

STATE OF ILLINOIS  
ILLINOIS LABOR RELATIONS BOARD  
STATE PANEL

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

Case No. S-RC-10-156

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

**I. Background**

On December 22, 2009, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME or Union) filed a petition with the Illinois Labor Relations Board (Board) seeking to include the title Senior Public Service Administrator (SPSA), Option 8L, in the Illinois Department of Healthcare and Family Services (DHFS), the Illinois Department of Public Health (DPH), the Illinois Environmental Protection Agency (EPA), and the Illinois Pollution Control Board (PCB), in the RC-10 bargaining unit. The State of Illinois, Department of Central Management Services (Employer) opposes the petition, asserting that some of the employees sought to be represented are excluded from coverage under the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2010), as amended, pursuant to the exemptions for confidential, supervisory and managerial employees.

In accordance with Section 9(a) of the Act, an authorized Board agent conducted an investigation and determined that there was reasonable cause to believe that a question concerning representation existed. A hearing on the matter was conducted on August 3 and 24, and September 21, 2010, by Administrative Law Judge Sharon Wells. The case was transferred to the undersigned. Both parties elected to file post-hearing briefs.

## II. Preliminary Findings

The parties stipulate and I find:

1. At all times material, the Employer has been a public employer within the meaning of Section 3(o) of the Act and the Board has jurisdiction over this matter pursuant to Section 5(a) of the Act.
2. AFSCME is a labor organization within the meaning of Section 3(i) of the Act.
3. RC-10 is an appropriate bargaining unit for the petitioned-for employees should they be determined to be public employees within the meaning of the Act.<sup>1</sup>
4. The following Senior Public Service Administrator, Option 8Ls shall be **included** in the RC-10 bargaining unit based on the Board's decision in Case No. S-RC-09-176: Julie Armitage, William Ingersoll, Kyle Rominger, Connie Tonsor. The parties specifically agree that this inclusion is subject to any appeals filed in S-RC-09-176.
5. The parties agree to **include** the following Senior Public Service Administrator, Option 8Ls in the RC-10 bargaining unit: Antoinette Murphy, Jonathan Siegel, Dale Cone, L. Joseph Howard, Mark Iocca, Daniel Leikvold, and Richard Saavedra.
6. The parties agree to **exclude** the following Senior Public Service Administrator, Option 8Ls from the RC-10 bargaining unit as managerial and/or confidential: Rukhaya Alikhan, Jason Boltz, Shannon Stokes, and John Kim.
7. The parties agree that testimony and evidence presented in S-RC-10-196 shall be incorporated into the record of the above-captioned case as it pertains to the following Senior Public Service Administrator, Option 8L employee: Kathleen Crowley.

## III. Issues and Contentions

The issues are (1) whether any of the petitioned-for employees are confidential, supervisory or managerial as defined by Sections 3(c), 3(r) and 3(j) of the Act, respectively, and

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<sup>1</sup> The Employer argues the issue of unit appropriateness on brief. I do not address this issue because the parties stipulated that the proposed unit was appropriate. As such, the parties must be held to their stipulations. See, County of Kankakee and Coroner of Kankakee County, 28 PERI ¶ 21 (IL LRB-SP 2011). Notably, the ALJ's own articulation of the issue reflects this agreement and was neither challenged nor explicitly modified by the parties at hearing.

(2) whether certain employees may be deemed managerial and/or confidential solely because they are Rutan-exempt and exempt from section 4d(3) of the Personnel Code.

The Employer argues that Kathleen McGinty, Kyong Lee, Kiran Mehta and Kathleen Crowley are confidential under the Act. Further, the Employer contends that Ryan Lipinski and Kyong Lee are supervisory under the Act. In addition, the Employer argues that Lee, Lipinski, Yvette Perez-Trevino, Kiran Mehta, and Allan Abinoja are managerial under the Act. Finally, the Employer argues that Abinoja and Crowley should be deemed managerial and confidential as a matter of law because they are Rutan-exempt and exempt from section 4d(3) of the Personnel Code.

AFSCME argues that all the employees at issue should be included in the unit because none are confidential, supervisory, or managerial. Next, AFSCME argues that none of the employees should be excluded solely because they are exempt from the Personnel Code under 4d(3) or because their positions are Rutan-exempt.

#### IV. Facts

The employees at issue hold positions in the following departments of the state: the Department of Healthcare and Family Services (HFS), Department of Public Health (DPH), and the Pollution Control Board (PCB). I address the employees by department and office, below.

##### 1. Department of Healthcare and Family Services

###### **1. Office of the Inspector General: Kathleen McGinty**

The Office of the Inspector General (OIG) is an independent organization responsible for the “program integrity functions” of HFS and the Department of Human Services. It investigates Healthcare providers, benefits recipients, vendors and staff to prevent, detect and eliminate fraud, waste, abuse, mismanagement and misconduct in any of the programs administered by HFS.

Kathleen McGinty is bureau chief for the Bureau of Administrative Litigation (“the bureau”), within the OIG. The bureau represents HFS in actions to enforce child support compliance or to sanction providers. McGinty oversees seven employees: two clerical staff members and five attorneys who hold the job title Public Service Administrator (PSA). All McGinty’s subordinates are unionized. The administrative assistants are represented by

AFSCME in a separate unit; the PSAs are represented by the Illinois Nurses Association (INA) in RC36.

Between August 2008 and October 2009, the Employer and INA negotiated the PSAs' initial collective bargaining agreement. Terri Shawgo, bureau chief of the Office of Labor Relations and the Bureau of Training, organized a small team to assist management in contract negotiations. The team included Shawgo herself, John Weathers from Central Management Services, the Employer's chief spokesperson and negotiator, Wyona Johnson, Deputy Inspector General for HFS, and Kathleen McGinty.<sup>2</sup>

Between August 2008 and July 2009, McGinty attended negotiations five or six times in Chicago.<sup>3</sup> She sat on the Employer's side of the table, spoke on behalf of the Employer, and contributed to negotiations. When bargaining took place in Springfield, Weathers kept McGinty apprised of developments in negotiations and asked her questions on bargaining-related matters.

During that time, McGinty caucused with the Employer in her office. She discussed the Employer's proposals, the Union's counterproposals and the Employer's bargaining strategies with the other members of management's team. Most of the management team's discussions were never shared with the Union because they concerned the ultimate direction of negotiations, employees' work performance and employees' personalities. None of the Employer's bargaining proposals were ever made available to the Union before negotiation sessions.

Shawgo sought McGinty's assistance in drafting the Employer's proposals because McGinty was the only management team member from HFS's supervisory structure and thus the only team member with first-hand knowledge of bargaining unit members' day-to-day activities. As a result, McGinty was exhaustively involved in discussions concerning the Employer's strategy on wage negotiations. She produced a "wish list" concerning the contract provisions on employee pay and oversight. She also drafted the wage proposal and drafted a counterproposal to the Union's professionalism proposal.<sup>4</sup>

In July 2009, the Inspector General directed McGinty to stop attending negotiations because she had had personality conflicts with some of INA's negotiators. Between August

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<sup>2</sup> John Allen, the Inspector General, received reports on negotiations but did not sit in on them.

<sup>3</sup> McGinty testified that she only attended one negotiating session. Three other witnesses testified that McGinty had attended at least five sessions.

<sup>4</sup> McGinty did not have any knowledge of the wage schedule as it was adopted by the parties until after the contract was finalized.

2009 and February 2010, Shawgo continued to update McGinty on bargaining matters and shared information with McGinty that was not shared with those outside the process. Specifically, Shawgo spoke with McGinty at least a couple of times about negotiations and told McGinty which matters were on the table and which were stagnant. During that period, Shawgo discussed bargaining proposals with McGinty, referencing them by number. While McGinty stopped making decisions about negotiations, she possessed management's proposals in advance of the Union.

Shawgo testified that McGinty was still part of management's team after July 2009. Shawgo was never informed that she should refrain from discussing bargaining strategy with McGinty and was never told that McGinty would have no more involvement in negotiations. As a result, Shawgo never restricted McGinty's access to management's bargaining strategy. Similarly, Weathers was never informed that McGinty was relieved of her duties with respect to the contract and continued to have phone calls with McGinty concerning negotiations. Weathers also testified that though McGinty was no longer present at the table, she was involved in the contract negotiation process through to the end and that the Employer could not have finished the contract without her participation.

McGinty, on the other hand testified that she did not have any conversations with Weathers regarding contract negotiations or wages after June or July, 2009. In addition, McGinty testified that after that date she had no further communication with Shawgo regarding negotiations and that management's team no longer discussed negotiations in her presence.

The PSAs' three-year contract was finalized in November or December of 2009 and will expire in 2011.

## **2. Office of the General Counsel: Kyong Lee, Kiran Mehta and Ryan Lipinski**

HFS is responsible for Illinois' medical assistance programs, employee benefits plans, and child support enforcement programs. HFS's legal department, the Office of the General Counsel (OGC), advises the department on policy issues and the legal implications of its programs.

The OGC is headed by General Counsel Jeannette Badrov. She oversees the Deputy General Counsel of Administration, Kyong Lee, Deputy General Counsel of Programs, Leo J. Howard, administrative support staff, and an assistant ethics officer.

i. Kyong Lee

Kyong Lee is Deputy General Counsel of Administration for the OGC in HFS. He oversees the Bureau of Administrative Hearings and reports directly to General Counsel Badrov. Lee has five direct reports: Dale Cone, Rich Saavedra, Ryan Lipinski, Ethel Edwards and Sue Biddle. Dale Cone is the chief legal advisor for procurements. Cone reviews procurement business cases, reviews requests for procurement, interprets procurement law, writes decision memos, and advises program areas on procurement issues.<sup>5</sup> Rick Saavedra advises the Division of Child Support enforcement on all child support issues. Ryan Lipinski is Chief Administrative Law Judge. Ethel Edwards and Suzanne Biddle perform clerical work.

Lee's attorney subordinates address day-to-day legal issues concerning the department's programs including child support and procurement matters. Lee similarly addresses legal issues concerning those subjects. However, he also addresses more weighty and less routine legal issues which "may implicate the Office of General Counsel or HFS as a whole." For example, Lee interprets child support laws and makes decisions on those child support issues which Saavedra is not comfortable making. He also answers Cone's questions about procurement law. Lee discusses his decisions with his subordinates and with Badrov.

