

**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-08-154
	)	
State of Illinois, Department of Central	)	
Management Services,	)	
	)	
Employer	)	

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

On June 26, 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-08-154 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 a Public Service Administrator, Option 8L position employed by the Illinois Department of Human Services (DHS) in the existing RC-10 bargaining unit.<sup>1</sup>

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<sup>1</sup> On July 22, 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 exclusion 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 14, 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 issue to be resolved is whether the petitioned-for employee is a managerial employee within the meaning of the Act. The Employer contends that the petitioned-for employee is a managerial employee within the meaning of the Act. The Petitioner contends that the petitioned-for employee is not a managerial employee within the meaning of the Act.

### III. FINDINGS OF FACT<sup>2</sup>

As noted above, the instant petition concerns one Public Service Administrator, Option 8L position employed by DHS. This position's working title is Administrative Law Judge (ALJ). The ALJ at issue, Susan Bradshaw, reports directly to Sheila Harrell, the Bureau Chief of the Bureau of Administrative Hearings (Bureau). The Bureau is part of the Division of Administrative Hearings and Rules (Division) of DHS, which is overseen by the Division's Deputy General Counsel.

The Bureau's sole ALJ predominantly (1) schedules and conducts administrative hearings and (2) drafts recommended decisions and reports on behalf of the Bureau. All of the ALJ's recommended decisions and reports are reviewed by the Bureau Chief. When conducting this review, the Bureau Chief largely ensures that the ALJ's work is clear, concise, and free of typographical or spelling errors. In addition, the Bureau Chief ensures that the ALJ correctly interprets the relevant rules and accurately applies those rules to the facts. For each case, the Bureau Chief's review generally takes 30 to 45 minutes. As part of this review, the Bureau Chief may instruct the ALJ to clarify or rewrite a portion of a recommended decision or report. The ALJ is expected to make the corrections or changes suggested by the Bureau Chief.

After the ALJ makes the appropriate revisions, the Bureau Chief approves or disapproves the ALJ's written work and submits that work to the Deputy General Counsel for his or her review. Subsequently, the Deputy General Counsel may return the ALJ's work to the Bureau Chief with suggested changes or may immediately approve the ALJ's work. Depending on the type of case, after the Deputy General Counsel's review, the ALJ's recommended decisions and reports are either submitted to the Secretary or Assistant Secretary of DHS. After a review, the

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<sup>2</sup> The following facts are based, in part, on the testimony of Bureau Chief Sheila Harrell and Administrative Law Judge Susan Bradshaw.

Secretary or Assistant Secretary can adopt or reject the ALJ's recommended decisions and reports through final orders. The ALJ's recommended decisions and reports are not distributed to the parties of the case until and unless the ALJ's recommended decisions and reports are adopted by the Secretary or Assistant Secretary in these final orders.

A final order provides the decision that is ultimately adopted by the Secretary or Assistant Secretary. Within a specific timeframe, either party can file a "motion to reconsider" or a similar motion to appeal a final order. When a final order is reconsidered, the reconsideration is not handled by the ALJ who originally considered the matter.

#### Health Care Worker Registry Cases

The type of case that is most commonly heard by the ALJ concerns the Illinois Department of Public Health's Health Care Worker Registry. Generally, in such a case, a representative of the DHS Office of the Inspector General (OIG) has completed an investigation and has determined that a state health care employee or an employee working for a health care agency that is licensed or funded by the state has been abusive or neglectful of an individual who is mentally retarded, developmentally delayed, or resides in a facility that is either operated by the state, licensed by the state, or receives state funds. That employee has also been notified of the OIG's intention, based on its initial determination, to report the petitioner's name to the Health Care Worker Registry.

