

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

Treasurer of the State of Illinois,)	
)	
Employer/Petitioner)	
)	
)	Case No. S-UC-12-056
and)	
)	
American Federation of State, County)	
and Municipal Employees, Council 31,)	
)	
Labor Organization)	

**ADMINISTRATIVE LAW JUDGE’S CORRECTED RECOMMENDED DECISION AND
ORDER**

I. Background

On April 26, 2012, the Treasurer of the State of Illinois (Employer or Petitioner) filed a unit clarification petition with the Illinois Labor Relations Board (Board) seeking to exclude the title Information Systems Analyst II from the unit certified by the Board in Case No. S-AC-02-002. The Employer asserts that the Information Systems Analyst II must be excluded from coverage under the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2010), as amended, pursuant to the exemption for confidential employees.

In accordance with Section 9(a) of the Act, an authorized Board agent conducted an investigation and determined that there was reasonable cause to believe that a question concerning representation existed. A hearing on the matter was conducted on November 9, 2012. Both parties elected to file post-hearing briefs. After full consideration of the parties' stipulations, evidence, arguments, and briefs, and upon the entire record of this case, I recommend the following:

II. Preliminary Findings

The parties stipulate and I find:

1. At all times material, the Employer has been a public employer within the meaning of Section 3(o) of the Act and the Board has jurisdiction over this matter pursuant to Section 5(a) of the Act.
2. AFSCME is a labor organization within the meaning of Section 3(i) of the Act.

III. Issues and Contentions

The issues are (1) whether the Employer may file a unit clarification petition under the instant circumstances and (2) whether the position of Information Systems Analyst II should be excluded from the bargaining unit as confidential pursuant to Section 3(c) of the Act.

The Employer argues that the unit clarification petition is properly before the Board because the Appellate Court has held that the Board must allow the State to file such petitions at any time to remove confidential employees from the bargaining unit who were improperly included. Further, the Employer asserts that unit clarification is proper here because Sarah Schuering's duties changed when she moved from the Department of Financial Institutions to the Treasurer's Office.

Next, the Employer argues that Schuering must be excluded from the bargaining unit as a confidential employee under the authorized access test because the Treasurer intended her position to have access to the entire computer system. In support, the Employer asserts that Schuering has both authorized and intended access to nearly all drives, files, documents, servers, and databases on the Treasurer's system, including employees' personal drives (P Drives), because she possesses the network administrator password. The Employer contends that such broad access "necessarily entails authorized access to information relating to the effectuation and review of collective bargaining policies" since members of management store collective bargaining-related materials on their P Drives and Schuering has the capability to read all documents stored there.

The Employer also argues that Schuering has authorized access to collective bargaining-related documents because she is required to troubleshoot hardware and software problems for Treasurer Office employees, including members of the Office's bargaining team and those who

formulate the budget. The Employer first notes that such employees work on collective bargaining-related documents and documents which contain preliminary budget information. Next, the Employer asserts that Schuering would view confidential documents if she were asked to help employees save the documents onto their P Drives. Similarly, Schuering would view confidential Excel documents if employees asked Schuering to help them copy information from page to page, to save the documents, or to establish formulas to obtain a particular result.

Further, the Employer asserts that Schuering has access to collective bargaining-related information because she is capable of logging into the email server to read employees' emails which include discussions of collective bargaining strategies, preliminary budgetary information, legislative priorities, proposals to restructure divisions, and decisions concerning FOIA requests. In addition, the Employer notes that Schuering may be required to read collective bargaining-related emails if they are misdirected to the spam folder because she must read email classified as spam to determine whether it should be released to the recipient.

Further, the Employer asserts that Schuering has authorized access to information related to collective bargaining because she is permitted to retrieve employees' internet logs which show employees' search histories. The Employer explains that such internet logs reveal confidential information because management employees use the internet to track other states' approaches to collective bargaining by reviewing other states' labor statutes, legislative perspectives, and approaches to public relations.

Next, the Employer asserts that Schuering has authorized access to information related to collective bargaining because she is capable of accessing any documents that the Employer would use during the grievance process. First, the Employer notes that the Treasurer keeps all grievance-related documents on the server and that Schuering is capable of accessing all such documents. In particular, the Employer states that Schuering has authorized access to grievance-related documents concerning the Employer's internet policy because Schuering must access employees' detailed internet logs when the Employer suspects that employees have misused the internet.