Lee's evaluation states that he spends 25% of his time acting as a full-line supervisor. He may spend more or less time overseeing his subordinates than the figure stated on his evaluation. No witness testified with more specificity concerning the portion of Lee's job duties which are allocated to supervision.

Lee has authority to approve time off for his subordinates, including vacation, furlough and sick time. Lee must ascertain whether the office has adequate coverage before granting time off. He also considers the employee's work load and whether the employee has time available.

Lee has the authority to grant overtime. The Employer introduced no evidence as to the process by which Lee decides to grant such overtime.

Lee also fills out performance evaluations for his subordinates together with Badrov, who then also signs off on them.<sup>6</sup> Employees are rated on a scale of one to four: the lowest rating is

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<sup>5</sup> Cone also is assigned certain individual contracts but performs more procurement work than others.

<sup>6</sup> Q: And did you make any changes to Cone's evaluation when you signed it?

A: We worked on the evaluation together. [Badrov]

Q: You both did it together?

“needs improvement” (1), the highest is “exceeds expectation” (4). No bonuses are given on the basis of good evaluations. However, if a majority of an individual’s ratings are low, then Lee may withhold the employees’ contractually bargained-for step increase. No step increases have ever been withheld in the Office of the General Counsel as a result of poor performance evaluations.

Lee assigns work to his subordinates. Badrov “does not micromanage” Lee and could not testify as to the basis of Lee’s assignments of work to his subordinates. He also reviews the work product of his attorney subordinates for legal sufficiency. While he may recommend changes, there is no evidence in the record that he has ever done so.

Lee recommended a salary increase for subordinate Dale Cone. Lee and Badrov brought the request to the governor’s office. The request is pending and the adjustment has not yet been approved.

Lee has authority to discipline his subordinates and has done so on one occasion since February 2010 when acting as ALJ. He also has the authority to hold pre-disciplinary hearings, but has never done so.

Lee hears grievances at the first step. He need not consult with his supervisor to determine his response to a grievance. He has denied grievances and has partially granted at least one. He denies or grants a grievance based the credibility of witnesses to the alleged misconduct and the type of evidence produced by the grievant in support of the grievant’s position. Lee discusses the grievances with Terri Shawgo, bureau chief of the Office of Labor Relations for HFS. He has also consulted Badrov on grievance adjustments. Shawgo has, on occasion, drafted grievance responses for Lee.

Lee has the authority to affect change in the procedures by which administrative hearings are conducted. There is no evidence in the record that Lee has actually made any departmental policy or procedural changes on any matter. Lee also advises HFS on the legal implications of certain policies.

a. Kiran Mehta

Kiran Mehta serves as Assistant General Counsel in the legal services section of the OGC. She reports directly to Leo Howard, the Deputy General Counsel of Programs. As

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A: Yes. [Badrov]

Assistant General Counsel, she advises HFS on the legal issues concerning the department's medical assistance programs. She is also one of the department's Freedom of Information Act (FOIA) officers.

b. Kyong Lee and Kiran Mehta: FOIA officer duties

Lee and Mehta are FOIA officers for HFS. FOIA requires public bodies to provide certain information to members of the public upon request. It also enumerates classes of information which are exempt from that requirement. FOIA officers review requests for documents made under the Act. If the department possesses the requested documents, the FOIA officers then apply the statute to determine whether to grant or deny the request. FOIA officers will deny a request for information if it meets FOIA's exemptions or if the request is too vague.

Most of HFS's approximately 600-yearly FOIA requests are routine. In routine cases, clerical staff members gather the information. They then draft a letter summarizing the request and describing the department's response. The FOIA officers review the letter and documents for responsiveness and to determine if and how the documents must be redacted. Finally, the FOIA officers provide the documentation to the requestor in a timely manner. When requests are not routine, Badrov, human resources, or even the governor's office may provide guidance as to whether, or to what extent, the request for documents must be granted.

AFSCME has submitted FOIA requests to HFS in the past. There is no evidence in the record as to the type of information AFSCME requested.

ii. Ryan Lipinski

Ryan Lipinski is the Chief Administrative Law Judge (ALJ) of HFS. She is responsible for the administration of the Bureau of Administrative Hearings and reports directly to Lee. As Chief ALJ, Lipinski oversees the hearing team, the fair hearings section and the paternity hearing section. Lipinski also indirectly oversees the administrative support staff for the fair hearings section. She ensures that hearings are conducted appropriately, addresses evidentiary issues that arise, reviews the ALJ's recommended decisions, and handles other matters that pertain to the functioning of the hearings and their decorum. In addition, Lipinski serves as the liaison between the Office of the General Counsel and the Bureau of Administrative Hearings to address legal issues that affect the hearings. Lipinski does not usually hold hearings though she is

occasionally willing and able to perform some hearings and may also do so when fair hearings chief has a conflict.

The hearings team ALJs resolve disputes concerning alleged accounting discrepancies and determine whether providers of HFS's medical assistance programs have rendered services which warrant the billing. They preside over the hearings, listen to the evidence presented by HFS<sup>7</sup> and the providers, and make conclusions of law and findings of fact in their recommended decisions.

Fair hearing officers determine whether non-custodial parents are in arrearage in child support payments. The hearing officers certify that arrearage in a written decision. The certification is sent to the appropriate licensing agency so that the non-custodial parent's state-issued license may be revoked pursuant to statute. Hearing officers also determine whether individuals are eligible for medical assistance program services.

The paternity division determines the paternity of prisoners' children.

a. Supervisory authority

Lipinski completes performance evaluations for two administrative staff members, and attorneys Hilary Johns, and Bill Kurylak.<sup>8</sup> She has complete discretion in filling out her direct reports' evaluations, but "may" complete them with her superior, Kyong Lee. The evaluations have a four-point rating system. The lowest rating is "needs improvement." If a majority of a subordinates' ratings need improvement, Lipinski may withhold their contractually bargained-for step increase. There is no evidence in the record that Lipinski has withheld any subordinate's step increase by rating them low on an evaluation.

Lipinski has authority to assign cases to ALJs but does not generally do so. Instead, most cases are automatically distributed to Lipinski's subordinates by a procedure that was in place before Lipinski's tenure. However, Lipinski may occasionally assign a special or extraordinary case to an individual subordinate. Most recently, Lipinski conferred with Lee and decided that a case concerning property liens should be handled by Kurylak.

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<sup>7</sup> The Bureau of Administrative Litigation represents the department in these proceedings.

<sup>8</sup> Kurylak, not Lipinski, completes evaluations for the ALJs in the hearings team. Lipinski has the authority to perform those evaluations herself but does not do so because she is not as familiar with the ALJs' work as Kurylak is.

Lipinski has authority to approve time-off requests at her discretion, though Lee may review her decisions. Lipinski determines whether to grant time off by verifying that the employee has the available benefit time.

Lipinski also reviews flextime schedules and has authority to change the schedules based on “what works best for [her] area.” Any flextime schedule request must be forwarded up the chain of command for final approval. There is no evidence in the record as to whether Lipinski’s decisions concerning flextime schedules are routinely accepted.

Bardov testified that Lipinski has discretion to approve overtime for her subordinates. Lipinski stated that she was not aware of that authority and that she has never exercised it.

Lipinski reviews ALJs’ recommended decisions for legal sufficiency. She may change their legal analysis, but not the findings of fact. There is no evidence in the record as to whether Lipinski has actually made or recommended changes to ALJs’ decisions. The Director of HFS makes the final decision concerning an ALJ’s rulings.

Finally, Lipinski has authority to hold pre-disciplinary hearings and to discipline her subordinates; she also has the authority to adjust grievances and serves as the first step of the grievance process. Lipinski has never disciplined her subordinates or held pre-disciplinary hearings and there is no evidence in the record that she has ever heard or adjusted a grievance.

According to Lipinski’s position description, she spends 20% of her time acting as a full-line supervisor. Badrov testified that Lipinski could spend more or less time supervising than that stated on her position description. However, Badrov could not state with greater specificity how much time Lipinski actually spends on such duties. Lipinski’s job description also states that she spends 20% of her time acting as chief legal advisor to the General Counsel and the Deputy General Counsel.

a. Managerial authority

Lipinski has signature authority for Badrov on certain expenditure voucher forms, payroll time certifications, telephone bills which are reviewed to certify that the calls were made for state business, and sick leave/time-off request forms. Once Lipinski signs the documents, Badrov approves them.

As Chief ALJ, Lipinski may dictate the manner in which hearings are conducted and has the authority to shorten the hearings if she feels they are too long. She may also change the format of the ALJs' recommended decisions.

**b. Division of Child Support Services: Yvette Perez-Trevino**

The Department of Healthcare and Family Services, Division of Child Support Services ("the division"), establishes paternity administratively through voluntary acknowledgments or administrative orders, determines how legal parentage should be established when a child is born out of wedlock, refers cases to court through the division's legal representative to establish paternity when the parties are not in agreement, and enforces child support compliance through administrative or judicial proceedings.

The division is headed by Pamela Lowry, the administrator, who is responsible for the overall oversight and administration of the division's Title IV-D program, under the Social Security Act. She ensures that the State of Illinois remains in compliance with State and Federal statutes and that the department continues to operate successfully to provide services to the public.

Lowry directly oversees three deputy administrators who are each charged with different responsibilities. Lowry testified that she and the three deputy administrators are the division's "decision-making" team. Lowry and the deputy administrators decide the future direction of the program and determine how the program will achieve compliance with changing laws and regulations. In addition, Lowry and her three deputies decide which services should be cut when budgetary constraints require that services be eliminated. They also decide which services the program will continue to provide and which entities will help provide them, given the department's budgetary constraints.

Perez-Trevino is the deputy administrator for judicial or legal operations and is responsible for running the day-to-day operations of the department's legal section. She directly oversees attorneys Richard Phalen and Ralph Abt, and administrative assistant Lucy Laney. Phalen is the line supervisor for the appeals unit; Abt is a technical advisor to the appeals unit and to the field operations section.

