

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

American Federation of State, County and)	
Municipal Employees, Council 31,)	
)	
Petitioner,)	Case Nos. S-UC-15-052
)	S-RC-15-044
and)	
)	
State of Illinois, Department of Central)	
Management Services,)	
)	
Respondent.)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On October 2, 2014, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME or Union) filed a unit clarification petition in Case No. S-UC-15-052 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 one Executive I position in the Department of Agriculture, Bureau of County Fairs and Horse Racing (Bureau or Employer), held by Kelly Beck (Beck). Additionally, on December 8, 2014, AFSCME filed a majority interest petition with the Board in Case No. S-RC-15-044, seeking to represent the above-referenced position.

After the petitions were consolidated, a hearing was held on April 8, 2015, 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:

I. PRELIMINARY FINDINGS

The parties stipulate and I find that:

1. The Board has jurisdiction to hear this matter pursuant to Section 5(b) and 20(b) of the Act;

2. AFSCME, Council 31, is a labor organization within the meaning of Section 3(i) of the Act;
3. The State of Illinois is a public employer within Section 3(o) of the Act;
4. The position at issue is an Executive I at the Illinois Department of Agriculture;
5. The position number is: 13851-11-05-100-00-02;
6. This position is currently held by Kelly Beck; and
7. The issues to be resolved through these proceedings are whether: (a) a unit clarification is appropriate; and (b) whether the Executive I position is a managerial employee as defined in Section 3(j) of the Act.

II. BACKGROUND

On October 2, 2006, this Board certified a bargaining unit based on a majority interest petition in Case No. S-RC-05-106. That bargaining unit included certain Executive I positions. The position currently held by Beck was excluded from the 2006 certification. On October 2, 2014, AFSCME filed a unit clarification petition to include Beck's position, asserting that "[t]his position is now appropriately included in the AFSCME represented bargaining unit." The Employer opposed this petition on the grounds that it failed to allege a distinct criterion for unit clarification. Further, the Employer argued that even if the petition properly articulated a basis for unit certification under the Act, the position should remain excluded because the duties and functions of Beck's position have not substantially changed to remove the position from the managerial exclusion.

On November 6, 2014, in light of the Employer's contention that "[t]his position is now appropriately included in the AFSCME represented bargaining unit" did not sufficiently identify the requisite circumstances which brings the petition within one of the five recognized bases for a unit clarification petition, I issued an Order to Show Cause directing AFSCME to state the nature of and reasons for the proposed amendment or clarification. 80 Ill. Admin. Code 1210.170(b)(5). AFSCME responded to the Order to Show Cause on December 2, 2014. In AFSCME's response, it indicated that its unit clarification petition was appropriate due to a "substantial change to the duties of the position." The Employer replied to the Union's response

to the Order to Show Cause and submitted performance evaluations dating back to 2005 to demonstrate that there was no substantial change in Beck's duties and functions.¹

On December 8, 2014, AFSCME filed a majority interest petition with the Board in Case No. S-RC-15-044, seeking to represent the Executive Secretary I position. The Employer opposed this petition, asserting that the position sought to be represented should be excluded from coverage of the Act pursuant to the exemption for managerial employees. I consolidated the petitions for hearing.

III. ISSUES AND CONTENTIONS

The threshold issue is whether the unit clarification petition is appropriately filed to include Beck's position into the existing bargaining unit represented by AFSCME.

The Employer contends that the unit clarification petition is inappropriate because the duties and functions of Beck's position have not substantially changed since 2006. In support of this argument, the State points to Beck's position description and performance evaluations, which have largely remained the same from 2006 until the filing of this petition.

AFSCME contends that the unit clarification petition was appropriately filed because substantial changes occurred in the duties and function of Beck's position since being excluded from certification on October 2, 2006. To determine whether a substantial change has occurred, AFSCME argues that the probative inquiry must be into Beck's actual duties and the authority of her position, not merely the content of her position description and performance evaluations.

The next issue that must be resolved is whether the position should be excluded as managerial within the meaning of the Act.

The Employer argues that by virtue of Beck's proximity to the Deputy Director, her loyalties would be divided between the Agency and the Union. Further, Beck's duties, based upon both her testimony and a reading of her position description and performance evaluations, demonstrate that she is a managerial employee.

AFSCME contends that by looking at the actual duties as well as the authority exercised by Beck, she is not a managerial employee as defined by the Act. Although Beck is proficient at her job, she has neither ultimate authority nor ability to recommend actions which could be

¹ The Board's Rules to not allow for reply briefs. I, therefore, did not consider the Employer's arguments presented except to the extent they were properly raised through the hearing and post-hearing brief.

considered to establish agency policy or direct the effectuation of the same. Instead, AFSCME argues that Beck's role is predominately clerical.

IV. FINDINGS OF FACT

The Department of Agriculture is divided into six Bureaus, including the Bureau of County Fairs and Horse Racing. As the name would suggest, the Bureau is broken down into the County Fairs Program and the Horse Racing Program. Each Bureau is supervised by a Bureau Chief, who reports to the Deputy Director,² who in-turn reports to the Director of the Department of Agriculture. At the time of hearing, Rhonda Jachino (Jachino) was serving as acting Bureau Chief. As acting Bureau Chief, Jachino supervises the County Fairs and Horse Racing Programs, and the Bureau's three full-time employees: Jacquelyn Wolford in accounting, Gina Merano (Merano) in the County Fairs Program, and Beck in the Horse Racing Program. Beck has worked in the Horse Racing Program as an Executive 1 since approximately 2002; before 2002, she worked in a similar capacity, though the position was classified as an Administrative Assistant II.

