

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

**American Federation of State, County
and Municipal Employees, Council 31,**

Petitioner

and

**State of Illinois, Department of Central
Management Services (Pollution Control
Board),**

Employer

Case No. S-RC-11-062

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On October 7, 2010, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME or Petitioner) filed an amended majority interest Representation/Certification Petition (Petition) with the Illinois Labor Relations Board, State Panel (Board), pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315 (2010), as amended (Act) in the above-captioned case. By the Petition, AFSCME sought to become the exclusive representative of two employees employed by the State of Illinois, Department of Management Services (Employer), at the Illinois Pollution Control Board, one each in the titles of Environmental Scientist I and II, including them in the existing bargaining unit, known as RC-63, whose members it already represents.¹ Based upon the showing of interest cards filed by the Petitioner and the employee name and signature exemplars which the Employer provided, Petitioner has satisfied the required majority showing of interest for the petitioned-for unit. There is no allegation of fraud or coercion with respect to the showing of interest. The issues

¹ The initial petition filed September 23, 2010 identified both employees as occupying the same title.

presented are threefold: 1) whether the Environmental Scientist II is a supervisory employee within the meaning of the Act; 2) whether either or both of the petitioned-for employees occupying the Environmental Scientist I and II positions are managerial employees within the meaning of the Act; and 3) if either or both the Environmental Scientist I and II are public employees, whether the petitioned-for RC-63 bargaining unit is appropriate, or whether, as the Employer contends, only a stand-alone unit is appropriate. My findings and recommendation are set forth below.

I. BACKGROUND

A. Employer's Position Statement

On October 26, 2010, the Employer filed a Position Statement in which it argued that Anand Rao, who occupies the Environmental Scientist II position, is both a supervisory and managerial employee within the meaning of the Act, and Alisa Liu, an Environmental Scientist I, is a managerial employee within the meaning of the Act. Because of their respective status, the Employer maintains that Rao and Liu should be excluded from the petitioned-for bargaining unit, RC-63.

The Employer contends that the Environmental Scientist II position meets the Act's definition of a supervisory employee. In particular, the Employer points to the position description for the title as evidence of the position's authority to supervise subordinate staff. The Employer relies on the Appellate Court's decision in Village of Maryville v. Illinois Labor Relations Bd., 402 Ill. App. 3d 369, 26 PERI ¶67 (5th Dist. 2010), to support its position that the Environmental Scientist II is a supervisory employee even though he has only one subordinate, the Environmental Scientist I. In urging that the Environmental Scientist II be found to be a supervisory employee within the meaning of the Act, the Employer also cites the potential for a

conflict of interest if the Environmental Scientist II is included in the same unit at his subordinate.

The Employer next maintains that both the Environmental Scientist I and II are managerial employees within the meaning of the Act and should thus be excluded from a bargaining unit. It calls attention to Section 3(j) of the Act which defines a managerial employee 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).

In its Position Statement, the Employer argues that the Environmental Scientist I and II satisfy the alternative test for managerial employees articulated by the Illinois Supreme Court in Office of the Cook County State's Attorney v. Illinois Local Labor Relations Board, 166 Ill. 2d 296, 11 PERI ¶4011 (1995) in which the state's high court concluded that the Cook County Assistant State's Attorneys were managerial employees based on their statutory duties. According to the Employer, the doctrine of managerial employee as a matter of law requires only that the subject employees be involved in the implementation and effectuation of policy, but not its formulation. The Employer maintains that both positions at issue are involved in effectuating and implementing the Pollution Control Board's policies, and perform only functions which align squarely with the interests of the Chairman and other Members of the Pollution Control Board.

In addition, the Employer contends that because the Environmental Scientist I and II positions are exempt from the Personnel Code, individuals occupying these positions should be deemed *de facto* managerial employees within the meaning of the Act. The Employer argues that such positions which are exempt from the protections of the Personnel Code are inherently

inappropriate for organizing into a bargaining unit. Specifically, the Employer maintains that including such positions in a bargaining unit would fundamentally change them by rendering them subject to a collective bargaining agreement with its provisions regarding how and why discipline can be issued, as well as how a vacancy is filled. The Employer concludes that even if the Environmental Scientist I and II are found to be public employees within the meaning of the Act, the petitioned-for bargaining unit, RC-63, is an inappropriate unit for such positions which are "at-will" or exempt from the Personnel Code.