When employees leave the division, Perez-Trevino decides whether to fill their position or whether to create a new position instead with a different title that better fits the division's

needs. Perez-Trevino consults with human resources and Lowry before making such changes, in accordance with the department's rules and personnel policies. Additional head count was allocated about a year ago based on Perez-Trevino's request.

One of Perez-Trevino's main functions is to negotiate intergovernmental agreements to govern the State's Attorneys' representation of HFS. Ordinarily, the Attorney General fulfills its constitutionally-prescribed duties to represent HFS in legal proceedings. However, the Attorney General has allocated its duties to the State's Attorney's office in thirteen counties. Perez-Trevino negotiates intergovernmental agreements for those thirteen counties in which the Attorney General has delegated its representational duties to the State's Attorney's office. Perez-Trevino spends most of her work time between January and May of each year performing these contract negotiations.

The agreements set forth practices that allow HFS to maintain compliance with federal regulations while conforming to judges' requirements and the practices of private attorneys. Specifically, the contracts delineate the number of staff members in the State's Attorney's office who are obligated to work under the respective contracts and the costs of their legal services.

Much of the contract language is boilerplate. Perez-Trevino does not draft contract language and cannot change, or add to, the language of existing provisions unless the General Counsel, the Attorney General, or Lowry ask her to do so. The General Counsel's office has rejected Perez-Trevino's proposed changes and amendments to contract language. However, Perez-Trevino did add one new provision to a contract at the Attorney General's instruction. The provision required the State's Attorneys to represent HFS in petitions for downward modification of child support. That provision was successfully included in the final contract as a result of Perez-Trevino's negotiations.

Usually, Perez-Trevino negotiates only billing and payment portions of the contract, those provisions which concern contractors' services and duties. Each month, Perez-Trevino and Lowry meet to discuss elements of the State's Attorney contract. Lowry provides Perez-Trevino with budgetary guidelines and tells her the desired outcome of the negotiations. Perez-Trevino must negotiate the contract within those guidelines and cannot vary from them without approval. However, as a non-attorney, Lowry is reliant on Perez-Trevino's judgment in legal matters. Each year, Perez-Trevino renegotiates the price of procuring the State's Attorney's legal services

using her judgment and a nuanced approach to ensure the department obtains the right services for the right price, depending on the department's needs and case load.

Once a contract is completed, it must go through the procurement process as required by Illinois law. The contract must also be signed and approved by the Attorney General's office and the department's director. None of Perez-Trevino's contracts have ever been rejected or sent back to her for revision.

Perez-Trevino also acts as the liaison between the department and the legal communities around the state. In that capacity, she explains the department's administration of federal and state statutes, rules and regulations to judges and advocates. Through these legal explanations, she ensures that the State's Attorney's office fulfills its contractual obligations and that the judiciary follows the department policies and complies with state and federal statutes.

For example, in one case, a judge intended to find the Department in contempt because HFS would not pay for genetic testing of certain children. Perez-Trevino explained that the Department was legally precluded from funding testing for those children at issue while the statutes permitted HFS to fund genetic testing of other children. In another case, an assistant states attorney misinterpreted the law, refused to represent the department in downward medication petitions, and interrupted the department's case flow as a result. Perez-Trevino spoke with the states attorney and told him he was required to follow the Department's policy or be in breach of the intergovernmental contractual agreement. The assistant state's attorney ultimately complied with the contract.

## 2. Department of Public Health, Division of Legal Services

### 1. Division of Legal Services: Allan Abinoja

Allan Abinoja is Deputy General Counsel of the Illinois Department of Public Health (DPH). He reports directly to General Counsel Jason Boltz and oversees four attorneys who litigate cases in the department's two offices, the Office of Healthcare Regulation and the Office of Health Protection.<sup>9</sup> Abinoja assigns work to his subordinates and provides general overall supervision in their litigation responsibilities. He has the authority to assign them work and to review the work they produce. However, Abinoja does not spend much time reviewing his

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<sup>9</sup> Two of those subordinates are in Chicago while the other two are in Springfield. Abinoja has administrative oversight over the Springfield attorneys.

subordinates' work because they are experienced attorneys. Instead, Abinoja primarily represents the department in litigation, as his subordinates do.

In addition, Abinoja helps draft rules to implement the Nursing Home Care Act, Senate Bill 326. Abinoja's work on the rules is considered a significant assignment. He is part of a team put together by the deputy director for the Office of Healthcare Regulation (OHR) which includes the deputy director for the OHR, a division chief of the OHR, and Teresa Garate, Assistant Director for DPH. Abinoja reviews the deputy director's and the assistant director's proposals on the rules and gives them feedback on legal language. Once the rules are completed, they must be revised, submitted to the long-term care advisory board, then submitted to the Joint Committee on Administrative Rules (JCAR), posted for comment and then resubmitted to JCAR before they are finalized.

Further, Abinoja has advised Garate on an Office of the Executive Inspector General (OEIG) investigation into a personnel matter. Specifically, OEIG issued a recommendation concerning the discipline of a contractor. Garate was unsure as to whether HFS should follow the OEIG's recommendation. Garate chose to disregard the OEIG's recommendation after receiving legal counsel on the matter from Allan Abinoja and Jason Boltz.

Abinoja's position is exempt from the Personnel Code's merit and fitness requirements under Section 4d(3) of the Code and it is also exempt from the U.S Supreme Court's ruling in Rutan v. Republican Party of Ill., 497 US 62 (1990). Employees exempt from the Personnel Code's merit and fitness requirements under Section 4d(3) and exempt from Rutan are considered to be completely at will and may be dismissed from their positions for any non-discriminatory reason. They are also hired outside the grading, examining, appointment and selection rules set forth in the Personnel Code. There is currently no language found in the state's Master Agreement to address the work status of a 4d(3) exempt employee or an individual working under a term appointment. Unions represent some state employees in positions that are exempt from other provisions of the Personnel Code. They also represent employees who are Rutan-exempt.

### 3. Pollution Control Board

#### 1. Kathleen Crowley

The Pollution Control Board (PCB) operates under the Illinois Environmental Protection Act, 415 ILCS 5/5 (2008). It is a statutorily created agency with quasi-legislative and quasi-judicial duties.

The PCB has five board members. Each board member has one attorney assistant. Kathleen Crowley is attorney assistant to board member Carrie Zalewski. Crowley spends more than 50% of her time acting as an attorney assistant.<sup>10</sup> When acting as an attorney assistant, Crowley performs largely the same functions as the four other attorney assistants who are classified in the job title PSA Option 8L and who were certified by the board into the RC-10 bargaining unit in Case No. S-RC-10-196. Currently pending judicial review. Dep't of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., No. 4-11-0877 (Ill. App. Ct., 4th Dist.)

In addition, Crowley oversees the PCB's clerk's office and the legal unit of the PCB. She answers staff members' legal questions concerning the filing of appeals with the appellate court and also acts as a senior legal advisor to the various board members.

Crowley's position is exempt from the merit and fitness requirements of the Personnel Code by section 4d(3) of the Code and it is also exempt from the U.S. Supreme Court's decision in Rutan v. Republican Party of Ill., 497 US 62 (1990).

## V. Discussion and Analysis

### 1. Confidential exclusion

The Employer argues that Kathleen McGinty, Kyong Lee, Kiran Mehta, Allan Abinoja and Kathleen Crowley are confidential employees.

Confidential employees are excluded from the definition of "public employee" under the Act. The Act defines a confidential employee as one "who in the regular course of his or her duties, assists and acts in a confidential capacity to persons who formulate, determine and effectuate management policies with regard to labor relations or who in the regular course of his or her duties has authorized access to information relating to the effectuation or review of the employer's collective bargaining policies." 5 ILCS 315/3(c).

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<sup>10</sup> This function is not reflected in Crowley's job description.

By this definition, the Act sets forth two tests to determine whether an employee is subject to the confidential exclusion, (1) the labor nexus test and (2) the authorized access test.<sup>11</sup> An employee is deemed confidential under the labor nexus test if, in the regular course of his duties, he assists, in a confidential capacity, a person who formulates, determines, and effectuates management policies regarding labor relations. Chief Judge of the Circuit Court of Cook County v. Am. Fed'n of State, County and Mun. Empl., Council 31, 153 Ill. 2d 508, 523 (1992). The person assisted must perform all three functions. Id.

In contrast, an individual is deemed confidential under the authorized access test if he or she "ha[s] authorized access to information concerning matters specifically related to the collective-bargaining process between labor and management." Chief Judge of the Circuit Court of Cook County, 153 Ill. 2d at 523. In other words, the employee must have access to information which concerns ongoing or future collective bargaining negotiations and strategy; mere access to otherwise "confidential" information, including statistical information, personnel data or matters concerning the inner workings of the department, is insufficient to confer confidential status even if the employer bases its labor relations policy on such information. City of Evanston v. State Labor Rel. Bd., 227 Ill. App. 3d 955, 978 (1st Dist. 1992); Chief Judge of the Circuit Court of Cook County v. Am. Fed. of State, County and Mun. Empl., Council 31, 218 Ill. App. 3d 682, 699 (1st Dist. 1991); Niles Twp. H.S. Dist. 219, Cook County v. Ill. Educ. Labor Rel. Bd., 387 Ill. App. 3d 58, 71 (1st Dist. 2008)(applying similar provisions of the Illinois Educations Labor Relations Act, 115 ILCS 5 (2010)); Bd. of Educ. of Comm. Consolidated High School Dist. No. 230, Cook County v. Ill. Educ. Labor Rel. Bd., 165 Ill. App. 3d 41, 61 (4th Dist. 1987); Cf., Dep't of Cent. Mgmt Serv. v. Ill. Labor Rel. Bd., 2011 IL App (4th) 090966 ¶ 168-169 (employee's authorized access to information that might be used by the Employer in collective bargaining, including financial data and the Governor's nonpublic budget proposals, conferred confidential status; court noted that specific knowledge of collective bargaining strategy was not required).

