

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

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

Case No. S-RC-11-030

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On August 12, 2010, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME or Petitioner) filed a Majority Interest Petition with the Illinois Labor Relations Board, State Panel (Board) in the above-captioned case pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315, (2010), as amended, (Act). The Petitioner seeks to become the exclusive representative of the employees of the State of Illinois, employed in the title Senior Public Service Administrator, Option 8L (SPSA Option 8L), in the Department of Human Services (DHS) by including them in the existing RC-10 bargaining unit. The Employer maintains that one of the petitioned-for employees must be excluded from the RC-10 bargaining unit because she is a confidential employee within the meaning of the Act, that three of the petitioned-for employees must be excluded from the RC-10 bargaining unit because they are managerial employees within the meaning of the Act, and that proposed unit is not appropriate for bargaining because three of the employees have term appointments.

A hearing on the matter was conducted on January 18, 2011 by Administrative Law Judge Eileen Bell. DHS General Counsel Mary-Lisa Sullivan testified regarding her knowledge

of two positions that Kathleen Ward held at the time or in the recent past. At the time of the hearing, Ward performed the job duties of both positions. The case was transferred to Administrative Law Judge Thomas Allen. Both parties elected to file post-hearing briefs.

I. Preliminary Findings

The parties stipulate and I find:

- 1) The Employer is a public employer within the meaning of Section 3(o) of the Act and subject to the jurisdiction of the State Panel of the Board pursuant to Section 5(a) of the Act.
- 2) The Petitioner is a labor organization within the meaning of Section 3(i) of the Act.
- 3) The Board has jurisdiction to hear this matter, pursuant to Sections 5(a) and 20(b) of the Act;
- 4) There is no history of collective bargaining involving the petitioned-for employees;
- 5) Three of the employees, Kathleen Ward, Robert Connor and Sheila Harrell, hold term appointments as defined by the Personnel Code;
- 6) The positions held by Amy Tarr, Timothy Gehany and Dan Dyslin are included in the RC-10 bargaining unit; and
- 7) The positions held by Mary-Lisa Sullivan, Matt Langer and Camela Gardner are excluded from the RC-10 bargaining unit.

II. Issues

At issue is whether the two positions held by Kathleen Ward are confidential under Section 3(c) of the Act, whether Ward's positions as well as those held by Robert Connor, and Sheila Harrell are managerial within the meaning of Section 3(j) of the Act, and whether the proposed unit is an appropriate unit.

III. Facts

The petition seeks to add ten positions held by nine employees at the Department of Human Services (DHS), all of whom are attorneys. The parties stipulated to the status of six of the ten positions, leaving four positions at issue. DHS contains eight divisions with over 14,000 employees. The Office of the General Counsel contains 80 total staff members with 20 attorneys. General Counsel Mary-Lisa Sullivan oversees the Office of the General Counsel, the Bureau of Policy and the Bureau of Civil Affairs. Sullivan makes all decisions regarding hiring, firing and discipline in these three divisions of DHS. Sullivan reports directly to the Secretary of DHS and the Governor's General Counsel.

At the time of the hearing, Kathleen Ward held the position of Deputy General Counsel for Administrative Support of DHS, duties she began performing in August 2010. Ward previously held the position of Deputy General Counsel of Health Insurance Portability and Accountability Act, Freedom of Information Act and Legislative Affairs. She began performing the duties of this position in March of 2008. This position was vacant at the time of the hearing, but Ward continued to perform its duties. The parties presented evidence pertaining to both positions.

At the time of the hearing, Robert Connor held the position of Deputy General Counsel of the Division of Disabilities and Behavioral Services and Sheila Harrell held the position of Bureau Chief of Administrative Hearings. Ward, Connor and Harrell were all serving term appointments.

As the Deputy General Counsel for Administrative Support, Ward reviews administrative policies. These policies are then sent to the appropriate division within DHS and returned to Ward for a final legal review before the policy is issued or revised. In this position, Ward also serves as the DHS Ethics Officer. As the Ethics Officer, Ward fields inquiries from DHS

employees about potential violations of the Ethics Act. Ward then counsels the employee to report the conduct to the Office of the Executive Inspector General (OEIG) or makes the report herself. Ward may consult Sullivan but she is not required to do so. When Ward reports a potential violation of the Ethics Act to the OEIG, the OEIG conducts an investigation and issues recommendations to the Secretary of DHS. These recommendations could include discipline. Ward receives a copy of the OEIG's recommendations, but she is not involved in DHS' decision regarding how to proceed given the recommendation. Ward keeps these reports and uses them to aid her in responding to future ethics inquiries. Additionally, the Ethics Act requires Ward to collect statements of economic interest from DHS employees and send this information to the Secretary of State. Ward fields inquiries from DHS employees regarding the Revolving Door Act and the Gift Ban Act. When she receives an inquiry, Ward reviews the relevant act and DHS policy to determine how to respond. Ward does not tell the employee that DHS rules or state law forbid his or her conduct. Rather, Ward gives her opinion on whether the employee's conduct would violate any DHS policy or law.