B. Employer's Offer of Proof

On December 29, 2010, the Employer submitted an Offer of Proof in response to an Order to Show Cause. In its Offer of Proof, the Employer relied on the verified statement of G. Tanner Girard, the Acting Chairman of the Illinois Pollution Control Board to support its position that Anand Rao, the Environmental Scientist II, is a supervisory employee within the meaning of the Act.² According to Girard's verified statement, Rao, as the Environmental Scientist II, is the direct supervisor of one subordinate, Environmental Scientist I Alisa Lieu, and as such, Rao uses his discretion in assigning and reviewing her work, training her on new policies and procedures, and completing her annual performance evaluation. The verified statement also maintains that Rao has the authority to recommend discipline for Liu. Paragraph 17 of that verified statement explains the work that Rao and Liu perform:

[B]oth Mr. Rao and Ms. Liu are involved in the review and drafting of policies which affect the operation of the Pollution Control Board generally. Both are responsible for variously drafting, reviewing, interpreting, analyzing, and otherwise evaluating legislation, rules, decisions, and technical and/or scientific data that the Chairman, Board Members, and the Board's legal staff use in formulating regulatory policies and adjudicating contested cases.

² In addition to Girard's statement, the Employer submitted several exhibits, including the job descriptions for Environmental Scientist I and II.

Girard's verified statement concludes with his opinion that Rao and Liu spend the most significant portion of their work time performing the work tasks "ascribed to them above."

The Employer maintains that including Rao in the same bargaining unit as Liu, his subordinate, would result in a situation of divided loyalty. The Employer explains that Rao would be placed in the "very awkward position" of completing performance evaluations and imposing discipline on an employee that he works with and is his equal in the Union. In support of this argument, the Employer submitted three performance evaluations that Rao completed for Liu in successive fiscal years, the first ending May 31, 2008.

The Employer's Offer of Proof also cites Girard's verified statement to support its position that both the Environmental Scientist I and II positions are managerial within the meaning of the Act. In making its argument that the occupants of these positions are managerial employees, the Employer emphasizes that their duties and responsibilities are part of the decision-making processes that the Chairman and Board Members undertake in performing the rulemaking and/or adjudicatory duties of the Illinois Pollution Control Board. In addition, the Employer argues that the Chairman and Board Members rely *on* the answers which the Environmental Scientists I and II—it calls them "technical advisors"—provide them.

The Employer quotes from the Board's decision in Illinois Federation of Public Employees and State of Illinois, Dep't of Central Management Services (Historical Preservation Agency), 10 PERI ¶2037 (IL SLRB 1994), holding that Site Managers and Site Superintendents were managerial employees within the meaning of the Act: "responsibility for the overall effective and efficient operation of a department or a major unit thereof is indicative of managerial status." The passage below presents the Employer's final statement following its request for a hearing in its Offer of Proof:

[T]he Board should find the petitioned-for [Environmental] Scientists I and II employees to be *scientific/technical professionals* who *work with* the Chairman and Members of the [Illinois] Pollution Control Board in effectuating and implementing their rulemaking and adjudicatory duties under the state statute which created that agency. (Emphasis added).

C. Parties' Positions Regarding Appropriate Bargaining Unit

As indicated earlier, the Employer maintains that if the Environmental Scientists I and II positions are found to be occupied by public employees, the petitioned-for bargaining unit, RC-63, is inappropriate. In explaining, the Employer takes the position that RC-63 is inappropriate for positions that are exempt from the Personnel Code. The two petitioned-for positions—Environmental Scientists I and II—are both exempt from the provisions of the Personnel Code pursuant to Section 4c(12) for “technical and engineering staff.” 20 ILCS 415/4c(12) (2010). The Employer contends that only a stand-alone unit is appropriate for the Environmental Scientist I and II positions which are exempt from the Personnel Code.