Finally, the Employer contends that Schuering is confidential even though she asserts she has never seen confidential, collective bargaining-related information because courts have held that an employee need only have real and more than incidental access to such information during

the regular course of her duties and that an employer need not prove an employee has actually seen confidential documents.

The Union argues that the unit clarification petition is not properly before the Board because the Employer has met none of the conditions for unit clarification under the Board's rules. Further, the Union distinguishes the case cited by the Employer for the proposition that the State may file a unit clarification petition to exclude a confidential employee at any time, noting that in the cited case, the employer filed the petition three months after the parties included the employees by mutual mistake, while in this case, the employee has been part of the unit for 13 years and was not placed there in error. The Union further notes that the Board never amended its rules to permit an employer to use unit clarification to exclude an employee from the unit as confidential at any time.

Next, the Union asserts that Schuering is not a confidential employee because the Employer has never directed her to access confidential information and because she has not actually seen confidential information in the 13 years that she has held her position. Finally, the Union argues that Schuering is not confidential merely because she is capable of accessing certain confidential documents when she has no permission to read them.

IV. Facts

Deborah Price is the Information Technology director of the IT department (department) of the Treasurer's Office. The department performs application and web development, network administration, and user support. Specifically, the department works with employees of the Treasurer's Office to develop applications that meet their business needs. The department assists employees in the warrant division, accounting division, and the banking division, General Counsel Maureen Lydon and legal staff, Director of Human Resources Lori Ann McCabe and human resources staff, outreach staff, the Chief of Staff Kyle Ham, Director of Accounting Jessica Olive, budget personnel, legislative affairs personnel, Chief Budgeteer Justin Sinner, and the Treasurer himself.

Price oversees Sarah Schuering, an Information Systems Analyst II. Schuering is a network administrator. As network administrator, Schuering creates the network administrator password and keeps it confidential. In addition, she maintains the office's 25-30 servers. For example, Schuering configures and monitors automated backup procedures for File, SQL, and

Exchange (email) servers which are backed up on a nightly basis. In addition, she checks the server logs daily to ensure that the servers are running and upgrades them as necessary.¹ If a server encounters a problem, the log records a warning or error message. Schuering reviews the logs and addresses the issues. Schuering also reviews the servers' performance if she receives a complaint that the system is booting up very slowly.

Schuering serves as user support lead. In this capacity, she takes calls from users who have computer-related problems and troubleshoots computer hardware and software issues. She fixes computers when screens freeze, when a peripheral device does not work, or when employees have trouble printing. Schuering provides technical support for third party software systems such as Unclaimed Property Wagers and Liberty Net Systems.² Schuering helps employees save documents on the server if the server is experiencing problems. Under those circumstances, Schuering will also likely see the document she helps save. She also troubleshoots for the Excel spreadsheet program. The manager of accounting frequently uses Excel; some Excel spreadsheets contain preliminary budget information. Schuering helps employees save Excel documents or copy information from one sheet to another. In addition, Schuering helps employees establish Excel formulas to achieve particular results within the document. For example, she helps employees multiply or divide two columns of numbers. When Schuering troubleshoots such problems on Excel, she sees the open document and, in some cases, must assess its contents to solve the problem. Formerly, another employee performed the primary troubleshooting support on Excel, but that employee left the Treasurer's employment and Schuering assumed those responsibilities. Schuering testified that, to her recollection, none of the Treasurer's managers had ever directed her to look at a document that they had created. To Schuering's knowledge, she has never seen documents related to collective bargaining.³

Schuering sets up, administers, and upgrades the SQL Server databases which hold all of the Office's documents and information. For example, if a database becomes full or if it takes up too much space on a server, she may migrate it to a larger server.

¹ The Office also has a Blackberry server for eight individuals who receive emails on their Blackberries.

² The unclaimed property software helps the office return unclaimed property to its rightful owners. Liberty Net is a document imaging system which helps tracks all claims that are filed with the office.

³ Schuering did not explain what materials she understood "collective bargaining-related documents" to encompass.

