

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

Service Employees International Union,)	
Local 73,)	
)	
Petitioner)	
and)	Case No. S-RC-11-006
)	
Secretary of State,)	
)	
Employer)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On June 10, 2010, in Case No. S-RC-10-242, Service Employees International Union, Local 73 (SEIU, Union or Petitioner) filed a majority interest representation petition with the State Panel of the Illinois Labor Relations Board (Board), pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315 (2010), as amended, (Act) and the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code, Parts 1200 through 1240, (Rules) seeking to include all full-time and part-time Executive Is and Executive IIs (Exec Is and IIs or Execs) employed by the Secretary of State (SOS or Employer) in the bargaining unit certified in Case No. S-UC-04-046. On July 1, 2010, the Employer filed a position statement in which it objected to the inclusion of the petitioned-for employees on the basis that they were supervisory under Section 3(r) of the Act; the Employer included employees' job descriptions in support. SEIU subsequently withdrew its petition because it lacked the proper showing of interest.

On July 16, 2010, SEIU filed an election petition in this case, with a sufficient showing of interest, seeking to represent the same class of employees petitioned-for earlier while specifically excluding those employees petitioned-for by another union. On July 28, the Board converted SEIU's election petition into a majority interest petition. On July 29, 2010, ALJ Deanna Rosenbaum issued the Employer an Order to Show Cause as to why the unit should not be certified. On August 13, 2010, in response to the Order to Show Cause, the Employer submitted questionnaires (surveys) completed by the petitioned-for employees' supervisors to

supplement its earlier position statement submitted in the previous case.¹ SEIU filed a brief in reply. On August 27, the Employer filed a response to SEIU's brief.

In April 2011,² the case was administratively transferred to the undersigned. In accordance with Section 9(a) of the Act, I conducted an investigation and determined that the petition raised questions concerning representation. On May 2, I informed the parties of my conclusion via email and offered them two sets of dates for hearing on the matter.

Later on May 2, SEIU filed a Motion to Narrow the Issues for Hearing and to Set Hearing for a Date Certain. On May 3, the Employer noted that it was available for hearing on May 23-25. On May 4, I set hearing for May 23-25, independent of SEIU's motion. That same day, the Employer filed a Motion to Dismiss the Petition for Want of Jurisdiction. On May 9, the Employer filed objections to SEIU's May 2 motion. On May 10, SEIU filed a response to the Employer's May 4 Motion to Dismiss. On May 11, I issued an Interim Order denying the Employer's Motion to Dismiss. I also issued an order denying SEIU's Motion to Narrow Issues for Hearing. On May 18, the Employer submitted its pre-hearing memorandum. In this document, the Employer raised a new argument that the petitioned-for employees were also managerial, not just supervisory.

A hearing on the matter was conducted (and concluded) on May 23. Based on the Employer's offer of proof at hearing, I allowed the Employer to address the managerial issue in addition to the supervisory one. The record was closed upon receipt of the Union's exhibits and two other documents which the parties stipulated into evidence. Both parties elected to file post-hearing briefs.

On July 1, SEIU filed objections to the Employer's brief. On July 11, the Employer filed a response. Both parties continued to file responses to each others' respective replies until July 19.

I. PRELIMINARY FINDINGS

The parties stipulate and I find that:

1. The Employer is a public employer within the meaning of Section 3(o) of the Act.
2. SEIU is a labor organization within the meaning of Section 3(i) of the Act.

¹ The ALJ did not require the Employer to file a new position statement.

² All remaining dates are in 2011, unless otherwise specified.

3. SEIU seeks to add all full-time and part-time Executive Is and IIs employed by the Secretary of State to the existing bargaining unit as certified in case number S-UC-04-046.

II. ISSUES AND CONTENTIONS

The Employer argues that the petition and the proceeding should be dismissed for want of jurisdiction. In the alternative, the Employer contends that the petitioned-for employees should be excluded from the bargaining unit because they are supervisory. Specifically, the Employer states that the petitioned-for employees have the supervisory authority to direct, discipline and adjust grievances. In addition, the Employer argues that the petitioned-for employees have the supervisory authority to hire, promote, discharge and/or reward through their evaluations of subordinates. Next, the Employer argues that the petitioned-for employees are managerial under the Act. The Employer contends that it is not limited to advancing the managerial argument with respect to the 26 alleged managerial employees listed in its prehearing memorandum.

SEIU argues that the Board does have jurisdiction over this matter. In addition, SEIU contends that the Employer did not establish that any of the employees at issue are supervisory or managerial under the Act and, consequently, that the employees must be included in the bargaining unit. SEIU also argues that the Employer's managerial status argument was waived before hearing. In the alternative, SEIU argues that the Employer's managerial status argument should be limited in scope to conform to the parties' stipulations and the content of the Employer's prehearing memorandum. SEIU also notes that the Employer's brief is longer than the 50 pages permitted by the Rules and that the Board should disregard all pages in excess of that limit. Finally SEIU states that the Board must certify the petition *nunc pro tunc* to November 13, 2010.

III. MATERIAL FACTS

The employees at issue in this case are Executive Is and IIs (Execs) who work in the Drivers Services Department of the Secretary of State. Driver Services maintains the records of 8.5 million driver's licenses in the state. It also maintains the records of 3 million state identification cards and operates the organ donor and federal motor voter programs. Drivers

Services is divided into the Metro area (Cook County and the collar counties) which employs between 550-600 individuals, and Downstate, which is comprised of 105 driver service facilities.

Drivers Services is headed by a Director. Below him, in descending order of hierarchy, are the Chief Deputy Director, Deputy Director, administrator, zone managers, facility managers, assistant facility managers, supervisors, and all remaining employees who are either public services representatives (PSRs) or public service clerks (PSCs). There are around 116 employees at issue in this case.³ Seventy-three are Exec Is and forty-three are Exec IIs. Of these employees, thirty-three are supervised by public employees, members of a bargaining unit represented by the International Federation of Teachers (IFT). Execs are either assistant managers or managers. If a facility employs both Exec Is and IIs, the Exec Is are typically assistant managers while Exec IIs are managers. The majority of the petitioned-for Execs oversee their own facility and are the highest-ranked employees at their individual locations.

1. Supervisory Exclusion

i. Direction

a. Oversight and Assignment of Work

Each Exec has between 7 to 50 subordinates. Gary Lazzarini, Director of Drivers Services for the Metro Area, testified that the primary function of Execs is to “direct, manage and supervise” those employees “to ensure that procedures and policies are being carried out within the department and [that] customer service at all times is [also] being carried out.” Execs spend 75-80% of their time “directing” their subordinates.

Specifically, Execs instruct their subordinates as to when they may take breaks, what assignments they must complete, and which shifts they may fill. The Execs base their instructions on their subordinates’ job descriptions, staffing levels, and available work at the facility.⁴ The questionnaire completed for Janice Crain confirms this procedure, stating that “work is assigned within job title by the facility manager, workers may be assigned to a specific area or function within the facility by the manager to meet the workflow needs of the facility as

³ On brief, the Employer states there are 119 employees at issue, while the Union states there are 118. However, according to Union Ex. 2, which was stipulated into evidence, there are only 116.

⁴ As Lazzarini noted, “they’re directing [their subordinates] to do their job as—that’s in the job description, they’re directing them as far as the different shifts, the different breaks, job assignments, job duties.”

long as such assignments meet with the employee's job classification. These assignments may be changed as needed by the manager to meet operational need and work flow."

For example, each Drivers Services facility has different work areas including the greeter's desk and the camera area. Execs assign staff to these various locations to ensure that the facility runs properly. Execs have no authority to assign work to employees that goes outside their job description.