In response to this argument, the Petitioner submitted certifications in scores of cases which show the Board has certified it as the exclusive representative of State of Illinois employees exempt from the Personnel Code pursuant to Section 4c(12), the same exemption at issue in this case. 20 ILCS 4154c(12) (2010). In addition, AFSCME provided evidence that many of the positions—the employees on the technical and engineering staffs of the Illinois Commerce Commission and the Illinois Emergency Management Agency—are covered under the current agreement between AFSCME and the State. Moreover, the Petitioner’s documentation shows that the current agreement expiring June 30, 2012 includes separate classification series for Code and non-Code employees in the RC-63 bargaining unit.³ Finally, AFSCME provided a Memorandum of Understanding (MOU) that it entered into with the State

³ The terminology “Code and non-Code employees” is synonymous with employees subject to the Personnel Code and exempt from the Personnel Code.

regarding non-Code employees as a supplement of its master contract. That MOU applies to employees exempt from the Personnel Code jurisdiction due to the technical or engineering nature of their duties, and sets forth certain provisions applicable only to non-Code employees with respect to filling of vacancies, layoff, and recall rights.

II. DISCUSSION AND ANALYSIS

In a representation hearing, the party claiming a statutory exclusion has the burden of proving its existence. Chief Judge of the Circuit Court of Cook County and Chicago Newspaper Guild, Local #34071, 18 PERI ¶2016 (IL LRB SP 2002). Consequently, no hearing is required where the party seeking that exclusion fails to raise an issue of fact or law. See e.g., State of Illinois, Dep't of CMS (Human Rights Commission) v. Illinois Labor Relations Board, 406 Ill. App. 3d 310, 314, 26 PERI ¶13 (4th Dist. 2010); City of Chicago v. Illinois Labor Relations Board., 396 Ill. App. 3d 61, 71-72, 25 PERI ¶158 (1st Dist. 2009). After careful consideration of the parties' submissions, I find that the Employer has failed to raise a question of fact or law as to whether the Environmental Scientist II at issue is a supervisory employee within the meaning of the Act, whether the Environmental Scientist I and/or II are managerial employees within the meaning of the Act, and whether the RC-63 bargaining unit is appropriate if they are found to be public employees.

A. Supervisory Issue

In relevant part, Section 3(r) of the Act defines a supervisory employee as follows:

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

Applying this definition, an individual will be deemed a supervisory employee within the meaning of the Act if he or she meets all four parts of the test: the alleged supervisor must 1) perform principal work substantially different from that of his subordinate(s); 2) exercise or recommend the exercise of one or more supervisory functions enumerated in Section 3(r) of the Act; 3) consistently use independent judgment in the performance of those functions; and 4) devote a preponderance of employment time exercising such supervisory authority. City of Freeport v. Illinois State Labor Relations Board, 135 Ill. 2d 499, 6 PERI ¶4019 (1990); Northwest Mosquito Abatement District v. Illinois State Labor Relations Board, 303 Ill. App. 3d 735, 748, 708 N.E.2d 548, 15 PERI ¶4007 (1st Dist. 1999); AFSCME, Council 31 and State of Illinois, DCMS (ISP), 23 PERI ¶38 (IL LRB-SP 2007); Village of Wheeling, 3 PERI ¶2005 (IL SLRB 1986); aff'd, 170 Ill. App. 3d 934, aff'd sub nom., City of Freeport v. Illinois State Labor Relations Board, 135 Ill. 2d 499, 6 PERI ¶4019 (1990).

The Employer has failed to raise an issue concerning the first, necessary element. Neither the Employer's Position Statement nor its Offer of Proof allege that the principal work of the Environmental Scientist II is substantially different from that of his subordinate, the Environmental Scientist I. The Order to Show Cause specifically asked the Employer to provide documentation showing "how the principal work of the Environmental Scientist II differs from that of his . . . subordinate." The Employer's Offer of Proof does not respond to that request.