Schuering sets up and administers users' access to the network and ensures that the users' names may be found in the directory. For example, each user has a personal drive ("P Drive") on which they store documents so that the server may back them up on a nightly basis. Schuering is able to enter any user's P Drive by logging into the server using her network administrator password. Upon entering the user's P Drive, Schuering can see the names of the documents from the server but not the files' contents. To read the files, Schuering needs to copy the documents onto her own PC. However, Schuering is not permitted to enter another employee's P Drive and copy a file into her own P Drive to read it. If Schuering's superiors discovered she did so, they would discipline or fire her.⁴

Don Gray is the Deputy Chief of Staff for the Illinois State Treasurer Dan Rutherford. Gray develops management's bargaining strategies and formulates their contract proposals; he stores all documents pertaining to collective bargaining on his P Drive. Gray drafts documents for use by the Treasurer in collective bargaining including documents which outline the Treasurer's long term strategic proposals, the availability of the Treasurer's resources, and management's goals. He also drafts preliminary budgetary documents which impact collective bargaining. The chief of staff, legal counsel, accounting staff, the budgeter, and John Webb, who works on legislative affairs, also store preliminary budget information on their respective P Drives.

Schuering sets up and administers shared data access file directories to facilitate collaboration between Treasurer's Office employees across different divisions. Employees may request that Schuering create such directories; Schuering will do so once she receives permission from the requesting employee's supervisor. The directory permits employees to share files by giving multiple employees access to all files stored in the directory.

Schuering suspends and archives users as required when the Office terminates their employment or investigates them. When Schuering suspends an individual's access, she changes their passwords and archives all their information onto a CD. She also often attaches their mailbox to someone else's, typically their supervisor's, so that individuals who have contacted the user can maintain contact with the office. If an individual is absent because of a disciplinary suspension, that individual's supervisor decides what should happen with the mailbox.

⁴ Schuering does not have to change a password to copy and paste documents from another employee's P Drive to her own. A supervisor would have to specifically investigate whether Schuering had taken such action.

Schuering troubleshoots the email system which employees use to communicate amongst themselves and with individuals outside the department. Schuering checks the email spam folder to ensure that work-related email has not been caught by the spam filter. While Schuering can often ascertain whether the email is spam by looking at the subject line, Schuering must sometimes read the body of the message to determine whether the email is a legitimate work email which must be released. A legitimate email may get caught in the spam folder if a message is sent to more than 20 people on a distribution list. Alternatively, the subject of the email may inadvertently cause it to be classified as spam. For example, an email without a subject line may be caught by the spam filter. In addition, Schuering sets up employees' mailboxes on their home server and may raise their mailbox size limits. However, she does not see the contents of their mailboxes when she does so.

Schuering has the capability to read other users' email if she logs on as the Network Administrator and grants herself the rights to such access, but she is not permitted to do so. Schuering has permission to read individuals' emails only when they are misdirected into the spam folder. Price has never instructed Schuering to read an email located in the mailbox of the HR director, legal counsel, the deputy chief of staff, or the chief of staff.

Gray formulates collective bargaining strategies and proposals over email in collaboration with other members of the Treasurer's Office including General Counsel Lydon, Director of Accounting Olive, Chief Budgeteer Sinner, Director of Human Resources McCabe, Chief of Staff Ham, and the Treasurer himself.⁵ All email correspondence is housed on, and transmitted using, exchange servers located on the Treasurer's network. Gray's emails to Director of Human Resources McCabe and Chief General Counsel Lydon include attachments of documents related to collective bargaining such as documents outlining the office's legislative priorities, proposals for restructuring divisions and consolidating positions, and levels of compensation. Email facilitates the formulation of collective bargaining strategies because the individuals who help create them are located in different offices.⁶ Gray analyzes his colleagues' input for feasibility and formulates the information into a one-page single document called a

⁵ Gray, McCabe, and Lydon also meet in person to formulate collective bargaining proposals.

⁶ The Director of Human Resources is based solely out of the Monroe Facility; the General Counsel is based in Chicago but routinely travels to Springfield and has an office there; Gray himself has three different offices in Springfield.

“white paper” which he presents to the Treasurer and shares with executive staff through email. The white paper contains budgetary information and information pertaining to salaries.⁷

Gray also uses email to communicate with the Treasurer, the Chief of Staff, directors of the programs across all divisions, legal counsel, legislative affairs personnel John Webb, and the caucuses throughout the budget formulation and passage process concerning budget cutting measures.⁸ The emails contain information concerning preliminary budget proposals to which the Union and the public do not have access. Gray uses this budgetary information to develop bargaining proposals over email with the directors of each division within the Treasurer’s Office. He asks the Treasurer and the Chief of Staff about their main fiscal concerns and priorities and then relays those thoughts to the directors.

Gray communicates via email with the chief of staff, legal counsel, human resources, and the Treasurer concerning potential discipline of employees. Those individuals ask him whether they should pursue certain disciplinary issues and the manner in which they should handle employee misconduct, including the disciplinary means and methods they should employ pursuant to the contract.

