

2. At all times material, the Employer is a public employer within the meaning of Section 3(o) of the Act.
3. At all times material, the Employer has been subject to the jurisdiction of the Board's State Panel pursuant to Sections 5(a) and 20(b) of the Act.

II. ISSUE AND CONTENTION

The issue for hearing is whether the Military Facility Officer¹ title held by Daniel Stanbery, Gary Hamilton and Michael Winner is a supervisory and/or confidential position within the meaning of the Act and should therefore be excluded from the petitioned-for bargaining unit. In its post hearing brief, the Employer also argued that if the AFOs are found to be public employees, the RC-42 bargaining unit is an inappropriate unit for their inclusion.

The Employer asserts that the AFOs have the supervisory authority to hire, direct, reward, discipline and adjust grievances. Being the highest authority in their area office, the Employer maintains that they are relied upon to run day-to-day operations of their office without the opportunity for direct review. Moreover, the Employer contends that the petitioned-for employees have authorized access to confidential information when disciplining and adjusting grievances of their subordinates. Lastly, the Employer maintains that the petitioned-for unit is inappropriate for the inclusion of the AFOs because they do not have a sufficient community of interest.

The Petitioner contends that the petitioned-for title is not supervisory or confidential based on the terms and conditions of the Act and therefore they spend no time performing supervisory duties. The Petitioner also argues that the petitioned-for unit is appropriate and that the Employer's argument lacks merit.

¹ Also referred to as "Area Facility Officer" and "AFO."

III. FINDINGS OF FACT

The State of Illinois, Department of Military Affairs is responsible for administering and coordinating the functions and services of the Illinois National Guard. They carry out these duties by repairing and maintaining National Guard facilities throughout the State of Illinois. There are approximately 54 armories, 2 Army Aviation Support Facilities and 19 maintenance shops. Each AFO is required to cover between 15 and 19 facilities. Each AFO is also required to be a current member of the Illinois National Guard or a retired member whose last post was in the Illinois National Guard. This is required because AFOs need to be familiar with the military organization and its structure.

Daniel Stanbery, Gary Hamilton and Mike Winner are AFOs for the department. Daniel Stanbery is over Area 1, which is the Chicago area; Gary Hamilton covers Area 2, which is the Northern Area; and Mike Winner is over the Area 3 which is called the Southern Area. The AFOs report to Chief Larry Fuller. He has been the department chief for approximately two years. Chief Fuller reports to Colonel Randy Scott. As chief, Fuller's main function is to budget state and federal expenditures and allocate funding to the AFOs. He is also responsible for the AFOs and the training sites. He performs independent evaluations of the AFOs and review and approve their requests for funding. The Chief is in contact with the AFOs at their quarterly meetings in Springfield and speaks to AFO Stanbury every other day and to the other two about once a week.

The AFOs receive maintenance requests from area facilities daily. Per guidelines, each request is prioritized in one of three levels. Level one is assigned to requests that do not require attention in a timely fashion. Level two requests require attention sooner rather than level one

and emergencies are level three priorities that require immediate attention. After assessing priority, AFOs estimate funding and submit request for funding to Chief Fuller. The AFOs then assign the jobs to either their maintenance teams or hire independent contractors. When there is an emergency, an AFO can decide to send the maintenance team or hire a contractor to handle the emergency prior to getting funding approval, but the funding request must be submitted as soon as possible.

AFOs meet with their maintenance teams daily to discuss maintenance requests and unfinished projects and assign that day's duties. Although that day's assignment is sometimes a collective decision with the military maintenance engineer (MME), the AFO has final authority on assignments. The maintenance teams consist of three to four individuals: one MME and two to three building-grounds maintenance personnel. The Chicago maintenance team also has a plumber. The AFO will communicate with the MME in deciding how and in what order requests should be handled. Upon the AFO's final decision, the teams are dispatched.

In the field the MME is the "lead worker" in charge and the AFOs rely on them to make smaller decisions independently to complete jobs. For example, if a \$3 bolt needs to be purchased to fix a leaky toilet, the MME can independently make the decision to purchase the bolt without having to get funding approved. For more substantial purchases or problems the MME's contact the AFOs for guidance. The AFOs will assist by getting any equipment requested, hiring an outside contractor if the maintenance team does not handle the job or by requesting additional funding. In the AFOs absence, their MMEs can do their job functions including hiring contractors, though this rarely if ever occurs.

