 1146. In other words, the factual record does not clearly indicate that the procedure by which the petitioned-for employees hold hearings and draft recommended decisions is the primary means by which the agency fulfills its various statutory mandates.

Additionally, while the ALJs of the ICC and the petitioned-for employees employed by DHFS both appear to participate in the enforcement of laws by conducting administrative hearings and recommending a particular outcome, for example, the relevant procedural structures of the two agencies are not entirely parallel. In the instant matter, before a recommended decision can be adopted by the Director, the original draft recommended decision has, as a rule, been reviewed and possibly revised by the Supervising ALJ, the Chief ALJ, a designee of the Director, and, ultimately, the Director. Further, unlike the ALJs considered in Illinois Commerce Commission, the petitioned-for employees are not involved in “rule-making,” do not develop the language of policies, and do not conduct hearings on proposed rules. It also appears that the ICC’s ALJs uniquely handle every ICC case. Accordingly, it is not clear that the petitioned-for employees actually wield the same power as the ALJs of the ICC.

Kurylak’s Predominant Duties

According to Lipinski, Kurylak’s predominant duties (or “main functions”) are monitoring the assignment of cases and reviewing the initial drafts of the ALJs’ recommended decisions. This testimony is generally supported by the record. However, when Kurylak performs his predominant duties, he does not appear to demonstrate managerial authority within the meaning of the Act.

Regarding Kurylak's monitoring of the assignment of cases, the Employer has provided no support which would indicate that such a routine or "automatic" function demonstrates an executive or management function, for example, or that this responsibility broadly affects the goals of DHFS or the Bureau or the means of achieving those goals. Testimony indicates that Kurylak does not prioritize the workload of the ALJs. Moreover, when Kurylak balances the workload between the three petitioned-for employees, Kurylak does not appear to demonstrate that he is empowered with a substantial measure of discretion to determine how any policies will be effected. In fact, according to the record, no one person is entirely responsible for the assignment of cases.

An analysis of Kurylak's review function is somewhat parallel to an analysis of the drafting of recommended decisions. For example, Kurylak's review, similarly, does not appear to formulate new policies or rules. At most, Kurylak's review affects the specific cases being reviewed and only plays a supporting role within the larger mission of DHFS. Moreover, after Kurylak's initial review of draft recommended decisions, all draft recommended decisions are independently reviewed and possibly revised by superiors. Thus, Kurylak's review function is neither far-reaching nor absolute. Additionally, because an ALJ can reject Kurylak's recommended changes and appeal to the Chief ALJ, for example, it also is not clear that Kurylak, in this context, is empowered with a substantial measure of discretion to determine how any policies will be effected.

Concerning Kurylak's secondary duties, evidence suggests that, like the ALJs, Kurylak conducts hearings and drafts recommended decisions. Additionally, the record indicates, for example, that Kurylak has performed duties related to counseling, performance evaluations, leave requests, procurement, and an initial budget for DHFS' Office of the General Counsel.

However, Section 3(j) of the Act specifically contains a predominance component requiring that employees be excluded from collective bargaining as managerial employees only if they are engaged “predominantly” in executive and management functions and also are charged with directing the effectuation of management policies and practices. See State of Illinois, Department of Central Management Services, 5 PERI ¶2012 (IL SLRB 1988); Chief Judge of the 18th Judicial Circuit, 14 PERI ¶2032.¹³ Assuming arguendo that the secondary aspects of Kurylak’s work do constitute performance of executive and management functions, Kurylak does not appear to engage predominantly in such executive and management functions as required for exclusion under the Act.¹⁴

Managerial Employee as a Matter of Law

In light of the foregoing, I find that the Employer has failed to meet both of the requisite elements of the traditional managerial employee test. Nevertheless, in addition to the Board’s traditional analysis under Section 3(j) of the Act, the Employer would apply the alternative managerial employee test to all three of the petitioned-for employees. The alternative test, as set out by the Illinois Supreme Court, considers whether a petitioned-for employee is a managerial employee as a matter of law. See Chief Judge of the Sixteenth Judicial Circuit, 178 Ill. 2d 333, 341, 687 N.E.2d 795, 798 (1997); State of Illinois, Departments of Central Management Services and Healthcare and Family Services, 23 PERI ¶173.

¹³ Furthermore, Kurylak’s annual budget-related work (which “to a large extent” reflects Kurylak’s work from a previous year) merely appears to consist of determining the projected costs for a particular budget year by “sending out memos to various people within the department,” entering the provided information into spreadsheets, and sending these spreadsheets to a superior for approval. Thus, Kurylak’s role in this budget process is so advisory in nature that it cannot be deemed an executive or management function. See Chicago Park District, 9 PERI ¶3007 (IL LLRB 1993).

¹⁴ Similarly, while the record suggests that the ALJs can perform a variety of additional duties including, for example, compiling records of appealed cases, functioning as a “notice agent,” or reviewing legislation, such duties are clearly not the ALJs’ predominant duties. In addition, given that the ALJs’ involvement or participation in policy development through such duties is, at best, sporadic and occasional, evidence of these duties is insufficient to meet the statutory requirement that managerial employees be predominantly engaged in executive and management functions. See State of Illinois, Department of Central Management Services, 5 PERI ¶2012; Chief Judge of the 18th Judicial Circuit, 14 PERI ¶2032.