Gray also communicates by email with outside counsel concerning contract proposals and potential disciplinary actions that may be taken against bargaining unit members.

Gray also uses the internet to develop his bargaining proposals. He compares the Treasurer’s salary proposals with those presented by other states and the federal government. He looks at the development of negotiations and “bargaining elements” in other states.

Schuering reviews internet usage logs. The logs automatically generate summary reports of internet activity which include a list of the top users of the internet and the various internet programs used by Treasurer’s Office employees. Schuering reviews the reports to ensure that employees only use the Internet for appropriate business purposes and to ensure that the office has enough bandwidth for users in multiple locations. The summary reports do not identify which employee has used which program.

The department may require Schuering to create detailed reports on employees’ internet usage if the summary report indicates that some employees are not using the internet for appropriate business purposes. Schuering is permitted access to employees’ internet usage data

⁷ In addition, if the Union submits a FOIA request, Gray, McCabe, and Lydon determine what may be disclosed.

⁸ He also communicates with these individuals in person and over the telephone.

at all times to perform that task. She pulls individuals' detailed logs upon the request of her superior. The detailed logs show the amount of time an employee has spent on the internet and the substance of the internet activity. It includes the server the individual used, the individual's name, the date and time stamp, and every URL the individual visited. If Schuering sees a program name that should not be installed on an individuals' computer, Schuering determines which individual installed the program and notifies the user that the department must uninstall it.⁹ Schuering testified that she does not analyze the data provided by the internet logs. Further, Schuering does not look at individual's logs unless there is a request from a superior or unless the summary report demonstrates that there is a need to do so.

The department of human resources once asked Schuering to determine the internet usage of a particular employee. Schuering produced a file comprised of entries based on the individual's IP address. She gave that file to Price, who summarized and formatted it. The IT department does not render an opinion on whether an employee is performing work-related activity or not.¹⁰

Finally, Schuering manages issues with the virtual private network (VPN). The VPN is a secured internet connection to the Treasurer's Office which allows individuals to connect to the Office from their home or through any remote location. The Office arranges individuals' access to the VPN by issuing them air cards. The air cards give individuals internet connectivity so that they do not need to use unsecured Wi-Fi connections. The individual's home or personal computer then becomes part of the Treasurer's Office's network.

⁹ In one case, Schuering determined that an employee had used Skype during work hours.

¹⁰ In one case, a coworker told Schuering that a Treasurer's Office employee was logged on to the server when the IT department performed a reboot of it. After obtaining further information from an intern, Schuering discovered that the employee was printing non-work-related documents outside of work hours.

V. Discussion and Analysis

1. Appropriateness of the Unit Clarification Procedures

The unit clarification petition is properly before the Board because the Employer asserts that Schuering is a confidential employee and the Board must allow the State to file unit clarification petitions to remove allegedly confidential employees from bargaining units at any time.

The Board's rules set forth three circumstances under which an employer or union may file a unit clarification petition. The petitioner must show that (1) there was a substantial change in the duties and functions of an existing title which raises an issue as to the title's unit placement, (2) an existing job title that is logically encompassed within the existing unit was inadvertently excluded by the parties at the time the unit was established, or (3) a significant change took place in statutory or case law that affects the bargaining rights of employees. 80 Ill. Adm.Code §§ 1210.170(a)(1), (a)(2), (a)(3), as amended by 27 Ill. Reg. 7393.

Illinois case law sets forth two additional circumstances under which parties may file unit clarification petitions. First, a party may file a unit-clarification petition when a newly created job classification has job functions similar to functions already covered in the bargaining unit. Am. Fed. of State, Cnty. & Mun. Empl. v. Ill. State Labor Rel. Bd., 333 Ill. App. 3d 177, 182 (5th Dist. 2002). Second, an employer may file a unit clarification petition "to sever confidential employees from a bargaining unit." Dep't of Cent. Mgmt. Serv. (Dep't of Corrections) v. Ill. Labor Rel. Bd., State Panel ("Dep't of Corrections"), 364 Ill. App. 3d 1028, 1036 (4th Dist. 2006)("the State can file a unit-clarification petition to remove a confidential employee from a bargaining unit at any time"). The Court reasoned that "given the importance of confidentiality in labor-relations matters" the Board must allow employers to file unit clarification petitions to exclude allegedly confidential employees regardless of how long those employees had been included in the unit. Id. at 1034, 1036. ("The fact that a confidential employee was improperly placed in a bargaining unit and the issue of his placement was not raised for several years should not dictate that he forever be allowed to stay in the bargaining unit").

