

**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-11-122
)	
Illinois State Board of Elections,)	
)	
Employer)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On April 7, 2011, American Federation of State, County and Municipal Employees, Council 31 (Petitioner or AFSCME), filed a majority interest representation/certification petition in the above-captioned case 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). The Petitioner seeks to become the exclusive representative of approximately 55 employees at the Illinois State Board of Elections (Employer or SBE).¹ Based upon the showing of interest cards filed by Petitioner and the employee names and signature exemplars, which the Employer provided, Petitioner has satisfied the required majority showing of interest. There is no allegation of fraud or coercion with respect to the showing of interest.

¹ The petitioned-for unit consists of all unrepresented employees including the following job titles: Administrative Coordinator, Administrative Specialist, Administrative Specialist II, Division Secretary, Election Specialist, Election Specialist I, Election Specialist II, Election Specialist III, Election Specialist IV, Election Specialist Trainee, Election Project Manager, Facility Services Specialist I, Information Services Technician, Information Specialist, Information Specialist II, Information Specialist III, Information Service Coordinator, Mail Room Clerk, Microfilm Specialist, Office Receptionist, Procurement Officer, Public Information Associate, Receptionist, and all other eligible employees as defined by the Act, and excluding all managerial, supervisory, and confidential employees as defined by the Act.

The only issue is whether the petitioned-for employees are “public employees” within the meaning of the Act, or instead “managerial employees” as defined by the Act and/or as a matter of law. After consideration, I find that the Employer has failed to provide sufficient evidence raising a question of law or fact as to the alleged managerial status of the petitioned-for employees. I recommend the following:

I. BACKGROUND

On May 11, 2011, in response to the majority interest petition, the Employer filed a Position Statement asserting that the petition should be dismissed because all of the employees in the petitioned-for unit are managerial employees as defined by the Act and/or as a matter of law.² On May 19, 2011, after reviewing the Employer’s Position Statement, I issued a letter to the parties directing the Employer to provide sufficient evidence raising a question of law or fact as to the petitioned-for employees’ status as managerial employees. I noted in the letter that if the Employer could not establish that there existed a question of law or fact, I would recommend that, with the exception of the alleged confidential employees, the petitioned-for unit be certified. The Employer timely filed its response to the order on June 2, 2011.

² The Employer also asserted that three of the petitioned-for employees serving as Administrative Specialist IIs (Amy Calvin, Darlene Gervase, and Sue Klos) are confidential employees within the meaning of the Act. The Employer did raise an issue of law or fact regarding the confidential status of these three employees. In this case, the question of their confidential status does not affect the determination of majority support and, therefore, whether a hearing is necessary was dependent upon the Employer providing sufficient cause with respect to the alleged managerial status. According to the Board’s rules, where there are unit or exclusion issues, but the number of the contested positions is not sufficient to affect the determination of majority support, the Executive Director will prepare a tally of the finding of majority support and issue a certification and the tally concerning the employees not in dispute. The Petitioner may thereafter invoke the Board’s unit clarification procedures to determine the status of the disputed employees’ inclusion in the unit. See Section 1210.100(b)(7)(B) of the Board’s Rules.

A. Employer's May 11, 2011 Position Statement

In the Employer's Position Statement, the Employer argues that all of the petitioned-for employees are managerial employees given the "unique nature" of the SBE, the Petitioner's involvement in "partisan political activity and lobbying," and that the "statutory duties and responsibilities" of the SBE and its employees will create an inherent conflict of interest and a divided loyalty among the employees if they are placed in a bargaining unit.

The Employer's Position Statement states that two tests have been applied to determine whether an individual falls within the Act's definition of a managerial employee: (1) the traditional test, which considers whether the employee is a managerial employee as defined by Section 3(j) of the Act; and (2) the alternative test, which considers whether the employee is a managerial employee as a matter of law. Office of the Cook County State's Attorney v. Illinois Labor Relations Board, 166 Ill. 2d 296 (1995); Chief Judge of the Sixteenth Judicial Circuit v. Illinois Labor Relations Board, 178 Ill. 2d 333 (1997).

1. "Unique nature" of the SBE

In its Position Statement, the Employer argues that given the "unique nature" of the SBE, the petitioned-for employees are managerial as defined by the Act and/or as a matter of law. The SBE is the central election authority for the entire state and has general supervision over the administration of registration and election laws throughout the state. The SBE is led by a bipartisan constitutional board consisting of a chairman, vice chairman, and six members. The SBE consists of ten administrative units under the direction of the Executive Director: Office of the Executive Director, Office of the Assistant Executive Director, Office of the General Counsel, Division of Election Information, Division of Election Training and Resource Development, Division of Voting Systems and Standards, Division of Voter Registration

Services, Division of Campaign Disclosure, Division of Administrative Services, and Division of Information Technology.

The Employer notes that the SBE is not under the jurisdiction of the Governor or Central Management Services with respect to its employees, rules, or policies. The Employer also points out that the Election Code specifically prohibits SBE employees from engaging in “any partisan political activity whatsoever, except to vote at elections,” or contributing “either financially or in services or goods or any other way to any political party, candidate or organization engaged in political activity.” The Employer states that the SBE’s rules and regulations also prohibit an employee from “engaging in any conduct in which the employee’s private interests or involvements are, or may reasonably be construed to be, in conflict with or detrimental to the objective performance of his or her official duties and responsibilities” or participating in political activity, with the exception of voting.