A. Beck's Current Duties

The Bureau's Horse Racing Program provides monetary incentives to horse owners to encourage breeding, racing and ownership of horses in Illinois. As the sole employee in the Horse Racing Program, Beck is currently responsible for the State's Thoroughbred, Standardbred, and Quarter Horse Racing Programs. The State's only witness, Linda Rhodes (Rhodes), the Department of Agriculture's Labor Relations Manager, testified that Beck's position description accurately reflects her responsibilities and duties. The basis of Rhodes' knowledge is derived from her involvement in this case; specifically, from discussions with the Deputy Director, from reviewing the position description, and from preparing unit clarification petitions, questionnaires, and surveys regarding the position that were submitted to the Illinois Department of Central Management Services (CMS). Beck testified that the position description was a fairly accurate summation of the essential functions.

Looking to the position description, Beck, under the direction of the Bureau Chief, initiates, directs, develops, coordinates, and manages the Thoroughbred Horse Racing Program

² This position has been reference by the parties and witnesses as either Deputy Director or Chief of Staff. Exhibit 1 is an organizational chart of the Illinois Department of Agriculture, which denotes that the Deputy Director and Chief of Staff titles are held by the same individual. In accordance with their interchangeability, I will use Deputy Director to describe this position.

ensuring proper registration of horses, as well as monitoring receipt and disbursement of monies related to the Program. Before 2012, there were two additional Executive Is within the Bureau. Until this time, Beck was only responsible for the Thoroughbred Racing Program. Following the retirement of those two Executive Is in May 2012 and a reshuffling of responsibilities within the Bureau, Beck became responsible for the Thoroughbred, Standardbred, and Quarter Horse Programs.

Since 2012, Beck has been responsible for maintaining the registration process on all Illinois conceived and foaled horses for each of the State's racing Programs. Beck testified that the registration process is her most time consuming responsibility. In Illinois, owners must send in forms to the Bureau to register their stallions, mares, and foals. Once received, she reviews the information, ensures what has been submitted is in accordance with the State's rules and statutes, and then enters that information into an electronic database. Despite assuming more responsibilities in 2012, Beck testified that her work load did not significantly increase due a decrease in the number of registrations in all three Programs. If a registration question arises regarding whether an application is in compliance with the State's rules and regulations, Beck will confer with the Bureau Chief. Prior to doing so, she gathers the necessary information along with the relevant rules for presentation to the Bureau Chief. Should the Bureau Chief need another opinion, the Bureau Chief decides whether the Legal Department should be contacted. While Beck and Legal may provide an opinion as to the best course of action, the Bureau Chief ultimately makes the decision as to how to proceed.

A corollary responsibility to registration is working with field investigators. If an issue or question arises with the registration of a stallion, foal, or mare, a field investigator may be utilized to resolve any discrepancy. To initiate a field investigation, Beck will determine where horse is located and provide all relevant information to that county's assigned field investigator. These investigators do not report to Beck, but to the Bureau Chief. Once the investigation is completed, Beck receives the photographic and documentary evidence the investigators collect and enters that information into the electronic database. If a small discrepancy remains, Beck will call the owner directly for clarification; otherwise the matter is presented to the Bureau Chief for decision.

Beck administers, coordinates, plans and develops staff programs, activities, procedures and policies for the Racing Programs. This includes the initiation, drafting and submission of

new or amended rules and changes in the statutes governing the Program as suggested and approved by the Illinois Thoroughbred Advisory Board (Advisory Board). Before statutory changes are executed by the Advisory Board, the Advisory Board will meet and discuss the proposed changes with the Bureau Chief. Beck has attended and participated in these meetings, but her contribution was limited to verbally expressing any insights she may have on the subject. Following a robust discussion about any proposed change, only the Advisory Board has final approval authority. Beck also provides information regarding the Racing Programs to the Advisory Board and reports to the Chief Fiscal Officer and Director's Office. Compiling information for the annual report falls within this responsibility. Each year, Beck collects the Bureau's statistical data with a copy of last year's cover letter for presentation to the Bureau Chief. The Bureau Chief then reviews the information and can alter the cover letter before adopting it with his or her signature.

Each fiscal year, the Advisory Board is required to approve a budget. Before anything is presented to the Advisory Board, the Bureau Chief and Beck refer to the draft budget outline from the previous year and discuss a breakdown of where the money should go. That proposed budget is then presented to the Advisory Board for approval. Once the budget has been approved, Beck is responsible for monitoring and recording how the money is spent. Because all money is pre-approved in the budget, she ensures there are no expenditures that exceed the amount that has been allotted. Further, because Bureau money is regulated, that regulation controls what the money can be used for, such as owner's awards, stallion awards, advertising, administrative expenses, or county fair purses. To ensure compliance, Beck reviews invoices for accuracy. If she determines an invoice is accurate and being utilized for an approved expenditure, that invoice is then submitted for approval by the Bureau Chief. If approved, the Bureau Chief or Beck send the invoice to accounting, where it is processed for payment. The budget process also requires that a computerized file tracks the money used during county fair horse races. While the County Fair Program is handled by Merano, purse money approved by statute for the Thoroughbred and Quarter Horse Program is Beck's responsibility.

