STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

American Federation of State, County and Municipal Employees, Council 31,	)	
Petitioner	)	
and	)	Case No. S-RC-11-074
State of Illinois, Department of Central Management Services (Illinois Commerce Commission),	)	
Employer	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On October 5, 2010, the American Federation of State, County and Municipal Employees, Council 31 (Petitioner/AFSCME) filed a petition in Case No. S-RC-11-074 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). This petition seeks to include the title of Assistant Director Administrative Law Judge (ALJ) employed by the Illinois Commerce Commission (Commission/ICC) in the existing RC-10 bargaining unit. The State of Illinois, Department of Central Management Services, Illinois Commerce Commission (Employer/CMS) opposes the petition, asserting that the petitioned-for position is excluded from the Act's coverage pursuant to the exemptions for supervisory, managerial, and confidential employees. CMS further asserts that, if the position is covered by the Act, it is inappropriate to include it in the RC-10 bargaining unit.

A hearing was held on July 19 and 20, 2011, before Administrative Law Judge Sharon Wells in Chicago, Illinois. At that time, all parties appeared and were given a full opportunity to participate, adduce relevant evidence, examine witnesses, and argue orally. Briefs were timely filed by both parties. CMS included the affidavits of Robb Craddock and Margaret van Dijk as exhibits attached to its post-hearing brief. AFSCME filed a motion to strike the affidavits.

After full consideration of the parties' stipulations, evidence, arguments, and briefs, and upon the entire record of this case, I recommend the following:

I. PRELIMINARY FINDINGS

The parties stipulate, and I find, that:

1. At all times material hereto, the Employer has been a public employer within the meaning of Section 3(o) of the Act;
2. The Employer is subject to the jurisdiction of the State Panel of the Board pursuant to Section 5(a-5) of the Act; and
3. The Petitioner is a labor organization within the meaning of Section 3(i) of the Act.

Further, I find that the RC-10 bargaining unit is a statewide bargaining unit comprised of attorneys employed the Employer, including the Illinois Commerce Commission's ALJs V.[1]

The petitioned-for Assistant Director ALJ position is currently occupied by Glennon Dolan (Dolan).

II. ISSUES AND CONTENTIONS

The issues to be resolved are:

1. Whether the affidavits attached to CMS's post-hearing brief should be stricken from the record;
2. Whether the Assistant Director ALJ position is excluded from the Act's coverage because:
    a. Dolan is a managerial employee within the meaning of Section 3(j) of the Act;
    b. Dolan is a supervisor within the meaning of Section 3(r) of the Act;
    c. Dolan is a confidential employee within the meaning of Section 3(c) of the Act; or
    d. Dolan is "a *de jure* managerial or confidential employee"; and

[1] State of Illinois, Department of Central Management Services (Illinois Commerce Commission), Case No. S-RC-10-046, 26 PERI ¶ 40 (IL LRB-SP 2010).

3. If the position not excluded from the Act's coverage, whether it is appropriate to include it in the existing RC-10 bargaining unit.

CMS argues that the petitioned-for position is excluded from the Act's coverage because Dolan is a managerial employee, a supervisor, and a confidential employee within the statutory definitions of those terms. CMS also argues that Dolan is a "*de jure* managerial or confidential employee" because his position is exempt from the decision of the Supreme Court in Rutan v. Republican Party of Illinois, 479 U.S. 62 (1990), and from Jurisdiction B of the Personnel Code. Finally, CMS asserts that, if the petitioned-for position is not excluded from the Act's coverage, it is inappropriate to include the position in the RC-10 bargaining unit because it is subject to these exemptions.

AFSCME denies that Dolan is a managerial employee, a supervisor, or a confidential employee under the Act, and concludes that the Assistant Director ALJ position is therefore included in the Act's coverage. Furthermore, AFSCME objects to CMS's attempt to prove that the position is exempt under Rutan and Jurisdiction B of the Personnel Code through affidavits attached to its post-hearing brief, and has filed a motion to strike the affidavits. Lastly, AFSCME argues that it is appropriate to include the petitioned-for position in the existing RC-10 bargaining unit.

III. FINDINGS OF FACT

1. Structure and Function of the Illinois Commerce Commission

The ICC is a state agency created by the General Assembly and headed by a 5-member board of Commissioners. The Commission's powers and responsibilities are set out in the Public Utilities Act, 220 ILCS 5. The agency has regulatory authority over public utilities operating within the State, including providers of telecommunications, water, and electricity; sewerage disposal; and oil and gas pipelines. The ICC's core mission, according the Chief ALJ Michael Wallace, is to ensure that safe and reliable utility services are available to the public at a reasonable cost.