Although no exact criteria define a managerial employee as part of this alternative analysis, the courts have relied on the existence of three factors in determining the petitioned-for employees were managerial as a matter of law: (1) close identification of the office holder with actions of his or her assistants; (2) unity of their professional interests; and (3) power of the assistants to act on behalf of the public officer. Chief Judge of the Sixteenth Judicial Circuit, 178 Ill. 2d at 344, 687 N.E.2d at 800; Office of the Cook County State's Attorney, 166 Ill. 2d at 304, 652 N.E.2d at 305; County of Cook, 19 PERI ¶58 (IL LRB-LP 2003), aff'd sub nom. County of Cook, 351 Ill. App. 3d 379, 813 N.E.2d 1107. The analysis of these factors is designed to indicate whether an individual stands in the shoes of or acts as a "surrogate" of a superior office holder. See State of Illinois, Department of Central Management Services, 21 PERI ¶205.

The definitive examples of acting in such a capacity are represented by the assistant public defenders in Chief Judge of the Sixteenth Judicial Circuit, 178 Ill.2d 333, 687 N.E.2d 795, and the assistant state's attorneys in Office of the Cook County State's Attorney, 166 Ill. 2d 296, 652 N.E.2d 301. County of Cook, 351 Ill. App. 3d at 391, 813 N.E.2d at 1118; see also American Federation of State, County and Municipal Employees, Council 31 v. Illinois State Labor Relations Board, 333 Ill. App. 3d 177, 775 N.E.2d 1029 (5th Dist. 2002) (assistant appellate defenders); Salaried Employees of North America v. Illinois Local Labor Relations Board, 202 Ill. App. 3d 1013, 560 N.E.2d 926 (1st Dist. 1990) (attorneys employed by the City of Chicago Law Department). In these two definitive cases, the assistants, in accordance with their statutorily defined duties and responsibilities, made decisions or exercised the authority reserved to either the Kane County Public Defender or the Cook County State's Attorney that, without any prior review or approval, committed these office holders to a specific course of action. Moreover, those employees were called upon to take numerous discretionary actions that

effectively controlled or implemented employer policy and possessed absolute discretion in handling their cases, almost never consulting with their superiors.¹⁵

The petitioned-for employees in this case are not readily comparable to the assistant state's attorneys or the assistant public defenders described above. In contrast, the overall record indicates that all three of the petitioned-for employees lack the independent authority to render an ultimate determination in the absence of their superiors. This fact distinguishes the petitioned-for employees from the assistant state's attorneys who, for example, could act with the full power of the State's Attorney in his or her absence. Office of the Cook County State's Attorney, 166 Ill. 2d at 304, 652 N.E.2d at 304. Furthermore, the petitioned-for employees are not surrogates of the Director; they are not "Assistant Directors," for example. See Department of Healthcare and Family Services, 388 Ill. App. 3d at 333, 902 N.E.2d at 1132.

When discussing the ALJs employed by the ICC in the context of the alternative managerial employee test, the Illinois Appellate Court in Illinois Commerce Commission contrasts the particular administrative procedures of the ICC and the Illinois Human Rights Commission (IHRC), specifically the procedures relating to "exceptions." See Illinois Commerce Commission, 406 Ill. App. 3d at 782, 943 N.E.2d at 1149; Department of Central Management Services/Illinois Human Rights Commission v. Illinois Labor Relations Board, 406

¹⁵ It might also be noted that the Illinois Supreme Court, in its decisions in Office of the Cook County State's Attorney and Chief Judge of the Sixteenth Judicial Circuit, made plain the limited extent of those holdings. Given the existence of a factual record detailing the petitioned-for employee's distinguishable duties, and given that these duties generally fail to meet the traditional standard for exclusion under Section 3(j) of the Act, it is not entirely clear that the managerial as a matter of law exclusion is properly applicable to the circumstances presented. See State of Illinois, Departments of Central Management Services and Healthcare and Family Services, 23 PERI ¶173. Further, in Office of the Cook County State's Attorney, 166 Ill. 2d at 305, 652 N.E.2d at 305, the Court noted, for example, that its determination does not suggest that all publicly employed lawyers must necessarily be deemed managerial employees under the Act. Similarly, in Chief Judge of the Sixteenth Judicial Circuit, 178 Ill. 2d at 347, 687 N.E.2d at 801, the Court emphasized that its holding should not be broadly interpreted to mean that all publicly employed attorneys or other professional employees are deemed managerial employees under the Act.

Ill. App. 3d 310, 943 N.E.2d 1150 (4th Dist. 2010).¹⁶ As that case observes, under the Illinois Human Rights Act, if no written exceptions are filed concerning the recommended order of an ALJ employed by the IHRC, the recommended order automatically becomes the final order of the IHRC as if the members of the IHRC themselves issued the order. The lack of exceptions deprives the IHRC of any power to gainsay the recommended decision of its ALJ. See Illinois Commerce Commission, 406 Ill. App. 3d at 781, 943 N.E.2d at 1149.

In the Illinois Commerce Commission case, however, the Court was unaware of a comparable statute or rule that so bound the ICC. Instead, after receiving the ALJ's recommended order, the ICC is expected to make its own decision, even if it receives no exceptions. Accordingly, the Court determined that unlike an ALJ of the IHRC, an ALJ of the ICC does not become a surrogate (i.e., a substitute or alter ego) of the ICC members whenever there is an absence of exceptions. The members of the ICC retain the power and the duty to issue their own order or decision after receipt of the ALJ's recommended order. Under no circumstances is an ALJ of the ICC clothed with the ultimate power of the commission members. Accordingly, the Court determined that ICC ALJs are not managerial employees as a matter of law within the meaning of Chief Judge of the Sixteenth Judicial Circuit and Office of the Cook County State's Attorney.