2. Petitioner’s involvement in “partisan political activity”

The Employer argues that due to the “partisan political activity” of Petitioner, the petitioned-for employees are managerial. The Employer notes that AFSCME spent \$1,092,320.00 in 2010 on “political activities and lobbying.” The Employer provides quotes from several portions of AFSCME’s International Constitution and Council 31’s Constitution to establish that the Petitioner is involved in “partisan political activity.” The Employer notes that AFSCME’s International Constitution states that it will assist in promoting collective bargaining legislation and other legislative objectives. The Employer also cites to AFSCME’s “Obligation of an Officer”: “I will work for these goals by organizing unorganized workers, mobilizing workers to participate in the political process, and fighting to gain and defend the best possible working standards through contracts and legislation.” Further, the Employer cites to AFSCME’s

“Objectives”: “Both as union members and citizens, we shall also employ available legislative and political action.” Finally, the Employer notes that AFSCME has a “People Committee” which is authorized to solicit and accept voluntary contributions from AFSCME members for use in political campaigns.

3. “Statutory duties and responsibilities” of the SBE and its employees

The Employer argues that the “statutory duties and responsibilities” of the SBE and its employees will create an inherent conflict of interest and a divided loyalty among the employees if they are placed in a bargaining unit. The Employer notes that political committees established by AFSCME and other labor organizations are reviewed by the SBE’s Division of Campaign Disclosure. The Employer asserts that the duties and responsibilities of certain of the petitioned-for employees, particularly those in the Division of Campaign Disclosure, include assessing civil penalties against political committees, administering complaint procedures, auditing political committees, and reviewing campaign finance reports.

a. Records examination process

The SBE acts as the electoral board for statewide and certain legislative and congressional candidate nominating petitions if the petitions are challenged. As part of the election petition objection process, SBE employees conduct “records examinations.” Records examinations refer to the process of verifying voter signatures on candidate nominating petitions. SBE employees compare SBE’s registration records against the signatures on the candidate’s nomination petition.³ Each staff member is given a packet of petition sheets to compare against the registration records contained in the SBE’s electronic voter database. After examining the

³ Common objections to signatures include: the signature is not genuine, the signer is not registered at the address listed on petition, the signer does not reside in the state, the signer’s address is missing or incomplete, and/or the signature is illegible.

registration records, SBE employees announce whether each objection to the petition has been sustained or overruled.⁴ The petition sheets are then proofread by SBE staff, and the rulings are used to create a line by line computer generated printout of the results of the records examination, which is given to the parties. The Employer did not identify which employees or job titles conduct records examinations.

The parties are then given an opportunity to present objections to the SBE or a hearing examiner at an evidentiary hearing. The Employer did not indicate which employees act as hearing examiners in this regard.⁵ The hearing examiner relies on the results of the records examination to determine whether the objection to the petition should be overruled or sustained. The SBE's general counsel considers the hearing examiner's report and recommended decision and then makes his or her own recommendation to the SBE board. The SBE board considers both the hearing examiner's report and recommendation and the general counsel's recommendation. The SBE board then votes on whether to sustain or overrule the objection, and orders the candidate's name be certified or not be certified to the ballot.

The Employer argues that the records examination process would result in a conflict of interest if the petitioned-for employees were included in a bargaining unit. The Employer asserts that because SBE employees have to make individual determinations as to the validity of signatures on candidate petitions, employee impartiality might be compromised when the candidate, whose petitions are being challenged, has taken a public stance regarding collective bargaining rights, or when the candidate has taken contributions or been endorsed by AFSCME

⁴ A sustained ruling strikes the signature from the petition; an overruled ruling signifies a valid signature. SBE employees mark the petition "s" for sustained and "o" for overruled.

⁵ It should be noted that the petitioned-for unit does not include the job title of hearing examiner, hearing officer, or administrative law judge. Therefore, it is not always clear throughout the Employer's Position Statement and Offer of Proof, which employees the Employer is referring to when it uses the word hearing examiner and hearing officer.

and/or its political committee. The Employer argues that because of the large volume of signatures that must be checked in a short time period, it would be impossible for the SBE to complete the records examination process if staff members, who are union members, were unable to participate in the records examinations process. The Employer argues that “Board employees are not signature experts; therefore, the determination as to whether a signature matches is purely a judgment call by an individual staff member.”

b. Office of the Executive Director

The following petitioned-for employees work in the Office of the Executive Director: Amy Calvin (Administrative Specialist II), Darlene Gervase (Administrative Specialist II), and Frankie Desmangles (Information Services Coordinator).⁶ As stated prior, the Employer has raised an issue of fact or law with regard to the confidential status of Darlene Gervase and Amy Calvin. Nowhere in the Position Statement or Offer of Proof, however, does the Employer describe Desmangles’ duties or responsibilities.

c. Division of Campaign Disclosure

The Division of Campaign Disclosure is responsible for the enforcement of the provisions in Article 9 of the Election Code, the Campaign Finance Act, and Title 26, Part 100 and 125 of the Rules and Regulations of the SBE.⁷ The division assesses civil penalties for delinquent filing of reports and for exceeding contribution limits, hears complaints for violations of the Campaign Finance Act, audits political committees, and reviews political committees’ campaign finance reports.

⁶ Except for the three alleged confidential employees, the Employer did not state which employees are employed in which departments, rather I determined this by examining the organizational charts in the SBE Policy and Procedures manual.

⁷ I assume the Employer was referring to the Division of Campaign Disclosure when it referred to the “Campaign Finance Division” in its Position Statement. There is no Campaign Finance Division according to the SBE Policy and Procedures manual that the Employer provided with its Position Statement.

The following petitioned-for employees work in this division: Nick Blaida (Election Specialist I), Jason Hinds (Election Specialist I), Jason Meyer (Election Specialist I), Katie Miller (Election Specialist I), Clinton Jenkins (Election Specialist II), Kimberly Mrozowski (Election Specialist II), Tara Cachur (Election Specialist III), John Levin (Election Specialist III), Tom Newman (Election Specialist III), David Grubb (Microfilm Specialist II), Patricia Bensken (Public Information Associate), and Maryse Franklin (Public Information Associate). Except for the Election Specialist III and IV positions, the employer did not state which employees perform which duties within this division.

