

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

Secretary of State,	)	
	)	
Petitioner/Employer	)	
	)	
and	)	Case Nos. S-UC-14-006
	)	S-UC-12-034
Service Employees International Union,	)	
Local 73, CTW/CLC,	)	
	)	
Labor Organization/Petitioner.	)	

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

On February 7, 2012, Petitioner Service Employees International Union, Local 73 (“Union”) filed a unit clarification petition in Case No. S-UC-12-034 with the State Panel of the Illinois Labor Relations Board (“Board”) pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315 (2014) *as amended* (“Act”), and the Rules and Regulations of the Board, 80 Ill. Admin. Code, Parts 1200 through 1300 (“Rules”), seeking to include all currently unrepresented Executive I and II positions employed by the Illinois Secretary of State (“Employer”). Additionally, on August 15, 2013, the Employer filed a unit clarification petition in Case No. S-UC-14-006 seeking to exclude Drivers Facility Manager (“DFM”) I and II positions and Executive I and II positions from the existing bargaining arguing the positions are exempt from Section 3(n)’s definition of “public employee” amended in April 2013.<sup>1</sup>

After the cases were consolidated, a hearing was held on July 29, 2014, before the undersigned Administrative Law Judge (“ALJ”). At that time, all parties appeared and were given a full opportunity to participate, adduce relevant evidence, examine witnesses, and argue orally. Both parties timely filed written briefs. After full consideration of the parties’ stipulations, evidence, arguments, and briefs, and upon the entire record of the case, I recommend the following.

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<sup>1</sup> In addition to defining the term “public employee,” Section 3(n) lists a number of exclusions, including: [a person] who is a State employee under the jurisdiction of the Secretary of State who holds the position classification of Executive I or higher, whose position authorizes, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation, or who is otherwise exempt under the Secretary of State Merit Employment Code.

## **I. ISSUES AND CONTENTIONS**

At issue in this case is whether, following the 2013 amendments to the Act made by Public Act 97-1172, the at-issue employees are “public employees” within the meaning of Section 3(n) of the Act. As to the Executive I and II positions, the Employer contends that these positions are exempt from the Act under Section 3(n) because they “[hold] the position classification of Executive I or higher.” By contrast, the Union argues that the Executive Is and IIs do not fall within the exemption because, although the positions are Executive I or higher, they (1) do not also authorize, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals; or (2) are also exempt under the Secretary of State Merit Employment Code. In short, the Union asserts that the relevant language from Section 3(n) should be read in the conjunctive requiring the Employer to show that a person is in a position classified as an Executive I or above and also meets one of two additional criteria.

With regard to the DFM Is and IIs, the Employer argues that the DFMs are now exempt from the Act’s definition of “public employee” because they hold the classification of Executive I or higher. The Employer also argues the DFMs authorize “either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation.” The Union contends that the DFMs do not fit any of the Section 3(n) exclusions. First, it argues the position classification of DFM is not an Executive-series classification. Moreover, the language of the Act and statutory construction make clear that this exclusion was intended only for the Executive series, not other titles that may be similar to Executive position. Second, the Union argues that the second exclusion criterion (as I have identified it) does not apply to the DFMs, because they are not political policymakers. Specifically, any discretion exercised by DFMs is highly regulated and/or subject to prior approval. As such, the Union argues, the DFMs are public employees under the Act.

## **II. BACKGROUND AND PROCEDURAL POSTURE**

This case arises from the Illinois General Assembly’s 2013 amendments to the Act. On April 5, 2013, Governor Pat Quinn signed Public Act 97-1172 into law. Among other things, P.A. 97-1172 amended Section 3(n) of the Illinois Public Labor Relations Act (“Act”), 315 ILCS 5/1-1 *et seq.*, which defines the term “public employee.”

Section 3(n) reads in relevant part,<sup>2</sup>

“Public employee” or “employee,” for purposes of this Act, means any individual employed by a public employer, including [various positions described in sections (i) through (vi)], but excluding all of the following: ...[various positions and categories of positions]...; a person who is a State employee under the jurisdiction of the Secretary of State who holds the position classification of Executive I or higher, whose position authorizes, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation, or who is otherwise exempt under the Secretary of State Merit Employment Code; ... [additional positions and categories of positions].

Before addressing the actual duties of the at-issue positions, a brief account of the procedural posture of the consolidated petitions is necessary.

**A. Procedural History of Case Number S-UC-12-034**

Prior to the 2013 amendments, on February 7, 2012, the Union filed a unit clarification petition in Case No. S-UC-12-034 seeking to include all then-unrepresented Executive I and II positions. On July 26, 2012, the Board issued a Decision and Order clarifying the unit to include all previously unrepresented Executive I and II positions into the bargaining unit previously recognized in Case No. S-UC-04-046 as modified by Case No. S-RC-11-006.<sup>3</sup> Ill. Sec’y of State, 29 PERI ¶ 28 (IL LRB-SP 2012). The Employer appealed the Board’s decision in Case No. S-UC-12-034. While the appeal was pending, the legislature passed Public Act 97-1172, which was effective immediately upon Governor Quinn’s signature on April 5, 2013. Because the new law amended the Act in ways that implicated the certification of Executive I and II positions, on May 7, 2013, the Fourth District Appellate Court remanded Case No. S-UC-12-034 to the Board with directions to enter an order vacating the prior decision and order, revoke the certification of representative, and conduct further proceedings applying the new law to the

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<sup>2</sup> The amended definition of “public employee” also excludes “employees in the Office of the Secretary of State who are completely exempt from jurisdiction B of the Secretary of State Merit Employment Code and who are in Rutan-exempt positions on or after April 5, 2013 (the effective date of Public Act 97-1172).” 315 ILCS 5/3(n). The parties have stipulated that neither the DFM I and II positions nor the Executive I and II positions are both completely exempt from jurisdiction B of the Secretary of State Merit Employment Code and also Rutan-exempt. Therefore, this provision is inapplicable to the present case.

<sup>3</sup> The Board decision in Case No. S-RC-11-006 was subsequently affirmed by the Illinois Appellate Court in Secretary of State v. Ill. Labor Relations Bd., 2012 IL App (4th) 111075 *appeal denied* 370 Ill. Dec. 333 (Ill. 2013).

petition. On July 12, 2013, the Board issued an Order and Decision complying with the appellate court's directives. Ill. Sec'y of State, 30 PERI ¶24 (IL LRB-SP 2013).

**B. Procedural History of Case Number S-UC-14-006**

The Board first certified a unit including the DFM I and II positions in 2003 in case number S-RC-03-036. Sec'y of State, 20 PERI ¶11 (IL LRB-SP 2003). In that case, the Board rejected the Employer's contention that the petition should be dismissed because the DFMs were supervisory, managerial, and confidential employees as defined by the Act at that time. The Board's certification was not appealed.

On August 15, 2013, the Employer filed a unit clarification petition in Case No. S-UC-14-006 seeking to exclude DFM I and II positions and Executive I and II positions from the existing bargaining unit represented by the Union on the basis that the employees in those positions were no longer "public employees" as that term is defined by the Act. On or about September 9, 2013, the Union objected to the petition on a number of grounds.

**C. Consolidation of the Cases and Pre-Hearing Rulings**

Case No. S-UC-12-034 was consolidated with Case No. S-UC-14-006 and ultimately assigned to the undersigned ALJ for hearing. Prior to the hearing, the parties filed competing motions and raised issues which resulted in three interim orders.

*1. Union's Motion to Dismiss Unit Clarification Petition with Respect to DFMs and Certain Executives*

On June 17, 2014, the Union filed a Motion to Dismiss the petition as it relates to the DFMs and the Executives I and II positions that were certified by the Board prior to December 2008. The Union argued that the DFMs and Executives certified before 2008 are not subject to the amended definitions of "supervisory employee" and "managerial employee" in Section 3(r) and 3(j) of the Act, respectively. Therefore, the Union reasoned, the only mechanism by which a unit clarification would be appropriate was if the positions were subject to exclusion by the amended definition of "public employee" in Section 3(n) of the Act. The Union argued for an interpretation of the statutory provision that would require the Employer to prove that the positions held the position of Executive I or higher *and* either (1) was in a position that authorizes, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation or (2)

was exempt under the Secretary of State Merit Employment Code. The Union also argued that the phrase “position that authorizes, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation” was interchangeable with “Rutan-exempt.” It reasoned that the petition should be dismissed as to the positions certified before 2008, as it was uncontested that the positions were neither Rutan-exempt or exempt from the Secretary of State Merit Employment Code. The Union further argued proceedings should be limited to whether the Executive positions certified after 2008 could be excluded under the amended definitions of “managerial employee” and “supervisory employee” in Section 3(j) and (r) of the Act, respectively.