A close review of documents submitted as part of the Employer's Offer of Proof shows that the substantive work which the Environmental Scientists I and II perform is *similar, rather than different*. In particular, paragraph 17 of the affidavit which G. Tanner Girard signed in December 2010 as the Acting Chairman of the Illinois Pollution Control Board describes the

work performed by Rao and Liu as Environmental Scientists II and I, respectively, without differentiating between them:

[i]n the work that they perform, both Mr. Rao and Ms. Liu are involved in the review and drafting of policies which affect the operation of the Pollution Control Board generally. Both are responsible for variously drafting, reviewing, interpreting, analyzing, and otherwise evaluating legislation, rules, decisions, and technical and/or scientific data that the Chairman, Board members, and the Board's legal staff use in formulating regulatory policies and adjudicating contested cases.

In the next paragraph of his affidavit, Girard maintains that both Rao and Liu spend the most significant portion of their work time performing the tasks described in the passage quoted above.⁴ This account of the work of the Environmental Scientists I and II is consistent with the job descriptions the Employer submitted for these positions.

The Employer's evidence is also insufficient to raise a question of fact or law regarding the fourth, necessary element. The fourth prong of the supervisory test requires that the alleged supervisor spends a preponderance of his/her employment time exercising supervisory authority. City of Freeport, 135 Ill. 2d at 532. According to the preponderance of time standard articulated in State of Illinois, Dep't of Cent. Mgmt. Serv. v. Illinois State Labor Relations Bd., 278 Ill. App. 3d 79, 85, 662 N.E.2d 131, 13 PERI ¶4003 (4th Dist. 1996), the term "preponderance" means that the purported supervisor spends more time on supervisory functions than on any one nonsupervisory function.⁵

The Employer fails to allege that Rao spends the most significant portion of his work time engaged in activities which the Act deems supervisory. In particular, paragraph 18 of

⁴While the Employer submitted evidence that Rao is the direct supervisor of Liu and is expected to assign and review her work, train her on new policies and procedures, complete her annual performance evaluations, approve her time-off requests and recommend discipline for her, the Employer makes no contention that such tasks constitute Rao's principal work as the Environmental Scientist II.

⁵The court stated that this formulation of "preponderance" is the same as defining "preponderance" to mean that the most significant allotment of the employee's time must be spent exercising supervisory authority. 278 Ill. App. 3d at 85.

Girard's affidavit states that Rao and Liu "spend the most significant portion of their work time performing the work tasks ascribed to them above" in paragraph 17 which defines the crux of the work that they perform as "drafting, reviewing, interpreting, analyzing, and otherwise evaluating legislation, rules, decisions and technical and/or scientific data." The actions described in this provision are *not* those deemed supervisory within the meaning of the Act.

This review of the evidence submitted shows that the Employer has failed to raise an question of representation concerning both the first and the fourth elements necessary to establish a supervisory employee within the meaning of the Act. In light of this infirmity, I have not analyzed the evidence which the Employer tendered concerning the second and third elements required, the exercise of supervisory indicia with independent judgment.

B. Managerial Issue

In addition, the Employer has failed to present sufficient evidence to raise a question of fact or law regarding its objections that the Environmental Scientists I and II positions are occupied by managerial employees within the meaning of the Act. Pursuant to Section 3(j) of the Act, 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." The Act excludes these managerial employees from the class of employees who are entitled to engage in collective bargaining. See Sections 3(n) and 6(a) of the Act. This exclusion is intended to maintain the distinction between management and labor and to provide the employer with undivided loyalty from its representatives in management. See Chief Judge of the Sixteenth Judicial Circuit v. Illinois State Labor Relations Board, 178 Ill. 2d 333, 339, 687 N.E.2d 795, 13 PERI ¶4014 (1997) (citing

National Labor Relations Board v. Yeshiva University, 444 U.S. 672, 682, 100 S. Ct. 856, (1980)).