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<sup>11</sup> The Board has also developed the "reasonable expectations" test, which applies only when a collective bargaining unit is not yet in place; it is satisfied where the employees at issue are expected to assume confidential responsibilities once the unit is established. Chief Judge of the Circuit Court of Cook County v. Am. Fed. Of State, County and Mun. Empl., 153 Ill. 2d 508, 528 (Ill. 1992); see also, Wilmette v. Educ. Labor Rel. Bd., 366 Ill. App. 3d 830, 837 (1st Dist. 2008). Since a unit was already established in the case at bar, the employees' duties are not speculative and this test does not apply. Wilmette, 366 Ill. App. 3d at 837.

i. Kathleen McGinty (OIG of HFS)

McGinty is a confidential employee under the authorized access test because she had, and maintains, unfettered access to the employer's collective bargaining strategies and bargaining-related information in the regular course of her duties.

As a preliminary matter, McGinty's access to confidential collective bargaining information, between 2008 and July 2009 is not in dispute. During that time, McGinty attended contract negotiations, sat on the Employer's side of the table, had access to management's bargaining proposals before they were given to the union, caucused with the Employer in meetings where the Employer developed its bargaining strategy, engaged in discussions regarding contract language, and had general access to all of the Employer's negotiation-related information and discussions which were mostly not available to the Union.

Further, the weight of the evidence demonstrates that McGinty's access to the employer's collective bargaining strategies, and other confidential bargaining information, was never limited or revoked in July 2009 when the Inspector General instructed McGinty not to attend contract negotiations due to her personality conflicts with some INA negotiators. First, no witness testified that the Inspector General's instruction required McGinty to end all participation in the collective bargaining process. Indeed, Shawgo was never informed that she should refrain from discussing bargaining strategy with McGinty. Likewise, Weathers was never informed that McGinty was relieved of her duties with respect to the contract. Rather, both understood that McGinty was merely instructed to step away from the table and refrain from engaging in direct negotiation.

While McGinty testified that she did not participate in the collective bargaining process at all after July 2009, other testimony that demonstrates McGinty was still part of management's team and had authorized access to confidential information, though she no longer attended negotiations or made decisions concerning those negotiations. For example, Weathers testified that he had phone calls with McGinty concerning negotiations after July 2009. In addition, Shawgo testified that even after July 2009, she never restricted McGinty's access to management's bargaining strategy, continued to discuss management's proposals with McGinty, updated McGinty on bargaining matters, and shared information with her that was not shared with those outside the process. Moreover, both Shawgo and Weathers testified generally that

McGinty's collaboration with management continued through to the end of collective bargaining. Indeed, Weathers stated that the employer could not have finished the contract without McGinty's participation.

In addition, McGinty is a confidential employee under the labor nexus test because she acquired advance knowledge of the Employer's bargaining positions when she assisted Shawgo and Weathers<sup>12</sup> by offering them input on the Employer's bargaining strategies and by formulating some of the Employer's collective bargaining proposals. Specifically, McGinty was exhaustively involved in discussions concerning the Employer's strategy on wage negotiations. Not only did McGinty provide Shawgo with management's "wish list" concerning wages, she also drafted the Employer's wage proposals. In addition, McGinty voiced her specific desires concerning the contract provision on employee oversight--informed by her exclusive knowledge of HFS employees--and drafted the Employer's counterproposal on professionalism. Thus, McGinty assistance to Shawgo and Weathers warrants confidential status under the Act.

The Union concedes that McGinty's above-referenced participation in contract negotiations and access to confidential bargaining-related information would "most likely" render her a confidential employee. Yet, the Union argues that McGinty's participation cannot support confidential status because it occurred prior to the date on which the Union filed its petition, on December 24, 2009.

Contrary to the Union's contention, the relevant inquiry in this case is whether McGinty performed her confidential functions in the regular course of her duties. While the Board usually assesses an employee's duties as of the date the petition is filed, courts have held that an employee's infrequent and sporadic performance of confidential duties is sufficient to support his exclusion from the bargaining unit as long as he performs them in the "regular course" of his duties. Niles Tp. High School Dist. 219, 387 Ill. App. 3d at 71 (interpreting identical language in the IELRA); See also, Bd. of Educ. of Plainfield Comm. Consolidated School Dist. No. 202 v. Ill. Educ. Labor Rel. Bd. ("Plainfield"), 143 Ill. App. 3d 898, 911 (1986). Accordingly, the fact that McGinty performed her confidential functions a few months prior to the date of the petition merely reflects the cyclical and intermittent character of most contract negotiation-related

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<sup>12</sup> There is no dispute that these individuals are responsible for formulating, determining and effectuating labor relations policies.

duties.<sup>13</sup> It does not suggest, as the Union argues, that McGinty is no longer responsible for performing such duties at all. Indeed, the evidence demonstrates that McGinty retained confidential responsibilities even after the Inspector General directed her to stop attending negotiations because there is no indication that he terminated McGinty's access to confidential information and severed her collaboration with management's team. Moreover, there is no evidence that the Inspector General permanently removed McGinty's negotiating functions.<sup>14</sup>

Thus, McGinty must be excluded from the unit as a confidential employee because she assisted the Employer's collective bargaining agents in a confidential capacity and likewise retained authorization to access confidential collective bargaining information in the regular course of her duties.

ii. Kyong Lee and Kiran Mehta (OGC of HFS)

Lee and Mehta are not confidential employees under the authorized access test by virtue of their duties as FOIA officers. As noted above, mere access to "confidential" personnel or statistical information is insufficient to confer confidential status; instead, the employees must have access to information which concerns ongoing or future collective bargaining negotiations and strategy rather than general, although otherwise confidential, department administration materials. Niles Tp. High School Dist. 219, Cook County v. Illinois, 387 Ill. App. 3d at 71; City of Evanston, 227 Ill. App. 3d at 978; Bd. of Educ. of Comm. Consolidated High School Dist. No. 230, Cook County, 165 Ill. App. 3d at 61; Chief Judge of the Circuit Court of Cook County, 218 Ill. App. 3d at 699; Cf. Dep't of Cent. Mgmt Serv. v. Ill. Labor Rel. Bd., 2011 IL App (4th) 090966 ¶ 168-169 (employee's authorized access to information that might be used in collective bargaining including financial data and the Governor's nonpublic budget proposals conferred confidential status; court noted that knowledge of collective bargaining strategy was not required).

The Board, applying these precedents, has held that an employee's duties as FOIA officer are insufficient to confer confidential status. State of Ill., Dep't of Cent. Mgmt Serv., 28 PERI ¶ 50 (IL LRB-SP 2011); State of Ill., Dep't of Cent. Mgmt Serv., 26 PERI ¶ 83 (IL LRB-SP 2010).

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<sup>13</sup> The PSA's contract is renegotiated only every three years.

<sup>14</sup> Notably, the fact that McGinty was removed from negotiations as a result of personality conflicts suggests that those duties will be reinstated when INA's negotiators change.

Accordingly, Lee and Mehta's FOIA duties do not render them confidential employees under the Act.

More specifically, there is no evidence in the record that Lee and Mehta, as FOIA officers, have authorized access to confidential information that is directly related to the collective-bargaining process. Though the Union has made FOIA request to HFS in the past, FOIA explicitly exempts the disclosure of "records relating to collective negotiating matters between public bodies and their employees or representatives." 5 ILCS 140/7(p) (2010). Accordingly, any requests for such information would be summarily rejected without review of the documents themselves and, as such, Lee's and Mehta's access to such information cannot be inferred from their status as FOIA officers.

Thus, Lee and Mehta are not confidential employees under the Act because they do not have authorized access to confidential information related to collective bargaining.

iii. Allan Abinoja

The Employer asserts that Abinoja is confidential under the authorized access test because he was granted access to materials concerning the disciplinary investigation of a contractor, conducted by the Office of the Executive Inspector General (OEIG).

Abinoja is not a confidential employee based on this single incident of authorized access to the OEIG's investigatory materials. As a preliminary matter, Abinoja did not have access to matters related to collective bargaining because the individual under investigation was a contractor, not a bargaining unit member. Further, Abinoja's hypothetical future access to similar information concerning bargaining unit members cannot support his exclusion because access to such information does not confer confidential status under the Act, though it may be generally deemed confidential in nature. Niles Twp. H.S. Dist. 219, 387 Ill. App. 3d at 71; City of Evanston, 227 Ill. App. 3d at 978; Bd. of Educ. of Comm. Consolidated High School Dist. No. 230, Cook County, 165 Ill. App. 3d at 61; Chief Judge of the Circuit Court of Cook County, 218 Ill. App. 3d at 699. Indeed, the Board has held that even those employees who routinely and actively conduct investigations into bargaining unit members should not be excluded as confidential on that basis. City of Chicago, 26 PERI ¶ 114 (IL LRB-LP 2010) (employees in the Inspector General's Office with access to disciplinary and pre-disciplinary investigatory materials were not found to be confidential); see also, State of Ill. Dep't of Cent. Mgmt Serv (Dep't of

Corrections), 24 PERI ¶ 33 (IL SLRB 2008); City of Chicago, 2 PERI ¶ 3017 (IL LLRB 1986). Thus, Abinoja is not a confidential employee based on his authorized access to the OEIG's investigatory materials in the instance cited by the Employer.

iv. Kathleen Crowley

The Employer states generally that Crowley should be deemed confidential based on her job duties, but makes no specific arguments for exclusion on that basis.

Crowley is not confidential under the Act because she performs largely the same duties as the other attorney assistants who were certified by the Board in Case No. S-RC-10-196 and who were deemed public employees under the Act. Further, the additional duties that only Crowley performs—oversight of the clerk's office and the legal section, and service as senior legal advisor to board members—do not implicate confidential status under either the authorized access or the labor nexus tests.