B. Beck's Duties Under Bureau Chief Tex Moats

The above discussion of Beck's responsibilities, and manner in which they are executed, contemplate the timeframe from 2006 until the present, under acting Bureau Chief Jachino and her immediate predecessor Charlyn Fargo-Ware (Fargo-Ware). Fargo-Ware held the position

from 2006 to 2014. Fargo-Ware's predecessor was Tex Moats (Moats). Moats was the Bureau Chief at or before the time Becks' title was changed from Administrative Assistant II to Executive I, in 2002, until the approximate time when the Board's certification was issued, on October 2, 2006. During the time Moats was Bureau Chief, he directed Beck to make decisions. If a question or issue arose during the registration process, Beck would resolve to issue herself or personally go to Legal. With the budget, Beck was responsible for its preparation and drafting, and presentation of the budget to the Advisory Board. Beck was also directed to respond to inquiries with regard to legislation or draft language for proposed changes to rules and regulations, without Moats' involvement. Finally, Beck would communicate directly with the Deputy Director.

C. Beck's Position Description, Performance Evaluations, and ePAR

Through Rhodes, the Employer offered into evidence the Bureau's Executive I position description from 2004, several years of Beck's performance evaluations, and an electronic personnel action request (ePAR).

The position description is a document generated by CMS that states the Executive I's essential functions, which are discussed in detail above. The position description has an effective date of August 1, 2004, when Moats was Bureau Chief. In this capacity, Moats signed off as the Executive I's "Immediate Supervisor" in the signature block on the bottom of the page. The position description was also signed by the Director of CMS and the Agency Head.

The ePAR was generated by the Bureau Chief of Human Resources Brent Eggleston (Eggleston) to request that Beck receive a 10% salary increase. The parties stipulated that the ePAR was generated sometime after July 2012, soon after the retirement of the two Executive Is in the Bureau. Fargo-Ware, Beck's then-Bureau Chief, provided Eggleston with the information to generate the ePAR.³ To justify the salary increase, Eggleston summarized Beck's duties as the Thoroughbred Horse Racing Manager. To further support the increase, Eggleston wrote that due to staff shortages and reductions, Beck has assumed a myriad of additional responsibilities and that it was in the best interest of the agency to grant this special salary increase. Rhodes testified that after the ePAR was generated by the Human Resources Bureau Chief and the

³ There is nothing on the record to indicate what information Fargo-Ware provided to Eggleston to drafting the ePAR, or what information Eggleston considered in formulated the language used and characterizations made within the ePAR. Rhodes testified that she had no involvement in the creation of the ePAR.

Deputy Director approved the request, it was then routed through CMS to the Governor's Budget Office for final approval.

Beck's performance evaluations span, non-contiguously, from 2003 through 2014. Specifically, the offered performance evaluations cover the following periods of report: August 1, 2003, through July 31, 2004; August 1, 2004, through July 1, 2005; August 1, 2005, through July 31, 2006; August 1, 2006, through July 31, 2007; August 1, 2007, through July 31, 2008; August 1, 2012, through August 1, 2013; and, August 1, 2013, through August 1, 2014.

The performance evaluation consists of nine parts, ending with signatures of the employee, supervisor, and agency head. Beck testified that evaluation process is informal, and normally involves a five minutes meeting with the Bureau Chief. Part I is a review of Beck's job description to ensure accuracy. If there is a discrepancy in the description, Part I offers the employee an opportunity to identify that the position description is not accurate and attach a revision to the job description. In Beck's 2012-2013 evaluation, she exercised this option and added the duties of administering the Quarter Horse and Standardbred Programs, in addition to her Thoroughbred duties. In the 2013-2014 evaluation, Beck revised the job description to reflect her current responsibilities associated with the computerized registration process for the Illinois Breeders Fund Program for eligible Quarter Horses, Standardbreds, and Thoroughbreds. Part II is the appraisal of objectives used by the Bureau Chief to document objectives set for Beck and to indicate her accomplishments toward those objectives. Beck testified that this list of objectives does not reflect her actual duties, and the list of objective has been the same for years. In the performance evaluations from 2003 until 2013, there was no change in the language of Part II. Part VI gives the employee the opportunity to comment on any part of the information within the evaluation. If the employee does not concur with the evaluation, she is then instructed to check the appropriate box in Part IX and explain the reasons for disagreement. The parties stipulated that Beck did not check that box in Part IX, which is contained in the signature box for the employee's signature. Part VII is a list of the employee's objectives for next year. From 2003 until 2008, there was no change in Beck's objectives for next year. Part VII of the 2012 performance evaluation used different language than its predecessors, but largely contemplated the same core objectives. Substantively, the 2012 evaluation added Quarter Horse in the paragraph discussing her registration responsibilities. Because the 2013 evaluation did not adopt the additional duty of Quarter Horse registration from 2012, Part VII of the 2013 evaluation

again listed Quarter Horse registration, as well as registration for the Illinois Breeders Fund and Standardbreds.⁴

V. ANALYSIS

A. **The Unit Clarification Petition is appropriate under Section 1210.170(a) of the Board's Rules.**

In 2006, there was a substantial change to Beck's duties, which raises an issue as to her current unit placement. Use of the unit clarification procedure to add employees to an existing bargaining unit circumvents the regular representation procedures, thereby denying the employees an opportunity to participate in a representation campaign and election. Accordingly, the Board limits the circumstances in which the unit clarification procedure may appropriately be invoked. City of Chicago, 9 PERI ¶ 3026 (IL LLRB 1993); City of Chicago, 2 PERI ¶ 3014 (IL LLRB 1986). There are five circumstances under which a unit clarification petition is appropriately filed. Three of those are articulated in Section 1210.170(a) of the Board's Rules. 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 the statutory or case law that affects the bargaining rights of employees. 80 Ill. Admin. Code 1210.170(a).

