

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

County of Will and State’s Attorney of)
Will County,)
)
Employer)
)
and)
)
American Federation of State, County)
and Municipal Employees, Council 31,)
)
Petitioner)

Case No. S-UC-14-013

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

I. Background

On November 21, 2013, the County of Will and State’s Attorney of Will County (Employer or Petitioner) filed a unit clarification petition with the Illinois Labor Relations Board (Board) seeking to exclude the Assistant State’s Attorneys from the bargaining unit certified by the Board in Case No. S-VR-93-001. These employees are represented by the American Federation of State, County, and Municipal Employees, Council 31 (AFSCME or Union). The Employer asserts that the positions must be excluded from coverage of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2012), as amended, because they are managerial as a matter of law, pursuant to the Illinois Supreme Court’s decision in Office of the Cook Cnty. State’s Attorney v. Ill. Local Labor Rel. Bd., 166 Ill. 2d 296 (1995).

On January 21, 2014, the Union filed a position statement arguing that the unit clarification petition was procedurally and substantively inappropriate. It objects to the unit petition on the following five grounds: (1) the unit clarification petition does not meet the standards set forth in Rule 1210.170(a); (2) there is a contract bar to the petition; (3) the petition was filed to punish employees for the exercise of their rights under the Act and under the First Amendment of the United States Constitution; (4) the employees are not managerial as a matter of law; (5) the employees are not managerial as a matter of fact.¹

¹ The Employer does not argue that these employees are managerial as a matter of fact. Accordingly, this issue is not addressed below.

II. Discussion and Analysis

1. The Unit Clarification Petition is Procedurally Appropriate

The unit clarification procedure is procedurally proper because the Board's Rules permit such clarification under the instant circumstances and because there is no bar to the petition.

First, the unit clarification is proper under Section 1210.170(a)(3) of the Board's rules. Section 1210.170(a) of the Board's regulations allow for the filing of unit clarification petitions under three sets of circumstances:

An exclusive representative or an employer may file a unit clarification petition to clarify or amend an existing bargaining unit when:

- 1) substantial changes occur in the duties and functions of an existing title, raising an issue as to the title's unit placement;
- 2) an existing job title that is logically encompassed within the existing unit was inadvertently excluded by the parties at the time the unit was established; and
- 3) a significant change takes place in statutory or case law that affects the bargaining rights of employees.

The Board has recognized two other circumstances under which a unit clarification petition is properly filed. The Courts have identified a third. First, an employer or union may file a unit clarification petition when there are newly created job classifications entailing job functions already covered in the unit. City of Evanston v. Ill. State Labor Rel. Bd., 227 Ill. App. 3d 955, 969-70 (1st Dist. 1992) (citing State of Ill. (Dep'ts of Cent. Mgmt. Serv. & Public Aid), 2 PERI ¶ 2019 (IL SLRB 1986)); Treasurer of the State of Ill., 30 PERI ¶ 53 (IL LRB-SP 2013). Second, unit clarification petitions may be used in the processing of majority interest petitions under Section 9(a-5) of the Act. 5 ILCS 315/9(a-5) (2012). "When, with respect to a majority interest petition, an employer objects to inclusion of certain positions, but its objections, even if well founded, would not eliminate majority support, the Board will certify the proposed unit, but exclude all objected-to positions, advising the petitioner to use a unit clarification petition to add in the objected-to positions." City of Washington v. Ill. Labor Relations Bd., 383 Ill. App. 3d 1112 (3d Dist. 2008); Treasurer of the State of Ill., 30 PERI ¶ 53; 80 Ill. Admin. Code 1210.100(b)(7)(B). Third, a unit clarification petition is appropriately filed when allegedly confidential employees were improperly included in a bargaining unit. Dep't of Cent. Mgmt.

Servs. (Dep't of Corrections) v. Ill. Labor Relations Bd., 364 Ill. App. 3d 1028 (4th Dist. 2006); Treasurer of the State of Ill., 30 PERI ¶ 53.

Here, the petition is appropriately filed under Section 1210.170(a)(3) of the Board's Rules because the Illinois Supreme Court's decision in Office of the Cook County State's Attorney represents a "significant change...in...case law that affects the bargaining rights" of the at-issue employees. Office of Cook Cnty. State's Attorney, 166 Ill. 2d at 302-305. The Court in that case formulated the "managerial as a matter of law" test, which did not exist in 1993 when the Board certified the Union as the employees' exclusive representative. Id. The Court applied that test to exclude Assistant State's Attorneys of Cook County from collective bargaining based on the employees' duties as articulated in statute and case law, without resort to the traditional, fact-intensive managerial analysis previously used by the Board. Id. This case affects the bargaining rights of the employees at issue here because its application eliminates their right to bargain collectively, as discussed below. Thus, the Court's decision in Office of Cook Cnty. State's Attorney demonstrates that the instant petition meets the threshold requirements of the Board's unit clarification rules.

Second, there is no contract bar to this petition because the Employer is using it to remove allegedly managerial employees from an existing unit and not to dispute the Union's representative status.

Section 1210.35(a) of the Board's rules sets forth the contract bar doctrine.² It provides the following:

When there is in effect a collective bargaining agreement of 3 years or shorter duration covering all or some of the employees in the bargaining unit, representation and decertification petitions may be filed during the window period (between 90 and 60 days prior to the scheduled expiration date of the collective bargaining agreement) or anytime after the expiration of the collective bargaining agreement. However, the collective bargaining agreement shall serve as a bar (contract bar) to filing representation or decertification petitions outside of the window period.