The Employer responded to the Motion, and after full consideration of the arguments raised, on June 27, 2014, I issued a written Order denying the Union’s Motion.<sup>4</sup> In denying the Union’s Motion to Dismiss, I specifically held that under the Act, an employee is excluded from the amended definition of “public employee” if he is “a State employee under the jurisdiction of the Secretary of State” and meets one of three exclusion criteria:

- (1) who holds the position classification of Executive I or higher;
- (2) whose position authorizes, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation; or
- (3) who is otherwise exempt under the Secretary of State Merit Employment Code.

*See* 315 ILCS 5/3(n). I also held that the phrase “position that authorizes, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation” was not interchangeable with “Rutan- exempt.”

2. *Employer’s Motion to Grant Unit Clarification Petition Regarding Executive I and IIs in Drivers Services Department Because of Res Judicata and/or Collateral Estoppel*

On June 17, 2014, the Employer filed its Motion to Grant Unit Clarification Petition Regarding Executive I and IIs in Drivers Services Department Because of *Res Judicata* and/or

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<sup>4</sup> An Amended Order denying the motion was issued in conjunction with this Recommended Decision and Order to correct minor typographical errors, with no substantive changes.

Collateral Estoppel. The Secretary argued that Case No. S-RC-11-006, which was appealed and affirmed, was a final decision on the merits that the Executives I and II in the Drivers Services Department exercised independent judgment when rewarding, disciplining, and discharging employees. However, the appellate court affirmed the Board's holding that the Executives were public employees under the Act, because the "Secretary failed to show that the Executives spend a preponderance of their time in these functions." Sec'y of State v. Ill. Labor Relations Bd., 2012 IL App (4th) 111075 at ¶ 112. The Secretary argued that because the amended definition of "supervisory employee" in Section 3(r) of the Act does not contain a preponderance requirement, its unit clarification petition should be granted as to the Executives certified in Case No. S-RC-11-06. In the alternative, the Secretary argued that collateral estoppel bars the Union from asserting that the at-issue Executives do not perform certain supervisory duties they perform with independent judgment.

The Union responded that application of *res judicata* and collateral estoppel are inapplicable because the underlying facts and law have changed. After full consideration of the arguments raised, on June 27, 2014, I issued a written Order denying the Employer's Motion.<sup>5</sup> I specifically found that the record at the pre-hearing stage was insufficient to find that the facts underlying the Board's prior decision were unchanged such that *res judicata* or collateral estoppel was applicable.

### 3. *Order Limiting the Scope of the Hearing*

The parties opted to use the first scheduled day of hearing attempting to mediate the issues presented by the petitions. The parties were directed to submit a joint statement of the remaining issues for hearing prior to start of hearing. The parties proposed the following issues:

1. Are all the petitioned for employees excluded from the definition of public employee as a result of the amendments to Section 3(n) of the Act?
2. Are the petitioned for Executive Is and IIs who were not certified in a bargaining unit prior to December 2, 2008, supervisory employees as a result of the amendments to Section 3(r) of the Act?

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<sup>5</sup> An Amended Order denying the motion was issued in conjunction with this Recommended Decision and Order to correct minor typographical errors, with no substantive changes.

3. Are the petitioned for Executive Is and IIs who were not certified in a bargaining unit prior to December 2, 2008, managerial employees as a result of the amendments to Section 3(j) of the Act?

However, based on my construction of the statutory exclusion language, I found that individuals who hold Executive I and II positions were no longer “public employees” as that term was defined by the Act following the amendment. Therefore, I held that there was no question of law or fact necessitating a hearing regarding those positions.

On June 25, 2014, I issued an Order<sup>6</sup> limiting the scope of the hearing to the question of whether the DFM I and II positions are excluded from the amended 3(n) definition of “public employees” in that they meet one of the following exclusion criteria:

- (1) holds the position classification of Executive I or higher;
- (2) position authorizes, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation; or
- (3) is otherwise exempt under the Secretary of State Merit Employment Code.

The parties proceeded to hearing on that question on July 29, 2014.

### **III. FINDINGS OF FACT**

#### **A. Organization of Drivers Services Downstate**

The Illinois Secretary of State is a constitutional officer of the State of Illinois who employs approximately 3,700 employees in 23 separate departments. Among the responsibilities of the Secretary of State is the administration of portions of the Illinois Vehicle Code involving driver licensing and vehicle titles and registration. Two of the Secretary’s 23 Departments are Drivers Services Downstate (“Department”) and Driver Services Metro. Downstate Driver Services has oversight over the driver services facilities outside of Cook County and the counties surrounding Cook County, commonly referred to as the “collar counties.” The at-issue DFM I and IIs work in the Secretary’s Drivers Services Downstate Department. There are approximately 86 drivers services facilities in the Department, which is divided into 10 different regions. Each of the 10 regions has a Regional Manager. The Regional Managers are the direct

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<sup>6</sup> An Amended Order denying the motion was issued in conjunction with this Recommended Decision and Order to correct minor typographical errors, with no substantive changes.

supervisors of the DFMs. The Regional Managers report to a Field Service Administrator (when those positions are not vacant), who then reports to Michael Mayer, the Director of Drivers Services Downstate. The Director reports to the Chief of Staff and Secretary of State.

The Department facilities generally perform a variety of services for drivers, including obtaining or renewing drivers' licenses or identification cards, obtaining duplicate drivers' licenses, paying fees necessary to reinstate driving privileges, and obtaining drivers' record abstracts. The facilities are classified as level 1, 2, or 3 facilities. Level 1 facilities perform short applications, such as renewing a registration sticker or issuing a duplicate or corrected drivers' license, but do not conduct driving tests, written tests, and other lengthier drivers' services functions. These express and mobile facilities are staffed only by Department employees. Level 2 facilities are also staffed solely by Department employees; these facilities perform all of the driver services offered by the Department (including the written and driving examinations) and also can perform about 80% of the work that would otherwise be performed by the Secretary of State's Vehicles Services Department, including completing the registration process, issuing registration stickers, completing applications for titles, and issuing some license plates. Level 3 facilities perform all drivers services, as well as all Vehicle Services operations. They are staffed by Department employees and by Vehicle Services Department employees (who perform the vehicles functions). The overall "property management" functions of all facilities typically comes under the purview of the DFM or Executive assigned to oversee the particular facility, even when facilities also house Vehicle Services Department employees.

In nearly every instance, DFMs are the highest ranking employee physically located at a level 1 or 2 facility, while level 3 facilities are typically managed by an Executive I. The front-line workers who staff the driver facilities are Public Service Clerks, Public Service Representatives (PSR), and Public Service Supervisors (PSS), although the Secretary of State also employs a handful of other front-line staff working on a contractual or intermittent basis. The distinction between a DFM I and DFM II relates to the number of subordinate employees they oversee. DFM Is oversee approximately six to nine facility employees, while DFM IIs oversee more than nine facility employees.

## **B. Duties of DFMs**

DFM positions are awarded based on training and experience, and are posted and filled through a competitive selection process. The Department of Personnel makes the ultimate hiring decision based on which applicant it believes has the best training and experience for the position; the Secretary of State himself is not involved in individual DFM hiring decisions.

The position descriptions for DFM I and IIs are nearly identical; each includes the following:

Plans, supervises, coordinates and evaluates staff involved in a variety of activities associated with a Driver Services Field Facility, including all drivers license/identification card and motor vehicle services assigned to the facility; supervises staff activities relating to all aspects of facility operations including, but not limited to, coordinating all staff activities relating to processing applicants, facilitates and expedites processing of applicants, closely monitors staff engaged in processing and testing applicants to ensure adherence to Secretary of State policies, including uniformity and consistency of instructions given to applicants, etc.; determines work schedules and priorities; approves and/or denies time-off; assigns and/or denies overtime and travel assignments; handles special problems and answers questions concerning staff functions; provides, arranges for and/or supervises the training of employees as directed or needed; administers progressive discipline; participates in resolution of grievances; handles employee complaints.