In addition, the Board has historically allowed parties to use a unit clarification petition to include newly created job classifications entailing job functions already covered in the unit. City of Evanston v. State Labor Rel. Bd., 227 Ill. App. 3d 955, 969-70 (1st Dist. 1992), citing State of Ill. (Dep't of Cent. Mgmt. Servs. & Public Aid), 2 PERI ¶ 2019 (IL SLRB 1986). More recently the Board has also permitted a union to file a unit clarification petition to include titles that the Board excluded as objected-to when certifying a majority interest petition that had majority support without consideration of the objected-to titles. 80 Ill. Admin. Code 1210.100(b)(7)(B); City of Washington v. Ill. Labor Rel. Bd., 383 Ill. App. 3d 1112 (3d Dist. 2008); Treasurer of the State of Ill., 30 PERI ¶ 53 (IL LRB-SP 2013) rev'd on other grounds by Am. Fed'n of State,

⁴ Performance Evaluation, Part III, appraisal of employee performance characteristics; Part IV, employee development; Part V, overall performance rating; and Part VIII, progress review, are not relevant for consideration of Beck's duties and responsibilities.

Cnty. & Mun. Employees, Council 31 v. Ill. Labor Rel. Bd., 2014 IL App (1st) 132455. In addition to a union using the unit clarification petition to accrete into a bargaining unit, the petition can also be used to exclude statutorily exempt positions. See Chief Judge of Circuit Court of Cook Cnty. v. Am. Fed'n of State, Cty & Mun. Employees, Council 31, 153 Ill. 2d 508, 521 (1992) (The state employer could file a unit clarification petition to remove a statutorily exempt employee from a bargaining unit at any time).

For this case, the relevant circumstance for unit clarification set forth in Section 1210.170(a) of the Board's Rules is the alleged substantial change in the duties and functions of Beck's title. During the tenure of Bureau Chief Moats, from 2002 through 2006, Beck was effectively charged with running Bureau's Horse Racing Program. Moats' *laissez-faire* leadership style consigned considerable authority and discretion upon Beck. The evidence demonstrates that Beck's subject matter competence and initiative enabled her to seamlessly fulfill the operational requirements of the Program. Between 2002 and 2006, Moat specifically told Beck to make decisions. If an issue arose during the registration process, she would either resolve it herself or personally consult with legal. Beck was ultimately responsible with deciding how to proceed. With the budget, Beck was responsible for its preparation and drafting, as well as presenting it to the Advisory Board. At no time during this process did she ask approval from Moats. Beck was also directed by Moats to respond to inquiries regarding legislation, and to draft language from proposed changes to the Bureau's rules. Finally, because of Moats' direction, Beck communicated directly with the Deputy Director about Horse Racing Program related issues.

The duties and functions of Beck under Moats, when the Bureau's Executive Is were excluded from certification on October 2, 2006, were not the same as those performed by Beck today. Moats was succeeded by Fargo-Ware in 2006, who was succeeded by Jachino in 2014. While Beck remained an integral source of insight and knowledge to these successor Bureau Chiefs, she no longer possessed the authority or discretion she had with Moats. With Moats' departure, Beck's duties and responsibilities reverted to those commensurate of an Executive I. If a question arises during the registration process, it is brought before the Bureau Chief to answer. With the budget, Beck constructs a draft borrowed from the previous year's budget, but the Bureau Chief makes the final approval and presents it to the Advisory Board. Legislative inquiries, and any proposed changes to the language in the rules, again, go before the Bureau

Chief for decision. Finally, Beck no longer communicates directly with the Deputy Director about Program issues. Successor Bureau Chiefs have fulfilled the duty of communicating up the chain-of-command. For these reasons, I find that a substantial change occurred in the duties and functions of Beck's title following the departure of Bureau Chief Moats in 2006.

There is no merit to the Employer's contention that the substantial change inquiry looks only to Beck's job description and performance evaluations, not Beck's actual duties and functions. Although the Employer accurately states that from the time Beck's position was excluded from certification in 2006 until the filing of the petition at issue, neither her job description nor performance evaluations have substantively changed, the Employer did not cite a single case to support the proposition that substantive continuity of duties in documentation is dispositive of whether a substantial change has occurred. See Cnty. of Cook, 19 PERI ¶ 58 (IL LRB-LP 2003) ("We simply cannot hold that a mere job description supports a finding that the attendings are managerial. Rather, we make finding of managerial status based on the actual duties performed by the employees at issue..."); State of Ill., Dep't of Cent. Mgmt. Servs., 20 PERI ¶ 105 (IL LRB-SP 2004) (Without evidence of the actual duties of an employee, the Board lacks evidence to determine the supervisory, confidential, or managerial status of a position); Cf. State of Ill. Dep't of Cent. Mgmt. Servs., __PERI__, Case Nos. S-UC-16-032, -033, -034 (IL LRB-SP September 2, 2016) (Board remanded for hearing a unit clarification petition for vacant positions, when evidence can be presented that "clearly and specifically defines the duties that prospective employees will be expected to perform.")