A reading of Illinois Human Rights Commission does reveal a number of seemingly significant parallels between the ALJs of the IDHR and the ALJ at issue. For example, the petitioned-for employees similarly preside over hearings and renders decisions. Moreover, under normal circumstances, the petitioned-for employees' recommended decisions can commonly become, in effect, final decisions of the agency. However, tellingly, like the ALJs of the ICC in

¹⁶ In that case "exceptions" were, generally, a party's written arguments against the recommended order that an ICC ALJ issues after an evidentiary hearing or administrative trial. See Illinois Commerce Commission, 406 Ill. App. 3d at 782, 943 N.E.2d at 1149; Illinois Human Rights Commission, 406 Ill. App. 3d at 316 943 N.E.2d at 1156.

Illinois Commerce Commission, the instant record does not suggest that the petitioned-for employees, under any circumstances, are generally clothed with all the powers and privileges of a superior, DHFS, or the Bureau. As noted above, the record generally suggests that every recommended decision is necessarily reviewed by a series of superiors. Thus, while a variety of parallels do exist, this analysis is necessarily guided by the differences in general authority and administrative procedures highlighted above. See Illinois Commerce Commission, 406 Ill. App. at 781, 943 N.E.2d at 1149.

Finally, I would note that, in general, a base consideration of the alternative managerial employee analysis is whether the functions of the petitioned-for employees so align them with management that, were they to be represented by a labor organization, they would be put in a position of divided loyalty between their employer and that labor organization. See Chief Judge of the Sixteenth Circuit, 178 Ill. 2d at 338, 687 N.E.2d at 797; State of Illinois, Department of Central Management Services, 21 PERI ¶205. Nothing in the record clearly suggests that the petitioned-for employees, if added to the proposed bargaining unit, would be forced to divide their loyalty between the Employer and the Petitioner. Likewise, nothing clearly suggests that the petitioned-for division would necessarily lessen the effectiveness of the Bureau. See Salaried Employees of North America, 202 Ill. App. 3d at 1022, 560 N.E.2d at 933. Accordingly, and in light of the foregoing analysis, I conclude that the instant record does not support a finding that the petitioned-for employees are managerial employees as a matter of law.

Supervisory Status

The Employer also asserts that Kurylak is a supervisor within the meaning of Section 3(r) of the Act.¹⁷ Under that Section, petitioned-for employees are supervisors if they: (1) perform

¹⁷ Section 3(r) of the Act states, in relevant part:

principal work substantially different from that of their subordinates; (2) possess authority in the interest of the Employer to perform one or more of the 11 indicia of supervisory authority enumerated in the Act; (3) consistently exercise independent judgment in exercising supervisory authority; and (4) devote a preponderance of their employment time to exercising that authority. City of Freeport v. Illinois State Labor Relations Board, 135 Ill. 2d 499, 512, 554 N.E.2d 155, 162 (1990); Village of New Lenox, 23 PERI ¶104 (IL LRB-SP 2007); Village of Bolingbrook, 19 PERI ¶125 (IL LRB-SP 2003); Village of Justice, 17 PERI ¶2007 (IL SLRB 2000). In this context, the party which seeks to exclude an individual from a proposed bargaining unit has the burden of proving that statutory exclusion. County of Boone and Sheriff of Boone County, 19 PERI ¶74 (IL LRB-SP 2003); Chief Judge of the Circuit Court of Cook County, 18 PERI ¶2016.

Principal Work Requirement

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

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

her subordinates. See Freeport, 135 Ill. 2d at 514, 554 N.E.2d at 162; Village of Alsip, 2 PERI ¶2038 (IL SLRB 1986); City of Burbank, 1 PERI ¶2008 (IL SLRB 1985). Though the alleged supervisor's main undertaking must differ from the main undertakings of his or her subordinates, he or she may, at times, engage in similar work as his or her subordinates and still be determined a supervisor if other indicia are present. See Freeport, 135 Ill. 2d at 513, 554 N.E.2d at 162; Peoria Housing Authority, 10 PERI ¶2020 (IL SLRB 1994); County of Knox and Knox County Sheriff, 7 PERI ¶2002 (IL SLRB 1990); Secretary of State, 1 PERI ¶2009 (IL SLRB 1985).

To be sure, Kurylak performs certain functions, at times, which are similar to those of his subordinates. Specifically, Kurylak, like Fischer and McNew-Clarke, conducts hearings and drafts recommended decisions. Nevertheless, as noted above, according to the record, Kurylak's main functions are monitoring the assignment of cases and reviewing the drafts of the ALJ's recommended decisions. In contrast, Fischer and McNew-Clarke centrally conduct hearings and draft recommended decisions. Accordingly, Kurylak's foremost or principal activity is not similar. In addition, Kurylak performs a number of duties that his subordinates do not. For example, the two ALJs do not appear to be responsible for monitoring the initial assignment of cases or creating drafts of annual performance evaluations. Characterized in this way, Kurylak's work is obviously and visibly different from that of his subordinates.

The Petitioner's post-hearing brief argues that the Employer has failed to show that Kurylak performs principal work that is substantially different than that of his subordinates. After noting that Kurylak reviews ALJs' recommended decisions, the Petitioner notes that Fischer and McNew-Clarke similarly "spend time reviewing and editing their own decisions." However, I find that the nature of their review obviously separates Kurylak's main function from that of the ALJs. Separately, the Petitioner also avers that both Kurylak and Fischer perform

“work related to bankruptcy cases.” Nevertheless, this analysis is intended to establish a qualitative comparison of the “principle work” of the alleged supervisor and his or her subordinates. Whatever work is performed in relation to bankruptcy cases is not the principal work of either employee. Because Kurylak’s principal work is substantially different than that of his subordinates, I find that Kurylak meets the first prong of the statutory test. See Village of Wheeling v. Illinois State Labor Relations Board, 170 Ill. App. 3d 934, 945, 524 N.E.2d 958, 966 (1st Dist. 1988).