DFMs are expected to ensure that customers are provided with consistent service across the different facilities. To this end, DFMs are responsible for making sure that the front-line staff are following proper procedures and are acting in accordance with how they have been trained. The DFMs also spend a considerable amount of time completing reports, audits, and other paperwork related to the facility's operation. Finally, DFMs at times work side-by-side with the front-line staff performing all of the duties of the other staff in their facilities. Reports tend to take up a larger proportion of a DFMs work time in larger facilities, while in the smaller facilities, DFMs spend more work time performing front-line duties alongside their subordinates.

In the performance of their duties overseeing their facilities, DFMs are expected to adhere to the collective bargaining agreement governing them and the front-line staff at the facilities, as well as the Personnel Rules, Policy Manual, Field Operations Manual, and Red Book (which addresses appropriate responses to certain emergency situations). The voluminous Field Operations Manual, which is consistently being updated, was described by the Director as

the Department's "Bible." One witness characterized the Field Operations Manual as a manual for "anything that could possibly happen in the facility." It contains extensive procedures detailing how to confront issues that could arise at a facility. It addresses applicant issues, cell phone use, bribes, accidents, counterfeit money, daily deposits, fraudulent document procedures, weather, security, and law enforcement issues. It details all of the various equipment and software utilized in the facilities. It contains operating procedures concerning abstracts, accounting and auditing, written and driving tests, the issuance of drivers' licenses, fees, vision screenings, voter registration, commercial drivers' licenses, and reinstatements. It details how to process applicants and which types of applicants should be processed expressly. The Policy Manual contains additional policies governing topics ranging from smoking, confidential information, FMLA, absenteeism and tardiness, solicitation, overtime, employee scheduling, discipline, alcohol and drugs, dress code, use of state and personal telephones and state equipment, luncheon meetings, and lost property.

Department employees receive extensive training. DFMs review a "start-up sheet" with new employees to prepare them for their off-site, four-and-a-half day training. Trainers also come on-site to train new employees, as well as those who need retraining, and these trainers stay on-site until they are satisfied that the employees they are training have developed proficiency. Still, DFMs have an ongoing responsibility to ensure their employees are properly trained. They are in charge of monitoring the facility to identify employees that need more training and are responsible for getting them trained so that the operation of the facility moves smoothly.

With respect to newer employees, the DFMs evaluate and discuss the subordinates' strengths and weaknesses with the subordinates, including conducting probationary evaluations. When a probationary employee is not performing particularly well, and has been evaluated as such by the DFM during the training period, the Department takes the recommendation from the DFM as to whether to keep the employee. Where the DFM believes that the probationary employee has shown progress and will become a great employee, the Department considers that opinion, in addition to the evaluations, in the decision-making process of whether the Secretary will ultimately continue to employ that individual past the probationary period.

DFMs also forward information regarding new procedures, policies, legislation, and other changes to their subordinates. The DFMs are the face of the facility in that if there are any questions from the public, they are charged with answering those questions. They also ensure that the facility transactions reported throughout the day are reconciled and in order, as well as making sure the daily transactions appear to be correct.

At hearing and in the accompanying post-hearing briefs, the parties addressed specific areas in which the DFMs make decisions and exercise discretion. My findings regarding each of these areas are outlined separately below.

*1. Functioning of the facility*

Director Mayer testified, “If there is any discretion that needs to be made with an applicant, [the DFMs] have full right to make that discretion.” For instance, for an applicant seeking a duplicate license, the DFMs have the discretion to decide whether to pull up the applicant’s prior information and rely upon it to issue a duplicate or to require more information from the applicant. While there are many documents that can be brought in by an applicant to try to prove their identity, the DFM is the position at the facility with the discretion to determine whether the applicant’s documentation should be accepted or the applicant should be asked to come back with different documentation. Mayer further testified that DFMs are aware of their authority in this regard and a failure to exercise their discretion in this context would be inappropriate. In contrast, the DFM’s subordinates, such as PSRs, do not have the authority to exercise similar discretion.

Indeed, Mayer gave examples of decisions that certain DFMs have made in the past regarding the Department’s policy towards customers. One example related to a facility where a mental health facility needed to bring in their residents. In the past, residents had been uncomfortable standing in line and were, at times, disruptive in the facility. The DFM initially decided that the drivers facility would stay open on Monday (a day on which it was ordinarily closed) to handle the transactions for these individuals. To do so, the DFM requested that her facility be given electronic access to the Secretary’s system to process transactions on a day it was normally closed. That request was granted. In deciding to open the facility on a Monday, the DFM would have authorized overtime to individuals to cover the Monday shift(s). At the request of the mental health facility, the DFM’s decision was ultimately not implemented.

Instead, the DFM worked with the mental health facility administrators to schedule the residents at the facility on less busy days in order to efficiently process the residents and minimize disruption to regular operations. If the DFM deemed it necessary, she could have rearranged the schedule of any intermittent employees, directed overtime, or asked for additional staff to be assigned from other facilities to cover the appointments.

The DFMs make recommendations regarding the physical layout of their facility and can rearrange how applicants physically flow through the space. The DFMs do not have unfettered discretion in this regard. In addition to consulting with IT and/or Physical Services to determine whether the changes are physically feasible for the space, DFMs seek approval through their regional manager, the Director of the Department, or internal liaisons.

In the past, DFMs have been praised in their performance evaluations<sup>7</sup> for steps taken to improve the functionality of their facility, including where a DFM “has been creative in finding ways to appease the customers by eliminating or cutting down their wait times” and “cleaned, organized, moved equipment, etc. so that the office will run more smoothly.” A relatively new DFM received an evaluation with these overall comments,

Ana has been the acting manager of the DeKalb facility since May 1, 2102. She has done an excellent job in this capacity. She has reorganized various areas of the facility operation including the cashier functions. While this remains an area con[c]ern with several employees[,] Ana’s efforts have greatly improved money handling overall in the facility. Ana has improved and clarified scheduling employee job responsibilities; this has resulted in better work flow and more efficient applicant processing. Ana has also improved administrative procedures in the facility – daily work and reports are being completed in a more timely manner. These results are indicative of Ana’s organizational skills and excellent leadership abilities.

Another Regional Manager evaluating a DFM noted, “[w]hen a facility operates this smoothly and has management that is this effective[,] it makes my job much easier.”

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<sup>7</sup> The Union argues that the DFM performance evaluations offered by the Employer are unhelpful in that the Employer did not call the evaluations’ authors to “give any color to what the evaluations state.” I find this argument unconvincing. Instead, I find that the evaluations shed light on the Employer’s expectations for DFMs.

## 2. *Assignment and scheduling of subordinates*

The DFMs make decisions about which of their subordinates will be assigned to perform the various work of the facility. DFMs are expected to assess the applicant flow of their facility throughout the day. In order to expedite customer service, DFMs are expected to reassign staff and/or perform customer service functions themselves to have customers served satisfactorily and quickly. This is particularly important late in the day. The Secretary has a general policy that customers are served if they arrive prior to 5:00 p.m. Noted exceptions include if the customer needs a driving test or is seeking to take multiple written tests. However, the DFMs have the discretion to determine that the number of looming requests is not manageable and invite customers to come back on another day and go to the front of the line upon their return.

The DFMs are also authorized to delegate reconciliation functions to subordinates. DFMs decide which of their subordinates will be in charge of the facility in their absence; similarly, a DFM can assign a subordinate to be a lead person to complete certain tasks.

The DFMs can use their discretion to determine whether they need an intermittent employee to work specific hours, so long as the employee's hours do not exceed a pre-determined yearly maximum. In other words, although the intermittent employees have a set work schedule, DFMs can, at their discretion, direct intermittent employees to deviate from their set schedule. DFMs can also designate staggered shifts for efficient facility operations. The shifts are then bid by seniority.