Here, where the duties set out in the position description and performance evaluations conflict with the duties actually performed, I find that consideration of the actual duties to be paramount in assessing whether a change in duties has occurred. Beck's job description broadly recites possible duties of the Executive I. The record reveals that through the course of Beck's tenure with the Bureau, it is undisputed that her role has evolved under different Bureau Chiefs, and with departure of Bureau staff. Despite this, Beck's position description remained unchanged. It is difficult to put much stock in any argument that asks for reliance on a job description that has remained exactly the same for a decade. Similarly, the performance evaluations, filled out every year by Beck's supervisor, have wholly failed to express the evolution and exact nature of Beck's contributions to the Horse Racing Program. Moats left the Bureau in 2006, but it wasn't until the 2012-2013 performance evaluation that any material

change was made to language used in Part II, appraisal of objectives, and Part VII, objective for next year. Further, with the 2012 departure of the two Executive Is, Beck took on their responsibilities. In the 2012-2013 evaluation, Beck disputed the job description, specifically adding language to reflect the additional responsibilities she assumed- registration for the Quarter Horse Program. Despite this effort on Beck's part, to ensure her performance evaluation accurately represented her duties, the 2013-2014 evaluation used the same language that was used in 2012-2013.

In contrast, the courts that found an employee to be managerial as a matter of law relied upon that employer's specific grant of statutory power that accurately reflects the authority bestowed upon that employee. Because of this statutory grant of authority, an employee becomes a surrogate of his or her employer without any further designation of power. Beck's testimony demonstrates that neither her job description, nor her performance evaluations, granted her such authority, or "clothed" her with the powers and privileges of the Bureau Chief. Instead, these static documents are merely used as a tool of the Bureau Chief to accomplish the required annual employee evaluation. Nothing more. When Moats was Bureau Chief, any authority Beck wielded wasn't granted through the operation of the job description, performance evaluation, or any other statutory apparatus, but came directly from Moats himself. Absent a statutory instrument of empowerment, as is the case here, the analysis for whether there was a substantial change in Beck's duties and functions must look to her actual duties and functions under different Bureau Chiefs. Accordingly and as discussed, I find that a substantial change occurred in Beck's duties and functions, following the departure of Moats, such that a unit clarification petition could be appropriate.

B. Though Otherwise Appropriate, the Unit Clarification Petition is Untimely.

Despite there being a substantial change to Beck's duties and functions in 2006, the Union's unit clarification petition is inappropriate on other grounds. In addition to there being limited circumstances in which unit clarification petitions can be utilized, there is a further limitation, namely that such a petition be filed within a reasonable period of time following the events that make a unit clarification appropriate. While there has been no Board decision definitively addressing what might be a reasonable amount of time to file a unit clarification following, in this case, an existing title undergoing "substantial changes in the duties and functions," the Board has generally insisted that the petition be filed within two years of the

triggering event. See Water Pipe Extension, Bureau of Engineering v. Ill. Local Labor Rel. Bd., 252 Ill. App. 3d 932 (1993) (Upheld Board's dismissal of a unit clarification petition as untimely where the petition was not filed until more than two years after the change in circumstances which was the basis of the petition); City of North Chicago, 25 PERI ¶ 162 (IL LRB-SP 2009) (noting that Board has generally insisted that the unit clarification petitions must be filed within two years of the triggering event); Ill. Dep't of Cent. Mgmt. Servs. & Public Health, 2 PERI ¶ 2005 (IL SLRB 1985) (finding two year delay in filing unit clarification petition after triggering event change rendered it untimely). The Board's dismissal of untimely petitions is further supported by decisions of other labor boards. See East Richland Educ. Ass'n v. Ill. Educ. Labor Rel. Bd., 173 Ill. App. 3d 878 (1988) (cases from other states are persuasive in construing the Illinois Public Labor Relations Act); In re Atlantic Community College, 11 NJPER ¶ 16015 (1994) (New Jersey Public Employment Relations Commission dismissed a unit clarification petition as untimely where the union did not file its clarification petition until eleven months after it was aware of the need for clarification).

With that framework in mind, the event to examine is when a substantial change occurred to Beck's role in the Bureau. As discussed and as the Union contends, the triggering event that constitutes a substantial change in Beck's duties and functions occurred toward the end of 2006, with the departure of Moats. Since 2006, the only time the Union has formally invoked the unit clarification procedure to add Beck to the existing bargaining unit was with the petition presently before the Board, filed on October 2, 2014, some eight years after the triggering event. Accordingly, the Union here is time-barred to invoke the unit clarification process. Of note, the Union provided no indication that it lacked knowledge of the change in Beck's duties and functions, nor identified any other potential legal barrier which would have prevented it from bringing a unit clarification petition earlier than it did.

If a unit clarification petition is brought after the expiration of that period, the Board will normally dismiss the petition, informing the parties that a representation petition, wherein the desires of the affected employee can be determined, is the proper means to include or exclude the employee in question. City of North Chicago, 25 PERI ¶ 162. On December 8, 2014, AFSCME filed such a petition in Case No. S-RC-15-044. I now turn to the merits of that petition.