Under the traditional analysis of managerial employee, the purported manager must 1) be engaged predominantly in executive and management functions; and 2) exercise responsibility for directing the effectuation of such management policies and functions. Dep't of CMS/Illinois Commerce Commission v. Illinois Labor Relations Board, 406 Ill. App. 3d 766, 774, 26 PERI ¶136 (4th Dist. 2010); County of Cook (Oak Forest Hospital) v. Illinois Labor Relations Board, 351 Ill. App. 3d 379, 386, 813 N.E.2d 1107, 20 PERI ¶113 (1st Dist. 2004); State of Illinois, Dep'ts of Central Management Services (CMS) and Healthcare and Family Services, 23 PERI ¶173 (IL LRB-SP 2007); State of Illinois, Dep'ts of CMS and Public Aid and AFSCME, 2 PERI ¶2019 (IL SLRB 1986). Regarding the first prong, the Board has interpreted it to mean that a managerial employee must possess and exercise a level of authority and independent judgment sufficient to broadly affect the organization's purpose or its means of effectuating these purposes. INA and State of Illinois, Dep't of CMS and Healthcare and Family Services, 23 PERI ¶173 (IL LRB-SP 2007); State of Illinois, Dep't of CMS and AFSCME, 1 PERI ¶2014 (IL SLRB 1985).

The Board has defined executive and management functions as those functions which specifically relate to the running of an agency or department including the following: establishment of policies and procedures; preparation of the budget; and/or the responsibility for assuring that the agency or department operates effectively. INA and State of Illinois, Dep't of CMS and Healthcare and Family Services, 23 PERI ¶173 (IL LRB-SP 2007); State of Illinois, Dep't of CMS and AFSCME, 1 PERI ¶2014 (SLRB 1985). Executive functions require more than simply the exercise of professional discretion and technical expertise. County of Cook (Oak

Forest Hospital) v Illinois Labor Relations Board, 351 Ill. App. 3d 379, 386, 813 N.E.2d 1107, 20 PERI ¶113 (1st Dist. 2004); City of Evanston v. State Labor Relations Board, et al., 227 Ill. App. 3d 955, 975, 592 N.E.2d 415, 8 PERI ¶4013 (1st Dist. 1992); INA and State of Illinois, Dep't of CMS and Healthcare and Family Services, 23 PERI ¶173 (IL LRB-SP 2007); State of Illinois, Dep't of CMS and AFSCME, 1 PERI ¶2014 (IL SLRB 1985).

Illinois courts have stated that the relevant consideration is effective recommendation or control rather than final authority over employer policy. County of Cook (Oak Forest Hospital), 351 Ill. App. 3d at 387 (citing Chief Judge at 178 Ill. 2d at 339-340); State of Illinois, DCMS (Dep't of Commerce and Economic Opportunity), 27 PERI ¶56 (IL LRB-SP 2011); State of Illinois, Dep't of CMS (Environmental Protection Agency, Dep't of Public Health, Dept of Human Services, Dep't of Commerce and Economic Activity) 26 PERI ¶155 (IL LRB-SP 2011).

The second element of the test requires that the alleged managerial employee exercise responsibility for directing the effectuation of such management policies and practices. County of Cook (Oak Forest Hospital), 351 Ill. App. 3d at 386, 813 N.E.2d at 1114, 20 PERI ¶113; INA, 23 PERI ¶173 (IL LRB-SP 2007); State of Illinois, Dep't of CMS, 2 PERI ¶2019 (IL SLRB 1986). An employee directs the effectuation of management policy when he/she oversees or coordinates policy implementation by developing the means and methods of reaching policy objectives, and by determining the extent to which the objectives will be achieved. County of Cook (Oak Forest Hospital), 351 Ill. App. 3d at 387; INA, 23 PERI ¶173 (IL LRB-SP 2007); State of Illinois, Dep'ts of CMS and Public Aid, 2 PERI ¶2019 (IL SLRB 1986). Such individuals must be empowered with a substantial measure of discretion to determine how policies will be effected. County of Cook (Oak Forest Hospital), 351 Ill. App. 3d at 387; INA, 23 PERI ¶173 (IL LRB-SP 2007). Effective recommendations that direct the effectuation of

management policies may also satisfy this prong. Dep't of CMS/Illinois Commerce Commission v. Illinois Labor Relations Board, 406 Ill. App. 3d 766, 781, 26 PERI ¶136 (4th Dist. 2010).