In order to perform its statutory duties, the Public Utilities Act instructs the Commission to employ an Executive Director to run the ICC's day-to-day operations. The Executive Director has statutory authority to direct and supervise Commission staff and to organize the ICC into such bureaus or sections as he or she deems fit. The Executive Director also has a statutory duty

to hire hearing examiners to examine issues coming before the Commission by taking testimony or by independent investigation. One of these examiners is designated as the chief hearing examiner and has the statutory authority to direct and supervise the other hearing examiners.

The ALJs perform the functions of the hearing examiners; Wallace, as Chief ALJ, is the chief hearing examiner. Wallace reports directly to the Commission's Executive Director. Further, he serves as the head of the ALJ bureau. Glennon Dolan serves as Assistant Director ALJ. At the time of the hearing in this matter, the Commission employed 12 other attorneys as ALJs III, IV, or V. Three of these ALJs were employed at the Commission's Springfield office, where Wallace was employed. The other nine attorneys worked in the Chicago office, where Dolan was based. The Chicago office also has two clerical employees who report directly to Dolan. Wallace testified that he had been unable to visit the Chicago office in the two years preceding the hearing in this matter due to budget constraints.

2. Duties of ICC Administrative Law Judges

ALJs employed by the Commission conduct hearings on a wide range of matters arising under the Public Utilities Act and other statutes administered by the ICC, and issue recommendations to the Commission in the form of proposed orders. The proposed orders issued by the ALJs become effective after they are adopted by the Commission.

While Dolan is handling his own case load, his duties are similar to the duties of ALJs III and IV. The Board has previously considered the functions of the ALJs III and IV in State of Illinois, Department of Central Management Services (Illinois Commerce Commission), Case Nos. S-RC-10-034 & S-RC-10-036, 29 PERI ¶ 76 (IL LRB-SP 2012). In that matter, the recommended decision and order adopted by the Board observed that ALJs conduct hearings and issue orders and proposed orders in a variety of cases. These include rate cases, which arise when a public utility seeks to increase the rates it may charge; certificate cases, which are brought by an entity seeking a license to engage in the utility business; complaint cases, in which ALJs adjudicate the claims of utility customers who assert that their bills are inaccurate; negotiated agreement cases, which seek the Commission's approval of interconnection agreements between an incumbent and a competing telephone company; citation cases, in which the ICC sanctions public utilities who fail to maintain their corporate status, fail to file an annual report, or cause property damage; and rulemaking cases, which are initiated by the Commission as part of its procedure for promulgating rules and regulations.

In any case in which a finding that is adverse to a party is made, an ALJ issues a proposed order. Once drafted, the order is officially served on all parties by the ICC's chief clerk. The ALJ then sets a time for the parties to file briefs on exceptions to the order and replies thereto. Following this period, the ALJ may revise the proposed order in response to the exceptions. The post-exceptions order is then placed on the Commission's docket. If approved by the Commission, the proposed order becomes a final order of the Commission. In uncontested cases, where no finding that is adverse to a party is made, an ALJ issues an order that is placed on the Commission's docket with no period for exceptions. This order also becomes final upon the Commission's approval.

According to Wallace, some of these matters are routine. In citation cases, for example, Wallace testified that all of the orders look alike and an ALJ would probably draft an order by copying a prior, similar order. However, some cases require proposed orders that are lengthy and more complex. In a certificate case, for example, an ALJ may issue a proposed order denying a certificate when a public utility fails to show it has the proper financing or staff to operate a public utility. Rate cases may require an ALJ to analyze a completely new rate structure proposed by a public utility.

The proposed orders issued by the ALJs and adopted by the Commission are intended to effectuate the policies behind the Public Utilities Act and other statutes administered by the ICC. These policies include encouraging retail competition in the supply of electricity and gas, protecting consumers, and ensuring safe and reliable utility service. The Commission achieves these policies through its regulatory authority to issue final orders in the cases before it. These final orders, in turn, are typically based on the recommendations of ALJs. According to Wallace's testimony, approximately 96% of proposed orders issued by ALJs in the Chicago office had been adopted by the Commission in 2011.

Before voting to approve a proposed order, the members of the Commission and their assistants have the opportunity to review an ALJ's post-exception proposed order and suggest changes. The Commission will vote on the adoption of the members' proposed changes as amendments, and then vote to approve the order as amended by any of these changes. Of 81 orders issued by ALJs in the Chicago office and approved by the Commission in the seven months preceding the hearing, 78 were approved with no changes, and two were approved with what Wallace characterized as minor changes. In only one order—a major rate case involving

Commonwealth Edison—did the Commission change conclusions made by an ALJ. Four changes promulgated by the Commission resulted in a net decrease of $11 million in Commonwealth Edison's award, from a base of $6.6 billion.

Additionally, AFSCME has submitted proposed and final orders in three other cases in which the Commission had rejected conclusions reached by an ALJ. These include a 2009 decision in which Illinois Bell Telephone Company had petitioned to have its services re-certified as competitive, which was denied by an ALJ but ultimately authorized by the Commission; a 2010 decision in which an ALJ rejected the sale of Verizon assets to Frontier Communications, which was overruled by the Commission; and a 2010 order in which the Commission made substantive changes to 10 conclusions of 34 in a proposed order on an Ameren rate case. Dolan did not handle any of these cases, although he testified that he reviewed at least one of the proposed orders before it was submitted to the Commission.