The following specific examples were presented as evidence of direction: Grant Lankin instructed subordinates regarding the sign in and sign out procedure, noting that an employee must note sign in/out times based on the clock nearest the sign-in sheet. Lankin noted that his subordinates should not contact the building themselves concerning the thermostat and should direct requests to him instead. Lankin also asked a subordinate if she could work the phone room for a certain period of time. Raymond Mikula told his subordinates that nail polish and remover were no longer permitted at employees' desks. James Piland requested that one subordinate forward a notary application to a different office and instructed other subordinates—at the request of his own supervisor—to search for missing notary applications. Alta Aten instructed a hearing officer to contact another state regarding the use of a restricted driving permit, instructed another hearing officer to obtain more information regarding an incomplete hearing, coordinated an effort with Driver Services to have an informal hearing officer present at an Office Summit in Decatur, and requested subordinates to cease using a certain form letter. Joel Hilgen instructed an employee to assist another in processing permit applications. Cynthia McMahon's questionnaire states that she schedules hearing officers, hearing representatives and contractual personnel.

Both McMahon's and Aten's surveys also state that they "exercise[] ... independent judgment" in assigning job duties, scheduling time off for their subordinates and "setting/enforcing policy matters for staff."

b. Time off/leave

Execs review their subordinates' time-off requests. They consider the contract's requirements, whether the facility is adequately staffed, and the amount of work to be done, in determining whether to grant the requests. The contract addresses staffing levels and states that only two employees may be on vacation at one time. Execs also consider the time of year in

assessing staffing needs because certain times of year are predictably busier than other times of year and require more staff at the facilities. Finally, Execs approve or deny vacation requests based on seniority.

ii. Evaluations and their impact

Execs evaluate their probationary subordinates twice a year and their non-probationary subordinates once a year.

Execs rate the following areas of their subordinates' performance: work habits and accountability, teamwork, communication and interpersonal skills, initiative, job knowledge, and public service. They are required to provide comments on the evaluations if the evaluated subordinate "exceeds expectation" or "needs improvement."

The evaluations are scored from one to four. The scores of probationary employees determine whether they are certified or dismissed. The scores of non-probationary employees determine whether they receive pay increases. Salary increases are set by the collective bargaining agreement; however, a non-probationary employee who receives less than a 2.0 average grade over a two-year period does not receive a pay increase and may also lose his job. Lazzarini stated that evaluations also play a part in promotion, but he did not provide further explanation.

Zone managers may "possibly" serve as a "sounding board" and a "second opinion" on evaluations after they are written, before they are issued. Exec facility managers may also discuss evaluations with their subordinate assistant managers. Execs are not required to discuss their evaluations with anyone.

The Personnel Department and Director review all evaluations. Zone managers may also review evaluations "from time to time." The purpose of this review is to ensure that the scores awarded fit with the written justification. The Personnel Department will direct the Execs to make changes in the evaluation if the score does not match the justification. The Personnel Department has not often directed Execs to do so and Lazzarini could not remember the last time it had happened. The Director has never instructed Execs to change their evaluations.

iii. Discipline

The Drivers Services Department has a progressive discipline system which starts with oral warnings, followed by written warnings, suspensions and discharge. Execs may also counsel their subordinates, but the Employer does not consider counseling disciplinary.

Execs identify policy violations to issue oral/written warnings or to request higher discipline for subordinates. Execs may issue oral and written warnings without approval from a superior but they may not unilaterally issue any higher discipline.

The majority of discipline is attendance-related. Where an employee has repeated unexcused absences which indicate an abuse of sick time, Execs may place their subordinates on proof status and require them to provide a doctor's note for absences. Placing an employee on proof status does not constitute discipline under the contract. Rather, the contract provides that if an "employee fails to provide acceptable documentation [excusing their absence once on proof status] then they may be subject to progressive discipline." For example, the first unauthorized absence during the proof status period is grounds for an oral warning.

Oral warnings are the first step of progressive discipline. The written documentation of the oral warning becomes part of the employee's personnel file. The documentation states that, "to avoid further disciplinary action, [the employee] must comply with the Secretary of State policies concerning efficiency and standards." The following Execs have issued oral warnings to subordinates on the subjects within the parentheses: Roy Carrington (re: inattention/standards of service); Ada Carrasco-Carter (re: inattention); Mary Pamela Meehan (re: lack of courteousness); Alta Aten (re: provoking a coworker; signing in and out automatically and by computer); Mark Frappoly (re: drivers test administered on improper vehicle); Ben Hughes (re: tardiness); Joel Hilgen (re: argumentative and disrespectful behavior); Rhonda Lucas (re: no notification of supervisor for absence); Dennis Sepanik (re: cellphone use); Jim Smith (re: insubordination); John Statsny (re: disrespect); Yvette Westnedge (re: failing to complete the mail process; disorderly conduct); Joseph Boggs (re: inattention); Tom Kovalichuck (re: absenteeism); Penny Meyer (re: absenteeism); Deborah Shoemaker (re: absenteeism); Kate Bartolo (re: discourteousness); Karon Russell (re: absenteeism, discourteousness and failing to meet standards, tardiness); Lawrence Dalicandro (re: making a customer cry).

Written warnings are the second step of the progressive discipline process. Written warnings became part of the employee's personnel file. According to the standard warning form,

“to avoid further disciplinary action up to and including discharge, [the disciplined employee] must comply with the Office of the SOS’s policies.” The following Execs have issued written warnings: Michael Christopher (re: insubordination and disrespect); Charles Diprima (re: inattention and falling asleep during roadtest); Dianna Gunnel (re: unprofessional behavior and discourteousness); Susan Keenan (re: absenteeism); Kathy Larson (re: inattention); Denita Mathews (re: inattention and disrespect); Erin Mathy (re: impoliteness); Loretta Allen (re: absenteeism); Cynthia McMahon (re: tardiness); Rich Morton (re: unspecified); Jim Smith (re: incompetence, harassment); Lucille Murray (re: absenteeism, tardiness); Robert Toussaint (re: discourteousness, failure to meet standards); Barry Welsh (re: sexting); Robert Douglass (re: absenteeism); Matthew Adduci (re: inappropriate comments); Denise Martin (embarrassing and personal comments to a coworker); Denita Mathews (inattention and disrespect).⁵

Execs may also request higher discipline for subordinates from the Drivers Services Administration. When the Execs make such requests, the Director of Drivers Services conducts a ground level investigation and obtains witness statements from the individuals involved in the matter. He sends the results of his investigation to Personnel. The Administrator complies with the Execs’ requests for discipline a majority of the time.

The surveys completed for Matthew Adducci and Anthony Gentile state that they "effectively recommend[] and impose[] disciplinary action."

James Piland once made a “formal request for termination of...a temporary employee” for repeated absenteeism and general incompetence. The Employer presented no evidence as to the whether the recommendation was considered or followed.

iv. Adjustment of grievances

Execs try to amicably resolve interpersonal problems at work. The survey completed for Janice Crain states that she “handles personnel matters” including “staff disputes.” Likewise, Anthony Gentile’s survey states that he “adjusts grievances.” Finally, Timothy Skiba’s survey provides that his duties include “labor relations work (grievances/discipline).”

Raymond Mikula once told his subordinates that nail polish and remover were no longer permitted at employees’ desk in response to employee complaints of smell. Another Exec told

⁵ The Employer also cites to one discipline memorandum written by Andrea Ferriola. There is no indication that the memo was placed in a subordinate’s personnel file or even that the subordinate who the memo concerned was notified of the report.

his subordinates not contact maintenance directly about the thermostat to avoid conflicting requests to change the room temperature.

2. Managerial Exclusion

None of the petitioned-for employees formulate policies that apply to all of the Secretary of State. They have no authority to deviate from the Employer's policies except in exigent circumstances. For example, Drivers Services regularly conducts driving tests but the contract provides that "all road tests, pre-trip tests, and CDL skills tests will be suspended when severe weather conditions pose an imminent threat to an employee's safety."