If an individual's name is reported to the Health Care Worker Registry, that employee shall not be employed in any capacity by a state agency or an agency licensed or funded by the state in the health care field. However, an employee can file a petition requesting that his or her name be removed from the Health Care Worker Registry. If the employee does not file such a petition, his or her name is automatically reported to the Health Care Worker Registry. If a

petition is filed, the ALJ conducts a hearing on the matter. Following this hearing, the ALJ recommends, based upon his or her findings, whether or not the employee's name should be placed in the Health Care Worker Registry.<sup>3</sup>

#### Grant Fund Recovery Cases

Though uncommon, the ALJ also hears cases pursuant to the Grant Fund Recovery Act. In these cases, an agency or facility has received a grant from DHS and, because the grantee has inappropriately spent or accounted for the provided funds, DHS seeks to recoup the funds. The ALJ's hearing on the matter is preceded by an audit. During such a hearing, the results of this audit are presented as evidence by a representative of DHS. After the ALJ's hearing, the ALJ recommends whether or not DHS should recover the funds from the grantee.<sup>4</sup>

#### DASA Cases

Illinois facilities must maintain an appropriate license in order to provide a particular type (or "level") of treatment for a variety of issues. After DHS' Division of Alcoholism and Substance Abuse (DASA) has conducted an inspection of a facility, determined the facility is not in compliance with DHS' procedures, and concluded that the facility's license should be revoked or suspended, the ALJ can conduct a hearing on the matter. The ALJ hears about three DASA cases a year.

For DASA cases, the ALJ does not create a recommended decision that the Secretary can either adopt or reject. Instead, after the ALJ conducts a hearing, the ALJ provides the Secretary a report consisting of a finding of fact and a statement concerning the credibility of the

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<sup>3</sup> In such a case, the ALJ's recommendation may not determine whether a termination that resulted from the OIG's determination was proper. Furthermore, the ALJ may not conduct a hearing until the underlying employment issue has been resolved through arbitration or a comparable civil service procedure. If the individual prevails and is rehired, the ALJ is precluded from recommending that the individual's name be placed in the Health Care Worker Registry.

<sup>4</sup> Bradshaw testified that she has never found for the grantee after a hearing has been conducted.

witnesses. Further, when the ALJ submits his or her report to the Bureau Chief, the ALJ also submits two final orders. One final order revokes a license while the other does not. The ALJ does not recommend a particular final order.

#### Mental Health Service Charges Cases

The ALJ also hears mental health service charges cases. In these cases, an individual has been hospitalized in a state mental health facility and has been assessed service charges for his or her time in that facility. That individual has the right to request a hearing to determine whether or to what extent he or she must pay those service charges.

In mental health service charges cases, before submitting a finding of fact and recommend decision, the ALJ conducts a hearing and considers the petitioner's finances, income, assets, and debt. In addition, the ALJ can consider outstanding medical bills and catastrophic circumstances.

#### WIC Cases

The ALJ infrequently hears cases involving the Special Supplemental Nutrition Program for Women, Infants and Children, otherwise known as the "WIC Program." The WIC Program issues customers vouchers which can be used for certain products. In turn, a vendor (typically a grocery store) that is granted a license by DHS to participate in the WIC Program must offer these products at a particular price. DHS uses an investigator to determine if that vendor is in compliance with the WIC Program's rules. Subsequently, the vendor can be notified that it is to be fined or that its license will be suspended or revoked. The vendor can appeal this determination to the ALJ.

During a WIC case's hearing, DHS investigators testify and submit evidence of the DHS investigation. In general, when the ALJ determines that a pattern of overcharges exists, the ALJ

can recommend a fine or recommend that the vendor's license be suspended or revoked.<sup>5</sup> For WIC cases, the ALJ's recommendations are ultimately submitted to the Assistant Secretary.

#### Other Cases

The ALJ may handle other kinds of cases as well. For example, the ALJ may hear cases related to individuals who are inappropriately removed from community-integrated living arrangements (CILAs). Additionally, the ALJ may hear cases involving grants provided for home-based services for the mentally ill or developmentally delayed.

### **IV. DISCUSSION AND ANALYSIS**

The Employer asserts that the ALJ at issue is a managerial employee within the meaning of Section 3(j) of the Act.<sup>6</sup> As the party seeking to exclude the ALJ from bargaining, the Employer has the burden of proving that position is statutorily excluded from bargaining as a managerial employee. 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, the traditional test and 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 Employer argues that the ALJ at issue is a managerial employee under either of these tests, a claim the Petitioner denies.

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<sup>5</sup> Bradshaw testified that she has never made a recommendation that no pattern existed.

<sup>6</sup> Section 3(j) of the Act states:

“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.

### The Traditional Managerial Employee Test

The traditional managerial employee test considers, factually, whether the employee conforms to the Act's definition of a managerial employee. The Act sets down two criteria, both of which the 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 ALJ does 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 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).<sup>7</sup> Further, to

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<sup>7</sup> 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

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).