3. Additional Duties Performed by the Assistant Director Administrative Law Judge

In addition to handling his own case load, Dolan performs duties in his position as Assistant Director that other Commission ALJs do not. Twice, while Wallace was on vacation or medical leave, Dolan assigned cases to other ALJs. While Wallace left instructions to assign all cases involving applications for licensure of agents, brokers, and consultants to ALJ Steve Yoder, the other assignments during these periods were left to Dolan's discretion. Dolan has also conducted performance evaluations for other employees of the ALJ bureau, though Wallace does the majority of these evaluations. Wallace testified that these evaluations could be used for disciplinary purposes if an employee's performance is found to be unsatisfactory. Dolan also approves requests for vacation and other leave and authorizes overtime for employees of the Chicago office. Though Wallace and Dolan both testified that Dolan has never denied a request for vacation or leave, Dolan suggested that he does review these requests and would deny a request if the need arose. For example, Dolan suggested that he would deny an ALJ's request for time off if it conflicted with a scheduled hearing, or if both clerical employees requested the same dates off. However, the authorization of overtime is a matter of bureau policy, and overtime is granted only in limited circumstances.

Dolan testified that he also monitors the case load of the other ALJs to ensure that cases are progressing according to schedule. Dolan is the only ALJ in the Chicago office that performs

this duty. In a performance evaluation he prepared, Wallace noted that Dolan had been "invaluable in directing the ALJs in Chicago in successfully completing their dockets."

Dolan also exercises additional unique duties relating to the drafting of orders and proposed orders. Before an order is submitted to the Commission or a proposed order is served on parties, it is reviewed by either Wallace or Dolan. Dolan reviews the orders and proposed orders issued by the ALJs of the Chicago office, and Wallace reviews those issued by ALJs of the Springfield office. In the seven months preceding the hearing in this matter, 61 proposed orders had been served from the Chicago office, and 17 from the Springfield office. Wallace testified that he and Dolan review these proposed orders for scrivener's errors, but that he would also expect Dolan to raise any errors in the application of law to the ALJ who wrote the proposed order and to make sure that the order is consistent with ICC policy. Dolan confirmed that, while he would not instruct an ALJ to change a conclusion, he would point out errors and advise an ALJ that he or she may have difficulty justifying a conclusion to the Commission. In his performance evaluation of Dolan, Wallace noted that Dolan was "very thorough" in reviewing these proposed orders, and that he assisted "when necessary to improve the quality of the order."

In the time that Dolan has served as Assistant Director, he has not adjusted any grievances, nor has he been involved in recruiting, interviewing, or hiring. However, no grievances have been raised by employees of the ALJ bureau during Dolan's tenure as Assistant Director. Dolan testified that, were any grievances to arise, he would expect the ALJs and clerical staff of the Chicago office to approach him first. In the event that a grievance did arise, Wallace testified that neither Dolan nor Wallace would have the authority to resolve the grievance according to previous instruction from the ICC's human resources staff. The fact that Dolan has not been involved in recruiting, interviewing, or hiring during his tenure as Assistant Director is likewise attributable to the fact that no hiring had occurred since he took the position. Dolan testified that he would expect to be included in the process if the ALJ bureau were to hire new employees.

Wallace testified that he did not serve on any collective bargaining committee for either the Commission or CMS. Furthermore, Wallace stated that Dolan did not have authorized access to any labor relations files.

Wallace and Dolan agreed that, in the year preceding the instant hearing, Dolan had spent approximately 70% of his time handling his own case load. For the majority of that time, Dolan

was working on a rate case involving Commonwealth Edison, which the parties described as the bureau's largest and most complex case. Wallace estimated that in previous years Dolan spent only 40% of his time handling his own case load. However, he acknowledged that this was an estimate and that no time study had been performed with respect to the Assistant Director position. Dolan stated that he had spent 10 to 15% of his time in recent years reviewing proposed orders drafted by the ALJs in the Chicago office, and 70% of his time handling his own case load. Dolan also testified that he was assigned to nine cases at the time of hearing, whereas other ALJs were assigned to between 16 and 36 cases. Dolan attributed this discrepancy to the fact that the cases he handles are more complicated and substantial, in addition to the fact that he spent the previous 11 months handling the bureau's largest and most complex case. Wallace stated that the lighter case load is also meant to provide Dolan additional time to devote to his supervisory duties.