2. Supervisory exclusion

The Employer asserts that Ryan Lipinski and Kyong Lee are supervisors within the meaning of Section 3(r) of the Act. Under that section, employees are supervisors if they: (1) perform principal work substantially different from that of their subordinates; (2) possess authority in the interest of the Employer to perform one or more of the 11 indicia of supervisory authority enumerated in the Act; (3) consistently exercise independent judgment in exercising supervisory authority; and (4) devote a preponderance of their employment time to exercising that authority. City of Freeport v. Illinois State Labor Rel. Bd., 135 Ill. 2d 499, 512, 554 N.E.2d 155, 162 (1990); Vill. of Justice, 17 PERI ¶ 2007 (IL SLRB 2000); Vill. of New Lenox, 23 PERI ¶ 104 (IL LRB-SP 2007); Vill. of Bolingbrook, 19 PERI ¶ 125 (IL LRB-SP 2003).

a. The Principal Work Requirement

As a threshold matter, petitioned-for employees may be deemed supervisors under the Act only if their principal work is substantially different from that of their subordinates. City of Freeport, 135 Ill. 2d 499, 554 N.E.2d 155; Vill. of Elk Grove Vill. v. ISLRB, 245 Ill. App. 3d 109, 613 N.E.2d 31 (2nd Dist. 1993); County of McHenry, 15 PERI ¶ 2014 (IL SLRB 1999); Northwest Mosquito Abatement Dist., 13 PERI ¶ 2042 (IL SLRB 1997), aff'd sub nom.,

Northwest Mosquito Abatement Dist. v. ISLRB, 303 Ill. App. 3d 735, 708 N.E.2d 548, 15 PERI ¶ 4007 (1st Dist. 1999); Vill. of Glen Carbon, 8 PERI ¶ 2026 (IL SLRB 1992). The initial consideration is whether the work of the employees in each of the disputed positions is "obviously and visibly" different from that of their subordinates. City of Freeport, 135 Ill. 2d at 511. If it is, then the principal work requirement is satisfied. If the work is not obviously and visibly different, that is, if it is facially similar to the work of their subordinates, then the determinative factor in such an inquiry is whether the "nature and essence" of the alleged supervisor's functions is very different from that of his subordinates. Id.

a. Supervisory Indicia, Independent Judgment and Need for Specific Examples

In addition to meeting the principal work requirement, the petitioned-for employees must exercise authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, discipline employees, adjust grievances, or effectively recommend any such action; they must also consistently use independent judgment in performing or recommending any of these functions. Chief Judge of the Circuit Court of Cook County v. Am. Fed. of State, County and Mun. Empl., Council 31, 153 Ill. 2d 508, 9 PERI ¶ 4004 (1992); City of Freeport, 135 Ill. 2d 499 (1990); County of McHenry, 15 PERI ¶2014 (IL SLRB 1999); Northwest Mosquito Abatement Dist., 13 PERI ¶2042 (IL SLRB 1997); Vill. of Glen Carbon, 8 PERI ¶ 2026 (IL SLRB 1992).

Independent judgment requires an employee to make a choice between two or more significant courses of action without significant review of the decision by the employee's superiors. Metro. Alliance of Police, 362 Ill. App. 3d 469, 477-78 (2nd Dist. 2005). The choices cannot be merely routine or clerical in nature, nor can they be made merely on the basis of the alleged supervisor's superior skill, experience, or knowledge. City of Freeport, 135 Ill. 2d at 531-32. However, the Board has held that an employee's decisions concerning legal matters can, under certain specific circumstances, require the exercise of independent judgment. Dep't of Cent. Mgmt Serv. (Dep't of Human Serv.), 28 PERI ¶ 16 (IL LRB-SP 2011).

Whether the Employer must provide specific examples to illustrate such independent judgment is a matter in dispute among the districts of the Illinois Appellate Court. On the one hand, the Fourth and Fifth Districts have held that the Employer is not required to provide evidence of specific instances in which petitioned-for employees exercise their supervisory

authority; rather, a written policy or job description conferring such authority is sufficient for the Employer to meet its burden. Vill. of Maryville v. Ill. Labor Rel. Bd., 402 Ill. App. 3d 369, 932 N.E.2d 558, 342 (5th Dist. 2010); Ill. Dep't of Cent. Mgmt. Servs. v. Illinois Labor Rel. Bd., State Panel, 2011 IL App 4th 090966. On the other hand, the First and Third districts do require the Employer to prove by example that employees exercise their granted authority. Vill. of Broadview v. Ill. Labor Rel. Bd., 402 Ill. App. 3d 503, 508, 932 N.E.2d 25, 32 (1st Dist. 2010) (finding job descriptions alone and the theoretical possibility that a petitioned-for employee might otherwise discipline, reward, or adjust grievances was insufficient to meet the Village's burden of proof); City of Peru, 167 Ill. App. 3d 284, 291 (3d Dist. 1988) (holding job descriptions alone insufficient to prove supervisory authority); Ill. Dep't of Cent. Mgmt. Servs. v. Illinois Labor Rel. Bd., State Panel, 382 Ill. App. 3d 208, 228-29 (4th Dist. 2008) (despite job descriptions purporting to vest employees with supervisory authority, Board could reasonably conclude that employees were not supervisors because they had never exercised supervisory authority "in practice").

Applying the approach of the First and Third District Appellate Courts, I find that the Employer is required to provide specific examples of petitioned-for employees' supervisory authority because job descriptions, departmental policy and general orders do not describe the "means and methods by which [an employee's] duties are accomplished on a daily basis." N. Ill. Univ. (Dep't of Safety), 17 PERI ¶ 2005 (IL LRB-SP 2000). Accordingly, such evidence does not permit the Board to ascertain whether the petitioned-for employee uses his independent judgment in performing the task. Instead, this documentation generally describes the duties of employees in legally conclusive terms and is consequently the "least helpful" type of evidence in representation hearings.<sup>15</sup> N. Ill. Univ. (Dep't of Safety), 17 PERI ¶ 2005 (IL SLRB 2000); see also Quadcom Communications, 12 PERI ¶ 2017 (IL SLRB 1996), aff'd by unpub. order, Nos. 2-96-0479, 2-96-0728 (Ill. App. Ct., 2nd Dist., 1997), see also State of Ill., Dep't of Cent. Mgmt. Serv. (Dep't of Transportation), 28 PERI ¶ 20 (IL LRB-SP 2011) (instances of actual performance of tasks is strong evidence of authority to perform those tasks).

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<sup>15</sup>For instance, Kathleen Crowley's job description does not list her primary and most substantial duty which is to serve as attorney assistant to a Pollution Control Board member.

a. Preponderance requirement

Finally, petitioned-for employees are deemed supervisory only if they spend the preponderance of their work time performing supervisory functions. To satisfy this test, employees must spend more time on supervisory functions than on any one nonsupervisory function. Dep't of Cent. Mgmt. Serv. v. Ill. State Labor Rel. Bd., 278 Ill. App. 3d 79, 83-85 (4th Dist. 1996); State of Illinois, Dep't of Cent. Mgmt Serv., (EPA, DPH, DHS, DCEA), 26 PERI ¶ 155 (IL LRB-SP 2011), appeal pending, No. 4-11-0638 (Ill. App. Ct. 4th Dist.). The Employer must demonstrate such allotments of time by setting forth the employees' day-to-day activities, as documented by specific facts in the record. State of Illinois, Dep't of Cent. Mgmt Serv., (EPA, DPH, DHS, DCEA), 26 PERI ¶ 155 (IL LRB-SP 2011) (citing, Stephenson County Circuit Court, 25 PERI ¶ 92 (IL LRB-SP 2009)); Vill. of Bolingbrook, 19 PERI ¶ 125 (IL LRB-SP 2003).

i. Ryan Lipinski (OGC of HFS)

Ryan Lipinski satisfies the principal work requirement because she performs work that substantially different from that of her subordinates: unlike her subordinates, Lipinski does not usually hold hearings and write recommended decisions; she instead reviews her subordinate ALJs' work for legal sufficiency, acts as chief legal counsel to the Deputy General Counsel and the General Counsel, completes her subordinates' performance evaluations and assigns work to her subordinates.

1. Direction

Lipinski exercises the supervisory authority to direct when she completes her subordinates' performance evaluations and when she assigns work.

The term direct encompasses several distinct but related functions: giving job assignments, overseeing and reviewing daily work activities, providing instruction and assistance to subordinates, scheduling work hours, approving time off and overtime and formally evaluating job performance when the evaluation is used to affect the employees' pay or employment status. Chief Judge of the Circuit Court of Cook County, 19 PERI ¶ 123 (IL SLRB 2003); County of Cook, 16 PERI ¶ 3009 (IL LLRB 1999) County of Cook, 15 PERI ¶ 3022 (IL LLRB 1999), aff'd by unpub. order, No. 1-99-1183 (Ill. App. Ct., 1<sup>st</sup> Dist., 1999); City of Naperville, 8 PERI ¶ 2016 (IL SLRB 1992). To constitute supervisory authority to direct within the meaning of the Act,

the petitioned-for employees' responsibility for their subordinates' proper work performance must also involve significant discretionary authority to affect the subordinates' terms and conditions of employment. State of Illinois, Dep't of Cent. Mgmt. Serv., 25 PERI ¶ 186 (IL LRB-SP 2009).

Here, Lipinski has complete discretion in filling out the evaluations, which are based on her assessment of her subordinates' work. Moreover, these evaluations may affect employees' terms and conditions of employment because an employee who receives a majority of low scores may not receive a step increase. See, City of Naperville, 8 PERI ¶ 2016 (IL SLRB 1992) (supervisory authority found where evaluations affected merit raises); see also, Illinois Secretary of State, 28 PERI ¶ 68 (IL LRB-SP 2011) (similar authority to deprive employees of pay increases deemed supervisory in nature, although analyzed under indicium of reward). The fact that Lipinski "may" sometimes complete the evaluations in conjunction with Lee does not undercut her independent judgment because there is no evidence that Lee and Lipinski always complete the evaluations together.

In addition, Lipinski directs with independent judgment when she assigns cases to particular attorneys. While the office has a case management system which distributes most work automatically to Lipinski's direct subordinates, Lipinski has overridden the system on occasion and has assigned certain cases to the attorney most suited to the job. For example, Lipinski specially assigned a property liens case to Bill Kurylak. In doing so, Lipinski considered the nature of the case and, by implication, the skills of the attorney to whom she made the assignment. County of Cook, 15 PERI ¶ 3022 (IL LLRB 1999) (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 subordinates' relative levels of skill and experience and the employer's operational needs"). While Lipinski conferred with Lee on that assignment, such consultation does not preclude a finding that Lipinski exercised her independent judgment in making that decision or in making other similar ones. See, State of Illinois, Dep't of Cent. Mgmt. Serv., 25 PERI ¶ 184, FN 10 (IL LRB-SP 2009). Accordingly, Lipinski exercises the supervisory authority to direct when she assigns work to her subordinates, outside of the case management system.