Christine Works made a recommendation to her superiors concerning methods of administration after she evaluated the Employer's system of internal accounting and administrative control. Works created a corrective action plan in which she recommended that using a new database program would create a more accurate system for maintaining and managing records. There is no evidence that her recommendations were followed or even reviewed. The "reviewed by" signature line of her report is blank.

The section of the Employer's documentary record regarding Christine Works also contains minutes of a meeting agenda. The agenda describes policies which employees must follow. These include an open door policy, a requirement that employees communicate via email, and a Monday due date for all employee tasks. The agenda contains links to the Employer's policy manual. The document contains no evidence as to who devised the listed policies or who wrote the document.

Sixty-eight of the petitioned-for employees are the highest-ranked employees at their respective facility.

Above, I considered the testimony and any additional, relevant facts specifically addressed by the parties' briefs.⁶

⁶ The Employer failed to put me on notice of any other relevant facts in the record and rendered my independent search for them unduly burdensome. First, the Employer cited too broadly, referencing the whole record, large portions of it, or alternatively using long string-cites, without sufficient explanation. Notably, the index included with the evidence served as an inadequate substitute for narrative guidance because it merely labeled the pages that corresponded to each individual employee at issue and listed the pages on which their respective surveys, job descriptions and oral/written warnings could be found. While the index did sometimes provide short descriptions of miscellaneous documents, those descriptions were uniformly conclusory, and like the Employer's page citations on brief, did not always accurately reflect content.

IV. DISCUSSION AND ANALYSIS

1. Procedural matters

a. The Board's Jurisdiction/Effect of 120-day Provision

The Act provides that "if a hearing is necessary to resolve any issues of representation under [Section 9], the Board shall conclude its hearing process and issue a certification of the entire appropriate unit not later than 120 days after the date the petition was filed....[t]he 120-day period may be extended by one or more times by the agreement of all parties to a hearing to a date certain." 5 ILCS 315/9(a-5).

Here, the Board did not conclude its hearing process or issue a certification within 120 days after SEIU filed its petition. Nor did the parties mutually agree to extend the 120-day time period. Rather, hearing was held over ten months after the filing date and this Recommended Decision and Order issued even later. In addition, the Employer asserted that it did not agree to an extension, accordingly revoked all previously-offered hearing dates, and attended the hearing under protest.

While both parties object to the Board's delay in resolving this matter, they advance different positions as to how passage of the prescribed 120 days affects this case: The Employer argues that the Board must dismiss the petition because it no longer has jurisdiction. On the other hand, SEIU asserts that the Board must issue the petitioned-for certification *nunc pro tunc* as of the date on which the 120-day time limit expired. Both parties' assertions are incorrect.

Contrary to the Employer's argument, the Board has jurisdiction over the instant representation petition because Section 9(a-5) is not jurisdictional in nature. First, there is nothing in the Act's legislative history, the Board's case law, or the Act itself to suggest that expiration of the 120-day period removes the Board's jurisdiction to hear representation cases.

Similarly, the single live witness, whose testimony lasted less than two hours and produced 24 pages of transcript, did not identify any specific, relevant parts of the Employer's documentary evidence. Notably, the witness mentioned no single employee by name, no single incident by date of occurrence, and referenced the documentary evidence only to confirm that all the job descriptions were accurate.

Finally, the Employer's physical presentation of the evidence was chaotic, rendered even more so by its sheer volume, and was consequently un-navigable. Specifically, the Employer introduced 3491 pages of documentary evidence, but contrary to my hearing order and subsequent written request, did not tab or bind them. Instead, the pages were introduced loose, in a cardboard box, paginated with an index, and not all in consecutive numerical order. The 500 or so pages that did not fit in the box were introduced in a stack on top of the box.

Second, to interpret the Act in such a way would frustrate the purposes of the 120-day provision and run contrary to the policies of the Act as a whole.

The 120-day period serves to expedite resolution of representation petitions. County of Cook, Sheriff of Cook County, 26 PERI ¶ 89 (ILRB GC 2010). If the instant petition were dismissed, the representation process would be needlessly prolonged because SEIU would be required to re-file. Moreover, as the Employer notes, the delay here occurred “through no fault, reason, or cause attributable to the parties.” Thus, to deem the 120-day provision jurisdictional in this case would punish the petitioner for the Board’s own administrative error. Such a result is incompatible with the purposes of the Act.

Contrary to SEIU’s assertion, passage of the 120-day deadline does not entitle SEIU to *nunc pro tunc* certification, either. While the Board has granted *nunc pro tunc* certification in cases where it has made clerical errors in the original certification document, such is not the case here. Plainfield Firefighters, Int’l Ass’n of Fire Fighters, 23 PERI ¶ 105 (IL LRB-SP 2007) (Board certified paramedics into the unit because it had inadvertently omitted the rank of paramedic from the description of the existing unit). Moreover, there is no indication that the Board grants *nunc pro tunc* outside those specific circumstances.

Thus, the Board has jurisdiction to resolve this issue concerning representation and the Board will not issue certification *nunc pro tunc*.

b. Length of the Employer’s Brief

The Employer submitted a sixty-eight page brief. The first forty pages constituted the body of the brief. The remaining twenty-eight pages were comprised of three attachments including the index for the exhibit, additional information regarding Executive Is and IIs, admitted into evidence post-hearing, and a case excerpt.

Section 1200.60 of the Rules states that “[a]ll briefs shall be no more than a total of 50 double-spaced pages with margins of at least ½ inch, **including attachments.**” (emphasis added) The rule further provides that “all of the pages in excess of the 50-page limit will be rejected.”

Here, the brief was sixty-eight pages, eighteen pages longer than permitted. Accordingly, I reject the last eighteen pages of the Employer’s brief. Notably, the effect of such rejection is minimal because two of the attached exhibits are already part of the record and the third is an excerpt of a case, cited by the Employer and readily available.

2. Supervisory Exclusion

The Illinois Supreme Court has adopted a four-part test to determine whether an employee is a supervisor within the meaning of the Act. Chief Judge of the Circuit Court of Cook County v. Am. Fed. of State, County and Mun. Empl., Council 31, AFL-CIO, 153 Ill.2d 508, 515 (1992). "The test requires that (1) the supervisory employee must perform principal work substantially different from that of [his] subordinates; (2) the supervisory employee must have authority to perform some or all of the 11 functions enumerated in section 3(r); (3) the supervisory employee must consistently use independent judgment in the performance of these 11 enumerated functions; and (4) generally, the supervisory employee must devote a preponderance of [his] time to exercising the authority to handle these 11 functions." Nat'l Union of Hosp. and Health Empl., Am. Fed. of State, County and Mun. Employees, AFL-CIO v. County of Cook, 295 Ill. App. 3d 1012, 1020-21 (1998). In order for an employee to be considered a "supervisor," he must meet all four parts of this test. Chief Judge, 153 Ill.2d at 515.

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 v. Illinois State Lab. Rel. Bd., 135 Ill. 2d 499, 511 (1990). If so, 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.

Here, SEIU conceded that the essence of the petitioned-for employees' duties differs from the duties performed by their subordinates. While SEIU took this position months before

hearing, I find SEIU must be held to it.⁷ First, SEIU gave no express notice to the Employer that it planned to change its position. Second, no such notice may be implied from SEIU's conduct at hearing since SEIU did not mention this aspect of the supervisory test in its opening statement or otherwise hint to a change in position through questions asked.

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

In addition to meeting the principal work requirement, supervisory status under the Act demands that the alleged supervisor exercise authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, discipline employees, adjust their grievances, or effectively recommend any such action; the alleged supervisor 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, 6 PERI ¶4019 (1990); County of McHenry, 15 PERI ¶2014 (IL SLRB 1999); Northwest Mosquito Abatement District, 13 PERI ¶2042 (IL SLRB 1997); Village 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.