4. Employer's Post-Hearing Affidavits

During opening arguments, counsel for CMS reserved the right to make legal arguments in the post-hearing brief regarding whether Dolan is a *de jure* managerial or confidential employee and whether it is appropriate to include his position in the RC-10 bargaining unit. CMS's legal arguments on these matters hinge on its assertion that the Assistant Director ALJ position is exempt under the Supreme Court decision in Rutan and from Jurisdiction B of the Personnel Code pursuant to Section 4d(3), 20 ILCS 415. CMS presented no testimony relating to these exemptions at the hearing for this matter. However, CMS introduced the job description for the Assistant Director ALJ position as an exhibit at the hearing. This description identifies the position as both Rutan- and merit-exempt. CMS also included the affidavits of Robb Craddock, Deputy Director of Labor Relations for CMS, and Margaret van Dijk, former Deputy Director of Personnel for CMS, as exhibits to its post-hearing brief. According to CMS, these affidavits establish that the Assistant Director ALJ position is both Rutan- and Personnel Code-exempt.

IV. DISCUSSION AND ANALYSIS

1. Petitioner's Motion to Strike

In its motion to strike, AFSCME objects to the affidavits attached as exhibits to CMS's post-hearing brief. AFSCME argues that it is inappropriate to present new testimonial evidence

in the form of an affidavit after the evidentiary record in a case has closed because it deprives the other party of the opportunity to cross-examine witnesses as to these matters.

The Illinois Administrative Procedure Act governs the resolution of this issue. According to the Act, findings of fact in an administrative order must be based exclusively on evidence adduced and matters administratively noticed. 5 ILCS 100/10-35(c) (2010). In contested cases, a party has the statutory right to cross-examine a witness when cross-examination is necessary for a full and fair disclosure of the facts. 5 ILCS 100/10-40(b) (2010).

In this case, CMS reserved the right to address in its post-hearing brief "strictly legal arguments" relating to the appropriateness of including the petitioned-for position in the RC-10 bargaining unit and whether Dolan is a *de jure* managerial or confidential employee. In making those arguments, however, CMS relied in part on affidavits attached to its post-hearing brief rather than testimony offered at the hearing in this matter. Because these affidavits introduce new testimonial evidence at the post-hearing stage, any consideration given to them would deprive AFSCME of its statutory right of cross-examination. For these reasons, I conclude that the Petitioner's motion to strike these affidavits and the references thereto in the Employer's post-hearing brief should be granted. However, I also conclude that the Employer properly reserved its right to make strictly legal arguments on these issues.

2. Is the Assistant Director ALJ position excluded from the Act's coverage?

   a. Is Dolan a managerial employee within the meaning of Section 3(j) of the Act?

CMS argues that the petitioned-for position is exempt from the Act's coverage because Dolan is a managerial employee. In support thereof, CMS contends that Dolan makes effective recommendations relating to ICC policy through the adoption of his proposed orders. AFSCME counters that Dolan's recommendations predominantly involve applying facts to the law in accordance with established ICC policy. AFSCME also asserts that the record in this case provides enough evidence to conclude that the proposed orders issued by administrative law judges (ALJs) such as Dolan are not effective recommendations given the substantial review and changes made to the proposed orders by the ICC Commissioners.[2]

[2] AFSCME filed a petition on July 28, 2009, to include the ICC's ALJs III and IV in the RC-10 bargaining unit. Though the Board's Executive Director initially certified AFSCME as the exclusive representative for the ALJs III and IV, the Illinois Appellate Court for the Fourth District remanded the petition to the Board with instructions to conduct a hearing to determine whether the petitioned-for ALJs were managerial employees. In a decision issued October 26, 2012, the Board found that the ALJs III and IV are managerial employees pursuant to Section 3(j) of the Act. State of Illinois, Department of Central Management Services (Illinois Commerce Commission), Case Nos. S-

Section 3(j) provides that a managerial employee is "an individual who is [1] engaged predominantly in executive and management functions and [2] is charged with the responsibility of directing the effectuation of management policies and practices." 5 ILCS 315/3(j) (2010). Managerial employees are not public employees within the Act's definition. 5 ILCS 315/3(n) (2010).

As to the first part of the statutory definition, "executive and management functions" amount to the running of an agency. State of Illinois, Department of Central Management Services (Illinois Commerce Commission) v. Illinois Labor Relations Board (ICC), 406 Ill. App. 3d 766, 774 (4th Dist. 2010) (citing, American Federation of State, County and Municipal Employees, Council 31, 25 PERI ¶ 68 (IL LRB-SP 2009); City of Freeport, 2 PERI ¶ 2052 (IL SLRB 1986)). This element of the definition may be shown where an alleged managerial employee establishes policies and procedures, prepares a budget, or otherwise assures that an agency runs effectively. Id. It may also be shown, however, where the job functions of an employee encompass a major component of an agency's mission. ICC, at 778. Thus, when considering the function of the ICC, if the ALJs are "the whole game when it comes to utility regulation," the ALJs and Dolan help run the agency and therefore engage in executive and managerial functions. Id.