## 3. *Overtime*

DFMs are authorized to make decisions related to overtime. Some overtime is explicitly governed by distinct policies, such as overtime resulting from travel to another facility. However, other common reasons for overtime, including an influx of customers at the end of the day, equipment failures, or an overage or shortage with the facility's money, call for a DFM to exercise discretion. As DFM Jay Morgan testified, he is authorized to mandate overtime if the situation in his facility warrants. In the case of a money discrepancy, he is required to keep the cashier with him; however, if there is an equipment issue, he determines whether to have a subordinate stay late on overtime depending on the severity of the issue. Morgan testified that the first step would almost always be to notify his Regional Manager of an issue with cash

balancing or in the case of an equipment failure, and that it would be an abuse of discretion not to stay over until malfunctioning equipment was fixed or a cash discrepancy was reconciled.

Regional Manager Lora Walters testified that the purpose of the DFM notifying the Regional Manager of impending overtime is just informational so that the Regional Manager is not surprised when they see the overtime report. Walters clarified that the DFM's decision to grant overtime, unlike overtime decisions made by others in the Department, is not subject to approval. The Department Director and an internal liaison sign off on the overtime requests but they do so only after the overtime has already been worked. DFMs are responsible for managing overtime in the context of ensuring that their subordinates can use the compensatory time they earn and must follow the collective bargaining contract in terms of who they ask to work the overtime. However, the collective bargaining agreement is not a limit on the DFM's decision whether to mandate overtime.

#### 4. *Discipline*

DFMs make decisions regarding the discipline of their subordinates, including whether to correct subordinates without initiating disciplinary procedures. DFMs orally counsel subordinates when they observe poor performance or other things that need addressed, and decide whether to forward information relevant to possible discipline or continue to deal with the situation themselves. DFM Morgan testified that when he observed one of his subordinates failing to obtain the necessary signatures, he took corrective action by orally counseling the employee. Morgan has also notified his Regional Manager when an employee has missed signatures and counseled the employee after the Regional Manager suggested it. The Director is not made aware of a situation giving rise to a counseling until after the counseling has been issued and is sent to him to be put into the employee's personnel file. Oral counseling can be used as a basis for future discipline. Other than oral counseling, DFMs do not generally independently issue discipline. However, the Field Operations Manual allows for immediate suspension in emergency situations, such as "grossly improper conduct, unprovoked assault or intoxication." As the highest ranking employee at the facility, the DFM would likely be the one sending the employee home in such an emergency situation.

When DFMs forward concerns to either the Regional Manager or an internal discipline officer within the Department, the internal discipline officer reviews the facts and circumstances

giving rise to the situation in order to determine whether discipline is justified, and, if so, what the level of discipline should be. Chief Deputy Director for the Department of Personnel Gina DiCaro also works with the Department's discipline officer to establish guidelines and standards for discipline and routinely involves herself in individual disciplinary decisions. Morgan testified about an instance where he reported up his chain of command that an employee had lost her set of keys to the building, which resulted in the employee being issued a three-day suspension despite Morgan not believing discipline was warranted. Another DFM was praised in her evaluation for her efforts at documenting problems her subordinate was having at work. The evaluation noted, "With this documentation[,] progressive discipline has been very quick and effective." Another Regional Manager commented on a DFM's performance in this capacity: "He is addressing attendance issues with documentation and discipline. He is seeing problem areas within his facility and is jumping in with both feet on the correction and direction that the facility needs." After discipline has been issued, DFMs play no role in the grievance process. The Field Operations Manual also specifically prescribes that DFMs can recommend an employee be suspended for good cause.

#### 5. *Policy development*

The Department's Field Operation Manual is established to ensure that policies and procedures are relatively consistent throughout the facilities. Mayer testified that he solicits input from the DFMs regarding the policies and procedures in the Field Operation Manual. Mayer testified that "everything starts from the facility level" and proposed changes go back through the DFMs to ensure that proposed policy changes do not actually make things more difficult for the DFMs in the field. Based on the DFMs' input, the Employer will look to improve the Field Operation Manual. With respect to new legislation or new processes, the Director sits down with the DFMs, regional managers, and trainers to work through how the new law or process should be implemented in the facility.

The DFMs also attend a number of meetings in the Department, including regional meetings dealing with, among other things, human resources functions. They also attend meetings with the Chief of Staff in which the Chief of Staff seeks input about the needs of the drivers facilities or any assistance he can provide to the DFMs.

A review of DFM evaluations also reveal the expectations of the position relating to development of policies. DFM I Phillip Webb received positive feedback noting that “[h]e is always a person to come forward with ideas and suggestions to streamline and improve customer service within his facility.” Another DFM I received positive comments regarding his open communication with his Regional Manager “even if he disagrees with a decision.”

### **C. Secretary of State Classification Plan and Pay Plan**

The Employer relies on the Classification Plan and Pay Plan in support of its contention that the DFMs are Executive Is or higher. The Illinois Secretary of State Merit Employment Code requires the Secretary of State Merit Commission to maintain a Classification Plan. The Department of Personnel is the office that generally oversees the hiring, testing, and training processes for employees at the Secretary, makes amendments to the Merit Employment Code and Rules of the Department of Personnel, negotiates on behalf of the Secretary during collective bargaining, and develops job classifications, job descriptions, class specifications, and pay plans.

Section 420.210 of the Rules of the Department of Personnel for the Secretary mandates that the Director of Personnel:

Maintain and revise when necessary, a uniform position classification plan for positions under the Merit Employment Code based on the similarity of duties and responsibilities assigned so that the same schedule of pay may be equitably applied to all positions in the same class, under the same or substantially the same employment conditions.

80 Ill. Adm. Code 420.210.

Pursuant to this directive, a position classification is a document that provides the overall duties and knowledge, skills, and abilities that are required for a particular title within the Secretary’s organization. There are multiple job descriptions within a particular position classification that provide more specific job duties. Jobs within a particular classification have similar job duties and responsibilities and are given similar pay grades. The current Classification Plan consists of a voluminous collection of all of the various class specifications for all of the different titles employed by the Illinois Secretary of State.

If a Secretary of State employee believes that he is performing duties and responsibilities different from those listed in the class specification, he can request a job audit. Through that process, the employee could be moved to a different classification. The Department of Personnel

can also change the allocation of existing positions when changes occur in the duties, responsibilities, and requirements of the positions. When appropriate, the Department of Personnel can also reclassify positions.

The Pay Plan is based on the functions and responsibilities of the various positions, with higher functions and responsibilities typically corresponding to greater pay. The DFM Is and Executive Is are in the same pay grade; likewise, the DFM IIs and Executive IIs are in the same pay grade. Nevertheless, the pay range is not currently the same for all Executives and DFMs. Unionized DFM Is are currently paid the same as unionized Executives I and unionized DFMs II are paid the same as unionized Executive IIs. However, those Executive I and IIs without a union have not seen certain salary increases that the union has negotiated for its members, and are accordingly paid less than the DFMs, who are all unionized.

The Employer's assignment of pay grades determines whether a movement from one classification or title to another is considered a voluntary reduction, transfer, or promotion. Transfers between DFM I and Executive I classifications, as well as transfers between DFM II and Executive II classifications, are considered lateral transfers by the Employer. At least one later transfer between a DFM I position and an Executive I has occurred. The Employer's witness stated that due to the similarity in job functionality, the transfer was granted "as a matter of course."

**D. Some Executives perform similar work to DFMs.**

Unlike DFMs, not all Executives I and II work in the same department, and they do not all perform identical duties. Instead, the Executive series are general classifications utilized in various departments based on very generic class specifications. Of the Employer's 23 departments, Executives I and II perform a variety of functions in at least the following 8 departments: Vehicles, Driver Services Downstate, Driver Services Metro, Physical Services, Accounting Revenue, Library, Business Services, Security, Secretary of State Police, and Communications. Accordingly, the reporting structure for Executives varies depending on what department the Executive works in. Based on the testimony adduced at hearing, at least some Executives in Driver Services Metro perform duties in driver services facilities similar to the duties that DFMs perform in the Department. Within the two Drivers Services Departments, both

the DFM and Executive positions operate as supervisors over certain groups of front-line staff providing services at drivers facilities.