If a maintenance request is beyond the skills of the maintenance team, or its use is not fiscally responsible, the AFO will hire an outside contractor instead. Initially all requests were

handled by contract workers. In 2008, the maintenance teams were formed to handle some requests; however, most of the maintenance requests still go to outside contractors. Contractors perform the more difficult requests. When hiring a contractor, the AFOs have to find bidders, draw sketches, type up and preprint specifications, set bidding dates and work with State Purchasing Officer Lisa Mays to get professional business cases written and approved and to contract competent vendors. A \$15,000 job could take seven or eight days to complete. AFOs spend several hours a week hiring independent contractors.

When they are not in the office, the AFOs visit area facilities to make sure the maintenance teams and contractor workers are completing their work correctly. While there, they follow up with the staff about the quality of work completed at the facility and the maintenance teams' performance and inquire about other maintenance necessary for the upkeep of the facility. If the work is not completed correctly, an AFO can send the maintenance team back to the location with directions on how to correctly complete the job. AFOs also speak to staff at the area facilities to get details about individual work performance. They use this information when completing performance evaluations.

Due to traffic and the distance between facilities, AFOs can spend two to three hours in the car traveling while in the field. AFOs are available by cellular phone and email while traveling. However, unlike other AFOs, AFO Stanbery cannot talk on his cellular phone while traveling to and from facilities in the Chicagoland area due to local laws. AFO Stanberry returns phone calls and emails once he reaches his destination.

While in the office, the AFOs answer emails and voicemails and work on funding requests. They also sign off on time off requests including vacation, sick, furlough and personal day requests from the members of their maintenance team. The AFO generally signs off on time

off requests first and they are then sent to state personnel (HR) for approval. Sometimes furlough days are approved by HR first and their subordinates will inform the AFO of their intent to take time off. Although AFOs can, they have never denied a time off request because their subordinates generally do not request time off when they are needed in the office. When scheduling time off, the subordinates use time that the State has allocated.

AFOs complete performance and probationary evaluations of employees. For probationary employees, AFOs have the final decision on whether an individual continues employment with the agency or is terminated. AFOs evaluate the probationary employees and those evaluations go straight to HR. HR reviews them for grammatical errors and comply with the recommendations. Dannie Cook and John Strain are two probationary employees who received positive evaluations by an AFO and maintained employment during the two years that Chief Fuller has been in his position. A probationary/contract employee has also received an extension in his contract based on a written recommendation by an AFO. An AFO has not issued an unsatisfactory probationary evaluation.

The AFOs sign off on the all evaluations of the maintenance team members. For the building-maintenance employees, the AFOs have delegated the duty of performing evaluations to the MMEs. The MMEs evaluate them and sign off on their evaluations. The AFOs review those evaluations for honesty, fairness and grammatical errors and also sign off on those evaluations before they go to HR. The AFOs personally perform the performance evaluations of their MMEs. They complete these evaluations by judging results of work completed at facilities, talking to armory managers and making sure funding requests and other documents submitted by MMEs are correct. HR reviews all performance evaluations to ensure they are consistent with

policies and procedures of the State and for grammatical errors and then signs off on them. HR has never made any substantive changes to evaluations.

Performance evaluations and salary increase recommendations are put in an employee's personnel file. Salary increase recommendations are awarded when subordinates receive a rating of acceptable or higher. Raises can also be denied if an employee receives a negative evaluation. Each merit increase recommended has been sent to HR without review from the chief and has been implemented. An AFO has never issued a negative performance evaluation and he or she believes that HR would question it.

It is up to AFOs to ensure that their subordinates receive the proper training. Generally the maintenance team will ask for specific training if they believe it will be beneficial to their work performance. AFOs can also train their teams if they believe they are deficient in a certain area. AFOs spend approximately 1 hour a month signing their subordinates up for trainings and making sure they have completed training.