C. The Union's Majority Interest Petition is Not Barred by the Parties' Agreement in Case No. S-RC-05-106.

The Union's current majority interest petition seeks to add Beck's position to an existing bargaining unit and excludes all supervisory, managerial, and confidential employees as defined by the Act. The Employer objects to this petition, arguing that the proposed bargaining unit is inappropriate, because it is barred by a 2006 agreement between the parties to exclude Executive Is in the Bureau from the bargaining unit. Accordingly, the Employer argues that the Union must prove it should not be bound by the prior exclusion or that the position has changed in some significant way as to make its inclusion appropriate.

The Union is not indefinitely barred from seeking to add Beck to the existing unit, despite her position being excluded from certification in 2006. Without the parties' agreement or the Board's subsequent certification, there is nothing before me to glean the parties' intent regarding the nature of Beck's exclusion.⁵ Specifically, there is no evidence before me to determine whether the Bureau's Executive I position was specifically excluded, if a reason was articulated to support the exclusion, if a length of time for exclusion was contemplated, or if the union made a promise to refrain from seeking to organize the Bureau's Executive I employee. Despite a lack of evidence on the parties' intent, a recent Board decision explains why, under these circumstances, the Union is not precluded from seeking to represent Beck. See City of Chicago, __PERI__, Case No. L-RC-16-007 (IL LRB-LP June 30, 2016).

At issue in City of Chicago was whether a 2001 agreement between the parties operated as a bar to the union bringing a subsequent majority interest petition seeking to represent a position that was previously excluded. See Id. In that case, the Board delineated between an agreement with a general exclusionary clause and an agreement with an express waiver. Id. An agreement with a general exclusionary clause does not specify the reason the position has been excluded, or establish a length of time for exclusion. Id. An agreement with an express waiver requires a promise by the union to refrain from seeking to organize certain employees. Id. Although City of Chicago dealt with an agreement with a general exclusionary clause, the Board held that neither a general exclusionary clause nor an express waiver operates as a perpetual bar. Instead, the Board held that even when an express waiver is at issue, it will operate as a bar only for a reasonable period of time. Id.; see Quincy Pub. Library, 11 PERI ¶ 2041 (IL SLRB 1995) (holding that the union does not indefinitely waive its organizational rights to employees subject

⁵ Based on the proffers of both parties, I will take judicial notice that in Case No. S-RC-05-106, the Bureau's Executive I position was then excluded as managerial under Section 3(j) of the Act.

to an exclusionary clause, rather the union waives its rights for a reasonable period of time, and the Board found that reasonable duration was one year from certification).

Here, the Bureau's Executive Is were excluded from certification based upon agreement by the parties. Under these circumstances, whether the parties' agreement contained a general exclusionary clause or an express waiver of exclusion does not change the outcome; neither operates as an indefinite waiver of the Union's organizational rights to add Beck's position to the existing unit. For the Union to fulfill its agreement with the Employer regarding Beck's position, it was required to refrain from seeking to add this position to the bargaining unit for a reasonable duration of time after it entered into the agreement. Given that the parties entered into the agreement almost a decade ago, and the Union seeks to add Beck's position to the unit, I find it has fulfilled its bargain with the Employer. The Employer offers no authority for the proposition that even a valid waiver of a union's right to represent a position should be enforced in perpetuity. Therefore, the Union is not now precluded from seeking to add Beck's position into bargaining unit RC-62.

The Employer cites Int'l Ass'n of Machinists for the proposition that the parties should be bound by the prior decision by the Board to exclude Beck's position. Int'l Ass'n of Machinists and Aerospace Workers, Dist. 8 v. Dep't of Cent. Mgmt. Servs., 2014 IL App. (4th) 130126-U.⁶ The Employer is correct that the Board has a general policy of binding parties to their express agreement regarding bargaining unit inclusions and exclusions, and will certify units in accordance with those express agreements. Quincy Pub. Library, 11 PERI ¶ 2041; City of Carmi, 9 PERI ¶ 2012 (ISLRB 1993) (Board held that the employer can only move to statutorily exclude a position it previously stipulated belonged in the unit if it presents arguments that there has been a change in duties). This policy is consistent with the concept, as articulated by the National Labor Relations Board, that a party should be held to its express promise. Lexington Health Care Group, LLC, 328 NLRB 894, 895 (1999) (holding that because the union expressly agreed to refrain from organizing a particular group of employees for one year, it was precluded from doing so even though the express agreement was not contained in the parties' collective bargaining agreement); Briggs Indiana Corp., 63 NLRB 1270, 1271 (1945). The Board is not required to make a finding regarding the unit's appropriateness in order for a

⁶ The Employer inappropriately cites to the Appellate Courts unpublished decision; however, the Board's decision in Dep't of Cent. Mgmt. Servs., 29 PERI ¶ 122 (IL LRB-SP 2013), stands for the same proposition.

position to be included or excluded from the unit, because, as it did in Case No. S-RC-05-106, the Board will certify a bargaining unit when the parties' expressly recognize the unit's description.