Contrary to the Employer's contention, Lipinski does not exercise the supervisory authority to direct when she reviews her subordinates' work because although she has an

obligation to correct her subordinates' faulty legal analysis, there is no evidence in the record that she has actually done so or, indeed, that her review constitutes direction. As a preliminary matter, the Courts have held that independent judgment requires more than just the exercise of superior skill and knowledge. City of Freeport, 135 Ill. 2d at 531-32. However the Board has clarified that an individual performing technical legal work may exercise independent judgment in decision-making even if such choices are *also* informed by his superior skill and knowledge. Dep't of Cent. Mgmt Serv. (Dep't of Human Serv.), 28 PERI ¶ 16 (IL LRB-SP 2011). For example, the Board has held that a chief hearing officer's review of subordinate hearing officers' decisions required the consistent exercise of independent judgment where the chief hearing officer had the authority to substantively change his subordinates' decisions. Id.

However, the Board does not automatically consider such review as evidence of supervisory direction even if the alleged supervisor makes a choice between two significant courses of action. Instead, the Board also addresses the manner in which those changes are communicated to the subordinate: where an employee makes extensive changes to a subordinate's work which are intended to serve an instructive purpose, the employee's review of his subordinates' work constitutes direction under the Act. Id. (chief hearing officer's review of subordinates' work constituted direction where chief hearing officer substantially changed the draft decision, did not simply make the corrections himself but sent it back to the subordinate for correction and instructed the subordinate to compare the initial draft with his improved version to improve future performance); see also State of Illinois, Secretary of State, 28 PERI ¶ 68 (IL LRB-SP 2011) (supervisor is required to be actively involved in checking, correcting and giving instructions to subordinates); City of Chicago, 10 PERI ¶ 3017 (IL LLRB 1994); City of Lincoln, 4 PERI ¶ 2041 (IL SLRB 1988); County of Cook and Sheriff of Cook County (Dep't of Corrections), 15 PERI ¶ 3022 (IL LLRB 1999), aff'd by unpub. order, 16 PERI ¶ 4004 (1999).

In this case, there is no evidence that Lipinski has ever revised her subordinates' work for an instructive purpose, that she returns her subordinate ALJs' drafts, or indeed that she has made any changes to the ALJs' work at all. Accordingly, Lipinski's review of her subordinates' work is not evidence of the supervisory authority to direct.

In addition, Lipinski does not direct with independent judgment when she grants time off because her decisions are routine and clerical in nature, based on whether the employee has the available benefit time. City of Freeport, 135 Ill.2d at 531 (routine or clerical decisions do not require the exercise of independent judgment).

Further, Lipinski does not effectively recommend on matters concerning her subordinates' flextime schedules because there is no evidence in the record as to whether she has any control over the Employer's final decision. State of Illinois, Dep't of Cent. Mgmt. Serv., (Environmental Protection Agency, Dep't of Public Health, Dep't of Human Services, Dep't of Commerce and Econ. Activity), 26 PERI ¶ 155 (IL LRB-SP 2011) (Board considered whether employee possessed sufficient control over the department's policies or decisions in determining whether the Act's exclusion applied); Cf. City of Peru v. ISLRB, 167 Ill. App. 3d 284, 290 (3rd Dist. 1988) and Peoria Housing Authority, 10 PERI ¶ 2020 (IL SLRB 1994), aff'd by unpub. order, docket No. 3-90317 (3rd Dist. 1995) (finding that effect recommendations are those adopted by the alleged supervisor's superiors as a matter of course with very little, if any, independent review).

Finally, Lipinski does not possess the authority to grant her subordinates overtime. Though the Employer's witness testified that Lipinski does possess the authority to do so, the fact that Lipinski did not know of that purported authority and has never granted overtime is strong evidence to the contrary. County of Cook, Sheriff of Cook County, 26 PERI ¶ 92 (IL LRB-LP ALJ 2010) (ALJ considered employee's own knowledge of his authority in determining supervisory status).

## 2. Discipline and adjustment of grievances

Lipinski does not discipline or adjust grievances with the requisite supervisory authority under the Act. While the Employer asserts Lipinski has authority to discipline her subordinates and hold pre-disciplinary hearings, there is no evidence in the record that she has ever done so. Further, contrary to the Employer's contention, the mere fact that Lipinski is designated to be the first step in the grievance process is insufficient to confer supervisory status where there is no evidence in the record that Lipinski possesses the authority to provide substantive relief against the employer's pecuniary interests. See, State of Illinois, Dep't of Cent. Mgmt. Servs., (Dep't of Cent. Mgmt. Servs., Dep't of Public Health, and Pollution Control Board), 26 PERI ¶ 113 (IL

LRB-SP 2010) (designation as first step in grievance process is insufficient to confer supervisory status).

### 3. Preponderance Requirement

Finally, though Lipinski directs her subordinates with the requisite independent judgment when she evaluates them and when she assigns work, Lipinski does not supervise within the meaning of the Act for a preponderance of her work time. Here, Lipinski spends only around 20% of her time acting as a full-line supervisor. While Badrov testified that Lipinski could spend more or less that 20% of her time engaged in supervisory functions, Lipinski's job description states that she spends 20% of her time serving as counsel to the Deputy and the General Counsels. Accordingly, absent more specific evidence on the amount of time Lipinski spends on supervision, it is impossible to discern whether Lipinski spends more time on her supervisory functions than on another non-supervisory task.

#### ii. Kyong Lee

Kyong Lee satisfies the principal work requirement because the nature and essence of his work is very different from that of his subordinates. While Lee and his subordinates both perform legal tasks, only Lee addresses weighty, non-routine, legal issues which may implicate the Office of General Counsel or HFS as a whole. In addition, Lee performs functions for his subordinates that they do not fulfill for him: he reviews their work for legal sufficiency, approves time off, assigns them work, fills out their performance evaluations, and adjusts their grievances.<sup>16</sup>

#### 1. Adjustment of grievances

Lee also satisfies the second and third prongs of the supervisory test because he adjusts grievances with the requisite independent judgment. Lee has partially granted and partially denied at least one grievance. His action on that grievance demonstrates the exercise of independent judgment because he considered evidence presented by the grievant and made credibility determinations in deciding its outcome. The fact that Lee consulted his supervisor on the matter does not alter this conclusion. State of Illinois, Dep't of Cent. Mgmt. Serv., 25 PERI

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<sup>16</sup> Whether these functions constitute supervisory authority under the Act is addressed below.

¶ 184, FN 10 (IL LRB-SP 2009) (mere consultation does not eliminate independent judgment). Likewise, it is immaterial that Terri Shawgo of Labor Relations occasionally drafts Lee's grievance responses because she did not do so in the case referenced above. Cf, Village of Broadview, 25 PERI ¶ 63 (IL LRB-SP 2009) (No independent judgment used to adjust grievances when sergeants merely signed grievances and forwarded them up the chain of command) (citing, Freeport, 135 Ill. 2d 499 (1990)). Accordingly, Lee possesses the supervisory authority to adjust his subordinates' grievances.

## 2. Direction

Though the Employer asserts that Lee directs his subordinates, the Employer has not demonstrated that Lee does so with independent judgment.

While Lee assigns work to his subordinates, the Employer has introduced no evidence of the criteria by which he assigns work and has therefore not shown Lee exercises independent judgment in making those assignments.

Likewise, while Lee has the authority to grant overtime for non-union subordinates Employer introduced no evidence as to the basis of Lee's decisions on these matters. In addition, the procedure for granting overtime for union members is set forth in the collective bargaining agreement and therefore Lee's decisions on overtime do not support a finding of independent judgment. Vill. of Morton Grove, 23 PERI ¶ 72 (IL SLRB 2007) (decisions regarding overtime and leave circumscribed by the Employer's policy are routine and clerical, not supervisory).

Similarly, Lee approves time off for his subordinates in a routine manner that requires no independent judgment, by assessing the employee's workload, determining whether the office has adequate coverage and ascertaining whether the employee has time available. See, City of Naperville, 8 PERI ¶ 2016 (IL SLRB 1992) (sergeants who determined whether to approve leave requests based on the department's staffing requirement did not exercise independent judgment).

Next, while Lee reviews his subordinates' work for legal sufficiency such review does not automatically constitute supervisory direction.<sup>17</sup> Rather, the Employer must demonstrate that the employee's review of his subordinate's work is both substantial—requiring the use of independent judgment—and instructive. In other words, it must constitute more than mere

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<sup>17</sup> See discussion, above.

monitoring and minor correction. County of Vermilion, 18 PERI ¶ 2050 (IL LRB-SP 2002); N. Ill. Univ., 17 PERI ¶ 2005 (IL LRB-SP 2000); City of Lincoln, 4 PERI ¶ 2041 (IL SLRB 1988); State of Illinois, Dep't of Cent. Mgmt. Serv., 4 PERI ¶ 2013 (IL SLRB 1988); City of Chicago, 10 PERI ¶ 3017 (IL LLRB 1994). Here, however, the Employer introduced no evidence as to the nature and extent of the review or the methods (if any) by which Lee instructs his subordinates through the review process. Accordingly, Lee's review of his subordinates' work is not evidence of supervisory authority to direct. Cf. Dep't of Cent. Mgmt Serv. (Dep't of Human Serv.), 28 PERI ¶ 16 (IL LRB-SP 2011) (finding supervisory authority where employee rewrote his subordinates' legal writing, informed his subordinates of their mistakes and instructed them on how to write the future documents in a more satisfactory manner).

Finally, Lee's evaluation of his subordinates does not demonstrate independent judgment because Lee fills out the evaluations together and in close collaboration with his own supervisor. Vill. of Broadview, 25 PERI ¶ 63 (IL SLRB 2009)<sup>18</sup> (collaborative evaluation process where each participant offered input on each employee and participants reach a consensus on rating lacked the requisite independent judgment to constitute supervisory authority) (citing County of Knox and Knox County Sheriff, 7 PERI ¶ 2002 (IL SLRB 1991)). Such collaboration is unlike "mere consultation," which preserves the employee's independent judgment, because in a joint effort, a supervisor's influence or input inevitably overrides the employee's independent judgment. See, State of Illinois, Dep't of Cent. Mgmt Serv., 25 PERI ¶ 184, FN 10 (IL LRB-SP 2009) (mere consultation with a supervisor does not undercut employee's independent judgment). Thus, Lee does not exercise the supervisory authority to direct with his evaluations even though a negative evaluation may affect employee pay.