In addition to this traditional test for a managerial employee, Illinois courts have developed an analysis in which certain publicly employed attorneys have been held to be managerial employees under the Act as a matter of law and thus excluded from collective bargaining. See e.g., Chief Judge, 178 Ill. 2d at 344); Cook County State's Attorney v. Illinois Local Labor Relations Board, 166 Ill. 2d 296, 304, 652 N.E.2d 301, 11 PERI ¶4011(1995). The Illinois Supreme Court focused on the statutory duties of the attorneys at issue rather than on a factual record in determining that the attorneys were managers as a matter of law. Id. In Cook County State's Attorney, 166 Ill. 2d at 304, the Court relied heavily on the existence of the following three factors to support its conclusion that the attorneys at issue were managers as a matter of law: 1) the close identity of a State's Attorney with the actions of his/her assistant; 2) the unity of their professional interests; and 3) the power of the assistants to act on behalf of the State's Attorney. Cook County State's Attorney, 166 Ill. 2d at 304; See also Chief Judge 178 Ill. 2d at 344.

However, the doctrine manager as a matter of law has limited applicability. See Chief Judge 178 Ill. 2d at 347; Cook County State's Attorney, 166 Ill. 2d at 305. The Illinois Supreme Court has stated that the manager as a matter of law analysis should not be used to deem all publicly employed lawyers managerial employees under the Act. Id. When there was no "office holder" or statute enumerating the duties of the public employees at issue, the Board has upheld the conclusion that the employees were not managers within the meaning of Section 3(j) of the Act. AFSCME and State of Illinois, Dep't of CMS (Capital Development Board), 20 PERI ¶18 (IL LRB-SP).

Pursuant to either the traditional analysis or the manager as a matter of law doctrine recognized by the Board and courts, the Employer's evidence does not warrant a hearing. First, the Employer does not argue that the Environmental Scientist I and II at issue meet the traditional test. Instead, the Employer essentially admits that these positions do not satisfy the first part of the Act's definition of managerial employee when it states, according to its interpretation of the manager as a matter of law doctrine, that the purported managers must be involved in only the implementation and effectuation of policy, but not its formulation. However, this interpretation is contrary to the explicit language of Section 3(j) of the Act. See . Dep't of CMS/Illinois Commerce, 406 Ill. App. 3d at 779 (4th Dist. 2010) (confirming that managerial employee requires both elements of Section 3(j)). Similarly, the following description of the Environmental Scientist I and II from the Employer's Offer of Proof acknowledges that neither position satisfies the initial part of the Act's definition of managerial employee:

The petitioned-for [Environmental] Scientist I and II employees [are] scientific/technical professionals who work with the Chairman and Members of the Pollution Control Board in effectuating and implementing their rulemaking and adjudicatory duties under the statute which created that agency.

In sum, the Employer does not allege that the positions at issue perform executive and management functions, the first part of the traditional test for managerial employee.

The Employer's comparison of the Environmental Scientist I and II to the employees at issue in Illinois Federation of Public Employees, Local 4408, IFT-AFT and State of Illinois, Dep't of CMS (Historic Preservation Agency), 10 PERI ¶2037 (IL SLRB 1994), is unpersuasive. In that case, the Board determined that the Site Managers and the Site Supervisors were managerial employees within the meaning of the Act despite being responsible for operation of only a single historic or conservation site. Pivotal to the Board's finding was the fact that the

petitioned for employees “possess the authority and discretion to broadly affect agency or department policy.” Id. However, in the instant case, the discretion of the Environmental Scientist II is not linked to policy formulation or any other decision-making that determines how the Pollution Control Board does its work, and the Employer does not even allege that that the Environmental Scientist I has any discretion in performing her duties.