As an initial matter, concerning the ALJ's predominant duties, it might be argued that by drafting recommended decisions and reports, the ALJ is, in effect, formulating the policies of DHS or the Bureau and is thus engaged in executive and management functions. In general, by drafting recommended decisions and reports, the ALJ does appear to apply or carry out a variety of DHS policies and rules. Yet, these predominant duties do not immediately suggest that the ALJ is independently responsible for formulating these policies or rules. The record does not suggest, for example, that the ALJ, by drafting recommended decisions and reports, exercises the authority to initiate an entirely new policy or discontinue or modify existing policies. Indeed, the Bureau Chief's testimony generally confirms that the ALJ does not review, establish, or modify the Bureau's practices, procedures, and policies. This testimony is largely supported by the record.

Furthermore, where an employee's decisions are significantly circumscribed by predetermined requirements and procedures, that employee's activities are not managerial under the Act. Village of Elk Grove Village, 245 Ill. App. 3d at 121, 613 N.E.2d at 320; see also Chief Judge of the 18th Judicial Circuit, 14 PERI ¶2032 (IL SLRB 1998), aff'd Chief Judge of the Eighteenth Judicial Circuit v. Illinois State Labor Relations Board, 311 Ill. App. 3d 808, 726

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PERI ¶2052 (IL SLRB 1992). However, in general, the record does not indicate that the ALJ is engaged in these other functions. Furthermore, nothing in the record specifically suggests that the ALJ is responsible for preparing a budget or assures efficient and effective operations.

N.E.2d 147 (2nd Dist. 2000). In this case, when drafting recommended decisions and reports, the ALJ must often adhere to relatively defined guidelines. As suggested by the provided performance evaluation, the ALJ consistently interprets rules and statutes with uniformity and issues recommended decisions in accordance with required rules and procedures.<sup>8</sup>

In practice, when handling a WIC case, for example, the ALJ consistently finds that a pattern exists and recommends accordingly. Under such circumstances, testimony alleges that the ALJ has essentially no discretion. Similarly, because grant recovery cases follow an audit, the ALJ has never found that a grantee can retain the funds at issue. Concerning mental health service charge cases, testimony also suggests the ALJ has “very limited authority.” When making a recommendation as to whether an individual should pay assessed service charges, the ALJ may only consider certain factors outlined by the relevant administrative rules. Further, as a rule, when the ALJ is assigned a DASA case, the ALJ may not recommend an ultimate determination.

Concerning the ALJ’s secondary duties, limited evidence suggests that the Bureau Chief hoped to obtain the ALJ’s input regarding a revision of various rules pertinent to the Bureau. However, by the date of the hearing, this input had not been provided. Testimony also notes that the Bureau Chief wanted the ALJ to assist in compiling a procedures manual, but this manual merely appears to contain existing Bureau procedures and is therefore not indicative of managerial status. See Circuit Clerk of Champaign County, 17 PERI ¶2032 (IL LRB-SP 2001); State of Illinois, Department of Central Management Services, 8 PERI ¶2052. While the Bureau Chief may expect the ALJ to identify means by which the Bureau can improve efficiency, such

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<sup>8</sup> While the ALJ may not always be entirely bound by procedural guidelines, the fact that the ALJ’s decision-making is not wholly routine or ministerial certainly does not mean that the ALJ’s actions rise to the level of formulation or establishment of department policy or otherwise render such activities executive and management functions. See Chief Judge of the 18th Judicial Circuit, 14 PERI ¶2032.

input is uncommon and few specific suggestions are provided in the record. The ALJ has recommended rule changes, but none of these recommendations have been adopted.

According to Bradshaw, in one instance, when she did propose a change to a particular rule, the ALJ was allegedly informed that the department's policy, essentially, "is pretty much that rule changes should not come from us but should come from the division who has promulgated the rules." Put another way, rules changes are expected to come from "the different subdepartments within the agency." Furthermore, Bradshaw's testimony indicates that she does not feel that she is expected "look at the rules" that affect her work and make recommendations. Thus, I cannot find that the ALJ's secondary duties elevate the ALJ to managerial status. See Chief Judge of the 11th Judicial District, 16 PERI ¶2043 (IL SLRB 2000).