Supervisory Indicia

With respect to the second and third prongs of the Act’s supervisory definition, the Employer must establish that the employee at issue has the authority to perform or effectively recommend any of the eleven indicia of supervisory authority listed in the Act and consistently exercise that authority with independent judgment. The use of independent judgment must involve a consistent choice between two or more significant courses of action. Further, the petitioned-for employee’s decisions cannot be routine or clerical in nature or be made merely on the basis of the alleged supervisor’s superior skill, experience, or knowledge. Freeport, 135 Ill. 2d at 531, 554 N.E.2d at 170; Chief Judge of the Circuit Court of Cook County v. American Federation of State, County and Municipal Employees, Council 31, 153 Ill. 2d 508, 531, 607 N.E.2d 182, 193 (1992); Justice, 17 PERI ¶2007. In this context, whether independent judgment is used “is a fact-based determination to be made with a case-by-case analysis.” Chief Judge of the Circuit Court of Cook County v. American Federation of State, County and Municipal Employees, Council 31, AFL-CIO, 153 Ill. 2d 508, 522, 607 N.E.2d 182, 189 (1992). An effective recommendation satisfying the Act’s supervisor requirements is one that is adopted by the alleged supervisor’s superiors as a matter of course with very little, if any, independent

review. City of Peru v. Illinois State Labor Relations Board, 167 Ill. App. 3d 284, 289, 521 N.E.2d 108, 112 (3rd Dist. 1988); Village of Justice, 17 PERI ¶2007; Peoria Housing Authority, 10 PERI ¶2020. In this case, the Employer specifically asserts that Kurylak directs and disciplines within the meaning of the Act.¹⁸

Direct

The authority to direct encompasses several distinct but related functions. In general, the authority to direct requires the alleged supervisor to be responsible for the work of his or her subordinates and have the authority to make operational decisions affecting those subordinates in the areas of assigning work, granting time off or vacation requests, evaluating subordinates, reviewing work, and instructing how work is to be performed. See Illinois Department of Central Management Services (Department of Professional Regulation), 11 PERI ¶2029 (IL SLRB 1995). Here, the Employer specifically argues that Kurylak directs within the meaning of the Act when he assigns cases to the ALJs, approves leave requests, drafts annual performance evaluations, reviews the draft recommended decisions of the ALJs, and trains newly hired ALJs.

Indeed, limited testimony suggests that Kurylak “assigns cases” and, as suggested, the Board has found that the authority to direct subordinates includes the authority to assign work to those individuals. See County of Cook, 15 PERI ¶3022 (IL LLRB 1999); City of Sparta, 9 PERI ¶2029 (IL SLRB 1993). In practice, when a case is initially submitted to the Bureau, that case is

¹⁸ The Employer’s post-hearing brief did not specifically allege that Kurylak adjusts grievances within the meaning of the Act. Nonetheless, testimony suggests that the Supervising ALJ may handle grievances. Additionally, one annual performance evaluation indicates that Kurylak “properly and timely handled an employee grievance.” However, the mere designation as the first step in the grievance procedure is insufficient to establish supervisory authority. Metropolitan Alliance of Police v. Illinois Labor Relations Board, 362 Ill. App. 3d 469, 479, 839 N.E.2d 1073, 1082 (2nd Dist. 2005). Instead, the evidence must show that the petitioned-for employee consistently uses independent judgment in the exercise of that authority. Village of Bolingbrook, 19 PERI ¶125. Absent evidence that the petitioned-for employee makes a choice between two or more significant courses of action, there is no basis to conclude that employee utilizes independent judgment in handling grievances. Freeport, 135 Ill. 2d at 521, 554 N.E.2d at 166. Concerning this issue, testimony simply indicates that Kurylak would not adjust a grievance without the Chief ALJ’s agreement. Thus, the record fails to demonstrate that Kurylak exercises the authority to adjust grievances within the meaning of the Act.

placed in a docket. This docket is documented in an Excel chart that is maintained by Kurylak and indicates which employee was assigned each case. Generally, these cases are divided between the Supervising ALJ and the two other ALJs. According to testimony, because there are so few employees who may be assigned these cases, “[t]here is not much of a choice.” However, additional testimony notes that Kurylak “will monitor the rotation of the types of cases” assigned to the two ALJs “to try to make it as fair as possible.” Further, when a case is assigned, the comprehensiveness of a particular type of case and the caseloads of the employees are taken into consideration. Otherwise, Kurylak is not responsible for “prioritizing the cases for the ALJs.” According to Lipinski, “each case should be treated equally.”

The Employer contends that Kurylak assigns cases “with a view to fairness and to balance caseload based on the agency’s needs.” However, assigning cases in order to maintain a balanced caseload is generally considered a routine function which does not require the use of independent judgment. See Chief Judge of the Circuit Court of Cook County, 153 Ill. 2d at 521, 607 N.E.2d at 188; City of Naperville, 20 PERI ¶184 (IL LRB-SP 2004); Village of Bellwood, 19 PERI ¶106 (IL LRB-SP 2003); State of Illinois, Department of Central Management Services (Department of Professional Regulation), 11 PERI ¶2029; Village of Glen Carbon, 8 PERI ¶2026 (IL SLRB 1992); State of Illinois, Departments of Central Management Services and Revenue, 4 PERI ¶2027 (IL SLRB 1988). Put another way, the mere distribution of work does not constitute the “direction” of employees unless the assignment criteria are non-routine and entail substantial discretion. See Chicago Park District, 9 PERI ¶3007; City of Chicago (Mayor’s Office of Information and Inquiry), 10 PERI ¶3003.