1. Assessment of civil penalties

Political committees must file various reports with the SBE and if they fail to do so in a timely manner, they can be assessed a civil penalty. A division staff member will send a Notice of Assessment to the committee indicating the amount of the civil penalty, and information on how the assessment was based.⁸ The Employer did not identify which employees make this assessment.

The political committee can appeal the assessment. A hearing examiner will review the appeal to determine whether the appeal should be granted, and will then write a written recommendation. The appeal and recommendation are reviewed by the SBE's general counsel, and then the SBE board, which makes the final determination. The SBE board's decision, including the written recommendation of the hearing examiner, is subject to judicial review. The Employer did not indicate which employees act as hearing examiners in this regard.

⁸ The assessment is based on how late the report was filed and whether the political committee has had any past violations of the Campaign Finance Act.

SBE Division of Campaign Disclosure staff also assess civil penalties for violations of the newly enacted Campaign Finance Act contribution limits. Since the limits for political committee contributions are fairly recent, the staff has only assessed a small number of penalties for violations. The assessment and appeals process for exceeding those limits is heard in the same manner as for the delinquent filing of reports.

2. Hearing of complaints for violations of the Campaign Finance Act

Any person can file a complaint with the SBE for violations of the Campaign Finance Act. Once a complaint is filed, it is assigned to a hearing examiner. The initial hearing is closed to the public. The Employer noted that in almost all cases, the hearing examiner is a Division of Campaign Disclosure staff member. The Employer stated that Election Specialist IIIs are authorized to conduct the initial closed hearing. The Employer did not clarify whether Election Specialist IIIs have in fact actually conducted closed hearings, and if so how often.

At the closed hearing, the hearing examiner can rule on motions, determine which evidence to accept, and conduct the hearing so as to gather enough evidence to determine whether it has been filed upon justifiable grounds. The hearing examiner cannot rule on questions of law however. After the hearing, the hearing examiner creates a written recommendation, which is then presented to the SBE's general counsel and the SBE board. The SBE board then reviews the recommendation and makes the determination as to whether the complaint was filed upon justifiable grounds. If the SBE board finds that it was, it can either order a public hearing or enter an order to bring the respondent into compliance without a hearing.

The public hearing is more structured than the initial hearing. It is adversarial in nature and involves direct and cross examination, discovery proceedings, admission and/or exclusion of

evidence, and post hearing motions. After the hearing, the hearing examiner creates a written recommendation, which is then presented to the SBE's general counsel and the SBE board. The SBE board will review the recommendation and then issue its final order. The Employer notes that attorneys are required to conduct the public hearing if possible.⁹ On some occasions, SBE staff attorneys will act as hearing examiners at the public hearing. If no SBE attorneys are available either, an Election Specialist III or "above" can conduct the public hearing.¹⁰ The Employer again did not clarify whether Election Specialist IIIs and IVs have in fact conducted public hearings, and if so how often. The proceedings of both the initial closed hearing and the public hearing are subject to judicial review.

3. Auditing of political committees

The SBE can order political committees to perform audits of their financial activities for cause (based on criteria in the Campaign Finance Act). The SBE is also required to randomly select up to 3% of registered political committees to perform audits. Political committees must submit their audits to SBE staff for review to determine whether they meet the requirements set forth in the Campaign Finance Act.

A political committee that has been ordered to conduct an audit for cause has the right to appear in a closed hearing where it can argue why it should not be required to perform an audit. The hearing is conducted by SBE staff. The Employer did not identify which employees conduct these hearings. The SBE can assess penalties against committees that do not perform an audit as required and also assess penalties for violations discovered as a result of the audit. The penalties

⁹ The petitioned-for unit does not include SBE attorneys.

¹⁰ The Employer did not identify what "above" means. I presume the Employer was referring to Election Specialist IVs.

are then subject to appeal before a Division of Campaign Disclosure staff hearing examiner. The Employer again did not identify which employees perform these duties.

4. Review of campaign finance reports

Division of Campaign Disclosure employees also review political committees' campaign finance reports for compliance.¹¹ The Employer notes that this includes the review of committees established by AFSCME and other labor organizations that may be affiliated with AFSCME.

If an employee finds a deficiency with a campaign finance report, he or she will contact the committee, and generally have it file an amended report to correct the deficiency. If the issue is not resolved at this stage, the employee can refer it to the Division Director for the filing of a complaint. The Employer did not identify which SBE employees perform these reviews.

Campaign finance report violations are administered through the same complaint procedures as Campaign Finance Act violations. Reports that are not filed on time are also referred to other Division of Campaign Disclosure staff, for the assessment of civil penalties. The penalties can be appealed and heard by "such" staff. Again, the Employer did not identify which employees or job titles assess civil penalties or hear appeals.

The Employer notes that Division of Campaign Disclosure staff also routinely assist political committees with preparing and filing reports, and also provide information, advice, and

¹¹ The review includes examining whether the committee supplied occupation and employer information for individual contributors of over \$500; whether expenditures were made in violation of the prohibited expenditure provision in the Campaign Finance Act; if the committee exceeded \$1000 in contributions, whether the committee filed a Schedule A-1 report; whether the committee's beginning balance matched the ending balance of the previously filed quarterly report and review; and whether the committee has properly designated itself on its Statement of Organization (candidate, political party, political action, or ballot initiative committee).

assistance upon request. The Employer again did not identify which employees perform this duty.

d. SBE's other administrative units

In its Position Statement, the Employer did not provide any further information beyond that described above with respect to the petitioned-for unit employees or the remaining divisions of the SBE and the corresponding employee's job duties. The only further information pertaining to the petitioned-for employees and their job duties was in regard to the alleged confidential employees who work in the Office of the General Counsel and the Office of the Executive Director.