Here, the unit clarification petition is properly before the Board because the Employer seeks to remove an allegedly confidential employee from the bargaining unit. Contrary to the Union's contention, Department of Corrections is not distinguishable because the Court's

decision in that case hinged only on the asserted confidential status of the employees in question, the same assertion which justifies the petition here.¹¹ See Dep't of Corrections, 364 Ill. App. 3d at 1036.

2. Confidential Status

Schuering is a confidential employee because she has authorized access to collective bargaining-related material when she troubleshoots problems on Excel.

The Act sets forth two tests to determine whether an employee is subject to the confidential exclusion, (1) the labor nexus test and (2) the authorized access test.¹² An employee is confidential under the labor nexus test if, in the regular course of his duties, he assists in a confidential capacity, a person who formulates, determines, and effectuates management policies regarding labor relations. Chief Judge of the Circuit Court of Cook Cnty. v. Am. Fed'n of State, Cnty. and Mun. Empl., Council 31, 153 Ill. 2d 508, 523 (1992). The person assisted must perform all three functions. Id.

In contrast, an employee is confidential under the authorized access test if he "ha[s] authorized access to information concerning matters specifically related to the collective-bargaining process between labor and management." Id. Such information includes the employer's strategy for dealing with an organizational campaign, actual collective bargaining proposals, and matters related to contract administration. City of Burbank, 1 PERI ¶ 2008 (IL SLRB 1985). Both the Board and the Courts have held that mere access to confidential information does not create confidential status within the meaning of the Act when such information is not related to collective bargaining or contract administration. City of Burbank, 1 PERI ¶ 2008 (IL SLRB 1985); Niles Twp. H.S. Dist. 219, Cook Cnty. v. Ill. Educ. Labor Rel. Bd. ("Niles"), 387 Ill. App. 3d 58, 71 (1st Dist. 2008) ("labor relations" does not include hiring, performance or promotion or mere access to personnel or statistical information, even if that

¹¹ Contrary to the Employer's assertion, the change in Schuering's job duties, which occurred when she left the Department of Financial Institutions to work for the Treasurer's Office, cannot serve as the basis for the unit clarification petition because there is no indication that Schuering held the same job title then as she does now. 80 Ill. Adm. Code §§ 1210.170(a)(1) (requiring a change in duties of a job title).

¹² In City of Burbank, the Board adopted the "reasonable expectation" test for confidential status which is used where the work place is new to collective bargaining. City of Burbank, 1 PERI ¶ 2008 (IL SLRB 1985). Under this test, an employee must be excluded from the unit if there is a reasonable expectation that he will be performing confidential duties at the onset of collective bargaining. Id.

information is confidential”). Further, merely supplying raw financial data for use in negotiations is insufficient to establish confidential status. Chief Judge of Circuit Court of Cook Cnty. v. Am. Fed. of State, Cnty. and Mun. Empl., Council 31, 218 Ill. App. 3d 682, 705 (1st Dist. 1991). The “inquiry is limited to whether the employee in question has unfettered access ahead of time to information pertinent to the review or effectuation of pending collective-bargaining policies.” State of Ill., Dep’t of Cent. Mgmt Serv., 25 PERI ¶161, (quoting Bd. of Educ. of Comm. Consolidated High School Dist. No. 230 v. Ill. Educ. Labor Rel. Bd., 165 Ill. App. 3d 41, 62 (4th Dist. 1987)). Thus, an employee will be deemed confidential if he regularly handles or has access to information which, if divulged prior to negotiations, would give a bargaining unit representative advance notice of the employer's policies concerning labor relations. Chief Judge of Circuit Court of Cook Cnty., 218 Ill. App. 3d at 699. Only the authorized access test is at issue here.

“When a position has existed for a substantial amount of time, the Board will weigh heavily the employee’s actual access to collective bargaining material.” Niles, 387 Ill. App. 3d at 76. However, Courts have interpreted the meaning of “actual access” differently in different cases. For example, in Niles, the First District Appellate Court held that “actual access” to confidential information required an employee to have read collective bargaining-related materials. Id. at 76-77. Thus, the Court found that information technology employees who troubleshoot documents, including those related to labor matters, had no actual access to confidential information in the regular course of their duties because they were not required to read collective bargaining-related documents to perform their functions. Id. at 74, 76-77 (citing, Bd. of Educ. of Glenview Comm. Consolidated School. Dist. No. 34 v. Ill. Educ. Labor Rel. Bd. (“Glenview”), 374 Ill. App. 3d 892, 901-902 (4th Dist. 2007)). The Court, applying this definition, noted that employees’ access to confidential material was therefore merely theoretical because the employees had never read collective bargaining-related material during their five or more years of employment. Id. at 76 (“sporadic means sometimes, not never”).