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 Fifth District has 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. ILRB, 402 Ill. App. 3d 369, 932 N.E.2d 558, 342 (5th Dist. 2010). On the other hand, the First, Third and Fourth districts do require that the Employer prove by

⁷ See SEIU's Reply to Employer's Response to Show Cause, submitted August 18, 2010 to ALJ Deanna Rosenbaum.

example that employees exercise their granted authority. Vill. of Broadview v. Illinois 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 are not supervisors because they had never exercised supervisory authority "in practice"). Thus, most appellate districts clearly favor the requirement that employers introduce specific examples of supervisory authority.

Moreover, it is prudent to require the Employer to provide specific examples 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). 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. 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).

Thus, in light of the case law and policy described above, I find that the Employer is required to provide specific examples of petitioned-for employees' supervisory authority.

i. Direction

The term "direct" encompasses several distinct but related oversight functions, including reviewing and monitoring work activities, scheduling work hours, approving time off and overtime, assigning duties, and evaluating job performance. However, significant discretionary authority to affect subordinates' employment in areas likely to fall within the scope of union representation must accompany an individual's oversight authority in order to make that authority supervisory within the meaning of the Act. State of Illinois, Dep't of Cent. Mgmt. Serv., 25 PERI ¶ 186 (IL LRB-SP 2009); County of Cook and Sheriff of Cook County (Dep't of Corrections), 15 PERI 13022 (IL LLRB), aff'd by unpub. order, 16 PERI ¶ 4004 (1999); Chief

Judge of the Circuit Court of Cook County, 153 Ill.2d 508, 9 PERI ¶ 4004 (1992); Freeport, 135 Ill.2d at 530-31; County of McHenry, 15 PERI ¶ 2014 (IL SLRB 1999); City of Bloomington, 13 PERI ¶ 2041 (IL SLRB 1997); City of Sparta, 9 PERI ¶ 2029 (IL SLRB 1993); State of Illinois, Dep't. of CMS (DCFS), 8 PERI ¶ 2037 (IL SLRB 1992); City of Naperville, 8 PERI ¶ 2016 (IL SLRB 1992). To constitute supervisory authority to direct within the meaning of the Act, therefore, 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, Dept of Cent Mgmt Serv., 25 PERI ¶ 186 (IL LRB-SP 2009).

1. Oversight and Review

Execs do not exercise supervisory authority to direct when they oversee their subordinates because there is no evidence that they actively instruct their subordinates and correct their work in a manner that requires consistent use of independent judgment.

Oversight and review of employee work constitutes supervisory authority to direct only if it entails more than merely observing and monitoring subordinates, or generally being responsible for the operation of a shift. 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). Rather, a supervisor is required to be actively involved in checking, correcting and giving instructions to subordinates. City of Lincoln, 4 PERI ¶ 2041 (IL SLRB 1988); City of Chicago, 10 PERI ¶ 3017 (IL LLRB 1994); 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).

Here, the Employer references few specific examples of review or oversight and none demonstrate the exercise of independent judgment. In one case, an Exec told his subordinates not to use nail polish at their desks. In another, the Exec stated that employees should sign in using the time on the clock closest to the sign-in sheet. Neither incident required the Exec to choose between two or more *significant* courses of action; accordingly, these incidents are not evidence of supervisory authority. Metro. Alliance of Police, 362 Ill. App. 3d 469, 477-78 (2d Dist. 2005). While the Employer notes that the record is "replete with [other] examples" which

show that Execs review their subordinates' work and provide them with instruction, the Board is not required to assume the truth of such statements. O'Regan v. Arbitration Forums, Inc., 246 F.3d 975, 987 (7th Cir. 2001) (a court is not required to assume the truth of a nonmovant's conclusory allegations on faith).

The Employer presents no other evidence as to the manner in which Execs oversee their subordinates' work, instead it notes only that Execs ensure their subordinates carry out the department's policies. Accordingly, the Employer falls short of demonstrating supervisory authority by failing to present further evidence of the policies themselves and the manner of their execution. Chief Judge of the Circuit Court of Cook County, 19 PERI ¶ 123 (IL LRB-SP 2003) (No supervisory oversight found, despite testimony that petitioned-for employees enforced department policy, because Employer presented no evidence of the policies or evidence of employee discretion in how they were applied).

Further, the Employer improperly relies on conclusory testimony and survey statements to show that Execs "direct" by ensuring their subordinates perform according to their job descriptions and that they are "expected to take action (training, disciplines, supervisory reviews) to improve [subordinates'] performance." Yet it is well-established that such generalized testimony is insufficient to support an assertion of supervisory authority. State of Illinois, Dep't of Cent. Mgmt. Serv., 26 PERI ¶ 39 (IL LRB-SP 2010); Chief Judge of the Circuit Court of Cook County, 19 PERI ¶ 123 (IL LRB-SP 2003) (no supervisory direction found where Employer failed to provide specific examples and relied on testimony that a petitioned-for employee told a subordinate how to do his job); Vill. of Bolingbrook, 19 PERI ¶ 125 (IL LRB-SP 2003); Peoria Housing Authority, 10 PERI ¶ 2020 (IL SLRB 1994).

Finally, contrary to the Employer's assertions, supervisory oversight may not be inferred either from the Execs' rank or the fact that they evaluate their subordinates. First, the employees' rank—in some cases highest at their facility—does not independently demonstrate supervisory oversight nor does it fulfill the statutory requirements for supervisory status. City of Freeport, 135 Ill. 2d at 512 (court required Employer to prove supervisory authority by satisfying the statutory test; that lieutenants were the highest-ranking individuals on duty merely *added weight* to the conclusion that they were in fact supervisors)(emphasis added). Second, infrequent annual or bi-annual evaluations do not evidence continual oversight and instruction. State of Illinois, Dep't of Cent. Mgmt. Serv., (EPA, DPH, DHS, DCEA), 26 PERI ¶ 155 (IL LRB-SP

2011) (employees' annual evaluations did not meet the preponderance of time standard absent separate evidence that employees engaged in continual oversight and monitoring of employee work sufficient to constitute supervisory direction); Circuit Clerk of Champaign County, 26 PERI 2032 (IL LRB-SP 2001) (analysis of oversight distinct from analysis of 5-month evaluation which could affect pay); Chief Judge of the Circuit Court of Cook County, 9 PERI ¶ 2033 (IL SLRB 1993) (authority to annually evaluate subordinates' performance which in turn affected subordinates' eligibility for a year-end lump sum bonus was not sufficient to raise putative oversight and review of a subordinate's work to the level of supervisory direction); Village of Streamwood, 26 PERI ¶ 134 (IL LRB-SP 2010)(evaluations not even considered direction when only effect on their terms and conditions was monetary).

Consequently, Execs do not exercise supervisory authority to direct when they oversee their subordinates' work.

2. Assignment

The petitioned-for employees do not exercise supervisory authority when they assign work to their subordinates because their decisions are routine and clerical.

Assignments that are routine or clerical in nature do not require the exercise of independent judgment. City of Freeport, 135 Ill. 2d at 531-32. Here, Execs mainly shuttle staff to and from different work areas such as the greeter's desk and the camera area, to ensure those areas are manned; they may also schedule employees or ask them to find documents and produce information relating to their work. In doing so, Execs make only routine assessments of operational need. Moreover, they rely on their subordinates' job descriptions, not on their respective skills and experience, to determine suitability for a given task and accordingly exercise no independent judgment.⁸ Vill. of Morton Grove, 23 PERI ¶ 72 (IL LRB-SP 2007)(assignment of patrol officers to respond to calls as needed were routine actions not performed with the requisite independent judgment); Cf. County of Cook, 15 PERI ¶ 3022 (IL LLRB 1999), aff'd by unpub. order, 16 PERI ¶ 4004 (1999) (alleged supervisors' daily

⁸ While the Employer notes that some survey authors state Execs do consistently use "independent judgment" in assigning work, such comments constitute conclusory legal assertions which the Board may safely disregard. Cent. Mgmt. Serv. (Dep't of Public Health, and Pollution Control Bd.), 26 PERI ¶ 113 (IL LRB-SP 2010)("the Board is certainly not required to defer to a [declarant's] legal assessment" concerning a petitioned-for employee's exercise of supervisory authority).

assignment of tasks to subordinates required them to consider factors such as their 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, and thus evidenced the consistent use of independent judgment).