AFOs have assisted in the hiring of their subordinates. In 2008, when the department decided to hire maintenance teams, the AFOs opposed the idea. However, the department went forward and the AFOs generated the questions that were used when interviewing candidates. They also interviewed candidates. AFOs conducted some interviews alone and others with another AFO. After the interviews, they transposed their notes on to evaluation reports and scored each interviewee. These forms then went to HR. The AFOs did not call specific individuals with offers for positions. HR consistently hired those with the highest scores.

AFOs have the authority to issue counseling and corrective action plans, adjust grievances and discipline their subordinates. Counseling and corrective action plans are not considered discipline and an AFO has never issued such to a subordinate. Grievances are

handled by the AFOs at the first step per the collective bargaining agreement; however, no AFO has ever handled a grievance. When disciplining a subordinate the AFO must follow the collective bargaining agreement for bargaining unit employees, the personnel code and CMS rules. An AFO can issue oral and written reprimands. Oral reprimands are not considered discipline and are not put in the employee's personnel file. AFO Hamilton has verbally reprimanded a subordinate by telling him to stop coming in late. No AFO has ever issued a written reprimand and they are unsure if they have the authority to do so.

AFOs also have work issued cellular phones; they can choose where they want their office within their area; and they have government issued vehicles.

IV. DISCUSSION AND ANALYSIS

SUPERVISORY

The Employer argues that the petitioned-for employees are supervisors within the meaning of the Section 3(r)² of the Act because they direct and discipline their subordinates using independent judgment.

The Board has interpreted this provision to require that an employee in State employment meet each of the four following criteria in order to be found a supervisor: 1) his principal work must be substantially different from that of his subordinates; 2) he must possess the authority to perform one or more of the enumerated supervisory functions, or he must effectively recommend the performance thereof; 3) his function, as such, must not be routine or clerical in nature, but

² Section 3(r) of the Act provides:

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

must require the consistent use of independent judgment; and 4) he must devote a preponderance of his time to performing supervisory functions. State of Illinois Department of Central Management Services (DCFS), 8 PERI ¶2037 (IL SLRB 1992).

Principal Work

An analysis of the "principal work" portion of the supervisor test starts from the proposition that "an employee may engage in the same work as his subordinates the majority of his time, but if the essence of his work differs from that of his subordinates, a supervisory determination may result if other indicia are present." Secretary of State, 1 PERI ¶2009 (IL SLRB 1985). Thus, while the test is "easily satisfied where the work of the alleged supervisor is obviously and visibly different from that of the subordinates ... the Board will look at what the alleged supervisor actually does, to determine whether the 'nature and essence' of his work is substantially different." City of Freeport v. Illinois State Labor Relations Board, 135 Ill. 2d 499; 554 N.E.2d 155, 162-163 (1990).

The evidence provided makes it clear that the AFOs perform work substantially different from that of their subordinates. Their maintenance teams work in the field performing the actual manual labor that is required at area facilities. The AFOs do not work in the field. They receive work requests, fill out funding requests and observe the work once it has been completed by the maintenance team or contractors. They also perform several duties when hiring contractors that their subordinates do not perform. Both parties agree that the petitioned-for employees do not perform job duties similar to those of their subordinates. As such, the principal work analysis has been met.

Supervisory Authority

Direct

The Employer contends that the AFOs have the supervisory authority to direct because they assign the maintenance team duties, prioritize their work locations, monitor and review their work, grant and deny leave requests and complete performance evaluations. The authority to "direct" encompasses several functions, including reviewing and monitoring work activities, scheduling work hours, scheduling training, approving time off and overtime, assigning duties, and formally evaluating job performance, provided the evaluations are shown to affect the subordinates' pay or other terms and conditions of employment. Performance evaluations that have no role in determining pay or employment status do not constitute supervisory direction. Illinois Department of Central Management Services, 26 PERI ¶39 (ILRB SP 2010) (citing, Village of Elk Grove Village v. Illinois State Labor Relations Board, 245 Ill. App. 3d 109, 117 (2d Dist. 1993); County of Cook (Department of Corrections), 15 PERI ¶3022 (IL LLRB 1999); City of Naperville, 8 PERI ¶2016 (IL SLRB 1992). Supervisory direction is not established by conclusory statements that the alleged supervisors are responsible for the operation of their shifts, but is instead established only by evidence that they check and, where necessary, correct their subordinates' work, giving them instructions without guidelines or review by others. City of Chicago, 10 PERI ¶3017 (IL LLRB 1994). To constitute supervisory authority to direct within the meaning of the Act, the employees' responsibility for their subordinates' proper work performance must involve significant discretionary authority to affect the subordinates' terms and conditions of employment. City of Naperville, 8 PERI ¶2016.