As Assistant Director ALJ, Dolan is involved many of the different types of cases that come before the Commission. Dolan in particular conducts hearings and issues proposed orders in the Commission's most complex and substantial cases, including the Commonwealth Edison rate case he handled 2011, which set the rates Commonwealth Edison was permitted to charge for utility services. The Commission, in turn, uses Dolan's proposed orders to carry out its statutory duty to enforce laws related to public utilities. The proposed orders are the starting point and often, the sole basis, for the Commission's final orders. Thus, these proposed orders are the primary mechanism by which the Commission regulates public utilities in Illinois. Dolan's job functions encompass a major component of the ICC's mission to regulate public utilities, therefore he is involved in the running of the ICC. This constitutes executive and management functions sufficient to meet the first prong of the statutory definition of a

RC-10-034 & S-RC-10-036, 29 PERI ¶ 76 (IL LRB-SP 2012). AFSCME argues that, unlike the matters involving the ALJs III and IV, the factual record in this case contains sufficient examples of the Commission thoroughly reviewing and altering proposed orders issued by ICC ALJs to support a finding that these orders are not effective recommendations such as would result in a conclusion that Dolan is a managerial employee.

managerial employee. Furthermore, Dolan predominantly performs these executive and management functions because he spends 70% of his time handling his own case load.

The second part of the statutory definition requires that a managerial employee not only engage in executive and management functions, but also that his or her authority "extends beyond the realm of theorizing and into the realm of practice." Id. at 774. Thus, in order to be a managerial employee under the definition in Section 3(j), an employee must have the responsibility of making policy happen. Id. at 775. An employee whose role is advisory and subordinate is not a managerial employee because he or she does not have the final responsibility and independent authority to effectuate policy. Id. This, however, is subject to the qualification that an advisory employee who makes effective recommendations can be managerial. Id. at 775 (citing Chief Judge of the Sixteenth Judicial Circuit v. Illinois State Labor Relations Board, 178 Ill. 2d 333, 339-40 (Ill. 1997)). Thus, where an employee's recommendations are followed in that they almost always persuade his or her superiors, the employee makes effective recommendations and therefore satisfies the second prong of the statutory definition. Id. at 775 and 777. In determining whether an employee's recommendations are effective, thorough review of the recommendations does not negate their effectiveness; despite independent review, the influence of an employee's recommendations remains the litmus test under the second prong. Id. at 777.

Dolan likewise meets the second prong of the statutory definition because his proposed orders are effective recommendations. In the first seven months of 2011, the Commission accepted 96% of the proposed orders issued by ALJs in the Chicago office. Though the record does not establish how many proposed orders during this period were drafted by Dolan, nor the treatment Dolan's proposed orders received in the hands of the Commissioners, the record also reveals no reason to conclude that the rate of acceptance of Dolan's proposed orders is significantly lower than 96%. This acceptance rate weighs heavily in favor of a finding that the ALJs' proposed orders constitute effective recommendations. Furthermore, even a thorough review, such as the review AFSCME suggests proposed orders undergo before the Commissioners, does not negate a reliance on the recommendation. Id. at 777. Testimony indicates that the ALJs not only present their conclusions to the Commission in the form of their proposed orders, but also defend these conclusions before the Commission following a period for exceptions. Because the law and the highly technical facts in cases before the Commission may

be open to multiple legitimate interpretations, an ALJ's proposed order and defense thereof must persuade the Commission in order to withstand scrutiny in the face of countervailing arguments over 90% of the time. This leads to the conclusion that the influence, rather than the "correctness," of proposed orders is the litmus test for their adoption by the Commission. Therefore, the recommendations are effective and meet the second prong of the statutory definition. I find that Dolan is a managerial employee within the definition of Section 3(j) of the Act.

b. Is Dolan a supervisor within the meaning of Section 3(r) of the Act?

In support of its claim that he is a supervisor, CMS contends that Dolan spends much of his time overseeing the Chicago office. AFSCME counters that Wallace himself admitted that Dolan spent 70% of his time over the year preceding the hearing in this matter handling his own case load, and that Dolan's exercise of authority is routine and governed by established policies.

Section 3(r) provides that a supervisor is an employee: (1) whose principal work is substantially different from that of his or her subordinates; (2) who has the 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 those actions; (3) who must consistently use independent judgment in the exercise of that authority; and (4) who devotes a preponderance of his or her employment time to the exercise of that authority. 5 ILCS 315/3(r) (2010).