### 3. Reward

Lee does not have the supervisory authority to effectively recommend reward; although Lee recommended that the governor grant his subordinate a salary increase, there is no evidence that Lee's recommendation was adopted since the request is still pending. See, Peoria Housing Auth., 10 PERI ¶ 2020 (IL SLRB 1994), aff'd by unpub. order, No. 3-94-0317 (Ill. App. Ct., 3d Dist., 1995) (recommendations are only effective under the Act if they are adopted as a matter of

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<sup>18</sup> The Employer appealed the Board's Broadview decision, but not the issue of promotion. The Court affirmed the Board's decision based on the issues appealed by the Employer. Vill. of Broadview v ILRB, 402 Ill. App. 3d 503, 932 N.E.2d 25, 26 PERI ¶ 66 (1st Dist. 2010).

course); see also Vill. of Glen Carbon, 8 PERI ¶ 2026 (IL SLRB 1991); City of Peru v. ISLRB, 167 Ill. App. 3d at 290 (recommendations need not be “rubber-stamped”); Vill. of Oak Brook, 26 PERI ¶ 7 (IL SLRB 2010), appeal pending, No. 2-10-0168 (Ill. App. Ct., 2nd Dist.) (The extent of review determines whether the recommendation is considered effective).

#### 4. Discipline

Similarly, though Lee has disciplined a subordinate on one occasion, the Employer did not introduce evidence as to the basis on which Lee imposed the discipline and it is accordingly impossible to discern whether Lee exercised any independent judgment in doing so.

Further, while Lee has the authority to hold pre-disciplinary hearings, he has never held any. Thus, Lee does not exercise the supervisory authority to discipline with independent judgment. Vill. of Broadview, 402 Ill. App. 3d at 508 (requiring specific examples); City of Peru, 167 Ill. App. 3d at 291; Ill. Dep’t of Cent. Mgmt. Servs., 382 Ill. App. 3d at 228-29.

#### 5. Preponderance requirement

Finally, Lee does not satisfy the preponderance requirement because he spends only around 25% of his time acting as a full-line supervisor and appears to spend most of his time addressing legal issues for HFS and the OGC. While witnesses testified that Lee may spend somewhat more or somewhat less than 25% of his time on supervisory functions, no witness provided greater specificity concerning the portion of Lee’s job duties allocated to supervision. Indeed, the Employer’s evidence does not permit the required time-comparisons because the Employer did not set forth the specific portion of Lee’s duties which are allocated to any single non-supervisory function. Contrary to the Employer’s contention, the Board cannot assume Lee spends more of his time on supervisory functions than on any one non-supervisory function merely because Badrov does not micromanage Lee’s oversight of his subordinates.

#### 3. Managerial exclusion

A managerial employee is defined as "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." 5 ILCS 315/3(j) (2010). Thus, to be deemed managerial, the employees at issue must satisfy a two-part test: 1) they must be engaged

predominantly in executive and management functions; and 2) they must exercise responsibility for directing the effectuation of such management policies and functions. Dep't of Cent. Mgmt. Servs. (Illinois Commerce Com'n) v. Ill. Labor Rel. Bd., 406 Ill. App. 3d 766 (4th Dist. 2010), (“DCMS/ICC”); County of Cook (Oak Forest Hosp.) v. Ill. Labor Rel. Bd., 351 Ill. App. 3d 379, 386, 813 N.E.2d 1107, 20 PERI ¶ 113 (1st Dist. 2004); Dep'ts of Cent. Mgmt. Servs. and Healthcare and Family Serv., 23 PERI ¶ 173 (IL LRB-SP 2007) (“INA and CMS”); State of Ill., Dep'ts of Cent. Mgmt. Serv. and Public Aid, 2 PERI ¶ 2019 (IL SLRB 1986).

Under the first prong, courts consider the nature of the duties to which the employee devotes most of his time. DCMS/ICC, 406 Ill. App. 3d at 774. Functions which amount to running an agency—establishing policies and procedures, preparing the budget, or otherwise assuring that the agency operates effectively—constitute executive and managerial functions. State of Illinois, Dep't of Cent. Mgmt Servs., 25 PERI ¶ 68 (IL LRB-SP 2009); City of Freeport, 2 PERI ¶ 2052 (IL SLRB 1986).

Under the second prong, an employee must do more than “merely perform[.] duties essential to the employer's ability to accomplish its mission.” State of Illinois, Dep't of Cent. Mgmt. Servs. (Dep't of Healthcare and Family Servs.), 388 Ill. App. 3d 319, 331 (4th Dist. 2009) citing Dep't of Cent. Mgmt. Servs., 278 Ill. App. 3d at 88. Rather, the employee “must possess the authority or responsibility to determine the specific methods or means by which the Employer's services will be provided or by which the Employer fulfills its statutory mission.” State of Illinois, Dep't of Cent. Mgmt. Servs. (Dep't of Healthcare and Family Servs.), 388 Ill. App. 3d at 331; DCMS/ICC, 406 Ill. App. 3d at 777. However, the employee need not have final authority over the employer's policy; he may be deemed managerial as long as he makes effective recommendations on such matters. DCMS/ICC, 406 Ill. App. 3d at 777; Chief Judge of the 16th Judicial Cir. v. Ill. Labor Rel. Bd., 178 Ill. 2d 333 (1997).

#### 1. Kyong Lee (OGC of HFS)

Lee is not managerial under the Act because he does not predominantly perform executive and management functions and instead primarily addresses legal issues concerning the department's programs. Further, neither Lee's legal counsel to the department nor his remaining duties rise to the level of managerial authority under the Act.

First, while Lee provides the department with legal advice on issues that “may implicate the Office of General Counsel or HFS as a whole,” the Employer has not provided specific examples or testimony to demonstrate that his advice constitutes recommendations on matters of policy or recommendations on the means by which HFS provides its services. Even if Lee’s legal advice did constitute recommendations on those matters, the Employer has not introduced evidence on the extent to which the department follows Lee’s advice and, accordingly, whether his recommendations are effective. Accordingly, Lee does not perform executive and managerial functions when he provides legal advice.

Next, the Employer argues that Lee is managerial because he helps ensure the agency operates effectively by overseeing his subordinates. While assuring that the agency operates effectively may contribute to a finding of managerial authority, here, Lee’s oversight or supervisory functions comprise only a small portion of his work time. Further, such authority cannot substitute for evidence that an employee is responsible for broadly formulating and effectuating an employer’s policies. State of Illinois, Dep’t of Cent. Mgmt Serv., 25 PERI ¶ 184 (IL LRB-SP 2009) (the fact that employees helped operate the office did not confer managerial status); see also, Cent. Mgmt. Serv. (Historical Preservation Agency), 10 PERI ¶ 2037 (IL SLRB 1994) (Board considered supervisory authority in applying managerial analysis but such authority did not provide the sole basis for managerial exclusion).

Finally, contrary to the Employer’s contention, Lee is not managerial by virtue of his FOIA duties or the purported divided loyalties allegedly fostered by those functions. The Board has held that the potential for divided loyalties arises only when the Employer has demonstrated managerial, confidential or supervisory status. Chief Judge of the Circuit Court of Cook County v. Am. Fed’n of State, County and Mun. Empl., 229 Ill. App. 3d 180, 186 (1st Dist. 1992); Illinois Secretary of State, 28 PERI ¶ 68 (IL LRB-SP 2011). There is no indication from the record that Lee’s FOIA duties implicate either confidential or managerial status and, as a result, those duties raise no conflicts of interest to support his exclusion from the unit.

## 2.Kiran Mehta (OGC of HFS)

For reasons noted directly above, the Employer’s arguments for excluding Mehta as managerial because of her FOIA duties must likewise be rejected. Notably, the Employer has

advanced no other arguments for Mehta's managerial status and there is no evidence in the record to support such additional arguments. Thus, Mehta is a public employee under the Act.

### 3. Ryan Lipinski (OGC of HFS)

Lipinski is not managerial under the Act because she does not predominantly perform managerial or executive functions and instead spends her time reviewing her subordinates' recommended decisions,<sup>19</sup> answering her subordinates' questions during hearing, addressing any legal issues that may affect the hearings and acting as chief legal counsel to the Deputy General Counsel and the General Counsel. Notably, the Employer has not provided evidence or argument that any of these functions are managerial or executive under the Act. Contrary to the Employer's contention, the presence of some indicia of supervisory authority cannot simply substitute for evidence of managerial authority because the Board must determine the application of an exclusion in accordance with the particular legislative formulas set forth in the Act. County of Vermillion v. Ill. Labor Rel. Bd., 344 Ill. App. 3d 1126, 1136 (4th Dist. 2003).

Further Lipinski's power to change the manner in which hearings are run (by shortening them) or to reformat an ALJ's decisions does not demonstrate she has the authority to formulate and effectuate broader policies concerning health care and family services. Rather, such actions constitute minor and localized operational decisions which are not evidence of managerial status. Dep't of Cent. Mgmt Serv. (Dep't of Healthcare and Family Serv.), 28 PERI ¶ 75 (IL LRB-SP 2011); see also, State of Illinois, Dep't of Cent. Mgmt. Serv., (Illinois Gaming Bd. and Illinois Dep't of Revenue), 26 PERI ¶ 149 (IL LRB-SP 2011) (casino docksite supervisors were not managerial though they had authority to create additional internal controls for their respective sites because those controls would affect only that site and not the goals of the Gaming Board as a whole); State of Illinois, Dep't of Cent. Mgmt. Serv., 25 PERI ¶ 68 (IL LRB-SP 2009) (pharmacy directors who could determine the pharmacy's hours of operation and whether to train pharmacy students were not managerial under the Act).