The Board has held that these functions, as well as other functions of direction are not considered to be supervisory unless there is evidence that the purported supervisor possesses

significant discretion to affect the subordinate employee's employment in areas that fall within the scope of union representation such as discipline, transfer, promotion or hiring. County of Lake, 16 PERI ¶2036 (IL LRB-SP 2000); City of Bloomington, 13 PERI ¶2041 (IL SLRB 1997); City of Sparta, 9 PERI ¶2029 (IL SLRB 1993).

Assigning and Monitoring

AFOs exercise independent judgment when assigning and monitoring the work of their maintenance teams. Although priority of work requests may be determined using guidelines, experience and skill, AFOs have the final authority to assign priority over day to day duties. The AFOs receive the majority of the work requests and it is through them that their maintenance teams find out what they are doing and where they are going daily. When assigning work, AFOs also decide which projects should go to their maintenance teams and which projects should go to contract workers based on the maintenance team's skill level, the work location and financial feasibility. When doing so the AFOs do not consult with the Chief. The Board has found that assignment of a subordinate's work is not indicative of supervisory direction where it is based principally on the desire to maintain balanced workloads, or based on other routine factors, as this does not require the consistent use of independent judgment. Chief Judge of the Circuit Court of Cook County v. American Federation of State, County and Municipal Employees, Council 31, 153 Ill. 2d 508, 519, (1st Dist. 1992); Village of Bolingbrook, 19 PERI ¶125.

Although assigning work based on priority may be clerical and routine, the AFOs use independent judgment when prioritizing and choosing between two significant courses of action when examining the strengths and weaknesses of the maintenance team to decide if the team should handle the job or if a contractor should be hired instead. State of Illinois (Dep't of Corrections), 28 PERI ¶46 (IL-SBP 2011) (where assigning work based on subordinates'

particular expertise presented a choice between two significant courses of action...that is more than a routine and/or clerical function).

In order for the alleged supervisor to effectively direct under the act, the supervisor “must be actively involved in checking, correcting and giving instruction to subordinates.” Superior Officers Council and Cnty. of Cook, Sheriff of Cook Cnty. (Dep't of Corrections), 15 PERI ¶3022 (IL LLRB 1999). The AFOs also travel to the facilities to check and monitor the work completed by both their maintenance team and contractors to ensure it was completed properly. While at the facilities, the AFOs speak with facility staff to ensure they too are satisfied and gather information regarding other work that may need to be done. If the work has not been properly completed, the AFO can send the maintenance team back to complete the job.

Evaluations

AFOs have supervisory authority to evaluate their subordinates and probationary employees. AFOs evaluate their MMEs annually, sign off on those evaluations and send them directly to HR. MME Dannie Cook, Kevin Bonds and John Strain have all received merit increases based on their exceptional performance evaluations. These evaluations and merit increases were sent to HR without the Chief's review. If an AFO gave an unacceptable performance rating, the individual would not receive a merit increase. Evaluations completed by the AFOs directly affect an employee's pay or employment status which is evidence of supervisory direction. Village of Elk Grove Village, 8 PERI ¶2015 (IL SLRB 1992); Village of Hinsdale, 22 PERI ¶176 (IL SLRB 2006) (employer demonstrated that evaluations affected terms and conditions of employment because patrol officer was required to achieve an overall “standard” to advance to the next pay grade and officers could fail to advance based on a sergeant's negative overall rating).

Although the AFOs have delegated the duty of performing evaluations on the rest of the maintenance team to their MMEs, they review these evaluations for fairness and honesty and also sign off on them before they are sent to HR. This is also done without review from the Chief.