To determine whether a person's principal work is substantially different from that of his or her subordinates, the Board first considers whether a person's position is obviously and visibly different from that of his or her subordinates. City of Freeport v. Illinois State Labor Relations Board, 135 Ill. 2d 499, 513 (Ill. 1990). If it is not, the first prong of the statutory definition may still be satisfied where the nature and essence of a person's position is different from that of his or her subordinates. Id. At 513-14. In this case, the task Dolan spends most of his time doing—conducting hearings and issuing proposed orders in the Commission's public utilities cases—is similar to the principal work of the other ALJs in the Chicago office. However, the nature and essence of Dolan's position is very different from that of the other ALJ positions. Only Dolan reviews proposed orders drafted by the other ALJs, helps other ALJs manage their case loads, approves requests for time off and overtime, assigns work, and completes performance evaluations. Unlike the other ALJs, Dolan has administrative

responsibilities and authority in his position as Assistant Director ALJ. Therefore, the first prong of the statutory definition is satisfied.

The second prong is satisfied by a showing that an employee has the authority to engage in, or to effectively recommend, even one of the enumerated 11 supervisory functions. Only one indicium of supervisory authority is sufficient to indicate supervisory status, so long as it is also accompanied by independent judgment. Chief Judge of the Circuit Court of Cook County v. American Federation of State, County and Municipal Employees, Council 31, 153 Ill. 2d 508, 516 (Ill. 1992). The third prong, the requirement that an alleged supervisor consistently use independent judgment when exercising supervisory authority, requires that the employee at issue "make choices between two or more significant courses of action without substantial review by superiors." Id. (quoting St. Clair Housing Authority, 5 PERI ¶ 2017 (IL SLRB 1989)). The frequency with which independent judgment might be required, rather than the number of times supervisory authority requiring independent judgment is actually used, controls the analysis under the third prong. City of Freeport, 135 Ill. 2d at 520-21.

CMS presented no evidence to support a conclusion that Dolan has the authority to transfer, suspend, lay off, recall, promote, discharge, reward, or discipline employees. CMS did, however, present evidence on the issues of Dolan's authority to hire and direct employees and to address grievances.

Authority to Hire

Dolan testified that he would expect to be involved in the hiring process. However, the ALJ bureau has not engaged in any hiring during his tenure as Assistant Director ALJ. Therefore, I cannot conclude that Dolan himself has the authority to hire because I have no basis for determining the amount of control Dolan would exercise over the process. Furthermore, there is no indication of the influence his recommendations on hiring decisions would have, thus I cannot conclude that he makes effective recommendations on hiring decisions.

Authority to Adjust Grievances

Dolan likewise testified that he would expect subordinates in the Chicago office to bring their grievances to him. While this might be his expectation, Wallace has received instructions that even he, as Chief ALJ, does not have the authority to adjust grievances. In the face of this testimony, I cannot conclude that Dolan, Wallace's subordinate, exercises the authority to adjust grievances that even the bureau Chief lacks. Furthermore, because no grievances have arisen

during Dolan's tenure as Assistant Director ALJ, there is nothing to indicate that his recommendations during the grievance process would rise to the level of effective recommendations.

Authority to Direct

Several functions can indicate the authority to direct: giving job assignments, overseeing and reviewing daily work activities, providing instruction and assistance to subordinates, scheduling work hours, approving time off and overtime, and formally evaluating job performance when the evaluation is used to affect the employees' pay or employment status. Chief Judge of the Circuit Court of Cook County, 19 PERI ¶ 123 (IL LRB-SP 2003); County of Cook, 16 PERI ¶3009 (IL LLRB 1999); County of Cook, 15 PERI ¶3022 (IL LLRB 1999), aff'd by unpub. order No. 1-99-1183 (Ill. App. Ct., 1st Dist. 1999); City of Naperville, 8 PERI ¶2016 (IL SLRB 1992). However, in order to rise to the level of supervisory authority, an alleged supervisor must exercise significant discretionary authority which affects the terms and conditions of his or her subordinates' employment. Village of Broadview v. Illinois Labor Relations Board, 402 Ill. App. 3d 503, 510 (Ill. App. 1st 2010) (citing Illinois Fraternal Order of Police Labor Council v. McHenry, 15 PERI ¶ 2014 (IL SLRB 1999) and Chief Judge of the Circuit Court of Cook County, 9 PERI ¶ 2033 (IL SLRB 1993)).

The ability to approve requests for time off or to approve overtime constitutes supervisory authority so long as the exercise of this authority involves the consistent use of independent judgment and is not of a mere routine or clerical nature. Village of Morton Grove, 23 PERI ¶ 72 (IL LRB-SP 2010) (citing City of Carbondale, 3 PERI ¶ 2044 (IL SLRB 1987)). In this case, Dolan has the authority to approve both requests for time off and overtime. However, he does not use independent judgment when approving overtime because he is constrained by established policy. Dolan's only function in this respect is routine and ministerial: he must determine whether a request falls within ICC policy before approving it. Dolan's testimony does indicate that he substantively reviews requests for time off to ensure that the office's clerical employees will not be off on the same day and that an ALJ has not requested time off for a day on which he or she has a hearing scheduled. Though Dolan has not a denied a request for time off during his tenure as Assistant Director ALJ, his testimony establishes the criteria he would use if he did. However, it appears that he is merely following policy in this

respect and that he otherwise automatically approves requests. Absent additional evidence, I cannot conclude that Dolan exercises independent judgment in approving requests for time off.