In contrast, the Fourth District Appellate Court in Glenview held that an employer need not demonstrate that the employee in question has actually seen confidential information to prove that the employee has “actual access” to it. Glenview, 374 Ill. App. 3d at 902 (assessing actual access where administrative assistant position had existed and had been staffed for more than a year). Rather, the employer is merely required to show that an employee has “real and

more than incidental access” to confidential material during the regular course of her duties. *Id.* at 902. Thus, the Court held that a technology administrative assistant who troubleshoots documents which could include labor relations material was not confidential because she could troubleshoot without paying attention to the potentially confidential materials. *Id.* at 901-902. As such, the Court determined that reading the documents was not an inherent part of her troubleshooting duties and that the employee’s exposure to confidential material was therefore not “real and more than incidental” because it would only result from chance.¹³ *Id.*

Likewise, the Fourth District Appellate Court in Department of State Police, rejected the Board’s contention that an employee must have seen or read confidential material to have actual authorized access to it and found, instead, that “one must consider the position’s job responsibilities and not just what the current position holder just happens to have done so far in the position.”¹⁴ State of Ill. Dep’t of Cent. Mgmt. Serv. (Dep’t of State Police) v. Ill. Labor Rel. Bd., State Panel (“Dep’t of State Police”), 2012 IL App. (4th) 110356 ¶ 32. In so holding, the Court reasoned that a staff attorney with the State Police was confidential, even though he had never worked on labor issues or matters concerning collective bargaining, because his position’s job responsibilities included providing legal advice to the labor-relations division. *Id.* at ¶ 8, 30, 32. The Court remarked that “looking just at what the current employee has done so far in the position, and not what his or her job responsibilities include, yields absurd results.” *Id.* at ¶ 32. It creates a situation where the Board includes an employee in the unit simply because he has not yet undertaken a task that the Employer has specifically designated him to perform and requires the Board to immediately exclude that same employee once he performs the task at issue, despite the fact that his job responsibilities never changed. *Id.* Consequently, the Court concluded the employee’s actual access to confidential information was not speculative or based on future job duties, but rather on the scope of the employee’s actual job responsibilities. *Id.* at ¶ 30.

Thus, the courts in most cases have held that actual access merely requires employees to have real and more than incidental exposure to confidential material, as demonstrated either by their current job duties or their past experiences, and that an employer need not demonstrate that

¹³ The Court carefully pointed out that the Board did not err when it commented that the assistant would have to read the documents displayed on the screen to be considered confidential, finding that the Board’s analysis was part of a lengthy discussion that distinguished between the manner in which this employee, and another employee in a different case, handled files. *Id.* at 906.

¹⁴ The Court did not note how long the employee had held his position and did not consider such information in its analysis.

employees have actually seen confidential documents. Although the First District Appellate Court in Niles suggested that an employer must prove that an employee has read such collective bargaining-related documents to find that employee confidential, the precedent that the court cited for that proposition did not articulate the standard in the same way and instead expressly disavowed that approach. See Glenview at 902 (an employer was not required prove that a confidential employee had actually seen collective bargaining-related documents, even where the position had been filled for more than a year). Accordingly, the First District Appellate Court's approach to actual access set forth in Niles is not applied here. Niles at 74, 76-77.

Here, Schuering has authorized access to confidential information because she routinely troubleshoots a class of documents which includes those that contain confidential bargaining-related data and because the manner in which she troubleshoots those documents sometimes requires her to assess and evaluate their contents.

First, Schuering is responsible for troubleshooting Excel documents, a class of materials which includes documents that contain preliminary budget information not available to the Union or the public, "access to which would most certainly impact the effectuation... [of the employer's] bargaining policies." Dep't of Cent. Mgmt Serv. v. Ill. Labor Rel. Bd., State Panel, 2011 IL App (4th) 090966 ¶ 169 (Public Service Administrator Option 2s who had access to the Governor's proposed budget before it was made public were confidential employees).