The Secretary primarily began using the term “DFM” to more easily distinguish between the individuals who oversee the drivers facilities in the Downstate Drivers Services Department (DFMs) and the individuals who oversee the drivers facilities in the Drivers Services Metro Department (Executives).<sup>8</sup> The similarity in duties is reflected in the position classifications. For instance, the DFM I position classification’s distinguishing features is: “[u]nder direction, plans, supervises, coordinates and evaluates the activities of Drivers Facility Representatives engaged in providing drivers license services to the public in a small downstate drivers facility.” The Executive I’s position classification expresses a similar distinguishing feature: “[u]nder direction, performs supervisory work in planning, organizing, directing and coordinating a minor or small program of limited scope and responsibility or an equivalent supportive program; exercises responsibility for personnel management requiring use of discretion and independent judgment relative to subordinate personnel.” In the Drivers Services Metro Department, the program that some Executive Is are charged with supervising is a drivers facility.

#### **IV. ANALYSIS**

The question at the heart of this case is whether the 2013 amendments to Section 3(n) of the Act, which exempted certain Secretary of State positions from the definition of “public employee,” apply to the Executives and DFMs employed by the Employer. Again, Section 3(n) provides that:

“Public employee” or “employee,” for purposes of this Act, means any individual employed by a public employer, including [various positions described in sections (i) through (vi)], but excluding all of the following: ...[various positions and categories of positions]...; a person who is a State employee under the jurisdiction of the Secretary of State who holds the position classification of Executive I or higher, whose position authorizes, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation, or who is otherwise

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<sup>8</sup> The record reflects that prior administrations sometimes utilized the classification of Executive instead of DFM for the positions supervising drivers facilities, even the Downstate Drivers Services Department. However, the record suggests that under the current administration, Executives have been replaced with DFMs as the Executives have retired, resigned, or otherwise left the service of the Employer.

exempt under the Secretary of State Merit Employment Code; ...  
[additional positions and categories of positions]

For the reasons that follow, I find that the amendments do apply to the at-issue employees and that both the Executives and DFMs are excluded from the Act's definition of "public employee."

**A. The Executive Is and IIs are not "public employees" as defined by the Act.**

The Union contends that the Executives are not exempt from the definition of "public employee" because they do not (1) hold a position of Executive I or higher *and* (2) authorize, "either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation" or are exempt under the Secretary of State Merit Employment Code." However, under the rules of statutory interpretation, I find the Union's argument untenable.<sup>9</sup>

The primary objective of statutory interpretation is to ascertain and give effect to the intent of the legislature. Gruszczka v. Ill. Workers' Compensation Comm'n, 2013 IL 114212 ¶ 12; Cty. of Du Page v. Ill. Labor Relations Bd., 231 Ill. 2d 593, 603-04 (2008); Kraft, Inc. v. Edgar, 138 Ill. 2d 178, 189 (1990). The most reliable indicator of such intent is the language of the statute, which is to be given its plain and ordinary meaning. County of DuPage, 231 Ill. 2d at 604. Words and phrases should not be considered in isolation; rather, they must be interpreted in light of other relevant provisions and the statute as a whole. Id. citing Williams v. Staples, 208 Ill. 2d 480, 487 (2004); In re Detention of Lieberman, 201 Ill. 2d 300, 308 (2002). Where an enactment is clear and unambiguous, an administrative agency has no liberty to depart from the plain language and meaning of the statute by reading into it exceptions, limitations and conditions the legislature did not express. Kraft, Inc., 138 Ill. 2d at 189. One must read the statute as a whole, with all relevant parts considered, and attempt to construe it so that no word or phrase is rendered superfluous or meaningless. Id. In addition to the statutory language, the court may consider the purpose behind the law and the evils sought to be remedied, as well as the consequences that would result from construing the law one way or the other. County of DuPage, 231 Ill. 2d at 604 *citing Williams*, 208 Ill. 2d at 487; Lieberman, 201 Ill. 2d at 308.

Applying the tenets of statutory construction to the applicable provision, I find that Union's argument misstates the criteria set out in the applicable provision of Section 3(n) by

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<sup>9</sup> I already addressed the Union's argument in my Order denying the Union's Motion to Dismiss. However, for the convenience of the Board, I will summarize my analysis herein.

improperly reading into the language limitations and conditions the legislature did not express. In this case, the legislature’s intent can be gleaned from the plain and ordinary meaning of the language of the applicable provision. The applicable provision (set off from other listed exclusions by semicolons) states that a person is excluded if he meets specific criteria (the list set off by commas). Under the applicable provision, “a person who is a State employee under the jurisdiction of the Secretary of State” is excluded from the definition of “public employer” if he meets one of the following:<sup>10</sup>

- (1) who holds the position classification of Executive I or higher;
- (2) whose position authorizes, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation; or
- (3) who is otherwise exempt under the Secretary of State Merit Employment Code.

The plain and ordinary meaning of the language does not express the legislative intent that a Secretary of State employee is excluded from the definition of “public employee” if he is both an Executive I or higher *and* also meets one of two additional criteria.

A review of other provisions of Section 3(n) confirms that this reading of the applicable provision correctly manifests the legislature’s intent. In two other places in Section 3(n), the legislature listed items separated by commas and used the word “or.”<sup>11</sup> In both places, the list

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<sup>10</sup> For the purposes of this Order, I refer to these three ways a position can be excluded as “exclusion criteria,” the first of which is that a person hold the position classification of Executive I or higher. The second exclusion criteria is satisfied if the position authorizes, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation.

<sup>11</sup> Section 3(n)(v) includes the following in the definition of “public employee:”  
beginning on the effective date of this amendatory Act of the 98th General Assembly and notwithstanding any other provision of this Act, any person employed by a public employer and who is classified as or who holds the employment title of Chief Stationary Engineer, Assistant Chief Stationary Engineer, Sewage Plant Operator, Water Plant Operator, Stationary Engineer, Plant Operating Engineer, and any other employee who holds the position of: Civil Engineer V, Civil Engineer VI, Civil Engineer VII, Technical Manager I, Technical Manager II, Technical Manager III, Technical Manager IV, Technical Manager V, Technical Manager VI, Realty Specialist III, Realty Specialist IV, Realty Specialist V, Technical Advisor I, Technical Advisor II, Technical Advisor III, Technical Advisor IV, **or** Technical Advisor V employed by the Department of Transportation who is in a position which is certified in a

separated by commas and “or” was used disjunctively to set out a list of separate ways to meet a particular exclusion. For example, to be included, a person need not show that he is both a Realty Specialist V and also a Technical Advisor II. To be excluded, a person need not show that he is both an Agency General Counsel and also a Public Information Officer. Put another way, three times in Section 3(n), including the at-issue provision, the legislature used the formulation A, B, or C as a disjunctive list.

The Supreme Court has long held that where the language of a statute is clear, one must not read into it exceptions, limitations, and conditions the legislature did not express. Kraft, Inc., 138 Ill. 2d at 189. Accordingly, I decline to add an “and” where only a comma exists in the statute and, thus, decline to add a condition that the legislature did not express. Therefore, as the Executive Is and IIs hold positions of Executive I or higher, they are not “public employees” as defined by the Act.

**B. The DFM Is and IIs are not “public employees” as defined by the Act.**

Turning to the DFMs, the Employer argues that the DFMs are not public employees because they, similarly to the Executives, hold a position classification of Executive I or higher. In the alternative, the Employer argues that the DFMs authorize either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation. I will discuss each argument in turn.

*1. The DFMs do not hold the position classification of Executive I or higher.*

It is uncontested that the DFMs do not hold the position classification of Executive; they hold the classification of Drivers Facility Manager I or II. The Employer asks the Board to find that the DFM positions are “Executive I[s] or higher” because they are in the same pay grade, transfers between the positions are treated as laterals, and at times employees perform the same

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bargaining unit on or before the effective date of this amendatory Act of the 98th General Assembly. (Emphasis added).  
Another provision of Section 3(n), excludes the following:  
any employee of a State agency who (i) holds the title or position of, or exercises substantially similar duties as a legislative liaison, Agency General Counsel, Agency Chief of Staff, Agency Executive Director, Agency Deputy Director, Agency Chief Fiscal Officer, Agency Human Resources Director, Public Information Officer, **or** Chief Information Officer and (ii) was neither included in a bargaining unit nor subject to an active petition for certification in a bargaining unit. (Emphasis added).

duties overseeing a drivers facility. However, the Union argues that the plain language of this first exclusion criterion only applies to persons who hold the position classification of Executive I or higher, i.e. Executive I, II, III, IV, V, etc. The Union’s argument on this point is well-taken.