AFOs complete probationary evaluations of their subordinates. Due to AFO Gary Hamilton's satisfactory evaluations of probationary employees Dannie Cook and John Strain, they both received permanent positions with the department. Neither evaluation was reviewed by the Chief or any other superior prior to being sent to HR. HR reviewed the evaluations for completeness and to ensure policy and procedures were followed.

Training

The AFOs can provide training for their maintenance teams in any area they deem they are deficient. AFO Dan Stanbery made sure his team was signed up for training with a Fire Marshall. AFO Hamilton also requested funds to send his team to boiler training at the suggestion of his team because they felt they needed the additional training. Because the AFOs have the authority to request outside training in areas where their teams are deficient, they have sufficient authority to recommend training of their subordinates. Chief Judge, 19 PERI ¶123 (The Board has found supervisory authority to direct where training was based on the petitioned-for employee's judgment that the subordinate's performance was deficient or to correct a deficiency).

Hiring

The AFOs effectively recommend the hiring of employees. When hiring members of their maintenance teams, the AFOs prepared the questions used in the interviews. They also conducted those interviews, sometimes jointly and other times alone. The Board has held that if

an individual participates in a committee which includes his or her supervisors, his or her recommendation is not “effective” within the meaning of the Act. County of Lake, 16 PERI ¶2036 (IL SLRB 2000). Although the AFOs have performed interviews collectively, they have not done so with the inclusion of a superior. They have also conducted interviews individually. In both instances the AFO’s recommendations and scores were followed by HR every time. HR consistently hired the applicant with the highest score. Although it is not the AFOs who call and make actual job offers, the Board has previously recognized that final authority is not necessary, and the ability to make effective recommendations or control decisions is sufficient to meet the statutory supervisory criteria. State of Illinois, Dep’t of Cent. Mgmt. Serv. (Env’tl Protection Agency), 26 PERI ¶155 (IL LRB 2011).

Time off

The AFOs do not exercise supervisory authority to direct when they approve time off requests because their decisions are based on departmental policy and are uniformly granted. Village of Morton Grove, 23 PERI ¶72 (IL SLRB 2007) (decisions regarding overtime and leave circumscribed by department policy are routine and clerical) see also, Village of Bolingbrook, 19 PERI ¶125 (approving all overtime requests that are submitted as a matter of course is ministerial and routine). AFOs approve sick, vacation and personal time as long as their subordinates have the time available according to HR. Furlough time off is approved by HR first, and then their subordinates notify them as to their planned time off. The AFOs have the ability to deny time off requests based on the department’s staffing needs but have never denied or changed a time off request.

Discipline and Adjusting Grievances

The Employer argues that the AFOs have the authority to discipline and adjust grievances with independent judgment. The Employer must show that the employees at issue consistently use independent judgment when disciplining and adjusting grievances for the authority to be supervisory under the Act. City of Freeport, 135 Ill. 2d at 519. To illustrate such independent judgment, the Employer must provide specific examples. Village of Broadview v. Illinois Labor Relations Board, 402 Ill. App. 3d 503, 508 (1st Dist. 2010) (finding job descriptions alone and the possibility that a sergeant might 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 Relations Board State Panel, 382 Ill. App. 3d 208, 228-29 (4th Dist. 2008) (Board could reasonably conclude that employees are not supervisors because they had never exercised supervisory authority "in practice" despite authority described in job description); but see Village of Maryville v. ILRB, 402 Ill. App. 3d 369 (5th Dist. 2010) (employer is not required to provide evidence of specific instances in which sergeants exercise their supervisory authority; rather, a written policy or job description conferring such authority is sufficient for the Employer to meet its burden).

The evidence suggests that the AFOs may have the ability to discipline but that they have never done so. AFO Hamilton has verbally admonished a subordinate for consistently coming in late. This admonishment was not documented and oral reprimands, even when documented, are not part of the employee's file as a disciplinary action and are not used in progressive discipline. The Board has consistently held that oral reprimands have to be documented and considered in progressive discipline in order to be considered discipline under the Act. Freeport, 135 Ill. 2d at

519. The AFOs have never issued a written reprimand or any other form of discipline. Thus, there is no evidence that the AFOs have the supervisory authority to discipline with independent authority.