Further, the manner in which Schuering troubleshoots certain Excel documents demonstrates that her access is not merely incidental and is instead an inherent part of her duties because Schuering must assess and evaluate the substantive contents of the documents she troubleshoots so that she may fix problematic formulas. Cf. Glenview, 374 Ill. App. 3d at 901 (access to confidential information incidental to employee's primary duties where reading the documents was not an inherent part of the employee's troubleshooting duties as demonstrated by the fact that the employee testified that she did not pay attention to documents she troubleshot); Cf. Niles, 387 Ill. App. 3d at 74 (employees were not confidential where they did not have to read collective bargaining documents to perform their functions). Here, when an employee asks for help on a formula, Schuering must ensure that certain columns multiply or divide properly and that the formula which orders such action achieves the desired result. She cannot perform this function without examining the data on the sheet and inspecting the formula's output. As a result, Schuering's access to Excel data is not a matter of chance and is instead an inherent part

of her troubleshooting duties because she must interact with the substance of the document and understand its contents to fix the problem.

Contrary to the Union's contention, the fact that Schuering has never seen a collective bargaining-related document during her 13-year tenure at the Treasurer's Office does not render her a public employee under these facts because Schuering's job responsibilities demonstrate that she has authorized access to such materials in the regular course of her duties. The Fourth District Appellate Court cautioned that the proper focus of the authorized access inquiry is on an employee's job responsibilities, not solely on the tasks they have performed in the past. Dep't of State Police, 2012 IL App. (4th) 110356 at ¶ 32. Here, as noted above, the Employer grants Schuering authorized access to confidential information because some Excel documents contain collective bargaining-related information and the Employer permits Schuering to read and evaluate the contents of *any* Excel document whose formula she is required to fix. As such, it is squarely within Schuering's job duties to troubleshoot problems on confidential Excel documents, and the fact that the Employer has not yet directed Schuering to do so should not alter this conclusion. *Id.*; See also Glenview at 901-902 (Employer was not required to show that an employee had actually seen confidential information, even where the position had existed for over a year).¹⁵

Contrary to the Employer's contention, Schuering's capacity to read all documents stored on employees' P Drives does not make her a confidential employee, because she is prohibited from taking the only action which would allow her to read them. Authorized access to collective bargaining-related information requires more than the capability to access it. Niles, 387 Ill. App. 3d at 75 ("the issue is not what access an employee is capable of exercising, but what access the employer intends for the employee to exercise"); Glenview, 374 Ill. App. 3d at 902; Cnty. of Cook v. Ill. Labor Rel. Bd., 369 Ill. App. 3d 112, 125 (employees were not confidential, although they had "the means to access information related to collective bargaining," since the employer did not authorize it). Rather, the employer must intend that the employee have access to such materials. Niles, 387 Ill. App. 3d at 75. Necessarily then, an employee's access to material is not authorized where the employer prohibits it because the employer has affirmatively represented

¹⁵ Notably, the years during which Schuering never fixed a formula on a collective bargaining-related Excel document should not be given great weight here because for a period of time a different employee performed the primary troubleshooting support on Excel and Schuering assumed additional Excel troubleshooting responsibilities only after that employee left the Treasurer's employment.

that it does not intend for the employee to have such access. Here, Schuering has the means to read documents on employees' P Drives only if she copies and pastes the documents into her own P Drive. Nevertheless, the Employer has not authorized such access because the Employer has prohibited Schuering from taking such action and would discipline Schuering if it discovered she had done so.¹⁶ Id. (employees subject to a unit clarification were found not to be confidential even though they were capable of accessing documents on a server relating to negotiations or grievances without their supervisor's knowledge because the employees were not authorized to do so); See also Bd. of Educ. of Glenview Comm. Consolidated School. Dist. No. 34 v. Ill. Educ. Labor Rel. Bd., 374 Ill. App. 3d 892 (1st Dist. 2008) (finding that employee was not confidential, even though she had the unfettered ability to access information on the employer's computer network at will, where the Employer did not demonstrate that the employee was authorized to explore those files; also finding that employee's ability to see the descriptive titles of subfolders, files, and e-mails did not establish authorization to view the documents themselves); But see Support Council of Dist. 39, Wilmette Local 1274, IFT-AFT, AFL-CIO v. Ill. Educ. Labor Rel. Bd., 366 Ill. App. 3d 830 (1st Dist. 2006) (network manager was confidential because he saw, manipulated, read, and developed reports from all data on all district computers including confidential material pertaining to labor relations) and Woodland Comm. Unit School Dist. 5, 16 PERI ¶ 1026 (IL ELRB 2000) (technology coordinator was a confidential employee because she had authority to open any and all of the Employer's computer files to make sure they had not been corrupted and to perform repairs; the Board held Employer authorized employee's access to their contents because it was "virtually impossible" for her to avoid reading the displayed material).