Again, the fundamental rule of statutory construction requires courts and administrative agencies to ascertain and give effect to the legislature’s intent, and the statutory language, given its plain and ordinary meaning, best indicates the legislature’s intent. General Motors Corp. v. Pappas, 242 Ill. 2d 163, 180 (2011). Here, neither party contends that the at-issue is ambiguous; each contends that the plain language of the statute supports its interpretation. Reviewing bodies are not bound by the parties’ agreement that the statute is not ambiguous. Commonwealth Edison Co. v. Illinois Commerce Comm’n, 2014 IL App (1st) 132011, ¶ 21 *appeal denied*, 21 N.E.3d 713 (Ill. 2014); Hyatt Corp. v. Sweet, 230 Ill. App. 3d 423, 429 (1st Dist. 1992). Yet, a statute is not ambiguous simply because the parties disagree as to its meaning. Commonwealth Edison Co., 2014 IL App (1st) 132011, ¶21. A statute is ambiguous if its meaning cannot be interpreted from its plain language or if it is capable of being understood by reasonably well-informed persons in more than one manner. Krohe v. City of Bloomington, 204 Ill. 2d 392, 395–96 (2003); People v. Fort, 373 Ill. App. 3d 882, 885–86 (1st Dist. 2007) (“There are times when courts cannot determine the meaning of a statute by examining its plain language or when the statute is capable of being understood by reasonably well-informed persons in two or more different senses, thus creating statutory ambiguity.”); *see also* Commonwealth Edison Co. v. Illinois Commerce Comm’n, 398 Ill. App. 3d 510, 523 (2nd Dist. 2009) (“A statute is ambiguous if it may be reasonably read as expressing multiple meanings.”).

Here, this statutory provision is clear. In order to fall under the first of the three at-issue statutory exclusion criteria, the person must “hold[] the position classification of Executive I or higher.” I find that the legislative meant what it said – persons holding the position classification of Executive I, II, III, IV, ... are not public employees under the Act. I need not turn to any extrinsic aids to ascertain the meaning of this language.

Instead of this simple, straightforward interpretation, the Employer argues that the language should be interpreted to mean “Executive I or higher *or a position performing similar duties as an Executive I or higher.*” Moreover, it contends it can satisfy this exclusion by pointing to the myriad of ways that the DFMs are similar to at least some Executives, including

performing nearly identical duties in different geographical regions. However, looking at the amendments to Section 3(n) as a whole, it becomes even more evident that had the legislature intended to allow for the exclusion of individuals whose positions were performing the same or similar duties to Executives, it would have done so and did, in fact, do so with different positions.

In different provisions of the 2013 amendments, the legislature allowed for exclusion of positions based on similarity of duties performed. For example, with respect to positions under the jurisdiction of the Illinois Treasurer, the legislature set criteria for exclusion, one of which is that the person “holds the title or position of, *or exercises substantially similar duties* as a legislative liaison, Agency General Counsel, Agency Chief of Staff, Agency Executive Director, Agency Deputy Director, Agency Chief Fiscal Officer, Agency Human Resources Director, Public Information Officer, or Chief Information Officer.” 5 ILCS 315/3(n) (emphasis added). In the same legislation that amended Section 3(n), the legislature also created a mechanism by which the Governor could designate positions for exclusion. 5 ILCS 315/6.1. In setting out the criteria the legislature accounted for the functions of positions and similarity of duties. In Section 6.1(b)(1), the legislature allowed for exclusion of any position that “authorize[s] an employee in that position to act as a legislative liaison” without mentioning a specific job title. 5 ILCS 315/6.1(b)(1). The legislature also allowed for exclusion of specific titles as well as any other positions that authorize a person to exercise “substantially similar duties as” the identified titles. 5 ILCS 315/6.1(b)(2).<sup>12</sup>

If, as the Employer invites, the Board held that the statutory language meant that any person performing similar duties to individuals in the Executive-series classifications was not a “public employee,” it would be rendering superfluous the language in the amendment that extends exclusion to positions with substantially similar duties to specifically identified

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<sup>12</sup> 5 ILCS 315/6.1(b)(2) reads:

To qualify for designation under this Section, the employment position must meet one or more of the following requirements: ... (2) it must have a title of, or authorize a person who holds that position to *exercise substantially similar duties* as an, Agency General Counsel, Agency Chief of Staff, Agency Executive Director, Agency Deputy Director, Agency Chief Fiscal Officer, Agency Human Resources Director, Senior Public Service Administrator, Public Information Officer, or Chief Information Officer (emphasis added).

positions. The Board is not at liberty do so, and, as such, I decline to accept the Employer's interpretation. Kraft, Inc. v. Edgar, 138 Ill. 2d at 189.

2. *The DFMs authorize, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation.*

Regardless of the finding that the DFMs do not hold the classification of Executive I or higher, they could be still be excluded from the amended definition of public employee if the DFM positions authorize, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation.<sup>13</sup> As a preliminary matter, I note that this case is the first to address what the phrase "authorize either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation" means in the context of its use in the Act. The Union argues that I should give this phrase the understood meaning arising out of federal political patronage cases; thus, this criterion only excludes employees who are in "Rutan-exempt" positions. However, the Employer urges a straightforward reading of the plain language, arguing that "the phrase means exactly what it says it does."

- a. The First Exclusion Criteria does not mean "Rutan-exempt."

Where statutory language is ambiguous or unclear, a reviewing court "may look beyond the act's language to ascertain its meaning." Nowak v. City of Country Club Hills, 2011 IL 111838, ¶ 11, 958 N.E.2d 1021, 1023 *citing* In re D.D., 196 Ill. 2d 405, 419 (2001). A statute is ambiguous if it is capable of more than one reasonable interpretation. Id. Again, neither party expressly argues that the language of the second exclusion criterion is ambiguous, but each argues for a different reading of the language. I find the Employer's argument more convincing.

As it did in its Motion to Dismiss, the Union in its post-hearing brief asserts that the phrase "authorize either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation" is interchangeable with the term "Rutan-exempt." In support of its argument,

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<sup>13</sup> As stated above, the third criteria for exclusion is not at issue in this case, as the parties have stipulated that the DFMs are neither excluded from the Employer's Merit Code nor Rutan-exempt.

the Union notes that this phrase is identical to language used in the Seventh Circuit case, Nekolny v. Painter, 653 F.2d 1164 (7th Cir. 1981), and its progeny which use this phrase as a test to determine whether a government position is a policymaking position such that political affiliation is an appropriate criterion for hiring or firing. The Union points to United State Supreme Court precedent holding, “where [the legislature] uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that [the legislature] means to incorporate the established meaning of these terms . . . .” Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992), *citing* Kelly v. Southern Pacific Co., 419 U.S. 318, 322-323 (1974); Baker v. Texas & Pacific R. Co., 359 U.S. 227, 228 (1959); Robinson v. Baltimore & Ohio R. Co., 237 U.S. 84, 94 (1915). Thus, the Union argues, when the General Assembly used the Nekolny test, they meant to incorporate the meaning “policymaking position for which political affiliation is an appropriate criterion.” The flaw in this argument is evident in the Union’s own cite. Here, the statute dictates otherwise.

In Illinois government, policymaking or confidential positions for which political affiliation is an appropriate criterion are often referred to as “Rutan-exempt” referring to the United States Supreme Court case, Rutan v. Ill. Republican Party, 496 U.S. 62 (1990), which held that for most government employees, political affiliation is not an appropriate criterion for hiring or firing. The Union argues that because the parties agree that the DFMs are not Rutan-exempt, the Employer cannot satisfy this second criterion.

In interpreting the statute to give meaning to each provision and not render any phrase as redundant, as I must, I find that the second exclusion criteria means something other than “Rutan-exempt.” Kraft, Inc. v. Edgar, 138 Ill. 2d at 189. Immediately following the provision at issue in this case, the legislature amended the Act to allow for exclusion of a person who is both completely exempt from jurisdiction B of the Secretary of State Merit Employment Code and in a Rutan-exempt position. If I were to accept the Union’s interpretation, I would be rendering this portion of the statute redundant. The Union asks me to interpret the amendments to find that the legislature allowed for the exclusion of individuals in positions for which political affiliation is an appropriate criterion not once, but twice, *and* in successive provisions. I decline to interpret the statute in this manner.