The following petitioned-for employees work in the Division of Election Information: Brent Davis (Election Project Manager); Gary Nerone (Election Specialist III), Kay (Cheryl) Walker (Election Specialist III), and Jane Gasperin (Election Specialist IV).

The following petitioned-for employees work in the Division of Election Training and Resource Development: Vera Bolden (Division Secretary), Darcell McAllister (Election Specialist I), Rose Rodriguez (Election Specialist I), Brian Zilm (Election Specialist I), Jeff Berry (Election Specialist II), Marc Petrone (Election Specialist II), and Jamye Sims (Election Specialist III).

The following petitioned-for employees work in the Division of Voting Systems and Standard: Brian Matthews (Election Specialist I), Amy Evans (Election Specialist II), Michael Montney (Election Specialist II), Bruce Brown (Election Specialist III), and Rick Fulle (Election Specialist IV).

The following petitioned-for employees work in the Division of Voter Registration Services: Amy Eddings (Election Specialist I), Michael Heap (Election Specialist II), and Cheryl Hobson (Election Specialist IV).

The following petitioned-for employees work in the Division of Administrative Services: Anne Barnes (Administrative Coordinator), Erica Christell (Administrative Coordinator), Mickey (Denise) Reinders (Administrative Specialist I), Ryan Turner (Facility Services Specialist I), Walter Blakney (Mailroom Clerk), Tia (Lavittia) Jefferson (Office Receptionist I), and Jeremy Kirk (Procurement Specialist).

The following petitioned-for employees work in the Division of Information Technology: Joe Knoedler (Information Specialist II), Jason Kilhoffer (Information Specialist III), Kalpana Krishnamurthi (Information Specialist III).

e. The alleged confidential employees

It should be noted that the Employer did provide position descriptions with its Position Statement for the three employees it alleges are confidential. It also devoted six paragraphs within its Position Statement exclusively to Darlene Gervase, seven paragraphs to Sue Klos, and five paragraphs to Amy Calvin describing their duties and why they should be excluded. The Employer however did not provide position descriptions for the remaining 22 petitioned-for titles. Nor did the Employer describe with any particularity what the other 22 positions' job functions and duties consist of. The Employer states throughout its Position Statement that certain employees and staff perform certain duties but does not specify them by job title or name. The Employer did not identify which employees perform records examination. The Employer did not identify which employees act as hearing examiners for objections to records examination. The Employer did not identify which employees assess civil penalties for delinquent filing of

reports or for exceeding contribution limits. The Employer did not identify which employees act as hearing examiners for appeals of civil penalty assessments. The Employer did not identify which employees review campaign finance reports.

The Employer did state that Election Specialist IIIs are authorized to act as hearing examiners at closed hearings for complaints of Campaign Finance Act violations. The Employer also stated that Election Specialist IIIs and “above” can act as hearing examiners at the public hearing if no attorneys are available. The Employer also noted that campaign finance report violation complaint procedures are administered through the same complaint procedures as Campaign Finance Act violations. Finally, the Employer does provide an example of a hearing examiner report from a records examination appeal, but the hearing examiner who completed it is not listed as one of the petitioned-for employees.

Documents provided by the Employer:

The Employer provided 17 documents, a total of 846 pages, with its Position Statement.¹² Eighty percent of the documents were from AFSCME’s International Constitution, AFSCME Council 31’s Constitution, and AFSCME’s 2010 Form LM-2 Labor Organization Annual Report filed with the Department of Labor.¹³ SBE’s Policy and Procedure Manual constituted 94 pages. An SBE hearing examiner’s report and recommended decision, along with the SBE board final order, constituted six pages. This report was from Barbara Goodman, an employee not included in the petitioned-for unit. The Employer also provided documents from the records examination process. After examining the Position Statement and documents provided, I found that the overall evidence was insufficient to raise a question of law or fact necessitating a hearing on the

¹² See Appendix A for a list of all the documents provided by the Employer with its Position Statement.

¹³ Labor organizations are required to fill out Form LM-2, which includes political contributions, financial information, and accounting information.

petitioned-for employees' status as managerial employees. Therefore, I ordered the Employer to provide specific evidence, such as documentary evidence and affidavits, which supported its objection to the petition on the basis of the petitioned-for employees' managerial status.

B. Employer's June 2, 2011 Offer of Proof

In its Offer of Proof, the Employer again argues that all of the SBE employees should be excluded as managerial employees because of the "unique nature" of the SBE, the Petitioner's involvement in "partisan political activity", and that the "statutory duties and responsibilities" of the SBE and its employees would create an inherent conflict of interest and a divided loyalty among the employees if they are placed in a bargaining unit.

The Employer argues that the inherent conflict of interest is not hypothetical and points to a 2008 SBE board order in which AFSCME Council 31's political action committee was assessed civil penalties for a violation of the Illinois Campaign Disclosure Act. The Employer contends that SBE employees, who are allegedly in positions which the Petitioner now seeks to represent, conducted the investigation which led to the penalties. However, the Employer did not state which employees or job titles perform these investigations. The Employer also states that a hearing was held in the matter and it was conducted by a hearing examiner, a position it alleges the Petitioner now seeks to represent. It should be noted that the hearing examiner in the matter was Sharon Steward, who is the division director of the Division of Campaign Disclosure and is not included in the petitioned-for unit.