Testimony indicates that, in the instant case, the assignment of cases “is sort of automatic” and does not require substantial discretion. There is no clear evidence, for example,

that Kurylak must consider the ALJs' relative skills and qualifications when making assignments or determine which particular employee would best forward the Employer's interest in a particular instance. See County of Cook, 15 PERI ¶3022 (employees exercise independent judgment in direction when they consider factors such as knowledge of the individuals involved, the nature of the task to be performed, the employees' relative levels of experience and skill, and the employer's operational needs); City of Chicago, 15 PERI ¶3005 (IL LLRB G.C. 1998). Further, in certain instances, the Bureau's rotational system is apparently subject to additional limitations. For example, of the petitioned-for employees, McNew-Clarke appears to exclusively handle Fair Hearings Section cases. Moreover, when McNew-Clarke receives a Fair Hearings Section case, McNew-Clarke "skips" a Vendor Hearings Section case. Thus, Kurylak's authority to assign cases is not indicative of supervisory status under the Act. This determination is also strengthened by testimony which indicates that no one person in particular is responsible for the assignment of cases.

The approval of leave requests can also demonstrate supervisory authority to direct within the meaning of the Act. See State of Illinois, Department of Central Management Services, 12 PERI ¶2032 (IL SLRB 1996). Before the ALJs and Supervising ALJ were temporarily placed in a bargaining unit, when an ALJ requested time off, he or she completed a request form and submitted this request to the Supervising ALJ for his or her approval. When an ALJ called in sick, the Supervising ALJ was also responsible for verifying that the employee was indeed sick. At the time of the hearing, however, the Supervising ALJ, in accordance with the Chief ALJ's instruction, was not responsible for approving the ALJs' leave requests. Instead, this duty was performed by the Chief ALJ. Accordingly, the record does not indicate that Kurylak is currently responsible for approving leave requests.

In addition, even when Kurylak did exercise the authority to approve leave requests, Kurylak did not clearly exercise this authority with the requisite independent judgment. Generally, when Kurylak received a request, Kurylak simply looked at a calendar and determined whether or not the request conflicted with a scheduled hearing date. In general, leave decisions which are simply constrained by pre-determined staffing requirements do not establish supervisory authority. See Village of Broadview v. Illinois Labor Relations Board, 402 Ill. App. 3d 503, 512, 932 N.E.2d 25, 34 (1st Dist. 2010). Moreover, such restricted and limited power does not clearly demonstrate the authority to direct within the meaning of the Act. See City of Tuscola, 15 PERI ¶2034 (IL SLRB 1999); City of Naperville, 8 PERI ¶2016 (IL SLRB 1992). Additionally, Kurylak's testimony suggests that he has "almost never" disapproved a leave request.¹⁹ Leave requests that are routinely granted are not evidence of supervisory direction. Freeport, 135 Ill. 2d at 520, 554 N.E.2d at 165; County of Lake, 16 PERI ¶2036 (IL SLRB 2000); Chief Judge of the Circuit Court of Cook County, 9 PERI ¶2033 (IL SLRB 1993).

The evidence also shows that the Supervising ALJ is responsible for creating the "first draft" of the annual performance evaluation for each ALJ. The responsibility for formally evaluating work performance is evidence of the authority to direct when the evaluation is used to affect the evaluated employees' pay or employment status. See City of Naperville, 8 PERI ¶2016; Illinois Department of Central Management Services (Division of Police), 4 PERI ¶2013 (IL SLRB 1988). Though no evidence indicates that the drafts completed by Kurylak have actually impacted his subordinates' terms and conditions of employment, according to testimony, a negative performance evaluation can have consequences.

For example, if a bargaining unit employee receives an "extremely negative" performance evaluation, that employee can allegedly have his or her pay withheld and may be

¹⁹ Each of the leave requests that were entered into evidence were approved by Kurylak.

disciplined for failure to perform. While merit compensation employees will not have their pay withheld as a result of a negative performance evaluation, those employees can be disciplined for poor performance. In addition, performance evaluations “can factor in on a promotion or transfer.” Further, if a probationary employee receives a negative performance evaluation, the probationary employee can be “noncertified” and may return to a prior position or be terminated.

Each annual performance evaluation, in part, consists of a general appraisal of objectives and employee performance. Separate sections within each evaluation also provide an opportunity for a superior to provide remarks and establish objectives for the next reporting period. Though the record does not explain in great detail how Kurylak reaches his determinations when creating his draft performance evaluations, a brief review of the submitted performance evaluations initially suggests that the annual performance evaluation process is neither routine nor a clerical function. These evaluations, for example, do not appear to use objective numbers, statistics, or comparisons in a way that would clearly indicate that Kurylak fails to have significant discretion in his judgment and assessment of an ALJ’s performance.

Nonetheless, after the Supervising ALJ creates a first draft, each draft performance evaluation is necessarily submitted to the Chief ALJ for an independent and final review before those evaluations are given to an evaluated employee. Further, while uncommon, the Chief ALJ has the authority to change the ratings within each performance evaluation and has done so.²⁰ Because the ultimate evaluation is a product of Kurylak’s and the Chief ALJ’s joint consideration and because the Chief ALJ’s final review of the Kurylak’s drafts does not appear to be cursory, I find that Kurylak’s collaborative role does not demonstrate the exercise of supervisory authority within the meaning of the Act. See State of Illinois, Department of Central

²⁰ In the past, when an ALJ disagreed with the Supervising ALJ’s evaluation, that ALJ could bring his or her disagreement to the Chief ALJ for his or her review. After both the ALJ and the Supervising ALJ “represented their case” to the Chief ALJ, the Chief ALJ could change a rating.