Though Wallace completes the majority of the performance evaluations for employees of the ALJ bureau, Dolan has completed up to four evaluations as Assistant Director ALJ. According to Wallace, these evaluations do not affect an employee's salary. However, Wallace also testified that he believed that an employee's performance evaluation could be used for disciplinary purposes if his or her performance was deficient. The record, though, does not establish that these evaluations have actually been used for disciplinary purposes. Therefore, I have no basis to conclude that the evaluations affect employment status.

Testimony established that twice, while Wallace was on leave, Dolan assigned cases to other ALJs. In doing so, he was constrained by Wallace's instruction to assign all cases involving licensure for agents, brokers, and consultants to ALJ Steve Yoder. Though Wallace testified that he himself considers many factors, including the expertise of the ALJs and the needs of the Commission when making assignments, Dolan only stated that he considered the ALJs' relative case loads. Assigning work in order to maintain a balanced case load is generally considered a routine function that does not require the use of independent judgment. State Of Illinois, Department of Central Management Services (Department of Healthcare and Family Services), 28 PERI ¶ 160 (IL LRB-SP 2012) (citing Chief Judge of the Circuit Court of Cook County, 153 Ill. 2d at 521; City of Naperville, 20 PERI ¶ 184 (IL LRB-SP 2004); Village of Bellwood, 19 PERI ¶ 106 (IL LRB-SP 2003); State of Illinois, Department of Central Management Services (Department of Professional Regulation), 11 PERI ¶ 2029; Village of Glen Carbon, 8 PERI ¶ 2026 (IL SLRB 1992); State of Illinois, Departments of Central Management Services and Revenue, 4 PERI ¶ 2027 (IL SLRB 1988)). Therefore, I cannot conclude that Dolan exercises independent judgment in assigning cases.

Finally, Dolan exercises the authority to review and oversee the daily work of the other ALJs because he assists them in managing their case loads and he reviews the proposed orders written by ALJs in the Chicago office before they are served on the parties. It also appears that his exercise of the authority to review is not merely routine or clerical. While Dolan does review the ALJs' proposed orders for scrivener's errors, Wallace testified that he expects Dolan to point out any errors in the legal analysis as well. Dolan confirmed that, while he would not instruct an ALJ to change a conclusion, he does advise the ALJs of the Chicago office when he believes

they will have difficulty defending a position before the Commission. However, in the vast majority of cases day-to-day review and oversight does not rise to the level of supervisory authority. Village of Bolingbrook, 19 PERI ¶ 125 (IL LRB-SP 2003). It is only when an alleged supervisor exercises discretionary authority that affects the terms and conditions of employment, such that the alleged supervisor would be potentially torn between his or her duty to the employer and loyalty to the union, that the second prong is met. Id. In this case, there is no evidence that Dolan's oversight and review rises to this level.

Having found that the requirements that Dolan exercises supervisory authority and consistently uses independent judgment in doing so are not met, it is unnecessary to determine whether he spends a preponderance of his time exercising supervisory authority. However, I will nonetheless do so in the interest of administrative efficiency. AFSCME correctly points out that Dolan does not meet the preponderance requirement by quantitative measures because he spends 70% of his time on one non-supervisory function: handling his own case load. However, preponderance can mean superiority in numbers or in importance, and this fourth requirement can be met by a showing that an employee's supervisory functions are of such significance that they make up a preponderance of his or her duties in a qualitative sense. State of Illinois, Department of Central Management Services (Department of Corrections) v. Illinois State Labor Relations Board, 278 Ill. App. 3d 79, 86 (Ill. App. 4th 1996). If Dolan's review of proposed orders of the ALJ's in the Chicago office were, despite my conclusions, sufficient to satisfy the second and third prongs of the statutory definition, I would likely conclude that this function is of such significance that it makes up of preponderance of his duties. Wallace's testimony makes it clear that he relies on Dolan alone to ensure that the proposed orders drafted by 75% of the Commission's ALJs are substantively reviewed before they are served on the parties.

c. Is Dolan a confidential employee within the meaning of Section 3(c) of the Act?

CMS also claims, without further elaboration, that Dolan is a confidential employee under the definition in Section 3(c) of the Act. AFSCME argues that there is not sufficient evidence in the record to support a finding that Dolan is a confidential employee.

Section 3(c) provides that a confidential employee is one who, in the regular course of his or her duties, (1) assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations, or (2) has authorized access to

information relating to the effectuation or review of the employer's collective bargaining policies.[3] 5 ILCS 315/3(c) (2010).