For the same reason, Schuering is not confidential simply because she is capable of reading all emails on the servers (i.e., those never marked as spam) by logging into the system as Network Administrator and granting herself access rights, because the Employer has prohibited her from doing so. See cases, *supra*.

Similarly, Schuering is not rendered a confidential employee by her need to read email in the spam folder to determine whether the spam filter misdirected legitimate correspondence because there is no evidence that emails related to collective bargaining would be, or have ever

¹⁶ Under these circumstances, it is immaterial that Schuering could surreptitiously copy, paste, and read confidential documents regarding bargaining-related documents from management employees' P Drives because she has no authorization to do so.

been, classified as spam. For example, the filter may classify an email as spam if it is sent to more than 20 people on the distribution list; however, confidential collective bargaining-related emails would not be caught by this filter because the Employer identified fewer than 20 people who bargain for the Treasurer and formulate its bargaining proposals. Likewise, the filter may classify an email as spam based on the subject line; yet, the Employer introduced no additional evidence as to what sort of subject line would trigger the filter, whether a member of management would ever attach such a subject line to a collective bargaining-related email, and whether the filter applies to emails sent from individuals within the network. Finally, the filter may classify an email as spam if it has no subject line; nevertheless, the Employer introduced no evidence concerning management's email practices, whether members of the Employer's collective bargaining team customarily (or ever) address emails without subject lines, or whether the filter applies to emails sent from addresses on an established contact list. Thus, Schuering does not have authorized access to confidential collective bargaining-related emails, even though she reads emails in the spam folder, because there is no evidence that confidential email ever ends up in the spam folder for Schuering's inspection.

Likewise, Schuering is not a confidential employee by virtue of her access to employees' internet logs, even though the employer may use that data to take disciplinary action against other employees and even though Deputy Chief of Staff Gray uses the internet to develop his bargaining proposals. First, an employee is not confidential merely because she helps enforce the employer's internet policy by reviewing data on servers which contains information that may reveal an employee has violated the employer's internet policy. See Niles, 387 Ill. App. at 63 & 73 (1st. Dist. 2008)(employee who helped enforce the "Acceptable [Internet] Use Policy" by doing searches on the server for indications that employees had violated the policy was not deemed confidential, noting that access to information relating to hiring performance, promotion, personnel, or statistics does not turn an employee into a confidential one)(citing Bd. of Educ. of Comm. Consolidated High School Dist. No., 165 Ill. App. 3d at 61-63. Second, Schuering is not confidential by virtue of the fact that she may review employees' private internet history because the URLs listed on the internet logs contain public information and the mere fact that a member of management has looked at such public information does not lend insight into the manner in which he will use it. Indeed, it is no secret that public employers gather information on the salaries of employees from other jurisdictions who hold positions comparable to those in the

unit. Moreover, such salary information is available to anyone. Thus, Schuering does not have authorized access to confidential collective bargaining-related information when she examines employees' internet logs.

In sum, Schuering is a confidential employee because she has authorized access to confidential collective bargaining-related documents during the regular course of her duties when she troubleshoots problem formulas within Excel spreadsheets.

VI. Conclusions of Law

1. The unit clarification petition is properly before the Board.
2. The title Information Systems Analyst II is confidential within the meaning of Section 3(c) of the Act.

VII. Recommended Order

The unit clarification petition is granted and the bargaining unit is clarified as follows:

Included: All employees of the Office of the State Treasurer in the following positions: Office Assistant; Office Associate; Office Specialist; Office Admin. Specialist; Accountant Advance; Financial Institutions Examiner Trainee; Financial Institutions Examiner I, II, and III; Leadperson; Information Services Specialist I.

Excluded: All supervisory, managerial, and confidential employees as defined in the Illinois Public Relations Act.

VIII. 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 to this recommendation and briefs in support of those exceptions no later than 14 days after service of this recommendation. Parties may file responses to any exceptions, and briefs in support of those responses, within 10 days of service of the 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 with the General Counsel of the Illinois Labor Relations Board, 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 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 9th day of April, 2013

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

/s/ Anna Hamburg-Gal

**Anna Hamburg-Gal
Administrative Law Judge**