Management Services (Department of Public Health), 27 PERI ¶10 (IL LRB-SP 2011); State of Illinois, Department of Central Management Services, 25 PERI ¶161 (IL LRB-SP 2009); City of Fairview Heights, 22 PERI ¶14 (IL LRB-SP G.C. 2006).

As the Employer notes, Kurylak is also responsible for reviewing the draft recommended decisions of the two ALJs. However, the authority to direct requires more than just observing and monitoring subordinates' work. Peoria Housing Authority, 10 PERI ¶2020; City of Naperville, 8 PERI ¶2016. In part, this authority requires active involvement in checking, correcting, and giving instructions to subordinates without guidelines or review by others. City of Naperville, 8 PERI ¶2016; City of Lincoln, 4 PERI ¶2041 (IL SLRB 1988); Superior Bakery v. National Labor Relations Board, 893 F.2d 493, 496 (2nd Cir. 1990). The responsibility for overseeing subordinates' work does not constitute direction for purposes of the Act if it does not require the use of independent judgment in the interest of the employer. Chicago Park District, 9 PERI ¶3007 (IL LLRB 1993). Additionally, for his or her activities to constitute direction, the alleged supervisor must derive his or her authority over his or her subordinates principally from the employer and not merely from the alleged supervisor's greater skill, experience, or expertise. See City of Sparta, 9 PERI ¶2029 (IL SLRB 1993).

In general, the Supervising ALJ's review consists of checking and possibly recommending changes to the ALJs' draft recommended decisions. These recommended changes can concern perceived style, organization, grammar, or punctuation issues. The Supervising ALJ also ensures the ALJ correctly cited code sections. To this extent, Kurylak's review could be described as a clerical or routine task that does not amount to "direction." See County of Cook, Recorder of Deeds, 13 PERI ¶3013 (IL LLRB G.C. 1997). Nonetheless, the Supervising ALJ's review can also concern more substantive issues as well. See City of

Carbondale, 27 PERI ¶68 (IL LRB-SP 2011); Village of Bellwood, 19 PERI ¶106; State of Illinois (Department of Central Management Services), 12 PERI ¶2032. For example, the Supervising ALJ's review also ensures that the ALJ appropriately analyzed all relevant issues. Further, the Supervising ALJ may ask an ALJ to research a particular issue or rewrite a section of a draft. At this stage, the Supervising ALJ does not change the ALJ's findings of fact, but may share his or her concerns with an ALJ about the findings of the draft. Likewise, the Supervising ALJ may suggest a different conclusion.²¹

Because Kurylak's review is not conducted in accordance with detailed guidelines, he does appear to conduct his review with a degree of independence. See City of Tuscola, 15 PERI ¶2034. Furthermore, according to testimony, Kurylak's ultimate purpose in reviewing draft recommended decisions (like the alleged purpose of the Chief ALJ's subsequent review) is to ensure that the ultimate decision will be upheld despite administrative review.²² However, as a rule, after the Supervising ALJ conducts his review, the recommended decision is also substantively reviewed by a series of superiors.

More specifically, even if an ALJ and the Supervising ALJ do not dispute a recommended change, every draft recommended decision is submitted to the Chief ALJ for his or her substantive review. After this review, the Chief ALJ commonly makes changes to recommended decisions. In the past, the Chief ALJ has offered suggestions that would clarify, develop, or change the language of a draft. The Chief ALJ also checks the accuracy of dates and

²¹ According to McNew-Clark's testimony, the Supervising ALJ has once "outright reversed" an ALJ's conclusion of law and has ordered her to make additional findings of fact. Separate documentary evidence indicates that the Supervising ALJ and the Chief ALJ "have the authority to change conclusions of law, but not conclusions of fact."

²² In State of Illinois, Department of Central Management Services (Department of Employment Security), 11 PERI ¶2021 (IL SLRB 1995), the Board indicated that an individual's oversight responsibilities constitute supervisory direction in the interest of the employer if that individual's oversight decisions are driven not by industry-wide or professional norms and standards, but by a desire to effectuate the public policies established by a particular employee.

names and ensures the draft's findings of fact match its conclusions.²³ Further, the Chief ALJ may instruct the ALJ to research prior decisions, insert a particular legal conclusion or analysis, or use provided language in a recommended decision. As noted above, after the Chief ALJ's review, each recommended decision is also substantively reviewed by a designee of the Director and, ultimately, the Director. Additionally, under some circumstances, a designee of the Director may independently investigate the record. While the Director may generally accept recommended decisions, the Director has the authority to reverse a recommended decision and has done so. This reversal can include specific instructions indicating how an ALJ must revise his or her analysis. Thus, in a sense, Kurylak's review is not entirely conducted without the review or approval of others. Accordingly, to some degree, Kurylak's review appears to fall short of the Act's definition of supervisory "direction." See Village of Bellwood, 19 PERI ¶106.

