

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

Illinois Office of the Comptroller,	)	
	)	
Petitioner	)	
	)	
and	)	Case No. S-UC-13-044
	)	
International Union of Operating Engineers	)	
Local No. 965,	)	
	)	
Labor Organization	)	

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

On May 13, 2013, the Illinois Office of the Comptroller (Petitioner) filed a unit clarification petition in Case No. S-UC-13-044 with the State Panel of the Illinois Labor Relations Board (Board) pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315 (2012) as amended (Act), and the Rules and Regulations of the Board, 80 Ill. Admin. Code, Parts 1200 through 1240 (Rules). The Petitioner seeks to exclude all Public Service Administrators (PSAs) it employs from the bargaining units originally certified in Case Nos. S-UC-(S)-12-016 and S-UC-(S)-12-022. Those PSAs have been represented by the International Union of Operating Engineers Local No. 965 (Union), which responded to the instant petition on June 7, 2013.<sup>1</sup> The Petitioner responded to the Union’s filing on June 14, 2013. After full consideration of all aspects of the controversy, I recommend the following.

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<sup>1</sup> The Union asks the Board for “intervenor status.” Because I already consider the Union to be a regular party, I suggest that it is unnecessary to grant that particular request.

## **I. ISSUES AND CONTENTIONS**

The Act grants “public employees” a variety of rights. Section 3(n) of the Act defines who those public employees are. That definition was amended to exclude all PSAs under the jurisdiction of the Petitioner. The amendment became effective on April 5, 2013. The petition at issue was filed in response to the amendment.

The Petitioner contends (1) that the Board should clarify that the exclusion of the PSAs was “self-effecting;” (2) that, “alternatively and without concession,” the PSAs should be excluded based on a significant change in statutory law; and (3) that the Petitioner did not and could not agree to include the PSAs in the bargaining unit subsequent to the effective date of the amendment. The Union disputes the Petitioner’s contentions and asks for either (1) a temporary stay of the instant petition or (2) a formal hearing. The Petitioner urges the Board to deny the Union’s request.

## **II. DISCUSSION AND ANALYSIS**

### **The Petitioner’s Contentions**

As indicated, the Petitioner initially contends that the amendment at issue was “self-effecting.” In support of that contention, the Petitioner notes that, when the legislature excluded the Petitioner’s PSAs, the legislature “also amended the Act to exclude, or changed the definition allowing for exclusion of, other employees” and, in those instances, “the legislature required that a petition for unit clarification be pending either at the time or on or after the effective date of the legislation in order for the employees to be excluded from the Act.” Purportedly, the legislature did not include language requiring a petition when it excluded the Petitioner’s PSAs from the Act’s definition of public employee. The Petitioner further notes that the legislature also

amended Section 6(a) of the Act by adding the phrase “and employees excluded from the definition of ‘public employee’ under subsection (n) of Section 3 of [the] Act.” Thus, according to the Petitioner, as of April 5, 2013 (the effective date of the amendment), the Petitioner’s PSAs no longer enjoyed the rights guaranteed by the Act “as a matter of law.”

In sum, the Petitioner seems to contend that its PSAs are excluded without a unit clarification petition being filed. To the extent that it must be addressed, I would reject that contention. On one hand, I would grant that, presently, the Act unambiguously declares that, as of the effective date of the amendment, the Petitioner’s PSAs are not public employees. However, the same part of Section 3(n) similarly excludes others such as managerial, confidential, and supervisory employees. Traditionally, the Board has required parties who seek to enforce such exclusions to do so via petitions. Moreover, the Board has consistently held that parties that seek to exclude individuals from a bargaining unit maintain the burden of proving that statutory exclusion. Stephenson County Circuit Court, 25 PERI ¶92 (IL LRB-SP 2009); City of Washington, 23 PERI ¶101 (IL LRB-SP 2007). I would apply those principles in this instance as well.

The Act and the Rules provide a reliable vehicle for enforcing and finalizing the statutory exclusion at issue. Section 9(a-6) of the Act states that an employer may file a unit clarification petition to clarify an existing bargaining unit. In relevant part, Section 1210.170 of the Rules clarifies that an employer may file such a petition when a significant change takes place in statutory or case law that affects the bargaining rights of employees. That sort of change has occurred and, accordingly, the Petitioner has appropriately filed a unit clarification petition. That petition provides the Board an opportunity to “officially” recognize that the Petitioner’s PSAs are now excluded from the Act’s definition of public employee. See State of Illinois,

Department of Central Management Services v. Illinois Labor Relations Board, State Panel, 364 Ill. App. 3d 1028, 1032, 848 N.E.2d 118, 121 (4th Dist. 2006). I recommend that the Board do so and grant the Petitioner's second contention.