In addition, though Lipinski has signature authority for General Counsel Badrov on certain expenditure voucher forms, telephone bills and sick leave/time off request, such delegation relates to clerical and routine matters which likewise fail to demonstrate Lipinski possesses managerial authority or autonomy to establish departmental goals on a broad scale.

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<sup>19</sup> Notably, there was no evidence or argument to support a finding that Lipinski's review of her subordinate ALJs' decisions allows her to broadly formulate and effectuate HFS's policies.

County of Union, 20 PERI ¶ 9 (IL LRB-SP 2003) (routine duties and responsibilities do not constitute executive and management functions because such functions do not involve formulating policy nor do they require the authority and autonomy to establish departmental goals on a broad scale).

Thus, Lipinski is not managerial under the Act.

#### 4. Yvette Perez-Trevino (HFS, child support)

Perez-Trevino is managerial under the Act because she is part of HFS's decision-making team and exercises authority as the department's representative in intergovernmental contract negotiations.

First, as deputy administrator for judicial or legal operations, Perez-Trevino establishes and implements HFS policy and procedures by determining the future direction of her department: she helps determine which services should be cut, given the department's budgetary constraints. Contrary to the Union's contention, Perez-Trevino exercises managerial authority even though she makes such decisions in conjunction with Lowry, her supervisor, and the other deputy administrators. Dep't of Cent. Mgmt Serv., 2011 IL App (4th) 090966 ¶ 187 (finding that a managerial employee need not direct the effectuation of management policies and practices *independently*).

Second, Perez-Trevino performs additional executive functions demonstrative of managerial authority because she acts as the department's representative in negotiating the price for intergovernmental contracts so that HFS may obtain the services of State's Attorneys in certain counties. Authority in such negotiations is evidence of managerial status even though the employee in question must negotiate within the pre-established limits of a budget.<sup>20</sup> See, State of Ill, Dep't of Cent. Mgmt Serv. (Dep't of Comm. and Econ. Opportunity), 27 PERI ¶ 56 (IL LRB-SP 2011). Further, the fact that Perez-Trevino spends five months of the year negotiating these contracts tends to refute the Union's position that Perez-Trevino's work on these contracts is rote and lacking in discretion. Indeed, the evidence demonstrates that Perez-

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<sup>20</sup> Likewise, such authority is managerial in nature even though the General Counsel's office has rejected some of Perez-Trevino's proposed contractual changes since none of Perez-Trevino's contracts have ever been rejected entirely or even sent back to her for revision.

Trevino takes a nuanced approach to effectuate management's goal and ensure the division's continued functionality by obtaining the right services for the right price.

Finally, Perez-Trevino's responsibility for running the day-to-day operations of the department's legal section lends additional weight to the finding that she is managerial under the Act because she has effectively recommended that the department obtain additional personnel in her capacity as deputy administrator.<sup>21</sup> State of Illinois, Dep't of Cent. Mgmt Serv., 28 PERI ¶ 26 (IL LRB-SP ALJ 2011) (individuals who identify hiring needs and may choose to fill or not to fill a vacancy exercise managerial authority).

Taken together, the scope of these responsibilities encompasses a major component of HFS's mission and Perez-Trevino's performance of them shows that she is both predominantly engaged in executive/management functions and that she formulates and effectuates the department's goals. DCMS/ICC, 406 Ill. App. 3d at 774-776. State of Ill, Dep't of Cent. Mgmt Serv. (Dep't of Comm. and Econ. Opportunity), 27 PERI ¶ 56 (IL LRB-SP 2011).

#### 5.Allan Abinoja

Abinoja is not managerial under the Act because although he participates in the rule-making process which implements new legislation, he is not predominantly engaged in managerial or executive functions and he does not make effective recommendations on rules formulated by his superiors.

As a preliminary matter, while Abinoja's participation in rule-making undisputedly constitutes a significant task, the Employer has not introduced evidence as to the actual amount of time Abinoja spends on such functions. Indeed, both testimony and documentary evidence demonstrate that Abinoja spends the largest portion of his work time litigating cases and providing legal counsel to the department, not performing managerial functions.

The Employer argues that Abinoja's oversight of his subordinates should be weighed in this analysis. While the Board has sometimes considered an employee's oversight of subordinates in determining managerial authority, it has also rejected that approach. Dep't of Cent. Mgmt. Serv. (Historical Preservation Agency), 10 PERI ¶ 2037 (IL SLRB 1994)(Site Managers' and Site Superintendents' oversight of subordinates considered in managerial analysis

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<sup>21</sup> Contrary to the Employer's contention, Perez-Trevino's responsibilities as liaison to the legal community do not constitute managerial authority because Perez-Trevino merely uses her legal skills to explain existing law to attorneys and judges.

where petitioned-for employees could also change, replace, or discontinue programs or events offered at their sites without approval of their superiors and allocate site resources or personnel to best fulfill the agency's goals); but see, State of Illinois, Dep't of Cent. Mgmt. Serv., 25 PERI ¶ 68 (IL LRB-SP 2009) (employee's direct administrative oversight for various pharmacy operations located in Springfield were deemed irrelevant to level of authority to broadly effect the organization's purposes or its means of effectuating them). In this case, it is unnecessary to determine which approach to apply because Abinoja's administrative oversight of subordinates is minimal--his subordinates are seasoned attorneys who need little direction. Accordingly, the Employer has not met its burden to show that Abinoja is predominantly engaged in managerial or executive functions.

Further, even if Abinoja spent most of his time on rule-making, the quality of his participation does not constitute managerial authority under the Act because Abinoja's recommendations on rule language are not effective. Here, Abinoja gives the OHR deputy director and assistant director feedback on the legal language of the rules they propose, but the record does not demonstrate that they accept his advice and incorporate it into their draft. Even if the Employer had shown that Abinoja's superiors followed his advice, the Employer has not demonstrated that the substance of Abinoja's advice was preserved in the final draft through the subsequent process of rule revision and editing. Accordingly, the Employer has not demonstrated that Abinoja's recommendations are effective and indicative of managerial authority.

#### 4. Effect of Personnel Code and Rutan exemptions on exclusions: Allan Abinoja and Kathleen Crowley

The Employer argues that Abinoja and Crowley should be deemed managerial or confidential employees as a matter of law because they are exempt from the Personnel Code's merit and fitness requirements under Section 4d(3) of the Code, 20 ILCS 415/4d(3), and because they are exempt from the Supreme Court's ruling in Rutan.

However, the Board has repeatedly found no merit to such arguments. State of Ill., Dep't of Cent. Mgmt Serv., 28 PERI ¶ 50 (IL LRB-SP 2011); State of Ill, Dept of Cent.Mgmt Serv., (EPA, DPH, DHS, DCEA), 26 PERI ¶ 155 (IL LRB-SP 2011) (holding that exemption from the

Personnel Code by section 4d(3) is not contained in the act as an exclusion and that, as such, suggests that the General Assembly created, within the Act itself, all the exceptions it intended to create); State of Ill., Dep't of Cent. Mgmt Serv., 25 PERI ¶184 (IL LRB-SP 2009) (“Shakman exempt” “Rutan exempt” or “at-will” civil service classification may not serve as a basis to exclude employees from collective bargaining) (citing County of Cook, 24 PER I ¶ 36 (IL LRB-LP 2008) and City of Chicago (Mayor's Office of Information and Inquiry), 10 PERI ¶ 3003 (IL LLRB 1993). As a result, Abinoja and Crowley are not managerial or confidential as a result of their exemptions from the Personnel Code and Rutan.

**VI. Conclusions of Law**

1. Kathleen McGinty is a confidential employee under section 3(c) of the Act.
2. Kyong Lee, Kiran Mehta, Allan Abinoja and Kathleen Crowley are not confidential employees under section 3(c) of the Act
3. Kyong Lee and Ryan Lipinski are not supervisory employees under section 3(r) of the Act.
4. Kyong Lee, Kiran Mehta, Ryan Lipinski and Allan Abinoja are not managerial employees under section 3(j) of the Act.
5. Yvette Perez-Trevino is a managerial employee under section 3(j) of the Act.
6. Allan Abinoja and Kathleen Crowley are not managerial or confidential as a matter of law because they are exempt from the Personnel Code's merit and fitness requirements under Section 4d(3) or because they are exempt from the Supreme Court's ruling in Rutan.

**VII. Recommended Order**

Unless this Recommended Decision and Order Directing Certification is rejected or modified by the Board, the American Federation of State, County and Municipal Employees, Council 31 shall be certified as the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment pursuant to Sections 6(c) and 9(d) of the Act.

INCLUDED: Antoinette Murphy, Jonathan Siegel, Dale Cone, L. Joseph Howard, Mark Iocca, Daniel Leikvold, Richard Saavedra, Julie Armitage, William Ingersoll, Kyle Rominger, Connie Tonsor, Kyong Lee, Kiran Mehta, Ryan Lipinski, Allan Abinoja, and Kathleen Crowley.

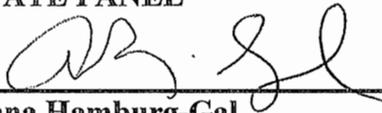
EXCLUDED: Rukhaya Alikhan, Jason Boltz, Shannon Stokes, John Kim, Kathleen McGinty, and Yvette Perez-Trevino.

**VIII. Exceptions**

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

**Issued at Chicago, Illinois this 13th day of December, 2011**

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

  
\_\_\_\_\_  
**Anna Hamburg-Gal  
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-10-156

**AFFIDAVIT OF SERVICE**

I, Elaine Tarver, on oath state that I have this 13th day of December, 2011, served the attached **ADMINISTRATIVE LAW JUDGE RECOMMENDED DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD** issued in the above-captioned case on each of the parties listed herein below by depositing, before 5:00 p.m., copies thereof in the United States mail at 100 W Randolph Street, Chicago, Illinois, addressed as indicated and with postage prepaid for first class mail.

Melissa Mlynski  
Central Management Services  
Labor Relations  
Room 501 Stratton Office Building  
Springfield, IL 62706

Gail Mrozowski  
Cornfield & Feldman  
25 East Washington Street  
Chicago, IL 60602



**SUBSCRIBED and SWORN to**  
before me this **13th day**  
of **December 2011**.



**NOTARY PUBLIC**