Significantly, if, after a discussion, an ALJ and the Supervising ALJ disagree about the Supervising ALJ's recommended change, the disagreement is resolved by the Chief ALJ. Further, in such an instance, the ALJ and the Supervising ALJ plead their cases and advocate for their positions. When a dispute is resolved in this way, Kurylak does not appear to direct with any authority drawn from his employer. See County of Cook, Recorder of Deeds, 13 PERI ¶3013, Lincoln Land Community College, 20 PERI ¶1 (IL ELRB ALJ 2003). Instead, Kurylak appears to utilize, at best, mere persuasion based upon his superior position. Accordingly, I find that Kurylak's authority to review the ALJs' work is akin to that exercised by non-supervisory and intermediate "lead workers" who, because of their superior skills, may instruct and advise their fellow employees on the work to be performed. See Stephenson County Circuit Court, 25 PERI ¶92 (IL LRB-SP 2009); County of Cook, Recorder of Deeds, 13 PERI ¶ 3013; Highway

²³ Testimony indicates that, in practice, the Chief ALJ does not change a finding of fact or a legal conclusion. However, the Chief ALJ does have the authority to change an ALJ's legal conclusion.

Department of Sangamon County, Illinois, 1 PERI ¶2006 (IL SLRB 1985); National Labor Relations Board v. Security Guard Service, Inc., 384 F.2d 143, 148 (5th Cir. 1967).²⁴ Also signaling an inferior role, currently, Kurylak may only discuss his review of a draft recommended decision with one of the two ALJs. For the remaining ALJ, Kurylak is currently only expected to provide the Chief ALJ with his “markup” of that ALJ’s drafts.

Separately, the Employer notes, “Kurylak is responsible for training new ALJs and is currently putting together objectives and other training materials for the new ALJs that are being hired.” Indeed, according to testimony, the Supervising ALJ is expected to put together a training program for newly-hired ALJs. Lipinski imagined this program could include shadowing, providing the relevant statutes and case law, and providing the employee with objectives or expectations.²⁵

However, the testimony describing Kurylak’s future authority to train subordinates is clearly speculative. An employer’s assertion of the authority of the alleged supervisor will have at some future time does not support a finding of actual, present authority. See County of Cook, Recorder of Deeds, 13 PERI ¶3013; City of Chicago (Mayor’s Office of Information and Inquiry), 10 PERI ¶3003. Moreover, in representation cases, the party which seeks to exclude an individual from a proposed bargaining unit has the burden of proving that statutory exclusion through specific examples of the alleged supervisory, managerial, or confidential authority. The party claiming the statutory exclusion does not satisfy its burden of proof by producing vague, generalized testimony regarding the disputed individual’s job functions. See State of Illinois, Department of Central Management Services, 25 PERI ¶125 (IL LRB-SP 2003).

²⁴ Moreover, like a lead worker, Kurylak also regularly performs some work similar to that of his subordinates when he handles his own caseload and drafts his own recommended decisions. See City of Chicago, 15 PERI ¶3005.

²⁵ Kurylak’s prior “training” simply consisted of providing a newly hired ALJ copies of relevant statutes and case law and describing the ALJ’s responsibilities.

In addition, it has not been established that Kurylak's function in providing the so-called training is anything more than the result of his superior knowledge, skill, or experience. See State of Illinois, Department of Central Management Services, 26 PERI ¶131 (IL LRB-SP-2010). The record does not allege, for example, Kurylak provides training to employees based on his judgment that the employees' performance is deficient and he has made the judgment that the employees required the training to correct the work deficiencies in lieu of discipline. See Chief Judge of the Circuit Court of Cook County, 19 PERI ¶123 (IL LRB-SP 2003). The party seeking exclusion must demonstrate independent judgment in training and has not done so in this instance. See State of Illinois, Department of Central Management Services, 26 PERI ¶116 (IL LRB-SP 2010).

Discipline

The Employer generally asserts, "Kurylak has the authority to issue discipline or to effectively recommend such action." However, currently, Kurylak does not appear to decide when discipline is appropriate. In fact, select testimony indicates that Kurylak has been instructed by Lipinski not to issue discipline. Instead, when an issue arises, Kurylak simply brings the issue to Lipinski's attention and Lipinski deals with the issue and decides whether or not discipline is warranted. Accordingly, Kurylak does not currently discipline within the meaning of the Act.²⁶

Indeed, in the past, Kurylak has issued a variety of discipline. For example, the record includes memoranda confirming Kurylak's issuance of an oral warning and a written reprimand. Separately, the record also indicates that Kurylak had some authority to counsel other employees. However, nothing in the record evidences the use of any discretion or a choice

²⁶ This determination is supported by a performance evaluation which indicates that Kurylak "may not discipline subordinates." It might also be noted that since Lipinski has served as Chief ALJ, Kurylak has not issued any discipline.

between two or more significant courses of action that would have satisfied the general requirement that the exercise of any supervisory authority under the Act must involve the consistent use of independent judgment. See County of Kane and Sheriff of Kane County, 7 PERI ¶2043 (IL SLRB 1991). According to testimony, Kurylak has never made a disciplinary decision entirely by himself. Kurylak always first discussed the discipline with his superior and followed his superior's recommendation. In addition, the record does not illustrate the level of review conducted by the Chief ALJ in this context. See State of Illinois, Department of Central Management Services, 25 PERI ¶140 (IL LRB-SP 2009). Thus, even if considered, Kurylak's prior authority does not clearly demonstrate the authority to discipline within the meaning of the Act.

Preponderance Requirement

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

1993). The second interpretation of preponderance relies on whether the supervisory functions are more significant than the non-supervisory functions. State of Illinois Department of Central Management Services v. Illinois State Labor Relations Board, 278 Ill. App. 3d 79, 85, 662 N.E.2d 131, 135, 12 PERI ¶2024 (4th Dist. 1996).²⁷ For the following reasons, the employee at issue meets neither formulation of the preponderance requirement.