Where the adjustment of grievances extends only to minor matters of a routine nature, the exercise of that authority does not require the consistent use of independent judgment. Village of Bolingbrook, 19 PERI ¶125 (IL SLRB 2003). The evidence in the record does not establish that the AFOs have a supervisory authority to adjust grievances with the requisite independent judgment. The AFOs are designated at the first step in the grievance process according to the collective bargaining agreement. The AFOs have never adjusted a grievance and mere designation as the first step in the grievance procedure, without more, does not constitute supervisory authority under the Act. Village of Bolingbrook, 19 PERI ¶125.

The Employer also argues that the AFOs have the authority to adjust informal grievances. Relying on the Board's finding in State of Illinois (CMS), 12 PERI ¶2032, the Employer contends that resolving workplace complaints that involve issues such as equitable work assignments, personality disputes and equipment problems qualify as "grievances" within the meaning of the Act.. Here, there are no examples of the AFOs having resolved minor personal grievances from their subordinates. AFO Stanbery has had involvement with disciplining janitors that work at the area facilities; however, these employees are not subordinates of the AFO. Therefore, the AFOs do not have the authority to adjust grievances with the requisite independent judgment.

Preponderance of Time

The fourth prong of the Act's definition of a supervisor requires that the alleged supervisor spend a preponderance of his or her employment time exercising supervisory

authority, as defined by the Act. The Illinois Supreme Court, in City of Freeport, interpreted the preponderance standard to mean that the alleged supervisor must spend more time on supervisory functions than on any one non-supervisory function. 135 Ill. 2d at 533. Since the Freeport decision, two panels of the Fourth District of the Illinois Appellate Court have issued differing interpretations of the preponderance analysis. The first interpretation defines preponderance as requiring that the employee spend a majority, or more than 50% of his time, engaged in supervisory activity. Department of Central Management Services (Department of Children and Family Services) v. Illinois State Labor Relations Board, 249 Ill. App. 3d 740 (4th Dist. 1993). The second interpretation relies on whether the supervisory functions are more significant, or of “superiority in importance” than the non-supervisory functions. State of Illinois (Department of Central Management Services) v. Illinois State Labor Relations Board, 278 Ill. App. 3d 79, 86 (4th Dist. 1996). (“Whether a person is a ‘supervisor’ should be defined by the significance of what that person does for the employer, regardless of the time spent on particular types of functions. No one can expect mathematical certainty in these types of cases.”). The Court has found the more recent formulation to be the appropriate test in determining whether an alleged supervisor meets the preponderance requirement.

The Employer maintains that the AFOs spend more time exercising the supervisory function of directing their subordinates than on any one non-supervisory function. The Employer’s witness, Chief Fuller, testified that the AFOs spend 60-70% of their time scheduling work, assigning work, or reviewing the work. The AFOs testified to spending 20-30% of their time driving to and from facilities.

Of the supervisory functions to direct, the AFOs spend a majority of their time assigning, monitoring and reviewing work. The AFOs only conduct one performance evaluation annually

and merely review those of their building-maintenance workers. They spend one hour a month training their subordinates. The AFOs have assisted with the hiring of their subordinates in 2008 but has not participated in hiring since. Such infrequent activity for the above supervisory indicia is unlikely to constitute the most significant allotment of their employment time. Illinois Secretary of State, 20 PERI ¶11 (IL LRB-SP 2003). If the Board decides that the petitioned-for employees do in fact have the authority to discipline and adjust grievances, the fact that they have never done so would preclude those functions from meeting the preponderance standard as being the most significant allotment of time.

I find that the AFOs in fact do spend the most significant allotment of their time assigning, monitoring and reviewing work but not the work of their subordinates. The AFOs assign, monitor and review the work of the contract workers in the same fashion as they do for their subordinates. They also engage in a very involved hiring process for the contract workers. That process includes finding bidders, drawing sketches and working with the state purchasing officers to get vendors approved. The AFOs testified that a \$15,000 job to a contractor can take the AFO 7-8 days to complete. The testimony is also clear that contract workers are assigned 80% of the maintenance requests and that they handle the more significant requests. The maintenance teams will fix leaky toilets whereas contractors complete more difficult jobs like fixing a roof. Hiring independent contractors who handle a majority of the maintenance requests and complete major jobs, and reviewing and monitoring their work product is the AFOs' most significant job function. Because the independent contractors are not public employees within the meaning of the Act, these functions are not supervisory. Therefore, I find that the AFOs do not meet the preponderance test.