As the Deputy General Counsel for HIPAA, FOIA and Legislative Affairs, Ward is primarily responsible for responding to FOIA requests. When FOIA requests are made, they are directed to different parts of DHS by mail control. The employees in these parts of the department prepare a response and submit it to Ward for approval. In responding to FOIA requests, Ward determines what documents and information would be responsive to the request. Ward also considers what exemptions may allow DHS to exclude documents or information from their response. If Ward thinks that an exemption applies to the FOIA request, she contacts the Attorney General's Public Access Counselor for an opinion. DHS has an attorney who responds to most HIPAA requests and does not report to Sullivan. As the Deputy General Counsel for HIPAA, FOIA and

Legislative Affairs, Ward also acts as a legislative liaison. In this capacity, Ward reviews legislation if DHS' Office of Legislation has any questions. Other DHS employees review legislation directly relating to programs they administer. While another employee in the office suggested a change to the travel policy, the Employer did not present any evidence that Ward is involved with making policies or has suggested any policy changes herself.

IV. Discussion and Analysis

a. Confidential

The Employer asserts that Kathleen Ward is a confidential employee within the meaning of Section 3(c) of the Act.¹ Three tests have been formulated to determine whether an employee is “confidential”: the labor nexus test, the authorized access test, and the reasonable expectation test. Chief Judge of the Circuit Court of Cook County v. AFSCME, Council 31, 153 Ill. 2d 508, 515 (1992). The reasonable expectation test applies where no collective bargaining unit was previously in place. Id. at 524. DHS has a history of collective bargaining so only the labor nexus and authorized access tests apply in this situation. The labor nexus and authorized access tests require analysis of the employee’s “regular course of duties.” State of Ill., Dep’t of Cent. Mgmt. Servs., 26 PERI ¶34 (IL LRB-SP 2010).

Under the labor nexus test, an employee is a confidential employee if he or she assists in a confidential capacity in the regular course of his or her duties a person or persons who formulates, determines, or effectuates labor relations policies. Chief Judge, 153 Ill. 2d at 523.

¹ Section 3(c) of the Act states:

“Confidential employee” means any 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.

The person being assisted must perform all three of these functions. Under the authorized access test, an employee is a confidential employee if he or she has authorized access to information concerning matters specifically related to the collective bargaining process between labor and management. Id.

The Employer claims that both of Ward's positions should be excluded under the labor nexus test because she assists Sullivan in a confidential capacity and Sullivan formulates, determines and effectuates labor policies. The Employer alleges that both of Ward's positions should be excluded under the authorized access test because she has access to information when responding to FOIA and ethics requests and this information could relate to collective bargaining. Finally, the Employer claims that there would be a conflict of interest and divided loyalty if Ward is a member of a union. The Employer alleges that Ward sees every OEIG report so she has advance notice of potential employee discipline. The Employer also alleges that in the event that the Petitioner makes a FOIA request, they would have access to documents through Ward. The Petitioner claims that Ward does not encounter information relating to labor relations policies in either of her positions at issue in this case. The Petitioner alleges that employees who respond to FOIA requests from labor organizations are not confidential employees because responding to FOIA requests does not involve dealing with labor relations policies. The Petitioner claims that the Employer presented no evidence that Ward was involved in any inquiries that involved labor relations information.

While Ward is Sullivan's subordinate, she is not her assistant as contemplated by the labor nexus test. If Sullivan has access to any labor relations or collective bargaining information, Ward does not have access to it merely because she is Sullivan's subordinate. There is no evidence that Ward assists Sullivan if or when Sullivan is involved in labor relations. There

is no evidence that Ward would see or have access to any labor relations or collective bargaining information to which Sullivan may have access. Simply put, there is merely an allegation that Ward “assists” Sullivan. The Employer did not present any evidence of how exactly Ward assists Sullivan. This is not enough to satisfy the labor nexus test for either of Ward’s positions.

The Employer claims that Ward could have access to any document in the DHS as a result of an ethics inquiry, or a FOIA inquiry. However, the Employer did not present any evidence that Ward has ever accessed any labor relations or collective bargaining information in the past. There is no evidence that Ward would have any reason to access this information when responding to inquiries within her job descriptions. Rather, Ward would only have reason to access labor relations or collective bargaining information if she were acting outside her job description. The Employer seems to seek to exclude Ward as a confidential employee based on the assumption that she would become a member of a union and then go out of her way to access confidential information for the union. This possibility would only occur if Ward were to act in a capacity outside of her job duties and is too remote of a possibility to exclude her from the bargaining unit as a confidential employee. The evidence presented does not satisfy the authorized access test. Rather, it only presents situations where Ward might have unauthorized access to labor relations or collective bargaining documents outside “the regular course of her duties.” 5 ILCS 315/3(c) (2010); State of Ill., Dep’t. of Cent. Mgmt. Servs., 26 PERI ¶34 (IL LRB-SP 2010).