The Employer repeats its contention that AFSCME, Council 31 is engaged in political activities, makes contributions to candidates and elected officials in Illinois, and has a political action committee which must file forms and reports that are reviewed by SBE employees. As was also the case with the Employer's Position Statement, the Offer of Proof does not identify

with any particularity which employees review these reports. The Employer notes again that AFSCME's International Constitution and Council 31's Constitution state that one of their objectives is to engage in political activities.

As for the petitioned-for employees' duties, the Employer argues:

SBE employees are responsible for reviewing candidate nominating petitions, participating in records examinations of petitions. Further, SBE employees are responsible for the assessment of civil penalties for delinquent filing of reports, assessment of civil penalties for exceeding contribution limits, hearing of complaints for violations of the Campaign Finance Act, auditing of political action committees and reviewing campaign finance reports filed by political action committees.

Again, the Employer does not identify by job title or name, which of the petitioned-for employees perform the above-described duties. Rather, the Employer refers to the employees as a whole. The Employer also does not explain how the employees' alleged duties act to exclude the petitioned-for employees as managerial employees as defined by the Act or as a matter of law, except to say that SBE's executive director would provide testimony at hearing regarding how "those duties and responsibilities place the SBE employees inextricably and ineluctably interrelated in representing management interests by taking or recommending discretionary actions that effectively control or implement SBE policy and fulfill the independent mission of SBE."

Documents provided by the Employer

The Employer provided nine documents with its Offer of Proof.¹⁴ Almost 90 percent of the documents were AFSCME's political committee forms, campaign contributions, and expenditure reports. The remaining seven pages of documents were from the 2008 hearing examiner report and SBE board final order assessing civil penalties, referenced above. After

¹⁴ See Appendix B for a list of the documents provided by the Employer with its Offer of Proof.

examining the Offer of Proof and the documents provided, I find that the overall evidence is insufficient to raise a question of law or fact necessitating a hearing on the petitioned-for employees' status as managerial employees.

II. DISCUSSION & ANALYSIS

Section 9(a) of the Act states that when a representation petition is filed, “the Board shall investigate such petition, and if it has reasonable cause to believe that a question of representation exists, shall provide for an appropriate hearing upon due notice.” The Board’s Rules and Regulations call for a hearing only “[i]f the investigation discloses that there is a reasonable cause to believe that there are unresolved issues relating to the question concerning representation.” Section 1210.100(b)(7)(C) of the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code, Part 1210. The Act “on its face provides for the evaluation of the evidence gathered and a determination of its sufficiency before an appropriate hearing must be held.” City of Chicago v. Illinois Labor Relations Board, Local Panel, 396 Ill. App. 3d 61, 71 (1st Dist. 2009), quoting Illinois Council of Police v. Illinois Labor Relations Board, Local Panel, 387 Ill. App. 3d 641, 659 (1st Dist. 2008). Thus, no hearing is required where the party seeking the statutory exclusion fails to raise an issue of fact or law. State of Illinois, Department of Central Management Services (Illinois Commerce Commission), 26 PERI ¶132 (IL LRB-SP 2010).

The party seeking to exclude an employee from a proposed bargaining unit has the burden of proving the statutory exclusion. City of Washington v. Illinois Labor Relations Board, 383 Ill. App. 3d 1112, 1120 (3d Dist. 2008); Chief Judge of the Circuit Court of Cook County, 18 PERI ¶2016 (IL LRB-SP 2002). The burden upon the party seeking exclusion is “in

accordance with the State’s public policy, determined by the legislature, which is to grant public employees full freedom of association, self-organization, and designation of representatives of their own choosing.” Chief Judge of the Circuit Court of Cook County, 18 PERI ¶2016.

A. Managerial

1. Traditional Test

A managerial employee is not a “public employee” or “employee” for purposes of the Act. The purpose of the managerial exclusion is to maintain the undivided loyalty of the employer’s representatives in management. Chief Judge of Sixteenth Judicial Circuit, 178 Ill. 2d at 339. Under the traditional test described in Section 3(j) of the Act, a managerial employee is an individual who must be both (1) engaged predominantly in executive and management functions and (2) charged with the responsibility of directing the effectuation of management policies and practices.¹⁵ State of Illinois, Department of Central Management Services, 26 PERI ¶83 (IL LRB-SP 2010), citing Department of Central Management Services/Department of Healthcare and Family Services v. Illinois Labor Relations Board, State Panel, 388 Ill. App. 3d 319, 330 (4th Dist. 2009).

Executive and management functions include using independent discretion to make policy decisions as opposed to merely following established policy, changing the focus of an employer’s organization, being responsible for day-to-day operations, negotiating on behalf of the employer, exercising authority to pledge an employer’s credit, formulating policies, preparing a budget, and overseeing efficient and effective operations. Id.; Village of Elk Grove

¹⁵ Section 3(j) of the Act states:

“Managerial employee” means 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.

Village v. Illinois State Labor Relations Board, 245 Ill. App. 3d 109, 121-122 (2d Dist. 1993); State of Illinois, Department of Central Management Services (Illinois Department of Revenue), 21 PERI ¶205 (IL LRB-SP 2005). The first prong of the test requires more than exercising professional discretion and technical expertise. Department of Healthcare and Family Services, 388 Ill. App. 3d at 331; County of Cook v. Illinois Labor Relations Board, 351 Ill. App. 3d 379, 386 (1st Dist. 2004). The employee must exercise independent judgment and possess a level of authority sufficient to broadly effect the organization's purpose or its means of effectuating those purposes. State of Illinois, Department of Central Management Services, 25 PERI ¶161 (IL LRB-SP 2009). In regard to the development of policy, managerial status is not found where the individual serves merely a subordinate or advisory function. Department of Healthcare and Family Services, 388 Ill. App. 3d at 331.