The Act's delineation of the fourth prong, on its face, restricts the work time that is relevant under a self-referential standard which harks back to the second and third prongs of the supervisory test. See State of Illinois, Department of Central Management Services (Department of Healthcare and Family Services), 28 PERI ¶69 (IL LRB-SP 2011). The second and third prongs address the authority to undertake or effectively recommend various supervisory functions (indicia). In turn, the time that is relevant under the fourth prong, so far as determining whether the preponderance of work time requirement is met, is employment time actually spent exercising that authority. That actual time does not include work time spent directing or disciplining employees when such activities do not amount to direction or discipline within the meaning of the Act. See Downer's Grove v. Illinois State Labor Relations Board, 221 Ill. App. 3d 47, 55, 581 N.E.2d 824, 829 (2nd Dist. 1991). Because the above analysis reveals that Kurylak neither directs nor disciplines with independent judgment, the Employer cannot satisfy the preponderance requirement.

Even if it is determined that Kurylak directs or disciplines within the meaning of the Act, the record does not delineate, in a useful way, how Kurylak spends his employment time. Kurylak testified, for example, that the amount of time he spends reviewing recommended

²⁷ While this panel appears to avoid a purely mathematical approach, Department of Central Management Services also observes, as noted above, that Freeport indicates that in order for an employee to be considered a supervisor under the fourth prong of the supervisory definition, the alleged supervisor must spend more time on supervisory functions than on any one nonsupervisory function. Department of Central Management Services, 278 Ill. App. 3d at 85, 662 N.E.2d at 135; Freeport, 135 Ill. 2d. at 532, 554 N.E.2d at 171; Secretary of State, 1 PERI ¶2009.

decisions depends on the length of the decision and how many times he is interrupted. Similarly, Lipinski indicated that the amount of time Kurylak spends performing his procurement-related responsibilities “depends on the time of the year.” However, this kind of testimony does not meaningfully address the requirements of this prong of the supervisory test. The Employer argues that Kurylak “spends more time directing the work of his subordinate ALJs than on any one non-supervisory function.”²⁸ However, during the hearing, when Kurylak was asked whether there is a particular function that he spends more time on than others, Kurylak was unable to provide a clear answer. Likewise, the general percentages provided by Kurylak’s position description do not sufficiently distinguish his various duties. Accordingly, I also find that the evidence does not support a finding that Kurylak spends a preponderance, or majority, of his employment time on supervisory tasks.

Nonetheless, as suggested above, “preponderance” can mean superiority in numbers or superiority in importance. Department of Central Management Services, 278 Ill. App. 3d at 85, 662 N.E.2d at 135. This approach avoids the use of a strictly mathematical “majority-of-time” test and asserts that whether a person is a supervisor should be defined by the significance of what that person does for the employer, regardless of the time spent on particular types of functions. Id. However, even assuming that Department of Central Management Services appropriately glosses the settled interpretation of the Act given in Freeport, such a standard would not necessarily lead to a different result in this instance.

Regardless of the time actually spent performing his various functions, the record generally indicates that Kurylak centrally monitors the assignment of cases and reviews ALJs’ draft recommended decisions. Similarly, several submitted performance evaluations list

²⁸ While analyzing the last prong of the supervisory test, the Employer’s post-hearing brief does not address the time devoted to discipline.

Kurylak's general "supervision" of ALJs and his review of their recommended decisions as primary "employee objectives." However, characterizing such work as supervisory at this stage seems to be inappropriate. That Kurylak has the responsibility and oversight for the work that he and the ALJs do is undoubted, but, as suggested above, the major means of accomplishing it is to act as a non-supervisory lead worker. See County of Cook, Sheriff of Cook County, 5 PERI ¶3013 (IL LLRB 1989); City of Springfield, Department of Public Affairs, 1 PERI ¶2005 (IL SLRB 1985); City of Chicago, 15 PERI ¶3005 (IL LLRB G.C. 1998). Thus, I cannot conclude that Kurylak satisfies the alternative interpretation of fourth and final prong of the test.

V. CONCLUSIONS OF LAW

1. I find that the petitioned-for employees employed by DHFS in the position of Public Service Administrator, Option 8L, currently occupied by Thomas Fischer, William Kurylak, and Dora McNew-Clarke, are not managerial employees as defined by Section 3(j) of the Act.
2. I find that the petitioned-for employee employed by DHFS in the position of Public Service Administrator, Option 8L, currently occupied by William Kurylak, is not a supervisory employee as defined by Section 3(r) of the Act.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the petitioned-for employees be included in the existing RC-10 bargaining unit.

VII. EXCEPTIONS

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

Issued at Springfield, Illinois, this 23rd day of January, 2012.

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



**Martin Kehoe
Administrative Law Judge**

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

American Federation of State, County and)
Municipal Employees, Council 31,)
)
Petitioner)
)
and)
)
State of Illinois, Department of Central)
Management Services,)
)
Employer)

Case No. S-RC-08-130

DATE OF
MAILING: **January 23, 2012**

AFFIDAVIT OF SERVICE

I, Lori Novak, on oath, state that I have served the attached **ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER** issued in the above-captioned case on each of the parties listed herein below by depositing, before 1:30 p.m., on the date listed above, copies thereof in the United States mail pickup at One Natural Resources Way, Lower Level Mail Room, Springfield, Illinois, addressed as indicated and with postage prepaid for first class mail.

Melissa J. Auerbach
Cornfield and Feldman
25 East Washington Street, Suite 1400
Chicago, Illinois 60602

Stephanie Shallenberger
Central Management Services
501 Stratton Office Building
Springfield, IL 62706

Lori Novak

Lori Novak

SUBSCRIBED and SWORN to
before me, **January 23, 2012**

Shannon L. Trumbo

NOTARY PUBLIC