Moreover, the Employer fails to submit any evidence that the Environmental Scientist I and II satisfy key aspects of the alternative test for managerial employee. First, the Employer does not argue that the responsibilities of the positions at issue are outlined in a statute. While the Environmental Protection Act established the Illinois Pollution Control Board, that same statute does not refer to the Environmental Scientist I and II. 415 ILCS 5/3.130 (2010). Nor is there another state statute which sets forth the duties of the positions at issue. Second, the Employer’s evidence does not assert that the Environmental Scientist I and II act as surrogates for an office holder—a critical element to finding that these positions are managerial employees as a matter of law. See Chief Judge of the Sixteenth Judicial Circuit, 178 Ill. 2d at 344; Office of Cook County State’s Attorney, 166 Ill. 2d at 303-04. Without providing evidence that advances proof of this status, the Employer has not raised a question of law or fact.

The marked differences between the instance case and the facts in a recent decision finding that the Administrative Law Judges at the Human Rights Commission are managerial employees as a matter of law demonstrates the deficiencies of the case at bar. See State of Illinois, Dep’t of CMS (Human Rights Commission) v. Illinois Labor Relations Board, 406 Ill. App. 3d 310, 26 PERI ¶13 (4th Dist. 2010). While the Appellate Court’s opinion specifically references the precise statutory provisions of the Illinois Human Rights Act, 775 ILCS 5/1-101, et seq., which authorize the duties of the Administrative Law Judges (ALJs) in the Human Rights

Commission (Commission), there is no comparable statute underlying the responsibilities of the Environmental Scientist I and II. Id. at 316. While the Appellate Court concludes that the ALJs have the authority to act on behalf of the Commission, the Employer does not make a similar claim here concerning the authority of the Environmental Scientist I and II. Id.

In addition, I do not accept the Employer's argument that exemptions of the Environmental Scientist I and II positions occupied by Liu and Rao, respectively, from the Personnel Code, 20 ILCS 415/4c(12)(2010) should also render them exempt from the Act. The Board has rejected this contention on numerous occasions. See e.g., AFSCME, Council 31 and State of Illinois, Dep't of CMS (Environmental Protection Agency, Dep't of Public Health, Dep't of Human Services, Dep't of Commerce and Economic Activity), 26 PERI ¶155 (IL LRB-SP 2011); AFSCME, Council 31 and State of Illinois, Dep't of CMS, 25 PERI ¶184 (IL LRB-SP 2009).

When the legislature promulgated the Act, it was careful to specify which employees were excluded from collective bargaining. Since the legislature did not provide in the Act that employees exempted under the Personnel Code were also excluded under the Act, I will not read this exclusion into the Act. See Solich v. George and Anna Porter Cancer Prevention Center of Chicago, Inc., 158 Ill. 2d 76, 82, 630 N.E. 2d 820 (1994).

C. Appropriate Bargaining Unit Issue

Having concluded that Liu and Rao are public employees within the meaning of the Act, I need to address whether the petitioned-for unit, RC-63, is appropriate. The Employer argues that RC-63 is inappropriate because the Environmental Scientist I and II are exempt from the Personnel Code, and maintains that only a stand-alone unit is appropriate for the petitioned-for positions. In response, AFSCME submitted evidence which shows that both Code and non-Code

employees have repeatedly been made a part of RC-63. Accordingly, I find the Employer's objection that RC-63 is an inappropriate unit to be meritless.

III. CONCLUSIONS OF LAW

I find that Anand Rao, the occupant of the petitioned-for Environment Scientist II position, is not a supervisory employee within the meaning of Section 3(r) of the Act.

I find that neither Alisa Liu, nor Anand Rao, the occupants of the petitioned-for Environmental Scientist I and II positions, respectively, are managerial employees within the meaning of Section 3(j) of the Act.

I find that the existing RC-63 bargaining unit is appropriate to include Environmental Scientist I Alisa Liu and Environmental Scientist II Anand Rao.

IV. RECOMMENDED ORDER

It is hereby recommended that the petitioned-for Environmental Scientists I and II positions occupied by Alisa Liu and Anand Rao, respectively, be included in the existing RC-63 bargaining unit.

V. 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 the Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 10 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 5 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross-responses must be filed with the

Board's General Counsel at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. The exceptions and cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions have been provided to them. The exceptions and cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 14-day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois this 6th day of February 2012.

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD**



Eileen L. Bell
Administrative Law Judge