During Dolan's direct examination and Wallace's cross-examination, both stated that Wallace, Dolan's supervisor, is not involved in collective bargaining as part of CMS' or the ICC's negotiating committee. Both also affirmed that Dolan does not have access to any labor relations files. These facts suggest that Dolan does not, in the regular course of his duties, perform the functions of a confidential employee or have authorized access to information such as would support a finding that he is a confidential employee. CMS failed to present any evidence at the hearing to counter these assertions. Therefore, I find that Dolan is not a confidential employee within the meaning of Section 3(c) of the Act.

d. Is Dolan "a *de jure* managerial or confidential employee"?

CMS argues that Dolan is also "a *de jure* managerial and confidential employee" because the Assistant Director ALJ position is Rutan-exempt[4] and exempt from the Personnel Code under Section 4d(3).[5] CMS asserts that an employee is subject to this double-exemption if he formulates and effectuates policy, and argues that any such employee is exempt from the Act's coverage as a managerial or confidential employee. AFSCME objects to the presentation of new testimony through affidavits attached as exhibits to CMS's post-hearing brief.

The job description submitted by CMS arguably establishes that the Assistant Director ALJ position is both Rutan-exempt and exempt from Jurisdiction B of the Personnel Code. However, I am unable to find a basis in law for CMS's assertions on these issues. The Board has long held that if the legislature intended for "Shakman-exempt" or "Rutan-exempt" status, or "at-will" civil service classifications, to serve as a basis to exclude employees from collective bargaining, it would have expressly stated as much in the Act itself, especially given that exclusions to the Act are interpreted narrowly. American Federation of State, County and Municipal Employees, Council 31, 25 PERI ¶ 184 (IL LRB-SP 2009); Service Employees

[3] CMS does not claim that Dolan is a confidential employee under the reasonable expectation test.

[4] A Rutan-exempt position is one for which the political affiliation can be considered in making a hiring decision. The Supreme Court's decision in Rutan v. Republican Party of Illinois has been interpreted to allow the hiring of policymakers and "inner-circle" employees based on political affiliation. Rutan, 497 U.S. 62, 90 (1990) (Stevens, J., concurring) (political affiliation can be "relevant to [an] employee's ability to function effectively as part of a given administration.").

[5] Section 4d(3) provides that positions which involve principal administrative responsibility for the determination of policy or for the way in which policies are carried out may be exempt from the merit and fitness provisions of the Personnel Code upon written recommendation by CMS and approval by the Civil Service Commission. 20 ILCS 415/4d(3) (2010).

International Union, Local No. 73, 24 PERI ¶ 36 (IL LRB-LP 2008). Accordingly, I find that Dolan is not a *de jure* managerial or confidential employee.

3. Is it appropriate to include Assistant Director ALJ in the existing RC-10 bargaining unit?

Because I have found that Dolan is a managerial employee within the meaning of Section 3(j) of the Act, and his position is therefore excluded from the Act's coverage, it is unnecessary to determine whether it would have been appropriate to include the position in the existing RC-10 bargaining unit. However, in the interest of administrative efficiency, I will nonetheless address CMS's arguments on this point.

Section 9(b) sets forth the criteria to be considered by the Board in determining whether it is appropriate to include a position in a given bargaining unit:

> [I]n each case, in order to assure public employees the fullest freedom in exercising the rights guaranteed by this Act, [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.[6]

CMS claims that it is not appropriate to include the Assistant Director ALJ in the RC-10 bargaining unit because, as a position that is both Rutan-exempt and exempt from the Personnel Code pursuant to Section 4d(3), the Assistant Director ALJ position at-will. CMS argues that at-will employees must be placed in a new bargaining unit in order to negotiate the terms and conditions of their employment. However, there is no legal basis to conclude that it is inappropriate to place an at-will employee in an existing bargaining unit that contains just-cause protection. 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) (citing Federal-Mogul Corp., 209 NLRB 343, 344-45 (1974).

Turning to the factors enumerated in Section 9(b), Dolan performs much of the same work as the ALJs V at the Chicago office because he spends most of his time handling cases; he works in the same office with the Chicago ALJs V; they have contact on a daily basis; finally, they share a common supervisor, Chief ALJ Michael Wallace. Thus, a sufficient number of the Section 9(b) factors are met and I conclude that it would be appropriate to include the Assistant

[6] 5 ILCS 315/9(b) (2010).

Director ALJ position in the existing RC-10 bargaining unit if it were not excluded from the Act's coverage.

V. CONCLUSIONS OF LAW

1. Petitioner's motion to strike the affidavits attached to the Employer's post-hearing brief and the portions of the brief referring thereto is granted.
2. The petitioned-for Assistant Director ALJ position is a managerial employee within the meaning of Section 3(j) of the Act, and therefore is not a public employee within the meaning of Section 3(n) of the Act.

VI. RECOMMENDED ORDER

It is hereby recommended that the petition filed in this case be dismissed.

VII. EXCEPTIONS

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

Issued at Chicago, Illinois, this 16th day of January, 2013

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Heather R. Sidwell
Administrative Law Judge