The second prong is met where the individual oversees or coordinates policy implementation by development of the means and methods of achieving policy objectives and by determining the extent to which the objectives will be achieved. Id. It is not enough to merely perform "duties essential to the employer's ability to accomplish its mission." Id. If an individual's decisions are "significantly circumscribed by predetermined requirements and procedures, the employee's activities are not managerial." Chief Judge of Eighteenth Judicial Circuit v. Illinois State Labor Relations Board, 311 Ill. App. 3d 808, 815 (2d Dist. 2000), citing Village of Elk Grove, 245 Ill. App. 3d at 121-22. The individual must be empowered with substantial discretion to determine how policies will be effected. Department of Healthcare and Family Services, 388 Ill. App. 3d at 331, citing State of Illinois, Department of Central Management Services v. Illinois State Labor Relations Board, 278 Ill. App. 3d 79, 87 (4th Dist. 1996). However, "the relevant consideration is effective recommendation or control rather than

final authority over employer policy.” Chief Judge of Sixteenth Judicial Circuit, 178 Ill. 2d at 339-40; State of Illinois, Department of Central Management Services, 26 PERI ¶155 (IL LRB-SP 2011).

In this case, the evidence submitted by the Employer in its Position Statement and Offer of Proof is insufficient to raise an issue of fact or law as to the petitioned-for employees’ managerial status within the meaning of the Act. In both its Position Statement and Offer of the Proof, the Employer makes no attempt to fit its documents within the criteria required under the traditional test for managerial status. Rather, the Employer repeatedly refers to the conflict of interest that it believes would result if the petitioned-for employees were represented by the Petitioner. The vast majority of the documents that the Employer provided with its Position Statement and Offer of Proof in fact speak to this issue: forms and reports that the Petitioner filed with the SBE and the Petitioner’s constitutions which establish that the Petitioner is involved in political activity. These documents do not show how the employees are engaged in executive and management functions or are charged with the responsibility of directing the effectuation of management policies and practices.

The documents the Employer does provide in regard to the employees’ actual job functions and duties demonstrate that the employees are merely serving a subordinate and advisory role, and not “broadly” affecting the SBE’s goals and means of achieving those goals. The Employer provided documents from the records examination process. However, the Employer has not shown how, in verifying voter signatures on candidate nominating petitions, the employees are exercising effective recommendation or control over SBE policy as opposed to merely following established SBE policy. The Employer’s description of the records examination process and accompanying documents show that the employees who perform this

function are significantly restricted by predetermined requirements and procedures. Finally, the Employer did not even identify which of the petitioned-for employees perform records examinations.

The Employer has also not shown how in assessing civil penalties, auditing political committees, and reviewing campaign finance reports, employees in the Division of Campaign Disclosure are exercising anything more than professional discretion and technical expertise. The Employer also did not identify which employees perform these duties.

The Employer stated that some of the employees involved in the records examination process and within the Division of Campaign Disclosure act as hearing examiners. The Employer does not identify which employees act as hearing examiners for objections to records examinations, appeals of civil penalty assessments, audits, appeals of audits, and appeals of assessment of civil penalties for campaign finance report deficiencies. The Employer stated that Election Specialist IIIs and above can conduct closed hearings, and open hearings on violations of the Campaign Finance Act if no attorneys or SBE attorneys are available. The Employer however did not state whether Election Specialist III and IV employees have in fact acted as hearing examiners. The Employer provided two examples of hearing examiners' reports and recommended decisions. Neither of these reports were written by employees in the petitioned-for unit. Nonetheless, even if Election Specialist III and IVs have in fact acted as hearing examiners, there is no evidence that in doing so they are managerial employees. The Employer's evidence, taken as true, does not show that the petitioned-for employees are engaged in executive and management functions or charged with the responsibility of directing the effectuation of management policies and practices. In both the records examination process and within the Division of Campaign Disclosure, the hearing examiners' recommendations are sent to the

SBE's general counsel, who gives his own recommendation to the SBE board. In both cases, the SBE board reviews the hearing examiner's recommendation and then makes the final decision. The facts the Employer does provide show that the employees' decisions are significantly circumscribed by predetermined requirements and procedures. Overall, the Employer provided insufficient facts to establish that the employees effectively control or recommend employer policy in their role as hearing examiners.

The Employer states that SBE's Executive Director and other witnesses "would provide testimony at hearing regarding the duties and responsibilities of the SBE employees and how those duties and responsibilities place the SBE employees inextricably and ineluctably interrelated in representing management interests by taking or recommending discretionary actions that effectively control or implement SBE policy and fulfill the independent mission of SBE." The Employer does describe some of the duties of the various units of the SBE. However, the Employer, with the exception of the Election Specialist III and IV positions, does not identify by title or name which employees perform which duties. The Employer completely neglects to describe the duties of many of the administrative units' employees. The Employer provides no information or description of the job duties for the following units: Division of Election Training and Resource Development, Division of Voting Systems and Standard, Division of Voter Registration Services, Division of Administrative Services, and Division of Information Technology. Overall, the Employer has failed to provide sufficient evidence to raise an issue of fact or law as to the petitioned-for employees' managerial status under the traditional test.