Thus, the petitioned-for employees do not direct within the meaning of the Act when they assign their subordinates work.

3. Time off/leave

Execs do not exercise supervisory authority to direct when they review and approve or deny their subordinates' time-off requests because their decision is based largely on the contract's requirements, which permit only two employees to be on vacation at once, and on seniority. Vill. of Morton Grove, 23 PERI ¶ 72 (IL SLRB 2007) (decisions regarding overtime and leave circumscribed by department policy are routine and clerical, not supervisory), see also Vill. of Broadview, 402 Ill. App. 3d 503 (1st Dist. 2010) (no supervisory authority to direct when decision to allow leave is constrained by considerations of seniority and predetermined staffing requirements); City of Carbondale, 3 PERI ¶ 2044 (IL SLRB 1987) (the ability to review requests for time off and vacation is a routine and clerical function not mandating the use of independent judgment). While the employees also consider the amount of work to be done and whether the facility is adequately staffed, such determinations are made based on the time of year, with the knowledge that certain times are predictably busier than others and require more staff. Accordingly, petitioned-for employees do not direct within the meaning of the Act when reviewing time-off requests.

ii. Reward

Execs exercise supervisory authority to recommend reward when they evaluate their subordinates because such evaluations constitute effective recommendations which, in turn, directly affect pay.

The authority to evaluate an employee is sometimes considered under the indicium of direction. City of Naperville, 8 PERI ¶ 2016 (IL SLRB 1992); State of Illinois, Dep't. of Cent. Mgmt. Serv. (Division of Police), 4 PERI ¶ 2013 (IL SLRB 1988). However, the Board has held that where evaluations have only a pecuniary effect on employees' terms and conditions of employment, the evaluations are more properly considered under the indicium of reward. Vill.

of Streamwood, 26 PERI ¶ 134 (IL LRB-SP 2010). Here, while evaluations may also affect probationary employees' continued employment, discussed below, I find they are more suitably addressed under reward because the Employer presented no evidence that they have any other effect on a non-probationary employee's terms and conditions of employment.

Employees exercise the supervisory authority to reward when they use independent judgment to complete evaluations which determine whether subordinates receive merit raises. Vill. of Streamwood, 26 PERI ¶ 134 (authority to reward where employees' positive evaluations determined whether certain subordinates would receive longevity/merit raises even though the petitioned-for employees did not determine threshold eligibility which was established by time served); City of Naperville, 8 PERI ¶ 2016 (IL SLRB 1992) (supervisory authority found where evaluations affected merit raises). However, petitioned-for employees do not exercise such supervisory authority to reward where their positive evaluations or commendations carry no monetary reward or when employee wages are dictated by the collective bargaining agreement, unalterable by employee performance. County of McHenry, 15 PERI ¶ 2014 (IL SLRB 1999) (non-monetary commendations do not constitute reward within the meaning of the Act), see also, County of Lake, 16 PERI ¶ 2036 (IL SLRB 2000); Vill. of Elk Grove, 8 PERI ¶ 2015 (IL SLRB 1992), *aff'd*, 245 Ill. App. 3d 109, 613 N.E.2d 311, 9 PERI ¶ 4009 (2nd Dist.1993); Chicago Park Dist., 9 PERI ¶ 3007 (IL LLRB 1993); Vill. of Broadview, 25 PERI ¶ 63 (2009); Peoria Hous. Auth., 10 PERI ¶ 2020 (IL SLRB 1994), *aff'd by unpub. order*, No. 3-94-0317 (Ill. App. Ct., 3rd Dist., 1995).

Here, the contract's "Across-The-Board Salary Increases" may be deemed merit raises because employees receive them only if their performance is above average, on the evaluation rating scale. Likewise, employees who perform inadequately—at an average lower than 2.0 over two years—do not receive them. Accordingly, Execs' evaluations of non-probationary employees affect their terms and conditions of employment because they determine whether those employees receive their contractually-specified raises. Contrary to the Union's argument, the contract does not concretely determine wages if an Exec's evaluation can change what is owed. Peoria Hous. Auth., 10 PERI ¶ 2020 (IL SLRB 1994), *aff'd by unpub. order*, No. 3-94-0317 (Ill. App. Ct., 3rd Dist., 1995)(performance evaluations had no impact on the wages or working conditions of the employees when the collective bargaining agreements governed the

staff's wages, benefits and working conditions and where petitioned-for employees' evaluations never resulted in merit raises).

In addition, the Execs recommend with independent judgment because they complete the evaluations alone, include commentary, and are required to score subjective categories such as teamwork, initiative, and communication. See Vill. of Hinsdale, 22 PERI ¶ 176 (IL LRB-SP 2006) (narrative comments and subjective categories in evaluations demonstrate the evaluator exercises independent judgment).

Contrary to the Union's assertion, evaluations are not the product of a collaborative effort between the Execs and their superiors. Execs are permitted, but not required, to seek out the guidance of superiors to "kind of take a look at" a finished evaluation, provide a second opinion or serve as a sounding board. Cf. Vill. of Broadview, 25 PERI ¶ 63 (IL SLRB 2009)⁹ (structured, collaborative evaluation process where each participant offered input on each candidate and participants reach a consensus on the nominee or rating lacked the requisite independent judgment to constitute supervisory authority) (citing County of Knox and Knox County Sheriff, 7 PERI ¶ 2002 (IL SLRB 1991)). More importantly, it appears that Execs' supervisors compare ratings to commentary only once the Execs have completed the evaluation; they do not issue such directives during the "planning process." Cf., Ill. Dept. of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd. State Panel, 382 Ill. App. 3d 208, 227 (4th Dist. 2008) (no independent judgment where supervisor required petitioned-for employee to revise the performance evaluation so that a rating and the corresponding comment were in congruence while it was "still in the planning process").

Finally, the evaluations constitute effective recommendations because superiors' review of them is non-substantive and the Execs' assessments are adopted by the Employer as a matter of course: the reviewer ensures only that the commentary corresponds with the numerical rating and rarely requires the Exec to alter an evaluation. 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 course, without independent review); see also Vill. of Glen Carbon, 8 PERI ¶ 2026 (IL SLRB 1991); City of Peru v. ISLRB, 167 Ill. App. 3d 284, 4 PERI ¶ 4008 (1988); City of Peru v. ISLRB, 167 Ill. App. 3d 284, 290, 521 N.E.2d 109, 113 (recommendations need not be "rubber-

⁹ 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).

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). Cf., Chicago Park Dist., 9 PERI ¶ 3007 (IL LLRB 1993)(substantive review by superiors and no independent authority found where personnel department reviewed each promotion candidate separately from the panel and could disregard the panel’s rating).

Thus, the petitioned-for employees effectively recommend reward through their evaluations.

iii. Discharge, Hire and Promote (through evaluations)

Execs also possess the supervisory authority to effectively recommend discharge of probationary employees because a negative evaluation of a probationary employee results in his termination. See analysis, *supra*.

The Employer additionally argues that Execs hire and promote through their evaluations. However, the Employer presented no evidence or argument as to how the evaluations are used in promotion and hiring. Accordingly, the petitioned-for employees do not have the supervisory authority to hire, promote or to effectively recommend those actions.

iv. Discipline

Execs exercise the supervisory authority to discipline because they unilaterally identify policy violations and determine a course of action that may either be disciplinary or non-disciplinary.