80 Ill. Admin. Code 1210.35(a).

The Illinois Appellate Court explained that the contract bar doctrine applies only to those ~~petitions that raise a "question concerning representation."~~ Black Hawk College Professional Technical Unit v. State of Ill. Educ. Labor Rel. Bd., 275 Ill. App. 3d 189, 192-93 (1st Dist.

² Section 9(h) of the Act also sets forth the contract bar doctrine as it pertains to elections. See 5 ILCS 315/9(h) (2012).

1995)(addressing similar provisions of the Illinois Educational Labor Relations Act and the Illinois Educational Labor Relations Board’s rules) (citing, 1 Hardin, *The Developing Labor Law* 396-411 (3d ed. 1993) and 48 Am.Jur.2d Labor and Labor Relations § 700 (1979)). A question concerning representation arises when “a labor organization or individual seeks recognition as the bargaining agent and the employer declines to recognize it, thus requiring a Board...to determine whether the union or the individual represents a majority of the employees.” *Id.* (applying the rationale to election petitions); see also *Vill. of Oak Brook*, 13 PERI ¶ 2025 (IL SLRB 1997)(contract bar prohibits a change in the representative of an existing bargaining unit during the term of a bargaining agreement for that unit).

The contract bar is inapplicable here because the Employer does not dispute the Union’s representative status and does not question that a majority of the employees in the unit desire union representation. Rather, the Employer simply disputes the employees’ status as public employees under the Act. Thus, there is no question concerning representation here and therefore no contract bar to the filing of the petition.³

Third, the Employer’s allegedly retaliatory motive for filing this petition does not warrant its dismissal here. First, the Union has not filed a charge alleging that the Employer filed the petition to retaliate against its employees for the exercise of their rights under the Act.⁴ Second, the Union has cited to no authority for the proposition that such a charge would block the Board from processing the petition, had the Union filed one. But see 5 ILCS 315/9(a) (pursuant to the blocking charge doctrine, the Board may extend the time for holding an election to permit the resolution by the Board of a “unfair labor practice charge filed by one of the parties to a **representational proceeding** against the other based on conduct which may either affect the existence of a question concerning representation or have a tendency to interfere with a fair and free election”)(emphasis added).

In sum, there is no procedural bar to the unit clarification in this case.

³ Notably, the Illinois Appellate Court has indicated that unit clarification petitions are appropriately filed, at any time, to exclude allegedly confidential employees who were improperly included in a bargaining unit. *Dep’t of Cent. Mgmt. Servs. (Dep’t of Corrections) v. Ill. Labor Relations Bd.*, 364 Ill. App. 3d 1028 (4th Dist. 2006). This rationale applies equally to employees who are managerial as a matter of law. Indeed, the Board has removed managerial as a matter of law employees even outside the contract bar window. See *State of Ill., Office of the State Appellate Defender*, 16 PERI ¶ 2027 (IL LRB-SP 2000).

⁴ The Union also asserts that the Employer filed the instant petition to retaliate against employees for the exercise of their First Amendment rights. The Board has no jurisdiction to remedy the alleged violation of First Amendment rights. Accordingly, this assertion has no impact on the outcome of the case.

2. The Unit Clarification is Substantively Appropriate

The Will County Assistant State's Attorneys are managerial as a matter of law under the Illinois Supreme Court's decision in Office of Cook County State's Attorney. Office of the Cook Cnty. State's Attorney v. Ill. Local Labor Rel. Bd., 166 Ill. 2d 296 (1995).

In Office of Cook County State's Attorney, the Court held that Cook County State's Attorneys were managerial as a matter of law and therefore not subject to the collective-bargaining provisions of the Act. Id. at 305. In so holding, the Court affirmed the Board's denial of an oral hearing, reasoning that statutory provisions sufficiently demonstrated the Assistant State's Attorneys' managerial authority because they articulated the duties of the States Attorney and clothed his assistants with all his powers and privileges. Id. 302-303. The Court relied on these statutes and supporting case law to determine that the Assistant State's Attorneys were surrogates to the State's Attorney and therefore managerial as a matter of law. Id.

The Court's decision in Office of Cook County State's Attorney is controlling here because the instant case is identical to Office of Cook County State's Attorney in all material respects. The Assistant States' Attorneys in both cases serve the same office holder—the State's Attorney. Further, their authority is described in the same statutory provision. See 55 ILCS 5/4–2003. Finally, the cited case law that describes their surrogate relationship to the officeholder is equally applicable. In short, there is no basis on which to distinguish Office of Cook County State's Attorney and the Union has cited none.

Thus, the Will County Assistant State's Attorneys are managerial as a matter of law.

III. Conclusions of Law

1. The unit clarification petition is properly before the Board.
2. The Assistant State's Attorneys of the County of Will and State's Attorney of Will County are managerial as a matter of law.

IV. Recommended Order

The unit clarification petition is granted.

EXCLUDE: All Assistant State's Attorneys in the office of the Will County State's Attorney.

V. Exceptions

Pursuant to Section 1200.135 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200-1240, the parties may file exceptions to this recommendation and briefs in support of those exceptions no later than 14 days after service of this recommendation. Parties may file responses to any exceptions, and briefs in support of those responses, within 10 days of service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the recommendation. Within five days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed, if at all, with the Board's General Counsel, Jerald Post, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted in the Board's Springfield office. Exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. If no exceptions have been filed within the 14 day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois this 11th day of April, 2014

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

/S/ Anna Hamburg-Gal

**Anna Hamburg-Gal
Administrative Law Judge**