2. Managerial as a matter of law

Illinois courts have developed an alternative analysis in which certain employees are held to be managerial employees as a matter of law and thus excluded from collective bargaining. Chief Judge of the Sixteenth Judicial Circuit, 178 Ill. 2d 333; Office of the Cook County State's Attorney, 166 Ill. 2d 296. The analysis focuses almost entirely on the statutory duties of the employees rather than on an examination of the actual duties of the petitioned-for employees. Office of the Cook County State's Attorney, 166 Ill. 2d at 304. Three factors have been identified that support a finding that an employee is managerial as a matter of law: 1) close identification of an office holder with the actions of his or her assistants; 2) unity of their professional interests; and 3) power of the assistants to act on behalf of the office holder. Id. at 304. The Illinois Supreme Court has emphasized that the managerial as a matter of law analysis has limited applicability and should not be used to deem all professional employees managerial employees under the Act. Chief Judge of Sixteenth Judicial Circuit, 178 Ill. 2d at 347. When there is no "office holder" or statute enumerating the duties of the employees at issue, the Board has upheld the conclusion that the employees were not managers within the meaning of the Act. Department of Central Management Services (Capital Development Board), 20 PERI ¶18 (IL LRB-SP 2004).

In Department of Central Management Services/Department of Healthcare and Family Services, the court found that staff attorneys were not managerial employees as a matter of law when their duties and powers were not described by statute, they were not surrogates for their superior, and they had no independent authority to act in his absence. Department of Central Management Services/Department of Healthcare and Family Services, 388 Ill. App. 3d at 333.

In Department of Central Management Services/Illinois Commerce Commission v. Illinois Labor Relations Board, State Panel, the court found that Illinois Commerce Commission (ICC) administrative law judges were not managerial as a matter of law because the ALJs' recommended orders did not automatically become final orders of the ICC. Department of Central Management Services/Illinois Commerce Commission v. Illinois Labor Relations Board, State Panel, 26 PERI ¶136 (4th Dist. 2010). The court noted that in each case the ICC made its own decision and order after it received the ALJ's recommended order, even if no exceptions were filed.¹⁶ Id. The court stated:

Hence, unlike an ALJ of the Human Rights Commission, an ALJ of the Commerce Commission does not become a surrogate, i.e., a substitute or alter ego, of the commission members whenever there is an absence of exceptions. Exceptions or no exceptions, the members of the Commerce Commission retain the power and duty to issue their own order, their own decision, after receipt of the ALJ's recommended order. Under no circumstances is an ALJ of the Commerce Commission clothed with the ultimate power of the commission members; therefore, the ALJ is not a managerial employee as a matter of law within the meaning of Chief Judge and Cook County State's Attorney.

Id., discussing Department of Central Management Services/Illinois Human Rights Commission v. Illinois Labor Relations Board, State Panel, 26 PERI ¶135 (4th Dist. 2010).

In this case, the evidence submitted by the Employer in its Position Statement and Offer of Proof is insufficient to raise an issue of fact or law as to the petitioned-for employees' status as managerial employees as a matter of law. As with the employees in Department of Central Management Services/Department of Healthcare and Family Services, there is no evidence that the petitioned-for employees act as surrogates of the SBE. They have no independent authority to perform records examinations, assess civil penalties for the delinquent filing of reports or

¹⁶ Exceptions are a party's written arguments against the ALJ's recommended order.

exceeding contribution limits, hear complaints for violations of the Campaign Finance Act, audit political action committees, or review campaign finance reports.

In regard to violations of the Campaign Finance Act, the Employer stated that Election Specialist III and IVs can be designated as hearing examiners for closed hearings and for open hearings if no attorneys or SBE attorneys are available. Again, like the employees in Department of Central Management Services/Department of Healthcare and Family Services, an employee so designated here “would be able to do those things not because of any statutory powers of his or her position but because” the SBE designated that employee. See Department of Central Management Services/Department of Healthcare and Family Services, 388 Ill. App. 3d 319. The petitioned-for SBE employees are not “clothed with all the powers and privileges” of the SBE, and therefore all “acts done by” the petitioned-for employees in that capacity must not “be regarded as if done by” the SBE itself. Office of the Cook County State’s Attorney, 166 Ill. 2d at 303.

Further, as with the employees at issue in Department of Central Management Services/Illinois Commerce Commission, there is no evidence in this case that hearing examiner recommendations become final orders of the SBE. For the records examination process, the SBE board issues the final order on whether to sustain or overrule an objection after reviewing the recommendations by the hearing examiner and the SBE’s general counsel. In regard to the appeals process for the assessment of civil penalties, the hearing examiner submits his or her recommendation which is then reviewed by the SBE’s general counsel and the SBE board, which then issues its final order. The SBE board also makes the final determination as to whether complaints for violations of the Campaign Finance Act were filed upon justifiable grounds. Therefore, because the SBE hearing examiners are not clothed with the ultimate power of the

SBE board, the hearing examiners are not managerial employees as a matter of law. Further, the Employer did not provide examples of any of the Election Specialist III or IV employees in their alleged role as hearing examiner. The only documents provided from hearing examiners were from employees not listed in the petitioned-for unit (Sharon Steward and Barbara Goodman).

Again, the Employer did not provide information or describe the duties of the petitioned-for employees in the following units: Division of Election Training & Resource Development, Division of Voting Systems and Standard, Division of Voter Registration Services, Division of Administrative Services, and the Division of Information Technology. The Employer has provided insufficient evidence in regard to these employees' managerial status as a matter of law to raise an issue of fact or law for hearing.

Finally, the Employer asserts that there is an inherent conflict of interest in having the Petitioner represent the petitioned-for unit. It does not automatically follow, however, that a hearing is necessary. Rather, there still must be an issue of fact or law necessitating a hearing. The Employer has failed to provide sufficient facts to raise an issue of fact or law in its Position Statement or Offer of Proof, as to the petitioned-for employees' managerial status under the Act or as a matter of law. Therefore, a hearing is not necessary in this matter.

III. CONCLUSIONS OF LAW

I find that the petitioned-for employees are not managerial employees within the meaning of Section 3(j) of the Act or as a matter of law.