While the Employer argues that the Union has provided no information as to why it should not be bound by the prior decision by the Board excluding the position, I find that the Employer has provided no information to determine what exactly the parties agreed upon with regard to Beck's position. As discussed, whether the agreement contained a general exclusionary clause or express waiver would not indefinitely preclude the Union from seeking to represent Beck. The Employer argues that I infer the parties' intent from unsubstantiated proffers, and that intent must point to the indefinite exclusion of Beck's position. Instead, the only inference I will make is that if the parties' agreement contained language to support the Employer's contention that Beck should be excluded from representation in perpetuity, then the Employer would have submitted that agreement into evidence. Therefore and as discussed, I find that that despite the Bureau's Executive I position being excluded for the Board's 2006 certification, Union is not precluded from seeking to represent Beck under the majority interest petition presently before the Board.

The Employer also cites Int'l Ass'n of Machinists for the proposition that the Board decision to exclude Beck's position should stand, absent a showing that her position has changed in some significant way as to make her inclusion appropriate. Int'l Ass'n of Machinists, 2014 IL App. (4th) 130126. In Int'l Ass'n of Machinists, the court affirmed the Board's dismissal of the union's majority interest petition after it failed to respond to an Order to Show Cause requesting the union explain why it is not bound by the earlier Board decision, and/or address any changed circumstance in the petitioned for employee's job duties. Id. (On appeal, the issue was whether the Board erred in dismissing the union's petition without an evidentiary hearing).

In this case, the Employer does not argue whether the Union's response to my Order to Show Cause could lead me to find there was "reasonable cause to believe that there are unresolved issues relating to the question concerning representation." 80 Ill. Adm. Code 1210.100(b)(7)(C)(2004). Instead, the Employer merely contends that there is no evidence of a change to Beck's position that would make inclusion appropriate. Contrary to the Employer's argument, Beck's testimony at hearing demonstrates an evolution of her duties and responsibilities after the 2006 certification.

Accordingly, I find the Union has made a showing that Beck's position has significantly changed to make her inclusion appropriate, an inquiry that mirrors the analysis of unit clarification appropriateness under Section 1210.170(a) of the Board's Rules. Therefore, the petition will be dismissed only if the Employer proves that Beck should be excluded as a managerial employee.

D. Beck is Not a Managerial Employee.

The Employer also asserts that Beck is a managerial employee within the meaning of Section 3(j)⁷ and is therefore excluded from bargaining.

The Employer bears the burden of proof as to any claimed exclusion of an employee as managerial under the Act. Chief Judge of the Circuit Court of Cook Cnty., 18 PERI ¶ 2016 (IL LRB-SP 2002). The Board has found that for an individual to be a managerial employee, she must both (1) be engaged predominantly in executive and management functions, and (2) exercise responsibility for directing the effectuation of such management policies and functions. City of Evanston v. Ill. State Labor Rel. Bd., 227 Ill. App. 3d 955 (1st Dist. 1992). The Board has interpreted the first prong of the managerial employee test to mean that an employee must possess and exercise a level of authority and independent judgment sufficient to broadly effect the organization's purposes or its means of effectuating those purposes. State of Ill. Dep't of Cent. Mgmt. Servs. (Public Aid), 2 PERI ¶ 2019 (IL SLRB 1986). Executive and management functions are functions that specifically relate to running an agency or department, which may include formulating policy, preparing the budget and overseeing effective and efficient operations. City of Evanston at 955. Executive functions require more than simply the exercise of professional discretion or technical expertise. Elk Grove Vill. v. Ill. State Labor Rel. Bd., 245 Ill. App. 3d 109 (2nd Dist. 1993). If an employee's role in establishing policy is merely advisory and subordinate, the employee is not managerial. Id.

In this case, Beck fails to satisfy either prong of the managerial test. For the first part of the managerial test, the inquiry is whether they are predominately engaged in executive and management functions. Beck, as an Executive I, is engaged in a broad scope of administrative activities with the Bureau. Beck testified that the registration process is her most time consuming responsibility. When owners send documentation to the Bureau to register their

⁷ Section 3(j) of the Act defines a managerial employee as "an individual who is engaged predominantly in exclusive and management functions and is charged with the responsibility of directing and effectuation of management policies and practices.

stallions, mares, and foals, Beck reviews the information and enters it into an electronic database. If a question arises from the registration material, she will confer with the Bureau Chief for advisement. Though Beck will discuss the issue with the Bureau Chief, she acts in the limited role of an advisor, a role that is too limited in scope to constitute the fulfillment of executive or management functions. With the budget, the evidence demonstrates that Beck's involvement is again limited to acting in an administrative support capacity when drafting a budget outline from previous years. The budget is then presented to the Advisory Board, the only body authorized to approve the budget. Beck does not control the Bureau's financial focus or devise the allocation of its resources. Instead, after the budget has been approved, she is responsible for the clerical task of monitoring and recording how the money is spent. Beck does not use discretion in this process because all money is pre-approved in the budget, so she is only responsible for ensuring there are no expenditures that exceed the amount that has been allotted. Further, because Bureau money is subject to State regulation, those regulations control what the money can be used for, such as owner's awards, stallion awards, advertising, administrative expenses, or county fair purses. As to Beck's contribution to the annual report, she acts as a facilitator in compiling information, not as a decision maker. It is clear that throughout all of Beck's duties, she acts in the role of a valued advisor and competent employee, based upon her professionalism and years of developed expertise. With any insight or contribution she provides to the Bureau Chief, she acts in a limited role of an advisor, a role that is too limited in scope to constitute the fulfillment of predominantly executive or management functions. Accordingly, I find Beck does not meet the first prong of the managerial test.