Furthermore, as the Petitioner observes, Section 3(j) of the Act 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. Assuming arguendo that secondary aspects of the ALJ's work do constitute performance of executive and management functions, the ALJ does not appear to engage predominantly in such executive and management functions as required for exclusion under the Act. As the record shows, the ALJ engages predominantly in activities related to administrative hearings and the drafting of recommended decisions and reports. Separately, the ALJ can provide some suggestions or input to a superior. Nonetheless, given that the ALJ's involvement or participation in policy development through such suggestions or input is, at best, sporadic or occasional, it 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 (IL SLRB 1988); Chief Judge of the 18th Judicial Circuit, 14 PERI ¶2032.

Returning to the ALJ's predominant duties, I also find that the recommended decisions and reports that are drafted by the ALJ, 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 the Bureau's or DHS' goals or means of achieving those goals. See Chief Judge of the 11th Judicial District, 16 PERI ¶2043; Chief Judge of the Eighteenth Judicial Circuit, 14 PERI ¶2032. Rather, the evidence suggests that whatever discretionary decision-making the ALJ undertakes in performing these duties is largely exercised in connection with specific cases.

Concerning this issue, limited testimony alleges, for example, that when an ALJ's recommended decision or report is adopted by a final order, it does have some precedential value. However, the Bureau does not maintain a public record of its cases. According to Bradshaw, during her time as the ALJ, no party has used a previous case as precedent. Bradshaw also indicated that she does not feel bound by the decisions of prior ALJs and has never been notified by a superior that she should. In this way, the ALJ's recommended decisions and reports do not appear to significantly impact the formulation of overall departmental policy.

Separately, it can be observed that though the ALJ's recommended decisions and reports are often adopted, the ALJ's written work is not automatically implemented as a matter of course.<sup>9</sup> Instead, as a rule, this written work is reviewed and possibly revised or substantively modified by a series of superiors including the Bureau Chief, the Deputy General Counsel, and the Secretary or Assistant Secretary ultimately responsible for the final order. Furthermore, the ALJ does not have the authority to make independent "directed findings" during the course of a

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<sup>9</sup> In addition, for DASA cases, the ALJ does not submit a recommended decision.

hearing. Because the ALJ's recommended decisions and reports are 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 ALJ's work, to some extent, the record intimates that the ALJ does not qualify as a managerial employee. See State of Illinois, Department of Central Management Services, 21 PERI ¶205.

It has been determined that 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). However, an advisory employee who makes "effective recommendations" can also 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).<sup>10</sup>

In part, the Employer argues that the ALJ's recommended decisions and reports are effective recommendations and therefore evidence of managerial status under the traditional test. Accordingly, the Employer observes, for example, that according to Bureau Chief Harrell, in the last three and a half years, only three of the ALJ's recommendations have been "overturned" by the Bureau Chief or other superior. However, in order to properly analyze the managerial issue at hand, this discussion must undertake a fact-based assessment of the control and authority

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<sup>10</sup> 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).

asserted by the employee at issue. See David Wolcott Kendall Memorial School v. National Labor Relations Board, 866 F.2d 157, 160 (6th Cir. 1989). Thus, the Employer's observation largely overlooks the more fundamental qualitative or factual analysis of the ALJ's predominant work. Although effective recommendation or control rather than final authority over employer policy is the relevant consideration, the employee must still formulate and effectuate management policies by expressing and making operative the decisions of his or her 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 ALJ's recommended decisions and reports are ultimately accepted or implemented ("after careful review and consideration") and may therefore be considered "effective," the ALJ's authority is 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 note that the ALJ's authority might reasonably be distinguished from the broader authority of the employees at issue in Yeshiva University. In that case, the university faculty 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 ALJ at issue possesses little decision or policy-making authority comparable to that of the employees found managerial in Yeshiva University. Unlike the faculty members described, the ALJ's authority is neither far-reaching nor absolute. As the Petitioner suggests, the cases heard by the ALJ, at best, "affect the individual respondents in the individual cases." The ALJ has 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, 303, 652 N.E.2d 301 (1995); David Wolcott Kendall Memorial School; 866 F. 2d at 160. The fact that the ALJ makes independent decisions with regard to carrying out his or her duties in each individual case does not mean that the ALJ's actions "transcend to the level of executive or management function." Chief Judge of the Eighteenth Judicial Circuit, 311 Ill. App. 3d at 815, 726 N.E.2d at 152.