Verbal and written reprimands constitute discipline within the meaning of the Act when they affect an employee’s job status or terms and conditions of employment. Cook County Medical Examiner, 6 PERI ¶ 3011 (IL LLRB 1990)(stating that discipline within the meaning of Section 3(r) of the Act is defined by its likely effect on an employee’s employment); see also, Carpentersville Countryside Fire Protection Dist., 10 PERI ¶ 2016 (IL SLRB 1994); City of Sparta, 9 PERI ¶ 2029 (IL SLRB 1985), aff’d by unpub. order, No. 5-93-0621 (Ill. App. Ct., 5th Dist., 1994); City of Burbank, 1 PERI ¶ 2008 (IL SLRB 1985). The reprimands affect an employee’s terms and conditions of employment if they are placed in an employee’s personnel file and form the basis for more severe discipline. City of Chicago (Dept of Public Health), 17 PERI ¶ 3016 (IL SLRB 2001); Carpentersville Countryside Fire Protection Dist., 10 PERI ¶

2016 (IL SLRB 1994); City of Sparta, 9 PERI ¶ 2029 (IL SLRB 1985), aff'd by unpub. order, No. 5-93-0621 (Ill. App. Ct., 5th Dist., 1994); Cook County Medical Examiner, 6 PERI ¶ 3011 (IL LRB 1990); Vill. of Hinsdale, 2 PERI ¶ 2042 (IL SLRB 1986); City of Burbank, 1 PERI ¶ 2008 (IL SLRB 1985); Cf. County of Boone, 19 PERI ¶ 74 (IL LRB-SP 2003)(no supervisory authority where it was unclear whether documentation of written and oral reprimands were placed in employees' personnel files).

Here, Execs exercise independent judgment in issuing discipline because they unilaterally identify breaches of the Employer's policy and have discretion to issue documented disciplinary warnings or to give non-disciplinary counseling instead.¹⁰ Vill. of Lake Zurich, 27 PERI ¶ 26 (IL LRB-SP 2011) (independent judgment to discipline shown where sergeants had discretion to issue documented notices of counseling and reprimands); Dep't of Cent. Mgmt. Serv. (Dept of Human Serv.), 27 PERI ¶ 71 (IL LRB-SP 2011) (independent judgment shown where petitioned-for employee made her own determination as to whether personnel rules were broken and did not decide based on a rote application of set personnel rules); City of Washington, 27 PERI ¶ 3 (IL LRB-SP 2011) (independent judgment to discipline found where sergeants have the discretion to determine the nature of the discipline and did not follow a pre-established disciplinary chart or order setting forth the appropriate discipline for any given infraction); Vill. of Roselle, 27 PERI ¶ 59 (IL LRB-SP 2011) (independent judgment to discipline where sergeants could select from a number of disciplinary options), see also City of Springfield, 27 PERI ¶ 69 (IL LRB-SP 2011). In addition, the warnings affect the employees' terms and conditions of employment because they are documented, are placed in an employee's personnel file and form the basis for greater discipline including suspension and termination. Accordingly, Execs exercise the supervisory authority to discipline.¹¹

¹⁰ Execs may also place subordinates on proof status. While proof status may sometimes constitute discipline, I need not determine whether it does so in this case because there are other examples of discipline in the record. See, State of Illinois, 12 PERI ¶ 2024 (IL LRB 1996) (authority to place an employee on proof status, if exercised with independent judgment, is an indication of supervisory authority to discipline); but see Am. Fed'n of State, Cnty. and Mun. Empl., Council 31 and State of Illinois, 23 PERI ¶ 38 (IL LRB-SP 2007), aff'd, Ill. Dept of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., 382 Ill. App. 3d 208 (4th Dist. 2008) (ability to impose proof status constitutes authority to issue only very low levels of discipline that Board deemed inadequate to qualify as supervisory authority);

¹¹ The Employer also argues that the petitioned-for employees may effectively recommend higher discipline such as suspension. Recommendations may be effective even if they are not rubber-stamped, yet extensive independent review by a supervisor will undermine their "effectiveness" under the Act. City of Peru, 167 Ill. App. 3d 284 at 290; Vill. of Oak Brook, 26 PERI ¶ 7 (IL LRB-SP 2010), appeal

v. Adjustment of Grievances

The petitioned-for employees do not possess the supervisory authority to adjust grievances because they merely resolve their subordinates' minor complaints concerning day-to-day working conditions.

On the one hand, a "grievance" is not limited to formal grievances filed pursuant to a collective bargaining agreement. State of Illinois, Dep't. of Cent. Mgmt. Serv., 12 PERI ¶ 2032 (IL SLRB 1996). For example, a petitioned-for employee may adjust grievances within the meaning of the Act merely by resolving workplace complaints that involve issues such as inequitable work assignments, personality disputes, and equipment problems. State of Illinois, Dep't of Cent. Mgmt. Serv., 26 PERI ¶ 116 (IL LRB-SP 2010) citing City of Freeport, 135 Ill. 2d at 519, (finding authority to adjust grievances where employees could resolve informal complaints from their subordinates). Nevertheless, an employee's authority to resolve such disputes does not require the consistent use of independent judgment, and accordingly does not constitute supervisory authority under the Act, where it extends only to minor matters of a routine nature. State of Illinois, Dep't of Cent. Mgmt. Serv., 25 PERI ¶ 184 (IL LRB-SP 2009); see also Village of Bolingbrook, 19 PERI ¶ 125 (IL LRB-SP 2003).

Here, Execs try to resolve interpersonal problems at work amicably. While one Exec forbade the use of nail polish at desks because employees complained of headaches, and another told employees not to contact maintenance directly about the thermostat to avoid conflicting requests, neither matter required the exercise of independent judgment because the disputes concerned only minor complaints about day-to-day working conditions and were simply resolved. County of Cook, 19 PERI ¶ 18 (IL LRB-LP 2003) (adjustment of grievances considered minor and non-supervisory where employees did not address concerns regarding

pending, No. 2-10-0168 (Ill. App. Ct., 2nd Dist.). Here, for example the employees' recommendations for higher discipline are not effective because the Director of Drivers Services himself always conducts extensive ground level investigations in which he personally obtains witness statements from the individuals involved. Vill. of Oak Brook, 26 PERI ¶ 7 (no effective recommendation where supervisor reviewed videotape depicting basis of discipline and authored his own report to the chief); Pleasantview Fire Protection Dist., 17 PERI ¶ 2006 (IL LRB-SP 2000)(no effective recommendation of discipline where petitioned-for employee's supervisor interviewed the individuals involved); Cf., City of Peru, 167 Ill. App. 3d at 290 (effective recommendation found where chief's review consisted of asking the person to be disciplined for his account of the incident but where he did not interview other witnesses or conduct an "exhaustive" investigation). Thus, the employees' recommendations are not effective.

discipline or money and the only matters resolved were routine, concerning scheduling); City of Freeport, 2 PERI ¶ 2052 (IL SLRB 1986) (resolution of day-to-day complaints concerning working conditions required no independent judgment); State of Illinois, Dep't of Cent. Mgmt. Serv., 25 PERI ¶ 68 (IL LRB-SP 2009) (where grievance was minor and the resolution was fairly simple no independent judgment was required); see also, State of Illinois, Dep't of Cent. Mgmt. Serv., 25 PERI ¶ 184 (IL LRB-SP 2009) and Vill. of Bolingbrook, 19 PERI ¶ 125 (IL LRB-SP 2003).¹²

Accordingly, the Employer failed to prove the petitioned-for employees exercise the supervisory authority to adjust grievances.

c. Preponderance requirement

Finally, the 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, Dept of Cent. Mgmt Serv., (EPA, DPH, DHS, DCEA), 26 PERI ¶ 155 (IL LRB-SP 2011). 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, Dept of Cent. Mgmt Serv., (EPA, DPH, DHS, DCEA), 26 PERI ¶ 155 (IL LRB-SP