As to the second prong of the test, it requires that the alleged managerial employee exercise responsibility for directing the effectuation of such management policies and practices. Id. An employee directs the effectuation of management policy when she oversees or coordinates policy implementation by developing the means and methods of reaching policy objectives, and by determining the extent to which the objectives will be achieved. Id. Such individuals must be empowered with a substantial measure of discretion to determine how policies will be affected. Id. It is the final responsibility and independent authority to establish and effectuate policy that determines managerial status under the Act. Id.

The second part of the statutory definition emphasizes that a managerial employee's authority extends beyond the realm of theorizing and into the realm of practice. Dep't of Cent.

Mgmt. Servs./Ill. Commerce Comm'n v. Ill. Labor Rel. Bd., (ICC) 406 Ill. App. 3d 766 (2010). An alleged managerial employee directs the effectuation of management policies and practices if she oversees or coordinates policy implementation through development of means and methods of achieving policy objectives, determines the extent to which policy objectives will be achieved, and is empowered with a substantial amount of discretion to determine how the policies will be effected. Id. at 775. Generally, it is insufficient to establish managerial status that an employee's role in establishing and implementing policy is to "merely recommend policies or give advice that someone higher up is equally apt to take or leave." Id. However, in ICC the Fourth District made clear that an employee does not have to have final responsibility and independent authority in order to qualify as a managerial employee. Id. Instead, the court found that we must "look beyond the formal structure of an employee's participation in the enterprise ... and take account of the power the employee yields." Id. at 779. If an employee's recommendations are implemented in the form of managerial orders, the recommendation and order are treated as the same for the purposes of determining whether the managerial exclusion applies.

Therefore, the Fourth District explained in ICC that an advisory employee may nonetheless be a managerial employee if she make effective recommendations. Id. at 775. In determining whether an employee's recommendations are effective, the test is the influence of the recommendations. Id. at 777, citing National Labor Rel. Bd. v. Yeshiva University, 444 U.S. 672, 677 (1980). While the review to which a recommendation is subjected may be indicative of its influence, the test is whether the recommendation almost always persuades her superiors. ICC at 777.

The Employer argues that her advisement to the Bureau Chief, involvement in the Bureau's registration and research, and the overseeing the operation of the Horse Racing Program establish she is a managerial employee. It is clear that Beck's experience and proficiency make her an invaluable member of the Horse Racing Program. By virtue of longevity in the Bureau, having outlasted at least two Bureau Chiefs in her tenure make her a wealth of information and a means of continuity. But her role in aiding the efficient operation of the Program does not establish she is engaged in executive and management functions. An employee must do more than simply exercise professional discretion or technical expertise. Dep't of Cent. Mgmt. Servs. (Dep't of Corrections) v. Ill. Labor Rel. Bd., 278 Ill. App. 3d 79, 87

(4th Dist. 1996). She must possess and exercise authority and discretion which broadly affects a department's goals and means of achieving its goals. Id.

Beck testified that when an issue arises, she will bring the matter before the Bureau Chief. If the issue is clear, the Bureau Chief will make a decision, which can be based upon Beck's subject matter expertise. If there is an issue where reasonable minds may differ, the Bureau Chief is charged with exercising discretionary authority, and can decide to seek advisement from the Legal Department. Beck's contribution in this scenario is not a function of any discretionary authority she possess, but of her proficiency in the subject matter. Likewise, Beck's involvement in responding to inquiries with regard to legislation, drafting language for proposed changes to rules and regulations, or drafting a budget proposal, is insufficient to establish her managerial status. First, there is no evidence that Beck's proposals are almost always adopted without substantial change. Second, assuming the Bureau Chief adopts Beck's drafts without substantial change, she does not possess or exercise the requisite discretionary authority when completing them because these matters are then taken before the Advisory Board – yet another echelon of authority. Beck's responsibilities within the Horse Racing Program do not rise to the level of executive or management functions. Therefore, I conclude that Beck is not a managerial employee.

VI. CONCLUSIONS OF LAW

1. Though otherwise appropriate under Section 1210.170(a) of the Board's Rules, the Union's unit clarification petition is untimely.
2. Pursuant to the Union's majority interest petition, Beck is not a managerial employee within the meaning of Section 3(j) of the Act.

VII. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the majority interest petition filed in Case No. S-RC-15-044 is granted. The Executive I position in the Department of Agriculture, Bureau of County Fairs and Horse Racing, held by Kelly Beck, is included in the RC-62 bargaining unit.

The Union's unit clarification petition filed in Case No. S-UC-15-052 is dismissed.

VIII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order in briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file

responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within seven (7) days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed with the General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, or to the Board's designated email address for electronic filings, at ILRB.Filing@Illinois.gov. All filing must be served on all other parties. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30-day period, the parties will be deemed to have waived their exceptions.

Issued at Springfield, Illinois, this 13th day of September, 2016.

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

s/ Sarah R. Kerley

**Sarah R. Kerley
Administrative Law Judge**

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

American Federation of State, County and)	
Municipal Employees, Council 31,)	
)	
Petitioner,)	Case Nos. S-UC-15-052
)	S-RC-15-044
and)	
)	
State of Illinois, Department of Central)	
Management Services,)	
)	
Respondent.)	DATE OF MAILING: Sept. 13, 2016

AFFIDAVIT OF SERVICE

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

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Lori Novak

SUBSCRIBED and **SWORN** to
before me,

NOTARY PUBLIC