CONFIDENTIAL

Section 3(c) of the Act defines a confidential employee as:

an employee 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.

Such an exception to the Act's broad extension of collective bargaining rights must be narrowly construed. See City of Decatur v. American Federation of State, County and Municipal Employees, Local 268, 122 Ill. 2d 353, 364-66, 522 N.E. 2d 1219, 4 PERI ¶4016 (1988); Metropolitan Alliance of Police, Sergeants Chapter No. 534 v. Village of Oak Brook, 26 PERI ¶7 (IL LRB-SP 2010).

A "confidential employee," must have access to confidential information specific to the collective bargaining relationship between labor and management, encompassing ongoing or future collective bargaining negotiations and strategy, not general, though undoubtedly otherwise confidential department administration matters. Chief Judge of Circuit Court of Cook County v. American Federation of State, County, and Municipal Employees, Council 31, 218 Ill. App. 3d 682, 699 (1st Dist. 1991). The purpose of excluding confidential employees is to keep employees from "having their loyalties divided" between their employer and the bargaining unit which represents them. Chief Judge of the Circuit Court of Cook County v. American Federation of State, County and Municipal Employees, Council 31, 153 Ill. 2d 508, 523 (1992). There are two tests for determining whether an individual is a confidential employee under the Act: the "labor nexus test" and the "authorized access" test.³

³ The Board has also formulated a third confidential status test, called the "reasonable expectation" test, to be applied where no collective bargaining agreement was previously in place, but it is expected that the establishment of the unit will require that confidential responsibilities be assumed by the employee. Chief

Under the “authorized access” test, the employees must have authorized access to information concerning matters arising from the collective bargaining process, for example, information regarding the employer’s strategy in dealing with an organizational campaign, actual collective bargaining proposals and information relating to matters dealing with contract administration, all not yet known to a labor representative. County of DeKalb, 4 PERI ¶2029 (IL SLRB 1988). The petitioned-for employee must have advance knowledge of specific collective bargaining proposals, or specific information such that premature disclosure would unduly prejudice the employer’s collective bargaining strategy. Id.

The Employer argues that the AFOs are confidential employees because they have access to internal preliminary information regarding the reasons for underlying discipline and grievance decisions. In support of its contention, the Employer relies on the decision in Northeastern Illinois University, 13 PERI ¶2035 (IL SLRB ALJ 1997) where the administrative law judge held that lieutenants who handled grievances and formulated both informal and formal responses, without prior review, were necessarily confidential employees. In that case, the judge relied upon the decision in City of Chicago (Law Department), 4 PERI ¶3028 (IL LLRB 1988) where the Board noted that an employee who regularly represents his employer in high-level grievance proceedings likely will be involved in, or privy to significant labor policy formulation, and therefore could be deemed a confidential employee.

Here, the Employer’s argument is not persuasive. Unlike in the above-referenced cases, there is no evidence as to whether the AFOs routinely adjust grievances without the prior review of the chief.⁴ AFOs have never adjusted a grievance and they are only able to do so, according

Judge, 153 Ill. 2d at 523; City of Burbank and AFSCME, 1 PERI ¶2008 (IL SLRB 1985). Here, where the RC-62 bargaining unit is already in place, the “reasonable expectation test” is not applicable.

⁴ I note also that the ALJ’s decision in Northern Illinois University, 13 PERI ¶2035 (IL SLRB ALJ 1997), is non-precedential and does not constitute legal authority for the Employer’s position.

to the collective bargaining agreement, at the first step in the grievance proceedings. This suggests that the AFOs do not play a role in high-level grievance proceedings. As such, the Employer provided no evidence to conclude that the AFOs are in any way privy to “significant labor policy formulation.” See Village of Bolingbrook, 19 PERI ¶ 125 (IL LRB-SP 2003). Thus, I find that the AFOs should not be excluded from the bargaining unit as confidential employees under the authorized access test.