¹² Notably, on brief the Employer referenced no specific examples of Execs' authority to adjust grievances at all, stating only that "there [were] numerous examples provided" in the record. Rather, the Employer merely cited to the alleged existence of such authority, as asserted by managements' conclusory survey statements and unidentified job descriptions. Cent. Mgmt. Serv. (Dept of Public Health, and Pollution Control Bd), 26 PERI ¶ 113 (IL LRB-SP 2010)(employer's statement in offer of proof that employee in question "adjusts ... grievances," was conclusory and generalized; even if the declarant "intended to use the term in the same sense in which it is used in Section 3(r), the Board [was] certainly not required to defer to her legal assessment"); Chief Judge of the Circuit Court of Cook County, 19 PERI ¶ 123 (IL LRB-SP 2003)(Conclusory and general testimony of employer's witnesses did not fulfill the employer's burden of proof); Vill. of Bolingbrook, 19 PERI ¶ 125 (IL LRB-SP 2003)(witness testimony to a legal conclusion could not form the basis for a determination that an individual was supervisory). Such statements are insufficient to satisfy the Employer's burden of proof. Vill. of Broadview v. Illinois Labor Rel. Bd, 402 Ill. App. 3d 503, 508, 932 N.E.2d 25, 32 (1st Dist. 2010), City of Peru, 167 Ill. App. 3d 284, 291 (3d Dist. 1988), Ill. Dep't of Cent. Mgmt. Servs. v. Illinois Labor Rel. Bd., State Panel, 382 Ill. App. 3d 208, 228-29 (4th Dist. 2008), (all cases requiring Employer to introduce specific examples to prove employees' alleged supervisory authority and corresponding exercise of independent judgment).

2011) (citing, Stephenson County Circuit Court, 25 PERI ¶ 92 (IL LRB-SP 2009) Vill. of Bolingbrook, 19 PERI ¶ 125 (IL LRB-SP 2003)).

As a preliminary matter, the Employer has not demonstrated that Execs satisfy the preponderance requirement because the Employer failed to describe the petitioned-for employees' day-to-day activities in sufficient detail. Rather, the Employer either cites broadly to all the surveys and job descriptions, without describing their content, or relies on conclusory testimony that Execs spend 75% of their time "directing" and additional time on other supervisory functions.¹³ See, State of Illinois, Dept of Cent. Mgmt Serv., (EPA, DPH, DHS, DCEA), 26 PERI ¶ 155 (IL LRB-SP 2011) (preponderance requirement not met where Employer failed to describe the petitioned-for employees' day to day activities). The Employer accordingly prevents any meaningful comparison of supervisory/non-supervisory time and fails to meet its burden on this prong of the test.

Yet Execs fail to satisfy the preponderance test even absent strict comparisons and calculations because Execs spend little time on any supervisory task.¹⁴ The exercise of supervisory authority under the preponderance standard must be the "actual exercise of supervisory authority." State of Illinois, Dep't of Cent. Mgmt. Serv., (EPA, DPH, DHS, DCEA), 26 PERI ¶ 155 (IL LRB-SP 2011) (citing Downer's Grove v. Illinois State Labor Relations Board, 221 Ill. App. 3d 47, 55 (2nd Dist. 1992)). For example, that actual time does not include work time spent in instructing employees or otherwise "directing" employees, when such instructions do not qualify to supervisory direction, under the Act. State of Illinois, Dept of Cent. Mgmt. Serv., (EPA, DPH, DHS, DCEA), 26 PERI ¶ 155.

¹³ Specifically, the Employer states that, "both the Questionnaires and the position descriptions provides [sic] sufficient evidence that the petitioned-for Executive I and II positions perform supervisory functions a preponderance of the time to warrant a finding that they have supervisory status." Employer's brief, P 36.

¹⁴ Notably, while the court in Dep't of Cent. Mgmt. Serv. v. Ill. State Labor Rel. Bd., 278 Ill. App. 3d 79, 85-86 (4th Dist. 1996) mentioned that supervisory status "should be defined by the significance of what that person does for the employer, regardless of the time spent on particular types of functions," the court appeared to limit such analysis to those close cases where "no one can expect mathematical certainty." Dep't of Cent. Mgmt. Serv., 278 Ill. App. 3d at 86. As explanation, the court provided its own illustrative example: "if an employee spends 51% of employment time doing administrative functions and 49% in supervisory functions, the most significant part of the job may not be the administrative matters because of the importance of employee relations." Id. This is not the type of close case to which the court referred.

Here, Execs exercise supervisory authority only when they issue discipline and evaluate their subordinates.¹⁵ While, the Employer introduced no evidence as to the amount of time spent disciplining, it can be no greater than 25% of work time since the Employer asserts the Execs spend 75% of their time “directing.” In addition, absent evidence to the contrary, it is reasonable to assume that time spent completing annual/bi-annual performance appraisals constitutes only a very minor portion of the employees’ efforts. State of Illinois, Dep’t of Cent. Mgmt. Serv. (ICC), 26 PERI ¶ 84 (IL LRB-SP 2010). Accordingly, it is impossible to conclude that Execs spend a preponderance of their time exercising supervisory authority. See, State of Illinois, Dep’t of Cent. Mgmt. Serv. (ICC), 26 PERI ¶ 84 (Where petitioned-for employee spent an unspecified amount of time disciplining and some time completing annual performance appraisals, absent evidence to the contrary, the performance evaluations constituted “a very minor portion [of that employee’s] efforts,” rendering it “impossible to conclude” that the petitioned-for employee spent a preponderance of his time exercising supervisory authority).

Thus, the petitioned-for employees are not supervisory under the Act because they do not spend a preponderance of their work time performing supervisory functions.

3. Managerial Exclusion

a. Waiver

SEIU argues that the Employer waived its managerial argument because the Employer presented it for the first time in its pre-hearing memorandum, just days before hearing and after the deadline for requesting subpoenas. The Employer, on the other hand, posits that arguments based on a statutory exclusion may never be waived.

The Board in its decisions has never addressed the issue of whether a party may waive the right to assert an exclusion under the Act in a representation case. On the one hand, Section 1210.100(b)(4) of the Rules provides that “the setting forth of a party’s position with respect to the appropriate unit shall not be deemed to waive or otherwise preclude the right of that party to subsequently assert a different position with respect to what unit it considers appropriate.” However, the Board does not apply its rules mechanically, setting aside all considerations of equity. In fact, the Board in adopting the ALJ’s decision in County of Menard, acknowledged

¹⁵ Accordingly, it does not matter whether evaluations are classified as direction, reward or any other indicia.

that the purpose of Section 1210.100(b) is, in part, to “safeguard parties against undue surprise” and to prevent the resulting prejudice to a party’s position. County of Menard, 4 PERI ¶ 2033 (SLRB 1988) (holding that union did not waive its right to a hearing by failing to timely provide the employer with a position statement since the employer was aware of what the union’s position was and was fully prepared to address it on the merits with witnesses and evidence). However, there is no prejudice in allowing the Employer to advance the managerial argument in this case, though it was raised close to hearing: First, the Employer relies chiefly on legal arguments and not new facts. While the Employer did support its argument with one new document, the parties agreed to its compilation and subsequent introduction into evidence. Accordingly, I find no prejudice here and will address the Employer’s argument on the managerial exclusion, below.

b. The Traditional Test

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., 943 N.E.2d 1136 (4th Dist. 2010), pet. for leave to appeal pending (Ill. Sup. Ct. Apr. 18, 2011) (“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 Illinois, 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, 943 N.E.2d at 1144. 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 (4th Dist. 2009) citing Dep’t of Cent. Mgmt. Servs., 278 Ill. App. 3d at 88. Formerly, in fact, an employee was required to possess “final responsibility and independent authority to establish and effectuate policy.” Dep’t of Cent. Mgmt. Servs., 278 Ill. App. 3d at 87 (employee who holds advisory and subordinate role is not managerial). However, the Fourth District recently clarified that an advisory employee who makes effective recommendations may still be deemed managerial. DCMS/ICC, 943 N.E.2d at 1144 (formulation of policy is only one of several managerial and executive functions) (citing Chief Judge of the Sixteenth Judicial Circuit v. Ill. State Labor Rel. Bd., 178 Ill. 2d 333, 339–40 (1997)).