Similar to the Employer’s evidence for the authorized access test, the Employer merely speculates about how Ward’s inclusion in a bargaining unit would cause her to act outside her job descriptions to view confidential information for the union. The Employer does not give examples of situations where Ward has had reason to view labor relations or collective

bargaining information but rather hypothesizes that Ward's status as a union member could cause her to pass information she might come across on to the union. The Employer's evidence consists almost solely of hypothetical argument and is not sufficient to satisfy the authorized access test. Therefore, Ward is not a confidential employee in either of her positions.

b. Managerial

The Employer argues that the Ward's two positions as well as the positions held by Robert Connor and Sheila Harrell should be deemed managerial under Section 3(j) of the Act solely because the employees hold term appointments. However, the Board has repeatedly found no merit to such arguments. State of Ill., Dep't of Cent. Mgmt. Serv., 28 PERI ¶50 (IL LRB-SP 2001); State of Ill, Dep't of Cent. Mgmt. Serv., (EPA, DPH, DHS, DCEA), 26 PERI ¶155 (IL LRB-SP 2011) (holding that exemption from the Personnel Code by section 4d(3) is not contained in the act as an exclusion and that the General Assembly created, within the Act itself, all the exceptions it intended to create); County of Cook, 24 PERI ¶36 (IL LRB-LP 2008) and City of Chicago (Mayor's Office of Information and Inquiry), 10 PERI ¶3003 (IL LRB 1993). Recently, the Board refused to reverse its position in American Federation of State, County and Municipal Employees, Council 31 and State of Illinois Department of Central Management Services (Department of Revenue), 29 PERI ¶62 (IL LRB-SP 2012), holding that employees holding term appointments are not managerial as a matter of law. As a result, the positions held by Kathleen Ward, Robert Connor and Sheila Harrell are not managerial under Section 3(j) of the Act solely as a result of fact that they hold term appointments.

c. Appropriate Unit²

Section 9(b) of the Act states that in determining whether a proposed bargaining unit is appropriate to represent petitioned-for employees, the Board “shall decide... a unit appropriate for the purpose of collective bargaining based upon, but not limited to, such factors as: historical pattern of recognition; community of interest, 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.” A petition must seek an appropriate unit, which need not be the most appropriate unit. State of Illinois (CMS), 24 PERI ¶112 (IL LRB-SP 2008); Rend Lake Conservation District, 14 PERI ¶2051 (IL SLRB 1998).

The Employer claims that the petitioned-for unit is not an appropriate bargaining unit because the petitioned-for employees hold term appointments. The Employer alleges that they can not be put into any appropriate unit because they are at-will employees under the Personnel Code. It claims that putting the petitioned-for employees into a bargaining unit contradicts their at-will status by giving them the employment protections of other employees in the unit.

The parties did not present evidence or argument on this issue and stated that it would be resolved by Board decisions in Charge Nos. S-RC-10-156 and S-RC-10-222. However, Charge No. S-RC-10-222 has come before the Board and the Board did not see fit to reverse its long held policy. American Federation of State, County and Municipal Employees, Council 31 and State of Illinois Department of Central Management Services (Department of Revenue), 29 PERI

² At hearing, the original ALJ stated that she would not rule on this issue until the Board has considered similar arguments raised in Case Nos. S-RC-10-156 and S-RC-10-222. The Board has still not addressed Case No. S-RC-10-156, but it has addressed Case No. S-RC-10-222, and the parties have not appealed that decision. For this reason, and to terminate the delay in the resolution of this case, I find it appropriate to rule on this issue.

¶62 (IL LRB-SP 2012). In that case, the Board held that an employee with a term appointment could be placed in a unit with other employees despite the fact that they did not share all of the same terms and conditions of employment. The Employer argues that the fact that the three employees at issue in this case hold term appointments is enough to make the proposed unit inappropriate. The caselaw on the subject clearly suggests otherwise. Additionally, the Board's recent decision reaffirmed its position despite the same Employer's request to reverse that position. I see no reason to do so in this case. Therefore, the petitioned-for unit is an appropriate unit for collective bargaining.

V. CONCLUSIONS OF LAW

1. I find that Kathleen Ward, Robert Connor and Sheila Harrell are public employees within the meaning of the Act.
2. I find that the proposed bargaining unit is an appropriate unit for bargaining under Section 9(b) of the Act.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the positions held by Amy Tarr, Timothy Gehany, Dan Dyslin, Kathleen Ward, Robert Connor and Sheila Harrell as described below, shall be included in the RC-10 bargaining unit currently represented by the American Federation of State, County and Municipal Employees, Council 31.

INCLUDED: The positions held at the time of the hearing by Amy Tarr, Timothy Gehany, Dan Dyslin, Kathleen Ward, Robert Connor and Sheila Harrell at the State of Illinois, Department of Human Services. The position of Deputy General Counsel of HIPAA, FOIA and Legislative Affairs at the State of Illinois, Department of Human Services.

EXCLUDED: The positions held at the time of the hearing by Mary-Lisa Sullivan, Matt Langer and Camela Gardner. All supervisors, confidential, and/or managerial employees as defined by the 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 Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 10 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 5 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed with the General Counsel of the Illinois Labor Relations Board at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 14-day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois, this 4th day of March, 2013.

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A handwritten signature in cursive script, reading "Thomas R. Allen", written in black ink. The signature is positioned above a solid horizontal line.

Thomas R. Allen

Administrative Law Judge