UNIT APPROPRIATENESS

The Employer argues, based on the minimal evidence presented at hearing, that in the event the petitioned-for employees are found to be public employees within the meaning of the Act, their inclusion within the RC-42 bargaining unit is inappropriate.⁵ The Employer contends that the AFOs lack a community of interest with the other employees in the RC-42 bargaining unit because they are military exempt under the State Personnel Code and because they do not perform hands-on maintenance duties. The military exemption requires the AFOs to be a current or retired member of the Illinois National Guard. The Employer argues that there are currently no military exempt employees in the petitioned-for unit and the only current military exempt positions at the Department of Military Affairs that are in a bargaining unit are within a unit represented by Service Employees International Union, Local 73.

Section 9(b)⁶ of the Act requires the Board to determine in each case a unit which is appropriate for the purpose of collective bargaining. In reviewing the factors to be considered in

⁵ At the close of hearing, and without further opportunity to present additional evidence, the Employer stated its intention to object to the bargaining unit being an appropriate unit. The ALJ allowed the Employer to present its argument in its post-hearing brief and gave the Petitioner an opportunity to respond.

⁶ Section 9(b) provides in pertinent part:

A unit appropriate for the purpose of collective bargaining is to be based upon, but not limited to, the following factors: historical pattern of recognition; community of interest

determining appropriate bargaining units, I find that although there is very limited evidence in the record to decide the appropriateness of the unit, the petitioned-for employees share a sufficient community of interest with their subordinates (who are included in the petitioned-for bargaining unit) making the petitioned-for unit appropriate. The AFOs testified that they are interchangeable with their MMEs and their absence the MMEs perform all of their job duties including creating funding requests and hiring contractors even though they rarely have to do so. The AFOs and their maintenance teams are also functionally integrated because they meet at the office daily to discuss their job duties for the day. They also have similar working conditions in that they all have to follow the same guidelines regarding the priority levels of maintenance requests.

In opposition, the Employer only offers the AFOs' military exempt status and the fact that they need not perform hands-on maintenance as evidence that the unit is inappropriate. The fact that the AFOs are military code exempt does not warrant automatic exclusion from the unit. It is the Board's long standing position that if the legislature had intended for "Shakman-exempt" or "Rutan-exempt" status, or "at-will" classification to serve as a basis for excluding employees from collective bargaining, it would have expressly stated as much in the Act itself.; AFSCME, Council 31 and State of Illinois, DCMS, 25 PERI ¶184 (IL LRB-SP 2009); Service Employees International Union, Local No. 73 and County of Cook, 24 PERI ¶36 (IL LRB-LP 2008); City of Chicago (Mayor's Office of Information and Inquiry), 10 PERI ¶3003 (IL LLRB 1993). This argument lacks merit.

including employee skills and functions; degree of functional integration; interchangeability and contact among employees; fragmentation of employee groups; common supervision, wages, hours and other working conditions of the employees involved; and the desires of the employees.

The AFOs' not performing "hands-on maintenance" duties is also not enough to refute the conclusion that the AFOs do share a sufficient community of interest with employees already in the petitioned-for unit.

IV. CONCLUSIONS OF LAW

I conclude that the Military Area Officers are public employees within the meaning of the Act and the petition to represent them within the RC-42 bargaining unit should be granted.

I. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the RC-42 bargaining unit is clarified to include all employees in the description of Military Area Officer at the State of Illinois, Department of Military Affairs.

II. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 14 days after service of this Recommended Decision and Order. Parties may file responses to exceptions, and briefs in support of the responses, no later than 10 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 5 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross-responses must be filed with the Board's General Counsel, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case

and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 14-day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois, this 14th day of December, 2011

ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

A handwritten signature in cursive script, appearing to read "Elaine Tarver", written over a horizontal line.

Elaine L. Tarver, 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-10-228

AFFIDAVIT OF SERVICE

I, Elaine Tarver, on oath state that I have this 14th 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.

James Daniels
Central Management Services
Labor Relations
Room 501 Stratton Office Building
Springfield, IL 62706

Don Todd
AFSCME Council 31
615 S Second Street, Box 2328
Springfield, IL 62705-2328



SUBSCRIBED and SWORN to
before me this **14th day**
of **December 2011**.



NOTARY PUBLIC