While presenting its third contention, the Petitioner argues that Section 3(s)(2) applies only to supervisors and is inapplicable to its PSAs and the instant petition.<sup>2</sup> It appears to do so because of a position taken by the Union in an April 26, 2013 grievance letter. In that letter, the Union commented that Section 3(s)(2) of the Act permits non-public employees to be encompassed by the Act with the express permission of the employer. It then suggested that the Petitioner gave that sort of permission when it entered into a collective bargaining agreement (CBA) that covered the PSAs.

I find that the Union's June 7, 2013 filing did not formally present the Union's Section 3(s)(2) argument to the Board. Therefore, I see no clear need to rule on the Petitioner's third contention. However, to the extent that the Board finds that there is such a need, I would generally agree with the Petitioner's position, as the Petitioner's PSAs are so clearly excluded by statute and have not been shown to be supervisors. See State of Illinois, Department of Central Management Services, 30 PERI ¶80 (IL LRB-SP 2013); County of Bureau and Bureau County Sheriff, 29 PERI ¶163 (IL LRB-SP 2013); Village of Lisle, 23 PERI ¶111 (IL LRB-SP 2007). If necessary, I would also suggest that public employers generally do not have the authority to place statutorily excluded, non-public employees in bargaining units. See State of Illinois, Department of Central Management Services, 364 Ill. App. 3d at 1035, 848 N.E.2d at 124.

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<sup>2</sup> Section 3(s)(2) of the Act states that a public employer may agree to permit its supervisory employees to form bargaining units and may bargain with those units.

### The Union's Contentions

In its filing, the Union notes that the parties have completed two CBAs. It also notes that, on April 26, 2013, it filed grievances on behalf of the Petitioner's PSAs. Those grievances sought to have an arbitrator determine whether the two CBAs are enforceable despite the amendment at issue. Evidently, in a May 9, 2013 letter to the Union, the Petitioner indicated that, because of the amendment, it need not participate in the grievance process. The Union subsequently filed two petitions with the Illinois Circuit Court. Those petitions seek to compel the Petitioner to process the Union's grievances.

Here, the Union contends that the decisions that will come from its petitions will "trump" and "overrule" any Board decision, thereby "prospectively binding" the Board as to the appropriate interpretation of the amendment. According to the Union, the instant petition should therefore be stayed until the Circuit Court is "allowed to rule." I would deny the Union's stay request, as I see no reason to delay the handling of this case which presents, at its core, a representation issue. Representation issues are matters for the Board. See Tweedle Litho, Inc., 337 NLRB 686 (2002); Marion Power Shovel Company, Inc., 230 NLRB 576, 577 (1977); The R.W. Page Corporation, 219 NLRB 268, 270 (1975).

As indicated, the Union has also requested a formal hearing. Generally speaking, a unit clarification petition will be set for hearing under two circumstances: (1) where there are unresolved issues of fact or (2) where issues of representation are evident. See Board of Education of Unit District #5, 1 PERI ¶1133 (IL ELRB ALJ 1985). The facts of this case are not in dispute. (For example, there is no doubt that the employees at issue are in fact PSAs.) Indeed, the Union's filing essentially concedes that the instant petition presents a "purely legal issue."

Moreover, there is no clear “issue of representation” in the ordinary sense. Accordingly, I see no need to conduct a hearing.

In addition to its central request, the Union argues that the amendment does not affect and is not applicable to CBAs signed and enforceable prior to the amendment of the Act. That argument, however, fairly clearly raises an issue that must be solved by an arbitrator, not by the Board. See International Brotherhood of Electrical Workers, Local 193 v. City of Springfield, 2011 IL App (4th) 100905, ¶17, 959 N.E.2d 687, 690. Generally, the determination of representation issues does not depend on contract interpretation. See Tweedle Litho, Inc., 337 NLRB at 686.

The Union also asserts that the Petitioner’s refusal to process the Union’s grievances is an unfair labor practice. However, the instant case emanates from a unit clarification petition and, accordingly, does not strictly address that sort of issue. If the Union believes an unfair labor practice has been committed, it should file an unfair labor practice charge with the Board.

### **III. CONCLUSIONS OF LAW**

I find that, as of April 5, 2013, the PSAs employed by the Petitioner are not public employees as defined by the Act.

### **IV. RECOMMENDED ORDER**

IT IS HEREBY ORDERED that the PSAs employed by the Petitioner be excluded from the bargaining units originally certified in Case Nos. S-UC-(S)-12-016 and S-UC-(S)-12-022.

**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. Within 5 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed with the General Counsel of the Illinois Labor Relations Board at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without that statement. If no exceptions have been filed within the 14-day period, the parties will be deemed to have waived their exceptions.

**Issued in Chicago, Illinois this 22nd day of November 2013.**

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**Martin Kehoe  
Administrative Law Judge**