To the extent that the ALJ can recommend broader policies outside the ALJ's written work, these recommendations cannot be instituted without the approval of others. Since it is the responsibility to formulate, determine, and effectuate policy and not the initial preparation of policy proposals which distinguishes the managerial employee from other positions, the ALJ's possible input into policy development is not indicative of managerial status. See Chief Judge of the 18th Judicial Circuit, 14 PERI ¶2032. Furthermore, in this narrower context, the ALJ's policy proposals have not been shown to have appreciably or effectively persuaded his or her superiors.

With respect to the second criterion, 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.<sup>11</sup>

In this case, the ALJ predominantly drafts recommended decisions and reports that may reflect management policy, but there is no evidence that the ALJ has any responsibility to determine the extent any policy objectives contained therein will be implemented or has the authority to oversee and coordinate the same. Further, the record reveals no evidence indicating that the ALJ has the authority or responsibility to determine the specific methods or means of how services will be provided. Instead, as outlined above, the ALJ generally applies existing policy in order to draft case-specific recommendations and reports. Demonstrating a lack of substantial discretion, the record provides an example of a rule change eliminating a particular type of hearing (and thereby reducing the ALJ's caseload). The ALJ, therefore, does 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 ALJ to the overall mission of DHS. See Illinois Commerce Commission, 406 Ill. App. 3d at 778, 943 N.E.2d at 1146.<sup>12</sup> If the responsibilities of a job title

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<sup>11</sup> 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 (i.e., the performance of executive or management functions) 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.

<sup>12</sup> 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

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 ALJ's recommended decisions, a good argument could be made that the ALJ makes effective recommendations on major policy and the implementation of such policy.

The Employer's opening statement suggests, for example, that the cases that are handled by the ALJ "go directly to the core mission and functions of the Illinois Department of Human Services." However, concerning a larger mission or function, testimony simply suggests that the Bureau is charged with receiving certain incoming appeal requests for the department and assigning those appeal requests to either the ALJ or hearing officers. Currently, Bradshaw is the only ALJ that serves under the Bureau Chief, but as suggested above, the record indicates that the ALJ performs particular duties, under administrative direction, within a larger "trilevel process." Occasionally, the Bureau Chief also handles cases that could otherwise be assigned to the ALJ. Further, certain types of cases are exclusively assigned to contractual hearing officers. In this context, it might also be noted, for example, that in addition to the Bureau of Administrative Hearings, the Deputy General Counsel also oversees the Bureau of Assistant Hearings (which "hears various other types of appeals") and the Bureau of Rules (which is responsible for creating, revising, and promulgating rules). Thus, to some extent, it cannot be said that the ALJ is "the whole game" when it comes to the larger mission of either the Bureau or DHS. See Illinois Commerce Commission, 406 Ill. App. 3d at 778, 943 N.E.2d at 1146.

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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.

Citing Office of the Cook County State's Attorney, 166 Ill. 2d at 301, 652 N.E.2d at 303, the Employer's post-hearing brief suggests that the authority to make independent decisions and the consequent alignment of the employee's interests with management's are hallmarks of managerial status for purposes of labor law. Subsequently, in order to demonstrate this alignment of interests, the Employer generally alleges, for example, that when the ALJ's work is accepted, that work is adopted as the final decision of the Secretary or Assistant Secretary; the ALJ's role is defined by a variety of statutes; the intent of the administrative hearings conducted by the ALJ "is that agency policies be given effect;" and "[t]he ALJ's hearings are a primary mechanism by which the agency fulfills its statutory mission."

As the Petitioner observes, the Court in Office of the Cook County State's Attorney did not appear to alter established Board case law interpreting the managerial exclusion set forth in Section 3(j) of the Act. As the above analysis generally suggests, the ALJ's predominant duties (conducting administrative hearings and drafting recommended decisions and reports) are not clearly characterized as executive and management functions. In addition, as the Board noted in Chief Judge of the 18th Judicial Circuit, 14 PERI ¶2032, "throughout State and local government, the duties and essential job functions of public employees of every level are to a significant extent defined and delineated by the General Assembly in the Illinois statutes."<sup>13</sup> Moreover, the relevant statutes are likely to clarify that the ALJ's determinations are subject to the review of his or her superiors.