In DCMS/ICC, the court assessed the managerial status of administrative law judges (ALJs) at the Illinois Commerce Commission, and reversed the Board which found them to be public employees under the Act. DCMS/ICC, 943 N.E.2d at 1150. The court held that the ALJ’s “by their recommended orders, which the Commission almost always accepts without modification...appear to be directing the effectuation of the State's policies regarding public utilities” under the Public Utilities Act, 220 ILCS 5/1. As such, the court noted that the ALJs might be managerial, even though they did not have final authority to formulate policy, because they helped “run” the organization by making what could be deemed effective recommendations.¹⁶ Id. at 1146.

However the court’s holding was narrow and may be distilled into the following two-pronged test: The employee at issue will be deemed managerial under DCMS/ICC when he (1) makes effective recommendations (2) on matters that encompass “a major component of the agency’s mission.” Id. at 1146. The court explained that an employee’s recommendation is effective only if it is adopted “almost all the time,” and “without modification,” while a matter encompasses a “major component of the agency’s mission” if it is “the *primary...if not the exclusive means*, by which the [Employer] fulfills its statutory mandate.” Id. at 1146 (emphasis added). Thus, as a threshold matter, the Employer must identify recommendations made by the petitioned-for employees. Next the Employer must show that the employee’s recommendations

¹⁶ The court remanded for further administrative proceedings on the issue of the ALJs’ managerial status.

were adopted almost all the time. Finally, the Employer must connect the nature of the employee's recommendation to the agency's statutory mission, in the manner noted above.

Here, the Employer has not satisfied this test. There is only a single reference to an employee recommendation in this case: Christine Works assessed the Employer's system of internal accounting and administrative control and subsequently suggested that the Employer should use a new database program to promote accuracy. However, there is no evidence that Works' recommendation was followed or even reviewed. In fact, the "reviewed by" signature line of her report is blank. Moreover, the Employer presents neither evidence nor argument that Works's recommendation on the database system is the primary or exclusive means by which the Secretary of State fulfills its statutory mandate. As such, Works' recommendations on these matters, even if routinely accepted, are not of the character which would satisfy the DCMS/ICC test.¹⁷

Despite failing to fulfill the requirements of DCMS/ICC, the Employer asserts that the petitioned-for employees, 80 in particular, are managerial because they are highest-ranked at their respective facilities and accordingly, "run the show."¹⁸ As such, the Employer further states that if these employees are unionized, there will be no non-union employees to supervise or manage at these locations. As noted above, the Employer has not demonstrated that the employees in question help run the agency, under DCMS/ICC or that they are supervisors under the Act. In addition, the physical proximity of a superior to his subordinate does not alone demonstrate managerial authority. Cf. Dep't of Cent. Mgmt. Serv. (Dep't of Conservation), 10 PERI ¶ 2037 (IL SLRB 1994)(highest-ranked employees at work location found managerial only when the chain of command was diffuse, and where they also took numerous discretionary

¹⁷ Likewise, while the documentary record contains minutes of a meeting agenda which describes policies that employees must follow, there is no indication as to who devised the policies listed or who wrote the document. The document is located in the part of the exhibit devoted to Christine Works. However, even if I assume that Works did devise the policies, including an open door policy, requirement that employees communicate via email, and a Monday due date for employee tasks, these are policies which govern each Driver Service facility, not Driver Services or the Secretary of State as a whole. Moreover, if the policies did apply more broadly, there is no indication that they are the exclusive means by which the Secretary of State fulfills its statutory mandate. As such, they satisfy no part of the DCMS/ICC test.

¹⁸The Union notes in its Objections to the Employer's Brief that the Employer should be limited to arguing the managerial status of the 26 employees first alleged as managerial in the Employer's pre-hearing memo. I find that the Employer has not presented any evidence that demonstrates a distinction between the duties of those employees who are highest ranked at their facility and those who are not. Accordingly, there is no prejudice to the Union if I address the managerial status of all petitioned-for employees as a group.

decisions which broadly affected not only the fundamental purposes and goals of their agency, but the methods and means of achieving those goals by initiating, developed and implemented the programs, services and activities offered at their particular historical or conservation site). Moreover, while “managerial status is not limited to those at the very highest level of the governmental entity,”¹⁹ neither was it intended to encompass those employees near the bottom of an agency’s hierarchy. Here, petitioned-for employees are outranked by the Chief Deputy Director, Deputy Director, administrator and zone managers, they are higher only than the front line staff and supervisors, and possess no demonstrable managerial authority as defined by case law or the Act. Accordingly, they must not be excluded from the bargaining unit.

Finally, the Employer argues that the petitioned-for employees’ managerial status should be implied from their alleged divided loyalty and conflict of interest.²⁰ However, the potential for divided loyalties arises only when the Employer has demonstrated managerial (or supervisory) status. To permit the Employer to assert divided loyalty as the *basis* for the managerial exclusion, absent the factors which demonstrate such authority, would present a tautology and place the cart before the horse. NLRB v. Yeshiva University, 444 US 672, 683 (1980) (Divided loyalty found only where employees exercised discretion “independently of established employer policy”); Salaried Empl. of N. Am., 202 Ill. App. 3d at 1122-23 (risk of divided loyalties where attorneys at issue exercised “tremendous” discretion on behalf of the City); 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) (divided loyalties ascertained where attorneys exercised broad decision-making authority and unilaterally made more than 98% of all decisions concerning cases they handled without input from the Public Guardian); Chicago Transit Authority, 20 PERI ¶ 10 (IL LRB ALJ 2003) (rejecting similar circular arguments with respect to supervisory status, noting no risk of “divided loyalties” where employees did not meet supervisory test under the Act and possessed no “significant discretionary authority to affect their subordinates’ employment in areas likely to fall within the scope of union representation”).

¹⁹ Salaried Empl. of N. Am. v. Ill. Labor Rel. Bd. (“SENA”), 202 Ill. App. 3d 1013, 1121 (1st Dist. 1990).

²⁰ SEIU argues in its Objections to the Employer’s Brief that the Employer should be barred from arguing managerial status based on any implied exclusion because the Employer stipulated that it would only advance the managerial as a matter of fact argument under the judicial/traditional test. I find that the Employer’s stipulation bars only managerial as a matter of law arguments. Divided loyalty, one of the rationales for the managerial exclusion, is referenced in almost every case on this subject. Thus, the Employer’s argument is permissible under its stipulation.

Thus, Execs are not managerial under the Act.

V. CONCLUSIONS OF LAW

1. The petitioned-for employees are not supervisors within the meaning of Section 3(r) of the Act.
2. The petitioned-for employees are not managerial within the meaning of Section 3(j) of the Act.

VI. RECOMMENDED ORDER

Unless this Recommended Decision and Order Directing Certification is rejected or modified by the Board, Service Employees International Union, Local 73 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 Section 6(c) and 9(d) of the Act.

INCLUDED: Petitioned-for Executive Is and IIs.

EXCLUDED: All confidential, supervisory and managerial employees as defined by the Illinois Public Labor Relations Act.

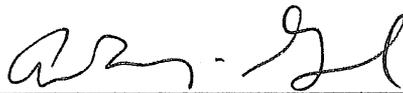
VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 14 days after service of this 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/or cross exceptions will not be considered without this statement. If no exceptions have been filed within the 14-day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois, this 1st day of August, 2011

**ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**



**Anna Hamburg-Gal,
Administrative Law Judge**