IV. RECOMMENDED ORDER

Unless this Recommended Decision and Order Directing Certification is rejected or modified by the Board, the American Federation of State, County and Municipal Employees, Council 31 shall be certified as the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment pursuant to Sections 6(c) and 9(d) of the Act.

INCLUDED: All employees at the Illinois State Board of Elections in the following job titles: Administrative Coordinator, Administrative Specialist, Division Secretary, Election Specialist, Election Specialist I, Election Specialist II, Election Specialist III, Election Specialist IV, Election Specialist Trainee, Election Project Manager, Facility Services Specialist I, Information Services Technician, Information Specialist, Information Specialist II, Information Specialist III, Information Service Coordinator, Mail Room Clerk, Microfilm Specialist, Office Receptionist, Procurement Officer, Public Information Associate, Receptionist and all other eligible employees as defined by the Act.

EXCLUDED: Darlene Gervase (Administrative Specialist II), Sue Klos (Administrative Specialist II), and Amy Calvin (Administrative Specialist II), and all supervisory, confidential, and managerial employees as defined by the Act.¹⁷

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 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.

¹⁷ Pursuant to Section 1210.100(b)(7)(B), the Petitioner may file a unit clarification petition to address the inclusion of those three positions in the petitioned-for bargaining unit.

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. 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 Springfield, Illinois, this 13th day of July, 2011.

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



Michelle N. Owen
Administrative Law Judge

APPENDIX A

Exhibit A: 2 pages

Email between counsel for the Employer and the Petitioner setting forth the three employees that the Employer asserts are confidential and the 17 employees that the parties agree will be excluded from the petitioned-for unit

Exhibit B: 455 pages

AFSCME's 2010 Labor Organization Annual Report, United States Department of Labor

Exhibit C: 190 pages

AFSCME International Constitution 2010

Exhibit D: 11 pages

AFSCME Council 31 Constitution

Exhibit E: 21 pages

AFSCME Interim Congressional Scorecard

Exhibit F: 11 pages

Copies of packet sheets from the records examination process

Exhibit G: 10 pages

Copies of signature sheets from the records examination process

Exhibit H: 32 pages

Results of the records exam from the records examination process

Exhibit I: 6 pages

Hearing Examiner's Report and Recommended Decision from the records examination process, Dunaway v. Scanlan, 09 SOEB GP 518

Exhibit J: 2 pages

Copy of the SBE's general counsel Summary Sheet from the records examination process, Dunaway v. Scanlan, 09 SOEB GP 518

Exhibit K: 2 pages

SBE board decision from the records examination process, Dunaway v. Scanlan, 09 SOEB GP 518

Exhibit L: 1 page

SBE Organization Chart: Office of the Executive Director

Exhibit M: 2 pages

Administrative Specialist II (Office of the Executive Director) Position Description,
Darlene Gervase

Exhibit N: 94 pages

SBE Policy and Procedures Manual

Exhibit O: 4 pages

Administrative Specialist II (Office of the General Counsel) Position Description, Sue
Klos

Administrative Specialist II Class Specification

Exhibit P: 2 pages

Administrative Specialist II (Office of the Executive Director) Position Description, Amy
Calvin

Exhibit Q: 1 page

Summary of Investigation and Discipline of two SBE employees (documents created and
organized by Amy Calvin)

APPENDIX B

Exhibit R: 2 pages

AFSCME Illinois Special PAC Account D-1 Statement of Organization

Exhibit S: 4 pages

AFSCME Report of Campaign Contributions and Expenditures Quarterly Report, Form D-2

Exhibit T: 4 pages

AFSCME Schedule A-1 Report of Campaign Contributions

Exhibit U: 2 pages

AFSCME Illinois Council 31 PAC's D-1 Statement of Organization

Exhibit V: 9 pages

AFSCME Illinois Council 31 PAC's Form D-2 Semiannual Report, Report of Campaign Contributions and Expenditures

Exhibit W: 12 pages

AFSCME Illinois Council 31 PAC's Form D-2 Pre-Election Report of Campaign Contributions and Expenditures

Exhibit X: 4 pages

AFSCME Illinois Council 31 PAC Form D-1 Statement of Organization

Exhibit Y: 15 pages

AFSCME Illinois Council 31 PAC Report of Campaign Contributions and Expenditures Semiannual Report

Exhibit Z: 7 pages

Hearing Examiner Report, Illinois State Board of Elections v. AFSCME IL Council 31 PAC, 07 AE 037 (appeal of civil penalty assessment for violation of Illinois Campaign Disclosure Act)

SBE Board Final Order, Illinois State Board of Elections v. AFSCME IL Council 31 PAC, 07 AE 037 (appeal of civil penalty assessment for violation of Illinois Campaign Disclosure Act)

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

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

Petitioner

and

Illinois State Board of Elections,

Employer.

Case No. S-RC-11-122

DATE OF
MAILING: July 13, 2011

AFFIDAVIT OF SERVICE

I, Lori Novak, on oath, state that I have served the attached **ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER** issued in the above-captioned case on each of the parties listed herein below by depositing, before 1:30 p.m., on the date listed above, copies thereof in the United States mail pickup at One Natural Resources Way, Lower Level Mail Room, Springfield, Illinois, addressed as indicated and with postage prepaid for first class mail.

Catherine Struzynski
AFSCME Council 31
205 N. Michigan Avenue, Ste. 2100
Chicago, IL 60601

Mark L. Juster
Laner Muchin
515 N. State St., Ste. 2800
Chicago, IL 60610



Lori Novak

SUBSCRIBED and **SWORN** to
before me, July 13, 2011


NOTARY PUBLIC