By conducting administrative hearings and providing recommended decisions and reports, the ALJ doubtlessly performs some role integral to the Bureau or DHS' larger mission.

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<sup>13</sup> Subsequently, in Chief Judge of the 18th Judicial Circuit, 14 PERI ¶2032, the Board observed, Thus, if the mere fact that a public employee's essential job functions are set forth in a statute were sufficient to warrant a designation of managerial status, the applicability and scope of the Act would be severely limited, a result in direct contravention to the General Assembly's intent in establishing a State-wide policy of collective bargaining for public sector employees.

However, such a role does not necessarily meet the second part of the managerial definition. 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 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.

#### 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 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. The alternative test, as set out by the Illinois Supreme Court, considers whether the employee is a managerial employee as a matter of law. See Chief Judge of the Sixteenth Judicial Circuit, 178 Ill. 2d at 341, 687 N.E.2d at 798; State of Illinois, Departments of Central Management Services and Healthcare and Family Services, 23 PERI ¶173.

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.

In contrast, the ALJ at issue clearly does not generally have the authority to act independently and commit an “office holder,” the agency, the Bureau, or a superior to any course of action. Instead, according to the general practice and procedure, the ALJ’s recommended decisions and reports are reviewed by the ALJ’s superiors and subject to revision. Further, the original drafts of these recommended decisions and reports are typically not automatically issued to the parties of a case. The ALJ only acts as a surrogate for a superior to the extent that his or

her work is ultimately adopted by that superior. Accordingly, the relationship between the ALJ and his or her superiors does not clearly manifest these three characteristics.<sup>14</sup>

When discussing the ALJs employed by the Illinois Commerce Commission (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 Ill. App. 3d 310, 943 N.E.2d 1150 (4th Dist. 2010).<sup>15</sup> 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

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<sup>14</sup> 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.

<sup>15</sup> 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; The Illinois Human Rights Commission, 406 Ill. App. 3d at 316 943 N.E.2d at 1156.

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 ALJ at issue similarly presides over hearings and renders decisions. Moreover, under normal circumstances, the ALJ's recommended decisions commonly become the final decision of the agency. However, tellingly, like the ALJs of the ICC in Illinois Commerce Commission, the instant record does not suggest that the ALJ at issue, under any circumstances, is generally clothed with all the powers and privileges of a superior, DHS, or the Bureau. As noted above, the record suggests that every recommended decision and report (if a recommendation is made at all) 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 in this instance. See Illinois Commerce Commission, 406 Ill. App. at 781, 943 N.E.2d at 1149.

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. Concerning this issue, the Employer simply proposes, “If this ALJ is included in the bargaining unit and subsequently must determine the fate of a fellow union member, her loyalties may be divided and agency policy may not be given full effect.” From the limited record, it is difficult to determine how the Bureau would operate if it was to be divided into union and non-union attorneys. However, nothing in the record suggests that the ALJ, if added to the proposed bargaining unit, would be forced to divide his or her loyalty between the Employer and the Petitioner. Further, nothing clearly suggests that the petitioned-for division would necessarily lessen the effectiveness of the Buereau. 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 ALJ at issue is a managerial employee as a matter of law.

#### V. CONCLUSIONS OF LAW

I find that the petitioned-for employee employed by DHS in the position of Public Service Administrator, Option 8L, currently occupied by Susan Bradshaw, is not a managerial employee as defined by Section 3(j) of the Act.

#### VI. RECOMMENDED ORDER

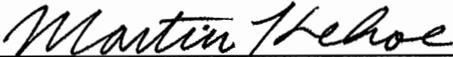
IT IS HEREBY ORDERED that the petitioned-for employee be included in the existing RC-10 bargaining unit.

## **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 13th day of December, 2011.**

**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-08-154

DATE OF  
MAILING: **December 13, 2011**

**AFFIDAVIT OF SERVICE**

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

Melissa J. Auerbach  
Cornfield and Feldman  
25 East Washington Street, Suite 1400  
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Juston D. Smock  
Illinois Department of Central Management Services  
100 West Randolph Street, Suite 4-500  
Chicago, Illinois 60601

*Lori Novak*

\_\_\_\_\_  
Lori Novak

**SUBSCRIBED** and **SWORN** to  
before me, **December 13, 2011**

*Shannon L. Trumbo*  
\_\_\_\_\_  
NOTARY PUBLIC