Moreover, the Illinois Supreme Court has held that, “[w]hen the legislature uses certain language in one part of a statute and different language in another, we may assume different meanings were intended.” Dep’t of Cent. Mgmt. Services v. Ill. Labor Relations Bd., 2015 IL App (4th) 131022, ¶ 26 *citing* State Bank of Cherry v. CGB Enterprises, Inc., 2013 IL 113836, ¶ 56 (*quoting* People v. Hudson, 228 Ill. 2d 181, 193 (2008)). As I noted in my Order Denying Respondent’s Motion to Dismiss Unit Clarification Petition with Respect to DFMs and Certain Executives, the legislature used both “Rutan-exempt” and the at-issue phrase in its amendment of Section 3(n) of the Act. As such, I found that the legislature meant different things when it used different language. Nothing in the Union’s reformulated post-hearing argument that this second exclusion criterion does not apply to DFMs because they are not “political policymakers” calls for a different conclusion.

- b. Giving the exemption criterion’s plain and ordinary meaning, the DFMs are authorized to have direct or indirect meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation.

Even though I agree with the Employer’s position that a plain reading of the language is the warranted approach, a straightforward reading still does not resolve the underlying issue. As I noted earlier, there is no case law interpreting what this particular phrase means within the context of the Act and the phrase is not just another way of saying “Rutan-exempt.” Interestingly, in the presence of such a vacuum, both parties rely on federal cases applying the same language at-issue here in the context of First Amendment/political patronage cases as the only available guidance for the application of this new statutory language. Although I ultimately find the line of political patronage cases to be somewhat helpful in structuring my analysis of this previously untouched statutory phrase, I would be remiss if I did not make clear the significant distinctions between the federal political patronage cases and the instant case. These distinctions highlight the limitations of relying on the political patronage cases for guidance.

It is axiomatic to state that political patronage and constitutional right cases are greatly distinguishable from cases involving a state-granted statutory right. Although there is no doubt that the rights granted by the Act are important and are meant to be extended broadly, the statutory right to collectively bargain is still a far cry from whether a person must declare or

abandon his constitutionally protected right to associate with a political party in order to keep his job. Bonds v. Milwaukee Cnty., 207 F.3d 969, 977 (7th Cir. 2000). Furthermore, federal courts have also noted that determinations of whether a specific position is policymaking can vary between the federal civil rights context and other state law purposes. Hartley v. Fine, 780 F.2d 1383, 1388 (8th Cir. 1985) (“...contrary interpretations exist because a position which is non-policymaking for purposes of the civil rights law may well be a policymaking position for state law purposes.”)

Thus, while the federal courts have interpreted this phrase in political patronage cases with the intent of applying and upholding the U.S. Constitution, here I am tasked with applying and upholding the Act. Yet again, this requires looking at statutory construction and the intent of the legislature in drafting the 2013 amendments.

The focus of the legislation resulting in the exclusion criteria was limiting the number of employees entitled by the Act to collectively bargain in order to increase government efficiency. When reviewing the gubernatorial designation provisions of the same legislation, the Illinois Appellate Court described the context of the amendments:

In 2011, the Illinois General Assembly began to debate measures that would remove state workers in management positions from their collective bargaining units with the goal that those employees would act as managers and would not act with any allegiance to their fellow collective bargaining unit members. The stated objective of these legislative efforts was to increase efficiency in the state government. In 2013, the General Assembly passed a public act that narrowed the class of those that could be considered “public employees” and set up a process by which the Governor could designate up to 3,580 positions as excluded from collective bargaining units.

Amer. Fed. of State Cnty. and Munic. Employees, Council 31 v. Ill. Labor Relations Bd. 2015 IL App (1st) 133454, ¶4. Moreover, the Court recognized, “[i]t cannot truly be disputed that the harm meant to be remedied—efficiency in government—is not identified. The statute’s purpose is discernible from the words of the statute, not to mention the legislative history.” Id. at ¶23; *see also* County of DuPage, 231 Ill. 2d at 604 *citing* Williams, 208 Ill. 2d at 487 (in interpreting statutes it is appropriate to consider the purpose behind the law and the evils sought to be remedied, as well as the consequences that would result from construing the law one way or the other). The legislative history also reveals that the legislators took particular note of the fact that

there are “some worksites ... where there is no one in charge. There is no supervisor.” 97th Gen. Assemb., H.R. Proceedings, 5/31/2011, at p. 297. The bill’s sponsor, Majority Leader/Representative Barbara Flynn Currie, noted that this situation, among others, “turns the idea of running the ship of state totally on its head. It runs it [] [a]ground.” *Id.* This legislative history crystalizes the question before the Board: whether the DFMs meet the criteria set out by the legislature intended to exclude positions from collective bargaining in order to foster government efficiency.

Despite my reluctance to rely on the substantive analysis of political patronage cases to any significant degree, I do find that two-step method for analyzing the language favored by the federal courts is helpful for the organization of my consideration of the parties’ arguments. Like the federal courts, I will address two questions in turn: (1) is there room for principled disagreement in the decisions reached by the DFMs and their superiors and (2) do the DFMs have meaningful direct or indirect input into the decision-making process. *Tomeczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir. 1985) *citing* *Nekolny*, 653 F.2d at 1170.

**i. There is room for principled disagreement in the decisions reached by the DFMs and their supervisors.**

The Employer argues that even though the overall goal of the Department applies to all Department employees, the DFMs make decisions over which there is room for principled disagreement. The Union argues that the DFMs’ decisions are circumscribed by the various manuals developed by the Employer. The Union focuses its analysis on the “character of the discretion” exercised by the DFMs. The Union argues that whatever discretion they exercise is “sufficiently cabined so that his or her meaningful policy and administrative guidance comes from superiors.” *See* *Gannon v. Daley*, 561 F.Supp. 1377, 1383-1384 (N.D. Ill. 1983). I disagree.

The Seventh Circuit has recognized that it is often difficult to determine whether an individual has policymaking responsibilities. *Davis v. Ockomon*, 668 F.3d 473, 477 (7th Cir. 2012) *c.f.*, *Kiddy–Brown v. Blagojevich*, 408 F.3d 346, 355 (“From this court’s cases, it is clear that the question whether an employee has policymaking powers in many cases presents a difficult factual question.”). Almost all jobs in government require individuals to exercise at least some level of discretion, resulting in somewhat arbitrary line-drawing based on how much

discretion is authorized. Davis, 668 F.3d at 477-78 *citing* Riley v. Blagojevich, 425 F.3d 357, 359 (7th Cir. 2005). The Nekolny court held that “policymaking and policy implementation may occur at many levels, even within a particular office whose sphere of authority is narrowly circumscribed.” Nekolny, 653 F.2d at 1170. For example, in Selch v. Letts, 5 F.3d 1040, 1043-47 (7th Cir. 1993), the Seventh Circuit found that a highway subdistrict superintendent exercised policymaking functions, even though he fell at the “lower end of the management hierarchy” due to the “potential impact on the actual or perceived implementation of policy, especially in emergency situations, and when dealing with members of the public.”

Here, though it is uncontested that the Employer provides numerous and voluminous resources to assist DFMs in their work managing drivers facilities, DFMs are authorized to and do, in fact, exercise discretion when making decisions over which there is room for principled disagreement. At hearing, the Employer elicited testimony regarding a DFM’s decision regarding how to handle a group of customers from a mental health facility. In that instance, the DFM worked with the administrators of the facility to best meet their needs while limiting the disruption to the general operation of the facility. The DFM first considered having the facility open on Monday to accommodate these customers, which would have required her granting overtime for staff to handle these transactions and perhaps seeking additional staff from other facilities. She was able to make this decision without prior approval but did need to request that the computer system allow for transactions on a day the facility is normally closed. That request was granted. Ultimately, the DFM and the facility agreed to schedule times for those customers to be processed during the regular business hours. However, by scheduling them at times when the facility was less busy, the DFM limited the disruption to the public and made the process easier on the facility residents. In circumstances such as this, the DFM is empowered to rearrange the schedule of intermittent employees, assign overtime, or seek additional staff in order to accommodate the influx of customers. Certainly, discretionary decisions such as these, leave ample room for principled disagreement.

DFMs also make decisions related to establishing the schedule for their facilities, though not necessarily which subordinate works each shift they establish; assignment of staff to perform particular functions throughout any given working day; reshuffling of customers in order to expedite end-of-the day processing; whether to offer end-of-the day customers the option of

returning on another day and moving to the front of the line; assignment of a subordinate to act as the manager in their absence; and whether to delegate their reconciliation duties. The DFM is also the only position at a drivers facility authorized to exercise discretion related to whether an individual has provided sufficient documentation to prove their identity such that the facility should go ahead and issue a license or identification card. DFMs are expected to work with the customer to try to verify their identity, but in the end, the decision whether to issue the requested license or identification card is the DFM's.

DFMs also are authorized to mandate overtime. Unlike many other managers in the Department, DFMs need not receive pre-approval before granting overtime. DFMs simply keep their Regional Managers informed of overtime, but they need not receive approval. Though the Union argues that situations giving rise to overtime are precisely prescribed, DFM Morgan made clear that in some instances it is his decision alone to make. For example, in the instance of an equipment failure requiring him to stay after the facility's regular hours, depending on the severity of the issue, he may require a subordinate to stay late with him. The record is devoid of any limitation on a DFM's decision whether to seek overtime. There is room for principled disagreement in how best to deal with issues that could give rise to overtime. Moreover, the collective bargaining agreement specifically allows the Employer to mandate an employee to work overtime to complete an in-progress task. A DFM and his chain of command could disagree over the number of employees to hold over on overtime (e.g. whether it is preferable to have two employees working 30 minutes of overtime or one employee working 15 minutes) or whether a task should be completed on overtime or completed on the following day.

Discipline is another area where DFMs make decisions over which there is room for principled disagreement. As the highest ranking employee on-site, the DFMs are responsible for addressing attendance issues, identifying performance deficiencies, and optimizing staff talents. DFMs are authorized to, and do, decide whether to address issues with their subordinates informally or through initiation of formal disciplinary procedures. DFMs who identify performance issues have a range of options including providing additional training; recommending the employee for additional outside training; discussing it with the employee; issuing an oral counseling, which in and of itself is not discipline but can form the basis for future discipline; or reporting the conduct up the chain of command for potential disciplinary action.

Decisions regarding how best to maximize performance of subordinates is something over which people may disagree. The Field Operations Manual specifically illustrates, in the context of suspensions, that DFMs can recommend more severe discipline and that emergencies may require immediate action. DFM Morgan also testified to his personal belief that more than one person should judge whether discipline is appropriate. The fact that he has set his own parameters in determining whether to initiate discipline underscores the fact that DFMs are authorized to exercise discretion in this regard.

These are decisions DFMs all across the state are making every day to fulfill the Department's mission of providing satisfactory customer service to the public. No manual, no matter how extensive, can anticipate every situation a drivers facility may face. Instead, the Employer authorizes the DFMs to make these on-site decisions in order to manage their staff and facilities to meet the needs of the customers and implement the Employer's policies and mission. As such, I find that the DFMs make decisions over which there is room for principled disagreement on goals and implementation.

**ii. The DFMs authorize meaningful direct or indirect input into the decision-making process.**

Federal courts have long emphasized that the ability to provide *input* into government decision making is critical to its determination whether a position is a policymaking position, and it was not necessary that the position holder be able to set his own goals or make final decisions. Michalowski v. Rutherford, 82 F. Supp. 3d 775, 792 (N.D. Ill. 2015); Allen v. Martin, 460 F.3d 939, 943-46 (7th Cir. 2006); Nekolny, 653 F.2d at 1170 (“That [one] d[oes] not have final decisionmaking authority is not determinative.”)

The record reveals the Employer not only authorizes the DFMs to have direct input in the decision-making process, but specifically seeks it out. Most notably, Director testified that he solicits input from the DFMs regarding the Department's “Bible,” the Field Operations Manual. The DFMs' direct involvement in the creation and updating of one of the Department's most valuable resources, as well as their regular meetings with the Chief of Staff to provide input about the needs of facilities, reflects that they meet this element of the exclusion criterion.

DFMs also are involved in regional meetings regarding human resources functions. On the issue of human resources functions, the Employer elicited uncontested testimony that in

deciding whether to continue to employ probationary employees it relies on the recommendations of DFMs. When a probationary employee is not performing particularly well, and has been evaluated as such by the DFM during the training period, the Department takes the recommendation from the DFM as to whether to keep the employee. Where the DFM believes that the probationary employee has shown progress and will become a great employee, the Department considers that opinion, in addition to the evaluations, in the decision-making process.

DFMs also provide indirect input in decision-making. For example, though DFMs do not have unilateral authority to implement discipline beyond an oral counseling, they provide critical input into disciplinary decisions regarding their subordinates by forwarding pertinent information for consideration of discipline. Moreover, an oral counseling issued by a DFM can form the basis of future discipline.

The Union cites to, Gibbons v. Bond, 523 F. Supp. 843 (W.D. Mo. 1981), *aff'd* 668 F.2d 967 (8th Cir. 1982), as the “most closely analogous case” to the present case and argues that the DFMs, like the Branch Managers in Gibbons, are not policymakers. I disagree, but address the case, as it further highlights the limitations of the political patronage line of cases. Finding that Branch Managers who oversaw Missouri drivers facilities performed “tasks which can be performed by competent Republicans, Democrats, or other persons not similarly aligned,” the Gibbons court held the Branch Managers could not be removed from their positions due to their political affiliation. The Gibbons decision is distinguishable both factually and legally. Legally, as I have exhaustively discussed, the Board is not being asked to assess whether political affiliation is an appropriate criterion for holding a DFM position. Instead, it is charged with determining whether the DFM position meets criteria established to foster government efficiency.

The Union ignores significant factual differences, as well. In coming to its conclusion, the Gibbons court noted that pursuant to their position description and practice, the Branch Managers were required to seek “administrative and policy direction from a superior in the central office” and did not, at the time of its decision, shoulder any responsibility for policy formulation. Id. at 851-52. As detailed immediately above, this is a significant difference. Here, the DFMs are involved in policy formulation, at least with respect to the Field Operations

Manual, the Department's "Bible." Moreover, the court noted that Branch Managers were required to seek approval for decisions like the hours of operation. *Id.* at 852. The record in this case reveals evidence that a DFM is authorized to exercise her discretion, without prior approval, to open her facility on a day it is normally closed, in order to handle a specific subset of customers needing served.

While the record does not support that DFMs have authority to unilaterally establish goals or to make final decisions, they certainly have the authority and opportunity to provide meaningful input into the Department's decision-making process regarding the goals and implementation of the Department's functions.

Because I find that the DFMs hold positions that authorize either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation, they are not public employees under the Act.

#### **V. CONCLUSIONS OF LAW**

Executive I and IIs are not public employees under the Act.

Drivers Facility Manager I and IIs are not public employees under the Act.

#### **VI. RECOMMENDED ORDER**

The Union's petition in case S-UC-12-034 seeking inclusion of Executive I and IIs is dismissed.

The employer's petition in case S-UC-14-006 seeking exclusion of Executive I and IIs and Drivers Facility Manager I and IIs is granted.

#### **VII. EXCEPTIONS**

Pursuant to Section 1200.135 of the Board's Rules, the parties may file exceptions no later than 14 days after service of this recommendation. 80 Ill. Adm. Code 1200.135. Parties may file responses to any exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the recommendation. Within five days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed, if at all, with Kathryn Nelson, General Counsel of the Illinois Labor Relation Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois, 60601-3103. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted in the Board's Springfield office. Exceptions and/or cross-

exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. If no exceptions have been filed within the 14-day period, the parties will be deemed to have waived their exceptions.

**Issued at Springfield, Illinois, this 30th day of December, 2015.**

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

*/s/ Sarah R. Kerley* \_\_\_\_\_

**Sarah R. Kerley  
Administrative Law Judge**